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And Equal Participation for All...The Americans with Disabilities Act in the Courtroom

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AND EQUAL PARTICIPATION FOR ALL . . . THE AMERICANS WITH DISABILITIES ACT IN THE COURTROOM

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I. INTRODUCTION

The Americans with Disabilities Act[2] ("ADA" or "the Act") has been called "landmark legislation"[3] which seeks to secure the acceptance of persons with disabilities into most of the daily activities of American life including employment,[4] public services,[5] transportation,[6] public accommodations,[7] and telecommunications.[8] Congress, by expressly pursuing this goal through the legislative process, joins a social policy movement which devalues judicial activism as a means to shape social policy in favor of civil rights policy development through legislation.[9] This shift follows a "new" concept of law

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[2]42 U.S.C. § 12101-12213 (1990).

[3]Nancy Lee Jones, *Overview and Essential Requirements of the ADA*, 64 TEMP. L. REV. 471 (1991); John W. Parry, *Mental Disability Under the ADA: A Difficult Path to Follow*, 17 MENTAL & PHYSICAL DISABILITY L. REP. 100 (1993).

[4]42 U.S.C. §§ 12111-17 (1990).

[5]42 U.S.C. §§ 12131-34 (1990).

[6]42 U.S.C. §§ 12141-65 (1990).

[7]42 U.S.C. §§ 12181-89 (1990).

[8]47 U.S.C. § 152 (1991); 47 U.S.C. § 221 (1990); 47 U.S.C. § 225 (1990); 47 U.S.C. § 611 (1990).

[9]Keri A. Gould, *Turning Rat and Doing Time for Uncharged, Dismissed or Acquitted Crimes: Do the Federal Sentencing Guidelines Promote Respect for the Law?*, 10 N.Y.L. SCH.

which recognizes the empowerment of legislators and administrators, as much as judges, as primary lawmakers.[10] Civil rights proponents recognize that legislative support for particular social solutions may be more influential than the less efficient appellate case analysis.[11] The important next step from the initial passage of a key law is the legislative impact on the course of the law's implementation. To enhance strict compliance with the ADA's goals, Congress endowed the Act with powers pursuant to the Fourteenth Amendment to the U.S. Constitution,[12] specifically abrogated Eleventh Amendment challenges,[13] and gave people with disabilities the status of a protected group.[14] The dual purposes of the ADA are to eliminate discrimination against individuals with disabilities[15] and to provide "clear, strong, consistent, enforceable standards" to address such discrimination by ensuring that the Federal government "plays a central role in enforcing [those] standards"[16] by invoking the "sweep of Congressional authority."[17]

The ADA's Congressional mandate is to end discrimination and prejudice directed at persons with disabilities or those treated as though they possess a disability.[18] People with disabilities constitute a broad constituency which has traditionally been denied equal, active participation in the courts.[19] A combination of socially sanctioned bigotry, benevolent paternalism based upon biased notions of incompetencies, and judicial inflexibility built upon a fear of unexplained differences has often relegated the rights of courtroom participants with disabilities to the bottom rung of judicial apathy.

J. HUM. RTS. (1993); David Wexler, *Therapeutic Jurisprudence and Changing Conceptions of Legal Scholarship*, 11 BEHAV. SCI. & L. 17 (1993); Jones, *supra* note 3.

[10]Wexler, *supra* note 9, at 18.

[11]*Id.* at 19, citing Edward L. Rubin, *The Concept of Law and the New Public Law Scholarship*, 89 MICH. L. REV. 792, 819 (1991).

[12]42 U.S.C. § 12101(b)(4) (1990).

[13]42 U.S.C. § 12202 (1990).

[14]42 U.S.C. § 12101(a)(7) (1990). The Act uses the language stating that individuals with disabilities are a "discrete and insular minority." This language is taken directly from United States v. Carolene Prod. Co., 304 U.S. 144, 152 n.4 (1938).

[15]42 U.S.C. § 12101(b)(1) (1990).

[16]42 U.S.C. § 12101(b)(2)(3) (1990).

[17]42 U.S.C. § 12101(b)(4)(1990).

[18]Historically, the ADA is the first civil rights statute protecting persons with disabilities that has broad application. Section 504 of the Rehabilitation Act of 1973, upon which much of the ADA language is based, prohibits discrimination against persons with disabilities only in programs receiving federal financial assistance. Other statutes have been promulgated which protect groups including those with disabilities, or secure limited protections to persons with disabilities.

[19]Michael Perlin, *On "Sanism"*, 46 SMU L. REV. 373 (1992).

This article hopes to encourage the use of the ADA as a mechanism to increase courtroom accessibility to people with disabilities. The article proceeds in the following manner. Initially, I outline the procedural history and design of the Act. Then, in Part III, I discuss how the ADA seeks to ensure the increased participation of persons with disabilities[20] in courtroom practices and procedures. In Part IV, I discuss the Act's Title II, Public Services, which controls access to and accommodations by the state courts. Next, I trace the discrimination frequently faced by persons with disabilities, which is illustrated by a possible case history. I conclude by offering reasonable systemic courthouse accommodations as well as accommodations for individual courtroom procedures and practices to encourage the active participation of people with disabilities.

The Americans with Disabilities Act demands no less than the integration of courtroom procedures with the active involvement of participants with disabilities. The ADA has fascinating, far-reaching uses. It is an important tool to use in the struggle to assure equal rights and equal access to justice for the forty-three million disabled persons in this country.[21]

II. THE AMERICANS WITH DISABILITIES ACT

On July 26, 1990, President George Bush signed into law the Americans with Disabilities Act.[22] The Act, which has been hailed as the most significant civil rights law since the 1960s,[23] passed with broad bipartisan support.[24] Passage of the ADA began with the congressional finding that forty-three million Americans have one or more physical or mental disabilities, a number which increases as the population as a whole grows older.[25] Congress concluded that

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[20]In this article, I use the term disability in a manner consistent with the definition in the ADA. For a detailed discussion of definition of disability as it is used in the ADA, see notes 51-74, *infra* and accompanying text.

[21]42 U.S.C. § 12101(a)(1) (1990).

[22]42 U.S.C. § 12101 *et seq.* (1990).

[23]George Bush, Remarks on Signing the Americans with Disabilities Act of 1990, *in* 2 PUB. PAPERS OF THE PRESIDENTS: GEORGE BUSH 1067, 1068 (July 26, 1990); "The ADA will end this American apartheid. The act has the potential to become one of the great civil rights laws of our generation." 135 CONG. REC. S10717 (daily ed. Sept. 7, 1989) (statement of Senator Kennedy). See also, Lowell Weicker, *Historical Background of the Americans with Disabilities Act*, 64 TEMPLE L. REV. 387, 387 (1991) (stating that he had "the very high honor of rising on the floor of the United States Senate to introduce a historic piece of legislation-the Americans with Disabilities Act"); Peter Susser, *The ADA: Dramatically Expanded Federal Rights for Disabled Americans*, 16 EMPLOYEE RELATIONS L. J. 157 (1990).

[24]After much discussion and amendments by both Houses, the final bill was passed by the House on July 12, 1990 [136 CONG. REC. H4629 (daily ed. July 12, 1990) and the Senate followed, passing what is now the ADA the next day. 136 CONG. REC. S9695 (daily ed. July 13, 1990)

[25]42 U.S.C. § 12101(a)(1) (1992).

despite the fact that some improvements had been made over the years, insidious forms of discrimination against individuals with disabilities, including isolation and segregation, continue to be a serious and pervasive social problem.[26] Congress found that individuals with disabilities are a discrete and insular minority who face restrictions and limitations resulting from stereotypic assumptions not truly indicative of their abilities to participate in and contribute to society.[27] Persons with disabilities often have no legal recourse to redress such discrimination.[28] The ADA expresses a national goal of assuring equal opportunity, full participation, independent living, and economic self-sufficiency for persons with disabilities.[29] The Act also promotes the eradication of continuing unfair and unnecessary discrimination, segregation, and prejudice against those having, or perceived as having, mental or physical disabilities.

This broad-reaching law is divided into five subchapters or titles with an introductory Congressional Findings and Purposes section[30] and a definitional section.[31] The first four titles seek to end discrimination against persons with disabilities in specific contexts such as employment (title I),[32] Public Services (title II),[33] Public Accommodations (title III),[34] and Telecommunications (title IV).[35] Title V contains miscellaneous provisions and possibly the Act's most important enforcement mechanism: the legislative overruling of cases which suggest that the Eleventh Amendment can exempt individual states from complying with federal anti-discrimination laws.[36] In the past, the Eleventh

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[26] 42 U.S.C. § 12101(a)(2) (1992). In addition, Congress found that "discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." 42 U.S.C. § 12101(a)(3) (1992). Congress went on to find that individuals continuously encounter various forms of discrimination including architectural and communication barriers, and the continuing failure of others to make modifications to existing facilities and practices. 42 U.S.C. § 12101(a)(5) (1992).

[27] 42 U.S.C. § 12101(a)(7) (1992).

[28] 42 U.S.C. § 12101(a)(4) (1992).

[29] 42 U.S.C. § 12101(a)(8) (1992).

[30] 42 U.S.C. § 12101 (1992).

[31] 42 U.S.C. § 12102 (1992).

[32] 42 U.S.C. §§ 12111-12117 (1992).

[33] 42 U.S.C. §§ 12131-12165 (1992).

[34] 42 U.S.C. §§ 12181-12189 (1992).

[35] These provisions are set forth in the Communications Act of 1934, as amended, 47 U.S.C. § 225 (1992); and the Cable Communications Policy Act of 1984, as amended, 47 U.S.C. § 611 (1992).

[36] 42 U.S.C. § 12202 (1990). *See generally,* Pennhurst State Sch. and Hosp. v. Halderman, 465 U.S. 89 (1984).

Amendment has been effectively used by state governments as a loophole to circumvent compliance with federal laws in order to resist integrating community services[37] and to forbid the enforcement of Section 504 of the Rehabilitation Act and the Education of the Handicapped Act against a state agency.[38]

A critical analysis of the Act's potential impact must begin with a brief discussion of the Rehabilitation Act of 1973 ("the Rehabilitation Act"),[39] a predecessor statute whose precepts have been incorporated into the text of the ADA. Prior to the enactment of the ADA, the Rehabilitation Act was the principal federal law prohibiting discrimination against individuals with disabilities (called "handicapped individuals" in the statute).[40] The potential of the Rehabilitation Act for stopping discrimination is stunted by the statute's limited scope of application. The Rehabilitation Act only applies to federal agencies, government contractors, and other recipients of federal funds.[41] Despite its sweeping statutory language,[42] over the years the Rehabilitation Act has been ineffectively implemented.[43] This may be due in part to the

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[37]Pennhurst State Sch. and Hosp. v. Halderman, 451 U.S. 1, 16 n.12 (1981).

