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### **Authors**

Waterstone, Michael E.  
Stein, Michael Ashley  
Wilkins, David B.

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## DISABILITY CAUSE LAWYERS

Michael E. Waterstone, Michael Ashley Stein, & David B. Wilkins

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### ABSTRACT

There is a vast and growing cause lawyering literature demonstrating how attorneys and their relationship to social justice movements matter greatly for law's ability to engender progress. But to date, there has been no examination of the work of ADA disability cause lawyers as cause lawyers. Similarly, despite an extensive literature focused on the ADA's revolutionary civil rights aspects and the manner in which the Supreme Court's interpretation of that statute has stymied potential transformation of American society, no academic accounts of disability law have focused on the lawyers who bring these cases.

This Article responds to these scholarly voids. We conducted in-depth interviews with many of the nation's leading disability rights cause lawyers. What we found makes three novel contributions. As the first examination of the activities of these public interest lawyers and their advocacy, it brings to light a neglected sector of an otherwise well-examined field. In doing so, this Article complements, but also complicates, the cause lawyering literature by presenting a vibrant and successful cohort of social movement lawyers who in some ways emulate their peers and in other ways have a unique perspective and mode of operation. The Article also forces a reconsideration of academic critiques of the efficacy and transformative potential of the ADA because it

demonstrates how disability cause lawyers have effectively utilized the statute to achieve social integration in the shadow of the Court's restrictive jurisprudence.

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“[W]e’ve been filling a void that for decades has been out there and [we have been] able to really have a fundamental impact on the lives of millions of people with disabilities. It has been an immense pleasure . . . to use law as the instrument for social change that I think it was designed for.”<sup>1</sup>

## INTRODUCTION

Extensive scholarship has explored the significance of the Americans with Disabilities Act (ADA) for creating social change. These examinations have largely focused on the ADA’s revolutionary civil rights aspects and the manner in which the Supreme Court’s interpretation of the statute has stymied potential transformation of American society. Yet, despite considerable academic analyses of the ADA, no study has focused on the lawyers who bring these disability civil rights cases.<sup>2</sup> This is a significant

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<sup>1</sup> Interview with Lawyer 13 (Feb. 21, 2011). In order to preserve the anonymity of our sources, we have identified each lawyer using the generic “Lawyer” title and assigned each a number. To further protect their identities, we have removed all reference to their employers and, in some cases, geographic location. This procedure is in accordance with protocols of the Institutional Research Board (LMVIRB 2010 S-66). IRB approval was obtained for this project, and the certificate is on file with the authors. The audio recordings and transcripts of these interviews are also on file with the authors.

<sup>2</sup> A lone study describes the role of lawyers in drafting the ADA, but not lawyers’ public interest litigation under the statute. See generally Neta Ziv, Cause Lawyers, Clients, and the State: Congress as a Forum for

omission from an otherwise vast cause lawyering scholarship demonstrating how attorneys and their relationship to social justice movements matter greatly for law's ability to engender progress.<sup>3</sup> In a companion piece, we began to explore the role of disability cause lawyers.<sup>4</sup> We noted that they differed from predecessor movement advocates by eschewing Supreme Court constitutional litigation in favor of lower federal court public accommodation cases that generated settlements and rulings affecting large numbers of people with diverse disabilities.<sup>5</sup>

This Article builds on our initial and unique research on the work performed by disability cause lawyers after the ADA. We interviewed the most active and nationally prominent disability rights attorneys to gain a deeper understanding of their daily practice, motivation, and self-awareness as leading advocates of the disability rights movement. Why have they elected to bring cases in a manner that diverges from that of predecessor civil rights movements? What do they feel their ethical and fiduciary duties are to both their immediate clients and to the broader disability rights community? And what litigation tools and tactics do these

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Cause Lawyering During the Enactment of the Americans with Disabilities Act, in *CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA* 211, 211–43 (Austin Sarat & Stuart Scheingold eds., 2001).

<sup>3</sup> See id. at 215.

<sup>4</sup> Michael Ashley Stein, Michael E. Waterstone & David B. Wilkins, Cause Lawyering for People with Disabilities, 123 *HARV. L. REV.* 1658 (2010) (book review).

<sup>5</sup> Id. at 1663–64.

cause lawyers feel are best suited for achieving their goals—at a time characterized by a Supreme Court that is averse to a progressive view of disability rights as well as to civil rights more generally?

This Article makes three novel contributions. It presents a snapshot, and helps tell the story, of disability cause lawyers' activities. The Article also begins situating disability cause lawyers within the emerging literature on law and social movements. In both tactics and strategy, disability cause lawyers operate similarly to lawyers for other causes. Yet, given the unique political and historical context of the disability rights movement, some important differences emerge that enlarge the understanding of what it means to be a cause lawyer. Finally, the Article forces a reconsideration of academic critiques of the efficacy and transformative potential of the ADA by demonstrating the ways that disability cause lawyers have effectively used the statute to achieve social integration in the shadow of the Court's restrictive jurisprudence.

The classic archetype of cause lawyering remains the heroic struggles of the Legal Defense Fund against American apartheid culminating in Brown v. Board of Education,<sup>6</sup> and depicts lawyers as the central actors who conceived and led the fight against segregation.<sup>7</sup> This iconic view has been challenged on the ground that cause lawyers were overly optimistic for believing constitutional litigation would remedy their

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<sup>6</sup> 347 U.S. 483 (1954).

<sup>7</sup> See, e.g., MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961 (1994).

movement's plight,<sup>8</sup> and furthermore were elitists who controlled and papered over schisms within their constituencies while striving to present their cases before the Supreme Court.<sup>9</sup> More recent iterations of cause lawyering take into account the activities of attorneys acting, respectively, on behalf of politically conservative groups<sup>10</sup> and gays and lesbians seeking equality.<sup>11</sup> What emerges is a more complex dynamic that acknowledges the traditional role lawyers and litigation play while at the same time assessing the prospects for winning political victories through courtroom defeats.<sup>12</sup> Modern social movement lawyers are also more successful in lobbying legislatures as an effective and nonlitigious means of serving their communities, while viewing advocacy as a multidimensional process.<sup>13</sup>

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<sup>8</sup>. See, e.g., GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 336–43 (1991).

<sup>9</sup>. See, e.g., Tomiko Brown-Nagin, Elites, Social Movements, and the Law: The Case of Affirmative Action, 105 COLUM. L. REV. 1436, 1455–66 (2005).

<sup>10</sup>. See, e.g., Ann Southworth, LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION (2008).

<sup>11</sup>. See, e.g., CARLOS A. BALL, FROM THE CLOSET TO THE COURTROOM: FIVE LGBT RIGHTS LAWSUITS THAT HAVE CHANGED OUR NATION (2010).

<sup>12</sup>. See generally Douglas NeJaime, Winning Through Losing, 96 IOWA L. REV. 941 (2011).

<sup>13</sup>. See infra note 183 and accompanying text.

In discussing their successes and failures, disability cause lawyers bear little resemblance to “single-minded and politically naive rights crusaders” who succumb to a myth of rights and a simplistic view of the interplay between litigation and social change.<sup>14</sup> Rather, these lawyers closely dovetail with advocates for political conservatives and gay and lesbian groups who view litigation as one form of a larger mobilization strategy,<sup>15</sup> engage in multiple forms of advocacy,<sup>16</sup> and have real, sustained connections to the communities they serve.<sup>17</sup> In addition, disability cause lawyers resemble their movement advocate peers in that their work generates radiating effects on the targets of their litigation as well as potential allies and the public;<sup>18</sup> mobilizes aligned constituencies within the movement;<sup>19</sup> and generates media coverage that transforms disputes “in ways that reassign blame and responsibility.”<sup>20</sup> And like other groups, disability cause lawyers are deft in securing new rights and

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14. Ann Southworth, Lawyers and the “Myth of Rights” in Civil Rights and Poverty Practice, 8 B.U. PUB. INT. L.J. 469, 469 (1999).

15. See infra note 249 and accompanying text.

16. See infra notes 181–85 and accompanying text.

17. See infra note 311 and accompanying text.

18. See, e.g., JOEL F. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM 29–31 (1978).

19. See, e.g., JENNIFER GORDON, SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS 65–66, 70–71 (2005); HELENA SILVERSTEIN, UNLEASHING RIGHTS: LAW, MEANING, AND THE ANIMAL RIGHTS MOVEMENT 232 (1996).

20. SOUTHWORTH, supra note 10, at 150.



favorable interpretations of existing rights through legislative and regulatory processes.<sup>21</sup>

The disability cause lawyer interviews also highlight distinctions from other social movement advocates that question and expand existing understandings of cause lawyers. If we consider Brown v. Board of Education as characterizing a “first wave” of cause lawyering,<sup>22</sup> it presents an instance of a social movement in conflict with an oppressive governmental structure, with the goal of toppling formally instantiated inequality. Lawyers advancing gay and lesbian equality, as well as conservative causes—a “second wave” of cause lawyering—find themselves in consistent and repeated value clashes, popularly thought of as culture wars. For example, advocates for marriage equality consistently find themselves in conflict with advocates for conservative groups. Similarly, the pro-life and pro-choice movements are familiar adversaries, finding themselves in opposition against each other in multiple forums.

Post-ADA disability cause lawyers, however, find themselves in a different historical and political context. Unlike other groups, they began with an omnibus civil rights statute enforceable with a private right of action.<sup>23</sup> Moreover, there is no entrenched, large, repetitive protagonist with which disability rights advocates consistently battle. Rather, their task involves educating—and litigating against when necessary—a broad range of employers, businesses, and public entities. Animus is not

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<sup>21</sup>. See, e.g., infra notes 181–85 and accompanying text.

<sup>22</sup>. 347 U.S. 483 (1954).

<sup>23</sup>. See infra text accompanying note 298.

typically an issue, but bias, stigma, and concerns about cost are constant ideological adversaries.

Despite pursuing multilayered forms of advocacy, lawyers for political conservatives and gays and lesbians have focused to some extent on reaching the Supreme Court.<sup>24</sup> In contrast, with less centralization and a better legislative starting place, disability cause lawyers are exceptional for the extent to which they eschew the Court. As one lawyer bluntly put it, “[I]f you don’t need the Supreme Court, don’t use it.”<sup>25</sup> When these lawyers litigate, they are primarily interested in winning through settlement or at the district court level. This victory can then be leveraged to transform other industry actors, ultimately creating cultural changes in the entities they target. Many disability cause lawyers thus avoid employment cases for the express reason that victories in that field, while important, will redound only to individuals seeking individual remedies and not benefit the greater community of persons with disabilities. Moreover, our research revealed some instances where disability cause lawyers operate more like corporate lawyers in that they respond to the advocacy goals of their highly organized and well-resourced clients. Sometimes this requires litigation, but in other instances the legislature

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<sup>24</sup>. See BALL, *supra* note 11, at 252–53 (noting that although a gradualist approach of legal challenges up to the Supreme Court worked in the sodomy context, in other contexts, gay and lesbian rights advocates sought to avoid Supreme Court review); SOUTHWORTH, *supra* note 10, at 152–58.

<sup>25</sup>. Interview with Lawyer 1 (Oct. 21, 2010).

and administrative state are the preferred forums.<sup>26</sup> Although scholars of other social justice groups have noted that lawyers operate in lawmaking arenas outside the courts,<sup>27</sup> disability cause lawyers show particular deftness and comfort in securing new rights and favorable interpretations of existing rights through legislative and regulatory processes.<sup>28</sup>

This research into the strategic motivations of modern disability cause lawyers also yields new insight into how American disability law functions in practice, and thereby both confirms and challenges existing scholarship. Commentators have argued normatively for the ADA's progressive application and rebuked the Supreme Court's narrow gatekeeping definition of disability.<sup>29</sup> Their assessments likewise have critiqued the ADA's implementation and dourly assessed its efficacy as a civil rights statute.<sup>30</sup> Despite the Court's parsimonious ADA jurisprudence, the disability cause lawyer interviews revealed a strikingly different picture in practice. The lawyers generally disagreed with the Supreme Court's ADA decisions.<sup>31</sup> Indeed, many contributed to the ADA Amendments Act (ADAAA) that eventually revised those rulings. Yet, the Court's judgments did not

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<sup>26.</sup> See infra notes 181–85 and accompanying text.

<sup>27.</sup> See, e.g., Kenneth W. Mack, Rethinking Civil Rights Lawyering and Politics in the Era Before Brown, 115 YALE L.J. 256, 260–61 (2005).

<sup>28.</sup> See infra notes 181–85 and accompanying text.

<sup>29.</sup> See infra notes 320–21.

<sup>30.</sup> See infra notes 323–24 and accompanying text.

<sup>31.</sup> See infra text accompanying note 325.

impact their daily work.<sup>32</sup> Simply put, the disability cause lawyers persisted in bringing public services and accommodations cases on behalf of people who met even restrictive definitions of disability and continued to secure meaningful changes in defendants' programs and businesses.

In a similar vein, scholars have asserted that Supreme Court decisions have undermined ADA enforcement by mooted civil rights attorney fees.<sup>33</sup> The disability cause lawyers we interviewed acknowledged that these rulings negatively affected their work, but also explained how they brought cases in states with generous attorney fees and intentionally tailored claims to negate the brunt of the Court's decisions.<sup>34</sup> Moreover, the lawyers were not inclined to push the limits of class action procedures to bring together diverse categories of people with disabilities, as commentators have championed.<sup>35</sup> Rather, the disability cause lawyers used the class action device when it was expedient to achieve results on a disability-by-disability basis.<sup>36</sup> Thus, even as the ADA and other civil rights statutes fared poorly in the Supreme Court and the resulting decisions were identified by academics as preventing societal transformation,<sup>37</sup>

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<sup>32</sup>. See infra text accompanying note 326.

<sup>33</sup>. See, e.g., Catherine R. Albiston & Laura Beth Nielsen, The Procedural Attack on Civil Rights: The Empirical Reality of Buckhannon for the Private Attorney General, 54 UCLA L. REV. 1087, 1090–92 (2007).

<sup>34</sup>. See infra notes 67–75 and accompanying text.

<sup>35</sup>. See infra notes 121–24 and accompanying text.

<sup>36</sup>. See infra notes 121–22 and accompanying text.

<sup>37</sup>. See infra notes 320–21 and accompanying text.

disability cause lawyers achieved significant progress for their clients. As such, the disability cause lawyers incrementally manifest part of the movement's long-held desire of social integration—the “right to live in the world.”<sup>38</sup> Until now, this story has been overlooked amidst the academic assault on the Court's ADA decisions.

The Article proceeds in three Parts. Part I explains our methodology for selecting and interviewing disability cause lawyers and presents an extended review of the results of those discussions. This data set is a rich compilation of the self-perceived successes and failures of a diverse group of lawyers that provides a unique snapshot of what the struggle to enforce and implement American disability law looks like on the ground. Part II situates the disability cause lawyers within the broader cause lawyering scholarship and compares the methodology, goals, and self-imposed ethics among modern social movement lawyers. Finally, Part III applies the substance of our interviews to disability civil rights scholarship. The day-to-day work of disability cause lawyers confirms some of the academic scholarship regarding the impact of the Supreme Court's narrow ADA and civil rights jurisprudence. The interviews, however, also challenge much established wisdom by revealing the overlooked story of how these lawyers successfully bring about social transformation for Americans with disabilities despite the decisions of the Supreme Court.

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<sup>38</sup>. See Jacobus tenBroek, The Right to Live in the World: The Disabled in the Law of Torts, 54 CALIF. L. REV. 841, 852 (1966).

## I. DISABILITY CAUSE LAWYER INTERVIEWS

There are many different ways to define “cause lawyer.”<sup>39</sup> Consistent with our prior research, we focused on lawyers who primarily engaged in litigation on behalf of people with disabilities, as opposed to lawyers whose main efforts were on other types of advocacy.<sup>40</sup> Accordingly, we

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<sup>39</sup>. See SOUTHWORTH, supra note 10, at 5; see also William B. Rubenstein, Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns, 106 YALE L.J. 1623, 1632–33 (1997) (using “professional public interest litigators” and private “pro bono attorney” as terms to describe civil rights lawyers pursuing these types of cases). See generally Scott Barclay & Anna-Maria Marshall, Supporting a Cause, Developing a Movement, and Consolidating a Practice: Cause Lawyers and Sexual Orientation Litigation in Vermont, in THE WORLDS CAUSE LAWYERS MAKE: STRUCTURE AND AGENCY IN LEGAL PRACTICE 171, 174 (Austin Sarat & Stuart Scheingold eds., 2005) (“The definition of cause lawyering is broad, encompassing a variety of tactics and strategies and emphasizing the transformative goals and motivations of the attorneys engaged in the work.”).

<sup>40</sup>. See Stein et al., supra note 4, at 1661 (“[W]e mean attorneys who spend a significant amount of their professional time designing and bringing cases that seek to benefit various categories of people with disabilities and who have formal connections with disability rights organizations.”). This choice may exclude some lawyers who could be considered cause lawyers.

started with the evolving Disability Rights Bar Association (DRBA).<sup>41</sup> The DRBA originated with “a group of disability counsel, law professors, legal nonprofits and advocacy groups who share a commitment to effective legal representation of individuals with disabilities.”<sup>42</sup> It describes itself as an online community of lawyers “who specialize in disability civil rights law” and facilitate the pursuit of stronger cases through information and strategy exchange, mentorship, and coordination efforts.<sup>43</sup> One of the stated values of the organization is that “[l]itigation and other legal advocacy strategies play a highly effective and necessary role in enforcing and advancing the rights of people with disabilities,” and one of its objectives is to “advance and enforce the rights of people with disabilities in all spheres of life through the use of litigation and other legal advocacy strategies.”<sup>44</sup>

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<sup>41.</sup> See DISABILITY RIGHTS BAR ASSOCIATION, <http://disabilityrights-law.org> (last visited Feb. 24, 2012). This organization was formerly called the Association of Disability Rights Counsel. Id. Professor Waterstone is a member of the DRBA.

<sup>42.</sup> Id.

<sup>43.</sup> Id. DRBA membership is limited to nonprofit organizations and private law firms and their lawyers who represent or advise persons with disabilities, individual attorneys representing persons with disabilities, and law school professors who teach or study disability rights law. Id. Members must certify that at least 90 percent of their disability-related work is on behalf of people with disabilities. Id.

<sup>44.</sup> Id.

We requested and received permission to contact members of the Executive Committee to see if they would interview for this project, but excluded several members of the Executive Committee who were not actively engaged in litigation. Using convenience sampling, we conducted semi-structured interviews of Executive Committee members in selected cities. We also interviewed several additional lawyers who were repeatedly recommended by the lawyers we first interviewed. This ultimately led to the interview of thirteen lawyers. Twelve were done in face-to-face interviews, and one was done via videoconferencing using the Internet-based program Skype. Each interview lasted between forty-five and ninety minutes, during which we asked questions about the following: their respective backgrounds; their current office and organization; the economic model on which such entities were based; the nature of the cases typically brought; their motivations for bringing cases; their views on and involvement with ADA employment litigation; what goals they sought subsequent to litigation and how they hoped to achieve those goals; their views on constitutional disability litigation and the Supreme Court; their views of the role of litigation in the disability movement; the use of media in their work; and finally, their connections with other disability cause lawyers and lawyers for other social movements.

Our interviewing methodology yielded access to lawyers in private law firms, lawyers affiliated with public interest organizations, and lawyers connected to different disability communities (including the Deaf, visually impaired, those with mental disabilities and psychosocial disabilities,



and the mobility impaired), with some geographic diversity.<sup>45</sup> Still, as an initial survey, the cohort interviewed lacked several representative factors. Because we targeted locations with multiple interviewees, certain geographic areas are absent. We also did not interview public enforcement officials at either the state (e.g., California's Department of Fair Employment and Housing) or federal (e.g., Department of Justice) levels. Although much of their work is significant, these officials fall outside our working definition of cause lawyers. We did, however, interview a high-level attorney in the National Disability Rights Network, the largest nonprofit membership organization for the Protection and Advocacy (P&A) network,<sup>46</sup> in order to obtain background information on the organization and its connections and relationships with disability cause lawyers.<sup>47</sup> Finally, a significant cohort of lawyers referred to as "high volume lawyers," or more derisively as "serial litigators" or "drive-by lawyers," consider themselves disability cause lawyers.<sup>48</sup> These lawyers

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<sup>45</sup>. We interviewed lawyers in California, Colorado, Maryland, and Washington, D.C.

<sup>46</sup>. See About NDRN, NATL DISABILITY RIGHTS NETWORK, <http://www.ndrn.org/en/about/about-ndrn.html> (last visited Feb. 24, 2012).

<sup>47</sup>. Interview with Lawyer 12 (Feb. 18, 2011).

<sup>48</sup>. See Stein et al., supra note 4, at 1681 n.72. Typically, these lawyers bring access lawsuits against businesses, filing multiple lawsuits at once, pursuing early settlements, representing the same clients as lead plaintiffs, and initiating their claims with a demand letter to the challenged business. Id. These lawyers are controversial for bringing a high volume of

were excluded from our interviews because of the nature of the network through which we chose to construct our sample, and not from any negative value judgment ascribed to their work.<sup>49</sup>

#### A. Backgrounds

Most lawyers we interviewed had either some significant connection with disability or life experience with it. Eight cause lawyers interviewed identified themselves as lawyers with disabilities and another was married to a lawyer with a disability.<sup>50</sup> Nearly every lawyer identified their work in this area as being based in some form of a commitment to social justice.<sup>51</sup> Several had backgrounds in other types of civil rights work,

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cases under the ADA's public accommodations provisions or comparable state law and seeking quick settlements. See Samuel R. Bagenstos, *The Perversity of Limited Civil Rights Remedies: The Case of "Abusive" ADA Litigation*, 54 UCLA L. REV. 1, 2–5 (2006).

<sup>49.</sup> Indeed, we have previously opined as to the value of this type of litigation, if not the approval of the tactics these lawyers use. See Stein et al., *supra* note 4, at 1681 n.72 (acknowledging that “these lawyers provide a valuable public service”).

<sup>50.</sup> See, e.g., Interview with Lawyer 7 (Dec. 21, 2010); Interview with Lawyer 8 (Dec. 21, 2010).

<sup>51.</sup> See, e.g., Interview with Lawyer 2 (Oct. 10, 2010) (“We started [the law firm with] the idea of a firm that could do good and do well at the same time.”); Interview with Lawyer 5 (Dec. 17, 2010) (referring to work as a “human issue” that is “so important”); Interview with Lawyer 9 (Feb. 18, 2011) (“[Our mission is] about equality and people with disabilities,

like unions, Title VII employment discrimination on behalf of women and minorities, and the rights of low wage workers.<sup>52</sup> Almost uniformly, these lawyers came from elite backgrounds, with most graduating from what are universally considered top-ranked national law schools.<sup>53</sup> Several clerked for federal judges after law school, held government positions, or worked at elite law firms.<sup>54</sup>

## B. Type of Office and Financing

The lawyers who were interviewed worked in several different types of settings. Some lawyers moved between public interest firms, private law firms, and government, and could thus comment about both present and past positions.<sup>55</sup> At the time of the interviews, five of the lawyers

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particularly serious mental disabilities or clients of the public mental health system . . . having the opportunity to live as much as possible like people without disabilities.”).

