Title
Backlash Against the Americans with Disabilities Act: Interdisciplinary Perspectives and Implications for Social Justice Strategies

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FOREWORD – BACKLASH AGAINST THE AMERICANS WITH DISABILITIES ACT: INTERDISCIPLINARY PERSPECTIVES AND IMPLICATIONS FOR SOCIAL JUSTICE STRATEGIES

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For civil rights lawyers who had toiled through the 1980's in the increasingly barren fields of race and sex discrimination law, the charmed passage of the Americans with Disabilities Act through the U.S. House and Senate and across a Republican President's desk must have seemed vaguely surreal. The strongly bipartisan House vote in the Summer of 1990 was a remarkable 377 to 28, the vote in the Senate an equally overwhelming 91 to 6.[1] Rising to speak in favor of the bill, Republican co-sponsor Orrin Hatch – not known for impassioned endorsements of new civil rights protections – cried on the Senate floor.[2] Senator Tom Harkin, who had earlier delivered his floor remarks in American Sign Language, said of the bill following the Senate vote, "It will change the way we live forever."[3]

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[1]Cites to Congressional Record

[2]Elaine S. Povich, *Senate OK's Bill Fixing Rights of the Disabled*, CHI. TRIB., July 14, 1990, at 1.

[3]*Bush Eager to Sign Bill Opening Doors for 43 Million Disabled*, ORLANDO SENTINEL TRIB., July 14, at A1.

Signing the bill into law, President Bush was equally effusive. Describing the nation's historical treatment of the disabled as comprising a "shameful wall of exclusion," President Bush compared passage of the ADA to the destruction of the Berlin Wall:

> Now I am signing legislation that takes a sledgehammer to another wall, one that has for too many generations separated Americans with disabilities from the freedom they could glimpse but not grasp. And once again we rejoice as this barrier falls, proclaiming together we will not accept, we will not excuse, we will not tolerate discrimination in America . . . Let the shameful wall of exclusion finally come tumbling down."[4]

At the July 27th signing ceremony, held on the White House South Lawn to accommodate the large crowd of activists in attendance, President Bush cavalierly dismissed predictions that the law would prove too costly or loose an avalanche of lawsuits.[5] Republican Senator Bob Dole, a strong ADA supporter, admitted that the new law would place "some burden" on business, but found that burden justified because the Act would "make it much easier" for America's disabled.[6]

For traditional civil rights lawyers, this was incongruous fare. For the previous two months, Senators Dole and Hatch, along with Vice President Quayle, President Bush, and others in his

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[4]"*Knocking Down a Barrier*," NEWSDAY, Friday, July 27, 1990, Nassau and Suffolk Edition, News, p. 7.

[5]President Bush was quoted in the Boston Globe as stating, "We've all been determined to ensure that it gives flexibility, particularly in terms of the timetable of implementation, and we've been committed to containing the costs that may be incurred." John W. Mashek, *To Cheers, Bush Signs Rights Law for Disabled*, BOSTON GLOBE, Friday, July 27, 1990, at 4.

[6]*Id*.

administration, had been sharply denouncing the Civil Rights Act of 1990,[7] pejoratively labeling it a "quota bill."[8] The soon to be vetoed legislation, which in much-diluted form eventually became the Civil Rights Act of 1991,[9] sought to countermand a series of Supreme Court cases that, among other things, had virtually erased disparate impact theory,[10] an accepted feature of Title VII jurisprudence since the early 1970's. The veto, which the Senate failed to override by 1 vote, represented a dispiriting defeat for traditional civil rights constituencies and their lawyers.

The Civil Right Act of 1990 was not the only employment rights casualty of President Bush's veto power. Just a year before he signed the ADA into law,[11] the President had vetoed a bill that would have raised the minimum wage from $3.35 and hour to $4.55. Stunning the Congressional

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[7]136 CONG. REC. S10287-01, N.Y. TIMES, July 23, 1990, at __; 136 Cong. Rec. S9809, S9814; 136 Cong. Rec. S10321.

[8]On July 19, 1990, Vice President Dan Quayle said of the Act, "the Administration is not going to have a quota bill crammed down its throat disguised as a civil rights bill." Steven A. Holmes, *Accord is Sought on Rights Measure to Avert a Veto*, N.Y. TIMES, July 20, 1990, at 1. Quayle's comments followed upon those of White House Chief of Staff, John Sununu, who on July 17th, stated, "The bill, as crafted right now, is a quota bill..." Steve Gerstel, *Senate Limits Debate on Civil Rights Bill; Veto Threatened*, UNITED PRESS INTERNATIONAL, July 17, 1990. Senator Hatch referred to the bill as "terrible," even "heinous," and predicted that it would "create a litigation bonanza." Concluded Hatch in one interview, "[e]ven a cursory review reveals that (the bill) is simply and unalterably a quota bill." In his veto statement, delivered on October 20, 1990, President Bush justified his action by stating, "I will not sign a quota bill." George Archibald, *Special Report: The Bush Record*, WASH. TIMES, Sep.13, 1992, at A8.

[9]Pub. L. No. 102-166, 105 Stat. 1071 (1991).

[10]The disparate impact case was Wards Cove Packing Company v. Atonio, 490 U.S. 642 (1989).

[11]President Bush vetoed the minimum wage bill on June 13, 1989. *See* 135 CONG. REC. H2498-03.

leadership, the veto came a mere 51 minutes after the bill had reached the President's desk. On June 29, 1990, only two days after the ADA's festive South Lawn signing ceremony, President Bush vetoed the Family and Medical Leave Act, which would have required covered employers to accommodate workers by providing up to 12 weeks of unpaid leave in cases of family illness or childbirth. In defense of the veto, Bush stated that such practices should not be mandated by the government, but should rather be "crafted at the workplace by employers and employees."[12] Neither the minimum wage hike nor the FMLA, which Bush vetoed again in 1992, would become law until passed by the next Congress and signed into law in 1993 by newly inaugurated President William Jefferson Clinton.

