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The Americans with Disabilities Act (ADA) does not protect everyone. It notably excludes people with Gender Identity Disorder (GID), an impairment involving the misalignment between one's anatomy and gender identity. Many would say this is as it should be – gender nonconforming people are not impaired and so they should not be covered by disability law. But this argument misapprehends the reason that GID was excluded from the ADA in the first place.

GID was excluded from the ADA because, in 1989, a small handful of senators believed that gender nonconformity – like pedophilia, pyromania, and kleptomania – was morally harmful to the community. In the eleventh hour of a marathon floor debate, and in the absence of an organized transgender lobby, the ADA's sponsors and disability rights advocates reluctantly agreed to sacrifice GID and nine other mental impairments in exchange for passage in the Senate. The fact that Congress went out of its way to exclude GID, along with nine mental impairments that involve some harm to oneself or others, sends a strong symbolic message: people with GID have no civil rights worthy of respect. The ADA is a moral code, and people with GID its moral castaways.

In 2008, when Congress decided to expand the ADA's definition of "disability" to protect more people, things should have been different for people with GID. Sadly, they were not. Instead of removing the GID exclusion once and for all, Congress enshrined its moral opposition to people with

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GID by preserving the exclusion. The ADA's message to people with GID, and to the transgender community more broadly, is now clearer than ever: nearly twenty years after the passage of the ADA, people with GID are still despicable and even dangerous, and therefore undeserving of legal protection. The ADA's moral code remains.

In order to achieve true equality, transgender advocacy must rebut the moral case against transgender people. The ADA should play a prominent role in this project because the ADA's GID exclusion is the moral case against transgender people. The ADA should be righted once more through passage of a modest bill, the "ADA Inclusion Act," which removes GID from the ADA's list of excluded impairments.

I. INTRODUCTION

Rachel Maddow. Jerry Sandusky. Chaz Bono. Although the ADA Amendments Act of 2008 (ADAAA) expanded the ADA's definition of disability to include medical impairments that are not typically thought of as "disabling,"[1] it left intact the exclusion of those who are gay, lesbian, or bisexual, those with pedophilia and other sexual disorders, and those who are transgender.[2] Many will say that this is as it should be.

Being gay, lesbian, or bisexual, after all, is not a medical impairment. In 1974, the American Psychiatric Association removed same-sex orientation from its standard classification of mental disorders, known as the Diagnostic and Statistical Manual (DSM).[3] Because same-sex orientation is not an

1. Kevin Barry, *Toward Universalism: What the ADA Amendments Act of 2008 Can and Can't Do for Disability Rights*, 31 BERKELEY J. EMP. & LAB. L. 203, 208 (2010) [hereinafter Barry, *Toward Universalism*] (discussing the ADA Amendments Act's protection of "nearly everyone from discrimination based on impairments" under the third prong and the relaxation of the "substantial limitation" requirement under the first and second prongs).

2. 42 U.S.C. § 12211 (2006). "Transgender" is an umbrella term that refers to those who are gender nonconforming. *See* Paisley Currah et al., *Introduction*, *in* TRANSGENDER RIGHTS xiv (2006). Generally speaking, it includes those diagnosed with Gender Identity Disorder (GID), as well as those without the diagnosis "whose gender identity or expression does not conform to the social expectations for their assigned sex at birth." *Id.*

3. HERB KUTCHINS & STUART A. KIRK, MAKING US CRAZY: DSM: THE PSYCHIATRIC BIBLE AND THE CREATION OF MENTAL DISORDERS 71-72 (1997). *See generally About DSM-5*, AM. PSYCHIATRIC ASS'N DSM-5 DEV. http://www.dsm5.org/about/pages/default.aspx (last visited Nov. 7, 2012) ("[DSM]" is the standard classification of mental disorders used by mental health professionals in the United States and contains a listing of diagnostic criteria for every psychiatric disorder recognized by the U.S. healthcare system."). Although the DSM "was developed for clinical, public health, and research purposes"—not legal ones—it nevertheless "has been recognized as an important reference by courts" and, according to the EEOC, "is relevant for identifying [mental] disorders." *Proposed Revision, Definition of a Mental Disorder*, AM. PSYCHIATRIC ASS'N DSM-5 DEV. Proposed revisions are no longer available online, but are on file with the author. Please see dsm5.org for the final version of the rule. [hereinafter *Mental Disorder, DSM-5 Proposed Revision*]; *What is a "mental impairment" under the ADA?*, EEOC, Notice No. 915.002, ENFORCEMENT GUIDANCE: THE AMERICANS WITH DISABILITIES ACT AND

impairment, the argument goes, it should not be covered by the ADA. Rachel Maddow, for example, who is openly lesbian and the host of MSNBC's primetime news show, "The Rachel Maddow Show,"[4] is excluded from the ADA's definition of disability because she has no medical impairment. The ADA should no more protect her, one might reasonably argue, than it should protect people with brown eyes, short legs, or dark hair.[5] These are characteristics, not impairments, and therefore not the stuff of disability protection.

By contrast, pedophilia, the sexual attraction to prepubescent children, remains an impairment under the DSM and few would argue that it should not be.[6] But *disability coverage* for pedophiles is another matter; one might reasonably argue that the ADA should not extend to pedophiles because they threaten the safety of one of our most precious resources—our future.[7] Jerry Sandusky, for example, who is the former defensive coordinator for the Penn State football team and was arrested in 2011 for sexually abusing eight boys over a 15-year period,[8] has a medical impairment alright. He, too, is excluded from the ADA's definition of disability, but for a very different reason than Rachel Maddow. He is excluded because he is morally depraved and therefore undeserving of disability protection.[9]

PSYCHIATRIC DISABILITIES (1997) *available at* http://www.eeoc.gov/policy/docs/psych.html.

4. Jessica Pressler, *The Dr. Maddow Show*, N.Y. MAG. Nov. 2, 2008, http://nymag.com/news/media/51822/.

5. 29 C.F.R. Pt. 1630, App. (2010) ("The definition of the term 'impairment' does not include physical characteristics such as eye color, hair color, left-handedness, or height, weight, or muscle tone that are within 'normal' range and are not the result of a physiological disorder.").

6. *Pedophilic Disorder: Proposed Revision*, AM. PSYCHIATRIC ASS'N DSM-5 DEV. Proposed revisions are no longer available online, but are on file with the author. Please see dsm5.org for the final version of the rule.

7. This is not to say that reasonable arguments cannot also be made for disability coverage of pedophiles. *See infra* note 189.

8. Mark Viera, *Former Coach at Penn State Is Charged With Abuse*, N. Y. TIMES (Nov. 5, 2011), http://www.nytimes.com/2011/11/06/sports/ncaafootball/former-coach-at-penn-state-is-charged-with-abuse.html.

9. One might reasonably argue that gay, lesbian, and bisexual people were excluded from the ADA not because legislators believed they were not impaired, but rather because legislators believed that they, too, were morally suspect. Much of the ADA's legislative history, including the original ADA bill passed by the Senate, supports this argument. *See* Ruth Colker, *Homophobia, AIDS Hysteria, and the Americans with Disabilities Act*, 8 J. GENDER RACE & JUST. 33, 44-46, 49-50 (2004) [hereinafter *Homophobia*] (discussing ADA's legislative history). Nevertheless, because the final version of the ADA clarified that "homosexuality and bisexuality are not impairments and as such are not disabilities," the text of the law supports a clear distinction in the reasoning for excluding homosexuality and bisexuality, on the one hand, and a host of other conditions, on the other. 42 U.S.C. § 12211 (2005). *See also infra* notes 130-31 and accompanying text. *Cf.* Katrina C. Rose, *Where the Rubber Left the Road: The Use and Misuse of History in the Quest for The Federal Employment Non-Discrimination Act*, 18 TEMPLE POL'L & CIV'L RTS. L. REV. 397, 436 n.199 (2009) (quoting Steve Smith, a lobbyist for the Human Rights Campaign Fund at time of the ADA's passage, who praised the ADA exclusions; and Peri Jude Radecic, who agreed with the ADA's exclusion of homosexuality and bisexuality but noted that "as far as the other categories are concerned, I think that anytime that people are removed from protections, I don't necessarily think that's a good situation. I'm not happy anyone is excluded from

Gender Identity Disorder (GID), which involves the misalignment between one's anatomy and gender identity, is a harder case.[10] According to proposed changes to the DSM, which will take effect in 2013, people with GID experience, or are at risk of experiencing, distress if they do not receive the right support, ranging from talk therapy to pharmacological and surgical interventions.[11] The fact that GID remains a listed DSM diagnosis, coupled with the fact that having GID has nothing to do with hurting people,[12] would appear to favor disability coverage under the ADA. But some in the transgender community—echoing the call of gay, lesbian, and bisexual people over thirty years ago—believe that GID is not a mental impairment and therefore has no business being in the DSM.[13] Accordingly, one might argue, GID has no business being in the ADA either. GID sits at the uneasy crossroads of pathology and difference.