<sup>52.</sup> See, e.g., Interview with Lawyer 3 and Lawyer 4 (Dec. 17, 2010) (detailing Lawyer 3’s prior work involvement with union and civil rights matters and Lawyer 4’s previous engagement with Title VII litigation).

<sup>53.</sup> These include Boalt Hall (Berkeley), Cornell, Harvard, Hastings, Georgetown, University of Texas, Northwestern, and Yale.

<sup>54.</sup> See, e.g., Interview with Lawyer 3 and Lawyer 4 (Dec. 17, 2010) (detailing Lawyer 3’s prior work involvement with union and civil rights matters and Lawyer 4’s previous engagement with Title VII litigation).

<sup>55.</sup> See, e.g., Interview with Lawyer 1, supra note 25; Interview with Lawyer 8, supra note 50; Interview with Lawyer 13, supra note 1.

were at private law firms,<sup>56</sup> six were at public interest law firms,<sup>57</sup> and two were in government and academia.<sup>58</sup> For the lawyers in private law firms, disability rights cases ranged from being over half of their caseload to the vast majority of their practice.<sup>59</sup> These were all small law firms, ranging from one- or two-person law firms to fourteen- or fifteen-person firms.<sup>60</sup> None of these lawyers viewed themselves as doing this work primarily pro bono.<sup>61</sup> Although a minority of disability rights cases yielded

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<sup>56.</sup> Interview with Lawyer 2, supra note 51; Interview with Lawyer 3 and Lawyer 4, supra note 52 (both Lawyer 3 and Lawyer 4); Interview with Lawyer 7, supra note 50; Interview with Lawyer 8, supra note 50.

<sup>57.</sup> Interview with Lawyer 1, supra note 25; Interview with Lawyer 5, supra note 51; Interview with Lawyer 6 (Dec. 17, 2010); Interview with Lawyer 11 (Feb. 18, 2011); Interview with Lawyer 12, supra note 47; Interview with Lawyer 13, supra note 1.

<sup>58.</sup> Interview with Lawyer 9, supra note 51; Interview with Lawyer 10 (Feb. 18, 2011).

<sup>59.</sup> See, e.g., Interview with Lawyer 7, supra note 50 (“The concept from the very beginning was to . . . focus on Title 2, Title 3 Rehab Act and Fair Housing Act. And that has been what we’ve done.”); Interview with Lawyer 8, supra note 50 (“I’m almost exclusively a disability rights attorney.”).

<sup>60.</sup> See, e.g., Interview with Lawyer 3 and Lawyer 4, supra note 52 (Lawyer 3 is a solo practitioner); Interview with Lawyer 7, supra note 50 (a two-partner firm).

<sup>61.</sup> See, e.g., Interview with Lawyer 3 and Lawyer 4, supra note 52 (detailing Lawyer 4’s agreement that cases are not a pro bono endeavor and

damage judgments,<sup>62</sup> attorneys' fees were the primary way that they generated payment for their cases.<sup>63</sup> The one exception was private

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noting that "we do get paid for the work we do").

<sup>62.</sup> See Interview with Lawyer 1, supra note 25 (asserting that the ADA usually fails to provide for damages); Interview with Lawyer 6, supra note 57 (reflecting that most cases do not go to trial for a judgment to be rendered); Interview with Lawyer 11, supra note 57 ("[E]verybody knows that Title III of the ADA doesn't allow for damages."). But several of the lawyers we interviewed were involved in National Federation of the Blind v. Target Corp., 582 F. Supp. 2d 1185, 1209 (N.D. Cal. 2007) (denying Target's motion for summary judgment), and 452 F. Supp. 2d 946, 966 (N.D. Cal. 2006) (granting part of Target's motion to dismiss but denying the remainder of it). See, e.g., Interview with Lawyer 13, supra note 1. This case challenged the accessibility of Target Corporation's website. 582 Supp. 2d at 1188–89. It ultimately settled for six million dollars. Target Settles Web Suit, N.Y. TIMES, Aug. 28, 2008, at C8.

<sup>63.</sup> See, e.g., Interview with Lawyer 3 and Lawyer 4, supra note 52 (statement of Lawyer 3) ("[W]e only have to take cases that . . . would be entitled to fees . . . under fee shifting statutes because neither our organizations nor our individuals pay us."); id. (statement of Lawyer 4) ("[W]e select cases based on the ability to be successful. We choose cases that we think will ultimately have a result for our clients . . . [and where they are] entitled to attorneys' fees."); Interview with Lawyer 7, supra note 50 ("[We operate] entirely [on] attorneys' fees.").

lawyers who did work for the NFB, which pays its lawyers by the hour.<sup>64</sup> Lawyers who worked for the NFB noted that it paid by the hour to ensure that it received top-level legal service,<sup>65</sup> and other lawyers who did not work for the NFB spoke with admiration about its litigation organization and resources.<sup>66</sup> For the private lawyers, all believed that the Supreme Court's decision in Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources—which reversed the catalyst theory of recovering attorneys' fees and replaced it with the requirement that a prevailing party achieve an in-court resolution of the dispute

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<sup>64.</sup> Interview with Lawyer 3 and Lawyer 4, supra note 52 (statement of Lawyer 3) (“It’s very different . . . NFB pays by the hour.”).

<sup>65.</sup> One lawyer explained that when first asked to work on an NFB case: “I told them I was so excited about getting this work that I wanted to discount my hourly rate, not realizing there was a long history of the blind and other people with disabilities getting second rate services as charity. And Dr. [Jernigan] . . . was still alive then and said, ‘[W]e have been dealing with lawyers for nearly 50 years. We long ago concluded that lawyers pay the most attention to that on their desk which pays the best. If you were to represent us, we want your undivided attention, am I clear?’”

<sup>66.</sup> See, e.g., Interview with Lawyer 7, supra note 50 (“[W]e literally will sit around [green with envy at] the infrastructure that the NFB has.”).

to recover attorneys' fees<sup>67</sup>—had dramatically impacted their ability to receive payment for cases.<sup>68</sup>

These private lawyers talked about how Buckhannon led them to bring cases in jurisdictions like California and Massachusetts where they could include state law claims for damages.<sup>69</sup> Despite noting that many of their cases were prime candidates for not receiving attorneys' fees under Buckhannon,<sup>70</sup> because they often litigated under Title III of the

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<sup>67.</sup> 532 U.S. 598, 604–05 (2001).

<sup>68.</sup> See, e.g., Interview with Lawyer 2, supra note 51 (“[W]e take it as a given that when we do a civil rights case in Maryland we’re going to lose money. We’re going to be pressured to settle.”); Interview with Lawyer 7, supra note 50 (stating that “[Buckhannon] took a big bite out of our business plan” and noting that before Buckhannon, the lawyer figured she could get paid under the catalyst theory).

<sup>69.</sup> See Interview with Lawyer 7, supra note 50 (“[Buckhannon] pushed us to strengthen the California practice.”); Interview with Lawyer 8, supra note 50 (“[W]e find ourselves with the federation cases in particular, we find ourselves going to California a lot where . . . if we employ state law we don’t have to worry about [Buckhannon].”); Interview with Lawyer 13, supra note 1 (“[P]articularly [in] California [Buckhannon] is not as big of a . . . concern because California state law has a fee recovery provision that still contains a catalyst fee recovery.”).

<sup>70.</sup> See, e.g., Interview with Lawyer 7, supra note 50 (“[Buckhannon] took a big bite out of our business plan.”); see also Interview with Lawyer 13, supra note 1 (“[Buckhannon] has impacted . . . every area of civil

ADA where only injunctive relief was available,<sup>71</sup> these lawyers developed strategies to blunt its effect. These strategies included bringing cases with broad requests for injunctive relief because they believed, under Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.,<sup>72</sup> a high mootness burden existed.<sup>73</sup> They also required defendants to sign a letter waiving Buckhannon before engaging in negotiations to remedy alleged access violations.<sup>74</sup> Finally, some of the lawyers performed less traditional legal work, such as drafting policy positions on proposed regulations and filing amicus briefs, on a pro bono basis subsidized by their firms.<sup>75</sup>

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rights.”).

<sup>71.</sup> See, e.g., Interview with Lawyer 7, supra note 50 (describing litigation under Title III of the ADA as a “perfect storm” for Buckhannon issues).

<sup>72.</sup> See 528 U.S. 167, 189–94 (2000).

<sup>73.</sup> See Interview with Lawyer 7, supra note 50 (“[S]hort of things that are concrete in the literal and figurative sense, almost anything comes undone.”).

<sup>74.</sup> Interview with Lawyer 3 and Lawyer 4, supra note 52 (statement of Lawyer 3) (“[The letter we require defendants to sign to engage in negotiations] waives [Buckhannon] specifically, expressly. Because otherwise—and we could say otherwise—we could have a great agreement, but at the end of the day you could say ‘you’re out of luck, you didn’t have a binding judgment order.’”).

<sup>75.</sup> See id. (discussing unpaid work on Justice Department regulations and amicus briefs); see also Interview with Lawyer 7, supra note 50



Other lawyers worked in public interest law firms or policy think tanks. These ranged from cross-disability organizations that represented people with different types of disabilities,<sup>76</sup> organizations that represented primarily individuals and groups with one type of disability,<sup>77</sup> and broad public interest organizations that had one disability practice area within their broader portfolio.<sup>78</sup> These entities had different backgrounds and histories.<sup>79</sup> They all relied to varying extents on fundraising to support their

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(discussing work on an amicus brief in a Ninth Circuit disability access case).

<sup>76</sup>. E.g., Interview with Lawyer 12, supra note 47.

<sup>77</sup>. E.g., Interview with Lawyer 11, supra note 57.

<sup>78</sup>. E.g., Interview with Lawyer 5, supra note 51.

<sup>79</sup>. One was purposefully set up to be the “National Defense Fund” for disability rights, consciously trying to “piggy back on the movements of minorities and women.” Interview with Lawyer 6, supra note 57. At the time the group was started, this move was viewed as a “whole change in culture to go from . . . a name of a disease basically at the top of your letterhead to a name that’s very obviously continued in a civil rights tradition.” Id. Describing this creation, this lawyer stated:

“[W]e were very aware of the fact that we wanted to be in that tradition. And we convened a meeting in 1980 of the top cause lawyers in the country basically to come to San Francisco where we introduced them to disability rights as a civil rights issue and we wanted to learn from them.”

Id. Another organization that has a disability rights component to its

work, which included donations from big law firms, cy pres contributions, and state and federal grants.<sup>80</sup> Several lawyers noted how fundraising had become more difficult in the current economic downturn.<sup>81</sup> To varying degrees, they also relied on attorneys' fees to fund some of their litigation activity.<sup>82</sup> Some identified Buckhannon as an issue that adversely

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practice was initially set up as a traditional legal aid society, doing traditional legal services for poor people. Interview with Lawyer 5, supra note 51. Eventually the decision was made to opt out of federal funds and to become more of a specialty group with a commitment to workers' rights, with program areas in different areas including disability rights. Id. Another organization was an academic think tank focusing on disability rights issues that was connected to a university. Interview with Lawyer 1, supra note 25. Its origins were as a social science research institute, with the goal of using research to support advocacy in the areas of costs of accommodations, vocational rehabilitation, and the implementation of disability rights. Id.

<sup>80.</sup> See, e.g., Interview with Lawyer 5, supra note 51 ("We have historic donors from the big law firms. . . . We solicit outside contributions, we do some grant writing."); Interview with Lawyer 6, supra note 57 (emphasizing focus on state and federal grants).

<sup>81.</sup> See, e.g., Interview with Lawyer 6, supra note 57 ("[F]unding [is] always a struggle.").

<sup>82.</sup> See, e.g., Interview with Lawyer 5, supra note 51 ("We consider attorneys' fees . . . and once we have cases filed we absolutely keep our eye on the attorneys' fees as an important way to sustain the work.");

impacted their practices;<sup>83</sup> others felt it made less of an impact.<sup>84</sup> These lawyers generally appeared less tied to attorneys' fees than their private counterparts.<sup>85</sup> They felt that their cases involved large enough requests

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Interview with Lawyer 6, supra note 57 (agreeing that attorneys' fees "very much" figure into funding); see also Interview with Lawyer 1, supra note 25 ("I do think [Buckhannon] is a big issue. I do think that the treatment of attorneys who do this work as the private attorneys general is very important [and] that needs to be support[ed]. And particularly since the ADA for the most part doesn't provide for damages. Somebody needs to pay professionals to do this job, and the federal government's not going to be able to do it all.").

<sup>83.</sup> See, e.g., Interview with Lawyer 6, supra note 57 ("[Buckhannon] does dictate a lot of what we will and will not do."); Interview with Lawyer 9, supra note 51 ("[We] sort of have to not count on getting fees. . . . [T]he environment for winning cases and then the environment around fees is so bad that we always kind of treat fees as a windfall.").

<sup>84.</sup> See, e.g., Interview with Lawyer 11, supra note 57 ("[Buckhannon has not been an issue] for us. . . . [T]here are some ways of getting around [Buckhannon]. . . . The first way is to put in a damage claim. And, seemingly to me, lots of places get federal financial assistance. . . . So we bring a Rehab Act claim."); Interview with Lawyer 13, supra note 1 (explaining that Buckhannon has not had as much of a direct impact on his practice, especially compared to private practice attorneys).

<sup>85.</sup> See Interview with Lawyer 5, supra note 51 ("We try not to let [attorneys' fees] drive the case selection. . . . [I]n general these big institutions

for injunctive relief that it was practically impossible for defendants to completely moot out their claims.<sup>86</sup> These lawyers also generally had more freedom to work on other legal advocacy, including policy research, regulatory work, and amicus briefs.<sup>87</sup>

### C. Relationships With Clients and the Disability Rights Community

Although the relationships between the lawyers and their clients varied, there were also some significant commonalities. Nearly all these lawyers, public and private, viewed themselves as lawyers for

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aren't able to reform their systems in time. So we end up not having a [Buckhannon] problem."); see also Interview with Lawyer 1, supra note 25 ("Here we don't do much straight litigation, so it's not attorneys'-fee funded. So I don't think very much about [Buckhannon] now."); Interview with Lawyer 5, supra note 51 (agreeing that in employment cases, damage claims can be brought, so Buckhannon is not an issue); Interview with Lawyer 6, supra note 57 ("[W]e put in our retainer agreement now . . . that our clients won't waive our fees.").

<sup>86.</sup> See Interview with Lawyer 9, supra note 51 ("I suspect it's rare that you have a big investment in a case . . . [where] there's been a lot of litigation that goes on and then the government just says 'oh, you win' [rather than settling].").

<sup>87.</sup> See, e.g., Interview with Lawyer 1, supra note 25 (organizing Disability Rights Bar Association and working on policy briefs); Interview with Lawyer 5, supra note 51 (doing legislative work); Interview with Lawyer 6, supra note 57 (working on legislative issues).

the entirety of, or at least various segments of, the disability community.<sup>88</sup> They generally had significant relationships with these communities that transcended any individual case, because the lawyers were themselves people with disabilities, had close family members with disabilities, or maintained their most significant professional relationships with disability rights organizations.<sup>89</sup> These lawyers reflected on how they used these relationships to gauge community need and direction for the types

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<sup>88.</sup> See, e.g., Interview with Lawyer 5, supra note 51 (“I think it’s important to try to—I don’t know if the word listen is right but to try and pay attention to what people [in] the community want, not just what the lawyers want. I go to—I also go to lawyer events but I will also go to disability community events.”); Interview with Lawyer 6, supra note 57 (noting that in the early days of the organization, a nonlawyer with deep connections to the disability community, who “was very much of the movement” and knew “how it is to try to get a doctor’s appointment and [solve] access issues” was the one who did all the community trainings and helped build a transformational moment when the disability community took ownership of the law); Interview with Lawyer 7, supra note 50 (describing a significant and close relationship with the state disability rights group, and remarking that “when we came to [our current city], we met up and then started working with the folks at the [state disability rights group]. . . . [W]e love working with them, they’re awesome clients, they’re some of our best friends . . . And we knew that we would have a very powerful ally that . . . wanted to go out and enforce the law through litigation.”).

<sup>89.</sup> See supra notes 50–51 and accompanying text.

of cases that should be brought.<sup>90</sup> Several lawyers went even further in their articulation of how they viewed themselves as being driven by community need: they explained that their clients in the disability community were very clear about why they wanted to bring litigation and what they wanted to accomplish, and they viewed their role as providing the legal skills and work needed to accomplish those goals through litigation.<sup>91</sup> At

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<sup>90.</sup> See Interview with Lawyer 5, supra note 51 (“[In our workers’ rights clinic] we serve thousands in a limited way, with advising counsel. So because of that . . . it’s almost like we have all this data about this group of several thousand low-wage workers [that] are coming [through] the door every year. And from that we have an understanding of—at least from that population—what the needs are.”); see also Interview with Lawyer 3 and Lawyer 4, supra note 52 (statement of Lawyer 4) (“Well everything is client driven, we don’t think of an issue and then just decide to do a case about it. We really consider ourselves the lawyers for [various organizations of individuals who are blind]. . . . And people tell us what sort of problems they’re having and then that’s how we select our cases.”); Interview with Lawyer 6, supra note 57 (“Sometimes it’s like someone actually comes and alerts us on an issue that we go ‘Whoa that’s quite an issue,’ and other times it’s areas that we know; it’s kind of buzzing in the community that there is no access but no one is doing anything about it.”); Interview with Lawyer 1, supra note 25 (“[I]t’s right to [respond to client needs] because that is the community’s expression of what is important.”).

<sup>91.</sup> See Interview with Lawyer 2, supra note 51 (“I am strictly the chauffeur. [My client] decides what it wants to focus on and the character of

least one lawyer took the view that there was some disconnect between disability rights litigators and their principals in the various disability rights organizations.<sup>92</sup> It was clear that different lawyers primarily served, and had connections with, discrete populations of people with disabilities. Some lawyers brought cases primarily on behalf of individuals with mobility impairments. Others litigated primarily on behalf of blind individuals. Even within these communities, there was a split between lawyers who primarily served the NFB and lawyers who served the ACB and state affiliates.<sup>93</sup> There were some examples of cross-advocacy by lawyers who

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the result right down to [whether you] define accessibility in terms of some kind of objectives—kind of like what category are you going to do—[such as] a functional standard, like all information and transactions available to sighted people must be available to the blind person with a substantially equal ease of use. So in this respect, I am very much like any private practice work with clients because [my client] is deciding. . . . [M]ake no mistake about it, I'm never the decision maker—it's [my client] that's making the decisions.”).

<sup>92.</sup> See Interview with Lawyer 10, supra note 58 (“I just . . . felt like there was a division between the lawyers that were litigators and saw themselves as litigators and the kind of folks that were running disability membership organizations.”).

<sup>93.</sup> See Interview with Lawyer 3 and Lawyer 4, supra note 52 (statement of Lawyer 3) (“[W]e don't do any cases with NFB because there [are] organizational differences . . . but I think we would say that we try very hard to have a really good relationship with [NFB lawyers] because we all

generally served one community or another, but some lawyers felt they represented the interests of one community of people with disabilities because they understood these issues best.<sup>94</sup> Other lawyers had a more consistent cross-disability practice and served various communities.<sup>95</sup> Some lawyers spoke longingly of a more unified disability community but felt it was difficult given the very diverse nature of the larger movement.<sup>96</sup>

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agree that there is plenty of work to go around and it doesn't help anyone for there to be any internal competition."); see also Interview with Lawyer 8, supra note 50 (wishing to ensure that "when the ACB is involved or something, that we were acting enough in the coordinating fashion that we're not hurting the overall state of the law").

<sup>94.</sup> See, e.g., Interview with Lawyer 3 and Lawyer 4, supra note 52 (statement of Lawyer 3) ("I think . . . that there's really a lot of issues around blindness and to do it right, I wouldn't touch an issue around deafness or hearing impairment . . . . We know what's involved in doing a good job for blind people so we know what we don't know in these other fields.").

<sup>95.</sup> Lawyers also noted that some issue areas, like employment and technology, have issues that transcend individual disabilities. See, e.g., id. ("Well I think the technology connection is cross over. I think we are seen as leaders because of our work that we have done in the disability technology field which is . . . large for blindness but also involves deafness . . . at least with the experts.").

<sup>96.</sup> See, e.g., Interview with Lawyer 7, supra note 50 ("[It] is a very diverse movement and for whatever reason one part of it has gotten



#### D. Cases and Litigation Strategy

The lawyers who were interviewed brought cases under different disability rights laws. These included section 504 of the Rehabilitation Act;<sup>97</sup> Titles I, II, and III of the ADA;<sup>98</sup> the Fair Housing Amendments Act;<sup>99</sup> the Individuals with Disabilities Education Act;<sup>100</sup> state disability rights laws;<sup>101</sup> and others.<sup>102</sup> In terms of the issue areas of cases, although different lawyers had different practices, it is possible to note some generalities. The largest pocket of concentration was on various forms of access litigation under Titles II and III of the ADA. In this area, some groups—particularly the NFB—purposefully targeted access to technology for individuals who are blind.<sup>103</sup> Similarly, some lawyers focused on making

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very organized around the NFB, but I think if you sat down and told, ADAPT . . . and Californians for Disability Rights and [the Colorado Cross Disability Coalition] and United Spinal and [said]: ‘Okay, everybody is going to get together under one banner and . . . this is going to be our litigation strategy’ there will be just [uproarious] laughter.”).

<sup>97.</sup> 29 U.S.C. § 794 (2006).

<sup>98.</sup> 42 U.S.C. §§ 12101–12213.

<sup>99.</sup> Id. §§ 3601–3619.

<sup>100.</sup> 20 U.S.C. §§ 1400–1419.

<sup>101.</sup> See, e.g., CAL. COV. CODE §§ 52(a), 54.3 (West 2006).

<sup>102.</sup> MASS. GEN. LAWS ch. 93, § 103 (2006). These include, among others, the Randolph-Sheppard Act, 20 U.S.C. § 107, and the Air Carrier Access Act, 49 U.S.C. § 41705.

