

THE ADA AT THIRTY: ITS LIMITS & POTENTIAL

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INTRODUCTION

This ADA Symposium Volume of the *Syracuse Law Review* commemorates the thirtieth anniversary of the Americans with Disabilities Act, and the fifteenth anniversary of the Syracuse University College of Law’s Disability Law and Policy Program. The ADA was passed by a bi-partisan Congress and signed by President George H.W. Bush on July 26, 1990. This law represents a significant accomplishment for the disability rights community.¹ In the words of President Bush, “[t]oday’s legislation brings us closer to that day when no Americans will ever again be deprived of their basic guarantee of life, liberty, and the pursuit of happiness. . . . Let the shameful wall of exclusion finally come tumbling down.”²

Over the past three decades, the ADA has resulted in greater access to jobs, transportation, technology, and private and public buildings, services, and programs.³ The ADA also has mobilized legislators, lawyers, scholars, and activists, including, most significantly, people with disabilities, themselves. These constituencies have worked to realize the stated goal of the ADA to provide a “clear and comprehensive mandate for the elimination of discrimination”⁴ against people with disabilities.

In 2005, Syracuse University College of Law responded to this challenge by creating the first Disability Law and Policy Program (DLPP) in the United States. The goal of the DLPP is to recruit and train students,

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1. See *Introduction to the ADA*, ADA.GOV, https://www.ada.gov/ada_intro.htm (last visited June 6, 2021).

2. Remarks on Signing the Americans with Disabilities Act of 1990, PUB. PAPERS (July 26, 1990), available at <https://bush41library.tamu.edu/archives/public-papers/2108>.

3. See Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 328 (codified as amended at 42 U.S.C. § 12101(b) (2021)).

4. 42 U.S.C. § 12101(b)(1) (2018).

with and without disabilities, who wish to specialize in the new and growing field of domestic and international disability law. The DLPP offers a specialization in international and comparative disability law for J.D., LL.M., and S.J.D. students; disability law-related clinics and externships; and dual degree programs in disability studies, inclusive education as well as in other fields such as public administration, international relations, public health, and social work.⁵ For the past fifteen years, the DLPP has grown to become the most extensive disability law program in the country, and perhaps the world, as our faculty and students have worked on projects with the United Nations, governments, non-profit organizations, and disabled peoples' organizations to advance the cause of disability rights, justice, and inclusion worldwide. The DLPP has graduated hundreds of students who have gone on to secure positions at the leading disability organizations in the United States and other countries.

When the DLPP was founded, disability law was a brand-new field within the legal academy. Today, most professional organizations, including the American Association of Law Schools (AALS) and the American Bar Association (ABA) have sections devoted exclusively to disability law. There are now numerous casebooks on disability law, and each year an increasing number of disability law-related articles appear in the popular press as well as in law reviews and interdisciplinary journals. Most significantly, the number of law students, lawyers, and law professors with disabilities who are entering the profession is increasing. In fact, just this year a proposal for a new "Section of Law Professors with Disabilities and their Allies" was submitted to the AALS,⁶ and the first "National Disabled Law Student Organization"⁷ was incorporated as a nonprofit organization. The disability rights movement also has expanded to become a movement for disability justice. Social media has become a catalyst for this movement, with hashtags such as *#CripTheVote* recently gaining momentum in mainstream media.⁸ Social

5. For more information about the DLPP, see *Disability Law and Policy Program*, SYRACUSE UNIV. COLL. OF LAW, <http://law.syr.edu/academics/centers-institutes/disability-law-and-policy-program/> (last visited June 6, 2021).

6. Prior to the proposal for a new AALS Section of Law Professors and Allies, spearheaded by Professor Katie Eyer (Rutgers Law) and Associate Professor Kat MacFarlane (Southern University Law Center), the AALS had established a Section on Mental Disability Law in 1973, and a Section on Disability Law, founded by Professors Laura Rothstein and Arlene Kanter, in 2006.

7. For more information about the NDLSA, see NATIONAL DISABLED LAW STUDENTS ASSOCIATION, <https://ndlsa.org/> (last visited June 6, 2021).

8. *#CripTheVote* is an online movement encouraging the political participation of people with disabilities which was started in 2016 by activists Alice Wong, Andrew Pulrang, & Gregg Beratan. See *Online Activism*, DISABILITY VISIBILITY PROJECT,

media is also now promoting strands within the greater disability justice movement, such as the autistic/neurodiversity/neurodivergent community.⁹ This new multitude of disabled voices and intersectional perspectives is a legacy of the ADA.

This Symposium Volume seeks to examine various aspects of the legacy of the ADA. It includes a selection of articles that explore the ADA's accomplishments as well as the many and significant challenges that remain in realizing the goals of equality, inclusion, and justice for people with disabilities.

