LEGAL CROSS-DRESSING: SEXUALITY AND THE AMERICANS WITH DISABILITIES ACT

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"To retain respect for sausages and laws,, one should not see them in the making."[1]

The United States government wants its citizens to know that the Americans with Disabilities Act of 1990 ("ADA")[2] is about more than eliminating physical barriers and creating opportunities for employment. It is part of a larger project of breaking down stereotypes, dispelling myths, and quieting fears.[3] Ironically, the ADA, in its application and jurisprudence, has probably done more to perpetuate stereotypes, myths, and fears than it has to eliminate them. The fears and stereotypes fostered by the ADA are not primarily about disabilities and their effects. Instead, these fears revolve around sexuality. How do handicaps connect to sexualities? They are linked through an anxiety of shifting marginalities.

In addition to their attempts to order behavior or to balance interests and rights, legal texts and statutes reflect our obsessions and fascinations. Even when a legal text is associated with an individual, a specific court, or a legislative or regulatory body, it is the product of collective processes and

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[1] Attributed to Otto von Bismarck. *See, e.g., Otto von Bismarck quotes, available at* http://www.brainyquote.com/quotes/authors/o/otto_von_bismarck.html (last visited Dec. 10, 2005).

[2] Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (2005).

[3] *See* UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMM'N, COMPLIANCE MANUAL § 902.8(a) (2000), *available at* http://www.eeoc.gov/policy/docs/902cm.html [hereinafter EEOC].

reflects collective values. A piece of complex legislation like the ADA is a mine of hidden subtexts. These are most visible when the legal areas touch the areas of gender and sexuality. Michel Foucault and others have amply shown us that mental structures or *mentalités* can lead us down unexpected paths.[4] Literary and cultural critics have made us aware that this is the case with artistic and cultural production. The law is no exception, as both legal specialists and literary critics have amply demonstrated: Robert Ferguson,[5] Richard Posner,[6] Stanley Fish,[7] or Peter Brooks,[8] to name but four.[9] The imaginary is as critical in the law as it is elsewhere in our intellectual universe. It seems impossible to make sense of the Americans with Disabilities Act without examining the mentalities it embodies and the place of both the statute and its jurisprudence in the contemporary American imaginary.

Restricting ourselves to a legal canon does not by any means, however, imply a lack of awareness of the field of disability studies, whose existence is already decades old.[10] Nor does this restriction imply a lack of interest in the innumerable testimonials by disabled personages, ranging from the physically handicapped to the mentally ill. These touching narratives may enrich the legal world and they may complement it, but they will not alter the contents of the ADA statute that we shall be examining.[11]

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[4] *See* MICHEL FOUCAULT, HISTOIRE DE LA SEXUALITÉ I: LA VOLONTÉ DE SAVOIR (1976); MICHEL FOUCAULT, HISTOIRE DE LA SEXUALITÉ II: L'USAGE DES PLAISIRS (1984); MICHEL FOUCAULT, HISTOIRE DE LA SEXUALITÉ III: LE SOUCI DE SOI (1984).

[5] *See* ROBERT A. FERGUSON, LAW AND LETTERS IN AMERICAN CULTURE (1984).

[6] *See* RICHARD A. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION (1988).

[7] *See* STANLEY FISH, DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES (1989)

[8] *See* LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW (Peter Brooks & Paul Gewirtz eds., 1996).

[9] *See* LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW (Peter Brooks & Paul Gewirtz eds., 1996).

[10] *See* THE BODY AND PHYSICAL DIFFERENCE: DISCOURSES OF DISABILITY (David T. Mitchell & Sharon L. Snyder eds., 1997); DISABILITY AND CULTURE (Benedicte Ingstad & Susan Reynolds Whyte eds., 1995); FEDWA MALTI-DOUGLAS, BLINDNESS AND AUTOBIOGRAPHY: AL-AYYÂM OF TÂHÂ HUSAYN (1988); Fedwa Malti-Douglas, *Mentalités and Marginality: Blindness and Mamlûk Civilization*, *in* THE ISLAMIC WORLD FROM CLASSICAL TO MODERN TIMES: ESSAYS IN HONOR OF BERNARD LEWIS 211 (C. E. Bosworth et al. eds., 1989); POINTS OF CONTACT: DISABILITY, ART, AND CULTURE (Susan Crutchfield & Marcy Epstein eds., 2000).

[11] These testimonials exist in many languages and range from physical disabilities (including various illnesses) to mental illness. Some of the classics of the genre include HELEN KELLER, THE STORY OF MY LIFE (1976); FRIDA KAHLO, THE DIARY OF FRIDA KAHLO:

Reading a legal text is a way to enter the American psyche. This is certainly true for a work like *The Starr Report*, the referral to the United States House of Representatives by Independent Counsel, Kenneth W. Starr.[12] I attempted to demonstrate in *The Starr Report Disrobed* that the work of the Independent Counsel was not merely a legal text but was also a cultural text that reflected our gender obsessions and anxieties at the time of its appearance.[13] This is equally true for different types of trial documents such as closing arguments. These can be crafted as literary masterpieces designed to sway a jury while also providing us with a singular look at American history and literature.[14]

Why should it not be the same for legal acts emanating from the United States Congress? These are often perceived by their readers as lacking in narrative complexity. Is it perhaps that these legal constructions, when viewed closely, are carefully laid out as fairly dry outlines of the law, rather than as stories and narratives? Certainly, this is the case with the ADA, signed into law by President Bush in 1990.[15]

The ADA was the child of a strange union, that of the Civil Rights Act of 1964 with the Rehabilitation Act of 1973. The Americans with Disabilities Act is much more than what it purports to be. The Act was designed "to establish a clear and comprehensive prohibition of discrimination on the basis of disability."[16] Seen this way, the ADA links itself directly to the Civil Rights Act, as the word "discrimination" indicates.

The various titles in the ADA include employment, public services, and public accommodations and services operated by private entities, as well as miscellaneous provisions.[17] Attention will be directed to the miscellaneous provisions of the ADA since these represent a category that is not clearly defined, unlike the sharply delineated provisions on

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AN INTIMATE SELF-PORTRAIT (Barbara Crow de Toledo & Ricardo Pohlenz trans., 1995); FLORA RHETA SCHREIBER, SYBIL (1973).

