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**Jacobus tenBroek Second Annual Law Symposium**

**Closing**

**Future of Disability Rights Advocacy and**

**“The Right to Live in the World”**

**Eve Hill and Peter Blanck<sup>1</sup>**

As we approach the twentieth anniversary of the Americans with Disabilities Act (ADA),<sup>2</sup> the disability community finds itself facing new challenges and opportunities. The ADA has

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<sup>2</sup> 42 U.S.C. §§ 12101–12213 (2009).

been amended to strengthen its protections through the ADA Amendments Act (ADAAA);<sup>3</sup> the Obama Administration has expressed a renewed commitment to disability rights;<sup>4</sup> and disability civil rights have been recognized internationally through the UN Convention on the Rights of Persons with Disabilities.<sup>5</sup> However, barriers to enforcement of disability rights persist, negative public perceptions of disability rights linger, and many courts remain committed to the old charity and medical models of disability.<sup>6</sup>

The Second Jacobus tenBroek Disability Law Symposium, held on April 17, 2009 in Baltimore, Maryland, brought disability advocates together from around the world to discuss “New Perspectives on Disability Law: Advancing the Right to Live in the World.”<sup>7</sup> The Symposium carries on the legacy of Jacobus tenBroek, a constitutional law scholar who introduced the concept that civil rights should extend to Americans with disabilities, and who founded the National Federation of the Blind.<sup>8</sup> The Symposium brings together leading legal scholars, policymakers, and practitioners in the field of disability rights to consider current barriers to full inclusion of people with disabilities and to identify legal and policy solutions.

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<sup>3</sup> Pub. L. No. 110-325, 122 Stat. 3553 (2008).

<sup>4</sup> See The White House, Disability, <http://www.whitehouse.gov/issues/disabilities/> (last visited Nov. 8, 2009).

<sup>5</sup> Convention on the Rights of Persons with Disabilities and Optional Protocol, Dec. 13, 2006, 46 I.L.M. 443, available at <http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf> (last visited Nov. 8, 2009).

<sup>6</sup> For a prior review, see Peter Blanck, “*The Right to Live in the World*”: Disability Yesterday, Today, and Tomorrow, 13 TEX. J. C.L. & C.R. 367 (2008).

<sup>7</sup> See Jacobus tenBroek Disability Law Symposium, [http://www.nfb.org/nfb/Law\\_Symposium.asp](http://www.nfb.org/nfb/Law_Symposium.asp) (last visited Nov. 8, 2009).

<sup>8</sup> See National Federation for the Blind, <http://www.nfb.org> (last visited Nov. 8, 2009).

Colleagues at the Burton Blatt Institute (BBI),<sup>9</sup> authors Hill and Blanck participated in the planning and presentation of the Symposium and offer this closing article. BBI, a university-wide institute at Syracuse University, is dedicated to advancing the civic, economic, and social participation of people with disabilities worldwide through a global network of research, education, community development, and advocacy. BBI's central areas of focus include employment, entrepreneurship, economic empowerment, civil rights, and community participation, each touching dimensions of the experience of people with disabilities.

BBI's multidisciplinary approach facilitates the inclusion into the disability rights movement of valuable perspectives: those of scholars, lawyers, policymakers, social science researchers, advocates, community members with and without disabilities, and providers of funding at the national and international levels. BBI impacts national and international civil rights through diverse efforts, including management of the Association of Disability Rights Counsel (ADRC); publications, including the casebook "Disability Civil Rights Law and Policy";<sup>10</sup> operating the Southeast Disability and Business Technical Assistance Center (DBTAC): ADA Center;<sup>11</sup> hosting the World Bank's Global Partnership on Disability and Development (GPDD);<sup>12</sup> and hosting the BBI Disability Policy Internship for Law Students in its Washington, D.C. office.<sup>13</sup>

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<sup>9</sup> See Burton Blatt Institute, <http://bbi.syr.edu> (last visited Nov. 8, 2009).

<sup>10</sup> PETER BLANCK, ET AL., *DISABILITY CIVIL RIGHTS LAW AND POLICY: CASES AND MATERIALS* (2<sup>nd</sup> Edition, 2009).

<sup>11</sup> See DBTAC: ADA Center, <http://www.sedbtac.org> (last visited Nov. 8, 2009).

<sup>12</sup> See GPDD, <http://www.gpdd-online.org> (last visited Nov. 8, 2009).

<sup>13</sup> See Burton Blatt Institute: 2009 Disability Policy Leadership Program, <http://bbi.syr.edu/scholarship/leadership2009.htm> (last visited Nov. 8, 2009).

This closing article reflects discussions and ideas of the Symposium, focusing on the roles of the federal government, private plaintiffs and their attorneys, the international community, and the disability community. We draw from and build on the remarks of the speakers at the Symposium.<sup>14</sup> We are very grateful to them for their thoughtful, intelligent, and forward-looking ideas.

Part I of this article, drawing from comments from Kareem Dale, Samuel Bagenstos, and Christine Griffin, discusses disability issues facing the Obama Administration and possible responses in a variety of areas, including community integration and health care, housing, education, employment, and access to goods and services. Part II, inspired by the comments of Tim Fox, Amy Robertson, Samuel Bagenstos, Peter Blanck, and Scott LaBarre, discusses barriers and solutions to private enforcement of disability civil rights laws. Part III, based on comments by Maura Healey, Tim Fox, and Amy Robertson, addresses state-level disability rights enforcement. Part IV addresses judicial approaches to disability rights in response to changes in law, federal policy, and enforcement mechanisms. Finally, Part V, drawing from comments by Gerard Quinn and Katherine Guernsey, addresses the international growth of disability rights.

## I. Future of Federal Disability Rights Implementation

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<sup>14</sup> The key speakers were, in order of appearance: Kareem Dale, Special Assistant to the President for Disability Policy; Maura Healey, Assistant Attorney General and Chief, Civil Rights Division, Office of the Attorney General, Commonwealth of Massachusetts; Tim Fox, Principal, Fox & Robertson, P.C.; Amy Robertson, Principal, Fox & Robertson, P.C.; Ari Ne'eman, Founding President, The Autistic Self-Advocacy Network; Gerard Quinn, Professor of Law, National University of Ireland, Galway; Katherine Guernsey, International Lawyer and Adjunct Professor, American University School of International Service; Samuel Bagenstos, Visiting Professor of Law, UCLA School of Law, and Professor of Law, University of Michigan Law School (Fall 2009); Christine Griffin, Commissioner, Equal Employment Opportunity Commission; Peter Blanck, University Professor and Chairman, Burton Blatt Institute, Syracuse University; Scott LaBarre, Principal, LaBarre Law Offices, P.C., and President, National Association of Blind Lawyers.

The Obama Presidential Campaign expressed a commitment to the rights of people with disabilities and ensured that people with disabilities were actively included in a variety of campaign roles.<sup>15</sup> Now the Obama Administration must decide how that commitment is implemented. People with disabilities and disability advocates are shaping the Administration's approach to disability rights in a variety of contexts, from inside and outside the government. The Administration's commitment to disability rights may manifest in a variety of ways: development, interpretation, research, enforcement, implementation, and modeling of disability rights laws and concepts. The level of commitment also may be evident in substantive areas, such as community integration; health care; education; employment; equal access to goods, services, and technology; and involvement of people with disabilities in the federal government.<sup>16</sup>

### *Community Integration*

The federal government plays a central role in the implementation of the "integration mandate" expressed by the U.S. Supreme Court in *Olmstead v. L.C. ex rel. Zimring*,<sup>17</sup> which was issued ten years ago. The Court in *Olmstead* held that the ADA requires states to provide services for people with disabilities in the most integrated setting appropriate for the individual. As a result, states cannot require people with disabilities to live in institutions—such as nursing

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<sup>15</sup> Fact Sheet, Obama for America, Barack Obama and Joe Biden's Plan to Empower Americans with Disabilities (2008), <http://www.barackobama.com/pdf/DisabilityPlanFactSheet.pdf> (last visited Nov. 4, 2009).

<sup>16</sup> For a review of these and related topics, see PETER BLANCK ET AL., *DISABILITY CIVIL RIGHTS LAW AND POLICY: CASES AND MATERIALS* (2d ed. 2009).

<sup>17</sup> 527 U.S. 581 (1999).

homes, psychiatric hospitals, or residential schools—to receive disability-related services, such as health care. States must develop viable community-based options.

Because the federal government, through Medicaid<sup>18</sup> and Medicare,<sup>19</sup> provides much of the funding that states use for long-term care and health care services, as well as housing<sup>20</sup> for low-income, elderly, and disabled individuals, the federal government influences and encourages states to transition services from institutional to community-based settings. The federal government also enforces Title II of the ADA, including the integration mandate,<sup>21</sup> and therefore shapes the ways states move people with disabilities out of institutions. The Obama

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<sup>18</sup> Federal Medicaid funding matches state expenditures for health care services for low-income people. The minimum Federal Medical Assistance Percentage (FMAP) was fifty percent for 2004–2008. For 2009, because of increases through the American Recovery and Reinvestment Act (ARRA), the minimum FMAP is 56.2 %. CMS Information Related to the Economic Recovery Act of 2009, Medicaid (2009), [http://www.cms.hhs.gov/Recovery/09\\_Medicaid.asp](http://www.cms.hhs.gov/Recovery/09_Medicaid.asp). The FMAP for each state varies from 56.2 % to nearly 76 %. *Id.*; see also Federal Matching Rate (FMAP) for Medicaid and Multiplier (2009), <http://www.statehealthfacts.org/comparetable.jsp?ind=184&cat=4> (last visited Nov. 4, 2009). The Medicaid program serves approximately 60 million Americans annually. THE HENRY J. KAISER FAMILY FOUNDATION, EXPLAINING HEALTH CARE REFORM: WHAT IS MEDICAID? 1 (2009), available at <http://www.kff.org/healthreform/upload/7920.pdf>.

<sup>19</sup> Federal Medicare provides funding for health care services for individuals over age sixty-five and individuals with certain disabilities and health conditions. Medicare acts like health insurance for eligible individuals, providing payment to providers of health care services. Individuals may pay a monthly premium for coverage. See THE HENRY J. KAISER FAMILY FOUNDATION, MEDICARE: A PRIMER 1 (2009), <http://www.kff.org/medicare/upload/7615-02.pdf>. In 2009, the federal government expects to spend \$477 billion on Medicare services. *Id.* at 13. The program serves over 37 million people. *Id.* at 14.

<sup>20</sup> The U.S. Department of Housing and Urban Development supports housing for low- and middle-income Americans by providing mortgage insurance, down payment assistance, rental assistance (i.e., Section 8 vouchers), public housing subsidies, and grants. See U.S. DEP'T OF HOUS. AND URBAN DEV., ANNUAL PERFORMANCE PLAN FISCAL YEAR 2009 3–4 (2009), available at <http://www.hud.gov/offices/cfo/reports/pdfs/app2009.pdf>. HUD has several programs focusing on people with disabilities and health conditions. *Id.*

<sup>21</sup> The ADA Title II regulations state the integration mandate on which the *Olmstead* Court relied: “A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.” 28 C.F.R. § 35.130(d) (2009).

