End Around: HIV Discrimination in the Post-Amendments Act Workplace

Andrew J. Gordon

Follow this and additional works at: https://scholarship.law.berkeley.edu/bjell

Part of the Law Commons

Recommended Citation

Link to publisher version (DOI)
https://doi.org/10.15779/Z38RK39

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Berkeley Journal of Employment & Labor Law by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.
COMMENT

End Around: HIV Discrimination in the Post-Amendments Act Workplace

Andrew J. Gordon†

Congressional leaders made sweeping promises when passing the Americans with Disabilities Amendments Act in 2008. Following a series of Supreme Court cases that narrowed the ADA’s scope, many individuals living with HIV infection found themselves unable to satisfy the ADA’s disability definition and thereby enjoy the Act’s protections. By legislatively superseding the Court’s so-called Sutton Trilogy, the Amendments Act restored the ADA’s intentionally broad coverage and resolved any doubts about HIV coverage under the ADA.

Yet Congress left unaddressed in the Amendments Act an opportunity for HIV discrimination intimated by several district court decisions. However obscure, these cases create an “end around” the ADA at the intersection of HIV status and sexual orientation. Simply put, the post-amendment ADA may offer no protection against discrimination that occurs on the apparent or purported basis of sexual orientation, even when inferences about orientation owe principally or entirely to the “gay disease” stereotype of HIV.

This Comment defines the HIV “end around” and situates it within federal antidiscrimination doctrine. It posits that the end around is created by the ADA’s express exclusion of homosexuality as a disability, and also the particularized understanding of disability stereotypes embodied within the ADA’s structure. This Comment then argues that the social meaning of HIV requires courts to understand sexually prejudicial statements and conduct as evidence of HIV bias. Finally, it calls upon Congress to eliminate the end

† J.D., University of California, Berkeley, School of Law (2014); B.A., University of Wisconsin-Madison (2007); Law Clerk, Hon. Valerie P. Cooke, D. Nev. (2014-15); Law Clerk, Hon. Sheila M. Finnegan, N.D. Ill. (2015-16). I extend deep gratitude to Professors Catherine Albiston and Claudia Center for their helpful suggestions and insights during the writing process; to Professor Anne Joseph O’Connell for her continual kindness and mentorship during my studies at Boalt; to Mike Gaitley and Teresa Renaker for fostering my interest in employment and civil rights law; and finally, to the staff of the Berkeley Journal of Employment and Labor Law for its thoughtful and careful editing.
around by passing the Employment Non-Discrimination Act ("ENDA"). ENDA would extend federal workplace antidiscrimination protections to LGBT employees, and thereby eliminate the coverage gap in which the end around arises. Working together, the courts and Congress may yet effect one of the Amendments Act’s essential promises: ending discrimination against Americans living with HIV.

INTRODUCTION........................................................................................................ 216
I. THE ADA’S HIV-INCLUSIVE INTENT ..................................................................... 222
   A. Legislative History ...................................................................................... 222
   B. Statutory Language and Judicial Interpretation ........................................ 224
   C. The Amendments Act ................................................................................ 228
II. THE HIV-DISCRIMINATION END AROUND ....................................................... 229
   A. Judicial Disaggregation .............................................................................. 230
   B. Proving Discrimination .............................................................................. 235
   C. The End Around Explained ........................................................................ 239
III. ENDING THE END AROUND ............................................................................. 244
   A. Judicial Treatment of Sexual Prejudice Evidence ..................................... 244
      1. HIV’s Social Meaning ............................................................................ 246
      2. HIV Stigma as a Vehicle for Sexual Prejudice ....................................... 253
   B. Amending Title VII .................................................................................... 256
CONCLUSION ........................................................................................................... 259

INTRODUCTION

For the past several years, each week seemingly brings a new victory in the struggle for LGBT equality. In 2012, President Barack Obama became the first sitting president to embrace marriage equality, and he was handily re-elected in spite of—or perhaps because of—this stance.\(^1\) That November, gay and lesbian candidates won hundreds of elected offices,\(^2\) with Tammy Baldwin of Wisconsin becoming the first openly gay United

---

1. See Jackie Calmes & Peter Baker, Obama Endorses Same-Sex Marriage, Taking Stand on Charged Social Issue, N.Y. TIMES, May 10, 2012, at A1, available at http://www.nytimes.com/2012/05/10/us/politics/obama-says-same-sex-marriage-should-be-legal.html?pagewanted=all (explaining that the President’s allies were concerned about “the unpredictable fallout the president would face by taking a clear stand on one of the most contentious and politically charged social issues of the day, before what is likely to be a close election”).

States Senator.³ Marriage equality also won at the ballot box. Freedom-to-
marry campaigns prevailed in states on both coasts, and Minnesotans
rejected a proposed constitutional amendment that sought to limit marriage
to opposite-sex couples.⁴ The amendment’s defeat marked a considerable
change from the prior ten years, in which thirty-two states adopted similar
measures with palpable ease.⁵

Successes have also come at the courthouse. In United States v.
Windsor, the United States Supreme Court struck down a provision of the
Defense of Marriage Act (“DOMA”) that forbid the federal government
from recognizing same-sex marriages offered or recognized by the states.⁶
Accordingly, Windsor entitled thousands of same-sex couples to full federal
marital benefits, and at last, meaningful equality under the law. Somewhat
unexpectedly, however, Windsor offered a sword by which same-sex
couples and equality advocates have strongly and swiftly struck at state-
level marriage bans. In dispraising DOMA, the Windsor Court remarked
that the law represented little more than a “bare congressional desire to
harm a politically unpopular group[,]” in violation of fundamental due
process and equal protection principles.⁷ But in finding DOMA
constitutionally infirm, the opinion also drew strongly upon notions of
federalism—that is, that states should be free to decide certain issues (like
family law matters) for themselves.⁸ Nevertheless, Windsor was a
harbinger of equal protection and due process victories to come. Guided by
this “gift that keeps on giving,”⁹ state and federal courts have dramatically
increased the number of states allowing all citizens to marry.¹⁰ The

---

³. Michael M. Grynbaum, Fickle Wisconsin Sends a Trusty Progressive to the Senate, N.Y.
wisconsin-sends-tammy-baldwin-to-senate.html?_r=0.

⁴. See Erik Eckholm, As Victories Pile Up, Gay Rights Advocates Cheer ‘Milestone Year’, N.Y.
gains-cheer-gay-rights-advocates.html?_r=0.

⁵. Id.

⁶. 133 S. Ct. 2675 (2013).

⁷. Id. at 2693 (quoting Dep’t of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

⁸. See id. at 2699-92.

⁹. Lucas Grindley, In Her Own Words: Roberta Kaplan Remembers How DOMA Fell, THE
ADVOCATE.COM (Feb. 12, 2014, 6:41 PM), http://www.advocate.com/politics/marriage-
equality/2014/02/12/her-own-words-roberta-kaplan-remembers-how-doma-fell.

¹⁰. See Editorial Board, A Leap for Equality, N.Y. TIMES, Nov. 16, 2013, at A18, available at
http://www.nytimes.com/2013/11/16/opinion/a-leap-for-equality.html; David S. Cohen & Dahlia
Lithwick, It’s Over: Gay Marriage Can’t Lose in the Courts, SLATE (Feb. 14, 2014, 10:43 AM),
http://www.slate.com/articles/news_andpolitics/jurisprudence/2014/02/virginia_s_gay_marriage_ban_r
uled_unconstitutional_aperfect_record_for.html; Polling Tracks Growing and Increasingly Diverse
Support for the Freedom to Marry, FREEDOM TO MARRY, http://www.freedontomarry.org/resources/
entry/marriage-polling#352014 (discussing a March 2014 poll by the Washington Post and ABC News
that found support for marriage equality among 59% of respondents).
“remarkable winning streak” for marriage equality shows few signs of abating: in recent months, the Fourth, Seventh, Ninth, and Tenth Circuits affirmed district court decisions striking down state marriage bans. With the Sixth Circuit’s contrary decision creating a circuit split in September 2014, the Supreme Court granted certiorari in January 2015, and many expect that the Court will issue a final stamp of approval.

Although the marriage equality cause célèbre is the most visible area of progress in gay rights, it certainly is not alone. Similarly confirming the rapid rise of equality are countless additional gay rights achievements—hate crimes measures, opportunity for military service, and the defeat of spurious state “religious freedom” laws that are likely vehicles for private discrimination. Yet these triumphs also underscore the disquieting reality of sexual orientation in America today: winning the marriage equality question will not be transcendent. Much work remains in fostering real,
meaningful, everyday equality in the exchanges between citizens straight and gay. Marriage matters—but it cannot, and must not, be ultimate.18

For this reason, the Americans with Disabilities Amendments Act of 2008 ("ADA Amendments Act" or "Amendments Act") is as important a gay rights victory as any other. Since the 1980s, the human immunodeficiency virus ("HIV") has been inseparably associated with the gay community because of HIV’s initial emergence in, and its devastating impact on, gay men.19 Longstanding and intense sexual prejudice toward gays and lesbians led to initial public apathy when the mysterious, then-isolated health crisis surfaced.20 As the epidemic raged in the following years, HIV-positive Americans faced hysteria, inadequate treatment options and healthcare services, and lack of legal protections. The landmark passage of the HIV-inclusive Americans with Disabilities Act of 1990 ("ADA" or "the Act") was therefore a seminal moment—not only in the fight against HIV, but also for gay rights.

One decade after the ADA’s passage, however, federal court decisions opened significant holes in the ADA’s coverage. Directed by the Supreme Court’s Sutton Trilogy, lower courts increasingly held that a wide range of impairments no longer satisfied the ADA’s definition of disability.22 The narrow disability definition was particularly problematic for HIV-positive Americans because efficacious HIV medications, capable of rendering HIV asymptomatic, became increasingly widespread in the 1990s and 2000s. In 2008, Congress passed the ADA Amendments Act, in part to address this issue.

In light of the ADA’s restored coverage,23 HIV/AIDS advocacy organizations increasingly have called upon HIV-positive Americans to “come out” as positively. One such call occurred in early 2013, when the

18. For this reason, some gay activists criticize the movement’s present focus on “military, marriage, and money,” particularly as HIV rates remain stable at best and data suggest a possible surge. See Elizabeth Flock, Gay Community Won Battles on Marriage, But May Be Losing the War on HIV/AIDS, U.S. NEWS AND WORLD REPORT (July 3, 2013, 11:02 am), http://www.usnews.com/news/articles/2013/07/03/gay-community-won-battles-on-marriage-but-may-be-losing-war-on-hivaids.
20. This Comment uses the term “sexual prejudice” to refer to what is commonly called “homophobia.” See generally Gregory M. Herek, The Psychology of Sexual Prejudice, 9 CURRENT DIRECTIONS IN PSYCHOLOGICAL SCIENCE 19 (2000).
22. See Part I.B, infra.
President of AIDS United called for a “National HIV Coming Out Day” to “concretize the HIV problem . . . and begin to address the stigmatization, isolation, and unfair enmity some people impose on members of the HIV-positive community.” The use of “come out” is not without meaning. HIV-positive Americans, usually gay men, have courageously answered these calls for public disclosure. Some do so individually, while others do so as a group. For example, the AIDS/LifeCycle, an annual 545-mile charity biking event between San Francisco and Los Angeles, increases awareness about HIV with the involvement of the “Positive Pedalers,” a group of HIV-positive riders who aim to be a “positive face of HIV” through their open, public example. Whether alone or together, HIV-positive individuals who are fighting stigma by living their lives openly have been assured by congressional leaders, the federal government, and AIDS legal service providers alike that they are protected from discrimination at work and in most walks of life.

The increased openness fostered by the ADA and the Amendments Act raises important questions. Are the amended ADA’s protections as firm as its promises? Does the Act now offer adequate protections to HIV-positive Americans who disclose their statuses at work? The answers are disappointing. Even today, after much fanfare, HIV-positive employees


25. The phrase, of course, has long referred to the choice of gays and lesbians to share their identity with others. See George Chauncey, Gay New York: Gender, Urban Culture, and the Making of the Gay Male World, 1890–1940, at 8 (1995).


32. Writing in regard to less specific questions, other commentators have similarly forewarned that the Amendments Act may not be the solution that Congress envisioned. Stacy Hickox, pointing to the amended Act’s loose language, predicts that “lower courts may still be able to limit coverage of persons with disabilities who are still able to perform tasks that involve a major life activity” without proper regulatory guidance. Stacy A. Hickox, The Underwhelming Impact of the Americans with Disabilities Amendments Act, 40 U. BALI. L. REV. 419, 420 (2011). Similarly, Elizabeth Emens suggests that we should again expect narrowing of the Amendments Act by the courts because the Act’s
may still suffer prejudiced-based employment actions that ultimately owe to their HIV statuses without remedy under federal law.

This Comment discusses what it calls the HIV-discrimination “end around.” The end around is the judicial disaggregation of discriminatory statements and conduct that contain indicia of sexual prejudice and HIV enmity. In several decisions, both before and after the Amendments Act’s passage, federal courts intimated this alarming opportunity for discrimination. Through the end around, it is possible that no ADA liability arises for: conduct and statements by employers (or harassing coworkers) that indicate both HIV bias and sexual prejudice; when HIV enmity appears as or is directed at only the employee’s actual or assumed sexual orientation (i.e., the employer uses the “wrong words”); or when the employer avers that sexual orientation was its reason for acting, even though its inference or belief about the HIV-positive employee’s sexual orientation owed primarily or entirely to HIV status. The end around principally affects gay men, as that group continues to have a disproportionately high rate of HIV infection. But it can equally leave without ADA protection lesbians and even heterosexuals, for it operates on the presumption of sexual orientation, whether or not the inference is correct.

Part I of this Comment considers the ADA’s HIV-inclusive intent, statutory language, early judicial interpretations, and Congress’s response to those decisions in the Amendments Act. Part II explains and explores the HIV-discrimination end around. Against the framework of federal antidiscrimination statutes, this Part examines four “end-around cases,” in which courts have disaggregated HIV enmity and sexual prejudice and...
suggested that evidence of sexual prejudice cannot be used to prove an ADA claim. It further identifies possible causes of this disaggregation. Thereafter, Part III argues that courts presiding over HIV discrimination cases must evaluate statements and conduct seemingly related to anti-gay prejudice in light of HIV’s social meaning. So considering, courts will see the pertinent link between the two, and thereby understand that such evidence is relevant to claims under the ADA. Finally, Part III calls for congressional action: the passage of the Employment Nondiscrimination Act. Under ENDA’s proposed inclusion of sexual orientation within the existing Title VII framework, HIV-positive employees will be able to seek remedy no matter how the evidence manifests. In tandem, these solutions will guarantee robust workplace protections for Americans living with HIV.

I. THE ADA’S HIV-INCLUSIVE INTENT

The ADA, in its original form and as amended, proscribes employers from discriminating against employees on the basis of HIV status. This Part discusses the ADA’s HIV-inclusive intent, the Act’s statutory language, judicial decisions that prevented the Act from achieving its legislative goals, and Congress’s response to those decisions in the Amendments Act.

A. Legislative History

Congress considered and passed the ADA with HIV and AIDS in mind. As hysteria surrounding the HIV epidemic peaked in the late 1980s, several HIV-related proposals moved through Congress, many of which offered expanded legal protections. In 1987, the 100th Congress considered but took no final action on the AIDS Federal Policy Act, which proposed a ban on discrimination in employment, housing, and other public services on the basis of actual or perceived HIV infection. One year later, the same Congress considered the first version of the ADA. By supporting that


legislation, HIV/AIDS advocates “abandon[ed] the approach of an HIV-specific statute [in favor of] a more generalized approach to antidiscrimination protection for persons with disabilities[,] without identifying specifically individual diseases or disorders covered such as AIDS or HIV infection.” 39 The ADA of 1988 received a joint hearing, at which Members of Congress heard from witnesses with a wide variety of medical conditions, including HIV infection. 40 The witnesses “testified about . . . the pervasiveness of stereotyping and prejudice” they encountered because of their disabilities. 41

The 101st Congress considered anew the ADA when it convened in 1989. 42 As with the prior version, the ADA offered protection from discrimination on the basis of HIV status. Although the House and Senate committees to which the bill was referred debated “whether HIV, as an infectious disease, should be treated differently than other disabilities,” 43 the legislation as introduced did not single out HIV – for inclusion or differing treatment. 44 Instead, the committees “simply assume[d] that the impairment caused by HIV [was] a significant physical impairment and that persons with HIV infection [were] assumed to have a disability.” 45

But “[a]s the ADA made its way through Congress, . . . there were a number of attempts by hostile members to split apart the disability and AIDS coalitions” that had formed to guide the bill to the White House. 46 Some Members of Congress vehemently argued that the inclusion of HIV was a duplicitous attempt to provide discrimination protections for gays and lesbians under federal law. 47 Eventually, the ADA’s HIV inclusiveness threatened to derail the entire Act. The most serious attempt came from Representative Jim Chapman of Texas, who proposed an amendment, understood to target HIV-positive Americans, that would have allowed employers “to refuse to assign, or to reassign, an employee with an


39. Hermann, supra note 37, at 812.

40. See Joint Hearing Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources and the Subcomm. on Select Educ. of the House Comm. on Educ. and Labor, 100th Cong. (1988).

