Some Lessons on Equality from the Americans with Disabilities Act[1]

by Professor Robert L. Burgdorf Jr.
University of the District of Columbia David A. Clarke School of Law

I. INTRODUCTION

Any attempt to draw conclusions from legal developments and experiences in one country and to offer them for consideration in the policy-making processes of other countries must be approached with great caution. All social initiatives and laws need to reflect the unique cultures, traditions, and legal systems of the particular countries that enact them. And yet it would appear that the human condition is not so dissimilar that the experiences of one country cannot serve as food for thought about possible policies and legal approaches in other nations. At the very least, policymakers can learn from mistakes and nonproductive outcomes of efforts in other countries. This paper rests on the hope that the American experience with the Americans with Disabilities Act (ADA) may be of some use to other jurisdictions in highlighting some of the promising paths and pitfalls that lie on the route to an effective legal guarantee of equality on the basis of disability.

On July 26, 1990, a date that he heralded as "an incredible day, ... an immensely important day," President George H.W. Bush signed the Americans with Disabilities Act into law. During the signing ceremony, the President portrayed the Act as an "historic new civil rights Act, ... the world's first comprehensive declaration of equality for people with disabilities." With American politicians' typical penchant for rosy rhetorical flourishes, he gushed that "[w]ith today's signing of the landmark Americans With Disabilities Act, every man, woman, and child with a disability can now pass through once-closed doors into a bright new era of equality, independence and freedom."

In the more than fifteen years that have passed since the enactment of the ADA, many of the law's strengths and weaknesses have manifested themselves. The provisions of the ADA have been interpreted, dissected, and tweaked; enforced, implemented, sidestepped, and ignored; praised, maligned, second-guessed, contradicted, and copied; amplified by being construed broadly and constricted by being construed narrowly. The legal literature in the U.S. is replete with discussions, by the author -- drafter of the original version of the legislation -- and numerous other commentators, of numerous legal, technical interpretations various provisions of the Act have received. On behalf of the National Council on Disability, the independent U.S. government agency that first proposed the ADA, the author has written an extensive report, *Righting the ADA*, that offers a series of proposals, consolidated as a single proposed bill -- the ADA Restoration Act -- designed to correct many of the judicial misinterpretations that have hampered full implementation of the ADA.

In contrast to such undertakings, which focus on the analysis of fine points of interpretation of specific ADA provisions, the present paper traces some more general insights and broad lessons that can be derived from the drafting, implementation, and enforcement of the ADA, in the hope that some of these may be useful to policymakers and advocates in other jurisdictions. These involve observations regarding the overall objectives of a prohibition of discrimination on the basis of disability; the issue of how broadly the category of persons to be granted equality rights should be defined; the existence of essential prerequisites, including an accessible public and governmental infrastructure, for a disability nondiscrimination mandate to succeed; the scope of entities that ought to be subject to such a law; some suggestions regarding standards and criteria applied under an equality mandate; and reflections on the overall value and impact of such legislation. Under each of these categories, the paper presents one or more principles or lessons, gleaned from experience with the ADA, about laws that promote equality by prohibiting discrimination on the basis of disability.

II. OVERALL OBJECTIVES OF A DISABILITY EQUALITY LAW

A key preliminary question is: Why have such a law? What will this type of law accomplish? This section suggests several answers to these questions.

1. *A primary function of a disability equality law is to serve as a statement of societal moral imperative proclaiming that discriminating against people because of physical or mental disabilities is wrong and that good people should refrain from*

doing it.

This principle flows from the concept of law as a teacher. The enshrinement of some precept in the formal laws of a society sends a message to the citizens that the society deems the policy that the law embodies sufficiently important to receive official recognition and to justify imposing a sanction on those who violate it. In regard to the ADA, Justin Dart (an outspoken advocate for the legislation; vice chair of the National Council on Disability that proposed it; and a man who held disability policy positions in the Reagan, Bush (the elder), and Clinton administrations) declared that the Act was "a landmark commandment of fundamental human morality." Justin contended that most people are inclined to obey the law, especially when it seeks to reinforce people's respect for the rights of others, and that the primary goal of a such a law is not to punish violators but to influence the behavior of the great majority of law-abiding citizens. Under this view, perhaps the most important impact of laws such as the ADA is in the realm of moral suasion.

2. *There is considerable value in the legal enforceability of a disability equality law.*

In the early (more radical?) days of his career, the author once wrote:
Charity may be the highest of the virtues, but in some situations it may not be as valuable as a court order. Judicial decrees may sometimes get things accomplished when all manner of appeals to abstract justice and humanitarian impulse prove futile.

This viewpoint is the flip-side of the "societal moral imperative" objective of Lesson 1 immediately above. It suggests that, in addition to educating those who seek to obey the law, there is a need to address the conduct of those who would violate it.

In the USA, initiatives for protection from discrimination for people with disabilities represented a shift in paradigms regarding societal responsibilities toward such individuals -- from charity to civil rights.[2] Encapsulated by some disability activists in the slogan, "You Gave Us Your Dimes, Now We Want Our Rights,"[3] the civil rights point of view regards persons with disabilities not as unfortunate, afflicted creatures needing services and help, but as equal citizens, individually varying across the spectrum of human abilities, whose overriding need is to be freed from discrimination and given a fair chance to participate fully in society.[4] In this tradition, an equality law such as the ADA empowers individuals to challenge discrimination that is directed toward them; it gives them a weapon for fighting back against discriminators. And if they are successful, they can secure the protection of judicial power to ensure that they are afforded equal opportunity even when discriminators resist changing their conduct. In this way, a disability equality law helps to balance otherwise unbalanced power relationships by empowering people who encounter disability discrimination to force changes to be made in the interest of effecting equality.

3. *Disability equality laws address the plight of a seriously disadvantaged, isolated segment of society.*

The ADA and other disability equality initiatives are certainly not arbitrary exercises in abstract justice and political correctness. In the ADA, the Congress found that "census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally."[5] In examining the results of the first-ever national poll of Americans with disabilities, the National Council on Disability observed that "[t]he overall picture that emerges from such data is of a greatly isolated, stay-at-home population of Americans with disabilities."[6] The studies documented extremely high (about two-thirds) rates of joblessness, high rates of poverty, and severe undereducation of people with disabilities. They also found disproportionately low rates of participation in social activities such as going to movies, theater, music performances, sports events, restaurants, church services and activities; in sexual activity, and even in shopping in grocery stores. This data led Congress to declare, in the "findings" section of the ADA, that people with disabilities "occupy an inferior status" and are "severely disadvantaged socially, vocationally, economically, and educationally," as documented by "census data, national polls, and other studies."[7] Thus, a disability equality measure such as the ADA addresses a real and profound problem in society, and seeks to correct a pattern of debilitating isolation of a sizeable minority.

