

## COMMENTS

### A Growing Body of Law: Obesity, Disability, and the Airline Industry

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I.	INTRODUCTION .....	207
II.	BACKGROUND.....	209
	<i>A. Obesity</i> .....	209
	<i>B. The Airline Industry</i> .....	210
III.	OBESITY AND DISABILITY LEGISLATION.....	211
	<i>A. Framing the Issue</i> .....	211
	<i>B. Canada</i> .....	212
	<i>C. United States</i> .....	214
	<i>D. European Union</i> .....	220
IV.	IMPACT .....	221
	<i>A. Canada</i> .....	221
	<i>B. United States</i> .....	223
	<i>C. European Union</i> .....	225
V.	CONCLUSION .....	226

#### I. INTRODUCTION

It is a situation that stirs anxiety in even the most frequent of fliers: sitting in the economy-class cabin with an open seat on both sides and a morbidly obese passenger slowly making his or her way toward the row. It is also a very sensitive situation. Air carriers commonly refer to such travelers with a politically correct euphemism, such as “customers of size” or “passengers requiring extra space,” and they are the subject of a heated debate within the airline community.<sup>1</sup> Southwest Airlines, a U.S. carrier, recently ordered its employees to more stringently enforce its

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\* © 2009 Ryan Mylrea. This Comment is dedicated to my parents and grandparents, who made me the man I am today, and to Megan, who constantly inspires me to become a better one tomorrow.

1. See *Thompson v. Sw. Airline Co.*, Civ. No. 04-cv-313-sm, 2006 LEXIS 4654, at \*4 (D.N.H. Feb. 6, 2006); *United Airlines, Passengers Requiring Extra Space*, <http://www.united.com/page/article/0,6722,52985,00html> (last visited Oct. 27, 2009).

policy of requiring large passengers to purchase two seats.<sup>2</sup> The airline claimed it could “no longer ignore complaints from Customers who traveled without full access to the seat purchased due to encroachment by a large seatmate.”<sup>3</sup> United Airlines, another U.S. carrier, announced in April 2009 that it would begin enforcing a policy almost identical to that of Southwest; it also cited a high volume of complaints from neighboring passengers.<sup>4</sup> These policies have led to some unpleasant interactions between large passengers and airline staff,<sup>5</sup> but they are far from unique within the airline industry.<sup>6</sup>

As obesity rates climbed through the last quarter of the twentieth century, individual airlines determined on their own whether and how to address obese passengers. Southwest Airlines was not the only carrier to implement a policy requiring the purchase of an additional seat,<sup>7</sup> nor was it the only carrier to face a lawsuit from an offended passenger.<sup>8</sup> Policymakers and courts around the world took scant notice of these incidents, despite media attention. This began to change in 1997, when an obese Canadian law professor flew round-trip from Calgary to Ottawa.<sup>9</sup> Professor McKay-Panos experienced discomfort, pain, and off-hand remarks due to her inability to fit comfortably into the seat.<sup>10</sup> The professor responded by waging an eleven-year legal battle that revolutionized air travel for obese Canadians.<sup>11</sup>

This Comment examines the legal issues confronting obese air travelers. Part II provides a background discussion of both the airline industry and obesity. Part III then describes the relationship between obesity and disability antidiscrimination legislation. Part IV analyzes

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2. Dan Fitzpatrick, *Weighty Matter Pits Passenger Against Airlines*, PITTSBURGH POST-GAZETTE, Mar. 13, 2005, at A-1.

3. Southwest Airlines, *Customer of Size Q&A*, [http://www.southwest.com/travel\\_center/cos\\_aq.html](http://www.southwest.com/travel_center/cos_aq.html) (last visited Sept. 22, 2009).

4. Deenah Beasley, *United Air To Charge Obese Double on Full Flights*, REUTERS, Apr. 15, 2009, <http://www.reuters.com/article/topNews/idustRE53E72Q20090415>. United Airlines' policy is slightly more generous than Southwest's. If United requires a passenger to pay for a second seat, the passenger is entitled to twice the carry-on baggage allowance. United Airlines, *Passengers Requiring Extra Space*, <http://www.united.com/page/article/0,6722,52985,00.html> (last visited Oct. 30, 2009).

5. See, e.g., *Thompson*, 2006 LEXIS 4654, at \*8-10.

6. See David Landsel, *How Airlines Deal with "Customers of Size"*, AVIATION.COM, Aug. 6, 2008, <http://www.aviation.com/travel/080806-airlines-and-customers-of-size.html>.

7. See, e.g., Air France, *Passengers with High Body Mass*, <http://www.airfrance.us> (follow "Information and services" hyperlink; then follow "Passenger assistance" hyperlink; then "Passengers with high body mass" hyperlink) (last visited Oct. 27, 2009).

8. Judy Adamson, *Excess Baggage*, SYDNEY MORNING HERALD, Aug. 28, 1999, at 2.

9. McKay-Panos v. Air Can., [2006] F.C.A. 8 para. 4 (Can.).

10. *Id.* paras. 5-6.

11. *Id.* para. 4.

and predicts the impact disability status for the obese will have on the airline industry, and Part V suggests a strategy for directly addressing the rights of the obese in the air. This Comment will focus on three developed legal communities that have consistently posted some of the highest obesity rates in the world: the United States, Canada, and the European Union.

## II. BACKGROUND

### A. Obesity

The World Health Organization (WHO) defines obesity as having a body mass index (BMI) greater than or equal to 30.<sup>12</sup> The American Medical Association (AMA) also uses the BMI 30 benchmark to define mild obesity, classifies a BMI over 35 to be moderate obesity, and considers a BMI over 40 as severe/extreme obesity.<sup>13</sup> By all measures, obesity is on the rise.<sup>14</sup> The WHO projected that 1.6 billion adults worldwide were overweight in 2005, and at least 400 million were obese.<sup>15</sup> By 2015, it expects the number to rise to 2.3 billion overweight adults, with an additional 700 million obese.<sup>16</sup> The epidemic is especially prevalent in developed countries. In the United States, roughly one-third of the adult population is considered obese.<sup>17</sup> Projections for the future are not optimistic.<sup>18</sup>

The obesity epidemic has radically altered the way of life in societies around the globe. High BMI increases the risk for heart disease, type 2 diabetes, some cancers, hypertension, dyslipidemia, stroke, liver and gallbladder disease, sleep apnea, osteoarthritis, and gynecological problems.<sup>19</sup> Estimates of health care expenses for obesity in the United States alone are over \$100 billion annually.<sup>20</sup> Excess pounds also mean excess expenses in less prominent areas. In Australia,

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12. BMI is equal to  $\text{kg/m}^2$ , or  $(\text{lbs} \times 703)/\text{in}^2$ . World Health Organization (WHO), Obesity and Overweight, <http://www.who.int/mediacentre/factsheets/fs311/en/index.html> (last visited Sept. 30, 2009).

13. Robert F. Kushner, Evaluating Your Patients for Overweight or Obesity 5 (Nov. 2003), available at <http://www.ama-assn.org/ama1/pub/upload/mm/433/booklet2.pdf>.

14. See, e.g., Ctrs. for Disease Control & Prevention, Obesity Among Adults in the United States, <http://www.cdc.gov/nchs/data/databriefs/db01.pdf> (last visited Sept. 30, 2009).

15. WHO, *supra* note 12.

16. *Id.*

17. Ctrs. for Disease Control & Prevention, Overweight and Obesity, <http://www.cdc.gov/obesity/data/index.html> (last visited Sept. 15, 2009).