It must have been difficult for traditional civil rights lawyers, reeling from these many setbacks, to comprehend the triumphal enthusiasm with which Republican senators and administration officials celebrated the passage of the ADA. How could such a transformative statute, requiring not only formal equality, as the non-discrimination concept had traditionally been understood, but also structural equality -- the accommodation of difference -- have passed by such lopsided margins? How could it have garnered so much support from Republicans in the House and Senate, or from a Republican President who had in other contexts so vigorously resisted the expansion of civil rights protections? How could the President and the Republican Congressional leadership embrace the disparate impact provisions of the ADA so readily, while at the same time sharply decrying them in the doomed Civil Rights Act of 1990?

There was incredulity in the traditional civil rights community, but there was also hope -- hope

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[12] *See* 136 CONG. REC. H24451-02.

not only that the ADA would transform the lives of disabled Americans, but also that the theoretical breakthrough represented by reasonable accommodation theory would eventually play a role in solving other equality problems, which the more broadly accepted equal treatment principle had proven inadequate to address.

The Americans with Disabilities Act, and the administrative regulations that followed it, seemed to hold enormous practical and theoretical potential. The Act's definition of disability had been drawn broadly, to cover not only the "traditional disabled," such as individuals who were blind, or deaf, or used wheelchairs, but also people who had stigmatizing medical conditions such as diabetes, or epilepsy, or morbid obesity. It covered not only people who were actually disabled, but those who had a record of a disability, such as cancer survivors, whom employers might be unwilling to hire for fear of increased medical insurance costs or future incapacity. The statute covered people who were not disabled at all, but were simply perceived as such, like people with asymptomatic HIV or a genetic predisposition towards a particular illness. It covered not only physical disabilities, but mental disabilities as well, arguably the most stigmatizing medical conditions in American society.

The ADA incorporated a profoundly different model of equality from that associated with traditional non-discrimination statutes like Title VII of the Civil Rights Act of 1964.[13] Those statutes, for the most part,[14] were geared toward achieving only *formal* equality: equal treatment of similarly

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[13]42 U.S.C. §2000e (as amended).

[14]Title VII's disparate impact theory does represent a structural model of equality. However, that theory can be applied only in very narrow circumstances. For a discussion of this issue, *see* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity,* 47 STAN. L. REV. 1161, 1162, n. 3 (1995).

situated individuals. As numerous legal scholars had observed, the equal treatment principle had not proven tremendously effective in addressing problems of equality and difference.[15] The ADA required not only that disabled individuals be treated no worse than non-disabled individuals with whom they were similarly situated, but also directed that in certain contexts they be treated differently, arguably better, to achieve an equal effect.[16]

In this regard, the statute and its implementing regulations required covered employers to do something that no federal employment rights statute had ever done before: it required them to engage with a disabled employee or applicant in a good faith interactive process to find ways to accommodate the employee's disability and enable him to work.[17] This "duty to bargain in good faith" represented a

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[15]*See, e.g.,* Martha Minow, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW (1990); Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279 (1987) (exploring problems of gender equality and difference); Linda J. Krieger & Patricia Cooney, *The Miller Wohl Controversy: Equal Treatment, Positive Action, and the Meaning of Women's Equality* in Weinstein, FEMINIST LEGAL THEORY: FOUNDATIONS 156 (1993).

[16]The term "discriminate," which was not defined at all in the Civil Rights Act of 1964, is defined in a highly detailed and multi-faceted way in Section102 of the A.D.A. With respect to reasonable accommodation, Section 102 provides that the term "discriminate" includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity." 42 U.S.C. §12112(b)(5)(A). The meaning of "undue hardship" is defined in the statutes implementing regulations at 29 C.F.R. §1630.2(p).

[17]The "interactive process duty" is described at 29 C.F.R. §1630(o)(3). This section provides:

> To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

dramatic shift in the ordinary power relationship between employers and employees on such issues as shift assignments, hours of work, physical plant, or the division of job duties among employees. At least in the non-union context, these had previously been aspects of the employer-employee relationship over which employers exercised exclusive control, subject of course to the basic non-discrimination principle that no applicant or employee could be treated less favorably for a reason specifically proscribed by law.

When enacted in the Summer of 1990, the ADA was the only employment-related federal civil rights statute that centrally featured a structural theory of equality. Title VII's disparate impact theory, which had been under attack throughout the 1980's, had been all but obliterated by the Supreme Court's decision in *Wards Cove Packing Company v. Atonio*,[18] and by the President's veto of the Civil Rights Act of 1990. Other Supreme Court cases had years before either strongly implied or explicitly precluded the assertion of disparate impact claims in Title VII pay equity cases,[19] or in cases seeking to enforce constitutionally-based protections against race, sex, or national origin

[18]490 U.S. 642 (1989).

[19]Although the issue was not directly before it, the Supreme Court in *County of Washington v. Gunther*, 452 U.S. 161, 170 (1981) opined that Title VII's Bennett Amendment, 42 U.S.C. § 2000e-2(h), which incorporated into the statute the affirmative defenses contained in the Equal Pay Act of 1963, would in all likelihood preclude the use of disparate impact theory in Title VII pay equity cases. This has been, and continues to be, the approach taken in a majority of the circuits. *See, e.g.*, Auto Workers v. Michigan, 886 F.2d 766, 769 (6th Cir. 1989); State, County, & Municipal Employees v. Washington, 770 F.2d 1401, 1405, 1408 (9th Cir. 1985).

discrimination.[20] And, in *Trans World Airlines, Inc. v. Hardison*,[21] the Court had so severely limited Title VII's religious accommodation principle as to render it virtually useless.

The ADA's embrace of structural equality seemed clear and unambiguous. Qualification standards, employment tests, or other selection devices having an unjustified disparate impact on disabled applicants or employees were clearly defined as discriminatory,[22] as were standards, criteria, or methods of administration that had discriminatory effects.[23] The non-discrimination principle unambiguously included a duty of reasonable accommodation, with which employers were required to comply even if the accommodation lowered an employee's net marginal productivity, so long as the expense incurred did not rise to the level of "undue hardship."[24]

The ADA and its implementing regulations had yet another remarkable feature: they limited an employer's prerogative to exclude a disabled person from a particular job based on a scientifically unsound assessment of the risks to health and safety posed by the person's disability. Under the new law, an employer could exclude a disabled individual from a particular job on safety grounds only if the

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[20]Washington v. Davis, 426 U.S. 229 (1976) (holding that disparate impact theory is unavailable in cases asserting rights under the Equal Protection Clause of the Fifth and Fourteenth Amendments).

