RESTORING THE ADA AND BEYOND: DISABILITY IN THE 21ST CENTURY

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I. INTRODUCTION

Perhaps it was imprudent for me to agree, in response to the request of the symposium organizers, to address the future of disability law. Nobel Prize-winning physicist Neils Bohr supposedly once said that "[p]rediction is very difficult, especially about the future."[1] Columnist and author Jim Bishop wrote, "The future is an opaque mirror. Anyone who tries to look into it sees nothing but the dim outlines of an old and worried face."[2] Prognosticating is a very tricky and uncertain undertaking.

I cannot pretend to have any particular gift for crystal ball gazing in disability matters. When I joined the staff of the National Council on the Handicapped in 1984, I was unsure whether it was worth the effort to push the idea of comprehensive disability nondiscrimination legislation to the predominantly conservative Council. At a meeting with the late Justin Dart who was Vice Chair of the Council, I shared my misgivings; Justin's reaction was "Bob, I don't see how we could not do it."[3] We

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1. Arthur K. Ellis, TEACHING AND LEARNING ELEMENTARY SOCIAL STUDIES 431 (Natural History Press, 1970) (Bohr reportedly credited Danish cartoonist Storm P (Robert Storm Petersen) as the source of the quotation, but its origin has also been attributed to a variety of other people, including American baseball legend Yogi Berra, film producer Samuel Goldwyn, and many others. See Charles Stimson and Andrew M. Grossman, *Keep Track of Crack Cocaine Facts,* WebMemo #1882, The Heritage Foundation, April 4, 2008, *available at* http://www.heritage.org/research/Crime/wm1882.cfm#_ftn1. For a web page listing a number of suggested originators of the quotation, see Larry Denenberg, *Who first said "It is difficult to make predictions, especially about the future" (or one of its many variants)?, available at* http://www.larry.denenberg.com/predictions.html.)

2. Jim Bishop, NEW YORK JOURNAL-AMERICAN, March 14, 1959.

3. Former Senator Lowell Weicker referred to my meeting with Justin in his article in the

did, and, to my pleasant surprise, the Council endorsed the idea unanimously and enthusiastically, and turned out to be vigorous advocates for what became the Americans with Disabilities Act (ADA). Again, when I had penned the first draft of the ADA in the early months of 1987, I thought it might take decades for such legislation to be enacted, if it was even introduced at all; a little less than three-and-a-half years later, the ADA was signed into law.[4]

Likewise, when the Education for All Handicapped Children's Act,[5] the predecessor of the Individuals with Disabilities Education Act (IDEA) was enacted in 1975, I thought that the Individualized Education Program (IEP) process spelled out in the Act would be a very positive and effective way to empower parents of children with disabilities by making them equal partners with school personnel in figuring out what particular educational program would be effective and appropriate for each child with special education needs. I never anticipated that many school districts would preempt effective parental participation by making most decisions about the IEP prior to the team meeting with parents and present the school's unilaterally devised offerings in a take-it-or-leave-it or take-it-or-hire-a-lawyer fashion, and that many districts would embrace a strategy of fighting almost all parental objections up the procedural process and into the courts. I had no idea that what appeared to be a worthwhile and promising advance in disability law would turn out to be largely a *pro forma*, often meaningless exercise.

And when Congress passed the Developmental Disabilities Assistance and Bill of Rights Act of 1975[6] with its list of "Rights of the Developmentally Disabled,"[7] my immediate reaction was not to prophesy that the Supreme Court would declare the "Rights" effectively unenforceable in the courts.[8] Indeed, I wrote and filed a brief *amicus curiae* with the Court on behalf of the National Association of Protection and Advocacy Systems and forty-five individual states' P&As in which I argued that Congress intended the Developmental Disabilities Bill of Rights to be enforceable.[9]

Temple Law Review. Lowell P. Weicker Jr., *Historical Background of the Americans with Disabilities Act*, 64 TEMP. L. REV. 387, 390–91 (1991).

4. Nor, as a teacher of constitutional law, did I in any way anticipate that the Supreme Court would suddenly change the standards it had applied to determine congressional authority to enact legislation and begin to invalidate or call into question statutes that clearly passed constitutional muster at the time they were enacted; like most legal scholars, I never expected that the Supreme Court would overrun the authority of both elected branches of government–supposedly "coequal branches"—and question the validity of highly popular, overwhelmingly bipartisan legislation passed by huge voting majorities, such as the ADA.

5. Pub. L. No. 94-142, 89 Stat. 773 (1975) (This statute was the predecessor of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C.§ 1400 (2008)).

6. Pub. L. No. 94-103, 89 Stat. 486 (1975).

7. *Id.* at § 201, 89 Stat. 502.

8. *See* Pennhurst State Sch. and Hosp. v. Halderman, 451 U.S. 1 (1981) (holding that the "bill of rights" provision of the Developmentally Disabled Assistance and Bill of Rights Act did not create any substantive rights to "appropriate treatment" in the "least restrictive" environment in favor of persons with mental retardation).

9. In my defense, I must say that by the time I filed the brief, I well understood that Congress's formulation of the list of rights as a "finding" instead of a substantive provision "establishing" or "imposing" the rights on funding recipients might prove a fatal flaw to judicial enforceability. But this was less a prediction of what the Court was going to do than a simple recognition of what we were up against based on the details of the legislative language; I still hoped

Accordingly, my record for reading the tea leaves as to what is about to happen in disability rights law has not always been particularly impressive.[10] Fortunately, that is not what I propose to do in this paper. Instead of predicting what is going to happen, I am going to focus on suggesting what should, not necessarily will, happen. I undertake to throw out some ideas about issues that are going to face us, and what ought to or needs to happen. For that task, I do have some credentials.

In the early 80s, I was privileged to be hired to work in the Office of General Counsel of the U.S. Commission on Civil Rights to help write, with legally blind civil rights attorney Christopher Bell, the Commission's first-ever report on disability discrimination. In the report we developed—ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES[11]—we marshaled disability statistics; social science studies; federal laws; and a sizeable, growing, and somewhat muddled body of caselaw to try to create a framework for making sense of, and guiding the future development of, disability civil rights law. The report offered "orienting principles" of disability nondiscrimination law,[12] adopted and elaborated on the goal of "full participation" articulated by Professor tenBroek, [13] provided a conceptual foundation for and definition of reasonable accommodation, [14] and offered guidance about the extent to which traditional civil rights concepts and analysis should apply to disability rights law. [15]

When Chris Bell and I were unable to convince the Civil Rights Commission to recommend specific federal legislative changes, we proceeded on our own to write a law review article that provided what we called a "statutory blueprint" for a federal law broadly prohibiting discrimination on the basis of disability and clarifying the elements of such a law.[16] One of its recommendations was that Congress should

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and half-expected, misguidedly as it turned out, that we would prevail on the issue.

10. My ability to see the future in regard to disability rights issues did, however, compare favorably to that of a couple of Supreme Court Justices, at least in one particular case. In a brief *amici curiae* filed in *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001), on behalf of principal congressional ADA sponsors Senators Robert Dole, Tom Harkin, James M. Jeffords, and Edward M. Kennedy, and Representative Steny Hoyer, I argued that permitting plaintiff Casey Martin to use a golf cart on account of his serious mobility impairment would not destroy the integrity or threaten the essential nature of PGA golf tournaments, and thus would not "fundamentally alter" PGA events. Brief for the Honorable Robert J. Dole et al. as Amici Curiae Supporting Respondent at 27, *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001). In his dissenting opinion, in which he was joined by Justice Thomas, Justice Scalia argued that the majority's analysis, which asked whether a proposed reasonable modification would alter an essential element of the sport or would give the individual a competitive advantage, would prove to be "expansive and destructive," and lead to all sorts of mischief in sports. Justice Scalia felt the holding not only raised the possibility that the cup in golf might have to be enlarged for golfers with disabilities, but also imperiled "[e]ighteen-hole golf courses, 10-foot-high basketball hoops, 90-foot baselines, 100-yard football fields," and would lead to such scenarios as entitling a Little League player with attention deficit disorder to four strikes. 532 U.S. at 701–703 (J. Scalia, dissenting). Obviously, despite the Court's ruling in favor of Martin, none of these disruptive eventualities has come to pass.

11. U.S. COMMISSION ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES (1983).

12. *Id.* at 86–101.

13. *Id.* at 67–85.

14. *Id.* at 102–129.

15. *Id.* at 141–158.

16. Robert L. Burgdorf Jr. & Christopher Bell, *Eliminating Discrimination Against Physically and Mentally Handicapped Persons: A Statutory Blueprint*, 8 MENTAL & PHYSICAL DISABILITY L. REP.

prohibit discrimination against persons with disabilities in all contexts in which Congress had prohibited other forms of discrimination, including prohibiting disability discrimination by all entities that affect interstate commerce.[17]

Upon joining, in the mid-80s, the staff of the National Council on the Handicapped, later re-designated the National Council on Disability (NCD), an independent federal agency whose primary mission is to make recommendations to the Congress, the President, and the American people on disability issues, I was assigned to several tasks with hortatory overtones. As staff author for NCD of its 1986 report, TOWARD INDEPENDENCE,[18] I pulled together the forty-five legislative recommendations that were drawn from detailed topic papers addressing ten broad topic papers and adopted by the Council. I also got to write the topic paper on "Equal Opportunity Laws" in which, building upon the "Statutory Blueprint" Chris Bell and I had previously developed, I proposed, and the Council adopted, a recommendation for the enactment of "a comprehensive law requiring equal opportunities for individuals with disabilities, with broad coverage and setting clear, consistent, and enforceable standards prohibiting discrimination on the basis of [disability]."[19] In a follow-up report issued in 1988—ON THE THRESHOLD OF INDEPENDENCE—we were able to report that 80% of the recommendations had been partially or fully accomplished, including the enactment of twenty-one statutory provisions consistent with the Council's recommendations.[20] One recommendation that had not been accomplished, however, was the call for a comprehensive law prohibiting discrimination on the basis of disability. As a result, in the process of preparing for the 1988 report, NCD asked me to draft such a law, to be called "the Americans with Disabilities Act (ADA)." My draft ADA bill was published in ON THE THRESHOLD, and was introduced in Congress, with a few changes, [21] in 1988.[22] This version of the ADA provided the basis for revised ADA bills that were introduced in the 101st Congress in May 1989[23] and enacted in 1990.

More recently, after NCD had become concerned about the harm caused to the ADA by a series of negative decisions of the United States

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64 (Jan./Feb. 1984).

17. *Id.* at 71.

18. Nat'l Council on the Handicapped, TOWARD INDEPENDENCE (1986), http://www.ncd.gov/newsroom/publications/1986/toward.htm [hereinafter TOWARD INDEPENDENCE].

19. *Id.*, App. at A-50; *Id.* at 18.

20. NAT'L COUNCIL ON THE HANDICAPPED, ON THE THRESHOLD OF INDEPENDENCE at xiii (1988) (Andrea Farbman, ed.) [hereinafter ON THE THRESHOLD].

21. Certain changes were negotiated by representatives of national disability consumer organizations in meetings with representatives of the National Council and potential congressional sponsors. These included deletion from the bill of provisions covering the federal government, federal grantees, and federal contractors (otherwise covered by Sections 501, 503, and 504 of the Rehabilitation Act of 1973); and addition to the bill of provisions relating to access by persons with disabilities to broadcasting and communications services.

22. S. 2345, 100th Cong., 2d Sess., 134 CONG. REC. S5110 (daily ed. Apr. 28, 1988); H.R. 4498, 100th Cong. 2d Sess.; *see* 134 CONG. REC. E1307 (daily ed. Apr. 29, 1988).

23. S. 933, 101st Cong., 1st Sess., 135 CONG. REC. S4978 (daily ed. May 9, 1989); H.R. 2273, 101st Cong., 1st Sess., 135 CONG. REC. H1690 (daily ed. May 9, 1989).

Supreme Court, the Council asked me to head up, as a consultant, a project to develop a report containing a proposed legislative response to the damaging rulings. Accordingly, I wrote a report for the Council titled RIGHTING THE ADA[24] that described the problematic decisions, explained the mischief that they have caused, and presented a legislative proposal—an ADA Restoration Act—to repair the damage and get the ADA back on track. The report and the Restoration Act proposal will be discussed in some detail subsequently in this paper.

In each of the instances I have mentioned, and in some of my other writing,[25] I have had fortuitous opportunities and the requisite audacity to try to suggest some paths that disability nondiscrimination law should take. Accordingly, in response to the request of the symposium organizers for me to address the future of disability law, I shall undertake, not to foretell upcoming events, but to sketch some prospects and to outline some possible courses that I believe will lead us in the direction that, for reasons described below, Jacobus tenBroek would approve.

II. BACK TO THE FUTURE: THE PAST AS PRELUDE

On the time continuum that marks human events on earth, we build in the present on the foundation of the past toward what we hope will be a better future. Thus, the disability rights movement had its beginnings in the relatively near past, has proceeded to the present state of affairs, and needs to continue on into the future. My best guide in trying to contribute toward a future disability law agenda will be signposts from the past and present. Fortunately, there are some very helpful, enlightening signposts pointing the way. Without invoking clichés about learning from history, I think we can derive some very important lessons from the annals of the disability rights enterprise.

Going to court to challenge discrimination on the basis of disability has no definitive starting point. In my casebook on the legal rights of persons with disabilities published in 1980,[26] I included a case from 1893 in which a student excluded from school because he was considered "too weak-minded to derive profit from education" sued the City of

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24. National Council on Disability, RIGHTING THE ADA (2004).

25. My purposes in producing the first law school casebook on disability rights law, published in 1980, included a desire to establish disability rights as a recognized academic field, and to organize the field of law into logical sub-specialties. ROBERT L. BURGDORF JR., THE LEGAL RIGHTS OF HANDICAPPED PERSONS: CASES, MATERIALS, AND TEXT (Paul H. Brookes Publishing Co., 1980). Similarly, in my treatise on disability and employment law I tried to add a disability rights movement perspective to a comprehensive review of the law on this topic. ROBERT L. BURGDORF JR., DISABILITY DISCRIMINATION IN EMPLOYMENT LAW (1995). Shortly after the enactment of the ADA, I wrote an article for the Harvard Civil Rights-Civil Liberties Law Review in the hope of advancing my perspective on various provisions of the Act. Robert L. Burgdorf Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413 (1991). In 1997, I penned a lengthy article for the Villanova Law Review in which I futilely sought to redirect the growing body of legal precedent narrowing the coverage of the ADA. Robert L. Burgdorf Jr., *"Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability*, 42 VILL. L. REV. 409 (1997).

26. ROBERT L. BURGDORF JR., THE LEGAL RIGHTS OF HANDICAPPED PERSONS: CASES, MATERIALS, AND TEXT (1980).

Cambridge, unsuccessfully, to challenge his exclusion.[27] By at least 1868, courts in the United States had announced that it was not unreasonable for a blind or visually impaired person to proceed on the public streets.[28] Such cases—summarized by Professor Jacobus tenBroek in his landmark work *The Right to Live in the World: The Disabled in the Law of Torts*,[29] to be discussed subsequently—arose in the context of torts litigation, in which defendant municipalities charged that blind people who had been injured by dangerous conditions on the streets or sidewalks were contributorily negligent for traveling unattended. While they did not address direct challenges to discrimination on the basis of disability, decisions in which courts rejected this contributory negligence defense implicitly and sometimes explicitly recognized an entitlement of persons with disabilities to use the public thoroughfares.[30] A direct condemnation of discrimination related to travel occurred in 1897 when the Supreme Court of Mississippi ruled that a railroad, as a common carrier, had violated its legal obligations when it refused to sell tickets to a man solely because he was blind.[31] Even earlier, after the Civil War, disabled veterans had employed pressure tactics, political activities, and court actions in their efforts to obtain and enforce pension rights.[32]

This very limited sampling of historical instances of legal advocacy to establish and implement legal rights for people with disabilities in America illustrates the haphazard occurrence and sometimes nebulous character of such actions, and points up the difficulty of establishing a clear starting point of disability nondiscrimination litigation activity.

But if it is difficult to identify the exact beginning of court actions challenging disability discrimination, it is much easier to ascertain the precise origin of the conceptual foundation for the systematic use of such actions, ultimately culminating in what we have come to call a Disability Rights Movement—it all began in 1966 with the publication of two law

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27. Watson v. City of Cambridge, 32 N.E. 864 (Mass. 1893). For other similar early decisions, see, for example, *State ex rel. Beattie v. Bd. of Educ. of City of Antigo*, 172 N.W. 153 (Wis. 1919) (upheld board of education's authority to exclude student described as "crippled and defective child") and *Board of Educ. v. State ex rel. Goldman*, 191 N.E. 914 (Ohio Ct. App. 1934) (parent of brain-injured child who had low score on I.Q. test unsuccessfully sued local board of education that had excluded child from public schools).

28. Davenport v. Ruckman, 37 N.Y. 568 (1863). *See also* Town of Salem v. Goller, 76 Ind. 291 (1881) ("[T]he mere fact that [the plaintiff] was blind is not conclusive evidence of negligence in venturing upon the sidewalks, which he had a right to presume were in a safe condition.").

29. Jacobus tenBroek, *The Right to Live in the World: The Disabled and the Law of Torts*, 54 CAL. L. REV. 841, 866 n.146 (1966).

30. See, e.g., Balcom v. City of Independence, 160 N.W. 305, 310 (1916) ("It is said uniformly that the blind and the halt have as much right to the use of the street as those who have possession of their faculties"); Sleeper v. Sandown, 52 N.H. 244, 251, 1872 WL 8705, *8 (1872) ("[T]his plaintiff, although blind, had the same right to assume the existence of a rail on each side that any traveler passing either in the daytime or in the night-time would have."); Shields v. Consolidated Gas Co.,193 A.D. 86, 90, (1920) ("It is well settled that one who is blind or whose eyesight is impaired, is not thereby deprived of the right to use the public highways, and that in venturing onto them he does not do so at his peril.").

31. Zackery v. Mobile & Ohio R. Co., 74 Miss. 520 (1897).

32. Peter David Blanck & Michael Millender, *Before Disability Civil Rights: Civil War Pensions and the Politics of Disability in America*, 52 ALA. L. REV. 1 (2000).

review articles written (one as author and one as co-author) by the man whom this symposium honors: Jacobus tenBroek. The first article, *The Disabled in the Law of Welfare*,[33] co-written with Political Science Professor Floyd Matson, contained several important conceptual points about disability, including identifying the societal tendency to lump people with disabilities together with others viewed as "deviants,"[34] recognizing certain commonalities in the treatment and experiences of persons having different kinds of disabilities,[35] drawing a distinction between "disability" and "handicap,"[36] highlighting the role of public attitudes and assumptions regarding disabilities,[37] and noting the propensity to regard people with disabilities as incompetent and needing charity.[38] But most pertinent for present purposes was the article's articulation of two alternative societal approaches to disability—what the authors referred to as "custodialism" and "integrationism":

> The older custodial attitude is typically expressed in policies of segregation and shelter, of special treatment and separate institutions. The newer integrative approach focuses attention upon the needs of the disabled as those of normal people caught at a physical and social disadvantage. The effect of custodialism is to magnify physical differences into qualitative distinctions; the effect of integrationism is to maximize similarity, normality, and equality as between the disabled and the able-bodied.[39]

TenBroek and Matson wrote that integrationism "gives emphasis to the normal capacities of the physically disabled and hence to their potential for full participation as equals in the social and economic life of the community."[40]

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33. Jacobus tenBroek & Floyd W. Matson, *The Disabled and the Law of Welfare*, 54 CAL. L. REV. 809 (1966).

34. *Id.* at 812–14 ("The tendency to lump together all those who display a visible difference, either of appearance or behavior—as in the physical scale of 'defectives' or the sociological scale of 'deviants'—represents the survival in attenuated form of the cruder prejudices of primitive societies.").

35. *Id.* at 814 ("Psychologically, socially, and legally, the disabled throughout history have enjoyed among themselves a peculiar 'equality'; they have been equally mistrusted, equally misunderstood, equally mistreated, and equally impoverished.").

36. *Id.* at 814 ("[A] meaningful distinction may be made between 'disability' and 'handicap'–that is, between the *physical disability*, measured in objective scientific terms and the *social handicap* imposed upon the disabled by the cultural definition of their estate. 'A disability is a condition of impairment, physical or mental, having an objective aspect that can usually be described by a physician . . . A handicap is the cumulative result of the obstacles which disability interposes between the individual and his maximum functional level.'") (quoting Kenneth W. Hamilton, COUNSELING THE HANDICAPPED IN THE REHABILITATION PROCESS 17 (1950)).

37. *Id.* at 814–16 ("The legal and constitutional status of the physically disabled—like their status in society and in the economy—is a reflection of underlying attitudes and assumptions concerning disability and of social policies based upon those attitudes. For the most part it is the *cultural definition* of disability, rather than the scientific or medical definition, which is instrumental in the ascription of capacities and incapacities, roles and rights, status and security.").

38. *Id.* at 809–10 ("Throughout history the physically handicapped have been regarded as incompetent to aid themselves and therefore permanently dependent upon the charity of others—in short, as indigent beggars.").

39. *Id.* at 816.

40. *Id.* at 815.

Having introduced the custodialism and integrationism alternatives in the Law of Welfare article, Professor tenBroek went on to take a more prescriptive approach in the second article—*The Right to Live in the World: The Disabled and the Law of Torts*.[41] In a section bluntly titled "Integration the Answer," he wrote that in making disability policy determinations, "[T]he courts, other agencies of government, and other public and private bodies should be controlled by a policy of integrationism—that is, a policy entitling the disabled to full participation in the life of the community and encouraging and enabling them to do so . . . ."[42] He argued that such an approach had already been officially adopted and was applicable to the courts:

> [T]his policy is now, and for some time has been, the policy of the nation, declared as such by the legislatures of the states and by the Congress of the United States; and [] the courts and others are thus bound to use that policy at least as a guide, if not as a mandate, in reaching their decisions, whatever may be their views as to its desirability or feasibility.[43]

In support of his contention that integrationism and full participation had been adopted as national and state policy, tenBroek pointed to various federal and state laws, including rehabilitation legislation, architectural barriers laws, special education laws, guide dog and white cane statutes, and laws prohibiting of discrimination on the basis of disability in particular contexts.[44] Since 1966, the ultimate objectives of integration and full participation articulated by Professor tenBroek have been recognized by various government entities and endorsed in disability legislation including, notably, the Americans with Disabilities Act (ADA).[45]

TenBroek went on in *The Disabled in the Law of Torts* article to consider the body of torts decisions involving disability through the lens of the integration/custodialism distinction, and suggested reforms to make the

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41. tenBroek, *supra* note 29.

42. *Id.* at 843.

43. *Id.*

44. *See id.* at 843–47, and authorities cited therein.

45. *See, e.g.*, ACCOMMODATING THE SPECTRUM, *supra* note 11, at 67–68 ("[G]overnment bodies at all levels of modern American society have, with relative consistency, chosen full participation as the desired objective for handicapped people.") and the authorities cited therein; ON THE THRESHOLD, *supra* note 20, at 28 ("[T]he Nation's proper goals regarding persons with disabilities are to assure equality of opportunity, full participation, independent living, and, wherever possible, economic self-sufficiency for such citizens."); 29 U.S.C. § 701(a)(3)(F) ("right of individuals to . . . enjoy full inclusion and integration in the economic, political, social, cultural, and educational mainstream of American society"), (a)(6)(B) ("the goals of the Nation properly include the goal of providing individuals with disabilities with the tools necessary to . . . achieve equality of opportunity, full inclusion and integration in society, employment, independent living, and economic and social self-sufficiency, for such individuals"), & (c)(3) ("It is the policy of the United States that all programs, projects, and activities receiving assistance under this chapter shall be carried out in a manner consistent with the principles of . . . inclusion, integration, and full participation of the individuals"); S. Rep. No. 1297, 93d Cong., 2d Sess. 56 (1974), reprinted in 1974 U.S.C.C.A.N. 6373, 6406 (people with disabilities have a basic human right of full participation in life and society). Section 12101(a)(8) of the ADA provides that "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals." 42 U.S.C. § 12101(a)(8).

law reflect the integrationist approach.[46] In the process, he argued that people with disabilities have a constitutional and legal right to live in the world, to freedom of movement within that world, and to equal access to places of public accommodation; and that artificial barriers that keep such individuals from moving about throughout society are or should be illegal.[47]

Apart from other qualities and groundbreaking contributions to disability law, the *Law of Welfare* and *Law of Torts* articles provided several fundamental notions that provided guidance to the disability rights movement that began to emerge in the decade that followed, and that continue to afford direction as we proceed toward the end of the first decade of the 21st century:

1) the guiding star of full participation and integration as the ultimate objectives of disability rights advocacy;

2) the perception of people with disabilities as "normal people caught at a physical and social disadvantage";

3) the difference between deficits incident to disability and those imposed unnecessarily by society as an outgrowth of negative attitudes and misdirected practices; and

4) the creative use of existing legal precedents and theories to establish, expand, and enforce legal rights of people with disabilities.

In 1969, only about three years after the seminal tenBroek articles, two important publications came out that explicitly recognized the prototype that the civil rights efforts of African Americans during the sixties offered for individuals with disabilities in their efforts to improve their status in American society. In an article titled *Uncle Tom and Tiny Tim: Some Reflections on the Cripple as Negro*,[48] Professor Leonard Kriegel suggested that, as people with disabilities were seeking equality and dignity, they should adopt as a model the approaches taken by black people in their civil rights struggles. Another professor, Richard Allen, wrote a monograph titled *The Legal Rights of the Disabled and Disadvantaged*[49] in which he suggested that people with disabilities have many of the same problems—in education, job opportunities, and social participation—as poor people and racial and ethnic minorities. He proposed that all these groups are seeking similar goals such as normalization, fairness, and respect for the dignity and worth of each individual. He advocated a shift "from charity to rights" and called for recognition of "a common right to full

46. 54 CAL. L. REV. 841 (1966).

47. tenBroek, *supra* note 29, at 848–52, 910–18.

48. Leonard Kriegel, *Uncle Tom and Tiny Tim: Some Reflections on the Cripple as Negro*, 38 AM. SCHOLAR 412 (1962).

49. Richard Allen, LEGAL RIGHTS OF THE DISABLED AND DISADVANTAGED (U.S. Department of Health, Education, and Welfare, 1969).

enjoyment of that fundamental concept of our jurisprudence: *Equal Justice under Law*; they who have for so long had precious little of either."[50] Professor Allen went a step further and outlined some ways in which such principles could be pursued in the context of court actions and legislation, thereby mapping out a blueprint for the litigative and legislative activities on behalf of individuals with disabilities in the 1970s and thereafter.

To me, these four publications together provide a pretty good roadmap for the disability rights movement—or perhaps a more accurate analogy would be an AAA TripTik, that accurately portrays the starting point, suggests a route for proceeding, and indicates the location of the final destination being sought. The four publications serve as a useful measuring stick for looking at how far the disability rights movement has come, and where we still need to go.

III. UNFINISHED BUSINESS: THE RESTORATION OF THE ADA[51]

One very obvious part of any future disability rights agenda is to repair the damage to the Americans with Disabilities Act resulting from ill-advised judicial decisions. The enactment of the ADA was a huge step forward; the negative court interpretations of the statute represent a step back, not nearly as momentous as its enactment but quite substantial in their detrimental effects. Correction of these distortions of our principal civil rights guarantee must surely be at the top of objectives in the near future.

In July of 1990, Congress and the George H.W. Bush Administration realized the momentous and long-needed objective of according people with disabilities protection from discrimination—the right to be treated equally and to challenge unfair treatment against them—by enacting the ADA. In this legislation, the two elected branches of government made a compact with the American people that America would no longer tolerate discrimination on the basis of disability, and if people encountered such discrimination they could challenge it in court. Unfortunately, the judiciary—the unelected branch—has largely taken away important parts of the protection of the ADA and access to the courts to enforce it by drastically and aggressively limiting the coverage of the ADA. Today, large numbers of people with disabilities around the country find that they no longer have the rights the Congress (by overwhelmingly favorable bipartisan voting majorities) and the President gave them.

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50. *Id.* at 1.

51. Materials in this section are derived in substantial part from testimony that I delivered to the House Committee on Education and Labor in January—*ADA Restoration Act of 2007: Hearing on H.R. 3195 before the House Comm. on Education and Labor*, 110th Cong., January 29, 2008 (statement of Robert L. Burgdorf Jr., Professor, University of the District of Columbia, David A. Clarke School of Law)—which was based, in turn, on material derived from sections I had written for the RIGHTING THE ADA report of the National Council on Disability (2004), the series of topic papers that led up to it, and other NCD reports that I helped develop.

A. *Impact of the ADA*

In a variety of ways, the ADA has lived up to the high hopes that accompanied its passage. The provisions of the ADA that address architectural, transportation, and communication accessibility have changed the face of American society in numerous concrete ways. A vast number of buildings and other structures have been affected by provisions of the ADA that make it illegal to design or construct any new place of public accommodation or other commercial facility without making it readily accessible to and usable by people with disabilities, or to alter such a facility without incorporating accessibility features.[52] The ADA's mass transit provisions ended decades of disagreements and controversy regarding exactly what is required of public transportation systems to avoid discriminating on the basis of disability. The ADA contains detailed provisions describing requirements for operators of bus, rail, and other public transportation systems, and intercity and commuter rail systems.[53] Although implementation has been far from perfect and ADA provisions do not answer all the questions, much progress in transportation accessibility has been made. The ADA's employment provisions have dramatically affected hiring practices by barring invasive preemployment questionnaires and disability inquiries and the misuse of preemployment physical information. These provisions also have made job accommodations for workers with disabilities more common than they were before the ADA was enacted. The ADA's telecommunications provisions have resulted in the establishment of a nationwide system of relay services, which permit the use of telephone services by those with hearing or speech impairments, and a closed captioning requirement for the verbal content of all federally funded television public service announcements.

Other provisions of Title II of the ADA (covering state and local governments) and Title III (covering public accommodations) have eliminated many discriminatory practices by private businesses and government agencies. The ADA has had a particularly strong impact in promoting the development of community residential, treatment, and care services in lieu of unnecessarily segregated large state institutions and nursing homes. The Act provided the impetus for President George W. Bush's "New Freedom Initiative," issued in February 2001, committing his administration to assuring the rights and inclusion of people with disabilities in all aspects of American life; and for Executive Order No. 13217, issued on June 18, 2001, declaring the commitment of the United States to community-based alternatives for people with disabilities.

At the ADA signing ceremony, the first President Bush declared that other countries, including Sweden, Japan, the Soviet Union, and each of the 12 member nations of the European Economic Community, had announced their desire to enact similar legislation. In the years since

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52. Americans with Disabilities Act, 42 U.S.C. § 12181–12189 (1990).

53. *Id.* at § 12131–12165 (1990).

its enactment, numerous other countries have been inspired by the ADA to seek legislation in their own jurisdictions to prohibit discrimination on the basis of disability. These countries have looked to the ADA, if not as a model, at least as a touchstone in crafting their own legislative proposals.

In 1988, while the original ADA bills were pending before Congress, the Presidential Commission on the Human Immunodeficiency Virus (HIV) Epidemic endorsed the legislation and recommended that the ADA should serve as a vehicle for protecting from discrimination people with HIV infection. The ADA has proved to be the principal civil rights law protecting people with HIV from the sometimes egregious discriminatory actions directed at them.

In a broader sense, the ADA has, as the Council has observed in a report issued in 2000, "begun to transform the social fabric of our nation":

> It has brought the principle of disability civil rights into the mainstream of public policy. The law, coupled with the disability rights movement that produced a climate where such legislation could be enacted, has impacted fundamentally the way Americans perceive disability. The placement of disability discrimination on a par with race or gender discrimination exposed the common experiences of prejudice and segregation and provided clear rationale for the elimination of disability discrimination in this country. The ADA has become a symbol, internationally, of the promise of human and civil rights, and a blueprint for policy development in other countries. It has changed permanently the architectural and telecommunications landscape of the United States. It has created increased recognition and understanding of the manner in which the physical and social environment can pose discriminatory barriers to people with disabilities. It is a vehicle through which people with disabilities have made their political influence felt, and it continues to be a unifying focus for the disability rights movement.[54]

This is not to ignore the fact that there are huge gaps in enforcement of the ADA's requirements or that some covered entities have taken an I-won't-do-anything-until-I'm-sued attitude toward the obligations imposed by the law. Indeed, the *Promises to Keep* report, from which the preceding quotations were taken, described a variety of problems and weaknesses in federal enforcement of the ADA and presented recommendations for remedying such deficiencies.

Numerous people with disabilities, however, have declared that the ADA has played an important role in improving their lives. In 1995, NCD issued a report titled *Voices of Freedom: America Speaks Out on*

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54. NAT'L COUNCIL ON DISABILITY, PROMISES TO KEEP: A DECADE OF FEDERAL ENFORCEMENT OF THE AMERICANS WITH DISABILITIES ACT 1 (2000).

the ADA, in which it presented a large number of statements by individuals with disabilities talking about the impact of the ADA. The following is a tiny sampling of the thousands of statements NCD received:

> The ADA is fantastic. I can go out and participate. The ADA makes me feel like I'm one of the gang. (Sandra Brent, Arkansas)
>
> Even though we had the Rehab Act of 1973, it took the ADA to make real change. The ADA has given me hope, independence, and dignity. (Yadi Mark, Louisiana)
>
> Because of the ADA, I have more of the opportunities that other people have. Now I feel like a participant in life, not a spectator. (Brenda Henry, Kansas)
>
> A successful person with a disability was once thought of as unusual. Now successful people with disabilities are the rule. It's the ADA that has opened the door. (Donna Smith-Whitty, Mississippi)[55]

The report presented statements by people with disabilities about their experiences with the ADA in various aspects of their lives, including access to the physical environment, access to employment opportunities, communication mobility, and self image. The report concluded that,

> [T]he actual research data and the experiences of people with disabilities, of their family members, of businesses, and of public servants, [demonstrates] that this relatively new law has begun to move us rapidly toward a society in which all Americans can live, attend school, obtain employment, be a part of a family, and be a part of a community in spite of the presence of a disability. What is needed now is a renewed commitment to the goals of the Act (which were crafted under unprecedented bipartisan efforts), sufficient resources to support further education and training concerning the ADA, and effective enforcement.[56]

In a similar vein, President George W. Bush declared the following in 2002:

> In the 12 years since President George H.W. Bush signed the ADA into law, more people with disabilities are participating fully in our society than ever before. As we mark this important anniversary, we celebrate the positive

55. NAT'L COUNCIL ON DISABILITY, *Voices of Freedom: America Speaks Out on the ADA* 26 (1995).

56. *Id.* at 27.

> effect this landmark legislation has had upon our Nation, and we recognize the important influence it has had in improving employment opportunities, government services, public accommodations, transportation, and telecommunications for those with disabilities.
>
> Today, Americans with disabilities enjoy greatly improved access to countless facets of life; but more needs to be done. We must continue to build on the important foundations established by the ADA. Too many Americans with disabilities remain isolated, dependent, and deprived of the tools they need to enjoy all that our Nation has to offer.[57]

B. *Judicial Resistance*

In light of the overwhelming endorsement of the ADA by Congress in enacting it, by the Presidents in office at and since its enactment, and by the majority of the general public, it is surprising and disappointing that the judiciary all too often has given the Act the cold shoulder. Problematic judicial interpretations have blunted the Act's impact in significant ways. The National Council on Disability, numerous legal commentators, and large numbers of people with disabilities have become increasingly concerned about certain interpretations and limitations placed on the ADA in decisions of the U.S. Supreme Court.

This is not to suggest that all the rulings of the high court on the ADA have been negative. Among favorable decisions, the U.S. Supreme Court has (1) upheld the ADA's integration requirement and applied it to prohibit unnecessary segregation of people receiving residential services from the states;[58] (2) held the ADA applicable to protect prisoners in state penal systems;[59] (3) held that the ADA prohibits discrimination by a dentist against a person with HIV infection;[60] (4) ruled that the ADA required the PGA to allow a golfer with a mobility impairment to use a golf cart in tournament play as a "reasonable modification";[61] and ruled that the ADA protects the rights of people with disabilities to have access to the courts.[62] But while not all of the Court's ADA decisions are objectionable, those that are have had a serious negative impact. They have placed severe restrictions on the class of persons protected by the ADA, have narrowed the remedies available to complainants who successfully prove violations of the Act, have expanded the defenses available to employers, and have even called into question the very

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57. President George W. Bush, Presidential Proclamation on the Anniversary of the Americans with Disabilities Act, (July 26, 2002).

58. Olmstead v. L. C., 527 U.S. 581 (1999).

59. Pa. Dep't. of Corrections v. Yeskey, 524 U.S. 206 (1998).

60. Bragdon v. Abbott, 524 U.S. 624 (1998).

61. PGA Tour, Inc. v. Martin, 532 U.S. 661 (2001).

62. Tennessee v. Lane, 541 U.S. 509 (2004).

legality of some parts of the Act. NCD's policy paper, *The Impact of the Supreme Court's ADA Decisions on the Rights of Persons with Disabilities*, explores the effect such decisions have had on individuals with disabilities.[63]

Media coverage of the Court's ADA decisions has made matters worse. While such coverage has not been uniformly negative, a significant portion of it has been misleading, presenting the Act in a highly unfavorable light and placing a negative "spin" on the ADA, the court decisions interpreting it, and its impact on American society. NCD's extensive and detailed policy paper, *Negative Media Portrayals of the ADA*, discusses prevalent media-fed myths about the ADA.[64]

C. *Surprising Problems with the Definition of Disability*

When Congress passed the ADA and President George H.W. Bush signed it into law, hardly anyone expected trouble in the courts with the definition of disability. Congress played it safe by adopting in the ADA a definition of disability that was the same as the definition of "handicap" under the Rehabilitation Act. That definition was enacted in 1974 and clarified in regulations issued under Section 504 of the Rehabilitation Act. Because the definition was a broad and relatively uncontroversial one, defendants seldom challenged plaintiffs' claims of having a disability.[65] In 1984, a federal district court noted that, after 10 years' experience with the Rehabilitation Act definition, only one court found a Section 504 plaintiff not to have a "handicap."[66]

In 1987, the U.S. Supreme Court made it abundantly clear that the definition of "handicap" under Section 504 was very broad. In *School Board of Nassau County v. Arline*, the Court took an expansive and nontechnical view of the definition.[67] The Court found that Ms. Arline's history of hospitalization for infectious tuberculosis was "more than sufficient" to establish that she had "a record of" a disability under Section 504 of the Rehabilitation Act.[68] The Court made this ruling even though her discharge from her job was not because of her hospitalization.[69] The Court displayed a lenient interpretation of what a plaintiff needed to show to invoke the protection of the statute. It noted that, in establishing the new definition of disability in 1974, Congress had expanded the definition "so as to preclude discrimination against '[a]

63. Nat'l Council on Disability, *No. 7: The Impact of the Supreme Court's ADA Decisions on the Rights of Persons with Disabilities*, THE AMERICANS WITH DISABILITIES ACT POLICY BRIEF SERIES: RIGHTING THE ADA, http://www.ncd.gov/newsroom/publications/2003/decisionsimpact.htm.

64. Nat'l Council on Disability, *No. 5: Negative Media Portrayals of the ADA*, POLICY BRIEF SERIES: RIGHTING THE ADA, http://www.ncd.gov/newsroom/publications/2003/policybrief.htm.

65. *See* Mary Crossley, *The Disability Kaleidoscope*, 74 NOTRE DAME L. REV. 621, 622 (1999).

66. Tudyman v. United Airlines, 608 F. Supp. 739 (C.D. Cal. 1984).

67. 480 U.S. 273 (1987).

68. *Id.* at 281.

69. *Id.*

person who has a record of, or is regarded as having, an impairment [but who] may at present have no actual incapacity at all.'"[70]

The Court declared that the "basic purpose of Section 504" was to ensure that individuals "are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others" or "reflexive reactions to actual or perceived [disabilities]" and that the legislative history of the definition of disability "demonstrates that Congress was as concerned about the effect of an impairment on others as it was about its effect on the individual."[71] The Court elaborated as follows:

Congress extended coverage . . . to those individuals who are simply "regarded as having" a physical or mental impairment. The Senate Report provides as an example of a person who would be covered under this subsection "a person with some kind of visible physical impairment which in fact does not substantially limit that person's functioning." Such an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment.[72]

When Congress was considering the ADA, the Supreme Court's decision in *School Board of Nassau County v. Arline* was the leading legal precedent on the definition of disability. The *Arline* ruling was expressly relied on in several ADA committee reports discussing the definition of disability, including the report of the House Judiciary Committee, which quoted the exact language of the Court as set out above.[73]

This was the legal background when Congress adopted the essentially identical definition of disability in the ADA. To further ensure that the definition of disability and other provisions of the ADA would not receive restrictive interpretations, Congress included in the ADA a provision requiring that "nothing" in the ADA was to "be construed to apply a lesser standard" than is applied under the relevant sections of the Rehabilitation Act, including Section 504, and the regulations promulgating them. In his remarks at the ADA signing ceremony, President George H.W. Bush pointed with pride to the ADA's "piggybacking" on Rehabilitation Act language:

> The administration worked closely with the Congress to ensure that, wherever possible, existing language and standards from the Rehabilitation Act were incorporated into the ADA. The Rehabilitation Act standards are already familiar to large segments of the private sector that are either federal contractors or recipients of federal funds. Because the Rehabilitation Act was enacted 17 years ago, there is already an extensive body of law interpreting the requirements of that Act.

70. *Id.* at 279.
71. *Id.* at 285.
72. *Id.* at 282–83.
73. H.R. REP. NO. 101 485, at 30 (1990).

> Accordingly, at the time of the ADA's enactment, it seemed clear that most ADA plaintiffs would not find it particularly difficult to establish that they had a disability. NCD issued two policy papers that discuss the care with which the ADA definition of disability was selected and the breadth of that definition.[74]

For some time after the ADA was signed into law, the pattern of broad and inclusive interpretation of the definition of disability, established under Section 504, continued under the ADA. In 1996, a federal district court declared that "it is the rare case when the matter of whether an individual has a disability is even disputed."[75] As some lower courts, however, began to take restrictive views of the concept of disability, defendants took note, and disability began to be contested in more and more cases.

Beginning with its decision in *Sutton v. United Airlines* in 1999, the U.S. Supreme Court started to turn its back on the broad, relaxed interpretation of disability endorsed by the Court in the *Arline* decision.[76] By the time of the *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams* decision in 2002, the Court was espousing the view that the definition should be "interpreted strictly to create a demanding standard for qualifying as disabled."[77] This stance is directly contrary to what the Congress and the President intended when they enacted the ADA.

The result of the Court's harsh and restrictive approach to defining disability places difficult, technical, and sometimes insurmountable evidentiary burdens on people who have experienced discrimination. The focus of many time-consuming and expensive legal battles is on the characteristics of the person subjected to discrimination rather than on the alleged discriminatory treatment meted out by the accused party. The ADA was intended to regulate the conduct of employers and other covered entities, and to induce them to end discrimination. To the extent that these parties can divert the focus to a microscopic dissection of the complaining party, central objectives of the law are being frustrated.

Other governments and judicial forums have rejected the Supreme Court's restrictive interpretation of disability. Thus, courts in the individual states[78] and in other countries[79] have embraced more inclusive

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74. Nat'l Council on Disability, *No. 2: A Carefully Constructed Law*, THE AMERICANS WITH DISABILITIES ACT POLICY BRIEF SERIES: RIGHTING THE ADA, http://www.ncd.gov/newsroom/publications/2002/carefullyconstructedlaw.htm; Nat'l Council on Disabilities, *No. 4: Broad or Narrow Construction of the ADA*, THE AMERICANS WITH DISABILITIES ACT POLICY BRIEF SERIES: RIGHTING THE ADA, http://www.ncd.gov/newsroom/publications/2002/broadnarrowconstruction.htm.

75. Morrow v. City of Jacksonville, 941 F. Supp. 816, 823 n.3 (E.D. Ark. 1996).

76. 527 U.S. 471 (1999).

77. 534 U.S. 184, 197 (2002).

78. *See, e.g.*, Stone v. St. Joseph's Hospital of Parkersburg, 538 S.E.2d 389, 400–04 (W. Va. 2000), in which the Supreme Court of West Virginia, after acknowledging that the state law had been amended in 1989 to adopt the federal three-prong definition of disability, chose to reject the "restrictive approach" of federal interpretation of the definition, endorsing an "independent approach . . . not mechanically tied to federal disability discrimination jurisprudence." The court also cited a number of cases from other states that had interpreted the definition of disability more expansively than under federal nondiscrimination laws. *Id.* at 405 and n.23. Likewise, in *Dahill v. Police Dep't of Boston*, 748 N.E.2d 956 (2001), the Massachusetts Supreme Judicial Court embraced

interpretations of who has a disability under nondiscrimination laws. And legislatures in the states[80] and in other countries[81] deliberately have rejected the narrow approach under U.S. law as enunciated in the Supreme Court's decisions.

