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*The Disability Rag*

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## Before Its Time: Public Perception of Disability Rights, the Americans with Disabilities Act, and the Future of Access and Accommodation

Mary Johnson\*

The 1990 Americans with Disabilities Act (ADA)<sup>1</sup> passed Congress as a result of the work of a small group of disability rights lobbyists. Unlike those who worked on the 1964 Civil Rights Act when it was in Congress, these lobbyists did not mount an effort to explain to the public the need for the law. They did not try to get reporters to write about the problem of disability discrimination and the need for civil rights protections for people with disabilities. They believed that reporters held too many stereotypes about people with disabilities to be trusted to write accurately about the need for the law.<sup>2</sup>

Because of this group's strategy of avoiding the media, the ADA passed without any broad societal understanding about what "disability discrimination" means, and it seems that, because of this, it has taken a beating in both the court of law and the court of public opinion. There's still little public discussion (or comprehension) of the reality of discrimination based on disability. It will fall to those outside the traditional disability rights advocacy circles to right this wrong, as aging baby boomers—the nation's largest demographic group<sup>3</sup>—begin to experience discrimination based on disability and come to appreciate the ideas of access and accommodation that underpin the ADA.

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\* Mary Johnson, a journalist, has covered the United States disability rights movement since 1980 as Editor of *The Disability Rag* and *Ragged Edge* magazine (now *Ragged Edge Online*).

1. Americans with Disabilities Act, 42 U.S.C. §§ 12101–300 (2000).

2. See Joseph Shapiro, *Disability Policy and the Media: A Stealth Civil Rights Movement Bypasses the Press and Defies Conventional Wisdom*, 22 POL'Y STUD. J. 123, 126 (1994).

3. Amy Gillentine, *Baby Boomers Still Shape Market, Say Experts*, COLO. SPRINGS BUS. J., Nov. 18, 2005.

The ADA is not only a law in which economic considerations were allowed to determine civil rights, it was also a major rights law passed with virtually no public scrutiny. After its passage, anti-disability rights groups quickly moved to weaken its protections by publicly ridiculing its provisions.<sup>4</sup> Unlike other civil rights laws, the ADA defined those who were to be granted its protections, and opponents focused on this, taking aim at those they felt did not deserve its protections.<sup>5</sup> The concepts underlying disability rights were not widely understood by the public, and as ADA cases came before judges it was clear that the courts as well had little understanding of the principles upon which the law is based.<sup>6</sup> This proved particularly to be the case when courts attempted to discern who qualified for the law's protections in the thinking of those who framed the law.<sup>7</sup> But it has become increasingly clear, beginning with the Supreme Court's rulings in 1999, that the disability rights movement's concept of "disability" and many of the law's core concepts have simply not permeated public consciousness. A law designed to protect all Americans from discrimination on the basis of disability—a law which could make life better for many people—seems truly to have been passed before its time.

#### I. PASSING THE ADA: A STEALTH CIVIL RIGHTS MOVEMENT GETS A CIVIL RIGHTS LAW WITH AN ECONOMIC LOOPHOLE AS A COMPROMISE

In 1990 the ADA passed both houses of Congress by huge majorities.<sup>8</sup> Although news coverage in the days surrounding its

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4. See generally MARY JOHNSON, MAKE THEM GO AWAY: CLINT EASTWOOD, CHRISTOPHER REEVE & THE CASE AGAINST DISABILITY RIGHTS 19–67 (2003).

5. 42 U.S.C. § 12102(2) (definition of disability).

6. See Matthew Diller, *Judicial Backlash, the ADA and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19, 23 (2000). Diller writes, "the pattern of narrow and begrudging interpretations of the ADA derives from the fact that the courts do not fully grasp, let alone accept, the statute's reliance on a civil rights model for addressing problems that people with disabilities face in the workplace." *Id.*

7. See generally Steven S. Locke, *The Incredible Shrinking Protected Class: Redefining the Scope of Disability Under the Americans with Disabilities Act*, 68 U. COLO. L. REV. 107 (1997).

8. See NAT'L COUNCIL ON DISABILITY, EQUALITY OF OPPORTUNITY: THE MAKING OF THE AMERICANS WITH DISABILITIES ACT, at xix (1997), available at <http://www.ncd.gov/>

passage called it a “civil rights law,” the ADA had certainly not been preceded by the kind of national uproar and soul searching that had led to the passage of the Civil Rights Act in 1964. Indeed, most Americans were unaware of the ADA, before and after its passage.<sup>9</sup>

The law came with an exception: rights would be extended, but not if providing the access (or “accommodation” as the law called it) would overly inconvenience others.<sup>10</sup> The ADA is a civil rights act with an economic loophole built in: it says if assuring rights of access cost too much they do not have to be granted. The terms in the bill that Congress passed were “undue hardship” and “reasonable accommodation.” If it was too hard for a business, it did not have to be done; if the accommodation was not “reasonable,” it did not have to be provided.<sup>11</sup> The product of an era in which the public discourse centered on economics and not the moral imperatives of the civil rights era, the bill offered nondiscrimination protections to persons with disabilities and included a three-part definition to explain just who those persons were.<sup>12</sup>

The economic loophole was considered reasonable because people believed disability rights were different than other civil rights. The argument went like this: with women and minorities, removing the discrimination was a relatively painless act of simply no longer telling people they could not come in your store, could not hold that job, and so on. With disabled people, something else had to be done, generally something physical: a ramp had to be installed; a sign language interpreter had to be hired for a meeting; a meeting agenda had to be printed in a large-print format; seats had to be removed. In order to correct the discrimination against disabled individuals, businesses had to do physical things, which they generally viewed as costly things.

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newsroom/publications/1997/pdf/equality.pdf. The Senate passed the ADA by a vote of 76 to 8 on September 7, 1989. *Id.* The House of Representatives passed the ADA by a vote of 403 to 20 on May 22, 1990. *Id.*

9. See Shapiro, *supra* note 2, at 123, 126.

10. See 42 U.S.C. § 12113(a).

11. See *id.* § 12111(10).

12. *Id.* § 12102(2).

The ADA has no federal enforcement mechanism. It can only be enforced through a lawsuit.<sup>13</sup> Under its employment title, the Equal Employment Opportunity Commission has to approve a suit.<sup>14</sup> Disabled individuals who face architectural or communications barriers at commercial establishments can file suits for injunctive relief under the law's Title III,<sup>15</sup> but when the bill that would become the ADA was in Congress in 1989, disability advisors privately told President George Bush that most disabled individuals would be unlikely to sue.<sup>16</sup>

The ADA passed Congress due to the efforts of a relatively small group of disability insiders—a group which was seemingly uncomfortable with taking the message about the reality of disability discrimination directly to the American public via the mass media.<sup>17</sup> “The bill seemed to come out of nowhere,” the *New York Times*'s Steve Holmes remarked soon after the ADA became law.<sup>18</sup> Even this reporter assigned to Congress had not seen it coming,<sup>19</sup> although it had been the central agenda item of the organized disability rights movement for a number of years. Disability rights advocates had been trying unsuccessfully to get the 1964 Civil Rights Act extended to cover disability discrimination, and it was only when that proved unfeasible that they turned to crafting the bill that would become the ADA.<sup>20</sup>

People believed that African Americans had a claim to redress, as they were barred from society due to what lawyers called “animus,” or pure ill will; but that there was no animus against disabled people.<sup>21</sup> Thus they did not believe disabled people had as legitimate

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13. See *id.* §§ 12117, 12133, 12188.