[38]Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 TEMP. L. REV. 393, 395 (1991).

[39]Rehabilitation Act of 1973, Pub. L. No. 93-112, §§ 500-504, 87 Stat. 390 (current version at 29 U.S.C. §§ 791-794 (1992)).

[40]Section 504's use of the term 'handicapped individual' has been replaced in the ADA with "individual with disabilities" to reflect a new sensitivity to descriptive language and its power. The new language conveys the message that people are not disabled, but are merely encumbered with disabilities. Brent E. Kidwell, *The Americans with Disabilities Act of 1990: Overview and Analysis*, 26 IND. L. REV. 707, 708 n. 5 (1993). *See also* Department of Justice, commentary at 28 C.F.R. § 35.104, Pt. 35, App A, (1993) [hereinafter DOJ commentary].

[41]29 U.S.C. §§ 794(b)(1)(A)-(B) (1992).

[42]Much of the spirit and language of the ADA is taken from specific provisions of the Rehabilitation Act and its regulations or judicial interpretations of the Rehabilitation Act provisions.

[43]Despite the Rehabilitation Act, "[w]e still see, in almost every school district across the country, just as many students with disabilities excluded and segregated .... Adults with disabilities seeking access to integrated residential and community services have fared little better." Cook, *supra* note 38, at 394-95.

The Rehabilitation Act's ambiguous legislative history and language has provoked reluctancy by the courts to apply it broadly in cases involving institutionalized mentally disabled persons. Michael Perlin, The American with Disabilities Act: Breathing New Life into Mental Disability Law (Speech Prepared for South Carolina Department of Mental Health Commissioner's Quarterly Forum) (transcript on file with author).

See also Marsh v. Skinner, 922 F.2d 112 (2d Cir. 1990), *cert. denied*, 112 S. Ct. 102 (1991) (plaintiff receiving federal Supplemental Security Income funds for an undisclosed mental disability, who met the Rehabilitation Act definition of handicapped, was denied eligibility for New York City Department of Transportation discount fare benefits because the Urban Mass Transit Act's definition was more stringent).

low-level status accorded to the legislation. For example, § 504 of the Act, the disability rights legislation covering recipients of federal assistance, was passed as merely a single sentence tacked onto vocational rehabilitation legislation.[44] Subsequent clarification was largely left to the Judiciary and the Executive, resulting in divergent court decisions on critical questions.[45]

In contrast, Congress included specific findings and purposes in the body of the ADA which express the legislature's intent in clear terms.[46] Highlighting the disparity between the statutes, the body of the ADA runs some fifty pages in length, whereas the Rehabilitation Act, including amendments, is contained in a mere several pages.[47]

Throughout the body of the ADA, Congress uses strong, clear language to ensure the implementation of the legislation's mandates. First, pursuant to its fact-finding capacity, Congress found that individuals with disabilities are a "discrete and insular minority . . . subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness."[48] By using the "discrete and insular minority" language, Congress defines people with disabilities as a minority group with the power to deflect challenges to the ADA unless those declining to accommodate disabilities can demonstrate a "compelling state interest" for the discriminatory treatment.[49] Classifications that segregate persons with disabilities are to be given the same level of constitutional scrutiny under the ADA that classifications based upon race are given under the fourteenth amendment and the federal civil rights laws.[50]

Further protection of the congressional statutory mandates is assured because the statute has the full "sweep of Congressional authority, including the power to enforce the fourteenth amendment."[51] Therefore, any violation of the statute must be viewed as a violation of the Equal Protection Clause. Congress rarely invokes this power. Utilization of this power underscores the depth of Congressional commitment through the ADA.[52]

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[44]Cook, *supra* note 38, at 415.

[45]Examples of critical issues without consistent interpretation include the degree to which § 504 prohibits or permits segregation, the standard of review for classifications based upon disability, and the defenses available in disability discrimination cases. Cook, *supra* note 38 at 415-16. (citations omitted).

[46]42 U.S.C. § 12101(a), (b) (1992). *See also* Cook, *supra* note 38, at 416.

[47]Jones, *supra* note 3, at 476 n.29.

[48]42 U.S.C. § 12101(a)(7) (1992).

[49]United States v. Carolene Prod. Co., 304 U.S. 144, 152-53 n.4 (1938)(Justice Stone's formulation to determine whether a discriminatory classification should be given "more exacting judicial inquiry" or whether such classification requires only a rational basis to be upheld).

[50]Cook, *supra* note 38, at 397, 433-39 nn.280-235.

[51]42 U.S.C. § 12101(b)(4) (1992).

[52]Perlin, *supra* note 43.

After setting the clear congressional mandate and securing the ADA's reach through constitutional power, the statute goes on to define important terms. It is necessary to understand the wide scope of the ADA's definition of "disability" in order to ascertain the potential impact of the law.[53] Significantly, Congress chose to use § 504's definition of disability when drafting the ADA. By doing so, Congress sought to mandate attitudinal change[54] while reducing the litigious pursuit of covered disabilities. The broad definition remains constant throughout all sections and titles of the Act.

In order to qualify for statutory protection under the ADA, a person must be a "qualified individual with a disability."[55] Qualified individuals with disabilities are those who: (a) have a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (b) have a record of such an impairment; or (c) are regarded as having such an impairment.[56]

The first prong of the definition is fairly straight forward. The legislative history of the statute[57] incorporates, verbatim, the impairments listed in the regulations for section 504 of the Rehabilitation Act of 1973.[58] However, Congress chose not to include in the statute a list of *all* the specific conditions,

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[53]42 U.S.C. § 12102(2) (1992); 28 C.F.R. § 35.104 (1993).

[54]School Bd. of Nassau County v. Arline, 480 U.S. 273 (1987). The Court recognized that:

> By amending the definition of "handicapped individual" to include not only those who are actually physically impaired, but also those who are regarded as impaired and who, as a result, are substantially limited in a major life activity, Congress [in § 504 of the Rehabilitation Act] acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.

Id. at 284.

[55]42 U.S.C. § 12111(8) (1992); 28 C.F.R. § 35.104 (1993); DOJ commentary, *supra* note 40, at 448.

[56]42 U.S.C. § 12102(2) (1992). This definition is drawn from § 504 of the Rehabilitation Act, 29 U.S.C. § 706(8).

[57]S. REP. NO. 116, 101st Cong., 1st Sess. 22 (1989); H.R. REP. NO. 485, 101st Cong. 1st Sess., pt. 2, at 51; pt. 3, at 28 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 333, 450-51.

[58]45 C.F.R. 84.3(j)(2)(i) (1993). The act covers physical impairments including any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting any one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory (including speech organs); cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine. Mental impairments include mental or psychological disorders such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. U.S. Dept. of Justice, *Americans With Disabilities Act, Technical Assistance Manual Title II*, No. 1 BUSINESS MANAGEMENT GUIDE (CCH, March 5, 1992) [hereinafter Tech. Ass't Man.].

diseases, or infections constituting physical or mental impairments under the statute because it could not ensure its comprehensiveness.[59]

The legislative history makes clear that the term includes such conditions, diseases, and infections as: orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, asymptomatic and symptomatic HIV,[60] cancer, heart disease, tuberculosis, alcoholism, diabetes, mental retardation, emotional illness, specific learning disabilities, and past drug addiction.[61] Covered mental impairments include any mental or psychological disorder, including mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.[62] The legislative history of the ADA reflects Congress' intent to condition the inclusion of a mental disorder upon its appearance in the Diagnostic and Statistical Manual of Mental Disorders ("DSM-III-R"),[63] in its current edition (DSM-IV), as determined by the delineated symptomology. The DSM-III-R is the principal diagnostic manual used by mental health care professionals to diagnose and treat mental disorders.[64]

Initially, when the Senate Labor Committee reported the ADA to the Floor, there were no categorical exclusions for mental disabilities. Several senators expressed apprehension and suggested amendments which would eliminate persons with the most commonly diagnosed psychiatric disorders from the Act's coverage, including persons with schizophrenia, manic-depression, or psychotic disorders.[65] After extended debate, a modified amendment by

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[59]H.R. REP. NO. 485, 101st Cong, 1st Sess., pt. 3, at 28 (1990) (Report from the Committee on the Judiciary, Mr. Brooks, referring to Section 3(2) Disability).

[60]28 C.F.R. § 35.104 (1993). The DOJ's Office of Legal Counsel, after interpreting committee reports, § 504 interpretations, and other materials, concluded that asymptomatic HIV is "an impairment that substantially limited a major life activity, either because of its actual effect on the individual or because the reactions of other people to individuals with HIV disease cause such individuals to be treated as though they are disabled." 56 Fed. Reg. 35,698 (1991).

[61]*Id. See also* S. REP. NO. 116, 101st Cong., 1st Sess. 22 (1989).

[62]28 C.F.R. § 35.104 (1993). Courts and administrative agencies pursuant to the Rehabilitation Act and similar state statutes have recognized clinical disorders, psychiatric disorders such as manic depressions, and post-traumatic stress syndrome as covered disabilities. Paul F. Mickey, Jr. & Maryelena Pardo, *Dealing with Mental Disabilities Under the ADA*, 9 LAB. LAW. 531, 535 n.17 (1993)(citations omitted).

[63]135 CONG. REC. S10772 (daily ed. Sept. 7, 1989)(statement of Sen. Armstrong).

[64]The DSM-IV, as well as the prior DSM-III-R, charts symptomology and prognosis using a multiaxial system; Axis I: Clinical Disorders, Other Conditions That May Be a Focus of Clinical Attention, Axis II: Personality Disorders, Mental Retardation, Axis III: General Medical Conditions, Axis IV: Psychosocial and Environmental Problems, and Axis V: Global Assessment of Functioning. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-IV (4th ed. 1994).

[65]135 CONG. REC. S10785 (Sept. 7, 1989).

