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Reforming Disability Nondiscrimination Laws: A Comparative Perspective

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REFORMING DISABILITY NONDISCRIMINATION LAWS: A COMPARATIVE PERSPECTIVE†

Stanley S. Herr*

Comparing the law and policies of other countries concerning disability rights to ours can help us understand how we may strengthen those rights and heighten compliance with nondiscrimination laws. Since it took effect in 1992, the Americans with Disabilities Act (ADA) has been a leading example of such comprehensive legislation on behalf of people with disabilities. Along with the United Nations Standard Rules on Equalization of Opportunities for Persons with Disabilities, the ADA has inspired many countries to develop their own disability nondiscrimination laws and remedial agencies. This process must work in both directions, however, and laws and agencies from other countries must inspire further improvement in the United States' system. This Article compares alternative mechanisms to resolve complaints of discrimination in employment, government services, and other spheres of public life. Such approaches include negotiation, mediation, arbitration, administrative remedies, litigation, and the use of national ombudsmen or equal rights commissions.

The Article focuses on reforms occurring in Israel, a country that often looks to the United States for models of progressive social legislation. Israel's Equal Rights for Persons with Disabilities Law (ERPD) contains noteworthy advances in its statutory text, but its implementation is still in its early stages.

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Editorial Note:

Because Professor Herr's death occurred before the completion of the Article, the editors have allowed leeway, liberty, and flexibility by way of citation support and format. Many of the sources used for this article such as all of Professor Herr's personal interviews, all of the foreign sources, and any similar sources not readily accessible can be found on file at the Archives and Library on Disability, The Coleman Institute for Cognitive Disabilities, University of Colorado System, Department of Psychiatry, Boulder, Colorado. Readily available material such as American case law, law journal articles, and the like, are, of course, not included at the Institute. Please use this general footnote as a point of reference for finding such sources as it serves as a replacement for marking every relevant source as "on file" at the end of each footnote. This was done as the number of "on file" sources is substantial.

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When examining the experience in other countries, American lawyers and policy-makers gain a richer perspective on the progress made under the ADA and the Standard Rules; they also identify additional reforms to pursue. To this end, the Article discusses not only the United States and Israel, but also the United Kingdom, and presents a table of the laws of forty-one countries that legislated disability nondiscrimination provisions. These countries' experiences have influenced the international disability rights movement and offer lessons to share among countries struggling to eliminate disability-based discrimination.

Reform proposals suggest ways to strengthen or create high-level government mechanisms, to stress the use of alternative means of implementation and enforcement, to develop selective litigation strategies, and to encourage other countries to enact or apply disability nondiscrimination norms. These reforms may not only contribute to the international growth of disability rights, but also help include people with disabilities in the fabric of social, economic, and cultural life.

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INTRODUCTION

Disability discrimination law reflects the character of a people. In the United States, the Americans with Disabilities Act of 1990 (ADA)¹ is highly specific and relies heavily on individual, or private, means of enforcement. In Israel, the Equal Rights for Persons with Disabilities Law of 1998 (ERPDL)² is relatively new, still in the process of development, and relies on a governmental commission (the Israeli Commission for Equal Rights for Persons with Disabilities) for enforcement. Like Israel, the United Kingdom has a Disability Rights Commission (established by the Disability Discrimination Act of 1995 (DDA)),³ and Sweden has a Disability

1. 42 U.S.C. §§ 12101-213 (1994).

2. Equal Rights for Israel for People with Disabilities Law, 5758-1998 (1999) (Isr.), available at http://www.justice.gov.il/structure/foreign/files_eng.htm (last visited Mar. 5, 2002).

3. Disability Discrimination Act, 1995, c. 50 (Eng.). For example, the United Kingdom launched the Disability Rights Commission on April 26, 2000 to oversee progress and encourage good practices dealing with "disabled persons" as employees, customers, and renters. See *infra* Parts II.A.3.ii, II.B.2, II.C.2, III.2, and III.3 (discussing these oversight agencies and their relevance to proposed reforms in the United States).

Ombudsman responsible for oversight of disability nondiscrimination laws.⁴

This Article focuses on the struggles in various countries to implement laws adopted to remedy discrimination based on disability and to recognize other disability rights. These struggles to enforce national disability laws led to a campaign for effectively designed international treaties on disability rights.⁵ A United Nations (UN) co-sponsored experts' meeting in Hong Kong concluded that the UN, its member states, and disability rights organizations, "should initiate the process for the adoption of an international treaty dealing specifically with the human rights of people with disabilities."⁶ On a regional level, a treaty is now open for ratification: the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities.⁷ Unlike "soft law" declarations, regional and UN treaties are enforceable and have teeth.⁸ This Article emphasizes national disability nondiscrimination laws not because they are the only social legislation that face hurdles and difficulties in implementation, but because in many countries such laws are the most conspicuous form of human rights protection for people with disabilities. The rights-based model of disability⁹ has also become a

4. Law Prohibiting Discrimination Against Disabled Persons in Employment, 1999:132 §§ 17 (1999) (Swed.).

5. See, e.g., San Jose Declaration, A/CONF.157/LACRM15; A/CONF.157/PC 58, at ¶ 17; *Oral Intervention by Disabled Peoples' International at the UN Commission on Human Rights*, 52nd Sess. (1996); LEANDRO DESPOUY, HUMAN RIGHTS AND DISABLED PERSONS (1993) UN Sales No E.92XIV.4, at ¶ 281.

6. Stanley S. Herr, *UN Symposium on International Disability Rights*, 7 LAW & HEALTH CARE NEWSL. 4 (University of Maryland School of Law, College Park, MD) (Spring/Summer 2000). Such a drafting process should be open and inclusive, taking into account the interests of all persons with disabilities, and involving such persons as principal participants in that process.

7. Org. of American States, AG/RES, 1608 (XXIX-0199) (June 7, 1999). Costa Rica, Mexico and Chile have ratified the Convention. Twenty countries have signed the Convention; the United States has not. The ADA is credited by one commentator as influencing this instrument and other Latin American laws on disability rights. See Rodriguez Jiminéz, *The Americans with Disabilities Act and its Impact on International and Latin American Law*, 52 ALA. L. REV. 419, 420 (2000).

8. "Soft law" refers to a body of unformalized but internationally recognized norms that have become so well-accepted that they now constitute enforceable international law, e.g., wartime prohibitions against torture or mistreatment of citizens.

9. "Rights based" models refer to systems of law predicated on empowerment through guarantees of enforceable rights. Earlier models emphasized social welfare protections to "care for" the basic needs of persons with disabilities: food, shelter, education, work, and health care. See, e.g., Ilene R. Zeitzer, *Appendix II: The Replies, USA, US Social Security Administration*, A Discussion on the Views on Human Rights of People with Disabilities 82 (Social Commission Rehabilitation International, Erkki Kempainen ed., 1999) ("Probably most Americans with disabilities would agree that the greatest human rights success in the United States for people with disabilities was passage, in 1990, of the Americans with Dis-

prime focus for disability studies as well as for human rights research.¹⁰

This Article compares disability nondiscrimination laws in the United States,¹¹ Israel,¹² and the United Kingdom.¹³ It stresses the Israeli experience in particular because the ADA inspired Israel's disability nondiscrimination law. This Article shows that the three countries share a common interest in the greater use of alternative dispute resolution methods to minimize, if not eliminate, disability discrimination.

Part I explores the origins, provisions, and current status of the ADA. It also offers a critique of how the ADA promotes equality between citizens with and without disabilities. Part II traces the creation and development of disability nondiscrimination laws outside the United States, focusing on Israel and the United Kingdom. Notably, this Part highlights the parallels between the United Kingdom's Disability Rights Commission and Israel's Commission for Equal Rights for Persons with Disabilities and the examples each provide for an alternative mode of implementation. To provide an overview of such laws in other countries, Part II also summarizes the table of disability nondiscrimination laws in forty-one countries found in the Appendix. Part III focuses on the benefits of a comparative perspective in analyzing the strengths and weaknesses of litigation-based dispute resolution under the ADA and on alternative mechanisms for its application and enforcement.¹⁴ Part III also proposes reforms in the United States that build on the ADA's bedrock of political support. The Conclusion identifies implications of this research for the international disability rights movement and its efforts to combat disability discrimination around the globe.

This Article has particular timeliness and relevance given the general antipathy the United States Supreme Court has exhibited in recent decisions affecting litigation-based remedies under the

abilities Act (ADA). The reason is that the ADA extended civil rights protections to all people with disabilities in virtually all the major areas of life.”)

10. DAVID JOHNSTONE, AN INTRODUCTION TO DISABILITY STUDIES 21–23 (1998) (analyzing the strengths and limitations of the Disability Discrimination Act (DDA) and citing the ADA as an “example of legislation that has come to be a powerful testimony to the campaigning zeal of disabled people”).

11. See Part I, *infra*.

12. See Part II.A, *infra*.

13. See Part II.B, *infra*.

14. The term “litigation-based” refers to remedies obtained through court decisions, as opposed to remedies from negotiation, settlement, or alternative dispute resolution.

ADA.¹⁵ A decision in 2001 denies damage claims by state employees while identifying openings for injunctive relief by private individuals, damage actions by the U.S. government, and redress under state law for disability rights claimants.¹⁶ Coupled with a trilogy of losses in 1999,¹⁷ the Supreme Court created a tidal shift that may make federal judicial forums increasingly hazardous for ADA litigants.¹⁸

I. THE AMERICANS WITH DISABILITIES ACT: ORIGINS, PROVISIONS, STATUS, AND CRITIQUE

A. *Origins*

Progress in removing the barriers of discrimination against people with disabilities has come only through struggle. The campaign to bring U.S. citizens with disabilities into the mainstream of society began only a generation ago with the passage of the Rehabilitation Act of 1973,¹⁹ the first in a series of landmark pieces of legislation.²⁰ It contained terse nondiscrimination sections that dealt with programs receiving federal assistance, federal contractors, and the federal government itself.²¹ In many respects, it

15. For a hopeful exception to this trend, see *PGA Tour, Inc. v. Casey Martin*, 532 U.S. 661 (2001).

16. *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 374 n.9 (2001).

17. *Murphy v. United Parcel Service Inc.*, 527 U.S. 516 (1999) (stating that a determination of whether the employee's impairment "substantially limits" one or more life activities is made with reference to the mitigating measures he employs; individual fired because his high blood pressure exceeded requirement for drivers of commercial vehicles and was not disabled under the ADA because with medication he functioned normally); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) (stating that Court's determination of whether an individual is disabled under the ADA should be made with reference to measures that mitigate or correct a person's impairment, holding that employers are free to discriminate against impairments that, when corrected, do not rise to the level of disability); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999) (holding that an individual with a disability was not "otherwise qualified" for the position when former employer used its compliance with applicable Department of Transportation (DOT) safety regulations to justify its visual-acuity job qualification standard, despite the existence of an experimental program by which DOT standard could be waived in an individual case).

18. Even before the *Garrett* decision, one commentator bemoaned the Court's rulings as "disheartening at best, and abhorrent at worst." Bonnie Poitras Tucker, *The Supreme Court's Definition of Disability Under the ADA: A Return to the Dark Ages*, 52 ALA. L. REV. 321, 373 (2000).

19. 29 U.S.C. § 701 (1994).

20. See generally Robert Silverstein, *Emerging Disability Policy Framework: A Guidepost for Analyzing Public Policy*, 85 IOWA L. REV. 1695 (2000).

21. See, e.g., 29 U.S.C. § 701.

preceded the political mobilization and public education necessary to achieve its goals.²² The results of the 1973 law were slow in coming: when the Department of Health, Education and Welfare (HEW) delayed issuing regulations, public interest litigators filed suit to compel their issuance and disability demonstrators occupied a Federal office building in San Francisco in 1977.²³

The next major step in battling discrimination against people with disabilities occurred in February 1988, when the National Council on the Handicapped proposed the first draft of the ADA.²⁴ The Council's members, generally conservatives appointed by President Ronald Reagan, drafted an expansive civil rights bill.²⁵ Unfortunately, Congress made little progress on the proposal. It was introduced in the last days of the 100th Congress and competed with the Iran-Contra affair and reelection campaigns for the attention of legislators, President Reagan, the media, and the public.

22. Richard Scotch observed that Section 504 of the Rehabilitation Act was:

not the result of the efforts of a social movement or of traditional interest group politics but rather the result of a spontaneous impulse by a group of Senate aides who had little experience with or knowledge about the problem of discrimination against disabled people. Seeing an opportunity in a fairly standard piece of legislation, these Senate staff members sought to promote disabled people's participation in employment and other activities by prohibiting discrimination on the basis of handicap in federally supported programs. Because of their strategic role in the legislative process, they were able to do so essentially on their own initiative.

RICHARD K. SCOTCH, FROM GOOD WILL TO CIVIL RIGHTS: TRANSFORMING FEDERAL DISABILITY POLICY 139 (1984).

23. *Cherry v. Matthews*, 419 F. Supp. 922 (D.D.C. 1976) (requiring HEW to promulgate regulations to enforce Section 504); see JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT 64–69 (1993) (describing a twenty-five-day sit-in that ended when HEW Secretary signed Section 504 regulations).

24. See SHAPIRO, *supra* note 23, at 108.

25. *Id.* The National Council on the Handicapped changed their name to the National Council on Disability (NCD) in 1988 to reflect the change in national attitudes toward the abilities and potential of persons with disabilities. Their January 1988 Report, *On the Threshold of Independence*, contains the NCD's proposed language for the Americans with Disabilities Act of 1988. National Council of Disability, *On the Threshold of Independence* (Jan. 1988), available at <http://www.ncd.gov/newsroom/publications/threshold>. This draft established that any 1) denial of opportunity to participate, 2) obstruction of access to equal goods and services, or 3) refusal to modify physical structures or existing policies and practices, constitutes discrimination based on disability. *Id.* While the ADA, which became law in 1990, established that modification or equal opportunity in the workplace is not required if doing so necessitated a fundamental alteration or undue burden. The 1988 draft bill de-emphasized these permissible exceptions and excused compliance only when compliance would entail a "fundamental alteration or threaten the existence of a program, activity, business, or facility . . ." *Id.* at § 7(a)(2). In addition, the draft bill clarified that even though compliance is not required, "there shall continue to be a duty to conform to other requirements of this Act and to take such other actions as are necessary to make a program, activity, or service, when viewed in its entirety, readily accessible . . ." *Id.*

After substantial revision,²⁶ a draft of the ADA was reintroduced at the outset of the Bush administration in May 1989, modeled on the Civil Rights Act of 1964. It took as its goal the use of civil rights remedies to eliminate the marginalization of people with disabilities.²⁷ During the 1988 presidential election, George H. W. Bush acknowledged the political power of people with disabilities during his acceptance speech at the Republican National Convention, and stated that he was “going to do whatever it takes to make sure the disabled are included in the mainstream.”²⁸ Disability activists, working with Senators Tom Harkin and Edward Kennedy, rewrote the bill to narrow its scope and make compromises to gain the support of the business community.²⁹ The new version of the ADA bill mandated accessibility only for new buildings and those existing buildings that undergo major renovation. The revised bill omitted a provision allowing persons with disabilities to request punitive damages in a discrimination suit. Finally, the bill requires modifications or accommodations only if they are easily achievable and at reasonable expense.³⁰ Depending on their resources, businesses might be required to spend anywhere from a few hundred to several thousand dollars.³¹

26. Originally, a broader definition of disability required only a demonstration that an individual was treated differently because of a “physical or mental impairment, perceived impairment, or record of impairment.” H.R. 4498, 100th Cong., § 3(1) (1st Sess. 1988). The term “physical or mental impairment” was broader as well, requiring only proof of a “physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more systems of the body” or “any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.” *Id.* § 3(2). See Ruth Colker, *ADA Title III: A Fragile Compromise*, in *AMERICANS WITH DISABILITIES: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS* 293, 313 (Leslie Pickering Francis & Anita Silvers eds., 2000) [hereinafter Colker, *Compromise*]. The ADA’s subsequently successful legislative path is outlined in note 32, *infra*.

27. Richard K. Scotch, *Making Change: The ADA as an Instrument of Social Reform*, in *AMERICANS WITH DISABILITIES: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS* 275, 276 (Leslie Pickering Francis & Anita Silvers eds., 2000) (applying civil rights remedies to discrimination against persons with disabilities).

28. SHAPIRO, *supra* note 23, at 124.

29. See SHAPIRO, *supra* note 23, at 114. To address concerns of then-Attorney General Richard Thornburgh and the business community that small business would be disproportionately harmed by the law, the term “readily achievable” was retained but was defined as meaning “easily accomplishable and able to be carried out without much difficulty or expense.” 42 U.S.C. § 12181(9) (1994). Factors to be considered when determining the ready achievability of accommodations were added, to make clear that the burden on small businesses would be minimal. *Id.* § 12181(9)(a)-(d).

30. See S. 933, 101st Cong. § 302(b)(2)(A)(v) (1989).

31. See Shapiro, *supra* note 23, at 115. The cost of accommodations has provided a continuing source of debate in the post-enactment stage of the ADA. The Job Accommodation Network, a service of the President’s Committee on the Employment of People with Disabilities, offers technical assistance to assist employees with disabilities in performing their work. The organization performs an ongoing evaluation of the cost of accommodations; those

With the support of a powerful coalition of people with disabilities, their families, politicians, and disability professionals, the ADA moved swiftly through Congress.³² The bill brought the formerly fragmented community of disability-rights organizations together.³³ One hundred and eighty national organizations endorsed the bill.³⁴ These groups represented the major disabilities, including mental retardation, spinal-cord injuries, and deafness, as well as less familiar disabilities, such as AIDS, Tourette's syndrome, and chronic fatigue syndrome. The organizations varied in their use of political strategies, from the tactics of traditional parent and professional organizations to those of radical civil rights organizations willing to use civil disobedience (such as media portrayals of people in wheelchairs getting arrested).³⁵

On July 26, 1990, President Bush signed the ADA into law on the south lawn of the White House. "Let the shameful wall of exclusion come tumbling down," he said.³⁶ Some 3000 disability rights advocates attended. Unlike the stall in the implementation of regulations derived from the 1973 Rehabilitation Act, the Department of Labor promptly issued regulations for the ADA and the law took effect in 1992.³⁷

responding over the past several years report that 20% of accommodations cost nothing, 51% cost under \$500, 11% cost between \$501 and \$1000, and 18% cost more than \$1000. See Job Accommodation Network, available at <http://www.jan.wvu.edu> (last visited Jan. 28, 2002).

32. S. 933, 101st Cong. (1st Sess. 1989), was introduced in the U.S. Senate on May 9 and passed on September 7, 1989. H.R. 2273, 101st Cong. (1st Sess. 1989), was introduced in the U.S. House of Representatives on May 9, 1989 and passed the House on May 22, 1990. The House agreed to Conference Report 101-96 on July 12 and the Senate passed it on July 13, 1990. The bill was presented to President Bush on July 17, 1990. He signed P.L. 101-336 into law on July 26, 1990.

33. SHAPIRO, *supra* note 23, at 126.

34. *Id.* at 127.

35. See, e.g., *A Crawl-In at the Capitol (Physically Disabled Demonstrate in Support of the Americans with Disabilities Act)*, TIME, Mar. 26, 1990, at 25; Marsha Mercer, *If You Protest at the Capitol, Getting Arrested Is de Rigueur*, RICH. TIMES-DISPATCH, Apr. 22, 1990 at D1; William M. Welch, *Disabled Climb Capitol Steps To Plea For Government Protection*, ASSOCIATED PRESS, Mar. 12, 1990, available at 1990 WL 5995237.

36. SHAPIRO, *supra* note 23, at 140. President Bush further stated that "every man, woman and child with a disability can pass through once-closed doors into a bright new era of equality, independence and freedom." Arlene Mayerson & Matthew Diller, *The Supreme Court's Nearsighted View of the ADA*, in AMERICANS WITH DISABILITIES: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS 124 (Leslie Pickering Francis & Anita Silvers eds., 2000).

37. See, e.g., 29 C.F.R. § 1601 (1991).

B. Provisions and Current Status: An Overview

1. *Major Provisions of the ADA*—Title I of the ADA prohibits discrimination in the employment of persons with disabilities in “job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”³⁸ Employers with more than fifteen employees are required to provide reasonable accommodations enabling a “qualified individual with a disability”³⁹ to perform the essential functions of the job unless doing so would constitute an “undue hardship” to the employer.

Title III of the ADA protects individuals with disabilities from discrimination at places of public accommodation.⁴⁰ Its definition of “public accommodations” is broad; it prohibits discrimination and mandates accessibility at places visited to obtain basic essentials such as food, lodging and health care, as well as at sites individuals visit to enhance the quality of their lives, such as restaurants, hotels and places of amusement and recreation.⁴¹ Thus, Title III is more than a specific protection from discrimination; it is a policy commitment to the social integration of persons with disabilities.

Title II prohibits discrimination against persons with disabilities in public services, including any state or local government, department, agency, special purpose district, or other instrumentality of a state or local government, and also public transportation. This comprehensive provision extends to the deinstitutionalization of unnecessarily segregated persons with disabilities.⁴²

Title I incorporates the remedies and enforcement powers of the Civil Rights Act of 1964.⁴³ This includes giving authority to the Equal Opportunity Employment Commission (EEOC),⁴⁴ to the At-

38. 42 U.S.C. § 12112(a) (1994).

39. *Id.* § 12111(8). A “qualified individual with a disability” is someone who “with or without reasonable accommodation, can perform the essential functions of the employment position that such person holds or desires.” *Id.*

40. “No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.” *Id.* § 12182(a).

41. Colker, *Compromise*, *supra* note 26, at 293.

42. *Olmstead v. L.C.*, 527 U.S. 581 (1999). For discussion of efforts to implement this ruling, see *infra* Part III.B.3.e.ii.

43. 42 U.S.C. §§ 2000e-4-6, e-8-9 (1994).

44. 29 C.F.R. § 1601.27 authorizes the Commission to bring a civil action against a respondent (with the exception of a government, government agency, or political subdivision) thirty days after a charge has been filed, unless the respondent has agreed to a settlement agreement acceptable to the Commission.

torney General for pattern and practice suits, or to private individuals to file suit for injunctive relief and monetary damages. Title II incorporates already-existing enforcement measures and remedies under Section 504 of the Rehabilitation Act, which Congress originally envisioned as injunctive relief and monetary damages.⁴⁵ Despite a broad list of covered entities, Title III's remedies are still limited because private parties may only obtain injunctive relief, not monetary damages.⁴⁶

2. *Current Status*—On July 26, 2000, the ADA reached its tenth anniversary. An undercurrent of unease and backlash exists despite celebratory events and optimistic presidential and other proclamations.⁴⁷ One dramatic setback is the U.S. Supreme Court's decision in *Board of Trustees of the University of Alabama v. Garrett*,⁴⁸ which undercuts the constitutionality of Title I's Fourteenth Amendment foundations permitting monetary damages against state governments.⁴⁹ It is ironic that this celebration of a decade of ADA activity occurs in such close juxtaposition⁵⁰ to the Supreme Court's assault on Congressional power under Section 5 of the Fourteenth

45. Monetary damages for employment discrimination by a state or state-owned entity, such as a university, were recently disallowed under the Eleventh Amendment to the U.S. Constitution in the *Garrett* decision. See *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 374 n.9 (2001).

46. For a full discussion of possible modes of enforcement and remedy, see *infra* Part III.B.

47. See generally Symposium, *Backlash Against the ADA*, 21 BERKELEY J. EMP. & LAB. L. 1 (2000).

48. 531 U.S. 356 (2001). The Court did not reach the issue of whether state employees could bring claims under Title II even though it held that they could bring such claims under Title I. *Id.* at 360 n.1.

49. On October 11, 2000, the Supreme Court heard argument in *Garrett* to determine if Congress acted within its power in enacting the ADA under Section 5 of the Fourteenth Amendment. Although the state's counsel asserted that there were no challenges to the Commerce Clause foundations of the ADA, Professor Michael Gottesman, for the respondents with disabilities, rebutted by noting that there were attempts in other courts to eviscerate the ADA on those grounds as well. The issue, however, is clearly in play as signaled by the concluding line of Justice Breyer's dissent: "Whether the Commerce Clause does or does not enable Congress to enact this provision, . . . in my view, § 5 gives Congress the necessary authority." *Id.* at 389 (citations omitted).

50. The mischief in *Garrett* is not confined to depriving state employees of the effective incentive of monetary damages to compel states to meet their employment disability nondiscrimination obligation. Rather, the Court's harsh undermining of Congressional power under § 5 to deal with the "somewhat broader swath of conduct" that goes beyond the 14th Amendment text; its imposition on Congress of burdens of proof and strict rules of sufficient evidentiary support for justifying legislative action; and its lack of deference to Congressional competence to legislate in disability rights matters cast a deep cloud over the future of litigation to remedy ADA violations. *Id.* at 387 (citation omitted). As the dissenters observe, "it is difficult to understand why the Court, which applies "minimum 'rational basis' review" to statutes that *burden* persons with disabilities . . . subjects to far stricter scrutiny a statute that seeks to *help* those same individuals." *Id.* at 387–88.

Amendment⁵¹ to force states to end disability discrimination. The 1998–99 Supreme Court term saw three losses in ADA cases dealing with the definition of persons protected by the Act.⁵² Even *Olmstead v. L.C.*,⁵³ a consoling victory that establishes the landmark precedent against unjustified isolation of people in state institutions, stands in some peril. The so-called federalism revolution and the willingness of the Supreme Court to uphold states' sovereign immunity claims suggest the Court may subject congressional findings to unprecedented hyper-scrutiny.⁵⁴

Another legal victory in that Court term, *Cleveland v. Policy Management Systems Corp.*,⁵⁵ held that a person who claims Social Security benefits on the basis of a severe and permanent disability is not barred from bringing an employment discrimination suit under the ADA. The Court held that such claims do not inherently conflict and the plaintiff may explain why she can still perform the essential functions of her job.⁵⁶

C. Critique

A small but growing body of legal scholarship questions whether the ADA skews resources in ways that can undermine general egalitarian goals⁵⁷ or strict economic

51. "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. AMEND. XIV, § 5.

52. See *supra* notes 17 and 18.

53. 527 U.S. 581 (1999). For a discussion of problem-solving approaches and an executive order implementing *Olmstead*, see *infra* note 388 and accompanying text.

54. See Linda Greenhouse, *The Separation of Justice and State*, N.Y. TIMES, July 1, 2001, at D1 (noting that the political inexperience of the Supreme Court's Justices might have led them to make an unfavorable ruling in the *Olmstead* case "as the majority did in a decision limiting the states' exposure to suits under the Americans With Disabilities Act, that despite holding 12 hearings over three years Congress had failed to prove state governments had a history of discriminating against people with disabilities.").

55. 526 U.S. 795 (1999).