While reasonable arguments can be made for the exclusion of GID under the ADA, the ADA's current exclusion of GID is not a reasonable one.[14] GID is explicitly excluded from the ADA *not* because people with GID are not impaired (Rachel Maddow), but rather because, in 1989, several members of Congress believed that people with GID were morally bankrupt, dangerous, and sick (Jerry Sandusky). The ADA became a moral code separating the deserving disabled from the subjects of scorn, with people with GID falling squarely into the latter camp. Chaz Bono, for example, a transgender man, and the child of Sonny Bono and Cher, who danced his way into American's living rooms two years ago, is not protected by the ADA.[15] Whether or not one believes that Chaz Bono has an impairment is beside the point—the ADA says that he *does* have an impairment, but that

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the bill"). Peri Jude Radecic was a lobbyist for the National Gay and Lesbian Task Force at the time of the ADA's passage. *See Peri Jude Radecic Takes Over as Executive Director of the Arizona Center for Disability Law*, ARIZONA CENTER FOR DISABILITY LAW, (May 29, 2007), http://www.acdl.com/PR052907.htm.

10. *See Gender Dysphoria in Adolescents or Adults: Proposed Revision*, AM. PSYCHIATRIC ASS'N DSM-5 DEV. Proposed revisions are no longer available online, but are on file with the author. Please see dsm5.org for the final version of the rule [hereinafter *Gender Dysphoria, DSM-5 Proposed Revision*].

11. *Id.*

12. Not everyone would agree with this statement. Those in an intimate relationship with someone who "comes out" as transgender might say otherwise. But as physically mature, consenting adults, their hurt is different in kind from that of a prepubescent child.

13. *See* Judith Butler, *Undiagnosing Gender*, *in* TRANSGENDER RIGHTS, *supra* note 2, at 274.

14. *See* L. Camille Hébert, *Transforming Transsexual and Transgender Rights*, 15 WM. & MARY J. WOMEN & L. 535, 540-41 (2009) ("While one might argue for the exclusion of certain conditions from the definition of disability as justified by not wanting to pathologize certain individuals and conditions, this does not appear to have been the motivation of Congress.") (citation omitted).

15. Chaz Bono was a cast member of ABC's "Dancing with the Stars" in 2011. Elizabeth Flock, *Chaz Bono on 'Dancing With the Stars' puts Transgender Rights in Spotlight*, WASH. POST (Sep. 1, 2011), http://www.washingtonpost.com/blogs/blogpost/post/chaz-bono-on-dancing-with-the-stars-puts-transgender-rights-in-spotlight/2011/09/01/gIQAIMj2uJ_blog.html.

he, like Jerry Sandusky, is not morally deserving of protection.

The ADAAA could have changed things for people with GID, but it did not do so. In fact, by changing nearly everything about the definition of disability *except* the ADA's list of exclusions, the ADAAA appears to ratify the ADA's moral disapprobation of people with GID. Law can sometimes create the very thing it seeks to dismantle, and the ADA is a case in point.

By expanding the definition of disability, the ADAAA signaled that nearly everyone, not just those traditionally considered "disabled," should be protected from discrimination based on impairment. The newly amended ADA's scope of coverage is nearly universal. Accordingly, the ADA does not protect "those" people with stigmatized impairments that impose severe functional limitations; it now protects all of us who are treated unfairly based on impairment, whether or not our impairments are typically thought of as disabilities. Like the "Genderqueer" who blur the boundaries between gender's perceived poles of male and female, the newly amended ADA is "disabilityqueer," blurring the line between the nondisabled and the disabled – between the healthy "us" and the unfortunate "them."[16]

But by maintaining the GID exclusion, the ADAAA cemented GID's last-place position in the hierarchy of mental impairments. Now more than ever, the ADA "disables" people with GID.

While the ADAAA's preservation of GID's place in the hierarchy of im-

16. The newly amended ADA is disabilityqueer in the sense that its expanded definition of "disability" protects almost any one of us who is treated adversely based on an impairment – even those whose impairments are not typically thought of as disabling. *See infra* notes 160-67. For example, under the amended ADA, a person with controlled asthma, epilepsy, diabetes, or anxiety, who is refused an accommodation, or a person fired because of a bad back, ankle injury, carpal tunnel syndrome, or high-functioning autism, is "disabled." By the same token, those who comprise this vastly expanded group of people now considered "disabled" under the ADA are, *themselves*, disabilityqueer; they are "disabled" in the eyes of the law but are not typically considered to be "disabled" by the rest of society. In this way, disabilityqueer refers to both the laws and the people who blur the boundaries between disabled and nondisabled.

"Disabilityqueer" is closely related to the concept of "bi-ability" articulated by Professor Ruth Colker. *See* Ruth Colker, *Bi: Race, Sexual Orientation, Gender, and Disability*, 56 OHIO ST. L.J. 1, 1 n.4 (1995). According to Professor Colker, "bi-ability" refers to those who are not covered by disability law but who nevertheless experience disadvantage based on their impairments, including those not typically considered to be disabled (e.g., a person with controlled asthma, epilepsy, or diabetes; an obese person who cannot fit into a movie theater seat; a child with "strabismus (commonly known as crossed eyes)" who lacks depth perception). *Id.* at 58-59, 61-62. Such people are "neither disabled [under the law] nor able-bodied" – they are in between. *Id.* at 1 n.4. Under the pre-amendments ADA, there were many bi-abled. "Disabilityqueer," on the other hand, refers to those who *are* covered by disability law but are not typically considered to be disabled (e.g., people with carpal tunnel syndrome, ankle injuries, back injuries, high-functioning autism, and so on). By expanding the definition of disability under the ADA's first prong and covering nearly all people under the "regarded-as" prong, the 2008 amendments to the ADA reduce the number of bi-abled and increase the number of disabilityqueer. *See also* Elizabeth F. Emens, *Disabling Attitudes: U.S. Disability Law and the ADA Amendments Act*, 60 AM. J. COMP. L. 205, 223-25 & n.92 (2012) (preferring term "bidisability" over "bi-ability," and discussing ADAAA's purported conversion of "many of the bidisabled into the legal category of disability").

pairments is understandable as a political matter, it is unfortunate. GID was originally excluded from the ADA for moral reasons: "transgender is bad." But times have changed. The transgender rights movement has found its voice. Transgender people have won significant legal battles at the federal, state, and local levels, including battles before the U.S. Equal Employment Opportunity Commission, which ruled in April 2012 that transgender discrimination is "sex" discrimination under Title VII.[17] And Chaz Bono is dancing with the stars. At long last, transgender is becoming good.[18]

As one scholar recently put it, "[f]ederal law has an important expressive function, especially concerning the messages it sends about disadvantaged groups."[19] While protection of transgender people under existing federal and state "sex" discrimination laws and state "gender identity" discrimination laws is an essential part of making transgender "good," it does not erase the stain in federal disability law that likens people with GID to people who hurt others and burn and steal things. It does not eliminate the fact that federal disability law stigmatizes transgender people. Removing the ADA's intractable GID exclusion should be part of the project of making transgender good. The ADA's definition of disability should be righted once more.

This Article begins with a brief introduction to the ADA and its comprehensive prohibition of disability discrimination. Next, this Article discusses the ADA's legislative history and the untold back-door deal that resulted in the exclusion of GID. Here, my goal is to unmask, to expose why exactly the ADA protects all physical impairments but only some mental impairments—the ones we pity, not the ones we despise.[20]

I then turn the clock forward seventeen years to the negotiations that culminated in passage of the ADAAA. I discuss why the Amendments maintained the ADA's GID exclusion despite its broad expansion of the definition of disability, the emergence of a powerful transgender lobby, and growing support for transgender people in popular culture and under state and federal law.[21]

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17. Macy, EEOC Appeal No. 0120120821, 2012 WL 1435995 (April 20, 2012).

18. This is not to say that transgender people do not still have a long way to go. *See, e.g.*, JAIME M. GRANT ET AL., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 2-8 (2011) *available at* http://www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf [hereinafter "INJUSTICE AT EVERY TURN"] (documenting rampant discrimination against transgender people in education, employment, family life, public accommodations, housing, health care, jails, interactions with police, and obtaining ID documents); Shannon Price Minter, *Do Transsexuals Dream of Gay Rights? Getting Real About Transgender Inclusion*, *in* TRANSGENDER RIGHTS, *supra* note 2, at 146-50 (discussing reluctance of mainstream LGB movement to accept transgender people).

19. Michael Waterstone, *Returning Veterans and Disability Law*, 85 NOTRE DAME L. REV. 1081, 1122 (2010).

20. *See infra* Part II.

21. *See infra* Part III.

