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Substantially Limited Justice?: The Possibilities and Limits of a New Rawlsian Analysis of Disability-Based Discrimination

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SUBSTANTIALLY LIMITED JUSTICE?: THE POSSIBILITIES AND LIMITS OF A NEW RAWLSIAN ANALYSIS OF DISABILITY-BASED DISCRIMINATION

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INTRODUCTION

> Traditional political morality . . . has adopted a discourse in which disability, in virtue of the functional limitations it represents, is easily supposed to alter people so profoundly as to render them "naturally" and irredeemably unequal. As a result, many traditional democratic accounts of justice have failed to embrace people with disabilities and so have not advanced them, while many others have immobilized the disabled in a suffocating embrace. [1]

John Rawls has been called the most significant and influential moral philosopher of the twentieth century, and his ideas have deeply influenced discussions of social, political, and economic justice across disciplines including law, philosophy, and political science. Given his preeminence, does Rawls's theory of justice as fairness fail in either of the two ways described above or is it a promising analysis for achieving justice for people with disabilities?

In its most recent terms, the Supreme Court has increasingly turned its attention toward the Americans with Disabilities Act of 1990 (the ADA).[2] In several significant decisions, it has grappled with the questions of who should be protected under the ADA and what such protection requires.[3] In

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[1] ANITA SILVERS ET AL., DISABILITY, DIFFERENCE, DISCRIMINATION 1, 2 (James P. Sterba & Rosemarie Tong eds., 1998).

[2] 42 U.S.C. §§ 12101–12213 (2000).

[3] In 1999, the Supreme Court decided *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), *Albertson's Inc. v. Kirkingburg*, 527 U.S. 555 (1999) and *Murphy v. UPS*, 527 U.S. 516 (1999) on the issue of standing. In 2001, the Court decided *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), which exempted states from suits for damages under the ADA. In 2002, it issued four more ADA decisions. *See* Barnes v. Gorman, 536 U.S. 181, 189–90 (2002) (concluding punitive damages may not be awarded in private suits brought under section 202 of the ADA and section 504 of the Rehabilitation Act); Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73, 83 (2002) (finding EEOC regulation authorizing refusal to hire an individual because of his performance on the job would endanger his own health, owing to a disability, does not exceed the scope of permissible rulemaking under ADA); US Airways, Inc. v. Barnett, 535 U.S. 391, 394 (2002) (determining that a requested accommodation conflicts with the rules of a seniority system when it is shown that the accommodation is not "reasonable," and such a showing entitles an employer/defendant to summary judgment unless the plaintiff/employee presents evidence of special circumstances that make reasonable a seniority rule exception in a particular case); Toyota Motor Mfg. v. Williams, 534 U.S. 184, 195–96 (2002) (construing "substantially limited" in performing manual tasks to mean that an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily

the wake of these decisions, workers with disabilities[4] have found it increasingly difficult to assert and protect their right to be free of discrimination in the workplace, and debate regarding who should be protected under the ADA and what such protection requires has intensified. Attempts to reconcile the decisions to the language and purposes of the ADA, however defined, lead back to more fundamental questions about disability: what does it mean to have a disability, and what, if anything, is society obligated to do for people with disabilities?[5] In light of this continued uncertainty and Rawls's recent and final reformulation of his theory of justice as fairness in *Justice as Fairness: A Restatement*, it is an especially appropriate time to take a fresh look at Rawls's work in the context of disability, specifically Title I of the ADA.

This Article seeks to use Rawls's recently restated methodology as a philosophical foundation from which to evaluate the structure and content of the ADA, as well as recent ADA jurisprudence. Part I provides an overview of Title I of the ADA and of Rawls's recent reformulation of his theory of justice as fairness. Part II articulates a Rawlsian approach to the problem of disability-based discrimination in employment, focusing primarily on the two parts of Rawls's second principle of justice: the Principle of Fair Opportunity and the Difference Principle. Part III uses Rawls's methodology to critique recent ADA jurisprudence and argues that these cases were not decided based on the values of distributive justice or the language and

lives).

[4] The term "worker" as used in this Article refers to both current employees and applicants. Evidence suggests that the vast majority of ADA disputes arise in cases in which the employee is already working for the employer. *Cf.* John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 984 (1991) (discussing employment discrimination after Title VII of the Civil Rights Act and noting "antidiscrimination laws are predominantly used to protect the existing positions of incumbent workers"). In addition, this Article uses the term "worker with a disability," rather than terms such as "disabled worker" or "handicapped worker," which tend to define the individual only in terms of the disability. For a discussion of the social meaning of common terminology used to identify or describe people with disabilities, see generally Paul K. Longmore, *A Note on Language and the Social Identity of Disabled People*, 28 AM. BEHAV. SCIENTIST 419 (1985) and Tanya Titchkosky, *Disability: A Rose by Any Other Name? "People- First" Language in Canadian Society*, 38 CANADIAN REV. SOC. & ANTHROPOLOGY 125 (2001).

[5] These two questions were posed by Richard K. Scotch in *Models of Disability and the Americans with Disabilities Act*, 21 BERKELEY J. EMP. & LAB. L. 213 (2000).

stated purposes of the ADA. Finally, Part IV identifies several of the limitations of a Rawlsian interpretation of the ADA and the consequences of those limitations for workers with disabilities.

I. BACKGROUND

A. An Overview of the ADA's Employment Title

The ADA was enacted to "provide clear, strong, consistent, [and] enforceable standards [for] addressing discrimination against individuals with disabilities" and to bring such individuals into the economic and social mainstream of American life.[6] It prohibits discrimination in employment, public services, public transportation, public accommodations, and public services operated by private entities and telecommunications.[7] Although it is based on Title VII of the

[6] 42 U.S.C. § 12101(b)(2) (2000).

[7] Other federal statutes which protect people with disabilities include the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1401–1487 (2000) (guaranteeing that each child with disabilities will have an "individualized plan" so that he or she can receive a "free appropriate education"); the Developmental Disabilities Assistance and Bill of Rights Act of 2000, 42 U.S.C. §§ 15001–15115 (2000) (guaranteeing that individuals with developmental disabilities and their families "participate in the design of and have access to needed community services, individualized supports and other forms of assistance"); the Air Carrier Access Act of 1986, 49 U.S.C. § 41705 (2000) (prohibiting any carrier, including a foreign carrier, from discriminating against an otherwise qualified individual with a mental or physical handicap); the Voting Accessibility for the Elderly and Handicapped Act of 1984, 42 U.S.C. §§ 1973ee-1–1973ee-6 (2000) (improving access for handicapped and elderly individuals to registration facilities and polling places for federal elections); sections 501 and 503 of the Rehabilitation Act of 1973, 29 U.S.C. §§ 791–796 (2000) (creating regulations for employment of disabled individuals under federal government contracts; prohibiting exclusion of otherwise qualified individuals with disability from the participation in, denial of benefits of, or being subjected to discrimination under any program or activity receiving federal financial assistance; ordering the removal of architectural, transportation, or communication barriers; guaranteeing that federal employees and members of the public who are disabled have the same access to, and use of, information and data that is comparable to the access to and use of the information and data by federal employees and members of the public who are not disabled; providing a support system in each state to protect the legal and human rights of individuals who are otherwise ineligible under 29 U.S.C. § 732, 42 U.S.C. § 15041, 42 U.S.C. § 10801); the Fair Housing Act Amendments of 1988 (FHAA), 42 U.S.C. §§ 3601–3631 (2000) (prohibiting discrimination on the basis of handicap in the sale or rental of housing, in residential real estate related transactions and in the provision of brokerage services). *See generally* RUTH COLKER ET AL., THE LAW OF DISABILITY DISCRIMINATION (3d ed. 1999) (discussing the history and effectiveness of these statutes).

Civil Rights Act of 1964 ("Title VII"),[8] which prohibits discrimination on the basis of race, national origin, sex, and religion, Title I of the ADA contains several distinctive and significant features.

1. The Definition of "Disabled"

Unlike Title VII, which allows anyone to raise a claim for discrimination based on the protected categories of race, national origin, sex, or religion, the ADA grants standing only to "qualified individuals with a disability."[9] The ADA defines "disability" to mean, with respect to any individual: (1) "a physical or mental impairment that substantially limits one or more . . . major life activities"; or (2) "a record of such an impairment"; or (3) "being regarded as having such an impairment" regardless of whether the individual actually has the impairment.[10]

The first prong of the definition of disability corresponds to a medical-functional approach to disability that focuses on the physical or biological impairment of the individual.[11] The focus on biology is evident in the definition of "impairment" as "[a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the . . . body systems" or "[a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities," and excluding environmental, cultural, and economic disadvantages.[12] The functional approach is reflected in the definition of "major life

[8] 42 U.S.C. §§ 2000e–2000e-17 (2000).

[9] 42 U.S.C. § 12111(8) (2000). For the suggestion that the ADA should be amended to prohibit discrimination "on the basis of a disability" generally, rather than prohibiting discrimination against a qualified individual with a disability, see Lisa Eichhorn, *Major Litigation Activities Regarding Major Life Activities: The Failure of the "Disability" Definition in the Americans with Disabilities Act of 1990*, 77 N.C. L. REV. 1405, 1408 (1999).

[10] 42 U.S.C. § 12102(2) (2000).

[11] For a complete description and discussion of the functional–medical model and the experiential–social models of disability, see Elizabeth A. Pendo, *Disability, Doctors and Dollars: Distinguishing the Three Faces of Reasonable Accommodation*, 35 U.C. DAVIS L. REV. 1175, 1191–1203 (2002).

[12] 29 C.F.R. § 1630.2(h) (1998). According to the "Interpretative Guidance" provided by the EEOC, other specific exclusions from the definition of impairment include: predisposition to illness or disease, pregnancy, common personality traits, and "normal" deviations in physical traits and characteristics. *See* 29 C.F.R. pt. 1630, App. § 1630.2(h) (1998).

activities" that include, but are not limited to, "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[13] Moreover, a major life activity is substantially limited within the meaning of the statute if the individual is "[u]nable to perform a major life activity that the average person in the general population can perform" or is "[s]ignificantly restricted as to the condition, manner or duration under which [he or she] can perform a particular major life activity" as compared to the general population.[14]

The second and third prongs of the definition of disability represent an experiential-social approach to disability because they focus on the social context that creates discrimination or disadvantage, rather than on the real or perceived impairment. For example, the EEOC has defined the "regarded as" prong to mean:

> (1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;
>
> (2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or
>
> (3) Has none of the impairment defined in paragraphs (h) (1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.[15]

Meeting the definition of "disability" is a necessary but not sufficient step in establishing standing, which is limited to otherwise qualified individuals with a disability.[16] A worker with a disability as defined by the ADA still can be barred from the workplace if not "otherwise qualified," which includes meeting legitimate qualifications that are job related and consistent with business necessity. An example of a business necessity is that the worker not constitute a "direct threat to the health or safety of other individuals in the workplace."[17]

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[13] 29 C.F.R. § 1630.2(i) (1998).

[14] *Id.* § 1630.2(j).

[15] *Id.* § 1630.2(*l*); *see also* Sutton v. United Air Lines, Inc., 527 U.S. 471, 489–90 (1999) (discussing the "regarded as" prong).

[16] 42 U.S.C. § 12111(8) (2000).

[17] *Id.* § 12113(a)–(b).

2. The Scope of Reasonable Accommodation

In addition to the traditional forms of discrimination such as those prohibited by Title VII,[18] the ADA also prohibits "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business."[19]

As defined by the ADA, reasonable accommodation is a flexible, interactive, and personalized process. It may include: "making existing facilities used by employees readily accessible to and usable by individuals with disabilities"; restructuring work schedules, reassigning individuals to other positions;

[18] *Compare id.* § 12112(a) ("No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."), *with id.* § 2000e-2. The latter provides that under Title VII:

> It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id. § 2000e-2.

[19] *Id.* § 12112(b)(5)(A). Prior to the ADA, "reasonable accommodation" had been used in two very dissimilar capacities. "Reasonable accommodation" was used in section 504 of the Rehabilitation Act of 1973, which applies to schools and housing providers receiving federal assistance. 29 U.S.C. § 794 (2000). "Reasonable accommodation" was also used in the context of Title VII's prohibition on discrimination on the basis of religion, under 42 U.S.C. § 2000e(j), which was interpreted as no more than a *de minimus* cost to an employer, and severely restricted by the courts to avoid conflict with the First Amendment prohibition against establishing religion. *See* Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84–85 (1977); *see also* Robert L. Burgdorf Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 511–13 (1991) (discussing "reasonable accommodation" under Title VII and the ADA). The religious discrimination interpretation was specifically rejected by the legislature in the context of the ADA. *Id.* at 513 (citing H.R. REP. NO. 101-485, at 68 (1990)). Thus, "[a]lthough the ADA is not the first civil rights legislation to use the concept of reasonable accommodation," it is the first to "invest[] reasonable accommodation with significant and far-reaching meaning." Pendo, *supra* note 11, at 1180.

acquiring or modifying equipment, examinations, or training procedures; and other similar accommodations for individuals with disabilities."[20] Courts have held that reasonable accommodation includes such changes as specialized testing, training, or other work procedures;[21] provision of specialized equipment or other physical modifications of the workplace;[22] and job restructuring.[23]

[20] 42 U.S.C. § 12111(9) (2000).

[21] *See, e.g.*, Mulholland v. Pharmacia & Upjohn, Inc., 52 Fed. Appx. 641, 648 (6th Cir. 2002) (concluding employer adequately accommodated employee's short-term memory problems caused by traumatic brain injury by providing written instructions regarding how to prepare timecards); Williams v. United Ins. Co. of America, 253 F.3d 280, 283 (7th Cir. 2001) (determining that under ADA, "[a] blind person cannot insist that her employer teach her Braille, though she may be able to insist that her employer provide certain signage in Braille to enable her to navigate the workplace"); Vollmert v. Wisconsin DOT, 197 F.3d 293, 302 (7th Cir. 1999) (recognizing under the ADA, employer did not reasonably accommodate learning disabilities that interfered with employee's ability to master new computer system when it refused to provide training sufficiently designed to address her disability, and refused her request for a tutor trained in learning disabilities after she indicated that a tutor was likely available free of charge through government agency); Fink v. N.Y. City Dep't of Personnel, 53 F.3d 565, 567 (2d Cir. 1995) (finding employer sufficiently accommodated visually-impaired candidates for promotion by providing them with tape recording of examination, tape recorder, reader-assistant to help with operation of recorder and to read questions and answers, a private room, and double time afforded to other candidates). *But see* Mitchell v. Washingtonville Cent. School Dist., 190 F.3d 1, 9 (2d Cir. 1999) (agreeing with school district that it was not required to retrain and assign disabled head custodian to entirely different position, such as courier or bus dispatcher, which positions were not available at relevant time); Needle v. Alling & Cory, Inc., 88 F. Supp. 2d 100, 108 (W.D.N.Y. 2000) (dismissing employee's disability claim because employer has no obligation to retrain disabled employee for position for which he is not qualified).