41. Mayerson, supra note 38.


43. Hermann, supra note 37, at 813.

44. See id. (discussing the committee reports).

45. See id.


47. See, e.g., 136 CONG. REC. H4621 (daily ed. July 12, 1990) (statement of Representative William Dannemeyer of California) (“[T]he homosexual activist community, once this bill is signed by the White House, is going to send out a press release yelling, ‘Hallelujah.’ The Congress of the United States has just given us our Civil Rights Act of 1990 . . . .”.)
infectious or communicable disease to a job involving food handling, provided the employer provided the worker alternative employment.”\textsuperscript{48} The disability and AIDS coalition forcefully resisted each attempt to narrow the Act’s coverage for HIV, and these advocates ultimately prevailed.\textsuperscript{49} Accordingly, upon the ADA’s passage, HIV was intentionally protected as an ADA disability. The ADA thus represented not only a landmark achievement in legal protections for disabled Americans, but also for the gay community as it attempted to gain an upper hand with the battle against HIV.

\textbf{B. Statutory Language and Judicial Interpretation}

Title I of the ADA, which contains the employment provisions, mirrors Title VII of the Civil Rights Act of 1964 (“Title VII”) by prohibiting employment actions based upon animus or prejudice.\textsuperscript{50} Like Title VII, the ADA forbids “discrimination against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”\textsuperscript{51} Yet “discrimination” under the ADA is expansively defined, in order to eliminate both intentional discrimination and also actions and barriers rooted in thoughtlessness. Congress believed that most instances of disability discrimination were “the product, not of invidious animus, but rather of thoughtlessness and indifference – of benign neglect.”\textsuperscript{52} Among other forms, discrimination includes “limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee.”\textsuperscript{53}

\textsuperscript{48} Hermann, supra note 37, at 813-14.
\textsuperscript{49} Disability Rights Advocate Arlene Mayerson recounted the coalition’s response: “Even at the eleventh hour, after two years of endless work and a Senate and House vote in favor of the Act, the disability community held fast with the [AIDS] community to eliminate an amendment which would have excluded food-handlers with [AIDS], running the risk of indefinitely postponing the passage or even losing the bill.” Mayerson, supra note 38. Similarly, disability rights expert (and current EEOC Commissioner) Chai Feldblum explained that the coalition’s unity on an HIV-inclusive ADA was key to defeating the Chapman amendment: “the disability community as a whole was fighting the amendment... People in wheelchairs, people with cerebral palsy, people who were blind—they were all saying this [was] a bad amendment.” Andriote, supra note 46, at 234. Their unwavering opposition led to a toothless compromise provision. Hermann, supra note 37, at 813-14.
\textsuperscript{51} 42 U.S.C. § 12112(a) (2012).
\textsuperscript{53} 42 U.S.C. § 12112(b)(1) (2012). Discrimination also includes the use of “standards, criteria, or methods of administration” that have a disparate impact on persons with disabilities; taking action
Almost all of these protections, however, are available only to persons with a “disability.”

Disability is a multifaceted legal determination under the ADA, and requires one of the following: a physical or mental impairment that “substantially limits one or more major life activities”; a record of such an impairment; or being “regarded as” having such impairment (the so-called “regarded as” prong).

Under the actual-disability prong, courts conduct a tripartite inquiry: the plaintiff must have (1) a physical or mental impairment (2) that substantially limits (3) a major life activity. Litigation in the Act’s first eighteen years often focused on whether a particular plaintiff had satisfied each of these elements. This was contrary to the intent of the Act’s primary supporters, who had anticipated that courts would broadly construe the disability definition, and, thus, the primary issue would be whether the disability prevented the employee from performing job duties. Indeed, however straightforward the threshold disability requirement appeared, it became quite problematic in countless cases, as courts applied the provision’s inexact language to complex and varying facts. Unhelpfully, the ADA neither defined what a “major life activity” consisted, nor the extent of limitation required for an impairment to be “substantial.”

The Supreme Court eventually answered these questions. The Court’s first interpretation of the disability definition coincidentally involved an HIV-positive plaintiff. In Bragdon v. Abbott, the Court considered whether asymptomatic HIV infection constituted a

against a qualified individual who has a relationship or association with a disabled person, failure to make a “reasonable accommodation” for an otherwise qualified individual with a disability where it would not have been an undue hardship on the employer, and the use of “qualification standards, employment tests or other selection criteria” that tended to, or actually screened out qualified persons with disabilities where such standards, tests, or criteria were not business necessities. See id. §§ 12112(b)(2)-(7) (2012) (amended by the ADA Amendments Act of 2008).

Certain provisions of the Act apply to persons who associate with persons with a disability or are simply perceived to have a disability (regardless of actual disability status). See id. § 12112(b)(4); id. §§ 12102(1)(C), (3)(A)-(B) (2012) (amended by the ADA Amendments Act of 2008).

42 U.S.C. § 12102(1) (2012) (amended by the ADA Amendments Act of 2008). Although not focused upon here, the original ADA’s “regarded as” prong required the employee to show not only that the employer regarded the employee as having an impairment, but also that the employer regarded the employee as “substantially limit[ed]” by the impairment. See 42 U.S.C. § 12102(1) (2006). Under the Amendments Act, the employer’s simple regard of the employee as having a physical or mental condition triggers the ADA’s protections. See 42 U.S.C. §§ 12102(1)(C), 12102(3)(A) (“An individual meets the requirement... whether or not the impairment limits or is perceived to limit a major life activity.”).


BLANCK ET AL., supra note 38, at 3-1.


59. See id. (discussing flaws in the ADA’s definition of disability).

60. Bragdon, 524 U.S. at 624.
disability under the ADA. The Court concluded that the Act indeed covered the heterosexual female plaintiff’s HIV infection. Justice Kennedy rooted his holding in the plaintiff’s argument that her infection, although asymptomatic, still interfered with her ability to bear children.61 Promisingly, the Court appeared to leave open the possibility that HIV might interfere with other major life activities, perhaps contemplating immune function or other activities pertinent to gay men.62 Despite fears that lower courts would read Bragdon narrowly in HIV suits brought by gay men,63 initial decisions applying Bragdon did not limit the ADA’s reach to straight plaintiffs who intended to reproduce.64 For example, the Rotter v. Brinker Restaurant Corp. court rejected the argument, premised upon Bragdon, that an HIV-positive gay man could not be disabled under the ADA simply because he lacked intent to father children.65

The tripartite disability inquiry stiffened dramatically not long after Bragdon. Guided by the Supreme Court’s Sutton Trilogy,66 a series of lower court decisions rendered uncertain the ADA’s HIV coverage. In Sutton v. United Air Lines, Inc., the Court held that ameliorative effects of “mitigating measures” were to be taken into account when courts determined whether impairments substantially limited major life activities.67 Accordingly, under Sutton, HIV infection was no longer an unquestionable disability, at least where the plaintiff adhered to an effective antiretroviral

61. Id. at 637.
62. See id. at 638. The Court explained that it focused on reproduction because that was the major activity put forward by the plaintiff. But it recognized that other plaintiffs would undoubtedly put forward different activities.
63. Several scholars cautioned soon after Bragdon that the victory might be hollow, particularly for gay men and lesbians, due to the Court’s focus on reproduction. See, e.g., Brian K. Esser, Beyond 43 Million: The ‘Regarded As’ Prong of the ADA and HIV Infection—A Tautological Approach, 49 AM. U. L. REV. 471, 491 (1999) (noting that these groups would have to engage in “costly, time-consuming, and uncertain litigation to determine whether the activities they substitute in place of reproduction do in fact constitute major life activities”); Michelle R. King & Beth S. Herr, The Consequences and Implications of a Case-By-Case Analysis under the Americans With Disabilities Act for Asymptomatic HIV-Positive Gay Men and Lesbians Post Bragdon, 8 L. & SEXUALITY 531, 546-49 (1998) (considering other life activities that gay men and lesbians could rely upon in lieu of reproduction).
64. See, e.g., Swatzell v. Sw. Bell Tel. Co., No. 7:00-CV-139-R, 2001 WL 1343429 (N.D. Tex. Oct. 31, 2001); but see United States v. Happy Time Day Care Ctr., 6 F. Supp. 2d 1073 (W.D. Wis. 1998) (highlighting the difficulty, while Bragdon was pending before the Supreme Court, of finding a major life activity substantially limited by HIV when the injured party was an HIV-positive toddler).
drug regimen that rendered the infection asymptomatic. Eventually, some district courts reached that conclusion: in St. John v. NCI Building Systems, Inc., a federal district court in Texas held that a plaintiff could not show that HIV substantially limited any major life activities because his medication rendered the infection asymptomatic at all times.

A few years after Sutton, the Court again stiffened the ADA’s disability definition in Toyota Motor Manufacturing v. Williams. Explaining that the definition must “create a demanding standard,” the Court held that only “those activities that are of central importance to daily life” qualified as major life activities. As examples, it mentioned daily volitional tasks like “household chores, bathing, and brushing one’s teeth.” After Williams, lower court decisions seemed to foreclose the possibility left open by Bragdon of gay men citing life activities other than reproduction when attempting to establish disability. For example, in a case about Hepatitis B infection, the Seventh Circuit rejected regular liver function as a major life activity. The case thereby intimated that activities beyond reproduction that HIV-positive gay plaintiffs might cite, such as immunological function, were not sufficient to show a disability under the ADA.

Taken together, these cases limited the ability of HIV-positive Americans to bring ADA claims, and increasingly hinted that the ADA may offer no protection for many or most HIV-positive gay men. At bottom, early ADA jurisprudence created a fool’s choice as treatment options improved: health or legal protection. That ADA case law strayed so

68. See Ann Marie Girot, “‘Disability Status’ for Asymptomatic HIV? Pondering the Implications, Unanswered Questions, and Early Application of Bragdon v. Abbott, 1999 UTAH L. REV. 755, 773 (1999) (surmising that Sutton’s mitigating measure rule, applied to the instance of asymptomatic HIV, may limit the ADA’s protection for HIV positive individuals). As Brian Esser wrote at the time, “[t]he ramifications of this decision could affect plaintiffs infected with HIV who take [antiretroviral drugs], respond well to them, and achieve an undetectable viral load. These individuals, by all obvious standards, have regained their health entirely, and the undetectability of HIV in their blood stream seems to indicate that HIV infection is, for certain individuals, a ‘medically controllable condition.’ . . . [I]t is not implausible that a court will hold in the future that HIV infection is a medically controllable condition that must be considered in its mitigated state.” Esser, supra note 63, at 490.


70. 534 U.S. 184 (2002).

71. Id. at 197.

72. Id. at 202.

73. Furnish v. SVI Sys., Inc., 270 F.3d 445 (7th Cir. 2001). Although the case preceded Williams by three months, it relied on the same reasoning adopted by the Williams Court. The Seventh Circuit explained that even if Hepatitis B infection impaired liver function, the major life activity inquiry focused on activities “integral to one’s daily existence,” such as eating or working. Id. at 449-50. Although the court’s explanation was somewhat opaque, it appeared to interpret Bragdon’s meaning of “activity” to be some manner of affirmative, volitional daily tasks, rather than an essential bodily function—even when those functions are essential to life itself. See id.
quickly from Congress’s HIV-inclusive intent was not only disappointing, but puzzling. 74

C. The Amendments Act

Called to action by the judiciary’s narrowing of the ADA, Congress considered and passed the ADA Amendments Act in 2008. 75 The Amendments Act expressly criticized and rejected several Supreme Court decisions, including Sutton and Williams. 76 In a new definition of “major life activities,” Congress articulated a robust list of volitional tasks and bodily functions, which specifically included immunological function. 77 Helpfully, the Amendments Act directed courts to treat the list not as a ceiling, but a floor. 78 Consistent with its restorative intent, Congress also included within the Amendments Act several “rules of construction” for the disability provisions, which instructed courts to: construe disability “in favor of broad coverage”; treat episodic impairments or those in remission as if they were active; and conduct the disability inquiry without considering mitigating measures other than eyeglasses and contact lenses. 79

Through these statutory revisions, Congress again made clear that the ADA protected a broad population of Americans from workplace discrimination—including discrimination on the basis of having HIV. In a speech on the House floor, then-Representative Tammy Baldwin specifically urged her colleagues to vote for the Amendments Act because of its strengthened protection for HIV-positive Americans. Explaining that people living with HIV had “been fired, not hired, or suffered other adverse employment actions” as the result of “narrow court interpretations”—even though “the ADA clearly intended to protect people living with HIV”—Baldwin proclaimed that the Amendments Act would reestablish needed protections and “reaffirm the right for American workers—including any

74. Scholars advance competing explanations for the Court’s interpretations. Matthew Diller proposes a backlash theory. See Matthew Diller, Judicial Backlash, the ADA, and the Civil Rights Model, 21 BERKELEY J. EMP. & LAB. L. 19, 22 (2000). Michael Selmi suggests that, beyond avoiding excessive costs upon employers, Congress’s intentions for the ADA were actually indefinite. Accordingly, the Supreme Court interpreted the Act within its own ideological and institutional preferences. See Michael Selmi, Interpreting the Americans with Disabilities Act: Why the Supreme Court Rewrote the Statute, and Why Congress Did Not Care, 76 GEO. WASH. L. REV. 522, 525 (2008).


78. See id. (“major activities include, but are not limited to...”); see generally Alex B. Long, Introducing the New and Improved Americans with Disabilities Act: Assessing the ADA Amendments Act of 2008, 103 NW. U. L. REV. Colloquy 217, 218 (2008).

79. 42 U.S.C. § 12102(4) (2012). Notably, however, courts are to consider deleterious effects of mitigating measures, such as side effects of medication. See 42 U.S.C. § 12102(4)(E).
American living with HIV—to be judged based upon their skills, talents, loyalty, character, integrity and work ethic.”80 The amendments have been law for half of a decade, and signs suggest that courts have largely understood Congress’s message. Whatever the earlier uncertainty regarding HIV under the ADA, courts have determined, now with ease, that HIV infection falls within the ADA’s ambit.81

II. THE HIV-DISCRIMINATION END AROUND

Although the Amendments Act resolved the ADA’s definitional shortcomings, Congress likely lacked awareness of a hole in HIV coverage, the ADA “end around,” made possible by a small number of obscure, potentially far-reaching district court decisions. As described in Part I, the ADA plainly protects employees from discrimination on the basis of HIV infection. It is not uncommon, of course, for an employer to learn that an employee is HIV positive—whether inadvertently, through the employee’s confidential disclosure, or as a result of the employee’s open discussion. But what if the employer assumes, on the basis of HIV status, that the employee is gay? What if the employer discriminates on its assumption about orientation, or coworkers harass the presumptively gay employee on that basis? How, if at all, does the ADA respond?

