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LEGAL RESOURCE FOR PEOPLE WITH DISABILITIES

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"Disabled Peoples' Civil Rights Day" march and rally, San Francisco, California, October 20, 1979.

Disability Rights Law: Roots, Present Challenges, and Future Collaboration

By Arlene Mayerson

I started in disability rights in 1979, two years after the regulations explicating the first federal disability civil rights statute, Section 504 of the Rehabilitation Act of 1973, had been promulgated.[1] Section 504 was the disability corollary to the 1964 Civil Rights Act provisions that barred race (Title VI) and sex (Title IX) discrimination by recipients of federal financial assistance.[2] An emerging disability rights movement hailed the Rehabilitation Act's passage as the bill of rights for people with disabilities. For the first time, the word "discrimination" became associated with the exclusion and segregation of people with disabilities. Previous public policy was based on the unquestioned assumption that the problems, such as unemployment and lack of educational opportunity, that people with disabilities faced were inherent to the disability itself. Section 504 established disability as part of the corpus of civil rights laws, recognizing that, like racial minorities and women, people with disabilities faced societal obstacles that limited opportunity. After a sustained movement effort, the regulations that were issued gave teeth to the nondiscrimination ban by recognizing that equal opportunity for people with disabilities required affirmative conduct, such as removing barriers and providing accommodations.

Although Section 504 and its regulations were modeled on Titles VI and IX of the 1964 Civil Rights Act and their regulations, the Section 504 regulations presented unique and untested principles of equality. The fundamental issue was the recognition that the existing paradigm of equality for race and gender—equal treatment—would not achieve access for many people with disabilities. Transportation cases under Section 504 before the regulations were promulgated in 1977 are graphic examples of both the ineffectiveness of an equal-treatment paradigm and the challenges before us in getting the courts to recognize anything but unequal treatment as "discrimination." Two scenarios with the same facts illustrate this quandary. In each a wheelchair user sues for not being able to board the public bus. In one scenario, the court says, this is not discrimination because the city has no ban on disabled people riding city buses; the person involved just could not climb the stairs. In the other scenario, the court says that if the person cannot ride the bus, then that person is being excluded from a public service and that is discrimination. The remedy must involve the affirmative step of removing the physical barrier to boarding the bus. Our work was cut out for us: convincing the courts that removing barriers to participation—whether policy, architectural, communication, or attitudinal—was part of the equal opportunity guarantee for people with disabilities.

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[1]Rehabilitation Act of 1973, 29 U.S.C. § 794.

[2]Title VI, Civil Rights Act of 1964, 42 U.S.C. §§ 2000d *et seq.*; Title IX, Civil Rights Act of 1964, 20 U.S.C. §§ 1681 *et seq.*

Roots

Just before I started my work in 1979, the Legal Services Corporation, after results of a comprehensive survey demonstrated the lack of services to people with disabilities by legal aid offices, established a two-year demonstration program for clients with disabilities: the Disability Law Resource Center was a joint project between the Center for Independent Living in Berkeley and Alameda County Legal Services.[3] I saw the job announcement as an opportunity to fulfill two dreams: to be a civil rights lawyer and a legal aid lawyer. The term "disability rights lawyer" did not exist.

The Disability Law Resource Center, housed at the Center for Independent Living, presented unique issues and opportunities. As lawyers at the Center for Independent Living, which was a hub of the disability rights movement, we understood from the get-go that we were there to serve the movement's interests and that the center's disabled leadership would set strategies and priorities. The disability community had fought long and hard to get the Section 504 regulations promulgated. This history created a constituency that was uniquely familiar with the law and claimed it as a movement victory. Lawyers had the license to practice, but the community had the moral authority to lead.

First Section 504 Case

When I started my work in 1979, the disability community was in an uproar over the first case that the U.S. Supreme Court decided under Section 504, *Southeastern Community College v. Davis*.[4] That case, which the National Center for Law and the Deaf brought, represented the optimism of the movement. A deaf nursing school student wanted course modification, interpreting services, and some individualized supervision for some of the clinical portions of the nursing program. The disability community thought that to be what the new law was all about: pursuing individual choice and receiving the reasonable accommodations necessary to enable full participation.

