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A NEW RIDE: USING TITLE II AS A CIVIL RIGHTS VEHICLE TO AMERICAN SOCIETY'S ELUSIVE "LEVEL PLAYING FIELDS"[d1]

Franklin L. Ferguson, Jr.[dd1]

Abstract

In this Article, Professor Ferguson uses three cases to examine how courts have interpreted Title II of the ADA.

I. Learning to Overcompensate[1] —Innovative Applications of Title II of the ADA

Beginning in 1997 and continuing to the present date, a number of civil rights advocates have employed Title II of the Americans with Disabilities Act of 1990[2] (ADA) within the course of lawsuits in an effort to ***518** establish a series of innovative precedents. These cases benefit qualified persons with traditionally-defined, physical and mental disabilities, as well as, potentially, non-traditionally disabled classes.[3] Against the backdrop of more traditional avenues of civil rights relief, most notably litigation brought pursuant to 42 U.S.C. § 1983,[4] cases have been vigorously and successfully litigated. In essence, Title II of the ADA (Title II) frees plaintiffs from bearing the burden of the very difficult state-ofmind element of proof, wherein plaintiffs must prove that a defendant consciously deprived one or more victims of rights protected by the Constitution or other federal laws. Under Title II, the disparate impact standard looks purely to whether (1) a person is disabled, and (2) a covered governmental entity provides the entitled service, benefit, or program.[5]

Title II, in large measure due to the non-racially defined constituency it was targeted to serve, has enjoyed several years of a relative "honeymoon period"; the statute has been allowed to enfranchise the disabled ***519** to the full extent of its plain language.[6] Unburdened with the perversely difficult labor that is the demonstration of invidious intent,[7] Title II plaintiffs have been allowed to place affirmative obligations upon governmental-entity defendants: these municipalities must provide accommodations to those qualified to receive them, and the unreasonable failure to do so constitutes discrimination.[8] The elimination of the need to demonstrate a state-of-mind element results in greater opportunities for remediation of de facto discrimination, breathing life into congressional intent, the removal of obstacles to the full participation of the disabled within American society.

In the matter of civil rights, Title II imposes affirmative, playing-field leveling[9] responsibilities upon states and their municipalities. The public entities which are covered

by Title II, like persons without the normal use of one or more of their sensory faculties, have the responsibility to develop acute “sensitivities” or to “overcompensate” on behalf of the disabled, lest they run afoul of the statute. The resulting flexibility that characterizes the potential application of these affirmative obligations is ***520** illustrated by three cases, two having been litigated in the United States District Court, Central District of California. [10] The third case, a Sixth Circuit Court of Appeals controversy, has been granted writ of certiorari by the United States Supreme Court. [11] These cases demonstrate a potential range of significant applications of Title II, whether in the context of protecting the disabled from “traditional,” invidious-yet-unspoken bias, [12] forging access to places integral to the exercise of constitutionally fundamental rights, [13] or crafting the right to accommodation out of a municipality's street-level, mentally-disturbed person, medical intake procedure. [14]

This Article suggests that Title II is an appropriate vehicle for such innovative approaches to playing-field leveling. Litigation that is brought ***521** pursuant to Title II, whether following the model within Lane v. Tennessee, [15] Hayes v. City of Bellflower, [16] or Hood v. City of Los Angeles, [17] serves to promote a broader view of remedial legislation under section 5 of the Fourteenth Amendment to the United States Constitution. Such an aggressive approach to remediation should further the interests of other disabled classes, ultimately including insular racial groups, legitimizing their claims for accommodation. Hood in particular poses an interesting question: Could particular racial categories within the American social compact be deemed a recognized state of disability, warranting affirmative municipal accommodation? At a minimum, civil rights advocates are free to pursue characterization of their particular constituencies as “disabled,” qualifying for the affirmative accommodations of Title II.

Part II of this Article contrasts the challenges of successfully litigating a 42 U.S.C. § 1983 prima facie case against the manner in which Fourteenth Amendment section 5 remedial legislation was intended to operate. Justice John Marshall Harlan, Justice William Joseph Brennan, and Justice Thurgood Marshall were three jurists who frequently wrote in favor of proffering a plain-reading to the Fourteenth Amendment. The Lane, Hayes, and Hood cases serve to vindicate these “dissenting voices,” relying upon a statute (ADA, Title II) that approaches the enfranchisement envisioned by these note-worthy jurists.

In Part III, the Article tracks the approach proffered by Tennessee v. Lane. [18] By focusing upon fundamental rights within the penumbra of the Fourteenth Amendment's Due Process Clause, the Lane plaintiffs are attempting to avoid the Supreme Court's overly-constricted equal protection jurisprudence, most significantly represented by Board of Trustees of the University of Alabama v. Garrett. [19]

***522** In Part IV, the Article focuses on the Hayes case as an example of the effective use of Title II as an alternative to 42 U.S.C. § 1983. Hayes illustrates the statute's application to addressing unspoken yet pervasive biases and underscores the advantages wielded by Title II plaintiffs over their section 1983 colleagues: freedom from the burden of having to prove that the actions of defendant municipalities were motivated either by invidious intent or a conscious disregard for the violation of a plaintiff's constitutional or federal rights. [20]

Part V takes even further the “alternative theory” perspective of Title II versus the application of § 1983. A discussion of Hood demonstrates the potential utility of Title II within the difficult realm of police misconduct cases. Part V dissects the manner in which the United States Supreme Court has narrowly interpreted section 5 of the Fourteenth Amendment, particularly as manifest in 42 U.S.C. § 1983 litigation.

The Article's conclusion forms Part VI. Title II delivers the affirmative remedial relief intended by section 5 of the Fourteenth Amendment. The statute serves as a viable, preferable alternative to § 1983 for disenfranchised persons. The statute's potential impact, based upon expansion of the applications introduced in Lane, Hayes and Hood, is tremendous, a portent of the “playing field leveling” decisions yet to come.

II. Title II Can Provide a Successful, Alternative Theory of Relief with Respect to 42

U.S.C. § 1983 Allegations

A. Section 1983 Standard of Proof

It is important to note that states are not "persons" to be held liable for § 1983 actions, since Congress did not intend to abrogate the states' Eleventh Amendment immunity relative to that statute, nor was abrogation effected.[21] In the Title II context, Congress did intend to abrogate ***523** state immunity.[22] State immunity is far more essential to the substantive rights afforded by Title II, since the programs and services implicated have a vastly more substantial and practical impact upon the insular group protected. The comparison of 42 U.S.C. § 1983 theory with Title II theories advanced in the Lane, Hayes and Hood cases is included, however, in order to illustrate the potential civil rights utility of Title II, both as a substitute and model for the future interpretation of 42 U.S.C. § 1983 claims.

