Spring 2004

State Anti-Discrimination Law as a Model for Amending the Americans with Disabilities Act

Alex B. Long

STATE ANTI-DISCRIMINATION LAW AS A MODEL FOR AMENDING THE AMERICANS WITH DISABILITIES ACT*

I. INTRO

By now, the rise and fall of the Americans with Disabilities Act (ADA)[1] is a familiar story. The Act was hailed as a revolutionary measure that would bring individuals with disabilities into the mainstream of American life.[2] Instead of relying on outdated notions that defined an individual's disability solely on the basis of the existence of an impairment or an impairment that prevented the individual from being gainfully employed, the ADA, like its predecessor, the Rehabilitation Act of 1973,[3] was to take a functional, civil rights approach to the problem of disability discrimination. With its creation of a three-pronged definition of disability, Congress took notice of the fact that not all actual physical or mental impairments were inherently limiting, and that, in the words of the Supreme Court, "society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment."[4] Thus, the ADA would cover individuals who not only had actual

---

* Assistant Professor of Law, Oklahoma City University School of Law. The author wishes to thank the Kerr Foundation and Alumni Fund for its support of this Article. The author is indebted to Professors Lisa Eichhorn, Chai Feldblum, and Mark A. Rothstein for their comments on an earlier draft of the article. Sandra Koerner (J.D. 2004) and Lori Gibson (J.D. 2004) provided valuable research assistance.

[1] 42 U.S.C. §§ 12101-213 (1994 & Supp. 2002).

[2] *See, e.g.*, Miranda Oshige McGowan, *Reconsidering the Americans with Disabilities Act*, 35 GA. L. REV. 27, 30 (2000).

[3] 29 U.S.C. § 701 (1998).

[4] School Bd. of Nassau County v. Arline, 480 U.S. 273, 284 (1987).

physical or mental impairments that substantially limited major life activities, but also those individuals who had records of such impairments or were regarded as having such impairments.[5]

Moreover, the Act was to go beyond the approach of first-generation anti-discrimination statutes such as Title VII[6] and the Age Discrimination in Employment Act (ADEA)[7] in the sense of merely prohibiting unequal treatment of individuals with disabilities. Instead, discrimination in employment under the ADA would include the failure to make reasonable accommodations to the known physical or mental limitations of a qualified individual with a disability unless the employer could demonstrate that providing the accommodation would result in an undue hardship.[8] Thus, employers would be required to alter their workplaces or practices within reason in order to allow disabled employees equal opportunity to compete in the workplace. Congress also used this reasonable accommodation concept to define which individuals were protected under the Act. A qualified individual with a disability would be one who, with or without reasonable accommodation, could perform the essential functions of the position the individual holds or desires.[9] Thus, Congress' inclusion of the reasonable accommodation concept represented a recognition on its part that discrimination against the disabled frequently involves an ignorance of the special circumstances of individuals with disabilities or an unwillingness to make minor, relatively inexpensive modifications to the established ways of

---

[5] 42 U.S.C. § 12102(2).
[6] 42 U.S.C. § 2000e (1994).
[7] 29 U.S.C. § 621 et seq. (1994).
[8] 42 U.S.C. § 12112(b)(5)(A).
[9] 42 U.S.C. § 12111(8).

doing business that would allow disabled employees to participate in the workplace in and society as a whole.[10]

The result of this re-evaluation of the concept of disability and the imposition of an affirmative obligation on the part of employers and other covered entities to remove unnecessary barriers that had long operated to exclude individuals with disabilities was to be the integration of individuals with disabilities into the economic and social mainstream of American life.[11] According to sponsors, in addition to being the right thing to do *for* people with disabilities, passage of the ADA was "also the right way to help strengthen our economy and enhance our international competitiveness."[12] In particular, the employment-related provision of the ADA, Title I, would help reduce the staggeringly high level of unemployment among individuals with disabilities.[13] In sum, hopes were high for what supporters referred to as "the 20th century emancipation proclamation for people with disabilities."[14]

Yet, less than five years after the ADA took effect, there was a widespread feeling that the Act was already a disappointment.[15] Statistics soon began to pour in suggesting that not only

---

[10] S. Elizabeth Malloy, *Something Borrowed, Something Blue: Why Disability Claims are Different*, 33 CONN. L. REV. 603, 621 (2001).

[11] H.R. REP. No. 101-485 (II), at 22 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 304.

[12] 135 CONG. REC. S 10714 (daily ed. Sep. 7, 1989) (statement of Sen. Harkin).

[13] *See* H.R. REP. No. 101-485 (IV), at 35 (1990), *reprinted in* 1990 U.S.C.C.A.N. 512, 524. The figure most commonly cited was that "[t]wo-thirds of all disabled Americans between the age of 16 and 64 are not working at all; yet 66 percent of those not working say they want to work." *Id.* at S 10712 (statement of Sen. Harkin) (quoting Lou Harris poll).

[14] 135 CONG. REC. S 10711 (statement of Sen. Harkin).

[15] *See* 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, 415 (1997) (stating that the courts' "restrictive interpretation of protection under the ADA represents a considerable journey down the wrong road ...."); Arlene B. Mayerson, *Symposium, Restoring Regard for the "Regarded as" Prong: Giving Effect*

had the ADA not been the windfall for plaintiffs that many business interests had feared, if anything, the Act had been a windfall for defendants.[16] Roughly seven years after the Act's effective date, the Supreme Court significantly restricted the scope of the ADA's coverage in a trilogy of cases that was met with widespread dismay.[17] Three years later, the Supreme Court once again generally sided with employers in a new round of ADA cases.[18]

Thus, despite the promise of the ADA, the overwhelming consensus among scholars is that the Act has not lived up to its potential. For some commentators, the main problem has been what they perceive to be the tendency of federal courts to provide an overly-restrictive interpretation of the Act. According to these commentators, the root causes of this tendency are the failure of federal courts to fully appreciate the differences between the ADA and other anti-discrimination statutes,[19] a failure on the part of courts to fully understand what it means to be disabled or the different type of discrimination that individuals with disabilities face,[20] and/or a generalized hostility to the notion contained within the ADA that equal opportunity for individuals with disabilities may actually require unequal or preferential treatment for such

---

to Congressional Intent, 42 VILL. L. REV. 587, 587 (1997) (arguing that restrictive judicial interpretations of the ADA "reflect, at best, a lack of understanding of the statute and, at worst, a blatant hostility towards the profound goals of the ADA.").

[16] Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants,* 34 HARV. C.R.-C.L. L. REV. 99 (1999).

[17] McGowan, *supra* note 2, at 81.

[18] Toyota Motor Mfg., Inc. v. Williams, 122 S. Ct. 681 (2002); US Airways, Inc. v. Barnett, 122 S. Ct. 1516 (2002); Chevron U.S.A., Inc. v. Echazabal, 122 S. Ct. 2045 (2002).

[19] *See* Malloy, *supra* note 10, at 607; Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19, 23 (2000).

[20] *See* Michael Ashley Stein, Book Review, *Disability, Employment Policy, and the Supreme Court*, 55 STAN. L. REV. 607, 625 (2002); Jane Byeff Korn, *Cancer and the ADA: Rethinking Disability*, 74 S. CAL. L. REV. 399, 442 (2001).

individuals.[21] Whatever the cause, the result has been employer success rates in ADA litigation hovering in the neighborhood of 90%.[22] Other commentators have placed the blame, at least in part, on the language of the ADA itself. These commentators have argued that although the judicial interpretations of the terms contained within the phrase "qualified individual with a disability" have been cramped and possibly contrary to congressional intent, they are not necessarily illogical or contrary to generally-accepted methods of statutory construction.[23] As such, some commentators have suggested that the key to effectuating the ADA's goals is not a change in the judicial mindset, but a change to the text of the ADA.[24]

In light of the increasing calls for judicial re-evaluation or legislative amendment of the ADA, it seems appropriate to pause to consider the fact that discrimination against individuals with disabilities is not exclusively a federal problem. Nor is the federal government necessarily the only source capable of effectively dealing with the problem of discrimination against the disabled. One of the benefits of the federal system is that states can serve as social laboratories and experiment with solutions to social problems.[25] These state solutions may, in turn, prompt

---

[21] *See* Diller, *supra* note 19, at 23; Burgdorf, *supra* note 15, at 411.

[22] *See* Colker, *supra* note 15, at 101, 108; Patricia Manson, *Study: Disabled Losing Nearly All Discrimination Cases*, CHICAGO DAILY LAW BULLETIN, 1, June 19, 2003.

[23] *See* McGowan, *supra* note 2, at 112; Lisa Eichhorn, *Major Litigation in 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, 1470-71 (1999); *see also* 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, 140-41 (2000) (noting the failure of courts to grasp the congressional intent underlying the ADA, but adding, "The bottom line is that statutory text matters, sometimes even too much.").

[24] *See infra* notes 186-201 and accompanying text.

[25] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

nationwide reform.[26] There is a long history of dialogue between the states and the federal government concerning social policy, particularly in the area of individual rights.[27] In some instances, the legislative or judicial branch of the federal government initiates a dialogue with the states about individual rights that results either in the creation of a nationwide standard or more experimentation among the states.[28] In other instances, the states have served as the catalyst for federal reform.[29] Sometimes the dialogue is more involved. For example, Congress modeled Title VII of the Civil Rights Act of 1964 on existing state-anti-discrimination laws, but went further than some states by prohibiting sex discrimination.[30] The enactment of Title VII and the development of federal case law under the measure led more states to adopt their own anti-discrimination laws and to follow federal decisional law, thus resulting in an essentially national approach to certain forms of employment discrimination.[31] Despite this uniformity, numerous states have provided for even greater protection from discrimination than that found in federal legislation, most notably in the form of protection from genetic discrimination[32] and sexual orientation discrimination.[33] These state innovations have, in turn, led to suggestions that

---

[26] For example, when the American Bar Association's (ABA) Ethics 2000 Committee began the task of revising the ABA's Model Rules of Professional Responsibility, it reviewed the ethics codes of each state to determine how states may have varied from the Model Rules and how their experimentations worked in practice. *See* Nancy J. Moore, *Lawyer Ethics Code Drafting in the Twenty-First Century*, 30 HOFSTRA L. REV. 923, 932-33 (2002).

[27] Sally F. Goldfarb, *The Supreme Court, the Violence Against Women Act, and the Use and Abuse of Federalism*, 71 FORDHAM L. REV. 57, 87 (2002).

[28] *Id.* at 89-90.

[29] Goldfarb, *supra* note 27, at 90.

[30] *Id.* at 90-91.

[31] *Id.* at 91.

[32] *See* Pauline T. Kim, *Genetic Discrimination, Genetic Privacy: Rethinking Employee Protections for a Brave New Workplace*, 96 NW U. L. REV. 1497, 1515 (2002).

[33] *See* Jeremy S. Barber, Comment, *Re-Orienting Sexual Harassment: Why Federal Legislation*

Congress might possibly use these more expansive state statutes as models for federal legislation.[34]

Thus far, nearly all of the scholarship concerning employment discrimination against individuals with disabilities has focused on the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973,[35] the two dominant federal laws in the area. However, the states have not entirely ceded the field to the federal government. Even prior to the ADA's enactment in 1990, 48 states had statutes outlawing employment discrimination against individuals with disabilities in the private sector.[36] And while a number of states have since amended their statutes or interpretive regulations to bring them into harmony with federal law, a sizable minority continue to chart their own course by eschewing reliance on the federal model.[37]

---

is Needed to Cure Same-Sex Sexual Harassment Law, 52 AM. U. L. REV. 493, 523 (2002).

[34] *See* Goldfarb, *supra* note 27, at 91 (stating that more protective state statutes "provide a roadmap for possible future reforms of federal law."); Patricia A. Roche, *The Genetic Revolution at Work: Legislative Efforts to Protect Employees*, 28 AM. J.L. & MED. 271, 281 (2002) (discussing state approaches to genetic discrimination as a possible model for federal legislation).

[35] 29 U.S.C. § 794 (1994).

[36] *See* Steven B. Epstein, *In Search of a Bright Line: Determining When an Employer's Financial Hardship Becomes "Undue" Under the Americans with Disabilities Act*, 48 VAND. L. REV. 391, 395 n.16 (1995).

[37] *See infra* notes 226-234 and accompanying text.

Indeed, in at least two instances since 1999, a state has amended its statute, in part, to address some of the perceived shortcomings of the ADA.[38]

This Article examines the extent to which state anti-discrimination law can serve as a model for federal reform in light of the growing criticisms of federal law. Part II catalogs the federal government's evolving approach toward disability discrimination, which ultimately resulted in the passage of the Rehabilitation Act and Americans with Disabilities Act. Part II discusses the Supreme Court's interpretations of the ADA and the negative reaction and dissatisfaction that Court's pronouncements on the Act have produced among commentators. In addition, it discusses some of the suggested modifications to the ADA and its protected-class approach that commentators have offered. Part IV surveys state laws prohibiting discrimination on the basis of disability and discusses the different approaches taken by the states. Finally, Part V examines in greater depth some of the state statutes that take an approach to disability discrimination entirely different than that taken by the ADA. It compares the alternative approaches offered by some commentators with the actual working models present in some states and makes some preliminary evaluations as to their overall potential to serve as models for federal reform.

II THE EVOLVING CONCEPTION OF DISABILITY DISCRIMINATION AT THE FEDERAL LEVEL

A. Historical Treatment of Individuals with Disabilities

[38] *See infra* notes 258-266 and accompanying text.

Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990 represented dramatic departures from the traditional governmental and societal approaches toward individuals with disabilities. Up until the 20th century, the prevailing view of individuals with disabilities was as objects of pity.[39] Such individuals were viewed as unable to function in society, and thus were either excluded from or cared for outside the mainstream of society.[40] In keeping with this view, states took it upon themselves to care for individuals with disabilities by constructing almshouses for the physically disabled and asylums for the mentally ill.[41]

The approach toward individuals with disabilities shifted during the first half of the twentieth century from a model of pity and exclusion to one of rehabilitation. Under this conception of disability, the problem that individuals with physical and mental impairments faced were the impairments themselves.[42] Under this so-called "medical model," the best way to help the disabled was to use medicine to cure or lessen the effects of an impairment or to employ rehabilitation techniques to enable individuals to overcome the effects of their impairments.[43] In keeping with this approach, Congress passed legislation during World War I and shortly thereafter to create vocational rehabilitation programs for disabled veterans and civilians to help reintegrate them into the workforce.[44] The primary focus of federal legislation throughout much of the twentieth century was on an individual's impairment itself and how it affected the individual's ability to work. Under the Vocational Rehabilitation Amendments of 1954, for

---

[39] Feldblum, *supra* note 23, at 95.
[40] *Id.*
[41] *Id.* at 94-95.
[42] Mary Crossley, *The Disability Kaleidoscope*, 74 NOTRE DAME L. REV. 641, 650 (1999).
[43] *Id.*
[44] Feldblum, *supra* note 23, at 95-96, n. 25.

example, a "physically disabled individual" was one "who is under a physical or mental disability which constitutes or results in a substantial handicap to employment, but which is of such a nature that vocational rehabilitation services may reasonably be expected to render him fit to engage in remunerative occupation."[45] Similarly, only those individuals who were out of work and who were unable "to engage in any substantial gainful activity" were entitled to financial support under the Social Security Disability Insurance (SSDI) system.[46] Furthermore, in order to be eligible for the receipt of SSDI benefits, an individual must also have a "medically determinable physical or mental impairment."[47] Thus, the SSDI program takes a primarily work-related view of the problems associated with disabilities and reflects the view that the problems faced by individuals with disabilities are essentially caused by biology, rather than societal attitudes.[48]

B. The Rehabilitation Act of 1973

Beginning with the civil rights movement of the 1960s, the governmental approach toward individuals with disabilities began to change. Drawing upon the civil rights successes of other groups, individuals with disabilities began to reject "society's attitudes of pity, charity, or rehabilitation."[49] Instead, a new conception of disability began to emerge, one which viewed the cause of the problems faced by individuals with disabilities not always as the physical or mental impairments of such persons, but the barriers – both physical and attitudinal – erected by society

---

[45] Pub. L. No. 565, § 11, 68 Stat. 652, 660 (1954); Feldblum, *supra* note 23, at 96.
[46] Social Security Amendments of 1956, Pub. L. No. 84-880, § 103(a), 70 Stat. 807, 815-24 (1956); 42 U.S.C. § 423(d)(1)(A) (1994).
[47] 42 U.S.C. § 423(d)(2)(A).
[48] Crossley, *supra* note 42, at 629, 651.
[49] Feldblum, *supra* note 23, at 97.

as a whole.[50] Under this new conception of disability, independent living, equal opportunity, and integration could be achieved, not necessarily by changing the person with the impairment, but by changing the societal lack of understanding and unequal treatment of such persons.

