

20th Anniversary of the Americans with Disabilities Act

Rational Discrimination and Shared Compliance: Lessons from Title VI of the Americans with Disabilities Act

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Recommended Citation

Michael Steven Stein and Emily Teplin, *Rational Discrimination and Shared Compliance: Lessons from Title VI of the Americans with Disabilities Act*, 45 Val. U. L. Rev. 1095 (2011).

Available at: <https://scholar.valpo.edu/vulr/vol45/iss3/7>

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RATIONAL DISCRIMINATION AND SHARED COMPLIANCE: LESSONS FROM TITLE IV OF THE AMERICANS WITH DISABILITIES ACT

Michael Steven Stein* and Emily Teplin**

I. INTRODUCTION

Twenty years after the Americans with Disabilities Act (“ADA”) was enacted, the state of communication access for deaf people is the tale of two ADAs.¹ Consider the hypothetical circumstance of a deaf man who has moved to a new town and needs to find a new dentist. After identifying a dentist who has received favorable reviews online, the deaf man turns on his videophone and enters the dental office’s phone number. His telephone call is automatically routed to a call operating center which connects him to an American Sign Language (“ASL”) interpreter within five seconds. The interpreter communicates with the deaf man in ASL through her own videophone, but she also wears a headset connected to a telephone. She introduces herself to the deaf man, gives him her interpreter identification number, and then initiates the call by dialing the requested phone number.

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¹ For the sake of convenience, we will generally use the term “deaf” in this Article to refer to individuals who communicate primarily in ASL. However, the word “deaf” actually applies to individuals with a widely diverse range of communication styles and preferences, not all of whom sign. Communication preferences range from spoken English to Signed Exact English to Cued Speech, to name but a few. See Michael A. Schwartz, *Deaf Patients, Doctors, and the Law: Compelling a Conversation About Communication*, 35 FLA. ST. U. L. REV. 947, 948 n.1 (2008) (stating that estimates of signing deaf people range from 300,000 to 2,000,000). Moreover, the phrase “deaf people” may include those individuals who are deaf, hard of hearing, deaf-blind, and late deafened. Many deaf individuals who identify as culturally deaf and communicate primarily in ASL refer to themselves as Deaf (with the capitalized ‘D’) to emphasize their position as a linguistic and cultural minority. See generally CAROL PADDEN & TOM HUMPHRIES, *DEAF IN AMERICA: VOICES FROM A CULTURE* (1988). Since not all deaf people identify as Deaf, we adopt the more general term deaf. While this Article is focused on access to interpreter services for deaf people who communicate primarily in ASL, the bulk of our discussion is equally applicable to access for a wide range of deaf and hard of hearing people who do not know sign language and may benefit instead from other forms of accommodation such as captioning.

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The dentist's receptionist answers the phone. The interpreter introduces the call, explaining that the caller is using ASL and that she will facilitate communication between him and the hearing caller. The interpreter then "connects" the call, and the deaf man states his name in sign language and asks to schedule an appointment. The receptionist, using nothing but his voice and regular telephone, discusses appointment dates with the deaf man through the interpreter. When the appointment has been booked, the deaf man signs his request that the office provide a sign language interpreter during the appointment. The receptionist puts the call on hold to consult with the dentist, who performs a simple cost-benefit analysis: the office charges \$120 for a basic dental hygiene visit and consultation with an approximate net profit of \$50. The cost of a sign language interpreter in her area is \$45 per hour with a two-hour minimum. The dentist concludes that she will "lose" money—\$40, representing the cost of the visit (\$120) minus typical expenditures (\$70) and the cost of the interpreter (\$90)—on the deaf patient. She instructs the receptionist to tell him that he is welcome to make an appointment but that her office will not provide an interpreter; instead, the dentist will communicate with him by writing notes back and forth.

There are two ADAs in this story: (1) the law that enabled the deaf man to place, *for free*, a telephone call and book a dental appointment in ASL with the same ease as a hearing person, and (2) the law that was supposed to, but ultimately did not, ensure the deaf man effective communication with the dentist during his actual appointment. Although the dentist offered to write notes back and forth with the deaf man, writing may not result in effective communication if the deaf man's primary means of communication is ASL, a visual language entirely distinct from English, with its own grammar and syntax.² Moreover, even if the deaf man has a good command of English (as do many deaf and hard of hearing people), the slow process of writing notes may severely limit the extent and complexity of the interactive dialogue that the dentist typically has with hearing patients. The dentist's analysis focused not on which means of communication would result in effective communication but rather on identifying her cheapest option.

This tale of two ADAs turns on economic incentives. The deaf man's call was regulated by Title IV of the ADA, which requires common

² See, e.g., *EEOC v. UPS Supply Chain Solutions*, 620 F.3d 1103, 1105 (9th Cir. 2010) ("[ASL's] grammar and syntax differ from the grammar and syntax of English and other spoken languages. In many cases, there is no one-to-one correspondence between signs in ASL and words in the English language." (citations omitted)); *Calloway v. Boro of Glassboro Dep't of Police*, 89 F. Supp. 2d 543, 547 n.9 (D.N.J. 2000).

carriers to ensure functionally equivalent telephone services for people with hearing and speech impairments.³ The Federal Communications Commission (“FCC”), which is charged with implementing Title IV, established a regulatory regime that assesses a tax on all common carriers for this purpose. The resulting revenues contribute to a fund which compensates relay service providers for their services. Relay service providers can turn a profit by providing free relay services for deaf people wishing to call hearing individuals and then seeking reimbursement from the relay service fund; indeed, the relay services industry now generates nearly \$1 billion per year. Providers therefore compete for the privilege of providing free sign language interpreters for the deaf man to call his dentist.

But what economic motive existed for the dentist to pay for an interpreter to communicate with her deaf patient during the actual appointment? None, except perhaps the fear of litigation. Title III of the ADA requires places of public accommodations, such as a dental office, to pay for qualified interpreters when necessary to ensure effective communication with a deaf person.⁴ The law prohibits the dentist from charging her deaf patient for the cost of interpreter services.⁵ Although a dentist’s office may assert the affirmative defense that providing interpreter services for a deaf patient who requests them poses an “undue burden,”⁶ the Department of Justice (“DOJ”) has taken the position that covered entities cannot simply compare the cost of the interpreter with the likely revenue from the deaf individual’s business, as the dentist in our hypothetical did.⁷ Rather, “undue burden” factors include the covered entity’s overall resources and the availability of tax credits to compensate the entity for part of the cost.⁸ It is doubtful that the dentist could establish that “losing” approximately \$40 for a single office visit posed an undue burden.⁹ The dentist likely violated Title III by refusing to provide an interpreter for the deaf man’s visit.

However, as we discuss in this Article, dentists as well as lawyers and innumerable other entities covered by the ADA routinely make precisely the same calculation our hypothetical dentist made despite the

³ 47 U.S.C. § 225 (2006).

⁴ *See generally* 42 U.S.C. § 12182 (2006).

⁵ 28 C.F.R. § 36.301(c) (2010).

⁶ 42 U.S.C. § 12182(b)(2)(A)(iii).

⁷ *See* Letter from Bill Lann Lee, Acting Assistant Attorney Gen., to Sen. Joseph I. Lieberman (Sept. 8, 1999), *available at* http://www.justice.gov/crt/foia/readingroom/frequent_requests/ada_tal/tal801.php.

⁸ *See id.* Limited tax credits are codified at 26 U.S.C. § 44 (2006).

⁹ We are aware of no court that has held, as a matter of law, that providing interpreter services constitutes an undue burden under the ADA.

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specter of liability.¹⁰ Even large entities with presumably deeper pockets, including multinational corporations and governmental agencies, which are also required to provide auxiliary aids such as interpreter services to ensure equal access to its services,¹¹ bristle at the cost of communicating effectively with deaf people.¹²

It is easy to see why the ADA is often referred to as an “unfunded mandate.”¹³ Under Titles I through III, the cost of paying for interpreter services and other means of ensuring effective communication with deaf people generally falls to those entities that happen to be approached by individual deaf people. Entities perform a cost-benefit analysis that often leads them to risk liability and refuse to pay, even when the cost of making their services accessible would not be overly burdensome.

We do not mean to downplay the successes that the ADA has had in opening many doors for deaf people. Many covered entities now provide auxiliary aids and services as a matter of course. The workplace, government services, and the marketplace are generally much more accessible today than they were before the ADA was enacted. However, we observe that while many covered entities do in fact comply with the ADA, there remains a sizeable number of entities which do not fulfill their legal obligations to ensure communication access, and thus equality, for deaf people.

The hard fact remains that after twenty years, deaf people still struggle to access employment opportunities, government services, and public accommodations in a manner commensurate with that enjoyed by hearing people. By contrast, Title IV has ensured virtually uniform industry-wide ADA compliance and readily available tools for hearing and deaf people to communicate with each other with ease through relay services. Our aim in this Article is to explain why Title IV has been so much more effective in achieving its goals than Titles I through III.

In this Article, we expand on the tale of two ADAs and offer our simple hypothesis: deaf people enjoy greater access to telecommunication services than they do in any other context because Title IV mandates that the entire telecommunications industry share the

¹⁰ See *infra* Part II.B.3. Indeed, the facts of this hypothetical are loosely based on *Mayberry v. Von Valtier*, 843 F. Supp. 1160 (E.D. Mich. 1994), a representative case discussed at some length below.

¹¹ See 42 U.S.C. §§ 12132, 12182; 28 C.F.R. §§ 35.130, 35.160, 36.303 (2010).

¹² See, e.g., *Randolph v. Rodgers*, 170 F.3d 850, 855 (8th Cir. 1999) (identifying the state correctional department as asserting undue burden to provide sign language interpreter for deaf prisoner to attend hearings, medical appointments, and educational programs).

¹³ See, e.g., Russell Powell, *Beyond Lane: Who is Protected by the Americans with Disabilities Act, Who Should Be?*, 82 DENV. U. L. REV. 25, 53 (2004) (referencing the ADA’s requirement that employers provide reasonable accommodations to employees with disabilities).

cost of communication access regardless of which company's services deaf people use. Titles I through III, in contrast, generally impose the cost on individual covered entities only when they encounter deaf people.

In Part II, we summarize the requirements of Titles I through III as they pertain to deaf people. Communication barriers pose the greatest hindrance to the inclusion of deaf people in society, and the ADA requires effective communication and the provision of auxiliary aids and services as a means of achieving equality. These access mandates have resulted in greater access for deaf people, but rampant noncompliance and underenforcement of Titles I through III have severely hindered full inclusion of deaf people in all aspects of society.

In Part III, we discuss how the successes of Titles I through III have been limited by the perpetuation of economic disincentives in the context of disability rights in general, and deaf communication access in particular. The ADA locates the "problem" of disability in the environment rather than in the person with a disability, and accordingly imposes costs associated with redressing inaccessibility on entities that foster the inaccessible or disabling environments. Like traditional antidiscrimination law, the ADA prohibits discrimination even when it is economically rational, but equality for deaf people requires real, quantifiable, ongoing expenditures. We agree with those scholars who argue that, as an antidiscrimination law, the ADA appropriately requires covered entities to take the necessary steps to ensure effective communication. However, we also argue that increased compliance with the law, which will translate into increased accessibility for deaf people, requires a broader and preemptive redistribution of the cost of communication access.

We turn in Part IV to the "other" ADA, Title IV, which provides a powerful illustration of what happens when the law compels an entire industry to share the cost of communication access and to do so in anticipation of—rather than in response to—encounters with deaf people. The enforcement failures of the other titles of the ADA contrast with the overall success of Title IV. Title IV's shared funding mechanism has resulted in the near complete accessibility of telecommunications and a vibrant marketplace for relay service providers competing to provide the best services to deaf people. Relay services are not without flaws—in our experience, most deaf people strongly prefer on-site interpreter services to interpreters who appear remotely via video feed—but the ubiquitous compliance issues in the context of Titles I through III are conspicuously absent when it comes to Title IV.

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In Part V, we present some illustrations of how entities covered by Titles I through III of the ADA have semi-voluntarily (often as the result of settling lawsuits) adopted Title IV's principle of sharing the cost of communication access. In Part VI, we explore other potential opportunities to expand the success of Title IV beyond telephone access while also acknowledging their limits. Our primary goal is to explain how Title IV's shared compliance mandate works to address the entrenched problem of economically rational discrimination in Titles I through III and to suggest several ways to expand on its success.

II. THE RIGHT TO EFFECTIVE COMMUNICATION

A. *Legal Requirements of Titles I-III*

We begin with a brief overview of the best-known provisions of the ADA, specifically as they apply to deaf individuals. The ADA is intended "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."¹⁴ It prohibits discrimination in "three major areas of public life": employment (Title I), public services (Title II), and public accommodations (Title III).¹⁵ For deaf people who communicate primarily in sign language, the ADA seeks to achieve full inclusion by establishing a right to effective communication through the provision of auxiliary aids and services which include sign language interpreters and captioning.

Title I prohibits employment discrimination "on the basis of disability."¹⁶ Under Title I, discrimination includes an employer's failure to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity."¹⁷ Equal Employment Opportunity Commission ("EEOC") regulations define reasonable accommodations as "[m]odifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities."¹⁸ Reasonable accommodations and modifications vary based on the individual deaf employee or applicant's

¹⁴ 42 U.S.C. § 12101(b)(1).

¹⁵ *Tennessee v. Lane*, 541 U.S. 509, 516 (2004).

¹⁶ 42 U.S.C. § 12112(a) (Supp. II 2008).

¹⁷ *Id.* § 12112(b)(5)(A) (2006).