I. A BRIEF HISTORY OF THE ADA

The Americans with Disabilities Act of 1990 (ADA), as well as its amendments, known as the Americans with Disabilities Amendments Act (ADAAA) of 2008, have been praised as a turning point in the history of treatment of people with disabilities in the United States.¹⁰ Prior to the ADA, people with disabilities were denied the legal protections that other marginalized groups enjoyed under the Civil Rights Act of 1964 (CRA). Even in 1972, when the CRA was amended, disability was not included as a protected category.¹¹ It was not until 1973, with the passage of the Rehabilitation Act, that Congress began to address the rights of people with disabilities as a minority group worthy of legal protection. But Section 504 of the Rehabilitation Act, which prohibits disability discrimination, applies only to programs and activities that receive federal financial assistance.¹² Moreover, the Education of All Handicapped Children's Act, enacted a decade earlier in 1965, and later amended as the Individuals with Disabilities in Education Act in 1990,

<https://disabilityvisibilityproject.com/2021/03/21/ep-99-online-activism/> (last visited June 6, 2021). On November 7, 2020 in the wake of the election of President Joe Biden, the movement was mentioned on CNN in a discussion of the disability community "as a political force." See Dali Dimovski, *CNN's Jake Tapper Mentions #CripTheVote*, YOUTUBE (Nov. 8, 2020), <https://www.youtube.com/watch?v=BHnV0xpbRfc>.

9. Rabia Belt & Doron Dorfman, *Disability, Law, and the Humanities: The Rise of Disability Legal Studies*, in OXFORD HANDBOOK OF L. & HUMAN. 145, 151 (Simon Stern et al. eds., 2020).

10. See Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 328 (codified as amended at 42 U.S.C. § 12101(b) (2021)); see also ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

11. See Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified in 42 U.S.C. §§ 2000e–2000e-17 (2021)); see also Arlene S. Kanter, *The Americans with Disabilities Act at 25 Years: Lessons to Learn from the Convention on the Rights of People with Disabilities*, 63 DRAKE L. REV. 819, 826 (2015); Kevin Barry, *Toward Universalism: What the ADA Amendments Act of 2008 Can and Can't Do for Disability Rights*, 31 BERKELEY J. EMP. & LAB. L. 203, 228 (2010).

12. See Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended at 29 U.S.C. § 794 et seq. 2021)).

addresses the education rights of children with disabilities, but does not mandate inclusion nor prohibit segregated classes or schools.¹³ Further, the federal Fair Housing Amendments Act, which was enacted in 1988 to outlaw discrimination in housing against people with disabilities and their families, has not resulted in an increase in housing opportunities for people with disabilities—in large part due to the lack of accessible affordable housing.¹⁴ In short, it was not until 1990 when the ADA was enacted that private individuals, businesses, and state and local governments were put on notice that disabled people, like other marginalized groups, were protected from discrimination under federal law.¹⁵

The ADA sought to address the long history of exclusion of people with disabilities by prohibiting discrimination against disabled people in employment, access to public services, transportation, telecommunications, and places of public accommodation. As stated in the law's preamble, Congress found that “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.”¹⁶

By all accounts, the ADA represents progress.¹⁷ Yet between the time President Bush signed the original ADA into law in 1990 and the enactment of the ADAAA in 2008, the Supreme Court had decided several cases which significantly narrowed the definition of disability.¹⁸

13. *See* Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773, 775; *see also* Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, § 901(a)(1), 104 Stat. 1103, 1141–42 (codified as amended at 20 U.S.C. §§ 1400–1482 (2021)).

14. *See* Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (codified as amended at 42 U.S.C. §§ 3601–3631 (2021)). In addition, the Developmental Disabilities Assistance and Bill of Rights Act of 1975 and the Mental Health Systems Act of 1978 also sought to support people with disabilities, but they targeted only subgroups of people with disabilities and failed to include a broad anti-discrimination mandate. *See* Javits-Wagner-O'Day Act of 2011, Pub. L. No. 111-350, § 3, 124 Stat. 3833 (codified as amended at 41 U.S.C. §§ 850–8506 (2021)); *see also* Developmental Disabilities Assistance and Bill of Rights Act of 1975, Pub. L. No. 94-103, 89 Stat. 486 (codified as amended at 42 U.S.C. §§ 15001–15009 (2021)); *see also* Mental Health Systems Act of 1980, Pub. L. No. 96-398, 94 Stat. 1564 (codified as amended at 42 U.S.C. § 9501(2021)).

15. 42 U.S.C. §§ 12101–12213 (2021).

16. § 12101(a)(2).

17. *See, e.g.*, JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT at 322–332, 336 (1993, 1994); LENNARD J. DAVIS, ENABLING ACTS: THE HIDDEN STORY OF HOW THE AMERICANS WITH DISABILITIES ACT GAVE THE LARGEST US MINORITY ITS RIGHTS at 248–251 (2015).

18. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999); *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002).