Local governmental entities may be held liable for the actions of their agents, acting in their official capacities under 42 U.S.C. § 1983, where the individuals' "action pursuant to official municipal policy of some nature caused a constitutional tort."[23] The governmental "entity's (official) 'policy or custom' must have played a part in the violation of federal law."[24] The custom or policy of inaction, however, must be the result of a "conscious,"[25] or "deliberate choice to follow a course of action . . . made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question."[26] Liability under 42 U.S.C. § 1983 is predicated, accordingly, on a constitutional violation being promulgated by a "person" wielding the ostensible and considerate authority of a municipality.[27]

***524** To establish a prima facie case under 42 U.S.C. § 1983 the plaintiff must prove (1) that the "conduct complained of was committed by a person," (2) that the person was "acting under color of state law," and (3) that "this conduct deprived (the plaintiff) of rights, privileges, or immunities secured by the Constitution or laws of the United States."[28] "(Section) 1983 provides a remedy for deprivations of rights secured by the Constitution and laws of the United States. . . ."[29] The statute does not create substantive rights, but merely exists as a cause of action based on preexisting federal constitutional and statutory rights.[30] Section 1983 is not simply a federal tort statute, prohibiting all wrongs inflicted by governmental employers. "Unless a deprivation of some federal constitutional or statutory right has occurred, § 1983 provides no redress even if the plaintiff's common law rights have been violated and even if the remedies available under state law are inadequate."[31]

Because of this standard of proof, 42 U.S.C. § 1983 plaintiffs must demonstrate an intellectual cognizance, or awareness on the part of government officials, rising to some level of hostility towards the insular group. Under 42 U.S.C. § 1983, the plaintiffs in Lane, for example, who claim to be inhibited from participating in activities which take place ***525** within Tennessee courthouses, would have had to demonstrate essentially a massive conspiracy adverse to the interests of the disabled.[32] These plaintiffs would have had to argue that there was some level of planning, or at least a mindset properly characterized as "reckless disregard," with respect to the thousands of engineers, architects and legislators, relative to the planning, construction and maintenance of physically accessible government buildings.[33]

B. Title II Standard of Proof

Title II governs every service, program and activity sponsored by "public entities." Besides municipalities, public entities include the states and their departments, agencies and instrumentalities.[34] Title II articulates that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[35] Covered entities are prohibited from engaging in discrimination against qualified persons as those terms are defined in Title II.

A "qualified individual with a disability" is

an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity. [36]

States and municipalities are accordingly mandated by Title II to affirmatively accommodate qualified persons with disabilities. [37] Courts need ***526** not investigate the rationale, only the actions of the covered entity, when determining liability.

The legislative scheme that accompanies Title II provides that the United States Attorney General is responsible for the drafting of regulations, relative to the implementation of Title II. [38] The purpose of these regulations is to assure that the administration of Title II is executed in "the most integrated setting appropriate to the needs of" the disabled. [39] Another goal of the regulations is to "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability." [40] Congress intended that covered entities take affirmative steps to include the disabled in public services and programs.

Title II also prevents covered entities from administering programs and services in a manner that has "the effect of subjecting qualified individuals with disabilities to discrimination" or of "impairing accomplishment of the objectives" of the ADA. [41] Public entities are also precluded from disadvantaging qualified persons with disabilities by using selection criteria which "screen out" disabled persons and prevents such citizens from "fully and equally enjoying any service, program, or activity." [42] The only way that a covered entity can avoid the mandated accommodation provisions of Title II is by showing that the efforts with respect to such an accommodation would effectively create an economic hardship, or "fundamentally alter the nature of the service, program, or activity." [43]

Eligible persons who are harmed by assorted violations of Title II are empowered to sue offending covered entities in federal court, potentially to recover the same "remedies, procedures, and rights" as those allowed under the Rehabilitation Act of 1973, 29 U.S.C. § 794a. [44] The regulations ***527** essentially mandate that covered entities render their programs, whether structural or conceptual, to be "accessible" to disabled persons. [45] As prevailing parties, aggrieved plaintiffs may even be awarded attorneys' fees. [46] This statutory scheme provides an opportunity for the implementation of more aggressive litigation strategies, [47] making possible the effective remediation of any inequalities Congress deems to exist, relative to disabled Americans.

C. Title II Avoids the Remedial Legislation Congruence and Proportionality Quagmire, Via the Fourteenth Amendment's Due Process Clause

It may be that, in the wake of Board of Trustees of the University of Alabama v. Garrett, [48] congressional authority under section 5 of the ***528** Fourteenth Amendment, with respect to the power to enforce the Equal Protection Clause, is limited. Since City of Cleburne v. Cleburne Living Center, Inc., the majority of the United States Supreme Court appears to have established a clear rule that discrimination against the disabled is subject to only rational basis review. [49]

In Garrett, the Supreme Court determined that Title I of the ADA cannot be used to enforce disability anti-discrimination measures against state employers. The Garrett majority said that "the scope of the constitutional right at issue" is simply "equal protection." [50] Title I of the ADA does not encompass claims based on substantive rights under the Fourteenth Amendment's Due Process Clause; the constitutional right Congress has attempted to enforce via Title I does not extend beyond the province of equal protection liability. [51]

Even if the protections afforded by Title I are argued, pursuant to Garrett, to be no broader than the scope of traditional equal protection analysis, Title II is not so limited.

Title II, unlike Title I, encompasses various due process claims, with varying standards of liability and is not limited to equal protection claims.[52] The Due Process Clause of the Fourteenth Amendment requires a balancing of "the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions."[53]

It may not ultimately matter that Title II is a congruent and proportional response to actual and threatened violations of the Fourteenth Amendment.[54] Title I of the ADA may not be sustained by the Supreme Court as an exception to Eleventh Amendment state immunity.[55] Garrett, however, was wrongly decided. Most importantly, due to the diverse ***529** legislative schemes within the various ADA titles, the constitutionality of Title II should not be governed by the Garrett decision.[56]

Though the focus of this Article is neither the constitutionality of Title II in particular nor that of section 5 remedial legislation in general,[57] a brief discussion of congressional power to enforce the Fourteenth Amendment, via section 5 remedial legislation, assists to contextualize the cases which illustrate the Article's thesis. Legislation crafted pursuant to the Fourteenth Amendment's section 5 necessarily involves a redistribution of societal values and resources. When it comes to the proper scope of the Fourteenth Amendment, no members of the United States Supreme Court have been as faithful to the drafters' intentions than Justice John Marshall Harlan, Justice William Joseph Brennan, and Justice Thurgood Marshall.[58]

In the 1883 Civil Rights Cases,[59] the Supreme Court was faced with one of its very first opportunities to interpret the constitutionality and applicable scope of the Fourteenth Amendment. When determining the outcome of the Civil Rights Cases, the majority of the Supreme Court declared applicable sections of the Civil Rights Act of 1875 to be unconstitutional.[60] As a result, Congress's attempt to prohibit segregation in places of public accommodation was thwarted. The Civil Rights Cases majority declared that Congress was limited in its power, pursuant to the ***530** Fourteenth Amendment, to redress private wrongs, emphasizing the "negative" power of the amendment. The Supreme Court essentially declared that Congress possessed only the ability to redress blatant or overt acts of state-sponsored discrimination. The Supreme Court, in one fashion or another, has proffered this limited view of congressional power under the Fourteenth Amendment's section 5 ever since, failing to directly overturn the Civil Rights Cases.[61]