Administration has the opportunity to shape policy and enforcement to advance the integration of people with disabilities into their communities.

The Administration has committed to make community integration a priority, announcing on June 22, 2009, the “Year of Community Living,” led by a Coordinating Counsel at the Department of Health and Human Services (HHS).<sup>22</sup> As part of this effort, HHS plans to fund Aging and Disability Resource Centers in every state to help individuals of all ages with disabilities understand, explore, and choose among the various services that help them live in their communities. HHS will fund efforts to strengthen partnerships between Aging and Disability Resource Centers and hospitals in certain states to help people being discharged receive assistance at home instead of in nursing homes. HHS will seek public input into other options to reduce the barriers to community living for individuals with disabilities.<sup>23</sup>

Ten years after *Olmstead*, concerns remain about the states’ capacities to provide community-living services to beneficiaries that need and want such support. Many states are working to reform their existing long-term-care delivery systems to build the community-based infrastructure needed to deliver these services. To appropriately allocate the resources essential to respond to needs, the federal government should facilitate a uniform functional assessment of need across the existing institutionalized populations in each state rather than simply relying on medical diagnoses.

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<sup>22</sup> News Release, U.S. Dep’t of Health and Human Servs., HHS Announces Initiatives in Support of the “Year of Community Living” (June 22, 2009), *available at* <http://www.hhs.gov/news/press/2009pres/06/20090622b.html>.

<sup>23</sup> Medicaid Program, Home and Community-Based Services (HCBS) Waivers, 74 Fed. Reg. 118 (proposed June 22, 2009) (to be codified at 42 C.F.R. pt. 441), *available at* <http://edocket.access.gpo.gov/2009/pdf/E9-14559.pdf>.

Furthermore, it is essential that people with disabilities living in the community have access to competent assistance. The federal government should encourage states to invest in their community-based-services workforces and ensure access to competency-based training, living wages, and benefits. Federal and state governments should also invest in moving people from institutions to communities and in helping people to continue living in their communities. Deinstitutionalization is not as simple as opening doors and letting people out. Individuals need community services and supports to assist them before and after they leave an institution.

Federal and state governments can facilitate successful transition by developing a cadre of community-living coordinators knowledgeable in housing, personal assistance, transportation, employment, social, and other services and programs that help people remain in, or successfully transition to, their communities. These programs and services could be based on “community village” models currently in place in a variety of neighborhoods.<sup>24</sup> However, the need for additional infrastructure of needs assessment, workforce development, and care coordination cannot be used as an excuse to keep people in institutions. Many people inappropriately remain in institutions and have been waiting ten years for enforcement of the integration mandate from *Olmstead*.<sup>25</sup>

The federal and state governments also must adopt the flexibility necessary to make transitions possible. For example, global budgeting practices should be instituted to allow

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<sup>24</sup> For a list of villages nationwide, see Beacon Hill Village, *Other Villages: Other At-Home Organizations* (2008), <http://beaconhillvillage.org/villages.html> (last visited Nov. 8, 2009). New York provides government support for Naturally Occurring Retirement Communities (NORCs). See FREDDA VLADECK, UNITED HOSPITAL FUND, *A GOOD PLACE TO GROW OLD: NEW YORK’S MODEL FOR NORC SUPPORTIVE SERVICE PROGRAMS* (2004), available at <http://www.uhfny.org/publications/203833>.

<sup>25</sup> See, e.g., *Disability Advocates, Inc. v. Paterson*, No. 03-CV-3209 (NGG), 2009 WL 2872833 (E.D.N.Y. Sept. 8, 2009).



resources to move between and among previously allocated budget categories, permitting Medicaid funding to follow the beneficiaries as they move from institutions to the community.

### *Housing*

The Administration recognizes the need to provide community housing options for individuals leaving institutions. The U.S. Department of Housing and Urban Development (HUD) will support community living by providing one thousand housing vouchers for individuals with disabilities transitioning from institutions to community-based living arrangements, and three thousand vouchers for non-elderly individuals with disabilities.<sup>26</sup> HHS and the Department of Justice will coordinate their efforts to ensure targeted, effective enforcement of the integration mandate under the ADA and Rehabilitation Act.<sup>27</sup> At the same time, the Administration included approximately \$140 million in the American Recovery and Reinvestment Act to support independent living centers across the country.<sup>28</sup>

Efforts to update fair housing laws through regulatory and legislative measures will be crucial to preventing the conditions that force people into institutions. Currently, newly constructed or altered federally funded multi-unit housing is required to be accessible by Section 504 of the Rehabilitation Act.<sup>29</sup> Five percent of units are required to be physically accessible in

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<sup>26</sup> News Release, U.S. Dep't of Hous. and Urban Dev., HUD to Offer Housing Assistance to 4,000 Americans with Disabilities (June 22, 2009), *available at* <http://www.hud.gov/news/release.cfm?content=pr09-095.cfm>.

<sup>27</sup> News Release, U.S. Dep't of Health and Human Servs., Statement by HHS Secretary Kathleen Sebelius on the 10th Anniversary of the U.S. Supreme Court Decision *Olmstead v. L.C.* (June 22, 2009), *available at* <http://www.hhs.gov/news/press/2009pres/06/20090622a.html>.

<sup>28</sup> U.S. DEP'T OF EDUC., AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009: INDEPENDENT LIVING RECOVERY FUNDS (Apr. 1, 2009), <http://www.ed.gov/policy/gen/leg/recovery/factsheet/ils.html>.

<sup>29</sup> 24 C.F.R. §§ 8.22–8.23 (2009). An additional two percent of units are required to be accessible for people with hearing and vision impairments.

accordance with the Uniform Federal Accessibility Standards.<sup>30</sup> This leaves new single-family homes, which constitute approximately seventy percent of the new homes being built,<sup>31</sup> inaccessible. The lack of accessible housing makes it difficult for many people to remain in their communities as they age or develop disabilities. It also substantially reduces the ability of individuals with disabilities to find housing. Research shows that demand for accessible housing exceeds the supply, and the gap between demand and supply is growing, especially as baby boomers age with or into disability.<sup>32</sup>

Incorporating reasonable “visitability” requirements into federally funded multi-unit housing and into single-family and townhome housing would substantially improve the ability of people with disabilities to remain in the community. Generally, visitability requires a zero-step entrance, 32-inch doors and 36-inch hallways, and a bathroom on the main floor that is large enough to accommodate a wheelchair.<sup>33</sup> Several states and cities have put in place visitability requirements for government-funded or subsidized housing.<sup>34</sup> Financial incentives to support

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<sup>30</sup> *Id.*

<sup>31</sup> See DAVID BERSON ET AL., HOMEOWNERSHIP ALLIANCE, AMERICA’S HOME FORECAST: THE NEXT DECADE FOR HOUSING AND MORTGAGE FINANCE 9, *available at* [http://www.freddiemac.com/news/pdf/americas\\_home\\_forecast.pdf](http://www.freddiemac.com/news/pdf/americas_home_forecast.pdf) (last visited Nov. 8, 2009).

<sup>32</sup> See Nichole Earley & Jean Memken, *Accessible Housing Availability for the Growing U.S. Elderly Population*, 34 HOUSING AND SOCIETY 1 (2007); William N. Myhill & Peter Blanck, *Disability and Aging: Historical and Contemporary Challenges*, 10 MARQUETTE ELDER’S ADVISOR (forthcoming 2010); INFORMEDSIGN, ELDERLY POPULATION EXCEEDS ACCESSIBLE HOUSING STOCK (2007), [http://www.informedesign.umn.edu/Rs\\_detail.aspx?rsId=3235](http://www.informedesign.umn.edu/Rs_detail.aspx?rsId=3235).

<sup>33</sup> See STEVEN TRUESDALE & EDWARD STEINFELD, REHABILITATION ENGINEERING RESEARCH CENTER ON UNIVERSAL DESIGN AT BUFFALO VISIT-ABILITY: AN APPROACH TO UNIVERSAL DESIGN IN HOUSING 2, *available at* <http://www.ap.buffalo.edu/idea/Visitability/Booklet/VisBk%20Ver3-7-03.pdf> (last visited Nov. 8, 2009).

<sup>34</sup> See, e.g., MINN. STAT. ANN. § 462A.34 (West 2001); IND. CODE ANN. § 22-13-4-7 (West 2003). See also OR. REV. STAT. ANN. § 456.510 (West 2003); TOLEDO, OHIO, MUNICIPAL CODE 1347.02 (2008); SAN ANTONIO, TEX. MUNICIPAL CODE ch. 6, art. XII, § 6-316 (2009).

visitability have also been adopted in some states, including Georgia and Pennsylvania.<sup>35</sup>

Preliminary case studies of visitability elements indicate that the costs of including visitability elements in new single-family home construction are minimal and the benefits are substantial.<sup>36</sup>

HUD should consider amending its Section 504 regulations to require reasonable visitability in new federally funded single-family homes. If additional information is needed to support such a change, the U.S. Architectural and Transportation Barriers Compliance Board (Access Board) may be charged with examining what constitutes minimal visitability requirements. Further research may assess the costs of incorporating visitability elements in new single-family housing, and the expected savings of subsequent modifications to incorporate the same elements into inaccessible homes.<sup>37</sup>

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<sup>35</sup> GA. CODE ANN. §48-7-29.1 (West 1998) (granting a credit to a taxpayer who incorporates the following accessible elements into his home: “(A) One no-step entrance allowing access into the residence; (B) Interior passage doors providing a 32 inch wide clear opening; (C) Reinforcements in bathroom walls allowing later installation of grab bars around the toilet, tub, and shower . . . ; and (D) Light switches and outlets placed in accessible locations.”); 72 PA. CONS. STAT. ANN. §4751-104 (West 2006) (granting tax credit to taxpayers who comply with visitability design requirements); *see also* 310 ILL. COMP. STAT. ANN. 95/15 (West 1999) (requiring people applying for the accessibility demonstration grant to include “(1) . . . at least one no-step exterior entrance with a 36-inch-wide entrance door . . . ; (2) . . . interior passage doors [that] allow at least 32 inches of clearance in width; (3) . . . electrical outlet[s] in the home [that are no] lower than 15 inches from the finished floor and [light switches that are no] more than 48 inches from the finished floor[;] [a]ll environmental controls in the home shall [also] be in accessible locations; [and] (4) [i]n each bathroom . . . the walls adjacent to [fixtures such as a toilet, bathtub, shower stall, or shower seat must be] reinforced in a manner [to] allow the later installation of grab bars around those fixtures”).

<sup>36</sup> TRUESDALE & STEINFELD, *supra* note 34, at 15–23 (estimating cost increases of \$25–\$1,500).