¹⁸ 29 C.F.R. § 1630.2(o)(1)(iii) (2010).

circumstances; frequently they involve interpreter services for meetings and training sessions,¹⁹ but they may also encompass unusual requests, such as a fan for a factory worker whose hearing aid was negatively affected by “steam-induced perspiration.”²⁰

Title II provides that deaf people shall not “be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”²¹ Title II’s regulations, promulgated by the DOJ,²² specify that public entities must “furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity.”²³ Moreover, they must ensure that “communications with applicants, participants, and members of the public with disabilities are *as effective as communications with others*.”²⁴

Auxiliary aids can include the services of a qualified interpreter, telecommunication devices or personal device assistants, or even writing on a pen and paper or employing gestures to communicate.²⁵ The “length and complexity of the communication” determines the appropriate method for providing effective communication.²⁶ Accordingly, the law may be violated when a public entity relies on written notes to communicate when interpreter services are necessary to ensure effective communication under the particular circumstances.²⁷ Moreover, in determining what type of auxiliary aid and service is necessary for a given circumstance, public entities are required to give “primary consideration” to the request of the deaf person.²⁸ A public entity must normally honor the request of the deaf person unless it can

¹⁹ See, e.g., *EEOC v. Wal-Mart Stores, Inc.*, 187 F.3d 1241, 1246 (10th Cir. 1999).

²⁰ *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 257–58 (1st Cir. 1999).

²¹ 42 U.S.C. § 12132.

²² The EEOC promulgates regulations for Title I, the employment provision of the ADA, while the DOJ is responsible for Titles II and III. Regulations for Title IV, discussed in depth below, are under the auspices of the Federal Communication Commission (“FCC”).

²³ 28 C.F.R. § 35.160(b)(1) (2010).

²⁴ *Id.* § 35.160(a) (emphasis added); see, e.g., *Boyer v. Tift Cnty. Hosp. Auth.*, No. 7:06-cv-027, 2008 WL 2986283, at *5 (M.D. Ga. July 31, 2008) (“The [Title II] regulations charge Defendant hospital with the responsibility of taking steps to ensure that it could communicate with Plaintiff as effectively as it could communicate with its hearing patients. Further, Defendant hospital was responsible for furnishing Plaintiff with a qualified interpreter – if she so desired – so she could be properly treated while hospitalized.”).

²⁵ 28 C.F.R. § 35.104.

²⁶ See DEP’T OF JUSTICE, ADA TITLE II TECHNICAL ASSISTANCE MANUAL COVERING STATE AND LOCAL GOVERNMENT PROGRAMS AND SERVICES § II-7.1000 (1993), available at <http://www.ada.gov/taman2.html#II-7.1000>.

²⁷ See, e.g., *Center v. City of West Carrollton*, 227 F. Supp. 2d 863 (S.D. Ohio 2002).

²⁸ 28 C.F.R. § 35.160(b)(2).

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demonstrate that another effective means of communication exists or that the use of the requested communication method would result in a “fundamental alteration” of its program or service or would impose an undue financial or administrative burden.²⁹

Title III likewise requires public accommodations to ensure effective communication with deaf individuals through the provision of auxiliary aids and services.³⁰ Public accommodations are typically asked to ensure effective communication through the provision of auxiliary aids and services such as sign language interpreters,³¹ but the law also applies to structural modifications such as a sign at a drive-thru restaurant menu instructing deaf patrons to proceed to the window.³² Unlike Title II, Title III does not include regulatory language compelling the entity to afford “primary consideration” to the deaf person’s request for a particular means of communication. The public accommodation is ultimately responsible for deciding which, if any, auxiliary aids or services to employ, but it maintains legal responsibility for providing communication as effective as communication with others.³³

Small businesses³⁴ are eligible for a fifty percent tax credit up to \$5,000 for making expenditures to comply with the ADA, including paying for auxiliary aids and services such as interpreter services and captioning.³⁵ After spending \$250, they may take a fifty percent tax credit on expenditures up to \$10,250. This scheme, however, still leaves businesses liable for the majority of expenses, especially as they may encounter deaf consumers infrequently and not spend enough to qualify for the tax credit or for more than a small portion of the tax credit. In addition, it is entirely unavailable to government agencies and larger businesses.³⁶

²⁹ *Id.* § 35.164; *see also* Nondiscrimination on the Basis of Disability in State and Local Government Services, 75 Fed. Reg. 56,164, 56,183 (Sept. 15, 2010) (to be codified at 28 C.F.R. pt. 35).

³⁰ 42 U.S.C. § 12182(b)(2)(A)(iii) (2006).

³¹ *See, e.g.*, Loeffler v. Staten Island Univ. Hosp., 582 F.3d 268 (2d Cir. 2009).

³² Bunjer v. Edwards, 985 F. Supp. 165, 166 (D.D.C. 1997).

³³ *See* Kerr v. Heather Gardens Ass’n, No. 09-cv-00409-MSK-MJW, 2010 WL 3791484, at *4 (D. Colo. Sept. 22, 2010) (citing 28 C.F.R. pt. 36, app. B) (“[C]ommunication with the disabled individual must be as effective as that with a non-disabled individual. Use of the most advanced technology is not required, however, as long as the accommodation selected results in effective communication.” (internal citations omitted)).

³⁴ *See* 26 U.S.C. §§ 44(b)(1)(A)-(B) (2006) (stating that “eligible small business[es]” are those with either gross receipts not exceeding \$1,000,000 or businesses which do not employ more than thirty full-time employees).

³⁵ *See id.*

³⁶ *Id.* (indicating that by its terms, the tax provision applies only to “eligible small business[es]”).

B. The Extent of Noncompliance

The ADA has resulted in the greater inclusion of deaf people in society. Not all covered entities refuse to provide sign language interpreters and other auxiliary aids upon request so that they can communicate effectively with deaf people. Our focus is on noncompliance not because we think Titles I through III have entirely failed in their laudable goals, but because we think that the ADA can be made much more effective than it has been in its first twenty years.

It is difficult to measure the precise extent of noncompliance with Titles I through III. We do not attempt to undertake an empirical study of how and when covered entities decide to provide auxiliary aids and services. We note, however, that there is a strong consensus among scholars and empirical evidence suggesting that the ADA generally – not just as it applies to deaf people – is subject to widespread noncompliance.³⁷

In our personal experiences representing deaf individuals across the country, we have had deaf clients tell us that they contacted a dozen or more doctors before they found one willing to provide sign language interpreters. We have observed that entities are not always willing to hire an interpreter immediately after an initial request and will instead insist that a less costly approach, such as writing notes, results in equally effective communication even when voluminous amounts of information are being provided or the deaf person lacks strong reading and writing skills.

Our anecdotal experiences are supported by a wealth of case law in which entities both large and small in a variety of contexts refuse to ensure effective communication. Below, we examine illustrative cases litigated under each of the first three titles of the ADA involving the refusal by covered entities to provide sign language interpreters.

1. *EEOC v. Federal Express Corp.*³⁸

Ronald Lockhart is deaf and his primary means of communication is American Sign Language.³⁹ He has not mastered the English language

³⁷ See Samuel R. Bagenstos, *The Perversity of Limited Civil Rights Remedies: The Case of "Abusive" ADA Litigation*, 54 UCLA L. REV. 1, 4 (2006) (noting "a strong consensus . . . emerging among experts that the ADA's [Title III] public accommodations title is underenforced"); Kathryn Moss et al., *Unfunded Mandate: An Empirical Study of the Implementation of the Americans with Disabilities Act by the Equal Employment Opportunity Commission*, 50 U. KAN. L. REV. 1 (2001) (analyzing research regarding ADA Title I claims).

³⁸ 513 F.3d 360 (4th Cir. 2008).

³⁹ *Id.* at 364.

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and communicates with his wife and children in ASL.⁴⁰ From March 2000 to January 2003, Lockhart worked as a package handler at an airport facility of Federal Express.⁴¹ When he initially applied for the position, FedEx refused his request to provide an interpreter for his job interview. Despite FedEx's legal obligations under the ADA, Lockhart supplied his own interpreter (a friend) for both the interview and a subsequent multiday orientation session "because he 'really wanted the job,' and because he 'felt as if [he] had no other choice.'"⁴²

Although Lockhart did not need an interpreter to perform his essential job duties as a package handler sorting and processing mail, he requested an interpreter on numerous occasions for FedEx's mandatory employee trainings and meetings concerning "essential topics for its employees, such as workplace safety, job training, and employee benefits."⁴³ FedEx categorically refused his requests. As a result, Lockhart missed the information conveyed in employee meetings and was on some occasions not even informed about their occurrence.⁴⁴ Lockhart's inability to participate in employee meetings became particularly unsettling after September 11, 2001, when he missed receiving "vast amount[s] of information" about safety protocols because of FedEx's continuing denial of interpreter services.⁴⁵ A jury concluded that FedEx discriminated against Lockhart, awarding both compensatory and punitive damages which were subsequently upheld on appeal.⁴⁶

2. *Mosier v. Commonwealth of Kentucky*⁴⁷

Teri Mosier is a deaf attorney admitted to the Kentucky bar.⁴⁸ Without auxiliary aids and services such as sign language interpreters, she cannot understand court proceedings. The Kentucky Court of Justice had a policy of providing sign language interpreters to ensure effective communication with litigants, jurors, and witnesses, but not with attorneys.⁴⁹ When Mosier requested sign language interpreters for her

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 365 (alteration in original).

⁴³ *Id.*

⁴⁴ *Id.* at 366.

⁴⁵ *Id.* at 367.

⁴⁶ *Id.*

⁴⁷ *Mosier v. Kentucky (Mosier II)*, 675 F. Supp. 2d 693 (E.D. Ky. 2009). Author Michael Steven Stein was co-counsel on this case.

⁴⁸ *Id.* at 694.

⁴⁹ *Id.* at 698.

court appearances as a solo practitioner, the Kentucky Court of Justice refused her request.⁵⁰

In 2008, Mosier filed a lawsuit against several state defendants alleging that the Kentucky Court of Justice violated Title II in refusing to provide auxiliary aids and services to ensure effective communication with her during her court appearances as an attorney.⁵¹ The state defendants asserted undue burden as an affirmative defense.⁵² They further argued in part that Mosier's employer (she was self-employed at the time), and not the Kentucky Court of Justice, was the entity responsible for providing sign language interpreters for Mosier's court appearances. The court rejected this argument, ruling that Title II applied to "all services, programs and activities made available by public entities."⁵³ The parties eventually settled, with the Kentucky Court of Justice agreeing to provide auxiliary aids and services when necessary to ensure effective communication with deaf attorneys.

3. *Mayberry v. Von Valtier*

Dr. Cheryl Von Valtier was the primary care physician for Shirley Mayberry, a deaf individual. During physical examinations, they communicated through writing or by using a "signor," who was often one of Mayberry's children.⁵⁴

On three occasions, however, an agency provided sign language interpreters. Once, when an interpreter was present, Dr. Von Valtier realized that an earlier diagnosis had probably been incorrect and wrote in the chart that to the misdiagnosis likely resulted from "poor communication."⁵⁵ On two of the three occasions that an interpreter was present, Dr. Von Valtier did not have to pay for the interpreters. On the third occasion, the interpreter submitted a bill for \$28. Dr. Von Valtier paid the bill and sent the following letter to the interpreter:

Enclosed is payment for your services to Shirley Mayberry in this office 12/18/92. The Medicare payment for Mrs. Mayberry's office visit has been received, and I would now like to explain why I won't

⁵⁰ *Id.* at 695.

⁵¹ *Id.* at 697. Mosier also asserted a claim under Section 504 of the Rehabilitation Act, a predecessor to the ADA applicable to government entities and generally analyzed identically with the ADA. *See, e.g.,* *Buboltz v. Residential Advantages, Inc.*, 523 F.3d 864, 868 (8th Cir. 2008).

⁵² *Mosier v. Kentucky (Mosier I)*, 640 F. Supp. 2d 875, 878 (E.D. Ky. 2009).

⁵³ *Id.* at 878-79 (citing 28 C.F.R. § 35.102(a) (1999)).

⁵⁴ *Mayberry v. Von Valtier*, 843 F. Supp. 1160, 1162 (E.D. Mich. 1994).

⁵⁵ *Id.*

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be able to utilize your services in the future, or indeed why I really can't afford to take care of Mrs. Mayberry at all.

My regular fee for a 15 minute office visit is \$40.00. I spent about 45 minutes with Mrs. Mayberry on December 12, 1992, for this I was paid \$37.17 by Medicare and (hopefully) \$9.29 by Mrs. Mayberry. My office overhead expense rate is a rather steady 70% of my gross receipts, which means that for that 45 minutes I was able to "pocket" \$13.94, that is, until I paid your bill for \$28.00.

I certainly hope that the Federal Government does not further slash this outrageous profit margin.⁵⁶

Subsequently, Mayberry brought suit and sought an injunction requiring Dr. Von Valtier to continue to treat her and to pay for an interpreter for medical appointments. Mayberry further requested that the court order Dr. Von Valtier "to promulgate policies and procedures for providing interpreters to ensure effective communication" with deaf patients and notify them of their right to auxiliary aids and services.⁵⁷ The court denied the doctor's motion for summary judgment, concluding that there was "ample evidence to establish an issue of fact whether defendant intended to discriminate against plaintiff and withhold future accommodation, or was merely protesting her duty to accommodate handicapped patients."⁵⁸

4. Lessons

Mayberry is notable for Dr. Von Valtier's frank admission that she performed a cost-benefit analysis and concluded that it did not make financial sense for her to continue to use interpreter services. Similarly, in *Mosier*, the Kentucky Court of Justice asserted the defense of undue burden and further tried to shift to her employer the obligation to pay for interpreters (even though *Mosier* was self-employed at the time). In *Lockhart*, the company apparently did not see the value of communicating effectively with one of its package handlers as outweighing the cost of retaining occasional interpreter services to communicate with him.

⁵⁶ *Id.*

⁵⁷ *Id.* at 1163.

⁵⁸ *Id.* at 1168.

As these cases show, both larger entities (i.e., FedEx and the Kentucky Court of Justice) and smaller entities (Dr. Von Valtier's office) are reluctant to provide auxiliary aids and services despite legal obligations to do so for the simple reason that it requires them to incur expenses. They hesitated to pay for interpreters even though the requests for interpreter services generally tended to be intermittent—for meetings, trainings, interviews, and court appearances, for example—as opposed to regular requests for daily services. In other words, far from imposing an undue burden, requests for interpreter services generally impose a cost that is *de minimis* when compared to a covered entity's available financial resources. Nonetheless, entities routinely refuse to ensure effective communication when providing auxiliary aids and services seems economically irrational.