In his Civil Rights Cases dissent, Justice John Marshall Harlan articulated what appears to be an inescapably logical and constitutionally sound view of congressional power pursuant to section 5 of the Fourteenth Amendment. Justice Harlan was perhaps the Supreme Court's earliest supporter of a faithful interpretation of congressional power to enforce the Fourteenth Amendment. Justice Harlan's views are especially impressive, in the light of the majority of the Supreme Court's apparent and persistence reluctance to upset the status quo:

> It is, I submit, scarcely just to say that the colored race has been the special favorite of the laws. What the nation, through congress, has sought to accomplish in reference to that race is, what had already been done in every state in the Union for the white race, to secure and protect rights belonging to them as freemen and citizens; nothing more. The one underlying purpose of congressional legislation has been to enable the black race to take the rank of mere citizens. The difficulty has been to compel a recognition of their legal right to take that rank, and to secure the enjoyment of privileges belonging, under the law, to them as a component part of the people for whose welfare and happiness government is ordained. . . . Today it is the colored race which is denied, by corporations and individuals wielding public authority, rights fundamental in their freedom and citizenship. At some future time it may be some other race that will fall under the ban. If the constitutional amendments be enforced, according to the intent with which, as I conceive, they were adopted, there cannot be, in this republic, any class

> of human beings in practical subjection to another class, with power in the latter to dole out to the former just such privileges as they may choose to grant. The supreme law of the land has decreed that no authority shall be ***531** exercised in this country upon the basis of discrimination, in respect of civil rights, against freemen and citizens because of their race, color, or previous condition of servitude. To that decree-for the due enforcement of which, by appropriate legislation, congress has been invested with express power-every one must bow, whatever may have been, or whatever now are, his individual views as to the wisdom or policy, either of the recent changes in the fundamental law, or of the legislation which has been enacted to give them effect. [62]

Justice Harlan interpreted section 5 of the Fourteenth Amendment to have permanently enveloped Congress with the power to eradicate the de facto impacts of discriminatory state action, irrespective of nominal, or per se, compliance with constitutional norms. Were he a member of the United States Supreme Court in 1976, Justice Harlan would not have celebrated this nation's 200th year of independence by willingly steering the nation onto the dubious path dictated by the seminal decision in Washington v. Davis. [63]

In Washington, the Supreme Court rejected the notion that demonstration of racially disparate impact was alone sufficient to demonstrate a violation of the Equal Protection Clause of the Fourteenth Amendment. [64] Instead, the Court insisted that an invidious or racially discriminatory purpose be demonstrated, though no such language is presented within the amendment itself. [65] Such invidious purpose must be demonstrated from the plain language of the statute, or as applied. Even where a plaintiff is able to demonstrate an inference of invidious discriminatory purpose, under the Washington progeny, the defendant governmental entity is afforded an opportunity to rebut the prima facie case, via presentation of evidence manifesting racially neutral selection or eligibility terms.

The reality of the Washington decision, however, is that unintentional discrimination promulgated by governmental entities, irrespective of its deleterious effects, is constitutionally sound, a lesson that has not gone unnoticed by would-be violators of the Fourteenth Amendment's spirit. Justice Harlan's judicial philosophy was prescient; he would have avoided ***532** the overt-covert discrimination conundrum that characterizes present-day Fourteenth Amendment jurisprudence, particularly with respect to interpreting congressional power to create section 5 remedial legislation.

In the 1896 Plessy v. Ferguson decision, the majority of the United States Supreme Court rendered the infamous “separate but equal doctrine” [66] and paved the way for legal race segregation. The result in Plessy was made possible through the majority's constricted view of the Fourteenth Amendment's purposes and the scope of Congress's remedial legislation power under section 5. [67] Dissenting, Justice Harlan accurately predicted the evils which would be wrought by the Plessy majority's refusal to appropriately breathe life into its perspective of the Fourteenth Amendment and articulated jurisprudential tenets which would ultimately serve to define his Supreme Court tenure. [68] Justice Harlan suggested that the Constitution does not permit the dissemination of civil rights according to race; [69] that the Fourteenth Amendment's plain language demands de facto equality; [70] that federal privileges and immunities should be interpreted broadly, in order that section 5 of the Fourteenth Amendment be given its proper scope; [71] that the personal liberty, of both Whites and Blacks, was affronted via segregation; [72] and that the Plessy majority's decision would encourage states to avoid the implications of the Fourteenth ***533** Amendment with respect to citizenship. [73] Finally, Justice Harlan suggested that if Whites are truly the “dominant race,” they did not need a legal “crutch,” such as the dilution of congressional remedial legislation, in order to maintain such status. [74] In the context of the proposed infusion of previously disenfranchised Blacks into the American social compact, Justice Harlan seemed to ask, “why not?”

In his dissent from the majority opinion in United States v. Guest, [75] Justice William Joseph Brennan saw the necessity to faithfully interpret congressional power under section 5 of the Fourteenth Amendment as it related to the constitutionality of 28 U.S.C. §

241. Guest involved the United States Attorney's prosecution of a conspiracy to prevent Blacks from using places of public accommodations and from traveling interstate highways via acts of threats, intimidation and violence. [76] The Supreme Court was faced with the very important question of whether state action was a necessary component of a section 241 prosecution wherein the underlying constitutional violation was interference with the free exercise of rights protected by the Fourteenth Amendment. Though the majority rested its opinion on the scintilla of state action, Justice Brennan would have found interference with the exercise of the Fourteenth Amendment within the conduct of private parties; Congress has been enveloped with power, according to Justice Brennan, to prohibit actions which serve to impede citizens' exercise of rights protected by the Fourteenth Amendment. [77]

***534** Viewed in its proper perspective, (section) 5 of the Fourteenth Amendment appears as a positive grant of legislative power, authorizing Congress to exercise its discretion in fashioning remedies to achieve civil and political equality for all citizens. . . . . And I can find no principle of federalism nor word of the Constitution that denies Congress power to determine that in order adequately to protect the right to equal utilization of state facilities, it is also appropriate to punish other individuals-not state officers themselves and not acting in concert with state officers-who engage in the same brutal conduct for the same misguided purpose. [78]

Finally, Justice Marshall's dissent in City of Cleburne v. Cleburne Living Center, Inc. [79] forewarned of the dangers posed by the application of rational-basis scrutiny to the disabled.

