NOTES

THIS ESTOPPEL HAS GOT TO STOP: JUDICIAL ESTOPPEL AND THE AMERICANS WITH DISABILITIES ACT

ANNE E. BEAUMONT*

I sometimes think human society is asleep and dreaming a dream where some people are perfect, beautiful, and powerful and others are flawed, unbeautiful and powerless. In the dream the perfect people play their immortal parts and the imperfect people are rejected from human life. We are helping to awaken humanity to the reality that all people are flawed and yet beautiful, and each one limited in his or her unique way and yet powerful.[1]

INTRODUCTION

There are more than forty million people with disabilities in the United States.[2] It has been said that the best definition of what it means to be a person with a disability in America is to be unem-

* Thanks to Paul G. Hearne of the Dole Foundation for the Employment of People with Disabilities, Andrew Imperato of the Equal Employment Opportunity Commission, Susan M. Daniels and Marie Parker Strahan of the Social Security Administration, John D. Kemp and Christine A. Sly of Very Special Arts, and Alan Rich for their indispensable assistance and encouragement. The author also acknowledges the friendship, contributions, and support of Steven H. Blomgren, Carolynn L. Carreño, Arthur K. Chung, Professor Rochelle C. Dreyfuss, Professor Michael Stein, Eric Alan Stone, Robyn L. Thiemann, Paul R.Q. Wolfson, and the staff of the *New York University Law Review*.

The author assisted plaintiff's counsel in the preparation of the brief in opposition to defendants' motion for summary judgment in Mohamed v. Marriott Int'l, Inc., 944 F. Supp. 277 (S.D.N.Y. 1996).

This Note is dedicated with love and admiration to my father, Professor Roger A. Beaumont.

1 Diane Driedger, The Last Civil Rights Movement: Disabled Peoples' International 115 (1989) (quoting Jim Derksen, Speech at Disabled Peoples' International Dakar, Senegal Leadership Training Seminar (Dec. 7-15, 1982)).

2 See 42 U.S.C. § 12101 (1994) (finding population of people with disabilities in United States to be 43 million). But see Joseph P. Shapiro, No Pity: People with Disabilities Forging a New Civil Rights Movement 6 (1993) (noting that number of disabled Americans ranges from 35 million to 43 million "depending on who does the counting and what disabilities are included"). More recent U.S. Census figures have estimated the number of Americans with disabilities to be as great as 49 million. See John M. McNeil, Bureau of the Census, U.S. Dep't of Commerce, P70-33, Americans with Disabilities: 1991-92: Data from the Survey of Income and Program Participation 6 (1994) (counting 48,836,000 people with disabilities).

ployed.[3] The Americans with Disabilities Act[4] (ADA) was enacted in 1990 to implement a federal policy of greater inclusion of people with disabilities in all facets of the nation's life—including employment.[5] The employment provisions of the Americans with Disabilities Act have the potential to ameliorate the staggering unemployment rate of people with disabilities by protecting them against discrimination on the basis of disability as they enter and advance in American workplaces.[6]

In addition to being marked by extremely high unemployment rates, the lives of people with disabilities are characterized by constant interaction with numerous state and federal legal regimes that seek to protect their rights and provide them with various kinds of benefits. For example, an individual with a disability might be protected in her lifetime by as many as three federal civil rights laws,[7] a federal law protecting her ability to use air transportation,[8] and numerous state or

---

[3] See Louis Harris & Assocs., Inc., The ICD Survey of Disabled Americans: Bringing Disabled Americans into the Mainstream 47 (1986) [hereinafter ICD Survey] ("Not working is perhaps the truest definition of which [sic] it means to be disabled . . . ."); see also Peter David Blanck, Assessing Five Years of Employment Integration and Economic Integration Under the Americans with Disabilities Act, 19 Mental & Physical Disability L. Rep. 384, 386-87 (1995) (measuring ADA's impact by, inter alia, percentage of persons with disabilities in integrated employment, unemployment rate of people with disabilities, and incomes of employed people with disabilities).

People with disabilities have an unemployment rate of over 60%. See ICD Survey, supra, at 52 (stating that 62% of people with disabilities who are aged 16 to 64 are not employed or are seeking employment); Louis Harris & Assocs., Inc., N.O.D./Harris Survey of Americans with Disabilities 15 (1994) ("[T]wo-thirds of Americans with disabilities . . . are not working.").

[4] 42 U.S.C. §§ 12101-12213 (1994).

[5] See id. § 12101(a)(8) ("[T]he Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency . . . ."); see also Paul G. Hearne, Employment Strategies for People with Disabilities: A Prescription for Change, in The Americans with Disabilities Act: From Policy to Practice 111, 111-12 (Jane West ed., 1991) ("The purpose of the Americans with Disabilities Act (ADA) is to enable persons with disabilities to participate fully in American life by prohibiting practices that systematically discriminate against them. Full participation in American life means many things, but the most important may be paid employment . . . .").

[6] See 42 U.S.C. §§ 12111-12117 (1994) (employment discrimination provisions of ADA).

[7] See Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12112, 12132, 12182, 12184 (1994) (outlawing disability discrimination in employment, state and local government services, public transportation, and public accommodation); Fair Housing Amendments Act of 1988, 42 U.S.C. § 3604 (1994) (outlawing disability discrimination in rental and sale of housing); Rehabilitation Act of 1973, 29 U.S.C. §§ 794, 794a (1994) (making disability discrimination illegal in employment and service provision by federal government and its contractors and funding recipients).

[8] See Air Carrier Access Act of 1986, 49 U.S.C. § 41705 (1994) (regulating disability access in commercial passenger air transportation).

local human rights laws.[9] In addition, as a school-aged child she might be eligible for financial benefits under the Individuals with Disabilities Education Act,[10] and as an adult she might benefit from state and federal workers' compensation programs[11] and the income support programs of the Social Security Act.[12] This abridged list demonstrates the significant role that statutory law plays in the lives of Americans with disabilities.[13]

While the ADA provides an umbrella of civil rights protections for all people with disabilities, it is almost certain that an individual with a disability will call upon the protections or entitlements of at least one additional state or federal program at some time in her life. Among the disability programs most familiar to both disabled and nondisabled people are workers' compensation and the Social Security Act's income support programs for people with disabilities. Many individuals with disabilities seek both the financial resources made available by workers' compensation and Social Security disability programs and the civil rights protections of the ADA.

Some hypothetical situations can illustrate how and why an individual might pursue such a course of action. Take Mary, a woman born in 1960 who has cerebral palsy. She has difficulty with walking and speaking but is of above-average intelligence. As was very common at the time of her birth, she was institutionalized for most of her

---

9 See, e.g., D.C. Code Ann. §§ 1-2512, -2515, -2519 to -2520 (1995) (prohibiting disability discrimination in employment, real estate transactions, public accommodations, and educational institutions); Me. Rev. Stat. Ann. tit. 5, §§ 4571, 4581-4582, 4591, 4602, 4684-A (West 1995) (prohibiting disability discrimination in employment, housing, public accommodations, and educational institutions and outlawing deprivation of civil rights based on, inter alia, disability); Mass. Gen. L. ch. 272, § 92A (1996) (prohibiting disability discrimination in public accommodations); N.Y. Exec. Law §§ 296, 296-a (McKinney 1996) (prohibiting disability discrimination in employment, public and private housing, public accommodations, and credit applications); Wis. Stat. §§ 111.321, 118.13 (1994) (prohibiting disability discrimination in employment and public education).

10 20 U.S.C. §§ 1400-1485 (1994).

11 See, e.g., Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1994) (providing federal workers' compensation benefits for longshoremen and harbor workers); Fla. Stat. ch. 440 (1995) (Florida workers' compensation law); Mass. Gen. L. ch. 152, §§ 1-77 (1996) (Massachusetts workers' compensation law); N.Y. Work. Comp. Law §§ 1-11 (McKinney 1992) (New York workers' compensation law); Tex. Lab. Code Ann. §§ 401.001-.023 (West 1996) (Texas workers' compensation law); Wis. Stat. §§ 102.01-.89 (1994) (Wisconsin workers' compensation law).

12 42 U.S.C. §§ 401-433, 1381-1385 (1994). See generally infra text accompanying notes 90-94 (describing Social Security Act's income support benefits).

13 See Robert L. Burgdorf, Jr., The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute, 26 Harv. C.R.-C.L. L. Rev. 413, 428 (1991) (noting that as many as 29 federal laws prohibit discrimination against people with disabilities); Jane West, The Social and Policy Context of the Act, in The Americans with Disabilities Act: From Policy to Practice, supra note 5, at 3, 16-19 (describing federal programs that served as ADA's "legislative building blocks").

life until she was eighteen and therefore had little access to education and did not develop marketable job skills. When her nursing home was closed and she was deinstitutionalized in 1978, Mary needed financial support to get started living on her own. She applied for and readily received such assistance through the Supplemental Security Income (SSI) program, an income support program for people with disabilities that is part of the Social Security Act. In 1985, Mary enrolled in a supported employment program through an independent living center.[14] This program enabled Mary, with the help of a job coach, to become employed as a mail clerk in the office of a federal contractor in her town. She only worked part-time, however, because if she had earned more than $500 per month her SSI benefits would have been discontinued.[15]

Over a period of several years, Mary developed both the vocational and social skills necessary to advance in her employment. In 1991, having decided to try to support herself without SSI, she applied for a job as a full-time clerk in a large business office. Mary did not get the job because the employer interpreted her speech difficulty as a sign that she was mentally retarded. If Mary were to sue pursuant to the ADA for employment discrimination on the basis of disability, could the employer raise Mary's previous application for—or acceptance of—SSI as a defense to her claims? If the employer is allowed to succeed with such a defense, what are the implications for the policies underlying the ADA and for Mary's personal efforts to work, support herself, and live independently?

Now consider Bob, who for most of his life was not disabled according to any definition. At the age of thirty-five he was seriously injured when lifting an overweight package as a delivery person for a parcel delivery company. Bob received workers' compensation benefits and was unable to work for almost a year.

When his doctor determined that Bob was fit to return to work, Bob attempted to return to his old job but instead was given a desk job at a reduced salary. The employer now says that the desk job and salary cut were its ways of "reasonably accommodating" Bob's disability. Bob sues under the ADA, saying he has no disability other than the record of having a back injury. Can the employer point to Bob's experience with the workers' compensation system as evidence—or even proof—of his inability to perform his original job? Conversely,

[14] For a description of independent living centers, see infra notes 38-39 and accompanying text.

[15] See infra note 103.

does the ADA's definition of "disability" automatically include every individual who has received workers' compensation benefits?

While these scenarios suggest why an individual with a disability might want to pursue her rights under these statutes simultaneously or even seriatim, the ADA appears at first blush to be somewhat inconsistent with statutory income support programs:[16] The ADA extends its prohibitions of discrimination in employment to an individual who has a disability but who can perform the essential functions of a particular job with or without reasonable accommodation.[17] On the other hand, the Social Security Act and most workers' compensation statutes require applicants to demonstrate an inability to work in order to receive benefits.[18] Given these superficial explanations, one might readily conclude that someone who is sufficiently disabled to receive workers' compensation or Social Security disability benefits is too disabled to be protected by the ADA's employment discrimination prohibitions. In fact, a growing number of courts have concluded just that, using an equitable device known as "judicial estoppel" to foreclose ADA claims by individuals who have had experience with statutory income support programs.[19] Nevertheless, there are significant legal and policy reasons why an individual can and should receive income support under workers' compensation or the Social Security Act and still be able to seek ADA protection in a lawsuit.[20]

The ADA, not surprisingly, has been the subject of much commentary. So far, such scholarship has tended to focus on the ADA in

---

16 This Note will refer to workers' compensation, SSI, and Social Security Disability Insurance (SSDI) together as "statutory income support programs."

17 See 42 U.S.C. §§ 12111(8), 12112(a) (1994) (defining "qualified individual with a disability" and outlawing discrimination against individuals so defined).

18 See, e.g., 33 U.S.C. § 902 (1994) (defining "disability" in federal longshoremen's and harbor workers' compensation law as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment"); 42 U.S.C. § 423(d)(1)(A) (1994) (defining disability in Social Security Act as "inability to engage in any substantial gainful activity"). Some workers' compensation laws do not require that an employee be disabled from all work, but only from the work she had been doing prior to the injury. See, e.g., N.Y. Work. Comp. Law § 37 (McKinney 1993) (defining "disability" in New York workers' compensation law as "the state of being disabled from earning full wages at the work at which the employee was last employed").

One of this Note's primary arguments is that judicial estoppel is not appropriate because the workers' compensation definition of disability is not congruent with the ADA's definition of qualified individual with a disability. The question whether judicial estoppel is somehow more appropriate where a workers' compensation law's definition of disability more closely parallels the ADA—particularly in the ADA's essential functions and reasonable accommodation provisions—is beyond the scope of this Note.

19 See infra Part II.

20 See infra Part III.

isolation, rather than in the context of existing statutory frameworks.[21] Other commentators have considered the ADA's effect on employer behavior in connection with workers' compensation and whether individuals who have received statutory income support benefits ought to be eligible automatically for ADA protections.[22] This Note attempts to reconcile the ADA's terms and policies with the statutory frameworks of income support programs and to determine whether a per se exclusion of recipients of such income supports comports with these legal regimes and their underlying policies.

Part I of this Note examines the social and legal history of disability in American society and law in order to place the ADA and its policy goals in their proper context in the disability rights movement. It then compares the terms of and policies underlying the ADA's defi-

---

21 See, e.g., Burgdorf, supra note 13, at 415 (analyzing ADA's "approach and content" and "its implications for future civil rights legislation"); Adrienne L. Hiegel, Note, Sexual Exclusions: The Americans with Disabilities Act as a Moral Code, 94 Colum. L. Rev. 1451, 1454 (1994) (describing ADA as "transformation in the law's treatment of disabled persons" and analyzing its moral implications); Eric Wade Richardson, Comment, Who Is a Qualified Individual with a Disability Under the Americans with Disabilities Act, 64 U. Cin. L. Rev. 189, 223 (1995) (arguing that interpretation of Rehabilitation Act definition of "disability" should be persuasive, not binding, authority because ADA imposes greater burden on society); Amalia Magdalena Villalba, Comment, Defining "Disability" Under the Americans with Disabilities Act, 22 U. Balt. L. Rev. 357, 357-58 (1993) (analyzing ADA definition of "disability" in light of legislative history, statutory language, regulations, and Rehabilitation Act).

22 See, e.g., John M. Floyd, Americans with Disabilities Act: Impact upon Workers' Compensation—Friend or Foe? A Primer for the Corporate Insurance Department and Outside Counsel, 17 Am. J. Trial Advoc. 637, 638 (1994) (discussing employers' new obligations under ADA and noting possibility of issue whether "disability" under ADA and workers' compensation overlap); Janet E. Goldberg, Employees with Mental and Emotional Problems—Workplace Security and Implications of State Discrimination Laws, the Americans with Disabilities Act, the Rehabilitation Act, Workers' Compensation, and Related Issues, 24 Stetson L. Rev. 201, 202-14 (1994) (discussing impact of workers' compensation and ADA on workplace violence by employees with mental or emotional illnesses); Ranko Shiraki Oliver, The Impact of Title I of the Americans with Disabilities Act of 1990 on Workers' Compensation Law, 16 U. Ark. Little Rock L.J. 327, 361-70 (1994) (discussing employers' new obligations under ADA); Frank S. Ravitch, Balancing Fundamental Disability Policies: The Relationship Between the Americans with Disabilities Act and Social Security Disability, 1 Geo. J. on Fighting Poverty 240, 251 (1994) (explaining relevance of ADA's reasonable accommodation principles to SSDI benefit determinations); Edward T. Wahl & Jenny B. Wahl, Disability Discrimination and Workers' Compensation After the Americans with Disabilities Act: Sorting out the Rights and Duties, 16 Hamline L. Rev. 81, 103 (1992) (arguing that ADA threatens workers' compensation's "bargain" between employers and employees); Scott A. Carlson, Comment, The ADA and the Illinois Workers' Compensation Act: Can Two "Rights" Make a "Wrong"?, 19 S. Ill. U. L.J. 567, 567-68 (1995) (arguing that ADA imposes increased risk on employers that was not part of original "bargain" of workers' compensation system); Mary E. Ingley & Barbara L. Kornblau, Workers' Compensation and the Americans with Disabilities Act, 66 Fla. B.J. 77, 80 (1992) (arguing that ADA will cut employers' costs by ensuring return to work after leaves due to work-related injuries).

nition of "qualified individual with a disability" with the goals, methods, and definitions of "disability" of typical workers' compensation statutes and the Social Security Act. Part II analyzes the ADA cases in which courts have employed judicial estoppel. Part III criticizes the legal and policy reasoning behind this approach and proposes an alternative, drawing from the decisions of courts that have refused to employ judicial estoppel in similar factual circumstances as well as from the text and policy goals of the ADA.

I
DISABILITY IN AMERICAN SOCIETY AND LAW

The ADA signifies the coming of age of a civil rights movement that has been in the making for decades, and the experience of people with disabilities in America, like that of some racial minorities, has in large measure been reflected in and influenced by the law. The ADA represents the state-of-the-art in legal protections for disability rights, and its employment provisions have immense potential to further the independence and quality of life of people with disabilities. In contrast, statutory income support programs reflect a vision of disability and its relationship to employment that is decades old. These programs address the needs of people with disabilities through income support rather than through civil rights protections. Individuals with disabilities therefore can be caught between very disparate visions of disability and conflicting views about the best legal and policy approaches to assist them.

A. A Short History of Disability in American Society and Law

1. Defining "Disability"

The social and legal history of the disability rights movement illustrates how the concept of "disability" in society has changed drastically, most especially in the last twenty-five years. Congress took notice of this reality in its deliberations concerning the ADA. The legislative history of the ADA is replete with stories about the personal experiences of people with disabilities, which, perhaps more than any other data presented to Congress, illustrate the diversity of the disability experience in America.[23] Depending on who does the defining, "disability" can include a variety of personal characteristics.

