The Americans with Disabilities Act: Determining which Learning Disabilities Qualify for Reasonable Accommodations

I. Introduction

In 1990, President George Bush signed into law the Americans with Disabilities Act[1] (ADA); the purpose of the Act is to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[2] Determining which persons qualify for protection under the Act hinges on whether or not a legal disability is found to exist. Thus far, the methods courts have employed to make this determination pertain almost exclusively to cases of physical disabilities. Ten years after the passage of the Act, courts now struggle to decide whether, and to what extent, those methods should be applied to learning disabilities.

This Note makes two recommendations regarding determinations of whether a person with a learning disability qualifies for reasonable accommodations under the ADA in a professional licensing situation. First, the proper definition of a disability as applied to a person with a learning disability should be a definition that considers actions a person takes to improve her learning and cognitive ability. To use the Act's terminology, "self-accommodations" ought to be considered by the courts when they determine whether a claimant qualifies for reasonable accommodations under the statute. The cognitive coping mechanisms employed by a person with a learning disability, however, should not be classified by the courts as "self-accommodations." These mechanisms are better viewed as achievements. Second, the proper comparison group to which the courts should compare a claimant is that of *other persons with comparable training, skills, and abilities*. This is a term of art promulgated by the Equal Employment Opportunity Commission (EEOC) and will be explained more fully later in this Note.[3] These conclusions rest on careful consideration of the legal questions as well as policy and ethical implications involved.

To understand properly the debate surrounding the ADA, it is important to first grasp the impetus behind the Act. For this reason, Part II of this Note provides the context for the legal, policy-based, and ethical analysis of different methodologies. It explains the 14th Amendment constitutional underpinnings of the concept of equality, providing an explanation of two different concepts of equality that the courts may employ. One approach is labeled *formal equality*, the other *substantive equality*. The language of the Act demonstrates that Congress embraced the notion of *substantive equality* when drafting the Act.

Part III explains the logistics and legal protection afforded by the ADA, including the definition the Act provides for a disability. It describes recent controversies regarding the proper methodology for determining a disability. Particularly, the case of *Bartlett*

1. 42 USCA §12101 et seq. (1994).
2. 42 USCA §1201 (b)(1) (1994).
3. *See* discussion *infra* Part VI.

v. New York State Board of Law Examiners[4] provides a useful vehicle to discuss the way in which courts struggle to adopt a proper approach to determine whether a learning disability qualifies for protection of the ADA. The Second Circuit will soon decide the case[5] in accordance with three recent Supreme Court decisions[6] regarding the role that self-accommodation has played in decisions of physical disabilities. In the realm of physical disabilities, any "self-accommodations," for example the availability of medication to control high blood pressure, is included in the determination of whether a person is disabled, per the ADA.[7] This holding is derived from the plain language of the Act but runs counter to the legislative history of the Act.[8] Both the plain language approach and the legislative history of the ADA are described in detail.

Part IV concludes that the Supreme Court's approach towards physical disabilities is proper and addresses concerns raised by the methodology. Drawing upon these concerns, Part V compares learning disabilities to physical disabilities. Recognizing the substantial differences between the two, this Note concludes that the cognitive coping mechanisms employed by persons with learning disabilities do not qualify as "self-accommodation" for two reasons. First, the beneficial effects of cognitive coping mechanisms may not be readily gauged in the instance of learning disabilities, whereas the improvements afforded by prescriptive aids are often easily assessed as in the instance of physical disabilities. It would prove impracticable to measure a person's learning disability with the "self-accommodation" and then compare it to a person's ability without the "self-accommodation." Second, cognitive coping mechanisms should fall outside the purview of "self-accommodation" based on ethical considerations. To discount such efforts would de-legitimize individual achievement. Instead, such efforts ought better to be viewed as accomplishments. By affirming these accomplishments, such an approach honors the ADA's goal of *substantive equality* and furthers the movement towards greater rights for persons with disabilities. Any and all measures

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4. 156 F.3d 321 (2d Cir. 1998), *cert. granted and judgment vacated*, 119 S. Ct. 2388 (1999).

5. *See* 119 S. Ct. 2388 (1999) (The Supreme Court vacated judgment and remanded the case to the United States Court of Appeals for the Second Circuit for further consideration in light of Sutton v. United Air Lines 119 S. Ct. 1752 (1999); Murphy v. United Parcel Service, Inc., 119 S. Ct. 2133 (1999); and Albertsons, Inc. v. Kirkingburg 119 S. Ct. 2162 (1999)).

6. *See id. See also* discussion *infra* Part III-B, §§1-3 (All three cases turned on whether or not physical disabilities ought to be assessed in light of self-accommodations including: The use of corrective lenses for eyesight problems, *see* Sutton v. United Air Lines, 119 S. Ct. at 2143 (1999); medication for high blood pressure, *see* Murphy v. United Parcel Service, Inc., 119 S. Ct. at 2136 (1999); and subconscious mechanisms employed to improve poor vision attributable to an uncorrectable eyesight condition, *see* Albertsons, Inc. v. Kirkingburg, 119 S. Ct. at 2168 (1999)).

7. *See Murphy*, 119 S. Ct. at 2136 (1999).

8. *See id.* at 2137, citing the holding in *Sutton v. United Air Lines*, 119 S. Ct. at 2146 where the Supreme Court explained

> We conclude that respondent is correct that the approach adopted by the agency guidelines— that persons are to be evaluated in their hypothetical uncorrected state— is an impermissible interpretation of the ADA. Looking at the Act as a whole, it is apparent that if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures—both positive and negative—must be taken into account when judging whether that person is 'substantially limited' in a major life activity and thus 'disabled' under the Act. . . . Because we decide that, by its terms, the ADA cannot be read in this manner, we have no reason to consider the ADA's legislative history.

Id.

taken by persons with learning disabilities to realize better achievement should necessarily be part of the assessment of whether a disability exists. To do otherwise would discount a part of who that person is.

Lastly, Part VI of this Note argues that the proper comparison group by which to determine if someone with a learning disability qualifies for protection of the ADA should be that employed by Title I of the Act. Persons with learning disabilities should be assessed in comparison to *other persons with comparable training, skills, and abilities*. This is the fairest approach because it rewards persons with learning disabilities who realize high achievement levels, leads towards better equality, is unlikely to be over-inclusive, and is practical to employ.

II. Social Impetus for the Disabilities Rights Movement and Considerations of Equality

Before analyzing the legal, social, and normative complexities surrounding the ADA and its implications for persons with learning disabilities, it is important to understand the impetus behind the Act. In American jurisprudence, legislation regarding persons with disabilities is a relatively recent phenomenon. For example, until the mid-twentieth century, the only federal laws providing protection for individuals with disabilities were the Social Security Act of 1935[9] and the LaFollette-Barden Act of 1943.[10] Both of these acts had a narrow focus. For example, the Social Security Act provisions focused on providing medical and therapeutic services for 'crippled' children. In comparison, the LaFollette-Barden Act focused on providing services that would enhance the employability of persons older than fifteen years of age.[11]

The fruition of the disabilities rights movement came after the landmark decision *Brown v. Board of Education*;[12] the momentum of the movement stemmed from concerns, similar to those in *Brown*, of equal protection and due process under the 14th Amendment to the United States Constitution.[13] In this context, one author explained that, "The hallmark of the modern [disabilities rights] movement is the refusal of disabled people to be *marginalized*—that is, to be viewed as 'the Other'—in a society dominated by non-disabled people."[14] The disabilities rights movement is fighting for the right to participate fully in society, "recognition of disabled people as full human beings and elimination of physical and attitudinal barriers to their full participation in society."[15]

The 14th Amendment provided the vehicle by which the disabilities rights movement achieved the legislative protection of the ADA. Before delving into the protection that the Act affords, it is useful to establish a framework within which to assess recent

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9. 42 U.S.C. §§ 301-99 (1994).