[12] KENNETH W. STARR, COMMUNICATION FROM KENNETH W. STARR, INDEPENDENT COUNSEL TRANSMITTING A REFERRAL TO THE UNITED STATES HOUSE OF REPRESENTATIVES FILED IN CONFORMITY WITH THE REQUIREMENTS OF TITLE 28, UNITED STATES CODE, SECTION 595(C), H.R. DOC. NO. 105-310 (1998).

[13] FEDWA MALTI-DOUGLAS, THE STARR REPORT DISROBED (2000).

[14] *See* MICHAEL S. LIEF ET AL., LADIES AND GENTLEMEN OF THE JURY: GREATEST CLOSING ARGUMENTS IN MODERN LAW (1998).

[15] Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (2005). For the background and the context of the Act's passage, see RUTH O'BRIEN, CRIPPLED JUSTICE: THE HISTORY OF MODERN DISABILITY POLICY IN THE WORKPLACE (2001).

[16] American with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327, 327 (1990).

[17] *Id.*

employment. This will be followed by discussion of the *Compliance Manual* of the United States Equal Employment Opportunity Commission ("EEOC")[18] and the landmark Supreme Court decision in *Bragdon v. Abbott*.[19]

I. THE STATUTE

Sections 507-512 of Title V are notable because they are the place in the ADA where disability and sexuality meet.[20] Although these two topics might seem an odd pair, they are linked within the statute in a way that prioritizes heteronormativity.

The first indication that the sexual is on the mind of the ADA drafters appears in § 508, which reads: "SEC. 508. TRANSVESTITES. For the purposes of this Act, the term 'disabled' or 'disability' shall not apply to an individual solely because that individual is a transvestite."[21]

The mere presence of this "section" should stop us in our tracks. A section is a major division of the ADA. The statute consists of five titles and each title contains between five and twenty sections. Sections frequently go on for several pages. When they are very short, they are usually devoted to an important issue, such as §§ 244 and 246, which are only a few lines each, and which set the dates for legal requirements.[22] Section 508 is but two lines for the sole purpose of excluding transvestites—not sexual deviants, not child molesters, not homosexuals, just transvestites. This is an extraordinary privilege for cross-dressers. No other group of individuals is isolated in this way and given this kind of attention in the ADA. One might think that America was threatened by an imminent plague of transvestism. Strengthening the argument for the highly significant inclusion of this section is its complete gratuitousness. Textually redundant, it is legally superfluous since the point is already made elsewhere in the statute. Somehow, without warning, we have moved from the disability arena to that of sexuality within the text of the ADA.

It is not merely the presence of "transvestites" that signals that more is at play here than legal disability. Literary critics have long been aware of the paradigmatic and syntagmatic relationships in a text. The syntagmatic relationship exists between an element and those that precede it or follow it in a series. A paradigmatic relationship exists between elements

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[18] EEOC, *supra* note 3, § 902.

[19] 524 U.S. 624 (1998).

[20] American with Disabilities Act of 1990 §§ 507-511, 42 U.S.C. §§ 12207-12211 (2005); § 512, 29 U.S.C. § 706 (2005).

[21] § 508.

[22] §§ 244, 246.

that can be substituted or that can replace one another in a series, generally because they have the same function. A series can be either a text, a cultural practice, or something linking the two. In a sentence, for instance, words are syntagmatically related to the words that precede and follow them. They are paradigmatically related to the words that can replace them: the verb in "thou shalt not kill" with that in "thou shalt not commit adultery." Similar rules apply in a cultural practice such as a formal dinner. Syntagmatically, the beef Wellington follows the crab salad as the main course follows the appetizer. Paradigmatically the beef Wellington could be replaced by a leg of lamb, just as the crab salad could be replaced by a stuffed artichoke. In masculine attire (to return to cross-dressing), the collar relates syntagmatically to the tie. Paradigmatically, the tie could be knit, traditionally striped, patterned, or tied in a bow.

Syntagmatically, the transvestites in § 508 are neatly tucked between § 507, "Federal Wilderness Areas," and § 509, "Coverage of Congress and the Agencies of the Legislative Branch."[23] What is the relationship of these three sections? The section on "Federal Wilderness Areas" is the more provocative in this highly unusual textual syntagmatic relationship.

What does the "Federal Wilderness Areas" section of the ADA provide? It states:

> (a) Study. The National Council on Disability shall conduct a study and report on the effect that wilderness designations and wilderness land management practices have on the ability of individuals with disabilities to use and enjoy the National Wilderness Preservation System as established under the Wilderness Act (16 U.S.C. 1131 et seq.).
>
> (b) Submission of Report. Not later than 1 year after the enactment of this Act, the National Council on Disability shall submit the report required under subsection (a) to Congress.
>
> (c) Specific Wilderness Access.
>
> (1) In general. Congress reaffirms that nothing in the Wilderness Act is to be construed as prohibiting the use of a wheelchair in a wilderness area by an individual whose disability requires use of a wheelchair, and consistent with the Wilderness Act no agency is required to provide any form of special treatment or accommodation, or to construct any facilities or modify any conditions of lands within a wilderness area in order to facilitate such use.
> (2) Definition. For purposes of paragraph (1), the term "wheelchair" means a device designed solely for use by a

[23] §§ 507, 509.

> mobility-impaired person for locomotion, that is suitable for use in an indoor-pedestrian area.[24]

Section 509, "Coverage of Congress and the Agencies of the Legislative Branch," reiterates the Senate's commitment to Rule XLII of the Standing Rules of the Senate and extends some of the provisions of the ADA to the House of Representatives.[25] The section covers employment and includes remedies for failing to hire, discharging, or discriminating against an individual "on the basis of such individual's race, color, religion, sex, national origin, or state of physical handicap."[26]

So what are transvestites doing wedged between these complicated discussions regarding "Federal Wilderness Areas" and the "Coverage of Congress?" Some readers jumping from the "Wilderness Areas" to transvestites may well laugh at the syntagmatic relationship between these two neighbors. Are we to assume that transvestites are wild? Or have we simply entered, as this Article suggests, a sexual wilderness? Such a conclusion cannot be completely eliminated. Since the ADA specifically excludes transvestites from its coverage, are we also to assume that transvestites cannot enjoy the wilderness areas? Or can it be taken for granted that since transvestites are not disabled, they need not worry about the provisions of the "Federal Wilderness Areas?"