[23] See, e.g., House Comm. on Education and Labor, 101st Cong., 2d Sess., Legislative History of P.L. 101-336, The Americans with Disabilities Act 108, 304-05 (Comm. Print 1990) [hereinafter ADA Legislative History] (summarizing testimony of numerous distinguished members of disability rights community).

Journalist Joseph Shapiro has summarized the scope of the term "disability" as follows:

> There are hundreds of different disabilities. Some are congenital; most come later in life. Some are progressive, like muscular dystrophy, cystic fibrosis, and some forms of vision and hearing loss. Others, like seizure conditions, are episodic. Multiple sclerosis is episodic and progressive. Some conditions are static, like the loss of a limb. Still others, like cancer and occasionally paralysis, can even go away. Some disabilities are "hidden," like epilepsy or diabetes. Disability law also applies to people with perceived disabilities such as obesity or stuttering, which are not disabling but create prejudice and discrimination. Each disability comes in differing degrees of severity. Hearing aids can amplify sounds for most deaf and hard-of-hearing people but do nothing for others. Some people with autism spend their lives in institutions; others graduate from Ivy League schools or reach the top of their professions.[24]

2. *Legal Landmarks*

America has grown substantially more welcoming to people with disabilities since the time of its founding. During the colonial period, people with disabilities were deported from the colonies because they were not thought to be able to support themselves in the physically rigorous society.[25] Starting with New York State in 1910, and in response to the outrageous costs and destructive effects of litigation between employers and employees concerning on-the-job injuries, all fifty states enacted workers' compensation statutes.[26] Most of these programs provide for no-fault insurance for workplace and work-

---

[24] Shapiro, supra note 2, at 5. Shapiro also points out that "[d]isability . . . is the one minority that anyone can join at any time." Id. at 7. While most definitions seem to assume that disability has only negative effects and connotations, disability has been acknowledged to have benefits and positive associations. See, e.g., Michael Bérubé, Life as We Know It: A Father, a Son, and Genetic Destiny, Harper's Mag., Dec. 1994, at 41, 49 (discussing "the notion that Down syndrome wouldn't have been so prevalent in humans for so long without good reason"); Oliver Sacks, An Anthropologist on Mars, The New Yorker, Dec. 27, 1993/Jan. 3, 1994, at 106, 120-21 (describing unique capabilities and career accomplishments of woman with autism); see also Shapiro, supra note 2, at 38-40 (describing fight of woman with disability to conceive and bear child with disability); id. at 147 (describing how some traits of autistic people make them extremely dependable and desirable employees). Many people with hearing impairments, for example, consider themselves to be a part of a distinct and positive culture. See id. at 74-104 (describing "deaf culture").

[25] See Shapiro, supra note 2, at 58. It is thought, however, that Stephen Hopkins, one of the signers of the Declaration of Independence, had cerebral palsy. See id. at 59.

[26] See Kenneth W. Koprowicz, Corporate Criminal Liability for Workplace Hazards: A Viable Option for Enforcing Workplace Safety?, 52 Brook. L. Rev. 183, 190-91 (1986) (describing history and then-current legal state of workers' compensation law); see also Albert J. Millus & Willard J. Gentile, Workers' Compensation Law and Insurance 30 (1st

related injuries, funded by contributions from both employers and employees.[27]

People with disabilities continued to advance in the periods following both the Civil War and World War I, thanks to governmental programs set up to assist military veterans.[28] With the return of American soldiers after World War II, the social and medical treatment of people with disabilities changed drastically. Rehabilitation medicine as a distinct medical specialty was created, focusing on the return to normal life of veterans with disabilities.[29]

Despite improvements brought about by workers' compensation and rehabilitation medicine, the popularity of Social Darwinism and the eugenics movement in the first half of the twentieth century fostered societal antipathy toward people with disabilities, who were placed in institutions, hidden from the view of their families and the public.[30] Meanwhile, the earliest rumblings of rebellion by people with disabilities began to be felt as blind and deaf people organized national advocacy groups[31] and as parents fought to gain better opportunities for their children with disabilities.[32]

In 1956 and then again in 1974, as part of amendments to the Social Security Act, the federal government established two national income support programs for people with disabilities: Supplemental Security Income (SSI) and Social Security Disability Insurance

---

ed. 1976) ("In the years immediately following 1910, almost every jurisdiction followed New York's pioneering lead and enacted a worker's compensation statute.").

27 See Jay E. Grenig, Prentice Hall's Workers' Compensation Handbook ¶ 101, at 102 (1987) (describing terms of "typical" workers' compensation law); see also Koprowicz, supra note 26, at 191-92 (describing common features of workers' compensation laws).

28 See Shapiro, supra note 2, at 60-62 (describing impact on society of soldiers returning from Civil War and World War I).

29 See id. at 63; cf. Driedger, supra note 1, at 7 (noting that "young people disabled by war, polio epidemics and accidents began to live longer" as a result of post-World War II technological advances).

30 See Driedger, supra note 1, at 7 ("At the turn of the twentieth century, most disabled people were hidden from public view . . . hidden away by their families . . . [and] housed in institutions for the so-called crippled, and asylums for the so-called mentally incompetent and deranged."); see also Shapiro, supra note 2, at 61 (describing institutions as "places of abuse, isolation, and segregation"); Barbara P. Ianacone, Historical Overview: From Charity to Rights, 50 Temple L.Q. 953, 954-55 (1977) (describing application of eugenic sterilization laws "to solv[e] society's problem of dealing with the disabled").

31 See Driedger, supra note 1, at 9-12 (describing emergence of international, national, and local organizations for people with disabilities).

32 See id. at 9 ("In the 1950s, many parents, friends and other interested people realized that disabled young people needed services . . . [that] would enable disabled people to live productive lives."); see also Shapiro, supra note 2, at 63 ("Disabled people turned to civil disobedience for the first time during the Depression.").

(SSDI).[33] These schemes marked the federal government's first efforts to assist people with disabilities.

Despite increasing financial support from the federal government, people with disabilities remained one of the few groups against which it was still socially and legally acceptable to discriminate after the advances of the civil rights movement of the 1960s.[34] Until the 1970s, it was routine for people with disabilities to be warehoused in prison-like institutions and nursing homes, even if they were not ill and without regard to their ability to contribute to society or to the economy.[35]

Heartened by the success of people of color in the 1960s,[36] people with disabilities battled in the late 1960s and early 1970s to deinstitutionalize themselves by moving into group homes.[37] Next came the "independent living" movement, founded in the late 1960s by Ed Roberts.[38] There are now hundreds of independent living centers across the country assisting people with disabilities in determining their own lifestyles, whether in a segregated setting with other people with disabilities, integrated into the community as a whole, or somewhere in between.[39]

---

[33] See infra text accompanying notes 90-94. See generally Frank S. Bloch, Federal Disability Law and Practice §§ 1.3, .6 (1984) (describing addition of SSI and SSDI programs to Social Security Act).

[34] See Shapiro, supra note 2, at 113 (noting unacceptability of institutionalizing woman or black person although "it was all right if they were born disabled").

[35] See id. at 61, 160 (noting that institutionalization removed "basic right to choice, opportunity, and claim to community" of people with disabilities).

[36] See Driedger, supra note 1, at 1 ("Many disabled people view their rights movement as the last in a long series of movements for rights—labor, blacks, colonized peoples, poor people, women . . . ."); Shapiro, supra note 2, at 41 (comparing arrival of disability rights leader Ed Roberts at University of California to arrival of James Meredith at newly integrated University of Mississippi); Burgdorf, supra note 13, at 427 (noting that disability civil rights movement "was inspired in large part by the struggles of African-Americans and other minorities in the 1960s").

[37] See, e.g., Shapiro, supra note 2, at 161-62 (describing closing of institutions in order to integrate people with disabilities into community group homes and foster families); Ianacone, supra note 30, at 959 (describing how, in 1977, "many handicapped persons [were] organized to demand their 'right to live in the world'" (quoting Jack Achtenberg, Law and the Physically Disabled: An Update with Constitutional Implications, 8 Sw. U. L. Rev. 847, 851 (1976))).

[38] See Shapiro, supra note 2, at 41-53. Roberts was a quadriplegic wheelchair user and student at the University of California, Berkeley, who was forced to live in the University's hospital because no support services were available to permit him to live on his own in a dormitory or apartment. See id. at 45-46; William K. Muir, Ed Roberts, Cal. Monthly, June 1995, at 53, 53 (obituary). Frustrated by this experience, Roberts founded the first "center for independent living," a clearinghouse to help people with disabilities connect with the support services necessary to allow them to live on their own. See Shapiro, supra note 2, at 53-55; Muir, supra, at 53.

[39] See Shapiro, supra note 2, at 72.

While Ed Roberts was working at the grassroots level to gain independence, Congress passed the Rehabilitation Act of 1973.[40] Its main purpose was not to confer civil rights protections on people with disabilities but simply to lay the statutory foundation for national programs of vocational rehabilitation[41] and job training[42] for people with disabilities and to establish a number of national governmental organizations focused on the employment of people with disabilities.[43] However, buried in the middle of the statute was the little-noticed and unsought-after[44] "Section 504,"[45] which provided that:

> No otherwise qualified individual with handicaps . . . shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.[46]

Through this brief provision, Congress outlawed disability discrimination throughout the federal government and in the numerous private businesses and organizations that receive federal funding.[47] Although signaling a major shift in the tactics of federal policy toward people with disabilities by moving from financial assistance to civil rights protections, Section 504 obviously did not eliminate discrimination overnight. It took a tense political standoff—one of the first instances of

---

40 Pub. L. No. 93-112, 87 Stat. 355 (codified as amended at 29 U.S.C. §§ 701-797b (1994)).

41 See id. §§ 2-6, 100-130, 87 Stat. at 357-59, 363-74 (codified as amended at 29 U.S.C. §§ 701-705, 720-753a (1994)).

42 See id. §§ 200-204, 87 Stat. at 374-77 (codified as amended at 29 U.S.C. §§ 760-765 (1994)).

43 See id. §§ 401-405, 87 Stat. at 386-89, repealed by Act of Nov. 6, 1978, Pub. L. No. 95-602, § 117, 92 Stat. 2955, 2977; id. § 501 (codified as amended at 29 U.S.C. § 791 (1994)).

44 See Shapiro, supra note 2, at 65 ("Section 504 . . . was no more than a legislative afterthought.").

45 Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (1973). As codified, this section is found in amended form at 29 U.S.C. § 794(a) (1994). However, among the disability community it continues to be known as "Section 504," as it was numbered in the original legislation. See, e.g., Shapiro, supra note 2, at 64-70 (discussing battle for promulgation of regulations for "Section 504").

46 § 504, 87 Stat. at 394.

47 See 29 U.S.C. § 794(b) (1994) (describing private entities coming within the definition of "program or activity"); see also E.E. Black Ltd. v. Marshall, 497 F. Supp. 1088, 1092 (D. Haw. 1980) (first case to apply Rehabilitation Act's antidiscrimination provisions to general construction contractor with $50,000 federal government contract and more than 50 employees).

large-scale, public political activism by people with disabilities—to compel promulgation of the regulations implementing Section 504.[48]

Once Section 504 opened the door, more expansive legislation followed. In 1975, the Education for All Handicapped Children Act[49] (later amended and renamed the Individuals with Disabilities Education Act (IDEA)[50]) promised a "free appropriate public education" to all children with disabilities.[51] Three years later, Congress passed the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments,[52] which created a variety of federal programs, such as employment development and rehabilitation programs, for people with disabilities and which created agencies to oversee them. In 1986, the Air Carrier Access Act[53] guaranteed access to commercial airline transportation for people with disabilities, and the Fair Housing Act[54] was amended in 1988 to include individuals with disabilities among those entitled to nondiscriminatory access to housing.[55] Finally, with the ADA's passage in 1990, Congress deemed discrimination against people with disabilities to be contrary to national policy[56] and generally prohibited by federal law.[57]

3. *Disability in America After the ADA*

While not all people with disabilities unanimously support the immense changes wrought by the disability rights movement,[58] the emer-

---

[48] See Shapiro, supra note 2, at 64-70 (describing 25-day occupation of Department of Health, Education and Welfare office in San Francisco and ensuing promulgation of regulations for Section 504 of the Rehabilitation Act).

[49] Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified at 20 U.S.C. §§ 1400-1485 (1994)).

[50] See Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, § 903(a), 104 Stat. 1103, 1141-42 (codified at 20 U.S.C. § 1400(a) (1994)) (revising, inter alia, short title of statute).

[51] Pub. L. No. 94-142, § 3(c), 89 Stat. at 775.

[52] Pub. L. No. 95-602, 92 Stat. 2955 (1978) (codified as amended in scattered sections of 5, 20, 25, 29, 42, 43, 48 U.S.C. (1994)).

[53] Pub. L. No. 99-435, 100 Stat. 1080 (1986) (codified as amended at 49 U.S.C. § 41705 (1994)).

[54] Pub. L. No. 90-284, tit. VIII, 82 Stat. 81 (1968) (codified as amended at 42 U.S.C. §§ 3601-3619 (1994)).

[55] Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (codified as amended at 28 U.S.C. §§ 2341, 2342 (1994), 42 U.S.C. §§ 3601, 3602, 3604-3608, 3610-3631 (1994)).

[56] See 42 U.S.C. § 12101 (1994) (setting forth "the Nation's proper goals regarding individuals with disabilities").

[57] See id. §§ 12112, 12132, 12182 (1994) (stating general prohibitions of discrimination in employment, public services, and public accommodations).

[58] Compare Richard Epstein, Out of Institutions, into Group Homes, The Record (Hackensack), Oct. 8, 1995, at L3, available in LEXIS, News Library, NJREC File ("[C]hange [involved in moving into the community] can be frightening . . . .") with Shapiro, supra note 2, at 183 (explaining how resistance to integration of some people with disabilities keeps others in segregation).

gence of people with disabilities as a potent political force is a positive development.[59] However, the same issues that originally brought about these changes continue to have significance in the lives of people with disabilities, who seek to decide for themselves how to live, learn, work, and socialize without being constrained in their choices by the stereotypes and prejudices of nondisabled people.[60]

Employment is perhaps the best measure of the independence of people with disabilities because it makes so many other facets of independent living possible. By working, people with disabilities gain the ability to be consumers, taxpayers, travelers, and homeowners, and to do many other things most able-bodied people take for granted. However, people with disabilities suffer from an alarming unemployment rate of sixty percent or higher.[61] Therefore, it is not surprising that concern with employment discrimination has such a prominent place in the ADA and that so much of its promise lies in its ability to bring people with disabilities into the work force.[62]

B. The Americans with Disabilities Act

1. The ADA's Provisions

In 1990, Congress passed and President George Bush signed into law the Americans with Disabilities Act.[63] The ADA furthers the policy goal of integrating people with disabilities into American society through prohibitions against discrimination in three major areas:

---

[59] See Shapiro, supra note 2, at 332 (describing how disability rights movement aims to "create a society more hospitable to all").

[60] See id. ("[People with disabilities] insist simply on common respect and the opportunity to build bonds to their communities as fully accepted participants in everyday life."); Burgdorf, supra note 13, at 426-27 (describing "civil rights view of persons with disabilities not as unfortunate, afflicted creatures needing services and help, but as equal citizens, individually varying across the spectrum of human abilities, whose over-riding needs are freedom from discrimination and a fair chance to participate fully in society"); see also Shapiro, supra note 2, at 328-29 (describing typical reactions of nondisabled people to people with disabilities).

[61] See sources cited supra note 3.

[62] In addition to the social costs discussed in this Note, keeping people with disabilities out of the workplace has huge economic costs. See, e.g., Shapiro, supra note 2, at 162-63 (noting that states spend average of $56,000 annually on each person in institution compared with slightly more than half that amount for programs allowing people with disabilities to live in communities); Shelley Donald Coolidge, Fewer with Disabilities at Work Since Passage of Civil Rights Act, Christian Sci. Monitor, Mar. 7, 1995, at 1, 9 ("It costs $200 billion a year in public and private payments to keep disabled Americans in dependence . . . .").

[63] Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. §§ 12101-12213 (1994)).

employment,[64] state and local government services,[65] and public accommodations.[66] Regulations have been promulgated to implement the ADA and to provide employers and others with technical assistance in complying with the ADA.[67]

An individual with a disability may enforce her rights pursuant to the ADA through a complaint to a federal agency and then, if the complaint receives the support of that agency, through a civil suit in federal court.[68] The Equal Employment Opportunity Commission (EEOC) is charged with oversight and enforcement of the employment provisions of the ADA.[69] As of September 1996, more than 72,000 complaints of employment discrimination in violation of the ADA had been filed with the EEOC.[70]

In a typical employment claim, an individual with a disability might sue a potential employer for not having hired her based on her disability, or she might sue a current or former employer for having discriminated against her in the course of her employment or for having discharged her. If such a suit is successful, remedies are available in the form of equitable relief—such as reinstatement or an order to reasonably accommodate[71] the employee—or, under the Civil Rights Act of 1990, in the form of damages.[72]

---

64 See 42 U.S.C. §§ 12111-12117 (1994).

65 See id. §§ 12131-12165.

66 See id. §§ 12181-12189.

67 See id. §§ 12116, 12134, 12149, 12164, 12186, 12204 (allocating authority to promulgate regulations for and enforce ADA among Equal Employment Opportunity Commission, Department of Justice, Department of Transportation, and Architectural and Transportation Barriers Compliance Board); see also 28 C.F.R. pts. 35, 36 (1996); 29 C.F.R. pt. 1630 (1996) (ADA regulations for Titles I, II, and III).