<sup>37</sup> BBI is working with the Global Universal Design Commission (GUDC) to develop universal design standards for buildings, products, and services. The GUDC involves builders, architects, disability advocates, and national and international leaders in the development and adoption of consensus universal design standards. To date, the GUDC has focused on commercial buildings, but universal design standards for housing may be pursued through this mechanism. *See* Global Universal Design Commission, Inc., <http://www.globaluniversaldesign.org> (last visited Nov. 8, 2009).

Privately and federally funded housing is covered by the Fair Housing Amendments Act (FHAA), which applies to multi-unit housing constructed since 1991.<sup>38</sup> Although FHAA applies to all units in a facility, the accessibility requirements of FHAA are minimal. FHAA requires all common areas to be accessible; doors to be thirty-two inches wide; at least one accessible route into and through the unit; light switches, outlets, and thermostats in accessible locations; reinforcements in bathroom walls to allow subsequent installation of grab bars; and kitchens and bathrooms large enough to allow an individual in a wheelchair to maneuver.<sup>39</sup>

These requirements alone often do not achieve an accessible unit where a person with a mobility disability could live. As a result, many individuals with disabilities must invest substantial resources in additional modifications, such as installing grab bars or an accessible shower, or lowering or removing kitchen cabinets. In addition, FHAA does not require accessibility in alterations to housing built before 1991, no matter how substantial the alterations.<sup>40</sup>

As mentioned above, demand for accessible housing is likely to continue to exceed the supply as the population ages. For people who cannot afford to make substantial modifications to their homes, the lack of fully accessible units increases their risk of losing their homes and being forced to move to institutions. The federal government needs to consider ways to sensibly spur the increased accessibility of multi-unit housing.

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<sup>38</sup> FHAA, 42 U.S.C. § 3604(f)(3)(C) (2009).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* (covers multifamily dwellings for first occupancy after the date that is thirty months after the date of enactment of the FHAA of 1988).

Private businesses are subject to accessibility requirements under Title III of the ADA for new construction (full access),<sup>41</sup> alterations (full access of the altered area, plus proportional access to the path of travel),<sup>42</sup> and existing buildings (ongoing “readily achievable” barrier removal).<sup>43</sup> Because integrated accessible housing is central to the quality of life of individuals with disabilities, elderly people, and our communities in general, similar attention to housing development as that paid by Title III to private businesses is justified.

FHAA could be amended to require accessibility in substantial alterations, and unit-by-unit accessibility in smaller alterations, much as the Rehabilitation Act does.<sup>44</sup> In an alteration, the additional costs of incorporating accessibility will likely be marginal. However, to offset any additional costs under either approach, tax incentives may be provided, modeled after the Disabled Access Credit available to small businesses for compliance with the ADA<sup>45</sup> and the tax deduction for removal of architectural and transportation barriers.<sup>46</sup>

In new, large, multi-unit private housing projects, FHAA could be amended to require a percentage of units to incorporate accessibility, perhaps modeling or improving on the Uniform Federal Accessibility Guidelines. Again, meaningful tax or financial incentives may offset additional costs and potentially create economic incentives for builders and owners.

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<sup>41</sup> 28 C.F.R. § 36.401 (2009).

<sup>42</sup> *See id.* §§ 36.402–36.403.

<sup>43</sup> *See id.* § 36.304.

<sup>44</sup> Substantial alterations under the Rehabilitation Act are those involving fifteen-unit or larger projects where the cost of the alteration is seventy-five percent or more of the replacement cost of the facility. 24 C.F.R. § 8.23 (2009).

<sup>45</sup> 26 U.S.C. § 44(c)(2) (2006).

<sup>46</sup> *See id.* § 190.

Additional tax and other financial incentives may be provided to housing providers who go beyond FHAA requirements by providing greater accessibility in covered units, providing accessibility to units that are not covered, or incorporating accessibility in renovations. Such front-end incentives may save the government money by reducing the tax deductions (as medical expenses) given to individuals who have to modify their homes to accommodate their disabilities. Such retrofits typically are more expensive than the cost of incorporating accessibility during construction or renovations.<sup>47</sup>

Finally, the federal government should find ways to help people modify their pre-FHAA homes when necessary to accommodate a disability. The substantial retrofit costs associated with inaccessible housing, if placed solely on individuals with disabilities, will continue to force people to impoverish themselves and move into nursing homes and onto government benefits. By focusing on cost-effective accessibility at the front end of the construction process, and by assisting people to remain in their homes (where they can remain independent and self-sufficient, instead of seeking government support in institutions), the government serves not only its humanitarian and civil rights interests, but also its own financial interests as well as those of housing developers.

The federal government needs to play a central role in facilitating voluntary implementation of the housing accessibility requirements. Much confusion surrounds the application of fair housing laws, including: how FHAA applies to federally funded housing; how public housing authorities should implement their obligations to “affirmatively further fair housing”<sup>48</sup> for people

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<sup>47</sup> Myths and Facts about the Americans with Disabilities Act, <http://www.ada.gov/pubs/mythfct.txt> (last visited Nov. 8, 2009).

<sup>48</sup> 24 C.F.R. § 903.7(o)(1) (2008).

with disabilities; and how accessibility requirements for alterations and for unaltered public housing facilities<sup>49</sup> should be interpreted and implemented. HUD's technical assistance does little to clarify these requirements.<sup>50</sup> The Administration has an opportunity to provide real guidance to builders, building owners, and people with disabilities on their rights and responsibilities.

The government also needs to take a lead role in enforcement of the fair housing laws. Some courts recently have held that there is no continuing violation rule for accessibility violations in housing.<sup>51</sup> Under this approach, a person with a disability must file suit within the statute of limitations period, which begins when the housing is constructed (e.g., one year after construction is completed). If a person with a disability does not try to rent a unit until after that period, the accessibility requirements will not be enforceable. The new administration has the opportunity to revise FHAA to address the continuous violation doctrine. Meanwhile, HUD should take a new proactive role in compliance and enforcement, particularly by instituting innovative programs for building plan reviews and site inspections of newly constructed housing, and by requiring violators to fund the development of accessible units.

### *Education*

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<sup>49</sup> See *id.* § 8.24 (program access in existing unaltered housing); *id.* § 8.23 (accessibility requirements for altered and substantially altered housing).

<sup>50</sup> See U.S. Dep't of Hous. & Urban Dev., Section 504 Frequently Asked Questions, <http://www.hud.gov/offices/fheo/disabilities/sect504faq.cfm#anchor275219> ("Question: When and how should an individual request an accommodation?") (last visited Nov. 8, 2009).

<sup>51</sup> See *Garcia v. Brockway*, 526 F.3d 456 (9th Cir. 2008). *But see* *Fair Hous. Council, Inc. v. Vill. of Olde St. Andrews, Inc.*, 210 F. App'x 469 (6th Cir. 2006). For a recent analysis, see Eve Hill & Peter Blanck, *Future of Disability Rights: Part Three—Statutes of Limitations in Americans with Disabilities Act, "Design and Construct" Cases*, 60 SYRACUSE L. REV. (forthcoming 2009).

Education provides an experience of community integration for children and a foundation for integration for adults. Integrated or mainstream education supports the ability of individuals with disabilities to live in the community by allowing them to interact with people without disabilities at a formative age. It provides young people without disabilities a formative opportunity to engage with individuals with disabilities. Education, beyond the social aspect, is the foundation for community and economic life. A person's education largely determines their employment options, income level, and social status. Therefore, equal access to quality education for students with disabilities makes the difference between, on the one hand, poverty and reliance on government benefits, and on the other hand, employment, independence, and financial self-sufficiency.<sup>52</sup>

The Individuals with Disabilities Education Act (IDEA) provides federal financial support and legal requirements for the education of students with disabilities, including special education services.<sup>53</sup> IDEA calls for the federal government to provide forty percent of the average cost of special education.<sup>54</sup> However, until 2009, Congress had never provided even twenty percent.<sup>55</sup> The Obama campaign promised to seek full funding for special education services under

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<sup>52</sup> ALEMAYEHU BISHAW & JESSICA SEMEGA, U.S. CENSUS BUREAU, INCOME, EARNINGS, AND POVERTY DATA FROM THE 2007 AMERICAN COMMUNITY SURVEY 16 (2008), *available at* <http://www.census.gov/prod/2008pubs/acs-09.pdf> (each level of educational attainment results in \$10,000 or more increased median income).

<sup>53</sup> IDEA, 20 U.S.C. § 1400–1439 (2009).

<sup>54</sup> *Id.* § 1411.

<sup>55</sup> NEW AMERICA FOUNDATION, INDIVIDUALS WITH DISABILITIES EDUCATION ACT - FUNDING DISTRIBUTION (2009), <http://febp.newamerica.net/background-analysis/individuals-disabilities-education-act-funding-distribution> (American Recovery and Reinvestment Act provides an additional \$12.2 billion for IDEA implementation by states over two years, temporarily raising the federal contribution to just over thirty percent).



IDEA.<sup>56</sup> Full funding of special education services will allow students with disabilities to be educated alongside their peers and learn on a level playing field. As a result, they will be able to pursue meaningful education and meaningful work and rely less on public benefits.

### *Employment*

A part of deinstitutionalization that is rarely addressed is the segregated employment system in which many people with mental and intellectual disabilities are required to work. These segregated sub-minimum-wage programs, often referred to as sheltered workshops, pay people with disabilities below minimum wage, often for fully-productive work.<sup>57</sup> The nature of these segregated programs conflicts with the basic disability rights principles of integration and fairness.

In one of the largest national empirical studies of sheltered work settings, Peter Blanck and his colleagues found that these programs include a significant proportion of people with disabilities who are capable and desirous of working in integrated competitive work settings.<sup>58</sup> Moreover, as news coverage demonstrates, these programs are vulnerable to abuse.<sup>59</sup> The federal government should increase oversight of segregated employment programs to stop fraud

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<sup>56</sup> Fact Sheet, Obama '09, Barack Obama and Joe Biden's Plan to Empower Americans With Disabilities, <http://www.barackobama.com/pdf/DisabilityPlanFactSheet.pdf> (last visited Nov. 8, 2009).

<sup>57</sup> Fair Labor Standards Act, 29 U.S.C. § 214(c) (1989).

<sup>58</sup> Peter Blanck, Helen Schartz & Kevin Schartz, *Labor Force Participation and Income of Individuals with Disabilities in Sheltered and Competitive Employment: Cross-Sectional and Longitudinal Analyses of Seven States During the 1980s and 1990s*, 44 WM. & MARY L. REV. 1029, 1087 (2003).

<sup>59</sup> See Gregg Jones, *Texas farm that employed mentally disabled faces more scrutiny after Iowa facility's shutdown*, DALLAS MORNING NEWS, June 7, 2009, available at <http://www.dallasnews.com/sharedcontent/dws/news/texasouthwest/stories/060709dnmetnewlostboys.44ea260.htm>; *Disabled "Fight Club" Trial Begins*, CBS NEWS, August 10, 2009, available at <http://www.cbsnews.com/stories/2009/08/10/national/main5230499.shtml>.

and abuse. More importantly, the government should reconsider the role of segregated sub-minimum-wage programs and shift to appropriate programs supporting integrated employment and entrepreneurship.