<sup>103.</sup> See Interview with Lawyer 2, supra note 51 (“[A] very good

the financial services industry—including ATMs and other point-of-sale machines—accessible to blind individuals.<sup>104</sup> Other lawyers worked

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example of that is that in the late '90s . . . Marc [Maurer the president of the NFB] . . . sat down with me and he said, 'Look, technology should be incredibly liberating [for] the disability community and instead because . . . designers of technology aren't thinking about access, we're actually being more isolated than we were.' And I asked him to explain and he said, '[when we] buy a new house today the [stove] was inaccessible, the washer and dryer . . . and the thermostat are inaccessible because all the dials are gone and things I used to be able to do for myself independently I can't do anymore.' And he said, 'I want you to design a campaign to get the attention of technology developers.'"); see also Interview with Lawyer 1, supra note 25 ("Right now, I've been working mostly on technology cases, websites, e-book readers, other forms of educational technology and other more general technology to get accessibility built into the mainstream. . . . [T]his is such a huge opportunity for people with print disabilities, not just blind but hearing disabilities and learning disabilities and intellectual disabilities and all these things. It's a huge opportunity, but if we don't start to do it every day the way we do other things . . . you've got a brand new thing that doesn't work and people will be further behind than they were. So everybody else will get their information off of Google and blind people have to find a paper book and have it . . . turned into a disc-readable version. And so it's an opportunity and a huge risk and that's why I'm interested in that.").

<sup>104.</sup> See, e.g., Interview with Lawyer 3 and Lawyer 4, supra note 52

to make state and local governments and privately-owned places of accommodation accessible for individuals who use wheelchairs in terms of both physical infrastructure and those entities' programs and policies.<sup>105</sup>

Other groups worked on cases involving community integration, implementing and extending the Supreme Court's decision in Olmstead v. L.C.<sup>106</sup> Case selection of some lawyers was driven by the missions of their organizations; in other instances, lawyers were driven by path dependence—they originally worked on one type of case, achieved success and became known for it, and then duplicated that type of case multiple times.<sup>107</sup>

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(statement of Lawyer 4) (“Our goals [in targeting financial services industries] are for people with visual impairments and other people with disabilities to have independence and live decent lives.”).

<sup>105.</sup> See, e.g., Interview with Lawyer 7, supra note 50 (“[T]he goal is to get these companies to both change their physical plant and change [the way] they do business.”).

<sup>106.</sup> Olmstead v. L.C. ex rel Zimring, 527 U.S. 581, 587, 607 (1999) (holding that Title II of the ADA includes a preference for individuals to be put in community-based treatment programs instead of institutions); see Interview with Lawyer 9, supra note 51 (“[Our] mission really is about community integration.”).

<sup>107.</sup> See Interview with Lawyer 3 and Lawyer 4, supra note 52 (statement of Lawyer 4) (“After we had a few talking ATM agreements we started getting complaints from people with visual impairments, members of these

When polled about why they bring specific cases, the lawyers were uniformly uninterested in using the courts to dramatically change the landscape of disability law. Rather, the most common answer was some variation of litigating to “make a point.”<sup>108</sup> These lawyers were most interested in bringing cases that changed not only the behavior of the given defendant in the case, but also that of other similarly situated defendants who were not parties to the lawsuit. One lawyer stated:

“[I am] looking for the industry change case . . . [Y]ou look for the case that will change a lot of behavior besides just the behavior of the individual [defendant]. Because we simply

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affiliated ACB organizations, that were saying, ‘You know I used to be able to check out at the grocery store and use my ATM card on a tactile keypad[, but] the grocery store recently swapped out those machines for flat screen machines [and now] I can’t check out at the grocery store and use the ATM card without giving the clerk my pin, so can we do something about that.’ So that generated another twelve cases.”); see also Interview with Lawyer 7, supra note 50 (discussing how initial litigation against a national company in one city led to similar cases in a different state).

<sup>108</sup>. See, e.g., Interview with Lawyer 1, supra note 25 (“[M]ostly for me I want to win, I want to get the issue resolved and I want to get it settled and that can be at the local level, it can be at the state level, it can be at the trial level, it can be at the appellate level. Mostly when I go about doing something it’s not about making law, it’s about making a point.”).

don't have the resources to address one by one . . . you do selective enforcement to change the behavior of many."<sup>109</sup>

This same lawyer, explaining attempts to change behavior through litigation, explained that with technology cases, the goal was to change the law enough to make additional defendants feel that they could be liable for certain behaviors.<sup>110</sup> This sentiment, although expressed differently, was shared by many of the lawyers.<sup>111</sup> The largest exception

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<sup>109.</sup> Interview with Lawyer 2, supra note 51. This lawyer referenced litigation against a large retailer that had concluded with the court ruling that the retailer's online website needed to be accessible to consumers who are blind. The lawyer noted that in a study of the top ten e-tailing sites, one third of the sites were more accessible six months after the lawsuit than the day the suit was filed. Id.

<sup>110.</sup> Id.

<sup>111.</sup> See Interview with Lawyer 6, supra note 57 ("On litigation basically our aim is . . . that it has to be a case that is systemic in some way."); see also Interview with Lawyer 3 and Lawyer 4, supra note 52 (statement of Lawyer 3) ("[W]e changed the banking industry by negotiating 19 agreements for talking ATMs, websites in Braille and large print and audio. . . . [N]ow the finance industry is the most accessible private industry."); id. (statement of Lawyer 4) ("[W]e choose cases that we think will ultimately have a result for our clients that includes injunctive type relief, you know some kind of systemic change with the company that we're approaching."); Interview with Lawyer 7, supra note 50 ("[T]he goal is to get these companies to both change their physical plant and change [the

to this “make a point” vision included cases that were brought purely to counter a position, generally taken by a state agency, which infringed on an important right of someone with a disability.<sup>112</sup>

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way] they do business.”); Interview with Lawyer 8, supra note 50 (“[G]etting involved in litigation is a major investment. It takes a lot of resources. So we want to bring cases that are high impact and will truly help change the system.”); Interview with Lawyer 11, supra note 57 (“[W]e’re looking for cases that translate to help [for] as many people as possible.”); Interview with Lawyer 13, supra note 1 (“[W]e want to know that the work that we put into it if we’re successful is going to change society in a fundamental way, and remove barriers to not just the main plaintiff, but to an entire class of people with disabilities.”).

<sup>112.</sup> See Interview with Lawyer 1, supra note 25 (“[At previous disability rights organizations] we did things where we knew something bad was going to happen, the State is going to cut back benefits or the county is going to close [a hospital that serves people who have rehabilitation needs] and something had to be done about that.”); see also Interview with Lawyer 2, supra note 51 (“[T]here is a whole other category of cases where you have no choice but to do them, the case where some state agency thinks ‘[because a] new mother is blind, she can’t possibly raise the child, [so] we are taking the child.’ And those [cases] you just do because they are so fundamental that you have to do them and I think I’ve had maybe five of those ‘take the child away cases,’ either involving mothers or grandmothers with custody.”); Interview with Lawyer 8, supra note 50 (“[A] classic example . . . is some of these custody cases . . . [in which] a state agency tries to

We also polled the lawyers on whether they viewed themselves as trying to enforce existing law or make new law. Generally speaking, these lawyers felt they were trying to do both, and there was no particular correlation between private and public interest lawyers. There were no differences in how private or public interest lawyers explained themselves. Most felt that the existing laws were good, although underenforced.<sup>113</sup> From this, some lawyers viewed their role as being law enforcers.<sup>114</sup> Other lawyers were not interested in bringing enforcement

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take a child away from a blind person because of alleged concerns about safety . . . or it comes up in custody [battles] where, let's say a sighted father will say, 'No no no, I don't want the child with the mom, she's blind.' So those are very individual battles in some ways, but we get involved in those to help our members, but also to make a point, of course.”).

<sup>113.</sup> See Interview with Lawyer 3 and Lawyer 4, supra note 52 (statement of Lawyer 4) (“[W]e think the law is pretty good already. . . . And the courts are bad.”); see also Interview with Lawyer 8, supra note 50 (“Oh yeah, absolutely [I believe the ADA is under-enforced]. I don't suppose it's much different then what other civil rights lawyers found at first with, you know, the Civil Rights Act of 1964. Just putting something on paper is . . . good, it's a starting place, but it doesn't do you any good until people really understand it and enforce it.”); Interview with Lawyer 9, supra note 51 (“[E]xisting law—it's not enforced very well.”).

<sup>114.</sup> See, e.g., Interview with Lawyer 1, supra note 25 (“If I want to enforce the law . . . generally I want to enforce it at its broadest—that's when I do litigation.”).

actions where there were clear statutory violations,<sup>115</sup> preferring instead to focus on securing favorable interpretations of existing law so that other lawyers benefit from these interpretations.<sup>116</sup> Thus, some lawyers evinced an interest in creating favorable ADA precedent, although nearly always tied to specific relief for a client.<sup>117</sup> Others were expressly

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<sup>115.</sup> See Interview with Lawyer 9, supra note 51 (“[I]f you mean enforc[ing] existing law in terms of . . . [where there is] a pretty clear understanding of what existing law is, [and] let’s just enforce it—no, we have no interest.”); see also Interview with Lawyer 11, supra note 57 (“[W]e like to litigate in areas that have not been litigated by others in the past. We’re looking to get good case law out there as illustrations for others to kind of carry on.”).

<sup>116.</sup> See Interview with Lawyer 9, supra note 51 (explaining the statutory interpretation issues his organization sought to establish under the Olmstead decision and stating that “on the question of whether people are capable of living outside the institution, does the state get to make that decision first? . . . If the state has a process for making those determinations, what degree of deference is due to it? If they don’t have such a system, can the judge make that decision on his own in a trial?”).

<sup>117.</sup> See Interview with Lawyer 7, supra note 50 (“[P]art of the challenge of Title [III] is even now—15 years in, it’s still kind of new. There’s still a lot of nooks and crannies that have not been ruled on. So yes, we’d like to push it, but it’s sort of playing offense and defense at the same time, we want to make sure it just comes out right.”); see also Interview with



uninterested in building up case law, noting a reluctance to engineer favorable legal results through cases that might lose at the trial level but yield favorable precedents in the appellate courts.<sup>118</sup> One lawyer flatly stated that her firm was not creating legal precedents; rather, the

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Lawyer 6, supra note 57 (“[S]ometimes we think we are bringing a case [setting] forth existing law and then we find out once we are in the court that according to what the defendant says I guess we are establishing new law because they say there is no basis for what we are saying.”); Interview with Lawyer 8, supra note 50 (“[T]hese direct threat cases are a perfect example, you know, if an employer has a burden of proving that an employee with a disability would be a direct threat to him or herself or others and you have to prove that through objective means. Well that all sounds really good but, you know, we’ve worked hard to get cases sort of interpreting that and making it clear that the employer really does have to establish that burden. They just can’t say, ‘I’m afraid.’ Or, ‘I can think of some parade of horrors where somebody can get hurt.’”).

<sup>118</sup>. See Interview with Lawyer 1, supra note 25 (“[M]ostly I don’t take cases to push the law where I don’t believe it is right.”); see also Interview with Lawyer 3 and Lawyer 4, supra note 52 (statement of Lawyer 4) (“It’s not just like, ‘Oh should we do a lawsuit and win and get great [precedent],’ it’s ‘Should we do a lawsuit and risk getting bad [precedent].’”); Interview with Lawyer 7, supra note 50 (“[W]e probably would not take on a case, for example, with seriously bad facts and just sort of push just to try to test the law.”).

firm was “[c]reating industry precedent. We care about results.”<sup>119</sup> This desire to “make a point” illuminated these lawyers’ choice of class actions versus individual cases. Some lawyers generally did significant class action work; others handled a blend of class and individual cases. And while there was some discussion of the importance of cases to vindicate individual rights, the primary emphasis was a preference for cases that make a larger point.<sup>120</sup> At times, individual cases with an individual plaintiff looking for broad injunctive relief, or even organizational or associational plaintiffs, could accomplish this. When the class action vehicle was employed, it was often to circumvent standing problems with individual cases.<sup>121</sup> This seemed to be the primary driver of the use of class

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<sup>119</sup>. Interview with Lawyer 3 and Lawyer 4, supra note 52 (statement of Lawyer 3, echoing a similar statement by Lawyer 4). Other lawyers made similar statements. When asked about the goals of her work, one lawyer stated, “I feel like we have these laws and the goal is to enforce the law, which is important in every issue area, but particularly with disability rights, with the affirmative obligations that you really need lawyers to enforce often. But also to make sure that we are not just enforcing, but sort of pushing just a little bit.” Interview with Lawyer 5, supra note 51.

<sup>120</sup>. See, e.g., Interview with Lawyer 2, supra note 51 (“It’s really the litigation strategy that defines which way I’m looking for maximum impact. And sometimes the individual who comes may not be susceptible to class action. And so it’s done as an individual case. Sometimes you can get broad relief with associational standing.”).

<sup>121</sup>. See Interview with Lawyer 7, supra note 50 (“[I]f someone presents

actions; it was viewed less often as a vehicle for damage aggregation.<sup>122</sup> When these lawyers did bring class actions, their classes were generally noncontroversial, at least in terms of the aggregation of people with disabilities.<sup>123</sup> There was little indication of any efforts—or desire—to test or push the limits of class certification law by trying to certify classes of

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us with a problem that is wide enough spread, so that . . . we're going to have enough people to satisfy numerosity, who also satisfy commonality, and where we think that a class-based solution is going to solve the problem. And sometimes the problem is sufficiently simple that you can either have a single plaintiff or an organizational plaintiff. . . . I think it's really case by case . . . the case like a Taco Bell or Kmart really needs a class because if you have one person with one type of disability come in, they can really only take on so much and potentially only for a store or two.”); see also Interview with Lawyer 1, supra note 25 (“I’ve done individual cases that have done as much impact as in the class. It doesn’t have to be a class.”); Interview with Lawyer 5, supra note 51 (“I think it is important to get broad injunctive relief and to do . . . classes, but I really also think that individuals are important too.”).

<sup>122.</sup> One lawyer did note, however, that he “started to learn to use class actions more and of course when we want the fear of damages to motivate an industry.” Interview with Lawyer 2, supra note 51.

<sup>123.</sup> See, e.g., Interview with Lawyer 5, supra note 51 (“[T]he only [class action cases] that are really possible right now are probably deaf and hard [of] hearing [cases].”).

people with different types of disabilities, even among organizations that valued their cross-disability focus.<sup>124</sup>

Of the lawyers interviewed, only a few worked regularly on Title I employment discrimination cases. This was not because they were viewed as unimportant. On the contrary, many of these lawyers talked about the importance of employment to people with disabilities and the belief that people were often discriminated against in employment on the basis of disability.<sup>125</sup> As one attorney put it: “I see [the] employment and disability community the way I look at housing and racial justice. The

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<sup>124.</sup> See, e.g., Interview with Lawyer 13, supra note 1 (“[W]e are explicitly cross disability in our focus. So, we try to address the needs of every part of the disability community. We don’t always do it in the same case . . . [because] it’s difficult to combine every disability group in the single case and get it certified as a class action.”).

<sup>125.</sup> See Interview with Lawyer 1, supra note 25 (“I’m personally interested in why people with disabilities [are] not employed and that’s about hiring. And you almost never can do ADA enforcement at the hiring stage because you don’t know why you didn’t get hired.”); see also Interview with Lawyer 6, supra note 57 (noting interest in doing more employment cases based on the importance of employment); Interview with Lawyer 8, supra note 50 (“[T]here’s still a lot of employment discrimination against blind people.”); Interview with Lawyer 13, supra note 1 (“So, we know that [employment] is an issue that is critical; that somehow or another we have to focus and make progress.”).

great unfulfilled promise and the hardest problem there is.”<sup>126</sup> The lawyers who regularly brought Title I cases, while acknowledging that they were not class action cases, spoke passionately about the importance of this work.<sup>127</sup> Lawyers also noted how an employment practice creates space to develop reasonable accommodation law, a revolutionary legal issue with implications for other civil rights communities.<sup>128</sup>

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<sup>126.</sup> Interview with Lawyer 2, supra note 51.

<sup>127.</sup> See Interview with Lawyer 5, supra note 51 (“I just think it’s incredibly important . . . what people [with] disabilities really care about. People really want to work, more than anything else they want to be in the workplace, they want to make a contribution, they want to be included, they want equal opportunity to advance. . . . I have no doubt that my interest in workplace issues will last my entire life.”); see also Interview with Lawyer 8, supra note 50 (“In our society we identify people with, ‘What do you do for a living?’ And we classify people just with that simple question, and so for me, having access to the employment world is just as important as, you know, access to websites, or wheelchair access to Taco Bells.”).

<sup>128.</sup> See Interview with Lawyer 5, supra note 51 (“I think reasonable accommodation is very interesting, I think it’s potentially revolutionary. . . . [After the amendments to the ADA] more and more people are covered, more and more changes can be made to accommodate people so that the work place becomes more flexible. That’s good for everybody, I would love for everybody to have reasonable accommodation [in] the workplace. I don’t think it should be limited to people with disabilities.”). This lawyer also noted her view that many disability cause lawyer

The interviewed lawyers offered several reasons for the lack of employment litigation in their practices, ranging from an established plaintiffs' employment bar taking cases,<sup>129</sup> the economic challenges of doing this type of work,<sup>130</sup> and even the fact that these cases were not a good personality fit for the lawyers.<sup>131</sup> The most common reason these

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colleagues do employment cases. Id. This insight led to additional interviews with people this lawyer identified.

<sup>129.</sup> See Interview with Lawyer 6, supra note 57 (“I think that employment is an area where people with disabilities probably have the most representation because [the National Employment Lawyers Association (NELA)] and a lot of private attorneys do employment.”); see also Interview with Lawyer 7, supra note 50 (“That area [of disability employment discrimination] is well covered, and we didn’t feel like we’d be adding something. We did feel like we’d have a lot of really high-quality competition.”); Interview with Lawyer 8, supra note 50 (“I think what has happened is, the . . . ADA cases dealing with employment have been awful in terms of the Supreme Court litigation and other cases. So I think that’s deterred a lot of people from taking them, and I think that’s been a problem.”).

<sup>130.</sup> See, e.g., Interview with Lawyer 2, supra note 51 (“[W]e have, for a variety of reasons, eschewed doing employment cases, whether it’s disability discrimination or other forms of discrimination, because of the economic challenges of doing individual employment discrimination cases.”).

<sup>131.</sup> See, e.g., Interview with Lawyer 7, supra note 50 (“[W]e would rather . . . do the kind of cases where you measure liability with a tape measure rather than the type where your client breaks down in tears in your

lawyers offered for not bringing Title I employment cases related to their desire to bring cases to make a point. Title I cases were viewed as individualized, incapable of aggregation, and the most likely to generate bad law by hostile courts.<sup>132</sup> As one lawyer explained:

“If you’re trying to make a point, you’re mostly not going to get there [with employment cases because the easiest cases

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conference room. . . . [F]undamentally we’re math and arts nerds with law degrees.”).

<sup>132.</sup> See Interview with Lawyer 3 and Lawyer 4, supra note 52 (statement of Lawyer 4) (“[O]ur firm does class action litigation [in non–ADA cases] and I only know of one successful class action . . . under Title I, [and] I have the impression that it’s just much harder [to] find a commonality to do a successful Title I class action . . . [because] you would have to find an employer that actually has an across-the-board policy and that’s going to be hard to find.”); see also Interview with Lawyer 2, supra note 51 (“There are a couple of reasons [to not do employment cases]. . . . [F]irst of all it’s very hard to do something on a class basis. . . . [B]y and large it’s hard to get a class, so it’s hard to have a piece of litigation that can have a broad impact. Second, if you’re doing these cases, other than company employees, you’re going to have a jury and you have to deal with the public perceptions of disability as being far more limiting than they truly are. And that’s a challenge you don’t have in the public accommodation cases and the Title II cases.”); Interview with Lawyer 6, supra note 57 (“It’s not like we haven’t gone that direction [with Title I cases] ever, but generally we don’t because it is often a fact-specific case.”).

resolve at the EEOC level.] . . . The harder cases are the ones that come out of the EEOC unresolved that you take back and take to litigation, and . . . they always end up getting individualized, [because] it's a reasonable accommodation, it's an individualized inquiry, [and] it's very hard to make a point in that arena, I think. And it's very easy to make a bad point."<sup>133</sup>

Another lawyer put it similarly: “[W]hen you’ve won [a disability employment discrimination case], you may have won for that one individual but you haven’t changed anything.”<sup>134</sup> There was frustration about this, and at least one lawyer viewed failure-to-hire testing as a universe of cases that should be brought.<sup>135</sup> But this lawyer identified high barriers

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<sup>133.</sup> Interview with Lawyer 1, supra note 25. This lawyer went on to explain:

“[I]n the reasonable accommodation area [in employment] it’s hard to make law because it’s also individualized. It’s easy to make bad law because the defendants are going after the summary judgment stage and so they’re trying to make law and you’re trying to save your client. So there’s a disconnect there, the courts are going to look at the bad, easy way to get out of the case.”

Id.

<sup>134.</sup> Interview with Lawyer 2, supra note 51.

<sup>135.</sup> See Interview with Lawyer 1, supra note 25 (“I’m personally interested in why people with disabilities [are] not employed, and that’s about hiring. And you almost never can do ADA enforcement at the hiring stage



to this type of work and given the time, complexity, and resource challenges, felt that the EEOC should be doing it.<sup>136</sup>

We also asked these lawyers about the mechanics of how they hoped to achieve change as a result of their cases. Generally, these lawyers expressed a desire for flexibility, of not being tied to one particular vision of private settlements or consent decrees.<sup>137</sup> In many

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because you don't know why you didn't get hired. So you don't get to go back and say you didn't hire me because I had a disability. Nobody told you that, you have no basis for saying it. So in order for you to do that you have to do testing.”).

<sup>136.</sup> See id. (“[Y]ou have to nail down every possible excuse that they could come up with for why it's not a disability reason. And so you have to do not just match pairs but . . . [you have to] video tape them during interviews. And you've got to get inside as much as you could possibly and you've got to look at all the possibilities—that you can't even think of ahead of time—for why they'll make an excuse that it really wasn't a disability-related decision. So testing, just the basic match pairs testing will give you a sort of 'yes, people discriminate' feeling, but that's not enough to go forward with the case. So it's just a lot of factors and you have to do it a lot of different times. You can't just do one matched pair, and you [have] to keep track of it all and watch for every excuse and nail down at the front end of any excuse they could be coming up with before you can take it forward.”).

