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Challenges and Dilemmas in Implementing the Americans With Disabilities Act: Lessons From the First Decade

Stephen L. Percy

The Americans With Disabilities Act (ADA) of 1990 represents a strong national commitment to protecting the full rights and opportunities of persons with disabilities. This article traces evidence of the impact of the ADA's implementation and compliance during its first decade.

The Americans with Disabilities Act (ADA) built upon long-term efforts by the disability rights community to see that comprehensive legislation be created to protect the full rights and opportunities of persons with disabilities (Bishop & Jones, 1993). Enactment moved forward quickly in the late 1980s, with the statute substantially expanding the reach of federal antidiscrimination law—including coverage to many private sector organizations. With passage of the ADA, the challenge moved from lawmaking to effective policy implementation in many sectors of American society.

The year 2000 marked the end of the first decade of experience in implementing this powerful civil rights legislation. The statute has been enacted, most of the administrative regulations are in place, implementation guidelines have been crafted, monitoring has begun, complaints have been registered, and settlements have been negotiated or imposed. Observers across the nation—people with and without disabilities—are beginning to ask key questions: What difference has the ADA made? Have the rights and opportunities of people with disabilities been expanded? Have public agencies and private businesses been burdened with regulations and costly accommodations that threaten their viability? Have the courts become clogged with litigation involving people with disabilities using the judicial process as a means to force public and private entities to conform to ADA mandates?

These are important and vital questions that can only be partially answered at this point. While significant evidence can be gleaned from implementation experiences, the complete picture is not known, for the magnitude of compliance responsibility extends to thousands of governing units and hundreds of thousands of business enterprises across the nation. Despite the importance of the ADA as civil rights legislation, Congress has had no hearings on the law since its enactment, and practically no federal government funds have been allocated for research on the effectiveness of ADA implementation (West, 1994). Yet while no global evaluation or assessment is currently available, it is possible at this point to pull together information from multiple sources that sheds light on specific dimensions of implementation experience and provides evidence on what has changed as the result of the ADA.

This examination of ADA implementation is organized around the key political and policy arenas associated with disability rights. This will include examination of the sustainability of public support for the ADA and the regulatory

mandates that it contains, enforcement of ADA protections in the important context of public and private sector employment, and compliance activity in the state and local public sectors as well as the private sector service industry.

Lessons in the Context of Employment Protections

Title I of the ADA stipulates that covered entities may not create policies or take actions that discriminate against a qualified individual with a disability—a person who, with or without reasonable accommodation, can perform the essential functions of the employment position—with regard to job application procedures, hiring, advancement, discharge, or compensation. Employers with 15 or more employees must provide reasonable accommodations to protect the rights of individuals with disabilities. Accommodations are required up to the point that they represent an undue hardship on the operation of the covered business. With employment the key to independence and self-sufficiency in American life, it is not surprising that much attention regarding ADA implementation has focused on employment. Employment, after all, is the great equalizer for people with disabilities, the catalyst to independence (Milk, 1980).

Evidence on Enforcement: Complaints and Resolutions

One slice of the implementation picture is provided through information compiled by the Equal Employment Opportunity Commission (EEOC) on ADA discrimination claims and their disposition. From the beginning of ADA enforcement of Title I in July 1992 through the end of fiscal year 1998, 108,939 charges of discrimination were filed with the EEOC, and 106,988 were resolved (Equal Employment Opportunity Commission, 1999). Charges rose to an annual high of 19,798 in 1995 and have since dropped annually to 17,806 by 1998. Of the complaints resolved as of 1998, about 11% were resolved to the benefit of people with disabilities. About 5% of resolutions were negotiated settlements where those making charges received benefits, another 6% were cases where charges were withdrawn upon receipt of benefits, and 1% were successful settlements where relief was granted to the charger and all other adversely affected parties. Most of the remaining resolutions were dropped because no probable cause was found upon investigation or because of administrative closures (e.g., failure to locate charging party, charging party failed to respond to EEOC communications, closed due to the outcome of related litigation, etc.).

It is difficult to determine the true meaning of these numbers. While some disabled people are receiving redress for their claims of discrimination, other cases are being closed because people with disabilities are not following through (potentially as the result of a disability that makes communication difficult or a lack of confidence that their complaint will lead to a successful conclusion) and because no probable cause is being found (raising questions about whether ambiguity in the law affects the capacity of evaluators to determine if discrimination has taken place and whether the language of the ADA covers the full set of practices that can lead to discrimination based upon handicap). The EEOC data do tell us that the resolutions of complaints made to the EEOC represent an estimated \$211 million of benefits awarded to people with disabilities (not counting benefits acquired as the result of successful litigation).