That would seem to be the case, since, in fact, the "Federal Wilderness Areas" section is really directed at "individuals with disabilities."[27] But this section of the Act is at best ill-organized. The reader is told that nothing in the Wilderness section "is to be construed as prohibiting the use of a wheelchair in a wilderness area."[28] Wilderness calls up rough terrain, uneven ground, and an unhappy environment for a wheelchair user generally. But do we really know what a "wheelchair" means? The ADA will define it for us. It "means a device designed solely for use by a mobility-impaired person for locomotion, that is suitable for use in an indoor pedestrian area."[29]

A "wheelchair" is "solely for use" in an "indoor-pedestrian area." "Solely" is, once again, a term of exclusion. On the most superficial level, this use of exclusionary language functions as a kind of irony in a statute that seeks to prevent exclusion. But when this section is read in

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[24] § 507.

[25] § 509.

[26] *Id.*

[27] § 507.

[28] *Id.*

[29] *Id.*

juxtaposition with the exclusion of transvestites in the section following, an indirect linkage is created between the two references. In fact, "an indoor-pedestrian area" are the three last words in the section on "Wilderness Areas." This is yet another odd juxtaposition because indoor pedestrian areas are the antithesis of wilderness areas. These last words also drag us to the transvestites, since they are also defined by exclusion. The same word, "solely," is employed in both instances.

Following the section on "Coverage of Congress" is the section entitled "Illegal Use of Drugs."[30] Embedded between the "Illegal Use of Drugs" and "Amendments to the Rehabilitation Act" is § 511, "Definitions."[31] The small size of "Definitions" should not mask its enormous importance. It reads:

> (a) Homosexuality and Bisexuality. For purposes of the definition of "disability" in section 3(2), homosexuality and bisexuality are not impairments and as such are not disabilities under this Act.
>
> (b) Certain conditions. Under this Act, the term "disability" shall not include—
>
> (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.[32]

This set of definitions is the crux of the nexus of sexuality and the ADA. Are not transvestites, found again in § 511(b)(1), already familiar to the reader from their placement directly following the "Federal Wilderness Areas?" Yes. This repetition is but an obsession on the part of the drafters of the ADA.

Note first that homosexuality and bisexuality are isolated in a category of their own. Is this because they are not categorized as disorders in the *Diagnostic Criteria from DSM-IV-TR* of the American Psychiatric Association? All the other so-called "conditions" are considered to be potential disorders according to the *DSM-IV*.[33] In this dance of marginalities, some are recognized as diseases and some are not. Some are criminalized

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[30] § 510.

[31] § 511.

[32] *Id.*

[33] AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC CRITERIA FROM DSM-IV 157, 243-49, 269-71 (1994). *See also* DONALD H. J. HERMANN, MENTAL HEALTH AND DISABILITY LAW 306-20 (1997).

and others are not. Sexual minorities add a distinctive flavor to this amalgam. The tortured handling of this entire matter reflects a visible discomfort. Behind this discomfort lies a threatened heteronormativity. One common element that connects transvestism, homosexuality, and bisexuality is that they all violate the heteronormative ideal. The other marginalities add the context of criminality to that of perversion.

Not surprisingly, a champion of this threatened heteronormativity was Senator Jesse Helms from North Carolina. Senator Helms was concerned about the conditions cited above being covered by the ADA.

> Mr. Helms asked if the Act would be of benefit to pedophiles. He was told, no, it would not, as pedophilia was a crime. He asked if it would help pyromaniacs. He was told, no, it would not, as setting fires to buildings was a crime. He asked if it would help kleptomaniacs. He was told, no, it would not, as stealing was a crime. He then asked if it would help transsexuals. There was a huddle among the Act's supporters before they responded, it would help transsexuals as that is a ligitimate [sic] medical condition that would be covered under the Act. Mr. Helms then introduced an amendment to the bill that specifically excluded protection for transsexuals and transvestites, i.e., excluded all transgendered people for [sic] protection under the law.[34]

Although the concerns expressed in the above quotation are well taken, they need to be qualified. The "Definitions" section of the ADA specifies the exclusion from coverage of "gender-identity disorders not resulting from physical impairments, or other sexual behavior disorders."[35] It would certainly seem possible to interpret the above to mean that a gender disorder or transsexualism associated with a biological state of gender indeterminacy, like hermaphroditism or any other medical abnormality of the genitalia, could come under the ADA. In fact, one could go even further. The reference to "other sexual behavior disorders" could open the door to any gender-identity disorder or transvestism. One could then argue that the much-trumpeted exclusion of transvestism could turn out to be more important symbolically than legally.

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[34] *Senator Helms' Concerns with the ADA*, *available at* http://www.transhistory.org/history/TH Jesse Helms.html (last visited March, 2003). *See* 135 CONG. REC. S10,765 (1989). A slightly different version of this interchange can be found in JoAnna McNamara, Employment Discrimination and the Transsexual n.72 (1996) (unpublished manuscript), *available at* http://www.willamette.edu/~rrunkel/gwr/mcnamara.

[35] § 511.

II. THE EEOC

These areas of sexual discomfort in the ADA are also evident within section 902 of the United States Equal Employment Opportunity Commission's *Compliance Manual*.[36] Section 902 is engaged in defining the term 'disability.' Like the ADA itself, section 902.6 lists the exceptions to the definition of disability: "The statute specifies that certain conditions are not disabilities covered by the ADA. Since homosexuality and bisexuality are not impairments, those conditions are not disabilities."[37] This statement is followed by the identical list of exclusions from the term "disability" found in the ADA. This reasoning suggests that a disability is an impairment covered under the Act and that homosexuality and bisexuality are not impairments in the first instance. Therefore, neither homosexuality nor bisexuality can be covered by the Act. The impairment or non-impairment status of the other excluded categories is not specified.

