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Just Semantics: The Lost Readings of the Americans with Disabilities Act

ABSTRACT. Disability rights advocates and commentators agree that the Americans with Disabilities Act (ADA) has veered far off course from the Act's mandate of protecting people with actual or perceived disabilities from discrimination. They likewise agree that the fault lies in the language of the statute itself and in the courts' so-called literalist reading of its definition of disability. As a result, many disability rights advocates have pinned their hopes for doctrinal reform on the proposed ADA Restoration Act, now in congressional committee. Although the Act would likely be a boon to plaintiffs, its chances of passage are uncertain. This Article tells a very different story of the problem and its solution. I agree that blame should fall on the courts, but not for reading the statute too closely. Rather, they have not read it closely enough. A truly rigorous interpretation of the ADA would expose a structural ambiguity in the regarded-as prong of the disability definition, with important consequences for interpretation. Although this ambiguity is a basic one—the kind that we resolve every day without thinking about it—it creates what is in fact a nine-way ambiguity in the statute. The courts have to date overlooked all but one of a corresponding nine readings; the other eight are effectively lost. Drawing on ordinary intuitions about sentence meaning, and borrowing some basic conceptual tools from formal linguistics, this Article aims to make ambiguity in the regarded-as prong visible to the reader. This opens the door to invoking the ADA's rich legislative history for the purpose of resolving the ambiguity. Such history favors a broad reading of the statute and would mark a departure from an era of increasingly narrow interpretation of the ADA's disability definition. Thus, while it may be a surprising alliance to consider, formal linguistic rigor in the hands of civil rights advocates holds the potential to realign ADA jurisprudence with the statute's purpose.

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INTRODUCTION

"Absurd";[1] "bizarre";[2] "counterintuitive."[3] These are the ABCs of the ADA—the Americans with Disabilities Act of 1990[4]—from the perspective of many disability rights advocates and commentators on the jurisprudence interpreting this statute.[5] The ADA, heralded upon its enactment as comprehensive civil rights protection for people with disabilities in areas such as employment,[6] has lost much of its expected force in the courts. There the

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1. *See, e.g.*, Cheryl L. Anderson, *"Deserving Disabilities": Why the Definition of Disability Under the Americans with Disabilities Act Should Be Revised To Eliminate the Substantial Limitation Requirement*, 65 MO. L. REV. 83, 107 (2000) (citing the language of the ADA as to blame for the absurd results of the disability definition); Arlene B. Mayerson, *Restoring Regard for the "Regarded As" Prong: Giving Effect to Congressional Intent*, 42 VILL. L. REV. 587, 599 (1997) (describing the absurd results of applying the actual-disability inquiry to the regarded-as analysis).

2. Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB. L. 91, 147 (2000) (describing the inquiry into major life activities under the disability definition as a "bizarre web").

3. *See, e.g.*, Lisa Eichhorn, *Major Litigation Activities Regarding Major Life Activities: The Failure of the "Disability" Definition in the Americans with Disabilities Act of 1990*, 77 N.C. L. REV. 1405, 1428 (1999) (arguing that defining disabilities in terms of limitations on "major life activities" "runs counter to the notions of the disability rights movement and fails to capture the overall intent of the drafters"); Wendy E. Parmet, *Plain Meaning and Mitigating Measures: Judicial Interpretations of the Meaning of Disability*, 21 BERKELEY J. EMP. & LAB. L. 53, 77 (2000) (describing the perverse result of taking mitigating measures into account for purposes of ascertaining disability).

4. 42 U.S.C. §§ 12101-12213 (2000).

5. While this Article focuses on the ADA, its arguments are equally pertinent to the disability definition in the Rehabilitation Act of 1973, § 7, 29 U.S.C. § 705(20)(B) (2000), which the ADA incorporates. *See infra* text accompanying note 42. Congress intended that case law interpreting the Rehabilitation Act's disability definition under its nondiscrimination provisions (section 504, 29 U.S.C. § 794 (2000)) be applicable also to the ADA. *See* H.R. REP. NO. 101-485, at 27-30 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 450-53. The ADA contains an express provision for this link at 42 U.S.C. § 12201(a) (2000): "Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 . . . or the regulations issued by Federal agencies pursuant to such title."

6. NAT'L COUNCIL ON DISABILITY, THE AMERICANS WITH DISABILITIES ACT POLICY BRIEF SERIES: RIGHTING THE ADA 3 (2002), *available at* http://www.ncd.gov/newsroom/publications/pdf/rightingtheada.pdf. The ADA's employment protections are found in title I of the Act, 42 U.S.C. §§ 12111-12117 (2000). The present analysis considers the employment context in particular because it represents the bulk of case law on the definition of disability, but its conclusions are equally applicable to other contexts, such as public transportation (title II) and public accommodations (title III).

statute's definition of an "individual with a disability" has become a tripwire for plaintiffs,[7] who must meet this definition in order to claim ADA protection.[8]

Particularly vexing for plaintiffs is the requirement to show as a threshold matter that they have, or are regarded as having, "an impairment" that substantially limits a "major life activit[y]."[9] The detailed inquiry around these terms has tended to eclipse or preclude argument over what would typically be the crux of a discrimination claim: whether discriminatory animus motivated an employment action. This disconnect between ADA goals and ADA jurisprudence has given litigation under the statute a surreal tinge. For example, an employee suffering from schizophrenia, who was refused employment after the employer told her she was "physically and mentally incapable of having a job," loses her case because she cannot prove that she was regarded as having a mental impairment.[10] Similarly, the claim of an employee with end-stage kidney failure, who was denied accommodation for dialysis treatment, becomes a contest over whether "eliminating waste from the body" is a major life activity.[11]

Advocates and commentators largely agree that the root of this doctrinal problem is the language of the disability definition itself, compounded by the courts' unwillingness to veer from it.[12] As the lament goes, the courts' "literalist reading"[13] of the definition's unfortunate wording yields absurd results that

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7. Susan Stefan, *Delusions of Rights: Americans with Psychiatric Disabilities, Employment Discrimination and the Americans with Disabilities Act*, 52 ALA. L. REV. 271, 275 (2000) (citing the failure to meet the disability definition as the "primary reason that [ADA employment discrimination] plaintiffs . . . are losing their cases").

8. 42 U.S.C. § 12112(a) (2000).

9. *Id.* § 12102(2)(A)-(C). Disability with respect to an individual is defined as: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." *Id.* I do not address the jurisprudence of the record-of prong, which has not received the same level of attention in litigation or commentary as the definition's other two prongs.

10. Hayes v. Phila. Water Dep't, No. 03-6013, 2005 U.S. Dist. LEXIS 41852, at *31-32 (E.D. Pa. Mar. 31, 2005) (granting summary judgment for an employer where employer did not know of the plaintiff's specific disorder).

11. Fiscus v. Wal-Mart Stores, Inc., 385 F.3d 378, 382-83 (3d Cir. 2004) (holding kidney failure to be disabling because eliminating waste from one's body is a major life activity).

12. *See, e.g.*, Anderson, *supra* note 1, at 107 (stating that the "language of the ADA" is to blame for absurd results for plaintiffs); Feldblum, *supra* note 2, at 140 ("The bottom line is that statutory text matters, sometimes even too much.").

13. Feldblum, *supra* note 2, at 141.

run counter to the clear intent of Congress.[14] In interpreting "impairment" and "major life activities" narrowly, courts have held that conditions the ADA drafters assumed would be covered as actual disabilities under the Act are not, in fact, disabling.[15] They have likewise dulled the "regarded-as" prong of the statute, which had been understood as a catch-all provision for conditions that are not actually disabling but are viewed by employers as such.[16] Advocates have conceded that the regarded-as prong of the definition suffers from the same technical flaws as the actual-disability prong.[17] Accordingly, the critique of the courts' "obsessive"[18] literalism is a tempered one. As one important commentator suggests, it is hard to fault the courts for reading the statute as written.[19]

The conversation in the disability rights movement, then, has moved from a stunned "what happened to the ADA?" to a determined "what can we do about it?"[20] Recently, a swell of dissatisfaction with the statutory language has sparked an effort to overhaul the definition of disability legislatively. This revision has been termed "the big prize" sought through the multifaceted ADA Restoration Act of 2007.[21] The goal of this proposed legislation is to step back

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14. *See id.* at 157.

15. Examples of such impairments are epilepsy, diabetes, and cancer. *Id.* at 131, 139 (noting Congress's intent to cover a broad range of impairments).

16. Mayerson, *supra* note 1, at 609-11; *see also* Michelle T. Friedland, Note, *Not Disabled Enough: The ADA's "Major Life Activity" Definition of Disability*, 52 STAN. L. REV. 171, 183-85 (1999) (explaining the choice of the "major life activities" wording in the ADA's definition of disability and observing that the regarded-as prong is "'expansive in scope,' in that [it] appl[ies] to people . . . who are regarded as having an impairment, whether or not they actually would be considered disabled under the first prong").

17. *See, e.g.*, Anderson, *supra* note 1, at 124 (asserting that the regarded-as prong "[b]y its plain language . . . incorporates the flawed idea" of requiring a substantial limitation on a major life activity); Eichhorn, *supra* note 3, at 1462-63 (conceding that the regarded-as prong analysis follows the interpretation of the actual-disability prong analysis); Feldblum, *supra* note 2, at 157 (pointing out the deficiencies of the regarded-as prong as written); Friedland, *supra* note 16, at 180-81 (discussing the problem of the major-life-activities requirement in the regarded-as prong).

18. Feldblum, *supra* note 2, at 93, 154 (stating that the ADA's drafting may not have reflected congressional intent, and that statutory text "reigns supreme" in interpretation).

19. *See id.*

20. *Id.* at 93-94, 162-63 (accounting for the veering of jurisprudence away from congressional intent and proposing a legislative amendment of the disability definition).

21. Concerning the 2006 version of this bill, see Samuel R. Bagenstos's post to Disability Law, http://disabilitylaw.blogspot.com/2006/11/new-congress-and-ada.html (Nov. 13, 2006, 9:29 EST) [hereinafter Bagenstos] (discussing the effect and likelihood of the passage of various provisions of the proposed Act). The 2007 bill is similar in pertinent part to the 2006 version, but the latter used the term "perceived" instead of "regarded as" in the third

to an earlier, more expansive understanding of what Congress intended having a disability—and being regarded as disabled—to mean. Now in congressional committee,[22] the Act would eliminate the "major life activities" requirement and thereby remove an important hurdle for plaintiffs.[23] But "would" and "will" are not the same thing, and though the former may reflect the hopes of the plaintiffs' bar, the latter is a function of another kind of will—the political variety—that many view as currently lacking.[24] If the outlook for rewriting the ADA is gloomy, then the same may be said for much of disability rights advocacy in the near term.

I suggest taking a different kind of step back: rather than throw in the towel on the wording of the disability definition, advocates should reconsider the potential of the statute as written. For the courts have not read the disability definition too closely, but just the opposite: they—and perhaps we all, as lawyers—have not read it closely enough. Were courts to access ordinary intuitions as to what it means to regard someone as having a disability, they would notice that this language can describe categorically distinct types of factual scenarios. That is, the definition is structurally ambiguous in a very precise way.[25] This type of ambiguity is easily spotted and well-theorized in the field of linguistics, where it is termed the de dicto-de re distinction,[26] yet it has gone all but unnoticed in the law.[27] To make matters worse, the ambiguity is

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prong of the disability definition. *Cf.* ADA Restoration Act of 2007, H.R. 3195, 110th Cong. § 4; Americans with Disabilities Act Restoration Act of 2006, H.R. 6258, 109th Cong. § 3.

22. *See* Press Release, Am. Civil Liberties Union, ACLU Joins Civil Rights Organizations for Disability Rights Briefing (Jan. 8, 2008), *available at* http://aclu.org/disability/ada/33539prs20080108.html.

23. Bagenstos, *supra* note 21.

24. *Id.*

25. It is important to distinguish this structural ambiguity from mere vagueness or indeterminacy of meaning in borderline cases. *See, e.g.*, E. ALLEN FARNSWORTH, WILLIAM F. YOUNG & CAROL SANGER, CONTRACTS: CASES AND MATERIALS 572 (6th ed. 2001). The argument presented in this Article is not based on vagueness, i.e., the notion that the regarded-as language is blurry at its conceptual edges and has been read too narrowly at those edges. Rather, my claim concerns the availability of clear alternate readings of that language to the one reading tacitly endorsed by the courts.

26. *See, e.g.*, GENNARO CHIERCHIA & SALLY MCCONNELL-GINET, MEANING AND GRAMMAR: AN INTRODUCTION TO SEMANTICS 243-46 (1990) (explaining de dicto-de re in belief contexts); Thomas McKay & Michael Nelson, *The De Re/De Dicto Distinction*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Dec. 19, 2005), http://plato.stanford.edu/entries/prop-attitude-reports/dere.html (presenting a historical and conceptual account of the de dicto-de re distinction).

27. Only two works in the legal literature, both of them short essays in one symposium volume, take up the de dicto-de re distinction in any detail. Howard Pospesel, *Toward a Legal Deontic Logic*, 73 NOTRE DAME L. REV. 603, 617-21 (1998) (presenting a technical account of "may"

not a simple two-way split. Both "impairment" and "major life activities" are susceptible of three different interpretations, so the full regarded-as prong has no fewer than *nine* distinct literal readings—nine possible ways a plaintiff might count as disabled under this prong. It is striking, then, that the courts to date seem to have missed all but one of those legitimate readings; the other eight are effectively lost.[28]

Eight "lost readings" of the regarded-as prong might sound overwhelming for the reader or for the courts. But the ambiguity in question is actually of a kind that we resolve every day without thinking about it, as some simple sentences discussed in Part II will show. And like anything we handle naturally and unconsciously but would be hard pressed to explain, it is *thinking about it* that poses a challenge in law, where we thus far lack a vocabulary for making structural semantic ambiguity salient. Toward that end, I borrow some terms, methods, and logical notation from basic formal linguistics to make the ambiguity stand out to the reader[29] and to give the reader some handles to hold onto for distinctions of meaning that can be slippery. Importantly, though, this Article is less an attempt to bridge the gulf between law and linguistics than to reconcile everyday speaker competency on the one hand with legal reasoning on the other, in a context where the need for such competency in the courts is a pressing matter of civil rights.

A close, formally rigorous reading of the statute would expose its structural ambiguity and call for grappling with these lost readings. Acknowledging ambiguity would give courts further reason to consult sources outside the words of the regarded-as prong itself—in particular, the statute's legislative history. Tapping this history for the purpose of statutory construction would be a significant triumph for the disability rights movement, perhaps nearly as

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and "must" contexts in law); Robert E. Rodes, Jr., *De Re and De Dicto*, 73 NOTRE DAME L. REV. 627, 627-30 (1998) (listing twelve short legal puzzles, most involving intent issues that can be explained by de dicto-de re analysis). I am aware of no published case that mentions the de dicto-de re distinction by name or by reference to any related account of ambiguity, or that acknowledges ambiguity in a way that clearly maps onto this distinction.

28. For discussion of how the jurisprudence of the regarded-as prong favors a single one of these nine readings, see *infra* Section III.B.

29. If the reader is familiar with the "magic eye" computer-generated images that were popular in the 1980s, where a three-dimensional image at once emerges from apparent visual gibberish, that is the desired effect of making de dicto-de re ambiguity visible: the distinction should pop out for the reader. In less vision-centric terms, one might hear the distinction like a chord, or feel it snap into place like a puzzle piece. By whatever metaphor, the hallmark of apprehending ambiguity is a crisp rather than fuzzy awareness of alternative sentence meanings.

much of a triumph as a legislative overhaul of the statute.[30] That history is where advocates hold all the high cards: Congress placed ample signposts of the broad remedial intent behind the ADA throughout this record. A thorough interpretive process would undoubtedly expand judicial interpretation of the regarded-as prong.

Yet this approach would not extend the ADA unreasonably, as some employers may fear, to make every workplace grievance a potential claim under the regarded-as prong. Of the nine readings I identify, I propose that only four of them comport with legislative intent. The kinds of claims reached by these four readings would in no way stretch the intended application of the ADA. Rather, such claims are emblematic of disability discrimination, yet paradoxically they have been held not to be actionable under the current state of the law.

To be sure, the ADA's definition of disability is far from perfectly tailored to its purposes. Experience in disability rights litigation might suggest that crafting such categories as "major life activity" was a design flaw in the first place. The explanation, of course, is that the ADA's disability definition was never the product of design at all. Rather, it is an artifact of tinkering with the language of predecessor statutes, particularly the Rehabilitation Act of 1973.[31] In this way, the ADA resembles an old Victorian house that has been modified over time to suit modern needs: its layout may be quirky and suboptimal at this point, but what matters is whether it is ultimately functional once we see its potential. Before setting our sights on a politically ambitious remodeling of the ADA, we may first want to expand our sense of its structural capaciousness, reevaluate the narrow paths thus far trodden through it, and find new ways to make it livable. Doing so would require reclaiming the high ground of rigorous interpretation and faithfulness to the text of the statute, territory that has too long been ceded to a jurisprudence of blunting the ADA's impact.[32]

This Article has six parts. Part I lays out the background of the courts' narrow interpretation of the disability definition, its counterintuitive results, and advocates' calls to amend the statute. Part II walks through the ambiguity

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30. Concededly, the ambiguity argument applies only to the regarded-as prong of the disability definition. However, the regarded-as prong can serve as a catch-all for cases in which the plaintiff is deemed not disabled enough to meet the actual-disability definition under 42 U.S.C. § 12102(2)(A) (2000), yet where the facts support a finding that discrimination based on impairment has occurred.

31. Pub. L. No. 93-112, 87 Stat. 355 (1973) (codified as amended at 29 U.S.C. §§ 701-796*l* (2000)). For an indispensable first-hand perspective on the history of the ADA disability definition, see Feldblum, *supra* note 2, at 126-34.

32. For a description of the courts' narrow reading of the ADA and the call for amending the statute, see NAT'L COUNCIL ON DISABILITY, *supra* note 6.

at work in the regarded-as prong, first using simple sentences as conceptual building blocks, and ultimately arriving at a matrix of nine distinct readings of the regarded-as prong. Part III reviews the specific ways the courts have failed to apprehend all but one reading of the ambiguous language and the analytical flaw at the heart of this failure. Part IV discusses which of the nine readings comport with the intent behind the ADA. Part V considers three categories of cases in which admitting certain of the lost readings could cover plaintiffs in a way that comports with antidiscrimination norms. Part VI discusses how this analysis would change the strategy of reforming ADA law, short of legislative amendment, to harmonize ADA litigation with the statute's remedial purpose.

I. THE NARROWED DISABILITY DEFINITION

The importance of the courts' failure to notice ambiguity in the regarded-as prong is an outgrowth of the trend toward a tightened reading of the actual-disability prong of the disability definition. Before turning to this background, an example will illustrate the current gap between ADA goals and ADA interpretation.

A. A Smoking Gun Scenario?

The following is an example of an employment action that the ADA was surely meant to prohibit, but that it arguably does not prohibit under the current state of the law, due to a flawed interpretation of the regarded-as prong.

Employer Sonia is about to call applicant John to offer him a job. First, though, she notices this sentence in a reference letter from John's current employer: *John has outperformed all of his peers, which is especially noteworthy in light of his disability.*

Imagine that Sonia has no further information or belief as to any impairment or limitation that John may have. She e-mails John this message: *John, I recently learned from your current employer that you have a disability. For this reason alone, I have decided not to hire you.*

Now, surely an employer would never send such a smoking gun communication to an applicant in this age of the Americans with Disabilities Act, which protects individuals with disabilities from discrimination in a variety of domains.[33] But is it a smoking gun? As a threshold matter, John must

33. 42 U.S.C. §§ 12101-12213 (2000) (addressing employment, public services, public accommodations, and miscellaneous).

meet the ADA's definition of an "individual with a disability."[34] Imagine further that John does not have an actual disability by the ADA's now-narrow standard. His claim will thus hinge on whether or not he meets the definition of an "individual with a disability" under the regarded-as prong: he must be "regarded as having [a physical or mental impairment that substantially limits one or more of the major life activities of such individual]."[35] Does John meet this definition? Intuitively, there could hardly be a clearer case than John's of being regarded as disabled.

While no court has decided a regarded-as case on such spare and stark facts, by the reasoning of many courts, John's case will fail for lack of proof that Sonia regarded him as having "a[n] ... impairment that substantially limits one or more [of his] major life activities."[36] This is because the courts have required ADA claimants to prove a *particular* impairment they were regarded as having, and a *particular* major life activity that the employer regarded as being limited. John cannot prove either, simply because there is no such particular impairment or major life activity that Sonia had in mind. Thus, although a clearer instance of discrimination based on disability per se would be difficult to imagine, the very fact that the employer's actions are so categorical and sweeping, so nonspecific as to John's condition, and so characteristic of stereotyping is what forecloses an ADA claim. And if the above scenario seems removed from the reality of the workplace, this shows only how much more difficult it would be for a plaintiff to prevail against the savvier employer, whose discriminatory intent may be equally categorical but more veiled. How can this be, for a statute billed as a "comprehensive civil rights measure"?[37]

The explanation for this paradox is the failure of courts to apprehend ambiguity in the regarded-as prong of the ADA. That ambiguity concerns the noun phrases embedded in the regarded-as prong and whether they must refer to particular "impairments" and "major life activities." While these terms have been a part of federal antidiscrimination legislation since the 1970s, the courts' scrutiny of them is a relatively recent phenomenon, which I turn to next.

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34. *Id.* § 12112.

35. *Id.* § 12102(2)(A), (2)(C).

36. *Id.* For the full text of the disability definition, see *infra* text accompanying note 40.

37. NAT'L COUNCIL ON DISABILITY, *supra* note 6, at 3 (quotation marks omitted).

B. Scrutinizing "Impairment" and "Major Life Activities"

While the ADA provides protection from discrimination across many domains, it protects only "a qualified individual with a disability."[38] The general rule is that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual."[39] The definition of "disability" with respect to an individual is: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."[40]

Thus, the plaintiff must establish that she has "an impairment"[41] that substantially limits at least one "major life activit[y]"—or has a record of, or is regarded as having, such an impairment. This three-part definition—known by its separate "actual," "record of," and "regarded as" prongs—was borrowed from the Rehabilitation Act of 1973, which prohibits disability discrimination in federally funded programs.[42] Under the Rehabilitation Act, the question of whether a plaintiff was "really" disabled within the meaning of the statute was rarely the subject of litigation.[43] When the ADA was enacted in 1990 to make disability discrimination actionable in private contexts, however, attention turned to the definition as defendant employers challenged whether an individual plaintiff's condition was sufficiently serious to warrant the ADA's protection.[44]

In 1999, the Supreme Court signaled that the issue of whether an impairment substantially limits a major life activity would be a focus of ADA jurisprudence. In *Sutton v. United Air Lines, Inc.*, the Court held that two airline pilots who were refused jobs due to their poor uncorrected vision did not meet

38. 42 U.S.C. § 12112(a). The ADA differs in this way from Title VII of the Civil Rights Act of 1964 which protects all people from discrimination "because of . . . race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1).

