

On the Importance of the Americans With Disabilities Act at 30

Peter Blanck, PhD, JD¹

Abstract

This article offers a glimpse of the Americans with Disabilities Act (“ADA”) of 1990, as amended by the ADA Amendments Act of 2008 (“ADAAA”), at its 30th anniversary. It considers current issues before the courts, primarily legal cases from 2020 and 2021, and new questions in light of the COVID-19 pandemic, such the latitude of the ADA’s antidiscrimination protections and its definition of disability. It provides a quick primer on the basics of the ADA: employment discrimination under Title I, antidiscrimination mandates for state and local governments under Title II, and commands to places of accommodation offering services to the public under Title III. The ADA at 30 remains a beacon for a future in which all people, regardless of individual difference, will be welcomed as full and equal members of society.

Keywords

Americans With Disabilities Act, disability law, policy, and practice, reasonable accommodation, disability discrimination

This article offers a glimpse of the Americans with Disabilities Act (“ADA”) of 1990, as amended by the ADA Amendments Act of 2008 (“ADAAA”) (42 U.S.C. § 12101 et seq. 1990), at its 30th anniversary. It considers current issues before the courts, primarily legal cases from 2020 and 2021, and new questions in light of COVID-19, such as the latitude of the ADA’s antidiscrimination protections and its definition of disability. It provides a quick primer on the basics of the ADA: employment discrimination under Title I, antidiscrimination mandates for state and local governments under Title II, and commands to places of accommodation offering services to the public under Title III.

All the matters addressed here, not just those before the courts, have been complicated today by the pandemic and the resulting global health and economic emergency. The pandemic is profoundly affecting the lives of persons living with disabilities across the life course, whether they are living in poverty; have multiple, intersectional minority identities associated with race, ethnicity, sexual orientation, or gender identity; are addressing the limits of age; or are facing the many and varied challenges of disability otherwise or in conjunction with other life experiences (Blanck, Abdul-Malek, et al., 2020).

My most recent book, *Disability Law and Policy* (Blanck, 2020b), examined the ADA at its 30th year, but it was mostly written during the years immediately preceding the pandemic. Prior to the pandemic, by most estimates, there were 60 million individuals (almost one in five) in the United States living with disabilities, although not all were necessarily considered “disabled” for purposes of the

ADA. Before the emergency, more than one quarter of working-age people with disabilities in the United States were living below the poverty level, over twice the rate of those without disabilities (Blanck, 2020b). Despite some modest declines in unemployment rates during the years immediately preceding the pandemic, people with disabilities were still disproportionately excluded from the labor market and from other economic, social, and civic opportunities (Morris et al., 2016, 2019; Schur et al., 2013).

My aim in this article is to offer a current view of the ADA, relying primarily on illustrative cases decided during and shortly after this 30th anniversary year. The ADA is but one part of a complex, interconnected, and constantly evolving U.S. disability law and policy scheme. The U.S. legal framework and interpretation of its aspects by the courts involve legal, social, economic, political, and historical conceptions, at times working in concert and other times in opposition.

In the United States, disability law itself is almost wholly statutory. That is, it is derived primarily from federal and state laws and policies, as opposed to sweeping interpretations under the Constitution. As these laws, such as the ADA and the Rehabilitation Act of 1973, have developed, the courts below the U.S. Supreme Court—the

¹Syracuse University, NY, USA

Corresponding Author:

Peter Blanck, Burton Blatt Institute, Syracuse University, 950 Irving Avenue, Syracuse, NY 13244, USA.

Email: pblanck@syr.edu

District Courts (trial courts) and the 13 Courts of Appeals (designated by circuit number, for example, the First Circuit)—typically have interpreted and shaped enforcement of these statutes, giving them broad scope in certain instances and narrow latitude in others.

Moreover, on the federal level, the Congress has assigned executive agencies—for example, the Equal Employment Opportunity Commission (“EEOC”) and the Departments of Justice, Education, and Transportation—prominent roles in interpreting and enforcing disability laws and policies such as the ADA. ADA cases have also been brought by individual plaintiffs or classes of plaintiffs, with a few going all the way to the Supreme Court. These cases often determine the scope of executive agency interpretations in areas related to employment (ADA Title I) and to governmental programs and services (ADA Title II), including educational and community-based activities, as well as the undertakings of private businesses offering services to the general public (ADA Title III).

The ADA perspective on disability reflects a Rights (or Civil Rights) Model that began to influence U.S. government policy about disability in the 1970s. Both the Rights disability model and the parallel “Social” (or Ecological) disability model view persons with disabilities as a minority group, entitled to the same hard-won legal protections for equality that have emerged from the struggles of African Americans, women, and individuals with differing sexual orientations and gender identities (Blanck, 2020b).

Coming later but working somewhat in parallel to the ADA, the United Nations’ 2008 Convention on the Rights of Persons with Disabilities (“CRPD”) was a groundbreaking international treaty reflecting a new global era in disability human rights. The CRPD established a foundation for equal protection and treatment of people with disabilities across a wide range of basic human rights. As with the ADA, the CRPD recognized disability as a label applied when people with impairments confront attitudinal and environmental (structural and policy) barriers that hinder full and effective participation in society on an equal basis with others.

This recognition of disability as a concept rather than only as a personal trait is the central insight of the ADA; that is, “disability” is the result of the interaction between a person with an impairment and the world and society in which the person lives. In the past, U.S. laws, policies, and practices had subordinated the rights of people with disabilities. With the ADA, the government aimed to secure the equality of people with disabilities by eliminating artificial barriers that unfairly preclude full and equal involvement in society. But although significant strides have been made, disability in the U.S. today, as suggested by the discussion below, continues to be both inextricably linked to and independent of one’s physical and mental capabilities.

Language, Culture, and the ADA

Disability is a socially and legally constructed concept given form through language and conceptions of human identity. It is inexorably linked to history and culture, and to economic and political context. The ADA’s definition of disability, inevitably, is interpreted and applied in an individualized fashion, at a particular point in time, by political and judicial actors, and thus may be used to create and justify categories of human difference. Ideally, the ADA seeks to prevent unfair or unfounded categorization, and any resultant discriminatory behavior, when they are based solely on perceived or actual human difference resulting from or related to a disability.

Closely tied to culture, language usage impacts the interpretation of the ADA and related laws. That disability language preferences and usage, which not only varies greatly but also changes over time and context, is apparent. Not too long ago, the labels for persons with intellectual and developmental disabilities included “feeble-minded,” “idiot,” “moron,” and, more recently, “mentally retarded.” And individuals labeled that way did not have many of the basic rights provided today by the ADA.

The ADA, in contrast, influenced by the disability Rights Model, uses people-first (or person-first) language, when linguistically possible, to emphasize the importance of the individual as a “person” who has accompanying rights and responsibilities in law. In the language of the ADA, a person with an “actual” disability is an individual who has (or has a “record of,” or has been “regarded as” having) a mental or physical impairment, condition, or characteristic that markedly (substantially) affects that individual’s important daily undertakings (major life activities). The ADA does not delineate certain disabilities that are to be covered by the law; each case is considered on a case-by-case basis.

Not all individuals with, or groups supporting people with, disabilities endorse in all circumstances the ADA’s person-first language. The National Federation of the Blind may refer to “blind people.” In deaf culture, individuals may refer to a “Deaf Person” or “hard of hearing person.” In the Autistic community, some may refer to “Autistic Individuals” or “being on the spectrum.” The notion of “neurodiversity,” as a naturally occurring aspect of the human condition, is one way that people describe themselves or others with neurological differences. Others with neurodiversity may describe themselves as having conditions such as dyslexia, attention deficit hyperactivity disorder, and autistic spectrum disorder.

Just as there is individual complexity embedded in language, so, too, are personal and social attributes of self or others reflected as unique individual and “intersectional” qualities. These identities and social roles are not monochromatic, but instead are multiple and mediated by context,

language, time and history, and other factors external to individuals. People often have multiple minority identities that are heterogeneous, which adds to the myriad and often complex ways to understand and consider the concept of disability (Blanck et al., 2021; Blanck, Hyseni, & Altunkol Wise, 2020). These identities exist for all people and are not necessarily simply additive. Disability is intertwined with race, gender identity and sexual orientation, age, and other identities to produce uniquely individual selves. The ADA requires, as many laws do, that individuals protected by the law be “disabled,” but this co-occurs with other primary identities. Outside the language of the ADA, disability identification is only a starting point to express deeper, nuanced presentations of self and others.

The concept of disability in the ADA, however, is somewhat bound by the culture of 30 years ago and it still evidences attitudinal and structural biases toward people with disabilities, especially for those who identify with multiple minority identities—gender, race, ethnicity, LGBTQ+ (lesbian, gay, bisexual, transgender, queer or questioning)—and with their intersections (Blanck, Abdul-Malak, et al., 2020). People with multiple minority identifications continue to experience among the largest disparities in full and equal access to society and discrimination. Yet, for purposes of the ADA, such intersectional presentations largely are constrained by the limits of the law’s definition of disability.

Historical Models of Disability and the ADA

Disability language and identity are inescapably tied to history, culture, and political considerations at large. The ADA’s definition of disability is the way in which American society chose at a particular, arguably politically unique, point in time to aim to prevent discrimination against people on the basis of their human differences. But a long history preceding the last 30 years also came into play; it still can influence how some matters are decided today. In particular, earlier categorizations of difference have perpetuated unfair and stigmatized views about disability on a nationwide scale dating back at least to the U.S. Civil War pension system of the 1870s (Blanck, 2001; Logue & Blanck, 2010, 2018).

At that time, societal attitudes about “disability” were shaped considerably by the experiences of hundreds of thousands of Union Army veterans forced to navigate the then-new “disability” pension system’s bureaucracy (at the time, veterans from the Confederate Army were excluded). The pension scheme for Union veterans with disabilities was, up to that time, the nation’s largest and most highly medicalized welfare system, although its benefits were only available to the select group of disabled men who were deemed “worthy.”

In U.S. language and perception, the pension system approach (now known as the “Medical Model” of disability) forever linked the law’s definition of disability to an “inability to work,” with physicians and governmental bureaucrats as gatekeepers of the rewards (Logue & Blanck, 2020). This model endured for the rest of the 19th and well into the 20th centuries. It categorized people by individual deficits, with disability conceived as an infirmity that precluded participation in the economy and society. The Medical Model cast people with disabilities in a subordinate role, through encounters with doctors, rehabilitation professionals, and bureaucrats, all of whom aimed to “help them” adjust to a society structured around the convenience and nonaccommodating interests of the “able bodied.”

