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Bluebook 21st ed.

Dick Thornburgh, *The Americans with Disabilities Act: What It Means to All Americans*, 1 B.U. PUB. INT. L.J. 15 (1991).

ALWD 7th ed.

Dick Thornburgh, *The Americans with Disabilities Act: What It Means to All Americans*, 1 B.U. Pub. Int. L.J. 15 (1991).

APA 7th ed.

Thornburgh, Dick. (1991). *The Americans with Disabilities Act: What It Means to All Americans*. Boston University Public Interest Law Journal, 1, 15-20.

Chicago 17th ed.

Dick Thornburgh, "The Americans with Disabilities Act: What It Means to All Americans," Boston University Public Interest Law Journal 1 (1991): 15-20

McGill Guide 9th ed.

Dick Thornburgh, "The Americans with Disabilities Act: What It Means to All Americans" (1991) 1 BU Pub Int LJ 15.

AGLC 4th ed.

Dick Thornburgh, 'The Americans with Disabilities Act: What It Means to All Americans' (1991) 1 Boston University Public Interest Law Journal 15

MLA 9th ed.

Thornburgh, Dick. "The Americans with Disabilities Act: What It Means to All Americans." Boston University Public Interest Law Journal, 1, 1991, pp. 15-20. HeinOnline.

OSCOLA 4th ed.

Dick Thornburgh, 'The Americans with Disabilities Act: What It Means to All Americans' (1991) 1 BU Pub Int LJ 15 Please note: citations are provided as a general guideline. Users should consult their preferred citation format's style manual for proper citation formatting.

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THE AMERICANS WITH DISABILITIES ACT: WHAT IT MEANS TO ALL AMERICANS*

BY
DICK THORNBURGH**

It has now been almost three decades since the Civil Rights Act of 1964 first became law. Many of us who participated in those heady, often dangerous, days within the movement can well remember how men and women of good will from all racial, religious, and ethnic strains united and fought valiantly to overcome the systematic denial of the blessings of freedom in our American society.

Though we all remain dedicated to that goal, there is an inevitable tendency toward differing views, even rising dispute, and sometimes faction, the more distant we are from those early days when basic advances were made. No great awakening ever kept everybody "up" forever. We have had more than our share of such dispute over civil rights legislation this year — largely because the bill¹ is embroiled in good faith conflict over what many regard as "legal technicalities."

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. Just as the former can lead to injustice, the latter can lead to quotas. But as convinced as I am on those points, I see them as secondary to the next great leap forward in the civil rights movement that Congress enacted and President Bush signed into law this summer: the Americans with Disabilities

* Adapted from an address at the Emily Rose Peeke Lecture (N. Neal Pike Institute for the Handicapped, Boston University School of Law), September 14, 1990, Boston, Massachusetts. For a publication of a similar address given to the Temple University School of Law Conference on the Americans with Disabilities Act, see 41 Lab. L.J. 801.

The editors of the Boston University Public Interest Law Journal have made slight editorial changes to adapt what was given as an oral address to the printed format.

**The author is a former Attorney General of the United States.

¹ The Civil Rights Act of 1990 (S. 2104) was passed by the Senate on October 16, 1990 and by the House on October 19, 1990. It was vetoed by President Bush on October 22, 1990. Two days later, the Senate failed (by one vote) to override the veto. See 136 Cong. Rec. S16,562 (daily ed. Oct. 24, 1990). On October 30, 1991, the Senate approved a compromise civil rights bill by a vote of 93-5. President Bush has said that he will sign the bill. Frisby, *Senate Approves New Rights Bill*, Boston Globe, Oct. 31, 1991, at 1, col. 4.

Act(ADA).²

The impact of ADA is not disparate, but broadening, inclusive, and re-awakening. Do not let this bright moment in modern American history escape you. I can describe its coming impact upon our communal life in straightforward but startling terms.

Consider these demographic figures. Over thirty million Black Americans make up 12.3 per cent of our populace. Other minorities — just over eight million — comprise another 3.4 per cent. That total is a full 15.7 per cent of our entire population. But 43 million Americans with disabilities represent 17 per cent of the nation. So you have just seen those empowered by our civil rights laws in this country double. And though I take these figures from the *rolls* of potential beneficiaries under ADA, 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 passage of ADA is truly another emancipation — not only for the 43 million Americans with disabilities who will benefit directly, but even more so for the rest of us — now free to benefit from the contributions which these Americans will make to our economy, our communal life, and our individual well-being.

Speaking for the Department of Justice, we eagerly accept the responsibility for framing the regulations necessary for both compliance with the Act and effective enforcement of its provisions. We accept this responsibility not as a burden, but 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.