Thanks to its construction, the EEOC is replete with examples of various possible scenarios illustrating what a disability is and is not. The situations imagined by the drafters of the EEOC not only demonstrate the exclusions noted above but also, through endless repetition, show the obsession with excluding these conditions. Consider the following samples:

> Example 1: Several years ago, CP [charging party] was hospitalized for treatment for a cocaine addiction. He has been rehabilitated successfully and has not engaged in the illegal use of drugs since receiving treatment. CP, who has a record of an impairment [we are not told which] that substantially limited his major life activities, is covered by the ADA.
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> Example 2: Three years ago, CP was arrested and convicted of the possession of cocaine. He had used the substance occasionally, perhaps three or four times over a sixteen-month period. CP has not used cocaine or any other illegal drug since his arrest. CP is not covered by the ADA. Although CP has a record of cocaine use, the use was not an addiction and did not substantially limit any of CP's major life activities.
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> Example 3: CP applies for a job with R, which requires job applicants to undergo a test to determine the current illegal use of drugs. CP's drug test falsely indicates that CP is using cocaine. R's personnel manager informs CP that the test came back positive for cocaine use and that R will not hire CP because "we don't want

[36] EEOC, *supra* note 3, § 902.

[37] *Id.* § 902.6.

> drug addicts working here." CP is not currently using cocaine and does not use any other drug illegally. R, which erroneously regards CP as being addicted to cocaine, erroneously regards CP as having a substantially limiting impairment. CP, therefore, meets the definition of "disability."[38]

Cocaine use is not a disability because illegal drug users are excluded from ADA coverage. Being falsely accused of using cocaine could be a disability, however, even though the actual status of cocaine addict does not indicate a disability. Therefore, the false suspicion of a non-disabling act could still constitute a disability according to the EEOC examples. But what happens if we slide homosexuality into the slot holding cocaine use? Does this mean that if one is reputed to be a homosexual and is not than that reputation itself is an impairment? A disability? Refusing to hire a homosexual would be legal under the ADA. But denying employment to a straight male because you think he is gay would seem to be a violation of the ADA. The only way to exclude the homosexual parallel would be to view drug addiction as a non-covered disability which can then be covered by false reputation. Homosexuality, not covered in itself, may not be covered by false reputation since we are told that homosexuality is not an impairment. This analysis, however, depends on a distinction between impairment and disability. Yet the definition of disability in § 3 of the ADA clearly states that a disability means an "impairment," "a record of such an impairment," or "being regarded as having such an impairment."[39] Even if we posited a category of non-covered impairment, the problem of false reputation of sexual deviance being covered when the actual deviance is not would extend to the other sexual marginalities covered in § 511(b)(1). Neither the Act nor the EEOC manual, despite the latter's valiant attempts, can extricate us from this thicket of entangled marginalities.

Consider one more example from the EEOC:

> A person who alleges disability based on one of the excluded conditions is not an individual with a disability under the ADA. Note, however, that a person who has one of these conditions is an individual with a disability if (s)he has another condition that rises to the level of a disability. See House Education and Labor Report at 142. Thus, a compulsive gambler who has a heart impairment that substantially limits his/her major life activities is an individual with a disability. Although compulsive gambling is not a disability, the individual's heart impairment is a disability.[40]

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[38] *Id.*

[39] Americans with Disabilities Act of 1990 § 3, 42 U.S.C. § 12102 (2005).

[40] EEOC, *supra* note 3, § 902.6.

The EEOC is trying desperately to follow the impairment and not the individual. Hence, transvestism is not a disability because the statute states that it is not, but an individual who is a transvestite may possess an impairment which is not his transvestism, in which case he may be covered. The point ought to be clear enough, but the apparent defensiveness of the regulations (which may be partly accounted for by the litigiousness of our legal culture) results in a tormented comparison among marginalities, some of which are considered disabilities and some not.

These EEOC examples are oddly reminiscent of the types of reasoning and discussions that one commonly finds in texts of the Graeco-Islamic dream interpretation tradition. In the major writings of this tradition, which began under the ancient Greeks and was translated, adapted, and modified by the medieval Arabs, interpretations are subject to multiple interlocking categories. One discovers that seeing a certain item or figure means one thing. It can mean something quite different, however, if the figure or item possesses certain qualities or is placed in certain contexts. It can mean still other things depending on the status of the dreamer.

For example, in Ibn Ishâq's recension of Artemidorus of Ephesus, deadly poisons signify death, except when they mean life.[41] For a slave, seeing a cage in a dream is a good omen, signifying fidelity. For the unmarried person, it signifies marriage, and for the childless, the arrival of a child.[42] If a man or a woman who wishes to get married sees his or her own face in the mirror and it appears beautiful, then he or she will get married. If a man sees himself in the mirror but the face looking back at him is not his own, then he has been cuckolded and those he thinks are his children are not his own.[43] If someone sees his own face while looking at the ground, then he or a family member will die.[44] It is a good sign for a man to see himself with a thick beard. If a woman sees herself with a beard, then the outcome will depend on the context. If she is married, then she will lose her husband but keep her house. If she is a widow, then she will remarry. If she is pregnant, then she will have a male child. A slave before the age of wisdom who sees himself with a beard will die.[45]

According to Ibn Sîrîn, hair signifies riches and long life.[46] If the dreamer is a virtuous man, then his hair promises advantages, protection,

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[41] ARTÉMIDORE D'EPHÈSE, KITÂB TA'BÎR AL-RU'YÂ 342 (Toufic Fahd ed., Hunayn Ibn Ishâq trans., 1964).

[42] *Id.* at 326.

[43] *Id.* at 199.

[44] *Id.* at 200.

[45] *Id.* at 69.

[46] MUHAMMAD IBN SIRIN, LE GRAND LIVRE DE L'INTERPRÉTATION DES RÊVES 204 (Youssef Seddiq trans., 1993).

and prestige. If he is rich, then it indicates his fortune. If poor, then it indicates his sins. If the dreamer sees his hair as both smooth and kinky, then he will have a good reputation. If his hair is smooth in real life but kinky in the dream, then he will lose status.

No argument is being made for historical influence, even indirect, of the dream interpretation tradition on American law. Complication is always a potential result of a classificatory system with more than one axis (for example, a car can be classified by age, ownership, make and model, or color). But there is something more than sheer coincidence here. Both the dream interpreters and the ADA interpreters (if we may call them that) are dealing in a world of shifting signifiers and multiple meanings, a world in which things are not always what they seem. And, need we add, a world in which unconscious forces are at play.

