

THIRTY YEARS OF THE AMERICANS WITH DISABILITIES ACT: LAW STUDENTS AND LAWYERS AS PLAINTIFFS AND ADVOCATES

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I. INTRODUCTION

Thank you for the opportunity to give this keynote address today,¹ in honor of the July 26, 1990, passage of the Americans with Disabilities Act (“ADA” and, as amended, “ADAAA”).² At this, its thirtieth anniversary, I believe that America is better off because of the ADA.³

There is much I could say for the thirtieth anniversary. Today, we embrace the ADA’s principles of equal opportunity and participation in society, independent and integrated living, and economic self-sufficiency.⁴ But for this address, and especially because of the important efforts by NYU Law School’s Disability Allied Law Students Association (“DALSA”) to organize this symposium, I focus my remarks on thirty years of ADA advocacy as driven by law students and other lawyer advocates with disabilities.

My thirty-year journey with the ADA is intertwined, as it is for many, with personal and professional experiences. One foundational aspect of this journey has been how law students like you here today, and practicing lawyers with disabilities,

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¹ This article is derived from my keynote address at the “ADA 30th Anniversary Symposium,” organized by the Disability Allied Law Students Association at NYU School of Law on Friday, September 25, 2020. *See ADA 30th Anniversary Symposium: Keynote by Dr. Peter Blanck*, NYU LAW, <https://its.law.nyu.edu/eventcalendar/index.cfm?fuseaction=main.detail&id=78507> [<https://perma.cc/6UZ9-PX79>] (last visited Jan. 1, 2021). A transcript of my remarks at the Symposium, and additional information on the Symposium, are available at: <https://socialchangenyu.com/harbinger/ada-30-symposium>. This article is dedicated to the memory and lasting legacy of Richard (“Dick”) Thornburgh, former governor of Pennsylvania and U.S. Attorney General. Dick (and his wife Ginny) championed passage of the ADA to the betterment of us all. I will miss him greatly.

² Americans with Disabilities Act of 1990, ADA Amendments Act of 2008, 42 U.S.C. § 12101(a)(8) (2008). *See generally* PETER BLANCK, *DISABILITY LAW AND POLICY* (2020).

³ Peter Blanck, *Why America is Better Off Because of the Americans with Disabilities Act and the Individuals with Disabilities Education Act*, 35 *TOURO L. REV.* 605 (2019).

⁴ For a review, see Peter Blanck, *Americans with Disabilities Act at Thirty: Disability Law, Policy, and Practice in 2020*, __ *J. DISABILITY POL’Y STUD.* __ (forthcoming 2021).

have inspired me as they have sought to vindicate their ADA rights. Many of the cases in which I have acted as an expert on the ADA, or as co-counsel, were piloted by leading lawyers, many of whom happened to have disabilities. Some of them are no longer with us today.

One such dear friend and colleague, Larry Paradis, was the co-founder of Disability Rights Advocates (“DRA”), one of the premier national nonprofit disability rights legal centers. To his life’s end, Larry pursued disability civil rights for himself and others in the areas of employment, education, deinstitutionalization, and access to society. His cases were of national importance and groundbreaking. Larry once said: “We are committed to using the law as an instrument for social change to make the world a fair place for people with disabilities. We are focused on changing institutions and the entire fabric of American society so that people with disabilities have a fair shot at being full participants.”⁵

There are many others, stellar law students, lawyers who have disabilities, and others without disabilities, whom I have been fortunate—blessed really—to tag along with on this thirty-year, ongoing, ADA journey. The disability civil rights project has always been, and is still, led by individuals of personal courage and conviction.⁶ I have known law students and lawyers willing to self-disclose their disabilities that they might advocate for others. I will speak today of one such individual, Boston University law student Elizabeth Guckenberger, who called out her university president and provost in federal court and vindicated her disability rights in education, and thereby, those of others. I will also tell you about Martin, a stellar lawyer at his firm, who refused to accept unwarranted professional rejection on the basis of his bipolar disorder. His vindication in court was also a victory for others.

The ADA, in action, is not just words but also the real-life stories of Larry, Liz, Martin, and others, many of whom are or were law students with disabilities. The disability rights movement accepts—in fact, celebrates—human difference in all its naturally occurring expressions: disability, race, gender identity and sexual orientation, age, national origin, and others. People from all individual and social identities are leading the charge for a “fair shot,” as Larry said, for the full and equal *opportunity* to participate in society.⁷ In this way, the disability rights movement is

⁵ *Keeping Larry Paradis’ Legacy Marching Forward*, DISABILITY RIGHTS ADVOCATES (n.d.), <https://dralegal.org/larry-paradis-legacy> [<https://perma.cc/8ZMY-8SML>] (last visited Nov. 14, 2020).

⁶ See, e.g., Marcy Karin & Lara Bollinger, *Disability Rights Past, Present and Future: A Roadmap for Disability Rights*, 23 U. D.C. L. REV. 1 (2020); Samuel Bagenstos, *The ADA Amendments Act and the Projects of the American Disability Rights Movement*, 23 U. D.C. L. REV. 139 (2020). For my earlier writings on ADA stories, see Peter Blanck, “*The Right to Live in the World*”: *Disability Yesterday, Today, and Tomorrow*, 13 TEX. J. CIV. LIB. & CIV. RIGHTS 367 (2008); Peter Blanck, *Americans with Disabilities and their Civil Rights: Past, Present, and Future*, 66 U. PITT. L. REV. 687 (2005); Peter Blanck, *Justice for All? Stories about Americans with Disabilities and their Civil Rights*, 8 J. GENDER, RACE & JUSTICE 1 (2004).

⁷ For a program of study on lawyers with multiple minority identities, see Peter Blanck, Ynesse Abdul-Malak, Meera Adya, Fitore Hyseni, Mary Killeen & Fatma Altunkol Wise, *Diversity and Inclusion in the American Legal Profession: First Phase Findings from a National Study of Lawyers with Disabilities and Lawyers Who Identify as LGBTQ+*, 23 U. D.C. L. REV. 23 (2020); Peter Blanck, Fitore Hyseni & Fatma Altunkol Wise, *Diversity and Inclusion in the American Legal Profession: Workplace Accommodations for Lawyers with Disabilities and Lawyers Who Identify as LGBTQ+*, 30

a sister to such movements as #MeToo, Black Lives Matter, and others, especially during this time of a global health, social, and economic emergency due to the pandemic.