Heightened but not strict scrutiny is considered appropriate in areas such as gender, illegitimacy, or alienage because the Court views the trait as relevant under some circumstances but not others. That view-indeed the very concept of heightened, as opposed to strict, scrutiny-is flatly inconsistent with the notion that heightened scrutiny should not apply to the retarded because “mental retardation is a characteristic that the government may legitimately take into account in a wide range of decisions.” Because the government also may not take this characteristic into account in many circumstances, such as those presented here, careful review is required to separate the permissible from the invalid in classifications relying on retardation. [80]

Contemplating the views of Justices Harlan, Brennan, and Marshall comprehensively, the following observations can be rendered: The Fourteenth Amendment was intended to affirmatively enfranchise disfavored groups, empowering Congress to curb a broad swath of conduct that has the impact of impeding citizens' exercise of constitutional privileges and immunities. The emphasis, according to these distinguished jurists, in the battle to establish equal protection of the laws, must be upon the pragmatic, de facto realities implicated by the statutes. In this context, 42 U.S.C. § 1983 and Title II serve as independent expressions of congressional ***535** willingness to enforce these philosophies. As indicated above, however, due to judicial interpretations, only Title II comes close to fulfilling its remedial purpose.

III. Tennessee v. Lane—Avoiding the Implications of Garrett

Some circuit courts of appeal would apply the Garrett rule to both Title I and Title II of the ADA. Although the Supreme Court has not made the Garrett holding explicitly applicable to Title II, it is possible that the decision will be extended to Title II, at least within the equal protection context. [81] Even if, however, Garrett is ultimately deemed to bind the equal protection analysis of Title II, [82] according to Popovich v. Cuyahoga County Court [83] and Lane v. Tennesee, [84] advocates can still seek refuge for Title II claims within the Due Process Clause. Indeed, an independent, due process analysis, as explored in Popovich and Lane, provides a separate avenue of relief.

Title II directly implicates protection of several fundamental rights of citizenship. [85] Title II protects people with disabilities against violations of their constitutional rights with respect to an assorted array of important areas of state action. [86] “The constitutional predicate for (the violation of) ***536** the statute is likely to vary widely across those different

activities,"[87] since each constitutional right is uniquely characterized. "Title II applies to an array of 'qualitatively different' state activities."[88] Title II implicates a wide-range of behavior, including those areas in which covered entities, including states, bear heightened-scrutiny constitutional obligations.

Courthouses are the locations in which individual citizens often have their most important and extensive contacts with the government. . . . (C)ourthouses sit at the nexus of an array of rights and obligations of citizenship, including the opportunity to seek redress as litigants, to testify as witnesses, to participate as jurors, and to observe proceedings as members of the interested public.[89]

"The opportunity to testify and seek redress in the courts was a primary aspect of the 'protection of the laws' that the Fourteenth Amendment's drafters sought to guarantee to all persons."[90] According to the legislative history, "states have frequently denied individuals with disabilities their fundamental right to vote."[91] Even when they are not involved in the subject litigation, persons with disabilities possess a "fundamental, natural yearning to see justice done."[92]

Congress may require states to consider . . . the constitutional right at issue, the . . . cost of compliance, and the effect of failure to accommodate those with disabilities. . . . Congress could ask states to weigh the fundamental importance of access to the courts to our justice system, that the perpetuation of the current physical barriers force people with disabilities to either forgo ***537** their right to be present in court or be carried into court, and that the remedy is often inexpensive and simple.[93]

Qualified persons with disabilities, due to accessibility of physical structure issues, have been precluded from the right "to seek aid from the government."[94] According to Title II's "legislative history(, there are) numerous examples of individuals who could not attend important government proceedings, file claims in government offices, or meet with their elected representatives due to the inaccessibility of state facilities."[95] Qualified "(p)eople with disabilities have also frequently been denied another set of fundamental rights . . .- the rights to marry and to have and raise children."[96] Finally, qualified people with disabilities have suffered consistent denial of "rights guaranteed by the Fourth, Fifth, and Eighth Amendments in dealings with law enforcement."[97]

A. Popovich v. Cuyahoga County Court

In the realm of judicial proceedings, a state's failure to accommodate an individual party's deafness, or other disability, may greatly increase the chance that some error or other injustice will occur in the proceeding. If the deaf party is precluded from responding to charges made by the non-disabled, opposing party, an essential element of the adversary system is lost.[98] Accommodations to the hearing disabled, however, must be ***538** balanced against state interests. The state has an important interest in administering its decisions in a cost-conscious and time-effective manner. "(A)t some point, the requested accommodations may become so expensive or onerous as to outweigh their usefulness in reaching a decision."[99]

In Popovich v. Cuyahoga County Court, a hearing impaired plaintiff was embroiled in a child custody hearing.[100] Based on the United States Supreme Court cases concerning the due process that is required in such controversies, it is clear that the state is required to provide an individual who is a party to a custody hearing with some level of hearing assistance, depending on the degree of his disability.[101] It is also clear that the state may not retaliate against the disabled plaintiff for making a request for such accommodation.[102] The "participation" requirement of Title II serves to protect hearing disabled plaintiffs' due process right to meaningful participation in a hearing that impacts fundamental rights.[103]

Popovich thus determined that, in child custody cases involving hearing-impaired parents, Congress is well within its express authority under the Fourteenth Amendment's section 5 to require states to accommodate parental disability and to refrain from retaliation for requests for the same. Such action represents enforcement of the relevant due process

right, as opposed to any purported “expansion” of due process. Importantly, the Sixth Circuit Court of Appeals determined in Popovich that Congress has not changed the nature of the due process right or watered down the constitutional standard, by simply mandating the hearing impaired be accommodated at child custody hearings. [104]

B. Tennessee v. Lane

Respondents in Tennessee v. Lane argued that Congress acted within its power, bestowed by section 5 of the Fourteenth Amendment, when ***539** it decided to require the state of Tennessee to assure that its court system, “ when viewed in its entirety, is readily accessible to and usable by individuals with disabilities,” since the legislative history manifests a pervasive problem. [105] In Lane, six named plaintiffs were prevented from effectively participating in the state of Tennessee's judicial proceedings. [106] The actual physical structures of courthouses were deemed physically inaccessible to certain people living with disabilities. Even the Commission on the Future of the Tennessee Judicial System admitted that, “‘(f)or persons with significant physical or mental impairment, the system can be quite literally inaccessible.’” [107]

When developing the ADA's legislative history, Congress compiled a record that clearly illuminates the fact that judicial buildings nationally were inaccessible at the time of the statute's enactment. A Civil Rights Commission report that provided much of the basis for Congress's consideration of the statute declared that seventy-six percent of all state buildings open to the general public were inaccessible to people with disabilities. [108] Congress had every reason to conclude that courthouses were no exception to this perceived rule.