Senator Hatch was incorporated into the body of the final Bill.[66] Importantly, the Hatch amendment did not exclude the previously mentioned psychiatric diagnoses, although it did exclude from the Bill's coverage transvestites, pathological gamblers, people diagnosed as having kleptomania or pyromania and current psychoactive substance use disorders, and several other diagnostic categories, many of which centered on sexual behavior issues.[67]

Under the ADA, protection is also extended to individuals with a record of impairment, but who may not now be impaired.[68] This group includes those individuals who may have been misclassified as having a mental or physical impairment that substantially limits one or more major life activities, or who may have a history of mental or physical illness which is no longer active.[69]

The third group considered disabled under the ADA definition reflects the legislature's heightened concern for individuals inappropriately treated as disabled. The third prong extends protection to individuals who are treated as though they have a physical or mental impairment which substantially limits a major life activity, even if they do not.[70] In this section, the ADA uses the same "regarded as" test set forth in the § 504 regulations.[71] As a result, an individual who has a physical or mental impairment that does not substantially limit a major life activity, but is treated as having such a limitation, or an individual whose impairment substantially limits a major activity only as a result of the attitude of others toward such an impairment, or an individual who has none of the covered impairments but is treated as having such an impairment, is deemed covered by the ADA.[72]

It is the perception of the employer, public entity, or public accommodation which is central to invoking statutory protection. Uninformed, inaccurate, and bigoted perceptions foster segregationalist policies based upon "society's accumulated myths and fears about disabilities and disease."[73] The third prong of the statute's definition of disability is perhaps one of the most far-reaching

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[66] 42 U.S.C. § 12211(b)(1990).

[67] 135 CONG. REC. S10765, 66 (Sept. 7, 1989); 42 U.S.C. § 12211(a) (1990) (homosexuality and bisexuality excepted); 42 U.S.C. § 12211(b) (1990) ("under this chapter, the term 'disability' shall not include . . . (1) transvestitism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders . . ."); 28 C.F.R. § 35.104 (1993). Many of these conditions are not excluded as impairments under § 504. DOJ commentary, *supra* note 40, at 447.

[68] 42 U.S.C.§ 12102(2)(B) (1990); 28 C.F.R. § 35.104 (1993).

[69] S. REP. NO. 116, 101st Cong., 1st Sess. (1989); *see also*, Susser, *supra* note 23, at 160-161.

[70] 42 U.S.C. § 12102(2)(c) (1990).

[71] 28 C.F.R. § 42.540(k)(2)(iv) (1993).

[72] 42 U.S.C. § 12102(2)(C) (1990); 28 C.F.R. § 35.104 (1993).

[73] School Bd. of Nassau County v. Arline, 480 U.S. 273, 284 (1987).

of the ADA as it challenges preconceived, erroneous notions about difference and inclusion.[74]

In the ADA, Congress carefully crafted a wide-ranging definition of disability intended to cover those impairments that substantially limit "major life activities" such as caring for one's self, performing manual tasks, walking, seeing, hearing, breathing, learning, working, and participating in other reasonable activities.[75] Impairments must be assessed without consideration of mitigating aids or accommodations which could result in a less substantial limitation.[76]

Although the ADA's definition of disability extends to individuals with mental disabilities, learning disabilities, and developmental disabilities, few commentators[77] have examined rules, policies, or practices beyond physical accessibility concerns. This article hopes to enlighten those interested in judicial access by opening dialogue about some of the hidden issues confronted by people with disabilities wishing to participate in courtroom procedures.

III. COURTROOM PARTICIPATION

One of the most cherished beliefs of our system of government is "equal access to justice." Unfortunately, this ideal is often imperfectly implemented with respect to persons with disabilities.[78] Congress, by enacting the ADA, sought to ameliorate court-related accessibility differentiation by specifically including state and local courthouses within the statute's definition of public

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[74]MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW (1990).

[75]28 C.F.R. § 35.104 (1993); Tech. Ass't Man., *supra* note 58, at 4-5. This language is also taken from the Rehabilitation Act of 1973.

[76]28 C.F.R. § 35.104 (1993).

[77]Some exceptions include: Deborah Dorfman, *Effectively Implementing Title I of the Americans with Disabilities Act for Mentally Disabled Persons: A Therapeutic Jurisprudence Analysis*, 8 J.L. & HEALTH 105 (1994); Loretta K. Haggard, *Reasonable Accommodations of Individuals with Mental Disabilities and Psychoactive Substance Use Disorders Under Title I of the Americans with Disabilities Act*, 43 J. URB. AND CONTEMP. L. 343 (1993); Mickey & Pardo, *supra* note 62; Parry, *supra* note 3; Michael Perlin, *The ADA and Mentally Disabled People: Can Sanist Attitudes Be Undone?* 8 J.L. & HEALTH 15 (1994); Cook, *supra* note 38; Bonnie Milstein et al., *The Americans With Disabilities Act: A Breathtaking Promise for People with Mental Disabilities*, 24 CLEARINGHOUSE REV. 1240 (1991); Laura Mancuso, *Reasonable Accommodations for Workers With Psychiatric Disabilities*, 14 PSYCHOSOCIAL REHABILITATION J. 3 (1990).

[78]Arthur S. Hayes, *Courts Give the Mentally Disabled Mixed Signs on Legal Treatment*, WALL ST. J. Feb. 8, 1993 at B6. (the criminal justice system is widely perceived as hostile to the disabled); Barbara Kantrowitz, *Verdict After Day of Horror*, NEWSWEEK, March 29, 1993, at 27 (prosecutors often do not bring cases regarding retarded victims because they worry about juries' prejudices and the victims' credibility on the stand).

services.[79] Nondiscriminatory practices by public entities are covered under Title II of the Americans with Disabilities Act. Some action has been initiated to effectuate courthouse accommodations for physical and communicative access, particularly for the persons with physical disabilities and hearing and visually impaired individuals.[80] However, it is time for a greater examination of appropriate accommodations for all disabled persons traditionally segregated from mainstream life to ensure an active, participatory judicial system.

This section seeks to examine those rules, policies, and practices entrenched in the state and local judicial systems which inhibit people with disabilities from fully participating in the judicial process.[81] The mandates found within the ADA which compel court administrators and judges to address the ways in which idiosyncratic practices may be modified to circumvent any negative impact on disabled participants will also be explored.

A. Title II (A), Public Services

Part A of Title II and the Department of Justice (DOJ) regulations promulgated thereunder state that "no qualified individual with a disability shall, by reason of such disability be excluded from participation in or denied the benefits of the services, programs or activities of a public entity,[82] or be

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[79] Federal courts are not included because they must already comply with the same standards under § 504 of the Rehabilitation Act of 1973. *See supra* notes 40-46 and accompanying text.

[80] The New York State Bar Association Committee on Mental and Physical Disability, in cooperation with the Office of Court Administration and in conjunction with the New York State Commission on Quality of Care for the Mentally Disabled, has prepared a survey to review the accessibility of the New York State Courts for people with disabilities and their compliance with the ADA accessibility guidelines. Of the fifty-three questions on the survey, forty-five relate to physical accessibility issues, three pertain to the hearing disabled, and four pertain to sight-impaired persons using the state courts. In the state of Utah, the Administrative Office of the Courts is evaluating each state court building against the accessibility standards set out by the Legal Center for People with Disabilities through a survey based upon the New York survey. Telephone conversation with Michael K. Gould, Program Coordinator of PAIR Program (Protection & Advocacy for Individual Rights), Legal Center for People with Disabilities, Salt Lake City, Utah (Nov. 28, 1994).

[81] In the joint ABA/OCA/CQC survey, there is only one general catch-all question asking if other accommodations are available to persons with disabilities. Such an oversight may be due to the patterning of the questions along the lines of the DOJ regulations which similarly do not specifically address accommodations other than communication and accessibility. (Survey on file with author).

For personal sagas of the discrimination faced by disabled lawyers, read Schwartz, M. *60 Centre is User-Unfriendly for the Deaf*, N.Y.L.J., Feb. 5, 1992, at 2 (hearing impaired attorney) and Ronald K. Skubecz, *A Matter of Access*, 16 PA. BAR ASSOC. Q. 30 (1994) (attorney with multiple sclerosis).

[82] Public entity is defined as any state or local government, any department, agency, or instrumentality of a state of local government, the National Railroad Passenger Corporation, and certain rail commuter authorities. 42 U.S.C.§ 12131(1) (1990); 28 C.F.R.

subjected to discrimination by any such entity."[83] Each state or local court system is considered a public entity under the Act. Therefore, each state and local court system as a whole and each of the individual services it offers may not use procedures, practices, or methods of administration that discriminate against any qualified individual with a disability. This prohibition extends to all persons who meet the statutory definition, including those whose impairments may not be obvious at first glance as well as persons who, to the poorly-informed or paternalistic judge or administrator, may appear to be prohibitively disabled from engaging in the particular service.[84]

The Act assumes that appropriate accommodations are possible even if they require greater creativity, flexibility, or ingenuity than the reflexive altering of a physical structure or appointment of a sign language interpreter.[85] For instance, the appointment of a sign language interpreter for a deaf person who lip reads would not be an appropriate accommodation.

Under Title II, a "qualified individual" is one who meets the "essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity."[86] Assessment of these eligibility requirements must be made with or without reasonable modifications of the program involved, removal of architectural, communication or transportation barriers, or the provision of auxiliary aids and services.[87] A public entity must not provide a qualified individual with a disability with an aid, benefit, or service that is not effective in affording equal

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§ 35.104 (1993). The federal government is expressly excepted as an employer under the Act and is not subject to compliance with the Act. Presumably this is because the federal government must comply with the Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504 (1973).

[83] 42 U.S.C. § 12132 (1990); 28 C.F.R. § 35.130(a) (1993).

[84] This is precisely the type of discrimination the ADA seeks to eradicate. "The existence of societal discrimination against persons with disabilities, especially the historically grotesque intolerance toward persons with disabilities, . . . continues in somewhat more patronizing and benign forms today. Ironically, the intolerance of others is still often used as an excuse for continuing the segregation of persons in warm, cozy environments where they will not be teased or ridiculed." Cook, *supra* note 38, at 440.

Research has repeatedly shown that persons with disabilities with low skill levels, exhibiting severe, aberrant behavior, or medical fragility can live, work and participate in community activities when they receive appropriate support. Cook, *supra* note 38, at 444.

[85] 28 C.F.R. § 35.150 (1993). Each program or service, "when viewed in its entirety, must be readily accessible." Jeanne Dooley & Erica Wood, *Opening the Courthouse Door: The Americans with Disabilities Act's Impact on the Courts*, 76 JUDICATURE 39 (1992) (highlighting problems related to physical and communication barriers in courts and finding that there are problems in access to the court buildings, with using courtroom facilities, and in participating in courtroom procedures).

[86] 42 U.S.C. § 12131(2)(1990); 28 C.F.R. § 35.104 (1993).

