AAPL Guideline for Forensic Evaluation of Psychiatric Disabilities: A Disability Law Perspective

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Contemporary disability law takes into account the insight that physical and mental conditions need not be disabling but for the environmental and attitudinal barriers that keep people with disabilities from social participation on a plane of equality with others. The need to use a wheelchair does not disable except for curbs and stairs, and many mental conditions do not disable except for social attitudes. The "AAPL Guideline for Forensic Evaluation of Psychiatric Disabilities" is a refreshing departure from writings that approach disability from a perspective that focuses on nothing but medical considerations and the study of how individuals are defective compared with established norms. The Guideline stresses the process of examination and list important legal considerations for examiners to apply. But the Guideline does not show any awareness of a model of disability other than a medical one that classifies individuals by defect. Psychiatrists would do well to consider the role of social barriers when using the Guideline in making disability-related examinations.

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The central insight of the disability rights movement and contemporary disability law is that physical and mental conditions do not necessarily disable. Instead, disability is created by the dynamic between physical and mental conditions on the one hand and, on the other, environmental and attitudinal barriers that keep people with disabilities from full participation in society. In the most common illustration, paraplegia does not in itself disable, but for stairs, curbs, and thresholds that keep people who use wheelchairs for mobility from obtaining access to interior and exterior spaces. A physical or mental condition likewise need not be disabling from most employment, but for the attitudes displayed by some employers who will not hire persons with disabilities, even though they are perfectly capable of doing jobs if given modest accommodations. The human-created barriers that exclude persons with disabilities from social and economic opportunities are similar to attitudinal barriers that discriminate against members of many minority groups[1] and justify legal antidiscrimination initiatives, such as the Americans with Disabilities Act (ADA).

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This social relations, or civil rights, model of disability contrasts with a medical model, which focuses on the deviance of the person with a disability from the physical or mental norm and proceeds from there to place attention on fixing the defect or adjusting the psyche of the person to his or her limits. The medical model emphasizes the individual's restrictions and lends itself to identifying and excluding that individual if he or she cannot be made functionally normal. By contrast, the social or civil rights model of disability emphasizes eliminating barriers in the society that keep persons with disabilities from being fully integrated. Over the past generation, the challenge to the medical model and embrace of the civil rights model have energized a movement of activists pressing for social change and led to development of the academic fields of inquiry of disability studies and disability law.

In the legal arena, the civil rights approach has stimulated support for antidiscrimination law and laws promoting integration of people with disabilities into the mainstream of public life on a plane of equality with people who do not have disabilities. The insight about attitudinal barriers in restricting access of people with disabilities has given inspiration to a cadre of civil rights lawyers who handle disability discrimination cases and other law reform initiatives.

Medical intervention will always be a part of the lives of people with disabilities. But the emphasis in disability studies and disability law is not on the medical fix but on social change. Law is an apt means to accomplish that social reform.

What does a disability law approach have to say about the "AAPL Guideline for Forensic Evaluation of Psychiatric Disability"?[2] In the first place, Bravo! The Guideline does not wallow in defect-ology. In fact, it stresses process, notably the process that a treater or evaluator should go through in rendering opinions about psychiatric disability in relation to eligibility for various forms of public and private benefits, fitness for duty, return to work, and the like. The Guideline does not attempt to define disability. Instead, it sets out legal considerations and outlines helpful steps to go through in forming and rendering opinions to be used by others who must determine disability.

On second thought, however, the reaction may be a little more reserved. The Guideline does not evince any awareness of a social model of disability or a civil rights approach to disability in society. This is, of course, understandable. The purpose of the Guideline is to be a practical tool for conducting evaluations under legal regimens that, except for the ADA, long predated the civil rights model. The Guideline refers to the Social Security listing of impairments, the *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision*,[3] and the American Medical Association's "Guides to the Evaluation of Permanent Impairment,"[4] documents that of necessity are about mental and physical defects, because the programs in which they are used call for screening on the basis of mental and physical impairments. Those programs' documents embody—some might say entrench—a medical model, because their mission is to define in medical terms who is disabled and who is not.