In Lane, George Lane attempted to answer criminal charges in September of 1996. [109] Mr. Lane was restricted to use of a wheelchair and could not walk, much less climb stairs. [110] Because all proceedings in that courthouse occurred on the second floor, and the building had no elevator, Mr. Lane was required to abandon his wheelchair and literally crawl up the steps in order to appear in court. [111] When he refused to submit to such humiliation, upon the occasion of his next court appearance, Mr. Lane ***540** was arrested and jailed for failure to appear in court. Mr. Lane had indeed located himself at the entrance of the courthouse, but refused to allow court personnel to carry him up the steps. [112]

A second party in Lane, Beverly Jones, was a paraplegic confined to a wheelchair who earned her living as a certified court reporter. [113] Several Tennessee county courthouses were inaccessible to members of the physically disabled population, including Ms. Jones, which inhibited her professional engagements. [114] Ms. Jones made specific requests for accommodations that were denied. [115] The remaining four named plaintiffs in Lane-Ann Marie Zappola, Ralph Ramsey Sr., Dennis Cantrel, and Russell Larson-were each excluded from participating in essential, state-sponsored programs held at inaccessible Tennessee courthouses. [116]

The plaintiffs in Lane argued that inaccessible courts directly implicate the Fourteenth Amendment's Due Process Clause. [117] “(T)he due process guarantee of a fair trial give criminal defendants the ‘right to be present at all stages of the trial where (their) absence might frustrate the fairness of the proceedings.’” [118] States also have an obligation to accommodate the appearances of subpoenaed witnesses and other persons who are compelled to participate in many civil proceedings, since such presence is often necessary to provide a “meaningful opportunity to be heard.” [119] “In many cases, this constitutional obligation requires states to bear some cost to facilitate access, at least where doing so imposes no ‘undue burden on the State.’” [120]

***541** By arguing that Title II protects the fundamental right that is due process, the Lane respondents avoided the potential conflict with Board of Trustees of the University of Alabama v. Garrett. [121] Once a fundamental right is at issue, it does not matter that a denial of the right is unintentional. [122] Discriminatory purpose is not required to make out an equal protection violation in fundamental rights contexts. [123]

The six plaintiffs filed suit on August 10, 1998 against the state of Tennessee and several of its counties, seeking “both damages and injunctive relief” and claiming “that the defendants had violated Title II of the ADA by maintaining inaccessible courthouses.” [124] The district court denied Tennessee's motion to dismiss the complaint by means of asserting Eleventh Amendment immunity. [125] Citing Popovich v. Cuyahoga County Court, [126] after Tennessee's interlocutory appeal, the Sixth Circuit affirmed the district court's denial of the motion to dismiss. [127]

IV. There Are No Bigots Here: Hayes v. City of Bellflower and the Traditional Means of Employing Title II

In Hayes v. City of Bellflower, Timothy Hayes, Cheri Hayes and Jack Hartman, III, the natural child of Cheri Hayes and the adopted son of Timothy Hayes, brought a civil action against the City of Bellflower, California. [128] The lawsuit was filed in the United States District Court, Central District of California. Jack Hartman, twelve years of age at the ***542** time the complaint was filed, was afflicted with autism, a disability as defined by Title II. [129]

The City of Bellflower is a California municipality, a “public entity” subject to the jurisdiction of Title II. [130] Title II prohibits public entities from discriminating against persons with disabilities relative to the services, programs, or activities of state government. Significantly, the Eleventh Amendment's immunity is inapplicable to units of local government. [131] “These entities are subject to private claims for damages under the ADA without Congress' ever having to rely on (section) 5 of the Fourteenth Amendment to render them so.” [132]

***543** On June 18, 1999 a Municipal Code Enforcement Officer for Bellflower inspected 8715 Walnut Street, in Bellflower, California, the residence of Jack Hartman, III. [133] Via a June 23, 1999 letter, Bellflower communicated notice that the Hayes family was in violation of Bellflower Municipal Code section 19-16.5, pertaining to the height of the chain-link fence surrounding the property's front yard. [134] Though the fence had been erected three years earlier, the Hayes family was being notified that their six-foot fence was too high. [135]

Cheri Hayes was physically unable to care for Jack without assistance, and Timothy Hayes's work responsibilities precluded him from providing the around-the-clock care that Jack requires. [136] On account of Jack's disability, he qualified to receive protective supervision through In Home Protective Services, a state and federally funded enterprise. [137] In addition to the aforementioned six-foot fence, Jack's care and protection required a twenty-four-hour caregiver, extensive counseling and behavior modification sessions, and assorted adjustments to the physical plant of the 8715 Walnut property. [138] The six-foot fence provided a solid barrier of protection against Jack's self-endangerment tendencies. The fence height, admittedly in excess of the ordinance's limits, served as a reasonable and necessary accommodation of Jack's disability. [139]

The sole purpose for the fence's height was to restrain Jack, to serve as a protection against his self-destructive proclivities. [140] Jack's autism disability, compounded by brain lesions and epilepsy, prevented him from comprehending issues germane to his own safety and caused him to display “elopement tendencies.” [141] On more than one occasion prior to the fence being erected, ostensibly attracted by objects beyond the reach ***544** of the residential boundaries, Jack ran into the street abutting the 8715 Walnut property and was struck and injured by passing automobiles. [142] The fence had been erected in order to “slow Jack down” during the occasions when the twelve-year-old sought to “escape” the confines of the home and to enter the street. [143]

The Hayes family believed that Bellflower was enforcing the fence height ordinance against them in a selectively discriminatory manner, manifesting a bias against Jack's autism disability. [144] At all times relevant to the litigation, there were several houses, within a half-mile radius of the Hayeses' home, which were also subject to Bellflower Municipal Code § 19-16.5. [145] The ordinance was not uniformly enforced: none of the other houses that boasted fences out of code within the half mile radius of the Hayeses'

residence had been cited for violation of the ordinance.[146] It is constitutionally improper for a municipality to selectively enforce a particular zoning scheme against an individual on account of an immutable characteristic such as autism or any legally cognizable disability.[147] "Selective enforcement of a statute(, regulation or policy) violates the equal protection clause . . . if it is part of a deliberate and intentional plan to discriminate based on an arbitrary or unjustifiable classification."[148]

The administration of a statute that is fair on its face but results in unequal application to persons who are entitled to be treated alike denies equal protection if it is the product of intentional or purposeful discrimination.[149] Given the several examples of non-enforcement, along with the Hayeses' specific request for a variance, or commensurate "non-enforcement," the Hayes family argued that Bellflower had no rational ***545** basis[150] for its continued denial of what was ultimately determined by the trial court to be a reasonable accommodation.

Timothy and Cheri Hayes were forced to pay $400 to apply for a variance to the ordinance in question, with no guarantee of approval.[151] Timothy and Cheri Hayes applied for the variance to Bellflower's fence height ordinance. After a public hearing, Bellflower in fact denied their application.[152] Bellflower demanded that the fence height be reduced to forty-two inches, or in the alternative, that the fence be moved to a location further from the public easement, which would have eliminated over fifty percent of Jack's front yard play environment.[153] The Hayes family administratively appealed Bellflower's decision, but were again denied relief.

