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Chapter 10

The Americans with Disabilities Act at Thirty Years

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10.1 INTRODUCTION

This chapter offers a glimpse of the Americans with Disabilities Act (ADA) of 1990, as amended by the ADA Amendments Act of 2008 (ADAAA),[2] at its thirtieth anniversary. It considers current issues before the American courts, primarily legal cases from 2020 and 2021, and new questions in light of COVID-19, such as the latitude of the ADA's antidiscrimination protections and its definition of disability. It also provides a quick primer on the basics of the ADA: employment discrimination under Title I, antidiscrimination mandates for state and local governments under Title II, and commands to places of accommodation offering services to the public under Title III.

All the matters addressed here, have been complicated today by the pandemic and the resulting global health and economic emergency. The pandemic is profoundly affecting the lives of persons living with disabilities across the life course, whether they are living in poverty; have multiple, intersectional minority identities associated with race, ethnicity, sexual orientation or gender identity; are addressing the limits of age; or are facing the many and varied challenges of disability otherwise or in conjunction with other life experiences.[3]

My recent book, *Disability Law and Policy*, examined the ADA at its thirtieth year, but it was written during the years immediately preceding the pandemic.[4] Prior to the pandemic, by most estimates, there were sixty million individuals (almost one in five) in the US living with disabilities, although not all were necessarily considered "disabled" for the purposes of the ADA. Before the pandemic, more than one quarter of working-age people with disabilities in the US were living below the poverty level. This

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2 42 U.S.C. § 12101, et seq.

3 *See, e.g.,* Peter Blanck, Ynesse Abdul-Malak, Meera Adya, Fitore Hyseni, Mary Killeen, and Fatma Altunkol Wise, Diversity and Inclusion in the Legal Profession: Preliminary Findings from a National Study of Lawyers with Disabilities. *University of the District of Columbia Law Review*, 23, 23-87 (2020); Peter Blanck, Fitore Hyseni, & Fatma Altunkol Wise, Diversity and Inclusion in the Legal Profession: Workplace Accommodations for Lawyers with Disabilities and Lawyers Who identify as LGBTQ+. *Journal of Occupational Rehabilitation*, 30, 537-64 (2020); Peter Blanck, Fitore Hyseni, Fatma & Altunkol Wise, Diversity and Inclusion in the Legal Profession: Discrimination and Bias Reported by Lawyers with Disabilities and Lawyers Who Identify as LGBTQ+, *American Journal of Law and Medicine*, 47, 21-63 (2021).

4 Blanck, *supra* (2020).

was over twice the number of those without disabilities.[5] Despite some modest declines in unemployment rates during the years immediately preceding the pandemic, people with disabilities were still disproportionately excluded from the labor market and from other economic, social, and civic opportunities.[6]

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

In the US, disability law itself is almost wholly statutory. This means that it is derived primarily from federal and state laws and policies, as opposed to sweeping interpretations under the Constitution. As these laws, such as the ADA and the Rehabilitation Act of 1973, have developed, the courts below the US Supreme Court—the District Courts (trial courts) and the thirteen Courts of Appeals (designated by circuit number, for example, the First Circuit)—typically interpreted and shaped enforcement of these statutes, giving them broad scope in certain instances and narrow latitude in others.

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

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5 Blanck, *supra* (2020).

6 *See* Lisa Schur, Douglas Kruse, & Peter Blanck, *People with Disabilities: Sidelined or Mainstreamed?* New York NY: Cambridge University Press. *See also* Mihael Morris, Nanette Goodman, A. Baker, K. Palmore, and Peter Blanck, Closing the Disability Gap: Reforming the Community Reinvestment Act Regulatory Framework. *Georgetown Journal on Poverty Law & Policy*, XXVI(3), 347-74 (2019); Michael Morris, Christopher Rodriguez, and Peter Blanck, ABLE Accounts: A Down Payment on Freedom, *Inclusion*; 4(1), 21-29 (2016)..

activities as well as the undertakings of private businesses offering services to the public (ADA Title III).

The ADA perspective on disability reflects a rights (or civil rights) model that began to influence US government policy in the 1970s. The disability rights model, and the parallel "social" (or ecological) disability model, both view persons with disabilities as a minority group, entitled to the same hard-won legal protections for equality that have emerged from the struggles of African Americans, women, and individuals with differing sexual orientations and gender identities.[7]

Coming later but working somewhat in parallel to the ADA, the United Nations Convention on the Rights of Persons with Disabilities (CRPD) was a groundbreaking international treaty reflecting a new global era in disability human rights. The CRPD established a foundation for equal protection and treatment of people with disabilities across a wide range of basic human rights. As with the ADA, the CRPD recognized disability as a label applied when people with impairments confront attitudinal and environmental (structural and policy) barriers that hinder full and effective participation in society on an equal basis with others.[8]

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

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7 Blanck, *supra* (2020).

8 *See, e.g.,* Anna Lawson, The United Nations Convention on the Rights of Persons with Disabilities: New Era or False Dawn. Syracuse Journal International Law and Commerce, 34, 593-595 (2007).

10.2 LANGUAGE, CULTURE, AND THE ADA

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

Language usage, which is closely tied to culture, impacts the interpretation of the ADA and its related laws. Hence, it is evident that disability language preferences and usage not only vary greatly, but also change over time and context. Not too long ago, the labels for persons with intellectual and developmental disabilities included "feeble-minded," "idiot," "moron," and, more recently, "mentally retarded." Individuals labeled that way did not have many of the basic rights provided today by the ADA.

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

Not all individuals with disabilities or groups supporting people with disabilities endorse the ADA's person-first language in all circumstances. The National Federation of the Blind may refer visually challenged persons as "blind people." In deaf culture, individuals may refer to themselves or other such people as a "deaf person" or "hard of hearing person." In the Autistic community, someone may be referred to as "autistic individuals" or "being on the spectrum." The notion of "neurodiversity," as a naturally occurring aspect of the human condition, is one way that people describe

themselves or others with neurological differences. Others with neurodiversity may describe themselves as having conditions, such as dyslexia, attention deficit hyperactivity disorder, and autistic spectrum disorder.

