

# DISSING ABILITY

by  
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*People with disabilities have historically endured the horrors of exclusion and elimination because America has incessantly fixated on disability without seeing ability. To correct a disabling view of people with disabilities, this Article prescribes a paradigm shift that permanently redirects the focus from disability to ability. If America achieves this hopeful vision to no longer diss—or disrespect—ability, then people with disabilities will enjoy equal access to equal opportunity.*

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## INTRODUCTION

When you read the word disability, do you envision ability? When you see a person with a disability, do you focus on the disability before you recognize the person’s ability? Regrettably, it is common to ignore a person’s ability when blinded by an incessant focus on disability. Three little letters—D I S—placed in front of ability can zap it of its power. Put simply, a misdirected focus on disability can diss ability. Diss is a slang term that means “to treat with disrespect or contempt.”<sup>1</sup> It is an insult.<sup>2</sup> For centuries, America has dissed—or disrespected—ability through its misguided focus on disability. A societal emphasis on people’s disabilities ensures that they never enjoy equal opportunity. This Article prescribes a permanent paradigm shift that makes a person’s ability—and not disability—the enduring focal point.

Casting a vision to end America’s propensity to diss ability, this Article looks backward to understand how society has mistreated people with disabilities and forward with a plan to permanently change course. Explaining that disability is a common experience, Part I challenges society to focus on ability over disability. Looking backward, Part II details historical horrors that have befallen people with disabilities when society incessantly focused on disability. This long and cruel history recounts structural exclusion and societal elimination of people with disabilities. The Article then transitions from the horrors of the past to hope for the future. Part III catalogues major civil rights milestones that began to fulfill the promise of equal access to equal opportunity for people with disabilities. Part IV features the historic Americans with Disabilities Act of 1990 and the ADA Amendments Act of 2008 that ensured national civil rights for people with disabilities. Even though this part unleashes enduring hope for equal opportunity, it cautions that America’s historically

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<sup>1</sup> *Diss*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/diss> (last visited July 27, 2021).

<sup>2</sup> *Id.*

misguided focus on disability is not easily corrected and continues to diss ability. Part V concludes with a profile of The Reverend Harold H. Wilke, a disability rights pioneer who proved that ability trumps disability when imagination is engaged.

America's incessant focus on disability must recede permanently from view so that ability may emerge in full view. Hoping to end the disabling view that disability means inability, this Article envisions a future in which America no longer tolerates prejudicial views of disability. If America follows this Article's prescription for a clear vision of ability that is not blurred by a misdirected view of disability, it will no longer diss ability.

## I. A HOPE-FILLED VISION TO SEE ABILITY DESPITE DISABILITY

Disability will not diss ability when society focuses on ability. But it is easy to lose sight of ability when one's vision is obscured by an incessant focus on disability. Why do scuba divers fall backwards into the water? If they fell forward, they would still be in the boat. This joke is funny because it defies expectations. When the joke begins, you picture scuba divers sitting on the edge of a boat with their backs to the water in anticipation of falling backwards into the water. While anchored to this vision, you expect to be told why scuba divers fall backwards into the water. The joke makes you laugh by diverting your attention from an expected answer to an unexpected one that has the divers simply falling forward into the boat. As applied to people with disabilities, however, it is no laughing matter when society anchors to the false expectation that disability means inability. No funny punchline comes when we diss ability through a prejudicial view of disability. Instead, the joke is *always* on the person with a disability. This must end.

### A. *Disability Is a Common Experience*

Disability generally means a physical or mental condition that limits certain abilities.<sup>3</sup> Admittedly, it is easy to see that a person is blind, has no arms, or uses a wheelchair. Unfortunately, it is not as easy to see past a disability to recognize ability. This Article strives to teach America not to allow our sight of a person's disability to blind us from seeing that person's ability.

No single experience tells the disability story. Many disabilities are visible, yet invisible disabilities are more common.<sup>4</sup> Proving that disability is a common life

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<sup>3</sup> See *Disability*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/disability> (last visited July 27, 2021).

<sup>4</sup> DORIS ZAMES FLEISCHER & FRIEDA ZAMES, *THE DISABILITY RIGHTS MOVEMENT: FROM CHARITY TO CONFRONTATION* 254 (updated ed. 2011). Visible disabilities might include blindness, deafness, paraplegia, cerebral palsy, Down syndrome, missing limbs, muscular dystrophy, or multiple sclerosis; invisible disabilities might include epilepsy, autism, diabetes, HIV/AIDS, arthritis, learning disorders, mental illness, heart trouble, or cancer.

experience, the largest American minority consists of people with disabilities.<sup>5</sup> Even though the number is imprecise, about 20% of Americans have a disability and 10% have a severe disability.<sup>6</sup> There is a broad spectrum in the types of disabilities that people have: 85.6 million have cardiovascular disease; 75 million have hypertension; 30.6 million have trouble walking; 29.1 million have diabetes; 14.1 million have cancer; 8.1 million have visual impairments; 7.6 million have hearing impairments; 5.7 million have bi-polar disorder; 5.4 million have Alzheimer's disease, senility, or dementia; 2.4 million have schizophrenia; 600,000 have polycystic kidney disease; and 400,000 have multiple sclerosis, just to name a few.<sup>7</sup>

Though disability is a common experience, history shows that people with disabilities have been excluded from society based on a perverted “*social construct*” that was created without regard to them.<sup>8</sup> That history is perplexing, because unlike other minority groups, disability is “the only protected class that anyone can enter at any time through birth, accident, illness, or advanced age.”<sup>9</sup> Not a single person “is immune to developing a disability, and almost no one, regardless of race, gender, religion, or economic status, will go through life” without having some form of disability.<sup>10</sup> Most people will, at some point during their lives, have a disability, and the likelihood increases dramatically with age.<sup>11</sup> Disability is “the equal opportunity situation.”<sup>12</sup> Arguably, we should be united in recognizing “that disability is about everyone whether those who identify or those who do not identify with the disability community acknowledge that reality.”<sup>13</sup>

If you think that disability is only part of someone else's story, you may be mistaken. Disability may become part of *your* story. In the blink of an eye, you could join the class of people with disabilities. If your chair collapsed under you or the ceiling over you, your world would change. Invisible barriers that you failed to see in your past would be central to your future. Whether caused by accident, genetics, or aging, disabilities are routine parts of life for millions of Americans. Because we

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<sup>5</sup> MARK C. WEBER, UNDERSTANDING DISABILITY LAW (2d ed. 2012); FLEISCHER & ZAMES, *supra* note 4, at 215.

<sup>6</sup> LAURA ROTHSTEIN & ANN C. MCGINLEY, DISABILITY LAW: CASES, MATERIALS, PROBLEMS 8–10 (6th ed. 2017).

<sup>7</sup> *Id.* at 9–10.

<sup>8</sup> See FLEISCHER & ZAMES, *supra* note 4, at 255.

<sup>9</sup> *Id.* at 215.

<sup>10</sup> *Id.* at 109.

<sup>11</sup> See *id.* at 253–54.

<sup>12</sup> *Id.* at 109.

<sup>13</sup> *Id.* at 253–54. People with disabilities should be “a source of reassurance . . . that although life is unpredictable and circumstances may be unfavorable, versatility and adaptation are possible.” *Id.* at 205.

*all* share these common experiences, we all should be treated equally with an inclusive eye toward our abilities rather than an exclusionary focus on our disabilities.<sup>14</sup>

### *B. Disability Does Not Diss Ability*

How does an incessant focus on disability obscure ability? Perhaps a few questions might prod this line of thinking. Do you believe that a person born without a right hand can pitch in Major League Baseball? Can a person who uses a wheelchair and has never played football serve as a kicking coach in the National Football League? Can a person with near total paralysis become a world-renowned theoretical physicist? How about a person with schizophrenia reaching the highest levels in the field of mathematics? Do you believe that a person must have the ability to stand and walk to serve as President of the United States? This exercise builds our capacity to avoid a misguided focus on disability that will diss ability by seeing past disability to view ability in all forms. Here are a few examples of people with disabilities who had earth-shattering abilities.

Jim Abbott played quarterback on his high school football team, was an All-American pitcher at the University of Michigan, played in Major League Baseball for a decade, won a Gold Medal in the Olympics, threw a no-hitter for the New York Yankees, and won the Sullivan Award as “the outstanding amateur athlete in the United States.”<sup>15</sup> Even though Jim was born without a right hand, it would have been pure folly to focus on his disability to conclude that he was unable to play professional baseball. Jim’s ability to use his left hand was extraordinary such that any focus on his disability in not having a right hand was an immaterial exercise in futility.

In recognizing that he was “born this way,”<sup>16</sup> Jim kept his disability in perspective by drawing the focus away from it. Hyper-focused on what he could do, Jim proclaimed, “Just because you do things a little differently doesn’t mean you can’t

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<sup>14</sup> See Joseph P. Shapiro, *What the ADA Teaches Us About the Value of Civil Rights*, in A LOOK BACK: THE BIRTH OF THE AMERICANS WITH DISABILITIES ACT 43, 44–45 (Robert C. Anderson ed., 1996) (“The disability movement . . . is a reminder that all Americans have a mutual investment in protecting civil rights,” because “anyone can join the nation’s population of . . . persons with disabilities at any time, and as we live longer our odds of doing so increase.”).

<sup>15</sup> Rick Swaine, *Jim Abbott*, SOC’Y FOR AM. BASEBALL RES., <https://sabr.org/bioproj/person/jim-abbott/> (last updated Jan. 18, 2017); *U of M Baseball*, UNIV. OF MICH.: BENTLEY HIST. LIBR., <https://bentley.umich.edu/athdept/baseball/baseball.htm> (last updated July 17, 2018); *Biography*, JIM ABBOTT, <http://www.jimabbott.net/biography.html> (last visited July 27, 2021); *History Overview: AAU Sullivan Award Overview: The Significance*, JAMES E. SULLIVAN AWARD, <http://www.aausullivan.org/History/Overview> (last visited May 23, 2021).

<sup>16</sup> TEDx Talks, *Misfortune as a Gift*, YOUTUBE (Sept. 6, 2016), <https://www.youtube.com/watch?v=J7QyhsJ8GUA>.

do them just as well.”<sup>17</sup> And he always tried to do things differently.<sup>18</sup> He admitted that he faced daunting challenges, felt like an outsider, and often “was filled with uncertainty and self-doubt and thinking that [he] couldn’t do it.”<sup>19</sup> No matter how difficult it was to compete with one hand, Jim believed that “what’s been taken away once will be given back twice,” because “more has been given . . . than was ever taken away.”<sup>20</sup> Despite his ever-present disability, Jim embraced each challenge “as an opportunity, as a chance to prove [himself], as a chance to reveal inner strength.”<sup>21</sup> Fully embracing life with one hand, Jim recognized that people who “have endured some misfortune will always be set apart, but it is just that misfortune which is their gift and their strength.”<sup>22</sup> Displaying an incessant focus on ability, Jim made this emboldened plea for people to embrace the challenges of having a disability:

[N]othing can stop you if you can be tough, if you can be creative, if you can believe in who you are and what you can do, nothing . . . can hold you back. . . . There are so many great things that are possible in this world, and each and every one of them are within your reach and it doesn’t matter how you were born.<sup>23</sup>

Jim’s attitude about his abilities transformed his view of his disability.

Doug Blevins was a coach in the National Football League.<sup>24</sup> Would you be surprised if he had never played football because he was born with cerebral palsy and used a wheelchair?<sup>25</sup> But the disability that kept Doug from the playing field did not define his ability to coach. Prevented from playing the game that he loved,

<sup>17</sup> Trevor Cameron, *Jim Abbott 30 for 30*, YOUTUBE (Jan. 9, 2019), <https://www.youtube.com/watch?v=ciLIE81oiV0>.

<sup>18</sup> TEDx Talks, *supra* note 16.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* (quoting Cormac McCarthy).

<sup>23</sup> *Id.* Armed with one hand, Shaquem Griffin plays linebacker for the Seattle Seahawks. His disability does not define him; his ability to play professional football does. *See, e.g., Seattle Seahawks Shaquill and Shaquem Griffin Share How “Inseparable” Bond Led Them to NFL*, NBC SPORTS (Jul. 8, 2019), <https://www.nbcsports.com/northwest/seattle-seahawks/seattle-seahawks-shaquill-and-shaquem-griffin-share-how-inseparable-bond-led-them>; Jen Murphy, *How Shaquem Griffin Works to Stay in the NFL with One Hand*, WALL ST. J. (Sept. 8, 2019, 7:34 PM), <https://www.wsj.com/articles/how-shaquem-griffin-works-to-stay-in-the-nfl-with-one-hand-11567947301>.

<sup>24</sup> Robert Klemko, *Kicking Guru Doug Blevins ‘Shocked’ by Hall of Fame Nomination*, USA TODAY (Oct. 7, 2012, 12:12 PM), <https://www.usatoday.com/story/sports/nfl/2012/10/07/doug-blevins-hall-of-fame-nomination/1617861/>.

<sup>25</sup> *Id.*; Mike Ervin, *Kicking Coach Doug Blevins Creates Champions from his Chair*, ABILITIES.COM, [https://www.abilities.com/community/adaptive\\_sports-kicking-coach.html](https://www.abilities.com/community/adaptive_sports-kicking-coach.html) (last visited July 27, 2021).

Doug learned the game from a coaching perspective.<sup>26</sup> As his passion for coaching grew, so did his ability.<sup>27</sup> Confronting misconceptions about his disability, Doug lamented, “Most people automatically assumed that because I had cerebral palsy, I could not or should not have pursued a coaching career.”<sup>28</sup> Disregarding prejudicial views of his disability, Doug responded, “I was successful because I never listened to those people!”<sup>29</sup> Doug focused on his ability and, eventually, others did, too: “Professional football is a results-oriented business. As soon as people saw that I could create the desired results and achieve the appropriate level of success, I was welcomed into the arena.”<sup>30</sup> Doug’s disability did not determine his career trajectory; his profound abilities did and earned his nomination to the Pro Football Hall of Fame.<sup>31</sup>

Dr. Stephen Hawking was a world-renowned theoretical physicist.<sup>32</sup> Even though his mind displayed endless brilliance, his body did not. While in his early twenties, Dr. Hawking’s world abruptly changed when he realized that he would live the rest of his life with a disability that would get progressively worse.<sup>33</sup> Diagnosed with a motor neuron disease or amyotrophic lateral sclerosis, commonly referred to as ALS, Dr. Hawking’s disability left him paralyzed and speechless.<sup>34</sup> When he lost his ability to speak, he first used a handheld switch to generate speech<sup>35</sup> and later moved a muscle in his cheek to trigger a device to speak.<sup>36</sup> Despite his disability, he rose to the highest levels of science based on his abilities. And his enormous abilities might have been aided by his seemingly enormous disabilities. One can argue that Dr. Hawking’s paralyzing disease forced him “to develop pictorial ways of solving problems to which others did not have access.”<sup>37</sup> If he had been judged solely by his disability, that irrational focus would have obscured his abilities.<sup>38</sup> One

<sup>26</sup> Ervin, *supra* note 25.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Biography: Serious Career Work*, STEPHEN HAWKING, <https://www.hawking.org.uk/biography> (last visited July 27, 2021).

<sup>33</sup> *Biography: Graduation from Oxford and the Move to Cambridge*, STEPHEN HAWKING, <https://www.hawking.org.uk/biography> (last visited July 27, 2021).

<sup>34</sup> *Id.*; Nina Godlewski, *How Did Stephen Hawking’s Speech and Communication Tools Work?*, NEWSWEEK (Mar. 14, 2018, 1:32 PM), <https://www.newsweek.com/stephen-hawking-talk-communicate-how-845125>.

<sup>35</sup> *Biography: A Health Crisis, and Authorial Success*, STEPHEN HAWKING, <https://www.hawking.org.uk/biography> (last visited July 27, 2021).

<sup>36</sup> Godlewski, *supra* note 34.

<sup>37</sup> FLEISCHER & ZAMES, *supra* note 4, at 255.

<sup>38</sup> Unusual powers of concentration common to some people with autism might provide a heightened ability to reason and to classify—traits that are essential in certain career fields. *Id.* at

lesson is crystal clear—focusing on disability is fruitless; focusing on ability is fruitful.

Dr. John Forbes Nash Jr. was a distinguished mathematician whose work on game theory helped explain how decisions are made inside complex systems and in everyday life.<sup>39</sup> Dr. Nash is the only person to be honored with the Nobel Memorial Prize in Economic Sciences and the Abel Prize.<sup>40</sup> A book and movie entitled *A Beautiful Mind* told the story of Dr. Nash's amazing life.<sup>41</sup> Even though Dr. Nash had schizophrenia, a severe mental disability, it did not define his ability; it may have enhanced it. Dr. Nash's biographer contends that there was "a connection between Nash's schizophrenia and his beautiful mind," because his "flashes of intuition were non-rational" compared to how most people see the world.<sup>42</sup> She believed that "schizophrenia gave him insights that were not available to his peers."<sup>43</sup> Agreeing that he derived abilities from his disability, Dr. Nash explained, "The ideas I had about supernatural beings came to me the same way that my mathematical ideas did. So I took them seriously."<sup>44</sup> His ability overshadowed his disability.

Franklin Delano Roosevelt was America's thirty-second President who was elected four times and served twelve years.<sup>45</sup> Having led America during the Great Depression and World War II, he was a towering political figure.<sup>46</sup> Even while President Roosevelt's abilities carried him onto the world stage, his legs could not.<sup>47</sup> Unable to walk, he required a wheelchair to perform "arguably the most demanding job in the world."<sup>48</sup> But the press and voting public did not want to think of a

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254. While autism might be disabling in fields that demand various social skills, the abilities of people with autism shine in others like "computer science, or engineering, or library science, fields orientated around categorizations and rational thinking." *Id.* at 228–29.

<sup>39</sup> See *John F. Nash Jr.: Biographical*, NOBEL PRIZE, <https://www.nobelprize.org/prizes/economic-sciences/1994/nash/biographical/> (last visited July 27, 2021).

<sup>40</sup> See, e.g., *id.*; Morgan Kelly, *A 'Long Awaited Recognition': Nash Receives Abel Prize for Revered Work in Mathematics*, PRINCETON UNIV. (Mar. 26, 2015, 12:45 PM), <https://www.princeton.edu/news/2015/03/26/long-awaited-recognition-nash-receives-abel-prize-revered-work-mathematics>; *John F. Nash, Jr. and Louis Nirenberg Share the Abel Prize*, ABEL PRIZE, <https://www.abelprize.no/nyheter/vis.html?tid=63589> (last visited July 27, 2021).

<sup>41</sup> See, e.g., SYLVIA NASAR, *A BEAUTIFUL MIND* (1998); *A BEAUTIFUL MIND* (Universal Pictures 2001).

<sup>42</sup> FLEISCHER & ZAMES, *supra* note 4, at 255 (internal quotations omitted).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Franklin D. Roosevelt: The 32nd President of the United States*, WHITE HOUSE, <https://www.whitehouse.gov/about-the-white-house/presidents/franklin-d-roosevelt/> (last visited July 27, 2021) (citing FRANK FREIDEL & HUGH SIDNEY, *THE PRESIDENTS OF THE UNITED STATES OF AMERICA* (2006)).

<sup>46</sup> See FLEISCHER & ZAMES, *supra* note 4, at 1, 291.

<sup>47</sup> See *id.* at 1.

<sup>48</sup> *Id.* at 3.



President as having a disability.<sup>49</sup> Myths were generated so that President Roosevelt was not seen as “a person diminished by disability.”<sup>50</sup> It is breathtaking that during Roosevelt’s presidency “not a single picture was ever printed of the President in his wheelchair.”<sup>51</sup> Ability and disability were felt to be mutually exclusive, so his disability was hidden from public view.<sup>52</sup>

Although these legendary figures had significant disabilities, a misdirected focus on their disabilities would have obscured astronomical abilities. If society had not seen their abilities due to an incessant focus on their disabilities, these inspiring stories would have been erased from history. Society often misses these types of stories once a disability is spotted but before abilities emerge. Many people have faced such a fate, and that is a tragedy. Keep your minds open so that you may see ability even after seeing a disability. Stories that feature ability over disability play out millions of times each day in the lives of our mothers, fathers, grandmothers, grandfathers, sisters, brothers, children, colleagues, and friends. The story of disability and ability may have played out in your past, is currently playing out in your present, or may play out in your future. For each one of us, our abilities can be unlocked only when disability is not the focus of our story.

It is time to admit that the real disability is not found in people with disabilities; it forms inside us when we focus on disability. The never-ending story of equal opportunity begins anew each day when we remove harmful barriers to ability. This Article prescribes a paradigm shift that permanently redirects societal focus toward ability and away from disability. Regrettably, the opposite has been true for centuries. The historically horrific mistreatment of people with disabilities is a direct result of an incessantly misdirected focus on disability.

## II. HORRORS OF AMERICA’S INCESSANT FOCUS ON DISABILITY

It is impossible to understand how American society views people with disabilities today without a full understanding of how people with disabilities have been viewed over time.<sup>53</sup> Society’s incessant focus on disability has brewed contempt for ability. Gird yourself, because the historical account of the mistreatment of people with disabilities is long and depressing.

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<sup>49</sup> *Id.* at 1–2, 5.

<sup>50</sup> *Id.* at 1.

<sup>51</sup> *Id.* at 4 (quoting DORIS KEARNS GOODWIN, *NO ORDINARY TIME: FRANKLIN AND ELEANOR ROOSEVELT: THE HOME FRONT IN WORLD WAR II*, at 586–87 (1st ed. 1994)).

<sup>52</sup> *See id.*

<sup>53</sup> ARIE RIMMERMAN, *SOCIAL INCLUSION OF PEOPLE WITH DISABILITIES: NATIONAL AND INTERNATIONAL PERSPECTIVES* 9 (2013).