DALSA members whom I have come to know represent the new generation of law students, lawyers to be, taking up the disability rights project. Like Larry, Martin, and Liz, you seek a fair opportunity to partake in all that society has to offer. But you have even broader views of individual difference than many of us did before: beliefs in individual expression and the endless combinations of identity. Your expanded vision is reflected by what Kimberlé Crenshaw has powerfully described as intersectionality, the unique product of multiple minority identities in all forms, a concept inspired by the distinctive historical oppression of Black women.⁸

DALSA is thus more than an affinity group for people with disabilities and their allies. You also represent a path forward that recognizes the past. DALSA aspires to a future in which people are not judged on the basis of a medical diagnosis or a preconceived idea of disability, but rather on the value in their individual and social expressions of being human. You are bringing this breadth to the ADA, as you will to the practice of law.⁹

DALSA, of course, is not alone. Many law school affinity groups, including the Disability Law Society¹⁰ at my own, have taken up the ADA challenge. The National Disabled Law Students Association (“NDLSA”), with almost 700 members, is working to “eliminate the stigma of disability within the legal profession and foster an environment where law students and lawyers are easily able to obtain the accommodations necessary to achieve career success.”¹¹ These student advocates who have disabilities are challenging unwarranted attitudinal and structural barriers in, for instance, the academic accommodation process. I have been fortunate to learn from many of NDLSA’s leaders—AJ, Jeremy, Olivia, Lucy, Beth, Tara, Grace, Jordan, Kyra, BJ, Aly, and Mercedes.

Certainly today, we all live in a “new normal.” America and the global society are being ravaged by a pandemic of devastating proportions that brings to the fore longstanding health, social, economic, and environmental inequities. These disparities will need to be addressed by today’s law students. You will enter your profession in uncertain times, but with a determination for disability rights. As

J. OCCUPATIONAL REHAB. 537 (2020), <https://doi.org/10.1007/s10926-020-09938-3> [<https://perma.cc/53KS-DZRT>]; Peter Blanck, Fitore Hyseni & Fatma Altunkol Wise, *Diversity and Inclusion in the American Legal Profession: Discrimination and Bias Reported by Lawyers with Disabilities and Lawyers Who Identify as LGBTQ+*, 46 AM. J. L. & MED. __ (forthcoming 2021).

⁸ For the seminal paper establishing intersectionality theory, see generally Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1 U. CHI. L. F. 139 (1989).

⁹ *Disability Allied Law Students Association (DALSA)*, N.Y.U. LAW, <https://www.law.nyu.edu/studentorganizations/DALSA> [<https://perma.cc/XS59-ZHD5>] (last visited Nov. 13, 2020).

¹⁰ *Syracuse University College of Law Disability Law Society*, SYRACUSE U. COLL. L., <http://law.syr.edu/academics/centers-institutes/disability-law-and-policy-program/disability-law-society/> [<https://perma.cc/Q7NA-4HJA>] (last visited Nov. 13, 2020).

¹¹ NATIONAL DISABLED LAW STUDENTS ASSOCIATION (NDLSA), <https://ndlsa.org/the-ndlsa/> [<https://perma.cc/J7UW-UZ8C>] (last visited Nov. 13, 2020).

disability rights advocates, you have the skills to ensure the rights of those among us who are the most vulnerable in society and who are bearing the brunt of the pandemic.¹²

II. EARLY ADA YEARS: ACCOMMODATION PRINCIPLES TO ADVOCACY

Many of you DALSA members are under thirty years of age and have grown up not knowing a world without the ADA or the Individuals with Disabilities Education Act (“IDEA”).¹³ Great strides have been made since their passage, but as you know, more work remains. It was only twelve years ago that the United Nations Convention on the Rights of Persons with Disabilities (“CRPD”) was established.¹⁴

Back in 1990, when I was a new lawyer, the ADA had just been passed into law. As a young lawyer trained as a social psychologist studying the therapist-patient relationship, I focused on mental health disability law and civil rights. Among my first cases was a civil rights one involving the deinstitutionalization of people with intellectual and developmental disabilities.¹⁵ Related to this interest, I studied the right to employment for the then-emerging workforce of people with intellectual and developmental disabilities.¹⁶ At the heart of equal opportunity for employment was the ADA’s reasonable accommodation principle, which I began to examine empirically. As luck would have it, I also became a law professor at the University of Iowa College of Law, which was the home state of U.S. Senator Tom Harkin, one of the sponsors of the ADA.

My ongoing studies of the ADA’s reasonable accommodation principle led me to the view that most requests for accommodations were denied, not because they were costly or burdensome, but because an employer or supervisor, school administrator, owner or operator of a business, or governmental official simply held negative attitudes or misconceptions about disability. At that time, a prevailing view was that an accommodation would provide a person with a disability, whether a job applicant or worker, a student, an exam taker, a customer, or even a citizen, some unfair advantage or perk that others without disabilities did not get.¹⁷ The

¹² Peter Blanck, *Disability Inclusive Employment and the Accommodation Principle: Emerging Issues in Research, Policy, and Law*, 30 J. OCCUPATIONAL REHAB. 505 (2020), <https://doi.org/10.1007/s10926-020-09940-9> [<https://perma.cc/LRM9-GJEV>].

¹³ Individuals with Disabilities Education Act (“IDEA”) of 1990, Pub. L. No. 101-476; Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (2004) [Amendment 20 U.S.C. §§ 1400 et seq.]; Individuals with Disability Education Act Amendments (IDEA) 1997, Pub. L. No. 105-17.

¹⁴ See generally *Convention on the Rights of Persons with Disabilities and Optional Protocol*, UNITED NATIONS, <http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf> [<https://perma.cc/YA99-WY66>] (last visited Nov. 17, 2020).

¹⁵ See PETER BLANCK, *THE AMERICANS WITH DISABILITIES ACT AND THE EMERGING WORKFORCE: EMPLOYMENT OF PEOPLE WITH MENTAL RETARDATION* (1998).

¹⁶ See Peter Blanck, Leonard A. Sandler, James L. Schmeling & Helen A. Scharz, *The Emerging Workforce of Entrepreneurs with Disabilities: Preliminary Study of Entrepreneurship in Iowa*, 85 IOWA L. REV. 1583 (2000).