[22] *See, e.g.*, Trepka v. Bd. of Educ., 28 Fed. Appx. 455, 460 (6th Cir. 2002) (holding that employer reasonably accommodated teacher with disability by offering teacher a cart to carry her teaching materials and/or assistance of custodian to carry materials); Jensen v. GTE Northwest, Inc., 7 Fed. Appx. 778, 780–81 (9th Cir. 2001) (finding employer's failure to provide orthopedic chair during one-week training session, in light of other accommodations it had provided in the past, including: modified workstation, high orthopedic chair, additional time off for doctor's appointments, chiropractor and physical therapist, and sit/stand workstation, which allowed employee to adjust computer height electronically, extensive medical leave, did not violate the ADA); O'Grady v. Zurich Holding Co. of America, 12 Fed. Appx. 96, 98 (4th Cir. 2001) (finding employer made reasonable accommodations under ADA by "assigning [employee] to a new position as a data input specialist when she could not handle her workload as a secretary, offering her new office equipment, ergonomically altering her workstation, and allowing her a paid hour of cumulative exercise periods in addition to her regular breaks and lunch period"); Wernick v. Federal Reserve Bank, 91 F.3d 379, 385 (2d Cir. 1996) (affirming dismissal of employee's claims because employer reasonably accommodated employee by

providing her with ergonomic furniture and allowing her to move around and stretch periodically); Stewart v. County of Brown, 86 F.3d 107, 110 (7th Cir. 1996) (affirming summary judgment in favor of county and county sheriff for adjustments made in response to employee's complaints that reasonably accommodated employee as a matter of law, which included restructuring the courthouse security room, where sheriff built a platform and later lowered room's video monitors, installing mini-blinds to minimize glare, purchasing ergonomic chair and modifying work schedule).

[23] *See, e.g.*, Ruhle v. Hous. Auth., 54 Fed. Appx. 61, 63 (3d Cir. 2002) (directing entrance of judgment for city employer that had reasonably accommodated employee by making him a full-time lobby monitor which he kept for several years until he took a laborer's position); Mays v. Principi, 301 F.3d 866, 868 (7th Cir. 2002) (reassigning nurse to clerical position that gave her the same net after-tax salary as she had earned as a nurse, though with fewer fringe benefits and fewer career advantages, was a reasonable accommodation); Harris v. Circuit Court, 21 Fed. Appx. 431, 432 (6th Cir. 2001) (concluding municipal employer's holding open for one year position of employee who had to take leave of absence for cancer treatment was reasonable accommodation); Lovejoy-Wilson v. NOCO Motor Fuel, Inc., 263 F.3d 208, 217 (2d Cir. 2001) (allowing employee to find means to make bank deposits other than driving herself to bank would not impose undue hardship on employer); McCrary v. Ohio Civil Service Employees Association Local 11, 18 Fed. Appx. 281, 283 (6th Cir. 2001) (agreeing with district court's dismissal of employee's case where the state human services department made reasonable efforts to accommodate employee's sleep disorder "by allowing him to travel with his co-workers, encouraging him to apply for other positions and offering him disability retirement"); Selenke v. Medical Imaging of Colorado, 248 F.3d 1249, 1262 (10th Cir. 2001) (determining that former employer acted reasonably in implementing modifications of its offices to provide for better ventilation in mammography dark room for employee with sinusitis, granting employee's leave requests, providing her with respiration mask and offering her alternative position in mobile unit); Gronne v. Apple Bank for Savings, 1 Fed. Appx. 64, 66 (2d Cir. 2001) (holding employer's offer to accommodate employee's disability, which prevented her from climbing stairs or driving by "not assigning *any* duties which would require her to climb stairs and paying one-half the cost of a private car service to and from work on days when friends or family members could not drive her" reasonable under the ADA) (internal quotations omitted); Allen v. Rapides Parish School Bd., 204 F.3d 619, 623 (5th Cir. 2000) (noting employee failed to provide evidence sufficient to demonstrate that the employer denied transfer requests on the basis of his disability); Hennenfent v. Mid Dakota Clinic, P.C., 164 F.3d 419, 422 (8th Cir. 1998) (finding clinic extended reasonable accommodation within meaning of ADA to physician where it provided him with reduced work schedules, extended leaves of absence, and backup physicians to assist him with his on call duties). *But see* Lamb v. Qualex, Inc., 33 Fed. Appx. 49, 59 (4th Cir. 2002) (requesting part-time work accommodation by account service representative who was suffering from depression which rendered him incapable of working full-time was not reasonable under ADA because employer had no part-time positions and could not have accepted employee in part-time role without hiring additional employees to make up the difference); Lucas v. W. W. Grainger, Inc., 257 F.3d 1249, 1257 (11th Cir. 2001) (refusing to require employer to reassign employee to customer service representative position to reasonably accommodate his back injury under ADA where there were no vacancies in that position and reassigning employee to such position would have constituted a promotion); Phelps v. Optima Health, Inc., 251 F.3d 21, 26 (1st Cir. 2001) (finding

Reasonable accommodation is constrained by, among others, the undue hardship defense, which bars accommodations that require significant difficulty or expense when considered in light of such factors as "the nature and cost of the accommodation needed," "the overall financial resources of the facility" involved or of the employer, "the type of operation or operations" of the employer,[24] and the potential disruption to other workers and the production process.[25]

B. Rawls's Justice as Fairness: The 2001 Reformulation

Getting Rawls right is important. Rawls is often cited in legal literature,[26] and legal scholars have applied his methodology to a wide range of issues including welfare rights, tax policy, campaign finance, and employment discrimination law.[27] Rawls first published his groundbreaking *A Theory of*

hospital not required to allow nurse with back disability to engage in job-sharing as a reasonable accommodation for her to perform the essential functions of her job).

[24] 42 U.S.C. § 12111(10)(B) (2000).

[25] *See* 29 C.F.R. pt. 1630, App. § 1630.2(p) (1993) (providing, for example, that "[a]lthough the individual [with a disabling visual impairment] may be able to perform the job in bright lighting, the nightclub will probably be able to demonstrate that that particular accommodation, though inexpensive, would impose an undue hardship if the bright lighting would destroy the ambience of the nightclub").

[26] For example, Rawls was cited in over 500 articles in 2001 (12/8/02 Westlaw search "DA(AFT 12/31/2000) & Rawls" yielded 567 articles).

[27] *See generally* Robert P. Burns, *Rawls and the Principles of Welfare Law*, 83 NW. U. L. REV. 184 (1989) (rejecting Rawls's theory as it applies to welfare rights); Isaak I. Dore, *Constitutionalism and the Post-Colonial State in Africa: A Rawlsian Approach,* 41 ST. LOUIS U. L.J. 1301 (1997) (examining the viability of the post-colonial state in Africa along the precepts of Rawls's theory of political liberalism); Eric Freedman, *Campaign Finance and the First Amendment: A Rawlsian Analysis*, 85 IOWA L. REV. 1065 (2000) (arguing that, using the framework provided by Rawls, the Supreme Court's jurisprudence that deals with campaign finance is flawed); W. Robert Gray, *The Essential-Functions Limitation on the Civil Rights of People with Disabilities and John Rawls's Concept of Social Justice,* 22 N.M. L. REV. 295 (1992) (critiquing the essential-functions test using a Rawlsian analysis); Walter C. Long, *Appeasing a God: Rawlsian Analysis of* Herrera v. Collins *and a Substantive Due Process Right to Innocent Life,* 22 AM. J. CRIM. L. 215 (1994) (using Rawls's philosophy to determine whether there exists a substantive due process right to innocent life); Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice,* 121 U. PA. L. REV. 962 (1973) (analyzing welfare rights using Rawls's theories); Charles R. O'Kelley Jr., *Rawls, Justice, and the Income Tax,* 16 GA. L. REV. 1 (1981) (analyzing tax policies in light of Rawls's original position); Mark S. Stein, *Rawls on Redistribution to the Disabled*, 6 GEO. MASON L. REV. 997 (1998) (considering the question of redistribution to the disabled from a Rawlsian perspective, and arguing that Rawls's response to the issue is

Justice in 1971, and subsequent development of his concept of justice as fairness is well known.[28] I will give a brief restatement of his theory, focusing on the modifications contained in *Political Liberalism*[29] and responses to critiques of same, and Rawls's recent and final reformulation in *Theory of Justice: A Restatement*.[30]

1. The Basic Structure as Subject

Rawls addresses his theory to the "basic structure" of a property-owning democratic society[31] defined as the background social framework of the main social and political institutions, such as an independent judiciary, a system of property rights, the structure of economy, and the conception of family.[32] Rawls takes the basic structure as his subject because of its "profound and pervasive influence on the persons who live under its

unconvincing); Jesse Furman, Note, *Political Illiberalism: The Paradox of Disenfranchisement and the Ambivalences of Rawlsian Justice,* 106 YALE L. J. 1197 (1997) (arguing that Rawls's theory of "justice as fairness" is characterized by the same ambivalence as that in the paradox of disenfranchisement between toleration and exclusion).

[28] JOHN RAWLS, A THEORY OF JUSTICE (rev. ed. 1999) [hereinafter RAWLS, THEORY]. Rawls's theory of justice as fairness has continued to evolve since the publication of *A Theory of Justice* in 1971. *See* JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT (Erin Kelly ed., 2001) [hereinafter RAWLS, RESTATEMENT]; JOHN RAWLS, POLITICAL LIBERALISM (1993) [hereinafter RAWLS, LIBERALISM]; John Rawls, *Justice as Fairness: Political Not Metaphysical*, 14 PHIL. & PUB. AFF. 223 (1985) [hereinafter Rawls, *Justice as Fairness*].

[29] RAWLS, LIBERALISM, *supra* note 28.

[30] RAWLS, RESTATEMENT, *supra* note 28. In this work, Rawls reviews his other major writings on justice as fairness, including *A Theory of Justice* (1971), *Justice as Fairness: Political Not Metaphysical* (1985), and *Political Liberalism* (1993), and recasts the theory as a form of political liberalism, rather than as a comprehensive liberal theory. According to his student and friend Professor Samuel Freeman, "[Rawls] resisted publishing his collected papers; he said he saw them as opportunities to experiment with ideas, which would later be revised or rejected in a book." Samuel Freeman, *John Rawls, Friend and Teacher*, CHRONICLE OF HIGHER EDUCATION, Dec. 13, 2002, at B12.

[31] RAWLS, RESTATEMENT, *supra* note 28, at 135–79. In this chapter, Rawls clarifies his preference for property-owning democracy over laissez faire capitalism, welfare-state capitalism, state socialism with a common economy, and a liberal (democratic) socialism on the basis of four evaluative questions: are its institutions right and just, are they designed to realize the society's goals, can the citizens be relied upon to comply with the just institutions and its rules, and are tasks assigned to positions in a way that encourages competency. *Id*. at 136.

[32] *Id.* at 10; *see also* John Rawls, *The Basic Structure as Subject*, 14 AM. PHIL. Q. 159, 159 (1977).

institutions"[33] and because preservation and regulation of fair background conditions is a necessary, overarching precondition to rules that reduce the inequalities in the lives of individuals caused by class, endowments and opportunities, and chance. [34]

The basic structure includes institutions that "assign basic rights and duties and regulate the division of advantages that arises from social cooperation over time."[35] This includes the political constitution;[36] federal legislation, presumably including anti-discrimination laws such as the ADA;[37] and possibly common law decisions with large scale or systemic impact.[38] It does not include small scale or personal decisions and agreements or international law and policy.[39] The ADA should be considered part of the basic structure because "anti-discrimination laws are an indispensable component of a basic structure that justly distributes the benefits and burdens of social cooperation." [40]

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[33] RAWLS, RESTATEMENT, *supra* note 28, at 55.

[34] *Id.* at 39–40.

[35] *Id.* at 10.

[36] *Id.*

[37] *See* Sujit Choudhry, *Distribution vs. Recognition: The Case of Anti-Discrimination Laws*, 9 GEO. MASON L. REV. 145, 149 (2000) ("Egalitarians argue that anti-discrimination laws are an indispensable component of a basic structure that justly distributes the benefits and burdens of social cooperation.").

[38] Rawls does not address whether the common law falls within the basic structure. However, Professor Heidi Li Feldman has argued that although the common law seems "to fall both inside and outside the basic structure," common law decisions can be considered part of the Rawlsian basic structure when they have "large-scale, systematic effects." Heidi Li Feldman, *Rawls' Political Constructivism as a Judicial Heuristic: A Response to Professor Allen*, 51 FLA. L. REV. 67, 76–78 (1999).

[39] For example:

> One should not assume in advance that principles that are reasonable and just for the basic structure are also reasonable and just for institutions associations, and social practices generally. While the principles of justice as fairness impose limits on these social arrangements within the basic structure, the basic structure and the associations and social forms within it are each governed by distinct principles in view of their different aims and purposes and their peculiar nature and special requirements. Justice as fairness is a political, not a general, conception of justice: it applies first to the basic structure and sees these other questions of local justice and also questions of global justice (what I call the law of peoples) as calling for separate consideration on their merits.

RAWLS, RESTATEMENT, *supra* note 28, at 11.

[40] *See* Choudhry, *supra* note 32, at 149. Query: Are some aspects of disability policy arguably local and therefore outside of the scope of Rawls's two principles of justice? *See* RAWLS, RESTATEMENT, *supra* note 28, at 11 ("The principles of justice to

2. The Two Principles of Justice

Against the backdrop of a fair basic structure,[41] Rawls turns to the two principles of justice that provide a method for identifying rules that are "most appropriate for a democratic society that not only professes but wants to take seriously the idea that citizens are free and equal, and tries to realize that idea in its main institutions."[42] First, "[e]ach person has the same indefeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all."[43] Basic liberties include freedom of thought, liberty of conscience, political liberties such as the right to vote and participate in politics, freedom of association, rights and liberties relating to physical and psychological integrity of the individual, and the rights and liberties covered by the rule of law.[44] This "principle of liberty" is lexically prior to the second principle, so generally basic liberties can be restricted only for the sake of other basic liberties.[45]

Second, any social and economic inequalities must be both attached to offices and positions open to all under conditions of fair equality of opportunity—the "principle of fair opportunity"—and to the greatest benefit of the least advantaged members of society—the "difference principle".[46] The principle of fair opportunity goes beyond simple formal equality, as it means that in addition to public and social positions being open to everyone, everyone should have a fair chance to meet the qualifications for such positions. In other words, "those who have the same level of talent and ability and the same willingness to use these gifts should have the same prospects of success regardless of their social class of origin," and there should be "roughly the same prospects of culture and achievement for those similarly

be followed directly by associations and institutions within the basic structure we may call principles of local justice." (citing JON ELSTER, LOCAL JUSTICE (1992))).

[41] Because the two principles of justice are meant to be applied only in the presence of a fair basic structure, it is important to know if the basic structure is fair in a Rawlsian sense. For purposes of this analysis, I assume that the basic structure is fair.

