Classification, Social Contracts, Obligations, Civil Rights, and the Supreme Court

Sutton v. United Air Lines

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ABSTRACT

This article analyzes the 1999 decision of the United States Supreme Court, *Sutton v. United Air Lines*, by asking four questions and showing how the majority of the Court answered them. It then sets out the significance for people with disabilities, including especially students covered by the Americans with Disabilities Act, the Individuals with Disabilities Education Act, and the antidiscrimination provisions (Section 504) of the Rehabilitation Act. It also sets out the implications of the decision for special and general educators as they engage in Individualized Education Program planning with students and their parents.

Introduction: Four Questions

CONSIDER FOUR QUESTIONS: FIRST, WHO IS "DISabled"? That's an old question, one that is fraught with philosophical, policy, and service-provision implications. Second, what does a person with a disability owe to society, and what does society owe to the person? That's another old question, raising concerns regarding the nature of the social contract and requiring us to revisit Rousseau and other Enlightenment philosophers. Third, what obligations, if any, does the person with a disability have to take initiative to blunt the effects of the disability? Again, another old question, subsumed under the social contract theory but sharpened by the technologies that progressively assist the person to mitigate the effects of the disability. Fourth, what kind of civil rights protections can people with disabilities expect from law and society today? That's a very current and controversial question.

What does the United States Supreme Court have to say in answer to these four questions? As one of the nation's three most powerful policy-making bodies (the president and Congress being the other two), the relevant views of a majority of the Court certainly warrant our attention. Those views are accessible in *Sutton v. United Air Lines* (1999).

The *Sutton* Case: Facts, Issues, Holding, and Rationale

The Facts

In *Sutton*, two twins, Karen Sutton and Kimberly Hinton, sued United Air Lines when the company refused to offer them positions as commercial airline pilots. The company was entirely candid about its reasons: Neither Karen nor Kimberly met the company's minimum vision requirement, which was uncorrected visual acuity of 20/100 or better (*Sutton*, p. 476).

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The twins' suit rested on the provisions of the Americans with Disabilities Act (ADA, 1990) that prohibit discrimination in employment against "otherwise qualified" individuals with a disability. Specifically, the twins alleged that United Air Lines had discriminated against them on the basis of their disability or because it "regarded" them "as having a disability" (*Sutton*, p. 476).

ADA prohibits discrimination in employment against qualified individuals with a disability because of the person's disability (§ 12112(a)). It defines *disability* as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual," and it protects a person who has such a disability, has a record of such an impairment, or is regarded as having such an impairment if the person, with or without reasonable accommodations, can, in spite of the disability, perform the essential functions of the position that the person seeks or already has (ADA, § 12102(2); *Sutton*, p. 476).

The twins' disability was "severe myopia"; each twin had uncorrected visual acuity of 20/200 or worse in the right eye and 20/400 or worse in the left eye. With the use of corrective lenses, however, each had vision of 20/20 or better. Without corrective lenses, neither could "effectively . . . see to conduct numerous activities such as driving a vehicle, watching television, or shopping in public stores" (*Sutton*, p. 475), but with corrective measures, such as glasses or contact lenses, each functioned "identically to individuals without a similar impairment" (*Sutton*, p. 475).

The Issues

On its face, then, the main issue in *Sutton* was whether ADA protects the twins; are they "otherwise qualified" individual beneficiaries of the statute and, as such, entitled to not be discriminated against because of their visual impairments?

Immediately below that issue clearly lay another: "whether disability is to be determined with or without reference to corrective measures" (*Sutton*, p. 481). Is a person who also can mitigate the effect of the disability by various technologies or other measures protected?

The Court's Holding

The Court held that ADA does not protect an individual with an impairment who can mitigate the effects of the disability:

> Looking at the Act (ADA) as a whole, it is apparent that if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures—both positive and negative—must be taken into account when judging whether that person is "substantially limited" in a major life activity and thus "disabled" under the Act. (*Sutton*, p. 482)

The Court's Rationale

The Court stated three reasons to support its conclusion. First, ADA defines *disability* as an impairment that "substantially limits" an individual's functioning in a major life activity. In an approach that can be regarded as Clintonesque (What is the meaning of "is"?), the Court parsed ADA and rested its decision (in part) on a verb tense:

> Because the phrase "substantially limits" appears in the Act in the present indicative verb form, we think the language is properly read as requiring that a person be presently—not potentially or hypothetically—substantially limited in order to demonstrate a disability. A "disability" exists only where an impairment "substantially limits" a major life activity, not where it "might," "could," or "would" be substantially limiting if mitigating measures were not taken. (*Sutton*, p. 482)

What bears noting is that just as some were especially critical of President Clinton for his lawyer-like defense in the Lewinsky matter (where the meaning of "is" was part of his defense), so the same and perhaps others seem warranted in faulting the Court for its similar reliance on the active verb tense in interpreting ADA.

