Justice for All?

Stories about Americans with Disabilities and Their Civil Rights

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I. Introduction

It is a special honor to address distinguished colleagues and friends of the Iowa Law School. This article is part of a Symposium sponsored by The Journal of Gender, Race & Justice.

The author has been privileged to grow with people engaged in disability civil rights policy and law. During years of work in this area—as researcher, lawyer, court-appointed expert, and advocate—a sea of change has occurred in the fabric of disability policy, anchored by passage of the Americans with Disabilities Act (ADA) in 1990.

Yet, subsequent anniversary celebrations of the ADA's passage have been bittersweet for those who take stock of the law's impact on the lives of Americans with disabilities. While we celebrate the ADA's transformation of our nation's physical environment and its prompting of employers to provide workplace accommodations, case after case reveals discouraging judicial interpretations. Employers win in well over ninety percent of employment discrimination cases, and a string of U.S. Supreme Court decisions has narrowed the law's breadth.

The medical model of disability—which had roots in the Civil War Pension program—saw disability as an infirmity that precluded equal participation in society. It posited that government provide resources to cure the worthy disabled of their impairments. Because the medical model did not consider the physical and social environment as disabling, it countenanced segregation and economic marginalization.

The rights model that began to influence policy in the 1970s conceptualized people with disabilities as a minority group, entitled to the protections that emerged from the struggles of women and African-Americans for equality. In the 1970s, national disability policy also began to integrate concepts of the independent living philosophy. Title VII of the Rehabilitation Act of 1973 initiated funding for Centers for Independent Living (CILs), which grew from ten centers in 1979 to over three hundred and fifty.

In the ADA, Congress recognized that historically, society has tended to isolate and segregate individuals with disabilities, and that despite some improvements, such forms of discrimination continue to be a serious and pervasive social problem. Individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society (42 U.S.C. § 12101(a)).

This Article tells the stories of some of these Americans with disabilities in their quest for civil rights. The narratives are organized by the structure of the ADA: employment (Title I), integration (Title II), and accessibility (Title III).

II. Disability Civil Rights Stories

David Engel and Frank Munger comment in Rights of Inclusion: Law and Identity in the Life Stories of Americans with Disabilities (2003) that passage of the ADA presented an extraordinary opportunity to explore from the very outset what rights actually did and how they mattered, or did not matter, to their intended beneficiaries. The stories in this article attempt to give faces to the statistics and illustrate how rights may be understood through personal experiences under the ADA.

A. ADA Title I

Title I prohibits discrimination in employment for qualified individuals with disabilities. From application to termination, Title I imposes obligations on employers covered by the law (42 U.S.C. § 12112). Perhaps the most heavily litigated provisions of the ADA have been the law's employment sections.

Two forces underlie the miserly interpretation of Title I. The first is the "new federalism" jurisprudence endorsed by the Rehnquist Supreme Court, which has narrowed the ADA's reach. In Board of Trustees v. Garrett, 531 U.S. 356 (2001), the Court held that Congress exceeded its powers in allowing states to be subjected to ADA actions for monetary damages in employment discrimination cases. The second force is negative attitudes that continue to perpetuate prejudice toward disabled Americans in employment and daily life.

1. Don Perkl and Chuck E. Cheese: Disability Stigma

Don Perkl is a person in his early fifties with mental retardation who does not speak. The Equal Employment Opportunity Commission (EEOC) retained the author to testify as an expert witness in a lawsuit brought against Chuck E. Cheese for employment discrimination under the ADA.

Don had worked at Chuck E. Cheese as a janitor with excellent job performance; his co-workers enjoyed working with him. One day, a company regional manager visited the Madison, Wisconsin restaurant and criticized the local supervisor for hiring one of "those people." After returning on another visit, the regional manager fired Don after the local supervisor refused to do so. The supervisor then sought guidance from corporate human resources, asking, "Can someone please help me with this situation, so we can

at least give this guy a chance? We are an equal opportunity employer, are we not?" The request was unsuccessful. The local supervisor and other staff quit in protest.

At trial, the defendant argued that Don was not qualified for the job and that there was something threatening about him—possibly to the kids and patrons at the restaurant. The company retained a local psychiatrist to support these claims. Contrary to the company's assertions, Don was a qualified and dedicated worker with good interactions with co-workers and customers.

