

Journal of Gender, Race and Justice

Spring 2004

Articles

***33 HOMOPHOBIA, AIDS HYSTERIA, AND THE AMERICANS WITH DISABILITIES ACT**Ruth Colker [\[FN1\]](#)

Copyright © 2004 Journal of Gender, Race and Justice; Ruth Colker

The ADA is the last ditch attempt of the remorseless sodomy lobby to achieve its national agenda before the impending decimation of AIDS destroys its political clout. Their Bill simply must be stopped. There will be no second chance for normal America if the ADA is passed. - Representative Dan Burton (R. Ind.) [\[FN1\]](#)

On June 6, 1988, when the Americans with Disabilities Act (ADA) was just a general concept, Joseph Weber wrote an article in Business Week in which he described individuals with disabilities as the "last minority" to fight for its rights. [\[FN2\]](#) Similarly, when Senator Robert Dole (R. Kan.) spoke in favor of an early draft of the ADA on September 7, 1989, he described individuals with disabilities as the "last minority." [\[FN3\]](#) Description of individuals with disabilities as the "last minority" was not limited to the business community or conservative Republicans. Senator Tom Harkin (D. Iowa) also used this phrase at the end of the debate over passage of the ADA. Speaking to his staff, Harkin reportedly said:

'Congress will pass this bill,' Senator Harkin told us, 'because it is the right thing to do.' With his enthusiasm and fervor building, the Senator leaned across the table to us and swore that together we would finally bring civil rights protection to 'the last minority' in America in need of such protection. [\[FN4\]](#) *34 But Senator Harkin, like anyone who had heard the debate surrounding the enactment of the ADA, should have been aware that, at a minimum, sexual minorities were still in need of civil rights protection. If that fact were not evident before Congress considered the ADA, then it certainly should have been evident during the time period in which Congress was considering the ADA. Why? Because the debate surrounding the ADA reflected blatant homophobia, as suggested in the opening quotation from Representative Burton.

The story of the ADA's enactment can offer interesting insights on the status of homophobia in 1990, when the ADA was enacted. The story of the ADA's passage provides at least three important lessons. First, it was acceptable at that time for some members of Congress to speak in derogatory terms about virtually all sexual minorities, including gay men, lesbians, bisexuals, transvestites, and transgendered individuals. Second, Congress traded off concern for these groups against concern for other minority groups, specifically individuals with HIV. Third, although Congress ultimately chose to protect individuals with HIV, courts have not always honored that decision. Courts have often acted as if this trade-off never occurred. They have often acted as if Congress chose to protect neither sexual minorities nor individuals with HIV.

In this article, I would like to re-tell the story of the ADA's enactment from a gay-rights and AIDS-rights perspective. In other words, what story do we hear when we read the legislative history in that light? Moreover, what stories do we hear when we read the case law in light of that legislative history?

In Part I, I will discuss the text of the ADA. We will see that the ADA is unusual legislation in that it has text dealing specifically with gay rights and HIV issues. In Part II, I will discuss the legislative history of the ADA. We will see that the text was generally intended to prevent the statute from assisting sexual minorities, while also intended to offer some modest assistance to individuals with HIV. Nonetheless, one cannot possibly say that Congress overlooked sexual minorities and individuals with HIV when it enacted the ADA. Quite to the contrary. In fact, the possibility that the statute might indirectly help

these individuals almost derailed enactment of the statute. Thus, the story of the enactment of the ADA is, in part, a story of homophobia and, to a lesser extent, AIDS hysteria. It is important to tell these stories so that we understand the blatant homophobia that was still acceptable in Congress in 1990 when the ADA was enacted. In Part III, I will examine the case law interpreting these provisions to determine whether homophobia and AIDS hysteria have influenced judicial decisions under the ADA. In Part IV, I will conclude by speculating as to whether Congress would tolerate such homophobic comments today.

*35 I. The Text

The ADA mentions sexual minorities several times in arguably redundant language. Section 12208 states: "For the purposes of this Act, the term 'disabled' or 'disability' shall not apply to an individual solely because that individual is a transvestite."

[FN5] Section 12211 offers further exclusions of sexual minorities, repeating the exclusion for transvestites:

(a) Homosexuality and bisexuality

For purposes of the definition of "disability" in section 12102(2) of this title, homosexuality and bisexuality are not impairments and as such are not disabilities under this chapter.

(b) Certain conditions

Under this chapter, 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. [FN6]

There is no direct mention of HIV in the ADA. However, Congress added section 12113(d) to the ADA in response to complaints from the restaurant industry that passage of the ADA would bankrupt it by requiring restaurants to employ individuals with HIV who the public perceived to be a danger to the food supply. [FN7] This lengthy provision requires the Secretary of Health and Human Services to maintain a list of diseases that can be transmitted through food handling. It also permits an employer to "refuse to assign or continue to assign" an individual with one of those diseases to a "job involving food handling" if the risk of transmission "cannot be eliminated by reasonable accommodation." [FN8] As we will see in Part II, proponents of this language wanted to permit restaurants to not hire individuals with HIV. The final language resulted from a compromise between the House and Senate. Congress drafted section 12113(d) so that employers could respond to actual threats rather than unfounded, perceived threats and could not fire individuals who are HIV-positive merely on the basis of prejudice rather than actual medical facts. [FN9] As we will see in Part *36 III, the courts, however, have not always honored this language.

Thus, the text of the ADA is clear with respect to excluding sexual minorities from protection. Anyone reading that text might suspect that there is a story to be found in the legislative history, especially since the text excluded transvestites twice. The HIV story, however, is subtler. One has to probe the legislative history to locate the AIDS hysteria because it did not make it directly into the statutory text.

II. The Legislative History

The ADA's legislative history reflects a sincere and widespread desire to assist individuals with HIV. Even when that protection threatened to derail passage of the ADA, the drafters refused to compromise. Protection of sexual minorities, however, was never part of that basic agreement to help individuals with HIV.

The legislative history began in 1985 and 1986 when Congress reacted to two D.C. district courts' denials of motions to dismiss Rehabilitation Act claims, finding that the Rehabilitation Act could cover transsexuals and transvestites. The first case, *Doe v. U.S. Postal Services*, was an unpublished decision by Judge Pratt in a D.C. district court. [FN10] In what Judge Pratt

describes as a "sad case," "Jane Doe" had her job offer rescinded after she informed her new employer, the U.S. Postal Service, that she would be undergoing sex reassignment surgery and would prefer to begin employment dressed as a woman. [FN11] The employer rescinded the position even after the plaintiff offered to delay her surgery and continue to dress like a man. [FN12] She brought a cause of action under both Title VII and the Rehabilitation Act. [FN13] Her Title VII claim failed even though the supervisor clearly denied her employment because of her intention to change her gender from male to female. [FN14] Having dismissed her Title VII claim, the court then considered her Rehabilitation Act claim. The court denied the defendant's motion to dismiss, finding that the Rehabilitation Act was not intended to cover only "traditionally recognized handicaps." [FN15] The court therefore permitted her case to go forward to trial. There is no record of whether Doe was ultimately successful in her Rehabilitation Act claim after trial.

