Essential Requirements of the Act: A Short History and Overview*

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EDITOR'S NOTE

Remarkable for both its comprehensive content and its bold mandate, the Americans with Disabilities Act (ADA) is one of few laws that legitimately belongs under the rubric of "landmark legislation." Nancy Lee Jones holds that the ADA highlights a trend of moving from the judicial to the legislative arena in the development of civil-rights policy. Jones walks us through the development of key concepts of the ADA, including "reasonable accommodation" and "undue hardship," as she examines the rich 17-year history of articulating antidiscrimination requirements under section 504 of the Rehabilitation Act. She reviews the legislative history and describes the requirements of the law, as well as offering a glimpse of the next generation of ADA-related issues: the provision of health insurance and the parameters of the definition of disability. Concluding that rights and funding must go hand in hand, Jones calls for an examination of the Individuals with Disabilities Education Act as a potential model for post-ADA disability legislation.

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The Americans with Disabilities Act (ADA) is a landmark piece of legislation guaranteeing the civil rights of 43 million Americans with disabilities. As the most significant piece of civil-rights legislation since the Civil Rights Act of 1964, the ADA's enactment will profoundly change the legal rights of individuals with disabilities. The ADA points toward a future where its promise of civil rights combines with existing programs of financial support to create meaningful equality of opportunity for individuals with disabilities.

This legislation has not occurred in a vacuum; in order to understand its concepts and possible effect, it is necessary to look to the broad societal forces that have shaped its history and to examine predecessor statutes. It is sufficient to note here that the legal and social trends relating to persons with disabilities are a part of even larger societal tensions involving basic questions about the functions of government and the responsibilities of society to its citizens. Ultimately, the tension that runs through much of this century's jurisprudence arises over conflicts between individual liberty and the interests of society. The civil-rights movement is an example of this theme, especially as it is expressed in equal-protection analysis under the fourteenth amendment. Equal-protection theory has evolved into a tripart test, with differing weights given to certain kinds of individual rights, which are balanced against state interests. For example, statutes that involve distinctions based on race are deemed to be "suspect," and the balance is shifted in favor of the individual. Statutes that involve less critical interests, on the other hand, must only be rationally related to a legitimate state interest to pass constitutional muster. The Americans with Disabilities Act is one of the most recent expressions of this balancing of interests.

Historically, the ADA marks the first pure civil-rights statute for persons with disabilities that has broad application. Unlike section 504, which prohibits discrimination against individuals with disabilities solely in programs or activities receiving federal financial assistance, the ADA prohibits discrimination even when federal funds are not

involved.[1] The ADA is a detailed and complicated statute that enacts many of the concepts expressed in regulations under section 504 into law. Two recent acts—the Civil Rights Restoration Act of 1987[2] and the Fair Housing Act Amendments of 1988[3]—included other minority groups and were limited in application; however, the disability component of each act served as an important precedent during ADA enactment (West 1991). The form of the ADA owes much to politics: both the careful negotiations within congressional committees and the felt necessity to be explicit to the future writers of regulations. Enactment of statutes like the ADA may also indicate that the cutting edge of civil-rights application is moving to the legislative arena as the judicial atmosphere becomes less conducive to expansive interpretation of individual rights (Marshall 1989).

ENACTMENT OF THE ADA

Prior to examining the specific requirements of the ADA, it is helpful to chronicle briefly its legislative journey. Although legislative attempts to implement various concepts in the ADA have been long-standing (Burgdorf and Bell 1984),[4] the original proposal for the ADA was offered by the National Council on Disability, an independent federal agency whose statutory functions include providing recommendations to the Congress regarding individuals with disabilities.[5] The National Council initially proposed antidiscrimination legislation in its 1986 report to Congress and the President, *Toward Independence*. A draft of the legislation was included in their 1988 report, *On the Threshold of Independence*. Legislation of this type was also recommended in the 1988 report of the Presidential Commission on the Human Immunodeficiency Virus [HIV] Epidemic.

Legislation was introduced in the 100th Congress,[6] and a joint House and Senate hearing was held, but no further action was taken. A substantially revised version of the ADA[7] was introduced in both the House and Senate on May 9, 1989. The revised bill included changes in the definition of disability, and the requirement for reasonable accommodation (Jones 1989). The amended bill passed the Senate on September 7, 1989.

In the House, the legislative process was complicated by the bill's referral to four committees: Education and Labor, Energy and Com-

merce, Transportation and Public Works, and Judiciary. Education and Labor is the committee that has had traditional jurisdiction over disability issues in the House. Whereas many in the other committees were familiar with certain aspects of the legislation, they lacked detailed expertise in disability issues. This created long, and occasionally frustrating, days and nights for disability advocates, who often served as educators for the committee members.

Due to the joint referral to four committees, House consideration would have been complicated in any event, but the resignation of the chief Democratic House sponsor, Representative Coelho, added to the difficulties. Mr. Coelho, an individual with epilepsy who had personally experienced discrimination as a result of his condition had been an impassioned advocate of the legislation (U.S. Congress 1988). Representative Hoyer assumed House leadership of the ADA and, as described in a recent article in the *Congressional Quarterly,* "shepherded the bill through a procedural and jurisdictional labyrinth . . . called 'complex enough to kill any bill' " (Rovner 1990b). ADA passage through the Senate was smoother because it was referred to only one committee, Labor and Human Resources, and was guided by the strong leadership of Democratic Senators Harkin and Kennedy.

Critical to passage of the ADA was the strong bipartisan support it received in both the House and the Senate. In the Senate, Republican Senators Dole and Hatch were key proponents of the legislative concepts; Representative Bartlett played a similar role in the House.

After numerous Committee hearings and votes, the ADA passed the House on May 22, 1990. During the course of the lively debate, numerous amendments were offered; the most controversial one, added by Representative Chapman and passed by the House, concerned food handlers with contagious diseases. This amendment, actively supported by the National Restaurant Association, would have permitted workers with communicable diseases to be transferred out of food-handling jobs—even if the disease could not be transmitted by food handling. The supporters of the amendment did not argue that HIV infection, the condition that prompted the amendment, could be spread by handling food, but rather that public perceptions were such that to provide protections to HIV-infected persons would create severe hardships for businesses.[8]

Opponents strongly criticized this argument as bowing to public misperceptions and perpetuating discrimination. As Representative McDermott stated: "The amendment is not about the reality of conta-

gious disease. Let us be honest: it is about the fear of AIDS . . . As long as anyone in our country remains ignorant, this amendment says, as long as anyone is still afraid, the food industry may cater to that ignorance and fear."[9]

Another major difference before the conference committee was the ADA coverage of Congress. The version passed by the Senate during its debate[10] contained a very brief statement that the provisions of the act shall apply in their entirety to the Senate, House, and all the instrumentalities of Congress or either House. Opponents strenuously objected to this amendment, not because of its substance, but because it was seen as possibly creating constitutional separation-of-powers questions. In the House, the language was changed to provide for internal House remedies to eliminate the problems inherent in executive-branch enforcement of legislation binding on Congress.