This was clearly understood by N. Neal Pike — a man unsighted since early in his life — when he set up the Institute for the Handicapped here at Boston University School of Law. He did not do so solely among the blind. He set up this Institute among the sighted as well, to pursue legal reform for those with disabilities by calling upon the abilities of those who devote their gifts of intellect to the law. He did so because he understood that, if we are truly to extend the boundaries of liberty for those with disabilities, all Americans must participate in that legal process.

A first priority, always, has been to provide physical access for the disabled. We are gathered right now in what was once Hayden Hall, built some 50 years ago with doors wide enough, by architectural chance, for those among us using wheelchairs. But we still would not be able to meet here today if Hayden Hall had not been retrofitted a year ago to become Tsai Hall. Notice how the aisles have all been ramped. Notice also how a new elevator has been ingeniously provided — this orchestra pit elevator. Brought to floor level, it opens up space in the auditorium for those members of the audience who have

² Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990).

joined us, down front. Raised up one more level, it gives those using wheelchairs access to this stage, and I'm reassured that future plans for Tsai Hall include a proper stage elevator, designed to comply with the requirements of ADA.

That is now all part of a federal directive to widen the doors — a civil right became an architectural imperative. But not just physical doors — please understand — also the doors of opportunity for those with disabilities. And, among the broader public community, the doors of perception — so that we all recognize the right of people with disabilities to come in to mainstream society; to come in to the restaurant or concert hall or house of worship or movie theater, or aboard the bus; to come in, most particularly, to the work place, and, above all, to long-term prospects for a future life of hope and achievement.

This final widening of the doors through ADA comes after a long legal campaign. The Rehabilitation Act of 1973 was the first milestone, showing that doors could be physically widened, and other public access offered — but more importantly, that federal employment policy could accommodate those with handicaps. Then came the Education for the Handicapped Act two years later — Public Law 94-142 — which gave a new generation its great opportunity.

That Act set about teaching people with disabilities within the nation's mainstream school systems, guaranteeing an appropriate educational placement in the least restrictive setting. In the ensuing fifteen years, an unsighted person or somebody with impaired hearing or mental retardation or using a wheelchair could learn right alongside other, more able-bodied students. He or she could have started somewhere between kindergarten and twelfth grade and, by now, be all the way through college. This new generation overcame both its disabilities and the prejudices, often very sympathetic prejudices — the hardest to counter — that its disabilities aroused. Those in this new generation have received a high school education either by diploma or certificate of completion. Many have gone on to college and even advanced degrees. And yearly they are coming into the labor market — 150,000 strong. They are well-educated, well-motivated, well along in understanding what prospects life can really hold for them, and well up on the rights they are determined to secure for themselves under our Constitution.

They are the first generation of Americans with disabilities who will be, in every best sense, fully empowered in the 1990s. And they have now been guaranteed their civil rights under the Americans with Disabilities Act. To touch all its bases, ADA overcomes our past failure to eliminate attitudinal, architectural, and communications barriers in employment, transportation, public accommodations, public services, and telecommunications. In short, it widens all the doors I have spoken of, mandating true access for Americans with disabilities to mainstream society.

First and foremost, the ADA acts against job discrimination in the private sector. At present, 58 per cent of all men with disabilities, and 80 per cent of all women, are jobless. So long as unemployment continues to be the lifelong fate of two thirds of those with disabilities, 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.

The ADA requires — following Section 504 of the 1973 Rehabilitation Act — that the private employer make reasonable accommodation to the known mental or physical impairments of qualified disabled persons, so long as making that accommodation does not result in an undue hardship on the operations of the employer. Of course, this inevitably raises the concern: what extra hardship might be caused small businesses? That is why the ADA takes a phase-in approach that, over four years, will extend its provisions to cover all businesses with more than 15 employees.

As for businesses with less than 15 employees — if this new generation is all that it educationally appears to be, why shouldn't it be considered among other minorities for future hire, even in the absence of legal compulsion? A gain in education and brain power and "stick-to-it-ivity" could easily off-set the expense of putting in a ramp, or assisting an unsighted or hearing-impaired employee with telecommunication equipment — especially with computer and other technological advances in compensatory assistance.

The President's Committee on Employment of People With Disabilities has already done excellent work to show how any small business — from one to 1000 employees — can economically employ those "ready, willing, and available." And, as Attorney General, I have a role to play, under ADA, in offering technical assistance to any employer, large or small, ready to hire from this pool of people with disabilities. It seems highly unlikely that any small-business employer in a stressed labor market, skewed demographically toward minorities, is going to undervalue any group's potential contribution. A mind, whatever its limitations or the disability of the body, is still a terrible thing to waste.

The other great widening, under ADA, is in access to general accommodations and public transportation. None of our citizens should have to face preventable obstacles and inconveniences when they go out shopping, or to the movies. What is only a curb to most of us may seem like a rugged cliff to somebody using a wheelchair. Not long ago, we saw a quadriplegic actually scale El Capitan in Yosemite. Few of us with two sound arms and two sound legs could manage that feat. So surely we are ready to help some others conquer these slighter elevations.