People with disabilities “have always been *in* but not *part of* society.”<sup>54</sup> Society has made it clear that people with disabilities do not belong.<sup>55</sup> *Separation* “best describes the historical [mis]treatment of persons with disabilities,” because they “have been isolated, institutionalized, and ignored.”<sup>56</sup> The twin evils of persecution and stigmatization led to exclusion.<sup>57</sup> Existing on the margins of society, people with disabilities have been excluded from “housing, employment, healthcare, civic engagement, democratic participation[,] due process and human rights.”<sup>58</sup> Exclusion is predictable after an avalanche of dehumanizing stereotypes like these: “the sad, unlucky disabled person, in need of pity and charity”;<sup>59</sup> “a burden”;<sup>60</sup> “better off dead”;<sup>61</sup> “the image of Tiny Tim”;<sup>62</sup> “dangerous, unpredictable, and evil”;<sup>63</sup> “mal-adjusted”;<sup>64</sup> “his or her own worst enemy”;<sup>65</sup> “unable to live a successful life”;<sup>66</sup> “helpless, dependent and in need of ongoing care by people without disabilities”;<sup>67</sup> “feeble-minded[]”;<sup>68</sup> “morons”;<sup>69</sup> and “idio[ts].”<sup>70</sup> These horrifying mischaracterizations of a person’s ability are wrought by a misguided focus on disability. Society used these ghastly stereotypes to erect structural barriers—legal, architectural, institutional, and attitudinal—that excluded people with disabilities from full participation in society.<sup>71</sup> And make no mistake about it, when one person is devalued and

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<sup>54</sup> *Id.*

<sup>55</sup> JACQUELINE VAUGHN SWITZER, *DISABLED RIGHTS: AMERICAN DISABILITY POLICY AND THE FIGHT FOR EQUALITY* 32 (2003).

<sup>56</sup> *Id.* at 31–32.

<sup>57</sup> See ESTHER ISABELLE WILDER & WILLIAM H. WALTERS, *VOICES FROM THE HEARTLAND: THE NEEDS AND RIGHTS OF INDIVIDUALS WITH DISABILITIES* 9 (Suzanne Ryan ed., 2005).

<sup>58</sup> RIMMERMAN, *supra* note 53, at 33 (internal parentheses omitted).

<sup>59</sup> SWITZER, *supra* note 55, at 41.

<sup>60</sup> *Id.* at 42.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 41.

<sup>63</sup> *Id.* at 42.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> RIMMERMAN, *supra* note 53, at 61.

<sup>68</sup> SWITZER, *supra* note 55, at 34.

<sup>69</sup> *Id.* at 36.

<sup>70</sup> *Id.* at 34.

<sup>71</sup> See *id.* at 14; Arlene S. Kanter, *The Globalization of Disability Rights Law*, 30 SYRACUSE J. INT’L L. & COM. 241, 247 (2003) (explaining that socio-environmental, institutional, and attitudinal barriers are the most disabling structures); KIM E. NIELSEN, *A DISABILITY HISTORY OF THE UNITED STATES*, at xvi (2012) (describing how disability discrimination is a structural problem); RIMMERMAN, *supra* note 53, at 125 (contending that “discrimination against people with disabilities in the form of purposeful unequal treatment and historical patterns of segregation and isolation was the major problem confronting people with disabilities”).

demeaned, it is biography; when millions endure similar mistreatment, “it is social history.”<sup>72</sup>

With that overview, it is time to recount America’s horrifying mistreatment of people with disabilities birthed from an ignorant focus on disability. To achieve equal opportunity, we must comprehend how the historically misguided focus on disability has shaped our society and why it is so agonizingly difficult to prescribe a new vision that sees ability. This Article’s prescription seeks to correct our historically poor vision so that we may always see ability over disability.

#### A. *Structural Exclusion of People with Disabilities*

Before America was established, popular perception equated a person’s disability with inability. People were locked out of our country based on their disability.<sup>73</sup> Immigration policy prohibited people with disabilities “from settling in the towns and villages of our Thirteen Colonies unless they could demonstrate ability to support themselves independently.”<sup>74</sup> The mere existence of a disability justified exclusion from society.<sup>75</sup> Even families hid those with disabilities.<sup>76</sup> Worse yet, families allowed people with disabilities to die by withholding life-support services.<sup>77</sup> Barred by debilitating persecution, people with disabilities began to reflect societal misjudgments about their abilities with poor self-perception, dependence, and little self-reliance.<sup>78</sup>

American democracy was founded on the idea that good citizens would vote, contribute economically, participate in government, and stand on their own two feet.<sup>79</sup> It became axiomatic that independence is good; dependency is bad.<sup>80</sup> Dependency meant “inequality, weakness, and reliance” on other people.<sup>81</sup> Once disability was tied to the evils of deficiency and dependency, disability was stigmatized to the point that people with disabilities were classified as inferior citizens.<sup>82</sup> It then stood to reason that people with disabilities posed a direct threat to the American

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<sup>72</sup> FLEISCHER & ZAMES, *supra* note 4, at 11 (quoting Paul Longmore, *The Life of Randolph Bourne and the Need for a History of Disabled People*, 13 REV. AM. HIST. 581, 587 (1985)).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* (quoting Frank Bowe, *An Overview Paper on Civil Rights Issues of Handicapped Americans: Public Policy Implications*, in CIVIL RIGHTS ISSUES OF HANDICAPPED AMERICANS: PUBLIC POLICY IMPLICATIONS 8–9 (U.S. Comm’n on Civil Rights 1981)).

<sup>75</sup> *Id.* (quoting Bowe, *supra* note 74, at 8–9).

<sup>76</sup> *Id.* (quoting Bowe, *supra* note 74, at 9).

<sup>77</sup> *Id.* (citing Bowe, *supra* note 74, at 9).

<sup>78</sup> *Id.* (citing Bowe, *supra* note 74, at 9).

<sup>79</sup> NIELSEN, *supra* note 71, at xii.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at xii.

<sup>82</sup> *Id.* at xiii.

ideals of independence.<sup>83</sup> As America stoked the false idea that people with disabilities did not have the requisite abilities to participate in the democratic process, the concept of disability “was used to justify legally established inequalities.”<sup>84</sup> With its misguided view of people with disabilities, America was not off to a great start on its promise of equal opportunity.

Just after the Revolutionary War, society viewed disability as the opposite of ability.<sup>85</sup> A person’s value was linked to economic utility.<sup>86</sup> Concluding that unproductive people with disabilities should be made “financially whole,” society met a broad range of needs simply by cutting checks.<sup>87</sup> In 1818, the Revolutionary War Pension Act established disability as a social welfare category.<sup>88</sup> Society’s view that it was burdened by people with disabilities created an abiding focus on disability that dissed ability.<sup>89</sup> That misguided view later led states to disenfranchise citizens with disabilities through disability-based voting exclusions.<sup>90</sup>

But it got much worse as society fixated on the negative aspects of disability without seeing the positive potential of ability. Society eventually sought to exclude people with disabilities from every aspect of life. Subjected to public scorn, people with disabilities were “considered less than human.”<sup>91</sup> Dehumanization efforts led to the enacting of ugly laws, passing of discriminatory immigration laws, and warehousing people with disabilities in segregated institutions.

People with disabilities faced structural exclusion when cities passed ugly laws to hide them from public view.<sup>92</sup> Ugly laws were ordinances that outlawed the public appearance of people with disabilities.<sup>93</sup> San Francisco passed the first ugly law

<sup>83</sup> *Id.* at xii–xiii.

<sup>84</sup> *Id.* at 49–50.

<sup>85</sup> See SWITZER, *supra* note 55, at 8, 45.

<sup>86</sup> NIELSEN, *supra* note 71, at 61.

<sup>87</sup> SWITZER, *supra* note 55, at 8.

<sup>88</sup> NIELSEN, *supra* note 71, at 54.

<sup>89</sup> This attitude was seen a century later in disability insurance programs that required recipients of federal aid to certify that they had no ability to “engage in substantial gainful activity in the U.S. economy.” See FLEISCHER & ZAMES, *supra* note 4, at xvi, 12 (quotation omitted); *Social Security Disability Insurance (SSDI)*, SOCIAL SECURITY ADMINISTRATION, <https://ssa.gov/benefits/disability/> (last visited July 27, 2021). Even if well intended, this type of program perpetuates dependency and segregation and views people with disabilities as burdens. See RIMMERMAN, *supra* note 53, at 102.

<sup>90</sup> NIELSEN, *supra* note 71, at 76.

<sup>91</sup> SWITZER, *supra* note 55, at 7.

<sup>92</sup> See NIELSEN, *supra* note 71, at 89; Maria Pearce Burgdorf & Robert Burgdorf, Jr., *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a “Suspect Class” Under the Equal Protection Clause*, 15 SANTA CLARA LAW. 855, 863–64 (1975). The term *ugly laws* was coined in 1975. SUSAN M. SCHWEIK, *THE UGLY LAWS: DISABILITY IN PUBLIC* 7, 291 (N.Y.U. Press 2009).

<sup>93</sup> See SCHWEIK, *supra* note 92, at 291–96; see also EGBERT JAMIESON & FRANCIS ADAMS,

in 1867.<sup>94</sup> Other cities that took this shameful path included New Orleans, Portland, Denver, Lincoln, Columbus, Omaha, New York, and Reno.<sup>95</sup> Pennsylvania enacted a similar law.<sup>96</sup> Revealing the depth of societal depravity in rendering people with disabilities invisible, Chicago passed this ordinance: “No person who is diseased, maimed, mutilated, or in any way deformed so as to be an unsightly or disgusting object or improper person to be allowed in or on the public ways or other public places in the city, shall therein or thereon expose himself to public view.”<sup>97</sup> Ugly laws were properly named only in that they described the prejudice of the people who enacted them and not the people excluded by them.

In addition to excluding people with disabilities through ugly laws, immigration laws restricted access to America for immigrants with disabilities who society “deemed defective—morally, physically, or intellectually—or even potentially defective.”<sup>98</sup> The madness of focusing on disability without an understanding of ability is demonstrated in the story of Charles Proteus Steinmetz.<sup>99</sup> Because of a spinal deformity, strict immigration policies required his exclusion from America based on his disability.<sup>100</sup> Fortunately, Steinmetz’s powerful friends fought for his entrance to America based on his intellectual genius and staggering abilities in mathematics.<sup>101</sup> Once his disability was ignored so that his abilities could emerge, Steinmetz became “an internationally leading inventor, scientist, engineer, and researcher.”<sup>102</sup> As a leading engineer at General Electric and a pioneer in developing electric cars, he helped electrify America.<sup>103</sup>

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THE MUNICIPAL CODE OF CHICAGO: COMPRISING THE LAWS OF ILLINOIS RELATING TO THE CITY OF CHICAGO, AND THE ORDINANCES OF THE CITY COUNCIL; CODIFIED AND REVISED 377 (Beach, Barnard & Co. 1881).

<sup>94</sup> S.F., Cal., Order No. 783 To Prohibit Street Begging, and to Restrain Certain Persons from Appearing in Streets and Public Places (July 9, 1867), *reprinted in* SCHWEIK, *supra* note 92, at 291–92.

<sup>95</sup> See Burgdorf & Burgdorf, *supra* note 92, at 863–64; Susan M. Schweik & Robert A. Wilson, *Ugly Laws*, EUGENICS ARCHIVES (February 5, 2015), <https://eugenicsarchive.ca/discover/tree/54d39e27f8a0ea4706000009>.

<sup>96</sup> Act of June 25, 1895, no. 208, 1895 Pa. Laws 291; *see also* SCHWEIK, *supra* note 92, at 294 (referencing an Act that was proposed in 1891, though not passed).

<sup>97</sup> FLEISCHER & ZAMES, *supra* note 4, at 12 (quoting Longmore, *supra* note 72, at 583–86 (citation omitted)).

<sup>98</sup> NIELSEN, *supra* note 71, at 103.

<sup>99</sup> See Gilbert King, *Charles Proteus Steinmetz, the Wizard of Schenectady*, SMITHSONIAN MAG. (Aug. 16, 2011), <https://www.smithsonianmag.com/history/charles-proteus-steinmetz-the-wizard-of-schenectady-51912022/>.

<sup>100</sup> NIELSEN, *supra* note 71, at 106.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

In addition to exclusionary ugly laws and immigration laws, America warehoused people with disabilities in segregated institutions. People with disabilities were viewed as having “flawed minds and bodies” and being “crippled.”<sup>104</sup> They were viewed differently because they were “confined to wheelchairs” and “victims of conditions such as cerebral palsy, or suffering from deafness, blindness, mental illness, or mental handicap.”<sup>105</sup> Many people with disabilities were called freaks.<sup>106</sup> With a fierce focus on disability, society tried to “transform the questionable citizen into a good one” or “confine those either refusing or incapable of transformation.”<sup>107</sup> Institutions were built to house people “who were considered feeble, deformed, or otherwise unfit—physically or mentally.”<sup>108</sup> Called insane asylums, these institutions were part of “the colony plan.”<sup>109</sup> During the period of institutionalization, from the 1890s to 1920s, people with disabilities were “transitioned from places where education and assimilation were sought to places that were simply custodial.”<sup>110</sup> Because disability was viewed as “a personal tragedy and a social problem or burden for the rest of society,” asylums warehoused those who could not care for themselves.<sup>111</sup> If a person had a disability and could not receive adequate care from family, friends, and welfare services, they were “segregated in specialized institutions.”<sup>112</sup> One highly intelligent woman with cerebral palsy explained that because

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<sup>104</sup> COLIN BARNES & GEOFF MERCER, *DISABILITY 1* (2003) (internal quotations omitted).

<sup>105</sup> *Id.* (internal quotations omitted).

<sup>106</sup> SWITZER, *supra* note 55, at 32.

<sup>107</sup> NIELSEN, *supra* note 71, at 51.

<sup>108</sup> SWITZER, *supra* note 55, at 7. *But see* FLEISCHER & ZAMES, *supra* note 4, at 16 (providing a counterpoint to institutionalization of the time: because of the “high incidence of deafness on Martha’s Vineyard” during the mid-nineteenth century, the entire community learned sign language “demonstrat[ing] how deaf people can blend successfully with the rest of the community . . . when the sign language for which they have a natural predilection is regarded as any other language and allowed to flourish.” (citing NORA ELLEN GROCE, *EVERYONE HERE SPOKE SIGN LANGUAGE: HEREDITARY DEAFNESS ON MARTHA’S VINEYARD* (1985)). Institutionalization grew because doctors who diagnosed disabilities had the power to lock people up. NIELSEN, *supra* note 71, at 66–67, 69.

<sup>109</sup> NIELSEN, *supra* note 71, at 92, 98–99, 118.

<sup>110</sup> *Id.* The Middle Ages featured policies that treated people with disabilities with pity and as in need of charity. RIMMERMAN, *supra* note 53, at 14–15. Excluding people with disabilities, society built institutions to warehouse them. *Id.* at 15. These were not “charitable” housing projects to benefit people with disabilities; they were built to protect society. *Id.* The Renaissance offered some progress in how societies viewed people with disabilities. *Id.* The idea of “special” care for people with disabilities was introduced, but exclusion was the dominant view, intended to protect society. *Id.* This history of exclusion ran through America’s founding until World War I as “institutions for mentally and emotionally impaired persons were custodial rather than educational.” FLEISCHER & ZAMES, *supra* note 4, at 12 (quoting Bowe, *supra* note 74, at 9).

<sup>111</sup> BARNES & MERCER, *supra* note 104, at 1 (internal quotations omitted).

<sup>112</sup> *Id.*

her parents were ashamed of her disability, they hid her in a hospital for children with developmental disabilities.<sup>113</sup> This unfair focus on her disability made her feel like she “wasn’t part of the human race.”<sup>114</sup>

These exclusionary institutions offered deplorable conditions.<sup>115</sup> Care involved attempts to “cure” disabilities by bleeding, purging, and other barbaric means<sup>116</sup> to eliminate a “societal problem” caused by people with disabilities.<sup>117</sup> Institutionalized segregation kept unwanted people out of society.<sup>118</sup> The early 1900s saw massive institutionalization—incarceration—of people with disabilities.<sup>119</sup> In just over a decade, the number of institutionalized people with disabilities skyrocketed from 5,254 in twenty-four institutions to 14,347 in forty-two institutions.<sup>120</sup>

Two enduring-yet-harmful societal values emerged during this time. Disability was deemed harmful to society, and people with disabilities were valued less than others. Our national structure now forged numerous foundational pillars upon which was built a sophisticated exclusionary and dehumanizing regime. As the twentieth century dawned, society’s structural exclusion took an uglier turn toward wholesale elimination of people with disabilities. The constant effort to dehumanize people with disabilities eventually led to the notion that they were entirely disposable.<sup>121</sup> Through restrictive immigration laws, anti-marrying laws, and government-forced sterilization, society launched a wholesale assault against people with disabilities with one perverse goal in mind—to permanently eliminate them from our society.<sup>122</sup>

### *B. Societal Elimination of People with Disabilities*

The incessant focus on disability took a wretched turn a little over a century ago. After decades of dehumanizing people with disabilities, America leaped from

<sup>113</sup> FLEISCHER & ZAMES, *supra* note 4, at 215.

<sup>114</sup> *Id.*; see also NIELSEN, *supra* note 71, at 182 (“There is no question that the power to define bodies as disabled has given justification, throughout [U.S.] history, for subjugation and oppression.”).

<sup>115</sup> NIELSEN, *supra* note 71, at 37–38.

<sup>116</sup> *Id.* at 38.

<sup>117</sup> SWITZER, *supra* note 55, at 7 (internal quotations omitted).

<sup>118</sup> *Id.* at 33.

<sup>119</sup> See *id.* at 36.

<sup>120</sup> *Id.*

<sup>121</sup> A shocking example of how people with disabilities were viewed as disposable is the treatment of slaves. When Africans were transported across oceans for the slave trade, slaves with disabilities were vulnerable to the noxious combination of disability discrimination and racism. Considered worthless, slaves with disabilities were disposed of literally by being thrown overboard. NIELSEN, *supra* note 71, at 44–45, 47.

<sup>122</sup> *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 461–64, 463 n.12 (Marshall, J., concurring in part and dissenting in part); NIELSEN, *supra* note 71, at 100, 102.

exclusion to elimination. At the time that institutions locked up people with disabilities inside of America while immigration laws locked them out of America, a more deplorable plan was hatched. With evermore shocking mistreatment of people with disabilities, the growing field of eugenics with its dogmatic view of social Darwinism sought to rid America of people with disabilities.<sup>123</sup> Deemed “defective,” people with “retardation, mental illness, deafness, visual impairment, and epilepsy” were not allowed to marry.<sup>124</sup> Entrenched in the belief that people with disabilities are harmful to society, the eugenics movement “sought to strengthen society by encouraging people with ‘goodly heritage’ to bear children, while those with a history of ‘defectives’ in the family were discouraged from reproducing.”<sup>125</sup> Eugenics—the pseudo-science of the “well born”—determined that Natural Selection was too slow to cure the defects caused by “excessive production” of people with disabilities.<sup>126</sup> The solution was to limit the number of people with disabilities to reduce the burden on society and ensure that only children “of the best stock” would be allowed to live.<sup>127</sup>

In a twist of historical cruelty, as the costs of institutionalization rose, some rationalized that reproductive sterilization was a cheaper alternative to the societal problems presented by people with disabilities.<sup>128</sup> Based on sheer collective ignorance, society initially deemed itself just in bearing the burdens of people with disabilities by warehousing them in institutions. Once the enormous costs of institutional segregation became apparent, it then seemed wise to eliminate people with disabilities entirely to alleviate the ongoing burden of housing them.

Society embraced the idea that the most effective elimination method would involve government-forced sterilization.<sup>129</sup> The American Breeders’ Association,<sup>130</sup> rebranded the American Genetics Association, proposed a law to sterilize those deemed “socially unfit” with the goal of “cleaning up the gene pool.”<sup>131</sup> In 1907, Indiana led this gruesome social experiment to eliminate undesirable people with

<sup>123</sup> See SWITZER, *supra* note 55, at 36 (citing JAMES W. TRENT, JR., *INVENTING THE FEEBLE MIND: A HISTORY OF MENTAL RETARDATION IN THE UNITED STATES* 135–37 (1994)).

<sup>124</sup> See WILDER & WALTERS, *supra* note 57, at 9.

<sup>125</sup> RIMMERMAN, *supra* note 53, at 16.

<sup>126</sup> *Id.* at 17 (quoting FRANCIS GALTON, *MEMORIES OF MY LIFE* 323 (1908)). Francis Galton is the person credited with coining the term “eugenics.” *Id.*

<sup>127</sup> *Id.* (quoting GALTON, *supra* note 126 at 323). Under this line of reasoning, euthanasia of children with disabilities was deemed valuable for society. See *id.* at 18. This dangerous orthodoxy also led to bans on interracial marriage. *Id.*

<sup>128</sup> See SWITZER, *supra* note 55, at 37; Paul A. Lombardo, *Disability, Eugenics, and the Culture Wars*, 2 ST. LOUIS U. J. HEALTH L. & POL’Y 57, 62–63 (2008).

<sup>129</sup> See FLEISCHER & JAMES, *supra* note 4, at 12.

<sup>130</sup> When humans create a breeders’ association to eliminate humans, it is clear that human does not mean humane.

<sup>131</sup> FLEISCHER & JAMES, *supra* note 4, at 12; RIMMERMAN, *supra* note 53, at 17–18.



disabilities from America; more than thirty states followed this dark path.<sup>132</sup> Broadly defining the scope of those who had no right to bear children, these laws sought to eliminate “socially inadequate classes” of people with disabilities.<sup>133</sup> States segregated and sterilized “deaf people, blind people, people with developmental disabilities . . . [and] people [with] tuberculosis.”<sup>134</sup> Some eugenicists advocated for the “mercy killing” of any person “with epilepsy or mental handicaps, especially those who were mildly mentally retarded.”<sup>135</sup> Because most of the people who were sterilized were poor and segregated in state institutions, society thought that it was protecting itself from genetic and economic destruction.<sup>136</sup> Instead of feeling overwhelming shame, the eugenicists deemed the elimination of an entire class of people a “patriotic cause” that was a “better solution than long-term institutionalization.”<sup>137</sup> Spreading like a disease, sterilization laws flourished in an effort to rid society of the unfit and dangerous.<sup>138</sup>

### 1. *The Horrors of* *Buck v. Bell*

As the noxious weed of eugenics grew, the deplorable practice of state-sanctioned elimination of people with disabilities was laid bare before the United States Supreme Court when Virginia’s 1924 Sterilization Act was challenged as unconstitutional.<sup>139</sup> Headlining this dark stain in American history was a degrading opinion by storied Supreme Court Justice Oliver Wendell Holmes Jr.<sup>140</sup> The notorious case of *Buck v. Bell* arguably is one of the least humane decisions of the Supreme Court. Before addressing that decision, one must first ask how Virginia undertook its heinous assault against the civil rights of people with disabilities by forcing them into institutions and then forcefully sterilizing them. The historical reason that the state could diss ability was because of its incessant focus on disability that blinded it from seeing ability.