[21]432 U.S. 63 (1977).

[22]42 U.S.C § 12112(b)(6).

[23]42 U.S.C. § 12112(b)(3)(A).

[24]42 U.S.C. § 12112(b)(5). The meaning of "undue hardship" is spelled out in the ADA's implementing regulations at 29 C.F.R. § 1603.2(p)(1).

person presented a "direct threat"[25] to the health or safety of others in the workplace, as that term had been narrowly interpreted under the Rehabilitation Act of 1973.[26] Specifically, under the direct threat defense an employer could exclude a disabled individual from a particular job only upon a "reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence," taking into account the duration of the alleged risk, the nature and severity of the potential harm, the imminence and actual likelihood that the potential harm would occur.[27]

Because stigmatizing conditions are so often associated with irrational perceptions of danger,[28] and because risk assessment in any context is more often based on popular myths and stereotypes than on sound scientific analysis,[29] the ADA's direct threat defense was potentially transformative. No longer, it seemed, could a disabled person be excluded from a particular job because his or her

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[25]The direct threat defense is found in Section 103 of the ADA, 29 U.S.C. §12113(b).

[26]Section 501 of the ADA provides: "Except as otherwise provided in this Act, nothing in this Act shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973; (29 U.S.C. 790 et. seq.) or the regulations issued by Federal agencies pursuant to such title." The direct threat defense had been defined for Section 504 purposes in terms virtually identical to those incorporated into the ADA Regulations in *School Board v. Arline*, 480 U.S. 273, 288 (1987).

[27]29 C.F.R. §1630.2(r).

[28]In connection with this aspect of stigma, *see generally* Erving Goffman, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY (1963). This point is developed later in this volume by Vicki Laden and Greg Schwartz in *Psychiatric Disabilities, the Americans with Disabilities Act, and the New Workplace Violence Account*, *infra* p. **[insert first page # of Laden/Schwartz].**

[29]For an interesting exploration of this phenomenon and its broader implications for governmental risk regulation, *see* Timur, Kuran & Cass Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683 (1999) (describing the threats to rational regulatory activity posed by popular dynamics of risk perception).

presence was in good faith viewed as presenting an elevated health or safety risk. In making any such assessment, the ADA seemed to require that an employer replace an "intuitive" or "popular" approach to risk assessment with more scientific methods and standards.

In short, the Americans with Disabilities Act appeared to be a "second generation"[30] civil rights statute, advancing both formal and structural models of equality by imposing a duty of accommodation as well as a duty of formal non-discrimination, regulating health and safety risk analysis in situations involving disabled employees or applicants, and extending these protections to an apparently wide class – a class ranging far beyond those traditionally viewed as "disabled" in legal and popular culture. Supporters hailed it as a triumph of a new "civil rights" or "social" model of disability over an older and outmoded "impairment" or "public benefits" model.[31] The ADA promised to revive the concept of stigma as a powerful hermeneutic for the elaboration and judicial application of American civil rights law.[32] Supporters and detractors alike predicted that the structural approach to equality advanced by

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[30]I borrow here from Robert Burgdorf, *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L.REV. 413 (1991).

[31]*See, e.g.,* Jonathan C. Drimmer, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities,* 40 U.C.L.A. L. Rev. 1341, 1357-58 (1993); Richard K. Scotch & Kay Schriner, *Disability, Civil Rights, and Public Policy: The Politics of Implementation*, 22 J. POLICY STUD. 170 (1994). For a thorough treatment of the development of the civil rights and social models of disability within the disability rights movement, *see* Richard K. Scotch, FROM GOOD WILL TO CIVIL RIGHTS: TRANSFORMING FEDERAL DISABILITY POLICY (1984) (focusing on events connected with the passage and implementation of Section 504 of the Rehabilitation Act of 1973). In this volume, *see* Harlan Hahn, *Accommodations and the ADA: Unreasonable Bias or Biased Reasoning?*, *infra p.* **[insert first page # for Hahn piece]**.

[32]*See, e.g.,* Jonathan Drimmer, *Cripples, Overcomers and Civil Rights, supra* note 31, at 1349-51 (discussing the concept of stigma in relation to disability rights law and policy); *see generally*

the ADA might eventually diffuse into other areas of the law, eroding the entrenched understanding that equality always – and only – requires equal treatment under rules and practices assumed to be neutral.

The employment discrimination provisions of the ADA were gradually phased in between 1990 and 1994. Although passed in 1990, the Act did not become effective until 1992,[33] at which point Title I, which prohibits discrimination in employment, covered employers with 25 or more employees.[34] In 1994, coverage was extended to employers with 15 or more employees.[35] Within the disability activist community, expectations for the statute ran high. Within the employer community, so did concerns. Across the country, large law firms began running training sessions for their employer clients and strategy development workshops for employment defense lawyers, who would soon busy themselves preventing and defending cases brought under the new law.[36]

As judicial opinions in Title I cases began to accumulate, it became clear that the Act was not being interpreted as its drafters and supporters within the disability rights movement had planned. Indeed, by 1996 many in the disability community were speaking of an emerging judicial backlash

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Harlan Hahn, *The Appearance of Physical Difference: A New Agenda for Political Research,* J. HEALTH & HUM. RESOURCES ADMIN. 391 (1991) (discussing stigma and other aspects of the attitudinal environment in relation to the concept of discrimination).

[33]P.L. 101-336, tit. I, at 108, 104 Stat. 337 (1990) ("This Title [42 U.S.C.S. §§ 12111-12117] shall become effective 24 months after the date of enactment.").

[34]42 U.S.C. § 12111(5).

[35]*Id*.

