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Harriet L. Turney
University of Dayton

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Defining the Handicapped: Section 504 of The Rehabilitation Act

I. INTRODUCTION

Historically, discrimination against persons with physical or mental disabilities has been the general rule rather than the exception. The Athenians put deaf children to death, and the practice of exposing such children reportedly had the approval of Aristotle and Plato.¹ In the Middle Ages, when handicapped persons were not imprisoned, they were driven from cities² to wander through rural areas.³ Traditionally, Western societies have treated handicapped persons little differently than criminals, drunks, or slaves⁴ and have, in the past, imprisoned them when their only crime was their inability to support themselves.⁵

American colonists brought European biases with them when they crossed the Atlantic.⁶ During the eighteenth and nineteenth centuries, local officials were free to deal with handicapped persons according to personal inclination, with little or no attention being given to the interest of the afflicted person.⁷ Consequently, an almshouse system developed in this country around 1800.⁸ "By 1830, almost all states encouraged or mandated the establishment of an almshouse, which housed the destitute as well as the sick and 'insane'."⁹

Not until 1948 did the federal government extend its interest in nondiscrimination to handicapped persons, when Congress moved to prohibit discrimination in federal employment because of physical handicap, so long as "such employment will not be hazardous to the appointee or endanger the health or safety of his fellow employees or others."¹⁰ Until recently, however, discrimination

1. Burgdorf & Burgdorf, *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect" Class Under the Equal Protection Clause*, 15 SANTA CLARA LAWYER 855, 885 (1975); 1 SPECIAL EDUCATION FOR THE EXCEPTIONAL 5 (M. Frampton & E. Gails eds. 1955).

2. Burgdorf & Burgdorf, *supra* note 1, at 884. See N. KITTRIE, THE RIGHT TO BE DIFFERENT 57 (1971).

3. Burgdorf & Burgdorf, *supra* note 1, at 884; A. DEUTSCH, THE MENTALLY ILL IN AMERICA: A HISTORY OF THEIR CARE AND TREATMENT FROM COLONIAL TIMES 25 (2d ed. 1949).

4. Burgdorf & Burgdorf, *supra* note 1, at 884; N. KITTRIE, *supra* note 2, at 57.

5. *Id.* at 57-58.

6. Burgdorf & Burgdorf, *supra* note 1, at 885; See A. DEUTSCH, *supra* note 3, at 41-45.

7. A. DEUTSCH, *supra* note 3, at 39-54.

8. Burgdorf & Burgdorf, *supra* note 1, at 885.

9. *Id.* (footnote omitted).

10. Civil Service Act Amendment, Pub. L. No. 80-617, 62 Stat. 351 (1948) (amending 22 Stat. 403). See Dowling, *Legal Remedies in Education and Employment*, 79 VOLTA REV. 327, 331 (1977).

against the handicapped has gone virtually unnoticed. Recent discrimination has existed in many forms. Entire school systems flagrantly violated state laws by excluding handicapped children;¹¹ planners designed buildings which were inaccessible to the physically handicapped;¹² employers refused to hire them;¹³ and cancer patients who had won their medical battles returned to work to find they had lost their seniority, health insurance, possible promotions, or even their jobs.¹⁴

In 1973, Congress sought to rectify the discriminatory treatment of handicapped persons.¹⁵ Under the Rehabilitation Act of 1973,¹⁶ "No otherwise qualified handicapped individual in the United States, as defined in section 7(6), shall, solely by reason of his handicap be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal assistance."¹⁷ Initially, the Act's coverage was limited by its definition of "handicapped individual" which included only those persons who could "reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to the Act."¹⁸ This narrow definition was found to be unworkable and the Act was subsequently amended to its present form in the Rehabilitation Act Amendments of 1974.¹⁹

II. THE DEFINITION OF HANDICAPPED INDIVIDUAL IN THE 1974 AMENDMENTS

As amended, the definition of a "handicapped individual" is "any person who (A) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (B) has a record of impairment, or (C) is regarded as having such impairment."²⁰ Congress' understanding of the definition of "handicapped individual" is expressed in the legislative history of the 1974 amendments:

11. See 118 CONG. REC. 1258 (1972) (remarks of Rep. Vanik).

12. See Wash. Post, Dec. 8, 1972, § D, at 3, col. 1.

13. M. GANDY, NOTES ON EMPLOYMENT PROBLEMS AND EPILEPSY PATIENTS, Jan. 4, 1971 (available from the Epilepsy Foundation of America).

