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The Americans With Disabilities Act: An Introduction for Lawyers and Judges

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I. INTRODUCTION

In July of 1990, a sweeping federal law was enacted which is directed toward people with physical and mental disabilities, and, as will be described, those who are perceived as having such impairments. Now fully implemented, the Americans with Disabilities Act (hereinafter referred to as the ADA)[1] is intended to address disability-based discrimination in its subtle and not so subtle forms. If this law fulfills its stated purpose and the predictions of both those who advocated its passage as well as those who opposed it, the ADA will touch the life of virtually every American, and, in some unique ways, the activities of lawyers and judges.

Like developments which continue to arise under other civil rights laws, the full ramifications of the ADA will not be apparent for some time. The ADA and the rules and regulations promulgated under it do assume, however, that a new mind-set—a conviction that the way people who have disabilities are allowed to interact in society must change—is already in place. Approaching the ADA with that appreciation may be difficult for those who would wish for gradual change. It does have the advantage, however, of making this intricate law more comprehensible.

This article attempts to assist those interested in gaining an understanding of the ADA by describing some of the more significant historical settings in which it was conceived and the objectives of disability rights. It then describes the meaning of "individual with a disability" and the law's primary thrust which is divided into three major titles, pertaining to employment, public programs and services, and the accessibility of private business and commercial enterprises. Special attention is paid, within the description of the public services title (Title II of the ADA), to the measures which are now required of courts in conducting their activities. The suggestion is made, among others, that traditional thinking as to the competency and desirability of people with disabilities participating in the judicial process as jurors must be discarded in favor of individualized evaluations and the provision of appropriate assistance as necessary.

II. GENERAL OVERVIEW

A. Disability Rights

Mary Johnson, editor of *The Disability Rag*, cogently described the premise upon which the modern notion of disability rights is based:

1. The Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (Supp. III 1991), was passed by Congress on July 13, 1990, and signed by President Bush on July 26, 1990.

"[d]isability, is not really the cause of an undignified, harsh life. The real cause is lack of access to buildings, jobs, transportation; segregation and denial of services."[2] More poignantly, Justin Dart, the citizen described by Senator Robert Dole as a driving force behind the ADA,[3] explained that the hurdle disability rights seeks to overcome is an ancient, almost subconscious assumption that people with disabilities are less than fully human and, therefore, not fully eligible for the opportunities, services, and support systems which are available to other people as a matter of right.[4] To strengthen the rights of people with disabilities, it was argued that a new perspective was needed. Advocates suggested that the focus should be on capabilities rather than on disabilities. This perspective has been described as the "enabling paradigm."[5]

The National Council on the Handicapped (hereinafter referred to as the Council),[6] lent support to this call for a paradigm shift in its report entitled *Toward Independence*.[7] The report, issued in 1986 in response to a statutory mandate,[8] was the result of a comprehensive review of federal laws and programs serving people with disabilities. The Council concluded that federal disability programs reflected an over-emphasis on income support and an under-emphasis on initiatives for equal opportunity, independence, self-sufficiency, and prevention of injury.[9] These deficiencies were described as being at odds with an approach developed more than a quarter-century ago and preferred by the federal and many state governments, as well as by international organizations of people with disabilities.

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2. Mary Johnson, *Jerry's Kids*, THE NATION, Sept. 14, 1992, at 232.

3. 135 CONG. REC.14,19804 (1989).

4. Statement made at hearing on *H.R. Doc. 2273 held by the Subcommittee on Select Education and the Subcommittee on Employment Opportunities of the House Committee on Education and Labor*, 101st Cong., 1st Sess. 62 (1989), and referred to by Sen. Kennedy, D.-Mass., 135 CONG. REC.14,19808 (1989). Justin Dart is the Chairperson of the Task Force on the Rights and Empowerment of Americans with Disabilities and a member of the National Council on Disability.

5. James C. Dugan, *The Conflict Between "Disabling" and "Enabling" Paradigms in Law: Sterilization, The Developmentally Disabled, and the Americans with Disabilities Act of 1990*, 78 CORNELL L. REV. 507 (1993).

6. The National Council on the Handicapped (now known as the National Council on Disability) consists of 15 members who are appointed by the President of the United States and confirmed by the Senate. The Council was established in 1978 as an advisory board within the Department of Education. Pub. L. No. 95-602 (1978). The Rehabilitation Act Amendments of 1984 transformed the Council into an independent federal agency. Pub. L. No. 98-221 (1984).

7. NATIONAL COUNCIL ON THE HANDICAPPED, TOWARD INDEPENDENCE: AN ASSESSMENT OF FEDERAL LAWS AND PROGRAMS AFFECTING PERSONS WITH DISABILITIES—WITH LEGISLATIVE RECOMMENDATIONS (1986) [hereinafter TOWARD INDEPENDENCE]. Copies of the report are available for sale from the Superintendent of Documents, U.S. Printing Office, Washington, D.C. 20402, Gov't Printing Office Stock Number: 052-003-01022-4. A second report, entitled ON THE THRESHOLD OF INDEPENDENCE, was issued by the Council in 1988.

8. 29 U.S.C. § 401 (1988).

9. TOWARD INDEPENDENCE, *supra* note 7, at vi.

The approach is directed toward providing access to opportunities rather than "taking care of" people with disabilities:[10]

> The older custodial attitude is typically expressed in policies of segregation and shelter, of special treatment and separate institutions. The newer integrative approach focuses attention upon the needs of the disabled as those of normal and ordinary people caught at a physical and social disadvantage. The effect of custodialism is to magnify physical differences into qualitative distinctions; the effect of integrationism is to maximize similarity, normality, and equality as between the disabled and the able-bodied.[11]

The Council concluded that a number of specific deficiencies existed in equal opportunity laws.[12] As a result of its conclusions the Council

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10. NATIONAL COUNCIL ON THE HANDICAPPED, TOWARD INDEPENDENCE: AN ASSESSMENT OF FEDERAL LAWS AND PROGRAMS AFFECTING PERSONS WITH DISABILITIES—WITH LEGISLATIVE RECOMMENDATIONS app. (1986) [hereinafter TOWARD INDEPENDENCE app.]. Copies of the appendix are available for sale from the Superintendent of Documents, U.S. Printing Office, Washington, D.C. 20402, Gov't Printing Office Stock Number: 052-003-01023-2.

11. Jacobus tenBroek & Floyd W. Matson, *The Disabled and the Law of Welfare*, 54 CAL. L. REV. 809, 816 (1966).

12. *See* TOWARD INDEPENDENCE app., *supra* note 10, at A15-39. Among the deficiencies identified were the following:

- Money damages are not available in actions against state governmental entities for violations of the major Federal disability rights law pursuant to the Supreme Court's ruling in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985);
- Although many victims of employment and housing discrimination based upon race, color, religion, sex and national origin may seek redress under federal law, victims of disability-based discrimination have no comparable protection;
- The receipt of federal assistance does not trigger institutionwide requirements that educational facilities refrain from disability-based discrimination pursuant to the Supreme Court's ruling in *Grove City College v. Bell*, 465 U.S. 555 (1984);
- Places of public accommodation are not prohibited from discriminating on the basis of disability as they are with respect to race, color, religion and national origin;
- The nature and extent of a federal assistance recipient's obligation to make its activities accessible by providing "reasonable accommodation" to people with disabilities is inconsistently interpreted by federal courts;
- While the law declares that disability-based discrimination by those who receive federal assistance is illegal, it does not define what is intended by "discrimination," (e.g., what obligation is there to remove physical barriers, or is it acceptable to discriminate against a person with a disability if his or her disability is not the sole reason for the act?);
- Enforcement proceedings under federal law, in those instances where disability-based discrimination has been made illegal, is fraught with delay and there is uncertainty as to whether private causes of action exist; and,
- Traditional civil rights standards are not easily applied to cases of discrimination against people with disabilities. One difference, for example, relates to employment qualification standards. While race, sex, national origin, and religion are almost never legitimate criteria, in the case of disabilities there is a much more complex relationship between disability

recommended enactment of a comprehensive law, having broad coverage, and establishing clear, consistent and enforceable standards.[13] The result came in 1990 with the enactment of the Americans with Disabilities Act.

The ADA provides multiple protections to people with disabilities and, consistent with the recommendations of *Toward Independence*, one of the law's express goals is that it "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[14] When President Bush signed it into law, he was apparently of the opinion that the ADA had succeeded in this respect, and he pronounced the law "powerful in its simplicity."[15] He said fears that the law is too vague or costly and will lead to an explosion of litigation were misplaced.[16] In contrast, many others have described it as less than a model of clarity and a law which will require extensive judicial interpretation.[17]

Regardless of the conclusion as to draftsmanship, there appears to be agreement that the ADA will create substantial change. It has been described as the "Emancipation Proclamation" for people with disabilities,[18] the most comprehensive federal civil rights legislation since the Civil Rights Act of 1964,[19] and "the most sweeping piece of civil rights legislation since the Civil War era."[20]

The ADA refers to 43 million members of the American population who, on the date of its passage, were thought to have one or more physi-

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and performance ability, and consequently, a more complex set of standards is required.

13. TOWARD INDEPENDENCE, *supra* note 7, at vi.

14. 42 U.S.C. § 12101(b)(1) (Supp. III 1991).

15. Remarks on signing the Americans with Disabilities Act of 1990, PUB. PAPERS, George Bush, Book II - July 1 to Dec., 31, 1990, at p.1068 (July 26, 1990).

16. Statement on signing the Americans with Disabilities Act of 1990, PUB. PAPERS, George Bush, Book II - July 1 to Dec., 31, 1990, at p.1070 (July 26, 1990).

17. *E.g.*, Emily Harrison, *Officials Predict Problems with Title I Disabilities Act Enforcement*, CASPER STAR-TRIBUNE, Mar. 20, 1992, at A3, (David Simonton, Esq., Supervisor of the Wyoming Department of Employment's Labor Standards Division, reportedly viewed the language of the ADA as vague and open to interpretation and was quoted as saying that "[w]e're going to have a lot of court cases and the courts are going to be intricately involved with setting some of the standards").

18. 135 CONG. REC. 14,19801 (1989) (statement of Sen. Harkin).

19. *Hearings on H.R. 2273 before the Committee on the Judiciary and the Subcommittee on Civil and Constitutional Rights of the Committee on Civil and Constitutional Rights of the Committee on the Judiciary, House of Representatives*, 101st Cong., 1st Sess. 201-12 (1989) (Attorney General Dick Thornburgh testified that the ADA presented an historic opportunity parallel to the Civil Rights Act of 1964); Americans with Disabilities Act of 1989: *Hearings before the Committee on Labor and Human Resources and the Subcommittee on the Handicapped on S. 933, U.S. Senate*, 101st Cong., 1st Sess. 500 (1989) (Sally Douglas, testifying on behalf of the National Federation of Independent Business that the ADA would prove more sweeping than the Civil Rights Act of 1964).

20. 135 CONG. REC. 14,19804 (1989) (statement of Sen. Hatch).

cal or mental disabilities.[21] Nationally, that figure translates into approximately one in every six people.[22] In Wyoming, the Department of Employment has estimated that over 45,500 residents of the state are protected by the ADA, or about one out of every ten people.[23] Furthermore, the law's coverage is expected to increase with time.