This proved to be the first of many examples where the understandings of the movement were way ahead of the Supreme Court. A reading of the decision revealed that clearly the Court could not fathom why a deaf nurse who needed accommodation was claiming "discrimination." With this opinion we had our work cut out for us. How could we make the courts understand that people with disabilities faced discrimination as courts understood that word? How could we explain that equal treatment alone was discrimination in a world built and designed for nondisabled people? That has been the task of lawyers in this arena ever since.

Hailing the ADA

Despite court setbacks and the conservative political climate of the 1980s, the disability community was still able to convince Congress to enact proactive legislation; several bills directly overturned negative Supreme Court decisions. The culmination of these efforts was the historic and internationally proclaimed Americans with Disabilities Act of 1990 (ADA).[5]

The disability community hailed the ADA as the most comprehensive disability rights statute in the country. There was no doubt that the ADA recognized the

[3]For an oral history transcript containing detailed information on the Disability Law Resource Center, see www.archive.org/details/cofounderdir00bresrich (2000) (Mary Lou Breslin, cofounder and director of the Disability Rights Education & Defense Fund and movement strategist). The Disability Law Resource Center, founded in 1978, became the independent Disability Rights Education & Defense Fund, founded in 1979. For information about the Disability Rights Education & Defense Fund, see www.dredf.org. For information on the Center for Independent Living, see www.cilberkeley.org/. Alameda County Legal Services is now part of Bay Area Legal Aid in Oakland; see www.baylegal.org/.

[4]*Southeastern Community College v. Davis*, 442 U.S. 397 (1979) (Clearinghouse No. 21,942).

[5]Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101 *et seq.*

constitutional right to equal protection. We believed that the ADA reflected a modern and expansive view of disability, a view that focused attention away from limitations caused by medical diagnoses and toward limitations caused by societal obstacles. We believed that the principles of the ADA were the rejection of paternalism, the right to self-determination, and the dignity of making choices about risks. Although the disability rights community compromised on the language of the Senate bill, we believed that these basic principles were intact. Seventeen years later, the Supreme Court has undermined each of these principles.

The Supreme Court and the ADA

The constitutional underpinning of the ADA and the most basic assumption of the disability movement—that the Fourteenth Amendment equal protection guarantee of equal opportunity required accommodations when necessary to eliminate exclusion—has been devastated by a series of Supreme Court jurisprudence on the constitutionality of the ADA as applied to states. The first case, *Board of Trustees of the University of Alabama v. Garrett*, starkly demonstrates the Court's problem in applying the civil rights paradigm to disability discrimination.[6] In *Garrett* the Court held that Congress lacked authority under the Fourteenth Amendment to permit suits for money damages by people with disabilities against states for employment discrimination.[7]

I cannot here explain all of the Supreme Court jurisprudence leading up to the *Garrett* decision, and perhaps one could say that disability is only the latest casualty in the determination of the five-member majority of the court to curtail federal intervention in state affairs.[8] However, I think that the decision also leaves no doubt that the Court is hostile to both the notion of discrimination as applied to people with disabilities and the accommodation remedy in the ADA.

The test that the Court established for valid Fourteenth Amendment legislation is twofold. First, did Congress establish a record of unconstitutional conduct by states when it enacted the statute, and, second, is the legislative response proportionate to the problem presented?[9] In *Garrett* the ADA was judged to have failed both parts.[10] Now the important thing to remember is that the Supreme Court requires Congress to make a record of conduct that the Supreme Court considers unconstitutional.[11] It matters not that Congress considered the conduct violative of equal protection principles.