14. *After Cancer, the Tough Return to the Job*, 10 PSYCH. TODAY 30 (1977) [hereinafter cited as PSYCH. TODAY].

15. 29 U.S.C. §§ 701-09 (Supp. V 1975).

16. *Id.*

17. *Id.*, § 794.

18. Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 361 (current version at 29 U.S.C. § 794 (Supp. V 1975)).

19. 29 U.S.C. § 794 (Supp. V 1975).

20. *Id.*

Clause (B) is intended to make clearer that the coverage of [section 503] . . . extends to persons who have recovered—in whole or in part—from a handicapping condition, such as a mental or neurological illness, a heart attack, or cancer and to persons who were classified as handicapped . . . but who may be discriminated against or otherwise be in need of the protection of [section 503]

Clause (C) in the new definition clarifies the intention to include those persons who are discriminated against on the basis of handicap, whether or nor they are in fact handicapped, just as Title VII of the Civil Rights Act of 1964 prohibits discrimination on the ground of race, whether or not the person discriminated against is in fact a member of a racial minority. This subsection includes within the protection of [section 503] . . . those persons who do not in fact have the condition which they are perceived as having, as well as those persons whose mental or physical condition does not substantially limit their life activities and who thus are not technically within clause (A) in the new definition. Members of both of these groups may be subjected to discrimination on the basis of their being regarded as handicapped.²¹

Section 503 (a) of the Act directed the President “to implement the provisions of this section by promulgating regulations within ninety days after the date of enactment.²² After lengthy delays, President Ford ordered²³ the Secretary of the Department of Health, Education, and Welfare²⁴ to establish “standards for determining who are

21. S. REP. NO. 1297, 93d Cong., 2d Sess. 50-51, reprinted in [1974] 4 U.S. CODE CONG. & AD. NEWS 6389-90. Congressional estimates of the number of handicapped individuals in the United States vary significant. Compare 120 CONG. REC. 35,007 (1974) (7 million children, 28 million adults) with 119 CONG. REC. 24,562-63 (1973) (7 to 12 million) and 119 CONG. REC. 24,442 (1973) (28 to 50 million). The Department of Labor gives the figure of 20 million, not including people with cancer, heart disease, diabetes, and many other diseases which are barriers to employment. 2 EMPL. PRAC. GUIDE (CCH) ¶ 5343 (1976). See also *Oversight Hearings on Civil and Affirmative Action: Hearings Before Subcomm. on the Handicapped of the Comm. on Labor and Public Welfare*, 94th Cong., 2d Sess 1490 (1976) (statement of Martin H. Gerry, Director, Office of Civil Rights) (25 million) [hereinafter cited as *Subcomm. on the Handicapped*].

For source material on estimates of the total number of the physically handicapped and a brief discussion of the difficulties in obtaining meaningful statistics see Comment, *A Broad in the Land: Legal Strategies to Effectuate the Rights of the Physically Disabled*, 61 GEORGETOWN L.J. 1501 n.2 (1973).

22. In Exec. Order No. 11,758, 3 C.F.R. ____ (Supp. 1975), issued on January 17, 1974, President Nixon delegated his authority to prescribe regulations implementing section 503 to the Secretary of Labor. The first proposed set of regulations under section 504 were published for comment on August 29, 1975, 40 Fed. Reg. 39,887.