Anti-discrimination in employment of people with disabilities is a major focus of the ADA. Still, the overall employment rate of people with disabilities remains unacceptably low.<sup>60</sup> The Administration is unlikely to pursue a legislative strategy to change the requirements of the disability rights laws because of the recent passage of the ADAAA. The Administration has numerous non-legislative opportunities to shape disability rights and other laws regarding employment.

The Administration may take a strong role in interpreting the law. For example, the Equal Employment Opportunity Commission (EEOC), Department of Justice, and Department of Transportation have authority to issue regulations interpreting the definition of disability under the ADAAA.<sup>61</sup>

The ADAAA was enacted in response to judicial narrowing of disability rights protections.<sup>62</sup> Following the Supreme Court's decision in *Sutton v. United Air Lines, Inc.*,<sup>63</sup> and

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<sup>60</sup> See Peter Blanck, Meera Adya, William N. Myhill, Deepti Samant & Pei-Chun Chen, *Employment of People with Disabilities: Twenty-Five Years Back and Ahead*, 25 LAW & INEQ. 323 (2007). In July 2009, the unemployment rate of persons with a disability was 15.1 %, compared with 9.5 % for persons with no disability, not seasonally adjusted. Bureau of Labor Statistics, Labor Force Statistics from the Current Population Survey, <http://www.bls.gov/cps/cpsdisability.htm> (last visited Oct. 30, 2009). For a study of disparities in employment between workers with and without disabilities, see Lisa Schur, Douglas Kruse, Joseph Blasi & Peter Blanck, *Is Disability Disabling in all Workplaces? Workplace Disparities and Corporate Culture*, 48 INDUS. REL. 381 (2009).

<sup>61</sup> ADA Amendments Act of 2008, Pub. L. No. 110-325, § 6(a)(2) (2008).

<sup>62</sup> *Id.* §§ 2(a)(4)–(7), 2(b)(2)–(5).

<sup>63</sup> 527 U.S. 471 (1999).

its companion cases,<sup>64</sup> lower courts read the definition to exclude people who took medication or used equipment (i.e., “mitigating measures”) to function, such as those with diabetes and people who use glasses.<sup>65</sup> Courts further limited the definition of disability to exclude people with episodic impairments, such as asthma and epilepsy, because these health conditions were substantially limiting only part of the time.<sup>66</sup> The courts also narrowed the definition to exclude people with learning disabilities who worked hard and succeeded despite their disabilities because they were compared to the average person, not the average person in their circumstances.<sup>67</sup>

The Supreme Court, in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*,<sup>68</sup> added a requirement that to be considered a major life activity, an activity must be of “central importance” to most people’s daily lives.<sup>69</sup> This led to the exclusion from coverage of people with significant impairments, such as difficulty lifting, because courts held the activities affected by such impairments (for example, grocery shopping or child care) were not important enough to be covered by the law.<sup>70</sup>

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<sup>64</sup> *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555 (1999); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999).

<sup>65</sup> *See, e.g., Greenberg v. Bellsouth Telecomm., Inc.*, 498 F.3d 1258 (11th Cir. 2007); *McPherson v. Fed. Express Corp.*, 241 Fed. App’x. 277 (6th Cir. 2006).

<sup>66</sup> *See, e.g., Equal Employment Opportunity Comm’n v. Sara Lee Corp.*, 237 F.3d 349 (4th Cir. 2001); *Rhoads v. Fed. Deposit Ins. Corp.*, 257 F.3d 373 (4th Cir. 2001).

<sup>67</sup> *Wong v. Regents of the Univ. of Cal.*, 410 F.3d 1052 (9th Cir. 2005).

<sup>68</sup> 534 U.S. 184 (2002).

<sup>69</sup> *Id.* at 198.

<sup>70</sup> *See, e.g., Mack v. Great Dane Trailers*, 308 F.3d 776 (7th Cir. 2002).

These people were excluded because the courts decided their life activities were not “substantially limited” enough to deserve protection, even though their employers might have discriminated against them because of their impairments.<sup>71</sup> In essence, the courts disregarded the civil rights model on which the ADA was based. This model is premised on the idea that barriers to access for people with disabilities are not the necessary result of their medical conditions, but often are the result of societal assumptions and decisions to exclude people with disabilities.<sup>72</sup> Instead, these courts relied on a medical or charity model in which coverage is determined by the severity of a person’s disability. The courts treated ADA rights as special treatment, like charity, and believed people should only receive that special treatment if they were severely disabled and, therefore, deserving.

In light of the prior judicial narrowing of protection, forthcoming regulations need to be clear. These regulations must advance the law’s civil rights approach, focusing on whether unfair and unnecessary discrimination has occurred, rather than on whether the employee is deserving of assistance or special treatment. In June 2009, the EEOC convened a meeting to discuss proposing regulations.<sup>73</sup> The EEOC published proposed regulations on September 23, 2009.<sup>74</sup>

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<sup>71</sup> *Id.*

<sup>72</sup> See Harlan Hahn, *Equality and the Environment: The Interpretation of ‘Reasonable Accommodations’ in the Americans with Disabilities Act*, 17 J. REHAB. ADMIN. 101, 103 (1993).

<sup>73</sup> U.S. Equal Employment Opportunity Commission, Transcript of Notice of Proposed Rulemaking Implementing the ADA Amendments Act of 2008, June 17, 2009, <http://www.eeoc.gov/abouteeoc/meetings/6-17-09/transcript.html#notice>.

<sup>74</sup> Regulations To Implement the Equal Employment Provisions of the Americans With Disabilities Act, as Amended, 74 Fed. Reg. 48431 (proposed Sept. 23, 2009) (to be codified at 20 C.F.R. pt. 1630).

The ADAAA provides that the phrase “substantially limits” in the definition of disability is less stringent than courts have interpreted it.<sup>75</sup> The Act provides that mitigating measures generally are not to be considered in determining whether an impairment is substantially limiting.<sup>76</sup> The ADAAA reverses Supreme Court decisions holding that a “regarded as” plaintiff must prove the defendant believed him to be substantially limited in a major life activity (a high standard).<sup>77</sup> The ADAAA provides that a plaintiff now need only show that the defendant believed she had an impairment that was not minor or transitory.<sup>78</sup> The ADAAA makes clear that a “regarded as” plaintiff is not entitled to reasonable accommodations or reasonable modifications.<sup>79</sup>

The ADAAA provides non-exclusive lists of life activities and bodily functions that constitute “major life activities.”<sup>80</sup> The proposed ADAAA regulations would include the major life activities listed in the legislation itself, and also additional activities that have caused confusion in the past, such as reaching, sitting, and interacting with others.<sup>81</sup> The EEOC has previously issued guidance indicating that these are major life activities, but regulations will be

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<sup>75</sup> ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2 (2008).

<sup>76</sup> *Id.*

<sup>77</sup> *See* Tice v. Ctr. Area Transp. Auth., 247 F.3d 506, 513 (3d Cir. 2001); Sullivan v. Neiman Marcus Group, Inc., 358 F.3d 110 (1st Cir. 2004). The ADA provides protection for individuals who do not have current/actual disabilities, but whose employers believe they have a disability and act on that basis. 42 U.S.C. § 12102(2)(C) [It might be useful to include a definition of a “regarded as” plaintiff.]

<sup>78</sup> Pub. L. No. 110-325, § 3 (2008).

<sup>79</sup> *Id.*

<sup>80</sup> 42 U.S.C. 12102 § 3(2) (2008).

<sup>81</sup> Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, As Amended, 74 Fed. Reg. 48431, 48440 (proposed Sept. 23, 2009) (to be codified at 29 CFR pt. 1630).

given greater deference by courts than mere guidance.<sup>82</sup> The proposed regulations will include the “major bodily functions” listed in the ADAAA, and also add functions of the hemic, lymphatic, and musculoskeletal systems, which were previously included in the definition of “impairment.”<sup>83</sup>

The proposed regulation would make clear that if a person’s impairment restricts a major life activity, the activity need not be of central importance to most people’s daily lives. The regulations would make clear the major life activity (for instance, lifting) is sufficient without adding a laundry list of practical implications of the disability.<sup>84</sup> Thus, the regulations would overturn the Supreme Court’s decision in *Toyota v. Williams*.<sup>85</sup>

The proposed regulation would provide a list of impairments that will usually be found to be substantially limiting, including blindness, deafness, intellectual disabilities (formerly called mental retardation), partially or completely missing limbs, mobility impairments requiring the use of a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV and AIDS, multiple sclerosis and muscular dystrophy, major depression, bipolar disorder, post-traumatic stress disorder, and schizophrenia.<sup>86</sup> The regulation would clarify the analysis of “working” as a major life activity.<sup>87</sup> The prior regulations provided that a person was substantially limited in working

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<sup>82</sup> *Matczak v. Frankford Candy & Chocolate Co.*, 136 F.3d 933, 937 (3d Cir. 1997).

<sup>83</sup> 74 Fed. Reg. 48431, 48440 .

<sup>84</sup> U.S. Equal Employment Opportunity Commission, *supra* note 74.

<sup>85</sup> 534 U.S. 184 (2002).

<sup>86</sup> 74 Fed. Reg. 48431, 48441.

<sup>87</sup> *Id.* at 48442.

only if she were excluded from a class of jobs or a broad range of jobs.<sup>88</sup> The new regulation would instead focus on whether the person is unable to do the “type of work” at issue.<sup>89</sup>

The proposed regulations thus attempt to address the major areas of confusion around the definition of disability and require courts to focus on the issue of whether discrimination occurred, rather than on the preliminary issue of whether the plaintiff is disabled. However, to the extent the EEOC’s proposed regulations when finalized go beyond what the ADA specifically requires, courts may challenge their validity and refuse to defer to them.

In *Sutton*, the Supreme Court rejected the three administrative agencies’ position that mitigating measures were not to be considered in assessing the substantiality of a person’s limitations because it found those regulations “an impermissible interpretation of the ADA.”<sup>90</sup> To the extent EEOC regulations create potential inconsistencies with the statutory language, they may be subject to similar treatment. For example, the proposed regulations provide a list of disabilities presumed to be protected.<sup>91</sup> However, such a list must not conflict with the legislative language requiring an assessment “with respect to an individual,”<sup>92</sup> which the Supreme Court has read to require an “individualized inquiry.”<sup>93</sup>

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<sup>88</sup> 29 C.F.R. § 1630.2(j)(3).

<sup>89</sup> 74 Fed. Reg. 48431, 48442.

<sup>90</sup> *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 472 (1999).

<sup>91</sup> 74 Fed. Reg. 48431, 48441.

<sup>92</sup> ADA, 42 U.S.C. § 12102(1).

<sup>93</sup> *Sutton*, 527 U.S. at 483.