4. *Disability equality yields an economic benefit to society; enabling some citizens to escape circumstances of inactivity and dependency allows them to participate more actively in the job and consumer marketplaces.*

While it certainly should not be overstated, effective disability equality laws have a positive effect on economic activity. Such an economic benefit was certainly a major part of the rationale for the ADA. In the *Toward Independence* report in which it originally proposed an Americans with Disabilities Act, the National Council on the Handicapped proffered federal fiscal considerations in support of its recommendations. In a program-by-program review of federal expenditures affecting persons with disabilities, the Council identified over $60 billion that was being spent each year by the federal government on disability benefits and programs, with about $57 billion going to programs that the Council deemed to be premised upon "dependency."[8] One of the major findings in the report was that "Federal disability programs reflect an overemphasis on income support and an underemphasis of initiatives for equal opportunity, independence, prevention, and self-sufficiency."[9] The Council argued that its recommendations, including the ADA, would "reduce the barriers to opportunity and independence for people with disabilities, allowing many more people with disabilities to remove themselves from Federal aid programs by achieving self-sufficiency and independence."[10] In its letters of transmittal to the President of the United States, the President of the Senate, and the Speaker of the House, the Council asserted "financial implications" and "future efficiencies in Federal spending" as major reasons why its proposals should be implemented.[11] As the ADA bill was moving forward, President Bush, Attorney General Thornburgh, and others[12] touted the long-term economic benefits of eliminating discrimination on the basis of disability. In passing the legislation, Congress made a formal finding of an economic rationale for the Act by declaring that discrimination and prejudice against people with disabilities "costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity."[13]

American economists continue to argue about whether or not the benefits of the ADA are larger than the sums expended to achieve compliance with the law. Most civil rights advocates resist cost-benefit analysis of such legislation on the grounds that "doing the right thing" by not discriminating against a disadvantaged segment of society should not be dependent on whether it will result in a net profit on a monetary balance sheet.[14] And certainly the costs of dismantling the mechanisms, systems, and emblems of discrimination should not be an excuse for continuing to discriminate, any more than the costs of removing "Whites Only" signs would justify leaving them up.

The more salient point for the present discussion, however, is that among the various factors that may bear upon decisions to adopt and structure disability equality mandates there is certainly some economic benefit from such measures. Since the adoption of the ADA, many shop owners in the US and their patrons have seen a noticeable increase in the number of wheelchair users and other persons with observable disabilities in shopping malls and other consumer facilities. While it may be difficult to document the exact dollar amounts involved, these additional customers are certainly spending some money in the establishments, money that would not been spent if they had been kept away due to architectural barriers and fear of discriminatory treatment.

III. WHO SHOULD BE AFFORDED EQUALITY RIGHTS?

5. *Eligibility for disability equality protection should not be defined narrowly.*

The question "Who should be entitled to equality under the law?" seems to cry out for the answer "Everyone!" Yet, in the mysterious process of developing and negotiating legislative language, this seemingly straightforward principle can become obscured. In large part because of prior legislative programs that provided income support, rehabilitation, and other types of benefits and services to a specified class of individuals with certain types or degrees of disabilities (which therefore called for precise determinations of who was eligible and who was not), legislators and other policymakers have sometimes approached disability nondiscrimination initiative with an expectation that they needed to restrict the scope of coverage of statutory protection.

Fueled in part by the inartful drafting of a prior law prohibiting disability discrimination -- Section 504 of the Rehabilitation Act of 1973 -- a restrictive approach was imported into the interpretation of the definition of "disability" in the ADA. Both the language of the ADA and its legislative history are replete with indications that Congress intended the coverage of the Act to be very broad, and there is a long-standing tradition in the U.S. that laws protecting civil rights are to be interpreted broadly to accomplish their remedial purposes. Ignoring such indications, however, many American courts imposed increasingly restrictive interpretations, until, in 2002, the Supreme Court of the United States expressly declared what prior decisions had

already suggested -- that the Court was embracing a view that the elements of the definition of "disability" in the ADA "need to be interpreted strictly to create a demanding standard for qualifying as disabled ...."[15]

This constricted approach to what constitutes a disability, which Justice Stevens, in his dissenting opinion in another case, referred to as a "miserly" construction,[16] has led to hypertechnical arguments about the meaning of such concepts as "substantial limitation" and "major life activities." It has caused considerable litigation on such issues as whether a person whose condition (e.g., epilepsy, diabetes) is controlled by medication is still a person with a disability (the Supreme Court says the answer is basically "no"); how long the process of a broken bone's healing has to take before it amounts to a disability; how many jobs a person's condition has to preclude her or him from before it constitutes a substantial limitation on employment; whether such activities as reproduction, reading, and running are or are not major life activities; and whether a person whose orthotic device enables a fairly normal range of functioning despite an amputation can be considered to have a disability.

Most significantly, the narrow approach has denied the protection of the ADA to numerous people who have, and have been considered by employers and other covered entities as having, serious physical impairments. Some years ago, the author inventoried many problematic decisions of lower courts based on the restrictive interpretation of the ADA definition of disability.[17] He identified numerous instances in which courts had found plaintiffs had not satisfied the definition of disability even though they had one of the following conditions: "replacement of hips and shoulders (as a result of avascular necrosis); diabetes; cancer; laryngectomy (removal of larynx); hemophilia; heart attack; absence of one eye; degenerative hip disease resulting in limp; permanent severe limitations in use of right arm and shoulder; various serious back injuries; depression and paranoia; six-inch scar on face resulting in supervisors calling employee "scarface;" "bilateral carpal tunnel syndrome;" asthma; asbestosis -- "a progressive and often fatal condition of the lungs" -- that had reduced the plaintiff's lung capacity to 50%; HIV-infection; traumatic brain injury resulting in vision limitations, memory deficiencies, problems with verbal fluency, problems abstracting, and motor deficits; and stroke resulting in the loss of use of the left hand, arm, and leg."[18] And such examples have mushroomed since the Supreme Court endorsed the narrow approach.

People with all sorts of serious impairments are being subjected to discrimination by employers who often expressly premise their termination, nonhiring, or other negative job action on the person's physical or mental impairment, and then turn around and argue successfully that the person's condition is not substantial enough to constitute a disability. The result is that approximately nine out of ten plaintiffs in ADA employment cases have their lawsuits dismissed in response to defendants' motions for summary judgment or motions to dismiss, without the courts ever considering their claims of having been discriminated against. And that statistic does not address potential ADA claimants who do not file actions or who abandon their cases after administrative proceedings because of the anticipated hurdles they will face in trying to prove that they have a disability.