68 A private right of action to enforce rights under the ADA is provided through the Civil Rights Act of 1964. See 42 U.S.C. §§ 12117(a), 12133, 12188(a) (1994) (enforcement provisions in ADA); see also id. §§ 2000e-4 to -6, -8 (1994) (private right of action provisions in Civil Rights Act).

69 See id. § 12117 (1994) (assigning enforcement authority for Title I to EEOC); see also 29 C.F.R. pt. 1630 (1996) (EEOC regulations implementing employment provisions of ADA).

70 Equal Employment Opportunity Comm'n, Cumulative ADA Charge Data for the July 26, 1992-September 30, 1996 Reporting Period (1996).

71 The term "reasonable accommodation" refers to those actions an employer might take to make it possible for a person with a disability to perform a job for which she is otherwise qualified. See 42 U.S.C. § 12111(9) (1994); see also 29 C.F.R. pt. 1630, app. § 1630.2(o) (1996) (describing and offering examples of three categories of reasonable accommodations).

72 See 42 U.S.C. § 1981a(a)(1) (1994).

2. *The ADA's Protected Class*

A large measure of the criticism of the ADA has been directed at the breadth—some say vagueness—of its terms.[73] The term "disability" raises particularly difficult issues for courts and for those employers[74] who seek to comply with the ADA. The ADA defines "disability" as follows:

> The term "disability" means, with respect to an individual—
>
> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment.[75]

Through these three alternatives, the ADA accounts for the varied ways people with disabilities[76] face limitations in employment and in obtaining services from employers, businesses, and state and local

---

[73] See, e.g., Kevin Pritchett, Provisions of Disabilities Act Puzzle Many Firms, Wall St. J., Nov. 29, 1991, at B1 (quoting lawyer as saying one of ADA's weaknesses is its "use of terms that really don't have anything but vague and ambiguous meanings"); The Lawyers' Employment Act, Wall St. J., Sept. 11, 1989, at A18 (editorial) (criticizing bill for including a "bevy of . . . groups" not yet imagined in definition of "disability"); Carolyn L. Weaver, Disabilities Act Cripples Through Ambiguity, Wall St. J., Jan. 31, 1991, at A16 ("With ambiguous legal standards, resources that could have been devoted to [people with disabilities] . . . will be siphoned off to creating new jobs for attorneys . . . ."); see also Benjamin Zycher, Watch the Pork Barrel, Not His Lips, L.A. Times, May 18, 1990, § B, at 7 (calling ADA "a guarantee of full employment for the lawyers"). But see Marlene Cimons, Far-Reaching Bill to Protect Disabled from Discrimination Gains Speed, L.A. Times, July 30, 1989, § 1, at 6 ("Through its broad scope, the bill has forged a massive and unusual coalition of supporters."); Freeing the Disabled from Bias, L.A. Times, July 29, 1989, § 2, at 8 (editorial) (noting that breadth of ADA's definition of "disability" furthers extension of civil rights protections originated in Rehabilitation Act); Some Good Civil Rights News, Wash. Post, Sept. 9, 1991, at A14 (editorial) (noting that ADA defines as much as one-sixth of population as disabled and extends to them full protection of civil rights laws).

[74] Only those employers with 15 or more employees are required to comply with the employment provisions of the ADA. See 42 U.S.C. § 12111(5)(A) (1994).

[75] Id. § 12102(2) (1994).

[76] In the ADA, Congress adopted the more current term "person with a disability" rather than "handicapped person":

> The use of the term "disability" instead of "handicap" . . . represents an effort by the Committee to make use of up-to-date, currently accepted terminology. . . .
>
> . . . [T]he choice of terms to apply to a person with a disability is overlaid with stereotypes, patronizing attitudes, and other emotional connotations. . . .
>
> . . . [I]t [is] important for the current legislation to use terminology most in line with the sensibilities of most Americans with disabilities. No change in definition or substance is intended nor should be attributed to this change in phraseology.

ADA Legislative History, supra note 23, at 119; see also Shapiro, supra note 2, at 33 (noting that "person with a disability" is preferable to disabled or handicapped because "it emphasizes the individual before the condition").

governments.[77] The first part of the definition accounts for most conditions that are traditionally thought of as disabilities, such as physical abnormalities, learning disabilities, and many diseases.[78] The second part targets the residual discrimination that might occur either when a disability no longer exists—as when a cancer survivor is treated as if she still has cancer[79]—or when the improper documentation of a condition noted in the first prong influences the actions of a covered entity.[80] The third part addresses the problem of an individual being perceived and discriminated against as disabled although she has no disability at all, or when her condition, while arguably an "impairment" of some sort, does not, as the first prong requires, "substantially limit one or more major life activities." This provision is aimed at stereotypes, biases, and premature conclusions about the abilities of people with disabilities, such as where a burn victim who has visible scars but no disability in practical terms is presumed by others to be disabled.[81]

The ADA's employment provisions apply to a protected class that is somewhat smaller than the universe of all people with disabilities. The protections against employment discrimination in Title I of the ADA are available only to a "qualified individual with a disability," which is defined as "[a]n individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or

---

77 This three-part definition is essentially the same as the definition of "individual with handicaps" used in the Rehabilitation Act of 1973. See ADA Legislative History, supra note 23, at 467. In addition to looking to the Rehabilitation Act for its definition of "disability," Congress incorporated the substantial body of case law interpreting the Rehabilitation Act into the ADA such that this case law is binding on courts seeking to interpret the ADA's terms. Therefore, in interpreting the ADA's definition of "disability," courts are bound by prior interpretations of the term "handicap" as used in the Rehabilitation Act. See id. at 119 (providing analysis of term "individual with handicaps" in regulations implementing Rehabilitation Act to apply to ADA definition of "disability"). Rehabilitation Act jurisprudence is incorporated into the ADA with the proviso that the Rehabilitation Act protections constitute a floor for the ADA's protections. See 42 U.S.C. § 12201(a) (1994). Congress also expected that the Rehabilitation Act regulations would apply as binding authority in interpreting the ADA definition of "disability," although this is not specified in the text of the ADA itself. See ADA Legislative History, supra note 23, at 323. As a result, the ADA's Rehabilitation Act heritage underlies all ADA jurisprudence.

78 See ADA Legislative History, supra note 23, at 120 (describing possible range of conditions covered).

79 See id. at 121.

80 See id.

81 See id.; see also Nancy Lee Jones, Essential Requirements of the Act: A Short History and Overview, in The Americans with Disabilities Act: From Policy to Practice, supra note 5, at 25, 43 (describing how burn victim would come within ADA's definition of disability).

desires."[82] This definition confines the ADA's protections against employment discrimination to individuals with disabilities who are qualified to perform the core duties of the positions they hold or seek. Nevertheless, the ADA also requires an employer to make "reasonable accommodations" to enable a person with a disability to perform her job.[83]

As the first national civil rights statute for people with disabilities, the Americans with Disabilities Act offers unprecedented opportunities for people with disabilities to participate fully as members of American society. Its civil rights approach to furthering such participation represents a significant change in tactics from statutory income supports, which provide solely financial benefits to people with disabilities.

C. *Statutory Income Support Programs: Workers' Compensation Statutes and the Social Security Act*

While the ADA provides overarching civil rights protections to people with disabilities, workers' compensation and Social Security provide a more finite resource: funding for income support. These income support programs, although somewhat different in their terms and goals, use virtually identical means to define the class of individuals to receive their benefits.

1. *Workers' Compensation*

All fifty states currently have some form of workers' compensation program, which provides income support to individuals who are injured on the job.[84] Full disability benefits are generally only available to people who have been "totally disabled" by such injuries, as defined by the relevant state statute.[85]

Workers' compensation statutes impose absolute liability on employers, regardless of who caused the employee's injury,[86] without im-

---

[82] 42 U.S.C. § 12111(8) (1994).

[83] Id. § 12111(9).

[84] See Jeffrey V. Nackley, Primer on Workers' Compensation 1 (2d ed. 1989) ("Workers' compensation is a system . . . by which individuals who sustain physical or mental injuries due to their jobs are compensated . . . .").

[85] See Grenig, supra note 27, ¶ 611, at 602 (discussing permanent total disability benefits).

[86] This no-fault system was pioneered by the state of New York, whose Wainwright Commission in 1909 determined that the then-existing system of employer liability was "woefully inadequate and completely unsatisfactory." Millus & Gentile, supra note 26, at 21.

posing any direct cost on individual workers.[87] In exchange for paying the cost of workers' compensation, employers are immunized from suit for negligent actions.[88] To obtain benefits under a workers' compensation program, an injured worker must notify her employer, file a written claim, and, in some cases, present her claim to an administrative agency.[89]

2. *Social Security Disability Benefits*

Because it assists so many people, including those who were not considered disabled prior to their on-the-job injuries, workers' compensation is probably the best-known statutory income support program for people with disabilities. However, the Social Security Act contains an equally extensive, federal system of income support benefits that is not tied to employment. In 1956, disability was added as a basis for Social Security benefits through the SSDI program.[90] In 1973, Congress enacted SSI, a federal welfare program for people with disabilities (and elderly people) to be administered by the Social Security Administration (SSA).[91]

SSI and SSDI use identical definitions of disability,[92] with SSDI providing disability income to noninsured individuals and SSI offering need-based income support to individuals with disabilities who are ineligible for SSDI.[93] In recent years, more than three million claims for SSI and SSDI benefits have been filed each year, with from 8,000,000 to 8,900,000 individuals with disabilities receiving benefits totaling from $54 to $56 billion per year.[94]

---

87 See id. at 31-32 ("[Workers' compensation laws] uniformly imposed liability without fault upon an employer who was the sole contributor to the program . . . without direct cost to almost every worker across the country . . . .").

88 See Nackley, supra note 84, at 7-8.

89 See id. at 7.

90 Social Security Amendments of 1956, Pub. L. No. 84-880, §§ 101-121, 70 Stat. 807, 807-37 (codified in relevant part as amended at 42 U.S.C. §§ 401(b), 420-425 (1994)). See generally Bloch, supra note 33, §§ 1.2-.4 (discussing history of Social Security Act and addition of disability as basis for benefits).

91 Social Security Amendments of 1972, Pub. L. No. 92-603, § 301, 86 Stat. 1329, 1465-78 (codified in relevant part as amended at 42 U.S.C. §§ 1381-1383(d) (1994)). See generally Bloch, supra note 33, §§ 1.6, 2.1 (discussing creation of federal Supplemental Security Income program administered by Social Security Administration).

92 See Bloch, supra note 33, § 2.1 ("The disability standard for [SSI] for adults is identical to the disability standard for [SSDI].").

93 See id. § 1.6 (noting that SSI established public assistance disability program parallel to SSDI program, with nondisability eligibility for SSI based on financial need).

94 See Coolidge, supra note 62, at 9 ("Nearly 8 million people with disabilities are Social Security beneficiaries, costing $56 billion in 1994."); Steven A. Holmes, Disabilities Act Hasn't Meant More Jobs, Survey Finds, The Dallas Morning News, Oct. 23, 1994, at 9A ("[SSI] pays about 4.5 million disabled people who are considered poor a maximum of $446 a month . . . . [SSDI] pays 3.7 million disabled people an average of $642 a month . . . .

3. *Definitions of Disability in Workers' Compensation and Social Security Programs*

The difference between the policies of the statutory income support programs and the civil-rights-focused policy of the ADA is illustrated vividly in a comparison of these statutes' disparate definitions of "disability." In the Montana workers' compensation program, for example, disability is defined as "a physical condition resulting from injury . . . in which a worker does not have a reasonable prospect of physically performing regular employment."[95] Almost all workers' compensation statutes follow a similar approach, with some making reference to an injured worker's preinjury wage-earning capacity as a baseline and anything differing from that baseline considered abnormal.[96] Some states also require medical or other objective confirmation of disability.[97]

The Social Security Act[98] uses a definition of "disability" similar to those used in the workers' compensation context:

> (1) The term "disability" means—
>
> (A) inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months . . . .[99]

The Social Security Act also sets up a variety of ways to measure and verify disability, requiring, for example, that an individual be disabled and that the disability "be of such severity that he is not only unable to do his previous work but cannot . . . engage in any other kind of substantial gainful work which exists in the national economy."[100] In-

---

Together, the two programs cost $54 billion in the fiscal year that ended on Sept. 30[, 1994]."); John B. O'Donnell, Handicapped by Social Security: Agency Ill-Equipped to Evaluate Clients, Get Them Back to Work, The Sun (Baltimore), Oct. 22, 1995, at 1A ("SSI pays an average of $390 a month to 4.9 million disabled recipients; [SS]DI pays an average of $665 a month to 4 million disabled workers.").

95 Mont. Code Ann. § 39-71-116(23) (1995).

96 See, e.g., Ky. Rev. Stat. Ann. § 342.0011(11) (Michie 1994) (defining disability as "a decrease of wage earning capacity due to injury or loss of ability to compete to obtain the kind of work the employee is customarily able to do, in the area where he lives"); Mich. Comp. Laws § 418.401(1) (1996) (defining disability as "a limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training resulting from a personal injury or work related disease"); Miss. Code Ann. § 71-3-3(i) (1995) (defining disability as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or other employment").

97 See, e.g., Miss. Code Ann. § 71-3-3(i) (1995) ("[I]ncapacity . . . must be supported by medical findings.").

98 42 U.S.C. §§ 301-1397f (1994).

99 Id. § 423(d)(1)(A).

100 Id. § 423(d)(2)(A).

dividuals also are subject to verification of their impairments by medical experts[101] and to evaluation according to earnings criteria set forth in the Act and its regulations.[102]

The SSI and SSDI regulations describe a "five-step sequential evaluation" which the SSA uses to determine eligibility for its disability benefits programs.[103] Although many applications require the SSA to complete all five steps in making its determination, there are

---

101 See id. § 423(d)(3), (5).

102 See 20 C.F.R. pt. 404, subpt. P (1996) (regulations for determination of disability).

103 See 20 C.F.R. § 404.1520 (1996) (describing five steps used to evaluate applicant's disability); Bloch, supra note 33, § 2.10 ("When followed fairly and correctly, [the evaluation process] will require a resolution of the ultimate statutory question: whether a claimant is unable to engage in substantial gainful activity."); Social Sec. Admin., U.S. Dep't of Health & Human Servs., SSA Pub. No. 64-039, Disability Evaluation Under Social Security 7 (1995) [hereinafter Disability Evaluation] (describing five-step "sequential evaluation process" to determine adult disability). The five steps are, in summary, as follows:

1) The SSA ascertains whether the applicant is engaged in "substantial gainful activity." 20 C.F.R. §§ 404.1574(b)(2), 416.972(b) (1996); Bloch, supra note 33, § 2.10. An applicant earning more than $500 per month is considered to be engaged in substantial gainful activity. See Office of Supplemental Sec. Income, Social Sec. Admin., SSA Pub. No. 64-030, Red Book on Work Incentives—A Summary Guide to Social Security and Supplemental Security Income Work Incentives for People with Disabilities 9 (Aug. 1995) [hereinafter SSA Red Book]. Applicants who are engaged in substantial gainful activity are not considered disabled—regardless of their medical condition—and therefore are not eligible for Social Security disability benefits. See 20 C.F.R. §§ 404.1520(b), 416.920(b) (1996).
2) If the applicant is not performing substantial gainful activity, the SSA then must determine if the applicant has a "severe impairment" that significantly limits her ability to perform work. 20 C.F.R. §§ 404.1520(c), 416.920(c) (1996); Bloch, supra note 33, § 2.10. An applicant who does not have such an impairment is not considered disabled and is not eligible for Social Security disability benefits. See 20 C.F.R. §§ 404.1520(c), 416.920(c) (1996).
3) The SSA then consults the "Listing of Impairments" in the regulations, 20 C.F.R. pt. 404, subpt. P, app. I (1996). If the applicant's impairment is on this list and the applicant is found to meet the additional requirements specified for the listed impairment (some of which require submission of medical evidence), the applicant is considered disabled without the need for further consideration of her age, education, or work experience. See 20 C.F.R. §§ 404.1520(d), 416.920(d) (1996); Bloch, supra note 33, § 2.10; Disability Evaluation, supra, at 15-98.
4) If the applicant's impairment is not on the list, the SSA then determines whether the applicant is prevented from performing her "past relevant work." 20 C.F.R. §§ 404.1520(e), 416.920(e) (1996); Bloch, supra note 33, § 2.10. If the applicant is not prevented by her impairment from doing any other work, the applicant is not considered disabled and is not eligible for disability benefits. See 20 C.F.R. §§ 404.1520(e), 416.920(e) (1996).
5) If the claimant is prevented by her impairment from performing any other work, the SSA then asks whether, considering the applicant's age, education, "residual functional capacity," and past work experience, she can perform other substantial gainful work which is available in significant numbers in the national economy. If other work is available, the claimant is not considered disabled; if other work is not available, she is considered disabled. See 20 C.F.R. §§ 404.1520(f), 416.920(f) (1996); Bloch, supra note 33, § 2.10.

two significant shortcuts to this process. Certain illnesses and conditions are considered disabilities per se, requiring none of the aforementioned showings because they are assumed to be fully disabling to every person affected by them.[104] First, an applicant might be deemed disabled because she has a "listed impairment."[105] Second, an applicant might be deemed "presumptively disabled."[106] In either of these ways, a Social Security disability benefits applicant can be found disabled as defined in the Social Security Act without any inquiry at all into her ability to perform work. The presumptive disability category is similar to the listed impairment category in that presumptively disabling impairments are listed in the Social Security Act regulations.[107] Presumptive disabilities differ from listed disabilities in that the applicant need not meet additional requirements or present medical evidence to be found presumptively disabled.[108] There also is no provision in the SSI and SSDI benefits determinations procedures to consider the impact on an applicant's ability to work of reasonable accommodations or a reduction of a job to its essential functions.