56. *Id.* at 802. The Court explained that a negative presumption of conflict would not be warranted because there are many circumstances where an Social Security Disability Insurance (SSDI) claim and an ADA claim can comfortably coexist. For example, since the Social Security Administration (SSA) does not take into account the possibility of "reasonable accommodation" in determining SSDI eligibility, an ADA plaintiff's claim that she can perform her job with reasonable accommodation may be consistent with an SSDI claim that she could not perform her own job (or other jobs) without it. Alternatively, an ADA plaintiff's condition might have changed over time, so that a statement about her disability made at the time of her application for SSDI benefits does not reflect her capacities at the time of the relevant employment decision. *Id.* at 795–96.

57. See MARK KELMAN & GILLIAN LESTER, JUMPING THE QUEUE: AN INQUIRY INTO THE LEGAL TREATMENT OF STUDENTS WITH LEARNING DISABILITIES 14 (1997) ("[W]e question

rationality.⁵⁸ Critics of the Act claim that the requirement of accommodations burdens employers; these critics attempt to undermine, if not “overturn the ADA with negative newspaper and television stories.”⁵⁹ Some scholars note that disability nondiscrimination laws differ from other nondiscrimination laws by requiring special adjustments that alter resource distribution, not just category-blind treatment.⁶⁰

Nevertheless, an impressive body of legal scholarship defends the objectives and strengths of the ADA.⁶¹ On the whole, the ADA has helped “to level a playing field which historically had discriminated against people with disabilities by imposing medicalized stereotypes.”⁶² Its effects are visible in curb cuts to sidewalks, Braille signage, and accessible hotel rooms. To ignore the legal requirements is to face the real risks of negative publicity and even the prospects of being named as a defendant in an ADA suit, as Clint Eastwood discovered in his real-life role as a hotel owner.⁶³

the tendency of this discourse to disclaim generally egalitarian arguments in favor of ‘anti-discrimination’ principles that focus on the need to be more tolerant of difference.”).

58. See, e.g., RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 480–94 (1992).

59. Zeitzer, *supra* note 9, at 85. Zeitzer’s rejoinder is that empirical evidence shows that “most accommodations cost under \$200 and the government and disability advocates are fighting back.” *Id.*

60. See Samuel Issacharoff & Justin A. Nelson, *Discrimination with a Difference: Can Employment Provisions of the Americans with Disabilities Act?*, 79 N.C. L. REV. 307 (2001). ADA supporters acknowledge that the law requires affirmative actions, but explain that without these additional obligations it would be difficult to achieve the ADA’s goals of equal access and opportunity for people with disabilities:

Just because an employer ignored the fact that a person was in a wheel chair would not mean that the person could enter the employer’s building or have the same right to be considered for a job on his/her merits. Therefore, the ADA goes one step further: [and] mandates a level playing field.

Zeitzer, *supra* note 9, at 83.

61. See, e.g., Peter David Blanck & Mollie Weighner Marti, *Attitudes, Behavior and the Employment Provisions of the Americans with Disabilities Act*, 42 VILL. L. REV. 345 (1997); Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 TEMP. L. REV. 393 (1991); Elizabeth Clark Morin, *Americans with Disabilities Act of 1990: Social Integration Through Employment*, 40 CATH. U. L. REV. 189 (1990); Paul V. Sullivan, *The Americans with Disabilities Act of 1990: An Analysis of Title II and Applicable Case Law*, 29 SUFFOLK U. L. REV. 1117 (1995).

62. Michael Ashley Stein, *Labor Markets, Rationality, and Workers with Disabilities*, 21 BERKELEY J. EMP. & LAB. L. 314, 331 (2000).

63. *Zum Brunnen v. Mission Ranch*, No. C97-20668 (S.D. Cal. Sept. 29, 2000). According to a newspaper account, the jury did find two pre-verdict ADA violations (a lack of a ramp and signage for the accessible bathrooms), but because these problems had been remedied and because there were inconsistencies in the plaintiff’s account of whether a disability-accessible hotel room was available, the jury ruled in favor of Eastwood. See Shannon Lafferty, *Jury Rejects ADA Claim against Clint Eastwood*, THE RECORDER (San Francisco), Oct. 2, 2000, at 3.

The ADA's remedies for pervasive discrimination affect many sectors of society, from higher education authorities to employers with fifteen or more employees.⁶⁴ Indeed, society's leaders must incorporate the rights and responsibilities outlined under the ADA into the knowledge they need to run their operations lawfully. The ADA has become a central organizing tool for mobilizing and maintaining a cohesive lobby for the civil rights empowerment of America's people with disabilities, estimated to be fifty-four million people.⁶⁵

In the United States, as in Israel and in many other countries, disability rights laws help to end many forms of exclusion.⁶⁶ For instance, both the United States and Israel first denied schooling, then segregated large proportions of school-age children, and only slowly developed more inclusive forms of education for children with disabilities.⁶⁷ The U.S.'s vigorous enforcement of the ADA, however, has achieved more rapid progress in moving people with mental and other disabilities in institutions to community settings in which they experience more normal patterns of life.⁶⁸ Yet even with the ADA, Americans with disabilities who want to work still have difficulty finding work, or can only obtain employment at sheltered subminimum wages.⁶⁹

64. 42 U.S.C. § 12111 (5)(A) (1994) (applying to employers); *id.* § 12181(7)(J) (applying to educational organizations).

65. U.S. CENSUS BUREAU, AMERICANS WITH DISABILITIES: HOUSEHOLD ECONOMIC STUDIES: CURRENT POPULATION REPORTS 1 (1997) (relying on data from 1994). Congress found in 1990 that 43 million Americans have a disability; however, it recognized that this number would increase as the population ages. 42 U.S.C. § 12101(a)(1) (1994).

66. For a list of forty-one countries that have enacted disability nondiscrimination laws and a summary of their main features, see Appendix, *infra*. In developing this table, I analyzed the laws collected by Professor Theresia Degener and maintained on the website by the Disability Rights Education and Defense Fund, which is: <http://www.dredf.org>.

67. The federal Individuals with Disabilities Education Act (IDEA) and its 1997 amendments make it clear that schools have a duty to educate children with disabilities in general education classrooms. 20 U.S.C. §§ 1400–1487 (1994). See also NATIONAL INFORMATION CENTER FOR CHILDREN AND YOUTH WITH DISABILITIES, NATIONAL STUDY OF INCLUSIVE EDUCATION (1995).

68. See Stanley S. Herr, *Human Rights and Mental Disability: Perspectives in Israel*, 26 *Isr. L. Rev.* 142, 166–67 (1992) [hereinafter Herr, *Perspectives*].

69. See, e.g., Paul Wehman, *Supported Employment: Toward Equal Employment Opportunity for Persons with Severe Disabilities*, 26 *Mental Retardation* 357, 357–61 (1988).

II. EXPERIENCE WITH DISABILITY NONDISCRIMINATION LAWS OUTSIDE THE UNITED STATES

A. The Equal Rights for Persons with Disabilities Law: Israel's Experience with Comprehensive Disability Nondiscrimination Legislation

Israel is undergoing a struggle to operationalize the ERPDL,⁷⁰ finalize its regulations and apply its provisions in practice. Because of a strong tendency to inertia in the field of social legislation, aggressive political measures and adverse publicity will be necessary to induce the Israeli government to act on disability rights. As a columnist in *Ha'aretz* observed on the previously delayed appointment of the Equal Rights Commissioner for disability:

The delay in the establishment of the commission does not, then, only break the law but also ignores the thinking that was behind the egalitarian legislation. It could turn the provisions of the law that obligate the state to make it possible for every person with disabilities—physical disabilities, mental illness, learning difficulties, etc.—to live a decent life into a dead letter.⁷¹

The ERPDL's ambition sometimes exceeds its grasp. As Netz Ziv, Director of Clinical Programs at Tel Aviv University's Faculty of Law, and a prime drafter of the ERPDL, observed, the law not only relies on the concept of nondiscrimination but seeks the "goal of achieving equality" through a "legal entitlement to receive adequate support."⁷² The ERPDL, thus far, has generated more expectations than action. This presents an obvious question: If the implementation of the more abridged law is problematic, is there any reason to believe that an expanded law would enjoy more practical success?⁷³

70. Equal Rights for Israel for People with Disabilities Law, 5758–1998 (1999) (Isr.).

71. Avirama Golan, *The Land of Limited Opportunities*, HA'ARETZ, May 24, 2000, at 5. Although this media characterization may be too strong, Part V *infra* reveals the forcefulness of the Israeli disability rights movement that, like in the United States, has sometimes turned to street protests to press for enforcement of its rights.

72. Neta Ziv, *Disability Law in Israel and the United States: A Comparative Perspective*, 28 ISR. Y.B. ON HUM. RTS. 171, 171 (1998).

73. For a discussion of the proposed amendments to the ERPDL, see *infra* Part II.A.2.i.

1. *Pre-ERPDL Efforts for Disability Rights*—"God and the people of Israel forgot the disabled,"⁷⁴ said Israel Katz, chair of the Commission on Comprehensive Disability Rights Legislation. In making this provocative comment, Katz, an authority in the field of social welfare⁷⁵ who is partially disabled as a result of a stroke, believes that Israelis with disabilities are "very much neglected" when compared to other minority groups and that Israeli society has done little to attend to their needs or effectuate their rights.⁷⁶

The Report of the Public Commission on Comprehensive Legislation Concerning the Rights of People with Disabilities, popularly known as the Katz Commission Report, catalogued the long-unresolved grievances of the Israeli disability community.⁷⁷ It noted that unemployment is rife, with 70% of people with disabilities unemployed and 130,000 people receiving National Insurance Institute benefits, even though most of them are able and willing to work.⁷⁸ In addition, the systems of residential services rely too much on institutionalization, with 5700 of 7100 out-of-home placements for people with mental retardation in institutions and 3530 individuals (more than one-half) of all people in psychiatric hospitals solely because of the lack of community beds, not because of clinical needs.⁷⁹ The Report heavily criticized the inaccessibility of public buildings, public transportation, bomb shelters, and schools, the lack of sensory access for persons who are blind and deaf, and the lack of cognitive accessibility for persons with intellectual disabilities.⁸⁰

In response to the social isolation of people with disabilities, the Commission recommended a statutory duty to provide them with programs of culture, leisure, and sport, particularly those facilitating integration in regular programs.⁸¹ Noting that tens of thousands of children with disabilities do not receive the services mandated under the Special Education Act of 1988, that several

74. Interview with Israel Katz, Chair of the Commission on Comprehensive Disability Rights Legislation, in Jerusalem, Isr. (May 8, 2000) [hereinafter Katz Interview].

75. Katz served as the Minister of Labour from 1977 through 1981. He has also served as the Director of the National Insurance Institute (the Israeli equivalent of the Social Security Administration), Dean of Social Work School at the Hebrew University. He founded the Institute for Social Policy Research. He has authored several books, including *ISRAELI SOCIETY AND DIASPORA PHILANTHROPY: HOW WELL DOES THE GIFT PERFORM?* (1991) and *ISSUES IN SOCIAL WELFARE IN ISRAEL* (1966).

76. Katz Interview, *supra* note 74.

77. REP. OF THE PUB. COMM'N ON COMPREHENSIVE LEGIS. CONCERNING THE RTS. OF PEOPLE WITH DISABILITIES (Isr.) (1996 Eng. Summary) [hereinafter KATZ COMMISSION REPORT].

78. *Id.* at 7-8.

79. *Id.* at 8.

80. *Id.* at 7.

81. *Id.* at 9.

hundred are entirely excluded from school and that other shortcomings plague the educational sphere, the Commission called for a right to education that takes into account the needs of persons with disabilities.⁸² The Report outlined many other necessary reforms. In the criminal justice context, the Commission urged that interrogation and court procedures include the special protections to which people with disabilities are entitled.⁸³ The Commission also recommended the creation of rights for people with disabilities to benefits and remissions in purchasing special equipment (such as wheelchairs and hearing aids), an expansion of mobility benefits in terms of assistance with car purchases, and the right to professional consultation as a means to minimize the use of guardianship.⁸⁴ The centerpiece of the Report was the creation of the Equal Rights Commission for Persons with Disabilities to monitor and enforce the proposed legislation.⁸⁵

Katz is modest about the long-term influence of this Report, saying: "I don't subscribe too much importance to it."⁸⁶ He is not very hopeful that the positive experience with the ADA in the United States will soon be replicated in Israel. He does acknowledge, however, that the Report is the first comprehensive review of disability policy in Israel, and is unique in employing a cross-disability approach rather than focusing on a particular disability or set of disabilities. Furthermore, the distinctive Israeli approach of combining nondiscrimination and service mandates in the same law struck him as being "logical to combine since you have to see both aspects of (disability policy) problem."⁸⁷

Although the Commission Report does not contain a minority report, there was not unanimity of opinion among the Commission's members.⁸⁸ Katz prevailed in pressing the Commission to

82. *Id.* at 10. It also recommended supplemental statutory rights for compensatory education for children long absent from schools, for schooling from birth to age three, and for adaptations to permit entry and study in institutions of higher education.

83. *Id.* at 11.

84. *Id.* at 11–12.

85. *Id.* at 12–13. The Commission specified thirteen functions for the Commission, including rulemaking, proposed legislative revisions, rights advising, complaint investigation, the filing of suits in the name of the Commission, assistance in helping private parties to file their own suits, and the development of "mediation, arbitration and other actions designed to settle disputes regarding the rights of people with disabilities." *Id.* at 13. These functions were consistent with my recommendations to the Commission, including giving "explicit statutory encouragement to mediation and other means of less formal dispute resolution" and providing through the Equal Rights Commission "an administrative remedy for the bulk of the claims under the Act." *Id.* at 6–7 (citing Memorandum from Stanley S. Herr, to Dr. Israel Katz, Invited Submission on Disability Rights Legislation in Israel (May 6, 1997)).

86. Katz Interview, *supra* note 74.

87. *Id.*

88. *Id.*

display outward unanimity because, as he put it, “we would have enough enemies” without creating a minority report to undercut the Commission’s proposal.⁸⁹ The main internal debates centered on what Israel could financially afford to include in the law. In the end, the Commission opted for expansive language, leaving budgetary battles to another day.⁹⁰

2. *Legislative Provisions and Case Law*—On February 23, 1998, Israel’s legislature passed the Equal Rights for People with Disabilities Law (ERPD), pledging commitment to “the recognition of the principle of equality and the value of human beings created in the Divine Image.”⁹¹ The main legislative compromise consisted of enacting a few chapters of the Act in 1998 and leaving the bulk of the proposed legislation to a future legislative session.

a. *Legislation*—The current Israeli law focuses on employment, transportation, and the creation of an administrative enforcement mechanism. Like the ADA, the protected class under the ERPD is very broad: The term “person with a disability” encompasses people with a physical, emotional, or mental disability, “including a cognitive disability” that substantially limits functioning in “one or more [of] the major spheres of life.”⁹²

The law has several notable purposes. It seeks to protect individual dignity and freedom, enshrine the right to equal and active participation in society in all the major spheres of life, and “provide an appropriate response to the special needs of a person with a disability, in such a way as to enable the person to live with maximum independence, in privacy and dignity, realizing her/his potential to the full.”⁹³ The law is more than a nondiscrimination measure. It also contains a strong self-determination mandate. A person with a disability has “the right to make decisions that pertain to her/his life according to her/his wishes and preferences.”⁹⁴

89. *Id.*

90. *Id.*

91. Equal Rights for Israel for People with Disabilities Law, 5758-1998 § 1 (1999) (Isr.), available at <http://www.dredf.org/symposium/Israel.html> (last visited Jan. 17, 2002). The reference to the “Divine Image” reflects a compromise between legislators with a religious orientation and those with a secular orientation who wanted to stress equality of opportunity. Such language and the salience of religious issues in the legislature stands in sharp contrast to the United States, where First Amendment principles would make such text problematic.

92. *Id.* § 5. The ADA definition of disability is broader. It not only includes a person with a “physical or mental impairment that substantially limits one or more of the major life activities of such individual,” but an individual with a record of such an impairment or an individual “regarded” as having such an impairment. 42 U.S.C. § 12102(2) (1994).

93. Equal Rights for People with Disabilities Law, 5758-1998 § 2 (Isr.), available at <http://www.dredf.org/symposium/Israel.html> (last visited Jan. 17, 2002).

94. *Id.* § 4.

Furthermore, powerful language, absent from the ADA, permits affirmative action to correct prior or present discrimination against people with disabilities or to promote their equality.⁹⁵ The significance of this expansive, though under-enforced, law and its implications for legal and policy reforms in the United States are analyzed below.⁹⁶

Israel's law is still a work in progress. The second installment of Israel's Equal Rights law (which, for convenience, will be called "ERPDL II") is extremely ambitious.⁹⁷ The scope and language of ERPDL II is remarkably expansive. It sets out statutory rights to community living, education from preschool to higher education, and access to programs of culture, leisure, and sports.⁹⁸ It expands social benefits through direct subsidies and remissions, such as mobility allowances, and recognizes the right of persons with disabilities to enhanced liberty, dignity, and personal autonomy.⁹⁹ Finally, it adds to the powers and functions of the Equal Rights Commission for Persons with Disabilities, along the lines of the Katz Public Commission Report.¹⁰⁰

ERPDL II would amend the law in three basic ways. First, it creates entitlements to services that would promote independence and enhance community living.¹⁰¹ Second, it expands protections against discrimination.¹⁰² Third, it creates new services and accommodations in education.¹⁰³ Also, the proposed law would guarantee persons with disabilities the right to live in the community.¹⁰⁴ Persons with "special residential needs due to . . . disability" might be eligible for assistance from the state, depending on their ability to pay.¹⁰⁵ In addition, personal assistance would be available to promote independence and full participation in the community. Importantly, individuals with disabilities would be given such personal assistance provided under the Act to the extent that no other

95. See *id.* § 3.

96. See *infra* Part III.c.2.

97. Labor and Welfare Knesset Committee Bill, Equal Rights for Persons With Disabilities Amendments.

98. See *id.* ch. 7 (Community Living); *id.* ch. 8 (Culture, Leisure and Sports); *id.* ch. 9 (Education).

99. *Id.* ch. 11 (mobility allowances); *id.* ch. 7 (allowing person with disability right to live in community with dignity).

100. See *id.* § 3 of the bill, amending § 21 of the 1998 Act.

101. *Id.* ch. 7, as amended by § 2.

102. *Id.* ch. 5, as amended by § 2.

103. *Id.* ch. 9, as amended by § 2 (providing that students with disabilities are eligible for accommodations in tests and examinations for admissions or for equal access to programs and activities, including accommodation in study aids and facilities).

104. *Id.* ch. 7, as amended by § 2.

105. *Id.*

assistance was available under otherwise applicable laws.¹⁰⁶ ERPD L II defines personal assistance services as including supervision, personal care, and help with everyday activities; assistance with communication with other members of the community, including translation or interpretation services; and help with household tasks, including cleaning, shopping, cooking, and laundry.¹⁰⁷ Individuals would be eligible for such services whether or not they reside with their families.¹⁰⁸ The bill allows the Minister of Labor and Social Affairs to issue regulations specifying conditions, criteria of eligibility, and scope of the services, taking into consideration the severity of the physical, mental, or cognitive disability.¹⁰⁹ Furthermore, ERPD L II would also develop services to expose persons with disabilities to cultural, leisure, and sports programs, with a preference for including persons with disabilities in regular programs.¹¹⁰

In the educational sphere, the ERPD L provides that individuals with disabilities are eligible for education and training consistent with their age and special needs due to disability.¹¹¹ The proposed law expresses a clear preference for the inclusion of students with disabilities in educational settings with their peers.¹¹² Furthermore, students with disabilities would be entitled to educational services through high school, with the goal of enabling students to live in the community after finishing their education.¹¹³ In addition, the Minister of Education is directed to plan for transition services from school to adult life.¹¹⁴

Full accessibility within five years would be required of all schools, including institutions of higher education.¹¹⁵ Students with disabilities would be allowed accommodations in tests and examinations, and guaranteed the right to participate in the programs and activities of the school.¹¹⁶

The bill's passage is gaining momentum. Because ERPD L II is a "private members' bill," it was not moved by the government and it first had to survive a preliminary reading. The preliminary reading

106. *Id.* ch. 7(43), as amended by § 2.

107. *Id.*

108. *Id.* ch. 7(44), as amended by § 2.

109. *Id.* ch. 7(45), as amended by § 2.

110. *Id.* ch. 8(46), as amended by § 2.

111. *Id.* ch. 9(47), as amended by § 2.

112. *Id.* ch. 9(47) (a), as amended by § 2.

113. *Id.* ch. 9(47) (b), (48), as amended by § 2.

114. *Id.* ch. 9(49), as amended by § 2.

115. *Id.* ch. 9(50) (a), as amended by § 2.

116. *Id.* ch. 9(50) (b), as amended by § 2.

occurred in December of 2000.¹¹⁷ For several months, it languished in the Legislative and Constitution Committee of the Knesset.¹¹⁸ Finally, in March 2000, the bill was transferred to the Knesset's Committee of Labor, Social Affairs, and Health, which took an active interest in its passage.¹¹⁹ Indeed, on June 18, 2000, the Committee held a hearing at which over thirty persons, many representing government ministries and nonprofit organizations, testified.¹²⁰ Most of the witnesses spoke in support of the bill.¹²¹ Factors that signaled the importance of the matter included the scheduling of the hearing for a rare Sunday session and the assurance of Committee Chairman David Tal that he will continue to schedule Sunday sessions to complete the legislative work "within less than a year."¹²² As a foreign expert, I was given the rare opportunity to open the testimonial hearings and to comment and respond to various issues raised by other speakers and observers. In addition, the presence of a national radio reporter who subsequently broadcast the highlights of the hearing underlined the national and international significance attending the hearing.¹²³

In his opening remarks, Chairman Tal stressed that people with disabilities had long been neglected. He observed that they are "like everybody else but may just do some things more slowly."¹²⁴ Their plight, he said, is a "test for society" and the public's ability to "be patient, to wait a little" so that people with disabilities can receive their due accommodations.¹²⁵ "Everyone must realize their own potential," he declared.¹²⁶ Passage of the law, in his view, represented an expression of social solidarity.¹²⁷ He envisioned the nonprofit organizations as being "still very busy" because the government was not doing its share.¹²⁸ In this context, the law is

117. *Saving The Law*, NEWS FROM BIZ'CHUT, Sept. 2001, at 1.

118. See Dan Orenstein, Senior Attorney at the Ministry of Justice (Isr.), Lecture at the Hebrew University Faculty of Law, Minerva Center on Human Rights in Jerusalem, Isr. (June 7, 2000) (contemporaneous notes from author).

119. *Id.*

120. *Id.*

121. *Id.*

122. Interview with David Tal, Chair of the Knesset's Committee of Labor, Social Affairs and Health (June 18, 2000). The Chairman later shared with the author, privately, that he hoped to complete the legislation in half a year. This assessment proved over-optimistic.

123. The account of this hearing is taken from contemporaneous author's notes, which are available through the Coleman Institute, University of Colorado.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. The author responded to the remarks of a parent-dominated disability services agency that the bill should not reduce the status of nonprofit organizations in the disability field because the Commissioner could gain power at their expense, that the Equal Rights

intended as a comprehensive, holistic structure that would cover every aspect of life. Although the first legislative discussions dated from 1996, Chairman Tal promised a more expeditious approach to the law in the future.¹²⁹

No one directly challenged the law's premises. The Finance Ministry expressed general concern about its cost and the need to assess the regulatory burden.¹³⁰ The Ministry of Transportation's representative noted the difficulty of framing the regulations required by existing law, the existence of opposition to these measures, and the particularly vexing problem of access to intercity buses, which had proven difficult to solve, even in developed European countries.¹³¹ He pointed out that drivers are private persons likely to be even less responsive to the government than are bus operators. The Health Ministry drew a distinction between its own activities and those of health care maintenance organizations.¹³² The Ministry of Culture, Science, and Sport urged greater attention to the needs of deaf and hard-of-hearing persons.¹³³ The Ministry of Education noted the high cost of accessibility to schools and universities, drawing Tal's rejoinder that the Committee understood the cost and that the country must forge ahead nonetheless.¹³⁴ The Ministry of Labor and Social Affairs called for adequate consideration of other pending laws and initiatives dealing with the problem of community living, such as a vocational rehabilitation bill that calls for a right to community living for each mental patient able to benefit from that type of setting.¹³⁵ The Interior Ministry emphasized the need for very clear implementing guides or regulations to interpret this sweeping legislation.¹³⁶

Ilan Gillon, a co-sponsor of the bill and one of the only members of the 120-person Knesset to have a visible disability, brushed aside the objections. He was given the floor to make several counterpoints, including the observation that disability discrimination imposes costs on society and the government, exhibited by the 130,000 people on disability benefits who are effectively foreclosed from the labor market by external barriers.¹³⁷ Furthermore, I noted

Commission was the "hand of the government," and private-public partnership would remain essential to move ahead. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

that access measures benefit the elderly, those pushing baby carriages, and others who need adaptations to the environment.¹³⁸ Even though disabled veterans receive a favorable benefit level, even these heroes of Israeli culture confront the costs of societal barriers and prejudice.¹³⁹

Because the record of the proceedings (known as the “protocol”) is a very important tool in the legislative process, and because this particular record appeared quite precise, I took care to preserve the record.¹⁴⁰ My written submissions elaborated on Section 41, which simply declares that the disabled person shall have the right to community living.¹⁴¹ I urged that the principle of the “least restrictive individually appropriate alternative” be added, and the relevant ministries (Health for mental patients, and Labor and Social Affairs for persons with mental retardation) be required to make annual reports to document whether the delivery of community living services was increasing or not.¹⁴² A lengthy opening statement was allowed, and I was asked for any recommendations to change the bill.¹⁴³ In general, the mood of the hearing was one of optimism, and there appeared to be a general assumption of the likelihood of ultimate success. Although the decorum and discourse

138. *Id.*

139. The telephone relay system under the ADA was a gain for the deaf community, and should be carefully considered for adoption in Israel. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *See id.* The major recommendation was to insist on timelines and compliance with any law adopted, not just to permit again a situation of lip service rather than real rights. The possibility of sanctions against tardy ministries, or cooperation with other committees with budgetary authority over such ministries was urged.

The opening statement recommended early passage of this historic, internationally significant and urgently needed law. Its uniqueness stems from its combination of needed services and supports with a nondiscrimination mandate:

Passage of this law will provide a blueprint for the future, a unifying statement of national goals on disability policy, and a way to lift up one of Israel's most distressed sectors. Some 15 countries already have laws on this subject. The presence of 37 co-sponsors is another mark of this measure's wide appeal.

Passage of this bill will do each of you, and the State of Israel, great credit. With the fulfillment of this law, Israel can truly become a “light unto the Nations.” The essential genius of this law is to combine nondiscrimination with needed supports to achieve real equality, by enabling people with disabilities to better compete and more fully participate in society.

among Knesset members can often be abrasive,¹⁴⁴ this session was a model of thoughtful deliberation of the issues.¹⁴⁵

In an extremely encouraging sign, the bill was approved in first reading on December 19, 2000 by a vote of twelve to zero.¹⁴⁶ It must now pass a second and third reading to be enacted into law.