This Article then looks to the future, and considers what, if anything, ought to be done about the ADA's exclusion of GID. After discussing some likely counter-arguments from the transgender community, this Article concludes that the ADA's definition of disability should be amended to provide federal disability rights protection for people with GID.[22]

II. A COMPREHENSIVE CIVIL RIGHTS ACT

In order to understand the ADA's past and present (and recommendations for its future), some brief background is in order. The ADA is a comprehensive civil rights law that prohibits discrimination based on disability in a range of areas, including private employment (Title I), governmental benefits and services (Title II), and places of public accommodation (Title III).[23] In order for people to claim protection under the ADA, they must show that they have a "disability" as defined by the statute.[24] Simply put, a person can show that he or she is disabled – and therefore protected under the ADA – if that person (1) actually has, (2) has a record of having, or (3) is regarded by others as having a "physical or mental impairment that substantially limits one or more major life activities."[25]

Congress intended this definition to be interpreted broadly. The word "impairment," for example, is defined broadly under the ADA's regulations to include virtually any physiological or mental disorder.[26] And the third prong of the definition of disability (the "regarded-as" prong), which covers those whose impairments are not substantially limiting and even non-existent, was intended to be a catch-all for those not covered under the first and second prongs.[27]

When compared with the definition of disability under the Social Security Act, the breadth of the ADA's intended scope of coverage becomes clear. The Social Security Act provides cash benefits to people who cannot work

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22. *See infra* Part IV.

23. *See* Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12111-17 (workplace); §§ 12131-65 (state and local government); §§ 12181-89 (public accommodations) (2006); *see also* Americans with Disabilities Act of 1990, Pub. L. No. 101-336 ("An Act To establish a clear and comprehensive prohibition of discrimination on the basis of disability.").

24. *See id.* at § 12102(2)(A)-(C).

25. *Id.* at § 12102(2)(A)-(C)); *see also* Kevin Barry, *Exactly What Congress Intended?*, 17 EMPLOYEE RTS. & EMPLOYMENT POL'Y J. (forthcoming 2013) [hereinafter, *Congress Intended*].

26. *See* 29 C.F.R. § 1630.2(h) (2012) ("Physical or mental impairment means – (1) [a]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems..." or "(2) [a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities."); *see also* Samuel R. Bagenstos, *Subordination, Stigma, and Disability*, 86 VA. L. REV. 397, 407 (2000) (stating that "impairment" is "sufficiently broad to ensure that no serious question of application arises in the vast range of cases . . .").

27. Barry, *Toward Universalism*, at 225 n.123.

on account of impairments that "can be expected to result in death or [that have] lasted or can be expected to last for a continuous period of not less than 12 months."[28] The ADA, by contrast, is a civil rights law, not a benefits law. It does not provide cash benefits to those who cannot work; it provides antidiscrimination protection to those who can.[29] By its terms, the ADA protects all those who face barriers—attitudinal, architectural, and so on—because of their impairments.[30]

Importantly, the ADA's definition of disability is not new. It was taken verbatim from an earlier federal law, § 504 of the Rehabilitation Act of 1973, which prohibits the federal government and recipients of federal funds from discriminating based on disability.[31] Although the U.S. Supreme Court and lower courts had given the definition of disability an expansive reading under the Rehabilitation Act, these broad interpretations did not hold under the ADA. Instead, the Supreme Court and lower courts finely parsed the definition of disability, narrowing the ADA's scope of coverage to those with the most severely limiting impairments.[32] As discussed in Part IV, these narrow interpretations spurred Congress to amend the ADA in 2008, greatly expanding the ADA's scope of coverage and what it means to be "disabled."

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28. Social Security Act, 42 U.S.C. § 423(d)(1)(A) (providing disability insurance benefit payments to those with an "inability to engage in substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months . . .").

29. Barry, *Congress Intended*, *supra* note 25. As further discussed below, ADA protection extends beyond employment to public services such as education and transportation, as well as to places of public accommodation like restaurants and hotels. *See infra* note 209 (discussing examples of ADA's comprehensive coverage).

30. *See* Americans with Disabilities Act of 1990 § 2, 42 U.S.C. § 12101(a)(5) (2005) ("[I]ndividuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities . . . ."). *See also* ADA Amendments Act of 2008 § 2(a)(2), 42 U.S.C. § 12101 Historical and Statutory Notes ("[I]n enacting the ADA, Congress recognized that physical and mental disabilities in no way diminish a person's right to fully participate in all aspects of society, but that people with physical or mental disabilities are frequently precluded from doing so because of prejudice, antiquated attitudes, or the failure to remove societal and institutional barriers.").

31. Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794 (2006) (prohibiting discrimination in federal programs based on disability); Rehabilitation Act Amendments of 1974 § 111(A), Pub. L. No. 93-513, 88 Stat. 1617 (codified in scattered sections of 29 U.S.C.); 29 U.S.C. § 705(20) (2006) (defining "individual with a disability"). Section 504 of the Rehabilitation Act "is just one part of a larger and complex statute that increased federal support for vocational and rehabilitation programs." Barry, *Congress Intended*, *supra* note 25.

32. Barry, *Congress Intended*, *supra* note 25.

III. GENDER IDENTITY DISORDER AND THE ADA OF 1990: ADA AS MORAL CODE

Since 1990, the ADA has explicitly excluded from coverage the following list of impairments:

> (1) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;
> (2) compulsive gambling, kleptomania, or pyromania; or
> (3) psychoactive substance use disorders resulting from current illegal use of drugs.[33]

While subpart (1) purports to exclude all "sexual behavior disorders," it notably includes Gender Identity Disorder (GID) (and Transsexualism, which was folded into the definition of GID in 1994 and is no longer used by the DSM)—which is not a sexual behavior disorder.[34] Unlike the sexual

33. 42 U.S.C. § 12211(b) (2006).

34. The classification "Gender Identity Disorders," and the three diagnoses within that classification, "Transsexualism," "Gender Identity Disorder of Childhood," and "Atypical Gender Identity Disorder," first appeared in the DSM in 1980. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-III 261–66 (1980). The DSM-III, as it was called, considered "Gender Identity Disorders" to be a subclass of "Psychosexual Disorders," alongside "Paraphilias" such as pedophilia and voyeurism. *Id.* at 261-66. When the DSM was revised in 1987, the DSM-III-R removed "Gender Identity Disorders" from the subclass "Psychosexual Disorders" and instead listed it as a subclass of "Disorders Usually First Evident in Infancy, Childhood, or Adolescence." AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-III-R 27, 71 (1987) [hereinafter DSM-III-R]. Paraphilias were listed as a subclass of "Sexual Disorders." *Id.* at 279. The DSM-III-R was the version of the DSM in effect at the time of the ADA's passage in 1990. This version also added a fourth diagnosis, "Gender Identity Disorder of Adolescence or Adulthood, Non-Transsexual Type," which differed from "Transsexualism" in that the former did not involve a "persistent . . . wish to get rid of one's primary and secondary sex characteristics and acquire the sex characteristics of the other sex." *Id.* at 77.

In 1994, a new version of the DSM, the DSM-IV, "replaced the diagnosis of 'Transsexualism' with 'Gender Identity Disorder.'" *See* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-IV 532-38 (1994) [hereinafter DSM-IV]. *See also The Harry Benjamin International Gender Dysphoria Association's Standards of Care for Gender Identity Disorders, Sixth Version,* TRANSGENDER LONDON, http://transgenderlondon.com/
HBSOC.htm. Despite its removal from the DSM-IV, the word "transsexual" continues to be used colloquially to refer to those "who seek to live in a gender different from the one assigned at birth and who may seek or want medical intervention (through hormones and/or surgery) for them to live comfortably in that gender." *Teaching Transgender,* NATIONAL CENTER FOR TRANSGENDER EQUALITY, 16 (Jan. 2009), http://transequality.org/Resources/NCTE_
Teaching_Transgender.pdf. Like its predecessor, the DSM-IV distinguished between "Gender Identity Disorders" and "Sexual Disorders." DSM-IV, *supra* note 34 at 493. The DSM-IV-TR maintains this distinction, see AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL

disorders listed in subpart (1), all of which are characterized by "recurrent, intense sexual urges, fantasies, or behaviors that involve unusual objects, activities, or situations," GID is, as its name suggests, a *gender identity* disorder.[35]

According to the DSM-IV, GID is characterized by a "strong desire" to be "the other gender" and "clinically significant distress or impairment in social, occupational, or other important areas of functioning."[36] Like so many other mental impairments[37] under review by the American Psychiat-

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OF MENTAL DISORDERS: DSM-IV-TR 535 (2000), as do proposed changes to the DSM that will take effect in 2013, see *Gender Dysphoria, DSM-5 Proposed Revision*, *supra* note 10.

