THE AMERICANS WITH DISABILITIES ACT: TIME FOR CELEBRATION, OR TIME FOR CAUTION?

BY
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INTRODUCTION

When President Bush signed the Americans with Disabilities Act (ADA)[1] on July 26, 1990, he proclaimed a new age: where "[e]very man, woman and child with a disability can now pass through once-closed doors into a bright new era of equality, independence and freedom."[2] After a long winter of struggle invisible to most citizens, the ADA provided a very public symbol of societal education and political success. We who have disabilities, along with our friends and allies, waged a public campaign for the Act, thrusting our ideas, our passion and our physical selves into the sight and imagination of legislators and the American people. Around the country we watched, counted heads, invoked higher powers and crossed fingers—and we succeeded. With great joy and pride, we saw our brothers and sisters shake hands with the President at the signing ceremony and heard him declare with fervor that the "shameful walls of exclusion are tumbling down."[3]

Our euphoria was understandable. But the job ahead—drafting and evaluating regulations, implementing enforcement and, hardest of all, changing attitudes—was daunting. Of course we had our doubts. We had met other "new ages" only to watch as our gains were washed away. In the movement we had learned bitter truths: beneficent motives are often the most harmful to rights;

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I am heartened to see the debut of the Public Interest Law Journal, and honored to be a participant. This essay is dedicated to my parents, William and Sarah Macurdy, who taught me that my worth was measured by my care for others, not by my physical limitations, and to my siblings James Macurdy and Anne Macurdy Pardee who never accepted that I had limits at all. Limits imposed by power and prejudice were at the heart of Mary Jo Frug's work, and it is to her memory that this essay also is dedicated. Taken from us in violence, she would have us eschew hate; though we are inconsolable, she would have us hope. I would also like to thank Martha Minow, Avi Soifer, Joe Singer, Fred Lawrence, and Harry Beyer, as well as Neal Pike, Cynthia Dunn, and for research assistance, Maria Frucci.

[1] Americans with Disabilities Act of 1990. Pub. L. No. 101-336, 104 Stat. 327 (1990).

[2] President's Remarks on Signing the Americans with Disabilities Act of 1990, 26 Weekly Comp. Pres. Doc. 1334 (July 26, 1990).

[3] *Id.*

statutory protections wither without political mobilization; isolation breeds marginality and powerlessness. But doubts seemed misplaced on that sunny afternoon—indeed, almost ungrateful. Wasn't this our hour of triumph?

I. HISTORIES OF STRUGGLE

The passage of the ADA is due in large part to generations who struggled for human rights, especially in the challenge to racial segregation. With the Supreme Court imprimatur of *Brown v. Board of Education*,[4] the civil rights movement achieved significant impact upon fundamental values, fashioned enforcement weapons and established, at least rhetorically, the role of anti-discrimination principles in public discourse. Whether prejudices were actually eliminated is less important than these basic facts: much of society will no longer tolerate racist remarks or support for overtly racist ideas; courts and legislatures have produced a myriad of federal and state civil rights decisions and statutes elaborating the demands of equality for people of different races; and the very language of equality now frames debate across the ideological spectrum, where once people talked of inherent differences or paternalistic protections.

A. *The Larger Civil Rights Movement*

The struggle for racial justice in law reaches at least as far back as the Reconstruction Era statutes.[5] However, it is the legislation produced by "modern" civil rights legislation that lays the groundwork for the ADA. Most significant of these laws is the Civil Rights Act of 1964, outlawing discrimination based on "race, color, religion, or national origin" in places of public accommodations such as hotels, restaurants, and places of entertainment[6] and by employers with at least fifteen employees.[7] Also significant was the Fair Housing Act of 1968,[8] which prohibited discrimination in public housing and was later amended to include disability in 1988.[9]

Challenges to racial oppression inspired and empowered minority activism, a rising feminist resurgence and a fledgling disability rights movement. By challenging discriminatory treatment, advocates set in motion events that would lead to legislative action on sex,[10] age[11] and disability bias.[12]

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[4] 347 U.S. 483 (1954).

[5] 42 U.S.C. §§ 1981, 1983, 1985 (1988).

[6] 42 U.S.C. § 2000(a) (1988).

[7] 42 U.S.C. § 2000(e) (1988) (as amended), more commonly known as Title VII.

[8] 42 U.S.C. §§ 3601-3619 (1988).

[9] Fair Housing Act Amendments of 1988, Pub. L. No. 100-480, 102 Stat. 1619 (1988), 42 U.S.C. §§ 3601-3619 (1988).

[10] Sex discrimination, in fact, was added to the 1964 Act in a last minute attempt to defeat the legislation. 110 CONG. REC. 2577-2584 (1964). Subsequent cases have construed Title VII to prohibit sexual harassment in employment. *See* Mentor Savings Bank v. Vinson, 477 U.S. 57 (1986). For a fascinating twist on harassment, *see* Rob-

For race, sex and age issues, the "modern" civil rights movement advocated rights from the start. In the courts and in federal agencies, discrimination was addressed in the language of rights: there were hearings, appeals, burdens of proof, causes of action. Though part of the enforcement structure concerned conditions under which federal financial assistance was available, the breadth of civil rights protection made clear that the duty of nondiscrimination was society's duty.[13] For disability rights, however, legislative responses came more slowly, and in a different form.