This new understanding of what it meant to have a disability soon began to materialize in federal legislation.[51] Perhaps the most important example is Section 504 of the Rehabilitation Act of 1973 and the amendments to the Act in 1974. Added to the existing Rehabilitation Act with little forethought by Senate staffers,[52] Section 504 provided that "no otherwise qualified handicapped individual ... shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."[53] Thus, individuals with disabilities now enjoyed protection from discrimination in the public sector comparable to the protections against discrimination based on race, gender, etc. enjoyed in the private sector by virtue of Title VII of the Civil Rights Act of 1964.

Section 504's language borrowed heavily from the language of Title VI of the Civil Rights Act[54] and Title IX of the Education Amendments of 1972.[55] Despite the use of other civil rights statutes as a blueprint, Section 504 retained some aspects of the older conception of disability, which defined disability in terms of the inability to work. As the Rehabilitation Act

---

[50] Richard K. Scotch, *Disability as the Basis for a Social Movement: Advocacy and the Politics of Definition*, 44 J. SOC. ISSUES 159, 159-63 (1988).
[51] Wendy E. Parmet, *Plain Meaning and Mitigating Measures: Judicial Interpretations of the Meaning of Disability*, 21 BERKELEY J. EMP. & LAB. L. 53, 57 (2000).
[52] Feldblum, *supra* note 23, at 99; Burgdorf, *supra* note 15, at 419-20.
[53] Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (codified as amended 29 U.S.C. § 794(a) (1998)).
[54] 42 U.S.C. § 794(a) (1994); *see* Feldblum, *supra* note 23, at 99.

was originally designed to encourage vocational rehabilitation, the Act continued to define an "otherwise qualified handicapped individual" in terms of whether the individual had an impairment that constituted a "substantial handicap to employment."[56] However, the new anti-discrimination mandate of Section 504 went beyond employment and included a prohibition against discrimination "under *any program or activity* receiving federal financial assistance." Given the Act's coverage of discriminatory practices in housing, education, and health care, Congress believed that the existing definition's focus on employability had proven "troublesome" and "far too narrow and constricting."[57] In 1974, Congress amended Section 504's definition of a "handicapped individual" to mean "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 an impairment, or (iii) is regarded as having such an impairment."[58]

This new definition contained aspects of both the older conception of disability and the newer civil rights conception.[59] The first prong of the three-pronged definition still required the existence of some actual physical or mental impairment; however, it defined "handicap" in terms of the functional limitations an impairment imposed on an individual. Thus, the first prong of section 504's defined disability in functional terms, rather than solely medical terms.[60] In addition, the new definition represented a departure from traditional notions of individuals with disabilities in the sense that it did not focus solely on employability and in the sense that it

---

[55] 20 U.S.C. § 1681(a) (1994); *see* Feldblum, *supra* note 23, at 99.
[56] Pub. L. No. 93-112, §7(6), 87 Stat. 355 (1973).
[57] S. Rep. No. 93-1297, 93rd Cong., 2nd sess., *reprinted at* 1974 U.S.C.C.A.N. 6373, at 6388, 6413(1974); School Bd. of Nassau County v. Arline, 480 U.S. 273, 278 n.3 (1987).
[58] H.R. 17503, 93rd Cong., 2nd sess. (1974) (codified as amended at 29 U.S.C. § 706(8) (1998)).
[59] McGowan, *supra* note 2, at 63 (stating same about the similarly-worded ADA).

required only substantial limitations of major life activities, not total inabilities to function in society. The inclusion of the second and third prongs in Section 504's definition also represented a departure from the older medical approach and a move toward a civil rights approach to the issue of what it means to have a disability.[61] Under the "record of" and "regarded as" prongs, an individual need not have a current, actual impairment to fit within the statutory definition. Instead, these prongs represent a recognition on Congress' part that societal attitudes about disability and disease can be as limiting as the actual physical limitations that flow from an impairment.[62]

Despite these changes, the 1974 Amendments still evidenced some possible discomfort on the part of Congress in providing for an overly-expansive prohibition against discrimination against individuals with disabilities. Some have suggested that, even prior to the enactment of Section 504, Congress demonstrated a willingness to act only on behalf of individuals it believed to be "truly disabled." For example, some have argued that the requirement that an individual have a "medically determinable physical or mental impairment" in order to be eligible for SSDI coverage arose out of a congressional fear that people who were able to work would abuse the system by feigning disability.[63] This same concern is perhaps embodied in Section 504's creation of a protected class. Most anti-discrimination statutes do not limit the scope of their protection to certain individuals. Title VII, for example, simply prohibits discrimination because of certain

---

[60] *Id.* at 62.
[61] *Id.*
[62] *Arline*, 480 U.S. at 284.
[63] Crossely, *supra* note 42, at 651 (citing DEBORAH A. STONE, THE DISABLED STATE 79 (1984)).

characteristics such as race, gender, etc.,.[64] In contrast, Section 504 requires an individual with a disability to first establish that he or she is "otherwise qualified" before she is entitled to protection under the Act. Putting aside the question of what the word "otherwise" in the phrase means,[65] numerous critics have questioned the need to define the Act's coverage in terms of "qualified" individuals."[66] Indeed, in 1972 Representative Charles Vanik introduced a bill that would have amended Title VII to prohibit "discrimination because of physical or mental handicap in employment ... unless there is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."[67] The bill failed to make it out of committee.[68]

One explanation for the inclusion of the otherwise qualified language is that the drafters feared that Section 504 might be interpreted to mean that, as is the case with other anti-discrimination statutes prohibiting consideration of certain characteristics in employment decisions, a person's disability could play no role in eligibility determinations.[69] However, Robert Burgdorf, one of the chief authors of the ADA, has suggested that Section 504's protected class approach is symptomatic of a larger problem: a lingering view of the disabled as being

---

[64] 29 U.S.C. § 20002-e(a) (1994).

[65] The Supreme Court has clarified that "[a]n otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap," rather than one who is qualified except for the handicap. Southeastern Community College v. Davis, 442 U.S. 397, 407 n.7 (1979).

[66] *See, e.g.*, Burgdorf, *supra* note 15, at 422 (citing the positions of the U.S. Civil Rights Commission and the National Council on Disability);

[67] H.R. 140333, 92nd Cong., 2d Sess. (1972) (cited in Burgdorf, *supra* note 15, at 418).

[68] *See* Burgdorf, s*upra* note 15, at 418.

[69] *Id.* at 428.

objects of pity and charity.[70] Burgdorf and others have argued that Section 504's protected class approach is based on a view that "there is a certain core group of severely disabled people who are deserving of the special service of being protected from discrimination."[71] Only when an individual with an impairment fits within a societal stereotype of the "truly disabled" is such an individual deserving of the protection of anti-discrimination law.

In time, the contours of the "otherwise qualified" language were fleshed out through regulations and case law. In 1978, the Department of Health, Education, and Welfare (HEW) deleted the troublesome word "otherwise" in its regulations and referred instead to "qualified handicapped persons."[72] Through case law and regulations, a "qualified handicapped person" was defined as one "who, with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of the individual or others and who ... [m]eets the experience and/or education requirements of the position in question."[73]

Case law under the Rehabilitation Act was relatively scarce prior to the enactment of the ADA in 1990.[74] Several commentators have stated that questions of whether an individual had a handicap were rarely at issue in most Rehabilitation Act cases prior to 1990.[75] Indeed, in 1987,

---

[70] *Id.* at 568.
[71] *Id.*; *see* Eichhorn, *supra* note 23, at 1426 ("Another possible rationale behind the protected class structure is the fear that people who are not 'truly disabled' will somehow take advantage of antidiscrimination laws.").
[72] Burgdorf, *supra* note 15, at 422.
[73] 29 C.F.R. § 1613.702(f) (1994) (quoted in Fedro v. Reno, 21 F.3d 1391, 1396 (7th Cir. 1994)).
[74] *See* Epstein, *supra* note 36, at 433 (stating that only 265 lawsuits had been filed under the Rehabilitation Act between 1973 and 1990).
[75] *See, e.g.*, Feldblum, *supra* note 23, at 92.

in *School Board of Nassau County v. Arline*, the Supreme Court gave an expansive reading to Section 504's definition.[76] In concluding that an individual with a history of hospitalization for tuberculosis fit within with Section 504's "record of" prong, the Court spent little time parsing the language of the statutory definition and suggested in dicta that an individual who had been denied an employment opportunity based on the negative reactions of others to an impairment that was not otherwise substantially limiting could fit under the "regarded as" prong.[77] Thus, on the eve of Congress' consideration of the ADA, most disability rights advocates believed that a workable approach toward addressing disability discrimination was already in place and could serve as a model for future legislation.[78]

C. The Americans with Disabilities Act of 1990

Although the Rehabilitation Act provided protection from discrimination for federal employee and employees of those who received federal funds, there was still no anti-discrimination measure in place to protect employees in the private sector from disability discrimination. Although nearly all states had laws prohibiting discrimination in the private sector against individuals with disabilities by the late 1980s,[79] ADA proponents believed that state laws were "inconsistent and incomplete."[80] In 1990, Congress sought to rectify the situation through the enactment of the ADA. The Rehabilitation Act served as the blueprint for the ADA.

---

[76] *Id.* at 128.
[77] 480 U.S. at 280-811; Feldblum, *supra* note __, at 118, 119.
[78] *See* Feldblum, *supra* note 23, at 129. *See generally* Colker, *supra* note 16, at 278 (stating that on eve of the effective date of the ADA, Rehabilitation Act plaintiffs in employment discrimination cases were faring twice as successfully as would ADA plaintiffs over the next decade).
[79] *See supra* note36 and accompanying text.
[80] 134 CONG. REC. 5090-02 (1988) (statement of Sen. Simon).

However, an earlier draft of the legislation took a much different approach toward the problem of discrimination against individuals with disabilities than would the final version of the Act.

An early version of the measure (the Americans with Disabilities Act of 1988), drafted by Robert Burgdorf of the National Council on the Handicapped, was far more expansive than the version that ultimately became law. Specifically, Burgdorf's version prohibited discrimination "on the basis of handicap," which was then defined as "because of a physical or mental impairment, perceived impairment, or record of impairment."[81] Although this language retained Section 504's basic three-pronged definition of "handicapped," it contained some important differences. First, Burgdorf's draft eliminated any references to substantial limitations of major life activities. Instead, the draft simply defined "handicap" under the first prong of the definition to mean a physical or mental impairment. A "perceived impairment" meant "not having a physical or mental impairment as defined [under the first prong], but being regarded as having or treated as having a physical or mental impairment."[82] A "record of impairment" meant "having a history of, or having been misclassified as having, a physical or mental impairment."[83] Moreover, in keeping with the criticisms of Section 504 concerning its creation of a protected class of "qualified individuals," Burgdorf's bill omitted any such references. Instead, the draft explained that it was not a discriminatory practice for an employer to apply neutral standards that operated to exclude disabled individuals if the standards were "both necessary and substantially related to the ability to perform or participate in the essential components of the particular job"

---

[81] Feldblum, *supra* note 23, at 127; S. 2345, § 3(1), 134 CONG. REC. 5090-02 (1988).
[82] Feldblum, *supra* note 23, at 127; S. 2345, § 3(3), 134 CONG. REC. 5090-02 (1988).
[83] Feldblum, *supra* note 23, at 128; S. 2345, § 3(4), 134 CONG. REC. 5090-02 (1988).

and "such performance or participation cannot be accomplished by reasonable accommodation."[84]

[84] S. 2345, § 5(b), 134 CONG. REC. 5090-02 (1988).

Senator Lowell Weicker and 13 Senate co-sponsors introduced the measure in 1988.[85] Although the measure received a hearing, no further action was taken on the bill by the time Congress recessed in October of 1988.[86] A new version of the ADA was introduced in May of 1989, which served as the basis for the final version of the Act that was passed in July of 1990.[87] Although the new version made a few adjustments (e.g., substituting "disability" for "handicap"), the new version essentially used the same definitions of "disability" and "qualified individual" that appeared in Section 504's regulations. Disability rights advocates preferred this new measure over Burdgorf's for several reasons. First, the new version was considered to be more politically viable.[88] Because Burgdorf's bill required employers to make reasonable accommodations for individuals who simply had physical or mental impairments, rather than individuals with physical or mental impairments that *substantially limited* a major life activity, Burgdorf's bill imposed greater burdens on employers than did Section 504.[89] Disability rights advocates also believed it would be easier to sell to Congress a set of definitions that had been in use for fifteen years than it would to convince lawmakers to adopt a set of untested definitions.[90] Moreover, disability rights advocates believed that the judicial interpretation of the terms contained within Section 504 and its regulations had been, on the whole, fairly expansive; thus, they saw little need to tinker with a definition that seemed to be working.[91]

---

85 Feldblum, *supra* note 23, at 126.
86 *Id.*
87 *Id.* at 127.
88 *Id.*; McGowan, *supra* note 2, at 97.
89 Feldblum, *supra* note 23, at 127.
90 *Id.* at 128.
91 *See supra* notes 75-78 and accompanying text.

The final version of the ADA employed a set of definitions nearly identical to those found in Section 504 and its regulations. Only "qualified individuals with disabilities" (or those who had an association with such an individual) were entitled to protection under the Act.[92] The definition of "disability" mirrored that of Section 504:

> (2) Disability – The term "disability" means, with respect to an individual –
> (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
> ©) being regarded as having such an impairment.[93]

The EEOC soon promulgated regulations that explained that "major life activities" included functions such as "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[94] Thus, by defining disability both in terms of the limiting effect an impairment actually had on an individual and how others perceived the existence of an impairment, the ADA took the same functional, civil rights approach toward defining its protected class as did Section 504.[95]

The ADA's definition of a "qualified individual with a disability" was substantially similar to the Rehabilitation Act's definition of an "otherwise qualified handicapped individual." The ADA defined a "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the

---

[92] 42 U.S.C. § 12112(a),(b)(4) (1994).
[93] 42 U.S.C. § 12102(2) (1994).
[94] 29 C.F.R. § 1630.2((I) (2003).
[95] McGowan, *supra* note 2, at 63 (stating that the ADA takes a functional, civil rights approach to the problem of disability discrimination).

employment position that such individual holds or desires."[96] Congress also provided a non-exhaustive list of possible reasonable accommodations:

> (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
> (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.[97]

The ADA also attempted to define the scope of an employer's reasonable accommodation duty by providing that an employer was not required to make such an accommodation where the employer "can demonstrate that the accommodation would impose an undue hardship on the operation" of the employer's business.[98] The Act then defined "undue hardship" in terms of "significant difficulty or expense," and included several factors to be considered in assessing whether the accommodation would impose an undue hardship on a particular employer.[99] One important distinction between the ADA and Section 504 in this regard was the inclusion of the

---

[96] 42 U.S.C. §12111(8) (1994).
[97] *Id.* §12111(9).
[98] 42 U.S.C. § 12112(5)(A).
[99] 42 U.S.C. § 12111(10)(A). Although employer groups raised concerns over the potential costs involved in making accommodations, the version of the ADA drafted by Robert Burgdorf and proposed by Senator Weicker would arguably have imposed greater costs on employers. Under Burgdorf's bill, it was not a discriminatory practice for an employer to refuse to make an accommodation if the accommodation "would fundamentally alter the essential nature, or *threaten the existence* of, the program, activity, business, or facility in question. S. 2345, § 7(a)(1), 134 CONG. REC. 5090-02 (1988). Indeed, the reasonable accommodation language in the first version was dubbed the "bankruptcy provision" by business interests. *See* Epstein, *supra* note 36, at 423. This language even raised concerns among one of the bill's co-sponsors, Senator Robert Dole. *See* 134 CONG. REC. 5090-02 (1988). When the original version of the ADA was scrapped, the "undue hardship" language was added, and the legislative history indicates that Congress intended for the term to be applied consistently with the interpretation of the term given under Section 504. *See* H.R. REP. NO. 101-485 (II), at 62, reprinted in 1990

accommodation of reassignment to a vacant position. Instead of requiring that an individual be able to perform the essential functions of the employment position *in question* as Section 504 had, an individual with a disability was qualified under the ADA if the individual could perform the essential functions of the position the individuals "holds *or desires*."[100] The inclusion of "or desires" language in the definition of a qualified individual and the inclusion of reassignment to a vacant position as a possible form of reasonable accommodation was significant. The federal courts had almost uniformly concluded that an employer was not required under the Rehabilitation Act to reassign a disabled employee to a vacant position if the employee could no longer perform the essential functions of the position the employee occupied.[101] Federal courts reached this conclusion on several grounds. Some courts relied heavily on the phrase "the position in question" and concluded that an employer's reasonable accommodation duty was limited to the specific position to which the plaintiff had applied or the position from which the plaintiff was discharged.[102] Other courts relied in part on the argument that reassigning an individual with a disability would not amount to equal treatment of individuals with disabilities but would instead provide individuals with disabilities with greater rights than their non-disabled counterparts.[103]

U.S.C.C.A.N., at 344].