The conferees agreed to a conference report, but the Senate, on July 11, 1990, voted to recommit the legislation to conference, where a compromise was reached (Rovner 1990a). On July 12, the House voted to pass the ADA[11] and on July 13 the Senate followed suit.[12] President Bush signed the legislation on July 26.

SECTION 504 OF THE REHABILITATION ACT OF 1973

One of the key rationales used to support the ADA was that it was essentially an extension into the private sector of section 504, an already existing federal statute.[13] Many of the concepts used in the ADA originated in section 504 jurisprudence, although section 504 differs from the ADA in several respects, the most significant departure being ADA's coverage of entities not receiving federal funds. The ADA contains a specific provision stating that, except as otherwise provided in the act, nothing in the act shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973[14] or the regulations issued by federal agencies pursuant to such title.[15] A basic understanding of the legal theories underlying section 504 is thus critical to any analysis of the ADA.

Section 504 was enacted with little debate and most likely little understanding of its critical role in the development of civil-rights policy. Its original language was about a paragraph; even with subsequent amendments the provision is only several pages long. In contrast,

the ADA is more than 50 pages in length. Yet, in many significant ways, the two statutes contain similar requirements. Much of the difference in length can be explained by the insertion of the language of the section 504 regulations in the statutory text of the ADA. (For an in-depth analysis of disability rights prior to the ADA, see Percy 1989.)

It is important to note the basic difference between civil-rights statutes for persons with disabilities and civil-rights statutes prohibiting discrimination on the basis of race, sex, or national origin, such as title VII of the Civil Rights Act of 1964.[16]

Seldom do race, sex, or national origin present any obstacle to an individual when performing a job or participating in a program. Disabilities by their very nature, however, may make certain jobs or types of participation impossible. Compounding this difficulty is the fact that both disabilities and jobs vary widely. Although an individual with a particular type of disability may not be able to perform one type of job, he or she may be eminently qualified for another. In addition, unlike discrimination on the basis of race, sex, or national origin, discrimination against persons with disabilities is more often motivated, not by ill will, but rather by thoughtlessness or by ignorance of an individual's abilities. The Supreme Court clearly indicated this[17] when it stated that the purpose of section 504 was "to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others [and] that society's accumulated myths and fears about disability and disease are as handicapping as the physical limitations that flow from actual impairment."[18]

The requirements of section 504 can be broken down into several component parts: an individual must be handicapped, otherwise qualified, subjected to discrimination solely on the basis of handicap, and such discrimination must be in a program or activity that receives federal financial assistance, an executive agency, or the U.S. Postal Service. The definitional section applicable to section 504 defines the term individual with handicaps as "any individual who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment."[19] The regulations provide further guidance and specifically list certain covered impairments.[20] In addition, the Supreme Court dealt with the definitional issue in section 504 in the context of contagious diseases. The Court, in an opinion written by Justice Brennan, found that a person with the contagious disease of tuberculosis may be a handicapped individual

under section 504.[21] Thus, the definition of handicapped individual, as defined by statute and regulation and interpreted by the Supreme Court, is a broad one. However, the broad definition is limited by the requirement that an individual be "otherwise qualified."

The term "qualified handicapped person" is defined in the regulations as meaning "[w]ith respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question and (b) with respect to services, a handicapped person who meets the essential eligibility requirements for the receipt of such services."[22] The first Supreme Court decision concerning section 504 involved this very issue: whether a hearing-impaired applicant for a college nursing program could be denied admission to the program. The Court found, in *Southeastern Community College v. Davis*, that an otherwise qualified handicapped individual "is one who is able to meet all of a program's requirements in spite of his handicap."[23]

However, this holding does not negate the requirement for reasonable accommodation. The Supreme Court, in *Alexander v. Choate,* further elaborated on the Davis decision:

> We held that the college was not required to admit Davis because it appeared unlikely that she could benefit from any modifications that the relevant HEW regulations required . . . and because the further modifications Davis sought—full-time, personal supervision whenever she attended patients and elimination of all clinical courses—would have compromised the essential nature of the college's nursing program . . . Such a "fundamental alteration in the nature of a program" was far more than the reasonable modifications the statute or regulations required.[24]

The Court in *Choate* went on to conclude that section 504 required a balancing approach between the rights of persons with disabilities to be integrated into society and the legitimate interests of grantees in preserving the integrity of their programs.[25]

Finally, there must be discrimination in order for there to be a violation of section 504. The regulations promulgated pursuant to section 504 provide detailed guidelines for determining discriminatory practices. First, there are general prohibitions against discrimination which include, among others, exclusion of a qualified handicapped person from participation in the benefits of a program that receives

federal financial assistance.[26] There are also guidelines relating to employment discrimination that require reasonable accommodation "unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program."[27] In addition, the regulations discuss program accessibility and when inaccessibility may be considered discrimination.[28]

Despite these guidelines, determining when discrimination has occurred is not always an easy task. The Supreme Court held that a Tennessee state proposal to reduce from 20 to 14 the number of annual inpatient hospital days that state Medicaid would pay hospitals was not a violation of section 504.[29] The Court, in a unanimous opinion by Justice Marshall, found that the 14-day limitation was neutral on its face, did not rest on a discriminatory motive, and did not deny persons with disabilities meaningful access to or exclusion from the package of Medicaid benefits. In arriving at this holding, the Court found that section 504 does not require proof of discriminatory intent; a disparate impact may be sufficient. However, not all actions that have a disparate impact on persons with disabilities are discrimination under section 504. Again, the Court emphasized that section 504 requires a balancing approach, so that rights are given to persons with disabilities and to covered entities.