B. *Disability Legislation*

The early congressional approaches to disability emphasized protection from harm and provision of services, rather than combating societal discrimination. The protectionist perspective, though connected to earlier views of women and blacks, arose naturally in the context of institutional reform. Often horrid conditions, lack of treatment, and burgeoning national interest in patient rights all contributed to reform litigation on behalf of those with developmental disabilities and mental illnesses.[14]

The first comprehensive disability legislation Congress enacted was the Rehabilitation Act of 1973.[15] Under this act, federal contractors and recipients of federal funding are barred from discriminating against "otherwise qualified handicapped individuals" and are obligated to provide reasonable accommodations for those "handicapped" individuals.[16] Although the Act was later broadened to cover Federal agencies as well, the Act has been typically employed to reach those institutions, such as state hospitals and rehabilitation commissions, which serve the most basic, subsistence needs of people with

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ertson v. Jacksonville Shipyard, Inc., 55 Empl. Prac. Dec. (CCH) para. 40.535 (D. N. Fla. Jan. 18, 1991) (holding that displaying explicit pornographic photographs in the workplace constitutes sexual harassment).

[11] Age Discrimination in Employment Act of 1967, 81 Stat. 602, 29 U.S.C. §§ 621-634 (1988).

[12] See text accompanying notes 6-7.

[13] The 1972 Amendments to Title VII, for example, extended coverage to employers with fifteen or more employees, state and local governments (42 U.S.C. § 2000(e)-2000(f) (1988)), educational institutions (42 U.S.C. § 2000(e)(1) (1988)), and the federal government (42 U.S.C. § 2000(e)(16) (1988)).

[14] *See, e.g.*, D. ROTHMAN & S. ROTHMAN, THE WILLOWBROOK WARS (1984). Claims of rights to protection and habilitation under the U.S. Constitution were upheld, at least for involuntarily placed residents, in Youngberg v. Romeo, 457 U.S. 307, 328 (1982), but a recent decision on affirmative duties, DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 196 (1989), casts some doubt over that type of claim. For a discussion of affirmative rights under state constitutions, see Amicus Brief, Mass. Federation for Children with Special Needs, In the Matter of McKnight, *decided on other grounds* 406 Mass. 787, 550 N.E.2d 856 (1990) (on file with the author).

[15] 29 U.S.C. § 794(a) (1988).

[16] *Id.*

disabilities.

By 1975, Congress enacted the Developmental Disabilities Assistance and Bill of Rights Act,[17] which provides federal funds for programs to educate or assist individuals with developmental disabilities and requires the creation of protection and advocacy systems and compliance with federal regulations. The Education for All Handicapped Children Act[18] was also passed in 1975. This act entitled all children to a "free and appropriate public education" in the "least restrictive setting," thereby enshrining mainstreaming[19] in law and public consciousness. As many as four million children who had been receiving no educational benefits would now be able to obtain an education from sometimes resistant school systems.[20]

Mainstreamed public schools and special education prepared my generation for leadership in the rights movement, and the Rehabilitation Act changed the ways in which colleges and universities conducted business, enabling many individuals with disabilities to continue their education.[21] The absence of national commitment to access and nondiscrimination, however, often limited the Rehabilitation Act to continued policies of paternal care. While individuals with disabilities may need to be protected and aided, such approaches reemphasize and perpetuate stereotypes of helplessness and incapacity, which in turn limit participation in society. Set in a system of education and human service programs, disability rights seemed only important within the narrow world of government benefits. Nondiscrimination was merely a manner in which services were provided, not a human rights duty. As women and Native Americans had been, "the disabled" would also be guided and helped; each would be protected and treated with solicitude, but not granted access to, or participation in, mainstream society.

II. THE ADA

Although not part of the celebration in 1964, individuals with disabilities now are part of the civil rights agenda, with its substantive rights and enforcement structures. For us, the potential change in our legal position is no less revolutionary than for women and people of color after President Johnson signed the 1964 Act.

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[17] 42 U.S.C. § 6001 (1988).

[18] 20 U.S.C. §§ 1400-1485 (1988).

[19] "Mainstreaming" originally referred to the integration of children with disabilities into classes with non-disabled chidren. The term has become a general one for any integration of individuals with disabilities into the larger society.

[20] *See* 20 U.S.C. § 1400(b) (1988).

[21] NATIONAL CLEARINGHOUSE ON POSTSECONDARY EDUCATION FOR INDIVIDUALS WITH DISABILITIES, INFORMATION FROM HEATH (Vol. 10, No. 2, Special Insert, June 1991).

A. *Substantive Rights Created by the ADA*

In marked contrast to the warm and friendly atmosphere of "social legislation" embodied in the earlier needs/protection model, the ADA uses the cold adversarial language of suspect class and civil rights remedies. The congressional findings that introduce the ADA recognized the relationship between disability oppression and the lack of enforceable rights. Congress noted that individuals with disabilities faced ignorance and inequality, and "often had no legal recourse to redress . . . discrimination."[22] People with disabilities clearly were viewed by Congress as constituting a "discrete and insular minority . . . subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society."[23]

Although the ADA speaks of rights enforcement, it utilizes much of the definitional structure of the Rehabilitation Act and the 1988 Amendments to the Fair Housing Act. For purposes of the ADA's prohibition against discrimination, an "individual with a disability" is defined as a person with "a physical or mental impairment that substantially limits one or more of [that person's] major life activities . . . ; a record of such an impairment; or [a person who is] regarded as having such an impairment."[24] "Major life activities" can include "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[25] An individual's impairment is "substantial" if the individual is "restricted as to the conditions, manner, or duration" of performing an activity when compared to most people.[26]

By far, the most significant and far-reaching difference between the ADA and the Rehabilitation Act is the increased scope of the prohibition on disability-based discrimination in employment. The Rehabilitation Act applies only to those employers with a federal nexus—federal funds, contracts, agencies. Title I of the ADA, however, prohibits employers with at least twenty-five employees (fifteen after four years), employment agencies, labor organizations and joint management-labor committees from discriminating against a "qualified individual with a disability . . . in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training and other terms, conditions, and privileges of employment."[27]

The ADA defines a "qualified individual with a disability" as a person "with a disability who, with or without reasonable accommodation, can per-

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[22] ADA § 2(a)(4).