In denying the variance, Bellflower relied upon its finding that the ordinance solely served the interest of aesthetics and that the fifty percent reduction of playing space that would result from moving the fence to a location closer to the house would be sufficient.[154] It was patently obvious that the city officials took great pains to express their "non-discriminatory" ***546** rationale in making their decision. Bellflower refused to allow the reasonable accommodation, necessary for plaintiffs' use and enjoyment of the property, free from discrimination.[155]

A. Demonstrating Title II Prima Facie Case—Selective Enforcement of the City of Bellflower's Ordinance Provides One Example of Discrimination

State and local ordinances and regulatory programs are "activities" or "programs" of local governments subject to Title II.[156] Bellflower's aforementioned building ordinance, and the enforcement thereof, constitutes an example of such "programs" or "activities" which are subject to the ADA. The United States Supreme Court has held that the issue of reasonable modifications required an analysis of the particular circumstances presented.[157] In the Hayes case, the interests of and benefits which would have flowed toward the Hayes child as a result of the requested accommodation were significant and far outweighed any inconveniences to Bellflower's program. The particular facts of the Hayes case presented the reality that a disabled boy's life deserves protection through an exception, or ordinance variance. Title II required the City to affirmatively act, to bring a disabled child and his family positively into the social compact, via elimination of the ordinance, the barrier to Jack's ability to live in an integrated setting.

For every Title II claim, the prima facie case involves proof by the plaintiff "that he or she is a 'qualified individual with a disability.'"[158] Title II defines that term as

***547** an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.[159]

Significantly, no mention of "requirements" for acquisition of employment are found within the statute.

To establish a violation of Title II,

a plaintiff must show: (1) he is a “qualified individual with a disability”; (2) he was either excluded from participation in or denied the benefits of a public entity's services, programs or activities, or was otherwise discriminated against by the public entity; and (3) such exclusion, denial of benefits, or discrimination was by reason of his disability. [160]

For example, a municipality such as Bellflower discriminates when it refuses to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such persons equal opportunity to use and enjoy a dwelling. Jack Hartman, III was disabled and denied an accommodation via variance that would not have fundamentally altered Bellflower's ordinance scheme, and the refusal to accommodate was necessarily based upon his disability status, since that was the basis of the Hayes family variance application.

Bellflower's ordinance, although facially neutral, [161] discriminated against the Hayeses' disabled child because it prevented the maintaining of a safe perimeter fence as an aid to protect this child from wandering away from home due to his disability. The refusal to grant a variance in this particular case then adversely affected the safety of a disabled person. One of the central purposes of the ADA, the integration of the disabled into larger society, was accordingly frustrated.

By engaging in the aforementioned conduct and refusing to accommodate Jack Hartman's disability, Bellflower unduly burdened the plaintiffs' ***548** ability to enjoy the home that had been altered to suit his living needs, free from discrimination. [162]

The variance, as requested by the Hayes family, did not fundamentally alter the city of Bellflower's ordinance plan. Congress intended such a competitive balance between aesthetic uniformity and accommodation of a disabled child to be measured in favor of the child. The accommodation would have only allowed a beautiful child to continue to enjoy a safe and healthy life. Bellflower's ostensible “discomfort” with the presence of the Hayes child playing in his front yard has been addressed by the Supreme Court, and reasonable accommodations which allow for the integration of persons with disabilities into mainstream society are mandated by law. [163]

B. Bellflower's Defensive Strategy Focused on the Hayeses' Traditional 42 U.S.C. § 1983 Civil Rights Claim, Though No Such Claim Had Been Made

From the outset, counsel for the city of Bellflower approached the Hayes case as if the claim supporting the Hayes family's case theory fell under 42 U.S.C. § 1983. [164] This miscalculation, though understandable in light of the fact that the vast majority of civil rights plaintiffs have employed 42 U.S.C. § 1983, led to the city of Bellflower's failure to file both a motion to dismiss and a motion for summary judgment. The City was also influenced into using a failed strategy, articulated at trial. The essence of the City's defense was that there was no illegally conscious behavior by Bellflower, at least to the extent that such could be proven by the plaintiffs under the traditional 42 U.S.C. § 1983 analysis. Though it had been the subject of pleadings, meetings and phone conversations, the city of Bellflower never saw the Hayeses' Title II claim coming until an adverse jury verdict was read.

***549** Relative to the Hayes case, [165] the Hayes family, in order to successfully raise a 42 U.S.C. § 1983 claim, would have had to prove that the City of Bellflower officials' decision to deny their application for a variance to a city-wide ordinance was motivated by a discriminatory intent, or negative animus directed towards a twelve-year-old, autistic boy on account of said disability. This would have been a prohibitively difficult, if at all possible, task, one the Hayes family would most probably decline to shoulder.

V. “To Serve and Protect”—Hood v. City of Los Angeles [166]

On November 15, 1997, Darryl Hood was shot and killed by officers Brent Houlihan, Miguel Perez, or other unknown officers of the Los Angeles Police Department (LAPD). [167] Ginger Hood, Darryl Hood Jr., Dashawn Hood, Kevin Darnell Hood, Katie Marie Hood, and Howard Bo Keemont Hood were the sole successors in interest and

heirs of decedent Darryl Hood.[168] Darryl Hood had a documented history of mental illness, which was separate and apart from his use of PCP and other illegal drugs.[169]

The LAPD failed to respond in a reasonable manner to the situation that involved the decedent on November 15, 1997.[170] Instead of providing Mr. Hood with the intervention that is part of a comprehensive treatment plan for his patent mental and emotional disability, the involved officers immediately and without necessity resorted to the use of deadly force, which killed Mr. Hood and precluded him from his right to non-discriminatory ***550** access to public mental health treatment facilities.[171] The officers involved knew or should have known that Mr. Hood was mentally and emotionally disturbed and that Mr. Hood presented neither an immediate nor a remote threat to the safety of the officers themselves.[172] Mr. Hood's actions on November 15 also did not threaten the safety of any member of the public.[173]

In response to the Hood family allegations, the City of Los Angeles suggested that Mr. Hood was not qualified as a person with a disability on account of his recent use of the drug PCP.[174] Darryl Hood was excluded from the ADA relief to which he was entitled under 42 U.S.C. § 12114(a) or 42 U.S.C. § 12210(a), since the defendants did not subject Mr. Hood to the discriminatory treatment of which the plaintiffs have complained "on the basis of" his allegedly current use of illegal drugs.[175] When the defendants engaged Mr. Hood, they could not have acted on the basis of his alleged illegal drug use because they did not know that Mr. Hood had ingested illegal drugs within a relatively recent, though precisely indeterminable, time frame.[176]

According to the Title II Technical Assistance Manual, as well as 42 U.S.C. § 12210(c), "the ADA does prohibit denial of health services, or services provided in connection with drug rehabilitation, to an individual on the basis of current illegal use of drugs, if the individual is otherwise entitled to such services."[177] Importantly, Mr. Hood was neither an employee of the defendants, in possession of job performance obligations, nor an in-patient resident of a public drug rehabilitation center.[178] Instead, Mr. Hood was an individual eligible to receive mental health services from the City of Los Angeles.[179]