Congress recognized that the number of people with disabilities would grow.[24] A contributing factor is the circumstance referred to as the "graying of America": the fact that there are 30.4 million people in this country who are at least 65 years of age, and that by 2030 that figure is expected to grow to approximately 66 million.[25] In addition, the number of people over 85 years old is increasing,[26] and the incidence of disabilities becomes greater with age.[27]

The ADA does not guarantee equal results, establish quotas or require that preference be granted to people with disabilities. In a real sense, however, it is an affirmative action law, not in the traditional sense of the term, but in that compliance with the ADA is not to be passively achieved. It is not enough to continue what may have traditionally been considered as "nondiscriminatory" policies. Instead, specific, legally enforceable responsibilities are created for both public and private parties in order to help bring about a much greater level of participation by people with disabilities within all facets of American society.[28]

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21. 42 U.S.C. § 12101(a)(1) (Supp. III 1991).

22. According to the 1990 United States Census we are a country of approximately 250 million people.

23. DIVISION OF VOCATIONAL REHABILITATION, WYOMING DEPARTMENT OF EMPLOYMENT, REPORT ON THE AMERICANS WITH DISABILITIES ACT 1 (1991)

24. 42 U.S.C. § 12101(a)(1) (Supp. III 1991).

25. AMERICAN BAR ASSOCIATION & NATIONAL JUDICIAL COLLEGE, COURT-RELATED NEEDS OF THE ELDERLY AND PERSONS WITH DISABILITIES: A BLUEPRINT FOR THE FUTURE 70 (1991) (recommendations of the Feb. 1991 Conference with the assistance of the Commission on Legal Problems of the Elderly and the Commission on the Mentally Disabled).

26. *Id.*

27. TOWARD INDEPENDENCE, *supra* NOTE 7, at 4. For example, today close to half of the people over 65 have some functional limitation in physical activity. The figure climbs to 55.3% for people age 70-74 and to 72.5% for those over 75. COURT-RELATED NEEDS, *supra* note 25, at 70.

28. The National Council on Disability remarked that there is a lack of a clear distinction between nondiscrimination and affirmative action. TOWARD INDEPENDENCE app., *supra* note 10, at A25-27. It noted the Supreme Court's attempt, in *Southeastern Community College v. Davis*, 442 U.S. 397, 410-13 (1979), a case decided under the Rehabilitation Act of 1973, to draw a distinction between "evenhanded treatment of qualified handicapped persons and affirmative efforts to overcome the disabilities caused by handicaps." The former, according to the Court, being nondiscrimination, the latter, affirmative action. Six years later, the Court noted the haziness of the *Davis* opinion in *Alexander v. Choate*, 496 U.S. 287, 300 n.20 (1985). To address the problem, the Council recommended the establishment of clear and enforceable equal opportunity standards, and explicit requirements for recruitment and outreach to increase participation by people with disabilities. TOWARD INDEPENDENCE, *supra* note 7, at A-27.

The ADA addresses these responsibilities under three main titles. Title I concerns employment discrimination.[29] Title II deals with the services and practices of state and local governments, including the operations of their court systems.[30] Title III places requirements on business and is somewhat misleadingly termed the "public accommodations" section.[31] Another part of the ADA deals with telecommunications. Its primary requirement is that broadcast public service announcements be closed-captioned and that phone companies provide "non-voice" services to people with hearing and/or speaking disabilities.[32] Finally, a catch-all section of the law concerns miscellaneous topics such as enforcement, retaliation, attorneys fees, insurance, and the ADA's relationship to other laws.[33] As will become apparent, these titles are filled with terms which have specific meanings. Gaining familiarity with these terms is key to understanding the law.

B. The Meaning of "Individual with a Disability"

One of the more complex concepts of the ADA concerns who has a "disability."[34] The law provides that there are three categories of protected individuals with disabilities. A person with a disability is one who has a physical or mental impairment that substantially limits a major life activity, has a history of such an impairment, or is regarded as having such an impairment.[35]

The ADA itself provides no further definition of the terms used in this three-category description. However, various federal agencies were charged by Congress with implementing and enforcing the ADA,[36] by, among other things, promulgating rules and regulations to supplement the law. Those rules and regulations provide additional definition to the terms used in the ADA.[37]

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29. 42 U.S.C. §§ 12111-12117 (Supp. III 1991).

30. 42 U.S.C. §§ 12131-12165 (Supp. III 1991).

31. 42 U.S.C. §§ 12181-12189 (Supp. III 1991).

32. Title IV of the ADA amends the Communications Act. *See* 47 U.S.C. §§ 225, 611 (Supp. II 1990).

33. 42 U.S.C. §§ 12201-12213 (Supp. III 1991).

34. The term "disability" rather than "handicap," and the term "individual with a disability" instead of "individual with handicaps" is preferred. *See* 28 C.F.R. app. § 35.104 (1993).

35. 42 U.S.C. § 12102(2) (Supp. III 1991).

36. 42 U.S.C. §§ 12117, 12133 & 12188 (Supp. III 1991).

37. Interpretive comments to various rules are provided in appendices and preambles which are cited throughout this article. Other assistance is provided by technical assistance manuals published by various implementing/enforcing agencies. The force of these interpretative aids is established by the rule of law that a court will defer to an agency's interpretation in the face of ambiguity. *See* Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 843-44 (1984). This circumstance

Some of the ADA's terms have different meanings depending upon which title of the law is in issue, and therefore which agency's rules apply. However, that is not the case with the term "disability," the definition of which was borrowed by all agencies from an earlier federal law: the Rehabilitation Act of 1973.[38]

Under section 504 of the Rehabilitation Act, an individual is protected from disability-based discrimination in certain circumstances if she[39] can prove that she is a "handicapped individual."[40] The Council on Disability emphasized that to people with disabilities who have spent years stressing their abilities, achievements and independence, and objecting to the label "handicapped," the need to prove that one is a handicapped individual can be very difficult indeed.[41] This problem, the report goes on to point out, was addressed in part by the use of a broad, three-category definition incorporated into Title V of the Rehabilitation Act.[42] The federal agencies charged with ADA rule promulgation apparently agreed and modeled their interpretation of "disability" after that of the Rehabilitation Act.[43] As a result, the precedent developed under the earlier law is thought to have become generally applicable to ADA matters.[44]

The first categorical definition pertains to people with "physical or mental impairments" that "substantially limit" a "major life activity."[45] According to the Equal Employment Opportunity Commission (hereinafter referred to as the EEOC), physical or mental impairments include:

> (i) any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory—including speech organs, cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or,

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was recognized during the debate on the ADA. *See generally* 135 CONG. REC. 14,19861 (1989) (statement of Sen. Bumpers).

38. 29 U.S.C. §§ 701-796 (1988 & Supp. III 1991).

39. Unless the context suggests otherwise, the use of the feminine or masculine personal pronouns is arbitrary.

40. 29 U.S.C. § 706 (1988 & Supp. III 1991).

41. *See* TOWARD INDEPENDENCE app., *supra* note 10, at A-22 to 25.

42. *See supra* note 40.

43. The agencies' approach is consistent with the tenet that the ADA not be construed as imposing lesser standards than those of the Rehabilitation Act of 1973. 42 U.S.C. § 12201(a) (Supp. III 1991).

44. *E.g.*, *supra* note 16, at 1070.

45. 42 U.S.C. § 12102(2)(A) (Supp. III 1991).

> (ii) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.[46]

The Department of Justice (hereinafter referred to as the DOJ) rules explicitly provide, that in addition to the two categories listed by the EEOC, "physical or mental impairment" includes, but is not limited to:

> [S]uch contagious and noncontagious diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease (whether symptomatic or asymptomatic), tuberculosis, drug addiction and alcoholism.[47]

While under consideration, the proposed law was criticized in the United States Senate for its failure to more specifically list the mental impairments to be covered.[48] At least one Senator predicted that if the ADA were enacted, the private sector would be swamped with mental disability litigation.[49] By a successful amendment some uncertainty was removed and the conditions which the Senator argued would have made for the more egregious lawsuits were excepted from the definition of disability.[50] The excepted "conditions" are "homosexuality and bisexuality . . . transvestism, transsexualism, pedophilia, exhibitionism, voyeur-

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46. 29 C.F.R. § 1630.2(h) (1993); for similar language concerning Title II, *see* 28 C.F.R. § 35.104 (1993), and concerning Title III, *see* 28 C.F.R. § 36.104 (1993).

47. 28 C.F.R. § 36.104 (1993) and 28 C.F.R. § 35.104 (1993); *see also* THE REPORT OF THE SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES, quoted in part 135 CONG. REC. 15,20571 (1989). EEOC provides the following further explanation of what impairments are intended to be covered:

> The definition of the term 'impairment' does not include physical characteristics such as eye color, hair color, left-handedness, or height, weight or muscle tone that are within 'normal' range and are not the result of a physiological disorder. The definition, likewise, does not include characteristic predisposition to illness or disease. Other conditions, such as pregnancy, that are not the result of a physiological disorder are also not impairments. Similarly, the definition does not include common personality traits such as poor judgment or a quick temper where these are not symptoms of a mental or psychological disorder. Environmental, cultural, or economic disadvantages such as poverty, lack of education or a prison record are not impairments. Advanced age, in and of itself, is not an impairment. However, various medical conditions commonly associated with age, such as hearing loss, osteoporosis, or arthritis would constitute impairments within the meaning of this part.

29 C.F.R. app. § 1630.2(h) (1993).

48. 135 CONG. REC. 14,19871 (1989) (statement of Sen. Armstrong); 135 CONG. REC. 1,520,572 (1989).

49. 135 CONG. REC.14,19884 (1989) (statement of Sen. Armstrong).

50. *See supra* note 48, at 20574.

ism, gender identity disorders not resulting from physical impairments, and other sexual behavior disorders."[51]

The rules give examples of the "major life activities" which must be "substantially limited" by a mental or physical impairment for an individual to qualify as having a disability. These activities include the functions of caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.[52]

Under the third prong of the definition, a major life activity is "substantially limited" if a person is:

> (i) unable to perform the major life activities that the average person in the general population can perform; or
> (ii) significantly restricted - as to condition, manner or duration - in the manner in which the individual can perform a major life activity, relative to the average person in the general population.

In addition, the following factors are to be considered in determining whether an individual is substantially limited:

> (i) the nature and severity of the impairment;
> (ii) the duration or expected duration of the impairment; and,
> (iii) the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.[53]

The second category of protected individuals with a disability includes those who have a *history* of a mental or physical impairment which substantially limits a major life activity. As might be expected, the rules refer to a person with a history of such an impairment. Perhaps surprisingly, they go on to provide that those who have been misclassified as having such impairments are also protected.[54]

The third category of individual with a disability—"one who is regarded as having such an impairment"—requires a bit more explanation.

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51. 42 U.S.C. § 12211 (Supp. III 1991).

52. 29 C.F.R. § 1630.2(i) (1993).

53. 29 C.F.R. § 1630.2(j) (1993); concerning Title II, *see* 28 C.F.R. app. § 35.104 (1993); concerning Title III, *see* 28 C.F.R. app. B § 36.104 (1993). It should be noted that the existence of an impairment is to be determined without regard to mitigating measures such as medicines, and assistive or prosthetic devices. Regarding Title I, *see* 29 C.F.R. app. § 1630.2(h) (1993).