The current Equal Rights Law and the dynamic movement for nondiscrimination for persons with disabilities has spurred a wave of new legislation. For example, a new law, Nondiscrimination in the Provision of Goods, Services and Access to Entertainment and Public Accommodations, passed on December 11, 2000 furthers egalitarian aims.¹⁴⁷ Another illustration is the Free Education for Sick Children Law (2001).¹⁴⁸ Passed on January 1, 2001, the law gives children (five years or older) who are absent from school for over twenty-one days, or diagnosed with a condition that prevents them from attending school, a right to an at-home schooling program.¹⁴⁹

Finally, the Rehabilitation of Persons with Mental Disabilities in the Community Law was passed on July 11, 2000.¹⁵⁰ It aims to rehabilitate and accommodate persons with mental disabilities within their community in the least restrictive environment possible.¹⁵¹ It seeks to guarantee their independence, human dignity and quality of life in the spirit of "Israel's Basic Law: Human Dignity and Liberty."¹⁵² It calls for the creation of individualized personal rehabilitation plans and an oversight committee, as well as special funding to implement the law's mandate.¹⁵³

Id.

144. For example, one Member of the Knesset accused another of fomenting a holocaust for not supporting subsidies for religious schools.

145. The Committee expected to complete its work on the bill despite the repeated coalition crises faced by the Government.

146. Zvi Zrahiya, Handicapped Access Bill Advances, HA'ARETZ NEWS, DEC. 20, 2000 (discussing a bill requiring all public places to arrange convenient access, sidewalk ramps, and many other disability benefits and measures).

147. Nondiscrimination in the Provision of Goods, Services and Access to Entertainment and Public Accommodations Law.

148. Free Education for Sick Children Law (2001).

149. *Id.*

150. Rehabilitation of Persons with Mental Disabilities in the Community Law.

151. *Id.*

152. Basic Law: Human Dignity and Liberty, 1991, S.H. 1391, available at <http://www.us-israel.org/jsource/politics/basic-law-human-dignity-and-liberty> (last visited Feb. 21, 2002) [hereinafter Basic Law]. See generally Zeev Segal, *A Constitution Without a Constitution: The Israeli Experience and the American Impact*, 21 CAP. U. L. REV. 1 (1992). This quasi-constitutional law guarantees to all Israeli nationals fundamental rights to privacy, property, and liberty. A 1994 Amendment clarifies that such rights are "held in the spirit of the principles set forth in the Declaration of the Establishment of the State of Israel." Basic Law, 1994, S.H. 1454.

153. See Rehabilitation Law, *supra* note 150.

b. Precedent—Despite the slow start in implementing the law, many well-informed Israelis remain optimistic that progress will be made. Their attitude may be a reflection of the philosophy of the nation's first prime minister, David Ben-Gurion, who observed that, to be a realist in Israel, one has to believe in miracles.¹⁵⁴ But there is an infectious energy and commitment expressed by those who have been closest to the formation of the ERPD. This includes the chairman of the Commission that gave the law its impetus, Israel Katz, and two of the Commission's most active members, Ariella Auphir, the newly appointed Commissioner on Equal Rights for Persons with Disabilities, and Dan Orenstein, senior attorney in the Ministry of Justice's legislative section.

The judiciary is also a potential ally for disability rights supporters. It would appear that the courts appreciate how slow the progress has been in establishing disability rights in Israel and that there is a long way to go to enforce these rights. For example, the Supreme Court in Israel has decided only a handful of cases in this field. The leading case, *Botzer v. Maccabim-Reut Local Authority*, upheld the right of a high school student with physical disabilities to attend a physically accessible school.¹⁵⁵ Supreme Court President Barak broadly declared that

The disabled person is a human being who deserves equal rights. Neither outside society nor on its margins, the disabled person is an ordinary member of his society. The purpose of these arrangements is not to improve the quality of his isolation, but rather to integrate him—on occasions using affirmative action—in the regular structure of social life.¹⁵⁶

Two years later, in a 1998 decision in *Shtrum v. Election Commissioner*, the court ruled that polling places have to be physically accessible.¹⁵⁷ The court interpreted election law to enforce the requirement that at least one polling place be accessible to voters with physical disabilities. In Israel, no voting by mail ballots is permitted. The law does, however, require that the Minister for the Interior make arrangements to permit a voter with a disability to vote outside his or her regular polling place in a physically accessible site. A remarkable feature of this judgment was the Supreme Court's drastic threat to postpone nation-wide general elections if

154. See *Saving the Law*, *supra* note 117.

155. H.C. 7081/93, *Botzer v. Maccabim-Reut Local Authority*, 50 P.D. 1, 19 (Isr.).

156. *Id.* at 26.

157. H.C. 1759/99, P.D.; see also H.C. 6790/98, *Avratz v. Election Commissioner of Jerusalem*, P.D. (petition on comparable issue denied as not timely filed).

these access arrangements were not promptly made.¹⁵⁸ The Government took the threat seriously and speedily complied.¹⁵⁹

Even before the ERPDL, the Supreme Court of Israel recognized the concept of reasonable accommodations for differences based on disability. In a 1995 case that dealt with a woman's attempt to be an air force pilot, Justice Tovia Strasberg-Cohen drew the following analogy:

What is the rule when the qualifications [of the candidates] are equal but there is a difference that is relevant but can and should be neutralized in order to achieve equality? If—for example—a disabled person using a wheelchair seeking employment at a public institution and is qualified for the job but the office is only accessible through a stairway. The basic physical disability imposing a limitation in the accessibility of the workplace, creates a relevant difference [between candidates] but it can be neutralized with a reasonable price and should be accommodated to achieve equality of opportunities. Therefore, it requires the use of resources to neutralize the difference and remedy through [the installation] of an elevator or other means that will enable the disabled person access to the office in question.¹⁶⁰

Earlier disability cases dealt primarily with bioethical issues. In *Attorney-General v. Anonymous*,¹⁶¹ the Court held that parents cannot withhold potentially life-saving treatment from their child on the ground that the child has severe disabilities. In *Attorney-General v. X and others*¹⁶² the Supreme Court ruled against organ donation from a son with mental retardation for transplantation to his father, holding that the procedure would require the son's express informed consent, or if he was incompetent to consent, the findings of a court that the operation was consistent with the medical, social, emotional, and material well-being of the incompetent ward.¹⁶³

A recent discrimination case fared less successfully in the courts. On September 9, 1999, *Biz'chut* (the Israel Center for Human Rights for Persons with Disabilities, dismissed a case asserting that a

158. Aviv Lavie, *Enabling the Disabled to Vote*, HA'ARETZ, Apr. 17, 1999.

159. *Id.*

160. Miller v. Def. Minister, 49(4) P.D. 107, 120–21.

161. R.E.E. 5587/97, 51(4) P.D. 830.

162. See Naomi Hillel, *A Digest of Selected Judgments of the Supreme Court of Israel*, 24 ISR. L. REV. 128, 144–48 (1990) (summarizing the case).

163. For discussion of the limited number of Israeli disability law cases in the higher courts, see Herr, *Perspectives*, *supra* note 68, at 156, 170–73.

pilot with cerebral palsy who used canes to assist his mobility was improperly denied a pilot's license because of unfounded fear and stereotypes.¹⁶⁴ Despite the fact that the Israel Civil Aviation Administration refused to grant him a test flight to demonstrate his abilities, a High Court panel of three judges expressed strong negative views of his chances of prevailing as a matter of law.¹⁶⁵ Facing this explicit warning that the Court would rule against the plaintiff if pressed to decide, Biz'chut's attorney withdrew the claim rather than risk creating an unfavorable precedent.¹⁶⁶

The Israeli Court plainly has a role in enforcing disability rights in Israel. The judiciary finds it easier to enforce rights in circumstances of non-compliance than in those involving the interpretation of ambiguous language. Israeli courts can issue injunctions or declarations of rights in public law cases. They can act when judges find unreasonable delay in the implementation of a law, especially in a case in which the law specifies a deadline for issuing regulations. Because the Equal Rights Law contains precisely such a deadline, which expired in January 2000, it appears that the Government will be in a legally insupportable position should they face a petition in the high Court (called *Begatz* in Hebrew) to remedy noncompliance. It can also be expected of the Israeli judiciary that its members will reject an argument that the Government lacks the funds to implement a particular law, because such an argument has force only before legislation is enacted. The defense relying on the unavailability of funds is not a good argument for doing nothing, and at best becomes relevant when there is a choice of means to fulfill the law.

The Israeli judiciary would appear to be receptive to more litigation on the rights of people with disabilities. Although there have been no major disability cases decided since the *Boetzer* decision in 1996, a number of cases were recently filed and early results appear promising. Yet, as is apparent from the proliferation of lawsuits by non-governmental organizations (NGOs) in other fields of public interest law, the Israeli disability rights movement could make greater use of the courts. Concepts such as "the right to dignity," enshrined in one of the country's so-called Basic laws, offer a building block for good precedent in this field.¹⁶⁷ Such legal developments appear consistent with Israeli judicial trends. In addition, in terms of legislative and policy advocacy, comparisons

164. H.C. 9207/96, *Gabay v. Head of the Civil Aviation Admin.* (withdrawn Sept. 9, 1999).

165. *Id.*

166. *Id.*

167. Basic Law: Human Dignity and Liberty, 1991, S.H. 1391, § 1 (Isr.).

between what is provided to persons disabled through military services and persons disabled through other causes can provide a basis for further action.

In industrialized nations, the courts certainly have a role to play in clarifying, if not always strengthening, disability rights. For example, the U.S. Supreme Court has proved active in reviewing disability cases in the 1999 term, with almost 10% of its caseload arising from the ADA and the IDEA (seven of seventy-seven total cases decided).¹⁶⁸ If litigants with disabilities will come forward with well-chosen cases, it appears that the Israeli judiciary will play a more constructive role.

Those cases may not be long in coming. One claim filed by fifty-three families of children with Down's syndrome requests inclusive education under the Special Education Law of 1988.¹⁶⁹ The manager of the Ministry's special education program, Ruth Pen, has filed a response asserting that the 1988 law does not permit the authorities to assist "special education children" in regular education, and even if it theoretically did, they lack the funds to do so.¹⁷⁰ On June 30, 2000, the High Court heard this case and issued a preliminary order that the Ministry of Education must respond within three months to the claim that the law obligates mainstreaming in appropriate cases.¹⁷¹ This period will permit the Ministry to take into account the June 2000 recommendations of the Committee to Review the Implementation of the Special Education Law, headed by Professor Malka Margalit of Tel Aviv University. On May 14, 2001, the Court ordered the state to create a professional committee to plan for the integration of children with Down's Syndrome, including a budgetary plan within forty-five days to implement the committee's recommendations.¹⁷² Even without issuing a ruling, the courts may make positive use of the ERPDL. For example, in one case involving an institution of higher learning, the judge

168. Thomas C. Goldstein, *Statistics for the Supreme Court's October Term 1999*, 69 U.S.L.W. 3033, 3076 (July 18, 2000).

169. H.C. 2599/00, Yated (The Down's Syndrome Ass'n of Israel) v. Ministry of Educ., (unpublished opinion).

170. The Ministry claims that there is a "basket of mainstream services" that can be provided under 1995 arrangements, permitting the school principal to allocate three to five hours per week of extra teaching assistant time but that these arrangements are outside the 1988 legal framework. Interestingly, no claim has yet been made under the general principles governing the provision of disability services under the Equal Rights Law.

171. The court panel, which consisted of Justices Levine, Benish, and Procaccia, evinced skepticism at the defense attorney's assertion that an order in favor of the children would be impractical since neither the budget nor the teaching supports are available for this type of educational reorganization. The court, did, however, deny a request for a preliminary order for immediate support for the fifty-three named children.

172. Yated, *supra* note 169.

pressed the parties to settle on terms favorable to a college student with epilepsy who sought a field placement as a student teacher of younger children.¹⁷³

In another judicial matter, Knesset member Ilian Gillon, the public interest law firm Biz'chut, and the Biz'chut Inter-Organizational Coalition for Promoting the Equal Rights for People with Disabilities Law, charged the Ministry of Transportation with a failure to implement the transportation provisions of the Equal Rights Law. Lawyers from Biz'chut claimed that no buses in Israel are accessible to a person in a wheelchair and that the government's fourteenth-month delay in issuing regulations on accessibility of transportation was a violation of law.¹⁷⁴

The High Court responded by issuing an interim order freezing the purchase of inaccessible buses.¹⁷⁵ As a result of that order and negotiations between the parties, the plaintiffs compelled the Minister of Transportation to issue regulations on all forms of accessible mass transportation as they were required to do under the law.¹⁷⁶ The Court also instructed the "Dan" Cooperative (the bus cooperative for the Tel Aviv and Dan areas) to desist from buying any new inaccessible buses.¹⁷⁷ This suit was also accompanied by efforts at political pressure through a well-publicized demonstration.¹⁷⁸

Such cases are only the tip of the iceberg. Many disability rights claims remain to be filed and explored. But at present, there are many disincentives to pursuing such actions. Because of the lack of regulations, the requirements created by statute remain broad and ambiguous. The pendency of further disability discrimination laws before the Knesset has led some to favor a strategy of quiet negotiations, designed to avert a backlash.¹⁷⁹ Furthermore, few lawyers

173. See Ariella Auphir, Lecture at Hebrew University in Jerusalem, Isr. (June 7, 2000).

174. Mose Reinfeld, *Court Asked to Ensure Buses Fit for Disabled*, HA'ARETZ, June 5, 2000, at 3. Biz'chut claimed that the transportation minister breached a promise to end the purchase of inaccessible buses. When two bus cooperatives sought to purchase a fleet of sixty such buses, the civil rights organization sought to freeze the sale. They also asserted that other forms of transportation, such as trains, ships, and planes, were not accessible for people with disabilities, including those who are blind or deaf. Even some central train stations were deemed inaccessible, according to attorney Tirza Leibowitz. E-Mail from Tirza Leibowitz, attorney, to the author (June 12, 2000).

175. See Reinfeld, *supra* note 174.

176. *Accessible Buses—Closer Than Ever*, NEWS FROM BIZ'CHUT, Oct. 2000, at 1.

177. *Id.* (noting the agreement of the parties that already-purchased buses in Israel would be retrofitted, regardless of cost, to increase their accessibility).

178. See, e.g., Anat Tzigelman, *The Disabled Want to Get on the Bus: Dan Has Deployed Four Buses and Has Plans for 80 with Wheelchair Access*, HA'ARETZ, Apr. 5, 2000.

179. Interview with Arik Rimmerman, Dean of the Faculty of Social Welfare and Health, Haifa University in Haifa, Isr. (June 13, 2000) [hereinafter Rimmerman Interview].

are aware of the new law, and few are willing to test its effectiveness. The threat of litigation, however, can contribute to the desired outcome. For example, the Association for Civil Rights in Israel (ACRI) issued a demand letter¹⁸⁰ to the government that it appoint the Commissioner for Equal Rights for Persons with Disabilities.¹⁸¹ After that letter and other interventions, the government broke the impasse over the Commissioner's appointment.¹⁸² Other factors included a letter writing campaign by influential figures, petitions signed by over 300 concerned persons, adverse newspaper publicity over the impasse, and a prominent academic's behind-the-scene interventions with the Office of the Prime Minister.¹⁸³

Lawyers, however, could use familiar legal tools to advance the interests of clients with disabilities. Traditional common law cases may also provide vehicles for positive social change and greater integration. For example, in 1980, Justice Barak was in the minority in a case on compensation for a motor vehicle tort when he urged that "fair compensation" was "full rehabilitation," including support necessary to maintain an injured child in the natural home.¹⁸⁴ Other courts have since adopted this position as the law in Israel.

c. Critique—Despite its comprehensive and groundbreaking nature, the implementation of the ERPDL struggles in a legal and cultural environment which tends to exalt symbol over substance. Like Section 504 of the U.S. Rehabilitation Act, it is also weakened by being the product of a handful of legally trained activists and legislative staffers rather than a strong grassroots disability rights movement. This subsection discusses these factors as well as an encouraging, but embryonic, disability rights movement in Israel.

d. Underenforcement of Social Legislation—Social legislation, in general, and employment discrimination laws, in particular, are notoriously under-enforced in Israel.¹⁸⁵ As Guy Mundlak of Tel Aviv

180. A demand letter is a written communication from an aggrieved person to a potential defendant, outlining perceived problems and desired remediation, typically notifying the potential defendant that if problems are not addressed within a certain period of time, the writer will bring suit for redress.

181. *Commissioner for Disabled Appointed*, HA'ARETZ, May 29, 2000, at 3.

182. Rimmerman Interview, *supra* note 179.

183. Avirima Golan, *Beilim, Yishai Delay Naming Handicapped Commission*, HA'ARETZ, May 19, 2000, at 3.

184. C.A. 357/80, *Naim v. Borde*, 36(3) P.D. 762 (Isr.).

185. Interview with Guy Mundlak, Senior Lecturer, Faculty of Law, and the Labor Department in the Faculty of Social Science, University of Tel Aviv in Tel Aviv, Isr. (Apr. 2000). He recounts one case for equal pay under the sex discrimination law of 1964, one for comparable worth under the 1996 law, only two cases of age discrimination, and little more than "a handful" of cases in other fields.

University's law faculty summarized it, "the number one problem is no enforcement of the law."¹⁸⁶ The problem is characteristic, he says, of Israeli labor laws that have their origins in the 1950s, sex discrimination laws that date from 1964 and 1996, and the Equal Opportunities in Employment Law of 1988: "We have a myriad of laws, with affirmative action, comparable worth for the genders, reasonable adjustments for disabled people. We have it all, everything in the recipe book for remedying unlawful discrimination. But nothing is being done about it."¹⁸⁷ He complains that fewer than ten significant cases have been decided in other fields of employment discrimination.¹⁸⁸ As a result, he is not optimistic that future attempts at remedying disability discrimination through legal means will receive a greater share of judicial attention.¹⁸⁹

Why this lack of legal interest? The explanation may lie in the system's undue reliance on individual claimant initiative and adjudication as a mode of redress. In a society like Israel, which is not a "mature civil society," individuals may not have the sense that they can and should challenge the state.¹⁹⁰ Moreover, even when a rare case comes before a court, such as a matter of discrimination based on Arab national origin, the current trend is for judges to press the parties into mediation, notwithstanding the cardinal rule that mediation is less efficacious when the parties possess unequal bargaining power.¹⁹¹ Other cases of discrimination for preferences based on religious practice or Ashkenazi (European Jewry) origins do not even surface or afford actionable claims.¹⁹² In such a society, individuals may not have the sense that they can and should challenge the state.

e. Prospects for Enforcement of the ERPD L—Full and timely enforcement of the ERPD L will pose a significant challenge. Ariella Auphir, the first Commissioner for the Equal Rights of Persons

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. Interview with Ephraim Yuchtman-Yaar, Professor of Sociology, Faculty of Social Sciences & head of Steinmetz Center for Peace Research, Tel Aviv University in Tel Aviv, Isr. (Mar. 28, 2000).

191. For example, a labor court judge recently faced one of the first cases of job discrimination against an Israeli Arab. Despite clear evidence captured on a tape recorder of anti-Arab bias and the opportunity to make precedent in an area of important public interest, the court pressured the parties into mediation. Interview with Ofer Shinar, Clinical Instructor, Faculty of Law, Tel Aviv University in Tel Aviv, Isr. (Nov. 11, 1999) [hereinafter Shinar Interview]. One can only speculate that the judge sought to avoid a politically unpopular ruling or took the course of least burden on the court.

192. Shinar Interview, *supra* note 191.

with Disabilities Commission, faces a full agenda vying for her attention. This includes:

1. creating a new office to be connected to, but remain independent of, the Ministry of Justice;
2. staffing and deploying resources for the office with a budget estimated at New Israel Shekels (NIS) 2.5 million (\$600,000) annually;
3. lobbying for the second installment of the EPRDL;
4. developing strategies for publicizing, promoting, and enforcing the existing law;
5. informing key policymakers in the government;
6. marshalling a coalition of forces with an interest in supporting the ERPDL;
7. building credibility for the Office of the Commissioner as a center for positive change with persons with disabilities and their organization;
8. assuring businesses and other private sector actors that the law will be applied in a fair and balanced way; and
9. providing (or stimulating the creation of) other centers for technical advice and assistance in complying with the law's still unfamiliar requirements.

The success of the Equal Rights for Persons with Disabilities Law will require coordination of the efforts of many. These and the related tasks of breathing life into the embryonic structures for equal rights with persons with disabilities will demand activity from many sectors of Israeli society, not just from the Commissioner's office, no matter how energetic and committed that office may be. At the Karten Endowed Lecture on Rehabilitation held at the University of Haifa, I suggested the formation of a semi-formal group to be designated the "Friends for Applying the Equal Rights for Persons with Disabilities Law." Just as the judiciary has recognized a role for *amici curiae* to express viewpoints and offer expertise in a significant case, there is a need for friends or constituents of a new—and in Israeli terms—revolutionary act. The idea was well-received by the new Commissioner and prompted offers of such support from Professor Dan Shnit (former head of the Shapell School of Social

Work at Tel Aviv University), from the Clinical Law Office at the University of Maryland, and from others.¹⁹³

In summary, based on the discussions at the Karten Lecture, there appears to be consensus that progress in implementing equal rights laws like Israel's will involve several ingredients. I believe that the following eight "Cs" are part of the "right recipe":

1. Cadres of activists focused on specific implementation goals;
2. Coalitions that constitute a strong political constituency for the ERPDL, a contrast with the current fragmentation;
3. "Carrying on," or the power of persistence to overcome resistance to the law's implementation and expansion;
4. Cash to realize rights through such steps as subsidies or tax credits to businesses to provide expensive reasonable accommodation or auxiliary aids;
5. Celebrating the disability rights movement's victories to build momentum and morale;
6. Cultural change, including promotion of the belief that the legal and popular cultures can and should change over time to accommodate people with disabilities;¹⁹⁴
7. Civil society's emergence as the engine and reflection of such socio-cultural changes; and
8. Commitment by public leaders to use legal and other channels to pursue the ideal of a just and more equal society for people with disabilities.

193. The concept is to use research, advice, and technical assistance to help support the Commissioner and others who would see the concepts of the EPRDL become a reality. The audience concurred with the view that such international exchange and support is feasible in a world that has grown smaller, and that the problems in Israel have too many counterparts in other lands to reinvent the proverbial wheel in terms of strategies and means to implement nondiscrimination laws. For similar views, see Kemppainen, *Introduction, supra* note 9, at 9, 10 (collecting information from fourteen countries to "support the improvement of the opportunities of people with disabilities in different countries" to "obtain knowledge about the role of human rights in development in the society and about which human rights are the most important").

194. Israel has proved open to absorbing some of the latest trends, "high tech" innovations, and successive waves of immigrants, so that it can find new ways of respecting people with disabilities and honoring their rights.

With the ERPDL as a blueprint for social change, the Commission can develop a clear strategic plan as a rallying point for these collaborative efforts. Over the four decades that I have visited Israel, I have observed many more positive approaches to people with disabilities. One of those changes is the gradual maturation of Israeli society into one with greater citizenship power, a pluralistic voluntary sector, and willingness of groups like the disability demonstrators and the proponents of the ERPDL—to challenge and be skeptical of dismissive claims by the political elite. Thus, the status quo is no longer acceptable, even when the defense is that the external security threats to Israel prevent the allocation of time and energy for disabilities (or other social causes). As Professor Asa Kasher, one of the recipients of the prestigious Israel Prize put it: “now people don’t buy it.”¹⁹⁵ Two expressions of this skepticism and drive for recognition of disability rights are a movement for more inclusion of children with disabilities in public education and a new militancy by adults with disabilities.

f. Explanations for the Weak Implementation of Disability Rights—Another chronic legal problem in Israel is the failure to implement the law on physical accessibility of public buildings. Most public buildings are not accessible nor were retrofitted to meet these requirements.¹⁹⁶ Thus, the term “equal access,” at least as far as access to the physical environment is concerned, rings hollow. The failure to implement this law was addressed in the 1996 report of the Katz Commission calling for the Bill on Equal Rights for Persons with Disabilities and by Chief Justice Barak in the previously discussed *Botzer* case.¹⁹⁷ In addition, a survey conducted by *Biz’chut* found that in the elections that took place in February, 2001, most voting locations were still inaccessible to persons with disabilities.¹⁹⁸

Israeli disability rights suffer from a variety of impediments. According to Ephraim Yuchtman-Yaar, professor at Tel Aviv University and a leading authority on public opinion polls, there are several reasons that limit the popular appeal of this issue in general and the ERPDL in particular.¹⁹⁹ These factors include the weakness of

195. Interview with Professor Asa Kasher, The Laura Schwarz-Kipp Chair in Professional Ethics and Philosophy of Practice, Tel Aviv University, in Tel Aviv, Isr. (Mar. 26, 2000) [hereinafter Kasher Interview].

196. KATZ COMMISSION REPORT, *supra* note 77.

197. H.C. 7081/93, *Botzer v. Maccabim-Reut Local Authority*, 50 P.D. 1, 19 (1993) (Isr.).

198. This problem is also common in the United States, and has received renewed attention in the wake of the disputed Florida elections. Indeed, as new technology for voting is introduced, the disabled will exercise the franchise with greater privacy and independence.