10. 29 U.S.C. §§ 31-42 (1958) (repealed 1973).

11. LAURA F. ROTHSTEIN, DISABILITIES AND THE LAW § 1.02 (2d ed. 1997).

12. 347 U.S. 483 (1954).

13. *See* ROTHSTEIN, *supra* note 11, at § 1.02 (Tracing the history of the disabilities rights movement, in the early 1970's two court decisions provided increased impetus to intensify the momentum of the disabilities rights movement. The two cases were *Pennsylvania Association for Retarded Children (PARC) v. Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971) and *Mills v. Board of Education*, 348 F. Supp. 866 (D.D.C. 1972). These two cases established that "denying education to children with disabilities or treating them differently within the educational system was a denial of equal protection and due process under the Fourteenth Amendment to the Constitution.").

14. Lisa Eichhorn, *Major Litigation Activities Regarding Major Life Activities: The Failure of the "Disability" Definition in the Americans with Disabilities Act of 1990*, 77 N.C. L. REV. 1405, 1409-10 (1999) (emphasis added).

15. *Id* at 1418.

development and controversy surrounding interpretation of the ADA. At its base, this framework consists of the concept of equality characterized *substantive equality*. This concept is derived from the 14th Amendment and employed by the ADA.

Section 1 of the 14th Amendment states: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the *equal protection* of the laws," from which is derived the equal citizenship principle.[16] There are many different interpretations of the meaning of the Equal Protection Clause of the 14th Amendment among jurists.[17] The two most prominent concepts of equality are *formal equality* and *substantive equality*. Depending on which concept is adopted, jurists will likely come to dramatically different conclusions when faced with the same question.[18] Ultimately, through close examination of the language of the ADA, this Note concludes that *substantive equality* is a more appropriate framework by which to analyze current ADA issues.

A. Formal Equality

In search of a basic definition to the term equality, one theorist has explained that "equality, pure and simple, can be reduced to a formal abstraction—the idea that like cases should be treated alike."[19] But the "likeness" dimension compared should be essential in content—and not arbitrary. For example, an essential criterion for comparison might be talent, while an arbitrary comparison might be hair color. Given the variety of "essential" dimensions, however, in which people might be considered "like," this sim-

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16. U.S. CONST. amend. XVI, §1 (emphasis added).

17. *See* ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT (1994) (West explains that jurists interpret the Equal Protection Clause in many ways. West wrote: "The two interpretations of equal protection that dominate current law, which we might call *formalist* and *antisubordinationist*, have in one form or another been present in judicial interpretations of the phrase from its genesis." *Id.* at 11. West also refers to the antisubordinationist theory as "substantive justice." *Id.* at 10. This Note adopts the term *substantive equality*. *See* discussion *infra* Part II-A, §2.).

18. *See id.* at 90-99. West discusses the meaning of the equal protection clause by way of example. West describes a movement towards *formal equality* in the judiciary by the use of three cases: *Brown v. Board of Education*, 347 US 483 (1954); *Regents of the University of California v. Bakke*, 438 US 265 (1978); and *City of Richmond v. J.A. Croson Company*, 488 US 469 (1989). *Id.* at 90-92.

West claims that in *Brown*, the Court embraced "a *substantive* account of the equal protection clause: separate and unequal educational facilities produce unequal educational opportunities, contributing directly to the subordination of blacks and dominance of whites in an already white-dominated society." *Id.* at 91 (emphasis added).

West claims that the progression towards *formal equality* is evidenced by the *Bakke* decision; West explains that *Bakke* stands for the proposition that "the equal protection clause does not require an end to subordination, but rather, requires that likes be treated alike. . . [B]lacks and whites are, for all purposes that matter, alike, and any segregatory scheme — whether 'equal' or 'unequal,' and whatever its impact on the dominance or subordination of one race vis-à-vis the other — treats the two groups differently and is hence presumptively unconstitutional." *Id.* at 91.

Lastly, West claims that the movement toward *formal equality* is complete based on the Court's decision in *Croson*:

> Far from requiring race-conscious dismantling of institutional and social subordination of blacks, a more united, as well as more conservative, Court held that the Fourteenth Amendment presumptively prohibits most race-conscious decision making, absent strong evidentiary showings of past discrimination. Affirmative action aimed at ending subordination is not only not required by the Fourteenth Amendment, it is prohibited by it.

Id. at 92.

19. Kenneth L. Karst, *Why Equality Matters*, 17 GA. L. REV. 245, 246 (1983).

ple definition proves problematic and elusive. This is the long-criticized problem with the seemingly simple concept of *formal equality*.[20]

For example, specifying one dimension by which to label individuals "alike," may necessarily lead to inequality for individuals who share a characteristic which is *not* the specified criteria for comparison. This inequality is significant because, indisputably, there are many non-arbitrary criteria by which to compare individuals. "Because of its relational nature, equality is bound to create some inequality. 'The question . . .' is not '*Whether* equality?' but '*Which* equality?'"[21] Therefore, "[t]o make sense of any claim to equality, one must connect that claim to some substantive value. But substantive values compete with one another; thus the rhetoric of equality, . . . 'is subject to use, if not capture, by any side of the question.'"[22] For this reason, *formal equality* is a poor instrument by which to gauge whether society has achieved what it would deem a fair treatment of all people.

B. Substantive Equality

In contrast, *substantive equality* approaches the topic from a different perspective.[23] *Substantive equality*, at a minimum, clarifies that "all individuals are *moral* actors entitled to equal *autonomy* and *respect*, capable of making moral choices and of rationally pursuing their life-plans . . . [I]t justifies those equalities and inequalities that, in a given social context, are compatible with equal autonomy and respect for all."[24]

Under this approach, the equal citizenship principle defines equality as a right "to be treated by the organized society as a *respected*, responsible, and *participating member*."[25] Accordingly, the "principle [of equality] is preemptively violated when the organized society treats someone as an inferior, as part of a dependent caste, or as a nonparticipant."[26] Such a notion further clarifies a substantive value in equality. Equality is not only being a member of society, but feeling a *sense of belonging* to that society.[27] That is why stigma is equality's antithesis: "Stigma dissolves the human ties we call 'acceptance' and excludes the stigmatized from 'belonging' as equals. Stigma represents the breakdown of empathy."[28]

Substantive equality, then, appears to have been the driving force behind the disabilities rights movement. If the "hallmark" of the movement is the end of marginalization,[29] it is also the end of stigma, and the realization of acceptance. The argument that

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20. *See* MICHAEL QUINN, JUSTICE AND EGALITARIANISM: FORMAL AND SUBSTANTIVE EQUALITY IN SOME RECENT THEORIES OF JUSTICE 9-14 (1991). In describing Aristotle's theories about equality, Quinn explains that

> [t]he imperative of justice, for Aristotle, is to treat equals equally, and unequals unequally . . . Aristotle is plainly aware that 'the question we must keep in mind is, equality or inequality in what sort of thing.' It is clear that for Aristotle the important task is the substantive one of establishing which particular inequalities are to count as relevant to a discussion of justice.

Id. at 10.

21. Michel Rosenfeld, *Substantive Equality and Equal Opportunity: A Jurisprudential Appraisal*, 74 CAL. L. REV. 1687 at 1700 (emphasis added) (1983).

22. *Id.*

23. *Id.* at 1701.