Treatment of ADA evaluations in the Guideline illustrates the stubborn persistence of the medical model. Although the ADA represents an effort to escape the medical model of disability and recognize the importance of the environment in disabling people, its drafters felt a need to limit the persons covered by the Act. Unlike, say, title VII of the Civil Rights Act, which forbids employment discrimination on the basis of race, color, sex, and religion for all persons of any race, color, sex, national origin, or religion, the ADA protects only qualified persons with disabilities from disability discrimination. Under the Act, the universe of persons with disabilities is limited to persons with a mental or physical impairment that substantially limits a major life activity of that individual (or who has a record of such an impairment or is regarded as having such an impairment).[5] As long as that definition is in place, psychiatric evaluation must focus on medically determinable impairments and limits on life activity to identify persons who are covered under the Act. The ADA attempted to move away from defect-ology and the medical model in general by avoiding a listing of impairments that qualify an individual for protection, but it could not avert creating a definitional term, because of the political necessity of imposing some limits on the population that the Act embraces.

In fact, under the ADA, disability determination matters are more complicated than even that description entails, and this complication demonstrates one weakness in the AAPL Guideline's text, even when approached under the Guideline's own terms. As the Guideline recognizes, examiners making an evaluation of an individual in connection with ADA claims need to discuss the existence of a mental impairment, and how the impairment substantially limits a major life activity of the individual. The Guideline does not alert examiners, however, to the potential contradiction between being disabled enough to be covered under the Act but not so disabled as to lose the status of a qualified individual. There is some risk that an examiner may inadvertently overstress limits on an individual's activities without being aware that such overestimation may make it harder for the individual to establish that he or she can perform the essential functions of the job when reasonable accommodations are provided. The problem is the Catch-22 the Act creates because of the term "qualified individual with a disability." The strict standard of disability that many courts are applying leaves few persons covered by the Act, and those who are covered are unlikely to meet a strict standard for being qualified.

Perhaps even greater pitfalls exist when evaluating individuals who are pursuing both Social Security Disability Insurance benefits and an ADA employment discrimination claim. If an examiner provides data supporting the conclusion that the person is unable to engage in previous work or substantial gainful work that exists in the national economy, it may be hard to support the proposition that the in-

dividual is nevertheless able to perform the essential functions of a job that he or she has applied for or seeks to be restored to. In fact, at one time, many courts threw out ADA employment discrimination claims when the person bringing the claim had applied for Disability Insurance benefits, on the ground that once the claimant said he or she was unable to work, he or she was legally estopped from stating that he or she could perform the essential functions of the job being sought.

In *Cleveland v. Policy Systems Management Corp.*, the United States Supreme Court recognized that the two statements are not necessarily incompatible but instead are "often consistent."[6] Justice Breyer wrote that the Disability Insurance standard does not take into account the availability of reasonable accommodations. It may well be the case that a claimant can perform a job with reasonable accommodations (the ADA test) but be unable to perform that job or other jobs available in significant numbers in the national economy without accommodations (the Disability Insurance test). The opinion also noted that the rules of the Social Security Administration provide for eligibility simply on the basis that an individual is not currently working and has an impairment that meets or equals one of the impairments listed in the Social Security regulations. Thus, the inability to work at any job available in significant numbers in the national economy is not even considered in the eligibility process for many applicants because they have a listed impairment or the equivalent medical condition. The Court said that there should be no estoppel or even presumption of a disqualification from bringing an ADA claim if the person has applied for or received Disability Insurance benefits. The claimant must simply offer a sufficient explanation of any inconsistency between the statements on the Disability Insurance application and the claim of being qualified for the job in the sense of being able to perform the job's essential functions with or without reasonable accommodations.

The *Cleveland* case suggests the way out of the ADA's disabled-individual-yet-qualified-not-so-disabled-individual dilemma as well. A psychiatric examiner may opine that the individual's mental impairment substantially limits a major life activity and yet still leave open the prospect that the individual could perform the essential functions of a job if that person received reasonable accommodations from the employer. What the examiner should not do is write the evaluation in such a way as to give unintentional support to an unwarranted inference that a job previously held or now being sought would be impossible when creative accommodations, perhaps even those beyond the imagination of the examiner, would make the job's essential functions possible to perform. Looking to job descriptions to make determinations about essential functions is a particularly perilous step. As with the recently leaked Wal-Mart memo directing that job descriptions be rewritten to discourage persons with medical conditions from working there,[7] the employer's description of the job may simply be its form of special pleading on the qualification question. Many a job is far different from its formal description, and employers have an incentive to exaggerate the differences between description and reality if the inclusion of what are really nonessential tasks insulates them from otherwise justified ADA claims.