In *Garrett* the Court concluded that, even if Congress had established a pattern of unconstitutional conduct by states, it still would have found that Congress exceeded its authority because the remedies in the ADA were too expansive.[12] With the following example, the Court explained that Congress went too far: "Whereas it would be entirely rational and therefore constitutional for a state employer to conserve scarce financial resources by hiring employees who are able to use existing facilities, the ADA requires employers to make facilities accessible."[13]

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[6]*Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001) (Clearinghouse No. 52,744). For additional discussion of *Garrett*, see Rochelle Bobroff, *Scorched Earth and Fertile Ground: The Landscape of Suits Against the States to Enforce the ADA*, in this issue.

[7]*Garrett*, 531 U.S. at 360.

[8]See *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000) (Clearinghouse No. 52,102); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (Clearinghouse No. 51,112).

[9]*Boerne*, 521 U.S. at 520, 530–31.

[10]*Garrett*, 531 U.S. at 374; see also *id.* at 370, 372.

[11]See, e.g., *Boerne*, 521 U.S. 507.

[12]*Garrett*, 531 U.S. at 372.

[13]*Id.*

Hence the Court repudiated a basic tenet of disability discrimination that the courts, policymakers, and the community had accepted without question since the promulgation of Section 504 regulations. The Court simply assumed that a state refusing to provide basic access to its facilities was rational. While *Garrett* and its progeny have limited practical effect because most state agencies may be sued under Section 504, the tenor of the decision is nasty and dismissive and strikes a blow to the civil rights and constitutional underpinnings of the ADA.[14]

Definition of Disability Cases

From a practical perspective, the biggest setback in the Supreme Court cases has been the definition-of-disability cases. First a little background on the definition.[15] The definition of disability in the ADA incorporates the three-prong definition from Section 504: a physical or mental impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment.[16] In the seventeen years between the passage of the Rehabilitation Act in 1973 and the ADA in 1990, court decisions, with very few exceptions, did not address the definition of "disability." Instead employment decisions concentrated on whether the plaintiff was qualified for the job.

So the definition in the ADA is a hybrid of the two prevailing notions of disability. Prong 1 incorporates a functional approach, which looks to the characteristics of the individual. Prongs 2 and 3, "record of" and "regarded as," incorporate the social-relations approach, which looks to the conduct of the defendant. Under this approach, disability is attributed primarily to negative reactions of the entities that the ADA covers (e.g., employers and public accommodations) to an impairment rather than the extent of the impairment itself. The drafters of the ADA believed that the definition covered the wide range of discrimination that people with disabilities faced. If someone was not substantially limited but was subjected to adverse treatment because of a real or perceived impairment, the third prong would kick in.

But the experience after the ADA did not prove to be like that after Section 504. Although Section 504 had covered entities receiving federal financial assistance for seventeen years before the ADA was passed, the ADA covered private businesses for the first time. The ADA was visible in a way that Section 504 had never been, and the corporate bar forged ahead full force with training sessions and seminars about how to defeat ADA cases. The most effective strategy was to try to get them thrown out on summary judgment at the definition stage. Questions about the employee's qualifications for the position and reasonable accommodations could thereby be averted. More than 90 percent of employment cases were dismissed at that stage.[17] The courts' receptiveness to defendants' arguments on the definition of disability under the ADA was wholly unanticipated and staggering.

Supreme Court Disconnect

The Supreme Court definition cases reinforce traditional notions of disability and continually narrow ADA coverage. Those of us who worked on the ADA—leg-

[14]See, e.g., *United States v. Georgia*, 546 U.S. 151 (2006) (Clearinghouse No. 55,981); *Tennessee v. Lane*, 541 U.S. 509 (2004) (Clearinghouse No. 55,480). For additional discussion of these two cases, see Bobroff, *supra* note 6.

[15]Other articles in this issue discuss definitions of "disability" in other contexts; see, e.g., Fred Fuchs, *Using the Reasonable-Accommodation Provision of the Fair Housing Act to Prevent the Eviction of a Tenant with Disabilities*; Susan Ann Silverstein, *Expanding and Preserving Affordable Housing Opportunities for Persons with Disabilities*; Kevin Liebkemann & Raymond Cebula, *Interplay Among Unemployment Insurance, Welfare, Social Security Disability, and SSI Benefits*; Alan M. Goldstein & Barbara Siegel; *Making the ADA Work for Social Security Disability Beneficiaries: Life After* Cleveland v. Policy Management Systems; Linda Landry & Gerald A. McIntyre, *Social Security: Changes on the Horizon*.