[100] 42 U.S.C. §12111(8) (1994).

[101] Fedro v. Reno, 21 F.3d 1391, 1395 (7th Cir. 1994).

[102] Davis v. U.S. Postal Service, 675 F. Supp. 225, 234 (M.D. Pa. 1987); Carty v. Carlin, 623 F. Supp. 1181, 1186, 1188 (D. Md. 1985); Alderson v. Postmaster General, 598 F. Supp. 49, 55 (W.D. Okla. 1984).

[103] Fedro, 21 F.3d at 1396; *Carty*, 623 F. Supp. at 1188-89.

Congress' inclusion of reassignment to a vacant position in the list of possible reasonable accommodations under the ADA eliminated any reliance on the statutory language as a basis for concluding that reassignment was, *per se*, not a reasonable accommodation. Thus, under the ADA the inquiry into whether an individual is qualified is not limited to consideration of the individual's ability to perform his or her current job.[104] Consequently, an employer's reasonable accommodation duty does not end with an employee's existing job, but may include reassignment to an entirely different position.[105]

Expectations were high when the Act became law in 1990.[106] Individuals with disabilities finally had a measure in place that not only ensured them protection from discrimination in the private sector, but seemed also to express the view that "their major obstacles are not inherent in their disabilities, but arise from barriers that have been imposed externally and unnecessarily."[107] Although the measure was not as sweeping as some may have desired, based on past experiences under the Rehabilitation Act, disability rights advocates believed they had little to fear when the ADA was put to the test in the courts.

III. THE INTERPRETATION OF THE ADA BY THE FEDERAL COURTS

Despite high hopes for the ADA, disability rights advocates have been greatly disappointed by the federal courts' interpretation of the ADA.[108] The tendency of the federal courts to read the ADA's definition of disability in a narrow fashion, and in particular the

---

[104] Smith v. Midland Brake, Inc., 180 F.3d 1154, 1161-62 (10th Cir. 1999).
[105] *Id.* at 1161.
[106] McGowan, *supra* note 2, at 30.
[107] 134 CONG. REC. 5090-02 (1988) (statement of Sen. Weicker).

Supreme Court's pronouncements on the definition, have left some disability rights advocates and scholars frustrated. From the perspective of the federal courts, some of the open-ended concepts employed by the ADA have made resolution of employment discrimination claims particularly difficult.[109]

A. Decisions Concerning the Definition of Disability

1. Sutton v. United Air Lines, Inc. *and the Mitigating Measures Rule*

One issue involving the ADA's definition of disability that has generated significant consternation is the question of whether an individual's use of measures to correct or mitigate the effects of an impairment should be taken into account in assessing whether the individual has a disability under the Act. After the ADA became effective, the question soon arose as to whether an individual who, for example, employed the use of a device such as a hearing aid or who took medication to mitigate the effects of high blood pressure was substantially limited in a major life activity, despite the fact that the person's use of mitigating or corrective measures helped alleviate the effects of an impairment. The EEOC had taken the view, generally espoused in the legislative history of the ADA, that "the 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

---

[108] *See supra* notes 15-21 and accompanying text.

[109] Justice Sandra Day O'Connor has been quoted as saying that the ADA is an example of what happens when a bill's "sponsors are so eager to get something passed that what passes hasn't been as carefully written as a group of law professors might put together." Charles Lane, *O'Connor Criticizes Disabilities Law as Too Vague*, WASH. POST, March 15, 2002, at A2. To O'Connor, the ADA is "one of those [acts] that did leave uncertainties as to what Congress had in mind." *Id.*

measures such as medicines, or assistive or prosthetic devices."[110] By 1999, the majority of federal courts had deferred to the EEOC's position on the matter.[111]

In 1999, the Supreme Court rejected the EEOC's position in *Sutton v. United Airlines, Inc.* The Court concluded that the plain language of the ADA's definition of disability required that a plaintiff's use of mitigating measures be considered when assessing whether the plaintiff's impairment substantially limited a major life activity.[112] To the Court, the statute's use of the present indicative verb form in the phrase "substantially limits" mandated that a plaintiff's impairment must presently substantially limit a major life activity – it is not enough that the impairment "'might,' 'could,' or 'would' be substantially limiting if mitigating measures were not taken."[113] As the definition had a plain meaning according to the Court, the fact that the legislative history and EEOC Interpretive Guidance suggested a contrary result was largely irrelevant.[114]

2. The Single-Job Rule and the Regarded as Prong

The other issue in *Sutton* was whether the petitioners, regardless of the existence of an actual disability, had adequately alleged that United Air Lines regarded them as being substantially limited in the major life activity of working.[115] The Court's resolution of the issue illustrates how the ADA's definition of disability has limited the reach of the statute. In cases brought under the "actual disability" prong, the EEOC had concluded that in order to be

---

[110] 29 C.F.R. app. § 1630.2(j) (1998); H.R. Rep. No. 101-485 (II), at 52 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 334.
[111] *See* Sutton v. United Air Lines, Inc., 527 U.S. 471, 495-96 (1999) (Stevens, J., dissenting).
[112] *Id.* at 482.
[113] *Id.*
[114] See id. at 482.

substantially limited in the major life activity of working, it is not sufficient that an impairment limits an individual's ability to perform a particular job. Instead, an individual must be precluded from a class of jobs or a broad range of jobs.[116] The difficulty for an ADA plaintiff who alleges that an employer regarded the plaintiff as having a disability is that the definition refers a court back to the "actual disability" prong: for a plaintiff to fit within the "regarded as" definition, the defendant must regard the plaintiff as having "such an impairment," i.e., an impairment that substantially limits a major life activity. Thus, read in this fashion, an ADA plaintiff who alleges that an employer regarded the plaintiff as being substantially limited in the major life activity of working must establish that the employer regarded the plaintiff as having an impairment that precluded the individual, not just from the job in question, but from a class of jobs or a broad range of jobs.

This is precisely the interpretation adopted by the Supreme Court in *Sutton*. In *Sutton*, the petitioners had merely alleged that United Air Lines regarded them as being unable to perform the job of a global airline pilot.[117] Therefore, at best, they had alleged that United regarded them as being unable to perform a single job.[118] As such, they had not alleged that they had a disability within the meaning of the ADA. That same day, the Court handed down its decision in *Murphy v. United Parcel Service, Inc.*[119] In *Murphy*, the Court applied the reasoning of *Sutton* to conclude that an individual with hypertension that was controlled by medication did not have an actual disability and that his employer did not regard him as being substantially limited in the

---

[115] Sutton, 527 U.S. at 490.
[116] 29 C.F.R. § 1630.2(j)(3)(I) (1999); 29 C.F.R. app. § 1630.2(j).
[117] 527 U.S. at 493.
[118] *See id.*

major life activity of working because it only viewed the individual as being precluded from working at a particular job.[120]

3. The Demanding Standard

Even where the mitigating measures and single-job rules are not implicated, ADA plaintiffs face a difficult task in establishing the existence of a disability. Even prior to the enactment of the ADA, there were several federal court decisions that expressed the view that the Rehabilitation Act was designed to assure that "*truly disabled*, but genuinely capable, individuals will not face discrimination in employment ...."[121] This same basic sentiment was echoed by Justice Ginsberg in *Sutton*, when she opined that individuals with correctable impairments did not have disabilities within the meaning of the ADA because those individuals were not part of the "discrete and insular minority" Congress sought to protect.[122] And that sentiment found perhaps its fullest voice in 2002 when, in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*,[123] Justice O'Connor, writing for a 9-0 majority, stated that the terms in the ADA's definition of disability "need to be interpreted strictly to create a demanding standard for qualifying as disabled ...."[124]

In *Toyota Motor*, the Court clarified that the word "substantially" in the phrase "substantially limits" suggests "considerable" or "to a large degree."[125] Even if an ADA plaintiff can establish that an impairment limits a life activity to a large degree, the plaintiff still must

---

[119] 527 U.S. 516 (1999).
[120] *Id.* at 521, 524.
[121] *Forrisi v. Bowen*, 794 F.2d 931, 934 (4th Cir. 1986).
[122] *See supra* note and accompanying text.
[123] S. Ct. 681 (2002).
[124] *Id.* at 691.

establish that the life activity in question is "major," or, as the Supreme Court has defined the term, "of central importance to daily life."[126] Numerous ADA plaintiffs with fairly serious impairments have been unable to satisfy the ADA's demanding standard for qualifying as disabled either because they were not substantially limited in a major life activity or because the life activity they were substantially limited in was not major.[127] The Court's explicit pronouncement in *Toyota Motor* that the terms within the definition of disability must be interpreted strictly is likely to contribute to the overall trend of pro-defendant outcomes on the question of the existence of a disability under the ADA.[128]

4. The Special Problem of Individuals with Psychiatric Disabilities

The ADA's definition of disability poses particular challenges for individuals with mental impairments. Given the public's general fear over mental illness, individuals with mental disabilities are perhaps more likely to face discrimination in the form of stereotyping, fear, and avoidance than are individuals with physical disabilities.[129] Of course, these were exactly the

---

[125] *Id.*

[126] *Id.*

[127] *See Sussle v. Sirina Protection Systems Corp.,* 2003 WL 21346935 (S.D.N.Y. June 10, 2003) (Hepatitis C); *Vandeveer v. Fort James Corp.,* 192 F. Supp. 2d 918 (E.D. Wis. 2002) (multiple sclerosis); *Pimental v. Dartmouth-Hitchcock Clinic*, 236 F. Supp. 2d 177 (D.N.H. 2002) (plaintiff who had recovered from breast cancer after eight months of radiation treatment and chemotherapy and who had endured a modified radical mastectomy). *See generally* Wendy F. Hensel, *Interacting with Others: A Major Life Activity Under the Americans with Disabilities Act?*, 2002 WIS. L. REV. 1139, 1158 (discussing the courts' treatment of "interacting with others" as a major life activity).

[128] *See generally Vandeveer*, 192 F. Supp. 2d at 935 (relying upon *Toyota Motor* to conclude that plaintiff with multiple sclerosis did not have a disability).

[129] Ann Hubbard, *The ADA, the Workplace, and the Myth of the "Dangerous Mentally Ill,"* U.C. DAVIS L. REV. 849, 850 (2001); Susan Stefan, *Delusions of Rights: Americans with Psychiatric Disabilities, Employment Discrimination and the Americans with Disabilities Act*, 52 ALA. L. REV. 271, 273 (2000).

types of uninformed reactions to individuals with disabilities that Congress sought to address in enacting the ADA. However, the ADA's functional definition of disability has perhaps imposed even more obstacles for individuals with mental disabilities seeking redress under the ADA than it has for individuals with physical disabilities.[130]

Individuals with psychiatric disabilities, such as depression, bipolar disorder, or post-traumatic stress disorder, have faced particularly difficult challenges.[131] First, some courts have refused to recognize certain activities, such as concentrating or interacting with others, that are likely to be affected by a psychiatric impairment as constituting "major" life activities.[132] Instead, some courts have analyzed claims involving difficulties in concentrating or interacting with others as being subsumed within the major life activity of working.[133] If the individual's condition is aggravated solely by the individual's workplace environment, the single-job rule may work to exclude the individual from coverage.[134] Second, while it might be a fairly simple matter for an individual with a psychiatric condition to establish that a workplace was permeated with stereotypical attitudes about psychiatric conditions, the Supreme Court's literal reading of the ADA's "regarded as" prong has made it difficult for such individuals to establish that an employer regarded the individual as being substantially limited in a particular major life activity.[135] Third, *Sutton*'s mitigating measures rule may work to exclude individuals receiving

---

130 Stefan, *supra* note 129, at 281-83.
131 *Id.* at 281-83.
132 Pack v. K-Mart Corp., 166 F.3d 1300, 1305 (10th Cir. 1999); Soileau v. Guilford of Maine, 105 F.3d 12, 15 (1st Cir. 1997).
133 *Cf.* Emerson v. Northern States Power Co., 256 F.3d 506, 511 (7th Cir. 2001);
134 *See* Rhoads v. FDIC, 257 F.3d 373, 389 (4th Cir. 2001) (applying this rule in the context of an individual with asthma).
135 *See* Steele v. Thiokol Corp., 241 F.3d 1248, 1256 (10th Cir. 2001) (holding that an employee

psychiatric treatment or medication to limit the effects of their psychiatric condition.[136] Finally, the intermittent nature of some psychiatric conditions may make it more difficult for individuals to establish that a condition substantially limits a major life activity.[137]

B. Decisions Concerning the Reasonable Accommodation Requirement

Although the ADA's definition of disability has generated significant controversy and has limited the potential reach of the statute, the existence of a disability is only one piece of the ADA puzzle. Even if an individual has a disability, the individual still must be "qualified," i.e., capable of performing, with or without a reasonable accommodation, the essential functions of the position held or desired.[138] And, even if the employee can meet this standard, an employer is not required to provide such an accommodation when it would result in an undue hardship on the operation of the employer's business.[139] Thus, questions as to the meaning of the terms "reasonable accommodation" and "undue hardship" have also arisen quite frequently.

Prior to the ADA, most private employers had never been required by federal law to spend any money or otherwise alter their employment practices in order to accommodate employees with disabilities.[140] Thus, one might have expected Congress or the EEOC to provide fairly detailed guidelines for employees and employers to follow as to when an accommodation is "reasonable" and when a "reasonable accommodation" nonetheless imposes an undue hardship

---

who had been called "Psycho Bob," "crazy as hell," and a "psychopath" by co-workers could not proceed under a hostile environment theory because the employer did not regard employee as having a disability).

136 Stefan, *supra* note 129, at 281.

137 *Id.* at 281-82.

138 42 U.S.C. § 12111(8) (1994).

139 42 U.S.C. § 12112(b)(5(A) (1994).

140 Epstein, *supra* note 36, at 395.

on the employer.[141] Indeed, while Congress was considering the ADA, business groups pressed for concrete standards to define these terms, including the use of mathematical formulas based on the cost of an accommodation vs. an employee's annual salary.[142] However, Congress failed to define the term "reasonable accommodation" at all, opting instead to provide a non-exhaustive list of possible reasonable accommodations.[143] And while Congress defined "undue hardship" generally to mean "an action requiring significant difficulty or expense" and provided several factors to consider in making a determination on the question, neither Congress nor the EEOC did anything to define more precisely this somewhat vague term.[144]

Given this lack of specificity, the reasonable accommodation requirement has been the subject of considerable controversy.[145] In its Interpretive Guidance, the EEOC explained that the reasonable accommodation requirement "is best understood as a means by which barriers to the equal employment opportunity of an individual with a disability are removed or alleviated."[146] Despite this categorization of the reasonable accommodation requirement as a means of insuring equal opportunity, critics have charged that some courts are reluctant to give full effect to the requirement because they view it as creating "special rights" for individuals with disabilities.[147]

---

[141] *See id.* at 396.
[142] Id. at 425-27.
[143] 42 U.S.C. § 12111(9).
[144] 42 U.S.C. sec. 12111(10); 29 C.F.R. sec. 1630.2(p) (2003).
[145] *See* Barnett v. US Airways, Inc., 122 S. Ct. 1516, 1529 (2002) (Scalia, J., dissenting) (stating that the Court's approach renders the reasonable accommodation requirement a "standardless grab bag"); Samuel Issacharoff & Justin Nelson, *Discrimination with a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act*?, 79 N.C. L. REV. 307, 339-40 (2001).
[146] 29 C.F.R. app. § 1630.9 (2003).
[147] Cheryl L. Anderson, *"Deserving Disabilities": Why the Definition of Disability Under the Americans with Disabilities Act Should be Revised to Eliminate the Substantial Limitation*

At the same time, courts and commentators have raised concerns that the requirement has the capacity to undermine the legitimate interests of employers and adversely impact other employees.[148]

Certain accommodations, such as the reallocation of job duties and extended leaves of absence, have the potential to force other employees to assume unwanted job duties.[149] The accommodation of reassignment to a vacant position has proven particularly controversial. The federal courts have split on several reassignment issues, including whether an employer is required to reassign a disabled employee when the employee is not necessarily the best-qualified individual for the position;[150] whether an employer is required to reassign a disabled employee to a vacant position in contravention of a collective bargaining agreement provision;[151] and whether an employer is required to reassign a disabled employee to a vacant position in contravention of an employer's unilaterally-imposed seniority rule.[152]

Requirement, 65 MO. L. REV. 83, 143 (2000).