Similarly, the proposed regulations address the Supreme Court's finding that major life activities are only those that are "of central importance to most people's daily lives."<sup>94</sup> The EEOC's proposed rejection of that requirement may be subject to challenge because that requirement was not explicitly addressed by the ADAAA's text. However, all of the EEOC's proposed regulations could be justified interpretations of the ADAAA's overarching mandate to interpret the meaning of "substantially limits" less stringently than the agency's and the courts' previous approaches.

The Administration has the opportunity to play a central role in enforcing disability rights laws in hiring. The Administration may employ new tools, such as employment testing strategies, to find, stop, and prevent disability discrimination. Disability-based hiring discrimination often cannot be uncovered by an individual applicant. Typically, no reason is given for a failure to hire. Moreover, the statistical size of the disability applicant pool is not large enough to form a basis for a discrimination finding on the basis of disparate impact.<sup>95</sup>

The Administration, through the EEOC, has the appropriate resources to investigate and uncover hiring discrimination and other denials of services through a testing program. Such a testing program could be implemented by submitting matched applications or resumes to employers of applicants with and without disabilities, but with similar qualifications.<sup>96</sup> The EEOC should consider pursuing class-wide enforcement actions when appropriate. Class actions

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<sup>94</sup> Toyota Motor Mfg. Co. v. Williams, 534 U.S. 184, 200 (2002).

<sup>95</sup> See Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, As Amended, 74 Fed. Reg. at 48437.[conform to fn 82]

<sup>96</sup> Michael Waterstone, *A New Vision of Public Enforcement*, 92 MINN. L. REV. 434, 473–74 (2007).



have been used effectively in Title II and Title III cases, but are rarely used in Title I cases.<sup>97</sup> Such class actions may more effectively challenge discriminatory workplace norms; encourage employers to adopt broader policies regarding hiring, inclusion, and accommodation; and reach disparate impact discrimination in the workplace.<sup>98</sup>

The Obama Administration may further improve enforcement of the ADA and other disability laws by increasing collaboration among its different program and enforcement agencies. For example, many people applying for Social Security benefits are prevented from working by discrimination, including employers' refusals to provide accommodations. As in the Supreme Court case *Cleveland v. Policy Management System Corp.*,<sup>99</sup> employment discrimination (e.g., failure to accommodate) often results in an individual being unable to work and qualify for government benefits. Yet people do not understand that they may pursue their discrimination claim. Collaboration between the Social Security Administration and the EEOC may empower people applying for government benefits to enforce their civil rights, regain employment, and end their reliance on government benefits.

#### *Access to Goods, Services, and Technology*

Because of limitations on private enforcement of Title III of the ADA discussed below, it is essential for the Department of Justice to play a lead role in Title III enforcement in public accommodations. The Department of Justice has previously taken a strong role in Title II

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<sup>97</sup> Michael A. Stein & Michael E. Waterstone, *Disability, Disparate Impact, and Class Actions*, 56 DUKE L.J. 861, 903–04 (2006).

<sup>98</sup> *Id.* at 914–17.

<sup>99</sup> 526 U.S. 795 (1999).

enforcement against state and local governments, through complaint investigation, litigation, and Project Civic Access reviews.<sup>100</sup> The Department will need to dedicate more resources to investigating and litigating individual Title III claims, because those claims are difficult to enforce through private methods.

The Department of Justice also needs to take a leadership role in combating discrimination by standardized testing agencies. These standardized tests control how far people with disabilities are able to pursue their education and their careers. The perspective of standardized testing agencies, which focus on across-the-board implementation of exams without differentiation, often is in conflict with the individualized needs of people with disabilities. The Department of Justice has access to the technical, scientific, and enforcement resources needed to address this discrimination. In addition, the federal government should support rigorous study of whether reasonable modifications (such as extended time) for students with and without disabilities provide unfair advantage, and whether and to what degree standardized tests assess the relevant skills, abilities, and knowledge.

With the advent and explosion of electronic information, American society must be prepared to ensure that everyone has access to the mechanisms of electronic communication, information, and interaction.<sup>101</sup> The Administration has expressed a commitment to increasing

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<sup>100</sup> See ADA Home Page, [www.ada.gov](http://www.ada.gov) (last visited July 15, 2009). Project Civic Access is a wide-ranging effort by the Department of Justice to ensure that counties, cities, towns, and villages comply with the ADA by eliminating physical and communication barriers that prevent people with disabilities from participating fully in community life. The Department has conducted reviews in 50 states, as well as Puerto Rico and the District of Columbia.

<sup>101</sup> Peter Blanck, *Flattening the (Inaccessible) Cyberworld for People with Disabilities*, 20 ASSISTIVE TECH. J. 175, 175–80 (2008).

access to digital information.<sup>102</sup> Through its responsibilities under Section 508 of the Rehabilitation Act,<sup>103</sup> the Administration has an opportunity to take the accessibility requirements for technology seriously.

As a major purchaser of information technology, the federal government has a leadership role to play in insisting that electronic, information, and communications technologies are accessible to people with disabilities, including electronic devices with menus and controls that do not require vision, and software with text-to-speech capability for content. Federal monitoring of agencies' compliance with Section 508 should be centralized, rather than left to each agency. Currently, the Department of Justice is supposed to review and report on agencies' implementation of Section 508 bi-annually. However, the Department has not issued such a report since 2001.<sup>104</sup> The report indicated that many agencies had accessibility barriers in their websites.<sup>105</sup> Recent investigations indicate that problems still remain.<sup>106</sup> The technical standards for Section 508 compliance must be kept up-to-date to reflect improving technological capabilities.<sup>107</sup> In addition, as the Administration develops its technology infrastructure, it will

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<sup>102</sup> Fact Sheet, Obama '08, Barack Obama: Connecting and Empowering All Americans Through Technology and Innovation, <http://lessig.org/blog/Fact%20Sheet%20Innovation%20and%20Technology%20Plan%20FINAL.pdf> (last visited July 15, 2009).

<sup>103</sup> 29 U.S.C. § 794(d) (2009).

<sup>104</sup> <http://www.justice.gov/crt/508/report/content.php>

<sup>105</sup> Id.

<sup>106</sup> See Federal News Radio, GSA: accessibility compliance improves everyone's quality of life, <http://www.federalnewsradio.com/?nid=35&sid=1795669> (October 27, 2009) (General Services Administration investigation reveals that over half of all procurements do not mention accessibility).

<sup>107</sup> The Web Content Accessibility Guidelines (WCAG) of the World Wide Web Consortium (W3C) were updated in December 2008 to version 2.0. W3C, Web Content Accessibility Guidelines (WCAG) 2.0, <http://www.w3.org/TR/WCAG20/> (last visited Nov. 4, 2009). The U.S. Architectural and Transportation Barriers Compliance Board ("Access Board") plans to issue updated guidelines for Section 508 compliance later in 2009.

be important to include staff with experience and responsibility in enhancing accessibility for persons with disabilities.

However, not all technology is sold to the federal government and, therefore, some is not subject to Section 508. Currently, the courts are split on the issue of whether the internet and other mechanisms of electronic communication are covered by Title III of the ADA.<sup>108</sup> Title III covers “places of public accommodation,” and some courts require a “place” to be a physical location.<sup>109</sup> Therefore, some websites offered by physical businesses and websites offered by internet-only businesses are inaccessible to people with vision, hearing, and other sensory disabilities.<sup>110</sup> Similarly, the “place” requirement has been used to exempt insurance policies from nondiscrimination requirements.<sup>111</sup> The Administration needs to clarify, through regulations by the Department of Justice, that the “place” requirement does not limit nondiscrimination and accessibility requirements to physical locations, and that the internet and other electronic communication mechanisms are covered by Title III of the ADA.

The Administration also needs to bolster enforcement action against places of public accommodation, as well as libraries, universities, and government agencies, that provide inaccessible websites or use other inaccessible electronic technology. To date, the government has left open the possibility that these entities could comply with the effective communication

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See Federal News Radio, [New standards for Section 508 compliance are coming](http://www.federalnewsradio.com/?sid=1779637&nid=19), <http://www.federalnewsradio.com/?sid=1779637&nid=19> (October 6, 2009).

<sup>108</sup> For a review, see Blanck, *supra* note 102, at [].

<sup>109</sup> *Access Now, Inc. v. Southwest Airlines Co.*, 227 F. Supp. 2d 1312, 1318 (S.D. Fla. 2002).

<sup>110</sup> Blanck, *supra* note 102, at [].

<sup>111</sup> *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1010–14 (6th Cir. 1997).

requirements of the ADA by providing the same information through other means (for example, staffed telephone lines or alternative formats).<sup>112</sup>

Apparently relying on this possibility, many covered entities have not made their websites and other technologies accessible, choosing instead, to believe no one with a disability will access the technology. Thus, for example, six colleges and universities recently adopted the Kindle DX electronic book reader for their students, even though the reader is not accessible for individuals who are blind.<sup>113</sup> Numerous public libraries have begun offering online electronic books through Adobe Digital Editions, though the software does not provide text-to-speech and is incompatible with screen reading software used by blind people.<sup>114</sup>

The U.S. Departments of Justice and Education, among others, need to make clear this loophole does not exist. In fact, the 24-hour, immediate, at-home access to information online is not equivalent to alternative “special” programs for accessibility. Such special requests for alternative formats generally involve long delays and inferior products. Because there exists technology that can make electronic information accessible, covered entities should not be

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<sup>112</sup> U.S. DEP’T OF JUSTICE, ACCESSIBILITY OF STATE AND LOCAL GOVERNMENT WEBSITES TO PEOPLE WITH DISABILITIES 1 (2003), [http://www.ada.gov/websites2\\_prnt.pdf](http://www.ada.gov/websites2_prnt.pdf).

<sup>113</sup> See Press Release, National Federation of the Blind, National Federation of the Blind and American Council of the Blind File Discrimination Suit Against Arizona State University (June 26, 2009), <http://www.readingrights.org/458> (last visited July 15, 2009); see also Peter Blanck, *The Future of Electronic Learning—Opportunities for Inclusion or Exclusion?*, THE CHRONICLE OF HIGHER EDUCATION (forthcoming 2009).

<sup>114</sup> See District of Columbia Public Library, <http://overdrive.dclibrary.org/A0A6C13C-C6F1-455C-AE03-E09EF8CD03D4/10/323/en/Help-QuickStartGuide.htm>; Salt Lake County Library, <http://slco.lib.overdrive.com/C04E0376-1D2B-4504-806E-58CF616EC948/10/328/en/default.htm> (last visited Nov. 4, 2009); Michigan Library Consortium, <http://ebooks.mlcnnet.org/7196478A-27C0-4924-B338-A2BC09FA2012/10/246/en/default.htm> (last visited Nov. 4, 2009); Brooklyn Public Library, <http://digitalbooks.brooklynpubliclibrary.org/4E5B23B3-EE1E-42F0-9FE2-98A32A1BEEF0/10/340/en/default.htm> (last visited July 15, 2009).

allowed to provide ineffective and unequal communication methods to individuals with disabilities.