14. *Id.* § 2000e-5.

15. *Id.* § 12188.

16. Ruth Colker, *ADA Title III: A Fragile Compromise*, in *AMERICANS WITH DISABILITIES: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS* 293, 296 (Leslie Pickering Francis & Anita Silvers eds., 2000).

17. JOSEPH P. SHAPIRO, *NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT* 105–41 (1993).

18. Telephone Interview with Steven A. Holmes, N.Y. Times Staff Reporter (Summer 1990).

19. *Id.*

20. See NAT'L COUNCIL ON DISABILITY, *supra* note 8.

21. In *Alexander v. Choate*, 469 U.S. 287 (1985), we find this: “[D]iscrimination against the handicapped is primarily the result of apathetic attitudes rather than affirmative animus.” *Id.*

a claim to redress, even though they knew they were kept out of buildings, for example, by steps and heavy doors.<sup>22</sup> Even knowing this, however, disability lobbyists eschewed the kinds of tactics employed by organizers of other causes attempting to draw national attention to discriminatory practices. The disability rights advocates who labored in Washington to craft what would become the only major piece of civil rights legislation to pass in nearly a quarter century did not attempt to educate the public about the moral wrongness of disability discrimination.<sup>23</sup>

It was a conscious strategy: there would be no effort made to explain the sweeping anti-discrimination legislation to the press.<sup>24</sup> “We would have been forced to spend half our time trying to teach reporters what’s wrong with their stereotypes of people with disabilities,” explained one ADA lobbyist.<sup>25</sup>

“One way to describe news coverage of the ADA is to say that there was very little of it,” said journalist Joe Shapiro, who was writing a book about the disability rights movement.<sup>26</sup> There was some coverage, however. On August 14, 1989, the *New York Times* ran what Shapiro described as “an alarmist lead story”<sup>27</sup> on its front page.<sup>28</sup> Headlined “Bill Barring Bias Against Disabled Holds Wide Impact,” the story by congressional reporter Susan Rasky left the unmistakable impression that the ADA’s impact would be mostly in the form of “a wave of lawsuits.”<sup>29</sup> The piece almost exclusively reflected businesses’ fears about the burdens of the bill.<sup>30</sup> A follow-

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at 296.

22. Edward L. Hudgins, *Handicapping Freedom: The Americans with Disabilities Act*, REGULATION, Spring 1995, at 67, 68.

23. See Shapiro, *supra* note 2, at 126. This was counter to the approach employed by other organizers: the efforts by those who planned Mississippi Freedom Summer in a bid to draw national attention to the situation of southern blacks; efforts by those who planned the campaign for Military Service to draw national attention to the Pentagon policy of dismissing gays in the armed forces; and efforts by the women’s movement to draw attention to pay inequalities, sexual harassment, and rape as a crime of violence. *Id.* at 124.

24. See *id.* at 123.

25. *Id.*

26. *Id.* at 125.

27. *Id.*

28. Susan F. Rasky, *Bill Barring Bias Against Disabled Holds Wide Impact*, N.Y. TIMES, Aug. 14, 1989, at A1.

29. *Id.*

30. See *id.*

up editorial on September 6, 1989, asked whether Congress was writing a “blank check for the disabled.”<sup>31</sup>

The bill that eventually passed was a highly compromised piece of legislation. The original 1988 draft bill<sup>32</sup> called for virtually all public and commercial buildings to be retrofitted to allow disabled people access within several years.<sup>33</sup> It prohibited discrimination, which included “outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities.”<sup>34</sup> Introduced by Representative Tony Coelho and Senator Lowell Weicker,<sup>35</sup> the bill focused on the “prohibition of discrimination on the basis of handicap.”<sup>36</sup> It included sections banning discriminatory activities—in employment, in access to services or programs—and required the removal of architectural barriers.<sup>37</sup> The definition of “handicap” was also a broad one.<sup>38</sup>

In 1973, a nondiscrimination provision first raised the idea of protecting people from discrimination based on disability. That provision—Title V of the Rehabilitation Act—covered only programs and contractors getting federal money, however.<sup>39</sup> The ADA would cover society at large. When the bill was re-introduced in Congress in 1989, lobbyists argued that the ADA was merely an extension of the protections already afforded under the Rehabilitation

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31. See Editorial, *Blank Check for the Disabled?*, N.Y. TIMES, Sept. 6, 1989, at A24.

32. “On April 28, 1988, Senator Weicker introduced the Americans with Disabilities Act on the floor of the United States Senate. He called the legislation historic . . . . The following day, Congressman Coelho joined Weicker by introducing an identical bill to the floor of the House of Representatives. Civil rights for persons with disabilities had entered the national, legislative agenda.” NAT’L COUNCIL ON DISABILITY, *supra* note 8.

33. *Americans with Disabilities Act: A New Day for Disability Rights?*, DISABILITY RAG (Louisville, Ky.) July 1988, at 1.

34. Americans with Disabilities Act, 42 U.S.C. § 12101(a)(5) (2000).

35. See 134 Cong. Rec. 9357 (1988).

36. *Id.*

37. *Id.*

38. See Colker, *supra* note 16, at 313 n.30.

39. See 29 U.S.C. § 794(a).

Act, a law that had caused no one any trouble.<sup>40</sup> What they did not say was that it had rarely been enforced.<sup>41</sup>

The 1988 version made little headway in Congress. But savvy disability lobbyists saw that with the election of President George Bush they could get a disability rights bill through Congress even during a decidedly anti-rights era if they revised the bill in certain ways.<sup>42</sup> Bush, no friend to liberal causes, nonetheless had ties that disability rights insiders knew could be used to their advantage.<sup>43</sup>

The bill's authors were worried that a law prohibiting discrimination based on disability would still be seen as a novel idea. Judges might think that nondiscrimination "meant treating the individual simply as if he or she [did] not have a disability,"<sup>44</sup> and we would end up having blind people suing to be allowed to be bus drivers.<sup>45</sup> So the word "qualified" was inserted to modify the term "individual with a disability."<sup>46</sup>

The revised bill mandated accommodation and access only when it would not pose an undue burden on a business.<sup>47</sup> Unlike the Civil Rights Act of 1964, which prohibited employers from using cost (or any other rationale) to justify disparate treatment of employees on the basis of race, the ADA was a civil rights act with a dispensation: if assuring equal rights for the disabled caused a business undue hardship, the accommodations did not have to be provided.<sup>48</sup>

40. See Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB. L. 91, 92 (2000).

41. See Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 TEMP. L. REV. 393, 395-96 (1991).

42. Shapiro, *supra* note 2, at 114-25.

43. *Id.*

44. 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, 428 (1997).

45. *Id.*

46. *Id.* at 421-22. Burgdorf writes, "Another shortcoming of the language of section 504 is the use of the phrase 'otherwise qualified.' . . . [The Department of Health, Education, and Welfare] omitted the word 'otherwise' and simply referred to 'qualified' in its regulation. . . . The ADA also speaks of 'qualified' in lieu of 'otherwise qualified.'" *Id.* (footnotes omitted).

47. See 42 U.S.C. § 12113 (2000).

48. 42 U.S.C. § 12111(10).