As the foregoing shows, many deaf people encounter a glass ceiling at work or are otherwise unable to benefit fully and equally from services in the public or private sector because covered entities refuse to pay for interpreters or other accommodations, no matter how minor, that might cut into the employers' profit margin.⁵⁹ In Part III, we discuss some of the theoretical underpinnings of the ADA to explain why Titles I through III are established in a way that perpetuates these economic disincentives, before examining in Part IV how Title IV removes the disincentives without deviating from the antidiscrimination principles animating the law.

III. THEORETICAL UNDERPINNINGS: AN IMPERFECT INHERITANCE FROM ANTIDISCRIMINATION LAW

The problems hindering compliance with Titles I through III are in many ways rooted in two important principles underlying the economic structure of those provisions: (1) the social model of disability, and (2) the understanding of antidiscrimination as encompassing accommodations. These ideas have resulted in a legal regime that places the cost of communication access on the individual entity that encounters the deaf person, rather than, for example, on the deaf person herself or on society at large. However, as we explained in Part II, individual entities are eager to avoid any expenditure for accommodations and the result has been rampant noncompliance. The economic disincentives to comply with the ADA are compounded by

⁵⁹ See, e.g., *EEOC v. UPS Supply Chain Solutions*, 620 F.3d 1103, 1106–07 (9th Cir. 2010) (interpreter requested for occasional meetings and required computer training); *Downing v. United Parcel Serv., Inc.*, 215 F. Supp. 2d 1303, 1310 (M.D. Fla. 2002) (interpreter requested for hearing test related to Department of Transportation driving certification).

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enforcement problems, notably Title III's prohibition on demands for damages. What is missing in the funding structure of Titles I through III is the key feature of Title IV: compulsory shared responsibility for the cost of ADA compliance among an industry or economic sector.

A. *The Social Model of Disability and Universal Design*

In her anthropological study of a community on Martha's Vineyard from the eighteenth through early twentieth centuries, Nora Groce explains how a disproportionately high rate of hereditary deafness lead most of the hearing population to learn a form of sign language.⁶⁰ According to the hearing islanders Groce interviewed,⁶¹ the deaf islanders were fully included in island society; sign language was so commonplace that hearing islanders sometimes used it to communicate with each other even when no deaf people were present.⁶² In that context, deafness was not a "disabling" condition.

The principle derived from Groce's study, as well as the work of other scholars,⁶³ is that "disability" is a product of environmental conditions rather than inherent characteristics of the "disabled" person. This "social model of disability" is a basic tenet of disability rights. As Tom Shakespeare has discussed, "[w]hile the problems of disabled people have been explained historically in terms of divine punishment [and] karma or moral failing, . . . the disability [rights] movement has focused attention onto social oppression, cultural discourse, and environmental barriers."⁶⁴ The social model's policy objectives "point[] away from medical treatment and charity and toward civil rights."⁶⁵

In the context of deafness, the disability arises when a hearing person cannot communicate in sign language and the deaf person with whom she wants to communicate cannot speak clearly or understand what the other person is saying. If our society were like the community in Martha's Vineyard discussed in Groce's study and everyone knew

⁶⁰ NORA ELLEN GROCE, EVERYONE HERE SPOKE SIGN LANGUAGE: HEREDITARY DEAFNESS ON MARTHA'S VINEYARD (1985).

⁶¹ *Id.* at 6. No deaf islanders were alive when Groce conducted her research, so she relied on elderly hearing islanders' recollections and documentary evidence. *Id.*

⁶² *Id.* at 63-67.

⁶³ See, e.g., MARTHA MINOW, MAKING ALL THE DIFFERENCE 111 (1990) (describing the "social-relations approach" to difference, which seeks to avoid "locat[ing] the problem in the person who does not fit in rather than in relationships between people and social institutions").

⁶⁴ Tom Shakespeare, *The Social Model of Disability*, in THE DISABILITY STUDIES READER 197 (Lennard J. Davis ed., 2d ed. 2006) (discussing the history of the social model).

⁶⁵ SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT 20 (2009).

sign language, there would no longer be any communication barriers to disable deaf people. This ideal would comport with the principles of universal design. Universal design is the elimination of a distinction between a utility and its “accessibility features.” Universally designed objects or systems accommodate, and ultimately benefit, everyone.⁶⁶

For example, curb cuts on sidewalks, crucial for wheelchair users, have benefited people pushing baby strollers and many others, and are often cited as a paradigmatic example of universal design. Similarly, the laws requiring that television programming has closed captioning,⁶⁷ enabling deaf people to access any program, have benefited many hearing people. Closed captioning is now routinely turned on in restaurants, gyms, and other public places not wishing to project the sound. With curb cuts and television captioning, accessibility is built into the social fabric and can be used at any time by anyone.

Universal design in the context of everyday, variable interactions between people (as opposed to television programming that can be captioned a single time and then displayed in accessible format indefinite times) poses a great challenge; our society, after all, is not Martha’s Vineyard in the nineteenth century. Most Americans do not know ASL and the ADA does not require anyone to learn it. Instead, the law requires covered entities to provide auxiliary aids and services when necessary to ensure effective communication with deaf people. The law does not compel the deaf person to pay for auxiliary aids and services.⁶⁸ Such a requirement would run contrary to the social model’s understanding of disability as the product of a disabling environment. Instead, the ADA places responsibility on covered entities to ensure that they do not create or perpetuate the disabling environment. However, as we have seen, many covered entities choose to evade their legal responsibilities when it requires them to incur even minimal costs.

This discrimination is economically “rational” only from the perspective of the covered entity. From a social perspective, such discrimination entails costs in the form of barriers that exclude deaf

⁶⁶ See M. David Lepofsky & Randal N.M. Graham, *Universal Design in Legislation: Eliminating Barriers for People with Disabilities*, 30 STATUTE L. REV. 97, 98 (2009) (“The basic premises of Universal Design are (i) that persons with disabilities ought to have meaningful access to the same products, buildings, and facilities as everyone else and (ii) that enhanced accessibility benefits everyone.”); see also Douglas K. Rush & Suzanne J. Schmitz, *Universal Instructional Design: Engaging the Whole Class*, 19 WIDENER L.J. 183, 187–88 (2009) (detailing principles of universal design and arguing for the integration of universal design into law school instruction).

⁶⁷ See 47 C.F.R. § 79.1 (2010).

⁶⁸ See, e.g., 28 C.F.R. § 35.130(f) (2010) (prohibiting surcharges by Title II entities); *id.* § 36.301(c) (same prohibition on Title III entities).

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people and result in lost productivity. As we have seen with television captioning and curb cuts, universal design benefits not just people with disabilities but everyone. When auxiliary aids and services such as interpreters and real-time captioning are integrated into the social fabric, hearing people and deaf people are able to communicate more efficiently, resulting in productivity gains.

B. Accommodation as Antidiscrimination

In order to imagine a more economically efficient ADA which results in the greater inclusion of deaf people in society, we explore the ADA's roots as an antidiscrimination law borrowing heavily from prior statutes prohibiting discrimination on the basis of sex, race, and religion, most pertinently the Civil Rights Act of 1964. Traditional antidiscrimination law would clearly prohibit the dentist in our example from refusing to serve women patients because they are women, or Muslim patients because they are Muslim.⁶⁹ Such discrimination is based on prejudice and animus and is economically irrational—the dentist is losing out on the prospective patients' business. Likewise, the ADA prohibits the dentist from refusing to treat a patient because he is deaf.⁷⁰ The ADA therefore treats people with disabilities as a minority group akin to a historically disadvantaged racial, ethnic, or religious group.⁷¹

This approach reflects a long-standing demand among disability rights advocates for equality through civil rights rather than charitable

⁶⁹ See, e.g., *Bollenbach v. Bd. of Educ.*, 659 F. Supp. 1450, 1472 (S.D.N.Y. 1987) (articulating that “the fact that the Hasidic clientele strongly prefer male [bus] drivers does not [justify discrimination]”); *Wilson v. Sw. Airlines Co.*, 517 F. Supp. 292, 302 n.25 (N.D. Tex. 1981) (“If an employer could justify employment discrimination merely on the grounds that it is necessary to make a profit, Title VII would be nullified in short order”); Eugene Volokh, *The California Civil Rights Initiative: An Interpretive Guide*, 44 UCLA L. Rev. 1335, 1373 (1997) (“If customers feel uncomfortable doing business with female executives or being served by male flight attendants, that’s the customers’ problem”). Outside the employment context, see, e.g., *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618–22 (1984) (finding exclusion of women from the Jaycees actionable discrimination); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (upholding constitutionality of public accommodations part of Civil Rights Act in context of hotel refusing to rent rooms to African-Americans); *United States v. Gulf-State Theaters, Inc.*, 256 F. Supp. 549, 552 (N.D. Miss. 1966) (rejecting theater’s defense that white patrons objected to presence of African-American patrons).

⁷⁰ See, e.g., *Sumes v. Andres*, 938 F. Supp. 9, 11–12 (D.D.C. 1996) (granting summary judgment against doctor who refused to treat deaf patient because he believed “all deaf people are high risk” but had not made any inquiry into patient’s condition).

⁷¹ BAGENSTOS, *supra* note 65, at 21–22. As Bagenstos has explained, advocates for disability rights have not uniformly embraced this view of disability; some adopt a more universal view of disability.

laws.⁷² Beginning in the 1970s, disability rights advocates began to argue that social welfare provisions intended to assist them also impugned their autonomy and hindered their participation as full citizens.⁷³ In many ways, the ADA represents the fruits of these efforts. The Civil Rights Act addresses racism not by offering subsidies to employers and other entities which would otherwise exclude historically disadvantaged racial groups, but by penalizing those entities which engage in such exclusion and thus perpetuate subjugation and inequality. Likewise, the ADA is a fault-based regime that imposes upon entities encountering deaf people the responsibility to eliminate communication barriers that the law views as resulting from the entity's own conduct.⁷⁴

Despite this similarity in approach, it has been contended that the Civil Rights Act and the ADA differ in that the former prohibits discrimination based on animus while the latter also prohibits economically rational discrimination.⁷⁵ For instance, the dentist's denial of interpreter services likely stemmed not from any dislike of deaf people generally, but rather from her simple cost-benefit analysis. The discrimination banned by traditional antidiscrimination law, it has therefore been argued, is economically irrational, while the ADA also proscribes economically rational discrimination. Based on these and other distinctions, numerous scholars and even judges have urged that the ADA's accommodation mandate is fundamentally different than more traditional antidiscrimination law.⁷⁶

Many scholars, however, have explained how the distinctions between antidiscrimination and accommodation are overblown.⁷⁷ Traditional civil rights statutes, after all, also prohibit conduct that results in a disparate impact on individuals in a protected class, even when there is no stereotyping or discriminatory animus present. Christine Jolls offers as an illustration a grooming policy, adopted by a Domino's pizza franchise, which prohibited male employees from

⁷² See generally JOSEPH P. SHAPIRO, *NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT* (1993).

⁷³ Samuel R. Bagenstos, *The Future of Disability Law*, 114 *YALE L.J.* 1, 17 (2004).

⁷⁴ BAGENSTOS, *supra* note 65, at 69.

⁷⁵ Mark Kelman, *Market Discrimination and Groups*, 53 *STAN. L. REV.* 833, 880 (2001).

⁷⁶ Lisa Eichhorn, *Hostile Environment Actions, Title VII, and the ADA: The Limits of the Copy-and-Paste Function*, 77 *WASH. L. REV.* 575, 605 (2002); Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 *DUKE L.J.* 1, 3 (1996); see also *Erickson v. Bd. of Governors*, 207 F.3d 945, 949 (7th Cir. 2000) ("Title I of the ADA . . . requires employers to consider and to accommodate disabilities, and in the process extends beyond the anti-discrimination principle.").

⁷⁷ Christine Jolls, *Antidiscrimination and Accommodation*, 115 *HARV. L. REV.* 642 (2001); Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 *U. PA. L. REV.* 579 (2004).

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wearing beards.⁷⁸ Because a certain skin condition makes it difficult or impossible for a significant number of black men to shave, but has no such effect on white men, the Eighth Circuit struck down the franchise's rule as having an impermissible disparate impact on African-American men.⁷⁹ The court concluded that the franchise could not establish a business necessity for the rule, exempting it from liability, "even though it had acted in response to perceived customer concerns about bearded employees."⁸⁰ Likewise, job selection criteria, such as certain physical requirements for a police officer position, may be discriminatory if it disproportionately and negatively impacts female applicants and is not justified by business necessity.⁸¹ Indeed, some courts have explicitly recognized that disparate impact law can impose costs on employers.⁸²

As these examples illustrate, in addition to banning decisions based on prejudice and animus towards a group, traditional antidiscrimination law also prohibits economically rational discrimination. Employers may not "engag[e] in intentional race or sex discrimination even when a rational, nonbigoted, purely bottom-line-oriented employer would engage in that conduct."⁸³ An employer cannot decline to hire a person because, even though the employer is not prejudiced, it anticipates that customers' preference for having a person of a particular sex in the job will hamper business.⁸⁴ Title VII does allow employers to make decisions based on an individual's religion, sex, or national origin when such a quality "is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."⁸⁵ This, however, is an "extremely narrow exception."⁸⁶ Notably, it does not include decisions based on race.⁸⁷

The ADA likewise prohibits discrimination based on economically rational discrimination, which we have observed in our practice to be the

⁷⁸ Jolls, *supra* note 77, at 653.

⁷⁹ Bradley v. Pizzaco of Neb., Inc., 7 F.3d 795, 796-99 (8th Cir. 1993).

⁸⁰ Jolls, *supra* note 77, at 654.