### *Participation of Individuals with Disabilities*

The Administration has a key role to play in shaping the federal government so that it respects and upholds the individual rights of people with disabilities. After years of judicial appointments reflecting activist states' rights or anti-government agendas, many in the judiciary are resistant to recognition of individual rights. Disability rights have arguably been narrowed more than most under the scrutiny of federal judges.

The Obama Administration's judicial nominations should reflect the importance of individual rights and fairness. The President has done so with the nomination of then-Judge Sonia Sotomayor to the Supreme Court. Justice Sotomayor herself has a disability: insulin-dependent diabetes.<sup>115</sup> In addition, her decisions have demonstrated an understanding of the civil rights model of disability and a commitment to individual rights.<sup>116</sup>

Equally important, the Administration has an opportunity to involve people with disabilities in issues that are not limited to disability interests by appointing them to positions in a variety of areas. This approach recognizes that disability issues arise in a variety of areas and that people with disabilities have broad expertise. Treating disability as a central element of the diversity

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<sup>115</sup> President Barack Obama, Announcement of Judge Sonia Sotomayor as Nominee for the U.S. Supreme Court (May 26, 2009) (transcript available at <http://www.cnn.com/2009/POLITICS/05/26/obama.sotomayor.transcript/index.html#cnnSTCText>); Tom Watkins, *Sotomayor's diabetes: 'She overcomes it every day,'* May 27, 2009, CNN.COM, <http://www.cnn.com/2009/HEALTH/05/27/sotomayor.diabetes/index.html#cnnSTCText> (websites last visited July 16, 2009).

<sup>116</sup> See, e.g., *Bartlett v. N.Y. State Bd. of Law Exam'rs*, 2001 WL 930792 (S.D.N.Y. 2001)(holding plaintiff entitled to reasonable accommodations for the New York bar examination).

that the Administration seeks to incorporate across all areas is an opportunity for the Administration and the disability community.

The Obama Administration has the additional opportunity to be a model employer by treating disability as part of diversity in its hiring, promotion, and accommodation policies and practices. Setting goals, tracking disability in the federal work force, and holding itself accountable for inclusion are important mechanisms to make disability inclusion a reality.

## II. Future of Private Disability Rights Enforcement

Individual and organizational lawsuits by private plaintiffs, represented by private attorneys, in nonprofit organizations and in private practice, are an important part of the enforcement of the disability rights laws. However, barriers inhibit the private enforcement of disability rights law. For example, the ADA does not provide for economic damages against Title III private entities that discriminate against their customers.<sup>117</sup> Therefore, individuals with disabilities who experience discrimination often are not compensated for their injuries.<sup>118</sup> Without the possibility of compensation, individuals with disabilities may be hesitant to go through the difficulties, delay, and expense of pursuing litigation. Judicial decisions under the ADA, IDEA, Section 504 of the Rehabilitation Act, and the Fair Housing Act, have made it difficult to enforce those laws privately.<sup>119</sup>

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<sup>117</sup> See Samuel Bagenstos, *The Perversity of Limited Civil Rights Remedies: The Case of "Abusive" ADA Litigation*, 54 UCLA L. REV. 1 (2006).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*; *Garcia v. Brockway*, 526 F.3d 456 (9th Cir. 2008) (no continuing violation doctrine for statute of limitations in housing construction cases); *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598 (2001) (no catalyst theory for recovery of attorneys fees by plaintiffs in disability and housing cases); *Ferguson v. City of Phoenix*, 157 F.3d 668 (9th Cir. 1998) (no damages under Title II unless intentional

Because damages are unavailable under Title III, contingency fee arrangements are not a viable mechanism for disability rights plaintiffs to pay for attorneys. Therefore, it is essential that attorneys' fees and costs be recoverable from defendants through fee-shifting when the plaintiff prevails.<sup>120</sup> Fee-shifting provides support for private plaintiffs and their attorneys to act as "private attorneys general" to enforce the public interest in stopping discrimination. Without fee-shifting, individuals with disabilities are forced to pay for attorneys to enforce their rights, with no ability to recover their expenses or to recover for their injuries. Essentially, enforcement without fee-shifting punishes the victim, rather than the lawbreaker.<sup>121</sup>

One of the significant barriers to private enforcement is the Supreme Court's 2001 decision in *Buckhannon Board & Care Home, Inc. v. West Virginia. Dep't of Health & Human Resources*,<sup>122</sup> which was a housing disability case. The Court held if a defendant, in response to a lawsuit, voluntarily stops violating the law, the plaintiff may not recover her attorneys' fees for bringing the suit.<sup>123</sup> Previously, the courts applied a "catalyst" theory, which held that if the plaintiff's legal action was a catalyst to the defendant's change in behavior, the plaintiff could recover her fees through the fee-shifting provision.<sup>124</sup>

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discrimination); *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006) (parents may not recover expert's costs in special education cases).

<sup>120</sup> See 42 U.S.C. § 12205 (2009) (allowing for reasonable attorney's fees for the prevailing party at the court's discretion).

<sup>121</sup> Bagenstos, *supra* note 115, at 10–11.

<sup>122</sup> *Buckhannon*, 532 U.S. 598, 609 (2001).

<sup>123</sup> *Id.*

<sup>124</sup> See, e.g., *Kelm v. Arlington Heights Park Dist.*, No. 98 C 4786, 2000 WL 1508240, at \*4 (N.D. Ill. 2000).



After *Buckhannon*, the defendant’s change in behavior must be mandated for the plaintiff to be considered a “prevailing party” for purposes of fee-shifting. This is particularly problematic in Title III cases, where the defendant’s change in behavior (e.g., making a physical accessibility modification) may moot the case because only injunctive relief is available, not damages. The defendant may thus prevent recovery of fees for the plaintiff’s successful efforts to stop the discrimination.

The Obama Administration and Congress should change the legal definition of “prevailing party” in disability rights and other laws to specify that a party whose legal action is a catalyst to the defendant’s change in behavior is entitled to prevailing party status for purposes of fee-shifting. In addition, because private enforcement is limited, particularly in Title III cases, the federal government should focus its enforcement efforts in that area.<sup>125</sup> Without such strong federal enforcement, the ADA’s goal of increasing access to public accommodations will not be achieved.

In the meantime, private attorneys may avoid the ramifications of *Buckhannon* in a few ways.<sup>126</sup> After the *Buckhannon* decision, most Title III cases are brought in states that have comparable state laws that provide damage remedies, such as California, New York, Minnesota, and the District of Columbia.<sup>127</sup> The availability of a damage remedy prevents the defendant’s change in behavior from automatically making the case moot, because the damages issue will

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<sup>125</sup> Waterstone, *supra* note 97, at 475–76.

<sup>126</sup> See Mark Weber, *Litigation Under the Individuals with Disabilities Education Act After Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 65 OHIO ST. L.J. 357, 361 (2004).

<sup>127</sup> Unruh Civil Rights Act, CAL. CIV. CODE §§ 51, 52; CAL. CIV. CODE §§ 54, 54.1, 54.3 (West 2009); N.Y. CIV. RIGHTS LAW § 41 (McKinney 2009); MINN. STAT. § 363A.29 (2008); D.C. Human Rights Act of 1977, D.C. CODE § 2-1403.16 (2009).

remain. Therefore, it is important to advocate for state laws to be updated to include damages remedies. Another option is to pursue claims in states that have rejected the *Buckhannon* approach to fee-shifting. Where a state law, even if it only provides injunctive relief, recognizes the catalyst theory, a plaintiff will be considered a prevailing party if her suit resulted in the defendant's change of behavior, even if that change is not the result of judicial action.

Unfortunately, some states have explicitly adopted the *Buckhannon* approach into state law.<sup>128</sup>

Few states have, to date, rejected the *Buckhannon* approach.<sup>129</sup>

Even if a plaintiff may not avoid *Buckhannon*, the defendant should face a high evidentiary burden to demonstrate it has stopped the illegal behavior. The defendant must demonstrate that it has essentially locked itself into the changed behavior. For example, in a challenge to the inaccessibility of a website, a defendant who made the current website's pages accessible would not be able to demonstrate that it had made the accessibility permanent, if pages are added periodically to the website and the policy could change at any time. Therefore, the defendant would not have bound itself to the changed behavior. Similarly, a modification in policy is changeable and difficult for a defendant to prove the change is permanent, unless it is the subject of a legal agreement.

Partnering with state attorneys general or state human rights agencies is another way to enforce the ADA's public accommodation requirements. A state agency investigation may reduce the amount of resources the private plaintiff must invest in pursuing a violation. The state

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<sup>128</sup> See *Wittlinger v. Wing*, 735 N.Y.S.2d 382 (N.Y. App. Div. 2001); *Auguste v. Hammons*, 727 N.Y.S.2d 880 (N.Y. App. Div. 2001).

<sup>129</sup> See *Barrios v. Cal. Interscholastic Fed'n*, 277 F.3d 1128, 1137 (9th Cir. 2002) (allowing award of attorneys fees under California law).

agency may be able to reach a negotiated, mediated, or conciliated agreement, whereas a private business may refuse to negotiate with a private plaintiff alone.

Another approach is to challenge physical access or other barriers at many facilities at the same time (e.g., via a class action or representing a membership organization). This approach to discrimination by business chains makes it difficult for the defendant to moot the case because they need to make the necessary changes at all facilities. In addition to these benefits, the potential scope of relief is much broader than with individual actions. Thus, the future of private disability rights enforcement is likely to involve more class actions and organizational plaintiff actions. However, class and organizational actions add delay and expense to the pursuit of disability rights enforcement.

In addition to the legal barriers to private enforcement, allegedly frivolous or serial disability rights lawsuits have generated a great deal of negative press, which influences the public's and the judiciary's opinions of disability rights.<sup>130</sup> To minimize these negative perceptions, it is important to notify prospective defendants of the violations in writing and give them an opportunity to correct the issues in advance of the suit. It is important to ensure that the complaint goes beyond the minimal pleading requirements. As the first entry in the "story" of the lawsuit, the complaint should tell a compelling story, including the negative impact of the challenged discrimination. It is also important for the plaintiffs and the disability community to publicly tell the story of the discrimination, through press releases, press conferences, and other media.

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<sup>130</sup> See Bagenstos, *supra* note 115 at [get pincite].

As these barriers are making it difficult to privately enforce the disability rights laws, it is important that private plaintiffs and their attorneys be strategic and thoughtful in choosing and pursuing their cases. Disability rights attorneys have opportunities to shape the practice and the substance of disability rights law. They, of course, owe it to themselves and the community to bring strong cases and pursue them vigorously.

Disability rights attorneys must also support each other, share knowledge, and expand the advocacy community. To effectuate that supportive function, leading disability rights attorneys nationwide have gathered together to create the Association of Disability Rights Counsel (ADRC).

The ADRC, hosted by BBI, provides an online venue to share strategies, arguments, and documents through a listserv and a brief bank. The ADRC provides opportunities for groups of attorneys to work together on legal issues, such as educational testing and electronic information technology. It provides a venue to help attorneys identify effective experts and resources on various disability issues. The ADRC may assist with public outreach and education campaigns supporting individual litigation efforts. For example, when a disability rights suit is filed, local chambers of commerce and business groups often publish Op-Eds and articles to shape public opinion in the area. The ADRC may similarly educate the press and the local community about the disability community and the effects of discrimination.