<sup>137.</sup> See Interview with Lawyer 7, supra note 50 (“It depends on a lot of things, it depends somewhat on the judge . . . because some judges are

cases, the lawyers were able to get the results they wanted through settlement, although that happened at varying stages of the litigation process.<sup>138</sup> Several lawyers discussed how settlements were almost always made public, either through their own or their client's policies.<sup>139</sup> As one lawyer explained:

“[A]ll of our settlements are public. So what we're looking for is to create precedent so with the next company, we may not even file a suit, we may just talk to them and they start to say ‘Well you know what we want is the definition of accessibility is XYZ,’ we can say, “No, here is what we've done . . . here

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very hostile to retaining jurisdiction, [and] it depends on the defendant.”); see also Interview with Lawyer 1, supra note 25 (“I think that's really case and defendant specific.”); Interview with Lawyer 2, supra note 51 (“[A settlement] needs to work and we need to be able to get back into court[,] unless the lesson we need to convey is you know, always . . . be enjoined[,] we don't necessarily need a court order.”).

<sup>138.</sup> Two lawyers interviewed typically negotiated complete settlements without resorting to litigation, using their reputation in the community, track record, and negotiation skills to convince companies to eschew the necessity of litigation to resolve the issue. See Interview with Lawyer 3 and Lawyer 4, supra note 52.

<sup>139.</sup> See id. (statement of Lawyer 3) (explaining that she makes all settlements publicly available on her firm's website, although the settlements sometimes have a confidential addendum).

are the last 6 settlements we did in this area, and this is the standard.”<sup>140</sup>

There was a clear focus on post-dispute monitoring, which many lawyers viewed as crucial to prevent backsliding. There was some skepticism of courts adequately monitoring such agreements. Lawyers thought about empowering companies to continually make needed changes and optimally to include some representation of the disability community so as to ensure that difficult technical issues were considered from a disability perspective.<sup>141</sup> Many lawyers spoke of their desire to

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<sup>140.</sup> Interview with Lawyer 2, supra note 51; see also Interview with Lawyer 11, supra note 57 (“We got a declaratory judgment [saying] that what [one defendant athletic team] was doing . . . was violating Title III of the ADA. We used that and we filed a lawsuit against [another athletic team.] And to [their] credit, after we filed it they read [the first settlement, and] we resolved that case with a consent decree.”).

<sup>141.</sup> See Interview with Lawyer 2, supra note 51 (“[F]or example, with websites what we are most concerned about is the ability to monitor but also giving the company the tools to stay accessible. . . . Websites are very dynamic things and there are going to be people in the company who are going to be putting in code every day, so I’m more focused on getting a good set of guidelines and best practices and changing the culture in the company.”); see also Interview with Lawyer 10, supra note 58 (“I feel like if you really want to change cultures and bureaucracies in terms of how they interact with disability issues, the best way to do it is to get disabled people into the bureaucracy.”).

change the culture within companies and organizations, and tried to tailor their litigation approaches to accomplish this goal. One set of lawyers never used the word “discriminate” in their discussions and early negotiations with defendants, preferring instead to focus on something internally in the company that aligns with the disability-friendly values these lawyers are promoting.<sup>142</sup> Another explained:

“[W]e try to go about this in a way that will make them enthusiasts and converts and want to reach beyond [the minimum in the law]. . . . [W]e may start in an adversarial position, but what we are talking about here is social change and attitude change and if we just sort of grind people into the dust, well settlement is not going to last, change is not going to last, not with them individually . . . but also we’re not helping to get that broader acceptance.”<sup>143</sup>

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<sup>142.</sup> See Interview with Lawyer 3 and Lawyer 4, supra note 52 (statement of Lawyer 3); see also Interview with Lawyer 2, supra note 51 (“[What] we try to do is to make settlements that are commercially reasonable so that when we do approach somebody with the threat of a lawsuit they know that if they talk to us we will be working with them to come up with a solution that’s a win for both [of] us.”); Interview with Lawyer 3 and Lawyer 4, supra note 52 (statement of Lawyer 3) (“We know you pride yourself on being the friendliest airlines in the skies, [but] you forgot this part of your population.”).

<sup>143.</sup> Interview with Lawyer 2, supra note 51.

Several lawyers talked about how they viewed a particular result as successful when a case led companies to work towards a more disability-inclusive and forward-thinking approach to disability issues.<sup>144</sup> Although damages are often not available under the statutes used in disability cases, these lawyers viewed damages as a tool to get the attention of companies and industries and encourage them to become more disability-accessible.<sup>145</sup> During the interviews, lawyers expressed little

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<sup>144.</sup> See Interview with Lawyer 7, supra note 50 (talking about one defendant company and saying the people have been “fabulous. . . . [E]specially since the settlement, we have gotten to watch inside a company while they figure out how to do it right, and they’re so dedicated. . . . [T]hey’re doing a great job and they’re making a great effort, and I mean, that’s kind of the best set case scenario for us.”); see also Interview with Lawyer 3 and Lawyer 4, supra note 52 (statement of Lawyer 3) (noting culture change in a defendant company with whom they settled); Interview with Lawyer 8, supra note 50 (noting that one defendant, Target, is “a perfect example now. . . . Target works with us and wants to make sure that they maintain accessibility and are more of a partner now. . . . [W]e really are trying to create an environment of partnerships.”).

<sup>145.</sup> See, e.g., Interview with Lawyer 2, supra note 51 (“[W]e know that people are motivated to make money and we know that they are motivated not to lose money . . . especially corporations that have to be answerable, and so we want to create concern about liability.”).

interest in taking a case that involved only a request for damage relief; they viewed such action as a poor vehicle for changing behavior.<sup>146</sup>

No lawyers we interviewed brought constitutional cases as a regular part of their practice. A poll showed a near-uniform consensus among the lawyers that constitutional litigation was not a priority or even a significant item on the litigation agenda.<sup>147</sup> Although the specific explanation varied, the overriding view was that within the disability realm, a rich statutory field existed but the constitutional landscape was bleak, especially under the Equal Protection Clause, which did not offer meaningful protection—or at least any protection in excess of what the ADA and other relevant statutes provided.<sup>148</sup> One lawyer observed, “I would

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<sup>146.</sup> See, e.g., Interview with Lawyer 13, supra note 1 (“[W]e don’t take cases where the only relief sought would be damages. . . . [W]e’d only keep the focus on providing access itself.”).

<sup>147.</sup> See, e.g., Interview with Lawyer 5, supra note 51 (“I think that because we have that sort of rich panoply of laws on the federal level with the 504, IDEA and ADA . . . I think that that’s generally right that we primarily work in the statutory realm. It’s pretty rare that we are working in the constitutional realm or in something really cutting edge like that.”); Interview with Lawyer 7, supra note 50 (“[I]n this area it seems to me like . . . Title II and the Rehab Act are much stronger tools.”); Interview with Lawyer 11, supra note 57 (“For the cases that we have here . . . we live well with the statute. There’s not a pressing need to use the Constitution.”).

<sup>148.</sup> In City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 446

totally use the Constitution if it helped us. [T]he Constitution is very weak on this, and so I've thrown it in, but mostly it hasn't been the lead for us because it's weak on disability and [is even] used against us on disability issues."<sup>149</sup> Another explained:

"I live in an age when Federal courts are not going to interpret the Federal Constitution in ways that are going to assist me, and so unless I have a case that absolutely screams out for it, I'm not going to be looking for novel constitutional theories because all I'm likely to accomplish in doing that is to create a precedent that will foreclose those who come after me in what I hope will be a warmer judicial climate. . . . I'm a craftsman, and I use whatever tools look appropriate to the task."<sup>150</sup>

Several lawyers thought that the constitutional landscape reflected a society and judiciary that still viewed disability from a medical—and

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(1985), the Supreme Court held that people with disabilities were only entitled to rational basis scrutiny under the Equal Protection Clause. This principle has been affirmed in subsequent cases. See, e.g., Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 366–67 (2001).

<sup>149</sup>. Interview with Lawyer 1, supra note 25; see also Interview with Lawyer 9, supra note 51 (“[I]t’s not clear what the Constitution gives you that the ADA doesn’t. . . . I kind of think we’ve exhausted the Constitution, that we’ve got this new civil rights statute; let’s run with it.”).

<sup>150</sup>. Interview with Lawyer 2, supra note 51.

pitying—perspective, not as a true civil rights issue.<sup>151</sup> They believed litigation could help play a role in changing that perspective.<sup>152</sup>

Several lawyers acknowledged the constitutional backdrop of several important disability rights laws, particularly the Individuals with Disabilities Education Act (IDEA);<sup>153</sup> they also discussed the importance of using constitutional law defensively to respond to challenges of the

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<sup>151.</sup> See id. (“I don’t see how you can do constitutional litigation in the disability area until you have judges whose perception[s] of disability move[ ] away from the sympathy narrative to the rights narrative.”); see also Interview with Lawyer 8, supra note 50 (noting that the level of scrutiny is reflective of the fact that “people don’t think about disability rights on the same level as racial discrimination or race-based civil rights”).

<sup>152.</sup> See Interview with Lawyer 10, supra note 58 (“I think ADA litigation . . . can be very valuable in the sense that if you’ve got a fresh case with egregious facts, it helps remind the public that this stuff is going on; that this kind of discrimination is still going on, and it’s discrimination, and there should be a law against it, and there is. So from my perspective fresh cases that help remind the public of what goes on [with] sophisticated employers and unsophisticated employers is valuable.”); see also Interview with Lawyer 12, supra note 47 (“[Y]ou [can] have a good fact pattern that the judge could actually see . . . is not some pie-in-the-sky thing; you actually have a bunch of people with severe disabilities functioning in the community.”).

<sup>153.</sup> See 20 U.S.C. §§ 1400–1419 (2006).



constitutional underpinnings of disability statutes.<sup>154</sup> Although a few lawyers provided some limited examples of using constitutional law,<sup>155</sup> some musings of how it might be useful in the future,<sup>156</sup> and some frustration over the limited range of constitutional arguments raised by disability rights lawyers,<sup>157</sup> the lawyers did not have a short-term or long-term constitutional strategy.<sup>158</sup> Noting the limited vision of judges in this area, one lawyer observed, “If the day comes when I think that I’ve got not just a judge before me but the reviewing court that will understand this issue,

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<sup>154.</sup> See, e.g., Interview with Lawyer 1, supra note 25 (“I don’t think we’ve needed [constitutional law] that much except to say the ADA is okay.”).

<sup>155.</sup> See, e.g., Interview with Lawyer 7, supra note 50 (discussing work on a case “involving a prisoner with mental illness that has 8th Amendment and Due Process claims”).

<sup>156.</sup> See, e.g., Interview with Lawyer 1, supra note 25 (“[W]here I think [constitutional law has] been underused and where we may need it is in special education, and nobody remembers that the statute is not the point in special education. . . . [T]he statute is based on a series of constitutional decisions.”).

<sup>157.</sup> See, e.g., Interview with Lawyer 6, supra note 57 (noting frustration that lawyers in Garrett did not provide any argument that Cleburne was no longer good law).

<sup>158.</sup> See, e.g., Interview with Lawyer 1, supra note 25 (remarking that taking constitutional cases to the Supreme Court is not on the short-term agenda).

that is to say disability in the context of constitutional rights, then I'll start doing it."<sup>159</sup>

Related to constitutional law, we polled the lawyers about the role of Supreme Court litigation in the disability rights movement. We also specifically asked for reactions to our prior observation that none of the ADA cases that had gone up to the Supreme Court had been engineered from the trial court level by disability cause lawyers.<sup>160</sup> The participation of these lawyers in Supreme Court cases included two lawyers who had argued cases in front of the Supreme Court, a few lawyers who had been part of strategy conference calls, and several lawyers who had limited input into the Supreme Court cases; nearly all interviewed lawyers had participated in amicus briefs for the cases.<sup>161</sup> One organization worked to bring together disability rights lawyers to provide input for cases that had reached the level of Supreme Court review.<sup>162</sup> A few lawyers had

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<sup>159</sup>. Interview with Lawyer 2, supra note 51.

<sup>160</sup>. See Stein et al., supra note 4, at 1661–63, 1670–72.

<sup>161</sup>. See, e.g., Interview with Lawyer 1, supra note 25 (noting that he had taken cases to the Supreme Court and drafted amicus briefs); Interview with Lawyer 2, supra note 51 (drafting amicus briefs); Interview with Lawyer 12, supra note 47 (discussing strategy conference calls).

<sup>162</sup>. See Interview with Lawyer 9, supra note 51 (“We developed an approach to bringing the disability community together around Supreme Court cases . . . to organize and coordinate the disabilities response to Supreme Court cases.”). This lawyer also noted that these sessions had strengthened the relationship between disability cause lawyers and the

also been involved in at least one successful attempt to keep a potentially harmful case out of the Supreme Court.<sup>163</sup> The lawyers expressed

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community. See id. (“I’d like to say we made a deliberate decision to strengthen our relationship with the community, but I think it just kind of happened, and it emerged in part from the Supreme Court work.”).

<sup>163.</sup> See Interview with Lawyer 10, supra note 58 (“You know, I remember there were some cases that the Supreme Court took that we knew were going to be a disaster for us based on [the] facts [and] there were kind of creative [and successful] efforts to get that case to go away.”).

One lawyer specifically recalled the success of keeping Hason v. Medical Board of California, 279 F.3d 1167 (9th Cir. 2002), out of the Supreme Court. See Interview with Lawyer 6, supra note 57. In regards to Hason, we have previously observed:

“Dr. Hason’s application for a medical license was denied on the grounds of his mental illness. The Supreme Court granted certiorari to decide whether or not under these circumstances Title II validly abrogated state sovereign immunity. In light of an unsympathetic plaintiff and the Court’s opinion in Garrett, California disability rights advocates followed a creative strategy to get the case off of the Court’s docket before it could be heard. The advocates prevailed upon then-Governor of California, Gray Davis, to appoint a new member of the Medical Board who was supportive of disability rights. The Board then agreed to reconsider the case and reverse its decision. At that point, the case was moot and the writ of certiorari was dismissed.”

a desire to do more of this in the future, but no lawyer articulated a clear plan or strategy for accomplishing that goal. Other lawyers were frustrated that disability rights lawyers were not more active in Supreme Court litigation, but they questioned, “[D]id the [NAACP] have its drive-by lawyers out there? How did they control people from coming in and bringing annoying small marginal cases that the Supreme Court would seize ahold of?”<sup>164</sup> Others expressed similar sentiments. Some lawyers thought the disability rights community needed to place more of a premium on cultivating a lawyer with the life experience of a person with disabilities who could argue cases before the Court.<sup>165</sup>

The lawyers advanced a general sense that being before the Supreme Court was not a good idea, and that such an appearance

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Stein et al., supra note 4, at 1677 (footnotes omitted). The lawyers interviewed that were involved in this process were unable to recall whether similar efforts were made in some of the Supreme Court’s definition of disability cases, particularly in Sutton v. United Airlines, 527 U.S. 471 (1999). See Interview with Lawyer 6, supra note 57.

<sup>164</sup>. Interview with Lawyer 7, supra note 50.

<sup>165</sup>. See, e.g., Interview with Lawyer 10, supra note 58 (“I feel like it was in our interest to cultivate a lawyer with a personal connection to disability who could be up there on a regular basis talking about these issues . . . [to] build that rapport with the Court and help put a human face on the issues. . . . [I]f you have somebody that’s actually experienced discrimination and lives with disability every day it may be harder for some of these Justices that are critical swing votes to pull them out.”).

should only occur when the community was brought in on the defensive side.<sup>166</sup> Lawyers expressed skepticism that a Supreme Court case, even if victorious, could create lasting legal change on the ground.<sup>167</sup> One lawyer put it simply: “[I]f you don’t need the Supreme Court, don’t use it.”<sup>168</sup> Another lawyer explained, “I would regard cases getting to the Supreme Court in the disability area by and large to be the result of unfortunate accidents. I don’t see this Court as one I’m anxious to get to with a case.”<sup>169</sup> When asked about the cases that have gone up to the Supreme Court, this lawyer replied:

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<sup>166.</sup> See, e.g., Interview with Lawyer 5, supra note 51 (noting that, generally speaking, disability cases should stay out of the Supreme Court).

<sup>167.</sup> See, e.g., Interview with Lawyer 1, supra note 25 (“The Supreme Court is not ahead of the curve on this, on our issues. Maybe someday they will be. . . . You can’t just go do Brown v. Board of Education and racism goes away. All that other stuff still has to happen. You still have to do the local stuff, you still have to . . . create an integrated program . . . you still have to do the legislative pieces, you still have to do the public outreach. The Supreme Court makes a big statement, but it doesn’t get you there.”).

<sup>168.</sup> Id.; see also Interview with Lawyer 13, supra note 1 (“[W]e do generally try to keep our cases from the Supreme Court. . . . I think the goal of most civil rights lawyers in every field these days is to stay out of the Supreme Court.”).

<sup>169.</sup> Interview with Lawyer 2, supra note 51.

“I look at Garrett and I think that this is a Court that is not going to be a champion of disability rights and therefore it is very much in our opponents’ interest to get cases up there and very much in our interest to figure out successful litigation strategies that don’t require it.”<sup>170</sup>

This lawyer explained that he had thought about bringing a case that would highlight a circuit split on the issue of website accessibility under Title III, but then realized that with existing tools, including state statutes, he could force the industry to become accessible.<sup>171</sup>

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<sup>170.</sup> Id.

<sup>171.</sup> Id. Another lawyer explained:

“I don’t try to create splits unnecessarily, I stack them all in the good circuits and then use them to domino the other ones. . . . So we’re not going to go to the Fifth Circuit then the Ninth Circuit, I’m going to go to the Ninth Circuit and the First Circuit, maybe the Second Circuit and the Third Circuit and stack them up and then use them against the other circuits.”

Interview with Lawyer 1, supra note 25; see also Interview with Lawyer 9, supra note 51 (noting that when the issue comes up amongst disability lawyers, he always asks, “Why are you even thinking about taking this case [up] to the Supreme Court? . . . I mean yes we might win; but we might also lose. And who is betting on the Supreme Court? I don’t even get it.”); Interview with Lawyer 11, supra note 57 (“I think the most important thing is winning in the district court. . . . And then whatever happens after that, some part of it is under your control and

The lawyers considered whether they should get involved in cases that lawyers from outside the disability rights community took to the Supreme Court.<sup>172</sup> At least one professed a desire to spend more time and energy trying to place on the Court a Justice with a demonstrated commitment to disability rights.<sup>173</sup>

The lawyers expressed some desire for a unifying, important case, engineered by the disability rights community, that would eventually go up to the Supreme Court.<sup>174</sup> But no plan for doing so has been

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part of it isn't.”).

<sup>172.</sup> See, e.g., Interview with Lawyer 1, supra note 25 (“[I]f the defense is taken up to the Supreme Court, yes we’ll get on board and fight if we have to, but if the plaintiffs are doing it, yeah you make the decision, you make the calculation, will it help and how bad is the appellate court decision? Can we live with the appellate court decision?”). This lawyer also had declined requests to participate in amicus briefs of cases she did not believe were fruitful to go to the Supreme Court. Id.

<sup>173.</sup> See Interview with Lawyer 10, supra note 58 (“I’m trying to find the Justice more than the case right now. To me, in order to get a Brown v. Board of Education you’ve got to have at least one Justice on the Court who really can write with power, passion, and persuasion around the issue.”).

<sup>174.</sup> See Interview with Lawyer 1, supra note 25 (“I think we should decide how we want to use the Supreme Court, let’s be optimistic that in the next Obama administration there will be more appointments and it could switch 5 to 4 the other way. How would we intentionally, proactively use

implemented, and the lawyers shared a view that such a tactic was difficult, impracticable, and potentially impossible.<sup>175</sup> One lawyer observed:

“[W]hat is the Brown case that the disability rights movement needs other than . . . [Olmstead]? What interpretation do we need that will make this huge change that we are not getting? We don’t have a [separate but equal] doctrine to knock down.”<sup>176</sup>

Another stated:

“I don’t think it’s that easy to set up a case that’s going to go to the Supreme Court, I don’t know anybody who’s done it and at the end said, “See, [I] made it to the Supreme Court and I won.” I don’t think you can say you’re going to bring

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the Supreme Court?”); see also Interview with Lawyer 8, supra note 50 (“[S]ooner or later another employment law will go up, but I think we as a community [are] getting better at communicating with each other. . . . I think we will find a good case and I think we will bring it up . . . Hopefully we can get a good direct threat case or reasonable accommodation case up to the Court.”).

<sup>175.</sup> See Interview with Lawyer 7, supra note 50 (stating that getting a case to the Supreme Court is “situational”); see also Interview with Lawyer 5, supra note 51 (“I just don’t know if there is a federal sort of big national splash type of case that would work right now.”); Interview with Lawyer 9, supra note 51 (“On the Supreme Court, you can’t possibly have that degree of . . . control.”).

<sup>176.</sup> Interview with Lawyer 2, supra note 51.



this case and take it to the Supreme Court. . . . It takes so long, maybe I lack imagination to see this is the issue that's going to work through in this way that's not going to get mooted out and that's going to interest the Supreme Court eight years down the line."<sup>177</sup>

Notably, for several of these lawyers, while the Supreme Court cases that had limited the definition of disability were unfortunate, they did not impact the core of their practices because these lawyers typically represented individuals who were covered by even a restrictive vision of the ADA's definition of disability.<sup>178</sup>

#### E. Other Forms of Advocacy

Despite the fact that the lawyers were selected specifically for their use of litigation on behalf of people with disabilities, nearly every lawyer engaged in some other type of advocacy besides litigation. Most of these lawyers had some level of engagement with the legislative process, whether it was having input into proposed legislation, or advocating

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<sup>177</sup>. Interview with Lawyer 1, supra note 25.

<sup>178</sup>. See Interview with Lawyer 9, supra note 51 (noting that the decisions considering the ADA's definition of disability were not a huge problem in his cases); see also Interview with Lawyer 11, supra note 57 ("The Supreme Court cases . . . on [the definition of disability] . . . [were] no hindrance to us in our cases, and certainly now with the ADA [Amendments Act] there's no hindrance at all. . . . I was trying to think of something that we did not bring because of the disability-defined issue, and I can't think of any.").

for, or assisting in, drafting state and federal laws.<sup>179</sup> Some lawyers felt that this was a way to ensure that new regulations did not move the law backwards from what they had achieved in litigation.<sup>180</sup> Other lawyers had particular expertise in working with administrative agencies to influence how the laws were implemented and enforced.<sup>181</sup> Several lawyers had relationships with legislators and other government officials and used these relationships to help advance the disability cause.<sup>182</sup> In working

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<sup>179.</sup> See supra note 51.

<sup>180.</sup> See, e.g., Interview with Lawyer 3 and Lawyer 4, supra note 52 (statement of Lawyer 4) (“I think our main [goal] at least in this regulatory process is to make sure that the government doesn’t bring us backwards. . . . We don’t want the law to move backwards, and so we feel like we have to protect what we’ve already gained.”).

<sup>181.</sup> See, e.g., Interview with Lawyer 1, supra note 25 (“[W]hen I [want to] change the law, I go through the regulatory process or through the legislative process or through the press or public process. And that’s how you change the law—you go to the implementers and get them to implement it differently.”).