39. 42 U.S.C. § 12112(a).

40. *Id.* § 12102(2)(A)-(2)(C).

41. I use "an impairment" as shorthand for "a physical or mental impairment," where the latter forms of impairment are defined separately for each title in the implementing regulations. *E.g.*, 29 C.F.R. § 1630.2(h) (2007) (providing definitions for title I).

42. 29 U.S.C. § 705(20)(B).

43. Feldblum, *supra* note 2, at 106.

44. *Id.* at 138-39.

the disability definition.[45] They were not actually disabled because they were not substantially limited once mitigating measures (for example, contact lenses) were taken into account.[46] Further, they were not regarded as limited in "the major life activity of working" because United presumably saw them as unfit only for the job they were seeking, and not from "a broad class of jobs."[47] This decision dramatically raised the bar for plaintiffs relying on "working" as a major life activity for the purpose of establishing disability.

As a counterpart to *Sutton*'s pronouncements in the area of "working" as a major life activity, the Supreme Court in 2002 laid out a standard for determining both what constitutes a major life activity apart from working, and a substantial limitation therein. The Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams* held that the major life activity of "performing manual tasks" cannot concern merely on-the-job tasks.[48] Rather, major life activities must be activities of "central importance to most people's daily lives."[49] Here, a plaintiff with job-related carpal tunnel syndrome was found not to be substantially limited in performing manual tasks because she could still manage personal tasks such as brushing her teeth and washing her face.[50] In order to be "substantially limited," the Court held, a plaintiff must show that she is "prevented or restricted" from performing the activity in question.[51]

The *Sutton* and *Toyota* decisions have had three important and related effects. First, they have resulted in waves of cases, often decided on summary judgment, in which impairments that would have been found disabling prior to the narrowing of the definition—such as breast cancer,[52] epilepsy,[53] and

45. 527 U.S. 471 (1999) (scrutinizing the term "substantially limited in a major life activity" in application of disability definition and holding that mitigating measures must be considered in this assessment).

46. *Id.* at 482-83.

47. *Id.* at 491. Two other cases in the "*Sutton* trilogy" came to a similar conclusion. Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999) (holding that monocular vision mitigated by perceptual compensation is not disabling); Murphy v. United Parcel Serv., Inc., 527 U.S. 516 (1999) (holding that medicated high blood pressure is not disabling).

48. 534 U.S. 184, 187 (2002).

49. *Id.*

50. *Id.* at 200, 202.

51. *Id.* at 187.

52. *E.g.*, Treiber v. Lindbergh Sch. Dist., 199 F. Supp. 2d 949, 960-61 (E.D. Mo. 2002) (granting summary judgment for an employer because breast cancer is not disabling without a showing of limitation of a major life activity).

53. *E.g.*, Todd Acad. Corp., 57 F. Supp. 2d 448, 455 (S.D. Tex. 1999) (holding that lifelong epilepsy is not disabling where seizures were weekly and of short duration). The *Todd* court

diabetes[54] – may now not be considered limiting enough to qualify the plaintiff for the ADA's protection.[55] Second, in terms of litigation, the lion's share of litigation energy and expense has been allocated to establishing that the plaintiff meets the disability definition, not to proving that discrimination was "because of" disability. Third, because proving that a plaintiff is disabled in this way has so little to do with the nature of the discriminatory harm that occurred, the jurisprudence of the ADA has taken on an abstruse and "tortuous" quality quite divorced from the harm of disability discrimination and the remedial purposes of the ADA.[56]

Against the tightening of the actual-disability prong, advocates might have expected to find refuge in the definition's regarded-as prong. This provision had been understood by many, including some among its drafters, to be a catch-all category for those who are not limited enough to be actually disabled, but who can show that the employer treated them as though they were so limited.[57] Advocates found support for this view in the Supreme Court's 1987 decision under the Rehabilitation Act, *School Board of Nassau County v. Arline*.[58] The *Arline* Court held that, where an employee with asymptomatic tuberculosis was dismissed for fear of contagion, she was regarded as disabled.[59] Citing congressional intent to take aim at prejudiced attitudes surrounding impairment, the Court reasoned that "society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment."[60] Thus, the *Arline* Court did not base its reasoning on the statutory requirement that the regarder view an impairment

noted that, prior to *Sutton*, epilepsy would result in "nearly automatic ADA protection." *Id.* at 452.

54. *E.g.*, Orr v. Wal-Mart Stores, Inc., 297 F.3d 720, 725 (8th Cir. 2002) (affirming summary judgment for an employer where a diabetic employee presented no evidence of current substantial limitation).

55. *See generally* Anderson, *supra* note 1; Eichhorn, *supra* note 3; Feldblum, *supra* note 2; Friedland, *supra* note 16.

56. Feldblum, *supra* note 2, at 122-26 (chronicling how a Department of Justice memorandum's analysis of asymptomatic HIV as disabling later resurfaced as legal reasoning in Bragdon v. Abbott, 524 U.S. 624 (1998)).

57. Mayerson, *supra* note 1, at 609; *see also* Feldblum, *supra* note 2, at 157 (referring to the regarded-as prong as "the safety valve").

58. 480 U.S. 273 (1987).

59. *Id.* at 289.

60. *Id.* at 284.

as "substantially limiting a major life activity." Rather it held the regarded-as prong to apply where the limitation flowed from the regarding itself.[61]

While the Court in *Sutton* cited *Arline* approvingly,[62] it endorsed a different, slimmer path to protection under the regarded-as prong based more directly on the statutory language. That Court stated two "apparent ways" that one may be regarded as disabled: "(1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities."[63] In other words, under *Sutton*, the employer must apprehend the impairment itself as substantially limiting, as opposed to the *Arline* approach wherein it is the "regard" of the employer and others that creates the limitation.[64] So, where many lower courts prior to *Sutton* had found plaintiffs to be regarded as disabled primarily because an employment action was based on irrational prejudice, courts since *Sutton* have tended to apply the actual-disability prong's stringent inquiry into substantial limitation of a major life activity to claims under the regarded-as prong.[65] This poses for plaintiffs the

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61. The EEOC echoed this view of the regarded-as prong in its regulations defining that provision as reaching one who:

> (1) Has a physical or mental impairment that does not substantially limit major life activities but is treated . . . as constituting such limitation; (2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (3) Has none of the impairments defined [in the actual impairment paragraph] . . . but is treated . . . as having a substantially limiting impairment.

29 C.F.R. § 1630.2(*l*) (2007).

62. Sutton v. United Air Lines, Inc., 527 U.S. 471, 489 (1999).

63. *Id.*

64. Feldblum notes that this turn was foreshadowed by a legal memorandum issued by the Department of Justice, which stated that *Arline* "appears not to accept the distinction between being perceived as having an impairment that itself limits a major life activity (the literal meaning of the statutory language) and having a condition the misperception of which results in limitation of a life activity." Application of Section 504 of the Rehabilitation Act to HIV Infected Individuals, 12 Op. Off. Legal Counsel 209, 218 n.14 (1988), 1988 WL 391017.

65. *See, e.g.*, Robinson v. Lockheed Martin Corp., 212 Fed. App'x 121, 125 (3d Cir. 2007) (upholding a grant of summary judgment for an employer and suggesting that the employer's grant of disability and FMLA leave for a known seizure disorder did not amount to regarding the employee as disabled without evidence of perceived limitation in a major life activity); Kupstas v. City of Greenwood, 398 F.3d 609 (7th Cir. 2005) (affirming summary judgment for an employer where the employee failed to show that the employer perceived a limitation to a major life activity); Lessard v. Osram Sylvania, Inc., 175 F.3d 193 (1st Cir. 1999) (holding that the plaintiff must show that she was regarded as substantially

additional challenge of producing evidence of the employer's state of mind with respect to particular major life activities, and claims under the regarded-as prong tend to fail wherever the actual-disability claim fails as well.[66]

In an important work explaining the narrowing of the disability definition, Chai Feldblum pits the "concededly circular"[67] approach of the *Arline* Court against a "literalist reading"[68] of the statute that emerged in the lower courts and was endorsed by *Sutton*. Of the *Arline* approach she states: "Indeed, the circular approach was the only way to provide coverage for individuals with certain impairments, such as cosmetic disfigurements, who were limited in life activities *solely* because of the responses and attitudes of others to their impairments."[69] Feldblum thus suggests that the definition as written may fail to encompass many of the claims that Congress intended to be covered. She describes judicial attempts to broaden its application as mere Band-Aids on a gaping wound, and she concludes that congressional action is needed, either to clarify the meaning of the existing definition or to remove the requirement of substantial limitation in a major life activity.[70]

But the *Arline* approach is not the only way to provide coverage for the impairments Feldblum speaks of, or for many other conditions held not to constitute actual disability. While amending the definition of disability to rid it of the major-life-activity requirement would bring the statute into greater harmony with congressional intent, a more expedient and feasible solution to much of the ADA's drift lies in revisiting the maligned language of the statute itself. This is because the regarded-as prong, read literally, is ambiguous in a very distinct, structural way. Acknowledging this ambiguity would open the door to using legislative history to ascertain congressional intent, which would

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limited under the regarded-as prong rather than base her claim on myths associated with impairment).

66. For discussion of the relationship between the actual-disability and regarded-as prongs, see, for example, Anderson, *supra* note 1, at 124, which asserts that the regarded-as prong "[b]y its plain language . . . incorporates the flawed idea" from the actual-disability prong that only certain impairments can be disabling; Eichhorn, *supra* note 3, at 1432, which concedes that the regarded-as prong analysis "raises identical problems" to those of the actual-disability prong; Friedland, *supra* note 16, at 180, which discusses the problem of the "major life activities" language from the actual-disability prong as incorporated in the regarded-as prong; and Sharona Hoffman, *Corrective Justice and Title I of the ADA*, 52 AM. U. L. REV. 1213, 1232 (2003), which asserts that the regarded-as prong does not meaningfully broaden ADA coverage beyond the actual-disability prong.

67. Feldblum, *supra* note 2, at 157; *see also id.* at 158 ("This circular, non-literalist reading of the third prong of the definition never caught on in the lower courts . . . .").

68. *Id.* at 141.

69. *Id.* at 157-58.

70. *Id.* at 161.

undoubtedly favor a broadened interpretation. But first we have to see the distinctions of meaning.

II. DE DICTO-DE RE AMBIGUITY IN THE REGARDED-AS PRONG

This Part analyzes the semantic ambiguity operating in the regarded-as prong. The claim that this ambiguity has been present quite literally "to the nines" in the definition of disability without engendering comment until now may naturally meet with skepticism. For this reason I first discuss why lawyers tend to overlook this ambiguity as an initial matter.

A. Ambiguity and Lawyers

The regarded-as prong of the ADA's disability definition manifests a phenomenon that linguists and philosophers have traditionally called the de dicto-de re distinction.[71] Simply put, a sentence is de dicto-de re ambiguous—it has both a de re reading and a de dicto reading—when a term within it can be understood as functioning in either of two ways: (1) as a "referring expression" that points to a particular thing in the world (e.g., a particular impairment), or (2) as a "nonreferring expression" that designates a category but does not point to a particular individual member within that category (e.g., the concept of "an impairment" in general).[72] The regarded-as prong contains two terms that give

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71. *See, e.g.*, CHIERCHIA & MCCONNELL-GINET, *supra* note 26, at 243; L.T.F. GAMUT, LOGIC, LANGUAGE, AND MEANING 46-47 (1991); E-mail from Gillian Ramchand, Professor of Linguistics, Univ. of Tromsø, Nor. to author (July 17, 2007, 09:24 EST). For a discussion of the history of the distinction, see Catarina Dutilh Novaes, *A Medieval Reformulation of the De Dicto/De Re Distinction*, 2003 LOGICA YEARBOOK 111. The modern philosopher most closely associated with theoretical developments concerning the class of phenomena that the distinction captures is W.V.O. Quine, whose thinking on de dicto-de re is summarized in MICHAEL MORRIS, AN INTRODUCTION TO THE PHILOSOPHY OF LANGUAGE 113-33 (2007). Quine's work in turn relates back to a distinction drawn by Gottlob Frege between "reference" and "sense." Gottlob Frege, *Über Sinn und Bedeutung* [*On Sense and Reference*], *in* 100 ZEITSCHRIFT FÜR PHILOSOPHIE UND PHILOSOPHISCHE KRITIK [JOURNAL OF PHILOSOPHY AND PHILOSOPHICAL CRITICISM] 25 (1892), *translated in* TRANSLATIONS FROM THE PHILOSOPHICAL WRITINGS OF GOTTLOB FREGE 56, 56-58 (Peter Geach & Max Black trans., 1970). For an explanation of the de dicto-de re phenomenon in epistemic contexts (e.g., believing, thinking, regarding), see CHIERCHIA & MCCONNELL-GINET, *supra* note 26, at 243-47.

72. I take some liberties here with the terminology, defining de dicto and de re in terms of referring and nonreferring expressions, because I think these are the most descriptive terms to use to keep track of the distinctions. The most accessible discussion of reference I have encountered of this class of ambiguity phenomena is in JAMES R. HURFORD, BRENDAN HEASLEY & MICHAEL B. SMITH, SEMANTICS: A COURSEBOOK 36-45 (2d ed. 2007). That text

rise to a de dicto-de re distinction: "a[n] impairment" and "major life activities."[73] To complicate matters, each of these two sites of ambiguity is independent of the other, and each yields a three-way distinction in meaning. The combined result is that the regarded-as prong is susceptible of nine different readings, each corresponding to a distinct semantic structure.[74] This Article discusses these nine readings in greater depth in Section II.C., but first it explores why this type of ambiguity in the ADA has not yet been recognized.

A nine-way ambiguity—is this not a paradise for lawyers, or at least our equivalent of a crossword aficionado's *New York Times* Sunday Puzzle? Whether arguing for the dual meaning of a term in the Internal Revenue Code or positing an alternate grammatical structure in an insurance contract, spotting ambiguity and making hay with it is considered quintessentially lawyerly. So it may seem hard to believe that, with so many eyes from the bench and the bar trained on federal disability discrimination law, such a rich patchwork of meaning could slip by undetected for over thirty years.[75]

What explains this puzzle is that our knowledge of ambiguity in natural language (i.e., everyday speech) is largely tacit, and it is hard to make tacit knowledge explicit.[76] We may be able to resolve ambiguous sentences with ease when we hear them. But it is not easy to explain how we do this. Nor is it easy

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does not use the de dicto-de re terminology, but it addresses the same class of phenomena under a discussion of ambiguity in "opaque contexts." *Id.* at 38-40. For more on opaque and transparent contexts, see *infra* notes 94-96 and accompanying text. To see why it makes sense to define the de dicto-de re distinction in terms of nonreferring and referring expressions, compare the examples in HURFORD ET AL., *supra*, at 38-41, which are stated in terms of referring expressions, with the examples in CHIERCHIA & MCCONNELL-GINET, *supra* note 26, at 243-47. Both concern the same class of ambiguous sentences. The analysis of this type of ambiguity and related phenomena is contested terrain in linguistics. For a summary of competing accounts, see Barbara Abbott, Specificity and Referentiality 6-7 (Aug. 18, 2003) (unpublished manuscript), http://www.msu.edu/~abbottb/spec&ref.pdf. *See also* IRENE HEIM, THE SEMANTICS OF DEFINITE AND INDEFINITE NOUN PHRASES 4-6, 38-39 (1988) (discussing whether or not indefinite nouns can refer and contrasting accounts of indefinite nouns based on reference, specificity, and quantificational scope).

73. The term "substantially limits" is also likely another site of ambiguity: by whose measure (i.e., in fact or in the view of the regarder) must there be a substantial limitation? This is an important issue, but one outside the scope of this Article.

74. See *infra* Table 1 for a matrix of these nine readings.

75. While the ADA was enacted in 1990, the language of the current definition of disability under it first appeared in the Rehabilitation Act as amended in 1974. *See* Amendments to the Rehabilitation Act of 1973, § 111(a), Pub. L. No. 93-516, 88 Stat. 1617, 1619 (codified as amended at 29 U.S.C. § 705(9) (2000)).

76. *See* LAWRENCE M. SOLAN, THE LANGUAGE OF JUDGES 95 (1993) (noting that linguistic concepts that may seem uncontroversial and simple in practice may be highly complex and difficult to describe).

to do so in the relatively contrived setting of statutory interpretation, especially where the ambiguity is not the usual kind of dual meaning that lawyers are used to confronting. The ADA's ambiguity is not a simple matter of a single term having two meanings (for example, does "term" in the sentence you are now reading mean "word" or "time period"?). To resolve such straightforward "lexical ambiguity"[77] we can look up "term" in a dictionary and *see* two or more distinct entries. Nor is the ADA's ambiguity as easily understood and diagrammable as the case where a sentence has two possible grammatical structures (for example, does "easily" in the present sentence modify "understood and diagrammable" or just "understood"?). As contract law professors know, you can write such a "syntactically ambiguous" sentence on the blackboard, mark it up with brackets to highlight its constituent phrases and with arrows to show various relations among them, and expect the expressions of students to signal, "Aha! I see the distinction now." Seeing is believing; depicting ambiguity on the page or the blackboard makes it real for speakers, including lawyers.[78]

By contrast to lexical and syntactic ambiguities, the de dicto-de re distinction is obscured because it occurs at the level of "compositional semantics."[79] Compositional semantics concerns not the meanings of individual words, but the logic of how words combine to yield complex sentence meaning.[80] These relations are often highly abstract, so the formalism linguists use to show the logical structure of a sentence may end up looking very little like the sentence itself, or even like English for that matter.[81] If this were not daunting enough, there is also not much payoff in practical terms for

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77. *See* HURFORD ET AL., *supra* note 72, at 128 (describing lexical ambiguity).

78. FARNSWORTH ET AL., *supra* note 25, at 574. The casebook gives this example of syntactic ambiguity in a contractual clause: "All domestic water piping and rainwater piping installed above finished ceilings under this specification shall be insulated," which is ambiguous as to whether "installed above" modifies "domestic water piping and rainwater piping," or just "rainwater piping." *Id.*

79. CHIERCHIA & MCCONNELL-GINET, *supra* note 26, at 86-87 (discussing the relationship between reference and compositional semantics in English); Alice ter Meulen, *Linguistics and the Philosophy of Language*, *in* 1 LINGUISTICS: THE CAMBRIDGE SURVEY 430, 441-42 (Frederick J. Newmeyer ed., 1988) (discussing accounts of ambiguity at the level of compositional semantics).

80. Ter Meulen, *supra* note 79, at 441-42.

81. There are actually many different formal notations used to express semantic structure. To convey an impression of the "barriers to entry" for using but one of them, here is how the common formalism known as Montague Grammar depicts the logical structure of the verb phrase, "thinks that a student hates every professor": λx[think'(x, $\hat{}\exists y$[student'(y) $\wedge$ $\forall z$[professor'(z) $\rightarrow$ hate'(y, z)]]]. In fact, this represents the structure of just one of three possible readings of this phrase. CHIERCHIA & MCCONNELL-GINET, *supra* note 26, at 344.

mastering such a formalism. We do not need it to resolve ambiguity in everyday speech. In conversation, we do this more or less "on the fly," by consulting the context in which the ambiguous utterance occurs.[82] And unlike the dictionaries and the representations of grammar that help us detect lexical and syntactic ambiguity, formalisms that depict structural semantic ambiguity are of little use in everyday life. Where we might wish we had them in our lawyering toolbox, though, is when we sense that some interpretative matter has gone awry, perhaps absurdly so, yet we cannot put a finger on exactly what went wrong. This is just what is happening now with judicial interpretation of the regarded-as prong.

In sum, it is a striking oversight of sorts for the legal community to have missed ambiguity in the ADA, but it is also not astonishing given that we lack the tools to make it salient. This Part aims to bring the de dicto-de re distinction into view by offering a Swiss-Army-knife version of a linguist's tools. First, some simple, concrete sentences will serve as conceptual building blocks to construct the ambiguity as it operates in the ADA. I adopt a streamlined formal notation, so that one can see the relevant distinctions clearly before mapping this understanding onto the regarded-as prong. Formal notation aside, the most important equipment to bring along in this undertaking is something the reader already possesses: ordinary intuitions about language and meaning.

B. Nouns as Referring or Nonreferring Expressions

> *A noun is a person, place or thing.*
>
> —*Schoolhouse Rock!*[83]

> *Confusion of meaning with reference has encouraged a tendency to take the notion of meaning for granted.*
>
> —W.V. Quine[84]

The ambiguity at issue in the ADA concerns the nouns "impairment" and "major life activities," and how they behave differently in the regarded-as

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82. For a brief discussion of how context enables us to resolve ambiguity without conscious effort, see *infra* Section II.B.

83. Lynn Ahrens, *A Noun Is a Person, Place, or Thing*, *on* GRAMMAR ROCK (Rhino/Wea 1997) (1973). For lyrics, see Schoolhouse Rock, A Noun Is a Person, Place or Thing (Sept. 1, 2007), http://www.school-house-rock.com/nou.html.

84. WILLARD VAN ORMAN QUINE, FROM A LOGICAL POINT OF VIEW 47 (2d ed., rev. 1980).

prong versus the actual-disability prong.[85] It may seem strange to think of nouns as "behaving" at all, and so I begin by calling attention to a basic split in the types of roles nouns can play. Everyone knows these two roles intuitively if often not explicitly—nouns can either *refer* or not.[86]

We tend to think of nouns as naming things; nouns pick out and point to entities in the world. In linguistics, "reference" is the term for this pointing relationship between words and things. A referring expression (the noun phrase itself) is one that points to a referent (the actual entity in the world).[87] The concept of reference gives us little trouble in analyzing nouns, as we can see by analyzing the phrase "a dog" in this simple sentence:

(1) *John has a dog.*

Here, "a dog" straightforwardly refers to a particular dog, John's dog. In the terms used thus far, "a dog" is a referring expression, with the actual animal as its referent. We can paraphrase the logic of the sentence this way: "There is some thing in the world that is a dog and that John has." Using a simplified notation borrowed from linguistics, we can describe the logical structure of the sentence with this formal expression:

(1a) *There exists some X such that [X is a dog and John has X]*

This notation makes visible something important that this sentence does via reference: it asserts the existence of a particular *thing* in the world, the referent of "a dog." In order for this sentence to be true, there must exist an actual dog in the world (one that meets the criterion of belonging to John). It is crucial to view this assertion of existence as a special function of nouns in certain contexts, rather than to take it for granted that all nouns behave as referring expressions. In fact, the contingency of reference is the fulcrum of ambiguity in the regarded-as prong.

It may seem obvious, and even necessary, that nouns refer to things in the world. Yet in many contexts this is not the case. Compare Sentence (1) above to this equally commonplace one:

(2) *John does not have a dog.*

Here it is easy to see that "a dog" has no referent: there is no dog to which the phrase points. The meaning of this sentence in logical terms is roughly,

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85. My analysis invokes the term "have," although this verb is not present in the actual-disability prong, since "to have a disability" is equivalent to "being a person with a disability." The "have" formulation makes the actual-disability and regarded-as prongs parallel in structure and therefore easier to compare. 42 U.S.C. § 12102(2)(A), (2)(C) (2000).