[23] ADA § 2(a)(7). For the first time, Congress has extended civil rights obligations to itself by prohibiting disability-based discrimination by the House, Senate and legislative agencies. *Id.* § 509. It is a good first step, but Congress should practice what it preaches for all other forms of discrimination as well.

[24] ADA § 3(2).

[25] S. REP. No. 116, 101st Cong., 1st Sess. 22 (1989). The Report views people with AIDS/HIV as fitting within the defined limits on major life activities.

[26] *Id.* at 23.

[27] ADA § 102.

form the essential functions of the employment position" held or desired.[28] What it means to be "qualified" has been much debated since passage of the Rehabilitation Act in 1973. That Act prohibits discrimination against an "otherwise qualified handicapped person." The definition of "otherwise qualified" was considered in 1979 by the Supreme Court in *Southeastern Community College v. Davis*.[29]

Davis, a prospective nursing student who is deaf, was refused admittance to the college's nursing program because, in the view of the college, nurses can never be qualified if they cannot hear.[30] While at first glance the policy appears sensible—considering the demands for patient safety—there are roles for nurses where no safety issues arise, but where nursing training would be essential, such as nurse-administrator, non-clinical instructor or medical ethicist. Apart from this unduly narrow conception of nursing roles, a more significant fault of *Davis* is that the way in which Justice Powell supports the college's policy severely cramps the obligations imposed by section 504.

Section 504 on its face requires reasonable accommodation to the needs of an "otherwise qualified" handicapped person, so long as it does not impose an undue burden on the employer/program.[31] Davis, joined by rights advocates, argued that "otherwise qualified" meant qualified with accommodations to her disability that were reasonable. Justice Powell, however, felt that section 504 did not require the school to change the essential character of its program, and therefore, "otherwise qualified" meant qualified "in spite of" her disability.[32] Powell was probably unable to conceive of an accommodation that would be effective in this case, but by grounding the decision in the definition of "other-

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[28] ADA § 101(8). A late amendment permits employers and employees to use a written description of the employment position — prepared before advertisement or interview — as evidence of the essential functions of the job. *Id.* This amendment creates a presumption of legitimacy for posted requirements, shifting the burden of proving a function is notessential to the prospective employee. The point of employment provisions is to take apart the job description to expose those requirments not essential to the employment position. The amendment permits an employer — or factfinder — to avoid this disassembly, and the need to substantiate that each requirement is an "essential function". The ADA also bars the use of qualification standards and employment tests that tend to screen out individuals with disabilities. *Id.* § 102(b)(6). Current drug users are not "qualified" under the ADA, per § 104, and the ADA amends Section 504 of the Rehabilitation Act to remove them. As noted throughout the Act, a covered entity is not required to hire/retain an employee who poses a "direct threat," *Id.* § 103(b), defined as a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation. *Id.* § 103(d)(3). An employer may remove an employee with a contagious disease from a job involving food handling only if that disease is published on a list of diseases that may be so transmitted, by the Secretary of Health and Human Services. *Id.* § 103(d)(1)-103(d)(3).

[29] 442 U.S. 397, 406-7 (1979).

[30] *Id.* at 401.

[31] 29 U.S.C. § 794 (1988).

[32] Davis, 442 U.S. at 406.

wise qualified," rather than in the nature of what accommodations were reasonable, he created a principle that threatened to undermine the obligation of accommodation—and therefore the obligation of non-discrimination—through a mechanistic formal equality. In effect, the essential functions of a job could expand to include most "major life activities,"[33] since no accommodations are needed by those who are qualified "in spite of" disabilities. To be called "equal" in a world of prejudice and physical barriers is substantively meaningless.

The ADA is structured in much the same way as the Rehabilitation Act, requiring reasonable accommodations which may include making existing facilities accessible, restructuring jobs, modifying work schedules, reassignment to an open position, or providing adaptive equipment and interpreters.[34] An employer need not accommodate where such accommodations impose "undue hardship."[35] Advocates can anticipate encountering the same types of conceptual and evidentiary problems in utilizing the ADA as had been at issue in much of the litigation over the Rehabilitation Act, particularly in employment.[36]

Title II of the ADA prohibits disability-based discrimination in the provision of public services. The definition of "public entities" has been expanded to include not only entities receiving federal funds, but also state and local governments,[37] government departments and instrumentalities, public transit and commuter rail authorities and Amtrak.[38] In public transportation, the Act requires that new fixed-route buses be accessible unless no such buses are available, all new commuter rail cars be accessible, and that existing vehicles and stations be retro-fitted to make them accessible.[39] In addition, communications systems for emergency services such as police, fire or ambulance must be usable by individuals with hearing impairments through "telecommunications devices for the deaf" (TDDs).[40]

The ADA bars discrimination in public accommodations through Title III.

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[33] *See* note 25 *supra*, and accompanying text.

[34] ADA § 101(9).

[35] ADA §§ 102(b)(5)(A), 101(10). Factors include nature and cost of the accommodation, overall size and resources of the business and the type of business.

[36] Title I is effective as to employers with twenty five or more employees on July 26, 1992, and those with fifteen or more employees after July 26, 1994. ADA §§ 101(5)(a), 108.

[37] The ADA specifically removes the states' eleventh amendment immunities. *See* the discussion of ADA enforcement, notes 54-56 *infra*, and accompanying text.

[38] ADA § 201(1).

[39] ADA §§ 241-246. Paratransit services must be provided to those unable to ride buses/subways unless it can be demonstrated to the Secretary of Transportation that such services pose an "undue financial burden." ADA § 223.

[40] ADA § 401. *See* also H.R. REP. No. 485, 101st Cong., 2nd Sess., pt. 2, at 84-85 (1990); CONF. REP. No. 596, 101st Congr., 2d Sess. 67-68 (1990). This provision eliminated the need for the Emergency Phone System Equal Access Act, H.R. 1690, 101st Cong., 1st Sess. (1989).