In summary, section 504 contains a broad definition of individuals with disabilities and requires reasonable accommodation. However, such individuals must be otherwise qualified and their rights are balanced against the rights of recipients of federal financial assistance to preserve the integrity of their programs. Section 504 does not provide bright lines or absolute rules; rather, in light of the myriad of different disabilities and job and program requirements, it provides for a very individualized approach. This same approach was essentially adopted in the ADA.[30]

OVERVIEW OF THE ADA

SHORT TITLE AND DEFINITIONS

Section 1 contains the short title and the table of contents of the act.[31] Section 2 contains statements concerning congressional findings and purpose. Congress found that 43 million Americans have one or more physical or mental disabilities and that they are a discrete and insular

minority faced with unfair and unnecessary discrimination.[32] The purpose of the ADA is described as providing a "clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." Section 3 contains definitions of auxiliary aids and services, disability, and state.[33] The term *disability* is defined as meaning with respect to an individual "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." This definition is drawn from the definitional section applicable to section 504 of the Rehabilitation Act.[34]

Because the definition of disability is a key concept in the ADA, it is important to examine its parameters. Like section 504, its approach is functional rather than itemized. A purely illustrative list that appeared in the House and Senate Reports included the following: orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, HIV infection, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, drug addiction, and alcoholism.[35] In the three-part definition quoted above, a physical or mental impairment (A), is defined in the same manner as under section 504: "any physiological disorder or condition, cosmetic disfigurements, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine." A mental impairment is defined as "any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities."[36] Not encompassed by the definition are physical characteristics such as eye color, or left-handedness, environmental, cultural or economic disadvantages, or minor physical impairments.[37] To be covered, an impairment must limit a *major* life activity. The ADA also adopted the Supreme Court's interpretation in *School Board of Nassau County v. Arline*[38] of the definition of handicapped person as including a person with a contagious disease.

The second aspect (B) of the definition of disability is having a record of a disability. Like the interpretation accorded section 504 under its regulations,[39] having a record of an impairment is interpreted to include a history of an impairment and being misclassified as having an impairment.[40] This component of the definition, then, would cover

individuals who have a history of cancer, or a mental or emotional illness.

The third component of the definition of disability is being regarded as having a disability. The ADA uses the same definition of this phrase as is used in section 504: it means an individual "(A) has a physical or mental impairment that does not substantially limit major life activities but that is treated . . . as constituting such a limitation; (B) 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 (C) has none of the impairments defined but is treated . . . as having such an impairment."[41] The phrase "regarded as having such an impairment" was added to the definition of individual with handicaps in the Rehabilitation Act in 1974 as part of a revision of the definition to reflect more appropriately the coverage of discriminatory practices. The Senate report on the amendment indicated that it reflected congressional concern with prohibiting discrimination based not only on simple prejudice, but also on stereotypical attitudes and ignorance about individuals with disabilities.[42] This component would cover children who are not mentally retarded but who are erroneously placed in class for mentally retarded children,[43] as well as individuals who are denied employment because they are inaccurately perceived as having a disability that might limit the ability to perform the job.[44] As the ADA report of the House Judiciary Committee stated, this part of the definition "is intended to cover persons who are treated by a covered entity as having a physical or mental impairment that substantially limits a major life activity. It applies whether or not a person has an impairment, if that person was treated as if he or she had an impairment that substantially limits a major life activity."[45]

TITLE I—EMPLOYMENT

Title I provides that no covered entity shall discriminate against a qualified individual with a disability because of the disability 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.[46] The term *employer* is defined as a person engaged in an industry affecting commerce who has 15 or more employees; however, for the two years following the effective date of the title, an employer means a person engaged in an industry affecting commerce who has 25 or more employees.[47] The term

qualified individual with a disability is defined as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such person holds or desires."[48]

Title I incorporates many of the concepts set forth in the regulations promulgated pursuant to section 504, including the requirement to provide reasonable accommodation unless such accommodation would pose an undue hardship on the operation of the business.[49] Undue hardship is defined as meaning an action requiring significant difficulty or expense when considered in light of various factors, including (1) the nature and cost of the accommodation needed, (2) the overall financial resources of the facility, (3) the overall financial resources of the covered entity and the number, type, and location of its facilities, and (4) the type of operation or operations of the covered entity, including the composition, structure, and functions of the work force, the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

Section 103 specifically lists some defenses to a charge of discrimination:

1. The alleged application of qualification standards has been shown to be job related and consistent with business necessity and such performance cannot be accomplished by reasonable accommodation.
2. The term *qualification standards* can include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.
3. Religious entities may give a preference in employment to individuals of a particular religion to perform work connected with carrying on the entities' activities. In addition, religious entities may require that all applicants and employees conform to the religious tenets of the organization.

The Secretary of Health and Human Services is required to list infectious and communicable diseases transmitted through the handling of food and if the risk cannot be eliminated by reasonable accommodation, a covered entity may refuse to assign or continue to assign an individual with such a disease to a job involving food handling.[50]

Another controversial issue concerned the application of the ADA to drug addicts and alcoholics. The act provides that an employee or

applicant for employment who is currently engaging in the illegal use of drugs is not considered to be a qualified individual with a disability.[51] This section also provides that a covered entity may prohibit the illegal use of drugs and the use of alcohol at the work place.

As with section 504, the ADA broadly defines an individual with disabilities, but limits the application of the nondiscrimination requirement by requiring that an individual be "qualified." This balancing approach[52] means that with regard to employment an individual must be able to perform the "essential functions" of the job with "reasonable accommodation" and without creating an "undue burden" on the employer.

The Senate report on the ADA describes essential functions as meaning job tasks that are "fundamental and not marginal."[53] An example of a nonessential function would be a requirement for a driver's license where driving is not a major function or for which driving functions can be reassigned.[54] The essential-functions language aroused considerable concern in the business community, which argued that the employer's views should determine what constitutes essential functions. Their argument was not accepted; however, the ADA requires consideration of the employer's judgment as to what is essential and accepts a job description written prior to advertising or interviewing applicants as evidence of the essential functions of the job.