***551** A hospital emergency room may not refuse to provide emergency services to an individual on the basis of current illegal drug use, pursuant to either 42 U.S.C. § 12114 or 42 U.S.C. § 12210.[180] Likewise, under the precedent established in Hood, the defendants were unable to escape the responsibility to provide non-discriminatory access to mental health services based upon the distinct, though related, condition of the decedent's alleged illegal drug use.[181]

Darryl Hood first went to a mental health practitioner in 1994, at the urging of his family, because he had cut himself with a sharp object.[182] Ginger Hood, the decedent's wife, was the first family member to speak to a psychiatrist or psychologist in order to learn the reason that her husband would deliberately harm himself.[183] In January of 1994, in response to his ingestion of ammonia, Ms. Hood took her husband to the Augustus F. Hawkins Comprehensive Community Medical Health Center, believing him to be mentally ill.[184]

There were several manifestations of Darryl Hood's mental illness prior to November 15, 1997. Mr. Hood often took his wife outside of their home in order to speak because he thought people from within the television would otherwise hear their conversation.[185] On another occasion, in 1994, Mr. Hood inflicted sharp-object wounds to his stomach, chest and chin.[186] Ginger Hood also believed that, during the periods wherein his mental illness was most manifest, her husband could not understand the things that she said to him.[187] After the self-inflicted stabbing incident, Mr. Hood was again taken by Los Angeles police officers to Augustus Hawkins.[188] Following this stabbing incident, Mr. Hood would not speak either in front of the television or over the telephones ***552** within the house because he believed the phones were "bugged."[189] In another incident, Mr. Hood set the Hood family home garage on fire.[190]

Darryl Hood was diagnosed with a mental illness and prescribed medication as a result of [191]

this aberrant behavior. When he took it, the medication seemed to help to improve Mr. Hood's condition a great deal. [192] Mr. Hood was treated and evaluated for approximately one week in November 1994, however, after he neglected to take his medication and then both cut his own ear and ingested rat poisoning. [193]

Ms. Hood believed her husband needed the assistance of mental health professionals because she did not believe drinking ammonia and engaging in self-mutilation were indicative of normal mental functioning. [194] She did not think that her husband actually wanted to kill himself but believed that he possessed a particular mental illness that caused self-destructive behavior. [195] Though Ms. Hood believed her husband needed professional mental help, she believed he was a danger only to himself and not to her or her children. [196] Even on the day before he was killed, Ms. Hood attempted to get help for her husband. [197] The week before the incident in which Mr. Hood was killed, Ms. Hood realized his mental health would not improve independent of professional care, and she would not allow her husband back into their family home until he received treatment. [198]

As a result of his family's concerns and the aforementioned mental health evaluations performed by mental health care professionals at the Augustus Hawkins Center, Darryl Hood was diagnosed, by all legitimate standards of medical and miscellaneous diagnostic evaluations, not to be of sound mind, to be categorically psychotic, schizophrenic or otherwise ***553** neurologically impaired and, consequently, unable to interpret legal commands as might have been issued under any stressful and extreme circumstances. [199] This diagnosis was rendered prior to November 15, 1997 and represents Mr. Hood's mental condition on that date. [200] Furthermore, Mr. Hood's mental illness was not the result of his use of such narcotic substances. [201] Mr. Hood's psychiatric and psychological conditions were contributing factors for his use of narcotic substances. [202]

United States District Court Judge Margaret Morrow agreed with the Hoods that the facts in this matter, as well as the permissible inferences which could be drawn from them, raised material genuine issues of fact. The defendants did not act on the basis of Mr. Hood's alleged drug use, as necessitated by both 42 U.S.C. § 12114(a) and 42 U.S.C. § 12210(a). Further, consistent with 42 U.S.C. § 12210(c), the Hoods' decedent specifically could not be denied mental health services for which he was qualified on the basis of current illegal drug use. The Hoods argued that 42 U.S.C. § 12210, as opposed to 42 U.S.C. § 12114, was applicable, since the Hoods' decedent was not an employee of the covered entity, but a person eligible to receive public mental health services.

Congress intended that Title II would be construed in accord with the Rehabilitation Act. [203] Cases interpreting the Rehabilitation Act make it clear that public entities must do more than offer services to disabled persons; they must take affirmative steps to make programs and services accessible to the disabled. [204] Title II requires that public entities take such affirmative steps, such as the protective and interventive detention, as necessary in the instant case, to ensure that the access they provide is meaningful. Such access must be sufficient to ensure that the disabled ***554** actually derive the benefits of the government programs and services. [205] This articulation of the ADA's purposes further supports the interpretation of 42 U.S.C. § 12114(a) and 42 U.S.C. § 12210(a) promulgated by the Hood family: that the defendants did not act on the basis of Darryl Hood's alleged current drug use because on November 15, 1997 they did not have concurrent, legally certain knowledge of said use.

The city of Los Angeles failed to make its mentally and emotionally disabled persons evaluation procedures available to Darryl Hood on a non-discriminatory basis. Mr. Hood's exclusion from needed mental health services came about largely because of the policies of the LAPD. These policies make such evaluation and treatment procedures and services inaccessible to the mentally ill. The city of Los Angeles's failure to provide badly needed mental health services to Darryl Hood was also unreasonable, discriminatory, and violative of the ADA. But for the LAPD's discriminatory policies, relative to the mentally and emotionally disabled, Darryl Hood would not have been fatally wounded by the

persons charged to provide the first line of treatment or protective detention.

The police did not have specific knowledge, prior to shooting Darryl Hood and to being privy to the information gathered pursuant to the battery of blood tests, mental and physiological health records and expert analytical reports, that Darryl Hood had in fact ingested PCP. Even had the officers been in possession of definitive information verifying the presence of PCP in Darryl Hood's system, prior to encountering him, the city of Los Angeles simply could not argue that it was acting on the basis of such use by shooting Mr. Hood. Shooting an individual who has ingested PCP is not, short of this individual engaging in criminal behavior beyond the fact of such ingestion, an act in which the city of Los Angeles is authorized. Each of the cases supporting the proposition of a covered entity acting on the basis of an individual's drug use involves the covered entity penalizing an individual for such illegal drug use. [206]

Acceptable forms of “punishment” include banishment from drug rehabilitative services, [207] but do not include death by gunfire. The use ***555** of deadly force is beyond the scope of mental health care services; in its capacity as mental health services provider, the city of Los Angeles cannot claim to have acted on the basis of Mr. Hood's use of PCP since at the time of the encounter it could not have known with any degree of certainty that PCP was in Mr. Hood's system and Mr. Hood's mental illness was distinct from the presence of PCP, rendering Mr. Hood “otherwise entitled” to mental health services.