For clarity, the end around is not an instance in which the employer assumes that an openly or presumptively gay employee has HIV. Certainly, that stereotype is familiar and longstanding: it has presented in cases since the ADA’s adoption. For example, in the 1993 case Miller v. Spicer, a federal district court in Delaware considered a Rehabilitation Act claim82 in which a surgeon allegedly made specific inquiries into a patient’s HIV status solely because of the patient’s presumptive sexual orientation.83

Where HIV positivity is presumed on the basis of homosexuality, the “regarded as” prong of the ADA’s disability definition offers protection

82. The Rehabilitation Act, 29 U.S.C. § 701 et seq., is a model for the ADA. It prohibits discrimination on the basis of disability in federal agency programming, by organizations receiving federal funding, in employment with the federal government, and in employment by contractors working under federal contracts. See generally Paul A. Race & Seth M. Dornier, ADA Amendments Act of 2008: The Effect on Employers and Educators, 46 WILAMETTE L. REV. 357, 362-63 (2009).
83. 822 F. Supp. 158, 160 (D. Del. 1993). In Miller, an on-duty emergency room physician evaluated a patient who presented in the emergency room with a lacerated tendon, and remarked when making his report to the surgeon that the patient had “broken wrists,” “a derogatory comment about plaintiff or [his] companions that was apparently meant to be a joke.” Id. The physician later explicitly whispered to the surgeon that the patient was gay, as the surgeon had apparently not understood the earlier slur. Id. Immediately, the surgeon asked the patient if he had “any ailments.” Id. When the patient stated he did not, the surgeon angrily demanded of the patient’s nearby friends: “you’re going to have to level with me. You’re going to have to tell me whether he has AIDS.” Id.
because the employer regards the employee as having an ADA-protected impairment.84

In contrast, the end around utilizes the reverse assumption. The employee’s known HIV status raises an inference about his sexual identity. Just like the Miller-type presumption, the inference is rooted in the long association between HIV and the gay community.85 As one district court thoughtfully explained in Henderson v. Thomas, a 2012 case concerning HIV discrimination in an Alabama state prison,

a relentless stigma adheres to HIV . . . . HIV is most frequently found among historically marginalized populations: particularly, gay men. Prejudice against homosexuals intensifies prejudice against HIV, and prejudice against HIV becomes a proxy for prejudice against members of the gay community . . . . HIV deeply implicates . . . . homophobia.86

As the employer or harassing coworker acts upon a stereotypic belief about the employee’s disability, one might think that the ADA offers protection, as the Act intends to make liable actions taken on the basis of invidious disability stereotypes. Puzzlingly, however, courts likely will not construe the ADA to offer protection in this circumstance. As the four cases below indicate, courts likely will view actions based on apparent or presumed sexual orientation as owing only to sexual prejudice, even where HIV status appears to be a possible or probable genesis for the inference about sexual identity. In short, courts seemingly sort evidence in HIV cases into one of two exclusive categories: HIV enmity or sexual prejudice. At least in these cases, the courts did not find support for HIV-discrimination claims in the evidence that they relegated to the latter category, even though the facts demanded a less categorical approach.

This Part explains the “end-around cases,” and thereafter discusses why this disaggregation is problematic within the framework of federal antidiscrimination law. Then, in closing, it posits that the disaggregation results from the ADA’s exclusion of homosexuality as a protected impairment, and also the Act’s structure and view of disability stereotypes.

A. Judicial Disaggregation

Several cases suggest that federal courts disaggregate statements and conduct concerning sexual orientation and HIV status in HIV-discrimination cases. These courts imply or declare that allegations can concern either sexual orientation or HIV status, but not both. The

84. See, e.g., Horgan, 704 F. Supp. 2d at 820 n.4. The Horgan court explained that, although the plaintiff had not argued the issue in his brief opposing the motion to dismiss, the employer’s treatment of the employee as impaired by HIV infection easily established disability under the ADA’s regarded-as prong. Id.
85. See Part III.A, infra.
classification is seemingly made at face value, and the courts make no apparent inquiry into whether the alleged conduct or statements about sexual orientation are actually manifestations (or clumsy articulations) of HIV prejudice. As a result, the plaintiffs in the following cases were left with little HIV-specific evidence and, therefore, were unable to establish ADA liability.

In Pope v. Kaiser Foundation Health Plan, the district court for the Eastern District of California contemplated that HIV status may sometimes motivate anti-gay comments or conduct, but ultimately held that only evidence facially related to HIV positivity could show disability discrimination in the particular case.\(^ {87}\) Pope concerned an HIV-positive pharmacy technician’s allegations of several discriminatory workplace actions.\(^ {88}\) In support of his claims, he alleged two HIV-related comments: first, that a coworker said that the plaintiff “looked like the Tom Hanks character in the movie ‘Philadelphia,’ ‘the one that died of AIDS,’” and second, that a coworker remarked, while the plaintiff was on medical leave, that the plaintiff “had ‘full-blown AIDS.’”\(^ {89}\) The plaintiff also averred that coworkers snickered at him because of his HIV status.\(^ {90}\)

In addition, the plaintiff alleged four homophobic workplace incidents. First, “a supervisor said she could tell plaintiff was gay and made a limp-wrist motion”; second, “a coworker mocked him by putting her arms in the air, with wrists limp,” which garnered laughter from a supervisor; third, a supervisor dismissively laughed at the plaintiff when he complained about the gay slurs and told him that he “was no longer in San Francisco”; and fourth, his coworkers habitually circulated rumors and snickered in his presence without apparent reason.\(^ {91}\)

At the outset, the court declined to consider the latter four allegations. The court reasoned that there was no evidence from which a jury could infer that the comments owed to his HIV positivity because the plaintiff had not established that each of the individuals involved in those incidents knew of his HIV status.\(^ {92}\) Accordingly, it concluded that “these incidents were based on his perceived sexual orientation, not on his HIV-positive status.”\(^ {93}\) The court then repeatedly held that the Tom Hanks comment, standing

\(^ {88}\) Id. at *1, *3.
\(^ {89}\) Id. at *1.
\(^ {90}\) Id.
\(^ {91}\) Id. at *1 n.1.
\(^ {92}\) Id. at *5 n.9.
\(^ {93}\) Id. at *1.
alone, failed to establish disability discrimination under any of the plaintiff's theories. 94

The court's reasoning was inconsistent with two important facts. First, the plaintiff had expressly informed two coworkers that he had HIV. 95 It was thus entirely plausible, if not likely, that they violated his confidence and shared the information with the others. Second, and by contrast, the plaintiff was not openly gay at work. 96 Although it was certainly possible that the plaintiff's coworkers assumed he was gay for other reasons, it was at least equally possible that the two coworkers disclosed his HIV status to others who, on the basis of that knowledge, inferred and acted on the basis of the plaintiff's presumptive sexual orientation. Hence, it is unclear what more the court believed necessary for a reasonable jury to find that the plaintiff's HIV status engendered the anti-gay harassment.

Other courts have been far less open than the Pope court to the possibility that sexual orientation may be assumed from HIV status. In Posante v. Lifepoint Hospitals, Inc., the court flatly rejected the notion that statements about sexual orientation were evidence of HIV discrimination.97 The case presented an ADA claim of an HIV-positive man who worked as a unit secretary at a regional hospital. 98 He disclosed his HIV status during his interview. 99 His only allegation facially relating to his HIV status was a comment his coworkers made about catching HIV from his phone.100 Additionally, he averred that a coworker declared that his mouth should be "wired shut."101 The plaintiff conceded in his brief opposing summary judgment that "some of the comments and offensive language were directed at his sexual orientation, [but] he also contend[ed] that his sexual orientation was not the primary reason for the harassing conduct."102 In its motion, the employer seized on the sparse evidence: it dismissed the relevancy of statements regarding "his assumed homosexuality," and

94. See id. at *4-5 (finding that the "tactless, offensive remark" about Tom Hanks was an "isolated incident" that could not evince a hostile work environment); id. at *6 (reasoning that the Tom Hanks comment was "only one incident" and therefore did not show the "continuous pattern of disability discrimination" required for a hostile work environment claim).
95. Id. at *3. The court refused to contemplate that the plaintiff's co-workers shared the information because the plaintiff had not specifically said that he shared it before the incidents occurred. See id. at *3 n.4.
96. See id. at *1-3 (repeatedly referencing his "perceived" orientation but containing no indication that he was actually gay, and if so, whether he was openly so).
98. Id. at *1.
99. Id.
100. Id. at *8.
101. Id. at *7.
102. See id.
argued that the single HIV comment was insufficient to establish an ADA hostile work environment claim. The court granted summary judgment in the employer’s favor, and correctly so on the insufficient evidence and the employee’s concession that his orientation caused the harassment. But the court’s analysis was troubling:

[T]here is no indication that the comments were based on his disability (save for the one-time inquiry regarding catching HIV from using the same phone Plaintiff used) . . . Nothing links [the alleged] comments to his HIV status, and his claims that offensive language was directed at his perceived sexual orientation are not protected under the ADA.

As with Pope, the defendant and its employees apparently knew that the plaintiff was HIV positive, but did not know for a fact that he was gay. But parsing the court’s words, even had the plaintiff been able to show a significant volume of harassing comments pertaining to his perceived sexual orientation, it would not have mattered. Apparently, the court desired some sort of unexplained link between the anti-gay conduct and HIV—something more than the employer’s knowledge of his HIV status and corresponding lack of knowledge that he was gay, and something more than the longstanding relationship between HIV and homosexuality recognized by the Henderson court. In treating the evidence as it did, the Posante court advanced a paradigm—HIV discrimination or sexual prejudice, but not both, to be facially determined by the court. The paradigm likely forecloses the possibility that anti-gay conduct may actually be the manifestation of HIV enmity. Beyond pointing to the ADA’s express exclusion of homosexuality as a disability, the court did not explain why, exactly, it implicitly adopted this paradigm.

Lederer v. BP Products North America similarly illustrates judicial disaggregation of an employer’s commingled statements and conduct about HIV positivity and sexual orientation. There, the court considered the ADA claims of an HIV-positive gay man who had been terminated from his job as a convenience store baker. He alleged a yearlong series of grotesque anti-gay comments made by his manager and others. For example, the manager purportedly called another gay employee a “faggot” and remarked to the plaintiff of that gay employee, “I don’t know how he

108. Id. at *3.
109. Id. at *1-2.
can work, he’s always on his knees.” The plaintiff also alleged that his manager repeatedly asked whether the plaintiff had interest in performing oral sex on him, and if he could “ever see [himself] blowing another man? Isn’t that disgusting?”

Initially, the supervisor uttered the statements in ignorance of the plaintiff’s HIV status and sexual orientation. Eventually, the plaintiff revealed his HIV positivity, after being pressed by the manager about a doctor’s note that indicated the plaintiff’s earlier work absence was related to treatment of his Hepatitis C infection. The supervisor queried whether the plaintiff “had gotten AIDS from a man or a woman,” at which point the plaintiff indicated he was gay, and the supervisor then asked whether he “had been ‘blowing guys in the kitchen cooler.’” The employer terminated the plaintiff one month later on the proffered basis that he had missed work and borrowed money from the cash register without authorization.

In allowing the plaintiff to survive summary judgment, the court cautioned:

It should be noted that the allegations... pertain both to [the plaintiff’s] HIV status and his sexual orientation; plaintiff has offered little or no evidence suggesting the extent to which HIV status was an independent basis for his mistreatment. To prevail under the ADA, plaintiff must show discrimination based on his disability[...]. Given the common stereotypes linking homosexuality and HIV/AIDS, as evidenced by the close association in [the supervisor’s] alleged remarks between [the plaintiff’s] HIV status and his sexuality, it may be difficult to sort out the nuance of [the supervisor’s] bias even if [the plaintiff’s] version of these events is true. But that is a task for the factfinder.

Despite comparator evidence and the timing of certain other factual developments, the court described the evidence to be “thin,” and the plaintiff’s odds of prevailing “long.”

The Lederer court’s explanation hints at disaggregation. It may well be that the defendant’s animus in this case owed to sexual orientation, and the comments directed at the other gay employee seemingly support that interpretation. Yet the court’s search for an “independent” basis is perplexing. It is true that the plaintiff needed to prove that he suffered the

110. Id. at *1.
111. Id.
112. Id. at *2.
113. Id. (internal punctuation omitted).
114. See id. at *1, *5.
115. Id. at *6 (emphasis added).
116. See id. at *5-6.
117. Id. at *7.
termination because of his HIV status to prevail under the ADA. Only if the court interpreted statements about orientation, however, as expressing sexual prejudice alone would the evidence be “thin.” By contrast, the claim would be strong if the statements were understood as concerning HIV status as well.

The *Wengert v. Phoebe Ministries* court went one step further than the prior three courts by declaring that, today, HIV and sexual orientation are entirely dissociated.\(^\text{118}\) The court concluded that the claim failed on the facts.\(^\text{119}\) In his deposition, the plaintiff recounted overhearing coworkers discuss that he “should not be working [here] ‘due to the fact that he is gay and he could have—you know,... HIV stuff].’”\(^\text{120}\) The court determined not only that the conversation had not occurred, but also that the plaintiff did not show the relevant decision maker had knowledge of his HIV status.\(^\text{121}\) Yet the court also dismissed in a troubling way the allegation’s significance, stating, “if derogatory comments about [his] sexual orientation were made, that is inappropriate and unprofessional behavior. [But] in 2012, it should go without saying that one’s sexual orientation is not synonymous with his or her HIV status.”\(^\text{122}\) The court is literally correct, but the essence of the statement is that, today, HIV and sexual orientation are entirely dissociated. As Part III describes, this aspirational declaration conflicts with the long history and present reality of HIV in the United States.

In sum, the courts’ language and reasoning in these end-around cases suggests a paradigm by which they interpret facts in HIV-discrimination cases. Words, of course, have meaning. But the courts seemingly foreclose the possibility that words and conduct directed toward an HIV-positive employee that are facially anti-gay can demonstrate HIV bias; absent some unexplained “link,”\(^\text{123}\) the courts seemingly accept that such evidence cannot be about HIV.

### B. Proving Discrimination

As made plain by the end-around cases, the consequence of judicial disaggregation is that HIV-positive plaintiffs have little evidence with which to prove their ADA claims. The following discussion provides greater context as to why, specifically, disaggregation makes bringing a

---

119. *Id.* at *5*.
120. *Id.* (internal punctuation omitted).
121. *See id.* (pointing to his conflicting deposition testimony).
122. *Id.*
disability discrimination claim exceedingly difficult for HIV-positive men facing similar factual circumstances.

Two common individual claims under the ADA are intentional disparate treatment and hostile work environment claims. Intentional disability discrimination claims are eponymous: the employer makes a material employment decision because of the employee’s disability. Courts often rely upon the burden-shifting McDonnell Douglas framework, originally developed by the Supreme Court in the Title VII context, to analyze these claims.\(^{124}\) The McDonnell Douglas framework assists the plaintiff in establishing that the purported discrimination occurred not because of the reason the employer articulates or some other lawful reason, but instead, because of the employee’s disability. Usually, because the employer claims a lawful reason, the employee must show that the employer’s stated reason is pretense that “mask[s] discriminatory animus.”\(^{125}\) Although the Supreme Court has remarked that proving a claim through the McDonnell Douglas framework is not “onerous,”\(^{126}\) many employment law scholars disagree.\(^{127}\) The burden on the employee to produce substantial and convincing evidence is often a heavy one.\(^{128}\)

Employees may also bring claims for hostile work environments (“HWE”), more commonly called “harassment.” Although not expressly forbidden by statute, federal courts have interpreted most federal antidiscrimination laws to prohibit harassing conduct at work.\(^{129}\) The Supreme Court has yet to decide whether the ADA prohibits workplace harassment, but as the ADA and Title VII share nearly identical language in this respect, most circuits have held or assumed that HWE claims are available under the ADA.\(^{130}\) Like intentional discrimination claims, HWE

\(^{124}\) See McDonnell Douglas v. Green, 411 U.S. 792 (1973); Serwatka v. Rockwell Automation, Inc., 591 F.3d 957, 962-63 (7th Cir. 2010) (treating Title VII precedent as persuasive authority for interpreting the ADA); Trans World Airlines v. Thurston, 469 U.S. 111, 121 (1985) (explaining that McDonnell Douglas is “designed to assure that the plaintiff [has] his day in court despite the unavailability of direct evidence”) (internal quotations and citation omitted).

\(^{125}\) See EEOC v. C.R. Eng., Inc., 644 F.3d 1028, 1045 (10th Cir. 2011).


\(^{127}\) For example, as Natasha Martin explains, plaintiffs “have a hard row to hoe in proving unlawful discriminatory bias” because McDonnell Douglas requires that they “rely on a variety of factual circumstances to weave a story that convinces the fact-finder that an employer’s actions constitute unlawful discrimination. Notwithstanding the best efforts of plaintiffs and their lawyers, claims of workplace bias are met with skepticism.” Natasha T. Martin, Pretext in Peril, 75 Mo. L. Rev. 313, 315 (2010). She further states that “even where competing reasonable inferences can arise from pretextual evidence,” courts often dismiss or summarily adjudicate claims instead of “permitting a jury to draw its own conclusions.” Id. at 354.