D. *Specific Problems with the Interpretation of Disability*

In its Righting the ADA report, the National Council on Disability described nine issues to which the Supreme Court's narrow approach to the definition of disability in the ADA had led it to deviate from the legislative intent with harmful consequences. These issues were:

1) Consideration of Mitigating Measures in Determining Disability;

2) Substantial Limitation of a Major Life Activity;

3) Employment as a Major Life Activity;

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virtually every argument advanced by disability rights advocates that the United States Supreme Court had rejected in *Sutton v. United Airlines*, and ruled that mitigating measures should not be considered in determining whether an individual has a "handicap" under Massachusetts antidiscrimination law. According to the *Dahill* Court, the public policy underlying the antidiscrimination statute supported its interpretation that mitigating measures should be excluded, while embracing the *Sutton* standard would "exclude[ ] from the statute's protection numerous persons who may mitigate serious physical or mental impairments to some degree, but who may nevertheless need reasonable accommodations to fulfill the essential functions of a job." *Id.* at 962 and n.10.

79. *See, e.g.*, Granovsky v. Canada, [2000] 1 S.C.R. 703, in which the Supreme Court of Canada expressly rejected the restrictive approach of the U.S. Supreme Court in *Sutton v. United Airlines*, noted the "ameliorative purpose" and "remedial component" of the disability nondiscrimination provision of the Canadian Charter of Rights and Freedoms, and adopted an approach in which the focus is "not on the impairment as such, nor even any associated functional limitations, but is on the problematic response of the [defendant] state to either or both of these circumstances." The Court added that it was the alleged discriminatory action "that stigmatizes the impairment, or which attributes false or exaggerated importance to the functional limitations (if any)." *Id.* para. 26. Similarly, in *Quebec v. Montréal*, [2000] 1 S.C.R. 665 (Can.), the Supreme Court of Canada noted that "[h]uman rights legislation is [to be] given a liberal and purposive interpretation," and ruled, "The objectives of the Charter, namely the right to equality and protection against discrimination, cannot be achieved unless we recognize that discriminatory acts may be based as much on perception and myths and stereotypes as on the existence of actual functional limitations. Since the very nature of discrimination is often subjective, assigning the burden of proving the objective existence of functional limitations to a victim of discrimination would be to give that person a virtually impossible task. Functional limitations often exist only in the mind of other people, in this case that of the employer." *Id.* para. 39. The Court ruled that "a 'handicap,' therefore, includes ailments which do not in fact give rise to any limitation or functional disability."

80. Some states, such as California and Rhode Island, have amended their disability nondiscrimination statutes to reject federal case law narrowing the scope of individuals protected. Others, such as Connecticut, New Jersey, and New York have never adopted the rigid and stringent concept of "disability" consisting of an "impairment" which "substantially limits" one or more major life activities. For a discussion of state laws that have deviated from the restrictive federal model, see NCD's paper titled *Defining "Disability" in a Civil Rights Context: The Courts' Focus on the Extent of Limitations as Opposed to Fair Treatment and Equal Opportunity*. Paper No. 6 of NCD's POLICY BRIEF SERIES: RIGHTING THE ADA PAPERS, http://www.ncd.gov/newsroom/publications/2003/policybrief.htm.

81. For example, the definition of disability provisions of Australia's Disability Discrimination Act of 1992 (4.(1)) and of Ireland's Employment Equality Act (1998) Stat. (2), both of which were adopted after the ADA was enacted, are framed in very broad terms that encompass not only a wide variety of currently existing conditions, but also include any condition that previously existed but no longer does, that "may exist in the future," or that "is imputed to a person."

4) The "Class or Broad Range of Jobs" Standard;

5) "Regarded As" Having a Disability;

6) Validity of and Deference to Be Accorded Federal Regulations Implementing the ADA's Definition of Disability;

7) Duration Limitation on What Constitutes a Disability;

8) Per Se Disabilities; and

9) Restrictive Interpretation of the Definition of Disability to Create a Demanding Standard.

In regard to each of these issues, the report describes "What the Supreme Court Did," analyzes the "Significance of the Court's Action," and gives specific "Examples of Impact" of the rulings.[82] To provide a graphic summary of the ways that the court decisions have deviated from the intentions expressed by Congress when it enacted the ADA, when I testified before the House Committee on Education and Labor in 2008, I prepared a chart contrasting "What Congress Said" with "What the Courts Are Now Saying"; the chart is attached as an appendix to this paper. Similarly, the RIGHTING THE ADA report contains a section titled "Principles and Assumptions Regarding the Definition of Disability When the ADA Was Enacted That Have Been Disregarded or Contradicted by the Supreme Court" which presents eleven important ways in which the Court's ADA definitions decisions deviate from expectations in place when the ADA was negotiated debated and enacted.[83]

Before the Supreme Court upset the applecart, all the relevant authorities were nearly unanimous in the view that mitigating measures should not be considered in deciding whether a person has a disability under the ADA. Even before the ADA was enacted, the committee reports on the pending legislation declared clearly that mitigating measures should not be factored in. The three ADA Committee Reports that addressed the issue all concurred that mitigating measures are not to be taken into account when determining whether an individual has a disability. The House Committee on Education and Labor declared unequivocally that "[w]hether a person has a disability should be assessed without regard to the availability of mitigating measures."[84] The House Committee on the Judiciary likewise declared that "[t]he impairment should be assessed without considering whether mitigating measures . . . would result in a less-than-substantial limitation."[85] To illustrate the application of this approach, the Committee discussed the

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82. RIGHTING THE ADA, *supra* note 24 at 44–72.

83. *Id.* at 73–74.

84. H.R. REP. NO. 101-485, at 52 (1990).

85. H.R. REP. NO. 101-485, at 28 (1990).

examples of a person with epilepsy whose condition is mitigated by medication and of a person with a hearing impairment whose hearing loss is corrected by the use of a hearing aid. In the Committee's view, these individuals would be covered by the ADA.

In a sharp break from the legislative history of the ADA, the position of the executive agencies responsible for enforcing the ADA, and the prior rulings of eight of the nine federal courts of appeal that had addressed the issue, the Supreme Court decided, in its rulings in the *Sutton*,[86] *Murphy*,[87] and *Albertson's*[88] cases, that mitigating measures should be considered in determining whether an individual has a disability under the ADA. The Supreme Court's position on mitigating measures ignores the rationale that led courts, regulatory agencies, and Congress to take a contrary position—that unless you disregard mitigating measures in determining eligibility for ADA protection, you shield much discrimination on the basis of disability from effective challenge.

The result of the Court's rulings on mitigating measures turns the ADA's definition of disability into an instrument for screening out large groups of individuals with disabilities from the coverage of the Act, and thereby insulating from challenge many instances of the pervasive unfair and unnecessary discrimination that the law sought to prohibit. To the extent that mitigating measures are successful in managing an individual's condition, the Supreme Court's stance on mitigating measures deprives the individual of the right to maintain an ADA action to challenge acts of disability discrimination she or he has experienced, because such a person is not eligible for the ADA's protection. This means an employer or other covered entity may discriminate with impunity against such individuals in various flagrant and covert ways. NCD issued a policy paper examining the function and types of mitigating measures, discussing the near consensus in the law prior to the Supreme Court's taking a contrary position, and describing the repercussions of the Court's position.[89]

Taking the condition of epilepsy to illustrate, before the Supreme Court's rulings in *Sutton*, *Murphy*, and *Kirkingburg*, "a person [with] epilepsy would receive nearly automatic ADA protection,"[90] consistent with statements in the ADA legislative history and regulatory guidance. The ADA regulatory commentary of the Equal Employment Opportunity Commission (EEOC) and the DOJ specifically declared that an individual with epilepsy would remain within the coverage of the ADA even if the effects of the condition were controlled by medication.

The situation changed dramatically with the Supreme Court's mitigating measures decisions. To the extent that a covered entity can

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

87. Murphy v. United Parcel Serv., 527 U.S. 516 (1999).

88. Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999).

89. Nat'l Council on Disability, *No. 11: The Role of Mitigating Measures in the Narrowing of the ADA's Coverage*, POLICY BRIEF SERIES: RIGHTING THE ADA, http://www.ncd.gov/newsroom/publications/2003/mitigatingmeasures.htm.

90. *Todd v. Academy Corporation*, 57 F. Supp. 2d 448, 453–54 (S.D. Tex. 1999).

successfully demonstrate (after extensive, intrusive discovery into the details of the person's condition) that an individual's epilepsy is effectively controlled by medication, the individual cannot challenge the discriminatory actions of the covered entity. This is true even if the employer or other covered entity has an express policy against the hiring of people with epilepsy; puts up signs that say, "epileptics not welcome here"; inaccurately assumes that all persons with epilepsy are inherently unsafe; or has the irrational belief that epilepsy is contagious. The unfairness or irrationality of the covered entity's actions and motivations, including stereotypes, fears, assumptions, and other forms of prejudice, cannot be challenged by a person whose condition is mitigated. The end result is that it is a rare plaintiff who is in a position to challenge even the most egregious and outrageous discrimination involving a condition that can be mitigated. One study, by the Epilepsy Legal Defense Fund, found that, of thirty-six cases in which courts had ruled on the issue since the Supreme Court issued its decision in *Sutton v. United Airlines*, thirty-two had decided that epilepsy was not a disability.

Epilepsy is an illustrative example, but the same principles apply to diabetes, various psychiatric disabilities, hypertension, arthritis, and numerous other conditions that, for some individuals, can be controlled by medication. Moreover, the same problems arise with conditions for which techniques and devices other than medication provide an avenue for mitigation. Thus, a company that discriminates against people who use hearing aids will be insulated from challenge by people for whom the hearing aids are effective in offsetting, to some degree, diminution of functional ability to hear. Other mitigating measures, including prosthetic devices, can raise the same issues—to the extent that they are successful, they may lead to an argument that the person does not have a disability, even if she or he is discriminated against precisely because of the underlying condition or even the use of the mitigating measure itself. Obviously, this is directly contrary to the stated intentions of the congressional committees and the Congress as a whole.

E. TenBroek Saw It, Why Can't the Courts?

Two of the basic conceptual insights in the tenBroek/Matson articles discussed in Section II of this article were the following:

the perception of people with disabilities as "normal people caught at a physical and social disadvantage"; and

the difference between deficits incident to disability and those imposed unnecessarily by society as an outgrowth of negative attitudes and misdirected practices.

Courts that have espoused restrictive interpretations of the definition of disability under the ADA have truly missed the boat on disability, in large part because they have not appreciated these two principles. All too often, the courts have exhibited long-held, antiquated notions about disability and about the role of government in addressing disability. If courts think of people with disabilities as not capable of

working, for example, anyone who is able to work must not be disabled. Similarly, access barriers were historically viewed by many people as being barriers because of an individual's disability, as opposed to the problem being the barrier itself. When a person with a mobility impairment could not cross a street with curbs, the person's disability was considered to be the reason, as opposed to recognizing that the design of the curb was deficient because it was done with only certain types of people in mind, when it could just as easily have been designed to be usable by all. The ADA embodies a social concept of discrimination that takes the view that many limitations resulting from actual or perceived impairments flow, not from limitations of the individual, but, rather, from the existence of unnecessary barriers to full participation in society and its institutions. The social model is at variance with the medical model of disability that centers on assessments of the degree of a person's functional limitation.[91] Professor tenBroek anticipated the more enlightened modern thinking in his identification of the difference between deficits incident to disability and those imposed unnecessarily by society as an outgrowth of negative attitudes and misdirected practices.

Perhaps even more significantly, tenBroek's perception of people with disabilities as "normal people caught at a physical and social disadvantage" captures a seemingly simple, but hugely important principle that the courts have often not grasped. In my previous writing, I have commented:

> In his remark, Professor tenBroek captured a truth that is both the guiding star and essential foundation . . . —that individuals with disabilities are just people, not essentially different from other people. Though this proposition is relatively simple to state, its acceptance is the single most universal aspiration of most individuals with disabilities, a central tenet of the Disability Rights Movement, and a *sine qua non* of real equality for people with disabilities.[92]

91. In light of the courts' failure to appreciate and apply the social model of disability discrimination, NCD's RIGHTING THE ADA report suggests that the social model should be made explicit by incorporating it as an additional ADA finding as follows:

> Discrimination on the basis of disability is the result of the interaction between an individual's actual or perceived impairment and attitudinal, societal, and institutional barriers; individuals with a range of actual or perceived physical or mental impairments often experience denial or limitation of opportunities resulting from attitudinal barriers, including negative stereotypes, fear, ignorance, and prejudice, in addition to institutional and societal barriers, including architectural, transportation, and communication barriers, and the refusal to make reasonable modifications to policies, practices, or procedures, or to provide reasonable accommodations or auxiliary aids and services.

RIGHTING THE ADA, *supra* note 24, at 109.

92. Robert L. Burgdorf Jr., *"Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability*, 42 VILL. L. REV. 409, 534 (1997). I elaborated on the significance of tenBroek's observation in a section I called "People with Disabilities as Regular Joes and Janes":

The "integration" and "full participation" that tenBroek advocated as the ultimate objectives of disability laws imply that individuals with disabilities shall not be unnecessarily differentiated from the rest of society. To this end, analysis under nondiscrimination laws should not focus on differentiating characteristics of the person alleging discrimination, but instead on scrutinizing the practices and operations of covered entities to determine whether they are discriminatory when examined in light of latent flexibility in structuring and modifying tasks, programs, facilities, and opportunities. "Legal standards imposed under these laws should serve to eliminate practices, policies, barriers, and other mechanisms that discriminate on the basis of disability, not to eliminate as many people as possible from the protection provided in these laws. In short, these laws seek to promote real equality, not to protect a special group."[93]

Despite common misconceptions that there are two distinct groups in society—those with disabilities and those without—and that it is possible to draw sharp distinctions between these two groups, people actually vary across a whole spectrum of infinitely small gradations of ability with regard to each individual functional skill. And the importance of particular functional skills varies immensely according to the situation, and can be greatly affected by the availability or unavailability of accommodations and alternative methods of doing things. This human "spectrum of abilities" was recognized in the 1983 report by the U.S. Commission on Civil Rights—ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES, described above. The Commission noted that, while the popular view is that people with disabilities are impaired in ways that make them sharply distinguishable from nondisabled people, instead of two separate and distinct classes, there are in fact "spectrums of physical and mental abilities that range from superlative to minimal or nonfunctional."[94] In some of its publications, the National Council on Disability has explained and

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> This helps to explain why terminology in regard to disabilities has been a sensitive issue. People with disabilities have come to recognize that processes by which they are assigned labels have reinforced the perception that they are substantially different from others. In response, they have strongly insisted that "we are people first," and have demanded that their common humanity be acknowledged rather than their differences magnified. It also explains why many individuals with disabilities resist attempts to characterize them as "special" or their daily accomplishments as "inspirational" or "courageous." At best, such characterizations mark the individual so labeled as extraordinary and different from the rest of the population and one whose accomplishments and success are a surprise. At worst, they suggest that the speaker really means, "Being who you are is so bad that I could not face it; I would just give up," "Your limitations are so severe that I don't see how you accomplish anything," or even "I would rather be dead than to live with your impairments." People with disabilities do not view their going about the tasks and trials involved in ordinary activities and trying to have accomplishments and success as something atypical and heroic. They would prefer to be seen for what they are, as ordinary individuals pursuing the same types of goals—love, success, sexual fulfillment, contributing to society, material comforts, etc.—as other folks.

Id. at 534–535 (footnotes omitted).

93. *Id.* at 535–36 (footnotes omitted).

94. ACCOMMODATING THE SPECTRUM, *supra* note 11.

elaborated on the spectrum of abilities concept.[95]

In addition, authorities on disability are generally in agreement that the concept of disability entails a social judgment; people come to have a disability when they are viewed and treated as having one by other people. As the U.S. Commission on Civil Rights put it in ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES, "[P]eople are *made* different—that is socially differentiated—by the process of being seen and treated as different in a system of social practices that crystallizes distinctions . . . ."[96] Thus, the experience of disability is closely linked to the concept of discrimination. Individuals may encounter discrimination on the basis of disability whether or not they previously thought of themselves as having a disability, and whether or not they meet foreordained, medically oriented criteria. To achieve its purposes of eliminating discrimination and achieving integration, the ADA should reduce the unnecessary differentiation of people because of actual, perceived, or former physical and mental characteristics. It emphatically should not force people to demonstrate their differentness as a prerequisite to receiving protection under the Act.

The ADA is based on a social or civil rights model (sometimes referred to as a socio-political model), in contrast to the traditional "medical model." It views the limitations that arise from disabilities as largely the result of prejudice and discrimination rather than as purely the inevitable result of deficits in the individual. Sociology Professor Richard K. Scotch, a disability policy author, has written:

> In the socio-political model, disability is viewed not as a physical or mental impairment, but as a social construction shaped by environmental factors, including physical characteristics built into the environment, cultural attitudes and social behaviors, and the institutionalized rules, procedures, and practices of private entities and public organizations. All of these, in turn, reflect overly narrow assumptions about what constitutes the normal range of human functioning.[97]

Professor Linda Hamilton Krieger has written that the ADA's concept of disability views it "not only in terms of the internal attributes of the arguably disabled individual, but also in terms of external attributes of the attitudinal environment in which that person must function. 'Disability,' under this conception, resides as much in the attitudes of society as in the characteristics of the disabled individual."[98] She elaborated on the ADA's adoption of the social model as follows:

> [T]he drafters of the ADA sought to transform the institution

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95. *See, e.g.*, *Negative Media Portrayals of the ADA*, *supra* note 64.

96. ACCOMMODATING THE SPECTRUM, *supra* note 11, at n.17.

97. Richard K. Scotch, *Models of Disability and the Americans with Disabilities Act*, 21 BERKELEY J. EMP. & LAB. L. 213, 214–15 (2000).

98. Linda Hamilton Krieger, *Afterword: Socio-Legal Backlash*, 21 BERKELEY J. EMP. & LAB. L. 476, 480–81 (2000).

> of disability by locating responsibility for disablement not only in a disabled person's impairment, but also in "disabling" physical or structural environments. Under such a construction, the concept of disability takes on new social meaning. It is not merely a container holding tragedy, or occasion for pity, charity, or exemption from the ordinary obligations attending membership in society. The concept of disability now also, or to a certain extent instead, contains rights to and societal responsibility for making enabling environmental adaptations. The ADA was in this way crafted to replace the old impairment model of disability with a socio-political approach.

The National Council on Disability has discussed the necessity for applying the social model of disability under the ADA.[99] In the topic paper accompanying its initial proposal of an Americans with Disabilities Act, NCD expressly rejected the "medical model" and the need for people to demonstrate the severity of their limitations as a precondition to being protected from discrimination.[100] In its RIGHTING THE ADA report, NCD included a section titled "Incorporation of a Social Model of Discrimination." The Council declared:

> The ADA embodies a social concept of discrimination that views many limitations resulting from actual or perceived disabilities as flowing, not from limitations of the individual, but, rather, from the existence of unnecessary barriers to full participation in society and its institutions. This is in contrast to the medical model of disability that centers on assessments of the degree of a person's functional limitation.[101]

Accordingly, NCD called for the enactment of a specific provision of its ADA Restoration Act proposal to make the endorsement of the social model explicit.[102] This is in addition to provisions addressing more directly the narrow interpretations of the definition of disability.

F. Other Kinds of Problems Resulting from Supreme Court Rulings

Apart from problems with the definition of disability, the RIGHTING THE ADA report discusses in detail several other kinds of problems that have resulted from ill-advised ADA rulings of the Supreme Court. These include the following:

1. In *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*,[103] the Supreme Court

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99. *See, e.g.*, *Negative Media Portrayals of the ADA*, *supra* note 64.
100. TOWARD INDEPENDENCE, *supra* note 18 at A-22 to A-23.
101. RIGHTING THE ADA, *supra* note 24, at 109.
102. *Id.*
103. 532 U.S. 598 (2001).

rejected the "catalyst theory" that most lower courts had applied in determining the availability of attorney's fees and litigation costs to plaintiffs in cases under the ADA and other civil rights statutes, and under other federal laws that authorize such payments to the "prevailing party."

2. In *Barnes v. Gorman*,[104] the Supreme Court ruled that punitive damages may not be awarded in private suits brought under Title VI of the 1964 Civil Rights Act, under Section 202 of the ADA, or under Section 504 of the Rehabilitation Act.

3. In *Chevron U.S.A. Inc. v. Echazabal*,[105] the Supreme Court upheld as permissible under the ADA the EEOC regulatory provision that allows employers to refuse to hire applicants because their performance on the job would endanger their health because of a disability, despite the fact that, in the language of the ADA, Congress recognized a "direct-threat" defense only for dangers posed to other workers.

4. In *U.S. Airways, Inc. v. Barnett*,[106] the Supreme Court recognized a reasonableness standard for reasonable accommodations separate from undue hardship analysis.

5. In *U.S. Airways, Inc. v. Barnett*, [107] the Supreme Court ruled that the ADA ordinarily does not require the assignment of an employee with a disability, as a reasonable accommodation, to a particular position to which another employee is entitled under an employer's established seniority system, but that it might in special circumstances. The Court declared that "to show that a requested accommodation conflicts with the rules of a seniority system is ordinarily to show that the accommodation is not 'reasonable.'"

The implications of these rulings are explained in some detail in RIGHTING THE ADA and in the specific topic papers mentioned in the report.[108] As those sources explain, the negative impact of such decisions on the protection of people with disabilities under the ADA is significant and disturbing.

G. Getting the ADA Back on Track: Remedial Legislation[109]

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104. 536 U.S. 181 (2002).

105. 536 U.S. 73 (2002).

106. 535 U.S. 391 (2002).

107. 535 U.S. 391 (2002).

108. RIGHTING THE ADA, *supra* note 24, at 85–98.

109. On September 25, 2008, after this article was written, the ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553, was signed into law. Although this law had its origins in the ADA Restoration Act proposals discussed in this section and accomplishes some of the objectives of those proposals, this article does not attempt to analyze the provisions of the ADA Amendments Act, to point out its strengths and weaknesses, nor to identify the ways in which it is consistent with and different from the legislative proposals that preceded it.

Based on its analysis of what has happened since the ADA was enacted the National Council on Disability reached the following conclusion:

> Incisive and forceful legislative action is needed to address the dramatic narrowing and weakening of the protection provided by the ADA, resulting from the Supreme Court's decisions, and to restore civil rights protections. Millions of Americans experience discrimination based on ignorance, prejudice, fears, myths, misconceptions, and stereotypes that many in American society continue to associate with certain impairments, diagnoses, or characteristics. To revive the scope and degree of protection that the ADA was supposed to provide—to address "pervasive" discrimination in a "comprehensive" manner, as the Act declares—and to put ADA protections on a more equal footing with other civil rights protections under federal law, it is necessary to remove conceptual and interpretational baggage that has been attached to various elements of the ADA. Any legislative proposal should address, in some way, each of the problems listed in Section II of this report [RIGHTING THE ADA] that the Court's decisions have created.[110]

In NCD's RIGHTING THE ADA report, the Council presented a legislative proposal for getting the ADA back on course—an ADA Restoration Act bill—with an explanatory introduction and a section-by-section summary.[111] It addressed both the problems with the restricted interpretation of those eligible for protection of the ADA as persons with a disability and other problems described in the previous subsection that have resulted from negative ADA decisions of the Supreme Court; NCD sought to offer specific legislative proposals to "restore" the ADA to its original congressionally intended course.

Based on NCD's proposals regarding the definition of disability, ADA Restoration Act bills were introduced in the 109th and 110th Congresses.[112] As this symposium takes place, S. 1881 is pending in the Senate and H.R. 3195 in the House of Representatives. Hearings have been held in both houses of Congress and negotiations are proceeding. In testimony before the House Committee on Education and Labor in January 2008, I opined as follows:

> The courts have made a royal mess of the three-prong definition of disability in the ADA. This has occurred in spite of very clear and explicit language and guidance Congress provided in the Act and its legislative history. Baffled individuals with all sorts of physical and mental impairments find that they are not allowed to challenge

110. *Id.* at 99.

111. *Id.* at 123.

112. H.R. 6258, 109th Cong. (2006); S. 1881, 110th Cong. (2007); H.R. 3195,110th Cong. (2007).

discrimination against them, based on legal rationales that are tortured, hypertechnical, and contrary to common sense.[113]

While a detailed analysis of the bills is beyond the scope of this article, my overall view is that the pending legislation addresses the most serious distortions that have resulted from a constricted interpretation by the courts of the ADA definition of disability. Consistent with informed public policy, the bills return the primary focus away from misplaced efforts to draw pedantic, absurd distinctions based on judicial assessments of degree of limitation and return it to identifying and eliminating discrimination on the basis of disability. To repair the tangle of interpretations that have resulted from the Supreme Court's announced proclivity for seeing to it that the ADA's coverage is "interpreted strictly to create a demanding standard for qualifying as disabled,"[114] the bill would replace the concept of "substantial limitation," with the straightforward concept of physical or mental impairment, a concept that has a clear and settled definition. If the legislation is enacted, a person who has been subjected to an adverse employment action (or disadvantaged in regard to other types of services or benefits of non-employment programs and entities covered by the ADA) because of a physical or mental impairment will be protected by the ADA.

In my view, the enactment of the pending legislation is a critical step toward re-establishing the protection that the ADA was intended and understood to provide.[115] Following that, I would hope that some or all of the other recommendations in the NCD version of the Restoration Act would be considered by Congress and passed into law.

H. *Other Clarifications and Improvements to the ADA*

Even with the enactment in its entirety of the NCD Restoration Act proposal, more would still need to be done to make the ADA maximally effective. This stems in part from the fact that the NCD *Righting the ADA* project only undertook to address problems resulting from decisions of the Supreme Court entered before 2004, and not problems, even if widespread and serious, engendered by rulings of the lower courts. And some issues have arisen which relate to matters not covered

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113. *House Committee on Education and Labor in January—ADA Restoration Act of 2007: Hearing on H.R. 3195 before the House Comm. on Education and Labor*, 110th Cong., January 29, 2008, p. 32 (statement of Robert L. Burgdorf Jr., Professor, University of the District of Columbia, David A. Clarke School of Law). I added:

> Employers are able to say "Your condition is so problematic that I can't hire you," or "so problematic that I must terminate you," and then turn around and argue in court, successfully, that "your condition isn't serious enough to constitute a disability." The focus of proceedings in most ADA cases is not on the alleged discrimination the plaintiff experienced. Instead the focus is on an invasive and often embarrassing, detailed dissection of the plaintiff's condition, limitations, and medical background.

Id.

114. Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184, 194 (2002).

115. See discussion at *supra* note 109.

or clearly addressed by the ADA, which suggest the need for some fine-tuning or amplification of the ADA's requirements. Disability litigators and organizations can identify numerous such concerns. This subsection presents only a sampling, as follows:

1. Preclusion of ADA Rights for Applicants for, and Recipients of, Disability Benefits

Some lower courts have ruled that people with disabilities who apply for Social Security and other disability benefits and, in the process, represent that they are unable to work, have thereby disqualified themselves from showing that they are "qualified" for a job under the ADA; these courts have ruled that such persons are "judicially estopped" from invoking ADA protection because they cannot be permitted to maintain that they are qualified in light of their previous representations of disability benefits eligibility.[116]

The Supreme Court sought to clarify this situation to some extent in 1999. In *Cleveland v. Policy Management Systems Corp.*,[117] the Supreme Court concluded that, because the ADA and the Social Security Disability Act serve different purposes, a declaration of disability under one act does not necessarily preclude recovery under the other, and a plaintiff's pursuit of Social Security disability benefits does not automatically estop him or her from pursuing an ADA claim.[118] The Court stated that the law does not even erect a strong presumption against an SSDI recipient's success under the ADA.[119] The Court indicated, however, that a plaintiff in such circumstances must explain why an SSDI contention regarding inability to work is consistent with a representation in an ADA case that she or he could "perform the essential functions" of her or his previous job, at least with "reasonable accommodation."[120]

Subsequent to the *Cleveland* decision, some courts have shown themselves to be less receptive to judicial estoppel based on disability benefits representations.[121] Others, however, have found such representations to be too large of a hurdle for particular ADA plaintiffs to overcome.[122] Because of the significant differences of purposes, standards,

116. *See, e.g.*, the authorities cited in Robert L. Burgdorf Jr., *"Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability*, 42 VILL. L. REV. 409, 489–505 (1997).

117. 526 U.S. 795 (1999).

118. *Id.* at 797.

119. *Id.*

120. *Id.* at 798.

121. *See, e.g.*, Murphey v. City of Minneapolis, 358 F.3d 1074, 1077 (8th Cir. 2004); Parker v. Columbia Pictures Industries, 204 F.3d 326 (2d Cir. 2000); E.E.O.C. v. Stowe-Pharr Mills, Inc., 216 F.3d 373 (4th Cir. 2000); Giles v. General Elec. Co., 245 F.3d 474 (5th Cir. 2001); Nodelman v. Gruner & Jahr USA Pub., 2000 WL 502858, *7 (S.D.N.Y. Apr 26, 2000).

122. Johnson v. ExxonMobil Corp., 426 F.3d 887 (7th Cir. 2005); Lee v. City of Salem, Ind., 259 F.3d 667 (7th Cir. 2001); McClaren v. Morrison Management Specialists, Inc., 420 F.3d 457 (5th Cir. 2005) (under Texas Commission on Human Rights Act); Moore v. Payless Shoe Source, Inc., 139 F.3d 1210 (8th Cir.1998), *judgment vacated, and remanded for further consideration in light of* Cleveland v. Policy Management Systems Corp. (526 U.S. 795 (1999)), 526 U.S. 1142 (1999), *on remand*, Moore v. Payless Shoe Source, Inc., 187 F.3d 845 (8th Cir. 1999).

and relevant time parameters between being "qualified" under the ADA and eligibility for disability benefits,[123] representations regarding one should have nothing to do with the other. Either the ADA, disability benefits legislation, or both should be amended to make this clear.

2. ADA Coverage of Independent Contractors

Without any mention of independent contractors in the ADA, discrimination against such contractors or their employees has been assumed, wrongly I believe, not to be reached by the Act. In *PGA Tour, Inc. v. Martin*,[124] PGA Tour, Inc., had argued, and the district court had agreed, that Title I of the ADA did not apply to the plaintiff because he was an "independent contractor" and not an "employee." In his dissenting opinion, Justice Scalia underscored this view, observing that "Title I protects only 'employees' of employers who have 15 or more employees. It does not protect independent contractors."[125] The majority, however, did not make any ruling on the independent contractor issue, but ruled that the plaintiff golfer was protected from discrimination as a "client" or "customer" under Title III of the ADA.

In *Clackamas Gastroenterology Associates v. Wells*,[126] the Supreme Court recognized that the tests for determining whether or not someone was an independent contractor or an employee were not very helpful in determining whether physician shareholders were employees under the ADA. This approach has led to what one legal commentator described as "Collapsing the Distinctions,"[127] and prompted another to write that "a number of courts have recognized that the application of any employment status test in a rigid fashion does not make much sense in employment law."[128]

The lack of clear boundaries for the classification "independent contractor" and for distinguishing it from employee status, coupled with the inconclusive resolution of the independent contractor question in the *Martin* case, has left a large void for the lower courts to fill. In doing so, they have generally rejected ADA protection for contractors.[129] Such

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123. *See*, Robert L. Burgdorf Jr., *"Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability*, 42 VILL. L. REV. 409, 494–506; 575–580 (1997).

124. 532 U.S. 661 (2001).

125. *Id.* at 692 (J. Scalia, dissenting) (citations omitted).

126. 538 U.S. 440, 447–48 (2003).

127. Katherine V.W. Stone, *Legal Protections for Atypical Employees: Employment Law for Workers without Workplaces and Employees without Employers*, 27 BERKELEY J. EMP. & LAB. L. 251, 281 (2006).

128. Mitchell H. Rubinstein, *Our Nation's Forgotten Workers: The Unprotected Volunteers*, 9 U. PA. J. LAB. & EMP. L. 147, 173 (2006).

129. *See, e.g.*, Wojewski v. Rapid City Regional Hosp., Inc., 450 F.3d 338, 342 (8th Cir. 2006) ("While the ADA protects 'employees,' the Act does not protect independent contractors."); Lerohl v. Friends of Minnesota Sinfonia, 322 F.3d 486, 489 (8th Cir. 2003) ("Both statutes [ADA & Title VII] protect 'employees' but not independent contractors."); Chadha v. Hardin Memorial Hospital, 202 F.3d 267 (Table), 2000 WL 32023, *2 (6th Cir. 2000)) ("[T]he ADA does not cover an independent contractor."); Case v. ADT Automotive, Inc., 163 F.3d 601 (Table), 1998 WL 671445 (8th Cir. 1998)); Birchem v. Knights of Columbus, 116 F.3d 310, 312 (8th Cir. 1997) ("[T]he ADA protects 'employees' but not independent contractors."); Dykes v. DePuy, Inc., 140 F.3d 31, 37 n.6

decisions have led to a denial of protection from disability discrimination for individuals in a wide range of situations and activities; types of independent contractor undertakings considered by the courts have included that of a surgeon with staff privileges at a hospital,[130] musicians,[131] an anesthesiologist,[132] an auctioneer,[133] an insurance agent,[134] a manufacturer's sales representative,[135] a "verifier" for a telemarketing firm,[136] workers at private bookstore on a state university campus,[137] a physical therapist,[138] and a temp worker.[139] The courts considering these cases have generally treated the determination that the plaintiffs did not meet the criteria for being an "employee" under Title I of the ADA as dispositive of ADA protection.

Given the ADA's focus on providing a "comprehensive prohibition of discrimination on the basis of disability,"[140] it is quite possible to frame a strong argument that independent contractors who encounter discrimination by entities covered by Title II and Title III of the ADA were meant to be protected. The Sixth Circuit has made such a ruling in regard to Title II, holding that an operator of city's public access cable station with ankylosing spondylitis, a deforming hip disease, whom the court ruled was an independent contractor, was protected from discrimination by Title II of the ADA.[141] The district court had ruled, and the Court of Appeals affirmed, that the plaintiff was not an "employee" for purposes of Title I. The Sixth Circuit took a broad view, however, of Title II's prohibition of discrimination in "services, programs, or activities" of a public entity, declaring: "We conclude that (1) the discrimination referenced in the statute must relate to services, programs, or activities; and (2) services, programs, and activities include all government activities, including contracting such as that in this case."[142] It elaborated that "the phrase 'services, programs, or activities' encompasses virtually everything that a public entity does,"[143] and ruled that "[t]he ADA and its regulations forbid the city from discriminating against people who are, with reasonable accommodation, qualified to

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(1st Cir. 1998) (parties' agreement); D'Agostino v. Ver-A-Fast Corp., 110 F. App'x 681, 2004 WL 2300092 (6th Cir. 2004); Swallows v. Barnes & Noble Book Stores, Inc., 128 F.3d 990, 992 (6th Cir. 1997) ("In order to hold TTU liable under the ADEA and/or the ADA, plaintiffs must show that TTU was their "employer" within the meaning of those statutes."); Reith v. TXU Corp., 2006 WL 887413, *7 (E.D. Tex., April 04, 2006) ("The Court has previously found that TXU was never Plaintiff's employer and that TXU cannot therefore be liable for violating the ADA with respect to Plaintiff.").

130. Wojewski v. Rapid City Regional Hosp., Inc., 450 F.3d 338, 342 (8th Cir. 2006).

131. Lerohl v. Friends of Minnesota Sinfonia, 322 F.3d 486 (8th Cir. 2003).

132. Chadha v. Hardin Memorial Hospital, 202 F.3d 267 (6th Cir. 2000).

133. Case v. ADT Automotive, Inc., 163 F.3d 601 (8th Cir.1998).

134. Birchem v. Knights of Columbus, 116 F.3d 310 (8th Cir. 1997).

135. Dykes v. DePuy, Inc., 140 F.3d 31 (1st Cir. 1998).

136. D'Agostino v. Ver-A-Fast Corp., 110 F. App'x 681, 2004 WL 2300092 (6th Cir. 2004).

137. Swallows v. Barnes & Noble Book Stores, Inc., 128 F.3d 990 (6th Cir. 1997).

138. Lee v. Glessing, 2006 WL 2524185 (N.D.N.Y., August 30, 2006).

139. Reith v. TXU Corp, 2006 WL 887413 (E.D. Tex., April 04, 2006).

140. 42 U.S.C. § 12101(b)(1).

141. Johnson v. City of Saline, 151 F.3d 564, 568–569 (6th Cir. 1998).

142. *Id.* at 569.

143. *Id.*

'participate' in contracting with the city to provide services."[144]

An analogous case can be made under the public accommodations provisions of Title III of the ADA. Not only does Title III apply broadly to "services, facilities, privileges, advantages, or accommodations,"[145] but Title III specifically designates as prohibited discrimination denials of opportunities to participate or benefit from such services, facilities, privileges, advantages, or accommodations, "through contractual, licensing, or other arrangements."[146] In addition, Title III also makes it a violation "contractually or through other arrangements" to "utilize standards or criteria or methods of administration . . . that have the effect of discriminating on the basis of disability."[147] These provisions would seem to provide ample basis for protecting contractors from discrimination on the basis of disability. The National Council on Disability has declared:

> NCD believes that in pursuing the expressed congressional goal of ADA "to provide a clear and comprehensive prohibition of discrimination on the basis of disability," 42 U.S.C. 12101(b)(1), Congress fashioned Title III in extremely broad terms intended to guarantee that no individual is discriminated against on the basis of disability in the full and equal enjoyment of public accommodations. Accordingly, people who perform, render services, or otherwise participate in events or activities at places of public accommodation, whether characterized as competitors, performers, participants, or independent contractors, should be protected by Title III.[148]

The ADA should be amended to clarify that independent contractors of covered entities are protected from discrimination on the basis of disability.

3. Cyberspace and Other Non-Physical "Places" of Public Accommodation

Because Title III of the ADA prohibits discrimination on the basis of disability in "the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of *any place of public accommodation* by any person who owns, leases (or leases to), or operates *a place of public accommodation*,"[149] some dispute has arisen about the coverage of websites or other types of services not tied to a

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144. *Id.* at 570. *See also* McKibben v. Hamilton County, 215 F.3d 1327 (Table), 2000 WL 761879, **4 (6th Cir. 2000) (Johnson ruling does not apply when plaintiff is an employee).

145. 42 U.S.C. § 12182(a).

146. 42 U.S.C. § 12182(b)(1)(A)(i), (ii), and (iii).

147. 42 U.S.C. § 12182(b)(1)(D)(i).

148. *Supreme Court Decisions Interpreting the Americans with Disabilities Act*, subpart II(L), http://www.ncd.gov/newsroom/publications/2002/supremecourt_ada.htm.

149. 42 U.S.C. § 12182(a) (emphasis added).

particular, concrete place where the service is rendered. Some, including some courts, have taken the phrase "place of public accommodation" hyper-literally and concluded that only a physical facility or site can constitute a "place."

Disputes regarding whether a physical place where a provider provides, and a consumer or other person obtains, a service, benefit, or product—such as a store, a shop, or an office—is a prerequisite to Title III coverage, and whether accessibility required by the ADA is limited to access to a physical place, have occurred in several different contexts, including web sites, telephone access, and insurance. The Department of Justice (DOJ) has consistently taken the position that ADA accessibility requirements apply to web sites, telephone access systems, and other communication modalities of public accommodations covered under Title III of the ADA and to public entities covered by Title II of the ADA. In a 1996 letter to Senator Harkin, then Assistant Attorney General for Civil Rights Deval Patrick observed that "[t]he Internet is an excellent source of information and, of course, people with disabilities should have access to it as effectively as people without disabilities." More pointedly, he declared:

> Covered entities under the ADA are required to provide effective communication, regardless of whether they generally communicate through print media, audio media, or computerized media such as the Internet. Covered entities that use the Internet for communications regarding their programs, goods, or services must be prepared to offer those communications through accessible means as well.[150]

Subsequently, the DOJ has argued for coverage of the Internet under Title III of the ADA in several amicus briefs,[151] and it has negotiated or approved complaint settlements requiring access in cases involving non-physical location issues such as brokerage or credit card statement accessibility.[152] The DOJ has taken the position that businesses which provide services over the Internet fall within the definition of "public accommodations" covered by Title III, and that Title III covers the services "of" a place of public accommodation, not "at" the place of public accommodation."[153] It has contended that the

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150. Letter from Deval L. Patrick, Ass't Att'y General, Civil Rights Div., U.S. Dep't of Justice, to Hon. Tom Harkin, U.S. Senate (Sept. 6, 1996), at http://www.usdoj.gov/crt/foia/cltr204.txt and at www.cybertelecom.org/ada/adaletters.htm, National Disability Law Reporter, Vol. 10, Iss. 6, para. 240 (Sept. 11, 1997).

151. *See, e.g.*, Amicus Brief of the US Department of Justice, filed in the Fifth Circuit in the case of *Hooks v. OKbridge* (No. 99-50891), *available at* http://www.usdoj.gov/crt/briefs/hooks.htm, and the Department's amicus brief to the Eleventh Circuit in *Rendon v. Valleycrest Productions, Ltd.*, 294 F.3d 1279 (11th Cir. 2002), *available at* http://www.usdoj.gov/crt/briefs/rendon.pdf.

152. *See, e.g.*, Enforcing the ADA: A Status Report from the Department of Justice: April–June 2002, http://www.ada.gov/aprjun02.htm (settlement between credit card company and legally blind man who complained that company refused his request for credit card statement and other printed communications in 24-point type).

153. The 2d Circuit espoused this line of reasoning in *Pallozzi v. Allstate Life Ins. Co.*, 198 F.3d 28, 33 (2d Cir. 1999) ("We find no merit in Allstate's contention that, because insurance policies are not used in places of public accommodation, they do not qualify as goods or services "of

only reason that Congress did not explicitly mention coverage of the Internet as a public accommodation in the ADA is that the Internet did not exist when the ADA was enacted. In response to the argument that the ADA's protections apply only to services rendered on the premises designated a "place of public accommodation," the DOJ has countered that such reasoning would render a wide range of ordinary service establishments outside the coverage of the Act whenever their services are provided over the telephone, through the mail, via the internet, or at some location outside the premises of the business. It noted that catalog merchants, furniture delivery companies, courtroom lawyers, plumbers, and food delivery services, for example, would be able to refuse to serve patrons with disabilities.[154] Companies that offer services both on-site and through other means (such as a travel services that arrange reservations both over the phone and at a walk-in office) would be required to offer non-discriminatory services on-site, but be free to discriminate over the phone or the Internet. And the DOJ has observed: "Neither the language of the statute, nor the underlying purposes of the Act, require or permit such an absurd result."[155]

The case law regarding Title III coverage of websites is still developing, but has not been too bad overall. In *National Federation of the Blind, Inc. v. AOL Time Warner, Inc.*,[156] NFB charged that AOL had violated the ADA because AOL's proprietary web browser was not accessible to persons with visual impairments as it interfered with the use of screen-reader software to access the AOL system. The case was settled by written agreement between the parties on July 26, 2000—the 10-year anniversary of the ADA's enactment—and voluntarily dismissed.[157] AOL admitted no wrongdoing but agreed to issue an accessibility policy, to make its AOL 6.0 software compatible with screen reader assistive technology, and to consult with the disability community on software accessibility concerns.[158]

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a place of public accommodation." The term "of" generally does not mean "in," and there is no indication that Congress intended to employ the term in such an unorthodox manner in Section 302(a) of Title III.").

154. As the DOJ has elaborated:

> [Any other interpretation of Title III] permits discrimination by more traditional businesses that provide services in locations other than their premises. For example, many businesses provide services over the telephone or through the mail, including travel services, banks, insurance companies, catalog merchants, and pharmacies. Many other businesses provide services in the homes or offices of their customers, such as plumbers, pizza delivery and moving companies, cleaning services, business consulting firms, and auditors from accounting firms.... [T]hose selling car insurance over the telephone would be free to hang up on blind customers, Publisher's Clearing House could refuse to sell magazines through the mail to people with HIV, and colleges could refuse to enroll the deaf in their correspondence courses.

Hooks brief at 9–10.

155. *Id.*

156. Civil Action No. 99-12303EFH (D. Mass., complaint filed November 16, 1999).

157. *See, e.g.*, Hiawatha Bray, Group Behind Blind-Access Suit Resolves Suit with AOL, BOSTON GLOBE at E4 (July 27, 2000).

158. The agreement between NFB and AOL is available at www.nfb.org/legacy/tech/accessibility.htm, and AOL's "Accessibility Policy" is available at

Another Title III case regarding accessibility of a company's website began in 2002, when Access Now, Inc., a nonprofit advocacy organization for individuals with disabilities, and Robert Gumson, a blind man, brought suit in the United States District Court for the Southern District of Florida, alleging that Southwest Airlines' website—Southwest.com—was inaccessible to persons with visual impairments. The plaintiffs contended that the lack of alternative text (alt text) for graphic information presented on the computer screen, and other features of Southwest.com's design rendered the website inaccessible to persons using a screen reader in violation of Title III guarantees of: (1) communication barriers removal; (2) auxiliary aids and services; (3) reasonable modifications; and (4) full and equal enjoyment and participation. The district court dismissed the case for failure to state a claim, finding that Southwest.com is not a place of public accommodation based on the following reasoning:

> [B]ecause the Internet Web site, Southwest.com, does not exist in any particular geographical location, plaintiffs are unable to demonstrate that Southwest's Web site impedes their access to a specific, physical, concrete space such as a particular airline ticket counter or travel agency.[159]

The validity of the district court's restrictive rationale, contrary to that of the Department of Justice and various commentators,[160] seemed headed for repudiation when the decision was appealed to the Eleventh Circuit. A few months before the district court's ruling, the Eleventh Circuit had entered a decision in *Rendon v. Valleycrest Productions, Ltd.*,[161] a ruling which the district court in the *Southwest Airlines* case referred to, but whose rationale it seemed to deviate from. In *Rendon*, the Court of Appeals held that an automated fast finger telephone selection process for a television quiz show was a place of "public accommodation" under Title III of the ADA, and rejected the rationale of the district court that had dismissed the plaintiffs' complaint because the automated telephone contestant selection process was not conducted at any single physical location, and thus the plaintiffs had not identified "any *place* that is subject to the public accommodation provisions of Title III."[162]

In *Southwest Airlines*, the district court's decision flew in the face of the Eleventh Circuit's *Rendon* ruling by requiring that the plaintiffs were required to identify "a Physical, Concrete Place of Public

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http://corp.aol.com/corporate-citizenship/accessibility.