The original bill covered all commercial entities.<sup>49</sup> Senator Lowell Weicker said that “simple justice argues strongly for requiring the removal of barriers that exclude or limit participation of people with disabilities.”<sup>50</sup> Modeled on provisions in the Fair Housing Act,<sup>51</sup> that original 1988 bill also had provided for both compensatory and punitive damages—payments which would compensate the disabled person for discrimination and punish the offending business.<sup>52</sup>

Bush’s Attorney General, Richard Thornburgh, however, did not think those remedies should be used for this law.<sup>53</sup> Senator Bob Dole, the major Republican sponsor of the ADA, insisted the “damages” section be dropped.<sup>54</sup> Wanting a bill that would have bipartisan support, Democratic Senator Tom Harkin, chief sponsor of the re-introduced 1989 bill, eventually capitulated on the remedies issue.<sup>55</sup>

In the bill that passed, “place[s] of public accommodation” had replaced “commercial entities”—a smaller group altogether.<sup>56</sup> “Private parties,” meaning the individuals who sued, could obtain only injunctive relief.<sup>57</sup> The damages section was gone. It had been “excluded in order to head off predatory lawsuits,” the Cato Institute would explain five years later.<sup>58</sup> Under the enacted ADA, a disabled person who sued could get no monetary award of any kind. (When the bill was in Congress in 1989, disability advisors privately told President George Bush that most disabled individuals would be unlikely to sue.<sup>59</sup>)

“Given the highly publicized struggle to pass the Civil Rights Act of 1964—and the fact that the ADA was the most extensive civil rights bill since then—the relatively little scrutiny” the ADA received was startling.<sup>60</sup> But maybe it would not matter that lobbyists sold the

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49. Colker, *supra* note 16, at 313 n.32.

50. *Id.*

51. 42 U.S.C. §§ 3601–3631.

52. Colker, *supra* note 16, at 296.

53. *Id.*

54. *Id.*

55. *Id.*

56. 42 U.S.C. § 12182(a).

57. *Id.* § 12188(a)(2).

58. Hudgins, *supra* note 22, at 69.

59. Colker, *supra* note 16, at 296.

60. Shapiro, *supra* note 2, at 126.

need for rights protections for disabled people directly to Congress without going through their public. Maybe the public would instinctively understand that disability discrimination was wrong, and would welcome a law to protect against it. That seemed to be the thinking of disability activists in the heady days following the law's passage and signing.

In the absence of a strong national disability rights voice in the media, the coverage of the ADA in the *New York Times* became the belief about the ADA for much of the nation and almost all of the press. "No one wishes to stint on helping the disabled," the *Times* editorialized when the bill that would become the ADA passed the Senate in the fall of 1989.<sup>61</sup> "It requires little legislative skill, however, to write blank checks for worthy causes with other people's money."<sup>62</sup>

The *Orange County Register*, a publication as conservative as the *New York Times* is liberal, took much the same tack: the ADA, if passed, would be a "bad law"—it would actually debase those it purportedly helped.<sup>63</sup> Under the headline "Hampering the Disabled," the paper wrote, "[s]ome companies doubtless will be bullied into treating them better. But many other companies, though now favorably disposed toward them, may look on hiring the disabled as an invitation to lawsuits."<sup>64</sup> The *Orange County Register* contended that the ADA actually hurt the disabled by making it less likely that businesses would hire them for fear of lawsuits.<sup>65</sup>

## II. THE COURT OF PUBLIC OPINION: THE ADA'S OPPONENTS PRESS THE CASE AGAINST DISABILITY RIGHTS IN THE MEDIA, FOCUSING ON THE LAW'S DEFINITION OF "DISABILITY"

On June 22, 1995, the editorial page of the *Wall Street Journal* carried an opinion piece by right-wing pundit James Bovard.<sup>66</sup> "The

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61. See Editorial, *supra* note 31.

62. *Id.*

63. Editorial, *Hampering the Disabled*, ORANGE COUNTY REG. (Santa Ana, Cal.), Sept. 15, 1989, at B10.

64. *Id.*

65. *Id.*

66. James Bovard, *The Disabilities Act's Parade of Absurdities*, WALL ST. J., June 22,

Disabilities Act's Parade of Absurdities" in the *Journal* was a shorter version of his "The Lame Game" in the then-current issue of *The American Spectator*.<sup>67</sup> Bovard's article was just the tip of the iceberg, though. The case against disability rights was in full swing, and emerging in the public mass media.

Conservative policy—"market theology," as one political scientist called it<sup>68</sup>—had moved to the center of the nation's political conversation when the bill that would become the ADA was fashioned.<sup>69</sup> There was less talk about civil rights; more talk about entrepreneurship. It is little wonder the law carried the caveat that it must not hurt businesses.

This "market theology" was being generated primarily via think tanks like the Heritage Foundation, the American Enterprise Institute, and the Cato Institute. Magazines like *Reason* and *The American Spectator* pushed efforts to limit regulation of the government and free markets, and worked to harness public opinion to achieve these ends.<sup>70</sup> As the ADA was taking effect, between 1992 and 1994, a dozen leading conservative philanthropic foundations put over \$200 million into the anti-government, unregulated markets objectives.<sup>71</sup> Over \$10 million was invested in the law-and-economics movement alone.<sup>72</sup> Over \$40 million went into educating the media.<sup>73</sup> In 1995, a single think tank generated over a thousand op-ed articles and provided background to hundreds of newspapers who had signed up for policy briefings.<sup>74</sup> These groups supplied the philosophical underpinnings of the case against disability rights.

One of the most influential of those arguing the case against disability rights was Edward L. Hudgins, the Cato Institute's Director of Regulatory Studies. In an article published in the Cato Institute's

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1995, at A16.

67. James Bovard, *The Lame Game*, AM. SPECTATOR, July 1995, at 30.

68. See, e.g., SALLY COVINGTON, NAT'L COMM. RESPONSIVE PHILANTHROPY, MOVING A PUBLIC POLICY AGENDA: THE STRATEGIC PHILANTHROPY OF CONSERVATIVE FOUNDATIONS 3 (1997).

69. *Id.* at 40–45.

70. *Id.* at 13.

71. *Id.* at 6.

72. *Id.* at 8.

73. *Id.*

74. *Id.*

magazine, *Regulation*, in the spring of 1995, he wrote: “Few would disagree that, unlike able-bodied citizens, Americans with real physical disabilities face special challenges as they attempt to earn their livings and enjoy their lives. It is also understandable that policymakers would want to ease the burdens that disabled Americans face.”<sup>75</sup> In this statement, which preceded his complaint about the law, we hear the “no one is against the handicapped” disclaimer that is almost always prefaced in any exposition of the case against disability rights. Hudgins wrote that although “President Bush and his supporters in Congress promoted the ADA as a civil rights law,” the 1964 Civil Rights Act had merely restrained business from doing evil and required no further action of them.<sup>76</sup> “[A] business that hires the best job applicant regardless of race is following a wise and profitable practice, and certainly does not incur any additional direct costs. [But the ADA] requires local governments and private enterprises to pay the costs of accommodation out of their own pockets.”<sup>77</sup>

Much of the case against disability rights was like Hudgins’s argument. It was nothing more than boilerplate law-and-economics, free-market rhetoric. At its core, the message was the *us-versus-them* mantra that “they are hurting us.”<sup>78</sup> This was not surprising. What was surprising was that virtually no disability rights group or spokesperson refuted the attacks, continuing the stealth strategy they had used to get the law through Congress.