54. Regarding Title I, *see* 29 C.F.R. § 1630.2(k) (1993); regarding Title II, *see* 28 C.F.R. § 35.104 (1991); and regarding Title III, *see* 28 C.F.R. § 36.104 (1993). An example of a person who has been misclassified as having an impairment is one who is mistakenly thought to have been mentally retarded or ill. 28 C.F.R. app. § 35.104 (1993).

The rationale for this category of individual with a disability was articulated by the Supreme Court in *School Board of Nassau County v. Arline*.[55] In *Arline*, a schoolteacher was fired because her employer feared that her tuberculosis was contagious.[56] In doing so, however, the defendant argued that the protections and requirements of the Rehabilitation Act of 1973 did not apply since it was acting, not because of Ms. Arline's impairment, but out of concern for the health of others.[57] The Court disagreed, and in interpreting the Rehabilitation Act referred to "society's accumulated myths and fears about disability and diseases" and held that they "are as handicapping as are the physical limitations that flow from actual impairment."[58] The ADA rules adopt that viewpoint and provide that a person is "regarded as having such an impairment":

> (i) even if the individual has no impairment but is treated by a covered entity as if he did;
> (ii) if the individual has such an impairment only as a result of the attitudes of others toward such impairment; or,
> (iii) if the individual has no such impairment but is treated by a covered entity as if she did.[59]

According to the EEOC, an example of a person satisfying the first part of this category would be one with controlled high blood pressure which is not "substantially limiting." If the person's employer were to reassign the individual to less strenuous work because of a fear that the person might suffer a heart attack, the employer would be regarding the individual as disabled.[60] As an example of someone contemplated by the second part of this category, the EEOC refers to an individual with a prominent facial scar or a periodic involuntary jerk of the head which does not limit a major life activity. If the person's employer discriminates against the person because of the condition, for example because of negative customer reaction, the employer would be regarding the individual as disabled.[61] Finally, the agency cites, as an example of a person protected under the third part of this category, the case of an individual erroneously

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55. 480 U.S. 273 (1987), *reh. den.* 481 U.S. 1024 (1987).

56. *Id.* at 276.

57. *Id.* at 281.

58. *Id.* at 284. The case was remanded for further findings as to whether the risk of infection precluded the plaintiff from being "otherwise qualified" for her job and, if so, whether reasonable accommodations were possible. *Id.* at 277.

59. 29 C.F.R. § 1630.2(l) (1993); regarding Title II, *see* 28 C.F.R. § 35.104 (1993); and regarding Title III *see* 28 C.F.R. § 36.104 (1993).

60. 29 C.F.R. app. § 1630.2(l) (1993).

61. *Id.*

believed by an employer to be infected with HIV. The protections of the ADA would be invoked if the employer discriminates against the person based on the erroneous belief.[62]

III. TITLE I—EMPLOYMENT

Title I of the ADA prohibits disability-based employment discrimination by "covered entities."[63] Generally, the rule is that an employer must select the most qualified person for a job without regard to the disability. An important caveat, however, is that, except in some special circumstances which are described below, should a person with a disability require assistance—in the words of the law a "reasonable accommodation"—an employer, or prospective employer, with knowledge of the need is obligated to provide it.[64] Congress charged the EEOC with implementing and enforcing Title I and instructed the agency to promulgate the necessary rules and regulations.[65]

Under Title I, "a qualified individual with a disability" is protected in every phase of employment. Therefore, all terms, conditions and privileges of work including hiring, advancement, discharge, and the provision of benefits, are regulated.[66] This protection exists in both the public and private workplace.[67]

"Covered entities" which are subject to the prohibition against discrimination include employers, employment agencies, labor organizations and joint labor-management committees.[68] These definitions, as well as several others used in the Title I rules, are identical, or almost identical, to terms found in Title VII of the Civil Rights Act of 1964.[69] According to the EEOC, they are to have the same meaning under the ADA as they have under the Civil Rights Act.[70]

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62. *Id.*

63. 42 U.S.C. § 12112 (Supp. III 1991).

64. 42 U.S.C. §§ 12111(8)-(9) & 12112(a) (Supp. III 1991).

65. 42 U.S.C. § 12116 (Supp. III 1991). *See* 29 C.F.R. Part 1630 (1993) (the rules, regulations, and explanatory appendix); 56 Fed. Reg. 35734 (1991) (the preamble, which does not appear in 29 C.F.R. Part 1630); the EEOC TECHNICAL ASSISTANCE MANUAL; and the joint EEOC - DOJ ADA HANDBOOK are chief sources of information concerning Title I.

66. 42 U.S.C. §12112(a) (Supp. III 1991).

67. Some federal employees and Presidential appointees were brought within the ADA's coverage by the Civil Rights Act of 1991. C.R.A. of 1991 §§ 301-325 (1991).

68. 42 U.S.C. § 12111(2) (Supp. III 1991).

69. 29 C.F.R. app. § 1630(a)-(f) (1993). The Civil Rights Act of 1964 appears at 42 U.S.C. § 2000e (1988 & Supp. III 1991).

70. 29 C.F.R. § 1630.2(c) (1993).

A private employer, and any agent of the employer, is subject to the Title I provisions if the employer is engaged in an industry affecting commerce and employs, or has employed, 15 or more people during each working day in each of 20 or more calendar weeks in the current or preceding calendar year.[71] Excluded from coverage are private membership clubs—other than labor organizations—if such clubs are tax exempt under § 501(c) of the Internal Revenue Code.[72]

Employment protections extend to "qualified" individuals with disabilities. In the employment context, qualified means one who, with or without reasonable accommodation, can perform the "essential functions" of the job.[73]

An essential function of a job is to be distinguished from one which is "marginal."[74] The EEOC description of an essential function is not very helpful. It describes it as a duty which is fundamental because, for example, the position exists to perform the task; within the employer's work force there is only a limited number of employees available to perform the function; or, the task is so highly specialized that people are hired specifically because of their ability to perform it.[75]

A person with a disability has the burden of informing an employer, or prospective employer, of the need for assistance in performing the essential functions of the job. Furthermore, in the case of a prospective employee, he or she is required to inform the employer that assistance is required in conjunction with the hiring process.[76] This burden is consistent with the ADA tenet that an employer may not make any medical inquiry prior to the offer of employment.[77]

When an employer is on notice that accommodation is needed, a case-by-case, interactive process is contemplated to determine what as-

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71. 42 U.S.C. § 12111(5)(A) (Supp. III 1991).

72. 42 U.S.C. § 1211(5)(B)(ii) (Supp. III 1991). The Internal Revenue Code grants tax exempt status to private, non-profit organizations under certain conditions. I.R.C. § 501(c)(3)

73. 42 U.S.C. § 12111(8) (Supp. III 1991).

74. 29 C.F.R. § 1630.2(n) (1993).

75. *Id.* In the rules, the EEOC lists the following as examples of the evidence that an employer might use to demonstrate that a function is essential: an employer's opinion, *see* 42 U.S.C. § 12111(8) (Supp. III 1991); a written description of functions which was prepared before interviews or advertisement of the job (note, the ADA does not require job descriptions, however, because a job description may support an employer's claim that a function is essential, thorough descriptions may be advisable), *see* 42 U.S.C. § 12111(8) (Supp. III 1991); the amount of time to be spent performing the function; the consequences of not requiring the performance of the function; the terms of a collective bargaining agreement; the work experience of past incumbants; and/or the current work experience of incumbants in similar jobs.

76. 29 C.F.R. app. § 1630.11 (1993).

77. 42 U.S.C. § 12112(d) (Supp. III 1991); *see also* 29 C.F.R. § 1630.13 (1993).

sistance is required. The EEOC suggests that first an employer determine the essential functions of the job, assuming that this was not done in advance of taking applications for the position in question.[78] Next, the employer is to communicate with the person in need of accommodation to determine his or her job-related limitations and how they might be overcome.[79] Finally, in consultation with the person—and, if necessary, by consulting with outside technical assistance—an employer is to analyze potential accommodations, giving primary consideration to the preferences expressed by the person in need of assistance.[80]

An employer's obligation to provide accommodation is not without limits. First, it does not extend to adjustments or modifications which are primarily for the personal benefit of an individual with a disability.[81] In other words, if a measure is not only job-related, but is instead one which assists the person throughout his or her daily activities, both on and off the job, it is considered a personal item and the employer is not required to provide it.[82]

In addition, an employer is only required to provide "reasonable" accommodations. An accommodation which imposes an "undue hardship" on an employer is not reasonable.[83] This limitation is intended to take into consideration the financial abilities of the employer, as well as whether the accommodation under consideration would be unduly disruptive or "fundamentally alter" the nature of the employer's business.[84]

A. Pre-hire Inquiries

As stated, the ADA's employment protections are first imposed at the pre-hire stage and apply to all employment decisions.[85] To begin with, a covered entity may not use qualification standards, tests or selection

78. Job descriptions are not required by the ADA, but are generally advisable.

79. 29 C.F.R. app. § 1630.9 (1993).

80. *Id.* The EEOC describes the requirement that a proposed accommodation be linked to an essential function with the following example: suppose an individual has a vision impairment which restricts his or her field of vision. Suppose further that reading is an essential function of the job in question. The person would not be required to accept an accommodation, such as a reader, to be considered qualified. If on the other hand, the person in the example were not able to read unaided, refusing a reasonable accommodation would render him or her unqualified. 29 C.F.R. app. § 1630.9(d) (1993). It should also be noted that an individual with a disability is not required to accept an accommodation offered by an employer. 29 C.F.R. § 1630.9(d) (1993).

81. 29 C.F.R. app. § 1630.9 (1993).

82. *Id.* For example, according to the EEOC interpretive appendix, an employer would not be required to provide items such as prosthetic limbs, wheelchairs, and eyeglasses.

83. 42 U.S.C. § 12112(b)(5)(A) (Supp. III 1991).

84. 29 C.F.R. app. § 1630.2 (1993).

85. *See supra* text accompanying notes 66-67.

criteria that *tend* to screen out people with disabilities on the basis of their disabilities, unless the method or criterion is shown to be job-related and consistent with business necessity.[86] Next, if an applicant requires an accommodation to interview or compete for a position, and if it is reasonable, the employer must provide it.[87] The objective is to prevent qualified applicants from being excluded from consideration merely because they have a disability which has no connection with their ability to perform the essential functions of the job.[88] Possibly in anticipation of reverse discrimination charges which may challenge pre-employment assistance provided to people with disabilities, the EEOC announced that it will view reasonable accommodations as a form of non-discrimination.[89]

Recently, a U.S. District Court in New York provided some insight into these provisions.[90] Even though the case was not decided under the employment title of the ADA, it offers some evidentiary advice to employers, an interpretation of "reasonable accommodation," and a reaction to unfair advantage concerns. In the case, Ms. D'Amico, a law school graduate and applicant for admission to the New York Bar, sued for an injunction compelling the State Board of Law Examiners to provide requested accommodations in conjunction with the bar examination.[91] She had a vision related disability which made reading extremely difficult, and which the examiners agreed entitled her to reasonable accommodations.[92] Taking the exam in the summer of 1992, she was allowed six and one-half extra hours to take the two day test, supplied with a large print exam, and afforded other minor accommodations.[93] Unsuccessful in this attempt, she applied to take the exam again in February 1993, and asked for additional accommodations, including permission to take the test over four days.[94] The examiners refused to extend the test schedule, citing security and a concern that allowing the requested additional time would give D'Amico an unfair advantage.[95] The court viewed the case principal-

86. 29 C.F.R. § 1630.10 (1993).