After a four-hour deliberation, the jury found Chuck E. Cheese had unfairly discriminated against Don in violation of the ADA. The jury awarded Don approximately $70,000 in back pay and compensatory damages, plus legal fees. To make their point, the jury also awarded $13 million in punitive damages—at that time the largest monetary award from a jury in a Title I case brought by the EEOC. The trial court imposed the maximum amount of damages allowed under the ADA, stating that "the breathtaking magnitude of an eight-figure punitive damages award demonstrates that the jury wanted to send a loud, clear message."

2. Daniel Schwartz and Electronic Data Systems (EDS): Definition of Disability or Stigma

Daniel Schwartz has developmental disabilities and other health conditions. He was born with congenital hypothyroidism, and his resulting developmental disability limits his life activities such as learning, thinking, and performing manual tasks. Daniel is married and lives independently in his own apartment.

Daniel had worked for more than twenty years as a mailroom clerk with a large bank in Los Angeles. Periodically, he requested additional supervision, repeated instructions, and additional training as modest workplace accommodations for his developmental disabilities. He received positive performance evaluations and pay increases each year.

In the late 1990s, the bank subcontracted its mailroom functions to Electronic Data Systems, Inc. (EDS). EDS transferred Daniel along with the mailroom functions to an offsite location. Daniel faced a hostile work environment, with unsupportive supervisors and incomplete accommodations. When Daniel tried to take written notes about how to run a mail-sorting machine, his job trainer asked him to stop and wrote the notes for him "as a favor." His team leader then confiscated the notes, believing this was an "unfair advantage" to Daniel.

EDS did not engage in the interactive process required by Title I to determine appropriate accommodations, and after less than three months, EDS fired Daniel. The reason given: low performance ratings in interpersonal ability, communication, leadership, job skills, and his ability to be a "visionary" and "motivate and inspire others"—criteria of questionable relevance to a mailroom clerk position.

At a two-minute summary judgment hearing, the district court ruled that because Daniel had worked successfully for years, he could not be "disabled" for purposes of the law and therefore did not need accommodation. Daniel appealed to the Ninth Circuit, and before a decision, accepted a settlement of more than $100,000 plus legal fees from EDS.

3. Mario Echazabal and Chevron: Paternalism and Title I's "Direct Threat" Defense

Mario Echazabal worked for an independent contractor in Chevron's refinery for some twenty years without accident or injury to himself or anyone else. Chevron would not hire Mario directly because he had asymptomatic Hepatitis C—not because he was unqualified, but because the company believed its workplace might worsen his condition, an opinion disputed by Mario's doctors.

Mario's case centered on the ADA's "direct threat" defense. The statute defines this defense as a requirement that an individual "not pose a direct threat" only "to the health or safety of other individuals in the workplace" (42 U.S.C. § 12113(b)). The statute contains no mention of a threat-to-self as a defense. One of the insidious aspects of paternalistic discrimination is the assumption that people with disabilities are not competent to make informed or safe life choices.

The Supreme Court found in favor of Chevron in Chevron U.S.A., Inc. v. Echazabal, 536 U.S. 73 (2002), endorsing the EEOC's interpretation that an employer may refuse to hire a person with a disability if the employer believes the individual poses a direct threat to their own health or safety—even though the ADA's legislative history cautioned against such an interpretation.

The ramifications spread quickly. More employers unilaterally began barring qualified workers with disabilities who do not pose a health or safety risk to others but who have health conditions. Research suggests workers with disabilities do not show an elevated risk for occupational injuries; one national study found only 3.5% of occupational injuries are explained by prior disability.

After losing his contractor position, Mario earned little steady income. He was hired as a part-time bus driver, requiring no use of his lifetime skills and providing no health benefits. Mario passed away in January 2004.

B. ADA Title II

ADA Title II requires that the services of public entities be available to people with disabilities (42 U.S.C. § 12132). One central element is that public entities administer their services in the most integrated setting appropriate to the needs of qualified individuals with disabilities. In Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581 (1999), the Supreme Court held that unjustified institutional placement constitutes discrimination within the meaning of Title II.