\(^{128}\) See id. at 354.


\(^{130}\) See, e.g., Arrieta-Colon v. Wal-Mart Puerto Rico, Inc., 434 F.3d 75, 85-87 (1st Cir. 2006); Mannie v. Potter, 394 F.3d 977, 982-83 (7th Cir. 2005); Lanman v. Johnson Cnty., Kan., 393 F.3d 1151,
claims have several elements. Most are not pertinent here, other than the requirements that plaintiffs prove sufficiently “extreme” harassment at work—something more than isolated statements—and also that the harassment occurred because of their disabilities. Harassment that occurs due to personal dislike of the plaintiff, or the harasser’s general unpleasantness, is not actionable under the ADA.

At core, these claims turn on whether the employee can establish causation. Federal courts typically interpret antidiscrimination causation language in one of two ways. “Single-motive” causation, often signaled by the phrase “because of,” requires that disability was the dispositive factor: that is, “but for” the employer’s consideration of disability, it would not have acted as it did. Mathematically speaking, disability must have been the fifty-percent-plus-one, bare majority factor. In contrast, the “mixed-motive” causation standard, most clearly invoked by the phrase “motivating factor,” poses a considerably lower burden. The plaintiff prevails by proving the protected characteristic was at least one of the factors that motivated the action: that is, at the moment of the decision or conduct, the protected characteristic was at least a reason, even if a small or isolated one. Because single motive is considerably harder to prove than mixed motive, which standard applies often makes all the difference to the plaintiff’s chance at recovery.

The amended ADA’s causation language requires the plaintiff to show discrimination “on the basis of disability.” The House Committee Report for the Amendments Act indicated that Congress changed the language from the original ADA’s “because of” to its present “on the basis of” to...
clarify and confirm that the ADA embraces both standards.\footnote{137} Most circuits had already interpreted the ADA’s original “because of” language as permitting both single-motive and mixed-motive claims,\footnote{138} but Congress was likely motivated by the Supreme Court’s pending Gross decision.

In Gross v. FBL Financial Services\footnote{139} and, more recently, in University of Texas Southwestern Medical Center v. Nassar,\footnote{140} the Supreme Court reasoned that, absent express statutory allowance for a mixed-motive instruction, plaintiffs must prove discrimination under the single-motive standard. Specifically, the Court held in those cases that the Age Discrimination in Employment Act (“ADEA”) and Title VII’s retaliation provisions embody only the single-motive standard, as the pertinent section of each statute expressly lacks the mixed-motive standard and fails to reference the part of Title VII that so contains.\footnote{141} The Supreme Court has not yet had occasion to determine which standard the ADA adopts, and it remains an open question whether the Court will defer to the Committee Report’s explanation.\footnote{142} Against the reasoning of Gross and Nassar, however, it appears likely that the Court will read the absence of the motivating factor language to indicate that Congress did not wish to provide mixed-motive causation in the ADA.\footnote{143} Tellingly, some district court opinions following Gross and Nassar have expressed uncertainty about whether mixed-motive causation has survived, and many courts have concluded that it does not.\footnote{144}

\footnote{137} H. Rep. No. 110-730(I), pt. 1 (2008). The Act passed several months before Gross was handed down, but the Committee Report may have been an attempt by Congress to provide guidance, regardless of how Gross came out.

\footnote{138} See, e.g., Head, 413 F.3d at 1063-65 (reaching this conclusion and citing the similar conclusions of seven sister circuits).

\footnote{139} 557 U.S. 167, 177-78 (2009).

\footnote{140} 133 S. Ct. 2517, 2533 (2013).

\footnote{141} See Gross, 557 U.S. at 177-78; Nassar, 133 S. Ct. at 2533. It is worth mentioning that the motivating factor language of Title VII, added by the Civil Rights Act of 1990 and codified at 42 U.S.C. § 2000e-2m, references only the primary provisions but not the retaliation provisions. Hence, there is no codified link between the two.

\footnote{142} The Roberts Court tends to prefer a resolution of statutory interpretation issues on textual grounds, thereby avoiding the legislative history entirely. See generally Philip P. Frickey, Interpretive-Regime Change, 38 LOY. L.A. L. REV. 1971 (2005).

\footnote{143} The question for some members of the Court is almost predictable: “if the Committee Report accurately expresses Congress’s intent, then why, when Congress took care to amend the ADA in 2008, did it not simply insert the ‘motivating factor’ language?”

The likely requirement of single-motive causation makes the end around all the more problematic. If plaintiffs need only show that HIV bias was a motivating factor at the moment of decision, disaggregation may not pose a great problem. Even where the employer’s bias owed principally to presumed or actual sexual orientation, the slightest indication of HIV bias would be sufficient for the court to find in the employee’s favor. In contrast, under the single-motive causation regime, plaintiffs will be left without remedy unless they can marshal significant evidence of HIV specific bias—a tall order when, as illustrated by the end-around cases, courts disaggregate animus-laden workplace occurrences without further inquiry into what bias might lurk. Altogether, these recent causation decisions combine with the end around to increase the threat of an ADA that provides no coverage to many HIV-positive gay men.

C. The End Around Explained

The end around relies on a disability stereotype: namely, that HIV-positive men are gay. The ADA intends to combat disability stereotypes. Hence, the conduct faced by the end-around plaintiffs should create ADA liability. Yet the cases belie this simple syllogism. Why? What explains the paradigmatic treatment of the evidence in these cases? Why, exactly, did the end-around courts set aside the anti-gay evidence when considering the ADA claims?

The easiest answer lies in the text. The ADA textually excludes homosexuality as an impairment from which disability can be established. In its nascence, the gay rights movement fought for the “demedicalization” of sexual orientation, which long had been viewed as an infirmity or psychological affliction. The effort succeeded in the 1970s, so for quite some time, medical science has not viewed homosexuality as a

---

10 Civ. 2428, 2013 WL 5338516, at *13 n.10 (S.D.N.Y. Sept. 24, 2013) (discussing confusion over the causation standard for ADA cases); Najjar v. Mirecki, No. 11 Civ. 5138, 2013 WL 3306777, at *7 (S.D.N.Y. July 2, 2013) (observing the uncertainty regarding which causation standard applies for ADA claims, but declining to extend Gross to the ADA context “absent guidance from the Second Circuit”); Chase v. U.S. Postal Serv., No. 12-11182, 2013 WL 5948373, at *12 (D. Mass. Nov. 4, 2013) (stating Nassar’s “take-away,” in a case about FMLA causation, “is that if Congress intended a 'motivating-factor' causation standard to apply to a particularly statutory discrimination or retaliation claim, it would have explicitly written that standard into the statute”).

145 42 U.S.C § 12211(a).

condition or impairment any more than heterosexuality is so viewed.\textsuperscript{147} Treating homosexuality as an impairment would not only be at odds with medicine, but also curious given the gay community’s involvement in the Act’s passage. Combined with the cries of a pro-LGBT “bait and switch” that menaced the ADA during its voyage through Congress,\textsuperscript{148} the ADA’s specific exclusion of homosexuality is unsurprising. Directed by the ADA’s language, courts have taken great care to avoid sweeping homosexuality into the Act’s ambit;\textsuperscript{149} unfortunately, imprecise application of said exclusion can lead to perfunctory rejection of evidence with anti-gay overtones, as the end-around cases well illustrate.

The ADA’s structure and understanding of disability stereotypes also play significant, but subtle roles. First, the ADA combats disability stereotypes by encouraging employers to determine the employee’s actual abilities. In so emphasizing, the ADA obscures the possibility that disability stereotypes may be entirely unrelated to the capacity for work. Title VII provides important background. Underlying Title VII is the notion that race, sex, and other protected characteristics are almost always unrelated to an employee’s skills and abilities.\textsuperscript{150} To an employer, these characteristics may be useful because of what they ostensibly imply about relevant workplace traits—that is, stereotypes about these characteristics stand in as proxies for some material, job-related trait.\textsuperscript{151} As examples, an employer might use sex as a measure of physical strength, which rests on the stereotype that women are weaker than men,\textsuperscript{152} or race might substitute for intelligence or work ethic. Because of the breadth of stereotypes about Title VII characteristics, the proxies that result therefrom touch upon innumerable material job traits. However, inferences that undergird proxies are rooted in invidious bias and ignorance, thereby leading to inaccurate, negative evaluation or magnification of attributes consistent with the stereotypes.\textsuperscript{153} Accordingly, consideration of protected characteristics is unlikely to lead to accurate or fair employment decisions, and Title VII forbids their use as a matter of policy.

\textsuperscript{147} See Spitzer, supra note 146.
\textsuperscript{148} See supra note 47. However, despite the exclusion, Congress apparently understood that the ADA’s provisions might offer incidental protections to LGBT individuals. See infra note 169 and accompanying text.
\textsuperscript{149} See, e.g., Vendeveer v. Fort James Corp., 66 Fed. App’x 16, 17 (7th Cir. 2003).
\textsuperscript{151} As Larry Alexander explains, “[i]n conclusively presuming for purposes of a particular decision that an individual with a proxy trait possesses the material trait, we stereotype[.]” Larry Alexander, What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies, 141 U. PA. L. REV. 149, 167-73 (1992).
Disability, and its principal stereotypic proxy, operates in a dissimilar way. Whereas Title VII characteristics may stand in for a variety of material traits disability stands in almost invariably for the ability to work. As such, Congress has viewed the characteristic of disability as a relevant workplace consideration. For example, the Social Security Act defines disability as the employee’s inability to work any prior job or any position available in significant number in the national economy. Thus, disability—i.e., the inability to work—is necessarily considered when the Social Security Administration reviews a claimant’s applications for benefits. Thus, as a policy matter, Congress has seemingly embraced the notion that the proxy relationship embodied within disability may lack the invidious and outright inaccuracies assumed within the Title VII context.

Accordingly, the ADA does not enact a flat bar on the employer’s consideration of disability; instead, it attempts to guide employers to accurate evaluations of a disability’s workplace effects. As part of its definitional requirements, the ADA demands that an employee demonstrate the ability to perform essential job functions. Hence, an employer that considers disability and makes a decision on that basis—but reaches a correct conclusion—will not be liable under the Act. Yet the ADA also mandates that employers provide reasonable accommodations to disabled employees, and whether the employee can perform job duties is considered in light of these job modifications. In this way, the ADA rejects the overly broad notion that the mere fact of disability destroys the capacity for work by enacting a scheme that determines whether a person can actually work despite his or her different abilities. Still, at bottom, the ADA allows the use of disability as a proxy, so long as its use produces an acceptable outcome. Questions about the employee’s functional abilities and which accommodations are reasonable dominate ADA litigation, and courts, therefore, have become accustomed to conceptualizing the disability stereotype in a singular way. As a result, the ADA unintentionally obscures that employers might consider a disabling impairment for reasons other than the employee’s ability to do the job—as in the end-around cases, where HIV engenders an inference about sexual identity. Although the ADA does not require such a narrow view, the Act likely facilitates it.

156. See 42 U.S.C. § 12112(a) (2012) (forbidding only discrimination against qualified individuals with disabilities).
157. See 42 U.S.C. § 12112(b)(5)(A) (requiring that employers make “reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or an employee . . .”).
Relatedly, ADA case law regarding disability-associated traits hinders courts from recognizing less common forms of disability stereotypes. Associated traits are characteristics that align with protected characteristics, such as hairstyle with race. It might be thought that discrimination on the account of an associated trait should entail liability, for associated traits are not meaningfully separate from the protected characteristic itself. Allowing trait discrimination creates a hole in antidiscrimination law, because it provides an easy and convenient way for an employer to avoid legal proscriptions. Title VII case law, again helpful for background, is generally permissive toward trait discrimination. Whether trait discrimination is actionable under Title VII turns on “immutability.” Employers cannot consider or act upon immutable characteristics such as race, but they may consider “mutable” traits, such as hairstyle, hair color, language, dialect, and accent—even where there is a strong association with protected characteristics. In essence, courts treat the immutability inquiry as a question of causality: only a causal relationship between protected characteristics and associated traits will establish immutability and thereby protect the latter as the former. As a result, associated traits facilitate legal workplace discrimination.

Although the ADA borrows this causal understanding of associated traits, its effect in the disability context is broad. “Disability” under the ADA extends beyond the fact of impairment to symptoms and certain disability-related conduct. Protecting only the status of disability but not its consequences would render the ADA’s protections meaningless. The breadth of any given disability, as with Title VII’s associated traits, turns on causality. Symptoms are an easy case, for impairments by their very nature cause symptoms or other “characteristic manifestations.” Similarly, the ADA protects causal effects of treatments, such as medication side effects like nausea. Disability-related conduct is protected less absolutely than


159. See id. at 1361-63. As Greene notes, however, Title VII’s treatment of sex is slightly different in this regard; sex encompasses certain associated traits under the Price Waterhouse sex stereotyping theory. See also Mark R. Bandusch, Ten Troubles with Title VII and Trait Discrimination Plus One Simple Solution (A Totality of the Circumstances Framework), 37 CAP. U. L. Rev. 965 (2009).

160. For example, an employer likely refuses to hire a black woman for having “cornrows” without running afoul of Title VII, whether hairstyle is a characteristic actually of concern to the employer (e.g. the business markets itself with a “traditional” image—even though that may mean a “white” image) or whether it is not (e.g. the employer simply has a predilection for white-associated hairstyles). See Rogers v. Am. Airlines, Inc., 527 F. Supp. 229, 231-33 (S.D.N.Y. 1981).

161. For example, this might include tuberculosis’s contagiousness. See Sch. Bd. of Nassau Cnty. v. Arline, 480 U.S. 273 (1987) (so concluding under the Rehabilitation Act); Vande Zande v. Wis. Dep’t of Admin., 44 F.3d 538, 543-44 (7th Cir. 1995) (under the ADA, holding that pressure ulcers that were a “characteristic manifestation” of the plaintiff’s medical condition were “a part of [the] disability itself”).

162. Doe v. Deer Mountain Day Camp, Inc., 682 F. Supp. 2d 324, 244 (S.D.N.Y. 2010) (“the fact that [the plaintiff] may take medications with certain side effects is inseparable from the fact that [he] is
symptoms, and this likely owes to less certain causation. Where courts have deemed conduct part of disability, they have been careful to require a causal tie. Only in isolated instances have courts found an employer liable under the ADA for acting on non-causal stereotypes about disability, and only then where the stereotype was about the impairment itself.

At core, the focus on causality with respect to disability-associated traits conceals “ordinary” stereotyping in the disability context. Indeed, only in isolated instances have courts found an employer liable under the ADA for acting on non-causal stereotypes about disability, and only then where the stereotype was about the impairment itself. Therefore, the ADA unintentionally guides courts to look over the fact that employers may discriminate on the basis of disability stereotypes that are related neither to the employee’s ability to work nor to a causal condition of the underlying medical condition. The pertinent example is HIV’s association with sexual orientation, but there are certainly others: an employer might assume an employee with lung cancer is a smoker or an employee with tuberculosis is impoverished or unsanitary. ADA cases provide almost no indication that courts have considered whether the ADA should treat stereotypic beliefs about non-causal associated traits as disability discrimination. Combined with imprecise application of the ADA’s exclusion of homosexuality and the ADA’s permissive view toward the consideration of disability, the end around easily arises.

In sum, courts seem to assume, encouraged by the ADA, that disability stereotypes are mistaken beliefs about the limitations or extent of disability itself, rather than prejudiced beliefs about some other separately arising personal characteristic. Although the concept of disability-associated traits should provide a doctrinal home for rendering liable discrimination against HIV-positive. Discriminating against [the plaintiff] because of medicinal side effects, therefore, still constitutes discrimination on the basis of [his] disability.”).

163. Compare Budde v. Kane Cnty. Forest Pres., 597 F.3d 860, 862 (7th Cir. 2010) (reasoning that a “[v]iolation of a workplace rule, even if it is caused by a disability, is no defense to discipline up to and including termination”) with Humphrey v. Mem. Hosps. Ass’n, 239 F.3d 1128, 1139-40 (9th Cir. 2001) (holding that “with a few exceptions,” disability-related conduct “is considered to be part of the disability, rather than a separate basis for [an adverse employment action]”).