Regulated Parties: Perspectives and Action

The best hope for quick and effective action to implement the ADA undoubtedly rests with those responsible for regulatory compliance. While policy entrepreneurs can guide legislative proposals into public statutes and operating principles in administrative regulations to guide compliance (Kingdon, 1984), they have much less capacity to prod implementation and compliance. This is particularly true given the reach of the ADA beyond public sector entities to all but the smallest firms that provide some form of service or accommodation to consumers. If regulated parties embrace the regulatory mandates they are expected to enforce, then compliance can be expected to occur more rapidly. Much the opposite can be expected where the purpose of mandates is questioned or challenged by those expected to direct compliance.

Significant empirical evidence has been gathered that sheds light on employer attitudes about ADA mandates. As a leading example, the President's Commission on Employment of People With Disabilities conducted a study in 1996 of 300 executives in Fortune 5000 companies responsible for making hiring decisions (President's Commission on Employment of People With Disabilities, 1996). This study found that 54% of people making hiring decisions said the ADA has had a positive impact on their corporations. Another nationwide survey, this one focusing on 400 senior corporate executives, reported favorable news from the private sector about employing people with disabilities: 70% of the executives supported the ADA and did not favor weakening its mandates, 89% approved of policies to increase the number of people with disabilities in their companies, and 75% said they are likely to make greater efforts to hire people with disabilities in the next 3 years (President's Commission on Employment of People With Disabilities, 1996). While there is some potential for respondents to overestimate their self-reported actions to implement the ADA, these data support the notion that the private sector has begun to recognize its responsibilities to hire people with disabilities as well as the potential benefit these workers bring to their companies.

While the findings of these and other surveys that employers see value and opportunity in hiring people with disabilities is encouraging, they do not necessarily demonstrate widespread understanding of the nature of disabilities and the relationship of disabilities to worker productivity. Multiple analysts have concluded that the ADA represents an important model or paradigm that can move employers to greater understanding of the capabilities of disabled persons (Haller, 1995; Wehman, 1993). Other analysts, however, remain concerned that insufficient information about disability, rather than prejudice itself, remains a significant obstacle to eliminating discrimination in employment for people with disabilities (Baldwin, 1997).

The Challenge of Enforcement

While the evidence that many employers embrace the general purpose and requirements of the ADA, and some report net benefits to their company from ADA compliance, instances of discrimination remain. As noted above, the responsibility for receiving and investigating reports of employment discrimination based upon disability rests with the EEOC. Studies document how the EEOC has had significant difficulty handling the mass of complaints that it

receives in a timely fashion. One study of practices in EEOC offices found that understaffing, insufficient investigative time, and inadequate travel and training funds undoubtedly have contributed to observed shortcomings in the investigation of charges (Moss & Johnsen, 1997).

One concern about enforcement of disability provisions that is particularly relevant to employment concerns protections for people who experience mental disability. Nonhandicapped people have historically not understood the problems and realities in the lives of persons with mental and physical disabilities. This is nowhere more true than in the context of psychological illness, where until recent decades, institutionalization was the primary strategy of treatment, often coupled with heavy medications that suppressed not only the symptoms of illness but also awareness and cognitive functions. Sterilization, shocking as it may seem, was practiced against people with disabilities into the 20th century (Burgdorf & Burgdorf, 1977). Only more recently, in the past two to three decades, have noninstitutional forms of treatment, such as halfway houses and sheltered workshops, been made widely available to those with serious mental disabilities.

One recent study has examined the resolution of employment discrimination cases by nature of the disability involved in discrimination cases. This study found relatively good news with regard to enforcement implementation. Psychiatric-based disabilities were the second most frequently reported type of disability cited in employment complaints to the EEOC—indicating that people with these disabilities understand their protections under federal law and are utilizing the enforcement mechanisms at their disposal. In addition, researchers found only a small difference between the outcomes of complaint charges involving individuals with psychiatric disabilities compared with those whose complaints derive from physical disability (Moss, Johnsen, & Ullman, 1998).