86. *See, e.g.*, CHIERCHIA & MCCONNELL-GINET, *supra* note 26, at 65; HURFORD ET AL., *supra* note 72, at 29-36.

87. HURFORD ET AL., *supra* note 72, at 37.

"There is no thing in the world that is a dog and that John has."[88] More formally:

(2a) *There does not exist an X such that [X is a dog and John has X]*

In this context, then, "a dog" is a nonreferring expression. Saying that "a dog" in this context is a "nonreferring expression" is not to say it has no meaning, of course. But instead of deriving its meaning by pointing to something in the world, a nonreferring noun is a description of a set of properties (for example, for "a dog," those properties that all dogs have in common), corresponding to what we would say the word "dog" means in general. In linguistic terms, this notion of meaning—what we would find if we looked up "a dog" in the dictionary—is called the "sense" of the word, as distinct from reference.[89] Unlike Sentence (1), Sentence (2) does not assert the existence of any *thing*. Indeed, it may be true even if no dogs exist in the world at all.

The fact that referring expressions assert the existence of things—and nonreferring expressions do not—has important implications for determining whether sentences that contain such expressions are true or false. To ascertain the truth or falsity of "John has a dog" (a referential context), we would naturally ask about the referent itself, the supposed dog: "What is the dog's name? How old is the dog? Show us a photo of the dog." But this strategy is useless, even absurd, where "a dog" is a nonreferring expression. To see why, imagine testing the truth of the sentence, "John does not have a dog," by asking John, "What is the name of the dog [you do not have]? How old is the dog [you do not have]? Show us a photo of the dog [you do not have]." More generally, *any* question about "*the X*" makes no sense in a context where there is no referent of "an *X*" to begin with, because this amounts to asking about something that is not asserted to exist. Where there is no dog in the world to refer to, we cannot reasonably speak of "the dog." Or, if Gertrude Stein were making this point, she would need only to drop two letters from her famed quip and put it this way: there's no *the* there.

The next step is to consider contexts that are ambiguous as to whether they contain a referring expression. The ADA's regarded-as prong is just such a

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88. This is equivalent to, "There is nothing that John has that matches the description of 'a dog.'" The reader may be tempted to claim that the semantic distinction between Sentence (1) and Sentence (2) lies in the lexicon—namely, that the article "a" is ambiguous, meaning "one dog" in the affirmative context and "any dog" in the negation context. A problem with this account is that it introduces a layer of complexity that is not needed on an account where negation operates globally and regularly on the entire predicate. The reader inclined in this direction, however, is very much in step with the linguistically reductive tendencies of legal reasoning in general.

89. HURFORD ET AL., *supra* note 72, at 31.

context. Owing to the courts' failure to grasp the ambiguity, the jurisprudence concerning the regarded-as prong has been nearly as absurd as asking John the name of the dog he does not have. But before considering the complex statutory language itself, it is helpful to make the de dicto-de re phenomenon visible in simpler, concrete contexts.

C. *Referentially Ambiguous Contexts and the De Dicto-De Re Distinction*

Sentences that are ambiguous as to whether nouns within them refer are said in linguistics to manifest the de dicto-de re distinction.[90] The following sentence may seem straightforward, but in fact it is ambiguous with respect to whether "a dog" is a referring expression.

(3) *John is looking for a dog.*

This sentence admits of two distinct readings, corresponding to two different types of factual situations. On one reading, "a dog" is a referring expression: there is a particular dog that John is seeking, perhaps his own dog. We can paraphrase this reading this way: "There is some individual thing in the world that is a dog, and John is looking for that particular thing." More formally:

(3a) *There exists some X such that [X is a dog, and John is looking for X]*

This is known as the de re reading of Sentence (3). The Latin term de re translates as "about the thing,"[91] meaning that "a dog" gets its referential meaning by virtue of its relationship to some particular thing (in Latin, the legally familiar res) in the world. On a de re reading, then, "a dog" behaves similarly to the way it behaves in the context of "have" when used affirmatively as in Sentence (1)—it points to a referent. But this is not the only way to read the sentence, as an alternate context shows.

A second reading of Sentence (3) is one in which "a dog" is a nonreferring expression. This reading could describe a very different scenario, perhaps one in which John is whiling away countless hours on Petfinder.com, an Internet database of domestic animals available for adoption, looking for a new family pet. Here, John has no particular dog—no res—in mind at all; rather, he is seeking something more generally matching the *description* of "a dog." The corresponding formalism would be this:

(3b) *John is looking for some X such that [X is a dog]*

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90. *See supra* note 72 and accompanying text.

91. Collins English Dictionary 426 (3d ed. 1994), *available at* http://dictionary.reverso.net/english-definitions/de%20re; *see also* Post of Mark Liberman to Language Log, http://itre.cis.upenn.edu/~myl/languagelog/archives/002573.html (Oct. 23, 2005, 7:44 EST).

This is the de dicto reading of Sentence (3). De dicto translates from Latin as "about the saying" (the legally familiar dictum).[92] On this reading, "a dog" gets its meaning not by pointing to a thing, but through the category "dog" and its relation to other categories, namely, the set of properties that we understand as essential to the meaning of that word. To further illustrate the contrast, on the de re reading, there must necessarily be some actual dog in the world—a res—that John is seeking; not so for the de dicto reading, where no dog need exist at all for the sentence to be true.[93] We can see this difference in the logical structures of the two readings given in Sentences (3a) and (3b) above: the de re formulation asserts the existence of some *X*; the de dicto reading does not.

To head off potential misunderstanding, it is important not to confuse a high degree of detail in de dicto description on the one hand with reference on the other. On the de re reading corresponding to the lost dog scenario, there is necessarily one and only one dog that exists as a referent of "a dog." By contrast, on the de dicto (Petfinder.com) reading, even with a very detailed description, there may be many dogs meeting that description, or there may be none. No matter how many criteria our "petfinder John" may have for the type of dog he is seeking (a Dalmatian, housebroken, etc.), there will still be no referent; he has only the dictum, not a res, in mind.

Common sense tells us that we resolve de dicto-de re ambiguity in natural language without thinking consciously about it. The sentences above may be ambiguous, but they are not confusing when they occur in everyday speech. What enables us to resolve the ambiguity is, crucially, *context*. If John knocks on your door saying he is looking for a dog (de re), you are unlikely to reply, "I know of a good dog you might like." Conversely, if the utterance arises where you know that John is in the market for a canine companion (i.e., a dog de dicto), it would be peculiar to ask, "If I approach the dog you are looking for, will it bite me?" Context is so helpful—in fact, essential—in resolving ambiguity, that we are unlikely even to notice that the utterance is ambiguous in the first place.

If we intuitively choose between de dicto and de re readings based on context, it should be equally clear that the two readings may split as to their truth or falsity, depending on the facts. Working still with the looking-for-a-

92. Collins English Dictionary, *supra* note 91, at 413; *see also* Liberman, *supra* note 91.

93. This difference is clearer if one substitutes "dog that can speak English" for "dog": the de re reading (in which John is looking for a particular English-speaking dog) can be true only in a context of fantasy, whereas on the de dicto reading, John could certainly be looking for such a dog in the actual world (for example, if John were delusional, or six years old) without any such animal actually existing.

dog sentence, the de dicto reading will be true where John is looking for a new family pet; the de re reading will be false.

A corollary of this point is that the method of proving that an ambiguous sentence is true differs according to which reading or readings we believe the speaker intends. If a de re interpretation alone is intended, the inquiry is straightforward: we ask about the supposed referent that John is looking for—what color is the dog, and so forth. Under the de dicto formulation, however, there is no referent to ask about. Instead, we would ask about John's more abstract relationship to "a dog" as a category: is he looking for something matching that general description? Unless we have consulted contextual clues to figure out which reading is intended, we cannot know which of these two paths of inquiry is appropriate. We cannot say, for example, that the ambiguous sentence "John is looking for a dog" is false in the Petfinder.com (de dicto) scenario just because John cannot identify a particular dog he is seeking. Yet this is exactly the mistake courts make—demanding proof of reference where none is required by the statute—in interpreting the ADA. As Part III shows, asking claimants "what is *the* impairment" and "what is *the* major life activity" may yield the right results under a de re reading of the regarded-as prong. But on a de dicto reading, these questions are unanswerable and inapposite. What remains is to show that the regarded-as prong creates this kind of ambiguity with respect to both "impairment" and "major life activities."

1. *Ambiguity in the Regarded-As Prong*

In linguistics, verbs that give rise to a de dicto-de re distinction are known as "opaque" verbs, where the opacity describes the fact that we cannot see through the verbal context to know whether a noun within it is a referring expression or not.[94] As shown above, "look for" is an opaque verb; by contrast, "have" is "transparent" to reference, as seen in Sentence (1).[95] Verbs pertaining to lack or desire (of which "look for" is one) and thought or attitude (such as

94. CHIERCHIA & MCCONNELL-GINET, *supra* note 26, at 59, 242; *see also* John A. Barnden & Donald M. Peterson, *Artificial Intelligence, Mindreading, and Reasoning in Law*, 22 CARDOZO L. REV. 1381, 1395-96 (2001). Under an alternative nomenclature, these verbs are termed "intensional" verbs as opposed to "extensional" ones. CHIERCHIA & MCCONNELL-GINET, *supra* note 26, at 59, 241-47.

95. BARBARA H. PARTEE, ALICE TER MEULEN & ROBERT E. WALL, MATHEMATICAL METHODS IN LINGUISTICS 409-10 (1990) (discussing major classes of opacity).

"believe" and "regard") are major classes of opaque verbs.[96] To see how the ambiguity arises in a "regard" context, consider this sentence:

(4) *Sonia regards John as having a job.*

On the de re reading, Sonia regards John as having some particular job, a res, perhaps because she has seen John at work. In formal terms:

(4a) *There exists some X such that [X is a job and Sonia regards [John as having X]]*

On the de dicto reading, by contrast, "a job" does not refer to any particular job at all. Sonia simply regards John as being *employed*, perhaps because she has heard John complain about his taxes every April. More formally:

(4b) *Sonia regards [there exists some X such that [X is a job and John has X]*[97]

The formal structures of the two readings draw attention to a difference concerning the asserted existence of *X*. Because the de re reading in Sentence (4a) asserts the existence of a particular *X*, which is a particular job, the proof inquiry may reasonably begin, "So, tell us about the job Sonia regards John as having." The de dicto reading is quite different with respect to the existence of "a job." On this reading, no particular job is asserted to exist. Rather, Sonia thinks there exists *some job or other* that John has. This may be the more natural, common sense reading of the sentence. If we were to ask Sonia about "the job" she regards John as having, she might legitimately respond, "I can't answer that. I just think he's employed." Certainly, her inability to answer questions concerning "the job" does not make the sentence any less true.

If one accepts that the regard-context gives rise to de dicto-de re ambiguity in the above example, one need do little more than plug in the more contestable terms "impairment" and "major life activities" to see the ADA's ambiguity. The sentence at issue here is this one:

(5) *Sonia regards John as having an impairment that substantially limits one or more of John's major life activities.*[98]

This sentence is de dicto-de re ambiguous with respect to both "an impairment" and "major life activities." For impairment, the de re reading

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96. *Id.* Sentences that contain verbs relating mental states (e.g., believing) to propositions (e.g., "John has an impairment") are called propositional attitude reports. *See* Thomas McKay & Michael Nelson, *Propositional Attitude Reports*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Dec. 19, 2005), http://plato.stanford.edu/entries/prop-attitude-reports. These sentences give rise to de dicto-de re ambiguity. *See* McKay & Nelson, *supra* note 26.

97. This is an awkward formulation owing to the unusual syntax of the verb "regard" as taking a nominal object (here, John) and a gerund as its complements, and to my efforts to make the semantic formalism correspond as closely as possible to the syntactic structure.

98. This sentence assumes "physical or mental" within the definition of "impairment." 42 U.S.C. § 12102(2) (2000).

requires that Sonia have a particular condition in mind, for example, heart disease, diabetes, or depression. The de dicto reading could correspond to a scenario in which Sonia regards John as impaired because his doctor says he cannot lift more than twenty pounds (which could be due to any number of impairments), or where Sonia regards John as either being depressed or bipolar but does not know which, or simply where she has heard that he is "disabled." Concerning "major life activities," a de re reading would correspond to facts where Sonia has a particular activity in mind, such as walking, seeing, or breathing.[99] A de dicto reading would describe a scenario in which Sonia regards John as limited in some important activity or other, but not in any particular one.

The ambiguity concerning "major life activities" is independent of the ambiguity concerning "impairment."[100] Sonia may have a referent in mind for both (for example, she regards John's ability to walk as being limited by his back injury). Or she may have a referent in mind for "an impairment" but not for "major life activities" (for example, she regards John's thyroid cancer as a severe condition but has no thought as to what particular activities it may limit). Conversely, she may regard some particular activity (i.e., a referent) as being limited by some impairment in a general sense, without a view as to any particular impairment (for example, she observes John's inability to walk more than twenty feet without resting and assumes this is an ongoing physical problem, but she has no view as to the type of impairment that might be causing it—it might be heart disease or it might be emphysema). Finally, Sonia may lack a referent for either term, simply viewing John as mentally or physically limited in some major way.

In sum, the pair of two-way ambiguous terms combine to yield four possible readings of the regarded-as prong so far. Indeed, while four readings may be an arresting conclusion where the courts have not acknowledged ambiguity at all, in fact the regarded-as prong is still more semantically complex, as the next Subsection shows.

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99. All three of these activities are listed as impairments in the ADA's implementing regulations promulgated by the EEOC. 29 C.F.R. § 1630.2(i) (2000).

100. This is not an uncontroversial claim. If the ambiguity is understood as deriving from or constrained by syntactic structure, then the fact that "major life activities" is syntactically embedded within the phrase headed by "an impairment" may restrict the available readings of "major life activities." If the ambiguity is purely semantic and independent of the syntax, then all combinatorially possible readings should be available. This is an open question as a theoretical matter. *See* CHIERCHIA & MCCONNELL-GINET, *supra* note 26, at 33 (discussing the relationship between syntactic structure and nonlexical ambiguities).

2. Wide-Scope and Narrow-Scope De Re Readings

The regarded-as context introduces another split in meaning: it presents two further possibilities for the ordering of "impairment" and "major life activities" with respect to "regard." This results in two distinct de re readings, which some linguists have termed "wide-scope de re" and "narrow-scope de re."[101] The distinction is fairly technical at the level of logical structure, but it helps us answer an intuitive question: what if the condition Sonia regards John as having is "an impairment" in Sonia's view only and not within the meaning of the ADA? Though such a condition – for example, being left-handed[102] – would not meet the test of "impairment" under the actual-disability prong, it is nevertheless a legitimate reading of the statute that Sonia does, on these facts, "regard John as having an impairment." Part IV takes up whether Congress intended this reading.

To see how this distinction works, consider a simplified version of Sentence (5), ignoring "major life activities" for now and focusing on "impairment":

(6) *Sonia regards John as having an impairment.*

This can correspond to two de re interpretations and sets of facts. Under one scenario, Sonia regards John as having a particular condition (for example, heart disease), and that condition is an impairment within the meaning of the ADA. Under another, Sonia likewise regards John as having a particular condition (for example, left-handedness), and she regards that condition as an impairment, but it is not an impairment within the meaning of the statute. Two distinct logical structures capture these de re readings:

Wide-scope de re:

(6a) *There exists some X such that [X is an impairment and Sonia regards [John as having X]]*

Narrow-scope de re:

(6b) *There exists some X such that [Sonia regards [John as having X and X is an impairment]]*

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101. Ramchand, *supra* note 71. Some linguists term language like the statutory language in question an intermediate scope construction, because the existence of *X* as an impairment falls in between the de dicto and wide-scope de re formulations. Richard Holton, *Attitude Ascriptions and Intermediate Scope*, 103 MIND 123, 123-26 (1994).

102. U.S. Equal Employment Opportunity Comm'n, Section 902 Definition of the Term Disability: Addendum, § 902.2(c)(2) (Feb. 1, 2000) [hereinafter EEOC Addendum], http://www.eeoc.gov/policy/docs/902cm.html (stating that "simple physical characteristics" such as left-handedness are not impairments).

Where these structures differ is on the question of whether the "impairment-ness" of the res falls outside (for wide-scope) or within (for narrow-scope) the scope of "regards." The bracketing illustrates this distinction. For the wide-scope reading in Sentence (6a), the phrase "*X* is an impairment" lies outside Sonia's regard; for the narrow-scope reading in Sentence (6b), it lies within her regard. It may be helpful to think of wide-scope de re as being equivalent to "there being a thing (a res) here, and it really is an impairment (because the law says it is), regardless of whether Sonia thinks it is." By contrast, a narrow-scope de re reading asserts, "there is a thing (a res) here, and it is an impairment according to Sonia, regardless of whether it really is an impairment according to the law." Thus, wide- and narrow-scope speak to the logical relations within the sentence, not to whether the meaning of "impairment" is interpreted broadly or narrowly.

We differentiate the two constructions by determining whether the res is an impairment in fact[103] or only in the regarder's view. The narrow-scope de re reading will be satisfied where, for example, Sonia regards John as having turquoise eyes, and she views this condition as an impairment. These facts will not satisfy the conditions of the wide-scope de re reading, because having turquoise eyes is not a legal impairment.[104] Conversely, where Sonia regards John as having epilepsy (held to be an impairment within the meaning of the ADA[105]), but she views epilepsy as a spiritual condition rather than a mental or physical condition,[106] the wide-scope de re reading will be true and the narrow-scope reading false. Where the res is an impairment in the view of both the law and Sonia, both de re readings will be true.

The wide- versus narrow-scope de re distinction occurs also with respect to "major life activities." For example, Sonia may regard John as being substantially limited in swimming, and she may regard swimming as a major life activity. This would satisfy the narrow-scope de re reading. But because

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103. Notwithstanding the traditional "in fact" versus "at law" distinction, here "in fact" can only mean "within the meaning of the ADA," because this is the relevant standard that determines whether something is "really" an impairment, as opposed to whether it is an impairment in the view of an individual.

104. EEOC Addendum, *supra* note 102, § 902.2.

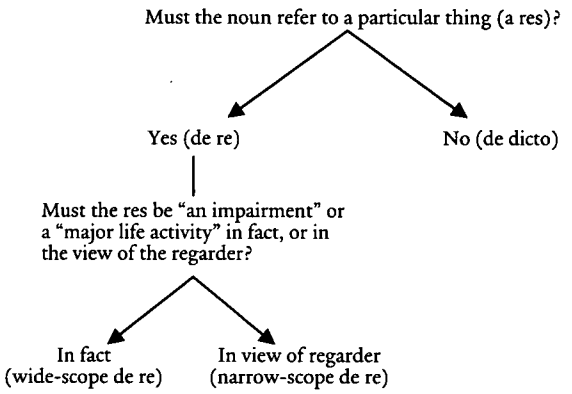
105. *E.g.*, Todd v. Acad. Corp., 57 F. Supp. 2d 448, 452 (S.D. Tex. 1999) (recognizing epilepsy as an impairment, if not a disabling one).

106. *See, e.g.*, ANNE FADIMAN, THE SPIRIT CATCHES YOU AND YOU FALL DOWN 20-31 (1997) (recounting the story of a Hmong family who culturally regarded epilepsy as a spiritual condition).

swimming is unlikely to be considered a major life activity,[107] these facts would not satisfy a wide-scope de re reading.

In sum, the regarded-as prong contains two terms, "an impairment" and "major life activities," that are ambiguous as to whether they refer at all (de re versus de dicto). Where they do refer, the statute is ambiguous as to whether its terms must reflect the state of the law or the state of the regarder's mind (wide- versus narrow-scope de re). The following diagram depicts the relationships among these three readings:

Figure 1.
THE FAMILY OF READINGS



Two independent terms showing a three-way ambiguity yield, in combination, nine possible readings of the regarded-as prong. It is essential to see that none of these readings is any more literal than any other: each is derived from the words of the statute and the logical ways they may combine. The Readings Matrix below organizes these readings into nine categories. It also gives a factual example for each reading, based on the "reference letter" scenario discussed in Part I. For each box in the Matrix, employer Sonia has received a letter from applicant John's current employer, mentioning some condition of John's and some limitation in activity. Each such example uses a different combination of language supporting a de dicto, wide-scope de re, or narrow-scope de re reading of "an impairment" and "major life activities," assuming that Sonia's view of John's condition is based on the information in the letter alone. Thus, the Matrix shows how the sentence, "Sonia regards John

107. Martinez v. City of Roy, No. 97-4095, 1998 U.S. App. LEXIS 5906, at *7 (10th Cir. Mar. 26, 1998) ("[c]oncluding, as we must, that recreational swimming is not a major life activity").

as having an impairment that substantially limits one or more of John's major life activities," may be true on nine different classes of facts.

Table 1.
READINGS MATRIX

Sonia regards John as having an impairment that substantially limits one or more of his major life activities.

READINGS OF "MAJOR LIFE ACTIVITIES"	READINGS OF "AN IMPAIRMENT"		
	WIDE-SCOPE DE RE	NARROW-SCOPE DE RE	DE DICTO
WIDE-SCOPE	**Box I** John has *epilepsy*, which substantially limits his ability *to work in a broad class of jobs.*	**Box II** John is *left-handed*, which substantially limits his ability *to work in a broad class of jobs.*	**Box III** John has *an impairment* that substantially limits his ability *to work in a broad class of jobs.*
NARROW-SCOPE	**Box IV** John has *epilepsy*, which substantially limits his ability *to drive to work.*	**Box V** John is *left-handed*, which substantially limits his ability *to drive to work.*	**Box VI** John has *an impairment* that substantially limits his ability *to drive to work.*
DE DICTO	**Box VII** John has *epilepsy*, which substantially limits some of his *major life activities.*	**Box VII** John is *left-handed*, which substantially limits some of his *major life activities.*	**Box IX** John has *an impairment* that substantially limits some of his *major life activities.*

Part III addresses which of the nine readings courts have tacitly validated; Part IV addresses which ones comport with congressional intent behind the ADA.

Finally, the significance of ambiguity is open to debate, both descriptively and normatively. Ambiguity is not necessarily a prerequisite for looking outside the text for evidence of intended meaning. Courts vary in the degree to which they require ambiguity as an initial matter, and there may even be a general trend away from the plain meaning rule.[108] An intensive focus on

108. NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION 257 (2007) ("[C]ourts are increasingly willing to consider other indicia of intent and meaning from the start rather than beginning their inquiry by considering only the language of the act.").

ambiguity might be criticized as advancing a textualist agenda over more context-sensitive interpretation. The focus here on ambiguity, however, is set against the backdrop of recent developments in ADA law. Two features dominate that scene: (1) an increased focus on parsing the definition of disability, and (2) a critique of this interpretive trend and of the statutory language itself. Against this background, it makes sense to consider textual arguments to demonstrate that the statute's wording does not ineluctably lead to the single interpretation embraced by the courts. My intention is not to endorse the plain meaning rule, but to point out that even the most literalist interpretive regime cannot escape the fact that the regarded-as prong is brimming with ambiguity overlooked until now.