Second, ADA requires an "individualized inquiry" whose purpose is to determine the effect of the impairment on the person's functioning. The issue is the present effect of an impairment on a person's functioning, not whether the condition that the person has automatically entitles the person to protection under ADA. Thus, in the case in which a dentist refused to treat a patient other than in a hospital operating room solely because the patient had HIV, the issue was not whether HIV itself is per se a disability under ADA but whether the dentist's decision constituted discrimination based on the effect of the HIV on the patient and the risk that the dentist may or may not be required to assume in treating the patient in or outside of the operating room (*Bragdon v. Abbott*, 1998).

Accordingly, in determining whether an individual qualifies for ADA protection, a court or an employer must be able to consider any positive or negative side effects "suffered by an individual resulting from the use of mitigating measures, even when those (negative) side effects are very severe" (*Sutton*, p. 484). Simply put, the individual, and only the particular individual, has a claim to ADA protection; merely having a condition (such as HIV or severe myopia) does not qualify the person for ADA protection, for ADA does not protect "members of a group of people with similar impairments" (*Sutton*, p. 508).

Third, ADA's legislative history requires the Court to conclude that Congress did not intend to protect "all those whose uncorrected conditions amount to disabilities" (*Sutton*, p. 485). Congress found that 43 million individuals are disabled; if the twins' position were to prevail, that number would be expanded to include between 100 and 160 million

individuals (*Sutton*, p. 485). The figure of 43 million "reflects an understanding that those whose impairments are largely corrected by medication or other devices are not 'disabled' within the meaning of the ADA" (*Sutton*, p. 486):

> Had Congress intended to include all persons with corrected physical limitations among those covered by the Act, it undoubtedly would have cited a much higher number of disabled persons in the findings [of fact in ADA]. That it did not is evidence that the ADA's coverage is restricted to only those whose impairments are not mitigated by corrective measures. (*Sutton*, p. 487)

Having set out the issues in *Sutton* and the reasons the Court gave for holding that mitigation displaces a person from ADA protection, let us now return to the four questions posed at the beginning of this article.

Classification

Who is "disabled"? Who is a person with a "disability"? In the view of the majority of the Court, a person with a disability is an individual who still is unable to function in one or more of life's major activities despite mitigating the impairment. Is this a defensible result?

An Illogical Result: Catch-22

Arguably, the result is not defensible. A person (i.e., Karen Sutton or Kimberly Hinton) has an impairment that limits her in the work for which she is otherwise (except for the disability) qualified, so she cannot obtain that work, but she is not protected under ADA and is unable to use that statute to challenge an employer's action that is based solely on the limitation. This seems illogical: The person is disabled from working at the job she wants, but she is also disabled from suing to remedy an employment decision that is patently based on her disability. It is a classic double-bind, the Helleresque Catch-22 (If you are crazy, then your request to not fly attack missions will be granted; but if you request to not fly attack missions, then you are obviously not crazy and must fly those missions.)

How does the Court's majority answer that double-bind, catch-22 criticism? What does it say about who is "classified" into the "disability" group? Its position is instructive and simultaneously encouraging but also troubling.

Individualized Inquiries: Due Process and Professional Practice

Let us begin with the "individualized inquiry" principle. There is no doubt but that due process requires individualized inquiries (*Bragdon;* see also 29 C.F.R. pt. 1630, App. § 1630.2(j)).

Constitutional principles aside, individualized inquiries are entirely appropriate as responses to disability. A "meat ax" approach in which one person with one trait (nature or type of disability) is treated identically with or similarly to others with the same or a comparable trait will disfavor some people with disabilities while simultaneously favoring others. Thus, if all people with mental illness or developmental disabilities were to be institutionalized (*Lessard v. Schmidt*, 1974; *Parham v. J. R.*, 1979), treated in the same way or not treated at all while in the institution (*Youngberg v. Romeo*, 1982), or discharged from the institution (*Olmstead v. L. C.*, 1999), or if all people with a physical disability were to be regarded identically and denied certain kinds of benefits—such as education (*Southeastern Community College v. Davis*, 1979; *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 1982) or employment (*School Bd. of Nassau Cty. v. Arline*, 1987)—the result would benefit some but not others (*Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*).