One of the critical concepts in the ADA is that of "reasonable accommodation."[55] The ADA has defined reasonable accommodation as including making existing facilities used by employees readily accessible to and usable by individuals with disabilities; job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modification of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; and provision of qualified readers or interpreters; and other similar accommodations. As in interpretation of section 504, the application of the concept of reasonable accommodation is fact specific and varies depending on the particular situation presented.[56]

Although an employer may be obligated to provide reasonable accommodation, this requirement is not unlimited. Such accommodation is not required under the ADA if it can be shown that it would impose an "undue hardship on the operation of the business of such covered entity." The term "undue hardship" is defined in the ADA as an action requiring significant difficulty or expense; certain factors are listed for consideration in making this determination. The ADA, like

section 504, embodies a flexible, case-by-case approach to the determination of undue hardship and specifically rejects the notion of a cost cap. An amendment was offered on the House floor that would have created a presumption of undue hardship if a proposed accommodation would have cost more than 10 percent of the annual salary of the position involved. The opponents of this proposal argued that this would work to the disadvantage of workers in lower-level jobs and did not focus on the resources of the employer.[57]

The remedies and procedures in sections 705, 706, 707, 709, and 710 of the Civil Rights Act of 1964[58] are incorporated by reference.[59] This would provide for certain administrative enforcement as well as allowing for individual suits. Presently, these remedies would include injunctive relief and back pay, but not compensatory and punitive damages.[60] The Equal Employment Opportunity Commission is to promulgate regulations no later than one year after the date of enactment. The agencies with enforcement authority for employment discrimination in the ADA and under the Rehabilitation Act of 1973 are to develop, within 18 months, coordination procedures to avoid a duplication of effort or varying enforcement standards. Title I will become effective on July 26, 1992, 24 months after enactment.[61]

TITLE II—PUBLIC SERVICES

Title II provides that no qualified individual with a disability shall be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity or subjected to discrimination by any such entity.[62] *Public entity* is defined as state and local governments, any department or other instrumentality of a state or local government, and the National Railroad Passenger Corporation.[63] This title also provides specific requirements for public transportation by intercity and commuter rail and for public transportation other than by aircraft or certain rail operations.[64] All new vehicles purchased or leased by a public entity that operates a fixed-route system are to be accessible and good-faith efforts must be demonstrated in the purchase or lease of accessible used vehicles. Retrofitting of existing buses is not required. Paratransit services would be required in most circumstances other than those involving commuter bus service. Generally, within five years, rail systems are to have at least one car per train that is accessible to individuals with disabilities.

The enforcement remedies of section 505 of the Rehabilitation Act of

1973[65] are incorporated by reference.[66] These remedies would be similar to those of title VI of the Civil Rights Act of 1964 and would include damages and injunctive relief. The Attorney General is to promulgate regulations relating to subpart A of the title (Prohibition against Discrimination and other Generally Applicable Provisions), although such regulations are not to include matters within the scope of the authority of the Secretary of Transportation.[67] Subpart B provides that the Secretary of Transportation shall issue regulations.[68] Generally, the effective date for title II is 18 months, but the date varies for some sections such as that relating to public entities operating fixed route systems.[69]

TITLE III – PUBLIC ACCOMMODATIONS AND SERVICES OPERATED BY PRIVATE ENTITIES

Title III provides that no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.[70] Entities to be covered by the term *public accommodation* are listed and include, among others, hotels, restaurants, theaters, auditoriums, laundromats, museums, parks, zoos, private schools, day-care centers, professional offices of health care providers, and gymnasiums.[71] Religious institutions or entities controlled by religious institutions are not included on the list. There are some limitations on the nondiscrimination requirement and a failure to remove architectural barriers is not a violation unless such a removal is "readily achievable."[72]

Readily achievable is defined as "easily accomplishable and able to be carried out without much difficulty or expense."[73] It is interesting to contrast this requirement with the undue hardship requirement for employment. The legislative history of the ADA indicates that Congress intended the undue hardship standard to be a "much higher standard."[74] The examples given of readily achievable accommodations in the committee reports further emphasize this distinction. The kind of barrier removal required was described as including the addition of grab bars, ramping a few steps, and lowering telephones.[75] The nondiscrimination mandate also does not require that an entity permit an individual to participate in or benefit from the services of a public accommodation where such an individual poses a direct threat to the health or safety of others.[76]

Title III also contains provisions relating to the prohibition of discrimination in certain public-transportation services provided by private entities.[77] Purchases of over-the-road buses are to be made in accordance with regulations issued by the Secretary of Transportation.[78] In issuing these regulations, the Secretary must take into account the recommendations of a study on the subject to be done by the Office of Technology Assessment.[79]

The remedies and procedures of title II of the Civil Rights Act shall be the powers, remedies, and procedures title III of the ADA provides to any person who is being subjected to discrimination or any person who has reasonable grounds for believing that he or she is about to be subjected to discrimination with respect to the construction of new or the alteration of existing facilities in an inaccessible manner.[80] Title II of the Civil Rights Act has generally been interpreted to include injunctive relief, not damages. In addition, state and local governments can apply to the Attorney General to certify that state or local building codes meet or exceed the accessibility requirements of the ADA.[81] The Attorney General may bring pattern or practice suits with a maximum civil penalty of $50,000 for the first violation and $100,000 for a violation in a subsequent case. The monetary damages sought by the Attorney General do not include punitive damages. Courts may also consider an entity's "good faith" efforts in considering the amount of the civil penalty. Factors to be considered in determining good faith include whether an entity could have reasonably anticipated the need for an appropriate type of auxiliary aid to accommodate the unique needs of a particular individual with a disability.[82] With some exceptions, the effective date of title III is 18 months after enactment.[83]

TITLE IV—TELECOMMUNICATIONS

Title IV amends title II of the Communications Act of 1934[84] by adding a section providing that the Federal Communications Commission shall ensure that interstate and intrastate telecommunications relay services are available, to the extent possible and in the most efficient manner, to hearing-impaired and speech-impaired individuals.[85] Any television public-service announcement that is produced or funded in whole or part by any agency or instrumentality of the federal government shall include closed captioning of the verbal content of the announcement.[86] The FCC is given enforcement authority with certain exceptions and

the services shall be provided not later than three years after the date of enactment.[87]

TITLE V—MISCELLANEOUS PROVISIONS

Title V contains an amalgam of provisions, several of which generated considerable controversy during the ADA debate. Section 501 concerns the relationship of the ADA to other statutes and bodies of law. Subpart (a) states that "except as otherwise provided in this act, nothing in this Act shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act . . . or the regulations issued by Federal agencies pursuant to such title." Subpart (b) provides that nothing in the Act shall be construed to invalidate or limit the remedies, rights, and procedures of any federal, state, or local law that provides greater or equal protection. Nothing in the act is to be construed to preclude the prohibition or restrictions on smoking. Subpart (c) limits the application of the act with respect to the coverage of insurance; however, this subsection is not to be used as a subterfuge to evade the purposes of titles I and III. Finally, subsection (d) provides that the act does not require an individual with a disability to accept an accommodation which that individual chooses not to accept.[88]