III. HOW THE COURTS MISS AMBIGUITY

This Part shows that the courts tend to miss all but one of the nine readings of the regarded-as prong. The single reading that has been given effect is represented in Box I, in which both "impairment" and "major life activities" are read as wide-scope de re. That is, courts have assumed both terms to be referring expressions that denote particular (de re) impairments and major life activities that would meet the legal definitions of those terms (i.e., wide-scope).[109] In a measure, then, the courts are neglecting nearly ninety percent of what the statute can be read to capture.[110] This inattention to a range of meanings is troubling when interpreting a statute intended to have broad remedial effect. Just as important is the fact that courts do not acknowledge textual ambiguity. Rather, they appear to take the reading in Box I for granted as the statute's literal meaning. The result is that courts ask the wrong questions for claims brought under the regarded-as prong. This Part walks through this interpretive lapse and its consequences, and later Parts turn to discerning the proper readings of the regarded-as prong.

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109. In fact, it is very likely that possible formal readings of the statute number far more than nine. *See supra* note 73.

110. This is not to say that facts on which each of the nine readings would be true are equally common, much less to suggest that courts misconstrue the regarded-as prong ninety percent of the time. Nevertheless, these readings are not just formal possibilities, such that we could reject them as obviously implausible. Rather, whether they should be recognized as intended readings of the disability definition demands some deliberation about Congress's intent in enacting the ADA. Part IV takes up this discussion in detail.

A. The Supreme Court Is Silent on Ambiguity in the Regarded-As Prong

The Supreme Court has not engaged the question of ambiguity in the regarded-as prong. The *Sutton* decision, however, did speak to the criteria for being regarded as disabled.[111] There the Court held that two pilots who were refused jobs due to their poor uncorrected vision were not regarded as substantially limited in the major life activity of working because the employer did not regard them as unable to perform a broad class of jobs.[112] The Court stated:

> There are two apparent ways in which individuals may fall within [the regarded-as prong of the] statutory definition: (1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities. In both cases, it is necessary that a covered entity entertain misperceptions about the individual—it must believe either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting.[113]

The "two ways" thus appear to differentiate claims where the "mistake"[114] goes to the presence or absence of impairment, as opposed to the degree of limitation of a correctly apprehended, actual impairment.[115] This formulation does little to resolve de dicto-de re ambiguity. The first "way" does not clarify whether there must be a particular (de re) impairment or major life activity. Nor does it state whether any such particular res must be an impairment or a major life activity by the legal standard, as opposed to in the mind of the regarder. Rather, it simply restates the ambiguous statutory language. Thus, the first "way" alone may correspond to any of the nine readings. Even if it

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111. Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999).

112. *Id.* at 491-93.

113. *Id.* at 489.

114. The *Sutton* Court equates "regarding" with "believing." I argue elsewhere that these terms are not interchangeable: one can regard another as limited without believing that person is limited, particularly where that regard is animus-driven. Jill C. Anderson, Regarding Is Seeing, and Seeing Is Not Believing (Mar. 30, 2008) (unpublished manuscript, on file with the Yale Law Journal).

115. *See, e.g.*, Eshelman v. Agere Sys., Inc., 397 F. Supp. 2d 557, 562-63 (E.D. Pa. 2005); Ross v. Kraft Foods N. Am., Inc., 347 F. Supp. 2d 200, 204-05 (E.D. Pa. 2004).

were argued that *Sutton* suggests a de re reading of impairment,[116] lack of discussion of ambiguity would weaken that argument. After *Sutton*, all nine literal readings are in play.

It bears noting, though, that *Sutton* does appear to answer a question related to the de dicto-de re distinction. By stating that one can be regarded as disabled where an employer mistakenly believes the individual's impairment is more limiting than it is, the Court implied that the regarded-as prong does not require proof that the perceived impairment be *actually* substantially limiting.[117] This arguably revised the law in a number of jurisdictions where courts had held that, in order to prove that the plaintiff had a disability under the regarded-as prong, she must show that she was actually substantially limited by the perceived impairment.[118] At first glance, such a requirement may seem at odds with the plain language of the regarded-as prong, and the *Sutton* correction may seem obvious. Certainly, the sentence, "Sonia regards John as having an impairment" may be true even if "John has an impairment" is false.[119] Why then should John have to prove that he actually has a substantially limiting impairment in order to prove that Sonia so regards him?

The answer is that the lower courts were tacitly adopting one logically possible reading of the statute—the wide-scope de re reading of *the entire noun phrase*: "[an] impairment that substantially limits one or more of [John's] major life activities."[120] To paraphrase this reading: there exists something that is in fact "an impairment that substantially limits ... John's major life activities," and Sonia regards John as having *that thing*.[121] Though it may be

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116. This argument is that reference to "an impairment ... *that* one does not have" should be read de re because a de dicto reading would require the regarder to have an internally contradictory belief, namely, "I think John has an impairment that he does not have."

117. 527 U.S. at 489.

118. *See, e.g.*, Welsh v. City of Tulsa, 977 F.2d 1415, 1417-19 (1992) (affirming summary judgment for an employer on a regarded-as claim under the Rehabilitation Act, where the plaintiff failed to meet the burden of proving a substantial limitation of a major life activity); *see also* Mayerson, *supra* note 1, at 590-98 & nn.16-44 (discussing some courts' effective nullification of the regarded-as prong and collecting cases).

119. CHIERCHIA & MCCONNELL-GINET, *supra* note 26, at 205.

120. This reading does not appear in the Readings Matrix, which considers the two noun phrases independently. *See supra* Table 1.

121. Interestingly, this is exactly the argument made by the defendant's counsel in oral argument before the Supreme Court in *Bragdon v. Abbott*, 524 U.S. 624 (1998). From the transcript:

> QUESTION: Well, the act seems to go further, and say if someone is regarded as having the impairment it's covered.
>
> MR. McCARTHY: I think that the language of the act says, if someone is regarded as having such impairment, and when they say such impairment they're referring

counterintuitive, reading the regarded-as prong to require an actual, substantially limiting impairment is a logical possibility. To be sure, the fact that some reading is logically possible does not make it a valid or reasonable reading in context, and commentators have more than adequately marshaled reasons that this interpretation is inconsistent with congressional intent.[122]

So it seems some lower courts were adopting the most extreme wide-scope de re reading of the disability definition before the *Sutton* correction. A more rigorous interpretation of the regarded-as prong would have acknowledged the ambiguity of the language in question and looked to its context—including legislative history—to resolve it.[123] Instead, the *Sutton* Court, in merely implying that the regarded-as prong does not require that the claimant have an actual substantial limitation, simply reincorporated the definition's ambiguities. Had the Supreme Court grappled with the fact that it was dealing with an ambiguous text that did not lend itself to "two apparent ways" to meet its requirements, it might have shed more light on how the statute's multi-way ambiguity ought to be resolved. Absent this, the lower courts, while constrained from adopting the most severe and unnatural reading of the statute, have remained free to (1) recognize only a wide-scope de re reading of "impairment" and "major life activities," and (2) take that reading for granted without acknowledging ambiguity.

B. Lower Courts Miss All Readings Other Than Wide-Scope De Re

In applying the impairment-and-major-life-activities-centered approach to the regarded-as prong, the lower courts have in effect reduced the available readings from the Readings Matrix to the one given in Box I, reading both "an impairment" and "major life activities" as referring expressions. This Section shows in sequence how the courts have overlooked the de dicto reading of

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> to an impairment that substantially limits a major life activity, so the regarded as only comes into play if you have an impairment that substantially limits a major life activity.
>
> Transcript of Oral Argument at 3-4, *Bragdon*, 524 U.S. 624 (No. 97-156), 1998 WL 141165, at *5.

122. Reasons to rule out this reading include (1) that it would render the regarded-as prong superfluous to and more difficult to satisfy than the actual-disability prong, (2) that it is unreasonable to require that a "perceived" impairment be "actually" limiting, and (3) that the statute's implementing regulations and legislative history contemplate the regarded-as prong to cover cases where the plaintiff has no impairment. *See, e.g.*, Anderson, *supra* note 1, at 123-24; Feldblum, *supra* note 2, at 91-102; Mayerson, *supra* note 1, at 611-12.

123. *See* Robinson v. Shell Oil Co., 519 U.S. 337, 345-46 (1997) (explaining that when statutory text is ambiguous, the Court should then look to "context" to aid in interpretation).

"impairment" (thereby excluding Boxes III, VI, and IX), the de dicto readings of "major life activities" (Boxes VII, VI, and IX), and all narrow-scope de re readings (Boxes II, IV, V, VI, and VII), leaving only the wide-scope de re reading for both terms.

1. *Courts Overlook the De Dicto Reading of "Impairment"*

A telltale sign that a court has neglected a de dicto reading in favor of a de re reading of "impairment" is an implicit demand that the claimant answer questions about *the* impairment, including "what is the impairment you were regarded as having?" On a de dicto reading, where no such impairment need exist, such questions are misplaced. A claimant who is regarded as impaired on a de dicto reading alone will not be able to answer them or will have to concoct implausible answers. This plaintiff's claim will therefore fail, as will any others corresponding to Boxes III, VII, and IX in the Readings Matrix, although the plaintiff in each instance may in fact be regarded as having "an impairment."

At least one court has held that articulating a specific impairment is a pleading requirement for an ADA claim.[124] Several courts have held as a matter of law that it is fatal to a claim, including one brought under the regarded-as prong, if the claimant does not identify a particular impairment at issue.[125] Others hold that such identification is necessary for the plaintiff to meet her burden at trial.[126] Some courts state this explicitly, as in *Poindexter v. Atchison, Topeka & Santa Fe Railway Co.*[127] That decision reversed a jury verdict for the plaintiff on the grounds that the jury had not been instructed as to specific

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124. Lee v. Se. Pa. Transp. Auth., 418 F. Supp. 2d 675, 678-79 (E.D. Pa. 2005) (holding that articulating a specific impairment is among the "minimal allegations" necessary to support an ADA claim).

125. *See, e.g.*, Liljedahl v. Ryder Student Transp. Servs., 341 F.3d 836, 841-42 (8th Cir. 2003) (holding on a state law claim under the ADA standard that a plaintiff must allege a specific impairment and that plaintiff's employer must know of this impairment); Sealey v. Tropicana Perfume Shoppes, Inc., No. 2005-193, 2006 U.S. Dist. LEXIS 83820, at *12-13 (D. Virgin Is. Nov. 14, 2006) (holding that an employer was entitled to judgment as a matter of law where the plaintiff did not state the name or nature of his impairment); Hughes v. Madison Local Sch. Dist., No. 1:05 CV 1403, 2006 U.S. Dist. LEXIS 28922, at *13-14 (N.D. Ohio May 11, 2006) (repeatedly citing plaintiff's failure to identify a specific impairment in granting summary judgment to an employer).

126. *E.g.*, Bolton v. Sprint/United Mgmt. Co., No. 05-2361, 2006 U.S. Dist. LEXIS 6955, at *6-7 (D. Kan. Feb. 23, 2006) (holding that a plaintiff need not identify a specific impairment or major life activity at the pleading stage, but may do so at trial).

127. 168 F.3d 1228, 1232 (10th Cir. 1999).

impairments and major life activities it could consider.[128] The *Poindexter* court explained, "A plaintiff has the option of clarifying his or her position at the pleading stage or waiting until trial to prove with particularity the impairment and major life activity he or she asserts are at issue."[129] Similarly, the court in *Murray v. John D. Archbold Memorial Hospital* upheld summary judgment for the employer where the plaintiff was obese, distinguishing obesity from a "specific condition," such as morbid obesity.[130] Likewise, in *Alexander v. Eye Health Northwest, P.C.*, the district court held that an employer's remarks alluding to the plaintiff's "disability" and "your knee, your neck, your this and that other surgeries" were insufficient as a matter of law to show that the plaintiff was regarded as disabled, in part because she could not identify any particular impairment that the employer had in mind in connection with her termination.[131]

Other courts are not explicit about the requirement that the plaintiff articulate a specific impairment, but they make a leap from the statutory requirement that the plaintiff prove that she was regarded as having *an* impairment to requiring that she prove facts about *the* impairment.[132] In an analysis typical of many jurisdictions,[133] the court in *Deas v. River West, L.P.* held that a prima facie showing of disability under the regarded-as prong requires evidence that "this [perceived] impairment" be the kind that would be

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128. *Id.*

129. *Id.*

130. 50 F. Supp. 2d 1368, 1377-78 (M.D. Ga. 1999) (holding that "impairment" must be the kind of impairment contemplated by the statute).

131. No. 05-1632, 2006 U.S. Dist. LEXIS 72282, at *8-10 (D. Or. Oct. 3, 2006).

132. Wooten v. Farmland Foods, 58 F.3d 382, 385 (8th Cir. 1995) ("The limiting adjectives 'substantially' and 'major' indicate that the perceived 'impairment must be a significant one.'" (quoting Byrne v. Bd. of Educ., 979 F.2d 560, 564 (7th Cir. 1992))); Gerdes v. Swift-Eckrich, Inc., 949 F. Supp. 1386, 1399-1400 (N.D. Iowa 1996) (citing regarded-as cases that failed where "plaintiff failed to generate evidence creating a genuine issue of material fact as to the employer's perception of *the necessary impairment*" (emphasis added)).

133. *See, e.g.*, Deane v. Pocono Med. Ctr., 142 F.3d 138, 143 (3d Cir. 1998) (stating that the "regarded as" claim requires determination of whether "the impairment" as perceived by the employer would have been substantially limiting); Barnett v. Tree House Cafe, Inc., No. 5:05-195, 2006 U.S. Dist. LEXIS 88999, at *16 (S.D. Miss. Dec. 8, 2006) (holding in a regarded-as case that "the impairment, whether real or imagined, must substantially limit a major life activity or be perceived as actually substantially limiting a major life activity"); EEOC v. Exxon Corp., 124 F. Supp. 2d 987, 998 (N.D. Tex. 2000) (outlining the inquiry focusing on "'whether the particular impairment constitutes for the particular person a significant barrier to employment'" (quoting Webb v. Garelick Mfg. Co., 94 F.3d 484, 488 (8th Cir. 1996))).

substantially limiting.[134] In other words, these courts assume that "an impairment" must refer to some res to which the plaintiff can point, and that a claim must allege facts specific to *the* or *this* impairment, actual or imagined.

Another way in which courts tacitly adopt a de re reading is by conflating the inquiries with respect to the actual-disability and regarded-as prongs.[135] The problem with collapsing the two provisions is that they do not behave the same with respect to reference. In linguistic terms, the actual-disability prong is a transparent context in which nouns must refer; the regarded-as prong is an opaque context in which nouns may or may not refer. If a plaintiff claims she has an impairment under the actual-disability prong, then yes, she must mean a particular impairment. But this requirement does not hold for the regarded-as prong, because a de dicto reading of that provision does not require reference. Thus, while the language of the regarded-as prong directly invokes that of the actual-disability prong,[136] merely plugging the terms of the latter into the former will screen out meritorious claims that can prevail on a de dicto reading.

The Second Circuit in *Jacques v. DiMarzio, Inc.*, spelled out this conflation of regarded-as and actual-disability inquiries.[137] There the court stated that, "to prevail under the 'regarded as' provision of the ADA, a plaintiff must show more than 'that the employer regarded that individual as somehow disabled; rather, the plaintiff must show that the employer regarded the individual as disabled *within the meaning of the ADA*.'"[138] The court then turned to the definition of disability under the actual-disability prong, and it inserted that prong's "three-step"[139] inquiry into the regarded-as analysis. In the hands of

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134. 152 F.3d 471, 476 (5th Cir. 1998).

135. *E.g.*, Smith v. Fed. Express Corp., No. 04-1955, 2005 U.S. Dist. LEXIS 31268, at *26 (N.D. Ga. Nov. 21, 2005) ("As with an 'actual disability' discussed above, the 'perceived disability' must be substantially limiting and significant.").

136. 42 U.S.C. § 12102(2)(A), (2)(C) (2000).

137. 386 F.3d 192, 201 (2d Cir. 2004); *see also* Walton v. U.S. Marshals Serv., 492 F.3d 998, 1006 (9th Cir. 2007) ("If the plaintiff does not have direct evidence of the employer's subjective belief that the plaintiff is substantially limited in a major life activity, the plaintiff must further provide evidence that *the impairment* imputed to the plaintiff is, objectively, a substantially limiting impairment." (emphasis added)).

138. *Jacques*, 386 F.3d at 201 (quoting Colwell v. Suffolk County Police Dep't, 158 F.3d 635, 646 (2d Cir. 1998)).

139. This three-step process was articulated by the Supreme Court in *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998). As generalized by the Second Circuit, the steps are: (1) "whether the plaintiff suffered from a physical or mental impairment," (2) whether "'the life activity' upon which the plaintiff relied . . . 'constitutes a major life activity under the ADA,'" and (3) whether "the plaintiff's impairment 'substantially limited' a major life activity identified in step two." *Colwell*, 158 F.3d at 641 (quoting *Bragdon*, 524 U.S. at 631).

the *Jacques* court, the third step of this inquiry asks whether "the plaintiff's impairment 'substantially limited' [*the*] major life activity identified."[140]

In many cases, the employer may very well have a particular impairment in mind, in that it may have been a topic of discussion between the employer and employee.[141] For this reason, and also perhaps because claimants know they must articulate a particular impairment under the regarded-as prong, there are few published cases in which the plaintiff has not argued the impairment issue with specificity. *Toussaint v. Sheriff of Cook County* is a rare outlier in this respect.[142] The plaintiff had returned to work from a triple-bypass surgery and had a heart condition that rendered him weak.[143] He alleged that his employer regarded him as disabled and discharged him for that reason. The court held that his failure to allege a specific impairment prevented him from meeting the definition of disabled under the regarded-as prong.[144] The court stated, "In fact, other than complaining about suffering from some vague 'weakness,' Plaintiff offers absolutely no specifics as to which impairment rendered him disabled."[145] In granting the employer's motion for summary judgment, the court did not admit of the possibility that the plaintiff's heart surgery and subsequent weakness would support an inference that the defendant regarded him as being generally physically frail and thus having some impairment or other that limited him in some major life activity or other.

Not every court has been entirely unsympathetic to reading "an impairment" de dicto, even if not in name or by recognizing statutory ambiguity. The Fifth Circuit in *EEOC v. R.J. Gallagher Co.* reversed a district court decision holding that a critically ill leukemia patient was not disabled under the regarded-as prong.[146] The trial court had stated, "Assuming that [the employer] perceived [the employee] as ill, that is not a perception of disability. The 'or perceived' language is in the law to protect people who have some

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140. *Jacques*, 386 F.3d at 201 (quoting *Colwell*, 158 F.3d at 641) (emphasis added) (alterations in original).

141. *But see* Alexander v. Eye Health Nw., P.C., No. 05-1632, 2006 U.S. Dist. LEXIS 72282 (D. Or. Oct. 3, 2006). For discussion of this case, see *supra* text accompanying note 131.

142. No. 97-7866, 2000 U.S. Dist. LEXIS 7172 (N.D. Ill. May 22, 2000).

143. *Id.* at *9.

144. *Id.* at *10. The *Toussaint* court discussed the consequences of failing to allege a particular impairment concerning the actual-disability prong, not the regarded-as prong. *Id.* However, it offered no separate explanation of why, even if the failure to allege a specific impairment might preclude a finding of actual disability, this should preclude a finding of disability under the regarded-as prong.

145. *Id.* at *9.

146. 181 F.3d 645 (5th Cir. 1999).

obvious specific [disability] . . . ."[147] In reversing and remanding, the Fifth Circuit stated that one need not have an obvious specific impairment to satisfy the regarded-as prong.[148] The court's language was thus friendly to the introduction of nonspecific notions of impairment, although it might also be read as doing no more than rejecting the requirement that the claimant have an obvious impairment.

Other courts have used language corresponding to a de re reading of impairment, but have arrived at results that reflect a de dicto reading with respect to "impairment." In *Stockton v. A World of Hope Childcare Learning Center*, the plaintiff had an irregular gait and problems with balance owing to an allergic reaction to a childhood immunization.[149] The court held that, as with the actual-disability prong,

> [u]nder the "regarded as" prong, a person is regarded as disabled if the employer "mistakenly believes that the person's actual, nonlimiting impairment substantially limits one or more major life activities." To put it another way, as with actual impairments, a perceived impairment must be one that, if real, would substantially limit a major life activity.[150]

Here, the court seems to be reading "a perceived impairment" as an impairment de re, because otherwise there would be no way to assess whether "it" would be substantially limiting "if [*it* were] real." However, the court did not end up requiring the plaintiff to identify a particular impairment in terms of a physical disorder. Instead, it looked to her functional limitations and was apparently satisfied that she had, and was regarded as having, some impairment or other.[151] But this apparent friendliness to de dicto findings on

147. EEOC v. R.J. Gallagher Co., 959 F. Supp. 405, 409 (S.D. Tex. 1997), *rev'd*, 181 F.3d 645 (5th Cir. 1999). For another post-*Sutton* case stating a rule more amenable to de dicto analysis, but falling into the familiar pattern of listing a particular impairment-and-major-life-activity pair, see *Williams v. Philadelphia Housing Authority Police Department*, 380 F.3d 751 (3d Cir. 2004). *Williams* held that an employee with depression may prove that he was "treated . . . as having" a substantially limiting impairment for a broad class of law enforcement jobs that required carrying firearms. *Id.* at 766 (quoting Taylor v. Pathmark Stores, Inc., 177 F.3d 180, 188 (3d Cir. 1999)).

148. 181 F.3d at 656.

149. 484 F. Supp. 2d 1304, 1310 (S.D. Ga. 2007) (granting summary judgment for employer where the employee was not regarded as substantially limited).

150. *Id.* at 1312 (citations omitted).

151. *Id.* at 1310 ("Plaintiff has certain physical impairments such as difficulties in her balance and her stride. Plaintiff also has an unsteady gait and poor reflexes. Finally, she has trouble

the "impairment" issue may be inconsequential; the court went on to find that the plaintiff had failed to prove the employer regarded her as substantially limited in any particular (de re) major life activity.

In sum, while the courts' interpretation of "an impairment" under the regarded-as prong may not be monolithically de re, most courts require this term to refer to a particular impairment that the plaintiff must specify. In doing so, they foreclose three of the possible readings in the Readings Matrix: Boxes III, VI, and IX.