While it is common to speak of "protected classes" under civil rights laws, in the U.S. such statutes generally protect every individual from discrimination on the grounds prohibited, whether it be race, sex, religion, or national origin; persons of all races, religions (even atheism), and national origins, and both females and males are protected from discrimination. Disability equality laws should take this same approach and guarantee all persons that they will be protected from discrimination on the basis of disability.

6. *Individuals or groups whose conditions are unpopular or not understood should not be excluded from eligibility for disability equality protection.*

One of the saddest chapters of the ADA's passage was the adoption, through last-minute amendments adopted by voice vote on the floor of the Senate as it struggled into the late evening on September 7, 1989, to complete Senate passage of the legislation,[19] of provisions that exclude certain conditions or attributes from the definition of "disability." They grew out of a broad attack precipitated by ultra-conservative Senators Jesse Helms, William Armstrong, and Gordon Humphrey, on the breadth of individuals afforded protection under the bill. They expressed outrage at a variety of characteristics they charged would cause an individual to be protected from discrimination under the Act; specifically targeted at various points in oratorical diatribes were: pedophilia, schizophrenia, kleptomania, manic depression, significantly low I.Q., psychotic disorders, homosexuality, transvestitism, AIDS and HIV infection, drug use, bisexuality, voyeurism, alcoholism, and

compulsive gambling. At one point, Senator Armstrong stood on the Senate floor and pointed to a long list of conditions in the *Diagnostic and Statistical Manual of Mental Disorders* of the American Psychiatric Association as an example of all the conditions included; his remarks raised the specter of a potential roll call on individual amendments to remove each of these conditions.[20] Attacks upon certain conditions provoked a strong response from other Senators who rose up to defend their inclusion in the Act's protection; Senator Kennedy led a defense of the inclusion of HIV infection[21], and Senator Domenici gave a spirited speech on behalf of individuals with manic-depression and schizophrenia, suggesting that Winston Churchill and Abraham Lincoln suffered from such disturbances.[22] Other conditions did not have the advantage of such Senatorial advocacy.

Ultimately, a series of compromises produced three major amendments to Title V of the Act restricting the definition of disability. One section provides that the terms "disabled" or "disability" shall not apply to an individual solely because that individual is a transvestite. Another states that an individual who is "a current user of illegal drugs" is not included as an individual with a disability.[23] And a third section specifies that the term disability does not include:

> (a) homosexuality or bisexuality;
> (b) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments or other sexual behavior disorders;
> (c) compulsive gambling, kleptomania, or pyromania; or
> (d) psychoactive substance use disorders resulting from current use of illegal drugs.

These exclusions seem wholly inconsistent with the overall tenor of the ADA, which encourages participation and decision-making based upon individualized determinations of actual ability and not preconceived assumptions and stereotypes. The Supreme Court has struck down governmental restrictions upon persons with mental retardation under the Equal Protection Clause on the ground that the restrictions were based upon "negative attitudes," "fear," and "irrational prejudice."[24] The Court has acknowledged that prior disability nondiscrimination legislation was motivated by a Congressional desire to condemn the effects of "negative reactions," "prejudiced attitudes," "ignorance," "myths and fears," "public fear and misapprehension," and "irrational fear."[25] In enacting the eleventh-hour exclusions from the ADA, Congress had not held any hearings or solicited any evidence about such conditions, other than in regard to the problem of illegal drug use. Consequently, it is arguable that the members of Congress relied upon nothing other than their own negative reactions, fears, and prejudices, in fashioning the list of excluded classes. Such exclusions run counter to the objectives and premises of any disability equality measure, and, if proposed, should be summarily rejected.

IV. ESSENTIAL PREREQUISITE OF AN ACCESSIBLE AND EFFECTIVE PUBLIC AND GOVERNMENTAL INFRASTRUCTURE

Disability equality involves, and the success of any disability equality mandate presupposes, the existence of a public and governmental infrastructure that is accessible to and effective in providing services to persons with physical and mental impairments. All manner of prohibitions of discriminatory treatment will be doomed to failure if the physical environment prevents people from participating equally or at all because of their impairments.

7. *A key aspect of disability equality is accessibility of buildings and facilities.*

The obvious example of a flight of stairs blocking the entrance to a building of an individual who uses a wheelchair is sufficient to illustrate the fact that physical accessibility is an absolute *sine qua non* of disability equality. The barriers that constitute impediments to access can take many other forms, including escalators, narrow doorways, revolving doors, inaccessible toilet and washroom facilities, narrow aisles, drinking fountains and light switches that are too high, fire alarm boxes that cannot be reached, lack of raised-letter and braille signs, overly-sloped or excessively long ramps, telephone booths and elevator controls that are difficult to reach, carpeting and floor surfaces that are slippery or too spongy, sidewalks without curb ramps, lack of grab bars and handrails, and others.[26] In the ADA, Congress listed "the discriminatory effects of architectural ... barriers" as one of the "forms of discrimination" that "individuals with disabilities continually encounter."[27]

The problem of architectural barriers occurs both in governmental facilities, that presumably should be usable by all citizens without respect to disability, and in those privately owned facilities that routinely admit members of the general public as customers, workers, or visitors. The ADA addresses architectural accessibility in four contexts: state and local government facilities, commercial facilities, places of "public accommodation," and job sites. The ADA subjects all state and local government facilities and services to federal accessibility requirements.[28] In addition, such entities are also required to make "reasonable modifications to rules, policies, or practices," to achieve "the removal of architectural ... barriers."[29]

All owners of "commercial facilities" must comply with accessibility requirements in constructing new facilities or altering existing ones.[30] The term "commercial facilities" is defined extremely broadly as "facilities -- (A) that are intended for nonresidential use; and (B) whose operations will affect commerce."[31] Alterations of commercial facilities must be done in such a manner that the altered portions are accessible.[32] Where alterations are made to an area of a facility that contains a primary function, the entity must provide an accessible path of travel to the altered area, and accessible bathrooms, telephones, and drinking fountains serving the altered area, unless doing so would be “disproportionate” to the overall cost and scope of the alterations.