On July 26, 1995, the fifth anniversary of the signing of the ADA, the *Wall Street Journal* published a rebuttal to Bovard by United States Attorney General Janet Reno and former Attorney General Richard Thornburgh, who wrote that the ADA had “opened the doors” for the disabled.<sup>79</sup> This was about all there was in the way of rebutting the perception of the ADA that was previously dictated to the public.

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75. *Id.* at 68.

76. *Id.* at 72.

77. *Id.*

78. See JOHNSON, *supra* note 4, at 33.

79. Janet Reno & Dick Thornburgh, *ADA—Not a Disabling Mandate*, WALL ST. J., July 26, 1995, at A12.

*A. Opponents of the Law Focus on Coverage Provisions*

Most of the anti-ADA rhetoric focused on whom the law defined as “disabled.” Worried about lawsuits, opponents of the ADA focused their message on the law’s employment provisions.

Bovard’s article highlighted the 410-pound Bronx subway cleaner who was refused promotion to train operator because his 60-inch girth precluded him from climbing under a stalled train to make adjustments and sued as a result of the discrimination; the woman whose suit claimed that Burger King’s drive-through windows discriminated against deaf people; and the telephone operator who sued when her employer refused to provide reasonable accommodation for her narcolepsy.<sup>80</sup> According to Bovard, these cases showed what happened when the ADA’s “absurd mandates” were not reined in.<sup>81</sup>

Like the alligator in the sewers of New York City, like the worms in the Big Mac, ADA abuse tales (of the high school guidance counselor who sued the school that had fired him, claiming his cocaine addiction a disability,<sup>82</sup> the man who claimed his mental disability required he carry a gun in the office,<sup>83</sup> the driver with epilepsy who had won \$5.5 million from Ryder under the ADA when all Ryder had been trying to do was keep the roadways safe<sup>84</sup>) were not questioned as to their accuracy. These examples served a different purpose: they were examples of people trying to gain protection from a law they had no right to use, and a warning to others not to try the same thing. Of all the complaints against disability rights, none was heard more frequently than the complaint about who was entitled to use the ADA.<sup>85</sup> Those making the case against disability rights really did not like the idea that the law seemed so expansive.

Like pornography, disability continues to elude efforts to define it. One doctor will declare a woman disabled whom another says is not.

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80. Bovard, *supra* note 67, at 31.

81. *Id.* at 31.

82. *Id.*

83. *Id.* at 33.

84. Walter Olson, *Disabling America*, NAT’L REV., May 5, 1997, at 40, 40.

85. See JOHNSON, *supra* note 4, at 45–67.

A man told by doctors that he is disabled is viewed by his co-workers as a lazy complainer. Subjective always, “disabled” is either a political act or a moral judgment, based not on anything about the individual in question so much as on the viewer’s own perception and attitudes about the way society should function.

When people say that “no one is against the handicapped,” what they are really saying is that no one is against the truly handicapped—the people who, in the colloquial turn of phrase, “cannot help it.” It seems self-evident that this definition encompasses relatively few individuals, and thus the throngs who claim a disability are trying to get something that they do not really deserve—the ADA’s protection.

The harshest judgment is that they are faking. The charitable judgment concedes that these people do sincerely believe they are disabled, but that they are in fact simply lazy or unmotivated—people who think they should be given something, special rights, for nothing.

This type of person was the focus of John Stossel’s ABC News Special Report entitled *The Blame Game*.<sup>86</sup> According to Stossel, the “truly disabled” were “real victims,” as opposed to the fakers, whom Stossel dubbed “so-called victims.”<sup>87</sup>

Stossel’s ideological comrade-in-arms was *U.S. News and World Report*’s John Leo.<sup>88</sup> Leo did not like the fact that “drug addicts and alcoholics are protected under disability laws.”<sup>89</sup> He also did not like that “almost any punishment of objectionable behavior can be a violation of disability law.”<sup>90</sup>

### *B. Disability as a Moral Judgment*

The problem with backers of the ADA, said critics, was that they erroneously put the “discrimination” label on things that are not

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86. *ABC News Special Report: The Blame Game: Are We a Country of Victims?* (ABC television broadcast Nov. 3, 1994).

87. *Id.*

88. John Leo, *Let’s Lower the Bar*, U.S. NEWS & WORLD REP., Oct. 5, 1998, at 19.

89. John Leo, *Feel Abused? Get in Line*, U.S. NEWS & WORLD REP., Apr. 10, 1995, at 21.

90. Leo, *supra* note 88.

discrimination at all, but are just the way society is designed:<sup>91</sup> people read using print; people listen to speeches; people live in houses designed with steps. That is just how society is designed. There is no ill will in any of that. The criticisms went further, though: one could hear in them the argument that laws like the ADA simply create false expectations in people, telling them they have a “right” to have what people who have normally functioning bodies have. Because of its vague definition of “disability,” the ADA, these critics implied, was allowing too many people to think they had a right to its entitlements<sup>92</sup>—people who, in an odd turn of phrase often heard, “might have something wrong with them but are not truly disabled.”<sup>93</sup> They wanted to get something that they did not deserve: special rights.

This criticism signaled (1) that the ADA’s rights were something extra that most people did not deserve (only the truly disabled deserved them); and (2) that these people might “have something wrong with them,” but were not truly disabled. The first suggests something about the nature of the rights that the ADA is thought to confer. The second speaks to how we really understand (or do not understand) “disability” as a political concept.

In fact, we might concede that everyone who sought the ADA’s protection did indeed have something wrong with them. But if it was something people thought they could snap out of if they would just shape up then the individual was not truly disabled. John Stossel, among others, felt such people did not deserve to get the benefits it was thought the law conferred.<sup>94</sup>

Vague and shifting, depending on circumstances, “disability” was above all a judgment of a moral nature. It explained why the case against disability rights repeatedly singled out people who had what we called “emotional disabilities,” and criticized their right to the

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91. See RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 480–82 (1992).

92. See *ABC News Special Report*, *supra* note 86. John Stossel in *The Blame Game* said, “If we’re victims, we’re not responsible for what we do . . . [Things] once considered just bad habit or lack of self control are now called diseases. And since diseases aren’t really your fault, you’re entitled . . . .”

93. See JOHNSON, *supra* note 4, at 50.

94. See *ABC News Special Report*, *supra* note 86.

ADA's protection.<sup>95</sup> It explained why people with bad backs came in for such a tarring: in critics' minds: these people could work if only they would grit their teeth and get on with it.<sup>96</sup>

A year after "The Blame Game," *Simpsons* creator Matt Groenig aired "King Sized Homer,"<sup>97</sup> with Homer Simpson trying a work-from-home scam due to his size. The "Am I Disabled" book he consults in the episode lists "hyper-obesity" and "lumber lung."<sup>98</sup> *King of the Hill* aired an episode which Hank is forced to hire a man on drugs because of the ADA.<sup>99</sup>

At the other end of the spectrum were what most people would consider "the truly disabled"—people like Christopher Reeve. What sanctioned them as truly disabled was the severity of their disabilities: totally paralyzed, totally blind. It is not by happenstance that in order to receive Social Security disability benefits one has to be what in common parlance is termed "totally disabled." This means that a person is unable "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or has lasted or can be expected to last for a continuous period of not less than 12 months . . . ."<sup>100</sup> The term "totally" signals that because the person cannot possibly pull themselves up by their bootstraps at all anymore they deserve our help. A synonym for "the truly disabled" is "the deserving disabled." When then-President George Bush said in his re-election campaign shortly after he signed the ADA that he wanted to "make the able-bodied work,"<sup>101</sup> his sentiments sprang from this belief.