Congress's purpose in enacting the ADAAA, therefore, was to overturn these Supreme Court decisions which, in Congress's view, inappropriately limited the "protection for many individuals whom Congress intended to protect."¹⁹

Perhaps the most significant accomplishment of the original ADA is its recognition of disability not as a problem of the individual, but as a "pervasive social problem."²⁰ The ADA challenges the long-standing medicalized view of people with disabilities, as those requiring a cure, medical treatment, or charity.²¹ Instead, the ADA views disabled people as rights holders who are disabled not by their particular impairment, but by a society that creates barriers to their full inclusion.²² This "social model" of disability, as it is known, views disability as the result of socio-cultural dynamics that occur in interactions between disabled people and the inaccessible and unaccepting societies in which they live.²³ The mandate of the ADA, therefore, is not to "fix" disabled people so that they can better fit into existing systems, but rather to "fix" the systems and society, generally, to be more inclusive of disabled people.²⁴

19. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

20. 42 U.S.C. § 12101(a)(1). Congress determined for example, that "census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally[.]" *Id.* § 12101(a)(6). In response, Congress decided that action was necessary to rectify past and present discrimination, when it wrote: "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[.]" *Id.* § 12101(a)(4).

21. See Tom Shakespeare, *Social Models of Disability and Other Life Strategies*, 6 SCANDINAVIAN J. DISABILITY RSCH. 8, 18 (2004); see also Arlene S. Kanter, *The Law: What's Disability Studies Got to Do with It or an Introduction to Disability Legal Studies*, 42 COLUM. HUM. RTS. L. REV. 403, 419 (2011).

22. Kanter, *supra* note 21, at 427–28.

23. *Id.*

24. Prior to this point in the article, I referred to "people with disabilities" to conform to "people first" language in which the disability is secondary to the person's primary identity as a person, focusing on the person not the disability. However, in the United Kingdom and more recently in the United States, scholars and self-advocates are opting to use "identity first language," which refers to the "disabled person" (as opposed to the person with a disability) to illustrate their pride in their primary identity of disability. Use of this language does not mean the person views disability as their *entire* identity, but rather it is an essential part of their identity. See, e.g., *Language Guide*, SYRACUSE UNIV. DISABILITY CULTURE CTR., <http://sudcc.syr.edu/resources/language-guide.html> (last visited June 6, 2020); see generally Nick Watson, *Well, I Know This Is Going to Sound Very Strange to You, But I Don't See Myself as Disabled: Disability and Identity*, 17 DISABILITY & SOC'Y 509 (2002) (describing conversations about self-identity); Brittany Wong, *It's Perfectly OK to Call a Disabled Person "Disabled," and Here's Why*, HUFF. POST (June 20, 2019), https://www.huffpost.com/entry/what-to-call-disabled-person_1_5d02c521e4b0304a120c7549.

While the ADA offers disabled people protection based on their shared history of discrimination and marginalization, it also reinforces their exceptionalism by requiring them to prove how they are different from the “able bodied” norm.²⁵ Thus while the ADA’s universality is heralded in its title and purpose,²⁶ its protections apply only to a limited group of disabled people: those who are “qualified” individuals with disabilities, according to the law’s definition.²⁷

Under the ADA, an individual must establish not only that they qualify as disabled but also that they qualify for special treatment in the form of accommodations, modifications, or auxiliary aids, because of a medically diagnosed condition.²⁸ This language in the law conjures up stereotypical images of people with disabilities as “broken, weak, unable to function, and deserving of pity.”²⁹ Further, once the individual qualifies for protection under Title I, they must show they possess the necessary job qualifications to do the job.³⁰ The disabled employee will continue to be viewed as unable to do the job like “everyone else” unless or until some “special” accommodations, adjustments, or modifications are made to the “normal” working rules, responsibilities, and conditions of employment.³¹

Of course, “special” arrangements are made all the time for people without disabilities—through collective bargaining agreements, privately negotiated agreements, and informal systems of nepotism.³² But it is the

25. 42 U.S.C. §§ 12111(8) (Title I), 12131(2) (Title II) (2021).

26. 42 U.S.C. § 12101(b) (2021).

27. 42 U.S.C. § 12112(a) (2021).

28. See 42 U.S.C. § 12111; see also 29 C.F.R. § 1630.2(g) (2021); see also Laura L. Rovner, *Perpetuating Stigma: Client Identity in Disability Rights Litigation*, 2 UTAH L. REV. 247, 250 (2001).

29. Rovner, *supra* note 28, at 250.

30. See § 12111(8).

31. These issues are more fully discussed in an upcoming article by Professor Arlene Kanter, entitled *Remote Work and the Future of Disability Accommodations* (forthcoming CORNELL LAW REVIEW). See also Kanter, *supra* note 11, at 858 (noting the benefits of reducing the “need for individual accommodations” and preventing the need for people with disabilities “to be singled out to ask for ‘special’ accommodations or modifications which may result in . . . stigmatization and exclusion”).