The Medical Model countenanced segregation and economic marginalization and it led to government policies that viewed assistance for people with disabilities as a form of charity or welfare. It penalized, in particular, those presenting less understood (and less visible) disabilities, which, at the time, were primarily mental and infectious conditions. The result, known by some as “ableism,” is “a strong and distinct (American) social force on its own” (Pulrang, 2020) and it is “compounded by other intersecting prejudices,” many of which are necessary to understand the impact of today’s pandemic on persons with disabilities.

Structure of the ADA

The ADA has a preface section and three main parts, commonly referred to as “Titles.” The Preface contains Congress’s “Findings and Purposes,” stating the nation’s goal to assure individuals with disabilities “equality of opportunity, full participation, independent living, and economic self-sufficiency.” Furthermore, the ADA’s predominant purpose is to “provide a clear and comprehensive national mandate for the elimination of discrimination against people with disabilities.” The Preface provides definitions that apply throughout the rest of the Act. Notably, in response to initial, restrictive Supreme Court decisions interpreting the ADA, the ADA Amendments Act of 2008 (“ADAAA”) amended the original ADA definition of disability to the current, broader one (Blanck, 2020b).

Title I covers employment and sets forth the general rule against discrimination:

[N]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual 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.

Employers are provided a defense to a discrimination claim in situations of “undue hardship” or where an employee poses a significant risk to the health or safety of

herself or others in the workplace; this aspect has become a point of debate in light of the pandemic.

Title II covers discrimination by public entities, which is discrimination by state or local governments, and it is divided into two parts. Part A sets forth the rule of nondiscrimination by public entities:

[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

Part B deals with discrimination by public entities in public transportation.

Title III addresses discrimination in public accommodations and services operated by private entities. The general rule is,

No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

A public accommodation must make reasonable modifications to its policies, practices, and procedures, unless that entity can demonstrate that the modification would fundamentally alter the nature of its goods, services, or facilities.

Accommodation Principle

At the heart of the ADA, and often the disputes involving it, is the requirement that social institutions spend resources to remove barriers confronting people with disabilities. The most prominent example is Title I's command that employers make "reasonable accommodations" for qualified applicants and employees.

In the ADA, "discrimination" includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee," in the absence of "undue hardship" for the business. Discrimination is also defined as denying employment opportunities to such a job applicant or employee if denial is based on the need for the entity to make reasonable accommodations to the physical or mental impairments of the employee or applicant.

The explicit command that employers accept the burden of paying for accommodations, up to the undue hardship ceiling, sets the ADA apart from other civil rights legislation and it has led to significant theoretical and practical disputes. Title III's requirement that accessible services and activities be provided by private entities offering services to the public—so-called "public accommodations"—allocates

similar responsibilities and has also evoked disputes. However, findings from numerous studies show that accommodating qualified employees with disabilities does not necessarily come at a high expense or at the expense of other employees, and that the benefits from accommodation often outweigh the costs (Blanck, 2020b; Schartz, Hendricks, & Blanck, 2006; Schartz, Schartz, et al., 2006; Schur et al., 2005, 2013, 2014).

Nonetheless, the wisdom of the reasonable accommodation paradigm remains a subject of debate today (Stein, 2004). Questions raised include whether the cost or benefit of accommodating qualified workers with disabilities affects their employment rates, the behavior of co-workers, and other fundamental aspects of the workplace. In 1990, when the ADA was passed, the data did not exist to address these questions. Although each situation may require a highly factual analysis, studies since then have found that the fears of high accommodation costs and negative reactions of co-workers have not been realized (Blanck, 2020b). Granting accommodations also has positive spillover effects on attitudes of co-workers, as well as positive effects on attitudes of requesting employees (Schur et al., 2014). Overall, studies have shown measurable benefits from a corporate culture of flexibility and attention to the individualized needs of employees (Blanck, Hyseni, & Altunkol Wise, 2020; Schur et al., 2014).

ADA Definition of Disability

The ADA protects individuals with disabilities defined by the law: an individual with an actual disability; an individual with a record of a disability; and/or an individual regarded as having, or treated as having, a disability. To be protected under Title I, a disabled individual must be a "qualified" individual, capable of performing the essential functions of the job sought. Generally, courts defer to the employer's judgment and consider a job description as evidence of the job's essential functions (*Kotaska v. Federal Express Corporation*, 2020). In Title I cases, most courts hold that the employee must prove she is capable of performing the essential job functions, with or without a reasonable accommodation. The employer must identify the valid essential job functions (Blanck, 2020b; *Kotaska v. Federal Express Corporation*, 2020).

To be protected under Title II, an individual must meet the essential eligibility requirements for the governmental service, activity, or program, with or without a reasonable accommodation. However, there is no express requirement that individuals be "qualified" for ADA Title III (private business) coverage because most covered private businesses are open to the public generally (Blanck, 2020b). To be held responsible under Title III, an individual or entity must have some ability to control the place of public accommodation.

Soon after passage, courts applying the ADA showed a tendency to focus on the limits of the protected class. They thereby avoided the ultimate question of whether unlawful discrimination had occurred, resulting in a narrow interpretation of the protections provided by the ADA. The ADAAA was passed in response. It sought to restore Congress's intent to provide a broad definition of disability to make it easier for people with disabilities to obtain protections under the law. The ADAAA rejected, in particular, several Supreme Court ADA decisions and reinstated Congress's broad construction of the "disability" mandate.

Yet, in the ADA's 30th year and thereafter, courts are still addressing definitional questions. In *Darby v. Childvine* (2020), the plaintiff had a double mastectomy after being diagnosed as having precancerous cells associated with a genetic mutation (*BRCA1*) that contributes to abnormal cell growth. She alleged that she was discriminated against under the ADA when her employer terminated her employment upon learning of her condition. The question facing the court was whether to dismiss, as insufficiently plausible, Darby's claim that her genetic mutation, with the associated growth of abnormal cells, constituted a disability under the ADA. The court held that Darby had plausibly claimed that her impairment—serious enough to warrant a double mastectomy—substantially limited her normal cell growth.

Aspects of the *Darby* case echoed those in the first ADA case decided by United States Supreme Court, *Bragdon v. Abbott* (1998), where the Court had held that infection with the HIV virus, even in the absence of symptoms of AIDS, was a disability covered by the ADA. But the decision was based on the virus's immediate effect on bodily functions, not because of the potential for it to lead to AIDS. In *Darby*, similarly, the court held that a genetic mutation (or other physical characteristic) that only predisposed an individual to other possible health conditions, in this case breast cancer, would not itself be a disability under the ADA. The court left it to further proceedings to determine whether Darby could go beyond allegations to prove that her condition in fact substantially limited normal cell growth.

In *Colton v. Fehrer Automotive* (2020), the plaintiff worked on an automotive plant assembly line. Her short stature limited her reach, which made it difficult for her to perform her job. She requested an accommodation for her short stature or a move to a different job. The employer, however, found plaintiff a bad fit for the job and terminated her. She alleged her "short stature" alone was an ADA disability and that the employer had discriminated against her on this basis. The court found height is a physical characteristic and not an actual or underlying physiological condition or disorder under the ADA. The definition of disability does not cover physical characteristics, even when outside the average range, unless the characteristic, as in *Darby* (arguably), results from an actual or underlying physiological disorder.

In *Colton*, the plaintiff also argued, alternatively, that the employer *regarded her as having* a physical or mental impairment that substantially limited her major life activities. Although the ADAAA broadened the ADA definition of disability, it did not alter the meaning of a "physical or mental impairment." As the plaintiff could not show her short stature was an ADA disability, she also could not demonstrate the employer perceived her height as a disability.

Short-term temporary impairments, without serious or long-term effects, likewise are not likely to be considered "substantial" impairments or conditions under the ADA. Under the ADAAA's "regarded as" prong of disability, transitory (expected duration of less than 6 months) and minor impairments are not covered by the law (*Eshleman v. Patrick Industries*, 2020). Other conditions, such as morbid or clinical obesity, as discussed in the next section, require an individualized determination as to whether they are ADA disabilities.

In *Jones v. McDonough* (2021), plaintiff Jones had worked for the Department of Veterans Affairs for 25 years and retired after indications that she had performance-related problems at work. She subsequently filed a complaint alleging the defendant, the U.S. Department of Veterans Affairs, violated the Rehabilitation Act of 1973, which is an antidiscrimination law that defines a "disability" using the ADA's definition, as amended by the ADAAA (Blanck, 2020b). She alleged the defendant failed to provide her a reasonable accommodation to permit her to continue working while addressing her purported disability and, thereby, that she was constructively discharged when she resigned.

Jones testified that she had experienced "stress and anxiety" in connection with the care and deaths of her parents at the time of her work-related performance problems. The defendant contended the plaintiff did not have a "physical or mental impairment" for purposes of the ADA's definition of disability because she did not provide adequate medical documentation to support the existence of a recognized impairment. The court agreed with the defendant, finding under the circumstances of the case that at least some adequate medical documentation was required and, lacking that, the plaintiff had failed to establish she had a mental impairment for purposes of the ADA's definitional analysis. Apparently, in this case, Jones had diagnosed herself as having depression and anxiety, but she did not indicate with specificity or medical support the onset date or duration of these conditions.

There is no general requirement in the ADA that medical testimony must be offered to satisfy the law's definition of disability. Clearly, some disabilities are visible, obvious, and severe enough that corroborating medical testimony is not required. However, the *Jones* court noted that "[i]n the context of mental health impairments and other impairments based upon a specific medical condition, . . . courts

have regularly held that a self-diagnosis is not sufficient to establish the existence of an impairment” (citing *Heit v. Aerotek*, 2018, at *13).

In a sign of the times, the court in *Jones* set out a less than sensitive view as to the mental health crisis associated with the COVID-19 pandemic, which includes continuing stigmatization of people with mental disabilities (as discussed later in this article). The court wrote,

Certainly, the general populace throws around the term “depression” colloquially to mean sad or down and the term “anxiety” to mean stress. Just because someone calls herself anxious and depressed, however, does not mean that she suffers from a “mental or psychological disorder” . . . the court finds, as a matter of law, that depression and anxiety, in order to qualify as an impairment under the ADA, must actually have been diagnosed by a medical professional . . . In this case, the plaintiff has not offered evidence . . . that she ever received a diagnosis of depression or anxiety. (*Jones v. McDonough*, 2021, at *13) (citations & footnotes omitted)

Nonetheless, the *Jones* court did have the leeway to make this decision: There are no per se ADA disabilities, only definitions of certain terms, and each case must be considered on an individualized basis. While the ADA defines “transitory” as an impairment with duration of 6 months or less, it does not define “minor,” which is to be determined on a case-by-case basis (*Eshleman v. Patrick Industries*, 2020). The ADA requires that an employer must establish the perceived impairment to be objectively both transitory and minor for a successful defense.

