

The ADA at 30:

My Perspective



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By Michelle Duprey

The day I'm writing this article is July 26th and it marks the 30th anniversary of the signing of the Americans with Disabilities Act (ADA). For most of the people reading this article, the day went by without any fanfare or even knowledge of its historic significance for me as a disabled person or my community. But for me, and nearly one in four Americans who live with a disability, it is the single most impactful civil rights legislation since the passage of the Civil Rights Act of 1964.

On July 26, 1990, I distinctly remember watching the news with my parents at their kitchen table. The story came on marking the event and showing footage of George H. W. Bush signing the bill that ultimately was designed to provide significant increases in accessibility to public buildings, state and local government programs, services and activities, and to open up a world of employment opportunities for people with disabilities by ridding the workplace of discrimination.

At that moment, I had not heard of the years-long struggle by disability rights advocates to get the legislation passed. But I was well aware of the barriers. I knew that there were lots of establishments I could not get my mobility scooter into nor a way to access public transportation options. In primary school, I had been bussed across town to the only accessible school. I had a great deal of difficulty finding a college that was accessible enough for me to attend. There were multiple colleges with whom I had scheduled interviews and discovered, after my family had driven for hours, that not even the admissions office was accessible to me. This meant we left without the interview. I had great hope for this new law that something would change and the doors would miraculously open up, figuratively and literally.

That night I sat at my parent's dinner table, I was wrapped up in my own world. I had just graduated college where I studied

economics and marketing and was just weeks away from starting law school at the University of Connecticut School of Law. I intended to be a corporate lawyer, working on international trade, as I had focused my undergraduate senior year on taking Chinese and studying the pacific rim. That plan got changed in 1992. During my second year of law school, I took Professor Jon Bauer's life-altering employment discrimination law class. I quickly forgot about international trade and focused on employment discrimination law and the Americans with Disabilities Act.

I grew up in Avon and went to Bryant University in Rhode Island. During that time, as a person with a significant physical disability, I did not believe and still don't that I was denied any opportunity to participate or excel because of my disability. I attended classes without issue, was heavily involved in student government, had a long list of other clubs and activities, and had a rich social life. But during my second year of law school while I was looking for a summer associate position, I was struggling to find a job. I was discussing my difficulties with one of my law professors who bluntly said to me, "Did it ever occur to you that you were being discriminated against because of your disability?" No. No, it had not. And this reality was a punch in the gut. Something I've had to get used to over the past 30 years, as do most people who disclose their disability or for whom the presence of a disability is self-evident.

I graduated law school and passed the bar. Afterward, I practiced law as a solo for a few years and, in 1998, I took my current position with the City of New Haven where I am the city's director of the Department of Services for Persons with Disabilities and the ADA coordinator. At the time, then Mayor John DeStefano was under pressure to hire someone with a disability for my position and the city had several lawsuits against it claiming the ADA had been violated. The hope was I could help on both accounts. The ADA was only eight years old at the time. The caselaw governing the ins and outs of the ADA and its regulations were still just unfolding.

Cases from the effective date of the ADA until it was amended in 2008 were mostly focused on who was covered under the law. Disability advocates found that the arguing over who was covered and who was not in cases all over the country a bit unexpected. Other civil rights laws, like the Civil Rights Act of 1964, didn't get the microscopic analysis of how much African American someone truly was, or ethnicity was in question like people with disabilities received when trying to assert they



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were disabled and their rights had been violated.

In 1998 *Bragdon v. Abbott* 524 U.S. 624 (1998) and in June of 1999, *Sutton v. United Airlines, Inc.* 527 U.S. 471 (1999) began to define who was disabled and who was not. In *Bragdon*, the court found that HIV is a disability because it substantially limited the plaintiff's ability to reproduce. In *Sutton*, the definition of disability was narrowed to include only people with substantial impairments of a major life activity whose affects could not be reduced by mitigating measures. Which, to many people with disabilities, seemed like a tortured conclusion. And as wheelchair-using writer, John Hockenberry, so perfectly opined in his June 29, 1999 piece entitled "Disability Games"¹ in the *New York Times*, about how the court framed disability, because he used a mitigating measure of a wheelchair to get around despite his paralysis, he would not be considered disabled under the Court's logic. Other cases followed that shredded who the courts considered disabled.