<sup>182.</sup> See, e.g., Interview with Lawyer 9, supra note 51 (“[W]e’ve always had a policy arm, which means people who do traditional D.C. lobbying and with Congress [and] agencies. . . . [I]n the last five years, maybe even longer, the lawyers have done most of the civil rights lobbying.”); see also id. (“[W]e’re spending a lot of time . . . [with] the Obama administration working with . . . the Civil Rights Division [of the Justice Department].”).

on legislative issues, these litigators felt their expertise, experience, and skills were useful. In particular, they had gained knowledge in litigation about how legislation actually operated and what reform was needed.<sup>183</sup> The lawyers also exhibited some level of coordination and work with public enforcement officials, particularly in the Obama administration.<sup>184</sup>

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<sup>183.</sup> See Interview with Lawyer 6, supra note 57 (“Our experience in all these cases too really informs our legislative work on law. . . . [In the reauthorization of the IDEA] [t]here was a lot of push to make sure that it said that to be educated that a kid would have access to the general curriculum; it was like a big issue, and we understood it, but we also knew how that could backfire [for us] because . . . the kids we mainly . . . represent [in education,] the most severely disabled kids . . . we think it’s important for them to be included but we don’t think they are going to [be included in] the general curriculum. . . . And so we can bring a perspective because we . . . are very aware of how things could work in the field and [because] our parent advocates . . . talk to hundreds of parents [of disabled children.]”); see also Interview with Lawyer 3 and Lawyer 4, supra note 52 (statement of Lawyer 3) (acknowledging “a kind of responsibility that we are lawyers, we are good writers, this [is] what we do, [and] it’s been a real privilege for the past 15 years to work with the blind community and we are . . . uniquely situated to do [this work]. . . . But I kind of feel we have an obligation to do it because we have a lot of information. . . . [W]e see big-picture things.”).

<sup>184.</sup> See Interview with Lawyer 2, supra note 51 (“The other big change is that we have the [Obama] administration where there are people we can

When queried about why they spent time involved in the legislative process, the lawyers had varying answers. Although legislative work was commonly viewed as an effective strategy that had delivered results before, often the lawyers recognized that there was no alternative but to go to the legislature.<sup>185</sup> One lawyer who practiced prior to the ADA's passage noted that at a meeting of top civil rights leaders in the 1980s, the disability rights movement had made a deliberate initial decision to establish a legislative presence in Washington:

“[S]o we set up the Washington office. . . . In terms of, the real thinking, the real strategizing, the real people—the representatives that went to the meeting with the [members of Congress]—they were all race and sex [advocacy groups]

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call at the White House, the Department of Justice, the Department of Education . . . and so having those resources has made it obvious that we've got some additional tools to use.”); see also Interview with Lawyer 8, supra note 50 (“[The] EEOC, state [Fair Employment] Practice agencies, or state human rights entities or DOJ . . . under the Obama administration, we've been working with a much more receptive DOJ, so we're working with DOJ a lot these days. . . . In a lot of these access cases or systemic change cases, we're finding that DOJ is interested in them.”); Interview with Lawyer 12, supra note 47 ([The relationship with the DOJ] just changed overnight in the last two years . . . and it's fabulous. . . . They are intervening in our cases, and now they're bringing their own.”).

<sup>185</sup>. See, e.g., Interview with Lawyer 2, supra note 51 (“[T]here are areas that the only thing we can do is legislation.”).

and unions. [T]here weren't disability [advocacy groups], and that was our goal to try and get disability included in that. So that was very conscious, and then we had a choice for us with our limited resources, we spent a lot of time in D.C. on this . . . . Opportunities develop as you develop relationships."<sup>186</sup>

Lawyers took the view that when the courts cut into civil rights protections for people with disabilities, the legislature could be an alternative forum, and often it proved to be more receptive. As one lawyer explained:

"[W]e realize that the law as it is can't always help us. We can use it creatively, we can use it effectively, but sometimes we just got to go change the law and a lot of us who are, you know, involved in the litigation are also involved in trying to get Congress, or in some cases, of course, [state] legislators, to change the law."<sup>187</sup>

This work predated the ADA. One lawyer noted that while the IDEA was grounded in those constitutional cases in the education realm that had a positive result, the ADA statute itself went far beyond what constitutional litigation could provide.<sup>188</sup> And while the initial equal protection disability cases were not successful, the disability rights issue was on the legislative radar, and Congress soon passed section 504

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<sup>186.</sup> Interview with Lawyer 6, supra note 57.

<sup>187.</sup> Interview with Lawyer 8, supra note 50.

<sup>188.</sup> See Interview with Lawyer 6, supra note 57.

of the Rehabilitation Act in 1973.<sup>189</sup> Once this happened, there was an opportunity to have more influence with the regulations than could have happened with constitutional litigation. This approach of restoring rights the Court had taken away continued through the passage of the ADAAA, and several of the lawyers contributed to the negotiations behind the Act.<sup>190</sup> There was a view among some lawyers that litigation losses helped create leverage in legislatures by grabbing the legislatures' attention.<sup>191</sup>

Nearly every lawyer interviewed had some type of strategy for dealing with media. In one approach, lawyers used the media to portray positive images of defendants trying to help and work with people with disabilities as a way to motivate more companies to make changes.<sup>192</sup>

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<sup>189.</sup> See Samuel R. Bagenstos, *The Americans with Disabilities Act as Welfare Reform*, 44 WM. & MARY L. REV. 921, 958 (2003); Michael Selmi, *Interpreting the Americans with Disabilities Act: Why the Supreme Court Rewrote the Statute, and Why Congress Did Not Care*, 76 GEO. WASH. L. REV. 522, 531–32 (2008).

<sup>190.</sup> See, e.g., Interview with Lawyer 10, supra note 58 (detailing how litigators were involved in the negotiation process leading up to the passage of the ADA).

<sup>191.</sup> See, e.g., Interview with Lawyer 2, supra note 51 (“[S]ometimes we have to litigate and lose before the legislature is willing to do anything.”).

<sup>192.</sup> See, e.g., Interview with Lawyer 3 and Lawyer 4, supra note 52 (statement of Lawyer 4) (stating that he always attempts to do “positive press”); see also id. (statement of Lawyer 3) (“[O]ur first principle is that

But the more prevalent view was more traditional, where lawyers called press conferences when filing a lawsuit—or upon its successful resolution—to educate the public as to the problem and to pressure potential future defendants into modifying their behavior.<sup>193</sup> One lawyer

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it's better to say something good about someone than to say something bad.”). One lawyer also noted that she sought press on settlements. She thought press was good because it gave “the corporations something that they can feel good about because it makes them more vested in the process, in the issues. And it pleases their boards so they get this good press for doing this good thing for people with disabilities.” *Id.* (statement of Lawyer 4); see also Interview with Lawyer 13, supra note 1 (“[The media is] key in at least 90% of our cases. . . . [W]e are focused on providing equal access . . . on opening doors for opportunities and we’re focused on discrimination by large, well-resourced entities. . . . [I]n those situations the media is a tool that we see as effective to a certain extent in helping to achieve the result that we are looking for.”).

<sup>193.</sup> See Interview with Lawyer 5, supra note 51 (“We announce mostly the filing of cases and do press conferences.”); see also Interview with Lawyer 1, supra note 25 (“I think press is important because judges read the news, too, as we discovered in the voting cases. . . . [Press coverage] points out problems that legislators have noticed before or state government people hadn’t noticed before, [and] it points out ways of thinking about things that people hadn’t thought about before.”). Several lawyers felt this tactic had been unsuccessful and needed more attention. See Interview with Lawyer 7, supra note 50 (“We have tried to use [the media]

characterized media use as “critical,” noting that he not only tries “to deliver the message that we are going to do something” but also “to get the word out to the individual companies that may be at the wrong end of a piece of litigation.”<sup>194</sup> This same lawyer explained, “You need to have a public agenda” and that “you don’t want to put your cards close to the vest here,” because “it is in our interest . . . for the folks who are developing [new products] to know we are planning to do something.”<sup>195</sup>

Another explained:

“[W]hen we file the complaint, we issue a press release, and as major things happen in the case, we issue press releases and we’ve gotten very good at getting those releases everywhere and generating interest and getting the people involved in the case talking to the media and explaining what’s going [on,] and we view that as a very important way of getting the word out there. [B]ecause, if you don’t publicize it, then a few people may know about what’s going on, but the investment

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in the sense of maybe a little bit of public shaming will bring people to the table, [but] it never has.”); see also Interview with Lawyer 10, supra note 58 (“I don’t think the media part is handled in a kind of professional and systematic way consistently. . . . Certainly [litigators] respond to questions from reporters and they try to be thoughtful about how to position the case in the media, but I don’t think they get that it may be worth actually having a staff position that’s focused on that.”).

<sup>194</sup>. Interview with Lawyer 2, supra note 51.

<sup>195</sup>. Id.



that we've put into the cases won't be as well used if we don't get the word out there, so that the public understands that we're trying to change attitudes and practices and get people to think about the way the world is structured."<sup>196</sup>

Finally, other lawyers noted how using the media could be helpful to draw other potential plaintiffs to bring their claims to these lawyers.<sup>197</sup>

#### F. Disability Cause Lawyers and Other Civil Rights Communities

We queried these lawyers about their connections with other disability cause lawyers. Nearly all professed a belief that these relationships were ongoing and important, even among lawyers that primarily serviced different communities of people with disabilities.<sup>198</sup> Although we did not ask the lawyers for the names of lawyers whom they contact regularly, these names did come up when discussing their work. Nearly every

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<sup>196.</sup> Interview with Lawyer 8, supra note 50.

<sup>197.</sup> See Interview with Lawyer 3 and Lawyer 4, supra note 52.

<sup>198.</sup> See Interview with Lawyer 5, supra note 51 ("We couldn't do [this kind of work] without our network."); see also Interview with Lawyer 3 and Lawyer 4, supra note 52 (statement of Lawyer 3) (recounting wide range of contacts among lawyers who do this work, and noting that contacts went beyond lawyers who represented blind individuals); Interview with Lawyer 7, supra note 50 (noting how she knows people in different parts of the country, and discussing how, before opening practice, the lawyers in her firm met with disability rights lawyers in different parts of the country).

lawyer mentioned another lawyer that was on our list of lawyers to be interviewed.

Although the picture was one of a movement that, in its current iteration, was still in the early stages of building relationships,<sup>199</sup> the lawyers almost all described the DRBA as a useful tool to share information and network. As one explained, “What DRBA grew out of . . . there wasn’t a place where we could talk about these issues on a high level without getting distracted by people who had different agendas.”<sup>200</sup> Another elaborated that “on a very basic level it’s very good that everybody shares their ideas so that everyone’s cases are stronger.”<sup>201</sup> For now, lawyers identified the key utility of the DRBA as its listserve, which one lawyer described as “an incredible brain trust of interesting ideas.”<sup>202</sup> Another explained that “[the DRBA] facilitates interaction in [realtime] speed. You can ask a question [and] it gets there immediately. I’ve had good experiences of having a discussion on the DRBA and then having it spin off a little bit . . . so that you talk to people and work on projects together.”<sup>203</sup>

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<sup>199</sup>. See, e.g., Interview with Lawyer 13, supra note 1 (“[W]e’re really at the beginning point, I’d say, of disability cause lawyer[ing]. . . . [N]ot a lot of people [are] talking to each other in the legal field about coordinating their efforts.”).

<sup>200</sup>. Interview with Lawyer 3 and Lawyer 4, supra note 52 (statement of Lawyer 3).

<sup>201</sup>. Id. (statement of Lawyer 4).

<sup>202</sup>. Interview with Lawyer 7, supra note 50.

<sup>203</sup>. Interview with Lawyer 5, supra note 51.

Another observed that the DRBA listserv was a source of shared insights and creativity: “[if] [s]omebody has dealt with a particular expert before, tackled a defense attorney before, the ability to share that information, can allow you to do a much better job.”<sup>204</sup>

The lawyers shared a collective hope that the DRBA would grow and begin to serve additional functions. Several lawyers noted that they would like the DRBA to function more like a true bar association, offering seminars, taking positions in amicus briefs, and having a brief bank.<sup>205</sup> They also shared a vision of the DRBA serving an additional mentoring and training role, and even exerting some measure of discipline and limited control over which cases rise to the Supreme Court.<sup>206</sup> As one lawyer explained:

“[When someone has their first disability rights case,] we would intervene at a mentoring stage . . . [and] we’ll get them someone to advise them. [Currently, these cases are] not being treated the way we would treat them. . . . So we give that advice and resources to the people who are just doing

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<sup>204</sup>. Interview with Lawyer 2, supra note 51.

<sup>205</sup>. See, e.g., Interview with Lawyer 7, supra note 50; Interview with Lawyer 11, supra note 57.

<sup>206</sup>. Cf. Interview with Lawyer 7, supra note 50 (implying that the DRBA should develop more of a litigation strategy); Interview with Lawyer 11, supra note 57.

the case or just starting and to people who want to start a disability rights practice.”<sup>207</sup>

This lawyer continued:

“[A]t the higher levels when one of us is approached or sees a case going to an appellate court or going wrong in some way we’ll then be able to reach out to those lawyers and offer them help at that stage and at every stage. If it’s preventing things from going to Supreme Court unnecessarily. . . . [H]alf the time the lawyer who did it at the lower court level [thinks,] ‘Shoot I don’t want to take this one. Who will take it?’ Or, ‘who will help me? Who will counsel me?’”<sup>208</sup>

This lawyer noted that they can help frame the issues for the courts of appeals or the Supreme Court, but noted there are limits on what they could do.<sup>209</sup> In addition, this lawyer suggested disability rights advocacy trainings on practical issues, including discovery, Daubert, negotiations, and IEP advocacy.<sup>210</sup> Finally, this lawyer was hopeful that the DRBA could be an organizing vehicle for case aggregation, where

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<sup>207.</sup> Interview with Lawyer 1, supra note 25.

<sup>208.</sup> Id.; see also Interview with Lawyer 8, supra note 50 (“We’ve got to form a stronger network and so when we start hearing about these cases we can talk to each other and go to some of the lawyers who have taken them and say, ‘Hey, we’re out here, you know, you need some help, let us know.’”).

<sup>209.</sup> See Interview with Lawyer 1, supra note 25.

<sup>210.</sup> See id.

the group identifies a common issue and everyone files a case on it at the same time.<sup>211</sup>

Given their background and interest in social justice, most lawyers interviewed had relationships—and in some cases, working partnerships—with lawyers for other civil rights groups.<sup>212</sup> Often these relationships developed around certain issues like employment or voting that impacted both people with disabilities and other communities. For lawyers who practiced at the inception of the disability rights era, many of these relationships were crucial in leading to disability rights’ “coming of age” as a civil rights movement. In some instances, the lawyers expressed a desire to improve and grow these relationships,<sup>213</sup>

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<sup>211.</sup> See id.

<sup>212.</sup> See, e.g., Interview with Lawyer 9, supra note 51 (“[We] tend to put together a consortium of legal organizations.”).

<sup>213.</sup> See Interview with Lawyer 1, supra note 25 (“[W]e’re very often trying to build on what [the other civil rights groups have] done. . . . We know the regulatory arena, and they are also trying to build on what we’ve done. So right now [the Lawyers Committee for Civil Rights] is trying to build on the ADA Amendments Act approach.”); see also Interview with Lawyer 5, supra note 51 (“I’m doing a project with . . . [the] National Center for Lesbian Rights and . . . talking about . . . some of the ideas from disability rights. . . . [T]hose concepts might be useful for people who are transgender.”).

although such collaboration was not without controversy in the disability community.<sup>214</sup>

## II. DISABILITY CAUSE LAWYERS AS CAUSE LAWYERS

Our interviews comprise the first in-depth research on post-ADA disability cause lawyers. What emerges is a portrait of disability cause lawyers who operate within their legal and political culture. Rather than trying to dramatically alter the legal landscape through the creation of new legal rights, these lawyers leverage their omnibus civil rights statute with the goal of changing behavior across the industry and with individual defendants. In a sense, their task is Sisyphean: they litigate to educate defendants about the legal and business rationale for disability inclusiveness, and even when successful, they find themselves facing another defendant with similar biases and concerns about cost. In this Part, we set forth a brief history of the disability rights movement to highlight the unique circumstances within which the lawyers we interviewed operate. Here, culture is key to understanding differences between disability cause lawyers and lawyers for other groups. We then turn to several critiques of cause lawyering generally in order to situate the self-reported work of disability cause lawyers.

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<sup>214</sup>. See Interview with Lawyer 9, supra note 51 (“Not everyone in the disability community is wild about the idea of the ACLU getting involved but we have what capacity we have.”).

### G. Unique Political and Legal Landscape

Disability cause lawyers, much like cause lawyers for other social movements, are a product of their movement's history. Americans with disabilities, as a group, have become progressively empowered by anti-discrimination protections since the late 1960s.<sup>215</sup> Paradoxically, the most notable victories were achieved by individuals acting of their own initiative or joined together in small, or disability-specific, coalitions, which lacked direct support from a large, organized disability rights movement.<sup>216</sup> Specifically, during the period between 1968 and 1990, Congress passed a

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<sup>215</sup>. The typical narrative of the modern disability rights movement begins around 1970, when Americans with disabilities began to conceive of themselves as a distinct minority group and to employ rhetoric from earlier civil rights movements. See, e.g., SHARON BARNARTT & RICHARD SCOTCH, *DISABILITY PROTESTS: CONTENTIOUS POLITICS 1970–1999*, at 20–21 (2001); RICHARD K. SCOTCH, *FROM GOOD WILL TO CIVIL RIGHTS: TRANSFORMING FEDERAL DISABILITY POLICY* 6 (2d ed. 2001). We note that significant and successful efforts existed prior to 1970, even if they remain largely unrecognized. See PAUL K. LONGMORE, *WHY I BURNED MY BOOK AND OTHER ESSAYS ON DISABILITY* 32–101 (2003) (relating vignettes of pre–1970 disability rights activities and arguing for the necessity of a comprehensive disability rights legal history).

<sup>216</sup>. See Michael Ashley Stein, Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination, 153 U. PA. L. REV. 579, 628 (2004) (“People with disabilities remain largely uncoordinated (and sometimes conflicted) in their activities.” (footnote omitted)).

series of civil rights statutes that incrementally expanded the realm of protection for disabled persons.<sup>217</sup> The passage of each of these statutes followed a similar course. Disability rights supporters, individually or with similarly minded collaborators, diverged from traditional civil rights methods of large-scale protests and constitutional litigation, and instead achieved their goals without the visible backing of a larger movement.<sup>218</sup>

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<sup>217.</sup> Chronologically, these are the Architectural Barriers Act of 1968, Pub. L. No. 90–480, 82 Stat. 718 (codified as amended at 42 U.S.C. §§ 4151–4157 (2006)); the Rehabilitation Act of 1973, Pub. L. No. 93–112, 87 Stat. 355 (codified as amended in scattered sections of 29 U.S.C.); the Education for All Handicapped Children Act of 1975, Pub. L. No. 94–142, 89 Stat. 773 (codified as amended at 20 U.S.C. §§ 1405, 1406, 1415–1419, and since renamed the Individuals with Disabilities Education Act); and the Americans with Disabilities Act of 1990, Pub. L. No. 101–336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213). Other notable enactments include the Developmentally Disabled Assistance and Bill of Rights Act of 1975, Pub. L. No. 94–103, 89 Stat. 486; the Voting Accessibility for the Elderly and Handicapped Act of 1984, Pub. L. No. 98–435, 98 Stat. 1678; the Air Carrier Access Act of 1986, Pub. L. No. 99–435, 100 Stat. 1080; and the Fair Housing Amendments Act of 1988, Pub. L. No. 100–430, 102 Stat. 1619.

<sup>218.</sup> At times, these uncoordinated lobbying efforts worked at cross purposes. For example, the curb cuts sought by the American Federation of the Physically Handicapped, whose members included wheelchair users, were opposed by the American Federation of the Blind, whose many



This approach played a crucial role in the ADA's passage.<sup>219</sup> Although the Congress that enacted the ADA "was among the most prolific in our nation's history when it came to Civil Rights legislation,"<sup>220</sup> the statute did not enjoy the broad public support or backing of powerful lobbyists that

<sup>219</sup>. See, e.g., Fred Pelka, THE ABC-CLIO COMPANION TO THE DISABILITY RIGHTS MOVEMENT 181 (1997) (noting that Washington insider Evan Kemp, a "self-described 'insider'" who himself used a wheelchair, played a pivotal role in advancing the disability rights agenda of the 1980s and in educating President George H.W. Bush on disability issues to the point where the president was willing to support and sign the ADA); Ruth Colker, The ADA's Journey Through Congress, 39 WAKE FOREST L. REV. 1, 2 (2004) (noting that the ADA was the "culmination of more than two decades of law reform efforts by the disability community" itself and those advocates within that community); see also Bagenstos, supra note 189, at 985 ("Disability rights advocates increasingly relied on welfare reform arguments as the political climate turned toward fiscal retrenchment and against extension of civil rights policies in the late 1970s and the 1980s. . . . [This strategy] appeal[ed] to the conservatives, neoconservatives, and neo-liberals who members of the conservative movement were (and are) often in the same room as the disability rights advocates in Washington." (footnote omitted)).

<sup>220</sup>. See P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT 139 (1993) 40–41.

bolstered the passage of other civil rights statutes.<sup>221</sup> Nor did the disability rights movement have a figurehead such as a Martin Luther King, Jr. or an effective umbrella group like the National Organization for Women to speak on its behalf.<sup>222</sup>

In contrast to their legislative successes, pre-ADA disability cause lawyers met an uneven reception at the Supreme Court. Litigation bringing claims under section 504 of the Rehabilitation Act, the IDEA, or the Fourteenth Amendment before the Burger Court (1969–1986), as well as the Rehnquist Court before the advent of the ADA (1986–1990), received a decidedly mixed reception.<sup>223</sup> The Supreme Court upheld rights of people with disabilities in theory, but in a parsimonious manner that limited future practical application.<sup>224</sup> Consequently, modern dis-

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<sup>221.</sup> For instance, the American Association of Retired Persons went full bore to support passage of the Age Discrimination in Employment Act of 1967. See id. at 540.

<sup>222.</sup> Although the movement did not use massive demonstrations, they did employ a handful of visible protests that garnered attention. The most dramatic of these was a staged “crawl up” of the stairs to the then-inaccessible Capitol building by wheelchair users from the advocacy group Americans Disabled for Accessible Public Transit (ADAPT). See Steven A. Holmes, Disabled Protest and Are Arrested, N.Y. TIMES, Mar. 14, 1990, at B7.

<sup>223.</sup> See Stein et al., supra note 4, at 1676 & n.56.