[148] *See* EEOC v. Humiston-Keeling, Inc., 227 F.3d 1024, 1028-9 (7th Cir. 2000); Anderson, *supra* note 141, at 33 (noting that the accommodation of reallocation of marginal job duties to another employee may mean that the other employee may have to bear the entire burden of the marginal tasks); Stephen F. Befort, *The Most Difficult ADA Reasonable Accommodation Issues: Reassignment and Leave of Absence*, 37 WAKE FOREST 439, 448 (2002) (stating that reassignment to a vacant position and leave of absence "impose greater burdens on employers and co-workers than do the other types of accommodations recognized by the ADA.").

[149] Befort, *supra* note 142, at 448; Anderson, *supra* note 141, at 33.

[150] *Compare* Smith v. Midland Brake, Inc., 180 F.3d 1154, 1167 (10th Cir. 1999) *with* EEOC v. Humiston-Keeling, Inc., 227 F.3d 1024, 1028-9 (7th Cir. 2000).

[151] *Compare* Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 1114 (8th Cir. 1995) *with* Aka v. Washington Hosp. Ctr., 116 F.3d 876, 896 (D.C. Cir. 1997), *aff'd en banc on other grounds*, 156 F.3d 1284 (D.C. Cir. 1998).

[152] *Compare* EEOC v. Sara Lee Corp., 237 F.3d 349 (4th Cir. 2001) *with* Barnett v. US Air, Inc., 228 F.3d 1105 (9th Cir. 2000).

In 2002, the Supreme Court addressed the ADA's reasonable accommodation requirement for the first time in *US Airways, Inc. v. Barnett*.[153] The case involved a disabled employee's request to be reassigned to a vacant position, despite the fact that a more senior employee was entitled to the position under the employer's unilaterally-imposed seniority policy.[154] The Court held that such a reassignment is ordinarily unreasonable.[155] However, the Court left open the possibility that an ADA plaintiff could demonstrate "special circumstances" that warrant a finding that such an accommodation is reasonable despite the existence of a seniority system.[156] Those special circumstances could include the fact that an employer departs from the policy so frequently or that the policy is already so filled with exceptions that one more departure is unlikely to upset the settled expectations of other employees.[157] Thus, to the extent that *Barnett* offered a chance for the Court to provide future litigants with a bright-line rule, the decision failed to achieve that goal.[158]

C. Criticisms and Calls for Reform

1. Criticisms

In recent years, there has been an avalanche of criticism concerning court decisions under the ADA. The criticism typically centers on the courts' interpretation of the ADA and/or the language of the statute itself. Perhaps the most consistent criticism of the courts' interpretation of

---

[153] 535 U.S. 391 (2002).
[154] *Id.* at 394.
[155] *Id.* at 406.
[156] *Id.* at 405.
[157] *Id.*
[158] *See id.* at 412 (Scalia, J., dissenting) ("Indulging its penchant for eschewing clear rules that might avoid litigation, the Court answers [the question presented] 'maybe.'").

the statute is that the interpretation given to the statute by the courts has resulted in a protected class of much smaller size than Congress intended.[159]

The *Sutton* and Murphy decisions have been derided for taking what some view as an overly formalistic approach to statutory interpretation, for refusing to extend the normal deference to the views of the agency charged with enforcing the statute,[160] and for relying on the discredited medical model of disability.[161] As a practical matter, the development of a demanding standard has resulted in a number of potential Catch-22 situations for ADA plaintiffs.[162] Under the mitigating measure rule of *Sutton*, an individual who takes medication or uses mitigating devices may not be disabled enough to meet the "demanding standard" for qualifying as disabled. If the individual does not employ such mitigating measures, the effects of an individual's impairment may be severe enough that the individual is no longer "qualified," i.e., capable of performing the essential functions of the position.[163] Under the single-job rule, the effects of an individual's impairment might be severe enough for an employer to regard the individual as being unable to work at a particular job, but not severe enough to cause the employer to regard the individual as being precluded from a broad class of jobs.[164] Even where

---

[159] *See, e.g.*, 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, 108-09 (1997).

[160] Rebecca Hanner White, *Deference and Disability Discrimination*, 99 MICH. L. REV. 532, 538 (2000); McGowan, *supra* note 2, at 84.

[161] Bonnie Poitras Tucker, *The Supreme Court's Definition of Disability Under the ADA: A Return to the Dark Ages*, 52 ALA. L. REV. 321, 349 (2001).

[162] *See, e.g.,* Mark A. Rothstein, Serge A. Martinez, and W. Paul McKinney, *Using Established Medical Criteria to Define Disability: A Proposal to Amend the Americans with Disabilities Act*, 80 WASH. U. L.Q. 243, 254-55, n.72 (2002).

[163] *Id.* at 254-55.

[164] *See, e.g.*, Barbara Hoffman, *Between A Disability and a Hard Place: The Cancer Survivors'*

these rules do not operate to exclude a plaintiff from coverage, plaintiffs still face a difficult task in satisfying the demanding standard the ADA's definition of disability imposes.

The most common complaint of those who take issue with the ADA's definition of disability is with the statute's requirement that an impairment must substantially limit a major life activity. Some critics argue that by focusing on the extent of an individual's impairment, the ADA's functional definition of disability places the focus on the wrong place.[165] Traditional anti-discrimination laws focus primarily on the actions of the defendant-employer's actions, not the characteristics of the plaintiff-employee.[166] Thus, it is illegal for an employer to discriminate on the basis of a characteristic (such as race); there is no inquiry as to the *extent* of the characteristic the plaintiff possesses.[167] In contrast, before an ADA plaintiff can pass through the statute's gate, the individual must establish that he or she is "truly disabled."

Others have suggested that although the functional approach of inquiring whether an impairment substantially limits a major life activity makes some sense when defining whether an individual has an actual disability, it makes little sense to include the same language in the statute's second and third prongs.[168] According to these authors, the substantial limitation

---

Catch-22 of Proving Disability Status Under the Americans with Disabilities Act, 52 MD. L. REV. 352, 433-34 (2002).

[165] *See, e.g.*, Burgdorf, *supra* note 15, at 561.

[166] *Id.*

[167] *See id.*; Anderson, *supra* note 138 , at 115.

[168] Stefan, *supra* note 129, at 298; *see also* Deane v. Pocono Medical Center, 7 AD Cases (BNA) 198, 207-08 (3d Cir. 1997) (holding that the ADA requires an employer to accommodate only those limitations caused by the individual's disability and that an employer is not required to provide an accommodation for an individual without an actual disability), *rev'd*, 142 F.3d 138 (3d Cir. 1998); Michelle A. Travis, *Leveling the Playing Field or Stacking the Deck? The "Unfair Advantage" Critique of Perceived Disability Claims*, 78 N.C. L. REV. 901, 943-44 (2000) (noting that Congress viewed the reasonable accommodation requirement as a way of

language of the actual disability prong is directly linked to the reasonable accommodation language in the statute: an individual with an actual, functional limitation may not capable of performing the essential functions of the position without an accommodation, but is perfectly capable of doing so with such an accommodation. Therefore, in keeping with the ADA's goal of equality of opportunity, employers should have to make reasonable accommodations for such individuals.[169] However, because employers are required to spend money or otherwise alter their existing practices in order to reasonably accommodate the known disabilities of such individuals, it makes sense to limit the number of instances where employers might be required to do so.[170] Thus, the "substantial limitation" language of the first prong effectively limits the number of people who can claim a right to such modifications and limits the burden on employers and might arguably justify a strict interpretation.

In contrast, an employee who does not have an actual, current impairment that substantially limits a major life activity has no need for an accommodation. An individual who is capable of performing the essential functions of a position without an accommodation does not seek special treatment; such an individual simply seeks to be treated like other employees.[171] As such, these kinds of ADA plaintiffs are virtually indistinguishable from plaintiffs who seek relief from discrimination under Title VII. Yet, under the ADA, an employer may refuse to hire an individual who does not have a substantially limiting impairment based solely on the employer's irrational negative reactions to, or misperceptions about, the individual's impairment, as long as

---

enabling those with substantially limiting impairments to compete in conventional workplaces designed for those without such impairments).

[169] Stefan, *supra* note 129, at 298; Travis, *supra* note 159, at 944.

[170] Stefan, *supra* note 129, at 300-01.

the employer does not regard the individual as having an impairment that substantially limits a major life activity. As mentioned, at the time of the ADA's inception, the second and third prongs of the ADA's were understood to protect individuals from exactly those types of thoughtless decisions.[172]

While the ADA's definition of disability has created numerous problems, Congress' failure to more clearly define the scope of an employer's reasonable accommodation duty may have contributed to the problem that plaintiffs have in establishing the existence of a disability. One of the more plausible explanations for the courts' strict interpretations of the definition of disability is that courts have created a high disability threshold in order to avoid having to decide difficult reasonable accommodation issues.[173] According to this theory, because Congress failed to provide courts with any meaningful guidance as to when a proposed accommodation is reasonable or imposes an undue hardship, courts have been reluctant to permit plaintiffs to pass the disability gate, lest they be forced to delve into the minutia of the workplace with little more to go on than an abstract notion of reasonableness.[174] This concern would seem to be particularly acute when a proposed accommodation potentially impacts other employees or cuts deeply into employer discretion.

2. Calls for Reform

It is clear that there is a widespread sense of dissatisfaction with the current state of case law under the ADA, at least among academics. What is less clear is what should be done about

---

171 *Id.* at 298.
172 *See supra* note 62 and accompanying text.
173 Issacharoff & Nelson, *supra* note 136, at 321.
174 *See id.* at 336-37.

it. Aside from general suggestions that courts should interpret the ADA differently than they have in the past, commentators have suggested numerous revisions to the language of the ADA itself. Some of the proposed modifications are relatively conservative. Others are more radical.

On the more conservative end is the suggestion that the word "substantially" be eliminated from the ADA's definition of "disability."[175] This approach, Professor Cheryl L. Anderson argues, would eliminate many of the interpretational problems associated with all three prongs of the ADA's definition.[176] In a similar vein, Professor Chai Feldblum has suggested that the basic definition could be left intact, but that it could be amended by adding a series of constructions to the phrases "substantially limits" and "major life activities" that would effectively undo some of the Supreme Court's restrictive interpretations of those terms.[177]

Moving farther along the spectrum of reform, several authors recently suggested that the Act be amended so that the EEOC is empowered to publish medical standards for determining when the most common mental and physical impairments are severe enough to be considered "disabilities" under the ADA.[178] Under this approach, the EEOC would consult medical practice guidelines and standard diagnostic and treatment protocols to aid in the establishment of medical criteria.[179] An individual who satisfied the criteria would be presumptively covered under the Act.[180] The fact that an individual has a condition that is included in the EEOC's list of

---

[175] Anderson, *supra* note 138, at 129.
[176] *Id.* at 128-29, n. 239.
[177] For example, Professor Feldblum has suggested, by legislative amendment, doing away with the mitigating measures rule and redefining the term "substantially limits" to mean "having a measurable effect on." Feldblum, *supra* note 23, at 162.
[178] *See* Rothstein, et al., *supra* note 153, at 244.
[179] *Id.* at 271.
[180] *Id.* The authors argue that because it would be impossible to include every medical

qualifying medical conditions would not automatically necessitate a finding of disability, however. Instead, the employer retains the ability to demonstrate through clear and convincing evidence that the impairment does not substantially limit a major life activity.[181] Similarly, an individual with an impairment that is not included in the list could still demonstrate the existence of a disability by establishing by a preponderance of the evidence that the impairment substantially limits a major life activity.[182] Despite the reliance on a primarily medical standard for determining the existence of a disability, the amended Act would retain the "record of" and "regarded as" prongs.[183] In addition to providing greater clarity regarding the definition of disability, the authors argue that such an approach would have the benefit of being politically viable because the new definition would continue to exclude minor impairments from coverage.[184]

Others have suggested a more radical approach.[185] Professors Chai Feldblum and Lisa Eichhorn have separately proposed that the ADA's prohibition against discrimination against qualified individuals with a disabilities be eliminated and replaced with a prohibition against discrimination "on the basis of disability."[186] Thus, the ADA would essentially mirror Title VII in this respect by placing the focus on the employer's reasons for an adverse action, rather than

---

condition, the regulation's list of conditions should be nonexclusive. *Id.*

[181] *Id.*

[182] *Id.*

[183] *Id.* at 273.

[184] *Id.* at 270.

[185] For example, Professor Jane Byeff Korn has suggested that the ADA be amended so that disability is defined as any physical or mental impairment that is associated with stigma, thus eliminating the distinction between the actual disability prong and the record of and regarded as prongs. Korn, *supra* note 20, at 448.

[186] Feldblum, *supra* note 23, at 163; Eichhorn, *supra* note 23, at 1473.

on the severity of an individual's impairment.[187] "Disability" would then be defined by eliminating any reference to substantial limitations of major life activities and would instead be defined as any physical or mental impairment, a record of such an impairment, or a perceived impairment.[188] If an employer takes an adverse action against an applicant or employee because of a physical impairment or the perception of an impairment, the employer would be liable unless it had a legitimate reason for doing so.[189] Under Eichhorn's approach, the reasonable accommodation requirement would essentially remained unchanged because, among other reasons, the requirement only exists when an impairment limits an individual's ability to perform a job or to be eligible for benefits and privileges of employment on an equal basis with non-disabled people.[190]

Although most of the discussion concerning reform of the ADA has centered around revising the statute's definition of "disability" or eliminating the statute's protected-class approach toward disability discrimination, several authors have suggested legislative clarification of the reasonable accommodation and undue hardship concepts.[191] For example, Steven B. Epstein has suggested a formula, based upon an employer's net profit and total number of

---

[187] *See* Eichhorn, *supra* note __, at 1474 ("The wrongness of [disability] discrimination does not depend on how severe the impairments are .....").

[188] Feldblum, *supra* note 23, at 163; Eichhorn, *supra* note 23, at 1473.

[189] Eichhorn, *supra* note 23, at 1473.

[190] *Id.* at 1476.

[191] Epstein, *supra* note 36, at 446-64; Jeffrey O. Cooper, Comment, *Overcoming Barriers to Employment: The Meaning of Reasonable Accommodation and Undue Hardship in the Americans with Disabilities Act*, 139 U. PA. L. REV. 1423, 1454 (1991); Julie Brandfield, Note, *Undue Hardship: Title I of the Americans with Disabilities Act*, 59 FORDHAM L. REV. 113, 131 (1990).

employees, for determining when an accommodation would impose an undue hardship.[192] Epstein's proposal does not, however, address those situations where providing a reasonable accommodation would impose non-monetary costs on an employer or other employees.[193]

IV. THE CONCEPTION OF DISABILITY DISCRIMINATION AT THE STATE LEVEL

Because the states are not bound by the ADA's definition of disability, states are free to experiment with their own definitions of disability and their own solutions to the problem of discrimination against individuals with disabilities. In some instances, state legislatures have chosen to depart from the model of the Rehabilitation Act and the ADA and charted their own courses. In other instances, state legislatures have modeled their anti-discrimination statutes after the Rehabilitation Act or the ADA.

A. Pre-ADA Conceptions of Disability

By 1980, 38 states and the District of Columbia had statutes prohibiting disability-based discrimination.[194] Thirty-four of these states outlawed discrimination in the private employment sector.[195] In this sense, the majority of the states were at least ten years ahead of the federal government.