[16]ADA, 42 U.S.C. § 12102(2) (2005); Rehabilitation Act, 29 U.S.C. § 705(20)(B)(i)–(iii) (2005).

[17]American Bar Association Commission on Mental and Physical Disability Law, *Study Finds Employers Win Most ADA Title I Judicial and Administrative Complaints*, 22 Mental and Physical Disability Law Reporter 403 (1998).

islators, lawyers, and activists—didn't get what we were up against when we tried to reverse centuries of baggage attached to the word "disability." The Court gets that the "truly disabled"—the same people who have historically been relegated to a life of dependence on the public dole—are covered. But the Court, no matter how absurd the consequences, doesn't get the idea that someone can be "disabled" because they are subjected to adverse treatment based on an impairment.

This disconnect is illustrated in the *Sutton* trilogy, the so-called mitigating measures cases.[18] In determining whether a plaintiff is "substantially limited," the Supreme Court held, a person's limitation should be assessed with the use of whatever device or medication the person uses to mitigate the effects of the disability.[19] So, for example, a person with diabetes who is not hired because of diabetes may not use the ADA to challenge this decision if the plaintiff's diabetes is under control through lifestyle and medication. If the same person fails to adhere to the strict regimen required to control diabetes and the person's blood glucose goes out of control and causes fainting and other side effects, the person would be entitled to bring the suit. But the employer—to show that the plaintiff is not qualified for the job—would use the same evidence that the plaintiff proffered to establish "disability." So after *Sutton* our client who uses a prosthesis because of a congenital amputation is not disabled because he functions so well. But the employer rejected him because of the prosthesis—the ultimate catch-22.

Then came *Toyota v. Williams*.[20] The employer required the plaintiff, who developed carpal tunnel syndrome on the job, to do a job function that she couldn't do because of her carpal tunnel. This case presented the Court for the first time with the question, How substantial is "substantially" limiting? The Court stated that Congress intended the definition to "create a demanding standard for qualifying as disabled."[21] Even though the plaintiff had severe vocational restrictions, she was not limited enough because she said in a deposition that she still did some household chores.[22] She also said that she restricted her activities with her children, her driving, and her leisure activities.[23] But the Court expressed its view that those activities were not essential in most people's lives and unlikely to be enough to establish a disability under the ADA.[24]

The progeny of *Williams* has been disastrous. The most recent outrage is a per curium unpublished decision of the Eleventh Circuit holding that an applicant to Wal-Mart with mental retardation was not substantially limited in a major life activity and thus not "disabled" under the ADA.[25] A slice of the reasoning gives a taste of what the lower courts are doing with *Williams*:

> We do not doubt that Littleton has certain limitations because of his mental retardation. In order to qualify as "disabled" under the ADA, however, Littleton has the burden of proving that he actually is, is perceived to be,

[18]*Sutton v. United Air Lines*, 527 U.S. 471 (1999) (Clearinghouse No. 52,331); *Murphy v. United Parcel Service*, 527 U.S. 516 (1999) (Clearinghouse No. 52,334); *Albertson's Incorporated v. Kirkingburg*, 527 U.S. 555 (1999) (Clearinghouse No. 52,335).

[19]*Sutton*, 527 U.S. at 475; *Murphy*, 527 U.S. 518–19; *Albertson's*, 527 U.S. at 565–66.

[20]*Toyota Motor Manufacturing v. Williams*, 534 U.S. 184 (2002) (Clearinghouse No. 54,341).

[21]*Id.* at 197.

[22]*Id.* at 190.

[23]*Id.*

[24]*Id.* at 183–84.