35. DSM-IV, *supra* note 34, at 493, 532. By adding the words "not resulting from physical impairments" after "gender identity disorders," the ADA presumably covers those whose GID is attributable to intersex conditions (formerly known as "Hermaphroditism" and increasingly referred to by the medical community as "Disorders of Sex Development" (DSD)), which affect the sexual and reproductive anatomy. *See* 42 U.S.C. § 12211(b)(1) (2006). For a good discussion of intersex conditions, see Yamuna Menon, Note, *The Intersex Community and the Americans with Disabilities Act*, 43 CONN. L. REV. 1221, 1227-32 (2011), and *Types of Intersex Conditions*, TRANSFAITHONLINE, http://www.transfaithonline.org/intersections/intersex/types/. At least one court has suggested that the GID exclusion may not, in fact, exclude GID to the extent that GID "results 'from physical impairments' in an individual's genome." Doe v. Yunits, 25 Mass. L. Rptr. 278 n.6 (Super. Ct., 2001) ("In light of the remarkable growth in our understanding of the role of genetics in producing what were previously thought to be psychological disorders, this Court cannot eliminate the possibility that all or some gender identity disorders result 'from physical impairments' in an individual's genome."); *see also* Jennifer L. Levi & Bennett H. Klein, *Pursuing Protection for Transgender Through Disability*, *in* TRANSGENDER RIGHTS 84 (2006) (stating that ADA's inclusion "of gender identity disorders *resulting from physical impairments* offer some hope for protection as the physical etiology of gender identity disorder is more thoroughly researched and understood . . .") (emphasis added).

36. DSM-IV, *supra* note 34, at 537-38.

37. The terms "mental impairment" and "mental disorder" are not without ambiguity. They are sometimes used to refer to conditions impacting one's cognitive development, such as Intellectual Development Disorder (formerly known as "Mental Retardation"). *See Intellectual Development Disorder: Proposed Revision*, AM. PSYCHIATRIC ASS'N DSM-5 DEV. Proposed revisions are no longer available online, but are on file with the author. Please see dsm5.org for the final version of the rule. They are also used to refer to conditions impacting one's emotions or behavior, such as Major Depressive Disorder or Oppositional Defiant Disorder. *See Major Depressive Disorder, Recurrent: Proposed Revision*, AM. PSYCHIATRIC ASS'N DSM-5 DEV. Proposed revisions are no longer available online, but are on file with the author. See dsm5.org for the final version of the rule; *Oppositional Defiance Disorder: Proposed Revision*, AM. PSYCHIATRIC ASS'N DSM-5 DEV. Proposed revisions are no longer available online, but are on file with the author. Please see dsm5.org for the final version of the rule. Here I use the terms "mental impairment" and "mental disorder" interchangeably to refer to conditions that impact cognition as well as emotions and behavior. This is consistent with the American Psychiatric Association's proposed revision to the definition of "mental disorder" in the DSM-5 as well as the U.S. Equal Employment Opportunity Commission's definition of "mental impairment" under the ADA. *Compare Mental Disorder, DSM-5 Proposed Revision* ("A Mental Disorder is a health condition characterized by significant dysfunction in an individual's cognitions, emotions, or behaviors that reflects a disturbance in the psychological, biological, or developmental processes underlying mental functioning."), *with* Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. § 1630.2(h) (2011) (August 17, 2012) ("[M]ental impairment means . . . [a]ny mental or psychological disorder, such as an intellectual disability (formerly termed 'mental retardation'), organic brain syndrome, emotional or mental illness, and specific learning disabilities.").

ric Association, the diagnostic criteria for GID are in a state of flux.[38] Under the proposed DSM-5, GID will be renamed "Gender Dysphoria,"[39] which is less "stigmatizing" and "better reflects the core of the problem: an incongruence between, on the one hand, what identity one experiences and/or expresses and, on the other hand, how one is expected to live based on one's assigned gender (usually at birth)."[40] Rather than "presuppos[e] the existence of acute or inherent distress" associated with GID, the DSM-5 modifies the requirement of "clinically significant distress or impairment" to include "a significantly increased *risk* of suffering death, pain, disability, or an important loss of freedom."[41] According to the DSM-5's Working Group on Sexual and Gender Identity Disorders, not all people with GID are distressed and, according to some studies, they "generally function psychologically in the non-clinical range."[42] The Working Group further suggests that it is "stigma" that causes distress, not GID, and that the desire "to be rid of body parts that do not fit one's identity is, in the absence of data," not "inherent[ly] distress[ing]."[43] According to the proposed DSM-5, the "desire to be rid of one's primary and/or secondary sex characteristics because of a marked incongruence with one's experienced/expressed gender" may not only *not* be distressing—it may well be liberating.

Given the unlikely company in which GID (and Transsexualism) finds itself, one might guess that this list was not the result of careful congressional deliberation. And one would be right. This list was a slapdash collection of mental impairments drawn from the DSM-III-R[44] and grafted onto the ADA by amendment to ensure passage in the Senate.[45] What follows

38. *See Gender Dysphoria, DSM-5 Proposed Revision*, *supra* note 10.

39. *Id.*

40. *Gender Dysphoria, DSM-5 Rationale*, *supra* note 10 (stating that DSM-5 Neurodevelopmental Disorders Working Group "received many favorable comments about the proposed name change, particularly with regard to the removal of the 'Disorder' label from the name of the diagnosis").

41. *Compare Gender Dysphoria, DSM-5 Proposed Revision*, *supra* note 10 *with* DSM-IV, *supra* note 34, at 537-38 (emphasis added).

42. *Gender Dysphoria, DSM-5 Rationale*, *supra* note 10; *see id.* ("[M]any individuals, after transition, do not meet any more the criteria set for gender dysphoria . . . .").

43. *Id.*

44. *See* DSM-III-R, *supra* note 34.

45. 135 CONG. REC. S10785 (Sep. 7, 1989) (statement of Sen. Armstrong) ("Under this act the term 'disability' does not include 'homosexuality,' 'bisexuality,' 'transvestism,' 'pedophilia,' 'transsexualism,' 'exhibitionism,' 'voyeurism,' 'compulsive gambling,' 'kleptomania,' or 'pyromania,' 'gender identity disorders,' current 'psychoactive substance use disorders,' as defined by DSM-III-R which are not the result of medical treatment, or 'other sexual behavior disorders.'"). Because the Senate also passed Senator Jesse Helms' amendment to the ADA excluding "transvestites" from coverage, *see* 135 CONG. REC. S10,776 (daily ed. Sep. 7, 1989), the ADA excludes "transvestism" twice. *See id.* at S10776; *see also* Colker, *Homophobia*, *supra* note 9, at 50 (stating that this "redundancy is itself derogatory because it highlights the legislators' extreme desire to prevent this group from having legal protection."); Robert Burgdorf, *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 519 (1991) ("No evidence suggests that Congress inves-

is a discussion of how that list came to be. Because much of this story has not been told, I discuss it in some detail.[46]

A. Excluding Mental Impairments: The Senate Floor

To understand why GID was excluded from the ADA, it is first necessary to understand legislators' objections to mental impairments more generally. As the ADA progressed through the Senate Committee on Labor and Human Resources, no attempt was made to exclude particular impairments, mental or physical.[47] In fact, Congress deliberately went in the opposite direction, including *all* impairments so long as they actually limited, previously limited, or were regarded as limiting a major life activity.[48] According to the Senate Committee on Labor and Human Resources Report:

> It is not possible to include in the legislation a list of all the specific conditions, diseases, or infections that would constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of such a list, particularly in light of the fact that new disorders may develop in the future. The term includes, however, such conditions, diseases and infections as: mental retardation, emotional illness, specific learning disabilities, drug addiction, and alcoholism.[49]

Disability rights advocates, therefore, had no indication of efforts to exclude impairments.[50]

This all changed during the Senate floor debate on the ADA on September 7, 1989. Late in the day, Senator William Armstrong (R-CO) came to the floor and expressed his concerns with the ADA's definition of disability – specifically, its coverage of certain mental impairments.[51] Several other

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tigated such conditions, except, perhaps, for the problem of illegal drug use. Consequently, it is arguable that the members of Congress relied upon nothing other than their own negative reactions, fears and prejudices in fashioning the list of excluded classes.").

46. For two helpful articles discussing the legislative history of the GID exclusion, see Colker, *Homophobia, supra* note 9, at 36-44, and Kari E. Hong, *Categorical Exclusions: Exploring Legal Responses to Health Care Discrimination Against Transsexuals*, 11 COLUM. J. GENDER & L. 88, 117-118 (2002).

47. Telephone Interview with Chai Feldblum, Professor of Law, Georgetown University Law Center (Oct. 10, 2011) [hereinafter Feldblum Interview].

48. *See* S. Rep. No. 101-116, at 20 (1989) (defining disability to mean "(1) A physical or mental impairment that substantially limits one or more of the major life activities of such individual; (2) A record of such impairment; or (3) Being regarded as having such an impairment").