Just as there is individual complexity embedded in language, there are personal and social attributes of self or others reflected as unique individuals and having "intersectional" qualities. These identities and social roles are not monochromatic. Instead, they are multiple and influenced by context, language, time, history, and other factors external to individuals. People often have multiple minority identities that are heterogeneous. These add to the myriad and often complex ways to understand and consider the concept of disability. These identities exist for all people and are not necessarily additive. Disability is intertwined with race, gender identity and sexual orientation, age, and other identities to produce uniquely individual selves. The ADA requires, as many laws do, that individuals protected by the law be "disabled," but this co-occurs with other primary identities. Outside the language of the ADA, disability identification is only a starting point to express deeper, nuanced presentations of the "self" and "others."

The concept of disability in the ADA, however, is somewhat bound by the culture from thirty years ago. In fact, it still evidences attitudinal and structural biases towards people with disabilities, especially for those who identify with multiple minority identities—gender, race, ethnicity, LGBTQ+—and with their intersections.[9] People with multiple minority identifications continue to experience some of the largest disparities in full and equal access to society and discrimination. Yet, for purposes of the ADA, such intersectional presentations largely are constrained by the limits of the law's definition of disability.

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[9] *See, e.g.,* Peter Blanck, Ynesse Abdul-Malak, Meera Adya, Fitore Hyseni, Mary Killeen, and Fatma Altunkol Wise, Diversity and Inclusion in the Legal Profession: Preliminary Findings from a National Study of Lawyers with Disabilities. *University of the District of Columbia Law Review*, 23, 23-87 (2020); Peter Blanck, Fitore Hyseni, & Fatma Altunkol Wise, Diversity and Inclusion in the Legal Profession: Workplace Accommodations for Lawyers with Disabilities and Lawyers Who identify as LGBTQ+. *Journal of Occupational Rehabilitation*, 30, 537-64 (2020); Peter Blanck, Fitore Hyseni, Fatma & Altunkol Wise, Diversity and Inclusion in the Legal Profession: Discrimination and Bias Reported by Lawyers with Disabilities and Lawyers Who Identify as LGBTQ+, *American Journal of Law & Medicine*, 47, 21-63 (2021). *See also*

10.3 HISTORICAL MODELS OF DISABILITY AND THE ADA

Disability language and identity are inescapably tied to history, culture, and political considerations at large. The ADA's definition of disability is the way in which the American society chose at a particular, arguably politically unique, point in time to aim to prevent discrimination against people on the basis of their human differences. However, a long history preceding the last thirty years also came into play, and it still can influence how some matters are decided today. Earlier categorizations of difference have perpetuated unfair and stigmatized views about disability on a nationwide scale dating back at least to the US Civil War pension system of the 1870s.[10]

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

In US language and perception, the pension system approach (now known as the "medical model" of disability) forever linked the law's definition of disability to an "inability to work," with physicians and governmental bureaucrats as gatekeepers of the rewards.[11] This model endured for the rest of the nineteenth and well the twentieth centuries. It categorized people by individual deficits and with disability was conceived as an infirmity that precluded participation in the economy and society. The medical model cast people with disabilities in a subordinate role through encounters with doctors, rehabilitation professionals, and bureaucrats, all of whom aimed to "help them" adjust to a society structured around the convenience and non-accommodating interests of the "able-bodied."

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10 Peter Blanck, Civil War Pensions and Disability. *Ohio State Law Journal*, 62, 109-249 (2001). *See also* Larry Logue and Peter Blanck, P. Before the Accommodation Principle: Disability and Employment among Union Army Veterans. *Journal of Occupational Rehabilitation*, 30, 565-74 (2020); Larry Logue and Peter Blanck, *Heavy Laden: Union Veterans, Psychological Illness, and Suicide*. New York NY: Cambridge University Press (2018); Larry Logue and Peter Blanck, P., *Race, Ethnicity, and Disability: Veterans and Benefits in Post-Civil War America*. New York: NY: Cambridge University Press (2010).

11 Logue and Blanck, *supra*.

The medical model countenanced segregation and economic marginalization. It led to government policies that viewed assistance for people with disabilities as a form of charity or welfare. It penalized those presenting less understood (and less visible) disabilities which, at the time, were primarily mental and infectious conditions. The result, known by some as "ableism," is "a strong and distinct social force on its own"[12] and it is "compounded by other intersecting prejudices," many of which are necessary to understand the impact of today's pandemic on persons with disabilities.

10.4 STRUCTURE OF THE ADA

The ADA has a preface section and three main parts, commonly referred to as "Titles." The preface contains the Congress's "Findings and Purposes," stating the nation's goal to assure individuals with disabilities "equality of opportunity, full participation, independent living, and economic self-sufficiency." Further, the ADA's predominant purpose is to "provide a clear and comprehensive national mandate for the elimination of discrimination against people with disabilities." The preface provides definitions that apply throughout the rest of the Act. Notably, in response to the initial, restrictive Supreme Court decisions interpreting the ADA, the ADA Amendments Act of 2008 (ADAAA) amended the original ADA definition of disability to the current, broader one.[13]

Title I covers employment and sets forth the general rule against discrimination: "[N]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." Employers are provided a defense to a discrimination claim in situations of "undue hardship" or where an employee poses a significant risk to the health or safety of

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12 *See, e.g.,* Andrew Pulrang, A. COVID-19 Teaches Us A Lot About Differences in the Disability Community, *Forbes* (Apr 30, 2020), https://www.forbes.com/sites/andrewpulrang/2020/04/30/covid-19-teaches-us-a-lot-about-differences-in-the-disability-community/#5febb5037714.

13 Blanck, *supra* (2020).

themselves or others in the workplace. This aspect has become a particular point of debate during the pandemic.

Title II covers discrimination by public entities, which is discrimination by state or local governments. Title III addresses discrimination in public accommodations and services operated by private entities. These entities must make reasonable modifications to their policies and practices, unless they can demonstrate that the modification would fundamentally alter the nature of their goods, services, or facilities.