⁸¹ *Id.*

⁸² See, e.g., EEOC v. Humiston-Keeling, Inc., 227 F.3d 1024, 1028 (7th Cir. 2000) ("It is true that antidiscrimination statutes impose costs on employers. That is obvious in disparate-impact cases, when the employer is told to change a policy that may not have been adopted for discriminatory reasons (though that is its effect) and so presumably is efficient.").

⁸³ BAGENSTOS, *supra* note 65, at 67.

⁸⁴ See, e.g., Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1276-77 (9th Cir. 1981); Diaz v. Pan Am. World Airways Inc., 442 F.2d 385, 389 (5th Cir. 1971).

⁸⁵ 42 U.S.C. § 2000e-2(e)(1) (2006).

⁸⁶ Dothard v. Rawlinson, 433 U.S. 321, 334 (1977); see also, e.g., *supra* note 69 (noting justifications for discrimination that the *Bollenbach* and *Wilson* courts did not accept).

⁸⁷ See Rucker v. Higher Educ. Aids Bd., 669 F.2d 1179, 1181 (7th Cir. 1982) ("It is . . . not irrational, but it is clearly forbidden by Title VII, to refuse on racial grounds to hire someone because your customers or clientele do not like his race.").

increasingly dominant form of discrimination against deaf people.⁸⁸ While deaf people are without doubt severely hindered by hearing people's prejudices towards them, more often discrimination takes the form of a covered entity simply not wanting to *pay* for the cost of ensuring effective communication.

Despite the broad similarities between traditional antidiscrimination law and the ADA in prohibiting discrimination that is both economically irrational and rational, however, we discern an important distinction. Accommodations made pursuant to traditional antidiscrimination laws are often difficult to quantify: how can an employer measure the cost of hiring a man despite the preference of its customers to see a woman in the job? As one district court concluded, "an employer's mere 'beforehand belief' that sex discrimination is a financial imperative" cannot by itself justify sex-based hiring criteria.⁸⁹

In the context of rational discrimination, therefore, traditional antidiscrimination law generally requires the employer or public accommodation to *absorb a potential (and sometimes illusory) future loss*. By contrast, ADA accommodations can involve *actual capital expenditures which can be calculated in advance*. Many accommodations required by the ADA are readily quantifiable and easy to measure against the profit generated by a customer or worker with a disability.⁹⁰ The dentist, for example, was able to ascertain in real financial terms that the cost of interpreter services for the deaf man's visit would exceed her office's net profit from his visit. Indeed, it would be a rare interpreter who would agree to perform a job without first clarifying her hourly rate and mandatory minimum payment.

In addition, in the specific context of accessibility for deaf people, the steps necessary to ensure access often do not facilitate the kinds of cost efficiencies that sometimes occur in addressing other types of barriers for people with disabilities.⁹¹ Accessibility features such as ramps and

⁸⁸ See BAGENSTOS, *supra* note 65, at 65.

⁸⁹ *Wilson v. Sw. Airlines Co.*, 517 F. Supp. 292, 304 (N.D. Tex. 1981).

⁹⁰ See, e.g., *Lyons v. Legal Aid Soc'y*, 68 F.3d 1512, 1515 (2d Cir. 1995) (denying motion to dismiss complaint by employee whose disability made it impossible to take public transportation to work and who requested that her employer pay for a parking space in the vicinity, even though the space cost "\$300-\$520 a month, representing 15-26 percent of her monthly net salary").

⁹¹ A further obstacle to cost efficiency is the fact that deaf people do not have uniform means of communication. Some deaf people use sign language as their primary means of communication. Other deaf people do not know sign language and instead rely on lipreading or captioning to receive information. The auxiliary aids and services necessary to ensure effective communication with a deaf individual in a specific situation may not result in effective communication with the same individual in another situation. The classic example is that writing notes may result in effective communication when placing a

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elevators, installed during construction or following litigation, often result in permanent, increased building accessibility.⁹² Similarly, as noted earlier, captioning television programming is a one-time expenditure; once a program is captioned, the captions can be displayed an infinite number of times to an infinite number of people for no additional charge.⁹³ By contrast, the cost of auxiliary aids and services for deaf people to ensure effective communication between two or more individuals in real time is an expense that must be borne each time communication takes place.

Although many covered entities may initially be willing to bear such expenses, or to bear them to a limited extent, they may refuse to provide auxiliary aids and services once they realize that the expenditures are potentially endless and may place them at a competitive disadvantage. Howard Rosenblum's experience with the Midwest Center on Law and the Deaf offers a telling illustration. Rosenblum, a deaf attorney, co-founded an attorney referral center for deaf people who could not otherwise find counsel despite having meritorious cases.⁹⁴ The Center's staff initially struggled to find attorneys willing to represent deaf people because of the cost of communication access. Those whom they eventually recruited were initially appreciative of the new business but became disenchanted when they realized that they were bearing the cost of communication access "for the whole legal profession."⁹⁵ These lawyers did not want to be at a competitive disadvantage relative to their peers who eschew their legal obligation to ensure effective communication for deaf clients.

restaurant order but not when attending a university lecture. Covered entities may be required to undertake an interactive process with the deaf person in order to learn which auxiliary aids and services, if any, are necessary to communicate effectively with that person. As a result, entities often cannot fully anticipate their legal obligations in a specific situation until they have encountered the deaf person or received an advance request for auxiliary aids and services.

⁹² See, e.g., *Steger v. Franco, Inc.*, 228 F.3d 889, 893-94 (8th Cir. 2000) (holding that to avoid "piecemeal compliance," a blind patron who had only experienced poor signage in single restroom nonetheless had standing to sue for building-wide ADA violations affecting blind individuals).

⁹³ The debate regarding the cost of captioning in movie theaters has centered on the cost of installation, not on ongoing costs. See, e.g., *Arizona ex rel. Goddard v. Harkins Amusement Enters., Inc.*, 603 F.3d 666, 668 (9th Cir. 2010) (discussing a case in which plaintiffs sought captioning in movie theatres). See also John Waldo, *The ADA and Movie Captioning: A Long and Winding Road to an Obvious Destination*, 45 VAL. U. L. REV. 1033 (2011) (presenting a discussion of the use of captioning at movie theaters).

⁹⁴ See generally Howard A. Rosenblum, *Communication Access Funds: Achieving the Unrealized Aims of the Americans with Disabilities Act*, 45 VAL. U. L. REV. 1061 (2011).

⁹⁵ *Id.* at 1072.

In short, the ADA reflects a historical move of disability rights activists “From Good Will to Civil Rights,”⁹⁶ but its antidiscrimination mandate fits imperfectly in the context of disability discrimination. The distinctions between traditional antidiscrimination law and Titles I through III suggest that economically rational discrimination is a much more potent and pervasive force in the context of ADA compliance than in other civil rights areas. The ADA may be quite similar, normatively, to other antidiscrimination laws, but we have no doubt that its accommodation mandate is *perceived* as an unfair economic burden by covered entities because it requires out of pocket expenditures which are more readily quantified in advance and which often must be incurred on an ongoing basis. Increasing ADA compliance—and, ultimately, the greater inclusion of people with disabilities in our society—will require solutions that acknowledge and directly address the economic disincentives presented by the law’s accommodation mandate.

C. Making Matters Worse, the ADA is Underenforced

Against the economic reasons *not* to comply with the ADA discussed above, the ADA offers the threat of liability as a reason *to* comply with the ADA. Potential liability, however, can only provide an economic incentive to comply with the ADA if litigation is a real possibility. However, the law is broadly underenforced.

Title III in particular has suffered from enforcement problems because it does not provide for damages.⁹⁷ Only injunctive relief is available.⁹⁸ This statutory limitation hinders enforcement in several crucial ways. Because the resources of nonprofit and governmental enforcement agencies are severely limited, ADA enforcement depends on the willingness of practitioners in the private bar to represent deaf people who have experienced discrimination.⁹⁹ However, in *Buckhannon Board & Care Home, Inc. v. West Virginia Dep’t of Health & Human Resources*, the Supreme Court barred the recovery of statutory fees absent a “judicially sanctioned change in the legal relationship of the parties”

⁹⁶ RICHARD K. SCOTCH, *FROM GOOD WILL TO CIVIL RIGHTS: TRANSFORMING FEDERAL DISABILITY POLICY* (2d ed. 2001).

⁹⁷ See RUTH COLKER, *THE DISABILITY PENDULUM: THE FIRST DECADE OF THE AMERICANS WITH DISABILITIES ACT 166* (2005) (describing the unavailability of damages under Title III as its primary impediment to enforcement).

⁹⁸ 28 C.F.R. § 36.504 (2010). Civil penalties are recoverable only in Title III enforcement actions commenced by the Attorney General. *Id.*

⁹⁹ See Michael Waterstone, *A New Vision of Public Enforcement*, 92 MINN. L. REV. 434, 447 (2007) (noting that “the ADA is heavily dependent on private enforcement” but that those efforts are hindered by various impediments and arguing for more robust enforcement by governmental entities).

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such as a consent decree.¹⁰⁰ At any time after a Title III lawsuit has been filed, a defendant might moot the case and undermine the plaintiff's ability to recover attorney fees, by making the change the plaintiff sought.¹⁰¹ The result is that Title III entities often can evade liability by immediately modifying discriminatory policies after the lawsuit is filed and then moving to dismiss the case as moot.¹⁰² While of course redressing a discriminatory policy is ultimately good for deaf people, *Buckhannon* has severely limited incentives for attorneys in the private bar to pursue ADA Title III cases, an effect that has hindered deaf people's ability to enforce their right to effective communication.

Moreover, private attorneys themselves are subject to Title III and beset with the same considerations of economically rational discrimination hindering compliance outside legal offices. They, too, discriminate against deaf people. Many deaf people who would like to bring discrimination claims based on the failure to ensure effective communication under Titles I through III cannot find an attorney who will remove the communication barriers necessary to facilitate proper representation.¹⁰³

¹⁰⁰ 532 U.S. 598, 605 (2001). Moreover, when attorneys do obtain the award of attorneys' fees, they are able to recover only the lodestar, which is the amount of hours worked multiplied by a rate commensurate with prevailing market rates paid to attorneys representing fee paying clients, without any enhancement to compensate for the high risk of civil rights litigation. *City of Burlington v. Dague*, 505 U.S. 557, 562 (1992); Bagenstos, *Perversity of Limited Civil Rights Remedies*, *supra* note 37, at 10–11. The result is that attorneys working on a contingency basis will inevitably earn an effective hourly rate lower than their colleagues with fee-paying clients. *Id.* Without the prospect of recovering a contingent amount of the plaintiff's damages, attorneys are even less economically incentivized to represent ADA plaintiffs than they are other kinds of civil rights plaintiffs.

¹⁰¹ See *Tressler v. Pyramid Healthcare, Inc.*, 422 F. Supp. 2d 514, 518–19 (W.D. Pa. 2006) (claiming mootness and attorney fees unavailable where addiction facility initially declined to admit blind patient but ultimately did provide treatment). Assertions of mootness due to remediation, however, are susceptible to challenges that the remedial actions are insincere, temporary, or incomplete. See, e.g., *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1184–89 (11th Cir. 2007) (claims of blind mother prohibited from accompanying son to examination room with her service animal not moot despite clinic's adoption of service animal policy).

¹⁰² To establish standing to bring a claim for prospective injunctive relief, a plaintiff must show not only that she has been injured in the past but also that she is at risk of suffering a similar injury in the future. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983); see also *Harris v. Stonecrest Care Auto Ctr., LLC*, 472 F. Supp. 2d 1208, 1216 (S.D. Cal. 2007) (citing factors a court may consider in determining the likelihood an ADA Title III plaintiff will return to a noncompliant business). But see *Clark v. McDonald's Corp.*, 213 F.R.D. 198, 227 (D.N.J. 2003).

¹⁰³ See, e.g., Settlement Agreement Between the United States of America and Joseph David Camacho, Esq., Albuquerque, New Mexico Under the Americans with Disabilities Act, Dep't of Just. No. 202-4937 (2007), <http://www.ada.gov/albuquerque.htm>. The Justice Department has sued several law offices for refusing to ensure effective communication

Even without the barriers that make it difficult for deaf ADA plaintiffs to find attorneys willing to represent them, litigation is a slow and high-risk means of dispute resolution. The priority of the deaf man denied interpreter services from the dentist is probably finding another dentist, not vindicating his rights. Once he finds a dentist willing to ensure effective communication through the provision of interpreter services, he may lose motivation to sue the discriminatory dentist, who is then emboldened to refuse future requests for interpreter services by other deaf clients.

We do not suggest that the dentist, let alone every other noncompliant entity, knows about the myriad hindrances plaguing ADA enforcement when they decide not to make themselves accessible to deaf people. We do suggest that rampant noncompliance is self-perpetuating. The dentist probably did not know of many other businesses that had been successfully sued by ADA plaintiffs. To the contrary, she may have observed that her competitors were also choosing noncompliance. The threat of litigation does not provide a sufficiently strong incentive to comply with the law when not complying seems economically rational in the short term.

D. What to Do?

In response to these well-documented problems, commentators have generally proposed reforms which would increase incentives to litigate, in the belief that more litigation will result in greater enforcement.¹⁰⁴ We do not disagree with this basic proposition. We believe, however, that even with more litigation, enforcement problems will persist because the threat of future litigation does not always outweigh the perceived immediate burden of incurring expenses to provide auxiliary aids and services to ensure equal access for deaf people. Moreover, litigation is a costly process that must be initiated each time that discrimination occurs; because it is not possible to sue every discriminatory entity, some portion of those who choose noncompliance will inevitably “win” the gamble in choosing noncompliance.

We believe that the path to greater compliance lies not in encouraging more lawsuits but in removing the economic disincentives to comply with the ADA. If individual entities no longer had to consider cost when determining whether to provide auxiliary aids and services because they had already paid in advance along with their competitors,

with deaf clients. *Id.*; see also Elana Nightingale Dawson, *Lawyers' Responsibilities Under Title III of the ADA: Ensuring Communication Access for the Deaf and Hard of Hearing*, 45 VAL. U. L. REV. 1143 (2011); Rosenblum, *supra* note 94.

