Does the ADA Disable the Disabled?—More Comments

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This article examines how best to identify individuals with disabilities for analysis of the impact of the Americans with Disabilities Act (ADA) of 1990. It also explores whether amending the ADA to broaden its definition of disability can be expected to improve the employment prospects of those who seek its protections. Answering these questions requires that we learn much more about the labor force participation decisions of those with disabilities. Our aim here is to encourage further consideration and analysis of these and related questions regarding the possible effects of the ADA and of other environmental factors that affect the labor force participation of those with disabilities.

WE HAVE SEEN IN RECENT YEARS A STEADY STREAM OF APPARENT INDICATORS THAT the Americans with Disabilities Act (ADA)—enacted in part to eliminate discrimination against those with disabilities and thereby enhance their employment opportunities—has failed miserably in its goals. Reports suggest that the employment rates of individuals with disabilities are worsening rather than improving since the ADA went into effect. Those reports lead naturally to the question of whether the ADA, despite the "good intentions" it reflects, is a cause of the apparent declines. Some people are quick to conclude that the answer to this question is "yes" if only because the reports and empirical analyses of relative employment rates of disabled individuals appear to confirm their general perception that the ADA is an unnecessary or otherwise "bad" law.

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Of course, the true answer to the question whether the ADA is the, or even a, cause of the apparent declines over time in the employment rates of individuals with disabilities would require an analysis of what life would have been like in America had the ADA not been enacted. Because we have no hope of examining this *It's a Wonderful Life* question directly, we are left with assessments of the myriad alternative explanations for the apparent declines and with the notion that with additional investigation we may begin to understand the true effects of the ADA's provisions.

The studies by Lee (2003) and Kruse and Schur (2003) that comprise this symposium contribute to that understanding. Although the studies examine different questions—one assesses plaintiffs' litigation success under the ADA, and the other evaluates the relative employment rates of disabled individuals given different definitions of who may fall within the category of "disabled"—they each expand our knowledge of life since the ADA went into effect. We focus here on two broad issues that the presented studies raise: how best to identify individuals with disabilities and whether amending the ADA to broaden its definition of disability can be expected to improve the employment prospects of those who seek its protections. We make no claim that we resolve either of these issues here. Instead, our aim is to encourage further consideration—and analysis—of these, and related questions regarding the possible effects of the ADA and of other environmental factors that affect the costs and benefits of labor force participation of those with disabilities.

What a Difference a Definition Can Make

The definition of *disability* and identification of those who have a disability are, to say the least, critical to any research addressing the relative employment of those with disabilities. If the purpose of the research is to examine labor demand and supply of those with disabilities relative to those without disabilities, use of a measure that asks individuals whether they are disabled or whether they have a disability that prevents or limits the work they can do possibly would be sufficient[1] (Hale 2001; Zwerling et al. 2002).

[1] Hale (2001) describes the problems associated with use of the CPS and SIPP data sets for examinations of the employment of individuals with disabilities. His description suggests that the CPS, in particular, cannot be relied upon to distinguish those with disabilities and those without disabilities. Kaye (2001) discusses these problems and proposes using alternate measures of employment rate, labor force participation, and unemployment. In addition, Kaye notes that that the reported decline in the employment rates of persons with disabilities after passage of the ADA is mitigated when using these alternative definitions, and when considering the effect of the early 1990s economic recession and the coinciding rise in working-age adults applying for and receiving federal disability benefits such as Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI).

However, such an approach, taken without regard to the ADA's language, will not likely yield valid conclusions if the purpose of the research is to assess the effects of the ADA. (Hale 2001; Schwochau & Blanck 2000). Given the ADA's definition of disability and its requirement that individuals be "qualified," the number of individuals covered by the law is significantly restricted—neither those whose disability completely prevents them from working or those whose disability imposes some (versus a "substantial") functional or activity limitation can expect the ADA to provide a cause of action.

If the purpose of the particular research is to examine the ADA's influences on the employment of those with disabilities, an obvious starting point for the definition of disability is the ADA's language. As may be readily acknowledged, however, the ADA's definition of *disability*—"a physical or mental condition that substantially limits a major life activity"—is subject to varied interpretations.

What is a *major life activity* under the ADA? What circumstances must be true for an individual to be *substantially limited* in a major life activity? Answers to these questions are not obvious, and an answer today may be in need of revision tomorrow. In 1999, contrary to most prior legal interpretations of the ADA, the U.S. Supreme Court decided that factors that mitigate an individual's impairment—such as prosthetic devices or blood pressure medication—are to be considered in defining whether that person's impairment is substantially limiting for purposes of the ADA (*Sutton v. United Airlines, Inc.*, 1999). During its 2001 term, the Supreme Court will decide if working or the ability to perform work-related manual tasks can be defined as major life activities subject to "substantial limitations" under the ADA (*Williams v. Toyota Mfg., Kentucky, Inc.* 2001).

