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**THE DISABILITY PENDULUM: THE FIRST DECADE OF THE AMERICANS WITH DISABILITIES ACT**, by Ruth Colker. New York: New York University Press, 2005. 280pp. Cloth \$45.00. ISBN: 0814716458.

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As we celebrate its fifteenth anniversary, it is a fitting task that Ruth Colker takes stock of the Americans with Disabilities Act (ADA), this nation's premier law affecting the lives of millions of persons with disabilities. In the past fifteen years there has been a sea of change in disability policy, anchored by passage of the ADA in 1990. Yet, anniversary celebrations have been bittersweet for those of us who examine the law's impact on the lives of Americans with disabilities (Blanck, Hill, Siegel, and Waterstone 2004; Blanck and Millender 2000).

Colker's opening chapter celebrates the high hopes for the ADA's transformation of our nation's attitudes and physical environment. But also, she observes a judicial backlash to the ADA, arising from U.S. Supreme Court decisions that narrow the law's breadth. Few advocates and scholars working in this area could have predicted the resistance with which many courts have approached the rights and antidiscrimination principles at the core of the ADA.

In tracing the passage of the ADA and related laws in Chapter 2, Colker identifies the complex forces influencing Americans with disabilities and their quest for civil rights. Colker observes that since the 1970s, national policies directed at the rights of people with disabilities replaced a longstanding medical conception of disability. The rights model that began to influence policy in the 1970s viewed people with disabilities as a minority group. During this time, people with disabilities challenged stereotypes about dependency in education, housing, health care, transportation and employment. The new "disability policy framework," grounded in equal rights, inclusion, empowerment and economic independence, fostered passage of laws from accessibility in voting and air travel, to independence in education and housing, and culminated in the ADA (Silverstein 2000).

*Is the ADA's rights model a failure?* In essence, the bulk of Colker's book, from Chapters 3 to 6, is spent addressing this major question. Her view, and mine, is that, despite resistance, the ADA disability rights model is succeeding. Indeed, the rights model has become a model for the world. Its fundamental themes are uniting countries in the pursuit of policies to improve the lives of persons with disabilities (Blanck, et al. 2004).

In Chapter 3, Colker presents an empirical investigation of litigation and settlement outcomes in ADA employment Title I litigation. She concludes by stating that "it is very difficult to paint a precise picture of [\*355] which factors are significant in predicting winning or losing ADA litigation" (p.95). Yet, this conclusion does not go far enough. Some studies show that since the ADA's passage employment has risen substantially among those with work limitations or severe functional limitations and who report the ability and desire to work (e.g., Kruse and Schur 2003). Moreover, the benefits to companies employing qualified workers have been documented, showing large and small businesses look beyond minimal compliance with the ADA (Blanck, et al. 2004). Of course, as discussed in Chapter 4, challenges and backlash to the ADA's employment provisions exist, so much so that disability advocates have proposed a bill that would restore the reach of the ADA. High on the list of topics included in the "ADA Restoration Act" is clarification of the definition of disability (National Council on Disability 2004).

In Chapter 5, Colker examines ADA Title II (non-discrimination in state and local governmental services) and its sweeping integration mandate. She describes the wave of challenges to Title II, with roots at the intersection of disability policy and constitutional law. Generally, the U.S. Supreme Court has concluded Congress has narrow constitutional authority to limit states' Eleventh Amendment sovereign immunity from civil rights suits under laws like the ADA (Blanck, et al. 2004). Importantly, in *TENNESSEE v. LANE* (2004), an Eleventh Amendment case, the Court's new federalism momentum paused, at least for a defined set of circumstances. In *LANE*, two persons with disabilities, a defendant in a traffic case and a court reporter, sued under Title II to vindicate their right of physical access to the courts. The *LANE* Court decided that Congress crafted Title II within its

constitutional bounds in preventing states from discriminating against people with disabilities in their right of access to the courts. As Colker acknowledges, it is an open question whether future challenges will limit Title II's integration mandate in areas such as education, transportation, and voting, should the Court view these areas as not implicating a fundamental constitutional right.

Chapter 6 discusses how ADA Title III (non-discrimination in the provision of public accommodations) provides that malls, professional offices, hotels, and so on, may not discriminate against people with disabilities. Increasingly, places of public accommodation are accessible to people with disabilities. In *PGA v. MARTIN* (2001) the Court found Casey Martin, a professional golfer with a circulatory disorder, was entitled to the individualized accommodation of riding a golf cart to allow him to play in tournaments. Yet, Colker's careful empirical analysis of Title III litigation outcomes suggests more work remains, particularly in the enforcement and remediation of Title III rights. Another question with far-reaching implications is whether Title III requires the Internet to be technologically accessible to prevent a "Digital Divide;" for instance, whether websites must be designed to work with screen reader software used by persons with visual and reading difficulties, and other accessible technologies for persons with hearing impairments, dexterity, developmental or learning disabilities (Blanck, et al. 2004). [\*356]

Colker's final Chapter 7, "Dissing Congress," questions the "confusing line of [ADA] decisions" (p.210) set out by the Rehnquist Court. From review of the definition of disability and accommodation, to the analysis of the role of Congress and the states, Colker concludes that the first decade of the implementation and enforcement of the ADA has been a disappointment. But she also "tells the story of a swinging pendulum" (p.xiv), one that has changed the world for people with disabilities and in which state disability laws now are on the rise.