24. *Id.* (emphasis added).

25. Karst, *supra* note 19, at 247-48 (emphasis added).

26. *Id.* at 248.

27. *See id.*

28. *Id.*

29. *See* discussion *supra* Part II & n.14.

the ADA posits a *substantive equality* approach, however, is most strongly bolstered by the language of the Act itself. For example, if the ADA had adopted a notion of *formal equality*, one would expect that it merely demand that no party discriminate against a person with a disability. This would neutralize the disabled characteristic of the individual, requiring no affirmative steps towards the accommodation of persons with disabilities. The definition of discrimination adopted by the ADA, however, goes farther than mere nondiscrimination.[30]

The ADA mandates that failure on the part of covered entities to make reasonable accommodations constitutes discrimination under its terms.[31] Mere nondiscrimination, in its traditional sense of not allowing criteria to negatively affect selection, is not sufficient for purposes of the ADA. Instead, the ADA requires that covered entities take steps to ensure that persons with disabilities have the opportunity to participate fully in society. For these reasons, this Note will evaluate the controversy regarding ADA protection for persons with learning disabilities under the penumbra of *substantive equality*.

III. The Americans with Disabilities Act

The purpose of the ADA is

> (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
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> (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
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> (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and
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> (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.[32]

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30. *See e.g.* Colette G. Matzzie, Note, *Substantive Equality and Antidiscrimination: Accommodating Pregnancy under the Americans with Disabilities Act*, 82 GEO. L. J. 193, 211-12 (1993). (Author discusses the definition of discrimination included in the ADA. Author cites 42 U.S.C. § 12112(b)(5)(A) (Supp. III 1991) providing that "the term discriminate includes: . . . not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability.").

31. 42 U.S.C. § 12112(b)(5)(A) (1994). The provision explains that the term "discriminate" means "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity."

32. 42 U.S.C. § 12101 (b) (1994). *See also* CCH EDITORIAL STAFF PUBLICATION, AMERICANS WITH DISABILITIES ACT OF 1990 LAW AND EXPLANATION ¶ 10. The purpose of the ADA is to address

> the problem of discrimination against individuals with disabilities in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services . . . to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities and to *bring persons with disabilities into the economic and social mainstream of American life*; to provide enforceable standards addressing discrimination against individuals with disabilities; and to ensure that the federal government plays a central role in enforcing these standards on behalf of individuals with disabilities

Id. (emphasis added).

Thus, the question of what qualifies as a "disability" is central to determining whether an individual qualifies for protection under the Act. With respect to an individual, the term "disability" means:

> (1) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
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> (2) a record of such an impairment; or
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> (3) being regarded as having such an impairment.[33]

This definition of disability is the same as employed in an earlier piece of legislation, the Rehabilitation Act of 1973.[34] The Rehabilitation Act protects individuals with disabilities from discrimination in the areas of employment, education, public facilities, transportation, and health and welfare services.[35] The Rehabilitation Act, however, reaches "only a small segment of the employment sector because its protection is limited to employees of federal employers, federal contractors, and recipients of federal financial assistance."[36] In comparison, the ADA fills this gap by covering all employers with fifteen or more employees.[37] "It should be noted that the ADA does not preempt the Rehabilitation Act, and most employers covered by the Rehabilitation Act will also be covered by the ADA."[38]

The ADA is divided into five titles. The first three titles set out the appropriate standard by which to conclude whether a legal disability exists. Title I prohibits discrimination in employment.[39] Title II prohibits discrimination with respect to public services,[40] and Title III deals with public accommodations and services operated by private entities.[41] Title I delineates the Equal Employment Opportunity Commission (EEOC) as the agency appointed to help promulgate regulations for workplace discrimination.[42] Titles II and III fall under the purview of the Department of Justice (DOJ).[43] Depending upon which title violation a plaintiff claims, a different agency promulgates the standard of comparison. For example, a plaintiff who claims workplace discrimination must show that she suffers a disability in comparison to other applicants with similar training,

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33. 42 U.S.C. § 12102(2) (1994).
34. 29 U.S.C.. §§ 790-96.
35. ROTHSTEIN, *supra* note 11, at §4.06.
36. *Id.*
37. 42 U.S.C. § 12111(5)(A) (1994).
38. ROTHSTEIN, *supra* note 11, at §4.06.
39. 42 U.S.C. § 12112(a) (1994). The section explains that "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."
40. 42 U.S.C. § 12132 (1994). The section provides that "Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such [public] entity."
41. 42 U.S.C. § 12182(a) (1994). The section explains that "No individual shall be discriminated 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."
42. 42 U.S.C. § 12111(1) (1994).
43. *Id.*

skills, and abilities.[44] The best way to grasp the methodology employed thus far in enforcing the ADA is to see it applied in a specific situation. For this reason, the *Bartlett* case is a particularly useful vehicle for discussion.

A. *New York State Board of Law Examiners v. Bartlett*

In June 1999, the Supreme Court, in *New York State Board of Law Examiners v. Bartlett*,[45] vacated the judgment of the Second Circuit. The Court remanded the case for further consideration in light of *Sutton v. United Air Lines, Inc.*,[46] *Murphy v. United Parcel Service, Inc.*,[47] and *Albertsons, Inc. v. Kirkingburg*.[48]

In *Bartlett v. New York State Board of Law Examiners*, the Second Circuit had to decide whether Dr. Marilyn Bartlett was disabled under the ADA and thereby qualified for reasonable accommodations in taking the New York State Bar Examination.[49] Bartlett has a Ph.D. in Educational Administration from New York University, a law degree from Vermont Law School, and has met all prerequisites to sit for the New York State Bar Exam.[50] She claims to have a cognitive disorder that impairs her ability to read.[51] The expert employed by the Board of Law Examiners, however, concluded that Bartlett did not suffer any reading disability.[52] As a result of Bartlett's performance on two battery tests, the Board instead concluded that Bartlett suffered no learning disability whatsoever.[53] In response, Bartlett presented expert testimony and other evidence to the effect that her reading disability could not be measured solely by the Board's test.[54]

Before the circuit court considered the case, the district court concluded that the Board's tests were inadequate in assessing Bartlett's learning disability.[55] The district court, nonetheless, "did not find that Dr. Bartlett [to be] substantially limited in the major life activities of reading or learning, reasoning that her 'history of self-accommoda-

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44. *See* discussion *infra* Part IV-A, § 2 discussing EEOC guidelines for determining whether a claimant qualifies for protection of the ADA.

45. 119 S. Ct. 2388 (1999).

46. *Id.* at 1752.

47. *Id.* at 2133.

48. 527 U.S. 555 (1999).

49. *Bartlett*, 156 F.3d at 323 (2d Cir. 1998).

50. *See id.* at 324.

51. *See id.*

52. *See id.* at 325.

53. *See id.* ("Dr. Vellutino's opinion is grounded primarily on Dr. Bartlett's performance on two subtests of the Woodcock Reading Mastery Test-Revised (the Woodcock), a battery of tests commonly employed to assess learning disabilities. Because Dr. Bartlett achieved scores above the 30th percentile on two subtests of that battery, Dr. Vellutino concluded that she did not have a reading disability.").

54. *See id.*

55. *See id.* at 325. The district court opined that

> (a) the Woodcock could not measure Dr. Bartlett's lack of 'automaticity,' i.e., her ability to recognize a printed word and read it accurately and immediately without thinking;
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> (b) the Woodcock was not timed and thus could not measure the slowness of reading—an important characteristic of adult dyslexics like Dr. Bartlett, who, on other tests, had demonstrated a reading rate comparable to the bottom fourth percentile of college freshman when timed;
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> (c) the Woodcock was designed principally to assess children and did not have enough items in the difficult range; and
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> (d) Dr. Bartlett's Woodcock results exhibited discrepancies, revealing high reading comprehension scores in comparison to low, but average, Word Attack and Word Identification scores.

