



**Date and Time:** Saturday, October 17, 2020 9:50:00 AM EDT

**Job Number:** 127889040

## Document (1)

1. [ARTICLE: The Unintended Consequences of the Americans with Disabilities Act WASHINGTON BUSINESS GROUP ON HEALTH THIRTEENTH ANNUAL NATIONAL DISABILITY MANAGEMENT CONFERENCE, 85 Iowa L. Rev. 1811](#)

**Client/Matter:** -None-

**Search Terms:** Title(The unintended consequences of the Americans with Disabilities Act)

**Search Type:** Terms and Connectors

**Narrowed by:**

**Content Type**

Secondary Materials

**Narrowed by**

Source: Iowa Law Review

**ARTICLE: The Unintended Consequences of the Americans with Disabilities Act WASHINGTON BUSINESS GROUP ON HEALTH THIRTEENTH ANNUAL NATIONAL DISABILITY MANAGEMENT CONFERENCE**

August, 2000

**Reporter**

85 Iowa L. Rev. 1811 \*

**Length:** 11694 words

**Text**

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**[\*1811]**

Friday, October 29, 1999

Introduction

Ann Elizabeth Reesman, Moderator

General Counsel

Equal Employment Advisory Council

Speakers

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University of Iowa. Dr. Blanck's research is

supported, in part, from grants from the National

Institute on Disability and Rehabilitation

Research, U.S. Department of Education; and from

the University of Iowa College of Law Foundation.

Walter Olson

Senior Fellow

The Manhattan Institute

Proceedings

MS. REESMAN: Thank you very much. I really appreciate the invitation to be here today. It's truly a delight for me. I have enjoyed the work of the Washington Business Group on Health > I was an attendee at one of these conferences before < > and I have also enjoyed the work of both of our panelists over the last at least ten years. So it's a true delight for me to have the opportunity to work with both of them simultaneously.

A little bit about my background. I'm Ann Reesman from the Equal Employment Advisory Council (EEAC). You may have heard of EEAC. We're an employers' association with about 315 large companies as members. In fact, I would imagine quite a few of your companies are members of EEAC. The representatives to EEAC from your companies tend to be the [\*1812] corporate human resources folks, the corporate Equal Employment Opportunity (EEO) and affirmative action folks, and the in-house employment lawyers. We focus specifically on EEO and affirmative action issues. So that's where I'm coming from. One of the areas in which I've specialized for EEAC for the last ten years is the Americans with Disabilities Act (ADA), so I think that's why I'm here.

The ADA, of course, is nine years old now, and the employment provisions have been in effect for more than seven years. During that time, we've seen a lot of developments, haven't we? We've seen a lot of press--both good and bad. We've seen a lot of wild stories, as well as some developments that I think any one of us could not have predicted were going to happen.

I think when the ADA was first passed, the disability advocacy groups who worked so hard to get it passed had certain goals and understandings about what the ADA was going to accomplish once it was enacted. At the same time, I think companies had some concerns about just how the ADA was going to affect them. I know a lot of you are with companies who are federal contractors, and so your companies knew going in all about equal employment opportunity for people with disabilities, as well as the concept of reasonable accommodation, because you've been dealing with the Rehabilitation Act for twenty years prior to enactment of the ADA. So I'm sure you wondered just how the ADA was going to change the scene. I think all of us did.

Well, here to talk about all of that today < > where the ADA came from, where it's been, where it's going in the next millennium < > every speaker this year has to use the word "millennium" somewhere < > are two of the country's leading experts, true experts, in this field.

Professor Peter Blanck, who is at my far left, is a professor of law, of preventive medicine, and a professor of psychology at the University of Iowa. He is a member of the President's Committee on Employment of People with Disabilities, of which I'm sure you're all familiar, as well as a former commissioner of the American Bar Association Commission on Mental and Physical Disability Law. Professor Blanck has written widely on the implementation of the ADA and has received a number of grants to study the implications of the ADA. He received his Ph.D. in psychology from Harvard and his law degree from Stanford Law School.

To my immediate left is Mr. Walter Olson, who is an author and commentator on the American legal system. His 1991 book, *The Litigation Explosion*, helped spark a national debate and led the *Washington Post* to call him an "intellectual guru of tort reform." His 1997 book, *The Excuse Factory*, was the first book that ever offered a popular criticism of our employment laws as we know them today, particularly our employment discrimination laws, and particularly the ADA. He's a senior fellow at the Manhattan Institute, which is a think tank in New York City, and he graduated from Yale with a degree in economics.

I've brought some toss-up questions to get these gentlemen started, [\*1813] but we'd like to make sure that you're involved in this, too. There's a microphone at the center of the room. There's also a microphone over there by Bruce for those of you in that end of the room. In addition, I can repeat the question for the group. So if you're away from a microphone, we can still take questions there, too.

What I'd like to do is get started with these gentlemen, and as we're going, also be thinking of questions that you might like to toss up to them. Let's start off with some historical context. Where did the ADA come from? What was Congress trying to accomplish when it passed the ADA in 1990, and why?

Professor Blanck?

DR. BLANCK: I am pleased to be here with Mr. Olson, whose work I have read carefully and who, to the surprise of maybe Mr. Olson and to some people in this room, I believe we have more common ground than you might think on some of these issues.

With regard to the Americans with Disabilities Act, I want to read you a quote first. It says, "What are disabilities? There are very few who could not have a disability. The door of fraud is thrown wide open to let those in who are not incapacitated and to virtually make an entitlement to them for life. It is safe to say that only a fraction of these disabilities were such as intended by the law, loose and liberal as it is."

That was in the New York Times in 1894, questioning the Civil War pension system, which is actually the subject of a large academic study that I am conducting with Chicago Professor and Nobel laureate Robert Fogel on understanding the pension system and conceptions of disability after the Civil War--that is, before the 1920 Vocational Rehabilitation Act, before the 1973 Rehabilitation Act, and before the ADA. Among the interesting findings are that, even then, when this new conception of disability was emerging and a new group of individuals in society was emerging, there was a tremendous attitudinal backlash against people with disabilities who were receiving pension benefits.

Our research on Civil War pensions shows that even when we take into account the severity of veterans' disabilities, in our analysis of some 6000 Union Army veterans, prejudice and stigma are still strong predictors of pension awards. Thus, a disability that was particularly stigmatizing would cause a veteran to receive a relatively lower pension award or to be rejected outright, as compared to a less stigmatized disability. That's one hundred years ago.

Seventy-five years ago, society received *Buck v. Bell*,<sup>1</sup> the famous Supreme Court decision, and Justice Holmes, an otherwise very distinguished Supreme Court justice, saying "three generations of imbeciles are enough." We then had huge programs of institutionalization. We had the disabled out of sight, out of mind.