¹⁷ For a range of these studies, see Lisa Schur, Lisa Nishii, Meera Adya, Douglas Kruse, Susanne Bruyère & Peter Blanck, *Accommodating Employees with and without Disabilities*, 53 HUM. RES. MGMT. 593 (2014); Lisa Schur, Douglas Kruse, Joseph Blasi & Peter Blanck, *Is Disability Disabling in All Workplaces? Workplace Disparities and Corporate Culture*, 48 INDUS. RELS. 381 (2009); Helen

accommodation principle was conflated with some preferential advantage, which was thought to destroy the “fairness” of the endeavor itself. Many of us debated this topic,¹⁸ and I continued to conduct, as did others, studies that debunked this belief.

Essentially, my colleagues and I, and others, have consistently found that people with disabilities want the same work opportunities as anyone else. Accommodations level the playing field. You can find extensive material about this issue.¹⁹ By the way, the late Supreme Court Justice Ruth Bader Ginsburg understood the accommodation principle to be among the most important drivers of the ADA’s inclusion command. In the seminal 2004 U.S. Supreme Court case *Tennessee v. Lane*, which involved physical access to courts by persons with disabilities, she wrote of the centrality of the ADA’s accommodation principle:

Including individuals with disabilities among people who count in composing “We the People,” Congress understood in shaping the ADA, would sometimes require not blindfolded equality, but responsiveness to difference; not indifference, but accommodation. Central to the Act’s primary objective, Congress extended the statute’s range . . . and required . . . “reasonable accommodations.”²⁰

But my focus today is on the stories of those who have fought for accommodations for themselves rather than on the history of ADA legislation and studies. Sadly, the stories of Martin, Liz, and others show the unrelenting pushback to the accommodation principle that has followed the enactment of the ADA. But they also show what happens when people not that different from you stand up for what they believe.²¹

These observations bring me back to the early ADA years, when I received a telephone call from Larry and Sid Wolinsky. They would later go on to found DRA, which remains a leading non-profit disability law center.²² They had an ADA case concerning the denial of workplace accommodations for a lawyer with a disability whose name was Martin. They asked me to testify about my research on the benefits of workplace accommodations for people with mental disabilities. This was the first time I had been asked to testify as an expert witness under the ADA, and Larry and Sid urged me to put my research into action.²³

Schartz, D.J. Hendricks & Peter Blanck, *Workplace Accommodations: Evidence-Based Outcomes*, 27 WORK 345 (2006).

¹⁸ See, e.g., Debate—Peter Blanck and Walter Olson, The Unintended Consequences of the Americans with Disabilities Act [Proceedings], 85 IOWA L. REV. 1811 (2000).

¹⁹ See, e.g., Mohammad Ali, Lisa Schur & Peter Blanck, *What Types of Jobs Do People with Disabilities Want?* 21 J. OCCUPATIONAL REHAB. 199 (2011); LISA SCHUR, DOUGLAS KRUSE, & PETER BLANCK, *PEOPLE WITH DISABILITIES: SIDELINED OR MAINSTREAMED?* (2013).

²⁰ *Tennessee v. Lane*, 541 U.S. 509, 536 (2004) (Ginsburg, J., concurring).

²¹ PETER BLANCK, *EQUALITY: THE STRUGGLE FOR WEB ACCESSIBILITY BY PERSONS WITH COGNITIVE DISABILITIES* (2014).

²² DISABILITY RIGHTS ADVOCATES, <https://dralegal.org/about> [<https://perma.cc/B569-3RHM>] (last visited Nov. 15, 2020).

²³ See also Peter Blanck., *ADA at 25 and People with Cognitive Disabilities: From Voice to Action*, 3 INCLUSION 46 (2015).

Martin was a Harvard-educated lawyer who had worked for a large corporation's legal department, which was the size of a medium-size law firm. Martin was, objectively, an excellent lawyer and highly regarded. In fact, he was billing more hours than the average lawyer at that office. But at some point in time, Martin made a difficult and courageous decision. He decided to tell his boss, the general counsel, that he had bipolar disorder (formerly called manic-depressive illness or manic depression²⁴). He said his condition led to shifts in his mood and energy levels. Martin told his boss he would continue to bill more hours than other peer lawyers, as he had done in the past. However, he wanted the general counsel to know that he might need some downtime or a breather from work in the future, and that a quiet office space would also help.

Then and now, mental illness has carried with it a particularly pernicious stigma, often leading to outright discrimination, as compared to other more socially "acceptable" disabilities.²⁵ This shaming of mental illness has long existed, and regularly so in the workplace.²⁶ When Martin came out about his mental disability, the general counsel (an older man) said to Martin (paraphrasing): "We're all depressed, who's not depressed, you should get over it, get on with your job without complaint—tough it out."

Martin, of course, was discouraged by his boss's response, as anyone would be, and his work environment went downhill quickly from there. Martin felt isolated by the people in his office and received less-valued assignments. Soon after his disclosure, Martin, a qualified lawyer who had chosen to disclose his mental disability, was let go. He had the courage, and the right, to ask his boss for a work accommodation. The accommodation he sought was a recognition of his need for some flexibility in his work structure, without lowering his higher-than-average billable hours, that he might continue to do his job well. He only asked for a modest understanding by his superior that sometimes he might need to do his work in a slightly different manner than his boss was used to.

Martin's boss likely viewed the accommodation request as conflicting with the perceived work ethic—"get it done at all costs," "that's the way we have always done it"—that is as pervasive in the legal profession today as it was then. No doubt, Martin's stress and anxiety levels at work increased, something many of today's young lawyers with and without disabilities experience, but individuals with other minority identities do so even more.²⁷ I will return to this issue in a moment.

²⁴ *Bipolar Disorder, Overview*, NAT'L INST. MENTAL HEALTH (NIMH), <https://www.nimh.nih.gov/health/topics/bipolar-disorder/index.shtml> [<https://perma.cc/8NYL-QT7V>] (last visited Nov. 13, 2020).