The disability advocacy community would not easily accept this result, which would limit some people while liberating others, nor would professionals, whose interventions are supposed to be individualized (Individuals with Disabilities Education Act [IDEA], 1990; Rehabilitation Act, 1973, §§ 504, 706(8)). Yet, group rights/claims are the principal objectives of disability advocacy (so that individuals may assert their own particular rights/claims) and are the very stuff of which a new discourse about rights, especially affirmative-action–based rights, has been carried out for at least the past 20 years (Glendon, 1991; *Hopwood v. State of Texas*, 1996; Minow, 1990).

Paternalism Revisited

Although the individualization principle is laudable, there is something troubling about it as the Court's majority in *Sutton* expressed it. Referring to the Equal Employment Opportunity guidelines requiring the determination of disability to be made in the absence of mitigating measures, the Court said that the guidelines

> could also lead to the anomalous result that in determining whether an individual is disabled, courts and employers could not consider any negative side effects suffered by an individual resulting from the use of mitigating measures, even when those side effects are very severe. (*Sutton*, p. 484)

What seems troubling about this passage is that it smacks of paternalism—the natural desire of those with public authority to protect especially vulnerable citizens from harm at the hands of the state or at the hands of private entities and indi-

viduals. The Court's language suggests paternalism because the Court is explicitly concerned about negative side effects that might result in the exclusion from ADA's protection of those who clearly have disabilities, who use mitigating measures but find that those measures are insufficient to fully correct the effects of a disability or have, themselves, negative side effects.

For example, a person with a mental illness may use medication but find that from time to time the medication does not blunt the illness; a person who is battling cancer might use medication but also find that the medication creates its own impairments. Each of these people experiences some negative side effects of mitigations; the fact that they do use mitigating measures should not, for that reason alone, exclude them from ADA's protection. Therefore, it is both right and paternalistic for the Court to be concerned about these people. At the same time, however, those who use mitigating measures but find no negative side effects are excluded from ADA's protection. So, does paternalism result in limitations? Apparently so.

This is not a new matter. When the state asylums were created, they were envisioned as safe havens and even training schools; their creation was motivated by altruism and paternalism (Rubenstein & Levy, 1996). Yet, asylums became institutional snake pits and have been the direct objects of some of the most effective disability advocacy of the past 30 years (*Wyatt v. Stickney*, 1971; *Parham v. J. R.*, 1979).

The lesson is clear and familiar. As the philosopher Lionel Trilling warned about altruism—here, paternalism—those who are the objects of our pity can become the objects of our study and then of our limitations (quoted in Rothman, 1980).

Competing Equities

The concerns about paternalism that are part of the "effects" (that is, "negative side effects") standard resurface in another part of the majority's opinion. One of the issues before the Court was whether United Air Lines (i.e., all current or prospective employers) "regarded" Karen Sutton and Kimberly Hinton (i.e., all persons who mitigate their disabilities' effects) as individuals with a disability. If United did so in violation of ADA, then the job seekers must not be eliminated from consideration as commercial airline pilots solely because they have mitigated their severe myopia.

Consider the position that United and other current or prospective employers face. If they must not discriminate against individuals who have mitigated their disabilities, they may put their customers at great risk. An error by a myopic pilot or by a person who sometimes uses or does not regularly use prescription drugs can lead to passengers' or other consumers' deaths and massive employer liability. Is that an acceptable result? No; public-safety concerns outweigh individual employment claims.

The balancing of individual versus general interests calls into play the theory of "competing equities." When interests or equities compete, it is sometimes justifiable to give an advantage to some people at the disadvantage of others; the "equities" (claims or interests) of the one outweigh the equities (claims or interests) of others. When, however, it comes to public safety, *Sutton* teaches that the equities favor the general, not the individual, interests.

The Court's own precedents make this result clear, and the precedents that *Sutton* follows are numerous. For example, educators who reject a deaf person from a nursing program because they are concerned about patient safety correctly balance public risk against individual benefit (*Southeastern Community College v. Davis*, 1979). Likewise, dentists who refuse to treat HIV-infected patients in their clinics but instead insist that they will do so only under hospital operating room conditions are not violating ADA if their refusal is professionally justified—that is, if the professional standards (which balance provider safety against patient interests to "normal" care) tip in their favor (*Bragdon*).