After that, we moved into the prominence of the medical model toward disability. In the 1960s and 1970s, we have the opening of our eyes **[\*1814]** with regard to institutional conditions, with regard to the stigmas and the attitudes towards persons with disabilities. Society began to address those problems in the 1973 Rehabilitation Act, the 1975 Individuals with Disabilities Education Act, the Fair Housing Act, and then ten years ago, with the Americans with Disabilities Act. The ADA is part of a continuing historical effort to raise awareness about equal opportunity for persons with disabilities in this country. It is an anti-discrimination law. It is not a preferential treatment law.

There are a lot of issues associated with the ADA that are open to debate, and we will talk about many of those today. There certainly are unintended consequences of the ADA, positive and those not anticipated, which, more often than not, cannot be cast only in an efficiency or a cost-benefit model.

Indeed, the ADA is part of an evolving conception in our society about the equal involvement of people with disabilities, no more and no less. We will debate today some of the so-called marginal cases, which perhaps have driven much of the public analysis of the law. But what I hope to discuss also is the impact of the ADA and laws like it on competitive business strategy for this new century in regard to return-to-work strategies, accommodation programs, wellness strategies, and corporate injury prevention programs.

Mr. Olson?

MR. OLSON: Let me agree with nearly all of Professor Blanck's remarks. We do indeed learn a great deal when we turn to history, and here I'm thinking not just of the history leading up to the passage of the ADA, but the fact that what we as a society can do to help the disabled has been on America's mind, and on the minds of civilized western countries, for a very long time. There is literature written in the 18th century that is still very readable and relevant today. Society has been thinking hard about this. It thinks especially hard after wars, and we have been

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<sup>1</sup> [274 U.S. 200, 207 \(1927\)](#).

lucky not to have in our generation the kind of war that led to a great deal of social thinking about disability after World Wars I and II, and of course after the Civil War.

Nonetheless, our approach is very different from that of earlier generations, and that gets us into what is so different about the ADA. Earlier generations learned to do a lot to assist disabled veterans and, indeed, disabled people generally, but they did not tend to characterize the problem as one of civil rights or discrimination. This is what the disability rights movement makes very central in its literature. It offers a new and distinctive explanation for the labor market woes that long have been experienced by the disabled--the lower labor force participation, lower wages, and lesser degree of attachment to the workforce.

The remarkable new answer that was offered was that these ills do not occur mostly because of the intrinsic limitations of disability, the way it cuts you off from being able to do various things, or interferes with your continuous availability for work. According to several important ADA advocates, that was not the main reason disabled persons were doing so poorly [\*1815] in the labor force. Instead, it was discrimination; very much the same kind of discrimination that America had lately been trying to overcome with respect to race.

The inference from that claim was that goodwill was no longer going to be enough, and here I think I'm paraphrasing fairly closely much of the disabled rights literature. We're not interested in goodwill. We're not interested in people wanting to be nice to us. This is a matter of rights. It is a matter that should be handed over to the law, and the law should make them give us what is no more than our due. A spirit of cooperation is nice, perhaps, on this view, but beside the point. What is needed here is to bring in--and here I'm using my own language--the adversary process, and to take the extraordinarily delicate, complicated, every-case-different set of explorations in which people such as you in this room find out whether someone is right for a particular job and do it with a policeman standing over your shoulder.

I'm editorializing a bit here, but I think that was really the key departure that we saw between legislation up to and through the World War II era and the ADA. So with the ADA, you got some very high penalties--\$ 50,000 for some first-time violations--plus attorney's fees provisions and various other things that made it frightening to think about being out of compliance.

The ADA's drafters also inherited a record from the Rehabilitation Act of 1973, which applied to federal contractors and had brought forth many, though not all, of the same issues as the ADA. The experience with the Rehabilitation Act, I think, should have raised questions which were not widely asked at the time of enactment of the ADA. One of the curious things was that the rate of disabled participation in the workforce had not been improving under the Rehabilitation Act. It in fact had been getting worse. We'll get to that a little bit later.

The main difference, however, and the main departure, on which I think second thoughts are beginning to set in, is in the question of whether it was proper to turn these questions over to the lawyers. That's what the ADA did.

MS. REESMAN: Thank you.

You've both talked a little bit already about some of the consequences of the ADA, and let's go to that next. We see a lot written about the consequences of the ADA, both intended and unintended, and I'd like to start off with your views on what some of the benefits of the ADA have been.

I'd like to start again with Professor Blanck.

DR. BLANCK: Well, this may be a risky approach, but how many people in this room see the ADA as a policeman hanging over your head, to use Walter Olson's terminology?

(Show of hands.)

DR. BLANCK: I count--one, two, three, four, five.

MR. OLSON: Seven, eight, nine.

DR. BLANCK: And how many definitely do not? Let's be fair and raise [\*1816] your hands. How many would definitely disagree and say that the ADA is not a policeman?

(Show of hands.)

MR. OLSON: So about twelve or thirteen.

DR. BLANCK: And what are the rest of you thinking?

(Laughter.)

DR. BLANCK: It's true that lawyers are involved. It's true that there is a structure in place now in which compliance is monitored. It also is true, at least based on my research and that of others, that in surveys with employment managers, such as by the Society for Management and Human Resource Professionals, approximately eighty percent of employment managers think that the ADA has been a good thing for their business.

It is true that the vast majority of disputes involving the ADA have been resolved informally and successfully out of the courts. It is also true that the litigation rates for the Americans with Disabilities Act are about the same in terms of success as for race and gender. There is some geographic differentiation in that regard. In either case, it's not a high victory rate for employees who bring such claims.

It is true that in the companies that I've talked to and have studied, many companies large and small, that there are many other things going on here besides minimal ADA compliance enforced in a policeman-like way through the law. For example, I did research a number of years ago on Sears, which owned Allstate Insurance who, like a lot of insurance companies, had huge numbers of people performing actuarial functions, and they also had a good number of people with visual impairments. Allstate and Sears were committed to trying to work through a way to retain those employees. Many of them were good, qualified employees.

So Allstate invested some money, which was a substantial amount of money, in a then new technology < >voice-activated computer input systems and alpha-braille displays. The short of the story was that not only did those workers with disabilities, with what they considered to be an accommodation at the time, become efficient and productive in the way they were approaching their job at Allstate, but other employees started crowding over their shoulders and saying, "How come they're getting out of here before I am? How come their wrists are not hurting as much as mine when I've got to input all this other information?" Then what happened? That whole work unit was rearranged around this new technology, which was derived from an attempt to consider an accommodation for this group of people with disabilities.