²⁵ For a historical account of the stigma associated with mental illness, see LARRY LOGUE & PETER BLANCK, *HEAVY LADEN: UNION VETERANS, PSYCHOLOGICAL ILLNESS, AND SUICIDE* (2018). For contemporary writings, see, e.g., Paul Harpur, Ursula Connolly & Peter Blanck, *Socially Constructed Hierarchies of Impairments: The Case of Australian and Irish Workers' Access to Compensation for Injuries*, 27 J. OCCUPATIONAL REHAB. 507 (2017), <https://doi.org/10.1007/s10926-017-9745-7> [<https://perma.cc/7DDA-EYFX>].

²⁶ See Blanck et al., *supra* note 7 (program of study on lawyers with multiple minority identities and findings for reports of mental health conditions).

²⁷ *See id.*

So Larry and Sid contacted me about Martin's case around the same time they were founding DRA. They had read a *New York Times* story about my early studies on the cost-effectiveness of workplace accommodations at Sears Roebuck that had been funded by the Annenberg Washington Foundation.²⁸ My studies had also considered workplace accommodations for persons with mental disabilities, hidden disabilities, the disclosure process, and ways in which accommodations may be implemented effectively to the benefit of everybody involved.²⁹

Martin's case went to arbitration, with the arbitrator being a former California Supreme Court Justice who knew a thing or two about lawyer potential. Martin, the general counsel, and others testified, and I testified as an expert qualified on accommodations in the workplace. After two or three days of testimony and the usual filing of papers, the arbitrator decided the case in Martin's favor. In violation of the ADA, Martin had been terminated on the basis of his disability and denied a reasonable accommodation that would have enabled him to continue to do his job, and do it excellently for that matter. Martin received a sizable money award as well as his attorney fees and costs for the litigation.

What struck me early on after Martin's case was not only the terrific waste of money that could have been used towards productive ends, but also the deliberate discarding of a qualified colleague whose only desire was to do his job well. There was no doubt as to the personal and professional toll the experience had on Martin, and I knew that such experiences would continue to have a toll on many others like Martin.

III. LAW STUDENTS COMING OF AGE UNDER THE ADA

Martin's case was a stark showing of why more hard facts were needed about the ADA's accommodation principle, as well its associated and deeply held myths and misconceptions. I was focused then, as today, on adding to that knowledge base. Of course, no single study or even series of studies is likely definitive; a body of evidence is continuously needed as to the operation of the accommodation principle in practice. Then, as now, many hidden or implicit attitudinal and structural biases in the operation of the accommodation principle remain to be documented.³⁰

²⁸ See, e.g., Peter Blanck, *Communicating the Americans with Disabilities Act: Transcending Compliance—A Case Report on Sears Roebuck & Co.*, 20 MENTAL & PHYSICAL DISABILITY L. REV. 278 (1996); Barbara Presley Noble, *At Work: A Level Playing Field, for Just \$121*, NY TIMES, Mar. 5, 1995 (§ 3) at 21.

²⁹ See, e.g., Peter Blanck, Jill Handley Anderson, Eric J. Wallach & James P. Tenney, *Implementing Reasonable Accommodations Using ADR under the ADA: The Case of a White-Collar Employee with Bipolar Mental Illness*, 18 MENTAL & PHYSICAL DISABILITY L. REP. 458 (1994).

³⁰ For this body of study, see, e.g., Lisa Schur, Douglas Kruse & Peter Blanck, *Corporate Culture and the Employment of Persons with Disabilities*, 23 BEHAV. SCI. & L. 3 (2005); Leonard A. Sandler & Peter Blanck, *The Quest to Make Accessibility a Corporate Article of Faith at Microsoft: Case Study of Corporate Culture and Human Resource Dimensions*, 23 BEHAV. SCI. & L. 39 (2005); Peter Blanck, Lisa Schur, Douglas Kruse, Susan Schwochau & Chen Song, *Calibrating the Impact of the ADA's Employment Provisions*, 14 STANFORD L. & POL'Y REV. 267 (2003).

While studies were proceeding in Iowa, and continued later at the Burton Blatt Institute at Syracuse University where I went next and remain today,³¹ Larry and Sid called again. DRA was bringing a class action lawsuit against Boston University (“BU”) called *Guckenberger v. Boston University*.³² The lead plaintiff was Elizabeth Guckenberger, who was a rising third-year student at BU’s School of Law.

I have written about the BU saga,³³ as others have. In 1996, students with learning disabilities who were enrolled at BU claimed under the ADA that they had been discriminated against on the basis of their disabilities. Students with learning disabilities—individuals with Attention Deficit Disorder and disorders such as dyslexia—alleged that BU had established unreasonable eligibility criteria for qualifying as a student with a learning disability. They alleged that BU did not provide reasonable procedures for evaluating their requests for academic accommodations. In 1997, Federal District Court Judge Patti B. Saris rendered her decision, holding that BU had violated the students’ rights under the ADA.

In the 1990s, BU, a private university, had more than 20,000 students, about five hundred of whom had disclosed learning disabilities. At that time, BU had an extensive program to provide academic accommodations for its students with learning disabilities. It maintained a nationally recognized Learning Disabilities Support Services program that provided academic accommodations such as extended time on examinations, tape-recorded textbooks, note-taking services, and approved course substitutions.

In early 1995, however, BU’s provost decided to end the university’s practice of allowing certain accommodations. He believed, for instance, that there was a lack of evidence that a learning disability prevented the successful study of a foreign language or math. He proceeded to deliver public speeches, coinciding with changes in university policy toward students with learning disabilities, in which he noted the growing number of students diagnosed with learning disorders. He accused “learning disability advocates of fashioning ‘fugitive’ impairments that [were] not supported in the scientific and medical literature.” He said “the learning disability movement is a great mortuary for the ethics of hard work, individual responsibility, and pursuit of excellence, and also for genuinely humane social order.” As if that were not enough, he also said that in

“seizing on the existence of some real disabilities and conjuring up other alleged disabilities in order to promote a particular vision of human society,” the learning disabilities movement cripples allegedly disabled students who could overcome their academic difficulties with “concentrated effort,” demoralizes non-disabled

³¹ See *Burton Blatt Institute*, SYRACUSE U., <http://bbi.syr.edu> [<https://perma.cc/ZG5Q-N732>] (last visited Nov. 9, 2020).