Depending on the individual circumstances, a COVID-19 infection might be considered an ADA disability, particularly if serious conditions and symptoms result, even if it lasts less than 6 months (cf. *Fraihat v. U.S. Immigration and Customs Enforcement*, 2020, 736 n. 21: people with disabilities at a heightened risk of severe illness and death upon contacting COVID-19 that may include cardiovascular disease; high blood pressure; chronic respiratory disease; diabetes; cancer; liver disease; kidney disease; autoimmune diseases; severe psychiatric illness; history of transplantation; and HIV/AIDS; accord, *Busby v. Bonner*, 2020, at 825). At some lower level of seriousness, though, a COVID-19 infection would probably be considered a transitory and minor condition not covered by the Act.

Title I Antidiscrimination Protections

The most heavily litigated provisions of the ADA have been the employment sections. They impose obligations on covered employers from job application to termination, including such matters as medical testing, reasonable accommodations, and the benefits and privileges of employment (Blanck, 2020b; Schur et al., 2017). An employer may not adopt job qualification standards

or testing requirements that exclude an individual with a disability, unless the criteria are job related for the position in question and consistent with business necessity (*Gibbs v. City of Pittsburgh*, 2021).

In *Taylor v. Burlington Northern Railroad Holdings* (2020), the court held that an employer had engaged in prohibited discrimination under Title I when it withdrew an offer of employment because of the prospective employee’s failure to pay for medical testing. The employer had required the testing because, due to the prospective employee’s perceived obesity, the employer thought he would not be able to perform the job. The ADA covers discriminatory acts by an employer when based on an actual impairment or the perception of an actual impairment. The employer’s perception of obesity alone, therefore, was a substantial factor in its discriminatory decision to deny the prospective employee a job.

In *Morriss v. BNSF Railway Co.* (2016), an individual’s weight has been judged a physical characteristic rather than an ADA disability (akin to Colton’s short stature discussed above). However, weight itself may qualify as an ADA physical impairment if both outside the normal range and the result of an actual, not potential future, physiological disorder.

How far do Title I’s protections reach? In 2020, the United States Supreme Court ruled that the First Amendment right of religious institutions to be free from state interference permits courts to dismiss ADA Title I disputes involving teachers at religious schools. In *Our Lady of Guadalupe School v. Morrissey-Berru*, *St. James School v. Biel* (2020), Ms. Biel worked as a lay teacher at a Catholic school. After the school did not renew Biel’s contract, she alleged under the ADA that she had been discharged on the basis of her disability: She had requested an accommodation leave for breast cancer treatment. The school maintained that its decision was based on her poor performance.

The Supreme Court ruled that the First Amendment’s Religion Clause prevented Biel’s Title I claims. Relying on a similar ADA case brought 8 years earlier, *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* (2012), the Court ruled the First Amendment barred the Title I discrimination claim on the basis of a “ministerial exception” to the ADA. The ADA does permit religious institutions to consider religion when making employment decisions, and they may require that job applicants and employees conform to their religious tenets.

However, the broadly interpreted ministerial exemption may serve to bar many otherwise qualified individuals with disabilities employed by religious institutions from Title I coverage.

Reasonable Workplace Accommodations

To be eligible for an ADA accommodation, the employee’s disability and need for accommodation must be known to

the employer. The request need not be phrased in terms of “reasonable accommodation” or use particular language, and the employee does not need to identify the change required. Qualified applicants and employees must receive reasonable accommodations whether they work part-time, full-time, or as probationary employees. An employee who can, even with some difficulty, perform the essential functions of his job without accommodation is still eligible for an effective and reasonable accommodation (*Bell v. O’Reilly Auto Enterprises*, 2020).

The accommodation requirement, however, does place a particular burden on an individual with a hidden or nonobvious impairment to disclose the claimed disability and request that the employer provide an accommodation (Hyseni & Blanck, 2021). But it places obligations on both parties to participate in good faith in an “interactive process.”

Should the interactive discussion process fail, the individual may bring a “failure-to-accommodate” claim under ADA Title I. Some courts find that an adverse employment action (i.e., denial of the terms and conditions of employment) is not a requisite element of an ADA failure-to-accommodate claim (*Exby-Stolley v. Board of County Commissioners*, 2020). Accordingly, in a failure-to-accommodate claim, a plaintiff typically must provide evidence that she is a qualified individual with a disability within the meaning of Title I; she works or worked for an employer that is covered by Title I; the employer, despite knowledge of the employee’s disability, did not reasonably accommodate the employee (Blanck, 2020b).

If an employee has a preexisting mental illness or anxiety disorder that qualifies as an ADA disability, and that has been exacerbated by the COVID-19 pandemic, she may be entitled to reasonable accommodation after an interactive discussion about how the accommodation may assist her to perform her job, absent an undue hardship to the employer (U.S. EEOC, 2020). Once again, an employer’s failure to provide a reasonable accommodation may violate Title I, according to most courts, regardless of whether or not the employee suffered an adverse employment action or experienced discriminatory intent (*Exby-Stolley v. Board of County Commissioners*, 2020; *Punt v. Kelly Services*, 2020).

In *McCray v. Wilkie* (2020), a veteran with physical and mental disabilities, arthritis, and post-traumatic stress disorder (“PTSD”), was a qualified employee of the Department of Veterans Affairs. He alleged that the government failed to accommodate his disabilities by, for example, not providing an adequate replacement van to address his arthritis and refusing to reassign him a new office for his stress and PTSD. The court found that an unreasonable delay in providing an accommodation to his known disability could amount to a failure to accommodate his disability in violation of the ADA. Whether a particular delay in the provision

of accommodations violates the ADA requires an individualized inquiry into “the totality of the circumstances,” considering such matters as “the employer’s good faith in attempting to accommodate the disability, the length of the delay, the reasons for the delay, the nature, complexity, and burden of the accommodation requested, and whether the employer offered alternative accommodations.” McCray’s complaint presented a plausible ADA claim based on the delay.

The pandemic has brought to the fore the question of whether being allowed to work from home can be a “reasonable accommodation” under the ADA. Before the pandemic, courts typically took the view that working at home was not a reasonable accommodation (Blanck, 2020b). They reasoned that when an employee’s job involves teamwork, the work cannot be accomplished at home without diminishing the employee’s performance. Another rationale for the reluctance to recognize telecommuting as an accommodation was the perception that a particular employee who requires significant supervision cannot be adequately managed at home, and the quality or productivity of such an employee’s work might decline significantly.

In *Peeples v. Clinical Support Options* (2020), the plaintiff, who had moderate asthma and increased vulnerability to COVID-19, requested that her employer permit her to continue to telework from home. She advised her employer that, although she needed to telework to protect her health, she would continue to perform the essential functions of her job along with her other job-related tasks while teleworking. Plaintiff’s request to continue teleworking was denied purportedly because managers were needed in the office building to support ongoing operations.

The *Peeples* court found that the plaintiff was likely to succeed on her failure-to-accommodate claim. It granted her request for a preliminary injunction, which enjoined the employer from terminating her for asking to telework. The court determined that as a reasonable accommodation under ADA Title I, the plaintiff was entitled to telework for 60 days, or until further order of the court. Also during this time period, the employer was entitled to review additional medical documentation concerning the plaintiff’s alleged disability.

The prevalence of remote work and its perception as a possible ADA accommodation have continued to change with the progression of the pandemic and its economic consequences. With improvements in technology, working from home is widespread and a “new norm” in many professions and industries (U.S. EEOC, 2020). One recent study of large and small businesses during the pandemic examined the prevalence of, and productivity in, remote work—defined as working from home at least 2 days per week (Bartik et al., 2020). Disability was not included as an employee-level variable, but the study did find that having

done prepandemic remote work, presumably including those who did so as an ADA accommodation, predicted the prevalence of postpandemic remote work.

In a related study, Schur et al. (2020) find that, although the COVID pandemic severely affected employment for all workers, it may have a long-term “silver lining” for workers with disabilities by making remote work more acceptable and effective as an element of workplace accommodation. Schur and colleagues analyzed pre-COVID data on disability and home-based work from the American Community Survey, American Time Use Survey, and Current Population Survey. They found that both employees and self-employed workers with disabilities are more likely than those without disabilities to work from home. Yet, workers with disabilities face wage gaps due to the types of on-site and home-based work they do. This indicates that although increased opportunities for remote work may create employment opportunities for workers with disabilities, it is unlikely to mitigate their wage disparities which, in part, are due to their types of jobs.

In accord with Schur’s findings, Bartik and colleagues find that the occurrence of remote work varies by industry sector, with a relatively lower prevalence of remote work in the manufacturing, hospitality, and leisure sectors. Higher levels of employee education were associated with the tendency to work remotely during the pandemic. In industries with higher-educated and paid employees, employers reported relatively lower productivity losses from remote work, although such initial impressions require further long-term and more controlled study (Bartik et al., 2020).

Many employers reported that remote work will remain common at their companies after the pandemic subsides. While such trends likely will vary over time as a function of future labor markets, and economic and public health developments, the notion of working from home as an accommodation is now embedded in our culture as never before.

Undue Hardship and Direct Threat Defenses to Charges of Discrimination

One critique of Title I is that accommodations create economic hardships that are costly and burdensome for employers (Blanck, 2020b). The ADA’s mechanism for dealing with this criticism is the “undue hardship” defense. An undue hardship is a significant difficulty or expense when considered in light of various factors; the inquiry is highly fact-intensive. Determining undue hardship will depend on the nature, frequency, and duration of the need.

Prior to the pandemic, research showed that most accommodations did not pose a significant expense when compared with an employer’s overall budget and resources (Blanck, 2020b). Today, the U.S. EEOC (2020) recognizes

that a significant loss of business revenue from the pandemic is a relevant factor in the undue hardship determination. But an employer still cannot reject outright any accommodation. It must make an individualized, interactive assessment in light of its financial constraints during the pandemic.

A direct threat to self or others is another defense to a Title I charge of discrimination and is based on considerations of workplace health and safety. But an employer may not claim undue hardship, or that an accommodation would result in a direct health threat to self or others, based simply on other employees’ or customers’ *unjustified* fears and prejudices, in general and about the pandemic. During the pandemic, employers may ask employees whether they have experienced virus symptoms, or whether they were vaccinated, to determine whether they may pose a direct threat to health in the workplace (U.S. EEOC, 2020).

Another pandemic-related note is that Title I does not require an employer to accommodate an employee without an ADA disability by, for instance, allowing her to work remotely to protect a family member with a disability from possible COVID-19 exposure (U.S. EEOC, 2020).