Section 502[89] abrogates the eleventh amendment state immunity from suit. Section 503[90] prohibits retaliation and coercion against an individual who has opposed an act or practice made unlawful by the ADA. Section 504[91] requires the Architectural and Transportation Barriers Compliance Board to issue guidelines regarding accessibility. These guidelines are to include procedures and requirements for alterations of historic buildings or facilities. Section 505[92] provides for attorneys' fees in "any action or administrative proceeding" under the act. Section 506[93] provides for technical assistance to assist entities covered by the act in understanding their responsibilities. Section 507[94] provides for a study by the National Council on Disability regarding wilderness designations and wilderness land-management practices and "reaffirms" that nothing in the wilderness act is to be construed as prohibiting the use of a wheelchair in a wilderness area by an individual whose disability requires the use of a wheelchair. Section 513[95] provides that "where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution . . . is encouraged . ." Section 514[96] provides for severability of any provision of the act that is found to be unconstitutional.

The coverage of Congress was a source major controversy during the House-Senate conference on the ADA. The Senate-passed version had provided that the ADA's requirements shalll apply in their entirety to the Senate, the House, and all the instrumentalities of the Congress. This language incorporated the provisions in various titles providing for administrative enforcement of the ADA, thus raising constitutional issues regarding separation of powers and speech and debate clause immunity. The House took a different approach and applied the rights and protections of the ADA to the Congress but provided for the official of each instrumentality of Congress to establish remedies and procedures for these rights. After considerable debate, existing Senate and House procedures concerning discrimination were codified and the concept of a private rights of action was dropped.[97]

Two other controversial areas were covered in title V—sex and drugs. Section 510[98] provides that the term "individual with a disability" in the ADA does not include an individual who is currently engaging in the illegal use of drugs when the covered entity acts on the basis of such use. An individual who has been rehabilitated would be covered. However, the conference-report language clarifies that the provision does not permit individuals to invoke coverage simply by showing they are participating in a drug-rehabilitation program; they must refrain from using drugs. The conference report also indicates that the limitation in coverage is not intended to be narrowly construed only to persons who use drugs "on the day of, or within a matter of weeks before, the action in question." The definitional section of the Rehabilitation Act that would be applicable to section 504 is also amended to create uniformity with this definition and to add some provisions relating to alcohol use.

Section 508[99] provides that an individual shall not be considered to have a disability solely because that individual is a transvestite. Section 511[100] similarly provides that homosexuality and bisexuality are not disabilities under the act and that the term disability does not include transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender-identity disorders not resulting from physical impairments, or other sexual behavior disorders, compulsive gambling, kleptomania, or pyromania, or psychoactive substance use disorders resulting from current illegal use of drugs.

Because title V of the ADA contains no effective-date section, there has been some confusion about the deadline for its substantive provisions, such as the amendments to the definition of handicapped individual in the Rehabilitation Act and the congressional coverage section.

This was most likely an oversight because the original version of the ADA contained one effective-date clause for the entire act and the various titles were later amended to provide separate dates for the differing titles. It could be argued that, in the absence of a specific provision, title V is effective immediately upon enactment. However, when the act is read as a whole, it would appear more logical that the effective date should be gleaned from the dates in the corresponding titles. For example, where the definition of individual with handicaps for the Rehabilitation Act is used with regard to employment, the effective date of the employment title of the ADA would arguably be the applicable date. Because the rationale for the change in the Rehabilitation Act was to create similar coverage to the ADA, a change at the time title I of the ADA becomes effective would appear the most logical. With regard to the Rehabilitation Act, this issue may be clarified during congressional debate on its reauthorization.

BEYOND THE ENACTMENT

The Americans with Disabilities Act was carefully crafted and based upon years of regulatory and judicial experience with section 504. However, section 504 itself still has some ambiguities and the ADA will undoubtedly be further clarified by regulations, possible amendment, and eventually judicial interpretation (see Samborn 1990). A few of the more troublesome ambiguities will be briefly examined here.

THE DEFINITION OF DISABILITY

Despite extensive regulatory and judicial discussion, the exact line between what is a disability and what is not blurs at the outer edges. Clearly, environmental, cultural, and economic disadvantages would not be covered.[101] Similarly, simple physical characteristics such as blue eyes or black hair would not be covered and neither age nor homosexuality would be included in the definition.[102] Not even all physical or mental impairments would be covered. The physical or mental impairment must be severe enough to result in a substantial limitation of one or more major life activities. Thus, a person with an infected finger would not be covered.

The definition of disability would also include individuals who have a record of an impairment, such as a person with a history of cancer,

and individuals who are "regarded as" having an impairment.[103] A severe burn victim would be an example of an individual who is regarded as having an impairment. But what about discrimination based on smoking, obesity, unattractiveness, or a genetic trait causing an individual to be more susceptible to certain illnesses?

The smoking-related issue was raised during the ADA debate but is not as clear-cut as it might appear. The ADA states that nothing in the act is to be construed "to preclude the prohibition of, or the imposition of restriction on, smoking in places of employment covered by title I, in transportation covered by title II or III, or in places of public accommodation covered by title III."[104] This provision appears to be aimed at the protection of nonsmokers from passive smoking. The unresolved issue is to what extent a smoker may be covered by the definition of an individual with disability and thus protected from discrimination in other contexts, such as employment.

Only one federal court has dealt with the question of the coverage of obesity under section 504 and it did not reach the merits of the issue.[105] However, a fourth-circuit case, Forrisi v. Bowen,[106] rejected an acrophobic plaintiff's claim under section 504 where the plaintiff had testified that his fear of heights had never limited a major life activity. This case, however, did not analyze the issue of whether the plaintiff was "regarded as having a disability" and thus may be decided differently today in light of the Supreme Court's decision in *School Board of Nassau County v. Arline.* As noted above, discrimination arising from disfiguring scars in a burn victim would give rise to an actionable complaint. What then about discrimination based on obesity or physical appearance? One commentator has noted that "[i]t thus seems an arbitrary distinction to say that an employer cannot refuse to hire a person who has a disfiguring scar on his chin, for example, but can refuse to hire someone whose chin is jutting or unusually shaped" (*Harvard Law Review* 1987). Another commentator has noted that courts may interpret the ADA to include persons who are physically unattractive (Lindsay 1989/1990).