[36]For further discussion of these developments, *see* in this volume, Chai Feldblum, *The Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, *infra* p. **[insert first page # of Feldblum's piece]**.

against the ADA. Law review articles written by many of the statute's drafters described a powerful narrowing trend in the federal judiciary, especially on the foundational question of who was a "person with a disability," entitled to protection under the Act. These articles, which told a consistent and to disability activists troubling story, bore titles like:

- *The Incredible Shrinking Protected Class: Redefining the Scope of Disability Under the Americans with Disabilities Act;*[37]
- *"Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability;*[38]
- *Restoring Regard for the Regarded As Prong: Giving Effect to Congressional Intent.*[39]

Of course, one might have discounted these alarmist accounts on the grounds that partisans on one or another side of a disputed social issue often over-estimate the strength of a hostile trend. But systematic studies of ADA Title I cases published in 1998 and 1999 eventually lent empirical support to what ADA advocates were reporting. The overwhelming majority of ADA employment discrimination plaintiffs were losing their cases, and the federal judiciary was interpreting the law in consistently narrowing ways.

A study of federal district court decisions conducted by the American Bar Association reported

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[37]Steven S. Locke, *The Incredible Shrinking Protected Class: Redefining the Scope of Disability Under the Americans with Disabilities Act*, 68 COL. L. REV. 107 (1997).

[38]Robert Burgdorf, "*Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability*, 42 VILL. L. REV. 409 (1997).

[39]Arlene Mayerson, *Restoring Regard for the Regarded As Prong: Giving Effect to Congressional Intent*, 42 VILL. L. REV. 587 (1998).

in 1998 that, in a data set including all published ADA Title I cases that had gone to judgment either before or after trial, plaintiffs lost 92 percent of the time.[40] In the Fifth Circuit, the figure was a startling 95%.[41]

Less than a year later, Ohio State law professor Ruth Colker published an even more comprehensive and arguably better-designed study of outcomes in federal district and appellate ADA Title I decisions.[42] Professor Colker's two part data set included not only the cases analyzed in the American Bar Association study, but also published and unpublished federal circuit court decisions available through Westlaw or other electronic reporting services.[43] Before analyzing these data, Professor Colker excluded cases that could readily be identified as "frivolous," including cases filed against a non-covered entity, cases challenging conduct that occurred before the Act's effective date, and cases otherwise asserting claims that could not possibly be covered by the ADA.[44]

Colker's results reinforced the American Bar Association findings. With respect to cases included in the appeals court data set, defendants had prevailed at the trial court level 94% of the time. As to that 94%, where plaintiffs were appealing an adverse district court judgment, defendants

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[40]American Bar Association Commission on Mental and Physical Disability, *Study Finds Employers Win Most ADA Title I Judicial and Administrative Complaints,* 22 MENTAL AND PHYSICAL DISABILITY LAW REPORTER, May-June 1998, at 403.

[41]*Id*.

[42]Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants,* 34 Harv. C.R.-C.L. L. Rev. 99 (Winter 1999).

[43]*Id.* at 103.

[44]*Id.* at 106, n. 39.

prevailed on appeal 84% of the time.[45] Of the 6% of district court cases in which plaintiffs had prevailed in the district court, almost half, or 48%, were reversed in defendants' favor on appeal.[46] Colker's re-analysis of the ABA data set largely confirmed the studies' original conclusions; she found that defendants had prevailed 92.7% of the time.[47]

Colker's content analysis of courts' opinions in these cases proved equally unsettling for disability rights advocates. Closely reviewing the decisions contained in the district and appellate court data sets, she demonstrated that courts were systematically deploying two strategies in ruling against plaintiffs. First, district courts were granting and appellate courts were confirming summary judgments against plaintiffs even in situations where material issues of fact were clearly present, thereby keeping cases from proceeding to jury trial.[48] Second, Colker showed, in construing the ADA's many ambiguous provisions, courts were consistently refusing to follow either the Act's extensive legislative history or the administrative regulations and other interpretive guidance issued by the EEOC.[49]

Of course, one might explain these otherwise alarming statistics by positing an adverse selection

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[45] *Id.* at 108.

[46] *Id*.

[47] *Id*. at 109. For a variety of reasons, these results probably *over-estimate* plaintiffs' rates of success. While a discussion of these reasons is beyond the scope of this paper, interested readers are referred to Colker's discussion at pp. 104-105 and 108-109. Her reasoning in this regard parallels earlier observations in Peter Siegelman & John J. Donohue III, *Studying the Iceberg from its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 L. & SOC'Y REV. 1133 (1990).

[48] *Id*. at 101.

[49] *Id*. at 102.

effect, caused by the more meritorious cases being resolved before any judicial complaint is filed. But as Steven Percy's paper later in this volume suggests,[50] one finds little support for this view in statistics maintained by the EEOC.

Between 1992 and 1998, the Equal Employment Opportunity Commission resolved a total of 106,988 charges of discrimination under the ADA. Of these, only 4,027, or 3.8%, resulted in reasonable cause determinations, and only 14,729, or 13.8%, resulted in "merit resolutions" of any kind, including settlements, withdrawal with benefits, or determinations of reasonable cause.[51] The largest category of administrative dispositions consisted of "no cause" determinations, which accounted for 51.4% of all dispositions, followed by "administrative closures," at 34.9%, many of which result from a charging party obtaining a right to sue and commencing his or her own legal action before the EEOC has completed its investigation.[52] Although more detailed study and analysis would certainly aid our understanding of how ADA cases proceed from initial dispute to litigation, there is little in the EEOC data to support the theory that a disproportionate share of non-meritorious cases are reaching the federal courts.

Oddly, during the years in which the cases analyzed in the Colker and ABA studies were accumulating, one could never have gleaned from popular media coverage of the ADA that the

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[50]Stephen Percy, *Administrative Remedies and Legal Disputes: Evidence on Key Controversies Underlying Implementation of the Americans with Disabilities Act*, *infra* p. **[insert first page # of Percy's article]**.

[51]United States Equal Employment Opportunity Commission, *Americans with Disabilities Act of 1990 (ADA) Charges FY 1992-1998* (EEOC 1999), available on the EEOC website at http://www.eeoc.gov/stats/ada.html.