Title II Antidiscrimination Protections

There are many ways to interact with state and local governments. The government provides educational facilities, social services, licenses, parks and recreation, and voting and court services. It oversees law enforcement and prison facilities. When it enacted the ADA, Congress found that discrimination against individuals with disabilities persists in many of these critical areas: education, transportation, voting, communication, recreation, institutionalization, prison services, health services, and access to public services (Blanck, 2017a, 2020b).

Title II therefore extended existing prohibitions on discrimination to state and local government entities. It requires that services, programs, and activities of public entities be accessible to people with disabilities. As with the other titles of the Act, courts have grappled with questions concerning what entities should be covered, what proactive steps covered entities must take, and what constitutes discrimination on the basis of disability.

Title II entities must take reasonable measures to remove architectural and other barriers to accessibility. It does not require states to compromise their eligibility criteria for public programs. It does require, however, “reasonable modifications” that would not fundamentally alter the nature of the services provided, but only when the individual seeking modification is otherwise eligible or “qualified” for the services offered. The entity is not required to take measures that impose an undue financial or administrative burden, compromise historic preservation interests, or effect a fundamental alteration in the service.

In 2020, in an array of lawsuits, inmates housed in correctional institutions filed petitions to obtain their release from custody, or to improve the health protections and safety of their living conditions, to limit their exposure to the COVID-19 virus. In these lawsuits, plaintiffs with disabilities typically have claimed that they are vulnerable to health complications if they contract COVID-19. In several of these cases, inmates have claimed they are qualified individuals with disabilities who are being discriminated against by reason of their disabilities. This discrimination is said to include a lack of accommodations for inmates with disabilities and preexisting medical conditions to allow them to physically distance at correctional facilities or to be released from low-security correctional facilities. At the time of this writing, these cases are working their way through the courts (e.g., *Denbow v. Maine Department of Corrections*, 2020; *Valentine v. Collier*, 2020).

Title II's "Integration Mandate"

Title II provides that public entities must administer services, programs, or activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities. In *Olmstead v. L.C. ex rel. Zimring* (1999), the U.S. Supreme Court considered the interplay between this "integration mandate" and the "fundamental alteration" limit on reasonable accommodation. *Olmstead* concerned the interpretation of Title II's antidiscrimination provision and whether its proscription required placement of persons with mental disabilities in community settings rather than in institutions. The Court held the answer was "a qualified yes," endorsing the ADA's integration mandate.

The *Olmstead* integration mandate confers a broad scope on the ADA's discrimination proscription and it obligates states to counter discrimination. Unjustified and unnecessary placement or retention of persons in institutions severely limits their exposure to the community and constitutes a form of discrimination based on disability that is prohibited by Title II. In evaluating a state's fundamental alteration defense to a charge of discrimination, courts must consider the resources available to the state for the cost of providing community-based care, the range of services the state provides others with disabilities, and the state's obligation to address those services equitably.

Olmstead's recognition of unjustified institutional isolation of people with disabilities as a form of discrimination was significant. The Supreme Court reasoned that institutional placement of people who can otherwise benefit from community settings perpetuates unwarranted assumptions that they are incapable or unworthy of participating in community life. Unnecessary civil confinement in an institution diminishes everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and

cultural enrichment. The ADA does not, however, require termination of institutional settings for people unable to handle or benefit from community settings; it provides only that qualified individuals with disabilities may not be subjected to discrimination, which may plausibly include claims that such individuals are at serious risk from institutionalization or segregation and are unduly isolated in their community homes (*Waskul v. Washtenaw County Community Mental Health*, 2020).

In 2020, the U.S. Department of Health & Human Services (U.S. HHS) provided guidance on how COVID-19 may affect state Medicaid health and other governmental services, cautioning that states remain responsible for compliance with *Olmstead*'s integration mandate. To avoid potential discrimination under Title II, for example, states should consider ways to help individuals with disabilities who may require assistance while avoiding unjustified institutionalization or segregation in state-sponsored congregate care settings or nursing homes.

Title II Coverage of Governmental Facilities, Programs, and Services

Title II applies to a public entity's physical structures, programs, and services. Courts have interpreted this reach to include city buildings, botanical gardens on the premises of a state university, publicly owned sporting arenas and theaters, city sidewalks, and voting procedures. "Physical structures" (or "facilities") refers to any portions of buildings, structures, sites, complexes, equipment, roads, walks, passageways, parking lots, and other property, including the site where the building, property, structure, or equipment is located.

Title II's prohibition of discrimination in facility access is patterned after Title II's general discrimination provision. Facilities may be "programs, services, or activities" within the meaning of the statute (including the voting process, *People First of Alabama v. Secretary of State for Alabama*, 2020, discussed below), or conduits such as websites (under Title III, for example, *Access Living of Metropolitan Chicago v. Uber Technologies*, 2020, also discussed below), or other "programs, services, or activities" public entities offer. What a public entity must do to ensure "program access" varies according to whether the facility is an "existing" facility, a new facility, or a facility that has been altered (Blanck, 2020b).

In *Hamer v. City of Trinidad* (2019), the Tenth Circuit found the plain language of Title II's services, programs, and activities includes city sidewalks. A public entity violates Title II when it constructs, creates, or maintains noncompliant sidewalks—a service, program, or activity that must be readily accessible to individuals with disabilities, such as those who use wheelchairs. In *Hamer*, the plaintiff was excluded from, or denied participation in, the benefits of the

city sidewalks each day she was deterred from using them due to the city's noncompliance. The daily injury would cease when the city remedied its noncompliance or when the plaintiff no longer showed an intent to access the services. The United States Supreme Court (*Trinidad v. Hamer*, 2019) did not disturb the lower court's ruling.

In *National Association of the Deaf v. Florida* (2020), the Eleventh Circuit likewise concluded that a Florida resident may properly bring suit under Title II against the State of Florida for not providing captioning for live and archived videos of Florida legislative proceedings. At stake was plaintiff's right to access information about governmental processes. Title II was enacted to protect people with disabilities' right to participate in society and its civic activities, even where a "fundamental" constitutional right, such as access to the democratic process, is not at stake (*National Association of the Deaf v. Florida*, 2020).

Also in 2020, in *People First of Alabama v. Secretary of State for Alabama* (2020), the district court, as affirmed by the appellate court, had denied a request by the Alabama Secretary of State for a stay of a preliminary injunction enjoining the State from enforcing Alabama voting restrictions against individuals with disabilities who were at risk of becoming seriously ill or dying if they contracted COVID-19. Because of the increased health risk of voting at polling stations, Alabama had made emergency alterations to election and voting protocols, such as allowing Alabamian voters to vote absentee. But Alabamian voters still had to comply with existing rules for casting absentee ballots. Individuals who wanted to vote absentee had to submit a copy of their photo identification with their absentee ballot application. The absentee ballot also would not be counted unless it was returned with an affidavit signed by a notary public or two adult witnesses. As people with disabilities faced a higher risk of contracting a COVID-19, the absentee voter restrictions essentially required them to give up social distancing and self-isolation to vote.

The district and appellate courts had held that the pandemic-mandated election restrictions violated Title II. The plaintiffs were "qualified individuals" for purposes of voting. The photo ID requirement effectively excluded many of them from voting participation solely by reason of their disability. In contradiction of Title II, the Alabama voting requirements forced voters with disabilities to choose between encountering immediate and severe potential health risks, and forsaking their fundamental right to vote (*People First of Alabama v. Secretary of State for Alabama*, 2020, concurring opinion). The plaintiffs had proposed curbside voting as a "readily available" modification to the voting requirements, which they alleged would not fundamentally alter the election process.

Several weeks after the appellate court's decision, in an unsigned order delivered by Associate Justice Thomas, on July 2, 2020, the Supreme Court granted the State's

application for a stay of the district and appellate courts' orders pending further appeal (*Merrill v. People First of Alabama*, 2020). The stay was granted in the absence of oral argument or an opinion in support. Further proceedings will determine whether this stay served to disenfranchise persons with disabilities in Alabama on the basis of their disabilities, in contradiction of Title II. In an order issued by the U.S. Supreme Court on July 16, 2020, in a similar voting rights case in Florida, Justice Sotomayor dissented, stating that the Court's order prevented thousands of eligible voters from participating in Florida's election "simply because they are poor" (*Raysor v. DeSantis*, 2020).

Title II Effective Communication Mandate

Title II's definition of qualified person with a disability links the "provision of auxiliary aids and services" to the concept of reasonable accommodations. The Title II regulations have a separate section devoted to "Communication," which makes clear that communication is an integral part of a public entity's responsibilities under Title II (Blanck, 2020b).

Title II's communication regulations and the case law interpreting them stand for the proposition that a public entity must offer effective communication alternatives. A public entity must take steps to ensure that communications with applicants, participants, and members of the public with disabilities are as effective as communications with others without disabilities. Most cases involve the question of exactly how effective a communication alternative has to be, for example, how effectively the assistance of a "qualified interpreter" in a health care setting may enable communication with a Deaf person.

The Title II regulations require that auxiliary aids and services be furnished when necessary to afford an individual with a disability an equal opportunity to participate in and enjoy the programs, services, or activities of the public entity. The effective communication obligation is owed to people with hearing, speech, vision, and print disabilities. In terms of types of auxiliary aids and services, a public entity must afford primary consideration to the requests of individuals with disabilities.

Auxiliary aids and services for people with hearing impairments include qualified interpreters, note takers, written materials, amplifiers, captioning, and TTYs (text telephone relays). For people with vision and print impairments, they include qualified readers, taped text, Braille, large print, and assistance locating items. For people with speech disabilities, they include TDDs (teletypewriters), computer terminals, speech synthesizers, and communication boards. A public entity need not take an action that would result in a fundamental alteration to its facility or an undue financial and administrative burden.

In *Silva v. Baptist Health South Florida* (2017, 2020), plaintiffs who were deaf made repeat visits to defendants' hospitals, which were private entities covered by Title III. Plaintiffs alleged they were not able to communicate effectively with staff because of the lack of auxiliary aids or services, which resulted in discrimination against them based on their disabilities. However, at the appellate level, the court held that plaintiffs could not continue to pursue injunctive relief because, given there had been a change in hospital policy, even if they were to return to the hospital, they would not likely experience a denial of benefits or discrimination; that is, they no longer had legal standing.

Overall, to bring an effective communication claim under Title III (and under Title II involving state and local government-run health care providers and hospitals), plaintiffs are not required to show deficient treatment or recount their lack of understanding during interactions with hospital staff. The test instead is whether plaintiffs have an equal opportunity to benefit from the hospitals' services (*Silva v. Baptist Health South Florida*, 2017, 2020).

Title II Transportation Provisions

A separate part of Title II covers nondiscrimination in transportation provided by public entities. Transportation was an area for which the ADA's framers recognized an existing pattern of discrimination and inequity. The law's framers viewed transportation as crucial in unlocking access to other opportunities that the ADA would help create.