23. Exec. Order No. 11,914, 3 C.F.R. 117 (1977).

24. Department “means the Department of Health, Education, and Welfare.” 42 Fed. Reg. 22,678 (1977) (to be codified in 45 C.F.R. § 84.3 (d)) [hereinafter all references to the Department are consistent with this definition].

Recipient “means any state or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which federal financial assistance

handicapped individuals . . . within the meaning of section 504," and to "adopt rules and regulations . . . which he deems necessary to carry out his responsibility under this order."²⁵ Four years after Congress passed the Rehabilitation Act, Joseph Califano, Secretary of the Department of Health, Education, and Welfare signed the final regulation.²⁶ Appended to the final regulation is a section-by-section analysis "which describes the basis and purpose of each section, discusses significant comments and explains the basis for any changes made from the proposed regulation published in 1976."²⁷

The three-part definition set out in the regulation²⁸ conforms to the tripartite statutory definition. The regulation, complemented by the appendix, goes beyond the broad statutory language to define who is considered a "handicapped individual" under the Act. The appendix provides information justifying certain inclusions and exclusions, and provides a substantial, but incomplete, list of those persons protected by the Act.

A. *Physical or Mental Impairment*

Section 84.3(j)(i) of the regulation conforms to the first part of the statutory definition of "handicapped individual" as set forth in section 504 of the 1974 Amendments.²⁹ Physical or mental impairment is defined as "(A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more . . . body systems"³⁰ or "(B) any mental or psychological disorder"³¹ The analysis section of the regulation points out that this part of the definition does not attempt to set forth all the specific diseases and conditions that constitute physical or mental impairments because any such attempt would fall short of being complete.³² The Department does, however, cite numerous examples of

is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance." 42 Fed. Reg. 22,678 (1977) (to be codified in 45 C.F.R. § 84.3(f)) [hereinafter all references to recipient are consistent with this definition].

25. Exec. Order No. 11,914, 3 C.F.R. 117-18 (1977).

26. 42 Fed. Reg. 22,676 (1977) (to be codified in 45 C.F.R. § 84). See *The Administration: Hire the Handicapped*, NEWSWEEK, May 9, 1977, at 39.

27. 42 Fed. Reg. 22,676, 22,685-86 app. (1977).

28. *Id.* at 22,678 (to be codified in 45 C.F.R. § 83.3(j)).

29. See text accompanying notes 18-19, *supra*.

30. 42 Fed. Reg. at 22,678. The body systems listed are: "neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive; genito-urinary; hemic and lymphatic; skin; and endocrine." *Id.*

31. *Id.* The disorders listed are: "mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." *Id.*

32. *Id.* at 22,685.

diseases and conditions included in the term, "physical or mental impairment." The list includes, "orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart attack, diabetes, mental retardation, emotional illness, drug addiction and alcoholism."³³ Also within this part of the definition are specific learning disabilities³⁴ which include perceptual handicaps, brain injury, minimal brain dysfunction,³⁵ dyslexia, and development aphasia. The term probably also encompasses such diseases and conditions as arthritis and related rheumatic diseases, birth defects, cystic fibrosis, hemophilia, kidney disease, sickle-cell anemia, and tuberculosis.³⁶

A limitation on this subsection of the definition is the requirement that the impairment be of such severity that it "substantially limits one or more major life activities."³⁷ Major life activities are defined as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working."³⁸ Omitted from the regulation is a definition of the term "substantially limits." In the appendix, this omission was noted but the Department merely stated its position that "a definition of this term was not possible at this time."³⁹

Failure to define "substantially limits" in the context of this part of the definition may have several ramifications. Complainants charging discrimination may clearly suffer a condition or disease which "substantially limits" a major life activity. Examples include persons who are blind, deaf, mute, or confined to a wheelchair. Probably excluded would be persons who have only the slightest manifestation of various diseases or conditions such as corrected vision for astigmatism or a hearing loss only at very high or very low decibels. There is, however, a significant range of severity between the two extremes. The scope of this qualifier will probably become more readily apparent as complaints begin to increase in number⁴⁰ and the Department has more opportunity to define the term based

33. *Id.*

34. *Id.* at 22,686. Education of All Handicapped Children Act, 20 U.S.C. §§ 1401-1461 (Supp. V 1975).