"Places of public accommodation," a term which applies to 12 broad categories of private establishments to be discussed below in section V, are required to remove "architectural barriers, and communication barriers that are structural in nature, in existing facilities ... where such removal is readily achievable."[33] "Readily achievable" is defined as "easily accomplishable and able to be carried out without much difficulty or expense."[34] As examples of barrier removal that will usually be "readily achievable," the ADA committee reports list "the addition of grab bars, the simple ramping of a few steps, the lowering of telephones, the addition of raised letter and braille markings on elevator control buttons, the addition of flashing alarm lights, and similar modest adjustments."[35]

In addition to the accessibility requirements for new construction and alterations that attach to all commercial facilities, employers are also subject to a legal obligation to make modifications to the workplace as a reasonable accommodation for a particular employee or job applicant. Thus, while a business may already have ramped the entrance to a building and made its toilet facilities accessible, it may still need to make adjustments to accommodate a particular worker with a disability, as, for example, by adjusting the height of a desk or countertop, to permit a particular individual to use a particular workspace.

These various requirements are simply an attempt to reflect the simple principle that disability equality cannot be realized to the extent that physical barriers prevent equal participation or even access to buildings and facilities.

8. *Accessible transportation is another principal component of disability equality.*

Achieving fair and equal treatment at government facilities, public accommodations, and workplaces is largely meaningless to an individual for whom there is no way to get to these places due to inaccessibility of transportation options. For this reason, either as part of a disability equality law or as an essential prerequisite to it, measures must be taken to ensure that the transportation system serves individuals with disabilities effectively. Most Western countries have some form of public transportation, and yet all too often transportation systems continue to purchase and operate inaccessible vehicles and to build and maintain inaccessible stations and other facilities.

Several provisions of the ADA addressed this problem. The Act subjected state and local government facilities, services, and communications to a requirement that they make "reasonable modifications to rules, policies, or practices" to remove "transportation barriers."[36] The ADA also includes detailed provisions applicable to public transportation systems, Amtrak, and commuter authorities. For public entities providing bus transportation, the following major obligations were established: (1) new or remanufactured buses must be accessible to individuals with disabilities;[37] (2) public transit authorities must provide paratransit service, comparable to fixed route service, for individuals with disabilities who are unable to use fixed route bus service, unless such paratransit services would impose an undue financial burden;[38] (3) new bus stations must be accessible;[39], and (4) alterations to existing stations must comply with accessibility requirements.[40]

In regard to rail systems, the Act imposed the following major requirements: (1) new or remanufactured vehicles must be accessible;[41] (2) rail systems must have at least one accessible car per train;[42] (3) new rail stations must be accessible,[43] and

alterations to existing stations must comply with accessibility requirements;[44] (4) in rapid rail, commuter rail, and light rail systems, "key stations" must be made accessible;[45] and (5) existing intercity rail, *i.e.*, Amtrak, stations must be made accessible by July 26, 2010.[46]

The ADA also establishes requirements regarding transportation services provided by nonpublic entities. In general, public accommodations that offer transportation must provide equivalent service to individuals with disabilities as is available to others.[47] Fixed-route vehicles seating more than 16 passengers must be accessible.[48] Public accommodations are required to remove "transportation barriers in existing vehicles and rail passenger cars used by an establishment for transporting individuals ... where such removal is readily achievable."[49]
Detailed requirements are established for those private entities that are "primarily in the business of transporting people."[50]

Obviously, many of the ADA provisions would not necessarily apply to the circumstances and transportation options available in other countries. They do perhaps offer, however, some approaches that might be considered in addressing the underlying issue of making sure that people with various disabilities, some of whom are unable to drive, can have a way to get to the places where goods, services, jobs, and activities take place.

9. *Communication access is a critical element of disability equality.*

With the ever-increasing use of communication technology in the modern world, the importance of making sure that individuals' disabilities do not prevent them from having access to the various means of communication continues to grow. Accordingly, an effective disability equality law must address the issue of communication access. Ordinary telephones, for example, may be unusable by people with hearing or speech impairments; configurations of website software may make sites difficult or impossible for people with visual impairments to use; and doorbells, fire alarms, and audio public address systems are ineffective for those who cannot hear them.

In the ADA, the provisions that require the removal of architectural and transportation barriers consistently specify communication barriers too. In addition, covered entities are required to ensure that no individual with a disability is disadvantaged because of the absence of "auxiliary aids or services."[51] The term "auxiliary aids and services" includes:
(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;
(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;
(C) acquisition or modification of equipment or devices; and
(D) other similar services and actions.[52]

Title IV of the law deals with "Telecommunications." This title addresses two particular types of telecommunications services -- telephone transmissions and television public service announcements -- that had proven problematic for people with certain impairments. One set of provisions applies to phone companies, "common carrier[s] providing telephone voice transmission services."[53] ADA Committee reports described the underlying problem addressed in these provisions as follows:
Currently, individuals with hearing and speech impairments can communicate with each other over the telephone network with the aid of Telecommunications Devices for the Deaf (TDDs). TDDs use a typewriter-style device equipped with a message display (screen and/or printer) to send a coded signal through the telephone network. However, users of TDDs can communicate only with other users of TDDs. This creates serious hardships for Americans with hearing and/or speech impairments, since access to the community at large is significantly limited.[54]

And Congress identified a remedy for this problem -- telephone relay services:
Current technology allows for communications between a TDD user and a voice telephone user by employing a type of relay system. Such systems include a third party operator who completes the connection between the two parties and who transmits messages back and forth in real time between the TDD user and the hearing individual. The originator of the call communicates to the operator either by voice or TDD. The operator then uses a video display system to translate the typed or voice message simultaneously from one medium to the other.[55]

Accordingly, the Act established a requirement that companies offering telephone services to the public must provide telephone relay services to individuals who use TDDs or similar devices throughout the areas which they serve.[56]

The public service announcement(PSA) provisions of the ADA require that "[a]ny television public service announcement that is produced or funded in whole or in part by any agency or instrumentality of Federal Government shall include closed captioning of the verbal content of such announcement."[57] This places obligations to ensure captioning upon three categories of entities: (1) federal government agencies that produce or fund television public service announcements; (2) individuals or agencies who produce such PSAs with full or partial funding provided by a federal agency; and (3) television broadcast station licensees who broadcast PSAs.

The requirements regarding federally-funded public service announcements do not resolve the responsibilities of television stations as to the captioning of all other types of programming. The 1988 version of the Americans with Disabilities Act bill had included a provision that would have required the Federal Communications Commission to promulgate regulations for television broadcast stations that included "requirements for progressively increasing the proportion of programs, advertisements, and announcements that are captioned."[58] In addition the 1988 bill included relatively detailed provisions concerning the removal of "communication barriers" from all types of programs and activities subject to the Act, including a delineation of what constitutes a communication barrier and what means should be used for avoiding or removing them.[59] These communications provisions were deleted from the bill during its revision prior to reintroduction in the 101st Congress in 1989.