32. The Supreme Court has ruled that seniority systems negotiated through collective bargaining supersede an entitlement to a certain position by an aggrieved plaintiff under the ADA. *Barnett v. U.S. Airways*, 535 U.S. 391 (2002). Moreover, while “special treatment” and accommodations afforded qualified employees with disabilities are subject to scrutiny, policies relying on cronyism and nepotism that may bring to the workplace unqualified employees often go unchecked. On the consequences of cronyism and nepotism in the workplace, see, e.g., Jone L. Pearce, *Cronyism and Nepotism Are Bad for Everyone: The Research Evidence*, 8 ORG. PSYCHOL. 41 (2015); Kathryn A. Morris, Margaret Y. Padgett & Robert J. Padgett, *Perceptions of Nepotism Beneficiaries: The Hidden Price of Using a Family Connection to Obtain a Job*, 30 J. BUS. PSYCHOL. 283 (2015).

changes or accommodations that people with disabilities may need in order to participate on equal footing with their nondisabled peers that require scrutiny under federal law. As one scholar has observed in the workplace context, “the ‘normal’ worker is supposed to be energetic, have high concentration abilities, be alert to adapt to changing conditions, and be able to withstand physical, mental or interactive stress in good humor.”³³ Workers who fail to measure up to one or more of these standards because of an impairment, will be viewed as “less than,” or even “whiners.”³⁴ Thus, even with the passage of the ADA and the ADAAA, equal treatment for many disabled people remains elusive.

The current pandemic has highlighted this unequal treatment. While more than forty-one million Americans have had COVID-19 (as of September 2021), disabled people have fared the worst, especially disabled People of Color and those who are incarcerated.³⁵ People with disabilities are at least three to four times more likely to die of COVID-19 than people without disabilities.³⁶ Moreover, even before the current pandemic, nearly one in three people with disabilities lived in poverty,³⁷

33. Susan Wendell, *Unhealthy Disabled: Treating Chronic Illnesses as Disabilities*, 16 *HYPATIA* 17, 27 (2001).

34. DAVIS, *supra* note 17, at 248.

35. *Coronavirus Resource Center*, JOHNS HOPKINS U. MED., <https://coronavirus.jhu.edu/> (last visited Mar. 14, 2021); *see also* William F. Marshall, III, *Coronavirus Infection by Race: What’s Behind the Health Disparities?*, MAYO CLINIC (Aug. 13, 2020), <https://www.mayoclinic.org/diseases-conditions/coronavirus/expert-answers/coronavirus-infection-by-race/faq-20488802>; *see also* Jackie Jahn, Christine Mitchell & Cheryl Conner, *Incarceration is a Public Health Crisis, During COVID-19 and Beyond*, HARV. MED. SCH. (Dec. 8, 2020), <http://info.primarycare.hms.harvard.edu/blog/incarceration-covid-19>; *COVID Data Tracker Weekly Review*, CDC (Nov. 19, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/index.html>.

36. Roni Caryn Robin, *Developmental Disabilities Heighten Risk of Covid Death*, N.Y. TIMES (Nov. 10, 2020), <https://www.nytimes.com/2020/11/10/health/covid-developmental-disabilities.html#:~:text=the%20main%20story-.Developmental%20Disabilities%20Heighten%20Risk%20of%20Covid%20Death,condition%20a%20new%20analysis%20found> (first citing *Risk Factors for Covid-19 Mortality Among Privately Insured Patients: A Claims Data Analysis*, FAIR HEALTH (Nov. 11, 2020), <https://s3.amazonaws.com/media2.fairhealth.org/whitepaper/asset/Risk%20Factors%20for%20COVID-19%20Mortality%20among%20Privately%20Insured%20Patients%20-%20A%20Claims%20Data%20Analysis%20-%20A%20FAIR%20Health%20White%20Paper.pdf>); and then citing Scott D. Landes et al., *Intellectual and Developmental Disability and Covid-19 Case-Fatality Trends: TriNetX Analysis*, 13 *DISABILITY HEALTH J.* 1 (2020)).

37. *See Fulfilling The Promise: Overcoming Persistent Barriers To Economic Self-Sufficiency For People With Disabilities: Hearing of the Comm. on Health, Educ., Lab., and Pensions*, 113th Cong. 8 (2014) (finding nearly one in three people with disabilities live in poverty). The Committee found that the disabled population is struggling to find work, maintain needed supports, and access basic infrastructure like transportation. *Id.* at 28–31. The report indicated that prejudice and low expectations compound the situation. *Id.* Those who testified before the Committee presented a litany of the obstacles, including years-long waiting lists for housing, discrimination, and low pay in the workplace. *Id.* at 3, 7, 14, 19, 25.