The ADA applies to individuals who own, lease, or operate privately owned places of public accommodation, including hotels, medical or legal offices, restaurants, theaters, retail establishments, places of public recreation and social service centers.[41] The ADA requires reasonable modification of rules and policies, as well as the provision of auxiliary aids or services, unless the provision or modification would fundamentally alter the nature of the program or impose an undue burden.[42] Furthermore, new construction for first occupancy and major renovations must now be accessible, unless "structurally impracticable."[43] Existing facilities must be made accessible if "readily achievable," that is "easily accomplishable and able to be carried out without much difficulty or expense."[44]

Among Title III's most important contributions is the requirement that public transportation services provided by private entities be accessible. Title III accomplishes this gain by mandating that all vehicles, except cars, purchased thirty days after July 26, 1991, be accessible.[45] For the first time, federal law protects rights of free association of citizens with and without disabilities by banning discrimination against individuals because of their associations with disabled persons.[46] In short, Title III requires that the same opportunities to participate are provided to individuals with disabilities as are provided to others, and declares that relationships between us, those with disabilities and without, give value to both sides.

Relationships require communication, and Title IV facilitates such communication by requiring that telecommunications systems be accessible to individuals with hearing or speech impairments.[47] All local and long distance tele-

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[41] ADA § 301(7). Religious organizations, clubs, etc. that are exempt under Title II of the Civil Rights Act of 1964 are exempt under this title. ADA § 307. ADA § 307 Regulations will be developed by the Departments of Justice and Transportation, and access standards by the Architectural and Transportation Barriers Compliance Board. ADA § 306. Title III is effective after February 26, 1992 except no actions will be taken against businesses with fewer than twenty five employees and gross annual receipts of under $1,000,000 before July 26, 1992, and those with fewer than ten employees and gross annual receipts of under $500,000 before February 26, 1993. ADA § 310.

[42] ADA § 302(ii)(iii). In cases involving exams or courses relating to applications, licensing, or certification for education, professional or trade purposes, a place or manner accessible to persons with disabilities must be offered. *Id.* at §309.

[43] ADA § 303(a)(1).

[44] ADA § 301(9). Factors considered are the same as for undue hardship.

[45] ADA § 304. Title III does not apply to air carriers which are covered by the Air Access Carriers Act, 49 U.S.C. § 1374(c) (1986). Terminals, bus stations, and other centers for public transportation are covered by Title III.

[46] ADA § 302(b)(1)(E). This provision will be of great utility, particularly in those situations where fear, revulsion and overt bigotry drive the exclusion, such as discrimination against associates of individuals known or perceived to be HIV positive. Title III does contain a "direct threat" exception. *Id.* at § 302(b)(3).

[47] ADA § 401.

phone companies must provide intrastate and interstate communication relay services by July 26, 1993, at no greater charge than a direct-dial call with the same points of origin and termination.[48] Title IV amends the Communications Act of 1934[49] to extend the "universal service" obligation of the Federal Communications Commission to individuals with disabilities.[50] In addition, Title II requires all public service announcements funded or produced by the federal government to be close-captioned.[51]

B. *Enforcement Provisions of the ADA*

The substantive rights created by the ADA are by no means self-effectuating, thus it is in the ADA's enforcement provisions that we place our hopes and our anxieties. The Attorney General echoes earlier protectionist impulses when he notes that:

> The ADA enacts certain accommodations for disabled Americans within the daily, social fabric to help ensure . . . understanding and long-term help. At the same time, it wisely tempers its punitive measures against those who—whether insensitively or inadvertently—traduce the rights of the disabled. It is social legislation to end barriers, not an instrumentality for continuous and acrimonious litigation.[52]

Civil rights advocates have much bitter experience with the significance of calls to lay down the weapons of discord and to "reason together." President Bush's stated reason for veto of the 1990 Civil Rights Act—"[civil rights laws] should not be turned into some lawyer's bonanza encouraging litigation at the expense of conciliation, mediation or settlement"[53]—is only the latest example of this phenomenon and complements the Administration's formalistic view that the goals of the rights movement have been accomplished. Unlike the Bush Administration, we can no longer place our trust in social progress and edification. Prejudice is by no means dead, and after the celebrations have ended we must get back to the nuts and bolts, micro-level task of protecting rights.

It must be said with great clarity and fervor that the ADA is a vehicle for the enforcement of disability-based violations of the Equal Protection clause of the fourteenth amendment.[54] Justice Powell's confusion over the Rehabilitation Act's foundation in the fourteenth amendment versus the Spending

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[48] ADA § 401(d). States may also operate and enforce their own relay system so long as they meet all minimum FCC guidelines. 47 U.S.C. § 225. Title IV requires use of qualified operators trained in American Sign Language, deaf culture, typing, grammar and spelling. S. REP. No. 116 at 81.

[49] 47 U.S.C. § 225.

[50] 47 U.S.C. § 225(b)(1). ADA § 401(d).

[51] ADA § 402.

[52] Thornburgh, *supra*, p. 20.

[53] *Current Developments*, BNA DAILY LABOR REPORT, May 18, 1990, at A-7.

[54] U.S. CONST. amend. XIV, §§ 1, 5.

Clause, in *Atascadero State Hospital v. Scanlon*,[55] left that statute unable to clear the states' eleventh amendment immunities.[56] The ADA amends federal statutes that for the most part do not face such immunity, and Title V specifically removes the states' eleventh amendment immunities.