Decision Making

The Court in *Sutton* said that there is a history of discrimination against people with disabilities that is based on "misperceptions" (*Sutton*, p. 489) and "stereotypic assumptions not truly indicative . . . of individual ability" (*Sutton*, p. 489, quoting *School Bd. of Nassau Cty. v. Arline*), and no doubt these "accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairments" (*Sutton*, p. 489, quoting *School Bd. of Nassau Cty.*).

Nonetheless, ADA "allows employers to prefer some physical attributes over others and to establish physical criteria" (*Sutton*, p. 490, citing ADA, Sec. 12101):

> An employer runs afoul of the ADA when it makes an employment decision based on a physical or mental impairment, real or imagined, that is regarded as substantially limiting a major life activity. Accordingly, an employer is free to decide that physical characteristics or medical conditions that do not rise to the level of an impairment—such as one's height, build, or singing voice—are preferable to others, just as it is free to decide that some limiting, but not *substantially* limiting, impairments make individuals less than ideally suited for a job. (*Sutton*, pp. 490–491)

Capitalism, Laissez-Faire Economics, and Judicial Postures

The Court adopts an explicitly pro-employer posture, at least with respect to employees or prospective employees. And in that posture, the Court asserts a capitalistic, laissez-faire doctrine: Let everyone compete for work, let the playing field be

even (thus, no discrimination against the person with a disability), and let the marketplace determine the outcomes, not the courts or the federal Equal Employment Opportunities Commission (EEBC).

This result was not unanticipated. In previous disability cases, the Court had deferred to professional decision making (*Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist.*; *Bragdon*; *Olmstead*; *Parham*; *Youngberg*), and in earlier "affirmative action" cases, the Court had been disinclined to uphold quota-based or other types of preferences and compensatory justice techniques (*Wygant v. Jackson Bd. of Educ.*, 1986; *Richmond v. J. A. Croson Co.*, 1989).

The consequence of these decisions is inherently conservative, in the sense that it conserves (i.e., protects) the institutions within which power has traditionally existed; when power must be balanced, it will be balanced in favor of institutions (i.e., employers, educators, other professionals), not individuals.

Floodgates, Disability Creep, and Damnation by Data

Another troubling aspect of the Court's classification result ("no disability if mitigated") is that the Court may be as troubled by the "floodgates" prospect as it is by the effect on individuals. True, the Court nowhere writes about the prospect that it and lower courts will be overwhelmed by the large number of ADA lawsuits that they will have to adjudicate if there are indeed 100 million to 160 million people with disabilities, not the 43 million the Congress identified. But just because the Court does not say something explicitly does not mean that it is unconcerned with the matter. Does the Court sense that disability is a "creeping" phenomenon; that once unleashed from a narrow definition, the very term *disability* may encompass many people who, under a traditional view of *disability*, are not truly disabled? That's not a far-fetched conclusion, for there is a great difference between 43 million and 100 million or 160 million individuals. The impact on an already overburdened judiciary system of quadrupling the number of potential ADA claimants cannot be overlooked.

There is an irony here that should not pass unnoticed. Congress, relying on the data assembled by an independent government agency—the National Council on Disability (NCD)—concluded that there are 43 million, and not more, individuals with disabilities. Indeed, the NCD regarded the figure of 160 million to be "over inclusive" (*Sutton*, p. 464). Accordingly, the NCD rejected the "health conditions approach" that led to that figure, and in doing so, it rejected the *medical model* that had been at the root of so much pathologizing and disempowering of people with disabilities (Gliedman & Roth, 1980).

Instead, the NCD, adhering to the more acceptable *functional model*, adopted a functional approach to defining disability: A person is classified as having a disability when the person cannot, even with special aids, perform "certain basic activities" (*Sutton*, p. 464). That is, the person cannot function in a nondisabled way in certain roles and in certain contexts. Here, then, is the irony: In rejecting the medical model and health conditions approach and adopting the functional model and work disability approach (which is closer to the productivity and capacity models that are so much part of the new view of people with disabilities), the NCD, and in turn Congress, was hoisted with its own petard—or, more accurately, damned by its own data.

The Social Contract

It is one thing for the Court to adopt a certain economic doctrine, and it is another for the Court to extend it and indeed to invite a challenge to a countervailing doctrine, yet that is just what the Court did in *Sutton*.