Id.

tion has allowed her to achieve . . . roughly average reading skills (on some measures) when compared to the general population."[56] Instead, the district court concluded Bartlett to be "disabled in her ability to 'work' because her reading rate compared unfavorably with 'persons of comparable training, skills and abilities.'"[57]

Disagreeing with the district court's reasoning, the Second Circuit held that Bartlett was substantially limited in her major life activity of reading or learning, but as compared to the manner and condition under which the *average* person can read or learn.[58] The Second Circuit reasoned that "a person's ability to self-accommodate does not foreclose a finding of disability."[59] The Second Circuit also pointed out that without the cognitive coping mechanisms Bartlett had developed, compared to an average person, she would suffer substantial limitations in her major life activities.[60] The court went on to describe legislative history and case law supporting the proposition that disabilities should be assessed *without* regard to mitigating measures "such as reasonable accommodations or auxiliary aids."[61]

The difference between the two courts' opinions turns on whether or not it is appropriate to take self-accommodations into consideration when defining a disability, and then to which group of persons a court should compare a claimant. This difference in approach leaves fertile ground for discussion: Should, from a legal and ethical standpoint, courts take into consideration self-accommodations when assessing a disability? Do the cognitive coping mechanisms that persons with disabilities employ qualify as "self-accommodations?" Should learning disability questions be assessed in terms of the average population, or with a comparison group comprised of those with similar training, skills, and abilities? The Supreme Court answered the first question in *Sutton*, *Murphy*, and *Albertsons*,

B. Disability Assessments and Consideration of Self-Accommodations

The Supreme Court decided *Sutton*, *Murphy*, and *Albertsons* on the same day.[62] All three cases turned on whether the Court's assessment of a person claiming a disability should include mitigating actions.

1. Sutton v. United Airlines, Inc.

In *Sutton*, the Supreme Court questioned whether twin sisters who both suffered severe myopia, should have their condition assessed with regard to the corrective lenses available that improved each girl's eyesight.[63] The Court held "the determination of whether an individual is disabled should be made with reference to measures that mitigate the individual's impairment, including . . . eyeglasses and contact lenses."[64]

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56. *Id.* at 326.
57. *Id.*
58. *See id.* at 329.
59. *Id.*
60. *See id.*
61. *Id.* (citing H.R.Rep. No. 101-485(II), at 52 (1990), and then describing *Done v. City of Omaha*, 115 F.3d 624, 627-28 (8th Cir. 1997) ("[The plaintiff's] brain has mitigated the effects of his impairment, but our analysis of whether he is disabled does not include consideration of mitigating measures. His personal, subconscious adjustments to the impairment do not take him outside of the protective provisions of the ADA.")).
62. *See* Sutton v. United Airlines, Inc., 119 S. Ct. 2139 (1999); Murphy v. United Airlines, Inc., 119 S. Ct. 2133 (1999); and Albertsons Inc. v. Kirkingburg, 119 S. Ct. 2162 (1999).
63. *Sutton*, 119 S. Ct. at 2143 (1999).
64. *Id.*

2. Murphy v. United Parcel Service, Inc.

In *Murphy*, the question presented to the Court was whether a mechanic's high blood pressure should be examined in its medicated state or its unmedicated state.[65] The Court concluded that the Tenth Circuit correctly considered petitioner in his medicated state.[66] Accordingly, the Court affirmed that "[Murphy's] hypertension is not a disability because his doctor had testified that when [Murphy] is medicated, he 'functions normally doing everyday activity that an everyday person does.'"[67]

3. Albertsons, Inc. v. Kirkingburg

In *Albertsons*, the Court clarified the definition of disability with regards to another type of eyesight problem. In *Albertsons*, the plaintiff suffered from "amblyopia, an uncorrectable condition that leaves him with 20/200 vision in his left eye and monocular vision in effect."[68] The Ninth Circuit erroneously had suggested that "in gauging whether a monocular individual has a disability a court need not take account of the individual's ability to compensate for the impairment."[69] In its analysis, however, the circuit court acknowledged that Kirkingburg's brain had developed subconscious mechanisms for coping with his visual impairment; in other words, his body compensated for his disability.[70] The Supreme Court explained that such compensation was extremely important to the disability determination.[71] The Court explained that it saw "no principled basis for distinguishing between measures undertaken with artificial aids, like medications and devices, and measures undertaken, whether consciously or not, with the body's own systems."[72]

Thus, the dilemma presents itself: how should the holdings in Sutton, Murphy, and Albertsons affect the law's treatment of persons with learning disabilities? Do the cognitive coping mechanisms that persons with disabilities employ qualify as "self-accommodations?" Should learning disability questions be assessed in terms of the average population, or with the comparison group being those with similar training, skills, and abilities?

C. Recent Developments: The *Sutton* Plain Language Approach

As a matter of proper judicial interpretation, despite legislative history and interpretive guidelines, the law lies in the language of the statute itself. The majority in *Sutton* explained that the plain terms of the ADA provided the answer to whether mitigating circumstances should be taken into consideration in making a disability determination, and are therefore controlling.[73]

The crux of the *Sutton* approach rests on the term "substantially limits," which is written in the present tense. The Court in *Sutton* held that the language demands that such limitation actually and presently exist.[74] This is the Court's view of the plain

65. *Murphy*, 119 S. Ct. at 2136 (1999).
66. *Id.*
67. *Id.* at 2137.
68. *Albertsons*, 119 S. Ct. at 2165-66 (1999).
69. *See id.* at 2168.
70. *Id.* at 2168.
71. *See id.* at 2168-69.
72. *Id.* at 2169.
73. *See Sutton*, 119 S. Ct. at 2146.
74. *Id.*

meaning of the statute, to which any further interpretation must adhere.[75] While the majority recognized that this contradicts the legislative history and interpretive agency edicts, it stressed that the statute's terms, because they are not ambiguous, must control.[76]

Furthermore, the Court went on to reiterate the fact that "whether a person has a disability under the ADA is an 'individualized inquiry.'"[77] The Court explained that to follow agency guidelines and discount accommodating measures would run counter to this mandate because it "would . . . require courts and employers to speculate about a person's condition and would, in many cases, force them to make a disability determination based on general information about how an uncorrected impairment usually affects individuals, rather than on the individual's actual condition."[78]

In further support of its position, the *Sutton* Court explained that the stated findings contained in the beginning text of the ADA also support the conclusion that self-accommodations should be included in the determination of a disability.[79] The Court pointed to the statute's estimate that 43 million persons suffer from disabilities.[80] The Court asserted that this number would be significantly higher if it included all health impairments in their untreated state.[81] Justice Ginsburg agreed with the majority opinion in her concurrence; she stated:

The strongest clues to Congress' perception of the domain of the Americans with Disabilities Act (ADA), as [she sees it], are legislative findings that 'some 43,000,000 Americans have one or more physical or mental disabilities,' §12101(a)(1), and that 'individuals with disabilities are a discrete and insular minority,' persons 'subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society,' §12101(a)(7). These declarations are inconsistent with the enormously embracing definition of disability petitioners urge.[82]

D. Legislative History: Judicial Interpretation, Published Guidelines on the Disability Definition, and Mitigating Measures

Although the Supreme Court concluded that the plain meaning of the ADA required that mitigating measures be a part of the assessment, this is not consistent with the Act's legislative history. Before assessing the Supreme Court's approach, it is important to understand the legislative history and administrative guidelines from which the Court deviated.