159. Access Now, Inc. v. Southwest Airlines, Co., 227 F. Supp. 2d 1312, 1321 (S.D. Fla. 2002).

160. *See, e.g.*, Jeffrey Scott Ranen, Note, *Was Blind But Now I See: The Argument for ADA Applicability to the Internet*, 22 B.C. THIRD WORLD L.J. 389 (2002); Adam M. Schloss, *Web-Sight for Visually-Disabled People: Does Title III of the Americans with Disabilities Act Apply to Internet Websites?*, 35 COLUM. J.L. & SOC. PROBS., 35 (2001); Matthew A. Stowe, Note, *Interpreting 'Place of Public Accommodation' Under Title III of the ADA: A Technical Determination with Potentially Broad Civil Rights Implications*, 50 DUKE L.J. 297 (2000); Jonathan Bick, *Americans with Disabilities Act and the Internet*, 10 ALB. L.J. SCI. & TECH. 205 (2000).

161. 294 F.3d 1279 (11th Cir. 2002).

162. Rendon v. Valleycrest Productions, Ltd., 119 F. Supp. 2d 1344, 1346 (S.D. Fla.,2000).

Accommodation" and dismissing their complaint because they had not done so.[163] Accordingly, there was every reason to expect that the *Southwest Airlines* decision would be reversed on appeal. Due to a strange turn of affairs and some questionable strategic decisions, the Eleventh Circuit did not have the chance to clarify the principles to be applied to website accessibility.

In considering the appeal, the Court of Appeals ruled that the plaintiffs' trial court claim was based on the theory that the airline's website, Southwest.com, was a place of public accommodation, but that they had taken a different tack and contended, for the first time on appeal, that Southwest Airlines as a whole was a place of public accommodation and that the website was a "travel service" provided by the public accommodation. As to the former contention—that the Southwest.com website was a place of public accommodation—the Eleventh Circuit considered it to have been abandoned on appeal because it had not been raised nor briefed.[164] As to the argument that Southwest Airlines was the public accommodation and the website part of the travel service it provides, the court considered it settled law in that "an issue not raised in the district court and raised for the first time in an appeal will not be considered by this court,"[165] and that this is particularly in cases, such as this, in which important issues are fact-driven.[166]

Based on this odd procedural posture, the Court of Appeals concluded that it could not properly evaluate the merits of either of the plaintiffs' theories, accordingly had no substantive question properly before it, and had to dismiss the appeal.[167]

The Eleventh Circuit expressed some regret that it could not reach the issues raised in the case:

> In declining to evaluate the merits of this case, we are in no way unmindful that the legal questions raised are significant. The Internet is transforming our economy and culture, and the question whether it is covered by the ADA—one of the landmark civil rights laws in this country—is of substantial public importance. Title III's applicability to web sites—either because web sites are themselves places of public accommodation or because they have a sufficient nexus to such physical places of public accommodation—is a matter of first impression before this Court. Unfortunately, this case does not provide the proper vehicle for answering these questions.[168]

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163. 227 F. Supp. 2d at 1319, 1322.

164. Access Now, Inc. v. Southwest Airlines Co., 385 F.3d 1324, 1327–28, 1330 (11th Cir. 2004).

165. *Id.* at 1331 (11th Cir. 2004) (citations omitted).

166. *Id.* at 1331–32.

167. *Id.* at 1330, 1335.

168. *Id.* at 1335. Another inconclusive resolution occurred in the case of Hooks v. OKbridge, Inc., 232 F.3d 208 (5th Cir. 2000) (TABLE, TEXT IN WESTLAW, NO. 99-50891), in which the plaintiff claimed that he had been barred from the defendant's online bridge tournaments and associated bulletin boards because of his disabilities. The district court entered summary

Perhaps the most significant of the cases to date addressing the coverage of websites by Title III, even though it is still at a pretrial stage, is *National Federation of the Blind v. Target Corp.*,[169] in which the National Federation of the Blind (NFB); the National Federation of the Blind of California; and Bruce Sexton, who is blind, filed suit against Target Corporation ("Target"), on behalf of a class of similarly situated people, claiming that Target.com is inaccessible to blind persons, and thereby violates the ADA and state laws prohibiting discrimination on the basis of disability. In considering Target's motion to dismiss the complaint for failure to state a claim, the federal district court had to address the argument that Title III did not cover the Target.com website. The court flatly rejected the contention that Title III does not prohibit "off-site discrimination":

> The statute applies to the services of a place of public accommodation, not services in a place of public accommodation. To limit the ADA to discrimination in the provision of services occurring on the premises of a public accommodation would contradict the plain language of the statute. To the extent defendant argues that plaintiffs' claims are not cognizable because they occur away from a "place" of public accommodation, defendant's argument must fail.[170]

The court also considered and rejected Target's argument that the plaintiffs had not stated a proper Title III claim because they had failed to assert that they had been denied "physical access to Target stores."[171] The court recognized that some courts, including the Ninth Circuit in which the *Target* case district court is located, "have held that a plaintiff must allege that there is a 'nexus' between the challenged service and the place of public accommodation."[172] But, said the court, the need for a

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judgment against the plaintiff on the grounds that Title III did not apply to OKbridge because it provided services over the internet rather than at a physical place, and, alternatively, even if Title III applied, OKbridge was "private club" exempt from ADA coverage under 42 U.S.C.§ 12187. Hooks v. OKbridge, No. 99-214 (W.D. Tex. Aug. 4, 1999) slip op. 7–8. The Fifth Circuit affirmed dismissal, 232 F.3d 208, but reportedly declined to follow the district court's reasoning, holding, instead, that since the defendant had not been aware of the plaintiff's disabilities, it could not possibly have intended to discriminate against him. *See*, National Council on Disability, *When the Americans with Disabilities Act Goes Online: Application of the ADA to the Internet and the Worldwide Web* (July 10, 2003) *available at* http://www.ncd.gov/newsroom/publications/2003/adainternet.htm. Because neither the district court nor the Eleventh Circuit decision is reported and because of the lack of clarity regarding the grounds on which the case was dismissed, the Hooks decision is of limited precedential value. Perhaps the most significant aspect of the case was the filing of a brief by the Department of Justice articulating various arguments why Title III covers websites of public accommodations. *See* http://www.usdoj.gov/crt/briefs/hooks.htm.

169. 452 F. Supp. 2d 946 (N.D. Cal., 2006).

170. *Id.* at 953 (citations omitted).

171. *Id.* at 952 ("According to defendants, in order for plaintiffs' claim to be actionable under the ADA, the 'off-site' discrimination must still deny physical access to Target's brick-and-mortar stores.").

172. *Id.* ("Under Ninth Circuit law, a 'place of public accommodation,' within the meaning of Title III, is a physical place. See Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1114 (9th Cir. 2000) (concluding that places of public accommodation are 'actual, physical places.')"). The court also observed that the Ninth Circuit had declined to join those circuits which have suggested that a "place of public accommodation" may have a more expansive meaning, citing

nexus does not entail the restrictive reading that Target was advocating:

> However, consistent with the plain language of the statute, no court has held that under the nexus theory a plaintiff has a cognizable claim only if the challenged service prevents physical access to a public accommodation. Further, it is clear that the purpose of the statute is broader than mere physical access—seeking to bar actions or omissions which impair a disabled person's "full enjoyment" of services or goods of a covered accommodation. Indeed, the statute expressly states that the denial of equal "participation" or the provision of "separate benefit[s]" are actionable under Title III.[173]

The court added that "[t]he case law does not support defendant's attempt to draw a false dichotomy between those services which impede physical access to a public accommodation and those merely offered by the facility," and elaborated as follows:

> Such an interpretation would effectively limit the scope of Title III to the provision of ramps, elevators and other aids that operate to remove physical barriers to entry. Although the Ninth Circuit has determined that a place of public accommodation is a physical space, the court finds unconvincing defendant's attempt to bootstrap the definition of accessibility to this determination, effectively reading out of the ADA the broader provisions enacted by Congress.[174]

The court concluded that "to the extent that plaintiffs allege that the inaccessibility of Target.com impedes the full and equal enjoyment of goods and services offered in Target stores, the plaintiffs state a claim, and the motion to dismiss is denied."[175] It added that such reasoning would not apply to information and services offered on Target.com to the extent that they are "unconnected to Target stores" and "do not affect the enjoyment of goods and services offered in Target stores."[176] After taking a look at the website, however, the court had some misgivings about the applicability of the "unconnected" category:

> It appears from a review of the website in question—which the court notes is not in evidence but nonetheless does raise some questions—that Target treats Target.com as an extension of its stores, as part of its overall integrated merchandising efforts. See www.target.com. This suggests

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Carparts Distribution Ctr., Inc. v. Automotive Wholesalers Assoc. of New England, Inc., 37 F.3d 12, 19–20 (1st Cir. 1994) (holding that "public accommodations" encompasses more than actual physical structures and includes the defendant insurance company); and *Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557, 559 (7th Cir. 1999) (noting, in dicta, that a "place of public accommodation" encompasses facilities open to the public in both physical and electronic space, including websites).

173. *Id.* at 953–54, quoting 42 U.S.C. §§ 12182(a) & 12182(b)(1)(A).

174. *Id.* at 955.

175. *Id.* at 956.

176. *Id.*

> to the court that perhaps with more evidence, the court's determination of what may be covered under the ADA in this kind of integrated merchandising may be subject to amendment. The website is a means to gain access to the store and it is ironic that Target, through its merchandising efforts on the one hand, seeks to reach greater numbers of customers and enlarge its consumer-base, while on the other hand it seeks to escape the requirements of the ADA. A broader application of the ADA to the website may be appropriate if upon further discovery it is disclosed that the store and website are part of an integrated effort.[177]

In January 2008, the court rejected another motion filed by Target to dismiss the plaintiffs' ADA claims, and noted that the plaintiffs had amended their complaint to add language reflecting the court's requirement of "a nexus between the website and the physical store."[178]

On balance, the case law regarding Title III coverage of websites of public accommodations has been relatively favorable, albeit still not totally conclusive. The meaning and ramifications of the concept of a "nexus" between the online services and the public accommodation are still being fleshed out. The big unanswered question concerns web enterprises that provide services only online. The cases to date have focused on identifying a physical "place" that constitutes a "place of public accommodation. The ADA expressly includes a "service establishment" as a category of "public accommodation" covered by Title III.[179] An argument can easily be framed that an online service enterprise is a "service establishment" and it is prohibited from discriminating in regard to the "services, . . . privileges, [and] advantages" it provides.[180] Yet the suggestion by some courts of the need to demonstrate a nexus to a physical place where services are rendered has seriously muddied the waters of this analysis.

The question of physical place has caused a split of authority in regard to the coverage of insurance under Title III. An "insurance office" is explicitly listed in the category of "service establishment" as a type of public accommodation.[181] Some courts, however, including particularly the Third, Sixth, and Ninth Circuits, have held that Title III of the ADA applies only to physical places or that Title III only proscribes interference with physical access to a place.[182] The Ninth

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177. *Id.* at n.4.

178. National Federation of the Blind v. Target Corp., Order Re: Defendant's Motion to Strike the Second Amended Complaint and Dismiss Plaintiffs' ADA Claims, Slip Copy, 2008 WL 54377 at *1 (N.D. Cal. Jan. 3, 2008).

179. 42 U.S.C. § 12181(7)(F).

180. 42 U.S.C. § 12182(a).

181. 42 U.S.C. § 12181(7)(F).

182. *See, e.g.*, Lenox v. Healthwise of Kentucky, Ltd., 149 F.3d 453, 456–57 (6th Cir. 1998) (plaintiff may not proceed under Title III against health insurer which refused to cover costs of heart transplant; "Even if the policy is deemed a good or service provided by a place of public accommodation, [plaintiff] is not complaining about physical access to a place of public accommodation or her ability to avail herself of the goods and services offered at a place of public accommodation, such as an insurance company office."); Parker v. Metropolitan Life Ins. Co., 121 F.3d 1006, 1011 (6th Cir. 1997), cert. denied, 522 U.S. 1084 (1998)); Ford v. Schering-Plough

Circuit has explained its vision of what the ADA does and does not apply to in relation to insurance services:

> Certainly, an insurance office is a place where the public generally has access. But this case is not about such matters as ramps and elevators so that disabled people can get to the office. The dispute in this case, over terms of a contract that the insurer markets through an employer, is not what Congress addressed in the public accommodations provisions.[183]

A number of courts, however, have disagreed with this narrow view of Title III coverage, and held that Title III applies to full and equal enjoyment of insurance policies and underwriting practices regardless of the place where the company offers insurance.[184] The Seventh Circuit has articulated such a view that Title III coverage of insurance is not limited to physical access to insurance offices in the following terms:

> An insurance company can no more refuse to sell a policy to a disabled person over the Internet than a furniture store can refuse to sell furniture to a disabled person who enters the store. . . . The site of the sale is irrelevant to Congress's goal of granting the disabled equal access to sellers of goods and services. What matters is that the good or service be offered to the public.[185]

Corp., 145 F.3d 601, 612–14 (3d Cir. 1998) (plaintiff fails to state claim against insurer under Title III because disability benefits are not "public accommodations" and there is no question of physical access to the insurer's office), cert. denied, 525 U.S. 1093 (1999); Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1114–16 (9th Cir. 2000) ("place of public accommodation" requires connection between good or service complained of and an actual physical place; court found "no nexus between the disparity in benefits and the services which . . . [the company] offers to the public from its insurance office"; although an insurance office is place of public accommodation, insurance company administering employer-provided insurance policy is not place of public accommodation.).

183. *Weyer*, 198 F.3d at 1114.

184. *See, e.g.*, Carparts Distribution Ctr., Inc. v. Automotive Wholesalers Assoc. of New England, Inc., 37 F.3d 12, 18–20 (1st Cir. 1994) ("public accommodations" encompasses more than actual physical structures and includes the defendant insurance company; Title III covers claim by plaintiff with HIV against insurer which placed allegedly discriminatory cap on health benefits for individuals with AIDS"); Doe v. Mutual of Omaha Ins. Co., 179 F.3d 557, 559 (7th Cir. 1999) ("the owner or operator of a . . . Web site, or other facility (whether in physical space or in electronic space) that is open to the public cannot exclude disabled persons from entering the facility and, once in, from using the facility in the same way that the nondisabled do"; "an insurance company cannot (at least without pleading a special defense . . . refuse to sell an insurance policy to a person with AIDS."); Morgan v. Joint Admin. Bd. Retirement Plan of Pillsbury Co., 268 F.3d 456, 459 (7th Cir. 2001) (rejecting interpretation of "public accommodation" as denoting a physical site); Pallozzi v. Allstate Life Ins. Co., 198 F.3d 28, 32–33 & n.3 (2d Cir. 1999) ("the statute was meant to guarantee . . . more than mere physical access"; Title III covers not just access to "offices" but also to goods and services off-site, including insurance policy obtained from company); Doukas v. Metropolitan Life Ins. Co., 950 F. Supp. 422, 424–27 (D.N.H. 1996) (public accommodations not limited to actual physical structures; "Under the plain language of Title III, an insurance office is a 'public accommodation' that is prohibited from discriminating on the basis of disability in the provision of a good or service, which includes insurance products."). *See, also,* McNeil v. Time Ins. Co., 205 F.3d 179, 186–87 (5th Cir. 2000) (Title III prohibits denying physical access and full and equal enjoyment of business's goods and services, but does not regulate content and type of goods or services), *cert. denied,* 531 U.S. 1191 (2001).

185. Morgan v. Joint Admin. Bd. Retirement Plan of Pillsbury Co., 268 F.3d 456, 459 (7th Cir. 2001).

Accordingly, there is a sharp split of authority regarding the extent of Title III coverage of insurance.

Apart from website services and insurance, questions of whether Title III of the ADA applies only to physical places or that Title III only proscribes interference with physical access to a place have been at issue in regard to some other types of service businesses. Discussed above was *Rendon v. Valleycrest Productions, Ltd.*,[186] in which the Eleventh Circuit ruled that an automated fast finger telephone selection process for a television quiz show ("Who Wants to be a Millionaire") was covered by Title III, and rejected the notion that a plaintiff needed to identify a particular physical location as a place of "public accommodation" where alleged discrimination occurred. The court declared:

> the definition of discrimination provided in Title III covers both tangible barriers, that is, physical and architectural barriers that would prevent a disabled person from entering an accommodation's facilities and accessing its goods, services and privileges, and intangible barriers, such as eligibility requirements and screening rules or discriminatory policies and procedures that restrict a disabled person's ability to enjoy the defendant entity's goods, services and privileges.[187]

And the court concluded that "[t]here is nothing in the text of the statute to suggest that discrimination via an imposition of screening or eligibility requirements must occur on site to offend the ADA."[188] Significantly, the Department of Justice submitted an amicus brief to the Eleventh Circuit in *Rendon* supporting Title III coverage in the case. The DOJ articulated the gist of the argument it made in the brief as follows: "TITLE III OF THE ADA APPLIES TO THE IMPLEMENTATION OF ELIGIBILITY CRITERIA GOVERNING ACCESS TO THE SERVICES AND PRIVILEGES OF A PLACE OF PUBLIC ACCOMMODATION EVEN WHEN IMPLEMENTED THROUGH AN OFF-SITE AUTOMATED TELEPHONE SYSTEM."[189] The Department contended that "[b]y its clear text, Title III requires a public accommodation to provide individuals with disabilities more than simple physical access to the accommodation's facilities," and declared that "the Act applies not only to barriers to physical access to business locations, but also to any policy, practice, or procedure that operates to deprive or diminish disabled individuals' full and equal enjoyment of the privileges and services offered by the public accommodation to the public at large."[190]

The "physical place" factor proved to be a major hurdle in a case in different context—that of digital cable T.V.—in the case of *Torres v.*

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186. 294 F.3d 1279, 1283–84 (11th Cir. 2002).
187. *Id.* at 1283 (citations omitted).
188. *Id.* at 1283–84.
189. http://www.usdoj.gov/crt/briefs/rendon.pdf at p. 5.
190. *Id.* at 6.

AT&T Broadband, LLC.[191] In that action, a visually-impaired subscriber to AT&T's digital cable service brought suit under Title III of the ADA, alleging that the service's channel listing program was not accessible to him. The court granted AT&T's motion to dismiss on the ground that AT&T's cable system was not a "public accommodation" under the Act. The court noted that "in no way does viewing the system's images require the plaintiff to gain access to any actual physical public place," and elaborated as follows:

> The plaintiff does not have to travel to some physical place, open to the public, in order to experience the benefits of the defendants' digital cable system. He simply turns on his television set and has automatic access to the sounds and images provided by the defendants' service.
>
> The plaintiff does not even allege that he was denied access to a physical place. He simply alleges that the defendants' cable services are not as valuable to him as they would be if he were not a visually impaired subscriber. That is not an ADA violation.[192]

The court reviewed a selectively abridged list of public accommodations mentioned in Title III, and observed that "[a] digital cable system is not analogous to any of these categories or examples";[193] significantly, the court's list did not include the category of "other service establishment." [194] The court concluded that "neither the digital cable system nor its on-screen channel menu can be considered a place of public accommodation within the meaning of the ADA."[195]

In *Stoutenborough v. National Football League*,[196] the Sixth Circuit upheld dismissal of a challenge by hearing impaired individuals to a "blackout rule," which prohibits live local broadcast of home football games that are not sold out; Thomas Stoutenborough and the organization Self-Help for Hearing Impaired Persons had filed an ADA claim against the National Football League, the Cleveland Browns, NBC, ABC, CBS, and three Cleveland television stations. The district court and Court of Appeals both interpreted Title III as requiring the identification of a particular physical place where a public accommodation rendered its services and the alleged discrimination occurred. The Sixth Circuit declared that '[a]lthough a game is played in a 'place of public accommodation' and may be viewed on television in another 'place of public accommodation,' that does not suffice. Moreover, the plaintiffs' argument that the prohibitions of Title III are not solely limited to "places" of public accommodation contravenes the

191. 158 F. Supp. 2d 1035 (N.D. Cal. 2001).
192. *Id.* at 1038.
193. *Id.* at 1037.
194. 42 U.S.C. § 12181(7)(F).
195. 158 F. Supp. 2d at 1038.
196. 59 F.3d 580 (6th Cir. 1995).

plain language of the statute."[197] As the court construed it, "the prohibitions of Title III are restricted to 'places' of public accommodation, disqualifying the National Football League, its member clubs, and the media defendants."[198] The Sixth Circuit concluded that "none of the defendants falls within any of the twelve 'public accommodation' categories identified in the statute," nor did they operate a "facility" as required by the language of Title III.[199] Actually, the Title III list of categories of public accommodations includes "stadium, or other place of exhibition or entertainment," a "place of public gathering," a "place of recreation," a "place of exercise or recreation," and a "service establishment."[200] There is no particular reason why T.V. transmission of a football game would not be a "service,' and a business providing it "a service establishment." Moreover, the definition of "facility" in ADA Title III regulation includes "equipment"[201]—a term that would seem to encompass television transmission equipment and transmission facilities. The Sixth Circuit ruled, however, that "[t]he televised broadcast of football games is certainly offered through defendants, but not as a service of public accommodation."[202]

In *Walker v. Carnival Cruise Lines,*[203] a case dealing with travel agencies that provided their clients with disabilities inaccurate information about the accessibility of a cruise ship and the rooms they had booked, the court did not view Title III as restrictively focused on physical access and physical location where the services were provided. The court expressly rejected the "line of authority . . . holding that the mandates of Title III of the ADA speak only to *physical* access," and ruled that "[t]he language of Title III cannot reasonably be read to require physical access alone."[204] The court declared that "[t]ravel agents fall squarely within the ADA's definition of public accommodations" and accordingly are obligated to treat customers non-discriminatorily in the services they offer, "quite apart from the physical accessibility of the Travel Agent's office."[205] Providing individuals with disabilities "inadequate or inaccurate information regarding the disabled accessibility of travel accommodations . . . deprives them of 'full and equal enjoyment' of travel information services."[206]

The upshot overall of the exaggerated concentration on physical access and the "place" in the phrase "place of public accommodations" in the ADA is that some courts are taking a highly restrictive view of what a public accommodation is and where services must be provided to be subject to Title III requirements, while other courts have read the terms and standards more broadly, giving more emphasis to other

197. *Id.* at 583.
198. *Id.*
199. *Id.*
200. 42 U.S.C. §§ 12181(7)(C), (D), (I), (L), & (F).
201. 28 C.F.R. § 36.104.
202. 59 F.3d at 583.
203. 63 F. Supp. 2d 1083 (N.D. Cal. 1999).
204. *Id.* at 1093.
205. *Id.* at 1092.
206. *Id.*, citing 42 U.S.C. § 12182(a).

phrases in the statute and regulations, such as "comprehensive national mandate for the elimination of discrimination,"[207] "service establishment,"[208] "equipment,"[209] "denial of opportunity to participate in or benefit from . . . services, privileges, advantages, or accommodations of an entity,"[210] "full and equal enjoyment of . . . services,"[211] "shall be discriminatory to provide . . . a . . . service, . . . privilege, advantage, or accommodations that is different or separate."[212]

From my perspective, the overemphasis on "place" in Title III is misplaced. The original version of the ADA proposed by NCD[213] and the initial ADA bills introduced in Congress in 1988[214] merely referred to "any public accommodation" and did not mention "*place of* public accommodation." The phrase "place of public accommodation" was inserted into the ADA as the bill was revised for reintroduction in the 101st Congress in 1989. The "place of public accommodation" formulation was derived from Title II of the Civil Rights Act of 1964. Actually, the scope of public accommodations covered in the pre-1989 versions of the ADA was identical to that of Title II, as the ADA bills had simply cross-referenced "any public accommodation covered by title II of the Civil Rights Act of 1964."[215] In those bills, these references were in a section titled "Scope of Discrimination Prohibited" that listed the entities and activities covered by the Act; a subsequent section titled "Forms of Discrimination Prohibited" listed various types of discriminatory actions that all the covered entities were prohibited from engaging in.

In the revised bills introduced in 1989, the Act was divided into separate titles addressing categories of covered entities—employers, state and local government entities, public accommodations, etc. In addition to a generic Title I that established general rules prohibiting discrimination, each of the particular titles covering a specific category of covered entity included provisions addressing discriminatory practices in that area. In the section headed "Prohibition of Discrimination by Public Accommodations," the 1989 bills established a "General Rule" that "No individual shall be discriminated against in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of *any place of public accommodation*, on the basis of disability."[216]

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207. 42 U.S.C. § 12101(b)(1).
208. 42 U.S.C. § 12181(7)(F).
209. 28 C.F.R. § 36.104.
210. 42 U.S.C. § 12182(b)(1)(A)(i).
211. 42 U.S.C. § 12182(b)(1)(A)(ii).
212. 42 U.S.C. § 12182(b)(1)(A)(iii).
213. National Council on the Handicapped, ON THE THRESHOLD OF INDEPENDENCE at 29, § 4(a)(6) (1988) (Andrea Farbman, ed.).
214. S. 2345, § 4(a)(3), 100th Cong., 2d Sess., 134 Cong. Rec. S. 5110 (Apr. 28, 1988); H.R. 4498, § 4(a)(3), 100th Cong. 2d Sess.; *see* 134 Cong. Rec. E 1307 (Apr. 29, 1988).
215. National Council on the Handicapped, ON THE THRESHOLD OF INDEPENDENCE at 29, § 4(a)(6) (1988) (Andrea Farbman, ed.); S. 2345, § 4(a)(3), 100th Cong., 2d Sess., 134 Cong. Rec. S. 5110 (Apr. 28, 1988); H.R. 4498, § 4(a)(3), 100th Cong. 2d Sess.; *see* 134 Cong. Rec. E 1307 (Apr. 29, 1988).
216. S. 933, § 402(a), 101st Cong., 1st Sess. (1989); H.R. 2273, § 402(a), 101st Cong., 1st Sess. (1989).

The only reason for the addition of "place of" was, as all of us who were involved in revising the language can attest, to make the language of the discrimination prohibition provision echo that of the public accommodations provisions in Title II of the Civil Rights Act of 1964[217] on the theory that familiar language would be easier to explain and endorse. The change in phrasing did not arise from any intent to exclude, restrict, or remove anything from the scope of coverage in the prior versions.

Actually, the 1989 bills engendered a substantial expansion, over Title II, of the class of public accommodations that would be covered by the ADA. Title II of the 1964 Act had addressed a range of establishments that had generated serious segregation problems; it defined the phrase "place of public accommodation" to include places providing lodging to transient guests, such as inns, hotels, and motels (except for certain small boarding houses); facilities that sell food for consumption on the premises, such as restaurants, cafeterias, lunchrooms, lunch counters, and soda fountains; gasoline service stations; and places of exhibition or entertainment, such as motion picture houses, theaters, concert halls, sports arenas, and stadiums.[218] This is, of course, a significant class of commercial establishments, but it pales in comparison to the array of public accommodations covered by the ADA.

In conjunction with some concessions and compromises of the disability community in revising the ADA bills for reintroduction in 1989, a decision was made to greatly enlarge the coverage of public accommodations. While Title II had addressed types of establishments that were perceived as particular trouble spots in the desegregation efforts in the early 1960s, the perception of disability advocates was that disability discrimination was a serious problem in all sorts of businesses across the commercial spectrum. Accordingly, as introduced in the 101st Congress, the ADA bill defined "public accommodation" to include all privately operated establishments whose operations affect commerce and are either "used by the general public as customers, clients, or visitors" or "are potential places of employment."[219] Subsequently, while the bills were pending in Congress, in response to concerns expressed by the George H.W. Bush Administration about this somewhat generic formulation, the definition was redrafted as a list of types of establishments covered as public accommodations to produce the twelve broad categories encompassed in the ADA as enacted.[220] The intent of those of us

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217. Section 201(a) of Title II provides: "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, and privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin." 42 U.S.C. § 2000a(a).

218. 42 U.S.C. § 2000a(b).

219. S. 933, § 402(2)(A), 101st Cong., 1st Sess. (1989); H.R. 2273, § 402(2)(A), 101st Cong., 1st Sess. (1989).

220. As enacted, title III of the ADA declares that the following entities are public accommodations if their operations affect commerce:

(A) an inn, hotel, motel, or other place of lodging . . .;

(B) a restaurant, bar, or other establishment serving food or drink;

(C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;

involved in developing the list was to make it so comprehensive that it would be as broad as the formulation "used by the general public as customers, clients, or visitors" it replaced.

The categories listed cover, with a few exceptions such as the sale or rental of housing,[221] private clubs and religious organizations,[222] and small boarding homes,[223] almost every facet of American life in which a business establishment or other nongovernmental entity serves or comes into contact with members of the general public. It covers all of the types of establishments that are subject to Title II of the Civil Rights Act, plus many others, such as sales, rental, service, and social service establishments, that are not covered by Title II. During congressional consideration of the ADA, the author of this article was the principal spokesperson for such expanded coverage. Appearing before the Senate Committee on Labor and Human Resources in the role of a legal and technical expert, I testified as follows:

> Title II was designed to deal with the worst problems of discrimination that were faced in 1964. It chose to attack segregated hotels, motels, inns, restaurants, et cetera—places where the sit-ins had been occurring.
>
> [P]eople with disabilities are facing discrimination in those places, but also in other places, and the concept of public accommodations is one of places open to the public . . . There is no sense to having certain facilities that are more needed by people with disabilities be closed off, when other facilities are open to them.
>
> For example, it makes no sense to bar discrimination against people with disabilities in theaters, but not in shops; or

(D) an auditorium, convention center, lecture hall, or other place of public gathering;

(E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;

(F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;

(G) a terminal, depot, or other station used for specified public transportation;

(H) a museum, library, gallery, or other place of public display or collection;

(I) a park, zoo, amusement park, or other place of recreation;

(J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;

(K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service establishment; and

(L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

42 U.S.C. § 12181(7).

221. Discrimination on the basis of disability in housing is prohibited under the Fair Housing Amendments Act. Pub. L. No. 100-430, 102 Stat. 1619, codified at 28 U.S.C. §§ 2341, 2342, 42 U.S.C. §§ 3601 notes, 3602, 3602 note, 3604–08, 3610–14, 3614a, 3615–19, 3631.

222. 42 U.S.C. § 12187.

223. Excepted is "an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor." 42 U.S.C. § 12181(7)(A). This incorporates the so-called "Mrs. Murphy's Boarding House exception" established under Title II of the Civil Rights Act. 42 U.S.C. § 2000a(b)(1).

> restaurants, and not in stores; or by places of entertainment, but not in regard to such important things as doctors' offices. It makes no sense that you can't be discriminated against on the basis of disability if you want to buy a pastrami sandwich at the local deli, but that you can be discriminated against next door at the pharmacy where you need to fill a prescription.[224]

My testimony on this issue was quoted in ADA committee reports in the Senate and the House.[225] ADA advocates and the members of news organizations shortened the reference to the irrationality of treating pharmacies different from eating places in regard to discrimination to the phrase "pastrami sandwiches but not prescriptions," and this slogan became the battle cry for expansive coverage of public accommodations.[226] And based in large part upon this rationale, Congress adopted the very broad definition of public accommodations in the ADA.

At no point in the congressional consideration of the ADA was there any suggestion of any intent to exclude off-premises services of service-providing entities or services not provided at a specified physical place from the coverage of Title III. To my knowledge, there is not a scintilla of legislative history to that effect.

Because of the confusion and uncertainty engendered by the court decisions that have construed Title III as applying only to physical places or as proscribing only interference with physical access to a place, clarification is needed. I propose that ADA Title III coverage should be clarified as follows:

> 1) A business that provides services over the internet is a "service establishment" within the meaning of Title III of the ADA; websites and other services provided online by entities covered by Title III are subject to its requirements and must be made available in an accessible format.[227]

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224. *Americans with Disabilities Act of 1989: Hearings on S. 933 Before the Committee on Labor and Human Resources and the Subcommittee on the Handicapped*, 101st Cong., 1st Sess. 100 (1989).

225. S. Rep. No. 101-116, 101st Cong, 1st Sess., 11 (1989); H.R. Rep. No. 101-485, 101st Cong., 2d Sess., Part 2, 35 (1990).

226. Yost, "Tedious Meetings, Testy Exchanges Produced Disability-Rights Bill," Washington Post, Aug. 7, 1989, at A4. In fact, a comparable argument for broad coverage of public accommodations under the Civil Rights Act of 1964, had been proffered by Justice Douglas in 1964, when he asserted that denials of equal access to places open to the public were not limited to exclusions from and segregation in interstate transportation or to restaurants refusing service to black persons, but also applied to hospitals refusing admission, to "a drugstore refusing antibiotics," or to a telephone company that refused to install a telephone. Bell v. Maryland, 255 U.S. 226, 252–253 (1964) (Douglas, J., concurring). "Constitutionally speaking," he asked," why should Hooper Food Co., Inc., or Peoples Drug Stores . . . stand on a higher, more sanctified level than Greyhound Bus when it comes to a constitutional right to pick and choose its customers?" *Id.* at 254–55. The "pastrami sandwiches but not prescriptions" argument was successful in the ADA negotiation process, as it had not been in fashioning the coverage of the Civil Rights Act of 1964.

227. The National Council on Disability (NCD), has recommended that the Department of Justice should develop guidelines clarifying the extent and manner in which websites are covered by Title III. NCD, NATIONAL DISABILITY POLICY: A PROGRESS REPORT (January 15, 2008), p. 60, Recommendation 2.5, at

> 2) Businesses that use computerized media, including the internet, for communications regarding their programs, goods, or services must offer those communications through accessible means.
>
> 3) Services provided by public accommodations are covered by the requirements of Title III and must be offered in an accessible, nondiscriminatory fashion regardless of whether the services are provided over the telephone, through the mail, via the internet, by radio or television transmission, by fiber optic cable or satellite transmission, or in some other communication medium, or at some location outside the premises of the business.

The coverage of insurance by Title III is somewhat more complex. As noted above, an "insurance office" is listed as a type of public accommodation.[228] And Title III makes it unlawful for such an entity to deny opportunities to individuals with disabilities or otherwise treat them unequally in regard to any of the "goods, services, facilities, privileges, advantages, or accommodations" provided.[229] This obviously includes insurance coverage—the primary type of goods, services, privileges, or advantages provided by an "insurance office." A provision in Title V of the ADA, however, establishes a safe harbor, subject to certain conditions, for "an insurer, hospital or medical service company, health maintenance organization, or any agent, or entity that administers benefit plans, or similar organizations,"[230] and for persons or organizations who are involved in "establishing, sponsoring, observing or administering the terms of" such insurance plans.[231] These protections are applicable only to the extent that the listed entities act in accordance with state law and insurance practices regarding administration of insurance risks.[232] While presented in the form of protected practices, these provisions also make insurers and purchasers and administrators of insurance subject to potential liability if they do not act consistently with state law or proper insurance underwriting practices.[233]

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http://www.ncd.gov/newsroom/publications/2008/doc/RevisedProgressReport.doc.

228. 42 U.S.C. § 12181(7)(F).

229. 42 U.S.C. § 12182(b)(1)(A).

230. 42 U.S.C. § 12201(c)(1).

231. 42 U.S.C. § 12201(c)(2).

232. 42 U.S.C. §§ 12201(c)(1) & (c)(2).

233. That these provisions impose restrictions upon insurance practices was expressly noted in committee reports. The Senate report and the report of the House Committee on the Judiciary used identical language in providing examples of the application of the provisions regarding insurance:

> For example, a blind person may not be denied coverage based on blindness independent of actuarial risk classification. Likewise, with respect to group health insurance coverage, an individual with a pre-existing condition may be denied coverage for that condition for the period specified in the policy but cannot be denied coverage for illnesses or injuries unrelated to the pre-existing condition.

S. Rep. No. 101-116, 85 (1989); H.R. Rep. No.101-485, 71 (1990). Both reports also included the following analysis:

I have previously written of the prohibitions contained in the insurance provisions of Title V.[234] Businesses providing or administering insurance are prohibited from: (1) underwriting risks, classifying risks, or administering risks relating to disabilities in a manner that is inconsistent with state law;[235] (2) establishing, sponsoring, observing, or administering the terms of a benefit plan based upon underwriting, classifying, or administering risks relating to disabilities that is inconsistent with state law;[236] (3) using the underwriting, classifying, or administering of risks, or establishing, sponsoring, observing, or administering the terms of a benefit plan as a subterfuge to evade the purposes of other provisions of the Act;[237] (4) establishing, sponsoring, observing, or administering the terms of a benefit plan which is not "bona fide;"[238] (5) denying coverage or otherwise disadvantaging an individual in the underwriting and classification of risks because of disability where such denial or disadvantaging is "independent of actuarial risk classification"[239] or is not "based on sound actuarial principles;"[240] and (6) denying coverage for illnesses or injuries based upon a pre-existing condition of disability when the illness or injury is unrelated to the pre-existing condition.[241]

Because of the line of cases discussed above[242] in which courts have ruled that Title III protects only physical access to insurance offices and does not prohibit discrimination in regard to the insurance policies and other services they provide, clarification of ADA coverage is necessary to make it clear that insurance policies and services provided by insurance companies, whether provided in an office, off-site, through the mails, online, or otherwise, are subject to the requirements of Title III. In addition, as a separate issue, the ADA's coverage should be clarified and the insurance provisions in Title V should be reconsidered toward a goal of providing more extensive protection to people who

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> Moreover, while a plan which limits certain kinds of coverage based on classification of risk would be allowed under this section, the plan may not refuse to insure, or refuse to continue to insure, or limit the amount, extent, or kind of coverage available to an individual, or charge a different rate for the same coverage solely because of a physical or mental impairment, except where the refusal, limitation, or rate differential is based on sound actuarial principles or is related to actual or reasonably anticipated experience.

Id. The latter report went on to make the Act's implications upon insurance practices abundantly clear: "In sum, ADA requires that underwriting and classification of risks be based on sound actuarial principles or be related to actual or reasonably anticipated experience." H.R. Rep. No.101-485, 71 (1990).

234. Robert L. Burgdorf Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 487–89, 507–509 (1991).

235. 42 U.S.C. § 12201(c)(1).

236. 42 U.S.C. § 12201(c)(2).

237. 42 U.S.C. § 12201(c).

238. 42 U.S.C. §§ 12201(c)(2) & (c)(3).

239. S. Rep. No. 101-116, 85 (1989); H.R. Rep. No. 101-485, 71 (1990). Illustrating this requirement, the reports both state: "For example, a blind person may not be denied coverage based on blindness independent of actuarial risk classification." *Id.*

240. H.R. Rep. No. 101-485, 71 (1990).

241. S. Rep. No. 101-116, 85 (1989); H.R. Rep. No. 101-485, 71 (1990).

242. *See supra* notes 181–185, and accompanying text.

encounter discrimination in insurance on account of disability.

4. Examinations and Courses

While the ADA was being considered by Congress, the House Committee on the Judiciary adopted an amendment creating a new section in Title III dealing with examinations or courses related to applications, licensing, certification, or credentialing for professional, educational, or trade purposes.[243] A person offering such courses or examinations must do so in "a place and manner" that is accessible to persons with disabilities or must "offer alternative accessible arrangements."[244] The "place," "manner," and "alternative . . . arrangements" terminology makes it clear that accessibility encompasses both the ability to get physically to the examination or course site and to have access to accommodations affecting the way in which the course or test is administered to permit individuals with disabilities an equal opportunity to perform well. The pervasiveness of courses and examinations as gateways to educational, trade, and professional opportunities makes this section of the Act quite significant; obvious examples include bar examinations and review courses, medical boards, CPA examinations, college entrance and law school admission tests, trade courses and certification tests, and professional continuing education courses.

A problem with the "examinations or courses" provision of Title III is that it only imposes requirements regarding the accessibility of the site where the exams or courses are held and the manner in which they are administered. It does not say anything about the uses that a testing entity can make of information it has garnered about who has been provided an "alternative accessible arrangement" or the disabling conditions of test-takers. To obtain such an accommodation in testing, a would-be test-taker must request such an accommodation and usually is required to submit documentation of a disabling condition and the need for the accommodation. Neither the statutory language nor the DOJ regulation[245] says anything about the test-taking entity keeping such information confidential or under what conditions it may be shared or used. This can lead to real problems. For example, the Law School Admission Council (LSAC), which administers the Law School Aptitude Test (LSAT), routinely flags, in its reporting of LSAT scores to law schools, students who received accommodations of extra time when they took the test. As the LSAC declares on its website, "If you receive additional test time as an accommodation for your disability, LSAC will send a statement with your LSDAS Law School Reports advising that your score(s) should be interpreted with great sensitivity and flexibility."[246] The LSAC reportedly does not disclose the reason the

243. 42 U.S.C. § 12189.

244. *Id.*

245. *See* 28 C.F.R. § 36.309.

246. At http://www.lsac.org/LSAT/accommodated-testing.asp.

accommodation was needed unless authorized to do so by the test-taker. Law schools are not supposed to demand information about the nature and extent of prospective students' disabilities, but the flagging gives them a clear tip-off of the likelihood that these particular students have disabilities. I am aware of instances in which admission counselors have informed law school applicants that their applications are more likely to receive favorable attention if they explain why they needed an accommodation when they took the test.

Such blatant disclosure of the provision of reasonable accommodations or "alternative accessible arrangements"—whose sole purpose is to give that test-taker a fair and equal chance to demonstrate what he or she can do, on a level playing field—is sharply contrary to the principles espoused elsewhere in the ADA. As Professor Jennifer Jolly-Ryan has written, "Flagging LSAT scores of test takers with disabilities stigmatizes law school applicants in the admissions process and is contrary to the goal of federal law in placing test takers with disabilities on an equal footing by assessing their abilities, rather than their disabilities."[247] Title I goes to considerable lengths to make sure that information about a person's disability is kept confidential and undisclosed, and cannot be used to prejudice the person's chances to be accepted.[248] Similar protections need to be added to the "examinations and courses" provision in Title III, either by DOJ regulation or, if necessary, by adding it to the ADA statutory language. Testers should be strictly and clearly prohibited from disclosing which test-takers needed accommodations because of physical or mental impairments in order to have an equal opportunity to demonstrate their skills and aptitudes on application, aptitude, and other standardized tests.

5. Other ADA Refinement Issues

Any attorney who represents clients with disabilities in ADA actions probably has a list of things about the ADA that she or he would like to see fixed or clarified. Although many aspects of the ADA and its enforcement that need improvement are real and compelling, a full discussion of such issues is well beyond the scope of this article and the knowledge-base of the author. Even mentioning a few disparate issues—such as clarifying the burdens of proof as to various elements of the reasonable accommodation requirement; ongoing problems with effective communication in various contexts, including particularly in medical treatment situations; accessibility requirements in particular contexts, such as pedestrian crossings at roundabout intersections;[249]

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247. Jennifer Jolly-Ryan, *The Fable of the Timed and Flagged LSAT: Do Law School Admissions Committees Want the Tortoise or the Hare?* (Social Science Research Network, 2007) *available at* http://ssrn.com/abstract=979590.

248. 42 U.S.C. § 12113(c).

249. *See, e.g.*, Jerry Wolffe, *Making Roundabouts Safe: Agreement Mandates Protections For Pedestrians*, THE OAKLAND PRESS, March 7, 2008, at http://www.theoaklandpress.com/stories/030708/loc_2008030731 0.shtml.

providing equal opportunities in athletics for students with disabilities;[250] and chemical sensitivity and fragrance issues[251]—seems futile in light of the scores of other issues that could be listed.