[52]*Id.*

administrative and judicial tide was flowing so powerfully against ADA plaintiffs. The picture painted in the media was in fact precisely the opposite. It portrayed a law and an adminisrative agency run wildly amuck, granting windfalls to unworthy plaintiffs and forcing employers to "bend over backwards"[53] to accommodate preposterous claims. Articles and commentary in the nation's leading newspapers bore headlines like:

- *The Disabilities Act's Parade of Absurdities;*[54]
- *Disabilities Law Protects Bad Doctors;*[55] and
- *Disabilities Act Abused? Law's Use Sparks Debate.*[56]

Negative media commentary crested after publication of the E.E.O.C.'s *Guidance on Psychiatric Disabilities and the ADA* in March 1997.[57] Designed to help employers understand what the Act did and did not require, the *Guidance* unleashed a torrent of rhetorical attacks on both the ADA and the E.E.O.C. Leading newspapers in major metropolitan areas ran stories and commentary

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[53]I nod here to Lennard Davis, later in this volume, *Bending Over Backwards: Disability, Narcissism and the Law, infra* p. **[insert first page # of Davis' text]**.

[54]James Bovard, *The Disabilities Act's Parade of Absurdities*, WALL ST. J., June 22, 1995, at A6.

[55]Walter Olson, *Disabilities Law Protects Bad Doctors*, N.Y. TMES, November 28, 1997, at A39.

[56]Stephanie Armour, *Disabilities Act Abused? Laws Use Sparks Debate,* USA TODAY, September 25, 1998, Final Edition, Mondy 1B

[57]United States Equal Employment Opportunity Commission, *Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities.*

with headlines like: *Late for Work: Plead Insanity*;[58] *Protection for the Personality-Impaired;*[59] and *Grey Matter -- Breaks for Mental Illness: Just What the Government Ordered.*[60] Cartoonists had a field day, as this selection from the Detroit News[61] exemplifies:

The ADA's "image problem" was not confined to the print media. As Cary LaCheen describes

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[58]Dennis Byrne, *Late for Work? Plead Insanity*, CHI. SUN-TIMES, May 8, 1997.

[59]George Will, *Protection for the Personality-Impaired*, WASH. POST, Apr. 4, 1996, at A31.

[60]Sheryl Gay Stolberg, *Week in Review Desk: Gray Matter; Breaks for Mental Illness: Just What the Government Ordered*, N. Y. TIMES, May 4, 1997, at 1.

[61]Larry Wright, ©Detroit News, 1997.

later in this volume,[62] the Act was pilloried in television news and sitcom programming as well. In all likelihood, many Americans' "understanding" of the ADA was shaped by a *Simpsons* episode entitled "King Sized Homer," in which Bart Simpson's father attempted to eat himself to a weight of 300 pounds, so that he could be diagnosed as "hyper-obese" and use the ADA to avoid participation in an otherwise mandatory workplace exercise program. Others may have learned about the law while watching a *King of the Hill* episode entitled "Junkie Business," in which a drooling, near catatonic addict-employee who spent much of the work day in a fetal position claimed protection of the ADA to avoid being fired. His "rights" to come in late, to have the lights dimmed, and to do little productive work are championed by a social worker, who, sporting a wrist brace for carpal tunnel syndrome, refers to himself and his addict-client as the "truly disabled." One by one, other employees at the business follow suit, until no one but the beleaguered manager is doing any work. Everyone else is claiming to be "disabled" and, under the sheltering wings of the ADA, immune from discipline or discharge.

Predictions that a backlash against the ADA might occur emerged as early as 1994. Perhaps the first such concern was voiced that year by Joseph Shapiro. In an article that troubled many ADA activists, Shapiro cautioned that because passage of the ADA was not preceded by a well-publicized social movement, the Act, along with the people who mobilized or enforced it, might be particularly

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[62]Cary LaCheen, *Achy Breaky Pelvis, Lumber Lung, and Juggler's Dispair, The Portrayal of the Americans with Disabilities Act on Television, infra* p. **[insert first page of LaCheen's text]**.

vulnerable to misinterpretation, hostility, resentment, and other backlash effects.[63] Shapiro reiterated these concerns the same year in his landmark book about the modern American disability rights movement.[64]

Additional predictions of backlash, or claims that a backlash against the ADA was already underway, followed in the law review literature. The first surfaced in 1995, in an article by Professor Deborah Calloway on the potential implications of new structural theories of equality.[65] Calloway's prediction was soon followed by claims that a judicial and media backlash against the ADA was in fact already underway.[66] By the time the American Bar Association study was released, many within the

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[63]Joseph P. Shapiro, *Disability Policy and the Media: A Stealth Civil Rights Movement Bypasses the Press and Defies Conventional Wisdom*, 22 POL'Y. STUD. J. 123 (1994).

[64]Joseph P. Shapiro, NO PITY: PEOPLE WITH DISABILITIES FORGING A CIVIL RIGHTS MOVEMENT 70-73, 328 (1994) (discussing potential for backlash against disability rights advocacy).

[65]Deborah A. Calloway, *Dealing With Diversity: Changing Theories of Discrimination*, 10 ST. JOHN'S J. LEG. COMMENTARY 481, 492 ("Expansive reading of the ADA definition of disability combined with demands for equal employment opportunity through workplace accommodation for individuals currently outside of ADA coverage may create a backlash against the rights granted under the ADA similar to the backlash against affirmative action."). For later references to potential ADA backlash, *see, e.g.,* Wendy E. Parmet, Mark A. Gottleib, & Richard A Daynard, *Accommodating Vulnerabilities to Environmental Tobacco Smoke: A Prism for Understanding the ADA,* 12 J. L. & HEALTH 1, 3-4, 21 (1997-98) (discussing the connection between an expansive definition of disability and attacks on the ADA); Christopher Aaron Jones, *Legislative Subterfuge? Failing to Insure Persons with Mental Illness Under the Mental Health Parity Act and the Americans with Disabilities Act*, 50 VAND. L. REV. 753, 785. (1997) (noting that by failing to define key statutory terms and provisions with sufficient specificity, Congress gives lip service to broad social ideals, but foists key controversial decisions and the hostility those decisions generate onto courts and administrative agencies).