199. Interview with Ephraim Yuchtman-Yaar, Professor at Tel Aviv University, in Tel Aviv, Isr. (Apr. 5, 2000).

civil society,²⁰⁰ the lack of appropriate and charismatic leadership, the lack of a powerful electorate invested in this issue, sporadic ability to mobilize public opinion to heed disability rights, and internal dissension and fragmentation among the various groups constituting the disability lobby. In short, the culture and climate of the times gives these issues relatively low priority and visibility. In the midst of high-stakes concerns about war and peace, economic growth, and the changing political leadership, it is easy to see why disability rights receives merely fitful attention.²⁰¹

Professor Asa Kasher, chair in the philosophy of professional ethics at Tel Aviv University, attributes the slow pace of rights-based change to several reasons.²⁰² First, Israel is one of the few democratic countries that lacks a constitutional bill of rights. "The idea of one demanding rights from the state for support is not self-evident," he observes, in a legal system in which rights are not constitutionally protected.²⁰³ Thus, everything in the public arena becomes a matter of constant negotiation, resulting in perennial dispute rather than enforcement of an entrenched bill of rights. Second, in contrast to the huge outlays of public funds lavished on disabled veterans, other Israelis with disabilities fare poorly. And because the veterans, the most popular and powerful group of individuals with disabilities, receive care under other arrangements (principally through the Israeli Defense Forces (IDF) and the Ministry of Defense), the disability community is divided.²⁰⁴ Furthermore, although Israelis, if polled, will say that they favor elevating all people with disabilities to the same level as the war-disabled, this is a passive general attitude that does not translate into political expression.²⁰⁵ Third, in Kasher's view, the phenomenon of Jewish survivalism prevents strong adherence to any particular cause because the mentality of the Diaspora survivor is to keep options open rather than to adopt firm positions or make "long-term efforts" or commitments to an altruistic cause.²⁰⁶ Fourth, the law has a limited impact in Israeli society because "law is

200. This weakness can be attributed to several factors, including a focus on individual pursuits over civil participation, narrow ethnic identities over national solidarity, political divisiveness over shared civil national ends, and security and collective interests over improvement of civic projects involving the betterment of marginalized groups. *Id.*

201. *Id.*

202. Kasher Interview, *supra* note 195.

203. Israel has two basic laws that have a quasi-constitutional status. Strong political divisions in the Israeli body politic have hindered attempts to draft and proclaim a full-fledged constitution. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

regarded as just another input, not the final word” on a subject, a factor to be “taken into consideration for the negotiation” that controls the outcome. Fifth, although Kasher views Israelis as altruistic when it comes to making donations, this sense of compassion does not “create a viable way to move forward” with an issue like disability rights. Charitable giving is at the level of impulse and does not translate to a sense of obligation. Thus, one gives if one feels like giving, but here again the survivalist mentality prevents commitment. Sixth, because Israel is not a grassroots, egalitarian western-style democracy, extra-democratic measures are possible. Kasher notes that polls show that 30% of the population is willing to engage in violence to achieve political ends, and 2.5% or 100,000 people are willing to support political assassination, suggesting that the lessons from the assassination of former Israeli Prime Minister Yitzhak Rabin have not yet been absorbed.²⁰⁷ Seventh, the Israeli political elite still behaves as if issuing declarations is a sufficient substitute for real action.²⁰⁸ “We’re great for issuing declarations, but it means nothing.”²⁰⁹ In Kasher’s view, this elite has not yet entirely grasped that Israel is a state and, as a result, continues to play with symbols, falling short when it comes to implementation of programs and stressing that “we cannot continue to dismiss implementation as if it were mere technical details.”²¹⁰ The ERPDL’s implementation problems are not unique; they continue the common pattern that after new laws are adopted there is a lack of attention to implementation and to the necessary follow up.²¹¹

Despite all these obstacles to change, Kasher and I believe there are some grounds for optimism.²¹² First, Israel actually is a very altruistic society in which people are willing to express solidarity, especially under conditions of hardship and crisis. If the country is in trouble, the people express basic firm solidarity. Second, Israel has highly skilled professionals, particularly in terms of the impact

207. Asa Kasher, *Should Teachers be Compelled to Teach the ‘Rabin Legacy’?* JERUSALEM REPORT, May 7, 2001, at 56.

208. Kasher Interview, *supra* note 195.

209. *Id.*

210. *Id.*

211. Nina Gilbert, *Women’s Rights Legislation Passes*, JERUSALEM POST, Mar. 30, 2000, at 3 (reporting that the Women’s Equal Rights Law passed forty-nine to two, but expressing skepticism that the law will change many things). New legislation is subject to budgetary constraints and caveats, as was the case with the Patients’ Bill of Rights Act which had generous terms but insufficient support. See Michael L. Gross, *Autonomy and Paternalism in a Communitarian Society: Patient Rights in Israel*, HASTINGS CTR. REP., July/Aug. 1999, at 13 (characterizing Israel as an avowedly communitarian state with “limited patient rights”).

212. Kasher Interview, *supra* note 195.

of their world-class research in computer science, management, and chemistry. Kasher believes that if Israelis apply their intelligence and resourcefulness to the goal of disability rights, they can succeed at ensuring equal rights for persons with disabilities in Israel.²¹³ He illustrates this point by noting that every part of the Latrun memorial site for the armored corps is accessible in its most minute aspect to people with disabilities.²¹⁴ Third, he points out that the children with disabilities who receive a better, more integrated education will eventually take their place in society.²¹⁵ Fourth, the IDF, as the most reliable and prestigious institution in society, models good treatment for people with disabilities in the rehabilitation of the wounded and the recruitment of people with mental retardation, mental health problems, and other disabilities.²¹⁶ Thus, the IDF is a force for integration that sets a high standard that can serve as an inspiration and precedent for other people with disabilities. For example, the IDF links the disabled former servicemen and women with their units, facilitating friendships and social connections.

g. Reflections on the Emerging Israeli Disability Rights Movement— Israel likes to think of itself as a compassionate place for people with disabilities, but the reality is otherwise. Most Israelis with disabilities do not want compassion or pity. Like their counterparts in the United States and elsewhere, Israelis with disabilities want their rights and they want the dignity of life in the mainstream. Thus, the goal is moving the discussion from matters of charity and private misfortune to matters of rights and public policy. Old notions that disability should be a basis for exclusion—for being “put away”—are fading.²¹⁷ The view that people with physical, mental, or sensory disabilities should be objects of pity is unacceptable. As will be shown later in this Article, people with disabilities are claiming their rights in numerous countries around the world (as is evident in the Appendix on Disability Nondiscrimination Laws). They insist that the time is long overdue for their participation in public policy arenas. They are tired of being patronized, sidelined from work and education, and pushed to the margins of everyday life. As in the United States with the ferment that accompanied the passage

213. *Id.*

214. *Id.*

215. *Id.*

216. Assistance for veterans with disabilities is provided through the Ministry of Defense in regard to practical supports and cash assistance, and the Division of Rehabilitation in the IDF in regard to moral support and motivation. *Id.*

217. Ziv, *supra* note 72, at 200.

of the ADA, the reverberations of this rights revolution are now being felt in Israel.

Public awareness and sympathy for disability rights has increased as a result of major demonstrations by protestors with disabilities in Jerusalem in October 1999 and January 2000.²¹⁸ The first—a thirty-seven-day strike that occupied the Finance Ministry's building—focused on the inadequacy of the approximately 1500 NIS-a-month-(\$350) basic disability benefit and to a lesser extent, the lack of implementation of the ERPDL.²¹⁹ The demonstrators' plight received favorable press coverage.²²⁰ The government was in a no-win situation, exemplified by former Prime Minister Barak's ill-advised statement that "we will not be moved by tears."²²¹ By the end of marathon negotiations, the disability community had won a resounding 140 million NIS (\$35 million) victory that permits multiple benefits (including mobility and personal assistant services) for persons with severe disabilities.²²² The second—a follow-up two-day protest—ended when the government, after an unconscionable three-month delay, agreed to commence the increased payments.²²³ It is now evident that disability has a place on the national agenda, but the business of respecting declared national and international disability rights has barely begun.

Israel may now be experiencing a real disability rights movement. Past disability protests in the 1970s in the offices of the Prime Minister and the Ministry of the Treasury received little media attention, and had little lasting impact.²²⁴ At present, the demonstrators are linking up with others and becoming a national force that is capable of convincing municipalities, employers, and the national government to pay attention to their rights.²²⁵ If they can forge alliances with established disability groups, sympathetic professionals, and family members, they can develop substantial political clout. With ties to civil rights groups, such as Biz'chut, they are becoming regular players on matters of disability policy.²²⁶ The successes of the disability demonstrators can also raise their expect-

218. Stanley S. Herr, *Real Rights or Just Lip Service*, HA'ARETZ MAG., Mar. 24, 2000, at 26.

219. See Moti Bassok et al., *Negotiations with Disabled Reach Impasse*, HA'ARETZ, Nov. 3, 1999, at 2.

220. See Larry Derfner, *Sitting Strong*, JERUSALEM POST, Nov. 5, 1999, at B7.

221. *Id.*

222. Moti Bassok et al., *Disabled Win Their NIS 140 Million from Cabinet*, HA'ARETZ, Nov. 8, 1999, at 1.

223. See Herr, *Perspectives*, *supra* note 68.

224. *Id.*

225. *Id.*

226. *Id.*; see also, Ziv, *supra* note 72.

tations and focus more scholarly light on other grave disability rights concerns.

In summary, Israeli society's conception of the disabled community's marginalization is more realistic. But the protests and media have just begun to focus on problems of accessibility to the physical environment, let alone to the mainstreams of educational, cultural, and economic life. The lack of implementation of existing laws mocks even the sparse rights found on paper for people with disabilities. Most striking, the Equal Rights for Persons with Disabilities Law (ERPDL), passed in 1998 and intended to take effect on January 1, 1999, still has no comprehensive regulations nor systematic publicity.²²⁷ A law this hidden is almost worse than no law at all. This remedy is barely known to its intended beneficiaries, let alone the employers and transportation providers who will have to comply with the law's requirements.

This state of affairs has started to slowly change. Ariella Auphir, former head of Biz'chut, was named the Commissioner. She finished staffing her office and is now ready to press for disability rights from inside the government. Along with others, she is lobbying for the expansion of the ERPDL. The nineteen proposed sections would cover all spheres of public life, require new support services designed to improve training and education, and fulfill the promise of equal rights.²²⁸

Yet social justice and disability rights enforcement remain problematic. As discussed earlier, rights and supports for Israelis with disabilities are unequally distributed, with widening inequalities between disabled veterans and the civilian disabled population, including those with congenital or early-onset disabilities such as cerebral palsy, post-polio, and mental retardation and other chronic intellectual disabilities. The invisibility of the problems of the disabled, especially when they occur among new immigrants or the Arab sector, hampers policy reforms and practical solutions. Tens of thousands are condemned to lives of despair and over-dependence because of the limited development (or non-existence) of community supports for early education, less restrictive special education of those of regular school age, residential support, and independent living in remote areas.²²⁹ The ordinary Israeli with a disability is struggling to live; enjoying the rights of citizenship is a distant goal.²³⁰

227. See Herr, *Perspectives*, *supra* note 68.

228. Biz'chut is another primary lobbyist for the expanded law.

229. See, e.g., Herr, *Perspectives*, *supra* note 68.

230. *Id.*

Israel, like many other countries, must choose between social Darwinism and real social rights for people with disabilities. In relation to some other social democracies, Israel lags far behind in the field of disability rights. The actual quality of life for its 600,000 citizens with disabilities could improve if the government implemented the Equal Rights Law with real commitment and if the Knesset filled some of the gaps by enacting nondiscrimination laws on public accommodations and the provision of self-determined services and support. The disability community itself needs to organize for the long term, as a dynamic and vigilant coalition to make these rights and promises real. As in other countries, the Israeli public should remember that—given the chances of accident or illness—this is the only minority group that one might (involuntarily) join at any time. This is a cause that can be supported for more than just reasons of altruism, since disability crosses every class, religious, and nationality line. Properly mobilized, the cause of disability rights should be championed by a hidden army of millions of Israelis as citizens look to their own rights and needs and those of family and friends who have or may develop disabilities.

One measure of a civilization is its treatment of the most vulnerable segments of society. Israel can build a network of support for its children and adults with disabilities that reflects the best of civilization rather than complacently settling for symbols and tokens of rights. As I concluded in the Israel National Conference on the Rights of People with Disabilities in Israel and the World:

No one else will do this hard and persistent work for us of making rights real. . . . In this time of Passover, let us recall that no lawmaker alone—not even Moses—could just bring down the ten commandments and expect, overnight, that people would change. If the people of Israel will not hear the deaf, or see the blind, or listen patiently to the slow of speech or mind, we must fight harder for their rights. The time for passivity is over. The time for social change, based on rights, political mobilization, and service reform is NOW!²³¹

Despite these flaws, the Israeli experience has many positive aspects from which other countries can learn and benefit. The law and its amending bill are ambitious and innovative. Israeli's Commission on Equal Rights for Persons with Disabilities is becoming more influential with each passing day. Despite all the security

231. STANLEY S. HERR, RIGHTS, VALUES AND SOCIAL CHANGE: TOWARDS EQUALITY FOR PEOPLE WITH DISABILITIES IN ISRAEL AND THE WORLD 29 (2001).

problems of this region, disability rights activists continue to press the government and the public for the realization of the ERPDL and related disability rights. A courageous Israeli disability rights movement fights on.

*B. The Disability Discrimination Act (DDA): the U.K.'s
Implementation of Disability Non-Discrimination Law*

The United Kingdom has also developed notable and comprehensive nondiscrimination laws. A recent amendment to create the Disability Rights Commission especially deserves discussion and further study. In addition, the Employers' Forum on Disability has mobilized a large sector of the corporate community to support the Disability Discrimination Act's (DDA) general aims. Yet there is also a sense that the Act is at a crossroads with controversy as to whether the pace of change is proceeding quickly enough.

1. *Creation of the DDA and the Influence of the ADA*—As in Israel, activists in Britain sought to enact a disability law that would not only eliminate technical barriers but also empower an oppressed minority. A central concern, as Vic Finkelstein, senior lecturer at the Open University, observed, was that “disabled people increasingly see themselves as oppressed, denied citizenship rights and disempowered.”²³² They sought a “Charter of Rights” and civil rights legislation that would place more power in their own hands. They viewed as barrier removal not merely the provision of ramps, information in Braille and on tape, and signing on television, but the development of a unique disabled people's perspective on the world and the opportunity to contribute to its future shape.²³³ More concretely, they sought civil rights laws to “provide a framework for guiding the development of community-based support systems for disabled people living in their own homes and to ensure equal opportunities in employment and equal access to education and medical services, housing, leisure, the environment and information.”²³⁴ With so sweeping a standard, whatever concessions a government would grudgingly grant were bound to fall short.

The British activists drew inspiration from U.S. examples. They viewed the U.S. Civil Rights Movement of the 1960s, the social

232. Vic Finkelstein, *Disability: A Social Challenge or Administrative Responsibility?*, in *DISABLING BARRIERS—ENABLING ENVIRONMENTS* 34, 40–41 (John Swain et al. eds., 1993).

233. *Id.*

234. *Id.* at 42.

protests that played a role in the Section 504 regulations of the Rehabilitation Act, and the passage of the ADA as significant models for change.²³⁵ The rise of self-help organizations in the disability community and the existence of equal rights laws based on race and gender also fueled demands for disability discrimination law. Despite the English activists' efforts, however, they repeatedly failed to enact such a law in the 1980s.²³⁶ By 1991, the Minister for Disabled People was still arguing for persuasion, not legislation, as the way to deal with acknowledged discrimination.²³⁷ The activists viewed such policies of persuasion as bankrupt. "The American Disability movement," they declared, "has used [the civil rights movement] tactics to good effect in the past 20 years to the point where its most recent convert [President George H.W. Bush] can claim, after signing the ADA 1990, which outlawed discrimination: 'Let the shameful walls of exclusion come tumbling down.'"²³⁸

Obtaining a new disability discrimination law did not sweep away intolerance, prejudice or lower expectations of disabled persons. First, the impetus for implementation was somewhat lacking, especially with the "exhaustion or 'greying' of the leadership within the disability movement."²³⁹ Second, the text of the Act led to problems of ineffective enforcement, with vague terms like "reasonableness" and "justification" making it difficult to prove discrimination.²⁴⁰ Third, the initial lack of a commission and the status of the National Disability Council as an advisory body left the Act without a strong watchdog. Fourth, the cost of private enforcement actions in the courts or industrial tribunals limited the number of claims under the Act. Finally, the DDA's wide exemption clauses left many sectors of the English economy and many forms of discrimination outside the reach of the law.²⁴¹

235. Mike Oliver & Colin Barnes, *Discrimination, Disability and Welfare: From Needs to Rights*, in *DISABLING BARRIERS—ENABLING ENVIRONMENTS*, *supra* note 232, at 266, 270.

236. *See id.* at 272.

237. *Id.* at 274 ("Nor would I deny that discrimination exists—of course it does. We have to battle against it, but rather than legislating, the most constructive and productive way forward is through raising awareness in the community as a whole." (citing Nicholas Scott, *HANSARD*, Mar. 28, 1991, at 1150)).

238. *Id.* at 276 (citing *Worklife: a Publication on Employment and People with Disabilities*, Vol. 3, No. 3 (quoting President George H.W. Bush)).

239. JOHNSTONE, *supra* note 10, at 42.

240. Brian Doyle, *Enabling Legislation or Dissembling Law? The Disability Discrimination Act of 1995*, 60 *MOD. L. REV.* 64, 77 (1997).

241. Those exemptions include companies with fewer than twenty employees. *See* JOHNSTONE, *supra* note 10, at 44–48. Tom Shakespeare, writing in *The Guardian*, charged that despite its "well-meaning messages promising inclusion and justice for disabled people," the DDA guarantees nothing and is a "pathetic substitute for civil rights legislation." *Id.* at 46 (citing Tom Shakespeare in *THE GUARDIAN* (London), Mar. 30, 1995). Another leading British commentator, Caroline Gooding, is pessimistic that the judiciary will pour activist

The Disability Discrimination Act (DDA)²⁴² bans discrimination against disabled persons in four sectors: employment; provision of goods, facilities, and services; purchases or rental of land or real property; and certain forms of transportation. The DDA applies to employers with fifteen or more employees, defining disability discrimination as treating a disabled person “less favourably” than someone else by reason of the person’s disability where the reason: (a) does not, or would not, apply to others; and (b) the treatment cannot be justified.²⁴³ The justification for the deferential treatment must be material and substantial, e.g., no adjustment would enable the disabled person to do the job in question or to assume another available position.²⁴⁴ Like the concept of “reasonable accommodations” under the ADA, the employer may have to make reasonable adjustments to the disabled person’s employment or the premises if the lack of these adjustments substantially disadvantage a disabled person compared to a person who is not disabled.²⁴⁵

Part III of the Act defines an array of prohibited practices by establishments that furnish goods and services.²⁴⁶ These practices include the refusal of services; the provision of services on worse terms or a lower standard of services; the failure to make reasonable adjustments that would allow a disabled person to access a service, provided that in each case the failure to make an adjustment or the treatment subject to complaint cannot be justified.²⁴⁷

2. *The Potential of the Disability Rights Commission*—On April 19, 2000, the government of the United Kingdom launched the Disability Rights Commission (Commission or DRC), formally replacing the National Disability Council established in 1995 under the DDA.²⁴⁸ According to the Disability Rights Task Force, one of the greatest flaws in the DDA was the lack of an enforcement body

content into the Act since it values “the freedom of discriminators above the rights of individuals to be free from discriminatory treatment.” *Id.* at 47 (citing CAROLINE GOODING, *DISABLING LAW, ENABLING ACT* 98 (1994)).

242. *Id.* at 46.

243. Disability Discrimination Act, 1995, c.50, Part II (Eng.). For the first appellate case interpreting justification and remitting an unfavorable decision for a disabled employee to the Employment Tribunal, see *Clark v. Novacold* [1999] I.L.I.R., 318 (C.A.) (deeming it unnecessary to identify a non-disabled person in similar circumstances treated more favorably, but only necessary to show that the reason for the less favorable treatment was related to the employee’s disability), the Court of Appeals thus reasoned.

244. See Doyle, *supra* note 240, at 74–75.

245. *Id.*

246. *Id.*

247. Disability Discrimination Act, 1995, c.50, Part III (Eng.).

248. The DRC came into formal operation on April 25, 2000.

to ensure compliance with the law.²⁴⁹ Following Task Force recommendations, Parliament passed the DRC Act (1999),²⁵⁰ conferring authority to investigate discrimination and enforce the provisions of the DDA. The government intended this non-governmental public body to avoid “adversarial” and “oppressive” approaches, and to emphasize public education and promotion of good practice.²⁵¹

Emulating the Equal Opportunities Commission (EOC) and the Commission for Racial Equality (CRE), the DRC has four main duties: working towards the elimination of disability discrimination, promoting the “equalization of opportunities for disabled persons,” encouraging “good practice in the treatment of disabled persons,” and keeping under review the Act and its implementation.²⁵² The DRC provides four core services: legal advice to individuals; investigation and resolution of complaints; shaping of policy; and media work.²⁵³ To fulfill these duties, the DRC may conduct formal investigations²⁵⁴ and issue nondiscrimination notices that give details of unlawful acts and compel cessation of those acts. The Commission can recommend action that the person concerned “could reasonably be expected to take with a view to comply with the requirements of the notice.”²⁵⁵ In addition, the Commission can enter into agreements in lieu of enforcement action, facilitate conciliation in relation to disputes under Part III of the DDA, and prepare and issue codes of practice.

The DRC is a non-departmental body consisting of fifteen commissioners, ten of whom are persons who have a disability.²⁵⁶ The DRC has seven regional offices with a total of sixty-five staff members, of which 30% are persons with disabilities.²⁵⁷ In addition to funding from the Department for Education and Employment, the Commission may charge for the facilities or services it provides.²⁵⁸

At the time of the DRC’s creation, the Minister for Disabled People, Margaret Hodge, set a generally optimistic tone. She noted

249. U.K. DEPARTMENT FOR EDUCATION AND EMPLOYMENT, FROM EXCLUSION TO INCLUSION: A REPORT OF THE DISABILITY RIGHTS TASK FORCE ON CIVIL RIGHTS FOR DISABLED PEOPLE 5 (1999) [hereinafter TASK FORCE REPORT].

250. Disability Rights Commission Act, 1999, c.17 (Eng.).

251. *See id.*

252. *Id.* § 2.

253. *Id.*

254. *Id.* § 3.

255. *Id.* § 3.

256. *Id.* § 1.

257. Press Release, Disability Rights Commission, Top Management Team for the Disability Rights Commission (Mar. 22, 2000).

258. Disability Rights Commission Act, 1999, c.17, § 1, cmt. A subs. 2 (Eng.). It can also recover costs or expenses arising from legal proceedings it has undertaken under the DDA. *Id.*

four successes under the DDA in winning monetary settlements for victims of discrimination.²⁵⁹ She acknowledged, however, that less than 24% of applicants before Employment Tribunals prevailed (106 out of 450 cases).²⁶⁰ In her speech, she expressed confidence that the DRC would have a “huge impact” as

A step upwards in the quality of life for disabled people. A step forward for those looking to change their practices. A helpful step for those prepared to change. A guiding step for those reluctant, or unconvinced of the need, to change. A warning slap to those opposing change. The DRC will have powerful legal armour to fight recalcitrant business.²⁶¹

3. The Employers' Forum on Disability and the Emergence of Alternative Means of Implementation—The Employers' Forum on Disability (EFD) is a unique association of employers that shares best practices under the DDA and brokers partnerships and initiatives to facilitate the recruitment and retention of disabled employees. As a private sector leader, it mobilizes employer support for the general aims of the DDA while simultaneously curbing lobbying by those who fear “radical legislative change” that could result in a more confrontational relationship between employers and their disabled workforce.²⁶² Formed in 1986, the EFD has 289 funding members (including the Post Office and some of the largest private employers) that employ about 20% of the UK's workforce.

The EFD's main services include the production of training materials, sponsoring of seminars and networking events, research, and initiatives to foster employment of people with disabilities. The EFD also convenes subgroups such as the Customer Advisory Group, the Broadcasters Disability Network, and the “New Deal Network” that exchange advice on best practices in recruiting disabled people. According to its chief, Susan Scott-Parker, the Forum tackles “the barriers faced by disabled people by focusing on the needs and expectations of the people with the jobs,” because “making it easier to recruit and retain disabled people must make it easier for disabled people to find and keep jobs.”²⁶³

259. This account is drawn from the speaking notes of Margaret Hodge from the DRC Launch on April 19, 2000.

260. *Id.*

261. *Id.*

262. Employer's Forum on Disability before the House of Commons Educ. and Employment Comm. (Nov. 10, 1998) at 21 (testimony of Susan Scott-Parker).

263. *Id.* at 20.

4. *Critique*—By 1999, disability specialists recommended numerous changes to strengthen the Disability Discrimination Act (DDA). In a 258-page report, the Disability Rights Task Force on Civil Rights for Disabled People made 156 recommendations in five major areas.²⁶⁴ First, the Task Force recommended that DDA coverage be extended to education and transportation. The Task Force emphasized the right to inclusive education and reasonable accommodations. In addition, the Task Force proposed closing several loopholes in the requirement of accessible public transportation. They proposed strengthening provisions relating to employment to match comparable race and gender discrimination legislation and to include all employers, regardless of size or occupation.²⁶⁵

Second, the Task Force called for encouraging the public sector to promote the equalization of opportunities for disabled people, including the adoption of performance measures to assess the impact of the DDA in the judiciary, local government, and the health and social services.²⁶⁶

The third group of recommendations concerned refinements of the DDA to strengthen housing protections, reasonable accommodations, equal employment, and equal access to goods and services. The Task Force also recommended expanding the DDA's definition of disability to cover people with HIV from the first diagnosis, those with cancer from the time when it has significant consequences on the individual's life, and those with middle-term illness and health conditions such as heart attacks, strokes, or depression.²⁶⁷ The Task Force also sought definitional clarification for those whose mental health problems are not "clinically well-recognised," but are serious and sometimes subject to disagreements among clinical practitioners.²⁶⁸

Fourth, the Task Force urged the government to consider other reforms, including the institution of universal design features.²⁶⁹ The Task Force also urged the private sector to provide product information in accessible formats.²⁷⁰

Whether the DDA is strengthened by legislative means, the existing Act represents an important milestone in British and European

264. TASK FORCE REPORT, *supra* note 249.

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.* at 31. Dysphasia, which affects speech and its understanding, was also singled out as a disability warranting DDA coverage. *Id.* at 31–32.

269. *Id.* at 246–48.

270. *Id.* at 246.

disability nondiscrimination law. As in the American experience with the ADA, the law has led to training by human resources professionals on the need to comply with mandates, greater flexibility in policies on hiring employees with disabilities, and more accessible facilities.²⁷¹ On both sides of the Atlantic, employee representatives report that the costs of training, supervising, and accommodating employees or applicants “are not significant barriers to the employment or advancement for persons with disabilities.”²⁷² In contrast to the United Kingdom Human Rights Act of 1998 and the European Convention on Human Rights, which fail to specify disability as a ground of prohibited discrimination, the DDA focuses attention on problems of disability discrimination.²⁷³ Despite its important first steps, however, the DDA remains a law in need of reform, described by a leading commentator as containing many “flaws” and “deliberately designed hoops and hurdles which are creating barriers to effective anti-discrimination laws in the field of disability.”²⁷⁴ Notwithstanding the

271. See Press Release, Cornell University School of Industrial Relations, Program on Employment and Disability, U.S., U.K. Now More Receptive to Working People with Disabilities, New Survey Shows (Dec. 15, 1999). Although human resource professionals in both the Britain and the United States noted the problem of negative attitudes toward workers with disabilities by their co-workers and supervisors, these specialists felt that disability management programs could change such attitudes and comply with disability laws. In terms of differences in management practices, the Cornell survey revealed that U.S. firms seemed better at keeping records on accommodations granted (87% in the U.S. versus 65% in the U.K.) and were better informed as to what questions can be asked.

272. SUSANNE M. BRUYERE, A COMPARISON OF THE IMPLEMENTATION OF THE EMPLOYMENT PROVISION OF THE AMERICANS WITH DISABILITIES ACT (ADA) IN THE UNITED STATES AND THE DISABILITY DISCRIMINATION ACT (DDA) IN GREAT BRITAIN AND NORTHERN IRELAND (Oct. 1999). A Switzer fellowship study (Fellowship #72-05644834F) of over 1800 American and British human resources professionals and other employee representatives deemed legal counsel the most frequently used and most helpful sources of advice to resolve disputes under disability nondiscrimination laws. Bruyere thus concluded that in-house or other counsel must be well-informed of the statute, evolving case law, and the practical implications of the workplace adjustments that claimants seek. *Id.*

273. SANDRA FREDMAN, A CRITICAL REVIEW OF THE CONCEPT OF EQUALITY IN U.K. ANTI-DISCRIMINATION LAW 15 (Univ. of Cambridge Centre for Pub. L. & Judge Inst. of Mgmt. Stud., Working Paper No. 3 1999). Oxford law professor Fredman asserts that direct discrimination “on grounds of disability should not be justifiable,” a position that challenges a premise of the DDA. *Id.* at 17.