These observations are less a criticism of the Guideline, which, after all, is tied to the pre-civil-rights model laws that form their legal groundwork, than a plea for examiners using them to be aware of the civil rights model and alert to the reality that attitudes and environments disable as much or more than impairments do. An examiner evaluating a claimant for Disability Insurance has to recognize that the person being examined may be unable to perform work that exists in significant numbers in the national economy not because of his or her mental impairment, or at least not because of the impairment alone. The reason may be that employers often consider behavior that is merely eccentric to be frightening or are unwilling to tolerate mental differences that do not actually affect job performance. Similarly, an examiner may conclude that in light of popular attitudes, an impairment affecting judgment, self-control, or maintenance of interpersonal relationships would substantially limit major life activities of thinking, self-expression, working, or performing activities of daily living, when the person is quite able to perform the essential functions of a given job if the employer made the reasonable accommodation of tolerating harmless oddities in behavior.

Could the pre-civil-rights model laws to which the Guideline relates be reformed to take into account a civil rights model of disability? Professor Martha Minow has made the thought-provoking suggestion that legal classification of persons might be able to be

done away with if those designing social policy and making judicial decisions paid attention to the relationships between people rather than trying to categorize the people.[8] Thus, the Social Security Act might be rewritten in terms that focus on the potential relationship between the applicant for benefits and the employers who control access to jobs and provide compensation when the needs of the one are too far apart from the accommodations in fact being offered by the other. The definitions of who is covered by the ADA could be reinterpreted to pay attention to which conditions are most stigmatizing such that employers or others bound by the law are least likely to consider entering into an employment or other relationship with the individuals with those conditions.[9] The ADA would grant protection to individuals whose physical or mental impairments are considered a stigma that is likely to become an obstacle to the desired relationship, in the absence of legal intervention.

At present, however, last-generation social initiatives such as Social Security Disability Insurance and workers' compensation and even current-generation reforms such as the ADA, by their own terms, have definitions of disability, some more rigid and medically oriented than others. So it is up to practitioners to be aware of the role of the physical and attitudinal environment in creating disability and to apply their psychiatric expertise to the task of making disability examinations that will fit with what the law demands while not inadvertently causing any denial of legal protection.

One additional observation should be made that is unrelated to evaluation of the Guideline based on the civil rights model. The Guideline bypasses the topic of disability evaluation of children. This is an understandable choice, because the various legal regimens affecting children have unique requirements for them. For a child to be eligible for special education services under the Individuals with Disabilities Education Act,[10] the child must have one or more specific disabling conditions, and by reason of the condition or conditions, need special education and related services. The conditions include "mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities."[11] There is significant legal controversy at the present time over the proper scope of the definition, including the definition of some of the disabling conditions and the application of the requirement that the child, by reason of the condition, needs special education. Children who are deemed eligible are entitled to a free, appropriate public education that includes services related to education. These services must be provided to enable the child to be educated to the maximum extent appropriate along with children who do not have disabilities.

The test for Supplemental Security Income benefits from Social Security based on a child's disability is also unique. As with adult disability, the test asks whether the applicant is working and has a severe impairment. The test then asks whether the applicant's condition meets the criteria for the listing of impairments, but there is a separate Part B to the listing that is used only for individuals under the age of eighteen (although the child may still be found to meet the criteria for Part A if the criteria in Part B do not apply).[12] If the child's impairment does not meet or medically equal the criteria for a listed impairment, the test asks whether the child's condition functionally equals criteria for one or more of the listings. This determination involves the assessment of the effect of the condition on the child's ability to function at home, at school, and in the community, asking what activities the child can and cannot perform, which activities are limited in comparison to activities of children of the same age, and what type and degree of help the child needs to complete age-appropriate activities. The test takes this information and then considers how much the child is limited in six domains: acquiring and using information, attending and completing tasks, interacting and relating with others, moving about and manipulating objects, caring for himself or herself, and having health and physical well-being. If the child's condition "causes marked limitations in two of these domains, or an extreme limitation in one domain, then his or her impairment(s) functionally equals a 'listed impairment' "; a marked limitation is an impairment or impairments "that interferes seriously with the child's ability to independently initiate, sustain, or complete activities. An extreme limitation interferes very seriously with these abilities."[13]

The AAPL Guideline is a valuable resource, one that puts before the thoughtful psychiatric examiner the processes that should be undertaken when conducting disability-related examinations and takes up many of

the legal concepts to be considered. Happily, the Guideline does not simply classify defects or categorize impaired individuals. Instead, it focuses on what the law requires. Psychiatrists using the Guideline would be well advised, however, to consider not just individuals' impairments but also the dynamic between personal conditions and the attitudinal and environmental barriers that exist in society. Doing so will bring a richer understanding to the disability determination process itself and may point in the direction of institutional reforms as well.

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