There was considerable variety in the approaches taken by the states both in defining the concept of "disability" and in defining the scope of an employer's obligations. Only two states

---

[192] Epstein, *supra* note 36, at 454-55.
[193] *Id.* at 397 n.22.
[194] *See* Terry L. Leap, *State Regulation and Fair Employment of the Handicapped*, 5 EMP. RELATIONS L.J. 382, 382 (1979-80); Maureen O'Connor, Note, *Defining "Handicap" for Purposes of Employment Discrimination*, 30 ARIZ. L. REV. 633, 650 (1988).
[195] *See* Leap, *supra* note 182, at 395-405. North Carolina only prohibited private employers

had definitions of "disability" (or "handicap") that were modeled after the Rehabilitation Act's definition.[196] Most state statutes covered only current, actual impairments.[197] A sizable number covered only physical impairments and excluded individuals with mental impairments from the statute's coverage.[198] A slight majority of states defined "disability" through some reference to the impairment's effect on employment.[199] Thus, employees who had impairments that were "[]related to the ability to engage in a particular occupation"[200] or that "substantially interfere[d] with the performance of the employee's duties"[201] were not entitled to protection under a majority of state statutes. Also common were laws that defined "disability" almost solely in terms of the existence of an impairment or medical condition (often requiring verification by a physician, psychiatrist, or psychologist) or that added the requirement that a disability must somehow be "substantial."[202] Thus, the medical model was still quite prevalent among the states by 1980. Finally, few states explicitly provided for a reasonable accommodation requirement on the part of

---

from discriminating on the basis of sickle-cell trait. *See id.* at 401.

[196] *See* O'Connor, s*upra* note 182, at 650 n.99.

[197] *See* Leap, *supra* note 182, at 386, 395-405.

[198] According to Leap, 15 states provided protection only for those with physical handicaps. *Id.* at 384.

[199] States that fall into this category clearly included Connecticut, Georgia, Illinois, Iowa, Kansas, Kentucky, Massachusetts, Michigan, New Hampshire, New Jersey, Nevada, New Mexico, New York, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Virginia, Washington, and Wisconsin. *See id.* at 395-405.

[200] *Id.* at 397 (quoting Iowa's law).

[201] *Id.* at 396 (quoting Georgia's law).

[202] For example, in 1975 Maine amended its Human Rights Act to define "physical or mental handicap" as "any disability, infirmity, malformation, disfigurement, congenital defect or mental condition caused by bodily injury, accident, disease, birth defect, environmental conditions or illness; and also includes the physical or mental condition of a person which constitutes a substantial handicap, as determined by a physician or, in the case of mental handicap, by a psychiatrist or psychologist, as well as any other health or sensory impairment which requires special education, vocational rehabilitation or related services." *Maine Human Rights Comm'n v.*

employers in their statutes, although at appears that, like at the federal level, the requirement was addressed in at least some states through administrative interpretation.[203]

As case law under Section 504 began to develop, more states began to adopt statutes prohibiting discrimination until, by the time of the ADA's enactment in 1990, 48 states and the District of Columbia had statutes prohibiting disability-based discrimination in the private sector.[204] The addition of prohibitions on discrimination against individuals with disabilities into existing state anti-discrimination statutes suggests an interplay between Congress and the states. Only a few states used the Rehabilitation Act's definition of "handicap" as a model prior to 1980;[205] however, between 1980 and 1990, as Rehabilitation Act case law began to develop, more and more states began to make significant revisions to their statutory definitions and more and more began to use the Rehabilitation Act's definition as a model.[206] Indeed, in some cases, the statutory revisions appear to have been motivated by a desire to create uniformity between a state and the federal government.[207] In addition, even in states that did not use Section 504 as a guide, courts often looked to federal case law and administrative interpretations for guidance.[208]

City of South Portland, 508 A.2d 948, 952 (Maine 1986) (quoting statute).

[203] *See* Leap, *supra* note 182, at 386 (noting that in Iowa, the law required an employer to make reasonable accommodation to physical and mental limitations); Holland v. Boeing Co., 583 P.2d 621, 623-24 (Wash. 1978) (reading a reasonable accommodation requirement into the statute based, in part, on the fact that the administrative regulations imposed such a requirement).

[204] *See supra* note 36 and accompanying text.

[205] *See supra* note 184 and accompanying text.

[206] *See* O'Connor, *supra* note 182, at 651.

[207] *See* Braun v. American Int'l Health and Rehab. Serv., Inc., 846 P.2d 1151, 1155 (Or. 1993) (quoting legislative history of amendment to Oregon's statute to the effect that the purpose of the amendment was to "conform the statutory definition ... more closely with the federal law using Sections 503 and 504" of the Rehabilitation Act).

[208] *See* O'Connor, *supra* note 182, at 651.

Thus, it seems clear that the Rehabilitation Act influenced the development of numerous state laws regarding disability discrimination.

At the same time federal law was influencing the states, the states appeared to have played a role in motivating Congress to extend protection from disability-discrimination to the private sector. As mentioned, the states were ahead of the federal government in terms of attempting to address discrimination against the disabled in the private sector.[209] At the same time, the ADA's Findings and Purposes and legislative history express the concern that, despite the states' efforts, state laws provided incomplete protection to many individuals with disabilities who had experienced discrimination.[210]

Despite the influence of the Rehabilitation Act on state anti-discrimination law, at the time of the ADA's enactment, there continued to be substantial diversity in terms of how the states approached disability-based discrimination.[211] By the late 1980s, the number of states that were using the Rehabilitation Act's basic approach of defining a disability in terms of an impairment that substantially limited a major life activity, while still not a majority, had grown

---

[209] *See supra* pg. 42 and accompanying text.

[210] 42 U.S.C. § 12101(a)(4) (1994) (finding that "individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination,"); 134 CONG. REC. 5090-02 (1988) (statement of Sen. Simon) (stating that state laws were "inconsistent and incomplete" at the time of the ADA's introduction).

[211] *See* O'Connor, *supra* note 182, at 634.

rapidly.[212] By 1990, the number of states that explicitly included a reasonable accommodation requirement in their statutes had grown to 27.[213]

B. The Influence of the ADA on State Anti-Discrimination Law

The enactment of the ADA brought increased attention to the problem of disability discrimination. Therefore, it is hardly surprising that the creation of the ADA and the huge growth in the amount of disability discrimination case law has prompted several states to take a fresh look at the problem of disability discrimination.

1. The Influence of the ADA on State Anti-Discrimination Statutes and Administrative Interpretations in Defining "Disability"

---

[212] For example, a 1988 survey found that 24 states relied primarily on Section 504's definition as a model. *Id.* at 672. However, six of these states omitted either or both of the "record of" of "regarded as" prongs from their definitions, thus limiting coverage to individuals with "actual" disabilities. *Id.*

[213] *See* Epstein, *supra* note 36, at 395 n.16. Four of theses states (Delaware, Louisiana, North Carolina, and Virginia) defined "reasonable accommodation" somewhat differently than that phrase had been interpreted under the Rehabilitation Act. *See id.*

The enactment of the ADA has clearly had a strong influence on state anti-discrimination statutes and interpretive regulations. With the exception of Alabama and Mississippi,[214] every state and the District of Columbia now has a statute prohibiting discrimination by private employers against individuals with disabilities.[215] In practice, approximately 37 states and the District of Columbia use a three-pronged statutory definition of disability (or handicap) that is the

---

[214] These states prohibit discrimination in the public sector, but not in the private sector. *See* ALA. CODE § 21-7-8 (2002); MISS. CODE ANN. § 43-6-15 (2002); S.C. CODE ANN. § 43-33-560 (Law Co-op 2002).

[215] ALASKA STAT. § 18.80.220(a)(1) (Michie 2002); ARK. CODE ANN. § 16-123-02(3) (Michie 2002); ARIZ. REV. STAT § 41-1463(F) (2002); CAL. GOVT. CODE § 12940(a)(1) (West 2002) ; COLO. REV. STAT. ANN. § 24-34-402 (West 2002); CONN. GEN. STAT. ANN. § 46a-60(a)(1) (West 2002); 19 DEL. CODE ANN. tit. 19, §724 (2002); D.C. CODE ANN. § 2-1401.11(1) (2002); FLA. STAT. ANN. § 760.10(1)(a) (2002); GA. CODE ANN. § 34-6A-4(2002); HAW. REV. STAT. ANN. § 378-2(1) (Michie 2002); IDAHO CODE § 67-5909 (2002); 775 ILL. COMP. STAT. ANN. 5/1-102(A) (West 2002); IND. CODE ANN. § 22-9-1-3(l) (Michie 2002); IOWA CODE ANN. § 216.6(1) (West 2002); KAN. STAT. ANN. § 44-1000(a) (2002); KY REV. STAT. ANN. § 344.020(1)(b) (Michie 2002); LA. REV. STAT. ANN. § 23:323 (West 2002); ME. REV. STAT. ANN. tit. 5, § 4553(2-F), (8-D) (West 2002); MD. CODE ANN. Art. 49B § 5(b) (West 2002); MASS. GEN. LAWS ANN. ch. 151B, § 4 (2002); MICH. COMP. LAWS. ANN. § 37.1202(1) (West 2002); MINN. STAT. ANN. § 363.03((2) (West 2002); MO. REV. STAT. § 213.055(1) (2002); MONT. CODE ANN. § 49-2-303(1)(a) (2002); NEB. REV. STAT. ANN. § 48-1104 (Michie 2002); NEV. REV. STAT. ANN. § 613.330(1) (2002); N.H. REV. STAT. ANN. § 354-A:7(I) (2002); N.J. STAT. ANN. § 10:5-4.1 (West 2002); N.M. STAT. ANN. § 28-1-7A (Michie 2002); N.Y. EXEC. LAW § 296(1) (2003); N.C. GEN. STAT. § 168A-5(a)(1) (2002); N.D. CENT. CODE § 14-02.4-03 (2002); OHIO REV. CODE ANN. § 4112.02(A) (West 2002); OKLA. STAT. ANN. tit. 25, § 1302(A)(1) (West 2002) OR. REV. STAT. § 659A.112(1) (2002); § 659A.115 (2002); 43 PA. CONS. STAT. ANN. §955(a) (West 2002); R.I. GEN. LAWS § 28-5-7(1) (2002); S.C. CODE ANN. § 1-13-80(A)(1) (Law Co-op 2002); S.D. CODIFIED LAWS § 20-13-10 (Michie 2002); TENN. CODE ANN. § 8-50-103(a) (2002); TEX. LABOR CODE ANN. § 21.051 (2002); UTAH CODE ANN. § 34A-5-106(1) (2002); VT. STAT. ANN., tit. 21, § 495(a)(1) (2002); VA. CODE ANN. § 51.5-41(Michie 2002); WASH. REV. CODE ANN. § 49.60.180 (West 2003); W. VA. CODE § 5-11-9 (2002); WIS. STAT. ANN. § 111.34 (West 2002); WYO. STAT. ANN. § 27-9-105(a)(i)(d) (West 2003).

same or substantially similar to the definitions of the Rehabilitation Act and the ADA.[216] In several of these states, the relevant statute is silent or unclear as to the definition of disability, but the appellate courts or administrative agencies charged with enforcing the statute have borrowed the definition of "handicap" or "disability" contained in the Rehabilitation Act or ADA.[217] In several states with statutes that parallel the ADA, the definitions were amended shortly after the passage of the ADA.[218]

---

[216] *See* Appendix. Within this category, there are occasionally variations on the ADA's three-pronged definition. For example, Alaska employs the ADA's three-pronged definition, but also extends coverage to impairments that require the use of a prosthesis, special equipment for mobility, or service animals. ALASKA STAT. § 18.80.300(12)(D).

[217] *See* Appendix.

[218] *See, e.g.*, ARIZ. REV. STAT. § 41-1461(4) (1992) (amended 1994) (quoted in Francini v. Phoenix Newspapers, Inc., 937 P.2d 1382, 1391 (Ariz. Ct. App. 1996).

Five states utilize the ADA's definition as a model, but have altered the ADA's three-pronged approach in some manner to either limit or broaden the scope of coverage: Arkansas has neither a "record of" nor a "regarded as" prong;[219] Virginia has both an "actual" and a "record of" prong, but not a "regarded as" prong;[220] and in Georgia, an individual must have a physical or mental impairment which substantially limits a major life activity *and* a record of such impairment, but there is no "regarded as" prong;[221] As discussed in greater detail *infra*, Minnesota's statute defines a disability in terms of a "material" limitation, rather than a "substantial" limitation,"[222] whereas California uses the ADA's three-pronged definition but has expanded that definition by requiring only that an impairment limit (rather than substantially limit) a major life activity.[223]

Three states employ definitions of disability that are more in line with the old medical model of disability and bear little resemblance to the definitions found in the Rehabilitation Act and the ADA.[224] In two of these states, disability is defined primarily in terms of medical conditions, infirmities, malformations, or disfigurements that are "determinable."[225] Despite the reliance on a primarily medical, rather than functional, definition, each of these three states allow plaintiffs to proceed by establishing that the employer regarded them as having a disability, either through statute or decisional law.[226] New York employs a hybrid definition that has

---

219 ARK. CODE ANN. § 16-123-02(3) (Michie 2002).
220 VA. CODE ANN. § 51-5.3 (Michie 2002).
221 GA. CODE ANN. § 34-6a-2(3); Hennly v. Richardson, 444 S.E.2d 317, 320 n.2 (Ga. 1994).
222 MINN. STAT. ANN. § 363.01(13) (West 2002).
223 CAL. GOVT. CODE § 12926(i), (k) (West 2002).
224 *See* Appendix.
225 *See* Appendix.
226 *See* Appendix.

characteristics of both the older medical model and the ADA's functional, civil rights approach.[227] Finally, Washington has a definition that is difficult to classify and has no real parallel.[228]

In states that use the Rehabilitation Act or ADA as a model, courts have routinely imported federal decisional law when interpreting their own parallel statutes. With only a few exceptions,[229] state courts have found federal disability law jurisprudence persuasive. Thus, in virtually every jurisdiction that has considered the questions, the ADA's mitigating measures and single-job rules have been incorporated into state law.[230]

2. *The Influence of the ADA on State Anti-Discrimination Statutes and Administrative Interpretations in Defining A "Reasonable Accommodation"*

The differences between the state and federal levels with respect to defining the scope of an employer's reasonable accommodation duty are perhaps greater than the differences with respect to defining the concept of disability. Interestingly, a significant number of states do not utilize the ADA's "protected-class approach" of limiting coverage to "qualified individuals with

---

[227] *See* Appendix.

[228] *See* Appendix.

[229] *See* Dahill v. Police Dept. of Boston, 748 N.E.2d 956, 963 (Mass. 2001) (refusing to construe identically-worded statute to require the consideration of mitigating measures as the Supreme Court had in *Sutton*); Stone v. St. Joseph's Hospital of Parkersburg, 538 S.E.2d 389 (W. Va. 2000) (criticizing the single-job rule articulated in *Sutton* and *Murphy* and holding that the fact that the plaintiff had presented evidence to establish that he had been treated by the employer "as a person who should not be entrusted with the duties of his regular job" was sufficient evidence from which a jury could conclude that the employer regarded the plaintiff as being substantially limited in the major life activity of working); Pulcino v. Federal Express Corp., 9 P.3d 787 (Wash. 2000) (refusing to import ADA's definition of "disability" into state statute and devising a much broader definition of "disability" that allowed a plaintiff with a temporary impairment to proceed).

[230] *See, e.g.,* Grant v. May Dept. Stores Co., 786 A.2d 580, 584-85 (D.C. 2001) (adopting *Sutton*'s mitigating measures and single-job rules).

disabilities." Instead, many simply include "disability" among other characteristics (such as race, gender, etc.) upon which it is illegal to base employment decisions.[231] Some statutes do clarify that it is not a discriminatory practice to take adverse employment action against an individual with a disability who cannot perform the essential functions of a job, even with a reasonable accommodation.[232] In other instances, however, there is no such clarification, nor is there in some instances an explicit requirement that employers must make reasonable accommodations.[233] Therefore, it has been up to the courts to clarify that employers are free to deny employment to individuals with disabilities who cannot perform the essential functions of a job or to otherwise graft a reasonable accommodation requirement onto the statute.[234]

The greater attention to the problem of disability discrimination brought about the passage of the ADA seems to have spurred some states to impose a reasonable accommodation requirement upon employers where none had existed before. For example, prior to the ADA's passage in 1990, Michigan defined the term "disability" by reference to an impairment that substantially limited a major life activity *and* was "unrelated to the individual's ability to perform the duties of a particular job or position, or [was] unrelated to the individual's qualifications for employment or promotion."[235] Michigan courts had interpreted this definition to mean that an employer did not have any duty to accommodate an employee with a disability if the employee's

---

[231] *See, e.g.,* IDAHO CODE § 67-5909 (2002).
[232] *See, e.g., id.*
[233] *See* Moody-Herrera v. Dept. of Nat. Resources, 967 P.2d 79, 87 n.39, n.40 (Alaska 1998) (listing states that do not have an explicit reasonable accommodation requirement in their statutes, but whose courts have relied on state regulations requiring such accommodations or found an implied statutory duty to make such accommodations).
[234] *See id.*
[235] Carr v. General Motors Corp., 389 N.W.2d 686, 688 (Mich. 1986) (quoting statute), *amended*

disability impeded job performance.[236] In other words, an employer did not have to provide an accommodation when an accommodation was actually needed.[237] In 1990 (the year of the ADA's passage), the Michigan legislature amended its definition of disability so that it included a reference to the ability of an individual to perform the duties of a particular job *with or without a reasonable accommodation*, thus generally brining the statute into line with federal law.[238]

Despite the influence of the ADA, the differences between the state and federal models with respect to the reasonable accommodation concept are perhaps greater than the differences in the definitions of disability. Some states impose a lesser duty on employers to make accommodations. For example, while Iowa's statute imposes a reasonable accommodation duty on employers, the Iowa Supreme Court has interpreted the statute by reference to an employer's obligation under Title VII to reasonably accommodate an employee's religious practices. Thus, as a general matter, an employer is not required to bear more than a *de minimis* cost in order to accommodate an individual with a disability[239] -- a standard specifically rejected by Congress in enacting the ADA.[240]

In most states that impose a lesser accommodation duty on employers, the difference in standards is largely attributable to the fact that the Rehabilitation Act, rather than the ADA, served as the model for the state statute. As discussed, federal courts had almost uniformly

---

on rehearing in part by 393 N.W.2d 873 (Mich. 1986).