THE DISABILITY PENDULUM is well worth the read. Ruth Colker is a premier disability scholar and researcher, and the book will be useful in graduate courses in law, disability studies, and political science. Colker's description of the stories of the plaintiffs in the leading ADA cases (Chapter 4) is compelling. Too often researchers, courts, lawyers and students of the ADA forget it is these personal stories that define the disability rights movement. I close with two such stories about my engagement in disability rights litigation, whose themes regarding attitudes about disability are illustrated prominently by Colker's swinging pendulum (Blanck 2004; Blanck forthcoming).

*Mario Echazabal: Paternalism.* I met Mario Echazabal in the halls of the U.S. Supreme Court during its 2002 term, waiting for oral argument in his case. I was counsel for the National Council on Disability in Mario's case. Along with my colleagues, I had prepared an *amicus* brief in *CHEVRON U.S.A, INC. v. ECHAZABAL* (2002). The case involved Chevron's decision not to hire Mario, a job applicant, because he had asymptomatic Hepatitis C. Chevron refused to hire Mario, not because he was unqualified for the position he sought in their refinery, but rather, because they believed its workplace might worsen his condition, an opinion disputed by Mario's doctors. Working for an independent contractor, Mario previously performed the job functions in Chevron's refinery successfully for twenty years. Mario personified the situation the ADA was intended to prevent: paternalism that results in exclusion and isolation.

The ADA includes a defense defined by Congress that an individual not pose a direct threat to the health or safety of *other* individuals in the workplace. Mario's case stemmed from regulations issued by the Equal Employment Opportunity Commission (EEOC) after the ADA's passage permitting employers to refuse to hire a person with a disability if the employer believed that individual poses a direct threat to his *own* health or safety. The Supreme Court found in favor of Chevron, 9-0, endorsing the EEOC's interpretation of the defense to include a threat to one's own health. The Court reached this conclusion even though the language of the ADA did not contain such a defense. After losing his job at Chevron, Mario earned little income. In early 2004, Mario passed away, and in September 2004, Mario's widow settled his case with Chevron in confidential agreement.

*Don Perkl: Disability Stigma.* I met Don Perkl and his family in 1999 at the Madison Packaging & Assembly facility, a sheltered workshop, in Madison, Wisconsin. Don is a person in his early fifties with mental retardation. He does not speak. He and I talked using [\*357] pictures and a communication board, a device that translates ideas into spoken words. We discussed his employment, job training and the things he enjoyed. The EEOC retained me to testify as an expert witness in a lawsuit that the government, Don, and local disability advocates

brought against Chuck E. Cheese for employment discrimination under the ADA. Don had worked at Chuck E. Cheese as a janitor. His job performance was excellent and his co-workers enjoyed working with him.

One day, a regional manager visited the Madison restaurant. On seeing Don working at the restaurant, he took the local store supervisor aside and criticized her for hiring one of “those people.” After returning to the restaurant on another visit, the regional manager fired Don after the local supervisor had refused to do so. The supervisor and restaurant staff quit in protest, and eventually testified for Don. At trial, the defense argued that Don was not qualified for the job and the company did not discriminate against him. They defended their actions by claiming there was something threatening about Don, possibly to the children and patrons at the restaurant. I testified about the myths and stigma facing persons like Don in employment and other daily life activities. While there was nothing deficient about Don’s work performance, there was something very wrong about management’s culture and attitudes, at least in this case.

The trial lasted a few days. The jury found Chuck E. Cheese had unfairly discriminated against Don in violation of the ADA, awarding him some \$70,000 in back pay and compensatory damages, as well as his legal fees. To make their point, the jury sent a message that discrimination against employees based on their disability would not be tolerated. They awarded Don \$13 million dollars in punitive damages, at that time the largest monetary award from a jury in an ADA employment case brought by the EEOC.

Colker’s description of “The Face of Judicial Backlash” (Chapter 4), like my stories and those of so many others, remind us that the goals of disability rights continue to have as much to do with battling attitudinal barriers and prejudice faced by persons living with disabilities as they have to do with overcoming physical barriers in the world. THE DISABILITY PENDULUM helps us to appreciate that how we address these issues will shape the lives of the next generation of children with disabilities. Unlike any generation before, our children will not know a world without the ADA, with its vision for equality, economic independence, and self-determination. They will expect no less.

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