87. 42 U.S.C. §§ 12112(b)(5)(A) & 12189 (Supp. III 1991); *see also* 29 C.F.R. app. § 1630.11 (1993).

88. In other words, a person may not be screened out merely because a disability prevents the taking of a test or negatively influences the results of the test. *See* 29 C.F.R. app. §§ 1630.1, .11 (1993).

89. "The obligation to make reasonable accommodation is a form of non-discrimination." 29 C.F.R. app. § 1630.9 (1993).

90. D'Amico v. New York State Bd. of Law Examiners, 813 F. Supp. 217, (W.D.N.Y. 1993).

91. *Id.* at 219.

92. *Id.* at 218.

93. *Id.*

94. *Id.* at 219.

95. *Id.* at 221.

ly as a medical issue and relied on the opinion of the applicant's physician because the defendant board presented no conflicting medical evidence, arguing instead that D'Amico's doctor was not qualified to recommend an extended test schedule.[96] It granted an injunction allowing the requested four-day schedule.[97] The court observed that, while attending physicians do not have the final word on determining what is reasonable, where there is no conflicting evidence and the doctor's opinion does not appear outrageous, it is entitled to great weight.[98] The significance of this case is that it confirms that an employer which is considering refusing an accommodation would be well advised to consider obtaining the support of a medical expert.

Intense debate took place in Congress over what inquiry employers should be allowed to make of job applicants.[99] Should, for example, an employer be able to ask an applicant for a teaching position whether he or she has a communicable disease? Should a committee of citizens charged with screening applicants for an appointment to the judiciary be able to ask about past health or alcohol abuse? Again, the ADA draws on the Rehabilitation Act of 1973.[100] The regulations make a sharp distinction between what questions are permissible before and after a job is offered.[101]

At the pre-offer stage, a prospective employer, or its agent, may inquire as to an applicant's ability to perform job-related functions and ask an applicant to describe or to demonstrate how, with or without reasonable accommodation, she will be able to perform them.[102] An employer may, in appropriate circumstances, ask an individual with a known disability to describe or demonstrate job performance.[103] However, unless a known disability will interfere with the applicant's performance of a job-related function, the employer may only request a description or demonstration of performance if the same request is made of all applicants.[104]

Before making a conditional offer of employment, it is unlawful to conduct a medical examination of an applicant or to ask whether the applicant is an individual with a disability, about the nature or severity of such disability,[105] or for a medical history.[106] Consequently, questions

96. *Id.* at 222-23.
97. *Id.* at 223-24.
98. *Id.* at 223.
99. *E.g.*, 135 CONG. REC. 14,19865-67 (1989) (exchange between Senators Helms and Harkin).
100. 29 C.F.R. app. §1613.10,13-14 (1993).
101. *Id.*
102. 42 U.S.C. §12112(d) (Supp. III 1991); 29 C.F.R. § 1630.14(a) (1993).
103. 29 C.F.R. app. § 1630.14(a) (1993).
104. *Id.*
105. 42 U.S.C. § 12112(d)(2)(A) (Supp. III 1990); *see also* 29 C.F.R. § 1630.13(a) (1993).

must be narrowly tailored[107] and should not be phrased in terms of disability.[108]

B. Post-offer Inquiries

After making an offer of employment, an employer may require that all entering employees in the same job category submit to a medical examination.[109] Somewhat confusingly, the rules provide that, although the post-offer examination can be broad, any criteria which are used to screen out a prospective employee with a disability must be job-related and consistent with business necessity, and relate to essential functions of the job which cannot be performed with reasonable accommodation.[110] Information obtained in the course of performing a post-offer inquiry or examination is confidential, must be segregated from other personnel files, and may only be used for specified purposes.[111]

C. Direct Threat

An individual with a disability need not be allowed to pose a "direct threat" to the health or safety of himself or others.[112] Again, an individualized assessment is expected to be conducted by the employer.[113] The rules require that a candidate's present ability to safely perform the essential functions of the job be analyzed, and that decisions are to be based on

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106. EEOC TECHNICAL ASSISTANCE MANUAL § 5.1.

107. 29 C.F.R. app. § 1630.14(a) (1993).

108. 29 C.F.R. app. § 1630.13(a) (1993). The EEOC also provides the following among its examples of inquiries which may *not* be included on application forms or in job interviews:

> list any conditions or diseases for which you have been treated in the past 3 years; have you ever been hospitalized; have you ever been treated by a psychiatrist or psychologist; have you ever been treated for any mental condition; have you had a major illness in the last 5 years; are you taking any prescribed drugs; have you ever been treated for drug addiction or alcoholism; do you have any disabilities or impairments which may affect your performance, or is there any health-related reason you may not be able to perform the job for which you are applying.

See EEOC TECHNICAL ASSISTANCE MANUAL, § 5.5(b). Suggestions of specific questions which may and may not be asked are available. *E.g.*, Robert B. Fitzpatrick, *Employers' Screening Procedures Under the Americans with Disabilities Act: What's Legal? What's Illegal? What's Debatable?*, C780 ALI-ABA 291 (June 3,1993).

109. 42 U.S.C. § 12112(d)(3) (Supp. III 1991); *see also* 29 C.F.R. § 1630.14(b) (1993).

110. 29 C.F.R. § 1630.14(b)(3) (1993).

111. 42 U.S.C. § 12112(d)(3) (Supp. III 1991); *see also* 29 C.F.R. 1630.14(c) (1993).

112. 42 U.S.C. § 12113(b) (Supp. III 1991); *see also* 29 C.F.R. § 1630.15(b)(2) (1993). A direct threat is a significant risk to the health or safety of the protected individual or others which cannot be eliminated by reasonable accommodation. *See* 42 U.S.C. § 12111(3) (Supp. III 1991); *see also* 29 C.F.R. § 1630.2(r) (1993).

113. 29 C.F.R. § 1630.2(r) (1991).

reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence.[114]

The EEOC cautions that subjective perceptions, irrational fears, patronizing attitudes, or stereotypes about the nature or effect of a particular disability, or disability in general, will not support the defense of direct threat. It cites, as an example, a law firm and observes that the firm could not reject an applicant with a history of disabling mental illness based upon a generalized fear that the stress of trying to make partner might trigger a relapse of the lawyer's mental illness.[115]

D. Remedies

The remedies available under Title I are those set forth in various sections of the Civil Rights Act of 1964,[116] as amended by the Civil Rights Act of 1991.[117] They include injunction (e.g., hiring or reinstatement, with or without back pay), compensatory damages (e.g., for future pecuniary loss, emotional pain, suffering, inconvenience, mental anguish and loss of enjoyment of life), and punitive damages—from private employers—if the employer has engaged in a discriminatory practice with "malice or reckless indifference" to an individual's rights.[118]

A reading of Title I and its enforcement mechanism,[119] in isolation, could lead to the conclusion that all individuals with ADA employment complaints must pursue their rights through the EEOC, as the administrative agency charged with enforcing the Title, before resorting to the courts. That would be consistent with the well-known concept of exhaustion of administrative remedies.[120] However, the requirement may not exist for public employment claimants. The Department of Justice has interpreted the program-activity-services provisions of Title II of the ADA as incorporating the employment protections of Title I.[121] In addition, the DOJ has made it clear that people complaining against state and local

114. *Id.* In examining a potential threat, the following factors are also to be considered: the duration of the risk; the nature and severity of the potential harm; the likelihood that the potential harm will occur; and the imminence of the potential harm. 29 C.F.R. § 1630.2(r) (1993).

115. 29 C.F.R. app. § 1630.2(r) (1993).

116. 42 U.S.C. § 12117(a) (Supp. III 1991).

117. 42 U.S.C. § 1981a (Supp. III 1991).

118. *Id.*

119. 42 U.S.C. § 2000e-5(f)(1) (1988).

120. The doctrine requires that where a potential administrative remedy exists it must be pursued before a claimant resorts to court. *See generally* 2 AM. JUR. 2D *Administrative Law* §§ 595-609 (1962).

121. 28 C.F.R. § 35.140 (1993).

governments need not exhaust their administrative remedies.[122] As a result, it seems that exhaustion may not be required when an employment discrimination charge is made against a public employer.[123]

E. Wyoming Fair Employment Practices Act

The ADA is not intended to invalidate or limit the rights or remedies of other federal, state or local laws, so long as they provide greater or equal protection to that provided by the ADA.[124] Wyoming has afforded people with disabilities protection from discrimination in employment since 1985.[125] The pertinent provision of the law reads:

> (a) It is a discriminatory or unfair employment practice:
> (i) For an employer to refuse to hire, to discharge, to promote or demote, or to discriminate in matters of compensation or the terms conditions or privileges of employment against, a qualified handicapped person . . .
> (ii) For a person, an employment agency, a labor organization, or the employees or members thereof, to discriminate in matters of employment or membership against . . . a qualified handicapped person . . .
>
> * * *
>
> (d) As used in this section 'qualified handicapped person' means a handicapped person who is capable of performing a particular job, or who would be capable of performing a particular job with reasonable accommodation to his handicap.[126]

This state law has not been widely used.[127] Recently, however, an individual successfully alleged a violation of the section against his former employer.[128]

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122. DOJ TECHNICAL ASSISTANCE MANUAL, II-9, 1000.

123. At least one federal district court has agreed. *See* Peterson v. University of Wisconsin Bd. of Regents, No. 93-C-46-C, (W.D. Wis. Apr. 20, 1993).

124. 42 U.S.C. § 12201(b) (Supp. III 1991).

125. Wyoming Fair Employment Practices Act, ch. 5, § 1 (1985) (codified as amended at WYO. STAT. § 27-9-105(b) (1991)).

126. WYO. STAT. § 27-9-105 (1991).

127. As of April 28, 1992, only three disability cases had gone to public hearing within the last three years. All other cases were either dismissed, settled or denied a public hearing for failure to present additional evidence or show misapplication of the law. Letter from David Simonton, Supervisor Labor Standards Division, Wyoming Department of Employment (Apr. 28, 1992) (on file with author).