*37 The second case, *Blackwell v. U.S. Department of Treasury*, [FN16] received even more attention from Congress, although the plaintiff was not ultimately successful. The plaintiff, William A. Blackwell, alleged that the Treasury Department denied him employment because he wore "feminine" clothing to each of two job interviews. [FN17] Rather than fill the position with Blackwell, who was entitled to priority consideration under the reduction in force (RIF) program, the second interviewer closed the position. [FN18] Blackwell argued that he was not hired because he was a transvestite. [FN19] Blackwell survived a motion to dismiss because the district court found that transvestites can qualify as disabled under the Rehabilitation Act. [FN20] At trial, the Treasury Department argued in defense that the interviewer perceived Blackwell to be a homosexual (a status not legally protected from discrimination under federal law), not a transvestite, and that the interviewer could not have engaged in unlawful discrimination without Blackwell bringing his "disability" to the interviewer's attention. [FN21] The court overlooked the testimony that the first interviewer had openly discussed Blackwell's appearance with him by asking him if "there was objection to his life-style." [FN22] The interviewer, however, testified that by "life-style," she was only referring to his perceived homosexuality, not his transvestism. [FN23] The trial court apparently found this testimony to be credible and entered judgment for the Treasury Department. [FN24] On appeal, in an opinion written by Ruth Bader Ginsburg, the D.C. Circuit Court affirmed the judgment dismissing the complaint, while vacating the lower court's decision that required plaintiff to give precise notice of his handicapping condition to a potential employer before the plaintiff could hold that employer liable for discrimination. [FN25]

Even though Blackwell was not successful in his discrimination claim, Congress spent a significant amount of time responding to his case. In May 1988, when Congress was considering overriding President Ronald Reagan's veto of the Civil Rights Restoration Act of 1987, [FN26] Senator Helms spoke at *38 length about court decisions finding that the Rehabilitation Act covered "transvestism and other compulsions or addictions, which churches or religious schools might once have felt comfortable in regarding as moral problems, not medical handicaps." [FN27] Senator Kennedy responded by stating that the moral majority had created a massive campaign against the Restoration Act, arguing that it reflected the "intent of Congress with regard to the inclusion of homosexuality as a protected classification under the present law." [FN28] These arguments against the Restoration Act were not successful. Congress voted 73-24 to override President Reagan's veto. [FN29] While this debate about "transvestism" was not successful at overturning the Restoration Act, it was successful at distracting Congress from the merits of extending the general coverage of various civil rights statutes.

The purpose of the Civil Rights Restoration Act of 1987 was to overturn the Supreme Court's decision in *Grove City College v. Bell*. [FN30] *Grove City* was a very technical decision about the meaning of the phrase "program or activity" as found in Title IX, Title VI, and Section 504 of the Rehabilitation Act. The Supreme Court in *Grove City* interpreted that phrase narrowly, [FN31] which, in turn, limited the application of those federal statutes. The Civil Rights Restoration Act overturned *Grove City* so that all the activities of an entity receiving federal financial assistance would be subject to these statutes, not simply the unit receiving federal financial assistance. [FN32]

Despite the fact that neither Grove City nor the Civil Rights Restoration Act mentioned disability status, some members of Congress argued that the *39 Civil Rights Restoration Act's expansion of the definition of "program or activity" [FN33] could have devastating effects on businesses because the Civil Rights Restoration Act may force them to hire gay, lesbian, or transvestite employees by amending the Rehabilitation Act to define them as "disabled." Grove City was a sex discrimination suit brought under Title IX; it did not even directly involve the Rehabilitation Act. But members of Congress argued that its holding would apply to suits brought under Section 504 of the Rehabilitation Act because Section 504 and Title IX contained the same "program or activity" language. Senator Helms used the Blackwell case to argue against the Civil Rights Restoration Act by claiming that if this bill were to become law, schools and day care centers would "be prohibited from refusing to hire a transvestite" [FN34] He did not ask Congress to amend the definition of disability to exclude transvestites from coverage; instead, he asked Congress to sustain President Reagan's veto of the entire Civil Rights Restoration Act. [FN35] Although Congress eventually caved to his request to exclude transvestites from coverage under the ADA, it also voted against Senator Helms' wishes to override the President's veto. [FN36]

Despite losing in his attempt to sustain President Reagan's veto of the Civil Rights Restoration Act, Helms persisted with his goal to exclude sexual minorities from the civil rights protection. When Congress considered the Fair Housing Amendments in 1988, Senator Helms insisted on an amendment stating that the term "handicap" "shall [not] apply to an individual solely because that individual is a transvestite." [FN37] That amendment was accepted in the Senate by a vote of 89-2 with the negative votes coming from Senators Cranston and Weicker. [FN38] This is the same language that Helms later offered under the ADA, except that he substituted the term "disability" for the term "handicap." [FN39] Thus, by the time the transvestite exception was offered under the ADA, the Senate was already on record as having acquiesced under the Fair Housing Act. There was little point in objecting to this highly popular language when there was no record of a transvestite even prevailing under Section 504.

The transvestite issue, however, is only one example of Congress exempting sexual minorities from ADA coverage. An examination of the general history underlying the ADA shows that Congress quickly and repeatedly caved on excluding coverage of sexual minorities under the ADA, while maintaining an overwhelming commitment to cover individuals *40 with HIV.

The first draft of the ADA was the culmination of work by several important commissions. President Ronald Reagan had created the National Council on Disability, an independent federal agency whose fifteen members were appointed by President Reagan and confirmed by the Senate. [FN40] They issued two reports: *Toward Independence* (1986) and *On the Threshold of Independence* (1988). [FN41] President Reagan had also created the Commission on the Human Immunodeficiency Virus Epidemic, which authored a report in 1988. [FN42] The HIV Commission found that omnibus civil rights legislation was needed to prevent disability discrimination, and that such legislation should cover HIV-related discrimination. [FN43] The importance of protecting people with HIV from disability discrimination is found in every major report and speech surrounding the passage of the ADA, beginning in 1988. [FN44]

On August 2, 1989, the Senate Committee on Labor and Human Resources met to markup the bill. [FN45] The Committee reported favorably on this version in a 16-0 vote, and the Committee's report made it clear that it intended the term "disability" to be interpreted broadly, thereby including HIV. [FN46] It specified that the term includes: "orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, infection with the Human Immunodeficiency Virus, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, drug addiction, and alcoholism." [FN47]

When Senator Cranston spoke in favor of the bill, he made special *41 mention of the fact that the ADA would cover indi-

viduals with HIV. [FN48] He also noted that the bill contained a "direct threat" defense that would permit an employer to exclude someone from employment if his or her medical condition posed a significant risk of transmitting the infection to others. [FN49] However, he concluded with this statement: "As medical evidence concerning HIV has shown, . . . AIDS carries very low risks of transmission. Therefore, the applicability of such a standard to an individual infected with the HIV virus should be rare." [FN50] No senator objected to the accuracy of Senator Cranston's statements.