Note that this is not about rights. It is about help. It seems that even today our nation is unable to understand dealing with its disabled through the prism of rights. The correct way to view things

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95. Leo, *supra* note 89.

96. See *ABC News Special Report*, *supra* note 86.

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

98. *Id.*

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

100. 42 U.S.C. § 416(i)(1) (2000).

101. Renee Loth, *Campaign Takes on a Southern Flavor*, BOSTON GLOBE, Mar. 2, 1992, at A6. "A new Bush ad that is airing in Georgia shows the president sitting in the Oval Office while an announcer describes his agenda for the future. It includes plans to make America more competitive and 'to change welfare, and make the able-bodied work.'" *Id.*

is as Christopher Reeve did: as a medical tragedy, whose solution is cure.

The way the United States deals with its disabled who have not been cured is through private charity or public benefits, which are seen as a form of charity, even though they are actually earned (veterans' disability benefits, Social Security disability benefits, and private disability insurance benefits are earned—through actual payments or through military service).

### *C. Why a Definition in a Civil Rights Law, Anyway?*

As noted earlier, the initial ADA bill, modeled on the 1964 Civil Rights Act, required barrier removal and forbade discrimination in virtually all commercial establishments, and never had a chance for passage. But the disability lobbyists who rallied to get a compromise bill through the 101st Congress believed lawmakers could be convinced to pass a bill that did not seem “strange” to them, so they stressed that the ADA was much like the Rehabilitation Act's Title V.<sup>102</sup> The Rehabilitation Act, which offered a national program of vocational rehabilitation—a benefits program—defined who was eligible for protection under the law.<sup>103</sup> It included a definition of a person with a handicap.<sup>104</sup> That definition was moved almost unchanged into the bill that would become the ADA. An “individual with a disability” is defined as someone who has “(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) [is] regarded as having such an impairment.”<sup>105</sup>

After the revisions, the bill read less like a true civil rights law than a strange hybrid based on the understanding our national legislators and their staffs had about disability law. It was based on the understanding that disability law was a kind of benefits-based

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102. Feldblum, *supra* note 40, at 92.

103. 29 U.S.C. § 705(2).

104. *Id.* § 705(2)(B)(i)-(iii) (“[I]ndividual with a disability” is defined as “any individual who—(i) has a physical or mental impairment which substantially limits one or more of such person's major life activities; (ii) has a record of such impairment; or (iii) is regarded as having such an impairment.”).

105. 42 U.S.C. § 12102(2).

legislation that gave something to a group of people—like Social Security, disability benefits, or rehabilitation services, services that you got only if you qualified as disabled.

In the years since the passage of the 1973 Rehabilitation Act, disability rights advocates' own language had changed, and in the late 1980s the terminology changed. "Handicapped" had been replaced by "disabled" at advocates' insistence.<sup>106</sup> "Handicapped," they said, was a term they were saddled with by professionals.<sup>107</sup> In a misguided exercise of self-determination, these activists insisted that it was society that handicapped the disabled.<sup>108</sup> They did not have handicaps but "disabilities" (the term they used to signal their condition: paralysis, cerebral palsy, epilepsy). Thus, they chose "disability" for their moniker: "I am a person with a disability, not a handicapped person. It's society that handicaps me."

This exercise of linguistic empowerment might have been good; however, their rationale never permeated beyond their own colleagues within the movement. Most who hear the words "disabled" or "disability" still take the word to mean what it has always meant to society: "unable," "incapable." No wonder it seems absurd for such people to insist they are qualified for the same jobs as people who have no disabilities!

Those drafting the law worried that employers would think that in order to avoid a charge of discrimination, they would need to treat disabled people the same as non-disabled people. This should not have been a concern: even though, unlike race, disability did sometimes have an impact on performance, the fact was that disqualifying a person from a bus-driving job because they were unable to drive would not be an act of disability discrimination<sup>109</sup> but merely "an evenhanded application of a job-related qualification standard."<sup>110</sup> (The ADA prohibits an employer from using "qualification standards" to screen out an "individual with a disability" unless the qualification standards are "job-related."<sup>111</sup>)

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106. See JOHNSON, *supra* note 4, at 54.

107. *Id.*

108. *Id.*

109. Burgdorf, *supra* note 44, at 428.

110. *Id.*

111. 42 U.S.C. § 12112(b)(6) says that discrimination includes:

Disqualifying a person with no legs from a typing job, on the other hand, would be an act of discrimination, because having legs has no bearing on any rational job-related qualification standard for typing. (A “qualified individual with a disability” was defined as “an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position . . . .”<sup>112</sup>)

Disability was still viewed as a medical problem making one incapable of working (and, with a doctor’s okay, entitled to benefits) when the ADA was enacted. Disability rights activists had conceived it as a civil rights law, but almost nobody else understood what “civil rights” could possibly mean when it came to disabled people.

It is safe to say that many members of Congress who voted for the law saw it only as an extension of the kinds of special benefits and programs that blind and disabled people had been given in the years after World War II.<sup>113</sup> And if this perception got the law passed, went the thinking, that was okay.<sup>114</sup>

In truth, what the Rehabilitation Act’s drafters had been trying to accomplish when they grafted a civil rights title onto the end of that social welfare law was to create a definition that would encompass everyone, and function as the kind of protection the Civil Rights Act of 1964 afforded African Americans.<sup>115</sup> To accomplish this goal, the drafters used what seemed an ingenious idea—a three-part definition of “handicapped individual” that would encompass virtually everyone.<sup>116</sup> This definition included not only people who had an

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[U]sing qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity . . . .

42 U.S.C. § 12112(b)(6) (2000).

112. *Id.* § 12111(8).

113. See NAT’L COUNCIL ON DISABILITY, *supra* note 8.

114. “By building on tested legal principles, the ADA was able to avert much of the debate that would have accompanied an act developed *de novo*,” NAT’L COUNCIL ON DISABILITY, *supra* note 8, at 5.

115. Robert L. Burgdorf, Jr., A Misunderstood Law, <http://www.accessiblesociety.org/topics/ada/misunderstood.htm>.

116. 42 U.S.C. § 12102(2).

impairment that affected a major life activity (these were the people everyone thought of as “the truly handicapped”),<sup>117</sup> but also people who “had a history” of disability.<sup>118</sup> In this second part the drafters were thinking of people who met with discrimination when employers knew they had cancer.<sup>119</sup> Finally, the definition’s third prong would encompass anyone who had been “regarded as” disabled, and discriminated against because they were regarded as disabled.<sup>120</sup>

It was this “regarded as” part of the definition that was to be the workhorse to carry the law’s protections to virtually all Americans. If an individual was being regarded as disabled, and was being discriminated against because he or she was thought to be disabled, the reasoning went, then the individual would be eligible for the law’s protections whether he or she really had a disability.<sup>121</sup> It seemed a clever solution to the problem of making a benefits law into a civil rights law. It just did not work out that way.