¹⁰⁴ Bagenstos, *Perversity of Limited Civil Rights Remedies*, *supra* note 37.

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these disincentives would disappear. In fact, it would become economically *irrational* to discriminate as entities would no longer want to turn away deaf people who are productive workers or paying clients. Moreover, they would want to utilize the services for which they had already paid. Paying for communication access in advance and in concert with competitors is precisely what Title IV demands of the telecommunications industry, and what we suggest all other entities should be required to do as well.

IV. TITLE IV: DIFFERENT ECONOMIC STRUCTURE, DIFFERENT RESULT

We now turn our attention to Title IV, which has succeeded where Titles I through III have failed in aligning economic incentives to ensure that deaf people have full access to communication. Title IV's relay services mandate has worked by spreading the cost of communication access equitably among all common carriers.

A. *The History of Relay Services*

Until the late 1990s, devices called TTYs were the predominant means for deaf people to make telephone calls.¹⁰⁵ TTYs are teletypewriters, which work by sending coded signals over telephone lines to other TTYs which translate the signals into text for the receiving party to read.¹⁰⁶ Individuals with TTYs can communicate with one another over telephone lines by placing telephone receivers on TTYs and typing messages to one another.

One limitation of TTYs, however, is that both parties to the call are required to have a TTY. Most hearing people do not have TTYs. An informal system developed in the late 1960s and 1970s where private operators with a TTY would "relay" calls between a deaf TTY user and a hearing telephone user.¹⁰⁷ The deaf person would type to the "relay" person who would read out loud the typed message. The hearing person would respond verbally for the "relay" person to type back to the TTY user. These underfunded private efforts could not meet demand and states started providing this service on a limited but growing scale

¹⁰⁵ S. REP. NO. 101-116, at 78 (1989); KAREN STRAUSS PELTZ, A NEW CIVIL RIGHT: TELECOMMUNICATIONS EQUALITY FOR DEAF AND HARD OF HEARING AMERICANS 131-32 (2006).

¹⁰⁶ 47 C.F.R. § 64.601(a)(8) (2010); *In re* Telecomms. Relay Servs., the ADA of 1990 & the Telecomms. Act of 1996, 12 FCC Rcd. 1152, 1154 n.15 (1997). Although TTYs are still in existence, the advent of computers, the internet, and personal device assistants ("PDAs") has rendered TTYs largely obsolete.

¹⁰⁷ STRAUSS PELTZ, *supra* note 105, at 56-61.

in the 1970s and 1980s.¹⁰⁸ Title IV of the ADA codified this developing practice by requiring it on a national scale.¹⁰⁹

Title IV amended the Communications Act of 1934 by requiring common carriers to provide telecommunications relay services (“TRS”).¹¹⁰ The statute defines “telecommunications relay services” as “telephone transmission services” which permit people with hearing or speech impairments a means of communicating with hearing people “functionally equivalent” to how two hearing people communicate over the telephone.¹¹¹ Title IV prohibits charging relay users rates greater than those charged for “functionally equivalent voice communication services.”¹¹² The FCC, which is charged with implementing Title IV, has explained that the process of calling the TRS provider to initiate a relay call is the functional equivalent of reaching a dial tone.¹¹³

On July 26, 1991, the one-year anniversary of the ADA’s signing, the FCC promulgated regulations governing the provision of relay services. In its order announcing the regulations, which established minimum standards for providing relay services,¹¹⁴ the FCC stated that

¹⁰⁸ *Id.* at 58–61; *see also In re Telecomms. Relay Servs.*, 12 FCC Rcd. at 1152 n.4 (noting that prior to the enactment of Title IV, “some states offered relay services, but the services offered differed from state to state, and were subject to many limitations” (citing Strauss, *Title IV – Telecommunications*, in IMPLEMENTING THE AMERICANS WITH DISABILITIES ACT 156–58 (Gostin & Beyer eds. 1993))); *In re Access to Telecomms. Equip. and Servs. by the Hearing Impaired and other Disabled Persons*, 3 FCC Rcd. 1982, 1987–88 (1988) (noting that state relay services were usually limited to intrastate calls).

¹⁰⁹ 47 U.S.C. § 225 (2006).

¹¹⁰ *Id.* § 225(c).

¹¹¹ *Id.* § 225(a)(3).

¹¹² *Id.* § 225(d)(1)(D). This law requires the FCC to implement regulations which “require that users of telecommunications relay services pay rates no greater than the rates paid for functionally equivalent voice communication services with respect to such factors as the duration of the call, the time of day, and the distance from point of origination to point of termination.” *Id.*

¹¹³ *In re Telecomms. Relay Servs. & Speech-to-Speech Servs. for Individuals with Hearing & Speech Disabilities*, 19 FCC Rcd. 12475, 12534 (2004). The FCC has been explicit in stating that relay services are the equivalent of telephone services. *Id.* Additionally,

[i]n enacting Title IV of the ADA, and creating the federally regulated TRS scheme, Congress intended that persons with hearing and speech disabilities be provided with a means of communicating with hearing individuals through a third party—the CA—who relays the conversation between the parties. To this end, as we have frequently explained, the TRS scheme is intended to ensure that persons with hearing and speech disabilities have *functionally equivalent access* to the telephone system.

Id.

¹¹⁴ *In re Telecomms. Servs. for Individuals with Hearing & Speech Disabilities & the ADA of 1990*, 6 FCC Rcd. 4657, 4659 (1991). As part of these mandatory minimums, the FCC required that TRS providers “operate every day, 24 hours a day.” *Id.* at 4669. Communications assistants are “prohibited from disclosing the content of any relayed

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“[c]ompetition among TRS providers to attract customers to the service . . . should spur providers to achieve the highest quality service.”¹¹⁵ The FCC referenced this theme to encourage TRS providers to hire communications assistants with high typing speeds¹¹⁶ and to offer customers discounted toll rates.¹¹⁷ As the FCC envisioned, the interstate relay system would depend upon reliable and efficient TRS providers, ideally competing with each other to offer superior services.

The FCC struggled, however, with the issue of how interstate relay services should be paid for and did not determine a specific cost recovery mechanism until February 1993, just months before common carriers were required to begin providing interstate TRS.¹¹⁸ In this February 1993 order, the FCC discussed its consideration of two proposals. One proposal was a shared-funding mechanism that would require interstate common carriers to pool their resources by contributing to a fund used to reimburse relay service providers. Another proposal was a self-funding proposal, which would have required interstate common carriers to fund their own provisions of relay services.

This was a critical fork-in-the-road moment for relay services. A self-funding mechanism would have paralleled Titles I through III, which require those entities that come into contact with deaf people to pay for the cost of communicating with them. As we have explained, many of these covered entities engage in a cost-benefit analysis which leads them to risk violating the law by not providing auxiliary aids and

conversation regardless of content” or “intentionally altering a relayed conversation and must relay all conversation verbatim unless the relay user specifically requests summarization.” *Id.* at 4668; *see also* 47 C.F.R. § 64.604 (2010); *Germano v. Int’l Profit Ass’n*, 544 F.3d 798, 803–04 (7th Cir. 2008).

¹¹⁵ *In re Telecomms. Servs. for Individuals with Hearing & Speech Disabilities*, 6 FCC Rcd. at 4659.

¹¹⁶ *Id.* at 4658–59. In 2000, the FCC would require communications assistants to have a minimum typing speed of sixty words per minute, citing technological improvements. *In re Telecomms. Relay Servs. & Speech-to-Speech Servs. for Individuals with Hearing & Speech Disabilities*, 15 FCC Rcd. 5140, 5171–72 (2000).

¹¹⁷ *In re Telecomms. Servs. for Individuals with Hearing & Speech Disabilities*, 6 FCC Rcd. at 4663.

¹¹⁸ *Id.* at 4664; *In re Telecomms. Servs. for Hearing-Impaired & Speech-Impaired Individuals & the ADA of 1990*, 5 FCC Rcd. 7187, 7190–91 (1990). The law breaks down relay services into interstate relay calls between relay users in different states and intrastate relay calls between relay users in the same state. Title IV requires the FCC to provide generally that “costs caused by interstate telecommunications relay services shall be recovered from all subscribers for every interstate service and costs caused by intrastate telecommunications relay services shall be recovered from the intrastate jurisdiction.” 47 U.S.C. § 225(d)(3)(B) (2006). The discussion which follows concerns the funding for interstate relay calls; intrastate relay calls are funded at the state level. *Id.* § 225(d)(3).

services such as interpreters. The self-funding mechanism would place telecommunication companies in a similar position to that of the dentist whose deaf patient requests interpreter services for his visit.

The FCC, of course, could not know how economic disincentives would hinder the effectiveness of Titles I through III. Nonetheless, the FCC anticipated the problem of rational discrimination, noting “that a self-funding mechanism would provide incentives for carriers to handle fewer relay calls, to degrade relay calling quality, to migrate relay customers to other carriers, and to restrict relay to only their presubscribed customers.”¹¹⁹ Dentists, lawyers, and other entities covered by Titles I through III engage in equivalent downgrading every day—they seek the least expensive means of engaging with deaf employees and consumers instead of the most effective means.

In light of this concern, the FCC selected shared funding as “the best interstate TRS cost recovery mechanism because it spreads the financial liability to all subscribers of every interstate service.”¹²⁰ The FCC explained that “by compensating TRS providers based on actual relay minutes, those TRS providers who provide excellent service to the public and thereby generate strong demand, will benefit.”¹²¹ Accordingly, a shared funding mechanism would “create strong incentives for TRS providers to offer high quality, innovative service at a reasonable cost.”¹²²

With these goals in mind, the FCC established an interstate relay services fund to which all carriers of interstate services are required to contribute.¹²³ The shared funding mechanism works by estimating the cost of providing relay services for the following year and dividing that number by the estimated interstate revenue base to yield a “contribution factor.” Interexchange carriers determine their contributions to the fund by multiplying their expected interstate revenues by the contributing factor.¹²⁴ In this fashion, each interexchange carrier make contributions

¹¹⁹ *In re* Telecomms. Servs. for Individuals with Hearing & Speech Disabilities & the ADA of 1990, 8 FCC Rcd. 1802, 1806 (1993) (emphasis added).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *In re* Telecomms. Relay Servs. & the ADA of 1990, 8 FCC Rcd. 5300, 5303 (1993).

¹²⁴ The initial contributing factor was 0.00047 for the period July 26, 1993, through April 26, 1994. *Id.* This figure was the equivalent of a 0.047% tax on interstate revenues. The contributing factor has fluctuated slightly over the years. For the 2010–11 fund year, the FCC set the contributory rate at 0.00585, at the equivalent of a 0.0585% tax on end-user revenues. *In re* Telecomms. Relay Servs. & Speech-to-Speech Servs. for Individuals with Hearing & Speech Disabilities, 25 FCC Rcd. 8689, 8689–90 (2010). In 1999, the FCC adjusted this revenue collecting scheme to focus on end-user revenues rather than gross interstate revenues. *1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements*

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to the fund based on their market share of interstate revenues, not based on the extent to which deaf individuals use their company's services.¹²⁵

The TRS fund makes payments to relay service providers based on the number of "minutes of use" of relay services provided and payment rates which the FCC adjusts on a periodic basis.¹²⁶ The FCC has explained that reimbursing providers based on the minutes of relay services provided "encourage[s] providers to develop efficient and cost-effective TRS programs."¹²⁷ The TRS administrator periodically adjusts the reimbursement rate, which varies by the type of relay service provided.¹²⁸ Only those providers which comply with the mandatory minimum standards for the provision of relay services are eligible for reimbursement.¹²⁹ Deaf people choose the TRS provider which will receive reimbursement every time they make a call.

Associated with Administration of Telecommunications Relay Services, North American Numbering Plan, Local Number Portability, and Universal Services Support Mechanisms, 16 Commc'ns Reg. (P & F) 688, 1999 WL 492955 (F.C.C.) ¶ 8 (July 14, 1999).

¹²⁵ At the intrastate level, states recover the cost of the intrastate service contracts from all ratepayers in the state, whether through an intrastate subscriber line surcharge or through a general ratemaking process. *In re* Telecomms. Relay Servs. & Speech-to-Speech Servs. for Individuals with Hearing & Speech Disabilities, 15 FCC Rcd. 5140, 5156 (2000). With respect to the provision of intrastate relay services, states have generally employed a competitive bidding process to select a single relay service provider which relay users must then use to make all intrastate relay calls. *In re* Telecomms. Relay Servs. & Speech-to-Speech Servs. for Individuals with Hearing & Speech Disabilities, 16 FCC Rcd. 4662, 4664-65 (2001); *In re* Telecomms. Relay Servs. & Speech-to-Speech Servs., 15 FCC Rcd. at 5156; *In re* Telecomms. Relay Servs., the ADA of 1990 & the Telecomms. Act of 1996, 12 FCC Rcd. 1152, 1154 n.13 (1997). Some states have employed a multi-vendoring system in which several vendors compete with each other in providing relay services. *In re* Telecomms. Relay Servs. & Speech-to-Speech Servs., 15 FCC Rcd. at 5158. Although the FCC has stated that "competitive forces are generally the preferred way to improve service quality and bring new services to customers" and that "giving consumers a choice among different TRS providers might well improve the quality of TRS service in different states," it has stated that FCC rules do not prohibit single vendor arrangements. *Id.* at 5157. Nonetheless, the FCC has "encourage[d] states to consider whether the single- or the multi-vendoring model best meets their constituents' particular needs" and "to continue experimenting with ways to allow competitive forces to improve the quality of TRS service." *Id.* at 5157-58.

¹²⁶ *In re* Telecomms. Relay Servs. & the ADA of 1990, 8 FCC Rcd. at 5305.

¹²⁷ *Id.*

¹²⁸ In June 2010, the most recent month for which reimbursement was made, relay services were reimbursed at between \$1.2801 and \$6.7025 per minute depending on the type of relay service provided. See Nat'l Exch. Carrier Ass'n, *TRS Monthly Fund Reports*, NECA, https://www.neca.org/cms400min/NECA_Templates/TRSInterior.aspx?id=1253 (click on "August" under 2010) (last visited Feb. 4, 2011).