The debate, however, soon turned to a discussion of sexual minorities and other disfavored categories of individuals. Senator William Armstrong (R. Colo.) led the charge, inquiring whether the bill covered drug users and alcoholics. [FN51] Senator Harkin informed him that they were working on some clarifying language for those disabilities. [FN52] Senator Armstrong then said he wanted to provide a list for consideration of questionable disabilities that the ADA should not cover, such as "alcohol withdrawal, delirium, hallucinosis, dementia with alcoholism, marijuana, delusional disorder, cocaine intoxication, cocaine delirium, [and] disillusional disorder." [FN53] This list was reportedly derived from court cases regarding similar legislation. [FN54] Senator Armstrong then inquired about "homosexuality and bisexuality." [FN55] Senator Harkin responded that the bill did not cover those categories of individuals. [FN56] Next, Senator Armstrong inquired about "exhibitionism, pedophilia, voyeurism, and similar." [FN57] Again, Senator Harkin replied that the ADA did not cover individuals in those categories. [FN58] Senator Armstrong then inquired about "compulsive kleptomania, or other impulse control disorders." [FN59] Again, Senator Harkin replied that the bill did not cover those categories. [FN60]

In response to questions from Senator Helms, who voted against the *42 ADA, [FN61] Senator Harkin replied that the bill did not cover pedophiles or homosexuals, he was not sure whether it covered kleptomaniacs or transvestites (but he noted that he would accept an amendment to exclude transvestites from coverage), and that the bill did cover schizophrenics, manic depressives, people with very low IQ's, and individuals with psychotic disorders. [FN62] Senator Helms repeatedly stated that he objected to the ADA covering individuals who are HIV-positive because most of the "people who are HIV positive, . . . are drug addicts or homosexuals or bisexuals." [FN63] Senator Harkin responded by saying that they were making good legislative history by agreeing that the ADA covers people who are HIV-positive. [FN64]

Later in this discussion, Senator Kennedy reiterated the point about the ADA covering people who are HIV-positive and asked to have some letters printed in the record from the National Commission on AIDS that were consistent with that point. [FN65] Despite the clarity of this legislative history, some lower courts actually concluded that HIV was not covered by the ADA. [FN66] Had judges made any inquiry into the ADA's legislative history, they would have seen a unanimous understanding that Congress intended HIV to be covered. Senator Helms objected to that coverage and ultimately voted against the bill. [FN67] But the supporters of the bill understood that it covered individuals with HIV.

Senator Armstrong continued the discussion about the breadth of the definition of disability, arguing that "voyeurism" would be covered by the ADA because it is a listed disability in the Diagnostic and Statistical Manual (DSM) III, [FN68] and requesting an amendment to exclude voyeurism and other *43 conditions from coverage under the ADA. [FN69] After further discussion about the definition of disability, Senator Helms offered an amendment that limited coverage of individuals who engage in the illegal use of drugs or are alcoholics under Section 504 of the Rehabilitation Act. [FN70] Senator Harkin complained that Senator Helms was seeking to amend a bill other than the ADA, but acquiesced to the amendment. [FN71] The Senate agreed to the amendment. Senator Helms then offered an amendment excluding transvestites from coverage. [FN72] Senator Harkin accepted the amendment, and the Senate agreed to the amendment. [FN73] Debate then turned to a discussion of amendment No. 722, which excluded various conditions and identities from the definition of disability. [FN74] Senator Kennedy supported the amendment while making it clear that it was a compromise that he would have preferred not to make. [FN75] He also pointed out "that some of the behavior characteristics listed, such as homosexuality and bisexuality are not, even without this amendment, considered disabilities." [FN76] Senator Armstrong spoke in favor of the amendment while

also noting that it should not be assumed "that because we have failed to exclude something that it is necessarily included." [\[FN77\]](#) Senator Hatch asked to be added as a cosponsor to this amendment. [\[FN78\]](#) Senator Hatch, like Senator Kennedy, argued that the amendment was *44 unnecessary but agreed to support it as a compromise. [\[FN79\]](#) The Senate agreed to the amendment. [\[FN80\]](#)

In extended remarks, which were published after the Senate passed the amendment, Senator Armstrong explained his legal foundation for the conclusion that this amendment was necessary. [\[FN81\]](#) One header in his extended remarks was the category "sexual disorders: transvestism and transsexualism." [\[FN82\]](#) He cited the Doe and Blackwell cases for the proposition that lower courts found plaintiffs to be disabled because they were transvestites or transsexuals. [\[FN83\]](#) No member of Congress bothered to respond to his interpretations of those cases, and, as discussed earlier, Congress quickly caved, passing an amendment that excluded transvestites and transsexuals from coverage under the ADA. [\[FN84\]](#)

The next key piece of homophobia in the debate over the ADA came in the form of a minority committee report from the Committee on Energy and Commerce. [\[FN85\]](#) The minority report characterized the ADA as a "homosexual rights" bill—even though the ADA specifically exempted homosexuals from statutory coverage. [\[FN86\]](#) Their reasoning was as follows: Sixty percent of the 119,500 adults who have been diagnosed with full-blown AIDS as of February 1990 contracted the fatal virus through homosexual activity. An additional 7 percent list homosexual activity as one of their risk factors. It does not require a particularly shrewd attorney to argue that the protections available in the ADA are available to all male homosexuals by virtue of the perception that homosexual males "are regarded as" being infected with HIV. Indeed, a New Jersey court has interpreted a similar state law in exactly this fashion . . . [W]e believe that the ADA is a homosexual rights bill in disguise. [\[FN87\]](#)

Legislative debate then turned to the passage of the House's rule governing debate during the ADA. [\[FN88\]](#) ADA opponents spoke against the rule, *45 arguing that it did not allow sufficient time for full debate. [\[FN89\]](#) Representative Steve Bartlett (R. Tex.) argued that the rules that the House was proposing for the debate of the ADA should be opposed so that a full debate of the ADA could occur. [\[FN90\]](#) He opposed the rule but voted for the ADA. [\[FN91\]](#) Despite this vigorous opposition to the rule for debate, the House adopted the rules overwhelmingly by a vote of 237-172, with twenty-three members not voting. [\[FN92\]](#) Debate, pursuant to the rule, then proceeded on the merits of the bill itself. [\[FN93\]](#)

The debate continued with many members of Congress revealing homophobic attitudes as they criticized the bill's merits. Representative Burton, for example, spoke at length about the ADA's purported coverage of "homosexuals." [\[FN94\]](#) He was concerned that the ADA would cover homosexuals because it covers people who have HIV. [\[FN95\]](#) He sought an amendment that "would clarify that the ADA is not in effect homosexual rights legislation, but stating that homosexuals are not deemed disabled because they are regarded as HIV positive." [\[FN96\]](#) Although Burton did not succeed in amending the ADA with such language, some courts have interpreted the ADA as if such an amendment were added. [\[FN97\]](#) Burton also expressed concern that the bill could be used by homosexuals to assist them in adopting children. [\[FN98\]](#)

Representative Delay offered into the Congressional Record an article entitled "Disabling the Disabled" by Maiselle Dolan Shortley that supported his homophobic perspective. [\[FN99\]](#) Shortley argued that child molesters would *46 be considered disabled under the ADA and that the language of the statute is so vague that it should be considered the "Lawyers Full Employment Act." [\[FN100\]](#)

Representative William E. Dannemeyer (R. Cal.) soon spoke against the definition of disability under the ADA, focusing in particular on its coverage of HIV. He said:

With this bill, in the form that it is now to be considered by the House, if it is adopted, every HIV carrier in the country im-

mediately comes within the definition of a disabled person Is that sound public policy? And since 70 percent of those people in this country who are HIV carriers are male homosexuals, we are going to witness an attempt or an utterance on the part of the homosexual community that, when this bill is passed, it will be identified by the homosexual community as their bill of rights. [\[FN101\]](#) Representative Burton agreed with Dannemeyer, arguing that amendments to protect the public against communicable diseases needed to be discussed or debated on the floor of the House. [\[FN102\]](#)

During debate over the merits of the bill, a new controversy arose. Some representatives claimed that the bill would bankrupt the restaurant industry by forcing employers to hire individuals who are HIV-positive, which would cause the public to perceive that their food was unsafe. [\[FN103\]](#) Representative Jim Chapman (D. Tex.), who voted for ultimate passage of the ADA, offered an amendment in response to this concern. [\[FN104\]](#) His proposed amendment would become a major source of controversy with the Senate. It read:

Food Handling Job. - It shall not be a violation of this Act for an employer to refuse to assign or continue to assign any employee with an infectious or communicable disease of public health significance to a job involving food handling, provided that the employer shall make reasonable accommodation that would offer an alternative employment opportunity for which the employee is qualified and for which the employee would sustain no economic damage. [\[FN105\]](#)

In supporting the amendment, Chapman suggested that food service employers could use the amendment to deny employment to people who are HIV-positive even though he stated, "I am not here to say that there is any *47 evidence that AIDS can be transferred in the process of handling food." [\[FN106\]](#) He argued that the amendment was needed "in the real world with real people who have real businesses that create real jobs. . . ." [\[FN107\]](#) Representative J. Roy Rowland (D. Ga.) suggested that the amendment be modified to say "as specified by CDC" so that there would be no ambiguity about what infectious or contagious diseases were affected by this amendment. [\[FN108\]](#)

The opponents to the Chapman amendment argued that it perpetuated discrimination against people with HIV by suggesting, contrary to medical evidence, that they can spread HIV through the food supply. [\[FN109\]](#) The supporters of the amendment recognized that there was no medical evidence that food handlers could transmit HIV, but they also argued that this amendment was necessary to protect the restaurant industry from the public's false perceptions about how HIV was transmitted. [\[FN110\]](#)

The House approved the Chapman amendment by a vote of 199-187, with forty-six Representatives not voting. [\[FN111\]](#) This amendment was controversial until final passage because the Senate considered it unnecessary. The House approved a weaker version in the final bill following two Conference committee reports, although the Sixth Circuit has interpreted the ADA as if the full Chapman amendment had prevailed. [\[FN112\]](#)

The Senate version of the ADA did not contain a food handling amendment. Because the House and Senate passed different versions of the ADA, the bill went to Conference. The Conference reported its suggested language on June 26, 1990. [\[FN113\]](#) The Conference Report indicated that the House receded to the Senate's version of the bill with respect to the food handling issue. [\[FN114\]](#) The Report noted that the undue hardship and direct threat rules already addressed any potential problems with contagious food handlers, rendering the Chapman amendment unnecessary. [\[FN115\]](#)

*48 When the Conference Report returned to the Senate for consideration, Senator Hatch proposed an amendment to resolve the food handling controversy. [\[FN116\]](#) Although Hatch had signed the Conference Report, he was not pleased with the way in which the conferees addressed the food handling controversy. [\[FN117\]](#) Under the Hatch amendment, "The Secretary of Health and Human Services . . . publish[es] a list of infectious and communicable diseases which are transmitted through the handling [of] the food supply." [\[FN118\]](#) Under this amendment, a restaurant could not discharge someone merely because of

public fears and misperceptions about the contagiousness of a disease. [\[FN119\]](#) In order for a restaurant to act adversely, the CDC must have indicated that there was a genuine risk of contagiousness. [\[FN120\]](#) Senator Hatch stated: "[The amendment] is not based on fear. It is based on sound science." [\[FN121\]](#)

Senator Helms opposed the Hatch amendment, claiming that it would "gut the Chapman amendment." [\[FN122\]](#) Senator Dole supported the Hatch amendment with one minor language change that Senator Hatch accepted. [\[FN123\]](#) In supporting the Hatch amendment, Senator Dole specifically mentioned that the ADA covers people with mental retardation, cerebral palsy, deafness, blindness, or HIV. [\[FN124\]](#) Like everyone else who commented on the food handling amendment, Dole presumed that the ADA covered individuals with HIV.

Ultimately, the Hatch amendment passed in the Senate on a vote of 99-1, with only Senator Helms voting against it. [\[FN125\]](#) Before the Senate completed its discussion of this matter, Senators Dole and Hatch had a colloquy in which Senator Hatch agreed that HIV would be one of the diseases the CDC considered including in its list of diseases that could be spread through the food supply. [\[FN126\]](#) Because the Senate had not accepted all the language from the Conference Report, a second Conference was necessary. The second Conference adopted the Hatch language [\[FN127\]](#) and it *49 became part of the adopted legislation. [\[FN128\]](#)

Another issue for the conferees to resolve was the definition of the term "disability." Both the House and Senate versions of the ADA had various exemptions from the definition of disability within Title V. [\[FN129\]](#) The Senate provided one long list of exemptions that lumped homosexuality with other categories that might be considered genuine impairments. [\[FN130\]](#) The House listed exclusions by category, separating homosexuality from other arguable impairments. [\[FN131\]](#) The Senate receded to the House version without explanation. [\[FN132\]](#) The Senate version arguably contained more exemptions because it included an exemption not in the House version--one for "current psychoactive substance-induced organic mental disorders (as defined by DSM-III-R which are not the result of medical treatment)." [\[FN133\]](#)

What do we learn from this legislative history? We learn that in 1990, even liberal members of Congress knew that there was no chance that a federal statute could be used to protect sexual minorities. But there was also *50 an interesting policy question for the gay rights community of whether it should even seek to fight these exclusions, because the American Psychiatric Association has taken the position, since the 1970's, that being gay, lesbian, or bisexual is not a mental health impairment. [\[FN134\]](#)

In an ideal world, the gay community would have fought these exclusions because the manner in which they were excluded was offensive. As written, the ADA lumps gay men, lesbians, and bisexuals with "voyeurs," [\[FN135\]](#) as if these groups have something in common. The language concerning transvestites and transsexualism is also extremely derogatory. Transsexual and transvestite individuals are lumped together with individuals who have "sexual behavior disorders." [\[FN136\]](#) Certainly, many individuals who are transgendered do not consider themselves to have a "sexual behavior disorder." Additionally, the Legislation excluded transvestites from coverage twice--in section 12208 [\[FN137\]](#) and in section 12211. [\[FN138\]](#) That redundancy is itself derogatory because it highlights the legislators' extreme desire to prevent this group from having legal protection. In sum, the language is deeply insulting to sexual minorities even if we agree that they should have no claim of coverage under the ADA. But with the right-wing clamoring about the "sodomy lobby," [\[FN139\]](#) there was no room in which to argue that these exclusions were harmful and degrading. The best that the gay rights community was able to achieve was to take "homosexuality" and "bisexuality" out of the sentence that listed "sexual behavior disorders." This was not much of a victory.

What is most interesting is that congressional support to stand firm on the HIV issue existed, despite considerable pressure

from the restaurant industry to provide a strong exemption. HIV could have been added to the list of exclusions. Moreover, the original food handling amendment, the Chapman Amendment, could have passed. Yet, in 1990, there was enough sensitivity in Congress on HIV issues that such efforts failed. The result is that the legislative history is very strong with respect to coverage of HIV. Yet, the courts treated this issue as if it were ambiguous. Many courts interpreting the ADA's HIV coverage examine the statute with an ahistorical lens and argue that Congress drafted an ambiguous statute.

III. Case Law

Despite the fact that the legislative history of the ADA is clear with *51 respect to Congress' intention to cover individuals infected with HIV, the courts have treated this issue as if it were a close question. The Supreme Court in *Bragdon v. Abbott* ultimately concluded that the ADA could cover HIV as an impairment. [FN140] But why, one might ask, was the vote 5-4 given the clarity of the legislative history? Never once in the Court's discussion of this issue in *Bragdon* did it mention the clarity of the ADA's legislative history--that the text of the ADA derived, in part, from a recommendation from the President's AIDS Commission and that even the bill's detractors always understood the bill to cover HIV. [FN141] Justice O'Connor, in a speech at Georgetown Law School, complained that the ADA was not clearly written and that it was rushed through Congress. [FN142] Had she, however, made any attempt to educate herself about the history of this statute, she would not have been able to be one of the four dissenters on this issue in *Bragdon*.