[236] *Carr*, 389 N.W.2d at 688-90; Hatfield v. St. Mary's Med. Ctr., 535 N.W.2d 272, 274 (Mich. Ct. App. 1995).

[237] *Carr*, 389 N.W.2d 688.

[238] MICH. COMP. LAWS. ANN. § 37.1103(l)(i) (West 2002); Rourk v. Oakwood Hosp. Corp., 580 N.W.2d 397, 400 (Mich. Ct. App. 1998).

[239] Cerro Gordo County Care Facility v. Iowa Civil Rights Comm'n, 401 N.W.2d 192, 197 (Iowa 1987).

concluded that an employer had no duty to reassign an employee with a disability to a vacant position under the Rehabilitation Act.[241] A significant number of states continue to employ the Rehabilitation Act's definition of a "qualified individual with a disability," rather than the ADA's definition.[242] Thus, in these states the issue is whether an individual can perform the essential functions of the position for which the individual was hired or from which the individual was fired. As a result, the courts in these states have almost uniformly concluded that an employer is not required to reassign an employee with a disability to a vacant position.[243]

Still other states have defined the scope of an employer's reasonable accommodation with greater specificity. A few states have chosen to define the concepts of "reasonable accommodation" and "undue hardship" by reference to mathematical formulas or dollar limits.[244] In Delaware, for example, if the cost of accommodating a new employee would exceed 5 percent of the annual salary or annualized hourly wage of the job in question, the accommodation imposes an undue hardship.[245] Others have taken steps to alleviate concerns that the reasonable accommodation requirement amounts to preferential treatment of individuals with disabilities at

---

[240] Malloy, *supra* note 10, at 628.
[241] *See supra* note 101 and accompanying text.
[242] *See, e.g*., MASS. GEN. LAWS ANN. ch. 151B, § 4(16) (2002) (defining a "qualified handicapped person" as one "capable of performing the essential functions of the position involved with reasonable accommodation ....").
[243] Rourk v. Oakwood Hosp. Corp., 580 N.W.2d 397, 402 (Mich. 1998); Lang v. City of Maplewood, 574 N.W.2d 451, 455 (Minn. Ct. App. 1998); Khatibi v. William B. Reily & Co., Inc., 703 So. 2d 187, 190 (La. Ct. App. 1997); Umphries v. Jones, 804 S.W.2d 38, 41 (Mo. Ct. App. 1991); *see also* Hayward v. Massachusetts Water Resources Auth., 2001 WL 635952, *6 (Mass. Super. May 15, 2001); Reidy v. Travelers, Inc., 928 F. Supp. 98, (D. Mass. 1996), *aff'd,* 107 F.3d 1 (1st Cir. 1997) (applying Massachusetts law).
[244] 19 DEL. CODE ANN. tit. 19, § 722(6) (2002); LA. REV. STAT. ANN. § 23:322(9) (West 2002); N.C. GEN. STAT. § 168A-3(10)(6),(7) (2002);
[245] 19 DEL. CODE ANN. tit. 19, § 722(6)(b)(i).

the expense of other employees. Several states have clarified that the reasonable accommodation duty does not require an employer to prefer a less-qualified disabled employee over a better-qualified, non-disabled employee,[246] to deviate from a bona fide seniority policy or practice,[247] or to reassign job duties of a disabled employee where the reassignment would significantly increase the skill, effort or responsibility required of another employee from that required prior to the change in duties.[248]

V. THE INFLUENCE OF STATE ANTI-DISCRIMINATION ON FEDERAL LAW?

Assuming for the sake of argument that legislative revision of the ADA is desirable, the various approaches of the states may serve as models for federal reform. The extent to which such law can serve as a model for federal legislation depends on a number of factors, not the least of which is the extent to which the model is politically viable.[249] As mentioned, a number of states take an approach toward remedying disability discrimination that is markedly different than those taken by the ADA and the Rehabilitation Act.[250] In most instances, the current versions pre-date the ADA, and, either through conscious decision or legislative inertia, these states have resisted the temptation to bring their statutes into accord with federal legislation. By contrast, the statutes of California and Rhode Island were recently amended in direct response to some of the Supreme Court's restrictive interpretations of the ADA. Of particular note is the fact

---

[246] ARIZ. REV. STAT. § 41-1463A (2002); 19 DEL. CODE ANN. tit. 19, § 721.
[247] IDAHO CODE § 67-5902(15) (2002); N.C. GEN. STAT. § 168A-3(10)(4) (2002).
[248] 19 DEL. CODE ANN. tit. 19, § 722(6)(b); N.C. GEN. STAT. § 168A-3(10)(2), (3).
[249] *See generally* Feldblum, *supra* note 23, at 128 ("The essence of 'legislative lawyering' is the capacity to combine a rigorous understanding of the law with a sophisticated grasp of politics).
[250] *See supra* notes 207-215 and accompanying text.

that for several of the suggested revisions to the ADA proposed by commentators,[251] there are states that employ a rough parallel. Thus, these states provide working models for possible revision to the ADA that can be studied in order to evaluate their overall effectiveness.

A. State Law as a Model for Amending the ADA's Definition of Disability

1. California's Fair Employment and Housing Act (FEHA), Rhode Island's Fair Employment Practices Act, and Minnesota's Human Rights Act: Alternatives to the ADA

a. Altering the ADA's Definition

To date, California and Rhode Island are the only states whose legislatures have amended their statutes, in part, in direct response to the United States Supreme Court's interpretation of the ADA.[252] Even prior to the Supreme Court's *Sutton* and *Murphy* decisions in 1999, California's statutory definition of "disability" in the employment discrimination context differed from that of the ADA. In 1992, the year the ADA became effective, California amended its Fair Employment and Housing Act[253] to substitute the phrase "physical disability" for "physical handicap," and generally modeled the definition of disability after the ADA's definition.[254] However, rather than requiring that an impairment *substantially* limit a major life activity, the FEHA simply required that an impairment *limit* major life activities.[255] Despite the less stringent standard that appeared

---

[251] *See supra* notes 166-181 and accompanying text.

[252] The human rights commissions in Maryland and Massachusetts have taken the position that the determination of whether an individual is substantially limited in a major life activity should be made with regard to the mitigating effects of a remedial appliance or device. CODE OF MD REGS. § 14.03.02.03(B); Massachusetts Commission Against Discrimination Fact Sheet: Employment Discrimination on the Basis of Disability, http://www.state.ma.us/mcad/dfactsheet.html(visited Sep. 10, 2003).

[253] CAL. GOVT. CODE § 12940 (West 2002).

[254] Colmenares v. Braemer Country Club, 130 Cal.Rptr.2d 662, 665 (Cal. 2003).

[255] *Id.* (citing Stats.1992, ch. 913, § 21.3, p. 4308, amending § 12926). Another difference was

in the text, several California courts had nonetheless spoken in terms of substantial limitations when addressing disability discrimination claims brought under the FEHA.[256] In 2000, the California legislature amended the FEHA to clarify that, notwithstanding any decisional law to the contrary, an impairment need only limit, rather than substantially limit a major life activity in order to qualify as a disability.[257]

In addition, the California legislature also appears to have taken direct aim at the Supreme Court's interpretation of the ADA. The amendment explicitly provided that although the ADA "provides a floor of protection, [California's] law has always, even prior to the passage of [the ADA] afforded additional protections"[258] and that the requirement of a limitation, rather than a substantial limitation, was "intended to result in broader coverage under [California law] than under [the ADA]."[259] Importantly, the amendment specifically directed courts to disregard the mitigating measures and single-job rules established by the United States Supreme Court when interpreting the FEHA. The amendment provides that "whether a condition limits a major life activity shall be determined without respect to any mitigating measures, unless the mitigating measure itself limits a major life activity" and that "'working' is a major life activity, regardless of whether the actual or perceived working limitation implicates a particular employment or a class or broad range of jobs."[260] Although Rhode Island's recent amendment makes no mention of the single-job rule, it does specifically direct that "whether a person has a disability shall be

---

that the statute required that an impairment limit major life activities (plural), rather than limiting one or more major life activities. *See id.*

[256] *Id.* at 670 n.6 (disapproving cases that required substantial limitations under the FEHA).

[257] CAL. GOVT. CODE § 12926.1(d) (West 2002).

[258] *Id.* § 12926.1(a).

[259] *Id.* § 12926.1©).

determined without regard to the availability or use of mitigating measures, such as reasonable accommodations, prosthetic devices, medications, or auxiliary aids."[261]

Minnesota's Human Rights Act also differs slightly from the ADA in the sense of requiring a material limitation of a major life activity, rather than a substantial limitation. On its face, the difference seems only minimal. However, the Minnesota Supreme Court has stated that the definition is less stringent than the ADA's definition.[262] The extent to which the definition is actually less stringent in practice is subject to debate, as the court has applied the Supreme Court's single-job in concluding that an insulin-dependent diabetic did not have a disability within the meaning of the Minnesota Human Rights Act.[263]

Thus, much like Professor Cheryl L. Anderson's proposal that the ADA be amended to eliminate the reference to "substantial" limitations and Professor Chai R. Feldblum's suggestion that the ADA be amended by adding a series of constructions to the phrases "substantially limits" and "major life activities" that would effectively undo some of the Supreme Court's restrictive interpretations of those terms,[264] the legislatures of California, Minnesota, and Rhode Island have limited some of the restrictive influence of federal decisional law. The California and Rhode Island legislatures' express instructions concerning the mitigating measures and single-job rules

---

[260] *Id.*

[261] R.I. GEN. LAWS § 28-5-6(9) (2002); *General Assembly Enacts New Minimum Wage, Unemployment Benefits Laws*, R.I. EMPLOYMENT LAW LETTER (Sep. 2000), *available in* WESTLAW, Rhode Island Employment Law Letter Database (discussing recent amendments).

[262] Sigurdson v. Carl Bolander & Sons Co., 532 N.W.2d 225, 228 n.3 (Minn. 1995).

[263] *Id.* at 229. *But see* Hoover v. Norwest Private Mortgage Banking, 632 N.W.2d 534, 543 n.5 (Minn. 2001) (concluding that plaintiff with fibromyalgia had a disability and distinguishing federal cases to the contrary on the grounds that federal law employs a more stringent definition).

[264] *See supra* notes 166-168 and accompanying text.

will almost certainly force those state courts that have adopted contrary positions[265] to re-evaluate those positions. Both amendments have only been in effect a short time, so it is still too early to determine their impact. However, early results suggest that California plaintiffs may have an easier time meeting the threshold requirement of the existence of disability than ADA plaintiffs as a result of the California legislature's clarification. For example, in 1999 the United States Supreme Court chided the Ninth Circuit Court of Appeals for being "too quick" to find that an individual with monocular vision had a disability under the ADA,[266] and several federal decisions subsequently found that similarly-situated individuals did not have disabilities.[267] In contrast, a California appellate court in 2001 had little difficulty concluding that a similarly-situated individual had produced sufficient evidence that his visual impairment limited (rather than substantially limited) him in the major life activity of seeing[268]

b. Drawbacks

Amending the ADA's definition of disability in any of these fashions would face several obstacles. While reversing the mitigating measures and single-job rules by legislative fiat is perhaps the most conservative of the suggested approaches, such action would significantly expand the ADA's coverage. Given the high success rates that employers currently enjoy, such action could almost certainly be expected to face stiff resistance. Amending the definition to

---

[265] *See* Hobson v. Raychem Corp., 86 Cal.Rptr. 497, 506 (Cal. Ct. App. 1999).

[266] Albertson's Inc. v. Kirkingburg, 527 U.S. 555, 564 (1999).

[267] *See* Flores v. American Airlines, Inc., 184 F. Supp. 2d 1287, 1292 (S.D. Fla. 2002); Hoehn v. International Security Services & Investigations, Inc., No. 97-CV-974A, 2002 WL 31987786, *10 (W.D.N.Y. 2002 Nov. 26, 2002); Rivera v. Apple Industrial Corp., 148 F. Supp. 2d 202, (E.D.N.Y. 2001); Sherman v. Peters, 110 F. Supp. 2d 194, 199 (W.D.N.Y. 2000) (Rehabilitation Act case).

[268] *See* Wittkopf v. County of Los Angeles, 109 Cal.Rptr.2d 543, 551 (Cal. Ct. App. 2001),

require mere limitations, rather than substantial limitations, would likely generate even more resistance for similar reasons. Perhaps more viable would be Minnesota's approach of requiring material, rather than substantial limitations. However, there are several drawbacks to such a revision. First such a change would arguably amount to little more than hair-splitting -- if courts are already inclined to interpret the ADA's definition of disability in a narrow fashion, it is difficult to see how such a minor change could have a substantial impact. Second, such a change fails to address the mitigating measures and single-job rules.[269] Finally, such a change would provide less, rather than greater, clarity – a substantial drawback for a statutory definition that, in its current form, has been criticized for being too vague.[270]

Moreover, some disability rights advocates would argue that simply tinkering with the definition of disability in any of these fashions fails to address the key policy concerns for prohibiting discrimination against individuals with disabilities. Professor Feldblum has argued that the key policy question in any discrimination case is whether an employer based its decision on a particular trait of the plaintiff and whether the employer was nonetheless justified in doing so.[271] Currently, so much of the focus in ADA cases is on whether an individual has a disability that courts lose sight of this fundamental concern that underlies all anti-discrimination law.[272] In sum, because the ADA in its present form is so preoccupied with excluding from its coverage

---

review granted and opinion superseded by 33 P.3d 446 (Cal. 2001).

[269] *See* Sigurdson v. Carl Bolander & Sons Co., 532 N.W.2d 225, 229 (Minn. 1995) (applying single-job rule).

[270] Rothstein et. al, *supra* note 162, at 243.

[271] Feldblum, *supra* note 23, at 164.

[272] *Id.*

those who are not "truly disabled," any changes to the definition of disability that do not address this fundamental flaw fail to effectuate the true purposes of anti-discrimination law.

2. The Medical, Civil Rights Approach

a. The Medical, Civil Rights Approach of New Jersey and Connecticut

As mentioned, three states define "disability" almost exclusively in medical terms, rather than in functional terms.[273] All, however, also provide for protection from discrimination based upon the perception that the individual has a disability.[274] Thus, these states take both a medical and civil rights approach to the problem of disability discrimination.

Of the three states, New Jersey and Connecticut are the most specific regarding which types of impairments are considered disabilities.[275] New Jersey's Law Against Discrimination provides an illustrative list of conditions that qualify as a "handicap." The statute defines a person with a handicap as one who is

> suffering from physical disability, infirmity, malformation or disfigurement which is caused by bodily injury, birth defect or illness including epilepsy, and which shall include, but not be limited to, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment or physical reliance on a service or guide dog, wheelchair, or other remedial appliance or device, or from any mental, psychological or developmental disability resulting from anatomical, psychological, physiological or neurological conditions which prevents the normal exercise of any bodily or mental functions or is demonstrable, medically or psychologically, by

---

[273] *See supra* note 211 and accompanying text.

[274] *See supra* note 213 and accompanying text.