1. Case Law and Legislative History

In a case similar to *Bartlett*, hinging on the question of whether mitigating measures should weigh in the determination of a disability, the Fifth Circuit offered a concise explanation of the legislative history surrounding the issue of whether to include mitigating measures in the determination. In *Washington v. HCA Health Services of Texas, Inc.*,[83] the court described the findings of the House Education and Labor Committee Report that discusses the three-pronged definition of a disability.[84] Of primary concern

75. *See id.*
76. *See id.*
77. *Id.* at 2147.
78. *Id.*
79. *See id.*
80. *See id.*
81. *See id.* at 2147.
82. *Id.* at 2152 (Ginsburg, J., concurring).
83. Washington v. HCA Health Services of Texas, Inc., 152 F.3d 464 (5th Cir. 1998).
84. *See id.* at 467.

is the first prong ("a physical or mental impairment that substantially limits one or more of the major life activities of such individual"[85]). The court quoted the report:

> 'Whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids. For example, a person who is hard of hearing is substantially limited in the major life activity of hearing, even though the loss may be corrected through the use of a hearing aid. Likewise, persons with impairments, such as epilepsy or diabetes, which substantially limit a major life activity are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication.'[86]

The court in *HCA* then considered the House Judiciary Committee Report.[87] This report's findings promulgated a similar approach. "The impairment should be assessed without considering whether mitigating measures, such as auxiliary aids or reasonable accommodations would result in a less-than-substantial limitation."[88]

Lastly, the *HCA* opinion looked to the Senate Labor and Human Resources Committee Report which concluded that "'whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids.'"[89] The Senate Report, however, went on to describe that the third prong would "'ensure that persons with medical conditions that are under control, and that therefore do not currently limit major life activities, are not discriminated against on the basis of their medical conditions.'"[90]

The Fifth Circuit ultimately placed less weight on the Senate Labor and Human Resources Committee Report. The court explained that the House reports were "express and directly on point;" while the Senate Report was relevant, it spoke primarily to the third prong and in doing so, spoke only tangentially to the first prong.[91] *HCA* also deferred to the House Report because it was issued after the Senate Report; "it seems that the House Committees were aware of how the Senate Report dealt with the mitigating measures issue and consciously changed the language of the Reports."[92]

2. Administrative Agencies: EEOC and DOJ Guidance

Legislative history was not the only interpretive guide available to the Court to help clarify the appropriate meaning of disability under the ADA. As *Sutton* explained, in addition to legislative history, courts may also look to appointed government agencies for guidance in interpreting the ADA.[93] In regards to the ADA, the EEOC has been granted authority to issue non-legislative guidelines for Title I regarding employment discrimination. Likewise, the DOJ carries authority to promulgate guidelines for Titles II and III. Although the Court makes clear that none of these agencies has authority to

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85. 42 U.S.C. §12102(2)(A).

86. *HCA*, 152 F.3d at 467 (5th Cir. 1998) (quoting H.R. REP. NO. 101-485(II) at 52 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 334).

87. *See id.* at 468.

88. *Id.* (citing H.R. REP. NO. 101-485(III), at 28, *reprinted in* 1990 U.S.C.C.A.N. 445, 451).

89. *Id.* (quoting S. REP. NO. 101-116, at 23 (1989)).

90. *Id.* (quoting S. REP. NO. 101-116, at 24 (1989)).

91. *Id.*

92. *Id.*

93. *See Sutton*, 119 S. Ct. at 2144.

issue regulations as to what the definition of disability is, the Court did recognize the interpretive value that such agencies may offer.[94]

On the subject of mitigating measures, the EEOC issued interpretive guidelines that read: "the determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices."[95] In comparison, the dissent in *Sutton* pointed out that the DOJ interpretation of disability likewise obviates the consideration of mitigating measures.[96] Justice Stevens wrote, "The Department of Justice has reached the same conclusion. Its regulations provide that '[t]he question of whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable modification or auxiliary aids and services.'"[97] Both the EEOC and DOJ recommend that the determination of whether a claimant is disabled be made without regard to self-accommodation.

IV. Honoring the Legal and Ethical Objective of the ADA

While the administrative agency approaches indicate that mitigating measures should not be taken into consideration, the approach of the Supreme Court is appropriate. The Court properly reads the language of the statute and, from its plain meaning, arrived at the conclusion that mitigating measures will legitimately weigh into decisions of whether an impairment *substantially limits a major life activity*. The Court set out one possible standard by which an individual will qualify as disabled under the ADA. But the Court did not foreclose other possible standards. Recall, the ADA provides more than one prong to the definition of a disability.[98] While the Court properly disregarded legislative history and administrative guidelines in determining whether a person *is* substantially limited in the performance of major life activities, the Court left open the possibility that the history and guidelines may properly be applied to those cases in which a party claims she is *regarded as being* substantially limited in a major life activity.

Specifically, the insight of the Fifth Circuit, in *HCA*, suggests that legislative history may still prove useful in the case of determining which persons are regarded as disabled. While the Fifth Circuit placed less weight on the Senate Labor and Human Resources Committee Report, for the reasons aforementioned,[99] the court recognized that the Senate Report honored legislative history. For example, much of the legislative history of the ADA focuses on physical disabilities: much of the accommodations debate surrounds physical disabilities such as eye sight and high blood pressure. Most of these impairments may be diagnosed and treated by medical procedures. It was in the broader goal of preventing discrimination against persons with disabilities that the ADA sought to ensure that qualified individuals, without even need of accommodation, have equal

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94. *See id.* at 2145.
95. *Id.* (citing 29 C.F.R. pt. 1630).
96. *See id.* at 2156 (discussing 29 C.F.R. pt. 1630) (Stevens, J., dissenting).
97. *Id.* (citing 28 C.F.R. pt. 35).
98. *See* discussion *supra* Part III explaining that the term "disability" means, with respect to an individual
    (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 an impairment; or
    (3) being regarded as having such an impairment.

42 U.S.C. § 12102(2) (1994).
99. *See* discussion *supra* Part III-D, at §1.

opportunity without arbitrary discrimination.[100] Such individuals fall under the "regarded" prong of the disability definition.[101]

Indeed, attention to the third prong helps to ameliorate the disagreement expressed by Justice Stevens in the *Sutton* dissent. Justice Stevens stated that he believes "in order to be faithful to the remedial purpose of the Act, [the Court] should give it a generous, rather than a miserly, construction."[102] Stevens pointed first to the fact that if the determination of disability focuses on mitigated conditions, "impairments that Congress surely had in mind" would not qualify as disabilities.[103]

Stevens explained his assertion by way of example. He started with the proposition that "[t]he three parts of this definition do not identify mutually exclusive, discrete categories. On the contrary, they furnish three overlapping formulas aimed at ensuring that individuals who now have, or ever had, a substantially limiting impairment are covered by the Act."[104] The example Stevens pointed to is the case of individuals who have lost one or more limbs, but through use of a prostheses and physical therapy can perform all of their major life activities just as efficiently as "an average couch potato."[105] Stevens argued that "If the Act were just concerned with their present ability to participate in society, many of these individuals' physical impairments would not be viewed as disabilities. Similarly, if the statute were solely concerned with whether these individuals viewed themselves as disabled – or whether a majority of employers regarded them as unable to perform most jobs – many of these individuals would lack statutory protection from discrimination based on their prosthesis."[106]

After this, Stevens explained that if an employer were to refuse employment, based solely on the use of a prosthetic limb (where the impaired individual's ability to perform the work was in no way affected), the individual might not qualify for protection of the ADA because most employers do not view such a prosthesis as a disability. He asserts that this is objectively wrong.[107] Stevens's objection, however, lies not with the first prong of the definition, but with interpretation of the third prong.