Despite the clarity of the legislative history concerning HIV coverage and the Supreme Court's decision in *Bragdon*, the lower courts have gone to great lengths, especially at the appellate level, to rule in favor of defendants in cases involving HIV discrimination. The defendants have prevailed using various creative defenses. In one case, an HIV-positive grocery store clerk lost his discrimination suit after a court found that he could pose a "direct threat" to others through his handling of food, [FN143] completely ignoring the specific language in the ADA that requires the CDC--not the courts--to decide whether HIV can be spread through the food supply. In another case, a court found that the ADA did not cover a man who was HIV-positive because he could not demonstrate a substantial limitation in the major life activity of reproduction due to this HIV status. [FN144] He and his wife had decided not to have any more children long before he learned that he was HIV-positive; his wife had undergone a procedure to prevent her from having any more children. [FN145] The court did not consider whether his HIV status might cause him to be substantially limited in any other major life activities. In *Carrillo v. AMR Eagle, Inc.*, the district court went so far as to presume that a man who is HIV-positive cannot qualify as an individual with a disability because there is no evidence that HIV status affects a man's reproductive system. [FN146] The district court said: [Plaintiff] failed to introduce into evidence any medical evidence from which a reasonable jury could find that HIV substantially limits a man's ability to reproduce: there is no study, medical *52 testimony, or statistical evidence in the record of a significant risk of infection of female partners by men with HIV; there is no evidence of whether an infected man's sperm may carry and transmit the virus to his child at conception; there is no evidence in the record of any treatment available to lower the risk of infection. [FN147] The court's complete ignorance of basic medical facts about the transmissibility of HIV through semen is unbelievable. Yet this decision reflects the measures that some courts will employ in order to avoid honoring Congress' intent to protect individuals who are HIV-positive with coverage under the ADA. [FN148]

But this is not to say that no individuals who are HIV-positive prevail under the ADA. An Illinois district court has refused to follow the reasoning employed in *Carrillo*. [FN149] There, the court denied the defendant's motion for summary judgment even though the HIV-positive plaintiff acknowledged that he was in a long-term, monogamous relationship with another man and did not offer evidence that he had ever had intentions of fathering a child. [FN150] The court noted that there are many other major life activities, such as caring for oneself, on which HIV can have an impact. [FN151] It found that "at the very least, questions of fact exist as to whether [the plaintiff] is disabled within the meaning of the ADA. The court assumes, for purposes of this motion for summary judgment, that he is." [FN152]

Further, appellate courts occasionally reverse a trial court decision in which both AIDS hysteria and homophobia seem to be at play. The best example of this phenomenon occurred in a case in which the district court and appellate court decisions were unpublished, despite the fact that there was a concurrence in the appellate decision. [\[FN153\]](#) In that case, the employer (an airline) fired Plaintiff, whom the employer knew was HIV-positive, after a flight attendant filed a report stating that plaintiff had oral sex with another man while traveling on an airplane flown by the defendant's company. [\[FN154\]](#) If such allegations were true, they would apparently have justified plaintiff's *53 discharge in violation of company policy. The district court granted summary judgment for the defendant even though there were disputed facts in the record regarding whether the incident had occurred. [\[FN155\]](#) The court of appeals reversed, concluding that there were material issues of disputed facts that precluded summary judgment. [\[FN156\]](#) The concurrence further criticized the trial court decision for failing to "set forth either on the record in court or in a written opinion its reasons for granting the motion for summary judgment." [\[FN157\]](#) There is no record of what happened on remand, but the appellate decision did permit the plaintiff to proceed to trial. [\[FN158\]](#) Because there is no written opinion, it is hard to know the reasons for the trial judge's decision to grant summary judgment. It seems reasonable to assume that bias against individuals who are HIV-positive or homosexual may have affected his decision, since he seems to have violated basic summary judgment principles in granting the motion in favor of the defendant. Additionally, the D.C. and Sixth Circuits have reversed two other summary judgment decisions in cases involving plaintiffs who are HIV-positive; [\[FN159\]](#) thus, the appellate process does occasionally protect HIV-positive plaintiffs from errors at the trial court level.

IV. Conclusion

The story of the ADA's passage is one of explicit homophobia and "AIDS hysteria" perpetuated by various members of Congress. The homophobia articulated during the ADA's consideration was standard fare during legislative debate at that time. Senator Helms made repeated homophobic comments as Congress considered the AIDS Control Act of 1989, and during consideration of the Ryan White CARE Act, Helms argued that federal funds should only be used to assist women and children, not homosexuals. [\[FN160\]](#) Senator Helms also blamed the "homosexual community" *54 for the AIDS epidemic. [\[FN161\]](#) His comments were so inappropriate that Senator Hatch felt compelled to respond to correct his errors. [\[FN162\]](#) Nonetheless, no one suggested that Senator Helms be reprimanded or censured due to his homophobic comments.

One must wonder if anything has really changed in society. Would those comments still be tolerated today? Or might homophobic remarks be considered as inappropriate as racially insensitive remarks? On December 5, 2002, former Senate Republican leader Trent Lott (R. Miss.) publicly stated that Republicans should have endorsed South Carolina Senator Strom Thurmond's segregationist bid in 1948 for the presidency. [\[FN163\]](#) Although President Bush initially declined to comment, within a week he sharply criticized Lott, saying his remarks did not reflect the beliefs of the Republican Party. [\[FN164\]](#) By December 20th, Lott stepped down from the party leadership role. [\[FN165\]](#)

Approximately five months later, Senator Rick Santorum (R. Pa.) made the following comment regarding the Supreme Court's decision in *Lawrence v. Texas*:

If the Supreme Court says that you have the right to consensual [homosexual] sex within your home, then you have the right to bigamy, you have the right to polygamy, you have the right to incest, you have the right to adultery, you have the right to do anything. [\[FN166\]](#) The President refused to criticize Santorum for his remarks and, instead, said, "The president has confidence in the senator and believes he's doing a good job as senator." [\[FN167\]](#) Senator Lincoln Chafee (R. R.I.) criticized *55 Santorum's remarks, as did the Log Cabin Republicans. [\[FN168\]](#) Besides these two criticisms, Republicans stood behind Santorum's comments. There were no calls for his resignation. While Santorum did later clarify, "I have no problem with homosexuality. I have a problem with homosexual acts," [\[FN169\]](#) he saw no need to offer an apology. [\[FN170\]](#)

So has anything really changed? Might members of Congress oppose legislation today by characterizing it as part of the "sod-

omy lobby"? Congress may reveal the answer when it next considers the Employment Nondiscrimination Act that proposes to ban private sector discrimination in employment against gay men, lesbians, and bisexuals. [\[FN171\]](#) Will Rick Santorum demonstrate that he really has "no problem with homosexuality"? For now, it appears that homophobia is still a tolerated political perspective; [\[FN172\]](#) but, despite that fact, Congress occasionally passes legislation that may be of assistance to some members of the gay community. For example, the ADA could be of assistance to some gay men who are HIV-positive. While courts may seek to water down the ADA's benefits for people with HIV, the statutory language is available for courts that want to enforce the law.