165. In MX Grp., Inc. v. City of Covington, the Sixth Circuit explained that “where the discrimination results from unfounded fears and stereotypes that merely because Plaintiff’s potential clients are recovering drug addicts, they would necessarily attract increased drug activity and violent crime to the city, such discrimination violates the ADA and Rehabilitation Act.” 293 F.3d 326, 341-42 (2002). However, even here, the stereotypic assumption is directly about the disability (i.e. the nature of drug addiction and its consequences) rather than an inference about a separately arising trait (e.g. homosexuality). Thus, the case serves as a weak counterpoint to the apparent trend.

HIV-positive employees on the basis of their perceived homosexuality, the causality requirement makes the outcome unlikely. Along with imprecise application of the ADA’s exclusion of homosexuality, ADA cases have created a legal landscape where it becomes altogether too easy to view the ADA as concerned only with the principal stereotype about the ability to work, and not others that might be rooted in animus about particular impairments. Against this backdrop, the end around easily arises.

III. ENDING THE END AROUND

Whatever the soundness of the end around’s causes, courts should not so quickly characterize evidence of sexual prejudice as concerning and establishing only discrimination on the basis of sexual orientation. This Part proceeds by first assessing judicial treatment of sexual prejudice evidence and related assumptions about HIV bias. Therein, it urges courts to rely on HIV’s social meaning as a link between HIV discrimination and evidence of sexual prejudice. Second, this Part calls upon Congress to pass the Employment Nondiscrimination Act (“ENDA”). Whatever the courts do, providing an independent basis for HIV-positive plaintiffs to sue on the basis of sexual orientation will resolve the balancing act the courts face in end-around cases.

A. Judicial Treatment of Sexual Prejudice Evidence

Although the end-around courts were correct to respect Congress’s exclusion of homosexuality as a disability, courts should nevertheless understand that evidence of sexual prejudice can establish HIV discrimination under the ADA. Before turning to the link that HIV’s social meaning provides between the infection and evidence of sexual prejudice, two anticipated critiques merit a response. First, the end around is not merely a theoretical problem. Of the estimated 870,000 Americans living with HIV in 2010, nearly half live in states without workplace antidiscrimination protections for sexual orientation under state law. \textsuperscript{167} Accordingly, without the ability to proceed under the ADA with the available evidence, legal recourse may be unavailable, however abhorrent the alleged workplace conduct. Second, the notion that courts would render liable conduct Congress has purposively not forbidden by allowing plaintiffs to rely on sexual prejudice evidence to establishing HIV discrimination is a straw-man argument. This Comment does not argue that

LGBT employees should be permitted to use the ADA as a backdoor for sexual orientation discrimination claims. LGBT employees will, of course, face the threshold disability showing and must also establish, by necessity, a nexus between their HIV infections and the sexually prejudiced conduct—such as comingled HIV-specific comments, the discriminator’s knowledge of HIV status, timing, and other circumstantial evidence that is common in employment cases. It is not inconsistent for courts to, on the one hand, deny remedy for sexual orientation discrimination under the ADA while, on the other, recognize that sexual prejudice evidence may speak to issues beyond sexual orientation discrimination.

Moreover, the idea that Congress intended the ADA to take an absolutist and inflexible approach to sexuality is mistaken. As Congress considered the ADA, it was aware that the Act would sometimes provide remedy to gay Americans who have HIV, even though sexual orientation itself is not a disability.\(^{168}\) Congress also recognized that the ADA’s “regarded as” prong would allow suit by gays and lesbians presumed to have HIV on the basis of their sexual identities and subject to discrimination on that basis, even though they might lack actual HIV infection and thus a qualifying disability under the ADA.\(^{169}\) Notwithstanding the inconsistency of these results with the Act’s exclusion of homosexuality, Congress passed the law. Additionally, the ADA’s disparate impact provision may forbid hiring and other workplace practices directed at sexual orientation because of their impact on HIV-positive employees.\(^{170}\) In sum, several ADA provisions incidentally protect gay employees, and there is no sound reason why the ADA’s primary

\(^{168}\) See Joint Hearing on H.R. 2273, the Americans with Disabilities Act of 1989: Hearing Before the House Subcomms. on Select Educ. and Emp’t Opportunities, 101st Cong. 14 (1989) (responding to an inquiry from Representative Steve Bartlett of Texas, EEOC Commissioner Evan Kemp confirmed that the ADA did not protect homosexuality as a disability itself); 135 CONG. REC. S10, 765-68 (responding to Senator Jesse Helms of North Carolina, Senator Tom Harkin of Iowa clarified that gays and lesbians could be protected by the ADA on the basis of HIV infection, but not on the basis of sexual orientation).

\(^{169}\) Representative Dan Burton of Indiana predicted that:

> Although the Americans with Disabilities Act is not intended to provide coverage for homosexuals, it could do so indirectly by giving the ADA coverage of individuals who are regarded, quote unquote, as HIV positive, and with the prevalence of AIDS in the homosexual community it is easy to see how a court could conclude that homosexuals are a protected class under this act.

\(^{170}\) See Douglas, supra note 169. Douglas argues that employment screens based on sexual orientation disparately impact HIV-positive individuals. \(\textit{id.}\) at 310-15. Therefore, he concludes that, although the ADA purposively excludes coverage of sexual orientation, such sexual orientation screens are unlawful under the ADA’s disparate impact provision. \(\textit{id.}\) In this way, the ADA incidentally benefits and protects gay persons because of the intersectional nature of HIV and sexuality. \(\textit{See id.}\)
discrimination protections should be denied to HIV-positive plaintiffs, i.e., persons with disabilities, simply because the words or conduct accompanying the discrimination they face clumsily (or purposively) references sexual orientation.

For two principal reasons, courts should consider evidence of sexual prejudice in HIV-discrimination cases. First, the Supreme Court has instructed that courts should search for the social meaning in discrimination cases, and the social meaning of HIV infection, a “gay disease,” is inseparably tied to homosexuality. This social meaning links HIV infection and sexually prejudicial statements or conduct, and thereby assists in proving causation. Second, social science research challenges the notion, as expressed in some of the end-around cases, that HIV stigma and sexual prejudice are meaningfully distinct. In short, HIV stigma is merely an expressive form of “homophobia.” Accordingly, it is entirely unsurprising that a discriminator, having learned about a person’s HIV status, may target the person because of the infection but use words related to sexual orientation.

1. HIV’s Social Meaning

In Ash v. Tyson Foods, Inc., the Supreme Court held that lower courts are to scrutinize alleged statements for their underlying meanings to discover whether they evince racial animus and, therefore, support discrimination claims. In so holding, the Court overturned the Eleventh Circuit’s finding that the word “boy” could not, standing alone, be circumstantial evidence of racial bias under Title VII case. The circuit court had previously rejected the district court’s contention that “boy” could never have racial meaning, but it ruled that the word must include a racial modifier, i.e. “black boy,” to raise an inference of discrimination.

The Supreme Court rejected both approaches. “Although it is true the disputed word will not always be evidence of racial animus, it does not follow that the term, standing alone, is always benign. The speaker’s meaning may depend on various factors including context, inflection, tone of voice, local custom, and historical usage.” What the Court was after, in fewer words, was social meaning. Under Ash, courts must consider the context and reality of words, rather than resorting to staid dictionary definitions, judicial precedent, or face-value meanings. Otherwise, courts may fail to understand the complexities and subtle nuances of workplace discrimination.

172. Id.
174. Ash, 545 U.S. at 456.
Scholars have elaborated on Ash and the idea of social meaning. Leora Eisenstadt has observed that “[l]anguage is undoubtedly impacted by contextual factors—social and historical realities . . . among them.”175 As she explains, courts tend to set aside social meaning when seeking comfort in dictionaries and precedential definitions. She contends the better approach is one in which courts “interpret[] words and phrases in light of the context of the situation, the identity of the speaker, and the cultural and historical realities that inform linguistic meaning.”176 Similarly, Wendy Greene has cautioned against the judicial habit of viewing “comments and actions in isolation of one another” because this renders “acontextual analyses . . . [that] effectively preclude the viability of disparate treatment claims” involving “subtle” but nonetheless real instances of adverse treatment . . . .”177 To avoid that result, she suggests courts should “view workplace behaviors as a continuum of individual interactions with cultural, racial, and gendered stereotypes . . . .”178 The approaches urged by Eisenstadt and Greene largely comport with the approach adopted by the Ash Court.

When courts examine evidence of sexual prejudice in light of the social meaning of HIV infection, they will often find evidentiary support for HIV-discrimination claims, as social meaning critically links such evidence to HIV bias—a link that the Poscente court expressly desired.179 The social meaning of HIV infection, simply put, is that the individual has contracted a “gay disease.” Most readers are somewhat familiar with the history of HIV in the gay community, but revisiting the topic reveals how intractable the gay disease notion was—and still is.

HIV surfaced in the United States as early as 1966,180 but the HIV crisis is commonly thought to have commenced in 1981. In that year, puzzling cases of pneumocystis pneumonia, a rare infection usually found only in severely immunosuppressed persons, appeared in five young, previously healthy Los Angeles gay men.181 In the following days, doctors

---

176. Id. at 337.
177. D. Wendy Greene, Pretext without Context, 75 Mo. L. Rev. 403, 420 (2010).
178. Id. For a lucid discussion of how stereotypes operate, see Michael L. Perlman, On “Sanism,” 46 SMU L. Rev. 373, 377-81 (1992).
nationwide flooded the Center for Disease Control ("CDC") with reports of similar cases, all in gay men. As information—and even the name—of this mysterious new condition rapidly changed in the following years, clinical reporting continued to strongly pair HIV with homosexuality and the "lifestyle" of promiscuous gay sex. Although pathologists hypothesized that an infectious agent caused the illness, they nevertheless termed the condition "gay-related immunodeficiency disease," or "GRID," because of its limited occurrence in gay men. Notwithstanding the infectious agent hypothesis, they kept open the possibility that, rather than a viral or bacterial cause, GRID may "simply indicate[] a certain style of life." The public view of AIDS as a gay disease prevailed, and it resulted in a view of the "homosexual lifestyle" as one of illness and death.

Accordingly, as HIV incidence increased throughout the 1980s, the public perception of HIV became framed by hysteria and prejudice against homosexuals. Fear was rampant nationwide because "[n]obody knew how [HIV] was transmitted." Americans were "starting to shake in their pants" and "just kind of started developing their own theories[,]" partly due to the silence of national authorities. The lack of credible information about the virus and the public’s growing fear made easy the efforts of anti-gay activists to stigmatize and lay blame. Due to the "public health threat" of homosexuals, [conservatives] proposed quarantine, reinstating state sodomy laws, tattooing people infected with HIV, and... admonished heterosexuals to avoid homosexuals, arguing that HIV and various AIDS-related diseases could be spread through casual contact, while actively campaigning to prevent AIDS education programs from providing explicit information to...
gay and bisexual men about how to protect themselves sexually from HIV. 190

Some anti-gay activists brashly assured Americans that “if [they thought] homosexuals [were] largely to blame for AIDS, then [they were] right.” 191 Movement leader Pat Buchanan declared that there was “one, only one, cause of the AIDS crisis—the willful refusal of homosexuals to cease indulging in the immoral, unnatural, unsanitary, unhealthy, and suicidal practice of anal intercourse, which is the primary means by which the AIDS virus is being spread through the ‘gay’ community, and thence, into ... the bloodstream of unsuspecting health workers, ... lovers, wives, children.” 192

The perception of HIV as a “gay disease” endured into the 1990s and beyond. 193 When NBA star Magic Johnson disclosed his HIV positivity in 1991, he remarked that he had previously believed that “only gay people can get it—It’s not going to happen to me.” 194 Although AIDS became the leading cause of death among all young people in 1995, 195 thereby confirming that HIV was neither a “gay disease” nor limited in its devastation to the gay community, “gay men with AIDS and men who contracted HIV through male-male sex were more negatively evaluated and blamed than were heterosexuals ...” 196 By 1997, only a third of new AIDS cases owed to gay sex—a “considerable” change from the 1980s. 197 Still, half of respondents in one survey volunteered that “they thought about homosexuality, gay men, lesbians, or bisexuals” when they heard the word “AIDS.” 198

Contemporary commentaries demonstrate that HIV and homosexuality remain strongly linked. 199 As one gay writer explained in 2014:

---

190. Herek & Capitanio, supra note 183, at 1131-32 (internal citations omitted).
192. Herek & Capitanio, supra note 183, at 1131.
196. Herek & Capitanio, supra note 183, at 1132.
197. Id.
198. Id. at 1133.
I’m 28 years old. When I started realizing I was attracted to men, one of the assumptions I made was that HIV/AIDS and being a gay man were inextricably linked. I remember going to the public library in my hometown and looking for nonfiction books about gay people. The only books available were either about HIV/AIDS or “coping with” your gay child.

A gay blogger who writes about sex and HIV echoes the sentiment. He shares that HIV’s constant presence continued well into his adult life:

When I came out to my parents at the age of 14, my parent’s first response was that I would probably die of AIDS. The LGBT youth group I attended regularly for the next two years didn’t teach me gay history; it taught me how to use a condom. Irregularities in the blood tests I needed to start Accutane in high school compelled my doctor to warn me that I might be HIV-positive. If a condom broke with a partner, I would get tested every month for the next six months—each time reading into some minute detail (the counselor’s tone of voice; his delay in returning to the testing room; an ominous voicemail[,] convinced that I was positive. For most of my life, HIV was a specter haunting me and my sex life.

Outside of the gay community, the mere mention of HIV raises the question of sexual orientation. When learning that a male is HIV positive, “the first question is,” for many Americans, “is he gay?” One social media commentator has contemplated that a straight person’s voluntary disclosure of a negative HIV test on social networking sites would lead peers to assume a gay orientation, since only gay-oriented websites typically include sections for HIV status. Similarly, a recent participant in an HIV-related study remarked that gay men “behave[] differently from other populations”; they “have a different lifestyle[.] . . . They’re a lot more promiscuous. . . . The disease is very prevalent in that society.”

The notion of HIV as a gay disease also surfaces in judicial opinions and oral arguments. In a seminal case concerning the ADA’s associational discrimination provision, the Seventh Circuit explained that an “illustrative” situation in which the provision applies is when an “employee’s homosexual companion [becomes] infected with HIV and the employer fears the employee may also have become infected, through sexual contact with the companion.” Although the court’s example accurately explains

---

204. Rochkind et al., supra note 202, at 18.
the provision, it would be equally illustrative without the use of “homosexual” as a modifier.

Similarly, in *SmithKline Beecham Corp. v. Abbott Laboratories*, in which the Ninth Circuit held that orientation-based classifications receive heightened equal protection scrutiny, the court considered the legality of a *Batson* peremptory strike to the only apparently gay person on the jury panel. The underlying case involved the pricing of HIV medication. Before the district court, SmithKline’s counsel challenged Abbott’s peremptory strike, explaining that:

the first challenge, your honor, is a peremptory challenge of someone who is—\( \text{who I think is or appears to be, . . . homosedual} \). That’s use of the peremptory challenge in a discriminatory way. The problem here, of course, your honor, is the litigation involves AIDS medication. The [incidence] of AIDS in the homosexual community is well-known, particularly [in] gay men.

Although the district court rejected SmithKline’s challenge to the strike, the Ninth Circuit sustained it on appeal. The circuit court agreed that the “litigation presented an issue of consequence to the gay community,” and also that there was reason to believe that Abbott struck the gay juror “because of its fear that he would indeed be influenced by concern in the gay community over Abbott’s decision to increase the price of its HIV drug,” which “had led to considerable discussion in the gay community.”

The easy acceptance by the court and the parties of the underlying assumption, that a gay juror would have particular or heightened concerns due to his sexual orientation and the case’s subject matter, confirms that the gay disease notion remains alive and well.

As the *Henderson* court observed, “social perceptions of HIV have yet to catch up with the modern realities of the illness.” Indeed, the current reality of HIV demonstrates that improved scientific understanding of HIV’s pathogenesis has not dissociated the virus from the public’s view of the gay community, and the public’s associated view of HIV as a gay disease. Dissociation is not certain to occur in the near future, as contemporary developments may further strengthen the tie. Signs of a second epidemic among gay men are emerging, as two thirds of all new

---

206. *Batson* allows a party to peremptorily strike a juror for any reason, provided the reason is not discriminatory under the Equal Protection Clause. *Baston v. Kentucky*, 476 U.S. 79, 89 (1986). Correspondingly, a “*Batson* challenge” requires the court to review a juror strike for unlawful discrimination. See *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 476, 479 (9th Cir. 2014).