The Private Contract

If it is a fair reading that the capitalist model prevails, then it is unsurprising that the Court undergirds that model with a complementary view of the social contract. The term *social contract* refers to the reciprocal claims that an individual legitimately makes or may make on society and the claims that society legitimately makes or may make on the individual. Just what are those claims?

Under English common law and under contract law as set out in American courts, an individual does not have a right to a particular job. *Sutton* endorses that perspective: An employer is free to specify the functions related to any job and thus the qualifications that a job applicant/holder must have, as long as (a) the employer does not mistakenly believe that a person has a physical impairment that substantially limits one or more major life activities, or (b) the employer does not mistakenly believe that an actual, nonlimiting impairment substantially limits one or more major life activities:

> In both cases, it is necessary that [an employer] 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. (pp. 466–467)

The employer's error is making a mistake, yielding to "stereotypic assumptions" and "myths and fears" (*Sutton*, p. 467; ADA, 1990, § 12101(7)). Absent that kind of mistake, however, the employer is free to hire and fire at will (*Sutton*, pp. 467–468).

It follows from common law and American contract law—and from the restatement of that law in *Sutton*—that the individual has no claim to a particular job. Consider the facts in this case: Karen Sutton and Kimberly Hinton each sought a particular position, that of "global airline pilot" (*Sutton*, pp. 467, 469). This is a single job, and United's refusal to em-

ploy them in that particular, single job was not discriminatory: They were not disabled because they had mitigated their disability, so United (with respect to nondisabled people) has the right to decide not only what kinds of functions must be performed in the job but also what kinds of qualifications a job seeker must have.

Thus, classification (i.e., not disabled if mitigated) and capitalism (i.e., employer decision making is entitled to deference) resulted in the twins not having the chance to work at a particular job, not in their having no chance to work at all: "Indeed, there are a number of other positions utilizing petitioners' skills, such as regional pilot and pilot instructor, to name a few, that are available to them" (*Sutton*, p. 469). The private contract is clear: A person who has a job to offer may offer it to anyone at all (subject to ADA) and may not be compelled to offer it to a particular person.

The decision-making power is the employer's, not the individual's. This result is pure original capitalist contract law; the balance of power favors the employer and disfavors the job seeker/job holder. The employer is under no legal obligation to offer a particular job to a particular job seeker, and the job seeker has no right to have that particular job.

Moreover, if the job seeker is able to work at other jobs, the person faces a choice: Seek and take that other work if it is offered, or remain unemployed. When a person (or persons, in the case of the twins) has mitigated the effects of a disability, that individual can also mitigate the effects of prospective unemployment by looking for other jobs and taking the one for which the person is qualified.

The Public Contract

This harkening back to contract law as it existed long before the modern "welfare state" reveals something about the social contract between the person with a disability or alleged disability and the public. It is as though the majority of the Court were giving us all a sermon, speaking the following message: If the person can work in other jobs, let him or her do so. Indeed, if the person can do so, the person is not "substantially limited in a major life activity" because work is still available, even if it is not the work the person wants. The individual is able to work, so let the person choose to work. If the person chooses to not work, then let the consequences fall on the person, not on the employer (who will pass the costs of a discrimination law judgment along to passengers and shareholders) or the public (which may have to support the person through various disability benefit programs).

The majority seems to be saying that just as the Chief Justice goes to work with a bad back and other Justices work through their cancer operations or the effects of aging or poor sight, so the twins and others with mitigated disabilities can get to work—enough of "victimization" theory! This is America, a capitalist democracy: Let those who can work, work. And let those who can but choose not to work personally bear the consequences of their choices; let them be unemployed, if that is what they want. But don't allow them to pass the costs of unemployment along to "innocent" people such as passengers (whom they might harm if hired but not qualified), an employer's shareholders (who would have to absorb the costs of a liability suit brought by passengers or of an employment-discrimination suit brought by the job seeker), or taxpayers (who will have to pay the unemployment benefits to the job seeker and the disability benefits to injured passengers).

The Nature and Consequence of Obligations

Ancient Doctrine Restated: ADA, IDEA, and Welfare Reform

What, then, is the nature of the private and public obligations of a person with an impairment? Under *Sutton*, it seems to be this: If barred from a particular job but still able to work, the person's obligation is to take a job, any job, to be an economically self-sufficient, productive member of society.