IV. AND BEYOND—A SKETCHY SURVEY OF FUTURE ISSUES AND DIRECTIONS

This section presents some ideas about steps and initiatives that

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250. On May 13, 2008, the Governor of Maryland signed into law the Fitness and Athletics Equity for Students with Disabilities Act, requiring county boards of education to ensure, inter alia, that students with disabilities have equal opportunities to participate in mainstream special education programs; to try out for and, if selected, participate in mainstream athletic programs; and to be afforded reasonable accommodations to enable them to participate to the fullest extent possible in mainstream physical education and athletic programs. 2008 Md. Laws ch. 464 (Md. Senate Bill 849; Md. House Bill 1411). See Preston Williams, *High Schools: Disabled Athletes to Get Equal Opportunities in Md.*, WASHINGTON POST, April 9, 2008, E2; John-John Williams IV, *Disabled Athletes Equal-Access Bill Passes: Within Three Years, Schools Must Allow Disabled to Compete*, baltimoresun.com, April 9, 2008, *available at* www.baltimoresun.com/news/local/politics/bal-sp.disabled09apr09,0,6049210.story; Maryland Department of Disabilities, *Press Release: Governor Signs Legislation That Provides Athletic Opportunities for Students with Disabilities; Protection Against Bullying*, May 13, 2008, *available at* http://www.mdod.maryland.gov/News%20and%20Features.aspx?id=1076. The legislation grew out of court suits filed by a high school wheelchair athlete. McFadden v. Cousin, No. AMD 06-648 (D.Md. 2006), (preliminary injunction granted permitting wheelchair racers to participate in races alongside non-wheelchair racers; ruling summarized in McFadden v. Grasmick, 485 F. Supp. 2d 642, 644 n.4 (D. Md., May 12, 2007)); McFadden v. Grasmick, 485 F. Supp. 2d 642 (D. Md., May 12, 2007) (motion for preliminary injunction to have wheelchair races at the Maryland public schools championships count in team standings denied). *See* Associated Press, *Paralyzed Athlete Allowed in Meets: Agreement Lets Teen Join High School Track Team*, January 10, 2007, *available at* http://seattlepi.nwsource.com/preps/299045_prep10.html; Eli Saslow and Alan Goldenbach, *Howard Racer Suffers Legal Blow: Teen Wants Points In Wheelchair Events to Count*, WASHINGTON POST, May 15, 2007, A01, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/05/14/AR2007051401614.html.

251. Sensitivity to chemicals or fragrances can give rise to ADA discrimination claims if a claimant is able to show that the individual's condition meets the ADA definition of disability (it substantially limits a major life activity, etc.). From July 1992 to September 2007, chemical sensitivity claims comprised 0.3% of the EEOC's ADA merit factor resolutions. U.S. Equal Employment Opportunity Commission, *ADA Charge Data By Impairments/Bases—Merit Factor Resolutions*, *available at* http://www.eeoc.gov/stats/ada-merit.html. The Job Accommodation Network has published an accommodation and compliance paper that contains information about the condition, ADA information, accommodation ideas, and resources for additional information. Tracie DeFreitas Saab, *Accommodation and Compliance Series: Employees with Multiple Chemical Sensitivity and Environmental Illness, Job Accommodation Network*, *available at* http://www.jan.wvu.edu/media/MCS.html (updated Aug. 4, 2007). See, generally, Andrew K. Kelley, Comment: *Sensitivity Training: Multiple Chemical Sensitivity and the ADA*, 25 B.C. ENVTL. AFF. L. REV. 485, (Winter 1998), *available at* http://findarticles.com/p/articles/mi_qa3816/is_199801/ai_n8766981.

Apart from the ADA, sensitivity to chemicals and fragrances can become a legal issue in a variety of ways. In Minnesota, for example, state Representative Karen Clark, concerned that scented products may trigger asthma or chemical sensitivity reactions in students, proposed legislation to ban "perfumes, air fresheners, scented lotions, and scented cleaning products" and other "fragrances" to create a "fragrance-free environment" in the Minneapolis public schools. H.F. 2148, 85th Leg. Sess. (Minn. 2007), *available at* https://www.revisor.leg.state.mn.us/bin/bldbill.php?bill=H2148.0.html&session=ls85. Subsequently, Representative Clark scaled back her initiative and introduced a bill to establish a "fragrance-free schools education campaign," in lieu of a ban. H.F. 3944, 85th Leg. Sess. (Minn. 2008), *available at* https://www.revisor.leg.state.mn.us/bin/bldbill.php?bill=H3944.0.html&session=ls85.

See Martiga Lohn, *Minnesota Lawmaker Wants Minneapolis Schools to Go Fragrance-Free*, LA CROSSE TRIBUNE, March 11, 2008, *available at* http://www.lacrossetribune.com/articles/2008/03/11/mn/4m.txt.

would help the advancement of the rights and status of people with disabilities in the future, and suggests some emerging or foreseeable issues upon which action is likely to be called for or advantageous. It is far from a complete or comprehensive menu of issues or directions that might be suggested, and should be viewed as more of a sampling that may, and hopefully will, stimulate more thought about future directions and the identification of many other similar and dissimilar ideas as to where the disability rights movement could or should go in the coming years and decades.

A. Forceful, Responsive, Effectual, Potent Disability Rights Movement

In 1985, during a presentation at a National Advocacy Program of the Paralyzed Veterans of America (PVA), I caused a bit of an uproar when I said that "the disability rights movement should stop being so wimpy."[252] As examples of public disrespect by public officials and agencies at the time, I referred to the Supreme Court's ruling in the *Pennhurst* case that the Developmental Disabilities Bill of Rights was not enforceable; Secretary of the Interior James G. Watt's notorious statement that a commission under his control included "a black, a woman, two Jews and a cripple";[253] the remarks of Eileen Gardner, a special assistant to Secretary of Education in the Reagan administration, who had declared that people become ill or disabled because they have "summoned" the conditions to "fit their level of internal spiritual development"—essentially that disability is the result of spiritual imperfection or sin;[254] and the convening of a Fair Housing Conference at an inaccessible facility.

Since 1985 there has been considerable disability advocacy activity. Successful battles were waged to avoid the rolling back of Section 504 and IDEA (EAHCA at the time) regulations during the Reagan administration; the Gallaudet protests embodied a powerful assertion of self-determination by deaf students and faculty; ADAPT protesters proclaiming "We will ride!" stalked the transit industry all over the country to challenge inaccessibility of public transit systems; amazing grassroots organizing, focusing of political clout, and symbolic

252. *Second Wind: The Disability Rights Movement Yesterday, Today, and Tomorrow, New Horizons Under the Rehabilitation Act* 3, 6, Paralyzed Veterans of America (1986).

253. Comments to U.S. Chamber of Commerce regarding the U.S. Coal Commission on September 21, 1983, quoted in Dale Russakoff, *Watt's Off-the-Cuff Remark Sparks Storm of Criticism*, The Washington Post, Sept. 22, 1983, A1.

254. See, *From the Writings of Eileen Marie Gardner* , The Washington Post; Apr 17, 1985, A4; Phil McCombs, *Eileen Gardner's Agenda for the Soul* , The Washington Post, May 17, 1985, B1; Keith B. Richburg, *Education Aide Defends Stance on Handicapped*, The Washington Post, Apr 18, 1985, A3; *Philosophy of Education*, The Washington Post; Apr 18, 1985, A22; Keith B. Richburg, *Controversial Officials Quit Education Dept.*, The Washington Post, Apr 19, 1985, A3; Keith B. Richburg, *Bennett Assailed For Aide's Views On Handicaps*, The Washington Post, Apr 17, 1985, A1; Joan Brest Friedberg, June B. Mullins, Adelaide Weir Sukiennik, PORTRAYING PERSONS WITH DISABILITIES: AN ANNOTATED BIBLIOGRAPHY OF NONFICTION FOR CHILDREN AND TEENAGERS (R.R. Bowker, 1992); *Discord over the Disabled*, Time, April 12, 1985.

activities of various kinds, including wheelchair-users climbing out of their chairs and scooting up the steps of the U.S. Capitol, were undertaken to support the passage of the ADA; various kinds of public demonstrations have been held in support of deinstitutionalization and getting federal money to follow people into community residential alternatives; PVA, NFB, the Bazelon Center, and scores of other groups have spearheaded litigation to establish and expand the rights of people with disabilities, and individual plaintiffs, often with the support of P&As, other public interest advocates, and private attorneys, have gone to court to assert their rights; and many, many other creative and often effective actions have been taken by various individuals and organizations that collectively comprise the disability rights movement.

And yet I think we too often still fall short of the doggedly consistent, well-orchestrated, concerted activism that we need. We still have not established the kind of continuing presence, the unfailing voice, that would earn us, if not raw fear,[255] at least grudging respect for our interests and concerns, and an expectation that we shall not stand silent while being trod upon. All too frequently, the rights and interests of people with disabilities have been, in the current vernacular, "dissed" by the agencies of the government that has repeatedly pledged to provide us equality and full participation. In response, our outcry has been relatively muted. Discussed in some detail above is the outrageous spectacle of the highest court in the land deciding, in spite of abundant contrary legislative history and traditional civil rights analysis, to minimize the protection afforded by our principal civil rights law—the ADA—by subjecting it to a tortured interpretation whereby eligibility for protection from discrimination is "interpreted strictly to create a demanding standard for qualifying . . . ."[256] Was the result people marching in the street or demonstrating in front of the Supreme Court? No, the response was primarily in the form of a few letters to the editor and erudite criticism by some of us legal scholars.[257]

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255. In 1969, Professor Leonard Kriegel wrote that a person with a disability "does not even possess the sense of being actively hated or feared by society, for society is merely made somewhat uncomfortable by his presence. It treats him as if he were an errant, rather ugly, little schoolboy." Leonard Kriegel, Uncle Tom and Tiny Tim: Some Reflections on the Cripple as Negro, 38 Am. Scholar 412, 413 (1969).

256. Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184, 197 (2002).

257. Within the parameters of its role of reviewing and evaluating federal policies affecting people with disabilities, and reporting on the implementation and effectiveness of the ADA, the National Council on Disabilities has been an outspoken and consistent critic of the *Williams* decision. In a 2002 "policy brief," the NCD wrote:

> The Court's position that the definition of disability is to be construed narrowly ignores and contradicts clear indications in the statute and its legislative history that the ADA was to provide a "comprehensive" prohibition of discrimination based on disability, and legislative, judicial, and administrative commentary regarding the breadth of the definition of disability. It also flies in the face of an established legal tradition of construing civil rights legislation broadly. Congress knowingly chose a definition that to that time had been interpreted broadly in regulations and the courts; it was entitled to expect the definition to continue to receive a generous reading. The Court's harsh and restrictive approach to defining disability—an approach that places difficult, technical, and sometimes insurmountable evidentiary burdens on persons who have experienced discrimination—was unwarranted and highly unfortunate.

Sadly, the *Williams* decision and the other ADA decisions addressed in the NCD RIGHTING THE ADA report[258] were not the only instances in which the Supreme Court has treated the cause of civil rights for people with disabilities with a certain lack of respect during the last decade. The questioning of the very constitutionality of some parts of the ADA, in such cases as *Board of Trustees of the University of Alabama v. Garrett*,[259] is an issue that may (but hopefully will not) have to be dealt with in the future, and is discussed in the next subsection. But it is noteworthy that in *Garrett* the Supreme Court ruled that discrimination on the basis of disability is to be subjected to the lowest possible level of scrutiny under the Equal Protection Clause.[260] In addition, the Court made a sweeping statement, albeit in dicta, that the Equal Protection

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National Council on Disability, Broad or Narrow Construction of the ADA, Paper No. 4 of the Americans with Disabilities Act Policy Brief Series: Righting the ADA (December 16, 2002) *available at* http://www.ncd.gov/newsroom/publications/2002/broadnarrowconstruction.htm. See also National Council on Disability, RIGHTING THE ADA, 70–72 (2004) ("In many ways, the most important, far-reaching, and damaging of the Court's rulings on the definition of disability is its announcement that the ADA's definition of disability should be interpreted narrowly to create a demanding standard for eligibility for the Act's protection."); John R. Vaughn, Chairman, National Council on Disability, Testimony Presented to the U.S. Senate Committee on Health, Education, Labor and Pensions during the Hearing on "Restoring Congressional Intent and Protections Under the Americans with Disabilities Act" (November 15, 2007), *available at* http://www.ncd.gov/newsroom/testimony/2007/restoring_11-15-07.htm.

258. See the discussion at *supra* notes 76–77, 86–88, 103–108, and accompanying text.

259. 531 U.S. 356 (2001).

260. The Court treated its decision in Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985), which involved a group home for individuals with mental retardation, as having settled the issue that disability is neither a suspect or quasi-suspect classification under the Equal Protection Clause. Accordingly, state discrimination on the basis of disability challenged as violating equal protection would merit only "rational-basis review" – the lowest level of equal protection analysis. Under this standard, a state will not be held to have violated the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose. The Court declared further that a state does not need to articulate its reasoning when making a particular decision that results in disparate treatment. Instead, the party bringing an equal protection challenge has the burden of showing that there is no reasonably conceivable state of facts that could provide a rational basis for the classification.

The *Garrett* Court's reading of *Cleburne* exceeded the actual ruling in that case in several ways. The *Cleburne* case dealt with a classification based on mental retardation. The Court did not reason that all disability classifications call for rational basis analysis and thus mental retardation does; it ruled that the classification mental retardation does not necessarily require higher level scrutiny. Such a ruling is quite different from determining whether exclusionary barriers barring people with disabilities from state employment opportunities might warrant elevated equal protection scrutiny.In addition, in *Cleburne* the Court did not actually apply the highly unfavorable scrutiny described in the *Garrett* decision. The *Cleburne* Court actually struck down the challenged discrimination because it was based on "negative attitudes," "fear," and "irrational prejudice," 473 U.S. at 448, 450, and certainly did not require the plaintiffs to prove that there was no reasonably conceivable state of facts that could provide a rational basis for the challenged classification. Commentators have described the beefed-up version of supposed rational basis analysis applied in Cleburne as "rational basis with teeth" or "rational basis with bite." *See, e.g.*, Timothy J. Cahill & Betsy Malloy, *Overcoming the Obstacles Of Garrett: An "As Applied" Saving Construction for the ADA's Title II*, 39 WAKE FOREST L. REV. 133, 150 n.105 (2004) ("rational with teeth"); Raffi S. Baroutjian, Note, *The Advent of the Multifactor, Sliding-Scale Standard of Equal Protection Review: Out with the Traditional Three-Tier Method of Analysis, in with Romer v. Evans*, 30 LOY. L.A. L. REV. 1277, 1310–1311, 1314 (1997) ("rational basis with bite"); Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 780 n. 9, 794 (1987) ("rational basis with bite"); Hannah Whitney McMurry Schrock, Note, *An Emerging Civil Rights Movement: Immigrant Populations in Need of Equal Protection Under the Fourteenth Amendment*, 34 N. KY. L. REV. 749, 767 (2007) ("rational basis with teeth"); David O. Stewart, *Supreme Court Report: A Growing Equal Protection Clause?*, 71 A.B.A. J., 108, 112–114 (1985) ("rational basis with teeth," quoting Prof. Victor Rosenblum). Neither the "teeth" nor the "bite" were present in the *Garrett* Court's purported application of the *Cleburne* standard.

Clause permits states to "quite hardheadedly—and perhaps hardheartedly—hold to job-qualification requirements which do not make allowance for the disabled."[261] This not only is highly provocative, inflammatory language, but it represents a regression from previous expressions by the Supreme Court of the importance of barrier removal, reasonable accommodations, and elimination of discriminatory qualification requirements in realizing equality for people with disabilities.[262]

Another disappointing example of either a lack of understanding or indifference to nuances of language by the Supreme Court in the disability rights realm occurred in the case of *U.S. Airways, Inc. v. Barnett*, when the Court labeled reasonable accommodations a "preference" afforded to people with disabilities.[263] U.S. Airways claimed that a reasonable accommodation that conflicted with terms of a seniority system constituted a workplace "preference," that grants employees with disabilities treatment that other workers could not receive.[264] And the airline argued that the ADA seeks only "equal" treatment for those with disabilities, and does not require an employer to grant preferential treatment.[265] The Court rejected the substance of U.S. Airways' argument, but adopted its phrasing and acknowledged its

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261. 531 U.S. at 367–368.

262. In Alexander v. Choate, 469 U.S. 287 (1985), the Supreme Court indicated that under Section 504 a covered entity (in that case the state of Tennessee) was obliged to provide people with disabilities "meaningful access" to benefits the entity provides, and that "to assure meaningful access, reasonable accommodations in the . . . program or benefit may have to be made." *Id.* at 301. The Court also recognized a need for "the elimination of existing obstacles against the handicapped," and the "elimination of physical barriers to access." *Id.* at 300 n.20, 307. In its opinion, the Court quoted approvingly the statement of Senator Hubert Humphrey that among the types of discrimination being prohibited was the "discriminatory effect of job qualification . . . procedures . . . ." *Id.* at 297. The Court would later recognize, in U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 397 (2002), that reasonable accommodations "sometimes prove necessary to achieve the Act's basic equal opportunity goal. The Act requires preferences in the form of 'reasonable accommodations' that are needed for those with disabilities to obtain the same workplace opportunities that those without disabilities automatically enjoy." The Court ruled that the reasonable accommodation obligation can require an employer to make exceptions to disability-neutral practices and rules, and elaborated as follows:

> Were that not so, the "reasonable accommodation" provision could not accomplish its intended objective. Neutral office assignment rules would automatically prevent the accommodation of an employee whose disability-imposed limitations require him to work on the ground floor. Neutral "break-from- work" rules would automatically prevent the accommodation of an individual who needs additional breaks from work, perhaps to permit medical visits. Neutral furniture budget rules would automatically prevent the accommodation of an individual who needs a different kind of chair or desk. Many employers will have neutral rules governing the kinds of actions most needed to reasonably accommodate a worker with a disability.

Id. at 397–398.

As far back as 1979, the Court had recognized that qualification standards that screen out people because of their disabilities could be called into question if they are not necessary for participation, and that there are situations "where a refusal to modify an existing program might become unreasonable and discriminatory" or where "an insistence on continuing past requirements and practices might arbitrarily deprive genuinely qualified handicapped persons of the opportunity to participate . . . ." Southeastern Community College v. Davis, 442 U.S. 397, 407, 412 (1979).

263. U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 397–398 (2002).

264. *Id.* at 397.

265. *Id.*

reasoning had some "linguistic logic":

> While linguistically logical, this argument fails to recognize what the Act specifies, namely, that preferences will sometimes prove necessary to achieve the Act's basic equal opportunity goal. The Act requires preferences in the form of "reasonable accommodations" that are needed for those with disabilities to obtain the same workplace opportunities that those without disabilities automatically enjoy. By definition any special "accommodation" requires the employer to treat an employee with a disability differently, i.e., preferentially. And the fact that the difference in treatment violates an employer's disability-neutral rule cannot by itself place the accommodation beyond the Act's potential reach.[266]

Accordingly, the Court ruled that "[t]he simple fact that an accommodation would provide a 'preference'—in the sense that it would permit the worker with a disability to violate a rule that others must obey—cannot, in and of itself, automatically show that the accommodation is not 'reasonable.'"[267]

The Court's holding on the need for reasonable accommodation to attain the ADA's "equal opportunity goal" appears enlightened. Its designation of reasonable accommodation as "special" and "preferential," on the other hand, is inartful, misguided, and damaging. It fosters the misconception that the ADA gives people with disabilities some type of advantage over people without disabilities. As NCD has explained in one of its reports:

> Properly understood, reasonable accommodations are adjustments or modifications intended to level the playing field for a person who would otherwise be denied an equal opportunity. In proposing the idea of an ADA in 1986, the Council identified reasonable accommodation as "[a] key element of eliminating discrimination" on the basis of disability, and described it as "the process of matching the particular abilities and limitations of each disabled individual with the essential requirements of a particular activity and trying to modify the activity as necessary to permit the individual with a disability to participate." The Council also observed that "[d]iscrimination against people with disabilities has literally been built into the physical environment, and eliminating such discrimination requires planning and action to remove barriers that exclude disabled people."[268]

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266. *Id.* at 397.

267. *Id.* at 398.

268. *Supreme Court Decisions Interpreting the Americans with Disabilities Act*, subpart II(J)(1), at http://www.ncd.gov/newsroom/publications/2002/supremecourt_ada.htm, quoting the National Council on Disability, TOWARD INDEPENDENCE, app., at A-15 & A-37 (1986). The NCD went on to declare:

In short, reasonable accommodation is not "preferential"; it is "remedial"—a necessary antidote to barriers and hindrances inherent in workplaces, facilities, practices, and procedures that were developed in ignorance or disregard of the possibility of participation by those having physical or mental impairments.

In its use of "special" and "preferential" labels for reasonable accommodations, the Court in *Barnes* exhibited a lack of awareness of an earlier, similar *faux pas* by the Court. In dicta in its decision in *Southeastern Community College v. Davis*[269] in 1979, the Court had at various points mischaracterized reasonable accommodation as an "affirmative action" obligation and suggested that it might exceed the nondiscrimination requirement imposed by Section 504.[270] Subsequently, in its opinion in *Alexander v. Choate,*[271] the Court found it necessary to recant the misphrasing and conceptual cloudiness in its opinion in *Davis*:

Our use of the term "affirmative action" in this context has been severely criticized for failing to appreciate the difference between affirmative action and reasonable accommodation; the former is said to refer to a remedial policy for the victims of past discrimination, while the latter relates to the elimination of existing obstacles against the handicapped.[272]

The Court added that "[r]egardless of the aptness of our choice of words in *Davis,*" it endorsed a legal mandate for "those changes that would be reasonable accommodations."[273] The Court noted with approval that "[t]he regulations implementing Section 504 are consistent with the view that reasonable adjustments in the nature of the benefit offered must at times be

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The ADA's reasonable accommodation requirement built upon a clear analytical foundation described in detail in ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES, the U.S. Commission on Civil Rights' 1983 report on disability discrimination. Central to the reasonable accommodation concept is recognition that the impact of physical and mental impairments largely "is as much inherent in the social context as in the impairment," and that while it is frequently assumed that there is only one way of doing things—tailored to the needs and abilities of those without disabilities—in fact, "programs, activities, and facilities may actually be organized in a variety of ways" that "can be changed in response to the abilities and characteristics of the person involved." ACCOMMODATING THE SPECTRUM, *supra* note 11, at 89, 90. To the degree that a particular job situation is slanted against a person with certain impairments, identical treatment of that person in relation to other employees or applicants would not provide real equality of opportunity. As the Commission on Civil Rights observed: "When decision-makers forget that social context almost always are structured for [people without disabilities], they are apt to view anything beyond . . . identical treatment as special, unequal treatment necessitated by the [disability]." *Id.* at 99. This is precisely the verbal trap suggested by the Court's "special" and "preferential" phrasing in the *Barnett* opinion.

Id. For additional verification that reasonable accommodation is not "special" treatment, and a description of types of "accommodations" employers routinely make for employees without disabilities, *see* Robert L. Burgdorf Jr., *"Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability*, 42 Villanova L. Rev. 409, 529–533 (1997).

269. 442 U.S. 397 (1979).

270. *Id.* at 411.

271. 469 U.S. 287 (1985).

272. 469 U.S. at 300 n.20.

273. *Id.*

made to assure meaningful access."[274] A similar recantation of its "preference" language in *Barnett* would be appropriate.

A most outrageous example of High Court insensitivity toward disability rights issues occurred just two weeks before the tenBroek Symposium, during oral argument in *Indiana v. Edwards*, a case addressing the issue of whether a defendant diagnosed with a mental illness and possible brain damage was competent to represent himself in his criminal defense. Justice Anthony Kennedy, apparently with a view toward getting a laugh, quipped that "[t]here are all kinds of nuts who could get 90 percent on the bar exam."[275] In the context, it is clear that Justice Kennedy used the term "nuts" to refer to people with mental illness.[276] What would happen if a Supreme Court Justice made a derogatory joke involving a pejorative term in regard to African Americans, or Latinos, or people of Japanese or Irish ancestry, or Buddhists, or Jews, or some other minority group, during oral argument? One would expect it would provoke quite a public outcry, but there has so far been little commentary in the mainstream media, and some of what there has been is not condemnatory but revels in the view of lawyers as not mentally sound.[277]

The upshot of these examples of disrespect and heedlessness of disability rights principles, insights, and sensibilities is that the courts do not consider disability rights advocates as a force to be reckoned with. This suggests a need for more concerted action by the disability community in reaction to unfavorable judicial rulings and derogatory public statements. Perhaps more importantly, it indicates a need for the disability rights movement to become a more significant participant in the judicial selection process and judicial education. We need judges who are better informed and tuned into disability rights issues and philosophy, and we need to take active and sustained steps to achieve such a judiciary.

The emphasis on judicial decisions, as befits a legal symposium and articles to be published in a law review, does not mean, however, that we do not also have serious axes to grind with the Legislative and Executive branches of the U.S. Government. For example, in another article in this symposium, Professor Michael Stein has provided an extensive, informative discussion of the United Nations Convention on the Rights of Persons with Disabilities that the United States has not been willing to sign. I had the opportunity to participate in an earlier effort to develop an international agreement to eliminate discrimination on the basis of disability—the Organization of American States (OAS) "Inter-

274. *Id.* at 301 n.21.

275. Indiana v. Edwards, No. 07-208, Oral Argument, United States Supreme Court Official Transcript (Mar. 26, 2008) 2008 WL 791973, *53.

276. Nor is Justice Kennedy alone in his inconsiderate use of the crass term to refer to mental limitations. Justice Antonin Scalia was quoted as explaining to a New York audience in 2005 why he was not willing to overturn large numbers of existing precedents even though he disagreed with their approach because, he said, "I am an originalist, but I am not a nut." Quoted in Jeffrey Toobin, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT (Doubleday, 2007).

277. *See, e.g.*, Craig Napier, *Commentary: Need information? Find a lawyer who's "nuts,"* Daily Record and the Kansas City Daily News-Press, Mar. 31, 2008, *available at* http://findarticles.com/p/articles/mi_qn4181/is_20080331/ai_n24975774.

American Convention for the Elimination of All Forms of Discrimination by Reason of Disability" that sought to prohibit disability discrimination throughout the western hemisphere. Along with Dr. Yerker Andersson, a member of NCD, in 1998 I participated as part of the U.S. delegation to a "Meeting of Experts to Examine the Draft Inter-American Convention." At the meeting, we "experts" grappled with a number of thorny issues, particularly in regard to the definitions of disability and discrimination on the basis of disability, and we made concrete suggestions for alternative language. Although the experts appeared close to consensus on many of the important issues, the political representatives of the member governments were unable to agree, and a replacement version of the convention was not adopted at that time. The draft convention remained stalled until April 30, 1999, when the Committee on Juridical and Political Affairs of OAS adopted a revised version—in my opinion, somewhat watered down and less specific. On June 7, 1999, the General Assembly of the OAS, meeting in Guatemala City, Guatemala, adopted the revised Convention. By its terms, the convention entered into force when it was ratified by at least six countries, but is only legally binding on countries that have themselves ratified it. Despite encouragement by NCD and others that Congress ratify the convention, it has yet to do so. Whatever imperfections the documents may have, how can the United States not join other nations in landmark commitments to eliminating discrimination on the basis of disability in the Americas or in the world? In the case of the U.N. Convention, U.S. officials have explained, as the rationale for not signing, that the Convention is weaker than American law.[278] Ironically, in working on the OAS Convention I witnessed U.S. Government representatives repeatedly object to any provisions that they deemed to go further than U.S. laws. Either way, the non-signing status to these Conventions of our country is an embarrassment, and a lapse by both the Executive and Legislative Branches that we should not tolerate without vigorous indignation and remonstration.

Section 501 of the Rehabilitation Act was enacted in 1973 with the intent of making the Federal Government a leader in employing workers with disabilities.[279] Since 1978, the pledge that the Federal Government shall be a "model employer" of persons with disabilities has been reflected in federal regulations.[280] Currently, 29 C.F.R. § 1614.203(a)

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278. Patrick Worship, *U.N. Convention for Disabled to Take Effect May 3*, Reuters, April 4, 2008, *available at* http://www.reuters.com/article/latestCrisis/idUSN03333101.

279. 124 Cong. Rec. 30,347 (1978) (comments of Sen. Cranston); S. Rep. No. 318, 93d Cong., 1st Sess. 49 (1973), reprinted in 1973 U.S.C.C.A.N. 2076, 2122. See, also, *Rehabilitation of the Handicapped Programs 1976: Hearing Before the Subcommittee on Labor and Public Welfare*, 94th Cong., 2d Sess. at 1502 (1976) (remarks of Sen. Williams) (Congress enacted Section 501 "to require that the Federal Government itself act as the model employer of the handicapped and take affirmative action to hire and promote the disabled."), quoted in Linn, *Uncle Sam Doesn't Want You: Entering the Federal Stronghold of Employment Discrimination against Handicapped Individuals*, 27 DE PAUL L. REV. 1047, 1060 (1978); Cong. Rec. S15591 (Sept. 20, 1978) (remarks of Senator Cranston) ("The legislative history of section 501 illustrates that with respect to the employment of handicapped individuals, Congress expected the Federal Government should be a leader.").

280. 43 Fed. Reg. 12293–12296 (Mar 24, 1978), codified at 5 C.F.R. § 713.703 (1978) ("The Federal Government shall become a model employer of handicapped individuals."); 29 C.F.R. § 1613.703 (1982) (same); 29 C.F.R. § 1614.203(b) (1992) (same).

(2008) provides as follows: "Model employer. The Federal Government shall be a model employer of individuals with disabilities. Agencies shall give full consideration to the hiring, placement, and advancement of qualified individuals with disabilities." To pursue these objectives, Section 501 requires each "department, agency, and instrumentality" in the executive branch to develop "an affirmative action program plan for the hiring, placement, and advancement of individuals with disabilities," to be updated and reviewed annually, that "provides sufficient assurances, procedures and commitments to provide adequate hiring, placement, and advancement opportunities for individuals with disabilities."[281] In addition, federal agencies have been given special appointing authorities to facilitate the hiring of employees with certain kinds of disabilities.[282] During his presidency, President Clinton initiated several initiatives aimed at promoting federal employment opportunities for people with disabilities.[283] In August 2004, the U.S. Office of Personnel (OPM) issued a Model Federal Agency Plan for the Employment of People with Disabilities that identifies "best practices" that federal agencies have used to increase the hiring and advancement of people with disabilities.[284]

As a part of its responsibility to monitor federal agency compliance with Section 501, the U.S. Equal Employment Opportunity Commission (EEOC) collects and compiles data regarding agencies' hiring and advancement of workers with disabilities. At the time of hiring, federal agencies provide employees the opportunity (not required) to self-disclose that they have a disability, on a Standard Form 256 (SF-256)[285]; the numbers of people who so identify are reported to the EEOC. In 1979, EEOC officially designated certain disabilities as "targeted

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281. 29 U.S.C. § 791(b).

282. See "Schedule A" appointing authorities: 5 C.F.R. § 213.3102(u) (for hiring people with mental retardation, severe physical disabilities, or psychiatric disabilities; after 2 years of satisfactory service, appointees may qualify for conversion to permanent status.); 5 C.F.R. § 213.3102(ll) (for hiring readers, interpreters, and personal assistants for employees with severe disabilities). See, also 5 C.F.R. § 315.604 (for hiring disabled veterans enrolled in a Department of Veterans Affairs (VA) training program; upon successful completion of the program, the trainee may be appointed non-competitively under a status quo appointment that may be converted to permanent status at any time); 5 C.F.R. §§ 316.302(b)(4) & 316.402(b)(4) (for hiring disabled veterans with compensable service-connected disability of 30% or more; veterans appointed under these authorities for more than 60 days may be converted to permanent status).

283. See Executive Order 13078 (March 13, 1998), 63 Fed. Reg. 13111 (March 18, 1998) (established National Task Force on Employment of Adults with Disabilities charged, inter alia, with reviewing and making recommendations regarding personnel practices of federal agencies, in order "[t]o ensure that the Federal Government is a model employer of adults with disabilities"); Executive Order 13163 (July 26, 2000), 65 Fed. Reg. 46563 (July 28, 2000) (to promote the hiring of 100,000 people with disabilities at all levels and occupations of the federal government by requiring federal agencies to use available hiring authorities, expand their outreach efforts, and increase their efforts to accommodate people with disabilities); Executive Order 13164 (July 26, 2000), 65 Fed. Reg. 46565 (July 28, 2000) (to promote model federal workplace that provides reasonable accommodations for individuals with disabilities in application process for federal employment, in performing essential functions of position, and with respect to enjoyment of benefits and privileges of employment equal to those enjoyed by employees without disabilities, by providing employees, supervisors, and managers, with an easy-to-understand, step-by-step explanation of the reasonable accommodation process).

284. U.S. Office of Personnel Management, *Federal Employment of People with Disabilities: Model Federal Agency Plan for the Employment of People with Disabilities*, found at https://www.opm.gov/disability/hrpro_8-04.asp.

285. See 29 C.F.R. § 1614.601(f).

disabilities" in its Management Directive 703 issued on December 6, 1979, which in 2003 was superseded by Management Directive 715.[286] MD 715 defines "targeted disabilities" as "Disabilities that the federal government, as a matter of policy, has identified for special emphasis in affirmative action programs. They are: 1) deafness; 2) blindness; 3) missing extremities; 4) partial paralysis; 5) complete paralysis; 6) convulsive disorders; 7) mental retardation; 8) mental illness; and 9) distortion of limb and/or spine."[287]

In January 2008, the EEOC issued a report on the performance of federal agencies regarding the participation of workers with disabilities in their workforces—*Improving the Participation Rate of People with Targeted Disabilities in the Federal Work Force*.[288] The findings were highly disturbing. Among them were the following facts:

> The percentage of federal employees with targeted disabilities has fallen every year since 1994.
>
> In 2006, the participation rate of persons with targeted disabilities fell to 0.94% of the federal government's total work force, the lowest participation rate in 20 years.
>
> Between 1997 and 2006, the actual numbers of employees with targeted disabilities in the federal workforce declined by 14.75%, despite the fact that the workforce as a whole grew by 5.48%.[289]

Since 1979, EEOC has estimated the availability of persons with targeted disabilities of working age and able to work as 5.95 percent of the workforce-age population, based upon U.S. Department of Labor Employment Standards figures, and had recommended this percentage as a conservative objective for federal government agencies.[290] As of 1982, the actual percentage of workers with targeted disabilities was only .82%.[291] For the next 10 years, this rate grew, albeit at a glacially slow

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286. EEOC, Management Directive 715 (October 1, 2003).

287. *Id.*, App. A—Definitions. The EEOC has explained that "[c]riteria used to select the nine disabilities that make up the group of targeted disabilities included the severity of the disability, the feasibility of recruitment, and the availability of work force data for individuals with targeted disabilities." EEOC, *Improving the Participation Rate of People with Targeted Disabilities in the Federal Work Force* (January 2008) at I.C, *available at* http://www.eeoc.gov/federal/report/pwtd.html.

288. EEOC, *Improving the Participation Rate of People with Targeted Disabilities in the Federal Work Force* (January 2008), *available at* http://www.eeoc.gov/federal/report/pwtd.html.

289. *Id.*, Executive Summary.

290. U.S. Dept. of the Interior, MD-71310/87, App. B at B-1 to B-2 (1987); Task Force on Employment of Adults with Disabilities, Re-charting the Course: If Not Now, When? (1999), *available at* http://www.dol.gov/oasam/library/ptfrepts/1999rpt/1999rpt.txt.

291. EEOC, ANNUAL REPORT ON THE EMPLOYMENT OF MINORITIES, WOMEN, & PEOPLE WITH DISABILITIES IN THE FEDERAL GOVERNMENT FOR THE FISCAL YEAR ENDING 1990 (1992), summarized in David Braddock & Lynn Bachelder, THE GLASS CEILING AND PERSONS WITH DISABILITIES (Glass Ceiling Commission, U.S. Dept. of Labor, 1994) at 62, *available at* http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1115&context=key_workplace; Pan Suk Kim, *An Analysis Of The Employment Of Persons With Disabilities In The Korean Government: A Comparative Study With The American Federal Government*, PUBLIC PERSONNEL MANAGEMENT, Spring 2006, at Table 1, *available at*

average rate of .04% per year; in 1992, EEOC noted that at that rate of increase it would take more than 21 years before people with targeted disabilities would comprise 2% of the federal work force.[292] But even the snail's pace of increase could not be maintained. The percentage of federal employees with targeted disabilities peaked at 1.24 in 1993 and 1994, and has been going downhill ever since.[293] In 2005, the rate fell below 1% for the first time since 1984.[294]

When the EEOC issued Management Directive 715 in 2003, it dropped the 5.95% objective for government employment of workers with targeted disabilities.[295] In December 2006, EEOC Commissioner Christine Griffin announced in a speech that she had a much more modest goal—to see the rate of federal employment of persons with targeted disabilities get to 2% by 2010.[296] This is approximately one-third of the goal EEOC had endorsed almost 30 years ago.[297]

In June 2006, at the urging of Commissioner Griffin, EEOC initiated what it called the LEAD (Leadership for the Employment of Americans with Disabilities) initiative to addresses the declining number of employees with targeted disabilities in the federal workforce; LEAD focuses on outreach to senior leaders at federal agencies to enhance their awareness of both the employment challenges faced by persons with targeted disabilities and policies and practices that can reverse the decline of such people in the federal work force population.[298] And yet, given recent performance, even the trifling 2% objective seems out of reach. As the EEOC observed in the January 2008 report,

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http://www.entrepreneur.com/tradejournals/article/160542364_6.html; EEOC Commissioner Christine Griffin, *Perspectives Conference: Keynote Address*, December 6, 2006 ("[R]ight now people with severe disabilities make up less than 1% of the federal workforce. We are exactly where we were in 1984!"), *available at* http://www.eeoc.gov/initiatives/lead/speeches/12-06.html.

292. EEOC, ANNUAL REPORT ON THE EMPLOYMENT OF MINORITIES, WOMEN, & PEOPLE WITH DISABILITIES IN THE FEDERAL GOVERNMENT FOR THE FISCAL YEAR ENDING 1990 (1992), summarized in David Braddock & Lynn Bachelder, THE GLASS CEILING AND PERSONS WITH DISABILITIES (Glass Ceiling Commission, U.S. Dept. of Labor, 1994) at 62, *available at* http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1115&context=key_workplace.

293. EEOC, *Improving the Participation Rate of People with Targeted Disabilities in the Federal Work Force*, Executive Summary & Table 1 (January 2008), *available at* http://www.eeoc.gov/federal/report/pwtd.html.

294. *Id.*, Table 1.

295. EEOC, Equal Employment Opportunity Management Directive 715, October 1, 2003 (superseding EEO Management Directives 712 (dated March 29, 1983), and 713 and 714 (both dated October 6, 1987)), *available at* http://www.eeoc.gov/federal/eeomd715.html.

296. EEOC Commissioner Christine Griffin, Perspectives Conference: Keynote Address, December 6, 2006 ("I want to see the federal government get to 2% by 2010. Two percent in three years—a modest goal with tremendous impact."), *available at* http://www.eeoc.gov/initiatives/lead/speeches/12-06.html.

297. Commissioner Griffin remarked further that "[t]wenty years, or 37 if you count the time from the signing of the Rehabilitation Act, is plenty of time for us to become the model employer we're supposed to be for all Americans." *Id.*

298. EEOC, *Improving the Participation Rate of People with Targeted Disabilities in the Federal Work Force* at I(D); Stephen Barr, *A Troublesome Decline in Disability Hiring*, THE WASHINGTON POST, January 17, 2008 at D04. According to LEAD's website, its aims include reversing the trend of decreasing participation in federal employment; increasing awareness of federal hiring officials about the declining numbers of people with disabilities in federal employment and about how to use special hiring authorities to bring people with disabilities on board; educating applicants with disabilities about how to apply using the special hiring authorities available; and providing information and resources regarding recruitment, hiring, and providing reasonable accommodations. http://www.eeoc.gov/initiatives/lead/.

> Between FY 1997 and FY 2006, the permanent work force increased in five of the ten years. The participation rate of PWTD [person with targeted disabilities] during that same ten year period nonetheless decreased every year. Moreover, in the five years when the size of the permanent work force decreased between FY 1997 and FY 2006, the participation rate for PWTD had a disproportionately higher decrease. For example, from FY 2002 to FY 2003, the permanent work force declined by 1.27%, but PWTD declined by twice as much at 2.59%. Overall, the federal government is losing more PWTD than it is hiring each year.[299]

It turns out that most federal agencies are not even bothering to set measurable objectives regarding increasing the numbers of workers with targeted disabilities in their workforces. The 2008 EEOC report cited figures from 2005 indicating "that despite the declining participation rate of PWTD in the federal government, only 15.82% of agencies established a numerical goal for increasing the employment of PWTD in their work force."[300] Some 41.1% of the agencies reported that they established non-numerical objectives, which turns out to be a euphemism for an agency saying "it will hire PWTD within the next few years."[301] The remaining 43% did not bother with making even that feeble pledge.[302] The performance of federal agencies in employing workers with targeted disabilities is abysmal, and the lack of agencies' commitment to doing any better is appalling.

These shocking problems have not escaped comment, both within and without the disability community. They have received some newspaper coverage, albeit not much.[303] In its 2008 Progress Report, the National Council on Disability dutifully acknowledged the problem of declining federal disability employment rates and expressed it concern; the report contained the following observations:

> Among the many statistics on the employment of people with disabilities, few are as surprising as those of federal employment. The Equal Employment Opportunity Commission (EEOC) is among those that have noted and

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299. EEOC, *Improving the Participation Rate of People with Targeted Disabilities in the Federal Work Force* at II.A.

300. *Id.* at II.B.

301. *Id.* at II.B & n.9.

302. *Id.* at II.B.

303. Stephen Barr of the Washington Post has written some significant articles. *See, e.g.*, Stephen Barr, *A Troublesome Decline in Disability Hiring*, THE WASHINGTON POST, January 17, 2008 at D04; Stephen Barr, *EEOC Moves to Stem Decline in Disabled Workforce*, THE WASHINGTON POST, October 6, 2006, at D04. Within the federal government, a most refreshing frankness about the problem appeared in an article in the Department of State's STATE MAGAZINE, which included the following observations: "One of the most notable statistics across the federal government is the low percentage of persons with "targeted disabilities" in the workforce.... According to the EEOC, only approximately 1 percent of federal employees are persons with targeted disabilities (PWTD). Some agencies have PTWD populations greater than 2 percent. At state, the number is less than .5 percent and declining." David J. King III, *Q&A: Helps and Hindrances to Workforce Diversity*, STATE MAGAZINE, January 2007, p. 33, *available at* www.state.gov/documents/organization/79237.pdf.

> addressed sharp declines, so much so that by 2005 the percentage of federal employees with significant disabilities, which had peaked in 1994, had slid back to 1984 levels. . . .
>
> Since enactment of the Rehabilitation Act of 1973 it has been understood as a matter of law, and NCD believes as a matter of consensus, that the Federal Government should be a leader in the employment of people with disabilities. Hence, when the overall national decline in employment for Americans with disabilities is confirmed and compounded by a perhaps even more precipitous decline in the public sector, this becomes a matter of great concern.[304]

Unfortunately, NCD was not particularly critical of the EEOC nor other federal agencies, and the Council's suggestions for addressing the problems it raises are largely for more information-gathering, study, and consultation, instead of a call for urgent, robust, concrete corrective action. NCD's recommendation regarding this issue was the following:

> NCD recommends that the EEOC undertake a comprehensive examination of the issues raised by the disheartening federal employment data on people with disabilities and submit a report to the President, Congress, and the public, setting forth major causes and proposed solutions to steadily raise levels of employment and monitor upward mobility.[305]

Others within the disability community have blown the whistle on the poor performance of federal agencies in hiring and retaining employees with disabilities;[306] too often, however, such commentary is compromised to some degree by patient, conciliatory, and sanguine overtones.[307] The performance of the federal government—the purported "model employer of persons with disabilities"—is outrageous; where are the expressions of outrage?

On January 28, 2008, the Office of Legislative Affairs of the U.S. Department of Justice (DOJ) sent a letter to the Chair and Ranking Minority Member of each of the congressional committees with jurisdiction over the ADA Restoration Act bills.[308] In the letter, the DOJ declared that "we strongly oppose the proposed legislation," and took the position that the only corrective legislation that the Department would

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304. NCD, National Disability Policy: A Progress Report (January 15, 2008), p. 136.

305. *Id.* at 139, Recommendation 7.3.

306. *See, e.g.*, Andrew Imparato, *Federal Government Falls Short as Employer, Again*, American Association of People with Disabilities, February 08, 2008 ("We need agency heads to set goals and to be held accountable for achieving those goals, and we need to secure commitments during this election season so that this problem doesn't continue to get worse."), *available at* http://communities.justicetalking.org/blogs/day13/archive/2008/02/08/federal-government-falls-short-as-employer-again.aspx.

307. *See id.* ("EEOC is to be commended for continuing to highlight this ongoing problem that is not getting enough attention from agency heads, the White House, Congress, or the media. Commissioner Christine Griffin is spearheading a federal effort to increase employment outcomes for people with disabilities in the federal government, and we need to add our voices to this important effort.").

308. See http://www.aapd-dc.org/News/adainthe/080227doj.htm.

endorse would address the single issue of mitigating measures. In my opinion, the DOJ position as expressed in the letter is uninformed, surprisingly inconsistent with stances the Department had taken in the past, un-nuanced, and harsh. It has not, however, provoked a storm of exasperated protest from the disability community. I can only hope that the DOJ position will be made an issue in the upcoming presidential election campaign.

On June 19, 2008, the Office of the Mayor of the District of Columbia issued a news release announcing that "[t]he National Capital Region Transportation Planning Board (TPB) approved funding to bring wheelchair accessible taxicabs to the District of Columbia for the first time."[309] This development is obviously a positive and admirable one, and the Administration of DC Mayor Adrian Fenty deserves some credit for helping to bring it about. The problem, however, is that it is only occurring in 2008, 18 years after the ADA was enacted, and over 40 years since Professor tenBroek announced that people with disabilities have "a legal right to be abroad in the land."[310] How is it possible that until now there have not been any accessible taxis in our nation's capitol? How has the absence of them not been a source of national disgrace, social activism, and strident hue and cry? How have our country's lawmakers and leaders of government allowed such a travesty to continue? And why hasn't the disability rights movement held the officials' feet to the fire until they corrected this failing?