That scene has been repeated in countless organizations across the country. Many of you probably have stories about how an increasing awareness of accommodations has helped you think differently about job sharing, job flexibility, employee assistance programs, wellness programs, injury prevention programs, and a range of other programs which were not anticipated at the time the ADA was passed.

With regard to dispute resolution, there are new ways of thinking [\*1817] about resolving disputes that are part of this buzz word that many of you are learning about or thinking about-"integrated risk management"-or something to that effect. Integrated risk management goes to resolving disputes in an efficient manner, which also goes to resolving workers' compensation claims in an efficient manner.

For me, some of the unintended consequences of this law, independent of the cost-effectiveness of accommodations, have to do with the change in corporate culture, a change in the way of doing business in our diversifying economy where labor is getting tight and where qualified employees are needed.

I'm always amazed. I was on a plane not too long ago, and the cover story on a small business magazine was, We Cannot Find Enough Qualified Employees to Work with Us. And I am thinking to myself, how many millions of employees, as a result of the ADA, are now out there with potential accommodations that can contribute to your workforce?

I should also say, I'm not aware of a single instance in the United States in which a company was bankrupted or put in a poor financial situation as a result of the Americans with Disabilities Act.

MR. OLSON: This is so unfair.

DR. BLANCK: I've thrown down the gauntlet. Go ahead.

MR. OLSON: It was so unfair. I was waiting for him just like a spider.

(Laughter.)

MR. OLSON: Brew Pub to Seek Shelter from Lawyers. This is the Sacramento Business Journal from last year. "A lawsuit over handicapped access has plunged the River City Brewery Company into bankruptcy court."

It's terrible because he's read all of my stuff and I've read all of his stuff, and he's got one of these waiting for something I say, too.

(Laughter.)

DR. BLANCK: I'll get even.

MR. OLSON: Well, details on demand about the brewery and restaurant, but let me get to the question about benefits, because critical though I am of the ADA, we do see the benefits all around us, and specifically, we see it in the built environment, as architects call it, in the ramps, in the new elevator buttons. We see things that sometimes do help the nondisabled in important ways, even if they were often extraordinarily expensive. The proper studies have not been done on how expensive many of them were, but once built, yes, there are definitely benefits, both for the disabled and often for others, too.

Once, however, you move from the architectural area to transportation, you have some dubious results. You have kneeling buses that break down a lot and may have gone through their entire useful lives without having their wheelchair feature used. You have some very, very poor bus districts in rural America that have not quite gone the way of the Sacramento brew pub, but have had to curtail business.

Then you turn to employment, and the picture on employment is, at a minimum, more complicated, because as I was hinting earlier, you look at [\*1818] where you would expect the benefits to show up--namely, labor force participation by the disabled--and you see to everyone's shock, and I didn't expect this either, that the figures have gone in the wrong direction.

To quote the Washington Post last year, "A survey conducted by Louis, Harris & Associates for the National Organization on Disability"< >this is not being done by critics--"found that twenty-nine percent of disabled persons are employed full or part-time, which is down from thirty-three percent in 1986." Indeed, the figures have become steadily worse. That's a fairly significant statistical drop, so something has gone wrong in that area, which we can talk about a bit later.

But yes, as Professor Blanck pointed out, accommodations made for the disabled have many implications for co-workers, other than simply the cost to the company. Sometimes those will be good results for co-workers as with some of the architectural changes.

Sometimes they are bad ones. You notice that when one person is given a great deal of scheduling accommodation, it may lead you to discover a wonderful new way of giving everyone schedule accommodations through some complicated computer program. Or it may simply be that the other people get less flexibility with their schedules because the one person has to be given as much leeway as possible. So it can be good, or it can be bad for co-workers.

I think, in fact, that the costs are discussed more because they're so hard to measure. Professor Blanck, and an economist that preceded him named Thomas Chirikos, have done some interesting work on the out-of-pocket costs

of compliance. They're one of the important things to look at. It's terribly hard to quantify the non-out-of-pocket costs of rescheduling, of managerial attention, of accommodating someone whose condition is imperfectly corrected by medication, but still comes in to work, as you see in the documents from this conference on mental health accommodation. It's very, very difficult to quantify any of those things, let alone what is called the Bermuda Triangle of the intersection of the ADA, the Family Medical Leave Act, and workers' compensation laws. No one has yet been seen to emerge who entered that Bermuda Triangle.

Maybe these applications of the law impose the kinds of costs that can be managed and adjusted to. Maybe they are costs that are out of control in some sense. You're actually more expert on that than we are. But will I deny that there are benefits? Of course not. There have been benefits.

DR. BLANCK: Everybody in this room has already made the determination that the benefits outweigh the costs by being here, and all these vendors that are selling you all these services have done that, because the costs of turnover are incredibly high. The costs of losing qualified workers, who perhaps are injured on the job, or who perhaps have some episodic condition < >mental illness, depression, or heart disease < >make it economically beneficial for employers to bring those workers, if they are qualified, back to work.

At Sears, Roebuck, for example, there are 350,000 or so employees in [\*1819] retail and seasonal business, and the turnover at Sears every year is tens of thousands of employees at a cost of about \$ 2500 per employee. By comparison, it costs Sears, in fairness to Mr. Olson's position, at least with regard to direct outlay of costs for accommodations for disabled workers, anywhere in the neighborhood of \$ 30 to \$ 100 on average.

You tell me what's a better economic decision in light of the ADA--to try to keep people at work, to keep people qualified. You just have to add up the numbers yourself. I bet you most of the major corporations in this room are in that position.

Second point. I guess we should get this out on the table, too. I would agree with Mr. Olson if he took the position that what is needed here is a hard analysis that is derived both from quantitative and qualitative research from a variety of disciplines, from a variety of ideological perspectives, in a meaningful way. But what is happening too much is that the policy debate on the critical side has been driven by anecdotal stories, by myths and misconceptions about these costs, and about the negative impact of a guy walking into a Florida corporation with a gun and saying, "You can't fire me because I'm covered by the ADA." Those are marginal cases in terms of the law of the ADA. Or because Casey Martin decides to bring a case against the PGA, and somehow now the whole world has to be turned upside down because the PGA can't run the tournament like it wants to run it.

I think that what has happened in this area is that there has been an overreliance on this policeman-like, fear-like, anecdotal-like myth and mentality, and what I've tried to do, at least in my corner of the world, is to bring some empirical information to the debate.

Do I believe that the results are mixed? You bet I do. There's no single study that can provide the definitive answer. Studies are needed from multiple perspectives. At least we need to pursue that road to make informed choices with regard to these important decisions. That may entail a modification of the ADA, if it's so desired, in light of some people in the advocacy community thinking that the recent Supreme Court decision, *Sutton v. United Air Lines, Inc.*,<sup>2</sup> involving mitigating measures was wrong. But we need to study the issue and find out what we're talking about before we jump to these really negative conclusions, which I believe are inconsistent with the way businesses are approaching these issues.