Public transportation is especially important to people with disabilities because evidence suggests they are more reliant on public transportation than others in the general population (Blanck, 2020b). The legal and policy tensions specific to transportation issues are, essentially, a microcosm of the entire Act. These tensions include the question of whether people with disabilities are best served by adjusting mainstream transportation services to facilitate use or by creating services specialized for them.

Thus, in the transportation context, the issues typically involve whether to mainstream existing transportation to accommodate people with disabilities or rely instead on paratransit. Paratransit refers to transportation services usually provided by vans operating separately from regular mass transit operations and that are distinct from privately operated on-demand transportation services (as discussed next in the context of Title III). Also considered is whether there should be a "threshold" or "necessary" level of governmental spending on mass transportation options for people with disabilities.

In *Guerra v. West Los Angeles College* (2020, 2021), the plaintiffs were students with physical disabilities who attended West Los Angeles College. They sued the College under Title II, alleging that the termination of the on-campus shuttle service restricted their access to the College's

programs and services. On appeal, the court concluded that Title II required a public entity such as the College to provide individuals with disabilities "meaningful access" to its programs and services viewed in their entirety. Plaintiffs were denied meaningful access to the College's programs and services once the shuttle service ended. Their access could not be reasonably and readily achieved by requiring the students take the Los Angeles paratransit service from their homes to the College and then having them travel the campus on motorized scooters or by foot.

Title III Antidiscrimination Protections

Title III extends the ADA's antidiscrimination mandate to places of public accommodation and commercial facilities. Discrimination under Title III is defined to include the failure to make reasonable modifications of policies, practices, and procedures; the failure to ensure effective communication; and the failure to take steps to make facilities physically accessible. The defenses to a charge of discrimination rely on the concepts of undue burden, fundamental alteration, and what is "readily achievable."

"Places" of Public Accommodation Under Title III

Title III covers "places of public accommodation" and "commercial facilities." Public accommodations consist of 12 specified categories of business that affect commerce, such as places of lodging; establishments serving food or drink; theaters, concert halls, stadiums, and convention centers; sales or rental establishments; professional offices; museums and places of public displays; places of exercise or recreation; places of education; and social service centers (Blanck, 2020b).

The general categories are exhaustive for purposes of Title III. If a business does not clearly fit into one of the categories, it is not a place of public accommodation. Places that do not fall within the categories generally are considered "commercial facilities." Public accommodations are subject to the nondiscrimination obligations of Title III, whereas commercial facilities are subject only to the requirements for new construction and alterations. However, a single facility may contain both public accommodations and commercial facilities. For example, stores within a private airport are public accommodations, although the airport itself is a commercial facility.

Title III does not cover residential facilities. However, areas of private homes used as places of public accommodation are covered under Title III. For instance, a home that houses a daycare facility or a physician's office will be covered under Title III, at least in those areas used for public accommodation or public activities. However, private homes that rent out rooms on a short-term basis, such as

through online marketplaces and on-demand services, generally are not covered by Title III.

Discrimination Under Title III

The types of discrimination under Title III include inequitable eligibility criteria; failure to make reasonable modifications of policy, practice, or procedure when necessary to permit a person with a disability to benefit from a place of public accommodation; failure to ensure effective communication through provision of auxiliary aids; and failure to remove architectural barriers to access when it is readily achievable to do so (Blanck, 2020b). A place of public accommodation may not assess a surcharge to a person with a disability to cover the costs of measures—such as the provision of auxiliary aids, barrier removal, or reasonable modifications—needed to provide that individual or group with the nondiscriminatory treatment required by Title III. Instead, the cost of compliance must be considered an overhead expense.

In *Pletcher v. Giant Eagle* (2020), a supermarket had a COVID-19 policy that customers must wear a mask or full-face shields to enter the store. The plaintiff alleged that this policy was a violation of Title III against her as a person with a disability; she had a condition, asthma, that substantially affected her major life activity of breathing and respiratory system. Due to her condition, she could not wear a mask over her mouth and nose without significant difficulty in breathing. Giant Eagle provided that its customers who cannot wear a mask or full-face shields because of a disability would have the option of having an employee shop for them or using curbside pickup and delivery services.

The court held that plaintiff's disability did not prevent her from complying with Giant Eagle's face-covering policy that permits customers to shop inside its stores wearing either masks or full-face shields. The court further found that the plaintiff did not show that the requested accommodation of being permitted to shop in the Giant Eagle without a mask or face shield was reasonable or necessary. Finally, the court acknowledged Giant Eagle's defenses that its face-covering policy arguably was a legitimate safety requirement during the COVID-19 pandemic and that, without a mask or face shield, plaintiff presented a direct threat to the health and safety of others, including customers and employees.

Many disputes of the sort in *Pletcher v. Giant Eagle* currently raise issues under Title III that implicate nondiscriminatory access to public accommodations, reasonable modifications in policies, and direct threat to the health and safety of self and others. In particular, these questions go to the interpretation and scope of the COVID-19 recommendations from the U.S. Centers for Disease Control and Prevention ("CDC"; Williamson et al., 2020). The CDC recommends wearing a face mask in public places like

grocery stores, and many states and local governments are requiring the use of a face mask when in public spaces.

The face mask mandates may impact not only individuals with asthma and chronic obstructive pulmonary disease ("COPD") but also people with post-traumatic stress disorder ("PTSD"), severe anxiety, claustrophobia, or other mental health conditions. Others affected may include people with autism who are sensitive to touch and texture; a person who has cerebral palsy and may have difficulty moving the small muscles in the hands, wrists, or fingers; and a person who uses mouth control devices such as a sip and puff to operate a wheelchair, assistive technology, or assistive ventilators (Williamson et al., 2020).

The *Pletcher* COVID-19 mask case highlights the interplay of alleged discrimination under Title III and questions of reasonableness, avoidance of "fundamental alterations" in a public accommodation's programs or policies, avoidance of "direct threats" to safety and health, and determining whether a proposed modification is "readily achievable." In deciding whether a requested modification is reasonable, poses a direct threat, or fundamentally alters the services or accommodations—in *Pletcher*, the question was whether Giant Eagle's policy of providing its customers who cannot wear a face mask because of a disability the option of having an employee shop for them or to use curbside pickup and delivery services is reasonable—the needs of a person with a disability must be evaluated on an individualized basis.

Presumably, therefore, a mask accommodation that is proper for one person may not be necessary for another. In 2021, Nike settled class action litigation brought by Plaintiff Cali Bunn, a college student who is deaf, that addressed an important pandemic-related mask issue that potentially affected millions of Californians who are deaf or hard of hearing. In *Bunn et al. v. Nike* (2021), in response to the pandemic, Nike stores instituted a policy requiring its employees to wear face masks when interacting with customers. Although the plaintiffs agreed that face masks are necessary to protect public health, they alleged that Nike's policy discriminated against people who are deaf or hard of hearing in violation of the ADA. This is because Nike permits its employees to wear opaque face masks while interacting with customers, which muffle sound and block visualization of the wearer's mouth and facial expressions necessary for people with hearing loss to understand speech.

In settling the case, Nike agreed to provide guidance and communications to its California store employees to accommodate customers with difficulty communicating due to an employee wearing an opaque face mask. Nike will post notices at store entrances that accommodations are available for customers with hearing loss and provide its store employees with transparent face masks and clean pen-and-paper sets when a customer requests an accommodation.

As a practical matter, if it is determined a particular modification does not constitute a fundamental alteration, as in *Nike*, it would seem difficult to deny the benefit of that finding to others with a range of similar impairments. Others with similar impairments should be able to take advantage of the policy change or reasonable modification (discussed next), absent a showing that the alteration is not appropriate or necessary for them.

“Reasonable Modifications” Under Title III

Title III provides that discrimination includes the failure to make “reasonable modifications” in policies, practices, or procedures when necessary for individuals with disabilities, unless such modifications “fundamentally alter” the nature of such goods, services, and accommodations. A reasonable modification, similar to the reasonable accommodation concept in Title I, may be a change in the way a good or service is provided. For example, allowing service dogs generally is a reasonable modification for places of public accommodations.

In litigation addressing the reasonable modification question, a plaintiff must first introduce evidence that a modification is generally reasonable. The covered entity then may introduce evidence that the modification would constitute an undue hardship. The language in Title I and Title III is similar in this regard. Title III defines discrimination to include a failure to make reasonable modifications unless the entity demonstrates that making such modifications fundamentally alters the nature of the public accommodation.

In the case *PGA Tour v. Martin* (2001), the Supreme Court held that Title III protects access to professional golf tournaments by a qualified entrant with a disability. The Court held that the contestant could not be denied use of a golf cart on the grounds it would “fundamentally alter the nature” of the tournament when other contestants must walk. The use of carts as a program modification was reasonable. The *Martin* Court underscored that the ADA requires individualized attention to accommodation requests that allow equal access by the public.

Service Animals as Reasonable Modifications/ Accommodations Under Title III (and Title II)

Service animals present issues not encountered with other personal assistance mechanisms for individuals with disabilities. Generally, a public accommodation must modify policies, practices, and procedures to permit the use of a service animal by an individual with a disability (Blanck, 2020b). In rare circumstances, accommodation may not be required because a fundamental alteration in the nature of the services or the safe operations of the public accommodation may result.

Under the ADAAA, a service animal is defined as a dog trained to do work or perform tasks for the benefit of an individual with a disability, including a physical (e.g., cerebral palsy, epilepsy), sensory (e.g., visual, hearing), psychiatric (e.g., clinical depression, PTSD), and intellectual (e.g., Down syndrome) disability. Other species of animals, trained or untrained, are not service animals for the purposes of this definition. Also, work performed by a service animal must be related to the individual’s disability, and care and supervision of a service animal are the responsibility of the individual with the disability. The public accommodation facility may only “ask if the animal is required because of a disability and what work or task the animal has been trained to perform” and it may not require a surcharge for admitting the service animal.

Some courts have held that a proposed accommodation by an individual with a disability for the use of a service animal is reasonable under the ADA as a matter of law (*Berardelli v. Allied Services Institute of Rehabilitation Medicine*, 2018). So entities covered by the ADA ordinarily must accommodate the use of service animals by individuals with disabilities, and the reasonableness of the accommodation must be decided on a case-by-case basis. Thus, an accommodation of a blind person’s request to be accompanied by her service animal—absent exceptional circumstances—is per se reasonable under Title III.