twice as many as people without disabilities. In addition, as of 2020, only 17.9 percent of working-age people with disabilities are participating in the workforce, which is far less than the 61.8 percent participation rate for workers without disabilities.³⁸ But it is not only the unacceptably high rates of death and unemployment that present challenges to disabled people in the United States. People with disabilities also experience prejudice and stigma, which further marginalizes them from mainstream society.³⁹ As the late disability studies scholar and activist, William Peace, had written, “[o]f course, the ADA has helped many people with disabilities, but, when these gains are measured against the daily reality experienced by those with disabilities, the law merely calls attention to the gross lack of equality.”⁴⁰

One of the reasons for the ADA’s failure to achieve greater equality for disabled people is that ensuring equality was actually not Congress’ intent in enacting the law. As others and I have written elsewhere, the ADA was intended as a narrowly drawn antidiscrimination law, designed, at best, to move a segment of the disabled population from reliance on government benefits to employment.⁴¹ Moreover, it did so by relying not on government-funded mandates, but on the goodwill of employers and providers of services, or the threat of litigation against them. With such a limited mandate, the ADA has had little chance of realizing the goal of substantive equality for people with disabilities.⁴²

A second reason for the ADA’s failure to ensure greater equality for people with disabilities is the systemic ableism that is embedded within society.⁴³ Ableism is defined as “a system of beliefs and actions based on

38. Press Release, Bureau of Labor Statistics, Persons with a Disability: Labor Force Characteristics (Feb. 26, 2020), <https://www.bls.gov/news.release/disabl.htm>. Further, as of 2019, when the U.S. employment rate was among the highest in recent years, fewer than one-third of people with disabilities ages sixteen to sixty-four were employed in the United States, compared to almost three-quarters of people without disabilities in comparable age groups. See *United States Employment Rate*, TRADING ECON., <https://tradingeconomics.com/united-states/employment-rate> (last visited June 6, 2021) (Employment rate in the United States averaged 59.22 percent from 1948 until 2021, reaching an all-time high of 64.70 percent in April of 2000 and a record low of 51.30 percent in April of 2020.); see also Press Release, Bureau of Labor Statistics, Persons with a Disability: Labor Force Characteristics (Feb. 26, 2020), <https://www.bls.gov/news.release/disabl.htm>

39. See MICHELLE R. NARIO-REDMOND, *ABLEISM: THE CAUSES AND CONSEQUENCES OF DISABILITY PREJUDICE* 168–70 (2020).

40. William J. Peace, *Parenting and Disability: The Final Frontier*, 5 HOUS. L. REV.: OFF THE RECORD 101, 103 (2015).

41. Kanter, *supra* note 11, at 822–23; see also SAMUEL R. BAGENSTOS, *LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT* 1–3 (2009).

42. See Kanter, *supra* note 11, at 823.

43. See *id.* at 878 (quoting Justin Dart, *Introduction: The ADA: A Promise to Be Kept*, in LAWRENCE O. GOSTIN & HENRY A. BYER, *IMPLEMENTING THE AMERICANS WITH DISABILITIES ACT* xxi (1993)).

the idea that certain abilities or ways of being are superior to others.”⁴⁴ Ableism denies people with disabilities the right to be treated equally and with dignity in their workplaces, neighborhoods, and by society, generally. As Justin Dart, one of the forces behind the ADA, has written, “[o]ur society is still infected by an insidious, now almost subconscious, assumption that people with disabilities are less than fully human and therefore are not entitled to the respect, the opportunities, and the services and support systems that are available to other people as a matter of right.”⁴⁵

This observation has resonance even today, decades after the adoption of the ADA.⁴⁶ For example, research has found that the greatest barrier to employment for disabled people is not their lack of skills or qualifications, but the discriminatory attitudes and prejudice of employers who refuse to hire them.⁴⁷ According to one study, nearly half of the people with disabilities surveyed reported that they had encountered disability discrimination in the workplace, and that they were paid less than workers with similar skills, or not hired at all.⁴⁸ Further, disability prejudice or ableism is evident not merely as “a unitary negative attitude.”⁴⁹ It can appear in the form of paternalism, benevolence, and pity.⁵⁰ As one scholar has observed, discrimination

44. See, e.g., FIONA KUMARI CAMPBELL, CONTOURS OF ABLEISM, THE PRODUCTION OF DISABILITY AND ABLEDNESS at 5 (2009); see NARIO-REDMOND, *supra* note 39.

45. See Kanter, *supra* note 11, at 878 (quoting Dart, *supra* note 43, at xxi).

46. See, e.g., Andrew Pulrang, *When Is Ableism Worth Canceling?*, FORBES (Mar. 28, 2021), <https://www.forbes.com/sites/andrewpulrang/2021/03/28/when-is-ableism-worth-canceling/?sh=6f7247622208>.