Because the ADA, just like other benefits laws, has a definition of a “qualified individual with a disability,”<sup>122</sup> it is perhaps not surprising that judges have come to view it as “a form of public benefit program for people with disabilities rather than a mandate for equality.”<sup>123</sup>

### III. THE COURT OF LAW: SUPREME COURT RULINGS REVEAL THAT THE ADA’S CORE CONCEPTS ARE POORLY UNDERSTOOD

In 1999 the Supreme Court decided three cases appealed from lower courts: those of Karen Sutton and Kimberly Hinton,<sup>124</sup> Hallie Kirkingberg,<sup>125</sup> and Vaughn Murphy.<sup>126</sup> Sutton and Hinton were twin

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117. *Id.* § 12102(2)(A).

118. *Id.* § 12102(2)(B).

119. Feldblum, *supra* note 40, at 100–02.

120. 42 U.S.C. § 12102(2)(C).

121. See NAT’L COUNCIL ON DISABILITY, POLICY BRIEF SERIES: RIGHTING THE ADA PAPERS NO. 4, BROAD OR NARROW CONSTRUCTION OF THE ADA 5 (2002), available at <http://www.ncd.gov/newsroom/publications/pdf/broadnarrowconstruction.pdf>.

122. 42 U.S.C. § 12111(8).

123. Diller, *supra* note 6, at 23.

124. Sutton v. United Air Lines, 527 U.S. 471 (1999).

125. Albertson’s, Inc. v. Kirkingburg, 527 U.S. 555 (1999).

126. Murphy v. United Parcel Serv., 527 U.S. 516 (1999).

sisters whom United Air Lines would not hire as pilots because they were nearsighted.<sup>127</sup> Commercial truck driver Hallie Kirkingberg functioned as though he had 20/20 vision, but he was dismissed by Albertson's grocery chain for not meeting the federal vision standard for driving commercial vehicles when his vision tested as "monocular," meaning having functioning vision in only one eye.<sup>128</sup> United Parcel Service mechanic Vaughn Murphy took medication for high blood pressure and could function well,<sup>129</sup> but because he was diagnosed with high blood pressure he lost his commercial driver's license, which was necessary to take a higher-paying driver's job; ultimately, he was dismissed by the company.<sup>130</sup> All of these people sued their employers under the ADA.<sup>131</sup> The companies they sued all insisted these people had no right to bring a lawsuit under the ADA in the first place because they were not truly disabled.<sup>132</sup>

The Supreme Court in *Sutton* appeared to be using this opportunity to issue behavioral injunctions against people who would claim disability status fraudulently. It seemed they were doing just what the experts contacted by *Readers Digest* had wanted lawmakers to do: "narrow the definition of disability" to "discourage marginal claims."<sup>133</sup>

By a vote of seven to two, the Court ruled that people "with physical impairments who can function normally when they wear their glasses or take their medicine generally cannot be considered disabled, and therefore do not come within the law's protection against employment discrimination," as *New York Times* Supreme Court reporter Linda Greenhouse put it.<sup>134</sup> In his dissent, Justice Stephen G. Breyer worried that people who used artificial limbs or hearing aids and faced discrimination on the basis of their disability would be told they were not allowed to use the law either.<sup>135</sup>

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

128. *Albertson's*, 527 U.S. at 558–60.

129. *Murphy*, 527 U.S. at 519.

130. *Id.* at 519–20.

131. See *Albertson's*, 527 U.S. at 560; *Sutton*, 527 U.S. at 476; *Murphy*, 527 U.S. at 520.

132. See *Albertson's*, 527 U.S. at 561; *Sutton*, 527 U.S. at 477; *Murphy*, 527 U.S. at 520.

133. Trevor Armbrister, *A Good Law Gone Bad*, READERS DIG., May 1998, at 151.

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

135. *Sutton*, 527 U.S. at 495 (Stevens, J., dissenting).

The Supreme Court “made the same mistake as many lower courts in treating the definition of disability under the ADA as analogous to eligibility criteria under the Social Security disability programs and special education programs,” wrote Burgdorf in an article appearing on the website of the Center for an Accessible Society.<sup>136</sup> He continued to insist that the ADA’s protection against discrimination on the basis of disability—like all other antidiscrimination statutes—had been intended to extend to all Americans who experience such discrimination.<sup>137</sup>

But the Supreme Court Justices did not understand “disability” as Burgdorf did. No, said the Court, “Congress did not intend to bring under the ADA’s protection all those whose uncorrected conditions amount to disabilities.”<sup>138</sup> Congress found that around “43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older.”<sup>139</sup> The court reasoned,

Had Congress intended to include all persons with corrected physical limitations among those covered by the Act, it undoubtedly would have cited a much higher number of disabled persons in the findings. That it did not is evidence that the ADA’s coverage is restricted to only those whose impairments are not mitigated by corrective measures.<sup>140</sup>

Justice Ruth Bader Ginsburg agreed, stating the law was not intended to protect

[T]he legions of people with correctable disabilities. The strongest clues to Congress’ perception of the domain of the Americans with Disabilities Act (ADA), as I see it, are legislative findings that ‘some 43,000,000 Americans have one or more physical or mental disabilities,’ and that ‘individuals with disabilities are a discrete and insular minority,’ persons ‘subjected to a history of purposeful unequal treatment, and

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136. Burgdorf, *supra* note 115.

137. *Id.*

138. *Sutton*, 527 U.S. at 484.

139. 42 U.S.C. § 12101(a)(1) (2000).

140. *Sutton*, 527 U.S. at 487.

relegated to a position of political powerlessness in our society . . . [T]he inclusion of correctable disabilities within the ADA's domain would extend the Act's coverage to far more than 43 million people.<sup>141</sup>

“[A]ny person who is disadvantaged by an employer because of a (real or imagined) physical or mental impairment should be entitled to claim the protection of the statute,” Burgdorf continued in his article.<sup>142</sup> “[I]t is not 36, 43, or 160 million people that the statute protects, but the entire 250 million or so people who live in America.”<sup>143</sup>

Justice John Paul Stevens, the other dissenting Justice in *Sutton*, suspected the Court had been “cowed by [employers’] persistent argument that viewing all individuals in their unmitigated state will lead to a tidal wave of lawsuits.”<sup>144</sup> The ADA was supposed to apply to all Americans, just like the Civil Rights Act, he wrote in an angry dissent:

[Congress] focused almost entirely on the problem of discrimination against African-Americans when it enacted Title VII of the Civil Rights Act of 1964. . . . But that narrow focus could not possibly justify a construction of the statute that excluded Hispanic-Americans or Asian-Americans from its protection—or as we later decided . . . Caucasians.<sup>145</sup>

[N]one of the Court's reasoning . . . justifies a construction of the [Americans with Disabilities] Act that will obviously deprive many of Congress' intended beneficiaries of the legal protection it affords.<sup>146</sup>

In the years following 2000 (the tenth anniversary of the ADA), the Supreme Court continued to hand down decisions on the Act, and although disability rights advocates, scholars, and attorneys bemoaned the Court's inability to understand what they felt were the

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141. *Id.* at 494 (Ginsburg, J., concurring) (citations omitted).

142. Burgdorf, *supra* note 115.

143. *Id.*

144. *Sutton*, 527 U.S. at 508 (Stevens, J., dissenting).

145. *Id.* at 505.

146. *Id.* at 508.

very simplest rudiments of disability rights theory,<sup>147</sup> in the public media their voices were silent. Rarely interviewed by reporters covering the Court, these advocates were also absent from the nation's opinion journals and editorial pages, save for a letter to the editor or two.