Under the DDA, Employment Tribunals can impose strong remedies: a declaration finding discrimination and requiring employer action (e.g., promotion, consideration for a job, or certain training facilities), or compensation, including no monetary limits for injury to feelings. I INTERNATIONAL LABOR AND EMPLOYMENT LAWS 7–78 (William L. Keller et al. eds., 1997) (noting that the European Court of Justice has imposed this “no monetary limit” rule and this rule has been followed in *Marshall v. Southampton & South West Hampshire Reg'l Health Auth.* (No. 2) [1993] I.R.L.R. 445).

274. BRIAN DOYLE, REFORM OF THE DISABILITY DISCRIMINATION ACT 1 (Univ. of Cambridge, Centre for Pub. L. & Judge Inst. of Mgmt. Stud., Working Paper No. 4 1999) [hereinafter DOYLE, REFORM]. Professor [now Judge] Doyle criticized the complexity of the

government's assertion that the DDA marks Britain as a European leader in disability anti-discrimination legislation, the law has been criticized as a half measure that has mollified, but not satisfied, the goal of full-fledged law reform.²⁷⁵

The operation of the Disability Rights Commission (DRC) raises new expectations that the Act will be taken more seriously by the affected parties.²⁷⁶ Based on a consultation process now under way, the Commission can help to strengthen the requirements for physical alterations by service providers that are due by 2004. It can lobby for statutory and other changes recommended by the Task Force on Civil Rights for Disabled People. It can stimulate changes that go beyond sterile notions of formal equality and address problems of indirect discrimination, i.e., the use of criteria that result in a pattern of under-representation by persons with disabilities in all sectors of British life. It can provoke a useful debate that challenges conventional notions of equality of opportunity as entailing merely the adoption of procedures or the removal of barriers. A more intellectually adventuresome DRC could work instead at stressing the values of human dignity that would lead society to redress disadvantage associated with disability, improving the individual's ability to compete, giving attention to remedies for cumulative discrimination (e.g., combating the problems faced by people of color with disabilities or females with disabilities), and campaigning for positive, affirmative action programs that go further than the narrow legalistic anti-discrimination paradigm.²⁷⁷

definition of disability as adding to litigation costs, discouraging potential litigants from mounting challenges, and leading to a higher than average rate of settlement and withdrawal in DDA cases. Although he views *Goodwin v. The Patent Office*, [1999] I.R.L.R. 4, as an enlightened approach by the Employment Appeal Tribunal to the handling of medical evidence and the determination of a claimant's disability, he concludes that employers continue to have "every strategic reason" and encouragement to challenge the status of the claimant as a disabled person. Part III's provisions on goods, facilities, and services are even more problematic than the employment provisions, with their ambiguities and confusion as to whether to apply both a subjective and an objective test for the justification defense to discrimination warranting wholesale reform or at least closer definition. *Id.* at 7.

275. See Doyle, *supra* note 240, at 78.

276. NATIONAL DISABILITY COUNCIL, 1998-1999 ANNUAL REPORT 28 (1999) ("The NDC strongly believes that there is a need for a Commission that has a greater capacity to influence business behaviour and development of the law.").

277. Despite this formidable agenda of distinctive disability rights issues and concern, there has been some discussion of harmonizing discrimination law in the United Kingdom and bringing race, gender, and disability issues under the purview of a single Equality Commission. This seems unlikely to happen, especially given the opposition by disability rights groups that struggled for many years to create the DRC and the fear that gains and concerns will be undermined in a unitary commission by the more powerful lobbies for women and ethnic minorities. See BOB HEPPLE, ET AL., OPTIONS FOR REFORM: CONSULTATION PAPER (Univ. of Cambridge, Centre for Pub. L. & Judge Inst. of Mgmt. Stud. 1999) [hereinafter HEPPLE ET AL., OPTIONS]; Interview with Bob Hepple, Master of Clare College,

Some British leaders, however, already question whether disability rights have gone too far. They fear a more coercive use of the DDA than in the past. For example, Colin Low, a member of the DRC writing in his personal capacity, asserts that the civil rights agenda has had “pernicious effects,” that proposed statutory remedies for disability discrimination in higher education are too adversarial, and that the disability movement acts in a manner suggesting the only weapons it “knows are the blunderbuss and the battering-ram.”²⁷⁸ Some employers also express fears that disability rights activists may capture the Commission, with its mix of roles (prosecutorial, quasi-judicial, investigative, advisory, educational, and promotional), and produce burdensome intrusions on their businesses.²⁷⁹

In fact, a distinctive feature of the British experience is its emphasis on cooperative alliances between employers and disability groups. This leads to some uneasiness about DRC-supported litigation and a distinct preference for nonadversarial alternative methods of dispute resolution. It also leads to efforts to improve the DDA without returning to Parliamentary action. For example, a revised Code of Practice attempts to remedy some of the weaknesses of the Part III provisions on access to goods and services, an area of the DDA that has been subject to very limited litigation.²⁸⁰ Furthermore, because the legal culture in the United Kingdom is less activist than in the United States, some leaders may view the prospects of winning substantial new disability rights victories in the Parliament or the courts as too remote to warrant heavy investment. Researchers characterize mediation and arbitration as useful to address “wider issues than are possible in litigation” with

in Cambridge, Eng. (May 3, 2000) [hereinafter Hepple Interview] (suggesting, as a matter of logic, that a single commission might be more desirable, but that it is not feasible politically to merge DRC with the two other anti-discrimination commissions when the work of the DRC has just begun and its tasks are complex and different from those dealing with issues of gender and racial discrimination).

278. Colin Low, Address to the Vice-Chancellor and Other Guests of the City University, in London, Eng. (Apr. 2001), available at http://www.disabilityworld.org/03-04_01/news/low (last visited May 16, 2001). He also decries advocacy to provide compensatory awards for claimants before the Special Educational Needs and Disability Tribunal, greater inclusion in the school system, and what he describes as the “punitive animus” of some civil rights activists who fear that the DRC conciliation service will reduce the likelihood of high-visibility cases, resulting in fines against providers who discriminate in the provision of goods and services.

279. HEPPLE ET AL., OPTIONS, *supra* note 277, at 12. A disadvantage cited by this possibility is “complex and inflexible rules, over-regulation, legalism, delay and unnecessary intrusion into businesses which face competitive pressures.” *Id.*

280. DOYLE, REFORM, *supra* note 274, at 6. Other provisions of the DDA are largely untested, like those on discrimination in the rental or purchase of land, perhaps due to the complexity of the drafting. *See id.* at 8.

remedies that “may go well beyond monetary compensation.”²⁸¹ Many disability leaders may, on pragmatic or economic grounds, look beyond litigation to avenues for social change that appear more promising (such as, for example, stressing the common interests between employers and workers with disabilities). Su Jenkins, a senior employment and discrimination lawyer for the Sainsbury supermarket and gas station chains advocates for “a best practice approach.”²⁸² As an in-house corporate lawyer and a volunteer leader in the Employers’ Forum on Disability, she sees this approach to creative problem-solving as one that may generate even greater protections than those in the DDA rather than merely exacting grudging legal compliance with the Act.²⁸³ In a similar vein, some DRC members favor giving advice to employers, thereby encouraging their patronage by making the positive business case for accommodating employees and others with disabilities. For example, the National Disability Council has publicly praised employers who have taken the initiative to promote equality of opportunity for people with disabilities, collected examples of good business practices to share with other employers, and stressed the huge pool of talent and skills in persons with disabilities.²⁸⁴

281. HEPPLE ET AL., *OPTIONS*, *supra* note 277, at 52. Parties can now settle their cases with the aid of the Advisory, Conciliation, and Arbitration Service. Another reason for turning to Alternative Dispute Resolution (ADR) approaches is that disability cases are prone to experience the longest delays in resolution compared to race and gender discrimination cases, perhaps because of difficult medical issues or issues of disability definition. *Id.* at 44. In Britain, unlike the United States, one expert deems it unlikely that the government will take on the task of providing arbitration or mediation services but will seek instead to privatize this function. Hepple Interview, *supra* note 277.

282. Su Jenkins, *Disability Made Easy 3* (Mar. 10, 2000) (unpublished manuscript) (on file with Employers’ Forum on Disability, London, Eng.).

283. Jenkins describes this best practice approach as follows:

My Business focuses on the person, be they job applicant or existing employee and considers their need and requirements to do the job. If some element of the job needs adjusting so that the jobholder is able to do their job then this is considered and sorted out if at all possible.

So we developed what is now known as a best practice approach and this approach just makes life so much easier. Disability becomes something that we deal with as part of business as usual. It can even be fun. It is certainly rewarding. People in my Group Companies are learning to think laterally and to look for ways of helping our colleagues to work and grow in our business. With this approach disability is not seen as a problem and the attendant minefield of litigation is minimized or simply disappears.

Id. at 3.

284. NATIONAL DISABILITY COUNCIL, *supra* note 276.

C. An Overview of Disability Nondiscrimination Laws in Other Countries

Countries throughout the world have enacted disability nondiscrimination laws. These laws are presented in summary fashion in the Appendix, entitled Table of Disability Nondiscrimination Laws. In forty-one countries, these laws vary from nondiscrimination statutes to constitutional nondiscrimination provisions, from highly specific protections and prohibitions to more hybrid social welfare laws with some nondiscrimination language, from penal laws to those with civil characteristics, and from generic nondiscrimination to disability-specific laws.

1. Analysis of Disability Laws—Some countries have multiple laws dealing with this subject matter, with half of those laws enacted by 1995. The earliest example is found in the United States, with the nondiscrimination provisions of the Rehabilitation Act of 1973.²⁸⁵ Canada and Spain enacted laws in 1982 and 1980 respectively.²⁸⁶ In 1990, the Americans with Disabilities Act became the first comprehensive disability nondiscrimination law; forty-seven laws in various countries soon followed. Another inspiration for such laws was the United Nations' Standard Rules on the Equalization of Opportunities for Persons with Disabilities,²⁸⁷ declared in 1993, with thirty-four laws adopting it in subsequent years. The year 1996, with the enactment of eight laws, witnessed the largest volume of legislation.

The scope of the laws varies from comprehensive protections in employment, public accommodations, education, and government services to skeletal or general prohibitions against nondiscrimination. The most comprehensive laws provide protections in the areas of housing and the provision of goods and services. Only four countries limit coverage to a specific area, such as employment or public access.²⁸⁸ One of those four, Sweden, as discussed next, adopted a comprehensive employment nondiscrimination provision in 1999 to build upon its previous laws on progressive

285. 29 U.S.C. § 794 (1994).

286. CAN. CONST. (Constitution Act, 1982) pt. 1 (Canadian Charter of Rights and Freedoms); Workers Charter, Código Civil [C.C.], 1980, art. 4(2)(c) (Spain).

287. G.A. Res. 108, U.N. GAOR, 48th Sess., Annex, U.N. Doc. A/RES/48/96 (1993).

288. Those four countries are Ethiopia, Sweden (employment); Korea (education); and Fiji (access to goods and services).

disability policies. Twelve countries have a reasonable accommodations requirement in at least one of their nondiscrimination laws.²⁸⁹

Countries vary widely in their definition of disability. Twenty-seven of the forty-one countries do not define the categories of individuals covered by their law.²⁹⁰ Countries with a constitutional nondiscrimination provision are much more likely to include disability in a list of characteristics against which discrimination is prohibited (e.g., race, religion, political beliefs, and disability).²⁹¹ The most comprehensive laws include prohibitions against individuals regarded as having a disability and their family members, defining disability to include drug and/or alcohol addiction.²⁹² One of the most narrowly drafted laws specifically excludes persons with mental illness, alcoholism, and drug addiction.²⁹³

The most comprehensive nondiscrimination laws contain defenses for "reasonable" discrimination or undue hardship to businesses.²⁹⁴ In a nod to past paternalistic attitudes, several countries created a defense for discrimination "in the best interest" of the person with a disability.²⁹⁵ In addition, several laws contain a provision allowing the severity of a person's disability to be considered when deciding whether discrimination has occurred.²⁹⁶ The most comprehensive laws include specific injunctive, declaratory, or judicial remedies, including money damages, although the amount of damages may be limited in some cases.²⁹⁷ Four countries apparently have not provided for an individual right of enforcement²⁹⁸ and twenty-nine countries fail to specify remedies.²⁹⁹

Nineteen countries established a commission or ombudsman to mediate claims of disability discrimination or otherwise apply disability laws.³⁰⁰ The duties of such commissions vary by country, from

289. The twelve countries are Australia, Canada, Hong Kong, Hungary, Ireland, Israel, New Zealand, The Philippines, Sweden, the United Kingdom, the United States, and Zimbabwe.

290. For example, disability is not defined in the laws of Austria, Brazil, Fiji, Finland, Germany, or Ghana.

291. For examples, see Austria, Brazil, Switzerland, and Uganda.

292. For examples, see Canada, Hong Kong, The Philippines, the United Kingdom, and the United States.

293. *The Rights of Disabled Persons to Employment*, Proclamation No. 101 (1994) (Eth.).

294. For examples, see Canada, Fiji, Ghana, Hong Kong, and the United States in the Appendix.

295. For examples, the laws of Hong Kong and Zimbabwe, as outlined in the Table of the Appendix, *infra*.

296. For examples, the laws of Ghana and Zimbabwe, in the Appendix, *infra*.

297. For example, the laws of Australia, Canada, Hong Kong, and the United States in the Appendix, *infra*.

298. These four countries are Austria, Malawi, Switzerland, and Uganda.

299. For example, see Austria, Bolivia and Brazil, in the Appendix, *infra*.

300. For example, see Australia, Bolivia, Canada and Chile in the Appendix, *infra*.

educational to litigative. The most comprehensive commissions may promulgate regulations, investigate complaints, and issue injunctions against discrimination. Commissions may also provide mediation or arbitration services, represent an individual with a disability in seeking judicial remedies, and coordinate national disability policy. Other commissions may certify workers as “disabled,” or confer tax exemptions on businesses or other organizations providing employment, accommodations or accessibility to persons with disabilities.

2. *The Swedish Example*—Even some countries with a tradition of progressive disability legislation were slow to enact disability nondiscrimination laws. An instructive example is Sweden, which only banned employment discrimination against persons with disabilities in May 1999.³⁰¹

The Swedish anti-discrimination law protects persons with a permanent physical or mental limitation.³⁰² It covers both direct and indirect discrimination (the latter referring to treating a job applicant or employee less favorably by using a rule, requirement or procedure that seems neutral but in practice is particularly unfavorable to persons with a particular disability).³⁰³

Defining an action for disability harassment, the law imposes a duty on the employer who is informed that an employee considers herself or himself subject to harassment by other employees on the basis of disability. In such situations, employers must investigate the reported harassment and undertake measures reasonably necessary to prevent future harassment.³⁰⁴

Another distinctive feature of the law is the Disability Ombudsman's central role in ensuring compliance through persuasive activities in the first instance,³⁰⁵ or adversarial methods if necessary.³⁰⁶ This litigation capability resembles powers vested in the U.S.

301. SVENSK FO(**)RFATTNINGSSAMLING [SFS] art. 1999: 132 (Swed.). For an unofficial translation of that law, see PAUL LAPPALAINEN, SWEDEN: SEPARATE BUT EQUAL ANTI-DISCRIMINATION LAWS? (2000).

302. SVENSK FO(**)RFATTNINGSSAMLING [SFS] art. 1999: 132 § 2 (Swed.).

303. *Id.* § 4.

304. *Id.* § 9. Failure to fulfill this duty can make the employer liable for damages. *Id.* § 15.

305. *Id.* § 17. The Ombudsman must first attempt to convince employers to voluntarily follow the law. The Ombudsman may request and the employer must provide relevant information concerning the employer's activities or the qualifications for a particular job position. A breach of this duty may render the employer liable to a civil fine. This duty is limited by a vague defense that the employer is not to be unnecessarily burdened, and that “if there are special reasons the employer is not under a duty to provide information.” *Id.* § 18.

306. *See id.* §§ 22–23, 25. The Disability Ombudsman can appear before the Board Against Discrimination to impose a civil fine. It can sue under the laws governing trials in

Attorney General under the ADA.³⁰⁷ Here again, the oversight powers of the Disability Ombudsman bears close study and may serve as an inspiration for reforms in the United States.

In summary, legislation in Israel, the United Kingdom, and Sweden reflects a number of common purposes, including the integration of persons with disabilities in society, the end of discrimination in their lives, and the provision of efficient remedies for violation of equal employment obligations. The legislators in these countries attempted to reconcile the tensions between equality norms and the individualized needs of persons with disabilities and between the costs of dependency and the costs of making reasonable accommodations for qualified employees, job applicants, and users of government services or public accommodations.

III. REALIZING THE BENEFITS OF A COMPARATIVE ANALYSIS: PROPOSALS FOR IMPROVING THE ENFORCEMENT OF DISABILITY NONDISCRIMINATION NORMS IN THE UNITED STATES

Like Israel, Britain and Sweden, the United States increasingly focused on the development of disability nondiscrimination norms and a continuum of strategies for their effective implementation. The following discussion analyzes some of the advantages and disadvantages of the primary means of enforcing the ADA. Although litigation and administrative remedies inevitably will retain an important place in the arsenal of strategies, the following analysis recommends that the United States learn from the foreign experience and devote greater attention and resources to alternative mechanisms for compliance.

labor disputes on behalf of an employee or job applicant, if the individual agrees and the Ombudsman finds that a judgment in the dispute would be important for the application of the law, or there are other special reasons for bringing the case. The Ombudsman may in the same lawsuit also present other claims as the representative of the individual. *Id.*

307. The United States Attorney General has the power to bring pattern or practice suits or those of "general public importance." 42 U.S.C. § 12188(b)(1)(B). This authority can be compared to the Swedish Disability Ombudsman's standing to pursue certain legally significant claims. But unlike the ADA, a labor union in Sweden may have a superior right to the public official to bring a claim on behalf of the employee. The Swedish law, however, does not appear to contemplate class or other group forms of nondiscrimination action. SVENSK FO(**)RETTNINGSSAMLING [SFS] art. 1999: 132 (Swed.).

A. The Benefits of a Comparative Perspective

In an era of globalization, scholars and advocates of disability rights cannot afford to take a parochial approach to this subject. They can and must glean lessons from the experiences of other countries. The backlash against disability rights and the frequently disappointing outcomes of litigation and administrative remedies in the United States suggest that it is time to explore less adversarial methods. Instead of the hyper-litigation characteristics of the American legal culture, most countries with disability nondiscrimination laws seek positive outcomes through a mixture of formal and informal ADR strategies, with litigation reserved as a last-ditch strategy for particularly egregious or stubborn misconduct. In the field of disability discrimination, where real animus toward persons with disabilities tends to be rare, the experiences of other countries bear careful comprehension and further study. Indeed, this Article documents a striking convergence of the development of high-profile disability rights commissions, armed with governmental powers and public funds, to combat such discrimination.³⁰⁸ Their existence and their enhanced use of alternative means of implementation and legal enforcement offer important lessons not just to the United States but other countries that are contemplating the enactment of disability nondiscrimination laws. Such a commission in the United States would expand upon the limited role given to the EEOC to mediate employment disputes and bring suits or issue a right-to-sue letter if attempts to settle the case fail, by serving as an entity charged with all aspects of implementation of the ADA, including proposing changes or additions to strengthen the law.

This experience can help fuel the global disability rights movement as well. Instead of over-reliance on lawyers and other highly trained advocates, who may be in short supply (either in absolute numbers or as a result of these professionals' unwillingness to undertake disability rights cases), the non-litigious approach focuses on practical methods and approaches available to grass-roots activists. Thus, the public protest and civil disobedience that took place in Israel, and other bottom-up strategies, can empower people with disabilities in both industrialized and nonindustrialized nations. The yawning gap between laws and their enforcement will remain until large numbers of people with disabilities become invested in

308. See *supra* note 85 and accompanying text (discussing Israel's Equal Rights Commission for Persons with Disabilities); see also *supra* text accompanying notes 250–258 (discussing the U.K. Disability Rights Commission).

the implementation of disability nondiscrimination laws and other forms of disability rights.

Although disability rights lawyers will continue to play leadership roles in many countries, including the United States, there are pragmatic and value-centered reasons for increased use of political and ADR solutions. Disability rights leaders and their allies may more readily employ such approaches. By empowering those with disabilities to use such self-help, the disability rights movement is strengthened and gains power in the public's perception. A national focal point for the implementation of disability rights, coupled with the use of the full continuum of dispute resolution strategies, offers greater promise of including people with disabilities in the fabric of the social, economic, and cultural lives of their respective countries.

B. Adversarial and Alternative Mechanisms for Dispute Resolution and Compliance

1. *Litigation*—Court cases serve to focus public attention on a problem. They offer the opportunity to establish a legal precedent and/or target an industry and a set of stubborn enforcement issues. Litigation establishes a public record and gives the plaintiff community a better understanding of not only that industry and the obstacles and constraints to compliance, but a cumulative roadmap that may lead to more effective and sophisticated strategies in future cases. It may also help to inform those who provide technical assistance to do a better and more useful job based on the information acquired through litigation.³⁰⁹ Unlike the ADR movement, in which victories are often packaged as compromises and publicity is often kept to a minimum, litigation garners a lot of attention and can change perceptions within an industry and the general public with regard to the costs and benefits of complying with the ADA. At the appellate level—particularly in the handful of cases that reach the Supreme Court—litigation can draw many non-party organizations into the fray as amici curiae, thus creating moments for framing new coalitions, organizing for justice, and even mobilizing a broader array of disability activists.

309. Interview with Marc Dubin, Senior Trial Attorney, Disability Rights Section, Civil Rights Division, U.S. Dep't of Justice, in Baltimore, Md. (Feb. 18, 2001) [hereinafter Dubin Interview].

But litigation also has well-understood drawbacks. It is expensive, time consuming, and can be administratively burdensome when undertaken by government agencies with many levels of approval in the bureaucratic chain of command.³¹⁰ Political considerations may influence whether meritorious cases are filed as presidential administrations weigh competing political priorities and the possible consequences of Justice Department action. The low rate of success for plaintiff parties acts as a deterrent to private as well as governmental litigants.³¹¹ In Title I judicial decisions, the employer prevailed in 92% of 760 final merits decisions (1992–1997) and 94.4% of 397 merits decisions in 1998.³¹² In the public sector, there are strikingly limited resources of manpower and money for launching cases.³¹³ In the private sector, there is only a finite number of attorneys with real specialization in ADA law and incentives to bring cases that serve not only their clients but take into account the disability constituency.³¹⁴ Looming over potential litigation is a Supreme Court controlled by a majority that is openly skeptical of, if not hostile to, the broad aims and wide coverage that Congress built into the Act.

The most recent example of this unfortunate domination is *Board of Trustees of the University of Alabama v. Garrett*.³¹⁵ Writing for the Court, Chief Justice Rehnquist scoffed at the irrational biases that often underlie stereotypical responses to disabled persons.

310. Justification memos must be written; an Executive Order favoring ADR methods must be considered; and supervisors of line attorneys must grant their approval before cases can go forward.

311. See Feature, *Study Finds Employers Win Most ADA Title I Judicial and Administrative Complaints*, 22 MENTAL & PHYSICAL DISABILITY L. REP. 403 (1998); see also John W. Parry, *1999 Employment Decisions under the ADA Title I—Survey Update*, 24 MENTAL & PHYSICAL DISABILITY L. REP. 348 (2000).

312. This finding suggests that according to judicial opinion evidence, as few as seventy-nine individuals with disabilities over a seven-year period obtained a benefit by filing a Title I lawsuit.

313. One positive recent development is the greater involvement of U.S. Attorneys bringing their own ADA cases, or doing so in coordination with the Department of Justice in Washington, thus bringing greater litigation resources to bear on the issue. The National Association of Attorneys General (NAAG) also has become active in enforcing state disability discrimination claims.

314. Although many civil rights and other attorneys may hold themselves out as competent to bring ADA cases, the reality may be otherwise. In some states with a strong disability nondiscrimination law, such as California, attorneys must first make a sophisticated analysis of whether to elect a state or federal court forum. The hodgepodge of state laws and the resulting complexity of where to file public accommodation (or, to a lesser extent, employment law) claims may further deter inexperienced attorneys from pursuing cases in this field. Furthermore, unlike tort law, ADA cases are not viewed as “cash cows” especially given that Title III and Title I (*Garrett*—type) claims do not permit damages for private litigants and that attorneys’ fees claims may have their own problems.

315. 531 U.S. 356 (2001).

“[The Fourteenth Amendment does not require States] to make special accommodations for the disabled, so long as their actions toward such individuals are rational. They could quite hardheadedly—and perhaps hardheartedly—hold to job-qualification requirements which do not make allowance for the disabled.”³¹⁶ (Justice Breyer protested that the majority’s evisceration of the congressional power under section 5 of the Fourteenth Amendment “is reminiscent of the similar (now-discredited) limitation that it once imposed upon Congress’ Commerce Clause power” in 1936).³¹⁷

2. *Administrative Remedies*—In the employment area, the EEOC is the main source of administrative remedy. It has several advantages. It is free for the employee, operates on a nationwide basis, and has a well-established set of rules and guidelines. At the state level, there are counterpart agencies of varying degrees of effectiveness and claim-making ease.³¹⁸

Unfortunately, as in other ADA cases, complainants experience discouragingly low rates of success.³¹⁹ At district EEOC offices, the likelihood of delay, impersonal case handling, and backlogs can deter employees from filing or fully pursuing a complaint to a successful conclusion.³²⁰

316. *Id.* at 367–68.

317. *Id.* at 387 (Breyer, J., dissenting). *Cf.* SETH WAXMAN, *THE PHYSICS OF PERSUASION: ARGUING THE NEW DEAL* (Yale Law School, Occ. Papers, Second Series No. 5, 1999) (arguing that concepts like friction, magnetism, and momentum can create a favorable or unfavorable climate for deciding challenges to certain controversial statutes, and suggesting that the “more massive the new program” that the Court is asked to uphold the more pronounced is “friction’s effect”) *Id.* at 4. For a recent exception to this trend, see *PGA Tour v. Martin*, 532 U.S. 661 (2001) (allowing a professional golfer, with progressive circulatory disorder causing pain and atrophy of the leg, to use a golf cart does not fundamentally alter the sport, and hence is a reasonable accommodation).

318. With respect to Title III, however, there are no real administrative law remedies. The DOJ takes the position that the existence of any administrative remedy at the state level does not create an exhaustion of remedy defense to their bringing a Title III claim. See Dubin Interview, *supra* note 309.

319. From 1992–2001, on average 17% of EEOC complaints resulted in merit resolutions, defined as charges with outcomes favorable to charging parties or charges with meritorious allegations. These include negotiated settlements, withdrawals with benefits, successful conciliations, and unsuccessful conciliations. This data is available online at <http://www.eeoc.gov/stats/ada-charges.html>.