The foregoing suggests the need for more vigorous, forceful involvement in response to unfavorable actions by the courts, the Congress, the President, and government officials and agencies. We need to let transgressors know that they have erred and that there will be consequences. Likewise, the disability rights movement needs to be a more visible and active participant in the processes by which officials are elected or appointed; we need to make sure that our interests and issues are "on the table" when political deals are cut and potential candidates are evaluated for fitness for office. Some national disability organizations have spoken up and tried to exercise influence in these forums; they are to be commended. But they are too few and often not sufficiently influential to sway negotiations and elections; we can do better and help to make the disability community a more major player in national politics.

In making a perhaps grandiose plea for a more "Forceful, Responsive, Effectual, Potent Disability Rights Movement"—the heading I chose for this subsection—I do not mean to imply that I have the expertise to give advice as to how this should be accomplished; there are many community organizers, street activists, deal brokers, long-range

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309. Government of the District of Columbia, Executive Office of the Mayor, News Release—Accessible Taxicabs Will Be Available to Wheelchair Users for the First Time: Three Companies Receiving Funding to Provide 21 Wheelchair Accessible Taxis in DC, June 19, 2008, *available at* http://www.dc.gov/mayor/news/release.asp?id=1314&mon=200806; see also Michael Birnbaum, Accessible Taxicabs Will Roll: Federal Funds Back Purchase of 21 Vans for D.C. Fleets, Washington Post, June 19, 2008, B04, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/06/18/AR2008061802943.html?nav=rss_metro/dc.

310. tenBroek, *supra* note 29.

strategists, tacticians, potential philosopher-kings, and many others in the disability community who know much better than I how to pursue such objectives. Nor am I trying to indicate any particular role that any person or organization should play; if my 35 years of experience in the disability rights field has taught me anything, it is that the progress of a disability agenda depends upon a wide array of activists, from those who take to the streets for demonstrations, acts of civil disobedience, and consciousness-raising; to those who work quietly to achieve change "within the system"; to those who file and try lawsuits; to those who write bills and articles; to those who form and sustain organizations and coalitions; to those who walk the halls of Congress to lobby for legislative changes; to those who reach out to form alliances with people with different disabilities or who are members of other communities; and to those who pursue a wide range of other constructive activities. I am not seeking to encourage disability activism to become more "nasty"; perhaps somewhat more intolerant of continuing injustice and affronts, yes, but not in an unnecessarily hostile or inflammatory manner. We ought to confront and persuade, but seek not to offend, alienate, or insult.

Essential to my vision of the future of disability law, which I am seeking to sketch in this article, is the hope that we can progress toward that mystical objective we often speak of—empowerment. We need to empower not only each individual who has been held back or discounted because of physical or mental impairment, but also the disability rights community as a whole. We lack, and we need to make, a concerted, creative, energetic effort to obtain the key missing ingredient of a successful disability movement—clout.

B. *ADA Constitutionality*[311]

This subsection addresses a possible problem that I sincerely hope will not become a serious impediment, but that has raised its ugly head sufficiently that I believe I cannot avoid discussing it as part of the future disability rights agenda—the question of whether the Supreme Court might consider parts of the ADA as exceeding the constitutional authority of Congress, under newly restrictive standards that the Court has been enunciating.

As I alluded at the beginning of this article,[312] when the ADA was being considered and enacted, it would never have occurred to me (or anyone?) that there could be any doubt about the constitutional authority of Congress to enact it. The "Purpose" section of the ADA, that I drafted, declared a congressional intent to invoke the sweep of

311. Much of the material in this subsection is derived from a portion of a report I wrote for the National Council on Disability—*Supreme Court Decisions Interpreting the Americans with Disabilities Act*, subpart II(F), at http://www.ncd.gov/newsroom/publications/2002/supremecourt_ada.htm. In addition, the discussion of the sources of constitutional authority recited in the Purposes section of the ADA is based upon a similar discussion in my treatise on disability and employment law. Robert L. Burgdorf Jr., DISABILITY DISCRIMINATION IN EMPLOYMENT LAW (Bureau of National Affairs (BNA) 1995) at 50–53.

312. *See supra* note 4.

congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce . . . ."[313] These are the two principal fonts of congressional power that had been asserted to authorize previous federal nondiscrimination laws, and the cases upholding their breadth were staples of any Constitution Law course at the time, including those that I taught.[314]

Section 5 of the Fourteenth Amendment gives Congress power to enact "appropriate legislation" to enforce the Amendment's provisions.[315] Section 5 had been interpreted as an expansive grant of authority that provides to Congress "the same broad powers expressed in the Necessary and Proper Clause,"[316] and for which a similar test, derived from *McCulloch v. Maryland,*[317] was applied—whether a statute "may be regarded as an enactment to enforce the Equal Protection Clause, whether it is, plainly adapted to that end' and whether it is not prohibited by but is consistent with, the letter and spirit of the [C]onstitution.'"[318] The Supreme Court had indicated that congressional authority to regulate under Section 5 did not depend on whether the judiciary would find a denial of equal protection in the absence of legislation, but that the judgment of whether a particular measure is an appropriate way of implementing Fourteenth Amendment guarantees was constitutionally delegated to Congress: "It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did."[319]

In *EEOC V. Wyoming,*[320] the Court had stated that, to uphold a statute as an exercise of Section 5 authority, the Court must "be able to discern some legislative purpose or factual predicate that supports the exercise of that power."[321] The Court upheld the Age Discrimination Act of 1967 as an exercise of the interstate commerce power but added dicta describing the appropriate standards for analyzing Section 5 authority that had been proffered as an alternative source of authority for the provisions at issue.[322] The Court clarified: "That does not mean, however, that Congress need anywhere recite the words 'section 5' or 'Fourteenth Amendment' or 'equal protection,' . . . for '[t]he . . . constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to

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313. 42 U.S.C. § 12102(b)(4).

314. *See, e.g.*, Atlanta Motel v. United States, 379 U.S. 241 (1964) (upheld Title II of Civil Rights Act of 1964 as applied to motel as valid exercise of commerce authority); Katzenbach v. McClung, 370 U.S. 294 (1964) (upheld Title II of Civil Rights Act of 1964 as applied to restaurant as valid exercise of commerce authority); EEOC v. Wyoming, 460 U.S. 226 (1983) (upheld Age Discrimination in Employment Act as applied to state and local governments as valid exercise of commerce authority).

315. U.S. CONST. amend XIV, § 5.

316. *Id.* at art. I, § 8, cl. 18.

317. 17 U.S. (4 Wheat.) 316, 421 (1819).

318. Katzenbach v. Morgan, 384 U.S. 641, 650 (1966) (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819)) (upholding section of the Voting Rights Act of 1965 as valid exercise of congressional authority under § 5 of Fourteenth Amendment). *See also* South Carolina v. Katzenbach, 383 U.S. 301 (1966) (upholding other provisions of Voting Rights Act of 1965).

319. *Katzenbach,* 384 U.S. at 653.

320. 460 U.S. 226 (1983).

321. *Id.* at 243 n.18.

322. *Id.*

exercise.'"[323]

Title II of the ADA expressly regulates the activities of state and local governments;[324] such activity constitutes state action and thus seemed to fall squarely within the broad scope of congressional authority to enact legislation appropriate to implement the equal protection guarantee of the Fourteenth Amendment. But the power that Congress wields under the Fourteenth Amendment was thought to be considerably more extensive; one renowned constitutional commentator had written:

> Congress, in the field of state activities and except as confined by the Bill of Rights, has the power to enact any law which may be viewed as a measure for correction of any condition which Congress might believe involves a denial of equality or other fourteenth amendment rights.[325]

He added that "the Court has long been committed both to the presumption that facts exist which sustain congressional legislation and also to deference to congressional judgment about questions of degree and proportion."[326]

In addition to Section 5, Congress explicitly based the authority it exercised in the ADA on another source of constitutional authority—its power to regulate interstate commerce. The Constitution gives Congress power to "regulate commerce . . . among the several States."[327] This provision had come to be recognized as an expansive source of congressional authority, particularly regarding laws that prohibit various types of discrimination.[328] Court decisions interpreting Congress's power under the Interstate Commerce Clause reflected enormous expansion of that authority and increasing relaxation of the prerequisites for exercising it.[329] At the time the ADA was enacted, the test the courts applied to determine whether a particular legislative provision was a valid exercise of commerce authority was one established in 1981 in *Hodel v. Indiana*,[330] where the Court declared: "A Court may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate

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323. *Id.* at 243–44 n.18 (quoting *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948)).

324. 42 U.S.C. § 12102(b)(4).

325. Archibald Cox, *Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 107 (1966).

326. *Id.* at 107. *See also* Robert L. Burgdorf Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 496–501 (1991) (suggesting that, in addition to power to regulate activities that constitute state action, § 5 of Fourteenth Amendment should be interpreted as also providing Congress with authority to regulate some private enterprises that constitute public uses to guarantee equal rights of citizens by prohibiting discrimination in places open to public).

327. U.S. CONST. art. I, § 8, cl. 3.

328. *See, e.g.*, Atlanta Motel v. United States, 379 U.S. 241 (1964) (upheld Title II of Civil Rights Act of 1964 as applied to motel as valid exercise of commerce authority); Katzenbach v. McClung, 370 U.S. 294 (1964) (upheld Title II of Civil Rights Act of 1964 as applied to restaurant as valid exercise of commerce authority); EEOC v. Wyoming, 460 U.S. 226 (1983) (upheld Age Discrimination in Employment Act as applied to state and local governments as valid exercise of commerce authority).

329. *Id.*

330. 452 U.S. 314 (1981) (provisions of Surface Mining Control and Reclamation Act of 1977 protecting "prime farmland" upheld as valid exercise of Commerce Clause authority despite fact that only .006% of prime farmland protected).

commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends."[331]

Each of the pertinent ADA provisions regulates only activities that are (1) "in an industry that affects commerce,"[332] (2) "whose operations affect commerce,"[333] or (3) engaged in by an entity that is covered "if the operations of such entity affect commerce."[334] By definition, therefore, the requirements of Titles I and III of the ADA apply only to activities that affect commerce. In addition, the ADA findings and committee reports appeared to provide a solid factual basis for concluding that discrimination based on disability has a negative impact on commerce. In particular, the ADA committee reports noted the testimony and Harris Poll results indicating that discrimination was a major reason for a large majority of people with disabilities not going to restaurants, grocery stores, movies, theaters, or sports events[335] and described the drastic economic effects of discrimination in employment.[336] Such evidence was readily available under the ADA without even beginning to cull the voluminous testimony received during congressional hearings, which was a method the Court resorted to in upholding the Civil Rights Act of 1964.[337]

If there were not a clear indication of the effects on commerce in the wording of the ADA, the question would become whether the congressional findings and legislative history of the ADA would establish the necessary connection between the regulated activities and the effect on interstate commerce. In reviewing the constitutional validity of provisions of the Civil Rights Act of 1964, the Supreme Court had declared that "formal findings . . . are not necessary" and had been willing to look for evidence of a connection between the regulated activities and an effect on commerce in testimony received by Congress when it was considering the legislation.[338]

The ADA findings, the testimony of witnesses, and other evidence regarding the economic effects of discrimination against people with disabilities appeared to exceed greatly the levels held sufficient to establish a sufficient "nexus" with commerce in previous cases.[339] In one of the first cases to address the issue, the court in *Pinnock v. International House of Pancakes Franchisee*[340] upheld the constitutionality of the ADA against a variety of challenges and ruled that "[c]ongressional enactment of title III of

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331. *Id.* at 323–24.

332. 42 U.S.C. § 12111(5)(A) (definition of employer covered by Title I). This wording was patterned on Title VII of the Civil Rights Act of 1964.

333. *Id.* at § 12181(2) (definition of "commercial facilities").

334. *Id.* at § 12181(7) (definition of "public accommodation" regulated in Title III). The quoted wording was based on the definition of a public accommodation in Title II of the Civil Rights Act of 1964. *Id.* at § 2000a(b).

335. S. REP. NO. 101-116, at 6, 10–11 (1989); H.R. REP. NO. 101-485, pt. 2, at 34–35 (1990).

336. S. REP. NO. 101-116, at 9–10, 16–18 (1989); H.R. REP. NO. 101-485, pt. 2, at 32–34, 43–47 (1990). *See also* 136 CONG. REC. E1913–14 (daily ed. June 13, 1990) (statement of Rep. Hoyer).

337. Katzenbach v. McClung, 370 U.S. 294, 299 (1964); Atlanta Motel v. United States, 379 U.S. 241, 252 (1964).

338. *Katzenbach*, 370 U.S. at 299; *Accord Atlanta Motel*, 379 U.S. at 252.

339. *See especially* S. REP. NO. 101-116, at 6, 9–18 (1989); H.R. REP. NO. 101-485, pt. 2, at 28–47 (1990).

340. 844 F. Supp. 574 (S.D. Cal. 1993).

the ADA was well within Congress' power to regulate interstate commerce under the Commerce Clause."[341]

Well after the enactment of the ADA, however, the Supreme Court instituted a drastic change in the legal standards governing the legislative authority of Congress and eventually began to measure the ADA by these *ex post facto* standards. In *Board of Trustees of the University of Alabama v. Garrett*,[342] the Supreme Court ruled that suits by employees of a state to recover monetary damages from the state for violations of Title I of ADA are barred by the Eleventh Amendment. This result was influenced in part by the Court's decision the previous year in *Kimel v. Florida Bd. of Regents*,[343] in which it had ruled that the Age Discrimination in Employment Act did not validly abrogate states' Eleventh Amendment immunity from suits by private individuals. En route to its decision in *Garrett*, the Court indicated that, in evaluating congressional authority to enact ADA provisions as part of its power to enforce the Fourteenth Amendment, the Court would require that legislation reaching beyond the scope of the Fourteenth Amendment's guarantees must exhibit "congruence and proportionality" between the constitutional injury being addressed and the means adopted to address it.[344]

In considering the constitutional injury addressed by ADA, the Court indicated that it would apply "rational-basis review"—the lowest level of equal protection analysis—to state discrimination on the basis of disability challenged as violating equal protection.[345] In applying such standards to Title I of ADA and as it applies to state employment, the Court found that the evidence Congress assembled of unconstitutional state discrimination in employment was inadequate, and that Congress had not imposed a remedy that is congruent and proportional to the targeted constitutional violation.

Disability rights activists and scholars were quick to point out the limited scope of the *Garrett* ruling. On the day that the Court announced its decision, ADA Watch noted in a Press Release that the ruling does not: (a) prevent individual suits against a state employer for injunctive relief; (b) bar suits initiated by the Federal Government for monetary damages; (c) bar suits for money damages against private employers or local governments; and (d) apply to Title II of ADA.[346] Some of these limitations are based upon footnote 9 in the Opinion in which the Court clarified that its ruling did not mean that persons with disabilities have no federal recourse against discrimination.[347] The Court noted that states are still subject to Title I standards, and those standards can be enforced by the United States in actions for money damages, as well as by private individuals in actions for injunctive relief. In addition, state laws

341. *Id.* at 579.

342. 531 U.S. 356 (2001).

343. 528 U.S. 62 (2000).

344. *Garrett*, at 531 U.S. 365, quoting *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

345. *See supra* note 260 and accompanying text.

346. ADA Watch, *Press Release: Civil Rights Advocates Respond to Supreme Court Decision*, February 21, 2001, http://www.raggededgemagazine.com/drn/garrettadawatchresp.htm.

347. 351 U.S. at 374.

protecting the rights of persons with disabilities in employment may provide additional avenues of redress.

Subsequently, in *Buckhannon Board and Care Home, Inc. v. W. Va. Dep't of Health and Human Res.*,[348] the Court reiterated long-standing principles that "[o]nly States and state officers acting in their official capacity are immune from suits for damages in federal court," and that "[p]laintiffs may bring suit for damages against all others, including municipalities and other political subdivisions of a State." In another footnote (number 1) at the beginning of its opinion in *Garrett*, the Court stressed that it was not addressing whether Title II, "which has somewhat different remedial provisions from Title I," is appropriate legislation under Section 5.[349] Of course, one can only speculate the extent to which some of the analysis the Court applied to Title I in *Garrett* may nonetheless affect the analysis of Eleventh Amendment immunity under Title II in future court challenges. The direct impact of the Court's ruling in *Garrett* is fairly easy to describe, but its longer-term implications are much harder to determine. It is not unreasonable to fear that the analytical standards applied to Title I in *Garrett* will be applied to bar private suits for monetary damages against states under Title II as well. The *Garrett* decision might be but one step on a broader effort by the Court to restrict congressional authority and to expand the rights of states that may have serious repercussions for the Commerce Clause authority also expressly invoked by the Congress in enacting ADA, and perhaps even to the Spending Clause authority that provides the constitutional underpinning of Section 504 of the Rehabilitation Act of 1973. On the other hand, such threats may be purely speculative, alarmist, and unlikely. The *Garrett* decision certainly gives mixed signals, and has been the subject of much discourse and debate.[350]

While recognizing limitations on the direct scope of the *Garrett* decision, NCD described the decision, shortly after it was announced, as "another obstacle in the path of people with disabilities," and has expressed its deep concern that the *Garrett* decision could initiate a "slippery slope" that would lead to further restriction of rights established under ADA.[351] More recently, the Council recommended enactment of a new provision that would make state waivers of immunity from suits under Titles I or II of the ADA a precondition to the receipt of "federal financial assistance" under any federal program.[352] This approach is an attempt to provide the ADA with a Spending Power foundation and to sidestep Eleventh Amendment problems. One

348. 532 U.S. 598, 609 n.10 (2001).

349. 531 U.S. at 360 n.1.

350. *See, e.g.*, Jaclyn F. Okin, *Has the Supreme Court Gone Too Far?: An Analysis of the University of Alabama v. Garrett and its Impact on People with Disabilities*, 9 AM. U. J. GENDER SOC. POL'Y & L. 663 (2001); Mark A. Johnson, Note, *Board of Trustees of the University of Alabama v. Garrett: A Flawed Standard Yields A Predictable Result*, 60 MD. L. REV. 393 (2001).

351. NCD, *News Release: National Council on Disability Deeply Troubled by U.S. Supreme Court Decision Limiting Scope of Americans with Disabilities Act* (Feb. 21, 2001).

352. NCD, NATIONAL DISABILITY POLICY: A PROGRESS REPORT (January 15, 2008), Chapter 2, p. 59 Recommendation 2.1, http://www.ncd.gov/newsroom/publications/2008/Revised_NationalDisabilityPolicy_ProgressReport.html#17.

continues to hope that the existing constitutional foundations will be found sufficient to sustain our principal civil rights law.

C. Scientific and Technological Advances

For most adults, and particularly for those of us born before the last half of the 20th Century, the pace of scientific and technological change today is breathtaking. We cannot say we were not warned; way back in 1970, Alvin Toffler predicted that by the beginning of the 21st Century "millions of ordinary, psychologically normal people will face an abrupt collision with the future. Citizens of the world's richest and most technologically advanced nations, many of them will find it increasingly painful to keep up with the incessant demand for change that characterizes our time."[353] The disorientation resulting from "the greatly accelerated rate of change in society" Toffler called "future shock."[354] As individuals living in 2008, most of us, other than a few entrenched Luddites, have arrived at some state of accommodation or coexistence with technological and scientific progress, whether it be enthusiastic appreciation, begrudging toleration, or something in between. For the disability rights movement, however, the relentless and accelerating advances bring ever-changing challenges, benefits, and risks, that call for vigilant attention and scrutiny. My technological and scientific prowess is mediocre at best, so I will not pretend to be anywhere near the cutting edge in my knowledge and understanding of complicated technical matters. What I hope to do in this subsection is to throw out some potential dilemmas, issues, and opportunities that seem likely to confront us in the future within the limits of my admittedly confined vision of the technological and scientific future.

1. Communications and Information Technology

> The technologies used in information and communication products are advancing at an ever increasing rate. Devices are getting smaller, lighter, cheaper, and more capable. Electronics are being incorporated into practically everything, making a wide variety of products programmable, and thus more flexible. Computing power is increasing exponentially. What requires a supercomputer one year can be done on a child's game player 15 years later.[355]

The quoted language, from the beginning of the NCD's influential December 2006 report on the impact of information and technology advances on disability policy, OVER THE HORIZON, illustrates the

353. Alvin Toffler, FUTURE SHOCK 9 (Bantam ed. 1971).

354. *Id.* at 11.

355. National Council on Disability, OVER THE HORIZON: POTENTIAL IMPACT OF EMERGING TRENDS IN INFORMATION AND COMMUNICATION TECHNOLOGY ON DISABILITY POLICY AND PRACTICE (2006) at 1.

dizzying acceleration of changes in such technology. The report mentions four technology trends that will have a particular impact on information and communication technology—increasing computation power with decreasing cost and size; new interface possibilities; availability of connectivity and network services nearly everywhere and in wearable form; and the development of virtual places, providers, and products.[356] Such trends can make communication and information technology more accessible, less costly, and more effective for users with disabilities. They represent a two-edged sword, however, because they may generate significant disadvantages as well. As NCD has summarized:

> Many of the same technological advances that show great promise of improved accessibility, however, also have the potential to create new barriers for people with disabilities. The following are some emerging technology trends that are causing accessibility problems.
>
>> Devices will continue to get more complex to operate before they get simpler. This is already a problem for mainstream users, but even more of a problem for individuals with cognitive disabilities and people who have cognitive decline due to aging.
>>
>> Increased use of digital controls (e.g., push buttons used in combination with displays, touch screens, etc.) is creating problems for individuals with blindness, cognitive and other disabilities.
>>
>> The shrinking size of products is creating problems for people with physical and visual disabilities.
>>
>> The trend toward closed systems, for digital rights management or security reasons, is preventing individuals from adapting devices to make them

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356. The report uses somewhat more technical and detailed language in describing these trends:

> Increasing computational power, combined with decreasing size and costs;
>
> New interface research in areas such as virtual projected interfaces, speech input and output, direct brain interfaces, multi modal interfaces, and artificial intelligent agents that can act as mediators;
>
> Ubiquitous connectivity and network services, including the ability to be in constant connection with people or services that can provide assistance or augment a person's abilities—all with technologies that soon will be wearable or incorporated directly into clothing; and
>
> Creation of virtual places, service providers, and products that can enable a person to shop, explore, learn, travel, socialize, and work in "cyber space."

Id.

> accessible, or from attaching assistive technology so they can access the devices.
>
> Increasing use of automated self-service devices, especially in unattended locations, is posing problems for some, and absolute barriers for others.
>
> The decrease of face-to-face interaction, and increase in e-business, e-government, e-learning, e-shopping, etc., is resulting in a growing portion of our everyday world and services becoming inaccessible to those who are unable to access these Internet-based places and services.[357]

The pace of change in communication and information technology engenders a variety of difficulties in the ongoing interaction between mainstream and assistive technologies, including problems keeping federal policy current with evolving technology and making an on-going "business case" for accessible technology.[358] Shifts in focus from traditional telephone networks to internet technologies, and from analog to digital communication technology are examples of technological developments that may outstrip policy established in existing laws and regulations. Questions about ADA coverage of websites, discussed previously in subsection III.H.3 *supra*, is another example.

The NCD report examines an array of action items to address disability policy issues raised by advances in communication and information technology:

> 1) Maximizing the effectiveness of assistive technologies and lowering their cost.
>
> 2) Maximizing the accessibility of mainstream information and communication technology products, so that people with disabilities and seniors can use standard products.
>
> 3) Ensuring access to the Internet and other virtual environments as to physical places of public accommodation.
>
> 4) Addressing new barriers to the accessibility of digital media caused by digital rights management, including when visual and audio rights are sold separately.
>
> 5) Basing all policy regarding information and communication technology accessibility on consideration of the business case.
>
> 6) Creating accessibility laws and regulations that are not

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357. *Id.* at 2–3.
358. *Id.* at 3–4.

technology specific, but are based on the functions of a device; that provide clear guidance as to what is sufficient to meet the standard; that have requirements indexed to technologies, as they evolve, using baselines; and that, to the extent possible, are harmonized with laws and regulations of other countries for products that are sold internationally.

7) Ensuring the availability and use by the public of up-to-date information about accessible mainstream technology and assistive technology.[359]

The body of the OVER THE HORIZON report contains extensive, detailed, and at times quite technical discussion of the significance of these action items, and of various means and approaches for pursuing them. Among those aspects of the report that have a more legal flavor, the report discusses the need for the "broad application and enforcement of existing accessibility standards, such as Section 255 of the Telecommunications Act of 1996 and Section 508 of the Rehabilitation Act of 1973."[360] Section 255[361] applies to manufacturers of telecommunications equipment and to providers of telecommunications services, and requires them to ensure that such equipment and services are accessible to and usable by individuals with disabilities, so long as doing so is "readily achievable."[362] "Readily achievable," a term derived from the ADA, means "easily accomplishable, without much difficulty or expense."[363] If making a product or service accessible is not readily achievable, manufacturers or service providers must make their products or services compatible with adaptive equipment commonly used by people with disabilities, if that is readily achievable.[364] Guidelines for accessibility of telecommunications equipment are issued by the federal Architectural and Transportation Barriers Compliance Board (Access Board), and the requirements of Section 255 are enforced by the Federal Communications Commission.[365]

As amended in 1998,[366] section 508 of the Rehabilitation Act of 1973 requires all federal agencies to make their electronic and information technology accessible to people with disabilities.[367] It applies to agencies whenever they develop, procure, maintain, or use any type of electronic or information technology;[368] it is not limited to assistive technologies used by people with disabilities. Covered agencies must ensure that Federal employees and members of the public with disabilities have access to and use of information and data, comparable to

359. *Id.* at 5–6.
360. *Id.* at 39.
361. 47 U.S.C. § 255.
362. *Id.* §§ 255(b) & (c).
363. *Id.* § 255(a)(2).
364. *Id.* § 255(d).
365. *Id.* §§ 255(e) & (f).
366. Pub. L. No. 105-220, August 7, 1998, 112 Stat 936.
367. 29 U.S.C. § 794d.
368. *Id.* § 794d(a)(1)(A).

that provided to employees and members of the public without disabilities, to the extent that doing so does not pose an "undue burden."[369] When development, procurement, maintenance, or use of electronic and information technology would impose an undue burden, the federal agency is required to provide individuals with disabilities the pertinent information and data by an alternative means of access that allows the individual to use the information and data.[370] Section 508 directs the Access Board to develop access standards for this technology that become part of federal procurement regulations.[371] The IT Accessibility & Workforce Division of the U.S. General Services Administration's Office of Governmentwide Policy, which is responsible for educating federal employees and building the infrastructure necessary to support Section 508 implementation, operates an official government Section 508 website—http://www.section508.gov/—where government employees and the public can find information and resources for understanding and complying with the requirements of Section 508.[372]

Additional discussion of the matters discussed in the OVER THE HORIZON report is beyond the scope of this article, but the report is a very useful source of information for those interested in emerging and upcoming issues related to advances in communication and information technology and its impact on use of such technology by people with disabilities. At the same time that it issued OVER THE HORIZON, NCD released another report—THE NEED FOR FEDERAL LEGISLATION AND REGULATION PROHIBITING TELECOMMUNICATIONS AND INFORMATION SERVICES DISCRIMINATION[373]—in which it explored the need for additional legislative and regulatory measures to guarantee equal access by people with disabilities to evolving high speed broadband, wireless, and Internet-based technologies. Major topics discussed are federal disability safeguards, state laws, competitive marketplace failures, principles of universal service and universal design, emerging communications technologies, and video programming.[374] NCD presented numerous specific recommendations for legislation and regulatory changes in the following categories: Communications Technologies, Video Programming, Universal Service, the Americans with Disabilities Act, and Section 508 of the Rehabilitation Act.[375]

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369. *Id.*

370. *Id.* § 794d(a)(1)(B).

371. *Id.* §§ 794d(a)(2)(A) & (a)(3).

372. *See* http://www.section508.gov/.

373. National Council on Disability, The Need for Federal Legislation and Regulation Prohibiting Telecommunications and Information Services Discrimination (2006), *available at* http://www.ncd.gov/newsroom/publications/2006/pdf/discrimination.pdf.

374. *Id.* §§ II–VI.

375. *Id.* § VII. In regard to the "Universal Service" category, AT&T took a positive step in March 2008 by publishing its approach to universal design in the interest of encouraging application communications developers and handset manufactures to address the needs of customers with disabilities when designing services and products. See AT&T, *News Release—AT&T Unveils Universal Design Approach to Help Developers Meet the Wireless Needs of Customers with Disabilities: Wireless Leader Aims to Influence Industry-Wide Change and Innovation in the Design of Wireless Products and Applications*, March 13, 2008, *available at* http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=25327; the text of the document laying out AT&T's approach is at http://developer.att.com/devcentral/Orphan_Docs/Universal_Design.pdf.

2. Medical and Genetic Developments

If stunning advances have been made in regard to communications and information technology, developments in medical and genetic spheres, some already achieved and others apparently just around the corner, are downright astounding. Medical treatments involving replacements of joints or vital organs; or reattachment of severed limbs, digits, or even male sexual organs have become almost routine. Great progress has been made in identifying portions of the brain associated with particular functions and processes, enabling new treatments, including finely targeted surgeries and pharmaceutical treatments. Technology referred to as "brain pacemakers" involves implantation of a device in the brain that sends electric signals into the tissue; it has been used to address conditions that are known to involve malfunctions within the brain, such as epilepsy, Parkinson's disease, clinical depression, and others.[376] While "[i]t used to be considered dogma that a nerve, once injured, could never be repaired,"[377] ongoing research is considering a wide variety of methods that hold promise for accomplishing or facilitating the regeneration, repair, or replacement of nerves; these include stem cell manipulation, hormone treatments, nerve repair glues, and even silk from specially engineered silk worms that can be used to bridge the gap across severed nerves.[378] Such approaches offer the hope of future treatments for such nerve-related conditions as retinal damage, multiple sclerosis, spinal cord injuries, and even problems with nerves in the brain.

New medications continue to proliferate, although marketing forces and high prescription drug prices sometimes skew their availability to those who need them. Surgical, radiation, and chemotherapy techniques continue to be refined at a rapid pace. HIV infection and many forms of cancer are no longer the automatic death sentences they once seemed to be, and treatments for additional diseases are likely, if not just around the corner, at least on the horizon. Searches for additional curative drugs and vaccines continue and many of these

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376. *See, e.g.*, Rob Stein, *The Potential of "Brain Pacemakers": Implanted Devices May Alter Treatment of Many Disorders*, THE WASHINGTON POST, Mar. 6, 2004, A.01; Duke University, *How Brain Pacemakers Erase Diseased Messages*, SCIENCEDAILY, May 31, 2007, *available at* http://www.sciencedaily.com /releases/2007/05/070530122217.htm. But see Carla Williams, *Brain Device May Trigger Impulsiveness: Brain Implant That Stops Tremors of Parkinson's Disease May Block Impulse-Control Signal*, ABC News, Oct. 25, 2007, *available at* http://www.abcnews.go.com/Health/story?id=3777610.

377. American Society for Biochemistry and Molecular Biology, *Stem Cells Found in Adults May Repair Nerves*, ASBMB TODAY, vol. 3, issue 1, April 2004, at 22.

378. *See, e.g.*, *id.*; University of Calgary, *Pregnancy Hormone Key To Repairing Nerve Cell Damage*, SCIENCEDAILY February 21, 2007, *available at* http://www.sciencedaily.com /releases/2007/02/070221071152.htm; *Molecules That Guide Nerve Growth May Help Repair Damaged Spinal Nerves*, DOCTOR'S GUIDE, April 25, 1997, *available at* http://www.pslgroup.com/dg/24942.htm; *Composition and method for repairing nerve damage and enhancing functional recovery of nerve*, Abstract, U.S. Patent & Trademark Office Application # 20060083734, Apr. 20, 2006, *available at* http://www.freshpatents.com/Composition-and-method-for-repairing-nerve-damage-and-enhancing-functional-recovery-of-nerve-dt20060420ptan20060083734.php (fibrin glue composition for repairing nerve damage or enhancing functional recovery of a damaged nerve); *Silk Could Help Repair Nerves*, BBC News, July 12, 2006, *available at* http://news.bbc.co.uk/2/hi/science/nature/5172422.stm.

efforts can be expected to bear fruit sooner or later. Stem cell research shows considerable promise in potentially providing a renewable source of replacement cells to treat diseases and other medical conditions. Nanotechnology is adding to the array of medical possibilities; the development of tiny devices, including miniature machines, motors, robots, computers, and even factories, and engineered nanoparticles and constructed molecules—of a size that make a pinhead gargantuan in contrast—make it possible to insert such devices and substances in the body to attack cancers or disease cells, to serve as markers for diagnostic tests, to deliver medications precisely where needed, to manufacture missing chemicals or hormones, to open blockages, to reproduce or repair damaged tissues, to stimulate beneficial cell proliferations, and to serve untold other curative, therapeutic, and diagnostic functions.[379]

Very dramatic advances are occurring in the field of genetics. The mapping of the human genome has accelerated research to identify genes or groups of genes that cause or are linked to congenital conditions or to particular diseases, disorders, malformations, or syndromes, or to a proclivity or predisposition to develop such a condition.[380] On April 24, 2008, Senator Edward made the following statement on the floor of the Senate:

> Mapping the human genome has provided extraordinary insights for modern medicine, and it has opened the door to immense new opportunities to prevent, diagnosis, treat, and cure disease. Its discovery may well affect the 21st century as profoundly as the invention of the computer or the splitting of the atom affected the 20th century.[381]

According to the Genetics and Public Policy Center, genetic tests are currently available for over 1,000 diseases, and several hundred more are

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379. As with any innovative technology, nanotechnology may bring with it some undesirable consequences. For example, one study involving mice sounded safety alarm bells when it documented that "nanotubes," developed for use in a broad array of consumer products, have a cancer-causing effect similar to the effects of asbestos. *See* Rick Weiss, *Effects of Nanotubes May Lead to Cancer, Study Says*, WASHINGTON POST, May 21, 2008, A2.

380. In a 2002 position paper, the National Council on Disability wrote:

> Recent years have brought dramatic scientific advances in the study of human genetics. Scientists have mapped out DNA sequences in the human body and have identified many genes that cause disease. Consequently, they have been able to use genetic testing to identify individuals who may be susceptible to many diseases that are genetically linked. Tests now exist that are able to detect genetic predispositions for many diseases and illnesses, such as Huntington's disease, breast cancer, cystic fibrosis, Alzheimer's disease, colon cancer, and Parkinson's disease. The number of conditions that may be detected by genetic tests is rapidly growing. While these genetic advances hold tremendous potential for early identification, prevention and treatment of disease, they also create opportunities for discrimination against individuals based on their genetic information, even where individuals have no symptoms of disease.

National Council on Disability, *Position Paper on Genetic Discrimination Legislation* (2002), Introduction, *available at* http://www.ncd.gov/newsroom/publications/2002/geneticdiscrimination_positionpaper.htm.

381. 154 CONG. REC. S3363 daily ed. Apr. 24, 2008) (statement of Sen. Kennedy).

being developed.[382] The identification of genes that cause or are linked to medical conditions opened the door to possible approaches for achieving genetic corrections, substitutions, and screening. Genetic screening permits early identification, prevention, and treatment of many diseases. Would-be parents can assess the likelihood, based upon their genetic makeup, of passing on problematic genetic conditions to their offspring, and make informed decisions about whether or not to have children. Genetic testing has also had an unwelcome side effect of enabling employers and insurance companies to discriminate against people with a genetic predisposition to conditions deemed undesirable—a problem that hopefully has been substantially ameliorated by the recent enactment of the Genetic Information Nondiscrimination Act of 2008, which prohibits group health plans and health insurers from denying coverage or charging higher premiums based solely on genetic predisposition toward a disease, and prohibits employers from using genetic information in making hiring, firing, job placement, or promotion decisions.[383]

Apart from genetic screening, other uses of genetic technology and information have raised astounding, sometimes disquieting possibilities. I was surprised toward the beginning of the current decade when I learned that researchers had inserted a gene from a flounder into tomato plants to make them more tolerant to lower temperatures.[384] But subsequent uses of genetic engineering techniques have made that experiment seem rather quaint. Radical experimental manipulations of human genetic material, such as reproductive cloning and the creation of hybrid and chimera embryos, appear now to be within the range of scientific capability. British scientists recently reported that they had produced human-animal hybrid embryos by inserting human DNA into a hollowed-out cow egg.[385] In 2001, news reports indicated that a U.S. medical institute had pioneered a fertility treatment that, beginning in 1997, had produced the births of "the first genetically altered babies"; the technique involved injecting the genetic contents of a donor egg from a fertile woman into an infertile woman's egg along with her mate's sperm.[386] May 2008 news stories, however, reported the creation of the "first genetically engineered human embryo" when researchers at Cornell

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382. Genetics and Public Policy Center, *U.S. Public Opinion on Uses of Genetic Information and Genetic Discrimination* (Apr. 24, 2007), *available at* http://www.dnapolicy.org/resources/GINAPublic_Opinion_Genetic_Information_Discrimination.pdf .

383. Pub. L. No. 110-233, 122 Stat. 881 (May 21, 2008).

384. CBS News, *What Have They Done To Our Food?*, (Aug. 9, 2001) ("The U.S. Department of Agriculture approved a field test to grow the tomatoes with the experimental gene 'based on one identified in the winter flounder.' The idea: The gene that keeps flounders from freezing in cold water would also keep the tomato fresh in freezing weather. The tomatoes were grown but never sold."), *available at* http://www.cbsnews.com/stories/2001/02/28/60II/printable275254.shtml.

385. Alok Jha, *First British Human-Animal Hybrid Embryos Created by Scientists*, THE GUARDIAN, April 2, 2008, UK News section, p. 4, *available at* http://www.guardian.co.uk/science/2008/apr/02/medicalresearch.ethicsofscience.

386. David Whitehouse, *Genetically Altered Babies Born*, BBC News Online, May 4, 2001, *available at* http://news.bbc.co.uk/2/hi/science/nature/1312708.stm; CNN.com, *World's First Genetically Altered Babies Born*, May 5, 2001, *available at* http://archives.cnn.com/2001/TECH/science/05/05/US.genes.

University inserted a fluorescent protein into a human embryo; as the embryo cells divided, all the cells glowed.[387] In January 2008, a California biotech firm published an article in which it claimed to have cloned the first embryos from adult human DNA, by replacing the nuclear genetic material in unfertilized human eggs with DNA from adult skin cells, a claim that was met with some skepticism due to a prior claim of human cloning having turned out to be fraudulent.[388]

As scientists engaged in genetic engineering become more expert at the transfer, replacement, or splicing of genes, it is foreseeable that scientists will learn how to turn off, remove, or replace problematic genes; or to turn on or insert helpful genetic material. Genetic engineering can also be used outside the human body to produce medically helpful substances. The first genetically engineered medicine was synthetic insulin, produced by genetically altered bacteria to which genetic material containing directions for insulin-making had been inserted; the resulting synthetic "human" insulin, a product called Humulin, was approved by the United States Food and Drug Administration in 1982.[389]

The rapidly accelerating proliferation of medical and genetic advances is undeniable. Critical questions arise as to how these advances will affect people with disabilities, and how the disability rights will movement promote policies for the management and control of these advances to ensure maximum availability of their advantages and maximum avoidance of their harmful and dangerous effects. Even some of the most promising and apparently benevolent advances may have more complicated aspect. Consider techniques for avoiding and "fixing" impairing conditions. Within the foreseeable future, it is likely that science will provide a stunning variety of methods for repairing, ameliorating, and "curing" physical and mental impairments. It will be possible to repair severed spinal cords and undo damage to nerves; to destroy tumors or induce them to abate; to regulate levels of insulin and other internal body chemicals effectively and easily; to correct gene-based disorders by genetic manipulation or replacement; to repair or to replace almost any body part; to rectify malfunctioning sense organs;[390]

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387. Andrew Pollack, *Engineering by Scientists on Embryo Stirs Criticism*, THE NEW YORK TIMES, May 13, 2008, *available at* http://www.nytimes.com/2008/05/13/science/13embryo.html?ref=science; Malcolm Ritter, *Genetically Modified Human Embryo Stirs Criticism*, Associated Press, May 12, 2008, *available at* http://ap.google.com/article/ALeqM5jayE9Ru_1pu1_b3RQuKGszU6409QD90KBJH00.

388. Rick Weiss, *Mature Human Embryos Created From Adult Skin Cells*, THE WASHINGTON POST, January 18, 2008, at A01; Arthur Caplan, *Human Embryos Cloned: What Does It Mean?*, MSNBC, Jan. 17, 2008, *available at* http://www.msnbc.msn.com/id/22706947; Chris Williams, *US Biotech Firm in New Human Cloning Claim*, THE REGISTER, January 18, 2008, *available at* http://www.theregister.co.uk/2008/01/18/us_cloning_claim/.

389. Lawrence K. Altman, *A New Insulin Given Approval For Use In U.S.*, THE NEW YORK TIMES, October 30, 1982, *available at* http://query.nytimes.com/gst/fullpage.html?sec=health&res=9800E4D8133BF933A05753C1A964948260; Britannica Online Encyclopedia, *synthetic human protein*, *available at* http://www.britannica.com/EBchecked/topic/1312876/synthetic-human-protein.

390. An individual with Usher syndrome, which causes deafness and blindness, provided the following description of the status of research aimed at restoring vision:

> [I]nvestment in retinal degenerative diseases (retinitis pigmentosa, Usher syndrome,

to eliminate chemically based mental conditions, reverse the genetic causes of others, and fix malfunctioning brain cells, tissue, connections, and systems; to send nanotechnological machines and materials into the body to identify malfunctions, deliver medicines, remove obstructions, perform repairs, manufacture substances, and so on; to scan body parts or the entire body easily to diagnose the sources of problems (a la Star Trek); and to attach prostheses directly to nerves so that they can be controlled in the same manner as our natural joints and muscles. In utero diagnostic techniques already make it possible to identify a variety of disorders and abnormalities during pregnancy; as genetic screening procedures become ever more refined and sophisticated, parents will have considerably more information about the characteristics and impairments of their developing fetuses. Smallpox was eradicated almost 30 years ago; it is likely that pharmacological advances, genetic manipulation, and nanotechnology will produce many additional vaccines and other medical substances to prevent disability-causing diseases.

The positive side of many of these developments and innovations is self-evident. Curing cancer; reversing paralysis; eliminating tuberculosis, leprosy, and malaria; and correcting the organic causes of many mental health conditions, for example, would seem to be achievements that nearly everyone would applaud enthusiastically. The elimination of polio, now found in only 4 countries in the world, is well within reach; why would anyone lament its final eradication? Some day soon we will hopefully have the same success with vaccines for such conditions as HIV, lupus, influenza, perhaps even cancer. The possibility of avoiding, curing, or reversing most disabling conditions is, however, not totally without downside or controversy; some of its implications raise grave and thorny issues for the disability rights movement in the already emerging future. Many people with disabilities recognize that there are positive aspects to having a disability; in "Tell Them I'm a Mermaid," a musical about women with physical disabilities, a quadriplegic character observes of having a disability, "If everyone could do it, and come out able-bodied, I'd really recommend it."[391] But given the choice, most

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> macular degeneration, and glaucoma among others) is paying off—there are a few treatments in FDA-approved Phase I and II trials, and a dozen more treatment strategies are poised to make the leap from animal models into human trials. Other researchers are close to unlocking the secret of protein structures and processes within the photoreceptor cells in the retina—the very cells that make us see—and whose slow deaths lead to progressive blindness in millions of Americans.
>
> These are 21st century, Age of Biology cutting-edge stuff: gene therapy, stem cell research, nanotechnology. Tiny little capsules inside the eyeball delivering life-saving proteins to photoreceptor cells. Subretinal injections of embryonic stem cells into the retinal pigment epithelium layer. Flooding the photoreceptor layer with sixty trillion "fixed" DNA so these photoreceptors adopt the correct genes for normal function.

There are sight-saving technologies being tested on humans right now. Real treatments and cures are not far off. Adam Stone, *The End of Deaf-Blindness*, DEAFDC.COM BLOG, Mar. 3, 2008, *available at* http://www.deafdc.com/blog/adam-stone/2008-03-03/the-end-of-deaf-blindness/.

391. Quoted in John Corry, *TV: Singing Of Disabilities of 7 Women*, The New York

would choose to "come out able-bodied," *i.e.*, without their disabilities, if they could. Not everyone feels that way, however. Are people entitled not to ameliorate their level of disability, not to cure their curable disabilities, or not to avoid getting avoidable ones? What about not preventing, not mitigating, or not correcting disabling conditions in one's children? Such issues have already arisen, particularly in regard to deafness.

In the fall of 2002, a county prosecutor and a court-appointed advocate in a child neglect/custody case asked a family court in Michigan to order cochlear implants for two deaf children of a deaf mother on the theory that her failure to approve their having implants constituted child neglect.[392] For some time, cochlear implants have been a hot-button issue within the deaf community.[393] In the words of one article, "To most people, cochlear implants sound like a medical miracle—a device the size of a candy corn that can correct the inability to hear. But many in the Deaf community see the technology as a cultural threat, yet another example of the hearing world's inability to really listen."[394] Actually the notion that such implants can "correct the inability to hear" is an overstatement, and the procedure entails some risks as well as potential benefits.[395] But the primary objection to the procedure, particularly to its being pressed on or even imposed on people, is more central; it stems from a reluctance to being coerced to become not deaf. I. King Jordan, former president of Gallaudet University, has said of people who are deaf that "we hold in common this resentment of efforts to fix us."[396] In the Michigan neglect case, the judge ultimately ruled that the court did not have jurisdiction under the state's child neglect laws to order implants for the two deaf children whose parents opposed it, because she found that cochlear implants are

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Times, December 5, 1983, *available at* http://query.nytimes.com/gst/fullpage.html?res=9505E5D71E39F936A35751C1A965948260.