A separate U.S. law, Section 508 of the Rehabilitation Act of 1973, addresses another aspect of communication technology by requiring accessibility of the Federal Government's electronic and information technology.

The array of U.S. statutes discussed here, and others not mentioned, amounts to something of a patchwork attempt to deal with what is undeniably a significant concern -- ensuring that communications devices and systems are accessible to and usable by individuals with various disabilities.

10. *Disability equality cannot be achieved in the absence of effective social programs to provide necessary services, such as health care, personal care assistance, rehabilitation, and housing alternatives.*

A person with severe disabilities who is unable to get out of bed and get dressed cannot take advantage of opportunities for employment, recreation, civic participation, and other avenues to which equal access may be afforded under law. Personal care assistance may be an essential precondition to any meaningful exercise of rights guaranteed by a disability equality measure. Likewise, in the absence of health care, serious health problems can render equality rights illusory. Rehabilitation may be a necessary prerequisite to employment and social participation. The availability of housing alternatives can be the determinative factor as to whether an individual with a disability lives in the community with access to normal opportunities or is forced to live in an institutional setting that entails isolation and dependency.

Many other countries provide a more effective social "safety net" than the U.S. To the extent that necessary social support programs are in place, a nation will have a better opportunity of making disability equality a meaningful reality.

V. ENTITIES PROHIBITED FROM DISCRIMINATING

An important preliminary question about a disability equality mandate is what aspects of society are going to be subject to it -- what entities are going to be required to comply with it?

11. *To eliminate pervasive discrimination on the basis of disability, a disability equality law needs to cover as many spheres of society as possible*.

One of the chief objectives of the ADA was to enact a law that addressed disability discrimination on a "comprehensive"

basis. Congress found that discrimination on the basis of disability was "pervasive" in American society. To address such discrimination, Congress indicated that it was invoking "the sweep of congressional authority." Consistent with this object, Congress did enact a very broad law. It prohibited discrimination by private employers with 15 or more employees; by all agencies and instrumentalities of state and local government; by the U.S. Congress and congressional instrumentalities (federal executive agencies were already subject to federal nondiscrimination laws); by phone companies; by those who produce television public service announcements; by public transportation systems; by those engaged in licensing, certification, or credentialing examinations or courses for educational, professional, or trade purposes; and by twelve broad categories of places of public accommodation (places of lodging, establishments serving food or drink, places of exhibition or entertainment, places of public gathering, sales or rental establishments, service establishments, public transportation facilities, places of public display or collection, parks and other places of recreation, educational facilities, social service establishments, and exercise or recreation facilities[60]).

The scope of a disability equality law must depend, of course, on what is capable of being enacted given the particular political and legal situation. It seems advisable, however, to seek to prohibit discrimination in any area of a society in which it has occurred. Given the widespread nature of discrimination on the basis of disability in most societies, this means that broad coverage is usually called for.

VI. STANDARDS AND ELEMENTS OF DISABILITY EQUALITY

12. *A "reasonable accommodation" requirement is a central element of a disability equality mandate and should not be considered a "special benefit."*

One key form of discriminatory employment practice prohibited in the ADA is "not making reasonable accommodations to the known physical or mental limitations" of a qualified person with a disability, unless such accommodation "would impose an undue hardship on the operation of the business" of the covered entity.[61] In a 1983 report in which it traced the purpose and history of the reasonable accommodation concept, the U.S. Commission on Civil Rights defined the term as "providing or modifying devices, services, or facilities or changing practices or procedures in order to match a particular person with a particular program or activity. Individualizing opportunities is this definition's essence."[62] The Commission identified the basic function of this requirement as follows:

Discrimination against handicapped people cannot be eliminated if programs, activities, and tasks are always structured in the ways people with "normal" physical and mental abilities customarily undertake them. Adjustments or modifications of opportunities to permit handicapped people to participate fully have been broadly termed "reasonable accommodation."[63]

The ADA recognizes the need for individualized adjustments to facilitate one-to-one matching of jobs and people with disabilities that the concept of reasonable accommodation represents, and declares that reasonable accommodation includes:

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.[64]

It is important to recognize that reasonable accommodation is an element of not discriminating on the basis of disability, and that one discriminates by failing to make reasonable accommodations to limitations resulting from disabilities. Workplaces and public facilities have usually been designed and constructed without regard for the possibility that people with disabilities may want to use them. Although it often is overlooked, the fact is that, in almost all circumstances, employers, businesses, and government agencies put a great deal of money and energy into "accommodating" the users of their services, facilities, and programs without denominating it as such.[65] Most of those "accommodations" are made, however, with the expectation that the user will have ordinary physical or mental abilities, and turn out to be useless or even disadvantageous for people with particular disabilities. It is, therefore, a matter of pure equity to require adjustments to enable individuals with disabilities to participate on an equal basis.

To the extent that people seek to characterize reasonable accommodations as a special benefit, it raises a danger that eligibility for them will be narrowly limited to a very select group of beneficiaries and that the range of accommodations required will be kept minimal.

13. *In addition to absolute, yes-or-no prohibitions of discrimination, disability equality laws can impose intermediate, relative degrees of obligations.*

Most civil rights/nondiscrimination standards are established in a yes-or-no fashion -- an obligation either applies or it does not; there are no "degrees" of requirements. Such absolute standards can be applied with some certainty; as with the red lights and green lights on traffic signals, the message is clear -- one is required to do a certain thing or to avoid doing something. A driver or pedestrian does not have to ascertain the exact tint of green or red on the traffic light to know whether to proceed or stop.

The "reasonable accommodation," concept discussed in the previous subsection is only one of several new standards imposed by the ADA that are matters of degree and whose application requires a weighing of various facts and circumstances to determine the extent to which compliance is mandated in a particular situation. As the application of these intermediate nondiscrimination standards involves the weighing of factors deemed legally relevant, the determination whether compliance is required or not depends upon the facts and circumstances in each situation. Generalizations based upon comparisons of the standards must, therefore, be viewed with caution. What is "readily achievable" for a General Motors may far outstrip what is the "maximum extent feasible" for a struggling Mom-and-Pop coffeeshop. Yet, if one postulates similar circumstances and resources, and similar costs of some change or modification at issue, one can meaningfully consider the various degrees of nondiscrimination requirements established in the ADA in comparison to one another, and can see them as falling into general ranges of low, moderate, and high degrees of obligation upon covered entities.