320. See Scott Burris et al., *Disputing Under the Americans with Disabilities Act: Empirical Answers, and Some Questions*, 9 TEMP. POL. & CIV. RTS. L. REV. 237, 238 (2000). On the operational problems at the EEOC due to underfunding and lack of central oversight, see Kathryn Moss, *The ADA Employment Discrimination Charge Process: How Does It Work and Whom It Is Benefiting?*, in *EMPLOYMENT, DISABILITY AND THE AMERICANS WITH DISABILITIES ACT: ISSUES IN LAW, PUBLIC POLICY, AND RESEARCH* 118, 140–42 (Peter David Blanck ed., 2000). For another recent critique of the agency, see Reed Abelson, *Anti-Bias Agency Is Short Of Will And Cash*, N.Y. TIMES, July 1, 2001, § 3 at 1 (“Although the agency’s mission of fighting discrimination in the workplace is central to a nation founded on the principle of equality, the

3. *Alternative Means of Dispute Resolution*—The standard approach to problems of ADA compliance stresses the use of ADR techniques. Indeed, the Act itself contains a provision encouraging the use of such techniques.³²¹ Despite this admonition, there is insufficient discussion and application of these and other creative methods for furthering the sweeping purposes of the ADA, including the goal of a “comprehensive” national mandate to eliminate discrimination against individuals with disabilities³²² and ensure the federal government’s central role in “enforcing the [ADA] standards.”³²³

a. *Negotiation*—All forms of dispute resolution employ settlement negotiations, both in the pre- and post-litigation settings. Although statistics on the use of negotiation are available in the general civil and criminal contexts,³²⁴ apparently no effort has been made to compile such information in the ADA setting. Good outcomes of negotiation may be difficult to obtain for ADA complainants because of sharp disparities in power and knowledge. The complainant may have limited verbal skills, and if alone and affected by severe mental disorders, may be unable to articulate a persuasive argument.³²⁵ Trained advocates or even helpful allies may be unavailable to most citizens seeking ADA redress. When former Attorney General Janet Reno led the Justice Department, she stressed the use of ADR techniques across the board and especially in the ADA field to help offset this pervasive problem.³²⁶

E.E.O.C. has spent most of its 37-year history out of sight and of mind, and typifying the worst of government bureaucracy.”)

321. 42 U.S.C. § 12212 (1994) (“Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, mini-trials, and arbitration is encouraged to resolve disputes arising under this Act.”). Experienced observers report that they have not heard of the use in the ADA context of such techniques as factfinding, mini-trials, arbitration, and facilitation. Telephone interview with Kathryn Moss, Ph.D., Research Associate at the Cecil G. Sheps Center for Health Services Research at the University of North Carolina at Chapel Hill (Feb. 19, 2001) [hereinafter Moss interview]; Dubin Interview, *supra* note 309.

322. 42 U.S.C. § 12101 (b)(1) (1994).

323. *Id.* at § 12101 (b)(3). These purposes are also linked to the nationally enunciated goals of assuring “equality of opportunity, full participation, independent living, and economic self-sufficiency for [Americans with disabilities]” *Id.* at § 12101 (a)(8).

324. See generally GERALD WILLIAMS, LEGAL NEGOTIATION AND SETTLEMENT (1983).

325. For the view that the EEOC has been aggressive in pursuing suits for persons like those with mental retardation who might not otherwise bring them, but avoids taking on some of the worst offending employers, see Abelson, *supra* note 320, at 12.

326. Policy on the Use of Alternate Dispute Resolutions and Case Identification Criteria for Alternative Dispute Resolution, 60 Fed. Reg. 36,895 (July 15, 1996) (Order of Attorney General Reno directing greater use of ADR by the Department of Justice). Memorandum from Bill Lann Lee, Acting Assistant Attorney General, U.S. Dep’t of Justice, Civil Rights Division, to Section Chiefs, et al., Subject: Internal Controls and Management Accountability for Alternative Dispute Resolution within the Division 1–3 (Jan. 27, 1999) (stressing ADR

Under her leadership, the Disability Rights Section became one of the largest sections within the Civil Rights Division. Its staff included a large public education component with technical assistance specialists and an information line for callers wanting help with ADA compliance.³²⁷ Negotiation can limit adversarial negativity and backlash. Some defendants who claim to want to “do the right thing” express surprise and resentment when a lawsuit is filed with no warning or opportunity to avoid court by correcting the problem.

b. Conciliation—In general, “conciliation” refers to the process of speaking to each party separately, acting as an intermediary, and trying to come to some resolution. Typically, there is no face-to-face meeting of the parties. According to Peter Maida of the Key Bridge Foundation, the process is “almost pre-mediation,” with a conciliator working with each of the parties to resolve individual biases and facilitate a meaningful dialogue.³²⁸ Conciliation, besides offering an amicable remedy, is arguably a response to the EEOC’s often clogged caseload.³²⁹

c. Arbitration—Arbitration represents a midpoint between mediation and litigation. An arbitrator will conduct a hearing and submit a decision, usually binding, to the parties about the merits of the ADA claim and the prevailing party. Arbitration generally is arranged by means of an arbitration agreement between the parties (typically a term of employment or an arrangement made at the time of the complaint).³³⁰ In some circumstances arbitration is mandatory.³³¹

as “integral part of each Manager’s job,” and noting nine junctures in litigation development at which review of ADR use should occur). The negotiating posture of ADA complainants is also buttressed by the technical assistance and the materials offered by the Justice Department that help to clarify rights under the ADA.

327. The size of this section, with some 100 employees, reflects the growing importance of disability discrimination in comparison to more traditional forms of discrimination. E-mail from Marc Dubin, Senior Staff Attorney, Disability Access Section, Civil Rights Division, U.S. Dep’t of Justice (June 2, 2001).

328. Telephone interview with Peter Maida, Executive Director of the Key Bridge Foundation (Mar. 13, 2001).

329. According to the EEOC, it received some 80,000 complaints in 2000. Abelson, *supra* note 320, at 12.

330. Arbitration is generally governed by the Uniform Arbitration Act, which nearly every state has adopted in some form. For the Uniform Arbitration Act and the statutes enacted in each state, see the American Arbitration Association at <http://www.adr.org>.

331. Arbitration can be court ordered, such as required by the Federal Arbitration Act, 9 U.S.C. §§ 1-307 (1994), or it can be mandated by agreements made prior to any dispute. See, e.g., Gary H. Barnes, *Introduction to Alternative Dispute Resolution*, at <http://www.hg.org/adrintro2.html> (last visited Apr. 7, 2001) (“[T]he National Association of Securities Dealers require members to submit all disputes between them to binding arbitration.”).

i. Advantageous Factors—Arbitration is preferable to litigation for the same reasons as mediation: It is quick, private, less expensive, and more flexible, all of which avoids damage to the ongoing relationship of parties in a work environment. In typical commercial cases, parties report 80% to 85% satisfaction rates.³³²

The arbitrator(s) are selected by the parties in dispute. Arbitrators usually are picked for their substantive knowledge in the field at issue. The number of arbitrators can vary. A common number is three, with each party selecting one arbitrator and then the two arbitrators selecting a third who can break a tie if necessary.³³³

Voluntary arbitration may offer an especially attractive form of ADR for statutory claims. For example, one commentator suggests that “case law dictates that arbitrators should not hesitate to adjudicate statutory claims under the ADA where such a forum selection arises out of voluntary arbitration agreements.”³³⁴ By agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; the party merely submits to a resolution in a non-judicial forum.³³⁵ To perform this role, the arbitrator should understand the statutory issues and vigorously protect party interests when statutory rights may have been waived unknowingly.³³⁶

Arbitration works especially well for fact-specific ADA claims. These claims require objective determination of the facts and their relative significance to the overall claim. Illustrations include: whether the person is a direct threat to himself or others so as to disqualify him for an ADA claim; whether questions asked of the plaintiff are preemployment medical inquiries that the Act prohibits; and whether health insurance has been denied because of a disability.³³⁷ The nature of what constitutes a reasonable accommodation is another example. Revolutionary changes in technology, such as voice-activated computers and light-weight prostheses, demand flexible and timely remedies. In addition, new Internet

332. Gaylee Cox, *The Appropriate Arena for ADA Disputes, Arbitration or Mediation?* 10 ST. JOHN'S J. LEGAL COMMENT. 591, 594 (1995).

333. That method, however common, is greatly criticized because it is felt that each party will select an arbitrator that will rule in their favor and therefore it is really the third arbitrator who makes the ultimate decision.

334. Jan W. Sturmer, *Arbitration, Labor Contracts and the ADA: The Benefits of Pre-Dispute Arbitration Agreements and an Update on the Conflict Between the Duty to Accommodate and Seniority Rights*, 21 U. ARK. LITTLE ROCK L. REV. 455, 511 (1999).

335. See *Circuit City Stores, Inc. v. Saint Clair Adams*, 532 U.S. 105, 123 (2001) (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991)).

336. Sturmer, *supra* note 334, at 511.

337. William D. Goren, *Americans With Disabilities Act: Tips For The Advocate*, at <http://www.mediate.com/articles/adaadr.cfm> (last visited Apr. 7, 2001).

arrangements that enable more people with disabilities to work at home suggest that a speedy ADR resolution that takes contemporary technology into account is superior to a protracted litigation in which the final decision is rendered moot by the evolving technology.³³⁸

One major benefit of arbitration is the amount of control it affords the parties. They agree before the hearing on how they want to conduct the arbitration.³³⁹ Although the format of arbitration can resemble a trial, and is more adversarial than mediation, it is decidedly less formalistic, ritualistic, and combative than litigation.³⁴⁰

Several other advantages of binding arbitration can be articulated. The private nature of the proceedings can encourage employees to engage in a candid assessment of their disabilities and the requested accommodations in a setting that they may perceive as less humiliating and stigmatizing than a public courtroom. Employers may be more inclined to hire workers with mental disabilities if a discharge for a legitimate reason will only risk an arbitration rather than a costly litigation battle.

Employers also may find that the costs and benefits of providing reasonable accommodations during a period of arbitration allows them to resolve the employment issue quickly without having to screen others for the job or to undertake an expensive reassessment of whether the position should be eliminated altogether. Furthermore, since the ADA involves a case-by-case analysis, there may be little difference in the quality of decision making between a resolution through arbitration or through a courtroom plagued with pressures to resolve claims as quickly as possible. Finally, diverting some ADA claims from congested court dockets or from EEOC backlogs may make eminently good sense.³⁴¹

ii. Disadvantageous Factors—Opposition to arbitration often stems from the fact that arbitration agreements are imposed before the dispute actually arises, thereby forcing the claimant to bring any claim through arbitration instead of the courts.³⁴² An arbitra-

338. Cox, *supra* note 332, at 592.

339. Guidelines, rules, procedures, forms, and lists of arbitrators (“neutrals”) can be found through the American Arbitration Association at <http://www.adr.org>.

340. Generally, there are no technical pleadings and motions such as dismissal and failure to state a claim. Evidentiary rules are not strictly enforced and therefore the questioning process is informal.

341. Heather Spragg, Note, *Enabling the Mentally Disabled Employee: Binding Arbitration under the ADA*, 72 S. CAL. L. REV. 929, 954–56 (1999).

342. The Supreme Court has recently upheld binding arbitration under the Federal Arbitration Act, exempting only those employment contracts mentioned in § 1 of the Act. See *Circuit City Stores, Inc. v. Saint Clair Adams*, 532 U.S. 105 (2001).

tion decision is usually final or lacks an adequate appeal process. The complainant thus is barred from the due process protections that attend the litigation process. In most cases, a court will not review the decision at all. If review is granted, a court will overturn an arbitrator's decision only under very narrow circumstances.³⁴³

Arbitration may not serve the ends of the ADA because the lack of a public forum for the dispute deprives the public of knowledge about arbitration awards involving disability discrimination. Because EEOC arbitration is seldom publicized, an adverse decision against a defendant does not tend to deter others from committing ADA violations. Furthermore, because employers are usually repeat players in the process, they can exploit unfair structural advantages over claimants that a public forum might help to neutralize.³⁴⁴ Arbitration also does not utilize *stare decisis* in the same way as the judicial system.

For many of these reasons, the EEOC has challenged the binding arbitration process in ADA complaints.³⁴⁵ The focus of the EEOC's concern is pre-dispute agreements in employment contracts that require mandatory arbitration and that preclude federal judges and juries from having a role in the development of ADA law. The result is a system that lacks extensive discovery, discourages public accountability, and curtails public disclosure of the true costs of disability discrimination. As a result, according to the EEOC, "private actions serve not only the interests of the claimant, but also those of the public, because such claimants serve as private

343. Judges often write that arbitrators are in the best position to make the final determination because of their special knowledge of the subject. Usually the decision will be overturned if the arbitrator abuses the process of the hearing or his or her powers. Gary H. Barnes, *Use of Arbitration Clauses in Commercial Agreements*, Hieros Gamos, at <http://www.hg.org/adrintro2.html> (last visited April 7, 2001). One reform proposal would provide for a built-in appeals process, especially for statutory claims such as the ADA, to promote fairness in the arbitration decision. See Sturmer, *supra* note 334, at 515. A counterargument, however, is that such an appeals process would lengthen the time of the dispute, complicate the process, and add cost, all of which arbitration is designed to reduce.

344. Mark Hansen, *Contract Disputes: EEOC Reaffirms Policy Favoring Judges Over Arbitrators for Workplace and Discrimination Claims*, A.B.A. J., Sept. 1997, at 26.

345. See, e.g., the *Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment*, (available at <http://www.eeoc.gov/press.7-10-97.html>), supporting the EEOC's position that agreements that mandate binding arbitration of discrimination claims as a condition of employment are contrary to the fundamental principles of employment discrimination laws. On January 15, 2002, by a six to three vote, the United States Supreme Court ruled in *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002), that a private arbitration agreement between an individual and that individual's employer does not prevent the EEOC from filing a court action in its own name and recovering monetary damages for the individual. The Supreme Court reversed a lower court decision that had prevented the EEOC from recovering monetary damages on behalf of an individual who had previously agreed with his employer to arbitrate the individual's private claim of discrimination.

attorneys general.”³⁴⁶ Notwithstanding this stance of the EEOC (one that is shared by the National Association for the Advancement of Colored People and the National Organization for Women),³⁴⁷ the campaign against arbitration appears to be a losing battle after the Supreme Court’s decision in *Circuit City Stores v. Adams*, which upheld binding arbitration.³⁴⁸

Persons with mental disabilities may face many disadvantages in the ADR context, and this is especially so when binding arbitration is involved. Claimants may suffer anti-therapeutic effects because the informal nature of the process conveys a message that their claims are not worthy of litigation and that they are less valuable than persons without disabilities. From an employer’s perspective, claims regarded as frivolous may be filed under arbitration that would be deterred by litigation sanctions, because employees, despite scant prospects of prevailing, seek to retain their jobs during an accommodation period.

d. Mediation—Mediation is a form of ADR that provides an informal alternative to traditional litigation. A trained mediator helps the parties reach a negotiated resolution of an ADA discrimination complaint. Some describe the ADA as the “first civil rights law to affirmatively promote mediation to resolve disputes under its provisions.”³⁴⁹ EEOC mediation is completely voluntary for the charging party and the employer. The mediator does not decide who is right or wrong and has no authority to impose a settlement upon the parties. The mediator’s role is to help the parties jointly explore and reconcile their differences. Mediation most often takes place early in the grievance process, usually prior to filing a complaint in court. Mediation can often save resources by avoiding investigation of a charge, as well as court and attorney costs. In addition, mediation prevents the hardening of positions that can occur during the process of investigation.

A set of ADA Mediation Guidelines developed by the Kukin Program for Conflict Resolution at Yeshiva University, Cardozo School of Law addresses several troublesome issues unique to ADA disability-related disputes.³⁵⁰

346. HENRY H. PERRITT, JR., *AMERICANS WITH DISABILITIES ACT HANDBOOK*, § 9.22, at 331 (3d ed. 1997, Supp. 2001–02) (citing EEOC Notice No. 915.002 (July 10, 1997)).

347. See Hansen, *supra* note 344. The EEOC has gone to court in at least twenty-eight employment discrimination claims since 1988 to oppose mandatory arbitration. *Id.*

348. 532 U.S. 105 (2001).

349. Bruce E. Meyerson, *New Guidelines for Mediation of ADA Claims*, ADR CURRENTS, Sept.-Nov. 2000, at 5.

350. Meyerson, *supra* note 349.

- Given the questions likely to arise about the capacity of the parties to participate in mediation, consideration must be given to whether the individual needs an accommodation or support helper, such as an attorney or other representative, in order to participate effectively in the mediation.
- The parties need to know their rights and responsibilities under the ADA prior to the mediation session.
- In situations in which the key issue is what constitutes a reasonable accommodation, the mediation should become an “interactive process”³⁵¹ to identify, evaluate, and design alternative disability accommodations.
- The mediator must be competent in terms of process, substantive skills, and “knowledge of disabilities, disabilities access, and disability law.”³⁵²
- The goal of ensuring a fair process requires that the mediator “make every effort to ascertain whether the parties have a sufficient understanding of [the parties’] rights and obligations under the ADA, and the implications of any (a) agreement that they reach, or (b) decision to reject an offer of settlement.”³⁵³

i. Advantages—The mediator is crucial to the process of ADR decision-making. The mediator facilitates communication between the parties, helping them focus on the real issues of the dispute and assisting them in generating options for settlement. Mediators, unlike arbitrators, do not mandate solutions.

“Procedural justice,” defined as “the perceived fairness of the process through which decisions are made”³⁵⁴ affect perceptions of the success of mediation. Participants are more likely to be satisfied with mediation if they feel they have been treated fairly by the mediator, their voice has been heard, and they have exercised some control over the outcome. Fairness requires adequate information,

351. *Id.* at 7.

352. *Id.*

353. *Id.*

354. Patrick McDermott et al., An Evaluation of Equal Employment Opportunity Commission Mediation Program, EEOC Order No. 9/0900/7632/2, § II(B)(1) (Sept. 20, 2000), available at <http://www.eeoc.gov/mediate/report/chapter2.html>.

the opportunity for assistance,³⁵⁵ knowing and voluntary participation, neutrality, confidentiality, and enforceability.³⁵⁶ Understanding of the process is essential for participants' satisfaction and perception of fairness. In order to make an informed choice about whether to participate in mediation, the parties need information about the mediation process, their statutory rights and remedies, and the advantages and disadvantages of both mediation and litigation.

The timing of mediation is another important variable affecting procedural justice. Promptly scheduling mediation is an indicator of effective program management. Timing is important because one of mediation's touted advantages is that it is less time-consuming than other methods of dispute resolution. Settlement may be more likely if mediation takes place promptly, before positions toughen. Mediation also attempts to focus on the ongoing relationship between the parties rather than on legalisms. This feature is important if parties want to preserve their relationship.

The traditional litigation system does not serve all employees equally well. Low-wage workers typically lack the time and money to pursue a court case. Not surprisingly, the traditional litigation system is dominated by ex-employers rather than current employees who seek to redress complaints while maintaining their employment. This is so, because litigation is inherently antithetical to a continuing relationship between employees and employer.

ii. Disadvantages—Critics of mediation point out that this approach and other ADR methods amount to a private justice system that does not always protect the public's interest in procedural fairness and disclosure of the terms and circumstances of the dispute resolution. Also, mediators must walk a fine line between neutrality and protection of weaker, often unrepresented, parties.³⁵⁷

Even ADR trade association representatives discourage mediation that is not fully consensual or that involves parties with types of disabilities that inevitably produce "tremendous power imbal-

355. Representation by attorneys or other advocates may serve to balance the power between ADA claimants and their opponents. Parties must be told that they can bring a representative and must be advised whether the other side will be represented, in order to avoid negative perceptions of the fairness of the process.

356. Typically, mediation programs are strictly confidential. In most cases, the mediator and both parties sign agreements that they will not reveal information gained during the mediation. This information cannot be disclosed to anyone and cannot be used during any subsequent investigation. The sessions are not tape recorded or transcribed. Notes taken during the mediation are discarded. Settlement agreements secured during mediation do not constitute an admission by the employer of any violation of laws enforced by the EEOC.

357. See Meyerson, *supra* note 349.

ance.”³⁵⁸ For instance, the Vice President for Governmental Relations of the American Arbitration Association views mediation as inherently unfair to some complainants with mental disability. As an example about what constitutes a reasonable accommodation at work, she cites her brother, who has Down’s syndrome and who would not be able to fully participate in a mediation.³⁵⁹ She also expresses the view that the resolution of disputes involving dyslexia or attention deficit disorder may require the hiring of experts, which the employee probably will not be able to afford and which therefore will result in a considerable financial hardship for the employee.³⁶⁰

iii. The EEOC Approach—The EEOC offers mediation to some individuals who file an ADA discrimination complaint.³⁶¹ The EEOC attempts to provide clear information on the availability of mediation for individuals filing a charge of discrimination under Title I of the ADA. When filed, a complaint is identified according to a “charging” process.³⁶² “A” charges usually are not selected for mediation. These charges involve cases in which an affirmative finding is highly likely or in which important pattern or practice/systemic issues or other public policy concerns weigh against the use of pre-investigation mediation.³⁶³ The EEOC, however, has discretion to grant a complainant’s request for mediation of “A” charges.³⁶⁴ “B” charges are those in which further investigation is required to make a determination concerning their merit.³⁶⁵ In general, “B” charges are eligible for pre-investigation mediation.³⁶⁶

After an employee makes an ADA complaint to the EEOC, a representative of the agency will contact the employee and employer concerning their participation in the program.³⁶⁷ If both parties agree, a mediation session is scheduled. Although it is not necessary to have an attorney in order to participate in the program, either party may engage one. The attendees of the mediation must have authority to resolve the dispute. If mediation

358. Cox, *supra* note 332, at 595.

359. *Id.*

360. *Id.*

361. Telephone interview with Chris Kuczunski, Staff Attorney at the Equal Employment Opportunity Commission (Feb. 23, 2001). See also Equal Employment Opportunity Commission, *Facts About Mediation*, available at <http://www.eeoc.gov/mediate/facts.html>.

362. Kuczunski Interview, *supra* note 361.

363. *Id.*

364. *Id.*

365. *Id.*

366. *Id.*

367. *Id.*

is unsuccessful, the charge is investigated like any other.³⁶⁸ A recent evaluation of the EEOC mediation program shows a high degree of participant satisfaction with the program both among charging parties (91%) and respondents (96%).³⁶⁹

Since 1997, EEOC district offices have offered mediation programs.³⁷⁰ Today, EEOC field offices use a combination of internal mediators employed directly by the agency and external mediators hired on a contract basis. District offices also conduct outreach and training activities about the mediation program to educate the public, employers and persons protected by the ADA about the mediation program. EEOC Commissioner Paul Miller has commented that the agency's mediation program is becoming "an important and effective weapon in our fight to eradicate discrimination in the workplace," particularly when there are sufficient funds to support EEOC mediation for claimants with disabilities.³⁷¹

The EEOC process has several formal stages. When the EEOC receives a complaint alleging employment discrimination under the ADA, the agency determines the relative priority of the complaint based on an assessment of the likelihood that discrimination actually took place. The EEOC can take several steps when conducting an investigation. First, it can resolve complaints through

368. *Id.*

369. McDermott et al., *supra* note 354, at 1 (Executive Summary), available at <http://www.eeoc.gov/mediate/report/summary.html>. The evaluation further states:

Participants, regardless of their satisfaction with the outcome of mediation, overwhelmingly indicated their willingness to return to mediation. This is a strong indication of their satisfaction with the EEOC mediation program. The fact that willingness to return was high, even among participants who did not receive what they wanted, indicates that a fair and neutral process that provides participants with an opportunity to present their views may be even more important than the obtained outcome.

Id.

370. Equal Employment Opportunity Commission, *History of EEOC Mediation Program*, available at <http://www.eeoc.gov/mediate/history.html>.

371. Paul Stevens Miller, *A Just Alternative or Just An Alternative? Mediation and the ADA*, 62 OHIO ST. L.J. 11, 23 (2001) (identifying additional protections needed to ensure equal access of claimants with disabilities to mediation and noting the disparity between employer willingness to submit to EEOC mediation [31%] and ADA charging parties [85%]); *see also* Telephone Interview with Paul Steven Miller, Commissioner, EEOC (May 10, 2001) (considering ways to mitigate this disparity, the EEOC debated mandatory non-binding mediation, but ultimately opted for a voluntary mediation program). For outside praise of this mediation program, *see* Abelson, *supra* note 320 (noting that 23,000 EEOC cases have been mediated in the last thirty months, with both employers and employees, for the most part, "extremely satisfied" with the process, and quoting Jeffrey A. Norris, president of a business nonprofit organization, the Equal Employment Advisory Council, as stating: "We think the [mediation] program ought to be expanded.").

an informal settlement agreement.³⁷² Second, the EEOC can find that there is no reasonable cause to believe discrimination has occurred, in which event the agency issues a “right to sue” letter that enables the individual to proceed on a private basis.³⁷³ Finally, if the EEOC determines there is reasonable cause, it can, inter alia:

1. Attempt conciliation, a settlement process in which the EEOC talks with the employer to resolve the issue before litigation. If successful, this process results in a settlement agreement.³⁷⁴
2. The EEOC can find reasonable cause to believe that discrimination occurred, but decide not to litigate, in which event the complainant is issued a “right to sue” letter.
3. The EEOC can litigate the complaint.³⁷⁵
4. Where the entity is a state or local government and conciliation has failed, the EEOC can refer the complaint to the Department of Justice for litigation under Title VII.³⁷⁶

Many cases will “wash out” before ever reaching an effort at conciliation. Much depends on the luck of the complainant in reaching the right district office and the right investigator being able to present himself or herself as an articulate and credible complainant.³⁷⁷ Before the mid-90s, the EEOC registered about a

372. The conciliation process is outlined in 42 U.S.C. § 2000(e) (1998) and elaborated in 29 C.F.R. §§ 1601–30 (1991). 29 C.F.R. § 1601.24 states that where reasonable cause is found, the Commission shall try to eliminate such practice by informal methods of conference, conciliation, and persuasion. The goal must be to provide “full relief” including money and punitive damages. A successful conciliation agreement is reduced to writing and is signed by the Commission's designated representative and the parties to the complaint. *Id.*

373. *Id.*

374. *Id.*

375. When a suit is in litigation, the EEOC can sign conciliation agreements where, pursuant to section 706(f)(1) of Title VII (of the Civil Rights Act, incorporated into Title I of the ADA though section 107), a court can stay processing in the case pending further efforts of the Commission to obtain voluntary compliance.

376. Although the utility of remedies by such private litigants is undercut by the decision in *Board of Trustees of the University of Alabama v. Garrett*, with its limitations on money damages, the majority opinion acknowledges that federal standards can still be enforced by “the United States in actions for money damages.” 531 U.S. at 374 n.9.