128. World Mart, Inc. v. Ditsch, 855 P.2d 1228 (Wyo. 1993).

James Ditsch, described by the Court as a "quadriplegic confined to a wheelchair," was employed as a telemarketer, and subsequently as a supervisor for a private, for-profit company selling light bulbs.[129] When the branch manager decided to relocate, Ditsch applied for the vacancy.[130] Another person, a woman with a history of alcohol abuse, was apparently the only applicant interviewed and she was subsequently placed in the position instead of Ditsch.[131] After her appointment, she removed Ditsch from his supervisory position, and when he refused reassignment, terminated his employment with the company.[132] In his complaint, Ditsch alleged that he was the most qualified applicant for the branch manager position and that he was impermissibly passed over.[133]

As is required by the Act,[134] the charge of illegal discrimination was investigated by the Wyoming Fair Employment Practices Commission,[135] which, after conducting a fact-finding hearing, found reasonable cause to believe that discrimination had occurred and proposed a settlement.[136] The parties rejected the Commission's settlement proposal and a contested case was conducted pursuant to the Wyoming Administrative Procedures Act.[137]

Interestingly, the employer contended that because the person selected for the position was also "handicapped," Ditsch could not sustain his burden of proof.[138] The hearing officer for the Commission found that the new branch manager was a practicing, rather than a recovered alcoholic, and for that reason rejected the employer's claim.[139] The examiner also held that the employer had not established by a preponderance of the evidence that Ditsch was denied the position or terminated for legitimate, non-discriminatory reasons.[140] In making this ruling, the examiner apparently adopted the argument presented on behalf of Ditsch that the branch manager was not a handicapped person under the definition in the Commission's Rules, which is substantively identical to that in the ADA.[141]

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129. *Id.* at 1231.
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.* at 1231.
134. *See* WYO. STAT. § 27-9-104 (1991).
135. *World Mart, Inc.*, 855 P.2d at 1231.
136. *Id.*
137. *Id.* The Wyoming Administrative Procedures Act is found at WYO. STAT. §§ 16-3-101 to 16-3-115 (1990 & Supp. 1993).
138. *World Mart, Inc.*, 855 P.2d at 1233.
139. *Id.*
140. *Id.*
141. "(a) 'Handicapped person' means any person who has a physical or mental impairment

The Wyoming Supreme Court avoided the issue of whether alcoholism constitutes a disability under state law, holding that whether the new manager was "handicapped," either as a recovering or practicing alcoholic, was not controlling.[142] Instead, it held that in either event, once a prima facie showing of discrimination was shown by Ditsch—and the Court held that there was substantial evidence in the record to support that conclusion—the burden shifted to the employer to establish that the new branch manager was more qualified.[143] Since the employer did not carry its burden, the administrative decision was sustained.[144]

IV. TITLE II—STATE AND LOCAL GOVERNMENT SERVICES, PRACTICES AND ACTIVITIES

A. Transportation

According to a key Senate sponsor of the ADA, transportation is the linchpin which enables people with disabilities to be integrated and mainstreamed into society.[145] It is the key to opening up education, employment, and recreation, thus the other provisions of the ADA are meaningless unless there is an accessible public transportation system.[146]

Title II of the ADA consists of two subtitles. Subtitle B concerns public transportation, other than aircraft and certain rail operations, and the facilities associated with transportation.[147] Disability-based discrimination in connection with the provision of transportation is forbidden.[148] Discriminatory actions such as segregation, the imposition of special

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which substantially limits one or more major life activities, has a record of such impairment, or is regarded as having such an impairment." Rules of Practice and Procedure Before the Wyoming Fair Employment Commission Concerning Handicap Discrimination Complaints Filed Pursuant to the Fair Employment Practice Act of 1965 as Amended, Ch. X, § 3 (Jan. 14, 1986). *Compare* 42 U.S.C. § 12102(2) (Supp. III 1991) (the ADA definition).

142. *World Mart, Inc.*, 855 P.2d at 1233.

143. *Id.*

144. *Id.* at 1235. In addition to awarding back pay with interest against World Mart, Inc., the order for relief required the defendant to cease its discriminatory practices, and to implement an affirmative action program which would offer equal employment opportunities "to all persons regardless of handicap or disability." *Id.* at 1232. On appeal, the employer argued that this portion of the order was an abuse of discretion. The Court disagreed, holding that it was undisputed that the employer only hired handicapped individuals for telemarketer positions. In responding to this "reverse discrimination" allegation the Court held that the statute in question, WYO. STAT. § 27-9-106(g) (1991), was sufficiently broad to justify the order, and that the Commission had not abused its discretion. *World Mart, Inc.*, 855 P.2d at 1238.

145. 135 CONG. REC. 14,19802 (1989) (statement of Sen. Harkin).

146. *Id.*

147. 42 U.S.C. §§ 12141-12165 (Supp. III 1991).

148. 49 C.F.R. § 37.5(a) (1993).

charges, and requirements for users to be accompanied by an attendant are all addressed, as are standards for vehicle and facility accessibility.[149]

The Department of Transportation is responsible for enforcing compliance with this section by public entities which receive federal assistance.[150] The DOJ is charged with watching over the transportation activities of other public entities and of all private transportation providers.[151]

B. Other Services, Practices and Activities of State and Local Governments

Subtitle A of Title II is applicable to state and local government.[152] It may be seen as a rough blend of the employment provisions of Title I and the facilities-services-goods accessibility concepts of Title III which relate to public accommodations.[153] Implementation and enforcement of the Subtitle are the responsibility of the DOJ.[154] Accordingly, it has promulgated pertinent rules and regulations.[155]

The entities covered by Subtitle A include all levels and instrumentalities of state and local government,[156] as well as their contractors.[157] In recognition of the Supreme Court's decision in *Atascadero State Hospital v. Scanlon*,[158] Congress attempted to ensure that there was no question that a claim of immunity would be available to a state pursuant to the Eleventh Amendment to the Constitution.[159]

The title protects qualified individuals with disabilities in relation to all services, programs and activities of state and local government.[160] Essentially, everything that these public entities do or are involved with is addressed, and in at least one area there is double coverage.[161]

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149. 49 C.F.R. §§ 37.5-37.9 (1992).

150. 49 C.F.R. § 37.11(a) (1992).

151. 49 C.F.R. § 37.11(b)-(c) (1992).

152. 42 U.S.C. §§ 12131-12134 (Supp. III 1991).

153. *See infra* notes 247-289 and accompanying text

154. 42 U.S.C. § 12134 (Supp. III 1991).

155. 28 C.F.R. pt. 35 (1993). These rules along with an interpretative appendix, 28 C.F.R. pt. 35 app., Technical Assistance Manual, and ADA Handbook, issued jointly between the DOJ and the EEOC, are chief sources of information about the subtitle.

156. 42 U.S.C. § 12131(1) (Supp. III 1991).

157. 28 C.F.R. § 35.130(b) (1993).

158. 473 U.S. 234 (1985). In *Atascadero*, a case brought under the Rehabilitation Act of 1973, the Court held that the Eleventh Amendment prohibits suits for monetary damages against states, with the majority holding that Congress can abrogate state immunity from federal suit "only by making its intention unmistakably clear in the language of the statute." *Id.* at 242.

159. 28 C.F.R. § 35.178 (1993).

160. 42 U.S.C § 12132 (Supp. III 1991).

161. Employment practices are covered by both Titles I and II. *See* 28 C.F.R. app. § 35.140

Initially, the DOJ proposed utilizing the definition of "employer" found in the EEOC Title I rules and regulations, which would have exempted public entities with fewer than 15 employees, like private sector employers of that size.[162] In the final analysis, however, the DOJ was persuaded by Congress' intent to have the employment practices of all public entities regulated,[163] and the final rules reflect that conclusion.[164] The effective date for full compliance by all state and local government employers, regardless of number of employees, was January 26, 1992.[165]

1. Program Accessibility

The thought that programs should be made accessible to people with disabilities was established in the Rehabilitation Act of 1973 § 504 regulations which were adopted by the Department of Health, Education and Welfare for use in the federally-assisted programs it supervised.[166] Under the regulations, recipients of federal assistance were allowed to make their federally-assisted programs and activities available to individuals with disabilities by modifying the programs and activities, when possible, rather than making physical alterations to facilities. This approach proved to be workable[167] and was incorporated into the ADA rules with respect to *existing facilities*.[168] As a result, each service, program and activity of a public entity, when viewed in its entirety, must be readily accessible to and usable by people with disabilities.[169]

To accomplish that end, the rules require all public entities to evaluate their policies and practices to identify those which are not consistent with this objective.[170] The evaluation process must include an opportunity for interested people to participate by submitting comments.[171] Entities employing more than 49 people are required to maintain and allow public

(1993). Overlapping jurisdiction was a matter of concern to Congress. 42 U.S.C. § 12117(b) (Supp. III 1991). Accordingly, federal agencies have pledged to work with each other to develop coordinated enforcement. 28 C.F.R. § 35.140 (1993). Currently however, both the EEOC and the DOJ are sources for employment-based complaint resolution, at least with respect to state and local government.

162. *See* Notice of Proposed Rulemaking Implementing Subtitle A of Title II of the ADA, 56 Fed. Reg. 8538 (1991).

163. 28 C.F.R. app. § 35.140 (1993).

164. 28 C.F.R § 35.140 (1993).

165. 28 C.F.R § 35.140 (1993).

166. *E.g.*, 28 C.F.R. pt. 39 (1993).

167. 28 C.F.R. pt. 35, subpart D, app. (1993).

168. 42 U.S.C. § 12134(b) (Supp. III 1991).

169. 28 C.F.R. § 35.150 (1993).

170. 28 C.F.R. § 35.105(a) (1993).

171. 28 C.F.R. § 35.105(b) (1993).

inspection of their self-evaluation study for three years.[172] Such entities are also required to have a transition plan describing how and when they will come into compliance if structural modifications[173] are necessary.[174]

Structural modifications required for program accessibility are to be completed as soon as possible but in no event later than January 26, 1995.[175] Non-structural changes are to be made immediately.[176] New construction and alterations to public facilities are to be made so that the final product is readily accessible, which generally means that one of two accessibility standards must be met. Either the ADA Accessibility Guidelines (ADAAG),[177] or the Uniform Federal Accessibility Standards (UFAS)[178] may be followed by a public entity.[179]

An entity is not required to take action which would threaten the historical significance of a property.[180] It also need not take an action which it can demonstrate would fundamentally alter a service, program or activity, or result in an undue financial or administrative burden.[181] Fitting a facility or activity into this exemption is not easily achieved.[182] A public entity's decision to claim the exemption must be made by its head or his or her designee, after considering all resources available to the entity for use in the funding and operation of the service, program, or activity.[183] In addition, the claim must be accompanied by a written statement of reasons supporting the conclusion.[184]

Contrasted with the requirement of Title III that private entities remove architectural barriers where "readily achievable,"[185] Title II

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172. 28 C.F.R. § 35.105(c) (1993).

173. "Structural" changes in this context include all physical changes to a facility. 28 C.F.R. app. § 35.150 (1993).

174. 28 C.F.R. § 35.150(d) (1993).

175. 28 C.F.R. § 35.150(c) (1993).

176. 28 C.F.R. app. § 35.150 (1993).

177. 28 C.F.R. pt. 36 app. A (1993).

178. The Architectural Barriers Act of 1968 and its amendments required that buildings and facilities constructed or altered by the federal government or with federal funds be free of physical barriers. 42 U.S.C. §§ 4151-4156 (1988). The General Services Administration (GSA), which oversees federal courthouses, along with other agencies performing similar functions, were directed to develop accessibility standards for properties under their supervision. As a consequence, the UFAS guidelines were developed. Uniform Federal Accessibility Standards, 41 C.F.R. pt. 1190 app. A (1993).

179. 28 C.F.R. § 35.151(c) (1993).

180. 28 C.F.R. § 35.150(a)(2) (1993).

181. 28 C.F.R. § 35.150(a)(3) (1993).

182. The DOJ has stated that in its opinion compliance with the section would not result in undue financial and administrative burdens in most cases. 28 C.F.R. app. §35.150 (1993).

183. 28 C.F.R. § 35.151(c) (1993).