From Kruse and Hale's (2003) description of the efforts to find a reliable and accurate measure of disability, it may be concluded that merely asking individuals whether they have a physical or mental condition that substantially limits a major life activity likely will not suffice in identifying those with disabilities. Given that *substantially* is at least as subjective as *difficult*, such a query has few prospects of being reliable.

Accuracy (or validity) is another matter, for that term implicitly assumes that there is one truth and that we are attempting to get as close to that truth as possible in our measure of disability. The question that is raised, of course, is whose "truth" we should be trying to measure. The ADA defines a disability not only in terms of functional limitations but also separately in terms of how individuals are regarded by others. Should individuals who are surveyed by researchers be asked whether others such as employers or coworkers would regard them as disabled? Although at least some

ADA plaintiffs may be expected to claim to be disabled for purposes of litigation, Lee's paper (2003) highlights the potential for a tremendous difference among how an individual may report an impairment and interpret the ADA's definition of disability and how courts interpret that definition. Thus, although an individual may consider himself or herself as having a physical or mental condition that falls within the ADA's definition of disability, a court (we observe very often) may conclude otherwise.

Should we measure disability taking courts' interpretations of the ADA into account? For instance, should we follow *Sutton* and ask whether an individual is limited in a given activity and also ask whether he or she is limited in that activity taking into account any mitigating measures he or she uses? Or should we take the Court's future *Williams* decision into account in asking whether he or she is limited in his or her ability to work (or to perform certain work-related tasks)? It is worth quoting the position of the United States as amicus curiae in the *Williams* case (2001):

> [A]n individual is "substantially limited" in "working" only if his impairment excludes him from a class of jobs or a broad range of jobs in various classes. Where a plaintiff alleges that he is substantially limited in the activity of "performing manual tasks," and the tasks he identifies are solely work-related, the plaintiff should likewise to be required to show that as a result of his impairment he is excluded from a class of jobs or a broad range of jobs. . . . In considering major life activities other than working, judicial inquiry cannot properly be limited to the effects of the individual's impairment that are evidenced in the workplace [pp. 35–6].

Measuring disability status in a manner that explicitly takes into account courts' decisions interpreting the ADA is challenging, to say the least. However, inquiries such as these would be useful to assess empirically whether court decisions are part of the reason for the continuing low employment rates of those with disabilities, as Lee's (2003) work implies and as Kruse and Hale (2003) and others have suggested.

Beyond this line of inquiry, measuring disability with attention paid to courts' interpretations may have limited real-world usefulness. One purpose of the ADA is to enhance employment opportunities by providing a cause of action to those who are irrationally discriminated against because of their current or past record of disability or because they are perceived by others to be disabled. Unless we are willing to assume that the ADA is the optimal law for achieving its overall goals, it would seem that "truth" from the individual's own perspective should be measured.

Yet a myriad of measurement issues arise if the individual's version of the truth is what matters. Some individuals no doubt already employ their personal definition of disability that is consistent with, for example, the *Sutton* Court's definition and, as a result, count themselves as not disabled. A person using medication to control his or her epilepsy may respond negatively to any question about whether he or she has a physical or mental condition that limits his or her ability to do, or makes difficult, any particular task. As Kruse and Hale (2003) and Kruse and Schur (2003) point out, if the ADA is effective in eliminating barriers that historically have thwarted attempts of individuals with disabilities to work, over time, fewer and fewer individuals potentially will identify themselves as being limited in their ability to work.

Technological innovations and the movement to achieve independence may have the same result with respect to individuals identifying limitations in other major life activities (Blanck and Sandler 2000). And even creating a measure that is based on what may be called "objective" criteria—for instance, the need for particular devices or products (a TTY telecomm device or voice-recognition software) or the need for assistance from another person to accomplish a particular task—may not yield what appear to be consistent answers over time (Berven and Blanck 1998).

These difficult measurement issues stem from the range of disabilities that appear in the working-age population and the basic focus of the definition of disability on a physical or mental condition that *limits* one's activities—if an individual perceives himself or herself not to be limited, he or she will not respond affirmatively to questions focusing on limitations or difficulties. This is undoubtedly a good thing from a policy and social perspective—it is not such a good thing if one is interested in measuring the effects of the ADA. Even if the law were responsible for changes in individuals' views regarding whether they are limited in the activities of life and were responsible for the increased employment rates of these individuals, they would be treated as not disabled under our current measurement approaches using cross-sectional or longitudinal data. This would tend to increase the likelihood of obtaining empirical results that suggest that the ADA has had a negative, or no, effect on the employment of individuals with disabilities (Blanck 1997).