But there are limits. In *Mayle v. City of Chicago* (2020), the court upheld the city’s decision that a plaintiff with bipolar disorder could not bring his emotional support hog into public places such as public beaches and parks: The ADA requires public entities to allow “service animals” such as dogs, but not hogs, to accompany people with disabilities. The plaintiff had trained the hog to respond to his anxiety attacks and alleviate his depression by providing him with massage therapy, and to encourage him to engage in physical activity, which helped mitigate his mental health conditions.

Plaintiff argued that ADA Title II prohibits public entities from excluding, denying benefits to, or discriminating against someone because of that person’s disability. But this rule is limited in that Title II also requires public entities to make only reasonable modifications to their policies, practices, and procedures to avoid discrimination on the basis of disability. Generally, this means permitting people with disabilities to use a service animal, defined as a dog. A miniature horse, pig, and other species of animals, whether trained or untrained, are not service animals for the purposes of the ADA.

In 2020, the U.S. Department of Transportation (“DOT”), issued a final rule regarding “Traveling by Air with Service Animals,” which became effective in 2021. This DOT rule

defines a service animal as a dog, regardless of breed or type, that is individually trained to do work or perform tasks for the

benefit of a qualified individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability.

Among other regulations, the DOT rule allows airlines to classify emotional support animals as pets that are not service animals. Airlines may limit to two the number of service animals that one passenger can bring onboard an aircraft. Airlines may require passengers with a disability traveling with a service animal to submit a standard form in which they attest to the animal's training and good behavior and certify its good health (U.S. DOT, 2020).

In 2021, in a decision of first impression by the U.S. Court of Appeals for the Ninth Circuit, the court held that entities covered by the ADA may not impose a certification requirement for a psychiatric service dog to be qualified as a service animal under the law (*C.L. v. Del Amo Hospital*, 2021). Plaintiff C.L., diagnosed with post-traumatic stress disorder and other mental health conditions, had obtained a dog named Aspen intending it to be her service animal.

C.L. self-trained Aspen to conduct specific tasks to mitigate her disabling mental health conditions. These tasks enabled C.L. to spend more time engaged in daily life activities and included waking from nightmares, grounding with deep pressure, alerting for people approaching, interrupting self-injurious behavior, cornering alert if someone is approaching, boundary control with Aspen between C.L. and other people, alerting for medication, and standing guard by the shower. Training courses to provide Aspen with formal certification as a service animal were not a viable option financially.

C.L. sought voluntary inpatient treatment at Del Amo Hospital, a private hospital with programs that specialize in treatment of patients like C.L. who have experienced psychological and physical trauma. Del Amo denied C.L.'s request to bring Aspen with her because its clinicians believed that Aspen's presence "would interfere with C.L.'s therapy by allowing her to rely on Aspen rather than learn coping skills" (*C.L. v. Del Amo Hospital*, 2021, at 4).

After a bench trial, the district court found that C.L. was a person with a disability under the ADA and Del Amo a place of public accommodation under ADA Title III. However, the district court ruled in favor of Del Amo that C.L. had not shown Aspen was or is a service dog for purposes of the ADA. The Ninth Circuit reversed, holding the ADA prohibits certification requirements for qualifying service dogs. The court of appeals found that the ADA defines a service dog functionally, without reference to specific training requirements, and that the U.S. Department of Justice ADA regulations have rejected such a formal certification requirement. Moreover, the Ninth Circuit found that "allowing a person with a disability to self-train a service animal furthers the stated goals of the ADA, for other training could be prohibitively expensive" (*C.L. v. Del Amo*

Hospital, 2021, at 7). The court of appeals noted that, increasingly, research and practice show that a certification requirement for service animals would serve to harm the quality of life, and independence, of persons with psychiatric disabilities, such as those with PTSD, in contradiction of the ADA.

Although the Ninth Circuit held that the ADA (across all the law's titles) does not impose a certification requirement for service animals, it remanded the case to the district court to determine whether the trial testimony—of C.L. on her self-training of Aspen and expert testimony about the training of service animals and of Aspen—is sufficient to show Aspen was a qualified service dog at the time of trial. Should the court find that Aspen was a qualified service animal, the court must then determine whether Aspen accompanying C.L. at Del Amo "fundamentally alters" the inpatient psychiatric services offered to C.L. during the hospitalization. As mentioned, an entity covered by the ADA is not required to take measures that effect a fundamental alteration in the service. The medical experts who testified at trial for plaintiff and defendant were split on this issue.

In another setting, in 2021, an arbitrator found Uber liable as a transportation provider covered by ADA Title III for its drivers' misconduct for refusing 14 times to provide appropriate, nondiscriminatory, and safe transportation to the plaintiff, who was legally blind, because of her accompanying service dog (*Irving v. Uber Technologies*, 2021; see below discussion of Rideshare companies as "places" of public accommodation under Title III). Uber was found to be a transportation service under the ADA and subject to Title III as a result of its contractual relationship with its drivers to provide transportation.

Title III Requirements to Overcome Architectural Barriers

Unlike drafters of previous civil rights laws, the ADA's drafters had to contend with the fact that prejudice was not only a part of society generally but also had been *built* into the physical environment. Many existing buildings and facilities of various kinds had been designed and constructed with no thought about whether people with disabilities could access or use them (Blanck & Rotella, 2017; Global Universal Design Commission, 2021). And retrofitting existing buildings would be, for many, a significant expense. Ultimately, the drafters reached a compromise that provided a gradual approach to facility accessibility.

Title III thus requires elements in existing facilities to be modified to the extent readily achievable, defined as "easily accomplishable and able to be carried out without much difficulty or expense" (Blanck, 2020b). The "readily achievable" standard considers, among other factors, the nature and cost of barrier removal; the overall financial resources

of, and number of persons employed by, the concern in question; the effect on expenses and resources and legitimate safety requirements; and the financial resources and type of operation of a parent entity.

There are additional limits on the readily achievable standard. Even if it is readily achievable to do so, entities are not required to remove barriers if doing so would exceed the requirements for alterations or new construction. A covered entity does not have to rearrange movable features if doing so would result in “a significant loss of selling or serving space.”

In deciding which barriers to remove, a public accommodation must prioritize the significance of the barrier when the person with a disability attempts to access the goods and services. The first priority includes access to, and into, the facility. Elements addressed under this priority include parking, entrances, and curbs, among others. The second priority includes access to the goods and services of the public accommodation. Elements addressed here include aisles, shelves, signage, doorways, and so on. The third priority includes restroom access and involves elements such as toilet stalls, dispensers, grab bars, and mirrors. The final priority includes other barriers to access the goods and services of the public accommodation. Buildings constructed after the ADA was passed must be fully accessible in accordance with the applicable architectural standards.

Websites as “Places” of Public Accommodation Under Title III

The rise of the disability Rights Model, described earlier, bolstered by the passage of the ADA, coincided with technological advances that began to enhance inclusion and equal participation in society for persons with disabilities. Fundamental to the wave of technological advances has been the development of the internet’s World Wide Web and its use across the world. The internet offers increased connectivity between persons with disabilities and their employers and community and it is making products and services available to people with disabilities who previously excluded could not get them because of inaccessible facilities and materials (Blanck, 2014). This connectivity is a paramount need for persons with disabilities, and to an even greater degree for those who now may be further isolated due to the COVID-19 pandemic (*Fiallo v. Curv Group*, 2020).

As they have developed to provide access to the internet, computers, then mobile devices, and, now, smart assistive technologies have come to play a central role in the lives of individuals with disabilities. Mobile real-time applications help compensate for the physical and mental limitations inherent in some disabilities—those without finger dexterity use voice-recognition software to run a computer, and

those with speech impediments or with intellectual and developmental disabilities use software applications to connect with others. Video over internet protocol allows deaf individuals to communicate in real time using American Sign Language, and texting and instant messaging facilitate communication by individuals with sensory impairments.

The internet has transformed the nature of access to information. Full and equal societal participation increasingly depends on the ability to use the internet. However, and ironically, many of the accompanying technologies have created new types of barriers to social participation for people with disabilities. Equal access to the internet by persons with disabilities therefore remains a prominent topic of discussion under the ADA.

Thirty years ago, the drafters of the ADA could not have anticipated the significance of the internet to persons with disabilities. But as use of the internet has become pervasive, complex issues of internet accessibility for persons with disabilities have emerged for all of the ADA’s titles: for the public accommodations language of Title III, for state and local governmental activities covered by Title II, and for Title I’s employment provisions. The U.S. Courts of Appeals currently have a split of opinion as to whether Title III covers only physical “places” of public accommodation. Some circuits have held that public accommodations are limited to physical places; others have held to the contrary.

In *Robles v. Domino’s Pizza* (2019), the Ninth Circuit considered whether Domino’s Pizza stores had failed to design, construct, maintain, and operate its website and mobile application to be fully accessible to people who are blind and need to use screen-reading software to vocalize visual information on websites. Domino’s operated a website and online mobile application (“app”) for customers to order pizzas and products for at-home delivery and in-store pickup and to receive coupons and discounts. The plaintiff contended the website and app were not accessible to him.

The Ninth Circuit held that Title III did apply to Domino’s website and app, although the plaintiff predominantly did not access the services at the physical restaurant. Under Title III, places of public accommodation must provide auxiliary aids and services to make visual materials accessible to blind customers. Furthermore, it applies to services *of* a place of public accommodation and not only to services *in* a place of public accommodation. The court held that Domino’s had received fair notice that its website and app must comply with Title III. For instance, Title III requires “effective communication” with customers with disabilities to facilitate full and equal enjoyment of its goods and services. The United States Supreme Court decided not to disturb the lower court’s decision.

In February of 2020, essentially at the beginning of the pandemic, a group of U.S. disability advocates—individuals who are deaf and hard of hearing, along with the National Association of the Deaf (“NAD”; Disability Rights and

Education Defense Fund, 2019)—settled a Title III lawsuit against Harvard University and the Massachusetts Institute of Technology (“MIT”) brought 5 years earlier in a federal district court in Massachusetts. The plaintiffs had alleged that most of these universities’ online resources, including Massive Open Online Courses (“MOOCs”), were not captioned and that the few captions offered were often unintelligible, making the information either not accessible or incomprehensible. Plaintiffs identified captioning as a reasonable accommodation to afford them meaningful access to the services offered to the public. Before the settlement, the court had already held that plaintiffs’ allegations were sufficient to state a cognizable claim under ADA Title III, and the case had survived two motions by defendants to dismiss it.

Under the landmark NAD agreement, the universities are to institute web accessibility guidelines to ensure their websites and online materials are accessible to people who are deaf and hard of hearing. The agreement provides for captioning for publicly available online content, such as video and audio content posted internally by the universities and such content posted externally (as on YouTube). It also required that the universities increase access to their MOOCs for use by deaf and hard of hearing people.