MS. REESMAN: Mr. Olson, would you like to respond?

MR. OLSON: Why don't we have you ask another question, because I do have some responses, but they'll probably lead into more questions that you have.

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<sup>2</sup> [527 U.S. 471 \(1999\)](#).



MS. REESMAN: Let me just follow up a bit then on what Professor Blanck has said. His approach, as I understand it, is to say that a lot of the criticism of the ADA is based solely on anecdotal evidence, a couple of wild stories where people have tried to push the ADA much farther than where it was intended to go. **[\*1820]**

Can you comment on that?

MR. OLSON: Sure. We have here a game that all sides play in all public controversies for better or worse. For example, in the current debate over HMO liability, advocates of more stringent liability would be happy to read out of the public record surveys about overall medical outcomes and people's overall satisfaction with their employers' health plans. Instead, they focus on extraordinary cases— one from the San Diego Children's Hospital, three or four others from around the country. As the New York Times pointed out, I think after some frustration on the part of their reporters, these stories can't even be checked because the families' lawyers refuse to release their patient confidentiality in order to let the hospital give its side of the story.

So a reliance on remarkable individual stories is quite common in controversy. Is disabled-rights law an exemption? Well, if you go back to the hearings that brought us the ADA, they didn't spend that much time on statistics, perhaps because the statistics raised disturbing questions for them. They did bring in people who had been insulted in job interviews because of some physical disability that they had, and everyone's blood, including mine, boiled to think what complete SOBs some people in the business world are. To make that disabled person at the job interview sit through such insulting or insensitive questions or remarks! Why, anyone would want to pass a law.

Well, we can agree that a debate needs to be more than just that. Stories of striking injustice or unfairness from real life can get people focused on the question of whether a problem requires a legal remedy, but it can't fully answer that question until you look at other parts of the equation. What are the costs of moving in one direction versus the costs of moving in the other direction? In fact, we have now had the ADA for nine years, and an awful lot of experience has accumulated under it. I'll get to some of that experience in a moment.

Another reason it is legitimate to discuss individual legal cases—and where both sides do discuss such cases, both proponents and critics of the ADA—is to help answer the question: where exactly does the law stand? What do courts around the country believe that employers can legitimately be sued for not doing, by way of accommodation?

That is, by the way, a more complicated question than nonlawyers necessarily realize. You get one set of answers if you ask which fact patterns have resulted in cases lost by employers where the loss was upheld on appeal. You get another sort of answer if you ask which fact patterns have led courts to give a green light to suits denying summary judgment for the employer, to say, "yes, this does state a claim under ADA, now take your chances with a jury and with further litigation." Most cases where courts make the latter ruling never reach trial, because most companies will settle a case at some point between failing to win the summary judgment motion and eventually losing at some final verdict.

If a claim has gotten past summary judgment and perhaps even made its way into the Federal Reports, or another reporter, as stating a valid **[\*1821]** cause of action, then in my view it's perfectly legitimate to incorporate that into the debate about where the law stands. You don't want to wait for thousands of employers to defy it.

This brings us to the Florida case against GTE where the guy had been found stealing thousands of dollars from his co-workers' purses and desks at this quiet computer office. GTE is apparently a very broadminded company, because they didn't fire him even after that revelation, but they did fire him when someone opened his briefcase he had left behind and found a loaded gun that he had brought to work. He went off to federal court and his failure-to-accommodate claim for his disability of chemical imbalance, in fact, survived GTE's motion to dismiss.

When I cite that case, I see as its legal significance the fact that even though he went on and lost at trial, the initial opinions held that you've got to take your chances at trial on a case with those facts. When employers talk to their lawyers, the calculation is if a case can get that far, they had probably better consider making a serious offer on it. That's the usual practical effect when a case gets past summary judgment.

So individual cases can shed a lot of light on the current state of the law. And that state ought to give serious pause to employers and, indeed, to disabled people themselves who are wondering what they are entitled to ask for, because the definitions of terms like disability, which were deliberately drawn vaguely, have been only slightly clarified. Yes, there have been a few issues that have been clarified, but it's still frighteningly vague. You will still often be guessing whether the employee or job applicant who might be facing you before a jury five years from now—and who knows how long it will take in most jurisdictions to reach trial—will at that remove in time and distance be interpreted as considered to have been disabled or not.

So you still have to guess on that. You still have to guess on reasonable accommodation. That's an area both human nature and financial incentives tend to impel employers to lean way over backward to accommodate, because the legal consequences of guessing wrong are really serious.

So where does the law stand doctrinally, as illustrated by individual cases? This summer there was much hoopla over the mitigation cases, where the Supreme Court decided that perhaps you should not be covered by the ADA if you could see perfectly well with your glasses on, but have a lot of trouble seeing without your glasses. The justices reasoned, in part, that Congress must have intended the statute to be reserved for the originally specified forty-three million disabled people, rather than the larger number that the court believed would be swept under the cloak of the ADA by the more liberal view of mitigation. This led to a little boomlet of op-eds saying, in the words of one distinguished ADA proponent not present here, that the "heart had been ripped out of the ADA."

Statistics on what percentage of people in various populations view themselves as disabled are still interestingly unstable. I would point especially to the situation in the schools, which foreshadow perhaps ten years in advance what is going to happen with the workforce at all of your companies.

You see more and more designations as disabled and the accompanying requests for accommodation, extra time on tests, special tutoring, laptops, reference books to be brought in for the SAT, and many other such things. As the numbers march up in many states they come to exceed what had been anyone's highest estimates of how many kids might count as disabled.

In my own state of Connecticut, in Greenwich, well-known as one of the most affluent towns in the country, the Hartford Courant reports that nearly one third of the graduating kids at Greenwich High School now have a disability designation. It's a striking and puzzling statistic. This is not, I can assure you, because Greenwich has bad public health and these kids are thus physical wrecks. Indeed, Bridgeport, which does have relatively bad public health, has an extraordinarily low rate of disability designation for its students. So something is going on here other than an objective set of diagnostic methods, and I think part of the answer is that Greenwich is a wealthy and sophisticated community where people know how to get certain types of benefits by hiring the right types of professionals.

This is all, I fear, going to move first into secondary education, where universities are being turned upside down in many cases by the variety and extent of accommodation demands on testing and curriculum, and also in professional credentialing, where the law exam, the medical exam, and other credential exams are all typically under litigation pressure now.

But after that, inevitably, it arrives in workplaces like yours, and I just hope that you're ready for it, because there is a momentum here which, combined with a vague underlying law, I suspect will increase your caseloads in years ahead.