To start its harsh machinery to sterilize institutionalized people with disabilities, the superintendent of one of the state’s five hospitals had to conclude that it was in “the best interests of the patients and of society” that the person “afflicted with hereditary forms of insanity that are recurrent, idiocy, imbecility, feeble-mindedness or epilepsy” should be sexually sterilized.<sup>141</sup> Once this brutish decision was

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<sup>132</sup> NIELSEN, *supra* note 71, at 113–15; Lombardo, *supra* note 128, at 61.

<sup>133</sup> NIELSEN, *supra* note 71, at 113. Laws took aim at the “degenerate class.” *Id.* at 102.

<sup>134</sup> FLEISCHER & ZAMES, *supra* note 4, at 12.

<sup>135</sup> *Id.* (quoting Longmore, *supra* note 72, at 583–86).

<sup>136</sup> RIMMERMAN, *supra* note 53, at 19.

<sup>137</sup> NIELSEN, *supra* note 71, at 115.

<sup>138</sup> See FLEISCHER & ZAMES, *supra* note 4, at 12.

<sup>139</sup> RIMMERMAN, *supra* note 53, at 18.

<sup>140</sup> See *Buck v. Bell*, 274 U.S. 200 (1927).

<sup>141</sup> Virginia Sterilization Act of 1924, ch. 394, sec. 1, 1924 Va. Acts 569.

made by the superintendent, the hospital's board of directors could, upon considering "a petition stating the facts of the case," enter a sterilization order.<sup>142</sup> On January 23, 1924, seventeen-year-old Carrie Buck was deemed by Virginia to be "feeble-minded" and was "committed to the State Colony for Epileptics and Feeble-Minded."<sup>143</sup> Less than eight months after Carrie was imprisoned, the Superintendent of the Colony, *Warden* A. S. Priddy, sought to sterilize Carrie to ensure that she never bore children.<sup>144</sup> Priddy claimed that Carrie—or to use her new title of *inmate*—was the ideal candidate for forced sterilization:

[Carrie is] insane, idiotic, imbecile, feeble-minded or epileptic, and by the laws of heredity is the probable potential parent of socially inadequate offspring likewise afflicted, that the said inmate may be sexually sterilized without detriment to his or her general health, and that the welfare of the inmate and of society will be promoted by such sterilization.<sup>145</sup>

Priddy sought to arm a state-employed surgeon with the destructive tools to sexually sterilize Carrie by the surgical "operation of salpingectomy . . . the cutting of the fallopian tubes between the ovaries and the womb, and the tying of the ends next to the womb."<sup>146</sup> This surgery was deemed to "not impair the general health, or affect the mental or moral status of the patient, or interfere with [her] sexual desires or enjoyment"; it "simply prevent[ed] reproduction."<sup>147</sup> The hospital board entered a sterilization order against Carrie.<sup>148</sup> A state court enforced the order.<sup>149</sup> Carrie appealed to her state's highest court, claiming that involuntary sterilization violated the Virginia Constitution and the U.S. Constitution by denying due process, imposing cruel and unusual punishment, and denying equal protection of the law.<sup>150</sup>

According to the Supreme Court of Virginia, Carrie was "the mother of an illegitimate child of defective mentality," "had the mind of a child [of nine] years old," and was the daughter of a mother who had "been committed to the same colony as a feeble-minded person."<sup>151</sup> The court declared that based on "the laws of heredity, [Carrie] is the probable potential parent of socially inadequate offspring, likewise affected as she is."<sup>152</sup> The court further explained that Virginia's laws required that Carrie be kept "in the custodial care of the colony for 30 years, until she

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<sup>142</sup> *Id.*

<sup>143</sup> *Buck v. Bell*, 130 S.E. 516, 517 (Va. 1925), *aff'd*, 274 U.S. 200 (1927).

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 516–17.

<sup>150</sup> *Id.* at 518.

<sup>151</sup> *Id.* at 517.

<sup>152</sup> *Id.*

is sterilized by nature, during which time she will be a charge upon the state.”<sup>153</sup> But a sickly alternative was hatched. If Carrie were to be sterilized, then Virginia would *give* Carrie “her liberty and secure a good home [for her], under supervision, without injury to society.”<sup>154</sup> Displaying paradoxically barbaric charity, the court professed that involuntary sterilization would actually promote Carrie’s “welfare and that of society.”<sup>155</sup>

By misjudging Carrie’s value based solely on her alleged disability, the Virginia Supreme Court ruled against her. Likening her due process protections to those that controlled proceedings before the Board of Fisheries that protect “the natural oyster-beds, rocks and shoals” and the state’s “oyster industry,” the court held that Carrie enjoyed due process.<sup>156</sup> The court next held that involuntary sterilization is not cruel and unusual punishment because the Sterilization Act “is not a penal statute” that sought to punish people; instead, it protected “the class of socially inadequate citizens . . . from themselves” and promoted “the welfare of society by mitigating race degeneracy and raising the average standard of intelligence of the people of the state.”<sup>157</sup> Finally, the court insisted that no equal protection violation occurred because states may “take into custody and deprive the insane, the feeble-minded, and other defective citizens of the liberty which is otherwise guaranteed them by the Constitution.”<sup>158</sup> The court declared that the state’s police power justified involuntary sterilization because it was like “compulsory vaccination” statutes that are “for the good of the individual and of society.”<sup>159</sup>

The Virginia Supreme Court accepted the statutory reasons why government-forced sterilization was good for people with disabilities and society: (1) it promoted “the health of the individual patient and the welfare of society . . . by the sterilization of mental defectives,” (2) it authorized sterilization “in males by the operation of vasectomy and in females by the operation of salpingectomy, both of which said operations may be performed without serious pain or substantial danger to the life of the patient,” (3) it ensured that defective persons would not “likely become by the propagation of their kind a menace to society,” (4) it guaranteed that defective persons, if sterilized, could actually “become self-supporting with benefit both to themselves and to society,” and (5) it determined that “human experience has demonstrated that heredity plays an important part in the transmission of insanity,

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<sup>153</sup> *Id.* at 517–18.

<sup>154</sup> *Id.* at 518.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 518–19.

<sup>157</sup> *Id.* at 519.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 519–20.

idiocy, imbecility, epilepsy and crime.”<sup>160</sup> The Virginia Supreme Court humiliated itself through its prejudicial view of disability.

Finding no sanctuary from state-ordered sterilization in Virginia, Carrie sought protection from the Supreme Court of the United States. In 1927 in *Buck v. Bell*, the Supreme Court sided with Virginia to conclude that there was nothing constitutionally infirm about a state’s forcing a woman with an alleged mental disability to undergo a surgery to remove her fallopian tubes to ensure that she never gives birth to a child who could pose a danger to society.<sup>161</sup> Writing for an eight-justice majority, Justice Holmes could not see past Carrie’s disability. Sadly, he only viewed Carrie as “a feeble minded white woman who was committed to the State Colony,” “the daughter of a feeble-minded mother in the same institution, and the mother of an illegitimate feeble minded child.”<sup>162</sup> The Court held that there was “no doubt” that Carrie enjoyed due process, because there was “no doubt” that Virginia “most carefully considered” Carrie’s rights “every step” along the way through its “scrupulous compliance” with the involuntary sterilization statute.<sup>163</sup>

The Court rejected Carrie’s claim that she had a right not to lose her ability to procreate.<sup>164</sup> Comparing Carrie’s opposition to involuntary sterilization at the hands of her state to military draft laws or compulsory vaccination laws, the Court focused on what it deemed to be Carrie’s disability without an inkling as to her abilities.<sup>165</sup> Justice Holmes gave this horrifying justification as to why Carrie had no constitutional rights to shield her from the state’s execution of her legacy:

We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes.<sup>166</sup>

In a despicable line that will shake the foundations of American law for eternity, Justice Holmes gleefully shrieked, “Three generations of imbeciles are enough.”<sup>167</sup>

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<sup>160</sup> *Id.* at 517 n.1 (quoting the Virginia Sterilization Act of 1924, ch. 394, 1924 Va. Acts 569).

<sup>161</sup> *See* *Buck v. Bell*, 274 U.S. 200 (1927).

<sup>162</sup> *Id.* at 205.

<sup>163</sup> *Id.* at 207.

<sup>164</sup> *See id.*

<sup>165</sup> *See id.*

<sup>166</sup> *Id.* (internal citation omitted).

<sup>167</sup> *Id.* at 201.

Rounding out the case on the equal protection claim, the Court held there was no unequal treatment by sterilizing institutionalized people with disabilities and not sterilizing people with disabilities who are not institutionalized.<sup>168</sup> Astoundingly, the Court reasoned that both classes of people with disabilities will be treated the same eventually. As involuntary sterilizations of those institutionalized persons allow for their release, the asylum's doors are then opened to other people who have disabilities, who will then also be involuntarily sterilized, at which time "the equality aimed at will be more nearly reached."<sup>169</sup> Put another way, the state's elimination efforts would ensure that society eventually would prevail against the blight of disability.

Focused entirely on disability, the Court in *Buck v. Bell* ignored Carrie's abilities and the abilities of her potential children. The Court was blinded by centuries of societal bias against people with disabilities that viewed them as dangerous and burdensome. Society chose to see only the burdens of a disability without embracing the benefits of ability. How effective was the government-mandated elimination of people with disabilities? The eugenicists sterilized more than 65,000 people over a seven-decade reign of terror.<sup>170</sup> Ensnared in another historical irony, societal engineers found themselves in another Catch-22. After states realized that their sterilization schemes were difficult to enforce, they once again turned to a "large-scale drive toward custodial segregation" of people with disabilities.<sup>171</sup> The horrors of history were caught in a perpetually agonizing loop that sought to exclude or eliminate people with disabilities.

## 2. *The Horrors of the Permanent Elimination of People with Disabilities*

America was not alone in viewing people with disabilities as burdens. After watching Americans practice their purge of people with disabilities, the Nazis followed suit by passing a Law for the Prevention of Hereditarily Diseased Offspring, known as the Sterilization Law.<sup>172</sup> Building on the American intellectual tradition to rid society of the harm caused by people with disabilities, the Nazis ramped up their reign of terror by establishing "more than 200 Hereditary Health Courts" that forcefully sterilized over 400,000 people.<sup>173</sup> From institutional exclusion to wholesale elimination, society's incessantly misguided focus on disability continued to diss ability and threaten life itself. Once governments forcefully sterilized people with disabilities to eliminate future generations that society predicted would be burdens,

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<sup>168</sup> *Id.* at 208.

<sup>169</sup> *Id.*

<sup>170</sup> RIMMERMAN, *supra* note 53, at 19; Lombardo, *supra* note 128, at 63–64.

<sup>171</sup> WILDER & WALTERS, *supra* note 57, at 9.

<sup>172</sup> RIMMERMAN, *supra* note 53, at 19.

<sup>173</sup> *Id.*

could society execute people living with disabilities? Based on a shocking view that disability equates to harm, some answer yes.

People with disabilities have always been “particularly vulnerable to judgments that their lives are not worth living.”<sup>174</sup> Anthropologist Margaret Mead recognized that “society is always attempting to make the physician into a killer—for instance, to kill the defective child at birth.”<sup>175</sup> As gruesome as it sounds to kill children with disabilities, it is nothing new. Two thousand years ago, Aristotle and Plato cast a vision of a world without people with disabilities. Utterly disabled from seeing a person’s ability through an incessant focus on disability, they viewed people with disabilities as harmful to society. Determined to arm the government with only “healthy citizens to form an elite ruling class,” they sought to eliminate people with disabilities.<sup>176</sup> Chasing their utopian vision, they argued that reproduction should take place “at the peak of [a man and a woman’s] physical and mental powers in order to conceive the healthiest and most intelligent children.”<sup>177</sup> Revealing how the lives of people with disabilities were disposable for the greater good, the Greeks advanced infanticide to kill newborn infants with disabilities who were “incapable of self-sufficiency and integration into society.”<sup>178</sup> Elimination of an entire class of people was seen as a just societal response to the harms wrought by disabilities.

But this is ancient history, right? Unfortunately, no, because modern society’s thirst to eliminate people with disabilities was not quenched through forced sterilization. Once people are demeaned, diminished, devalued, and dehumanized based solely on their disabilities, the slippery slope carries them deeper into despair and danger. Total elimination is an option once disability is classified as an enduring threat to society. Indeed, “[t]he transition from sterilisation to euthanasia and the killing of children and adults born with physical deformities, intellectual disabilities or suffering from mental illness was a natural one for Adolf Hitler in order to maintain his eugenics ideology.”<sup>179</sup> Hitler started the T-4 program and named the eugenics headquarters—with a mission to slaughter people with disabilities—the “Charitable Foundation for Curative and Institutional Care.”<sup>180</sup> The government removed “defective” children from their families to take them to “hospitals” to exterminate them.<sup>181</sup> This cancerous idea metastasized and then spread to labeling adults “deficient” from the “master race.”<sup>182</sup> People with disabilities were led into

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<sup>174</sup> FLEISCHER & ZAMES, *supra* note 4, at 132.

<sup>175</sup> *Id.*

<sup>176</sup> RIMMERMAN, *supra* note 53, at 13.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 19.

<sup>180</sup> *Id.*; see also WILDER & WALTERS, *supra* note 57, at 9.

<sup>181</sup> RIMMERMAN, *supra* note 53, at 19.

<sup>182</sup> *Id.* at 19–20.

government institutions for one purpose—to be killed to protect society. Gas chambers suffocated adults with carbon monoxide, doctors administered lethal injections to “crippled children,” and forced starvation was carried out on some patients “marked for extermination.”<sup>183</sup> As the devastating purge of people with disabilities reached horrifying numbers, the common refrain continued to be that the government was simply alleviating burdens on society.<sup>184</sup>

There certainly is an historical distinction between America’s programs to eliminate people with disabilities from the Nazi’s more grotesque programs. But both societies chose to diss ability through an unflinching focus on disability. Disabled from viewing vulnerable victims as valuable, society calculated immeasurable harm from disabilities without any counterbalancing benefit from abilities. That dystopic vision allowed institutional exclusion to leap to wholesale elimination. But do not doubt that America’s foray into eugenic sterilization took it to the brink of total elimination, because the Nazi’s sinister efforts were connected to America’s efforts. If “[o]ne of the most egregious examples of the perversion of medicine was the mass killing of people viewed as mentally or physically inadequate by Nazi doctors,” it is important to recognize that their abhorrent practice was linked “with the eugenics movement that continued to be deemed respectable in the United States” in the 1920s.<sup>185</sup> Indeed, in 1923, a German geneticist bemoaned that his country could not match the eugenics research institutions in the United States.<sup>186</sup>

After Germany followed America into eugenic sterilizations, could America have followed Germany into eugenic executions? Though breathtakingly unthinkable, the consequential question teases the precarious position in which people with disabilities found themselves after more than a century of being misjudged based solely on their disabilities. A 1932 study about America’s sterilization efforts referenced “overzealous and overardent eugenicists” who regard “the feeble-minded, the epileptics, the mentally diseased, the blind, the deformed, and the criminals as inimical to the human race” because they “perpetuate their deficiencies and thus threaten the quality of the ensuing generations.”<sup>187</sup> Likening people with disabilities to a “foreign enemy,” the eugenicists intended “to exterminate these undesirables.”<sup>188</sup> Expressing views that were eerily similar to those of the Nazis, one Chicago surgeon believed that people with disabilities “were a menace, an evil stalking beast,

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<sup>183</sup> *Id.* at 20.

<sup>184</sup> *See id.* at 61.

<sup>185</sup> FLEISCHER & ZAMES, *supra* note 4, at 138.

<sup>186</sup> *Id.* (citing ROBERT JAY LIFTON, *THE NAZI DOCTORS: MEDICAL KILLING AND THE PSYCHOLOGY OF GENOCIDE* 23 (1986) (referring to Fritz Lenz)).

<sup>187</sup> *Id.* at 139 (quoting LIFTON, *supra* note 186, at 23 (referring to a study undertaken by J.P. Landman)).

<sup>188</sup> *Id.* (citation omitted).

that was going to devour society.”<sup>189</sup> Voicing vicious “contempt, hatred, fear and loathing for those born with disabilities,” he appeared to see no moral problem in letting children born with disabilities die.<sup>190</sup> Wrapping up this line of comparative reasoning, Nazi “doctors” ultimately executed over 200,000 people with physical and mental disabilities.<sup>191</sup>

When a government segregates people with disabilities into institutions and then plots their eternal destruction, things have gone awry. One wonders how close America came to eliminating people with disabilities like the Nazis. Once the horrific idea that society can exclude and then eliminate people with disabilities takes root, it grows like an invasive weed. In the early twentieth century, society could not control this noxious weed that was seeded on a misguided view that disability equates to harm. But disabilities are not the invasive species; ignorant views about disabilities are. Does this invasive weed still have roots from which to grow?

Finding ourselves more than two centuries after America’s founding and nearly a century after *Buck v. Bell*, the pace of change in eliminating societal prejudice toward people with disabilities “has been glacially slow.”<sup>192</sup> Without a corrective focus on ability, a centuries-old focus on disability will continue to diss ability and retrace past horrors. It is a common refrain that “[p]eople with disabilities are judged by and compensated for their deficit, their inability to live independently and their dependency.”<sup>193</sup> Nowhere is that more urgent than with decisions on life. For example, when protesting physician-assisted suicide, one artist gave this response:

It is tempting to pity a man [with a disability]. But pity has become a lethal weapon. On January 8 [1997], the Supreme Court heard arguments in favor of killing people like me—out of pity—to end our suffering. . . . Don’t waste your pity on me. I want to live. Every year, the practitioners of mercy death kill thousands of people against our will—out of pity. If the Supreme Court declares mercy death legal, that’s like declaring open season on people with disabilities. We are not contagious or dangerous . . . . We are people who hear the death train. We will not board that train willingly.<sup>194</sup>

Many people with disabilities are tired of being viewed as societal burdens. They are tired of the constant barrage of pity and paternalism that views them as less valuable

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<sup>189</sup> *Id.* at 138.

<sup>190</sup> *See id.*

<sup>191</sup> *Id.* at 139; see BARNES & MERCER, *supra* note 104, at 32–33 (recounting how the Nazis eliminated “unworthy” people with disabilities for being “travesties of human form and spirit”) (citation omitted).

<sup>192</sup> SWITZER, *supra* note 55, at 31.

<sup>193</sup> RIMMERMAN, *supra* note 53, at 23.

<sup>194</sup> FLEISCHER & ZAMES, *supra* note 4, at 132 (quoting activist Mark O’Brien who referenced *Vacco v. Quill*, 521 U.S. 793 (1997), wherein the Court ultimately held that New York’s prohibition on assisting suicide did not violate the Equal Protection Clause).



than people without disabilities. Exhausted from centuries of exclusion and elimination, they simply hope for a future in which their lives matter as much as anyone else's so that they may enjoy equal opportunity.

As Margaret Mead predicted, children who would be born with disabilities also stand particularly vulnerable to society's prejudicial views of disability. One autism activist fears that advancements in genetic research "might lead to a test that would result in preventing [people with autism] from ever existing in the first place."<sup>195</sup> As prenatal testing expands, will society welcome all kinds of people or will an incessant focus on disability close the gateway to life itself for people with disabilities?<sup>196</sup> Although it is common for doctors to discover a disability, it is literally a matter of life and death if ability cannot be discovered. It is essential to recognize that people with disabilities lead complex lives that are not defined by their disabilities; abilities must be taken into account.<sup>197</sup> Just like we have seen in our horrific past, ignorance may play an outsized role in whether a fetus with a disability gets to live. When life-and-death choices incessantly focus on disability, it becomes rare to fully understand the ability side of that life. When society prefers that children are not born with disabilities, it "conveys the strong impression that the problem is the disability itself rather than the society that could do so much more to welcome and include all its members."<sup>198</sup> If society promotes technology to prevent births of children to eliminate disabilities, history cautions that those living with disabilities may be "perceived as failures and a social problem."<sup>199</sup> At that point, ignorance of abilities compounds its destructive force in a perpetual onslaught against the basic civil rights of people with disabilities to enjoy equal opportunity.<sup>200</sup>

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<sup>195</sup> *Id.* at 228 (quoting Ari Ne'eman, founder of the Autistic Self-Advocacy Network (ASAN)).

<sup>196</sup> *See id.* at 229.

<sup>197</sup> *Id.* at 229–30.

<sup>198</sup> *Id.* at 230 (quoting David Wasserman & Adrienne Asch, Op-Ed, *The Uncertain Rationale for Prenatal Screening*, 8 VIRTUAL MENTOR 53, 54 (2006)).

<sup>199</sup> RIMMERMAN, *supra* note 53, at 23.

<sup>200</sup> We again stand on the brink of the consequential line between life and death for people with disabilities. With the rise of prenatal testing, many mothers choose abortion over birthing a child with Down syndrome, resulting in a significant decrease in the number of children born with Down syndrome. Julian Quinones & Arijeta Lajka, "What Kind of Society Do You Want to Live in?": Inside the Country Where Down Syndrome is Disappearing, CBS NEWS (Aug. 14, 2017, 4:00 PM), <https://www.cbsnews.com/news/down-syndrome-iceland/>. Since Iceland introduced prenatal screening nearly two decades ago, between 80–85% of pregnant women take a prenatal test, and nearly all women "who received a positive test for Down syndrome terminated their pregnancy." *Id.* The report caused quite an uproar and a renewed fight over abortion. Ariana Eunjung Cha, *Babies with Down Syndrome are Put on Center Stage in the U.S. Abortion Fight*, WASH. POST (Mar. 5, 2018, 10:50 AM), <https://wapo.st/3xj6LS7>. This discussion does not challenge views on abortion; it simply asks whether society views people with disabilities as valuable.

Horror of exclusion and hope for inclusion are divided by a razor-thin line of whether one sees only disability or can view ability in all of its forms. The only lasting hope for people with disabilities to enjoy equal opportunity can be found in the uprooting of the destructive seedling that promotes the idea that disability means inability. A paradigm shift must transition society's focus away from the burdens of disability and toward the benefits of ability. Enough is enough.