47. K.A. Dixon, Douglas Kruse & Carl E. Van Horn, *Restricted Access: A Survey of Employers about People with Disabilities and Lowering Barriers to Work*, at 9 (2003); see also Michele A. Paludi, Carmen A. Paludi & Eros R. DeSouza, *Disability Discrimination*, in PRAGER HANDBOOK ON UNDERSTANDING DISABILITY AND PREVENTING WORKPLACE DISCRIMINATION, 17–44 (Michele A. Paludi, Carmen A. Paludi & Eros R. DeSouza eds., 2010); Adrienne Colella, Ramona L. Paetzold & Lily Run Ren, *A Meta-Analysis of Experimental Studies on the Effects of Disability on Human Resource Judgments*, 18 HUM. RES. MGMT. REV. 191, 192 (discussing that people with disabilities face employment hurdles “because of stigmatized views” about disability).

48. KESSLER FOUNDATION & NAT’L ORG. ON DISABILITY, SURVEY OF EMPLOYMENT OF AMERICANS WITH DISABILITIES, 56 (2010). Another 2010 survey of employer attitudes towards disabled workers found that negative attitudes of co-workers are a reason most employers do not hire people with disabilities. H. Stephen Kaye, Lita H. Jans & Erica C. Jones, *Why Don’t Employers Hire and Retain Workers with Disabilities?* 21 J. OCCUPATIONAL REHAB. 526, 528 (2011).

49. NARIO-, *supra* note 39, at 336.

50. *Id.* (Disability prejudice may be “expressed unintentionally or deliberately in individual beliefs, emotions, behaviors, and institutional practices that result in prejudicial treatment of people on the basis of disability.”).

against people with disabilities is not something that only “unkind people do.”⁵¹

Thus, whether and to what extent the ADA has delivered on President Bush’s promise of “equality, independence, and freedom”⁵² for disabled people will continue to be the subject of debate. To assess the success of the ADA, some may point to employment rates and death rates, as discussed above; or the extent to which prejudice and ableism exists in society, as difficult as that may be to measure; or Congress’ stated purpose in enacting the ADA, to “assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals.”⁵³ Regardless of which metric is used, however, legal scholars will and should continue to debate not only the history of the ADA but also the question of how the ADA may be transformed in the future to achieve the goal of equality, inclusion and justice for disabled people. We hope this Symposium Volume contributes to that debate.

II. A BRIEF OVERVIEW OF THE ARTICLES IN THIS VOLUME

The articles in this Symposium Volume were selected among a large number of articles submitted to the *Syracuse Law Review*. They represent a diversity of topics and authors with intersectional identities, with and without disabilities, and with a range of expertise. Among them are well established disability legal scholars, newcomers to the legal academy, practitioners, and a graduating law student.

The first article, by Professor Elizabeth Emens, which serves as tribute to the late disability philosopher and bioethicist Adrienne Asch, takes on the question of the effectiveness of the ADA by delving into the consequences of the stigma people with disabilities face today.⁵⁴ In her article, *Getting It: The ADA After Thirty Years*, Emens poses several questions regarding the state of attitudes toward disability and how “better attitudes” can be cultivated and stereotypes reduced, through the law.⁵⁵ Inspired by Asch’s “intention to write about nondisabled people who ‘get it’ with regard to disability,” Emens sets out to “search for the meaning of getting it; the legal, societal, and individual mechanisms for spurring people to get it; and the overlooked affective and aesthetic

51. DAVIS, *supra* note 17, at 250; *see generally* Nicole Buonocore Porter, *Special Treatment Stigma After the ADA Amendments Act*, 43 PEPP. L. REV. 213 (2016).

52. Remarks on Signing the Americans with Disabilities Act of 1990, PUB. PAPERS (July 26, 1990), available at <https://bush41library.tamu.edu/archives/public-papers/2108>.

53. 42 U.S.C. § 12101(a)(7) (2021).

54. Elizabeth F. Emens, *Getting It: The ADA After Thirty Years*, 71 SYRACUSE L. REV. 637 (2021). The title alludes to a book that Adrienne Asch intended to write, before her untimely death, about those who “get it.”

55. *See id.*

dimensions of getting it.”⁵⁶ Building on her previous groundbreaking work that included a list of “better attitudes” based on the inside view—“the more knowledgeable, realistic view that one tends to develop through personal experience or close contact embedded in an informed disability community context”—Emens updates her list eight years later in this current article.⁵⁷

The second article in the volume, by Professor Natalie Chin, *Centering Disability Justice*, also examines the question of the effectiveness of the ADA, but through a different lens.⁵⁸ This article confronts the role that ableism and the intersection of race, immigration status, class, gender, sexuality, and the impact that systems of oppression have on Black, Indigenous, Brown, and other People of Color in accessing disability rights protections.⁵⁹ To Chin, even disability rights victories, as exemplified by the *Olmstead* case, ignore the experiences of People of Color who are also disabled.⁶⁰ This omission demands a shift, according to Chin, from disability rights, with its focus on disability alone, to the intersectional approach of disability justice. Disability justice addresses the impact of racism and ableism on People of Color who are also disabled, particularly with respect to police violence, their segregation in carceral spaces, and their unequal access to education and to medical care.⁶¹ In light of the recent pandemic, it is time to recognize, in Chin’s words, “how the ADA is failing people with disabilities who live at the intersection of disability and a racialized identity and what strategies can be utilized to more effectively challenge the inequities in disability equality for multiple marginalized populations.”⁶²