The task facing those attempting to identify an accurate and reliable measure of disability is, for these and other reasons, extremely difficult. Kruse and Schur's (2003) work should be viewed as encouragement to those faced with this task, as well as others who seek to devise or choose a disability measure to examine the effects of the ADA, because it demonstrates what a difference a measure can make. It also highlights the potential benefits from using multiple measures of disability.

The use of measures of functional limitations in addition to measures that capture limitations on an individual's ability to work will enable further investigation into the reasons why results appear to differ depending on which measure is employed. A separate analysis of those reporting work disabilities but no other functional limitations would have been interesting to see. These individuals arguably have had the worst success rate in ADA litigation because they are most likely to be forced to simultaneously argue that they are substantially limited in "working" in a range of jobs but are qualified to do the job in question. This issue is indeed at the crux of the *Williams* case before the Supreme Court.

It is clear from Kruse and Schur's (2003) work that defining disability in one way or another can have a substantial effect on the conclusions that researchers draw regarding the possible effects of the ADA on employment of individuals with disabilities. In turn, measuring disability in one way or another potentially can have large implications for future policy decisions. It is to policy decisions that we now turn.

Changing the ADA's Definition of Disability: A Solution or More of a Problem?

One implication of Lee's (2003) research is that given the courts' interpretations of the ADA's provisions, the law does not give the protection that Congress intended to provide and has been, as a result, largely ineffectual in achieving its goals. Lee's work, like that of others assessing ADA litigants' success rates, certainly appears to paint a dismal picture.

However, it is clear that the framers of the ADA did not intend to include within the law's coverage all individuals who have a physical or mental impairment (see *Sutton* 1999). One issue therefore is whether Congress' initial definition is too restrictive (or too vague) to provide those with disabilities the protection intended. Lee concludes that the ADA should be amended to broaden the definition of disability to include those with any limitation on a major life activity (Kelman 2001). Whether amendment or "restoration" of congressional intent occurs, of course, depends on whether today's Congress can be persuaded that what has happened (and not happened) since the ADA went into effect deviates from the desired state of affairs and that amendment to the ADA will rectify the situation.

It is these public policy questions that are the ultimate queries. Do we need a law like the ADA, or should we, as some have urged, rely on market forces to sort those with disabilities into jobs (Blanck 1997)? If an unacceptably large number of individuals with disabilities are without jobs, will a law

such as the ADA (or an even an amended ADA) bring about enhanced employment? Or will such a law only work to make employment more difficult for the disabled to find and to keep?

The standard economic model would suggest that the answer to the last question is yes (Acemoglu and Angrist 1998, 2001; DeLeire 1997, 2000), and thus amendment to broaden the ADA's coverage will only work to add to the problem. Broadening the coverage of the ADA will increase the number of possible legal challenges and may increase the success rate of ADA litigants (particularly those who will be able to pass the "qualified" hurdle), therefore increasing both the employer's "hiring subsidies" and "firing costs" associated with ADA litigation (Acemoglu and Angrist 1998, 2001).

Expanding the scope of the definition of disability also will increase the number of individuals to whom employers will have accommodation obligations. To the extent that firing and accommodation costs increase the costs of employing disabled workers, providing a cause of action to a larger number of disabled employees and prospective employees will be predicted to reduce the wages and employment of individuals with disabilities (Acemoglu and Angrist 1998, 2001; DeLeire 1997, 2000). Thus an application of the standard competitive model would lead to the prediction that the employment of individuals with disabilities will further decline if ADA's definition of disability is broadened.

Will this be the actual result? The amendment recommended by Lee (2003) would bring into the scope of the ADA a larger (but unknown) percentage of individuals represented in the "any functional/ADL limitations" columns in Kruse and Schur's (2003) tables. Determining whether the recommended change will have the deleterious effects predicted by economic theory will require that we learn much more than we currently know about who reports that they have a disability and why those individuals are or are not employed (Zwerling et al. 2002).

For instance, why do those represented in the "severe functional/ADL limitations" columns in Kruse and Schur's tables have what appear to be substantially different employment experiences than those falling within other disability categories? If individuals reporting severe functional or ADL limitations have higher accommodation costs, Kruse and Schur's results would appear to be inconsistent with the predictions of economic theory. We are left to wonder whether the relative wages of those reporting work disabilities, any functional limitation, and severe functional limitations provide an explanation for these seemingly anomalous findings.