35. See generally 39 THE PROGRESSIVE 45 (1975); F. WEINER, HELP FOR THE HANDICAPPED CHILD (1973); and Segregation of Poor and Minority Children into Classes for the Mentally Retarded by the Use of IQ Tests, 71 MICH. L. REV. 1212, 1215 n.19 (1973) [hereinafter cited as Segregation of Poor].

36. F. WEINER, *supra* note 35, at i.

37. 42 Fed. Reg. at 22,678 (§ 84.3(j)(1)(i)).

38. *Id.* (84.3(j)(2)(ii)).

39. *Id.* at 22,685.

40. See *Subcomm. on the Handicapped, supra* note 21, at 1515. In the three years following passage of the Act only 67 complaints were filed.

on individual cases. Until such time as the Department specifically defines the term or the case-by-case method begins to develop a body of law, the question of how severe a functional impairment must be before it is considered to "substantially limit" a major life activity will remain unanswered.

In addition to the "substantially limits" requirement, the Department makes clear that there are specific exclusions under this part of the definition. "Thus, environmental, cultural, and economic disadvantage are not in themselves covered; nor are prison records, age, or homosexuality."⁴¹ If such an individual also has a mental or physical impairment, he is included under the first part of the definition. Yet, even with these seemingly explicit exclusions, such individuals who are not afflicted with a physical or mental impairment may not be without recourse under the Act; they may merely "fit" under another part of the definition.⁴²

Perhaps the most controversial inclusions in this part of the definition are drug addiction and alcoholism.⁴³ The rationale for the inclusions can be gleaned from the appendix.⁴⁴ "The Secretary [of the Department] . . . believes that he is without authority to exclude these conditions from the definition,"⁴⁵ although he points out that the medical and legal experts have been unable to determine whether these "diseases" are primarily mental or physical.⁴⁶ One justification offered for the inclusions despite Congressional silence on the subject is the Department's "long-standing practice of treating addicts and alcoholics as handicapped individuals eligible for rehabilitation services under the Vocational Rehabilitation Act."⁴⁷ In explaining these inclusions, the Department emphasizes "that the statute and the regulation apply only to discrimination against qualified handicapped persons solely by reason of their handicap"⁴⁸ and that "if it can be shown that the addiction or alcoholism prevents successful performance of the job, the person need not be provided the employment opportunity in question."⁴⁹

41. 42 Fed. Reg. at 22,686.

42. *Id.*

43. *Id.* at 22,685.

44. *Id.* at 22,686.

45. *Id.*

46. *Id.*

47. *Id.* One writer, sharply critical of the inclusions explains the justification: "Having spent a bundle on alcoholism and drug addiction in the clinic, it [the government] now intends to do the same in the admissions and personnel offices." *Fair Play for Drunks*, 177 *NEW REPUBLIC* 7, 8 (1977).

48. 42 Fed. Reg. 22,686.

49. *Id.*

Some potential difficulties are discernible with these particular inclusions. Drug addicts and alcoholics are handicapped for purposes of the Act if their impairment affects one or more major life activities. Therefore the individual must be impaired in his ability to perform such functions as walking, seeing, hearing or speaking, and this impairment must "substantially limit" the activity.⁵⁰ Yet, an employer under the Act need not ignore these conditions or their behavioral manifestations in determining whether the individual is qualified for the employment opportunity.⁵¹ Although the Department had four years and the benefit of commentary input from some 60 national organizations and six national conferences⁵² to formulate the regulation, no specific examples are provided which would serve to guide the hiring employer in interpreting this confusing language. Situations could arise when a person's addiction or alcoholism would "substantially limit" a major life activity, and, at the same time, make him unfit for the employment sought. For example, an addict or alcoholic might suffer from severe trembling that prevents him from walking or speaking. An employer looking for a worker may find himself in the tenuous position of trying to correctly determine whether he must hire the otherwise qualified addict or alcoholic or whether the trembling condition is sufficient justification for refusing employment to the individual.⁵³ Until this subsection of the regulation is either tested in litigation or administrative proceedings, or the appendix is clarified, the scope of these inclusions will remain undefined.