¹²⁹ *In re* Telecomms. Relay Servs. & the ADA of 1990, 8 FCC Rcd. at 5305.

B. A Marketplace for Innovation in Telecommunication Access

The results of the FCC's funding structure have been spectacular. In setting up a regime that rewards relay service providers for attracting relay users, the FCC instantly created a new marketplace for providing deaf people with equal access to telephone services. New companies quickly developed to meet this need and competed with one another for the privilege of providing relay services.

This relay marketplace has resulted in innovations in services, making telephone services ever more accessible to deaf people.¹³⁰ When interstate relay services were first provided, deaf people could only place relay calls using a TTY. Relay users had the option of choosing between full TRS, in which the TTY user reads and types the entire conversation, and partial TRS, in which the TTY user has the option to voice or listen for himself.¹³¹

In the years that have followed Title IV and the advent of compulsory TRS funding, relay service providers have competed to offer new forms of relay services.¹³² The direct descendant of TTY relay services is internet protocol ("IP") relay. Through IP relay, deaf people may use computers or personal device assistants such as a Blackberry or iPhone to place or receive text relay calls.¹³³ Another new form of relay that has become popular with deaf people is captioned telephone relay. In this form of relay, the relay operator does not type what the hearing person is saying. Rather, the relay operator uses voice-recognition software which has been trained to recognize the relay operator's voice. The relay operator re-voices what the hearing person says and the words

¹³⁰ *In re* Telecomms. Relay Servs. & Speech-to-Speech Servs. for Individuals with Hearing & Speech Disabilities, 20 FCC Rcd. 20577, 20580-81 (2005).

¹³¹ When a relay user chooses "voice carry over" ("VCO"), the relay user speaks for himself and then the relay operator types the hearing caller's response. When a relay user uses "hearing carry over" ("HCO"), the relay user (typically a hearing person with a speech impairment) types his words and listens to the hearing caller's response. *In re* Telecomms. Relay Servs., the ADA of 1990 & the Telecomms. Act of 1996, 12 FCC Rcd. 1152, 1155 (1997) (describing VCO and HCO); *In re* Telecomms. Servs. for Individuals with Hearing and Speech Disabilities & the ADA of 1990, 6 FCC Rcd. 4657, 4658 (1991) (requiring VCO and HCO when the first regulations were promulgated).

¹³² *In re* Telecomms. Relay Servs., 12 FCC Rcd. at 1157 ("Since the implementation of TRS in July 1993, many TRS providers have, on their own initiative, sought to develop innovative forms of TRS by offering services and features not required under the Commission's current rules.").

¹³³ *In re* Provision of Improved Telecomms. Relay Servs. & Speech-to-Speech Servs. for Individuals with Hearing & Speech Disabilities, 17 FCC Rcd. 7779, 7781-83 (2002). Both intrastate and interstate IP calls are reimbursed by the interstate fund. *Id.* at 7786.

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come up on the deaf caller's end, whether through a computer, personal device assistant, or a specially ordered phone.¹³⁴

In addition to making telephone calls using text-based relay, deaf people can also now place video relay calls using sign language. In the late 1990s, the first trials were conducted for video relay services ("VRS"), which allow a deaf person to use a sign language interpreter to make telephone calls.¹³⁵ In this form of relay, the deaf person and the interpreter each have a videophone which permits them to see each other and use sign language to communicate with each other. This service proved popular among deaf people who were able to make telephone calls in real-time using their native language.¹³⁶ In 2000, the FCC stated that it would permit reimbursement for relay service providers which chose to offer this service.¹³⁷ Subsequently, competition among relay service providers has been so intense that companies have provided deaf people with free videophones to encourage them to use their services.¹³⁸

Relay service providers also now provide services in languages other than English. TRS providers must provide text-based relay services in Spanish and have the option to do so in other languages as well.¹³⁹ Relay service providers may also receive reimbursement for providing VRS between ASL users and Spanish speakers.¹⁴⁰ At least one relay service

¹³⁴ See *In re Telecomms. Relay Servs. & Speech-to-Speech Servs. for Individuals with Hearing & Speech Disabilities*, 18 FCC Rcd. 16121, 16122–23 (2003).

¹³⁵ *In re Telecomms. Relay Servs.*, 12 FCC Rcd. at 1158.

¹³⁶ STRAUSS PELTZ, *supra* note 105, at 132–35. Text-based relay calls are much slower for relay service providers to process because communications assistants cannot type as fast as people can talk. *In re Telecomms. Relay Servs.*, 12 FCC Rcd. at 1158.

¹³⁷ *In re Telecomms. Relay Servs. & Speech-to-Speech Servs. for Individuals with Hearing & Speech Disabilities*, 15 FCC Rcd. 5140, 5152 (2000). The FCC has ruled that the interstate TRS fund may be used to fund intrastate VRS calls, explaining that this reimbursement scheme would permit it "to asses[s] demand and let market forces determine the technologies of choice for delivery of [VRS], while not depriving any consumer who is willing to invest in new technologies the ability to make any call, not just an interstate call." *Id.* at 5154.

¹³⁸ The FCC does not reimburse VRS providers for the cost of providing videophones. See, e.g., *In re Structure & Practices of the Video Relay Serv. Program*, 25 FCC Rcd. 8597, 8614 (June 28, 2010). Some VRS providers sell videophones, while others provide videophones free of charge to encourage relay users to use their services. See, e.g., SORENSONVRS.COM, <http://www.sorensonvrs.com> (last visited Feb. 28, 2011) (prominently advertising a free videophone for deaf and hard of hearing people who use sign language).

¹³⁹ *In re Telecomms. Relay Servs.*, 15 FCC Rcd. at 5154–55.

¹⁴⁰ *In re Telecomms. Relay Servs. & Speech-to-Speech Servs. for Individuals with Hearing & Speech Disabilities*, 20 FCC Rcd. 13140, 13149–55 (2005).

provider even offers the option to place VRS calls using interpreters who can translate to and from virtually any widely spoken language.¹⁴¹

Finally, relay service providers must now offer speech-to-speech relay services. This form of relay service uses specially trained communications assistants who can understand the speech patterns of relay users and repeat their words clearly to the hearing caller.¹⁴² This form of relay benefits users who may have difficulty typing or signing due to a physical disability.¹⁴³

This dizzying array of innovative relay services today provides deaf people with multiple options for placing and receiving relay calls as often as they would like at any time of the day for little or no cost. The use of relay services has grown exponentially over the years as deaf people have had more options to choose from and have begun to take for granted that they can make telephone calls with the same ease as hearing people. In December 2010, the most recent month for which data is available, TRS relay totaled 14,813,870 reimbursable minutes, or more than twenty-eight years' worth of relay calls in a single month. Of this total, VRS relay totaled 8,199,535 reimbursable minutes or more than fifteen years' worth of relay calls in a single month.¹⁴⁴

This extraordinary growth in relay services has occurred even though relay services come with their own set of issues for users. We have observed that text-based relay is painfully slow for relay users who must slow down their conversations; communications assistants typing verbatim what they hear cannot keep up with the rapid pace of speech. VRS confines the three-dimensional language of ASL to a two-dimension screen, and ASL can lose some of its meaning and clarity in the process. Moreover, the quality of the video is only as good as the internet connection; when the connection is poor, it can be difficult, if not impossible, for sign language users to see and understand each other clearly.¹⁴⁵ Interpreters not physically present also have fewer opportunities to prepare in advance for the discussion and for the deaf individual's signing method. They cannot read the full body language of the conversants. VRS also assigns interpreters at random; deaf people

¹⁴¹ This service works by pairing the communications assistant with a language line. The relay service provider pays for the language line as a competitive feature. See LIFE LINKS.NET, <http://www.lifelinks.net/index.html> (last visited Nov. 8, 2010).

¹⁴² *In re Telecomms. Relay Servs.*, 15 FCC Rcd. at 5149-50.

¹⁴³ *Id.*

¹⁴⁴ *TRS Fund Performance Status Report: Funding Year July 2010-June 2011*, NAT'L EXCH. CARRIER ASS'N (Aug. 31, 2010), https://www.neca.org/cms400min/NECA_Templates/TRSInterior.aspx?id=1253 (click on "December" under 2010).

¹⁴⁵ See *Position Statement: VRI Services in Hospitals*, NAT'L ASS'N DEAF (Apr. 2008), <http://www.nad.org/issues/technology/vri/position-statement-hospitals>.

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can, however, channel through interpreters until they find an interpreter who they like.

There is one additional important limitation to Title IV, which we discuss in the remainder of this Article. From its conception, TRS has been conceived of as the functional equivalent of telephone services. Since hearing people do not ordinarily use the telephone to communicate with each other when they are in the same room, the FCC has ruled that relay calls between two people in the same room are not reimbursable.¹⁴⁶ Although the regulatory scheme does not *prohibit* relay service providers from providing relay services when the callers are in the same room, they will not receive reimbursement for such services. Therefore, most relay service providers generally will not accept such calls for processing (although it is our understanding that some VRS providers have a policy of interpreting communications between two people in the same room in emergency circumstances). As a result, the deaf person and the hearing person must resort to other means of communication when they are in the same room (if they do not choose to go into different locations to place a telephone call to one another). In such instances, such as a visit to a dentist's office, the other parts of the ADA may provide coverage. However, as described earlier in this Article, there are serious noncompliance issues with respect to those parts of the ADA.

C. *Lessons from Title IV*

Title IV's success is all the more remarkable because Title IV evolved from the same principle as Titles I through III—that covered entities (here, common carriers), and not deaf people, should take responsibility for paying for the accommodations necessary to ensure effective communication. Like Titles I through III, Title IV prohibits covered entities from placing a surcharge on deaf consumers to recoup the cost of providing accommodations.¹⁴⁷

¹⁴⁶ See *In re* Telecomms. Relay Servs. & Speech-to-Speech Servs. for Individuals with Hearing & Speech Disabilities, 19 FCC Rcd. 12475, 12537, n.466 (2004); *In re* Telecomms. Relay Servs. & Speech-to-Speech Servs. for Individuals with Hearing & Speech Disabilities, 16 FCC Rcd. 4054, 4058 (2000) (explaining that VRS is reimbursable through TRS funds while VRI is not); see also Nondiscrimination on the Basis of Disability in State and Local Government Services, 75 Fed. Reg. 56,164, 56,196 (Sept. 15, 2010) (to be codified at 28 C.F.R. pt. 35) (“The FCC has made clear that VRS functions as a telephone service and is not intended to be used for interpreting services where both parties are in the same room; the latter is reserved for VRI. The Department agrees that VRS cannot be used as a substitute for in-person interpreters or for VRI in situations that would not, absent one party's disability, entail use of the telephone.”).

¹⁴⁷ 47 U.S.C. § 225(d)(1)(D) (2006) (prohibiting common carriers from charging relay users greater rates than for functionally equivalent voice calls); 28 C.F.R. § 35.130(f) (2010)

As discussed in Part III, Titles I through III impose the cost of communication access on the individual entity that happens to be approached by a deaf person. As we have explained, the dentist is faced with a very real economic reason to disregard her legal obligation and not provide an interpreter: she believes she will lose money on the deaf patient in doing so. Making matters worse, if the dentist does fulfill her legal obligation, she might be approached by every deaf individual in the vicinity who was denied interpreter services by discriminatory dentists. The result is a race to the bottom as covered entities seek to evade the costs of complying with the law even when such evasion risks safety, as in the *Lockhart* case when FedEx did not provide an interpreter for its deaf employee during meetings regarding its safety protocol. It also poses the prospect of disenchantment among those who do fulfill their legal obligation and thus take on a comparatively larger and inequitable share of the cost of communication access relative to their competitors, as in the case of the attorneys receiving referrals from the Midwest Center on Law and the Deaf.

Title IV avoids these compliance problems by requiring telecommunication companies to share the cost of access regardless of whether and to what degree deaf people use their services. The shared-funding mechanism makes it impossible for covered entities to engage in the sort of cost-benefit analysis that encourages economically rational discrimination. The shared funding mechanism introduces a different kind of economic analysis that encourages equal access. The question is not “how much money will I lose by paying for an interpreter?” Rather, the question becomes, “how much will I benefit from interacting with the person whose deafness is incidental?” If FedEx were a participant in a shared funding scheme and did not have to pay on the margin for interpreter services, it is entirely possible that Ronald Lockhart would still be working there today.

When covered entities can consider only how much they can benefit from communicating with deaf people, economically rational discrimination disappears. In its place, a vibrant marketplace springs up as covered entities compete for deaf customers. In establishing a marketplace for relay services, the FCC created financial incentives for businesses to develop advancements in relay services technology which have made telephone services even further accessible to deaf people.

(prohibiting surcharges by Title II entities); *id.* § 36.301(c) (same prohibition on Title III entities).

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The FCC has analogized Title IV's funding mechanism to "taxes levied solely on telecommunications providers."¹⁴⁸ Yet Title IV is not a subsidy program that might result in stigmatization.¹⁴⁹ Its sole purpose is to redistribute the cost of accommodation within the telecommunications industry to ensure that the industry can meet its obligations to ensure equal access for deaf people. Title IV simply applies a "pay upfront" approach to meeting the obligation to ensure effective communication while still staying squarely within the civil rights and antidiscrimination paradigm of the ADA.¹⁵⁰

What if we could import Title IV's shared funding mechanism into the other titles of the ADA? To analogize to dentistry, it would be as if the American Dental Association anticipated that its members would be approached by deaf patients and mandated that dentists contribute to a communication access fund based on their proportionate revenues; the fund would pay for interpreter services for deaf patients no matter which dentist they chose. We posit that the outcome would result in higher compliance rates. Further, from a normative perspective, no single business would have to pay more to ensure effective communication with a deaf person simply because the deaf person chose to interact with it rather than one of its competitors. Rather, the cost of access would be spread equitably across all members of the industry or society.