10.5 ACCOMMODATION PRINCIPLE

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

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

The explicit command that employers accept the burden of paying for accommodations, up to the undue hardship ceiling, sets the ADA apart from other US civil rights legislation, and has led to significant theoretical and practical disputes. The requirement of Title III that accessible services and activities be provided by private entities offering services to the public—"public accommodations"—allocates similar responsibilities and has also evoked disputes. However, studies show that accommodating qualified employees with disabilities does not necessarily come at a high expense or

at the expense of other employees, and that the benefits from accommodation often outweigh the costs.[14]

Nonetheless, the wisdom of the reasonable accommodation paradigm remains a subject of debate.[15] The questions raised include whether the cost or benefit of accommodating qualified workers with disabilities affects employment rates, the behavior of co-workers, and other fundamental aspects of the workplace. In 1990, when the ADA was passed, the data did not exist to address these questions. Although each situation may require a highly factual analysis, studies since then have found that the fear of high accommodation costs and negative reactions of co-workers have not been realized.[16] Granting accommodations also has a positive spillover effect on the attitudes of coworkers. It has positive effects on the attitudes of requesting employees as well[17] . Overall, studies have shown measurable benefits from a corporate culture of flexibility, inclusion, and attention to the individualized needs of all employees.[18]

10.6 ADA DEFINITION OF DISABILITY

The ADA protects individuals with disabilities as defined by the law: "An individual with an actual disability, with a record of a disability, and/or regarded as having, or treated as having, a disability." To be protected under Title I, a disabled individual must be a "qualified" individual, capable of performing essential functions of the job sought. Generally, courts defer

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14 *See, e.g.,* Peter Blanck, Disability Inclusive Employment and the Accommodation Principle: Emerging Issues in Research, Policy, and Law. *Journal of Occupational Rehabilitation*, 30, 505-10 (2020); Helen Schartz, DJ Hendricks, & Peter Blanck, Workplace Accommodations: Evidence-Based Outcomes. *Work*, 27, 345-354 (2006); Helen Schartz, Kevin Schartz, DJ Hendricks, & Peter Blanck, Workplace Accommodations: Empirical Study of Current Employees. *Mississippi Law Journal*, 75, 917-43 (2006); Lisa Schur, K. Han, A. Kim, Mason Ameri, Meera Adya, Peter Blanck, & Douglas Kruse, Disability at Work: A Look Back and Forward. *Journal of Occupational Rehabilitation*, 27(4), 482–497 (2017); Lisa Schur, Douglas Kruse, Peter Blanck, Corporate Culture and the Employment of People with Disabilities. *Behavioral Sciences & the Law*, 23(1), 3-20 (2005); Lia Schur, Lisa Nishii, Meera Adya, Douglas Kruse, Susanne Bruyère, and Peter Blanck, Accommodating Employees with and without Disabilities. Human Resource Management, 53(4), 593–621 (2014).

15 Michael Stein, Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination. *University of Pennsylvania Law Review*, 1, 579-673 (2004).

16 Blanck, *supra* (2020).

17 Blanck, *supra* (2020).

18 Blanck, *supra* (2020).

to the employer's judgment, and consider a job description as evidence of the job's essential functions.[19] In Title I cases, most courts hold that the employee must prove that they are capable of performing the essential job functions, with or without reasonable accommodation. The employer must identify the valid essential job functions.[20]

To be protected under Title II, an individual must meet the essential eligibility requirements for the governmental service, activity, or program, with or without reasonable accommodation. However, there is no express requirement that individuals be "qualified" for ADA Title III (private business) coverage because most covered private businesses are generally open to the public.[21] To be held responsible under Title III, an individual or entity must have some ability to control the place of public accommodation.

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

Yet, in the ADA's thirtieth year and thereafter, the courts are still addressing definitional questions. In *Darby v. Childvine*,[22] the plaintiff had a double mastectomy after being diagnosed as having pre-cancerous cells associated with a genetic mutation (BRCA1) that contributes to abnormal cell growth. She alleged that she was discriminated against under the ADA when her employer terminated her employment upon learning of her condition. The question facing the court was whether to dismiss, as insufficiently plausible, Darby's claim that her genetic mutation, with the associated growth of abnormal cells, constituted a disability under the ADA. The court held that Darby had plausibly claimed that her impairment—serious enough to

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19 Kotaska v. Federal Express Corporation, 966 F.3d 624 (7th Cir. 2020).

20 Blanck, *supra* (2020).

21 Blanck, *supra* (2020).

22 Darby v. Childvine, 964 F.3d 440 (6th Cir. 2020).

warrant a double mastectomy—substantially limited her normal cell growth.

Aspects of the *Darby* case echoed those in the first ADA case decided by US Supreme Court—*Bragdon v. Abbott*[23]—where the Court had held that infection with the HIV virus, even in the absence of symptoms of AIDS, was a disability covered by the ADA. However, the decision was based on the virus's immediate effect on bodily functions, not because of the potential for it to lead to AIDS. In *Darby*, similarly, the court held that a genetic mutation (or other physical characteristic) that only predisposed an individual to other possible health conditions, in this case breast cancer, would not itself be a disability under the ADA. The court left it to further proceedings to determine if Darby could go beyond allegations to prove that her condition in fact substantially limited normal cell growth.

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

There is also no general requirement in the ADA that medical testimony must be offered to satisfy the law's definition of disability. Clearly, some disabilities are visible, obvious, and severe enough that corroborating medical testimony is not required. Thus, there are no per se ADA disabilities, only definitions of certain terms, and each case must be considered on an individualized basis. While the ADA defines "transitory" as an impairment with duration of six months or less, it does not define "minor," which is to be determined on a case-by-case basis.[24] The ADA requires that an employer must establish the perceived impairment to be objectively *both* transitory and minor for a successful defense.

Depending on the individual circumstances, a COVID-19 infection might be considered an ADA disability, particularly if serious conditions and

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23 Bragdon v. Abbott, 524 U.S. 624 (1998).

24 *Eshleman v. Patrick Industries*, 961 F.3d 242 (3d Cir. 2020).

symptoms result, even if it lasts less than six months.[25] People with disabilities at a heightened risk of severe illness and death upon contacting COVID-19 may include those with cardiovascular disease, high blood pressure, chronic respiratory disease, diabetes, cancer, liver and kidney disease, autoimmune diseases, severe psychiatric illness, and HIV/AIDS.[26] At some lower level of seriousness, however, a COVID-19 infection would probably be considered a transitory and minor condition not covered by the Act.

10.7 TITLE I ANTIDISCRIMINATION PROTECTIONS

The most heavily litigated provisions of the ADA have been the employment sections. They impose obligations on covered employers from job application to termination, including matters such as medical testing, reasonable accommodations, and the benefits and privileges of employment.[27] An employer may not adopt job qualification standards or testing requirements that exclude an individual with a disability, unless the criteria are job-related for the position in question and consistent with business necessity.[28]

10.7.1 Reasonable workplace accommodations

To be eligible for an ADA accommodation, the employee's disability and need for accommodation must be known to the employer. The request need not be phrased in terms of "reasonable accommodation" or use a particular language. Also, the employee does not need to identify the change required. Qualified applicants and employees must receive reasonable accommodations, whether they work part-time, full-time, or as probationary employees. An employee who can, even with some difficulty, perform the essential functions of his job without accommodation is still eligible for an effective and reasonable accommodation[29] .