³² 974 F. Supp. 106 (D. Mass. 1997). See Peter Blanck, *Civil Rights, Learning Disability, and Academic Standards*, 2 J. GENDER, RACE & JUST. 33 (1998); Peter Blanck, *Students with Learning Disabilities, Reasonable Accommodations, and the Rights of Colleges and Universities to Establish and Enforce Academic Standards: Guckenberger v. Boston University*, 21 MENTAL & PHYSICAL DISABILITY L. REP. 679 (1997) (I draw on these articles here).

³³ See articles cited in note 32, *supra*.

students who recognize hoaxes performed by their peers, and “wreak[s] educational havoc.”³⁴

Yet at the *Guckenberger* trial, the court found that there had not been a single documented instance at BU in which a student had been found to have fabricated a learning disorder to support a request for an accommodation. Still, the provost had directed that all accommodation requests be reviewed by his office, despite the fact that neither he, nor any of his staff, had expertise in evaluating accommodation requests by students with learning disabilities. The provost of BU had even gone so far as to say that students with learning disabilities were “a plague.”³⁵ Well, we in 2020 all know what an actual plague looks and feels like.

The BU provost was not alone. The BU Chancellor also chimed in, stating that “some of the things that pass for learning disabilities used to be called stupidity.”³⁶ He also called the students a “silent genetic catastrophe.”³⁷ We, law students and lawyers listening, have been taught about another supposed “genetic silent catastrophe” notoriously addressed in the 1927 *Buck v. Bell* involuntary sterilization case. In that case, the otherwise respected Justice Oliver Wendell Holmes, Jr. declared: “Three generations of imbeciles are enough.”³⁸ In the 1920s, Carrie Buck had been sterilized against her will because of her “idiocy,” but we know now that in fact she was not “feeble minded.” She was a poor and oppressed woman, who was impregnated by a sexual assault and who was sterilized because of the desire to avoid subsequent generations of “imbeciles.”

Nearly three-quarters of a century later, the BU provost terming learning disabilities a “plague,” and accusing the learning disability advocates of putting forth fake or “fugitive” impairments,³⁹ was sadly reminiscent of *Buck*. And now, nearing a full century after *Buck*, we have seen the backlash against the disability community from the “Varsity Blues” scandal.⁴⁰ Because a few bad actors (literally, including Felicity Huffman and husband William H. Macy) misused disability as an advantage for college admission, members of the disability community have been painted as academic scammers when requests for exam or other accommodations are made.

To finish Liz’s story: Despite the mockery, law student Liz Guckenberger and other BU students courageously chose not to accept the university’s attacks. Liz became the lead plaintiff against her own school, charging it had discriminated against her and others under the ADA.⁴¹ Like the lawyer Martin, Liz disclosed and

³⁴ *Guckenberger*, 974 F. Supp. at 118; see also articles cited in note 32, *supra*.

³⁵ *Guckenberger v. Boston Univ.*, 957 F. Supp. 306, 312 (D. Mass. 1997).

³⁶ See Robin Estrin, *Learning-Disabled Students Sue BU*, SOUTHCOAST TODAY (Jan. 10, 2011), <https://www.southcoasttoday.com/article/19970407/news/304079980> [https://perma.cc/JX82-2A4L] (last visited Nov. 9, 2020).

³⁷ *Guckenberger*, 957 F. Supp. at 312.

³⁸ *Buck v. Bell*, 274 U.S. 200, 207 (1927).

³⁹ See *Guckenberger*, 957 F. Supp. at 315.

⁴⁰ See Graham Kates, *Lori Loughlin and Felicity Huffman among Dozens Charged in College Bribery Scandal*, CBS NEWS (Mar. 12, 2019), <https://www.cbsnews.com/news/college-admissions-scandal-bribery-cheating-today-felicity-huffman-arrested-fbi-2019-03-12> [https://perma.cc/U3QU-W683] (last visited Nov. 9, 2020).

⁴¹ See *Guckenberger*, 974 F. Supp. at 149.

came forward. As a young law student she took on the system. After trial, BU modified its accommodation policies, but at heart of the matter were deeply troubling views by university leaders. The *Guckenberger* case became a moment of national importance, and it showed the need for continued advocacy for the ADA's accommodation principle in academics, the workplace, and elsewhere.

The BU case also reflected a national debate then that continues today, as I will discuss in a moment concerning recent cases. The debate pits the rights of undergraduate, law, and other graduate students with learning disabilities to receive academic accommodations against the rights of colleges and universities to establish general academic standards. The circumstances surrounding the BU case did not exist only within ivory tower walls. They were also part of a growing ideology that, knowingly or unknowingly, perpetuated attitudinal barriers and unjustified prejudice toward many qualified individuals with learning disabilities in educational, work, housing, and other daily life settings and activities.

IV. ADA AT 30 GOING STRONG

Fast forward to 2020, shortly before the beginnings of the health and economic emergency from the pandemic. In February of 2020, on Valentine's Day, I returned to BU's School of Law on the 25th anniversary of the *Guckenberger* decision. My host was the school's Disability Law Advocates and Allies ("BUDLAA") student group.⁴² BUDLAA supports and organizes the community of disabled students and their allies. Several BUDLAA members are leaders of the National Disabled Law Students Association, which I mentioned earlier.

In preparing my remarks, I thought first of Liz Guckenberger and her BU law student colleagues. I took the opportunity to talk again with Liz, now Liz Ball. Liz told me that, without a doubt, the pursuit of her ADA rights along with her student colleagues was among her most formative life-changing events. When she realized she must not accept the discriminatory actions of her university and that she must call them out in federal court, it changed the course of her life and her law career. Liz understood that BU's leaders had clearly crossed a civil rights line. Today, Liz is still fighting for and with students with disabilities to ensure the accommodation principle in education; in fact, this has become her life's work.

In my remarks at BU this year to this generation's students, professors, and other members of the community, I, of course, recounted Liz's story. I also recounted my involvement two years ago, in 2018, in another case in federal court. In this one, students with disabilities who were applying to law school were seeking to take the Law School Admissions Test ("LSAT") with reasonable accommodations.