We do not argue that aligning economic incentives with access will completely eliminate discrimination. Rather, we argue that it will eliminate economic incentives to discriminate, greatly boosting compliance rates, which would realize the promise of the ADA of including deaf people in all aspects of society. If covered entities still refused to provide the necessary auxiliary aids and services despite the absence of an economically rational reason to do so, it would be much

¹⁴⁸ *In re* Telecomms. Servs. for Individuals with Hearing & Speech Disabilities & the ADA of 1990, 9 FCC Rcd. 1637, 1640 n.25 (1993).

¹⁴⁹ Anne L. Alstott, *Work vs. Freedom: A Liberal Challenge to Employment Subsidies*, 108 YALE L.J. 967, 1041 (1999) (reviewing "troubling evidence" that employment subsidies can stigmatize the workers it seeks to assist and therefore "harm [those workers'] employment prospects").

¹⁵⁰ In this way, Title IV also addresses another problem with the economic model of Titles I through III on which we have not elaborated, namely the presumption that entities know of their legal obligation to ensure effective communication and how to fulfill it. Of course, many entities approached by deaf individuals have little or no experience with deaf people and do not know how to achieve effective communication. Title IV provides economic incentives for relay service providers to advertise their services and make their services user-friendly, reducing the need for consumers to invest time and resources in determining which services, if any, to use.

easier to impute a discriminatory motive such as animus towards deaf people.

We recognize that Title IV's shared funding mechanism has not been without problems. In recent years, several relay service providers went beyond engaging in legitimate competition and began manufacturing demand for their services by hiring people to make telephone calls which served no purpose other than to inflate the number of relay minutes for which they could seek reimbursement.¹⁵¹ The Department of Justice has initiated prosecutions of individuals engaging in this practice.¹⁵² More recently, the FCC has begun instituting stricter rules such as limiting the reimbursement that relay service providers can receive for services provided to their own deaf employees.¹⁵³ We believe that this enhanced regulatory oversight will reduce the potential for fraud and abuse.

Despite the need to guard against abuse, Title IV has succeeded remarkably in rendering telephone services accessible and has been far more effective in eliminating communication barriers than the other titles of the ADA.

V. BRINGING TITLE IV INTO TITLES I, II, AND III: SEMI-VOLUNTARY COLLECTIVE COMPLIANCE

In recent years, several Title III entities have begun adopting mechanisms for spreading the cost of the auxiliary aids and services necessary to ensure effective communication with deaf people. We describe several such instances below and then explore the implications of expanding the shared funding approach outside the context of Title IV.

Breitbach v. St. Cloud Driving School illustrates how the lessons of Title IV were applied on a small, local scale. In that case, several deaf teenagers sued five driver's education schools in St. Cloud, Minnesota, all of which denied them communication access to the classes they offered.¹⁵⁴ In settling their dispute, the parties might have agreed that the school contacted by each deaf person would be responsible for paying for the cost of interpreter services. That is what Title III requires, but it would have prejudiced schools that happened to be contacted by

¹⁵¹ See, e.g., *In re Structure & Practices of the Video Relay Serv. Program*, 25 FCC Rcd. 1868, 1870-71 (2010).

¹⁵² See, e.g., Press Release, U.S. Dep't of Justice, Twenty-Six Charged in Nationwide Scheme to Defraud the FCC's Video Relay Service Program (Nov. 19, 2009), available at <http://www.justice.gov/opa/pr/2009/November/09-crm-1258.html>.

¹⁵³ *In re Structure & Practices*, 25 FCC Rcd. at 1869-71.

¹⁵⁴ See Civil No. 06-1222 (DWF/RLE), 2006 WL 2265170 (D. Minn. Aug. 8, 2006).

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the deaf person and resulted in a potentially uneven allotment of responsibility to pay for interpreters. All of the schools, after all, had engaged in the exact same kind of discrimination.

Instead, pursuant to a consent decree, the parties agreed that all five schools would share the cost of providing auxiliary aids and services to the plaintiffs and all future deaf students. The schools agreed to jointly offer a class accessible to deaf and hard of hearing people three times a year. Each school was to pay for a portion of the class based on its relative size and revenue.¹⁵⁵ If no deaf student approached any school for driver education, the schools would not be required to host the accessible class; funding for the accessible class, however, was set aside preemptively. Plaintiffs who had not yet commenced driver education training could approach the school of their choice, but all the schools shared the cost of providing auxiliary aids and services no matter which school the plaintiff chose.¹⁵⁶

The consent decree did not permit driving schools to evade their legal obligations. The driving schools were still responsible for ensuring communication access on their own. In compelling local competitors to share the cost of communication access, however, it checked the economic disincentives to avoid compliance in the future. No school would be economically punished for opening its doors to deaf people when its competitors refused. In addition, the schools would no longer be caught off guard by a deaf person's request for an interpreter; money was already allocated for the purpose in advance.

In another example of the collective compliance approach to communication access in Minnesota,¹⁵⁷ emergency medical providers in the Minneapolis-St. Paul area established the Twin Cities Hospital Interpreter Consortium ("the consortium"), partly as a result of pending litigation against several emergency medical services providers that failed to ensure effective communication with deaf patients and family members.¹⁵⁸ Each hospital pays an interpreter agency a monthly fee for the agency's guarantee that it will provide an "on call" qualified medical interpreter within an hour eighty percent of the time and within two

¹⁵⁵ See *id.* at *3-4.

¹⁵⁶ See *id.* at *3.

¹⁵⁷ Plaintiffs in *Breitbach* and the hospital cases that led to the consortium were represented by Rick Macpherson of the Minnesota Disability Law Center.

¹⁵⁸ See Minnesota Hospital Consortium Agreement (on file with authors). There are forty interpreters in Minnesota qualified to interpret in the medical setting; three interpreters are "on call" at any given time under the consortium agreement. *Id.*

hours one hundred percent of the time. The hospitals pay an additional amount proportionate to their use of the service.¹⁵⁹

As with the driver education schools, there are a few features of the consortium that work to remove the typical economic disincentives plaguing compliance with Titles I through III. First, the cost of communication access is spread among several competitors, so none will be at a competitive disadvantage when it is required to provide interpreter services for a deaf person. In addition, the entities have already paid for the availability of interpreter services in advance of a particular request, so the economic pressure to find the cheapest way possible to communicate is greatly reduced. Indicative of the success of this approach, complaints about the accessibility of the consortium members' emergency rooms have been virtually nonexistent while the hospitals continue to be accused of failing to ensure effective communication *outside* the emergency room context—i.e., in-patient care— which the fund does not cover.¹⁶⁰

These examples of voluntary shared compliance in Minnesota reflect the resolution of lawsuits. Other efforts to collectively pay for auxiliary aids and services that have *not* arisen from litigation work similarly by preemptively assessing a small tax on a large group of individuals or entities in anticipation of the need to communicate with deaf or hard of hearing people. Several local bar associations,¹⁶¹ and at least one state,¹⁶² have established so-called "communication access funds" ("CAFs") through which attorneys can seek at least partial reimbursement when they provide interpreter services to deaf clients or potential clients. CAFs are typically paid for through bar association member fees.¹⁶³ However, it appears that many CAFs implemented as pilot projects have not been renewed beyond the initial period, and that many bar members (and deaf clients) are unaware of their existence. Moreover, most CAFs

¹⁵⁹ Interview with Martha Barnum, Commc'n Servs. for the Deaf, in St. Paul, Minn. (Nov. 1, 2010). Of course, this system retains a certain degree of economic disincentive to provide interpreter services because hospitals must pay an additional amount proportionate to their use of the interpreter services. Because, however, the hospitals pay a portion of the amount upfront, their economic disincentives not to use the service are reduced.

¹⁶⁰ *Id.*

¹⁶¹ See, e.g., *Sign Language Interpreter Fund Reimbursement Application*, PENN. B. ASS'N, <http://www.pabar.org/public/committees/disabili/Sign%20Lang.pdf> (last visited Nov. 8, 2010); see also *Sign-Up Fund*, ADVOCACY INC., www.advocacyinc.org/SignUpFunFlyer.pdf (describing one year pilot program from Texas State Bar Association ending fall 2008).

¹⁶² See ME. REV. STAT. tit. 5, § 48-A(4)(2009).

¹⁶³ For more information about the particular strengths and weaknesses of existing and previous CAFs, see Rosenblum, *supra* note 94, at 1077–87. See also *Communication Access Funds for Legal Services*, NAT'L ASS'N DEAF, <http://www.nad.org/issues/justice/lawyers-and-legal-services/communication-access-funds> (last visited Nov. 8, 2010).

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have been hindered by various restrictions on their applicability. For example, CAFs might limit attorneys' usage to a certain monetary amount, or they might cover only some types of auxiliary aids and services.¹⁶⁴ As this illustration should make clear, shared compliance must be *required* in order to have a lasting effect, and shared funding mechanisms are most effective when they fully cover the cost of auxiliary aids and services.¹⁶⁵

We applaud these efforts to implement shared funding mechanisms which reduce or eliminate disincentives to provide equal access to deaf people. Although limited in scope, these examples show that there are ways to avoid the pitfalls of economically rational discrimination while staying within an antidiscrimination paradigm.

VI. BUILDING ON TITLE IV'S SUCCESS: POSSIBILITIES FOR EXPANDING SHARED FUNDING

Title IV's success lies in its compulsory industry-wide cost-sharing mechanism which ensures the accessibility of telecommunications services and has spurred a new marketplace for businesses to provide relay services. As Part VI made clear, its approach to compliance can be incorporated on large and small scales, with or without litigation, and in the absence of any regulatory or congressional mandate. In this Part, we explore three possible mechanisms for expanding the benefits of Title IV outside the realm of telephone services while also recognizing their drawbacks and limitations.

A. *Implement Mandatory CAFs*

The regulations for Titles I through III or the statutes themselves could be amended to establish a shared-funding mechanism similar to that found in the FCC's regulations for Title IV. For example, the EEOC, which is charged with implementing Title I, and the DOJ, which is charged with implementing Titles II and III, could establish a shared-funding scheme requiring covered entities to contribute to a fund which would fully fund the cost of any auxiliary aids and services necessary to ensure effective communication with deaf people.

¹⁶⁴ See Rosenblum, *supra* note 94, at 1086-87.

¹⁶⁵ CAFs have also generally required attorneys to pay the full cost of communication access up front and then seek reimbursement later, thus evading one of the crucial aspects of Title IV's structure: telecommunications companies' obligation to pay for communication access is entirely fulfilled in advance, before any deaf person attempts to access their services.

These new funds could work in the same way as the TRS fund, by making payments to entities which provide auxiliary aids and services. For example, an agency that provides interpreters (remotely or on-site) or real-time captioning could provide the service free of charge to the covered entity and then bill the fund at rates set by the government regulator. As with TRS providers, these providers of auxiliary aids and services would have economic incentives to find innovative ways to deliver auxiliary aids and services to those who need them. They might distribute videophones or software free of charge to encourage the use of VRI or remote captioning. They could also station interpreters in public spaces to provide interpreter services for a few minutes at a time as needed.

Although covered entities would have to make contributions upfront to such a fund, we do not think that this proposal amounts to a tax increase. Covered entities are already legally obligated to pay for the provision of auxiliary aids and services when necessary to ensure effective communication with deaf people. In theory, mandatory CAFs would not change the amount of auxiliary aids and services procured; rather, they would reallocate these expenditures in a manner commensurate with an entity's size instead of its happening to encounter a deaf person and compel entities to obtain such services in advance of those encounters.

However, because the adoption of mandatory CAFs would eliminate economic disincentives for compliance, we expect that this would result in greater demand for auxiliary aids and services. As a result, total expenditures on auxiliary aids and services would likely increase. This rise in expenditures would be countered by savings due to the reduction in litigation and increases in productivity as hearing people and deaf people are able to communicate more effectively with one another.¹⁶⁶

B. Eliminate Title IV's Restriction on Funding Relay Between People in the Same Room

Another proposal is to remove the FCC's reimbursement restriction on relay calls when the deaf person and the hearing person are in the same room. Removing this limitation would result in much broader access to on-the-spot interpreter services. A deaf person could go to a lawyer's office and be able to pull up an interpreter immediately on a laptop computer with a webcam or even on his iPhone or iPad. The

¹⁶⁶ While we favor a broader approach, CAFs could also be introduced on a more limited scale, covering for example health care providers and lawyers or only a particular geographic region.

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dentist would have no financial incentive to object to the use of relay services since it would cost her nothing. She would even benefit from smoother communication with her deaf patient.¹⁶⁷ The same would occur when a deaf person needed to communicate with a coworker, a teacher, or even a police officer.

Even more broadly, expanding relay services would result in greater and much improved communication between deaf and hearing people in every context, not just interactions with covered entities which are employers with fifteen or more employees, state or local government agencies, and places of public accommodation. Rather, deaf people would have instant access to interpreting services when communicating with *anyone*. This could be a cousin at a family reunion. This could be a random person on the street who comes up to the deaf person to ask for directions. This could be a priest or rabbi (the ADA exempts religious entities from coverage¹⁶⁸). Deaf people would, for the first time, truly have access to all aspects of society through relay services. Relay could become seamlessly integrated into daily life, much like a public utility.

The technology already exists to provide remote interpreting services to facilitate communication between hearing people and deaf people who are located in the same room. Title IV's relay void has already been filled, to an extent, by video relay interpreting ("VRI"). VRI providers offer video interpreting services for individuals who are in the same room. VRI incorporates the same technology as VRS: videoconferencing equipment that permits the sign language interpreter and the deaf person to see each other and the interpreter and hearing person to hear one another. VRS and VRI differ only in the payment mechanism. Whereas VRS draws on the TRS fund, VRI providers charge users directly for the services provided.¹⁶⁹

¹⁶⁷ Interpreters, of course, are not exclusively "for" deaf people; rather, they assist two (or more) individuals who wish to communicate but do not speak the same language. They are as much "for" the hearing person who does not know ASL as they are for the deaf person who does. See Tim Wells, *Moving Mountains: Disabled Lawyers at the Top of Their Trade*, WASH. LAW., Sept./Oct. 1995, at 25.