The “start” of the pandemic in February 2020 thus brought many “new norms,” including the shift to online learning: Not just Harvard and MIT, but most universities, began plans to transition to online remote learning for their students. Issues immediately arose as to accessibility, usability, and equity in online learning for students with disabilities. Such issues have included adequate remote access to the internet, accessible learning and course materials and tools, the need to train teachers and students about online learning, and affordability and tuition equity in the use of online learning and hybrid on-site learning, among others.

Despite the settlement of the NAD case, at the time of this writing, there are still cases percolating in the courts addressing alleged Title III discrimination on the basis of disability in the provision of web-based and online learning programs by a private (or public under Title II) university. In June 2020, in an ongoing case, *Fernandez and NFB v. Duke University* (2020), the plaintiff, who is blind, was a graduate student at Duke enrolled to pursue a Master of Business Administration. She alleged that Duke violated ADA Title III in denying her equal access to course materials and educational technology; specifically, that Duke had failed to provide her timely and effective access to course materials, handouts, assignments, PowerPoint presentations, class notes, tactile graphics, and accessible course registration and employer recruiting software.

In a recent decision of potential widespread import, the Eleventh Circuit in *Gil v. Winn-Dixie* (2021) held the language in Title III defining a “public accommodation”—listing 12 types of locations as public accommodations, all

tangible types of locations at physical places—does not include “intangible” places or spaces such as websites. In other words, Title III public accommodations are limited to physical places. Accordingly, because websites are not a place of public accommodation under Title III, plaintiff Gil’s inability to access and communicate with the website due to his blindness was not a violation of the ADA.

In *Gil*, the plaintiff did not take the position that websites necessarily are places of public accommodation under Title III, relying instead on the argument that Title III also prohibits “intangible barriers” that may prevent an individual with a disability from equal enjoyment of the services of a place of public accommodation. In the case, Winn-Dixie provided only a limited use website on which no sales were possible. Although individuals with visual disabilities such as Gil could not fully access it, the Eleventh Circuit found the limited service website presented not enough of an intangible barrier to Gil’s full enjoyment of the services offered at Winn-Dixie’s physical stores, that is, at its “operative place of public accommodation.” Therefore, the court held that Winn-Dixie’s website was not a substantial “intangible barrier” to Gil’s ability to access and enjoy fully the goods and services offered at this particular place of public accommodation.

The dissenting opinion argued that because Gil was not able to equally access the services on the website, he was treated differently than other, sighted customers. In the ADA’s terms, Gil, although a person with a vision disability, was not provided an “auxiliary aid” as required by Title III to ensure his “effective communication” with a place of public accommodation—the website. The majority decision, in contrast, treated the website as not being a place of public accommodation. Therefore, Gil’s “mere inability to communicate with and access the services available on the website does not mean that Winn-Dixie necessarily is in violation of [Title III]” (*Gil v. Winn-Dixie*, 2021, at *9). According to the *Gil* majority, for there to be a Title III violation, the inaccessible website must be an “intangible barrier” to Gil’s equal ability to enjoy the services at Winn-Dixie’s *physical* stores, which included filling his prescriptions and taking advantage of shopping coupons.

The Eleventh Circuit in *Gil* also declined to adopt a “nexus” standard, which other circuits such as the Ninth Circuit (e.g., in *Robles v. Domino’s Pizza*, 2019, discussed above) have adopted in similar website cases. (By comparison, the First Circuit has held the term “public accommodation” under the ADA is not necessarily limited to actual physical structures with definite physical boundaries that a person enters to use the facilities or obtain services and, thereby, presumably there is no website nexus requirement under Title III; *Carparts Distribution Center v. Automotive Wholesaler’s Ass’n of New England*, 1994.) The Eleventh Circuit distinguished the facts of *Robles* because, while Domino’s made pizza sales via its website and app,

Winn-Dixie did not make product sales on its website. In the Ninth Circuit then, where the plaintiff demonstrates a nexus between the website services and the physical place of public accommodation, the website services may be covered by Title III (Blanck, 2014, 2020b).

Given the current split of opinion among the U.S. Courts of Appeals, it is likely that the Supreme Court (and/or first the full, en banc, Eleventh Circuit) may be called upon to resolve the difference of opinion as to the ADA's coverage of websites. Alternatively, as the majority opinion in *Gil* recognized, Congress may ultimately be called upon to clarify the scope of ADA Title III as it applies to the services of places of public accommodation and their websites that are part of today's ubiquitous online marketplace. Associated administrative rules and interpretive guidance from the U.S. Department of Justice likely would also be necessary.

While the Eleventh Circuit noted almost in passing that it "recognize[d] that for many Americans like Gil, inaccessibility online can be a significant *inconvenience*" (*Gil*, at *12, emphasis added), full and equal access to the web for individuals increasingly is recognized by courts and others as a basic right under the ADA, as well as under other laws. This is because the web is intimately tied to the full and equal enjoyment of, and meaningful participation in, society for people with disabilities, particularly in the wake of the pandemic.

Future issues will arise under the ADA as to rights to access the web for people with disabilities in light of the dynamic nature of the internet, including its design and development, software and hardware infrastructures, and product life cycles—with all of this happening in complex interactions with increasing numbers of humans across a wide range of contexts. Activities at the forefront of these developments include those websites using Artificial Intelligence ("AI") and geospatial location information sensors and systems designed to enhance equal participation in society (Blanck, 2014, 2020b; Harpur & Blanck, 2020, 2021). For now, the dissenting opinion in *Gil* lamented that

the majority opinion gives stores and restaurants license to provide websites and apps that are inaccessible to visually-impaired customers so long as those customers can access an inferior version of these public accommodations' offerings. That result cannot be squared with the ADA. (*Gil*, at *25, dissent)

Rideshare Companies as "Places" of Public Accommodation Under Title III

In the midst of the pandemic, it also remains a contested question in courts across the United States whether an on-demand rideshare app may be considered a "place of public accommodation" for purposes of Title III. In *Access Living of Metropolitan Chicago v. Uber Technologies* (2020), a plaintiff who used a motorized wheelchair sued Uber,

alleging Title III violations for not providing meaningful access to its ridesharing services. The court held that Uber was a "transportation provider" covered by Title III and that a public accommodation does not have to be a physical space. In accord with this ruling, in *Equal Rights Center v. Uber Technologies* (2021), the court found that plaintiff's allegations as to how Uber connects its drivers with its app plausibly established that it is a public transportation service under Title III (see also *Irving v. Uber Technologies*, 2021).

The plaintiff in *Access Living* was able to advance her claim that Uber operates a place of public accommodation (in accord, *Namismak v. Uber Technologies*, 2020; *O'Hanlon v. Uber*, 2021). But the *Access Living* court did not hold that Title III definitively applied to Uber. Whether plaintiff's requested modifications to Uber's practices were reasonable required a fact-specific inquiry in subsequent proceedings.

In *Independent Living Resource Center San Francisco v. Lyft* (2020), Lyft provided on-demand ridesharing transportation services in some regions of the country with an "Access" mode for riders to indicate their need for a wheelchair-accessible vehicle ("WAV"), but did not offer this service in the San Francisco Bay area. Plaintiffs alleged that this resulted in more restrictive services in San Francisco, with longer wait times for WAV users. Because of this, Plaintiffs did not use Lyft.

The court held that Lyft, as a private entity primarily engaged in the business of transporting people and whose operations affect commerce, was covered as a public accommodation under Title III. As such, Lyft was required to make reasonable modifications to its WAV policies and practices, such as provision of driver incentives, advertising, partnerships, and rentals to comport with the policies and practices offered in other cities. Subsequent court proceedings are necessary, however, as to whether the proposed modifications are reasonable.

Given the ongoing nature of the pandemic, various and associated new health and safety (and individual privacy) issues are certain to arise as to the nature of reasonable modifications required by rideshare providers under Title III.

ADA Evolving

This article began with the contention that the modern view of disability results from a dramatic change in perspective—from a medical status to be cured and pitied, or tolerated when the "sufferer" is "worthy" (the Medical Model), toward a difference that is accepted and accommodated as part of a Rights and Social Model of the human experience and individual identity. But this change has also been gradual, taking centuries so far, and no doubt will continue to be so.

New paradigms are developing that extend the Social Model to view all life conditions as existing on a

continuum, without a dichotomy separating people into those with and without disabilities. In other words, “disability” is not fixed, but is instead a fluid and continuous social, cultural, historical, and legal concept defined for human beings by human beings. It is an intersectional idea across disability *and* race, sexual orientation and gender identity, age, and other characteristics (Blanck, Abdul-Malak, et al., 2020; Blanck et al., 2021; Blanck, Hyseni, & Altunkol Wise, 2020). It is not uniform, but shaped by culture, context, and individual lived experience.

The move now, therefore, is toward a new model of disability, the “Universalist” (and relational) Model. The Universalist approach recognizes that across the life span, all human beings experience strengths and limitations (Blanck, 2020b). In some cultures, or environments, some of these limitations are called impairments or disabilities. Those who do not currently have disabilities are “temporarily able.” The Universalist Model applies to all people, so disability is not a rights-based issue limited to a minority, but a collective experience of humanity. Rather than viewing people with disabilities as a separate group in need of special protections under an ADA, the Universalist Model, akin to a Human Rights Model, emphasizes the benefits of accommodations, universal design, and antidiscrimination laws for all.

Yet, models are always simplified portraits of complex processes, and they often provide incomplete pictures of reality. No one model of disability fully captures the complete view. Rather than seeking the one “best” or “right” model, therefore, it is valuable to recognize the strengths and limitations of each for understanding disability law, policy, and practice, and for motivating political action. Viewed in this way, advances such as the ADA are as much shaped by respect for, and appreciation of, human diversity as they are aimed at eradicating discrimination in society. They seek to reinforce the view that support for human diversity is central to the opportunity for inclusion and participation in education, employment, and community living and must be accompanied by changes or accommodations by society itself.

This drive toward inclusion and community participation builds gradually, with earlier recognition ultimately leading to more expansive acknowledgment. In the United States at the time of the ADA’s enactment, as Congress recognized in the ADA Preamble, the slippery slope of segregation in education, employment, and housing had led to less opportunity for individual growth, community engagement, and self-determination.

One of the seminal cases interpreting the ADA exemplifies how more expansive recognition builds on earlier recognition. The integration mandate that resulted from the ADA Title II *Olmstead* case was only possible because of its 1954 predecessor in the area of race and education, *Brown v. Board of Education of Topeka* (1954). *Olmstead*

recognized that state-sponsored separate and nonintegrated living arrangements, like separate schools, often are discriminatory toward people with disabilities who desire to, and who can, live in the community. *Olmstead*’s integration mandate is changing lives for the better, helping to insure during the pandemic, for instance, that appropriate community and decision-making supports are available to individuals with disabilities (Jeste et al., 2018; Martinis et al., 2021). Whatever the form, unjustified separation from the community constitutes discrimination.