18. See, e.g., David S. Ludwig, *Childhood Obesity—The Shape of Things to Come*, 357 N. ENG. J. MED. 2325 (2007).

19. *Id.* at 2325-26.

20. Nanci Hellmich, *Weighing the Cost of Obesity*, USA TODAY, Jan. 21, 2002, at 1D.

for example, ambulances must now be fitted with hydraulic lifts, schools and movie theaters must purchase wider chairs, and even funeral homes are upgrading their crematoriums to handle the added girth.<sup>21</sup> Thus, it should come as no surprise that airlines are also forced to adapt to increasing obesity rates.

### B. *The Airline Industry*

Large passengers present a delicate problem for the airline industry. As mass transit providers, carriers have an obvious incentive to maintain a high number of passengers per flight. As with any profit-seeking industry, the goal is to maximize revenue minus costs (i.e., profits).<sup>22</sup> Increasing passenger capacity increases fares per flight while leaving the cost of each flight relatively unchanged.<sup>23</sup> Unfortunately, airline economics often work against the comfort interests of passengers. Although economy class seating has made air travel more accessible to people with low incomes, consumer groups have often derided it as “cattle-class.”<sup>24</sup> Obese travelers in adjacent seats do not make the experience any more enjoyable. An additional seat at no extra charge may relieve obese travelers and their fellow passengers, but airlines cringe at the prospect of lost revenue.<sup>25</sup> The dilemma has led European manufacturer Airbus to consider some unorthodox solutions, such as installing bunk beds in its planes rather than chairs.<sup>26</sup>

The airline industry also incurs additional costs from weighty passengers for a more subtle reason: more fuel is required to haul the additional weight. One study estimated that due to a ten pound average weight gain in the U.S. population during the 1990s, the airlines consumed an extra 350 million gallons of jet fuel in the year 2000 alone.<sup>27</sup> That increase translated into \$275 million in additional jet fuel costs and 3.8 million additional tons of carbon dioxide emissions for that

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21. Grant McArthur, *Now We Super-Size Our Ambulances*, HERALD SUN (Austl.), Feb. 27, 2009, at 11.

22. STEPHEN HOLLOWAY, *STRAIGHT AND LEVEL: PRACTICAL AIRLINE ECONOMICS* 581 (2d ed. 1997). There is, however, a school of thought in the services management industry that believes profit is “a by-product of the satisfaction and loyalty of both employees and customers,” rather than an end in itself. *Id.* at 6.

23. *Id.* at 288.

24. JENNIFER CLAY, *JETLINER CABINS* 41 (2003).

25. *See, e.g., In re Estate of Eric Norman*, [2008] C.T.A. Dec. No. 6-AT-A-2008, paras. 15-16 (Can.), available at <http://www.cta-otc.gc.ca/decision-ruling/decision-ruling.php?type=d&no-num=6-AT-A-2008&lang=eng>.

26. Dinah Hatch, *Bunk Beds on Planes*, DAILY TELEGRAPH (London), Feb. 14, 2009, at 5.

27. Andrew L. Dannenberg et al., *Economic and Environmental Costs of Obesity: The Impact on Airlines*, 27 AM. J. PREVENTIVE MED. 264 (Oct. 2004).

year.<sup>28</sup> Though airlines are not likely to implement weight-based fare policies any time soon, the idea is not far from many people's minds.<sup>29</sup>

### III. OBESITY AND DISABILITY LEGISLATION

#### A. *Framing the Issue*

The ideological debate over obesity as a disability is similar to the U.S. debate over abortion in that both sides frame the issue in starkly different ways. Proponents, such as the National Association to Advance Fat Acceptance, utilize civil rights arguments and claim that obesity is a variety of "body diversity" that should be accepted by mainstream society.<sup>30</sup> Opponents emphasize the fact that obesity is largely caused by factors that are under a person's control.<sup>31</sup> They frame the issue not as a struggle for the rights of an oppressed minority, but rather as an accommodation or subsidy for a portion of society that lacks the willpower to lead a healthy life.<sup>32</sup> Some detractors even argue that protecting the obese under the Americans with Disabilities Act (ADA) does injustice to other disabled people by reducing the public's opinion of the ADA's legitimacy.<sup>33</sup> The debate in the media over how airlines should handle obese passengers has divided along substantially similar, though perhaps less nuanced, lines.<sup>34</sup>

Reality, of course, lies somewhere between the two extremes. While genetic factors have long been acknowledged as predisposing some people to obesity,<sup>35</sup> personal choice is an undeniably important cause of society's fattening. While it is certainly true that all human beings deserve and are entitled to respect, the presence of personal

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28. *Id.*

29. Jerry Adler, *True or False: The Obese Should Have To Pay More for Airline Tickets*, NEWSWEEK, July 14, 2008, at 60; John Rolfe, *Subsidise Jet-Setting Fat People? When Pigs Fly*, DAILY TELEGRAPH (Austl.), Nov. 29, 2008, at 35 ("Why should I have to pay for my excess luggage when fatties don't have to?").

30. Abigail C. Saguy & Kevin W. Riley, *Weighing Both Sides: Morality, Mortality, and Framing Contests over Obesity*, 30 J. HEALTH POL., POL'Y & L. 869, 871-72 (2005).

31. Rogan Kersh & James A. Morone, *Obesity, Courts, and the New Politics of Public Health*, 30 J. HEALTH POL., POL'Y & L. 839, 846-48 (2005).

32. *Id.*

33. Margaret Carlson, *And Now, Obesity Rights*, TIME, Dec. 6, 1993, at 96.

34. *See, e.g.*, Editorial, *Obesity and the Airlines*, DENVER POST, Nov. 29, 2008, at A-31 (criticizing Canada's One-Person-One-Fare policy as an "invasion of common sense"); Andre Picard, *Let's Stop Penalizing Disabilities—Including Obesity*, GLOBE & MAIL (Can.), Dec. 11, 2008, at L4 ("The CTA policy is eminently reasonable and long overdue."); Rolfe, *supra* note 29 (arguing that "fatties" should be charged for a second seat and airfare should be based on passenger weight at check-in).

35. *See* Claude Bouchard, *Current Understanding of the Etiology of Obesity: Genetic and Nongenetic Factors*, 53 AM. J. CLINICAL NUTRITION 1561S (1991).

choice and mutability make obesity an awkward subcategory of “disability,” a term that is traditionally associated with blamelessness and sympathy.<sup>36</sup> Understandably, lawmakers have also had difficulty distinguishing the two.

### B. Canada

Part VII of the Air Transportation Regulations governs the terms and conditions of travel for disabled persons in Canada.<sup>37</sup> The regulations were established by the Canadian Transportation Agency (CTA) under authority granted by the Canada Transportation Act.<sup>38</sup> The Air Transportation Regulations are interpreted and supplemented by CTA adjudicatory decisions and court holdings.<sup>39</sup>

The legislative goal of the Air Transportation Regulations is “eliminating undue obstacles” to people with disabilities.<sup>40</sup> The term “disability,” however, is defined neither in the Canada Transportation Act nor in the regulations. In the vast majority of cases that go before the CTA, disability is uncontested.<sup>41</sup> Not surprisingly, disability status for obese passengers was an issue the CTA had not yet confronted before Professor McKay-Panos filed her complaint with the agency in 1997.<sup>42</sup> Before issuing a ruling as to whether obesity was a protected disability, the CTA invited submissions from McKay-Panos, Air Canada, and amicus curiae.<sup>43</sup> Hearings were held in Calgary over the course of seven days.<sup>44</sup>

The CTA released its opinion in 2001, finding that obesity is not, per se, a disability.<sup>45</sup> In addition to claiming obesity, an individual must demonstrate objective evidence of “activity limitations and/or participation restrictions” that the individual faced when traveling to

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36. Indeed, the United States Congress acknowledged this sentiment when it passed the Americans with Disabilities Act of 1990, § 2(a)(7), Pub. L. No. 101-336, 104 Stat. 327, 329 (1990) (“[I]ndividuals with disabilities . . . have been faced with restrictions and limitations . . . based on characteristics that are *beyond the control of such individuals*.” (emphasis added)).