In interpreting the ADA and statutory income support programs in the cases that follow, courts must juggle and strive to reconcile these varied policies, provisions, and methods. Judicial estoppel, as

---

104 Conversely, some conditions are excluded categorically from the SSA's definition of disability. For example, impairments resulting from criminal activity or incarceration are not considered disabilities for purposes of Social Security disability benefits determinations. See 42 U.S.C. § 423(d)(6) (1994).

The ADA has similar per se exclusions for homosexuality, bisexuality, transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, other sexual behavior disorders, compulsive gambling, kleptomania, pyromania, and psychoactive substance use disorders resulting from current use of illegal drugs. See id. §§ 12208, 12210-12211 (1994). See generally ADA Legislative History, supra note 23, at 93 (explaining rationale for per se exclusions).

105 Cf. Overton v. Reilly, 977 F.2d 1190, 1196 (7th Cir. 1992) (noting that SSA determination of disability might not be dispositive of Rehabilitation Act claim if claimant received Social Security disability benefits by virtue of having a listed disability).

106 See, e.g., McNemar v. Disney Stores, Inc., Civ. Action No. 94-6997, 1995 U.S. Dist. LEXIS 9454, at *12 (E.D. Pa. June 29, 1995) (awarding Social Security disability benefits to ADA claimant because he had AIDS, a presumptive disability), aff'd, 91 F.3d 610 (3d Cir. 1996).

107 See 20 C.F.R. pt. 416, subpt. I, § 934 (1996) (listing presumptive disabilities). Presumptive disabilities include amputations of certain limbs, total deafness or blindness, bed confinement or immobility, stroke, cerebral palsy, muscular dystrophy or atrophy, diabetes with amputation of a foot, Down syndrome, severe mental deficiency, and HIV infection. See Social Sec. Admin., Form SSA-3368-BK, Disability Report 7 (Aug. 1994).

108 See Social Sec. Admin., supra note 107, at 7; see also *McNemar*, 1995 U.S. Dist. LEXIS 9454, at *12 (discussing presumptive disability in ADA claim where judicial estoppel was applied); Brief of the Equal Employment Opportunity Commission as Amicus Curiae at 23-24, *McNemar* (No. 95-1590) (on file with the *New York University Law Review*) (arguing that judicial estoppel should not apply where Social Security disability benefits awarded based on presumptive disability).

described and criticized in the sections that follow, illustrates one way some courts have tried to harmonize these competing factors. Although its underlying logic is superficially appealing, judicial estoppel relies on a misapprehension of the relevant statutes and inadequate attention to the policy goals of the ADA.

II
JUDICIAL ESTOPPEL IN ADA CASES

More than 72,000 complaints of employment discrimination on the basis of disability have been filed with the EEOC[109] since the employment provisions of the ADA became effective in 1992.[110] In many of these cases, the defendant-employers have raised the plaintiffs' experiences with workers' compensation or Social Security disability income support programs[111] as a defense to liability. In a growing number of cases, courts have accepted this defense, applying a form of judicial estoppel to dispose of the plaintiffs' ADA claims as a matter of law.

A. Judicial Estoppel Defined

The doctrine of judicial estoppel is an old one, and it has appeared under many names and guises.[112] The form of estoppel ap-

---

[109] See Equal Employment Opportunity Comm'n, supra note 70.

[110] The ADA's employment provisions became applicable to employers with 25 or more employees as of July 26, 1992. See Effective Date Note, 42 U.S.C. § 12111 (1994). These same provisions were made applicable to employers with 15 or more employees as of July 26, 1994. See id. § 12111(5)(A) (1994). The employment provisions do not apply to employers with less than 15 employees. See id.

[111] In addition to these programs, employers in these and other cases also have pointed to the receipt of benefits under private short-term and long-term disability insurance programs, disability pension programs, and disability leaves of absence as possible bases for judicial estoppel. See sources cited infra note 129. While many of these cases are irrelevant to the situation addressed here due to differences in definitions as well as to the private nature of these programs, these cases are instructive and will be discussed in this Note wherever relevant. The preclusive effect that should be accorded such claims or awards is, however, beyond the scope of this Note. While the considerations would be similar to those discussed here with respect to statutory income supports, there is the additional question whether an individual can be required or should be permitted to waive the ADA's federal civil rights protections as a condition of receiving insurance or employment benefits.

[112] See Black's Law Dictionary 551-52 (6th ed. 1990) (defining estoppel and suggesting numerous synonyms). In the cases discussed here, courts use various terms (including equitable estoppel, judicial estoppel, estoppel in pais, estoppel by inconsistent positions, and issue preclusion) to describe what they are doing, although most courts use the term "judicial estoppel." See, e.g., Morton v. GTE N. Inc., 922 F. Supp. 1169, 1181 (N.D. Tex. 1996) (using term "estoppel"); Smith v. Midland Brake, Inc., 911 F. Supp. 1351, 1361 (D. Kan. 1995) (using term "judicial estoppel"); Lewis v. Zilog, Inc., 908 F. Supp. 931, 945 (N.D. Ga. 1995) (finding plaintiff "precluded or estopped as a matter of law"), aff'd without op., 87

plied in the ADA cases discussed resembles issue preclusion,[113] equitable estoppel, and estoppel in pais. While it is not always clear which form of estoppel is invoked in a given case, all of these forms achieve essentially the same thing: they prevent a party as a matter of law from proving a fact or from benefiting by taking inconsistent positions.[114]

1. Issue Preclusion

The form of judicial estoppel invoked in ADA cases most closely resembles issue preclusion.[115] Where the parties and a relevant issue are substantially identical in two proceedings and where the issue was actually litigated, decided, and essential to the judgment in the first proceeding, issue preclusion can be used to make the first determination of the issue conclusive in a second action.[116] Issue preclusion is improperly applied where the legal issues in the two determinations are not the same.[117]

Although it is usually asserted by a party who was present in the prior action, issue preclusion also can be used "nonmutually," that is, by a party who was not present in the prior action whose determina-

---

F.3d 1331 (11th Cir. 1996). This Note uses the term "judicial estoppel" to describe estoppel generally; where a particular form of estoppel is at issue, it is referred to by its specific name.

113 Although many courts use the outmoded term "collateral estoppel," this Note uses the more current equivalent term "issue preclusion." See 18 Wright et al., Federal Practice and Procedure § 4416, at 136 (1981) (explaining that "modern term of issue preclusion" and phrase "collateral estoppel" refer to same principle).

114 Compare Malascalza v. National R.R. Passenger Corp., Civ. Action No. 93-474 MMS, 1996 U.S. Dist. LEXIS 4198, at *8-*9 (D. Del. Mar. 12, 1996) (distinguishing judicial estoppel, which focuses on relationship between litigant and judicial system, from issue preclusion, which focuses on relationship between parties) with Muellner v. Mars, Inc., 714 F. Supp. 351, 356 (N.D. Ill. 1989) ("Though similar to equitable estoppel, the function of judicial estoppel is to protect the integrity of the judicial process.").

Some courts also use summary judgment to dispose of these claims. See, e.g., Kennedy v. Applause, Inc., 90 F.3d 1477, 1481 n.3 (9th Cir. 1996) (granting defendant's motion for summary judgment and declining to decide judicial estoppel issue). In light of the fact that summary judgment achieves the same end as judicial estoppel—it concludes litigation of the claim as a matter of law—these cases are treated here as if the courts therein employed judicial estoppel. This is not to say, however, that summary judgment is never appropriate in ADA cases. See infra text accompanying note 228.

115 See Mohamed v. Marriott Int'l, Inc., 944 F. Supp. 277, 281 & n.1 (S.D.N.Y. 1996) (noting that although judicial estoppel differs from issue preclusion, factors giving rise to issue preclusion also provide guidance in determining propriety of applying judicial estoppel). Issue preclusion furthers the general policy of affording litigants only one "bite at the apple" by preventing endless relitigation of the same issue until a litigant gets a desirable result. See 18 Wright et al., supra note 113, § 4416, at 138-42.

116 See Restatement (Second) of Judgments § 27 (1980) (defining issue preclusion).

117 See id. § 28(2)(a) (deeming issue preclusion inappropriate where legal claims in the two proceedings are "substantially unrelated").

tion is sought to be given preclusive effect.[118] For example, when applied against a plaintiff, it is termed nonmutual in cases where the defendant who asserts estoppel as a defense to liability was not a party to the prior action.[119]

There are, however, some equitable considerations that come into play when issue preclusion is asserted. Issue preclusion should not be used where a new determination is necessary in the subsequent action "to avoid inequitable administration of the laws."[120] Furthermore, issue preclusion in general, and nonmutual issue preclusion in particular, should not be applied without careful attention to whether its underlying purposes are served by dismissal in a particular case and whether the requisite characteristics are present.[121]

2. *Estoppel in Pais and Equitable Estoppel*

Both estoppel in pais and equitable estoppel are used to prevent a party from changing a statement made in a prior proceeding.[122] These forms of estoppel differ from issue preclusion mainly in that issue preclusion precludes relitigation of a *legal issue*, whereas estoppel in pais and equitable estoppel prevent retraction of *particular statements or facts* in subsequent litigation.[123] Accordingly, both assume some sort of fraud or deception by the party seeking to change her position in subsequent litigation or regard such a change in position as a kind of fraud.[124]

---

118 See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331 (1979) (holding that courts have discretion to determine when nonmutual issue preclusion may be used by plaintiff against defendant); Bernhard v. Bank of Am. Nat'l Trust & Sav. Ass'n, 122 P.2d 892, 894-95 (Cal. 1942) (Traynor, J.) (holding that mutuality not required to give preclusive effect to prior determination of issue).

119 See *Bernhard*, 122 P.2d at 895 ("[E]stoppel is not mutual since the party asserting the plea, not having been a party or in privity with a party to the former action, would not have been bound by it had it been decided the other way."). As Justice Rehnquist pointed out in his *Parklane* dissent, "the development of nonmutual estoppel is a substantial departure from the common law." *Parklane*, 439 U.S. at 350 (Rehnquist, J., dissenting).

120 Restatement (Second) of Judgments § 28(2)(b) (1980).

121 See id. § 28 (describing reasons and circumstances in which issue preclusion should not apply).

122 See Black's Law Dictionary 551 (6th ed. 1990).

123 See id.

124 See, e.g., United States v. Marine Shale Processors, 81 F.3d 1329, 1348 (5th Cir. 1996) ("[E]quitable estoppel responds to the unfairness inherent in denying the claimant some benefit after it has reasonably relied on the misrepresentations of the adverse party."); Harrison v. Labor & Indus. Review Comm'n, 523 N.W.2d 138, 140 (Wis. Ct. App.) (describing judicial estoppel as "a comparatively new name for the old doctrine of 'estoppel in pais'" and outlining goal and essential elements of estoppel in pais), review denied, 527 N.W.2d 355 (Wis. 1994). See generally Black's Law Dictionary 538-39, 551 (6th ed. 1990).

B. Judicial Estoppel in ADA Cases

Elements of each of these types of estoppel have been employed—under either its specific name or the umbrella term of judicial estoppel—to deny plaintiffs the protection of the ADA because they have applied for or received income support through a statutory income support program. Workers' compensation and the Social Security Act require a claimant to show her total inability to work.[125] An ADA claim requires a plaintiff to show her ability to do the job for which she applied or from which she was terminated.[126] Some courts have concluded from these generalizations that a plaintiff making a claim pursuant to the ADA after having applied for or received workers' compensation or Social Security disability benefits is trying to argue, in essence, that she is both unable to work and able to work. Such an argument, these courts reason, is logically infirm,[127] and, as a result, the ADA claim must fail as a matter of law.[128] In this way,

---

[125] See supra text accompanying notes 95-102.

[126] See supra text accompanying notes 82-83.

[127] See Hindman v. Greenville Hosp. Sys., No. 6:95-2942-21, 1996 WL 697739, at *8 (D.S.C. Nov. 20, 1996) (finding plaintiff's ADA claim to be "antithesis" of her position in seeking Social Security benefits); Griffith v. Wal-Mart Stores, Inc., 930 F. Supp. 1167, 1173 (E.D. Ky. 1996) (finding "irreconcilable inconsistency" between plaintiff's representations in Social Security disability benefits claim and ADA claim at bar); Cline v. Western Horseman, Inc., 922 F. Supp. 442, 446 (D. Colo. 1996) ("Simply stated, these two statuses are incompatible."); Pegues v. Emerson Elec. Co., 913 F. Supp. 976, 981 (N.D. Miss. 1996) ("These positions are clearly inconsistent, and regardless of the label attached to this phenomenon, their advancement is not legally proper."); Baker v. Asarco, Inc., No. CIV-94-1045-PHX-ROS, 1995 U.S. Dist. LEXIS 16852, at *12 (D. Ariz. Nov. 7, 1995) (stating that plaintiff's testimony in Social Security forms is "flatly inconsistent" with testimony supporting ADA claim); Nguyen v. IBP, Inc., 905 F. Supp. 1471, 1485 (D. Kan. 1995) ("It is impossible for Nguyen to have been both disabled under social security law and able to perform the essential functions of his work under the ADA."); McNemar v. Disney Stores, Inc., Civ. Action No. 94-6997, 1995 U.S. Dist. LEXIS 9454, at *13 (E.D. Pa. June 29, 1995) ("[Plaintiff] cannot be simultaneously 'unable to work' and 'qualified to perform the duties of his position.'"), aff'd, 91 F.3d 610 (3d Cir. 1996); cf. Bonnano v. Gannett Co., 934 F. Supp. 113, 115 (S.D.N.Y. 1996) (dismissing ADA claim as "totally at variance" with plaintiff's representations in applying for long-term disability benefits); Reiff v. Interim Personnel, Inc., 906 F. Supp. 1280, 1291 (D. Minn. 1995) (finding plaintiff's private long-term disability insurance claim and ADA claim "mutually exclusive"); Simo v. Home Health & Hospice Care, 906 F. Supp. 714, 721 (D.N.H. 1995) ("The very filing of the instant lawsuit under the Rehabilitation Act is 'totally inconsistent with the position [the plaintiff] took before the SSA.'" (citation omitted)); Harden v. Delta Air Lines, 900 F. Supp. 493, 497 (S.D. Ga. 1995) (finding, in case involving representations to private disability insurer and unemployment agency, that it was "'incredible' that a plaintiff would claim that he was discriminated against by his employer for failing to make reasonable accommodations while representing to various entities that he was unable to work").

[128] See Taylor v. Food World, Inc., CV95-H-2384-NE, 1996 U.S. Dist. LEXIS 18207, at *13 (N.D. Ala. Dec. 5, 1996) ("By virtue of his representations to the SSA, plaintiff is, as a matter of law, incapable of performing his past work . . . ."); *Hindman*, 1996 WL 697739, at *6 (holding that plaintiff's "contention of disability before the SSA precludes her from

experience with an income support program is considered proof per se of a plaintiff's failure to meet the ADA's definition of qualified individual with a disability.

C. *General Themes in Judicial Estoppel of ADA Plaintiffs*

The doctrine of judicial estoppel that has been employed in ADA cases originated in several cases involving plaintiffs whose statements

---

attempting to repudiate her disability in this proceeding"); Simon v. Safelite Glass Corp., 943 F. Supp. 261, 269 (E.D.N.Y. 1996) (granting defendant's motion for summary judgment in ADA claim based on plaintiff's application for Social Security disability benefits); Johnson v. U.S. Steel Corp., 943 F. Supp. 1108, 1115 (D. Minn. 1996) (finding that plaintiff's ADA claims "must fail" because of his assertions in workers' compensation claim); Trotter v. B&S Aircraft Parts & Accessories, Inc., Civ. A. No. 94-1404-FGT, 1996 WL 473837, at *9 (D. Kan. Aug. 13, 1996) (holding plaintiff not qualified individual with a disability "[a]s a matter of law"); Freeman v. Rollins Envtl. Servs., No. Civ. A. 94-1871(JEI), 1996 WL 451317, at *5 n.8 (D.N.J. Aug. 5, 1996) (finding it "impossible to reach the conclusion that Plaintiff was capable of performing the essential functions of his former position" based on statements on workers' compensation application); *Griffith*, 930 F. Supp. at 1173 (concluding that representations in Social Security disability benefits claim "preclude [the plaintiff] from raising an issue of fact" as to his status as qualified individual with a disability); Bennett v. United Parcel Serv., Inc., No. CIV. A. H-94-3270, 1995 WL 819035, at *5 (S.D. Tex. Dec. 19, 1995) (holding that plaintiff "has failed to establish a triable issue" in ADA claim because of Social Security disability benefits claim); Cheatwood v. Roanoke Indus., 891 F. Supp. 1528, 1538 (N.D. Ala. 1995) ("Having collected [workers' compensation] benefits based on these representations . . . the plaintiff is thereafter estopped from asserting . . . that they [sic] could have performed the essential functions of their job."); *McNemar*, 1995 U.S. Dist. LEXIS 9454, at *14-*15 ("[M]ost federal courts agree that an employee who represents on a benefits application that he is disabled is judicially estopped from arguing that he is qualified to perform the duties of the position involved."); Kennedy v. Applause, Inc., No. CV 94-5344 SVW(GHKX), 1994 WL 740765, at *6 (C.D. Cal. Dec. 6, 1994) ("Federal courts have held that disabled individuals who certify in a claim for disability benefits that they are totally disabled from work are estopped from claiming that they can perform the essential functions of their job."), aff'd, 90 F.3d 1477 (9th Cir. 1996); Reigel v. Kaiser Found. Health Plan, 859 F. Supp. 963, 970 (E.D.N.C. 1994) ("Plaintiff . . . now seeks money damages . . . on her assertion that she was physically willing and able to work during the same period of time that she was regularly collecting disability payments on her assertions that she was physically unable to work."); cf. August v. Offices Unlimited, Inc., 981 F.2d 576, 584 (1st Cir. 1992) (finding "no genuine issues of material fact as to whether August could have performed his job" because of representations to private disability insurer); Morris v. Siemens Components, Inc., 928 F. Supp. 486, 496 (D.N.J. 1996) ("[I]n light of the representations that Plaintiff made upon seeking disability benefits, Plaintiff is judicially estopped from asserting that she was capable of performing her job at the time she was discharged."); Williams v. Avnet, Inc., 910 F. Supp. 1124, 1132 (E.D.N.C. 1995) (applying estoppel where plaintiff's representations were in connection with tort action for personal injury); Peoples v. City of Salina, Civ. A. No. 88-4280-S, 1990 WL 47436, at *4 (D. Kan. Mar. 20, 1990) (estopping plaintiff's claim of disability discrimination under state civil rights statute based on representations made in obtaining disability pension benefits). The approach of the court in *August v. Offices Unlimited, Inc.* has been limited somewhat to the facts of that case. See D'Aprile v. Fleet Servs. Corp., 92 F.3d 1, 3 (1st Cir. 1996) (finding that "*August* stands for a much narrower proposition" than a complete bar to disability discrimination claim following disability insurance claim).

