

# Keynote Address

## Justice for All?

### Stories about Americans with Disabilities and Their Civil Rights

*Peter Blanck\**

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\* Charles M. & Marion Kierscht Professor of Law, Professor of Public Health and of Psychology, University of Iowa, and Director of the Law, Health Policy, and Disability Center (LHPDC) at the University of Iowa College of Law; Ph.D., Harvard University; J.D., Stanford University. This research was in part funded by grants from the U.S. Department of Education, National Institute on Disability and Rehabilitation Research, for (1) the Rehabilitation Research and Training Center (RRTC) on Workforce Investment and Employment Policy for Persons with Disabilities, Grant No. H133B980042-99, (2) "IT Works," Grant No. H133A011803, (3) "Technology for Independence: A Community-Based Resource Center," Grant No. H133A021801, and (4) "Asset Accumulation and Tax Policy For People With Disabilities," Grant No. H133A031732; and by the Great Plains ADA and IT Center, the Nellie Ball Trust Research Fund, and a generous gift by Stan and Gail Richards to the LHPDC. The views herein reflect those of the author and not of any funding agency. For most helpful comments on this article, I thank the participants of the symposium, and Robert Clabby, Chen Song, Michael Stein, Helen Schartz, James Schmeling, Barbara Henderson, Claudia Center, Robert Fine, LeeAnn McCoy, William Myhill, and Michael Waterstone. For Steve Zimmerman and Dennis Coll.

1. For a review, see Peter Blanck & Leonard A. Sandler, *ADA Title III and the Internet: Technology and Civil Rights*, 24 MENTAL & PHYSICAL DISABILITY L. REP. 855, 855-58 (2000) (discussing the issues in this part).

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## I. INTRODUCTION

It is a special honor for me to address distinguished colleagues and friends of the Iowa Law School. I am pleased to be a part of this important Symposium sponsored by *The Journal of Gender, Race & Justice*. I thank the students, faculty and visitors for supporting this endeavor.

I have been blessed in many ways. One way has been the privilege to grow with people engaged in disability civil rights policy and law. During the years I have worked in this area—as researcher, lawyer, court-appointed expert, and advocate—I have witnessed a sea of change in the fabric of disability policy, anchored by passage of the Americans with Disabilities Act (ADA) in 1990.<sup>2</sup>

Yet, subsequent anniversary celebrations of the ADA's passage have been bittersweet for those of us who take stock of the law's impact on the lives of Americans with disabilities.<sup>3</sup> Certainly, we celebrate the ADA's transformation of our nation's physical environment and its prompting of employers to provide workplace accommodations that enable people to join and remain in the workforce.

But, in case after case, we see discouraging judicial interpretations of the ADA. We observe employer victories in well over ninety percent of employment discrimination cases and a string of U.S. Supreme Court decisions that narrow the law's breadth.<sup>4</sup> My colleagues—Michael Millender, Chen Song and Larry Logue—and I have used the history of American politics to study the evolution of the disability civil rights perspective. We could not have predicted, however, the stubborn resistance with which many of today's courts approach the rights and antidiscrimination principles at the core of the ADA.<sup>5</sup>

In prior studies, my colleagues and I attached significance to the fact that in the 1970s and 1980s, national policies directed at the civil rights of

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2. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2000).

3. I draw this section from Peter Blanck & Michael Millender, *Before Disability Civil Rights: Civil War Pensions and the Politics of Disability in America*, 52 ALA. L. REV. 1, 1–50 (2000).

4. See generally PETER BLANCK ET AL., *DISABILITY CIVIL RIGHTS LAW AND POLICY* (2003) (discussing cases narrowing the ADA's definition of persons with disabilities).

5. See, e.g., Larry M. Logue & Peter Blanck, "There is Nothing That Promotes Longevity Like a Pension:" *Public Policy and Mortality of Civil War Union Army Veterans*, 38 WAKE FOREST L. REV. 49 (2004) (discussing implications of governmental policy on the lives of persons with disabilities).

people with disabilities rapidly replaced a medical conception of disability, which structured policy for most of the twentieth century. This medical model had roots in the Civil War Pension program under which disabled Union Army veterans were awarded monetary pensions based on their incapacity to perform manual labor.<sup>6</sup> The medical model saw disability as an infirmity that precluded equal participation in society. It posited that government provide resources to cure the worthy disabled of their impairments.

The medical model that continued to evolve after the First World War (with passage of the national Vocational Rehabilitation Act<sup>7</sup>) and well into the 1960s (with Medicaid entitlement programs for the poor and disabled) placed people with disabilities in subordinate roles with government, physicians and rehabilitation professionals, who sought to help the disabled adjust to a society structured around the convenience and interests of the nondisabled. Because the medical model did not consider the physical and social environment as disabling, it countenanced segregation and economic marginalization. And because it focused on needs of the disabled, it did not recognize their civil rights. This legacy contributed to policies that structured assistance for the disabled as welfare and charity, with public attitudes in accord.<sup>8</sup>

Until passage of the ADA, contemporary employment, health care, and rehabilitation programs for persons with disabilities were modeled on such medicalized stereotypes about disability. The rights model that began to influence policy in the 1970s conceptualized people with disabilities as a minority group, entitled to the protections that emerged from the struggles of women and African-Americans for equality.<sup>9</sup> During this time, people with disabilities, both as individuals and in organized groups, asserted their rights to challenge stereotypes about dependency in education, housing, health care, transportation and employment.<sup>10</sup>

In the 1970s, national disability policy also began to integrate concepts of the independent living philosophy. Prominently, Title VII of the Rehabilitation Act of 1973<sup>11</sup> initiated funding for Centers for Independent Living (CILs). Not only did the CILs provide services *for* individuals with

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6. See generally Peter Blanck & Chen Song, *Civil War Pension Attorneys and Disability Politics*, 35 U. MICH. J.L. REFORM 137 (2001/2002) (reviewing pension scheme) [hereinafter Blanck & Song, *Pension Attorneys*]; Peter Blanck & Chen Song, *Civil War Pensions for African-American Union Army Veterans: Politics of Race and Disability in Late Nineteenth Century America*, 8 J. GENDER RACE & JUST. (forthcoming 2004) (documenting discrimination in the operation of the pension system).

7. 29 U.S.C. §§ 731–741 (2000) (repealed 1973, reenacted in the Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355).

8. Peter Blanck, *Civil War Pensions and Disability*, 62 OHIO ST. L.J. 109, 109–249 (2001).

9. BLANCK ET AL., *supra* note 4, § 1.2.

10. See JOSEPH P. SHAPIRO, *NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT* (1993) (reviewing the history of modern disability rights movement).

11. 29 U.S.C. §§ 796–796f (2000).

disabilities, but also they were to be operated *by* individuals with disabilities.<sup>12</sup> CILs have grown from ten centers in 1979 to over three hundred and fifty.<sup>13</sup>

The new disability policy framework,<sup>14</sup> grounded in equal rights, inclusion, empowerment and economic independence, fostered passage of federal and state laws from accessibility in voting and air travel, to independence in education and housing, and culminating with passage of the ADA.

In the ADA, Congress recognized that:

[H]istorically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem; . . . [and that] individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society . . . .<sup>15</sup>

Proposing disability as a social and cultural construct, as articulated by leading thinkers such as Justin Dart, Ed Roberts, Judy Heumann and Harlan Hahn,<sup>16</sup> the ADA rights model focuses on the laws and practices that isolate disabled persons. Government is to secure their equality by eliminating the physical, economic and social barriers that preclude equal involvement in society.

I have been fortunate to meet individuals and their families at the forefront of the disability civil rights movement. These individuals did not want to be parked in sheltered workshops; they wanted real jobs. They did not want to live on welfare checks; they wanted paychecks. And, they did not want to view the world as outsiders; they wanted to be participants.

This Article tells the stories of some of these Americans with disabilities in their quest for civil rights. The narratives are organized by the structure of the ADA, in regard to the areas of employment (Title I), integration (Title II) and accessibility (Title III). I conclude with some thoughts on the implications of these stories and their relevance to the evolution of ADA civil rights for individuals with disabilities.

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12. See generally Heather Ritchie & Peter Blanck, *The Promise of the Internet for Disability: A Study of On-line Services and Web Site Accessibility at Centers for Independent Living*, 21 BEHAV. SCI. & L. 5 (2003).

13. In 2002, there were 368 CILs, with approximately 207 satellite offices. *Id.* at 7 (citation omitted).

14. See generally Robert Silverstein, *Emerging Disability Policy Framework: A Guidepost for Analyzing Public Policy*, 85 IOWA L. REV. 1691 (2000) (describing the new disability policy framework).

15. 42 U.S.C. § 12101(a) (2000).

16. See, e.g., Harlan Hahn, *The Potential Impact of Disability Studies on Political Science (as well as vice-versa)*, 21 POL'Y STUD. J. 740, 741 (1993).

## II. DISABILITY CIVIL RIGHTS STORIES

In their book, *Rights of Inclusion: Law and Identity in the Life Stories of Americans with Disabilities*,<sup>17</sup> David Engel and Frank Munger comment that “passage of the ADA, . . . presented an extraordinary opportunity to explore from the very outset what rights actually did and how they mattered, or did not matter, to their intended beneficiaries.”<sup>18</sup> Although many writers, myself included, collect and cite aggregate data and national polls about individuals with disabilities, the stories in this article attempt to give faces to the statistics.<sup>19</sup> The stories illustrate how rights matter and how they may be understood through recounting personal experiences under the ADA.

## A. ADA Title I

My colleagues Eve Hill, Charles Siegal and Michael Waterstone comment that perhaps the most heavily litigated provisions of the ADA have been the law’s employment sections.<sup>20</sup> Title I prohibits discrimination in employment for qualified individuals with disabilities.<sup>21</sup> From application to termination, Title I imposes obligations on employers covered by the law.<sup>22</sup> Critics of Title I argue that limitations on pre-employment questioning of job applicants and the need, within reason, to make workplace accommodations are counter-intuitive to employers. But Congress did not draft these protections in a vacuum; the protections were a measured response to years of discrimination affecting applicants and employees with disabilities.