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25 *Compare* Fraihat v. U.S. Immigration and Customs Enforcement, 445 F. Supp. 3d 709, 736 n.21 (C. Dist. Calif. 2020).

26 Busby v. Bonner, 466 F. Supp. 3d 821, 825 (W. Dist. Tenn. 2020).

27 *See, e.g.,* Mohamed Ali, Lisa Schur, & Peter Blanck, P., What types of jobs do people with disabilities want? *Journal of Occupational Rehabilitation*, 21(2), 199-210 (2011).

28 Gibbs v. City of Pittsburgh, 989 F.3d 226 (3d Cir. 2021).

29 Bell v. O'Reilly Auto Enterprises, LLC, 972 F.3d 21 (1st Cir. 2020).

The accommodation requirement, however, does place a particular burden on an individual with a hidden or non-obvious impairment to disclose the claimed disability and request that the employer provide an accommodation[30] . However, it places obligations on both parties to participate in good faith in an "interactive process."

Should the interactive discussion process fail, the individual may bring a "failure-to-accommodate" claim under ADA Title I. Some courts find that an adverse employment action (i.e., denial of the terms and conditions of employment) is not a requisite element of an ADA "failure-to-accommodate" claim.[31] Accordingly, in a "failure-to-accommodate" claim, a plaintiff typically must provide evidence that they are a qualified individual with a disability within the meaning of Title I; they work or worked for an employer that is covered by Title I; the employer, despite knowledge of the employee's disability, did not reasonably accommodate the employee.

If an employee has a preexisting mental illness or anxiety disorder that qualifies as an ADA disability, and that has been exacerbated by the COVID-19 pandemic, they may be entitled to reasonable accommodation after an interactive discussion about how the accommodation may assist them to perform their job without causing undue hardship to the employer. Once again, an employer's failure to provide a reasonable accommodation may violate Title I, according to most courts, regardless of whether the employee suffered an adverse employment action or experienced discriminatory intent.[32]

The pandemic has brought to the fore the question of whether being allowed to work from home can be a "reasonable accommodation" under the ADA. Before the pandemic, courts typically took the view that working at home was not a reasonable accommodation. They reasoned that when an employee's job involves teamwork, the work cannot be accomplished at home without diminishing the employee's performance. Another rationale for the reluctance to recognize telecommuting as an accommodation was the

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30 Fitore Hyseni & Peter Blanck, Diversity and Inclusion in the Legal Profession: Disclosure by Lawyers with Disabilities and Lawyers Who Identify as LGBTQ+. *Journal of Cancer Survivorship*, __, __ - __ (2021, forthcoming).

31 Exby-Stolley v. Board of County Commissioners, 979 F.3d 784 (10th Cir. 2020, en banc).

32 Punt v. Kelly Services, 862 F.3d 1040 (10th Cir. 2020).

perception that an employee, who requires significant supervision, cannot be adequately managed at home, and the quality or productivity of such an employee's work might decline significantly.

The prevalence of remote work and its perception as a possible ADA accommodation have continued to change with the progression of the pandemic and its economic consequences. With improvements in technology, working from home has become the "new norm" in many professions and industries. One recent study of large and small businesses during the pandemic examined the prevalence of and productivity in remote work—defined as working from home at least two days per week.[33] Disability was not included as an employee-level variable, but the study did find that having done pre-pandemic remote work, presumably including those who did so as an ADA accommodation, predicted the prevalence of post-pandemic remote work.

In a related study, Schur, Ameri, and Kruse (2020) have found that despite the COVID-19 pandemic severely affecting employment for all workers, it may have a long-term "silver lining" for workers with disabilities by making remote work more acceptable and effective as an element of workplace accommodation.[34] While such trends are likely to vary over time as a function of future labor markets as well as economic and public health developments, the notion of working from home as an accommodation is now embedded in our culture as never before.

10.7.2 Undue hardship and direct threat defenses to charges of discrimination

One critique of Title I is that accommodations create economic hardships that are costly and burdensome for employers.[35] The ADA's mechanism for dealing with this criticism is the "undue hardship" defense. An undue hardship is a significant difficulty or expense when considering various

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33 A. Bartik, Z. Cullen, Edward Glaeser, M. Luca, and C. Stanton, C. What Jobs Are Being Done at Home During the COVID-19 Crisis? Evidence from Firm-Level Surveys, Harvard Business School, Working Paper 20-138 (2020), https://www.hbs.edu/faculty/ Publication%20Files/20-138_ec6ff0f0-7947-4607-9d54-c5c53044fb95.pdf.

34 Lisa Schur, Mason Ameri, and Douglas Kruse, Telework After COVID: A "Silver Lining" for Workers with Disabilities? *Journal of Occupational Rehabilitation*, 30, 521-536 (2020). *See also* Fiallo v. Curv Group, LLC dba Key Smart, 2020 WL 2621205 (N. Dist. Ill. 2020).

35 Blanck, *supra* (2020).

factors; the inquiry is highly fact intensive. Determining undue hardship will depend on the nature, frequency, and duration of the need.

Prior to the pandemic, research showed that most accommodations did not require a significant expense compared to an employer's overall budget and resources.[36] Today, the US Equal Employment Opportunity Commission recognizes that a significant loss of business revenue due to the pandemic is a relevant factor in undue hardship determination.[37] However, an employer cannot outright reject any accommodation. It must make an individualized, interactive assessment in consideration of its financial constraints during the pandemic.

A direct threat to self or others is another defense to a Title I charge of discrimination and is based on considerations of workplace health and safety. However, an employer may not claim undue hardship, or that an accommodation would result in a direct health threat to self or others, based simply on other employees' or customers' *unjustified* fears and prejudices, in general, and about the pandemic. During the pandemic, employers may ask employees if they have experienced virus symptoms or if they were vaccinated to determine whether they may pose a direct threat to health in the workplace.[38]

Another pandemic-related note: Title I does not require an employer to accommodate an employee without an ADA disability by, for instance, allowing her to work remotely to protect a family member with a disability from possible COVID-19 exposure.[39]

10.8 TITLE II ANTIDISCRIMINATION PROTECTIONS

There are many ways to interact with state and local governments. The government provides, educational facilities, social services, licenses, parks

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36 Blanck, *supra* (2020).