2. *Courts Overlook the De Dicto Reading of "Major Life Activities"*

Courts have been at least as insistent on a de re reading of "major life activities," but with far more prejudicial consequences for plaintiffs. Much more is riding on the availability of de dicto readings with respect to major life activities than to impairment. For impairment, common sense suggests that there is often a particular referent known to both plaintiff and defendant, frequently in accord with the plaintiff's actual condition and perhaps accompanied by a medical diagnosis. Any such impairment is likely to be germane to the underlying dispute, and the plaintiff may not be hard-pressed to identify it. By contrast, the concept of "major life activity" is a legal construct that may have little or nothing to do with the factual context of the claim.[152] On a de re reading of "major life activities" in the regarded-as prong context, this disconnect is amplified. Whether an employer has a particular activity in mind will depend on how thoroughly, and perhaps how rationally, she has pondered the employee's condition.[153] Further, after *Toyota*, the particular activity must be one of central importance to *daily life*,[154] so the employer's speculation must presumably have extended to matters outside the workplace. Short of an obvious, "traditional," *actual* handicap that prevents some activity altogether

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lifting certain objects and weight .... A physical impairment alone, however, is not necessarily a disability under the ADA.").

152. A prime example of a particular impairment, but not a major life activity, being central to an underlying dispute is *Bragdon v. Abbott*, 524 U.S. 624 (1998), in which a dentist refused to treat a patient with asymptomatic HIV. The Court held that the major life activity limited by the impairment was reproduction. *Id.* at 647.

153. Congress recognized that much disability discrimination may be unconscious, noting in the House Report that "our society is still infected by the ancient, now almost subconscious assumption that people with disabilities are less than fully human . . . ." H.R. REP. NO. 101-485, at 31 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 313.

154. Toyota Motor Mfg. of Ky., Inc. v. Williams, 534 U.S. 184, 197 (2002).

(for example, paraplegia, blindness, deafness), the facts will rarely satisfy a de re reading of "major life activities."[155]

Failure to plead a specific major life activity is in some jurisdictions fatal to the plaintiff's case. In *Kaiser v. Banc of America Investment Services*, for example, the court held that a complaint was deficient for failure to allege "which 'major life activity' is pertinent to [plaintiff's] claim."[156] Other courts have held that the claimant "must select the major life activities that he will attempt to prove the employer regarded . . . as being substantially limited," and that not doing so is grounds for dismissal.[157] Where a complaint does not specify a particular major life activity at issue, some courts have assumed particular activities and evaluated the plaintiff's claim with respect to those activities only.[158] Whether required at the pleading stage or not, the demand that plaintiffs articulate "which major life activity" the regarder had in mind is a steady refrain.

The Seventh Circuit's reasoning in *Mack v. Great Dane Trailers*[159] shows how courts plug the actual-disability inquiry into the regarded-as analysis, with a result that leaves no room for de dicto readings. Having applied the Supreme Court's *Toyota* analysis to the plaintiff's actual-disability argument, the Court turned to the regarded-as claim, with this to say about the relationship between these two provisions:

> [W]hile *Toyota* did not address a claim that the employee was regarded as disabled, its analysis still controls in this case. Under the ADA, the concepts of "substantially limits" and "major life activity" are the same whether the employee is proceeding under a claim that she is actually disabled or regarded as disabled. The statute defines disability to include "being regarded as having such an impairment," – the

155. *See infra* notes 223-246 and accompanying text.

156. 296 F. Supp. 2d 1219, 1222 (D. Nev. 2003).

157. Cagle v. FinishMaster, Inc., No. 03-0265, 2004 U.S. Dist. LEXIS 26714, at *21 (S.D. Ind. Dec. 23, 2004) (quoting Amadio v. Ford Motor Co., 238 F.3d 919, 925 (7th Cir. 2001)).

158. *See, e.g.*, Thomas v. Avon Prods., No. 05-794, 2007 U.S. Dist. LEXIS 44750 (S.D. Ohio June 20, 2007) (assuming working as the major life activity and evaluating the regarded-as argument with respect to this activity); Barnett v. Tree House Cafe, Inc., No. 5:05-195, 2006 U.S. Dist. LEXIS 88999, at *16 (S.D. Miss. Dec. 8, 2006) (assuming a regarded-as claim based on "standing, caring for herself, and working," where the plaintiff had alleged those activities as actually limited but had not identified a particular activity under the regarded-as prong).

159. 308 F.3d 776 (7th Cir. 2002).

> referenced impairment being that described in the definition of actual impairment.[160]

Facts that satisfy only a de dicto reading of "major life activities" (in the sense of "some major life activity or other") will never be able to meet the standard of particularity that the actual-disability prong requires. Section III.C below discusses the analytical flaw in this type of analysis.

Some courts make the related mistake of shaving some language from the disability definition as though doing so will have no semantic consequences. From the requirement that the individual plaintiff be regarded as limited in one or more of "the major life activities *of the individual*,"[161] some courts move to assessing whether the plaintiff is regarded as limited in "one or more of the major life activities,"[162] period. This has the subtle but important effect of suggesting a small, fixed number of major life activities writ large, as opposed to the broader notion of "some major activity or other," and therefore indirectly pushing in favor of a de re reading.

By demanding particularity of reference with respect to "major life activities," the courts neglect de dicto readings of that term. In the Readings Matrix, such an analysis rules out Boxes VII, VIII, and IX.

Moreover, the failure to apprehend ambiguity in the regarded-as prong pervades other legal arenas, such as advocacy and ADA compliance. No published decision that I am aware of discusses any argument made on behalf of a plaintiff that she need not prove that the regarder had a particular major life activity in mind, let alone a particular impairment. Rather, the arguments cited tend to name strings of putative major life activities, which courts often shoot down in series: they find each to be either not a "major" life activity, or not supported by evidence that the regarder viewed the plaintiff as "substantially limited" in that discrete activity.[163] In commentary, the

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160. *Id.* at 781-82 (citations omitted).

161. 42 U.S.C. § 12102(2)(A) (2000) (emphasis added).

162. Johnson v. Am. Chamber of Commerce Publishers, Inc., 108 F.3d 818, 820 (7th Cir. 1997) ("[A] disability means an impairment 'that substantially limits one or more of the major life activities' .... Does [plaintiff's] mumbling 'substantially limit[] one or more of the major life activities'? Mumbling or stuttering would preclude employment as a telemarketer, but many other jobs would remain open.").

163. Lanman v. Johnson County, 15 Am. Disabilities Cas. (BNA) 1017 (D. Kan. 2003) (considering and rejecting working and interacting with others as regarded-as substantially limited activities, and rejecting "thinking" for lack of evidence, where the plaintiff alleged that her employer regarded her as mentally unstable); *see also* Walton v. U.S. Marshals Serv., 492 F.3d 998, 1006 (9th Cir. 2007) ("If the plaintiff does not have direct evidence of the employer's subjective belief that the plaintiff is substantially limited in a major life

ambiguity of the statute has been discussed not in a precise structural sense but in a broader way encompassing vagueness,[164] with most commentators concluding that the language of the statute should be redrafted.[165] It likewise appears that the requirement to articulate "the impairment" and "the major life activity" tends to be assumed at the level of ADA compliance and enforcement. For example, a published intake form offered by an ADA technical assistance and education entity asks, "Does the individual claim that s/he is 'regarded as' having a disability? (Yes/No) . . . If yes, *what is the major life activity* [s/he is regarded as being limited in]?"[166] Thus, advocates themselves may take for granted a de re reading of the statute and place this hurdle in the path of potential clients.[167]

3. *Courts Overlook Narrow-Scope De Re Readings*

Just as the courts tacitly exclude de dicto readings in favor of de re readings, they also exclude without explanation narrow-scope de re readings in favor of wide-scope de re readings, for both "an impairment" and "major life activities,"

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activity, the plaintiff must further provide evidence that the impairment imputed to the plaintiff is, objectively, a substantially limiting impairment."); Littleton v. Wal-Mart Stores, Inc., 231 Fed. App'x 874 (11th Cir. 2007) (considering and rejecting arguments based on working, learning, thinking, communicating, and taking part in social interaction), *cert. denied*, 128 S. Ct. 302 (2007).

164. *See, e.g.*, Samuel R. Bagenstos, *Subordination, Stigma, and "Disability,"* 86 VA. L. REV. 397, 417 (2000).

165. *See, e.g.*, Anderson, *supra* note 1, at 124 (asserting that the regarded-as prong "by its plain language" "incorporates the flawed idea" of requiring a substantial limitation in a major life activity); Eichhorn, *supra* note 3, at 1432 (conceding that the regarded-as prong analysis follows interpretation of the actual-disability prong); Friedland, *supra* note 16, at 185, 198 (arguing that the regarded-as prong as written is a poor fit for the statute's purposes and that the disability definition should be amended).

166. *ADA Checklist: Does This Individual Have a Disability?*, ROCKY MOUNTAIN Q. (Rocky Mountain ADA & IT Ctr., Colorado Springs, Colo.), Spring 2005, at 7, *available at* http://www.adainformation.org/newsletter/PrintSpring05.pdf (emphasis added); *see also* Job Corps disABILITY, Job Corps Checklist for Handling ADA Issues: Reasonable Accommodation 1-2, *available at* http://jcdisability.jobcorps.gov/documents/DallasRA_checklist.doc (last visited Feb. 8, 2008) (noting that the disability definition covers those who are "'regarded' as having . . . [a] physical or mental impairment that substantially limits a major life activity," and then asking "what is the major life activity?").

167. For an account of a case in which advocates saw a regarded-as claim as viable only if they could identify a particular major life activity, see *infra* text accompanying notes 243-244.

in the vast majority of jurisdictions.[168] This may ultimately be less problematic than is the exclusion of de dicto readings,[169] but it underscores the degree to which the courts miss the range of meanings available under the regarded-as prong.

What distinguishes narrow-scope from wide-scope is that narrow-scope readings require the referent to meet the criteria for "impairment" or "major life activity" only in the view of the regarder, not necessarily in the view of the law. Courts frequently state that the inquiry under the regarded-as prong is entirely or "almost entirely" a matter of the state of mind of the regarder.[170] This suggests that narrow-scope de re readings may be available. However, nearly all of these courts require the particular impairment and major life activity to conform to the legal definitions of those terms.[171] That is, they overlook the possible narrow-scope de re reading and require that the "regarded" impairment be one that meets a *legal* standard of "impairment," and one that would substantially limit a *legally recognized* "major life activity,"[172] rather than be merely something the employer would characterize as such.

Cases that pit wide-scope against narrow-scope interpretations are those where the employer regards the employee as having a particular condition (the res), and regards this as an impairment, but either the res does not meet the legal definition of impairment, or the activity that the regarder views as major (and substantially limited) is not one deemed under ADA law to be "major." For example, the Tenth Circuit in *EEOC v. Watkins Motor Lines, Inc.*, explained that the impairment—in this case, obesity—that the employee was regarded as having must be "an impairment protected by the ADA (rather than a disability

168. Only one case speaks favorably of a narrow-scope de re reading. *See* Cook v. R.I. Dep't of Mental Health, Retardation, & Hosps., 10 F.3d 17, 22-23 (1st Cir. 1993) (stating that a nonimpairment may be an impairment for regarded-as prong purposes).

169. For an argument that narrow-scope de re readings legitimately may be ruled out, see *infra* notes 204-222 and accompanying text.

170. Clawson v. Mountain Coal Co., 18 Am. Disabilities Cas. (BNA) 1874, 1881 (D. Colo. 2007) ("In a 'regarded as' claim, the focus is not on the *objective* effect of the employee's actual or perceived impairment on a major life activity, but instead upon the employer's subjective impressions of the consequences of the employee's actual or perceived impairment."); *see also* Ross v. Campbell Soup Co., 237 F.3d 701, 709 (6th Cir. 2001) (stating that proving a regarded-as claim with "working" as the major life activity is difficult because the question is "embedded almost entirely in the employer's subjective state of mind").

171. *See, e.g.*, EEOC v. Heartway, 466 F.3d 1156, 1163 (10th Cir. 2006) (holding that an employee must show that the employer "*subjectively* believed the employee to be significantly restricted as to a class of jobs").

172. This is not to say that the res must be an "actual" impairment (i.e., that the plaintiff actually have the condition)—only that the impairment, if actual, would have to be a substantially limiting one.

not named in the ADA that is perceived by the employer to be limiting)."[173] Thus, whether the regarder viewed obesity as an impairment was immaterial; if it is not "really" an impairment, then it does not satisfy the regarded-as prong. The EEOC had argued that an employee who has a condition perceived by the employer to be a disability, but which does not meet the ADA definition of impairment, may satisfy the requirements of the regarded-as prong.[174] In essence, the EEOC was arguing that "impairment" ought to be given its narrow-scope de re reading, an argument the court rejected. The court in *Felten v. Eyemart* suggested a similar conclusion concerning major life activities, stating that under the regarded-as prong, "the definition[] of . . . 'major life activity' still appl[ies]."[175]

In sum, then, ruling out narrow-scope de re readings rejects the cases covered by Boxes II, IV, V, VI, and VIII of the Readings Matrix. Combined with the overlooked de dicto readings, this leaves just one reading as a judicially recognized interpretation, as shown here by the shading out of the other eight boxes:

173. 463 F.3d 436, 440 (6th Cir. 2006) (holding that nonphysiologically caused morbid obesity is not an impairment, thus precluding a regarded-as claim).

174. *Id.* at 440 n.2.

175. Felten v. Eyemart Express, Inc., 241 F. Supp. 2d 935, 944 (E.D. Wis. 2003).

Table 2.
COURTS OVERLOOK DE DICTO AND NARROW-SCOPE DE RE READINGS

Sonia regards John as having an impairment that substantially limits one or more of his major life activities.

READINGS OF "MAJOR LIFE ACTIVITIES"	READINGS OF "AN IMPAIRMENT"		
	WIDE-SCOPE DE RE	NARROW-SCOPE DE RE	DE DICTO
WIDE-SCOPE	**Box I** John has *epilepsy*, which substantially limits his ability *to work in a broad class of jobs.*	**Box II** John is *left-handed*, which substantially limits his ability *to work in a broad class of jobs.*	**Box III** John has *an impairment* that substantially limits his ability *to work in a broad class of jobs.*
NARROW-SCOPE	**Box IV** John has *epilepsy*, which substantially limits his ability *to drive to work.*	**Box V** John is *left-handed*, which substantially limits his ability *to drive to work.*	**Box VI** John has *an impairment* that substantially limits his ability *to drive to work.*
DE DICTO	**Box VII** John has *epilepsy*, which substantially limits some of his *major life activities.*	**Box VII** John is *left-handed*, which substantially limits some of his *major life activities.*	**Box IX** John has *an impairment* that substantially limits some of his *major life activities.*

Only the reading in Box I—wide-scope de re with respect to both "impairment" and "major life activity"—retains any force in the courts.

C. The Analytical Flaw in Applying a De Re-Only Inquiry

"What is the impairment?"; "What is the major life activity?" These may seem like the right questions to ask plaintiffs claiming ADA coverage, given that all three prongs of the disability definition invoke the same terminology. They are, however, the wrong questions for the regarded-as prong. Courts that require the regarded-as-disabled plaintiff to articulate a specific impairment or major life activity commit an error of reasoning about language that was intuitively clear in the simple sentences above.

The courts' analytical misstep lies in treating the regarded-as prong just like the actual-disability prong with respect to proof. The reason they do this is clear: the regarded-as prong is stated in terms of the actual-disability prong. But in fixating on the commonality of certain *words* in the two provisions,

courts overlook important differences in *sentence* meaning between them. That is, they treat a referentially ambiguous provision (the opaque context of "regard") as though it were one whose terms are unambiguously referential (the transparent context of actually "having" a disability). True, the "tell us about the particular impairment and major life activity" method of proof is appropriate under the actual-disability prong; it also will lead to a correct result on a de re reading of the regarded-as prong. Both such contexts require a res for impairment and major life activity, so it makes sense to ask about that thing: "What is the impairment called? In what way is it limiting, and how severely?" and so on. But on a de dicto reading of these terms, where no such res need exist, the correct proof inquiry looks very different. With no real or imagined res to point to, we must consider a broader range of evidence to ascertain whether the employer's state of mind meets the definition's criteria. That is, we would need to ask whether that employer's words or conduct support an inference that she regarded the plaintiff as having *some impairment or other* that limited him in *some major way or other*.

From a lawyer's perspective, it may be tempting to characterize the error courts make as one of allocating the burden of proof. The thinking would go like this: why should the burden be on the plaintiff to show which impairment she was regarded as having (or which major life activity is at issue), when we might more fairly place the burden on the employer to show that there was no impairment she regarded the employee as having; after all, the employer has better access to her own state of mind, which the plaintiff cannot be expected to divine. Some courts have made a similar move, finding for the employer after concluding that there was no "possible major life activity" (argued or not), that the employer could have regarded as limited.[176] This might at first seem correct, in fact fair. If, for every "possible" major life activity, we can establish that the defendant did not regard that activity as limited, then how can we say that the plaintiff was regarded as limited in a major life activity at all? But this process of elimination approach is also analytically misguided–

176. A clear example of this reasoning is *Taylor v. Wal-Mart Stores, Inc.*, 376 F. Supp. 2d 653 (E.D. Va. 2005). That court said of the plaintiff: "Mr. Taylor does not specify which major life activity his impairment substantially limits. Due to the deference given Mr. Taylor as a *pro se* litigant, the Court will attempt to identify the possible major life activities that might be affected by his impairment." *Id.* at 660. The court went on to evaluate several particular "possible major life activities," and it found evidence lacking for any regarded-as limitation for each one, ultimately granting summary judgment to the employer. *Id.* at 660-61; *see also* Talanda v. KFC Nat'l Mgmt. Co. (*Talanda II*), 6 Am. Disabilities Cas. (BNA) 1321, 1323 (N.D. Ill. 1997), *aff'd*, 140 F.3d 1090 (7th Cir. 1998) ("[T]he only major life function [plaintiff's] injury may have limited [under the regarded-as prong] is working at certain jobs.").

and fated to fail for plaintiffs—where the regarder lacks a referent for "major life activity" in the first place.

To see why these lines of reasoning—burden-shifting and "ruling out possible major life activities"—miss the point as a matter of logic, consider this next hypothetical. Sonia sees John in a pinstriped baseball uniform outside a baseball stadium in the Bronx. She points to John and exclaims, "There's a New York Yankee!" Imagine Sonia has no knowledge or belief about any individual Yankees players;[177] she simply regards John as a member of that team because the uniform tipped her off. That is, she regards him as "a Yankee" de dicto: to her, he matches the general description, "a Yankee." But how would John prove that he was "regarded as being a Yankee" under an inquiry analogous to the regarded-as prong jurisprudence? That is, how will he answer the question, "Who is the Yankee you were regarded as being?" Because Sonia has only the general description of "a Yankee" and not any particular individual in mind, John will surely fail to identify "which Yankee" Sonia thought he was. This alone may be fatal to his claim.

Nor would it make a difference if we gave John a second path to proving that Sonia regarded him as a Yankee, namely by using the Yankees' roster and working through all the "possible New York Yankees" Sonia could have regarded him as being. There is still no res that John, Sonia, or anyone else can identify and link to Sonia's state of mind. In other words, we could go down the Yankees' roster and ask John, "Which Yankee were you regarded as being? Derek Jeter? Hideki Matsui? Johnny Damon?" and John would not be able to answer "yes" for any individual. Not because he does not know *which one* it is, but because no such one exists. More to the point, Sonia herself can truthfully and credibly deny, for every individual Yankee, that she regarded John as being that individual. And yet it is uncontroversially true that Sonia regarded John as being a Yankee on a legitimate (de dicto) reading of that sentence. By analogy, the logical flaw in requiring a plaintiff to prove *which* impairment and major life activity are at issue cannot even in theory be repaired by seemingly plaintiff-friendly manipulations of a misdirected inquiry.

Crucially, then, the analytical misstep plaguing the regarded-as prong, sometimes characterized as an epistemological problem,[178] is more centrally an ontological problem: it concerns what is assumed to exist as opposed to what can be known. While it certainly burdens plaintiffs to have to prove the mental states of defendants, it is at least within the realm of possibility to do so. By

177. If this seems implausible, assume Sonia is an embittered Seattle Mariners fan who avoids any mention of the Yankees.

178. *See, e.g.*, Hoffman, *supra* note 66, at 1232 (suggesting that requiring proof of regarder's inner thoughts makes the regarded-as prong of limited value to plaintiffs).

contrast, the question, "what is the major life activity that your employer regards as limited?" often cannot be answered in an absolute, logical sense, because it presupposes something that may not exist: a referent in the mind of the regarder. The problem of a false or contestable presupposition is more familiar when what is presupposed is a state of affairs rather than a referent. Such a question is (unfortunately) termed a "when did you stop beating your wife" question.[179] The frustration one feels in being asked such a question is perhaps typical of the mood of disability rights advocates at present, who sense that ADA interpretation has fallen down the rabbit hole but have difficulty tracing that slide to a particular analytical error. Against this backdrop, a de dicto-de re account not only explains the interpretive failure, but it captures the distinctive flavor of the problem, too.

Finally, note that traditional textual canons of construction do not help identify or resolve ADA ambiguity. In fact, they may steer us toward an incorrect result. The reason is that canons of construction speak to how we should ascertain the *sense* (the equivalent of a dictionary entry) of a word, not whether a word *refers*. For example, the "presumption of consistent usage" calls for repeated uses of a term in a statute to have a single interpretation. This canon suggests that "impairment" should have the "same meaning" under the regarded-as prong as under the actual-disability prong. True, the *sense* of "impairment" does not vary between the two prongs. That is, it is not as though "impairment" has one meaning in the actual disability prong and a different meaning under the regarded-as prong. By analogy, in our looking-for-a-dog examples, we would not say that "dog" means one thing in the lost-dog scenario and another thing in the Petfinder.com scenario, as though we have two mental dictionary entries for "dog." The sense of dog stays the same; what varies is the dimension of reference, whether or not the noun points to a res. No textual canon speaks to this distinction.[180]

D. Courts Take De Re Readings for Granted

Perhaps the most troubling aspect of the courts' misreading of the regarded-as prong is their wholesale failure to apprehend ambiguity in the first

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179. The presupposed state of affairs is, of course, that the addressee was at some prior point beating her wife. For a generic example of the use of this term in case law, see *United States v. Kragness*, 830 F.2d 842, 868 (8th Cir. 1987) (noting an objection by defendant's counsel to the government asking a "when did you stop beating your wife" question).