Because of the number of Title I cases reaching the Supreme Court, critics also conclude the statute is fatally ambiguous. Again, there is more underlying the outcomes of ADA disputes than legal wrangling over the law’s definitional terms. There are at least two forces behind the miserly interpretation of the law.

The first is the “new federalism” jurisprudence endorsed by the Rehnquist Supreme Court, with its general mantra against the passage by Congress of overly broad federal antidiscrimination laws. Under this philosophy, the Court has narrowed the ADA’s reach, as it has done to age and religion antidiscrimination laws, with gender-based antidiscrimination laws affected to a lesser extent.<sup>23</sup> The Court has concluded that Congress

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17. DAVID M. ENGEL & FRANK W. MUNGER, *RIGHTS OF INCLUSION: LAW AND IDENTITY IN THE LIFE STORIES OF AMERICANS WITH DISABILITIES* (2003).

18. *Id.* at ix.

19. *Id.* at x.

20. BLANCK ET AL., *supra* note 4, § 6-1.

21. 42 U.S.C. § 12112 (2000).

22. *Id.* §§ 12111–12117.

23. For a review of the Court’s general antipathy toward federal antidiscrimination law, *see*

exceeded its constitutional authority in limiting the states' sovereign immunity from civil rights statutes such as the ADA. In the context of the ADA's coverage of state employees, the Court held in *Board of Trustees v. Garrett* that Congress exceeded its powers and inappropriately allowed states to be subjected to ADA actions against them for monetary damages in employment discrimination cases.<sup>24</sup> The Court's new federalism jurisprudence takes a limited view of when such remedies are appropriate.

Some legal commentators contend the Court has restored the proper balance between federal civil rights legislation and state sovereignty.<sup>25</sup> Others argue this approach is unfounded, the product of an activist Court that has exceeded its role in limiting Congressional efforts to legislate pursuant to the Fourteenth Amendment civil rights guarantees.<sup>26</sup>

The second force underlying antipathy to Title I is shown in negative attitudes that continue to perpetuate prejudice toward disabled Americans in employment and daily life.<sup>27</sup> In response to these concerns, Congress set forth findings in the ADA about the pervasive nature of attitudinal discrimination against persons with disabilities.<sup>28</sup> The findings included discrimination resulting from "overprotective rules and policies," as well as intentional discrimination that relegated individuals with disabilities to inferior jobs and foreclosed their employment opportunities.<sup>29</sup> The loss in economic productivity was estimated to be in the billions of dollars.<sup>30</sup>

### 1. Don Perkl and Chuck E. Cheese: Disability Stigma

I met Don Perkl and his family in 1999 at the Madison Packaging & Assembly facility, a sheltered workshop, in Madison, Wisconsin. Don is a person in his early fifties with mental retardation. He does not speak. He and I talked using pictures and a communication board, a device that translates ideas into spoken words. We discussed his employment, job training and the

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NAT'L COUNCIL ON DISABILITY, POLICY BRIEF SERIES: RIGHTING THE ADA, NO. 8 THE AMERICANS WITH DISABILITIES ACT: THE IMPLICATIONS OF THE SUPREME COURT'S DECISION IN BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA V. GARRETT (Feb. 26, 2003), *available at* <http://www.ncd.gov/newsroom/publications/pdf/alvgarrett.pdf>.

24. *Bd. of Trs. v. Garrett*, 531 U.S. 356, 374 (2001); *see also* BLANCK ET AL., *supra* note 4, §§ 16-6 to 16-8 (discussing state immunity under the Eleventh Amendment to the U.S. Constitution from suits by citizens for monetary damages, and congressional abrogation of state sovereign immunity in limited circumstances).

25. For a review, *see* BLANCK ET AL., *supra* note 4, §§ 10.2.

26. *See, e.g., id.*; *see also* Jed Rubenfeld, *The Anti-Discrimination Agenda*, 111 YALE L.J. 1141, 1154-56 (2002).

27. Blanck, *supra* note 8, at 213.

28. 42 U.S.C. § 12101(a) (2000).

29. *Id.* § 12101(a)(5).

30. *See* NAT'L COUNCIL ON DISABILITY, POLICY BRIEF SERIES: RIGHTING THE ADA, NO. 9 CHEVRON V. ECHAZABAL: THE ADA'S "DIRECT THREAT TO SELF" DEFENSE 9 (Feb. 27, 2003), *available at* <http://www.ncd.gov/newsroom/publications/pdf/directthreat.pdf>.

things he enjoyed.

The Equal Employment Opportunity Commission (EEOC) retained me to testify as an expert witness in a lawsuit that the government, Don and local disability advocates brought against Chuck E. Cheese for employment discrimination under the ADA. Don had worked at Chuck E. Cheese as a janitor. His job performance was excellent and his co-workers enjoyed working with him. Don enjoyed going to work, something many other Americans cannot claim.<sup>31</sup>

One day, a company regional manager visited the Madison restaurant. Upon seeing Don working at the restaurant, he took the local store supervisor aside and criticized her for hiring one of “those people.”<sup>32</sup> After returning to the restaurant on another visit, the regional manager fired Don after the local supervisor had refused to do so. The local supervisor testified during the trial that she then sought guidance from the company’s corporate human resources department, asking, “Can someone please help me with this situation, so we can at least give this guy a chance? We are an equal opportunity employer, are we not?”<sup>33</sup> The request for guidance was unsuccessful. The local supervisor and other restaurant staff quit in protest.

At the trial, the defendant’s law firm, with its senior partners, junior partners, associates, and paralegals argued that Don was not qualified for the job, and consequently, the company had not discriminated against him. They defended their actions by claiming there was something threatening about Don, possibly to the kids and patrons at the restaurant. The company retained a local psychiatrist to support these claims. Of course, this was nonsense and misguided prejudice.

As an expert qualified by the court,<sup>34</sup> I testified about the pervasive myths and stigma facing persons like Don in employment and other daily life activities. Contrary to the company’s assertions, Don was a qualified and dedicated worker, who had good interactions with his co-workers and customers. While there was nothing deficient about Don’s work performance, there was something very wrong with management’s culture and attitudes, at least in this case.

The trial lasted a few days. It was less complicated than the defendant’s motions to dismiss, disqualify, and preclude evidence and experts. At the close of the trial, the case was sent to the jury. The jury either was in a hurry

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31. See HUMAN RESOURCES, BUREAU OF NAT’L AFFAIRS, HUMAN RESOURCES REPORT: JOB SATISFACTION DECLINES FURTHER, DEMANDS ON WORKERS RISE, SURVEYS SAY (Sept. 29, 2003), <http://hrcenter.bna.com/pic2/hr2pic.nsf/id/BNAP-5RUKUP?OpenDocument> (indicating that less than half of workers reported they were satisfied with their jobs).

32. See Press Release, EEOC, Chuck E. Cheese’s Must Pay Maximum Damages Under the ADA to Mentally Retarded Employee Following Multi-Million Dollar Jury Award (Mar. 15, 2000), at <http://www.eeoc.gov/press/3-15-00.html> (quoting trial testimony).

33. *Id.* (quoting trial testimony).

34. The defendant filed a motion with the court to disqualify the author of this article from serving as an expert witness; the trial judge denied aspects of the motion and allowed the author to testify about his research and writings.

or likely knew something that the expensive lawyers and experts did not know or acknowledge. After a four-hour deliberation, the jury found Chuck E. Cheese had unfairly discriminated against Don in violation of the ADA.

The jury awarded Don some \$70,000 in back pay and compensatory damages as well as his legal fees.<sup>35</sup> To make their point, the jury sent a message that discrimination against qualified employees based on their disability would not be tolerated. They awarded Don \$13 million dollars in punitive damages,<sup>36</sup> at that time the largest monetary award from a jury in a Title I case brought by the EEOC. The award was made despite Chuck E. Cheese's position that Don's mental retardation made it "highly unlikely" he would experience any emotional distress because of his termination.<sup>37</sup>

Chuck E. Cheese appealed the jury award, but the trial court imposed the maximum amount of damages allowed under the ADA,<sup>38</sup> stating: "the breathtaking magnitude of an eight-figure punitive damages award demonstrates that the jury wanted to send a loud, clear message."<sup>39</sup>

## 2. Daniel Schwartz and Electronic Data Systems (EDS): Definition of Disability or Stigma

After Chuck E. Cheese, I thought Daniel Schwartz's case would be easy. In early 2000, Daniel, his lawyer Claudia Center (a leading disability public interest advocate), and I met at a hotel at the Los Angeles International Airport to review his claims of disability discrimination and failure to accommodate under California's Fair Employment and Housing Act (FEHA).<sup>40</sup> FEHA offers many of the same anti-discrimination protections as, and in some ways exceeds, the ADA.

Daniel has developmental disabilities and other health conditions. He was born with congenital hypothyroidism, and his resulting developmental disability limits his life activities such as "learning, thinking, . . . and performing manual tasks."<sup>41</sup> Daniel is married to a woman with serious

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35. See EEOC, *supra* note 32, at <http://www.eeoc.gov/press/3-15-00.html>.

36. *Id.*

37. See Leye Jeannette Chrzanowski, *Jury Finds Hiring and Firing Based on Ability Not Myths, Fears and Stereotypes*, GREAT LAKES ADA NEWS SERV., Jan. 31, 2000, at <http://www.ada.greatlakes.org/adanews/001juryfinds.htm> (quoting Chuck E. Cheese attorneys).

38. The Civil Rights Act of 1991 provides that for employers with more than 500 employees, compensatory and punitive damages in ADA employment discrimination cases are capped at \$300,000, exclusive of attorneys' fees and costs. 42 U.S.C. § 1981a(a)(1), (b)(3)(D) (2000); see BLANCK ET AL., *supra* note 4, §§ 15.3, 16.3, 17.3 (discussing ADA remedies).