III. THE SUPREME COURT

Then there is *Bragdon v. Abbott*.[47] This case is also a wonderful example of tortured logic. The legal contortions of this case are of a completely different nature than the obsessions and the complications of the ADA statute and the EEOC *Compliance Manual*. Regardless of these differences, they reflect the same underlying and pervasive fear of everything that lies outside traditionally accepted heterosexual behavior.

Bragdon v. Abbott is a landmark case for three reasons. It was the first case under the ADA to reach the United States Supreme Court, it established HIV as an impairment under the ADA, and, most important for our purposes, it represented yet another flight from sexual wilderness to the relative security of traditional heteronormativity. The case was already famous before it reached the Supreme Court. Linda Greenhouse, writing in *The New York Times* prior to the decision, noted that "discrimination against people who carry the virus that causes AIDS offers the Justices a surprisingly blank slate on which to write an opinion with major implications not only for the law on the disease itself but for disability rights law in general."[48]

Not surprisingly, the case also attracted the attention of the gay community. On April 7, 1998, *Gay Men's Health Crisis in Brief*, a weekly newsletter, noted that

> no matter what legal niceties are displayed to convince the highest court in the land on this matter, we who deal with the

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[47] 524 U.S. 624 (1998).

[48] Linda Greenhouse, *Court to Weigh Whether H.I.V. is a Disability*, N.Y. TIMES, Mar. 23, 1998, at 1, *quoted in* DORIS ZAMES FLEISCHER & FRIEDA ZAMES, THE DISABILITY RIGHTS MOVEMENT: FROM CHARITY TO CONFRONTATION 102 (2001). THE DISABILITY RIGHTS MOVEMENT is an excellent work that covers legal and cultural issues.

> HIV-positive virus every day on legal matters recognize the following painful reality. An HIV-diagnosis casts a long shadow of discrimination over the person who lives with it whether or not that person is symptomatic.[49]

It is well-known that, in the last few decades, decisions by the United States Supreme Court have increasingly dealt with highly contentious political issues and have thus naturally become the focus for intense partisan political maneuvering. Consequently, there has been a tendency to focus on the result of Supreme Court decisions and examine the legal arguments chiefly for what they portend in future decisions. Despite these perfectly natural effects of our current political situation, what the *Gay Men's Health Crisis in Brief* refers to as "legal niceties" do matter.

The case of *Bragdon v. Abbott* involved an HIV-positive but asymptomatic woman in Maine whose dentist refused to treat her. The United States District Court for the District of Maine judged in favor of the patient and the dentist appealed.[50] The First Circuit Court of Appeals affirmed, and the dentist appealed once again.[51] The title of Linda Greenhouse's article in *The New York Times* captures the essential outcome of the case once it reached the Supreme Court: *Justices See HIV as Disability: Ruling on Bias Law.*[52] The ruling, five to four, was far from unanimous. Justice Kennedy held that HIV infection can be a disability under the ADA from the moment a person becomes infected because it substantially limits the major life activity of reproduction for the individual.[53]

The decision of the Supreme Court rests on the definition of a "major life activity," holding that "reproduction and the sexual dynamics surrounding it are central to the life process itself."[54] Reproduction is simply the respondent's "ability to reproduce and to bear children."[55] The Court had to clear this hurdle because the ADA provides the following core

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[49] FLEISCHER AND ZAMES, *supra* note 48, at 102.

[50] Abbott v. Bragdon, 912 F. Supp. 580 (D. Me. 1995), *aff'd*, 107 F.3d 534 (1st Cir. 1997), *cert. granted sub nom.* Bragdon v. Abbott 522 U.S. 991, *vacated*, 524 U.S. 624 (1998).

[51] 107 F.3d 534.

[52] Linda Greenhouse, *Justices See HIV as Disability: Ruling on Bias Law*, N.Y. TIMES, June 26, 1998, at 1, *cited in* DORIS ZAMES FLEISCHER & FRIEDA ZAMES, THE DISABILITY RIGHTS MOVEMENT: FROM CHARITY TO CONFRONTATION 102 (2001).

[53] *Bragdon*, 524 U.S. at 637-42.

[54] *Id.* at 638.

[55] *Id.* at 637.

definition of disability: "a physical or mental impairment that substantially limits one or more of the major life activities of such individual."[56]

The court addresses this issue in an imaginative manner. If the respondent tries to conceive a child (1) she "imposes on the man a significant risk of becoming infected"[57] and (2) she "risks infecting her child during gestation and childbirth, i.e. perinatal transmission."[58] Further, "the decision to reproduce carries economic and legal consequences as well." [59] Leaning on the Rehabilitation Act, the Court found that reproduction is a major life activity for the purposes of the ADA because reproduction "could not be regarded as any less important than working and learning."[60]

The reader is assured that "every court which addressed the issue before the ADA was enacted in July 1990 . . . concluded that asymptomatic HIV infection satisfied the Rehabilitation Act's definition of a handicap."[61] Nor is the Court aware of an instance "prior to the enactment of the ADA in which a court or agency ruled that HIV infection was not a handicap under the Rehabilitation Act."[62]

To reproduce or not to reproduce? Chief Justice Rehnquist, joined by Justices Scalia and Thomas, had some harsh words indeed. After questioning the majority decision, they posit that the majority is incorrect in concluding that reproduction is a major life activity, noting that, unfortunately, "the ADA does not define the phrase 'major life activities.'"[63]

The dissenting justices draw the following general interpretation:

> No one can deny that reproduction decisions are important in a person's life. But so are decisions as to who [sic] to marry, where to live, and how to earn one's living. Fundamental importance of this sort is not the common thread linking the statute's listed activities. The common thread is rather that the activities are repetitively performed and essential in the day-to-day existence of a normally functioning individual. They are thus quite

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[56] Americans with Disabilities Act of 1990 § 3, 42 U.S.C. § 12102 (2005).

[57] *Bragdon*, 524 U.S. at 639.

[58] *Id.* at 640.

[59] *Id.* at 641.

[60] *Id.* at 639.

[61] *Id.* at 644.

[62] *Id.*

[63] *Id.* at 659 (Rehnquist, J., dissenting).

> different from the series of activities leading to the birth of a child.[64]

It is ironic that three justices strongly associated with conservative ideology were the ones to effectively deemphasize the hetero-reproductive narrative. Whether or not one sympathizes with the Rehnquist-Scalia-Thomas argument, it should be clear that both they and Justice Kennedy danced around the central issue. Everyone knows that AIDS is associated with homosexuality in the popular imagination. The majority position in *Bragdon v. Abbott* is an attempt to find for the plaintiff without giving further legal recognition to homosexuality.