Rights in employment issues under Title I of the ADA are enforced through the procedures and remedies of Title VII of the 1964 Civil Rights Act. As in other Title VII cases, plaintiffs are entitled to bring suit in state or federal court to gain injunctive relief, hiring or reinstatement, and limited back pay.[57] Initial relief may be had through the Equal Employment Opportunity Commission.[58] In the provision of public services, Title II specifies that enforcement can be attained through the remedies and procedures of Section 505 of the Rehabilitation Act, which includes suit in state or federal court.[59]

Discrimination in public accommodations is dealt with through the remedies and procedures of Title II of the 1964 Civil Rights Act.[60] Thus, a disabled person who is discriminated against can bring an action for injunctive relief for violations of the public accommodations provisions of the ADA.[61] In addi-

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[55] 473 U.S. 334 (1985). For one lawyer's discussion of the incoherence of the Supreme Court's Tenth and Eleventh Amendment doctrine, *see* Macurdy, Sources of Congressional Power to Affect the States (1986) (unpublished manuscript on file with the author). *See also*, J. ORTH, THE JUDICIAL POWER OF THE UNITED STATES (1987); Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425 (1987); Brown, *State Sovereignty Under the Burger Court—How the Eleventh Amendment Survived the Death of the Tenth: Some Broader Implications of Atascadero State Hospital v. Scanlon*, 74 GEO. L.J. 363 (1985); Field, *The Eleventh Amendment and Sovereign Immunity Doctrines*, 126 U. PA. L. REV. 515 (1977) (Part I) and 126 U. PA. L. REV. 1203 (1978) (Part II); Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983); and Tribe, *Intergovernmental Immunities in Litigation, Taxation and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 HARV. L. REV. 682 (1976).

[56] U.S. *Const.* amend. XI reads:

> "The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

Since Hans v. Louisiana, 134 U.S. 1 (1890), the Eleventh Amendment has been interpreted to prohibit even "same-state" suits in federal court, i.e. not only are suits brought by citizens of Massachusetts against the state of New Hampshire prohibited, but suits by citizens of Massachusetts against the Commonwealth of Massachusetts are also not permitted. Civil rights laws, particularly where Congress explicitly overrides these immunities, usually are not limited by state immunity.

[57] ADA § 107.

[58] ADA § 106. *See* 56 Fed. Reg. 35,726 (1991) for the E.E.O.C. regulations.

[59] ADA § 203.

[60] ADA § 308(A)(1). *See* 42 U.S.C. § 2000a-3(a).

[61] 42 U.S.C. § 2000a-3(a). Damages generally are not available in these cases. *See, e.g.*, Newman v. Piggie Park Enterprises, Inc. 390 U.S. 400 (1968). Attorneys' fees are available to prevailing plaintiff. *See, e.g.*, Anderson v. Pass Christian Isles Golf Club, Inc., 488 F.2d 855 (5th Cir. 1974).

tion, the Attorney General may bring a civil action for civil penalties and damages where there has been a "pattern or practice of discrimination"[62] or where the discrimination raises an issue of "public importance."[63] Telecommunications provisions are enforced by the FCC through the remedies, such as injunctions and civil damages, provided in the Communications Act.[64] "Willful" violations are criminal offenses, punishable by fines of up to ten thousand dollars and imprisonment.[65] Finally, Title V prohibits intimidation or retaliation for enforcement of rights,[66] and gives attorneys fees' to prevailing parties in administrative and judicial forums.[67]

C. *Further Implications of the ADA*

The substantive and procedural rights outlined in the ADA have the potential to make great changes in our lives as individuals with disabilities, but its implications will affect some of our most troublesome societal questions. The controversies surrounding the AIDS epidemic, for example, reflect more than fear of contagion, but are symptomatic of this society's rejection of difference. Prejudice against individuals who are HIV positive is the starkest form of disability-based discrimination, existing wholly apart from any accommodations, and the ADA's provisions regarding public accommodations and services will play a growing role in defeating such discrimination.

Positive human developments engender fear and prejudice as well. Technological change and expanding medical expertise have enabled individuals with serious illnesses or injuries to live long, productive lives. While this means disability bias needs to be faced head on—as the ADA begins to do—there are more insidious developments that strike at the heart of human value and individual autonomy. Recent efforts to map the human genome i.e., to discover the functions of each human gene, have raised thorny ethical problems. These problems implicate privacy rights, threaten to vastly alter the balance of state-citizen power, and create the very real possibility of a quantum increase in the number of behaviors that should qualify as disability-based discrimination. For example, in the name of worker protection, often translated as minimizing tort exposure, companies are already testing for genetic disease markers that signal propensities for diseases common in specific industries. Businesses want to be able to refuse to hire in certain departments or to transfer workers to "safer" areas. All of these actions make distinctions between "qualified individual[s]" on the basis of a physiologic condition i.e., the presence, absence or state of specific genetic material, and can therefore be considered discriminatory under

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[62] ADA § 308(b)(1)(B).

[63] *Id.*

[64] ADA § 401(e). Injunctive relief is available through 47 U.S.C. § 205(a), and damages through 47 U.S.C. § 209.

[65] Criminal penalties may be found at 47 U.S.C. § 501.

[66] ADA § 503.

[67] ADA § 505.

the ADA.[68]

Genetic testing is also used by insurance carriers to screen out individuals who have genetic markers consistent with a propensity to develop certain diseases, or even to pass on congenital conditions to potential offspring.[69] Though such screening is a device to weed out individuals with actual or perceived disabilities,[70] the ADA explicitly exempts insurance underwriting from the requirement of nondiscrimination.[71] Insurers remain free to refuse coverage to anyone on the basis of "preexisting condition." The exemption of insurance companies from ADA coverage has devastating consequences to the disabled and for the overall effectiveness of the ADA.

For those of us with illnesses and impairments which require equipment, supplies, and daily medical support for substantial periods,[72] the insurance exemption leaves intact the awful dilemma: get a job and lose Medicaid or "dependents" private insurance (coverage for disabled dependents of an eligible employee) in a system where no private insurer will provide new coverage, and expenses are impossible to manage on a salary below a corporate CEO's; or remain unemployed and keep Medicaid/"dependents" coverage.