in connection with private disability insurance claims were held to preclude their subsequent ADA claims.[129] It has since been extended to workers' compensation and Social Security disability benefits claims.[130]

In addition to finding that the ADA's protected class excludes individuals who are receiving or who have received workers' compensation or Social Security disability benefits, courts applying judicial estoppel have addressed (or have failed to address) the significant differences between statutory income support programs and the ADA in several different ways. Some have considered these differences and simply found them meaningless or irrelevant to the disposition of the ADA claim. In *Nguyen v. IBP, Inc.*,[131] for example, the court analyzed the plaintiff's conformance to the ADA's definition of qualified individual with a disability by stating the ADA's definition, reviewing the plaintiff's sworn statements to an administrative law judge in connection with his Supplemental Security Income claim, and citing cases in which estoppel was applied.[132] The court ended its inquiry by concluding that the plaintiff, Nguyen, was likewise estopped.[133] At no point did the court discuss the differences between the Social Security Act and the ADA. In fact, the court's only mention of the Social Security Act's definition of disability was in a footnote explaining that "[t]he court is well aware" of the Social Security Act's definition of disability.[134] In another case, the court, focusing on the underlying policies of the ADA rather than its express terms, reasoned that the

---

129 See Grenier v. Cyanamid Plastics, Inc., 70 F.3d 667, 675 (1st Cir. 1995) (finding that employer properly interpreted plaintiff's representations to private disability insurer as evidence of his inability to perform his job); *Reiff*, 906 F. Supp. at 1291 (holding that plaintiff's assertion of total disability in connection with private long-term disability claim estops ADA claim); Lewis v. Zilog, Inc., 908 F. Supp. 931, 945 & n.4 (N.D. Ga. 1995) (holding that plaintiff's receipt of private long-term disability insurance benefits estops ADA claim), aff'd without op., 87 F.3d 1331 (11th Cir. 1996); *Harden*, 900 F. Supp. at 497 (holding that statements to long-term disability insurance carrier and in application for unemployment benefits estop ADA claim); Berry v. Norfolk S. Corp., Civ. A. No. 94-0075-R, 1995 WL 465819, at *2 (W.D. Va. June 23, 1995) (holding that plaintiff's representations to Railroad Retirement Board estop him from asserting ADA claim).

130 See, e.g., *Cline*, 922 F. Supp. at 446-49 (applying estoppel based on Social Security and workers' compensation claim); Lamury v. Boeing Co., No. 94-1225-PFK, 1995 U.S. Dist. LEXIS 16262, at *16 (D. Kan. Oct. 4, 1995) (applying estoppel based on workers' compensation claim); *Nguyen*, 905 F. Supp. at 1485 (applying estoppel based on Supplemental Security Income claim); *McNemar*, 1995 U.S. Dist. LEXIS 9454, at *12-*14 (applying estoppel based on Social Security claim); Garcia-Paz v. Swift Textiles, Inc., 873 F. Supp. 547, 555 (D. Kan. 1995) (same); *Reigel*, 859 F. Supp. at 970 (dismissing ADA claim because of plaintiff's Social Security and workers' compensation claims).

131 905 F. Supp. 1471 (D. Kan. 1995).

132 See id. at 1483-85.

133 See id. at 1485.

134 Id. at 1484 n.6.

denial of ADA protection to a former Social Security disability benefits recipient was not incompatible with the goals of the ADA.[135]

Other courts have managed to circumnavigate the significant differences between the ADA and statutory income supports by imputing the essential functions and reasonable accommodation provisions of the ADA to workers' compensation statutes and the Social Security Act, although neither contains such provisions. In *Cheatwood v. Roanoke Industries*,[136] the workers' compensation statute appeared to have no "essential functions" provision. Nevertheless, the court concluded from the transcript of the plaintiff's testimony at the workers' compensation hearing that the plaintiff was not a qualified individual with a disability and therefore was ineligible for ADA protection.[137] Although no finding was made or had to be made at the workers' compensation hearing concerning the plaintiff's ability to perform the essential functions of his job, the court in *Cheatwood* appeared to assume that the workers' compensation hearing involved such a finding. Similarly, another court found that the "fundamental issues" in determining eligibility for workers' compensation and for ADA protections are the same.[138]

In some instances, judicial estoppel is employed where the prior facts resulted from the process of application for statutory income support benefits.[139] In attributing their usage of estoppel to the appli-

---

135 See McNemar v. Disney Stores, Inc., Civ. Action No. 94-6997, 1995 U.S. Dist. LEXIS 9454, at *14 (E.D. Pa. June 29, 1995) ("[T]his Court fails to understand how the ADA's goals would be thwarted by adopting the principle of judicial estoppel in this case.").

136 891 F. Supp. 1528 (N.D. Ala. 1995).

137 See id. at 1534-38.

138 See Lamury v. Boeing Co., No. 94-1225-PFK, 1995 U.S. Dist. LEXIS 16262, at *16 (D. Kan. Oct. 4, 1995) ("[T]he fundamental issues of what [the plaintiff] was able to do, and the jobs available at Boeing, are common to both proceedings."); see also Trotter v. B&S Aircraft Parts & Accessories, Inc., Civ. A. No. 94-1404-FGT, 1996 WL 473837, at *9 (D. Kan. Aug. 13, 1996) (finding that representation of total disability in workers' compensation claim precludes plaintiff as a matter of law from showing he could have performed his job even with reasonable accommodation).

139 See, e.g., Farrow v. Bell Atlantic—PA, Civ. A. No. 95-1323, 1996 WL 316798, at *5-*6 (W.D. Pa. Apr. 26, 1996) (applying judicial estoppel although plaintiff's SSDI application had not yet been determined or adjudicated at time of suit); Morton v. GTE N. Inc., 922 F. Supp. 1169, 1182-83 (N.D. Tex. 1996) (citing plaintiff's statements in applications for private long-term disability insurance and Social Security disability benefits as basis for granting summary judgment against her); Kennedy v. Applause, Inc., No. CV 94-5344 SVW(GHKX), 1994 WL 740765, at *3-*4 (C.D. Cal. Dec. 6, 1994) (granting summary judgment against plaintiff based on statements by plaintiff in completing Social Security Administration claim forms), aff'd, 90 F.3d 1477 (9th Cir. 1996); cf. Reiff v. Interim Personnel, Inc., 906 F. Supp. 1280, 1289-91 (D. Minn. 1995) (granting summary judgment against plaintiff based on statements by plaintiff and her doctor in application for private long-term disability insurance benefits); Lewis v. Zilog, Inc., 908 F. Supp. 931, 945 & n.4 (N.D. Ga. 1995) (granting summary judgment against plaintiff based on her having applied for and received private long-term disability insurance benefits), aff'd without op., 87 F.3d

cation process rather than to an adjudication, courts again take varied approaches. For example, one court found the plaintiff's *application* for income support to be dispositive of the claim,[140] while others have suggested that the plaintiff's *receipt* of benefits spells the end of her opportunity for ADA protection.[141]

Many courts employing judicial estoppel suggest that the plaintiffs before them are attempting to commit deception, or even fraud, by seeking both statutory income support benefits and ADA protections.[142] These courts have stressed that applications for workers' compensation and Social Security disability benefits require the applicant to sign the forms and attest to the truth of her statements therein under penalty of perjury.[143] In *Reigel v. Kaiser Foundation Health*

1331 (11th Cir. 1996); Peoples v. City of Salina, Civ. A. No. 88-4280-S, 1990 WL 47436, at *4 (D. Kan. Mar. 20, 1990) ("[T]he issue of [the plaintiff's] qualifications . . . has effectively been resolved by means of the quasi-judicial administrative determination of the Kansas Police and Fire Pension System Board . . . .").

140 See *Kennedy*, 1994 WL 740765, at *5 (finding that "there is no ambiguity in the statements made by plaintiff in these documents and accept[ing] these statements at their face value").

141 Cf. Morris v. Siemens Components, Inc., 928 F. Supp. 486, 497 (D.N.J. 1996) (applying judicial estoppel because "the record does not reflect that Plaintiff ever renounced her statements on the forms indicating her total disability"); *Reiff*, 906 F. Supp. at 1291 ("[T]he acceptance of the [private long-term disability insurance] checks and the representations made are directly and indisputably at odds with his present [ADA] claim."); *Lewis*, 908 F. Supp. at 945 n.4 ("[T]his Court is not required to decide here whether merely applying for long term disability will preclude ADA relief because Plaintiff not only applied for, but is receiving long-term disability . . . ."); Simo v. Home Health & Hospice Care, 906 F. Supp. 714, 721 (D.N.H. 1995) ("The plaintiff, having already reaped the benefits of her past representations of total disability, may not now advance before this court any claim necessarily based on a contrary factual representation.").

142 See, e.g., Hindman v. Greenville Hosp. Sys., No. 6:95-2942-21, 1996 WL 697739, at *8 (D.S.C. Nov. 20, 1996) ("Permitting Hindman to proceed with this argument is the very height of countenancing an unfair advantage through manipulation of the judicial process."); Simon v. Safelite Glass Corp., 943 F. Supp. 261, 269-70 (E.D.N.Y. 1996) (calling plaintiff "paradigmatic judicial estoppel plaintiff" and noting that, having "played fast and loose with the system," "[t]he cost to [him] of lying" is summary judgment based on judicial estoppel; granting sanctions against plaintiff's counsel based on Fed. R. Civ. P. 11); Miller v. U.S. Bancorp, 926 F. Supp. 994, 1000 (D. Or. 1996) (applying judicial estoppel because plaintiff "cannot have it both ways"); Bollenbacher v. Helena Chem. Co., No. 1:95-CV-350, 1996 U.S. Dist. LEXIS 9089, at *34 (N.D. Ind. June 24, 1996) (expressing court's concern "about the inequity" of permitting plaintiff to advance ADA claim while receiving disability benefits); cf. Bonnano v. Gannett Co., 934 F. Supp. 113, 115 (S.D.N.Y. 1996) (dismissing ADA claim subsequent to application for long-term disability benefits because of plaintiff's "gamesmanship and blatant inconsistency").

143 See, e.g., Baker v. Asarco, Inc., No. CIV-94-1045-PHX-ROS, 1995 U.S. Dist. LEXIS 16852, at *9 (D. Ariz. Nov. 7, 1995) ("The SSA forms that Baker completed warned that making false statements in connection with a benefits application is a Federal crime. Baker's affidavit . . . is potentially self-incriminating."); McNemar v. Disney Stores, Inc., Civ. Action No. 94-6997, 1995 U.S. Dist. LEXIS 9454, at *9 n.4 (E.D. Pa. June 29, 1995) ("McNemar certified under penalty of perjury on his application for Social Security benefits . . . ."), aff'd, 91 F.3d 610 (3d Cir. 1996); Garcia-Paz v. Swift Textiles, Inc., 873 F. Supp.

Plan,[144] for example, the court accused the plaintiff of "speak[ing] out of both sides of her mouth" as it dismissed her ADA claim.[145] In some of these cases, the term "judicial estoppel" appears to be a synonym for equitable estoppel or estoppel in pais, which assume that because in one instance or the other a party must be or has been lying, it would be inequitable for the court to allow her to change her position—even to correct a falsehood—in order to gain a legal advantage. Under such circumstances, a party is held to her false representations for the purposes of the case at bar.[146]

While these justifications have some superficial logical, legal, or political appeal, each falls short on closer examination. As Part III will explain, the courts in these decisions fail to consider significant differences between the relevant statutes. As a result, these courts fail to recognize the extent to which the ADA's protected class overlaps with the class of individuals eligible for statutory income supports. Moreover, the reflexive use of judicial estoppel ignores and threatens to undermine the policies of both the ADA and the statutory income support programs.

III
A Critique of Judicial Estoppel

The definitions of disability in statutory income support programs focus on the worker's ability to earn a given level of wages, reflecting the perception that a worker with a disability is worth less—in wages—than a nondisabled worker.[147] In their single-minded focus

547, 555 (D. Kan. 1995) ("In applying [for Social Security disability benefits], plaintiff acknowledged that 'anyone who makes or causes to be made a false statement or representation of material fact in an application or for use in determining a right to payment under the Social Security Act commits a crime punishable under federal law by fine, imprisonment, or both.'"); *Kennedy*, 1994 WL 740765, at *4 ("The [plaintiff's Social Security disability benefits] claim specifically stated . . . that the foregoing statements . . . are to the best of my knowledge and belief true, correct and complete.").

144 859 F. Supp. 963 (E.D.N.C. 1994).

145 Id. at 970 (finding plaintiff's ADA claim insufficient as a matter of law based on her representations to employer's workers' compensation insurer, Social Security Administration, and private disability insurance carrier).

146 See supra text accompanying notes 122-24.

147 See Bloch, supra note 33, § 1.2, at 5 (noting that Social Security Act reflects perception that "earning one's food and shelter is always preferable to receiving public charity"). Many workers' compensation statutes also have rather morbid tables allocating levels of benefits and time off from work for various losses of limbs and functions that suggest a similar valuation of vocational ability. See, e.g., Ala. Code § 25-5-57(a)(3)a.1-34 (1992) (describing equivalencies among limb losses and setting statutory amounts and durations of compensation for various injuries).

Statutory income support programs also set up the somewhat degrading scenario where, to fit the definitions set forth in the statutes, an individual must show that she is

on wage-earning capacity as the basic indicator of disability and in their requirement that workers show their inability to work, the workers' compensation and Social Security Act definitions of "disability" are at odds with the spirit of the ADA. Unlike statutory income supports, the ADA defines its protected class in a way that requires an individual to demonstrate her ability to contribute to society, rather than to demonstrate and benefit from the protection of the law for her lack of ability.[148]

This is not to say that income support statutes are wrong to define "disability" as they do.[149] After all, they are clearly aimed at entirely different purposes than is the ADA.[150] However, the approaches to defining disability that are embodied in statutory income support programs are less useful for evaluating disability under the ADA, which demands a much more individualized approach than is possible or desirable in evaluating applicants for income supports. Because these differing definitions represent divergent policy goals and tactics, they often can prove problematic when applied to a single individual. Nevertheless, courts can construe these statutes to operate in harmony with both their legal terms and their underlying policies.[151]

Despite its superficial appeal, judicial estoppel is an inappropriate way to address the interaction between statutory income supports and the ADA. Most importantly, judicial estoppel is doctrinally improper

---

"disabled enough" to merit the law's protection by demonstrating that she lacks the ability to contribute to society as a worker. Consequently, the very process of seeking benefits conferred by any of these statutes can have a demoralizing effect on an individual. As one commentator observed:

> The behaviors and attitudes that are required for an individual to secure Social Security benefits are the exact opposite of the behaviors and attitudes required to convince an employer that the individual is the right person for a job. . . .
>
> . . . .
>
> . . . [T]he system to access benefits is often demoralizing and inadvertently takes away from the individual a sense of self-confidence and focus on goal-oriented, productive behavior, essential to obtaining and retaining employment.

Testimony of Stephen L. Start, CEO of S.L. Start & Associates, Inc., House Ways & Means Committee on the Social Security Disability Program, FDCH Congressional Testimony *5-*6 (Aug. 3, 1995) (transcript available in LEXIS, Legis Library, CNGTST File).

148 See supra text accompanying notes 73-83.

149 For an argument that workers' compensation statutes *are* wrong to take this approach, see Claire H. Liachowitz, Disability as a Social Construct 45-63 (1988) (arguing that workers' compensation laws are a "cause" of disability).

150 See Cramer v. Florida, 885 F. Supp. 1545, 1550-51 (M.D. Fla. 1995) (noting contrasting definitions of "impairment" and "disability" in ADA and Florida workers' compensation statute based on statutes' differing purposes).

151 See Harding v. Winn-Dixie Stores, Inc., 907 F. Supp. 386, 392 (M.D. Fla. 1995) (noting that purposes of Florida workers' compensation law and ADA "complement each other"); Ravitch, supra note 22, at 251 (arguing that ADA and Social Security disability benefit "schemes complement one another").

in ADA cases. In addition, the widespread usage of judicial estoppel to dispose of ADA claims conflicts with significant disability policy norms as well as with Congress's express intentions concerning the ADA. While there are obvious objections to the abandonment of judicial estoppel, they ultimately fail to resolve the serious doctrinal and public policy problems that judicial estoppel poses. This Note proposes a very simple but significant alteration in the way courts consider the significance of an ADA plaintiff's experience with statutory income supports. Such an alteration will reconcile the express terms and underlying policies of the relevant statutes while preserving the integrity of the judicial system so as to allay the fears that underlie courts' current usage of judicial estoppel.