In the case, California's Department of Fair Employment and Housing ("DFEH"), the state's civil rights agency, had brought a class action ADA lawsuit against the Law School Admission Council ("LSAC"), which administers the LSAT,

⁴² See *Law Student Organizations*, BUDDLAA, BOSTON UNIV. SCH. OF LAW, <https://www.bu.edu/law/admissions/student-life/student-organizations/> [https://perma.cc/CN8S-3E3L] (last visited Nov. 13, 2020).

on behalf of students with disabilities.⁴³ After several years of litigation in federal court, the parties had entered into a Consent Decree agreeing to revise LSAC's procedures to accommodate individuals with disabilities taking the LSAT. For example, LSAC had agreed not to flag whether tests were taken with accommodations in the score reports it provided to law schools, and it had agreed to implement the best practices established by an expert panel that had examined accommodations for LSAT test-takers with disabilities.

The DFEH was now claiming that LSAC had breached that prior Consent Decree. I presented testimony on behalf of DFEH and the student plaintiffs as to the accommodation principle. The federal court held that LSAC had breached the agreement and was in contempt of its prior obligations. It extended the terms of the Consent Decree and extended the Decree's reach nationally. Since this case, LSAC has undergone a leadership change and has actively attempted to improve services to its test takers with disabilities.

I spoke at BU about how the California LSAC case serves as another reminder of the importance of advocacy by students, like yourselves, who are engaged in protecting their ADA rights.⁴⁴ I am encouraged by a new sense of openness and commitment by LSAC to disability rights, but as always, vigilance by you students is required.

Later in 2020, during the summer months and in the throes of the pandemic, I again supported students with disabilities litigating their rights under the accommodation principle. This time the case was in California State Superior Court.⁴⁵ A class of student plaintiffs with disabilities sought to enjoin the Regents of the University of California ("UC") system from considering the results of SAT and ACT tests in university admissions and scholarship decisions. The UC Regents had earlier halted the use of SAT and ACT scores in admission, but had instituted a "test-optional" submission regime allowing such scores to support scholarship decisions and other aspects of the admission process at most of the UC campuses.

The plaintiffs argued that the UC's SAT and ACT "test-optional" program unfairly denied them, on the basis of their disabilities, the full benefits of admission and scholarships. Because the test centers did not provide appropriate accommodations during the pandemic, the students had not been able to take these tests and would not be able to. Therefore, they did not have the opportunity that other applicants enjoyed to present additional test information. Because of the lack of accommodations, these students with disabilities had thus been denied the same opportunities that non-disabled applicants enjoyed. I offered, for the plaintiffs, an expert declaration as to SAT and ACT test validation and the accommodation principle.

⁴³ Dep't of Fair Emp. & Hous. v. Law Sch. Admission Council, No. 12-cv-01830-JCS, 2018 WL 1156605 (N.D. Cal. Mar. 5, 2018).

⁴⁴ See Debra Cassens Weiss, *Council that Administers the LSAT Held in Contempt; ADA Consent Decree Is Extended*, ABA JOURNAL (Mar. 6, 2018), https://www.abajournal.com/news/article/council_that_administers_the_lsac_is_held_in_contempt_and_a_consent_decree_is [<https://perma.cc/M8G3-ZPX5>].

⁴⁵ *Smith v. Regents of Univ. of Cal.*, No. RG19046222 (Cal. Super. Ct., County of Alameda, Aug. 31, 2020).

The California State Court granted plaintiffs' request for a preliminary injunction to enjoin the UC Regents from offering the SAT and ACT test-optional program to applicants without appropriate accommodations during this COVID-19 pandemic. The court held that the pandemic had severely restricted the availability of testing sites for persons with disabilities needing accommodations, and that the students consequently were limited in their ability to locate suitable testing locations.⁴⁶ The test-optional regime was therefore likely to harm plaintiffs as compared to test-takers without disabilities.⁴⁷

I turn now to one last case, involving law school graduates with disabilities seeking a "fair shot" at taking the California Bar examination in October 2020, during the pandemic. I again provided an expert declaration for plaintiffs as to the operation of the accommodation principle in this testing regime. The plaintiffs were represented by another premier disability law advocacy organization, the Disability Rights Education and Defense Fund ("DREDF"), a leading national civil rights law and policy center directed by individuals with disabilities and parents who have children with disabilities, and by Legal Aid at Work, another nonprofit legal services organization assisting low-income working families.⁴⁸

In federal court in northern California, in *Gordon v. State Bar of California*,⁴⁹ the plaintiffs argued that their disabilities precluded them unfairly from taking the October 2020 California bar exam remotely. Due to the pandemic, the State Bar of California had initiated a "two-tier" approach with the possibility of remote testing (mostly at home) or in-person at approved testing sites. Plaintiffs sought a preliminary injunction to enjoin the State Bar from requiring them to take the bar in-person, in part because their disabilities made them particularly susceptible to COVID-19 outside of their homes. The plaintiffs also contended that the Bar was not going to provide them needed ADA-required accommodations, at home or in-person, such as allowance to take additional bathroom breaks during a test session, or to use paper tests and physical scratch paper.

The plaintiffs claimed, therefore, that the two-tiered testing system discriminated against them as disabled test takers by denying them equal and meaningful access to the bar exam. They also argued that their disabilities could be effectively and reasonably accommodated so that they might test remotely at their homes, without undue burden to the Bar Examiners. Absent accommodations, the plaintiffs argued, they would not be able to take the exam as others without disabilities could, and should they be forced to take the test at the testing sites their

⁴⁶ See Teresa Watanabe, *UC Must Immediately Drop Use of the SAT and ACT for Admissions and Scholarships, Judge Rules*, LA TIMES (Sept. 1, 2020), <https://www.latimes.com/california/story/2020-09-01/uc-may-not-use-the-sat-or-act-for-admissions-scholarship-decisions-for-now-judge-rules> [<https://perma.cc/3PP7-FH4D>].

⁴⁷ See, e.g., Scott Jaschik, *U of California Barred from Considering SAT/ACT Scores*, INSIDE HIGHER ED (Sept. 8, 2020), <https://www.insidehighered.com/admissions/article/2020/09/08/injunction-bars-u-california-using-sat-or-act-scores-admissions> [<https://perma.cc/29KN-XUG4>].

⁴⁸ DISABILITY RTS. EDUC. & DEF. FUND (DREDF), <https://dredf.org/about-us> [<https://perma.cc/SX3R-KSF7>] (last visited Nov. 13, 2020); LEGAL AID AT WORK, <https://legalaidatwork.org/our-mission-and-how-we-work/> [<https://perma.cc/F5M8-Y69H>] (last visited Nov. 13, 2020).