Putting *Sutton* aside for just a moment, it is fair to ask whether that is an altogether unacceptable result. The answer has to be no. Why? Because ADA and other disability laws (e.g., IDEA, Developmental Disabilities Assistance and Bill of Rights Act [1963, amended 1987, 1994, 1996, 2000], and Rehabilitation Act, 1973) proclaim that the nation's policy is to enable people with disabilities to be economically self-sufficient and productive, and because these laws advance that policy by protecting them against employment discrimination and entitling them to education and rehabilitative services that can lead to employment.

Thus, it would appear that the majority in *Sutton* seems to be saying this: If able to work, the person's obligation is to work, thereby preventing the cost of unemployment from being passed along to private and/or public entities. Here, the majority in *Sutton* seems to be consistent with the majority of Congress and even with President Clinton who (respectively) enacted and signed the 1996 Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA). That statute placed time limits on public welfare benefits and paid them (for that limited period of time) only if the welfare recipient engaged in work or took training that could lead to work. Under PRWORA, then, society's obligation is time limited and conditional. By extension, the obligation of the person receiving welfare benefits is to not be a charge on the public dole, to fiscally relieve the public of the cost of his or her life. The majority in *Sutton* give the same message as Congress gave in PRWORA: If the person can mitigate the disability, let the person do so and thereby mitigate the costs to the public.

It seems to be a fair reading of *Sutton* that the public's obligation is limited to those who are truly needy—that is, "substantially presently unable to work," even after mitigating their disability—and the private individual's obligation is to mitigate the effects of disability and the effects of unem-

ployment. Have we returned to the old "poor laws" and their premise that only some people—the undeniably destitute—are worthy of assistance? The case can be made.

Is this a new social contract? Arguably, no; indeed, it is rather old. The private employer–employee contract theory dates to the 17th century; the public support–private individual contract also is old and is based on the "truly worthy" views that predated the current "welfare state."

Consequences of the Obligation: The Chilling Effects and the Providers' Duties

The consequences of the Court's reassertion of old doctrines are manifold. We begin with the consequences for individuals themselves and then address the consequences for disability policy and practice in general.

The Individual's Choice. One consequence is that a person faces a Hobbesian choice: If I mitigate my disability, I may actually function more effectively and have greater capacity to live the kind of life that I can and should want to live, but I may also be disqualified from benefits and protection under various public policies. Here, the choice is between the prospects of either being less disabled or not attaining that status on the one hand and between remaining disabled and receiving the benefits of hard-won and newly threatened disability policy on the other.

What if the person in fact uses mitigating interventions, and they result in the person not having a substantial disability? The person has attained a level of economic self-sufficiency, productivity, and arguably self-regard/respect that accompanies those statuses.

But that fact alone may prevent the person from claiming the benefits of ADA; such was the consequence for Karen Sutton and Kimberly Hinton, and it will be the consequence for many others like them. Yes, they can still work, but only in some jobs and capacities, not in the ones they want. For them, the "glass ceiling" is permanent—they are limited in their job prospects, but at least they have jobs.

Moreover, if individuals use mitigating interventions, they may also lose the benefit of various rights, such as the right to a free, appropriate public education under IDEA or to nondiscriminatory education under ADA or Section 504. They may classify themselves out of a beneficiary class for not just educational opportunities but also for employment benefits under the Rehabilitation Act, medical benefits under the Social Security Act's Medicaid program, or cash transfers under the Social Security Act's Social Security Disability Insurance (SSDI) or Supplemental Security Income (SSI) programs or the Housing Act's rent subsidy programs.

So, an individual faces two kinds of decisions. First, do I mitigate and thereby risk the rights and benefits to which I am otherwise entitled? The answer may well be no, in which case the *Sutton* decision will have a chilling effect on the use of technology by (and on the development of new technology for) persons with disabilities. Such a result would be unfortunate, for technology—both the human technologies of special education, speech–language and hearing pathology, occupational and physical therapy, and so forth, and the "hard" technologies of the computer industry and other industries involved in manufactured devices—has made a great difference for people with disabilities and for those who are impaired because of aging or temporary impairment.

Second, the individual faces a wholly different kind of choice, one that involves a self-definition, not a matter of benefits. If I decide to mitigate my disability, I may indeed reject my image of myself as a person with a disability; I may become a different person than I have been—one who is now competent and not one who is limited.

This is not such an easy choice as it seems. On the face of it, who would not want to be more capable and less disabled? But if the person has learned to be a person with a disability, and if that trait defines the person and the person's self-image, associations, and place in society, then mitigation raises an existential issue: Who am I, who do I want to be, and what must or may I do to become what I may be?