Finally, and perhaps most importantly, the ADRC provides opportunities for new disability rights lawyers, law students interested in disability rights law, and lawyers taking their first disability rights cases to be mentored by experienced disability rights lawyers. For most people with disabilities who experience discrimination, there is no disability rights lawyer nearby.

Therefore, they go to a generalist or an employment lawyer, who may not have any disability rights experience. Without access to guidance from an experienced disability rights attorney, the lawyer may be unfamiliar with the most effective arguments, may waste time reinventing the wheel, and may make bad law, both for the individual client and for the community. By providing mentoring, experienced disability rights lawyers shape the implementation and interpretation of disability rights law beyond their own cases.

### III. Future of State Disability Rights Enforcement

State governments have a significant role to play in enforcement of disability rights. Most states have their own disability rights laws, sometimes with greater protection than the federal law. For example, many state laws provide for damages for victims of discrimination, which are not available under the ADA.<sup>131</sup> Some state laws, such as those of New York and California, provide protection to a broader range of people than federal law.<sup>132</sup> Other state laws, such as those of California and Minnesota, cover more entities.<sup>133</sup>

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<sup>131</sup> See, e.g., ARIZ. REV. STAT. ANN. § 41-1492.09(B)(2) (2009); ARK. CODE ANN. § 16-123-107 (West 2009); CAL. CIV. CODE § 54.3 (West 2009); D.C. CODE § 2-1403.13(a)(1)(C)–(E) (2009); MINN. STAT. § 363A.29 (2008); N.Y. CIV. RIGHTS LAW § 41 (McKinney 2009).

<sup>132</sup> N.Y. EXEC. LAW § 292 (McKinney 2009) (defining disability as “a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a *normal* bodily function or is *demonstrable by medically accepted clinical or laboratory diagnostic techniques*”; not requiring substantial limitation of major life activity as compared with national law) (emphasis added); see also Gaffney v. Dep’t of Info. & Telecomm., 536 F. Supp. 2d 445, 473 (S.D.N.Y. 2008) (stating, “Unlike the under the ADA, plaintiffs [claiming a disability per N.Y. Exec. Law § 292(21)] need not establish that their condition affects a major life activity”).

<sup>133</sup> See CAL. CIV. CODE § 51.10 (West 2009) (applies to “business establishments”), CAL. CIV. CODE § 54.1 (West 2009) (applies to “places to which the general public is invited”); see also Minnesota Dep’t of Human Rights, THE RIGHTS STUFF NEWSLETTER, *The ADA vs. the Minnesota Human Rights Act* (Nov. 2006) (saying that the Minnesota Human Rights Act covers employers with as few as one employee), available at [http://www.humanrights.state.mn.us/education/articles/rs06\\_4ada\\_mhra.html](http://www.humanrights.state.mn.us/education/articles/rs06_4ada_mhra.html) (last visited Nov. 13, 2009).

State attorneys general and offices of human rights, therefore, provide important mechanisms for disability rights enforcement. These offices may enforce the laws themselves through investigations and findings, settlement negotiations, or lawsuits, either on their own, or as interveners or amici in private suits. State agencies may have greater access to information, including subpoena power, than is available to private advocates. For example, in cooperation with the National Federation of the Blind, the Massachusetts Attorney General was able to reach an agreement through litigation with one of the largest ATM providers in the world to make its ATMs accessible.<sup>134</sup> Similarly, the Massachusetts Attorney General was able to negotiate, without litigation, the increased accessibility of Apple devices.<sup>135</sup>

Involvement of a state Attorney General or Office of Human Rights also brings attention to disability rights issues, thus providing a greater ripple effect from a single case. State agencies have their own networks and may gather greater national support for disability rights, including generating amici or opinions from other states. In a recent matter, twenty-three state attorneys general signed on to an objection to a proposed class action settlement agreement that would ban Segways from Disney resorts nationwide.<sup>136</sup> Because of the national impact of the proposed

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<sup>134</sup> National Federation for the Blind, Cardtronics Settlement Agreement Jun. 22, 2007, [http://www.nfb.org/nfb/Cardtronics\\_Settlement\\_Agreement.asp?SnID=533570205](http://www.nfb.org/nfb/Cardtronics_Settlement_Agreement.asp?SnID=533570205).

<sup>135</sup> National Federation for the Blind, Agreement, Sept. 29, 2008, <http://www.nfb.org/nfb/NewsBot.asp?MODE=VIEW&ID=367>.

<sup>136</sup> Brief of the Attorneys General in Opposition to the Proposed Class Action Settlement as Amicus Curiae Post-Hearing Brief, *Ault v. Walt Disney World Co.*, 254 F.R.D. 680 (M.D. Fla. 2009) (No. 6:07-CV-1785-GAP\_KRS), WL 2175359; *see also* Jason Garcia, Disney's Segway Ban Faces New Challenge, ORLANDO SENTINEL, June 3, 2009, [http://blogs.orlandosentinel.com/business\\_tourism\\_aviation/2009/06/disneys-segway-ban-faces-new-challenge.html](http://blogs.orlandosentinel.com/business_tourism_aviation/2009/06/disneys-segway-ban-faces-new-challenge.html).

settlement, the attorneys general supported their citizens with disabilities by opposing court approval of the settlement.<sup>137</sup>

State agencies may help prevent or curb discrimination by providing opinion letters, statements, or advisories letting covered entities know that particular actions would violate the law. These offices may work informally behind the scenes to advise their governments on the disability rights implications of proposed actions. State attorneys general may convene hearings, and draft or support legislation bringing attention to important disability issues. For these reasons, the future of disability rights enforcement involves greater collaboration and stronger relationships among private advocates and state and local government enforcement agencies.

State and local governments also often have commissions or councils representing the disability community.<sup>138</sup> These commissions may express the disability community's perspective to local government officials, and they may express a local government's perspective on disability issues to the public. The commissions, therefore, may support disability rights in a variety of ways: by raising awareness of disability perspectives, and raising issues within the state or local government and in the larger community.

#### IV. Future of Judicial Approaches to Disability Rights

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<sup>137</sup> Brief of the Attorneys General, *supra* 135.

<sup>138</sup> See, e.g., Hawaii Disability and Communication Access Board, <http://www.state.hi.us/health/dcab/aboutus/> (last visited Nov. 14, 2009); D.C. Commission on Persons with Disabilities, <http://odr.dc.gov/odr/cwp/view,a,1386,q,575704.asp>; Washington Governor's Committee on Disability Issues and Employment, <http://www.esd.wa.gov/newsandinformation/legresources/gcde/index.php>; Texas Governor's Committee on People with Disabilities, <http://governor.state.tx.us/disabilities/>; Wisconsin Governor's Committee for People with Disabilities, <http://dhs.wisconsin.gov/disabilities/physical/gcpd.htm> (last visited Nov. 14, 2009).

The courts will continue to play a major role in the development, interpretation, and implementation of disability rights laws. It remains to be seen how the courts will adapt to the expanded definition of disability in the ADA Amendments Act. Will they continue to force a narrow charity-based approach onto the law, allowing protection only to those who are “most disabled” and, therefore, perceived as “most deserving”? Will they, as discussed above, reject some of the EEOC’s regulations as not supported by the ADAAA’s language? Or, will they shift focus to the question of whether unfair discrimination occurred and whether needed accommodations are reasonable?

If the courts shift focus to the issue of discrimination and away from the issue of defining “disability,” they will need to address legal issues that have received short shrift to date, such as qualification, direct threat, reasonable accommodation, and undue burden. For example, courts are split on whether an employee who is on disability leave because she cannot perform the essential functions of the job is “qualified” for purposes of various employment benefits or job retention.<sup>139</sup> In addition, the interaction between “qualified” and “direct threat” will have to be explored. Some cases raise the question of whether functions that exist for the safety of the employee (e.g., ability to evacuate and job rotation to avoid repetitive motion injury) should be addressed as essential functions in the qualification determination or as indications of risk in the direct threat analysis.<sup>140</sup> This distinction is important because it affects the allocation of the burden of proof.

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<sup>139</sup> Compare *Johnson v. K-Mart Corp.*, 273 F.3d 1035 (11th Cir. 2001) (former employee may be qualified), with *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104 (9th Cir. 2000) (former employee is not qualified).

<sup>140</sup> See *Turner v. Hershey Chocolate USA*, 440 F.3d 604, 613–14 (3d Cir. 2006) (jury question whether participation in job rotation program to reduce repetitive motion injuries is essential function); *U.S. Equal Employment Opportunities Comm’n v. E.I. DuPont de Nemours & Co.*, 406 F.Supp.2d 645, 657 (E.D. La. 2005),



The need for, and proper impact of, expert testimony in the direct threat analysis will be an important issue for courts. For example, courts considering a direct threat defense may permit employers to rely on their internal experts for assessment of risk, require that such experts meet objective standards of expertise, require some level of consultation with independent experts, or require employers to achieve the “correct” answer.<sup>141</sup>

In addition, the question of whether an accommodation is reasonable will arise more often. Questions to be addressed include how the determination of “reasonableness” differs from that of “undue burden,” and how different burdens and standards of proof will be applied. All the circuits require that the plaintiff bear the burden of production by identifying a possible accommodation.<sup>142</sup> In some circuits, the defendant must then prove the proposed accommodation is unreasonable or poses an undue burden.<sup>143</sup> In other circuits, the burden of identifying and proving reasonableness is on the plaintiff.<sup>144</sup> In determining reasonableness and undue burden, courts will have to address the relevance of net cost, as well as whether, and how,

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*aff’d* in part and *rev’d* in part, 480 F.3d 724, 730 (5th Cir. 2007) (ability to walk in case of emergency evacuation not an essential function).

<sup>141</sup> See *Echazabal v. Chevron USA, Inc.*, 336 F.3d 1023 (9th Cir. 2003); see also discussion in *BLANCK ET AL.*, *supra* note 11, at 286(5).

<sup>142</sup> See, e.g., *Reed v. LePage Bakeries, Inc.*, 244 F.3d 254, 258 (1st Cir. 2001).

<sup>143</sup> *Id.* This approach is adopted by the First, Second, Third, Eighth, and Tenth Circuits. See *Borkowski v. Valley Central Sch. Dist.*, 63 F.3d 131, 138 (2d Cir.1995) *Walton v. Mental Health Assoc.*, 168 F.3d 661, 670 (3d Cir.1999); *Fjellestad v. Pizza Hut*, 188 F.3d 944, 950 (8th Cir.1999); *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1112 (8th Cir.1995); *White v. York Int’l Corp.*, 45 F.3d 357, 361 (10th Cir.1995).