If the case involved a male homosexual couple who obviously could not procreate but one of whose members was HIV-positive, would the case have reached a court at all, much less the Supreme Court? Most likely, the answer is no. The issue of procreation goes to the heart of our sacred notion of gender and the family.

A close look at the majority opinion will show not only the extent of the court's convoluted reasoning, but also, by extension, its great need to flee from homosexuality. Even the Court recognized that it would be incorrect to say that this woman could not reproduce because she was HIV-positive. More correctly, she could not reproduce without running certain risks. The court cited two in particular: 1) the risk of infecting her partner, and 2) the risk of infecting the fetus.[65] The Court's position is based on a completely traditional model of reproduction: the male inseminates the female during sexual intercourse and the impregnated female carries the child to term. Protecting a sperm donor, however, is easy. If the woman is artificially inseminated, then the male runs no risk of infection. The situation with the fetus is trickier but far from hopeless. Theoretically, the fetus could be fully protected by combining in vitro fertilization with surrogate motherhood. As a practical matter, the HIV-positive woman generally carries her own child and the risk of infection is today almost completely eliminated (less than two percent) by medicating mother and child before, during, and after childbirth.[66] The Court notes the existence of

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[64] *Id.* at 660.

[65] *Id.* at 639-40.

[66] The necessary technologies were in place in 1998, and the practices were in the process of implementation at the time of the Supreme Court's decision. For some of the major stages of this evolution, see Yvonne J. Bryson et. al., *Clearance of HIV Infection in a Perinatally Infected Infant*, 332 NEW ENG. J. MED. 13, 833-38 (1995); Katherine Luzuriaga et al., *Combination Treatment with Zidovudine, Didanosine, and Nevirapine in Infants with Human Immunodeficiency Virus Type 1 Infection*, 336 NEW ENG. J. MED. 19, 1342-49 (1997); Katherine Luzuriaga & John L. Sullivan, *Pediatric HIV-1 Infection: Advances and Remaining Challenges*, 2002 AIDS REVIEWS 4, 21-26; David R. Berk et al., *Temporal Trends in Early Clinical Manifestations of Perinatal HIV Infection in a Population-Based Cohort*, 293 J. AM. MED. ASS'N 18, 2221-31 (2005); Lynne M. Mofenson, *Successes and*

such therapies but minimizes their impact (partly by using documentation that was several years old in a quickly evolving field). Fundamentally, Justice Kennedy wants to have it both ways. He argues that the figure of an eight percent risk of transmission to the fetus is a fundamental limitation.[67] On the other hand, he states that "the Act addresses substantial limitations on major life activities, not utter inabilities. Conception and childbirth are not impossible for an HIV victim but, without doubt, are dangerous to the public health. This meets the definition of a substantial limitation."[68] The Court also cites with agreement the argument that regulatory regulations require "the substantiality of a limitation to be assessed without regard to available mitigating measures."[69]

Was the plaintiff in this case barred from reproduction or merely from reproduction in the style of Ozzie and Harriet? The handicap/disability-with-technological-mitigation model might have made some sense if the plaintiff were suing because she was unfairly denied access to technologies permitting her to reproduce. But those were not the facts of this case.

Was this the only path open to the court in its quest to assure ADA coverage to the HIV-positive? How about another approach that skips the problem of reproduction entirely?

One such approach would be to consider HIV-positive status as an impairment on its own. The ADA provides, and EEOC rules specify, that conditions wrongly considered to be impairing, or conditions which people may react to irrationally, can lead to discrimination under the Act.[70] An example would be disfigurement. It does not physically prevent the affected individual from performing daily activities. However, because of the irrational fears associated with it, such as the fear that customers will flee a disfigured person, discrimination on the basis of disfigurement is common but prohibited. Would this paradigm of irrational fear not make a far better fit with the facts of *Bragdon v. Abbott*? It was indeed the dentist's

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Challenges in the Perinatal HIV-1 Epidemic in the United States as Illustrated by the HIV-1 Serosurvey of Childbearing Women, 158 ARCHIVES OF PEDIATRICS & ADOLESCENT MED. 422 (2004); Arthur J. Ammann, *Pediatric Human Immunodeficiency Virus Infection*, *in* IMMUNOLOGIC DISORDERS IN INFANTS AND CHILDREN 878 (E.R. Steihm et al. eds., 2004); John P.A. Ioannidis et al., *Perinatal Transmission of Human Immunodeficiency Virus Type 1 by Pregnant Women with RNA Virus Loads <1000 Copies/mL*, 183 J. OF INFECTIOUS DISEASE 539, 539-45 (2001). Now that the risk is so limited, are HIV-positive women no longer disabled?

[67] *Bragdon*, 524 U.S. at 640-41.

[68] *Id.* at 641.

[69] *Id.* at 640.

[70] American with Disabilities Act of 1990 § 3, 42 U.S.C. § 12102 (2005); EEOC, *supra* note 3, § 902.2.

exaggerated fears that created the refusal of service and, consequently, the claim of discrimination. Would it be so hard for the Court to find that HIV-positive individuals suffer from stereotypes and irrational discrimination? The Court avoided this entire issue by arguing that, "In view of our holding, we need not address the second question presented, i.e., whether HIV infection is a *per se* disability under the ADA."[71]

Finding HIV as a *per se* disability would not run afoul of the ADA's exclusion of homosexuals. We can use the EEOC rules to help explain how this would work by analogizing from the compulsive gambler with the heart problem.[72] HIV-positive homosexuals would be covered as HIV-positive, not as homosexuals. But such a solution would disturb the efforts of the ADA to exclude homosexuals as a class and disrupt the reaffirmation of traditional heterosexual coupling. It might fit the ADA as a law, but does not fit the ADA as a register of anxieties.[73]

IV. THE CELEBRATION

On July 26, 2000, the tenth anniversary of the ADA was celebrated with much fanfare. The images and examples used for this commemoration display little of the twisted logics found in the statute or its jurisprudence. At first glance, they are as sweet and bland as apple pie. The web page is illustrated with heart-warming color photographs. [74] Obviously, the Department of Justice has no qualms about making a spectacle of the handicapped. For our purposes, the question is what kind of spectacle? In the context of what we already know about the ADA, it should come as no surprise that the images aggressively promote heteronormativity.