[275] Illinois' statute has the disadvantage of defining the term in terms of a characteristic that is "unrelated to the person's abilities to perform the particular duties of a particular job or position." 775 ILL. COMP. STAT. ANN. 5/103(I) (West 2002). On its face, the definition would seem to mean that an employer is free to take adverse action or refuse to provide an accommodation to an employee whose impairment interferes with the employee's ability to perform his or her job. *Cf. supra* notes 235-237 (discussing the Michigan courts' interpretation of a similarly-worded definition).

> accepted clinical or laboratory diagnostic techniques. Handicapped shall also mean suffering from AIDS or HIV infection.[276]

While the list is not as specific as it might be, it nonetheless includes numerous examples of the types of conditions that the New Jersey legislature considered serious enough to constitute disabilities.

Connecticut is even more specific in its description of a "mental disability."[277] Under Connecticut's 2001 amendment to its statute, an individual with a mental disability is one "who has a record of, or is regarded as having one or more mental disorders, as defined in the most recent edition of the American Psychiatric Association's 'Diagnostic and Statistical Manual of Mental Disorders. [DSM-IV]'"[278] Thus, all a court is required to do is consult this source in order to make the determination as to the existence of a mental disability.

In this sense, Connecticut's statute and New Jersey's Law Against Discrimination resemble the recent proposal by several authors to amend the ADA be amended so that the EEOC is empowered to publish medical standards for determining when the most common mental and physical impairments are severe enough to be considered "disabilities" under the ADA.[279] While New Jersey's approach is not as specific as the authors' proposed EEOC list of medical conditions, it takes a similar approach in that it provides a non-exhaustive list of certain conditions that are considered sufficiently severe to constitute disabilities. Connecticut's definition of mental disabilities is more rigid than the approach offered by the authors in the

---

[276] N.J. STAT. ANN. § 10:5-5(q) (West 2002).
[277] Connecticut's statutes has different definitions for physical disabilities, learning disabilities, and mental disabilities. CONN. GEN. STAT. ANN. § 46a-51(15),(19),(20) (West 2002).
[278] *Id.* § 46a-51(20) (West 2002).
[279] *See supra* notes 169-172 and accompanying text.

sense that there is no opportunity for an employer to contest a finding of disability if the plaintiff's condition happens to be one listed in the American Psychiatric Association's DSM-IV.[280]

b. New York's Medical, Functional, and Civil Rights Approach

New York's Human Rights Law (NYHRL) takes a somewhat different approach. New York's Executive Law § 292(21) defines a disability as follows:

> (a) a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques or (b) a record of such an impairment or c) a condition regarded by others as such an impairment, provided, however, that in all provision of this article dealing with employment, the term shall be limited to disabilities which, upon the provision of reasonable accommodations, do not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held.[281]

This definition incorporates elements of both the ADA's functional, civil rights approach toward defining disability and the older medical approach. Like the ADA, the NYHRL takes a civil rights approach toward the problem of disability discrimination in that an individual need not have an actual impairment in order to proceed under the statute's "record of" or "regarded as" prongs. The statute takes a functional approach toward defining disability that is somewhat similar to the ADA in that an individual may have a disability if she has an impairment "which prevents the exercise of a normal bodily function ...." However, this functional definition differs from the ADA's definition in two important ways. First, the statute speaks in terms of "normal bodily function[s]," not major life activities. Seemingly, this would make this part of the

---

[280] *See supra* note 180.
[281] N.Y. EXEC. LAW § 292(21) (2003).

definition more expansive than the ADA's definition; the functions need not be "major," i.e., "of central importance to daily life."[282] However, the statute's requirement that the impairment must "prevent[]" (rather than "substantially limit") the exercise of such a function has been seized on by several federal courts, which have stated that this portion of § 296(21)'s definition is actually more restrictive than the ADA's functional definition.[283] Under this reading of the statute, an impairment must actually *prevent* the exercise of a normal bodily function, not simply substantially limit it.[284]

The statute's alternative method of establishing the existence of a disability, however, almost unquestionably provides more expansive coverage.[285] If a plaintiff cannot establish that an impairment functionally limits her, she still may be able to establish the existence of a disability by proving that an impairment is demonstrable by medically accepted clinical or laboratory diagnostic techniques." This almost exclusively medical definition of disability relieves a plaintiff of the burden of demonstrating any functional limitations resulting from an impairment.

As is the case with the ADA, if a plaintiff proceeding under the NYHRL is able to satisfy the relatively light burden of establishing the existence of a disability, she still must establish that

---

[282] Toyota Motor Mfg., Inc. v. Williams, 122 S. Ct. 681, 691 (2002).

[283] *See, e.g.,* Aquinas v. Federal Express Corp., 940 F. Supp. 73, 79 (S.D.N.Y. 1996).

[284] Hendler v. Intelecom USA, Inc., 963 F. Supp. 200, 210 (E.D.N.Y. 1997); *cf. Toyota Motor Manufacturing, Inc.*, 122 S. Ct. at 691 ("an individual must have an impairment that prevents *or severely restricts* the individual ....").

[285] *See* Ruhlman v. Ulster County Dept. Of Social Services*,* 234 F. Supp. 2d 140, 178 (N.D.N.Y. 2002) ("Despite a wealth of legislative history which seems to dictate otherwise, a 'disability' is defined much more broadly under NYHRL than it is under the ADA.").

she was qualified for the position in question.[286] Ultimately, a plaintiff still must establish that the impairment, even upon the provision of reasonable accommodations, does not prevent her from performing in a reasonable manner the activities involved in the job or occupation sought or held.[287] In this sense, the approach taken by the New York legislature is somewhat similar to the approach advocated by Professor Feldblum and Professor Eichhorn, which would define a disability simply as any physical or mental impairment, a record of such an impairment, or a perceived impairment.[288] In addition to the practical benefits for ADA plaintiffs, Feldblum and Eichhorn argue that such an approach is in keeping with the goals of the ADA and anti-discrimination law more generally in that it places the focus on whether the employer had legitimate reasons for taking the action it did rather than on the extent of an individual's impairment..[289]

c. Benefits and Drawbacks

The practical advantages for plaintiffs from a primarily medical, civil rights definition of disability are obvious. For example, the NYHRL definition prevents a court from invoking the mitigating measures rule of the ADA because, regardless of whether the individual uses mitigating measures to correct the effects of the impairment, as long as the impairment itself still exists and is "demonstrable," the plaintiff has a disability.[290] Moreover, because this part of the definition does not speak to functional limitations, and because the statute does not exclude

---

[286] Burton v. Metropolitan Transp. Auth., 244 F. Supp. 2d 252, 258 (S.D.N.Y. 2003).
[287] N.Y. EXEC. LAW § 292(21) (2003).
[288] *See supra* notes 174-178 and accompanying text.
[289] Feldblum, *supra* note 23, at 163-64; GET AN EICHHORN CITE
[290] *See* Epstein v. Kalvin-Miller Intern., Inc., 100 F. Supp.2d 222, 229-30 (S.D.N.Y. 2000) (holding that plaintiff's type-2 diabetes and heart disease, even if treated, were disabilities within

impairments that are related to the ability to engage in the activities involved in the particular job in question,[291] the single-job rule does not bar plaintiffs who proceed under the NYHRL.[292]

Connecticut's definition of a mental disability provides similar advantages for plaintiffs. Because Connecticut's definition simply refers a court to an established list of mental conditions, a plaintiff alleging the existence of a mental disability is relieved of the task of demonstrating any functional limitation. Moreover, the fact that a plaintiff may proceed under a perceived disability theory enables the statute to address the types of irrational fears and prejudices that the ADA was designed to address – a concern that is particularly pronounced in the case of individuals with mental impairments.[293] While Connecticut's definition has only been in existence for a few years, early results suggest that the definition is likely to provide much greater coverage than does the ADA.[294]

In sum, the anecdotal evidence suggests that a medical, civil rights definition is far more expansive than the ADA's definition as evidenced by several decisions where plaintiffs were

---

the meaning of New York law even though they were not under the ADA).

[291] *See supra* note 259 and accompanying text.

[292] *See Ruhlman,* 234 F. Supp. 2d at 177, 179 (concluding that single-job rule barred ADA plaintiff from pursuing ADA claim, but that employer regarded the same plaintiff as being disabled under New York law).

[293] *See supra* note 129 and accompanying text.

[294] *Compare* Conte v. New Haven Bd. of Educ., No. CV020466475, 2003 WL 21219371, *4 (Conn. Super. Ct. May 15, 2003) (holding that individual had sufficiently alleged the existence of a mental disability by alleging that she was clinically depressed) *with* Heisler v. Metropolitan Council, 339 F.3d 622, 630 (8th Cir. 2003) (holding that plaintiff with major depressive disorder did not have a disability under the ADA); *compare* Conway v. City of Hartford, No. CV 950553003 1997 WL 78585, *5 (Conn. Super. Ct. Feb. 4, 1997) (applying same definition of disability found in a different section of Connecticut General Statutes and concluding that individual who alleged the existence of gender dysphoria adequately alleged the existence of a mental disability) *with* 29 C.F.R. § 1630.3(d) (2003) (stating that the ADA's definition of disability does not include gender identity disorders not resulting from physical impairments).

unable to establish that they had disabilities within the meaning of the ADA, but were able to establish the existence of a disability within the meaning of New York state law.[295] This conclusion is bolstered by similarly pro-plaintiff decisions from other states that employ a primarily medical definition.[296] From an objective standpoint, a primarily medical definition of disability would also immensely simplify the determination of the existence of a disability. Courts would be relieved of the need of giving meaning to the ADA's use of the words "substantially" and "major" and could determine the existence of a disability simply by resorting to a clear statutory definition or list of medical conditions.

---

[295] *See* cases cited *supra* notes 263-266; Reeves v. Johnson Controls World Serv., Inc., 140 F.3d 144, 154, 156 (2d Cir. 1998). *Compare* Doe v. Bell, 2003 WL 355603, *4 (N.Y. Sup. Ct. Jan. 9, 2003) (holding that gender identity disorder is a disability under New York law) *with* 29 C.F.R. § 1630.3(d) (2003) (stating that the ADA's definition of disability does not include gender identity disorders not resulting from physical impairments).

[296] *Compare* Lake Point Tower, Ltd. v. Illinois Human Rights Comm'n, 684 N.E.2d 948, 963 (Ill. App. Ct. 1997) (concluding that a plaintiff with a non-debilitating form of cancer that llowed her to swim, work out, and perform all of the duties of her employment could have an actual handicap, a history of handicap, and possibly was regarded as having a handicap by her employer under state law) *with* Hoffman, *supra* note 155, at 377-92 (discussing the difficulty of similarly-situated ADA plaintiffs have in establishing the existence of a disability); *compare* Kenall Manufacturing Co. v. Illinois Human Rights Commission, 504 N.E.2d 805 (Ill. App. Ct. 1987) (holding that employee with a history of heart disease who was cleared to work six months after a heart attack was handicapped within the meaning of Illinois' Human Rights Act) *with* Taylor v. Nimock's Oil Co., 214 F.3d 957 (8th Cir. 2000) (holding that plaintiff who suffered a heart attack and was cleared to work five months later was not disabled within the meaning of the ADA); *compare* Gimello v. Agency Rent-A-Car, Inc., 594 A.2d 264, 276 (N.J. Super. Ct. App. Div. 1991) (obesity falls within New Jersey's definition) *with* 29 C.F.R. app. § 1630.2(j) (2003) ("[E]xcept in rare circumstances, obesity is not considered a disabling impairment); *see* Clowes v. Terminix Int'l, Inc., 538 A.2d 794, 803 (N.J. 1988) (stating that New Jersey's statutory definition "is very broad in its scope"); *compare* Commission on Human Rights & Opportunities v. General Dynamics Corp., No. 517054, 1991 WL 258041, *10 (Conn. Super. Ct. Nov. 22, 1991) (holding that employee with claustrophobia was regarded as having a disability within the meaning of Connecticut's statute) *with Weigert v. Georgetown Univ.*, 120 F. Supp. 2d 1, 10-13 (D.D.C. 2000) (holding that employee with claustrophobia was not actually disabled nor was she regarded as having a disability).

Standing alone, however, the approaches offered by Professors Eichhorn and Feldblum are even less likely to be politically viable than some of the other proposed amendments to the ADA.[297] The primarily medical definition of disability employed by New York and a few other states imposes a light burden on plaintiffs.[298] If the results from discrimination cases in these states are any indication of the likely results that would follow from a similar to change to the ADA, such a change would have little chance of passage absent substantial changes to the ADA's reasonable accommodation requirement. In this sense, it might be more politically viable to use more concrete (and stringent) examples or criteria, such as those employed in New Jersey and Connecticut. Even in these states, however, plaintiffs have enjoyed much greater success in establishing the existence of a disability than have similarly-situated ADA plaintiffs.[299]

Reliance on a list of disabilities would potentially have other problems. Any such list would run the risk of being over- or under-inclusive. If the definition affords a court no flexibility in determining whether an individual has a disability, as is the case under Connecticut's definition, the definition may be over-inclusive in the sense that includes conditions that legislators might not be enthusiastic about recognizing. For example, under Connecticut's definition of mental disability, certain mental conditions, such as gender identity disorders, kleptomania, alcohol abuse, and pyromania, would all presumably be considered disabilities because they are listed in the DSM-IV.[300] These are also all conditions that are

---

[297] *See* Rothstein et al., *supra* note 153, at 270.
[298] *See* Feldblum, *supra* note 23, at 164 (acknowledging that such a definition is overinclusive).
[299] *See supra* note 268.
[300] AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (2000) Appendix E.

excluded from the ADA's definition,[301] presumably for political reasons. If the definition merely included a list of representative conditions and allowed a court to make the ultimate disability determination, as does New Jersey's LAD, the benefits of predictability and certainty would be lost as courts sought to fit certain conditions within the representative list or exclude them from the list.

In this sense, the suggested approach of establishing a more comprehensive list of qualifying conditions would represent an improvement. Moreover, such an approach might be more politically viable if, as suggested, employers maintained the ability to rebut the presumption of disability that would arise from a plaintiff having a condition that appears on the list by establishing through clear and convincing evidence that the conditions does not substantially limit a major life activity. This feature of the approach is certainly a drawback from a plaintiff's perspective. If an employer can rebut the disability presumption by bringing the inquiry back to the employer-friendly standard of whether the condition substantially limits a major life activity, it should logically be expected that employers would attempt to do just that in most cases. Thus, it is debatable how much change such a revision might bring about in practice. At the same time, however, the untested suggestion of establishing a clear and convincing standard might result in more cases at least surviving summary judgment on the question of the existence of a disability. Thus, because this approach takes away from employers with one hand, while giving to plaintiffs with the other, it might be the approach with the greatest potential for adoption.

B. Different Approaches to the Reasonable Accommodation Concept

---

[301] 29 C.F.R. § 1630.3(d) (2003).

One of the lessons to be learned from the above discussion is that, absent a major political realignment in Congress, any proposed change to the ADA's definition of disability that would result in broader coverage would probably need to be accompanied by a consequent change to the scope of employers' reasonable accommodation duty. One of the hypotheses suggested for the Supreme Court's restrictive interpretations of the ADA's definition of disability is that the Court has crafted its restrictive interpretations in "an attempt to create a gatekeeping mechanism within an inherently ambiguous legislative standard."[302] A lower threshold for the existence of a disability would mean that more cases would hinge on whether the accommodation that would enable the disabled employee to perform the essential functions of the job was "reasonable" (an inherently ambiguous term), whether the provision of the accommodation imposed an "undue hardship" (an ambiguous term as defined by Congress),[303] or whether the employer could justify the use of a facially-neutral policy or practice on the grounds of job-relatedness and business necessity (a potentially highly demanding standard for an employer to meet).[304]

Amending the ADA's definition of disability so that it would be in keeping with New York's definition, for example, without any clarification to the reasonable accommodation and undue hardship standards would mean an increased burden on courts at the summary judgment stage to sift through the minutiae of the workplace in an effort to determine the reasonableness of a proposed accommodation.[305] Although some bright-line rules regarding the reasonable

---

[302] Issacharoff & Nelson, *supra* note 136, at 321.
[303] *See* Epstein, *supra* note 36, at 396.
[304] *See* Dothard v. Rawlinson, 433 U.S. 321, 332 n.14 (1977) (stating that an employer must establish that a challenged practice is "*necessary* to safe and efficient job performance." (emphasis added)).
[305] *See generally* Issacharoff & Nelson, *supra* note 136, at 336-37 ("Absent some unequivocal

accommodation requirement have developed through case law,[306] Congress failed to provide courts, employers, or employees with much guidance as to its meaning.[307] Furthermore, such an amendment might very well impose greater costs and burdens on employers, who, quite possibly, would lose far more summary judgment motions than they currently do based on the inherently fact-specific nature of the reasonable accommodation requirement.[308] In sum, challenging the existence of a disability is the easiest route to employer success, and employers would most likely be highly reluctant to sacrifice this advantage without some concession on the part of disability rights advocates on the issue of reasonable accommodation. As such, the key to expanding the ADA's coverage may actually be a clarification of and concomitant limitation on the scope of employers' reasonable accommodation duty.