ADA keeps the removal of physical barriers reasonably limited to what is "readily achievable," such as the removal of those here in Tsai Hall. Its forward-looking emphasis is on new construction, and it should at most add one per cent to construction costs. Elevators are always the rising exception. The ADA prudently requires that elevators be built in all new construction over three stories, but otherwise only in multi-level shopping malls and other three-story-and-under professional buildings designated by the Office of the Attorney General.

ADA also ends barriers that people with hearing impairments face in using the telephone through mandating the use of auxiliary aids such as non-voice

terminal devices. But auxiliary aids must not, ADA further states, cause an "undue burden." A restaurant should not, for example, have to provide menus in braille to blind patrons if the waiter is willing to read the menu — especially a French restaurant.

It is in public transportation that ADA requires a giant step toward physical access within the near-term future — that urban bus systems really kneel down, if you will. All newly built buses must be accessible to persons with disabilities. The ADA does not mandate retrofitting buses already in service. But 35 per cent of present urban buses are already accessible, and, for once, the potholes are on our side! Twelve years rattling around our city streets — and especially in Boston — is a long life for any old bus. Attrition and replacement will quickly bring total accessibility to the nation's inner city bus systems. Meanwhile, to make up for any lack of urban transportation for the disabled, the ADA mandates supplementary paratransit services — which 75 per cent of urban transit agencies happen to provide already.

Other public transportation systems — Amtrak, subways, rapid and light rail — are given up to twenty, sometimes thirty years to comply, but we can abide this delay because other ADA provisions largely accommodate the lifestyles of persons with disabilities. We should always be sensitive to the day-to-day living patterns of people with disabilities, and not treat either their rights or their lives in the abstract. What we should notice is that the most important ADA provisions are all of a piece, meeting the actual needs of a populace that lives in a particular, habituated, interactive way.

For example, a major focus of the ADA is against job discrimination. Only, where are the jobs? Increasingly, outside the city. But where have persons with disabilities largely chosen to live? Within the city. Why? Because that is where accessible apartments and condos are available in buildings already provided with elevators — including braille buttons on the operating panels — in neighborhoods where the shops are already retrofitted with ramps. Then how do persons with disabilities get to their place of work, once they gain employment? Only via accessible public urban transport.

Suddenly the right to a seat on the bus — an old, first cause of civil rights protests — is once again vital to the right of employment. Once, the civil rights struggle was about not being forced to sit in the back of the bus on the way to work. Now the struggle is to get on the bus, period, on the way to work. The ADA becomes, in this respect, the enabling act for this new generation of Americans with disabilities, and all those who come after.

We have seen this intertwining of jobs, public accommodation, and accessible transportation work out right in the nation's capital. In Washington, the traffic pattern followed by persons with disabilities happens to run both ways, particularly on the D.C. Metro. Some travel out of the city as private employees to jobs beyond the Beltway, others come into the central nexus of the U.S. Government as federal employees. But please remember, persons with disabilities originally had to bring suit to gain this access to the Metro.

Now they are accepted as travelling companions on the Metro. What has changed — but must change even more — is attitudes. I have seen this hap-

pen as a father emotionally and intimately involved in the life and future of a son who has a disability, and as a staunch advocate of civil rights for the disabled. "Ten years ago, you were a patient," says a friend of my wife, from this new generation. "Now you're a client. Formerly, they healed the body, and just left you. Now there is so much more understanding and long-term help." The ADA enacts certain accommodations for disabled Americans within the daily, social fabric to help ensure that 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.

Still, we do need some consciousness-raising about Americans with disabilities, especially since our mistaken attitudes are often so well-meaning and so ingrained. Every Christmas, for example, we all go through one viewing or another of Dickens' beloved *Christmas Carol*. When the tale begins to touch on the fate of Tiny Tim, I often think, frankly, of the need for a rewrite of that classic. In these 1990s, the first thing we should do is stop calling him Tiny. He ought to be Tim, for the rest of his life. And while it is good of Ebenezer Scrooge to take up Tim's case, and try to see that he is cured and throws away his crutch — supposing Tim doesn't, and physically never can? Then what Tim needs is school — as much education as he can absorb — and he should be allowed to keep his crutch beside his desk in the classroom. In fact, if Scrooge really wants to help, he might very well, as a small businessman with less than 15 employees (minus now even Marley), think hard about hiring young Timothy Cratchit after he graduates. And when Tim comes into work — maybe via a kneeling bus, and up a ramp at curbside — Scrooge should see that he can easily access that very high stool where Bob Cratchit once sat before him. That is how we keep that sorry vision of Tim's crutch left to stand forlornly in the fireplace corner from ever happening. What's it doing there, Tim? Bring it to work!