### III. ENDURING HOPE FOR EQUAL OPPORTUNITY BASED ON ABILITY

The horrors of an incessantly misdirected focus on disability—dependence, exclusion, elimination—should reside in the overflowing dustbins of the historical mistreatment of people with disabilities. Hope for civil rights—independence, inclusive access, equal opportunity—lies in society's ability to unlock human potential based entirely on ability. In the middle of the twentieth century, the idea of basic civil rights for people with disabilities took root.<sup>201</sup>

As early as the 1930s, while eugenic elimination continued to diss ability, disability activists began to mobilize attention on basic civil rights.<sup>202</sup> In 1935, protestors in New York expressed disgust at government programs that automatically rejected people with disabilities after categorizing them as "unemployable."<sup>203</sup> Tired of being judged by their disabilities rather than their abilities, they adopted slogans such as "We Don't Want Tin Cups. We Want Jobs" and "We Are Lame But We Can Work."<sup>204</sup> Outbreaks of polio in America aroused even more disability activism.<sup>205</sup> Doors to higher education opened for some people with disabilities "due to the stubbornness and confidence of the young adults who had survived polio as children and wanted full lives as adults with disabilities."<sup>206</sup> Hope for equal opportunity was emerging.

#### A. *Rehabilitation Unlocks Ability*

After people with disabilities emerged from the shadows of exclusion, the dark past came into view. The ghastly mistreatment of people with disabilities entered society's conscience when it saw "the horrific conditions, squalidness, and brutality

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<sup>201</sup> RIMMERMAN, *supra* note 53, at 20.

<sup>202</sup> NIELSEN, *supra* note 71, at 132.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 141.

<sup>206</sup> *Id.*

within American institutions for people with psychiatric and intellectual disabilities.”<sup>207</sup> Shining a spotlight<sup>208</sup> on these warehouses, photographs revealed “naked or half-dressed individuals in crowded and barren environments, the common use of physical restraints simply to relieve staff of care obligations, and the jarringly casual disregard for fellow human beings.”<sup>209</sup> But horror soon transformed into hope.

Mass institutionalization ceded to rehabilitation.<sup>210</sup> Once America bore the burdens of massive increases in financial dependence for people with disabilities, rehabilitation efforts followed.<sup>211</sup> Rehabilitation sought to reduce government dependence by improving productivity and removing barriers to independence.<sup>212</sup> With the goal to move people with disabilities out of institutions, the thought was that rehabilitating people with disabilities would allow them to become productive employees.<sup>213</sup> Rejecting the view that the problem lies in people with disabilities, society realized it, too, had to fix its prejudicial attitudes.<sup>214</sup>

At the time that world wars liberated people from tyrannical oppression, they also liberated people with disabilities in America by turning attention away from disabilities and toward abilities. Federal legislation that coincided with wars helped people with disabilities find employment. The National Defense Act of 1916<sup>215</sup> authorized vocational training for veterans of World War I, which launched large-scale efforts to train people with disabilities.<sup>216</sup> The 1920 Fess-Kanyon Act<sup>217</sup> established

<sup>207</sup> *Id.* at 144.

<sup>208</sup> See Tory L. Lucas, *To Catch A Criminal, to Cleanse A Profession: Exposing Deceptive Practices by Attorneys to the Sunlight of Public Debate and Creating an Express Investigation Deception Exception to the ABA Model Rules of Professional Conduct*, 89 NEB. L. REV. 219, 220 (2010) (explaining how “sunlight is the best disinfectant and can effectively police human behavior”).

<sup>209</sup> NIELSEN, *supra* note 71, at 145; see also BARNES & MERCER, *supra* note 104, at 3 (recognizing that institutions “were often harsh” and residents were “‘written off as ‘socially dead’ while awaiting the ends of their lives” (quoting ERIC JOHN MILLER & GERALDINE V. GWYNNE, A LIFE APART: A PILOT STUDY OF RESIDENTIAL INSTITUTIONS FOR THE PHYSICALLY HANDICAPPED AND THE YOUNG CHRONIC SICK 80, 89 (1972))).

<sup>210</sup> FLEISCHER & ZAMES, *supra* note 4, at 11.

<sup>211</sup> *Id.* at 10; see also SWITZER, *supra* note 55, at 45.

<sup>212</sup> SWITZER, *supra* note 55, at 55.

<sup>213</sup> *Id.* at 8.

<sup>214</sup> FLEISCHER & ZAMES, *supra* note 4, at 46. Compensation and rehabilitation policies offered government assistance to make people with disabilities “whole.” See RIMMERMAN, *supra* note 53, at 44. Compensation redistributed wealth to people with disabilities; rehabilitation sought to increase productivity. *Id.* at 44–46. Even though rehabilitation sought to help people with disabilities become self-sufficient, it promoted dependence on others. *Id.* at 45–46.

<sup>215</sup> National Defense Act of 1916, Pub. L. No. 64-85, ch. 134, 39 Stat. 166, 186 (1916).

<sup>216</sup> See FLEISCHER & ZAMES, *supra* note 4, at 12.

<sup>217</sup> Vocational Rehabilitation (Fess-Kanyon) Act, Pub. L. No. 66-236, ch. 219, 41 Stat. 735 (1920).

vocational training programs for civilians with disabilities; the 1943 LaFollette-Barden Vocational Rehabilitation Act<sup>218</sup> expanded those efforts.<sup>219</sup>

America was turning to people with disabilities for productivity during times of war. When America experienced exceptional demand for labor during World War II, people with disabilities enjoyed more employment opportunities.<sup>220</sup> Compiling impressive work records, people with disabilities proved that they were valuable, needed, and able to contribute to society.<sup>221</sup> Major General Graves B. Erskine reported that 83% of industries employed people with disabilities during the war with remarkable results—lower turnover rates, “less absenteeism, and equal or higher production rates.”<sup>222</sup> Ability trumped disability in America’s time of need.

World War II caused another shift in attitudes about the abilities of people with disabilities when war veterans became key supporters of disability rights.<sup>223</sup> Having been injured battling on behalf of all Americans, these heroes returned home with physical and mental disabilities. Society mostly included them in the mainstream of American life, because veterans were seen, at least to a large extent, as being productive.<sup>224</sup> If veterans with disabilities were integrated into society based

<sup>218</sup> Vocational Rehabilitation Act Amendments of 1943, Pub. L. No. 78-113, ch. 190, 57 Stat. 374 (codified at 29 U.S.C. §§ 31–42 (1946)).

<sup>219</sup> NIELSEN, *supra* note 71, at 150.

<sup>220</sup> *Id.* at 148.

<sup>221</sup> *See id.*

<sup>222</sup> *Id.* at 153. When a worker shortage arose during World War II, the federal government “urged employers to get past their prejudices” to hire people with disabilities and produced a film with this message:

Sure enough, blind. But they can do it as well as anybody, and they volunteered, releasing workers with eyes for other duties. . . . All through the factory now you may glimpse things like . . . an unobtrusive limp that means only one good leg . . . [or] you really don’t need more than one arm for this job. . . . Maybe a man might be a better worker without his hearing with all this noise. But the point is, whereas, industry started out to make it possible for these physically handicapped people to help themselves, now it ends up that these handicapped people are helping their country.

FLEISCHER & ZAMES, *supra* note 4, at 12–13 (some alterations in original) (quoting *What’s Work Got To Do With It?*, in BEYOND AFFLICTION: THE DISABILITY HISTORY PROJECT (1998)).

<sup>223</sup> FLEISCHER & ZAMES, *supra* note 4, at 170–75. The hope-filled story of Douglas Bader illustrates how ability overshadows disability. After a flying accident took his legs and almost his life, Bader received tin legs. Despite his disability, he was independent, drove cars, learned to dance, and played competitive golf. Defying all expectations that he could return to the cockpit, he overcame doubts and was a flying ace in World War II. When his plane went down during a mission, Bader’s right leg was trapped in his burning aircraft that would soon crash. Because he had disposable legs, he bailed out to survive. Only a pilot with no legs could have survived; his disability saved his life. *See* Brad Lendon, *The Crazy-but-True Story of a WWII Fighter Pilot Who Said His Artificial Legs Saved His Life*, CNN (Aug. 29, 2020, 8:50 PM), <https://www.cnn.com/2020/08/29/europe/british-world-war-ii-pilot-douglas-bader-intl-hnk-dst/index.html>.

<sup>224</sup> FLEISCHER & ZAMES, *supra* note 4, at 170; NIELSEN, *supra* note 71, at 153.

on their abilities, it would seem illogical to view other people with disabilities as not being productive. If an enemy bomb or bullet blew off an arm or caused blindness, why would it matter if these disabilities were caused by non-war means? Ability is ability. Even though employees with disabilities performed well, once the war ended, non-veteran people with disabilities again suffered discrimination as employers sought “able-bodied” workers and returning veterans.<sup>225</sup>

But the disability rights movement was gaining steam as ability came into view. Disability activists sought to end discrimination in employment and education, gain access to public spaces and transportation, and transform all institutions to allow equal access to equal opportunity.<sup>226</sup> Even though disability can be viewed as “simply a medical, biologically based condition,” the horrors of history viewed disability as “a social condition of discrimination and unmerited stigma, which needlessly harms and restricts the lives of those with disabilities and results in economic disparities, social isolation, and oppression.”<sup>227</sup> This view of disability was ending.

### *B. Independent Living Embraces Inclusion over Exclusion*

As ability came into focus, society progressed from rehabilitating people with disabilities in institutions to promoting independence.<sup>228</sup> Out of the dark recesses of segregated institutions that perpetuated dependency, independent-living centers were built on principles of “self-determination, consumer control, and deinstitutionalization.”<sup>229</sup> Independent living liberated people with disabilities “to take risks and the freedom to make mistakes.”<sup>230</sup> It sought to unlock potential based on ability to “integrate the person with the disability fully into the social, economic, and political fabric of the community.”<sup>231</sup> Disability was yielding to ability.

Ability unlocked the doors of institutions that had incarcerated people with disabilities. In 1958, Anne Emerman was a twenty-one-year-old with quadriplegia who used a wheelchair.<sup>232</sup> She seemed destined to live and die in an institution because others believed that she was unable to “function in the mainstream.”<sup>233</sup> Even though the misguided focus on her disability excluded her from society for decades, her abilities shattered the chains that held her in an institution. Released “as a test

<sup>225</sup> NIELSEN, *supra* note 71, at 153; FLEISCHER & ZAMES, *supra* note 4, at 13.

<sup>226</sup> NIELSEN, *supra* note 71, at 161.

<sup>227</sup> *Id.* at 162.

<sup>228</sup> FLEISCHER & ZAMES, *supra* note 4, at 46.

<sup>229</sup> NIELSEN, *supra* note 71, at 163.

<sup>230</sup> FLEISCHER & ZAMES, *supra* note 4, at 46 (quoting CHRISTOPHER GEORGE BELL & ROBERT L. BURGDORF, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 84 & n.95 (1983)).

<sup>231</sup> *Id.* at 46–47.

<sup>232</sup> *Id.* at 33.

<sup>233</sup> *See id.* at 33–34.

case in independent living,” Anne graduated from high school<sup>234</sup> and college, earned a master’s degree in social work, served as a psychiatric social worker, enjoyed life as a spouse and mother, and directed the Mayor’s Office for People with Disabilities in New York City.<sup>235</sup> In hindsight, it is clear that society’s disability in failing to see ability was far more disabling than Anne’s.<sup>236</sup>

As people with disabilities were emerging from discriminatory exclusion, they began to “live independent, self-directed lives in the community more economically and productively” than in institutions.<sup>237</sup> The belief that it was good for society and people with disabilities to warehouse them in institutions was starting to crumble under the weight of a new reality.

Described as “[s]everely disabled by polio at the age of fourteen,” Edward Roberts found purpose in his “energetic, anti-institutional biases.”<sup>238</sup> When his disability paralyzed him so that he required an iron lung, his doctor told his mother, “You should hope he dies, because if he lives, he’ll be no more than a vegetable for the rest of his life.”<sup>239</sup> The doctor’s statement was ignorantly inaccurate. Three years after Edward recovered, he wanted to go out into society.<sup>240</sup> But he had to overcome “self-doubt and the general skepticism concerning the opportunities that would be available to him.”<sup>241</sup> Denied access to the University of California because they “tried cripples, and they don’t work,” Edward sued and “broke the disability barrier to higher education.”<sup>242</sup> Gaining access and attaining housing, however, were different dreams. Persevering, Edward helped people with disabilities secure accessible housing, wheelchair assistance, and attendant care.<sup>243</sup> Through the Rolling Quads,

<sup>234</sup> *Id.* When Anne dreamed of college, a social worker scolded her that going to college was “a fantasy, and fantasy can lead to mental illness,” because “such dreams were delusional.” NIELSEN, *supra* note 71, at 141–42 (citation omitted).

<sup>235</sup> FLEISCHER & ZAMES, *supra* note 4, at 33.

<sup>236</sup> Locked inside the same institution due to quadriplegia, Marilyn Saviola lamented, “This was where the people the world wanted to forget about were thrown.” *Id.* at 33 (quoting Douglas Martin, *A Victor Fears For the Future: Woman Sees Advances For the Disabled Imperiled by Budget Cuts*, N.Y. TIMES, Apr. 29, 1997, at B1, B6). Despite prejudicial views of her disability, Marilyn’s abilities allowed her to live independently, earn two degrees, and lead the first independent living center in New York. *Id.* at 34.

<sup>237</sup> *Id.* at 36.

<sup>238</sup> *Id.* at 37.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> *Id.* at 38 (quoting Edward Roberts; Cheryl Marie Wade, *Disability Culture Rap*, in THE RAGGED EDGE, 15, 17 (Barrett Shaw ed., 1994)).

<sup>243</sup> *Id.* at 39. One independent living advocate remarked that people with disabilities “were incarcerated against their will” simply for committing the “crime [of] needing attendant care.” *Id.* at 43 (internal quotation omitted).

Edward demonstrated that people with paraplegia should not be denied equal opportunity based on their disabilities.<sup>244</sup> He demolished a misguided focus on dependence based on disabilities by building a life of ability through independence and self-reliance.<sup>245</sup> Living as “an artichoke—a little prickly on the outside but with a big heart,” Edward was “angry that people with disabilities [were] second-class citizens” who were dependent on others for aid.<sup>246</sup> Eradicating barriers to independent living, Edward proved that it was unjust to force people with disabilities to just “deal with” their disabilities.<sup>247</sup> Fighting the “prevailing assumption that his [physical] disability negated his intellectual capacity and his employment potential,” Edward’s abilities and unquenchable thirst for independence allowed him to earn bachelor’s and master’s degrees from the University of California and lead California’s Department of Rehabilitation.<sup>248</sup>

As the deinstitutionalization trend continued into the 1960s, people with disabilities emerged from institutions into independent living and entered the mainstream of American life.<sup>249</sup> This was a pivotal moment in the disability rights movement.<sup>250</sup> Instead of imprisoning people due to their disabilities, their liberation into society revealed how misperceptions about disabilities were being replaced with the enduring truth that we are all defined by our abilities.<sup>251</sup>

### *C. America Dismantles Structural Barriers to Ability*

As the march for civil rights of other groups of people gained ground, people with disabilities were left behind. For example, the Civil Rights Act of 1964 provided federal protection against employment discrimination based on race, color, religion, sex, and national origin.<sup>252</sup> One glaring omission was the civil rights of people with disabilities. As barriers to human potential based on abilities were being removed in other areas, federal recognition of universal disability rights would have to wait another couple of decades. After centuries of building institutions to warehouse people with disabilities, society was not built for them. Structural barriers had been erected that prevented equal opportunities.<sup>253</sup> Ponder your life if you lived in

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<sup>244</sup> See *id.* at 39.

<sup>245</sup> *Id.*

<sup>246</sup> See *id.* at 37, 40 (quoting Edward Roberts).

<sup>247</sup> See *id.* at 42 (quoting Frank Bowe).

<sup>248</sup> *Id.* at 41.

<sup>249</sup> *Id.* at 33.

<sup>250</sup> See *id.* at 47.

<sup>251</sup> See *id.* at 47–48.

<sup>252</sup> 42 U.S.C. § 2000e-2(a)(1) (2018).

<sup>253</sup> See Kanter, *supra* note 71, at 246–47 (explaining that it was critical for society to advance from the rehabilitation idea that disability is a defect that must be cured to a civil rights idea that promoted structural change).

a society where nearly everyone was blind, but you had sight. Would society be built for your abilities or would sight be a disability? Would there be lights that could help you see? As you ponder this society, you might come to the frightening realization that you would be in a world of darkness in which your sight might not be an advantage; it might be viewed as a disability. That is precisely the darkened state in which people with disabilities have found themselves for centuries. Their abilities have been obscured by an incessant focus on disability that constructed barriers to equal opportunity.

On the path toward independence, all types of barriers—legal, attitudinal, educational, physical—must be removed. In 1968, Congress began to remove physical barriers by passing the Architectural Barriers Act.<sup>254</sup> This law declared that people with disabilities did not deserve to be excluded based on their disabilities. Acknowledging that society must be restructured, the law ensured that any building erected with federal funds could not erect barriers to people with disabilities.<sup>255</sup> As America embraced a new national policy of equal access for people with disabilities, “the creation of universally accessible surroundings necessitated a redesigning of society for *everyone*.”<sup>256</sup> One disability scholar remarked, “If you build it *accessible*, they will come.”<sup>257</sup> That powerful statement about ability contends that by removing barriers, people with disabilities will emerge from their long period of institutional segregation to participate equally in every aspect of life as employers, employees, students, consumers, spectators, travelers, and in all other capacities.<sup>258</sup> When ability becomes the guiding principle, disability becomes immaterial.

#### *D. Equal Access to Educational Opportunities Focuses on Ability*

Education is fundamental for opportunity. Before people with disabilities can enjoy equal opportunity, equal access to education is essential. Without a proper educational foundation, a life of unlimited potential is impossible. Unfortunately,

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<sup>254</sup> Architectural Barriers Act of 1968, Pub. L. No. 90-480, 82 Stat. 718 (codified as amended at 42 U.S.C. §§ 4151–56 (2018)).

<sup>255</sup> See 42 U.S.C. §§ 4153–54a (2018). In 1968, Congress also passed the Fair Housing Act to end discrimination based on race, religion, sex, and national origin, but not based on disability. Fair Housing Act of 1968, Pub. L. No. 90-284, §§ 802–05, 82 Stat. 81–84 (1968) (codified as amended at 42 U.S.C. § 3604 (1968)). It took another two decades before disability was included in the Fair Housing Act. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, § 6, 102 Stat. 1620 (1988) (codified at 42 U.S.C. § 3604(f) (1988)).

<sup>256</sup> FLEISCHER & ZAMES, *supra* note 4, at 13.

<sup>257</sup> *Id.* at 112 (quoting Terence Moakley of the Eastern Paralyzed Veterans Association).

<sup>258</sup> See *id.*; RIMMERMAN, *supra* note 53, at 107 (applauding barrier-free access for people with disabilities to foster inclusion, freedom, and full participation instead of the old norms of segregation and marginalization). Structural barriers built over centuries to deny equal access to people with disabilities were being dismantled brick by brick.



as children with disabilities began to leave institutions, closed schoolhouse doors often blocked equal access to educational opportunities.<sup>259</sup>

Institutional segregation is a prominent way to block equal access to equal opportunity. And schools had long been segregated in America. In 1954, the Supreme Court issued its blockbuster ruling in *Brown v. Board of Education* that opened once-closed schools to black children.<sup>260</sup> The Court's most basic holding was that segregating children based on race provided inherently unjust educational opportunities: "We conclude that in the field of public education, the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."<sup>261</sup> Because education awakens children to cultural values, prepares them for future opportunities, and allows normal adjustments to learning environments, the Court questioned whether "any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."<sup>262</sup> A unanimous Court employed the following reasoning that applies equally to disability: "To separate [children] from others of similar age and qualifications solely because of their race [or disability] generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."<sup>263</sup>

Clinging to the hope promised by *Brown*, children with disabilities sought equal access to educational opportunities.<sup>264</sup> Despite the momentous opening of schools for black children, doors were sealed against children with disabilities as their educational needs "remained forgotten, even though those needs were easily as great as those of the most cruelly disadvantaged *able*-bodied children."<sup>265</sup> In the 1970s, it still was a bleak proposition for children with disabilities to enjoy educational opportunities as their abilities were still obscured from view. Reflecting two centuries

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<sup>259</sup> See generally WEBER, *supra* note 5, at 97.

<sup>260</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

<sup>261</sup> *Id.* at 495.

<sup>262</sup> *Id.* at 493.

<sup>263</sup> *Id.* at 494. An EEOC commissioner later employed this line of reasoning to explain that there is no difference between prejudice based on race versus disability:

[T]here is no difference between being . . . sent to segregated schools because you are black or being sent to colonies because you have [a] mental [disability] and society believes that you will be better off with your own kind. There's no difference between being asked to leave a restaurant because you are black or because you use a wheelchair . . . [and] there's no difference between being denied the right to a job or to a promotion because you are black or because you are blind or deaf. All of it's discrimination. No such thing as separate but equal.

FLEISCHER & ZAMES, *supra* note 4, at 111 (quoting Paul S. Miller).

<sup>264</sup> See WEBER, *supra* note 5, at 97.

<sup>265</sup> FLEISCHER & ZAMES, *supra* note 4, at 184 (emphasis added) (quoting JOHN GLIEDMAN & WILLIAM ROTH, *THE UNEXPECTED MINORITY: HANDICAPPED CHILDREN IN AMERICA* 173 (1980)).

of exclusionary policies, only one in five children with disabilities was being educated,<sup>266</sup> only one-third of states mandated special education,<sup>267</sup> and schoolhouse doors remained locked to over a million children with disabilities.<sup>268</sup> Many states excluded students who were blind, deaf, “emotionally disturbed,” or “mentally retarded.”<sup>269</sup> More degrading, nearly 200,000 children with mental disabilities were still imprisoned in institutions.<sup>270</sup> If those numbers are not dire enough, it was even worse for certain students with disabilities—the likelihood of exclusion increased for “children with disabilities who lived in low-income, ethnic and racial minority, or rural communities.”<sup>271</sup>

Before equal access to educational opportunities arose, a common belief was that children with disabilities were uneducable.<sup>272</sup> Children fortunate to access education were offered inferior and segregated opportunities.<sup>273</sup> New York City was “supersegregated,” because children with disabilities “were not only segregated from nondisabled children but again segregated by specific disability.”<sup>274</sup> While other children flourished in school based on ability, children with disabilities floundered based on society’s prejudicial view of their abilities.<sup>275</sup> The woeful historical record shows that “the majority of children with moderate and severe disabilities were served by segregated schools that deprived students of any meaningful opportunities for interaction with their nondisabled peers.”<sup>276</sup> As late as 1979, when students with disabilities were allowed access to an education, it continued to occur in a segregated environment.<sup>277</sup> In the minds of educators, disability meant inability; only students without disabilities were worthy of education.