[42] RAWLS, RESTATEMENT, *supra* note 28, at 39.

[43] *Id.* at 42.

[44] *Id.* at 44.

[45] RAWLS, THEORY, *supra* note 28, at 220.

[46] RAWLS, RESTATEMENT, *supra* note 28, at 42–48.

motivated and endowed."[47] These two parts of the second principle are also ordered lexically so that the difference principle can be applied only when both the first principle of justice and the principle of fair opportunity are met.[48]

3. The Original Position

Rawls maintains that the two principles of justice described above are legitimate because they would be chosen by decision-makers in a hypothetical "original position" of fairness and neutrality. Decision makers in the original position are defined as rational, meaning that they are able to consider and assess various alternatives in light of their own sense of justice but not prone to what Rawls terms "special psychologies" such as envy, spite, acute risk aversion or the will to control others,[49] equally able to participate in the decision-making process[50] and to prefer more rather than less primary social goods.[51] They are also assumed to possess "public reason" or "the plain truths now common and available to citizens generally," including common sense and general knowledge such as the basic principles of human psychology, social organization, political affairs, and economic theory.[52]

In contrast, when it comes to the types of knowledge that might enable self interested or self centered decision making, the parties are imagined as behind a heavy "veil of ignorance."[53] Thus, they do not know the shape or status of their own society; their class or social status; their good or bad luck in the distribution of natural assets and disabilities; their own psychological traits such as optimism or fear of risk; or even their own comprehensive conception of the good, whether based on philosophy or religion.[54] As a result, "[t]hey do not know how

[47] *Id.* at 44.

[48] *Id.* at 61.

[49] *Id.* at 87. At least one author has criticized Rawls's "[a]ssuming evil away" as a major flaw in his theory. Jerry L. Mashaw, *Against First Principles*, 31 SAN DIEGO L. REV. 211, 213 (1994).

[50] They "all have the same rights in the procedure for choosing principles; each can make proposals, submit reasons for their acceptance, and so on." RAWLS, THEORY, *supra* note 28, at 17.

[51] *Id.* at 123.

[52] RAWLS, RESTATEMENT, *supra* note 28, at 90; *see also* RAWLS, THEORY, *supra* note 28, at 119.

[53] RAWLS, THEORY, *supra* note 28, at 118.

[54] *Id.* at 11, 118; RAWLS, RESTATEMENT, *supra* note 28, at 15.

the various alternatives will affect their own particular case and they are obliged to evaluate principles solely on the basis of general considerations."[55]

4. A Political Liberalism and the Fact of Reasonable Pluralism

One critical development in Rawls's theory of justice as fairness is the recasting of his theory as a political or non-comprehensive form of liberalism rather than a comprehensive liberal doctrine. Rawls describes theories of liberalism as "comprehensive" if they are anchored to a deep, foundational philosophical theory and are meant to apply in all spheres, not just the political. In *Political Liberalism*, Rawls (re)defines his theory as "political"—not part of a more comprehensive moral, religious, or philosophical doctrine and intended to apply only to the political sphere of a particular type of society, the constitutional democracy.[56]

Notwithstanding the political nature of Rawls's theory, he argues that multiple and even conflicting comprehensive doctrines are still present in a liberal democracy because each person's idea of justice and the good may be based on personally-held doctrines, comprehensive or not. Rawls embraces those doctrines that are different and incompatible—but still reasonable—as the "fact of reasonable pluralism."[57] A comprehensive doctrine is reasonable if it reflects the belief that society is a fair system of cooperation over time among free and equal citizens.[58] Conversely, a comprehensive doctrine that opposes liberal democratic forms of society is by definition

[55] RAWLS, THEORY, *supra* note 28, at 118. The original position is not meant to describe and explain how people actually think or act. Instead, Rawls imagines actors in the original position "according to how we want to model rational representatives of free and equal citizens." RAWLS, RESTATEMENT, *supra* note 28, at 81. The veil of ignorance is imposed so we can imagine how the actors would make decisions based on a shared (but limited) set of general facts and in the absence of culturally-dependent motivations such as envy, the desire to dominate, or extreme risk aversion. *Id.* at 81, 87. As a consequence, it does not matter that real people living in a culture do not (and perhaps cannot) think like the actors in the original position.

[56] Erin Kelly, *Editor's Foreword* to RAWLS, RESTATEMENT, *supra* note 28, at xi–xii (discussing development of political liberalism from *Justice as Fairness: Political Not Metaphysical* to *Political Liberalism* to *Restatement*); *see also* PATRICK NEAL, LIBERALISM AND ITS DISCONTENTS 98–101 (1997). For a discussion of Rawls's "practical turn," see id. at 99–132.

[57] Erin Kelly, *Editor's Foreword* to RAWLS, RESTATEMENT, *supra* note 28, at xi.

[58] RAWLS, LIBERALISM, *supra* note 28, at 15–22.

unreasonable and is excluded from the Rawlsian reasonable pluralism. It follows that a comprehensive doctrine that proposed that basic rights and political power be distributed according to race, sex, or ethnicity should be excluded as unreasonable.[59]

Given the fact of reasonable pluralism, individuals may form an "overlapping consensus" by affirming the same political conception of justice but for different reasons.[60] This is significant because Rawls argues that against a backdrop of fair institutions, a political liberalism supported by an overlapping consensus of reasonable doctrines will lead to stability: "[G]iven the existence of a reasonably well ordered constitutional regime, the family of basic political values expressed by its principles and ideals have sufficient weight to override all other values that may normally come into conflict with them."[61]

II. A RAWLSIAN APPROACH TO DISABILITY-BASED DISCRIMINATION IN THE WORKPLACE

Rawls's theory allows us to evaluate the actions of the state, including formulation of law from the point of view of the state, and to evaluate an existing rule against the two principles of justice to reveal the values it embodies. Such an analysis may not establish what the ADA should say, but it may suggest a way to evaluate what the ADA does say: "The role of a political conception of justice . . . is not to say exactly how these questions are to be settled, but to set out a framework of thought within which they can be approached."[62]

Rawls did not necessarily intend for the two principles of justice to be applied to legislation such as the ADA or to the Supreme Court cases interpreting it. In fact, he explains that the veil of ignorance is slowly lifted through each stage of decisionmaking:

> The principles of justice are adopted and applied in a four-stage sequence. In the first stage, the parties adopt the principles of justice behind a veil of ignorance. Limitations on knowledge

[59] *See* Marilyn Friedman, *John Rawls and the Political Coercion of Unreasonable People*, *in* THE IDEA OF A POLITICAL LIBERALISM 16, 27 (Victorian Davion & Clark Wolf eds., 2000).

[60] RAWLS, RESTATEMENT, *supra* note 28, at 32.

[61] *Id.* at 183.

[62] *Id.* at 12.

> available to the parties are progressively relaxed in the next three stages: the stage of the constitutional convention, the legislative stage in which laws are enacted as the constitution allows and as the principles of justice require and permit, and the final stage in which the rules are applied by administrators and followed by the citizens generally and the constitution and laws are interpreted by members of the judiciary. At this last stage, everyone has complete access to all the facts. [63]

Nonetheless, we can still use Rawls's methodology to shed light on the issue of judicial interpretation of the ADA in this context. Accordingly, this section will apply Rawls's methodology to the issue of disability-based discrimination, specifically Title I of the ADA.

A. Getting to Rawls's Second Principle of Justice

1. Putting Aside an Argument on Disability and the Principle of Liberty

There may be an argument that certain disability issues relate to basic liberties or "constitutional essentials"[64] and are therefore lexically prior to the two parts of the second principle of justice. Consider, example, how disability impacts practices such as state-sanctioned involuntary sterilization,[65] termination

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[63] *Id.* at 48.

[64] *Id.* at 49.

[65] *See, e.g.*, Elizabeth S. Scott, *Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy*, 1986 DUKE L. J. 806, 807 (characterizing laws which authorize the sterilization of persons with disabilities as "improperly limit[ing] the freedom of some persons who may be capable of making their own reproductive choices"); Joe Zumpano-Canto, *Nonconsensual Sterilization of the Mentally Disabled in North Carolina: An Ethics Critique of the Statutory Standard and Its Judicial Interpretation*, 13 J. CONTEMP. HEALTH L. & POL'Y 79, 99 (1996) (arguing "sterilization without a full investigation of the [disabled] individual's interest in marriage unethically invades sexual autonomy"); Robert Randal Adler, Note, *Estate of C.W.: A Pragmatic Approach to the Involuntary Sterilization of the Mentally Disabled*, 20 NOVA L. REV. 1323, 1361 (1996) (arguing that the "unceasing supervision" of a person with a disability constitutes "an ongoing infraction on her fundamental constitutional right to privacy"); James C. Dugan, Note, *The Conflict Between "Disabling" and "Enabling" Paradigms in Law: Sterilization, the Developmentally Disabled and the Americans with Disabilities Act of 1990*, 78 CORNELL L. REV. 507, 518–19 (1993) (characterizing the Court's decision dealing with the privacy rights of people with disabilities as "disabling"); Winiviere Sy, Note, *The Right of Institutionalized Disabled Patients to Engage in Consensual Sexual Activity*, 23 WHITTIER L. REV. 545 *passim* (2001) (discussing a disabled person's right to engage in consensual sexual activity while in an institution as an

of parental rights,[66] or limitations on the right to vote.[67] Notwithstanding that argument, this Article will focus on the links between Title I of the ADA which addresses disability-based discrimination in employment and the two parts of Rawls's second principle of justice.[68]

2. An Initial Position on Disability and the Veil of Ignorance

Rawls specifically excludes people with certain severe disabilities from the construct of the original position:

> [A] person is someone who can be a citizen, that is, a fully cooperating member of society over a complete life . . . .for our

aspect of the right to privacy and sexual autonomy). I would like to thank the students in my Law & Disability seminar, Fall 2002, for their work on these three issues which helped me to see them in the context of Rawls's methodology.

[66] *See, e.g.*, Susan Kerr, *The Application of the Americans with Disabilities Act to the Termination of the Parental Rights of Individuals with Mental Disabilities*, 16 J. CONTEMP. HEALTH L. & POL'Y 387, 396 (2000) (arguing that the fundamental right to procreate "appl[ies] to all persons: 'mentally disabled,' physically disabled, and married and unmarried alike"); Dave Shade, *Empowerment for the Pursuit of Happiness: Parents with Disabilities and the Americans with Disabilities Act*, 16 LAW & INEQ. 153, 153–54 (1998) (arguing that the right to establish a home and raise children is among the most basic of civil rights and that the ADA offers persons with disabilities a vehicle for enforcing those rights).

[67] *See, e.g.*, Kay Schriner & Lisa A. Ochs, *Creating the Disabled Citizen: How Massachusetts Disenfranchised People under Guardianship*, 62 OHIO ST. L.J. 481 *passim* (2001) (discussing how states have disenfranchised persons with disabilities, thereby interfering with the fundamental right to vote); Kay Schriner et al., *Democratic Dilemmas: Notes on the ADA and Voting Rights of People with Cognitive and Emotional Impairments*, 21 BERKELEY J. EMP. & LAB. L 437, 446–47 (2000) (discussing what the authors label as "contradictory" federal and state laws which prohibit persons with disabilities from voting); Boris Feldman, Note, *Mental Disability and the Right to Vote,* 88 YALE L.J. 1644, 1644 (1979) (arguing that mental disability restrictions on the right to vote violate the equal protection clause because "efforts to disfranchise irrational persons infringe upon fundamental rights without furthering a compelling state interest").

[68] Title I of the ADA is an appropriate subject within disability law and policy as it deals with distributive, and not allocative, justice. Distributive justice refers to the measures by which "the institutions of the basic structure [are] regulated as one unified scheme of institutions so that a fair, efficient, and productive system of social cooperation can be maintained over time, from one generation to the next." RAWLS, RESTATEMENT, *supra* note 28, at 50. It is a purely procedural concept, with no required result. *Id.* In contrast, allocative justice concerns itself with the allocation of "a given bundle of commodities . . . among various individuals whose particular needs, desires, and preferences are known." *Id.* Rawls rejects allocative justice as incompatible with fair system of cooperation over time, because there can be no criterion for a just distribution apart from the just background institutions and the entitlements that arise from actually working through the two principles of justice. *Id.* at 50–51.

> purposes . . . I leave aside permanent disabilities or mental disorders so severe as to prevent persons from being normal and fully cooperating members of society in the usual sense.[69]

Rawls attempts to explain or justify the exclusion of certain people with certain mental disabilities in *Political Liberalism*:

> [S]ince the fundamental problem of justice concerns the relations among those who are full and active participants in society, and directly or indirectly associated together over the course of a whole life, it is reasonable to assume that everyone has physical needs and psychological capacities within some normal range. Thus the problem of special health care and how to treat the mentally defective are aside. If we can work out a viable theory for the normal range, we can attempt to handle these other cases later.[70]

Beyond that, Rawls does not give explicit consideration to disability within his theory of justice as fairness.

Notwithstanding Rawls's brief and unsatisfying treatment of disability, some authors have argued that disability fares well under a Rawlsian analysis because, similar to the decision makers in the original position, no one knows if or when he or she might become disabled:

> The ADA fares remarkably well under a Rawlsian analysis, for the reality of disability closely corresponds to the hypothetical Rawlsian state of nature. At any given moment the majority of human beings have no disability, at least not as the term is used in the ADA. However, nobody knows what the future holds for them. They may become disabled later today, next year, in the next decade, or not at all.[71]

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[69] Rawls, *Justice as Fairness*, *supra* note 28, at 233, 234; *see also* RAWLS, RESTATEMENT, *supra* note 28, at 170 ("To begin, I put aside the more extreme cases of persons with such grave disabilities that they can never be normal contributing members of social cooperation.").

[70] RAWLS, LIBERALISM, *supra* note 28, at 272 n.10; *see also* EVA FEDER KITTAY, LOVE'S LABOR: ESSAYS ON WOMEN, EQUALITY, AND DEPENDENCY 80 (1999).

[71] David J. Popeil, *The Debate Over the Americans with Disabilities Act: A Question of Economics or Justice?*, 10 ST. JOHN'S J. LEGAL COMMENT. 527, 531 (1995); *see also* Gregory S. Kavka, *Disability and the Right to Work*, *in* AMERICANS WITH DISABILITIES: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS 174, 181 (Leslie Pickering Francis & Anita Silvers eds., 2000); Robert A. Bohrer, *A Rawlsian Approach to Solving the Problem of Genetic Discrimination in Toxic Workplaces*, 39 SAN DIEGO L. REV. 747, 751–52 (2002); Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 26–27 (1996).

Assuming that Rawlsian decision makers could consider disability, how would Rawls's principles of justice apply to the issue of disability, particularly disability-based discrimination in the workplace?