49. *Id.*

50. Feldblum Interview, *supra* note 47. *See also* 135 CONG. REC. S10785 (daily ed. Sep. 7, 1989) (statement of Sen. Hatch) (noting that ADA's "sweeping" inclusion of all mental impairments was "ignored" until Armstrong raised this issue during floor debate).

51. 135 CONG. REC. S10753 (daily ed. Sep. 7, 1989).

senators shared his concerns, which were of three types: moral, legal, and pragmatic.

1. The Moral Case for Excluding Certain Mental Impairments

Armstrong's first concern with the ADA's coverage of certain mental impairments was a moral one. Armstrong "could not imagine the sponsors would want to provide a protected legal status to somebody who has such [mental] disorders, particularly those [that] might have a moral content to them or which in the opinion of some people have a moral content."[52] According to Armstrong, although "the ideals of our country certainly call upon the Senate to do whatever it can to be helpful to people in wheelchairs or who have some kind of a *physical* disability or handicap of some sort and who are trying to overcome it," the ADA extended coverage to "[m]ental disorders, such as alcohol withdrawal, delirium, hallucinosis, dementia with alcoholism, marijuana, delusional disorder, cocaine intoxication, cocaine delirium, [and] disillusional disorder," which "by any ordinary definition we would not expect to be included."[53]

In a colloquy with Senator Harkin, Senator Armstrong expressed concern with still more "mental disorders," namely, current drug and alcohol abuse, "homosexuality and bisexuality . . . exhibitionism, pedophilia, voyeurism . . . compulsive kleptomania, or other impulse control disorders . . . conduct disorder, [and] any other disruptive behavior disorder. . . ."[54] Senator Harkin responded that *none* would be covered except for conduct disorder or other disruptive behavior disorder to the extent it was "closely connected with a mental disorder."[55] Senator Armstrong stated that he would submit a list of mental impairments to Senator Harkin for exclusion from the ADA, and would offer an amendment if "there [was] any doubt" as to their exclusion.[56]

Senator Warren Rudman (R-NH) shared Armstrong's concerns, particularly with regard to the coverage of alcoholism, drug addiction, compulsive gambling, pedophilia, kleptomania, and other "socially unacceptable, often illegal, behavior." According to Senator Rudman:

> A diagnosis of certain types of mental illness is frequently made on the basis of a pattern of socially unacceptable behavior and lacks any physiological basis. In short, we are talking about behavior that is immoral, improper, or illegal and which individuals are engaging in of their own volition, admittedly for reasons we do not

52. *Id.* (statement of Sen. Armstrong).
53. *Id.*
54. *Id.* at S10754.
55. *Id.*
56. *Id.*

> fully understand. Where we as a people have through a variety of means, including our legal code, expressed disapproval of certain conduct, I do not understand how Congress can create the possibility that employers are legally liable for taking such conduct into account when making employment-related decisions. In principle, I agree with the concept that the mentally ill should be protected from in[v]idious discrimination just as the physically handicapped should be. However, people must bear some responsibility for the consequences of their own actions.[57]

Echoing Senator Armstrong's and Rudman's moral concerns, Senator Jesse Helms (R-NC) pressed the sponsors on the ADA's presumptive coverage of five groups of individuals: "homosexuals"; "transvestites"; illegal drug users and alcoholics; "people who are HIV positive or have active AIDS disease"; and those with "psychosis, neurosis, or other mental, psychological disease[s] or disorder[s]," namely, pedophilia, schizophrenia, kleptomania, manic depression, intellectual disabilities, and psychotic disorders.[58] According to Senator Helms,

> If this were a bill involving people in a wheelchair or those who have been injured in the war, that is one thing. But how in the world did you get to the place that you did not even [ex]clude transvestites? How did you get into this business of classifying people who are HIV positive, most of whom are drug addicts or homosexuals or bisexuals, as disabled? . . . What I get out of all of this is here comes the U.S. Government telling the employer that he cannot set up any moral standards for his business by asking someone if he is HIV positive, even though 85 percent of those people are engaged in activities that most Americans find abhorrent. . . . [H]e cannot say, look I feel very strongly about people who engage in sexually deviant behavior or unlawful sexual practices.[59]

Senator Helms questioned whether, by covering these impairments, the ADA deprived an employer of "the right to run his company as he sees fit," including "mak[ing] a judgment about [his] . . . employees" based on his "own moral standards."[60]

Senator Harkin assured Senator Helms that, even absent an explicit exclusion, homosexuality and bisexuality were not covered by the ADA—not for moral reasons, but for medical ones. "[B]ehavior characteristics" such

57. *Id.* at S10796 (statement of Sen. Rudman).
58. *Id.* at S10765 (statement of Sen. Helms).
59. *Id.* at S10768, S10772.
60. *Id.* at S10765.

as "homosexuality and bisexuality are not disabilities under any medical standards."[61] Senator Harkin immediately accepted, without any debate, Senator Helms' amendment excluding "transvestites," citing Helms' identical amendment excluding transvestites from the Fair Housing Act the previous year.[62] Senator Harkin also reluctantly agreed to Helms' conforming amendment excluding from the Rehabilitation Act those currently using illegal drugs.[63] By contrast, Senators Harkin and Kennedy strongly defended the ADA's coverage of HIV/AIDS, noting that such coverage was "completely consistent with public health policy."[64] "If we fail to provide this protection," Senator Kennedy warned, "we will continue to drive this epidemic underground."[65] As a result, no amendment was offered to exclude HIV/AIDS during the Senate floor debate.[66]

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61. *Id.* at S10786 (statement of Sen. Harkin); *see also supra* note 26 and accompanying text. The decision to exclude homosexuality and bisexuality from the ADA was consistent with the treatment of sexual orientation under the Rehabilitation Act. *See* H.R. REP. NO. 101-596, at 88 (1990) (Conf. Rep.) ("The Senate bill restates current policy under section 504 of the Rehabilitation Act of 1973 that the term 'disability' does not include homosexuality and bisexuality.").

62. 135 CONG. REC. at S10765; *see also* Colker, *Homophobia supra* note 9, at 39 (discussing Senate floor debate on Fair Housing Amendments Act of 1988 and overwhelming support for Helms' amendment, which passed by vote of 89-2). Interestingly, Senator Helms did not express similar opposition to the protection of Transsexualism and GID, both of which were classified as mental disorders in the DSM at the time of passage of the Fair Housing Amendments Act (FHAA) and the ADA. *See supra* note 34. Helms' amendment to the FHAA, like his amendment to the ADA one year later, excluded only "transvestites." 135 CONG. REC. at S10765.

Senator Helms also expressed opposition to protection for "transvestites" during the floor debate over whether to override President Ronald Reagan's veto of the Civil Rights Restoration Act of 1987. 134 CONG. REC. S4236 (daily ed. Mar. 17, 1988) (statement of Sen. Helms) (objecting to courts' interpretation of Rehabilitation Act's definition of disability to include "transvestism and other compulsions or addi[c]tions, which churches or religious schools might once have felt comfortable in regarding as moral problems, not mental handicaps"); *id.* ("When people . . . think of handicaps, what first comes to mind are diseases which have no conceivable moral content and yet have been associated in the past with irrational fears—such as epilepsy—or else physical impairments. . . . But now we propose . . . to open for the courts the opportunity to eliminate the entire concept of a moral qualification for any job, position, or privilege . . . by referring to the strong trend in psychiatry to classify almost all compulsive or destructive behavior patterns as discrete and medically treatable diseases.").

63. 135 CONG. REC. at S10765 ("[T]he war on drugs will be lost if those who abuse drugs are allowed to hide behind laws designed to help those who are seriously handicapped," such as "the mentally retarded, the deaf, the blind, and those with muscular dystrophy.") (statement of Sen. Helms); *see id.* (statement of Sen. Harkin) ("I must say to the Senator I would have preferred not to amend any other statute [i.e., the Rehabilitation Act] during the consideration of [the ADA]; a position, which I might add, with which the administration concurs.").

64. *Id.* at S10768 (statement of Sen. Kennedy); *id.* at S10772 (statement of Sen. Harkin).

65. *Id.* at S10768 (statement of Sen. Kennedy).