DR. BLANCK: Don't buy into the fear, because that's what sells books. That is not what this debate is about.

(Laughter.)

We can get into the education side, if you like. It is clear that there are always going to be marginal players who push the system. I don't know what's going on in Greenwich, but for every kid in Greenwich, say, from a wealthy home, who gets an Attention Deficit Disorder diagnosis, there are ten times as many kids who are from the inner city and who are poor and cannot afford those same high-dollar psychologists, and who are labeled as behavior problems and end up in the criminal justice system.

MR. OLSON: What a terrible thing to say about the system. What a judgement on the ADA, that we have turned it on both sides, rich and poor, into something where the outcomes vary so far from any objective analysis of how to help kids.

DR. BLANCK: Well, that's my point. The point is that fearmongering is not helpful. What is helpful is a reasoned debate and study of the issues, from a cost perspective, as well as from a cultural value perspective.

I had the opportunity to listen to Dr. Rifkin yesterday briefly. He was talking about the same thing. "Do no harm first," was one of his suggestions [\*1823], and, in large part, what are the values that we want to derive from our society? If you have a kid who's smart who uses a wheelchair, do you want him to go to school on the "cripple bus" by himself, or do you want to try to get him on the bus with all the other kids to go to school? There are going to be people who take advantage of the system. There are going to be employees who file frivolous claims. We know that. You deal with that every day.

The question is, what does this say about our society? What does this say about competitive employment strategies for the next century? What are the values that are embodied in the ADA that we would like to bring to our children? To me, the values include inclusion, tolerance, and a broader thinking about individual involvement in our society.

Remember, the ADA is an anti-discrimination law. The cases that are brought many times are outliers. Many of you have probably been experts or fact witnesses in cases involving ADA or other cases that your companies were involved with. It often is not the best employees or the employees who are really in good faith bringing those cases. Many times they have merit, of course, but many times the cases that are highlighted by the press are the outliers, the anecdotal stories.

If you come away with anything from this debate, whether I or Mr. Olson am right or wrong is not the question. I think it is a broader thinking about a diversified workforce that is of value to you as employers, and how you might use the ADA to transcend what you've been doing in the past.

For example, there are criticisms about the Job Accommodation Network. There are some pluses and minuses about it. The President's Committee set up this operation where small and medium-sized businesses can call about accommodation requests. The fact of the matter is, it depends on how you interpret the statistics. Before the ADA there were few calls, and they had this system up before the ADA and after the Rehabilitation Act, and since the ADA there are many times more calls and dialogue about how employers should deal with accommodation issues.

Does that mean that the cases are not complicated? Of course they're complicated, and sometimes they are not feasible, and sometimes they are not cost-effective. But many times they are and they enable learning which transcends that particular disability. That is the point I was trying to make earlier with the Sears study.

MR. OLSON: Let me introduce a point that neither of us have made, but which heightens what I think of as the mystery that none of us have a good answer for, and I don't claim to have that great an answer myself, that is about technology. We live in an age which ought, by all accounts, to be the golden age for disabled employment in all of world history.

What has technology done for us? Technology has brought talking screens. It has brought microcontrols so that muscular strength is no longer needed for all sorts of operations where it would once have been required. Technology has brought a hundred extraordinary applications with which to get around the disadvantages of disability, as we all know if we've surfed [\*1824] around the remarkable features on Microsoft Windows or the various other programs familiar to us. Many of these are designed with direct input from the disabled community themselves to be exactly what those communities need to bring the technologies within reach.

This, by all logical rights, should have led to a golden age of new hiring and new entry into the labor force. If that didn't do it, then the extraordinary expenditures on architectural barrier removal, on transportation, on higher education accessibility, many of them sunk costs now< >in the 1970s and 1980s, we did them once and we won't have to do them again< >that in combination should also have produced a golden age.

So I return to the bad statistics. Everyone felt they would get better. Some said that the ADA would pay for itself. In fact, quite a few of the proponents, although not all of them, said that. We now know that labor force participation by the disabled has gone down, rather than up.

Can it be that the law has backfired and has made people feel more threatened about reaching out or going out on a limb? I think that sometimes happens. Whether it happens enough to be driving the numbers, I don't assert, but something has gone on that no one, including me, predicted in the numbers turning bad.

One possible factor is the fear of loss of government-provided health benefits because, in taking a private job, the disabled person either will be accepting less attractive health benefits or will risk losing them if the job ends. Some surveys suggest that most of the underemployed people at the margin in the disabled workforce have, over the years, had jobs available to them and were choosing not to take them. Probably this issue of health coverage was an extraordinarily important reason, and possibly we're going to see significant progress now that legislation has just moved through Congress to rectify that.

But if so, isn't this an extraordinary judgment on the ADA debate--that the proponents didn't bring up the health-care issue, and that they instead blamed discrimination on the part of the employers of America, when it turned out it was a matter of the logistics of health care delivery which the federal government could have fixed back then if it had cared to? It seems to me that if health coverage turns out to be the reason why the numbers have been so poor and did not get better after the law was passed, then someone owes someone an explanation about why it was insisted that employer prejudice was the big problem.

But one way or another, every one of us agrees that it is a distressing sign, and that we want those numbers to go up, rather than down. We have tried the adversary approach now for quite a while. I wonder whether we're heading in the wrong direction with it.

DR. BLANCK: If you come away with another point from this discussion, Mr. Olson's secondary analysis, of anecdotal information and newspaper accounts about the labor force participation rate of people with disabilities, is not correct. [\*1825]

My colleague Susan Schwochau and I have an article on this topic.<sup>3</sup> Our conclusion is that there is no definitive answer. We analyzed two papers by economists from MIT and from Chicago. They have findings in their papers that suggest that the labor force participation rate generally after the ADA, of people with disabilities, has gone down about eight percent, and that of those people with disabilities in the workforce, their wages have gone up somewhat.

However you cut their data, what Mr. Olson and many other newspaper writers and others fail to report is in those same studies, which they talk about as saying the labor force participation after the ADA has dropped, these same economists, who are not particularly favorable to the ADA one way or the other, find that since the ADA was enacted, labor force participation by women who have disabilities and are over age forty, relative to women without disabilities has increased. These studies also assert that minorities with disabilities' labor force participation has increased since the ADA, and that labor force participation rates have increased for individuals who are injured on the job.