Meanwhile on June 22, 1999, the Supreme Court decided *Olmstead v L.C.* 527 U.S. 581 (1999). This case was brought by two women in the State of Georgia. One was institutionalized for her mental illness and the other for her developmental disability by the State of Georgia for several years after their treatment had concluded and professionals had deemed that the most appropriate setting for them would be in the community. The Court held that public entities must provide the most integrated setting possible for those individuals with disabilities when appropriate, when it is wanted, and when necessary resources are available. Sadly, in my opinion, the outcome of *Olmstead* has not been fully realized here in Connecticut some 21 years later.

Since *Olmstead*, advocates in Connecticut have been working to move people with disabilities from residential facilities like nursing homes, psychiatric hospitals, and Southbury Training School to community settings—to communities like the City of New Haven where they can be more integrated. This was depicted in the 2017 Connecticut Public Television special "Building a Great Life,"² funded through the Connecticut Council on Developmental Disabilities. Other initiatives include nursing home transition programs and Money Follows the Person that help support people to move out of those institutions and into the community and ensure that the funding that would have been dedicated to housing them in an institution "follows" them to the community for support. Connecticut has had "rebalancing" plans for more than a decade and yet we still find people with disabilities living in institutions unnecessarily.

The ADA is not just about getting into stores and restaurants or not being asked discriminatory questions during an interview. I have been thinking about *Olmstead* a lot during this time of COVID-19 and wonder how many lives of nursing home residents and other institutions for people with disabilities would

have been saved had we truly met the mandate of the ADA as delineated in *Olmstead* 21 years ago.

The ADA cases continued, starting the new decade off with the *Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) decision. This was an employment discrimination case based on disability against the State of Alabama. The state asserted Eleventh Amendment immunity. Here in Connecticut, disability advocates, including myself, worked closely with then Attorney General Richard Blumenthal to support the rights of people with disabilities, including his decision that Connecticut would sign on to a pro-disability rights amicus brief written by the attorney general in Minnesota. Unfortunately, the court sided with the state in that it determined that in disability employment discrimination cases, sovereign immunity prevented money damages from being awarded on equal protection grounds.

Working with the attorney general's office on *Garrett* convinced me that lawyers with disabilities, like myself, needed to be at the ready to argue cases before the US Supreme Court. Anyone with a marketing background can tell you there is an unconscious component impacting decisions here. I truly believe that disability community members need to be representing our issues before such tribunals. Shortly thereafter, I was admitted to the US Supreme Court bar.

A couple of years later, another ADA case made its way to the US Supreme Court. The case was *Tennessee v. Lane* 541 U.S. 509. Mr. Lane was forced to crawl up the courthouse steps in Tennessee where the courthouse was not accessible. He sued the state for the inaccessibility, because the ADA provided that he could not be excluded from any government service, program, or activity by reason of his disability. Again, the state raised sovereign immunity under the Eleventh Amendment based on *Garrett*.

For oral arguments in *Lane*, I and many other advocates decided to go to Washington, DC. I was admitted to the US Supreme Court bar and would be able to hear the entire oral argument in space reserved for bar members. They have a separate line to wait to enter the courtroom for bar members. I and a handful of other lawyers were waiting for entry. I was the only one in the line with a visible disability as I sat there patiently in my power wheelchair. Suddenly, I was approached by a court staff person, who said to me in a scolding voice that this line was only for lawyers admitted to the bar. He clearly assumed because I was a person with a disability that I could not be a lawyer. This was one of the biggest gut punches of my career. I sternly said that I was a member of the bar and he sheepishly scurried off without making the same assumption to the able-bodied lawyers who were also waiting. The ADA had been in affect more than a decade and yet, at that moment, I felt as though the law never existed.