The third article in the volume, *The New Eugenics*, is by Professor Samuel Bagenstos, who is currently serving as General Counsel for the Office of Management and Budget.⁶³ In this article, Bagenstos offers a critical view of the ADA’s progress through a eugenics lens.⁶⁴ He addresses directly the failure of American society to abandon its eugenics history by presenting a compelling argument that not only have eugenic ideas and practices not disappeared, but that they became increasingly prominent, especially during the last half of the decade, culminating in

56. *Id.*

57. *See id.*

58. Natalie M. Chin, *Centering Disability Justice*, 71 SYRACUSE L. REV. 683 (2021).

59. *Id.*

60. *Id.*; *see also* *Olmstead v. L.C.*, 527 U.S. 581 (1999).

61. *See* Chin, *supra* note 58.

62. *See id.*

63. *See* Bagenstos, Samuel, MICH. L., <https://www.law.umich.edu/FacultyBio/Pages/FacultyBio.aspx?FacID=sambagen> (last visited June 6, 2021).

64. Samuel R. Bagenstos, *The New Eugenics*, 71 SYRACUSE L. REV. 751 (2021).

the election of Donald Trump.⁶⁵ Bagenstos focuses his argument on two recent examples. The first is the Trump Administration's effort to expand the public charge rule in U.S. immigration law to exclude people with disabilities, including those with various health conditions and communicable diseases.⁶⁶ The second example is the Trump Administration's response to COVID-19.⁶⁷ Here, Bagenstos argues that until activists called attention to the issue, people with disabilities were being denied life-saving treatment based on the view of the expendability of their lives, particularly those who lived in congregate living facilities, nursing homes, and prisons.⁶⁸ Although the Trump Administration has ended, the legacy of eugenics continues, and to combat that legacy, Bagenstos warns, ongoing vigilance is required.⁶⁹

The following three articles in the Volume move the reader from weighty questions of stigma, societal exclusion, racism, ableism, and eugenics to ways in which specific provisions of the ADA could be improved to provide greater equality and access to services and programs.

The fourth article in the volume, by Professor Mark Weber, is titled *Program Access Under Disability Discrimination Law*.⁷⁰ In this article, Weber suggests that claimants should invoke the requirement for state and local governments and federal grantees under Title II and Section 504, respectively, to operate programs that “when viewed in [their] entirety, [are] readily accessible to and usable by individuals with disabilities.”⁷¹ He presents his argument for a broader application of Title II's program access regulations by focusing on the case of *A.H. ex rel. Holzmueller v. Illinois High School Association*.⁷² In this 2018 case, the Illinois athletic association refused to create a separate division for para-ambulatory athletes following a request from a high school runner with elite status who had competed in the U.S. Paralympic Trials, but had failed to qualify for his state high school track meet.⁷³ The Seventh Circuit upheld the district court's decision in favor of the state association.⁷⁴ By upholding the athletic association's decision, Weber argues, the court failed to take into account the “extensive obligation on the part of state and local government and federal grantees” under Title

65. *See id.*

66. *See id.*

67. *Id.*

68. *See* Bagenstos, *supra* note 64.

69. *See id.*

70. Mark C. Weber, *Program Access Under Disability Discrimination Law*, 71 SYRACUSE L. REV. 765 (2021).

71. *Id.* (quoting 28 C.F.R. § 35.150(a) (2021)) (citing 28 C.F.R. § 42.521(a) (2021)).

72. *Id.*; *see also* 881 F.3d 587 (7th Cir. 2018).

73. *See* Weber, *supra* note 70; *see also* *A.H.*, 881 F.3d at 590.

74. *See* Weber, *supra* note 70; *see also* *A.H.*, 881 F.3d at 591.

II and Section 504, respectively, to ensure that the programs they “provide a benefit for everyone, no matter how disabling an individual’s condition might be.”⁷⁵ Weber concludes his article by calling for a reexamination of the meaning and use of Title II’s program access regulations, and arguing for broader protections for people with disabilities who seek access to state-run programs.⁷⁶