207. *SmithKline*, 740 F.3d at 474.

208. *Id.*

209. *Id.* at 475.

210. *Id.* at 476.

infections occur in gay men.\textsuperscript{212} A 2009 projection suggests that, at current infection rates, over half of gay and bisexual men who are currently in their twenties will contract HIV by the time they reach age fifty.\textsuperscript{213} A sustained spike in infections, and the likely media attention resulting therefrom, would all but assure the continued survival of the “gay disease” stigma.

Moreover, the gay community’s response to the possibility of an infection surge may purposively embrace the “gay disease” notion. Many gay leaders are urging the community to “reclaim” HIV.\textsuperscript{214} One AIDS advocate criticized the idea, observing that the community has “worked for many years to make sure people are aware this is not a gay disease . . . it is a disease of opportunity.”\textsuperscript{215} “In the early days of HIV, popular [gay] mantras were, ‘Everyone can get it,’ or ‘No one is immune.’”\textsuperscript{216} The “de-gaying of AIDS was a conscious political choice” made in the 1980s and 1990s on the thought that only by “making people afraid in the straight community” might the gay community push the government to act.\textsuperscript{217} The fear of reclaiming HIV, even though disclaiming it was only partially successful, likely owes to the belief that early federal inaction on HIV and AIDS was facilitated by prejudice against homosexuals.\textsuperscript{218} Stronger re-association may lead to withdrawal of prevention and treatment resources in some

\textsuperscript{212} See generally Chris Beyrer et al., The Changing Epidemiology of HIV in 2013,\textsuperscript{8} CURRENT OP. IN HIV & AIDS 306 (2013) (observing that HIV epidemics are declining worldwide, but finding that young gay men in America are a “critical exception”); HIV Among Youth, CENTERS FOR DISEASE CONTROL, http://www.cdc.gov/hiv/risk/age/youth (last visited Dec. 23, 2013).

\textsuperscript{213} Ron Stall et al., Running in Place: Implications of HIV Incidence Estimates Among Urban Men Who Have Sex with Men in the United States and Other Industrialized Countries,\textsuperscript{13} AIDS AND BEHAVIOR 615, 625 (2009) (projecting rates of HIV contraction among gay and bisexual men in industrial Western countries).


\textsuperscript{217} ANDRIOTE, supra note 46, at 235.

\textsuperscript{218} See, e.g., FINKEL, supra note 193, at 34-39 (discussing the perceived difference between “innocent” straight AIDS patients and “guilty” gay men, and President Reagan’s assurances to the public that AIDS, “primarily confined to gay men,” was no cause for panic); ANDRIOTE, supra note 46, at 138-39 (discussing a report by the congressional Office of Technology Assessment that stated the “government had shirked its responsibility [to fund AIDS prevention efforts] at least partly because providing advice on preventive sex practices might be viewed as ‘condoning the lifestyles’ of homosexuals”); see also SHILTS, supra note 21 (contending widespread homophobia led President Reagan to ignore the crisis as it raged).
locales, as well as continued stigmatization of the gay community and hindrance of progress in other areas.  

Nevertheless, Matt Foreman, a former Executive Director of the National Gay and Lesbian Task Force, has proclaimed that “HIV isn’t just a gay disease, but it is a gay disease in the United States.” Alex Garner of Frontiers LA, a regional gay magazine, further explained and defended reclamation: “[i]t’s ok to say [HIV is] a gay disease. It may not be a gay disease scientifically, but in every other way, it’s a gay disease. We’ve got to stop running away from it and just own it.” Echoing Garner, the founder of POZ, a magazine for HIV-positive gay men, explained that “[t]oo much of the community has relegated the epidemic as some other community’s concern.” Reclamation aims to encourage “ownership” and precautions that will limit further infections.

As the debate continues and HIV’s initial emergence slips farther into the past, gay men “remain at the epicenter” of HIV. HIV-discrimination cases under the ADA should acknowledge that reality. HIV infection has been, continues to be, and likely will remain centered on the gay community. It is a fundamental part of the public’s perception of gay Americans. HIV may not be a pathogenically gay disease, but it is a socially gay disease, and that is precisely why statements that appear to express only sexual prejudice can be manifestations of underlying HIV stigma. Although the task of discerning whether the relationship exists in any particular case will not always be easy, the same can be said of interpreting circumstantial evidence in almost any discrimination case. In complying with Ash’s directive to uncover and employ social meaning, anti-gay statements and conduct can and should be viewed as probative evidence by courts considering HIV-discrimination claims under the ADA.

2. HIV Stigma as a Vehicle for Sexual Prejudice

Gregory Herek, a psychologist who has studied HIV stigma for decades, has explained that “the character of AIDS stigma in the United States derives from widely perceived association between HIV and particular sectors of the population,” “especially gay and bisexual.

---

219. The fear has some empirical basis. See Philip H. Pollock III, Issues, Values, and Critical Moments: Did “Magic” Johnson Transform Public Opinion on AIDS? 38 AM. J. POL. SCI. 426, 426-27 (1994) (explaining that “[p]ublic opinion on AIDS-related issues... may be understood as a straightforward instance: attitudes toward homosexuals have been primary determinants of mass opinion on any policy that mentions AIDS—from funding for AIDS treatment to banning AIDS-infected children from school—regardless of whether the issue itself has anything to do with homosexuality.”).
221. Garner, supra note 216.
222. Heywood, supra note 215.
223. Flock, supra note 18 (quoting Center of Disease Control Director of HIV/AIDS Prevention Jonathan Mermin).
HIV stigma is a “convenient vehicle for expressing hostility toward homosexual persons.” HIV enmity is a symbolic stigma that manifests as “prejudice, discounting, discrediting, and discrimination directed at people perceived to have AIDS or HIV, and the individuals, groups, and communities with which they are associated.” Herek’s studies of HIV stigma and sexual prejudice commenced in the late 1980s, and he has repeatedly found that HIV animus is a manifestation of underlying prejudice against homosexuals.

As Herek explained in a 1999 study, the public’s attitudes toward HIV/AIDS in the years following the initial crisis became “for many heterosexuals a symbolic vehicle for expressing preexisting sexual prejudice.” Considering data collected over seven years, he offered several conclusions:

First, despite the changing epidemiology of HIV, most heterosexual adults continue to associate AIDS with homosexuality or bisexuality. Moreover, heterosexuals who think of AIDS primarily in terms of homosexuality or bisexuality harbor higher levels of sexual prejudice than do other heterosexuals. Third, a minority of the public equates any male-male sexual behavior with AIDS, even when it occurs between two men who are both HIV-negative. This finding helps to explain in part why many heterosexuals assign greater blame and more negative feelings toward gay and bisexual men who contracted AIDS sexually, compared to heterosexual [persons with AIDS].

Fourth, a substantial portion of the public expresses concern about mere symbolic contact with [persons with AIDS], such as touching an article of clothing or drinking from a sterilized glass used by a [person with AIDS]. Such discomfort is correlated with sexual prejudice. We interpret this finding as evidence for the potency of symbolic meanings associated with AIDS. Avoidance of even symbolic contact with [persons with AIDS] may socially and psychologically distance uninfected heterosexuals from disliked outgroups [like gay men] that threaten their sense of order.

Simply summarized, persons with high levels of sexual prejudice against gays and lesbians use HIV, a “gay disease,” to express dislike for gay


227. Herek & Capitanio, supra note 183, at 1132.

228. Id. at 1133.

229. Id. at 1143-44.
people. At core, HIV stigma is nothing more than a vehicle for disapproval of homosexuality.

In a subsequent study, Herek found that heterosexuals with the highest levels of sexual prejudice toward homosexuals tended to divorce actual risk of HIV transmission from the risk factors underlying various sexual activities. Instead, they tended to associate transmission risk with gay sex. The study considered a range of partner pairings (male-female, female-male, male-male) and inquired about respondents’ beliefs about the protagonist partner’s risk of contracting HIV in three specific scenarios: “unprotected” sex with an HIV-positive partner; unprotected sex with an HIV-negative partner; and protected sex with an HIV-negative partner. The only scenario in which there was a risk of HIV transmission, of course, was the first.

The results were surprising. Nearly two thirds of participants correctly responded to questions about all scenarios, answering that only the HIV-negative protagonist who had unprotected sex with an HIV-positive partner was at risk for contracting HIV. Curiously, one third believed that HIV transmission was possible where an HIV-negative person had unprotected sex with an HIV-negative partner, and still one fifth believed transmission possible where an HIV-negative person had protected sex with an HIV-negative partner. Tellingly, in the second scenario (unprotected sex between HIV-negative partners), survey respondents “who were asked about homosexual intercourse were significantly more likely to give an incorrect response than those who were asked about heterosexual


231. Herek used the terms “protected” and “unprotected” in the study to indicate the use or nonuse of a condom. Id. at 21. For ease of understanding, the terms are used here. The terms, however are misnomers. First, the use of “protected” or “safe sex” as synonymous with condom use implies greater protection than studies suggest, at least as far as HIV transmission is concerned. See, e.g., Karen R. Davis & Susan C. Weller, The Effectiveness of Condoms in Reducing Heterosexual Transmission of HIV, 31 FAMILY PLANNING PERSPECTIVES 272, 272 (1999) (finding that consistent condom use is about 87% effective in preventing HIV transmission). Second, several other methods, including regular HIV testing, “sero-sorting,” and the use of Truvada for prophylactic purposes (“PrEP”), offer protection with varying efficacy. See generally Liz Highleyman, “Raw Sex”—Are the Rules Changing?, SAN FRANCISCO AIDS FOUNDATION BETABLOG (Dec. 5, 2013), betablog.org/raw-sex-rules-changing/; Liz Highleyman, SF Forum Reveals Conflicting Views about Serosorting to Reduce HIV Transmission Risk, HIVANDHEPATITIS.COM (Sept. 20, 2012), http://www.hivandhepatitis.com/hiv-aids/hiv-aids-topics/hiv-prevention/3790-san-francisco-forum-reveals-conflicting-views-about-serosorting-to-reduce-hiv-transmission-risk. Studies suggest that PrEP with Truvada, when taken daily, may offer as much (or greater) protection against HIV infection as using a condom. See Tim Murphy, Sex Without Fear, NEW YORK MAGAZINE (July 13, 2014), http://nymag.com/news/features/truvada-hiv-2014-7/.

232. Herek et al., supra note 230, at 22.

233. Id. at 26.

234. Id.
intercourse.”  Similarly, in the third scenario (protected sex between HIV-negative partners), attitudes toward gays and lesbians emerged as a statistically significant predictor: “respondents with the least amount of sexual prejudice... were only about one-third as likely to answer incorrectly as respondents with the strongest level of sexual prejudice...” Questioning why high levels of sexual prejudice influenced the answers, Herek posited that “the linkage between male homosexuality and AIDS is so firmly established in American society that sexual prejudice affects even HIV-related beliefs that are unrelated to homosexual conduct.” Herek’s second study confirmed his earlier conclusions that HIV stigma is simply a vehicle for underlying sexual prejudice.

Herek’s work further supports this Comment’s call for courts to thoughtfully evaluate evidence of sexual prejudice in HIV-discrimination cases. If HIV stigma is simply a vehicle for underlying sexual prejudice against gay men, it can hardly be surprising that the discriminator’s words might match the source of the prejudice, rather than the immediate circumstance that causes him to act—namely, the employee’s HIV status. By recognizing and accepting this complexity, courts can avoid penalizing employees simply because their employers or harassing coworkers articulated the wrong words. Not only does this approach handle the intersectional nature of these claims in a more sophisticated way, it more fully honors the ADA’s undisputed intent to end HIV discrimination.

B. Amending Title VII

If courts do not modify their approach in ADA cases, few options remain for HIV-positive employees in end-around scenarios. Currently, the only possibility for a Title VII sexual orientation claim is a twist on the sex stereotyping theory developed in Price Waterhouse v. Hopkins. There, an employer unlawfully made promotion decisions based upon a female employee’s failure to meet certain gender-based behavioral expectations. Under the theory, HIV-positive plaintiffs might argue, on the basis of sexual prejudice evidence, that they faced discrimination because they did not conform to gender-based stereotypes.

Attempts by gay plaintiffs to rely on this theory have not been wholly successful. In Vickers v. Fairfield Medical Center, a gay plaintiff argued that his coworkers objected to “those aspects of homosexual behavior in which a male participant assumes what [they] perceive as a traditionally

235. Id.
236. Id. at 28.
237. Id. at 33.
female—or less masculine—role. In other words, . . . his sexual practices, whether real or perceived, did not conform to the traditionally masculine role.” The court rejected the plaintiff’s reliance on *Price Waterhouse* because that case focused on “characteristics that were readily demonstrable in the workplace, such as the plaintiff’s manner of walking and talking at work, as well as her work attire and her hairstyle.” By contrast, the conduct alleged in *Vickers*, sexual behavior, was “more properly viewed as harassment based on [the plaintiff’s] perceived homosexuality[.]”

More recently, the Third Circuit allowed a sex-stereotyping claim to proceed on the facts, but its reasoning followed the logic of *Vickers*. In *Prowel v. Wise Business Forms, Inc.*, the plaintiff alleged readily-demonstrable nonconformance with expected masculine behavioral norms. As the court explained in some detail, the plaintiff testified that he had a high voice and did not curse; was very well-groomed; wore what others would consider dressy clothes; was neat; filed his nails instead of ripping them off with a utility knife; crossed his legs and had a tendency to shake his foot “the way a woman would sit”; walked and carried himself in an effeminate manner; drove a clean car; had a rainbow decal on the trunk of his car; talked about things like art, music, interior design, and decor; and pushed the buttons on [office equipment] with “pizzazz.”

In reversing the district court’s summary judgment order, the circuit court stated that it was reviving a “gender stereotyping claim.” The court acknowledged that “the line between sexual orientation discrimination and discrimination ‘because of sex’ can be difficult to draw,” but only because a factfinder could reasonably find sex stereotyping on the facts did the panel reverse the district court.

The Fifth Circuit’s decision in *EEOC v. Boh Brothers Construction Co.* similarly considered a gender nonconformance theory in a case brought by the EEOC on behalf of a male complainant who faced degrading anti-gay epithets at work. The decision contained no indication of the employee’s actual orientation or that the harasser believed the employee was gay. In fact, in a deposition, the EEOC cleverly obtained the harassing supervisor’s admission that the statements were related to the employee’s perceived lack of masculinity, rather than the supervisor’s belief that the

---

239. 453 F.3d 757, 762-63 (6th Cir. 2006).
240. Id.
241. Id.
242. 579 F.3d 285 (3d Cir. 2009).
243. Id. at 287.
244. Id. at 290 (emphasis added).
245. Id. at 291.
246. 731 F.3d 444, 457 (5th Cir. 2013).
employee was gay. On that basis, the Fifth Circuit allowed the claim to proceed under Price Waterhouse.

Read together, Vickers, Prowel, and Boh Brothers suggest that a somewhat tenuous sex-stereotyping theory may be available for HIV-positive plaintiffs who are unable to proceed under the ADA because of the end around, but only if their outward workplace behaviors raise inferences of non-masculinity or femininity, rather than homosexuality—a line that lacks analytical clarity. Unfortunately, HIV-positive gay men who satisfy “commonly-accepted [gender] stereotypes” will be unable to rely on the theory. The theory’s usefulness is, therefore, limited, and even where it is available, it is a rather frustrating way to establish liability for conduct that ultimately owes to stereotypic assumptions rooted in HIV status.

If the end-around problem is to be remedied by Title VII, the better solution is legislative revision of Title VII via the Employment Nondiscrimination Act (“ENDA”). Congress can eliminate the need for contorted legal strategies by making sexual orientation a protected characteristic under federal law. ENDA would amend Title VII’s list of protected characteristics to include sexual orientation. Following its enactment, HIV-positive plaintiffs would have greater flexibility in bringing claims to combat HIV discrimination. Although the U.S. Senate passed ENDA in late 2013, the bill was not brought up for a vote in the House and its chance for passage in the near future seems slim.