When *Board of Trustees of the University of Alabama v. Garrett*<sup>148</sup> went before the Supreme Court, more than one hundred legal scholars submitted an amicus brief outlining the history of state-sanctioned discrimination against people with disabilities.<sup>149</sup> They said they submitted the brief “to ensure that the well-documented evidence of widespread state discrimination against persons with disabilities is not forgotten by this Court.”<sup>150</sup> The brief listed hundreds of “state statutes, session laws, and constitutional provisions that illustrate pervasive state-sponsored discrimination against persons with disabilities, dating from the late nineteenth century through the time of the ADA’s enactment and (in some cases) to the present.”<sup>151</sup>

The arguments set forth in the amicus brief were not sufficient, however, to convince the Court. It ruled that there was no real pattern of discrimination by states against people with disabilities sufficient to warrant Congress passing a law that superseded a state’s sovereign immunity protected by the Eleventh Amendment.<sup>152</sup> Racial discrimination in this country that led to the Voting Rights Act of 1965 was real and documented,<sup>153</sup> wrote Chief Justice William H. Rehnquist, but evidence of disability discrimination was only anecdotal.<sup>154</sup> He further explained that “[s]tates are not required by the Fourteenth Amendment to make special accommodations for the disabled so long as their actions toward such individuals are rational. They could quite hardheadedly—and perhaps hardheartedly—hold to

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147. See, e.g., *Getting Home*, RAGGED EDGE, Sept.–Oct. 1999, at 6.

148. 531 U.S. 356 (2001).

149. See Brief for Morton Horwitz et al. as Amici Curiae Supporting Respondents, *Bd. of Trs. v. Garrett*, 531 U.S. 356 (2001) (No. 99-1240), 2000 WL 1154025.

150. *Id.* at 1.

151. *Id.* at ia.

152. *Garrett*, 531 U.S. at 374.

153. *Id.* at 373.

154. *Id.* at 370.

job-qualification requirements which do not make allowance for the disabled.”<sup>155</sup>

Those opposing disability rights for the last decade often insisted that disability discrimination made sense—it was “rational.” It would be “entirely rational (and therefore constitutional) for a state employer to conserve scarce financial resources by hiring employees who are able to use existing facilities,” rather than making access modifications, Rehnquist reasoned in *Garrett*.<sup>156</sup>

Justice Anthony M. Kennedy voted with the majority in *Garrett*, but wrote his own opinion:

Prejudice, we are beginning to understand, rises not from malice or hostile animus alone. It may result as well from insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves. Quite apart from any historical documentation, knowledge of our own human instincts teaches that persons who find it difficult to perform routine functions by reason of some mental or physical impairment might at first seem unsettling to us, unless we are guided by the better angels of our nature.<sup>157</sup>

In Kennedy’s *Garrett* reasoning are the echoes of the “no one is against the handicapped” mantra of paternalism which underpins the still-conventional wisdom: because it is not inspired by animus, much of what people with disabilities regard as illegal discrimination is considered in fact “rational.” In the 2002 *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams* decision<sup>158</sup> the Supreme Court told former Toyota worker Ella Williams that she was not “disabled” under the ADA’s definition although she could no longer hold down a job at the auto plant because of wrist injuries.<sup>159</sup> “Merely having an impairment does not make one disabled for purposes of the

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155. *Id.* at 367–68.

156. *Id.* at 372.

157. *Id.* at 374–75 (Kennedy, J., concurring).

158. *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002).

159. *Id.* at 187.

ADA. Claimants also need to demonstrate that the impairment limits a major life activity. . . . [T]he limitation . . . [must also be shown to be] ‘substantia[.]’”<sup>160</sup> During oral arguments in *Williams*, O’Connor interrupted Williams’ attorney” to assert that the ADA was supposed to focus on the “wheelchair-bound,” not “carpal tunnel syndrome” or “bad backs.”<sup>161</sup>

Because of the Court’s ruling, people with “nontraditional disabilities,” like repetitive motion injuries such as those that cause carpal tunnel syndrome, who face discrimination on the job will apparently not get a chance to make their case in court. “If Americans knew what they had lost, they would weep,” the Center for an Accessible Society’s Cyndi Jones said following the ruling.<sup>162</sup>

It seems clear from the Court’s rulings that well over a decade after the ADA’s passage the concept of disability discrimination has still not permeated the national consciousness.

#### IV. A LAW CANNOT GUARANTEE WHAT A CULTURE WILL NOT GIVE

There is still little public discussion—or comprehension—of the reality of discrimination based on disability. A law designed to protect all Americans from discrimination on the basis of disability, a law which could make life better for many average people, seems to truly be a law passed before its time. Most people who easily comprehend the antidiscrimination purpose of the Civil Rights Act do not understand what the ADA is all about. This is partly because of the well-run campaign against the law mounted during the 1990s.<sup>163</sup> But it is equally due to the seeming inability of the disability rights movement to mount any effective public education effort about the meaning of “discrimination based on disability.” This absence of education leaves the public to naturally believe that the issue is about people being disabled enough (“truly disabled,” in O’Connor’s words) to qualify for the “benefit” of an accommodation, rather than

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160. *Id.* at 195.

161. Transcript of Oral Argument at 30, 39, *Williams*, 534 U.S. 184 (2002) (No. 00-1089), 2001 WL 1453954.

162. Telephone Interview with Cyndi Jones, Dir., Ctr. for an Accessible Soc’y (Jan. 10, 2002).

163. See, e.g., Leo, *supra* note 88; *ABC News Special Report*, *supra* note 86.

about illegal discrimination imposed by entities that deny access and even reasonable accommodations to people who either have disabilities, have a history of a disability, or are regarded as having a disability.

For example, well-known journalist and editor Michael Kinsley, who suspected his Parkinson's disease to be the reason for the withdrawal of a job offer, never connected negative treatment based on his own medical condition with protection under the ADA's law against employment discrimination.<sup>164</sup> Along with most of society, he appeared stuck in the mindset that "disability" must simply mean the opposite of "ability." "Discrimination based on ability usually does make sense," he wrote.<sup>165</sup> "Racial prejudice at its heart is irrational, whereas prejudice in favor of ability is not."<sup>166</sup> He seemed to buy the argument that was put forth for nearly a decade by the forces countering disability rights: that the ADA was about "forcing employers to hire less-qualified candidates . . . ."<sup>167</sup>

Yet, like Kinsley himself, one in five Americans has a condition that may be considered a "disability."<sup>168</sup> Disability advocates have for years been referring to that "one in five" as a sleeping giant, about to awaken.<sup>169</sup> But is it?

"Can you imagine what this country would have been like if, years after the 1964 Civil Rights Act, we'd still had bathrooms marked 'whites only' and 'colored only'?" attorney Steve Gold said.<sup>170</sup> "When Congress passed a law in 1964 saying racial access must be equal—why, if restaurants and bus stations had continued to keep separate bathrooms and separate water fountains, there would have been a bloodbath in this country!"<sup>171</sup>

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164. See Michael Kinsley, *In Defense of Denial*, TIME, Dec. 17, 2001, at 72, 73.

165. Michael Kinsley, *Disabilities and Inabilities: Must We Pay to Hear Bad Pianists?*, SLATE, June 27, 2002, <http://www.slate.com/?id=2067457>.