37 U.S. Equal Employment Opportunity Commission. (June 17, 2020). What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, Technical Assistance Questions and Answers; https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws.

38 Blanck, *supra* (2021).

39 U.S. Equal Employment Opportunity Commission. (June 17, 2020). What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, Technical Assistance Questions and Answers; https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws.

and recreation, and voting and court services. It oversees law enforcement and prison facilities. When it enacted the ADA, Congress found that discrimination against individuals with disabilities persists in many of these critical areas: education, transportation, voting, communication, recreation, institutionalization, prison services, health services, and access to public services.[40]

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

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

In 2020, in an array of lawsuits, inmates housed in correctional institutions filed Title II claims to obtain their release from custody, or to improve the health protections and safety of their living conditions, to limit their exposure to the COVID-19 virus. In these lawsuits, plaintiffs with disabilities typically have claimed that they are vulnerable to health complications if they contract COVID-19. As of the time of this writing, these cases are working their way through the courts.[41]

10.9 TITLE II'S "INTEGRATION MANDATE"

According to Title II, public entities must administer services, programs, or activities in the most integrated setting appropriate to the needs of the

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40 Blanck, *supra* (2020).

41 *See, e.g.,* Valentine v. Collier, 956 F.3d 797 (5th Cir. 2020); Denbow v. Maine Department of Corrections, 2020 WL 3052220 (D. Me. 2020).

qualified individuals with disabilities. In *Olmstead v. L.C. ex rel. Zimring,*[42] the US Supreme Court considered the interplay between this "integration mandate" and the fundamental alteration limit on reasonable accommodation. *Olmstead* dealt with the interpretation of Title II's antidiscrimination provision and whether its proscription required placement of persons with mental disabilities in community settings rather than in institutions. The Court held the answer was "a qualified yes," endorsing the ADA's integration mandate.

The *Olmstead* integration mandate confers a broad scope on the ADA's discrimination proscription and obligates states to counter discrimination. Unjustified and unnecessary placement or retention of persons in institutions severely limits their exposure to the community and constitutes a form of discrimination based on disability that is prohibited by Title II. *Olmstead's* recognition of unjustified institutional isolation of people with disabilities as a form of discrimination was significant. The Supreme Court reasoned that institutional placement of people, who can otherwise benefit from community settings, perpetuates unwarranted assumptions that they are incapable or unworthy of participating in community life. Unnecessary civil confinement in an institution diminishes everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment. The ADA does not, however, require termination of institutional settings for people unable to handle or benefit from community settings. It only provides that qualified individuals with disabilities may not be subjected to discrimination, which may plausibly include claims that such individuals are at serious risk from institutionalization or segregation, and are unduly isolated in their community homes.[43]

10.10 TITLE II COVERAGE OF GOVERNMENTAL FACILITIES, PROGRAMS, AND SERVICES

Title II applies to a public entity's physical structures, programs, and services. Courts have interpreted this reach to include city buildings, botanical gardens on the premises of a state university, publicly owned

42 Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581 (1999).

43 Waskul v. Washtenaw County Community Mental Health, 979 F.3d 426 (6th Cir. 2020).

sporting arenas and theatres, city sidewalks, and voting procedures. "Physical structures" (or "facilities") refer to any portions of buildings, structures, sites, complexes, equipment, roads, walks, passageways, parking lots, and other properties, including the site where the building, property, structure, or equipment is located.

Title II's prohibition of discrimination in facility access is patterned after its general discrimination provision. Facilities may be "programs, services, or activities" within the meaning of the statute, conduits such as websites, or other "programs, services, or activities" that public entities offer. What a public entity must do to ensure "program access" varies on the basis of the facility being an "existing" facility, a new facility, or a facility that has been altered.[44]

In *Hamer v. City of Trinidad*,[45] the Tenth Circuit found that the "programs, services, or activities" of Title II include city sidewalks. A public entity violates Title II when it constructs, creates, or maintains non-compliant sidewalks, "programs, services, or activities" that must be readily accessible to individuals with disabilities, such as those who use wheelchairs. The US Supreme Court did not disturb the lower court's ruling. In *National Association of the Deaf v. Florida*,[46] the Eleventh Circuit likewise concluded that a Florida resident may properly bring suit under Title II against the State of Florida for not providing captioning for live and archived videos of Florida legislative proceedings. Here, the plaintiff's right to access information about governmental processes was at stake. Title II was enacted to protect people with disabilities' right to participate in society and its civic activities.

10.11 TITLE II EFFECTIVE COMMUNICATION MANDATE

Title II's definition of qualified person with a disability links the "provision of auxiliary aids and services" to the concept of reasonable accommodations. The Title II regulations have a separate section devoted to

44 Blanck, *supra* (2020).

45 Hamer v. City of Trinidad, 924 F.3d 1093 (10th Cir. 2019), cert. denied sub nom. City of Trinidad v. Hamer, 140 S. Ct. 644 (2019).

46 National Association of the Deaf v. Florida, 980 F.3d 763 (11th Cir. 2020).

"Communication," which makes it clear that communication is an integral part of a public entity's responsibilities under Title II.[47]

Title II's communication regulations and the case law interpreting them stand for the proposition that a public entity must offer effective communication alternatives. A public entity must take steps to ensure that communications with applicants, participants, and members of the public with disabilities are as effective as communications with others without disabilities. Most cases involve the question of exactly how effective a communication alternative needs to be. For example, how effectively the assistance of a "qualified interpreter" in a healthcare setting may enable communication with a deaf person. The effective communication obligation is owed to people with hearing, speech, vision, and print disabilities.

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

10.12 TITLE II TRANSPORTATION PROVISIONS

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

Public transportation is especially important to people with disabilities because evidence suggests they are more reliant on public transportation than others in the general population[48]. The legal and policy tensions

47 Blanck, *supra* (2020).

48 Blanck, *supra* (2020).

specific to transportation issues are, essentially, a microcosm of the entire Act. These tensions include the question of whether people with disabilities are best served by adjusting mainstream transportation services to facilitate use, or by creating services specialized for them. Thus, in the transportation context, the issues typically involve whether to mainstream existing transportation to accommodate people with disabilities or rely instead on paratransit services that are usually provided by vans operating separately from regular mass transit operations.