In this light, Stevens's dissent loses strength. The Supreme Court's conclusion is appropriate. The question remains, however, whether this approach is appropriate for people with learning disabilities.

V. Learning Disabilities Compared to Physical Disabilities: Adopting an Approach for Self-Accommodations

Given this background, the question arises: how does this apply to Dr. Marilyn Bartlett? Should the progress she has made towards reading and learning qualify as "self-accommodation?"

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100. *See generally* Eichorn, *supra* note 14, at 1427. The article explains,

> Legislative history regarding section 504 [of the Rehabilitation Act- from which the ADA utilizes the same text to define disability] reveals that the later three-pronged definition was designed to address different types of disability discrimination. The first prong was meant to address direct discrimination based on actual disability and to provide a definition to facilitate the statute's disability-based affirmative action requirements. The remaining two prongs were designed to address discrimination stemming from classification of and *perceptions regarding disabilities*

Id. (emphasis added).

101. *See* discussion *supra* Part III laying out the three pronged definition of disability.

102. *Sutton*, 119 S. Ct. at 2152 (1999) (Stevens, J., dissenting).

103. *Id.* at 2153.

104. *Id.*

105. *Id.*

106. *Id.* at 2153-54.

107. *Id.* at 2154.

A. *Albertsons, Inc. v. Kirkingburg*

The Court in *Albertsons* provided useful dicta to address this issue. In querying whether an eye sight impairment qualified as a disability, the Supreme Court commented on the fact that the circuit court had improperly focused on the fact that "the manner in which [the plaintiff] sees differs significantly from the manner in which most people see because, [t]o put it in its simplest terms [he] sees using only one eye; most people see using two."[108] The Court stressed that difference alone does not qualify an impairment as a disability.[109] Instead, the difference must result in a "significant restriction" of ability to see.[110] The question was, then, whether the self adjustments the plaintiff had made to be able to see with one eye in a similar fashion to which people with two eyes see qualified as a self-accommodation that should be taken into account in determining a disability.

Following the mandate of *Sutton*, the Court explained that it saw "no principled basis for distinguishing between measures undertaken with artificial aids, like medications and devices, and measures undertaken, whether consciously or not, with the body's own systems."[111] One might argue that such a statement would include learning disabilities. That is, the actions that a woman takes to improve her cognitive ability qualify as measures taken on a conscious level with the "body's own systems." The critical question is then whether "the body's own systems" includes cognitive adaptations that individuals employ so that they may understand, learn, read, *etc.*, productively.

B. Learning Disabilities Compared to Physical Disabilities

The case law extrapolations regarding self-accommodations and ADA-protected disabilities is inappropriate because learning disabilities are inherently different than physical disabilities. The cognitive coping mechanisms employed by persons with learning disabilities should not be deemed "self-accommodations" for two reasons. First, the diagnosis and treatment of learning disabilities is extremely difficult to quantify. Actions taken to develop learning capacities should be considered as synthesized into the individual's learning (dis)ability. The individual is left with her ability, at the time of defining whether her impairment qualifies as a disability, to question whether she is substantially limited in major life functions. Such an approach is more in accord with the decisions thus far. Second, for ethical and policy reasons, it is more appropriate to view cognitive coping mechanisms employed by persons with disabilities as accomplishments. This will honor the ADA's foundational goals.

C. Two Obstacles: Defining Learning Disabilities and Offering Proof of their Existence

In all of the previous cases to which the Supreme Court referred the *Bartlett* court to consider, the question of disability pertained to quantifiable physical disabilities with readily distinguishable medical or other accommodations. In *Sutton*, the question was whether corrected or uncorrected eye sight should be the subject of a disability determination.[112] The Court had data that "each petitioner's uncorrected visual acuity is 20/200 or worse in her right eye and 20/400 or worse in her left eye, but '[w]ith the use of cor-

108. *Albertsons*, 119 S. Ct. at 2168 (1999).
109. *See id.*
110. *Id.*
111. *Id.* at 2169.
112. *See Sutton*, 119 S. Ct. 2139 (1999).

rective lenses, each ... has vision that is 20/20 or better.'"[113] This offered quantifiable data of the improvement that self-accommodation provided. In *Murphy*, the petitioner's blood pressure was 250/160, in its unmedicated state.[114] But in its medicated state, petitioner's blood pressure was tested at 160/102 and 164/104.[115] Again, the quantifiable nature of the data allowed the Court to clearly define the corrective visual aids and the medication as the source of the improvement, easily correlating the improvement to the accommodation.

Learning disabilities are different. In fact, some have even made assertions that learning disabilities are not quantifiable at all.[116] For example, there are many definitions for a learning disability ("LD"). The term is said to lack "any universally accepted meaning."[117] Furthermore, the ADA has not specifically defined which learning impairments qualify as disabilities. Instead, the consensus agrees that "one common feature of LD individuals is a significant discrepancy between aptitude and actual achievement. Other common characteristics include academic deficiencies or decreases in motivation level, memory, attention span, social skills, perceptual skills, or other cognitive abilities."[118]

Technology has yet to accommodate reliable diagnosis, and certainly not reliable and tested treatment (as may be the approach for many physical disabilities). Thus, two qualities differentiate learning disabilities from physical disabilities, the knowledge of exactly what a learning disability is, and ways to gauge its unmitigated state.

D. Ethical Considerations: The Supreme Court's Approach in Light of Substantive Equality

The premise of the 14th Amendment aims to ensure that each and every person is treated as a respected, responsible, and participating member of society.[119] In the context of learning disabilities and accommodations, it is the most ethical approach to treat learning disabilities as they exist in their present state. Society should not attempt to detach what might be termed "mitigating" accommodations in determining whether someone has a learning disability. There are two reasons for this. First, by avoiding any detachment approach, we affirm the autonomous state of the human life and afford the respect necessary to bring marginalized people into mainstream society. Second, by

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113. *Id.* at 2143.

114. *See Murphy*, 119 S. Ct. at 2136 (1999).

115. *Id.*

116. *See* THOMAS G. FINLAN, LEARNING DISABILITY: THE IMAGINARY DISEASE 3 (1994). The author asserts that "There has never been any scientific evidence that LD [learning disabilities] exists or any evidence that LD programs help students. Instead, LD theory and practices keep changing to accommodate current research most of which contradicts previous LD guesswork." *Id.* at 1. The text also goes on to explain that

> almost every textbook on LD begins with some version of the following: 'Learning disabilities, though very real, remain an intriguing puzzle. This is true, even though they officially received their name during the mid-1960's. . . . The term *learning disabilities* had different meanings to individuals in different professions. It may also have different meanings to individuals within the same profession. One expert in the field of special education noted that 'the field [learning disabilities] is in obvious turmoil, if not disarray. We move to an uncertain future, but when was that not true? We are at least not afflicted with the illusion of constancy and stability.

Id. at 26.

117. Samuel S. Heywood, Note, Without Lowering the Bar: Eligibility for Reasonable Accommodations on the Bar Exam for Learning Disabled Individuals Under the Americans With Disabilities Act, 33 GA. L. REV. 603, 609 (1999).

118. *Id.* at 610.

119. *See* discussion *supra* Part II-A, §2.

recognizing cognitive coping mechanisms as achievements instead of self-accommodations, we are more likely to move society towards the ideal of including all persons in the life activities that they choose.