B. The Principle of Fair Opportunity

1. Rawls and "Irrational" Discrimination

The principle of fair opportunity goes beyond simple formal equality and ensures that everyone is afforded a fair chance to meet the qualifications for important political and social positions. It requires that "those who have the same level of talent and ability and the same willingness to use these gifts should have the same prospects of success regardless of their social class of origin."[72] Prospects for success should be determined by factors within the individual's control as defined by Rawls, such as ambition or effort, and not those that are " 'arbitrary from a moral point of view.' "[73]

As traditionally conceived, employment discrimination can be rational, meaning based on a real or perceived trait that is relevant to job performance, or "irrational," meaning based on a real or perceived trait that is irrelevant to job performance.[74] The principle of fair opportunity corresponds with the traditional model of antidiscrimination law, the prohibition of so-called "irrational" discrimination. Irrational discrimination occurs when an employer is motivated by false assumptions, stereotypes, or prejudice on the basis of non-relevant traits instead of by the actual abilities of a particular individual.[75]

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[72] RAWLS, RESTATEMENT, *supra* note 28, at 44.

[73] Choudhry, *supra* note 37, at 150 (quoting JOHN RAWLS, A THEORY OF JUSTICE 15 (1971)).

[74] *See* Larry Alexander, *What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies*, 141 U. PA. L. REV. 149, 169–70 (1992) (distinguishing rational from irrational stereotype or proxy discrimination); Gray, *supra* note 27, at 318 (noting social and sexual prejudice are characterized by Rawls as "irrational" and commenting that "stereotypes are simply irrelevant characteristics that must be discarded so that the 'essential person' can compete on the basis of his natural and cultivated skills").

[75] *See* Norman Daniels, *Mental Disabilities, Equal Opportunity, and the ADA*, *in* MENTAL DISORDERS, WORK DISABILITY, AND THE LAW 281, 283 (Richard J. Bonnie & John Monahan eds., 1997); Alexander, *supra* note 74, at 169; Choudhry, *supra* note 37, at 148.

As Professor Sujit Choudhry has observed, Rawls's theory would characterize irrational discrimination as unjust because "its purpose is to deny persons access to a material good or opportunity on the basis of reasons that are irrelevant to the distribution of that material good or opportunity."[76] Rawls's theory would similarly characterize the use of pernicious stereotypes as "yet another way in which circumstance—. . . membership in a class of persons whose abilities or qualifications are on average below the requisite standard—instead of one's choices is allowed to determine distributive shares."[77] In the specific context of discrimination in employment:

> [S]tereotypes are simply irrelevant characteristics that must be discarded so that the "essential person" can compete on the basis of his natural and cultivated skills. . . . Laws like [T]itle VII strip away these irrational "accidents" or prejudice from the substantial person, but "leave[] the organization of work . . . to the operation of the marketplace."[78]

2. The ADA's "Regarded as" Disabled and "Record of" Disability Categories

Disability-based discrimination may be based on a real or perceived disability that is not relevant to job performance or on a real or perceived disability that is relevant to job performance to some degree.[79] In the disability context, irrational discrimination occurs when an employer is motivated by false assumptions, stereotypes, or prejudice related to disability instead of by the actual abilities of a particular individual with a real or perceived disability.

Congress clearly intended the ADA to prohibit irrational discrimination, as it found that people with disabilities have been disadvantaged, at least in part, "from stereotypic assumptions not truly indicative of the individual['s] ability . . . to participate in, and contribute, to society."[80] Indeed,

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[76] Choudhry, *supra* note 37, at 152–53.

[77] *Id.* at 157.

[78] *See* Gray, *supra* note 27, at 318 (alteration in original).

[79] *See generally* David Olsky, Note, *Let Them Eat Cake: Diabetes and the Americans with Disabilities Act After* Sutton, 52 STAN. L. REV. 1829 (2002) (analyzing rational and irrational employment discrimination against people with diabetes).

[80] 42 U.S.C. § 12101(a)(7) (2000); *see also* Sutton v. United Air Lines, Inc. 527

even prior to the ADA, the Supreme Court recognized that workers harmed by false assumptions about disability should be protected from discrimination in the workplace because of their real or perceived impairments.[81] Accordingly, by prohibiting discrimination not related to actual ability, at least one of the purposes of the ADA was to allow people with disabilities to compete on the same terms as people without disabilities:

> [T]he continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity *to compete on an equal basis and* to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.[82]

Textually, the ADA's prohibition of discrimination against an individual "regarded as" disabled, whether or not he or she is actually disabled, or having a "record of" a disability discrimination indicates that the ADA seeks to prohibit discrimination on the basis of stereotype, stigma, and myth.[83] Consider an employer that avoids rehiring workers who have sustained injuries on the job because of the employer's general fear of re-injury. The ADA prohibits that employer from refusing to rehire a healed worker—a worker who is in fact able to safely perform the essential functions of his job—just because of the employer's general fear of re-injury.[84] It also prohibits an employer for a parcel delivery service who falsely believes that drivers with monocular vision are always unsafe from refusing to hire a monocular driver notwithstanding his actual driving performance.[85]

U.S. 471, 489 (1999).

[81] *See* Sch. Bd. v. Arline, 480 U.S. 273, 284 (1987) (finding school teacher fired solely because of her past record of and believed continuing susceptibility to tuberculosis is "disabled" under Rehabilitation Act).

[82] Anita Silvers, *"Defective" Agents: Equality, Difference and the Tyranny of the Normal*, 25 J. SOC. PHIL. 154, 166 (1994) (quoting 136 CONG. REC. S7422, at S7423 (1990); 136 CONG. REC. H2599, at H2640 (1990)).

[83] *See* Gray, *supra* note 27, at 317.

[84] *See* 29 C.F.R. pt. 1630, App. § 1630.2(r) (2003). *But see* Munoz v. H & M Wholesale, Inc., 926 F. Supp. 596, 606–08 (S.D. Tex. 1996).

[85] *See* EEOC v. UPS, 149 F. Supp. 2d 1115 (N.D. Cal. 2000), *aff'd in part, rev'd in part*, 306 F.3d 794 (9th Cir. 2002). In that case, UPS had a corporate-wide policy prohibiting drivers with monocular vision that was not based on a Department of Transportation safety standard or any actual driving records, and was in fact mistaken as some monocular drivers can retain themselves to be as safe as average binocular drivers. *Id.* at 1157–58. Note that the court framed the question as one of

C. The Difference Principle

As shown above, the experiential-social approach of the "history of" and "regarded as" prongs of the definition of disability address irrational discrimination by focusing on the social context that creates discrimination or disadvantage, rather than on the real or perceived impairment. This model, however, does not work well when the discrimination is based upon actual disability that does affect job performance to some degree. This situation calls for application of the difference principle—that social and economic inequalities must be attached to offices and positions open to all under conditions of fair equality or opportunity and be for the greatest benefit of the least-advantaged members of society.

1. People with Disabilities as "Least Advantaged"

According to Rawls, the "least advantaged" are those with the fewest primary goods. Although income and wealth have been considered the central primary goods,[86] Rawls defines primary goods as the things that all free and equal people need as citizens, including the basic liberties described above: freedom of movement and free choice of occupation among varied opportunities, powers and prerogatives of offices and positions of authority and responsibility, income and wealth, and the social bases of self respect.[87] All of these are social primary goods, which are under the direct control of the basic structure. In contrast, natural primary goods such as health and vigor, intelligence, and imagination are not under the direct control of the basic structure. The two principles of justice are meant to apply to social primary goods, not natural primary goods.[88]

first impression—whether a blanket safety standard that allegedly discriminated in hiring of employees on the basis of disability should be evaluated under the traditional business-necessity defense. *Id.* at 1161–63. Although the factual similarity is striking, the Supreme Court in *Murphy* addressed a distinct question—the interpretation of "disability." *See* Murphy v. UPS, 527 U.S. 516, 518–19 (1999).

[86] *See* Stein, *supra* note 27, at 999 (noting that Rawls "focuses almost exclusively on the primary goods of income and wealth").

[87] RAWLS, RESTATEMENT, *supra* note 28, at 59–60. Social bases of self respect is understood as those aspects of basic institutions normally essential if citizens are to have a lively sense of their worth as persons and to be able to advance their ends with self-confidence.

[88] RAWLS, THEORY, *supra* note 28, at 54–55.

Although not specifically considered so by Rawls, people with disabilities can be seen as the "least advantaged."[89] The approach is intuitively appealing because, unlike Title VII which applies to all individuals,[90] the ADA applies only to qualified individuals with disabilities.[91] Essentially, everyone has standing to bring suit under Title VII for discrimination on the basis of his or her race, national origin, gender, or religion, but only individuals who meet the statutory definition of disabled can bring suit under the ADA.[92] Thus, the structure of the ADA creates a well-defined group for analysis.

In addition, as argued by several authors, strong factual arguments can be made that people with disabilities comprise a least, or at a minimum a less, favored group in the Rawlsian sense, as the available research shows that people with disabilities are disproportionately poor.[93] People with disabilities comprise the largest population of people living in poverty[94] and experience a poverty rate estimated at three times that of the rest of the population.[95]

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[89] *See* Stein, *supra* note 27, at 1013. However, Stein concludes that if people with disabilities are considered the most disadvantaged class, distribution of income and wealth will be plagued by issues of insatiability and uncompensability. *Id.* at 1012; *see also* Mashaw, *supra* note 49, at 220 (noting that "[t]he Rawlsian difference principle that requires social arrangements constructed such that they optimize the position of the least advantaged might provide a strong prima facie claim for special efforts on behalf of the disabled in all walks of life") (footnote omitted).

[90] For instance, Title VII permits an assertion of a claim by a person who is a victim of discrimination on the basis of a characteristic which all individuals are presumed to have—race, color, national origin, sex, religion.

[91] 42 U.S.C. § 12111 (8) (2000).

[92] One consequence is that there is no possibility of so-called "reverse discrimination" suits under the ADA—a nondisabled individual cannot bring an action claiming that he or she is not being offered an accommodation that is being offered to a person with a disability.

[93] See Gray, supra note 27, at 315; Mark C. Weber, Beyond the Americans with Disabilities Act: A National Employment Policy for People with Disabilities, 46 BUFF. L. REV. 123, 127–28 (1998).

[94] *See* Burgdorf, *supra* note 19, at 422 (stating that the rate of poverty among people with disabilities is more than twice that of other Americans); LOUIS HARRIS & ASSOCS., N.O.D./HARRIS SURVEY OF AMERICANS WITH DISABILITIES 8 (2000), *available at* www.nod.org (last visited June 14, 2003) (reporting the income gap as 19% between people with and people without disabilities).

[95] Weber, *supra* note 93, at 127–28 (citing *Law Banning Job Bias Against Disabled Expected to Have a Significant Impact,* STAR TRIBUNE (Minneapolis-St. Paul), July 19, 1992, at 24A)).

Unfortunately, people with disabilities are "disproportionately amongst the poorest of the poor" worldwide. Rebecca Yao, *Chronic Poverty and Disability*, Background Paper Number 4, 5 (2001), *at* http://www.chronicpoverty.org/cp4.htm

Closely linked to the issue of poverty, and particularly relevant to analysis of the employment title of the ADA, is the lack of what Rawls terms the "free choice of occupation among varied opportunities" for people with disabilities. In the years immediately following the passage of the ADA, "unemployment levels for persons with disabilities range[d] from fifty to ninety percent."[96] Current available data indicates that people with disabilities are still failing to achieve a noticeable expansion of employment opportunities, and post-ADA research has "consistently" demonstrated that people with disabilities "have lower average wages and lower employment rates than non-disabled workers."[97]

Federal aid programs do not adequately address this gap. Although the Social Security Disability Insurance and Supplemental Security Income programs guarantee "a subsistence income to persons with total, long-term disabilities," only employment "offers individuals enough money to participate fully in the life of the community, or the status and satisfaction that comes from economic self-sufficiency."[98] Nor can the conspicuous underemployment of people with disabilities be attributed to choice. To the contrary, a survey cited in the legislative history of the ADA reported that two-thirds of working age persons with disabilities say that they are not working, and 66% of those not working say that they want to

(last visited April 6, 2003). "Whilst not all disabled people are poor, evidence points to a disproportionate number of disabled people in all countries being amongst those living in extreme or chronic poverty." *Id.* at 8. Moreover, the international research demonstrates that disability and poverty are mutually reinforcing—"disability adds to the risk of poverty, and conditions of poverty increase the risk of disability." Ann Elwan, *Poverty and Disability: A Survey of the Literature*: Social Protection Discussion Paper No. 9932, at i (1999), *at* http://www-wds.worldbank.org/servlet/WDS_IBank_Servlet?pcont=details&eid= 000 094946_0011210532099 (last visited April 6, 2003).

[96] Peter David Blanck, Employment Integration, Economic Opportunity, and the Americans with Disabilities Act: Empirical Study from 1990–1993, 79 IOWA L. REV. 853, 913 (1994).

[97] Marjorie L. Baldwin, *Can the ADA Achieve its Employment Goals?*, 549 ANNALS AM. ACAD. POL. & SOC. SCI. 37, 41 (1997). **[UTL]***But see* LOUIS HARRIS & ASSOCS., *supra* note 94, at 7 (noting as of 2000, 56% of people with disabilities who reported that they were able to work were working, compared to 46% in 1986).

[98] Pendo, *supra* note 11, at 1215–16; *see also* Kavka, *supra* note 71, at 175 ("[T]he right to work is a right to *employment*; it is a right to *earn* income, not simply a right to receive a certain income stream or the resources necessary to attain a certain level of welfare.").

work.[99] A more recent survey by the Harris polling organization reported that 67% of people ages 16 to 64 who identified themselves as disabled and unemployed said that they would prefer to be working.[100]

As Rawls's focus on the goods of income and wealth in the advantage analysis is predominant but not exclusive,[101] it is worth noting that strong arguments can be made in reference to the other bases of advantage. Overall, "[p]eople with disabilities experience 'the most extreme unemployment, poverty, psychological abuse, and physical deprivation experienced by one segment of our society.' "[102] As noted above, many disability issues relate to the basic liberties, such as state sanctioned involuntary sterilization, termination of parental rights, or limitations of the right to vote on the basis of disability.[103] In addition to disproportionately high levels of poverty and underemployment, people with disabilities have also been faced with challenges relating to freedom of movement and

[99] H.R. REP. NO. 101-485, at 32 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 314 (citing ICD SURVEY OF DISABLED AMERICANS: BRINGING DISABLED AMERICANS INTO THE MAINSTREAM 50).

[100] LOUIS HARRIS & ASSOCS., *supra* note 94, at 7. "A recent survey in a large state found that 72% of persons with disabilities who are unemployed want to work." Weber, *supra* note 93, at 128 n.20 (citing Minette McGhee, *Justice is Blind—For One Day: Court Gets Lesson on Disability*, CHI. SUN–TIMES, Nov. 19, 1992, at 22).