[87] 42 U.S.C.§ 12131(2)(1990); 28 C.F.R. § 35.104(1) (1993).

opportunities. The entity must ensure that its communications with individuals with disabilities are as effective as communications with others. In order to provide equal access, the public service is required to make available appropriate aids and services where necessary to ensure effective communication in the most integrated setting possible.[88] Aids and services include a wide range of services and devices that promote effective communication.[89] Congress contemplated that the type of auxiliary aid or service necessary to ensure effective communication will vary with the length and complexity of the communication involved.[90]

The DOJ regulations promulgated pursuant to this title characterize auxiliary aids and services in four non-exclusive groupings, including effective methods of making aurally[91] delivered materials available to individuals with hearing impairments, effective methods of making visually delivered materials available to individuals with visual impairments, acquisition or modification of equipment or devices, and any other services and actions similar to those previously mentioned.[92] The Justice Department interprets the auxiliary aids and services as "a wide range of services and devices for ensuring effective communications, *i.e.* making aurally and visually delivered information available to persons with hearing, speech, and vision impairments."[93] However, the definition's failure to explicitly differentiate between communicative and other disorders,[94] creates a potential for interpretation

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[88]28 C.F.R.§ 35.150(b) (1993).

[89]Examples include, for persons who are aurally impaired, qualified interpreters, notetakers, computer-assisted transcription services, written materials, telephone handset amplifiers, assistive listening systems, telephones compatible with hearing aids, closed caption decoders, open and closed captioning, telecommunications devices for deaf persons (TDD's), videotext displays, and exchange of written notes. Examples for persons with vision impairments include qualified readers, taped texts, audio recordings, Brailled materials, large print materials, and assistance with locating items. Examples for individuals with speech impairments include TDD's, computer terminals, speech synthesizers, and communication boards. Tech. Ass't Man., *supra* note 58, at 35. *See also*, 28 C.F.R. § 35.104 (1), (2), (3), (4) (1993).

[90]DOJ commentary, *supra* note 40, at 443.

[91]The language "aurally delivered materials" was changed from the original "orally delivered materials" so as to include non-verbal sounds and alarms and computer-generated speech. DOJ commentary, *supra* note 40, at 443.

[92]28 C.F.R. § 35.104 (1993).

[93]DOJ commentary to 28 C.F.R. § 35, *supra* note 40, at 443.

[94]The DOJ commentary states that other sections of the regulations specifically discuss making services, programs or activities accessible to individuals with mobility and manual dexterity impairments. To substantiate these assertions, the commentary cites to 28 C.F.R. § 35.130(b)(7) (1993) which states that the public entity "shall make reasonable modifications in policies, practices or procedures when modifications are necessary to avoid discrimination on the basis of disability. . . ." While this subsection may lead one to infer that mobility and manual dexterity impairments are included, it is difficult to read this section as explicitly referring to those types of disabilities.

problems.[95] Although the statute's broad definition of disabilities includes non-communication impairments, the statutory definitions and commentary do not mention the range of services or aids to be provided to people with non-communication disorders. Ambiguity also results from the regulation's oversight with respect to communication disorders which are not aural or visual in nature. Such impairments include learning disabilities, developmental disabilities, and mental impairments.[96] Certainly, to remain true to the spirit and intent of the ADA, any reasonable interpretation of the catch-all section entitles persons with non-communication disorders to comparable aids and services.

In addition to providing auxiliary aids and services, the public entity must provide reasonable accommodations, consisting of the modification of rules, policies, or practices, or the removal of architectural, communication, or transportation barriers so that the person with a disability can participate in the public service.[97] To guarantee that persons with disabilities have an equal opportunity to use and participate in the public entity, in this case, the judge or court administrator must "give primary consideration to the requests of the individual with disabilities."[98]

A qualified person with a disability must meet the "essential eligibility requirements for the receipt of such services."[99] Persons who are not qualified include those who "pose a direct threat to the health and safety of others."[100] Such a threat is described as "a significant risk to the health and safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or the provision of auxiliary aids or services."[101] The determination that a person poses a direct threat may not be based upon generalizations or stereotypes attributed to the disability. It must be as a result of an individualized assessment, based on reasonable judgement, which relies on current medical evidence or the best available objective evidence.[102] The nature, duration, and severity of the risk, the probability that the potential injury will occur, and whether reasonable modifications will mitigate the risk

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[95] John Parry, *State & Local Government Services under the ADA: Nondiscrimination on the Basis of Disability*, 15 MENTAL & PHYSICAL DISABILITY L. REP. 615 (1991).

[96] *Id.* at 616.

[97] 28 C.F.R. § 35.130 (1993).

[98] 28 C.F.R. § 35.160(b)(2) (1993).

[99] 42 U.S.C. § 12131(2) (1990).

[100] 28 C.F.R.§ 36.208 (1993). This regulation implements Title III, Public Accommodations section, 302(b)(3) of the Act, which states that a public accommodation is not required to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of the public accommodation, if the individual possesses a threat to the health or safety of others.

[101] 28 C.F.R. § 36.208 (1993).

[102] *See* School Bd. of Nassau County v. Arline, 480 U.S. 273, 287 (1987).

must be considered in arriving at this determination.[103] Interestingly, the DOJ commentary finds that making this assessment will not usually require the services of a physician, but can be guided by information received from public health authorities, the Centers for Disease Control, and the National Institutes of Health.[104] The ADA's "direct threat" definition conflicts with the Equal Opportunity Commission's (EEOC) definition which includes threats to oneself as well as others.[105] This may become a factor when determining whether people with suicidal ideation may participate in court proceedings.

A reasonableness test is the principal limitation on a pubic entity's ADA obligations. The public entity must provide the requested accommodation unless it will "fundamentally alter the nature of the activity"[106] or the accommodation places an undue financial or administrative burden on the entity.[107] Congress intended to make it especially difficult for public entities to satisfy the undue burden standard.[108] To further that end, Congress made this burden much greater than the "readily achievable" standard required of private businesses pursuant to Title III. Nonetheless, if the preferred modification is deemed unreasonable, the public entity remains obligated to make other reasonable modifications.[109] In determining whether financial and administrative burdens are undue, all public entity resources available for the funding and operation of the service need to be considered.[110] The burden of proof to establish financial or administrative hardship, or the demonstration that the accommodation would result in a fundamental alteration in the nature of the service, program, or activity, is on the non-accommodating public entity.[111] The decision to refuse a burdensome compliance must be made by a high-level official who has budgetary authority and responsibility for making spending decisions.[112]

The intent of the Act is that an individual with a disability should be able to participate in public services, programs, or activities in all but the most unusual cases. Once the public entity chooses not to provide the accommodation, a written explanation of the decision not to act must be provided to the

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[103]*Id.* at 288.

[104]DOJ commentary, *supra* note 40 at 448.

[105]Parry, *supra* note 95 at 616.

[106]Southeastern Community College v. Davis, 442 U.S. 397, 413 (1979) (school established that plaintiff was not "qualified" under section 504 of the Rehabilitation Act because she was unable to "serve the nursing profession in all customary ways."

[107]28 C.F.R. §§ 35.150(a)(3), 35.164 (1993).

[108]Cook, *supra* note 38, at 438; Parry, *supra* note 95, at 618.

[109]28 C.F.R. § 35.150(a)(3) (1993).

[110]*Id. See also* 28 C.F.R. pt. 35 app. A at 459.

[111]28 C.F.R. § 35.150(a)(3) (1993).

[112]*Id.*

individual.[113] The public entity must then take all other actions to ensure that the individual with disabilities receives appropriate services.[114] There has yet to be any clarification of the formality and content required of the written explanation. Similarly, there has been no clarification of how to properly preserve the request for accommodations for purposes of making a formal complaint.[115] It seems reasonable to expect that accommodations requested during or prior to the commencement of courtroom proceedings should be made by written motion served on the presiding judge with notice to opposing counsel. This approach permits the judge to respond by written decision and preserves the request for a future claim.

Accommodations do not necessarily mean large financial expenditures.[116] Many accommodations merely require procedural flexibility. In the context of providing equal access to justice, state and local courts must make sure that there is "accessibility for litigants, jurors, victims, witnesses, attorneys, social services personnel, employees, volunteers, and members of the public with physical, sensory, communications or cognitive impairments; and access to each court program--provision of public information, pretrial services, jury service, courtroom hearings and trials, and access throughout the courthouse facility."[117] A flexible approach to requests for accommodations challenge court employees to question ingrained attitudinal beliefs about the integration of people with disabilities into the mainstream courtroom activities.

B. Sanism

Sanism is an irrational prejudice directed at persons with mental disabilities.[118] It is of the same quality and character that causes, and is reflected in, social attitudes about race, gender, sexual preference, or ethnic

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[113] *Id.*

[114] *Id.*

[115] The completed formal complaint must be in writing, include the name and address of the complainant or the complainant's representative who is filing the complaint. It should also describe the public entity's alleged discriminatory action in sufficient detail to inform the Federal agency of the nature and date of the alleged violation. The complaint must be signed by the complainant or someone authorized to sign on the complainant's behalf. Complaints filed on behalf of classes or third parties must describe or otherwise identify the alleged victims. 28 C.F.R. § 35.104(4) (1993).

[116] During Congressional hearings, lobbyists for business groups warned of unfair costs of accommodations. A study found that the costs employers would have to bear if the Bill passed would not be excessive. Thirty-one percent of the accommodations cost nothing. Only thirty-one percent cost more than $500,000. Michael C. Collins, *The ADA & Employment: How it Really Affects People with Disabilities*, 28 GONZ. L. REV. 209, 211 (1992-3); Dooley & Wood, *supra* note 85, at 40; Mancuso, *supra* note 77, at 14.

[117] JEANNE DOOLEY, NAOMI KARP & ERICA WOOD, OPENING THE COURTHOUSE DOOR: AN ADA ACCESS GUIDE FOR STATE COURTS 1 (1992).

[118] Perlin, *supra* note 19, at 388-98.

stereotyping.[119] Sanism is often invisible and widely socially acceptable. It is based upon myths, superstitions, and deindividualization.

Surrounded by the conformity demanded within most judicial settings, sanist attitudes and behavior carry over into courtroom procedural requirements. Recent studies show that judges rarely inform psychiatric patients in involuntary civil commitment hearings that there is a right to counsel, a right to seek voluntary admission, or a right to appeal.[120] Likewise, it is not uncommon in some jurisdictions to see judges refuse to render a decision while the subject of a commitment or involuntary medication proceeding is present in the courtroom.[121]

Judges frequently engage in sanist decision-making using flawed "ordinary common sense," heuristic reasoning, and biased stereotyping to justify their decisions.[122] This may occur because judges generally demand strict conformity with the rules and procedures they set in the courtroom. In fact, judges are given the power to punish court participants who do not adhere to court procedures and court orders by holding them in contempt of court. Such "punishment" becomes illusionary when applied to people with disabilities who may not be able to conform their behavior to rigid procedures.