The issue of whether refusal to hire an individual because of possible genetic traits that may make them more susceptible to injury is a complex one. Several members of Congress, however, noted during passage of the ADA that individuals with such genetic traits would be protected under the act.[107] In *UAW v. Johnson Controls, Inc.*,[108] the Supreme Court will have the opportunity to examine a related issue: whether fertile women can be excluded from workplaces that expose

employees to substances potentially hazardous to fetuses without violating title VII of the Civil Rights Act of 1964 (*Harvard Law Review* 1990; OuYang 1990; Williams 1981).

A conceptual distinction could be made to eliminate from coverage conditions that are self-imposed or volitional. To some extent, this has been done in the ADA by the limitations on drug addicts, alcoholics, and certain sexual conditions. This distinction has a certain appeal because there is no other protected class in civil-rights law that an individual can "will" him- or herself to join. There is some support for this position in section 504 case law; specifically in *Tudyman v. United Airlines,* where the weight of muscle mass gained from a self-initiated body-building program kept the plaintiff from employment as an airline steward. However, the attractiveness of this distinction pales when the difficulty of determining what is volitional is examined. For example, some recent research has indicated that a tendency toward obesity is genetic. Is smoking by an individual who is addicted to nicotine truly volitional? Would it be valid to deny protection to an individual who became paraplegic due to "volitional" motorcycle racing?

The definition of "individual with disability" under both section 504 and the ADA is a broad one and goes beyond "traditional" disabilities. However, despite its breadth, there are limitations and the line between what is a disability and what is not is often blurred, particularly with the part of the definition that covers individuals who are "regarded as" having an impairment.

THE SITE-SPECIFIC ISSUE

One of the major controversies during consideration of the ADA in the House Education and Labor Committee revolved around the issue of whether ADA coverage was "site specific." An entity cannot discriminate under the ADA, but there is an exception for this requirement if the accommodation required would impose an undue burden on the business. The question arose, when considering the definition of an undue burden, whether only the resources of a specific store or those of an entire national corporation would be considered. In other words, would the nondiscrimination provisions cover all of the stores in a national chain equally? The committee heard an argument stating that because the factors constituting an undue burden on a business may vary depending on which store of a national chain is involved, each

store therefore should be considered independently. Another argument put forward was that the location of a particular branch should not be determinative because the resources of the parent corporation could be used for any reasonable accommodation requirements.

This debate was resolved with a compromise: the definitions of undue hardship and readily achievable were amended to include considerations of "the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity."[109] The House Education and Labor Committee report further elaborated on this compromise.

> The addition of these factors reflects the Committee's intent that, in determining whether a reasonable accommodation would constitute an undue hardship, courts should look at and may weigh the financial resources and operations of those local facilities that are being asked to provide an accommodation, because the financial resources of local facilities may vary significantly. The factors further reflect the Committee's intent that, in determining whether a reasonable accommodation would constitute an undue hardship, the financial resources of the larger covered entity, and any of those financial resources available to the local covered entity, should be looked at and may be weighed by the court as well.[110]

The report went on to observe that a court would be expected to look at the "practical realities" of the situation.[111]

Exactly how a court would take these various factors into consideration and the weight each would be given is uncertain. Regulatory guidance on this issue would greatly aid interpretation although the complexities of corporate organization may make this task a difficult one.

CUSTOMER PREFERENCE

Another difficult issue presented by the undue burden language revolves around the question of to what extent, if any, customer preference can be used as a factor to limit the requirements of the ADA. This issue was raised during House debate on the Chapman amendment

where the main argument made in support of the amendment was that customers would refuse to patronize food establishments if an employee was known to have a communicable disease and that this could cause the business to close with a resulting loss of jobs.[112] Strong objections were raised to this argument as catering to "fear and prejudice"[113] and the resolution of the issue in conference was to deny coverage only in those situations where there was a risk to the public health.

Generally, the resolution of this issue comports with case law on customer preference under title VII. There, for example, the mere fact that customers may prefer that flight attendants be female has not been found to be sufficient to allow discrimination based on sex. However, under title VII there have been certain situations where customer preference may be sufficient for there not to be a finding of discrimination; for example, a female resident of a nursing home may have such a strong preference for a personal bathing attendant of the same sex that it would not be discrimination to hire on that basis. The unresolved issue under the Americans with Disabilities Act is whether there would be any situations so extreme as to allow customer preference. Given the rejection of this concept in the compromise on the Chapman amendment, it would appear likely that there would be few, if any, of these situations.

INSURANCE

The next generation of issues relating to individuals with disabilities will probably arise in the context of health care insurance. The Americans with Disabilities Act contains a specific exception relating to insurance:

> Title I through IV of this Act shall not be construed to prohibit or restrict—(1) an insurer, hospital or medical service company, health maintenance organization, or any agent, or entity that administers benefit plans, or similar organizations from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or (2) a person or organization covered by this Act from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or (3) a person or organization covered by this Act from

> establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance. Paragraphs (1), (2), and (3) shall not be used as a subterfuge to evade the purposes of title I and III.[114]

The legislative history of this provision indicates that it was added so that the ADA would not "affect the way the insurance industry does business in accordance with the State laws and regulations under which it regulates."[115] The last sentence of the section was added to insure that the provision was not used to evade the requirements of the Act. Thus, an employer could not deny a qualified individual with disabilities a job because the employer's current insurance plan does not cover the person's disability or because the employer's insurance costs would increase. Similarly, employee benefit plans are not violative of the ADA because they do not address the specific needs of every individual with disabilities.[116] However, there is some uncertainty about what would be considered to be a subterfuge. This may not need to be an intentional act and the mere fact that the benefit plan is already in effect at the time of the ADA's enactment may not be determinative. The result of this may encourage employers not to offer insurance benefit plans. The exact parameters of what is a subterfuge would benefit from regulatory guidance.