It is important that we tell these stories of homophobia that pervade our nation's leading bodies. It is vital that we reveal the ugly truth behind our laws so that people understand the beliefs and attitudes that are still part of mainstream culture. Maybe, someday, we can think of them as only outdated history. Until then, we must continue to expose homophobic opinions and laws as part of our efforts to eradicate such beliefs and attitudes from our culture. [\[FN173\]](#)

[\[FN1\]](#). Ruth Colker, Heck-Faust Memorial Chair in Constitutional Law, Michael E. Moritz College of Law, The Ohio State University. I would like to thank Christopher Geidner and Matthew Kear for their outstanding research assistance. Any errors are my own.

[\[FN1\]](#). 135 Cong. Rec. H6442 (daily ed. Oct. 2, 1989) (statement of Rep. Burton).

[\[FN2\]](#). Joseph Weber, The "Last Minority" Fights for Its Rights, Bus. Wk., June 6, 1988, at 140.

[\[FN3\]](#). Senator Dole said:

You know, many have called people with disabilities the last minority. Enactment of the Americans with Disabilities Act will bring this last, and largest, minority group into a position of achieving equal opportunity, access and full participation in the American dream. Mr. President, that's what the ADA is all about.

101 Cong. Rec. S10,790 (daily ed. Sept. 7, 1989) (statement of Sen. Dole).

[\[FN4\]](#). Chai Feldblum, [Sexual Orientation, Morality, and the Law: Devlin Revisited](#), 57 U. Pitt. L. Rev. 237, 238 (1996).

[\[FN5\]](#). Americans with Disabilities Act of 1990, [42 U.S.C. § 12208 \(2000\)](#).

[\[FN6\]](#). Id. § 12211.

[\[FN7\]](#). Id. § 12113.

[\[FN8\]](#). Id. § 12113(d)(2).

[\[FN9\]](#). See id.

[\[FN10\]](#). [Doe v. U.S. Postal Serv., No. CIV.A.84-3296, 1985 WL 9446, at *1 \(D.D.C. June 12, 1985\)](#).

[\[FN11\]](#). Id.

[\[FN12\]](#). Id.

[\[FN13\]](#). Id.

[\[FN14\]](#). See id. Like every other court that has considered this theory of discrimination, the district court rejected this argu-

ment, finding that Congress did not intend Title VII to cover such causes of action.

[FN15]. *Id.* at *2.

[FN16]. *Blackwell v. U.S. Dep't of Treasury (Blackwell II)*, 656 F. Supp. 713 (D.D.C. 1986).

[FN17]. *Id.* at 714.

[FN18]. *Id.*

[FN19]. *Id.*

[FN20]. *Blackwell v. U.S. Dep't of Treasury (Blackwell I)*, 639 F. Supp. 289, 290 (D. D.C. 1986).

[FN21]. *Blackwell II*, 656 F. Supp. at 715.

[FN22]. *Id.* at 714.

[FN23]. *Id.*

[FN24]. *Id.* at 715.

[FN25]. *Blackwell v. U.S. Dep't. of Treasury (Blackwell III)*, 830 F.2d 1183, 1184 (D.C. Cir. 1987).

[FN26]. Civil Rights Restoration Act of 1987, [Pub. L. No. 100-259, 102 Stat. 28 \(1988\)](#). The Civil Rights Restoration Act amended Title IX of the Education Amendments of 1972 to define the phrase "program or activity" to mean all of the operations of the entity when an entity received federal financial assistance. *Id.* at § 3. It likewise amended the Rehabilitation Act of 1973 and the Age Discrimination Act of 1975 to define the phrase "program or activity" to mean all of the activities of the aforementioned entities which received federal financial assistance. *Id.* at § 4. Because it expanded the coverage of Section 504, it could potentially lead to more entities being affected by Section 504's nondiscrimination requirements.

[FN27]. 134 Cong. Rec. S2400-01 (daily ed. Mar. 17, 1988) (statement of Sen. Helms).

[FN28]. *Id.* at S2683 (daily ed. Mar. 21, 1988) (statement of Sen. Kennedy). Of course, no Senator was ever able to cite a case in which a court had found that homosexuals were covered by the Rehabilitation Act.

[FN29]. See Helen Dewar, Congress Overrides Civil Rights Law Veto, *Wash. Post*, Mar. 23, 1988, at A1.

[FN30]. *Grove City Coll. v. Bell*, 465 U.S. 555 (1984). For a description of the purposes of this act, see section 2 of the Civil Rights Restoration Act, which reads:

The Congress finds that--(1) certain aspects of recent decisions and opinions of the Supreme Court have unduly narrowed or cast doubt upon the broad application of title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and title VI of the Civil Rights Act of 1964; and (2) legislative action is necessary to restore the prior consistent and long-standing executive branch interpretation and broad, institution-wide application of those laws as previously administered.

Civil Rights Restoration Act § 2.

[FN31]. *Grove City*, 465 U.S. at 570-75.

[FN32]. See the Civil Rights Restoration Act § 4.

[FN33]. See *id.*

[FN34]. 134 Cong. Rec. S2400-01 (daily ed. Mar. 17, 1988).

[FN35]. *Id.*

[FN36]. See *infra* note 84 and accompanying text; see also *supra* note 29 and accompanying text.

[FN37]. 134 Cong. Rec. S10,520 (daily ed. Aug. 1, 1988).

[FN38]. *Id.* at S10,471 (roll call vote on amendment No. 2779 to clarify definition of "handicapped").

[FN39]. 135 Cong. Rec. S10,776 (daily ed. Sept. 7, 1989).

[FN40]. 135 Cong. Rec. S4984 (daily ed. May 9, 1989) (statement by Sen. Harkin). Senator Harkin described the Council as "an independent Federal agency whose current membership consists of 15 persons appointed by President Reagan." *Id.*

[FN41]. See generally S. Rep. No. 101-16, at 6 (1989).

[FN42]. H.R. Rep. No. 101-485, pt. 2, at 48 (1990).

[FN43]. *Id.* The Commission stated:

Comprehensive Federal anti-discrimination legislation, which prohibits discrimination against persons with disabilities in the public and private sectors, including employment, housing, public accommodations and participation in government programs should be enacted. All persons with symptomatic or asymptomatic HIV infection should be clearly included as persons with disabilities who are covered by the anti-discrimination protections of this legislation.

Id. (quoting Presidential Comm'n on the Human Immunodeficiency Epidemic, Report 123 (1988)).

[FN44]. Senator Harkin referenced the HIV Commission's work when he introduced the ADA on May 9, 1989. See 135 Cong. Rec. S4985 (daily ed. May 9, 1989). Senator Harkin mentioned the Commission's work again on September 7, 1989 when a new version of the ADA was introduced in the Senate. See 135 Cong. Rec. 19,801 (1989). Senator Kennedy also mentioned the Commission's work. See *id.* at 19,807.

[FN45]. S. Rep. No. 101-16, at 21 (1989).

[FN46]. *Id.*

[FN47]. *Id.* at 22.

[FN48]. 135 Cong. Rec. 19,812-13 (1989).

[FN49]. *Id.* at 19,813.

[FN50]. *Id.*

[FN51]. *Id.* at 19,853.

[FN52]. Id.

[FN53]. Id.

[FN54]. 135 Cong. Rec. 19,853.

[FN55]. Id.

[FN56]. Id.

[FN57]. Id.

[FN58]. Id.

[FN59]. Id.

[FN60]. 135 Cong. Rec. 19,853.

[FN61]. 136 Cong. Rec. 17,376 (1990) (roll call on final Conference Report).