The Providers' Practices. Given that a person faces the choice of whether to use mitigating interventions, does this choice also involve service providers, especially the educators of students covered or potentially covered by IDEA? Absolutely.

Under IDEA, a local educational agency is required to secure the prior consent of a parent of a student (or of the student, at age of majority) for an initial nondiscriminatory evaluation (to determine whether the student has a disability and, if so, what its educational consequences are), for all subsequent evaluations, and for any change of placement (into, within, or out of general or special education or even school; IDEA, §§ 1414(a)(1)(C), 1414(c)(3)).

As a general rule, consent is valid only if it is "informed," so IDEA requires a local educational agency (LEA) to disclose to the parent or student information concerning the action the LEA proposes, an explanation as to why the LEA reached that decision, a description of any other options that the LEA considered and why the LEA rejected them, a description of each evaluation on which the LEA based its proposed decision, a statement of any other relevant factors, a statement concerning the parent/student procedural safeguard rights, and a list of sources the parent/student may contact to obtain assistance in understanding IDEA rights (§1415(b)(3)).

If the parent/student believes that related services are needed to enable the student to benefit from special education, the parent/student may request them, and the LEA must furnish them if indeed the services are necessary (IDEA, § 1414(c)(1)). Among the related services are "assistive technologies"—a term that covers devices and services that do indeed mitigate the effects of disability.

One question is whether an LEA is now, post-*Sutton*, required to advise a parent/student of the consequences of using

assistive technology. Arguably, no: IDEA does not specifically and explicitly require an LEA to inform a parent/student of those consequences. However, a different argument exists, one that holds that the LEA is required to provide that kind of information because the consequences will have a bearing on not only the student's rights to an IDEA-based education but also to any accommodations that the student may claim under Section 504.

A second question is whether a person who uses mitigating interventions is thereby automatically excluded from ADA's or IDEA's protections. The answer has to be no. For example, a person using assistive technology nevertheless may be so impaired as to be substantially limited in a major life activity. In *Sutton*, the majority of the Court makes that clear: "The use of a corrective device does not, by itself, relieve one's disability. Rather, one has a disability under subsection A if, notwithstanding the use of a corrective device, that individual is substantially limited in a major life activity" (p. 466). Likewise, a person who is using a mitigating intervention such as medication may find that the medicine does not fully control the effects of the impairment, that the person has intermittent periods of substantial limitation despite having periods when the mitigation is effective, that the side effects of a mitigation themselves substantially limit the person in major life activities, or that the person has a record or is regarded as having a limitation when in fact the person does not have one.

The risk–benefit calculation that an individual (parent, student, or professional) must make is now much more complicated than in the past: whether to mitigate. That fact alone should cause the U.S. Department of Education, state educational agencies and LEAs, and courts to interpret IDEA as requiring disclosure about the mitigation policy and *Sutton*.

Moreover, the pressure that an LEA or other provider system may bring to bear on the individual is likely to be increased: Use the mitigating intervention so that you become more capable, less disabled, and are disqualified from the expensive benefits that you would receive if you did not use the mitigation. As a matter of pure economics (a basis on which *Sutton* is justly analyzed), the schools will see that it is in their interests, as a matter of controlling the costs of special education by reducing the number of students who qualify as disabled, to urge parents/students to mitigate.

Does that pressure to extrude from the special services system pose ethical challenges to the providers? Should they or should they not counsel the use of mitigating interventions? To whom and what do professionals owe their loyalties: the student or the system? These are choices that *Sutton* forces educators and other professionals to make.

Civil Rights, the Court's Invitation, and an Inchoate Challenge to ADA

Finally, *Sutton* signaled the Court's very grave doubts about the legality of the EEOC regulations/guidelines and even the constitutionality of ADA. After making it clear that because the parties to the case accept the validity of the EEOC regulations, it would not determine their validity, the Court went on to note that "no agency has been delegated authority to interpret the term 'disability'" (*Sutton*, p. 460), although the EEOC has done just that. Indeed, the Court said that "there may be some conceptual difficulties in defining 'major life activities' to include work." And it noted that even the EEOC "has expressed reluctance to define 'major life activities' to include working" (*Sutton*, p. 468, on 29 C.F.R. pt. 1630, App. § 1630.2(j) (1998)). These comments were nothing less than an invitation to employers to challenge the very lawfulness of the EECC regulations on the grounds of *ultra vires* (beyond the power of the agency to promulgate).