But people with disabilities had grown tired of being seen as “second-class citizens.”<sup>278</sup> The 1970s ushered in an era of independence and civil rights for people with disabilities.<sup>279</sup> In 1972, Senator Hubert H. Humphrey introduced legislation to protect the civil rights of people with disabilities to enjoy equal opportunities

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<sup>266</sup> NAT’L COUNCIL ON DISABILITY, ED 438 632, BACK TO SCHOOL ON CIVIL RIGHTS: ADVANCING THE FEDERAL COMMITMENT TO LEAVE NO CHILD BEHIND 6 (2000), <https://eric.ed.gov/?id=ED438632> [hereinafter BACK TO SCHOOL].

<sup>267</sup> WILDER & WALTERS, *supra* note 57, at 73.

<sup>268</sup> BACK TO SCHOOL, *supra* note 266, at 6.

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

<sup>272</sup> *Id.* at 26.

<sup>273</sup> *Id.* at 27.

<sup>274</sup> FLEISCHER & ZAMES, *supra* note 4, at 187 (citation omitted).

<sup>275</sup> See WILDER & WALTERS, *supra* note 57, at 75, 79.

<sup>276</sup> *Id.*

<sup>277</sup> FLEISCHER & ZAMES, *supra* note 4, at 186.

<sup>278</sup> BARNES & MERCER, *supra* note 104, at 1.

<sup>279</sup> *Id.* at 1, 116–18.

without discrimination.<sup>280</sup> Focusing in part on educational opportunities, he implored America to recognize that with “more than one million children [] denied entry into public schools, even to participate in special classes,” “[t]he time has come when we can no longer tolerate the invisibility of [people with disabilities] in America.”<sup>281</sup> Senator Humphrey demanded that America recognize people with disabilities’ “right to live” and “work to the best of their ability—to know the dignity to which every human being is entitled.”<sup>282</sup> Senator Humphrey had grown weary of society’s willingness to diss ability through brutish ignorance of the massive abilities trapped inside people with disabilities. Later that year, two landmark education cases reversed centuries of societal exclusion of children with disabilities by determining that all children are educable and enjoy basic rights to an appropriate education in the least restrictive environment.<sup>283</sup> Even while society focused on disability, ability was emerging alongside it.

On the heels of these paradigm-shifting cases, Congress recognized that basic federal rights attached to children with disabilities who sought equal educational opportunities. In 1975, the Education for All Handicapped Children Act (EAHCA) required public schools that accepted federal funds to open their doors to children with disabilities.<sup>284</sup> In passing the EAHCA, “Congress sought to end the long history of segregation and exclusion of children with disabilities from the American public school system.”<sup>285</sup> Calling it “one of the most important civil rights laws ever written,” the National Council on Disability explained that the EAHCA’s premise “is that all children with disabilities have a federally protected civil right to have available to them a free appropriate public education [FAPE] that meets their education and related services needs in the least restrictive environment.”<sup>286</sup> The

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<sup>280</sup> See BACK TO SCHOOL, *supra* note 266, at 26.

<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

<sup>283</sup> In *Mills v. Board of Education*, children with disabilities contested the decision of the D.C. Public Schools to exclude them from getting an education. 348 F. Supp. 866, 868 (D.D.C. 1972). The students claimed educators excluded them after labeling them “as behavioral problems, mentally retarded, emotionally disturbed or hyperactive.” *Id.* With upwards of 22,000 children with disabilities in D.C. schools, thousands were not provided any education. *Id.* at 868–69. In *Pennsylvania Ass’n for Retarded Children (PARC) v. Pennsylvania*, children with disabilities challenged their exclusion from public schools. 343 F. Supp. 279, 281–82 (E.D. Pa. 1972). The *PARC* decision held that public schools could not summarily exclude children with disabilities by deeming them uneducable. See *id.* at 281–84, 302–03.

<sup>284</sup> Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as amended at 20 U.S.C. §§ 1400–1482 (1975)).

<sup>285</sup> BACK TO SCHOOL, *supra* note 266, at 25.

<sup>286</sup> *Id.* at 5.

EAHCA ensured that children with disabilities<sup>287</sup> enjoy the right to a FAPE.<sup>288</sup> After centuries of exclusion, children with disabilities were integrated with other children “to the maximum extent appropriate.”<sup>289</sup> Seeing that each child with a disability had unique abilities, the EAHCA required schools to tailor an “individualized educational program” (IEP) to the unique educational needs of each child.<sup>290</sup> Prepared collectively, the all-important IEP required a statement of the child’s current levels of educational performance, a statement of annual goals, a statement of the specific educational services to be provided, a statement on integration efforts, and a set of objective criteria and evaluation procedures to determine whether the child’s educational objectives were being met.<sup>291</sup> Blinded by a long history that focused on disability, America’s eyes were opening to see the educational ability in children with disabilities.<sup>292</sup>

In 1990, Congress renamed the EAHCA the Individuals with Disabilities Education Act (IDEA).<sup>293</sup> Building upon fifteen years of progress, America awakened to the transformative idea that children with disabilities were to be judged by ability. Shedding a horrific past that harbored prejudicial views of disability, America acknowledged that “[d]isability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society.”<sup>294</sup> The national goal to improve educational results for children with disabilities became “an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency.”<sup>295</sup>

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<sup>287</sup> The Education of the Handicapped Act, amended five years later by the EAHCA, defined “handicapped children” to include “mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, other health impaired children, [and] children with specific learning disabilities.” Education of the Handicapped Act, Pub. L. No. 91-230, § 602, 84 Stat. 175 (1970) (codified as amended at 20 U.S.C. § 1401(1) (2018)). As later amended, “child with a disability” currently “means a child with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as “emotional disturbance”), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities . . . who, by reason thereof, needs special education and related services.” 20 U.S.C. § 1401(3)(A).

<sup>288</sup> 20 U.S.C. § 1412(a)(1) (2018).

<sup>289</sup> 20 U.S.C. § 1412(a)(5).

<sup>290</sup> 20 U.S.C. § 1401(14).

<sup>291</sup> 20 U.S.C. § 1414(d)(1)(A) (2018); *see also* Honig v. Doe, 484 U.S. 305, 311 (1988) (characterizing “the IEP as the centerpiece” of the EAHCA’s “education delivery system” for children with disabilities).

<sup>292</sup> The EAHCA applied to institutions that received federal funds. BACK TO SCHOOL, *supra* note 266, at 5.

<sup>293</sup> 20 U.S.C. § 1400(a) (2018).

<sup>294</sup> 20 U.S.C. § 1400(c)(1).

<sup>295</sup> *Id.*

Children with disabilities were no longer warehoused in bleak institutions with little access to education; instead, schools were desegregated so *all* children could learn together.<sup>296</sup> Even though this desegregation effort lagged racial desegregation by decades, schools were opening for children with disabilities. Following the same vision that ended racial segregation, desegregation based on disability improved overall education because it broke “down the barriers of prejudice and misunderstanding” that breed notions that society may freely exclude children with disabilities from American life.<sup>297</sup>

Despite progress for equal access to educational opportunities, children with disabilities continue to struggle to unlock their full potential based on their abilities. Part of that struggle has been caused by the Supreme Court’s restrictive view of the EAHCA and IDEA. In *Board of Education v. Rowley* in 1982, the Supreme Court interpreted the EAHCA in a case involving a deaf student named Amy Rowley who sought the special education services of a sign-language interpreter.<sup>298</sup> The Court had to decide if the school district’s denial of Amy’s request denied her a FAPE.<sup>299</sup> The parties had advocated “starkly different” standards for a FAPE.<sup>300</sup> While Amy contended that she was entitled to an “equal educational opportunity” like children without disabilities, the school district contended that she had no “substantive individual rights,” because a FAPE was “merely aspirational.”<sup>301</sup> Rejecting both positions, the Court in *Rowley* had “carefully charted a middle path” in holding that the EAHCA “guarantees a substantively adequate program of education to all eligible children.”<sup>302</sup> It viewed the EAHCA’s primary goals as identifying and evaluating children with disabilities to provide them access to a public education.<sup>303</sup> Specifically, the Court held that the EAHCA’s “basic floor of opportunity” provided “access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.”<sup>304</sup> This low standard is met when an IEP sets out an educational program that is “reasonably calculated to enable the child to receive educational benefits,” which means that a child who is learning in a normal classroom would “achieve passing marks and advance from grade to grade.”<sup>305</sup> Because Amy had made “excellent progress” despite not having

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<sup>296</sup> FLEISCHER & ZAMES, *supra* note 4, at 187.

<sup>297</sup> See *id.* (quoting JOHN GLIEDMAN & WILLIAM ROTH, *supra* note 265, at 218).

<sup>298</sup> Bd. of Educ. v. Rowley, 458 U.S. 176, 184 (1982).

<sup>299</sup> *Id.* at 185–86.

<sup>300</sup> Endrew F. *ex rel.* v. Douglas Cty. Sch. Dist., 137 S. Ct. 988, 995 (2017) (discussing *Rowley*, 458 U.S. 176).

<sup>301</sup> *Id.*

<sup>302</sup> *Id.*

<sup>303</sup> *Rowley*, 458 U.S. at 200.

<sup>304</sup> *Id.* at 201.

<sup>305</sup> *Endrew*, 137 S. Ct. at 996 (citing *Rowley*, 458 U.S. at 202, 207).

access to a sign-language interpreter, the Court in *Rowley* held that her school had provided her a FAPE.<sup>306</sup>

The Court set a low standard for the educational benefit that children with disabilities could enjoy. Even though children with disabilities sought to unlock their full potential based on ability, opportunities remained hidden behind society's lowered expectations of them based on their disabilities. Without a sign-language interpreter, Amy's disability obscured her ability. The Court did not focus on ability in a hearty way. It simply recognized that Amy had the right to access an education that would unleash some of her potential. This dim view of Amy's right to educational opportunities as a child with a disability limited her full potential based on her actual ability.

Thirty-five years later in *Endrew F. ex rel. Joseph F. v. Douglas County School District*, the Court reconsidered when a school provides sufficient educational benefits to a child with a disability to satisfy the mandate for a FAPE.<sup>307</sup> The Court confessed that in *Rowley* it had avoided the "more difficult problem" of establishing "any one standard for determining" the adequacy of educational benefits conferred upon all children covered by the IDEA.<sup>308</sup> Since the age of two, Endrew had autism, "a neurodevelopmental disorder generally marked by impaired social and communicative skills, 'engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences.'" <sup>309</sup> By the time Endrew reached the fourth grade, his parents were dissatisfied with his stalled educational progress.<sup>310</sup> When a new IEP rehashed ineffective IEPs without a proper focus on behavioral issues caused by the disability, Endrew's parents enrolled him in a private school that specialized in educating children with autism.<sup>311</sup> Under an effective plan, Endrew's behavior improved, and he made more progress than when in public school.<sup>312</sup>

In updating the appropriate standard for a FAPE, the Court noted that it must be "specially designed instruction" that meets "the unique needs of a child with a disability."<sup>313</sup> The Court compared Amy's circumstances with Endrew's. The Court explained that because Amy had progressed smoothly through a regular, integrated classroom with her peers, she had been provided a FAPE.<sup>314</sup> Because Endrew was not being educated in an integrated setting, however, grade-level advancement could

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<sup>306</sup> *Id.*

<sup>307</sup> *Id.* at 993.

<sup>308</sup> *Id.*

<sup>309</sup> *Id.* at 996.

<sup>310</sup> *Id.*

<sup>311</sup> *Id.*

<sup>312</sup> *Id.* at 996–97.

<sup>313</sup> *Id.* at 1000 (quoting 20 U.S.C. §§ 1401(9), (29) (2012)).

<sup>314</sup> *Id.*

not be his goal; his educational program had to be “appropriately ambitious” so that he could “have the chance to meet challenging objectives.”<sup>315</sup> Admitting that this description of what the law requires is more of “a general standard” and “not a formula,” the Court set a somewhat demanding standard.<sup>316</sup> The Court held that a child who is offered “merely more than *de minimis*” progress each year “can hardly be said to have been offered an education at all.”<sup>317</sup> The Court observed that any goal of *de minimis* progress would amount to no more than abiding time until a child dropped out of school.<sup>318</sup> Rejecting centuries of exclusion that allowed this type of result, the Court announced that “IDEA demands more” by requiring “an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.”<sup>319</sup> Echoing generations of people with disabilities who fought for civil rights, Endrew’s parents contended that he was entitled to “an education that aims to provide a child with a disability opportunities to achieve academic success, attain self-sufficiency, and contribute to society that are substantially equal to the opportunities afforded children without disabilities.”<sup>320</sup> Rejecting this higher standard, the Court was content with its vague standard that the adequacy of a child’s “IEP turns on the unique circumstances of the child for whom it was created.”<sup>321</sup>

Even though education law has not equated equal access with equal opportunity to reach one’s full potential, there is no doubt that children with disabilities are being educated. They are no longer warehoused apart from other students or excluded from receiving any education. They now enjoy access to educational opportunities in the mainstream of education in integrated settings with children who do not have disabilities. But unlocking as much ability as possible for each child with a disability is still not our national policy. Until America enhances its educational expectations of children with disabilities based on ability, schools will continue to diss ability.

#### *E. Rehabilitation Act Brings Hope for National Civil Rights Based on Ability*

While educational barriers were being dismantled, people with disabilities faced other barriers in daily life. About the time that children with disabilities gained access to educational buildings erected with federal funds, the federal government banned discrimination against people with disabilities by organizations that received federal funds through the “groundbreaking” Rehabilitation Act of 1973 that

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<sup>315</sup> *Id.*

<sup>316</sup> *Id.*

<sup>317</sup> *Id.* at 1000–01.

<sup>318</sup> *Id.* at 1001.

<sup>319</sup> *Id.*

<sup>320</sup> *Id.*

<sup>321</sup> *Id.*

adopted a civil rights approach toward people with disabilities.<sup>322</sup> When the Rehabilitation Act and EAHCA joined forces in the mid-1970s, “the legal and cultural frameworks that shaped the daily lives of people with disabilities had changed dramatically.”<sup>323</sup>

America was embracing ability.<sup>324</sup> In September 1973, President Richard Nixon signed the Rehabilitation Act to expand disability rights.<sup>325</sup> Long and technical, it focused on an outdated view that sought to rehabilitate people with disabilities.<sup>326</sup> Consistent with the historical inability to see ability, the name itself—the *Rehabilitation* Act—focused on fixing a person’s disability. But while the title dissed ability, the law itself ultimately did not. Buried beneath dozens of pages that focused on rehabilitation, a hopeful view of civil rights emerged. The final four sections of a long bill ripped open the doors to equal opportunity for people with disabilities. Section 501 focused on federal employment of people with disabilities, seeking to lead the way in seeing ability over disability.<sup>327</sup> Similar to the Architectural Barriers Act, section 502 tore down barriers erected in federal buildings that denied equal access for people with disabilities.<sup>328</sup> To ensure that the federal government did not contract around its non-discrimination obligation, section 503 required any organization that contracted with the federal government to hire people with disabilities.<sup>329</sup>

The most far-reaching part of the Rehabilitation Act, however, was buried in “a single sentence at the end of the statute.”<sup>330</sup> Not “part of the original deliberations of the bill,”<sup>331</sup> Section 504 required organizations that received federal funds to respect the civil rights of people with disabilities: “No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any

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<sup>322</sup> SWITZER, *supra* note 55, at 8.

<sup>323</sup> NIELSEN, *supra* note 71, at 167.

<sup>324</sup> In 1970, Disabled in Action (DIA) was founded to end discrimination against people with disabilities. The DIA Singers—folk singers with varying disabilities—advocate for civil rights through songs of freedom. Their anthem is *Two Good Legs*. Focusing on ability over disability, this powerful song sees societal prejudice as the real disability that disses ability. *Two Good Legs*, DISABLED IN ACTION, [https://disabledinaction.org/inmotion\\_01.html](https://disabledinaction.org/inmotion_01.html) (last visited July 27, 2021); see also James Estrin, *Able to Sing, Able to Fight for Their Rights*, N.Y. TIMES (Jul. 27, 2010), <https://lens.blogs.nytimes.com/2010/07/27/showcase-192>.

<sup>325</sup> Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (1973) (codified at 29 U.S.C. §§ 701–794 (2018)).

<sup>326</sup> See *id.*

<sup>327</sup> 29 U.S.C. § 791(a) (2018).

<sup>328</sup> 29 U.S.C. § 792(a)–(b) (2018).

<sup>329</sup> 29 U.S.C. § 793(a) (2018).

<sup>330</sup> SWITZER, *supra* note 55, at 59.

<sup>331</sup> *Id.* at 59–60.



program or activity receiving Federal financial assistance.”<sup>332</sup> Section 504, and other reforms of the time, launched a “distinct shift in public policy—a sea change in the way programs for disabled persons are designed and implemented.”<sup>333</sup> While America had excluded people with disabilities for centuries, an inclusive view toward civil rights emerged.<sup>334</sup> A new national policy was forming that focused on ability and protected the civil rights of people with disabilities.<sup>335</sup>

#### IV. HOPEFUL PROMISE OF NATIONAL CIVIL RIGHTS FOR EQUAL OPPORTUNITY BASED ON ABILITY

Over the course of the twentieth century, America had experienced a profound paradigm shift in how disability was viewed.<sup>336</sup> But as America began to redirect its vision toward ability, only the federal government and entities that received federal funds were prohibited from discriminating based on disability.<sup>337</sup> It would take over two decades to fill the anti-discrimination gaps to ensure that everyone—whether in the public or private sectors—would be judged by their abilities rather than misjudged by their disabilities. Ten years after the Rehabilitation Act ushered in new hope for national civil rights, the National Council on the Handicapped took aim at a dim view of people with disabilities that saw them as damaged, flawed, and dependent.<sup>338</sup> Replacing that disabling view of disability, a civil-rights model emerged that ensured that people with disabilities could seek “maximum life potential, self-reliance, independence, productivity, and equitable mainstream social participation in the most productive and least restrictive environment.”<sup>339</sup>

The horrors of the past were turning toward hope for national civil rights. It is worth pausing here to reflect how difficult it had been for America to get to this point. In 1985, the Supreme Court decided *City of Cleburne v. Cleburne Living Ctr., Inc.*, a case that involved exclusionary discrimination of people with disabilities.<sup>340</sup>

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<sup>332</sup> Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355, 394 (1973) (codified at 29 U.S.C. § 794 (2018)); 29 U.S.C. § 794(a) (text modified from “qualified handicapped individual” to “qualified individual with a disability”).

<sup>333</sup> SWITZER, *supra* note 55, at 12–14, 60.

<sup>334</sup> *Id.* at 14.

<sup>335</sup> See Katherine R. Annas, *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams: Part of an Emerging Trend of Supreme Court Cases Narrowing the Scope of the ADA*, 81 N.C. L. REV. 835, 837 (2003).

<sup>336</sup> SWITZER, *supra* note 55, at 12.

<sup>337</sup> 29 U.S.C. § 793(b).

<sup>338</sup> SWITZER, *supra* note 55, at 13.

<sup>339</sup> *Id.* (quoting NAT’L DISABILITY POL’Y: A PROGRESS REPORT, NAT’L COUNCIL ON THE HANDICAPPED (1984), <https://ncd.gov/progressreport-publications/2020/national-disability-policy-progress-report-january-1984>).

<sup>340</sup> *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 450 (1985).

The civil-rights icon, Justice Thurgood Marshall, used the case to catalogue historical abuses endured by people with disabilities:

[T]he mentally retarded have been subject to a “lengthy and tragic history” of segregation and discrimination that can only be called grotesque. During much of the 19th century, . . . the retarded were largely left to their own devices. By the latter part of the century and during the first decades of the new one, however, social views of the retarded underwent a radical transformation. Fueled by the rising tide of Social Darwinism, the “science” of eugenics, and the extreme xenophobia of those years, leading medical authorities and others began to portray the “feeble-minded” as a “menace to society and civilization . . . responsible in a large degree for many, if not all, of our social problems.” A regime of state-mandated segregation and degradation soon emerged that in its virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow. Massive custodial institutions were built to warehouse the retarded for life; the aim was to halt reproduction of the retarded and “nearly extinguish their race.” Retarded children were categorically excluded from public schools, based on the false stereotype that all were uneducable and on the purported need to protect non-retarded children from them. State laws deemed the retarded “unfit for citizenship.”

Segregation was accompanied by eugenic marriage and sterilization laws that extinguished for the retarded one of the “basic civil rights of man”—the right to marry and procreate. Marriages of the retarded were made, and in some States continue to be, not only voidable but also often a criminal offense. The purpose of such limitations, which frequently applied only to women of child-bearing age, was unabashedly eugenic: to prevent the retarded from propagating. To assure this end, 29 States enacted compulsory eugenic sterilization laws between 1907 and 1931.

Prejudice, once let loose, is not easily cabined. As of 1979, most States still categorically disqualified “idiots” from voting, without regard to individual capacity and with discretion to exclude left in the hands of low-level election officials. Not until Congress enacted the Education of the Handicapped Act were “the door[s] of public education” opened wide to handicapped children. But most important, lengthy and continuing isolation of the retarded has perpetuated the ignorance, irrational fears, and stereotyping that long have plagued them.

. . . .

For the retarded, just as for Negroes and women, much has changed in recent years, but much remains the same; . . . irrational fears or ignorance, traceable to the prolonged social and cultural isolation of the retarded, continue to stymie recognition of the dignity and individuality of retarded people.<sup>341</sup>

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<sup>341</sup> *Id.* at 461–64, 467 (Marshall, J., concurring in part and dissenting in part) (internal

But America was learning its lessons because national civil rights for people with disabilities were emerging. In 1986, the National Council on Disability issued *Toward Independence: An Assessment of Federal Laws and Programs Affecting Persons with Disabilities—with Legislative Recommendations*.<sup>342</sup> This report encouraged Congress to “enact a comprehensive law requiring equal opportunity for individuals with disabilities, with broad coverage and setting clear, consistent, and enforceable standards prohibiting discrimination” based on disability status.<sup>343</sup>

#### A. ADA Unleashes Promise of Equal Opportunity Based on Ability

A comprehensive federal civil rights law for people with disabilities did not happen overnight. Section 504 of the Rehabilitation Act had been on the books for nearly two decades with mixed results.<sup>344</sup> Hopes for a renewed national commitment to see ability over disability were dimming. One doom-and-gloom prediction cautioned that “the effectiveness of the disability rights movement appears to have peaked in 1978.”<sup>345</sup> One civil rights leader bemoaned, “The day of civil rights is gone; there will never be another civil rights law passed.”<sup>346</sup> Out of deep pessimism borne by the horrors of a dark past, hope for equal opportunity emerged in the passage of a comprehensive national civil rights law. With overwhelming margins of 76 to 8 in the Senate and 377 to 28 in the House, Congress enacted the Americans with Disabilities Act of 1990 (ADA).<sup>347</sup> At the signing of the ADA, President George H.W. Bush showed America’s resolve to usher in a new era of civil rights in which people with disabilities would be seen by their abilities.<sup>348</sup>

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citations omitted).