⁴⁹ No. 20-cv-06442-LB, 2020 WL 5816580 (N.D. Cal. Sep. 30, 2020).

performance would suffer from resulting stress and anxiety. The case was similar in concept to the prior UC SAT and ACT testing case.

In this case, however, the federal court denied plaintiffs relief on the grounds that the two-tier bar exam rules promoted exam security while not discriminating because the in-person test procedures and COVID-19 preventative protocols allowed equal and safe access to the exam. The court found that the proposed accommodations would require the administrators, under short notice, to implement testing systems that would be unduly burdensome to the administration of the exam.⁵⁰ Still, some state bar examiners, as well as in the District of Columbia, addressed aspects of these accommodation issues successfully in their October 2020 administration of the Bar Exam.

V. YOUR GENERATION OF LAWYERS AND THE ADA

The cases I have remarked on show the drive and commitment for disability rights by law and other students like you. The students sought to stay in, and excel at, their undergraduate and graduate educations with the accommodations they were promised. They wanted a fair shot in taking the SAT and ACT, the LSAT, and the bar examination. They understood their ADA rights and were not naïve as to the bias and discrimination they confronted. They nonetheless chose to advocate publicly for their rights in court.

DALSA, and others, are in the same game, and especially so in our time of individual and social crisis. Martin chose to fight, as did Liz and the California students taking the SAT and ACT, and the LSAT. The California law graduates of 2020 did the same. In court, some of them prevailed and some did not. But they all won because they chose to engage actively to protect their disability rights. This choice, by itself, protects disability rights for all as to the accommodation principle and other rights in academe, the workplace, professional practice, and elsewhere.

In 2020, my colleagues and I released what we believe is among the largest empirical studies focusing primarily on certain lawyers who offer diversity to the profession: lawyers who have disabilities, and lawyers who identify with differing sexual orientations and gender identities.⁵¹ This work and writings about it are building on increasing recognition by the American Bar Association (“ABA”) and other entities that successful legal organizations must do a better job of hiring and retaining diverse talent. Our national study of 3,590 lawyers, from new lawyers like you to retiring lawyers, was designed to explore progress in diversity and inclusion in the legal profession.

With representation from all U.S. states and the District of Columbia, our lawyer participants represent diverse backgrounds, in large and small firms, in non-profits, in government and academe, serving as judges, and practicing in-house. The primary focus was on lawyers who identify as having health conditions, impairments, and disabilities, and on those who identify as lesbian, gay, bisexual,

⁵⁰ Press Release, *Test Takers with Disabilities Sue State Bar of California for Forcing Them to Test In-Person During the Covid-19 Pandemic*, LEGAL AID AT WORK (Sept. 15, 2020), <https://legalaidatwork.org/releases/gordon-v-state-bar> [https://perma.cc/C42L-6RC5].

⁵¹ See Blanck et al., *supra* note 7.

transgender, queer, or as having other sexual orientations and gender identities (“LGBTQ+” as an overarching term), all of whom are under-considered groups.

The study’s participants included slightly more than half women, slightly less than half men, and one percent who identified as transgender (or non-binary, non-binary-non-gender-conforming, genderfluid, gender nonconforming, androgynous, or agender). Approximately one in six lawyers in the study identified as lesbian, gay, or bisexual (“LGB”), and less than one percent identified their sexual orientation using no labels (or as demi-sexual or pan-sexual). The majority of lawyers identified as straight and cisgender.

One quarter of respondents reported a health impairment, condition, or disability. Of these individuals, almost one-third reported a mental health condition, which included depression and anxiety, as well as cognitive conditions such as learning disabilities. Relatively high rates of mental health conditions were reported among women, those identifying as LGB, those identifying as a person with a disability, minorities, and earlier-career lawyers.

About forty percent of respondents reported they had experienced some form of discrimination, harassment, or bias in the legal workplace. Yet, about one in five responses identified mentoring in their workplaces as an effective bias mitigation strategy. Membership in a specialized law network or affinity group was also noted as an effective means of bias and discrimination mitigation.

Our particular focus of the study data is on the multiple-identity, intersectional, experiences of lawyers. In adopting this intersectional perspective, we aim to better understand the unique experiences of individuals with multiple minority identities in the legal profession, which as Professor Crenshaw has importantly noted, helps in understanding how one’s multiple individual and social identities interact to create a unique human experience in context.

In the study, we also consider a more expansive view of diversity and inclusion in the legal profession. To the concept previously known as “D&I,” we add in the ADA’s accommodation principle and call the result “D&I+.”⁵² While our work is a start, there is much more to learn about the experiences of lawyers with disabilities, and who identify as LGBTQ+, along with myriad other identities across race/ethnicity, gender identity, and age.

Our study is part of a larger program of study in our newly-founded national “Center on Disability Inclusive Employment Policy,” funded by the National Institute on Disability, Independent Living, and Rehabilitation Research.⁵³ Beginning this year and over the next five years, we will implement a series of studies to produce fresh data and evidence to increase the full and equal employment of persons with disabilities. We will examine organizations of all sizes and types, including those in the gig economy, which largely involves independent, often short-

⁵² See *id.*

⁵³ *Burton Blatt Institute Receives \$4.3M to Lead National Center on Employment Policy for Persons with Disabilities*, SYRACUSE UNIV., BURTON BLATT INST. (Sept. 7, 2020), <https://bbi.syr.edu/2020/09/congratulations-on-bbis-new-nidilrr-disability-inclusive-employment-policy-rehabilitation-research-and-training-centers-rrtcs-grant> [https://perma.cc/52ZU-3RND] (Peter Blanck, Principal Investigator; Administration on Community Living (ACL); National Institute on Disability, Independent Living, and Rehabilitation Research (NIDILRR)).

time workers rather than so-called “permanent” employees.⁵⁴ In light of the profound changes to work and society generally brought on by the pandemic, it is crucial to examine ways in which organizational and individual work strategies are evolving and incorporate inclusive disability employment policies and practices.

VI. TEARING DOWN WALLS OF DISCRIMINATION

I have been honored to speak with you today. DALSA, like BU’s law students, my students of the Disability Law Society, the National Disabled Law Students Association, and others, are at the forefront of the disability rights movement. My generation tried to light and sustain a torch for disability rights. You are the current generation of torch bearers, and you have begun the journey along your path.