True, Justice Ginsberg's concurring opinion, which is all of one paragraph long, notes that "there is no constitutional dimension" to the case, and the dissents by Justices Stevens and Breyer also go to great lengths to point out that the constitutionality of ADA is not at issue here (any more than it was at issue in *Pennsylvania Dept. of Corrections v. Yeskey*, 1998).

On the face of the matter, all that is true enough. But what was really happening? In the same spring that the Court decided *Sutton*, it also struck down as unconstitutional three federal statutes on the grounds that Congress lacked authority to enact them (*Florida Prepaid v. College Savings Bank*, 1999; *College Savings Bank v. Florida Prepaid*, 1999; *Alden v. Maine*, 1999). These three cases directly raised the issue of the constitutionality of statutes that subjected states to lawsuits. ADA does likewise, subjecting not only private employers (United, in the *Sutton* case) but also public employers to lawsuits if they violate its provisions.

The federalism cases (*Florida Prepaid*, *College Savings Bank*, and *Alden*) dealt with federal–state issues and a public entity; *Sutton* dealt with private employers. True, *Sutton* did not directly raise the question of whether ADA was constitutional, but it is clear from the Court's decisions in the other three cases that the majority of the Court had it very much in mind to restrict federal (i.e., congressional) authority in federal–state (i.e., federalism) relations.

Very simply, in *Sutton* the majority was asking for an employer to challenge the lawfulness of the EEOC regulations. But there was a complexity to that invitation, in light of the federalism cases, which suggested that the Court would welcome a broader challenge to mandated accommodations for individuals with disabilities, one that would strike at congressional authority to abrogate state immunity. *Sutton* communicated the Court's willingness to entertain challenges to the scope of ADA and the authority behind it; the federalism cases communicated the form that such challenges should take.

It came as no surprise, then, that those who oppose ADA and similar antidiscrimination statutes accepted the Court's invitation or that the majority of the Court in *Sutton* continued to defederalize the law and to place the Court over Con-

gress in making laws (hardly a "conservative" position). Specifically, in *Kimel v. Florida Board of Regents* (2000), the Court struck down the federal statute that outlawed employment discrimination based on age. And in *Board of Trustees of the University of Alabama v. Garrett et al.* (2000), the Court struck down the provisions of ADA that prohibited employment discrimination by state governments. In a five-to-four decision (with Justice Ginsberg dissenting), the Court ruled that ADA's legislative history provided insufficient evidence of unconstitutional disability discrimination by states to support Congress' abrogation of the states' sovereign immunity under the 11th Amendment.

The question remains as to whether we have seen the last of the Court's invitations and attacks on ADA. The three federalism cases were foreboding harbingers of *Kimel*, and *Kimel* was a precursor to *Garrett*, just as two of the "gun control" cases, *United States v. Lopez* (1995) and *Printz v. United States* (1997), telegraphed the Court's desire to review the constitutionality of all federal laws that regulate state behavior, ADA among them. So, it is fair to read *Sutton* (and its invitation to challenge the EEOC regulations) in the same light as the other federalism cases and to contemplate that ADA would again be a target in the Court's effort to change the balance of federal–state relations and the power of Congress to legislate.

Conclusion

Sutton is a most alarming case. It addresses the fundamental issues of classification (i.e., who is disabled); of the social contract, both in its private and public dimensions; of the obligations of individuals and professionals; and of the constitutionality of the civil rights protection that ADA has offered to people with disabilities.

The Court has raised for the nation issues that, until *Sutton*, had not been frontally addressed in the judicial forums of public policy: Who is disabled, what is the nature of the social contract, what duties and claims exist among those with and without disabilities, and what is the scope of Congress' power to address disability (or other trait-based) discrimination?

One would have thought that these issues had been pretty well resolved as a result of nearly two and a half decades of disability policymaking (beginning in the early to mid-1970s). But one would have been wrong to think that. So the nation faces, yet again, the very issues that challenged it before the "rights revolution" began.

Should we thank the Court for that intellectual stimulus? We think not: If the Court is "reading" the pulse of the nation correctly, or if it is indeed leading the nation's response to disability and to congressional power to prohibit public and private discrimination, there soon will be a rollback of rights long ago sought, recently established, and nowadays only partially implemented. The new millennium begins with an antediluvian decision, hardly a welcome prospect. ■

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