10.13 TITLE III ANTIDISCRIMINATION PROTECTIONS

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

10.13.1 "Places of public accommodation" under Title III

Title III covers "places of public accommodation" and "commercial facilities." Public accommodations consist of 12 specified categories of business that affect commerce, such as places of lodging; establishments serving food or drink; theaters, concert halls, stadiums, and convention centers; sales or rental establishments; professional offices; museums and places of public displays; places of exercise or recreation; places of education; and social service centers.[49]

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

[49] Blanck, *supra* (2020).

within a private airport are public accommodations, although the airport itself is a commercial facility.

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

10.13.2 Discrimination under Title III

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

In *Pletcher v. Giant Eagle*,[50] a supermarket had a COVID-19 policy that customers must wear a mask or full-face shields to enter the store. The plaintiff alleged that this policy was a violation of Title III against her as a person with a disability. She had a condition—asthma—that substantially impacted her major life activity of breathing and respiratory system. Due to her condition, she could not wear a mask over her mouth and nose without significant difficulty in breathing. Giant Eagle provided that its customers who cannot wear a mask or full-face shields because of a disability would have the option of having an employee shop for them or using curbside pickup and delivery services.

[50] Pletcher v. Giant Eagle, 2020 WL 6263916 (W. Dist. Pa. 2020).

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

10.13.3 "Reasonable modifications" under Title III

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

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

In the case *PGA Tour v. Martin*,[51] the US Supreme Court held that Title III protects access to professional golf tournaments by a qualified entrant with a disability. The Court held that the contestant could not be denied use of a golf cart on the grounds it would "fundamentally alter the nature" of the tournament when other contestants must walk. The use of carts as a program modification was reasonable. The *Martin* case underscored that the

[51] PGA Tour v. Martin, 532 U.S. 661 (2001).

ADA requires individualized attention to accommodation requests that allow equal access to the public.

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

Service animals present issues that are not encountered with other personal assistance mechanisms for individuals with disabilities. Generally, a public accommodation must modify policies, practices, and procedures to permit the use of a service animal by an individual with a disability.[52] In rare circumstances, accommodation may not be required because it may result in a fundamental alteration in the nature of the services or the safe operations of the public accommodation.

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

Some courts have held that a proposed accommodation by an individual with a disability for the use of a service animal is reasonable under the ADA as a matter of law.[53] Thus, entities covered by the ADA must usually accommodate the use of service animals by individuals with disabilities, and the reasonableness of the accommodation must be decided on a case-by-case basis. The accommodation of a blind person's request to be accompanied by a service animal—absent exceptional circumstances—is per se reasonable under Title III. In 2021, the US Court of Appeals for the

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52 Blanck, *supra* (2020).

53 *Berardelli v. Allied Services Institute of Rehabilitation Medicine*, 900 F.3d 104 (3d Cir. 2018).

Ninth Circuit further held that entities covered by the ADA may not impose a certification requirement for a psychiatric service dog to be qualified as a service animal under the law.[54]

In 2020, the US Department of Transportation (DOT) issued a final rule regarding "Traveling by Air with Service Animals," which became effective in 2021.[55] This DOT rule "defines a service animal as a dog, regardless of breed or type, that is individually trained to do work or perform tasks for the benefit of a qualified individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability." Among other regulations, the DOT rule allows airlines to classify emotional support animals as pets that are not service animals.

In another setting, in 2021, an arbitrator found Uber liable as a transportation provider covered by Title III for its drivers' misconduct for refusing to provide appropriate, nondiscriminatory, and safe transportation to the plaintiff, who was legally blind, because of her accompanying service dog.[56] Uber was found to be a transportation service, subject to Title III, because of its contractual relationship with its drivers to provide transportation.

10.14 TITLE III REQUIREMENTS TO OVERCOME ARCHITECTURAL BARRIERS

Unlike the drafters of previous civil rights laws, the ADA's drafters had to contend with the fact that prejudice was not only a part of society in general, but also had been *built* into the physical environment. Many existing buildings and facilities had been designed and constructed with no thought about whether people with disabilities could access or use them.[57] Retrofitting existing buildings would be, for many, a significant expense. Ultimately, the drafters reached a compromise that provided a gradual approach to facility accessibility.

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54 C. L. v. Del Amo Hospital, 992 F.3d 901 (9th Cir. 2021).

55 U.S. Department of Transportation (December 12, 2020), Traveling by Air with Service Animals, 85 FR 79742.

56 *See also infra* discussion of Rideshare companies as "places" of public accommodation under Title III.

57 Global Universal Design Commission (2021), http://www.globaluniversaldesign.org/.

Title III requires elements in the existing facilities to be modified to the extent readily achievable, something that is "easily accomplishable and able to be carried out without much difficulty or expense." The "readily achievable" standard considers the nature and cost of barrier removal, overall financial resources, and number of persons employed, the concern in question, the effect on expenses and resources as well as legitimate safety requirements, and the financial resources and type of operation of a parent entity.

10.14.1 Websites as "places" of public accommodation under Title III

The rise of the disability rights model, bolstered by the passage of the ADA, coincided with technological advances that began to enhance inclusion and equal participation in society for persons with disabilities. The development of the world wide web and its use across the world was also fundamental to the wave of technological advances. The internet offers increased connectivity between persons with disabilities, their employers and the community. It also makes products and services available to people with disabilities, who previously could not get them because of inaccessible facilities and materials[58]. This connectivity is paramount for persons with disabilities and, to an even greater degree, for those who now may be further isolated due to the COVID-19 pandemic.

As they have developed to provide access to the internet, computers, then mobile devices, and now, smart assistive technologies, have come to play a central role in the lives of individuals with disabilities. Mobile real-time applications help compensate for the physical and mental limitations inherent in some disabilities. For example, those without finger dexterity use voice-recognition software to run a computer, and those with speech impediments or with intellectual and developmental disabilities use software applications to connect with others. Video over internet protocol allows deaf individuals to communicate in real-time using American Sign

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[58] *See, e.g.,* Peter Blanck, Web Accessibility for People with Cognitive Impairments: A Legal Right? In Stein M., Lazar J. (eds.), *Global Inclusion: Disability, Human Rights, and Information Technology*. Philadelphia PA: University of Pennsylvania Press, 41-57 (2017); Blanck, P. (2014). eQuality: The struggle for web accessibility by persons with cognitive disabilities. New York, NY: Cambridge University Press.

Language, while texting and instant messaging facilitate communication by individuals with sensory impairments.