[101] Gray, *supra* note 27, at 312. For example:

> [Rawls] also suggests an alternative selection of the least advantaged as those with "fixed natural characteristics" upon which the unequal distribution of goods is founded. Finally, Rawls makes it plain that it is not necessary "to think of the least advantaged as literally the worst off individuals[s]" but rather as a plausible embodiment of this "practicable" and necessary concept. Under these conditions, and by either the socio-economic or natural-disadvantage standard, people with disabilities can constitute Rawls's least advantaged group.

Id. (citations omitted).

[102] *Id.* at 315 (quoting Hearings on S. 933, To Establish a Clear and Comprehensive Prohibition of Discrimination on the Basis of Disability, Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources, 101st Cong. 19 (1989) (statement of Justin Dart, Chairperson Task Force on the Rights and Empowerment of Americans with Disabilities)); *see also* Burgdorf, *supra* note 19, at 415 (" 'By almost any definition, Americans with disabilities are uniquely underprivileged and disadvantaged. They are much poorer, much less well educated and have much less social life, have fewer amenities and have a lower level of self-satisfaction than other Americans.' " (quoting Senate Subcomm. on the Handicapped, S. HRG. 166, 101st Cong. 9 (1987) (statement of Humphrey Taylor))).

[103] *See supra* notes 65–67.

transportation,[104] underrepresentation with regard to powers and prerogatives of offices and positions of authority and responsibility,[105] and denial of the social bases of self respect.

Rawls defines the social bases of self-respect as those aspects of basic institutions that are normally essential if citizens are to have a lively sense of their worth as persons and to be able to advance their ends with self-confidence.[106] Rawls considers self-respect or self-esteem to be one of the most important primary goods, because without it nothing may seem worth doing.[107] Although Rawls's concept of self-esteem or self-respect is not concisely or consistently defined throughout his work,[108] it seems consistent to include participation in the economic life of a society through employment within his concept:

> [G]iven actual human psychology, self-respect, is—to a considerable degree—dependent upon other people's affirmation of one's own worth. And in modern advanced societies, employment, earnings and professional success are, for better of worse, positively correlated with social assessments of an individual's value. Further, beyond the reactions of other people, work and career identifications form significant parts of some people's conceptions of themselves and their own worth; hence these identifications may contribute

[104] *See* LOUIS HARRIS & ASSOCS., *supra* note 94, at 11 (stating that people with disabilities are three times more likely than people without disabilities to consider inadequate transportation a problem); S. REP. NO. 99–400, at 2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2328, 2329 (discussing the background of discrimination in transportation responded to by the Air Carrier Access Act of 1986). *See generally* Michael Lewyn, *"Thou Shalt Not Put a Stumbling Block Before the Blind": The Americans with Disabilities Act and Public Transit for the Disabled*, 52 HASTINGS L.J. 1037 (2001); Martha T. McCluskey, Note, *Rethinking Equality and Difference: Disability and Discrimination in Public Transportation*, 97 YALE L.J. 863 (1988); Sharon Rennert, Note, *All Aboard: Accessible Public Transportation for Disabled Persons*, 63 N.Y.U. L. REV. 360 (1988).

[105] Consider also that in the 1996 presidential election, approximately six out of ten people with disabilities were registered to vote, compared to almost eight out of ten people without disabilities, "suggesting that people with disabilities have not been engaged in the political process at the same rate as people without disabilities." LOUIS HARRIS & ASSOCS., *supra* note 93, at 10.

[106] RAWLS, RESTATEMENT, *supra* note 28, at 60.

[107] RAWLS, THEORY, *supra* note 28, at 386, 387 (stating that "unless our endeavors are appreciated by our associates it is impossible for us to maintain the conviction that they are worthwhile" and that "[w]ithout it nothing may seem worth doing, or if some things have value for us, we lack the will to strive for them").

[108] *See* ANDREW KOPPELMAN, ANTIDISCRIMINATION LAW & SOCIAL EQUALITY 190–204 (1996) (discussing Rawls's concept of self-esteem/self-respect).

directly to the creation and sustenance of self-respect, and their absence will frequently have the opposite effect.[109]

2. Rawls and "Rational" Discrimination

Assuming that people with disabilities could be considered a least, or at a minimum a less, favored group, application of the difference principle requires that any social and economic inequalities be to the greatest benefit of the least advantaged members of society. Under Rawls's theory, disabilities or impairments are natural inequities that a just society must compensate for: "[U]ndeserved inequalities call for redress; and since inequalities of birth and natural endowment are undeserved, these inequalities are to be somehow compensated for." [110] Indeed, "in order to treat all persons equally . . . society must give more attention to those with fewer native assets."[111]

Rawls's treatment of disability shares strong links to the medical-functional model of disability, wherein a person with a disability is viewed as innately biologically different and inferior. Consequently, Rawls's theory suggests that the best way to help the disabled person is to use either medicine to cure or ameliorate the impairment or rehabilitation techniques to enable the person to cope with or overcome the impairment's effects.[112] In the context of employment discrimination, however, the difference principle corresponds to the concept of "rational" discrimination, wherein an employer acts on the basis of an accurate assessment of the worker's qualifications and the risks and benefits of hiring that individual.

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[109] Kavka, *supra* note 71, at 179.

[110] RAWLS, THEORY, *supra* note 28, at 86.

[111] *Id. But see* John M. Vande Walle, *In the Eye of the Beholder: Issues of Distributive and Corrective Justice in the ADA's Employment Protection for Persons Regarded as Disabled*, 73 CHI.-KENT L. REV. 897 (1998) (reasoning that the ADA is concerned with distributive justice in the Aristotelian sense based on criterion of possession of a disability, as opposed to most anti-discrimination statutes which are concerned with corrective justice, but the inclusion of individuals "regarded as" disabled follows the model of corrective justice, and thus subverts its distributive justice rationale).

[112] *See* RAWLS, THEORY, *supra* note 28, at 86–87; *see also* Stein, *supra* note 27, at 1001 (applying Rawls's difference principle, if the most disadvantaged class is people with disabilities, distribution of income and wealth will be plagued by issues of insatiability and uncompensability).

3. The ADA's "Actual" Disability Category and the Reasonable Accommodation Requirement

As stated above, disability-based discrimination may be "rational," meaning based on a real or perceived disability that is relevant to job performance. For example, consider an employer who does not want to spend money on new ergonomically-correct office equipment, and therefore refuses to hire a specific worker with carpal tunnel syndrome who would in fact require some specialized equipment.[113]

Congress intended to prohibit forms of rational discrimination against people with disabilities.[114] The first prong of the definition of disability—a physical or mental impairment that substantially limits one or more major life activities—in conjunction with the reasonable accommodation requirement, address this form of discrimination as the prong requires that employers do more than simply treat individuals with disabilities the same way as other similarly qualified applicants or workers. Unlike equality of opportunity which "places no constraints on the processes that determine how jobs are defined and individuated,"[115] the ADA imposes on employers an obligation to provide reasonable accommodation to make it possible for people with disabilities to perform essential job functions and to secure equal enjoyment of all terms and conditions of employers. As the Supreme Court has recognized:

> The Act requires preferences in the form of "reasonable accommodations" that are needed for those with disabilities to

[113] Of course, this example is not to suggest that providing reasonable accommodation is always costly or that the mere presence of an additional cost renders a decision to reject a worker with disabilities rational. Indeed, "a review of the available data suggests that the majority of accommodations cost less than $100 per employee." Pendo, *supra* note 11, at 1183–84. For a more complete discussion of the costs of reasonable accommodation, see generally id. and Michael Ashley Stein, *Labor Markets, Rationality and Workers with Disabilities*, 21 BERKELEY. J. EMP. & LAB. L. 314 (2000).

[114] "Congress was relatively clearer about the multifaceted nature of disability discrimination. Legislators openly acknowledged that disability discrimination may result not only from invidious animus, but simply from 'unthinking' conduct." Michelle A. Travis, *Perceived Disabilities, Social Cognition, and "Innocent Mistakes,"* 55 VAND. L. REV. 481, 482 (2002) (exploring a tort-based approach to cases in which an employer that takes a negative employment action against an employee based on a mistaken belief that the employee is disabled).

[115] Richard J. Arneson, *Disability, Discrimination and Priority*, *in* AMERICANS WITH DISABILITES: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS, *supra* note 71, at 18, 23.

> obtain the *same* workplace opportunities that those without disabilities automatically enjoy. By definition a special "accommodation" requires the employer to treat an employee with a disability differently, *i.e.*, preferentially. And the fact that the difference in treatment violates an employer's disability-neutral rule cannot by itself place the accommodation beyond the Act's potential reach. [116]

III. A RAWLSIAN ANALYSIS OF RECENT ADA JURISPRUDENCE

In its last several terms, the Supreme Court has increasingly turned its attention toward the ADA. Indeed, Justice O'Connor suggested that the term ending June 2002 might be remembered as the "disabilities act term."[117] These cases spawned a wealth of scholarship, much of it critical,[118] and

[116] US Airways, Inc. v. Barnett, 535 U.S. 391, 397 (2002). However, the Court goes on to hold that in the absence of specific circumstances established by the employee an employer's showing that the requested accommodation conflicts with seniority rules is sufficient to show that the accommodation is not reasonable. *Id.* at 406.

[117] Speech by Justice Sandra Day O'Connor, March 14, 2002 at Georgetown University Law Center.

[118] The *Sutton* trilogy on standing is discussed in numerous articles. *See* Samuel R. Bagenstos, *Subordination, Stigma, and "Disability,"* 86 VA. L. REV. 397, 400 (2000) (suggesting "the criticism of the Court's 'disability' quartet—from both sides—is overblown"); Amy Maes, *The Americans with Disabilities Act—Time to Measure the Efficacy of This Legislation*, 79 MICH. B.J. 1664, 1664–65 (2000) [**UTL**] (commenting that the adoption of the restricted definition of disability by *Sutton*, *Murphy*, and *Albertson's* "may force out of the courtroom discussion any consideration of how medications themselves affect major life activities"); Tony R. Maida, *How Judicial Myopia Is Jeopardizing the Protection of People with HIV/AIDS Under the ADA,* 27 AM. J.L. & MED. 301, 304 (2001) (arguing that the *Sutton* trilogy definition of disability threatens the ADA's protection of persons with HIV/AIDS); Stacie E. Barhorst, Note, *What Does Disability Mean: The Americans with Disabilities Act of 1990 in the Aftermath of* Sutton*,* Murphy, *and* Albertsons, 48 DRAKE L. REV. 137 *passim* (1999) (exploring the effects of the Sutton trilogy on the ADA); Erin K. Barta, Comment, *Practical Effects of the* Sutton *Decision*: *Mitigation, Deference, and the EEOC*, 7 TEX. WESLEYAN L. REV 35, 57–59 (2000) (discussing the possible practical effects of *Sutton* on employers); Thad LeVar, Note, *Why an Employer Does Not Have to Answer for Preventing an Employee with a Disability from Utilizing Corrective Measures: The Relationship Between Mitigation and Reasonable Accommodation*, 16 BYU J. PUB. L. 69, 81 (2001) (arguing that an alternate, single qualification test to evaluate whether a claimant qualifies to bring an ADA employment discrimination claim, rather than the currently employed bifurcated qualification test, would close the loophole for employers who prohibit employees from using mitigating measures to correct disabilities); Lauren J. McGarity*,* Note, *Disabling Corrections and Correctable Disabilities: Why Side Effects Might Be the Saving Grace of* Sutton, 109 YALE L.J. 1161, 1162–63 (2000) (arguing that the impact of the Supreme Court's holding in the *Sutton* trilogy may

be significantly narrower than initial interpretations indicate); Sarina Maria Russotto, Comment, *Effects of the* Sutton *Trilogy*, 68 TENN. L. REV. 705, 712–13 (2001) (arguing "[w]hen the Supreme Court decided that mitigating or corrective measures must be considered to determine if an individual has an ADA disability, the Court effectively narrowed the protected class of people by identifying different classes of disabilities").

The *Garrett* case is not without its share of commentators. *See* Pamela Brandwein, *Constitutional Doctrine as Paring Tool: The Struggle for "Relevant" Evidence in* University of Alabama v. Garrett, 35 U. MICH. J.L. REFORM 37, 37–38 (2002) (examining the "difficulties involved in translating the social model of disability into the idiom of constitutional law"); Judith Olans Brown & Wendy E. Parmet, *The Imperial Sovereign: Sovereign Immunity & the ADA,* 35 U. MICH. L.J. REFORM 1, 2, 2–16 (2002) (following "the development of the Supreme Court's newfound concern for state sovereignty and discuss[ing] its culmination in *Garrett*"); Ruth Colker & Adam Milani, *The Post-*Garrett *World: Insufficient State Protection Against Disability Discrimination*, 53 ALA. L. REV. 1075, 1075–1121 (2002) (providing an overview of state anti-discrimination statutes and concluding that state laws are not a sufficient gap filler in the disability area); Ronald D. Rotunda, *The Eleventh Amendment,* Garrett*, and Protection for Civil Rights*, 53 ALA. L. REV. 1183, 1189 (2002) (arguing that "*Garrett* is not a break with precedent but part of it, and that Congress still has plenty of power" to protect the rights of persons with disabilities); Michael L. Russell, *The Americans with Disabilities Act and the Eleventh Amendment: Do States Have a License to Discriminate?*, 28 OHIO N.U. L. REV. 133, 146–47 (2001) (arguing that while the *Garrett* decision was disappointing for employee rights advocates and others, there still exist several avenues by which persons can enforce their rights under the ADA and similar antidiscrimination statutes); Sienna DeAgostino, Note*,* Board of Trustees of the University of Alabama v. Garrett: *The Decision's Impact on the Americans with Disabilities Act,* 79 U. DET. MERCY L. REV. 281 *passim* (2002) (exploring the effects of the *Garrett* decision on the ADA); Kimberly E. Dean, Note, *In the Light of the Evil Presented: What Kind of Prophylactic Anti-Discrimination Legislation Can Congress Enact After* Garrett, 43 B.C. L. REV. 697, 725 (2002) (arguing "[t]he *Boerne-Garrett* line of cases represents the Court's clear attempt to diminish Congress's power under Section 5 [of the Fourteenth Amendment]"); Roger C. Hartley, *Enforcing Federal Civil Rights Against Public Entities After* Garrett, 28 J.C. & U.L. 41 (2001) (arguing that the outcome in *Garrett* was dictated neither by precedent nor by rational basis standard of judicial review accorded disability based discrimination and evaluating the possible effects of the *Garrett* decision); Mark A. Johnson, Note, Board of Trustees of the University of Alabama v. Garrett: *A Flawed Standard Yields a Predictable Result,* 60 MD. L. REV. 393, 394 (2001) (arguing that *Garrett* was wrongly decided); Geoffrey Landward, Comment, Board of Trustees of the University of Alabama v. Garrett *and the Equal Education Opportunity Act: Another Act Bites the Dust*, 2002 BYU EDUC. & L.J. 313, 323–29 (2002) (applying the *Garrett* standard to the EEOA and arguing that the standard will fail to abrogate states' Eleventh Amendment immunity); Jaclyn A. Okin, Comment, *Has the Supreme Court Gone Too Far?: An Analysis of* University of Alabama v. Garrett *and Its Impact on People with Disabilities*, 9 AM. U. J. GENDER SOC. POL'Y & L. 663, 694 (2001) (arguing that "with the ruling in *Garrett*, the Supreme Court is prohibiting further implementation of the ADA, and it is unlikely that all individuals with disabilities will ever find themselves fully integrated within society"); Nicole S. Richter, Note*, The Americans with Disabilities Act After* University of Alabama v. Garrett: *Should the States Be Immune From Suit?*, 77 CHI.-KENT L. REV 879, 892–98 (2002) (arguing that the ADA

have rendered the federal courts a harsh environment for workers with disabilities.[119] Despite the clear links established above, the cases do not reflect a Rawlsian interpretation of the ADA.