377. Benefit rates for claimants decreased dramatically after the first three years of implementation of the ADA. For those with psychiatric disabilities, the rates dropped in half (15.1% to 7.9%), as less favorable court decisions and changes in EEOC case-handling processes reduced employer incentives to settle. As a leading study reports, this data raises concerns about the lack of ways to check “the accuracy of EEOC and FEPA [state Fair Employment Practice Agency] decision making,” as well as “the effectiveness and fairness of the charge process for claimants with meritorious claims.” Kathryn Moss et al., *Outcomes of*

2% rate of “reasonable cause” determinations of discrimination in ADA cases. Of the 175,226 charges filed under Title I, as of March 31, 1998, 15.7% resulted in some benefit to the complainant with a disability.³⁷⁸ One reason for this upsurge was the adoption of a triage system in 1995. The EEOC then decided that it would no longer investigate all cases with equal vigor, and instead would grade cases as categories A, B or C, with the A category deemed litigation-worthy. The difficulty with this policy is that its equity and effectiveness depend on the initial judgments made by intake personnel who may have varying degrees of skill, motivation, and knowledge.³⁷⁹

iv. The Department of Justice Approach—The DOJ also operates a successful mediation program for the resolution of Title II and Title III claims. DOJ reports a success rate averaging 79%, with a highwater mark of 92% in 1997 and a low of 65% in 1998.³⁸⁰ Their program is subsidized and coordinated by the Key Bridge Foundation located in the Washington, D.C. suburbs.³⁸¹ The program receives approximately \$500,000 in federal appropriations.³⁸² The mediations tend to take place in sites near the complainant’s residence or the site of the incident.³⁸³

The DOJ coordinator of this program is enthusiastic about the results and the process. She states that:

Mediation is really successful because it happens where people live, and preserves relationships between the parties. For example, a complainant living in a small city or rural area may not have a lot of choices as to where to do business. Mediation allows the parties to reach agreement basically on their own, without feeling that the heavy hand of government has been imposed.³⁸⁴

Employment Discrimination Charges Filed Under the Americans with Disabilities Act, 50 PSYCHIATRIC SERVICES 1028, 1034 (1999).

378. *Id.* (finding that 2400 charges resulted in reinstatements in old jobs or new jobs, nearly 16,000 in monetary benefits, and over 6800 in some other type of benefit).

379. Moss Interview, *supra* note 321.

380. United States Department of Justice, *Enforcing the ADA: A Status Report from the Department of Justice: Looking Back on a Decade of Progress*, available at <http://www.doj.gov/crt/ada/enforce.html>.

381. Key Bridge Foundation, *ADA Mediation Fact Sheet*, available at http://www.keybridge.org/ada_main/kbf_cfm_ada_fact_sheet.html.

382. Telephone interview with Sally Conway, Accessibility Coordinator, Disability Access Section, Civil Rights Division, U.S. Department of Justice (Apr. 24, 2001) [hereinafter Conway Interview].

383. *ADA Mediation Fact Sheet*, *supra* note 381.

384. Conway Interview, *supra* note 382.

The Department of Justice has maintained data on mediation it offers in Title II complaints. Since the program began, DOJ has offered mediation to 1554 complainants; 1110 of these cases, or 71%, agreed to mediate their dispute.³⁸⁵ Of these, 138, or 12%, were Title II cases, and 972, or 88%, alleged Title III violations. The percentage of complaints considered appropriate for mediation and referred each year has remained relatively constant at around 70%. The success rate for mediations has been uniformly high, averaging 79% for all years.³⁸⁶ It is noteworthy, however, that Title II mediations, alleging discrimination by government entities, have an average 32% success rate, while Title III mediations between private parties were successful 56% of the time, a striking twenty-four percentage-point difference. Thus, mediations between individuals and government entities are less likely to resolve the dispute than private individuals in Title III cases. Nonetheless, the overall data records more positive outcomes by a wide margin for ADA disputants through this ADR mode than in adversarial modes such as administrative hearings or litigation.

e. Other Problem-Solving Approaches—A wide variety of “out of the box” creative approaches are also available for ADA compliance matters. This subpart offers an illustration of governmental, non-governmental, and mixed initiatives that link public and private actors.

i. Governmental Initiatives—In 1994, the Clinton Administration launched the National Review on Disability Policy (NRDP) which included the objective of heightening ADA implementation. As one of the initiators and key planners of this review, I organized this review led by the President’s chief domestic policy advisor (Carol Rasco) and the Office of Management and Budget chief (Alice Rivlin). The goal of the review was to harmonize the nation’s maze of inconsistent and often conflicting disability policies with the ADA’s egalitarian and full participation imperatives. The NRDP led to the formulation of a progressive set of Guiding Principles and also produced four working groups, including one that provided the impetus for the Ticket to Work and Work Incentives Improvement Act.³⁸⁷ The Review also built on the work of the Clinton administration Interagency Task Force on Accommodations for

385. This paragraph summarizes a table on ADA mediation provided under Department of Justice sponsorship that was supplied to the author by Sally Conway of DOJ’s Disability Access Section.

386. *Id.* Successful mediations were reported as 82% in 1996, 92% in 1997, 65% in 1998, 82% in 1999, and 76% in 2000.

387. Pub. L. No. 106-170, 113 Stat. 1860 (1999).

Federal Employees and Federal Agency Customers, and the White House-convened meetings of administration appointees with disabilities, two other actions I convened. All of these initiatives, as well as my extensive internal review of the implementation of the ADA, with recommendations for reform, were submitted for the president's consideration.

ii. Quasi-Governmental Initiatives—One of the most pressing and vexing disability challenges of the new millennium is to design systems of care and treatment for individuals with disabilities that allow them to reside in communities rather than in institutions. In 1999, the Supreme Court ruled in *Olmstead v. L.C.* that unnecessary institutionalization of individuals with disabilities is a form of discrimination that violates the ADA.³⁸⁸ Although the Court was decisive in establishing that qualified individuals with disabilities have a right to care and treatment in community-based settings, many critical questions remain unanswered.³⁸⁹ These questions focus on the funding, the cost of accommodations on the care systems, and the political will to realize the *Olmstead* rights.

Rather than promoting litigation as the tool for resolving the unanswered questions and implementing the Court's mandate, the Department of Health and Human Services established an *Olmstead* working group within the Department. Many different agencies within the Department participated in this work group, which was co-chaired by the Department's Office for Civil Rights (OCR) and the Health Care Financing Administration (HCFA). The group's mission was to lead an effort to identify system-wide solutions that will promote care and treatment in community-based settings.³⁹⁰ The group's emphasis was on building coalitions within the Department, and with critical stakeholders outside the Department such as states, individuals with disabilities and their families, advocacy organizations, and foundations.³⁹¹

388. 527 U.S. 581, 596–97 (1999).

389. Such questions include the pace of deinstitutionalization, and whether the *Olmstead* mandate applies not only to those in institutions but to those at high risk of institutional placement, such as those on waiting lists for services or living with aged or disabled parents. The author gratefully acknowledges the information provided by Tom Perez, former Chief of the Office of Civil Rights, U.S. Dep't of Health & Human Services, who co-chaired the *Olmstead* working group. Interview with Tom Perez, Director of the Clinical Law Office, Maryland Law School, in Baltimore, Md. (May 3, 2001).

390. For example, a system-wide solution would address the institutional bias in Medicaid programs.

391. The *Olmstead* working group encompassed an impressively large and diverse set of actors, including approximately a dozen states (which in turn had their own state-level working groups) and thirty advocacy groups ranging from the Voice of the Retarded to more community-oriented organizations.

A critical focus has been on problem solving through cooperation rather than litigation. For instance, in the aftermath of the *Olmstead* decision, OCR received over 200 complaints in some twenty states alleging violations of the ADA.³⁹² Rather than conducting traditional investigations, which often can be adversarial and quite time-consuming, OCR invited the states to come together with OCR and other stakeholders (persons with disabilities and their families) to design a comprehensive plan for moving eligible individuals with disabilities into community-based settings.³⁹³ This approach has proved quite productive. In Arkansas, for instance, an *Olmstead* coalition was formed that now includes over 2000 participants.³⁹⁴ The governor of the state has signed an Executive Order memorializing his commitment to the development of a comprehensive plan, and many stakeholders who were previously adversarial are now working together to ensure the creation of a comprehensive, effective plan.³⁹⁵ These efforts are being replicated in other states.³⁹⁶ For example, as a result of the 2001 legislative session and the work of its *Olmstead* coalition, Maryland has now allocated nearly \$14 million to help relocate the residents of nursing homes and institutions to community care.

Many of the significant challenges in implementing the ADA are also the knottiest. It is often risky and inefficient to resort to litigation to resolve these challenges. In the *Olmstead* context, the Department of Health and Human Services has learned that coalition building is preferable to litigation.³⁹⁷

392. U.S. Dep't of Health and Human Services, Office of Civil Rights, *OCR Works to Implement Olmstead* (Summer 2000), available at <http://www.os.dhhs.gov/ocr/newletter/supp4.html>. Such complaints alleged, for example, that states or other public entities had improperly institutionalized persons with disabilities in Intermediate-Care Facilities for the Mentally Retarded (ICFs-MR), nursing homes, or psychiatric facilities for persons with mental illness.

393. U.S. Dep't of Health and Human Services, *Letter to State Medicaid Directors*, (Jan. 14, 2000), available at <http://www.hhs.gov/ocr/olms0114.html>.

394. THE ARKANSAS OLMSTEAD COALITION, *The Olmstead Report*. The plan is available at http://www.aradvocate.com/Olmstead_coalition.html.

395. *Id.*

396. Such efforts are being extended under the Bush Administration with the President signing an executive order committing his Administration to create community-based alternatives for the swift implementation of *Olmstead*. Exec. Order No. 13,217, 66 Fed. Reg. 33,155 (June 21, 2001). The executive order also requires DHSS Secretary Thompson and Attorney General Ashcroft to enforce fully Title II of the ADA banning discrimination in public services. To implement the order, the DHSS Secretary Thompson will make \$60 million in grants to the states and coordinate efforts to evaluate policies, programs, statutes, and regulations to determine if any federal governmental changes are required.

397. For comparable approaches of lawyers acting as problem-solvers along with their clients, and broader coalitions to address systematic barriers to racial justice innovation in ways that supplement litigation for individuals and groups, see Penda Hair, *Louder Than Words: Lawyers, Communities and the Struggle for Justice* (Rockefeller Foundation, Mar. 28, 2001).

iii. Private Initiatives—Initiatives by non-profit and other private sector actors are still indispensable for the ADA's proper implementation. The existence of a large, strong, and diverse disability coalition was crucial to the enactment of the ADA and remains a vital ingredient for retaining the ADA in its undiluted form. A host of legal, grassroots, and membership organizations continue to give priority to lobbying, litigation, and other creative strategies to transform the ADA's paper rights into real gains for people with disabilities.

Private sector actors have the flexibility, independence, and commitment to press for such changes. Groups like the American Association for People with Disabilities and hundreds of other nonprofits have a real stake in using the ADA, promoting a full array of implementation strategies and developing "out of the box" ADR solutions to persistent ADA problems. Legal advocates have pressed novel claims that push legal theory to resolve some of the most critical barriers to the implementation of ADA, Section 504, and related disability laws.³⁹⁸

Reliance on the private sector, however, has several drawbacks. There is a lack of coordination among the many actors that can produce inefficiency. These actions may have conflicting agendas or represent inconsistent interests. Such organizations are already cash-starved and face numerous demands on their time and resources. In the perennial competition for fundraising and public attention, private actors have to search for "new and exciting ideas" to fuel their organizations, and therefore, may devote less attention to the old, unfinished business under the ADA.

C. Proposals for Reform

This subpart identifies major reform proposals, the reasons for ongoing strong United States support for the ADA, and the ways

398. For an example, see the complaint filed in case of *Sanchez v. Johnson*, initiated on May 4, 2000, in the Northern District of California, available at <http://www.oaksgroup.org/complaint>. This case is a class action filed by the Public Interest Law Center of Philadelphia, the Disability Rights Education and Defense Fund, and Valarie Vanaman. The class action was initiated to enjoin California officials from ADA violations that unnecessarily segregate people in institutions and fail to provide "even-handedly" for community-based services for those waiting at home and elsewhere. The ADA violations underlying this case arose because of severe wage disparities between workers in institutions and community-based services, resulting in closures of group homes and chronic inability to hire and retain a qualified and trained workforce that can serve persons with developmental disabilities).

that laws like the ADA can fuel a more assertive movement for global disability rights.

1. *Strengthening the Israel Equal Rights for Persons with Disabilities Commission*—The Israeli experience suggests that a strong, independent oversight and enforcement agent can advance a disability nondiscrimination law. Indeed, the Equal Rights for Persons with Disabilities Commission is widely viewed as the linchpin for implementing the Equal Rights for Persons with Disabilities Law. The Commission has become the “primary address” for government officials seeking advice and consultation on a wide array of disability issues.³⁹⁹ It has the potential for mobilizing a variety of forces needed to promote equality of opportunity and fuller participation for persons with disabilities in Israeli social and legal culture.⁴⁰⁰ The Commission is an enforcer, publicist, and politically influential mobilizer of interests to transform the words of the ERPDL into effective action.⁴⁰¹

Since its creation in the summer of 2000, the Commission has faced a challenging agenda, particularly the need to frame a cohesive strategy, coalition, and set of priorities for its own work.⁴⁰² The Commission has emerged as a lobbyist for the enactment of a stronger ERPDL, the so-called second installment of that law, and for other bills before the Knesset. It has become a voice for disability rights interests on a range of governmental committees and public policy issues.⁴⁰³ The Commission is still in the process of

399. Telephone interview with Ariella Auphir, Commissioner of the Equal Rights for Persons with Disabilities Commission (Isr.) (May 5, 2001) [hereinafter Auphir Interview]. The ministries making such inquiries include Social Affairs, Interior and Justice.

400. See Stanley S. Herr, *Disability Rights: Old Responsibilities, New Challenges*, THE LAWYER (No. 21, 2001) (Journal of the Israel Bar Association).

401. Although the ERPDL gives the Commission the power to litigate, the Commission to date has not filed any cases. Indeed, consistent with the thrust of this Article's conclusions, the Commission prefers to use persuasion and other forms of negotiated settlement to resolve disputes. Formal ADR processes have not yet been established, but an influential NGO, the Joint Distribution Committee, is planning a mediation project for and with persons with disabilities to deal with a range of conflicts.

402. The Commission has a staff of five persons: the Commissioner, her deputy, the chief access officer, the policy and information specialist, and the secretary. One of the Commission's early accomplishments is the creation of a hotline on “equality in employment” to provide advice on a range of employment matters, including supported employment. Auphir interview, *supra* note 399.

403. Commissioner Auphir sits on many of those committees. She has pressed the National Insurance Institute (the equivalent of the Social Security Administration) to become physically accessible to Israelis with disabilities and to transfer determinations as to degrees of disability for purposes of an individual's disability benefits from the agency's clerks to medical professionals who apply more objective and consistent standards. Rimmerman Interview, *supra* note 179. The Commission also led a campaign for more accessible voting stations, after finding that no voting places were truly accessible by professional standards. It

forming an advisory board to assist its work in developing a national disability rights and policy agenda.⁴⁰⁴ The provisional naming of an eleven-person advisory board itself provoked controversy and this entity is likely to be replaced by a larger, more representative body.⁴⁰⁵ A stronger coalition of this sort will prove helpful as the second installment of the Equal Rights Law, now past its first reading, advances to an intense “mark-up” of its provisions and various groups press the Knesset to give higher priority to the bill.⁴⁰⁶ The Commissioner and others profess to be very enthusiastic about the prospects for improved disability rights in Israel, noting that the “train is moving faster and all are on the train.”⁴⁰⁷ The Commission can indeed energize the Israeli disability rights movement and stimulate reforms in other countries.

2. *Creating a White House Office on ADA Implementation and Disability Rights*—Earlier sections of this Article highlighted the value of a high-level governmental mechanism to focus on disability rights. The convergence of reform legislation in Israel, Britain, and Sweden has important implications for the United States as scholars in this country search for directions for reform and revitalization of the ADA. One promising approach is to create an office for ADA Implementation and Disability Rights in the White House. An analogy for this concept is the White House Office for AIDS/HIV Policy, first instituted by the Clinton administration and, after some interval of uncertainty, retained by the Bush administration.⁴⁰⁸

has now advanced reform proposals to the central Elections Commissioner to fix the problems for the next elections.

404. For discussion of the tasks facing the first Commissioner, and the author's proposal for the creation of a semi-formal group to constitute itself as the “Friends for Applying the Equal Rights for Persons with Disabilities Law,” see Part II, *supra*.

405. Many of the first group of advisors were professors with disability specialization, one of whom was disabled. Telephone interview with Dean Arik Rimmerman, Faculty of Social Welfare and Health Sciences, Haifa University (May 2, 2001). The call for a larger body that would include many non-governmental organizations in several respects and echoes the author's June 2000 proposal for a group to serve as the “Friends for Applying the Equal Rights for Persons with Disabilities Law.” *Id.*

406. See, e.g., *Saving the Law*, NEWS FROM BIZ'CHUT, Sept. 2001, at 1 (reporting that “[Biz'chut] and other disability organizations expressed their strong opposition to the new draft, demanding that action be taken to save the legislation. As a result, committee chairman David Tal instructed the government to work with Biz'chut and the Commission for Equal Rights for People with Disabilities to produce a new and acceptable draft.”).

407. Auphir Interview, *supra* note 399.

408. According to the White House website, this office facilitates an interdepartmental task force on HIV/AIDS which fosters communication and coordination among the federal agencies involved in HIV/AIDS policy and initiatives. The office was created to “provide broad policy guidelines and leadership on the Federal government's response to the national and international AIDS pandemic.” Office of National AIDS Policy at

Given the divided federal responsibilities for ADA enforcement and advisory oversight, an ongoing White House office can play a prominent role in bringing visibility and “political clout” to the complex tasks associated with fully implementing this landmark disability rights legislation. Moreover, the Office can assume other neglected tasks: ensuring that the broad range of federal policies, practices, and budgetary decisions are reviewed for their impact on the approximately 54 million Americans with disabilities and that those federal government decisions receive more analytical and disability-friendly scrutiny. It can also review the needs for stronger modifications in the ADA itself, examining closely more expansive rights in the nondiscrimination laws of other countries.⁴⁰⁹ Such an Office would need to listen to important stakeholders outside the federal government and develop better lines of coordination and cooperation with the States, the non-profit sector and other leaders on disability-rights and related disability policies.⁴¹⁰ The Office’s primary focus, however, should be the ADA and the law’s impact on private individuals and on government actors at the federal, state, and local levels. The civil rights provisions of the Rehabilitation Act should receive the Office’s attention because those disability nondiscrimination provisions affect federal contractors, federal employees, and recipients of federal assistance.

No one can dispute the magnitude and importance of these coordination, oversight, public education, and law enforcement tasks. At present, the United States lacks a coherent federal policy on disabilities and a sustained strong central stimulus for disability rights.⁴¹¹ The experience of other countries in implementing parallel nondiscrimination laws and raising the profile of disability matters through new administrative bodies can help to shape the U.S. debate and resulting reforms.⁴¹²

<http://www.whitehouse.gov/onap>. Another example of a high-profile coordinating office is the White House Office of National Drug Control Policy.

409. For example, the ERPDL’s provisions on affirmative action to correct discrimination or promote equality of opportunity are worthy of emulation. See *supra* Part II.A.2.i.

410. For a list of ninety-six major disability-related laws, both generic and disability-specific, enacted from 1956 to 2000, see Robert Silverstein, *Emerging Disability Policy Framework: A Guidepost for Analyzing Public Policy*, 85 IOWA L. REV. 1691, 1785–1801 (2000).

411. See *generally id.* at 1764 (noting that a central precept of a disability policy framework is that disability is a “natural and normal part of the human experience,” that the ADA sets four overarching national goals for that policy (equal opportunity, full participation, independent living, and economic policy), but implying that the overlay of 44 years of disability-related laws may require a new lens through which to view the design, implementation, and evaluation of existing policies and programs to ensure that people with disabilities realize meaningful inclusion in mainstream society).

412. For discussion of those administrative bodies, see *supra* Parts II.A to II.C.

An essential prerequisite for the formulation of an Office on ADA Implementation and Disability Rights, whether sited in the White House or elsewhere in the federal government, is a careful analysis and a mobilization of interest groups. The creation of yet another administrative entity with ADA responsibilities, let alone one with a wider mandate to perform a “disability impact review” function, raises a number of important questions. Will such an office constitute another layer of bureaucracy that will divert resources from real “doers?” Will it “second guess”—and thereby impede—the decision-making process that goes on in places with operational responsibilities like the Department of Justice and the EEOC? It would appear that such negative scenarios are unlikely to materialize. A small staff of disability specialists in the White House is unlikely to cause such adverse consequences. Will the White House exert the “political will” and commitment to disability rights to create and staff such an office in a way that truly advances the ADA implementation? This question is a valid one and can only be tested in practice.⁴¹³

The success of such an office will depend in large measure on the strength and vigilance of the disability rights movement. Will the Office have sufficient long-term stability to be taken seriously and to ensure continuity of effort? Although in the long term, a statutory body is preferable, the creation of the Office by Executive Order could signal serious purpose, avoid risky congressional debates, and lead to ongoing productive initiatives.⁴¹⁴ Will the tasks that are assigned the office—and the expectations raised by its creation—overwhelm its capacities? Here again, planning decisions can help meet the objection. Linking the Office to the well-established Domestic Policy Council of the White House also can mitigate the problem.

The prospects for creating a White House office are enhanced by indicia of the likelihood of bipartisan support. In just the second week of his Administration, President George W. Bush announced a \$1 billion package of new disability programs and a

413. Early signs in the Bush Administration indicate that civil rights for persons with disabilities will fare better than the rights of other minorities. On the appointment of Cari M. Dominguez as the new EEOC Commission Chair, a *New York Times* profile stated: “Some analysts suggest that the president may focus on protections for disabled Americans, a result of the main civil rights initiative of his father.” Reed Abelson, *A Fighter for Rights But a Conciliator, Too*, N.Y. TIMES, July 1, 2001, at B12.

414. An advantage of this approach over legislative enactment is the speed with which the office can be created, and the “fine tuning” of its mission that can occur over time. In the United States, an office created by the Executive Branch of government has the certainty of an Administration’s four-year term of office, an advantage that would not be available under the parliamentary systems of Israel, England, and Sweden.

recommitment to the goals of the ADA. At a White House ceremony on February 1, 2001, he declared that “[e]ven years after the ADA, we are a better country for it.”⁴¹⁵ His statement also broadly recognized shortcomings in compliance, noting that “[w]e must speed up the day when the last barrier has been removed to full independent lives for every American, with or without a disability.”⁴¹⁶

Although some congressional leaders were withholding judgment until the details of new programs were released, Senator Tom Harkin, an architect of the ADA, observed that disability issues have always enjoyed broad political support. On these issues, he said, “I’ve never known any partisan debate.”⁴¹⁷

3. Enhancing Use of Alternative Means of Implementation and Enforcement—Another important insight that flows from the disability rights experience in other countries is the critical role of non-litigation methods. In Israel and other industrialized nations seeking to affirm disability nondiscrimination norms, these methods, whether practiced formally or informally, are the dominant approaches. As these countries (which, admittedly, are less litigious than the United States) have found, it is prudent to begin non-adversarial interventions to foster cooperation and to minimize backlash from employers and other segments of society that could be antagonized by a very aggressive enforcement style. In Britain, the Employers’ Forum on Disability has demonstrated that employers can be organized to support disability rights and the implementation of nondiscrimination laws if positive methods, public education, and nonconfrontation are stressed. The merits of ADR alternatives, as described earlier in this Article, are a powerful argument in themselves for giving greater attention to the use of these techniques in certain categories of disputes concerning disability discrimination.

4. Selecting Appropriate Cases for Reform—Advances through well-chosen litigation will—and should—continue to be sought. The

415. Remarks by President Bush Announcing the New Freedom Initiative, Presidential Task Force on Employment of Adults with Disabilities, Feb. 1, 2001, available at http://www.dol.gov/_sec/programs/ptfead/speeches/020101sp.html.

416. David L. Greene, *President Introduces Programs to Aid People with Disabilities*, BALT. SUN, Feb. 2, 2001, at 3A.

417. *Id.* In a similar vein, Representative Jim Langevin, the first person with paraplegia to be elected to the U.S. House of Representatives, expressed encouragement at the prospects of continuity with the strong leadership that President Clinton had provided on disability rights issues: “President Clinton was an outstanding leader. He really gave substance to the issue of breaking down barriers. He did it in legislation, in action and in words. With him leaving the White House, I was concerned. Would there be an erosion of gains? Or would we move forward?” *Id.*

Olmstead case is a good example of the progress that can be achieved through landmark litigation, followed up by problem-solving approaches. As noted in the prior discussion of litigation, court cases have many advantages when favorable precedent is achieved, when the offending conduct is particularly egregious, and/or when other methods have or are likely to fail. Particularly in the United States, where the ADA was first enacted in 1990, advocates can make a persuasive argument that employers and other potential defendants have long been on notice of the changes that the ADA requires and that litigation is therefore appropriate in the case of a defendant who has willfully violated the ADA or chosen to remain ignorant of its requirements.

5. *Employing an Array of Enforcement and Implementation Options*—Political pragmatism, sound social policy, good public relations and, most importantly, the interests of Americans with disabilities, suggests that a balanced array of implementation options is needed. The Bush administration is likely to make conservative judicial appointments that reflect more of a states' rights and anti-trial lawyer agenda. If this happens, the federal courts and particularly the Supreme Court could become even less receptive to ADA claims than at present.⁴¹⁸ Regardless of the pragmatic considerations, good public policy supports a preference for ADR over litigation in the many situations in which ADR can produce greater satisfaction by disputants and/or more effective implementation of ADA norms. Public relations is another consideration favoring a balanced enforcement strategy, since conflicts that can be cast as battles between small, well-meaning commercial establishments and governmental Goliaths can harm the ongoing and critical battle for general public and political support for disability rights. Finally, it is important to keep in mind that Americans with disabilities are not a monolithic group: a significant minority favor more conservative approaches while the majority favors whatever approaches will yield the best results in their particular cases and for the disability rights movement in general.⁴¹⁹

418. As of May 2001, ninety-four vacancies existed for the 834 federal appellate and district court judgeships, creating the prospect of sharp conflict between a President committed to appointing so-called "strict constructionists," favoring limited government and Democrat senators and their allied civil-rights interest groups who fear that conservative and even moderate judicial nominees will undermine affirmative action and other civil-rights oriented public policies. David L. Greene & Thomas Healy, *Battle looms over judges: Democrats demand prominent role as Bush prepares nominations*, BALT. SUN, May 6, 2001, at 1.

419. See Peter David Blanck & Helen A. Scharz, *Emerging Workforce Issues: WIA, Ticket to Work and Transition, Towards Researching a National Employment Policy for Persons with Disabilities: A Report for the 22d Mary Switzer Memorial Seminar*, Univ. of Iowa, Sept. 15, 2000, available at <http://www.mswitzer.org/sem00/papers/blanck.html>.

From all points on the political spectrum, the disability community could support a high-profile government office focused on the ADA and other disability rights and policy concerns. This consensus has certainly emerged in Israel as well as in Britain and Sweden, as new commissions and disability ombudsmen have begun to share the work of leading campaigns to apply disability nondiscrimination laws.