The courtroom participation of a litigant with a disability or the calendaring of a case which must be decided pursuant to mental disability law often triggers sanist behavior on the part of judges, lawyers, and other court personnel.[123] One need only look at the language used in judicial decisions to see the bias against individuals with disabilities.[124]

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[119]Michael L. Perlin & Deborah A. Dorfman, *Sanism, Social Science and the Development of Mental Disability Jurisprudence*, 11 BEHAV. SCI. & L. 47 (1993).

[120]Charles Parry & Eric Turkheimer, *Length of Hospitalization and Outcome of Commitment and Recommitment Hearings*, 43 HOSP. & COMMUN. PSYCHIATRY 65, 66 (1992).

[121]I often came across this practice when I represented institutionalized psychiatric patients as an attorney for the New York State Mental Hygiene Legal Service. Imagine the uproar which would ensue if a criminal court judge routinely refused to render trial verdicts while defendants were present in the courtroom.

[122]Perlin, *supra* note 19, at 401.

[123]Perlin & Dorfman, *supra* note 119, at 49. "[D]ecisonmaking in mental disability law cases is inspired by (and reflects) the same kind of irrational, unconscious, bias-driven stereotypes and prejudices that are exhibited in racist, sexist, homophobic and religiously- and ethnically-bigoted decisionmaking . . . distort[ing] mental disability jurisprudence."

[124]Corn v. Zant, 708 F.2d 549, 569 (11th Cir. 1983)(defendant referred to as a "lunatic"); Youngberg v. Romeo, 457 U.S. 307, 318 (1982) (Court noted that even the plaintiff's attorney stipulated that his client was so severely disabled that he would never be able to live and receive services outside the institution). However, ten months after the court decision, Nicholas Romeo moved into a community residence where he receives services and works part-time in the community. Cook, *supra* note 38, at 443; Justice Oliver Wendall Holmes in Buck v. Bell, 274 U.S. 200, 207 (1927) concluded that persons with disabilities were "a menace" who "sap the strength of the state", as well as writing the infamous phrase "three generations of imbeciles are enough."

The same "ism" behavior which Professor Perlin ascribes to persons with mental disabilities is found in the general stereotyping of individuals with other sorts of disabilities. In this article, for lack of a more descriptive term, (sanism sounds as if it denotes only discrimination against persons believed to be "insane" as opposed to the multitude of disorders included in the term mental disabilities) I will use "sanism" to describe the prejudice against people with mental illness, mental retardation, cognitive disabilities, learning disabilities, intellectual impairments, and developmental disabilities.

A case in point is Gerry Jouels, a TV actress and stand-up comedian, who has cerebral palsy. She tells the story of how she was once treated as though she were hearing-impaired, retarded, and socially regressed simply because she was using a wheelchair and speaks with a slight speech impediment. The person persisting in this behavior was a kindly, albeit sanist, airline attendant.[125] Although she tells the story humorously, it is difficult not to feel the pain and humiliation she experienced.

Some commentators attribute benign ignorance, rather than conscious discrimination formed from ill will, to the court's exclusion of people with disabilities.[126] According to the Supreme Court, whatever the underlying rationale, the effects of such behavior "... are as handicapping as the physical limitations which flow from the impairment."[127]

For instance, persons with cognitive or psychiatric disabilities are often excluded from courtrooms when they have difficulty conforming their behavior.[128] As a result of their disability such persons may lack the internal controls to avoid speaking out of turn, may use unacceptable terminology, or engage in other behavior generally considered improper within the courtroom setting.[129] Insensitive and rigid courtroom procedures can lead to unjust treatment of the disabled community.[130]

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[125]Presentation, "The Americans with Disabilities Act: The Key to Change" Hofstra Law School, Hempstead, N.Y. November 6, 1992. (tape in author's private collection). *See also* Susan Stefan, *Silencing the Different Voice: Competence, Feminist Theory and Law*, 47 MIAMI L. REV. 763, 764 (1993)(discussing the stories of two intelligent women with cerebral palsy, who due to their communication impairments, were institutionalized and assumed to be imbeciles.)

[126]Jones, *supra* note 3.

[127]School Bd. of Nassau County v. Arline, 480 U.S. 273, 284 (1987).

[128]*See, e.g.*, Purcell v. Philadelphia, No. 86-7534, 1987 U.S. Dist. LEXIS 850 at *1. (E.D. Pa. Feb. 6, 1987). (pre-trial detainee suffering from Tourette's Syndrome filed a section 1983 civil rights action alleging, among other claims, that the stress of his court appearances produced severe manifestations of his disease resulting in his unwarranted removal from the courtroom.)

[129]One example may be persons with Tourette's Syndrome, a neuropsychiatric disorder characterized by involuntary motor and vocal tics and compulsive thoughts and acts. Common tics include eye blinking, facial movements, shoulder shrugging, and hand movements. The disorder may also be expressed by complicated movements such as squatting, twirling, excessive repeated touching, and self-inflicted hitting or biting. Vocalizations may include snorting, grunting, shrieks or shouts. A few persons with

C. A Possible Case History

Part A, Article II of the Americans with Disabilities Act (Public Services) requires the court system to become sensitive to the needs of courtroom participants. To do so requires the efforts of judges, court administrative staff, and correctional staff, among others, to accommodate defendants, witnesses, jurors, and lawyers in both criminal and civil proceedings. More than just an issue of sensitivity or awareness-training, the ADA demands active commitment and participation on the part of judges and other personnel within the courtroom to effectuate the equal, active participation of all individuals.

Within the courtroom, the burden falls most squarely on the presiding judge to provide the reasonable modifications necessary to assure competent participation during trial. The courts have an obligation to ensure effective communication with disabled courtroom participants subject to the section's "fundamental alterations in the services provided" and "undue burden" exceptions.[131] When determining what kind of accommodation is necessary for the participant with a disability the courts are required to give primary consideration to the requests of the individual.[132]

Imagine for a moment, a person similar to Benny on *L.A. Law*.[133] Here is a person, mentally disabled in some unarticulated way, who holds down a full time job and lives on his own. Despite his capabilities, in times of stress, he relies on familiar people and structure to ensure that he adequately or competently copes with unfamiliar processes and unforeseen consequences. Now consider the difficulties such a person might have if he is suddenly, and most likely involuntarily, thrust into a judicial proceeding. Consider the enormous stress which accompanies a person called to give testimony in a

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Tourette's involuntarily utter profane or anti-social words or make obscene gestures. Dava Sobel, *Diary Tells of Anguish of Tourette Sufferer*, N.Y. TIMES, January 6, 1981, at C1.

[130]ALAN LEVITT, TOURETTE SYNDROME ASSOCIATION, JIM EISENREICH: BACK TO THE DREAM 1-4 (1987) (professional baseball player from rural area had undiagnosed symptoms of Tourette's since age six, and suffered repeated discrimination for behavior which was symptomatic of his disability); Schwartz, *supra* note 81 (detailing the discrimination, prejudice and lack of simple courtesy and accommodations provided for a deaf lawyer in one of the largest New York State courthouses).

[131]See, *supra* notes 106-112 and accompanying text.

[132]28 C.F.R. § 35.160(2) (1993).

[133]Despite my later-stated claim that *L.A. Law* represents T.V. reality rather than real life, a number of other scholars have also referred to *L.A. Law*. Jay A. Canel, *Lessons from L.A. Law*, CBA Rec. (June 1992) at 25; Erik M. Jensen, *The Heroic Nature of Tax Lawyers*, 140 U. PA. L. REV. 367 (1991); Alex M. Johnson, Jr., *Think Like A Lawyer, Work Like A Machine: The Dissonance Between Law School and Law Practice*, 64 S. CAL. L. REV. 1231 (1991); Ronald J. Katz, *Ethical Concerns: Ad Hominem Attacks*, C695 ALI-ABA 351 (1991); David A. Schlueter, *The Twentieth Annual Kenneth J. Hodson Lecture: Military Justice for the 1990's--A Legal System Looking For Respect*, 133 MIL. L. REV. 1 (1991); Stephen Gillers, *Taking LA Law More Seriously*, 98 YALE L. J. 1607 (1989) and Robert Eli Rosen, *Ethical Soap: LA Law and the Privileging of Character*, 43 U. MIAMI L. REV. 1229 (1989).

court of law.[134] Is it at all clear that Benny, a man competent to make life decisions during the course of his daily existence, would be accommodated within the judicial process so that he could stand trial as a criminal defendant[135] or give testimony as a witness?[136] Under the ADA, the assumption is that Benny, or any person with a disability, can be appropriately accommodated. This article goes beyond that initial assumption to query the frequency, duration, and likelihood that the accommodation will be granted.

The scenario with the most debilitating potential is that of involuntary participation in the criminal justice system; where Benny will eventually find himself in a courtroom after enduring his arrest, incarceration, interrogation, and arraignment. What effect does the inflexibility of the judge to accommodate a participant's disabilities have on someone like Benny? In a court which will not explore necessary accommodations, it is likely that the functioning capabilities of the person with a disability will be reduced. This most likely will result in an inability to understand, follow, or actively participate in the proceedings.[137] In effect, what is now illegal courtroom procedural rigidity pursuant to the ADA, can mean that a defendant is

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[134]An increased recognition of clinical legal theory, and the proliferation of lawyering skills courses, has begun to sensitize lawyers to the powerful stress witnesses are under when giving testimony and the impact that stress plays in our judicial process. ROBERT M. BASTRESS & JOSEPH HARBAUGH, INTERVIEWING, COUNSELING AND NEGOTIATING (1990); DAVID A. BINDER, PAUL BERGMAN, & SUSAN PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT CENTERED APPROACH (1991); ABA Task Force on Law Schools and the Profession, *Legal Education and Professional Development*, 1992 (commonly referred to as the MaeCrate Report).

[135]A person being tried for a criminal offense must possess both the "sufficient present ability to consult with his lawyer with a reasonable degree of understanding" and "a rational as well as a factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402 at 402 (1960) (per curiam). Pursuant to this test, a conviction of a defendant who is incompetent to stand trial violates due process. Pate v. Robinson, 383 U.S. 375, 385 (1966). But see Rhode Island v. Burke, 574 A.2d 1217 (R.I. 1990) finding that a prosecutor did not violate the defendant's rights by failing to disclose a witness's learning disability.

[136]Connecticut v. Blasius, 559 A.2d 1116 (Conn. 1989)(victim unable to remember precise dates found competent to testify). But see Ambles v. Georgia, 383 S.E. 2d 555, 557 (Ga. 1989) upholding the constitutionality of a law stating that people "who [do] not have the use of reason" are incompetent to testify as witnesses.