As the Attorney General pointed out, 58% of men and 80% of women with disabilities are unemployed, and so long as they remain without work "we cannot break the bind of national expenditure for dependence: at least $169 billion annually — some even estimate as high as $300 billion — approaching nearly four per cent of GNP."[73] The main reason for unemployment among persons with disabilities, and for large federal expenditures, is the inability of

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[68] While not specifically addressing disability, the Supreme Court, in International Union v. Johnson Controls, 111 S. Ct. 1196 (1991) recently decided a sex discrimination case illustrative of the dangers to rights posed by the protective role of medical prediction. The plaintiff brought a Title VII action claiming that a company policy barring women of child-bearing age from certain jobs in areas considered hazardous to female reproductive capacities or fetuses discriminates against women. Justice Blackmun, joined by Justices Stevens, Marshall, Souter and O'Connor reversed the Seventh Circuit which held that the company's fetal protection policy was justified as a "business necessity." 680 F. Supp. 309 (E.D. Wisc. 1988), *aff'd en banc,* 886 F.2d 871 (7th Cir. 1989). Regardless of the benevolent purpose of "fetal protection", the company's policy constitutes facial sex discrimination. In essence, Justice Blackmun rejected a return to the protective view of the "weaker sex," and the view that all group-based distinctions are valid so long as motives are pure.

[69] 39 EMORY L.J. 619 (1990) (issue devoted to genome issues).

[70] *See, e.g.,* ADA §§ 102(b)(6), 302(b)(1).

[71] ADA §§ 501(c)(1) (health insurance), 501(c)(2) (benefit plans based on state law), and 501(c)(3) (benefit plans not based on state law).

[72] To provide a personal example, I am a wheelchair user who requires the use of portable ventilators, suction machines and a myriad of medical supplies. As this condition involves life-threatening respiratory deficits, 24 hour coverage is necessary, at tremendous cost. Although I am able to work a busy modified academic schedule, I must do so under severe income restraints in order to preserve that coverage.

[73] Thornburgh, *supra,* at 17-18.

these persons to obtain medical insurance. Until this society is ready to reorder its priorities and provide some form of universal health coverage, all invocations of a "new day" in this age of formalist resurgence will remain, for many of us, empty rhetoric.

More fundamentally, there are limits to the capability of any legal device to bring about changes in values, particularly in combating prejudice.[74] Our society is constructed, at least in part, around a reified norm of the ideally able-bodied or -minded individual, a binary simplification of reality that would relegate "them" (the "disabled") to a subordinate status, while obscuring "our" deviations from the norm itself (because no one is ever perfectly able at all times for all things). These differences often seem obvious to most observers and are therefore harder to deconstruct and discredit. Because we can "see" that Bob walks and Alice doesn't, demonstrating that characteristics attached to "not walking" are constructed by society, rather than physiology, runs counter to what we believe our eyes perceive.

In this respect, disability as a social phenomenon closely resembles distinctions associated with gender; that is, there is a core characteristic—Alice can't walk or Bob can't bear children—upon which stereotypes are grafted. Prejudice, however, is not an optic function, but occurs in the mind, associating images with attitudes in often ideological ways. Not walking is only different i.e., aberrant of the norm of ableness, because the society's ideology designates it as such.[75]

Adherence to the perceived norm perpetuates this ideological model of human worth and subordination on the basis of disability—a model so deeply ingrained, so much a part of our attitudinal landscape, that it validates disability hierarchy as natural and neutral, often leading individuals with disabilities to participate in their own subordination, by equating their value with their nearness to the mythical norm.[76] To achieve a society where people are not defined and subordinated by their disabilities, where participation in culture,

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[74] Clearly, disability-based prejudice must now be fought on an attitudinal battlefield mined with the boobytraps of ideology. As our visible successes mount we run the risk of society's loss of patience, and subsequent backlash, developments now thwarting progress on racial justice. Moreover, we face what Martha Minow describes as the "dilemma of difference": the more we intervene to remedy differences, the more profound those differences seem to become between us. *See* MINOW, MAKING ALL THE DIFFERENCE (1990).

[75] *See, e.g.*, Lawrence, The *Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

[76] As Charles Lawrence has noted, "... law transmits ideological imagery that helps to preserve and legitimize existing power relationships. Those in power use the legal system to achieve results in individual legal disputes that maintain the status quo. What is less obvious, but perhaps more important, is the use of legal ideas to create and transmit utopian images that serve to justify that status quo. By representing reality in ideal terms, the law validates the socioeconomic setting in which legal decisions are made. The ideological imagery masks or denies the reality of oppressive or alienating social and economic relations and persuades us that they are fair." *Id.* at 325 n.30.

markets and public life is assured, ideologies of non-inclusion and value hierarchy must be dismantled.

III. The Future Of Civil Rights And The ADA

Thirty years of civil rights enforcement have not yielded the results envisioned by the movement; progress on racism and sexism has bogged down. By many standards—income, health, shelter, education—the disparities between whites and blacks, men and women are widening.[77] Our streets and college campuses seethe with racial tension and sexual violence. Hate crimes against women, racial and ethnic minorities and homosexuals are again on the rise. Legislation seems unavailing. Discrimination and inequality seem unsolvable, and many citizens are immune to calls for justice and equality. Society has lost faith in its ability to effectuate its egalitarian goals.

The civil rights community has also witnessed the erosion of judicial and executive leadership on equality and human value. The Supreme Court has issued tortured interpretations of civil rights statutes over long-settled issues, often in obvious conflict with congressional intent.[78] Decisions of the last several years have endangered affirmative action and other remedies for discrimination.[79] Moreover, administrations have become agents of reaction, opposing established affirmative action plans,[80] arguing for restrictive interpretations of civil rights laws, and seeking appointments to key posts and judgeships for those hostile to civil rights enforcement.[81] Public officials serve as lightning rods for backlash while proclaiming full support for equality. We are all equal now, they say, so no need exists for "special legislation."[82]

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[77] *See, e.g.,* Derrick Bell, And We Are Not Saved (1988); Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law,* 101 Harv. L. Rev. 1331 (1988).