166. *Id.*

167. *Id.*

168. U.S. Census Bureau, *Disability Status: 2000—Census 2000 Brief*, <http://www.census.gov/hhes/www/disability/disabstat2k.html> (see Table 1).

169. See HolLynn D'Lil, *And The War Is On!*, RAGGED EDGE ONLINE, Jan. 30, 2006, <http://www.raggededgemagazine.com/departments/closerlook/000771.html>; see also Frank Bowe, *Disability Meets the Boom*, RAGGED EDGE ONLINE, Sept. 27, 2005, <http://www.raggededgemagazine.com/departments/closerlook/000106.html>.

170. Telephone Interview with Stephen F. Gold, Attorney (Jan. 1998).

171. *Id.*

Once the nation's business community finished reining in the law's mandates for nondiscrimination on the part of the nation's employers, it began to attack the law's nondiscrimination requirements placed on commercial establishments. And again, as before, it made the case directly to the American public through the media.

Actor Clint Eastwood took on the ADA<sup>172</sup> when his Mission Ranch Hotel in Carmel, California, was sued for access violations under the law.<sup>173</sup> "Dirty Harry wants revenge, Washington style," said the *Wall Street Journal*.<sup>174</sup> "Mr. Eastwood . . . is striking back with a Washington lobbying campaign for new legislation to modify the law," it reported.<sup>175</sup> Eastwood was shilling for Florida Republican Congressman Mark Foley's proposed ADA Notification Act, an amendment to the law that required a disabled person who wished to file suit under the ADA to give notice to the opposing party ninety days *before* filing.<sup>176</sup> Overall, the ADA Notification Act fight, part of the larger right-wing tort-reform effort, encountered little public rebuttal from either disability rights groups or the individuals who file access suits under the ADA.

Eastwood's campaign in 2000 continued the "no one is against the handicapped" cry, blaming access suits almost entirely on "unscrupulous attorneys," and perhaps not inadvertently painting the disabled plaintiff as a clueless pawn. More recently, anti-access pundits—notably in California—have taken off the gloves, characterizing disabled plaintiffs as money-grubbers who file suits not because of any real access problems, but only to "line their pockets."<sup>177</sup> While California law does allow for damages in access

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172. See Jim Vandehei, *Clint Eastwood Saddles Up for Disability-Act Showdown*, WALL ST. J., May 9, 2000, at A1.

173. *Id.*

174. *Id.*

175. *Id.*

176. ADA Notification Act, H.R. 2804 § 2 (amending § 308(a)(1) of the ADA), 109th Cong. (2005).

177. TRANSCRIPT, 2000 *Ada Notification Act Hearing Before the Subcommittee on the Constitution of the Committee on the Judiciary*, HOUSE OF REPRESENTATIVES ONE HUNDRED SIXTH CONGRESS SECOND SESSION, May 18, 2000, at 105.

suits,<sup>178</sup> the ADA does not, which makes this blame-the-victim tactic all the more brazen.

Still, as was the case with the mudslinging during the 1990s, no national disability group has mounted a public media effort at fighting back by speaking out about the real access problems that remain in commercial establishments seventeen years after the law's enactment. Disability rights lobbyists have quietly, away from the media eye, managed to hold back the Notification Act's progress in Congress so far.<sup>179</sup> But the public is getting a different story—a story almost entirely about small commercial establishments being forced out of business on picky technicalities after being sued by rapacious wheelchair users trying to make a fast buck.

With the media spotlight to themselves, small business trade groups have been free to reframe access discrimination as “drive-by lawsuits”<sup>180</sup> and press judges to rule plaintiffs as “vexatious litigant[s].”<sup>181</sup> A look at news stories and judges' rulings show they have been fairly successful.

Fairly successful, but not entirely: in January 2006, U.S. District Judge Lawrence Karlton of the Eastern District of California, urged by defendants to declare the plaintiff a “vexatious litigant,” ruled that “the number of lawsuits [the] plaintiff has filed does not reflect that he is a vexatious litigant; rather, it appears to reflect the failure of the defendants to comply with the law.”<sup>182</sup>

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178. *Id.* at 51.

179. See ADA Watch, ADA Notification Fact Sheet, <http://www.adawatch.org/protect.asp#factsheet> (last visited Feb. 4, 2007).

180. Harry Wessel, *Helping Disabled or Raking in Fees?*, ORLANDO SENTINEL (Orlando, Fla.), Apr. 3, 2005, at H1; see also Kelli Kennedy, *Businesses Complain Lawsuits Over Disabled Access Are Scams*, HOUSTON CHRON., Nov. 29, 2006, at A13.

181. Henry Weinstein, *Disabled Man's Suits Restricted*, L.A. TIMES, Dec. 11, 2004, at B1.

182. *Wilson v. Pier I Imports, Inc.*, 411 F. Supp. 2d 1196, 1200 (E.D. Cal. 2006).

## V. CONCLUSION

Critics of the ADA have successfully cast people who use the law as malcontents who hurt the rest of us. And many Americans have fallen for the argument that there are “disabled people” and “the rest of us”—the former divided into the truly disabled (read: deserving but few) and the fakers.

So, even as our wrists hurt from typing on our too-flat keyboards; even as we put the television on “mute” and just read the captions when it gets too noisy in the bar; even as we guiltily duck into the “handicap stall” at the airport because it’s big enough to accommodate us, our rollbag, and computer bag safely as we use the toilet, many of us grouse that the disabled are ruining things for society. They ruin it, we say, by wanting special treatment at work because they say they have carpal tunnel syndrome; or by wanting the little restaurant to ramp its entrance, even though nobody in a wheelchair has ever been seen near the place and the owner is quick to say he would help lift the wheelchair up the steps if anybody wanted to come in.

The ADA, despite the Supreme Court’s actions, still has a core premise that has yet to be understood by society: that people called “disabled” are just people—not critically different from the rest of us. In order to address disability discrimination the right way as a nation, we first have to come to grips with the underlying realities of human abilities and disabilities.<sup>183</sup> “Though we are conditioned to think otherwise, human beings do not really exist in two sharply distinct groups, people with disabilities and those without disabilities,”<sup>184</sup> wrote Burgdorf, echoing what he had written in the 1985 United States Commission on Civil Rights report that started the effort to create and pass the ADA:<sup>185</sup>

[Disability is] a natural part of the human condition resulting from that spectrum—and will touch most of us at one time or another in our lives. The goal is not to fixate on, overreact to or

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183. Burgdorf, *supra* note 44, at 519.

184. *Id.*

185. U.S. COMM’N ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES (1983).

engage in stereotypes about such differences, but to take them into account and allow for reasonable accommodation for individual abilities and impairments that will permit equal participation.<sup>186</sup>

It will fall to those outside traditional disability rights advocacy circles to assimilate this truth and act on it. As the large population of aging baby boomers begins to experience discrimination based on disability, perhaps they will come to appreciate the ideas of access and accommodation that underpin this disability rights law—if they can be educated to do so. “It’s quite clear we need new ways of thinking about the public sector and the common good,” says Michael Bérubé, who adds that those concerned about such things should “put the ADA front and center as the very model for a new paradigm in thinking about civil rights and citizenship.”<sup>187</sup>

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186. *Id.* at 87.

187. E-mail Interview with Michael Bérubé, Professor at Pa. State Univ. (Dec. 10, 2003).