<sup>342</sup> FLEISCHER & ZAMES, *supra* note 4, at 90; NAT’L COUNCIL ON DISABILITY, *Toward Independence: An Assessment of Federal Laws and Programs Affecting Persons with Disabilities—With Legislative Recommendations* (1986), [ncd.gov/publications/1986/February1986](http://ncd.gov/publications/1986/February1986).

<sup>343</sup> FLEISCHER & ZAMES, *supra* note 4, at 90 (quoting NAT’L COUNCIL ON DISABILITY, TOWARD INDEPENDENCE, *supra* note 342).

<sup>344</sup> See *id.* at 88, 90–91.

<sup>345</sup> See *id.* at 90 (quoting RICHARD K. SCOTCH, FROM GOOD WILL TO CIVIL RIGHTS: TRANSFORMING FEDERAL DISABILITY POLICY 164 (1984)).

<sup>346</sup> *Id.* (quoting Justin Dart).

<sup>347</sup> *Id.* at 92.

<sup>348</sup> Capturing the thesis of this Article, President Bush embraced ability over disability: Three weeks ago we celebrated our nation’s Independence Day. Today we’re here to . . . celebrate another “independence day,” one that is long overdue. With today’s signing of the landmark [ADA], every [person] with a disability can now pass through once-closed doors into a bright new era of equality, independence, and freedom. . . . This historic act is the world’s first comprehensive declaration of equality for people with disabilities. . . .

[W]e are keeping faith with the spirit of our . . . Declaration of Independence: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights.” These words have been our guide for more than

As the most comprehensive disability rights law ever passed in America, the historic ADA ushered in a new era of hope for equal opportunity.<sup>349</sup> It also served as “a watershed in the history for disability rights,” because America was the “first country to adopt national civil rights legislation, banning discrimination against people with disabilities.”<sup>350</sup> If one term were to capture the hope forged by the ADA, it would be *promise*.<sup>351</sup> When used in the civil rights context, that word springs forth memories of Reverend Martin Luther King Jr.’s *I Have a Dream* speech:

When the architects of our republic wrote the magnificent words of the Constitution and the Declaration of Independence, they were signing a promissory note to which every American was to fall heir. This note was a promise that all men, yes, black men as well as white men, would be guaranteed the unalienable rights of life, liberty and the pursuit of happiness.

It is obvious today that America has defaulted on this promissory note . . . . Instead of honoring this sacred obligation, America has given the Negro people a bad check, a check which has come back marked “insufficient funds.”

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two centuries as we’ve labored to form our more perfect union. But tragically, for too many Americans, the blessings of liberty have been limited or even denied. The Civil Rights Act of ‘64 took a bold step towards righting that wrong. But the stark fact remained that people with disabilities were still victims of segregation and discrimination, and this was intolerable. . . .

[The ADA] is powerful . . . [and] will ensure that people with disabilities are given the basic guarantees for which they have worked so long and so hard: independence, freedom of choice, control of their lives, the opportunity to blend fully and equally into the rich mosaic of the American mainstream. . . [I]t will provide our disabled community with a powerful expansion of protections and then basic civil rights [and] guarantee fair and just access to the fruits of American life which we all must be able to enjoy.

. . . .

[W]e must remove the physical barriers we have created and the social barriers that we have accepted. . . .

[The ADA] does something important for American business . . . You’ve called for new sources of workers. Well, many of our fellow citizens with disabilities are unemployed. They want to work, and they can work, and this is a tremendous pool of people. . . . who will bring to jobs diversity, loyalty, proven low turnover rate, and only one request: the chance to prove themselves. And when you add together Federal, State, local, and private funds, it costs almost \$200 billion annually to support Americans with disabilities—in effect, to keep them dependent. Well, when given the opportunity to be independent, they will move proudly into the economic mainstream of American life. . . .

. . . .

America welcomes into the mainstream of life all of our fellow citizens with disabilities. We embrace you for your abilities and for your disabilities, for our similarities and indeed for our differences, for your past courage and your future dreams.

*Remarks of President George H. W. Bush at the Signing of the Americans with Disabilities Act, ADA* (Jul. 26, 1990), [https://www.ada.gov/ghw\\_bush\\_ada\\_remarks.html](https://www.ada.gov/ghw_bush_ada_remarks.html).

<sup>349</sup> RIMMERMAN, *supra* note 53, at 103.

<sup>350</sup> *Id.* at 103, 107 (citation omitted).

<sup>351</sup> See SWITZER, *supra* note 55, at 112.

But we refuse to believe that the bank of justice is bankrupt. We refuse to believe that there are insufficient funds in the great vaults of opportunity of this nation. And so, we've come to cash this check, a check that will give us upon demand the riches of freedom and the security of justice.<sup>352</sup>

The promise of civil rights for all people to enjoy freedom and justice based on ability resounds through history. Reversing course on the horrors of history, “the ADA marked a dramatic change in the position of people with disabilities in American society.”<sup>353</sup> Senator Ted Kennedy referred to the ADA as the “Emancipation Proclamation for persons with disabilities.”<sup>354</sup> The ADA sought to extend “similar civil rights to people with disabilities that other groups already have on the basis of race, sex, national origin and religion.”<sup>355</sup> With a national focus on ability, the ADA raised high expectations that America would tear down barriers that excluded people with disabilities.<sup>356</sup>

The ADA opened opportunities for people with disabilities who had faced staggering segregation and diminishing discrimination. The ADA sought to ensure that people with disabilities would enjoy equal opportunity for full participation, full inclusion, and full integration into society. Title I prohibited employment discrimination.<sup>357</sup> Section 504’s limited application to entities that received federal financial assistance left a glaring gap of protection, because 80% of employment opportunities were in the private sector outside of Section 504’s reach.<sup>358</sup> When the ADA broadened civil rights protection to the private sector and forced employers to see people with abilities rather than discriminate based on disabilities, labor participation for people with disabilities increased and dependence on entitlement programs decreased.<sup>359</sup> When signing the ADA into law, President Bush predicted this result by estimating that governments spent \$200 billion to support people with disabilities.<sup>360</sup> The long history of payouts was based on a paternalistic view of dependency and disabilities; independence and abilities were the new norm.

Title II guaranteed that state and local governments would comply with the national mandate to open opportunities for people with disabilities in education,

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<sup>352</sup> Martin Luther King Jr., ‘I Have a Dream’ Speech at the Lincoln Memorial in Washington, D.C. (Aug. 28, 1963).

<sup>353</sup> RIMMERMAN, *supra* note 53, at 104.

<sup>354</sup> Helen R. Betenbaugh, *ADA and the Religious Community: The Moral Case*, in A LOOK BACK: THE BIRTH OF THE AMERICANS WITH DISABILITIES ACT 47, 47 (Robert C. Anderson ed., 1996).

<sup>355</sup> RIMMERMAN, *supra* note 53, at 104.

<sup>356</sup> *Id.* at 106.

<sup>357</sup> Americans with Disabilities Act of 1990, Pub. L. No. 102-336, tit. I, § 102, 104 Stat. 327 (codified as amended at 42 U.S.C. § 12112(a) (2018)).

<sup>358</sup> FLEISCHER & ZAMES, *supra* note 4, at 94.

<sup>359</sup> *Id.*

<sup>360</sup> *Id.*

employment, transportation, and recreation.<sup>361</sup> As state and local governments joined the federal government's promise not to discriminate against people with disabilities, America was embracing a national hope for equal opportunity for everyone based on ability.

When Title III was added to Titles I and II, doors that locked out people with disabilities for centuries were thrust wide open. Title III ensured that people with disabilities would enjoy equal access to public accommodations, which are privately operated services that are offered to the general public.<sup>362</sup> People with disabilities were emerging from the shadows of segregation to enjoy equal access to services that are essential to daily life that most people take for granted. Here is the list of public accommodations that Title III opened to people with disabilities:

- (A) an inn, hotel, motel, or other place of lodging . . . ;
- (B) a restaurant, bar, or other establishment serving food or drink;
- (C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;
- (D) an auditorium, convention center, lecture hall, or other place of public gathering;
- (E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;
- (F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;
- (G) a terminal, depot, or other station used for specified public transportation;
- (H) a museum, library, gallery, or other place of public display or collection;
- (I) a park, zoo, amusement park, or other place of recreation;
- (J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;
- (K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and
- (L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.<sup>363</sup>

It is difficult to fathom a life lived on the edges of society, excluded from equal access to employment opportunities, government programs and services, and public

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<sup>361</sup> 42 U.S.C. § 12132 (2018).

<sup>362</sup> Americans with Disabilities Act § 301(7), 42 U.S.C. § 12181(7) (2018).

<sup>363</sup> *Id.*

accommodations. Imagine your life if barriers had been erected around these essential areas. The ADA extended America's promise of equal opportunity to millions of people. When the ADA was passed, Congress estimated that 43,000,000 Americans had a disability and that the number would rise as Americans age.<sup>364</sup> Congress recognized that the transition from the horrors of the past to the hopeful promise of the future would not be easy. To bolster the ADA's impact, Congress made eight factual findings that revealed how people with disabilities still faced harmful barriers.

First, Congress recognized that people with disabilities have historically been isolated, segregated, and excluded from society.<sup>365</sup> Second, Congress acknowledged how discrimination against people with disabilities is "a serious and pervasive social problem" that infects every part of American life, including "such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services."<sup>366</sup> Third, Congress recognized that the march for civil rights had trod uneven ground. Even while national civil rights laws had long prohibited harmful discrimination "on the basis of race, color, sex, national origin, religion, or age," federal law failed to protect people with disabilities.<sup>367</sup> For example, in 1996, one author analyzed "the four prejudices that have dominated American life and reflection in the past half-century—anti-Semitism, racism, sexism, and homophobia."<sup>368</sup> It is breathtaking that this short list of prejudices made no reference to disability.<sup>369</sup> Despite the incessant focus on disabilities that produced historical segregation and discrimination, prejudice based on disability remained unrecognized.<sup>370</sup> While "[u]nkind words against homosexuals, African-Americans, Hispanics, and other minorities at least prompt rebuke from people," prejudice against people with disabilities remained a common phenomenon well into the era of civil rights.<sup>371</sup> Ignorance of ability drove this prejudice.<sup>372</sup>

Fourth, Congress found that although equal opportunity is an American hallmark, that beacon did not shine brightly for people with disabilities.<sup>373</sup> Fifth, Congress saw that people with disabilities "occupy an inferior status in our society, and

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<sup>364</sup> Americans with Disabilities Act § 2(1), 42 U.S.C. § 12101(a)(1) (2018).

<sup>365</sup> Americans with Disabilities Act § 2(2), 42 U.S.C. § 12101(a)(2).

<sup>366</sup> Americans with Disabilities Act § 2(30), 42 U.S.C. § 12101(a)(3).

<sup>367</sup> Americans with Disabilities Act § 2(4), 42 U.S.C. § 12101(a)(4).

<sup>368</sup> FLEISCHER & ZAMES, *supra* note 4, at xix (quoting Paul Robinson, *Intolerance*, N.Y. TIMES, May 19, 1996, at 41 (reviewing *The Anatomy of Prejudices* by Elisabeth Young-Bruehl)).

<sup>369</sup> *See id.*

<sup>370</sup> *Id.*

<sup>371</sup> *See id.* (citing R.C. Smith, *An Audience for Amy*, RAGGED EDGE 31–32 (May/Jun. 1998), <http://www.raggededgemagazine.com/0598/c598ft2.htm>).

<sup>372</sup> *Id.* Perhaps "a collective fear of disability" drives prejudicial views of disabilities.

<sup>373</sup> *See* Americans with Disabilities Act § 2(5), 42 U.S.C. § 12101(a)(5) (2018).

are severely disadvantaged socially, vocationally, economically, and educationally.”<sup>374</sup> Sixth, Congress honed in on ability, finding that discrimination against people with disabilities is based on ignorance and “characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.”<sup>375</sup> Discriminatory stereotypes diss ability by focusing on disability.

Seventh, Congress recognized that people with disabilities dream of “equality of opportunity, full participation [in society], independent living, and economic self-sufficiency.”<sup>376</sup> These are not special rights; they are basic human rights that form the bedrock of liberty. Eighth, Congress announced that discrimination against people with disabilities does not only harm them; it harms anyone who tolerates such discrimination.<sup>377</sup> Outdated views of disability rendered people with disabilities dependent on paternalistic handouts, which turned out to be expensive. Congress determined that because people with disabilities do not enjoy “the opportunity to compete on an equal basis and to pursue [equal] opportunities for which our free society is justifiably famous,” taxpayers bear the burdens of “billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.”<sup>378</sup> It does not take an economic genius to alert industry that if it saw ability over disability and unleashed the potential of people with disabilities—or people with abilities—it would result in a growing pool of employees, partners, and customers.<sup>379</sup>

Based on these compelling findings, Congress announced the ADA’s purposes.<sup>380</sup> First, the ADA launched “a clear and comprehensive national mandate for the elimination of discrimination” against people with disabilities.<sup>381</sup> Second, it set “clear, strong, consistent, enforceable standards addressing discrimination” against people with disabilities.<sup>382</sup> Third, it harnessed the full power of the federal government to enforce those standards.<sup>383</sup> Fourth, to ensure that the ADA was not a half-measure, Congress explicitly invoked the full sweep of its authority to attack “the major areas of discrimination faced day-to-day by people with disabilities.”<sup>384</sup>

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<sup>374</sup> Americans with Disabilities Act § 2(6), 42 U.S.C. § 12101(a)(6).

<sup>375</sup> Americans with Disabilities Act § 2(7).

<sup>376</sup> Americans with Disabilities Act § 2(8), 42 U.S.C. § 12101(a)(7).

<sup>377</sup> See Americans with Disabilities Act § 2(9), 42 U.S.C. § 12101(a)(8).

<sup>378</sup> *Id.*

<sup>379</sup> FLEISCHER & ZAMES, *supra* note 4, at xv.

<sup>380</sup> See Tory L. Lucas, *Henry J. Friendly: Designed to Be A Great Federal Judge*, 65 DRAKE L. REV. 421, 441 (2017) (explaining that “all law is driven by a purpose”).

<sup>381</sup> Americans with Disabilities Act § 2(b)(1), 42 U.S.C. § 12101(b)(1).

<sup>382</sup> Americans with Disabilities Act § 2(b)(2), 42 U.S.C. § 12101(b)(2).

<sup>383</sup> Americans with Disabilities Act § 2(b)(3), 42 U.S.C. § 12101(b)(3).

<sup>384</sup> Americans with Disabilities Act § 2(b)(4), 42 U.S.C. § 12101(b)(4).



Even though Congress built a strong foundation in expressing its findings and purposes, the ADA's foundation weakened when it focused on disability. Following the errors of history, instead of focusing on ability, the ADA's analytical framework that unlocks anti-discrimination protections focuses on whether a person has a disability.<sup>385</sup> Before the ADA asks if a person's ability was ignored based on discrimination, it focuses entirely on disability to determine if a person even has access to the ADA's protections. The ADA defines disability as "a physical or mental impairment that substantially limits one or more major life activities" of a person, "a record of such an impairment," or "being regarded as having such an impairment."<sup>386</sup> If a person can prove that she has a disability, only then does she enjoy the ADA's protections. If she cannot prove a disability as defined by the ADA, then the door to federal protection slams shut. Instead of asking if a qualified<sup>387</sup> person was discriminated against based on a disability, an incessantly misguided focus on disability precluded asking whether discrimination had occurred at all.

In interpreting the ADA, America was tested on how it viewed people with disabilities. America could retrace the horrors of its past and diss ability through an incessantly misguided focus on disability, or it could embrace a hopeful future and focus on ability to protect people with disabilities from discrimination. It had long been the goal of people with disabilities to be "judged by the content of their character" and "not stereotyped on the basis of" disability.<sup>388</sup> The ADA sought to change the incessant focus on disability by imploring Americans to look first at people's abilities and only then consider the impact of their disabilities.<sup>389</sup> Disability law was intended to focus on a person's ability while prohibiting discrimination based on disability.

Even though the ADA took a historic step down the road to justice, for many people, disability remained the focus. One lawyer described an early case under the ADA in which his client had been fired after she had a mastectomy.<sup>390</sup> When asked about the firing, the employer replied that "it wasn't the mastectomy; it was the cancer. It depressed the other workers, so I thought it was best to get rid of her."<sup>391</sup> Having endured centuries of disability discrimination, America simply could not shake its sordid past with its incessant focus on disability. Unable to chart a new

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<sup>385</sup> 42 U.S.C. § 12102(1).

<sup>386</sup> *Id.*

<sup>387</sup> The ADA focuses on ability by protecting qualified people with disabilities from discrimination. *See, e.g.*, 42 U.S.C. §§ 12112(a), 12132 (prohibiting employment discrimination "against a qualified individual on the basis of disability" and prohibiting state and local governments from discriminating against a "qualified individual with a disability").

<sup>388</sup> Shapiro, *supra* note 14, at 45.

<sup>389</sup> *Id.*

<sup>390</sup> FLEISCHER & ZAMES, *supra* note 4, at 95.

<sup>391</sup> *Id.*

course focused on ability, the Supreme Court later interpreted the ADA with a hyper-restricted view of disability that eliminated civil rights protections for people with disabilities.

*B. The Supreme Court's Incessant Focus on Disability Hijacks the ADA's Focus on Ability*

When the twentieth century dawned, America dehumanized people with disabilities, warehoused them in institutions, and attempted to eliminate them.<sup>392</sup> By the end of that century, America began to accept the view that people with disabilities enjoy basic civil rights.<sup>393</sup> Over half a decade after President Bush signed the ADA, he reflected that with its passage, “a shameful wall of exclusion came tumbling down” when America “took a dramatic step toward eliminating the physical barriers that existed and the social barriers that were accepted.”<sup>394</sup> Even though President Bush recognized that the ADA put America on the path to equal opportunity, he recognized that the road ahead would not be easy: “Much work lies ahead, but I am confident that we will finish the wonderful work already begun. After all, it’s the right thing to do.”<sup>395</sup> One disability rights activist agreed that “the real work had just begun,” because the simple passing of the ADA did not guarantee that discrimination would end.<sup>396</sup> This was prophetic because the incessantly misguided focus on disability continued into the twenty-first century. America had come a long way, but the road to an inclusive society was still paved with a prejudicial view of disability. Even though Congress and the President expressed a clear national consensus to end discrimination against people with disabilities—by valuing ability over disability—the third branch failed to follow suit. In a string of misguided cases, the Supreme Court took dramatic steps backward to embrace a centuries-old focus on disability to the detriment of ability that jammed the doors to justice.

In 1998, the Supreme Court first interpreted the ADA in *Bragdon v. Abbott*.<sup>397</sup> Sidney Abbott had been living with asymptomatic human immunodeficiency virus (HIV) for eight years when her dentist discovered a cavity.<sup>398</sup> After the dentist revealed a policy to fill cavities for HIV-infected patients in a hospital setting, treating

<sup>392</sup> RIMMERMAN, *supra* note 53, at 22.

<sup>393</sup> *Id.*

<sup>394</sup> George H.W. Bush, *Introductory Note from the Office of Former President George Bush, in A LOOK BACK: THE BIRTH OF THE AMERICANS WITH DISABILITIES ACT* 1, 1 (Robert C. Anderson ed., 1996).

<sup>395</sup> *Id.*

<sup>396</sup> Evan J. Kemp, Jr., *The Significance of the ADA to All Americans: The Process of Getting It, and Now that We Have It, How Is It Shaping Up?*, in *A LOOK BACK: THE BIRTH OF THE AMERICANS WITH DISABILITIES ACT* 9, 11 (Robert C. Anderson ed., 1996).

<sup>397</sup> *Bragdon v. Abbott*, 524 U.S. 624 (1998).

<sup>398</sup> *Id.* at 628–29.

her differently from patients without disabilities, Abbott claimed discrimination under Title III of the ADA.<sup>399</sup> Consistent with the historical focus on disability over ability, the Court focused entirely on disability. The Court asked “whether HIV infection is a disability under the ADA when the infection has not yet progressed to the so-called symptomatic phase.”<sup>400</sup> And the outcome of that consequential question determined whether Abbott had a right to be free from discrimination. If the Court held that her HIV was not a disability, then the federal courthouse door would slam shut on her disability discrimination claim.

Fortunately, the Court held that Abbott’s asymptomatic HIV is a disability because it is a physical impairment that substantially limits a major life activity.<sup>401</sup> Working through the analytical framework for what constitutes a disability, the Court spent seven pages explaining why the deadly virus is a “physiological disorder with a constant and detrimental effect on the infected person’s hemic and lymphatic systems from the moment of infection” to constitute “a physical impairment during every stage of the disease.”<sup>402</sup> The Court held that reproduction is a major life activity because it is “central to the life process itself.”<sup>403</sup> The final element was whether the physical impairment of HIV substantially limited the major life activity of reproduction.<sup>404</sup> Recognizing the health risks a man would face when conceiving a child with Abbott and the serious risks of infection of her child during gestation and birth, the Court held that Abbott’s reproductive opportunities were substantially limited by HIV.<sup>405</sup> Because Abbott was deemed to have a disability under the ADA, she enjoyed its basic protections to be free from discrimination.

The case was perplexingly close on whether the ADA’s anti-discrimination protections extended to a person who might die from a deadly disease. Four justices would have held that there were no major life activities that were substantially limited by HIV.<sup>406</sup> But the majority rejected any notion that substantial limitations on a major life activity require “utter inabilities” to engage in them.<sup>407</sup> It is hard to

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<sup>399</sup> *Id.* at 629.

<sup>400</sup> *Id.* at 628.

<sup>401</sup> *Id.* at 641.

<sup>402</sup> *Id.* at 631–37.

<sup>403</sup> *Id.* at 637–39. The Court also recognized “the pervasive, and invariably fatal, course of the disease.” *Id.* at 637.

<sup>404</sup> *Id.* at 639.

<sup>405</sup> *Id.* at 639–40.

<sup>406</sup> *Id.* at 657–61 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part); *see also id.* at 664 (O’Connor, J., concurring in the judgment in part and dissenting in part) (“I agree . . . that respondent’s claim of disability should be evaluated on an individualized basis and that she has not proved that her asymptomatic HIV status substantially limited one or more of her major life activities.”).