66. During the floor debate in the House, coverage of HIV/AIDS was again in controversy—this time for health reasons, not moral ones. "Some representatives claimed that the bill would bankrupt the restaurant industry by forcing employers to hire individuals who are HIV-positive, which would cause the public to perceive that their food was unsafe." Colker, *Homophobia, supra* note 9, at 46. Representative Jim Chapman (D-TX) offered an amendment allowing a food service employer to deny employment to a person "with an infectious or communicable disease of public health significance," which would have included people with

In response to Senator Helms' opposition to the inclusion of various mental impairments, Senator Harkin explained that "some people only think of people who are physically disabled as being handicapped. People can be mentally handicapped as well."[67] He elaborated:

> There is a wellspring of fears and unfounded prejudices about people with disabilities, unfounded fears, whether people have mental disorders, whether they are manic depressives or schizophrenia or paranoia, or unfounded fears and prejudices based upon physical disabilities. The point of the [ADA] is to start breaking down those barriers of fear and prejudice and unfounded fears, to get past that point so that people begin to look at people based on their abilities, not first looking at their disability.[68]

For example, Senator Harkin added, manic depression might be "completely controlled [by] . . . prescription drugs."[69]

Senator Pete Domenici (R-NM) likewise defended the ADA's inclusion of mental impairments, explaining that other types of discrimination "just scratch the surface in terms of the suffering that goes on in the lives of people who are assumed to be disabled because of . . . serious mental illness."[70] Noting that Winston Churchill and Abraham Lincoln were almost certainly "manic-depressive," and that "hundreds of thousands of Americans today . . . have been diagnosed or are being treated for manic-depression, bipolar effective disease or schizophrenia," Senator Domenici stated that "the time has arrived in the United States when people who have mental illnesses . . . [should] not be automatically discriminated against for employment in this country."[71]

HIV/AIDS. 136 CONG. REC. H2478 (daily ed. May 17, 1990) (statement of Rep. Chapman). The House approved the Chapman amendment. *Id.* at H2483-84. When the bill went to conference, the Chapman amendment was removed, despite its support among senators, including Helms and Armstrong. 136 CONG. REC. S9535, S9544 (daily ed. July 11, 1990) (statement of Sen. Helms). When the Conference Report returned to the Senate for consideration, Senator Hatch proposed a toothless (for people with HIV) version of the Chapman amendment, which allowed an employer to deny employment to a person with an infectious or communicable disease *only if* the disease is one that is "transmitted to others through the handling of food" as determined by the Secretary of Health and Human Services. 136 CONG. REC. 9532 (1990); *see* Colker, *Homophobia*, *supra* note 9, at 48. Hatch's amendment passed the Senate, was adopted at the second Conference, and became law. 42 U.S.C. § 12113(e) (2006); *see* Colker, *Homophobia*, *supra* note 9, at 48-49.

67. 135 CONG. REC. S10768 (daily ed. Sep. 7, 1989) (statement of Sen. Harkin).

68. *Id.*

69. *Id.* at S10766.

70. *Id.* at S10779 (statement of Sen. Domenici).

71. *Id.*

2. The Legal Case for Excluding Mental Impairments

Senator Armstrong's second concern with covering mental impairments was a legal one. According to Armstrong, civil rights laws traditionally deal "with very clear-cut, readily discernible categories," like "race, religion, and sex. . . . A person is or is not a man or a woman. A person is or is not a Catholic, a Jew, a Mormon, whatever, a Baptist, a Presbyterian. That is something we can readily determine. A person either is or is not Irish, Italian, and so on."[72] Rather than "list[ing] the specific protected categories," Armstrong explained, the ADA "proceeds from an entirely different point of view" by including "a very broad vague definition" of disability that extends civil rights protection "in a very broad and [] unquantified way."[73] Specifically, the ADA "protects all mental impairments that substantially limit a major life activity," which, according to Armstrong, meant that voyeurism, pedophilia, compulsive gambling and the "vast numbers of mental disorders" contained in that "great, fat book called the [DSM-III-R]" were "in" the ADA unless Congress took them out.[74]

Noting that the ADA's coverage of mental impairments was "appealing to the heart" but ought to "give our heads some concern," Armstrong added that he planned to introduce an amendment "that will take voyeurism and some other things out."[75]

Significantly, no one challenged Armstrong's characterization of civil rights laws. No one pointed out that civil rights laws protect all races, including white people; all religions, including atheists; and all sexes, including men.[76] No one argued that the ADA's applicability to mental impairments was therefore consistent with traditional civil rights law, not at odds with it. Furthermore, no one took issue with Armstrong's assumption that having (or having a history of, or being regarded as having) a mental impairment, by itself, meant that one was covered under the statute. In order to be considered "disabled," and therefore covered, the ADA requires more than just a mental impairment. It requires that the mental impairment substantially limit a major life activity (under prongs 1 and 2) or that a person be regarded as having a substantially limiting impairment (prong 3).[77]

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72. 135 CONG. REC. S10772 (daily ed. Sep. 7, 1989) (statement of Sen. Armstrong).

73. *Id.*

74. 135 CONG. REC. S11174, S11176 (daily ed. Sep. 14, 1989) (statement of Sen. Armstrong).

75. 135 CONG. REC. S10772-73 (daily ed. Sep. 7, 1989) (statement of Sen. Armstrong).

76. *See e.g.*, McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 278–79 (1976) ("Title VII of the Civil Rights Act of 1964 prohibits the discharge of 'any individual' because of 'such individual's race' . . . . Its terms are not limited to discrimination against members of any particular race.") (internal citations omitted).

77. *See* S. Rep. No. 101-116, at 20 (1989) (defining disability as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual, a record of such an impairment, or being regarded as having such an impairment"); *accord.* Americans with Disabilities Act of 1990 § 3(2), 42 U.S.C. § 12102(2) (2005).

3. The Pragmatic Case for Excluding Mental Impairments

Armstrong's third concern with the ADA's coverage of mental impairments was a pragmatic one. Given the vast and ever-changing array of mental impairments, Armstrong warned of the ADA's invitation to a flood of litigation.[78] In a statement published seven days after passage of the ADA, Armstrong stated that the ADA's protection of "all mental impairments that substantially limit a major life activity will have the most far-reaching and potentially disruptive effects on private decisionmakers. . . . [T]he private sector will be swamped with mental disability litigation."[79] According to Armstrong, private employers had better "prepare [them]selves for lawsuits based on the following types of mental conditions": compulsive gambling,[80] acrophobia (fear of heights) and other phobias; depressive neurosis[81]; paranoid schizophrenia; manic depression; borderline personality disorder; "sexual disorders: transvestism and transexualism"; schizoid personality disorder; stress disorders; and a catch-all "miscellaneous mental disorders."[82]

For each, Armstrong cited one or more cases in which courts found people alleging discrimination based on those mental impairments to be covered under the Rehabilitation Act. "In the reported cases," Senator Armstrong noted,

> persons with mental impairments often lose their cases because they are found not to be "otherwise qualified" for the position or

78. *See* 135 CONG. REC. S11174-75 (daily ed. Sep. 14, 1989) (statement of Sen. Armstrong). Senators Helms, Rudman, and Humphrey made similar arguments. *See* 135 CONG. REC. S10755 (daily ed. Sep. 7, 1989) (statement of Sen. Helms) (stating that ADA would lead to the "persecution of some small businessman" by "a horde of bureaucrats"); *id.* at S10783 (stating that ADA's coverage of "drug addicts and alcoholics . . . schizophrenics, manic depressives, and persons with extremely low IQ's[,] . . . persons with deadly infectious diseases, like AIDS . . . [and people with] virtually any mental or physical shortcoming . . . will deter employers from preserving high standards of fitness, safety, and efficiency within their work force") (statement of Sen. Humphrey); *id.* at S10796 (statement of Sen. Rudman) (stating that "[a]s a matter of law, this country has always granted employers a wide degree of latitude in making employment-related decisions, including the right to make judgments based on non-work related behavior. To limit this right based on the diagnosis of a mental illness or chemical dependency may be opening up a Pandora's box.").

79. 135 CONG. REC. S11174, S11176 (daily ed. Sep. 14, 1989) (statement of Sen. Armstrong).

80. Compulsive gambling, of course, had already been excluded by Armstrong's amendment no. 722. *See supra* note 45 and accompanying text (discussing passage of amendment excluding "compulsive gambling" from definition of disability under ADA). Armstrong may have included compulsive gambling in his subsequent statement out of concern that the House would not incorporate a similar exclusion.

81. "Depressive Neurosis," defined in DSM-II as "an excessive reaction of depression due to an internal conflict or to an identifiable event such as the loss of a love object or cherished possession" was replaced by "Dysthymic Disorder" in DSM-III. *See* W. EDWARD CRAIGHEAD ET AL., PSYCHOPATHOLOGY: HISTORY, DIAGNOSIS, AND EMPIRICAL FOUNDATIONS 332 (2008).

82. 135 CONG. REC. S11175-76 (daily ed. Sep. 14, 1989) (statement of Sen. Armstrong).