The opening page bears the seal of the Department of Justice on the right hand side, and is titled: "ENFORCING THE ADA: Looking Back on a Decade of Progress: A Special Tenth Anniversary Status Report from the Department of Justice. Below the title is the following image: [75]

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[71] *Bragdon*, 524 U.S. at 641-42. For a polemical take on this argument, see GREG PERRY, DISABLING AMERICA: THE UNINTENDED CONSEQUENCES OF GOVERNMENT'S PROTECTION OF THE HANDICAPPED 112 (2003).

[72] EEOC, *supra* note 3, § 902.6.

[73] There are numerous other potential objections to the Court's finding that reproduction is a major life activity. Would those who voluntarily sterilize themselves be in the same legal category as those who request the amputation of healthy limbs? Are all sterile females handicapped? Sterile or merely impotent males? All these questions, however, bring us back to the same starting point: the social agenda directing the majority decision.

[74] DISABILITY RIGHTS SECTION, U.S. DEPARTMENT OF JUSTICE, ENFORCING THE ADA: LOOKING BACK ON A DECADE OF PROGRESS, *available at* http://www.usdoj.gov/crt/ada/pubs/10thrpt.pdf (July 26, 2000).

[75] The caption when the mouse is moved over the photograph reads: "Cover Photo: man with disability and son." *Id.* at 1.

The photograph embedded in the text on the first page of the *Decade of Progress* could not have been chosen more effectively to reinforce American ideals, both those of race and those of disability. Seated outside on what looks like a café table is an African-American man in a wheelchair. Seated next to him is a child who seems to be eating a snack. Both are smiling. In this heart-warming pose, it is as if the viewer were being invited to join the happy duo in their leisurely activity. Father and son are taking a break either before or after enjoying play associated with America's favorite pastime, baseball. An African-American in a wheelchair reinforces the image of the ADA as the legal offspring of the Civil Rights Act of 1964 and the Rehabilitation Act of 1973.

On the web entry commemorating this tenth-anniversary report, Janet Reno is posed in front of an American flag, announcing "A Message from the Attorney General."[76] Attorney General Reno assures her reader that "there is so much to celebrate!":

> Look around. Over the past decade so much has changed. It is no longer unusual to see people with disabilities dining out at restaurants, working in the office, participating in town hall meetings, shopping at the malls, watching a movie or cheering at a stadium. That's because the ADA is making the dream of access a reality.[77]

It would seem that at least disabled Americans have had their dreams fulfilled. The Attorney General prides herself on making "a difference in the lives of so many."[78] Numerous examples attest to this, such as the small New York community who "agreed to purchase a public

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[76] *Id.* at 2.

[77] *Id.*

[78] *Id.*

address system to resolve a complaint from a hard of hearing citizen who wanted to listen to town board meetings."[79]

How does this tenth-anniversary celebratory mood relate to sexuality? In addition to the message from Attorney General Janet Reno, the Department of Justice provides another web site, appropriately entitled *Faces of the ADA*.[80]

The *Faces of the ADA* are numerous. But what is their relationship to sexuality? Dominating these examples is a discourse of inclusion, containing as its primary locus the heterosexual couple or family unit. Each of the success stories opens with a quotation in praise of the ADA. Organizing the *Faces of the ADA* is a summary page which features ten pictures along the left margin of the page, each associated with a legal case resolved in favor of the disabled individual.[81] It goes without saying that the Department of Justice does not celebrate those cases in which the impaired individual did not prevail. Next to each picture is a short text encapsulating the circumstances of the case.

In the last image, next to a picture of Jeremy Alvarez from the waist up, inhaler in mouth, is the following text: "Jeremy Alvarez is able to use his inhaler at his day care center," followed by a quotation from Jose and Lynn Alvarez, stating: "'The . . . ADA helped us and will prevent others like Jeremy from going through such an ordeal.'"[82]

The quote, technically unnecessary to the explanation of the legal case, restores the family unit. Jeremy has a mother and a father, and they seem to be married to each other. The Hispanic surname also signals inclusion. The case is presented not only as a success for the ADA but also as a victory for the entire concept of the heterosexual family. A mother, a father, and a child who is in need of medical attention are the winners. They form a living contrast to the story of *Bragdon v. Abbott*, where the woman will never procreate.

The series which ended with a family began, logically enough, with a couple. This is the story of a married couple finally able to vacation in Hawaii. Jenine Stanley and her quote appear as a title for the piece: "The ADA has given me the tools to feel included in society . . . ."[83] The full story is provided inside *Faces of the ADA*:

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[79] *Id.* at 4.

[80] United States Department of Justice, 10th Anniversary of the Americans with Disabilities Act: Faces of the ADA, http://www.usdoj.gov/crt/ada/adafaces.htm (last updated July 27, 2000). The following discussion references pictures and quotations from this website.

[81] *Id.*

[82] *Id.*

[83] *Id.*

> Jenine Stanley of Ohio is blind and uses a guide dog. She just wanted to travel and experience Hawaii. But because of a State policy that required all dogs to [be] quarantined in a State facility for 120 days, she was faced with the dilemma of not going or going without her guide dog.
>
> "Oh, I could have gone without my guide dog, but part of traveling for me, and feeling comfortable in a place, is having the independence my dog provides."
>
> The quarantine, which was established to prevent the spread of rabies to the Hawaiian islands, allowed travelers to visit their dogs at specified times, but would not allow their use while traveling within the quarantine period.
>
> The Department of Justice intervened in a lawsuit and reached an agreement with the State which allows individuals with vision impairments to travel to Hawaii with their guide dogs without having to undergo the quarantine, as long as they are able to demonstrate that the dog is free from rabies through documentation of rabies vaccination and serological testing.
>
> "One of the happiest days in this long struggle . . . was when DOJ signed on with us. Having DOJ behind us meant that we had the support and power of the people who enforce the ADA. We weren't just a group demanding something unreasonable.
>
> "My husband has wanted to live in Hawaii since long before he lost his sight. Now, we can do that freely and travel back to the mainland as often as we want. We have choices. Choice is not always as available to people with disabilities as to others in our society. From raised character and Braille signage on hotel room doors to being able to work my guide dog in Hawaii, the ADA has given me the tools and supports to feel included in society, rather than cared for by it."[84]

On the side of this narration are three photographs showing us a smiling and happy couple. In the first picture, we see Jenine and her husband both walking with guide dogs and entering or exiting an airport:[85]

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[84] Faces of the ADA: Jenine Stanley–"The ADA has given me the tools to feel included in society . . . ", Feb. 6, 2001, http://www.usdoj.gov/crt/ada/fhawaii2.htm.