<sup>407</sup> *Id.* at 641 (majority opinion). The Court took eighteen pages to hold that a woman with HIV had a disability under the ADA that protected her from intentional discrimination. *See id.*

fathom how the Court nearly held that a person with HIV had no protection against intentional disability discrimination.

After the Court protected people with asymptomatic HIV from discrimination under the ADA, civil-rights activists hoped that millions of Americans with disabilities such as diabetes, epilepsy, or infertility would enjoy protection against discrimination.<sup>408</sup> In 1999, that hope was dashed when the horrors of the past resurfaced through the Supreme Court's narrow view of disability. In a blistering line of cases, the Supreme Court withdrew the ADA's protections from millions of Americans. Without even a cursory glance at ability, the Court focused entirely on disability. Cruelly, the Court interpreted disability so narrowly that many people with disabilities suddenly did not have any disabilities under the ADA. For centuries, America's incessantly misguided focus on disability denied equal access to equal opportunities. In a perverted return of that prejudicial view of disability that would continue to diss ability, the Court embraced a myopic view of disability that shockingly would be used to exclude people without regard to ability.

In *Sutton v. United Air Lines, Inc.*, Karen Sutton and Kimberly Hinton, twin sisters with severe myopia, applied to fly planes for United Air Lines.<sup>409</sup> Each sister had poor visual acuity, but corrective lenses improved their vision.<sup>410</sup> Without corrective lenses, they were substantially limited in the ability to perform numerous life activities; with corrective measures, they functioned like anyone without seeing impairments.<sup>411</sup> Because Karen and Kimberly met the airline's "basic age, education, experience, and Federal Aviation Administration certification qualifications," they were invited to interview for pilot positions and take flight simulator tests.<sup>412</sup> During their interviews, the focus left their abilities as pilots to focus exclusively on their disabilities. They were informed that they were disqualified because they failed the minimum vision requirement.<sup>413</sup>

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at 630–47. Justice Ruth Bader Ginsburg expressed disbelief that anyone could doubt that HIV constitutes a disability under the ADA:

[HIV] has been regarded as a disease limiting life . . . [and pervading] life's choices: education, employment, family and financial undertakings. It affects the need for and . . . the ability to obtain health care because of the reaction of others to the impairment. No rational legislator . . . would require nondiscrimination once symptoms become visible but permit discrimination when the disease . . . is not yet visible.

*Id.* at 656 (Ginsburg, J., concurring) (citations omitted).

<sup>408</sup> FLEISCHER & ZAMES, *supra* note 4, at 102.

<sup>409</sup> *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 475 (1999).

<sup>410</sup> *Id.* (with corrective lenses, the sisters' vision was "20/20 or better" (internal citation omitted)).

<sup>411</sup> *Id.*

<sup>412</sup> *Id.* at 475–76.

<sup>413</sup> *Id.* at 476.

Affirming summary dismissal of their claims of disability discrimination, the Supreme Court held that “the determination of whether an individual is disabled should be made with reference to measures that mitigate the individual’s impairment, including, in this instance, eyeglasses and contact lenses.”<sup>414</sup> In reaching this conclusion after acknowledging that Karen and Kimberly were physically impaired, the Court rejected the guidance of the Equal Employment Opportunity Commission and the Department of Justice that the ADA protects employees from discrimination based on disability without regard to mitigating measures.<sup>415</sup> While focused exclusively on disability, the Court concluded that these pilots did not actually have disabilities that protected them from discrimination. In a decision that caught these plaintiffs coming and going, the Court permitted an employer to judge their abilities based solely on their disabilities without violating the ADA.

Dissenting, Justice John Paul Stevens revealed the important distinction between focusing on disability to discriminate versus focusing on ability to liberate. Consistent with the ADA’s broad remedial purpose, Justice Stevens viewed a person’s impairment—a disability in the most general sense—without regard to mitigating measures.<sup>416</sup> On the “threshold question” of whether a person has a disability under the ADA, he opined that courts should give the term “a generous, rather than a miserly, construction.”<sup>417</sup> Justice Stevens made clear that the only issue in the case was whether Karen and Kimberly were “members of the ADA’s protected class.”<sup>418</sup> Asking whether the ADA would allow them to enter the courthouse as other federal nondiscrimination statutes do, he explained, “Inside that door lies nothing more than basic protection from irrational and unjustified discrimination because of a characteristic that is beyond a person’s control.”<sup>419</sup> Even if the ADA lets a person with a disability into the courthouse, she would not automatically win, because she still must be qualified and not pose a safety risk.<sup>420</sup> He recognized what should be obvious when focused on ability—the ADA does not require airlines “to hire unsafe or unqualified pilots” or protect every person who wears glasses.<sup>421</sup> But he cautioned that it makes little sense to encourage a misdirected focus on disability to exclude a

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<sup>414</sup> *Id.* at 475; *see also* *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555, 565–66 (1999); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516, 521 (1999).

<sup>415</sup> *Sutton*, 527 U.S. at 481–82; *see id.* at 494 (Ginsburg, J., concurring) (agreeing that the ADA “does not reach the legions of people with correctable disabilities”). This Article’s criticism of *Sutton* is not based on whether a person who uses eyeglasses has a disability. Instead, this discussion illustrates how the Supreme Court unwittingly affirmed society’s enduring focus on disability that obscures ability that always results in exclusion over opportunity.

<sup>416</sup> *Id.* at 495 (Stevens, J., dissenting).

<sup>417</sup> *Id.*

<sup>418</sup> *Id.* at 503–04.

<sup>419</sup> *Id.*

<sup>420</sup> *Id.*

<sup>421</sup> *Id.* at 495.

person from coverage to give an employer unchecked license to act “purely on the basis of irrational fear and stereotype.”<sup>422</sup>

With exacting precision in teasing out the difference between disability and ability, Justice Stevens knew what was obvious—these sisters’ physical impairments were disabilities in the general sense, and the airlines took an employment action based on them. Justice Stevens thought that this exclusionary focus on disability was shortsighted because the ADA was meant to protect people “against irrational stereotypes and unjustified disparate treatment on that basis.”<sup>423</sup> As applied to the myopic pilots in the case, Justice Stevens made clear that the analysis should focus on whether they are qualified to safely fly planes rather than whether they can be summarily excluded because of their visual impairments.<sup>424</sup> The Court—and the airlines—focused entirely on the pilots’ disabilities to exclude them from equal employment opportunities. In a brutally ironic way, the Court held that despite its focus on disability, the ADA provided no protection because, oddly enough, there were no disabilities in the case worthy of anti-discrimination protection. Justice Stevens did not blindly follow suit. He could see past disability toward an inclusive view of ability and the right to be free from discrimination. He saw how a misdirected focus on disability can diss ability. For him, the relevant focus was not disability; instead, the simple question under the ADA was whether the airlines discriminated against these pilots based on their disabilities.

On the same day as *Sutton*, the Court decided *Murphy v. United Parcel Service, Inc.*, a case involving a blue-collar mechanic and trucker with high blood pressure that was controlled with medication.<sup>425</sup> Applying *Sutton*’s holding, the Court held that the mechanic did not have a disability when his high blood pressure was viewed in its corrected state.<sup>426</sup> A miserly definition of disability again ignored an impairment in its natural state to distort the ADA’s broad remedial purpose to protect this mechanic from disability discrimination. The courthouse doors again were closed to a person with an obvious impairment while the doors to intentional discrimination based on that impairment swung wide open. Justice Stevens dissented, believing that this employee had a disability under the ADA because “his very severe hypertension,” if left unmedicated, likely would force hospitalization.<sup>427</sup> Stated

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<sup>422</sup> *Id.* at 504.

<sup>423</sup> *See id.* at 506–07.

<sup>424</sup> *See id.* at 510–11; *see also* *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555, 558–59, 567, 576–78 (1999) (holding that a truck driver with a serious vision impairment was not qualified under the ADA because he failed to meet the vision standards required by the U.S. Department of Transportation).

<sup>425</sup> *Murphy v. United Parcel Serv. Inc.*, 527 U.S. 516, 518–19, 521 (1999).

<sup>426</sup> *Id.* at 521.

<sup>427</sup> *Id.* at 525 (Stevens, J., dissenting).

another way, when the employee takes medication, his employer is free to discriminate against him without violating the ADA despite his abilities; if unmedicated, the ADA would protect him as he lies in a hospital bed without the ability to work.

*Sutton* and *Murphy* demonstrate how societal views of people with disabilities were again colliding. On one side, the horrors of the past resurfaced with an incessant focus on disability to promote societal exclusion; on the other, the hope for a future of equal opportunity promoted a paradigm shift with a vision to focus entirely on ability. When the Supreme Court focused exclusively on disability to restrict protections for basic civil rights, it prevented judicial review for a large class of people with disabilities. It authorized employers to take adverse employment actions once they saw a person's disability without regard to ability. Consistent with America's long history, the incessant focus on disability again was used to exclude people with disabilities. It is irrational to think that once an employer spots a person with a form of disability, it can then take adverse action with no fear that the ADA provides an ounce of protection. The logical fallacy allows a conclusion that the person had no disability in the strictest sense, even though that is what the employer saw. That is the net effect of the Court's hyper-narrow view of disability that eliminated ADA protection for millions of people. That is precisely backwards in how to think about the ADA's anti-discrimination mandate. The key to unlocking protection under the ADA—which unlocks the vast potential of a vast number of people—demands that employers base decisions on actual ability and not a prejudicially dim view of disability. If you find yourself thinking that visually impaired pilots or truckers with hypertension are dangerous and unqualified and deserve no protection under the ADA, then you should recognize that you are focused on disability without regard to ability. The embedded bias in this circular line of thinking is that once a disability is spotted, then ability can be ignored. To unlock equal opportunity for people with disabilities, the incessant focus on disability must end.

Three years later, the Supreme Court again restricted coverage under the ADA with another misguided view of disability. In *Toyota Motor Manufacturing v. Williams*, an assembly-line employee was injured while performing work for her employer.<sup>428</sup> Her constant use of pneumatic tools caused carpal tunnel syndrome with accompanying pain in her hands, wrists, and arms, and her constant wiping motion caused myotendinitis and thoracic outlet compression with accompanying pain in her shoulders.<sup>429</sup> The Supreme Court asked whether this employee had a disability to unlock the ADA's anti-discrimination protections. After acknowledging that the employee had physical impairments, the Court asked if they limited her from performing manual tasks.<sup>430</sup> Focusing entirely on her job-induced impairments, the Court did not broadly interpret the ADA to protect the employee from disability

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<sup>428</sup> *Toyota Motor Mfg. v. Williams*, 534 U.S. 184, 187–89 (2002).

<sup>429</sup> *Id.* at 187–89.

<sup>430</sup> *Id.* at 192.

discrimination. Instead, it continued its miserly approach to civil rights for people with disabilities and decreed that disability must be “interpreted strictly to create a demanding standard.”<sup>431</sup> Further turning the dial back on ADA protections, the Court declared “that to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives.”<sup>432</sup> Fixated on disability without seeing ability, the Court narrowed the ADA’s scope. The incessant focus on disability over ability embraced society’s disabling view that had enabled centuries of structural exclusion of people with disabilities.

Millions of Americans with serious impairments suddenly lost legal protection under the ADA.<sup>433</sup> Instead of asking whether a qualified person had encountered unlawful discrimination, people who lived with disabilities were asked whether they even had a disability. That consequential question ensured expensive litigation focused only on disability.<sup>434</sup> This torturous twist in the law actually discouraged people with disabilities from pursuing civil rights claims, because courts held that they enjoyed no federally protected civil rights.<sup>435</sup> After the long struggle against exclusion based on society’s disabling view of disability, courthouses excluded claims of disability discrimination. The cruel irony is that the Supreme Court’s incessant focus on disability removed legal protection without even a cursory glance at ability, freeing employers to focus on disability without any legal jeopardy. After these cases assaulted the foundations of the ADA that had been built after centuries of misplaced focus on disability over ability, America was confronted with whether people with disabilities would enjoy the same civil rights as others. At this critical juncture on the path to equal opportunity, the polarizing question hinged on whether the ADA demanded an enduring focus on ability or tolerated an incessant focus on disability.<sup>436</sup>

When analyzing most civil rights claims, it is easy to determine, for example, a person’s sex, age, or race; the material question asks if a person suffered unlawful discrimination. Continuing the historical mistreatment of people with disabilities, the Supreme Court viewed them differently. Instead of asking whether a person suffered discrimination, ADA plaintiffs had to prove they had a disability in the strictest sense before a right to be free from discrimination attached. Although not

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<sup>431</sup> *Id.* at 197–98.

<sup>432</sup> *Id.*

<sup>433</sup> See FLEISCHER & ZAMES, *supra* note 4, at 104.

<sup>434</sup> *Id.* at 104.

<sup>435</sup> *Id.* at 105.

<sup>436</sup> See *Hostettler v. Coll. of Wooster*, 895 F.3d 844, 848 (6th Cir. 2018) (bemoaning that “years of court decisions narrowly defining who qualifies as an individual with disabilities left the ADA too compromised to achieve its purpose.”).



everyone has a qualifying disability, an obsession with creating a heightened standard for what constitutes a disability has curbed equal opportunities for people with real impairments and has unnecessarily restricted people with disabilities from reaching their potential. Despite the clear vision cast by Congress and the President that the ADA would focus on ability over disability, the Supreme Court's misdirected view of disability extended the long history of structural exclusion of people with disabilities into the twenty-first century.

It is difficult to comprehend why America struggles to ensure that people with disabilities get to enjoy equal opportunity free from discrimination. The ADA does not serve "a special minority whose concerns are separate and distinct from the interests of the general population."<sup>437</sup> Because everyone can develop a disability, we all carry the potential to join this group. To some extent, the ADA should serve "as an insurance policy against discrimination that every American in this society should cherish and protect as a matter of enlightened self-interest."<sup>438</sup> The heart of the ADA casts a hopeful vision that looks for ability and refuses to tolerate discrimination based on disability. By focusing on disability over ability and by removing civil rights protections for millions of people with physical and mental impairments, the Supreme Court re-erected barriers to exclude people with disabilities from a society that had been laboring to remove those barriers brick by brick. The isolating effects of such barriers rob people with disabilities "of energy, creativity and productivity" and force society to lose the benefits of their abilities while bearing large burdens to support them.<sup>439</sup> America must learn the hard lessons of its past that erecting barriers to exclude people with disabilities will always diss ability and cause more harm than good. The only way to eliminate structural barriers is to fix our eyes on ability without seeing disability.

### C. *ADAAA Renews Hope for a Renewed Focus on Ability*

When the Supreme Court focused exclusively on disability to deny civil rights protections to people with disabilities, America had retraced its horrific past. In 2005, I bemoaned how the ADA's promising purposes were coming up short:

The grand aspirations of the ADA—to mainstream individuals with disabilities, to decrease their federal dependence, to empower them, and to guarantee their equal treatment—can be accomplished only if the ADA's purposes stand on their own. Relegating the ADA to a second-class . . . statute is as bad as relegating individuals with disabilities to second-class citizens, which occurred for far too long.<sup>440</sup>

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<sup>437</sup> FLEISCHER & ZAMES, *supra* note 4, at 109.

<sup>438</sup> *Id.* (quoting Becky Ogle, chairperson for Justice For All).

<sup>439</sup> *Id.* at 216 (citation omitted).

<sup>440</sup> Tory L. Lucas, *Disabling Complexity: The Americans With Disabilities Act of 1990 and Its*

The ADA must be “consistently and compassionately interpreted to effectuate its goals.”<sup>441</sup> The reasoning is simple: “When the ADA does not reach its true potential, Americans with disabilities cannot reach their true potential. When Americans with disabilities do not reach their true potential, America as a nation will not reach its true potential.”<sup>442</sup> America’s incessant focus on disability continued to exclude people with disabilities into the twenty-first century. This had to change.

In response to the Supreme Court’s misguided view of disability that limited civil rights protections for people with disabilities, a groundswell developed that re-focused the ADA toward ability and away from disability. Bipartisan legislation backed by a broad coalition of divergent voices pushed back against the Supreme Court’s narrow interpretations of disability that limited the ADA’s effectiveness.<sup>443</sup> In seeking to fulfill the ADA’s original purpose, Senator Tom Harkin said, “When I explain to people what the Supreme Court has done, they are shocked. Impairments that the Court says are not to be considered disabilities under the law include amputation, intellectual disabilities, epilepsy, diabetes, muscular dystrophy, and multiple sclerosis.”<sup>444</sup> Following in his father’s footsteps in signing the ADA, President George W. Bush signed the ADA Amendments Act of 2008 (ADAAA) after it received overwhelming support in Congress.<sup>445</sup>

The ADAAA corrected America’s view that had distorted ability through an incessant focus on disability. The ADAAA made these historic findings: (1) the ADA was intended to “provide broad coverage”; (2) people’s disabilities do not diminish their “right to fully participate in all aspects of society”; (3) abilities are overlooked based on “prejudice, antiquated attitudes,”<sup>446</sup> or the failure to remove societal and institutional barriers”; (4) courts did not fulfill Congress’s expectations on how to interpret disability; (5) the Supreme Court’s decisions in *Sutton* and *Williams* narrowed broad protections intended by the ADA and eliminated protections for people with disabilities; (6) the *Williams* decision required “a greater degree of limitation than was intended by Congress”; and (7) “too high a standard” to prove substantial limitation defied congressional intent.<sup>447</sup> The bright hope for equal opportunity enshrined in the ADA regained its luster in the ADAAA.

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*Interaction with Other Federal Laws*, 38 CREIGHTON L. REV. 871, 992–93 (2005).

<sup>441</sup> *Id.* at 993.

<sup>442</sup> *Id.* at 970–71.

<sup>443</sup> FLEISCHER & ZAMES, *supra* note 4, at 218.

<sup>444</sup> 154 CONG. REC. S7956 (daily ed. Jul. 31, 2008) (statement of Sen. Tom Harkin).

<sup>445</sup> ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended at 42 U.S.C. § 12101 (2009)); RIMMERMAN, *supra* note 53, at 112.

<sup>446</sup> Attitudinal barriers exclude as much as, if not more than, physical barriers. FLEISCHER & ZAMES, *supra* note 4, at 69.

<sup>447</sup> ADA Amendments Act § 2(a), 42 U.S.C. § 12101(a) (2018).

Reenergizing the ADA, Congress announced that the ADAAA requires “a broad scope of protection.”<sup>448</sup> Congress rejected *Sutton*’s insistence that mitigating measures determine whether a person has a disability and *Williams*’s requirement that the ADA “be interpreted strictly to create a demanding standard for qualifying as disabled.”<sup>449</sup> Congress made clear that whether a person’s “impairment is a disability under the ADA should not demand extensive analysis.”<sup>450</sup> Congress clarified that the primary focus “should be whether entities covered under the ADA have complied with their [nondiscrimination] obligations.”<sup>451</sup> Before the ADAAA was enacted, the judiciary had denied coverage under the ADA based on a narrow view of disability in the most exclusionary sense. The ADAAA flipped the focus from disability to ability. The ADAAA no longer allowed a hyper-technical focus on disability to foreclose civil rights protections. Instead, the renewed focus was on a person’s ability. America finally was following the ADA’s prescription to correct its poor vision of people with disabilities and ensure that they did not face exclusion or discrimination.

The consequential question transitioned from whether a person had a disability in a hyper-technical sense to whether that person’s ability had been ignored based on unlawful discrimination based on disability. In a phrase, the ADAAA reversed course on an incessantly misguided focus on disability to see ability more clearly. Blanketed with “a broad scope of protection” against discrimination, people with disabilities should find that it “will be much easier” to seek protection under the ADA based on their abilities rather than being kicked out of court for failing to prove a disability.<sup>452</sup> It is less likely that a chronically faulty view of disability will continue to diss ability. America’s new prescription on how to view people with disabilities seems to be working. People with disabilities are litigating claims of discrimination based on ability rather than being excluded from the courthouse through a misdirected view of disability.<sup>453</sup>

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<sup>448</sup> 42 U.S.C. § 12101(b).

<sup>449</sup> *Id.* § 12101(b)(4).

<sup>450</sup> *Id.* § 12101(b)(5).

<sup>451</sup> *Id.*

<sup>452</sup> See *Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008*, U.S. EEOC (Mar. 25, 2011), <https://www.eeoc.gov/laws/guidance/questions-and-answers-final-rule-implementing-ada-amendments-act-2008>.

<sup>453</sup> See, e.g., *Hostettler v. Coll. of Wooster*, 895 F.3d 844, 853–54 (6th Cir. 2018) (holding that postpartum depression and separation anxiety are disabilities); *Feldman v. Law Enf’t Assocs. Corp.*, 779 F. Supp. 2d 472, 483 (E.D.N.C. 2011) (holding that multiple sclerosis with episodic flare-ups is a disability); *Moore v. Jackson Cty. Bd. of Educ.*, 979 F. Supp. 2d 1251, 1261 (N.D. Ala. 2013) (holding that an ankle injury is a disability); *Norton v. Assisted Living Concepts, Inc.*, 786 F. Supp. 2d 1173, 1185 (E.D. Tex. 2011) (holding that renal cancer in remission is a disability); Stephen F. Befort, *An Empirical Examination of Case Outcomes Under the ADA Amendments Act*, 70 WASH. & LEE L. REV. 2027, 2070–71 (2013) (concluding that courts are

As this hope-filled section concludes, it is noteworthy that America recently celebrated the twentieth anniversary of *Olmstead v. L.C.*,<sup>454</sup> the landmark Supreme Court decision “hailed as the *Brown v. Board of Education* for people with disabilities.”<sup>455</sup> Reversing centuries of exclusionary prejudice, the Court in *Olmstead* declared that the ADA prefers integrated placement of people with mental disabilities in the least restrictive environment rather than in age-old segregated institutions.<sup>456</sup> The Court held that unjustified institutional isolation of people with disabilities constitutes discrimination based on disability.<sup>457</sup> This holding is important to remember in the context of the promises of the ADAAA, because it reminds us that people with disabilities have the ability to live and work independently. Social integration is our national policy; structural exclusion, segregation, and discrimination are historical relics. As we march onward from here, “the level of expectation is promisingly high in the disability community, which is determined to settle for nothing less than the rights to which people with disabilities are entitled.”<sup>458</sup> When society can see past disabilities to abilities, it will be closer to ensuring equal access to equal opportunity for all.