180. The closest fit might be the canon of meaningful variation, by which a change in language denotes a change in meaning. But this principle is unavailing where the terms are identical, as they are in the actual-disability and regarded-as prongs.

instance. None of the cases cited here mentions ambiguity in any way that could be mapped conceptually onto the de dicto-de re distinction. One might term a jurisprudence that does not admit of ambiguity a "plain language" approach to statutory construction. But courts do not tend to use this phrasing or otherwise indicate that they are constrained by the text to require proof of a particular major life activity or impairment.[181] It is as though the meaning of the regarded-as prong is so plain as not to even register as "plain." Instead, the courts appear to consider the proof inquiry under the regarded-as prong to be a matter of simple substitution of equivalent expressions from the actual-disability prong. Given this flawed reasoning, current interpretation of the regarded-as prong might be better described as logical fallacy than as narrow interpretation. At the very least, courts seem to skip what ought to be the first step in statutory interpretation: determining whether or not the statutory language is ambiguous.[182]

Neglecting ambiguity in the regarded-as prong creates two problems. The more obvious is that courts uncritically adopt the de re proof inquiry, foreclosing a finding for the individual plaintiff who would meet the definition of disabled de dicto but not de re.[183] The second is that courts, perhaps believing that they are reading the statute literally and according to its "plain" meaning, do not consider the one thing that would help them resolve the ambiguity: context. By walling off context, a plain meaning approach is actually the opposite of the common sense approach it purports to be. This is because in natural language use, the meaning of language is always contemporaneously mediated by context.[184] In terms of the statute, context can take the form of extrinsic evidence of congressional intent. As disability rights advocates have persuasively argued, the ADA's legislative history favors a broader interpretation of the regarded-as prong than courts have thus far

181. I am aware of no case referencing a "plain meaning" or "plain language" approach when requiring, implicitly or explicitly, that the plaintiff articulate a particular impairment or major life activity.

182. Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997) (holding that the first step in statutory interpretation "is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case").

183. For the argument that readings containing a narrow-scope de re term can be properly excluded, see *infra* notes 204-217 and accompanying text.

184. This is quite literally what "context" means in its original derivation from Latin: *with* the text. The irony that the plain meaning rule separates context from the text should not be lost on advocates of textualism.

allowed.[185] Thus, acknowledging ambiguity has important implications for reconnecting the ADA with its underlying purpose.[186]

To summarize, the courts' and advocates' interpretive failure lies in analyzing claims under the regarded-as prong using the same inquiry that they use to establish actual disability. Because the regarded-as prong manifests an ambiguity not present in the actual-disability prong, this all-purpose inquiry asks the wrong questions – and screens out valid claims – when applied to facts that satisfy the statute de dicto.

IV. RESOLVING AMBIGUITY

> *I ain't no semanticist, ain't no semanticist's son, but I can resolve your ambiguities til your semanticist comes . . .*
>
> – Mark Liberman[187]

Once courts acknowledge ambiguity in the regarded-as prong, the next step is to determine which one or more readings are valid interpretations of the provision. While courts vary in amount and kind of extrinsic sources they consider when interpreting text, even a rather conservative approach would look to other provisions in the statute and to the legislative history for evidence of congressional intent.[188] These sources support de dicto in addition to wide-scope de re readings, but they do not appear to validate narrow scope de re readings.

A. De Dicto Readings Should Be Endorsed

De dicto readings, at a minimum those that are fully de dicto and those that combine with wide-scope de re readings, should be held valid as interpretations of the regarded-as prong. These readings are those in Boxes III, VII, and IX of the Readings Matrix. These represent the readings in which either impairment or major life activities or both are read de dicto, in addition to the wide-scope de re reading.

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185. *See* Feldblum, *supra* note 2, at 130-31; Mayerson, *supra* note 1, at 602.

186. Nat'l Council on Disability, The Supreme Court's Decisions Discussing the "Regarded As" Prong of the ADA Definition of Disability (May 21, 2003), http://www.ncd.gov/newsroom/publications/2003/regardedas.htm.

187. Mark Liberman, *Pernicious Ambiguity at Davos*, Language Log, Feb. 8, 2005, http://itre.cis.upenn.edu/~myl/languagelog/archives/001882.html.

188. *See* WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETATION 250 (2d ed. 2006) (ranking sources of statutory meaning).

The most important reason to recognize de dicto readings is that claims that can prevail only on a de dicto reading epitomize the sort of sweeping forms of discriminatory decision making that the ADA, like other civil rights protection, was intended to prohibit. An example is the smoking gun scenario discussed in Part I, in which the employer rejects an applicant upon hearing that he has "a disability." Such claims, where the regarder has no particular impairment or limited activity in mind, are those in which the employer's adverse action is least tailored to the actual abilities and limitations of the employee. That action is more likely to be driven by "myths, fears, and stereotypes,"[189] often because information specific to the individual is lacking or ignored.[190] When Sonia declines to hire John because she regards him as being impaired in some way or other and limited in some major way or other, she is generalizing not just to a group that shares a particular impairment, but to all people with significant limitations due to impairment—people with disabilities. In this way, it is the de dicto reading that puts the ADA more on a par with Title VII, which prohibits employers from generalizing as to race and other protected categories in decision making.[191] Because the regarded-as prong is the part of the disability definition that speaks most directly to an antidiscrimination principle,[192] the validity of de dicto readings ought to be uncontroversial.

A second basis for recognizing de dicto readings as valid is historical, and it concerns the heavily contested meaning of "major life activities." This term was introduced into the definition of disability by a 1974 amendment to the Rehabilitation Act of 1973, which had defined a disabled individual as one who has "a physical or mental disability which ... constitutes or results in a substantial handicap to employment."[193] Thus, by substituting the major-life-activities phrasing for "employment," Congress was recognizing that it was not an impairment's effect on work alone, but on *any* activity of importance, that

189. 29 C.F.R. § 1630.2(*l*) app. (2007) (explaining the purpose of the regarded-as prong).

190. *See, e.g.*, Talanda v. KFC Nat'l Mgmt. Co. (*Talanda I*), No. 94 C 1668, 1996 U.S. Dist. LEXIS 7634, *6 (N.D. Ill. May 31, 1996) (magistrate judge recommendation) (denying an employer's motion for summary judgment on an ADA claim where the employer fired a worker with missing teeth based on expected customer reactions even though "customers were pretty friendly [to her]"), *adopted in part*, 6 Am. Disabilities Cas. (BNA) 1321 (N.D. Ill. 1997), *aff'd*, 140 F.3d 1090 (7th Cir. 1998).

191. *See* 42 U.S.C. § 2000e (2000).

192. *See, e.g.*, Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 541 (7th Cir. 1995) (stating that the regarded-as prong is a "better fit" with the Act's preamble, which compares disability discrimination to other forms of invidious discrimination).

193. 29 U.S.C. § 705(9) (2000).

may constitute disability for the purposes of antidiscrimination law.[194] That is, the "major life activities" language signified a broadening of the statute. A fair reading of this shift is that it moved the focus of inquiry from the particular domain of employment to "any activity of importance," rather than to a fixed or small set of specific activities. This contextualized understanding of the disability definition coincides with a paraphrase of the de dicto reading of "major life activities": *in some major way or other.*

Moreover, de dicto readings may be necessary to capture cases of cosmetic disfigurement and similar impairments that may not be physically limiting, but which Congress intended to cover under the regarded-as prong.[195] The House Education and Labor Committee Report accompanying the ADA, citing *Arline*, states that the regarded-as prong is intended to protect individuals with such impairments, specifically mentioning discrimination against burn victims as an example.[196] However, courts have granted summary judgment in favor of defendants in cases where plaintiffs with severe scars were unable to show that they were "regarded as limited" in a particular major life activity.[197] On a de dicto reading, claimants in such cases would be covered if they could persuade a fact finder that they were regarded (by the employer or by others more generally[198]) as substantially limited in some major life activity or other, that is, in some way that is important. The negative reactions of the regarder could serve as evidence that the regarder attributes significant limitation to the individual, perhaps irrationally, through the impairment.

The move from "negative reactions" on the one hand, to imputing substantial limitation in a major life activity on the other, may not be self-evident. After all, one might argue, there are many forms of negative reactions

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194. *See* Sch. Bd. v. Arline, 480 U.S. 273, 277 (1987) (explaining that Congress found the definition for purposes of vocational rehabilitation too narrow to address various forms of discrimination).

195. By contrast, Professor Feldblum argues that, now that the Court has distanced itself from the reasoning of *Arline* as to the regarded-as prong, legislative amendment is necessary to capture cases of cosmetic disfigurement without resorting to unsound logic. Feldblum, *supra* note 2, at 157-58 ("Indeed, the circular approach was the only way to provide coverage for individuals with certain impairments, such as cosmetic disfigurements, who were limited in life activities *solely* because of the responses and attitudes of others to their impairments.").

196. *See* H.R. REP. NO. 101-485, at 53 (1990), *reprinted in* 1990 U.S.C.C.A.N. 335; *id.* at 30, *reprinted in* 1990 U.S.C.C.A.N. 452; S. REP. NO. 101-116, at 24 (1989).

197. *See, e.g.*, Van Sickle v. Automatic Data Processing, 952 F. Supp. 1213 (E.D. Mich. 1997) (upholding summary judgment for employer where employee with a six-inch facial scar was unable to show he was regarded as limited in a major life activity).

198. For an argument that the regarder need not be the employer, see Bagenstos, *supra* note 164, at 447.

that people may have to one another that do not implicate major life activities. It is likely, however, that negative reactions based on impairment are grounded in a view of the individual as *limited*. It is the view of another as limited—vulnerable in a way that "normal" people are not—that ties together various motivations for excluding people with impairments: fear (of contagion and the limiting effects of illness), pity, and avoidance (of others who may not be seen as fully independent, thriving, contributing individuals).[199]

This sequence shows the interplay between perceived limitation as a trigger for negative reactions and the actual limitation that results from exclusion. It thus links the text of the statute, which by its grammar requires limitation to flow from impairment, and the rationale of the *Arline* Court that limitation flows from the regarder's discriminatory response.[200] First, the employer views the employee as substantially limited by impairment in a general sense (erroneously or irrationally). Second, that view motivates the employer to take action that *actually* limits the employee by reducing her employment opportunities. The first step is distinctive of disability discrimination, as opposed to discrimination based on race or other categories (because it is tied to a notion of impairment and limitation); the second step is constitutive of disability (because it keeps people out of work). Thus, the competing interpretations of the regarded-as prong can be reconciled within the meaning of the text, and consistent with clear congressional intent, but only by reading the statute de dicto.

A more specific argument for de dicto readings is the ADA's prohibition on making inquiries into disability. The ADA forbids employers from "conduct[ing] a medical examination or mak[ing] inquiries of a job applicant as to whether such applicant is an individual with a disability."[201] This provision would make little sense if a de dicto reading of "a disability" is unavailable. A de dicto reading would cover a case where the employer asks the applicant if he has "a disability" or asks other general questions about mental and physical health. A de re reading would cover only those cases where the employer asks about a particular disabling condition. The more clearly

199. Such involvement may be limited in terms of quantity, as where an employer refuses to hire, avoids, or segregates an individual based on impairment. It may alternatively be a matter of the quality of involvement, for example, where an employer refuses to promote an individual to a position of greater authority.

200. For an alternative account of the relationship between animus-driven discrimination and the regarded-as prong, see Elizabeth F. Emens, *The Sympathetic Discriminator*, 94 GEO. L.J. 399, 467-68 (2006) (drawing on the EEOC regulations as a route to interpreting the regarded-as prong for animus-based discrimination).

201. 42 U.S.C. § 12112(d)(2)(A) (2000).

discriminatory – and the most likely – scenario for preemployment inquiries is one in which the employer asks about disability in general (for example, by asking about a history of worker's compensation claims[202]), rather than one in which she asks about one or more specific impairments. Because this provision of the Act is reasonably intended to be understood de dicto in light of its purpose, a de dicto reading ought to be likewise available for disability under the regarded-as prong, whose antidiscrimination purposes are similar.

Finally, one can make a counterfactual argument that Congress intended the regarded-as prong to be read de dicto. Had Congress intended only the de re reading, it could easily have disambiguated the definition to read "a certain impairment" or a "certain major life activity."[203]

B. Narrow-Scope De Re Readings May Be Properly Excluded

Critics will likely argue that opening up interpretation of the ADA to include more than the single wide-scope de re reading (Box I) will unreasonably broaden the statute so as to cover far more individuals than Congress meant to protect. On the other hand, many of the kinds of claims Congress certainly contemplated as being actionable under the ADA (for example, the smoking gun scenario discussed above, or claims brought by burn victims) currently founder on the threshold question of whether the plaintiff has a disability on a wide-scope de re reading.

Between these extremes I suggest that, of the nine possible readings of the regarded-as prong discussed here, an interpretation that admits a certain four of them[204] may best comport with the intent of Congress. The principle that excludes the other five is that a claim that can prevail only on a narrow-scope de re reading of either "impairment" or "major life activities" should not meet the definition. Turning back to the Readings Matrix, this would make available only those readings at the corners: Boxes I, III, VII, and IX. I turn now to the

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202. Griffin v. Steeltek, Inc., 160 F.3d 591, 592 (10th Cir. 1998) (reversing summary judgment for employer where employer's application asked applicants if they had "physical defects which [would] preclude [them] from performing certain jobs").

203. *See* HURFORD ET AL., *supra* note 72, at 36. For an example of using "certain" to disambiguate, see the immediately following footnote and accompanying text.

204. This phrasing shows the de dicto-de re distinction in action. Using the term "certain" here disambiguates in favor of a de re reading of "four of them." The intention is to convey that a particular "four of them" should be valid interpretations, not to advocate an interpretation that endorses "[some] four of them" (de dicto), as though there were something special about the number "four."

rationale behind this limitation, first recalling the narrow- versus wide-scope distinction.

Narrow-scope de re readings are similar to and different from wide-scope de re readings.[205] They are similar in that each involves a res that the regarder has in mind. They diverge in whether that res—for example, the referent of "an impairment"—must be an impairment in fact (for wide-scope de re) or in the mind of the regarder (narrow-scope de re).[206] Most of the time, these readings will either both be true or both be false, because the law and common intuitions as to impairment tend to coincide. For instance, few would doubt that quadriplegia is an impairment; few would contend that having a "whiny voice"[207] is an impairment.

On some facts, however, wide- and narrow-scope readings will yield different results. For example, an idiosyncratic employer might regard a person with a certain eye color as impaired,[208] although this would not be a legal impairment under the ADA.[209] On such facts, "an impairment" would be satisfied on a narrow-scope de re reading of the term (because the res the regarder has in mind is, in her view, an impairment), but it would be false on a wide-scope de re reading (because eye color is not in fact an impairment). Endorsing narrow-scope de re readings, some may argue, might thus create a federal cause of action under the ADA for discrimination based on categories that are not generally understood to be protected by the statute.

Did Congress intend for narrow-scope de re readings of "impairment" to be valid? Evidence for such an intended reading might include statements in the legislative history that focus more on the idiosyncratic discriminator as opposed to societal motivations behind disability discrimination. That history, as well as the preamble to the ADA itself, appears to suggest the contrary. The ADA's findings and purpose describe disability discrimination as a "pervasive"

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205. The shorthand "narrow-scope readings" here includes any reading in which either "impairment" or "major life activities" is understood as narrow-scope de re.

206. It may be the case that the res is an impairment both in fact and in the mind of the regarder. In that case, both the narrow and wide-scope de re readings would be true.

207. *See* ROBERT C. POST, PREJUDICIAL APPEARANCES 10 (2001) (quoting *The Tyranny of Beauty*, NEW REPUBLIC, Oct. 12, 1987, at 4).

208. *See* Cook v. Rhode Island, 10 F.3d 17, 25 (1st Cir. 1993) ("By way of illustration, suit can be brought against a warehouse operator who refuses to hire all turquoise-eyed applicants solely because he believes that people with such coloring are universally incapable of lifting large crates . . . .").

209. EEOC Addendum, *supra* note 102, § 902.2(c)(2) ("Simple physical characteristics are not impairments under the ADA. For example, a person cannot claim to be impaired because of blue eyes or black hair.").

and "day-to-day" problem perpetrated by "society."[210] The House Report speaks likewise to this pervasiveness.[211] Further, to the extent that Congress intended the regarded-as prong to counter "myths and fears" of disability, those notions gain their currency by virtue of being widely held.[212] Finally, in discussing features that are not impairments (e.g., eye color, age, and poverty), Congress expressly left room for individuals in such categories to claim the Act's protection *if* they also have a physical or mental impairment.[213] If Congress had intended for such individuals to be able to bring regarded-as claims based on these categories, it would have made sense to identify the regarded-as prong as another route to ADA protection.

Thus, the narrow-scope de re readings of "impairment" (Boxes II, V, and VIII) may not survive statutory construction against the backdrop of legislative intent. Regardless of whether one believes such readings are within the intended meaning of the ADA, courts are likely to seek a limiting principle to constrain the definition. The ambiguity analysis provides a principled interpretive mechanism for excluding a class of readings that, at the very least, are not central to ADA purposes.

On this issue, then, my account differs from that offered by one appellate court. In *Cook v. Rhode Island*, the First Circuit stated that an employer who regards having turquoise eyes as a substantially limiting impairment would be liable under the ADA if she were to discriminate based on that attribute.[214] That opinion is in tension with the majority of jurisdictions,[215] but it does provide a rare example of a narrow-scope de re reading of "impairment" in case law.

By contrast, instances where the difference between the law and the employer's view of impairment cuts the other way—where the law recognizes some condition as an impairment but the employer does not—should reach a different result. In such cases, it makes sense that the plaintiff should meet the disability definition. An example might be a case in which an employer does not regard an epileptic employee as disabled because she considers epilepsy to be a spiritual condition, rather than a physical or mental one.[216] On such facts,

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210. 42 U.S.C. § 12101(a)(2), (b)(4) (2000).

211. H.R. REP. NO. 101-485, at 30-31 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 311-12.

212. *Id.* at 53, *reprinted in* 1990 U.S.C.C.A.N. 303, 335.

213. *Id.* at 51, *reprinted in* 1990 U.S.C.C.A.N. 303, 333.

214. 10 F.3d 17, 25-26 (1st Cir. 1993).

215. *See supra* notes 168-175 and accompanying text.

216. *See* FADIMAN, *supra* note 106, at 20-31 (describing the Hmong cultural understanding of an illness such as epilepsy as a spiritual condition not amenable to medical intervention).

the wide-scope de re reading would be true (because epilepsy is an impairment under the statute), but the narrow-scope de re reading would be false (because the employer does not regard epilepsy as an impairment). It seems clear in this case that the disability definition should be satisfied. Even under the *Sutton* analysis, the regarded-as prong is triggered where the employer views an impairment as more limiting than it is. The employer ought not to escape liability due to an individual or cultural view of whether the impairment is of physical, mental, or other etiology.[217]

Turning now to "major life activities," should narrow-scope de re readings be excluded? The cases represented in Boxes II, V, and VIII in the Readings Matrix are those in which the employer regards the employee as limited in some particular activity (such as driving to work), which the employer herself views as a major life activity, even though the law does not.[218] This is a more difficult question than the corresponding question for "impairment," in part because the legislative history generally does not list examples of activities that are *not* major life activities (but which could be regarded as such by an employer).[219] Weighing in favor of narrow-scope readings is the emphasis Congress placed on "the reactions of others" as constituting disability under the regarded-as prong.[220] But for reasons overlapping those concerning impairment, it seems legitimate to foreclose narrow-scope readings of "major life activities" also. Where an employer has a particular activity in mind, but only a relatively minor one, then the employer's exaggerated emphasis on that activity is (1) likely to be job related, and (2) unlikely to be pervasive in society. Of course, if the employer additionally views the employee as limited in a particular major life activity *in fact*, or more generally in "some major way or other," then the employee may have a claim under a wide-scope de re or a de dicto reading of the regarded-as prong.

Relatedly, one box in the Readings Matrix warrants more discussion. Box IV combines a wide-scope de re reading of "impairment" with a narrow-scope de re reading of "major life activities." The example given is one in which Sonia

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217. This view would likely be upheld under the current state of the law, as it falls in Box I of the Readings Matrix. *See supra* Table 1. I raise it here in order to show how wide- and narrow-scope de re structures yield different results, and why narrow-scope de re readings may legitimately be rejected as intended readings.

218. *See, e.g.*, Chenoweth v. Hillsborough County, 250 F.3d 1328, 1329-30 (11th Cir. 2001) (holding that driving is not a major life activity); Colwell v. Suffolk County Police Dep't, 158 F.3d 635, 643 (2d Cir. 1998) (same).

219. The portion of the House Report that speaks to major life activities is found at H.R. REP. NO. 101-485, at 52-53 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 334-35.

220. *Id.*

regards John as having epilepsy (a legal impairment), and regards him as being substantially limited in driving to work (not a major life activity). The rule I have proposed thus far—that any reading in which either "impairment" or "major life activities" is narrow-scope de re—might not cover John on these facts. In this context, however, we might find it problematic if the plaintiff's epilepsy-as-regarded did not support a cause of action only because of the employer's narrow view of the effect of epilepsy—that it merely limits driving to work. But this problem disappears if we recognize that Box IV represents a plausible state of mind only for impairments that usually limit only minor activities. If the impairment at issue is one generally thought of as serious, then it will not be plausible that the regarder views the employee as limited only in a particular, unimportant activity. In the case of epilepsy, an impairment widely viewed as limiting across a spectrum of activities, an employer who regards the plaintiff as epileptic can be assumed to regard the plaintiff as limited not only in driving to work, but also in *some* (specified de re, or unspecified de dicto) other activity of importance.[221] If the courts permit a broad array of evidence relevant to perceptions of impairment and limitation, then the plaintiff would have the opportunity to demonstrate that his case falls in Box I or Box VII (wide-scope de re or de dicto with respect to "major life activities").

To summarize, I propose recognizing de dicto readings of "impairment" and "major life activities" as valid (as well as the wide-scope de re readings that the courts have thus far favored) but not recognizing narrow-scope de re readings. This leaves the following Matrix of intended readings: the corner Boxes I, III, VII, and IX (shown in white, with the ruled-out readings in gray).

221. *See* Bagenstos, *supra* note 164, at 502 ("[E]pilepsy is widely 'regarded as' a condition that substantially limits a variety of major life activities."). By contrast, a relatively minor impairment, such as a temporary ear infection, may be regarded as limiting activities that are not "major" (such as swimming) without triggering the implication that "major" life activities must also be limited—such a scenario thus should remain in Box IV, outside the intended coverage of the regarded-as prong.

Table 3.
INTENDED READINGS OF THE REGARDED-AS PRONG (IN WHITE)

Sonia regards John as having an impairment that substantially limits one or more of his major life activities.

READINGS OF "MAJOR LIFE ACTIVITIES"	READINGS OF "AN IMPAIRMENT": WIDE-SCOPE DE RE	READINGS OF "AN IMPAIRMENT": NARROW-SCOPE DE RE	READINGS OF "AN IMPAIRMENT": DE DICTO
WIDE-SCOPE	**Box I** John has *epilepsy*, which substantially limits his ability *to work in a broad class of jobs.*	**Box II** John is *left-handed*, which substantially limits his ability *to work in a broad class of jobs.*	**Box III** John has *an impairment* that substantially limits his ability *to work in a broad class of jobs.*
NARROW-SCOPE	**Box IV** John has *epilepsy*, which substantially limits his ability *to drive to work.*	**Box V** John is *left-handed*, which substantially limits his ability *to drive to work.*	**Box VI** John has *an impairment* that substantially limits his ability *to drive to work.*
DE DICTO	**Box VII** John has *epilepsy*, which substantially limits some of his *major life activities.*	**Box VII** John is *left-handed*, which substantially limits some of his *major life activities.*	**Box IX** John has *an impairment* that substantially limits some of his *major life activities.*

We can thus allay concerns that permitting de dicto interpretations of the regarded-as prong will lead to an infinitely contestable, open-ended notion of disability, such that anyone might be able to bootstrap their circumstances into an ADA claim.[222] If narrow-scope de re readings are excluded, then cases that do not speak to the harms targeted by the ADA will not survive past the disability definition threshold. Such an approach remains faithful to the statutory text at the same time that it engages an inquiry into the harms the ADA was meant to redress.