One advantage of the reform approaches stressed in this Article is that they do not require alterations to the ADA that could open the door to weakening amendments. With Congress so evenly divided along party lines, there is a real risk of adverse legislative change. Efforts through Congress to strengthen the ADA or undo negative Supreme Court rulings appear politically unwise at this time. The lack of partisan divide on support for disability issues has not translated into unconditional support for the ADA, particularly where business interests are concerned.⁴²⁰

CONCLUSION

This Article has depicted some of the ways in which the disability rights movement has reduced disability discrimination in the United States and worldwide. As the Article has shown, there is much the United States can learn from other countries with comparable laws and much we can share with them.

As previously analyzed, the Bush administration is more favorably disposed to the ADA than other civil rights measures. It is, after all, the signature civil rights accomplishment of the administration of George W. Bush's father. The first President Bush and his White House Counsel, Boyden Gray, were committed to passage of the ADA and won the passage of a law intended to bring down the walls that kept Americans with disabilities in isolation and in social, cultural, and economic poverty.⁴²¹ If "compassionate conservatism" means anything, surely it means making good on those promises. In light of this history, adoption of the reforms set forth in this Article are realistic and consistent with the public statements of the current administration and also consistent with its preferences for alternative forms of problem solving.

420. See, e.g., Robert L. Burgdorf, Jr., *A Catastrophic Loss*, available at <http://www.ragged-edge-mag.com/0999/b0999ft1b.html>.

421. See, e.g., SHAPIRO, *supra* note 23 (describing C. Boyden Gray's evolving friendship with Evan Kemp, a disability rights lobbyist, as a personal impetus to make changes in the law).

The ADA plays an important role in the Global Disability Rights Movement as an inspiration to countries around the world to enact and apply non-discrimination norms. As Justin Dart, Jr. has eloquently written, “keeping the promise” of the ADA is vital not only for the citizens of this country but is a beacon for the empowerment of “half a billion people in other nations” who have disabilities.⁴²² The ADA embodies the international human rights standards on nondiscrimination that are identified in Rule 15 of the UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities. The Table of Disability Nondiscrimination Laws in the Appendix attests to the progress that has been made in taking the UN Standard Rules and the ADA model and applying it in over forty-one nations. Further study is needed to understand the extent to which these new laws have produced new realities and not merely new expectations. Not only scholars but disability rights activists will have to be involved in this enterprise. Furthermore, visitors from abroad who come to the United States for study can carry home with them insights and impressions as to whether the ADA represents real progress. Adoption of the reforms proposed in this Article can favorably affect those assessments.

As this Article has shown, the ADA and the laws of Israel and Britain are tangible manifestations of an international movement for disability rights. They advance recognition of the rights of the world’s 500,000,000 people with disabilities. They help governments and the public to see and understand the human rights and needs of this huge but largely invisible minority. They can also help the even more difficult goal of assisting the less assertive and less vocal sectors of this minority—people with intellectual disabilities—to receive the rights and dignity they are due.

Universal disability rights has at least three dimensions: the development of a sense of personal pride and empowerment; the creation of authentic expectations for the rights that people with disabilities should enjoy and the quality of life that should be available to them; and the development of new mechanisms for the implementation of disability nondiscrimination laws, including the Israeli Commission on Equal Rights for Persons with Disabilities, the English Disability Rights Commission, and the Swedish Disability Ombudsman. There is a pressing need for changes in both the formal norms and the practical approaches used to breathe life into the norms. Knowledge of foreign laws can enrich U.S. advocates’ and policy makers’ understanding of the statutory tools and

422. Justin Dart, Jr., *Introduction: The ADA: A Promise to Keep*, in IMPLEMENTING THE AMERICANS WITH DISABILITIES ACT xvii (Lawrence O. Gostin & Henry A. Beyer eds., 1993).

strategies for advancing equality of opportunities and full implementation of the Americans with Disabilities Act.

Ultimately, laws like the Americans with Disabilities Act, the Israel Equal Rights for People with Disabilities Law, and Britain's Disability Discrimination Act are not panaceas. They constitute benchmarks that the players in the disability rights movement can use to raise public consciousness, change public policies, alter budgetary appropriations, and transform the day-to-day lives of people with disabilities. This process of transformation is measured not only by external criteria but by shifts in the self-images of adults and children with disabilities, as they come to see themselves as talented human beings who have much to contribute to society. The ADA and its counterparts thus act as catalysts for change. The changes have reverberations throughout the legal, political, and personal realms.

APPENDIX

TABLE OF DISABILITY NONDISCRIMINATION LAWS*

The appendix can be found on the following pages, and the author's acknowledgments follow.

*To fit within the table, person with disability is sometimes abbreviated as "pwd.")

COUNTRY	TITLE	NATURE OF LAW	YEAR OF ENACTMENT	SCOPE OF COVERAGE	DEFINITION OF DISABILITY	REASONABLE ACCOMMODATIONS PROVISION?	DEFENSES	REMEDIES	EXISTENCE OF COMMISSION OR OMBUDSMAN	LIMITATIONS
Australia	Disability Discrimination Act 1992	Civil Anti-Discrimination Law (Civil Rights-Based)	1992	Prohibits discrimination in the areas of work, housing, education, and sports and other facilities, land possession and the provision of goods and services	Disability, in relation to a person, means: (a) total or partial loss of the person's body or mental functions; or (b) total or partial loss of a part of the body; or (c) the presence in the body of organisms causing disease or illness; or (d) the presence in the body of organisms capable of causing disease or illness; or (e) the malfunction, malformation or disfigurement of a part of the person's body; or (f) a disorder or malfunction that results in the person learning differently from a person without the disorder, illness or disease that affects a person's thought processes, perception or reality, emotions or judgment or that results in disturbed behavior; and includes a disability that (h) presently exists; or (i) previously existed but no longer exists; or (j) may exist in the future; or (k) is imputed to a person.	YES	Acts reasonably intended to ensure equal opportunity or afford services, goods, or access to meet a person with disabilities' special needs are exempt; acts done under statutory authority	Judicial (damages); (administrative injunctions)	Human Rights and Equal Opportunity Commission and a Disability Discrimination Commission.	Among the most comprehensive disability discrimination laws.
Austria	Federal Constitutional Law as amended in 1997.	Constitutional Anti-Discrimination Provision	Federal Constitutional Law as amended in 1997.	General prohibition of discrimination of disabled persons without defining what exactly constitutes discrimination.	Disability not defined.	NO	Not mentioned in text.	Not mentioned in text.	Not mentioned in text.	No provisions for enforcement or monitoring of compliance with the law.

COUNTRY	TITLE	NATURE OF LAW	YEAR OF ENACTMENT	SCOPE OF COVERAGE	DEFINITION OF DISABILITY	REASONABLE ACCOMMODATIONS PROVISION?	DEFENSES	REMEDIES	EXISTENCE OF COMMISSION OR OMBUDSMAN	LIMITATIONS
Bolivia	Act No. 1678 about the Person with Disability (1985)	Civil Anti-Discrimination Law	1985	Relates specifically to persons with disabilities in a number of areas, such as work, education, health, and social security.	"Disability" is defined as any restriction or absence of the ability to carry out an activity in the manner or within the parameters of what is considered normal for a human being. "Handicap" is defined as a disadvantageous situation for a particular individual caused by a deficiency or disability, that limits and hinders the performance of a role that is normal, in terms of the attending age, sex and social and cultural factors.	NO	Not mentioned in text.	Not mentioned in text.	No private right of action, but establishes the National Committee on Persons with Disabilities to provide tax exemptions or equipment and materials needed for public and personal accessibility for persons with disabilities.	The law refers to fair treatment and accessibility but in terms of an authoritarian approach that does not necessarily involve persons with disabilities.
Brazil	Constitution of the Federal Republic of Brazil	Constitutional Anti-Discrimination Provision	Constitution of the Federal Republic of Brazil, as of 1983.	General prohibition of discrimination of disabled persons without defining what exactly constitutes discrimination; prohibition of discrimination with respect to salary and hiring criteria for workers with disabilities. Provides standards for the construction of public sites, buildings and the manufacturing of public transportation vehicles.	Disability not defined.	NO	Not mentioned in text.	Not mentioned in text.	Not mentioned in Text.	No provisions for enforcement or monitoring of compliance with the law.

COUNTRY	TITLE	NATURE OF LAW	YEAR OF ENACTMENT	SCOPE OF COVERAGE	DEFINITION OF DISABILITY	REASONABLE ACCOMMODATIONS PROVISION?	DEFENSES	REMEDIES	EXISTENCE OF COMMISSION OR OMBUDSMAN	LIMITATIONS
Canada	a) Canadian Human Rights Act, R.S.C. 1996; b) Charter of Human Rights and Freedoms as of 1982	a) Civil Rights Anti-Discrimination Law; b) Constitutional Anti-Discrimination Provision; c) General equality provision.	a) 1996; b) 1982	a) Covers discrimination in the provision of goods, services, facilities, or other accommodations available to the general public, including transportation. Also prohibits discrimination in employment, the provision of commercial premises, or housing; b) Ensures equal protection from and benefit of the laws without discrimination based on physical or mental disability.	a) "Disability" means any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol, or a drug; b) disability not defined.	a) YES; b) NO	a) No remedy if discrimination is reasonable, as defined by the Canadian Human Rights Commission guidelines, or there is a "bona fide" justification for the discriminatory treatment. No remedy for needed accommodations or business inconvenience constituting undue hardship; b) Not cited in text.	a) Administrative, judicial, money damages not exceeding \$5,000; b) Not cited in text.	a) Human Rights Commission and a Human Rights Tribunal.	Among the most comprehensive disability discrimination laws. Outlaws discriminatory public communications, publications and hate messages.
Chile	Chile Act No. 19,284	Civil Rights Anti-Discrimination Law	1984	Establishes provisions for access to public buildings, TV (closed captioning), educational institutions and curricula, special education, public transportation, and construction of new buildings, but excludes employment.	For purposes of this law a disabled person is anyone who, due to one or more physical, mental, or sensory deficiencies, whether genetic or acquired, foreseen to be permanent and independent of its cause, is hindered, by at least one third of his or her ability in learning, work or social integration.	NO	Not mentioned in text.	Anyone suffering discrimination can go to the local "police judge" who must take measures to uphold the rights of the pwr. Sanctions are monetary, amounts not expressed.	Creates an independent Foundation of the Handicapped.	Specific prohibitions of discrimination not delineated.
China	Law of the People's Republic of China on the Protection of Disabled Persons	Social Welfare Law, with Anti-Discrimination Provision	1990	General prohibition clause. Within special institutions, discrimination prohibited against disabled persons in recruitment, employment, promotion, determining professional or technical titles, payment and welfare.	A disabled person is one who suffers from abnormalities or loss of a certain organ or function, psychologically, physiologically, or in anatomical structure, and has lost wholly or in part the ability to perform an activity.	NO	None cited in text.	None cited in text.	China Disabled Persons Federation established to represent and protect the rights and interests of disabled persons.	Medical/segregated discrimination model prevails; employment opportunities are provided in institutions and sheltered work environments.

COUNTRY	TITLE	NATURE OF LAW	YEAR OF ENACTMENT	SCOPE OF COVERAGE	DEFINITION OF DISABILITY	REASONABLE ACCOMMODATIONS PROVISION?	DEFENSES	REMEDIES	EXISTENCE OF COMMISSION OR OMBUDSMAN	LIMITATIONS
Costa Rica	Law 7600 on Equal Opportunities for Disabled Persons.	Hybrid: Social Welfare Law/Civil Rights Based Anti-Discrimination Law	1996	Covers access to education, employment, public transportation, public services, information and communication, and to cultural, sports and leisure activities.	Any physical, mental or sensory deficiency that limits substantially, one or more of the principal activities of an individual.	NO	None mentioned in text.	Individual right of action in employment matters; monetary penalties apply. State-sponsored discrimination may be annulled at the request of the pwc. Public servants may be held personally responsible. Construction and public transportation companies that violate this law subject to fine	Not mentioned in text	Discrimination explicitly prohibited only with respect to employment, public health services and to participation in cultural, sports and leisure activities.
Ethiopia	The Rights of Disabled Persons to Employment, Proclamation No. 101	Civil Anti-Discrimination Law	1994	Applies to employment, in the areas of hiring, training, compensation,	A person who is unable to see, hear, or speak, or suffering from injuries to his limbs or from mental retardation, due to natural or man-made causes; provided, however, that the term does not include persons who are alcoholics, drug addicts and those with psychological problems due to socially deviant behaviors.	NO	A disabled worker cannot use disability as a defense in case of failure or fault in discharging his duties.	Not mentioned in text.	Pwd may lodge grievances with the organization empowered by law to hear labor disputes.	Remedies appear to be very limited.
Fiji	Constitution as of 1997.	Constitutional Anti-Discrimination Provision	1997	Every person has the right of access, without discrimination on a prohibited ground (such as disability) to shops, hotels, lodging houses, public restaurants, places of public entertainment, public transport services, taxis and public places.	Disability not defined.	NO	Obligation to provide access to public accommodations is predicated upon reasonableness.	An aggrieved person may apply to the High Court for redress.	Not mentioned in text.	No provisions for enforcement or monitoring of compliance with the law.

COUNTRY	TITLE	NATURE OF LAW	YEAR OF ENACTMENT	SCOPE OF COVERAGE	DEFINITION OF DISABILITY	REASONABLE ACCOMMODATIONS PROVISION?	DEFENSES	REMEDIES	EXISTENCE OF COMMISSION OR OMBUDSMAN	LIMITATIONS
Finland	Constitution as amended in 1999	Constitutional Anti-Discrimination Provision	2000;	General prohibition of discrimination of disabled persons without defining what exactly constitutes discrimination; b) Provides that every Finnish resident is, without discrimination, entitled to health and medical care.	Disability not defined.	NO	Not mentioned in text.	Not mentioned in text.	Not mentioned in text.	No provisions for enforcement or monitoring of compliance with the law.
France	a) Criminal Code; Law No. 90-602 of 13 July 1990; b) Law of July 13, 1991 c) Labor Code as amended in 1992	Penal/Civil Anti-Discrimination/ Employment quota laws	1990/1991 amended in 1992	a) prohibits discrimination on account of a person's "handicap" b) public access c) disability employment quota	c) Labor Code defines worker with a disability as "any person whose capacity to obtain or maintain a job is significantly reduced by a lack or diminution of physical or mental capacity."	NO	b) Administrative body can grant an exemption or delay from compliance if it finds "serious technical difficulties" (in construction).	a) fines of imprisonment b) denial or revocation of building permits c) fines & loss of government funds. NGOs may appear before courts and administrative bodies to enforce laws (b) and (c).	Commission to certify workers as disabled.	a) vagueness makes law largely symbolic with few if any prosecutions
Gambia	Constitution for the Second Republic of Gambia (sec. 31)	Constitutional Anti-Discrimination Provision	1996	General prohibition of discrimination of pwd with particular regard to health services, education, and employment.	Disability not defined.	NO	Not mentioned in text.	Not mentioned in text.	Not mentioned in text.	No provisions for enforcement or monitoring of compliance with the law.
Germany	Basic Law of the Republic of Germany (Art. 3)	Constitutional Anti-Discrimination Provision	As amended in 1998	General prohibition of discrimination of disabled persons without defining what exactly constitutes discrimination.	Disability not defined.	No	Not mentioned in text.	Not mentioned in text.	Not mentioned in text.	No provisions for enforcement or monitoring of compliance with the law.
Ghana	a) Disabled Persons Act; b) Constitution of 1992 (Art. 29).	a) Civil Anti-Discrimination Law/ Social Welfare Law Hybrid; b) Constitutional Hybrid; Anti-Discrimination Provision/Social Welfare Law	a) 1983; b) 1992.	Both laws protect the right to access to public places and services, and the right to treatment in the least restrictive environment.	Neither law defines disability.	NO	Accessibility need only be "as far as practicable", rights subject to "the physical and mental condition" of the pwd.	None mentioned in text, but criminal penalties available to violators of the law.	a) Establishes a National Council on Disabled Persons to enforce legal rights and coordinate national disability policy; b) None mentioned in text.	Both laws provide for primarily social welfare benefits, but some basic prohibitions against disability discrimination are provided for as well.

COUNTRY	TITLE	NATURE OF LAW	YEAR OF ENACTMENT	SCOPE OF COVERAGE	DEFINITION OF DISABILITY	REASONABLE ACCOMMODATIONS PROVISION?	DEFENSES	REMEDIES	EXISTENCE OF COMMISSION OR OMBUDSMAN	LIMITATIONS
Guatemala	Guatemala Act for the Protection of Persons with Disabilities, Decree No. 135-96.	Civil Anti-Discrimination Law	1996	Covers employment, education, premises, goods and services, facilities for the general public, barrister chambers, clubs and sports, and government activities.	"Disability" refers to total or partial loss of the person's body or mental functions; part of the body; the presence in a body of organisms causing or capable of causing disease or illness; the malfunction, malformation or disfigurement of a part of the person's body or mind affecting learning, thought processes, perception of reality, emotions or judgment or that results in disturbed behavior. Includes a disability that exists, existed, may exist in the future, or is imputed to a person.	YES	"unjustifiable hardship," all relevant circumstances of the particular case are to be taken into account, including (a) the reasonableness of any accommodation to a person with a disability, (b) the nature of the benefit or detriment likely to accrue or be suffered by any persons concerned, (c) the effect of the disability of a person concerned; and (d) the financial circumstances of and the estimated amount of expenditure (including recurrent expenditure) required to be made by the person claiming unjustifiable hardship.	Establishes an Equal Opportunities Commission to issue "codes of practice," investigate complaints, enforce the law or issue injunctions.	Among the most comprehensive disability discrimination laws. Prohibits harassment and vilification of persons with a disability and their associates.	
Hong Kong (SAR)	Hong Kong SAR Disability Discrimination Ordinance	Civil Anti-Discrimination Law	1995	Covers employment, education, premises, goods and services, facilities for the general public, barrister chambers, clubs and sports, and government activities.	"Disability" refers to total or partial loss of the person's body or mental functions; part of the body; the presence in a body of organisms causing or capable of causing disease or illness; the malfunction, malformation or disfigurement of a part of the person's body or mind affecting learning, thought processes, perception of reality, emotions or judgment or that results in disturbed behavior. Includes a disability that exists, existed, may exist in the future, or is imputed to a person.	YES	"unjustifiable hardship," all relevant circumstances of the particular case are to be taken into account, including (a) the reasonableness of any accommodation to a person with a disability, (b) the nature of the benefit or detriment likely to accrue or be suffered by any persons concerned, (c) the effect of the disability of a person concerned; and (d) the financial circumstances of and the estimated amount of expenditure (including recurrent expenditure) required to be made by the person claiming unjustifiable hardship.	Administrative remedies available through the Commission are injunctive and declaratory in nature. Judicial remedies include declaratory, injunctive; and damages; including punitive and exemplary damages.	Among the most comprehensive disability discrimination laws. Prohibits harassment and vilification of persons with a disability and their associates.	

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Hungary	Hungary Act No. XXVI of 1998 on Provision of the Rights of Persons Living with Disability and Their Equality of Opportunity.	Civil Anti-Discrimination Law	1998			YES			Establishes a National Disability Affairs Council in which disability organizations have to be represented.	
India	Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995	Civil Anti-Discrimination Law	1995	Covers transportation, roads, the built environment and government employment (excluding the hiring process)			Duties to enable access for disabled persons apply only "within the limits of ... economic capacity and development" and thus are rather easy to evade.		Establishes a multi-sectoral planning and monitoring mechanism; Central Coordination Committee with the Chief Commissioner for Persons with Disabilities and several State Coordination Committees.	Has rather weak non-discrimination provisions, but provides for quotas in various areas instead. Three percent quota schemes relate to government employment, government aided educational institutions and poverty alleviation schemes.
Ireland	a) Employment Equality Act; b) Equal Status Bill; c) National Disability Authority Act; d) Combatite Act	Civil Anti-Discrimination Law	a) 1998; b) 1999; c) 2000; d) 1999.			YES				

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Israel	Equal Rights for Persons with Disabilities Law	Civil Anti-Discrimination Law	1998	Covers employment, transportation and general principles,	A "person with a disability" includes those with physical, emotional, or mental disabilities that substantially limit functioning in "one or more of the major spheres of life."	YES		Declarations: This law also contains a strong self-determination mandate, giving a pwd "the right to make decisions that pertain to her/his life according to her/his wishes and preferences." Affirmative action permitted to correct prior or present discrimination against pwd or to promote their equality.	Commission for Equal Rights for Persons with Disabilities Law, intended to provide the main engine for enforcement, but right to judicial review also exists.	
Korea	a) The Welfare Law for Persons with Disabilities, Law No. 4179; b) Act Relating to Employment Promotion, etc., of the Handicapped Law No. 4210; c) Special Education Promotion Law	Social Welfare Law/Anti-Discrimination Provisions	a) 1994; b) 1990; c) 1994.	Prohibits discrimination against disabled students in all schools.				No individual right of enforcement.		Special school principals should take appropriate measures to provide entrance examinations and schooling for children with disabilities based on types and degrees of disability.
Luxembourg	a) Luxembourg Penal Code as of 1997 b) Act of 1991	Criminal Law/Labor Reintegration	2e-07	b) Access to special education training to return to labor market; no reference to non-discrimination.					National Agency for Workers with Disabilities.	Mental retardation not included in Act.
Madagascar	Madagascar Code of Labor of 29 September 1994.	Civil Anti-Discrimination Law	1994							
Malawi	Republic of Malawi (Constitution Sec. 20)	Constitutional Anti-Discrimination Provision	1994	General prohibition of discrimination of disabled persons without defining what exactly constitutes discrimination.	Disability not defined.	NO	Not mentioned in text.	Not mentioned in text.	Not mentioned in text.	No provisions for enforcement or monitoring of compliance with the law.

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Mauritius	The Training and Employment of Disabled Persons Act (Act No. 9 of 1996)	Civil Anti-Discrimination Law	1996							
Namibia	Namibia Labor Act of 1992	Civil Anti-Discrimination Law	1992				Provides that a person shall not be regarded to have been unfairly discriminated against if the disabled person is unable to perform the job because of his or her disability.			
New Zealand	New Zealand Human Rights Act of 1993	Constitutional Anti-Discrimination Provision	1993	General prohibition of discrimination of disabled persons without defining what exactly constitutes discrimination.		YES		No provisions for enforcement or monitoring of compliance with the law.		
Nicaragua	Nicaragua Act No. 202 Regulations and Policies for the Disabled in Nicaragua	Social Welfare Law/Public Access Law		Access to public accommodations, sports and cultural events					Council on Prevention, Rehabilitation and Provision of Opportunities	
Nigeria	Nigerians with Disability Decree 1993	Civil Anti-Discrimination Law	1993						Establishes a National Commission for Persons with Disabilities	
The Philippines	Magna Carta for Disabled Persons	Civil Anti-Discrimination Law/Social Welfare Law	1992	Prohibits disability based discrimination in employment, transportation, public accommodation and goods and services.		YES				Among the most comprehensive disability discrimination laws.
South Africa	a) Employment Equity Bill, 1998; b) Skills Development Bill, 1998; c) Constitution as of 1996.	Civil Anti-Discrimination Law/Constitutional Anti-Discrimination Provision	a) 1998; b) 1998; c) Constitution as of 1996	General prohibition of discrimination of disabled persons without defining what exactly constitutes discrimination.	Disability not defined.			b) No provisions for enforcement or monitoring of compliance with the law.		

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Spain	a) Act on the Social Integration of the Disabled; b) Workers' Charter as of 1980.	Social Welfare Law/Anti-Discrimination Provision	a) 1992 b) 1980	Prevention of disability, diagnosis and services, integration at work, etc.; anti-discrimination provision in the act states that any disability-based discriminatory provision in labor regulation, collective agreements, individual contracts or unilateral decisions shall be null and void.						
Sri Lanka	Sri Lanka Protection of the Rights of Persons with Disabilities Act, No. 28 of 1996	Civil Anti-Discrimination Law	1996							
Sweden	Sweden Act of 1999; 132 on the Prohibition of Employment Against Persons with Disabilities	Civil Anti-Discrimination Law	1999	Scope of law limited to employment; covers a wide range of employment decisions at the hiring, promotion, compensation, conditions of labor, or dismissal stages.	Law covers persons with a "permanent physical or mental limitation related to a person's ability to function."	YES		Remedies include a variety of remedial approaches: civil right of action; individual suit through labor union. No class or group forms of nondiscrimination action.	Disability Ombudsman has a supervisory and activist role to ensure compliance through conciliation, and, if necessary, as an advocate for the pwd.	Covers both direct and indirect discrimination, defined as "using a rule, requirement or procedure that seems neutral but which in practice is, particularly disfavorable to persons with a particular disability." An action for disability harassment in employment exists.
Switzerland	Switzerland Constitution as of 1999.	Constitutional Anti-Discrimination Provision	1999	General prohibition of discrimination of pwd without defining what exactly constitutes discrimination.	Disability not defined.	NO	Not mentioned in text.	Not mentioned in text.	Not mentioned in text.	No provisions for enforcement or monitoring of compliance with the law.
Uganda	a) Constitution as of 1995; b) Local Government Act of 1997	Constitutional Anti-Discrimination Provision	a) 1995; b) 1997	General prohibition of discrimination of pwd without defining what exactly constitutes discrimination.	Disability not defined.	NO	Not mentioned in text.	Not mentioned in text.	Not mentioned in text.	No provisions for enforcement or monitoring of compliance with the law.

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The UK	a) Disability Discrimination Act of 1995; b) Disability Rights Commission Act 1999	Civil Anti-Discrimination Law	a) 1995; b) 1999.	Covers discrimination in employment, in the provision of goods, facilities and services, and to some degree also covers the area of education and public transportation.		YES			Disability Rights Commission oversees progress and encourages good practices dealing with "disabled persons" as employees, customers, and renters.	Among the most comprehensive disability discrimination laws.
USA	a) Americans with Disabilities Act of 1990; b) Rehabilitation Act of 1973	Civil Anti-Discrimination Law	a) 1990; b) 1973.	Prohibits discrimination in the areas of employment, state and local government activities (including education, transportation, social services, etc.), public accommodations (goods and services) and telecommunication.		YES	Undue burden, no fundamental alteration of activity.	Injunctions; damages; reinstatement of job; reasonable accommodations can be ordered.	No	Among the most comprehensive disability discrimination laws.
Zambia	The Persons with Disabilities Act 1996 (Act No. 33 of 1996)	Civil Anti-Discrimination Law	1996						Establishes a Zambian Agency for Persons with Disability charged with enforcement; may issue "adjustment orders" requiring specific action.	
Zimbabwe	Disabled Persons Act	Civil Anti-Discrimination Law	1992			YES	Provides that disability may be a legitimate excuse for employment discrimination. In addition, the denial of any public service or amenity seems to be excused if it is "motivated by a genuine concern for the safety of the disabled person."		Establishes a Disability Board; may issue "adjustment orders" requiring specific action.	

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