[66]For examples of these claims, *see, e.g.,* Ruth Colker, *Hypercapitalism: Affirmative Protections for People with Disabilities, Illness and Parenting Responsibilities Under United States Law,* YALE J. L. & FEMINISM 213 (1997) ("The backlash against the Americans with Disabilities Act...has been immediate and strong."); Paul Steven Miller, *The Americans with*

disability advocacy community were speaking openly of a growing backlash against the ADA.

Most of us involved in this or other social justice struggles have at one time or another referred to resistance to civil rights initiatives as a "backlash." Whether working to advance the rights of women, to win basic civil rights for lesbians and gay men, to defend affirmative action, or to bring about the full integration of people with disabilities into every facet of economic, political, cultural, and social life, referring to resistance as "backlash" is, among other things, a good way to blow off steam. Of course, it is one thing to blow off steam and quite another to think systematically about precisely what "backlash" might be, what causes it to occur, and how it might be prevented or reckoned with if and when it emerges.

In an attempt to encourage this sort of systematic thinking, the Berkeley Journal of Employment and Labor Law brought together a remarkable group of disability activists and practitioners, and a distinguished group of scholars from the fields of law, sociology, psychology, political science, economics, history, and English literature whose work has centered on disability rights issues. Over the course of two days in March of 1999, this group, along with over 200 students, lawyers, and community members in attendance, collectively investigated the following questions implicated by public, judicial, and media responses to the ADA:

- What is "backlash?" Can it meaningfully be distinguished from other forms of retrenchment or resistance to social change initiatives?

Disabilities Act in Texas: The EEOC's Continuing Efforts in Enforcement, 34 HOUS. L. REV. 777, 779 (1997) (citing Kathi Wolf, *"Bashing the Disabled: The New Hate Crime,* THE PROGRESSIVE, Nov. 1995, at 24); Paul Steven Miller, *The EEOC's Enforcement of the Americans with Disabilities Act in the Sixth Circuit,* 48 CASE W. RES. 217, 218 (1998).

- Is there in fact an ongoing backlash against the ADA and related disability rights initiatives?

- If so, how is that backlash manifesting in the media, in judicial decision making, and in academic or other social commentary?

- Assuming some discrete backlash phenomenon exists, to what factors might it reasonably be attributed? How can our efforts to understand this phenomenon be informed by insights from legal studies and from other disciplines, such as sociology, psychology, political science, economics, history, or disability studies? And finally;

- What are the implications of public, media, and judicial responses to the ADA for future strategies in disability advocacy and policy-making, or for strategy formulation in social justice movements more generally?

The thirteen papers and three responsive commentaries comprising this volume bring diverse, interdisciplinary perspectives to the investigation of these questions.

The first three papers explore patterns of judicial response to the ADA from a traditional legal analytical perspective. In *Judicial Backlash, the ADA, and the Civil Rights Model*, Matthew Diller provides a broad overview of these patterns and suggests two partial explanations for them. First, he suggests that in interpreting the ADA, judges are continuing to rely on an impairment rather than a civil rights or social model of disability. The older impairment model, he postis, leads to a highly restrictive approach to statutory coverage. Second, Diller argues that by advancing a structural rather than merely formal model of disability, the ADA, stands beside affirmative action on the front lines of a cultural war about the meaning of equality in a diverse society and the legal interventions properly taken to effectuate it.

In her contribution, Wendy Parmet[67] continues the inquiry with an examination of the "mitigating measures" controversy and shows how it has operated to narrow the scope of ADA coverage. Her investigation, which includes a discussion of the Supreme Court's recent ADA definition of disability decisions,[68] reveals a consistent pattern of judicial refusal to utilize either the Act's legislative history or the administrative regulations promulgated by the E.E.O.C. in defining "disability" for ADA coverage purposes. She explores this pattern's connection with the "new textualist"[69] school of statutory interpretation and concludes that in focusing on the purported "plain meaning" of statutory terms, textualist methodology necessarily enmeshes the interpreter in the same stereotypic understandings of relevant constructs that a statute like the ADA was designed to change.

In *The Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, Chai Feldblum traces the breakdown of a pre-ADA consensus, developed in cases under the Rehabilitation Act of 1973, about the meaning of key disability-related terms and concepts. The breakdown, Feldblum's analysis suggests, resulted from the sudden infusion of large numbers of big-firm, defense-side employment lawyers into a disability rights enforcement process previously dominated by public lawyers and disability rights lawyer/activists. This new group of private, big-firm lawyers had little prior contact with the disability rights movement, little

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[67]Wendy Parmet, *Plain Meaning and Mitigating Measures: Judicial Interpretations of the Meaning of Disability, infra* p. **[insert first page # from Parmet's piece].**

[68]These include Sutton v. United Airlines, 527 U.S. ___, 119 S.Ct. 2139 (1999) (corrective lenses and myopia), Murphy v. United Parcel Service, Inc., 527 U.S. ___, 119 S.Ct. 2133 (1999) (hypertension controlled by medication), and Albertsons, Inc. v. Kirkenburg, 527 U.S. ___, 119 S.Ct. 2162 (1999) (monocular vision).

[69]I nod here to William Eskridge, Jr. *The New Textualism*, 37 U.C.L.A. L. REV. 621 (1990).

familiarity with the social model of disability, and little appreciation for the ways in which key normative elements of that model had animated the ADA. Armed with new textualist methods, these lawyers quickly went to work finely parsing the ADA's language and in crafting narrowing interpretations of its various terms and concepts. She proposed that these interpretations, though conceptually remote from the disability rights vision that had guided the statute's drafters, were readily embraced by members of the federal bench.

Professors Diller, Parmet, and Feldblum all describe a startling disconnect between the understanding of the ADA shared by the activists and legislative aides who drafted the statute, and the private lawyers and judges who eventually shaped its interpretation. Insights into the various factors contributing to this phenomenon are developed in the next set of papers, which includes contributions by political scientist Harlan Hahn, sociologist Richard Scotch, and English literature scholar Lennard Davis.