Are the labor force statistics overall bleak? You bet they are. There is a tremendous need in our country to figure out the reasons behind the high unemployment rate for people with disabilities. But do not buy into this spin that there's somehow a causal relationship between ADA and a decline in the labor force participation of people with disabilities. At best, the results are mixed and certainly, as Mr. Olson has pointed out, there are other important factors going on here, the most important of which relate to health care benefits and reforms that society is now implementing through the Workforce Investment Act and the Ticket to Work and Work Incentives Improvement Act,

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<sup>3</sup> Susan Schwochau & Peter David Blanck, *The Economics of the Americans With Disabilities Act, Part III: Does the ADA Disable the Disabled?*, [21 Berkeley J. Emp. & Lab. L. 27 \(2000\)](#).

to name a few. These policies will hopefully help, in a thoughtful way, and enable people with and without disabilities who cannot afford health insurance, but who want to work, to work.

MR. OLSON: Well, you have just been warned in stern terms not to buy my proffered statistics that labor force participation by the disabled has gone down since the passage of the ADA. So, of course, my ears pricked up and I listened with care to the exact details of this still unpublished study, which appears to reveal that, yes, Olson was right. Labor force participation rates went down on average, but if you look at subgroups like women or minorities, they didn't go down.

That suggests to me that if you look at men or non-minorities < certainly, if you look at men, and I think I've figured out the ratio of women to men > that they must have really plunged horribly in order for the overall average to have gone down. I do not rely on these statistics lightly. They have been coming out over the past decade. Initially, there were rough and ready studies from a firm called Vocational Econometrics. They were sort of a cloud on the horizon. The numbers looked bad, but everyone tended to dismiss them. **[\*1826]**

Then the supporters of ADA came out with a study based on census data which attempted to show that the law had actually improved employment numbers, and the supporters made an enormous hoopla about that. I can send you to all the newspaper clips in which Tony Coehlo and others were taking direct credit on behalf of the ADA for what was a brief improvement in disabled labor force participation rates, while omitting the fact that the period they were measuring was from the trough of the 1990 recession when, of course, the ADA was passed, to the economic recovery. Well, yes, if you have an enormous economic recovery, you can sometimes overcome even a bad trend in labor force participation, with the net effect being that the numbers go up slightly for disabled workers, while improving more robustly for the nondisabled. Well, after a further year or two, the numbers clearly turned back down and we heard no more of those statistics, but the overall decline has now been confirmed from about four different sources.

Last fall, Professor Blanck and I testified on different days before the United States Civil Rights Commission's hearing on The ADA: Where It Has Come From and Where to Go From Here, and I listened with care to the consensus of the other panelists who discussed this issue, and they, with their elaborate quantitative apparatus, appeared to have all reached a consensus. Yes, the numbers have gotten worse. This does not seem to be any longer something where it's confusing enough so that we can't tell whether they've gone up or down. They have gone down.

DR. BLANCK: The issue is: What are you going to expect of your labor force in the next century? Are you going to take a fear-policeman approach? Or, are you going to see an opportunity to examine your corporate culture in a way that helps you diversify your workforce and help you make money? You are in business to make money and your clients are in business to make money.

Are you going to learn from those statistics in a way that helps you make a more informed decision? It is true, I would concede to Mr. Olson, that the results are mixed, but I don't believe any single definitive study to date can tell us, unless you're pointing to one that I'm not aware of, that in fact this law, which is an anti-discrimination law, has in a major way depressed the employment rate of persons with disabilities.

We're at a time now when you are thinking about new ways of approaching your businesses. Risk management and injury prevention is where the money is spent. It's in figuring out how to maintain a qualified workforce. It's in figuring out your corporate culture. It's in figuring out how to recruit qualified workers < how to attract them and how to retain them.

This is an opportunity in the context of this discussion to examine your workforce in ways that far transcend the ADA. This law is, of course, an important law. It's a civil rights law; it's an anti-discrimination law. It also is an opportunity to give you a platform to rethink your business strategies. **[\*1827]**

Yes, there are going to be case outliers. Yes, there are going to be critics of the law. Yes, there are going to be costs involved. The question is, do the benefits outweigh those costs? Moreover, the debate goes to the types of values you have with regard to the type of organization you want to be a part of.

MS. REESMAN: That's where we're going next.

DR. BLANCK: By the way, I believe that the Supreme Court was wrong in their decisions this summer on mitigating measures. Eight of the nine appellate court decisions had gone the other way, the relevant federal agencies had gone the other way, the legislative history went the other way. Does that mean that it's a major defeat for the ADA? It may make it tougher for plaintiffs to have their day in court. Every single case that Mr. Olson is talking about has to do with legal standing. It has nothing to do with winning on the merits. Yes, that is the cost of doing business, of defending yourself in court. That's certainly true. Mr. Olson hasn't, however, brought up the American Bar Association survey illustrating that between eighty-five and ninety percent of ADA plaintiffs are losing in court, mostly on this definitional issue. Does that mean there's some vagueness in the law and perhaps it could be clarified? You bet, and that's what the judicial process is involved with.

I don't know how many people in this room would have said, if we were of age, that ten years after the Civil Rights Act of 1964 we should throw it out because it's vague and confusing. Well, Mr. Olson may have, but there may be others in the room as well.

We're still grappling with those very complex issues involving bussing and integration and so forth, and we have learned that this is not an issue that's going to be solved overnight. Likewise, it's only been eight years since the ADA employment provisions have been in effect.

#### QUESTIONS

DR. PRANSKY: Glen Pransky, University of Massachusetts and Liberty Mutual Research Center. Here's a very positive, unintended consequence of the ADA that I think is quite significant, and that's that the ADA has saved us from ourselves in the area of preemployment and preplacement examinations. I believe this act recognized something that had no scientific defense to it and was having a significant negative impact on the people who the act was intended to cover, as well as many other people, and that is asking questions and performing examinations that really had very little merit in terms of predicting future risk or fitness.

I think that the best objective evidence I can say for this is that the companies that thought they were going to make a fortune having people sit in a machine and move around in awkward postures and do motions that have absolutely nothing to do with their work performance, most of them are teetering on bankruptcy, and it's where they should be, I think, because the output of those exams doesn't tell me or anyone else very much about somebody's future risk on the job. [\*1828]

On the other hand, I know of another negative unintended consequence, and that's that the employer, being ultimately responsible for making the decision about medical standards and hiring for the job, is now the person who owns the medical record of the preemployment or preplacement examination, and I believe that creates a lot of fear for workers who are filling out forms, as well as a conduit of sensitive medical information to individuals who aren't prepared to interpret it.

So I wonder if both of you could address these two issues.

DR. BLANCK: Thank you, Dr. Pransky.

Dr. Pransky and I have just co-authored a chapter, which is in your packet, entitled *Workers With Disabilities*.<sup>4</sup>

I was thinking, as an empirical matter, to me another unintended consequence of the ADA is that most companies have job descriptions for their employees. You know what's expected of your employees.