[78] *See, e.g.,* Patterson v. McLean Credit Union, 491 U.S. 164 (1989) (holding that § 1981 does not prohibit racial harassment after contract formation).

[79] *See* City of Richmond v. J.A. Croson, 488 U.S. 469 (1989) (holding that minority set asides for city contracts are discriminatory); Martin v. Wilkes, 490 U.S. 755 (1989) (permitting collateral attack on affirmative action decrees); Wards Cove Packing Co. v. Antonio, 490 U.S. 642 (1989) (shifting the burden of proof to the plaintiff in Title VII cases).

[80] *See, e.g.,* Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984).

[81] The Reagan Administration appointment of William Bradford Reynolds as civil rights chief of the Department of Justice, and the failed confirmation of Robert Bork as Associate Justice of the Supreme Court are major examples.

[82] Nowhere is this attitude more apparent than in the December 12, 1990 pronouncement from the Department of Education that minority scholarships are probably unconstitutional. *See* Marriot, *Colleges Basing Aid on Race Risk Loss of Federal Funds,* N.Y. Times, Dec. 12, 1990, at A1, col. 1. After significant media attention, the President ordered a review, then appeared to disavow the Department's position, then only backed it partially. *See* Dowd, *President Orders Aid to Review New Minority Scholarship Policy,* N.Y. Times, Dec. 15, 1990, at A1. col. 5; Rosenthal, *White House Retreats on Ruling that Curbs Minority Scholarships,* N.Y. Times, Dec. 18, 1990, at

Three months after signing the ADA, President Bush vetoed the Civil Rights Act of 1990[83] which would have restored Title VII and Section 1981 to their condition prior to the bloodletting of the 1989 term when the Court eliminated punitive damages,[84] shifted the burden of proof to benefit employers (Title VII),[85] and restricted racial harassment claims to harassment occurring prior to contract formation (Section 1981).[86] Attorney General Thornburgh describes the Act as "embroiled in good faith conflict over what many regard as 'legal technicalities.'" Regrettably, these "technicalities" cut back on the effectiveness of both statutes.[87]

More fundamentally, what does President Bush's veto of the 1990 Civil Rights Act indicate about the Administration's commitment to the principles of antidiscrimination and the specific objectives of the ADA? At its most concrete, the ADA addresses employment discrimination by extending the substantive rights and remedies of Title VII of the 1964 Civil Rights Act to claims of disability-based discrimination.[88] By vetoing the 1990 Civil Rights Act, the Administration endorsed Supreme Court decisions that shifted the burden of proof to the victim and eliminated punitive damages in Title VII cases.[89] Thus, both the Supreme Court and the Administration have made Title VII *disability* cases harder to prove, and have diluted the deterrent value of the statute.

Likewise, individuals with disabilities have been excluded from economic participation in this society, and are at the bottom of the economic ladder.

A1, col. 1; and DeWitt, *U.S. Eases College Aid Stand, But Not All the Way*, N.Y. Times, Dec. 19, 1990, at A1, col. 1. *See also* DePalma, *Educators Report Great Confusion on Minority Aid*, N.Y. Times, Dec. 20, 1990, at A1, col. 1. We are confused too.

[83] Congress fell one vote short of an override on October 24, 1990. *See* 136 CONG. REC. S16,562 (daily ed. Oct. 24, 1990).

[84] Jett v. Dallas Independent School Dist., 491 U.S. 701 (1989).

[85] Lorance v. AT&T Technologies, Inc. 490 U.S. 900 (1989); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

[86] Patterson, 491 U.S. at 176.

[87] "The loss of surface cordiality on civil rights can be seen as more than 'Thornburghian' sibling rivalry, but as backlash eroding the foundation of rights enforcement from within the shining edifice of equality. Disputes over quota, disparate treatment versus disparate impact, harassment and burdens of proof do not simply reflect legal technicalities. Each is a symbol of reaction . . . The 'bogeyman' of quotas, invoked to appeal to emotional, latent majority fears [marks] a return to formal equality, a denial of the exclusion of entire races, women and individuals with disabilities. Burdens of proof are . . . seemingly technical rules that reflect commitment to social justice. A burden of proof is an allocation of power. In determining who bears the burden of presenting evidence, and persuasion, a society makes clear its priorities and the level of importance of human rights values." Remarks by Allan Macurdy, Press Conference in Support of the Civil Rights Act of 1990 (State House Steps, Boston) (Sept. 26, 1990).

[88] *See* notes 57-58 and accompanying text.

[89] *See* notes 83-85 and accompanying text.

Because the Supreme Court and the Administration, through its veto, refuse to recognize that prejudice has excluded minorities as a class[90] thus necessitating "class" remedies, disabled persons cannot overcome their subordination. Both the Court and the Administration are rooted in an understanding of discrimination as a product of intentional acts by "bad" individuals, rather than as majority advantage created through minority oppression, which has become so institutionalized as to be invisible. By emphasizing motive-based discrimination and requiring animus as an element of discrimination claims,[91] the Administration sets the stage for failure and our bitter disappointment, because only rarely is disability-based discrimination intentional and the result of bad motive. Defendants in these cases are, as the Attorney General acknowledges, "those who—whether insensitively or inadvertently—traduce the rights of the disabled."[92]

In vetoing the Civil Rights Act, the Administration denies the reality of group oppression in the lives of people with disabilities and seeks to recast the debate as a binary choice between discriminatory treatment of an individual and disparate impact upon a group of individuals with a common trait.[93] As the Attorney General put it:

> I don't shun these legal arguments. I would be happy to discourse on 'disparate treatment' of an individual, which we all agree the law should fully remedy, as opposed to 'disparate impact' upon a group, which, by all past legal principle, the plaintiff must first prove to the court before any remedy is ordered.[94]

This resistance to the group nature of prejudice and group-related remedies is not, however, a narrow issue of affirmative action, but marks a return to formal equality.