In *Accommodations and the ADA: Unreasonable Bias or Biased Reasoning?,* Professor Hahn argues that the crabbed judicial interpretations of the ADA described by Diller, Parmet, and Feldblum stem from three fundamental sources: 1) widespread judicial confusion over the relationship between impairment and disability; 2) the failure or refusal of judges to adopt a socio-political conception of disability; and 3) generalized resistance to the "minority group" approach to disability policy issues. He proceeds to trace the enduring influence of paternalism and covert hostility toward the disabled on judicial responses to disability discrimination claims, and proposes a principle of "Equal Environmental Adaptations" as a tool for slicing through attitudinal and conceptual barriers to full implementation of the policy goals underlying the ADA.

Professor Davis continues this excavation of judicial attitudes towards people with disabilities in his intellectually playful and engaging essay, *Bending Over Backwards: Disability, Narcissism, and the Law.* Bringing Freud and Shakespeare to bear on the reading of ADA cases as narrative texts, Davis demonstrates that ADA plaintiffs are being portrayed in federal case law in much the same way as they have been depicted in English literature and Freudian theory -- as narcissistic, self-concerned, and overly demanding. Davis' observations echo Harlan Hahn's claim that popular and legal discourse on disability remains heavily freighted with covert hostility and resentment directed toward the disabled.

Readers unfamiliar with the social model of disability will appreciate the concise and accessible overview of the subject provided by Richard Scotch's *Models of Disability and the Response to the Americans with Disabilities Act*. As Scotch explains, under an older "impairment" or "rehabilitation" model, disability is conceptually located within the disabled individual. Under this approach, an impairment is seen as causing "disability" if it prevents the disabled person from functioning effectively in the world-as-it-is. If the individual can be retrained or cured, he or she is no longer considered "disabled." If neither retraining nor cure is possible, social welfare benefits provide the disabled person with a subsistence income. Under this older model, which still underlies the federal social security disability system, a certification of disability operates as a kind of "ticket" into the system of rehabilitation and/or support, and signals to both the disabled individual and to members of the surrounding polity that the individual is neither expected nor entitled to function fully in the larger socio-economic world.

The model of disability reflected in the ADA represents a fundamentally different theoretical framework. Under the social model, disability is seen as resulting not from impairment *per se*, but from

an interaction between the impairment and the surrounding structural and attitudinal environment. Under this approach, *environments*, not simply *impairments,* cause disability.

Two consequences flow from this conceptual understanding, one implicated in the definition of disability and the other in ascertaining society's proper response to it. First, under a social approach to disability, determining whether a particular condition is "disabling" requires an examination of the attitudinal and structural environment in which a person functions, not merely an examination of the person herself. Accordingly, an impairment may be "disabling" in one structural and attitudinal environment but not in another. Second, once "disability" is no longer located entirely within the impaired individual, but in the environment as well, the presence of an impairment can be seen as triggering societal obligation to *change* the environment, so that disabled individual can function despite her impairment. As the articles by Professors Hahn, Davis, and Scotch demonstrate, appreciating the differences between the "impairment" and "social" models of disability is central to understanding the Americans with Disabilities Act.

The next two articles, the first by Cary LaCheen and the second by Vicki Laden and Gregory Schwartz, examine the depiction of disability issues in the media and then trace those depictions into ADA jurisprudence and human resource management discourse. In *Achy Breaky Pelvis, Lumber Lung and Juggler's Despair: The Portrayal of the Americans with Disabilities Act on Television*, LaCheen identifies and explores a number of curious parallels between ADA media coverage and the treatment of disability issues in federal case law.

LaCheen's well-documented claim that television coverage of the ADA has been overwhelmingly negative, one-sided, and substantially misleading is profoundly important. Popular

attitudes toward legal rights and obligations are likely influenced more by people's *beliefs* about what legal and regulatory schemes require, how they are enforced, and the effects of enforcement on individuals and society than by actual legal doctrine, enforcement activities, or (to the extent they can be accurately measured) practical effects. Popular beliefs about law are shaped by many factors, including media coverage, through which a particular set of scripts, symbols, and condensing themes is transmitted to the reading and viewing public.

To the extent that a particular law or regulatory regime is politically controversial, that controversy will be enacted in the print and broadcast media, as positive and negative scripts, symbols, and condensing themes compete for audience attention. The particular condensing themes that prevail in this contest become the dominant cognitive and attitudinal frames through which people assign meaning to the law and construe efforts to mobilize or enforce it. These "media frames"[70] organize the relevant discourse, both for the journalists who create the coverage, and for the public, which reads, hears, or views it. Eventually, socio-cultural dissemination of particular media representations proceeds to the point that it becomes meaningful to refer to these representations not only as "media frames," but as broader "discursive frames," which influence popular attitudes towards the law, its enforcers, and its beneficiaries.

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[70]This term is taken from Todd Gitlin, THE WHOLE WORLD IS WATCHING: MASS MEDIA IN THE MAKING AND UNMAKING OF THE NEW LEFT (1980). Gitlin defines media frames as "persistent patterns of cognition, interpretation, and presentation, of selection, emphasis, and exclusion, by which symbol-handlers routinely organize discourse, whether verbal or visual." *Id.* at 7. Gitlin's construction draws on the earlier work of Erving Goffman, who in more general terms described frames as implicit theories about the nature of reality, used heuristically to comprehend, manage, and respond to it. *See* Erving Goffman, FRAME ANALYSIS: AN ESSAY ON THE ORGANIZATION OF EXPERIENCE, 10-11 (1974).

In *Psychiatric Disabilities, the Americans with Disabilities Act, and the New Workplace Violence Account*, Vicki Laden and Greg Schwartz examine the impact of one particular discursive frame on judicial and public responses to the ADA. They identify a rhetorical construct which they refer to as the "new workplace violence account," and explore its use in attempts to delegitimate the ADA. Laden and Schwartz argue that the account's depiction of the volatile, psychotic employee, poised to explode in lethal violence, is used by media critics who claim that the ADA has deprived employers of the ability to protect employees from a potent workplace threat. They go on to describe a new workplace violence prevention industry, composed of defense-side employment lawyers, security experts, and consultants, who counsel employers on "how to identify and remove potentially violent workers in the hands-tied era of the ADA.[71] This rapidly expanding violence prevention industry, Laden and Schwartz contend, advances bold claims about the enormity and severity of the problem, reinforcing a key premise of ADA critics, that the Act unreasonably subordinates public safety interests to the "special rights" of the mentally ill. Through a close examination of judicial decisions and defense firm training materials on the one hand, and a review of relevant, current social science research on the other, Laden and Schwartz both expose the flawed empirical basis undergirding claims relating to prediction of dangerousness, and explore the implications of current scientific knowledge for compliance with the ADA and for administrative and judicial interpretation of its direct threat defense.