<sup>144</sup> See, e.g., *Hoskins v. Oakland County Sheriff’s Dep’t.*, 227 F.3d 719, 728 (6th Cir. 2000). This approach is used by the D.C., Fifth, Sixth, and Seventh Circuits. See, e.g., *Barth v. Gelb*, 2 F.3d 1180 (D.C.Cir.1993); *Riel v. Elec. Data Sys. Corp.*, 99 F.3d 678, 682-83 (5th Cir.1996); see *Hoskins v. Oakland County Sheriff’s Dep’t*, 227 F.3d 719, 728 (6th Cir.2000); *Monette v. Elec. Data Sys. Corp.*, 90 F.3d 1173, 1183 & n. 10, 1186 n. 12 (6th Cir.1996); *Vande Zande v. Wisc. Dep’t of Admin.*, 44 F.3d 538, 542-43 (7th Cir.1995); *Willis v. Conopco, Inc.*, 108 F.3d 282, 285-86 (11th Cir.1997).

cost-benefit analysis should be applied. Recent research indicates that both direct and indirect costs, as well as direct and indirect benefits, should be considered in assessing reasonableness and undue burden.<sup>145</sup>

Research regarding the first decade of ADA enforcement indicates defendants prevailed at trial in 93% of ADA cases.<sup>146</sup> When these pro-defendant decisions were appealed, the defendants prevailed on appeal in 84% of cases. Plaintiffs prevailed at trial in only 7.3% of cases and on appeal of pro-plaintiff cases, plaintiffs prevailed only 52% of the time.<sup>147</sup>

In 2008, the American Bar Association conducted a survey indicating that defendants prevailed in nearly 98% of cases (i.e., before the effective date of the ADA Amendments Act).<sup>148</sup> During the same period, plaintiffs prevailed in 24% of EEOC complaints.<sup>149</sup> Many of these cases were based on narrow interpretations of the definition of “disability.”<sup>150</sup> Therefore, results may change after the ADAAA. However, many were decided on narrow readings of the

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<sup>145</sup> Helen A. Schartz, D.J. Hendricks & Peter Blanck, *Workplace accommodations: Evidence based outcomes*, 27 WORK 345, 345-46 (2006), available at [http://bbi.syr.edu/publications/blanck\\_docs/2006/Work27\\_2006.pdf](http://bbi.syr.edu/publications/blanck_docs/2006/Work27_2006.pdf) (last visited July 15, 2009).

<sup>146</sup> Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 109 (1999).

<sup>147</sup> *Id.*

<sup>148</sup> AM. BAR ASS’N COMM’N ON MENTAL & PHYSICAL DISABILITY LAW, 2008 EMPLOYMENT DECISIONS UNDER THE ADA TITLE I – SURVEY UPDATE (2008), <https://www.abanet.org/disability/docs/2009TitleISurvey.pdf> (last visited July 15, 2009).

<sup>149</sup> *Id.*

<sup>150</sup> Colker, *supra* note 144, at 101.

questions raised above—whether individuals are qualified, job functions are essential, accommodations are reasonable, risks are significant, or hardship is undue.<sup>151</sup>

According to Professor Ruth Colker, courts frequently “substitut[e] their own normative judgments [on these issues] for that of the jury . . . , [which] is significant because it can affect overall outcomes,” as civil rights and employment discrimination plaintiffs fare better before juries than before judges.<sup>152</sup> In addition, according to Colker, courts applied unduly high summary judgment standards on the above issues and did not defer to agency guidance in interpreting the ADA.<sup>153</sup> These issues are not addressed by the ADAAA, and the future of judicial responses to disability rights remains to be seen.

#### V. Future of Disability Advocacy in the World

The United Nations General Assembly adopted the Convention on the Rights of Persons with Disabilities in 2006.<sup>154</sup> It was opened for signature in 2007, and effective in 2008.<sup>155</sup> As of October 2009, 143 countries have signed the Convention, and 87 have signed the Optional Protocol.<sup>156</sup> Seventy-one entities have ratified the Convention and forty-five have ratified the

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<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 101–02

<sup>153</sup> *Id.* at 102.

<sup>154</sup> UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES, G.A. Res. 61/106, U.N. Doc. A/RES/61/06 (Dec 13, 2006), *available at* <http://www.un.org/disabilities/default.asp?id=61>.

<sup>155</sup> UNITED NATIONS, ENTRY INTO FORCE, <http://www.un.org/disabilities/default.asp?id=210> (last visited Oct. 5, 2009).

<sup>156</sup> UNITED NATIONS, CONVENTION & OPTIONAL PROTOCOL SIGNATURES & RATIFICATIONS, <http://www.un.org/disabilities/countries.asp?id=166> (last visited Oct. 5, 2009).

Optional Protocol.<sup>157</sup> The European Union, independently of its member states, has signed the Convention.<sup>158</sup> On July 24, 2009, the Obama Administration announced its intent to sign the Convention.<sup>159</sup> U.S. law may now continue to be a model of compliance for other countries to follow, and the United States may be a strong voice in shaping disability law in the world.

The Convention will also challenge the United States to improve its domestic disability laws and policies.<sup>160</sup> U.S. disability laws, including the ADA, focus primarily on negative rights—rights to be free from future interference or discrimination.<sup>161</sup> Arguably, the adoption of the UN Convention will require the inclusion of positive rights to overcome the existing unequal position of people with disabilities resulting from past discrimination.<sup>162</sup> Such positive rights may include job training programs, hiring preferences, programs to combat social stereotypes, and programs that affirmatively overcome the increased gateway costs and barriers people with disabilities face, including health care, housing, education, transportation, and personal care.<sup>163</sup> The Convention will also challenge the United States to reconsider the defenses (e.g.,

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<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> CBSNews.com, *US to Sign UN Disabilities Rights Pact*, July 24, 2009, <http://www.cbsnews.com/stories/2009/07/24/politics/main5187796.shtml>.

<sup>160</sup> See Michael Ashley Stein & Janet Lord, *Ratify the U.N. Disability Treaty*, FOREIGN POLICY IN FOCUS (July 9, 2009), <http://www.fpif.org/fpiftxt/6247>.

<sup>161</sup> Michael Ashley Stein & Penelope J.S. Stein, *Symposium: Beyond Disability Civil Rights*, 58 HASTINGS L. J. 1203, 1209 (2007).

<sup>162</sup> *Id.* at 1240.

<sup>163</sup> *Id.* at 1211–12 and 1223–25.

fundamental alteration) in its disability rights laws, and to better address issues of immigration, legal capacity, international development, and education.<sup>164</sup>

However, the importance of the Convention lies not only in the technical legal changes it requires. Its lasting impact is in its ability to create a new type of disability politics worldwide. As articulated by Professor Gerard Quinn, the Convention introduces a new “dynamic of change.”<sup>165</sup> The future of disability rights in the world depends in large part on what countries and communities do in response to the Convention.

The implementation of the Convention will succeed or fail depending on whether it is implemented as merely a technical standard, or recognized as a roadmap for transformation. The Convention reaffirms our international societal core values of respect for dignity, autonomy, independence, nondiscrimination, participation and inclusion, respect for difference and diversity, equality of opportunity, accessibility, and equality. For the first time, it commits the international community to apply those core values to the disability community. The Convention forces the international community to recognize that our treatment of people with disabilities contradicts our core values. Substantively, the Convention adopts and adapts general human rights norms to the disability context. It elaborates a theory of equality and justice, and amplifies

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<sup>164</sup> NAT'L COUNCIL ON DISABILITY, FINDING THE GAPS: A COMPARATIVE ANALYSIS OF DISABILITY LAWS IN THE UNITED STATES TO THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (2008), <http://www.ncd.gov/newsroom/publications/2008/CRPD.html> (last viewed July 23, 2009).

<sup>165</sup> Gerard Quinn, *Resisting the 'Temptation of Elegance': Can the Convention on the Rights of Persons with Disabilities Socialise States to Right Behaviour?*, in THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: EUROPEAN AND SCANDINAVIAN PERSPECTIVES, 215 (Arnardottir & Quinn eds., 2009).

and clarifies the rights to ensure they are equally effectively available to people with disabilities.<sup>166</sup>

International disability rights will be achieved progressively, not necessarily immediately. Achieving these rights will require a dynamic of change and a pace of change that is both meaningful and measurable. To that end, procedurally, the Convention establishes a new treaty body—the Committee on the Rights of Persons with Disabilities—to assess state performance and process individual or group complaints.<sup>167</sup>

The Convention also creates a Conference of States Parties to exchange policy perspectives on subjects relevant to the Convention.<sup>168</sup> This may become the clearinghouse in the world on disability law and policy. Equally important, the processes called for by the Convention will transform the current processes that have led to ineffective and discriminatory laws on disability issues. For example, because of Article 4 of the Convention, which requires active engagement of government with people with disabilities, people with disabilities must now be included in the law-making process.<sup>169</sup> Similarly, Article 33 requires a focal point for disability responsibility,

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<sup>166</sup> GERARD QUINN & THERESIA DEGENER, U.N. HIGH COMM’N. ON HUMAN RIGHTS, *Human Rights and Disability: The Current use and future potential of United Nations human rights instruments in the context of disability*, 13–29 (Feb. 2002), <http://www.nhri.net/pdf/disability.pdf>.

<sup>167</sup> UN Enable: Rights and Dignity of Persons with Disability, UN Convention on the Rights of Persons with Disabilities, Article 34, <http://www.un.org/disabilities/default.asp?id=294>

<sup>168</sup> UN Enable: Rights and Dignity of Persons with Disability, UN Convention on the Rights of Persons with Disabilities, Article 40, <http://www.un.org/disabilities/default.asp?id=300>.

<sup>169</sup> See Michael Ashley Stein & Janet E. Lord, *Jacobus tenBroek, Participatory Justice and the UN Convention on the Rights of Persons with Disabilities*, 13 TEX. J. C.L. & C.R. 167, 177–78 (2008).

authority, and internal monitoring by an independent body in active consultation with people with disabilities.<sup>170</sup>

The growing international partnerships among the United States, the European Union and European countries, South American countries, Israel, Australia, Japan, and national and international organizations, such as BBI and the World Bank's Global Partnership on Disability and Development (GPDD), will help to implement the procedural and substantive transformation of disability rights law and policy across the globe.

Espousing the concept of freedom is a primary interest of the United States. The United States has been a leader in the development of the civil rights perspective of disability issues, but it has room to improve its disability rights perspective. By joining the Convention, the United States may internalize the best international disability-related values and externalize its own disability-related values. By joining and participating actively in the Conference of States Parties and the Commission on the Rights of Persons with Disabilities, the United States may ensure the Convention is used effectively to create a new space for discussion and development of disability rights, both at home and internationally.

### Conclusion

Many stakeholders, such as federal agencies and legislators, state legislators and government leaders, disability organizations, private attorneys, international governments and organizations, and individuals with disabilities, have important roles to play in the future of disability advocacy. What that future will be depends on stakeholders working together toward a

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<sup>170</sup> *Id.*

shared vision of inclusion, equal opportunity in society, and a renewed commitment to “The Right to Live in the World.”