To the extent changes to the ADA's reasonable accommodation and undue hardship standards may be necessary to make revisions to the definition of disability more palatable to employers, existing state statutes may provide some guidance. In an attempt to provide greater certainty in the area and to address the cost concerns of employers, Congress could use the mathematical formulas established in a few states as a model for changes to the undue hardship

---

governmentally-imposed rule defining job qualifications, courts will have no choice but to delve into the factual minutia of each individual case.").

[306] *See, e.g.*, Milton v. Scrivner, 53 F.3d 1118, 1124 (10th Cir. 1995) (stating that an employer is not required to reallocate essential job functions as a reasonable accommodation).

[307] *See* Issacharoff & Nelson, *supra* note 136, at 339-40.

[308] Statistical analysis might be of considerable value in verifying the accuracy of this assertion. As a matter of logic, however, it seems likely that if employers are deprived of their advantage in disputing the existence of a disability, they would be far less likely to prevail on a pre-trial motion to dismiss. *Cf.* Epstein v. Kalvin-Miller Intern., Inc., 100 F. Supp.2d 222, 229-30 (S.D.N.Y. 2000) (granting summary judgment to employer on plaintiff's ADA claim, but denying summary judgment on NYHRL claim).

standard.[309] Other changes might also be necessary. As discussed, the most controversial accommodation issues involve reassignment to a vacant position.[310] To address the concern the concern that this accommodation unduly limits the discretion of employers and creates special rights for individuals with disabilities at the expense of other employees, Congress could look to state statutes that address these concerns. The reasonable accommodation requirement could be amended to clarify that an employer is not required to reassign an individual when there is another, better-qualified employee for the position and/or when such reassignment would conflict with the provisions of a bona fide seniority system.[311] Finally, Congress could address similar concerns more generally simply by clarifying, as a few states have, that an employer is not required to reassign job duties of a disabled employee where the reassignment would

---

[309] *See supra* notes 231-232 and accompanying text. Another possibility would be to define "reasonable accommodation" and "undue hardship" by reference to an employer's obligation under Title VII to reasonably accommodate an employee's religious practices. Thus, an employer would not required to bear more than a *de minimis* cost in order to accommodate an individual with a disability. *See supra* notes 239-240 and accompanying text. Such a change is not desirable. For one, the establishment of a *de minimis* standard in the context of religious accommodation may have been necessary to avoid First Amendment problems. Malloy, *supra* note 10, at 627. No such problem would exist with the ADA. Second, many accommodations that would impose more than a *de minimis* cost can still be provided with little difficulty or expense. *See* EEOC, *Equal Employment Opportunities for Individuals with Disabilities*, 56 FED. REG. 8578, 8583 (1991) (citing study that concluded that more than 80% of accommodations cost less than $500).

[310] *See supra* note 141and accompanying text.

[311] *See supra* notes 233-234 and accompanying text. Another possibility would be to follow the example of several states and eliminate the reassignment accommodation altogether. *See supra* notes 229-230 and accompanying text. Again, such a change is not desirable. For one, reassignment may be the last chance for an individual with a disability to remain employed and for the ADA to satisfy its goal of assuring economic self-sufficiency. *See* 42 U.S.C. § 12101(a)(8). In addition, reassignment, in some circumstances, might be more reasonable and less onerous from an employer's perspective than any of the other forms of possible accommodations listed in the ADA. *See* Fedro v. Reno, 21 F.3d 1391, 1399 (7th Cir. 1994) (Rovner, J., dissenting) (quoting *Ignacio v. United States Postal Service,* Pet. No. 03840005,

significantly increase the skill, effort or responsibility required of such other employees from that required prior to the change in duties.[312]

In addition to addressing the concerns of employers and other employees, such revisions might also make courts more inclined to give full effect to the ADA's remedial purpose. If more concrete standards were in place, and if those standards were perceived as being fairer to employers and other employees, whatever concerns courts might have about interpreting the ADA in a broad manner should largely be alleviated. As such, courts might be more inclined to focus on the key question of whether an employer has discriminated against an individual rather than on the extent of an individual's impairment and whether it is fair to require an employer to provide a particular accommodation.

V. CONCLUSION

There has been no shortage of proposals to amend the ADA in order to fulfill the statute's initial promise. To date, however, the political will and a viable alternative have largely been absent. If disability rights advocates are serious about seeking legislative revision of the ADA, they have several models at the state level upon which they can draw for inspiration. By examining the results of cases decided under state anti-discrimination statutes that define the concept of disability in a manner different than the ADA, disability rights advocates can make a more intelligent choice if and when they present an alternative to the ADA.

Fed.Equal Opportunity Rptr. ¶ 843159, at XII-84-264 (EEOC Sept. 4, 1984)).

[312] *See supra* note 235 and accompanying text.

At the same time, if any change to the ADA's definition of disability is proposed, it will almost certainly have to be accompanied by changes to the reasonable accommodation requirement. Again, state law provides several alternatives that might make any proposed amendments to the ADA more politically viable. In sum, state solutions to the problem of disability discrimination may prove to be an important resource in the continuing quest for equality of opportunity for individuals with disabilities.

Appendix

States In Which the Definition of Disability is the Same or Substantially Similar to the ADA

Alaska: ALASKA STAT. § 18.80.300(12) (Michie 2002) (also includes a condition that may require the use of a prosthesis, special equipment for mobility, or service animal).

Arizona: ARIZ. REV. STAT § 41-1461(2) (2002).

Colorado: COLO. REV. STAT. ANN. § 24-34-301(2.5) (West 2002).

Delaware: 19 DEL. CODE ANN. tit. 19, §722(4) (2002).

D.C.: D.C. CODE ANN. § 2-1401.02(5A) (2002).

Florida: FLA STAT. ANN. § 760.10(1)(a) (2002) (prohibits discrimination based on handicap, but fails to define the term); Greene v. Seminole Elec. Coop., Inc., 701 So. 2d 646, 648 (Fla. Dist. Ct. App. 1997) (resorting to the definition of handicap found in Florida's Fair Housing Act (FLA. STAT. ANN. § 760.22(7), which parallels the ADA definition, to define the term).

Hawaii: HAW. REV. STAT. ANN. § 378-1 (Michie 2002).

Idaho: IDAHO CODE § 67-5902(15) (2002) (defines "disability" to mean "a physical or mental condition of a person, whether congenital or acquired, which constitutes a substantial limitation to that person and is demonstrable by medically accepted clinical or laboratory diagnostic techniques. A person with a disability is one who (a) has such a disability, or (b) has a record of such a disability, or ©) is regarded as having such a disability."); IDAHO ADMIN. CODE § 45.01.01.010.13, .14 (2003) (defines "disability" by using the ADA's definition).

Indiana: IND. CODE ANN. § 22-9-1-3®) (Michie 2002) (requires a "substantial disability"); IND. CODE ANN. § 22-9-5-27 (requires that the Illinois Civil Rights Commission adopt rules that are not in conflict with the provisions of the federal rules under the employment discrimination provisions of the ADA).

Iowa: IOWA CODE ANN. § 216.2 (West 2002) (requires a "substantial disability"); Probasco v. Iowa Civil Rights Comm'n, 420 N.W.2d 432, 434 (Iowa 1988) (relying on administrative rules to define "substantial disability" in an identical fashion to Rehabilitation Act and ADA).

Kansas: KAN. STAT. ANN. § 44-1002(j) (2002).

Kentucky: KY REV. STAT. ANN. § 344.010(4) (Michie 2002).

Louisiana: LA. REV. STAT. ANN. § 23:322(3) (West 2002).

Maine: ME. REV. STAT. ANN. tit. 5, § 4553(7-A), (7-B) (West 2002) (requires a "substantial disability"); Winston v. Maine Technical College System, 631 A.2d 70, 74-75 (Me. 1993) (relying on Maine Human Rights Commission's definition which tracks the ADA); Doyle v. State Dept. Of Human Services, 2002 WL 1978907 (July 10, 2002 Me. Super. Ct.) (applying Maine Human Rights Commission's definition).

Maryland: MD. CODE ANN. Art. 49B § 15(g) (West 2002) (any physical disability, infirmity, malformation or disfigurement which is caused by bodily injury, birth defect or illness including epilepsy, and which shall include, but not be limited to, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impairment, deafness or hearing impairment, muteness or speech impediment or physical reliance on a seeing eye dog, wheelchair, or other remedial appliance or device; and any mental impairment or deficiency as, but not limited to, retardation or such other which may have necessitated remedial or special education and related services); CODE OF MD REGS. § 14.03.02.02(B)(6)(b) ("A physical or mental impairment, other than those enumerated in B(6)(a) of this regulation, that is caused by bodily injury, birth defect, or illness, which substantially limits one or more of an individual's major life activities."); State Comm'n on Human Relations v. Anne Arundel County, 664 A.2d 400, 405 n.5 (Md. Ct. Spec. App. 1995) (relying on Maryland Commission on Human Relations' definition, which tracks the ADA).

Massachusetts: MASS. GEN. LAWS ANN. ch. 151B, § 1(17) (2002).

Michigan: MICH. COMP. LAWS. ANN. § 37.1103(d)(i)(A) (West 2002) (must be unrelated to the individual's qualifications for employment or promotion).

Missouri: MO. REV. STAT. § 213.010(4) (2002) (impairment, with or without reasonable accommodation, also must not interfere with performing the job).

Montana: MONT. CODE ANN. § 49-3-101(3) (2002).

Nebraska: NEB. REV. STAT. ANN. § 48-1102(9) (Michie 2002).

Nevada: NEV. REV. STAT. ANN. § 613.310(1) (2002).

New Hampshire: N.H. REV. STAT. ANN. § 354-A:2(IV) (2002).

New Mexico: N.M. STAT. ANN. § 28-1-2(M) (Michie 2002).

North Carolina: N.C. GEN. STAT. § 168A-3(7A) (2002).

North Dakota: N.D. CENT. CODE § 14-02.4-02(3) (2002).

Ohio: OHIO REV. CODE ANN. § 4112.01(13) (West 2002).

Oklahoma: OKLA. STAT. ANN. tit. 25, § 1301(4) (West 2002).

Oregon: OR. REV. STAT. § 659A.100(1) (2002).

Pennsylvania: 43 PA. CONS. STAT. ANN. §954(p.1) (West 2002).

Rhode Island: R.I. GEN. LAWS § 28-5-6(9) (2002) (but specifically states that whether a person has a disability shall be determined without regard to the availability or use of mitigating measures, such as reasonable accommodations, prosthetic devices, medications, or auxiliary aids).

South Carolina: S.C. CODE ANN. § 1-13-30(N) (Law Co-op 2002)

South Dakota: S.D. CODIFIED LAWS § 20-13-1(4) (Michie 2002) (must also be unrelated to the ability to perform the major duties of a particular job or position or be unrelated to the qualifications for employment or promotion).

Tennessee: TENN. CODE ANN. § 8-50-103 (2002) (prohibiting private discrimination on the basis of handicap); Forbes v. Wilson County Emergency, 966 S.W.2d 417, 420 (Tenn. 1998) (holding that the definition of handicap in § 8-50-103 is the same used in TENN. CODE ANN. § 4-21-102(9)(A) (2002)); TENN.

CODE ANN. § 4-21-102(9)(A) (2002) (defining "handicap" in parallel fashion to ADA).

Texas: TEX. LABOR CODE ANN. § 21.002(6) (2002).

Utah: UTAH CODE ANN. § 34A-5-102(5) (2002) ("'Disability' means a physical or mental disability as defined and covered by the Americans with Disabilities Act ....").

Vermont: VT. STAT. ANN., tit. 21, § 495d(5) (2002).

West Virginia: W. VA. CODE § 5-11-3(m) (2002).

Wisconsin: WIS. STAT. ANN. § 111.32(8) (West 2002) (physical or mental impairment that makes achievement unusually difficult or limits the capacity to work, a record of such impairment, or is perceived as having such an impairment); Kitten v. State Dept. of Workforce Development, 644 N.W.2d 649, 661 (Wis. 2002) (stating that definition of disability found in ADA is virtually identical).

Wyoming: WYO. STAT. ANN. § 27-9-101(a) (Michie 2002) (prohibits discrimination on the basis of disability, but fails to define the term); WYO. RULES & REG. EMP. LS CH. 10, §2 (2003) (uses Rehabilitation Act definition).

States That Use the ADA's Definition as a Model, But Have Altered the Definition

Arkansas: ARK. CODE ANN. § 16-123-02(3) (Michie 2002) (no "record of" or "regarded as" prongs).

California: CAL. GOVT. CODE § 12926 (I), (k) (West 2002) (requires only a limitation of a major life activity and specifically directs that "'[l]imits' shall be determined without regard to mitigating measures such as medications, assistive devices, prosthetics, or reasonable accommodations, unless the mitigating measure itself limits a major life activity); *id.* § 12926.1©) (eliminates single job rule).

Georgia: GA. CODE ANN. § 34-6A-2(3) (2002) (requires a physical or mental impairment that substantially limits a major life activity *and* a record of such impairment, but does not include a "regarded as" prong).

Minnesota: MINN. STAT. ANN. § 363.01(13) (West 2002) (a physical, sensory, or mental impairment which materially limits one or more major life activities).

Virginia: VA. CODE ANN. § 51.5-3 (Michie 2002) (requires a physical or mental impairment that substantially limits one or more major life activities or a record of such impairment. Impairment must also be unrelated to ability to perform job duties or unrelated to individual's qualifications for employment or promotion).

States That Define Disability Primarily in Medical Terms

Connecticut: CONN. GEN. STAT. ANN. § 46a-51(15) (West 2002) (any chronic physical handicap, infirmity or impairment, whether congenital or resulting from bodily injury, organic processes or changes or from illness, including, but not limited to, epilepsy, deafness or hearing impairment or reliance on a wheelchair or other remedial appliance or device); i*d.* § 46a-60(1) (discriminatory practice to discriminate because of a past history of disability); Commission on Human Rights & Opportunities ex. rel. Tucker v. General Dynamics Corp., No. 517054, 1991 WL 258041, *6 (Conn. Super. Ct. Nov. 22, 1991) (reading a "regarded as" prong into the statute).

Illinois: 775 ILL. COMP. STAT. ANN. 5/103(I) (West 2002) (a determinable physical or mental characteristic of a person, including, but not limited to, a determinable physical characteristic which necessitates the person's use of a guide, hearing or support dog, the history of such characteristic, or the perception of such characteristic by the person complained against, which may result from disease, injury, congenital condition of birth or functional disorder and which characteristic that is unrelated to the person's ability to perform the duties of a particular job or position).

New Jersey: N.J. STAT. ANN. § 10:5-5(q) (West 2002) (suffering from physical disability, infirmity, malformation or disfigurement which is caused by bodily injury, birth defect or illness including epilepsy, and which shall include, but not be limited to, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment or physical reliance on a service or guide dog, wheelchair, or other remedial appliance or device, or from any mental, psychological or developmental disability resulting from anatomical, psychological, physiological or neurological conditions which prevents the normal exercise of any bodily or mental functions or is demonstrable,

medically or psychologically, by accepted clinical or laboratory diagnostic techniques. Handicapped shall also mean suffering from AIDS or HIV infection.); Rogers v. Campbell Foundry Co., 447 A.2d 589, 591 (N.J. Super. App. Div. 1982) (reading a "regarded as" prong into the statute).

States That Employ a Hybrid Model

New York: N.Y. EXEC. LAW § 292(21) (2003) ((a) a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques or (b) a record of such an impairment or ©) a condition regarded by others as such an impairment, provided, however, that in all provision of this article dealing with employment, the term shall be limited to disabilities which, upon the provision of reasonable accommodations, do not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held).

Miscellaneous

Washington: WASH. REV. CODE ANN. § 49.60.180 (West 2003) (prohibits discrimination on the basis of disability but fails to define that term); Pulcino v. Federal Express Corp., 9 P.3d 787, 794 (Wash. 2000) (holding that a plaintiff who proceeds on the theory that an employer failed to make reasonable accommodation must establish (1) he or she has/had a sensory, mental, or physical abnormality and (2) such abnormality has/had a substantially limiting effect upon the individual's ability to perform his or her job).