Addressing the issue of respect hinges on a subtle understanding of what it would mean, in practice, to discount mitigating factors. The type of mitigating factors that the court would most likely have to consider would include measures that an individual has taken to improve her ability to achieve despite her impairment. These "mitigating factors" might better be described as accomplishments. To suppose that the court could confiscate a person's achievement, for the purpose of determining whether she is disabled, is somewhat dehumanizing. It fails to afford the respect that is due to that person's self-actualization and autonomy in the face of adversity. This runs counter to the respect that the disabilities rights movement and the 14th Amendment seek to guarantee to persons with disabilities. By rejecting the Supreme Court's physical disabilities approach when addressing the question of learning disabilities, society affirms that persons with learning disabilities are capable of the same autonomous, self-actualization that persons without disabilities achieve.

Indeed, reading *Bartlett*, the majority's opinion was tinged with a paternalistic tone. That is, to suggest that society ought to approach a person with a learning disability by first speculating "but for her efforts to ameliorate the situation, would she be substantially impaired?" falls prey to preventing true inclusion for persons with learning disabilities. This is played out in rather arrogant determinations of what would have been, especially in light of the fact that experts trained to diagnose and treat learning disabilities are reluctant to come to the same conclusions.[120] Rather than perpetuate a stereotype that a disability is abnormal, society should recognize that all persons have varying abilities. We all might be placed at different levels on a continuum.[121] Rather than ostracize and dissect where another would fall, but for certain achievements, society should accept a person's achievements as a part of who he or she is. It places him or her at a rung on the continuum. Society should focus instead on whether, at that rung, the individual qualifies for reasonable accommodations as a person with a disability.

VI. The Proper Comparison Group: Comparable Training, Skills, and Abilities

Thus far, this Note has argued two points. First, it is proper for physical disabilities to be ascertained in light of self-accommodations that individuals employ. Second, this mandate should require no analysis or debate regarding cognitive coping mechanisms that persons with learning disabilities employ to improve their capacity to learn, read, *etc.* Instead, because of the difference between a learning disability and a physical impairment, cognitive coping mechanisms internalized to help persons with learning disabilities achieve should not fall under the term "mitigating self-accommodations." These coping mechanisms are more appropriately viewed as accomplishments, a part of the individual disability assessment determination. But then the question is, given a person with a learning disability, on the bar exam, should she be compared to the average person or to persons with her similar training?

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120. *See generally* ROBERT J. STERNBERG AND LOUISE SPEAR-SWERLING, PERSPECTIVES ON LEARNING DISABILITIES: BIOLOGICAL, COGNITIVE, CONTEXTUAL (Robert Sternberg & Louise Spear-Swerling ed., 1999) (explaining that the development of diagnosing learning disabilities has been approached from many different perspectives and while progress has been made there is still far to go).

121. *See* Eichorn, *supra* note 14, at 1409–15.

A. Title II and Public Licensing

Title II of the ADA covers activities of public entities.[122] Licensing and regulation of professions and occupations is usually a public function carried out by state and local governments.[123] One commentator has explained the approach in this way:

> The ADA is a civil rights law and designed to further the individual rights of disabled persons. One goal of civil rights laws is to benefit the general public by enabling fuller involvement of all citizens in productive enterprises; likewise, licensing activities benefit the general public by ensuring safe professionals. The two goals of
>
> public safety and individual rights must be balanced by ensuring that the individual rights of disabled persons are advanced only if the individual is qualified and safe to practice her or his profession.[124]

Given this over-arching purpose, the DOJ has put forth criteria by which to determine whether someone is disabled. DOJ guidelines suggest that the comparison group employed should be that of the public at large. The *Sutton* Court agreed. "Regulations promulgated by the Justice Department under Title II of the ADA define a 'physical or mental impairment' as '[a]ny mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.'"[125] These same regulations define "'major life activities' as 'functions such as ... walking, seeing, hearing, speaking, breathing, learning, and working.'"[126] Under Title II, "substantially limits" is defined as "'[s]ignificantly restrict[s] as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under with the *average* person in the general population can perform that same major life activity.'"[127]

Under this approach, Bartlett would be compared to the average person in the general population to determine whether her learning disability substantially limits her ability to perform major life activities. Put into practice, however, this approach is not appropriate. To see how applying such a standard to the case of a licensing situation leads to obscure results, we can consider the case of medical students claiming disabilities. In *Price v. National Board of Medical of Medical Examiners*,[128] plaintiffs claimed that they required special accommodations because each had documented proof that they suffered Attention Deficit Hyperactivity Disorder (ADHD).[129] Without looking in depth at the nature of their learning disability, it is a useful vehicle for discussion to consider the comparison group to which the court compared the plaintiffs.

B. *Price v. Board of Medical Examiners*

In *Price*, the court held that the proper comparison group was that of the ordinary person.[130] The court offered two reasons for this. The first appeared to be similar to the majority approach in *Sutton*, focusing on the fact that the ADA specified how many

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122. *See* discussion *supra* Part III & n.40.

123. *See* James F. Carr, *Impact of the ADA on Professional and Occupational Licensing*, *in* THE AMERICANS WITH DISABILITIES ACT: PRIVATE AND PUBLIC COSTS 125 (Roger Clegg ed., 1996).

124. *Id.* at 128.

125. *Sutton*, 119 S. Ct. at 328 (1999).

126. *Id.* citing 28 C.F.R. §35.130(b)(6).

127. *Id.* citing 29 C.F.R. §1630.2(j)(1)(ii) (emphasis added).

128. 966 F. Supp. 419 (S.D. W. Va. 1997).

129. *Id.* at 422.

130. *See id.* at 426.

persons are thought to suffer disabilities, and the court viewed this as a restriction. The *Price* court explained, "a 'learning disability' does not always qualify as a disability under the ADA . . . The comparison to 'most people' is required to determine whether a learning disability rises to the level of a disability under the ADA."[131] The court went on to explain that such an approach was in accord with the legislative history promulgated by the DOJ which explains that the comparison group should be the average person.[132]

Furthermore, the court explained that

> The 'comparison to most people' approach has practical advantages as well. Courts are ill-suited for determining whether a particular medical diagnosis is accurate. Courts are better able to determine whether a disability limits an individual's ability in comparison to most people. Additionally, this functional approach is manageable and, over time, will promote a uniform and predictable application of the ADA.[133]

The result of this approach was that none of the students were deemed disabled, that is, substantially limited in comparison to the ordinary individual.[134] The problem with this lies with the fact that the ordinary individual will not achieve admittance into medical school. So from the outset, any medical student will be unlikely to qualify for the protection of the ADA regardless of their learning disability. This does not seem to be a fair comparison group and instead, a Title I standard seems more appropriate.

C. Title I: Comparable Training, Skills, and Abilities

The district court in *Bartlett* recognized the medical student's dilemma. Accordingly, it relied on regulations under Title I and held that Bartlett "[was] disabled in her ability to 'work' because her reading rate compared unfavorably with 'persons of comparable training, skills, and abilities.'"[135]

This employment discrimination standard is the one used by the EEOC. The district court viewed the bar exam as an employment test. Despite Bartlett's suit brought under Title II, the district court saw fit to use the employment standard. The district court's reasoning demonstrates the proper approach. In defining a disability, the DOJ explains that included in its definition are the provisions included in Titles I and III that are not inconsistent with the Rehabilitation Act.[136] Under this approach, perhaps it is in the court's purview to adopt the EEOC's approach of comparing the plaintiff to others with comparable training, skills, and abilities.