At the relatively low end of the scale, ADA requires certain modifications to be made if they are "readily achievable."[66] As noted previously, these are changes that can be accomplished without much difficulty or expense. Making readily achievable changes requires a public accommodation to take more than de minimis steps, but it imposes only a fairly limited responsibility. At the high end of the scale, the ADA imposes some very stringent requirements, usually stated in terms of very narrow exceptions or very high levels of performance, that demand much for compliance, but do not establish an absolute, unavoidable requirement. These include requirements that are imposed: "to the maximum extent feasible;"[67] unless "structurally impracticable;"[68] except where it would "fundamentally alter the nature" of the goods, services, facilities, etc.;[69] "to the extent practicable;"[70] or except where shown to be "consistent with business necessity."[71] The ADA Committee reports indicate that these concepts are to be applied very strictly to permit extremely limited exceptions from the norm of compliance with the nondiscrimination mandates, *e.g.*, where "virtually impossible,"[72] or creating "a narrow exception that will apply only in rare and unusual circumstances."[73]

In the middle, the ADA establishes the reasonable accommodation/undue burdens/undue hardship concepts, and an obligation to undertake accessibility changes that are "not disproportionate." While on the upper end, one can characterize the ADA as imposing standards that require a high degree of compliance almost always, and on the lower end as imposing a standard of doing something but often not very much, it is more difficult to capsulize the middle-level standards. Some guidance can be drawn from the fact that the Congress rejected an amendment that would have imposed a ceiling of 10 percent of the annual salary for the position in question as the upper limit for reasonable accommodations. And the Committee reports declare that a standard of 30% is an appropriate interpretation of the disproportionality concept.

The combination of these degrees-of-obligations standards from the ADA suggests a menu of possible choices of legislative language for imposing relative, non-absolute requirements in future disability and other types of equality legislation.

14. *A disability equality measure needs to address the significant problems that are posed by preemployment disability inquiries and medical exams.*

Inquiries about the existence or nature of a job applicant's disability and medical examinations that occur at the

preemployment stage create a thorny problem for such applicants. The author has previously described this problem as follows:
A person with a disability, such as a person with epilepsy, diabetes, or Hodgkin's cancer in remission, applies for a job. One of the first steps in the application process is for the applicant to fill out a medical questionnaire that asks, "What medical conditions do you have or have you ever had?" The person with the disability truthfully fills out the questionnaire, then completes other steps in the application process, including an interview, submission of a writing sample, and submission of references. At the end of the process, the applicant is denied the job.

At this point, the applicant has no firm knowledge as to why he or she was denied the job. It could be that, as soon as the prospective employer realized that the person had a disability, the employer decided not to offer the person the job. In that case, the other steps in the process were basically irrelevant from the employer's perspective. Or it could be that the employer was not affected at all by the applicant's disability, but the applicant's references or writing sample simply did not meet the employer's standards. In other words, discrimination on the basis of disability might have entered into the employment decision—or it might *not* have.

The problem for the person with a disability, however, is that she or he can never definitively know whether discrimination on the basis of disability entered into the employment decision-making process. Indeed, many people with disabilities are denied jobs because their disabilities are identified early in the application process, and that knowledge taints the remainder of the application process. At the same time, many people with disabilities are denied jobs not because of their disabilities, but because other applicants are better qualified. Without structural constraints on the application process, however, a person with a disability — at least a person with a "hidden" disability — would never be able to pinpoint whether his or her disability was a motivating factor in an employment decision.[74]

The ADA Committee reports described the dilemma posed for persons in this predicament.[75] To address it, the Congress incorporated provisions into the ADA to impose restrictions upon inquiries about disabilities and medical examinations by covered entities. These authorize employers to make preemployment inquiries into the ability of applicants to perform job tasks, but prohibit inquiries as to whether an applicant has a disability or as to the nature or severity of an individual's disability.[76] Employers are permitted to require post-job-offer, pre-entrance medical examinations, but only if the results are kept confidential, the exams are required of all entering employees, and the results are used only in accordance with other restrictions set out in the Act.[77] After an individual has been hired and begins work, medical examinations and inquiries about the existence, nature, or severity of disabilities are permitted but only if the employer can demonstrate that such exam or inquiry is job-related and consistent with business necessity.[78]

An effective disability equality initiative ought to address the quandary posed for job applicants with disabilities by preemployment inquiries and medical examinations.

VII. OVERALL IMPACT AND VALUE

15. *A disability equality law such as the ADA can have a substantial positive impact.*

In assessing the efficacy of the ADA, the National Council on Disability has declared:

In a variety of ways, the ADA has lived up to the high hopes that accompanied its passage. The provisions of the ADA addressing architectural, transportation, and communication accessibility have changed the face of American society in numerous concrete ways. A vast number of buildings and other structures have been affected by sections of the ADA that make it illegal to design or construct any new place of public accommodation or other commercial facility without making it readily accessible and usable by people with disabilities, or to alter such a facility without incorporating accessibility features. The provisions of the ADA dealing with mass transit ended decades of disagreements and controversy regarding many of the issues involved in determining exactly what is required of public transportation systems to avoid discriminating on the basis of disability; the ADA contains detailed provisions describing requirements for providers of bus, rail, and other public transportation conveyances, and intercity and commuter rail systems. Though implementation has been far from perfect and

ADA provisions do not answer all the questions, much progress in transportation accessibility has been made. The ADA's employment provisions have dramatically affected hiring practices by barring the previously unbridled use of invasive preemployment questionnaires and disability inquiries and of the formerly nearly ubiquitous preemployment physical; they have also made job accommodations for workers with disabilities much more common than they were before the ADA was enacted. Provisions of the ADA dealing with telecommunications have resulted in the establishment of a nationwide system of relay services that permit use of telephone services by those with hearing or speech impairments, and in a requirement of closed captioning of the verbal content of all federally funded television public service announcements.