1. Sara K. and the State of Wyoming: Community Inclusion

Sara K. was first encountered in 1991 when she was a resident of the health care unit of the Wyoming State Training School in Lander, Wyoming. The author had been appointed as a court overseer in a class action lawsuit, Weston v. Wyoming State Training School, seeking expansion of community living opportunities for people at the state training school.

Sara was a smart and bright-eyed ten-year-old who had spina bifida and other serious health conditions. The Weston settlement agreement mandated that children residing at the training school would be the first to move to appropriate community settings. Sara moved to a smaller health care facility nearer her home, and subsequently state professionals suggested she live at home with her parents with appropriate support services. Sara returned home.

Sara quickly adapted to her home life and flourished in mainstreamed classrooms. She went to her community school and spent her teenage years with loving family and friends. In her story, we saw a child the Supreme Court would later recognize as someone whose institutional placement perpetuated the false assumption that she was "incapable or unworthy of participating in community life" (Olmstead, 527 U.S. at 600–01).

Sara passed away in January 2001. She was 15 years old, going on 16. The director of Wyoming's community programs, Bob Clabby, noted: "I have a solid belief that the amount of time we spend on this earth is less important than what we do with the time we have, and Sara inspired many people."

2. Demetrius, Tyrone and South Carolina: State Juvenile Justice Programs

In 1994, the author served as a court-qualified expert for the plaintiffs in Alexander S. v. Flora Brooks Boyd, the first ADA Title II class action lawsuit against a state's juvenile justice facility, involving the South Carolina Department of Juvenile Justice (DJJ). Interviews with juveniles and staff revealed that the programmatic needs of juveniles with disabilities were often not properly identified and met.

Demetrius had been certified for special education programs as "Educably Mentally Handicapped," but DJJ placed him in the general education program without appropriate supports. He became depressed enough to attempt self-harm and was prescribed antidepressants with sedative effects. A side effect was dry mouth, leading him to drink large amounts of water. One form of punishment used on Demetrius was to deny him permission to use the restroom—a direct result of DJJ's failure to recognize his disability and provide required services.

Tyrone was also placed in general education classes without appropriate accommodations despite having been in special education prior to DJJ. He could not read and received little educational assistance at DJJ.

In 1995, after a three-month bench trial, the court found for the plaintiffs, ruling the State failed to adequately identify and serve the educational needs of those with disabilities (Alexander S., 876 F. Supp. at 785–88). The court ordered a remedial plan and appointed a special master to monitor its implementation. The State did not appeal.

This experience rings true today for thousands of minors in juvenile justice facilities across the country. In 2003, the U.S. Department of Justice issued a report finding that two Mississippi juvenile justice facilities violated the constitutional and statutory rights of juveniles—a majority of whom had mental disabilities.

C. ADA Title III

ADA Title III prohibits discrimination against persons with disabilities by public accommodations—private, non-governmental entities of any size that provide goods and services to the public (42 U.S.C. § 12182(a)). Another of the ADA's major goals is to remove architectural and communication barriers facing people with disabilities.

1. Access Now v. Theme Restaurant: Physical Accessibility

Access Now, Inc. sued a theme restaurant in South Miami for claimed access violations under Title III, seeking a permanent injunction and attorneys' fees. Access Now's strategy is to enter negotiations during litigation and conclude with a settlement specifying how and within what time frame an entity will achieve compliance.

The settlement required the restaurant to make a series of accessibility modifications: moving tables to the bar area with appropriate knee space, modifying table booths for wheelchair seating, reversing an entrance door, installing accessible signage outside bathrooms, modifying toilet stalls and grab bars, and insulating hot water pipes under lavatories to protect wheelchair users.

The restaurant completed these modifications within several months. Because the restaurant was newly constructed but apparently not built in accordance with access guidelines, the modifications cost approximately $30,000—virtually all of which would have cost nothing had they been part of the initial construction. The court dismissed the lawsuit with prejudice.

2. Accessibility to the Internet: The Digital Divide

In February 2000, the author testified before the Subcommittee on the Constitution of the U.S. House of Representatives Committee on the Judiciary on the applicability of the ADA to private Internet sites. The National Federation of the Blind had filed a class action lawsuit against America Online (AOL) in 1999, alleging AOL's Internet browser and services were inaccessible to the blind.