Now, there's this debate that Ms. Reesman and I can have about job reassignment and who is qualified and who is not qualified and so forth. Nevertheless, I believe that an unintended side benefit of the ADA has been to

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<sup>4</sup> Peter David Blanck & Glen Pransky, *Workers with Disabilities*, in 14 *Occupational Medicine: State of the Act Reviews* 581-93 (Howard Fromkin & Glen Pransky eds., 1999).

reconceptualize the way people do jobs and to reconceptualize this in a format that enables employers to make better strategic decisions about who's doing what and why.

Are there costs to that? Of course there are costs to that. There are indirect costs. My view is that the benefits outweigh the costs. The same thing is true with medical screening, regarding what Dr. Pransky has said.

Spring your trap.

MR. OLSON: I am glad the question was brought up. I was a bit startled and wondering whether this was an official position of Liberty Mutual Insurance< >that they're glad that preemployment inquiries have been suppressed in so many areas.

It seems to me that the suppression of preemployment inquiries is a very bad aspect of ADA if it more often ties employers' hands from taking into account legitimate information than it does foil their efforts to somehow become too well informed. I am thinking here, for example, about the inability to inquire into substance abuse problems that are not "recent." You know, some say an employer can only ask questions going back to a five-year cutoff, and some say even that is too far back. It seems to me that many of you employers are entitled to know about backgrounds of serious addiction, if only so that you can be sure that these people get help, should they have further problems.

Or take the ergonomics controversy currently in the news. I get asked by many employers, "Why is it they are now stopping us from asking people about work histories of carpal tunnel syndrome, thus ensuring that more of them get injured, since we put them on the kind of job where that's a risk? It's almost certainly going to lead to more injury if we don't have a right to know that they are people at risk because of their physique or other vulner [**\*1829**] abilities."

I don't have a good answer to give them. Why would the law be set up to encourage more injuries by preventing employers from getting a synoptic view of the potential risk factors when they must hire people for potentially injurious jobs?

DR. BLANCK: The answer is because the ADA doesn't. It's because you can make certain inquiries before hiring and you can make certain physicalrelated abilities or agility tests after.

With regard to the point earlier about preemployment medical inquiries, just consider the potential for genetic discrimination. Do you want every woman coming to the employment session with her history of potential for colon cancer, breast cancer, any other cancer or precondition, and then employers making hiring decisions on that basis alone? You may decide you want that. To me, that's not a valid indicator necessarily of, number one, whether the person's going to get the disease or not, or two, of how they're going to perform on the job.

MR. FLYNN: It's fascinating. I'm going to propose a question that arose in our session yesterday that relates to some research that you're engaged in with Cornell University and the Lewin group, and that is I personally believe< >and it may or may not be borne out in statistics< >that the efforts of employers to do disability management have resulted in the retention of a lot of folks who might otherwise have been disability benefit recipients.

However, are there incentives to hiring new employees with disabilities, especially given the fact that we do see studies that clearly indicate that the cost of medical care for people with chronic disabilities is much higher than those without disabilities?

I'd be interested in hearing both your views on whether, in fact, there really are any incentives to go beyond simply retaining employees who become disabled while they're working and hiring new employees with disabilities.

DR. BLANCK: Well, Mr. Olson and I will probably disagree on this point as well. I believe that, as a society, we might make a determination that our value is through this Workforce Incentives Act and other acts, that we are prepared to help people with serious disabilities pay for their health insurance needs over time, so that they can get

into the workforce. The net result will be a reduction in welfare benefit payouts. That's what this debate over the Workforce Incentives Act is about.

Many states have enacted these so-called Medicaid buy-in laws, and they're simply a way, at competitive insurance rates, in which a person with a disability can retain their Medicaid health insurance benefits, and not fall off the so-called income cliff if they earn more money by going back to work.

The question is, as a society, what sort of financial incentives to work do we want to create? I believe Medicaid buy-in is one important strategy that provides a bridge to full-time employment for people with disabilities. [\*1830]

Are there costs involved? There certainly are costs involved. Are there potential benefits? Yes, there are potential benefits. We need to understand whether those benefits outweigh the costs.

MR. OLSON: Bruce, your question is quite right about throwing a spotlight on the fact that hiring and termination operate in completely different ways as far as their response to legal incentives. You see this in other laws as well, in discrimination laws, in pretty much every way in which employers can get in legal trouble.

You start out with the underlying incentives, which are that turnover is incredibly costly at most companies. Most well-run companies will lean over way backward to prevent a turnover if a person has been doing a decent, average, or even somewhat subaverage job. It's bad for morale to have turnover, the retraining, the vacancy, the uncertainty < >all this you know.

Since turnover is enormously expensive, even aside from anything happening by way of legal exposures, companies have had reason all along to work with employees who are in a return-to-work situation where they could be brought back with an accommodation, or employees on the job who are subject to new or more severe disability but who, with an accommodation, could be saved from having to depart the workplace. When I read ADA cases that make it to the litigation reports, I'm often impressed by how far the employer had indeed tried to lean over backward. The employers have often tried a lot of different things, but they haven't tried the right combination to outguess the uncertainty of the law's terms.

Hiring is very different. In hiring cases, you've often got multiple candidates. The cost of picking one over another is not the \$ 40,000 that some companies pay on average every time they undergo a turnover. It's closer to zero. It can seem awfully cheap to go with the "safe" applicant and not take a "risk" on the disabled applicant who may have some very interesting strong pluses in their background, but who also makes you wonder, "What if they don't work out? You know, this will pose new problems in management that I haven't had to deal with. Maybe I should just take the safe applicant who's just like the people I've always hired for this."

This is the problem that disabled people face, the problem of getting in the door in the first place. Surveys have found that conversation in job interviews and elsewhere is not as easy when you are different from the norm, when you don't look just like the last ten people who have come in for the interview. This is going to be a problem, given human nature, in any case. Have we made the problem better or worse? Have we made the job interview more tense or more relaxed by these enormous penalties for asking the wrong question during the interview?

On this question of how the law has wound up affecting the numbers, I believe you could point to plenty of cases where it's worked as intended in keeping people at the workplace who otherwise might have left or not had a return to work.

But on the hiring side, I have been told the same story again and again by individual companies and managers. They would never go on the [\*1831] record about it, because it would get them in legal trouble to do so. But what they say is that they've seen managers, which may include themselves, who are less willing than they used to be to go out on a limb to hire a disabled person who they fear might not work out. I've heard from people at companies that used to have conscious and well-organized programs to hire the disabled, some dating back to World War II, of which they were proud, programs they would showcase in their annual report. They would at one point have seen it as part of their socially responsible nature to have had the highest percentage of disabled workers on their payroll in



their industry. Now they get this steady drip, drip, drip of advice from their lawyers saying, "You know that this is a high-cost way to be socially responsible, to deliberately go out in search of having a higher percentage of disabled."