39. See EEOC, *supra* note 32, at <http://www.eeoc.gov/press/3-15-00.html>.

40. Fair Employment and Housing Act, CAL. GOV'T CODE §§ 12900–12996 (1991 & 2003 Supp.). See generally Brief for Appellant, *Schwartz v. Elec. Data Sys., Inc.* (9th Cir. 2003) [hereinafter Appellant's Brief] (on file with *The Journal of Gender, Race & Justice*).

41. See Appellant's Brief, *supra* note 40, at 10 (citing Record at EOR 301–08, 658, 866–71, 1658). Daniel presented extensive evidence of his disability, including medical records and test results, and expert testimony on his substantial limitations. *Id.* at 20–25 (citations omitted).



health conditions. They live independently in their own apartment on their modest incomes.<sup>42</sup>

Daniel had worked for more than twenty years as a mailroom clerk with a large bank in Los Angeles. Periodically, Daniel requested additional supervision, repeated instructions and additional training as modest workplace accommodations for his developmental disabilities.<sup>43</sup> Daniel received positive performance evaluations and pay increases each year.

In the late 1990s, the bank subcontracted its mailroom functions to Electronic Data Systems, Inc. (EDS). EDS transferred Daniel, along with the mailroom functions, to an offsite location. In his lawsuit, Daniel contended that although EDS managers knew of his disability and need for accommodations, he faced a hostile work environment, with unsupportive supervisors and incomplete accommodations and training.

Daniel's goal was to succeed at EDS, obtain accommodations and keep doing his job. On one occasion, Daniel tried to take written notes about how to run a mail-sorting machine. But, his job trainer asked him to stop because Daniel could not write quickly enough. The trainer then wrote the notes for Daniel "as a favor."<sup>44</sup> Daniel's team leader subsequently confiscated the notes, believing this was somehow an "unfair advantage" to Daniel.<sup>45</sup> Daniel's attorney, Ms. Center, commented: "EDS never explained how an employee with a developmental disability could have an 'unfair advantage' as a result of possessing written notes that described his job tasks."<sup>46</sup>

During this time, EDS staff did not ask Daniel how he might improve his performance or otherwise interactively discuss how to accommodate his needs and did not implement effective and reasonable accommodations.<sup>47</sup> Title I requires employers and employees to engage in an "interactive process" (i.e., collaborative dialogue) to determine appropriate accommodations.<sup>48</sup> EDS did not consult with anyone within or outside of the company to help accommodate Daniel.<sup>49</sup>

After twenty years working for the bank, and less than three months with EDS, Daniel was fired. The reason given for his firing: Daniel, in the position of the mailroom clerk, had low performance ratings in interpersonal

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42. After Daniel was fired he was devastated; having worked his entire adult life, he spent more than one year without employment. He was forced to rely on his 87-year-old mother for financial assistance. *See id.* at 16.

43. Developmental disabilities are impairments in childhood development. Mental retardation may be considered a developmental disability. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 1994).

44. Appellant's Brief at 13, *supra* note 40 (citing Record at EOR 462, 1634).

45. *Id.* (citing Record at EOR 655, 671–72, 1634).

46. *Id.*

47. *Id.* at 12 (citing Record at EOR 234–36, 251, 732–34, 1665).

48. 29 C.F.R. § 1630.2(o)(3) (2003).

49. Appellant's Brief at 12–13, *supra* note 40 (citing Record at EOR 251, 252, 953–54, 976, 1667).

ability, communication, leadership, and job skills,<sup>50</sup> and in his ability to be a “visionary” and “motivate and inspire others.”<sup>51</sup>

Although Title I allows employers to determine essential job qualifications,<sup>52</sup> it was not apparent how being a visionary or having a global mindset had relevance to job-relatedness under Title I and to Daniel’s mailroom clerk position.<sup>53</sup> Shortly after he was fired, while job hunting, Daniel read an advertisement for EDS announcing numerous vacancies for jobs which he had done.<sup>54</sup>

After our initial meeting, I traveled to north Los Angeles to interview Daniel in his new place of employment. He worked in a small office as a clerk, sorting mail and performing other tasks. His employer thought Daniel was doing a good job. Daniel was working part-time, and as of yet had no health insurance benefits. He was hoping to find full-time employment to help pay his high health care costs.

The non-profit Employment Law Center had taken Daniel’s case. As in Don Perkl’s case, I testified as an expert on stigma and discrimination facing Daniel. In my deposition, I discussed Daniel’s job skills and the discrimination he faced throughout his life. I reviewed Daniel’s work history, describing a man who had worked his whole adult life and who was proud to be a taxpayer. I concluded that Daniel was capable of doing the mailroom job at EDS.

With the close of discovery and summary judgment motions filed, the case came before a Los Angeles federal district court judge. Surprisingly, the judge rendered his opinion from the bench, not seeing fit to reach the merits of the case. The judge ruled that because Daniel had worked for years and successfully so, he could not be “disabled” for purposes of the law, and, therefore, also did not need accommodation.<sup>55</sup>

Daniel worked for twenty years,<sup>56</sup> and the December 2000 summary judgment hearing lasted less than two minutes.<sup>57</sup> The court hearing record speaks for itself:

THE COURT: What accommodation did he request?

MS. CENTER: He requested additional time to learn his job duties.

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50. *Id.* at 14 (citing Record at EOR 1262, 1642–44).

51. *Id.* (citing Record at EOR 981–983, 1281–98, 1300–06, 1321–88, 1642–44, 1646–51).

52. 42 U.S.C. § 12111(8) (2000).

53. Appellant’s Brief at 15, *supra* note 40 (citing Record at EOR 444, 984, 994–1002, 1642–45, 1688).

54. *Id.* at 14–15 (citing Record at EOR 750–51, 1268, 1652–53).

55. With that, the trial judge dismissed Daniel’s claims and adopted verbatim defendant’s eleven page “[Proposed] Statement of Uncontroverted Facts and Conclusions of Law.” *See id.* at 7 (citing Record at EOR 1777–89).

56. *Id.* at 1.

57. Appellant’s Brief at 7, *supra* note 40 (citing Record at EOR 1860–1865).

He let the employer know that he was having problems on the job and that it took him longer to learn because of his mental disability.

THE COURT: Well, the response to that is that that job requires the time that they gave him.

MS. CENTER: Pardon, Your Honor?

THE COURT: The job requires the time. He's [sic] then is not qualified.<sup>58</sup>

Daniel's case was dismissed. Although Daniel had developmental and other disabilities, his ability to successfully perform the mailroom job for years led this judge to conclude that he was not disabled under the law.

Daniel appealed his case to the U.S. Court of Appeals for the Ninth Circuit. Before a decision was reached, Daniel accepted a settlement of more than \$100,000, along with his legal fees, from EDS. Justice for Daniel? Perhaps. Yet, EDS, like Chuck E. Cheese, could have avoided virtually all these costs simply by taking a modest amount of time to understand the perspective of a qualified employee with disabilities.

### 3. Mario Echazabal and Chevron: Paternalism and Title I's "Direct Threat" Defense

I first met Mario Echazabal in the marble halls of the U.S. Supreme Court during its 2002 term, waiting for the oral argument in his case to be called. I was counsel for the National Council on Disability in Mario's case. Along with colleagues and a local law firm, I had prepared and filed an amicus brief in the case *Chevron U.S.A., Inc. v. Echazabal*.<sup>59</sup>

In *Chevron U.S.A., Inc. v. Echazabal*, Chevron would not hire Mario, a job applicant, because he had asymptomatic Hepatitis C.<sup>60</sup> Chevron refused to hire Mario not because he was unqualified for the position he sought in their refinery, but rather, because they believed its workplace might worsen his condition, an opinion subsequently disputed by Mario's doctors.<sup>61</sup>

Working for an independent contractor, Mario successfully performed the essential job functions in Chevron's refinery for some twenty years without accident or injury to himself or anyone else. He was competent to make independent and informed decisions about his employment and medical treatment. Chevron was aware of his health status during these years through repeated medical evaluations submitted to Chevron's clinic

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58. *Id.* (citing Record at EOR 1797.4).

59. For a review of our brief and the case from which the discussion here is drawn, see NAT'L COUNCIL ON DISABILITY, *supra* note 30, at 1–7.

60. *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 77 (2002).

61. *Id.* at 73, 77.

physicians while he worked at their refinery.<sup>62</sup>

Mario Echazabal personified the situation the ADA was intended to prevent: paternalism that results in exclusion and isolation. Mario believed he was entitled to decide for himself, within reason, where he worked. Indeed, assessing and accepting risks within reason are basic elements of personal independence and the exercise of adult responsibility. Congress understood this, and acknowledged in the ADA that discrimination takes many forms, including paternalism. Although ADA Title I includes a direct threat defense, this defense is defined by Congress as a requirement that an individual “not pose a direct threat” only “to the health or safety of *other* individuals in the workplace.”<sup>63</sup> There is no mention in the statute of a threat-to-self as a defense to a charge of employment discrimination.

As we argued in our brief, one of the insidious aspects of paternalistic discrimination is the assumption that people with disabilities are not competent to make informed or safe life choices.<sup>64</sup> Mario’s case stemmed from regulations issued by the EEOC subsequent to the ADA’s passage that permitted employers to refuse to hire a person with a disability if the employer believed the individual poses a direct threat to her *own* health or safety.<sup>65</sup>

The Supreme Court found in favor of Chevron, endorsing the EEOC’s interpretation of the affirmative defense to include a threat to one’s own health or safety.<sup>66</sup> The Court reached this conclusion even though the language of the ADA did not contain such a defense and the Act’s legislative history cautioned against such an interpretation.<sup>67</sup>

I knew we were in trouble at oral argument when one of the Justices queried whether our view requires “an employer to take a position that could be completely barbarous,”<sup>68</sup> and commented that a ruling in our favor would force employers to hire “suicidal workers.”<sup>69</sup> Most reflective was the discussion of the concept of paternalism facing persons with disabilities:

[W]hy is Congress only worried about paternalism for the handicapped? Once you eliminate the stereotyping, you have individual determination that this person is—is going to be

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62. *Id.* at 76.