37. Air Transportation Regulations, SOR/1988-58, §§ 145-156 (Can.).

38. Canada Transportation Act, 1996 S.C., ch. 10, pt. V (Can.).

39. See *In re* Estate of Eric Norman, [2008] C.T.A. Dec. No. 6-A7-A-2008 (Can.), available at <http://www.cta-otc.gc.ca/decision-ruling/decision-ruling.php?type=d&no-num=6-AT-A-2008&lang=eng>.

40. Canada Transportation Act, 1996 S.C., ch. 10, pt. V, § 170(1).

41. *In re* McKay-Panos, [2001] C.T.A. Dec. No. 646-AT-A-2001 intro. (Can.), available at <http://www.cta-otc.gc.ca/decision-ruling/decision-ruling.php?type=d&no-num=646-AT-A-2001&lang=eng>.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

support a conclusion that the individual is disabled.<sup>46</sup> The agency called for a case-by-case analysis of obese complainants.<sup>47</sup> Appropriately, the CTA began proceedings to evaluate McKay-Panos's case.

The CTA's second panel denied McKay-Panos's complaint.<sup>48</sup> It restated the requirement that an individual demonstrate activity limitations or participation restrictions, and noted McKay-Panos's argument that the seat restricted her activity of air travel.<sup>49</sup> However, the panel felt that this reasoning was unacceptable because it forced the CTA to consider the obstacle—here, the seat—when determining whether the applicant was disabled.<sup>50</sup> Under the Canada Transportation Act, a remedy is only appropriate if the person has a disability, the person encountered an obstacle, and the obstacle is undue.<sup>51</sup> The panel feared that considering the obstacle when determining whether a disability existed would effectively result in a new per se class of disabled travelers—the obese.<sup>52</sup> They opined: “It is not the obstacle that makes a person deaf, blind or paraplegic and the Agency does not agree that it should be different in the case of obesity.”<sup>53</sup> Accordingly, a split panel rejected McKay-Panos's complaint.<sup>54</sup> She appealed the decision.<sup>55</sup>

The Federal Court of Appeal reversed the CTA decision.<sup>56</sup> It found nothing in the Canada Transportation Act that forbids considering the obstacle when determining disability, and stated that “no disability exists in the abstract.”<sup>57</sup> The court set aside the decision and remanded the matter back to the CTA to determine whether, given her impairment, McKay-Panos faced an undue obstacle.<sup>58</sup> For a third time, McKay-Panos faced the CTA; but this time, she would not face them alone.<sup>59</sup>

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46. *Id.* pts. (v)-(vi) (summary of findings).

47. *Id.*

48. *In re McKay-Panos*, [2002] C.T.A. Dec. No. 567-AT-A-2002 conclusion (Can.), available at <http://www.cta-otc.gc.ca/decision-ruling/drv.php?id=19824&lang=eng>.

49. *Id.*

50. *Id.*

51. *McKay-Panos v. Air Can.*, [2006] F.C.A. 28 paras. 29-32 (Can.) (citing Canada Transportation Act, 1996 S.C., ch. 10, § 172(3) (Can.)).

52. *Id.*

53. *Id.*

54. *In re McKay-Panos*, [2002] C.T.A. Dec. No. 567-AT-A-2002 conclusion.

55. *McKay-Panos*, [2006] F.C.A. 28 paras. 5-6.

56. *Id.* para. 45.

57. *Id.* paras. 37, 40.

58. *Id.* para. 45.

59. See Press Release, Can. Transp. Agency, Canadian Transportation Agency Decides in Favour of One-Person-One-Fare Policy (Jan. 10, 2008), available at <http://www.cta-otc.gc.ca/doc/php?did=661&lang=eng>.

During that time, Joanne Neubauer and Eric Norman were arguing that the CTA should implement a “one-person-one-fare” policy (1P1F).<sup>60</sup> Neubauer had severe rheumatoid arthritis and was wheelchair bound; Norman was paraplegic and passed away in 2006.<sup>61</sup> Both required personal attendants for air travel.<sup>62</sup> After McKay-Panos won her case in the Federal Court of Appeal, she was allowed to intervene on the side of Neubauer and Norman so the CTA could consider the 1P1F policy in one proceeding.<sup>63</sup>

After weighing the hardship imposed on the airlines against the hardships faced by severely disabled travelers, the CTA finally capitulated.<sup>64</sup> It concluded that charging a severely disabled person for an additional seat is an undue hardship and, as such, ordered a 1P1F policy for domestic flights.<sup>65</sup> Concerning obese travelers, it stated: “[T]here is no longer any doubt that there are persons who are disabled . . . by obesity where they cannot fit within the dimensions of an aircraft seat.”<sup>66</sup> However, the CTA specifically excluded those “who are obese but not disabled as a result of their obesity” from the scope of the 1P1F policy.<sup>67</sup> The airlines’ request for appeal was denied.<sup>68</sup>

### C. *United States*

The Air Carrier Access Act (ACAA)<sup>69</sup> is the primary source of protection for disabled air travelers in the United States. However, it provides little more than:

[A]n air carrier . . . may not discriminate against an otherwise qualified individual on the following grounds:

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60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *In re Estate of Eric Norman*, [2008] C.T.A. Dec. No. 6-AT-A-2008, para. 22 (Can.), available at <http://www.cta.otc.gc.ca/decision-ruling/decision-ruling.php?type=d&no-num=646-AT-A-2001&lang=eng>.

65. *Id.* para. 23. The CTA later ordered the airlines to implement training programs to ensure their staff treat obese passengers courteously and sensitively. *In re McKay-Panos*, [2002] C.T.A. Dec. No. 567-AT-A-2002, para. 50 (Can.), available at <http://www.cta-otc-gc-ca/decision-ruling/drv.php?id=19824&lang=eng>.

66. *In re Estate of Eric Norman*, C.T.A. Dec. No. 6-AT-A-2008, para. 128.

67. *Id.* para. 28.

68. *Ruling Means Airlines Must Make Room for Disabled*, CTA.ca News, Nov. 20, 2008, [http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20081120/scc\\_ruling\\_081120/20081120?hub=Health](http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20081120/scc_ruling_081120/20081120?hub=Health).