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

Thirty years ago, the drafters of the ADA could not have anticipated the significance of the internet to persons with disabilities. However, as the use of the internet has become pervasive, complex issues of internet accessibility for persons with disabilities have emerged for all of the ADA's titles. The US Courts of Appeals currently have a split of opinion as to whether Title III covers only physical "places" of public accommodation. Some circuits have held that public accommodations are limited to physical places, while others have held to the contrary.

In *Robles v. Domino's Pizza*,[59] the Ninth Circuit considered whether Domino's Pizza stores had failed to design, construct, maintain, and operate its website and mobile application to be fully accessible to people who are blind and need to use screen-reading software to vocalize visual information on websites. Domino's operated a website and online mobile application (or app) for customers to order pizzas and products for at-home delivery and in-store pickup as well as to receive coupons and discounts. The plaintiff contended that the website and app were not accessible to him.

The Ninth Circuit held that Title III did apply to Domino's website and app, even though the plaintiff predominantly did not access the services at the physical restaurant. Under Title III, places of public accommodation must provide auxiliary aids and services to make visual materials accessible to blind customers. Further, it applies to services "*of*" a place of public accommodation, and not only to services "*in*" a place of public accommodation.

[59] Robles v. Domino's Pizza, LLC, 913 F.3d 898 (9th Cir. 2019), cert. denied sub nom. Domino's Pizza, LLC v. Robles, 140 S. Ct. 122 (2019).

However, the Eleventh Circuit in *Gil v. Winn-Dixie* considered the language in Title III in defining a "public accommodation." Title III listed 12 types of locations as public accommodations, all tangible types of locations at physical places, but did not include "intangible" places or spaces such as websites[60]. In other words, Title III public accommodations are limited to physical places. Accordingly, because websites are not a place of public accommodation under Title III, plaintiff Gil's inability to access and communicate with the website due to his blindness was not a violation of the ADA. The court also held that Winn-Dixie's website was not a substantial "intangible barrier" to Gil's ability to access and fully enjoy the goods and services offered at this particular place of public accommodation.

Given the current split of opinion among the US Courts of Appeals, it is likely that the Supreme Court may be called upon to resolve the difference of opinion as to the ADA's coverage of websites. Alternatively, as the majority opinion in *Gil* recognized, the Congress may ultimately be called upon to clarify the scope of ADA Title III, as it applies to the services of places of public accommodation and their websites that are part of today's ubiquitous online marketplace.

10.14.2 Rideshare companies as "places" of public accommodation under Title III

Amid the pandemic, it remains a contested question in courts across the US whether an on-demand rideshare app may be considered a "place of public accommodation" for purposes of Title III. In *Access Living of Metropolitan Chicago v. Uber Technologies*[61], a plaintiff who used a motorized wheelchair sued Uber, alleging Title III violations for not providing meaningful access to its ridesharing services. The court held that Uber was a "transportation provider" covered by Title III and that a public accommodation does not have to be a physical space. In accord with this ruling, in *Equal Rights Center v. Uber Technologies*[62], the court found that the plaintiff's allegations as to

60 Gil v. Winne-Dixie Stores, 993 F.3d 1266 (11th Cir. 2021).

61 *Access Living of Metropolitan Chicago v. Uber Technologies*, 958 F.3d 604 (7th Cir. 2020). *See also* O'Hanlon v. Uber, 990 F.3d 757 (3d Cir. 2021); *Namisnak v. Uber Technologies*, 971 F.3d 1088 (9th Cir. 2020).

62 *Equal Rights Center v. Uber Technologies*, 2021 WL 981011 (D. D.C. 2021).

how Uber connects its drivers with its app plausibly established that it is a public transportation service under Title III.[63]

In another recent case, *Independent Living Resource Center San Francisco v. Lyft*,[64] Lyft provided on-demand ridesharing transportation services in some regions of the country with an "Access" mode for riders to indicate their need for a wheelchair-accessible vehicle (WAV), but did not offer this service in the San Francisco Bay area. Plaintiffs alleged that this resulted in more restrictive services in San Francisco, with longer wait times for WAV users. Because of this, the plaintiffs did not use Lyft. The court held that Lyft, as a private entity engaged in the business of transporting people and whose operations affect commerce, was covered as a public accommodation under Title III. As such, Lyft was required to make reasonable modifications to its WAV policies and practices.

10.14.3 ADA evolving

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

New paradigms are developing that extend the social model to view all life conditions as existing on a continuum, without a dichotomy separating people into those with and without disabilities. In other words, "disability" is not fixed; instead, it is a fluid and continuous social, cultural, historical, and legal concept defined for human beings by human beings. It is an intersectional idea across disability and race, sexual orientation and gender identity, age, and other characteristics. It is not uniform, but shaped by culture, context, and individual lived experience.

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63 *See also Irving v. Uber Technologies*, AAA Case No. 01-18-0002-7614 (Mar 18, 2021), https://www.peifferwolf.com/wp-content/uploads/2021/03/Award-in-Irving-v-Uber_Redacted.pdf.

64 Independent Living Resource Center San Francisco v. Lyft, 2020 WL 6462390 (N. Dist. Calif. 2020).

The move now, therefore, is toward a new model of disability, i.e., the "universalist" (and relational) model. The universalist approach recognizes that across their lifespan, all human beings experience strengths and limitations[65]. In certain cultures, or environments, some of these limitations are called impairments or disabilities. Those who do not currently have disabilities are "temporarily able." The universalist model applies to all people, so disability is not a rights-based issue limited to a minority, but a collective experience of humanity. Rather than viewing people with disabilities as a separate group in need of special protections under an ADA, the universalist model, akin to a human rights model, emphasizes the benefits of accommodations, universal design, and antidiscrimination laws for all.

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

This drive toward inclusion and community participation builds gradually, with earlier recognition, ultimately leading to more expansive acknowledgement. One of the seminal cases interpreting the ADA exemplifies how more expansive recognition builds on earlier recognition. The integration mandate that resulted from the ADA Title II *Olmstead* case was only possible because of its 1954 predecessor in the area of race and education, *Brown v. Board of Education*.[66] *Olmstead* recognized that state-sponsored separate and nonintegrated living arrangements, like separate schools at issue in *Brown*, are often discriminatory towards people with disabilities who desire to, and who can, live in the community. *Olmstead's* integration mandate is changing lives for the better, helping to insure

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65 Blanck, *supra* (2020).