[25]*Littleton v. Wal-Mart Stores Incorporated*, No. 05-12770, 2007 WL 1379986 (11th Cir. May 11, 2007) (per curiam) (unpublished).

> or has a record of being substantially limited as to "major life activities" under the ADA. (Citations omitted.) Assuming that thinking, communicating and social interaction are "major life activities" under the ADA, we conclude that Littleton has failed to create a genuine issue of material fact that he is substantially limited in those pursuits.[26]

On summary judgment the court dismissed the case, where there was no dispute that the plaintiff had mental retardation. That is but one example of the utter disconnect of the courts from the understanding of disability held by Congress and the movement.

Present Challenges

Fixing the damage caused by the Supreme Court is only one of the many actions that need to be taken. We need to continue efforts to build and revitalize the movement, to expand the consciousness of people who are elderly and poor and those who have industrial injuries but who have not traditionally seen themselves as disabled, and to educate the media and the courts on the nature of disability discrimination and the purposes of the ADA to promote inclusion and participation. The media have besieged us with the failings of the ADA, and we are often the worst perpetrators of the image that the ADA is a failed social experiment. The ADA has failed to fulfill all of its promises, particularly increasing employment, but we do ourselves a disservice when we totally denigrate our accomplishments.

Ask people who use wheelchairs if the ADA has made a difference in their lives, and I think you will hear "yes." As my friends and colleagues who use wheelchairs would be the first to tell you, don't ever underestimate the ability to use a restroom. Ask a deaf person what it is like to have a national relay system. The ADA has helped spur a revolution in technology. Talking automated teller machines and low-floor buses are just two other examples.

At the same time that we see the erosion of ADA protections by the courts, an awareness of and a change in the public's attitude about people with disabilities have been burgeoning. Ask schoolchildren, employers, or owners of public accommodations if they have an awareness that people with disabilities are part of our communities, and the answer is far more likely to be "yes" than before the ADA. Track media stories about disability before and after the ADA's passage, and you will see that disability is becoming part of our national dialogue. In part because of these changes, people with highly stigmatized disabilities such as mental illness are starting to discuss their disabilities and organize more openly.

College departments (e.g., history, literature, and culture) that have recognized gender and race as legitimate areas of study are now starting to see disability in same light. And with that comes a new intellectual environment that will elevate issues at best marginal before the ADA.

The international impact has been tremendous. Since passage of the ADA in 1990, more than fifty disability rights laws have been enacted around the world, in such diverse countries as Australia, Costa Rica, Ghana, the Philippines, South Africa, and Sweden. The ADA is an international word.

Future Collaboration

Against this backdrop are the everyday challenges facing our clients in their daily lives—to have enough money to feed their families, to have a safe place to live, to have their children receive a quality education, to combat discrimination in employment and public services. Many of the key cases that have been brought for people with disabilities have been brought by legal aid lawyers. Legal aid lawyers see more clients with disabili-

[26] *Id.* at *4.

ties than most "disability rights" lawyers. The disability bar can learn much from the daily exposure of legal aid offices to the daily problems of people with disabilities.

Likewise the lens that disability lawyers use can be helpful in serving clients who have disabilities and who may be legal aid clients because of an eviction but who also may need an accessible place to live. A Supplemental Security Income beneficiary may be a legal aid client because of a failure to respond to a notice but also may be a casualty of the Social Security Administration's systemic failure to accommodate people who have disabilities whose disabilities impede compliance with the rules. A public housing case that involves children living in public housing with lead paint and other dangerous conditions is likely also to be a case involving the failure of schools to provide appropriate education to learning-disabled students under the Individuals with Disabilities Education Act.[27] A case involving removing children from their parents' home and placing them in foster care raises the issue of the failure of the state to provide educational surrogates to foster children.

Much collaboration needs to be forged. We are not doing our work as "disability rights lawyers" if we are not serving the poorest and most marginalized of our constituents, and we can't do it without collaboration with the legal aid offices that serve these clients every day. Likewise, we can help identify and pursue disability issues that will result in fuller services to legal aid clients.

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[27]Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.*

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