IMPLICATIONS FOR TECHNOLOGY

The ADA's requirements for reasonable accommodation implicate technology in several ways. First, what is reasonable accommodation may well depend upon the technologies that are available and so the specific requirements may vary as technological advances are made. The definition of reasonable accommodation itself includes an "acquisition or modification of equipment or devices."[117] Second, the ADA requires certain technologies; for example, the requirements for telecommunications relay services. The main issue this raises is to what degree technological adaptations are required. For example, is electronic equipment access required by the ADA? The answer to this is most likely affirmative although, like other kinds of reasonable accommodations, it would be subject to a balancing and the requirement may depend on whether such access would pose an undue burden.[118]

Interestingly, there may be an issue of balancing to be accomplished in the area of expected technological advances. In a case arising under

section 504, *Nelson v. Thornburgh*,[119] the court balanced the cost of providing readers or electronic devices for visually impaired income maintenance workers and found that the accommodation sought was a small fraction of the organization's budget. The court concluded that the cost of accommodation was "quite small" and was likely to diminish as technology advances.

THE FUTURE OF DISABILITY LAW AND POLICY

The ADA is undoubtedly a landmark in the development of disability law and policy. It will have a profound effect on American life and, as President Bush stated in his comments on signing the legislation, it places the United States in the forefront of the world community regarding disability rights. And it does so at a time when the aging of the population portends an increase in the number of individuals with disabilities. What then does the future hold for disability law and policy?

First, there will be continuing refinements and interpretations of the ADA and existing statutes with regard to ambiguous areas. The trend away from paternalism and toward civil rights will continue. However, this does not mean that financial aid and benefits for persons with disabilities should or will end.[120] The concept of reasonable accommodation inherent in the nondiscrimination mandates of section 504 and the ADA implies some type of assistance. Increasingly, as issues of insurance and technology are explored, it will become clear that in order to have rights, there must also be financial support for those rights.

The challenge facing disability policy makers will be to integrate financial support for rights at a time of increasing budgetary concerns (see Cohn 1990; Fox 1990). At first blush, this would seem an impossibility, but the benefits in terms of increasing tax revenues and additions to the work force would argue against a simplistic rejection of the idea. This blending of civil rights and benefits is not entirely without precedent in existing law: Individuals with Disabilities Education Act (formerly called the Education for All Handicapped Children Act)[121] provides valuable guidance on the melding of these concepts. It provides grants but also very specific rights and there are years of experience working with its requirements. EHA is limited, however, by the

fact that its civil-rights provisions are contingent upon the receipt of the grant funds. Although for EHA this has been a marginal limitation because presently all states have chosen to receive funding under the statute, it might well be a major limitation if the funding levels were to decrease. Thus, although EHA is a glimpse of a future melding of funding and rights, it is not a complete model. The future of disability law and policy lies in a creative merger of the benefits gained from provisions relating to financial support and those relating to civil rights. This merger is most likely to occur in the congressional arena because judicial activism regarding civil rights appears to be on the wane. The ADA is a crucial step on the road to this future blending of rights and funding.

NOTES

1. 29 U.S.C.§794.
2. P.L. 100–259.
3. P.L. 100–430.
4. For example, see S. 446, 96th Cong.; H.R. 5510, 96th Cong.; H.R. 255, 97th Cong.; H.R. 1919, 97th Cong.; H.R. 3187, 97th Cong.; H.R. 3187, 97th Cong.; H.R. 1200, 98th Cong.; H.R. 1294, 99th Cong.; H.R. 370, 99th Cong.; H.R. 3071, 100th Cong. All of these bills would have amended title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2(a), by including persons with disabilities generally or by including a specific type of disability such as cancer.
5. 29 U.S.C. §781.
6. S. 2345 and H.R. 4498.
7. S. 933 and H.R. 2273.
8. This amendment would have also provided for alternative employment for the employee. For supporting comments, see 136 Cong. Rec. H 2479 (daily ed. May 17, 1990) (Comments of Representative Bartlett).
9. 136 Cong. Rec. H 2489 (daily ed. May 17, 1990).
10. S. 933. See 135 Cong. Rec. S 10780 (daily ed. Sept. 7, 1989).
11. 136 Cong. Rec. H 4629 (daily ed. July 12, 1990).
12. 136 Cong. Rec. S 9695 (daily ed. July 13, 1990).
13. §504 of the Rehabilitation Act of 1973, 29 U.S.C. §794.
14. 29 U.S.C. 790 et seq.
15. ADA, §501, 42 U.S.C. §12201.
16. 42 U.S.C. § 2000e et seq.
17. *School Board of Nassau County v. Arline,* 480 U.S. 273 (1987).
18. See also *Alexander v. Choate,* 469 U.S. 287, 295 (1985).
19. 29 U.S.C. §706(8).
20. 28 C.F.R. §41.31.

21. See supra, note 17.
22. 28 C.F.R. §41.32.
23. 442 U.S. 397 (1979) at 406.
24. 469 U.S. 287 (1985) at 300.
25. Id. at 300. The section 504 statutory requirement that discrimination be "solely by reason of his or her handicap" has been little used. See *Pushkin v. Regents of University of Colorado*, 658 F.2d 1372 (1981).
26. 28 C.F.R. §41.51.
27. 28 C.F.R. §41.53.
28. 28 C.F.R. §§41.56–41.58.
29. *Alexander v. Choate*, supra note 24.
30. This flexibility in the ADA has been strongly criticized as creating subjectivity and vagueness (Lindsay 1989/1990).
31. 42 U.S.C. §12101 note.
32. 42 U.S.C. §12101.
33. 42 U.S.C. §12102.
34. 29 U.S.C. §706 (8).
35. S. Rep. No. 116, 101st Cong., 1st Sess. 22 (1989); H. Rep. No. 485, 101st Cong. 2d Sess. Part 2 at 51 (1990). Section 504 uses the term "individual with handicaps" whereas the ADA refers to "disability," reflecting congressional use of "up-to-date, currently accepted terminology." S. Rep. No. 116, 101st Cong., 1st Sess. 21 (1989); H.Rep. No 485, 101st Cong. 2d Sess., Part 2 at 50–51 and Part 3 at 26–27 (1990).
36. S. Rep. No 1165, 101st Cong., 1st Sess. 21 (1989); H. Rep. No 485, 101st Cong., 2d Sess. Part 2 at 51; Part 3 at 28 (1990).
37. S. Rep. No.116, 101st Cong. 1st Sess. 22 (1989).
38. See supra, note 17.
39. 45 C.F.R. §84.3.
40. S. Rep. No. 116, 101st Cong. 1st Sess. 23 (1989); H. Rep. No. 485. 101st Cong., 2d Sess. Part 2 at 52–53 (1990).
41. H.Rep. No. 485, 101st Cong., 2d Sess. Part 3 at 29 (1990), quoting 45 C.F.R. 84.3.
42. S.Rep. No. 1297, 93d Cong., 2d Sess., reprinted in [1974] *U.S. Code Cong. & Ad. News* 6373, 6389.
43. *Carter v. Orleans Parish Public Schools*, 725 F.2d 261 (5th Cir. 1984).
44. See, e.g., *Duran v. City of Tampa*, 430 F.Supp. 75 (M.D. Fla. 1977).
45. H. Rep. No. 485, 101st Cong., 2d Sess. Part 3 at 29 (1990). It should be noted that the report language emphasizes the *substantial* nature of the limitation, whether such limitation is genuine or perceived. This parallels section 504 case law. See, e.g., *Forrisi v Bowen*, 794 F.2d 931 (4th Cir. 1986).
46. 42 U.S.C. §12112.
47. 42 U.S.C. §12111.
48. Id.
49. See 45 C.F.R. Part 84.
50. 42 U.S.C. §12113.
51. 42 U.S.C. §12114.
52. See *Alexander v. Choate*, note 18 supra.