Other provisions of Title II of the ADA (covering state and local governments) and Title III (covering public accommodations) have eliminated many discriminatory practices by private businesses and government agencies. The ADA has had a particularly strong impact in promoting the development of community residential, treatment, and care services in lieu of unnecessarily segregated large state institutions and nursing homes. The Act has provided the impetus for President George W. Bush's "New Freedom Initiative," issued in February 2001, committing his administration to assuring the rights and inclusion of persons with disabilities in all aspects of American life; and President Bush's Executive Order No. 13217, issued on June 18, 2001, declaring the commitment of the United States to community-based alternatives for individuals with disabilities.[79]

The Council further described some ways in which the ADA has "begun to transform the social fabric of our nation":

It has brought the principle of disability civil rights into the mainstream of public policy. The law, coupled with the disability rights movement that produced a climate where such legislation could be enacted, has impacted fundamentally the way Americans perceive disability. The placement of disability discrimination on a par with race or gender discrimination exposed the common experiences of prejudice and segregation and provided clear rationale for the elimination of disability discrimination in this country. The ADA has become a symbol, internationally, of the promise of human and civil rights, and a blueprint for policy development in other countries. It has changed permanently the architectural and telecommunications landscape of the United States. It has created increased recognition and understanding of the manner in which the physical and social environment can pose discriminatory barriers to people with disabilities. It is a vehicle through which people with disabilities have made their political influence felt, and it continues to be a unifying focus for the disability rights movement.[80]

The ADA certainly has flaws and some of its provisions have not been implemented and enforced as vigorously as had been hoped, particularly due to the courts' restrictive interpretation of disability in employment cases. In 2000, the tenth year after the enactment of the ADA, the National Council on Disability issued a report titled *Promises to Keep*, in which it described a variety of problems and weaknesses in enforcement of the ADA and presented recommendations for remedying such deficiencies. Overall, however, the Act has had a significant impact in reducing the pervasive and entrenched pattern of discrimination it was designed to address. As such, it suggests that such a measure, properly tailored to the legal system, governmental structure, customs, and traditions of the particular jurisdiction where it is enacted, can be a very worthwhile initiative.

16. *A disability equality law is not a cure-all.*

In the play known as *Marat/Sade*, there is a scene in which another character tells Jean-Paul Marat why people participate in the Revolution:

Their soup's burnt; they shout for better soup.
A woman finds her husband too short; she wants a taller one.
A man finds his wife too skinny; he wants a plumper one.
A man's shoes pinch, but his neighbor's shoes fit comfortably.
A poet runs out of poetry and desperately gropes for new images.
For hours an angler casts his line; why aren't the fish biting?
And so they join the Revolution thinking the Revolution will give them everything -- fish, poem, new pair of shoes, new wife, a new husband, and the best soup in the world.

So they storm all the citadels and there they are.
And everything is just the same.
No fish biting.
Verses botched.
Shoes pinching.
A warm and stinking partner in bed and the soup burnt ....[81]

In a similar vein, it is possible to overinflate expectations and then occasion disappointment when a disability equality mandate does not satisfy each person's fantasy of what it would accomplish. An ADA-like disability equality law prohibits discrimination on the basis of disability, no more, no less. It does not guarantee each individual a job; it does not pay for health care; it does not provide personal care assistance; it does not establish a program of rehabilitation services or effective community mental health services; it cannot solve other social problems, such as widespread poverty or inadequate educational systems. Even when a disability equality law is well-crafted and well-executed, there are still many other things that will be necessary to improve the status and quality of life of individuals with disabilities in society.

ENDNOTES

1. Portions of this paper are based upon materials contained in Professor Burgdorf's prior publications. Professor Burgdorf reserves the right to re-use, revise, and supplement material contained in this paper for future projects and publications.

2. See, e.g., Allen, Legal Rights of the Disabled and Disadvantaged 1-4 (1969); Scotch, From Good Will to Civil Rights: Transforming Federal Disability Policy, 15-40 (1984); Note, "Historical Overview: From Charity to Rights," 50 Temple L. Qrtrly. 953 (1977).

3. "The Handicapped, a Minority Demanding Its Rights," The New York Times (Feb. 13, 1977).

4. The idea of a "spectrum of human abilities" and the societal goal of "full participation" for people with disabilities are examined extensively in U.S. Commission on Civil Rights, Accommodating the Spectrum of Individual Abilities 67-101 (1983).

5. 42 U.S.C. § 12101(a)(6).

6. National Council on Disability, Implications for Federal Policy of the 1986 Harris Survey of Americans with Disabilities (November 1988) p. 35.

7. Census data regarding people with disabilities, and the problems with and limitations upon such data, are discussed in National Council on Disability, Toward Independence (1986) at 3-5. The "national polls" reference is primarily to polls conducted by Louis Harris and Associates. In 1986, the Harris organization undertook the first-ever nationwide telephone poll of persons with disabilities -- "The Survey of Disabled Americans."

8. Toward Independence, at vi, 12-13, 55-65.

9. Id. at 12.

10. Id. at 13.

11. Id., at ii.

12. See, S. Rep. No. 116, 101st Cong., 1st Sess. 16-18 (1989).

13. [ADA] Sec. 2(a)(9).

14. U.S. Commission on Civil Rights, Accommodating the Spectrum of Individual Abilities, 72-73 (1983).

15. Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 122 S.Ct. at 691.

16. Sutton v. United Airlines, 119 S.Ct. 2139, 2152 (1999).

17. See Robert L. Burgdorf Jr.,"Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability, 42 Villanova L. Rev. 409 (1997).

18. Id. at 539-41 (footnotes with citations omitted).

19. See, 135 Cong. Rec. S 10765-S 10786 (Sept.7, 1989).

20. Id. at S 10773, S 10785 (remarks of Sen. Armstrong). See, also, id. at S 10772 (remarks of Sen. Kennedy).

21. Id. at S 10768 - S 10772 (remarks of Sen. Kennedy).

22. Id. at S 10779 (remarks of Sen Domenici).

23. [ADA] Sec. 510(a). Subsection 510(b) clarifies that this exclusion does not apply to persons who are successfully rehabilitated from using drugs, are participating in a supervised rehabilitation program and are not currently using drugs, and to individuals erroneously regarded as illegal drug users. Subsection (c) provides that drug users shall not be denied health or social services they are otherwise entitled to.

Previously, the issue of inclusion of drug addiction in the protection of Section 504 of the Rehabilitation Act had been a controversial one. See, e.g., Accommodating the Spectrum of Individual Abilities, at 8, n. 29. The Rehabilitation Act definition was amended in 1978 to specify that for purposes of employment discrimination requirements, the term "handicapped individual" does not include an individual whose current use of alcohol or drugs prevents job performance or constitutes a direct threat to property or safety of others. Pub. L. No. 95-602, sec. 122(a)(7), 92 Stat. 2984, 2985 (1978), codified at 29 U.S.C. sec. 706(8)(B). Sec. 512 of the ADA amends the Rehabilitation Act to restrict sec. 706(8)(B) further to totally exclude from its coverage any individual who is a current user of illegal drugs.