69. Pub. L. No. 99-435, 100 Stat. 1080 (1986) (codified as amended at 49 U.S.C. § 41705 (2006)).



- (1) the individual has a physical or mental impairment that substantially limits one or more major life activities.
- (2) the individual has a record of such an impairment.
- (3) the individual is regarded as having such an impairment.<sup>70</sup>

The substantive protections for disabled passengers and affirmative duties for air carriers are laid out in extensive regulations subsequently enacted by the Department of Transportation (DOT).<sup>71</sup> The DOT regulations define “[i]ndividual with a disability” using language that mirrors the ACAA.<sup>72</sup> The definitional language in the ACAA and DOT regulations is also functionally equivalent to the definition of “disability” used in the ADA<sup>73</sup> and the Rehabilitation Act (RA);<sup>74</sup> accordingly, courts interpret the language in all three acts as being interchangeable.<sup>75</sup> Thus, even though there is currently no case law that directly addresses whether obesity is a disability under the ACAA,<sup>76</sup> cases decided under the ADA and RA are instructive. Similarly, regulations promulgated by the Equal Employment Opportunity Commission (EEOC) to implement the ADA and RA are also informative. The regulations enacted pursuant to all three disability acts further define a person to be “regarded as having [such] an impairment” if the individual:

- (A) [H]as a physical or mental impairment that does not substantially limit major life activities but that is treated . . . as constituting such a limitation;
- (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment;

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70. 49 U.S.C. § 41705 (2006).

71. See Nondiscrimination on the Basis of Disability in Air Travel, 14 C.F.R. § 382 (2009). The DOT recently revised and reorganized these regulations. The new regulations are set to take effect on May 13, 2009. Nondiscrimination on the Basis of Disability in Air Travel, 73 Fed. Reg. 27,614 (May 13, 2008). This Comment will refer to the updated DOT regulations unless otherwise noted.

72. See 14 C.F.R. § 382.3 (2009).

73. See 42 U.S.C. § 12102(2) (2006).

74. See 29 U.S.C. § 705(20)(B) (2006) (“[T]he term ‘individual with a disability’ means . . . any person who has a disability as defined in section 12102 of Title 42.”).

75. *Andrews v. Ohio*, 104 F.3d 803, 807 (6th Cir. 1997); see also *Nondiscrimination on the Basis of Handicap in Air Travel*, 55 Fed. Reg. 8008, 8011 (Mar. 6, 1990) (“It is clear that Congress intended [RA disability] standards to apply to implementation of the ACAA.”). This Comment will refer to the ADA, RA, and ACAA collectively as the “disability acts.”

76. In the small number of ACAA cases involving obese travelers, plaintiffs usually suffer from additional, widely accepted disabilities. See, e.g., *Adiutori v. Sky Harbor Int’l Airport*, 880 F. Supp. 696, 699 (D. Ariz. 1995) (“[P]laintiff was 73 years old, was 5’3” tall and weighed over 300 pounds, and had severe arthritis of his knees which left him with the ability to walk only with great difficulty using two canes.”); *Glatfelter v. Delta Air Lines, Inc.*, 558 S.E.2d 793, 796 (Ga. Ct. App. 2002) (“Mr. Glatfelter was 79 years old, obese, and had osteoarthritis in his left knee; he used a cane to walk and walked slowly and carefully.”).

or (C) has [no such] impairments . . . but is treated . . . as having such an impairment.<sup>77</sup>

Obese litigants<sup>78</sup> have had varying levels of success under the disability acts. The seminal case in this area is *Cook v. Rhode Island*.<sup>79</sup> The plaintiff in *Cook* was a 5-foot-2-inch tall woman who weighed over 320 pounds.<sup>80</sup> She had been employed by Rhode Island's Department of Mental Health, Retardation, and Hospitals (MHRH) on two previous occasions; she had a "spotless" work record and left voluntarily both times.<sup>81</sup> When she reapplied for the same position that she previously held, the MHRH turned down her application because, it claimed, her morbid obesity hampered her ability to evacuate patients and would likely cause health problems, which in turn would lead to absenteeism.<sup>82</sup>

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77. Nondiscrimination Basis of Handicap in Programs or Activities Receiving Federal Financial Assistance, 45 C.F.R. § 84.3(j)(2)(iv) (2008). This Comment will collectively refer to these as the "disability regulations." They further define "physical or mental impairment" as:

- (A) [A]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardio-vascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or
- (B) [A]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

45 C.F.R. § 84.3(j)(2)(i) (2009). The term "Major Life Activities" is defined as: "[F]unctions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." Regulations To Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. § 1630.2(i) (2009).

"Substantially limits" is defined as:

- (i) Unable to perform a major life activity that the average person in the general population can perform; or
- (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

*Id.* § 1630.2(j)(1). The recent addition to the DOT regulations explicitly states that its definition of physical or mental impairment is not exhaustive:

The term physical or mental impairment includes, *but is not limited to*, such diseases and conditions as orthopedic, visual, speech, and hearing impairments; cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, drug addiction, and alcoholism.

14 C.F.R. § 382.5(2) (2009) (emphasis added).

78. The distinction between obese, morbidly obese, and merely overweight litigants should not be considered lightly. See *Andrews v. Ohio*, 104 F.3d 803, 809 (6th Cir. 1997).

79. *Cook v. R.I., Dep't of Mental Health, Retardation & Hosps.*, 10 F.3d 17 (1st Cir. 1993).

80. *Id.* at 20.

81. *Id.*

82. *Id.* at 20-21.

Cook sued under the RA, claiming that she qualified as disabled because “MHRH regarded her as physically impaired.”<sup>83</sup> After the jury found in Cook’s favor, MHRH appealed, claiming there was insufficient evidence to support the verdict.<sup>84</sup>

The United States Court of Appeals for the First Circuit upheld the verdict.<sup>85</sup> The court found that the facts of the case “comfortably” supported a verdict based either on the theory that Cook had a substantial impairment or that she was treated as having such an impairment.<sup>86</sup> The court cited expert testimony from the trial that “morbid obesity is a physiological disorder . . . capable of causing adverse effects within the musculoskeletal, respiratory, and cardiovascular systems.”<sup>87</sup> It rejected both reasons advanced by MHRH for finding that obesity was not an impairment covered under the RA: that obesity is mutable and that obesity is to some degree voluntary.<sup>88</sup> Not only did the court find that a reasonable jury could have reached the opposite conclusion on those points, but it doubted that such factors are even appropriate to consider when determining whether a condition qualified as an impairment.<sup>89</sup>

A morbidly obese person also qualified as disabled under the “regarded as” prong, as described in *EEOC v. Texas Bus Lines*.<sup>90</sup> In that case, a 5-foot-7-inch tall woman who weighed 345 pounds applied for a position as a bus driver.<sup>91</sup> She passed the employer’s road test with flying colors; however, she failed to obtain DOT-mandated medical certification because the examining doctor felt her obesity disqualified her.<sup>92</sup> Citing the failure to obtain certification, Texas Bus Lines refused to hire her.<sup>93</sup> The EEOC filed suit against the employer for violating the ADA.<sup>94</sup>

The court emphasized that morbid obesity, per se, is not a disability under the ADA.<sup>95</sup> However, it stated that if an employer rejects an

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83. *Id.* at 22.

84. *Id.* at 21.

85. *Id.* at 28.

86. *Id.* at 23.

87. *Id.*

88. *Id.* at 23-24.

89. *Id.* at 24.

90. 923 F. Supp. 965, 975 (S.D. Tex. 1996).

91. *Id.* at 967 n.1.

92. *Id.* at 967.

93. *Id.* at 967-68.

94. *Id.* at 975.