[85] *Id.*

In the second photograph, the Stanleys stand (again with guide dogs) in what looks like a lush background which we can interpret as being the landscape of Hawaii. The wife carries an exotic plant in her right hand while holding the harness of the guide dog in her left hand: [86]

In the third and final picture, the happy duo are not standing together. Jenine is standing on the roadside and her husband is on the ground, their guide dogs beside them. The happy family is at a scenic spot, once again in the land of their dreams: [87]

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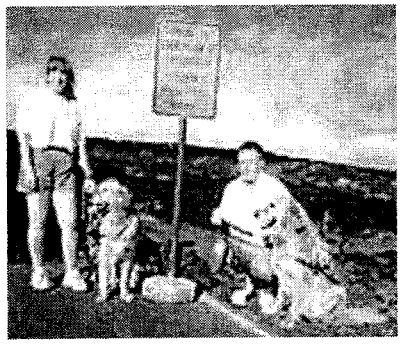
[86] *Id.*

[87] *Id.*



The text and photographs tell subtly different stories, though each is eloquent in its own way. The photos feature interrelated couples. In each picture is a human pair, male and female, and paired dogs. The coupling can be read in a variety of ways. Since the humans are male and female, we assimilate them to the heterosexual couple. Of course, each dog and owner also forms a couple with which any pet-owning American can identify.

The written text also heterosexually couples, although in a different way. At the beginning, there is only the woman who is blind, wants to go to Hawaii, and has a problem with her guide dog. Only after the narrative of the legal resolution of the case do we learn that Jenine wanted to go to Hawaii to please her husband. He had wanted to live in Hawaii "long before he lost his sight."[88] The married state and the shared handicap are introduced dramatically and under the sign of conjugal devotion.

The juxtaposition of images and text creates its own irony. Jenine speaks of herself and her own visual handicap next to a picture of two individuals and two guide dogs. The mouseover of the third picture reads: "Stanleys with dogs at overlook."[89] There are many ways blind individuals can appreciate this landscape. They can smell and feel and hear the air as it is altered by the environment. The temperatures of the breezes. The different smells of the vegetation. The sound of the wind. But one thing they cannot do is look over the overlook. Nor in the picture are they posed as if to do so. Instead, their backs are to the overlook as they face the camera. What is important is that we see the couple against the scenery. The entire spectacle could not be more sanitized and middle-class. Disability becomes a spectacle like scenery, with the couple holding pride of place.

Though the heterosexual couple is featured in only three of the ten "faces of the ADA" (others deal with public access and employment), it is not accidental that family units begin and end the series. When one adds the father and son on the cover of the tenth-anniversary celebration, the entire package is wrapped in heterosexuality and reproduction. It is perhaps not

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[88] *Id.*

[89] *Id.*

surprising that the federal government did not depict a same-sex couple in its display. In the context of the ADA and *Bragdon v. Abbott*, however, an otherwise banal set of traditional images takes on greater significance. The government is trying to desensitize us to one set of marginalities (and in the background a second—race). It certainly does not wish to introduce sexual marginalities as well.

The drafters of the ADA wish to dispel "society's accumulated myths and fears about disability and disease," acknowledging that these "are as handicapping as are the physical limitations that flow from actual impairment."[90] Changing mentalities is much more difficult than providing access or accommodation for the disabled. Mentalities have a nasty habit of infiltrating themselves into all levels of society and culture. The drafters of the ADA, like the interpreters who follow in their footsteps or the tracks of their wheelchairs, make loud noises about irrational fears and stereotypes. One wonders how aware they are of their own obsessions. The horrors they are fleeing stem not from a Stephen King novel but from their own fear of any sexualities that do not fit the heteronormative model.

How has disability become so entangled with homophobia and its cousins? Certainly, both the movements for homosexual rights and the rights of the disabled build on the Civil Rights paradigm. The proponents of both gay rights and disability rights view their struggles as extensions of the Civil Rights movement. In addition, anti-gay conservatives have expressed the fear that disability rights may strengthen gay rights.[91]

The level of obsession suggests something deeper. Both the physically disabled (the most visible form for most people) and sexual minorities awaken some of the same corporal fears. Both can be seen as an absence of virility or as incomplete manhood or womanhood. This connection emerged clearly in the politico-sexual phantasms thrown up by the Lewinsky Affair. Not only did Kenneth Starr blur President Clinton's gender identification (male to female) but he also associated sexual weakness with physical decrepitude, crutches, and a wheelchair.[92]

The apprehension manifested by the ADA is one of shifting categories. It is a paradigmatic anxiety, a fear of potential replacement of one item in a series by another from another series. Homosexual for wheelchair user. It is no coincidence then that the first ADA case to reach the Supreme Court concerned HIV, a condition which in our imaginary connects both to homosexuality and to physical disease and limitation. The specter that haunts the ADA is a collapsing of categories and a swirl of marginalities. Struggling with the issue of mainstreaming different forms of

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[90] EEOC, *supra* note 3, § 902.8.

[91] PERRY, *supra* note 71, at 110-11.

[92] MALTI-DOUGLAS, *supra* note 13, at 152-62.

marginality (and with the changes in our relations to our bodies and reproduction offered by modern medicine), we are unsure of our ability to keep each thing in its proper place. On the level of mental structures, we are concerned with the maintenance of order.[93] Perhaps this is why transvestites receive pride of place in the ADA statute. Transvestism is the perfect emblem of the paradigmatic anxiety. A person of one category is clothed in the garment of the other. One social category masquerades as another. This creates something even more threatening than marginality: ambiguity.

[93] *Cf.* CLAUDE LÉVI-STRAUSS, THE SAVAGE MIND 10 (1966) (discussing how the entire order of the universe is threatened when objects are taken out of their place, even in thought).

PRISON AND PUNISHMENT