63. 42 U.S.C. § 12113(b) (2000) (emphasis added).

64. See NAT’L COUNCIL ON DISABILITY, *supra* note 30, at 9.

65. *Chevron*, 536 U.S. at 78–79 (“The term ‘qualification standard’ may include a requirement that an individual shall not pose a direct threat to the health or safety of the individual or others in the workplace.”) (citing 29 C.F.R. § 1630.15(b)(2) (2001)).

66. *Id.* at 87.

67. See NAT’L COUNCIL ON DISABILITY, *supra* note 30, at 19 n.17 (citing H.R. Rep. No. 101-485, pt. 2, at 72 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 354).

68. Transcript of Oral Argument, *Chevron U.S.A., Inc. v. Echazabal* (No. 00-1406), at 2002 WL 371944, at \*37 (Feb. 27, 2002).

69. *Id.* at \*41–42.

harmed. Why does Congress say, if it's a disabled person, he can kill himself, but if it's not a disabled person, oh, no, you can let him kill yourself? Why would Congress want to make that distinction?<sup>70</sup>

The ramifications of Mario's case spread quickly in the lower courts. More employers unilaterally are barring from jobs qualified workers with disabilities who do not pose a health or safety risk to others, but who have health conditions, many times asymptomatic ones like Mario's. The result is to endorse the paternalism and stereotyping that Congress expressly sought to eliminate through the ADA.<sup>71</sup>

For thousands of Americans with disabilities like Mario Echazabal who want to work and who are capable of working, the *Chevron* decision has created a wave of uncertainties. After *Chevron*, a trial court in a Title I case may find in favor of a defendant employer on summary judgment based only on the potential existence of a direct threat-to-self. The *Chevron* decision permits a trial court to conclude that an employer may refuse to hire a qualified person with a disability if the employer (or its workers' compensation insurance carrier) presents information that people who use wheelchairs, are blind, deaf, cognitively impaired, and so on, are more likely to be injured in their workplace (which, in fact, research suggests is not true).<sup>72</sup>

After losing his job with the independent contractor for the Chevron refinery, Mario earned little steady income. A school district hired him as a part-time contractor bus driver, requiring no use of his abilities honed over a lifetime and providing no health benefits. For Mario, the litigation was upsetting and unsettling. He was deprived of employment in his chosen trade, a trade he performed successfully for more than twenty years, because of unfounded fears about his health and potential liability. Mario passed away in January 2004.

On a more positive note, in *Chevron* the Supreme Court reaffirmed that

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70. *Id.* at \*39 (attributable to Justice Scalia); *id.* at \*54 (“In order to avoid paternalism, we’re going to tell employers they can just commit their employees. (Laughter.)”).

71. A trial court may reach such a decision without considering whether the plaintiff may perform the essential job functions with reasonable accommodation. Post-*Chevron*, employers may bar qualified workers who do not pose a risk to others, but perhaps only to themselves. The result is to endorse the unjustified paternalism that Congress expressly sought to eliminate.

72. Researchers have found that by the 1980s approximately ten percent of the U.S. population between 18 and 64 years of age had a work limitation. See Craig Zwerling et al., *Occupational Injuries Among Workers with Disabilities: The National Health Interview Survey, 1985–1994*, 278 JAMA 2163, 2163 (1997) (citing DISABILITY IN AMERICA: TOWARD A NATIONAL AGENDA FOR PREVENTION 48–51 (Andrew M. Pope & Alvin R. Tarlov eds., 1991)). Over the following years, given the aging of the American workforce, the proportion of those with work limitations rose. Despite the high prevalence of Americans with work limitations, workers with disabilities do not show an elevated risk for occupational injuries. In a national study of occupational injuries across industries, Zwerling and his colleagues found that only 3.5% of occupational injuries are explained by the individual's prior disability. *Id.* at 2163–66. This finding does not support the exclusion of qualified workers with disabilities because of a slightly elevated risk, and not in the absence of consideration of reasonable accommodations.

the direct threat determination must be founded on an individualized assessment of a current and significant risk of substantial harm (based on objective medical evidence), and that the risk cannot be eliminated with reasonable accommodation.<sup>73</sup> On this basis, the Ninth Circuit remanded the case to the trial court for further proceedings consistent with the Supreme Court's opinion.<sup>74</sup>

### *B. ADA Title II*

ADA Title II requires that the services of public entities be available to people with disabilities.<sup>75</sup> Courts have grappled with questions concerning the entities covered by Title II and the steps they must undertake to prevent discrimination. One central element of Title II is that public entities administer their services, programs and activities in the most *integrated* setting appropriate to the needs of qualified individuals with disabilities.<sup>76</sup> In *Olmstead v. L.C. ex rel. Zimring*, the Supreme Court considered the reach of this integration mandate.<sup>77</sup>

In *Olmstead*, two women with mental retardation and psychiatric conditions brought suit under Title II, claiming that the state of Georgia had discriminated against them by serving them in institutionalized instead of community settings.<sup>78</sup> The state's professionals determined that community placement would be appropriate for the women, but none were available.<sup>79</sup> The Supreme Court held this unjustified institutional placement was discrimination within the meaning of Title II.<sup>80</sup>

The *Olmstead* Court recognized the integration mandate was not absolute.<sup>81</sup> In deciding whether the mandate would fundamentally alter the state's treatment programs, the proper inquiry was not just the cost of accommodating these two plaintiffs weighted against the states' mental health budget.<sup>82</sup> Rather, Title II's reasonable modification rule allows states

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73. *Chevron*, 536 U.S. at 86.

74. *Echazabal v. Chevron U.S.A., Inc.*, 336 F.3d 1023, 1035 (9th Cir. 2003). The Ninth Circuit concluded that *Chevron* still could not prevail on summary judgment because its direct threat defense relied only on the testimony of physicians who offered generalized conclusions about possible harms to *Echazabal*. *Id.* at 1033.

75. 42 U.S.C. § 12132 (2000).

76. *Id.*

77. *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999); *see also* *Helen v. DiDario*, 46 F.3d 325 (3d Cir. 1995) (holding that a state program requiring that a disabled individual receive necessary care services in a segregated setting, instead of in nursing home, violates ADA).

78. *Olmstead*, 527 U.S. at 602–03.

79. *Id.* at 593–94.

80. *Id.* at 600–04.

81. *Id.* at 603.

82. *Id.* at 603–04.

to show that in the allocation of resources the community placement would be inequitable, particularly given the responsibility the state has for the treatment of a diverse population of persons with disabilities.<sup>83</sup>

### 1. Sara K. and the State of Wyoming: Community Inclusion

In July of 2001, President George W. Bush entered an Executive Order reinforcing the *Olmstead* decision and providing guidance in its implementation to federal agencies.<sup>84</sup> As part of the administration's New Freedom Initiative (NFI), the Centers for Medicare and Medicaid Services subsequently distributed grants to help states increase community integration for people with disabilities.<sup>85</sup> However, years after the *Olmstead* decision, states face a lack of community services and a shortfall of funds in carrying out the integration mandate. One reason is related to an institutional bias, by which a disproportionate share of Medicaid funding for long-term care services is directed to large state institutions.<sup>86</sup>

In the early 1990s, before the integration mandate was set out in *Olmstead* and the NFI, I had been litigating in the deinstitutionalization area, working to improve conditions in large state facilities for persons with disabilities, and, where appropriate, to transition residents of these facilities into the community.

I first met Sara K. in 1991 when she was a resident of the health care unit of the Wyoming State Training School in Lander, Wyoming. I had been appointed as a court overseer in a class action lawsuit filed against Wyoming on behalf of its citizens living at the training school. The litigation, *Weston v. Wyoming State Training School*, and the settlement agreement I helped to oversee was to expand community living opportunities for people at the state training school.<sup>87</sup>

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83. *Id.* at 605–07. To have standing to bring an *Olmstead*, 527 U.S. at 601–02, claim, a plaintiff does not have to be in an institutionalized setting. In *Fisher v. Oklahoma Health Care Authority*, 335 F.3d 1175, 1177–78 (10th Cir. 2003), participants in a community Medicaid program challenged a decision by Oklahoma to severely limit prescription benefits for participants. Plaintiffs claimed the decision placed them at risk of institutionalization in nursing homes, and violated the *Olmstead* mandate. *Id.* The district court held that because the plaintiffs were not currently institutionalized, they could not bring an *Olmstead* claim. *Id.* The Tenth Circuit disagreed, finding that there was nothing in the ADA or in the *Olmstead* decision supporting such an interpretation. *Id.* at 1181.

84. Exec. Order No. 13,217, 66 Fed. Reg. 33,155 (June 18, 2001) (“Community-Based Alternatives for Individuals with Disabilities”).

85. See Johanna M. Donlin, *Moving Ahead with Olmstead: To Comply with the Americans with Disabilities Act, States Are Working Hard to Find Community Placements for People with Disabilities*, ST. LEGISLATURES, Mar. 1, 2003, at 28, 2003 WL 8909235.

86. *Id.*

87. For a review of the litigation and settlement in *Weston v. Wyoming State Training School*, No. C90-0004 (D. Wyo. Mar. 13, 1991), see Peter Blanck, *On Integrating Persons with Mental Retardation: The ADA and ADR*, 22 N.M. L. REV. 259 (1992). The Agreement established a Compliance Advisory Board of two persons. One member of the advisory board (me) was selected by the state, and the other by the Wyoming Protection and Advocacy System. The advisory board

Beginning with legal cases in the 1970s, the closing and downscaling of large public residential facilities for persons with disabilities and mental retardation had been the national trend. Largely as a result of class action lawsuits brought by residents of public institutional facilities, Wyoming, like a majority of states, had begun to refocus toward integrated programs for persons with mental retardation.