95. *Id.* at 975-76 (citing *Torcasio v. Murray*, 57 F.3d 1340 (4th Cir. 1995); *Smaw v. Va. Dep’t of State Police*, 862 F. Supp. 1469 (E.D. Va. 1994)). The United States Court of Appeals for the Ninth Circuit appeared to disagree with the court in *Texas Bus Lines*. In *Gaddis v. Oregon*, a worker’s compensation case, the court stated that “morbid obesity [is] a disability under the

individual based on “myth, fear or stereotype” associated with a condition, the individual is regarded as being impaired for purposes of the ADA even if the condition itself does not constitute an impairment.<sup>96</sup> In that case, the doctor based his denial on his conclusion that the woman could not “move around swiftly in case of an accident,” and therefore was unsafe.<sup>97</sup> He based this finding on his observation that the woman had difficulty rising from her seat and that she had “waddled” to the examining room.<sup>98</sup> However, the DOT listed neither weight nor agility as a disqualifying factor for medical certification.<sup>99</sup> Because the decision was based on “myth, fear or stereotype,” the woman was regarded as being impaired and thus protected by the ADA.<sup>100</sup>

In both *Cook* and *Texas Bus Lines*, the employers’ subjective, general belief that the applicants’ morbid obesity would inhibit their job performance was, in itself, sufficient to establish that the employers regarded the applicants as having an impairment that substantially limited a major life activity. However, in cases in which individuals were less than morbidly obese, or the employer had objective evidence that the individual’s condition interfered with job performance, courts have been less willing to grant ADA protection.

In *Andrews v. Ohio*,<sup>101</sup> seventy-six highway patrol officers sued the state under the ADA and RA after they failed to meet weight and fitness requirements.<sup>102</sup> The court agreed with the State, noting that merely being overweight is a physical characteristic, not rising to the level of an impairment or a physiological disorder.<sup>103</sup>

In *McDonald v. Kansas*, a morbidly obese prison guard was fired after his treating physician confirmed he was medically unfit to perform some of his duties.<sup>104</sup> The court found that the employee was not “otherwise qualified” for the job and, accordingly, did not analyze

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[ADA].” 21 F. App’x 642, 643 (9th Cir. 2001). The court, however, cited no authority, nor did it offer any discussion or analysis of that claim. *See id.*

96. *Texas Bus Lines*, 923 F. Supp. at 975.

97. *Id.* at 978.

98. *Id.*

99. *Id.* The court found that Texas Bus Lines’ reliance on the doctor’s conclusions was “wholly unreasonable.” *Id.* at 979.

100. *Id.*

101. 104 F.3d 803 (6th Cir. 1997).

102. *Id.* at 805-06.

103. *Id.* at 808-10. The court compared this to a previous case brought under the ADA in which an airline steward was fired because his muscle mass caused him to exceed the airline’s weight-for-height limit. *Id.* (citing Tudyman v. United Airlines, 608 F. Supp. 739 (C.D. Cal. 1984)).

104. *McDonald v. Kan.*, Dep’t of Corr., 880 F. Supp. 1416, 1419-20 (D. Kan. 1995).

whether the plaintiff was discriminated against on the basis of a real or perceived disability.<sup>105</sup>

Most recently, the issue of morbid obesity under the ADA was addressed by the United States Court of Appeals for the Sixth Circuit in *EEOC v. Watkins Motor Lines, Inc.*<sup>106</sup> In *Watkins*, a morbidly obese worker was terminated following an injury because his employer did not believe it was safe for him to return to work.<sup>107</sup> The employee could cite no cause for his excessive weight.<sup>108</sup> The court held that morbid obesity is not an ADA-protected impairment unless caused by a physiological disorder, and therefore affirmed the district court's dismissal.<sup>109</sup>

The various holdings have left the law in this field relatively unsettled. The holding in *Watkins* implicitly contradicts the court's statement in *Cook* that there is "no language suggesting that . . . protection is linked to how an individual became impaired, or whether an individual contributed to his or her impairment."<sup>110</sup> *McDonald* leads one to believe that a doctor's opinion will overcome an ADA challenge,<sup>111</sup> but *Texas Bus Lines* suggests that is not always true.<sup>112</sup> One of the few consistent themes that has emerged from these cases is that to qualify as disabled under the ADA and the RA, an individual must be morbidly obese *and* discrimination must arise from generalized stereotypes or assumptions arising from that obesity. Until the United States Supreme Court or Congress establishes clear guidelines regarding the morbidly obese under the disability acts, the area will continue to cause confusion.

The question of whether the obese are protected under the ACAA has not yet been litigated. However, since at least 1998, the DOT has taken the position that the ACAA does not require airlines to accommodate obese passengers by providing them with a second seat at no additional charge.<sup>113</sup> Although the term "morbid obesity" is noticeably absent from the current regulations, the DOT has made it abundantly clear that it does believe airlines should be required to provide an extra

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105. *Id.* at 1423-24.

106. 463 F.3d 436 (6th Cir. 2006).

107. *Id.* at 438-39.

108. *Id.* at 438.

109. *Id.* at 443.

110. *Cook v. R.I., Dep't of Health, Mental Retardation & Hosps.*, 103 F.3d 17, 24 (1st Cir. 1993).

111. *McDonald v. Kan. Dep't of Corr.*, 880 F. Supp. 1416, 1420-21 (D. Kan. 1995).

112. *EEOC v. Tex. Bus Lines*, 923 F. Supp. 965, 981 (S.D. Tex. 1996).

113. *See* Nondiscrimination on the Basis of Disability in Air Travel, 61 Fed. Reg. 56,481, 56,483 (Nov. 1, 1996); *see also* Nondiscrimination on the Basis of Handicap in Air Travel, 63 Fed. Reg. 10,528, 10,534 (Mar. 4, 1998).

seat to passengers for free merely because of their girth.<sup>114</sup> It also implied that it does not consider obesity to be a disability.<sup>115</sup>

#### *D. European Union*

Whether obese air passengers are disabled or deserve legislative protection has not yet been determined in the European Community. European air travel for persons with disabilities is protected by Regulation No. 1107/2006 (the European Union (EU) regulations).<sup>116</sup> It extends protection to disabled persons and persons with reduced mobility traveling to or from a European airport, as well as those who happen to be transiting through such an airport.<sup>117</sup> The EU regulations define “disabled person” and “person with reduced mobility” as:

any person whose mobility when using transport is reduced due to any physical disability (sensory or locomotor, permanent or temporary), intellectual disability or impairment, or any other cause of disability, or age, and whose situation needs appropriate attention and the adaptation to his or her particular needs of the service made available to all passengers.<sup>118</sup>

Each member state is required to designate an enforcement agency to ensure compliance with the EU regulations at the state’s airports, receive complaints from aggrieved passengers, and establish “effective, proportionate, and dissuasive” penalties for infractions.<sup>119</sup> Airports, carriers, and subcontractors are required to provide employees with equality and awareness training and refresher courses so that employees are aware of “how to meet the needs of persons having various disabilities or mobility impairments.”<sup>120</sup> The majority of the substantive provisions took effect on July 26, 2008.<sup>121</sup>

Due to its recent enactment, there is an absence of case law to define the contours of the disability definition.<sup>122</sup> However, even

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114. See Nondiscrimination on the Basis of Handicap in Air Travel, 14 C.F.R. §§ 382.31(b), .87(f) (2009) (“You may charge a passenger for the use of more than one seat if the *passenger’s size* . . . causes him or her to occupy the space of more than one seat.” (emphasis added)).

115. See Nondiscrimination on the Basis of Disability in Air Travel, 73 Fed. Reg. 27,614, 27,628 (May 13, 2008) (“[A] person who requires two seats for any reason (e.g., because of *obesity or a disability*) can be required to pay for two seats.” (emphasis added)).

116. Council Regulation 1107/2006, O.J. (L 204).

117. *Id.* art. 1(1)-(2).

118. *Id.* art. 2(a).

119. *Id.* arts. 14-16.

120. *Id.* art. 11.

121. *Id.* art. 18.