Well, I told them, please ignore your lawyers. Don't always listen to them. But what awful incentives for a law to be creating.

DR. BLANCK: This week, this past week, Microsoft, which is one of the largest corporations in this country, announced that it is putting together a consortium called the "Able to Work Consortium." Some of you may be familiar with it. A dozen, at least, maybe more, major corporations signed on to a commitment to enhance the hiring opportunities for employees with disabilities. Is this just a nice effort or a charity effort? Are these companies investing in the future of a diversified workforce for people who can contribute to their bottom line?

Maybe it's a combination of both. I cannot believe that every time an employee with a disability is hired, that it is for some reason that is not related to cost-efficiency questions. I have not seen the types of examples to which Mr. Olson is referring.

Don't fall into this lawyer bashing trap. The lawyer can be your friend, too. A lawyer can help you out with things. All lawyers aren't bad, and all lawyers don't want to just sue everybody.

MR. OLSON: We agree on that. Many times I've heard the difference among advisory lawyers described as being between green light lawyers and red light lawyers. There are lawyers who want to help you accomplish your objectives with a minimum of confrontation, the peacemakers, and there are lawyers who will lead you into conflict. So hire the former type of lawyers.

MS. REESMAN: We have time for one more question. Yes?

MR. DOUGLAS: Bruce Douglas from Marsh Risk Consulting. I'd like to point out two other unintended consequences of ADA that have not been mentioned today.

We are finding, rather dramatically today, as we go from one company to another with aging workforces, that the chronic illnesses that are frequently referred to, or the handicapping conditions frequently referred to and acceptable under the ADA, which we call comorbidities in the workplace, are being recognized because of the ADA. It's created a neutralized territory between employees and employers, and they're no longer being used as easily to push older people out of the workforce because of the ADA [\*1832] and because of the sensitivity that arises in their concerns for discriminating against people because they have these conditions.

That's very evident, and I think that as we get into the new era where the aging workforce is going to become more and more important, that the preservation of older skilled workers who happen to have < >because of the fact that they are older and that they've been around longer < >happen to have what we call comorbidities, will become a very relevant issue.

Secondly, you haven't talked at all about something that has had a profound effect on me personally. Up until the early 1990s, my hearing defect, which was service-related and which I handled as well as I could, was largely handled with inadequate hearing aids. Up until the early 1990s, my hearing aids were virtually useless to me. Research has evolved in many fields during the 1990s since the ADA, stimulated in part because of the technological orientation of the ADA that today has led me to have hearing aids that make it possible for me at my age to continue to function in society, and to be able to sit here at this meeting.

I needed those people ten years ago. Today, I don't, because I have advances in my ears that I believe have been markedly affected, as many other technological advances have been affected, by the pressure that has evolved out of the ADA. I don't know whether you wish to comment on this, but I think these are two unintended, very important consequences.

DR. BLANCK: Outstanding comments, both of them, and I would just give you a quick reference for any of you that want it. Dr. Heidi Berven and I have conducted a series of articles tracking the economic consequences of every

patent listed in assistive technology that has been filed with the Patent Office since 1990, which help people with different types of disabilities have a technological advantage, or at least level playing field to get back into the workforce.<sup>5</sup> Your question with regard to the aging workforce speaks for itself. That's an outstanding comment, and it's absolutely correct.

MR. OLSON: I will need to be brief, but on the technological advance, it is hard to sort out. Certainly, if you are filing a patent for one of these devices, you're going to throw in a mention of the ADA. There has been objectively, it seems, a big boost in technological innovation, some of which can surely be traced to the fact that the development of microprocessors, audio and video technology, and many of the other component technologies were exploding because of the age we live in. Aside from that, did the ADA help? We will need further research to figure out what kind of impact it may have had.

On the first point, though, you know, they said so much about who would wind up using the ADA, but it turned out to be a different group that has mostly invoked the law. You know, persons with bad backs, stress, various other conditions have way outnumbered the traditional blind, disabled, paraplegic groups. **[\*1833]**

DR. BLANCK: You're talking litigants.

MR. OLSON: In terms of complaints filed with the EEOC, whether or not they proceed to litigation, they've outnumbered the traditional disability categories by very, very large margins.

One of the fun lines from the disabled rights literature, which I've picked up and used for my own, is that all of us in this room are all divided between the disabled and the predisabled. Predisabled simply means that disability is a natural part of the human condition. If we don't get it earlier, then we will probably get it later, unless we're in the small fraction that dies in a plane crash or something similar.

Given that it is an immemorial part of the human condition and as predictable as anything in life can be, Congress should have done a better job of anticipating it < >figuring out how it will be measured and defined and what constitutes compliance for employers faced with the aging-related disability of their workforce. The other claw of the legal pincer, after all, is that the law has simultaneously banned the practice of automatic retirement at sixty-five or any other age. When automatic retirement was banned, companies figured, well, we will instead use impairment as the criterion for when people should leave our employ: When the person is having trouble doing their job or trouble making it into work regularly, that's going to be the cutoff when they have to leave.

Parenthetically, that impairment-based cutoff is, in my view, a much crueler cutoff than sixty-five used to be, because sixty-five wasn't personal, whereas now you have to leave because personally you can't handle the job any more. That is the last thing we need employers capping someone's career with.

Nonetheless, that's what employers thought they would be allowed to do. But now they learn that they simply get into a new range of obligations. The employee can now say, "My arthritis is worse, I can't make it in as early in the morning as I used to because of morning stiffness. But this isn't my problem. This is your problem as the employer because you have to accommodate my disability." What the employer's legal obligations are in the arthritis cases and others is still, as I said, up in the air, something the lawyers are thrashing out and you will live with whatever result they obtain.

DR. BLANCK: Brief closing remarks: Think out of the box. Think creatively. Don't be driven by fear and misconceptions. At least do the data analysis for yourself and figure out what's cost-effective for your company.

You are all here because you're already thinking about the benefits side of the equation. You are investing your time because your CEOs and others believe that the benefits of retaining qualified workers with disabilities is greater than not.

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<sup>5</sup> See, e.g., Heidi M. Berven & Peter David Blanck, *The Economics of the Americans with Disabilities Act Part II--Patents and Innovations in Assistive Technology*, 12 *Notre Dame J.L. Ethics & Pub. Pol'y* 9 (1998).

It has been a pleasure to talk with you today. Thank you.

MR. OLSON: Thank you so much for your attention.

(Applause.)

MS. REESMAN: Mr. Olson, did you want a two-minute closing?

MR. OLSON: No, no, that's fine. **[\*1834]**

MS. REESMAN: We've been there already?

Okay. In that case, again, please join me in thanking Mr. Olson and Professor Blanck.

(Applause.)

(Whereupon, the meeting was adjourned.)