<sup>224.</sup> See RUTH O'BRIEN, CRIPPLED JUSTICE: THE HISTORY OF MODERN DISABILITY POLICY IN THE WORKPLACE (2001) (arguing that the Justices subscribed to

ability rights advocates learned at an early stage that contrary to the experience of predecessor social justice movements, pursuing protection from Congress provided greater advantages than bringing litigation before the Supreme Court.<sup>225</sup> Ultimately, this determination led disability cause lawyers to turn toward Congress when seeking to expand disability rights and to turn away from the post-ADA Rehnquist Court when seeking to enforce those protections.<sup>226</sup> In keeping with this history, it is therefore unsurprising that the lawyers we interviewed felt comfortable in the legislative realm; those with early movement connections expressly observed that this was a space within which they had learned to inhabit and maneuver.

Partially as a result, the disability cause lawyers we interviewed find themselves in a different political and legal landscape than lawyers for other movements. Unlike other groups, the post-ADA disability cause lawyers began their efforts with an omnibus antidiscrimination statute

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the “whole man” schema, a variant of the medical model of disability, in which disabled persons are expected to comply with social expectations or forego opportunities).

<sup>225.</sup> See, e.g., PELKA, supra note 219, at 18–20 (discussing the work of the chair of the National Council on the Handicapped to bring the disability rights issue before Congress in the late 1980s).

<sup>226.</sup> See Stein et al., supra note 4, at 1670–75; see also STEPHEN L. PERCY, DISABILITY, CIVIL RIGHTS, AND PUBLIC POLICY: THE POLITICS OF IMPLEMENTATION 56–62 (1989) (discussing the background to the 1970s legislation on education).

in hand that conferred significant rights that other groups had to seek through the courts. Hence, many traditional cause lawyer accounts focus on litigation campaigns as a vehicle for creating rights.<sup>227</sup> These accounts are inapposite to the work of disability cause lawyers, who view their role as challenging deeply entrenched resistance to enforcement of existing law.<sup>228</sup> At the same time, disability cause lawyers believed, like lawyers in other progressive social movements, that they are operating in a conservative judicial climate.<sup>229</sup>

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<sup>227.</sup> See, e.g., GENNA RAE McNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL CIVIL RIGHTS 218–20 (1985) (discussing the career of an African American litigator who pursued civil rights changes in the Court); cf. Peter H. Schuck, Public Law Litigation and Social Reform, 102 YALE L.J. 1763, 1772 (1993) (book review) (suggesting that the litigation-based critique of cause lawyering focuses solely on constitutional litigation, whereas “[s]ocial reform through statutory interpretation has a distinctive dynamic that produces its own patterns of cause and consequence”).

<sup>228.</sup> See supra notes 113–14 and accompanying text.

<sup>229.</sup> See Interview with Lawyer 3 and Lawyer 4, supra note 52 (statement of Lawyer 4) (“[T]he courts are bad.”); see also supra notes 113–14, 121, 132 and accompanying text. This is in accord with the perceptions of other progressive public interest lawyers. See, e.g., Deborah L. Rhode, Public Interest Law: The Movement at Midlife, 60 STAN. L. REV. 2027, 2037 (2008) (“Most other leaders [of progressive organizations] saw the courts as more ideological and less open and responsive . . . to the law and facts.” (internal quotation marks omitted)).

Moreover, it is a bit misleading to speak of a disability movement in the traditional sense. The disability “movement” is made up of discrete constituencies with separate lived experiences.<sup>230</sup> And although these different groups have cohesively joined together in the past, the reality persists that for many purposes, these groups operate within individual silos.<sup>231</sup> This dispersion was reflected in the work of the lawyers we interviewed, the majority of whom had ties to, and primarily worked for, discrete communities of people with disabilities. This also makes for an interesting comparison with other social movements. Despite earlier conceptions of the NAACP as representing a monolithic group, scholars

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<sup>230.</sup> See DORIS Z. FLEISHER & FRIEDA ZAMES, *THE DISABILITY RIGHTS MOVEMENT: FROM CHARITY TO CONFRONTATION* 2–46 (2001) (chronicling the various and distinct disability protests that make up the movement); see also BARNARTT & SCOTCH, supra note 215, at 109–38 (discussing unity and disunity within the disability rights movement and noting that major differences in experiences and goals exist). According to one scholar, these tensions and conflicting goals remain as of the present day, often leaving courts and policymakers faced with opposing views as to what comprises equality within the disability context. See SAMUEL R. BAGENESTOS, *LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT* 148–50 (2009).

<sup>231.</sup> See Rhode, supra note 229, at 2045; see also Barnartt & Scotch, supra note 215, at 136–37.

now recognize that it too had differences and divisions,<sup>232</sup> much like all social movements.<sup>233</sup>

The disability movement is unique in the extent to which otherwise disparate agendas are only rarely bridged through cross-disability litigation initiatives. Other groups have coalesced around certain issue areas—for instance, libertarians and religious conservatives resisting eminent domain use<sup>234</sup> and gays and lesbians pursuing same sex marriage<sup>235</sup>—despite internal conflicts.<sup>236</sup> They also face a more consistent

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<sup>232.</sup> See, e.g., TOMIKO BROWN-NAGIN, *COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF CIVIL RIGHTS MOVEMENT* 432 (2011); see also Mack, supra note 27, at 263.

<sup>233.</sup> See, e.g., Rhode, supra note 229, at 2045 (“One concern involves the fragmentation of groups and splintering of their efforts. Too often individual organizations have worked in silos, in isolation or in competition for resources and recognition.”(citation omitted)); see also SOUTHWORTH, supra note 10, at 41–66 (commenting on divided constituencies amongst conservative lawyers); Rubenstein, supra note 39, at 1680.

<sup>234.</sup> See SOUTHWORTH, supra note 10, at 101–02.

<sup>235.</sup> See Douglas NeJaime, Marriage, Cruising, and Life In Between: Clarifying Organizational Positionalities in Pursuit of Polyvocal Gay-Based Advocacy, 38 *HARV. C.R.-C.L. L. REV.* 511, 511 (2003) (noting that, although not uncontroversial, “major GLBT organizations litigate for the ‘right to marry,’ apparently at the behest of those they seek to represent.”).

<sup>236.</sup> In a few instances, the gay and lesbian rights community has divided on litigation goals to the extent that one particular segment of the

set of adversaries than disability cause lawyers, who are trying to implement a broad remedial scheme amongst diverse constituencies, including employers, businesses, and public entities.<sup>237</sup> Surprisingly, none of the lawyers we interviewed identified common defendants, including organizational defendants, that were repeat players in their litigation.<sup>238</sup> Rather

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community intervened in cases brought by other members of the community, but siding with defendants to defeat standing. In Smelt v. County of Orange, a same-sex couple sought a marriage license from the county clerk's office. 374 F. Supp. 2d 861, 864 (C.D. Cal. 2005), aff'd in part and vacated in part, 447 F.3d 673 (9th Cir. 2006) (upholding the district court's dismissal for lack of standing). After suing in federal court to challenge their denial, defendants argued that plaintiffs did not have standing to challenge the Defense of Marriage Act (DOMA), Pub. L. No. 104–199, 110 Stat. 2419 (1996). Smelt, 374 F. Supp. 2d at 870. On appeal, cause lawyers for the gay rights movement—which included Lambda Legal and the National Center for Lesbian Rights (representing Equality California)—intervened, arguing that plaintiffs did not have standing and should abstain. See Stein et al., supra note 4, at 1676 n.55. The intervenors prevailed in the Ninth Circuit, thus evading potential Supreme Court review. Smelt, 447 F.3d at 686.

<sup>237</sup>. See supra notes 18–21 and accompanying text.

<sup>238</sup>. To the extent a unified face of resistance to the ADA exists, such resistance comes from popular culture, not from organized legal opposition. Clint Eastwood has gained notoriety in disability circles for taking very public stances against the statute's public accommodations provisions,

than challenging formal barriers or combating animus, disability cause lawyers are coming up against bias, stigma, and concerns about cost. This lack of a common adversary, combined with the absence of an overriding specific right such as the right to marry, creates a less-organized framework than that of other groups. And while disability rights activists share high-level commonalities about independent living, social integration, and autonomy,<sup>239</sup> our interviews revealed that the specific manifestations of these collective values play out with great variation according to the context of specific disabilities.<sup>240</sup>

#### H. Comparing and Critiquing Disability/Cause Lawyers

To date, the vast and exciting literature on cause lawyering, law and organizing, and legal mobilization has completely eluded the experiences

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see MARY JOHNSON, MAKE THEM GO AWAY: CLINT EASTWOOD, CHRISTOPHER REEVE, AND THE CASE AGAINST DISABILITY RIGHTS 1 (2003), as well as drawing the ire of groups like Not Dead Yet for his portrayal in the movie Million Dollar Baby of the life of someone with a disability as not worth living.

<sup>239.</sup> See, e.g., Paul K. Longmore & Elizabeth Bouvia, Assisted Suicide and Social Prejudice, 3 ISSUES L. & MED. 141, 147–48 (1987).

<sup>240.</sup> More research is needed on groups like the American Association of People with Disabilities that purport to be “mediator” organizations for people with disabilities. See generally SOUTHWORTH, supra note 10, at 124–49 (defining mediator organizations within a discussion of lawyers for conservative causes).



of post-ADA disability cause lawyers.<sup>241</sup> This Part situates disability cause lawyers within these various frameworks.

### 1. Court-Centered

A central, albeit increasingly dated, critique of cause lawyering admonishes advocates for naively looking to the courts—and especially the Supreme Court—as the vehicle for empowering a particular group.<sup>242</sup> Scholars have noted that litigation victories do not automatically translate into real change on the ground.<sup>243</sup> Yet lawyers are captivated by

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<sup>241.</sup> See CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA, *supra* note 2; CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES (Austin Sarat & Stuart Scheingold eds., 1998); CAUSE LAWYERS AND SOCIAL MOVEMENTS (Austin Sarat & Stuart A. Scheingold eds., 2006); STUART A. SCHEINGOLD & AUSTIN SARAT, SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM, AND CAUSE LAWYERING (2004); THE WORLDS CAUSE LAWYERS MAKE: STRUCTURE AND AGENCY IN LEGAL PRACTICE, *supra* note 39; *see also* THE CULTURAL LIVES OF CAUSE LAWYERS (Austin Sarat & Stuart Scheingold eds., 2008).

<sup>242.</sup> The genesis of this critique is attributed to *The Hollow Hope*, which asserted that litigation does not produce lasting social consequences. See ROSENBERG, *supra* note 8, at 341; *see also* ARYEH NEIER, ONLY JUDGEMENT: THE LIMITS OF LITIGATION IN SOCIAL CHANGE 243 (1982).

<sup>243.</sup> See Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937, 954 (2007) (“Isolated victories are not readily translated into sustained efforts for structural change; institutional change tends to be incremental and often illusive.”); Rhode, *supra* note 229, at 2043 (“Doctrinal change without

a “myth of rights”—a “simplistic view of the interplay between law and social movements according to which litigation victories directly advance social change.”<sup>244</sup> Part of this appraisal recognizes that courts are ill-equipped to monitor and follow through on court victories: judgments achieved do not necessarily translate into judgments enforced.<sup>245</sup> Under this view, litigation and law enforcement are primarily backward-looking phenomena, better suited for remedying past wrongs than shaping future conduct.<sup>246</sup>

More recent commentators have reviewed the work of cause lawyers more favorably, suggesting that lawyers can have “a more sophisticated and promising understanding of the relationship between law and political progress” through a “politics of rights,” wherein court rulings are “political

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a political base to support it is vulnerable to chronic noncompliance, public backlash, statutory reversal, or judicial retrenchment.”).

<sup>244.</sup> See SOUTHWORTH, supra note 10, at 149 (discussing Stuart Scheingold’s The Politics of Rights and comparing the “myth” to an alternative approach that used judicial decisions only as one piece of the larger strategy).

<sup>245.</sup> See Abram Chayes, The Role of the Judge in Public Law Litigation, 89 HARV. L. REV. 1281, 1282–84 (1976) (describing resources needed to effectuate civil rights judgments); Lobel, supra note 243, at 954.

<sup>246.</sup> See Lobel, supra note 243, at 954; see also Julie Chi-hye Suk, Antidiscrimination Law in the Administrative State, 2006 U. ILL. L. REV. 405, 405–06 (suggesting that employment discrimination law “is mainly enforced through quasi-tort lawsuits against alleged discriminators”).

assets to be used strategically in other arenas.”<sup>247</sup> Rather than being single-minded litigation engines, cause lawyers use litigation pragmatically to complement other advocacy and mobilization strategies.<sup>248</sup> In consequence, their advocacy is seen as generating radiating effects on both the targets of their litigation and potential allies in the public<sup>249</sup>—mobilizing various constituencies and generating media coverage, which can transform disputes “in ways that reassign blame and responsibility.”<sup>250</sup>

Recent case studies of cause lawyers for different groups have supported this more nuanced view. In Professor Rhode’s study of a broad cross-section of public interest lawyers, she observed how “[m]any leaders . . . noted that victory in the courts does not necessarily mean victory in practice,” and that the surveyed leaders recognized that it is “impossible to create policy, change attitudes, or build a movement solely through litigation.”<sup>251</sup> Studies of cause lawyers from the pay-equity and animal rights movements likewise concluded that these lawyers “did

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<sup>247.</sup> SOUTHWORTH, supra note 10, at 149 (examining Scheingold’s conception of the relationship between law and politics in his work The Politics of Rights).

<sup>248.</sup> See, e.g., Scott L. Cummings & Douglas NeJaime, Lawyering for Marriage Equality, 57 UCLA L. REV. 1235, 1241 (2010).

<sup>249.</sup> See HANDLER, supra note 18, at 209–10.

<sup>250.</sup> SOUTHWORTH, supra note 10, at 150; see also SILVERSTEIN, supra note 19, at 163–64 (discussing the importance of raising the consciousness of the public).

<sup>251.</sup> Rhode, supra note 229, at 2043 (internal quotation marks omitted).

not view litigation as an exclusive end in itself and were very committed to encouraging, enhancing, and supplementing movement activity.”<sup>252</sup> Moreover, Professor Southworth’s studies of civil rights and poverty lawyers in the Chicago area and lawyers for conservative causes paint portraits of lawyers who use litigation as part of a multidimensional political strategy that appreciates the constraints of conventional legal work and thus use litigation as a political asset.<sup>253</sup>

In describing their work, the disability cause lawyers we interviewed seemed more aligned with these more recent accounts. They could most readily be characterized as extreme pragmatists in their use of litigation. These lawyers were under no illusions that litigation would transform society by creating new rights.<sup>254</sup> Indeed, the disability cause lawyers explicitly and consistently remarked that they litigated to change the behavior of specific industry actors.<sup>255</sup> They were quite attuned to using

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<sup>252.</sup> Scott L. Cummings, Critical Legal Consciousness in Action, 120 HARV. L. REV. F. 62, 64 (2007) (quoting Michael McCann & Helena Silverstein, Rethinking Law’s “Allurements”: A Relational Analysis of Social Movement Lawyers in the United States, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES, supra note 241, at 261, 269 (internal quotation marks omitted).

<sup>253.</sup> See SOUTHWORTH, supra note 10, at 166–67 (conservative lawyers); Southworth, supra note 14, at 477 (civil rights lawyers).

<sup>254.</sup> See supra notes 108–16 and accompanying text.

<sup>255.</sup> See supra notes 109–10 and accompanying text.

litigation in a way that increased public support for disability rights.<sup>256</sup> To the extent they were looking to make new law, it was limited to securing favorable interpretations of particular provisions of the ADA.<sup>257</sup> And, as other commentators have noted, employment discrimination cases can be a poor vehicle to pursue systemic reform.<sup>258</sup> Although not couched in the language of academics, this was one of the main reasons most lawyers offered for generally eschewing ADA employment litigation.<sup>259</sup>

The lawyers did not embrace the notion of blindly relying on courts to transform litigation gains into real change. Rather, the interviewed lawyers viewed litigation, or the threat thereof, as the first step of a process that continued well beyond the courthouse door.<sup>260</sup> As one lawyer

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<sup>256.</sup> See supra note 152; see, e.g., Interview with Lawyer 13, supra note 1 (“[W]e also are attuned to the public support for disability rights. We want to emphasize that disability is something that touches everybody in America at one time or another, whether personal[ly], [or] with family members—in that [way] what disability rights is about is having a society that is inclusive of everybody.”).

<sup>257.</sup> See supra note 116 and accompanying text.

<sup>258.</sup> See Susan Sturm, Second Generation Employment Discrimination: A Structural Approach, 101 COLUM. L. REV. 458, 475 (2001); Suk, supra note 246, at 405–06 (advocating for the use of increased regulation instead to achieve these outcomes).

<sup>259.</sup> See supra notes 118–19 and accompanying text.

<sup>260.</sup> See Interview with Lawyer 13, supra note 1 (dividing strategy into several parts: the pre-dispute discussions, filing of a lawsuit, the “fix” or

explained, winning in court only completes “half the work.”<sup>261</sup> Disability cause lawyers were flexible on post-dispute monitoring and implementation strategies, although they exhibited some consensus that courts were the least preferred forum and that monitors needed technical expertise that would ideally be paid for by defendants.<sup>262</sup> Sometimes the lawyers advocated specific reforms, but more often they started with higher-level goals that were flexible enough to change and evolve over time.<sup>263</sup> The lawyers emphasized including members from the disability community in the ongoing compliance process, and several lawyers spoke about how

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removal of discriminatory barriers, and the monitoring); see also supra note 104.

<sup>261.</sup> Interview with Lawyer 9, supra note 51 (noting that one of his cases went on thirty-two years and that he was used to “cases that go on forever”). Another lawyer noted that the mission of the P&A network system was to remain actively involved in cases at the monitoring stage. See Interview with Lawyer 12, supra note 47 (“We’ve got to litigate the case and then we’ve got to stick around and make sure that [the consent decree] happens.”).

<sup>262.</sup> Interview with Lawyer 1, supra note 25.

<sup>263.</sup> See Charles F. Sabel & William H. Simon, Destabilization Rights: How Public Law Litigation Succeeds, 117 HARV. L. REV. 1015, 1019 (2004) (noting the move toward “experimentalist regulation,” which “combines more flexible and provisional norms with procedures for ongoing stakeholder participation and measured accountability”).

successful this tactic had been in the ongoing battle to change organizational culture.<sup>264</sup>

The extent to which these lawyers described disengagement from the Supreme Court reflected their pragmatic tendencies. In some instances, they succeeded in getting nationwide compliance with their preferred interpretation of the statute without a nationwide ruling.<sup>265</sup> This separates their work from groups who have, at least at some point in time, devoted resources to Supreme Court litigation, often with the ultimate goal being a Court enunciation of a new right. So, for example, “[i]n the desegregation campaign, cause lawyers intentionally maneuvered the claim of ‘separate but equal’ as inherently unequal before the Court.”<sup>266</sup> Likewise, women’s cause lawyers developed protections for sexual and reproductive freedom through the concept of a constitutional right to privacy by arguing landmark cases such as Griswold v. Connecticut<sup>267</sup> and Roe v. Wade.<sup>268</sup> In the gay rights movement, advocates focused on the right to privacy and liberty in sexual relations, resulting in the decriminalization

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<sup>264.</sup> See supra notes 143–44 and accompanying text.

<sup>265.</sup> See supra notes 107, 171.

<sup>266.</sup> Stein et al., supra note 4, at 1694.

<sup>267.</sup> 381 U.S. 479, 485–86 (1965) (striking down a prohibition on contraceptives as applied to married couples under the concept of a right to privacy).

<sup>268.</sup> 410 U.S. 113, 154 (1973) (concluding that the “right to personal privacy includes the abortion decision”).

of homosexual sodomy by the Court in Lawrence v. Texas.<sup>269</sup> Although the movement initially resisted the temptation to put the issue of marriage equality before the Court and instead focused on state supreme courts, even that issue will likely reach the Supreme Court with some movement support,<sup>270</sup> if not overwhelming enthusiasm, via Perry v. Schwarzenegger.<sup>271</sup>

The disability cause lawyers skillfully became involved, by means such as strategy coordination and amicus briefs, in cases that had otherwise arrived at the Supreme Court.<sup>272</sup> But these tactics differ substantially from pursuing cases from the ground up to take to the Court. In previous work, we noted that this strategy was in line with the movement's political and legal realities, although it did generate costs.<sup>273</sup> The cases that have gone to the Supreme Court have had some singularly poor fact patterns,<sup>274</sup> which in turn discomforted judges and provided

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<sup>269.</sup> 539 U.S. 558, 578 (2003).

<sup>270.</sup> See Carlos A. Ball, The Backlash Thesis and Same-Sex Marriage: Learning from Brown v. Board of Education and Its Aftermath, 14 WM. & MARY BILL RTS. J. 1493, 1501–04 (2006).

<sup>271.</sup> 591 F.3d 1147 (9th Cir. 2010) (preventing plaintiffs' discovery requests related to a challenge of the constitutionality of California's Proposition 8).

<sup>272.</sup> See supra note 163.

<sup>273.</sup> See Stein et al., supra note 4, at 1693–94.

<sup>274.</sup> Sutton v. United Air Lines Inc., for example, included claims by twin plaintiffs with severe myopia who sought accommodations as airline



ready fodder for lampoon in the media.<sup>275</sup> Our interviews revealed that lawyers were well aware of these costs. Although the lawyers exhibited some sense that cause lawyers should inject themselves into more Court practice, the abstract thinking and resource investment necessary for this strategy was not a good fit with their general pragmatism about using litigation to secure more immediate social change.

The disability cause lawyers were analogous to their peers from other social movements in viewing litigation as one tool among many at their disposal. Within the framework of legal change, these lawyers were particularly adept in advocating for and securing social transformation

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pilots. 527 U.S. 471, 471 (1999). Sutton thus expressly opened the door to concerns about disability rights weighed against public safety. See, e.g., Walter Olson, Disabling America, NAT'L REV., May 5, 1997, at 40 (noting that ADA lawsuits are on a "collision course" with public safety).