50. 29 U.S.C. § 706(6)(Supp. V 1975); 42 Fed. Reg. at 22,686 (1977).

51. *Id.*

52. *Subcomm. on the Handicapped, supra* note 21, at 1503-04 (lists the groups and organizations consulted in preparation of the regulation).

53. It should be emphasized that this inclusion deals with individuals presently suffering from addiction or alcoholism, and not those who have been cured or rehabilitated, except in cases where the effects of the disease are present after cure. Those individuals cured of the condition would be included within the scope of the second part of the definition. *Id.*, at 1514. See text accompanying note 54, *infra*.

The justification given for including addicts and alcoholics under the first part of the definition is perhaps misplaced in light of the probable inclusion under the second part of the definition. Eligibility for rehabilitation services implies cure or rehabilitation as an ultimate goal. Success in achieving this goal would presumably take the individual out of the scope of mental and physical impairment and into the category of "record or history of impairment." In fact, employment discrimination against persons fighting the battle against drug addiction or alcoholism may be more onerous than against those who have not availed themselves of available services since gainful employment is, in many cases, an important element of successful treatment. *Employment Discrimination Against Rehabilitated Drug Addicts*, 49 NEW YORK UNIV. L. REV. 67 (1974).

B. *Record of Impairment*

The second part of the statutory and regulatory definition includes individuals who have a "record of impairment."⁵⁴ The regulation defines record as "has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities."⁵⁵ The appendix cites examples of the first group as persons with histories of cancer or heart attack, and of the second group as persons who have been misclassified as mentally retarded.⁵⁶

The first part of this subsection apparently seeks to include within its ambit persons who have recovered from various handicapping conditions and diseases, for example, regained sight or hearing, and those whose condition or disease no longer "substantially limits" a major life activity. This might occur where speech therapy successfully returns a patient to normal speech or where physical therapy successfully restores muscle tone to an individual's lower extremities to enable him to walk again. Also included are persons who have been cured of cancer and individuals who have recovered from heart attacks or other serious illnesses.

Employment is just one area in which discrimination will no longer be tolerated if the employer receives federal funds.⁵⁷ A recent study,⁵⁸ conducted after passage of the Act but prior to the signing of the final regulation revealed that of the ninety-two recovered cancer patients interviewed, one-half had encountered at least one work problem related to their illness and almost one-quarter were either targets of discrimination or had been rejected for jobs because of their condition.⁵⁹ Thus, not only does this part of the definition protect from discrimination individuals who have of "record" suffered from a "traditional" handicap, it expands its coverage to include persons who, at the time of discrimination, may be totally free from physical or mental impairment but have either been cured or have recovered from what is conventionally considered to be a serious illness.

This part of the definition also extends protection to another group of individuals who are not technically handicapped and who may be without any physical or mental impairment, such as persons

54. 29 U.S.C. § 706(6) (Supp. V 1975).

55. 42 Fed. Reg. at 22,678.

56. *Id.* at 22,686.

57. See note 24 *supra*.

58. 10 PSYCH. TODAY, *supra* note 14, at 31.