66 *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

during the pandemic that community and decision-making supports are available to individuals with disabilities.[67]

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

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

One such significant stigma issue during this pandemic involved persons with disabilities and the rationing of healthcare equipment and services on the basis of disability[68]. Debates over the allocation of medical services are not new—the US Civil War's pension scheme discussed earlier was a test of the boundaries of this medicalization of disability. However, when unchecked, rationing protocols based on disability or pre-existing conditions alone may violate the ADA.

A different area of interest arising from the global health and economic emergency concerns the accelerating development of the online "gig

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67 *See, e.g.,* Peter Blanck, Supported Decision-Making: Emerging Paradigm in Research, Law, and Policy, *Journal of Disability Policy Studies*, __, 1-5 (2021), DOI: 10.1177/10442073211023168; Peter Blanck & Jonathan Martinis, "The Right to Make Choices": National Resource Center for Supported Decision-Making. *Inclusion*, 3(1), 24-33 (2015); Dilip Jeste, Grahm Eglit, Barton Palmer, Jonathan Martinis, Peter Blanck and Elyn Saks, An Overview of Supported Decision in Serious Mental Illnesses. *Psychiatry: Interpersonal and Biological Processes*, 81(1), 28-40 (2018).

68 Office for Civil Rights (OCR) at the U.S. Department of Health and Human Services (HHS). (March 28, 2020). BULLETIN: Civil Rights, HIPAA, and the Coronavirus Disease 2019 (COVID-19), file:///C:/Users/pblanck/Documents/A-Peter/Academ%20&%20BBI%20General/JDPS--ADA--2020/Research/HHS%20Rationing%20COVID--ocr-bulletin-3-28-20.pdf.

economy" and questions about its impact on people with disabilities. The "gig economy" provides opportunities for self-directed work, education, healthcare, and other areas central to daily life. It is typified by technologically-based, on-demand, and independent arrangements outside of traditional workplaces, educational settings, healthcare facilities, and retail centers. Although the "gig economy" provides new prospects, it presents challenges for people with disabilities.

The rise of the "gig economy" is tied to the expansion of "e-commerce"—the online marketplace for goods and services. e-Commerce relies on mobile handheld devices (smartphones, tablets, and other such devices) that allow for geolocation in real-time and "peer-to-peer" communications, new forms of artificial intelligence, and large data analytics. When well-conceived and implemented, the benefits of the "gig economy" for people with disabilities increase their abilities to independently choose and control workplaces, educational materials, healthcare choices, and retail purchasing by using customized and individualized disability-accessible systems. However, gig work and e-commerce technologies are not without challenges to people with disabilities. Many people with disabilities lack the training and financial resources to engage in the "gig economy." The vulnerabilities in the "gig economy" of people with disabilities and people from other minority communities compared to those in more traditional employment, may well become increasingly apparent. If not carefully considered, the" gig economy" may simply replace one form of structural and economic inequality with another[69].

10.14.4 The ADA at Thirty

The spirit and letter of the ADA has transcended national borders, influencing (and being influenced by) the development of the CRPD, perhaps the most significant international initiative in the recent years. Akin to the ADA's rights and social models of disability, the CRPD recognizes disability as an evolving concept that results from the interaction of persons who have impairments with attitudinal and environmental barriers that

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[69] *See, e.g.,* K. Abraham & S. Houseman, The Importance of Informal Work in Supplementing Household Income. *Employment Research* 26(4), 4-6 (2019); H. Rho & S. Fremstad S., Multiple Jobholders: Who Are They and How Are They Impacted by the Pandemic?, Center for Economic Policy and Research, https://cepr.net/multiple-jobholders-who-are-they-and-how-are-they-impacted-by-the-pandemic/?referringSource=articleShare (2020).

hinder full and effective participation in the society on an equal basis with others. The CRPD recognizes the importance of accessibility—to the physical and online, social, economic and cultural environments, to health and education, employment, and to information and communication—to ensure that persons with disabilities may fully enjoy all human rights and fundamental freedoms. It identifies aspects of disability discrimination, including intersectional forms of discrimination that a person with a disability may face, including racial, ethnic, language, age, and sexual orientation and gender identity.

Unlike in the ADA, "disability" is not defined definitively in the CRPD. Discrimination on the basis of disability is defined broadly as a distinction, exclusion or restriction on the basis of disability that impairs or nullifies the enjoyment of all human rights and fundamental freedoms on an equal basis with others. Presumably, "all human rights and fundamental freedoms" is a sufficiently broad concept and ensures that nothing of significance a person would want or need to do is omitted. In principle, the CRPD's approach casts a broader reach than the ADA. The latter limits its scope to its core sectors—employment, public services, public accommodation by private entities, and telecommunications. Yet, putting aside the limited definition of an employer in the ADA and other restrictions, it is fair to ask whether currently the practical reach of the two regimes differs substantially.

The CRPD is not alone internationally; it provides an additional level of disability law and policy among almost 200 member states and the United Nations. It is, therefore, no longer possible, nor advisable, to look at the ADA rights project only through a parochial, US periscope. Other countries face many of the same issues and challenges in disability law, policy, and practice that the US faces. They have dealt in their own ways with those issues and the associated effects of the pandemic. The modern principles of disability law and policy—whether in the US ADA, the CRPD, or other countries' law and policies—align with a dynamic, fluid, and individualized view of personhood. Disability is seen as a natural part of life. Often, it is only the society's attitudes and barriers that lead to a perceived difference.

To imagine the US without the ADA is to envision unrelenting segregation and marginalization, where human separation based on physical or mental

difference alone is tolerated.[70] The ADA at 30 years remains anchored in its respect for personhood—as reflected in individual inherent worth, autonomy, and self-determination—to the maximum extent possible, with supports and accommodations within reason. All people must be afforded this basic recognition of equality before the law, such that each new generation of individuals with disabilities may have the opportunity to be full and equal citizens.[71]

70 *See, e.g.*, Peter Blanck, Thirty Years of the Americans with Disabilities Act: Law Students and Lawyers as Plaintiffs and Advocates. *N.Y.U. Review of Law & Social Change*, 45, 8-24 (2021); Peter Blanck, Why American is Better Off Because of the Americans with Disabilities Act and the Individuals with Disabilities Education Act. *Touro Law Review*, 35, 605-18 (2019).

71 Peter Blanck, Disability in Prison. *University of Southern California Interdisciplinary Law Journal*, 26(2), 309-22 (2017); Peter Blanck, The First "A" in the ADA: And 25 More "A"s Toward Equality for Americans with Disabilities. *Inclusion*, 4(1), 46-51 (2016).