*D. America’s Incessantly Misguided Focus on Disability Continues to Diss Ability in Denying Equal Access to the Legal Profession*

To build a hopeful future for people with disabilities, America must shed the horrors of its scarred past that focused on disability. An illustration of how a misdirected view of disability continues to diss ability is the legal profession’s focus on disability to decide if a lawyer has the ability to practice law. The case of *Doe v. Supreme Court of Kentucky* illuminates this point.<sup>459</sup> Born and raised in Kentucky, Doe earned her law license in Florida in 2006 and practiced law in both the government and private sectors.<sup>460</sup> In 2014, Doe was diagnosed with Bipolar I Disorder.<sup>461</sup>

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interpreting the ADAAA consistent with congressional intent, resulting in a significant increase in the number of disability claims that survive the threshold question of whether a person has a disability); Curtis D. Edmonds, *Lowering the Threshold: How Far Has the Americans with Disabilities Act Amendments Act Expanded Access to the Courts in Employment Litigation?*, 26 J.L. & POL’Y 1, 60 (2018) (concluding that the number of ADA plaintiffs meeting the definition of disability is increasing).

<sup>454</sup> *Olmstead v. L.C.*, 527 U.S. 581 (1999).

<sup>455</sup> See generally Stacie Kershner & Susan Walker Goico, *Olmstead at Twenty: The Past and Future of Community Integration: A Letter from the Guest Editors*, 40 J. LEGAL MED. 1 (2020).

<sup>456</sup> See *Olmstead*, 527 U.S. at 587.

<sup>457</sup> *Id.* at 597.

<sup>458</sup> FLEISCHER & ZAMES, *supra* note 4, at xvii.

<sup>459</sup> See *Doe v. Sup. Ct. of Ky.*, 482 F. Supp. 3d 571 (W.D. Ky. 2020).

<sup>460</sup> *Id.* at 576.

<sup>461</sup> *Id.*

Despite her disability, Doe remained in good standing with the Florida bar.<sup>462</sup> Seeking to be licensed back home in 2015, Doe applied for a Kentucky law license.<sup>463</sup> Kentucky's focus on Doe's disability—and not her ability to practice law—began a “994-day tale of bureaucratic woe.”<sup>464</sup>

Focusing on Doe's disability, Kentucky forced Doe to disclose her history of depression, Bipolar I Disorder, and treatment.<sup>465</sup> Doe complied, allowing Kentucky to peer into the deepest recesses of her private medical records.<sup>466</sup> Kentucky next demanded that Doe disclose her monitoring records from the Florida bar; Doe complied.<sup>467</sup> Doe's doctors explained that Doe had complied with every medical requirement, had complied with every requirement from the Florida bar, and had the ability—despite her disability—to practice law “without concerns for her or the public's safety.”<sup>468</sup> None of this was enough for Kentucky; it could not see past Doe's disability. So the state dug deeper, demanding unlimited “access to inpatient records, outpatient records, and treatment notes.”<sup>469</sup> After all of these demands and shortly before Doe was scheduled to sit for the Kentucky bar exam, Doe's application to practice law in her home state was denied.<sup>470</sup> Doe brought a discrimination lawsuit, claiming that Kentucky “had illegally asked about her mental health history and treatment, illegally forced her to turn over her medical records and her therapists' notes from their counseling sessions, and illegally treated her like a criminal because of her disability.”<sup>471</sup> Why did Kentucky determine that Doe did not have the ability to practice law after more than a decade of proving her ability to practice law in Florida? According to the court, Kentucky deemed Doe “suspect and undesirable” and “thought her mental disability made her unfit.”<sup>472</sup>

This story did not play out simply against Doe in one state; it has played out in many states for many years. A longstanding issue in the legal profession has been whether law school graduates, as a condition to being admitted to a state bar, may be required to answer questions about their disabilities.<sup>473</sup> The court in *Doe* recounted a brief history of how the legal profession has focused on disability instead

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<sup>462</sup> *Id.*

<sup>463</sup> *Id.*

<sup>464</sup> *Id.*

<sup>465</sup> *Id.*

<sup>466</sup> *Id.*

<sup>467</sup> *Id.*

<sup>468</sup> *Id.*

<sup>469</sup> *Id.*

<sup>470</sup> *Id.* at 576–77.

<sup>471</sup> *Id.* at 574. Doe ultimately gained permission to practice law in Kentucky. *Id.* at 578.

<sup>472</sup> *Id.* at 574–75.

<sup>473</sup> Stanley S. Herr, *Questioning the Questionnaires: Bar Admissions and Candidates with Disabilities*, 42 VILL. L. REV. 635, 673–55 (1997).

of ability. Over the last three decades, numerous courts and the U.S. Department of Justice have concluded that the ADA does not allow state bars to focus on a lawyer's disability when making fitness-to-practice—ability—determinations.<sup>474</sup> The court in *Doe* characterized questioning lawyers about disabilities as “a medieval approach to mental health that is as cruel as it is counterproductive.”<sup>475</sup> Indeed, asking bar applicants “about their mental health status makes aspiring lawyers *less* fit [or able] to practice law.”<sup>476</sup> Consistent with this Article's purpose, any focus on disability simply does not address ability. Disability is not material; ability is. It is entirely proper to determine whether a person with a disability is qualified—or has the ability—to practice law. When focusing on ability, bars certainly may ask about misconduct, regardless of whether a “disability had a role in that conduct.”<sup>477</sup> But the ADA should prevent state bars from asking questions “about an applicant's status as a person with a mental disability” and treating her “differently based on that status.”<sup>478</sup>

This harrowing tale is a reminder that America's incessant focus on disability continues to diss ability. But there is hope in knowing that a simple fix awaits—bar fitness questions should focus entirely on ability. It is not the existence of a disability that makes the fitness determination; inability does. And inability and disability are not synonymous. That disabling view of people with disabilities has vexed America for too long and has dissed ability. This Article prescribes a corrected view of people with disabilities that transitions the improper focus on disability to the proper focus on ability. The legal profession should lead the way in this societal effort.

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<sup>474</sup> *Doe*, 482 F. Supp. 3d at 575 n.13, 576 n.14 (citing numerous federal and state court decisions and a letter from the Civil Rights Division of the Department of Justice).

<sup>475</sup> *Id.* at 475.

<sup>476</sup> *Id.* at 576. Mental disabilities are frequent among lawyers. *Id.* at 573–74. Even “law students have disproportionate levels of stress, anxiety, and mental health concerns compared with other populations.” *Id.* at 574 (internal citation omitted). Lawyers experience depression more frequently than non-lawyers. *Id.* A past president of the Kentucky Bar Association once bemoaned the rate of lawyers' dying by suicide as “disproportionate” and “disconcerting.” *Id.* Law students and lawyers should not live in fear that their ability to practice law may be foreclosed if they disclose a mental disability:

Law school is hard. The stress, rigor, and competition can lead to depression, anxiety, and substance abuse. Many students who start school healthy are far from it by the time they graduate. Some kill themselves.

Aspiring lawyers should seek the health care they need. But if Kentucky continues to punish people who get help, many won't. And one day, a law student will die after choosing self-help over medical care because he worried a Character and Fitness Committee would use that medical treatment against him—as Kentucky's did against Jane Doe. It is not a matter of if, but when.

*Id.* at 584 (footnotes omitted).

<sup>477</sup> *Id.* at 576 n.16.

<sup>478</sup> *Id.*

## V. A HOPEFUL PORTRAIT OF ABILITY OVER DISABILITY: REVEREND HAROLD H. WILKE

As this Article enters its final pages, it is important to cast a hopeful vision of why America should embrace a permanent change of focus from disability to ability. A mere thirty years ago, Congress ushered in an era of hope for equal opportunity based on ability with its rousing support of the ADA. At the ADA's signing, President Bush envisioned a bright future with equal opportunity and inclusion based on ability. In addition to being the first-ever national civil rights bill for people with disabilities, the signing made history in two other ways. First, more people attended the signing than any previous piece of legislation in American history.<sup>479</sup> Over 3,000 people flooded the White House lawn to witness the historic signing.<sup>480</sup> One commentator predicted, "This attendance record has not been broken and probably never will."<sup>481</sup> Second, the first-ever blessing was offered at a public presidential signing.<sup>482</sup> Here is a piece of that inspiring prayer:

"Let my people go!" was your decree, O God, [c]ommanding that all your children be freed from the bonds of slavery.

Today we celebrate the breaking of the chains which have held back millions of Americans with disabilities. . . . [and] the granting to them of full citizenship and access to the Promised Land of work, service and community. . . .

. . . .

Bless the American people and move them to discard those old beliefs and attitudes that limit and diminish those among us with disabilities.<sup>483</sup>

That prayer was lifted by The Reverend Harold H. Wilke, a pioneering minister who spent his life advocating for civil rights for people with disabilities.<sup>484</sup> A brief profile of this trailblazer's hope-filled life will help reorient America's focus toward ability and away from disability.

<sup>479</sup> Kemp, Jr., *supra* note 396, at 10.

<sup>480</sup> *Id.*

<sup>481</sup> *Id.* at 10–11.

<sup>482</sup> Harold H. Wilke, *Thoughts and Reflections: Envisioning the Future from the Guiding Principles of My Past*, in A LOOK BACK: THE BIRTH OF THE AMERICANS WITH DISABILITIES ACT 71, 72 (Robert C. Anderson ed., 1996) [hereinafter Wilke, *Thoughts and Reflections*]; see also Harold H. Wilke, *Blessing: Delivered at the Presidential Signing of the Americans with Disabilities Act* (July 26, 1990), in A LOOK BACK: THE BIRTH OF THE AMERICANS WITH DISABILITIES ACT 3, 3 (Robert C. Anderson ed., 1996) [hereinafter Wilke, *Blessing*].

<sup>483</sup> Wilke, *Blessing*, *supra* note 482, at 3.

<sup>484</sup> Alan A. Reich, *Tribute to an Advocate: Harold H. Wilke, DD*, in A LOOK BACK: THE BIRTH OF THE AMERICANS WITH DISABILITIES ACT 5, 7 (Robert C. Anderson ed., 1996). Wilke applauded how our society "has come a long way toward inclusion for persons with disabilities." Wilke, *Thoughts, and Reflections*, *supra* note 482, at 71.

Wilke was “an armless United Church of Christ minister whose early advocacy for people with disabilities helped set the stage for a movement that ultimately won basic protections for them in areas ranging from employment to transportation.”<sup>485</sup> Alan A. Reich<sup>486</sup> described Wilke as “a truly amazing man: author, scholar, teacher, motivational speaker, activist, visionary; role model, clergyman, parent; world leader and friend . . . world renowned as a religious leader and disability advocate.”<sup>487</sup> Reich expertly explained how Wilke’s ability overshadowed his disability: “Harold has never let his *disability* get in the way of his abundant, God-given talents and *ability*. He learned early that no challenge is so great that it can’t be overcome with dedication, hard work and a sense of humor.”<sup>488</sup> Wilke enjoined others to “[g]reet the person—not the disability.”<sup>489</sup> In awe that Wilke built bridges throughout his life, one commentator remarked, “Not bad for a man born without arms.”<sup>490</sup> Despite having no arms, Wilke “nevertheless developed deft ways of performing nearly all the activities which the person with two arms can perform.”<sup>491</sup>

Because Wilke’s abilities were staggering, his disabilities were mostly irrelevant. Without the ability to use arms, Wilke simply used his toes to do what hands and fingers normally would do. Despite his significant disability, Wilke was described as being “completely independent in activities of daily living.”<sup>492</sup> As early as the 1950s, Wilke taught himself to drive without arms, hands, or fingers by placing his left foot on the steering wheel.<sup>493</sup> You might be surprised to learn that your grandparents may have shared the road with an armless driver many decades ago. At the ADA signing at which he prayed, Wilke accepted a ceremonial pen from President Bush with his left foot.<sup>494</sup> A common occurrence throughout his life, Wilke stunned people when he would use his foot to take a pen out of his breast pocket, remove the

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<sup>485</sup> Elaine Woo, *Harold H. Wilke, 88; Armless Minister and Advocate for Disabled*, L.A. TIMES (Mar. 1, 2003, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2003-mar-01-me-wilke1-story.html>.

<sup>486</sup> Alan A. Reich founded the National Organization on Disability. See Wolfgang Saxon, *Alan A. Reich, 75, a Leader in Fighting for the Disabled, Dies*, N.Y. TIMES (Nov. 11, 2005), <https://www.nytimes.com/2005/11/11/us/alan-a-reich-75-a-leader-in-fighting-for-the-disabled-dies.html>.

<sup>487</sup> Reich, *supra* note 484, at 6.

<sup>488</sup> *Id.* (emphasis added).

<sup>489</sup> Robert Pietsch, *Becoming the Kingdom of God: Building Bridges Between Religion, Secular Society, and Persons with Disabilities: The Ministry of Harold Wilke*, in A LOOK BACK: THE BIRTH OF THE AMERICANS WITH DISABILITIES ACT 15, 18 (Robert C. Anderson ed., 1996).

<sup>490</sup> *Id.* at 15.

<sup>491</sup> *Id.* at 18 (citing Seward Hiltner, *Foreword* to HAROLD WILKE, GREET THE MAN vi (The Christian Education Press 1945)).

<sup>492</sup> *Id.* at 25.

<sup>493</sup> Woo, *supra* note 485. Wilke drove his entire family across America in 1968. *Id.*

<sup>494</sup> A LOOK BACK: THE BIRTH OF THE AMERICANS WITH DISABILITIES ACT 2 (Robert C. Anderson ed., 1996).



top, and write.<sup>495</sup> When others were blinded by their incessant focus on his disability of having no arms, Wilke drew their focus to his abilities. He explained that his feet and toes were not the means by which he achieved independence; it was his *imagination*.<sup>496</sup>

Wilke's transformational ingenuity proved that imagination unlocks abilities despite disabilities. He decried the shame and cruelty that a lack of imagination brings when we ignorantly see others through our own eyes and experiences without understanding theirs.<sup>497</sup> Wilke endlessly tapped his reservoirs of ability and strength. One could not view him with a misguided focus on his disability because his ability took center stage. As an ordained minister for over half a century, Wilke laughed off the stereotypical minister "who from the pulpit raises his arms and pounds the pulpit[.]"<sup>498</sup> Wilke's congregation ordained him based on his "gifts and *abilities*."<sup>499</sup> If anything, Wilke's life implored us to correct our vision so that we may see through the eyes of others to see what they can do and not what we believe they cannot. *Impossibility focuses on disability, possibility focuses on ability*. Hope springs from a paradigm shift that focuses on ability. That essential lesson undergirds the purpose of this Article.

Wilke's life experiences could fill volumes but allow for a few informative—and transformative—stories that challenge us to see ability in the face of disability. Illustrating how ability eclipses disability, Wilke confronted the task of presiding over baptisms in which the minister would dip his fingers into the baptismal font and sprinkle drops of water onto a child's forehead.<sup>500</sup> By focusing on the impossibility of performing this ceremony without fingers, one might conclude that Wilke was unqualified to be a minister. But that nearsighted view lacks imagination. To prove his ability while melting remnants of his disability, Wilke creatively kissed the water and then kissed the child's forehead, which allowed "the ecclesiastically proper three drops to course gently down the forehead of the child."<sup>501</sup> When a creative mind engages endless imagination, ability trumps disability. What a beautiful demonstration of how ability discards the idea of disability into an outdated relic of a mindless past.<sup>502</sup>

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<sup>495</sup> E.g., Reich, *supra* note 484, at 6.

<sup>496</sup> Pietsch, *supra* note 489, at 25.

<sup>497</sup> Wilke, *Thoughts and Reflections*, *supra* note 482, at 72.

<sup>498</sup> *Id.* at 74–75.

<sup>499</sup> *Id.* at 75 (emphasis added).

<sup>500</sup> *Id.*

<sup>501</sup> *Id.*

<sup>502</sup> Wilke insisted that churches "[o]rdain, bless, and empower" the abilities of people with disabilities. *Id.* Flipping the script on who has disabilities, he powerfully proclaimed, "Faith communities which do not have within them the active presence and participation of persons with disabilities are themselves dis-abled." *Id.* at 76. He contended that "[w]ithout their presence, the community of faith is not only incomplete: it is dis-membered." *Id.*

Shortly after his birth, his mother took her armless baby to the grocery store. Another patron said, "I heard the church bells this morning tolling the death of an infant, and I hoped that it was your poor little baby."<sup>503</sup> Like millions of others had done throughout the centuries that preceded her, this person focused incessantly on a challenging disability to conclude that the child without arms was helpless, worthless, and disposable. Standing firm against this form of timeless bias, Wilke's mother replied, "No, life is better."<sup>504</sup> Like so many people with disabilities who had come before him, Wilke knew what it was like to face societal elimination.

Shortly after this incident, Wilke's mother helped him learn the profound difference between disability and ability. While he was sitting on the floor trying to put on his shirt, his mother opened the shirt and placed it in front of him.<sup>505</sup> While her child struggled mightily and grew frustrated trying to put on his shirt, his mother simply watched.<sup>506</sup> Even though she had hands that her child lacked, she did not lift a single finger to help.<sup>507</sup> The spectacle was too much to bear for a friend, who scolded the mother to "help that child!"<sup>508</sup> The mother responded, "I am helping him."<sup>509</sup> A young Wilke and the mother's friend both saw a child without arms who was challenged in his ability to adorn a shirt. They saw his disability, as anyone would. This misguided focus allowed them to jump to the seemingly logical conclusion that the child could not help himself and had to depend on others. Fortunately, a loving mother saw past the disability to see ability, which laid a foundation for Wilke to unleash his imagination to seek independence.<sup>510</sup> She taught her son a valuable lesson that had eluded generations of people with disabilities—he did not need to depend on handouts from people with hands simply because he had none. Armed with this hopeful lesson, Wilke focused on his abilities throughout his life.

One final story highlights the hope that abounds from a healthy focus on ability. A young Wilke was on temporary duty during World War II with an orthopedic doctor who promised the aid of prosthetic arms after the war.<sup>511</sup> Consistent with history's incessant focus on disability, the doctor believed that he could fix or rehabilitate a broken Wilke. Changing his mind, the doctor later told Wilke, "Fitting you with prosthetic arms would provide me with professional satisfaction, but it

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<sup>503</sup> *Id.* at 79.

<sup>504</sup> *Id.*

<sup>505</sup> *Id.*

<sup>506</sup> *Id.*

<sup>507</sup> *Id.*

<sup>508</sup> *Id.*

<sup>509</sup> *Id.*

<sup>510</sup> "Having no arms myself, my *imagination* told me long ago that a coat is not only something that you can put on and button," Wilke illustrated. "It is also something that you can first button and then put on!" *Id.* at 72.

<sup>511</sup> *Id.* at 77.

wouldn't really help *you* that much. You're fully independent just as you learned it yourself."<sup>512</sup> Wilke took this lesson to heart. Pushing back against a close-minded view that "there's so much that people with disabilities cannot do," Wilke contended, "*All* aspects of life are open to a person with a disability."<sup>513</sup> When the focus moves from disability to ability, that promise can ring true for every person.

Perhaps Wilke's greatest contribution was to bring hope to people with disabilities.<sup>514</sup> Wilke firmly focused on the positive and the possible to pursue the impossible.<sup>515</sup> He implored employers to view people with disabilities as fully capable and productive.<sup>516</sup> With an ever-positive eye toward an inclusive future based firmly on abilities without regard to disability, Wilke promised, "The creative contributions of such persons has only begun to be mined."<sup>517</sup>

America must mine every gift and every talent from every person.<sup>518</sup> That is what breathes life and hope into the promises of equal access to equal opportunity. Fully grasping the lessons of Wilke's life, our goal should not be to fix or rehabilitate people with disabilities; to warehouse, exclude, or eliminate them; or to pay them off in a paternalistic way. The problems of our past did not lie with people with disabilities; the horrors were caused by society's incessant focus on disability that caused us to diss ability. Society's lack of sight and foresight is as disabling as any person's disability. We must seek to rehabilitate our prejudicial disability that blinds us from seeing another person's ability; to warehouse our discriminatory attitudes toward ability wrought by a misguided view of disability; and to eliminate the mistakes from our horrific history that has misunderstood ability. When this paradigm shift happens, the payoff will be equal opportunity based on ability without any reason to diss ability.

## CONCLUSION

If you think about a person with a disability, what do you see? More poignantly, who do you see? A misguided focus on disability disables you from seeing a person with ability. This Article calibrates the vision of disability law so that America's hopeful promise of equal access to equal opportunity based on ability is not foreclosed by a prejudicial view of disability.

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<sup>512</sup> *Id.*

<sup>513</sup> *Id.* at 78 (emphasis added).

<sup>514</sup> William A. Blair & Dana Davidson Blair, *Who Will Move the Next Mountain? Congregational Hospitality and Community Involvement*, in *A LOOK BACK: THE BIRTH OF THE AMERICANS WITH DISABILITIES ACT* 89, 89 (Robert C. Anderson ed., 1996).

<sup>515</sup> *Id.*

<sup>516</sup> Wilke, *Thoughts and Reflections*, *supra* note 482, at 77.

<sup>517</sup> *Id.*

<sup>518</sup> *See id.*

While displaying what appeared to be an okay sign formed by touching the tips of her index finger and thumb, Friend A said to Friend B, "I bet you that I have the ability to poke my head through this hole." Taken aback, Friend B insisted, "That is impossible. You do not have the ability to poke your head through that little hole. Your head is fifty times the size of that hole." Armed with a knowing smile, Friend A replied, "Your misplaced focus on what you deemed impossible has failed you. You are correct to see that my head is much larger than the hole that I created with my index finger and thumb. But with only a little imagination, the impossible becomes possible. I absolutely have the ability to poke my big head through this little hole." Friend A then placed the hole against her head, held up her opposite hand's index finger, stuck that finger through the small hole, and poked her head. She always possessed the ability to poke her head through that little hole. Only a misdirected focus on an apparent disability foreclosed seeing such an obvious ability.

Just like the jokes at the beginning and end of this Article, the punchlines come when we look in the wrong direction. Those are the regrettable lessons of history when it comes to people with disabilities. America simply has looked in the wrong direction for too long. And it is no longer a laughing matter. The horrors of the historical mistreatment of people with disabilities were borne out of an incessant focus on disability that blinded society from seeing ability. Only the modern civil rights approach rightly focuses on ability and seeks to remove irrational barriers built on ignorant views of disability. This Article's sole purpose is to transition America's incessantly misguided focus on disability to an enduring focus on ability. When America follows this prescription to see the abilities of people with disabilities, it will no longer diss ability.