59. *Id.*; See also Bell, *Chad Everett Helps Find Cure for Injustice*, 182 GOOD HOUSEKEEPING 58 (April, 1976).

who have been misclassified as having a handicap. The appendix refers specifically to persons misclassified as mentally retarded.⁶⁰ This type of misclassification is a complex problem which has its origins in educational testing procedures and devices. Potentially, this subsection may also reinclude persons excluded in the first part of the definition: the environmentally, culturally, and economically disadvantaged. Many testing devices inaccurately measure pure learning abilities and disabilities.⁶¹ These devices do not account for the potential for human error in administering and evaluating tests, nor do they account for differences in the test taker's racial, cultural, or economic background.⁶² The inadequacies of intelligence tests harm the misplaced minority child in several ways,⁶³ which may ultimately create a discriminatory situation contemplated under the Act. Misclassifying a child as retarded, based on inaccurate test results, damages the self-image of the child and limits the child's capabilities and opportunities.⁶⁴ Studies have indicated that children who have been labeled and committed to classes for the mentally retarded will act out the role of the mentally retarded person and will come to see himself as others see him.⁶⁵ Additionally, misclassification reduces the likelihood that handicapped children will receive the benefit of the special classes, or it may place the child in a special program which is inappropriate for his needs.⁶⁶

60. Others may qualify on the basis of inaccurate physical or mental diagnosis.

61. Krass, *The Right to Public Education for Handicapped Children: A Primer for the New Advocate*, 1976 ILL. L. FORUM 1016, 1022 n.35 (1976).

62. *Id.* See also *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom. Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969) (abolishing the District of Columbia's schools' tracking system because it was based on invalid classification which failed to distinguish among students by ability to learn rather than by racial, social, and economic factors).

63. *Segregation of Poor*, *supra* note 35, at 1219. In the past, when funds have been tight an educator would tend to be more conservative in deciding to label a child as handicapped. Krass, *supra* note 61, at 1022 n.38.

Misclassifications of this nature may be violative of the Act's proscription against discrimination and would clearly be violative of the Education of All Handicapped Children Act, *supra* note 34. Conversely, if the state reimbursement formulae are based on the number of students who are labeled as handicapped within a given district, the educator would have incentive to overinclude children in special education classes to increase state funding. Krass, *supra* note 61, at 1022 n.38. The resulting misclassification of this sort is contemplated by the definition.

64. *Segregation of Poor*, *supra* note 35, at 1219. "In psychological terms, to identify a child as retarded is to relegate him to a mental prison, where the sentence of retardation becomes a perpetual, self-fulfilling prophecy." *Id.*

65. *Id.* See Gushin and Spicker, *Educational Research in Mental Retardation*, 3 RESEARCH IN MENTAL RETARDATION 217, 250-51 (1968); Meyerowitz, *Self-Derogation in Young Retardates and Special Class Placement*, 33 CHILD DEVELOPMENT 443 (1962).

66. Krass, *supra* note 61, at 1023. This occurrence will probably be considered discrimination against handicapped persons either under the Education of All Handicapped Children Act or the Rehabilitation Act.

Once this misclassification has been accomplished, the individual is stigmatized, both internally and externally. At this point, the Act and the regulation embrace the individual and he is included in the broad definition of "handicapped." Therefore, in at least some instances, the environmentally, culturally, or economically disadvantaged individual⁶⁷ may be reincluded into the definition because of the effect of that condition in his development.

C. *Regarded as Having an Impairment*

The third part of the statutory definition includes any person who "is regarded as having such [mental or physical] impairment."⁶⁸ The regulation sets out a more complete definition:

(iv) "Is regarded as having an impairment" means (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such limitation; (B) has a physical or mental impairment that substantially limits major life activities [sic] only as a result of the attitudes of others toward such impairment; or (C) has none of the impairments defined . . . but is treated by a recipient as having such an impairment.⁶⁹

In an attempt to clarify still further, the appendix explains that this part of the definition "includes many persons who are ordinarily considered to be handicapped but who do not technically fall within the first two parts of the statutory definition.⁷⁰ Included are persons with a limp and others who might not usually be considered handicapped.⁷¹ This part of the definition can be described as a catch-all provision as it would seem to prohibit discrimination in the eye-of-the-beholder.⁷²

This catch-all provision, which may be considered overly broad by some, is not without justification. "A person who is perceived to have a physical or mental handicap is in fact disadvantaged insofar as his job evaluations or employment application reviews are concerned."⁷³ Distinctions between mental, physical, and socioeconomic factors may be blurred or a disability may result from an interaction of these factors.⁷⁴ An individual whose mental or physi-

67. See text accompanying note 40 *supra*.

68. 29 U.S.C. § 706(6)(C) (Supp. V 1975).