222. Of course, literally *anyone* (if only theoretically everyone) may be considered disabled under the ADA, as Congress surely intended by including the regarded-as prong (and notwithstanding the statutory findings that disabled people number a discrete forty-three million, to which the *Sutton* Court attributed much significance), if in fact they are regarded as disabled by a covered entity.

Even after constraining the doctrine by rejecting certain readings, a further objection to the entire program of exposing and resolving ambiguity in the ADA might go as follows. Congress is not a linguist, and Congress has probably never heard of de dicto and de re. If so, and if it takes some knowledge of linguistics to tease apart nine formally distinct readings of the regarded-as prong, then how can we say Congress intended to convey a certain subset of those readings? If the bench and the bar have not seen ambiguity in the statute, is that in itself not a strong indication that Congress had only one interpretation in mind, the one followed by nearly all courts thus far?

The problem with this reasoning is that it confuses tacit knowledge of language—what we all, including Congress, demonstrate when we communicate in our native languages—with the express, expert knowledge that it takes to *describe* what we are doing. The de dicto-de re distinction is nothing more than a shorthand for what all English speakers know in practice: for example, "I am looking for an earring" probably means I have lost my (de re) earring, but "I am looking for a taxi" probably does not mean I have lost my taxi. The fact that only a relative handful of linguists and philosophers can advance a theory of how this knowledge of ambiguity works does not mean that the rest of us cannot continue to use it daily. By the same token, Congress's lack of express awareness of the ambiguity it wrote into the ADA should not prevent us from exploring the full range of intended meanings available under the statute.

V. APPLICATION TO CASE LAW

Thus far, in order to highlight ambiguity in the regarded-as prong, I have drawn on examples that may seem at the fringes of disability discrimination, such as the "reference letter scenarios" in Part I and in the Readings Matrix. Without conceding the importance of these hypotheticals in illuminating a flawed ADA jurisprudence, there are in fact significant classes of litigation that would fare differently if de dicto readings were validated by the courts. These include cases involving (1) claimants with stigmatized impairments, (2) claimants who are considered "not disabled enough" to meet the actual disability prong, and (3) claimants who are regarded as disabled by proxy.

A. Stigmatized Impairment Cases

Cases involving impairments associated with stigma have tended to fall victim to the major-life-activities criterion, though there is evidence that

Congress intended them to come within the sweep of the regarded-as prong.[223] These cases correspond to Box VII of the Readings Matrix, in which the regarder has in mind a particular impairment but no particular major life activity. A de dicto reading of "major life activities" would change the nature of the proof required of claimants. A plaintiff would meet the definition if she could show that she was regarded as limited in some important but indeterminate way.

Claims involving stigma are a good fit for a de dicto reading of "major life activities" because the reactions of employers are not based on the employee being limited in a particular way, but on a view of the individual as limited in general as a function of stigma. Stigmatized impairments tend to be regarded as more limiting than they in fact are, in part due to what has been termed the "spread effect" of stigma.[224] By this mechanism, a range of limitations that are not rationally related to the impairment are attributed to the individual with a stigmatized impairment.[225] For example, mobility-impaired individuals who use wheelchairs are often regarded as being cognitively impaired.[226] Samuel Bagenstos has proposed that stigmatic impairments be considered per se disabling under the regarded-as prong.[227] The analytical link he asserts between stigma and the statutory language is this: major life activities include those for which the inability to do them results in stigma.[228] An ambiguity-based account forges a firmer link. The de dicto reading of "major life

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223. S. REP. NO. 101-116, at 24 (1989) ("This third prong is particularly important for individuals with stigmatic conditions that are viewed as physical impairments but do not in fact result in a substantial limitation of a major life activity. For example, severe burn victims often face discrimination." (citing Sch. Bd. v. Arline, 480 U.S. 273, 285 (1987); Thornhill v. Marsh, 866 F.2d 1182 (9th Cir. 1989); and Doe v. Centinela Hosp., No. 87-2514, 1988 WL 81776 (C.D. Cal. June 30, 1988))).

224. CHRISTOPHER G. BELL & ROBERT L. BURGDORF, U.S. COMM'N ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 25 (1983).

225. *See* ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 5 (1957) ("We tend to impute a wide range of imperfections on the basis of the original [stigmatized trait]."). For a summary of Goffman's work on stigma as it may pertain to the definition of disability, see Bagenstos, *supra* note 164, at 436-39.

226. Bagenstos, *supra* note 164, at 424.

227. *Id.* at 528 (proposing that impairments that frequently provoke discrimination and exclusion be considered disabling per se under the regarded-as prong). In their book, Susan Starr Sered and Rushika Fernandopulle use the term "caste" rather than stigma, but their findings resonate with Bagenstos's position. SUSAN STARR SERED & RUSHIKA FERNANDOPULLE, UNINSURED IN AMERICA 169 (2005) ("Set apart – that is the essence of caste.").

228. Bagenstos, *supra* note 164, at 446 (positing that "major" life activities are those that constitute being considered "normal," i.e., not marked by stigma).

activities" amounts to direct textual support in the regarded-as prong for Bagenstos's move from stigma to limitation in the mind of the regarder.

Relating stigma to the regarded-as language is crucial in cases where impairment-based stigma is driving the decision maker, but where the impairment is not a "core" disability. Tooth loss and obesity are two such conditions. Just like many people with traditionally recognized disabilities, an adult who is visibly missing one or more teeth is severely disadvantaged in employment opportunities,[229] as well as by important indices of health.[230] The two published federal cases considering whether tooth loss is a disability hold that it is not, under either the actual-disability or regarded-as prong.[231] Plaintiffs in both cases lost on the major-life-activities issue, relying on working[232] or working and speaking.[233]

On a de dicto reading of the regarded-as prong, the inquiry would look very different. Rather than examine discrete activities, the court would demand a showing that the employer regarded the employee as limited in some major respect, with or without any particular activity in mind. In terms of the employer's specific conduct, statements in the record indicating disgust,[234] an

229. *See* SERED & FERNANDOPULLE, *supra* note 227, at 168-69 (describing teeth as among the "clearest outward markers of caste" and observing that "[t]hough poor teeth or obesity may not cause someone to lose a job, either condition can certainly interfere with getting a good job"); DAVID K. SHIPLER, THE WORKING POOR: INVISIBLE IN AMERICA 52 (2002) ("[P]eople who got promotions tended to have something that Caroline did not. They had teeth."); Malcolm Gladwell, *The Moral-Hazard Myth*, NEW YORKER, Aug. 29, 2005, at 44 (describing "bad teeth" as a major barrier to success in the job market).

230. *See generally* Catherine A. Okoro et al., *Tooth Loss and Heart Disease: Findings from the Behavioral Risk Factor Surveillance System*, 29 AM. J. PREVENTIVE MED. 50 (2005) (finding progressive correlation between tooth loss and heart disease); Akira Taguchi et al., *Tooth Loss Is Associated with an Increased Risk of Hypertension in Postmenopausal Women*, 2004 HYPERTENSION 1297.

231. Talanda v. KFC Nat'l Mgmt. Co. (*Talanda III*), 140 F.3d 1090 (7th Cir. 1998) (holding that a fast food counter worker with missing teeth was not regarded as substantially limited in a major life activity); Johnson v. Dunhill Temp. Sys., Inc. (*Johnson III*), No. 95 c 5698, 1997 U.S. Dist. LEXIS 16771 (N.D. Ill. Oct. 24, 1997) (dismissing the plaintiff's ADA claim as res judicata, but finding that, even if the claim were not precluded, a telemarketer who was fired when his supervisor realized he was missing many teeth would not satisfy the ADA's regarded-as prong), *aff'd*, No. 98-1067, 1998 U.S. App. LEXIS 12210 (7th Cir. June 5, 1998).

232. *Talanda III*, 140 F.3d at 1097-98.

233. *Johnson III*, 1997 U.S. Dist. LEXIS 16771, at *7-8.

234. S. REP. NO. 101-116, at 7 (1989) (citing the testimony of a wheelchair user, who was described as "disgusting to look at," as an example of disability discrimination).

extreme or segregating response,[235] or any other sign that the employer viewed tooth loss as so significant that it placed the employee outside the class of "normal" people,[236] would have been probative of the employer's perception of the plaintiff as limited in some unspecified, yet important, respect. Social science research could also be relevant to this showing, including evidence of the social meaning of toothlessness as signifying dependency and lack of thriving,[237] as would the fact that "toothless" in its figurative sense means "weak." Where this type of argument may initially meet with skepticism is in drawing the inference of *limitation* from negative reactions to impairment. But this is exactly the function of the spread effect of stigma: the tendency to exaggerate the limitations of people with stigmatized conditions.[238]

The records in both tooth loss cases are rife with evidence of discriminatory animus.[239] This is more likely to be true in stigmatized impairment cases,

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235. Talanda v. KFC Nat'l Mgmt. Corp. (*Talanda II*), 6 Am. Disabilities Cas. (BNA) 1321, 1324 (N.D. Ill. 1997), *aff'd*, 140 F.3d 1090 (7th Cir. 1998); *see also* S. REP. NO. 101-116, at 6 ("One of the most debilitating forms of discrimination is segregation imposed by others.").

236. Talanda v. KFC Nat'l Mgmt. Co. (*Talanda I*), No. 94-1668, 1996 U.S. Dist. LEXIS 7634, at *7 (N.D. Ill. May 31, 1996) (magistrate judge recommendation) (stating an allegation that the employer said of an employee missing teeth, "what concerns me is that you would even consider having someone like that on your service line"), *adopted in part*, 6 Am. Disabilities Cas. (BNA) 1321 (N.D. Ill. 1997), *aff'd*, 140 F.3d 1090 (7th Cir. 1998).

237. SERED & FERNANDOPULLE, *supra* note 227, at 168-69 ("[People] know very well what rotten teeth signify in America today.... [T]hey understand that teeth have become one of the clearest outward markers of caste.").

238. For a discussion of the spread effect in an ADA context, see Bagenstos, *supra* note 164, at 423-25. Bagenstos maintains that the ADA disability definition is flexible enough to ensure protection from discrimination based on new forms of stigmatizing impairment. *Id.* at 449-50. As a contemporary marker of subordinated status, tooth loss seems to fit this category. Linking tooth loss to something akin to the spread effect, Sered and Fernandopulle relate the "caste" marked by "rotten teeth" to notions of productivity in the workplace: "[M]embership in ... [this caste] carries a moral taint in addition to physical markings and occupational immobility. This taint is a product of the moral value that American society has traditionally placed on productive work and good health." SERED & FERNADOPULLE, *supra* note 227, at 16.

239. *See, e.g.*, *Talanda I*, 1996 U.S. Dist. LEXIS 7634, at *7 (reporting that the employer referred to an employee who was missing teeth as "someone like that," and said that she did not want to see "that mouth"). In *Johnson v. American Chamber of Commerce Publishers, Inc.* (later *Johnson v. Dunhill Temporary Systems, Inc.*), evidence that the employment action was animus-driven was circumstantial. Plaintiff Johnson was missing eighteen teeth but had a speaking style that compensated for his tooth loss. He was hired as a telemarketer based on a telephone interview. His training evaluations were positive and noted his "good speaking voice" and "nicely" read script. After the in-person training, however, he was terminated, allegedly because he mumbled and was not a "good match" for the job. Johnson v. Am. Chamber of Commerce Publishers, Inc. (*Johnson I*), No. 95 C 5698, 1996 U.S. Dist. LEXIS. 10505, at *2 (N.D. Ill. July 19, 1996), *rev'd*, 108 F.3d 818 (7th Cir. 1997), *dismissed sub nom.*

where there is an added measure of social tolerance of derision based on impairment.[240] Where discriminatory intent is easy to show, claims tend to live, or more often die, by the particularized major-life-activities issue. A de dicto reading removes this unwarranted hurdle. Moreover, the inquiry under this reading would count signs of animus as evidence of being regarded as importantly and substantially limited.

Like tooth loss claims, obesity cases under the regarded-as prong tend to lack proof of a particular major life activity in the regarder's mind. Further similarities are that obesity is an outward marker of class or caste,[241] and that it tends to be associated with an array of health problems.[242] To explain the error of a particularized inquiry in a case of obesity, I offer an anecdote of strategizing over an obesity case under the regarded-as prong in a healthcare context. This account shows in practical terms how asking about "the res" has an effect that might be called the "atomizing" of an otherwise integrated and meritorious claim. In this story, though, the questions came not from the bench but from advocates themselves.

As a legal services lawyer, I was involved in litigating an action under the ADA on behalf of a class of obese women who had been denied Medicaid coverage for medically necessary surgical services because of their body mass index.[243] We alleged that our clients were regarded as disabled, based on the state Medicaid agency's assertion that obesity is associated with major health problems. One afternoon we spoke by telephone with the pro bono coordinator of a private firm, seeking to partner with them in the litigation. Looking to assess the strength of our ADA case, the coordinator asked, "What is the major life activity your clients are regarded as being limited in?" At that instant, I could practically hear our case—or at least our chances of securing this firm's cooperation—deflate like a punctured tire. Our weak response: "One reason

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Johnson v. Dunhill Temp. Sys., Inc., No. 95 c 5698, 1997 U.S. Dist. LEXIS 16771 (N.D. Ill. Oct. 24, 1997), *aff'd*, No. 98-1067, 1998 U.S. App. LEXIS 12210 (7th Cir. June 5, 1998).

240. Indeed, the Seventh Circuit opinion itself contains a derisive joke referring to the plaintiff's tooth loss: "Unlike [the plaintiff], the Americans with Disabilities Act has teeth." Johnson v. Am. Chamber of Commerce Publishers, Inc. (*Johnson II*), 108 F.3d 818, 819-20 (7th Cir. 1997), *dismissed sub nom.* Johnson v. Dunhill Temp. Sys., Inc., No. 95 c 5698, 1997 U.S. Dist. LEXIS 16771 (N.D. Ill. Oct. 24, 1997), *aff'd*, No. 98-1067, 1998 U.S. App. LEXIS 12210 (7th Cir. June 5, 1998).

241. SERED & FERNADOPULLE, *supra* note 227, at 169.

242. *Id.* at 167 (noting the link between obesity and high blood pressure, musculoskeletal problems, and diabetes).

243. *See* Mendez v. Brown, 311 F. Supp. 2d 134 (D. Mass. 2004) (denying the defendant's motion to dismiss on the grounds that the plaintiff may show that obesity constitutes a substantially limiting impairment).

the state gives for its policy is the difficulty in getting obese patients to walk after surgery, so we can argue that the major life activity is 'walking.'" Silence on the line. We continued, "They also mention difficulty inserting a breathing tube in obese surgical patients, so we could argue that 'breathing' is the major life activity. Or maybe 'healing.'" The coordinator paused and said, "Let's look at these *one at a time*. Walking—are you really saying the state regarded your clients as substantially limited in walking? And if it's only walking postsurgery, that's not an activity central to daily life, is it? It's the same problem with breathing." By the de re reading the courts have espoused, it was difficult to argue with her on these points.

Why does this seemingly reasonable question that tracks the language of the provision—"What is the major life activity?"—have such a devastating impact on claims brought under that provision? I suggest that this is because, where the regarder has a negative response to an individual based on obesity or other stigmatizing impairment, she very likely has no particular activity in mind. Rather, the regarder may have a generalized, blanket notion of physical defect and limitation, a view that is not fully rational and that is given to the spread effect of stigma.[244] In fact, the very irrationality of stigma-triggered bias will work to the regarder's advantage under a particularized proof inquiry. The disconnect between the job and any possible functional limitation the plaintiff might identify may pass for evidence that the obese individual was not regarded as limited at all. To neglect the mechanism of stigma is also to distort the nature of the harm it visits on people with impairments. The problem is not one of misunderstanding (that is, a mistake as to how limited the individual is) but of bias attendant to a deviation from a norm, perhaps reflecting, in the words of the *Arline* court, "pernicious mythologies."[245] The effect of singling out individual major life activities for scrutiny is not to analyze the claim properly, but to atomize it. It makes the defendant's apprehension of the plaintiff—as so unfit as to render her "other" than normal—seem thin and diffuse, even though the stigma underlying the defendant's action may be a solid and well-recognized feature of the social landscape.

And yet in our obesity case, it remained clear to our clients that the state regarded them as too compromised by their excess weight for a procedure that

244. Bagenstos, *supra* note 164, at 412. Like tooth loss, obesity may fit well within the notion of new forms of stigmatic disabilities discussed by Bagenstos. *Id.* at 449-50.

245. Sch. Bd. v. Arline, 480 U.S. 273, 284 n.12 (1987). Note that what the Court was alluding to here was not a mere—or rational—mistake as to the condition of the plaintiff or her ability to function, as the *Sutton* dicta suggests it would have to be, but to a deep-seated visceral fear (in that case, a fear of contagion).

was inexpensive, unusually low-risk, and life-changing. Remaining faithful to the text of the definition, the inquiry might have been framed this way: if the state views an individual as too vulnerable to be a suitable candidate even for such services, can it be inferred that the state regards the plaintiff as limited in some important, if indeterminate, activity? For the regarded-as prong to apply on a de dicto reading, it is sufficient that the defendant's words and actions evince a view of the plaintiff amounting to, "Your mental or physical impairment makes you appear very limited in a way that 'normal' people are not limited." A broad, undifferentiated array of evidence would be relevant to prove this. In this way, seeking proof appropriate to a de dicto reading of "major life activities" can bring the inquiry into alignment with the nature of the discriminatory harm.

Cases involving stigmatized impairments at times elicit judicial commentary that recognizing such "minor" impairments as disabling would trivialize the experience of individuals who are "truly disabled."[246] Although tooth loss and obesity may not be considered core disabilities, discrimination against individuals based on these impairments hews very close to the heart of the harm of disability *discrimination* as a fear- or animus-based response to impairment. Reviving causes of action in such cases through a de dicto interpretation of disability would therefore mark a significant course correction in the ADA's drift away from its antidiscrimination goals.

B. Not-Disabled-Enough Cases

Cases in which the plaintiff is impaired and functionally limited, but not limited enough to be "actually" disabled, are similar to the stigma cases in some ways. Both fall within Box VII of the Readings Matrix because they involve a particular (de re) impairment that the employer has in mind, but the plaintiff cannot show that there is a particular major life activity in which she is regarded as being substantially limited. Plaintiffs in not-disabled-enough cases, however, often do have some functional limitation that relates to the job in question. And unlike claims based on tooth loss or obesity, which are perhaps newly and not uncontroversially understood as disabling, not-disabled-enough claims tend to involve the more surprising examples of disabilities that the ADA drafters assumed would be covered, and which tended to succeed prior to the ADA. Examples of claimants deemed not-disabled-enough include an

246. As the district court in a tooth loss case stated, "Indeed, the argument that the ADA extends to such minor injuries unjustly trivializes the impact of genuine disabilities on the lives of disabled persons." Talanda v. KFC Nat'l Mgmt. Co. (*Talanda II*), 6 Am. Disabilities Cas. (BNA) 1321, 1326 (N.D. Ill. 1997), *aff'd*, 140 F.3d 1090 (7th Cir. 1998).

industrial machinery operator with job-related carpal tunnel syndrome who could no longer perform her job duties[247] and a plaintiff with a back injury who was fired after failing to report to work without restrictions.[248]

What accounts for not-disabled-enough cases is a catch-22 concerning how one characterizes the activity at issue. If the plaintiff defines the activity broadly (e.g., working in a broad class of jobs), then the burden to show she is severely restricted across such a broad swath of activity is often insurmountable. On the flip side, if she characterizes the activity narrowly (e.g., lifting over twenty-five pounds unassisted, working in cold weather, ambulating after surgery), then the activity itself will not be regarded as "major." This problem is perhaps unavoidable under the actual-disability prong, where "major life activities" must refer to some identified res.

If read de dicto, however, the text of the regarded-as prong can provide a second layer of protection in cases that Congress arguably intended to cover but which fall through the cracks of the actual-disability definition. This is because the de dicto inquiry does not require plaintiffs to make a choice as to how to characterize "the major life activity." The plaintiff will argue, rather, that the aggregate weight of the evidence supports a finding that the employer regarded the plaintiff as limited in *some* major respect or other, and all evidence relevant to *any* sense of limitation from the regarder's perspective should be admitted as relevant to this showing. The reasoning by which this finding would be made could go like this: An employer who had a strong negative reaction to an employee's functional limitations, when those limitations were not severe, more likely than not regarded that employee as substantially limited in some activity that is central to daily life, whether or not the employer had any particular activity in mind. Examples of evidence that an employer regarded the employee as substantially limited in some major respect might include requesting a physical[249] or mental health[250] evaluation, granting a sabbatical for medical reasons,[251] discussing the plaintiff's possible "frail[ty]" or

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247. Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 187-88 (2002).

248. Kupstas v. City of Greenwood, 398 F.3d 609 (7th Cir. 2005) (affirming the lower court's grant of summary judgment for an employer because the plaintiff did not show that the employer perceived that a major life activity was affected).

249. Tice v. Ctr. Area Transp. Auth., 247 F.3d 506 (3d Cir. 2001) (holding that a medical exam request did not compel a finding that an individual was regarded as disabled).

250. Cody v. CIGNA Healthcare, 139 F.3d 595, 599 (8th Cir. 1998) (holding that an employer's "request for a mental evaluation . . . is not equivalent to treatment of the employee as though she were substantially impaired").

251. Benko v. Portage Area Sch. Dist., 241 F. App'x 842, 847 (3d Cir. 2007) (stating that employer's grant of a health related sabbatical is not evidence of regarding the employee as limited but shows only that the employer was aware of plaintiff's impairment).

vulnerability to a relapse of a serious illness,[252] basing a termination decision on the job being "too stressful" because of the plaintiff's impairment,[253] or describing the employee as "an 'extremely emotional' and 'irrational' individual."[254]

To highlight the difference a de dicto inquiry would make in a not-disabled-enough case, imagine that employer Sonia says to John, who is undergoing cancer treatment, "John, I am cutting your hours. You always look like I could knock you over with a feather." Under the de dicto inquiry, we would ask whether, if Sonia regards John as being so weak that that she would describe him this way, we can infer that she regards him also as being too weak to perform all of his major life activities without substantial limitation. Such an inference seems entirely reasonable. By contrast, we might expect that the prevailing de re inquiry would focus absurdly on the question, "Is remaining upright while being struck with a feather a 'major life activity' as a matter of law?"[255] This may sound far-fetched, but it echoes the reasoning of many courts as to the relationship between the plaintiff's evidence and the employer's state of mind vis-à-vis limitation. The common refrain, "This evidence shows at most that the employer regarded the employee as limited in [some discrete minor activity or performing the single job at issue]"[256] is not only a tacit

252. Sebest v. Campbell City Sch. Dist. Bd. of Educ., 94 F. App'x 320, 322-26 (6th Cir. 2004) (concluding that the plaintiff's known history of leukemia and a hiring board member's speculation as to his frailty and vulnerability to relapse did not raise a triable issue of fact as to whether plaintiff was regarded as disabled).