Lessons From the Perspective of State and Local Governments

Title II of the ADA covers the programs, services, and activities of state and local government, representing another policy arena in which to examine policy implementation and compliance. This is an important arena for the ADA, since state and local governments provide essential services to citizens as well as public buildings where services are rendered, legal disputes are resolved, and public policies are deliberated and enacted. Unlike private sector purveyors of goods and services, state and local governments and other local authorities were directly involved in nondiscrimination policy for people with disabilities prior to the ADA. These public sector units have been subject to federal mandates in this field since Congress enacted section 504 of the Rehabilitation Act of 1973—the precursor to the ADA. State and local governments, like other parties involved in compliance with disability rights mandates, have traditionally supported the general concept of removing discrimination on the basis of disability (Percy, 1989). They have worried, however, about compliance costs and deadlines.

Nowhere were these worries greater prior to the ADA than in the field of public transportation. Administrative regulations promulgated in the late 1970s to enforce section 504 of the Rehabilitation Act of 1973 stipulated sweeping and expensive mandates to expand the access of people with disabilities to public transportation. These Department of Transportation (DOT) regulations stipulated

structural modifications to transportation facilities, lift-equipped features being added to buses, and the delivery of special paratransit services. These mandates hit the transit industry hard and stimulated a political response. Led by the American Public Transit Association, transit systems challenged DOT regulations in the courts, claiming that the regulations substantially exceeded statutory intent (Katzmann, 1986). The federal courts concurred, leading the DOT to rescind these regulations. Even though most of the mandates would reemerge in the ADA several years later, this skirmish symbolizes local concerns about mandated compliance efforts and costs. Following the ADA, when national government commitment to transit accessibility mandates was clear, the concerns shifted toward complaints about unfunded mandates.

A flavor of how the ADA is generating significant impacts on state and local governments is provided through a review of settlements and consent agreements that have been negotiated with these governments as the result of challenges and complaints lodged by people with disabilities. These agreements negotiated with cities, counties, regional authorities, and states have focused on such wide-ranging issues as: removal of physical barriers to ensure people with physical disabilities have access to public buildings (many local and county governments across the nation), determination of whether a diagnosis of diabetes necessarily disqualifies individuals from working as school bus drivers in North Carolina, the accessibility of lottery ticket sales outlets to people with physical handicaps in New Hampshire and Oregon, accommodations to the access needs of jurors in Philadelphia, and a ruling on whether the State of Hawaii can quarantine guide dogs used by visually impaired individuals when entering the state. The breadth of issues in these settlements and their geographic origins in state and local governments across the United States is testimony to change being activated through the ADA.

Public Accommodations: The Movement Into the Private Sector

Critics of federal disability rights policies prior to the ADA noted that federal laws did little to help people with disabilities achieve access to the privately owned facilities that provide most of the commercial, recreational, entertainment, and public accommodation needs of American citizens. A study done of state-based disability rights laws undertaken just before enactment of the ADA showed that several states had laws that required private businesses to take some kind of action to accommodate the access of disabled persons to services and facilities (Percy, 1989). The federal government caught up to, and in most cases surpassed, the states with Title III of the ADA, which stipulates that no individuals with disabilities shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations offered by the private sector.

The impact of the ADA in private sector services and accommodations is probably the most difficult area to study given the volume of enterprises regulated by Title III. Newspaper stories report episodes of accommodations made and disputes about whether, or to what extent, such accommodations can be made. While the full story has yet to be told here, limited evidence shows forward progress in implementation.

In the context of new construction, the Justice Department prosecuted its first major case when it sued the Days Inn Corporation in 1996 after receiving a few dozen complaints about this particular hotel chain, substantially more complaints than received concerning other hotel companies. The case served notice to the entire service industry that the Justice Department would hold providers accountable for enforcing building accessibility guidelines for newly constructed facilities covered by the ADA. In many ways, new construction is the easiest way to make accommodations, since accessible features add little additional cost to construction if they are undertaken in building design plans. Modifications to existing facilities and retrofitting to achieve accessibility standards, on the other hand, are more costly to achieve.

Intercity transportation through private bus lines is another private sector arena in which ADA mandates are beginning to take root. In March 1998, after lagging other executive agencies in issuing administrative regulations to guide implementation (evidence that creating administrative regulations to implement ADA provisions can be slow and retard implementation), the DOT issued draft regulations for over-the-road buses (those engaged in intercity transit with baggage storage facilities under the passenger carriage). These draft rules require bus companies to make their buses accessible to people with disabilities through such means as lift equipment or other mobility devices. The 15 big companies (those with annual revenues of \$5 million or more) are required to have lift equipment installed on half of their buses by 2006 and on all buses by 2012. Bus companies without schedules, such as tour and charter companies, must have lifts on 10% of buses by 2002 and to have lift-equipped buses available within 48 hours upon reservation by a disabled person. For companies like Greyhound, accommodation will be no small feat given a report that it only had about a dozen lift-equipped buses in operation in early 1998, with 20 more being built, and 20 more due at each successive 6-month period (Wade, 1998). At an additional \$18,000 per bus, complying with lift-equipment mandates represents a significant cost to intercity bus transit companies.