Upon its effective date, ENDA would permit HIV-positive plaintiffs to bring two claims, one under the ADA and another under an amended Title VII. In effect, plaintiffs will be able to trap their employers in end-around scenarios. If employers argue that sexual prejudice evidence is irrelevant to the HIV discrimination claim because it shows anti-gay bias, they would effectively concede liability under Title VII. In contrast, if they argue the anti-gay statements or conduct owed to HIV status, they would acknowledge discrimination under the ADA. Even if courts continue

247. Id. In an interview with the EEOC, the supervisor agreed that, by his statement that the plaintiff “seemed kind of gay,” he meant that the employee was “feminine” and “not manly.” Id. He further stated that he “did not think [the plaintiff] was queer or homosexual.”


251. Justin Sink, White House Rallies Behind ENDA Bill, THE HILL (July 11, 2014, 3:59 PM), http://thehill.com/homenews/administration/212009-white-house-rallies-behind-enda-bill (noting the bill had “stalled” in the House, and also had been abandoned by many gay rights groups because of concerns about its religious exemptions in light of the Supreme Court’s 2014 Hobby Lobby decision). The 113th Congress adjourned without passing ENDA, and as of January 2015, ENDA has not been reintroduced in the 114th Congress.
disaggregating evidence of sexual prejudice and HIV-specific facts, an amended Title VII would provide at least a possible basis for finding liability.

Cases arising in states with state law antidiscrimination protections for sexual orientation illustrate that employers face a difficult task in avoiding liability where commingled statements arise.252 These cases suggest that ENDA will work as this Comment anticipates. Further, because the remedies under the ADA and Title VII are mostly uniform,253 which particular claim succeeds is not altogether important. Although discrimination against gays and lesbians is wrong in itself, ENDA’s unintended benefit is closing the gap between the ADA and Title VII that uniquely threatens HIV-positive ADA plaintiffs.

CONCLUSION

The ADA is a thoughtful but complicated statute. Two decades following its passage, it remains the centerpiece of disability antidiscrimination law. Although this Comment illustrates one of its shortcomings, the ADA continues to work toward its goals of fostering inclusion and eliminating disability stigma in almost all areas of modern life. In exploring the boundaries of the Act, this Comment attempts not to provide a guide to those few employers that seek to subvert the letter and spirit of legal requirements. Instead, this Comment intends to challenge courts to adopt a better interpretation of the ADA, and provide to policymakers ideas for needed revision to America’s workplace laws.

The end-around problem discussed herein provides an additional reason for Congress to pass ENDA. But passage of ENDA is only a start. The discussion this Comment touches upon a more complicated topic for federal antidiscrimination law. Title VII, the ADA, the ADEA, etc.; these statutes are individual silos, each protecting certain characteristics in particular ways. But an HIV-positive gay man is not merely gay, male, or disabled. A black woman is not simply black, nor only female. All of the labels a person might wear ultimately intersect in the entire person he or she is, and the entire person to whom employers and coworkers respond. Discrimination may occur because of only one of these aspects, but it also may occur because of their complex, intersectional presentation.

252. See, e.g., Hotchkiss v. O’Reilly Auto Parts, 918 F. Supp. 2d 1108 (E.D. Wash. 2013) (applying the antidiscrimination laws of Washington state). As the case also indicates, dual protection under both the ADA and Title VII will not resolve every problem. With hostile work environment claims, the presence of only a few statements of both varieties may be insufficient evidence to prove either an ADA or amended Title VII claim. Nevertheless, dual protection is meaningful.

The laws Congress has enacted require that employees seek protection on each trait alone. These separate statutory schemes thereby divide identity into smaller pieces for sake of analytical clarity. In so categorizing, classifying, and dividing individuals and their experiences into neat categorical boxes, courts applying antidiscrimination law can lose the forest in the trees. In an ever-diversifying America, Congress and the courts must reconsider the treatment of complex identities under the law to better reflect and protect lived realities. Combined with more expansive statutory protections and more delicate attention by courts, federal antidiscrimination law can still accomplish its goals of ending stereotypes and discrimination against Americans on the many bases of who they are.
In *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, Michelle Alexander argues that the current American criminal justice system—from first-time traffic stops to post-incarceration felony laws—is a system of legalized racial control, analogous in many ways to southern Jim Crow laws. She aims to show that if mass incarceration is the body, then the War on Drugs is the muscle along a skeleton of deeply embedded American racism. While Alexander seeks to educate, she also calls for a social movement. Far beyond legal reform and an end to the drug war, Alexander argues that authentic change requires a fundamental shift in the “flawed public consensus” that drug crime is a black and brown problem. She demands that the country’s most prominent civil rights advocacy organizations abandon “lawyer-driven, trickle-down strategies for racial justice,” reconnect with the communities they once served, and care “the way they would have cared if the criminals were understood to be white.”

Alexander defines mass incarceration as a “racial caste system,” following the same pattern as Jim Crow and slavery and expanding in response to civil rights achievements. Just as anti-Populist policies developed in response to the successes of Civil War Reconstruction, this modern system of racial control, Alexander argues, grew as a backlash to the Civil Rights Movement in the 1960s by capitalizing on the fear and vulnerability of poor whites. Alexander explains how a few limited Nixon administration policies became the capital letter “War on Drugs” when President Reagan expanded those policies with massive funding. By the

---

2. Id. at 255.
3. Id. at 234.
4. Id. at 16.
time the Clinton administration came along with “get tough” drug-law enforcement policies, “a backlash against blacks was clearly in force . . .”

After establishing a current crisis of numbers—“nearly 7.3 million people [in 2009] under correctional control”—Alexander uses jolting racial statistics and disturbing anecdotes to guide readers down the gauntlet of racial discrimination in the criminal justice system. Facing disproportionately high numbers of traffic stops and arrests, black men must navigate inadequate legal representation, intense pressure to plea bargain, higher rates of imprisonment, longer sentences, and nearly unbeatable odds of re-incarceration due to parole standards that make violation almost impossible to avoid. At the same time, Alexander reminds readers “that whites comprise the vast majority of drug users and dealers—and may well be more likely than other racial groups to commit drug crimes . . .”

Alexander then walks the reader through the minefield of felon disenfranchisement laws that can make re-offense the only option when facing homelessness and unemployment. In particular, being “forced to ‘check the box’ indicating a felony conviction on employment applications . . . and denied licenses for a wide range of professions . . . lock[s] [drug felons] out of the mainstream society and economy—permanently.” AFL-CIO President Richard Trumka described mass incarceration as a major labor issue while advocating for California’s Proposition 47, which makes most nonviolent drug crimes a misdemeanor rather than a felony. Trumka noted that “entire communities crumble when able-bodied men and women come home and aren’t allowed to work.” Trumka’s statements reflect part of Alexander’s argument that the felon label is detrimental to communities as well as the workforce.

As a professor of law at Ohio State University and former director of the Racial Justice Project at the ACLU of Northern California, Alexander calls on the nation’s civil rights organizations to rise to her challenge and shift the public consensus. She poses important questions and encourages “reflect[ion] on whether traditional approaches to racial justice advocacy are adequate to the task at hand.” She offers “not a plan, but . . .

---

5. Id. at 48.
6. Id. at 101.
7. Id. at 99.
8. Id. at 92.
11. Alexander, supra note 1, at 99.
12. Id. at 229.
conversation starters . . . meant to be the beginning of a conversation, not an end.”\textsuperscript{13}

Alexander recognizes that organizations are made of humans and they, too, are susceptible to pervasive racial stereotypes. She identifies how the “professionalization” of civil rights lawyers during the 1960s, and the subsequent disconnection from the communities they once served, has disrupted their ability to recognize and respond to the new caste system.\textsuperscript{14} Civil rights organizations, Alexander argues, must now trade in or supplement their “[w]idespread preoccupation with litigation” for the harder work—advocacy on behalf of criminals.\textsuperscript{15}

She does not suggest that litigation and policy work be abandoned, however: “To the contrary, reform work \textit{is} the work of movement building, provided that it is done consciously \textit{as} movement-building work.”\textsuperscript{16} Alexander cites relatively recent Supreme Court cases\textsuperscript{17} to support her claim that litigation will struggle for efficacy until “a new, egalitarian racial consensus reflecting a compassionate rather than punitive impulse toward poor people of color” emerges.\textsuperscript{18} In the meantime, she fears, “[w]e run the risk of winning isolated battles but losing the larger war.”\textsuperscript{19}

While Alexander does not hold back from criticizing our legal system, she also responds to common counterarguments—namely that because the U.S. has a black president it cannot possibly also have a racialized caste system,\textsuperscript{20} and that “the analogy [to Jim Crow laws] has too little to say about black attitudes toward crime and punishment, masking the nature and extent of black support for punitive crime policy.”\textsuperscript{21} Alexander dedicates a

\textsuperscript{13} Id.
\textsuperscript{14} Id. at 225-26.
\textsuperscript{15} Id. at 226.
\textsuperscript{16} Id. at 235.
\textsuperscript{17} Id. at 108 (discussing the Court’s rejection of Fourth Amendment claims of discriminatory traffic stops by police in Whren v. U.S., 517 U.S. 806 (1996)); id. at 109 (discussing the Court’s denial of Fourteenth Amendment claims of racial discrimination in death penalty sentencing in McCleskey v. Kemp, 481 U.S. 279 (1987)); id. at 114 (discussing the Court’s failure to uphold a District Court Judge’s discovery order in response to a racially discriminatory selective-prosecution claim in Armstrong v. United States, 517 U.S. 456 (1996)).
\textsuperscript{18} Id. at 235.
\textsuperscript{19} Id. at 236.
\textsuperscript{20} Alexander argues that “[t]he current system of control depends on black exceptionalism; it is not disproved or undermined by it. . . . [R]acial caste systems do not require racial hostility or overt bigotry to thrive. They need only racial indifference, as Martin Luther King Jr. warned more than forty-five years ago.” Id. at 14.
\textsuperscript{21} James Forman, Jr., \textit{Racial Critiques of Mass Incarceration: Beyond the New Jim Crow}, 87 N.Y.U. L. REV. 21, 23 (2012). Alexander addresses this topic at length. After arguing that “surveys consistently show that African Americans are generally less supportive of harsh criminal justice policies than whites,” she explains that African American support for punitive crime policy is “complicity [that] is perfectly understandable, for the threat posed by crime—particularly violent crime—is real,” higher for black men, and “concentrated in ghetto communities.” Alexander, \textit{supra} note 1, at 208, 210. She
section to discussing the limits of the analogy and distinguishing Jim Crow and mass incarceration. She also repeatedly notes what is not in the book, acknowledging that mass incarceration impacts women and people of color outside of the African-American community in profound and different ways.  

Critics of The New Jim Crow find Alexander’s preemptive responses inadequate. James Forman, a Clinical Professor of Law at Yale, argues that Alexander’s analogy oversimplifies both the origins and effects of mass incarceration, and her failure to incorporate impacts of mass incarceration upon other racial groups weakens her argument. He and other critics dispute Alexander’s focus on the role of the War on Drugs in mass incarceration and argue that her “overemphasis” on drug-law enforcement diverts important discussion of violent crime, particularly in low-income, black communities. Forman writes that “the Jim Crow analogy leads to a distorted view of mass incarceration, and therefore hampers our ability to challenge it effectively . . .”

Widespread adoption of the disturbing analogy, however, is not Alexander’s primary objective. While the title raises alarm and hooks an audience, Alexander is clear that “[w]hat this book is intended to do—the only thing it is intended to do—is to stimulate a much-needed conversation about the role of the criminal justice system in creating and perpetuating racial hierarchy in the United States.” And it has worked—since the book’s publication in 2010, Alexander has been on the speaking circuit almost nonstop and has appeared extensively on radio and television programs, including giving mainstream, high-profile interviews with personalities like Stephen Colbert and Bill Maher.

Some critics tie Alexander’s speaking engagements into their attack, using the book’s commercial success as evidence of Alexander’s lack of

then links the higher violent crime rates to joblessness, partially resulting from underfunded and inadequate schools, lack of community investment, and an absence of job training (all impacts of mass incarceration). Id. at 210.

22. Alexander, supra note 1, at 16.
23. Forman, supra note 21, at 23.
25. Forman, supra note 21, at 25.
radical analysis. Greg Thomas, Associate Professor of English at Tufts University, attacks Alexander for “citing everything but traditions of Black political and even academic radicalism” and noting particularly a lack of discussion of the Black Power Movement of the 1960s and 1970s, political prisoners, and capitalism. Political sociologist Joseph Osel joins Thomas in this particular critique: “The New Jim Crow espouses a counterrevolutionary, self-serving position insofar as it omits all truly revolutionary stances from its discourse.”

And, he may be right. Alexander’s argument, lacking what her critics call “more insightful, radical, and fearless ideas,” has been embraced by many mainstream liberals—and it has fueled national conversations on mass incarceration specifically because of its approachability. Osel admits that “progressive liberals, . . . as well as the vast majority of progressive academics, will likely find The New Jim Crow stimulating, maybe cathartic and probably worth recommending,” which is precisely what Alexander set out to do.

Lisa Chaiet, J.D. 2016 (U.C. Berkeley)

29. Id.
In *The Production of Difference*, David Roediger and Elizabeth Esch argue that America’s history of “race management” is one source of the persistent racial inequities of the American economy.¹ Roediger and Esch borrow the title of their book from literary historian Lisa Lowe’s *Immigrant Acts* in which she posits that American business maximized profits and defeated working-class solidarity through “the social productions of ‘difference,’... marked by race, nation, geographical origins, and gender.”² Roediger and Esch trace the development of what they call “race management” from the proliferation of southern plantation management journals in 1830 through the aftermath of the 1926 Johnson-Reed Act’s immigration restrictions.

In Roediger and Esch’s account, “race management” was an internally inconsistent doctrine and set of strategies that white managers used to control their workforces by creating racial distinctions between groups.³ As the authors note, “neither ‘race’ nor ‘management’ refers...to something stable and easily defined.”⁴ Managers made wildly inconsistent assertions about the relative productivity and reliability of various racial groups and the best methods to extract labor from them. In some cases, managers claimed that nonwhite workers would achieve the greatest output when paternalistically “developed.”⁵ One plantation management article from 1860, for instance, advocated that masters should improve their slaves’ “moral sensibilities” so that slaves would obey not out of fear but because they “love[d]” their master and thought it “wrong to disobey.”⁶ Others claimed that violence—usually in the form of beatings and lashes—would yield superior results,⁷ and some recommended putting racial groups into direct competition.⁸

---

² *Id.* at 8.
³ *Id.* at 9.
⁴ *Id.*
⁵ *Id.* at 42.
⁶ *Id.*
⁷ *Id.* at 41.
⁸ *Id.* at 70.
Yet while the substance of the claims varied, they always served the dual purposes of trumpeting the specific managerial skill of the white person making the claim and validating for other white managers and the general white public the proposition that white people were rightfully in charge of people of color (what Roediger and Esch call “whiteness as management”). In this sense, race management can be seen as an intricate system of rationalizations supporting an exploitative, white supremacist labor system.

But the race management Roediger and Esch describe was not simply a bad faith justification for the status quo; it was also a system supervisors actively sought to implement, using purported racial distinctions to drive staffing decisions. Its popularity was not limited to southern plantations but also extended to management consultants in northern factories, authors of industrial trade journals, and even those devising the work policies at large infrastructure projects like the Panama Canal.

The Production of Difference argues that the very concept of personnel management in the United States originated on the southern plantation, and the book begins its examination of race management there. An extensive network of trade journals on plantation management developed between the 1830s and 1860s. The journals originally applied the term “management” broadly to the stewardship of land and animals. Writers gradually adopted the term to apply to the oversight of slave labor as one of the many responsibilities of white landowners. As with later forms of race management, the journals’ prescriptions varied, but they generally fell into one of two categories: a “whip-happy regimen designed to force immediate compliance,” or a “paternalist mode” that “sought to use shame and the threat of sale to enforce discipline.”