184. *Id.*

185. 42 U.S.C. § 12182(b)(2)(A)(iv) (Supp. III 1991).

does not require a public entity to make each of its existing facilities accessible.[186] But, there are three caveats to keep in mind when deciding whether and how to provide program accessibility. First, Congress intended that the "undue burden" exemption, which allows noncompliance with Title II,[187] should require significantly more of a public entity than the "non-readily achievable" exemption which allows noncompliance with Title III by a private party.[188]

The second caveat concerns the finding expressed in the ADA that individuals with disabilities have been segregated to their detriment and to the detriment of the rest of the nation: "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem."[189] Consistent with this finding, the regulations contain repeated cautions against methods of providing program accessibility which result in segregation.[190]

The final caveat concerning how to make programs accessible is the suggestion that those affected should be consulted. Public entities are encouraged to involve people with disabilities in the self-evaluation/transition planning process beyond soliciting comments.[191] People with disabilities should be a ready source of help in identifying program and facility accessibility deficiencies and suggesting methods of resolving them. Such individuals would also seem to be the most likely source of complainants/plaintiffs in enforcement actions. If they are made allies by being given a real opportunity to be community resources, they may thereby be encouraged to choose less adversarial, more local methods of expressing their needs and desires.[192]

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186. 28 C.F.R. § 35.150(a)(1) (1993).

187. 28 C.F.R. § 35.151(c) (1993).

188. 28 C.F.R. app. § 35.150 (1993).

189. 42 U.S.C. § 12101(a)(2) (Supp. III 1991). *See also supra* note 10, at C-1 to 31; 135 CONG. REC. 14,19802-3 (1989) (statement of Sen. Harkin); 135 CONG. REC. 14,19808 (1989) (statement of Sen. Kennedy).

190. 28 C.F.R. §§ 35.130(b)(2), 35.130(d) (1993).

191. Public entities that employ more than 49 people are required to provide opportunity for public participation in the self-evaluation process. 28 C.F.R. § 35.105(b) (1993).

192. 28 C.F.R. app. §§ 35.105 & 35.106 (1993). Beyond the planning stage, entities with more than 49 employees are required to establish a grievance process and to name an ADA coordinator which is another attempt to encourage local resolution of complaints. *See* 28 C.F.R. § 35.107 (1991). Local governments employing fewer than 49 people are not required to establish a grievance process or designate a responsible employee because, in the judgment of the DOJ, paperwork burdens on small communities should be minimized. 28 C.F.R. app. §§ 35.105 & 35.107 (1993). Nevertheless, it seems that they could benefit from voluntarily adopting these measures.

2. Qualified Individuals with Disabilities

The prohibition of Title II, subtitle A is directed toward discrimination by public entities against "qualified" people with disabilities.[193] Neither the ADA nor the DOJ does a good job of explaining who is qualified.[194] According to the DOJ, a person is qualified if he or she meets the essential eligibility requirements, with or without reasonable modifications to the rules, policies, or practices of the public entity, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services.[195]

Even the concept of "qualification" has been criticized. The § 504 regulations of the Rehabilitation Act refer to handicapped individuals who are otherwise qualified.[196] The provision was described in TOWARD INDEPENDENCE as redundant and illogical, the argument being that a person who is denied benefit because he or she does not possess the requisite qualifications has not been discriminated against on the basis of disability.[197] Arguably, a similar conclusion was reached by the United States Supreme Court in *Alexander v. Choate*,[198] where the Court noted that "the question of who is 'otherwise qualified' and what actions constitute 'discrimination' under . . . [s]ection [504 of the Rehabilitation Act] would seem to be two sides of a single coin."[199]

Congress was not persuaded however, and the term persists. Here again, focusing on the underlying objective—that admission to a service, program or activity should not be dependent upon the absence of disabilities—may be helpful to an understanding of who is qualified.[200] The DOJ provides as an example of one who is qualified, a person desiring information which is routinely provided by a public entity about its services. To be eligible to receive the information, a person need only ask. The ability to ask by voice telephone would not normally be "essential." Accordingly, an entity should provide an alternative,

193. 42 U.S.C. § 12132 (Supp. III 1991). Public transportation programs covered under Subtitle B are excluded. 28 C.F.R. § 35.102 (1993).

194. *See e.g.*, 42 U.S.C § 12131(2) (Supp. III 1991); 28 C.F.R § 35.104 (1993). Presumably, for further clarification the DOJ will look to interpretations developed under the Department of Health and Human Services' regulations, 45 C.F.R § 84.3(k) (1992), which implemented section 504 of the Rehabilitation Act of 1973 , since the DOJ took its definition of "qualified individual with a disability" from that source. 28 C.F.R. app. § 35.104 (1993).

195. 28 C.F.R. § 35.104 (1993).

196. 45 C.F.R. § 84.3(k) (1992).

197. *See* TOWARD INDEPENDENCE app., *supra* note 10, at A-19.

198. 469 U.S. 292 (1985).

199. *Id.* at 299 n.19.

200. *E.g.*, 28 C.F.R. app. § 35.102 (1993).

equally accessible format for people with disabilities to gain access to the information.[201] In other instances, according to the DOJ, eligibility requirements may need to be more stringent. For example, they cite to a medical school which may require that people who are admitted to it must first complete a specified undergraduate course of study. The undergraduate program would be an essential requirement for both those with and without disabilities, and one not completing it would be unqualified to attend medical school.[202]

An entity may also consider as unqualified a person who poses a direct threat to the health or safety of *others*, which cannot be eliminated or reduced to an acceptable level by a modification of an entity's policies, practices, or procedures, or by the provision of auxiliary aids or services.[203] This is subtly different from the direct threat concept in employment under Title I. An employer may consider a person to be unqualified if she poses a threat to the health or safety of *herself or to others*. Like the process under Title I however, reaching the conclusion that a person poses a direct threat under Title II must be based on an individualized assessment. Such an assessment, to withstand scrutiny, must rely on current medical evidence or on the best available objective information; a review of the nature, duration and severity of the risk posed; the probability that injury will occur; and, whether reasonable modifications would reduce or eliminate the risk.[204]

3. Accessibility and the Judicial Process

In addition to the requirements of Title II, that state and local government programs and facilities be accessible, there is also an obligation that communication with these entities be made easier.[205] These communication accessibility requirements should be of special interest to government officials responsible for overseeing legislative, regulatory and judicial activities.

The ADA's requirements, as they specifically relate to state and local courts, have not received wide attention, and the unique features and activities of such facilities have in large measure not yet been addressed. Only minimal guidance for court administrators is available now,[206] but more is expected in the near future.

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201. 28 C.F.R. § 35.104 (1993); *see also* D.O.J. TECHNICAL ASSISTANCE MANUAL at II-2.8000.
202. D.O.J. TECHNICAL ASSISTANCE MANUAL at II-2.8000.
203. 28 C.F.R. app. § 35.104 (1993); D.O.J. TECHNICAL ASSISTANCE MANUAL at II-2.8000.
204. 28 C.F.R. app. § 35.104 (1993); D.O.J. TECHNICAL ASSISTANCE MANUAL at II-2.8000.
205. 28 C.F.R §§ 35.160-.164 (1993).
206. UFAS, *supra* note 178, contain general directives, which are not specifically directed to

Because laws affecting state and local courthouse accessibility are not uniform, the DOJ has proposed detailed standards which will amend ADAAG.[207] These new provisions are intended to apply to all state and local facilities, including courts.[208]

Apart from facility accessibility, courts and other state and local government facilities must make appropriate auxiliary aids and services available in order to provide equal communication access to individuals with disabilities.[209] The first task to be undertaken relative to communication accessibility is to provide an opportunity for people with disabilities to request auxiliary aids and services.[210] Accordingly, appropriate notice must be given.[211]

In selecting among various types of communication assistance, an entity must give primary consideration to the expressed preference of the individuals seeking accommodation.[212] The person's choice must be granted unless a governmental entity can demonstrate that another equally effective means of communication is available, or that the use of the preferred means would result in a fundamental alteration in the activity or an undue financial or administrative burden.[213] The same decision-making process described above concerning facility accessibility is required to support an entity's decision.[214]

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judicial facilities. However, they do classify the public areas of courtrooms as an "assembly occupancy," which means that they must have certain accessible features for people with disabilities who can be expected to either visit or work in them. 41 C.F.R pt. 1190 app. A § 4.1.4(4) (1993). A revised design guide was distributed to federal court facilities in September of 1991. SPACE AND FACILITIES COMMITTEE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, U.S. COURTS DESIGN GUIDE (3d ed., 1991). Among its recommendations is that "courtroom space and circulation paths in the vicinity of the judge's bench, deputy clerk and law clerk, court reporter/recorder stations, and the witness box should be designed to accommodate handicapped ramps, lifts, or other required apparatus as they are needed." *Id.* at 97.

207. *See* 57 Fed. Reg. 60612, to be codifed at 36 C.F.R. pt. 1191 (1992). ADAAG, 28 C.F.R. pt. 36 app. A (1993).

208. 57 Fed. Reg. at 60623.

209. 28 C.F.R. §35.160(a) (1993).

210. 28 C.F.R. app. § 35.160 (1993).

211. 28 C.F.R. § 35.106 (1993); *see also* 28 C.F.R. app. § 35.106 (1993).

212. 28 C.F.R. § 35.160(b)(2) (1993). Deference to the request of the individual with a disability is preferred because of the range of disabilities, the variety of auxiliary aids and services, and the different circumstances requiring effective communication. 28 C.F.R. app. § 35.160 (1993).

213. 28 C.F.R. app. § 35.160 (1993).

214. 28 C.F.R. § 35.164 (1993). The DOJ has provided some interesting guidance which may suggest significant changes on the horizon relative to auxiliary aids. For example, consider the following in the context of accommodating people with hearing problems:

> [s]ome courtrooms are now equipped for 'computer-assisted transcripts,' which allow virtually instantaneous transcripts of courtroom argument and testimony to appear on displays. Such a system might be an effective auxiliary aid or service for a person who is deaf or has a hearing loss who uses speech to communicate, but may be useless for some-

To clarify this process consider the following example. Among the auxiliary aids and services listed by the DOJ are qualified interpreters.[215] According to the DOJ Technical Assistance Manual, a public entity "should provide . . . an interpreter who is able to sign to [an] individual who is deaf . . . effectively, accurately, and impartially, through the use of any necessary specialized vocabulary."[216] What may be effective, accurate, and impartial will depend on the needs of the individual to be assisted as well as the circumstances in which the communication is to take place. There are instances where literal transmission is required, e.g., in order for a person with a hearing disability to be able to meet statutory fluency requirements for jury service.[217] Consequently, qualified interpreters versed in several systems may be required by a court as the circumstances demand.[218]

Another DOJ rule requires that when a public entity communicates with people by telephone, a special device for the deaf, commonly referred to as a TDD,[219] or other, equally effective systems must also be available.[220] The concern expressed in the rules is that people who use or require TDD's should not be inhibited from communicating with a public entity.[221] Title IV of the ADA does allow the establishment of telephone relay services to serve as a link between those who communicate by TDD and those who use telephones.[222]

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one who uses sign language . . . . Although in some circumstances a note pad and written materials may be sufficient to permit effective communication, in other circumstances they may not be sufficient. For example, a qualified interpreter may be necessary when the information being communicated is complex, or is exchanged for a lengthy period of time. Generally, factors to be considered in determining whether an interpreter is required include the context in which the communication is taking place, the number of people involved, and the importance of the communication.

28 C.F.R. app. § 35.160 (1993).

215. 28 C.F.R § 35.104 (1993).