[137]For an example of how a court may accommodate a participant with a disability, *see* People v. Bisnett, 534 N.Y.S.2d 424 (App. Div. 1988)(defendant who had obstructive sleep apea was not unfit to stand trial because the court provided remedies including frequent adjournments, allowing testimony to be read back to the defendant by the court stenographer, and allowing witnesses to be recalled at the defendant's request). Even before the passage of the ADA, Hollywood contemplated reasonable accommodations within the courtroom for a deaf and mute criminal defendant. In SUSPECT (1987), the defendant was given accommodations including computer-assisted transcripts and a pen-based computer system with monitor. The use of both of these systems is supported in the ADA. *See* Tech. Ass't Man., *supra* note 58.

unnecessarily found incompetent to stand trial or that the testimony of a witness with a disability is never heard.

In most states, if a defendant like Benny is suspected of being incompetent to stand trial, he or she will be sent to a psychiatric hospital for somewhere between 30 to 60 days[138] while waiting for a court-ordered physician's evaluation of his or her competency to stand trial.[139] The trial judge's finding of competency[140] pursuant to such an evaluation[141] allows the case to proceed.[142]

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[138]Personal communication with Michael Kusevitsky, a New York City criminal defense attorney (January 12, 1994); Bruce J. Winick, *Restructuring Competency to Stand Trial*, 32 UCLA L. REV. 921, 931 (1985)(30 to 60 days); Gerald Bennett, *A Guided Tour Through Selected ABA Standards Relating to Incompetence to Stand Trial*, 53 GEO. WASH. L. REV. 375, 392 (1985)(15 to 60 days).

[139]This examination requirement is set forth in many state statutes including: ALASKA STAT. § 12.47.110 (1990); ARK. CODE ANN. § 5-2-310 (Michie 1987); CAL. PENAL CODE § 1370 (West 1994); COLO. REV. STAT. § 16-8-112 (1986); CONN. GEN. STAT. § 56d(f) (1958); FLA. STAT. Ch. 916 (1985); GA. CODE ANN. § 17-7-130 (b),(c),(d) (1990); ILL. REV. STAT. ch. 725 ¶ 5/104-17 (Smith-Hurd 1992); IND. CODE § 35-36-3.1(b) (1983); IOWA CODE § 812.4 (1994); KY. REV. STAT. ANN. § 504.110 (1988); MD. CODE ANN. CTS. & JUD. PROC. § 12-105 (1989); MASS. GEN. L. ch. 123, § 16 (1958); MICH. COMP. LAWS § 14.800 (1988); MINN. STAT. § 526.10 (1975); MO. ANN. STAT. § 552.040 (Vernon 1987); NEV. REV. STAT. § 178.425 (1992); N.J. REV. STAT. § 2C:4-6 (1992); N.M. STAT. ANN. § 31-9-1.2 (Michie 1978); N.Y. CRIM. PROC. LAW § 730.60 (McKinney 1985); N.C. GEN. STAT. § 15A-1002 (1984); N.D. CENT. CODE § 12.1-04.1-22 (1985); OHIO REV. CODE ANN., § 2945.38 (Anderson 1994); OKLA. STAT. tit. 22 § 1175.6 & .7 (1986); OR. REV. STAT. § 161.327 (1993); R.I. GEN. LAWS § 40.1-5.3-3 (f) (1956); S.C. CODE ANN. § 44-23-430 (1976); S.D. CODIFIED LAWS ANN. § 23A-10A-4 (1988); TEX. CODE ANN. §46.02(5) (1981); TENN. CODE ANN. §§ 39-11-501; 33-7-301 (1988); UTAH CODE ANN. § 77-15-6 (1953); VA. CODE ANN. § 19.2-169.2 (Michie 1950); WASH. REV. CODE § 10.77.090 (1990); W. VA. CODE § 27-6A-2 (1992); WIS. STAT. ANN., § 971.14(5) (West 1985); WYO. STAT. § 7-11-3-03 (1977).

[140]Many jurisdictions have a bifurcated process where the judge who hears the mental health docket makes a determination that the defendant is competent and returns the case to the trial judge who then makes an independent determination of competency. By the time the second hearing is held, the defendant, who is often housed with the general prison population rather than at a forensic psychiatric hospital or unit, often regresses so that he is found incompetent to stand trial by the trial judge and is returned to the psychiatric center. This revolving door syndrome may continue for years. For an especially egregious example, read United States v. Alexander, 471 F.2d 923 (D.C. Cir. 1970), *cert. denied*, 409 U.S. 1044 (1972).

[141]Research has shown that overwhelmingly, judges follow the recommendations of the examining physicians with regard to competency determinations. David A. Harris, *AKE Revisited: Expert Psychiatric Witnesses Remain Beyond Reach For The Indigent*, 68 N. C. L. REV. 763, 774 (1990). However, Harris also notes that doctors at state hospitals almost uniformly evaluate defendants as competent because state hospitals are "notoriously over-crowded," resulting in psychiatrists spending inadequate time with each defendant. *Id.* at 783 n.85.

[142]In 27 states, the defendant has the right to a hearing to controvert the recommendations of the examining doctors. In such a hearing, the defendant may present his or her own expert witnesses, or present testimony by the defendant or defendant's counsel. *E.g.*, W. VA. CODE § 27-6A-2 (1974).

The competency determination has a profound effect upon the defendant's subsequent liberty as well. At the arraignment the judge may release the defendant on his or her own recognizance[143] or set reasonable or unreasonable bail.[144] The judge may revoke the defendant's release or increase bail for good cause at any time during the proceedings. If incarcerated, the defendant may be held with the general prison population where it is likely that he or she will be the target of abuse.[145] Alternatively the defendant may be put in a cell reserved for inmates perceived as requiring psychiatric observation or monitoring. The impact of these determinations on the individual cannot be overrated and are often dependent upon the skills of the defense lawyer,[146] the sensitivity of the judge, and the level of notoriety the case engenders.[147]

If the defendant is found incompetent, he or she remains in, or is sent to, a psychiatric center until such time as he or she is found competent to stand trial.[148] Although defendants often remain in psychiatric centers for years waiting to gain competency,[149] at some point, when it is believed that the defendant will not become competent to stand trial, the charges must be

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[143]When a criminal defendant is released on his or her own recognizance ("ROR"), that defendant is entrusted by the court to appear when requested, without the threat of losing bail money.

[144]The reasonableness or unreasonableness of bail is a subjective standard determined in part by the severity of the charges, the likelihood of the defendants attendance at court proceedings and the economic circumstances of the defendant. United States v. Salerno, 481 U.S. 739 (1987)(the purpose of bail is to reasonably assure the appearance of the accused and the safety of persons in the community).

[145]Fred Cohen & Joel Dvoskin, *Inmates with Mental Disorders: A Guide to Law and Practice*, 16 MENTAL & PHYSICAL DISABILITY L. REP. 339, 340 (1992).

[146]Other authors have written on the distinctly poor level of representation persons with disabilities receive in commitment hearings. Perlin, *supra* note 19, at 404. In terms of representation in criminal matters, a large percentage of criminal defense attorneys view these cases as "bothersome," "unpleasant," or "too difficult," and look forward to their eventual loss among the cracks of the system. Personal Communication with Amy Porter, a defense attorney in New York City who specializes in cases involving people with disabilities, January 14, 1994.

[147]From my experiences in representing mentally disabled defendants, prosecutorial offices and individual judges are influenced by extensive media coverage.

[148]Grant H. Morris & J. Reid Meloy, Ph.D., *Out of Mind? Out of Sight: The Uncivil Commitment of Permanently Incompetent Criminal Defendants*, 27 U.C. DAVIS L. REV. 1 (1993).

[149]Two incredible cases are reported in Morris & Meloy, *id.* at 3. The first involved a 19-year old who, in 1901, was found incompetent to stand trial and was committed to Matteawan State Hospital, a maximum-security correctional facility in New York. In 1965, the 83 year old individual was still a patient, theoretically awaiting restoration of competence. The second began in 1896, when a 24 year old man was found incompetent to stand trial and was committed to a similar institution in Massachusetts. He remained there until his death, at age 87, in 1959.

dismissed and the accused is held pursuant to civil commitment standards.[150] By this time, unless life does imitate T.V., Benny has lost his job and very often his home.[151] He is thus precluded from the security of the people and structure he knows and the support network he needs to maintain competent functioning.[152] Such dire straits need not occur.

In the courtroom, not all disabilities may be immediately observable to the judge.[153] Is it incumbent upon the person with disabilities to request accommodations? The statute makes no mention of an affirmative duty to assert one's disabled status. However, there must be a determination that the participant seeking an accommodation is a "qualified person with a disability."[154] It seems contrary to the spirit of the Act to ask a judge to assume the existence of a disability or the severity of a disability without input from the person in need of accommodations. Likewise, the ADA allows for the person with disabilities to choose not to avail himself or herself of "an accommodation, aid, service, opportunity or benefit."[155] But if that person is a criminal defendant competing considerations may have to be acknowledged.

The Supreme Court has held that due process is violated if court proceedings are held when there is doubt regarding the defendant's competency to proceed.[156] The Court has not articulated the nature and amount of evidence necessary to trigger judicial doubt and has noted that states may prescribe individual standards.[157] In practice, criminal defense attorneys and judges often define competency in different ways depending on the severity of the case, trial strategy, and the expected disposition.[158]

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[150]Jackson v. Indiana, 406 U.S. 715 (1972). Even though over twenty years have passed since the *Jackson* decision, states are remarkably inconsistent in implementing *Jackson*. Morris & Meloy, *supra* note 146, at 32-33 (stating that 15 states circumvent *Jackson* while an additional 13 states and the District of Columbia ignore *Jackson* and allow the indeterminate commitment of permanently incompetent defendants. The authors conclude that 28 states and the District of Columbia have responded inappropriately to the *Jackson* decision).

[151]John P. Petrila, *Redefining Mental Health Law: Thoughts on a New Agenda*, 16 LAW & HUM. BEHAV. 89, 100-101 (1992).

[152]Recent research indicates a correlation between homelessness, schizophrenia and substance abuse, and rates of criminal activity. Barry J. Richman, Antonio Convit, & Daniel Martell, *Homelessness and the Mentally Ill Offender*, 37 J. FORENSIC SCI. 932 (1992).

[153]Even with the most diligent of screening efforts inmate disorders may not be detected or diagnosed because the symptoms are subtle or easily hidden. Cohen & Dvoskin, *supra* note 148, at 465.

[154]42 U.S.C. § 12131(2) (1990).

[155]42 U.S.C. § 12201(d) (1990).

[156]Drope v. Missouri, 420 U.S. 162, 180 (1975); Pate v. Robinson, 383 U.S. 375, 385 (1966).

[157]*Drope*, 420 U.S. at 172-3; *Pate*, 383 U.S. at 385.