> benefit they seek. On the other hand, sometimes they win. In either case, S. 933 gives persons with mental impairments a statutory basis for a lawsuit whenever a private employer or private provider of public accommodations takes an action that the impaired person[] believes is to his or her detriment and based on his or her disability.[83]

Implicit in Armstrong's case summaries is the belief that discrimination claims brought by people with mental impairments are inherently frivolous, and that such plaintiffs should *never* win. It is not "discrimination" when an employer fires or refuses to hire or accommodate a person with a mental impairment, Armstrong seems to argue—it is good business. Better, then, to dispose of such "egregious lawsuits" at the outset, rather than have to defend them through "litigation which is costly and time consuming."[84]

Because Armstrong submitted his case summaries into the record several days after the Senate passed the Americans with Disabilities Act, no senator ever challenged his interpretation of the cases. Had the ADA's sponsors had the opportunity to parse those cases, a different story might have unfolded—a story about cases that were not frivolous but tragic, and nothing to suggest a flood of litigation.[85]

For example, under the heading "Sexual Disorders," Senator Armstrong objected to the holdings of two cases that acknowledged that "transexualism" and "transvestism," respectively, were covered "disabilities"' under the Rehabilitation Act.[86] In *Doe v. United States Postal Service*, the plaintiff, a male-to-female transsexual, had her conditional job offer revoked after she disclosed her intent to transition to the other sex and suggested that she be allowed to work as a woman rather than changing her physical appearance during her employment.[87] Describing the case as a "sad" one, the United States District Court for the District of Columbia denied the United States Postal Service's motion to dismiss and held that the plaintiff stated a claim for "disability" discrimination.[88]

In *Blackwell v. U.S. Department of the Treasury*, a Treasury Department supervisor canceled a job vacancy just hours after interviewing the plaintiff, a "transvestite" male who dressed in feminine clothing.[89] Notwithstanding the plaintiff's priority hiring credentials (the plaintiff had worked for nearly ten years in other branches of the Treasury Department, and had been laid

83. *Id.* at S11174.

84. *Id.* at S11176.

85. *See* Sutton v. United Airlines, 527 U.S. 471, 511 (Stevens, J., dissenting) ("[I]t is hard to believe that providing individuals with one more antidiscrimination protection will make any more of them file baseless or vexatious lawsuits.").

86. 135 CONG. REC. S11174-75 (daily ed. Sep. 14, 1989) (statement of Sen. Armstrong).

87. No. 84-3296, 1985 WL 9446 at *1 (D.D.C. June 12, 1985).

88. *Id.* at *1, *3.

89. 656 F. Supp. 713, 714 (D.D.C. 1986).

off due to a reduction in force), and over the recommendation of an experienced, competent interviewer that the plaintiff be hired, the Department supervisor "changed the rules to avoid the inevitable administrative hassle that would occur if he declined a qualified applicant . . . . [The supervisor] knew [the] plaintiff could do the job and had no sound basis for even refusing to accept him for the job."[90] Characterizing the Treasury Department's actions as "highly reprehensible," the United States District Court for the District of Columbia nevertheless held that, while transvestism was a covered disability under the Rehabilitation Act, the plaintiff was not entitled to relief because he had not shown that he was refused hire on that basis.[91] According to the court, the plaintiff was instead refused hire "because [the supervisor] believed he was a homosexual (a condition not protected under the Rehabilitation Act)."[92] Significantly, the court acknowledged what it called the "underlying injustice" of its decision, and called on "wiser heads" to "correct" it.[93]

While indicating that neither "transexualism" nor "transvestism" should be a covered "disability," Armstrong never gave a reason for his objection. He never explained why it was *right* for the employers in *Doe* and *Blackwell* to refuse to hire the plaintiffs based on transsexualism or transvestism, despite the fact that both plaintiffs were eminently qualified to perform their jobs (i.e., the plaintiff in *Doe* had received and accepted her job offer, and the plaintiff in *Blackwell* was recommended for hire).[94] Rather than "sad" and "reprehensible," or an "injustice" to be corrected, Armstrong suggested that the actions of the employers in both cases were beyond repute.[95]

Another of Armstrong's case summaries dealt with compulsive gambling.[96] In *Rezza v. U.S. Department of Justice*, an FBI agent was fired for gambling away $2,000 in government funds in Atlantic City, and he sued his employer under the Rehabilitation Act for discriminating against him based on his compulsive gambling.[97] The U.S. District Court for the Eastern District of Pennsylvania indicated that compulsive gambling could be a covered disability and denied the FBI's motion for summary judgment based on material facts at issue regarding whether the agent was qualified to perform the job.[98]

Notwithstanding compulsive gambling's firm place under the DSM-III-R, Senator Armstrong attacked the premise that compulsive gambling was

90. *Id.* at 715.
91. *Id.*
92. *Id.*
93. *Id.*
94. *See Doe*, 1985 WL 9446 at *1; *Blackwell*, 656 F. Supp. at 714.
95. *Doe*, 1985 WL 9446, at *1; *Blackwell*, 656 F. Supp. at 715; 135 CONG. REC. S11175 (daily ed. Sep. 14, 1989) (statement of Sen. Armstrong).
96. 135 CONG. REC. S11175 (daily ed. Sep. 14, 1989) (statement of Sen. Armstrong).
97. No. 87-6732, 1988 WL 48541, at *1 (E.D. Pa. May 16, 1988).
98. *Id.* at *1, *6.

an impairment at all and implied that, even if it were, such an impairment rendered a person *per se* unqualified.[99] What Armstrong did not say was that the agent was a twenty-two-year veteran of the FBI with an "otherwise fine record of FBI and prior military service" and that, immediately following the incident, the agent entered a 22-day treatment program.[100] When the agent returned to active duty, he performed his duties satisfactorily, attended Gamblers Anonymous twice a week, and no longer gambled.[101] Senator Armstrong also failed to note that the FBI's Philadelphia director recommended against the agent's dismissal.[102]

In light of these facts, it seems far less clear whether the agent's gambling history necessarily disqualified him from serving in the FBI. Contrary to Armstrong's critique, the court's decision to defer judgment pending receipt of more facts regarding the agent's qualifications seems entirely reasonable. Armstrong's proposed denial of coverage of all claims involving compulsive gambling, by contrast, seems too crude a tool to root out meritless claims—a knee-jerk response that would eliminate many legitimate claims (especially considering the other tools provided by the ADA, including the qualification requirement and direct threat defense).[103]

The remaining cases cited by Armstrong provide even less support for his proposed blanket exclusion of various mental impairments. In each case, the plaintiff was found "disabled" under the Rehabilitation Act but "not qualified" to perform the job.[104] Far from proving abuse of the law, these cases demonstrate the Rehabilitation Act's balanced approach: to

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99. *See* 135 CONG. REC. S11175 (daily ed. Sep. 14, 1989) (statement of Sen. Armstrong) (rejecting reasoning of case in which court refused to grant summary judgment to federal government under Rehabilitation Act, in part, because issue of fact remained as to whether compulsive gambler was "otherwise qualified" to be FBI agent) (citing *Rezza*).

100. *Rezza*, 1988 WL 4851 at *1 n.2

101. *Id.* at *1

102. *Id.*

103. *See* Americans with Disabilities Act of 1990, Pub. L. No. 101-336 §103 (1990). Several other cases cited by Armstrong likewise support the legitimacy of discrimination claims involving various mental impairments and the importance of reaching the merits in these cases. *See, e.g.*, Majors v. Hous. Auth. of DeKalb Ga., 652 F.2d 454, 458 (5th Cir. 1981) (holding that material facts were at issue regarding whether tenant with mental impairment requiring companionship of dog was disabled, whether she was otherwise qualified to live in housing complex that prohibited dogs, and whether housing authority failed to reasonably accommodate her); Balzac v. Columbia Univ. Press, 495 N.Y.S.2d 45, 45 (App. Div. 1985) (holding that material facts were at issue regarding whether sales representative with manic depression, who was terminated on same day he returned from treatment and hospitalization, was qualified to perform his job); Barnes v. Barbosa, 494 N.E.2d 619, 623 (Ill. App. Ct. 1986) (holding that, under Illinois's Human Rights Act, bus driver with phobic reaction to carbon monoxide was disabled, and remanding case for determination of whether bus company discriminated against driver by not allowing him to transfer to another position within the company). *But see* Forrisi v. Bowen, 794 F.2d 931, 935 (4th Cir. 1986) (declining to reach merits and holding that utility worker with acrophobia, or fear of heights, who was terminated because he could not climb ladders to certain heights was not disabled).