A. The Cases

1. The *Sutton* Trilogy

In 1999, the Supreme Court decided the "*Sutton* trilogy" on standing, comprised of *Sutton v. United Air Lines, Inc.*,[120] *Albertson's, Inc. v. Kirkingburg*,[121] and *Murphy v. United Parcel Service, Inc.*[122] In the leading case of the *Sutton* trilogy, two applicants with severe but fully correctable nearsightedness challenged United Air Lines's requirement of uncorrected vision of 20/100 or better for global pilots. Plaintiffs contended that they had standing to assert an ADA claim because their visual impairment was an actual disability, meaning a physical or mental impairment which substantially limits one or more major life activities or, in the alternative, that they were "regarded as" having such impairment by United.[123] In diametric opposition to the EEOC's interpretation, the Court held that the ADA requires an individualized consideration of the plaintiff's undisputed impairment, taking into account any medical treatment,

should apply to the states because it is a valid abrogation of the states' Eleventh Amendment immunity); Joan Shinavski, Note, *The Eleventh Amendment Bars Private Individuals from Suing State Employers for Money Damages Under Title I of the Americans with Disabilities Act:* Board of Trustees of the University of Alabama v. Garrett, 40 DUQ. L. REV. 161 *passim* (2001) (discussing Eleventh Amendment immunity in light of the *Garrett* decision).

[119] Indeed, as Professor Ruth Colker has shown, ADA plaintiffs lose over 93% of their cases, while employment discrimination plaintiffs in general lose only 22% of their cases. Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV., 99, 100, 100 n.10 (1999) (documenting overwhelming pro-defendant outcome in appellate court decisions in ADA case decisions since the ADA became effective). According to another recent study, employers prevailed against workers and applicants in 95.7% of the Title I cases decided on the merits in federal court. William C. Smith, *Drawing Boundaries*, ABA JOURNAL, Aug. 2002, at 49, 50 (citing MENTAL AND PHYSICAL DISABILITY LAW REPORTER). In addition, employers prevailed against workers and applicants in 73.3 percent of Title I cases resolved by EEOC administrative decision. *Id.*

[120] 527 U.S. 471 (1999).

[121] 527 U.S. 555 (1999).

[122] 527 U.S. 516 (1999).

[123] *Sutton*, 527 U.S. at 475–76.

corrective devices and other mitigating measures.[124] Because the plaintiffs could fully correct their nearsightedness with contact lenses, the Court found that, despite their impairments, the plaintiffs were not actually disabled as defined by the first prong. The Court then held that the plaintiffs were not "regarded as" disabled because United did not regard them as substantially limited in the major life activity of working but only unable to perform the specific job of global pilot.

Similarly, in *Albertson's*, the Court rejected the attempt by an experienced driver with monocular but naturally compensable vision to challenge Albertson's failure to rehire him on the basis of his uncorrected vision. The Court again found no standing because, although monocular vision is a physical impairment within the meaning of the ADA, the plaintiff's natural compensation mechanisms prevented the impairment from substantially limiting his major life activities, specifically the activity of seeing.[125]

In the third case, *Murphy*, the Court considered a mechanic-driver's challenge to UPS's failure to rehire him on the basis of his failure to meet the blood pressure requirements for drivers of commercial vehicles set by the Department of Transportation. The Court found that he was not actually disabled within the meaning of the ADA because his high blood pressure did not substantially limit his major life activities when he was medicated for his condition.[126] Instead, his high blood pressure simply rendered him unqualified for his specific job because he was unable to obtain certification from the Department of Transportation. The Court then held that the plaintiff was not "regarded as" disabled because UPS did not regard him as substantially limited in the major life activity of working but only unable to perform the specific job of mechanic with driving

[124] According to the Court, the EEOC's "Interpretive Guidance" provides "[t]he determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assertive or prosthetic devices." *Sutton*, 527 U.S. at 480 (quoting 29 C.F.R. pt. 1630, App. § 1630.2(j) (1998)). The Court determined that no deference was due this regulation because "no agency has been delegated authority to interpret the term 'disability.' " *Id.* at 479.

[125] *Albertson's*, 527 U.S. at 562–67.

[126] *Murphy*, 527 U.S. at 521.

duties due to failure to meet the applicable certification standard.[127]

2. *Toyota Motor Manufacturing v. Williams*

Two years later, in *Toyota Motor Manufacturing v. Williams*,[128] the Court narrowly construed the major life activity of performing manual tasks.[129] It found that an employee with carpal tunnel syndrome, tendonitis, and other admitted impairments was not disabled within the meaning of the ADA because her impairments did not significantly affect her activities of daily life but only the specific tasks of her actual job.[130] It was not disputed that the plaintiff's impairment:

> [P]revented her from doing the tasks associated with certain types of manual assembly line jobs, manual product handling jobs and manual building trade jobs (painting, plumbing, roofing, etc.) that require the gripping of tools and repetitive work with hands and arms extended at or above the shoulder levels for extended periods of time.[131]

However, noting plaintiff's ability to "brush her teeth, wash her face, bathe, tend her flower garden, fix breakfast, do laundry, and pick up around the house," the Court stated that "[w]hen addressing the major life activity of performing manual tasks, the central inquiry must be whether the claimant is unable to perform the variety of tasks central to most people's daily lives, not whether the claimant is unable to perform the tasks associated with her specific job."[132]

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[127] *Id.* at 521–25.

[128] 534 U.S. 184 (2002).

[129] The *Williams* Court did not consider whether Williams was substantially limited in the major life activity of working. However, other courts have found that to be substantially limited in the major life activity of working, the plaintiff must be " 'significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities.' " Moysis v. DTG Datanet, 278 F.3d 819, 825 (8th Cir. 2002) (quoting 29 C.F.R. § 1630.2(j)(3)(i) (1998)); *see Sutton*, 527 U.S. at 492 (assuming that working is a major life activity, a claimant would be required to show an inability to work in broad range of jobs, rather than a specific job).

[130] *Williams*, 534 U.S. at 201–02.

[131] *Id.* at 192 (quoting *Williams v. Toyota Motor Manufacturing*, 224 F.3d 840, 843 (6th Cir. 2000)).

[132] *Id.* at 202, 200–01.

3. *Chevron v. Echazabal*

As noted above, a worker with a disability can be barred from the workplace under the ADA as not "otherwise qualified," which includes meeting legitimate qualifications that are job-related and consistent with business necessity, such as not constituting a direct threat to the health or safety of other individuals in the workplace. In its 2002 decision *Chevron U.S.A., Inc. v. Echazabal*,[133] the Supreme Court interpreted the ADA's definition of the "direct threat" doctrine to include a "threat-to-self" element and permitted an employer to reject an applicant with a medical condition that it believes might be exacerbated by workplace conditions. In that case Echazabal sought employment at one of Chevron's oil refineries, and was refused employment on the basis of the opinion of Chevron's doctors that Echazabal's liver condition would be exacerbated by continued exposure to toxins at the refinery. Echazabal brought suit, arguing that Chevron refused to hire him because of his disability in violation of the ADA.[134] Although the ADA provides that an employer may require "that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace,"[135] Chevron defended its refusal to hire in reliance on a significantly broader EEOC regulation that provided that an employer may reject a worker who poses "a direct threat to the health or safety *of the individual or* others in the workplace."[136] In interesting contrast to its approach in the *Sutton* trilogy, the *Echazabal* Court found that the EEOC's extension of the statutory language in *Echazabal* did not exceed the scope of permissible rule making under the ADA.

4. *US Airways v. Barnett*

The 2002 Court also created an additional bar to reasonable accommodation—distinct from the undue burden analysis—in *US Airways, Inc. v. Barnett*.[137] In that case, the Court held that in the absence of specific circumstances established by the employee, an employer's showing that the requested

[133] 536 U.S. 73 (2002).

[134] *Id.* at 76–77.

[135] 42 U.S.C. § 12113(b) (2000).

[136] *See Echazabal*, 536 U.S. at 77; 29 C.F.R. § 1630.15(b)(2) (2001) (emphasis added).

[137] 535 U.S. 391 (2002).

accommodation conflicts with an employer's voluntary seniority system is sufficient to show that the accommodation is not reasonable.[138] When Barnett injured his back as a cargo handler, he was reassigned to the mailroom. Subsequently, his mailroom position was opened to US Airways's seniority assignment system, and employees with more seniority requested his assignment. US Airways refused his request to keep his assignment as a reasonable accommodation of his undisputed disability, and he filed an ADA suit. The District Court and the Ninth Circuit both considered his request to keep his assignment a reasonable accommodation to be granted unless the employer can show that it represented an undue burden in light of the seniority system. In contrast, the Supreme Court held that the existence of a seniority system—whether voluntary or collectively bargained—impacted the reasonableness of the accommodation directly.[139]

B. Excluding Workers with Mitigatable Impairments Does Not Comport with the Principle of Fair Opportunity

In the *Sutton* trilogy, the Court espoused a narrow and individualistic biomedical model as the primary understanding of disability, resulting in a severe constriction of the protected class. As Professor Paula Berg has noted:

> Despite its centrality to antidiscrimination law, courts have largely eschewed the socio-political perspective when determining whether a plaintiff claiming discrimination is disabled and therefore entitled to legal protection. Instead, they have remained firmly entrenched in an essentialist biomedical understanding of disability, which has resulted in the fabrication of an extremely narrow category of disability. [140]

The trilogy also creates a "Catch-22"—a worker with an undisputed impairment who is rejected because of that impairment has no standing to challenge the rejection if it so happens that the impairment can be mitigated or corrected. This is true even if the impairment does not affect the worker's

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[138] *Id.* at 402–06.

[139] Indeed, the seniority system at issue was voluntarily and unilaterally imposed by US Airways, and was not the result of collective bargaining. *Id.* at 423–24 (Souter, J., dissenting).

[140] Paula E. Berg, *Ill/Legal: Interrogating the Meaning and Function of the Category of Disability in Antidiscrimination Law,* 18 YALE L. & POL'Y REV. 1, 13 (1999).

ability to do her job.[141] Thus, employers are free to reject fully capable workers with correctable impairments without fear of an ADA claim because those workers are not "disabled" as defined by the Court.

This interpretation of standing is not necessitated by the language or structure of the ADA and fails to prevent the type of irrational disability-based discrimination targeted by Rawls's principle of fair opportunity and the legislative history and structure of the ADA. As a result of the Court's decisions, many workers who are able to do their jobs without any accommodation and who experience real or perceived impairments significant enough to form the basis of disability-based discrimination will be excluded from the workplace without standing to seek relief. Reconsider the outcome of the examples of irrational discrimination in Part II.B.2. The Court's decisions suggest that an employer who avoids rehiring workers who have sustained injuries on the job because of a general fear of re-injury may refuse to rehire that worker because of his impairment even though he is able to safely perform the essential functions of his job.[142] They similarly suggest that an employer for a parcel delivery service who falsely believes that drivers with monocular vision are always unsafe may refuse to hire a monocular driver based on that disability notwithstanding his actual driving performance.[143] This is not merely a hypothetical possibility. One disability advocate has already reported that one of her clients, an individual with a congenital amputation, functioned so well with a prosthetic device that a court found he was not disabled under the *Sutton* standard, yet he was still rejected by the employer because of the prosthesis even though it did not effect his ability to perform his job.[144]

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[141] The facts of cases such as *Sutton* can obscure this important point because in such cases, even if the plaintiff had standing, relief would be denied for one of several reasons: the nature of the plaintiff's impairment renders her unable to perform the essential functions of her job; reasonable accommodation is not possible on the facts; or because such reasonable accommodation would be unduly burdensome or pose a direct threat to others in the workplace. The Court, however, never reaches any of these questions because it stops plaintiff short on the threshold issue of standing.

[142] *See* Munoz v. H & M Wholesale, Inc., 926 F. Supp. 596, 607–08 (S.D. Tex. 1996).

[143] *See* EEOC v. UPS, 149 F. Supp. 2d 1115, 1168–69 (N.D. Cal. 2000), *aff'd in part, rev'd in part*, 306 F.3d 794 (9th Cir. 2002).

[144] Smith, *supra* note 191, at 51 (citing Arlene Mayerson of the Disability

C. *Excluding Workers with Mitigatable and/or Job-Specific Impairments Does Not Comport with the Difference Principle*

Pursuant to the *Williams* case, a worker with an impairment that affects her ability to do her job, rather than to perform daily activities unrelated to the job, can be rejected on the basis of her impairment without recourse under the ADA. This is true even if, as was the case in *Williams*, the impairment could be, and had previously been, reasonably accommodated. Taken together with the *Sutton* trilogy, these cases dramatically constrict the protected class by excluding workers with mitigatable impairments or job-specific limitations or both. In effect, the Court has proceduralized the definition of disability and severed it from the concepts of disability-based stigma and prejudice as well as from the demands of the workplace.

This interpretation of standing is not necessitated by the language or structure of the ADA and fails to prevent the type of rational disability-based discrimination targeted by Rawls's difference principle and the legislative history and structure of the ADA. It is radically underinclusive if workers with disabilities are defined with respect to the Rawlsian concept of least advantaged. In addition, many workers who are able to do their jobs with reasonable accommodation and also experience real or perceived impairments significant enough to form the basis of discrimination will be excluded from the workplace without standing to seek relief. Reconsider the outcome of the examples of rational discrimination in Part II.C.2. The Court's decisions suggest that the employer who does not want to spend money on new ergonomically correct office equipment may refuse to hire a specific worker with carpal tunnel syndrome who would in fact require some specialized equipment. Consequently, the ADA will fail to prohibit a great deal of irrational disability-based discrimination: "[L]ower courts following *Toyota* and the *Sutton* trilogy may turn away precisely the workers the ADA was designed to protect: people with disabilities who can do the job with reasonable accommodations, but who don't get hired because of unfounded stereotypes."[145]

Rights Education Fund).

[145] *Id.* at 51 (citing Professor Scott C. Burris).

D. Limiting the Employer's Duty of Inclusion Does Not Comport with the Difference Principle

The *Echazabal* and *Barnett* decisions indicate that even if a worker manages to establish standing under the ADA, the employer's duty of inclusion is limited. The Court's expansive interpretation of the business necessity doctrine and narrow interpretation of the reasonableness of accommodations involving seniority systems is not necessitated by the language or structure of the ADA. It also fails to prevent the type of rational disability-based discrimination targeted by Rawls's difference principle and the legislative history and structure of the ADA.