Lastly, a word of caution about the view that regardless of the ADA's definition of disability, on average, reasonable accommodation net costs reduce

employers' incentives to hire disabled workers [compare Acemoglu and Angrist (1998, 2001) with Stein (2000)]. As an empirical matter, it is not clear that the ADA's accommodation requirement predominantly is a marginal cost that is not, on average, outweighed by marginal benefits to the firm. Blanck (1996) found that the direct costs of workplace accommodations at Sears, Roebuck were low and that the indirect costs of not accommodating disabled workers were high. Sears, like many companies, however, provided many times more undocumented accommodations for disabled workers through local discussions between managers and employees affected.

Similar analysis is possible of beneficial workplace accommodation strategies affecting job applicants and employees without disabilities, such as those geared toward employee wellness programs, flexible hours for workers with young children, employer-sponsored child care enters, or job-sharing strategies for workers with limited time availability. In fact, many companies quite rationally invest large sums of money accommodating the needs of workers without disabilities, which in the aggregate may be substantially greater than the costs associated with accommodations or turnover for workers with disabilities. Moreover, studies show that workplace accommodation strategies enhance the productivity and job tenure of those large numbers of qualified workers without disabilities who are injured on the job or who may become impaired in the future (Blanck 1997).

It is possible, therefore, that the net returns on the vast majority of workplace accommodation investments far outweigh their reported costs (i.e., reflecting the tip of the iceberg phenomenon). The fair question remains whether, on average, the ADA has influenced the degree to which firms provide more and different types of accommodations and to a broader range of individuals with impairments than they would in the absence of the law (Issacharoff and Nelson 2001; Karlan and Rutherglen 1996; Schwochau and Blanck 2000).

During its 2001 term, the Supreme Court will wrestle with the scope of the ADA's accommodation provision in the case *U.S. Airways v. Barnett* (2001). In *Barnett*, the Court will address the circumstances under which reassignment to another job may be a "reasonable" accommodation, particularly in a setting governed by a seniority or collective-bargaining agreement. Of interest will be the Court's review of the ADA's term *reasonable* as requiring an accommodation that is effective (i.e., one that overcomes the effects of an otherwise qualified worker's disability) or cost-efficient. The latter interpretation would entail analysis of whether the costs of the accommodation outweigh its benefits to the firm, thereby creating an "undue hardship" [see, for example, the brief of the National Employment Lawyers Association in *Barnett* (2001)].

Conclusions

Answering the crucial questions of how the ADA's definition of disability should be interpreted and studied, the scope of "reasonable" workplace accommodations, and whether the law should be amended as some have suggested requires that we learn much more about the labor force participation decisions of those with disabilities (Blanck 2000, 2001). What causes individuals with any functional limitation to decide to enter or stay out of the labor force? The disincentives created by disability income programs, the lack of adequate health insurance available through employment, and the lack of accommodations and assistive technology are well documented (Blanck and Schartz 2001; Kaye 2001).

Others have suggested that jobs' requirements have changed over time in ways that make it less likely that those with disabilities will be able to compete for positions [see Stapleton, Houtenville, and Goodman (2001) for an empirical assessment of this possibility]. In addition, more individuals may be out of the labor force because of investments in education if those investments are perceived to be associated with greater future benefits and have been made less difficult because of the ADA's provisions (Jolls 2000, 2001).

Of those entering the labor force, what factors contribute to their remaining unemployed? To what extent are workplace barriers and attitudes a continuing impediment to employment? What forces contribute to individuals' work patterns? What role does a lack of prior work experience and job training play in ensuring that those with disabilities (broadly defined) are not seen as equally productive, with or without accommodations? Do the answers to any of these queries differ depending on what definition of disability is used in the research?

We do not have the answers to these questions for the general population of those with disabilities, let alone the group of those with any functional limitations.[2] Yet these are precisely the answers we need to assess whether particular amendments to the ADA are either necessary or likely to be effective, if passed.

We are only beginning to empirically investigate questions regarding whether individuals who report a work disability or functional limitation continue to experience lower relative employment rates since the ADA was

[2] There are myriad policy-related questions associated with Lee's (2003) recommendation, not the least of which is how a change in the definition of disability will affect (or should affect) the "regarded as" prong of the ADA's definition. For example, will expansion of the ADA's definition of disability to include all those with any functional limitation mean that all those regarded as having any functional limitation should be covered by the act's provisions?

passed. We need to assess who those individuals are and why they are or are not employed before informed predictions regarding the effects of ADA's provisions (or amendments thereto) can be made. If future research builds on the studies presented here, we have the chance of obtaining at least some answers to these questions.

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