The journals and other contemporary sources also compared the merits of free versus slave labor, but they preferred to cast the discussion in racial terms, often comparing ratios of productivity of “Irish” and “negroes.” Perhaps unsurprisingly, the assertions often contradicted each other. Landscape architect Frederick Olmsted recorded in one of his travel diaries that two planters “separated by a few miles, . . . [concluded] both that ‘negroes’ out-produced the Irish by a factor of two, and underproduced them by a ratio of two-thirds.” Planters made claims of racial knowledge in trade journals and elsewhere to flaunt their managerial wherewithal to

9. Id. at 43.
10. Id. at 22-23.
11. Id. at 26-28.
12. Id. at 41.
13. Id. at 33-37.
14. Id. at 33.
each other and the white public, while also using racial comparisons to conceal the brutality of the slave system.

The logic of race management applied across industries. Iron foundries in the South described their decisions to use one race of workers over another in terms of the preferred group’s relative efficiency or amenability to hard “driving.” But the iron works also frequently used slaves and free black workers as “strike insurance” to reduce the power of white workers to demand better pay or improved working conditions.15 Likewise, planters would impute characteristics to racial groups to justify staffing choices, describing how overseers could drive “the negro” in contrast to how white men “wouldn’t stand it”16 or complaining that “whites ‘cannot endure heat and labour so well as the negro.”’17 In each of these cases managers made claims purporting to describe immutable racial characteristics but did so at the expense of a far simpler explanation: that under the system of slavery, white workers had the option to leave abusive circumstances and black workers did not. The choice to frame this system in terms of racial characteristics—in contrast to as the product of the violence of slavery—allowed the discourse of race management to appeal to supervisors beyond the South and helped it to survive after the Civil War.

After establishing the contours of race management by examining its use in the antebellum South, The Production of Difference turns to its application in America’s expansion in the late nineteenth and early twentieth centuries. Roediger and Esch direct their attention to the mining and railroad construction industries. Companies undertaking these projects employed many of the same techniques as southern plantations, putting racial groups into competition (in some cases, literally racing them against each other), comparing their relative productivity, and frequently searching for the “best” group to use as a labor force.18

The Central Pacific Railroad, one of the two companies that built the transcontinental line, exemplified these techniques. By the end of the 1860s, the Central Pacific almost exclusively employed Chinese workers.19 Its founder Charles Crocker testified before a congressional hearing on Chinese immigration that the railroad’s preference for Chinese labor was “because of its greater reliability and steadiness, and [Chinese workers’] aptitude and capacity for hard work.”20 As with other examples of race management, Central Pacific’s reasoning was inconsistent. At the same hearing, Crocker argued that the railroad preferred using Chinese labor for

15. Id. at 36.
16. Id. at 50.
17. Id. at 37.
18. Id. at 70.
19. Id. at 71.
20. Id. at 74.
its most dangerous tasks because this allowed white workers to be “in an elevated grade of labor, receiving wages far above.”21 At another point in the hearing Crocker claimed he would have preferred to employ white workers, but that there had simply not been enough of them willing to complete the work.22 Contrary to Crocker’s conflicting accounts, the Central Pacific began relying almost exclusively on Chinese workers in 1865 to break a strike by Irish workers, and the railroad soon realized that it could treat Chinese workers worse and pay them about half as much as it could the Irish workers.23

Chinese workers were often skilled at railroad construction not because of innate racial characteristics but because many had previously worked as miners.24 The railroad companies were able to subject Chinese workers to worse working conditions and pay them less because they had few other options, having been forced out of mining and other work “by legislation, violence, and discrimination.”25 As in the plantation economy, railroad managers boasted their executive genius by explaining their decisions in terms of the purported racial characteristics of different groups when their real motive had been to find a workforce with fewer legal protections that they could exploit more easily.26

The final section of The Production of Difference looks at race management’s integration into the “scientific management” movement of the early twentieth century, typified by Henry Ford’s assembly lines and Frederick Taylor’s time and motion studies.27 Although these management techniques theoretically sought to reduce production to a series of movements with workers like interchangeable cogs in a machine, race management persisted.28 Taylor used racially coded anecdotes to describe his management theories and Henry Ford attempted to “racially develop” his immigrant workforce.29 Across industries, despite their ostensible commitment to scientific precision, management delegated daily operations to foremen who put groups of immigrants and workers of color into competition and routinely made staffing decisions based on the purported relative productivity of the groups.30

21. Id. at 75.
22. Id. at 75.
23. Id. at 76-77.
24. Id. at 78.
25. Id.
26. Id. at 79.
27. Id. at 139-140.
28. Id. at 139-40.
29. Id. at 146-49.
30. Id. at 155-62.
While supervisors had, until the First World War, directed race management techniques at white immigrant groups as well as people of color, Roediger and Esch argue that this dynamic shifted in the 1920s. The war significantly reduced the flow of new immigrant groups into the country, and management responded by attempting to retain workers rather than pitting groups against each other. In the face of growing labor militancy among recent immigrant groups, including the Great Steel Strike of 1919 and 1920, management supported more selective federal immigration policies, ultimately resulting in the 1924 Johnson-Reed Act.

At the same time that management stopped using race management to divide white immigrant groups, however, they continued to make racial claims to justify their treatment of black workers who had moved to manufacturing centers during the Great Migration. In contrast to white workers, managers during this period claimed that black workers were more loyal and less prone to labor militancy. Companies continued to use black workers as “strike insurance” and to give to them the “work white men [wouldn’t] do.”

At the same time, employers encouraged workers from Mexico to immigrate so that they could be used as a lower-wage alternative to black and white labor in agriculture and industry. Supervisors often claimed that Mexican workers were loyal, hard-working, and even less susceptible to poisons used in the workplace. The claims of racial knowledge managers made in the 1920s and 1930s were as variable in substance as ever, and they served the same purposes they always had. White supervisors used them to exhibit managerial prowess to each other and the general white population and to conceal the political exploitation that made black and Latino workers more vulnerable to economic exploitation.

Although Roediger and Esch warn against drawing too direct a connection between the history they describe and the present, they suggest that supervisors continue to use race management in certain sectors of the economy including agribusiness and the service industry, reserving lower-paid and more physically-demanding work for black and Latino workers. Looking at the American economy, it is difficult not to see the legacy of race management in the considerably higher rates of unemployment for

31. *Id.* at 172.
32. *Id.* at 172-73.
33. *Id.* at 179-81, 189.
34. *Id.* at 187-89.
35. *Id.*
36. *Id.* at 190-91.
37. *Id.* at 198-200.
38. *Id.* at 201-02.
39. *Id.* at 206-08.
black and Latino Americans compared to white Americans, and in the fact that the median household income for white families is about fifty percent higher than that for black and Latino households. It is also apparent in the occupational segregation of sectors like the restaurant industry where black and Latino employees are severely underrepresented in the best paying positions despite constituting nearly half of the workforce. Matched-pair audits show that white applicants for server positions in fine-dining restaurants are more likely to be hired than equally qualified black or Latino applicants. Although the preference for white workers in more-skilled, higher-paid positions may be the result of implicit racial bias today rather than explicit managerial strategy, the discourses of race management could be one source of those biases. The racial disparities in the American economy did not come into being overnight, and The Production of Difference provides a starting point for understanding their origins.

Charles Sinks, J.D. 2017 (U.C. Berkeley)

43. Id. at 15-17.
44. See id. at 18.
Matt Taibbi’s *The Divide: American Injustice in the Age of the Wealth Gap* depicts the grossly divergent treatment of poor versus wealthy individuals in the American criminal justice system. Taibbi skillfully weaves together biographical vignettes, powerful statistics, and detailed descriptions of the criminal justice system. With these implements, he illustrates two very different realities: one in which aggressively pushing ethical and legal boundaries is rewarded, socially, financially, and by the government; and the other, in which standing in front of one’s own home or owning frilly panties can be cause for arrest or a basis for legal action.

Unlike the concepts he grapples with, Taibbi’s prose is straightforward. His pop-culture analogies, such as referring to a bank’s master computer as “HAL” from the movie *2001: A Space Odyssey*, make the scenarios clear and relatable.1 Furthermore, Taibbi places individual experiences with the criminal justice system within a larger political and social context in order to highlight the disparities. A personal account of being arrested for “obstructing pedestrian traffic”2 becomes more profound when contrasted with massive financial fraud schemes that have been permitted to operate without a single criminal charge.

The book’s strength comes from these various elements woven together. Personal narratives bring color and emotion to the complex legal and financial systems. In turn, Taibbi’s incorporation of detailed procedural descriptions and statistics on prison population, poverty, and crime lend credibility to the anecdotal experiences. As a cohesive whole, the book delivers a powerful message that the United States’ criminal justice system operates very differently on the two sides of the wealth gap.

At the macro level, this book assesses how the United States’ legal system handles crime, fraud in particular. But, as the author effectively argues, “you have to see the difference [in how we treat the rich and poor] up close, at a day-to-day level, to really grasp the breadth of the gap.”3 To

---

2. Andrew Brown was arrested in Brooklyn, New York, for obstructing pedestrian traffic because he “was standing in front of [his] own house” after coming home from work. *Id.* at 111.
3. *Id.* at 329.
accomplish this, Taibbi focuses in on the experiences of individuals on both sides of the divide.

Taibbi outlines several specific instances of corporate fraud, including the 2011 Hong Kong and Shanghai Banking Corporation (HSBC) investigation and the 2011 Lehman-Barclays bankruptcy case, noting that while there was a plethora of criminal activity, charges were never filed, and not a single individual was held accountable. In 2011, HSBC admitted to “laundering billions of dollars for drug carts in Mexico and Columbia, washing money for terrorist-connected organizations in the Middle East, allowing rogue states under formal sanctions by the U.S. government to move money freely by the tons of billions through its American subsidiary, letting Russian mobsters wash money on a grand scale . . . and helping tax cheats . . . hide hundreds of millions of dollars” in its accounts. Not one criminal charge was pursued. The settlement that the Department of Justice negotiated was a $1.9 billion fine, partially deferred bonus payments to top HSBC executives, and an apology.

The government’s practice of not prosecuting high-profile financial crimes originated in a 1999 memo written by Eric Holder, a former U.S. attorney and then-White House official, that introduced the concept of “collateral consequences.” The original memo sensibly suggested exercising prosecutorial discretion in order to protect the jobs of innocent employees, unless the company was thoroughly corrupt. However, Eric Holder, then the U.S. Attorney General, and Lanny Breuer, the head of the Criminal Division of the Department of Justice, expanded the doctrine of collateral consequences to justify prosecutorial discretion because of the “butterfly effect” on financial markets, rather than the direct effect on company employees. Collateral consequences shifted from protecting people to protecting profits.

The ruling in the Lehman-Barclays case was “the civil litigation version of Collateral Consequences.” After accumulating $700 billion in debt, the Lehman Brothers investment bank prepared for bankruptcy, borrowing $45 billion from the Federal Reserve to “keep its doors open” in the meantime. Lehman Brothers then purged the company’s remaining assets in a “dark pool merger” with the British bank, Barclays, executed “literally in the middle of the night” that paid executives exorbitant bonuses.

---

4. Id. at 59.
5. Id. at 61-62.
6. Id. at 13.
7. Id. at 68-69. During a PBS Frontline episode in January 2013, Larry Breuer expanded the concept of collateral consequences to include the “ripple effect” of criminal prosecution on the “whole economy.” Eric Holder endorsed this interpretation when he addressed the U.S. Senate in March 2013.
8. Id. at 191; see In re: Lehman Brothers Holdings, Inc., No. 12-2322 (2d Cir. 2014).
9. Id. at 165.
and moved billions of dollars into “the coffers of Barclays and out of the reach of Lehman’s creditors.” 10 Ultimately, all of Lehman’s 76,000 creditors were denied relief, draining worker pensions and forcing municipality cutbacks, among other casualties. 11

The government’s actions and rationale for criminal prosecution of Wall Street crimes stands in stark contrast to its criminal prosecution of street crimes. The collateral consequences of the crimes committed by HSBC and Lehman Brothers were drastic and far-reaching. Yet the poorest people in this country, at risk of perpetrating frauds with limited, if any, collateral consequences, are the most aggressively policed.

For example, “Project 100%” is a program in San Diego, California, designed to prevent welfare fraud by enforcing one-hundred-percent compliance with public assistance programs. 12 Joni Halpern, a lawyer who defends welfare recipients under that program, described the experience of her first client, a Vietnamese refugee who had come to America after losing her child and being raped. While searching the woman’s home, a requirement of the compliance program, the investigator fixated on a pair of panties that he thought were “too sexy for a woman living alone,” and he accused her of “having a man in the house,” cause for revoking her benefits and pursuing criminal charges of fraud. 13

Referring to the way in which the justice system correlates wealth with civil liberties, Taibbi states that “this is a cultural kind of bias,” where “if you receive a certain kind of public assistance, you forfeit” your constitutional rights. 14 He argues that Americans have a deep “hatred of the weak and poor, and a corresponding groveling terror before the rich and successful.” 15 This feature of our collective psyche has metastasized into social, political, and legal bureaucracies, and the American concept of citizenship is changing to reflect it. Traditionally, citizenship conferred rights and imposed responsibilities. But as Taibbi demonstrates, the criminal justice system has divided our society between the haves and the have-nots. Bankers at HSBC and Lehman Brothers are “above citizenship” and receive legal protections without the legal responsibilities. On the other side of the divide are undocumented immigrants, ghetto denizens, and welfare recipients, living with “virtually no rights at all.” 16

---

10. Id. at 143-44.
11. Id. at 193. The City of Long Beach, countless pension funds, and at least one foreign orphanage lost their savings as a direct result of the fraudulent borrowing at Lehman Brothers and its sale to Barclays.
12. Id. at 317. In 2011 as part of Project 100%, the county of San Diego completed 26,000 home searches.
13. Id.
14. Id. at 319.
15. Id. at xx.
16. Id. at 208.
The merits of capitalism on Wall Street and the social utility of welfare can be debated; regardless, the inconsistencies in U.S. fraud prosecution are glaring. For example, in 2013 a twenty-nine-year-old immigrant mother of three was convicted of welfare fraud for receiving taxpayer-funded assistance while working under another name for $12.56 an hour. Taibbi concedes, “nobody is saying people like this aren’t guilty, or that there shouldn’t be a punishment” for this type of fraud. His point is that, “if her crime gets punished,” which it did, “someone else committing the same crime has to receive the same punishment.”

Taibbi provides context for these specific examples by identifying larger social and political forces that have contributed to the current state of the U.S. justice system. Between 1991 and 2010, violent crime plunged more than 44%, yet in that same time period, prison population increased more than 100%. The discrepancies in these statistics and in U.S. fraud prosecution make one wonder: why are similar crimes prosecuted differently?

To address that question, Taibbi cites the “radical deregulation of the financial services industry” and massive welfare reform under President Clinton. As a result, criminal prosecution on Wall Street ceased, whereas “welfare fraud was prosecuted like never before.” With street crime decreasing and corporate crime untouchable, law enforcement budgets shrank. Out of financial necessity police departments targeted the poor, treating welfare recipients and immigrants like walking cash machines. Eventually, the political momentum in both parties traveled in the same direction, namely to merge social welfare and law enforcement systems, giving law enforcement a constant source of income while leaving the large-scale, complex fraud unfettered.

*The Divide* effectively illustrates that the American legal system does not “treat people the same way everywhere” and does not “have the same playbook for rich people.” Taibbi does an excellent job of including diverse individual experiences that touch on issues of immigration, single-family households, race, and gender. The issue of disparate treatment based on socio-economic status is clearly connected to many central issues of this era, as evidenced by the Occupy Movement, the prominence of immigration policy in politics, and the public response to the homicides of Trayvon Martin and Michael Brown.

17. *Id.* at 403.
18. *Id.* at xv.
19. *Id.* at 349.
20. *Id.* at 351.
21. *Id.* at 202.
22. *Id.* at 329.
Yet Taibbi does not condemn the system. In fact, he states that “the system” can be legitimized by “just trying to do the right thing.” The real focus of his critique is the people within the system: Taibbi calls the commissioner for the Securities and Exchange Commission a coward for avoiding the regulation of large, powerful banks, and he heralds the efforts of prosecutors in Texas, who spurred Congress to change a law allowing market manipulation. He states that “public outrage sometimes can change the calculus,” and lauds the ruling by a federal judge against New York’s stop-and-frisk policies. By focusing on individual participation within the justice system, Taibbi tasks each of us with bridging the wealth gap, and he suggests the solution may be found at the source: our own deeply buried assumptions about wealth and poverty in America.

Maggie Tides, J.D. 2016 (U.C. Berkeley)

23. Id. at 411-12.
24. Id.