In 1990, a group of plaintiffs with mental retardation residing at the Wyoming Training School initiated a federal class action lawsuit against the state.<sup>88</sup> At that time, approximately 300 adults and children with varying degrees of mental retardation and other disabilities resided at the facility. The Training School was the only public facility of this type in the state. The lawsuit brought by the Wyoming Protection and Advocacy System sought improvement of conditions at the training school and community living opportunities as an alternative to institutional care.<sup>89</sup>

Sara had spent most of her young life in the hospital unit at the training school. She was a smart and bright-eyed ten-year-old who had spina bifida and other serious health conditions. The *Weston* settlement agreement mandated that children residing at the training school would be the first to move from the training school to appropriate community settings.

Sara's parents understandably were concerned about Sara's health needs but agreed she could leave the hospital facility to live at a smaller health care facility in north central Wyoming, nearer her home. At that time, Sara was not expected to live long as a result of her multiple medical problems. But, she wanted to be closer to her family, have more time outdoors, and attend school in the community.

After residing in the smaller facility, the state professionals suggested Sara live at home with her parents with appropriate support services from the state. Following subsequent discussion and planning, Sara returned to live at her home. The rest is an amazing story. Sara quickly adapted to her home life and flourished in mainstreamed classrooms.

In Sara, we saw this now young teenager flower before our eyes. Not many years before, Sara would have spent her life at the training school in a hospital bed in a remote part of Wyoming. We watched as Sara's parents and siblings savored their time together, at home, as a family. Sara spent some of her teenage years with loving family and friends. She went to her community school.

We saw parents of other *Weston* class members and state officials appreciate the potential for many like Sara, who wanted to live in their communities with their families and friends. Years later, the Supreme Court would endorse this integration mandate in *Olmstead*.<sup>90</sup> As for Sara, the

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had primary responsibility for assisting the federal district court and the parties in the implementation of the Settlement Agreement. *Id.* at 267.

88. *Id.*

89. *Id.*

90. *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 581 (1999).



Court recognized that the institutional placement of persons who can live in the community perpetuates assumptions that these persons are “incapable or unworthy of participating in community life.”<sup>91</sup>

Sara passed away in January of 2001. She was 15 years old, going on 16. The director of Wyoming’s community programs, Bob Clabby, said to me, “I have a solid belief that the amount of time we spend on this earth is less important than what we do with the time we have, and Sara inspired many people; not least, I think, you and me.”<sup>92</sup>

## 2. Demetrius, Tyrone and South Carolina: State Juvenile Justice Programs

In 1994, as I walked the grounds of the Department of Juvenile Justice (DJJ) facility in Columbia, South Carolina, I thought of my review of the South Carolina Children’s Code: “[w]hen children must be placed in care away from their homes, the State shall insure that they are protected against any harmful effects resulting from the temporary or permanent inability of parents to provide care and protection for their children.”<sup>93</sup> South Carolina’s policy for children residing in its juvenile justice facilities is to provide treatment and rehabilitation for their mental and physical welfare in the best interests of the community.<sup>94</sup>

I was qualified by the federal court as an expert for the plaintiffs in the first ADA Title II (and Section 504) class action lawsuit against a state’s juvenile justice facility, *Alexander S. v. Flora Brooks Boyd*.<sup>95</sup> I made five visits to the DJJ facilities and conducted interviews with juveniles and staff members.<sup>96</sup> I was to determine if juveniles with disabilities were receiving adequate programming or experiencing discrimination because of their disabilities. My interviews revealed the programmatic needs of juveniles with disabilities, which often were not properly identified and met. Some of

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91. *Id.* at 600–01.

92. Email from Robert Clabby, Administrator, Wy. Developmental Disabilities Servs. Div., to Peter Blanck, Director, Law, Health Policy, and Disability Center at the University of Iowa College of Law (Sept. 30, 2003, 20:31:35 MT) (on file with *The Journal of Gender, Race & Justice*).

93. S.C. CODE ANN. § 20-7-20(D) (Law. Co-op. 1985). The DJJ is required to provide “a suitable corrective environment” for the children in its care. *Id.* § 20-7-7810. The DJJ is charged with providing for the “care, custody and control” of each child in its institutions and must have instruction suited to enable children to learn a useful trade. *Id.* § 20-7-8010. In *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 207, 213 (1998), the Supreme Court determined that state prisons were covered public entities under ADA Title II.

94. § 20-7-20(B), (D).

95. *Alexander S. v. Boyd*, 113 F.3d 1373 (4th Cir. 1997). The state conceded that its DJJ facilities were subject to the ADA and its regulations. *Alexander S. ex rel. Bowers v. Boyd*, 876 F. Supp. 773, 803 (D.S.C. 1995) (concluding that DJJ was subject to Title II’s physical and programmatic accessibility requirements; and the state conceded that the law’s barrier-free requirements applied to DJJ).

96. Peter Blanck, Report on the Adequacy of the System at the Department of Juvenile Justice, South Carolina: To Identify, Evaluate, Serve and Monitor the Needs of Individuals with Disabilities 17 (July 27, 1994) (on file with *The Journal of Gender, Race & Justice*).

DJJ's discipline practices had a particularly discriminatory effect on juveniles with disabilities. The situations of young teenagers like Demetrius and Tyron illustrated the discrimination faced and the deficiencies in the DJJ system.

Prior to coming to DJJ, Demetrius was certified for special education programs as "Educably Mentally Handicapped" (EMH). But, DJJ had not identified Demetrius' need for special education and placed him in the general education program, although the Individuals with Disabilities Education Act (IDEA) mandates students be placed in the most appropriate and inclusive environment with proper supports.<sup>97</sup> For Demetrius, these educational supports did not exist in DJJ's general education program. Demetrius became depressed enough to attempt to slit his wrists. He then was prescribed medication, antidepressants with sedative effects, as a treatment.

One side effect of the antidepressant medication is dry mouth, which led Demetrius to drink large amounts of water. One form of punishment used on Demetrius was to deny him permission to use, or to limit the times he could use, the restroom. Demetrius' case was a stark example of the failure of DJJ to recognize a disability, which led to denial of required educational services, and then to discipline that was inappropriate and punitive because of his disability.

Another student not properly served by DJJ was Tyrone. Tyrone was in special education classes prior to coming to DJJ. At DJJ, he was placed in general education classes without appropriate accommodations. Tyrone told me he could not read. He said teachers at his prior school tried to help him learn to read, but at DJJ he learned little. DJJ slated Tyrone to be included in an educational program for juveniles with mental retardation. Yet, Tyrone remained in general education classes without appropriate assistance; his needs not being served by DJJ.

The conditions at DJJ presented programmatic failures that violated the letter and spirit of the ADA (along with presenting other statutory and constitutional violations). In 1995, after a three-month-long bench trial, the court found for the plaintiffs.<sup>98</sup> Among other conclusions, the court ruled the State failed to adequately identify and serve the educational needs of those plaintiffs with disabilities.<sup>99</sup> The court ordered the State to implement a remedial plan to cure each violation and appointed a special master to monitor its implementation.<sup>100</sup> The State did not appeal the decision.

Without such dramatic intervention, the failures at DJJ likely would be a recurring problem. The population that DJJ serves would continue to include a disproportionate number of persons with disabilities not receiving

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97. 20 U.S.C. § 1412 (2000).

98. *Alexander S.*, 876 F. Supp. at 786–95.

99. *Id.* at 785–88.

100. *Id.* at 803–05.

appropriate treatment. ADA Title II requires facilities like DJJ to provide children, such as Demetrius and Tyrone, services and programs that give them, at the least, a meaningful opportunity to rehabilitate their behavior and become productive members of society on release.

Unfortunately, my experiences at South Carolina's DJJ ring true today for thousands of minors in juvenile justice facilities across the country. In 2003, for instance, the U.S. Department of Justice (DOJ) issued a report regarding services at two of Mississippi's juvenile justice facilities.<sup>101</sup> The DOJ found these facilities violated the constitutional and statutory rights of juveniles, a majority of whom have mental disabilities.<sup>102</sup> The youth confined in Mississippi experienced harm from the lack of mental health and medical care services, and the facilities did not provide education services to youth with disabilities as required by the IDEA,<sup>103</sup> Section 504 of the Rehabilitation Act of 1973<sup>104</sup> and ADA Title II.<sup>105</sup>

### C. ADA Title III

Another of the ADA's major goals is to remove architectural and communication barriers facing people with disabilities. Congress drafted the ADA Title III accessibility provisions to balance the access needs of people with disabilities and the legitimate concerns of businesses covered by the law. As such, Title III prohibits discrimination against persons with disabilities by public accommodations.<sup>106</sup> A public accommodation is a private, non-governmental entity of any size that provides goods and services to the public.<sup>107</sup> Places of public accommodation include sales and service establishments, places of entertainment, recreation and education.<sup>108</sup>

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101. Letter from Ralph F. Boyd, Jr., Assistant Attorney General, to Honorable Ronnie Musgrove, Governor of Mississippi (June 19, 2003), [http://www.usdoj.gov/crt/split/documents/oak\\_colu\\_miss\\_findinglet.pdf](http://www.usdoj.gov/crt/split/documents/oak_colu_miss_findinglet.pdf) (describing this case).

102. *Id.* at 8, n.4 (noting that “girls in Mississippi juvenile justice facilities are five to seven times more likely than boys to have a depression disorder, and are two to five times more likely than boys to meet the criteria for an anxiety disorder”) (citing ANGELA ROBERTSON & JONELLE HUSAIN, PREVALENCE OF MENTAL ILLNESS AND SUBSTANCE ABUSE DISORDERS AMONG INCARCERATED JUVENILE OFFENDERS 27–28 (2001)).

103. 20 U.S.C. § 1412 (2000).

104. 29 U.S.C. § 794(a) (2000).

105. *See generally* 42 U.S.C. §§ 12131–12132 (2000) (prohibiting discrimination against individuals with disabilities by public entities, for example, state educational institutions).

106. *Id.* § 12182(a).