The obstacles faced by this approach are those described in the *Price* case.[137] There is concern that the approach might prove over-inclusive. There is also the question of whether it is practical for courts to employ. Ethical implications, however, must also be considered.

1. Over-Inclusion

The current trend is that employers prevail in disputes regarding reasonable accommodations, there is little reason to think that a different approach will lead to an unmerited windfall to claimants. The American Bar Association's (ABA's) Commission on Mental and Physical Disability Law investigated claims that the ADA legislation un-

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131. *Id.*
132. *See id.*
133. *Id.* at 427.
134. *See id.* at 428.
135. *Bartlett*, 156 F.3d at 326 (2d Cir. 1998), quoting *Bartlett v. New York State Board of Law Examiners*, 970 F.Supp. 1094, 1121 (S.D.N.Y. 1997).
136. *See* 28 C.F.R. §35.103.
137. *See Price*, 966 F. Supp. at 426-27 (S.D. W. Va. 1997).

fairly favored employees with disabilities over employers of persons with disabilities.[138] These results may shed light on whether claimants fair better than defendants. These findings offer empirical evidence regarding the approach in question.

The study revealed that employer victories far outweighed employee victories. The *Reporter* reviewed 1,200 case decisions.[139] In the 63.3% of cases where a final decision had been made by the court (i.e. finding for the employee or the employer), employers prevailed 92.11% of the time. Employees prevailed in only 7.89% of those cases.[140] Further, an analysis of EEOC statistics reveals that of the 83,158 complaints resolved from 1992 through 1997, only 13.6% were decided in the employees' favor, as compared to 86.4% decided in the employers' favor.[141] The statistics indicate that ADA claimants litigate their cases in just over half of the time. Further, those claimants who reach the litigation stage are rarely successful. There is little reason to suspect that by clarifying its approach in the case of learning disabilities the Court will create an unmerited windfall to claimants.

2. Practical Employability

Since proving a disability often requires documentation from an expert, the expert is just as well, if not better, equipped to compare two specific groups. In order to establish the existence of a disability, as earlier discussed, courts require an analysis of each person's *individual* limitation. This often requires documentation of the claimant's disability issued from an expert or other professional qualified to make such a diagnosis. It is then for the court to decide whether or not such testimony is sufficient.

The individual claiming the disability has the obligation to provide appropriate documentation of the existence of the learning disability when placing it at issue . . . Unlike a student in a wheelchair, whose disability is obvious and who clearly qualifies as a protected individual in most situations involving discrimination in the college setting [the example the ABA uses to illustrate its point], the student claiming a learning disability must prove it. It is legitimate for the admissions office or the student service office to request documentation. Such documentation should be prepared by a professional qualified to diagnose a learning disability. The documentation should include testing procedures, instruments, results, and interpretations. It should reflect the individual's present achievement level and the results of testing for intelligence, vocabulary, reading rate, reading comprehension, spelling, mathematical comprehension, memory, and processing skills.[142]

Since expert testimony is required under either standard, courts face the same difficulty in employing either standard. By narrowing the comparison group, however, the Title I standard makes it more likely that the expert's analysis of the claimant's individual limitation will prove meaningful to courts. In conclusion, the available data suggests that employing the Title I standard will not pose any increased impracticability upon the courts. We must then question whether the Title I standard is the best choice, under normative analysis.

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138. *See* Commission on Mental & Physical Disability Law, American Bar Ass'n, *Study Finds Employers Win Most ADA Title I Judicial and Administrative Complaints*, 22 Mental & Phys. Disability L. Rep. 403 (1998).

139. *See id.* at 404.

140. *See id.*

141. *See id.*

142. ROTHSTEIN, *supra* note 11, at §3.22.

D. Ethical Considerations

The Title I comparison standard respects achievements that persons with disabilities have made and decreases stigma attached to persons with disabilities who seek professional careers. Whether a claimant will qualify for protection under the Act hinges in part upon the comparison group to which she is compared. In the case of professional licensing, and higher education as well, the proper comparison group should be the same as employed in Title I of the ADA, persons with similar comparable training, skills, and abilities. There are two ethical justifications for this assertion.

First, as explained earlier,[143] the cognitive coping mechanisms that persons with learning disabilities employ should not be discounted in making the disability assessment. These efforts should not limit a person's opportunities either. For example, Bartlett has substantially increased her word recognition and learning capacities; she has reached a high level of achievement in receiving admittance to and graduating from law school. This high level of achievement places her in an intellectual strata above that of the ordinary person. This should not preclude her from the opportunity to practice law, if she proves so qualified. If she is compared to persons of ordinary or average learning ability, however, she will likely not qualify as suffering a substantial limitation. This, in point, helps to substantiate that she has the ability and aptitude to do well on the bar exam. But it should not preclude reasonable accommodations that will enable her to reach her potential to practice the law. If it did, a strong message would be sent to persons with learning disabilities that there is a ceiling set for accomplishment. Achievement up to the average or ordinary person's achievement will be accommodated, but beyond this, one is without consideration. This runs counter to the inherent respect and empathy that the Equal Protection Clause demands.

Second, failure to adopt the EEOC standard would merely perpetuate stereotypes and discrimination regarding the qualifications of persons with disabilities who seek professional occupations. It would do so because denying persons with learning disabilities accommodations such as larger print would weed out persons not on their ability to meet the merit requirements of a position, but based on the fact that their merit does not show itself by way of ordinary measures. Systematically preventing a group of persons to enter a field of work will lead to a marked absence in the workplace. The result of this absence is likely to create a presumption that the absence is due to merit deficiency. This surely will not decrease stigma, the antithesis of equality. Furthermore, this sends a message to persons with learning disabilities that they are not welcome in the upper ranks of society. Instead, they are subjected to remain ordinary or average, at best. Such demoralization will not inspire individuals to continue to make efforts to be integrated into society.

VII. Conclusion

As described throughout this Note, the overarching goal of the disabilities rights movement is the inclusion of persons with disabilities in mainstream society. Accommodations are crucial in facilitating this goal. Whether individuals qualify for accommodations turns on whether they fall under the defined category of disabled, as set forth in the ADA. The majority of caselaw in this regard has focused on the question of physical disabilities.

Today, Congress and the courts must grapple with the question of learning disabilities as well. In this regard, two approaches should be adopted to honor both the legal and policy issues connected with the ADA. The cognitive coping mechanisms that persons

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143. *See* discussion *supra* Part IV.

with learning disabilities employ should not be considered self-accommodations, in the legal sense of the word. Instead, such actions ought better to be seen as accomplishments, and accordingly become part of the individual assessment of whether a claimant should qualify for reasonable accommodation. This honors the plain language of the statute. It also affords persons with disabilities the respect and autonomy that will lead to the realization of their aspirations.

The second approach that should be adopted is that, in questions of learning disabilities, the appropriate comparison group that courts should employ is that of Title I of the ADA, *comparable training, skills, and abilities*. This honors the intent of the Act, which is to encourage the integration and success of persons with disabilities. It is unlikely to prove impracticable, or over-inclusive in practice.

While the discussion regarding these two recommendations has focused extensively on the case of reasonable accommodations in a professional licensing question, the legal and moral underpinnings of this analysis are important for other purposes as well. For example, this analysis is important for employers and places of higher education across the nation. The methodology for determining a disability that is ultimately adopted by the courts and legislature will inevitably hold implications for the ways that social institutions approach the issue. With the theoretical, technical, and policy analysis considered in the case of professional licensing, institutions may choose whether to adopt the standard that the courts and legislature adopt or a more comprehensive protection. The critical issue is whether the courts and the Legislature adopt a standard that will guarantee a just result: people able to achieve their fullest potential.

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