122. As of January 2009, only sixteen of the twenty-seven Member States had sanctions schemes in place to enforce the EU regulations. Directorate-Gen. for Energy & Transp., Eur.

considering the regulation's relatively short life, the European Commission has thus far received surprisingly few complaints.<sup>123</sup> It posits that this phenomenon may be due to public confusion on what rights the EU regulations protect.<sup>124</sup>

There is also no universally accepted definition of disability throughout the EU,<sup>125</sup> nor does the European Commission seem interested in adopting one.<sup>126</sup> Instead, EU regulations allow the legislatures and agencies of member states to fine-tune their own definition of disability.<sup>127</sup> Such an approach "reflect[s] the diversity of cultures and legislative frameworks in the EU Member States."<sup>128</sup> For instance, the United Kingdom adopted a restrictive definition of disability for its employment discrimination statute in order to contain employer costs and prevent excessive litigation.<sup>129</sup> Sweden, on the other hand, was less concerned with costs and adopted a more expansive definition.<sup>130</sup>

#### IV. IMPACT

##### A. *Canada*

The CTA ordered the airlines to implement the 1P1F policy no later than January 10, 2009,<sup>131</sup> thus, conclusions about the impact it has had on the Canadian airline industry are premature. Presumptively, obese travelers who qualify for the 1P1F policy are also entitled to other disability protections under the CTA regulations. These include

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Comm'n, *Making Regulation 1107/2006 a Success*, Minutes from the First National Enforcement Bodies' Meeting § 2(1.1) (Dec. 3, 2008), [http://ec.europa.eu/transport/passengers/air/doc/prm/2008\\_12\\_03\\_minutes.pdf](http://ec.europa.eu/transport/passengers/air/doc/prm/2008_12_03_minutes.pdf).

123. *Id.* § 3(3.1).

124. *Id.*

125. THERESIA DEGENER, E.U. NETWORK OF EXPERTS ON DISABILITY DISCRIMINATION, DEFINITION OF DISABILITY 4-5 (2004), <http://www.pedz.uni-mannheim.de/daten/edz-ath/gdem/04/disabdef.pdf>.

126. Helen Bolderson et al., *Definitions of Disability in Europe: A Comparative Analysis 20* (Sept. 2002) (unpublished manuscript, on file with European Union) ("The Commission specifically mentioned that its goal . . . was not to move towards a single standard definition.").

127. European Agency for Safety & Health at Work, *People with Disabilities: Frequently Asked Questions*, [http://osha.europa.eu/en/good\\_practice/priority\\_groups/disability/faq.php/#1](http://osha.europa.eu/en/good_practice/priority_groups/disability/faq.php/#1) (last visited Sept. 15, 2009).

128. *Id.*

129. Bolderson et al., *supra* note 126, at 74.

130. *Id.*

131. *In re Estate of Eric Norman*, [2008] C.T.A. Dec. No. 6-AT-A-2008, para. 19 (Can.), available at <http://www.cta-otc.gc.ca/decision-ruling/decision-ruling.php?type=d&no-num=6-AT-A-2008&lang=eng>.

assistance at all stages of their flight,<sup>132</sup> periodic inquiries from airline staff about the needs of the traveler if he or she uses a mobility device,<sup>133</sup> and the right to be free of any and all assistance if the traveler so desires.<sup>134</sup> It is far from certain how many obese passengers will request such assistance or how costly it will be for the airlines.<sup>135</sup> However, the agency dedicated considerable effort to predicting the financial effects before ordering the 1P1F policy.<sup>136</sup>

The CTA estimated an after-tax fare increase of C\$0.16 to C\$0.41 per passenger to absorb costs from the 1P1F policy.<sup>137</sup> It arrived at these estimates after considering, inter alia, the economic makeup of the Canadian air travel market, tax consequences, travel frequency of disabled passengers, and the airlines' ability to pass costs along to consumers through fare increases.<sup>138</sup> Responding to the airlines' argument that any fare increase would effectively result in able-bodied passengers subsidizing the 1P1F policy, the CTA noted that such an outcome was "reasonable for the achievement of important societal goals."<sup>139</sup> However, airlines and able-bodied passengers are not the only ones affected by the new policy.

Canadian airlines responded by requiring passengers to obtain, at their own expense, a doctor's approval before utilizing the 1P1F policy.<sup>140</sup> Both WestJet and Air Canada require doctors to fill out a form available on their respective Web sites. WestJet's form asks for measurements in centimeters of an obese patient's waist and "[m]aximal girth of hip, or buttocks."<sup>141</sup> Air Canada's form instructs doctors to:

Have your patient sit on a paper covered examination table. Rest a ruler or straightedge on the left side of patient at the widest point (hip or waist) as shown on diagram below. Mark the touch point between the ruler and the paper as Point A. Rest a ruler or straightedge on the right side of patient at

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132. Air Transportation Regulations, SOR/1988-58, § 147 (Can.) (providing for assistance when a passenger is, inter alia, checking-in, proceeding to boarding area, boarding and deplaning, stowing and retrieving carry-ons, and moving to and from airplane washrooms).

133. *Id.* § 150.

134. *Id.* § 154.

135. *Ruling Means Airlines Must Make Room for Disabled*, *supra* note 68.

136. *See In re Estate of Eric Norman*, C.T.A. Dec. No. 6-AT-A-2008, paras. 221-831.

137. *Id.* para. 701, tbl.21.

138. *See id.* paras. 221-829.

139. *Id.* para. 742.

140. *See, e.g.*, Air Can., Customers with Special Needs, <http://www.aircanada.com/en/travelinfo/before/specialneeds.html> (last visited Sept. 15, 2009); *see also* WestJet Airlines, Travel Info, Special Needs Guests, <http://c5dsp.westjet.com/guest/travelTips.jsp> (last visited Sept. 15, 2009).

141. WestJet Airlines, Request for Additional Seating, Form C, at 3, *available at* [http://www.westjet.com/pdf/OPOF\\_FormC\\_en.pdf](http://www.westjet.com/pdf/OPOF_FormC_en.pdf) (last visited Sept. 30, 2009).



the widest point (hip or waist). Mark the touch point between the ruler and the paper as Point B. Measure the distance between Point A and Point B. Indicate this measurement above under d) Surface Measurement.<sup>142</sup>

While some disability advocates argue that evaluation cannot be left to the airlines and a medical opinion is necessary, the Canadian Medical Association considers the policy to be “an abuse of physicians’ time.”<sup>143</sup> Other disability rights groups complain the forms are too much of a burden and require too much personal information.<sup>144</sup>

### B. United States

It is impossible to predict what unique problems would arise if the United States were to implement a Canada-style 1P1F policy for obese travelers. The U.S. DOT has long maintained that airlines may charge passengers by the seat.<sup>145</sup> Thus, any change would likely have to come from the courts or the legislature. If the Supreme Court were to hold that obese travelers may qualify as disabled under the ACAA—similar to obese employees under the ADA—it is unclear whether such a ruling would require the DOT to employ a 1P1F policy. The current regulations are phrased to allow airlines to charge for use of a second seat without respect to the passenger’s disability.<sup>146</sup>

Regardless, such a holding would entitle obesity-disabled passengers to all the other benefits of the ACAA. Carriers would be required to make reasonable modifications to their policies and facilities to accommodate larger patrons.<sup>147</sup> Carriers would not be allowed to require that obese travelers give advanced notice of their travel plans.<sup>148</sup> Airlines would be required to ensure all plane and terminal facilities are accessible and usable by the morbidly obese.<sup>149</sup> Notoriously small

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142. Air Can., Fitness for Air Travel-Medical Information 5, <http://www.aircanada.com/en/travelinfo/before/documents/fft.pdf> (last visited Sept. 30, 2009).