Like Justice Powell in *Bakke*[95] and Justice Bradley in the *Civil Rights*

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[90] *See generally,* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (invalidating minority set-asides in city contracts); and Wards Cove Packing Co. v. Antonio, 490 U.S. 642 (1989) (nearly eliminating disparate impact theory first expressed in Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971)). The Court refused to recognize that disparate treatment is also a function of disparate impact. The Court also made collateral attacks on affirmative action decrees easier to accomplish in claims of reverse discrimination. Martin v. Wilkes, 490 U.S. 755 (1989).

[91] *See, e.g.,* Wards Cove, 490 U.S. 642 (1989); Memphis v. Greene, 451 U.S. 100 (1981); Washington v. Davis, 426 U.S. 229 (1976).

[92] Thornburgh, *supra,* at 20.

[93] Like most polar alternatives, one choice is clearly privileged—here, the individual victim model. *See generally* Dalton, *Deconstructing Contract Doctrine,* 94 YALE L.J. 997 (1985); and KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1989). *See also* Freeman, *Antidiscrimination Law: The View From 1989,* in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 121, 125 (D. Kairys ed. 1990).

[94] Thornburgh, *supra,* at 15.

[95] Regents of the University of California v. Bakke, 438 U.S. 265, 300 (1978).

Cases,[96] the Bush Administration, like its predecessor, believes that the goals of the civil rights movement have been achieved, that it is time minorities learned to compete without special "help." This perspective was revealingly illustrated by the following question[97] asked of Mr. Thornburgh following his address, and his reply:

> Question: The ADA states that people with disabilities are a discrete and insular minority subjected to a history of purposeful unequal treatment and relegated to a position of political powerlessness. By making this statement did Congress overturn the Supreme Court's ruling in *City of Cleburne v. Cleburne Independent Living Center?*[98]
>
> Answer: No. I think it's hard to envision that the Americans with Disabilities Act would have been on the books if the community of persons with disabilities was in a position of political powerlessness. I never saw a more effective effort to lobby and to secure passage of this legislation in my twenty years in public life.

That is, passage of this statute demonstrates that there has been no history of oppression, that there is no discrimination, and that there exists no continuing inequality.

If individuals with disabilities are not a "suspect class", disability-based distinctions challenged on equal protection grounds need *not* be subjected to strict scrutiny. Instead, the government must merely establish a rational relation between the law and a legitimate state purpose. Without strict scrutiny, the least important job requirement may legally exclude an individual from employment because it can be justified as a rational means of carrying out a legitimate business end. The exclusion would be valid even if a reasonable accommodation could overcome any inability to meet that job requirement, because the employer can almost always present a rational purpose for a requirement and therefore never reaches the accommodations issue. Like Justice Powell's test in *Davis*, mere rationality defines "qualified" however the employer wishes and vitiates the need for reasonable accommodations. The

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[96] The Civil Rights Cases, 109 U.S. 3, 25 (1883).

[97] This question was posed by Linda Long, Esq., then with Greater Boston Legal Services, now with the Disability Law Center in Boston. The directness of the question reflects my friend's perspective as a disability rights lawyer in the trenches, as well as her tenacity and vision.

[98] 473 U.S. 432 (1985). Plaintiffs in *Cleburne* challenged a city zoning ordinance applied so as to exclude community residences for individuals with mental retardation. Justice White for the majority found that 'the mentally retarded' were not a suspect class for purposes of equal protection, necessitating application of heightened scrutiny, but overturned the ordinance, as applied, under the lower rationality standard. For a thoughtful discussion of Cleburne and what it reveals about difference ideology, *see* Minow, *When Difference Has its Home: Group Homes for the Mentally Retarded, Equal Protection, and Legal Treatment of Difference*, 22 HARV. C.R.-C.L. L. Rev. 111 (1987).

Bush Administration already regards quotas as impermissible acts of discrimination on the basis of race or gender — are ramps and TDDs next?

So the Administration continues to undermine group remedies, but it can't have it both ways. It must not be permitted to take credit for the ADA and claim to be a "friend of civil rights," while taking down the structural supports of equality and human rights. In discussing "The Americans with Disabilities Act and What it Means to All Americans," the Attorney General emphasized the growth of freedom through civil rights achievements:

> [I] definitely mean it when I say that *rights* are what have truly doubled.
>
> Because each time civil rights are enlarged in this country, they extend over the whole of our society. *All* Americans, not just minorities, are involved in every new extension of such rights.
>
> [The Department of Justice] accept[s] this responsibility... as one more opportunity to further guarantee equal protection under the law for every citizen of this nation. And in the end, I do believe that is what makes us all the real beneficiaries of any progress on civil rights.[99]

He is exactly right, but this year his statement is double-edged. As individuals with disabilities, our success in defeating discrimination and its legacy is dependent upon our ability to maintain political influence as well as vigorous legal advocacy. We have influence only through our alliance with other civil rights constituencies; therefore, we may not sit quietly, basking in the ADA's new glow, while others lose protections. Not only are we affected directly now that these laws protect us as well, but, as importantly, we must recognize that we lose freedom when others are oppressed.

This year we have finally accomplished passage of the ADA, which extends mainstream civil rights protections to individuals with disabilities, in part through the enforcement mechanisms of Title VII. The ADA at last enables us to embrace our sisters and brothers in the struggle for civil rights for all peoples, but against a backdrop of weakening judicial and executive commitment to the core values of equality and human rights. Have we gained a seat on the bus, only to have the route discontinued?

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[99] Thornburgh, *supra*, at 16.