392. *In re* Kyron and Christian Robinson, Case No.: 01-0702-00 NA, Kent County (Michigan) Circuit Court, Family Division (unreported decision), October 4, 2002; discussed in American Association of People with Disabilities, *Press Release—Grand Rapids Cochlear Implant Case*, AAPD NEWS, *available at* http://www.aapd-dc.org/News/frompres/michcochlearimplantcase.html; Jenny Desai, *Falling on Deaf Ears*, SCIENCE & SPIRIT, January 2005, pp. 1–4, *available at* http://www.science-spirit.org/article_detail.php?article_id=467&pager=3; Cal Montgomery, *Mom Can Refuse Sons' Cochlear Implants, Says Court*, RAGGED EDGE MAGAZINE, Oct. 4, 2002, *available at* http://www.ragged-edge-mag.com/drn/10_02.shtml#446; Newsflash, *The Grand Rapids Case:Deciding What Is in "The Best Interests" of Deaf Children–and Whose Decision Should It Be?*, COCHLEAR WAR, October 4, 2002, *available at* http://www.cochlearwar.com/newsflash/003a.html.

393. *See, e.g.*, Carol Padden and Tom Humphries, INSIDE DEAF CULTURE, ch. 1, 166–70 (Harvard 2005) (discussing problems of cochlear implant surgery from Deaf culture perspective); Maya Sabatello, *Disability, Cultural Minorities, and International Law: Reconsidering the Case of the Deaf Community*, 26 WHITTIER L. REV. 1025 (2005); Amy Elizabeth Brusky, *Making Decisions for Deaf Children Regarding Cochlear Implants: The Legal Ramifications of Recognizing Deafness as a Culture Rather than a Disability*, 1995 WIS. L. REV. 235 (1995).

394. Jenny Desai, *Falling on Deaf Ears*, SCIENCE & SPIRIT, January 2005, p. 1, *available at* http://www.science-spirit.org/article_detail.php?article_id=467&pager=3.

395. *See, e.g.*, Jill Elaine Hasday, *Mitigation and the Americans with Disabilities Act*, 103 MICH L REV. 217, 220–21, 240–42 (2004); Jane E. Brody, *For Some Who Lost Hearing, Implants Help*, THE NEW YORK TIMES D7 (Oct 3, 2006).

396. I. King Jordan, *The Gallaudet Experience: Deafness and Disability*, 120 PUB. MOD. LANG. ASSOC. 625, 626 (2005).

elective surgery, and that the children's hearing loss did not pose a medical emergency.[397] But the issue of forcing parents to have their children's hearing impairments reduced, whether it be by cochlear implants, hearing aids, or treatments or technologies developed in the future, is one that may persist and have to be addressed by the disability advocacy movement.

The rights of parents have begun to come into conflict with societal pressures to avoid deafness in children in another context—that of embryo screening. In May 2007, the UK's Secretary of State for Health presented the Parliament the government's draft of a Human Tissues and Embryos bill that overhauled UK law on embryo research and assisted reproduction; it included a provision requiring that, in choosing reproductive cells, selecting a woman from whom an embryo is to be taken, and in deciding between embryos to be placed in a woman, persons and embryos not known to have a genetic abnormality with a significant risk of causing a disability, serious illness, or other serious medical condition must be preferred over those known to have such an abnormality.[398] Describing the rationale for this provision, the Explanatory Notes accompanying the draft bill mentioned that "[t]here have been reported cases, outside the UK, involving the positive selection of deaf donors in order deliberately to result in a deaf child. The new section . . . would prevent this."[399] Some deaf advocates opposed the provision, arguing that deaf parents should have the option of choosing to have a child who is deaf if they so choose.[400]

As this article was going to press, the legislation, renamed the Human Fertilisation and Embryology Bill," was still pending in Parliament, with a slightly differing wording of the preference for persons and embryos not having abnormalities entailing a risk of "a serious physical or mental disability."[401] Perhaps because of the 2007 version's Explanatory Notes focus on deafness, much of the continuing debate, both pro and con, has centered on this condition,[402] but some in

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397. See authorities cited *supra* note 369.

398. Department of Health, *Human Tissue and Embryos (Draft) Bill* (May 2007), Part 2, at 11–12, sec. 21(4), *available at* http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsLegislation/DH_074718 .

399. *Id.* at 100, Explanatory Notes, para. 66.

400. *See, e.g.*, Sarah-Kate Templeton, *Deaf Demand Right to Designer Deaf Children*, SUNDAY TIMES, December 23, 2007, *available at* http://www.timesonline.co.uk/tol/news/uk/health/article3087367.ece.

401. Human Fertilisation and Embryology Bill, House of Lords, Bill 70 07-08, Part 1, sec. 14(4) ("(9) Persons or embryos that are known to have a gene, chromosome or mitochondrion abnormality involving a significant risk that a person with the abnormality will have or develop –

(a) a serious physical or mental disability,

(b) a serious illness, or

(c) any other serious medical condition,

must not be preferred to those that are not known to have such an abnormality."), *available at* http://www.publications.parliament.uk/pa/cm200708/cmbills/070/2008070.pdf. For a summary of the bill and its status, see http://services.parliament.uk/bills/2007-08/humanfertilisationandembryology.html.

402. *See, e.g.*, Malaika Bova, *No to "Deaf" Embryos: New Fertility Bill Would Make It Illegal for Deaf Britons to Choose "Deaf" Embryos*, March 17, 2008, (quoting chairman of British Deaf Association linking preference for certain physical characteristics to "eugenic bias"), *available at* http://abcnews.go.com/Health/Story?id=4464873&page=1; RNID [Royal National Institute for

the disability community have noted its broader implications for embryonic conditions linked to other disabling conditions. One commentator with a disability has suggested an inconsistency between disability nondiscrimination initiatives and the pending legislation: "Whilst the Disability Discrimination Act says that we disabled folk should have equal rights and status, the HFE bill is effectively negating those rights by saying that we should seek to avoid the likes of us being here in the first place."[403] An editorial in DISABILITY NOW magazine noted that the result of the legislative provision will be that "when embryos are being selected for IVF, if there is a choice between those carrying the possibility of inherited impairment and those with no such possibility, the ones carrying no risk will always, automatically and incontrovertibly be preferred."[404] "What it represents in practice," according to the publication, "is nothing short of eugenics, or at least the thin end of a eugenics wedge. It's clearly a move to engineer out congenital impairment. What it also represents is the abolition of choice."[405] Some disability organizations, however, have focused more on the research possibilities for people with disabilities that would be enabled or limited by the UK legislation, rather than on its implications for parental choices and avoidance of births of people with certain disabilities.[406]

The aim of this discussion of embryonic selection related to disability is not to suggest how to resolve the issues, nor even to identify all of their dimensions and implications. The objective is simply to recognize the emergence of questions surrounding the possibility of such selection as very significant ones that the disability rights movement is going to have to grapple with increasingly in the not-too-distant future. And it affords a peek at the broader implications of advances that raise the possibility of eliminating or "curing" some disabilities. While many people with various types of disabilities would jump at the chance to have their impairments removed or remedied, and to avoid saddling their children with such conditions, the examples arising from the "deaf culture" perspective make it clear that not all people with disabilities see things that way. We have yet to explore in any systematic way which

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Deaf and Hard of Hearing People], *Briefing on the Human Fertilisation and Embryology Bill, December 2007* ("we do support selection of hearing embryos for implantation after [pre-implantation genetic diagnosis."), *available at* http://www.rnid.org.uk/VirtualContent/95457/briefing_on_the_human_fertilisation_and_embryology_bill_dec_2007.pdf; RNID, *RNID Comment on IVF Embryo Debate—11 January 2008* (Jan. 15, 2008) (quoting RNID chief executive Jackie Ballard: "Decisions about which embryo to implant are for parents and their clinicians, but RNID does not support the selection of a deaf embryo for IVF implantation where a hearing embryo is available."), *available at* http://www.rnid.org.uk/mediacentre/press/2008/ivf_embryo_debate.htm.

403. Rebecca Atkinson, *We Can Screen Abnormalities Out Before Birth, But Should We?*, BBC—Ouch! [disability website], January 28, 2008, *available at* http://www.bbc.co.uk/ouch/closeup/designing_babies.shtml.

404. Editorial, *As Complex as Life and Death*, DISABILITY NOW, April 2008, *available at* http://archive.disabilitynow.org.uk/search/z08_04_Ap/complex.shtml.

405. *Id.*

406. *See, e.g.*, Muscular Dystrophy Campaign, *MDC Statement on the Human Fertilisation and Embryology Bill*, March 14, 2008 (advocating amendments to permit development of new therapies for neuromuscular conditions through stem cell research), *available at* http://www.muscular-dystrophy.org/news/mdc_statement_1.html.

other conditions considered disabilities may give rise to similar reluctance to being "fixed." Some persons with autism, particularly those falling in the Asperger syndrome spectrum, have been vocal in their desire not to be considered ill or defective or in need of healing or cure. An early autism-rights pioneer wrote the following:

> It is not possible to separate the autism from the person. Therefore, when parents say, "I wish my child did not have autism," what they're really saying is, "I wish the autistic child I have did not exist and I had a different (non-autistic) child instead." Read that again. This is what we hear when you mourn over our existence. This is what we hear when you pray for a cure. This is what we know, when you tell us of your fondest hopes and dreams for us: that your greatest wish is that one day we will cease to be, and strangers you can love will move in behind our faces.[407]

More recently, an activist with Asperger's has challenged, on his website for those with Asperger's and autism, the "myth" that people with autism want to be cured: "Most autistics, in fact, do not want to be cured because they've already accepted autism as part of their personality, identity, and lifestyle."[408] Some people with autism display extraordinary skills in certain areas, such as the "savant" abilities of the character Dustin Hoffman played in the movie "Rain Man." A man with Asperger syndrome wrote an extensive essay describing "Traits, Diagnosis, and Social Aspects" of the syndrome, in which he noted that "[t]here are both negative and positive sides to having the sociological disorder known as Asperger Syndrome," and suggested that "[a]n interesting and positive trait that people with Asperger Syndrome have is that they develop unique interests and become highly intelligent especially in their main area of interest."[409] Because of such positive aspects, many people with Asperger's live satisfying lives and would not choose to give up the advantages for the disadvantages if they had the choice.[410]

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407. Jim Sinclair, *Don't Mourn for Us* (1993), *available at* http://web.syr.edu/%7Ejisincla/dontmourn.htm; originally published in OUR VOICE, the newsletter of Autism Network International, vol. 1, no. 3, 1993; quoted in Andrew Solomon, *The Autism Rights Movement*, NEW YORKER MAGAZINE, May 25, 2008, *available at* http://nymag.com/news/features/47225/. In an earlier essay, Jim Sinclair had written of his autism, "my personhood is intact. My selfhood is undamaged. I find great value and meaning in my life, and I have no wish to be cured of being myself. If you would help me, don't try to change me to fit your world." Jim Sinclair, *Bridging the Gaps: An Inside-Out View of Autism (Or, Do You Know What I Don't Know?)*, *available at* http://web.syr.edu/%7Ejisincla/bridging.htm; previously published in HIGH-FUNCTIONING INDIVIDUALS WITH AUTISM, edited by Eric Schopler and Gary B. Mesibov (Plenum Press, New York, 1992).

408. Alex Plank, *Ten Myths about Autism—Debunked*, posted on Sunday, February 24, 2008, at http://www.wrongplanet.net/article361.html.

409. Andrew Watts, Traits, *Diagnosis, and Social Aspects of Asperger Syndrome* (1999), *available at* http://srl2.tripod.com/andrew/asperger.htm. Watts went on to ascribe to Asperger's his "rather high IQ," his academic success, and his particular expertise and extensive knowledge in his areas of particular interest, including languages, science fiction, and the study of squirrels. *Id.*

410. Recently, an activist with Asperger's observed that, while people with diagnoses of autism and Asperger's may have problems with social interaction, "[W]e are not incapable of it and can succeed and thrive on our own terms when supported, accepted, and included for who we are."

While deafness and autism have been the focus of the lion's share of discussions of people wishing not to have their conditions eliminated or "cured," some individuals with various other kinds of impairments have voiced similar sentiments. Examples include individuals with such conditions as vision impairments,[411] bipolar disease,[412] and Down syndrome,[413] and people who use wheelchairs.[414] An article about attorney and author, Harriet McBryde Johnson, one of the giants of disability advocacy, whose degenerative neuromuscular disease caused her to use a wheelchair, noted that "Johnson doesn't want to be cured. While she needs help to bathe and get dressed, she said she can't imagine living any other way and thinks it would be weird and lonely to do these things alone," and quoted her as declaring that "[m]ost people see disability as a tragedy or a misfortune—something to be scared of. It can be those things, but not necessarily. It is much more complicated and interesting than that. . . . "Our lives are as rich and full as any other . . . ."[415]

The examples discussed are not necessarily representative of the views of most people having the specific conditions. They do serve to illustrate, however, that there can be no automatic assumption that each individual with a disability would welcome the chance to become

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Andrew Solomon, *The Autism Rights Movement*, NEW YORKER MAGAZINE, May 25, 2008 (quoting Ari Ne'eman), *available at* http://nymag.com/news/features/47225/.

411. For a thoughtful examination of the questions raised by new genetic therapy that might reverse her progressive sight loss, see Rebecca Atkinson, *Do I Want My Sight Back?*, THE GUARDIAN, July 17, 2007, *available at* http://lifeandhealth.guardian.co.uk/health/story/0,,2128104,00.html. Cf. Adam Stone, *The End of Deaf-Blindness*, DEAFDC.COM BLOG, Mar. 3, 2008 ("Unlike the majority of Deaf people who refuse any treatments for their deafness, I have a hunch that most people with Usher are definitely going to take advantage of sight-saving and sight-restoring treatments as soon as they become available."), *available at* http://www.deafdc.com/blog/adam-stone/2008-03-03/the-end-of-deaf-blindness/.

412. *See, e.g.*, Jeremiah Horrigan, *To Those Who Are Bipolar, It Isn't a Disease—It's a Gift*, TIMES HERALD-RECORD, June 05, 2005 (describing the perspective of a man with bipolar condition as follows: "He has a treatable disease. There's a vast pharmacopeia of treatments available to him. He can be cured. But [he] doesn't want to be cured, at least not in the all-or-nothing way science holds out for him. He feels he has a gift. A dangerous gift, to be sure, one that needs what he calls cultivation and care."), *available at* http://archive.recordonline.com/archive/2005/06/05/jhpolorw.htm.

413. A book dictated by two young men with Down syndrome provided a dramatic description of conflicting viewpoints about having the condition, as follows: "Mitchell: 'I wish I didn't have Down syndrome because I would be a regular person, a regular mainstream normal person. . . . I feel that . . . having Down syndrome, there's more to it than I expected. It was very difficult but . . . I was able to handle it very well.' Jason: 'I'm glad to have Down syndrome. I think it's a good thing to have for all people that are born with it. I don't think it's a handicap. It's a disability for what you're learning because you're learning slowly. It's not that bad.'" Jason Kingsley & Mitchell Levitz, COUNT US IN (1994), ch. 4, p. 26. Studies indicate that some 7 to 10% of expectant parents informed that their embryo has Down syndrome choose to give birth. Amy Harmon, *Prenatal Test Puts Down Syndrome in Hard Focus*, NEW YORK TIMES, May 9, 2007, *available at* http://www.nytimes.com/2007/05/09/us/09down.html?_r=1&pagewanted=print&oref=slogin; C. Mansfield, S. Hopfer, & T.M.Marteau, *Termination Rates After Prenatal Diagnosis Of Down Syndrome, Spina Bifida, Anencephaly, and Turner and Klinefelter Syndromes: A Systematic Literature Review*, PRENATAL DIAGNOSIS, vol. 19, no. 9 (Sept. 1999) at 808.

414. *See, e.g.*, Michelle Wright, *Smashing Stereotypes of Disabled People*, GREATREPORTER.COM, January 12, 2005 (quoting wheelchair user's declaration "I don't want to be cured, I want to be accepted."), *available at* http://greatreporter.com/mambo/content/view/326/14/.

415. K.J. Lang, *Speaker Says Disability is Not a Tragedy*, LA CROSSE TRIBUNE, April 14, 2008, *available at* http://www.lacrossetribune.com/articles/2008/04/14/news/z04speaker14.txt. Sadly, Harriet McBryde Johnson died on June 4, 2008.

nondisabled. Comprehension of this fact underscores the importance for the disability community of supporting individual preferences and self-determination, and resisting coercion and societal pressure. Recognition that "society has frequently made it clear that it believes [people with disabilities] would be better off dead, or better that they had not been born" and of "[t]he pressures upon people with disabilities to choose to end their lives, and the insidious appropriation by others of the right to make that choice for them" has led the National Council on Disability to oppose legalization of assisted suicide at the current stage of societal development.[416] The disability rights community has long embraced as a key aspect of full participation for people with disabilities the right of self-determination—of exercising full freedom of choice,[417] and this right certainly applies to the very basic right of deciding whether or not to retain one's disability, if such a choice is available.[418] With the likelihood increasing over time that such a choice will become a realistic option, it is reasonable to expect that people with disabilities will be subjected to growing pressure to exercise it to relieve society of what many might think of as the "problems" associated with disability. The disability rights community is going to need to get on top of these developments and try to ensure that any such choice is made freely, based on adequate information, without coercion or duress.

While decisions whether or not to cure, eliminate, or ameliorate a disabling, or potentially disabling condition, are, like other matters of

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416. National Council on Disability, *Assisted Suicide: A Disability Perspective*, March 24, 1997, *available at* http://www.ncd.gov/newsroom/publications/1997/suicide.htm; reissued June 9, 2005, http://www.ncd.gov/newsroom/publications/2005/pdf/assisted_suicide.pdf.

417. *See, e.g.*, Center for Independent Living, *Independent Living: The Right to Choose*, in DISABLED PEOPLE AS SECOND-CLASS CITIZENS 248 (Eisenberg, Griggins, & Duval, eds., 1982) ("full freedom of choice"); ACCOMMODATING THE SPECTRUM, *supra* note 11, at 83–84 (1983) ("self-choice," "right to self-determination," and "exercising full freedom of choice"); Gini Laurie, *Independent Living Programs*, 22 REHABILITATION GAZETTE 9–11 (1979) ("deciding one's own pattern of life—schedules, food, entertainment, vices, virtues, leisure, and friends. It is freedom to take risks and freedom to make mistakes"), quoted in ACCOMMODATING THE SPECTRUM, *supra* note 11, at 83; Gerben Dejong, *Independent Living: From Social Movement to Analytic Paradigm*, 60 ARCHIVES PHYSICAL MED. & REHABILITATION 435–46 (1979) ("[T]he mark of one's humanity is the right to choose for good or evil.") (quoted in ACCOMMODATING THE SPECTRUM, *supra* note 11, at 85); Joseph P. Shapiro, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT at 51–52 (1993) ("the control a disabled person ha[s] over his life") (discussing insights of independent living pioneer Ed Roberts).

418. The discussion of expected medical and technological advances in the subsection should not obscure the fact that the timetable for the real-life application of many such advances is uncertain, and many such "curative" procedures will arrive too late to make a difference for many of us. Indeed, some disability advocates have bridled at the futility of people waiting around for a "cure" that may never come instead of learning to live with one's impairments. This was one of the bases of criticism of the campaign for a cure for spinal cord injuries by the late actor Christopher Reeve, and particularly of his 2000 Super Bowl ad which contained a computer-simulated portrayal of Reeves getting out of his wheelchair and walking. *See, e.g.*, Charles Krauthammer, *Restoration, Reality and Christopher Reeve*, TIME MAGAZINE, Feb. 14, 2000 ("The false optimism Reeve is peddling is not just psychologically harmful, cruelly raising hopes. The harm is practical too. The newly paralyzed young might end up emulating Reeve, spending hours on end preparing their bodies to be ready to walk the day the miracle cure comes. . . . These kids should instead be spending those hours reading, studying and preparing themselves for the opportunities in the new world that high technology has for the first time in history made possible for the disabled. They can have jobs and lives and careers. But they'll need to work very hard at it. And they'll need to start with precisely the psychological acceptance of reality that Reeve is so determined to undermine."), *available at* http://www.time.com/time/magazine/article/0,9171,996064-2,00.html. Regarding the negative consequences of the "cure" perspective, see generally, Mary Johnson, MAKE THEM GO AWAY: CLINT EASTWOOD, CHRISTOPHER REED & THE CASE AGAINST DISABILITY RIGHTS, particularly at 128–133 (2003).

medical decision-making, generally considered to be questions of personal choice for legally competent individuals who have reached the age of majority,[419] questions of legal authority for such decision-making become a bit more complicated when the person making the decision is not the person who has or is at risk of having the condition, but is instead a parent in the position of making the decision for a child. Federal law authorizes grants to states and creates eligibility requirements, inter alia, to "prevent the withholding of medically indicated treatment from disabled infants with life-threatening conditions."[420] In the absence of a life-threatening emergency, the law has traditionally required parental consent before medical procedures can be performed on a child,[421] and accordingly generally honors parental refusals to consent to non-life-or-death treatments. Under their *parens patriae* power, states may override personal and parental decision-making authority in certain circumstances, as, for example, through laws requiring certain vaccinations[422] and prohibiting child labor.[423] The Supreme Court has recognized the authority of states to interfere with parental discretion when the exercise of such discretion may adversely affect the health of a minor.[424] While recognizing "broad parental authority over minor children," the Court has declared that "a state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized,"[425] and that parents' decision-making authority over their children may be contested or overridden "if it appears that the parental decision will jeopardize the health and safety of the child, or have a potential for significant social burdens."[426] Many state statutes include deprivation of medical treatment as a form of child neglect.[427]

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419. *See* 61 AM. JUR. 2D *Physicians, Surgeons, and Other Healers* § 157 (2008) ("[E]very individual of adult years and sound mind has a right to determine what shall be done with his own body and to control the course of his medical treatment. This right to determine may be set aside only in narrow circumstances, including those in which the patient presents a danger to himself or other members of society or engages in dangerous or potentially destructive conduct within an institution.") (footnotes omitted).

420. 42 U.S.C. § 5106a(b)(2)(B)(iii).

421. See 61 AM. JUR. 2D *Physicians, Surgeons, and Other Healers* § 160 (2008) ("[T]he law requires the consent of a parent to a surgical procedure on a child. However, a physician is not required to obtain consent before treating a child if an emergency exists and threatens the life of the child.") (footnotes omitted).

422. Jacobson v. Massachusetts, 197 U.S. 11, 26 (1905) (upholding constitutionality of a state law requiring smallpox vaccinations; the Court declared that "[t]here are manifold restraints to which every person is necessarily subject for the common good").

423. Prince v. Massachusetts, 321 U.S. 158 (1944).

424. *Id.* at 159–60 ("Parents may be free to become martyrs themselves. But it does not follow that they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.").

425. Parham v. J. R., 442 U.S. 584, 602, 603 (1979).

426. Wisconsin v. Yoder, 406 U.S. 205, 234 (1972).

427. *See, e.g.*, Utah Code Ann. § 78-3a-103(1)(u)(i)(D) (2008) (defining a neglected child as a minor whose guardian "fails or refuses to provide proper or necessary subsistence, education, or medical care, including surgery or psychiatric services . . . or any other care necessary for health, safety, morals, or well-being"); N.Y. Fam. Ct. Act § 1012(f)(i)(A) (McKinney [2008?]) (defining "neglected child" as one whose "condition has been impaired or is in imminent danger of becoming impaired" because of a parent's failure "to exercise a minimum degree of care . . . in supplying the child with adequate . . . medical, dental, optometrical, or surgical care"); Fla. Stat. Ann. § 39.01(43) (2007) ("'Neglect' occurs when a child is deprived of, or is allowed to be deprived of, necessary food, clothing, shelter, or medical treatment . . . .").

As options for correcting, eliminating, and lessening the effects of disabling conditions become more available, the question arises whether a parent's refusal to authorize such a procedure will come to be considered child neglect. The choice of the deaf mother in Michigan not to authorize cochlear implants was held, as discussed above, to be a matter of parental choice, since it was elective surgery and there was no serious medical emergency. Will courts apply such a hands-off policy[428] in other circumstances for corrective procedures that have become routine, and for which the consequences of non-treatment may be dramatic?

Embryonic selection and genetic modification raise similar and other questions. Countervailing concerns come into play and open up various policy directions for the future. On the one hand, an important strand of American law, arising out of such issues as miscegenation, sterilization, abortion, and contraceptive choices, holds that Americans have a right to make reproductive decisions free from state interference.[429] This perspective has led some scholars to propose that courts recognize the right to select the DNA of one's offspring as a legal and constitutional right.[430] On the other hand, society has, or may think it has, numerous reasons for wanting to avoid avoidable disabilities. The Human Fertilisation and Embryology legislation in the UK, discussed above, would make it illegal to choose an embryo with a substantial risk of having a disability when another embryo is available. Will such a rationale take hold in the United States? The author of one law review article observed: "The birth of a child with genetic disability used to be regarded as an acceptable risk of reproduction. Today, any diagnosable departure from genetic normality is increasingly viewed as the fault of doctors who failed to offer genetic testing, or of parents who refused

428. In various situations, courts have overridden parental medical decision-making in the interest of the child's health and well-being. For a survey and discussion of the case law, see John Alan Cohan, Judicial Enforcement of Lifesaving Treatment for Unwilling Patients, 39 Creighton L. Rev. 849, 860–872 (2006).

429. See Dov Fox, *Silver Spoons and Golden Genes: Genetic Engineering and the Egalitarian Ethos*, 33 AM. J.L. & MED. 567, 574–575 (2007).

430. *Id.*, citing Ronald Dworkin, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM 148, 158 (1994) (suggesting the Supreme Court presupposed principle of procreative autonomy in denying the state the specific power to criminalize contraception); John A. Robertson, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 38–39 (1994); John A. Robertson, *Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 S. CAL. L. REV. 939, 1040 (1986) (predicting that procreative liberty with minimal regulation will legally prevail); Cass R. Sunstein, *Is There a Constitutional Right to Clone?*, 53 HASTINGS LAW JOURNAL 987 (2002). (conceding that restrictions on cloning should survive constitutional scrutiny, but arguing that many of the rationales for banning cloning are based on ignorance and myth); Joshua Kleinfeld, *Tort Law and In Vitro Fertilization: The Need for Legal Recognition of "Procreative Injury*, 115 YALE L.J. 237, 237 (2005) (arguing that tort law should recognize and protect parents' procreative interests); Michael Malinowski, *Choosing the Genetic Makeup of Children: Our Eugenics Past-Present and Future?*, 36 CONN. L. REV. 125 (2003) (suggesting that laws governing human reproduction should not unduly burden the procreative liberty of prospective parents); John Harris, *Rights and Reproductive Choice*, in THE FUTURE OF HUMAN REPRODUCTION: ETHICS, CHOICE, AND REGULATION 5, 34 (John Harris & Søren Holm eds., 1998); Rosamund Rhodes, *Ethical Issues in Selecting Embryos*, 943 ANNALS N.Y. ACAD. SCI. 360, 367 (2001) (arguing that parents should be free to choose the sex of an embryo to implant); John Harris, *Clones, Genes and Human Rights*, in THE GENETIC REVOLUTION AND HUMAN RIGHTS 88–94 (Justine Burley ed., 1999 (arguing that parents should be free to clone existing people to produce new children).

such tests, or who proceeded with the pregnancy after receiving negative results."[431] In some states, the birth of a child with a genetic disorder can give rise to a suit against a physician, referred to as a "wrongful life" action, if an error in prenatal testing resulted in the parents not being informed about the disorder.[432] With the increasing use and acceptance of pre-natal testing, the pressures on parents not to give birth to a child whom they know will have a disability can only increase,[433] and it is surely not far-fetched to think that knowingly giving birth to a child with a disability could become a basis for child neglect charges or wrongful birth actions against parents on behalf of the child with a disability. In any event, these kinds of possibilities are ones that the disability rights community is going to have to prepare to take positions on and debate.

An obvious result both of pressures on parents and whatever legal constraints may emerge on producing embryos or giving birth to babies with disabilities is that the number of children born with some kinds of disabilities can be expected to decrease dramatically. On top of that, as more preventive, curative, restorative, and ameliorating techniques are developed, the numbers of people continuing to live with some disabilities will surely be reduced. Whether the numbers of people with disabilities who currently would die but will in the future be kept alive, will compensate for some portion of the reduction in disabilities can only be a matter of conjecture. Through the many types of medical and genetic advances discussed in this subsection, however, it seems inevitable that the incidence of some disabling conditions will be drastically cut. We need to begin to think about the implications for services, programs, and facilities of diminutions of targeted clientele.

Another concern related to use of medical procedures and technology is the extent to which the options of parents to impose severe measures on their children with disabilities ought to be restricted or regulated. American courts have set limits on the ability of parents to subject their children to some drastic, irreversible medical procedures, such as sexual sterilization.[434] Sometimes, however, parents of children with disabilities authorize other types of medical treatment for children with disabilities that most would consider outrageous or draconian if

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431. Dov Fox, *Silver Spoons and Golden Genes: Genetic Engineering and the Egalitarian Ethos*, 33 AM. J.L. & MED. 567, 606 (2007).

432. *See, e.g.*, Schirmer v. Mt. Auburn Obstetrics & Gynecologic Assoc., 108 Ohio St.3d 494, 844 N.E.2d 1160, 2006 Curlender v. Bio-Science Laboratories, 165 Cal. Rptr. 477 (Cal. Ct. App. 1980); Procanik v. Cillo, 478 A.2d 755 (N.J. 1984); and Harbeson v. Parke-Davis, 98 Wash. 2d 460, 656 P.2d 483 (1983).

433. "If prenatal testing becomes commonplace, and society does little to welcome or accommodate children with disabilities, then a couple who undergoes carrier screening is apt to be stigmatized for failing to act on the results, and thus feel compelled to terminate a pregnancy they would otherwise wish to continue. One American woman whose fetus was found to have a genetic mutation remarks: "I felt that others would be shocked to learn that we had produced an abnormal baby, that we would be outcasts." Dov Fox, *Silver Spoons and Golden Genes: Genetic Engineering and the Egalitarian Ethos*, 33 AM. J.L. & MED. 567, 606–607 (2007) (footnotes omitted).

434. *See, e.g.*, Ruby v. Massey, 452 F. Supp. 361, 366 (D. Conn. 1978) (parents do not have authority to give consent for sterilization of their children with disabilities); A. L. v. G. R. H., 325 N.E.2d 501, 502 (Ind. App. 1975) (common law does not invest mother of child with "borderline" I.Q. with authority to consent to his sterilization), cert. denied 425 U.S. 936 (1976); In re Terwilliger, 450 A.2d 1376, 1383 (Pa. Super. Ct. 1982) (absent statutory or judicial authorization, parents or guardians cannot consent to the sterilization of their children or wards).

applied to a child without a disability. A widely publicized, controversial incident involved the removal of the uterus and breast buds of a 6-year-old girl with brain damage, and the administration of high-dose hormone treatments to close growth plates and stop her growth at 4 feet 5 inches in height and 75 pounds in weight; the procedures were completed at a Seattle hospital at the request and with the consent of the girl's parents who referred to her as a "pillow angel."[435] The doctors involved wrote up the details of the case and the treatment regimen they administered that they acknowledged was "unconventional, and bound to be controversial" in an article published in the Archives of Pediatrics & Adolescent Medicine, in October 2006.[436]

Controversial it definitely was. A follow-up news report on the case noted a variety of criticisms: disability rights advocate Arlene Mayerson of the Disability Rights Education and Defense Fund was quoted as declaring, "Benevolence and good intentions have been among the biggest enemies of disabled people over the course of history. Many things done under a theory of benevolence were later seen as wrongheaded violations of human rights"; medical authorities pointed out that the doctors had administered an experimental treatment in the case and that there was no way to know the effect of high-dosage estrogen on such a young girl; others noted that "for brain-damaged children, development can come very slowly—so deciding when she's only six to change a child's body irreversibly can amount to a medical form of identity theft. Turning people into permanent children denies them whatever subtle therapeutic benefit comes from being seen as adults"; Julia Epstein, a disability activist and mother of a disabled child, commented that "they refer to her as the pillow angel. I know that's meant to be sweet term, but it's terminally infantilizing"; many commentators pointed out that instead of radical medical interventions, what is needed are much better supports, services, and management options to assist parents in the care of their children with disabilities.[437]

As it turned out, the treatment was not only "unconventional" and "controversial," it was illegal. An investigative report issued by the Washington Protection and Advocacy System in May 2007 found that the procedure that had been employed, particularly the removal of the girl's uterus, violated Washington state law.[438] The group's executive director issued a statement in which he declared, "Washington law specifically prohibits the sterilization of minors with developmental

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435. *See* Nancy Gibbs, *Pillow Angel Ethics*, TIME, Jan. 07, 2007, *available at* http://www.time.com/time/nation/article/0,8599,1574851,00.html; Nancy Gibbs, *Pillow Angel Ethics, Part 2*, TIME, Jan. 09, 2007, *available at* http://www.time.com/time/nation/article/0,8599,1575325,00.html; Amy Burkholder, *Disabled Girl's Parents Defend Growth-Stunting Treatment*, CNN, March 12, 2008, *available at* http://www.cnn.com/2008/HEALTH/conditions/03/12/pillow.angel/index.html.

436. Daniel F. Gunther & Douglas S. Diekema, *Attenuating Growth in Children with Profound Developmental Disability: A New Approach to an Old Dilemma*, ARCH. PEDIATR. & ADOLESC. MED., vol.160, 1013–1017 (2006).

437. Nancy Gibbs, *Pillow Angel Ethics, Part 2*, TIME, Jan. 09, 2007, *available at* http://www.time.com/time/nation/article/0,8599,1575325,00.html.

438. See, Amy Burkholder, *Report: "Pillow Angel" Surgery Broke Law*, TIME, May 8, 2007, *available at* http://www.cnn.com/2007/HEALTH/05/08/ashley.ruling/index.html.

disabilities without zealous advocacy on their behalf and court approval."[439] The hospital involved acknowledged its error in not seeking a court order before proceeding with the treatment, committed itself not to perform any other sterilization procedures, and also pledged to seek court approval for other procedures involved in its "growth attenuation therapy."[440]

Major lessons of the "pillow angel" case are that children with disabilities are not the property or playthings of parents, subject to whatever kinds of medical procedures the parents may desire, and that appropriate standards and procedures must be put in place to make sure that parental discretion does not stray beyond an acceptable range. Key ingredients of the protections that ought to apply in situations where drastic medical procedures are being considered are those identified in the Washington investigative group's report—zealous advocacy on behalf of the child and a requirement of advance court approval. Procedural protections are sometimes considered cumbersome, but, in the absence of real medical emergencies, they are our legal system's proven way to ensure that the best interests of the child are served and that objective, impartial decision-making is applied to determine whether extreme medical measures should be permitted. The disability rights community must advocate for laws and practices that provide such protections for children with disabilities. Another insight to be gained from the case is the need for a comprehensive and effective array of supportive services to assist parents in caring for and nurturing children with disabilities. Many disability organizations have advocated for people with disabilities to live at home rather than being forced into institutional facilities and nursing homes, and yet, all too often, inadequate support is available to allow families to succeed in providing a home environment that meets the needs of a child with a severe disability as well as the needs of other family members. It has become a cliché in our society that "it takes a village to raise a child"; it is likewise true that most families need help to successfully take care of and raise a child with a severe disability. Recognizing, as our laws do, that "disability is a natural part of the human experience,"[441] parents of children with disabilities should not be left alone, like Gary Cooper in the movie "High Noon," to grapple with the problem all alone while all others take cover, mumbling "Thank God it's not me." A high priority of the disability rights community must be to make the problems of parents of children with severe disabilities the problem of the whole society instead of the sole burden of the few.

The issues, of which only a smattering have been discussed here, raised for the future of disability rights by the mind-boggling advances that have been, are being, and will in the future be made in medicine and genetics are numerous, complex, and often controversial. It is critical that the disability rights movement grapples and comes to grips with

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439. *Id.*

440. *Id.*

441. 29 U.S.C. § 701(a)(3); 29 U.S.C. § 3001(a)(2); 42 U.S.C. § 15001(a)(1); 20 U.S.C. § 1400(c)(1).

such issues, and helps to shape the future of the law in this area, so we may reap, for people with physical and mental impairments, the great benefits and avoid the potential pitfalls associated with such advances.

3. Mechanical and Other Technologies

In addition to advances in communications and information technology, and in medical and genetic developments, the future will certainly feature innovations in other kinds of devices, machines, and systems. We can expect better ways of generating and transmitting power; better batteries and other ways of storing energy; more and better voice controls, eye controls, and other ultra-high tech control mechanisms (brain controls?); homes, offices, theaters, and vehicles that look after, pamper, and make life easy for their users; robots to do things that people can't or don't want to do; and a hard-to-imagine assortment of new appliances, gadgets and gizmos (Whatever happened to those flying cars we were led to expect by now?). Much of this new technology can be expected to have a major impact on the lives of Americans with disabilities. Using technology to make things easier will often mean easier for people with disabilities among others. But as in the discussion of communications and information technology, *supra*, unless the needs of those with physical and mental impairments are considered in the design and manufacture of these novel doohickeys and contraptions, the innovations may prove not helpful or even disadvantageous for those having such impairments. Talking cars or refrigerators, for example, may be totally useless for a person who cannot hear them. An otherwise helpful little robot may be bad news if it moves around silently and creates a dangerous obstacle for a person who is unable to see it.[442] It is conceivable that a fully supplied, self-sufficient, and self-contained house of the future may prove to be a counter-indicated hiding place or virtual prison for a person with agoraphobia, depression, or social phobia.[443]

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442. And it may be that the very use and application of technology may be problematic for some people. A few commentators have suggested that certain individuals have an aversion to technology or computers, referred to by such terms as, respectively, "technophobia" and "cyberphobia," that can rise to the level of a pathological mental condition. *See, e.g.*, MARK J. BROSNAN, TECHNOPHOBIA: THE PSYCHOLOGICAL IMPACT OF INFORMATION TECHNOLOGY (1998); M.J. Brosnan & S.J. Thorpe, *An Evaluation of Two Clinically-Derived Treatments for Technophobia*, COMPUTERS IN HUMAN BEHAVIOR, vol. 22, no. 6, pp. 1080–1095 (2006); S.J. Thorpe & M.J. Brosnan, *Does computer anxiety reach levels which conform to DSM IV criteria for specific phobia?*, COMPUTERS IN HUMAN BEHAVIOR, vol. 23, no.3, pp. 1258–1272 (2007); Shelley Widhalm, *Man Vs. Machine: Advancing Technology Feeds Fears About Control*, THE WASHINGTON TIMES, July 15, 2004 ("Technophobia, a generalized fear of technology, is not recognized in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders. The DSM, used by psychiatrists and psychologists, describes phobias as a type of anxiety. The response is one of terror, dread or panic when the feared object, situation or activity is encountered, the association says.").

443. *See, e.g.*, John McManamy, *The Sopranos: Depression, Isolation, and the Mafia Cure*, BIPOLARCONNECT.COM, May 08, 2007 ("Keep in mind that isolating is perhaps the most dangerous thing one can do in a state of severe depression. Isolation and depression literally feed off of one another, creating a dangerous and potentially deadly downward spiral."), *available at* http://www.healthcentral.com/bipolar/c/15/9317/sopranos-mafia-cure/; Allan Schwartz, *Depression Can Be Hazardous to Your Health*, PSYCHCENTRAL, August 30, 2006 ("This sets up a vicious cycle

An illuminating example of the advantages, disadvantages, and complexities associated with the impact of new and emerging technology on people with disabilities is provided by the two-wheeled, self-balancing electric vehicle unveiled in December 2001 that goes by the name of the Segway® Personal Transporter (PT).[444] A combination of microprocessors and gyroscopic sensors help to maintain the PT's vertical orientation as it moves, stops, or encounters changes in the slope of the terrain it travels over. Described by the company as a "two-wheeled, self-balancing, electric transportation device,"[445] it is manufactured by Segway Inc. of New Hampshire.

According to the Segway website, the device was an outgrowth of a project developed with the needs of wheelchair users in mind.[446] Once the PT was created, however, the company did not seek to promote it for customers with disabilities; a spokesperson for Segway was quoted as saying that sales to people with disabilities is "sort of like an unsought market for us at this point—a market we did not seek to retain or build, but it has come about on its own."[447] Segway's seeming indifference to marketing to those with disabilities is in fact based upon legal constraints.[448] Nonetheless, the "unsought market"—customers with disabilities—has proven to be significant. An owner of a Segway dealership in California has indicated that a third of its Segways sales are to people who need mobility assistance.[449] Quite a few persons with various disabilities, particularly those that affect walking more than standing, have found the PT to function very well as a mobility device.[450]

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in which isolation feeds depression, leading to anger and resulting in further isolation. . . . The sluggishness experienced in depression robs people of the desire to go out and enjoy social events. The tendency is to want to remain at home."), *available at* http://psychcentral.com/lib/2006/depression-can-be-hazardous-to-your-health?pp=0.

444. See, http://www.segway.com/about-segway/segway-milestones.php.

445. http://www.segway.com/about-segway/index.php.

446. http://www.segway.com/about-segway/who-we-are.php ("One day Dean Kamen saw a young man in a wheelchair struggling to get over a curb. He thought about it, and realized that the problem wasn't ineffective wheelchairs, it was that the world was built for people who could balance. So he and his team created the Independence IBOT™ Mobility System, a self-balancing mobility device that enables users to climb stairs and negotiate sand, rocks, and curbs.").

447. Rachel Metz, *Disabled Embrace Segway*, N.Y. TIMES, October 14, 2004 (quoting Segway spokeswoman Carla Vallone), *available at* http://www.nytimes.com/2004/10/14/technology/circuits/14segw.html.

448. When Dean Kamen, the inventor of the Segway PT, and his associates came up with the self-balancing technology used in the Segway, they were working on a project funded by the Johnson & Johnson company to develop the iBOT, a wheelchair that can go up stairs. Johnson & Johnson purchased the medical rights to the technology, and got FDA approval for the iBOT as a medical device, while Segway reserved rights for other commercial uses of the technology. Because Segway has not gone through the difficult approval process for certification of the PT as a medical device, it considers itself to be impeded legally from marketing directly to the demographic of people with disabilities. *See id.*; John Heilemann, *Reinventing the Wheel*, TIME, Dec. 02, 2001, *available at* http://www.time.com/time/business/article/0,8599,186660,00.html; Selena Simmons-Duffin, *Leaning Forward: The Segway's Emerging Role*, THE STANFORD DAILY, May 1, 2008, *available at* http://daily.stanford.edu/article/2008/5/1/leaningForwardTheSegwaysEmergingRole.

449. *See, e.g.*, Selena Simmons-Duffin, *Leaning Forward: The Segway's Emerging Role*, THE STANFORD DAILY, May 1, 2008 (quoting Steven Steinberg, one of the owners of Segway of Oakland), *available at* http://daily.stanford.edu/article/2008/5/1/leaningForwardTheSegwaysEmergingRole.

450. *See, e.g.*, Selena Simmons-Duffin, *Leaning Forward: The Segway's Emerging Role*, THE STANFORD DAILY, May 1, 2008, *available at* http://daily.stanford.edu/article/2008/5/1/leaningForwardTheSegwaysEmergingRole; Rachel Metz, *Disabled Embrace Segway*, N.Y. TIMES, October 14, 2004 (quoting Segway spokeswoman Carla

Promoting the use of Segway PTs by people with disabilities was one of the objectives that led to the founding of an organization named Disability Rights Advocates for Technology, or DRAFT, that seeks to "represent[] people with disabilities who refuse to be defined by their disability and whose passionate enthusiasm for participating in life's activities is supported by Universal Design and new and emerging technologies."[451] Through one of DRAFT's programs called "Segs4Vets," it raises money to provide Segways to U.S. military veterans with disabilities.[452] Another organization, ES Riders, donates PTs to kids with disabilities.[453] A group called "Road Access—Disability Alliance" operates a website at which it provides information, including tips, links to articles and essays, and state-by-state and disability-by-disability lists, in support of Segway use by people with mobility impairments.[454]

The popularity of PTs for persons with mobility impairments has prompted several federal government agencies, including the U.S. General Services Administration (GSA),[455] the Department of Transportation,[456] and the National Park Service[457] to adopt policies regarding their use. In the Federal Register of June 17, 2008, the DOJ published notices of proposed rulemaking (NPRMs) regarding some

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Vallone), *available at* http://www.nytimes.com/2004/10/14/technology/circuits/14segw.html; Scott Powers, *Disabled Advocates Push Disney World, Seaworld to Allow Segways: Disney and Seaworld Orlando Cite Visitor-Safety Concerns*, ORLANDO SENTINEL, October 13, 2007, *available at* http://www.aapd.com/News/transportation/071015os.htm.