¹⁶⁸ 42 U.S.C. § 12187 (2006).

¹⁶⁹ Nondiscrimination on the Basis of Disability in State and Local Government Services, 75 Fed. Reg. 56,164, 56,195-96 (Sept. 15, 2010) (to be codified at 28 C.F.R. pt. 35) ("Both VRI and VRS use a remote interpreter who is able to see and communicate with a deaf person and a hearing person, and all three individuals may be connected by a video link. VRI is a fee-based interpreting service conveyed via videoconferencing where at least one person, typically the interpreter, is at a separate location. VRI can be provided as an on-demand service or by appointment. VRI normally involves a contract in advance for the interpreter who is usually paid by the covered entity."); *In re* Telecomms. Relay Servs. & Speech-to-Speech Servs. for Individuals with Hearing & Speech Disabilities, 16 FCC Rcd. 4054, 4058 (2000) (distinguishing between VRI and VRS).

VRI is often used in the hospital setting, when time is of the essence in obtaining interpreters to communicate effectively with deaf people in times of emergency. VRI permits hospitals to begin providing interpreter services almost immediately rather than having to contact an interpreter in the vicinity and then wait an hour or more for the interpreter to arrive. VRI also allows hospitals in remote areas to provide appropriate interpreting services despite a dearth of qualified local interpreters.

The DOJ recently promulgated new regulations governing VRI. The new regulations define a VRI as “an interpreting service that uses video conference technology over dedicated lines or wireless technology offering high-speed, wide-bandwidth video connection that delivers high-quality video images.”¹⁷⁰ Covered entities choosing to provide VRI must ensure that staff persons are adequately trained in the use of technology, that there is clear and understandable transmission of video and audio, and that the image is large enough to display the face, arms, hands, and fingers of the sign language users.¹⁷¹

Recently amended ADA regulations endorse the provision of VRI as a tool which may be used to ensure effective communication with deaf people. The DOJ added VRI to its illustrative list of auxiliary aids and services and amended the definition of the term “qualified interpreter” to define an interpreter who “is able to interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary” and who is able to do so “via a video remote interpreting (VRI) service or an on-site appearance.”¹⁷²

Although VRI is growing in popularity among public and private entities, it suffers from the same fundamental problem as other auxiliary aids and services. As is the case for on-site interpreters, public and private entities must pay individually for the use of VRI should they choose to provide the service. The economic disincentives hindering compliance with Titles I through III make entities hesitant to sign a contract with a VRI provider unless they are certain that they will need to use its services.

In suggesting that Title IV could be expanded to include VRI, we do not mean to suggest that VRI is always appropriate. As the DOJ has recognized:

¹⁷⁰ Nondiscrimination on the Basis of Disability in State and Local Government Services, 75 Fed. Reg. at 56,177.

¹⁷¹ *Id.*

¹⁷² *Id.*

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VRI may not be effective in situations involving surgery or other medical procedures where the patient is limited in his or her ability to see the video screen. Similarly, VRI may not be effective in situations where there are multiple people in a room and the information exchanged is highly complex and fast-paced. The Department recognizes that in these and other situations, such as where communication is needed for persons who are deaf-blind, it may be necessary to summon an in-person interpreter to assist certain individuals.¹⁷³

The DOJ's recognition that VRI is not always an appropriate auxiliary aid and service comports with its broader recognition that determining the appropriate steps covered entities must take to ensure effective communication with deaf people is context-specific.¹⁷⁴ Notably, several hospitals have been sued by deaf individuals who assert that VRI did not ensure effective communication.¹⁷⁵

Clearly, VRI is no panacea. VRI is of no assistance, for example, to deaf individuals who do not have access to videophone technology or to deaf-blind people. Deaf people have also cited the three-dimensional nature of sign language as a reason for preferring an on-site interpreter to the two-dimensional interpreter on screen.¹⁷⁶ Moreover, the use of VRI makes it more difficult for a deaf person to watch both the speaker and the interpreter at the same time. For example, if a person is giving a

¹⁷³ *Id.* at 56,196.

¹⁷⁴ One complaint has been that health care providers have not set up and used the technology correctly, meaning that the equipment often goes unused during times of need or that the deaf person and interpreter cannot see each other well. *See id.* (noting "cases where the video monitor is out of the sightline of the patient or the image is out of focus; still other examples were given of patients who could not see the image because the signal was interrupted, causing unnatural pauses in the communication, or the image was grainy or otherwise unclear."). The new DOJ regulations should provide clarifying guidance to covered entities regarding their obligation to ensure that when they provide VRI services, they do so correctly and in appropriate situations. *Id.*

¹⁷⁵ *See, e.g.,* Gillespie v. Dimensions Health Corp., 369 F. Supp. 2d 636, 639 (D. Md. 2005) (identifying allegations that the VRI communication was ineffective "either because the staff was inadequately trained and unable to operate the VRI device, because Plaintiffs were unable to understand the video interpreter due to the poor quality of the video transmission, or both"). In Gillespie, the hospital signed a consent decree. Consent Decree Gillespie v. Dimensions Health Corp., 369 F. Supp. 2d 636 (D. Md. 2005) (No. DKC-05-CV-73), available at <http://www.ada.gov/laurelco.htm>. In the decree, the hospital agreed to modify its VRI policy. *Id.*

¹⁷⁶ *See Position Statement: VRI Services in Hospitals*, NAT'L ASS'N DEAF (Apr. 2008), <http://www.nad.org/issues/technology/vri/position-statement-hospitals>.

demonstration on how to use something, the deaf person may prefer that the interpreter stand next to the presenter so that both the interpreter and the presenter are in the same line of sight. This is not always possible with VRI.¹⁷⁷ The National Association for the Deaf (“NAD”), citing concerns about the limitations of VRI, has adopted the position that VRI should be used in hospital settings only to “fill the gap” in time until an interpreter arrives on site.¹⁷⁸ On-site interpreters, as the NAD explains, “have more physical flexibility, have greater access to visual and auditory cues and information present in the environment, do not encounter technology or equipment malfunctions, and can respond immediately to communication events as they arise.”¹⁷⁹

We note, however, that in our experiences working with deaf people, many of the individuals who say they dislike VRI love their videophones. As the skyrocketing numbers of reimbursable minutes indicate, deaf people are spending more time than ever using VRS to communicate with hearing people over the telephone despite the problems with relying on an interpreter who is not physically present. This increasing use of videophones suggests widespread acceptance of the use of remote interpreters to communicate with hearing people.

In short, we recognize problems with VRI and VRS, many of which cannot be fully redressed through technological advancements. VRI and VRS should never entirely replace on-site interpreters. In our view, however, remote video interpreting is the future of communication between deaf and hearing people and its possibilities—instantaneous access to interpreter services, anywhere, at any time—exceed its limitations.

As described above, telecommunications relay services are paid for by assessments on phone service providers that are passed on to consumers through a line item on their phone bills. This present limitation to common carriers makes sense because TRS ensures only that the telecommunications industry is accessible to deaf people. Were relay services broadened to include same-room communications, demand for TRS would grow as hearing and deaf people looked for inexpensive means to communicate productively with one another in all areas of life. Ensuring the sufficiency of funds to reimburse relay service providers would require an expanded revenue pool. It is not our purpose in this Article to identify a specific funding mechanism, but to illustrate the promises (and downsides) of removing the same-room

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

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restriction on VRS that has worked so well in rendering telephone services accessible to deaf people.¹⁸⁰

C. *Expand the ADA Tax Credit*

As we discussed above, the ADA provides small businesses with a limited fifty percent tax credit of up to \$5,000 for access-related expenditures between \$250 and \$10,250.¹⁸¹ This tax credit does not, however, broadly redistribute the cost of access because small businesses must still bear a significant portion of the cost. Moreover, because most small businesses are unlikely to encounter many deaf people, they may spend less than \$250 on interpreter expenses and therefore fail to qualify for the tax credit (as might the dentist in our example who would have spent only \$90 in providing a sign language interpreter). The availability of this limited tax credit does not significantly dampen entities' tendency to conduct a cost-benefit analysis, which in many circumstances still leads to economically rational discrimination.

Another means of expanding the principle of Title IV—shared funding—would be to expand this tax credit to cover *all* expenses incurred by covered entities in ensuring effective communication with deaf people. This approach would nearly eliminate economic incentives for economically rational actors to discriminate because they would be fully reimbursed for the cost of providing auxiliary aids and services.

As with the first two proposals outlined above, broadening the tax credit would also broaden the marketplace for the provision of interpreter services. With greater demand for interpreter services, VRI companies, interpreter agencies, and freelance interpreters would compete with each other to serve a larger market. They would likely use the tax credit to advertise their services as “free” and look for ways to make it easy for covered entities to take advantage of their services. We predict that the VRI industry would grow as businesses would continue to look for ways to provide interpreter services on demand without having to search for on-site interpreters and pay for the time and expense of bringing interpreters on-site.

¹⁸⁰ We do not doubt that opening up relay services in this manner would result in exponential growth in demand for relay services. We recognize that initially, there may not be enough qualified interpreters to meet this demand. If there is a shortage in interpreter services, we believe that it is due to a shortage in demand brought on by economically rational discrimination. We believe that once economically rational discrimination is eliminated and deaf people have the same access to communication as hearing people, market forces will correct any shortfall in supply. As demand for interpreter services grows, so will wages for interpreters. This will, in turn, spur more people to choose interpreting as a profitable and rewarding profession.

¹⁸¹ See 26 U.S.C. § 44(a) (2006).

However, we do not believe that a one hundred percent tax credit alone would achieve the same results as opening up relay services to same-room communications. Some entities may resist the notion of having to incur expenses and then seek reimbursement through the tax credit, temporarily losing access to those funds. There is also an administrative burden associated with applying for and receiving the tax credit.

Expanding the tax credit could complement the expansion of Title IV by removing economic incentives to discriminate against deaf people in instances when the use of VRI would not be appropriate. For instance, were the dentist to have a deaf-blind patient who could not see a remote interpreter, the dentist could pay for a tactile sign language interpreter and then obtain reimbursement through a full tax credit.¹⁸²

D. Political Prospects for Reform

We believe that the political prospects for reform are good. The ADA enjoyed broad bipartisan support when it was enacted in 1990, and when it was amended in 2008 to broaden the definition of disability. More recently, a nearly unanimous Congress enacted the Twenty-First Century Act which, among other things, mandates more accessible telecommunications devices for deaf people and people with vision impairments.¹⁸³ These reforms received support from the industries regulated by the statute.

Disability rights legislation has enjoyed broad support because most people know another person with a disability. Anyone can become a person with a disability. Because disability can affect anyone at any time, dialogue about disability often avoids the rancor that surrounds race and sex discrimination.

We believe that proposals to redistribute the costs of auxiliary aids and services would similarly receive broad support. The ADA already places on covered entities the legal obligation to incur expenses when necessary to ensure effective communication with deaf people. We recognize that Congress faces increasing pressure to avoid government imposed mandates, particularly on businesses. However, our proposal to apply Title IV's shared-funding mechanism to the other types of

¹⁸² Another possibility, which we do not consider at length here, would be to establish a national agency responsible for scheduling and paying for interpreter services upon request. We believe that the tremendous administrative burdens associated with such a scheme would likely wash away the promise of real and instantaneous facilitation of communication between hearing people and deaf people.

¹⁸³ See Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, 124 Stat. 2751 (2010).

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industries and entities would not, in theory, increase total expenditures because covered entities are already required to incur these costs. As we explained above in discussing the proposal of mandatory CAFs, adopting a shared-funding mechanism would simply reallocate expenditures in a more equitable fashion so that no single entity is solely responsible for the cost of providing auxiliary aids and services in any specific situation.

We believe that the increasing demand for relay services demonstrates that hearing and deaf people would support the expansion of relay services, making it easier for them to communicate with one another in real-time. From the perspective of industry, a broader distribution of communication access expenditures will decrease costs for those entities which do comply with the law. Noncomplying entities would be assured that they were paying for communication access in a manner that did not place them at a competitive disadvantage. Finally, we believe that disability rights groups and industry would support these proposals because they would reduce the need for, and thus likelihood of, costly litigation to ensure compliance.

VII. CONCLUSION

Twenty years of FCC regulatory supervision under Title IV has proven what should have been obvious when the ADA was enacted: accessibility incurs real, quantifiable costs. If required to pay out of pocket for these costs, businesses and government entities will more often than not disregard their obligation or choose the cheapest—rather than the most effective—option possible. If, on the other hand, entities are required to pay for accessibility on a pro rata basis with their competitors in advance of any particular request for accommodation, greater accessibility will result.

In our ideal society, a dentist does not think about losing \$40 on a deaf patient's visit, and deaf people can access all areas of society as comfortably as they do telecommunications. The story of the deaf patient would be a tale of one ADA, not two. Either the deaf patient would communicate with his dentist by pulling up a sign language interpreter on his iPhone, or the dentist would call an interpreter with whom she is familiar, knowing that a communication access fund would cover the expense or that she would be fully reimbursed through a tax credit. We do not believe that this future is far off. In fact, the future is already here with Title IV. Importing Title IV's compulsory shared-

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funding mechanism into Titles I through III will advance the ADA's goal of including deaf people fully in all aspects of society.¹⁸⁴

¹⁸⁴ Although we focus on deaf people in our Article, the lessons of Title IV are not limited to deaf people. The shared-funding mechanism could also be adopted to ensure the greater availability of auxiliary aids and services for people with disabilities in general. For example, DOJ regulations also list as examples of auxiliary aids and services "effective methods of making visually delivered materials available to individuals with visual impairments" such as "[q]ualified readers." 28 C.F.R. §§ 35.104(2), 36.303(b)(2) (2010). A shared-funding scheme could result in the greater availability of such auxiliary aids and services, resulting in the fuller inclusion of blind people in society.