Perhaps it is apparent from this brief tour that there are central themes in the ADA’s framework. One obvious subject is the on-the-ground importance of today’s ADA for ensuring the civil rights of millions of Americans living with disabilities. A second theme is aspirational and symbolic, envisioning an inclusive and participatory society, with respect for individual dignity and community engagement (Blanck, 2016, 2017a, 2019).

Do pervasive stigma and prejudice associated with disability still exist today in the United States and around the world? Of course, they do. Stigma still takes many forms, from simple avoidance, to “implicit” (subtle) and explicit bias, to overt discrimination, exclusion, and hostility, and, unfortunately, to violence. People without disabilities remain most uncomfortable around people with mental health and intellectual disabilities. Reactions that the ADA seeks to redress, stigma, and prejudice are common when there is uncertainty about an underlying difference attributed to a “disability.”

One such significant stigma issue during this pandemic involves persons with disabilities and the rationing of health care equipment and services on the basis of disability (Office for Civil Rights, U.S. HHS, 2020). Debates over the allocation of medical services are not new; the Civil War’s pension scheme discussed above was an early test of the boundaries of this medicalization of disability (Blanck, 2001). But when unchecked, rationing protocols based on disability or preexisting conditions alone may violate the ADA (Bagenstos, 2020). The ADA prohibits such distinctions on the basis of disability in employment (Title I), governmental services (Title II), and public accommodations (Title III). Such protocols are often based on myth and stereotype, rather than objective evidence. In one example from the pandemic, the Office for Civil Rights at the U.S. HHS intervened to prevent Alabama’s rationing of care for ventilator services for individuals with intellectual and developmental disabilities (Bagenstos, 2020).

A different area of interest arising from the global health and economic emergency concerns the accelerating growth and development of the new online “gig economy” and questions about its impact on people with disabilities. The gig economy provides opportunities for self-directed work, education, health care, and other areas central to daily life.

It is typified by technologically based, on-demand, and independent arrangements outside of traditional workplaces, educational settings, health care facilities, and retail centers (Blanck, 2014, 2017b). But while the gig economy provides new prospects, it also presents challenges for people with disabilities (Blanck & Harpur, 2020; Harpur & Blanck, 2020).

The rise of the gig economy is tied to the expansion of “e-commerce”—the online marketplace for goods and services. E-commerce relies on mobile handheld devices (smart phones, tablets, and other technologies) that allow for geolocation in real-time and “peer-to-peer” communications, new forms of artificial intelligence, and large data analytics. When well conceived and implemented, the benefits of the gig economy for people with disabilities are increased abilities to independently choose and control workplaces, educational materials, health care choices, and retail purchasing by using customized and individualized disability-accessible systems. Increased control over everyday tasks benefits people with disabilities, as well as others who desire flexibility in the tasks they undertake, such as people with family members with disabilities. That work, educational, and other daily tasks and schedules may be adjusted to individualized needs, without the need to disclose a disability, is of particular relevance to people with stigmatized disabilities, such as those with mental health conditions.

When managed well, the gig economy enables people with disabilities to be included fairly and safely in daily life activities and furthers their economic independence. But gig work is not without its particular challenges to people with disabilities. Many people with disabilities lack the training and financial resources to engage in the gig economy. The economic vulnerabilities in the gig economy of people with disabilities and people from other minority communities, compared with those in more traditional employment, may well become increasingly apparent. Yet, there is little study of the extent to which persons with disabilities can effectively engage in and benefit from the gig economy in traditional or self-employment (Gouskova, 2020), or in access to information, goods, and services more generally. If not carefully considered, the gig economy may simply replace one form of structural and economic inequality with another (Abraham & Houseman, 2019; Rho & Fremstad, 2020).

As the cases presented in this article suggest, the gig economy does not yet fully consider the individualized needs and skills of people with disabilities, notwithstanding its potential flexibility in work, service, and educational arrangements. As the Social model of disability explains, society and its technologies are in large part designed for able-bodied users, and people with disabilities are not regarded as “standard.” If it increases along with the increasing use of artificial intelligence, this physical and technological “designing-out” of people with disabilities could

exclude them even more from meaningful participation and integration in society (Blanck, 2008, 2014; Fundación ONCE & ILO Global Business and Disability Network, 2021; Harpur & Blanck, 2021; Harpur et al., 2017).

Despite the current challenges, both generally and from the pandemic, the legal cases touched upon in this article mostly promote inclusion, not segregation, and participation in society, not disempowerment from community. They provide the foundation for evolving U.S. disability law and policy, grounded in the ADA, to “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities . . . in education, employment, health care, housing, governmental programs, and in access to the built and digital public environments.”

These ADA goals are advanced, albeit incrementally and with pushback, when discrimination is challenged and brought to the fore. Because of these efforts, all Americans, with and without disabilities, are better off. Millions of children and adults with disabilities at least have a fighting chance for equal opportunity—that they may engage meaningfully in their communities to the maximum extent possible, with support from family and friends (Blanck & Martinis, 2015, 2019; Martinis & Blanck, 2019; Shogren et al., 2019; Uyanik et al., 2017).

The ADA Is Changing the World

The spirit and letter of the developing ADA has transcended national borders, influencing the development of the United Nations’ 2008 CRPD, perhaps the most significant international initiative in recent years (Blanck, 2020b; Blanck & Flynn, 2017). The ADA’s Rights Model provided foundational elements for the CRPD’s international Human Rights Model of disability and its objective to spur change in the domestic laws of its signatory member nations.

Akin to the ADA’s Rights and Social Models of disability, the CRPD recognizes disability as an evolving concept that results from the interaction of persons who have impairments with attitudinal and environmental barriers that hinder full and effective participation in society on an equal basis with others. The CRPD recognizes the importance of accessibility—to the physical and online, social, economic, and cultural environments; to health and education and employment; and to information and communication—to ensure that persons with disabilities may fully enjoy all human rights and fundamental freedoms. It identifies aspects of disability discrimination, including intersectional forms of discrimination that a person with a disability may also face, including racial, ethnic, language, age, and sexual orientation and gender identity.

Unlike in the ADA, “disability” is not defined definitively in the CRPD (Lawson, 2007). Discrimination on the basis of disability is defined broadly as a distinction, exclusion, or restriction on the basis of disability that impairs or

nullifies the enjoyment on an equal basis with others of all human rights and fundamental freedoms. Presumably, “all human rights and fundamental freedoms” is a sufficiently broad concept that nothing of significance a person would want or need to do is omitted. In principle, this approach casts a broader reach than the ADA. The latter limits its scope to its core sectors: employment, public services, public accommodation by private entities, and telecommunications. Yet, putting aside the limited definition of an employer in the ADA and other restrictions, it is fair to ask whether currently the practical reach of the two regimes differs substantially.

The CRPD is not alone internationally; it provides an additional level of disability law and policy as among almost 200 member states and the United Nations. It is therefore no longer possible, nor advisable, to look at the ADA rights project only through a parochial, U.S. periscope. Other countries face many of the same issues and challenges in disability law, policy, and practice that the U.S. faces. They have dealt in their own ways with those issues and the associated effects of the pandemic.

The modern principles of disability law and policy—whether in the U.S. ADA, the UN CRPD, or other countries’ law and policies—align with a dynamic, fluid, and individualized view of personhood. Disability is seen as a natural part of life. Often, it is only society’s attitudes and barriers that lead to perceived difference.

Forward ADA

The unprecedented health, social, and economic challenges raised by today’s pandemic require a retrospective, present-day, and prospective view of U.S. and ADA policy for individuals with disabilities. My colleagues and I are embarking on such an endeavor through a new national Rehabilitation Research and Training Center on Disability Inclusive Employment Policy (“DIEP RRTC”; Blanck, 2020a). The Center is designing and implementing a series of studies to produce new data and evidence to increase employment and inclusive opportunities in society for people with disabilities.

The DIEP RRTC has formed significant partnerships and brought together a consortium of nationally recognized and synergized researchers from multiple disciplines, including disability studies, economics, psychology, law and public policy, business, and health policy. The team is comprised of, and directed by, leading members of the disability community. It is complemented by national associations providing unprecedented reach to targeted audiences for knowledge-dissemination activities.

Among its activities, the DIEP RRTC is undertaking a scientifically rigorous set of randomized control trial and quasi-experimental studies on the employment life cycle

of people with disabilities. These studies examine ways to enhance employment engagement, reengagement, and new forms of work, as well as job quality and retention. They further examine federal, regional, state, local, and private industry policies and programs to identify critical outcomes and impacts that improve employment entry options, wage and income levels, worker retention, job quality and benefits, career growth and paths to economic stability, employment reengagement in the event of job loss, and reduced dependence on governmental disability benefits.

The Center’s objectives are to provide policy makers, employers, and individuals with disabilities with new evidence-based models and options for inclusive employment policy and practice. At the individual and organizational levels, activities are providing individuals with disabilities access to new knowledge to explore disability inclusive policy and practice.

The DIEP RRTC aims, over the longer-term, to provide models and evidence to support existing and next-generation innovative disability inclusive policy and practice research. It is disseminating information widely to target audiences in policy briefs, organizational white papers and practical guidance, and academic articles and presentations. Online and in-person training and technical assistance support are provided for policymakers, business leaders, and people with disabilities. These efforts are bringing together key private and public stakeholders for collaborative learning and real-world action in employment policy and practice.

America Is Better Off Because of the ADA

To imagine America without the ADA is to envision unrelenting segregation and marginalization, where human separation based on physical or mental difference alone is tolerated (Ali et al., 2011; Blanck, 2016, 2021; Blanck et al., 2003). The ADA is anchored firmly in the idea of “personhood,” as reflected in individual inherent worth, autonomy, and self-determination, to the maximum extent possible, with natural supports and accommodations within reason. All people must be afforded basic recognition of equality before the law, such that each new generation of individuals with disabilities may have the opportunity to be full and equal citizens.

Thirty years ago, at the signing ceremony for the ADA, President George H. W. Bush proclaimed, “Let the shameful wall of exclusion finally come tumbling down.” Today, walls of inaccessibility, exclusion, segregation, stigma, and discrimination are being torn down, sometimes brick by brick. The laws enabling these changes were passed at a unique time in U.S. legal and political history and by an

exceptional collection of individuals and groups that may be difficult to replicate any time going forward. But a new generation of people with disabilities, building on the efforts of others, is moving forward. Many in this generation never have known a United States without an ADA. As a guiding beacon, the ADA offers hope of a future in which all people, regardless of individual difference, will be welcomed as full and equal members of society.

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