A. Doctrinal Defects of Judicial Estoppel

Judicial estoppel is an unusual and drastic remedy which should be employed only in rare circumstances.[152] Its routine usage in ADA cases is doctrinally inappropriate for several reasons. First, judicial estoppel is inappropriate in the ADA claims discussed here because of the differing legal standards at issue. Second, the substantial variations between the procedures and approaches to determining disability under the ADA and income support statutes also counsel against applying judicial estoppel. Additionally, rules governing the use of after-acquired evidence in employment discrimination cases should apply in some ADA cases to forbid the introduction of the evidence upon which judicial estoppel is based. Finally, judicial estoppel may render meaningless that part of the ADA's definition of disability that outlaws discrimination on the basis of an individual's record of having a disability. These doctrinal factors require that judicial estoppel be abandoned in favor of an approach that does less violence to the legal principles at issue in ADA cases.[153]

---

[152] See Mohamed v. Marriott Int'l, Inc., 944 F. Supp. 277, 282 (S.D.N.Y. 1996) ("[I]t would be inappropriate to invoke the fact-sensitive and limited doctrine of judicial estoppel to erect a per se bar to ADA protection for individuals who have also applied for and/or received SSDI benefits." (citing Anne E. Beaumont, Note, This Estoppel Has Got to Stop: Judicial Estoppel and the Americans with Disabilities Act (unpublished manuscript, on file with author)); Dockery v. North Shore Medical Ctr., 909 F. Supp. 1550, 1558 (S.D. Fla. 1995) (finding that judicial estoppel should be applied only where plaintiff's "allegedly inconsistent pleadings were made under oath in a prior proceeding" and where "such inconsistencies . . . have been calculated to make a mockery of the justice system").

[153] Some courts and commentators have argued that judicial estoppel is also improper because it conflicts with the liberal pleading concepts embodied in the Federal Rules of Civil Procedure, which permit a plaintiff to plead alternative, inconsistent claims. See, e.g., *Mohamed*, 944 F. Supp. at 281 ("Circumspection in the use of judicial estoppel is warranted because of a concern for offending the liberal spirit of the federal pleading rules."); Leo T. Crowley, Disabilities Act Plaintiffs Face Estoppel Issues, N.Y. L.J., Aug. 29, 1996, at

1. *Differences in Applicable Legal Standards*

Judicial estoppel should not be applied where an award of income support benefits was made pursuant to a statute or program that does not define disability in terms that are substantially congruent with the ADA, including its essential functions and reasonable accommodation provisions.[154] This argument follows from the basic principle that preclusive effect should not be given to a prior determination where it cannot be said that the legal issues in both the prior and instant cases are the same.[155] In the ADA cases where estoppel has been applied, the issues involved in the application for or award of income support benefits are simply not the same as those involved in determining whether the applicant is a qualified individual with a disability as defined by the ADA.

Statutory income benefit applications and awards involve determinations that an applicant "is *unlikely* to find a job, but that does not mean that there is no work the claimant can do."[156] As discussed in

---

3 (noting that Federal Rule of Civil Procedure 8(e)(2) allows parties to maintain inconsistent claims and that judicial estoppel is "not fully consistent" with this rule). This criticism misses the point on two basic grounds. First of all, a plaintiff's application for statutory income support benefits is no way "pled" in an ADA claim. Second, as this Note explains, there is no inherent inconsistency between a benefits application and an ADA claim.

154 Nor is it clear that judicial estoppel is appropriate where the relevant statutes *are* congruent. See supra note 18 and infra text accompanying notes 215-16.

155 See 18 Wright et al., supra note 113, § 4417, at 148 (observing that issue preclusion "applies only when the same issue has been decided in one case and arises in another"); cf. Harrison v. Labor & Indus. Review Comm'n, 523 N.W.2d 138, 141 (Wis. Ct. App.) (noting that judicial estoppel should not apply if legal issues in Social Security disability benefits determination and claim under Wisconsin Fair Employment Act differ), review denied, 527 N.W.2d 355 (Wis. 1994).

156 Overton v. Reilly, 977 F.2d 1190, 1196 (7th Cir. 1992) (emphasis added) (regarding Social Security disability benefits); see also Koblosh v. Adelsick, No. 95 C 5209, 1996 WL 675791, at *8 (N.D. Ill. Nov. 20, 1996) (noting that plaintiff's representations to SSA indicated only "that he did not believe he would be able to find work, although it was not out of the question"); Nackley, supra note 84, at 48 ("[Workers' compensation] claimants . . . are not required to prove with absolute certainty that they will never engage in remunerative employment. Their burden is to establish that they have been removed from employment and that it is more probable than not that their medical condition will continue indefinitely . . . .").

Several courts' comments concerning the veracity of plaintiffs' statements in connection with their benefits applications suggest these courts are employing equitable estoppel or estoppel in pais. See supra text accompanying notes 122-24. Naturally, it is impossible to tell whether these plaintiffs were in fact lying or attempting to defraud or deceive either the court or the defendant-employer. Nevertheless, it is evident that a rule that a post-workers' compensation or post-Social Security disability benefit ADA claim is per se fraudulent might serve as a deterrent to prospective ADA plaintiffs with valid claims.

Such deterrence is not desirable when there are perfectly valid reasons for a person who has received or is receiving statutory income support benefits to make a claim pursuant to the ADA. Given this possibility, equitable estoppel is improper where the plaintiff has not actually misrepresented or defrauded the courts. See EEOC v. MTS Corp., 937 F.

greater detail elsewhere in this Note, statutory income support programs use a variety of administrative shortcuts to screen and evaluate benefits applications.[157] These programs generally lack the resources to make individualized determinations of ability to work and would be rendered inefficient if forced to proceed on a case-by-case basis.

By contrast, the ADA expressly requires a case-by-case determination of a plaintiff's specific circumstances because the "essential functions" and "reasonable accommodation" provisions of the ADA's definition of "qualified individual with a disability" may bring a statutory income support recipient within its protected class.[158] The essential functions provision ensures that employers seeking to screen out individuals with disabilities cannot add to job descriptions minor, nonessential tasks that an individual with a disability might not be able to perform. Instead, jobs are reduced to their essential functions, keeping open the option that nonessential functions might be assigned to another employee.[159] Similarly, the ADA's reasonable accommodation provision requires employers to make modifications (including reassigning nonessential functions to other employees) to worksites, furniture arrangements, schedules, tools, and procedures in order to make it possible for an individual with a disability to perform a job for which she is otherwise fully qualified.[160] Both provisions broaden the

---

Supp. 1503, 1511 (D.N.M. 1996) (declining to exercise equitable discretion for benefit of defendants where "[d]efendants forced [plaintiff] into the unenviable position of being unemployed, in the advanced stages of AIDS, and emotionally devastated by their discriminatory conduct"); Dockery v. North Shore Medical Ctr., 909 F. Supp. 1550, 1558 (S.D. Fla. 1995) ("'Because [judicial estoppel] looks toward cold manipulation . . . it has never been applied where plaintiff's assertions were based on fraud, inadvertence, or mistake.'" (emphasis omitted) (quoting Johnson Serv. Co. v. TransAmerica Ins. Co., 485 F.2d 164, 175 (5th Cir. 1973))).

157 See, e.g., supra notes 104-08 and accompanying text.

158 See 42 U.S.C. § 12111(8) (1994) (defining "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires").

159 See Chai R. Feldblum, Employment Protections, in The Americans with Disabilities Act: From Policy to Practice, supra note 5, at 81, 89 ("It is not legitimate . . . for the employer to refuse to hire or retain a person with a disability who cannot perform some job task that is marginal to the job.").

160 As Professor Feldblum notes:

> The underlying goal [of reasonable accommodation] is to identify aspects of the disability that make it difficult or impossible for the person with a disability to perform certain aspects of a job, and then to determine if there are any modifications or adjustments to the job environment or structure that will enable the person to perform the job.

Id. at 93-94; cf. D'Aprile v. Fleet Servs. Corp., 92 F.3d 1, 5 (1st Cir. 1996) (noting that plaintiff's claim to have been totally disabled for purposes of short-term disability benefits "does not constitute an admission that she had been unable to work with the accommodation of a part-time schedule").

range of jobs in which individuals with disabilities might be employed by eliminating physical barriers as well as barriers in job descriptions.[161]

On one hand, statutory income supports require only that there be a low, or virtually no, probability of an individual with a disability being able to work at any job as currently constituted. The ADA, on the other hand, allows for the possibility that although most jobs—as currently constituted—might be closed to an individual with a disability, a given job might be available to a particular individual with a disability, especially if reasonable accommodations and essential functions are taken into account. Therefore, the ADA's protected class to some degree overlaps the class of individuals eligible for statutory income supports.[162]

Such overlap is also possible because the Social Security Act specifically contemplates that individuals with disabilities might work while collecting those SSI/SSDI benefits.[163] Individuals with disabili-

---

161 See Feldblum, supra note 159, at 96 ("The provision of reasonable accommodations is a key component for ensuring real and effective employment opportunity for people with disabilities."); see also Leslie v. St. Vincent New Hope, Inc., 916 F. Supp. 879, 885-86 (S.D. Ind. 1996) (finding that plaintiff might still be able to demonstrate her ability to perform job with reasonable accommodation despite finding of permanent physical impairment in connection with successful workers' compensation claim).

162 See *Leslie*, 916 F. Supp. at 886 (finding that plaintiff who had applied for workers' compensation can still set forth prima facie ADA claim by showing that she could have performed her job with reasonable accommodation); Heise v. Genuine Parts Co., 900 F. Supp. 1137, 1152 (D. Minn. 1995) (refusing to consider Social Security Administration's award of benefits as dispositive of plaintiff's qualifications to perform job because ADA's definition "include[s] the concept of reasonable accommodation"); Ward v. Westvaco Corp., 859 F. Supp. 608, 615 (D. Mass. 1994) (finding that plaintiff's statements that he could have performed his duties with reasonable accommodations raised genuine issue of material fact whether he was "qualified handicapped person" despite application for and receipt of Social Security disability benefits); cf. Overton v. Reilly, 977 F.2d 1190, 1196 (7th Cir. 1992) (observing in Rehabilitation Act claim that finding of disability for purpose of Social Security disability benefits "is consistent with the claim that the disabled person is 'qualified' to do his job"); Anzalone v. Allstate Ins. Co., Civ. Action No. 93-2248 Section "R", 1995 U.S. Dist. LEXIS 1272, at *3-*5 (E.D. La. Jan. 30, 1995) (refusing to apply judicial estoppel due to plaintiff's application for private disability insurance because of plaintiff's assertion that "certain modifications" would permit him to work), aff'd, 74 F.3d 1236 (5th Cir. 1995); State v. G.S. Blodgett Co., 656 A.2d 984, 990 (Vt. 1995) (finding, in claim pursuant to Vermont Fair Employment Practices Act, plaintiff's statements in Social Security disability benefits proceeding not dispositive of whether she was qualified individual with a disability because "[t]hey were made without regard for the essential functions of the job and whether reasonable accommodations would enable her to perform the job"); Harrison v. Labor & Indus. Review Comm'n, 523 N.W.2d 138, 141 (Wis. Ct. App.) (finding, in claim brought pursuant to Wisconsin Fair Employment Act, that application for SSI benefits did not resolve whether plaintiff would have been able to perform his job with reasonable accommodation), review denied, 527 N.W.2d 355 (Wis. 1994).

163 See 42 U.S.C. § 422(c) (1994) (defining trial work period during which SSI or SSDI benefit recipient may work while continuing to collect benefits); Marvello v. Chemical

ties can work and simultaneously receive Social Security disability benefits in one of two ways. The Social Security Act provides for a "trial work period" lasting up to five years, during which an individual might gradually return to full productivity.[164] In addition, an individual with a disability might be employed and earn less than $500 per month and still collect SSI or SSDI because she is not considered to be engaged in substantial gainful activity.[165] Moreover, the Social Security Administration has taken the position—at least internally—that the determination of disability for purposes of its benefit determinations has no relationship to the determination of whether an individual comes within the ADA's protected class.[166]

Although both the ADA and statutory income support programs use the term "disability," the meaning of this term differs significantly in each of the statutes. Judicial estoppel assumes that the term "disability" means the same thing wherever it is used, without regard to the precise terms of the statutory definitions. However, the difference between the legal standard involved in determining eligibility for statutory income support and the standard involved in determining a plaintiff's status under the ADA precludes the use of judicial estoppel.

2. *Differences in Legal Forums and Procedures*

In addition to the differences between the legal *issues* in ADA cases and statutory income support claims, the *forums* in which the two claims arise and are resolved are so different as to counsel against the application of judicial estoppel pursuant to the logic of issue pre-

---

Bank, 923 F. Supp. 487, 491-92 (S.D.N.Y. 1996) (noting that courts applying judicial estoppel have not addressed fact that Social Security Act "clearly intend[s] to encourage SSI recipients to seek work even while receiving SSI support"); SSA Red Book, supra note 103, at 12 ("Work incentives [under Social Security Act] provide support . . . to allow the disability beneficiary to test the ability to work and gradually become self-supporting and independent. In general, a person has at least 4 years to test the ability to work . . . .").

However, none of the states appears to permit an injured worker to continue to collect workers' compensation benefits while working.

164 42 U.S.C. § 422(c) (1994); see also SSA Red Book, supra note 103, at 12-13 (noting that SSI work incentives allow people to continue to receive SSI checks while they work).

165 See SSA Red Book, supra note 103, at 9 (indicating that applicants are considered to be engaged in substantial gainful activity when earning more than $500 per month).

166 See Memorandum from Daniel L. Skoler, Associate Commissioner, Social Security Administration, to Headquarters Executive Staff, Administrative Appeals Judges, Regional Chief Administrative Law Judges, Hearing Office Chief Administrative Law Judges, Administrative Law Judges, and Supervisory Staff Attorneys 3 (June 2, 1993) (on file with the *New York University Law Review*) ("[T]he ADA and the disability provisions of the Social Security Act have different purposes, and have no direct application to one another.").

clusion.[167] At a minimum, issue preclusion requires that a defendant be able to point to a valid, final judgment on the merits in the prior claim to which the second court can give preclusive effect.[168] Many of the instances in which estoppel has been applied involve no judicial determination whatsoever and therefore present no "judgment" to which preclusive effect can be given.[169] For example, the mere fact of a plaintiff's having applied for income support benefits has been accorded preclusive effect, as has the cashing of benefit checks.[170] In

---

[167] See Mohamed v. Marriott Int'l, Inc., 944 F. Supp. 277, 283 (S.D.N.Y. 1996) (noting that "the case for application of [judicial estoppel] is clearly strongest when the forum and its procedures permit a judgment on the merits after the orderly presentation of evidence in adversarial litigation").

[168] See 18 Wright et al., supra note 113, § 4416, at 138 (stating that issue preclusion requires, inter alia, "a disposition that is sufficiently 'final,' 'on the merits,' and 'valid'").

[169] The differing legal standards used in income support claims and ADA claims also weigh against according preclusive effect to a plaintiff's receipt of statutory income support benefits even where it *was* the result of some sort of judicial determination. In a different but analogous context, courts have refused to give preclusive effect to awards from unemployment compensation proceedings when successful claimants have tried to use such awards to further their subsequent civil rights claims. See Dici v. Pennsylvania, 91 F.3d 542, 549-50 (3d Cir. 1996) (holding Title VII claim not barred by issue preclusion because of differing legal issues in prior workers' compensation claim); Swineford v. Snyder County Pa., 15 F.3d 1258, 1268 (3d Cir. 1994) (refusing to give preclusive effect to unemployment compensation award in later action based on constitutional claims under 42 U.S.C. § 1983); Maryland Casualty Co. v. Messina, 874 P.2d 1058, 1066 (Colo. 1994) (finding that issue preclusion due to results of prior workers' compensation hearing "does not bar . . . subsequent no-fault action"); Salida Sch. Dist. R-32-J v. Morrison, 732 P.2d 1160, 1165 (Colo. 1987) ("The use of an unemployment compensation decision to bind the parties in a subsequent section 1983 action . . . would be wholly inappropriate . . . .").

In *Swineford*, the issues of discharge in the plaintiff's initial unemployment compensation claim and her subsequent retaliatory discharge claim differed so as to bar the use of issue preclusion, even though the claims carried the same general label and had similar characteristics. See *Swineford*, 15 F.3d at 1268 ("[T]he issue of discharge before the [unemployment compensation board] is not identical to the issue of discharge presented in a civil rights claim."). In much the same vein, the court in *Maryland Casualty* considered the preclusive effect of an administrative law judge's determination that the car that the plaintiff had been driving when involved in an accident had not been operated with her employer's permission. The court held that the administrative law judge's determination did not resolve the same issues as the subsequent no-fault accident insurance claim, which required a similar but sufficiently different legal standard to render issue preclusion inappropriate. See *Maryland Casualty*, 874 P.2d at 1066 ("The ALJ's finding . . . is not identical to the issues to be addressed in Messina's no-fault action . . . ."). Likewise, although the issues in a statutory income support application or award and an ADA claim carry the same label of "disability" and are somewhat similar in other respects, they are in fact legally distinct issues, and therefore issue preclusion should not be applied. See 18 Wright et al., supra note 113, § 4417, at 166 ("In other cases, careful examination has shown that different legal standards are masquerading behind similar legal labels, so that preclusion is again inappropriate.").