[FN62]. 135 Cong. Rec. 19,865-66 (1989).

[FN63]. Id.

[FN64]. Id.

[FN65]. Id. at 19,867.

[FN66]. See, e.g., [Cortes v. McDonald's Corp.](#), 955 F. Supp. 541 (E.D. N.C. 1996) (granting summary judgment for defendant restaurant, concluding that a restaurant employee who was HIV-positive did not establish that he was perceived as or had a physical impairment that substantially limits one or more major life activities); [Runnebaum v. NationsBank of Md., N.A.](#), 123 F.3d 156 (4th Cir. 1997) (affirming grant of summary judgment for defendant bank, concluding that a bank employee who was HIV-positive did not establish that he was perceived as or had a physical impairment that substantially limits one or more major life activities).

[FN67]. 136 Cong. Rec. 17,376 (1990).

[FN68]. Senator Armstrong said:

The Senator from Massachusetts [Kennedy] pointed out that I was concerned about voyeurism and assured the Senate that voyeurism is not a protected classification under this proposed bill.

I would be relieved to think that is true but in fact there is no basis that I can find for that because the definition which is contained in this bill is exactly the same definition that appears elsewhere in the law. Cases that have been litigated have referred to what the Senator described as some book and which I will now identify, if I may, as the Diagnostic and Statistical Manual of Mental Disorder published by the American Psychiatric Association. This is the book which the courts have looked to to define what constitutes a mental impairment under statutory language which is identical to this proposed in this bill.

On page 289 of that book, the report of the American Psychiatric Association, is described the mental impairment of voyeurism. Voyeurism is in unless we take it out.

In due course, I am going to have an amendment that will take voyeurism and some other things out.

135 Cong. Rec. 19,871 (1989) (statement of Sen. Armstrong).

[\[FN69\]](#). Id.

[\[FN70\]](#). Id.

[\[FN71\]](#). Id. at 19,873.

[\[FN72\]](#). Id. at 19,875.

[\[FN73\]](#). Id.

[\[FN74\]](#). Senator Armstrong offered an amendment that read:

Under this act the term "disability" does not include "homosexuality," "bisexuality," "transvestism," "pedophilia," "transsexualism," "exhibitionism," "voyeurism," "compulsive gambling," "kleptomania," or "pyromania," "gender identity disorders," current "psychoactive substance use disorders," as defined by DSM-III-R which are not the result of medical treatment, or "other sexual behavior disorders."

135 Cong. Rec. 19,884.

[\[FN75\]](#). Id.

[\[FN76\]](#). Id.

[\[FN77\]](#). Id.

[\[FN78\]](#). Id.

[\[FN79\]](#). Id.

[\[FN80\]](#). 135 Cong. Rec. 19,885.

[\[FN81\]](#). 135 Cong. Rec. S11,173 (daily ed. Sept. 14, 1989) (statement by Sen. Armstrong).

[\[FN82\]](#). Id.

[\[FN83\]](#). Id. at S11,175.

[\[FN84\]](#). 135 Cong. Rec. 19,875 (1989).

[\[FN85\]](#). [H.R. Rep. No. 101-485, pt. 4, at 1 \(1990\)](#).

[\[FN86\]](#). Id.

[\[FN87\]](#). Id. at 82.

[\[FN88\]](#). William N. Eskridge, Jr. et al., *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* 31-32 (3d ed. 2001).

In the House, major legislation moves to the floor from committees in two ways... [Under the second method], when supporters want to structure deliberation in a particular way, the reporting committee will request a special order, or rule, from the

Rules Committee to advance the bill for expedited floor consideration. The Rules Committee, which is essentially an arm of the majority party, then decides whether it will propose a rule for the bill (its refusal to grant a rule effectively kills the bill for that session); what kind of rule to grant (an open rule permitting amendments, a closed rule prohibiting all floor amendments, or a modified closed rule permitting specified floor amendments and structuring the order of their introduction); when a bill is to be considered; and how much time for debate. The full House votes on the proposed rule; such rules are virtually always passed by party-line votes.

Id.

[FN89]. See, e.g., 136 Cong. Rec. H2315 (daily ed. May 15, 1990) (statement of Rep. Burton).

[FN90]. Id. at H2423 (daily ed. May 17, 1990).

[FN91]. See 136 Cong. Rec. 17,296 (1990) (vote on ADA Conference Report in House).

[FN92]. 136 Cong. Rec. H2425.

[FN93]. Id.

[FN94]. Id. at H2320-21 (daily ed. May 15, 1990) (statement of Rep. Burton).

[FN95]. Id.

[FN96]. Id.

[FN97]. See, e.g., [Runnebaum v. NationsBank of Md., N.A., 123 F.3d 156, 175 \(4th Cir. 1997\)](#) (holding that an HIV-positive Plaintiff did not qualify as having a disability under the ADA).

[FN98]. 136 Cong. Rec. H2320-21.

[FN99]. Id. at H2322 (statement of Rep. Delay).

[FN100]. Id.

[FN101]. Id. at H2421 (daily ed. May 17, 1990) (statement of Rep. Dannemeyer).

[FN102]. Id. (statement of Rep. Burton).

[FN103]. Id. at H2478.

[FN104]. 136 Cong. Rec. 17,296 (1990).

[FN105]. Id.

[FN106]. Id.

[FN107]. Id. The amendment, of course, does not specifically mention HIV and does give rise to ambiguity as to whether HIV should be considered an infectious or communicable disease.

[FN108]. Id. (statement of Rep. Rowland). Ultimately, that language- "as specified by the CDC" - was part of the comprom-

ise that was reached between the House and Senate on this issue. See [42 U.S.C. § 12113\(d\)\(1\)\(B\)](#) (requiring the Secretary of Health and Human Services to "publish a list of infectious and communicable diseases which are transmitted through handling the food supply.").

[FN109]. See, e.g., 136 Cong. Rec. H2480 (statement of Rep. McDermott).

[FN110]. Id. at H2478 (statement of Rep. Chapman).

[FN111]. Id. at H2483-84.

[FN112]. See [EEOC v. Prevo's Mkt., Inc., 135 F.3d 1089, 1096 \(6th Cir. 1998\)](#) (vacating district court's award of compensatory and punitive damages in a case involving a part-time HIV-positive produce clerk, finding that the grocery store was warranted in requiring the clerk to undergo a medical examination to determine if he posed a direct threat to others despite the extremely low risk of transmission).

[FN113]. [H.R. Conf. Rep. No. 101-558, at 1-54 \(1990\)](#).

[FN114]. Id. at 59.

[FN115]. Id.

[FN116]. 136 Cong. Rec. 17,033 (1990).

[FN117]. Id.

[FN118]. Id.

[FN119]. See id.

[FN120]. See id.

[FN121]. Id. at 17,035.

[FN122]. 136 Cong. Rec. 17,036.

[FN123]. Id. at 17,041.

[FN124]. Id. at 17,044.

[FN125]. Id. at 17,058.

[FN126]. Id. at 17,041.

[FN127]. See [H.R. Conf. Rep. No. 101-596, at 60-63 \(1990\)](#) (Second Conference Report).

[FN128]. As enacted, the ADA therefore provides:

(d) List of infectious and communicable diseases

(1) In general. --

The Secretary of Health and Human Services, not later than 6 months after [July 26, 1990], shall --

- (A) review all infectious and communicable diseases which may be transmitted through handling the food supply;
- (B) publish a list of infectious and communicable diseases which are transmitted through handling the food supply;
- (C) publish the methods by which such diseases are transmitted; and
- (D) widely disseminate such information regarding the list of diseases and their modes of transmissibility to the general public. Such list shall be updated annually.