69. 42 Fed. Reg. at 22,678.

70. *Id.* at 22,686.

71. *Id.*

72. Wright, *Equal Treatment of the Handicapped by Federal Contractors*, 26 EMORY L.J. 65, 70 (1977).

73. *Id.*

74. Levitan and Taggart, *Employment Problems of Disabled Persons*, 100 MONTHLY

cal impairment would not be of a degree or type protected within the first two parts of the definition would, nonetheless, be included in the third part if a socio-economic disadvantage interacts with his other impairments so as to create a perception of "handicap" in the mind of the employer.⁷⁵

On a broader scale, the provision is justified on the basis that the term "handicapped" is an artificial grouping created by the labeling process of society.⁷⁶ Aside from the more traditional "handicaps," other impairments such as the absence of a finger or color blindness may or may not be considered handicaps:⁷⁷ "A person can be handicapped for one purpose and not for another; for example, the 'six hour mentally retarded child' is considered mentally retarded during the time he or she is in school but copes well and is considered 'normal' outside the academic environment."⁷⁸ The line to be drawn is a subjective and often arbitrary one; it is generally drawn by the "normal majority."⁷⁹ This part of the definition of "handicapped individual" becomes applicable when recipients of federal funds, the normal majority, perceive an individual as having a handicap and discriminate against him for that reason.

The justifiable rationale for this part of the definition does not, however, make it any less unwieldy on a practical level. The question still remains: Who is included in the class of "handicapped individuals" under this catch-all provision? The answer may be: Anyone who can prove his or her case to the satisfaction of the Department or the courts.

One area for dispute will probably center on the weight of, and intent behind, one paragraph of the appendix on a latter part of the regulation. Specifically, the enforcing body will have to determine if the exclusions of the aged and homosexuals, as set out in the appendix, applies to the third part of the regulation's definition. For example, if being aged is considered a mental or physical impairment or a person is treated as having an impairment because of age, the exclusion of the first part of the definition no longer seems tenable. Along the same lines, homosexuality may be considered a mental impairment. Thus categorized, it too could fall within the

LABOR REV. 3 (1977).

75. This interpretation is implicit from the Appendix, which excludes environmental, cultural, and economically disadvantaged persons, in and of themselves, but which includes them when there is an accompanying mental or physical impairment. 42 Fed. Reg. at 22,686.

76. Burgdorf & Burgdorf, *supra* note 1, at 857.

77. *Id.*

78. *Id.*

79. *Id.* at 858.

coverage of this part of the definition. How this apparent internal conflict will be resolved is uncertain.

This part of the definition may also provide protections against a seldom discussed form of job discrimination: bias against short people.⁸⁰ Until now, there has been no law to help short people who are denied work because they do not fit the image that the employer had in mind.⁸¹ "'Short' is a negative word—shortsighted, short-handed, shortchanged. Short means 'untall' to many."⁸² The attitude against the hiring of short people has been stated, "Tall people seem to do better than short people because they fulfill an image—they look the part."⁸³ If discrimination on the basis of shortness is held to be a violation, so too may discrimination on the basis of tallness.