451. http://www.draft.org/draft3/.

452. *See, e.g.*, http://www.draft.org/draft3/Segs4Vets/tabid/85/Default.aspx; Selena Simmons-Duffin, *Leaning Forward: The Segway's Emerging Role*, THE STANFORD DAILY, May 1, 2008, *available at* http://daily.stanford.edu/article/2008/5/1/leaningForwardTheSegwaysEmergingRole; Rachel Metz, *Disabled Embrace Segway*, N.Y. TIMES, October 14, 2004 (quoting Segway spokeswoman Carla Vallone), *available at* http://www.nytimes.com/2004/10/14/technology/circuits/14segw.html; Scott Powers, *Disabled Advocates Push Disney World, Seaworld to Allow Segways: Disney and Seaworld Orlando Cite Visitor-Safety Concerns*, ORLANDO SENTINEL, October 13, 2007, *available at* http://www.aapd.com/News/transportation/071015os.htm.

453. See, e.g., ES Riders Donates Segways to Kids, *available at* http://www.segwaytoday.net/SegwayToday/Home.html; Carolyn Dube, Lending Their Hands to "A Fabulous Organization," Three Bedford Residents Named to Easter Seals Board, Bedford Journal, Dec. 27, 2007, *available at* http://www.cabinet.com/apps/pbcs.dll/article?AID=/20071227/MILFORD01/328712748/-1/Milford01.

454. http://www.digitalthreads.com/segway/.

455. General Services Administration, Notice of Interim Policy, Use of Segways® and Similar Devices by Individuals with a Mobility Impairment in GSA-Controlled Federal Facilities, 73 Fed. Reg. 1223 (January 7, 2008) (permitting individuals with mobility impairments to use Segways and similar devices in federal buildings under GSA jurisdiction), *available at* http://edocket.access.gpo.gov/2008/E7-25592.htm; see also, GSA BULLETIN FMR 2008-B3 (December 17, 2007) (same), *available at* http://www.gsa.gov/graphics/ogp/SegwayFRNotice_Final121107.doc.

456. Department Of Transportation, Disability Law Guidance, *Use of "Segways" on Transportation Vehicles* (Sept. 1, 2005) (transportation providers must permit Segways on a bus or train, when it is being used as a mobility device by a person with a mobility-related disability), *available at* http://www.fta.dot.gov/civilrights/ada/civil_rights_3893.html.

457. Memorandum D24(2420) from Daniel N. Wenk, Director, National Park Service, to Regional and Associate Directors, Use of Segways by Person with Disabilities in the National Park System (May 24, 2007) (use of Segways and similar devices by individuals with mobility disabilities is generally permitted in National Parks, but park superintendents may determine where such devices would not be appropriate; strong consideration should be given to permitting such mobility devices in areas where motorized wheelchairs are allowed).

proposed amendments to its ADA Title II (state and local government entities) regulation[458] and its Title III (public accommodations and commercial facilities) regulation.[459] Among other issues, the NPRMs discuss proposals relating to power-driven mobility devices other than wheelchairs and mobility scooters; these alternatives include, particularly, Segways. In parallel sections and often identical language of the Title II and Title III NPRMs, the DOJ is seeking public comment about use by individuals with disabilities of "devices that are not designed primarily for use by individuals with disabilities, such as electronic personal assistive mobility devices (EPAMDs)."[460] The DOJ indicates that the "only available model" of an EPAMD it currently knows of is the Segway, but adds that the Department is aware that "individuals with mobility disabilities have utilized riding lawn mowers, golf cars, large wheelchairs with rubber tracks, gasoline-powered, two-wheeled scooters, and other devices for locomotion in pedestrian areas."[461] The DOJ articulated one of its specific concerns as follows:

> The fact that the device is not designed primarily for use by or marketed primarily to individuals with disabilities, nor used primarily by persons with disabilities, complicates the question of whether individuals with disabilities should be allowed to operate them in areas and facilities where other powered devices are not allowed.[462]

The DOJ announced that it

> intends to address these issues and proposes to adopt a policy that sets the parameters for when these devices must be accommodated. Toward that end, the Department proposes new definitions of the terms ''wheelchair''—which includes manually and power-driven wheelchairs and mobility scooters—and "other power-driven mobility device'' and accompanying regulatory text.[463]

Under the proposed rules, "wheelchair" would be defined as "a device designed solely for use by an individual with a mobility impairment for the primary purpose of locomotion in typical indoor and outdoor pedestrian areas. A wheelchair may be manually operated or power-driven.''[464] The term "other power-driven mobility device" would mean

458. Department of Justice, Notice of Proposed Rulemaking, *Nondiscrimination on the Basis of Disability in State and Local Government Services*, 73 Fed. Reg. 34,465 (June 17, 2008) (hereinafter "Title II NPRM"), *available at* http://www.ada.gov/NPRM2008/t2NPRM_federalreg.htm.

459. Department Of Justice, Notice of Proposed Rulemaking, *Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities*, 73 Fed. Reg. 34,508 (June 17, 2008) (hereinafter "Title III NPRM"), *available at* http://www.ada.gov/NPRM2008/t3NPRM_federalreg.htm.

460. Title II NPRM, *supra*, at 73 Fed. Reg. 34,473 and Title III NPRM, *supra*, at 73 Fed. Reg. 34,518.

461. *Id.*

462. *Id.*

463. Title II NPRM at 73 Fed. Reg. 34,474 and Title III NPRM at 73 Fed. Reg. 34,518.

464. Proposed new provision of 28 C.F.R. § 35.104, 73 Fed. Reg. 34,504; proposed new

the following:

> any of a large range of devices powered by batteries, fuel, or other engines—whether or not designed solely for use by individuals with mobility impairments—that are used by individuals with mobility impairments for the purpose of locomotion, including golf cars, bicycles, electronic personal assistance mobility devices (EPAMDs), or any mobility aid designed to operate in areas without defined pedestrian routes.[465]

In light of the DOJ's belief that "clarification on what the ADA requires is necessary at this juncture,"[466] the proposed regulatory text of the NPRMs sets out some rules regarding the use of mobility devices, including wheelchairs, scooters, manually powered mobility aids, and "other power-driven mobility devices"—the category that includes Segway PTs.[467] Regarding the latter, the proposed regulatory text would require state and local government entities and public accommodations to "make reasonable modifications in its policies, practices, and procedures to permit the use of other power-driven mobility devices by individuals with disabilities, unless the public accommodation can demonstrate that the use of the device is not reasonable or that its use will result in a fundamental alteration . . . ."[468] Entities subject to Title II or Title III are further directed to "establish policies to permit the use of other power-driven mobility devices by individuals with disabilities when it is reasonable" to permit an individual with a disability to participate in a service, program, or activity of a public entity, or to access the goods, services, facilities, or accommodations of a public accommodation.[469] The proposed provisions state that what is "reasonable" in relation to specific venues is to be determined based on:

> (1) The dimensions, weight, and operating speed of the mobility device in relation to a wheelchair;
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> (2) The risk of potential harm to others by the operation of the mobility device;
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> (3) The risk of harm to the environment or natural or cultural resources or conflict with Federal land management laws and regulations; and

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provision of 28 C.F.R. § 36.104, 73 Fed. Reg. 34,553.

465. Proposed new provision of 28 C.F.R. § 35.104, 73 Fed. Reg. 34,503; proposed new provision of 28 C.F.R. § 36.104, 73 Fed. Reg. 34,552.

466. Title II NPRM, at 73 Fed. Reg. 34,481 (commentary on § 35.137), and Title III NPRM, at 73 Fed. Reg. 34,540 (commentary on § 36.311).

467. Title II NPRM, at 73 Fed. Reg. 34,504 (28 C.F.R. § 35.137), and Title III NPRM, at 73 Fed. Reg. 34,556 (28 C.F.R. § 36.311).

468. Title II NPRM, at 73 Fed. Reg. 34,504 (28 C.F.R. § 35.137(b)), and Title III NPRM, at 73 Fed. Reg. 34,556 (28 C.F.R. § 36.311(b)).

469. Title II NPRM, at 73 Fed. Reg. 34,504 (28 C.F.R. § 35.137(c)), and Title III NPRM, at 73 Fed. Reg. 34,556 (28 C.F.R. § 36.311(c)).

> (4) The ability of the [public entity/public accommodation] to stow the mobility device when not in use, if requested by the user.[470]

The factors listed in the NPRMs for determining when the use of Segways (and other kinds of "other power-driven mobility devices") by persons with mobility impairments is reasonable make clear that the DOJ does not consider such use to be appropriate in all circumstances. In some of its commentary on the proposed rules, the Department notes that not everyone is gung-ho about Segway use in pedestrian areas by people with disabilities, and that includes even some people with disabilities: "While some individuals with disabilities support the use of unique mobility devices, other individuals with disabilities are concerned about their personal safety when others are using such devices."[471] The DOJ commented further that "[t]hose who question the use of EPAMDs in pedestrian areas argue that the speed, size, and operating features of the devices make them too dangerous to operate alongside pedestrians and wheelchair users."[472] In 2002, the American Council of the Blind took a position in opposition to the proliferating use of Segways: "In the end, the Segway may well have a good use and place in our environment, but it is clear . . . that insufficient attention is being paid to pedestrian safety and injuries and deaths are not the price we should be paying for innovation."[473] The organization passed a resolution opposing operation of Segways on sidewalks, based on the following findings:

> Such a device, being battery powered, generates very little noise;
>
> Both the speed of the device and its innate quietness raise serious pedestrian safety concerns, especially for people with visual impairments;
>
> These concerns have caused some pedestrian advocacy groups to strenuously oppose legislation permitting operation of the Segway on sidewalks; and
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> Although Segway is exploring methods to increase the noise made by the Segway and to reduce its speed, major safety concerns continue to exist.[474]

Such concerns have led San Francisco and La Mirada, California, to ban the use of Segways on sidewalks, and Healdsburg, California, to

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470. *Id.*

471. Title II NPRM, at 73 Fed. Reg. 34,473–34,474, and Title III NPRM, at 73 Fed. Reg. 34,518.

472. Title II NPRM, at 73 Fed. Reg. 34,473, and Title III NPRM, at 73 Fed. Reg. 34,518.

473. American Council of the Blind, Important Pedestrian Safety Alert!, http://www.acb.org/pedestrian/segway020806.html.

474. American Council of The Blind, Resolution 2002-04, July 5, 2002, http://www.acb.org/resolutions/res2002.html#RESOLUTION%202002-04.

prohibit their use on four square blocks in the central downtown area.[475] While forty-two states and the District of Columbia have passed laws authorizing use of Segways, six states (Colorado, Connecticut, Massachusetts, New York, North Dakota, and Wyoming) have no legislation permitting the use of Segways, making such use *de jure* illegal in those states.[476] There is some question about the vigor of enforcement against people who use Segways illegally, but enforcement certainly does occur at least sporadically, as witness a New York man who was stopped by police for operating his Segway in midtown Manhattan in 2006, and given a citation carrying a $95 fine.[477] In 2007, New York Governor Eliot Spitzer vetoed a bill that would have authorized the use of Segways on roads and highways outside of New York City; he argued that the Segway "is not intended or recommended for primary use on roads," and that such use would be unsafe.[478] The Washington Metropolitan Area Transit Authority (WMATA), which operates the D.C. Metro subway system, refused to allow a woman with a disability to take her Segway aboard the Metrorail in 2003; after some bad publicity, WMATA changed its policy and now allows registered persons with disabilities who use Segways as a mobility device to use them on the Metro.[479]

Apart from the policies of governmental entities, some private businesses have taken anti-Segway stances.[480] Several individuals with disabilities have alleged that a company called Simon Property Group, which owns nearly 300 shopping malls in 38 states, has prevented them from using their Segways at malls owned by the group.[481] In at least a

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475. Caroline J. Rodier, Susan A. Shaheen, & Linda Novick, *Improving Bay Area Rapid Transit (BART) District Connectivity and Access with the Segway Human Transporter and Other Low Speed Mobility Devices*, Institute of Transportation Studies, California Partners for Advanced Transit and Highways (PATH), University of California, Berkeley, at 35 (August 1, 2004), *available at* http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1630&context=its/path.

476. *See* Governors Highway Safety Association, *Segway Laws*, *available at* http://www.ghsa.org/html/stateinfo/laws/segway_laws.html. The website features a chart of all state laws on Segway use on roadways and sidewalks.

477. Robert F. Moore, *NYPD Segways into Future With Mod 2-Wheel Cruisers*, NEW YORK DAILY NEWS, May 17th 2007, *available at* http://www.nydailynews.com/news/2007/05/17/2007-05-17_nypd_segways_into_future_with_mod_2wheel-1.html.

478. *See* Danny Hakim, *Spitzer Says No to Segways on Roads, Among Other Actions on Legislation*, THE NEW YORK TIMES, August 16, 2007, *available at* http://cityroom.blogs.nytimes.com/2007/08/16/spitzer-says-no-to-segways-on-roads/.

479. *See Metro Bans Disabled Woman's Segway: Transit Officials Cite Safety Concerns*, NBC4.com, May 9, 2003, *available at* http://www.nbc4.com/news/2193078/detail.html; Washington Metropolitan Area Transit Authority, *Segways and other ABWCs on Metrorail*, *available at* http://www.wmata.com/metrorail/segways.cfm; Board of Directors of theWashington Metropolitan Area Transit Authority, Resolution to: *Modify WMATA Tariff to Adopt a Policy Regulating the Use of Automatic Balancing Wheeled Conveyances, Accept D.C. Circulator Transfers, and Provide Free Travel for Sheriffs*, adopted July 21, 2005, *available at* http://www.wmata.com/metrorail/awbc_policy.pdf.

480. *See, e.g.*, Joe Kollin, *Broward Condo Tries To Ban Segway Riders*, South Florida Sun-Sentinel.com, May 14, 2008, *available at* sun-sentinel.com/business/realestate/sfl-flbcondocol0514sbmay14,0,10704.column

481. *See, e.g.*, Shasta Clark, *Local Man Fighting Mall Over Right to Use Segway*, WATE.com, July 26, 2005, *available at* http://www.wate.com/Global/story.asp?s=3643674; Sarah Antonacci, *Springfield Mall Sued Over Segway Ban*, ROCKFORD REGISTER STAR, Gatehouse News Service, Oct. 9, 2007, *available at* http://www.rrstar.com/homepage/x1998364676; Michael Hooper, *Man Suing Mall Over Use of Segway*, THE (TOPEKA) CAPITAL-JOURNAL, March 13, 2008, *available*

couple of instances, these disputes have triggered the filing of suits in federal courts charging that barring the use of Segways by individuals with disabilities violates the ADA.[482] In another incident involving a Simon Property Group mall, a man with a disability who was using a Segway was told that he had to leave the mall because but refused to do so and continued shopping; thereafter, mall officials had a security guard follow him around and shadow his movements.[483] After the incident, the mall manager issued a statement declaring that "[w]hile we appreciate the usefulness of the Segway Human Transporter, we simply cannot compromise the overall safety of our shopping public at our mall."[484] Ironically, Simon Property Group makes extensive use of Segways for its malls' security staffs.[485] According to an item posted on the Segway website in 2007, in the face of the federal court suit growing out the incident at the White Oaks Mall in Springfield, Illinois, and the potential of class-action litigation, the Simon Property Group "decided to reverse their [sic] former no-Segway policy and allow disabled individuals to use personal Segways to get around the mall property."[486] The lawsuits are still pending, however.

The most widely publicized lawsuit regarding bans on Segway use is *Ault v. Walt Disney World Co.* brought by three people with disabilities—one with multiple sclerosis, another having Lou Gehrig's disease (amyotrophic lateral sclerosis), and a third who lost his foot in an accident—who brought an ADA action against Walt Disney World in November 2007.[487] In February 2004, Disney announced that it had banned Segway PTs from its theme parks, including Disneyworld, Disneyland, and California Adventure, stating the PTs had not been approved by the FDA as medical devices.[488] Disney officials also

at http://www.cjonline.com/stories/031308/bus_256553515.shtml.

482. Wallace v. Simon Property Group, Inc., No. 3:2007cv03123 (C.D. Ill. filed May 11, 2007), *available at* http://dockets.justia.com/docket/court-ilcdce/case_no-3:2007cv03123/case_id-41534/; McElroy v. Simon Property Group, Inc., No. 5:2008cv04041 (D. Kan. filed March 11, 2008), *available at* http://dockets.justia.com/docket/court-ksdce/case_no-5:2008cv04041/case_id-65458/.

483. Local Mall Orders Security Guard to Follow Disabled Man on Segway, WATE.com, October 13, 2005, *available at* http://www.wate.com/Global/story.asp?S=3974699.

484. *Id.*

485. *See Simon Property Group Increases Segway® PT Fleet for Security Patrols: Company Now Has Over 225 Units Deployed At More Than 125 Shopping Malls*, Reuters, May 12, 2008 ("Segway Inc. today announced that Simon Property Group has made a substantial purchase of additional Segway Personal Transporters (PTs)"; Simon already has "the largest deployment by any company in the shopping center industry."), *available at* http://www.reuters.com/article/pressRelease/idUS131422+12-May-2008+PRN20080512.

486. *Segway Use for Disabled OK'd in Illinois Mall*, SEGWAY TODAY, *available at* http://www.segwaytoday.net/segwaytoday/News/Entries/2007/10/9_Segway_Use_for_Disabled_OKd_in_Illinois_Mall.html.

487. Ault v. Walt Disney World Co., NO. 6:07-CV1785ORL-31KRS, 2008 WL 490581 (M.D. Fla. *motion to dismiss granted* Feb. 20, 2008), *motion to dismiss amended complaint denied*, No. 6:07-cv-1785-Orl-31KRS, 2008 WL 2047930 (M.D.Fla. May 13, 2008). *See also* Scott Powers and Jason Garcia, *Judge Dismisses Lawsuit Against Disney, Orlando Sentinel*, February 21, 2008, *available at* orlandosentinel.com/business/local/newsletter/orl-biznews-segway022108,0,4592460.story; Associated Press, *Disney World Sued Over Segway Ban; Disabled Plaintiffs Denied Use Two-Wheel Vehicles in Park, Lawsuit Says* , MSNBC.com, Nov. 10, 2007, *available at* http://www.msnbc.msn.com/id/21724833/.

488. *See* Associated Press, Anger at Disney over Segway Ban: Disabled Riders Feel Left Out at the Magic Kingdom, MSNBC.com, Feb. 9, 2004, *available at* http://www.msnbc.msn.com/id/4217573; Scott Powers, *Disabled Advocates Push Disney World,*

pointed to safety concerns if potentially untrained visitors ride Segways on crowded walkways where there may be toddlers, elderly persons and those with sight, hearing, mental, or mobility impairments; and they expressed concerns about the speed of Segways, much faster than most motorized wheelchairs, and that Segways may tumble over if the batteries run out.[489] "Our concern has continued to be the safety of all our guests and cast members," said a Disney spokesperson,[490] who also contended that "We're not turning people away. We're turning away a particular form of transportation."[491] Interestingly, Disney operates a schedule of guided Segway tours of Epcot, the Fort Wilderness campground, and the California Adventure Park for a fee, and has many of its employees use Segways in the parks.[492]

In the *Ault v. Walt Disney World Co.* case, the three named plaintiffs claimed, on behalf of themselves and other similarly situated persons, that Disney's ban on Segway use by customers at its resort theme parks violates Title III of the ADA.[493] In February 2008, the court granted Disney's motion to dismiss the complaint in the *Ault* case on the grounds that the plaintiffs, seeking injunctive relief, had not adequately alleged definitive plans to visit Disney World in the future or of "injury in fact" sufficient to provide grounds for such relief.[494] The court gave the plaintiffs leave to file an amended complaint.[495] On May 13, 2008,

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Seaworld to Allow Segways: Disney and Seaworld Orlando Cite Visitor-Safety Concerns, ORLANDO SENTINEL, October 13, 2007, *available at* http://www.aapd.com/News/transportation/071015os.htm. Sea World Orlando also bans PTs for safety reasons, indicating that its facility has winding, thin paths and walkways of varying grades and construction, which may be problematic for Segways; Orlando's other major theme park, Universal Orlando, does not have an explicit policy regarding Segway use but apparently allows customers with disabilities to use them on a case-by-case basis. *Id.*

489. *See* Scott Powers, *Disabled Advocates Push Disney World, Seaworld to Allow Segways: Disney and Seaworld Orlando Cite Visitor-Safety Concerns*, ORLANDO SENTINEL, October 13, 2007, *available at* http://www.aapd.com/News/transportation/071015os.htm.

490. *See id.*, quoting Disney World spokeswoman Kim Prunty.

491. *See* Associated Press, *Disabled Groups Push Disney, Seaworld to Allow Segways*, U.S.A. TODAY, Oct. 14, 2007 (quoting Disney World spokeswoman Kim Prunty), *available at* http://www.usatoday.com/travel/destinations/2007-10-14-segways_N.htm.

492. *See* Mark Goldhaber, *New Epcot Segway Tour*, Walt Disney World Park Update, February 16, 2004, *available at* http://www.mouseplanet.com/articles.php?art=wd040216mg; *Around The World At Epcot*, Walt Disney World Resort, *available at* http://disneyworld.disney.go.com/wdw/parks/tourDetail?id=AroundtheWorldEpcotTourPage; Cruzin' Disney's California Adventure® Park, Disneyland Resort, *available at* http://disneyland.disney.go.com/disneyland/en_US/parks/tours/detail?name=CruzinDisneysCaliforniaAdventureParkTourPage; Scott Powers, *Disabled Advocates Push Disney World, Seaworld to Allow Segways: Disney and Seaworld Orlando Cite Visitor-Safety Concerns*, ORLANDO SENTINEL, October 13, 2007, *available at* http://www.aapd.com/News/transportation/071015os.htm; Associated Press, *Disabled Groups Push Disney, Seaworld to Allow Segways*, U.S.A. TODAY, Oct. 14, 2007 (quoting Disney World spokeswoman Kim Prunty), *available at* http://www.usatoday.com/travel/destinations/2007-10-14-segways_N.htm.

493. Ault v. Walt Disney World Co., NO. 6:07-CV1785ORL-31KRS, 2008 WL 490581 at *1 (M.D. Fla. *motion to dismiss granted* Feb. 20, 2008), *motion to dismiss amended complaint denied*, No. 6:07-cv-1785-Orl-31KRS, 2008 WL 2047930 at *1 (M.D. Fla. May 13, 2008).

494. Ault v. Walt Disney World Co., NO. 6:07-CV1785ORL-31KRS, 2008 WL 490581 at *2–*3 (M.D. Fla. *motion to dismiss granted* Feb. 20, 2008). *See* Scott Powers and Jason Garcia, *Judge Dismisses Lawsuit Against Disney, Orlando Sentinel*, February 21, 2008, *available at* http://www.orlandosentinel.com/business/local/newsletter/orl-biznews-segway022108,0,4592460.story; Selena Simmons-Duffin, *Leaning Forward: The Segway's Emerging Role*, THE STANFORD DAILY, May 1, 2008, *available at* http://daily.stanford.edu/article/2008/5/1/leaningForwardTheSegwaysEmergingRole.

495. Ault v. Walt Disney World Co., NO. 6:07-CV1785ORL-31KRS, 2008 WL 490581 at

the court denied Disney's motion to dismiss the plaintiffs' amended complaint, finding that each of the named plaintiffs had alleged a specific intent to visit the Parks in the future sufficient to establish standing to sue, and that Disney's argument that the complaint failed to state a claim under the ADA because it did not allege facts that would demonstrate that the use of Segways is a reasonable and necessary accommodation raised factual issues not properly raised in a motion to dismiss.[496] On May 28, 2008, Disney filed an answer to the complaint in which it admitted that "due to safety and operational considerations it has a general rule prohibiting guests from bringing Segways or any other two-wheeled devices into The Magic Kingdom Park, Epcot, Disney-Hollywood Studios and Disney's Animal Kingdom, and that this rule applies to all guests"; and that "two-wheeled guest vehicles are not permitted on its transportation systems within the Walt Disney World Resort."[497] Otherwise, in its answer, Disney denied or alleged a lack of sufficient information regarding most of the allegations in the complaint and raised an array of affirmative defenses regarding the plaintiffs' claims.

The example of Segways epitomizes the complexities that can attend the emergence of new technology in relation to the needs of people with disabilities. It is not nearly so simple as new technology is automatically good and helpful. Here, the devices clearly serve as beneficial mobility devices for people with certain kinds of impairments, and yet some other people with disabilities believe that they may endanger their physical well-being in some circumstances. Many businesses and governmental entities welcome and facilitate the devices, but others restrict or even ban them. Categorizations such as "wheelchairs," "medical devices," "mobility devices," "vehicles," "transporters," "assistive devices," and others have made regulation of the use of such devices for mobility of people with disabilities a thorny terminological quagmire. The Medicare system, for example, has struggled with an antiquated categorization of wheelchairs as "durable medical devices" that are eligible for Medicare coverage only if they are used solely in the home; as the National Council on Disability has noted, "With the advent of powered wheelchairs, scooters, and manual wheelchairs designed for sport or other purposes, and with the emergence of new sources for supplying them (other than traditional hospital or outpatient facility), Medicare has been confronted with new challenges, which it has yet to resolve or deal with effectively."[498] In the

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*3 (M.D. Fla. *motion to dismiss granted* Feb. 20, 2008).

496. Ault v. Walt Disney World Co., No. 6:07-cv-1785-Orl-31KRS, 2008 WL 2047930 at *2 (M.D. Fla. *motion to dismiss amended complaint denied* May 13, 2008).

497. Ault v. Walt Disney World Co., No. 6:07-cv-1785-Orl-31KRS, Defendant's Answer to Plaintiffs' First Amended Complaint, 2008 WL 2242344, at pars. 14 & 15 (M.D. Fla. *answer filed* May 28, 2008).

498. National Council on Disability, *National Disability Policy: A Progress Report*, January 15, 2008, at 91, *available at* http://www.ncd.gov/newsroom/publications/2008/pdf/RevisedProgressReport.pdf. The NCD went on to say that Medicare's rule "has led to pernicious results," and added: "NCD believes that CMS's interpretation of the law in relation to powered mobility devices is not supportable. In light of the widespread efforts in all spheres of life to foster community participation and full inclusion for

end, the courts, legislatures, and regulatory agencies are being called upon to sort out the competing interests and devise workable equitable standards regarding these devices. It is critical to these processes that the disability community seek to arrive at as much consensus based on clear and nuanced understanding of the issues as it can muster.

Another technological advance that has potentially harmful consequences to people with certain disabilities is, perhaps surprisingly, the development of more efficient, quieter automobiles. As far back as 1996, the Association for Education and Rehabilitation of the Blind and Visually Impaired (AERBVI) expressed its concern about "an increasing number of quiet vehicles on public rights of way," noting that "persons who are blind rely on vehicular sounds to determine intersection configuration, traffic control, and an appropriate heading and safe time to cross streets"; the Association called for research to "determine alternative technologies and techniques" for addressing this problem.[499] In 2000, AERBVI supplemented its call for research on the quiet car problem by urging the National Highway Transportation Safety Administration "to hold vehicle manufacturers accountable for meeting minimum acoustic information standards determined to be necessary to assure the life safety of pedestrians who are blind and visually impaired."[500]

In 2003, the National Federation of the Blind (NFB) expressed "its deep concern that the safe and free travel of blind pedestrians and all pedestrians may be significantly and increasingly impaired by quiet vehicles, a problem that will grow as such vehicles become more prevalent," and requested that the National Highway Traffic Safety Administration initiate research "to investigate the effect of quiet cars on blind pedestrians and all pedestrians, with the aim of proposing safety-based solutions to the problem."[501] NFB sponsors a "Quiet Cars webpage" where it provides articles, copies of resolutions, links, and other information about the problems caused by quiet vehicles; while the site acknowledges that "[w]e all benefit from a less noisy environment," and "applaud[s] the efforts of the automotive industry to control noise pollution," it cautions that "[q]uiet vehicles are highly problematic for blind pedestrians, who depend on the sound emitted by cars in order to travel safely and independently."[502] NFB argues that "the industry must take measures to insure the safety of blind and sighted pedestrians," and expresses its belief that "vehicles can be designed to emit an inoffensive

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people with disabilities, NCD further believes that CMS's restrictive approach in this area is contrary to some of our most basic values." *Id.* at 92–93.

499. Association for Education and Rehabilitation of the Blind and Visually Impaired, Resolution 96-11, July 24, 1996, *available at* http://quietcars.nfb.org/1996%20AER%20resolution%20quiet%20cars.htm.

500. Association for Education and Rehabilitation of the Blind and Visually Impaired, Resolution 2000-06, July 19, 2000, *available at* http://aerbvi.org/downloads/8/0/2000-06%20minimum%20acoustic%20information%20standards.doc.

501. National Federation of the Blind, Resolution 2003-05, July 4, 2003, *available at* http://www.nfb.org/Images/nfb/Publications/bm/bm03/bm0309/bm030910.htm.

502. National Federation of the Blind, Committee on Automobile and Pedestrian Safety, *Quiet Cars*, http://quietcars.nfb.org/.

sound that will give pedestrians the information they need."[503]

NFB has undertaken a lobbying campaign to support legislation to address the "quiet vehicles" problem. On May 13, 2008, Maryland enacted a "Maryland Quiet Vehicles and Pedestrian Safety Task Force" law promoted by NFB; the statute establishes a task force to "study the effects of vehicle sound on pedestrian safety, and technology available to enhance safety of blind pedestrians" and to report its findings to the Maryland General Assembly by December 31, 2008.[504] An NFB official was quoted as saying that the organization viewed the Maryland law as "a good first step."[505] Legislation being considered in New York, Arizona, Hawaii, and Virginia would go further and impose minimum sound levels to alert pedestrians with vision impairments that a hybrid running on electric power is approaching.[506] NFB and other organizations have also taken their concerns to the federal legislature; in April 2008, legislation, titled the "Pedestrian Safety Enhancement Act of 2008," was introduced in the U.S. House of Representatives that would require the Secretary of Transportation to conduct a study to "determine the minimum level of sound emitted from a motor vehicle that is necessary to provide blind pedestrians with the information needed to make safe travel judgments," and to "determine the most practical means of assuring that blind and other pedestrians receive substantially similar information [about approaching hybrid vehicles] to information such pedestrians receive from sound emitted by vehicles that use internal combustion engines."[507] Within 90 days of completing the study, DOT would be required to promulgate "a motor vehicle safety standard"—the section heading refers to it as "a minimum sound requirement for motor vehicles"—that will establish a method for alerting blind and other pedestrians of the presence and operation of nearby motor vehicles . . . ."[508] The legislation has been referred to the House Committee on Energy and Commerce, and to its Subcommittee on Commerce, Trade and Consumer Protection.[509] On June 23, 2008, the

503. *Id.*

504. 2008 Md. Laws ch. 384 (Md. Senate Bill 276; Md. House Bill 1160). *See* Kai Jackson, *Md. House Passes Measure to Study Quiet Cars*, WJZ/Associated Press, Mar 24, 2008, *available at* http://wjz.com/local/cars.hybrid.quiet.2.683806.html; Anne Broache, *Blind Advocates Lobby for Noisier Hybrid Cars*, CNET News.com, February 19, 2008, *available at* http://news.cnet.com/8301-10784_3-9874568-7.html.

505. Anne Broache, *Blind Advocates Lobby for Noisier Hybrid Cars*, CNET News.com, February 19, 2008 (quoting Jim McCarthy, director of government affairs of NFB), *available at* http://news.cnet.com/8301-10784_3-9874568-7.html.

506. *See id.*; David Shepardson, *Quiet Hybrids May Be Danger to Visually Impaired: Advocates Want Sound Requirements for Cars in Order to Prevent Injuries*, DETROIT NEWS, June 20, 2008, *available at* http://www.detnews.com/apps/pbcs.dll/article?AID=/20080620/AUTO01/806200362.

507. H.R. 5734, 110th Cong. § 4 (2008). *See, e.g.*, Associated Press, *Congress to Introduce Bill to Protect Blind People From Hybrid Cars*, FOX News.com, April 08, 2008, *available at* http://www.foxnews.com/story/0,2933,348370,00.html; David Shepardson, *Quiet Hybrids May Be Danger to Visually Impaired: Advocates Want Sound Requirements for Cars in Order to Prevent Injuries*, DETROIT NEWS, June 20, 2008, *available at* http://www.detnews.com/apps/pbcs.dll/article?AID=/20080620/AUTO01/806200362; Ken Thomas, *Advocates for Blind Seek Street Safety, Want Louder Hybrids*, DAILY NEWS, June 23, 2008, *available at* http://www.dailynews.com/ci_9678800.

508. H.R. 5734, 110th Cong. § 5 (2008).

509. See http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HR05734:@@@L&summ2=m&.

National Highway Traffic Safety Administration held a daylong hearing in Washington, DC, to discuss the quiet car issue.[510]

The American Council of the Blind (ACB) has been litigating a different issue that would involve a change in the status quo but might or might not involve much new technology—accessibility of U.S. currency. Since 1983, ACB has been trying to convince U.S. Treasury officials to make paper money easier for people with vision impairments to use.[511] Unlike other countries, the United States prints bills that are identical in size, shape, and color regardless of denomination,[512] which makes being able to read the printed images on the bills essential in distinguishing one denomination of bill from another. From time to time, there has been interest in the U.S. House of Representatives in altering paper currency to make it easier for people with visual impairments to use,[513] but none of those initiatives precipitated any changes to U.S. currency. In 2002, ACB and some individual named plaintiffs with vision impairments filed suit in federal court against the Secretary of the Treasury, seeking declaratory and injunctive relief, contending that the failure of the Department of the Treasury to design and issue paper currency that is readily distinguishable to blind and visually impaired people violates Section 504 of the Rehabilitation Act,[514] which prohibits discrimination on the basis of disability in any program or activity conducted by a federal executive agency.[515] In 2004, the district court judge denied the defendants' motion to dismiss, ruling that the plaintiffs had stated a valid claim and that exhaustion of administrative remedies would be futile.[516] In 2006, the court again denied the Department of the Treasury's renewed motion to dismiss or for summary judgment, granted summary judgment to ACB to the extent of ruling and declaring that "the Treasury Department's failure to design, produce and issue paper currency that is readily distinguishable to blind and visually impaired individuals violates

510. Associated Press, *Hybrid Cars Too Quiet, Advocates for Blind Tell Highway Safety Officials*, FOX News, June 23, 2008, *available at* http://www.foxnews.com/story/0,2933,370462,00.html; Ken Thomas, *Advocates for Blind Seek Street Safety, Want Louder Hybrids*, DAILY NEWS, June 23, 2008, *available at* http://www.dailynews.com/ci_9678800.

511. *See* Roger Parloff, *New U.S. Bills: Blind Justice?*, FORTUNE MAGAZINE, Jan. 11, 2007, *available at* http://money.cnn.com/magazines/fortune/fortune_archive/2007/01/22/8397965/index.htm.

512. Debbi Wilgoren, *Court Agrees That Paper Money Discriminates Against the Blind*, WASHINGTON POST, May 21, 2008, at A17, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/05/20/AR2008052001117_pf.html.

513. *See, e.g.*, H.R. 6027, 96th Cong. (1979); H.R. 3656, 97th Cong. (1981); H.R. 2666, 98th Cong. (1983); H.R. 2160, 102d Cong. (1991); H.R. Res. 122, 105th Cong. (1997). The sponsorship and gist of these legislative initiatives is described in American Council of the Blind v. Paulson, 463 F. Supp. 2d 51, 55 (D.D.C. 2006).

514. 29 U.S.C. § 794.

515. American Council of the Blind v. O'Neill, No. 1:02cv00864 (D.D.C. filed May 3, 2002), American Council of the Blind v. Snow, 311 F. Supp. 2d 86 (D.D.C. 2004) (denying defendants' motion to dismiss), American Council of the Blind v. Paulson, 463 F. Supp. 2d 51 (D.D.C. 2006) (denying defendant's motion for summary judgment and partially granting ACB's motion for summary judgment). *See also* Roger Parloff, *New U.S. Bills: Blind Justice?*, FORTUNE MAGAZINE, Jan. 11, 2007, *available at* http://money.cnn.com/magazines/fortune/fortune_archive/2007/01/22/8397965/index.htm.

516. American Council of the Blind v. Snow, 311 F. Supp. 2d 86, 88–91 (D.D.C. 2004). The court did grant the defendants' motion to dismiss the Treasurer of the United States from the action, ruling that he "has no hand in the design or production of the currency." *Id.* at 90–91.

§ 504 of the Rehabilitation Act."[517]

In reaching this decision, the court stressed the importance of the "meaningful access" component of disability nondiscrimination—a major touchstone of disability rights law. The notion that there are circumstances in which the law should look beyond mere surface equality to address de facto discrimination has antecedents in other areas of civil rights law. In *Griggs v. Duke Power Co.,*[518] for example, the U.S. Supreme Court said of Title VII of the Civil Rights Act of 1964:

> Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. On the contrary, Congress has now required that the posture and condition of the job-seeker be taken into account. It has to resort again to the fable, provided that the vessel in which the milk is proffered be one all seekers can use.[519]

Similarly, in *Lau v. Nichols,*[520] the Court ruled that a school system's failure to provide bilingual education to students whose primary language was not English constituted discrimination prohibited by Title VI and declared that

> there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education. We know that those who do not understand English are certain to find their classroom experiences wholly incomprehensible and in no way meaningful.[521]

In regard to the prohibition of discrimination on the basis of disability established by Section 504 of the Rehabilitation Act of 1973, the Supreme Court, building upon the "meaningfulness" standard of prior rulings, declared in its decision in *Alexander v. Choate*[522] that the statute requires that qualified individuals with disabilities "must be provided with *meaningful access* to the benefit that the [covered entity] offers," and that "to assure *meaningful access*, reasonable accommodations in the [entity's] program or benefit may have to be made."[523] Subsequent to the *Alexander v. Choate* ruling, the "meaningful access" standard has been followed and applied by numerous courts in Section 504 and ADA cases,[524] heralded and elaborated on by disability rights commentators,[525]

517. American Council of the Blind v. Paulson, 463 F. Supp. 2d 51, 63 (D.D.C. 2006).

518. 401 U.S. 424 (1971).

519. *Id.* at 431.

520. 414 U.S. 563 (1974).

521. *Id.* at 566.

522. 469 U.S. 287 (1985).

523. *Id.* at 301(emphasis added).

524. *See, e.g.*, Mark H. v. Lemahieu, 513 F.3d 922, 938 (9th Cir. 2008) (Section 504 "prohibits actions that deny disabled individuals 'meaningful access'"); Henrietta D. v. Bloomberg, 331 F.3d 261, 291 (2d Cir. 2003) ("injunctive relief to remedy a violation of the ADA or

endorsed in legislative history,[526] and codified in statutory and regulatory policy provisions.[527] The brilliant, visionary disability rights activist Tim

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Rehabilitation Act is appropriate if it provides the injured plaintiff with 'meaningful access' to the programs or services to which the plaintiff is facially entitled"), cert. denied 541 U.S. 936 (2004); Hunsaker v. Contra Costa County, 149 F.3d 1041, 1043 (9th Cir. 1998) (Title II of ADA requires state to provide "meaningful access" to state services, programs, and activities for persons with disabilities); Rothschild v. Grottenthaler, 907 F.2d 286, 292 (2d Cir. 1990) (deaf parents entitled under Section 504 to "meaningful access" to activities offered to parents by school district), Three Rivers Center for Independent Living, Inc. v. Housing Authority of the City of Pittsburg, 382 F.3d 412, 427 (3d Cir. 2004) (Section 504 requires "federal fund grantees to offer 'meaningful access' to programs they administer."); Brennan v. Stewart, 834 F.2d 1248, 1261 (5th Cir. 1988) ("under the standard of *Alexander*, the Board's restriction violates § 504 if it denies 'otherwise qualified' handicapped individuals 'meaningful access'"); Ability Center of Toledo v. City of Sandusky, 385 F.3d 901, 907 (6th Cir. 2004) (Title II of ADA requires that public entities not deprive individuals with disabilities of "meaningful access" to benefits of services such entities provide); Randolph v. Rogers, 170 F.3d 850, 858 (8th Cir. 1999) ("the ADA and [Rehabilitation Act] require that otherwise qualified individuals receive 'meaningful access' to programs and activities"); Lee v. City of Los Angeles, 250 F.3d 668, 691 (9th Cir. 2001) (public entity's denial of "meaningful access" to its services, programs, or activities by reason of disability gives rise to ADA claim); Bonner v. Lewis, 857 F.2d 559, 561 (9th Cir. 1988) ("Section 504 guarantees 'meaningful access' to programs or activities receiving federal financial assistance"); Chaffin v. Kansas State Fair Board, 348 F.3d 850, 857 (10th Cir. 2003) ("[W]e have held that the ADA requires public entitles to provide disabled individuals '*meaningful access*' to their programs and services"), quoting Patton v. TIC United Corp., 77 F.3d 1235, 1246 (10th Cir. 1996) (emphasis added); Randolph v. Rodgers, 170 F.3d 850, 858 (8th Cir. 1999) (although deaf inmate could physically attend prison activities, he did not have "meaningful access" without sign language interpreter); Theriault v. Flynn, 162 F.3d 46, 48 (1st Cir. 1998) (characterizing ADA protection as "a guarantee of 'meaningful access' to government benefits and programs . . . which broadly means that public entities must take reasonable steps to ensure that individuals with disabilities can take advantage of such public undertakings"); Marisol A. v. Giuliani, 929 F. Supp. 662, 685 (S.D.N.Y. 1996) (under ADA and Rehabilitation Act, "disabled individual is entitled to meaningful access to the benefits and services provided by a public agency or an agency receiving federal funds. Access alone, despite defendants' arguments to the contrary, is insufficient."), motion to certify allowed 1996 WL 419887 (S.D.N.Y. 1996), motion denied 104 F.3d 524 (2d Cir. 1997), certiorari denied 520 U.S. 1211, order affirmed 126 F.3d 372 (2d Cir. 1997); Galusha v. New York State Dept. of Environmental Conservation, 27 F. Supp. 2d 117, 123 (N.D.N.Y. 1998) ("meaningful access" standard applicable to ADA claim challenging restrictions on motorized vehicle use by individuals with disabilities in certain areas of state park).

525. *See, e.g.*, Cary LaCheen, *Using Title II of the Americans with Disabilities Act on Behalf of Clients in TANF Programs,* 8 GEO. J. ON POVERTY L. & POL'Y 1, 50, 103, 104, 112, 121, 154, 166, 209–210 (2001); Robert Silverstein, *Emerging Disability Policy Framework: A Guidepost for Analyzing Public Policy*, 85 IOWA L. REV. 1691, 1722–1725, 1749 (2000) ("meaningful opportunity," "genuine, effective, and meaningful treatment," "genuine, effective, and meaningful opportunity"). *See also* Note, *The Oregon Health Care Proposal and the Americans with Disabilities Act*, 106 HARV. L. REV. 1296, 1300–1301, 1305–1306 (1993).

526. The Senate ADA report states unequivocally that "[i]t is the Committee's intent that section 202 [the nondiscrimination requirement of Title II] and other sections of the legislation be interpreted consistent with Alexander v. Choate." S. Rep. No. 101-116, at 44 (1989) (citation omitted). See also, H.R. Rep. No. 101-485, pt. 2, at 84 (1990) ("it is also the Committee's intent that section 202 also be interpreted consistent with Alexander v. Choate) (citation omitted). *See also, e.g.*, S. Rep. No. 101-116 (1989) at 6 ("Discrimination also includes exclusion, or denial of benefits, services, or other opportunities that are as effective and meaningful as those provided to others."); 135 Cong. Rec. S4986 (daily ed. May 9, 1989) (statement of Sen. Harkin) ("Discrimination made illegal under the ADA includes . . . segregation, exclusion, or denial of benefits, services, or other opportunities that are as effective and meaningful as those provided to others"); 136 Cong. Rec. H2447 (daily ed. May 17, 1990) (statement of Rep. Miller) ("full and meaningful equality"); Hearings on H.R. 2273 and S. 933 Before the Subcomm. on Transportation and Hazardous Materials of the Comm. on Energy and Commerce, 101st Cong., 1st Sess. 1 (1989) (statement of Rep. Luken) ("[t]he premise of the bill is unassailable. Discrimination, whether produced by overt actions or thoughtless attitudes, produces segregation, exclusion, impoverishment, and denial of equal and meaningful opportunities"); 136 Cong. Rec. H2433 (daily ed. May 17, 1990) (statement of Rep. Luken) ("[d]iscrimination . . . produces segregation, exclusion, impoverishment, and denial of equal and meaningful opportunities").