No interdisciplinary examination of an important socio-legal phenomenon would be complete without an examination of its constituent issues and problems from an economic perspective. The

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[71]V. Laden & G. Schwartz, *Psychiatric Disabilities and the ADA, infra* p. **[insert first page number AND PIN CITE from Laden/Schwartz piece]**.

Symposium offers readers three such treatments and a responsive commentary. First, Susan Schwochau and Peter Blanck's *The Economics of the Americans with Disabilities Act, Part III: Does the ADA Disable the Disabled?* examines recent economic studies suggesting that the ADA may actually have led to an overall decline in the employment of people with disabilities. While conceding that disabled employment rates have not risen, and may in fact have declined somewhat since 1990, Schwochau and Blanck argue that existing research fails to support the claim frequently deployed by ADA opponents that these unfavorable trends can fairly be attributed to the ADA, as opposed to other socio-economic factors.

Michael Stein extends the inquiry in *Labor Markets, Rationality, and Workers with Disabilities*. He argues that stagnation in disabled employment results not from unintended negative consequences of the ADA, but rather from a particular "taste for discrimination" which the ADA has thus far been unable to control.

In *Backlash, the Political Economy, and Structural Exclusion*, Marta Russell argues that public hostility toward the ADA is driven in large measure by the high levels of job instability and worker displacement characterizing American labor markets. These, she contends, breed insecurity, fear, and resentment toward employment protections extended to members of disadvantaged groups. Russell suggests that hostility toward identity group-based employment protections will persist until employment at a living wage and access to health care are treated as fundamental rights attending membership in society, rather than as incidents of increasingly unstable employment status. The section concludes with the symposium commentary of economist Richard Burkhauser, who discusses selected claims made and issues raised in the previous three accounts.

The next three papers extend the investigation to areas beyond Title I of the ADA. Ruth Colker's *ADA Title III: A Fragile Compromise*, explores enforcement activities under the public accommodations provisions of the ADA, which prohibit discrimination by retail establishments, entertainment facilities, restaurants, and professional service providers. Stephen Percy continues in *Administrative Remedies and Legal Disputes: Evidence on Key controversies Underlying Implementation of the Americans with Disabilities Act*[72] with an analysis of administrative enforcement activities by the E.E.O.C. and the Department of Justice, identifying key areas of dispute or analytical difficulty.

Professor Percy's exploration raises, at least in this reader's mind, a number of intriguing questions about the problems associated with the use of indeterminate legal standards in complex regulatory regimes. Both the Rehabilitation Act and the ADA incorporate standards which might reasonably be described as "complex," or "tempering." Figuring out how to comply with these standards, which include "reasonable accommodation," "undue hardship," even "disability" as the term is defined in the ADA and the Rehabilitation Act, often requires a complex, situation-specific balancing of under-specified factors by unsophisticated legal actors. When one crafts laws utilizing complex tempering principles, how do they work? Do indeterminate standards function effectively in guiding statutory compliance, enforcement, or judicial interpretation? What strains do under-specified legal standards place on courts and administrative agencies, whose legitimacy often depends on perceptions that they are "applying" rather than "making" the law? Professor Percy's investigation suggests that,

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[72]Stephen Percy, *Administrative Remedies and Legal Disputes: Evidence on Key Controversies Underlying Implementation of the Americans with Disabilities Act.*

even setting aside the tug-of-war often associated with implementation of a new regulatory regime, hostility toward the ADA may reflect, at least in part, the negative affective response generated by a regulatory combination of normative uncertainty and potential liability.

Next, in *Democratic Dilemnas: Notes on the ADA and Voting Rights of People with Disabilities*, Kay Schriner, Lisa Ochs, and Todd Shields examine the history of *de jure* discrimination against people with disabilities in state and federal voting laws. In a fascinating account, Professor Schriner and her colleagues review the use of the disability category in American voting laws, describe its linkages to the English Poor Law, and compare the treatment of disability and other socially devalued status in state and federal voting rights laws and policies.

Finally, in a transcript of his oral Symposium remarks, Stanford Law Professor Michael Wald,[73] explores the paradox inherent in the ADA's conception of discrimination. This conception requires decision making to be tailored to each disabled person's individual characteristics and at the same time relies conceptually on a civil rights ideology that in other contexts has consistently directed decision makers to disregard individual characteristics tied to group membership. While this apparent contradiction has posed obstacles for the disability rights cause, it is the movement's heavy reliance on law, Professor Wald suggests, that represents its greatest problem. While law can be a useful tool, he advises, it is often ineffective in, and may even slow, efforts to bring about social change.

Professor Wald's commentary brings us full circle to the Symposium's convening questions: In the specific context of disability rights, and also more generally, what is the relationship between law

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[73] Michael Wald, **[insert title and *infra, p.* — from Wald's piece]**.

and social change? When are legal strategies relatively more effective in moving social justice movements forward, and when relatively less so? What is the significance of backlash in this context? Is it a meaningful construct, or merely an epithet used by social change activists to describe the arguments and activities of their opponents? If it is a meaningful construct, how and why does it emerge? And finally, how do these questions relate to public, judicial, and media responses to the Americans with Disabilities Act?

In closing the Symposium,[74] I offer a tentative theoretical framework for addressing these questions, and apply that framework to various observations and insights offered by the Symposium's contributors. The central premise is simple: to understand the role of law in effecting social change, one must consider the relationship between formal legal rules and constructs on the one hand, and informal social norms and institutions on the other. At its root, backlash, whether directed against the ADA or against any other transformative legal regime, is about this relationship. It can be avoided, or addressed once it emerges, only through careful attention to the complex processes that mediate it.

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[74]Linda Hamilton Krieger, *Afterword: Socio-Legal Backlash*, *infra* p. **[insert first page # from Krieger Afterward]**.