These cases continue to sanction the disabling of employees who could perform the essential function of their jobs with reasonable accommodation through employer rule making. Indeed, the facts of the *Williams* case provide an illustration of how workplace rule making can be disabling, as she was able to perform her existing job duties until manual inspection tasks were added to her job duties in 1996.[146] As one author has argued, the structure of the reasonable accommodation requirement, particularly the strict application of the requirement that a worker with a disability be able to perform every essential function of the job as defined by the employer, blocks the full inclusion of people with disabilities into economic life as envisioned by the difference principle.[147] Significantly, the employer continues to hold the power to define work and normal workplace standards.[148] Prior to these cases, it was established

[146] Plaintiff began working at an automobile manufacturing plant in 1990 on the engine fabrication assembly line. When use of the pneumatic tools on the assembly line caused pain in her hands, wrists, and arms, diagnosed as bilateral carpal tunnel syndrome and bilateral tendonitis, she was transferred to modified duty jobs. In 1993, she was transferred to a paint and body inspection line which required visual and manual inspection tasks. In light of her medical restrictions, she performed only the visual inspection. However, in 1996, her employer announced that all paint and body inspection line employees would be required to perform both visual and manual inspection, the latter consisting of wiping down the cars with a highlight oil. Soon after the manual inspection tasks were added to her job duties, she began to experience debilitating pain in her neck and shoulders. Thus, Ms. Williams was transformed from adequate worker to inadequate worker by virtue of her employer's policy change in 1996. And when she requested the accommodation of returning to her original job of visual inspection, Toyota refused. Toyota Motor Mfg. v. Williams, 534 U.S. 184, 187–90 (2002).

[147] Gray, *supra* note 27, at 333.

[148] Iris Marion Young, *Disability and the Definition of Work*, *in* AMERICANS

that the employer may choose the type of accommodation with no obligation to make the most efficacious or best accommodation possible or every accommodation required, as long as the accommodation made enables the individuals to perform the essential job functions and provides the employee with employment benefits equivalent to those of other employees.[149] However, these cases go much farther in limiting the employer's duty of inclusion, ironically in the language of worker safety and labor or union rights. There is no recognition of the disability category as a political and non-neutral instrument of the employer to control the workforce.[150]

IV. SOME LIMITATIONS OF A RAWLSIAN APPROACH TO THE ADA

Although the use of Rawlsian methodology as a foundation for interpretation of the ADA in recent cases would lead to results more in line with Rawlsian objectives as well as the language and stated purposes of the ADA, it also reveals some significant limitations of the Rawlsian approach.

A. Can the Rawlsian Assumption of Rationality Overcome a Failure of Identification?

Decision-makers in the original position are assumed to be rational and able to identify with the experiences of others based on the premise that they might be the "other" once the veil is lifted. Does this kind of rationality assumption work for disability in general or in the workplace in particular? Although some have argued that disability fares well under a Rawlsian analysis as outlined above, others have suggested that the Rawlsian construct of decision making in the original position will fail because people without disabilities will be unable to identify with the experiences of people with disabilities.[151]

WITH DISABILITES: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS, *supra* note 71, at 169, 171.

[149] *See* 29 C.F.R. pt 1630, App. § 1630.9 (1995).

[150] Young, *supra* note 148, at 171.

[151] This argument is related to but distinct from the general critique of Rawlsian decisionmakers as isolated and atomistic. *See* Linda McClain, *"Atomistic Man" Revisited: Liberalism, Connection, and Feminist Jurisprudence,* 65 S. CAL. L. REV. 1171, 1177 (1992) (contending that Rawls's theory "views human beings as essentially separate and disembodied from their social contexts" (citing MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982))); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 2 (1988) (arguing that Rawls's

Specifically, philosopher Anita Silvers argues that people without disabilities lack "experiential accessibility" in such situations:

> What obstruct[s] ethical thinking here is that reasoning responds to the common, not the deviant, case. In general, the compulsion to dismiss the disabled as abnormal—that is, as being in a state unthinkable for oneself—renders all appeals to such criteria as what one would wish done were one in the other person's place ineffective where persons with disabilities are concerned.[152]

There is, in fact, considerable evidence that suggests people without disabilities are unable to identify with people with

theory describes persons as "distinct individuals first," only forming "relationships and engag[ing] in co-operative arrangements with others" thereafter); *see also* MARTHA MINOW, MAKING ALL THE DIFFERENCE 149, 150 (1990) (stating that Rawls's theory claims to "be inclusive, participatory, and egalitarian, yet . . . replicate[s] the process of exclusion and subordination that preserves the two tracks of legal treatment," and Rawls's "heuristic device of the social contract presumes to address only autonomous, independent individuals who can separate themselves from others and enter freely, unencumbered, into an agreement about how to conduct private and public affairs"). *But see* McClain, *supra*, at 1204 (noting Rawls's assertion that his theory is not atomistic because he argues that political liberalism "rests upon shared public values that specify the fundamental terms of political and social cooperation"). "Rawls also acknowledges that citizens could not, in all likelihood, stand apart from their attachments and their views of the good, which are so integral to their identity." *Id.* "Rawls's theory envisions not a disembodied individual, but a society where recognition of interdependency leads to mutual respect. . . ." *Id.* at 1209. In addition, Rawls advances the conception of social union, a type of mutual cooperation necessary for self-completion. In short, "Rawls's justification pictures society not as atomistic or self-interested but as interdependent and connected." *Id.* at 1217.

[152] Anita Silvers, *Reconciling Equality to Difference: Caring (F)or Justice for People with Disabilities*, *in* FEMINIST ETHICS AND SOCIAL POLICY 23, 29 (Patrice DiQuinzio & Iris Marion Young eds., 1997). Although not specifically in the context of disability, Martha Minow makes a similar point about Rawls's requirement of identification or consideration of others:

> An especially telling remnant of particularity within Rawls's failed attempt to posit an individual removed from particular circumstances is that the very form of his questions presumes that the person behind the veil of ignorance is not the worst-off person. It assumes some essence of a self preexisting one's situation, and anyone would approach the possibility of being worst off the same way. Like the assumption of an unsituated perspective that contributes to the dilemma of difference, this approach ignores contrary perspectives while denying that it is partial. Rawls's question is put only to the particular person who is not the worst off, a particular person who is not likely to understand fully the situation of the worst-off.

MINOW, *supra* note 151, at 154.

disabilities, including empirical evidence indicating that people without disabilities significantly and unreasonably devalue the lives of people with disabilities. Indeed, the finding that people with serious and persistent disabilities report a good or excellent quality of life despite the negative judgment of external, non-disabled observers has been termed the "disability paradox."[153] For example, one study indicated that people with impairments rated their lives as more difficult but not less happy or satisfying. Moreover, only half, if given one wish, would use it to remove their disability.[154] Another found that:

> [T]he disabled tend to think of themselves as less unfortunate, less depressed, anxious and hostile than others judge them to be. They give the same ratings as the non-disabled do on their degree of satisfaction, frustration and happiness. Additionally . . . there is little association between good health and happiness, except in the case of the fatally ill.[155]

Even people with serious disabilities have reported a quality of life averaging only slightly lower than that reported by non-disabled people.[156]

The disparity between judgments of people with and people without disabilities about the lives of people with disabilities may be reflected and reinforced by a "spoiling process," whereby the physical impairment " 'obscure[s] all other characteristics behind that one and swallow[s] up the social identity of the individual within that restrictive category.' "[157] In his influential

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[153] Gary L. Albrecht & Patrick J. Devlieger, *The Disability Paradox: High Quality of Life Against All Odds*, 48 SOC. SCI. & MED. 977, 978–79 (1999).

[154] *Experiences of Deviance, Chronic Illness, and Disability, in* THE SOCIAL MEDICINE READER 75, 76 (Gail E. Henderson et al. eds., 1997).

> [A]n investigation of 145 physically disabled individuals found that, compared to nondisabled persons, those with impairments did not rate their lives as less happy or satisfying. The people with disabilities did, however, rate their lives as more difficult and likely to stay that way. Another study of 88 seriously physically restricted persons posed the question, "If you were given one wish, would you wish that you were no longer disabled?" Only half said they would wish to remove their disability.

Id. (citation omitted).

[155] Joan Susman, *Disability, Stigma and Deviance*, 38 SOC. SCI. & MED. 15, 17–18 (1994) (internal citations omitted).

[156] Ron Amundson, *Biological Normality and the ADA*, *in* AMERICANS WITH DISABILITES: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS, *supra* note 71, at 102, 106.

[157] Irving Kenneth Zola, *Self, Identity, and the Naming Question: Reflections on the Language of Disability*, *in* THE SOCIAL MEDICINE READER, *supra* note 154, at 77, 80 (quoting Paul K. Longmore, *A Note on Language and the Social Identity of*

work, *Stigma: Notes on the Management of Spoiled Identity*, sociologist Erving Goffman defines stigmatization as the process by which a trait or difference, such as disability or perceived disability, evokes a negative or punitive response.[158] Goffman asserts that a necessary but not sufficient basis of stigma is deviance from accepted norms, as "a person is not a deviant until his acts or attributes are *perceived* as negatively different."[159] Although disability is not necessarily stigmatizing, "research reveals that it often undermines the taken-for-granted aspects of ordinary encounters between disabled and non-disabled people."[160] Similar concepts discussed in the social science literature include disability as a "master status," wherein "a person who has an impairment somehow gets lost to awareness and only the impairment itself remains seen"[161] and "spread," defined as "the often unconscious assumption that a person, disabled in one way, is therefore disabled in all other ways."[162]

Disabled People, 28 AM. BEHAV. SCIENTIST 419 (1985)).

[158] *See generally* ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY (1963).

[159] Susman, *supra* note 155, at 16.

[160] *Id.* at 17.

[161] *Id.* at 19 (summarizing studies). Moreover, there is some evidence that the labeling negatively impacts people with disability. *See* Bruce G. Link, *Understanding Labeling Effects in the Area of Mental Disorders: An Assessment of the Effects of Expectations of Rejection*, 52 AM. SOC. R. 96 (1987) (finding when people enter psychiatric treatment and are labeled, beliefs that others devalue and discriminate against mental patients become personally applicable and lead to self-devaluation and/or the fear of rejection by others, which negatively impacts both psychological and social functioning).

[162] *See* Hugh Gregory Gallagher, *"Slapping up Spastics": The Persistence of Social Attitudes Toward People with Disabilities,* 10 ISSUES L. & MED. 401, 411 (1995). There is some interesting work on why disability provokes such strong emotional responses on the part of a person without a disability, responses which may have little if anything to do with the disabled person's reality. Professor Silvers contends that "[a]dvantaged persons dread beholding damaged persons out of fear that they in future might themselves become impaired." Silvers, *supra* note 152, at 31 (citing Lawrence Blum, *Moral Perception and Particularity*, 101 ETHICS 701, 718 (1991)). Another author's review of the anthropological literature suggests that disability's "undue salience" is attributable to fear or dread of becoming disabled, fear of dependence in light of our cultures excessive valuing of "independence, self-reliance, beauty, and health," violation of "belief in a just world" and discomfort with liminal categories such as disability. *See* Susman, *supra* note 155, at 19 (summarizing the work of Goffman, Mary Douglas and Claude Levi-Strauss, among others) (citations omitted). Confronting disability may also reveal a clash of different ways of perceiving disability—the ideology of normalization, overcoming and sympathy versus the reality—"Occasions of social reality instead elicit feelings of discomfort, confusion, even resentment toward the 'defectiveness' which is

The disparity between judgments of people with and people without disabilities about the lives of people with disabilities has real and destructive potential. This was highlighted by the debate surrounding the Oregon Health Care Plan (the "Oregon Plan"), particularly its use of quality of life assessments to rank treatments to be funded under Oregon's Medicaid program.[163] In

perceived to resist cure, to defy normalization, to cause societal problems." Marilynn J. Phillips, *Damaged Goods: Oral Narratives of the Experience of Disability in American Culture*, 30 SOC. SCI. & MED. 849, 849 (1990). "Perhaps it is *not* paradoxical that the American public are so generous at telethon–time, but reticent to accommodate disabled persons in public settings. Might installing a wheelchair ramp disaffirm the ideology of cure?" *Id.*

[163] Oregon Basic Health Services Act, OR. REV. STAT. §§ 414.025–414.750 (1989) (enacting Senate Bill 27). The Oregon Plan raises a host of issues relating to disability and the ADA which are beyond the scope of this Article. For more discussion, see Mary A. Crossley, *Medical Futility and Disability Discrimination,* 81 IOWA L. REV. 179, 181 (1995), on whether a cost-conscious futility policy violates the ADA. *See generally* Timothy B. Flanagan, *ADA Analyses of the Oregon Health Care Plan,* 9 ISSUES L. & MED. 397 (1994) (concluding that publication of several previously unpublished documents discussing whether the Oregon Plan's reliance on quality of life factors is permissible under the ADA); Kevin P. Quinn, *Viewing Health Care as a Common Good: Looking Beyond Political Liberalism,* 73 S. CAL. L. REV. 277 (2000) (discussing the limits of liberalism in the health care context and arguing that the Oregon Plan is a good example of how we can view health care as a political common good); Leonard S. Rubenstein, *Ending Discrimination Against Mental Health Treatment in Publicly Financed Health Care,* 40 ST. LOUIS U. L.J. 315 (1996) (discussing whether the ADA can provide a basis for challenging deliberate efforts by state and local entities to restrict coverage of mental health services for people with psychiatric disabilities in Medicaid and other publicly-financed health care programs); James V. Garvey, Note, *Health Care Rationing and the Americans with Disabilities Act of 1990: What Protection Should the Disabled be Afforded?,* 68 NOTRE DAME L. REV. 581 (1993) (discussing whether the Oregon Plan violates the ADA and what changes, if any, are necessary to bring the Oregon Plan into compliance with the ADA); Robert J. Moosy Jr., Comment, *Health Care Prioritization and the ADA: The Oregon Plan 1991-1993,* 31 HOUS. L. REV. 265 (1994) (analyzing and comparing the Oregon Plan's 1991, 1992, 1993 amendments prioritization methods and whether they violate the ADA); Note, *The Oregon Health Care Proposal and the Americans with Disabilities Act,* 106 HARV. L. REV. 1296 (1993) (discussing the ADA's effects on the Oregon Plan and concluding that the Oregon Plan probably withstands scrutiny under the ADA); Greg Phyllip Roggin, Note, *The "Oregon Plan" and the ADA: Toward Reconciliation,* 45 WASH. U. J. URB. & CONTEMP. L. 219 (1994) (analyzing the Oregon Plan's revised prioritization process in light of the ADA and offering a balancing test for courts to use when confronted with the Oregon Plan and ADA requirements); Nancy K. Stade, Note, *The Use of Quality-of-Life Measures to Ration Health Care: Reviving a Rejected Proposal,* 93 COLUM. L. REV. 1985 (1985) (discussing the Oregon Plan's quality of life measures in light of the ADA, and arguing that while state Medicaid agencies that seek to ration on the basis of quality-of-life measures can avoid certain facial conflicts with the ADA, the ADA must be modified by Congress to allow the use of measures purporting to quantify the quality of life associated with particular

brief, in 1989 the Oregon legislature created a commission to generate a prioritized list of individual health care services based on importance, which, when adopted, would guide its Medicaid financing decisions. Given available resources, the legislature would include services in a fully-funded "standard benefit package" in order of priority or rank, with services falling below the selected rank excluded from coverage.[164] As documented by disability rights attorney Timothy Flanagan, the commission's process of prioritization started with drafting of a list of conditions and paired treatments, which were then prioritized on the basis of medical outcomes, as defined by medical manuals and practicing medical professionals, and the perceived quality of life related to each outcome.[165] According to one of the plan designers, " 'Estimates of how treatments affect quality of life were by far the single most important factor in determining priority order on that list.' "[166] The commission also polled one thousand Oregon residents by telephone, "asking [them] to rank in order of undesirability and perceived quality of life each of the impairments and symptoms" used to evaluate the medical outcomes.[167]

Opponents of the Oregon Plan argued that the weight accorded to subjective quality of life judgments in setting priorities resulted in a devaluation of the lives of people with disabilities relative to people without disabilities.[168] In the words of one author, "[w]hen quality of life is taken into account,

medical conditions in determining the allocation of Medicaid dollars); Catherine Grace Vanchiere, Comment, *Stalled on the Road to Health Care Reform: An Analysis of the Initial Impediments to the Oregon Demonstration Project*, 10 J. CONTEMP. HEALTH L. & POL'Y 405 (1993) (identifying underlying principles of the Oregon plan).