104. *See* 135 CONG. REC. S11175-76 (daily ed. Sep. 14, 1989) (statement of Sen. Armstrong).

make out a successful claim of disability discrimination, one must show not only that one is "disabled," but also that one is qualified to perform the job, which is no easy feat. For example, in *Doe v. Region 13 Mental Health-Mental Retardation Commission*, the Fifth Circuit Court of Appeals affirmed a district court judgment upholding a mental health center's decision to terminate a staff psychologist with depressive-neurosis who threatened to commit suicide.[105] The Fifth Circuit Court of Appeals easily concluded that the staff member had a "disability" under the Rehabilitation Act, but held that she was not "otherwise qualified" to perform her job.[106] Notwithstanding the staff member's consistently "outstanding" job reviews, the court credited her treating physician's testimony that she was "severely depressed and suicidal" and therefore a threat to herself and her patients.[107]

Similarly, in *Doe v. New York University*, the Second Circuit reversed a district court injunction ordering NYU Medical School to admit a medical student with bipolar disorder because of a history of self-destructive and anti-social behavior.[108] In that case, the court concluded that the student had a disability but suggested that she was not "otherwise qualified" for admission to the school.[109] Despite supporting affidavits from several treating psychiatrists and the non-recurrence of symptoms in recent years while the plaintiff earned a masters degree from Harvard and worked for the federal government, the court found evidence that there was a "significant risk that [she would] have a recurrence of her mental disorder, with resulting danger to herself and to others with whom she would be associated as a medical student."[110]

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105. Doe v. Region 13 Mental Health-Mental Retardation Com'n, 705 F.2d 1402, 1404-05 (5th Cir. 1983).

106. *Id.* at 1408, 1412.

107. *Id.* at 1409.

108. Doe v. New York Univ., 666 F.2d 761, 772 (2d Cir. 1981).

109. *Id.* at 779.

110. *Id.* at 777; *see also* Fields v. Lyng, 705 F. Supp. 1134, 1137 (D. Md. 1988) (assuming, arguendo, that labor negotiator with behavioral disorder that resulted in "anxiety over travel and a propensity to shoplift, or kleptomania" was disabled, and holding that employee was not qualified because "he cannot travel safely or be trusted as a negotiator" and that, in any event, his employer reasonably accommodated him); Franklin v. U.S. Postal Service, 687 F. Supp. 1214, 1218 (S.D. Ohio 1988) (holding that postal worker with paranoid schizophrenia was disabled but not qualified because she refused to take medication, had excessive unexcused absences, and lashed out at co-workers and members of the public, and that, in any event, her employer reasonably accommodated her); Matzo v. Postmaster General, 685 F. Supp. 260, 263 (D.D.C. 1987) (holding that legal secretary with manic depression was disabled but not qualified due to excessive absences, irregular attendance, and insubordination; and holding that, in any event, her employer reasonably accommodated her); Swann v. Walters, 620 F. Supp. 741, 747 (D.D.C. 1984) (holding that computer operator with paranoid schizophrenia, whose job required security clearance and involved access to highly sensitive medical records, was disabled but not qualified because of his conviction for child sex abuse); Boyd v. U.S. Postal Service, No. 82-126R, 1983 WL 636, at *1, *8 (W.D. Wash. Aug. 1, 1983) (holding that postal worker with post-traumatic stress disorder was disabled but not qualified due to poor work history; and holding that, in any event, his employer reasonably accommodated him);

Rather than allow courts to engage in the careful consideration of qualifications demanded by these cases, Armstrong suggested that these cases ought to be foreclosed altogether by denying anyone with a mental impairment a cause of action.[111] "Who is a judge to believe?" Armstrong asked rhetorically.[112] His answer: the employer—every time.

Significantly, Armstrong offered no support for his argument that coverage of various mental impairments would necessarily lead to a deluge of claims.[113] The cases cited by Armstrong indicate no flood of litigation under the Rehabilitation Act with respect to such impairments and, even if they did, Congress has never seen the potential for lawsuits "as reason to restrict classes of antidiscrimination coverage."[114] Furthermore, if litigation were Armstrong's primary concern, EEOC charge statistics indicate that Armstrong should have targeted orthopedic impairments, not (or not only) mental ones.[115]

B. Excluding GID: The Untold Story of the Senate Antechamber

Behind the scenes and very late in the day, Senator Armstrong circulated his proposed amendment—a "long list of various kinds of conduct . . . extracted from the DSM III[-R]"—to the bill's sponsors, Senators Harkin, Kennedy, Dole, and Hatch.[116] According to Professor Chai Feldblum, one of the lead advocates for the disability rights community, Senator Armstrong's list consisted of "four pages of mental impairments literally copied from the pages of the DSM-III-R."[117] Disability rights advocates recom-

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Schmidt v. Bell, No. 82-1758, 1983 WL 631, at *10-*13 (E.D. Pa. Sep. 9, 1983) (holding that student loan collector with post-traumatic stress disorder was disabled but not qualified because of his behavioral and attitudinal problems and failure to adhere to routine office policy and procedure); Guerriero v. Schultz, 557 F. Supp. 511, 513 (D.D.C. 1983) (holding that foreign service officer with schizoid personality disorder and history of alcoholism was disabled but not qualified because, among other things, he could not travel on account of his need for continuing therapy in U.S.); Forrisi v. Bowen, 794 F.2d 931, 935 (4th Cir. 1986) (holding that utility worker with acrophobia, or fear of heights, who was terminated because he could not climb ladders to certain heights was not disabled (under "regarded as" prong) because he could perform other jobs).

111. *See* 135 CONG. REC. S11175-76 (Sep. 14, 1989) (statement of Sen. Armstrong).

112. *Id.*

113. *See id.* at S11174.

114. Sutton v. United Airlines, 527 U.S. 471, 511 (Stevens, J., dissenting).

115. U.S. EQUAL EMP. OPPORTUNITY COM'N, OFFICE OF RESEARCH, INFORMATION, AND PLANNING, ADA CHARGE DATA BY IMPAIRMENT/BASES - RECEIPTS FY 1997-FY 2011, http://eeoc.gov/eeoc/statistics/enforcement/ada-receipts.cfm (last visited June 4, 2012).

116. 135 CONG. REC. S10772 (daily ed. Sep. 7, 1989) (statement of Sen. Kennedy).

117. Feldblum Interview, *supra* note 47. As Legislative Counsel with the American Civil Liberties Union in Washington D.C. and Staff Attorney with the ACLU AIDS Project, Professor Feldblum was "the lead legal counsel for the disability and civil rights communities in Washington. D.C. during the three-year negotiations on the Americans with Disabilities Act." Chai R. Feldblum, *Medical Examinations and Inquiries Under the Americans with Disabilities Act: A View from the Inside*, 64 TEMP. L. REV. 521, 521 n.* (1991).

mended to the bill's sponsors that Senator Armstrong's proposed amendment "be put to an up or down vote," which they predicted would fail handedly.[118]

The sponsors' staff responded that they "wanted to negotiate the amendment with Senator Armstrong."[119] When disability rights advocates explained that the proposed amendment was "nothing more than a laundry-list of mental impairments and that there was nothing *to* negotiate," the sponsors reiterated that a "negotiation was the only option" at that point. Further, it was made clear that "homosexuality and bisexuality needed to be in the negotiated list of exclusions."[120]

Disability rights advocates whittled down Senator Armstrong's four-page list of exclusions to approximately five conditions.[121] As required by the bill's sponsors, homosexuality and bisexuality were among the excluded conditions.[122] Disability rights advocates saw "little downside to excluding those, since neither homosexuality nor bisexuality was considered a mental impairment under the DSM-III-R (and, therefore, was not a disability to begin with)."[123] Consistent with Harkin's response to Armstrong's questions during the floor debate, "kleptomania was also included in the initial list of proposed exclusions; GID was not."[124]

After receiving the revised list of exclusions, Senator Hatch entered the Senate antechamber and told Feldblum and other disability rights advocates that he "needed some more."[125] Feeling "sick to her stomach," Feldblum recalls, GID and approximately six other conditions found their way onto the list—and out of the ADA.[126] The final list hued closely to the floor debate: all impairments except GID and pyromania were explicitly mentioned by Senator Armstrong either on the Senate floor or in his statement published one week later.[127]

Well after 10 p.m. that evening, Senator Armstrong came to the floor and introduced the negotiated list as Amendment No. 722, which addressed his "most obvious concerns."[128] Senator Harkin stated that the

118. Feldblum Interview, *supra* note 47.

119. *Id. Cf.* 135 CONG. REC. S10785 (daily ed. Sep. 7, 1989) (statement of Sen. Hatch) (complimenting Senator Armstrong for "work[ing] long and hard this evening with the majority floor managers and the minority floor manager" on "a very good amendment" excluding GID and several other mental impairments, and committing to keeping amendment in final version of bill).

120. Feldblum Interview, *supra* note 47.

121. *Id.*

122. *See supra* notes 54-55, 58-61 and accompanying text.

123. Feldblum Interview, *supra* note 47.

124. *Id.*; *see also* 135. CONG. REC. S10785 (daily ed. Sep. 7, 1989).

125. Feldblum Interview, *supra* note 47.

126. *Id.*

127. 135 CONG. REC. S11175-76 (daily ed. Sep. 14, 1989) (statement of Sen. Armstrong); *id.* at S10754 (daily ed. Sep. 7, 1989) (statement of Sen. Armstrong).

128. 135 CONG. REC. S10785 (Sep. 7, 1989) (statement of Sen. Armstrong). *See also id.* at S10781 ("It is quarter of 10 at night.") (statement of Sen. Ford).