143. Josh Wingrove, *CMA Rejects MDs’ Notes for Obese Travellers*, GLOBE & MAIL (Can.), Jan. 10, 2009, at A-4.

144. Harriet Baskas, *Canadian Doctors Decry Airline “Tush Test,”* MSNBC.com, <http://www.msnbc.msn.com/id/28777115/> (last visited Sept. 30, 2009).

145. Nondiscrimination on the Basis of Disability in Air Travel, 63 Fed. Reg. 10,528, 10,534 (Mar. 4, 1998).

146. See Nondiscrimination on the Basis of Disability in Air Travel, 14 C.F.R. § 382.31(b) (2009) (“You may charge a passenger for the use of more than one seat if the passenger’s size or condition (e.g. use of a stretcher) causes him or her to occupy the space of more than one seat.” (emphasis added)).

147. See *id.* § 382.13.

148. See *id.* § 382.25.

149. See *id.* § 382.51(a)(1).

airplane lavatories<sup>150</sup> would be required to be “accessible” to overweight passengers on all new aircraft.<sup>151</sup> Airlines would be required to offer preboarding and preferential seat assigning.<sup>152</sup> Carriers would also be required to provide assistance to such passengers when moving through the terminal, as well as while boarding and deplaning.<sup>153</sup> While obese passengers are on the plane, the only activities for which airlines would not be required to offer assistance include: “actual” eating, using the restroom, and providing medical services.<sup>154</sup> Unlike their Canadian counterparts, U.S. carriers would be unable to require medical certificates for the morbidly obese to fly unless there was reasonable doubt the individual could complete the flight without requiring “extraordinary” medical care.<sup>155</sup> Indeed, even if courts or the DOT did not mandate a 1P1F policy in the United States, disability status would entail significant benefits for the obese.

If a 1P1F policy were adopted in the United States, there is evidence that the airline industry would not incur substantial additional costs. Southwest Airlines requires their customers of size to purchase an additional seat if he or she cannot lower the armrest, however the airline will refund the cost of the second seat if the plane is not fully booked.<sup>156</sup> According to the company’s Web site, 98% of extra seat purchases qualify for a refund, effectively resulting in the airline providing an additional seat at no extra charge.<sup>157</sup> Additionally, Southwest estimates that its “customer of size” policy affects “far less than half a percent” of its customers.<sup>158</sup>

U.S. air carriers are also subject to many of the same market factors that the Canadian Transportation Agency used to determine the projected cost of its 1P1F policy, such as the cyclical nature of the airline industry, the high fixed costs, and a significant portion of yearly revenue that come from leisure travel.<sup>159</sup> Even in light of these factors, the CTA

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150. See CLAY, *supra* note 24, at 94 (“‘You need to be a contortionist’ to get in and out of them.” (quoting passenger surveys)).

151. 14 C.F.R. § 382.63(a).

152. *Id.* §§ 382.85, .93.

153. *Id.* § 382.91(a)-(b); see also *id.* §§ 382.95, .101.

154. *Id.* § 382.113.

155. *Id.* § 382.23.

156. See Southwest Airlines, *supra* note 3.

157. *Id.*

158. *Id.*

159. See *In re Estate of Eric Norman*, [2008] C.T.A. Dec. No. 6-AT-A-2008, paras. 761-762, 773 (Can.), available at <http://www.cta.otc.gc.ca/decision-ruling/decision-ruling.php?type=d&no-num=6-AT-A-2008&lang=eng>.

estimated that costs from the 1P1F policy would amount to less than a 0.2% decline in gross revenues.<sup>160</sup>

*C. European Union*

If obesity were declared a disability for purposes of the EU regulations, the immediate impact on obese travelers would be largely the same as in the United States and Canada. Carriers would not be allowed to refuse service to obese individuals except under limited circumstances.<sup>161</sup> An airport's managing body would be responsible for providing assistance to obese travelers with checking-in and registering baggage, proceeding through customs and security, stowing and retrieving carry-on baggage, and making use of toilet facilities.<sup>162</sup> Airports would not be allowed to charge the obese passengers any additional fee for such services.<sup>163</sup>

Airlines would be required to "mak[e] all reasonable efforts to arrange seating to meet the needs of individuals with disability [sic] or reduced mobility on request and subject to safety requirements and availability," as well as assist them in moving to toilet facilities.<sup>164</sup> Airlines would not be allowed to charge the disabled person any additional fee for such accommodations.<sup>165</sup>

Airports and carriers would presumably be required to add obesity-related issues to the training required under EU regulations.<sup>166</sup> Airports would be allowed to levy a fee on each carrier in order to finance costs arising from the EU regulations.<sup>167</sup> The fee would be proportionate to the number of travelers each carrier services in order to "spread the burden equally among all passengers."<sup>168</sup>

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160. *Id.* para. 828.

161. The only exceptions would be either when another safety regulation required refusal of service or when "the size of the aircraft or its doors [made] the embarkation or carriage . . . physically impossible." Council Regulation No. 1107/2006, art. 4(1), 2006 O.J. (L 204). In the case of proper refusal of service, the airline must offer to refund, reroute, or provide an acceptable alternative to the passenger. *Id.*

162. *Id.* art. 7, annex I.

163. *Id.* art. 8(1).

164. *Id.* annex II.

165. *Id.* art. 10.

166. *See id.* art. 11.

167. *Id.* art. 8(3).

168. *Id.* pmb. (8).

## V. CONCLUSION

Applying the provisions of the Air Carrier Access Act, the Canada Transportation Act, and European Commission Regulation No. 1107/2006 to the context of persons impaired by obesity provides an illustration of the difficulty inherent in defining the concept of “disability.” On the one hand, because it is impossible to list all conditions that deserve protection, definitional language must be sufficiently broad to achieve legislative objectives. On the other hand, expansive definitions invite the risk of including conditions that society does not value enough to protect with the force of law. It is entirely possible for intelligent people to disagree over whether a narrow or broad scope is the greater evil.

Even if society spoke with one voice on the issue of disability status vis-à-vis obese persons, the definitional problem would merely shift to the question of which persons are obese enough to warrant protection. The WHO defines obesity as having a BMI of 30 or greater.<sup>169</sup> Southwest Airlines bases its determination on whether an airplane passenger can comfortably put the armrest down.<sup>170</sup> The Canadian Transportation Agency insists that “determination of whether a person is disabled by reason of obesity is dependent on the facts and circumstances in each individual case and must be assessed on a case-by-case basis.”<sup>171</sup>

Formulating a definition of obesity that is not (to some extent) arbitrary proves to be a daunting task.<sup>172</sup> BMI does not take body fat percentage into account; thus, an accomplished body builder may have the same BMI measurement as a habitual couch potato or a pregnant woman.<sup>173</sup> Southwest Airlines’ Web site admits that some clinically obese passengers may not be subject to its policy while some passengers who merely have “broad shoulders” may be required to purchase a second seat.<sup>174</sup> The medical certification required by the Canadian airlines is, on its face, the most objectively legitimate standard for determining obesity-

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169. WHO, *supra* note 12.

170. Southwest Airlines, *supra* note 3.

171. *In re Estate of Eric Norman*, [2008] C.T.A. Dec. No. 6-AT-A-2008, para. 128 (Can.), available at <http://www.cta.otc.gc.ca/decision-ruling/decision-ruling.php?type=d&no-num=6-AT-A-2008&lang=eng>.