In my generation, as President George H.W. Bush signed the ADA into law, he spoke of tearing down shameful walls of discrimination faced by people with disabilities. Today, much talk has been heard about building walls to keep people out of American society. Amid social isolation and distancing, and with a health and economic crisis hurting those most vulnerable among us, it is too easy to build walls of exclusion.

But you who are listening to me do not talk or build that way—you are committed to tearing down, brick by brick if necessary, society’s walls of segregation and disability discrimination. You already have committed to the ADA’s principles, as a beacon of hope, not only for people with disabilities, but also for all of us. Keep lighting the way forward with conviction that regardless of our individual differences—and we’re all different—we are all the same under our Constitution so as to be welcomed as full and equal members of this democratic endeavor.

VII. QUESTION AND ANSWER SESSION

Question: [A 1L] says that her law school does not have a disability law student association. Apart from following [NDLSA], what are other good sources for getting and staying involved?

Dr. Peter Blanck: Start by engaging with NDLSA. Unfortunately, once you enter the legal profession, I am aware of only two or three large firms that have disability affinity groups for lawyers with disabilities. Law schools have done better, but we have not moved the needle in practice, in part because of disclosure issues, as I have talked about. Justice Ginsburg understood this, and in addition to the

⁵⁴ See, e.g., Paul Harpur & Peter Blanck, *Gig Workers with Disabilities: Opportunities, Challenges, and Regulatory Response*, 30 J. OCCUPATIONAL REHAB. 511 (2020), <https://doi.org/10.1007/s10926-020-09937-4> [<https://perma.cc/YUX5-FATL>]; Peter Blanck & Paul Harpur, *California’s Response to the Status of Gig Workers with Disabilities: An Update*, 30 J. OCCUPATIONAL REHAB. 689 (2020), <https://doi.org/10.1007/s10926-020-09948-1> [<https://perma.cc/YTF4-VFQX>].

Tennessee v. Lane decision I mentioned, she wrote the seminal ADA opinion on the ADA's integration mandate in the case *Olmstead v. LC*.⁵⁵

Question: How does freedom of association play in? Have you seen it invoked in litigation to absolve institutions, probably private institutions, of the need to adhere to the provisions of the ADA?

Dr. Peter Blanck: During its 2020 term, the U.S. Supreme Court issued a decision involving the First Amendment's freedom of religion clause, broadening a "ministerial exception" to civil rights laws like the ADA and the Age Discrimination in Employment Act ("ADEA"). Basically, employees of a bona fide religious organization who are to carry out religious functions are not protected as employees under the ADA or ADEA because of the freedom of religion clause.⁵⁶ In dissent, Justice Ginsburg believed that this exception was overly broad, given that it might serve to cover other employees not engaged in religious activities.

Question: What do you see as the role of disability rights advocates in the movements to reform prisons and end mass incarceration?

Dr. Peter Blanck: This is a crucially important topic, and particularly so given the pandemic. Disability rights must be protected not only in prisons, but also in juvenile justice facilities, in schools, and in other public institutions, particularly when the state takes away individual liberties. Several years ago, I was engaged as an expert for the Southern Poverty Law Center in ADA litigation against the Alabama State prison system, which had large numbers of inmates with disabilities who were not accommodated in prison programs and services. I've written the article *Disability in Prison*⁵⁷ on this experience, and the case settlement resulted in changes overseen by the federal district court.

Question: NYU students have been trying to advocate for universal accessibility principles. But we have come up against the ADA's structure of reasonable accommodation limiting how people think of their obligation to make society inclusive for people with disabilities. How can we use either the ADA or some other legislation to get to that version of society?

Dr. Peter Blanck: That's an important point. Is the ADA a floor for accessibility requirements? Or, can or should entities go (or be required to go by laws) above that floor towards universal design ("design for all") in society? I serve as chairman of the Global Universal Design Commission,⁵⁸ a non-profit organization that promotes universally designed approaches to the physical and technological environments that are innovative and make business sense.

⁵⁵ 527 U.S. 581 (1999).

⁵⁶ *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020).

⁵⁷ Peter Blanck, *Disability in Prison*, 26 S. CAL. INTERDISC. L. J. 309 (2017).

⁵⁸ See GLOB. UNIVERSAL DESIGN COMM'N ("GUDC"), <http://www.globaluniversaldesign.org> [https://perma.cc/8QTN-9GHT] (last visited Nov. 13, 2020).

Question: You spoke about people with multiple identities or multiple disabilities or the intersection of disability with race and gender and other identities. Does the ADA have room for intersectional claims and an awareness of how other identities like race might affect and interact with someone's disability?

Dr. Peter Blanck: That is an excellent next-generation question about the ADA and other civil rights laws, and one you fittingly raise. It is a proper question for your generation of advocates. ADA claims are practically limited somewhat in this regard, as are other civil rights laws. Typically, but not always, when a claim of discrimination is brought on the basis of disability, or race, gender, or other protected areas, it is thought of as a claim on the basis of that particular protected identity, not of disability *and* race (that is an intersectional claim in its own right). Your question is prescient about a future in which there is greater recognition of identity intersectionality and discrimination on that basis. As Professor Crenshaw envisioned, the experience of discrimination and oppression of a Black woman, and with a disability, should be a uniquely cognizable claim under civil rights regimes. My hope is that we will begin to see a greater acceptance of such claims.

Question: Any takeaways or anything that surprised you from the other two panels, which were about the intersections of disability with criminal justice and with poverty?

Dr. Peter Blanck: There is clear recognition of the societal failures associated with mass incarceration and mass institutionalization, and with the inequities faced in our society from poverty and other forces. The ACLU has commented that one of three Black boys born today can expect to go to prison in his lifetime, as can one of six Latino boys, compared to one of seventeen white boys.⁵⁹ The answer is not to build more prisons or institutions. The answer, in my opinion, is to create and sustain meaningful societal support and resources that generate civil, economic, and social opportunities needed to begin to bridge the terrific gaps in society we currently face.

⁵⁹ *Mass Incarceration*, ACLU, <https://www.aclu.org/issues/smart-justice/mass-incarceration> [<https://perma.cc/UA3N-R3YU>] (last visited Nov. 13, 2020).