[170] See, e.g., Morton v. GTE N. Inc., 922 F. Supp. 1169, 1181-83 (N.D. Tex. 1996) (applying estoppel based on representations in applications for leave, long-term disability insurance benefits, and Social Security disability benefits); McNemar v. Disney Stores, Inc., Civ. Action No. 94-6997, 1995 U.S. Dist. LEXIS 9454, at *12 (E.D. Pa. June 29, 1995) (applying

fact, most of these applications of judicial estoppel against ADA plaintiffs involve no inquiry whatsoever into the existence of a binding judgment, much less its validity, finality, or inquiry into the merits.[171]

Courts also balk at applying issue preclusion where the low stakes and streamlined procedures of the first tribunal suggest that the issue sought to be given preclusive effect might not or could not have been fully and vigorously litigated.[172] In *Swineford v. Snyder County Pennsylvania*, for example, the initial determination of the plaintiff's eligibility for unemployment benefits had been made in a brief administrative hearing before the state's unemployment compensation board.[173] Such hearings, the court noted, are abbreviated in many respects because of the unemployment compensation program's primary goal of providing quick relief to eligible applicants.[174] If the outcomes of the hearings were accorded preclusive effect in subsequent litigation, the character of the hearings would have to change substantially

---

estoppel based on statements in application for Social Security disability benefits for which plaintiff's condition was considered "presumptive disability," requiring no factual showing of disability), aff'd, 91 F.3d 610 (3d Cir. 1996); Reigel v. Kaiser Found. Health Plan, 859 F. Supp. 963, 967-69 (E.D.N.C. 1994) (applying estoppel based on plaintiff's statements in interview with workers' compensation carrier, and on forms submitted to long-term disability insurance carrier and to Social Security Administration). But see EEOC v. MTS Corp., 937 F. Supp. 1503, 1511 (D.N.M. 1996) (refusing to apply judicial estoppel because applicant "completed the application over the phone, outside of the judicial machinery, without the benefit of counsel, and arguably under a great deal of emotional stress").

171 See, e.g., *MTS Corp.*, 937 F. Supp. at 1511 (declining to apply judicial estoppel where Social Security disability benefit application completed by telephone); cf. Dockery v. North Shore Medical Ctr., 909 F. Supp. 1550, 1557 (S.D. Fla. 1995) (finding that ADA claim "presents clearly different facts than those which only involve the filling out of disability applications"). But see Rissetto v. Plumbers & Steamfitters Local 343, No. 94-15724, 1996 WL 490350, at *9 (9th Cir. Aug. 29, 1996) (concluding that doctrine of judicial estoppel was not rendered inapplicable by fact that prior position was taken in workers' compensation proceeding rather than court).

172 See Restatement (Second) of Judgments § 28(3) & cmt. d (1980) (noting that issue preclusion should not apply where "[a] new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts"); 18 Wright et al., supra note 113, § 4423, at 220-21 (noting that issue preclusion should not apply where substantial differences exist between administrative and judicial proceedings); see also *Swineford*, 15 F.3d at 1269 (refusing to give preclusive effect to unemployment benefit board determination based on "fast and informal" procedures); Mitchell v. Humana Hospital-Shoals, 942 F.2d 1581, 1582 n.1 (11th Cir. 1991) (concluding that "res judicata has no application" where current claim could not have been brought in earlier trial); *Dockery*, 909 F. Supp. at 1557 ("This case presents clearly different facts than those which only involve the filling out of disability applications."); *Salida*, 732 P.2d at 1164 (refusing to apply issue preclusion where remedies available and procedures followed in federal court differed from unemployment compensation proceeding).

173 See *Swineford*, 15 F.3d at 1268-69.

174 See id.

to allow parties to ensure that all issues that might come up later were fully and vigorously litigated.[175]

Workers' compensation and Social Security proceedings are of a similarly informal and summary nature, and lack both the procedural safeguards and policy incentives to address issues that might arise in more formal litigation.[176] The proceedings are so structured to further the policy of affording qualified applicants the quick relief of these income support programs.[177] That the administrative tribunals making such determinations lack subject matter jurisdiction notwithstanding, this policy would be ill served were applicants given a strong incentive—because of the threat of judicial estoppel—to litigate their claims more fully and vigorously. Moreover, even were an administrative tribunal *able* to determine a plaintiff's status pursuant to the ADA, this determination still would not be "necessary" to the judgment, and judicial estoppel still would be inappropriate.[178]

Determinations of disability in connection with applications for Social Security disability benefits also should not be dispositive of ADA claims where a plaintiff received benefits because she had a listed or presumptive disability.[179] In such cases, the Social Security Administration makes no inquiry whatsoever into a claimant's ability to work. Rather, it awards benefits pursuant to a regulatory determination that most individuals with certain disabilities cannot work.[180] For example, in *McNemar v. Disney Stores, Inc.*,[181] the plaintiff had applied for and received Social Security disability benefits because he had AIDS, which is considered a presumptive disability under the So-

---

175 See id. at 1269.

176 See, e.g., Grenig, supra note 27, ¶ 1124, at 1107 (describing "range of attitudes" among administrative law judges concerning conduct and rules of evidence in workers' compensation hearings, and noting that "[t]he conduct of the hearing itself may be more or less relaxed"); Millus & Gentile, supra note 26, at 227 (noting that workers' compensation "proceedings are informal and unlike a judge in a court of law, the referee is not bound by the formal rules which prevail in a law court"); Dennis M. Sweeney & James J. Lyko, Practice Manual for Social Security Claims 97-127 (1980) (describing "informal" setting and procedures of Social Security adjudication before administrative law judge).

177 See Nackley, supra note 84, at 8-9 (describing underlying purpose of workers' compensation laws "to compensate injured and diseased workers . . . in as expeditious and non-adversarial a manner as possible").

178 See 18 Wright et al., supra note 113, § 4421, at 192 ("Issue preclusion attaches only to determinations that were necessary to support the judgment entered in the first action.").

179 See Mohamed v. Marriott Int'l, Inc., 944 F. Supp. 277, 284 (S.D.N.Y. 1996) (declining to apply judicial estoppel because plaintiff, who had a listed disability, received SSDI); supra text accompanying notes 104-08.

180 See supra text accompanying note 156.

181 Civ. Action No. 94-6997, 1995 U.S. Dist. LEXIS 9454 (E.D. Pa. June 29, 1995), aff'd, 91 F.3d 610 (3d Cir. 1996).

cial Security Act regulations.[182] Although he had made no claim or demonstration of total disability, the court held that McNemar's receipt of Social Security disability benefits estopped him from claiming that he had been able to do his job.[183]

Despite some superficial similarity to the ADA, statutory income support programs use forums and procedures that are incompatible with the factual determinations required in ADA claims. The administrative and adjudicative shortcuts used to expedite awards of statutory income support benefits weigh against the application of judicial estoppel because factual findings resulting from such expedited procedures are of little preclusive value in subsequent ADA litigation.

3. *The Analogy Between Statutory Income Support Experience and After-Acquired Evidence*

In some cases, the same logic that underlies the prohibition against the introduction of "after-acquired evidence" also should preclude the use of judicial estoppel. After-acquired evidence is evidence that is detrimental to a plaintiff's case and that an employer-defendant has obtained subsequent to the plaintiff's discharge.[184] A typical example is where an employer discovers evidence that a discharged employee committed theft or other conduct that could have served as a lawful basis for the employee's termination had the employer known of it.[185]

After-acquired evidence is not admissible in an employment discrimination lawsuit to prove the propriety of the employer's actions because the employer could not have relied on the evidence as the basis for its actions if it did not yet possess the information at the time of those actions.[186] This accords with the principle that an employ-

---

182 See id. at *12.

183 See id. at *14-*15. The Third Circuit's adherence to the judicial estoppel doctrine embodied in *McNemar* is particularly ironic in light of its hostility to issue preclusion in directly analogous contexts in other types of employment discrimination claims. See, e.g., Dici v. Pennsylvania, 91 F.3d 542, 549-50 (3d Cir. 1996) (refusing to apply issue preclusion in Title VII claim subsequent to workers' compensation claim); Swineford v. Snyder County Pa., 15 F.3d 1258, 1268 (3d Cir. 1994) (refusing to apply issue preclusion in § 1983 claim because of prior unemployment compensation award).

184 See generally Christine Neylon O'Brien, The Impact of After-Acquired Evidence in Employment Discrimination Cases After *McKennon v. Nashville Banner Publishing Company*, 29 Creighton L. Rev. 675, 689 (1996) (describing relevance of such evidence).

185 See, e.g., McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879, 883 (1995) (employer discovered that discharged employee had removed and copied confidential documents from employer's offices).

186 See id. at 885 ("The employer could not have been motivated by knowledge it did not have and it cannot now claim that the employee was fired for the nondiscriminatory reason.").

ment discrimination plaintiff's claim should not be defeated by evidence that did not exist when the employer made its adverse decision.[187]

In many ADA cases, the defense of judicial estoppel is predicated on evidence that a discharged employee sought statutory income support benefits after having been terminated.[188] Where the plaintiff in an ADA claim has sought statutory income support *after* her dismissal or rejection by the employer, this fact is not relevant to the evaluation of the employer's motive for its actions with respect to that employee.[189] As with after-acquired evidence, the employer cannot in any practical or logical sense have relied on such information when it did not exist at the time of the employer's decision. Moreover, the EEOC's interpretive guidance concerning the ADA requires that the determination whether an individual with a disability is qualified be made at the time the employment decision is made.[190] An employer's actions therefore should be examined in light of its actual knowledge about the individual with a disability at the time of its employment decision. In fact, in light of the ADA's prohibition of employment discrimination on the basis of a record of disability, any action an em-

---

[187] See Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221, 1228 (3d Cir. 1994) (holding that after-acquired evidence will not affect employer liability for discrimination), vacated on other grounds, 115 S. Ct. 1397, modified, 65 F.3d 1072 (3d Cir. 1995).

[188] See, e.g., Mohamed v. Marriott Int'l, Inc., 944 F. Supp. 277, 279 (S.D.N.Y. 1996) (deaf plaintiff applied for and received SSDI more than nine months after challenged termination); Farrow v. Bell Atlantic—PA, Civ. A. No. 95-1323, 1996 WL 316798, at *2-*5 (W.D. Pa. Apr. 26, 1996) (plaintiff with carpal tunnel syndrome applied for SSDI after discharge); Fussell v. Georgia Ports Auth., 906 F. Supp. 1561, 1567 (S.D. Ga. 1995) (employee with hand tremor applied for and received disability benefits after termination); McNemar v. Disney Stores, Inc., Civ. Action No. 94-6997, 1995 U.S. Dist. LEXIS 9454, at *5 (E.D. Pa. June 29, 1995) (discharged employee with HIV applied for and received disability benefits after dismissal); Smith v. Dovenmuehle Mortgage, Inc., 859 F. Supp. 1138, 1139-40 (N.D. Ill. 1994) (plaintiff with AIDS applied for and received Social Security disability benefits after discharge); see also O'Brien, supra note 184, at 687-88 (describing hypothetical scenarios where such evidence might come into play).

[189] See Brief of the Equal Employment Opportunity Commission as Amicus Curiae at 25 n.10, *McNemar* (No. 95-1590) (on file with the *New York University Law Review*) (arguing that plaintiff's postdismissal Social Security disability benefits application should not bar ADA claim); see also *Mohamed*, 944 F. Supp. at 282 (refusing to apply judicial estoppel where plaintiff applied for and received SSDI more than nine months after termination and had exemplary work record prior to termination); cf. D'Aprile v. Fleet Servs. Corp., 92 F.3d 1, 4 (1st Cir. 1996) (refusing to dismiss claim pursuant to Rhode Island fair employment statute because, inter alia, plaintiff's application for short-term disability benefits occurred after rather than contemporaneously with attempt to get reasonable accommodation).

The District Court in *McNemar* apparently rejected the EEOC's argument, although it made no specific reference to it in its decision.

[190] See Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. pt. 1630, app. § 2(m) (1996).

ployer might take based on its knowledge of such a claim at the time of discharge would itself violate the ADA.

4. Statutory Income Support Experience as a Record of Impairment

Judicial estoppel also renders meaningless the part of the ADA's definition of disability that includes people who have a record of having a disability.[191] This particular prong of the definition of disability is aimed at protecting individuals who might experience disability-related discrimination because of a prior experience with a disabling condition.[192] Congress intended this part of the definition of disability to address the problems facing two classes of individuals: those whose disabling conditions had improved or disappeared altogether, and those who once had been classified erroneously as having a disability and who continued to be treated and discriminated against as if they were disabled.[193] By including such individuals in the ADA's protected class, Congress forces society to examine these individuals' abilities anew, factoring in the possibilities that the passage of time, medical improvements and cures, and even technological advances might render qualified a previously unqualified, incapable individual.

Judicial estoppel prevents this review from happening; it stops the clock at the moment that a person with a disability encounters a program of statutory income supports and brands that person as incapable of working for a period that may extend far beyond the actual duration of her disability. Moreover, it allows employers to use an individual's record of having a disability (because of her experience with a statutory income support program) as proof of her incapacity, despite the ADA's express prohibition of just such a use of that record.[194] In this sense, judicial estoppel renders meaningless the ADA's prohibition of discrimination against individuals on the basis of their record of disability.[195]

---

191 See 42 U.S.C. § 12102(2)(B) (1994) (defining disability to include individuals with "a record of . . . an impairment"); see also supra text accompanying notes 75, 80.

192 See ADA Legislative History, supra note 23, at 121 ("Discrimination on the basis of such a past impairment would be prohibited [by the ADA].").

193 See id.

194 See 42 U.S.C. § 12102(2)(B) (1994) (defining ADA's protected class of individuals with disabilities to include those having record of impairment).

195 In addition, the usage of judicial estoppel overlooks the fact that forcing employers to provide reasonable accommodations to some individuals might mean that those individuals would not need to seek statutory income support benefits at all and would as a consequence conserve the limited financial resources of the income support programs.

It might well be that the ADA could work in conjunction with the statutory income support programs to require an effort at reasonable accommodation prior to an employee's application for statutory income support benefits. Such an interpretation would, of course, strain the meaning of all of these statutes as they are currently written in much the same

B. Policy Defects of Judicial Estoppel

While the aforementioned legal reasons might suffice to establish that judicial estoppel should not be employed in ADA cases, several policy factors also compel the abandonment of judicial estoppel in favor of a fact-based approach to determining whether individuals come within the ADA's protected class. Judicial estoppel contradicts both the legislative history and the text of the ADA, which strongly suggest that Congress did not intend to force plaintiffs to make a choice between statutory income supports and the ADA's civil rights protections. Moreover, Congress intended a very broad definition of the ADA's protected class, consistent with courts' tendency to construe civil rights statutes broadly to confer these statutes' benefits on society in general. Judicial estoppel also threatens to obstruct the reentry of people with disabilities into the work force, and bespeaks an unrealistically rigid view of the life experience of people with disabilities.

1. Inconsistency with Legislative History

a. The ADA as a Supplement to Existing Legislation. In enacting the ADA, Congress showed no inclination to force individuals with disabilities to choose between the civil rights protections of the ADA and the financial benefits of statutory income supports. Rather, Congress seems to have expected that the ADA would serve as an umbrella of rights—complementing, not preempting, other programs for people with disabilities.[196] The application of judicial estoppel to determine that workers' compensation and Social Security recipients are excluded from the ADA's protected class as a matter of law requires potential plaintiffs to choose very early and irrevocably whether they prefer disability benefits in the form of money (through statutory income supports) or in the form of protection against discrimination (through the ADA).[197]

---

way that it strains their meaning to exclude all individuals with disabilities who have experience with statutory income supports from the ADA's protected class. Therefore, such harmonization should be more appropriately accomplished through legislative—rather than judicial—action. See Ravitch, supra note 22, at 251 ("An attempt by the SSA to limit the availability of SSDI/SSI benefits by imparting ADA concepts into the disability benefits determination procedures would undermine the purposes of both the ADA and SSDI/SSI.").

[196] See ADA Legislative History, supra note 23, at 320-21 (describing "need to enact omnibus rights legislation for individuals with disabilities" to deal with gaps in existing "piecemeal" legislation).

[197] See Farrow v. Bell Atlantic—PA, Civ. A. No. 95-1323, 1996 WL 316798, at *6 (W.D. Pa. Apr. 26, 1996) ("This Court recognizes that such a holding will require individuals to chose [sic] between seeking disability benefits and suing under the ADA."); Michael

Such a determination is undesirable at the extremely early juncture that judicial estoppel requires. This determination might well have to be made long before the employer's discriminatory action out of which an ADA claim might arise. In such an instance, judicial estoppel forces the individual with a disability to waive rights she does not even know she might need to enforce. The threat of judicial estoppel of a possible, future ADA claim renders it nearly impossible for an individual with a disability who needs immediate income support, but who also might have a future ADA claim—including a claim based on a discriminatory act that has not yet occurred—to make an intelligent choice about how to proceed at the onset of her disability.[198]

b. The ADA's Deliberately Broad Protected Class. The ultimate goals of the ADA warrant the broadest possible definition of its protected class. Since the enactment of the Civil Rights Act of 1964, courts routinely have construed civil rights statutes broadly, the better to achieve their ameliorative purposes for as many people as possible.[199] Insofar as it aims to eradicate discrimination, the ADA might reasonably be characterized as a civil rights statute and also should be construed to apply to as many people as possible.

To the extent that the ADA allocates the theoretically infinite resource of civil rights, there is no limit to the benefits it can confer. In fact, broad construction of the ADA is also supported by the fact that its benefits are meant to reach society in general, in addition to the individual members of its protected class.[200] By contrast, workers'

Faillace & Ed Butler, Long-Term Disability and the ADA: Can Plaintiffs Have Cake and Eat It Too?, N.Y. L.J., July 8, 1996, at S1 ("[I]n order to challenge a termination or other adverse employment action, [people with disabilities] must forgo the opportunity to obtain benefits under the SSA . . . .").

198 See Brief of the Equal Employment Opportunity Commission as Amicus Curiae at 17, Talavera v. School Bd. of Palm Beach County (11th Cir. 1996) (No. 96-4756) (on file with the *New York University Law Review*) (arguing that judicial estoppel may thwart ADA enforcement by forcing potential ADA claimants to forego such claims if they opt for statutory income support benefits).