527. In articulating the "meaningful access" standard, the Court in *Alexander v. Choate* was construing and applying the single sentence nondiscrimination mandate of Section 504—which provides that no qualified person with a disability "shall be . . . denied the benefits of, or be subjected to discrimination" under any covered program or activity. The ADA, in its Title II, applies

Cook was a strong promoter of the *Alexander v. Choate* "meaningful access," formulation (along with "integration" and aversion to the "undue burdens" defense), and would be pleased to see the extent to which the concept has become accepted as a key element of disability nondiscrimination law.[528]

In the American Council of the Blind lawsuit regarding accessibility of U.S. currency, the district court found that the parties' cross-motions for summary judgment raised "two core issues": "(1) whether blind and visually impaired plaintiffs have 'meaningful access' to U.S. currency, and (2) if not, whether the acts necessary to achieve meaningful access

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the Section 504 nondiscrimination mandate to all programs and activities of state and local government entities, regardless of whether they do or do not receive federal financial assistance. Manifestly, the "meaningful access" standard is applicable under Title II, a fact that is made clear in the committee reports. *See supra* note 504. In lieu of articulating a broad general requirement of providing meaningful access or opportunities, the statutory language, regulations, and regulatory guidance under Section 504 and the ADA establish the several component standards by which it is to be achieved. Thus, the Section 504 regulations, ADA Title II and III regulations, and statutory provisions of Title III contain very similar provisions making it a prohibited act of discrimination on the basis of disability to provide a person with a disability an opportunity to participate or to receive benefits, services, or other things a covered entity provides that is (1) not equal to that afforded to others, (2) not as effective as that provided to others, or (3) that is unnecessarily different from those provided to others. *See* 45 C.F.R. § 84.4(b)(1) (HHS Section 504 regulation); 28 C.F.R. § 41.51(b)(1) (DOJ Section 504 coordination regulation); 28 C.F.R. § 35.130(b)(1) (DOJ ADA Title II regulation); 28 C.F.R. §§ 36.202(b) & (c) (DOJ ADA Title III regulation); 42 U.S.C. §§ 12182(b)(1)(A)(ii), (iii), & (B) (ADA Title III).

In regulatory guidance documents, federal agencies have been more likely to use the *Alexander v. Choate* "meaningful access" or similar shorthand expressions. Policy Guidance promulgated by the Office for Civil Rights of the Department of Health and Human Services regarding the application of disability nondiscrimination requirements to the administration of the TANF (Temporary Assistance for Needy Families) program is quite clear and explicit in this connection. See Department of Health and Human Services, Office for Civil Rights, *Prohibition Against Discrimination on the Basis of Disability in the Administration of TANF (Temporary Assistance for Needy Families)*, January 2001, *available at* http://www.hhs.gov/ocr/prohibition.html. In a part B of the Guidance headed "Legal Authority," a subsection titled "The Disability Policy Framework" provides: "Two concepts central to Section 504 and Title II of the ADA are of particular importance to administration of TANF programs in a manner that ensures equality of opportunity for individuals with disabilities. These concepts are: (1) individualized treatment; and (2) effective and meaningful opportunity." The Guidance elaborates that "individuals with disabilities must be afforded the opportunity to benefit from TANF programs that is as effective as the opportunity the TANF agency affords to individuals who do not have disabilities, and must also be afforded "meaningful access" to TANF programs." *Id.* The General Services Administration proclaims that "GSA is committed to providing meaningful access for individuals with disabilities . . . ." General Services Administration, *Key to Accessing Federally Conducted Programs and Activities (FCPA) Course*, *available at* http://64.233.169.104/search?q=cache:6MGOAaOmttgJ:www.gsa.gov/gsa/cm_attachments/GSA_DOCUMENT/The%2520Key%2520to%2520Access%2520Course_R2Z-i-r_0Z5RDZ-i34K-pR.ppt+meaningful+access+regulations+disability&hl=en&ct=clnk&cd=58&gl=us. *See also* Oregon Dept. of Human Services, *Non-Discrimination on the Basis of Disability for Programs, Services and* Activities, Policy No. DHS-010-005, Feb. 01, 2006 ("Title II of the ADA covers all activities of state and local government, regardless of the government entity's size or whether it receives federal funding. Title II requires that state and local governments give people with disabilities meaningful opportunity to benefit from all of their programs, services and activities. This requires that services provided to clients with disabilities must be as effective as those which are provided to persons without disabilities."), *available at* http://www.dhs.state.or.us/policy/admin/exec/010_005.htm.

528. *See, e.g.*, Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 TEMP. L. REV. 393, 396 n.23, 418, 424, 425, 426–429, 459, 466, 467 (1991) ("meaningful access," "effective and meaningful," "meaningful participation," "meaningful equality," "meaningful, integrated participation," "effective and meaningful opportunity"); Timothy M. Cook, *Scope of the Right to Meaningful Access and the Defense of Undue Burdens Under Disability Civil Rights Law*, 20 LOY. L. REV.1471 (1987).

would impose an 'undue burden' on the government."[529] In considering these issues, the court reviewed evidence regarding currency practices of other countries and found that, of the countries that issue paper currency, only the United States prints bills that are identical in size and color in all their denominations; a large majority of the other issuers vary bills in size according to denomination, and all the rest include at least some features that help people with visual impairments.[530] The court noted that "[m]ajor changes were made to U.S. currency in 1996 and 2004-for the first time since 1929," and suggested that the Department of the Treasury missed these opportunities "to introduce features into the design [to] make U.S. banknotes more readily usable by visually disabled people."[531]

Against this background, and strongly influenced by the fact that people with visual impairments are being forced to get help from sighted persons, the district court judge ruled that the Department of the Treasury was violating the "meaningful access" requirement:

> There was a time when disabled people had no choice but to ask for help-to rely on the "kindness of strangers." It was thought to be their lot. Blind people had to ask strangers to push elevator buttons for them. People in wheelchairs needed Boy Scouts to help them over curbs and up stairs. We have evolved, however, and Congress has made our evolution official, by enacting the Rehabilitation Act, whose stated purpose is "to empower individuals with disabilities to maximize employment, economic self-sufficiency, *independence*, and inclusion and integration into society." 29 U.S.C. § 701(b) (emphasis added). It can no longer be successfully argued that a blind person has "meaningful access" to currency if she cannot accurately identify paper money without assistance.[532]

As to the "undue burden" issue, the court recognized that "[a]ny change to the design of U.S. currency would undoubtedly require a substantial investment of labor, time, and money devoted to, among other things, research, consultation, planning, the creation of new plates, the purchase, installation, and operation of new equipment, and increased maintenance and production costs."[533] Yet, in the judge's opinion, even the government's own estimate of such costs would represent only a small fraction of the Bureau of Engraving and Printing's annual expenditures, and the burden could be even smaller if new access features were incorporated into a larger redesign, such as those that took place in 1996 or 2004.[534] Ultimately, the district court adjudged that "[p]laintiffs have demonstrated that they lack meaningful access to U.S.

529. American Council of the Blind v. Paulson, 463 F. Supp. 2d 51, 58 (D.D.C. 2006).
530. *Id.* at 54.
531. *Id.* at 56.
532. *Id.* at 59.
533. *Id.* at 62.
534. *Id.*

currency. They have put forth several potential accommodations that are reasonable on their face. The government has not sustained its burden of showing that any of them would be unduly burdensome to implement."[535] Accordingly, the court concluded that "the Treasury Department's failure to design and issue paper currency that is readily distinguishable to blind and visually impaired individuals violates § 504 of the Rehabilitation Act," and granted plaintiffs' prayer for a declaratory judgment.[536] The judged declined, however, to grant injunctive relief at that time, stating that she had "neither the expertise, nor, I believe, the power, to choose among the feasible alternatives, approve any specific design change, or otherwise to dictate to the Secretary of the Treasury how he can come into compliance with the law."[537] Instead, the court directed the clerk to schedule a status conference for the purpose of discussing a remedy and any additional proceedings that might be called for.[538]

Not all blind people were pleased by the court's decision in the currency case. After the decision was announced, in December 2006, the National Federation of the Blind (NFB) condemned the ruling as "dangerously misguided"; NFB's president, Dr. Marc Maurer, issued a statement in which he observed that "blind people transact business with paper money every day" and do not need "feel-good gimmicks that misinform the public about our capabilities."[539] A few months later, in February 2007, Dr. Maurer published an extensive article in the Braille Monitor in which he expanded upon his views about the lawsuit and described NFB's lengthy history of opposing it.[540] NFB and Dr. Maurer had an additional chance to express their displeasure at the litigation in May 2008,[541] when the United States Court of Appeals for the District of Columbia Circuit upheld the district judge's decision,[542] despite NFB's participation in the appeal on the side of the Department of the Treasury.[543]

On appeal, the Secretary of the Treasury contended that "various coping mechanisms" that enable people with visual impairments to use U.S. currency, the availability of portable currency readers to identify denominations, and credit cards as an alternative to cash, demonstrate that there is no denial of "meaningful access" to currency.[544]

535. *Id.*

536. *Id.*

537. *Id.*

538. *Id.*

539. *See* Roger Parloff, *New U.S. Bills: Blind Justice?*, FORTUNE MAGAZINE, Jan. 11, 2007, *available at* http://money.cnn.com/magazines/fortune/fortune_archive/2007/01/22/8397965/index.htm.

540. Marc Maurer, Is the Failure to Produce Tactile Currency Really a Matter of Discrimination?, Braille Monitor, February 2007, *available at* http://www.nfb.org/Images/nfb/Publications/bm/bm07/bm0702/bm070202.htm.

541. NFB, *National Federation of the Blind Denounces Ruling on Accessible Paper Money Lawsuit*, May 20, 2008, *available at* http://www.nfb.org/nfb/NewsBot.asp?MODE=VIEW&ID=325; NFB, *Paper Money Is in the News Again*, May 27, 2008, *available at* http://www.nfb.org/nfb/NewsBot.asp?MODE=VIEW&ID=329.

542. American Council of the Blind v. Paulson, 525 F.3d 1256 (D.C. Cir. 2008).

543. *Id.* at 1258.

544. *Id.* at 1259.

Alternatively, even if there was a denial of meaningful access, he argued that the district court had erred in regarding as acceptable options particular identified accommodations that would entail added costs and place burdens on the general public.[545] The Court of Appeals began its analysis of the case with a recognition that "Congress expressly intended the Rehabilitation Act to ensure that members of the disabled community could live independently and fully participate in society,"[546] and subsequently observed that the centrality to the Act of empowering people with disabilities "to engage in economic activity imbues the accessibility of currency with special importance. The visually impaired can hardly be 'empower[ed] . . . to maximize [their] employment, economic self-sufficiency, independence, and inclusion and integration into society,' if in everyday transactions they cannot use the paper currency that they possess without the assistance of third persons."[547] The appellate court repeatedly stressed the unacceptability of having to solicit such "assistance of third persons,"[548] and concluded that "[s]uch dependence is anathema to the stated purpose of the Rehabilitation Act, and places the visually impaired at a distinct disadvantage in two-way transactions involving paper currency because they can neither control the actions of those with whom they deal nor independently discern whether the paper currency they receive is correct."[549] The court rejected the Secretary of the Treasury's contention that "the visually impaired have not been denied meaningful access to U.S. paper currency in view of the absence of evidence of their being frequently defrauded," calling it "[a] somewhat astounding proposition on its face," that "implies that criminal victimization is a necessary predicate for the disabled to invoke the rights protected under section 504."[550] The court considered such a precondition inconsistent with Section 504's objective of ensuring "that qualified individuals receive services in a manner consistent with basic human dignity,"[551] and ruled that "the Rehabilitation Act's emphasis on independent living and self-sufficiency ensures that, for the disabled, the enjoyment of a public benefit is not contingent upon the cooperation of third persons."[552] The Court of Appeals declined to try to "define precisely the severity of the deprivation that a plaintiff must experience in accessing a program, benefit, or service to demonstrate a denial of meaningful access," but found that "[o]n this record, the Secretary is hard-pressed to overcome the Council's showing that the visually

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545. *Id.*

546. *Id.*, citing 29 U.S.C. § 701(b)(1).

547. *Id.* at 1269, quoting 29 U.S.C. § 701(b)(1).

548. *See id.* ("Where the basic task of independently evaluating the worth of currency in excess of 99 cents is difficult or impossible, the visually impaired are forever relegated to depend on 'the kindness of strangers' to shop for groceries, hire a taxi, or buy a newspaper or cup of coffee."); *id.* ("The Secretary's argument is analogous to contending that merely because the mobility impaired may be able either to rely on the assistance of strangers or to crawl on all fours in navigating architectural obstacles, they are not denied meaningful access to public buildings.") (citations omitted); *id.* at 1270 ("Instead they are compelled to rely on the honesty and carefulness of sighted individuals who often are on the opposite side of a financial transaction.").

549. *Id.* at 1269–1270 (citations omitted).

550. *Id.* at 1270.

551. *Id.*

552. *Id.* at 1269.

impaired are denied meaningful access to U.S. paper currency, and his attempts to do so are unpersuasive."[553]

On the other major issue, that of undue burden, the Secretary of the Treasury contended that the district court had "erred in holding categorically that none of the plaintiffs' proposals to modify the currency would impose an undue burden," and in having "improperly validated the most expensive accommodation."[554] The appellate court viewed these arguments as based on a misreading of the requisite burdens, as Section 504 "requires only that the least burdensome accommodation not be unduly burdensome. The Secretary has discretion to choose from a range of accommodations, and his failure to demonstrate that all accommodations found by the district court to be facially reasonable would pose an undue burden presents no occasion for us to address any particular accommodation."[555] The court also noted that the Secretary was swimming against the current of other nation's that had made accommodations in their currencies for people with visual impairments:

> [b]ecause other currency systems accommodate the needs of the visually impaired, the Secretary's burden in demonstrating that implementing an accommodation would be unduly burdensome is particularly heavy. The Secretary has not explained why U.S. paper currency is so different or the situation of the Bureau so unique that the costs associated with identified accommodations would constitute an undue burden.[556]

The Court of Appeals took notice of what it called the district court's "fulsome analysis of the deficiencies in the financial aspects of the Secretary's evidence" and found that it needed only to highlight some of the district's court's findings, including that the cost estimates submitted by the Bureau of Engraving and Printing "appear inflated."[557] Accordingly, the court agreed with the district court that the Secretary had not met his burden of proof on the undue burden issue.

Concluding that "the Council has demonstrated both the denial of meaningful access and the availability of facially reasonable accommodations that are feasible and efficacious, and that the Secretary has not demonstrated that implementation of every such accommodation would involve an undue burden," the Court of Appeals affirmed the grant of partial summary judgment on the Secretary's liability under Section 504, and remanded the case for the district court to determine appropriate injunctive relief.[558] The Court of Appeals decision generated a considerable amount of publicity, including some reports that mentioned the NFB position in opposition.[559]

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553. *Id.*
554. *Id.* at 1271, quoting Appellant's Br. at 34 and citing Appellant's Br. at 36.
555. *Id.* at 1271.
556. *Id.* at 1272.
557. *Id.* at 1271.
558. *Id.* at 1274.
559. See, e.g., Debbi Wilgoren, *Court Agrees That Paper Money Discriminates Against*

D. Someday (Soon?)—Ten Additional To-Do List Items for Today and Tomorrow

The preceding sections have suggested a number of significant issues and developments that the disability rights movement will need to address as the 21st Century proceeds. Certainly there are many more that could be examined, but an in-depth discussion of many or even a few more such issues would make this article even more unmanageably lengthy than it has already become. At the same time, it seems unsatisfactory not at least to mention some of the very important additional matters that we need to keep on our radar screens, and to put our energies into now and in coming months and years. Accordingly, this section identifies, in very abridged form, some additional, significant disability rights legal agenda items, with a minimum of, if any, description and elaboration. Most of these are things that we, our government, and our society could and ought to have made sure to accomplish before now, and so they are already overdue, many of them long past due. The biggest deficit of providing such a sample of unresolved problems and to-date-unmet needs is that it is woefully incomplete. Hopefully, a partial list of additional issues is better than none at all, and may serve as a springboard for pulling together a list of priority action items from the multitude of proposals, calls for action, and lines of attack proffered by disability advocacy groups, consumer organizations, and governmental entities. In preparing the sampling present here, I have relied very heavily on the reports of the National Council on Disability, which has played a prominent role in identifying issues and crystallizing a disability agenda within the federal government.[560]

> 1) Get the U.S. to ratify both the United Nations Convention on the Rights of Persons with Disabilities and the Organization of American States (OAS) Inter-American Convention for the Elimination of All Forms of

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the Blind, WASHINGTON POST, May 21, 2008, A17, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/05/20/AR2008052001117_pf.html; Jessica Dickler, *Federal Appeals Court Says Treasury Department Is Violating the Law by Keeping Dollars the Same Size and Feel*, CNNMoney.com, May 20, 2008, *available at* http://money.cnn.com/2008/05/20/news/money_blind.

560. In particular, I have drawn from the NCD's 2008 Progress Report on disability policy: National Council on Disability, *National Disability Policy: A Progress Report*, January 15, 2008, *available at* http://www.ncd.gov/newsroom/publications/2008/pdf/RevisedProgressReport.pdf. As I reflect on the numerous in-depth policy documents developed by the NCD and other organizations both within and without the government, I realize how simultaneously ambitious and inadequate is the listing presented in this section. It is even more humbling to compare it to the monumental array of position papers and reports that emerged from the White House Conference on Handicapped Individuals back in 1977, including a Final Report to the President and the Congress presenting 815 formal recommendations addressing 287 issues. *See* White House Conference on Handicapped Individuals, *Summary Final Report* (1978) (U.S. Dept. of Health, Education, and Welfare, Office of Human Development, Publication No. 22003).

Discrimination by Reason of Disability.[561]

2) Correct deficiencies with and inadequate enforcement of the Individuals with Disabilities Education Act.[562]

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561. *See, e.g.*, Michael Stein & Janet Lord, 13 TEX. J. ON C.L. & C.R. 167 (2008); NCD, *National Disability Policy: A Progress Report* (January 15, 2008), pp. 200–201 (discussing U.N. Convention); *supra* note 261 and accompanying text; Consortium for Citizens with Disabilities, Letter to Secretary of State Condoleezza Rice regarding International Disability Rights Convention, March 10, 2008, *available at* http://www.c-c-d.org/task_forces/Intl/CCD-Letter-on%20Int-Disability-Convention.pdf. For an interesting summary and critical look at the U.N. Convention, see Anna Lawson, *The United Nations Convention on the Rights of Persons with Disabilities: New Era or False Dawn?*, 34 SYRACUSE J. INT'L. L. & COM. 563 (2007) (part of Symposium: The United Nations Convention on the Rights of Persons with Disabilities).

562. In the NCD's 2000 report *Back to School on Civil Rights*, the Council reported that, "Every state was out of compliance with IDEA requirements to some degree; in the sampling of states studied, noncompliance persisted over many years." National Council on Disability, *Back to School on Civil Rights* (2000) at 7, *available at* http://www.ncd.gov/newsroom/publications/2000/pdf/backtoschool.pdf. Looking back at more than two decades of federal monitoring and enforcement of compliance with Part B of IDEA, the NCD found that "federal efforts to enforce the law over several Administrations have been inconsistent and ineffective." *Id.* at i (Letter of Transmittal). The NCD found further that the Department of Education had "made very limited use of its authority to impose enforcement sanctions such as withholding of funds or making referrals to the Department of Justice, despite persistent failures to ensure compliance in many states," with the result that "[n]otwithstanding federal monitoring reports documenting widespread noncompliance, enforcement of the law is the burden of parents who too often must invoke formal complaint procedures and due process hearings, including expensive and time-consuming litigation, to obtain the appropriate services and supports to which their children are entitled under the law." *Id.* at 7.

In 2008, the NCD issued a report on IDEA implementation and its interplay with the No Child Left Behind Act (NCLB), Pub. L. No. 107-110, 115 Stat. 1425 (2001) (codified as amended in scattered sections of 20 U.S.C.). NCD, *The No Child Left Behind Act and the Individuals with Disabilities Education Act: A Progress Report* (January 28, 2008), *available at* http://www.ncd.gov/newsroom/publications/2008/pdf/NoChildLeftBehind_IDEA_Progress_Report.pdf. The 2008 report presents a much rosier perspective of IDEA implementation, but appears to be pretty much an uncritical, unbalanced, fawning tribute to the No Child Left Behind Act. Symptomatic is a lengthy section of the report titled "Perspectives of Key Stakeholders," *id.* at 55–93, which is supposed to provide "an assessment of how NCLB, after three more years of implementation, has impacted students with disabilities," based "on interviews with disability policy, education, and advocacy leaders, and with students with disabilities and their parents," *id.* at 55 (Part III). The section is chock full of quotations from interviewees, identified only as "Administrator," "Official," "Policymaker," "Researcher," "Special Educator," "State Official," and "Advocate." Not a single quotation is from a person with a disability or a parent of a student with a disability. Not surprisingly, the recommendations in the report do not rock any boats; they are light on substance and very administrator-friendly (e.g., "1. Maintain high expectations for students with disabilities and continue to disaggregate outcome data by subgroups. 2. Develop the capacity of teachers to provide differentiated instruction and a more rigorous curriculum."). *Id.* at 95–97.

Many people with disabilities and parents of kids who receive or need special education services know that all is not rosy in the IDEA/NCLB realm. It is apparent that the serious problems identified in the NCD's Back to School on Civil Rights have not miraculously disappeared, despite all the hype over the NCLB. If anything, the problem of the power imbalance between parents and school officials has only worsened. Toward the beginning of this article I mentioned the distortion that has occurred with the IEP process that was intended to give parents an equal standing with teachers and school officials in designing an appropriate education program tailored to the special education needs of individual children. See text accompanying n.5 *supra*. In the 2004 law that amended IDEA, the so-called Individuals with Disabilities Education Improvement Act of 2004 (Pub. L. No. 108-446, 118 Stat. 2647), in addition to many beneficial amendments, several changes were made under the rubric of reducing paperwork. These included eliminating short-term objectives and benchmarks from IEPs (other than for students taking alternate assessments), establishing a 15-state paperwork reduction demonstration project, field-testing multi-year IEPs, and reducing to once a year the number of times a procedural safeguards notice is given to parents (instead of with each notification of an IEP meeting or a reevaluation). See, e.g., Robert Silverstein, *A User's Guide to the 2004 IDEA Reauthorization (P.L. 108-446 and the Conference Report)*, Consortium for Citizens With Disabilities, January 2005, at 27–28, 33, *available at* http://www.c-c-d.org/task_forces/education/IdeaUserGuide.pdf; Council for Exceptional Children, *The New IDEA,*

3) Take more concerted and vigorous action to eliminate inappropriate and unnecessary institutionalization of people with disabilities and to realize a comprehensive array of humane, independent-living-informed, community-based services and residential alternatives, including such measures as (a) developing and implementing a coherent national long-term services and supports public policy for people with disabilities[563]; (b) making the most of the Olmstead v. L.C. decision[564] by implementing and building on its integration requirement to prohibit unnecessary segregation of people receiving residential services from the states[565]; (c) enforcing the Civil Rights of Institutionalized Persons Act (CRIPA) more vigorously and comprehensively, and enhancing its legislative basis;[566] (d) expanding and generalizing the "money follows the person" approach[567] from a demonstration competitive grant program to a general operating principle aimed at facilitating deinstitutionalization and appropriate community placement of individuals with disabilities; (e) getting a Medicaid-Community-Attendant-Services-and-Supports-Act (MiCASSA)–type law enacted;[568]

CEC's Summary of Significant Issues, November 2004, at 15–16, *available at* http://www.cec.sped.org/AM/Template.cfm?Section=Advanced_Search§ion=Policy_and_Advocacy1&template=/CM/ContentDisplay.cfm&ContentFileID=723; Children's Defense Fund, *Summary: Improving Education for Homeless and Foster Children with Disabilities in the Individuals with Disabilities Education Improvement Act of 2004*, March 2005, *available at* http://www.childrensdefense.org/site/DocServer/idea_2004_summary.pdf?docID=558. To a large degree, these changes seem intended more at making life easier for school administrators by reducing accountability and disclosure of information than at improving the lot of students with special education needs and their parents. Student/parent empowerment was further diminished by the ruling of the Supreme Court in Schaffer v. Weast, 546 U.S. 49 (2005) that the student and parents bear the burden of proof in an administrative hearing challenging an IEP. If the IDEA is ever going to have the positive effects that were its objective, the IEP and due process hearing and appeals safeguards need to be fixed to give students with disabilities and their parents rights and status sufficient to allow them to hold their own in the process of determining appropriate and effective educational programs, and federal enforcement of IDEA requirements must be expanded and intensified.

563. *See*, NCD, The *State of 21st Century Long-Term Services and Supports: Financing and Systems Reform for Americans with Disabilities*, December 15, 2005, at p. 1 (Letter of Transmittal) & 14, *available at* http://www.ncd.gov/newsroom/publications/2005/longterm_services.htm; NCD, *National Disability Policy: A Progress Report* (January 15, 2008), pp.105–108, *available at* http://www.ncd.gov/newsroom/publications/2008/pdf/RevisedProgressReport.pdf.

564. Olmstead v. L. C., 527 U.S. 581 (1999).

565. *See, e.g.*, National Council on Disability, *Olmstead: Reclaiming Institutionalized Lives* (Full-Length On-Line Version), August 19, 2003, *available at* http://www.ncd.gov/newsroom/publications/2003/reclaimlives.htm; Steve Gold, *OVR and Olmstead—Information Bulletin #39*, STEVE GOLD'S TREASURED BITS OF INFORMATION, Sept. 19, 2002, *available at* http://www.stevegoldada.com/stevegoldada/archive.php?mode=A&id=58;&sort=D.

566. NCD, *National Disability Policy: A Progress Report* (January 15, 2008), pp. 57–58, 61 (Recommendation 2.10), *available at* http://www.ncd.gov/newsroom/publications/2008/pdf/RevisedProgressReport.pdf.

567. Deficit Reduction Act of 2005, § 6071, Pub. L. No. 109-171, 120 Stat. 4, 102–110 (Feb. 8, 2006), codified at 42 U.S.C. § 1396a NOTE. *See also* NCD, *National Disability Policy: A Progress Report* (January 15, 2008), pp. 86–87, 110–111, 116, 155–156, *available at* http://www.ncd.gov/newsroom/publications/2008/pdf/RevisedProgressReport.pdf.

568. See bills proposing the "Community Choice Act of 2007": S.799, 110th Cong. (2007); H.R.162, 110th Cong. (2007). See also 153 Cong. Rec. S2807 (daily ed. Mar. 7, 2007)

and (f) incorporating, as critical elements and preconditions of preadmission eligibility screening for possible placement of a person with a disability into a nursing facility, Intermediate Care Facility, or a mental health institution, of information and dialogue concerning health care services, attendant care, and other services the person can be provided in the community, and providing effective assistance in arranging such services promptly.[569]

4) Get sound Mental Health Parity legislation passed on a permanent basis.[570]

5) Take bold and substantial action to address the severely low employment rates of people with disabilities, including totally eliminating work disincentives in disability benefits programs, and developing innovative incentive programs for increasing the hiring and retention of workers with disabilities.[571]

6) Revise eligibility standards for Social Security and other disability benefits programs to eliminate total inability to work criteria, such as "unable to engage in any substantial gainful activity," and put in their place more realistic, flexible, and nuanced standards.[572]

(Statement of Sen. Harkin); NCD, *National Disability Policy: A Progress Report* (January 15, 2008), pp. 116 (Recommendation 5.2), *available at* http://www.ncd.gov/newsroom/publications/2008/pdf/RevisedProgressReport.pdf.

569. Steve Gold, *One Simple Proposal to Prevent "Unnecessary Institutionalization"—Information Bulletin #218*, STEVE GOLD'S TREASURED BITS OF INFORMATION, July 18, 2007, *available at* http://www.stevegoldada.com/stevegoldada/archive.php?mode=A&id=218;&sort=D; Steve Gold, *More on "One Simple Solution to Prevent Unnecessary Institutionalization"—Information Bulletin #227*, STEVE GOLD'S TREASURED BITS OF INFORMATION, Nov. 16, 2007, *available at* http://www.stevegoldada.com/stevegoldada/archive.php?mode=A&id=227;&sort=D.

570. As this article was in final editing for publication, the stated objective was substantially accomplished with the enactment of the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008, § 512 of the Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765 (October 3, 2008). Regarding the legislative situation preceding the 2008 law, see the Mental Health Parity Act of 1996, 29 U.S.C. § 1185a (expiring Dec. 31, 2008); S. 558, 110th Cong. (2007); H.R. 1424, 110th Cong. (2008); NCD, *National Disability Policy: A Progress Report* (January 15, 2008), pp. 97–98, 102 (Recommendation 4.10), *available at* http://www.ncd.gov/newsroom/publications/2008/pdf/RevisedProgressReport.pdf; Robert Pear, *House Approves Bill on Mental Health Parity*, N.Y. TIMES, March 6, 2008, *available at* http://www.nytimes.com/2008/03/06/washington/06health.html; Susan Jeffrey, *Mental Health Parity Bill Passes House, But Differs From Senate Bill*, MEDSCAPE, March 7, 2008, *available at* http://www.medscape.com/viewarticle/571164.

571. NCD, *National Disability Policy: A Progress Report* (January 15, 2008), pp. 131–132, 134, 139 (Recommendation 7.1), *available at* http://www.ncd.gov/newsroom/publications/2008/pdf/RevisedProgressReport.pdf.

572. In 2006, the NCD wrote:

> Our nation's current disability benefit programs are based on a principle that equates the presence of a significant disability and lack of substantial earnings with a complete inability to work. In the real world, however, conditions vary, and a disability may be partial or temporary. Some disabilities are cyclical, and other conditions, including mental health issues, have not been adequately studied in this

7) Require methods by which, and places at which, states and localities administer Temporary Assistance to Needy Families (TANF), Food Stamp programs, and other welfare-related and non-welfare programs be made accessible to and fully usable by people with disabilities, eliminating all architectural, transportation, communication, and other types of barriers that interfere with the ability of individuals with disabilities to participate in and benefit from such programs.[573]

8) Stimulate federal government agencies, either by new legal provisions or voluntarily, to apply tax provisions and other incentives to increase substantially the availability of accessible housing, and to eliminate barriers to homeownership facing Americans with disabilities.[574]

9) Convince the Department of Transportation and other relevant federal agencies to issue pending regulations and guidance and take other steps necessary to facilitate fully accessible and usable transportation systems that anticipate and accommodate the needs of passengers, including providing accessibility of airline websites, airport kiosks, and cruise ships, and nondiscriminatory, disability-user-friendly security screenings.[575]

> context to provide a good match for the method of determining disability and thus, eligibility for financial supports. People who might be able to participate in part-time or modified employment are discouraged from making such an attempt, because even partial employment could delay or even eliminate eligibility for Social Security disability benefits. Unsuccessful attempts to work are seen to carry a potentially devastating negative impact, including the loss of benefits and possibly, health care coverage.

National Council on Disability, *Issue Brief: The Basics of the National Council on Disability's Social Security Report*, Nov. 21, 2006, at 1, *available at* http://www.ncd.gov/newsroom/publications/2006/pdf/issue_brief.pdf. Similarly, see National Council on Disability, *The Social Security Administration's Efforts to Promote Employment for People with Disabilities: New Solutions for Old Problems*, November 30, 2005, at 45, *available at* http://www.ncd.gov/newsroom/publications/2005/ssa-promoteemployment.htm; generally, see id. at 41–54. See also Robert L. Burgdorf Jr., "Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability, 42 VILL. L. REV. 409, 489–505 (1997) and the authorities cited therein, suggesting at 501 n.482 that "the statutory eligibility standard for benefits should be framed in wording such as the following: '[I]s unlikely, in light of the claimant's physical or mental impairment and the reasonable availability of relevant work opportunities, to obtain paid employment in the near future.'"

573. *See* NCD, *National Disability Policy: A Progress Report* (January 15, 2008), p. 144, *available at* http://www.ncd.gov/newsroom/publications/2008/pdf/RevisedProgressReport.pdf.

574. *See* NCD, *National Disability Policy: A Progress Report* (January 15, 2008), pp. 149–165, *available at* http://www.ncd.gov/newsroom/publications/2008/pdf/RevisedProgressReport.pdf. In particular, the NCD recommended that "Congress amend the [The Low-Income Housing Tax Credit (I.R.C. § 42)] and other provisions of the [Internal Revenue Code] to require that all housing receiving tax credits, or all housing otherwise subsidized under the tax system through the use of tax-favored public activity bonds, be required to comply with the same accessibility standards currently applicable under federal civil rights laws to housing built or supported through direct federal subsidies." *Id.* at 163 (Recommendation 9.1).

575. NCD, *National Disability Policy: A Progress Report* (January 15, 2008), pp. 176 (guidelines for accommodating travelers who have hearing impairments), 177–178 (airline websites

> 10) Require the Federal Emergency Management Agency (FEMA); the Department of Homeland Security; other federal, state, and local security agencies; the Federal Communications Commission; law enforcement and other government officials; and emergency communication providers to ensure that communications of emergency information are available in forms accessible to people with various forms of disabilities;[576] that emergency evacuation and rescue procedures and plans address the needs of evacuees and rescuees with disabilities;[577] that accessibility assessments are incorporated into the development and testing of all new security systems and devices;[578] and that emergency and post-disaster facilities and temporary housing are accessible and appropriate for use by individuals with disabilities.[579]

V. CONCLUSION

The National Council on Disability chose the title *Promises to Keep* for its report on the first ten years of federal agency enforcement of the ADA.[580] Continuing, very respectfully, to draw on the same poem by Robert Frost, as I look at the numerous challenges that face us in the disability rights community, I can only conclude that we still have "miles to go."[581] In many ways we have made remarkable progress since the disability rights movement began to emerge in the late 1960s; we have participated in the passage of landmark pieces of nondiscrimination

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and airport kiosks), 179 (Recommendation 10.6) (cruise ship accessibility), 179 (Recommendation 10.8) (screening of deaf airline passengers), 180 (Recommendations 10.9 & 10.10) (airport kiosks and airline websites), *available at* http://www.ncd.gov/newsroom/publications/2008/pdf/RevisedProgressReport.pdf.

576. *See* NCD, *National Disability Policy: A Progress Report* (January 15, 2008), pp. 211–212, *available at* http://www.ncd.gov/newsroom/publications/2008/pdf/RevisedProgressReport.pdf; "In the Matter of WTTG-TV," FCC press release, Justice For All Archives, Article No. 2971 (November 21, 2006) (consent decree settling complaint against station for failing to make emergency information visually available to people with hearing impairments), *available at* http://www.jfanow.org/jfanow/index.php?mode=A&id=2971; Congressional Research Service, *Emergency Communications Legislation, 2002–2006: Implications for the 110th Congress*, CRS Order Code RL 33747 (December 14, 2006), *available at* http://assets.opencrs.com/rpts/RL33747_20080319.pdf.

577. *See, e.g.*, National Council on Disability, *Saving Lives: Including People with Disabilities in Emergency Planning*, April 15, 2005, *available at* http://www.ncd.gov/newsroom/publications/2005/saving_lives.htm

578. *See* NCD, *National Disability Policy: A Progress Report* (January 15, 2008), p. 60 (Recommendation 2.6), *available at* http://www.ncd.gov/newsroom/publications/2008/pdf/RevisedProgressReport.pdf.

579. *See* NCD, *National Disability Policy: A Progress Report* (January 15, 2008), pp. 208 (Recommendation 2.6), 212 (Recommendation 13.1), *available at* http://www.ncd.gov/newsroom/publications/2008/pdf/RevisedProgressReport.pdf; Brou v. Federal Emergency Management Agency, No. 06-0838 (E.D.La. Settlement Agreement Aug. 15, 2006) (federal class action lawsuit challenging accessibility problems with FEMA trailers), *available at* http://femaanswers.org/images/a/a6/Brou_v_fema_settlement_agmt.pdf.

580. NCD, PROMISES TO KEEP: A DECADE OF FEDERAL ENFORCEMENT OF THE AMERICANS WITH DISABILITIES ACT (2000).

581. Robert Frost, *Stopping by Woods on a Snowy Evening*, stanza 4, lines 3 & 4 (1923) ("And miles to go before I sleep, And miles to go before I sleep.").

legislation, have helped to transform for the better the architecture of America, and have seen much progress both in empowerment within our community and in public attitudes. This article documents, however, some of the things that remain to be done in the present and some others that will face us in the near or more distant future. Civil rights leaders and philosophers have expressed in various ways the fact that rights, freedom, and independence are not things that are given to people but must be fought for.[582] Regarding the civil rights struggles of African Americans, Martin Luther King, Jr., indicated the necessity of "agitation and revolt" that is "persistent" and "continual" and A. Philip Randolph cautioned that "the struggle must be continuous; for freedom is never a final fact, but a continuing evolving process to higher and higher levels of human social economic, political, and religious relationships."[583]

In the disability movement, we are sometimes not sure how much

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582. Frederick Douglass declared:

> The whole history of the progress of human liberty shows that all concessions yet made to her august claims, have been born of earnest struggle. . . . If there is no struggle there is no progress. Those who profess to favor freedom and yet deprecate agitation . . . want crops without plowing up the ground, they want rain without thunder and lightening. They want the ocean without the awful roar of its many waters.
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> This struggle may be a moral one, or it may be a physical one, and it may be both moral and physical, but it must be a struggle. Power concedes nothing without a demand. It never did and it never will.

Frederick Douglass, "The Significance of Emancipation in the West Indies" Speech, Canandaigua, New York, August 3, 1857, collected in pamphlet by author, *Two Speeches by Frederick Douglass: One on West India Emancipation, Delivered at Canandaigua, Aug. 4th, and the Other on the Dred Scott Decision, Delivered in New York, on the Occasion of the Anniversary of the American Abolition Society*, May, 1857 (New York 1857); quoted in THE FREDERICK DOUGLASS PAPERS. SERIES ONE: SPEECHES, DEBATES, AND INTERVIEWS, Volume 3: 1855–63 (John W. Blassingame, ed., Yale University Press 1985) p. 204. An earlier version of the quotation appeared in Frederick Douglass, *Letter to an Abolitionist Associate*, 1849, quoted in ORGANIZING FOR SOCIAL CHANGE: A MANDATE FOR ACTIVITY IN THE 1990S (K. Bobo, J. Kendall, and S. Max eds., Seven Locks Press 1991).

In a 1957 sermon at the Dexter Avenue Baptist Church in Montgomery Alabama, the Reverend Martin Luther King, Jr., stressed that "freedom is never given out, but it comes through the persistent and the continual agitation and revolt on the part of those who are caught in the system." Martin Luther King, Jr., *"The Birth of a New Nation," Sermon at Dexter Avenue Baptist Church*, April 7, 1957, in THE PAPERS OF MARTIN LUTHER KING, JR., Volume IV: Symbol of the Movement, *available at* http://stanford.edu/group/King/publications/papers/vol4/570407.003-The_Birth_of_a_New_Nation_Sermon_at_Dexter_Avenue_Baptist_Church.htm.

German philosopher Friedrich Nietzsche once wrote that "one does not acquire rights through gifts." Friedrich Nietzsche, SÄMTLICHE WERKE: KRITISCHE STUDIENAUSGABE, vol. 2, p. 242 (1878), reprinted in HUMAN, ALL-TOO-HUMAN, "Man in Society," aphorism 311, "Against the Confidential" (Giorgio Colli and Mazzino Montinari, eds., Berlin, 1980), quoted on PoemHunter.com at http://www.poemhunter.com/quotations/famous.asp?people=Friedrich%20Nietzsche&p=105.

Civil rights advocate and labor leader A. Philip Randolph stated that "[f]reedom is never granted; it is won. Justice is never given; it is exacted. Freedom and justice must be struggled for by the oppressed of all lands and races, and the struggle must be continuous; for freedom is never a final fact, but a continuing evolving process to higher and higher levels of human social economic, political, and religious relationships." Speech of A. Philip Randolph, 80th Birthday Dinner, Waldorf Astoria Hotel, New York, May 6. 1969, quoted by Jervis Anderson, A. PHILIP RANDOLPH, A BIOGRAPHICAL PORTRAIT, epigraph, p. vii (1972), *available at* http://www.bartleby.com/73/960.html.

583. *See* the quotations from King and Randolph in *supra* note 382.

militance is called for or appropriate. We know that at times we, individually and collectively, have been the beneficiaries of the compassion, charitable impulses, and even the discomfort and pity of others. As a direct beneficiary of the March of Dimes, I certainly would not disparage or ignore the contributions that have been and are being made by organizations that rely on the charitable contributions of those who want to "help" people with disabilities. Yet the disability activists who promoted the slogan "You Gave Us Your Dimes, Now We Want Our Rights"[584] in the late 1970s were onto something fundamental—the need for a shift to a civil rights point of view that considers persons with disabilities not as unfortunate, afflicted creatures needing services and help, but as equal citizens, individually varying across a spectrum of human abilities, whose overriding need is to be freed from discrimination and given a fair chance to participate fully in society. Jacobus tenBroek had anticipated and advocated that shift more than a decade earlier. If we can have the commitment, steadfastness, resolve, ingenuity, foresight, savvy, creativity, and good humor of the disability rights advocates who came before us,[585] we may continue to move forward toward a day when persons with disabilities can have the opportunity to achieve, as Professor tenBroek wished, "their potential for full participation as equals in the social and economic life of the community."[586]

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584. Terri Schultz, *The Handicapped, a Minority Demanding Its Rights*, THE NEW YORK TIMES (Feb. 13, 1977) at E8.

585. During my career, I have the good fortune to get to know many leading disability rights advocates, including such people as the following departed heroic powerhouses: Jack Achtenberg, Wade Blank, Burton Blatt, Elizabeth Boggs, Frank Bowe, Tim Cook, Justin Dart, Gunnar and Rosemary Dybwad, Eunice Fiorito, Ignacy Goldberg, Paul Hearne, Stan Herr, Tom Hodges, Harriet McBryde Johnson, Jim Lynch, Ron Mace, Durward McDaniel, Bill Mitchell, Lou Rigdon, Ed Roberts, Henry Viscardi, and Irv Zola.

586. Jacobus tenBroek & Floyd W. Matson, *The Disabled and the Law of Welfare*, 54 CAL. L. REV. 809, 815 (1966).

APPENDIX

CHART COMPARING CONGRESSIONAL DECLARATIONS ABOUT THE ADA DEFINITION OF DISABILITY AT ENACTMENT WITH THE SUPREME COURT'S INTERPRETATIONS

(From Professor Burgdorf's congressional testimony: ADA Restoration Act of 2007: Hearing Before the House Comm. on Education and Labor, 110th Cong., Serial No. 110-76 (2008), p. 47, *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_house_hearings&docid=f:40315.pdf, and (pp. 42–43) *at* http://edlabor.house.gov/testimony/2008-01-29-RobertBurgdorf.pdf)

CONGRESS SAID	THE COURTS NOW SAY
"COMPREHENSIVE PROHIBITION OF DISCRIMINATION ON THE BASIS OF DISABILITY"	**ELEMENTS OF DEFINITION "NEED TO BE INTERPRETED STRICTLY TO CREATE A DEMANDING STANDARD FOR QUALIFYING AS 'DISABLED'"**
"DISABILITY SHOULD BE ASSESSED WITHOUT REGARD TO THE AVAILABILITY OF MITIGATING MEASURES"	**MITIGATING MEASURES SHOULD BE CONSIDERED IN DETERMINING EXISTENCE OF A DISABILITY**
EMPLOYMENT IS A MAJOR LIFE ACTIVITY	**EMPLOYMENT MAY NOT BE A MAJOR LIFE ACTIVITY**
DENIAL OF A PARTICULAR JOB IS SUFFICIENT TO CONSTITUTE A SUBSTANTIAL LIMITATION IN EMPLOYMENT	**THERE MUST BE DENIAL OF A BROAD RANGE OR CLASS OF JOBS TO CONSTITUTE A SUBSTANTIAL LIMITATION**
FEDERAL AGENCIES ARE DIRECTED TO ISSUE REGULATIONS FOR CARRYING OUT ADA	**REGULATIONS INTERPRETING THE DEFINITION OF DISABILITY ARE OF DOUBTFUL VALIDITY**
"MAJOR LIFE ACTIVITIES OF SUCH INDIVIDUAL"	**"ACTIVITIES THAT ARE OF CENTRAL IMPORTANCE IN MOST PEOPLE'S DAILY LIVES"**
"SUBSTANTIALLY LIMITS"	**"PREVENTS OR SEVERELY RESTRICTS"**

CONGRESS SAID	THE COURTS NOW SAY
"REGARDED AS" PRONG APPLIES TO PERSON DISCRIMINATED AGAINST BASED ON DISABILITY EVEN IF PERSON DOES NOT HAVE SUBSTANTIALLY LIMITING CONDITION	**"REGARDED AS" PRONG SUBJECT TO FIRST PRONG LIMITATIONS, SUCH AS CONSIDERATION OF MITIGATING MEASURES AND REQUIREMENT THAT PERSON BE UNABLE TO PERFORM BROAD RANGE OR CLASS OF JOBS**
"REGARDED AS" PRONG APPLIES TO PERSON TREATED AS HAVING A DISABILITY	**"REGARDED AS" PRONG APPLIES ONLY WHEN EMPLOYER SHOWN TO "ENTERTAIN MISPERCEPTIONS ABOUT THE INDIVIDUAL" AND BELIEVES THE PERSON HAS A SUBSTANTIALLY LIMITING IMPAIRMENT**
NO MENTION OF DURATION-OF-IMPAIRMENT LIMITATION	**"IMPAIRMENT'S IMPACT MUST ALSO BE PERMANENT OR LONG TERM" TO CONSTITUTE A DISABILITY**
HIV, PARAPLEGIA, DEAFNESS, HARD OF HEARING/HEARING LOSS, LUNG DISEASE, BLINDNESS, MENTAL RETARDATION, ALCOHOLISM ARE DISABILITIES	**MAYBE SO, MAYBE NOT**