The listing of settlements and consent agreements secured through the Department of Justice (DOJ) is illustrative of the impact of the ADA. The DOJ listing includes many nationally recognized companies including those offering hotel accommodations (Holiday Inn, Marriott International), restaurants (Wendy's, Friendly Ice Cream), recreation facilities (Walt Disney World, Odeon Cineplex Theaters), business services (Smith Barney), and rental car companies (Budget, Dollar). While not admitting to any wrong-doing, each of these companies agreed to take action to address problems and concerns registered by people with disabilities. Even this partial listing illustrates the reach of the ADA into the private sector and the range of accommodations and changes in business practices that are being stimulated by the ADA.

Implementation: What Have We Learned So Far?

The evidence indicates that progress is being made in implementing the ADA and moving the nation forward to an objective of eliminating discrimination based on disability. Clearly, not all parties would agree that implementation is moving as rapidly as it should, and no one would claim that all entities regulated by the ADA are fully aware of its mandates or are in full compliance. We do see, however, gains being made, even if we cannot comprehensively document the full

scope of compliance and change. We do see enforcement agencies like the DOJ and EEOC investigating disputes, seeking resolutions, and commencing prosecutions were appropriate. And we do see most new buildings being constructed according to guidelines that ensure access by people with disabilities. Perhaps what is most useful at this point is to identify the significant challenges and sticking points that slow ADA implementation and frustrate people with disabilities. A short list of major obstacles would include the following:

(a) *Accommodations that entail substantial cost:* Where compliance requires substantial expenditures of funds, implementation has been slower. Public transit systems have been struggling, for example, to comply with ADA requirements for accessible buses and demand responsive systems that provide door-to-door transportation. Provision of interpretative services is another area where compliance is costly. These are areas where monitoring compliance will be important so that we can measure the extent that financing can impede implementation and possibly learn about ways in which new technologies may represent more cost-effective compliance mechanisms.

(b) *Lingering questions about who is covered:* Rather than stipulate specific conditions that signal disability and hence ADA coverage, the framers preferred a language that related to conditions that limit one or more major life functions. A significant number of court cases have focused on what conditions represent a limitation of life functions. It is quite likely that these coverage issues will continue to find their way into the federal courts for some time as policymakers and affected parties seek to learn the boundaries of ADA coverage.

(c) *The challenge of mental disability:* Throughout the evolution of both federal and state disability rights laws, protecting persons with mental disabilities has been relatively more difficult than protecting physically handicapped persons. Our knowledge and understanding of mental disabilities—both within the medical community and in the general populace—continues to change, making it difficult to understand mental disabilities and how they can be appropriately accommodated. Even if prejudice were eliminated—and we are a long way from this goal—recognizing the potential in people with disabilities and appropriate means to accommodate their situations remains a significant challenge.

(d) *Insufficient capacity to monitor implementation and compliance:* We currently lack systematic means to assess the overall effectiveness of ADA implementation. We can track complaints and investigations, count lawsuits, and conduct surveys of employers and service providers, but these tracking mechanisms, while valuable, do not portray the full reality. They offer little information about those who experience discrimination based on their disability but who, because of insufficient knowledge, resources, or energy, are unable to trigger effectively enforcement mechanisms. What is needed here is more research—and greater resources to support research studies—aimed at understanding what does and does not work in implementation, what best practices might be identified and communicated to others, and how we can move beyond stereotypes and misconceptions to greater opportunities for people with disabilities.

As we finish one decade of implementation and look forward to the next, it is generally agreed that we have more to learn about whether or not policy modifications are needed to ensure that public programs achieve their intended consequences. Justin Dart, Chair of the President's Commission on the Employment of People With Disabilities, noted soon after enactment of the nation's premier disability rights law, that "The ADA is only the beginning. It is

not a solution. Rather, it is an essential foundation on which solutions will be constructed" (West, 1994). Now is a critical time for policy analysts to join the fray to answer important policy questions, to reexamine the essential foundations of ADA policy and assess their merit.

Stephen L. Percy is professor of political science and director of the Center for Urban Initiatives and Research at the University of Wisconsin-Milwaukee.

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