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Lane was decided differently than *Garrett*, where the court found that Congress had effectively abrogated Eleventh Amendment immunity under due process and that Mr. Lane’s rights had been violated. This is a big victory under the ADA, but here in Connecticut it seems to have had little effect as several state court houses still have significant barriers for people with disabilities to enter, move around the building, use the restrooms, serve on juries, represent clients, serve on the bench, be a witness, and more.

In 2008, the ADA was amended to correct the corrosion of the law started in 1999 by *Sutton* and so many other cases. The ADA Amendment Act, in the employment setting, leaves employers the ability to focus on how to accommodate employees rather than whether they are disabled or not. This helped clear up ambiguity in the law and made it easier for employers like the City of New Haven to administer accommodations for employees.

Normally I see July 26th as a celebration and try to emphasize how far we have come in our employment, community access, transportation options, and public engagement. But I’ve grown weary of that. In the past two years, I’ve had other gut punches, small and big ones. I’ve had a bartender refuse to sell me a drink without the permission of my “caretaker.” I’ve had a lawyer ask me in an interview multiple questions that violate the ADA. I’ve had difficulty getting into state buildings. While I was called to jury duty a few months ago in New Haven, I faced numerous barriers. On breaks I had to travel two blocks to New Haven City Hall for an ADA compliant bathroom because the courthouse’s is not. I’ve argued with top state officials about what the state’s ADA obligations are. I’ve filed an ADA complaint against an inaccessible retailer. I’ve been on numerous calls with disability rights leaders in the state about health care rationing under COVID-19 that has caused people with disabilities to not receive equal care as those without disabilities. As we start to reopen in this COVID-19 era, I’m told to stay home while others can go out. I sometimes still feel like that kid so many years ago that had to ride without her friends on the short school bus.

I agree with the former head of the Disability Rights Section at the US Department of Justice, John Wodatch, and longtime disability rights activist and author, Judy Heumann, in their piece

printed recently in the *New York Times*, “We’re 20 Percent of America, and We Are Still Invisible”³ in which they argue that the ADA is a starting point, not an end. That more legislation needs to be passed, our culture has to begin to see disability differently, and social and political leaders with disabilities need to be elevated to prominence to effectuate real change.

One starting point for the readers of this publication might be to embrace disability and incorporate it in all the legal community’s diversity, equity, and inclusion initiatives. Employers need to understand the value of disability inclusion. The latest CBA poll regarding diversity shows that only about one percent of lawyers self-identify as having a disability.

Making the world inclusive for all isn’t only the right thing to do, it’s also good for business. The Accenture report “Getting to Equal: The Disability Inclusion Advantage,” produced in partnership with Disability:IN and the AAPD, found that companies that offered inclusive working environments for employees with disabilities achieved an average of: 28 percent higher revenue, 30 percent higher economic profit margins, and two times net income of industry peers.⁴

It is going to take all of us—those with disabilities and without—to truly meet the expectations I had at that dinner table with my parents 30 years ago, to assure I and those like me have equal opportunity. And if I am fortunate enough to write for the 40th celebration of the ADA, I truly hope I will announce that with your partnership, support, and encouragement, we have finally gotten there together. ■

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NOTES

1. www.nytimes.com/1999/06/29/opinion/disability-games.html
2. www.pbs.org/video/building-a-great-life-kvp9i2/
3. www.nytimes.com/2020/07/26/opinion/Americans-with-disabilities-act.html
4. www.globenewswire.com/news-release/2020/07/15/2062514/0/en/Disability-Equality-Index-reveals-2020-Best-Places-to-Work-for-Disability-Inclusion.html?fbclid=IwAR2h2_fZduCk9WifMJUoBZF-rfuafdcy-BYMXjxVU9jcNjiAaxlly7Qq1EPA