164 Garvey, *supra* note 163, at 591.

165 For more detail on this process, see Flanagan, *supra* note 163, at 401–02.

166 *Id.* at 401 (quoting David C. Hadorn, *The Oregon Priority-Setting Exercise: Quality of Life and Public Policy*, HASTINGS CENTER REP. (1991), Supp. at 11 (alteration in original).

167 *Id.* at 402.

168 Garvey, *supra* note 163, 583–84. "[T]he statistical data used to create the plan's quality of life quotients were nonobjective and arbitrary and were susceptible to the societal prejudices and stereotypes that Congress sought to eradicate by passing the ADA." Flanagan, *supra* note 163, at 404. Further, rationing health care based on quality of life assessments has been criticized as disadvantaging women and children. *See generally* John La Puma, *Quality-Adjusted Life-Years: Why Physicians Should Reject Oregon's Plan*, *in* RATIONING AMERICA'S MEDICAL CARE: THE OREGON PLAN AND BEYOND 125, 125 (Martin A. Strostberg et al. eds., 1992).

the very fact that a patient is disabled will automatically put that person at a disadvantage."[169] Indeed, in some cases, the availability of medically necessary treatment turned upon the existence of disability.[170] Because the surveys did not and perhaps could not take into account the "disability paradox," people with disabilities were put at risk of disproportional denial of health services based on prejudice, fear, and stereotypes.[171] Thus, although ultimately defeated, the Oregon Plan experience appears to support Silvers's criticism of the original position: "[V]eil of ignorance arguments substitute a kind of generalized prudence for the motivating considerations which arise for each of us

[169] Philip G. Peters Jr., *Health Care Rationing and Disability Rights*, 70 IND. L.J. 491, 536 (1995). Professor Peters argues that quality of life measurements such as that used in the Oregon Plan may disadvantage people with disabilities in four ways. First, "[w]hen outcomes are taken into account, patients with preexisting disabilities, such as diabetes, cancer, or pulmonary disease, could be disfavored because they often have more difficulty fighting unrelated illnesses (comorbidity) than patients who are otherwise healthy." *Id.* at 500. Second, the valuation of outcomes may disfavor seriously disabled patients if saving the life of a disabled person with an impaired quality of life generate fewer quality–adjusted life years than saving the life of a person whose quality of life after treatment would be higher. Third, permanently disabled patients in need of noncritical care could be disfavored if their disabilities limit the extent of improvement from treatment. Fourth, the scales used to measure quality of life underestimate the quality of life enjoyed by people with disabilities. *See id.* at 533–37.

At least four arguments in support of quality of life considerations are possible. One, suggested by David Hardon, is that quality of life measurements are appropriate because they measure the expected change in quality of life rather than the point-in-time quality of life of the patient. *See id.* at 536. A second potential justification is that quality of life is measured from the patient's perspective, not society's. QALY's typically do not attempt to establish the social worth of an individual by measuring factors like future employment prospects or moral character. *See id.* at 537. Paul Menzel suggests that reasonable persons would consent to the use of quality of life considerations because the harm to those most in need of care which results from their use in some contexts is offset by the advantage that they will confer on those individuals in other circumstances. *See id.* at 538. The fourth and strongest reason for taking quality of life into account is that quality of life really does not influence the value of life. *See id.* at 539.

[170] For example:

> [L]iver transplants for alcoholic cirrhosis of the liver is at number 690, and therefore outside the coverage of the "standard benefit package." However, liver transplants for non-alcoholic cirrhosis is at number 366, and thus part of the package. Because the ADA considers an alcoholic "disabled," the Oregon Plan would deny the "disabled" individual medically necessary treatment, while an "abled" individual with the same malady would be treated.

Garvey, *supra* note 163, at 591–92 (citations omitted).

[171] *See* Flanagan, *supra* note 163, at 404; Rubenstein, *supra* note 163, at 346.

out of our personalized experiences of what we are and how we need to live. But, in abstraction, prudence rarely moves us to precautions against eventualities we find unthinkable."[172]

How can the Rawlsian assumption of rationality overcome the "disability paradox?"[173] One solution is to promote greater integration of people with disabilities into every avenue of American life, including the workplace. This would provide an opportunity for the currently non-disabled majority to become educated about the reality of life with a disability and to dispel certain stereotypes based on fear and ignorance.[174]

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[172] Silvers, *supra* note 82, at 170.

[173] This leaves aside the possible argument that a failure of identification is a failure of Rawlsian rationality because disability arouses a deep and intractable prejudice. If disability is not attributable to culture and is instead innate, then the thought experiment of the original position and its veil of ignorance fails because it has no connection to any decisionmaking reality. This may be relevant to the consideration of disability and disability-based discrimination if the fear of dismemberment or disfigurement (which may relate to some but certainly not all forms of disability) can be considered innate and not culturally constructed, but this is a question for cultural anthropologists and beyond the scope of this analysis. I would like to thank my colleague, Andrew J. Cappel, for this point.

[174] There is evidence that people with previous interactions with people with disabilities report more positive perceptions about people with disabilities than those without similar previous experiences. *See* Mike Lyons, *Enabling or Disabling? Students' Attitudes Toward Persons with Disabilities*, 45 AM. J. OCCUPATIONAL THERAPY 311 (1993) (noting Australian college students who had experienced contact with people with persons with disabilities outside the caregiving context had significantly more positive attitudes than students without such contact); Amy K. Wagner & Paula J. B. Stewart, *Education and Administration: An Internship for College Students in Physical Medicine and Rehabilitation*, 80 AM. J. PHYSICAL MED. & REHABILITATION 459, 461–62 (2001) (summarizing research). More specifically, studies show that positive, direct, and structured contact between people with and people without disabilities decreases disability-based bias among the people without the disability in educational and pre-professional contexts. *See generally* Lyons, *supra*; Michael Shevlin & Astrid Mona O'Moore, *Fostering Positive Attitudes: Reactions of Mainstream Pupils to Contact with Their Counterparts Who Have Severe/Profound Intellectual Disabilities*, 15 EUR. J. SPECIAL NEEDS EDUC. 206 (2000) (determining structured contact between non-disabled Irish school children and their profoundly intellectually disabled peers resulted in development and maintenance of significantly more positive attitudes of the former toward the latter); April Tripp et al., *Contact Theory and Attitudes of Children in Physical Education Programs Toward Peers with Disabilities*, 12 ADAPTED PHYSICAL ACTIVITY Q. 323 (1995) (finding children in an integrated setting had significantly more positive attitudes toward peers with behavioral disabilities, but not physical disabilities, than those in segregated settings); Wagner & Stewart, *supra* (concluding college student participation in a Physical Medicine and Rehabilitation internship positively impacted participants' perceptions of people with disabilities). *But see* David Slininger et al., *Children's Attitudes Toward Peers with Severe Disabilities: Revisiting Contact Theory*, 17 ADAPTED PHYSICAL ACTIVITY Q. 176,

B. Does a Political ADA Go Far Enough?

Rawls's conception of the overlapping consensus upon which the right kind of political stability depends requires the exclusion of unreasonable doctrines:[175]

> [A] society is well ordered by justice as fairness so long as, first, citizens who affirm reasonable comprehensive doctrines generally endorse justice as fairness as giving the content of their political judgments; and second, unreasonable comprehensive doctrines do not gain enough currency to compromise the essential justice of basic institutions.[176]

Rawls suggests that a comprehensive doctrine that proposes that basic rights and political power be distributed according to characteristics such as race, sex, or ethnicity should be excluded as unreasonable.[177] Thus, it appears that a doctrine that proposes the distribution of work according to a characteristic such as the absence of any impairment—without regard to whether the impairment was relevant to job performance—should also be excluded as unreasonable.

Beyond the rejection of a blatantly ableist viewpoint, does the concept of reasonable pluralism still exclude too much to achieve meaningful inclusion for workers with disabilities? Consider that we could have a purely pluralist, rather than reasonably pluralist, version of the ADA that requires accommodation of all impairments regardless of whether they rise to the legal definition of "disability" and full and appropriate accommodation of impairments in the workplace, rather than

176–79 (2000) (summarizing research and noting that the literature does not uniformly support contact theory as a guide to changing children's behavior toward peers with disabilities).

[175] Rawls contrasts the stability produced by the overlapping consensus with another, less preferable type of stability—the *modus vivendi* agreement, characterized by a practical compromise between existing comprehensive doctrines. Rawls argues that the *modus vivendi* agreement is less preferable because an individual does not reach the compromise consensus as a result of the principles of his or her own comprehensive doctrine, and in fact may reach such compromise for practical reasons despite those principles. *See generally* RAWLS, RESTATEMENT, *supra* note 28, at 192–98.

[176] *Id.* at 187; *see also* Friedman, *supra* note 59, at 27 (exploring the rationale and consequences of Rawls's exclusion of the unreasonable from the "legitimization pool").

[177] *See supra* note 59.

simply reasonable accommodation. Of course, the language of the ADA itself does some of the excluding, as it provides that workers who are not "disabled" do not have standing and that disabilities need only be reasonably accommodated. But by going far beyond the language of the ADA, the Court's decisions suggest its commitment to excluding what it defines as unreasonable definitions of disability, unreasonable definitions of work, or unreasonable accommodations. As a result, very few workers with disabilities are able to demonstrate that they meet the legal definition of disability, that they are qualified to do the job as defined by the employer, or that the requested accommodation is reasonable.

Under one reading of the Court's recent cases, it does not make these exclusions on the basis of a comprehensive moral doctrine: it does not argue that its approach to disability-based discrimination is "right" in some moral sense.[178] Indeed, the language of the decisions suggests a prudentialist argument: the Court's decision is reasonable because of its sense—correct or not—that such exclusion is what has always been done or because it would be too expensive and disruptive to do it otherwise.[179] Such an interpretation resonates with Rawls's concern with exclusion of unreasonable doctrines for purposes of stability as well as with critiques of Rawlsian theory as essentially conservative and legitimating of the status quo.[180]

Much of the ADA's legislative history suggests a fundamental and deeply comprehensive argument that people

[178] Of course, an alternative reading would be that the Court is analyzing the cases on the basis of a comprehensive moral doctrine such a utilitarian economic analysis. *See generally* Pendo, *supra* note 11 (discussing the encroachment of an economic-based efficiency analysis within the reasonable accommodation and the undue burden analysis).

[179] For example, the *Barnett* Court explained that the employer's voluntary seniority system should not be undermined by a request for reasonable accommodation absent special circumstances because it would "undermine the employees' expectation of consistent, uniform treatment—expectations upon which the seniority system's benefits depend." US Airways, Inc. v. Barnett, 535 U.S. 391, 404 (2002). As Justices Souter and Ginsburg note in their dissenting opinion, the workers reasonable expectations in this regard are significantly weaker than that suggested by the majority, as US Airways explicitly reserved the right to change the system at any time. *Id.* at 423–24 (Souter, J., dissenting). Even if we accept that the expectations are reasonable, the majority does not explain why such expectations should continue to be protected in light of the competing requirements and underlying purpose(s) of the ADA.

[180] *See* NEAL, *supra* note 56, at 185–205.

with disabilities have a right to be included in all aspects of modern life and to be free of discrimination on the basis of stereotype, stigma, and myth. As Rawls explains, however, a liberal theory that is political as opposed to comprehensive attempts to avoid thorny philosophical questions by "deliberately stay[ing] on the surface, philosophically speaking" and "leav[ing] aside philosophical controversies."[181] This unwillingness to engage in a philosophical defense of disability rights limits a Rawlsian interpretation of the ADA. Indeed, it appears that other comprehensive doctrines, particularly the utilitarian cost-benefit approach, take over when Rawls's justice as fairness runs out, largely to the detriment of the rights of workers with disabilities. [182]

CONCLUSION

The Supreme Court's recent ADA decisions have spurred rather than settled debate on fundamental questions about the scope and purpose of the ADA. Who should the ADA be protecting? People unable to perform their specific job? Any job? Or only those that cannot perform basic and typical daily functions? People whose workplaces are disabling? Who should be reasonably accommodated in the workplace? The continuing debate surrounding these questions reveal a deep conflict in our understanding of disability and the justness of its social, political, and economic consequences.

The cases also signal a significant, continued limitation of access to the ADA's protection through procedural devices such as standing. As this Article shows, whatever the Supreme Court is doing in these cases is not linked to any broader concept of distributive justice, such as that developed by Rawls. Indeed, this analysis suggests that the process of contraction of rights in the context of the ADA has links to a broader attempt by the judiciary to constrain the reach of empowering democratic experiments through the application of seemingly neutral rules and requirements in multiple contexts. Using Rawlsian methodology as a foundation for interpretation of the ADA in recent cases would lead to results more in line with Rawlsian

[181] Rawls, *Justice as Fairness*, *supra* note 28, at 230.

[182] *See* Pendo, *supra* note 11, at 1204–08 (discussing the encroachment of an economic-based efficiency analysis within the reasonable accommodation and the undue burden analysis).

objectives as well as the language and stated purposes of the ADA. Although Rawls does not take us as far as we want to go, his theory has significant value for understanding and advancing the interests of workers with disabilities and perhaps those without disabilities as well.