216. DOJ TECHNICAL ASSISTANCE MANUAL § II-7.1200.

217. *E.g.*, WYO. STAT. § 1-11-101(a)(iii) (1988).

218. There are a number of sign language systems in use—the two most common are American Sign Language and Signed English. A person may be familiar with one system and not another. In addition, it is significant to note that American Sign Language is a separate language from English, with its own grammar and syntax. The person who acts as an intermediary using this system acts as would any foreign language interpreter, and consequently paraphrasing is common, and literal transmission unimportant. In contrast, signed English is not a separate language, but rather English in a different form, i.e., hand signals represent the exact words used by the speaker. *See* Randy Lee, *Equal Protection and Deaf Person's Right to Serve as a Juror*, 17 REV. OF LAW AND SOC. CHANGE 81, 100-02 (1989-90).

219. A TDD is a typewriter-style device that sends a typed message. 28 C.F.R. app. § 35.161 (1993).

220. 28 C.F.R. § 35.161 (1993).

221. 28 C.F.R. app. § 35.161 (1993).

222. 47 U.S.C. § 225 (Supp. III 1991). This service requires an operator using both a standard

Accordingly, a publicized relay system which allows people with disabilities to effectively communicate with a state or local governmental entity may meet the "equally effective system" requirement.[223]

4. Jury Selection[224]

The ADA creates a special concern for courts in connection with jury service. The United States Supreme Court has observed that "[c]ompetence to serve as a juror ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence presented at a trial."[225] The statutory juror competency test in Wyoming conforms to that view: "a person is competent to act as juror if he is: [i]n possession of his natural faculties, of ordinary intelligence and without mental or physical infirmity preventing satisfactory jury service."[226]

In light of these statements, one might rephrase the juror selection rule in Wyoming as follows: competence to serve as a juror must be based on an assessment of individual qualifications and ability to impartially consider evidence presented at a trial, with or without accommodation, including the provision of auxiliary aids.[227] Notions of equal protection would also seem to support such a rephrased rule.

The Fourteenth Amendment requires that people be treated equally under the law.[228] According to the United States Supreme Court, equal protection forbids exclusion from jury service of at least some

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telephone and a TDD to type the voice messages to the TDD user and read the TDD messages to the standard telephone user.

223. It should be noted, however, that this allowance was made over the objections of "many commentators." Detractors argued that public entities should not rely heavily on relay services because they do not provide effective access to all phone services. Among the examples they cited were increasingly popular automated systems that allow the caller to respond by pushing the buttons of a touch tone phone. With such devices, they argued, relay systems cannot operate fast enough to convey many messages within the time available with many answering machines. 28 C.F.R. app. § 35.161 (1993).

224. Several informative articles pertaining to jury service and people with disabilities have been written. *E.g.*, Harold Craig Manson, Comment, *Jury Selection: The Courts, The Constitution, and the Deaf*, 2 PACIFIC L. J. 967 (1980); Michael B. Goldbas, Comment, *Due Process: The Deaf and the Blind as Jurors*, 17:1 NEW ENGLAND L. REV. 119 (1981); and Lee, *supra* note 218.

225. Batson v. Kentucky, 476 U.S. 79 (1986).

226. WYO. STAT. § 1-11-101(a)(ii) (1988).

227. Compare the rule which was in issue in *Galloway v. Superior Court of the District of Columbia*, 816 F. Supp. (D.D.C. 1993). There the Court ruled that a policy which automatically excludes blind people from jury service violates the ADA, Rehabilitation Act of 1973, and the Civil Rights Act of 1871.

228. No state may "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

groups: "[p]eople excluded from juries because of their race are as much aggrieved as those indicted and tried by juries chosen under a system of racial exclusion."[229] Furthermore, the Court has observed the possibility that jury service involves not only the rights of parties, but the rights of potential jurors: "[w]hether jury service be deemed a right, a privilege, or a duty, the state may no more extend it to some citizens and deny it to others on racial grounds than it may invidiously discriminate in the offering and withholding of the elective franchise."[230] Consequently, the door may be gradually opening for people with disabilities to assert that their right to jury service should receive greater protection.

Historically, a key consideration for the federal judiciary in deciding on appropriate equal protection analysis[231] has been the political powerlessness of the group affected by the action under review. Although it has been argued that people with disabilities are properly described as politically powerless, the Supreme Court has not recognized them as a suspect class,[232] which means that their systematic exclusion, unlike the plaintiffs in *Carter*,[233] is not yet entitled to strict scrutiny. However, the legislative and executive branches of the federal government, in enacting and approving the ADA, may have taken an important first step in changing that.

The ADA expressly recognizes that people with disabilities are among the most repressed in our society:

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229. Carter v. Jury Comm'n of Greene County, 396 U.S. 320, 329 (1970).

230. 396 U.S. at 330. *Carter* was the first case to reach the Court in which an attack upon alleged racial discrimination in choosing juries was made by a potential juror, rather than by a defendant challenging a judgment of criminal conviction on the ground of systematic juror exclusion. *Id.* at 329.

231. Generally, a governmental classification which discriminates is presumed to be valid and will be sustained by a court if it is rationally related to a legitimate governmental interest. *See* New Orleans v. Dukes, 427 U.S. 297 (1976). A middle level of review has been held to be appropriate however, when a classification concerns certain characteristics (e.g., gender), and does not involve a "fundamental" right. In such cases the classification will be sustained if a court determines that the discrimination serves an important governmental interest. *See* Craig v. Boren, 429 U.S. 190 (1976). Furthermore, when discrimination occurs on the basis of race, alienage, or national origin, what have been referred to as "suspect classifications," or involves a fundamental right such as voting, the court will apply the highest level of review, the strict scrutiny test. This means that the action under review must promote a compelling governmental interest which cannot be achieved by less discriminatory means. *See* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966). *See generally* JAMES A. KUSHNER, GOVERNMENT DISCRIMINATION 1-28 (1988), and Gayle L. Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779 (1987).

232. The Court has held that mentally retarded people are not a suspect class because they are not "all cut from the same pattern." City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985).

233. 396 U.S. at 329.

> unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination; . . . individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society . . . resulting from stereotype assumptions not truly indicative of the individual ability of such individuals."[234]

Accordingly, as one of its purposes, the ADA announces that it is intended "to invoke the sweep of congressional authority, including the power to enforce the Fourteenth Amendment . . . in order to address the major areas of discrimination faced day-to-day by people with disabilities."[235]

A related awareness may be developing with the use and monitoring of peremptory challenges to potential jurors. A peremptory challenge is an arbitrary removal or striking of a juror by a party, distinct from a party's right to have a juror removed for cause, and may be employed to excuse a potential juror without any showing that the individual is biased or prejudiced.[236] Such challenges, however, have recently come under fire beginning with the case of *Batson v. Kentucky*.[237]

Batson involved a criminal trial in which the prosecutor used peremptory challenges to strike all of the black members on the venire, and, as a result, the jury which was selected consisted of only white people.[238] The jury found Batson guilty. When the case reached the Supreme Court it reversed the conviction, holding that the Equal Protection Clause forbids a prosecutor from using peremptory challenges to exclude potential jurors solely because of their race, or the bald assumption that black jurors as a group would be unable to impartially consider the government's case.[239]

The Court has since extended the holding in *Batson* so that whether a defendant and the excluded jurors are of the same race is

234. 42 U.S.C. §12101(a)(4) & (7) (Supp. III 1991).
235. 42 U.S.C. § 12101(b) (Supp. III 1991).
236. *See generally* 47 Am. Jur. 2d *Jury* § 233.
237. 476 U.S. 79 (1986).
238. *Id.* at 83.
239. *Id.* at 89.

now irrelevant.[240] Later the holding was made applicable to civil cases,[241] and most recently the Court held that Batson objections can be used against criminal defendants as well as by them.[242]

The Supreme Court has not held that jury service is a fundamental right, and therefore that its regulation is subject to the equal protection strict scrutiny test. However, it has observed that because race is unrelated to fitness, when the state denies a person participation in jury service on account of his or her race, it unconstitutionally discriminates against the excluded juror.[243] The same would seem to be true of a person's physical or mental impairments, provided, that with the assistance of such auxiliary aids, the person is competent to serve. Purposeful exclusion, the Court held in *Powers v. Ohio*, undermines public confidence and "[t]he overt wrong, often apparent to the entire jury panel, casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial of the cause."[244] *Georgia v. McCollum* goes on to hold that "if a court allows jurors to be excluded because of group bias, it is a willing participant in a scheme that could only undermine the very foundation of our system of justice—our citizens' confidence in it."[245] Again, this logic would seem to apply in the case of a person with a disability, whom, as pointed out, the ADA seeks to have fully integrate into society.

The Court has reaffirmed the view that peremptory challenges are not a constitutionally protected right: "the right to a peremptory challenge may be withheld altogether without impairing the constitutional guarantee of an impartial jury and a fair trial."[246] The desire to avoid the exclusion of people with disabilities, unless a party can articulate some justification, may, over time, become recognized as more important and fundamental than continuing the practice of allowing unchecked peremptory challenges.

V. TITLE III—PUBLIC ACCOMMODATIONS

Title III of the ADA deals with private business enterprise and prohibits the exclusion of people with disabilities which results from

240. Powers v. Ohio, 499 U.S. 400 (1991).
241. Edmonson v. Leesville Concrete Co., 111 S.Ct. 2077 (1991).
242. Georgia v. McCollum, 112 S.Ct. 2348 (1992).
243. *Batson*, 476 U.S. at 87.
244. *Powers*, 499 U.S. at 426.
245. *McCollum*, 112 S.Ct. at 2354.
246. *Id.* at 2359.

physically inaccessible facilities.[247] Its protection is directed to patrons, would-be patrons and visitors of the business and commercial community, rather than employees and prospective employees who are subjects of Title I.[248]

This Title is comprehensive, aiming at the provision of goods, services, facilities, privileges and advantages, all of which are collectively referred to for convenience as accommodations.[249] The requirement is that business facilities be designed, constructed, and, in some instances altered, and that activities be conducted so as to assure accessibility for individuals with disabilities.[250] Congress charged the DOJ with public enforcement of Title III,[251] with the exception of its transportation-related aspects, which were made the responsibility of the Department of Transportation.[252]

Title III is directed toward all members of the business community. Unlike Title I, it does not exempt entities employing a small number of employees; however, as discussed below, since a means-test of sorts is used to determine what is required of an entity, somewhat different standards may apply depending upon a public accommodation's resources.

The ADA identifies twelve categories of facilities included within the definition of "public accommodation."[253] By its terms, the Act

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247. 42 U.S.C. §§ 12181-12189 (Supp. III 1991).

248. 28 C.F.R. app. B § 36.304 (1993). Title I of the ADA is found at 42 U.S.C. §§ 12111-12117 (Supp. III 1991), and discussed *supra* in notes 63-144 and accompanying text.

249. 28 C.F.R. app. B § 36.101 (1993).

250. 42 U.S.C. §§ 12182-12183 (Supp. III 1991).

251. 42 U.S.C. § 12188(b) (Supp. III 1991). *See* 42 U.S.C. § 12186(b) (Supp. III 1991) (regarding the DOJ's responsibility to develop rules implementing the Title). DOJ rules, 28 C.F.R. §§ 36.101-36.608 (1993); the explanatory appendix, 28 C.F.R. at 36 app. B (1993); the DOJ TECHNICAL ASSISTANCE MANUAL; and the ADA HANDBOOK, published jointly by the DOJ and the EEOC, are chief sources of information concerning the public accommodation-related details of Title III.