The next article in the Volume, *The ADA Constrained: How Federal Courts Dilute the Reach of the ADA in Prison Cases*, by Professor Prianka Nair, also addresses shortcomings in Title II caselaw, but from the perspective of disabled people who are detained in our nation’s prisons and jails.⁷⁷ It is estimated that thirty-two percent of prisoners report having at least one physical or cognitive disability.⁷⁸ Of those, many encounter neglect and abuse on account of their disability.⁷⁹ Further, although the Supreme Court recognized in *Pennsylvania Department of Corrections v. Yeskey*, that “Title II of the ADA unambiguously extends to state prison inmates,”⁸⁰ many incarcerated individuals with disabilities continue to be denied equal access to programs and services. Such unequal treatment is allowed to continue, Nair argues, because federal courts have limited the categories of prisoners who may apply for relief under Title II.⁸¹ Nair observes that the federal courts’ deference to prison administration has “diluted” the potential relief for a significant portion of the disabled prison population.⁸² Nair invites courts to focus on whether state practices have a disparate impact on people with disabilities rather than routinely deferring to administrative decision making.⁸³ With this new focus, Nair suggests, courts may be more open to consider applying the integration mandate articulated by the Supreme Court in *Olmstead* to prison condition cases.⁸⁴

The sixth article in the volume presents the perspective of two legal practitioners on the challenges and possibilities of ADA class actions. In their article, *The Commonality of Difference: A Framework for Obtaining Class Certification in ADA Cases After Wal-Mart*, Steven Schwartz and

75. Weber, *supra* note 70.

76. *See id.*

77. Prianka Nair, *The ADA Constrained: How Federal Courts Dilute the Reach of the ADA in Prison Cases*, 71 SYRACUSE L. REV. 791 (2021).

78. Margo Schlanger, *Prisoners with Disabilities*, in REFORMING CRIMINAL JUSTICE: PUNISHMENT, INCARCERATION, AND RELEASE 295, 297 (E. Luna ed., 2017).

79. *See id.* (citing Schlanger, *supra* note 78, at 295, 297).

80. 524 U.S. 206, 213 (1998).

81. *See* Nair, *supra* note 77.

82. *See id.*

83. *See id.*

84. *See id.*; *see also* 527 U.S. at 603.

Kathryn Rucker discuss the limits of remedies currently available under the ADA, with particular focus on Title II class actions.⁸⁵ While the authors identify specific challenges of securing class certification in Title II cases, they argue that by properly framing the class and meeting the elements of proof required under Rule 23 of the Federal Rules of Civil Procedure, class certification is achievable and should not be viewed as an insurmountable deterrent to systemic relief in ADA cases.⁸⁶ While other articles have discussed class certification requirements for ADA cases, generally,⁸⁷ this article⁸⁸ offers a targeted analysis of Title II systemic reform cases. It also offers practical strategies to address the issues raised in class actions brought against public entities, including those arising under the Supreme Court's decision in *Olmstead v. L.C.*⁸⁹

Following these articles by leading disability rights legal scholars and practitioners, is a student note by Syracuse University College of Law graduate, Joseph Tantillo. His article, titled *An Invisible Truth: How Courts, Congress, and the ADA Have Failed to Support Reasonable Accommodations in the Workplace for People with Mental Illness*, explores the limits of Title I's protection for employees with mental health issues.⁹⁰ The author suggests alternative approaches for relief for qualified employees with mental disabilities, such as applying the fundamental alteration defense, currently included in Titles II and III, to Title I.⁹¹

This Symposium Volume closes with an Afterword by Professor Doron Dorfman, titled *The ADA's Imagined Future*.⁹² Dorfman's Afterword charts a new and ambitious course for future action under the ADA in three areas: disaster relief and protection, access to the physical and online environment, and a right to universal health care.⁹³ In order to ensure a prosperous future for all people with disabilities, Dorfman calls for reconsidering the limited antidiscrimination approach of the ADA and proposes the creation of a proper safety net and infrastructure to protect

85. Steven Schwartz & Kathryn Rucker, *The Commonality of Discrimination: A Framework for Obtaining Class Certification in ADA Cases After Wal-Mart*, 71 SYRACUSE L. REV. 835 (2021).

86. *Id.*

87. See e.g., Michael Ashley Stein & Michael F. Waterstone, *Disability, Disparate Impact, and Class Actions*, 56 DUKE L.J. 861 (2006).

88. See Schwartz & Rucker, *supra* note 85.

89. 527 U.S. 581 (1999).

90. Joseph F. Tantillo, Note, *An Invisible Truth: How Courts, Congress, and the ADA Have Failed to Support Reasonable Accommodations in the Workplace for People with Mental Illness*, 71 SYRACUSE L. REV. 897 (2021).

91. See *id.*

92. Doron Dorfman, *Afterword: The ADA's Imagined Future*, 71 SYRACUSE L. REV. 927 (2021).

93. See *id.*

the lives of people with disabilities during emergencies, and which properly enforces their right of access, as well as a right to universal health care that is not dependent on employment status or public benefits.⁹⁴

We hope that the articles in this Symposium Volume will enhance the readers' understanding of the ADA's limits and potential, while also inviting our readers to consider what additional legislative, political, societal, and individual action is needed to ensure greater equality, inclusion, and justice for disabled people today and in the future.

94. *See id.*