AOL settled the suit, agreeing to make its browsing software compatible with screen reader assistive technology, make the content of AOL services accessible to the blind, and publish an Accessibility Policy. The majority view is that web-based activities of public accommodations that have an online presence are subject to Title III provisions.

Section 508 of the Rehabilitation Act (enacted as part of the Workforce Investment Act of 1998) also spurs accessibility in e-commerce, requiring that electronic and information technology—such as federal websites, telecommunications, and software—be usable by persons with disabilities (29 U.S.C. § 794d).

III. Conclusion

The stories in this Article cannot do justice to the deeply personal and emotional aspects of these Americans' pursuit of their civil rights. Don Perkl prevailed, was back in a sheltered workshop setting for a time, and then secured two part-time janitorial positions. Mario Echazabal chased his American Dream, only to be thwarted by the paternalistic views of others. Sara K. wanted to live at home with family and friends.

Demetrius and Tyrone, and many like them, may never break out of a cycle of poverty, mental health problems, and educational deficiencies, despite Title II's goals.

Senior Ninth Circuit Judge John Noonan wrote in Narrowing the Nation's Power (2002) that too often courts proceed with an agenda in which the facts are of minor importance and the persons affected are worthy of almost no attention: "The people and their problems . . . become grist for the constitutional mill . . . and are incidental."

A. Is the ADA a Failed Law?

For a number of reasons, the answer is no.

1. Title I

Since the ADA's passage, employment rates of persons with disabilities have varied positively and negatively, depending on how disability is defined and measured. Employment has risen substantially among those with work limitations or severe functional limitations who report the ability to work. However, employment levels of people with disabilities remain well below those of non-disabled people, and the majority of non-employed people with disabilities would prefer to be working.

Disability advocates are considering support for an "ADA Restoration Act" that would restore much of the law's reach narrowed by the line of Supreme Court cases—particularly clarification of the definition of disability. The Supreme Court's decision in Sutton v. United Airlines, 527 U.S. 471 (1999) held that factors that mitigate an individual's impairment—such as prosthetic devices or medication—are to be considered in defining whether that person's impairment is substantially limiting.

2. Title II

Given the Court's Olmstead mandate, the integration requirement has reached thousands of individuals. However, the Supreme Court was set to decide in Tennessee v. Lane whether Title II should be considered under new federalism Eleventh Amendment jurisprudence. In Lane, a plaintiff crawled up two flights of steps to attend his state court hearing in a building without an elevator; when he did not repeat this for a second hearing, the judge had him arrested and jailed for failure to appear in court.

3. Title III

Places of public accommodation are increasingly more physically accessible to people with disabilities, in part due to Title III litigation. In PGA Tour, Inc. v. Martin, 532 U.S. 661 (2001), the Supreme Court found that professional golfer Casey Martin, who had a degenerative circulatory disorder, was entitled to a Title III accessibility modification (riding a golf cart) to participate in tournament play. The Court stated that Title III requires public accommodations to carefully weigh the purpose, as well as the letter, of any exclusionary rule before determining that no accommodation would be tolerable.

The Supreme Court's rejection of the "catalyst theory" in Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources, 532 U.S. 598 (2001), has made plaintiffs' attorneys reluctant to bring Title III access lawsuits in which

their case may be mooted by the defendant's voluntary actions, depriving them of attorneys' fees.

B. Closing

This conference and special issue of the Journal of Gender, Race & Justice contribute to the dialogue about inclusion and not segregation; economic independence and not dependency; and equality and not second-class citizenship. By enacting the ADA, Congress committed the federal government to the protection of the civil rights of individuals with disabilities, and refuted a prior focus on social programs that tended to isolate those individuals.

Despite progress, a wide gulf separates those sequestered in nursing homes, laboring in sheltered workshops, and waiting in poverty for the next government check. The ways in which we address these complex issues will shape the lives of the next generation of children with disabilities—those who have experienced integrated education and who have never known a world without the ADA.

Large and small organizations have been shown to benefit from incorporating people with disabilities into organizational life. Steps include establishing a strong and ongoing commitment by leadership to diversity and inclusiveness, and combating stereotypes and stigma about disability.

Striving toward an understanding of Justice for All?—for people in poverty, women, African-Americans, people with disabilities and others—perhaps is the crucial issue facing our society as we continue this new century.