[158]A study completed by members of the Institute of Law, Psychiatry & Public Policy at the University of Virginia showed that out of 202 felony cases defense attorneys had

A request for a competency examination may be made by the defense attorney, the prosecutor, or the judge. The ABA Criminal Justice Mental Health Standards specify that the judge has the ultimate responsibility for raising and determining the competency issue whether or not it was affirmatively raised by either party.[159] The Criminal Mental Health Standards were promulgated in 1984, well before the passage of the ADA. Does the ADA now impose an additional burden on the presiding judge to determine what accommodations may be necessary to maintain the defendant's competency to stand trial? If so, must a hearing be held in addition to, or in conjunction with, a competency hearing held pursuant to the applicable state statute?

Competency hearings always include the verbal testimony or written reports of medical experts. It seems likely that either a combined or bifurcated hearing would rely upon expert testimony on the issues of competency and accommodations. However, the DOJ regulations show a preference for obviating the need for physician testimony.[160] Should two separate hearings, each with different standards of proof, be held? At best, two separate hearings might resolve the evidentiary contradiction, but at the expense of judicial economy and without serving any fact-finding purpose.

The ADA seeks to legislate sensitivity to the issues facing a courtroom participant with disabilities by placing the burden of adequately responding to the needs of the individual in the lap of the courts. Educated courts must accept this burden to ensure that the spirit of the Act is upheld. To successfully integrate all courtroom participants, judges must be flexible and allow the incorporation of reasonable alterations to the courtroom procedures and practices while not offending the integrity of the legal process.

D. Courtroom Accommodations

The last two decades have seen a growing sensitivity to the architectural barriers faced by physically challenged persons.[161] Ramps, water fountains

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significant doubts regarding the competency of their clients in 15% of their cases. However, they only referred 8% of those clients for evaluation. Evidence showed that the greater the seriousness of the offense, the more likely the attorneys were to refer for clinical evaluation. INSTITUTE OF LAW, PSYCHIATRY & PUBLIC POLICY, REPORT OF ACTIVITIES 16 (1991). Keri A. Gould, *Therapeutic Jurisprudence and the Arraignment Process (The Defense Attorney's Dilemma: Whether to Request a Competency Evaluation?)*, 16 INT. J. L. AND PSYCH. (1994) ("When confronted with the ... murky decision of whether to ask for a competency hearing, defense attorneys are at risk when making a visceral response. Residual or even active symptoms of mental illness alone do not provide a basis for a defense attorney to determine that a client is incompetent to stand trial.")

[159]ABA STANDING COMMITTEE ON ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE, CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 7-4.2(a), 7-4.4(a) (1984).

[160]The DOJ specifies that physician testimony is not needed to determine whether a person is a direct threat to the health or safety of others. DOJ commentary, *supra* note 40, at 448.

[161]Cook, *supra* note 38, at 396.

accessible to people using wheelchairs, and parking spaces reserved for persons with disabilities are commonly accepted neighborhood sights. People tend to recommend commonly accepted solutions to problems which arise during the course of their daily activities. Judges are no exception. Judges often think in terms of commonly accepted methods of accommodation when determining individual needs within the courtroom.[162] Therefore, the courtroom participant who is not physically challenged, but has a mental or emotional impairment or a developmental disability,[163] has a more difficult task when seeking accommodations.[164]

Persons who are mentally retarded[165] or have severe learning disabilities[166] may have difficulties in comprehension, social interaction, behavior, and movement.[167] In addition, people who are retarded may evidence difficulties carrying out activities of daily living, including the regimens surrounding personal hygiene, appropriate dressing, transportation, and money management. Individuals with psychiatric illnesses may experience delusions or hallucinations, high levels of distractibility, decreased personal hygiene, social isolation or withdrawal, strange behavior, confusion, anxiety, poor

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[162]This tendency may be likened to the psychological construct of cognitive dissonance. Cognitive dissonance is the tendency of individuals to reinterpret information or experiences so as to avoid internal conflict and conform to external expectations. Keri A. Gould, *Madness in the Streets Rides the Wave of Sanism* 9 N.Y.L. SCH. J. HUM. RTS. 567, 575 (1992).

[163]The term developmental disability is generally defined to include any disability which is the result of mental retardation, cerebral palsy, autism, and epilepsy. James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 412 (1985).

[164]Three law students with learning disabilities recently filed suit pursuant to the ADA seeking reasonable accommodations when taking the February 1994 New York State Bar Examination. The New York State Board of Law Examiners has been accused by the Justice Department's Civil Rights Division of unreasonably denying special accommodation and discriminating against people with disabilities. The accommodations included double time to take the exam, a separate room for taking the examination, and use of a computer with word processing and spell checking capacity. Deborah Pines, *Bias Against Disabled Charged in Bar Exam*, N.Y.L.J., Feb. 17, 1994, at 1. The requested order was denied in each of the separately filed cases. N.Y.L.J., Feb. 23, 1994, at 1 c.2.

[165]Mental Retardation, as defined by The American Association on Mental Deficiency, and not codified in virtually every state, refers to subaverage, general intellectual functioning which originates during the developmental period and is associated with deficits in adaptive behavior. David L. Rumley, *A License to Kill: The Categorical Exemption of the Mentally Retarded from the Death Penalty*, 24 ST. MARY'S L.J. 1299, 1314 (1993).

[166]Learning disabilities is a generic term that refers to a heterogeneous group of disorders manifested in the acquisition and use of listening, speaking, reading, writing, reasoning or mathematical abilities. Hammil, Leigh, McNutt & Larson, *A New Definition of Learning Disabilities*, 4 LEARNING DISABILITY Q. 336 (1981).

[167]Haggard, *supra* note 77, at 363.

insight and judgement, and impaired interpersonal relations.[168] People who have mental disabilities may have difficulty maintaining stamina, managing time pressure, focusing on multiple tasks, or responding to negative comments.[169] In addition, some courtroom participants with mental disabilities may be experiencing the negative side effects of psychotropic medications.[170]

The purpose of psychotropic or nueroleptic drugs is to alter the chemical balance of the brain leading to beneficial changes in the individual's cognitive processes.[171] While therapeutic effects of antipsychotic drugs[172] have been documented, a significant number of people taking these drugs experience serious and even fatal side effects. Individual adverse reactions to medication can affect the perceptions formed by the judge and jury about the individual.[173] The serious side effects include acute dystonia (severe involuntary spasms of the upper body, tongue, throat, or eyes), akathesia (motor restlessness and inability to sit still), neuroleptic malignant syndrome (can lead to death by cardiac dysfunction), and tardive dyskinesia (a generally irreversible neurological disorder characterized by involuntary uncontrollable muscular movements often in the facial area).[174] Persons displaying these side effects may appear to be disinterested or withdrawn, or in the alternative, perpetuate a juror's or judge's perception that someone with uncontrolable or bizarre body movements is incompetent or crazy.

The ADA sets forth explicit procedural requirements which create generalized accommodating conditions within the courthouse. For instance, each court had to perform a self-assessment of its facilities to determine

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168 *Id.*

169 Mancuso, *supra* note 77, at 4.

170 Rivers v. Katz, 495 N.E.2d 337, 339 n.1 (N.Y. 1986).

171 Washington v. Harper, 494 U.S. 210, 229 (1990).

172 Antipsychotic drugs are also known as neuroleptic or psychotropic drugs and are often used for treating psychiatric disorders such as schizophrenia. Common drugs of this type go under the names of Thorazine, Haldol, Prolixon, Melleril and Navane. Lithium, the drug commonly used to treat bipolar disorder, is often included within this category of medications.

173 A number of comments to ADA regulation § 35.130, General Prohibitions Against Discrimination, asked for an amendment which would require training for law enforcement personnel to recognize the differences between criminal activity and the effects of seizures and other disabilities such as mental retardation, cerebral palsy, traumatic brain injury, mental illness, or deafness. Several commentators gave personal statements about the abuse they had been subjected to by law enforcement personnel. The DOJ did not include such a training requirement because it noted that a number of states have adopted the Uniform Duties to Disabled Persons Act. DOJ commentary, *supra* note 40, at 450-51.

174 *Washington*, 494 U.S. 229-30.

whether they were in statutory compliance.[175] The self-assessment was to be done within six months of the date the Act went into effect. Each court had to formulate a plan to address non-compliance by July 26, 1992. Any structural changes demanded by the Act were to be completed by Jan. 26, 1995.[176]

Courts must provide a continuous, unobstructed route from points where public transportation serves the court facility and from the parking areas to the main court where services are conducted. Along this route, courts must eliminate architectural barriers and communication barriers that impede a disabled individual's access to the court facility and use of the court facility.[177]

Courts must also perform a self-assessment of all current services, policies, and practices, and the effects thereof, within one year of the ADA effective date.[178] The courts must provide interested parties with an opportunity to participate in the courts' self-assessment by submitting comments.[179] Each court which employs more than fifty people must keep its records for at least three years and a list of interested parties consulted, a description of areas examined and problems identified, and a description of any modifications made.[180]

Courts must develop grievance procedures and designate an employee responsible for ADA compliance and for handling grievances.[181] Voluntary compliance between parties is preferred for handling grievances.[182] When that is not attainable, alternate dispute resolution methods should be attempted.[183] If the problem persists, then a complaint may be filed with the appropriate federal agencies[184] or a private party may bring a suit against the opposing party.[185] The implementation of these accommodations in the court system alerts court employees to promote individual accommodations within the courtroom and suggests that open communication between the individual with a disability and the court is encouraged and necessary for the successful modification of courtroom procedures.

Furthermore, the ADA encourages personnel to understand and be sensitive to the range of disabilities and the range of possible accommodations. This can

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175 Dooley & Wood, *supra* note 85, at 40.

176 *Id.*

177 *Id.*

178 28 C.F.R. § 35.105(a) (1993).

179 28 C.F.R. § 35.105(b) (1993).

180 28 C.F.R. § 35.105(c) (1993).

181 28 C.F.R. § 35.107 (1993).

182 28 C.F.R. § 35.173 (1993).

183 28 C.F.R. § 35.176 (1993).

184 28 C.F.R. § 35.170 (1993).