24. City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 448, 450 (1985).

25. School Bd. of Nassau County v. Arline, 480 U.S. 273, 283-284 (1987).

26. U.S. Commission on Civil Rights, Accommodating the Spectrum of Individual Abilities at 38–39 (1983).

27. 42 U.S.C. § 12101(a)(5).

28. 42 U.S.C. § 12134(b).

29. 42 U.S.C. § 12131(2).

30. 42 U.S.C. § 12183(a).

31. 42 U.S.C. § 12181(2).

32. 42 U.S.C. § 12183(a)(2).

33. 42 U.S.C. § 12182(b)(2)(A)(iv).

34. 42 U.S.C. § 12181(9).

35. S. Rep. No. 101-116, 101st Cong, 1st Sess., 66 (1989); H. Rep. No.101-485, Part 2, 101st Cong., 2d Sess., 110 (1990).

36. 42 U.S.C. § 12131(2).

37. 42 U.S.C. §§ 12142(a) and (c)(1). Public entities purchasing or leasing used vehicles must demonstrate "good faith efforts" to obtain accessible vehicles. 42 U.S.C. § 12142(c)(2). An exception to the requirements regarding remanufactured vehicles is provided for certain historic vehicles. 42 U.S.C. § 12142(c)(2).

38. 42 U.S.C. § 12143.

39. 42 U.S.C. § 12146.

40. 42 U.S.C. § 12147.

41. 42 U.S.C. §§ 12142(a) and (c)(1); §§ 12162(a)(2)(A), (b)(2)(A) and (d).

42. 42 U.S.C. §§ 12148(b), 12162(a)(1), 12162(b)(1).

43. 42 U.S.C. §§ 12146, 12162(e)(1).

44. 42 U.S.C. §§ 12147, 12162(e)(2)(B).

45. 42 U.S.C. §§ 12147(b)(2), 12162(e)(2)(A). The deadline for this requirement was July 26, 1993, but the Secretary of Transportation was authorized to grant an extension of up to 20 years for commuter rail systems, or up to 30 years for rapid or light rail systems in certain circumstances.

46. 42 U.S.C. § 12162(e)(2)(A)(ii)(I).

47. 42 U.S.C. §§ 12182(b)(2)(B)(ii) and (C).

48. 42 U.S.C. § 12182(b)(2)(B)(i).

49. 42 U.S.C. § 12182(b)(2)(A)(iv). Expressly not required are the removals of "barriers that can only be removed through the retrofitting of vehicles or rail passengers cars by the installation of a hydraulic or other lift."

50. 42 U.S.C. § 12184(a).

51. 42 U.S.C. § 12182(b)(2)(A)(iii).

52. 42 U.S.C. § 12102(1).

53. 47 U.S.C. § 225 (c).

54. S. Rep. No. 101-116, 101st Cong, 1st Sess., 78 (1989); H. Rep. No.101-485, Part 2, 101st Cong., 2d Sess., 129 (1990).

55. S. Rep. No. 101-116, 101st Cong, 1st Sess., 78 (1989); H. Rep. No.101-485, Part 2, 101st Cong., 2d Sess., 130 (1990).

56. 47 U.S.C. § 225(c).

57. 47 U.S.C. § 611. "Closed captioning" refers to a system which allows only viewers with a decoder to view the captions. In contrast, in "open captioning" subtitles appear on the screens of all viewers.

58. S. 2345, 100th Cong., 2d Sess., sec. 8(g), 134 Cong. Rec. S 5113 (April 28, 1988).

59. S. 2345, 100th Cong., 2d Sess., sec. 8(h), 134 Cong. Rec. S 5113 (April 28, 1988).

60. 42 U.S.C. § 12181(7).

61. 42 U.S.C. § 12112(b)(5)(A).

62. U.S. Commission on Civil Rights, Accommodating the Spectrum of Individual Abilities 102 (1983).

63. Id.

64. 42 U.S.C. § 101(9).

65. This observation is explored in some depth in Robert L. Burgdorf Jr., "`Substantially Limited' Protection From Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability," 42 Villanova Law Review 409, 529-32 (1997). For a similar view, see Harlan Hahn, "Accommodation and the ADA: Unreasonable Bias or Biased Reasoning?" 21 Berkeley Journal of Employment and Labor Law 166, 189-90 (2000).

66. 42 U.S.C. § 12182((b)(2)(A)(iv).

67. E.g., 42 U.S.C. §§ 12142(c)(1), 12147(a), 12162(d)(1), 12162(e)(2)(B)(i) & (ii), 12183(a)(2), and 12184(b)(7).

68. E.g., 42 U.S.C. § 12183(a)(1).

69. 42 U.S.C. §§ 12182(b)(2)(A)(ii) & (iii).

70. E.g., 42 U.S.C. § 12143(a)(2). Similarly, 42 U.S.C. § 12162(a)(4)(A) employs the phrase "[u]nless not practicable."

71. 42 U.S.C. §§ 12112(b)(6) & (c)(4)(A) and 12113(a).

72. S. Rep. No. 116, 101st Cong., 1st Sess., 68 (1989); H. Rep. No. 485, Part 2, 101st Cong., 2d Sess. 114 (1990) (construing the phrase "to the maximum extent feasible").

73. S. Rep. No. 116, 101st Cong., 1st Sess., 70 (1989); H. Rep. No. 485, Part 2, 101st Cong., 2d Sess. 120 (1990) (construing the phrase

"structurally impracticable").

74. Robert L. Burgdorf Jr., Disability Discrimination in Employment Law 329-330 (Bureau of National Affairs (BNA) 1995). See also Chai R. Feldblum, Medical Examinations and Inquiries under the Americans with Disabilities Act: A View from the Inside, 64 Temp. L. Rev. 521 (1991); Chai R. Feldblum, Employment Requirements, in The Americans with Disabilities Act: From Policy to Practice 81 (Jane West ed., 1991).

75. See S. Rep. No. 116, 101st Cong., 1st Sess. 39 (1989); H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 2, at 72 (1990), reprinted in 1990 U.S.S.C.A.N. 303, 354–55.

76. 42 U.S.C. § 12112(d)(2).

77. 42 U.S.C. § 12112(d)(3).

78. 42 U.S.C. § 12112(d)(4).

79. National Council on Disability, Righting the ADA 36-37 (2004).

80. Id. at 37-38; National Council on Disability, Promises to Keep: A Decade of Federal Enforcement of the Americans with Disabilities Act 1 (2000).

81. Peter Weiss, The Persecution and Assassination of Jean-Paul Marat As Performed by the Inmates of the Asylum of Charenton Under the Direction of the Marquis de Sade.