107. *Id.* § 12181(1). Title III covers only conduct affecting commerce that is directed at the public; that is, communication and trade within and among states, and between a foreign country and a state. *Id.*

108. *Id.* § 12181(7). Many private enterprises, such as libraries and museums, are public accommodations even though they transact business without profit. *Id.*

### 1. Access Now v. Theme Restaurant: Physical Accessibility

I had been retained by a company that owned a theme restaurant in South Miami to help settle a Title III case. Access Now, Inc.<sup>109</sup> sued the restaurant for claimed access violations, seeking a permanent injunction and attorneys' fees, litigation expenses and costs.<sup>110</sup> Access Now's mission is stated on its website:

Experience has taught us that we generally do not succeed in achieving compliance without instituting a lawsuit, when appropriate . . . . However, our goal . . . has been to obviate the necessity and expense of going to trial by instead entering, during the course of litigation, into negotiations which conclude with a Stipulation for Settlement, which details how and within what time frame an entity will make the alterations which will result in its compliance under the law . . . . Our ultimate goal is to sufficiently spread the word whereby public accommodations will make the necessary alterations on their own to comply with the law, instead of the prevailing attitude of waiting for someone to catch up with them.<sup>111</sup>

After Title III's implementation and with a wave of lawsuits filed by advocacy groups like Access Now, critics of the law argued it should contain a requirement that plaintiffs put non-accommodating businesses on notice before being allowed to file a lawsuit; the idea being that many businesses are unaware of their ADA requirements.<sup>112</sup> This approach, championed by a well-known film actor/local California politician, not Governor Arnold Schwarzenegger but former Carmel Mayor Clint Eastwood, resulted in a proposed bill to add a notice requirement and waiting period for plaintiffs to file Title III claims.<sup>113</sup>

Access Now's position is that a business that has not made itself accessible years after the Act's passage is not likely to change voluntarily. And, people with disabilities should have access to businesses without having to notify them about their legal requirements. For now, the ADA notice bill is stalled in Congress<sup>114</sup> and no courts of appeals have found a

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109. The plaintiff, Access Now, Inc., was a Florida Not-For-Profit Corporation. *See generally* ACCESS NOW, INC., HERE'S WHAT WE DO AND HOW WE CAN HELP YOU, at <http://www.adaccessnow.org/home.htm> (last visited Dec. 12, 2003).

110. I thank Robert Fine, Esq. for his comments and input in regard to the description of this case.

111. *See* ACCESS NOW, INC., *supra* note 109, at <http://www.adaaccessnow.org/home.htm>.

112. *See, e.g.*, Snyder v. San Diego Flowers, 21 F. Supp. 2d 1207, 1210–11 (S.D. Cal. 1998) (notice required), *overruled by* Botosan v. Paul McNally Realty, 216 F.3d 827, 832 (9th Cir. 2000).

113. *Congress Weighs 90-Day Delay for All Litigation Under ADA*, REP. DISABILITY PROGRAMS (LawGuru.com), June 16, 2000, at <http://www.lawguru.com/newsletters/2000/06/35368.html>.

114. *See* ADA Notification Act, H.R. 728, 108th Cong. (2003).

notice requirement in Title III.

The settlement in the *Access Now* case required the restaurant to make certain accessibility modifications. The bar counter was higher than thirty-four inches in height to the top of the serving counter. At no cost, the restaurant moved several tables to the bar area with appropriate knee space, as recommended by the ADA Accessibility Guidelines (ADAAG), which provides guidance about Title III modifications.<sup>115</sup> They also modified several table booths to provide appropriate wheelchair seating space in compliance with the ADAAG.<sup>116</sup> Again, marginal cost was associated with this modification.

The restaurant modified one entrance door to swing out into the restaurant area with the hinge side reversed from its current location.<sup>117</sup> There was accessible signage mounted outside of the bathroom on the wall.<sup>118</sup> To comply with the ADAAG, the restaurant modified the men and women's toilet stalls,<sup>119</sup> altered the grab bars in the stalls<sup>120</sup> and insulated the hot water pipes under the lavatories to protect against contact by those using wheelchairs.

The restaurant agreed to, and completed, these modifications in several months time. Because the restaurant was newly constructed, but apparently not in accordance with the access guidelines, the cost of the modifications was about \$30,000. Virtually all of the modifications would have cost nothing, had they been part of the initial construction. The company paid *Access Now's* attorneys' and expert fees of about \$5,000. The court dismissed the *Access Now* lawsuit with prejudice.<sup>121</sup>

Sometime after the case settled, the restaurant closed. According to their counsel, the closure was due to high lease expenses and the local market and not because of the accessibility settlement. *Access Now* continues its advocacy strategy.

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115. See 28 C.F.R. pt. 36 app. A [hereinafter ADAAG].

116. This seating space was provided at the end of the booth where there was a minimum of 65 inches from the table edge to the nearest table edge or seat to provide for wheelchair seating clear floor space and a minimum 36 inches wide access path behind the wheelchair at the table. See, e.g., ADAAG §§ 4.2.1, 5.3.

117. The door then provided a 32 inches wide minimum clear opening, and had a maximum opening force of 5 lbf. The inner door of the vestibule remained in its current configuration; however, it was modified to have a maximum opening force of 5 lbf.

118. See ADAAG §§ 4.30.1, 4.30.4, 4.30.5, 4.30.6.

119. In addition, there was to be a minimum 17 inch by 19 inch lavatory, complying with section 4.19 of the ADAAG, provided within the accessible stall. The lavatory was not located within the required clear floor space of the toilet.

120. The toilet paper dispenser was installed so that there was a minimum of 2 inches between the top of the dispenser and the bottom of the grab bar; the toilet paper may be grabbed at a minimum of 16 ½ inches above the floor and within 36 inches of the rear wall of the stall.

121. The settlement agreement did not constitute an admission by restaurant as evidence of liability or unlawful conduct.

2. Accessibility to the Internet: "The Digital Divide"<sup>122</sup>

In February of 2000, I testified with others before the Subcommittee on the Constitution of the U.S. House of Representatives Committee on the Judiciary on the applicability of the ADA to private Internet sites.<sup>123</sup> At that time, the issue of Internet accessibility had received national attention. The National Federation of the Blind (NFB) filed a class action lawsuit against America Online, Inc. (AOL) in 1999.<sup>124</sup> NFB alleged AOL's Internet browser and services were inaccessible to the blind and did not comply with the ADA Title III's accessibility requirements.<sup>125</sup>

In early 2000, the parties to the AOL litigation announced they reached a settlement. AOL agreed to make its Internet browsing software compatible with screen reader assistive technology (which makes AOL software accessible to blind users), make the content of AOL services accessible to the blind, publish an Accessibility Policy and post it on its web site and pursue other actions to implement accessibility features for blind users.<sup>126</sup>

At the February 2000 congressional hearings, persons with disabilities, technology specialists, industry executives and legal analysts testified.<sup>127</sup> In the intervening period, groups and individuals, working in concert with government agencies, continued to examine the accessibility of Internet service providers and web sites.<sup>128</sup> The majority view is that web-based activities of public accommodations that have an online presence (e.g., certain travel agents, insurance companies, online catalogues and retail stores) are subject to Title III provisions.<sup>129</sup> For the same reason, web-based

122. See Blanck & Sandler, *supra* note 1, at 855–59 (discussing the issues in this part).

123. See *Applicability of the Americans with Disabilities Act (ADA) to Private Internet Sites: Hearings Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106th Cong. 135–57 (2000) [hereinafter *Private Internet Site Hearings*], available at [http://commdocs.house.gov/committees/judiciary/hju65010.000/hju65010\\_of.htm](http://commdocs.house.gov/committees/judiciary/hju65010.000/hju65010_of.htm).

124. See *Nat'l Fed'n of the Blind v. Am. Online, Inc.*, No. 99CV12303EFH (D. Mass. filed Nov. 4, 1999).

125. 42 U.S.C. §§12181–12189 (2000); see Cynthia D. Waddell, *The National Federation of the Blind Sues AOL*, 27 HUMAN RTS. 22, 22–24 (2000) (Plaintiffs claimed that AOL's online service sign-up form, welcome screens and chat rooms were not accessible because screen readers could not read text hidden within graphic displays.).

126. See Todd R. Weiss, *AOL Promises Access for Blind*, COMPUTERWORLD, July 31, 2000, at 8, available at 2000 WL 2176778; see also Press Release, America Online, American Online: Our Commitment to Accessibility (Apr. 1, 2003), at <http://www.nfbnet.org/pipermail/nfb-talk/2003-April/001991.html>; NAT'L FED'N OF THE BLIND, NATIONAL FEDERATION OF THE BLIND / AMERICA ONLINE ACCESSIBILITY AGREEMENT, at <http://www.nfb.org/Tech/accessibility.htm> (last modified Apr. 12, 2002).

127. See generally *Private Internet Site Hearings*, *supra* note 123, at [http://commdocs.house.gov/committees/judiciary/hju65010.000/hju65010\\_of.htm](http://commdocs.house.gov/committees/judiciary/hju65010.000/hju65010_of.htm).