Currently, almost any attempt to identify other sub-groups to this part of the definition is merely speculation. Because of the "eye-of-the-beholder" concept, many members of the protected class cannot be ascertained until discrimination actually occurs.⁸⁵ A few possible inclusions can, however, be contemplated. Persons whose only affliction is that of being ugly could, conceivably, be within the definition.⁸⁶ An employer may no longer be able to select between two equally qualified individuals on the basis of relative comeliness. Other conditions which may be includable in this part of the definition are obesity, venereal disease, pregnancy, allergies, and asthma.

III. CONCLUSION

Although the Department of Health, Education and Welfare has signed the final regulation to effectuate the Rehabilitation Act

80. *Short People—Are They Being Discriminated Against?*, U.S. NEWS & WORLD REPORT, March 28, 1977, at 68.

81. *Id.*

82. *Id.*, quoting Dr. Charles I. Schoot, University of Texas Medical School, at 69.

83. *Id.*, quoting Robert Half, president of a New York City personnel agency, at 68.

84. *Id.* Although height regulations may not be held to be discriminatory under the Act, it is nevertheless possible that some weight regulations may come under attack.

85. Wright, *supra* note 72, at 70.

86. Some cities have in the past had on their books provisions which have been described as "ugly laws." Burgdorf & Burgdorf, *supra* note 1, at 863. Until three years ago, Chicago had such a statute which provided:

No person who is diseased, maimed, mutilated or in any way deformed so as to be an unsightly or disgusting object or improper person to be allowed in or on the public ways or other public places in the city, shall therein or thereon expose himself to public view, under a penalty of not less than one dollar nor more than fifty dollars for each offense. Chicago, Ill., MUN. CODE § 36-34 (repealed 1974). Other cities which have or had similar provisions are Columbus, Ohio, and Omaha, Nebraska. Burgdorf & Burgdorf, *supra* note 1, at 863 n. 57-59.

of 1973, and the Rehabilitation Act Amendments of 1974, the question of who is considered to be a "handicapped individual" under the Act is still largely an unanswered question. Individuals impaired by traditional handicaps are clearly covered under the first part of the definition and it is unlikely that much controversy or litigation will occur over these inclusions. A potential source of controversy will probably center on the meaning of "substantially limits." The Department will undoubtedly clarify the boundaries as it has more opportunity to hear complaints.

The inclusions of alcoholics and drug addicts in the first part of the definition may also meet with challenges because the regulation does not clearly set out guidelines for recipients of federal funds to follow in their decision making. Persons who claim to be handicapped under these inclusions may find their claims defeated on the basis of the employer's judgment that the physical or mental manifestations of their conditions are sufficient grounds to refuse employment or benefit.

The second part of the definition extends protection to persons who are no longer suffering from an impairment and to persons who never were actually handicapped in the sense contemplated in the first part of the definition. Perhaps the most significant inclusions are persons who in the past have had no protection whatsoever, such as victims of serious illnesses who have recovered or been cured. This section of the definition may also extend protection to persons excluded under the first part of the definition: the environmentally, culturally, and economically disadvantaged. Such persons may be able to challenge the exclusion under the second part of the definition if their disadvantage has resulted in misclassification.

The third part of the definition will probably be the most extensively tested. This provision, serving as a catch-all for any group not included elsewhere, defies specificity. Under it, a person who would not be considered handicapped in any other situation might be protected under the Act because of the attitude of one individual or organization. Inclusions under this part may also be the most difficult to prove because it requires subjective insight into the mind of the beholder. Acquisition of proof sufficient to substantiate a claim may be nearly impossible.

Numerous interpretation problems currently exist in the statutory and regulatory definition of "handicapped individual." The Department could perhaps have alleviated some of these problems by giving more detailed examples. On the other hand, any number of examples or illustrations would probably have resulted in an incomplete cataloging of inclusions and exclusions. As complaints

are brought to the attention the Department, certain vague areas and unanswered questions will undoubtedly be resolved to avoid spurious claims. At the same time, the built-in flexibility of the regulation will allow individuals with valid claims, who are not specifically covered by the Act, to successfully challenge discriminatory practices against them.

Harriet L. Turney