(2) Applications. --

In any case in which an individual has an infectious or communicable disease that is transmitted to others through the handling of food that is included on the list developed by the Secretary of Health and Human Services under [paragraph (1)] and which cannot be eliminated by reasonable accommodation, a covered entity may refuse to assign or continue to assign such individual to a job involving food handling.

(3) Construction. --

Nothing in this Act shall be construed to preempt, modify, or amend any state, county, or local law, ordinance, or regulation applicable to food handling which is designed to protect the public health from individuals who pose a significant risk to the health or safety of others, which cannot be eliminated by reasonable accommodation, pursuant to the list of infectious or communicable diseases and the modes of transmissibility published by the Secretary of Health and Human Services.

Americans with Disabilities Act of 1990, [42 U.S.C. § 12113\(d\) \(2000\)](#).

[FN129]. See [H.R. Conf. Rep. No. 101-596](#), at 60-63.

[FN130]. *Id.*

[FN131]. *Id.*

[FN132]. *Id.* at 84 (discussing differences in language between the House and Senate versions).

[FN133]. *Id.* at 88.

[FN134]. [Boy Scouts of Am. v. Dale](#), 530 U.S. 640, 699 (2000).

[FN135]. [42 U.S.C. § 12211 \(2000\)](#).

[FN136]. *Id.*

[FN137]. *Id.* at 12208

[FN138]. *Id.* at 12211

[FN139]. See, e.g., Philip A. Leider, [Domestic AIDS Vaccine Trials: Addressing the Potential for Social Harm to the Subjects of Human Experiments](#), 88 Cal. L. Rev. 1185, 1207 (2000).

[FN140]. [Bragdon v. Abbot](#), 524 U.S. 624, 633 (1998).

[FN141]. See *supra* note 44 and accompanying text.

[FN142]. See Charles Lane, O'Connor Criticizes Disabilities Law as Too Vague, Wash. Post, Mar. 15, 2002, at A2.

[FN143]. [EEOC v. Prevo's Mkt., Inc.](#), 135 F.3d 1089, 1095 (6th Cir. 1998).

[FN144]. [Blanks v. Southwestern Bell Communications, Inc.](#), 310 F.3d 398, 399 (5th Cir. 2002).

[FN145]. Id.

[FN146]. [Carrillo v. AMR Eagle, Inc.](#), 148 F. Supp. 2d 142, 145 (D.P.R. 2001).

[FN147]. Id.

[FN148]. Another good example of HIV hysteria infecting court decisions is [Onishea v. Hopper](#), 171 F.3d 1289 (11th Cir. 1999). Based on no scientific support, the court of appeals upheld a district court decision finding no ADA violation when HIV-positive prisoners were denied participation in various programs because of their HIV status. [Id. at 1301](#). The court found that segregation of HIV-positive prisoners was not an "exaggerated response" to their HIV status. Id.

[FN149]. See [Rotter v. Brinker Rest. Corp.](#), No. 98 C 50256, 1999 WL 1132982 (N.D. Ill. Dec. 10, 1999).

[FN150]. Id. at *3.

[FN151]. Id.

[FN152]. Id.

[FN153]. See [Archer v. Mesaba Aviation Inc.](#), No. 98-2434, 2000 WL 376677, at *1 (6th Cir. Apr. 3, 2000).

[FN154]. Id. at *2.

[FN155]. Id. at *1.

[FN156]. Id. at *3.

[FN157]. Id. at *6 (Bell, J., concurring).

[FN158]. Id. at *1.

[FN159]. See [Doe v. U.S. Postal Serv.](#), 317 F.3d 339 (D.C. Cir. 2003) (reversing grant of summary judgment for defendant employer where the court of appeals found that there were genuine issues of material fact as to whether employee's supervisor told co-workers about plaintiff's HIV status); [Holiday v. City of Chattanooga](#), 206 F.3d 637 (6th Cir. 2000) (reversing grant of summary judgment for defendant employer where genuine issues of material fact existed as to whether the plaintiff, who was HIV-positive, was qualified to perform the job of police officer).

[FN160]. For example, on January 25, 1989, he criticized the "homosexual lobby" for using the "AIDS issue to promote a political agenda." 135 Cong. Rec. S396 (daily ed. Jan. 25, 1989). He said: "Members of this militant movement have masterfully manipulated the American public into believing that they, the homosexuals, are innocent victims of the AIDS epidemic rather than its perpetrators." Id. When the AIDS Control Act was being considered two years later, Helms stated: "Is it not enough that the public health agenda of America has been torn apart by the AIDS movement, and that innocent children--like Ryan White--continue to die because the lobby and its allies promote civil rights rather than public safety?" 136 Cong. Rec. S5738 (daily ed. May 7, 1990).

[FN161]. He said to Senator Hatch: "Does the Senator realize that if they would stop what they are doing, there would not be

one additional new case of AIDS in the United States of America other than those already in progress." 136 Cong. Rec. S6123 (daily ed. May 14, 1990). He argued that the legislation "should focus on the 2 percent like Ryan White and like that young woman surgeon in Puerto Rico. It should focus on the women and children." Id. at S6197 (daily ed. May 15, 1990).

[FN162]. Hatch responded:

I do not agree with him that if all homosexuals quit having any homosexual contact that that would end the AIDS crisis. I do not think it would. In fact, I do not think it would make a dent. It would certainly help alleviate some of the AIDS problem. But we would still have the problem among heterosexuals, among children, among IV drug abusers and others. This is not just a homosexual problem.

Id. at S6124 (daily ed. May 14, 1990).

[FN163]. Ann McFeatters, White House Backs Santorum, Pittsburgh Post-Gazette, Apr. 26, 2003, at A-1.

[FN164]. Id.

[FN165]. Id.

[FN166]. Id. (alteration in original).

[FN167]. Id.

[FN168]. See Nick Anderson, GOP Leaders Shrug Off Senator's Remarks on Gay Sex, L.A. Times, Apr. 24, 2003, at 1-18.

[FN169]. Id.

[FN170]. Santorum reportedly said, "I do not need to give an apology." Sheryl Gay Stolberg, Congressional Memo: Persistent Conflict for Gays and G.O.P., N.Y. Times, Apr. 23, 2003, at A20.

[FN171]. See Employment Nondiscrimination Act of 2001, H.R. 2692, 107th Cong. § 2 (2001), WL 2001 CONG US HR 2692 (prohibiting discrimination in employment on the basis of sexual orientation).

[FN172]. Commenting on comments by Dick Armey, Rick Santorum, Tom DeLay, and Trent Lott, Harold Meyerson has said, "[I]t looks as if gay-bashing is not only accepted in the highest Republican circles but actually a prerequisite for leadership." Harold Meyerson, Grand Old Gay Bashers, Wash. Post, July 2, 2003, at A23.

[FN173]. As this article is going to press, the U.S. Judiciary Committee has begun to hold hearings on "A Proposed Constitutional Amendment to Preserve Traditional Marriage," at [www.http://judiciary.senate.gov/hearing.cfm?id=1118](http://judiciary.senate.gov/hearing.cfm?id=1118) (last visited on Mar. 23, 2004). As we listen to the debate concerning a proposed constitutional amendment to ban same-sex marriage, we can hear if the tone in Congress has changed with regard to homophobia.

END OF DOCUMENT