128. See Judy Heim, *Locking Out the Disabled*, PC WORLD, Sept. 2000, at 181, available at 2000 WL 9395458.

129. This would be true to the extent that equivalent services offered on-line or in other accessible formats (e.g., Braille) were not available to people with disabilities.

service industries (e.g., e-commerce retail companies) would be Title III covered entities because they affect commerce and offer services to the public.<sup>130</sup>

As an alternative to providing full accessibility through the Internet, Title III entities may offer their services in other effective formats. An e-commerce company may choose to make its services available through a telephone help-line or offer print catalogues in Braille format. Yet, the help-line, which Title III would require to be staffed in a fashion equal to the services provided to non-disabled customers via their web site, is costly relative to web site access.<sup>131</sup>

Section 508 of the Rehabilitation Act<sup>132</sup> also is spurring accessibility in the e-commerce industry. Enacted as part of the Workforce Investment Act of 1998, Section 508 requires that electronic and information technology, such as federal web sites, telecommunications and software, is usable by persons with disabilities.<sup>133</sup>

### III. CONCLUSION

The stories in this Article cannot do justice to the deeply personal and emotional aspects of these Americans' pursuit of their civil rights.<sup>134</sup> Yes, Don Perkl prevailed, was back in a sheltered workshop setting for a time, and then secured two part-time janitorial positions. Mario Echazabal chased

130. Some courts conclude that Title III does not cover the terms of an employer's insurance benefits program, so that public accommodations are places (e.g., the insurer's offices) and not services. *See, e.g., Ford v. Schering-Plough Corp.*, 145 F.3d 601 (3d Cir. 1998); *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006 (6th Cir. 1997) (en banc). But, in a Policy Ruling Letter about web site accessibility, the U.S. Department of Justice concluded that, under Titles II and III, government and the business sector must provide "effective communication" whenever they convey information, through the Internet or otherwise, about their services. Letter from Deval Patrick, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, to Tom Harkin, U.S. Senate (Sept. 9, 1996), *reprinted in* 10 NAT'L DISABILITY L. REP. 821-22 (1996); *see also* CYNTHIA D. WADDELL, NAT'L SCI. FOUND., *THE GROWING DIGITAL DIVIDE IN ACCESS FOR PEOPLE WITH DISABILITIES: OVERCOMING BARRIERS TO PARTICIPATION IN THE DIGITAL ECONOMY* (May 25-26, 1999), *available at* <http://www.aasa.dshs.wa.gov/access/waddell.htm>.

131. Access Now and others are engaged in related litigation over website accessibility. *See* Brief of Amici Curiae World Wide Web Consortium, *Access Now v. S.W. Airlines* (11th Cir. 2002) (No. 02-16163-BB), *at* [http://www.icdri.org/legal/w3c\\_amicus\\_brief.htm](http://www.icdri.org/legal/w3c_amicus_brief.htm).

132. Workforce Investment Act of 1998, Pub. L. No. 105-220, § 408, 112 Stat. 936 (1998) (codified at 29 U.S.C. § 794d (2000)) (amending section 508 of the Rehabilitation Act of 1973).

133. Federal agencies may not use technology that is not reasonably accessible to persons with disabilities. Section 508 does not require private companies who market technologies to the federal government to modify their products used by company employees or to make their Internet sites accessible. *See* Report from Attorney General Janet Reno to President William Clinton, *Information Technology and People with Disabilities: The Current State of Federal Accessibility, Executive Summary & Recommendations* (Apr. 2000), <http://www.usdoj.gov/crt/508/report/content.htm>.

134. For the complexity of like stories, *see* Steve Thunder-McGuire, *Completing Stories, in* EMPLOYMENT, DISABILITY AND THE AMERICANS WITH DISABILITIES ACT 447-62 (Peter Blanck ed., 2000).

his “American Dream,” only to be thwarted by the paternalistic views of others. And, if Chevron could deny employment to Mario, *for his own good*, when he had worked in Chevron’s refineries for twenty years with no health problems, what of the employment outlook for millions of like others?

In one case, a mother described how her deaf son’s dreams were demolished.<sup>135</sup> When her deaf son turned eighteen, he wanted to work for his father’s demolition company. The company’s workers’ compensation insurance provider refused to cover her son because they considered him a safety risk. In another case of attitudinal bias and perceived risk, a deaf nurse with bilateral cochlear implants began working at a hospital’s in-patient psychiatric unit. The other nurses on her shift filed a grievance claiming their safety was at risk because of her impaired hearing.<sup>136</sup>

In *Martell v. Sparrows Point Scrap Processing*,<sup>137</sup> a case similar to *Chevron*, the plaintiff, Robert Martell, experienced a hearing loss in childhood, but used hearing aids in both ears as an adult to regain significant auditory function.<sup>138</sup> Martell had been employed as a crane operator for more than twenty years and applied for a job as a crane operator with Sparrows Point Scrap.<sup>139</sup>

After initial pre-employment interviews, Martell was offered the job subject to a physical examination.<sup>140</sup> After the examination—in which Martell’s hearing was described as “abnormal”—Sparrows withdrew the offer saying that Martell’s hearing impairment, although corrected through the use of hearing aids, would pose a significant danger to himself and others in the performance of the crane operator job.<sup>141</sup> Reminiscent of Daniel Schwartz’s case, the district court found Martell was not substantially limited in the major life activities of hearing and working.<sup>142</sup> As in Daniel’s case, the court did not reach the ultimate issue of whether Martell could perform the job with accommodation.

Sara K. wanted to live at home with family and friends, and not only see them during visiting hours from her hospital bed. Sadly, Demetrius and Tyron, confined at the South Carolina DJJ facility, and many like them, may never break out of a cycle of poverty, mental health problems, and educational deficiencies, despite Title II’s goals.

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135. See NAT’L COUNCIL ON DISABILITY, *supra* note 30, at 15.

136. *Id.*

137. *Martell v. Sparrows Point Scrap Processing*, 214 F. Supp. 2d 527 (D. Md. 2002).

138. *Id.* at 528.

139. *Id.* at 529–30

140. *Id.* at 529.

141. *Id.*

142. *Id.* at 529–30 (In granting summary judgment for defendant, the court accepted the company’s contention of the potential safety risks, even though it noted that “[i]t may well be that Sparrows Point’s risk assessment is poorly calibrated, i.e., that it has erroneously measured the potential for harm if it allowed Martell to work as a crane operator.”).



Access Now continues to face a backlash for its Title III litigation strategy. Yet, our country clearly is more physically and technologically accessible than it was before passage of the ADA. Access Now and others have helped our society to move toward that goal.

There are many stories—good and not good—like the ones I have described. Karen Hirsch contends we learn most about our culture and its perspectives on disability through the oral histories and narratives of Americans with disabilities. Hirsch writes that “[s]elf-defining narratives are . . . important tools in the process of political empowerment and in the effort to redefine the cultural meaning of disability.”<sup>143</sup> Yet, courts, lawyers and others often forget it is these stories that define the disability civil rights movement.

In his 2002 book, *Narrowing the Nation’s Power*,<sup>144</sup> John Noonan, a Senior Judge of the Court of Appeals for the Ninth Circuit, said of the plight faced by many pursuing their civil rights under laws like the ADA:

[Too often] the courts proceed with an agenda . . . the facts are of minor importance, [and] the persons affected are worthy of almost no attention. The people and their problems . . . [become] . . . grist for the constitutional mill [as intellectualized by lawyers and judges], [and] are incidental.<sup>145</sup>

We do not know why cases like those I have discussed end up as they do. As a society, we have not come to grips with the fact that millions of persons with disabilities—those living in poverty, women and persons from minority groups—continue to face segregation and isolation, and negative stigma and discrimination.<sup>146</sup> We are learning why some organizational cultures promote inclusiveness and diversity, while others choke off such elements. How does an organization facilitate or hinder employment and promotional opportunities? How do they develop inclusive cultures that benefit people with disabilities, non-disabled employees, and the organization as a whole?

Although this is a new area of inquiry and further research is needed, large and small organizations have been shown to benefit from incorporating people with disabilities into organizational life. Lisa Schur, Doug Kruse and I have suggested steps that organizations may take to further this goal.<sup>147</sup>

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143. Karen Hirsch, *From Colonization to Civil Rights*, in EMPLOYMENT, DISABILITY, AND THE AMERICANS WITH DISABILITIES ACT, *supra* note 134, at 412, 428. See generally VOICES FROM THE EDGE: NARRATIVES ABOUT THE AMERICANS WITH DISABILITIES ACT 10, 24 (Ruth O’Brien ed., 2004).

144. JOHN T. NOONAN, JR., *NARROWING THE NATION’S POWER: THE SUPREME COURT SIDES WITH THE STATES* (2002).

145. *Id.* at 145.

146. See Johnette Hartnett et al., *Asset Accumulation and Tax Policy for People with Disabilities*, 8 J. GENDER RACE & JUST. (forthcoming 2004); Johnette Hartnett et al., *Poverty, Welfare Reform and Disability*, 8 J. GENDER RACE & JUST. (forthcoming 2004).

147. Lisa Schur et al., *Corporate Culture and the Employment of Persons with Disabilities*,

These include establishing a strong and ongoing commitment by leadership to diversity and inclusiveness, and combating stereotypes and stigma about disability.

*A. So, is the ADA a Failed Law?*

For a number of reasons, I answer this question in the negative.

1. Title I

My colleague, Susan Schwochau, and I conclude that, since the ADA's passage, employment rates of persons with disabilities have varied positively and negatively, depending on how disability is defined and measured.<sup>148</sup> While employment of Americans who report a work-limiting impairment or health condition has decreased in the 1990s, employment has risen substantially among those with work limitations or severe functional limitations who report the ability to work. Unfortunately, neither of these findings are completely valid measures of the ADA Title I population since they are both overinclusive and underinclusive, and changes in reported disability over time also reflect changes in the social, political and economic environment.<sup>149</sup>

Still, challenges to Title I lie ahead, and so much so that disability advocates are considering support for a bill that would restore much of the reach of the law that has been narrowed by the line of Supreme Court cases. High on the list of topics included in such an "ADA Restoration Act" is clarification of the definition of disability, and, thereby, the identification of those with disabilities who are, to say the least, critical to any ADA story.

Moreover, given the Court's interpretation of the ADA's definition of

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22 BEHAV. SCI. & L. (forthcoming 2004). In June of 2003, my colleagues and I convened a symposium at the Merrill Lynch New York headquarters to enhance study and dialogue among corporations, persons with disabilities and researchers on corporate culture and the employment of persons with disabilities. Participants included experts on corporate culture and disability studies, corporate leaders and government representatives. The special forthcoming issue will present topics such as the study of corporate culture, change in response to disability legislation and the usefulness of such study to corporations, policy makers, persons with disabilities and researchers. The symposium's proceedings are available at LAW, HEALTH POL'Y, & DISABILITY CTR., CORPORATE CULTURE AND DISABILITY SYMPOSIUM (June 9, 2003), at [http://disability.law.uiowa.edu/lhpdc/events/merrill\\_lynch\\_symp.html](http://disability.law.uiowa.edu/lhpdc/events/merrill_lynch_symp.html).