<sup>275.</sup> At the oral argument in Sutton, Justice Scalia waved his glasses in the air, noting that under the plaintiffs' preferred definition of the statute, seven out of nine Supreme Court Justices could count as protected class members, as could a majority of Americans. See Walter Olson, Under the ADA, We May All Be Disabled, WALL ST. J., May 17, 1999, at A27 (noting Justice Scalia's dramatics with approbation). On backlash against the ADA as seen through the lens of media accounts, see generally Cary LaCheen, Achy Breaky Pelvis, Lumber Lung and Juggler's Despair: The Portrayal of the Americans with Disabilities Act on Television and Radio, 21 BERKELEY J. EMP. & LAB. L. 223 (2000).

through the regulatory process<sup>276</sup> and through state and federal legislatures.<sup>277</sup> This is reflective of the history of the disability rights movement, which has successfully passed several favorable statutes.<sup>278</sup> They also reported that they viewed the results of litigation, even when unsuccessful, as being instrumental in helping to pass legislation.<sup>279</sup>

The lawyers we interviewed also reported leveraging litigation in forums outside of the legislature, including facilitating grassroots

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<sup>276.</sup> See Schuck, supra note 227, at 1772 (“Social reform through statutory interpretation has a distinctive dynamic. . . . [T]o note only the most obvious difference, administrative agencies ordinarily play central roles in effectuating statutory regimes. Their relationships to courts, legislatures, and constituencies are pivotal in determining how judicial doctrines are both shaped and implemented.”).

<sup>277.</sup> See supra notes 182, 185.

<sup>278.</sup> See Interview with Lawyer 12, supra note 47 (“[W]e really have had some pretty phenomenal success in getting disability statutes [passed]. . . . So that may [allow us to] avoid . . . having to always look to the constitutional issue.”).

<sup>279.</sup> See Interview with Lawyer 2, supra note 51 (“[S]ometimes we have to litigate and lose before the legislature is willing to do anything.”). On this phenomenon more broadly, see NeJaime, supra note 12, at 945 (“Litigation loss may, counterintuitively, produce winners. When savvy advocates lose in court, they may nonetheless configure the loss in ways that result in productive social movement effects and lead to more effective reform strategies.”).

mobilization and building up the public reputation of the disability rights movement as one seeking equality and dignity, not welfare or special treatment.<sup>280</sup> Beyond litigation, they participated in extralegal advocacy:<sup>281</sup> training self-advocates, increasing public education,<sup>282</sup> and building coalitions with other civil rights groups.<sup>283</sup> The disability cause lawyers

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<sup>280.</sup> See also Bagenstos, supra note 189, at 1007–08 (noting how the ADA was agreeable to both political parties on the issue of personal independence); Stein, supra note 216, at 664–70 (arguing the equality theory of ADA accommodations). This, too, is consistent with efforts and strategies of other groups. See Rhode, supra note 229, at 2041 (“Many leaders also stressed more intangible but equally crucial advances in public awareness, social attitudes, and client empowerment. Their organizations’ litigation and policy work . . . has helped to raise awareness, legitimate goals, mobilize support, attract funding, and gain leverage in dispute resolution and policy settings.”).

<sup>281.</sup> See Lobel, supra note 243, at 959 (describing the “sphere of action” outside the legal arena as the “realm of civil society”).

<sup>282.</sup> See Interview with Lawyer 6, supra note 57 (noting extensive public outreach efforts); see also Interview with Lawyer 10, supra note 58 (“[I]f you know your rights, and you know how to explain them to people, part of it is knowing how to be an effective self advocate, you can [change] . . . bureaucracies . . . just through your effective advocacy.”).

<sup>283.</sup> See supra notes 216–17 and accompanying text; see also Rhode, supra note 229, at 2048–49 (describing efforts of public interest lawyers to build coalitions and communicate with one another across groups).

also engaged the media to disseminate a narrative of disability rights as an empowering concept.<sup>284</sup> They were conscious of the limits of these alternative strategies while still viewing them as an important part of their work.

## 2. Resource-Diverting

Related to the court-centered arguments described above, commentators also consider reliance on litigation as an expensive endeavor that misallocates resources. According to this view, lawyers, by nature, place too much faith in lawsuits and thereby divert movement energy away from other avenues of social change, including other forms of political mobilization.<sup>285</sup> Because courts are countermajoritarian institutions, they “lack the legitimacy, expertise, and enforcement resources sometimes necessary for meaningful institutional reform.”<sup>286</sup> Lawyers, furthermore,

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<sup>284.</sup> See supra notes 193–97; see also Interview with Lawyer 10, supra note 58 (“[L]itigation is at its best [when] it’s trying to support goals that are bigger than the facts of the case, and if you don’t have a strategy to tell the story of the case in a way that changes the way people think about disability issues, you’re leaving some stuff on the table in terms of the impact of the case.”).

<sup>285.</sup> See, e.g., SOUTHWORTH, supra note 10, at 149–50; Lobel, supra note 243, at 949 (“Litigation entails high monetary costs and requires heavy investment of time and energy, all of which inevitably decrease the ability of a movement to engage in alternative courses of action.”); Rhode, supra note 229, at 2042–43.

<sup>286.</sup> Rhode, supra note 229, at 2043.

tend to divert resources away from grassroots groups, neglect goals that may be more important to a movement, and are insensitive to the poor return they provide clients given the expense of litigation.<sup>287</sup>

Other commentators have noted that cause lawyers may be more cognizant of the costs they engender than these critiques suggest.<sup>288</sup> The lawyers we interviewed were sensitive to the resources consumed by litigation<sup>289</sup> and acknowledged the limits of litigation strategies.<sup>290</sup> Nevertheless, our interviews revealed two findings that counter cause lawyering

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<sup>287.</sup> See, e.g., MICHAEL W. McCANN, *TAKING REFORM SERIOUSLY: PERSPECTIVES ON PUBLIC INTEREST LIBERALISM* 200 (1986) (warning that the use of law “absorb[s] scarce resources that could be used for popular mobilization”).

<sup>288.</sup> See, e.g., Rhode, supra note 229, at 2043 (“Many leaders shared those concerns, and noted that ‘victory in the courts does not necessarily mean victory in practice.’”).

<sup>289.</sup> See, e.g., Interview with Lawyer 10, supra note 58 (“[T]he challenge with litigation is [that] it can be very expensive, it can take a long time.”); Interview with Lawyer 11, supra note 57 (“The cost of litigation is just way, way too high, and the numbers of lawyers on the other side in these cases seemingly are endless. So as a result we really, for many reasons, partner with either private firms or P&A’s . . . to do the work.”).

<sup>290.</sup> To this end, our interviews did not fully explore these lawyers’ collaboration with law firms assisting them in their work on a pro bono basis, although some research has been conducted on the topic. See Rhode, supra note 229, at 2070–75 (discussing collaboration of public interest groups with law firms).

scholarship on the seduction of litigation. First, the resource-siphoning critique is predicated on the notion that cause lawyers pursue damage judgments to the detriment of structural reform.<sup>291</sup> By contrast, the lawyers we interviewed focused almost exclusively on securing injunctive relief in order to leverage structural reform within individual defendants and their broader industries.<sup>292</sup> Damages are not typically available under the ADA; when these lawyers sought damages under state laws, they did so to create fear of liability and initiate a domino effect on nonparty members of related industries.<sup>293</sup>

Second, the critique of litigation as a resource diversion presupposes that litigation is a lawyer-driven phenomenon. Yet our interviews revealed that some well-financed spheres of the disability rights movement are pressing for litigation with a very concrete sense of what social changes they hope to realize. Consequently, several of the lawyers we interviewed functioned more like classic private lawyers, whose clients hire them to accomplish discrete legal objectives through the courts.<sup>294</sup>

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<sup>291.</sup> See David Luban, Essay, Settlements and the Erosion of the Public Realm, 83 GEO. L.J. 2619, 2646 (1995) (suggesting a monetization of legal disputes, whereby cases are increasingly settled through monetary payments at the expense of structural reforms).

<sup>292.</sup> See supra notes 137–43 and accompanying text. When rare but similar criticisms are leveled against lawyers bringing ADA suits, they are directed against high-volume lawyers. See supra note 48.

<sup>293.</sup> See supra notes 145–46 and accompanying text.

<sup>294.</sup> See ROBERT L. NELSON, PARTNERS WITH POWER: THE SOCIAL

Some of these lawyers also demonstrated what Professor Robert Nelson has referred to as a “lack of autonomy” from the clients—when a powerful client’s repeat business becomes a source of professional strength for the lawyer.<sup>295</sup> The cause lawyers may share ideological commitments with the clients they serve, but they expressly observed they were not calling the shots and were instead “strictly the chauffeur.”<sup>296</sup> The fact that the NFB pays its lawyers by the hour, an unusual arrangement in public interest law, reinforces this similarity.<sup>297</sup>

The post-ADA disability rights movement started from a relative position of power—an omnibus civil rights statute that formally conferred protections and a private right of action—coupled with tepid public enforcement.<sup>298</sup> This combination undoubtedly influenced the choice to pursue statutory enforcement litigation. Nevertheless, the critique of cause lawyering as litigation-centric, and, by nature, an overly narrow

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TRANSFORMATION OF THE LARGE LAW FIRM 232 (1988).

<sup>295.</sup> Id. at 5.

<sup>296.</sup> See supra note 91. The lawyer implied that although he drove the car, he was told explicitly where to go. See also Interview with Lawyer 11, supra note 57 (“[T]his is a home for [a particular community of people with disabilities]. . . . They know that we’re going to listen to their issues, and if we can . . . we’re going to try to address them.”).

<sup>297.</sup> See Interview with Lawyer 3 and Lawyer 4, supra note 52 (statement of Lawyer 3).

<sup>298.</sup> See Michael E. Waterstone, A New Vision of Public Enforcement, 92 MINN. L. REV. 434, 440–41 (2007).

vehicle for dispute resolution, is certainly relevant: most of the disability cause lawyers we interviewed were focused on various stripes of ADA litigation.<sup>299</sup> Hence, a cadre of the most talented and resourceful movement advocates are focused on an antidiscrimination agenda to the detriment, perhaps, of seeking more universal policy reforms such as health-care or employment.<sup>300</sup> Given the persistently low employment rates of people with disabilities in the post-ADA period,<sup>301</sup> this is an insight worth reflecting on.<sup>302</sup>

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<sup>299.</sup> See supra note 103 and accompanying text.

<sup>300.</sup> See BAGENSTOS, supra note 230, at 118–20 (contending that the anti-discrimination agenda may even contribute to socioeconomic disparities because, despite its promise, it cannot by itself unseat deeply entrenched social stigma).

<sup>301.</sup> See DAVID C. STAPLETON & RICHARD V. BURKAUSER, THE DECLINE IN EMPLOYMENT OF PEOPLE WITH DISABILITIES 4 (2003).

<sup>302.</sup> See Michael Ashley Stein & Penelope J.S. Stein, Beyond Disability Civil Rights, 58 HASTINGS L.J. 1203, 1204 (2007) (noting the inability of civil rights statutes alone to effectuate change); accord Michael Ashley Stein & Michael E. Waterstone, Finding the Gaps: A Comparative Analysis of Disability Laws in the United States to the United Nations Convention on the Rights of Persons with Disabilities (CRPD), NAT'L COUNCIL ON DISABILITY 22–24 (May 12, 2008), <http://www.hpod.org/resources/human-rights> (follow hyperlink under “Reports”).



### 3. Elite Cooption

An additional concern with cause lawyering is that it creates unhealthy dependency by movements on elites. Commentators refer to this as the cooption effect of the legal profession on a social movement.<sup>303</sup> Cooption can manifest itself through lawyers pushing for outcomes that are not in their clients' best interests, or in dominating far-removed and rarely-consulted grassroots clients' interests.<sup>304</sup> Because lawyers have an inherent incentive to develop narratives with the best chance of winning a case, the client's own voice and diversity of interests are lost.<sup>305</sup> The depictions of the Legal Defense Fund litigation

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<sup>303.</sup> See, e.g., Lobel, supra note 243, at 952–53.

<sup>304.</sup> See GERALD P. LÓPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE 2–3 (1992); see also GIRARDEAU A. SPANN, RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA 166–68 (1993) (concluding that minorities have developed a dependence on Supreme Court decisions); Gary Bellow & Jeanne Kettle-son, From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice, 58 B.U. L. REV. 337, 341 (1978) (noting the capacity of public interest lawyers to influence client choice); Clark D. Cunningham, The Lawyer as Translator, Representation as Text: Towards an Ethnogra-phy of Legal Discourse, 77 CORNELL L. REV. 1298, 1300–01 (1992).

<sup>305.</sup> See Anthony V. Alfieri, Reconstructive Poverty Law Practice: Learn-ing Lessons of Client Narrative, 100 YALE L.J. 2107 (1991); see also NeJai-me, supra note 235, at 545–46 (discussing a gay rights advocacy organi-zation's presentation of the “ideal” same-sex marriage couple).

that ended official school segregation represents the classic reframing of cause lawyering: “The NAACP lawyers marginalized, cabined, and outright repudiated class issues through the complaints they pursued and those they ignored” so that by the time Brown and its underlying strategy coalesced, the cause lawyers had completely dominated any dissenting views.<sup>306</sup>

As discussed above, nearly all the lawyers we interviewed came from elite legal backgrounds, and in several instances they described their work in ways that are consistent with the image of advocates making key decisions about what litigation to pursue on behalf of underprivileged groups.<sup>307</sup> To this end, it is worth noting that several of the lawyers indicated a commitment to litigating on behalf of people with disabilities who were “at the margins” and possessed the least political clout, specifically, individuals with psychosocial disabilities.<sup>308</sup> Yet these lawyers also

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<sup>306.</sup> See Risa L. Goluboff, “We Live’s in a Free House Such as It Is”: Class and the Creation of Modern Civil Rights, 151 U. PA. L. REV. 1977, 1979 (2003).

<sup>307.</sup> See, e.g., Interview with Lawyer 1, supra note 25 (discussing the lawyer’s ability to choose the type of litigation that she wanted to pursue); Interview with Lawyer 9, supra note 51 (“[W]e’re looking for cases that advance our overall mission.”).

<sup>308.</sup> See Interview with Lawyer 5, supra note 51 (noting her desire to represent some people who are “real outliers in society”); see also Interview with Lawyer 9, supra note 51 (noting how his organization represents individuals with “the most challenging disabilities . . . [who] need this intensive

viewed themselves as being responsive to community need and putting their litigation focus where the community thought it should go.<sup>309</sup> This is a largely untested proposition; none of the interviewed lawyers offered much in the way of “movement” monitoring or checks to ensure accountability, apart from those instances when lawyers were retained hourly for litigation projects.<sup>310</sup> Many of the lawyers had significant life experience with disabilities and deep connections with various parts of the disability rights movement, and were often people with disabilities themselves.<sup>311</sup> This is harmonious with movement lawyers in other areas who share life experiences and identities with the communities they represent. Others

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intervention”). For a discussion of individuals with psychosocial disabilities as being the most marginalized community of people with disabilities, see Michael E. Waterstone & Michael Ashley Stein, Review Essay, Disabling Prejudice, 102 Nw. U. L. REV. 1351 (2008).

<sup>309.</sup> See supra notes 88–91 and accompanying text; see also Interview with Lawyer 13, supra note 1 (“[To] a large extent we look to [disability] organizations for guidance on where they want to see the legal team; we consider ourselves the legal arm of the movement. Where do they want the legal [team] to focus its efforts?”).

<sup>310.</sup> See, e.g., Interview with Lawyer 2, supra note 51 (discussing use of hourly rate); Interview with Lawyer 8, supra note 50.

<sup>311.</sup> See, e.g., Interview with Lawyer 7, supra note 50 (“[M]y husband uses a wheelchair . . . [and] his younger brother was born with a pretty severe cognitive disability.”); Interview with Lawyer 8, supra note 50 (“I am a blind attorney.”).

felt deeply that litigation was reflective of community desires and helped give their clients voice and restore power differentials.<sup>312</sup>

However, unlike other groups that have pursued systemic constitutional litigation, the lawyers we interviewed file an extremely small portion of test-case litigation under the ADA. Unlike the high-stake, preclusive nature of constitutional litigation, individuals seeking to vindicate their own statutory rights can and do bring the vast majority of ADA cases. Most ADA plaintiffs are not reliant on disability cause lawyers to bring their cases. As is well documented, the vast majority of ADA litigation involves Title I,<sup>313</sup> and the cause lawyers we interviewed were not primarily operating under that part of the statute.<sup>314</sup> Finally, it is worth noting, as discussed above, that in many instances, the lawyers we interviewed brought cases under the specific direction of their strong clients, which, like the NFB or National Association of the Deaf (NAD), are large grassroots membership organizations.

### III. DISABILITY CAUSE LAWYERS AND DISABILITY LAW

Our interviews on the strategic motivations of modern disability cause lawyers both confirm and challenge existing scholarship, thereby provoking a reassessment of how American disability law functions in practice. The disability cause lawyers' criticisms of the Supreme Court are on par

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<sup>312</sup>. See, e.g., Interview with Lawyer 11, supra note 57 (“I think [litigation] empowers the community to a great extent.”).

<sup>313</sup>. See Michael Waterstone, The Untold Story of the Rest of the Americans with Disabilities Act, 58 VAND. L. REV. 1807, 1822 (2005).

<sup>314</sup>. See supra note 103 and accompanying text.

with those of academics. Nevertheless, contrary to scholarly claims, the Court's narrow interpretation of the ADA has not undermined their daily activities.<sup>315</sup> Nor did the advocates agree with commentators who recommend increasing the use of class actions.<sup>316</sup> Rather, they prefer focusing on disability-specific cases whose settlements and verdicts in turn redound to the benefit of the larger disabled community.<sup>317</sup> Moreover, disability cause lawyers have developed effective litigation funding strategies despite academic fears that Supreme Court curtailment of civil rights attorney fees has thwarted public interest law. In consequence—and despite highly analyzed Supreme Court decisions—disability cause lawyers have made significant progress in bringing about social integration for Americans with disabilities.<sup>318</sup>

#### A. Beyond the Supreme Court

A dominant narrative in ADA scholarship has critiqued the Supreme Court's definition of disability and its attendant practical<sup>319</sup> and

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<sup>315.</sup> See supra note 178 and accompanying text.

<sup>316.</sup> See, e.g., Interview with Lawyer 11, supra note 57 (“[W]e do not file many class actions because the relief we can get doesn’t always require a class action.”).

<sup>317.</sup> See, e.g., Interview with Lawyer 13, supra note 1 (“[W]e’re able to achieve systemic relief without using the class action device . . . [and] challenge actual policies that affect lots of people.”).

<sup>318.</sup> For an account and analysis of this progress by disability cause lawyers, see Stein et al., supra note 4, at 1682–85.

<sup>319.</sup> For assessments from academics who contributed to the drafting of

theoretical<sup>320</sup> implications for the development of disability-based civil rights. In sum, academics analyzing the Court's ADA jurisprudence have noted the practical bind in which potential plaintiffs have been placed—being disabled enough to fall within the statute, yet not so disabled as to make claims to performing social functions implausible—and the direct consequence of this catch-22, namely, that plaintiffs are routinely turned away from court.<sup>321</sup> Within the employment realm, more than 93 percent

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the ADA, see Robert L. Burgdorf, Jr., “Substantially Limited” Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability, 42 VILL. L. REV. 409, 438–39 (1997); Chai Feldblum, Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It? 21 BERKELEY J. EMP. & LAB. L. 91, 139–41 (2000); Arlene B. Mayerson, Restoring Regard for the “Regarded as” Prong: Giving Effect to Congressional Intent, 42 VILL. L. REV. 587, 587 (1997); Bonnie P. Tucker, The Supreme Court's Definition of Disability Under the ADA: A Return to the Dark Ages, 52 ALA. L. REV. 321, 370 (2000).

<sup>320.</sup> See, e.g., Samuel R. Bagenstos, Subordination, Stigma, and “Disability”, 86 VA. L. REV. 397, 414–17 (2000); Mark Kelman, Does Disability Status Matter?, in AMERICANS WITH DISABILITIES: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS 91, 91–92 (Leslie P. Francis & Anita Silvers eds., 2000); Stein, supra note 216, at 583.

<sup>321.</sup> See, e.g., Aviam Soifer, The Disability Term: Dignity, Default, and Negative Capability, 47 UCLA L. REV. 1279, 1327 (2000). See generally Bradley A. Areheart, When Disability Isn't “Just Right”: The Entrenchment

of ADA claims have been unsuccessful, with an overwhelming number losing at the summary judgment stage for not adequately satisfying the definition of disability.<sup>322</sup> For these commentators, the Justices hold a retrogressive view of disability as not belonging to the overall civil rights agenda,<sup>323</sup> a perspective that has impaired the ADA and resulted in the statute having a negligible impact.<sup>324</sup>

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of the Medical Model of Disability and the Goldilocks Dilemma, 83 *IND. L.J.* 181 (2008). For a compilation of scholarship in this area, see Waterstone, supra note 313, at 1814–17.

<sup>322.</sup> See Ruth Colker, Winning and Losing Under the Americans with Disabilities Act, 62 *OHIO ST. L.J.* 239, 240 (2001) (showing that defendants prevail in nearly 94 percent of ADA Title I cases at the trial level that are appealed and in 84 percent of cases that reach the courts of appeal); see also Amy L. Albright, 2008 Employment Decisions Under the ADA Title I-Survey Update, 33 *MENTAL & PHYSICAL L. REP.* 363, 365 (2009). Professors Stein and Waterstone each served as ABA Mental and Physical Disability Law Commissioners.

<sup>323.</sup> See, e.g., Matthew Diller, Judicial Backlash, the ADA, and the Civil Rights Model, 21 *BERKELEY J. EMP. & LAB. L.* 19, 22 (2000); Bonnie P. Tucker, The ADA's Revolving Door: Inherent Flaws in the Civil Rights Paradigm, 62 *OHIO ST. L.J.* 335, 339 (2001). See generally *BACKLASH AGAINST THE ADA: REINTERPRETING DISABILITY RIGHTS* (Linda H. Krieger ed., Univ. of Mich. Press 2003).

<sup>324.</sup> See, e.g., Scott Burris & Kathryn Moss, The Employment Discrimination Provisions of the Americans With Disabilities Act: Implementation and



In our interviews, the disability cause lawyers generally agreed with the scholars' substantive criticisms of the Supreme Court's rulings and concurred in the view that the Court and the federal judiciary evinced hostility to disability-related suits.<sup>325</sup> Yet, in direct contrast to the academic perspective, the disability cause lawyers uniformly felt that the Court's decisions had a very limited direct impact on their daily activities.<sup>326</sup> This was in large measure due to the fact that the disability movement advocates did not represent the types of plaintiffs that courts excluded from ADA coverage.<sup>327</sup> Rather, these lawyers represented the blind community, the deaf community, individuals with obvious mobility impairments, and other individuals for whom even the most restrictive judicial interpretation of "disability" has not been an issue.<sup>328</sup> Hence, our findings reveal that disability cause lawyers have brought, and

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Impact, 25 HOFSTRA LAB. & EMP. L.J. 1, 31 (2007) (concluding that Title I of the ADA has not substantially improved employment rates among people with disabilities); see also STAPLETON & BURKHAUSER, supra note 301 (publishing a number of empirical studies that endeavor to explain the post-ADA employment decline).

<sup>325.</sup> See supra note 229.

<sup>326.</sup> See supra note 178 and accompanying text.