172. See Mary Crossley, *Impairment and Embodiment*, in AMERICANS WITH DISABILITIES: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS 111, 117 (Leslie Pickering Francis & Anita Silvers eds., 2000) (“[W]eight cases pose even more starkly than the cases involving pregnancy the difficulty of drawing lines on any kind of principled basis.”).

173. See, e.g., *Tudyman v. United Airlines*, 608 F. Supp. 739, 740-41 (C.D. Cal. 1984) (involving a body builder who was fired from his position as airline attendant for violating the airline’s established height-weight ratio).

174. Southwest Airlines, *supra* note 3.

caused disability, yet, the scheme is almost certainly a ploy to frustrate rather than advance the goals of the 1P1F policy. Simply put:

[T]here is no ideal method of drawing boundaries between disabled and not-disabled people in social policy. The systems which de-emphasise medical evidence . . . score highly on the criterion of social policy relevance. However, the more medically-oriented systems may enjoy wider legitimacy, particularly if doctors are highly respected and the system avoids situations of open disagreement between doctors.<sup>175</sup>

In addition to the problem of deciding the level of obesity at which a person is disabled, there is disagreement over whether etiology should be relevant. In *Cook v. Rhode Island*, the foundation of obesity-disability precedent in U.S. case law, the defendant relied primarily on the argument that the plaintiff's obesity was voluntary and mutable and, thus, not deserving of protection under the Rehabilitation Act.<sup>176</sup> Though the First Circuit did not agree with that line of reasoning, many segments of society did and still do.<sup>177</sup> Just a few months before *Cook* was decided, California's Supreme Court ruled that the overweight and obese must demonstrate some underlying physiological cause for their excessive weight in order to be protected by the state's disability discrimination law.<sup>178</sup> Although it stressed that it was not basing its ruling on the moral or social desirability of protecting obesity as a disability,<sup>179</sup> the court's decision "reflect[s] a societal desire to avoid according legal protections to persons whose obesity can be attributed to their own sloth, gluttony, or lack of self-discipline."<sup>180</sup>

Clearly, it is not a judge's place to interpret law based on his or her own moral code, but why should morality be a completely forbidden consideration when defining disability? Legal definitions are tailored to

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175. Bolderson et al., *supra* note 126, at 64; *see also* Crossley, *supra* note 172, at 120 ("[A]ll line-drawing ventures . . . based on physical characteristics or functioning are inevitably arbitrary to some degree.").

176. *See* 10 F.3d 17, 23-24 (1st Cir. 1993). The lower court in *Cook* agreed with the defendant:

[T]o the extent that obesity, or Cook's form of obesity, is caused by systemic or metabolic factors and constitutes an immutable condition that she is powerless to control, it may be a physiological disorder qualifying as a handicap. . . . Conversely, to the extent that obesity is a transitory or self-imposed condition resulting from an individual's voluntary action or inaction, it would be neither a physiological disorder nor a handicap.

*Cook v. R.I., Dep't of Health, Mental Retardation & Hosps.*, 834 F. Supp. 57, 62 (D.R.I. 1992).

177. *See* Kersh & Morone, *supra* note 31, at 846-48.

178. *Cassista v. Cmty. Foods, Inc.*, 856 P.2d 1143, 1153 (Cal. 1993). American states are divided on the issue. *See id.* at 1150 n.11.

179. *Id.* at 1147.

180. Crossley, *supra* note 172, at 120.

effectuate outcomes that society deems worthy of pursuing. If the practical outcome of an expansive definition does not align with—or is counter to—the moral considerations that inspired the legislation, why should a court be afraid to rein in the definition based on social desirability grounds? Surely a lawmaker's intentions can be used to inform the debate over an otherwise ambiguous definition. Some governing bodies recognize this principle and choose to define disability through a statement of purpose rather than a rigid definition.<sup>181</sup> Some commentators have argued that a “one-size-fits-all” definition of disability creates a disconnect between social policy goals and results.<sup>182</sup> This defeats the purpose of antidiscrimination legislation by creating “inappropriate incentives and gaps in coverage.”<sup>183</sup>

It is doubtful that any overweight Canadians will be inspired to pack on the additional pounds necessary to qualify as disabled because of obesity simply due to the “inappropriate incentive” created by the 1P1F policy. However, the question remains as to whether the rights of the obese are something society is willing to protect at the same level as those of a quadriplegic.

It is beyond the scope and capacity of this Comment to prescribe a substantive set of policies addressing the rights of overweight persons across the world. As this Comment has shown, intelligent people can and will disagree about the proper level of protection afforded to the obese. The Canadian Transportation Authority is not any more enlightened or progressive than the United States Department of Transportation simply because it grants fat people an extra seat on airplanes at no extra charge. What is clear, however, is that obesity cannot fit comfortably into the framework of disability laws.

The social and moral debate over what protections to grant obese citizens is irrelevant for purposes of this Comment. Obesity advocates are correct when they claim that all persons are entitled to respect and accessibility. Perhaps society should have more sympathy for a class of people who face daily ridicule and often feel powerless to change. On the other hand, their opponents are also correct when they contend that disability status for the obese requires all of society to shoulder the burden of what is largely a lifestyle choice. Excluding obesity from the definition of disability may be a desirable strategy for increasing incentives for people to lose weight, or, at the least, prevent further

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181. Bolderson et al., *supra* note 126, at 23.

182. NATIONS ACAD. OF SOC. INS., *BALANCING SECURITY AND OPPORTUNITY: THE CHALLENGE OF DISABILITY INCOME POLICY* 75 (Jerry L. Mashaw & Virginia P. Reno eds., 1996).

183. *Id.* at 76.

implicit acceptance of fatness as a lifestyle. Balancing these considerations is a task too great for any one person, whether that person is a scholar, judge, or the head of a government agency.

If the public debate sparked by Ms. McKay-Panos has proven anything conclusively, it is that the time is right for legislatures to address the issue. This conclusion is supported by the fact that even in Canada, where the rights of obese air travelers are relatively clear, no group is satisfied. Airlines still abhor the policy, and obese Canadians must have a doctor declare them “officially fat” in order to secure the CTA’s protections. In the United States, both workers and their employers cannot be sure when the ADA will protect an obese person and when it will not. Customers of size are typically unaware that they may be required to purchase an additional airplane seat until the issue is broached, embarrassingly, at check-in. No one knows how the issue will unfold in Europe. Even more unsettling is the fact that the rights of 400 million persons worldwide are at stake, and the number is rising. A population greater than that of the United States is unsure whether it will be forced to purchase a second airline seat or fired by employers based on nothing more than weight.

Obesity is nothing less than a public health nightmare for modern society. As this Comment has explained,<sup>184</sup> this epidemic has caused and will continue to cause drastic negative changes to the world’s health and resources. As the consequences of obesity mount, stakeholders will increasingly seek to use the law as a means of advancing their agendas and protecting their rights.<sup>185</sup> Courts and administrative agencies have thus far proven incapable of addressing the issue on their own. It is the duty of a representative body to weigh competing interests and declare which ones are most beneficial and which are destructive for society. It is time for legislatures to engage in that process and provide definitive guidelines for society to tackle the issue of obesity. Customers of size, their fellow co-passengers, and the airlines have waited long enough.

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184. See *supra* Part II.A.

185. See Michelle M. Mello et al., *Obesity—The New Frontier of Public Health Law*, 354 N. ENG. J. MED. 2601 (2006).