148. For a related discussion, see Susan Schwochau & Peter Blanck, *Does the ADA Disable the Disabled?—More Comments*, 42 INDUS. REL. 67, 67–77 (2003); Michael A. Stein, *The Law and Economics of Disability Accommodations*, 53 DUKE L.J. 79 (2003) (illustrating the positive economic effects of the ADA and refuting the neoclassical economic critique of the ADA).

149. See Schur et al., *supra* note 147. Analyzing employment trends is complicated by the fact that public disability income, which is strongly linked to lower levels of employment, became more available in the 1990s, coinciding with the implementation of the ADA. No matter the definition, employment levels of people with disabilities (but not necessarily those covered by the ADA) remain well below those of non-disabled people, and the majority of non-employed people with disabilities would prefer to be working. *Id.*; see also Blanck & Song, *Pension Attorneys*, *supra* note 6, at 209–12 (finding conceptions of disability and pension awards influenced by the political party in power).

disability and its requirement that individuals be “substantially limited” in a range of daily life activities, the number of individuals covered by Title I has been restricted. Daniel Schwartz, whose disability never prevented him from working, and Mario Echazabal, whose disability imposed perhaps some, but not a “substantial,” work limitation, now cannot expect Title I to provide them a cause of action.<sup>150</sup> In addition, contrary to prior interpretations of the ADA, the Supreme Court decided that factors that mitigate an individual’s impairment—such as prosthetic devices or medication—are to be considered in defining whether that person’s impairment is substantially limiting for purposes of the ADA.<sup>151</sup>

## 2. Title II

Given the Court’s Title II *Olmstead* mandate,<sup>152</sup> does that subchapter of the law provide the protections that Congress intended? The integration mandate has reached thousands of individuals like Sara K.<sup>153</sup> Yet, the Supreme Court is set to decide in *Tennessee v. Lane*<sup>154</sup> whether, in some fundamental ways, Title II should be considered under its new federalism Eleventh Amendment jurisprudence.<sup>155</sup> Indeed, Title II’s mandate that states ensure access to integrated government services goes to the heart of the federalism debate.

In *Lane*, two persons with disabilities, a defendant in a traffic case and a court reporter, sued under Title II to vindicate their fundamental right of access to the courts.<sup>156</sup> Their story is compelling. The plaintiffs were excluded from courthouses and court proceedings through an inability to access the physical facilities.

One of the plaintiffs, George Lane, crawled up two flights of steps to attend his state court hearing in a building that lacked an elevator. He decided not to make the same attempt when called for a second hearing, and notified the judge he was downstairs. The judge had him arrested and jailed

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150. Thus, an individual is only substantially limited in performing manual work tasks for purposes of Title I if the impairment severely limits that individual from activities that are central to daily life. See *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 185 (2002).

151. *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 472 (1999).

152. *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999).

153. See, e.g., *Rodde v. Bonta*, No. 03-55765, 2004 WL 213289, at \*4–8 (9th Cir. Feb. 5, 2004) (ADA Title II prohibits discrimination in state programs and services that would result from the closure of a large public health rehabilitation facility that provides necessary medical services for persons with disabilities).

154. *Tennessee v. Lane*, 315 F.3d 680 (6th Cir. 2003), cert. granted, 71 U.S.L.W. 3789 (U.S. June 23, 2003) (No. 02-1667).

155. Brief for Petitioner at \*15, *Tennessee v. Lane*, 71 U.S.L.W. 3789 (2003) (No. 02-1667), 2003 WL 22137324.

156. *Lane*, 315 F.3d at 683.

for failure to appear in court.<sup>157</sup> The other plaintiff, Beverly Jones, works as a court reporter in Tennessee. She claimed her work opportunities were limited because courthouses in Tennessee are physically inaccessible to her. She identified twenty-five counties in Tennessee she claims were inaccessible at the time of her complaint.<sup>158</sup>

In *Lane*, the Court will decide whether Congress crafted Title II within its constitutional bounds in attempting to prevent states from discriminating against people with disabilities. Should the Court rule Title II's remedies exceeded Congress' authority to abrogate states' sovereign immunity, the decision will severely curtail the law's practical reach.<sup>159</sup>

### 3. Title III

What of the impact of Title III? The premise of Title III is straightforward: Places of public accommodation cannot discriminate against people with disabilities in their use of facilities and the provision of goods and services. Increasingly, places of public accommodation are physically accessible to people with disabilities. And, generally, Title III defines discrimination broadly to include failure to take steps to make facilities physically accessible.

In *PGA Tour, Inc. v. Martin*,<sup>160</sup> the Supreme Court found that Casey Martin, a professional golfer with Klippel-Trenauney-Weber Syndrome,<sup>161</sup> was entitled to a Title III accessibility modification (riding a golf cart) to allow him to participate in tournament play.<sup>162</sup> The Court believed the PGA's description of the accessibility burden was overstated.<sup>163</sup> Significantly, the Court stated that Title III requires that public accommodations "not only give individualized attention" to accessibility requests, "but also carefully weigh the purpose, as well as the letter, of the [exclusionary] rule before determining that no accommodation would be tolerable."<sup>164</sup>

Is Title III broad enough to ensure effective communication on the Internet? Title III has spurred universal design and accessibility as

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157. *Id.* at 680.

158. Her requests for accommodations were not successful. *Id.*

159. In this scenario, Title II would be limited to prospective injunctive relief against states (or state officials) and to suits for damages against local governments brought by the United States. See BLANCK ET AL., *supra* note 4, § 10.2.

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

161. This degenerative circulatory disorder obstructs the flow of blood from his right leg to his heart. The disease causes severe pain when Martin walks, and walking creates a significant risk of hemorrhaging, blood clots, and bone fractures.

162. *Martin*, 532 U.S. at 661.

163. *Id.* at 691, n.53.

164. *Id.* at 691.

components of the Internet, providing information to a wide customer base. E-commerce now involves innumerable Internet links to commercial, governmental, and public and private partners that increasingly are accessible to persons with disabilities. Dialogue is needed, however, on the application of Title III to the physical and cyber setting, not only for people with disabilities, but for all underrepresented individuals in society—the poor, isolated and vulnerable.

Access Now’s Title III cases, and others, have generated change but also controversy. One trial judge’s decision exemplifies criticism of Title III and support for a notice requirement:

Requiring potential plaintiffs to notify offenders and provide an opportunity to remediate before filing suit is likely to solve access problems more efficiently than allowing all violators to be dragged into litigation regardless of their willingness to comply voluntarily with the ADA . . . . The goals of the ADA do not include creating an incentive for attorneys to seek statutory fees by laying traps for those who are ignorant of the law. The Court believes that the purposes of the ADA are best served by reserving private enforcement actions for knowing violators who refuse to comply without an injunction.<sup>165</sup>

The Supreme Court’s rejection of the “catalyst theory,” in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*,<sup>166</sup> effectively has incorporated such a notice requirement in Title III cases. In *Buckhannon*, the plaintiff sued to stop a requirement that assisted living facilities comply with a state law that required people in the facilities to be capable of moving themselves from situations involving imminent danger, such as fire.<sup>167</sup> After the lawsuit was brought, West Virginia stayed enforcement of the statute, and the legislature then enacted bills eliminating the requirement.<sup>168</sup> West Virginia successfully moved to dismiss the lawsuit as moot.<sup>169</sup> The plaintiffs requested attorneys’ fees for their efforts under the “catalyst theory,” arguing they were prevailing parties because their lawsuit had brought about a voluntary change in the state’s conduct.<sup>170</sup>

The Supreme Court disagreed and ruled against the plaintiffs. The Court found where there is no judicially ordered change in the relationship of the parties (e.g., issuing of a final judgment), an award of attorneys’ fees

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165. *Snyder v. San Diego Flowers*, 21 F. Supp. 2d 1207, 1210–11 (S.D. Cal. 1998), *overruled by* *Botosan v. Paul McNally Realty*, 216 F.3d 827, 832 (9th Cir. 2000).

166. 532 U.S. 598, 605 (2001).

167. *Id.* at 598 (citing W. VA. CODE §§ 16-5H-1 to 16-5H-2 (1998), *repealed by* Acts 2003, ch. 113).

168. *Id.* at 601.

169. *Id.*

170. *Id.*

would not be allowed.<sup>171</sup> As a result, plaintiffs' attorneys are reluctant to bring Title III access lawsuits in which they may have their case mooted by the actions of a defendant and thereby deprived of attorneys' fees.<sup>172</sup>

### *B. Closing*

We have participated in this conference and special issue of the *Journal of Gender, Race & Justice* to contribute to the dialogue about inclusion and not segregation; economic independence and not dependency; and equality and not second-class citizenship. By enacting the ADA, Congress committed the federal government to the protection of the civil rights of individuals with disabilities, and refuted a prior focus on social programs that tended to isolate those individuals.

Despite progress, however, a wide gulf separates those sequestered in nursing homes, laboring in sheltered workshops and waiting in poverty for the next government check. The ways in which we address these complex issues will shape the lives of the next generation of children with disabilities; those who have experienced integrated education and who have never known a world without the ADA. Time will tell whether our children's aspirations will be limited by others' low expectations and stigma. Perhaps, in the future, people will be welcomed as equal members of society based on their abilities that we may answer in the affirmative the question posed by the title of this Symposium.

I share a conviction that striving toward an understanding of this question, *Justice for All?*—for people in poverty, women, African-Americans, people with disabilities and others—perhaps is the crucial issue facing our society as we continue this new century.

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171. See BLANCK ET AL., *supra* note 4, § 19.1 (quoting *Buckhannon*, 532 U.S. at 605).

172. I thank Robert Fine for this observation from his practice.