<sup>327.</sup> See supra note 178 and accompanying text.

<sup>328.</sup> See supra notes 94–95 and accompanying text. We do not mean to imply that no disability cause lawyers represent groups facing tougher hurdles on the "definition of disability" issue; we are confident that some do.



continue to bring, high-profile and successful cases despite the Court's decisions, although perhaps in a narrowed issue area in the face of a hostile Supreme Court. This suggests that the ADA's impact may be two tiered—one for individuals who clearly meet the statute's definition of disability and another for the larger group that does not.<sup>329</sup> Depending on one's view of the disability rights movement, this may or may not be a positive thing.<sup>330</sup>

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<sup>329.</sup> Along similar lines, Professor Bagenstos noted that the Court's ADA coverage decisions can be understood as correlated with how stigmatized the particular disabilities are in given cases. See BAGENSTOS, supra note 230, at 37–39; see also Paula E. Berg, III/Legal: Interrogating the Meaning and Function of the Category of Disability in Antidiscrimination Law, 18 YALE L. & POL'Y REV. 1 (1999). These accounts, however, focus on the distinctions that have been made in ADA Supreme Court cases, not on the progressive nature of litigation generally for certain categories of disabilities.

<sup>330.</sup> One strand of disability rights thinking conceptualizes disability from a “minority group model” standpoint. See, e.g., Harlan Hahn, Civil Rights for Disabled Americans: The Foundation of a Political Agenda, in IMAGES OF THE DISABLED, DISABLING IMAGES 181, 184 (Alan Gartner & Tom Joe eds., 1987) (concluding that the achievement of rights for a more limited group of individuals with more severe disabilities would be a positive development). Other disability theorists take more of a “universalist” approach and prefer more expansive—though less focused—legal advances. See, e.g., Irving Kenneth Zola, Toward the Necessary Universalizing of

Moreover, the interviewed lawyers were more disability-specific than cross-disability in their representation. The high-profile, structural ADA litigation these lawyers brought is readily observable as disability-specific. No lawyer we interviewed had a concrete cross-disability strategy for pursuing litigation campaigns that benefited the disability classification generally, although many felt this was an admirable goal. Two of the authors have previously written about the need for more disability class actions, ideally in the employment realm and consisting of classes of individuals with multiple disabilities.<sup>331</sup> Our interviews suggest that at this point, at least within one community of people engaged in structural ADA litigation, this idea is a fairly academic exercise.<sup>332</sup>

While most ADA cases have been resolved at the definition of disability stage—and almost uniformly adversely for employment claims—the typical ADA case brought by these lawyers progressed further. When asked about the legal issues that determined their cases, these disability cause lawyers did not point to the threshold definition of disability. Rather, they identified the following as dispositive: the reasonableness of requested accommodations, the undue burden or direct threat defenses,

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Disability Policy, 67 MILBANK Q. 401, 420–21 (1989).

<sup>331.</sup> See Michael Ashley Stein & Michael E. Waterstone, Disability, Disparate Impact, and Class Actions, 56 DUKE L.J. 861, 864 (2006).

<sup>332.</sup> In Wal-Mart Stores, Inc. v. Dukes, the Supreme Court reversed the Ninth Circuit and denied current and former female Walmart employees class action certification to sue for employment discrimination. 131 S. Ct. 2541, 2547, 2556–57 (2011).

or the interpretation of other aspects of the statute's reach and coverage.<sup>333</sup> As one lawyer explained, "I think what's going to happen in employment cases is what's largely happened to blindness employment cases. [T]he battle ground always has been reasonable accommodations and direct threat, and I think we're going to see that more in the pan-disability sense."<sup>334</sup> This supports an assertion among some commentators that after the ADAAA, issues of reasonable accommodation will become more important.<sup>335</sup>

## B. Circumventing Buckhannon

Scholars have been critical of the Court's ruling in Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources,<sup>336</sup> averring that it undermines private civil rights

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<sup>333.</sup> See, e.g., Interview with Lawyer 8, supra note 50 ("So I think we're going to see a lot more of [reasonable accommodation cases] and of course good old direct threat.").

<sup>334.</sup> Id.

<sup>335.</sup> See, e.g., Mark C. Weber, Unreasonable Accommodation and Due Hardship, 62 FLA. L. REV. 1119, 1123 (2010) ("After the ADAAA, attention will turn to what accommodations employers must provide in order to comply with the Act."); see also Ani B. Satz, Disability, Vulnerability, and the Limits of Antidiscrimination, 83 WASH. L. REV. 513, 540 (2008) ("[B]y including greater numbers of individuals in the protected class, the ADAAA will likely focus more attention on whether accommodations impose an 'undue hardship' on an employer.").

<sup>336.</sup> 532 U.S. 598 (2001).

implementation and places increased pressure on public enforcement officials.<sup>337</sup> Indeed, one influential work surveyed two hundred public interest organizations and revealed that the greatest negative impact of Buckhannon is on paradigmatic test cases, such as class actions seeking injunctive relief against government actors.<sup>338</sup> Further, the survey questioned assumptions in Buckhannon that led the Court to label the plaintiff 's concerns—that meritorious but expensive claims would be discouraged—as “entirely speculative and unsupported by any empirical evidence.”<sup>339</sup> Our interviews confirm Buckhannon's chilling effect. Nearly every lawyer relied, at least in part, on attorneys' fees to fund his other docket and acknowledged that it has become increasingly difficult to represent civil rights claimants after Buckhannon.<sup>340</sup>

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<sup>337.</sup> See, e.g., Bagenstos, supra note 48, at 3; Erwin Chemerinsky, Closing the Courthouse Doors to Civil Rights Litigants, 5 U. PA. J. CONST. L. 537, 547 (2003); Pamela S. Karlan, Disarming the Private Attorney General, 2003 U. ILL. L. REV. 183, 207–08 (2003); David Luban, Essay, Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers, 91 CALIF. L. REV. 209, 243–45 (2003); Waterstone, supra note 298, at 443–44.

<sup>338.</sup> See Catherine R. Albiston & Laura Beth Nielsen, The Procedural Attack on Civil Rights: The Empirical Reality of Buckhannon for the Private Attorney General, 54 UCLA L. REV. 1087, 1092, 1105–08 (2007).

<sup>339.</sup> Id. at 1092.

<sup>340.</sup> See supra notes 68, 80–82.

However, we also discovered a wholly unexamined phenomenon—the disability cause lawyers’ strategies for operating in a post–Buckhannon world. First, in cases when litigation challenged wide-ranging access violations in large companies, the disability cause lawyers felt it was nearly impossible for defendants to sufficiently remedy systemwide breaches in time to moot out a claim for relief.<sup>341</sup> Specifically, these lawyers turned the table on the Supreme Court by applying its decision in Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.,<sup>342</sup> to rebut mootness challenges to recouping attorneys’ fees.<sup>343</sup> In Friends of the Earth, the Court reasoned that mootness only occurs if subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.<sup>344</sup> For lawsuits alleging systemic noncompliance with various disability access provisions, the disability cause lawyers reported that even when agreement existed on the nature of the barriers to be fixed, inertia and recidivism were powerful enough forces to keep the case from becoming

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<sup>341.</sup> See, e.g., Interview with Lawyer 7, supra note 50.

<sup>342.</sup> 528 U.S. 167 (2000).

<sup>343.</sup> See, e.g., Interview with Lawyer 7, supra note 50 (“Well, the great tool that the Supreme Court has given us to fight [Buckhannon] is [Friends of the Earth].”).

<sup>344.</sup> See 528 U.S. at 190. The Court noted that otherwise, “the exception to mootness that arises when the defendant’s allegedly unlawful activity is ‘capable of repetition, yet evading review,’ could not exist.” Id.

moot.<sup>345</sup> One lawyer described a large class action against multiple stores that revealed thousands of violations that the defendant then hurried to fix in order to moot the claim.<sup>346</sup> Those emendations, however, would invariably break down: “their general contractor would photograph a compliant toilet, and three months later our guy would go in and you could [see] from the photos it was a totally different toilet. They pulled it out, put in a new one, and [had] done it wrong.”<sup>347</sup>

Second, several disability cause lawyers noted that Buckhannon had led them to bring cases in jurisdictions where they could bring stand-alone state law claims—or include state statutes that allowed damage claims—thus escaping Buckhannon’s mootness dilemma.<sup>348</sup> The two jurisdictions most often mentioned in our interviews were California and Massachusetts.<sup>349</sup> This is particularly noteworthy because several of the lawyers who ascribed to this strategy did not live in either of those jurisdictions. For some types of cases, particularly those involving

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<sup>345.</sup> See, e.g., Interview with Lawyer 7, supra note 50.

<sup>346.</sup> See id. (discussing Taco Bell’s actions in a case concerning inadequate plumbing accommodations).

<sup>347.</sup> Id.

<sup>348.</sup> See supra note 69.

<sup>349.</sup> See, e.g., Interview with Lawyer 2, supra note 51 (California and Massachusetts); Interview with Lawyer 3 and Lawyer 4, supra note 52 (statement of Lawyer 4) (California). For California’s statutes, see CAL. CIV. CODE §§ 52(a), 54.3 (West 2006). For Massachusetts, see MASS. GEN. LAWS ch. 93, § 103 (2006).

technology and the Internet, the lawyers felt that they could effect nationwide change by bringing suit in these jurisdictions.<sup>350</sup> They reasoned that once a basic technological change was made in one jurisdiction, it ultimately would be replicated nationally.<sup>351</sup> One lawyer succinctly explained that when the subject matter is access to technology, “it doesn’t matter where I bring the case. I can get a national result.”<sup>352</sup> As a result, that lawyer estimated that 90 percent of his docket relating to technology and access cases is in Massachusetts or the Northern District of California.<sup>353</sup>

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<sup>350.</sup> See, e.g., Interview with Lawyer 2, supra note 51; see also Interview with Lawyer 3 and Lawyer 4, supra note 52 (statement of Lawyer 3) (“We are getting national relief [from our cases].”).

<sup>351.</sup> See Interview with Lawyer 2, supra note 51.

<sup>352.</sup> Id.

<sup>353.</sup> Id. We observed one other example of circumventing Buckhannon. At least one team of lawyers we interviewed put a heightened premium on early negotiations with defendants and made defendants’ waiver of their Buckhannon rights a condition of these early negotiations. See Interview with Lawyer 3 and Lawyer 4, supra note 52 (statement of Lawyer 3). In doing so, they relied on their track records of solving problems without resort to expensive litigation and engaging defendants from a combined business and moral perspective. Id. They also were able to offer a wealth of disability-specific knowledge—made possible by deep connections with their individual and organizational clients—that proved useful to defendants. Id.

Thus, while not disputing the general ill effects of Buckhannon for cause lawyers bringing civil rights cases, disability cause lawyers have discovered ways to circumvent or mitigate the Court's ruling.

### C. Pursuing Justice, Daily

Commentators on Supreme Court jurisprudence regarding the ADA and other civil rights statutes paint a bleak picture of social justice in post-1990 America.<sup>354</sup> It is a portrait that is largely well-earned, especially when one focuses on the relative disabled employment rates.<sup>355</sup> Nonetheless, there has been steady and salient progress—which is

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<sup>354.</sup> See, e.g., Sylvia A. Law, In the Name of Federalism: The Supreme Court's Assault on Democracy and Civil Rights, 70 U. CIN. L. REV. 367, 387–90 (2002) (explaining the negative impact of Buckhannon); Jed Rubenfeld, The Anti-Antidiscrimination Agenda, 111 YALE L.J. 1141, 1142–43, 1149 (2002) (discussing the Court's recent systematic efforts to limit antidiscrimination provisions of the civil rights agenda); Peter J. Rubin, Essay, Equal Rights, Special Rights, and the Nature of Antidiscrimination Law, 97 MICH. L. REV. 564, 564–65, 567 (1998).

<sup>355.</sup> As of 2010, the unemployment-population ratio among working-age adults with disabilities, ages 16–64, was 81.4 percent; only 21 percent of working-age people with disabilities reported that they were employed part- or full-time. See HARRIS INTERACTIVE, THE ADA, 20 YEARS LATER: KESLER FOUNDATION/NOD SURVEY OF AMERICANS WITH DISABILITIES 40 n.4 (2010), available at <http://www.2010DisabilitySurveys.org/pdfs/surveyresults.pdf>. For that same age range, the ratio for those without a disability was 63.9 percent. Id.



largely undocumented<sup>356</sup>—by disability cause lawyers on behalf of their clients and the larger disability community in helping to transform society through social integration—what seminal disability rights advocate, and NFB founder, Professor TenBroek called “the right to live in the world.”<sup>357</sup> TenBroek argued that the appropriate remedy for the historical exclusion of disabled persons from mainstream society was participatory justice—the notion that society has a moral imperative to remove artificial barriers to inclusion.<sup>358</sup> This is because nothing is “more essential to personality, social existence, economic opportunity—in short, to individual well-being and integration into the life of the community—than the physical capacity, the public approval, and the legal right to be abroad in the land.”<sup>359</sup> Put another way, “individuals cannot flourish without their joining with other humans in some sorts of collective activities.”<sup>360</sup>

One of the driving factors in passing the ADA was a desire to counteract the social isolation historically experienced by persons with disabilities.<sup>361</sup> Congress was presented with a catalog of evidence on

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<sup>356</sup>. But see Waterstone, supra note 298, at 441–43.

<sup>357</sup>. TenBroek, supra note 38, at 852.

<sup>358</sup>. See id. at 910, 912–13, 917–18; see also Michael Ashley Stein, Disability Human Rights, 95 CALIF. L. REV. 75, 102 (2007).

<sup>359</sup>. TenBroek, supra note 38, at 841.

<sup>360</sup>. Anita Silvers, People with Disabilities, in THE OXFORD HANDBOOK OF PRACTICAL ETHICS 300, 318 (Hugh LaFollette ed., 2003).

<sup>361</sup>. See 42 U.S.C. § 12101(a) (2006) (discussing Congress’s findings and purpose for the ADA).

the historical exclusion of Americans with disabilities from mainstream society, including eye-opening results of an independent nationwide poll of one thousand disabled persons.<sup>362</sup> That study found that two-thirds of working-age people with disabilities were unemployed, and that two-thirds of those individuals wanted to work but could not do so because of employer attitudes.<sup>363</sup> The study also reported that during the year preceding the ADA hearings, nearly two-thirds of individuals with disabilities did not attend movies; three-fourths of the disabled population did not see live theater or music performances; two-thirds of disabled people did not attend sporting events; 17 percent did not eat in restaurants; and 13 percent did not shop in grocery stores.<sup>364</sup> Empirically rigorous and anecdotal evidence corroborated these findings.<sup>365</sup> As a result of those

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<sup>362.</sup> See HUMPHREY, TAYLOR, ET AL., LOUIS HARRIS & ASSOCIATES, THE ICD SURVEY OF DISABLED AMERICANS: BRINGING DISABLED AMERICANS INTO THE MAINSTREAM, at i–iv (1986).

<sup>363.</sup> Id. at 47–51. The results were summarized to Congress by the study’s president, Humphrey Taylor, during hearings on the ADA. See Guaranteed Job Opportunity Act of 1987: Joint Hearing on S. 777 Before the Subcomm. on Emp’t and Productivity and the Subcomm. on the Handicapped of the Comm. on Labor and Human Res., 101st Cong. 9–10 (1987) [hereinafter Hearings] (statement of Humphrey Taylor).

<sup>364.</sup> TAYLOR ET AL., supra note 362, at 37–39.

<sup>365.</sup> For example, census data reported at that time that more than 20 percent of working-age individuals with disabilities were below the poverty level. NATIONAL COUNCIL ON THE HANDICAPPED, TOWARD INDEPENDENCE: AN

hearings, Congress determined that people with disabilities had been denied equal opportunities in society and discrimination persisted in “critical areas,” including employment, education, transportation, access to public services, and voting.<sup>366</sup> Moreover, Congress concluded that the source of this exclusion was artificial, sustained by the “continuing existence of unfair and unnecessary discrimination and prejudice.”<sup>367</sup> Among

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ASSESSMENT OF FEDERAL LAWS AND PROGRAMS AFFECTING PERSONS WITH DISABILITIES 5 (1986). Previous testimony before the Senate had concluded that “By almost any definition . . . disabled Americans are uniquely underprivileged and disadvantaged. They are much poorer, much less well educated and . . . hav[e] much less social life, enjoy fewer amenities and have a lower level of life satisfaction than other Americans.” Hearings, supra note 363 (statement of Humphrey Taylor). The more compelling anecdotal examples were personal testimonies by a wheelchair-using future under-secretary of the Department of Education who was removed from an auction house for being deemed “disgusting to look at;” individuals with Down Syndrome who were banned from a zoo because of the zoo keeper’s fear they would frighten the chimpanzees; an academically competitive and nondisruptive child who was barred from attending public school because of a teacher’s allegation that his physical appearance “produced a nauseating effect” in classmates; and a competent arthritic woman who was denied a job by a college because of its trustees’ belief that “normal students shouldn’t see her.” See S. REP. NO. 101–116, at 104–05 (1989).

<sup>366</sup>. See 42 U.S.C. § 12101(a)(3) (2006).

<sup>367</sup>. Id. § 12101(a)(8) (emphasis added).

the forms of unwarranted exclusion encountered by people with disabilities on a daily basis, Congress noted “the discriminatory effects of architectural, transportation, and communication barriers.”<sup>368</sup> Accordingly, Congress premised the ADA on the belief that society had to be redesigned to allow the full integration of disabled people.<sup>369</sup>

Progress towards achieving a disability-inclusive society has been assessed and documented in a series of reports conducted by the National Council on Disability (NCD), an independent federal agency that has critically assessed American disability law and policy and its implementation since 1984, six years before the ADA’s passage.<sup>370</sup> NCD studies have consistently found that the employment provisions of the ADA have been poorly implemented, but that the public accommodation provisions have been well-enforced.<sup>371</sup> Further, the studies have found that by making the physical and cyber environments more accessible, the daily lives of people with disabilities have improved.<sup>372</sup> To illustrate this,

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<sup>368</sup>. Id. § 12101(a)(5).

<sup>369</sup>. See Stein & Stein, supra note 302, at 1208–09.

<sup>370</sup>. An archive of NCD—and prior to 1990, the National Council on the Handicapped—publications is available at <http://www.ncd.gov/newsroom/publications>.

<sup>371</sup>. See NATIONAL COUNCIL ON DISABILITY, VOICES OF FREEDOM: AMERICA SPEAKS OUT ON THE ADA (1995), available at <http://www.ncd.gov/newsroom/publications/1995/07261995>.

<sup>372</sup>. See id. (relating the successful employment stories of those with disabilities who received technological innovations after the ADA).

NCD members visited every state to interview thousands of people with disabilities and then issued a report entitled Voices of Freedom: America Speaks Out on the ADA.<sup>373</sup> The report concluded that dramatic changes had already ensued in altering the physical environment and enabling social participation.<sup>374</sup>

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<sup>373.</sup> See id.

<sup>374.</sup> See, e.g., id. (statement of Don Holder, Florida) (“Not too long ago, very few places were accessible to people with disabilities. But today it’s different . . . people with disabilities can now get out into the world.”); id. (statement of Shelley Schwarz, Wisconsin) (“Before the ADA, I couldn’t even shop with my daughter for her first prom dress. But things have changed, and I recently did shop with my daughter to buy clothes: for her job interview!”); id. (statement of Denise Karuth, Massachusetts) (“Most people would not think that a blind person who uses a wheelchair could travel independently, hold a job, and be a taxpayer. But the transportation access requirements of the ADA allow me to make my 220-mile commute to Boston from my home in Northampton several times a month.”); id. (statement of Stephanie Wells, Georgia) (“In Hall County, the public library, the court house [sic], science center, school board building, and even the landfill are being made accessible. Without the ADA, none of the improvements to these facilities would be under way.”); id. (statement of Evelyn Williams, Mississippi) (“With the ADA, I finally have a role independent of my husband. I can get into buildings, go grocery shopping, all on my own now.”).

Our interviews revealed that disability cause lawyers viewed themselves as tasked with “making a point”—achieving daily victories that impact the lives of their clients and the broader disability community in such ways as documented in the NCD reports—and were decidedly uninterested in appearing before the Supreme Court.<sup>375</sup> Accordingly, these lawyers focused their efforts on implementing some parts of the ADA rather than endeavoring to create new legal rights. By focusing on public services and accommodation suits whose settlements and verdicts redound to the national community of persons with disabilities,<sup>376</sup> disability cause lawyers have made significant progress towards achieving the social integration envisioned by disability rights advocates such as TenBroek and contained in the ADA. This progress has moved social integration close to the point where citizens, disabled or not, are able to equally access opportunities and participate in society. Disability cause lawyers have enabled this social transformation by enforcing statutory rights in the shadow of the Supreme Court.

#### CONCLUSION

Scholarship on cause lawyering has a key insight: Lawyers matter. The strategic decisions lawyers make, their relationships with their clients, and their interactions with each other all impact the success of a social justice movement’s march toward progressive change. This Article breaks new ground by directly engaging leading disability rights cause lawyers on these topics.

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<sup>375</sup>. See supra notes 25, 108, 119–20 and accompanying text.

<sup>376</sup>. See supra text accompanying note 317.

The conclusions we reached have implications for both the general cause lawyering and the disability rights advocacy communities. The disability cause lawyers brought cases to “make a point” by reforming corporate entities and their broader industry sectors. Most of their other litigation decisions and strategies—whether to pursue class actions, how much attention to devote to post-dispute monitoring, and a general aversion to employment discrimination claims—were derivative of this overarching goal. The disability cause lawyers did not seek Supreme Court engagement because they viewed it as counterproductive and did not need to bring their cases before the Court to attain their goals. If law reform were needed, Congress provided a more conducive venue with a track record of success.

The portrait of relentless pragmatism derived from our interviews distances the disability cause lawyers from more dated conceptions of what it means to be a cause lawyer and instead aligns them with more recent accounts. The disability cause lawyers also expanded the framework of cause lawyering, especially through their disengagement with the Supreme Court. Our research demonstrates the importance of directly engaging with lawyers when evaluating the effect law has on social movements. The story our lawyers told had not been previously expressed in scholarship on the ADA and its supposed inefficacy. Although they did not pursue employment discrimination claims, these lawyers achieved victories in the realm of public accommodation. Notably, they did so despite commentators’ pronouncements that Supreme Court decisions, both on the ADA and on civil rights attorneys’ fees, would impair their ability to litigate. A direct result of the lawsuits brought

by disability cause lawyers is that persons with diverse disabilities around the nation are now able to participate in their communities through a variety of social interaction. Thus, contrary to academic accounts, the lawyers we interviewed were successfully pursuing justice on behalf of people with disabilities in ways that improved their daily lives.