185 28 C.F.R. § 35.172 (1993).

be accomplished by inviting members of local disability groups to speak with court staff about the needs of people with disabilities, stereotypes, and available resources.[186] Training in communication techniques should be included in court personnel training. Such training should focus on:

(1) always treating people with dignity and respect;
(2) offering verbal clues to a person who is visually impaired;
(3) establishing eye contact before speaking to a person who has a hearing impairment and speaking to the person while facing him or her directly, even if there is an interpreter present;
(4) trying to maintain equal eye level with a person in a wheelchair;
(5) speaking slowly, clearly and in concrete terms to a person with mental retardation or an elderly person;
(6) using appropriate facial expressions and check to ensure that the person understands what you are saying;
(7) using open-ended questions to ascertain the level of conceptual understanding;
(8) avoiding asking questions like "Do you understand?" which will often generate an automatic "yes" response;[187] and
(9) using community resources and governmental agencies or service suppliers to identify barriers and removal strategy or help courts obtain accommodations technology, and locate interpreters, court reporters who do instantaneous translation, architects with expertise in disability access, and specialists in cognitive and educational levels to redesign court forms.[188]

The application of the ADA to courtroom procedures opens numerous inquiries. Generally, the request for an accommodation will be made by the person seeking the accommodation or someone authorized to speak for that person. The request is made to the presiding judge who will rule on it. However, the regulations state that the decision to refuse an accommodation must be made by a high-level official who has budgetary authority and responsibility for making spending decisions.[189] Does this mean that the trial judge's decision must be reviewed by the chief administrative judge? Is there then a right to an automatic, immediate appeal, much in the way that a writ of habeas corpus is initiated?

An additional question arises about the modality of the request. Must the request be made on paper or may it be oral? The ADA is silent regarding specific

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186Dooley, Karp & Wood, *supra* note 117, at 22.

187*Id.* at 22-23.

188*Id.* at 47.

18928 C.F.R.§ 35.150(a)(3) (1993).

procedural aspects of requesting accommodations.[190] However, it seems reasonable to assume that a written record of the request should always be made following local motion practices. If this is impossible, at the very least, the person requesting the accommodation should place the oral request on the court record.

The ADA raises several significant questions regarding the application of Title II to courtroom procedures. The program accessibility requirement of Title II derives from § 504 of the Rehabilitation Act and states that each program or service "when viewed in its entirety, must be readily accessible."[191] Therefore, public entities, unlike private facilities open to the public under Title III, are not necessarily required to make each existing element of a program or service accessible as long as the program as a whole is accessible.[192]

There are problems adjusting this theory to the segregation faced by participants to the court process. While it may be permissible to substitute a courtroom in order to accommodate a participant with a disability,[193] is it permissible to switch judges? What if a particular judge is persistently unwilling to grant reasonable accommodations within his or her courtroom? Is it acceptable, under the ADA, to transfer the case to another judge? Simply changing judges does not square with the intent of the legislation. The provisions of the Act are intended to prohibit exclusion and segregation of individuals with disabilities based on biased beliefs and the denial of equal opportunity. Simply switching judges does nothing more than allow discrimination based upon "presumptions, patronizing attitudes, fears and stereotypes about individuals with disabilities"[194] to flourish in a banished courtroom in a system of justice which purports to be nondiscriminatory.

This is not permissible under the ADA. The regulations prohibit a public entity from using "criteria or methods of administration" that "perpetuate the discrimination of another public entity if both public entities are subject to common administrative control or are agencies of the same state."[195] Criteria and methods of administration refer to official written policies as well as actual practices.[196] In this case, all the courtrooms and all the judges within each state or local system are subject to common administrative control. Therefore, it is impermissible to allow discriminatory practices to be tolerated in even one courtroom. To allow otherwise would merely make the court system an

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[190]Once the accommodation is denied, the regulations lay out the specific procedures for making the complaint. 28 C.F.R.§ 35.170 (1993).

[191]28 C.F.R. § 35.150 (1993).

[192]Dooley, Karp & Wood, *supra* note 117, at 9.

[193]Tech. Ass't Man., *supra* note 58, at 19.

[194]DOJ commentary, *supra* note 40, at 451.

[195]28 C.F.R. § 35.130(b)(3)(iii).

[196]DOJ commentary, *supra* note 40, at 452. This standard is consistent with the interpretation of § 504 in Alexander v. Choate, 469 U.S. 287 (1985).

accomplice in "steering" the individual with a disability to one judge or away from another.

Even if permissible, such steering would be a logistical nightmare for the administrative judge and would surely open up charges of judge-shopping. Accusations that a disability has been manipulated to get to or away from particular judges are certainly foreseeable. Most importantly, to allow judges to engage in discriminatory, sanist behavior while segregating people with disabilities directly contradicts the tenor of the statute. The ADA seeks to enforce institutional change, not simply to remove people with disabilities from the paths of systemically tolerated bigotry.

Most accommodations need not be expensive or especially time intensive. Perhaps the two most widely acknowledged aids or services are the provision of interpreters and removal or alteration of the physical space in the courtroom. Architectural barriers may include the widening of courtroom walkways to accommodate people in wheelchairs or installing ramps so that jury boxes or witness boxes are accessible. Other modifications may include modifying the courtroom facilities to enhance the visibility of the judge, witnesses, and interpreters; provide improved lighting; enhance the acoustics; and use movable furniture to make the courtroom more secure, less formal, and to allow for wheelchairs.[197] If the room cannot be made accessible, then the proceedings must be moved to a room which can accommodate the individual.[198] Physical barriers must be removed if necessary, but extensive retrofitting is not required if programs can be made accessible in other ways.[199]

To uphold the intent of the ADA, courts will have to be more willing to allow other types of interpreters or court transmitters. Under the ADA, the term interpreter refers to more than the foreign language or sign language interpreter. A "qualified interpreter" means an interpreter who is able to interpret effectively, accurately, and impartially both receptively and expressively using any necessary specialized vocabulary.[200] A more accurate and inclusive term is court transmitters. Court transmitters may be used by people who speak English but, due to severe speech defects or developmental disabilities, cannot follow or respond adequately without someone to "transmit" the proceedings.[201]

This issue has arisen specifically in the context of the admissibility of evidence obtained through the technique of "facilitated communication." Facilitated communication is a technique where the facilitator places her hands

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[197]Dooley, Karp & Wood, *supra* note 117, at 9.

[198]Tech. Ass't Man., *supra* note 58, at 19.

[199]28 C.F.R. § 35.150 (1993).

[200]28 C.F.R.§ 35.104 (1993).

[201]Two separate courts in New York ruled that under the test of Frye v. United States, 293 F.1013 (D.C. Cir. 1923), there was insufficient research on the method to allow the statements as evidence. Jenny S. v. Mark and Laura, 593 N.Y.S. 2d 142, 151 (N.Y. Fam. Ct. 1992); In the Matter of M.Z., 590 N.Y.S. 2d 390, 395 (N.Y. Fam. Ct. 1992).

against or under the individual's hands or arms to give resistance so that the person is able to point or tap letters on a keyboard to spell a message. Individuals who use this mode of communication are usually totally or partially non-verbal. Opponents contend this method is invalid because of conscious or unconscious manipulation by the facilitator. The role of facilitated communication remains in doubt.

But what about the person, due to his or her disability, who has problems conforming his or her behavior to that normally expected in a courtroom? Suppose a trial participant has Tourette's Syndrome, a neuropsychiatric disorder characterized by involuntary motor and verbal tics and compulsive thoughts and acts. What types of accommodations are viable within the courtroom?

The court can either ignore the outbursts or allow the trial participant to take frequent breaks where he or she may be alone to "release" the florid expressions of the outbursts which where being held in while court was in session. Courts may grant a stressed-out participant frequent breaks to be with a support person, such as a friend, relative, therapist, or lawyer. In addition, courtroom observers can be limited. The judge can break instructions into small steps, provide positive feedback to the individual with a disability, and be attentive to the constraints of the individual's attention span. Another modification might be to arrange for morning and afternoon transcripts for a participant who is confused by verbal instructions or who has short-term memory loss.

A recent case explored courtroom accommodations for a disabled person. In the Glenn Ridge, N.J. sexual assault case, the victim, a mildly retarded woman with an IQ of sixty-four, was seventeen at the time of the attack. After a nine week trial, three high school football players were found guilty of committing degrading sexual acts involving a stick, a bat, and a broom. During the trial prosecutors asked for special courtroom arrangements to provide a non-intimidating atmosphere when the victim testified. The requests included reserving portions of the front two rows of seats in the courtroom for the victim's family and friends, requesting a half-hour recess after each hour of testimony, and requesting that defense counsel remain at their table when making objections and that they stay a "reasonable" distance from the victim when cross-examining her. The judge denied the last request to impose restrictions on the movements of the defense lawyers, but granted the other requests.[202]

Attorneys, advocates, and court personnel can take several steps throughout the court proceedings to accommodate individuals with disabilities. Prior to the actual court proceeding, it may be helpful to:

(1) outline the court's agenda prior to the court appearance;
(2) have the judge explain each procedure by breaking it down into individual steps;

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[202]Kantrowitz, *supra* note 78, at 27; Robert Hanley, *Woman Gives Her Account in Abuse Case*, N.Y. TIMES, Dec. 10, 1992 at B1; and Robert Hanley, *Special Steps Asked for Figure Central to Sex Assault Trial*, N.Y. TIMES, Dec. 2, 1992 at B6.

(3) contact local disability organizations for assistants to help persons with disabilities who need special support in the courtroom. Permit support persons in all proceedings and allow them to sit with the individual at counsel's table; and
(4) encourage persons with disabilities to familiarize themselves with the courtroom layout in advance.

During the court proceedings, the judge can:

(1) provide a soundproof carol or small conference room to enable the participants to engage in private conversations with assistants, companions, readers, and attorneys;
(2) allow the use of communication boards; and
(3) grant recesses to allow an attorney or support person to explain the proceedings, calm an agitated person, give needed respite, or take frequent bathroom breaks.[203]

I am not suggesting that all people provided with assistance will be able to participate at all times during the trial process. However, if judges and other court personnel are educated in addressing the ways in which rules, practices, or procedures negatively impact disabled participants, we can significantly lessen the tortuous trips made through the revolving court door.

IV. CONCLUSION

The Americans with Disabilities Act is a means of achieving the integration of peoples with disabilities into the daily fabric of American life. One critical component of that life is the active participation in our court system whether it be as a juror, lawyer, defendant, or plaintiff. Prior to the passage of the ADA, there was no law which mandated state court antidiscrimination in our judicial system. Now is the time to use the ADA to its fullest extent so that all "qualified people with disabilities" can be accommodated in the courtroom. By doing so, cases involving participants with disabilities can have closure while affording the person with the disability a significant level of dignity derived from his or her participation in the justice system.

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[203]These suggestions are a composite of ideas and practices gleaned from my own experiences as an attorney representing people with disabilities, the testimony of Dr. Robert Sadoff in an educational tape made by Professor Michael Perlin at New York Law School in which I play the defense attorney (The Case Of Darren Daniels)(on file with author), and the ideas and suggestions expressed so clearly and concisely in Dooley, Karp & Wood, *supra* note 117. Many of the ideas, practices and suggestions overlapped and repeated each other.