53. S. Rep. No. 116, 101St Cong. 1st Sess. 26 (1989).
54. Id.
55. Indeed, the House Judiciary Committee has stated that the reasonable accommodation requirement is central to the nondiscrimination mandate of the ADA. H.Rep. No. 485, 101st Cong. 2d Sess. Part 3 at 39.
56. See e.g., *Southeastern Community College v. Davis,* 442 U.S. 397 (1979); *Alexander v. Choate,* 469 U.S. 287 (1985). For an excellent discussion of reasonable accommodation under the ADA, see Bureau of National Affairs 1990: *The Americans with Disabilities Act*, 114–19.
57. 136 Cong. Rec. H 2470 (May 17, 1990).
58. 42 U.S.C. §§2000e-4, 2000e-5, 2000e-6, 2000e-8.
59. 42 U.S.C. §12117.
60. If legislation similar to the Civil Rights Act of 1990, S. 2104, 101st Cong., is enacted, the remedies referred to may change.
61. 42 U.S.C. §12111.
62. 42 U.S.C. §12132.
63. 42 U.S.C. §12131.
64. 42 U.S.C. §§12141–12150, 12161–12165.
65. 29 U.S.C. §794a.
66. 42 U.S.C. §12133.
67. 42 U.S.C. §12134.
68. 42 U.S.C. §12149.
69. 42 U.S.C. §§12131, 12141, 12161.
70. 42 U.S.C. §12182.
71. 42 U.S.C. §12181.
72. 42 U.S.C. §12182.
73. 42 U.S.C. §12181.
74. H.Rep. No. 485, 101st Cong. 2d Sess. Part 3, at 40 (1990).
75. S. Rep. No. 116, 101st Cong., 1st Sess. 66 (1989).
76. 42 U.S.C. §12182.
77. 42 U.S.C. §12184.
78. 42 U.S.C. §12186.
79. 42 U.S.C. §12185.
80. 42 U.S.C. §12188.
81. Id.
82. Id.
83. 42 U.S.C. 12181.
84. 47 U.S.C. 201 et seq.
85. 47 U.S.C. §225.
86. 47 U.S.C. §611.
87. 47 U.S.C. §225.
88. 42 U.S.C. §12201.
89. 42 U.S.C. §12202.
90. 42 U.S.C. §12203.
91. 42 U.S.C. §12204.
92. 42 U.S.C.§12205.
93. 42 U.S.C. §12206.

94. 42 U.S.C. §12207.
95. 42 U.S.C. §12212.
96. 42 U.S.C. §12213.
97. 42 U.S.C. §12209.
98. 42 U.S.C. §12210.
99. 42 U.S.C. §12208.
100. 42 U.S.C. §12211.
101. S. Rep. No. 116, 101st Cong. 1st Sess. 22 (1989).
102. Id.
103. Id.
104. 42 U.S.C. §12201.
105. *Russell v. Salve Regina College*, 649 F.Supp. 391 (D.R.I. 1986). See also *Tudyman v. United Airlines*, 608 F. Supp. 739 (C.D.Calif. 1984). A recently reported Maryland decision found that four overweight women had suffered unfair discrimination because of their perceived disability of obesity under a Maryland state statute (Valentine 1990 a,b).
106. 794 F.2d 931 (4th Cir. 1986).
107. See 136 Cong. Rec. H 4623. There is a record of genetic discrimination against individuals identified through genetic tests as being carriers of a disease-associated gene, most recently during sickle-cell screening programs during the 1970s. Under the ADA, such individuals may not be discriminated against simply because they may not be qualified for a job sometime in the future.
108. 886 F.2d 871 (7th Cir. 1989), cert. granted 58 U.S.L.W. (March 26, 1990).
109. 42 U.S.C. §12111 (10) (B) (iv) and §12181 (9) (D).
110. H.Rep.No.485, part 2, 101st Cong., 2d Sess. 68 (1990).
111. Id.
112. 136 Cong. Rec. H 2479 (daily ed. May 17, 1990)(Comments of Representative Bartlett).
113. Id. (Comments of Rep. Waxman).
114. 42 U.S.C. §12201 (c).
115. S.Rep. No. 116, 101st Cong. lst Sess. 84 (1989).
116. Id. at 85. The Senate Report also notes that this view is in keeping with the Supreme Court's interpretation of section 504 in *Alexander v. Choate*, 469 U.S. 287 (1985).
117. 42 U.S.C. §12111(9)(B). The term "auxiliary aids and services" is also defined as including the "acquisition or modification of equipment or devices." 42 U.S.C. §12102.
118. One of the interesting ramifications of the ADA may be the spur it provides to the development of technologies to aid persons with disabilities. Congress has already recognized the importance of technological developments to persons with disabilities in the Technology-Related Assistance for Individuals with Disabilities Act, P.L. 100–407, 29 U.S.C. §§2201 et seq. and the Education for All Handicapped Children Act, 20 U.S.C. §§ 1461–62.
119. 567 F.Supp. 369 (E.D.Pa. 1983), aff'd 732 F.2d 146 (3d Cir. 1983), cert.denied, 469 U.S. 1189 (1984).
120. The question of financial support to individuals with disabilities is a complex

one. One recent commentator has argued that the ADA takes the wrong approach by attempting to mandate new social legislation without providing funding (Burkhauser 1990).

121. 20 U.S.C. §1400 et seq.

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