199 See, e.g., Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 237 (1969) (noting that narrow construction of 42 U.S.C. § 1982 "would be quite inconsistent with the broad and sweeping nature of the protection meant to be afforded by § 1 of the Civil Rights Act of 1866 . . . from which § 1982 was derived"); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 437 (1968) (interpreting § 1982 broadly "'to give [the law] the scope that its origins dictate'" (quoting United States v. Price, 383 U.S. 787, 801 (1966))); 3A Norman J. Singer, Statutes and Statutory Construction § 74.05, at 374 (5th ed. 1992) (noting that civil rights laws should be construed broadly to effectuate their remedial purposes). But see Martinez v. Bethlehem Steel Corp., 78 F.R.D. 125, 129 (E.D. Pa. 1978) ("[S]tatutes in derogation of the Common Law, such as Civil Rights statutes, must be narrowly construed.").

200 See Kurt W. Andersen, As ADA Matures, Courts Clarifying Definitions, The Legal Intelligencer, Feb. 26, 1996, at S3 ("[A]nti-discrimination legislation [is] intended to protect

compensation and Social Security disability programs offer access to benefits that are limited by the amount of money governments allocate to fund claims.[201] In order to maximize the benefits available to individual recipients of statutory income supports, these statutes should be construed narrowly.[202] In light of this fundamental difference, it makes little sense to construe statutory income support programs to exclude from the ADA's protections individuals who may be within its protected class.

2. *Inconsistency with the Experiences of People with Disabilities*

Judicial estoppel also bespeaks a view of disability that is unrealistically rigid. It suggests that a snapshot of an individual's condition at any point will remain for an indefinite period an accurate representation of whether that person has a disability. However, disability is not a static phenomenon: individuals with disabilities may have improvements in their conditions, new cures and treatments may be discovered, technology may improve, and numerous other factors may change the situation and relative disability of an individual during the course of her life.[203] Both workers' compensation and Social Security disability benefits programs account for this through reviews of benefit recipients' conditions.[204] Similarly, the ADA's protected class in-

---

not only the plaintiff, but society in general . . . ."); cf. McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879, 884 (1995) (observing that private litigants in age discrimination suits vindicate "both the deterrence and the compensation objectives" of antidiscrimination statutes); Alexander v. Gardner-Denver Co., 415 U.S. 36, 45 (1974) (noting that private litigants in Title VII suits redress their own injuries and also vindicate congressional policies); Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221, 1234 & n.22 (3d Cir. 1994) (recognizing role of plaintiffs in employment discrimination suits as "private attorney[s] general" to further public policies and interests), vacated, 115 S. Ct. 1397 (1995), modified, 65 F.3d 1072 (3d Cir. 1995); Lawrence v. United States Interstate Commerce Comm'n, 629 F. Supp. 819, 822 (E.D. Pa. 1985) ("[A]cceptance of a disability annuity should not affect [the plaintiff's] attempt to redress an alleged violation of his constitutional rights.").

201 See Lance Liebman, The Definition of Disability in Social Security and Supplemental Security Income: Drawing the Bounds of Social Welfare Estates, 89 Harv. L. Rev. 833, 848 (1976) (observing that requirement of total disability in Social Security disability programs "implements an intention to allocate limited resources to the most needy").

202 But see Nackley, supra note 84, at 8-9 (observing that workers' compensation, as "beneficial" and "remedial" system, should be "liberally construed in favor of the intended beneficiaries").

203 See, e.g., Smith v. Dovenmuehle Mortgage, Inc., 859 F. Supp. 1138, 1141-42 (N.D. Ill. 1994) (refusing to apply judicial estoppel where plaintiff had found another full-time job).

204 See, e.g., 42 U.S.C. § 421(i) (1994) (describing procedure for review of continuing eligibility for SSDI); N.Y. Work. Comp. Law § 22 (McKinney 1993) (providing for modification of workers' compensation award for change in conditions).

cludes substantial numbers of individuals whose disability status has changed.[205]

Some courts applying judicial estoppel against ADA plaintiffs refuse or fail to consider whether the abilities and personal and vocational circumstances of the plaintiff might have changed between the time she made her claim for income support and the employer's actionable discriminatory acts. For example, a plaintiff might file an ADA claim because her employer refused to rehire her upon her attempt to return to work after a disability leave, during which time she might have applied for or received workers' compensation or Social Security disability benefits.[206] In addition, there is always a possibility that a plaintiff's condition might have improved in the time between the two proceedings.[207] Where judicial estoppel is applied, it may fail to account for and accommodate the nonstatic nature of disability and, as a consequence, may fail to serve adequately the needs of people with disabilities.

3. *Obstruction of Work Force Reentry*

On a more practical level, judicial estoppel may obstruct the entry and reentry of individuals with disabilities into the work force.[208] Federal policy requires that people with disabilities receiving Social Security disability benefits be returned to work.[209] In fact, both the Social Security Act and its regulations contemplate that individuals receiving disability benefits might be working at the same time they are receiving such benefits.[210]

A person might have or acquire a disability of such severity that she cannot perform or return to her job *without* reasonable accommodation, yet she may be able to perform it *with* reasonable accommoda-

---

205 See 42 U.S.C. § 12102(2)(B)-(C) (1994) (defining disability to include individuals with past records of disability and individuals who are perceived as disabled).

206 Cf. Reiff v. Interim Personnel, Inc., 906 F. Supp. 1280, 1283-84 (D. Minn. 1995) (plaintiff sought to return to work after absence due to bone marrow condition during which he received private long-term disability insurance benefits).

207 See, e.g., *Smith*, 859 F. Supp. at 1141-42 (refusing to apply judicial estoppel where improved condition of plaintiff with AIDS permitted him to obtain another job).

208 See Mohamed v. Marriott Int'l, Inc., 944 F. Supp. 277, 284 (S.D.N.Y. 1996) ("The ADA's overriding purpose of encouraging the disabled to seek employment would be thwarted by application of judicial estoppel under the circumstances of this case."); cf. Marvello v. Chemical Bank, 923 F. Supp. 487, 491-92 (S.D.N.Y. 1996) (noting that courts applying judicial estoppel have not addressed fact that Social Security Act "clearly intend[s] . . . [that] SSI recipients . . . seek work even while receiving SSI support").

209 See 42 U.S.C. § 422(a) (1994) ("It is declared to be the policy of the Congress that . . . the maximum number of [individuals receiving Social Security disability benefits] be rehabilitated into productive activity.").

210 See supra notes 163-66 and accompanying text.

tion. An example might be an employee who develops a repetitive-stress injury from operating a machine: although she might be so disabled by the repetitive-stress injury that she cannot perform the job using the same machine in the same manner, reasonable accommodations might allow her to return to work. That is, the machine might be modified, an alternate machine might be used, or she might be permitted additional rest breaks.[211]

The ADA's reasonable accommodation provision can expand the participation of people with disabilities in the work force by requiring employers to provide accommodations that assist qualified people with disabilities in performing their jobs.[212] The use of judicial estoppel in ADA cases thwarts this goal by allowing employers to avoid their legal duty to provide such accommodations to employees who have received statutory income supports.[213] Consequently, judicial estoppel prevents individuals with disabilities from entering or returning to the work force—a result directly contrary to the ADA's goal of greater employment for people with disabilities.[214]

C. *Does Judicial Estoppel Have Any Place in ADA Jurisprudence?*

Having dismantled the faulty logic that underlies judicial estoppel, it is necessary to address some counterarguments that might arise in support of continued judicial estoppel in ADA cases. For example, it might seem that judicial estoppel is appropriate where the definition of disability in the relevant statutory income support program is congruent with the ADA's definition of a qualified individual with a disability. In addition, it might be argued that judicial estoppel is an appropriate method to prevent overextension of the ADA's protected class in ways not intended by the statute. However, both of these ar-

---

211 A similar set of facts arose in State v. G.S. Blodgett Co., 656 A.2d 984 (Vt. 1995). In *Blodgett*, the employee-plaintiff requested that her employer install a machine in her garage at home, so that she could take periodic breaks to prevent exacerbating her injury. See id. at 987. Ironically, the employer refused to make the accommodation even though the plaintiff's work had since been contracted out to a sheltered workshop staffed entirely by people with disabilities. See id.

212 See Ravitch, supra note 22, at 251 (noting that availability of reasonable accommodation has expanded number of jobs available to people with disabilities).

213 See, e.g., Trotter v. B&S Aircraft Parts & Accessories, Inc., Civ. A. No. 94-1404-FGT, 1996 WL 473837, at *9 (D. Kan. Aug. 13, 1996) (finding that "[t]here is no accommodation which would have allowed plaintiff to return to work consistent with his representations of a total inability to work").

214 Cf. Ingley & Kornblau, supra note 22, at 80 ("The ADA may have the added advantage of cutting workers' compensation costs by stopping discrimination against injured workers and returning them to the workplace with or without a reasonable accommodation.").

guments in support of judicial estoppel ultimately fail to address the significant doctrinal and policy issues that favor its abandonment.

1. *Judicial Estoppel Where Statutes Are Congruent*

The notion that congruence between the relevant statutes might alleviate the concerns raised by judicial estoppel falls short. Such congruence—particularly by way of reasonable accommodations and essential functions provisions equivalent to those found in the ADA—would satisfy some of the concerns of this Note, but it would not resolve them all. Some of the objections to the deployment of judicial estoppel do not concern the definitions at issue in the two proceedings, but rather the imbalance between the procedures and forums in the two proceedings.[215] Unless statutory income support awards are administered in courts whose competence, procedures, and goals equal those found in courts of general jurisdiction, judicial estoppel should continue to be avoided. Furthermore, such an overhaul in the evaluation of statutory income support applications is not desirable and would compromise these programs' goal of getting financial support to eligible individuals in an expedient manner.[216]

2. *Broad Construction Dilutes the ADA's Force*

There also may be objections to the extension of the ADA's protections beyond those individuals most traditionally considered disabled.[217] Some might argue, for example, that broad construction of the ADA "dilutes" its force by giving its protections to people whose disabilities are somehow less deserving of protection than others.[218] This contention is countered by reference to the express terms of the ADA, as well as to its legislative history.[219] The ADA's legislative

---

215 See supra text accompanying notes 167-83.

216 Nevertheless, there might be strong policy reasons to include reasonable accommodations or essential functions provisions in statutory income support definitions of disability. For example, such provisions in a workers' compensation program might operate in conjunction with the ADA to motivate employers to provide accommodations to employees (or prospective employees) with disabilities. Employers who provided such accommodations would not only find themselves in compliance with the ADA, but also would avoid unnecessary workers' compensation expenditures because employees who might otherwise be collecting benefits could be returned to productive work sooner. But see Ravitch, supra note 22, at 251 (arguing against importation of ADA concepts into SSDI and SSI disability benefits determinations).

217 This group would include those people whose disabilities fall into the first part of the ADA's definition of disability—impairments that substantially limit one or more major life activities. See 42 U.S.C. § 12102(2)(A) (1994).

218 See sources cited supra note 73.

219 See supra text accompanying notes 199-202.

findings refer to forty-three million Americans with disabilities,[220] a figure which is believed to include those who have disabilities in the broadest sense of the term.[221] In addition, the ADA's definition of disability deliberately confers the ADA's protections upon two large groups of individuals who might not be considered disabled under traditional notions of disability: those with a record of disability[222] (but who might no longer be disabled) and those who are viewed by others as having a disability,[223] regardless of whether they have an "impairment that substantially limits one or more . . . major life activities."[224] The sweeping language of the ADA's definition of disability and its inclusion within its protected class of individuals not traditionally viewed as disabled suggest that Congress sought to have the ADA protect a very broad class of individuals.

D. A Proposal for the Abandonment of Judicial Estoppel

The concept of judicial estoppel has some superficial logical appeal. However, it absolves courts of the obligation to engage in thorough statutory interpretation, and it perpetuates negative stereotypes about the ability of people with disabilities to participate in the workplace. In the handful of ADA cases where courts have refused to apply judicial estoppel, each court has treated the determination of whether the plaintiff comes within the ADA's protected class as a question of fact rather than one of law. Courts that apply judicial estoppel, by contrast, cut off their inquiry as a matter of law once the plaintiff's experience with statutory income supports has been established.

Judicial estoppel is an extraordinary remedy and should not be applied as routinely as it has come to be used in ADA litigation. In order to protect the express terms of the ADA and fulfill its ambitious and worthwhile goals for individuals with disabilities and for society, courts can and should hesitate before abbreviating their analysis of a plaintiff's situation. Rather than continue on this course of applying judicial estoppel, courts should determine a plaintiff's disability as a matter of fact rather than as a matter of law, without relying solely on

---

220 See 42 U.S.C. § 12101(a)(1) (1994).

221 See, e.g., Robert A. Machson & Joseph P. Monteleone, Insurance Coverage for Wrongful Employment Practices Claims Under Various Liability Policies, 49 Bus. Law. 689, 697 (1994) ("[T]he [ADA's] broad definition of *disabled* may surprise employers with suits by employees . . . that they never may have considered disabled."); see also Feldblum, supra note 159, at 85 ("[T]he definition of disability under the ADA . . . is a broad and comprehensive one.").

222 See 42 U.S.C. § 12102(2)(B) (1994).

223 See id. § 12102(2)(C).

224 Id. § 12102(2)(A).

the plaintiff's experience with statutory income supports.[225] This approach is more faithful to the express terms and underlying policies of both the ADA and statutory income support programs. Furthermore, it would restore judicial estoppel to its appropriate role—a remedy to be deployed once in a great while to redress unique instances threatening fraud or extraordinary injustice.

A return to a factual determination of disability in ADA cases would not leave a court powerless to consider the significance of a plaintiff's experience with statutory income supports. Although that experience is not dispositive of the determination whether a plaintiff is within the ADA's protected class, neither is it completely irrelevant to that determination. A court could admit that experience as evidence—but not as absolute proof—that the plaintiff was not capable of performing her job.[226] In addition, a plaintiff's experience with statutory income supports might be factored into the damage award where a plaintiff prevailed.[227] Courts also will continue to have recourse to summary judgment in those cases where all available evidence—including, but not limited to, the plaintiff's experience with statutory income supports—clearly demonstrates that a claim should

---

225 See, e.g., Kupferschmidt v. Runyon, 827 F. Supp. 570, 574 (E.D. Wis. 1993) (holding that question whether plaintiff seeking reinstatement was "qualified" under Rehabilitation Act after having received SSDI benefits was to be decided at trial).

226 See, e.g., Dockery v. North Shore Medical Ctr., 909 F. Supp. 1550, 1559 (S.D. Fla. 1995) (refusing to apply estoppel, but noting that "this does not mean that a plaintiff's statements on disability applications, or other analogous instruments, are not relevant"); Heise v. Genuine Parts Co., 900 F. Supp. 1137, 1152 (D. Minn. 1995) ("[T]he fact that Heise received social security disability benefits . . . is relevant to demonstrate the extent of his disability, however, it cannot be construed as a judgment that Heise could not perform his job."); see also Overton v. Reilly, 977 F.2d 1190, 1196 (7th Cir. 1992) (noting, in Rehabilitation Act case, that "the determination of disability may be relevant evidence of the severity of [the plaintiff's] handicap, but it can hardly be construed as a judgment that [he] could not do his job"); Daffron v. McDonnell Douglas Corp., 874 S.W.2d 482, 487 (Mo. Ct. App. 1994) (finding plaintiff's applications for disability benefits not dispositive of issue of whether appellant could perform job and noting that such application "would be an evidentiary admission subject to explanation or impeachment by other evidence at trial"); State v. G.S. Blodgett Co., 656 A.2d 984, 990 (Vt. 1995) (finding, in claim pursuant to Vermont's Fair Employment Practices Act, that plaintiff's statements in Social Security proceeding were not dispositive but "probative of her job-related capabilities and the severity of her handicap").

Where such evidence is admitted, it should be accompanied by jury instructions clearly explaining the differences between the determinations in ADA claims and in statutory income support awards.

227 See, e.g., Oswald v. LaRoche Chems., Inc., 894 F. Supp. 988, 997 (E.D. La. 1995) (recognizing court's discretion to reduce plaintiff's back-pay award because of receipt of workers' compensation); see also Brief of the Equal Employment Opportunity Commission as Amicus Curiae at 25 n.10, McNemar v. Disney Stores, Inc., Civ. Action No. 94-6997, 1995 U.S. Dist. LEXIS 9454 (E.D. Pa. June 29, 1995) (arguing that possibility of plaintiff's "double recovery" could be addressed by offsetting disability benefits against monetary damage award), aff'd, 91 F.3d 610 (3d Cir. 1996).

fail as a matter of law.[228] Moreover, courts undoubtedly will devise additional means to give due weight to the fact of an ADA plaintiff's experience with statutory income supports. As courts' treatment of statutory income support experience becomes more refined, they will be able to achieve the judicial efficiency and integrity at which judicial estoppel aims without thwarting the ADA's goals.

CONCLUSION

The experience of an individual with a disability is not static. At different times in her life, she might have legally justifiable reasons for calling upon any of the myriad state and federal programs designed for her benefit. State and federal statutes employ different definitions, policies, and methods to achieve their goals. As a result, an individual with a disability can get caught in a legal double-bind, one major example of which is judicial estoppel. Courts should abandon judicial estoppel and instead should determine whether a plaintiff with statutory income support experience is within the ADA's protected class as a factual question rather than as a purely legal matter. In so doing, courts will further the compatibility of these varied legal regimes with the realities of life for individuals with disabilities and prevent such a double-bind from arising.

[228] See, e.g., Kennedy v. Applause, Inc., 90 F.3d 1477, 1481 n.3 (9th Cir. 1996) (affirming grant of summary judgment without deciding judicial estoppel issue); see also Hindman v. Greenville Hosp. Sys., No. 6:95-2942-21, 1996 WL 697739, at *10-*11 (D.S.C. Nov. 20, 1996) (granting summary judgment based on application of judicial estoppel but noting that undisputed material facts nonetheless would mandate summary judgment (citing *Kennedy*, 90 F.3d at 1479-81 & n.3)).