253. Ryan v. Grae & Rybicki, P.C., 135 F.3d 867, 872 (2d Cir. 1998) (stating that an employer's alleged belief that colitis made plaintiff's job too stressful for her at most demonstrated that the employer believed that plaintiff's job was too stressful for her).

254. Jacques v. DiMarzio, Inc., 386 F.3d 192, 204 (2d Cir. 2004) (quoting employer) (finding reversible error for jury instructions to the effect that an employer's statements as to plaintiff's irrationality supported an inference that the employer regarded plaintiff as disabled).

255. *See, e.g.*, Mack v. Great Dane Trailers, 308 F.3d 776, 781 (7th Cir. 2002). The Seventh Circuit in *Mack* circles close to a de dicto inquiry when it admits of the possibility that an employer's belief that an employee is limited in some discrete activity could evince a more general belief that the employee is limited in other ways. *Id.* at 781 ("There may well be cases in which, because of the nature of the impairment, one could, from the work-restriction alone, infer a broader limitation on a major life activity."). Yet the court returns to a de re approach, framing any such "broader limitation" in terms of a *particular* established major life activity. *Id.* ("An inability to lift even a pencil on the job might suggest an inability to lift a toothbrush . . . or to otherwise care for oneself . . . .").

256. *See, e.g.*, Murphy v. United Parcel Serv., Inc., 527 U.S. 516, 524 (1999) ("At most, petitioner has shown that [because of his hypertension] he is regarded as unable to perform the job of mechanic only when that job requires driving a commercial motor vehicle . . . ."); Kupstas v. City of Greenwood, 398 F.3d 609, 615 (7th Cir. 2005) ("At most, [plaintiff] can show that

rejection of a legitimate de dicto interpretation, but also an unreasonably cramped evidentiary approach, even on a de re reading.

C. *Proxy Cases*

Proxy cases may be the rarest of the case types discussed here,[257] but they make up an important category because they point out the absolute failure of the particularized de re inquiry to detect discrimination that is based on disability per se. I use "proxy" in a broad sense, meaning that some information known to the employer serves as a stand-in for disability. Examples of such information could include use of the term "disability" itself in connection with the plaintiff, the plaintiff's known receipt of public benefits for disabled individuals, or the presence of "disability studies" on the plaintiff's resume.[258] In terms of the Readings Matrix, these cases may fit into Box III, Box VII, or Box IX, depending on whether the regarder is relying on a proxy in regarding the employee as having an impairment (Box III) or being limited in a major life activity (Box VII) or both (Box IX).

The receipt of social security disability benefits could serve as a proxy for ADA disability in regarded-as cases. In *Lawson v. CSX Transportation, Inc.*, a diabetic plaintiff alleged that he told a prospective employer he had been "totally disabled" until recently and "was receiving social security disability benefits."[259] The trial court granted summary judgment in favor of the employer, holding that the plaintiff's limitations did not rise to the level of a disability under the actual-disability or record-of prongs. The Seventh Circuit

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[defendant] regarded him as unable to work in a specific job, the truck driver/laborer position [due to his back injury]."); EEOC v. Daimler Chrysler Corp., 111 F. App'x 394, 396, 400 (6th Cir. 2004) (finding that a plaintiff who had multiple musculoskeletal problems attendant to a hip replacement was regarded only as being unable to do a single job).

257. It appears that few cases have been argued explicitly as proxy cases. This is not surprising, considering the imperative from the courts to allege specific major life activities. This may simply be an instance of the bar following the lead of the bench, selecting cases and packaging legal claims according to the prevailing jurisprudence.

258. An interesting question is whether, in a period in which disability studies programs are proliferating in higher education, the mention of "disabilities studies" on an applicant's resume would support an inference that the employer regarded the applicant as disabled de dicto. This would make sense because, as in the context of race and Title VII, protecting nondisabled individuals who are associated with disability by proxy serves chiefly to protect people who are actually disabled. Such a claim could prevail only on a de dicto reading, where no particular impairment or major life activity need be alleged.

259. 245 F.3d 916, 921 (7th Cir. 2001); *see also id.* at 932-33 (Easterbrook, J., concurring) (arguing that an award of SSA disability benefits would not be conclusive evidence of disability because the ADA and SSA disability standards differ).

reversed and remanded for a factual determination of whether the plaintiff was disabled under either of those two provisions.[260] Conspicuously absent from this case was mention of the regarded-as prong.[261] With respect to the social security benefits, both the lower and appellate courts acknowledged that the ADA and social security definitions of disability are different.[262] But under the regarded-as prong, the known receipt of social security disability benefits could easily support the inference that the employer regarded the plaintiff as impaired and *somehow* significantly limited. This inference is reasonable at the very least because the Social Security Administration's definition of disability, being designed to ensure that only the "truly needy" receive scarce public benefits, is stricter than that of the ADA, which is designed to remove employment barriers to employable (and therefore less limited) individuals.[263]

But perhaps the most troubling failure of the de-re-only analysis is that, in a hypothetical case in which Sonia tells John simply, "I will not hire you because of your disability," John may not be able to invoke protection under the regarded-as prong. This may seem like a concern in theory only. However, several courts have suggested otherwise in holding that "[i]t is not enough . . . that the employer regarded that individual as *somehow* disabled; rather, the plaintiff must show that the employer regarded the individual as disabled *within the meaning of the ADA*."[264] Even where the employer's view of the employee is stated in ADA terms, the facts may not include the elusive "particular impairment or major life activity" that the courts require. Of course, we might predict that, if faced with stark and highly unlikely facts in which the employer has said, "I regard the employee as having an impairment that substantially limits a major life activity," courts would depart from a strict de re inquiry and find a way to determine that the regarded-as prong had been satisfied. But this is far from clear. For instance, in *Rotter v. ConAm Management Corp.*, the vice president of the employer company stated in an e-

260. *Id.* at 926, 929 (majority opinion).

261. Writing in concurrence, Judge Easterbrook doubted that the receipt of social security benefits could be relevant to a determination of disability other than under the record-of prong, at least in the instant case. *Id.* at 933 (Easterbrook, J., concurring).

262. *Id.* at 927-28 (majority opinion); Lawson v. CSX Transp., Inc., 101 F. Supp. 2d 1089, 1108 (S.D. Ind. 1999), *rev'd*, 245 F.3d 916 (7th Cir. 2001).

263. TOM BAKER, INSURANCE LAW AND POLICY 291 (2003) ("The definition of disability under the ADA is much more inclusive [than under workers' compensation law or social security disability insurance law].").

264. Colwell v. Suffolk County Police Dep't, 158 F.3d 635, 646 (2d Cir. 1998) (first emphasis added); *see also* Capobianco v. City of New York, 422 F.3d 47, 57 (2d Cir. 2005); Jacques v. DiMarzio, Inc., 386 F.3d 192, 201 (2d Cir. 2004); Bailey v. Ga.-Pac. Corp., 306 F.3d 1162, 1170 (1st Cir. 2002); Ross v. Campbell Soup Co., 237 F.3d 701, 709 (6th Cir. 2001).

mail about the employee, "He is ADA and in the past has complained . . . that I have been discriminatory."[265] That court held that this evidence did not raise an issue of fact as to whether the employee was regarded as disabled within the meaning of the ADA.[266]

To dramatize the problems created by a misplaced de re inquiry as applied to proxy cases, consider the proposal that Title VII of the Civil Rights Act of 1964 should incorporate a regarded-as type of analysis for race discrimination claims. Using the ADA's regarded-as prong as a model, two commentators propose "a new method for recognizing discrimination claims based on the use of proxies for race—even when those proxies have been used in a way that mistakenly identifies someone as belonging to a certain race."[267] They intend such a legal theory to cover cases in which a feature of an individual, such as a name of African origin on an applicant's resume, stands as a proxy for blackness (or Latina/o-ness, or femaleness), and the employer discriminates on that basis.[268] But imagine if this were to take the shape of requiring that the plaintiff prove he was "regarded as being a person of color." A de re inquiry applied to this wording would result in this sort of demand of the plaintiff: "So, Jamal, *which* person of color were you regarded as being? Julian Bond? Barack Obama? No one? Well, then you have failed to show that you were regarded as being a person of color."

Where interpretation of a civil rights statute fails to capture the most clearly group-based examples of discrimination per se or by proxy, under the very mechanism designed to proscribe that discrimination, we are no longer talking about the mere narrowing or whittling away at the edges of that law. We are dealing with civil rights protection that has deteriorated at its core. What is left is a puzzling legal labyrinth that, even when successfully navigated, comes up short of systemic change in the law for people with disabilities. This process is reversible if we recognize that the culprit is not a close reading of irremediably flawed statutory language, but an unsophisticated approach to interpretation and its correspondingly inadequate proof inquiry.

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265. 393 F. Supp. 2d 1077, 1083 (W.D. Wash. 2005) (holding that an employer's general remarks about plaintiff's "[being] ADA" were insufficient to establish disability under the regarded-as prong).

266. *Id.*

267. Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being "Regarded As" Black, and Why Title VII Should Apply Even if Lakisha and Jamal Are White*, 2005 WIS. L. REV. 1283, 1289.

268. *Id.* at 1289-90.

VI. IMPLICATIONS FOR REFORM

A. The List of Major Life Activities

Reading the regarded-as prong de dicto would prompt the disability rights community to reconsider a current trend in disability rights law, whereby advocates seek to expand the list of those activities that qualify as "major." Recent successful attempts to add to the list of legally recognized major life activities include eliminating waste from the blood,[269] circulating blood,[270] and interacting with others.[271] Recent unsuccessful attempts include getting along with others,[272] driving,[273] and operating machinery.[274] The trouble with this legal strategy is that adding to this list has little to do with accomplishing the ADA's goals, while it also plays into a reductionist focus on isolated activities. As shown with the Yankees hypothetical, even a long list (indeed, even an enormous list naming every possible activity) will be of no use to plaintiffs whose employers had no particular major life activity in mind. A big-picture approach calling for de dicto interpretation would better advance disability rights.[275]

Under a de dicto analysis, there is no requirement that the plaintiff either select from a menu of recognized "major life activities" or try to break new ground by adding another item to the list. A case of far more impact than the list-expanding litigation would be one that argues that claims should not be

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269. Fiscus v. Wal-Mart Stores, Inc., 385 F.3d 378, 385 (3d Cir. 2004) (holding that kidney failure is disabling because eliminating waste from the blood is a major life activity).

270. Snyder v. Norfolk S. Ry. Corp., 463 F. Supp. 2d 528, 537 (E.D. Pa. 2006).

271. Jacques v. DiMarzio, Inc., 386 F.3d 192, 202 (2d Cir. 2004).

272. *Id.* at 202. The *Jacques* court discussed the difference between "interacting with others" (as an "essential, regular function") and "getting along with others" (an "unworkably subjective" category). *Id.* at 202-03; *see also* Davis v. Univ. of N.C., 263 F.3d 95, 101 (4th Cir. 2001) (rejecting a claim by a plaintiff with multiple personality disorder where an inability to get along with others was a basis for termination).

273. Yindee v. Commerce Clearing House Inc., 16 Am. Disabilities Cas. (BNA) 1563, 1566 (N.D. Ill. 2005).

274. Corley v. Dep't of Veterans Affairs, 218 F. App'x 727, 732-34 (10th Cir. 2007).

275. Of course, this argument can be advanced without invoking the de dicto-de re distinction by name. Advocates might distinguish "referential" (de re) from "nonreferential" interpretations, or the employer's "specific" (de re) from "general" (de dicto) regard of the claimant as disabled. The latter approach would resonate with a distinction drawn in the law of wills between a "specific legacy" (e.g., a gift of "my car," meaning a particular car at the time the will is executed) and a "general legacy" (meaning whatever car the testator owns at the time of death). *See* PETER M. TIERSMA, LEGAL LANGUAGE 123 (1999).

tethered to a list under the regarded-as prong at all. This would move advocacy away from carving up the category of disability into parts that are not constitutive of disability as a concept even when taken together. What is constitutive of disability is a generalized perception of impairment and limitation, perhaps compounded by fear or other aversion, that then results in further limitation—in other words, facts covered by de dicto readings of the regarded-as prong.

Concededly, the de dicto inquiry does not speak to the actual-disability prong, which is not de dicto-de re ambiguous. The list-expanding approach would therefore likely continue as a byproduct, if not a strategy, of litigation under the actual-disability prong, even if the de dicto inquiry were to take root within regarded-as jurisprudence. If the regarded-as jurisprudence were interpreted to capture de dicto readings, however, it would cover many claims that are today failing to meet the actual-disability standard. As the National Council for Disabilities has stated, the regarded-as prong, properly clarified, "would become the vehicle for dealing with most complaints of disability discrimination."[276] Focusing on the length of the major-life-activities list, then, may distract the disability rights movement from the potential of a reinvigorated regarded-as prong.

B. ADA Restoration Act

Returning to the metaphor of the ADA's disability definition as a quirky Victorian house, the question confronting reformers can be compared to one faced by purchasers of an old home with a sagging staircase, odd floor plan, and other flaws: shall we consider this a fixer-upper, a candidate for remodeling, or a tear-down project? With blame for the current state of the law on the statutory language, the current proposal to make the ADA livable is to remodel it by legislative amendment through the ADA Restoration Act. The proposed legislation would preserve much of the statute's existing structure, including the three-pronged disability definition.[277] An important change is that the Act would eliminate any mention of major life activities.[278] Instead, it

276. NAT'L COUNCIL ON DISABILITY, RIGHTING THE ADA 111 (2004), *available at* http://www.ncd.gov/newsroom/publications/2004/pdf/righting_ada.pdf.

277. ADA Restoration Act of 2007, H.R. 3195, 110th Cong. § 4 (2007); *see also* Bagenstos, *supra* note 21 (discussing the effect and likelihood of passage of various provisions of the ADA Restoration Act proposed in 2006).

278. H.R. 3195, 110th Cong. § 4.

would forbid discrimination "on the basis of disability"[279] and would define "disability" under all three prongs in terms of impairment alone.[280]

The end result of a de dicto-de re analysis is consistent with the aims of the ADA Restoration Act. Moreover, the Act has other important provisions not addressed here, such as an amendment defining impairment without taking mitigating measures into account.[281] But in at least one respect, the Act might carry over the shortcomings of the current law. The proposed regarded-as prong, just like the existing statute, is de dicto-de re ambiguous with respect to "an impairment." Read de re, the regarder must have in mind some res as an impairment; read de dicto, the regarder need only regard the plaintiff as impaired in an unspecified way. Thus, even under this remodeled statute, courts may still be asking "what is the impairment" in cases where the employer may have no particular impairment in mind, such as in proxy cases.

One might discount this concern as a technical one unlikely to manifest itself in case law. But what we should learn from courts' tacit adoption of a de re inquiry and the proof required under it is (1) courts will overlook this ambiguity, and (2) the present tendency to disaggregate the inquiry—to see each evidentiary item as relevant only to discrete impairments and major life activities—indicates a reductionist tendency in the courts. This method could be trained on the notion of impairment as much as it has been in recent years on major life activities. In this way, the remodeled statute could still yield counterintuitive results, very much like the current law does today.

Despite this concern, the ADA Restoration Act would be a significant step forward for disability rights. The real worry on the part of advocates is that it will be difficult to pass.[282] If the ADA Restoration Act does not in fact pass, "fixing up" the interpretation of the disability definition to recover its lost readings could accomplish many of the goals of a legislative remodel.

C. *Implications of De Dicto-De Re Ambiguity Beyond the ADA*

De dicto-de re ambiguity is not limited to the ADA. Because large classes of constructions in English are formally ambiguous with respect to reference,[283]

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279. *Id.* § 5. The amended ADA would protect all individuals—not just disabled individuals—from disability-based discrimination. *Id.* This would shift the role of the disability definition from proving that one is in a protected class to proving causation.

280. *Id.* § 4.

281. *Id.*

282. Bagenstos, *supra* note 21.

283. *See* PARTEE ET AL., *supra* note 95, at 409-10.

we should expect many statutory, contractual, and testimonial contexts—in fact, any site of language use in law—potentially to give rise to this distinction. In a brief essay, one commentator has collected examples of de dicto-de re ambiguity in various legal contexts to illustrate this point.[284] Perhaps more instructive, though, is a chestnut case in statutory interpretation, *Whiteley v. Chappell*.[285] This case, often taught to law students, shows not only the potential of de dicto-de re analysis to solve interpretive problems and the missed opportunities to use it, but also the failure of commentators to correctly diagnose the problem.

The statute at issue in *Whiteley* made it a crime to fraudulently "personate any person entitled to vote."[286] The defendant had gone to the polls using the name of a registered voter who had died prior to the election. The court acquitted, reasoning that a dead person is not a "person entitled to vote" and that therefore it could not "bring the case within the words of the enactment."[287] Commentators routinely cite this decision as an example of extreme literalism leading to absurd results.[288]

But the *Whiteley* court was not adhering to literalism. Rather, it was uncritically adopting a wide-scope de re reading of the statute, ignoring equally literal de dicto and narrow-scope de re readings that better corresponded to legislative purpose.[289] The de re reading, assumed by the court and by many commentators to be the literal reading, requires that the defendant be pretending to be a particular person who is in fact entitled to vote. The de re

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284. Rodes, *supra* note 27, 627-31.

285. (1868) 4 L.R.Q.B. 146 (U.K.). For a casebook discussion of *Whiteley*, see HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS 1149-58 (1958).

286. *Whiteley*, 4 L.R.Q.B. at 147.

287. *Id.*

288. *See, e.g.*, LAW COMM'N & SCOTTISH LAW COMM'N, THE INTERPRETATION OF STATUTES, 1974, Law Cmnd. 21 & Scottish Law Cmnd. 11, at 18 n.66, *available at* http://www.scotlawcom.gov.uk/downloads/rep11.pdf (citing *Whiteley* as example of extreme literalism); HART & SACKS, *supra* note 285, at 1149-58 (characterizing *Whiteley* as an application of the "literal rule" wherein the "literal or linguistically most probable meaning" of the statute is determinative); MICHAEL ZANDER, THE LAW-MAKING PROCESS 146 (6th ed. 2004) (describing the *Whitely* opinion as a literal but irresponsible approach to interpretation); Sue Chaplin, *"Written in the Black Letter": The Gothic and/in the Rule of Law*, 17 CARDOZO STUD. L. & LITERATURE 47, 49 (2005) ("To take the law at its word in this instance, then, is to allow the impersonator of the deceased to go free . . . ."); Ian McLeod, *Literal and Purposive Techniques of Legislative Interpretation: Some European Community and English Common Law Perspectives*, 29 BROOK. J. INT'L L. 1109, 1111 (2004) (citing *Whiteley* as an example of "simple literalism").

289. Even defense counsel in *Whiteley* conceded that the defendant was "[v]ery possibly . . . within the spirit" of the statute. *Whiteley*, 4 L.R.Q.B. at 147.

inquiry asks, "What particular person did the defendant impersonate, and was that person entitled to vote?" On a de dicto reading, however, a "person entitled to vote" need not refer to a particular person; the statute is satisfied where one goes to the polls presenting oneself fraudulently as *a voter*.[290] On a narrow-scope de re reading, the statute is triggered where one fraudulently holds oneself out as a particular individual (the res), real or imagined, and pretends that such individual is entitled to vote.[291] If the court had acknowledged either of the latter readings in light of the statute's purpose, it would have reached the correct result. The *Whiteley* decision from 1868 may strike us as quaint, but the fact that we are training twenty-first century lawyers to consider it an application of literalism highlights a persistent lack of sophisticated interpretive methods in law.

CONCLUSION

Delicious ambiguity.

—Gilda Radner[292]

From the standpoint of disability rights, much of the ground that has been lost to the narrowing of the ADA's disability definition could be retaken, if only courts were to read that definition more closely. By "closely," I do not mean in a way that we would call conventionally lawyerly. That way—which may be better described as parsing than reading—is arguably what has charted the statute's errant course thus far. Rather, to read closely is to read with a mind open to possibilities of meaning, sensitive to context, and possessed of no more nor less specialized knowledge than the ordinary speaker demonstrates when John knocks on her door "looking for a dog." In short, to understand written language, we need to read it like a layperson (drawing on our natural linguistic

290. This reading may not be available if the reader finds the presence of "any" to push toward a de re reading, that is, to require reference. My informal polling finds that some speakers cannot register a de dicto reading with "any," although the narrow-scope de re reading is unaffected by "any."

291. To see the difference in the logic of these readings, using "pretend to be" as a more familiar semantic equivalent of "personate," consider these structures, which mirror the regarded-as constructions in Part II above:

> De dicto: John pretends [John is an *X* such that [*X* is a person entitled to vote]]
>
> Wide-scope de re: There is some *X* such that [[*X* is a person entitled to vote] and [John pretends to be *X*]]
>
> Narrow-scope de re: There is some *X* such that [John pretends [[John is *X*] and [*X* is a person entitled to vote]]]

292. GILDA RADNER, IT'S ALWAYS SOMETHING 10 (1989).

intuitions) or like a linguist (with the expertise to describe those intuitions). It is when we try to read it with "in between" knowledge, following a seemingly sound but faulty proof inquiry, that interpretation goes to the dogs.

If this is correct, then it seems that we in the disability rights community have gotten several things backward in our understanding of the shortcomings of the ADA. First, we have blamed the language of the disability definition. While that language is far from perfect, it is capacious enough to do the work of advancing disability rights, particularly through a reinvigorated jurisprudence of the regarded-as prong. Second, we have acquiesced to the courts' so-called literal interpretation of that language, when this supposed literalism is actually inattentive interpretation masquerading as strict adherence to the statute. Finally, to the extent that hopes for reform have been (and still are) tied to the "big prize" of amending the disability definition, we have missed opportunities to reshape the law around the statute as currently written.

There is another way through this problem, stopping short of legislation. Disability rights advocates can shake hands with a new friend: textual literalism. If this approach is applied to expose ambiguity, then a little literalism—just enough to pry open the door to legislative history for use in interpreting the ADA—will go a long way. The aim of this Article is to provide the linguistically rigorous means to undertake this task and to forge an analytical link between the language of the ADA and the insights of commentators and advocates as to how disability law might be "righted." With nothing more than ordinary intuitions about the meaning of complex sentences—and a way to describe this knowledge—the disability rights movement can take back the text of the ADA.