252. 42 U.S.C. § 12186(a) (Supp. III 1991).

253. 42 U.S.C. § 12181(7) (Supp. III 1991). They can be described as follows:

1. places of lodging;
2. establishments serving food or drink;
3. places of exhibition or entertainment;
4. places of public gathering;
5. sales or rental establishments;
6. service establishments;
7. stations used for specified public transportation;
8. places of public display and collection;
9. places of recreation;
10. places of education;
11. social service centers; and,
12. places of exercise.

acknowledges the constitutional requirement that, to be covered by the law, such facilities must affect interstate commerce.[254] However, recognizing the integrated nature of the national economy, "commerce" is defined in the same broad manner as in Title II of the Civil Rights Act of 1964.[255] As a result, expecting an exemption from the law's coverage under the argument that commerce is not affected can rarely, if ever, be relied upon.

Even if an entity does not fall within one of the twelve categories of public accommodation, it may still qualify as a "commercial facility" and therefore be subject to the new construction and alteration requirements of Title III. A commercial facility is one which affects commerce and is intended for non-residential use.[256] Commercial facilities that do not meet the definition of public accommodation are not subject to all of the Title III requirements.[257] In providing this exemption to existing commercial facilities, Congress recognized that the public generally does not visit such facilities, and that protection is in place for the employees of such facilities by virtue of Title I. Furthermore, there is a built in incentive to address accessibility; "to the extent that new facilities are built in a manner that make[s] them accessible to all individuals, including potential employees, there will be less of a need for individual employers to engage in reasonable accommodations for particular employees."[258]

A. New Construction

The federal government expects that "over time, access will be the rule rather than the exception."[259] In the short run, the DOJ sought to strike a balance between guaranteeing access to people with disabilities on the one hand, and the financial resources of the business and commercial sectors on the other.[260] As a result, the ADA establish-

254. 42 U.S.C. 12181(7) (Supp. III 1991).

255. 42 U.S.C. § 12181(1) (Supp. III 1991). The Act prohibits discrimination in public accommodations on the basis of race, color, religion or national origin. *See* 28 C.F.R. app. B § 36.104 (1993) for a detailed discussion of the term "commerce."

256. 42 U.S.C. § 12181(2) (Supp. III 1991). Several examples of commercial facilities are provided by DOJ: factories, warehouses, office buildings, wholesale establishments that sell exclusively to other businesses, and private airports. 28 C.F.R. app. B § 36.104 (1993).

257. *E.g.*, requirements concerning non-discrimination generally and the provision of auxiliary aids. 28 C.F.R. app. B § 36.104 (1993)

258. *Id.* (quoting from the report of the HOUSE COMMITTEE ON EDUCATION AND LABOR, H.R. REP. NO. 485, 101st Cong., 2d Sess. 2, at 117 (1990)).

259. *See* 28 C.F.R. app. B, Subpart D (1993).

260. *Id.*

es different standards for previously existing facilities and those which were, or are, to be constructed or altered.

Except in several limited circumstances,[261] facilities which are built for first occupancy to begin after January 26, 1993, must meet the ADAAG[262] requirements. In addition, alterations[263] to existing facilities made after January 26, 1992, are required to meet the standards to the "maximum extent feasible."[264]

The rules expressly recognize that unique characteristics of terrain may prevent the incorporation of accessibility features in new construction.[265] Similarly, in some existing facilities, the rules anticipate that it may be impossible to fully comply with the accessibility standards through a planned alteration.[266] In both cases, the rules indicate that these exemptions are to be narrowly interpreted.[267]

B. Existing Facilities

Of more immediate concern to a public accommodation is the requirement that it may need to remove existing physical barriers.[268] In addition, a public accommodation must modify its policies, practices, and procedures and provide auxiliary aids and services to afford access to its goods, services, facilities, privileges, or advantages, unless to do so would fundamentally alter the nature of such goods, services, facilities, privileges, or advantages.[269] Finally, public accommodations are required to eliminate eligibility requirements that tend to screen out people with disabilities from fully and equally enjoying what it is the entity provides, unless such are absolutely necessary.[270]

A public accommodation is obligated to remove existing barriers if removal is "readily achievable."[271] That term refers to removal

261. 28 C.F.R. § 36.401 (1993).

262. 28 C.F.R. pt. 36 app. A (1993).

263. An "alteration" is a change which affects or could affect usability or access by people with disabilities. 28 C.F.R. § 36.402(b) (1993).

264. 28 C.F.R. § 36.402(c) (1993).

265. For example, where a building must be constructed on stilts because of its location in marshlands or over water. The exception is not intended for "hilly" terrain or a plot of land with a steep grade where, according to the DOJ, physical integrity of a facility would not be impaired by providing accessibility. *See* 28 C.F.R. app. B § 36.401(c) (1993).

266. 28 C.F.R. § 36.402(c) (1993).

267. *Id.*

268. 42 U.S.C. § 12182(b)(2)(A)(iv) (Supp. III 1991).

269. 42 U.S.C. § 12182(b)(2)(A)(ii), (iii) (Supp. III 1991).

270. 42 U.S.C. § 12182(b)(2)(A)(i) (Supp. III 1991).

271. 42 U.S.C. § 12182(b)(2)(A)(iv) (Supp. III 1991).

which can be accomplished without much difficulty or expense, to be determined by an examination, on a case-by-case basis, of each entity's financial capabilities.[272] Even if a business can demonstrate that barrier removal is not readily achievable, it retains the obligation to search for alternative methods of providing access to its goods and services, and to employ those methods if they are readily achievable.[273]

An additional concern for a public accommodation seeking to assure accessibility is the dictate that separate but equal accommodations will generally be considered inadequate. Instead, a public accommodation is required to provide whatever it is that the business provides in the most integrated setting appropriate to the needs of the individuals who are sought to be protected by the ADA.[274]

C. Direct Threat

A public accommodation may deny an individual with a disability participation in or benefit of its goods, services, facilities, privileges, and advantages, if a direct threat—i.e., a significant risk—to the health or safety of *others* would be created, and which could not be eliminated through reasonable measures.[275] This rule differs from the direct threat standard under Title I which speaks to a risk to *either* the protected individual or others.[276] But like a claim of direct threat under Title I, an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence is required to support a claim of direct threat under Title III. In addition, the risk of injury to others must be not merely possible, but probable.[277]

One of the handful of ADA cases which has been decided dealt with the concept of "direct threat" under Title III. In *Anderson v. Little League Baseball*,[278] the defendants had adopted a policy which in effect excluded coaches who used wheelchairs, such as Anderson, from the playing field.[279] The district court held that the lack of an individualized assessment, and policy "implementation without public discourse, falls markedly short of the requirements" enunciated in the

272. 42 U.S.C. § 12181(9) (Supp. III 1991).
273. 28 C.F.R. § 36.305 (1993).
274. 42 U.S.C. § 12182(b)(i)(B) (Supp. III 1991).
275. 28 C.F.R. § 36.208 (1993).
276. 29 C.F.R. § 1630.2(r) (1991). *See also supra* note 112.
277. 28 C.F.R. § 36.208(c) (1993).
278. 794 F. Supp. 342 (D.Ariz. 1992).
279. *Id.* at 343.

Act and regulations.[280] An interactive approach and reliance upon objective evidence would appear to have avoided the decision.

D. Remedies

When an individual, like the plaintiff in *Anderson*, files a complaint, the DOJ is required to investigate.[281] It is also required to conduct periodic Title III compliance reviews. The DOJ is authorized to bring suit if it concludes that an entity is engaged in a pattern or practice of disability discrimination or if an allegation of discrimination raises issues of general public importance.[282] The remedies available in actions initiated by the Attorney General under Title III include injunction and civil penalties, not to exceed $50,000 for first violations and $100,000 for subsequent violations.[283] In addition, a court, if asked by the DOJ, may award other relief including non-punitive money damages to private victims of discrimination.[284]

The more common enforcement mechanism, however, is expected to be private suit. Individuals may commence an action if they are being subjected to discrimination or if they have "reasonable grounds for believing" that they are "about to be subjected to discrimination" in violation of the Title.[285] As a result, a private individual could arguably prevent the construction of a shopping mall if he or she discovered that the plans failed to incorporate appropriate accessibility features. The remedies available are those provided in the Civil Rights Act of 1964[286] and injunction.[287] Attorney fees and litigation expenses are also recoverable from a private party,[288] as well as from the United States.[289]

V. CONCLUSION

Not so long ago, slavery was an accepted fact of life in this country. Although there was scattered resistance, most people believed that

280. *Id.* at 345.
281. 42 U.S.C. § 12188 (Supp. III 1991).
282. 28 C.F.R. § 36.503 (1993).
283. 42 U.S.C. § 12188(b)(2) (Supp. III 1991).
284. 28 C.F.R. § 36.504(a)(2), (c) (1993).
285. 42 U.S.C. § 12188 (Supp. III 1991).
286. 42 U.S.C. § 12188(a)(1) (Supp. III 1991). The pertinent provisions of the Civil Rights Act of 1964 are found at 42 U.S.C. § 2000a-3(a) (1988).
287. 42 U.S.C. § 12188(a)(2) (1990).
288. 42 U.S.C. § 12205 (Supp. III 1991).
289. 28 C.F.R. § 36.505 (1993).

it could never be abandoned. Eighty-nine years after the colonists declared their independence from Britain, the Thirteen Amendment to the Constitution abolished the practice. The unfathomable became reality, and although racism persists, slavery as it existed is certainly no longer accepted, at least in America. Voting, a right once exclusively enjoyed by white males, presents a similar situation. In 1869, the Wyoming Territorial Legislature made history by extending to women the right to fully participate in all elections, and the next year women began serving on Wyoming juries.[290] Forty-eight years later, something that the Wyoming Legislature had been persuaded to declare a fundamental right had still not gained general acceptance, and a group of women spent six months in jail as a result of picketing the White House on behalf of women's suffrage.[291] It was not until 1920, with the ratification of the Nineteenth Amendment, that women became federally enfranchised. Today, we accept without question that a woman may not be barred from a voting booth because of her gender.

The point of these examples is to show that our frame of reference can shift, and when it does, a society often forgets that what is the norm today was believed impossible by some only yesterday. The Americans with Disabilities Act is not the final solution to disability-based discrimination. It is, however, a substantial step toward addressing the problems of less-than-equal opportunity for a large segment of society. Like other laws which have challenged assumptions and prejudices responsible for repressing various segments of our society, the ADA will come to be seen as an integral, if not perfect, step toward a better world.

All too seldom do we realize that as judges and lawyers we are looked to not only for fairness and reason, but as examples—through our conduct—of fairness and reason. On that ground alone, we should carefully consider our efforts to comply with the ADA. Our actions will invite understanding and cooperation, or indifference and contempt for this law's objective: that people with disabilities be treated with dignity and respect by being judged as individuals on the basis of ability rather than on the basis of irrational fears or patronizing attitudes.

290. TAFT A. LARSON, WYOMING, A HISTORY 79-84 (1977).
291. CAROLE L. CORBIN, THE RIGHT TO VOTE 79 (1985).