Los Angeles Police Officers Miguel Perez, who ultimately fired several rounds at Darryl Hood, and Berzon Distor responded to an “attempt suicide” call in the Jordan Downs housing project on November 15, 1997, the result of a report of one person stabbing himself in the head. [208] Officer Brent Houlihan, who would also later fire at Mr. Hood, responded to the same attempted suicide call heard by Officer Perez. [209] Officer Perez's goal with respect to his initial interaction with Mr. Hood was suicide intervention. [210] According to Officer Perez, his first thoughts upon hearing a radio call were to assist an attempted suicide victim in an effort to save his life. [211] Officer Perez did not know whether Darryl Hood's self-destructive behavior was a manifestation of a mental illness, the result of the influence of drugs or alcohol, or some combination thereof. Officer Perez did not act on the basis of Mr. Hood's alleged current illegal drug use. [212] Like Officer Perez, Officer Houlihan could not have been acting on the basis of Mr. Hood's alleged current use of illegal drugs, since he did not know, on November 15, whether or not Mr. Hood had in fact been under the influence of any illegal drug. [213]

In the world of the delivery of health services to the mentally ill, reality suggests that illegal drug use and severe mental illness exist together in a somewhat symbiotic relationship. [214] The exceptions to the exceptions ***556** that are 42 U.S.C. § 12114(a) and 42 U.S.C. §§ 12210(a) and 12210(c) indicate that Congress recognized this to be the case and made allowance for the constituency to be served by public provision of mental health care. A prime example of this congressional consideration is stated in the Title II Technical Assistance Manual: “A municipal medical facility that specializes in care of burn patients may not refuse to treat an individual's burns on the grounds that the individual is illegally using drugs.” [215] Besides the fact that the defendants cannot argue they acted because of Mr. Hood's alleged illegal drug use, Mr. Hood falls under the ambit of 42 U.S.C. § 12210(c). Apart from any alleged drug use, Mr. Hood was “otherwise entitled” to receive mental health services.

When he arrived to the scene of the incident, Officer Perez was not acting in the capacity of a state drug rehabilitation facilitator, or on the basis of any alleged drug use by Darryl Hood, but rather in an effort to prevent Mr. Hood from committing suicide. In order to act on the basis of current illegal drug use, the covered entity must first have reason to believe that the individual was in fact engaging in illegal drug use, to the exclusion of all other possible rationales for said individual's behavior. The officers who responded to Jordan Downs housing project on November 15, 1997 had no way of discerning the precise cause or causes of Darryl Hood's aberrant behavior on that day, short of a blood-level analysis, psychiatric or psychological evaluation, which could only be conducted

significantly subsequent to the fact of their response.

The city of Los Angeles was not allowed to attribute, in an ex post facto manner, the information subsequently gained about Mr. Hood via blood tests and review of mental and physical health records, to the states of mind possessed by the involved police officers on November 15. It is clear in 42 U.S.C. § 12210 that, by excluding from Title II coverage those persons currently engaging in the use of illegal drugs, the section is limited to those situations wherein the covered entity has discernible knowledge of the individual's illegal drug use, as opposed to mere suspicion thereof, and specifically acts to enforce a particular policy relative to such illegal drug use. [216]

***557** When the covered entity is engaged in providing non-drug rehabilitative health services, including the identification of persons in need of mental health services, it may not withhold said services on the basis of illegal drug use when such use is extraneous to the service being provided by the covered entity. The issue, therefore, concerning whether or not Mr. Hood was a “current” drug user was irrelevant in the face of the fact that the majority of the population for whom the implicated service is intended also suffers from current drug use. There is no performance owed by the mentally ill constituencies which would be compromised by current drug use. As the Title II Technical Assistance Manual examples demonstrate, with respect to Title II, the ADA does not require its beneficiaries to be perfect; only in the context of drug rehabilitative services does the necessity to refrain from current illegal drug use become an issue, as absenteeism from current drug use may in fact be a necessary requirement in the in-patient setting. [217]

Finally, the Hood family would have been faced with a nearly impossible task: to demonstrate that the police officers' interventive actions resulting in multiple gunshots at an armed, non-responsive burglary suspect were motivated by the officers' illicit considerations of the decedent's race or that he was afflicted with mental illness. A scenario involving demonstration of such evidence strains the imagination.

VI. Conclusion

Title II is a well-suited legislative vehicle, crafted to level the playing field relative to the delivery of public services to the disabled. The Lane, Hayes, and Hood litigation models serve to illustrate a distinctly inclusive perspective of appropriate remediation, pursuant to section 5 of the Fourteenth Amendment to the United States Constitution. The implementation of this perspective is long overdue, though it formed an integral aspect of the judicial philosophies espoused by Justices John Marshall Harlan, William Brennan, and Thurgood Marshall. Eventually, the American social compact would benefit from the application of Title II to “non-traditionally disabled” groups, such as racial minorities. Once such a ***558** group qualifies as disabled, it would be eligible to receive affirmative accommodations relative to municipal and state programs and services.

Footnotes

d1 This is a reference to a popular metaphor that has been applied to affirmative action and other social change initiatives. See, e.g., Lundy R. Langston, Affirmative Action, A Look at South Africa and the United States: A Question of Pigmentation or Leveling the Playing Field?, 13 Am. U. Int'l L. Rev. 333, 348-49 (1997) (discussing President Lyndon Johnson's use of the “playing field” sports metaphor to demonstrate the need for affirmative action). “Racism raised high hurdles, making it impossible for otherwise ‘equal’ runners to compete. Thus, when (minorities) passed the baton to the next generation, they did so running with less speed, having covered a shorter distance, and having less stamina than they would have had in a non-racist society.” Gabriel J. Chin et al., Beyond Self-Interest: Asian Pacific Americans Toward a Community of Justice, a Policy Analysis of Affirmative Action, 4 Asian Pac. Am. L.J. 129, 131 (1996).

dd1 B.A. (1990), University of Pennsylvania; J.D. (1993), New York University

School of Law. The author served as an Associate Professor of Law at Southwestern University School of Law from July, 1999 through June of 2004. The author thanks Adrian Armstrong, Esq., Professor Peter Blanck, Professor James Kushner and Ms. Shannon Quinley for their valuable contributions to this Article. Finally, the author is especially grateful to God for the gift of his family and the inspiration they consistently provide.

1 Many disabled persons overcompensate for one physical limitation via reliance upon their sound faculties. The deaf have been known to possess acute sensitivity to visual and tactile stimuli. Sprague v. United Airlines, Inc. No. 97-12102-/GAO, 2002 WL 1803733 (Mass. Aug. 7, 2002). Title II can be creatively applied to compensate for the "disabilities" inherent in civil rights litigants' attempts to demonstrate invidious discrimination or conscious disregard for their rights. See Parts II, III and IV, infra.

2 42 U.S.C. §§ 12131-12165 (2003).

3 As demonstrated in Part II, infra, as long as a person qualifies as disabled, in accordance with Title II's statutory scheme, she is entitled to the receipt of affirmative accommodations, relative to the goods, programs and services offered by a public entity. Extending this benefit to persons who would traditionally be forced to pursue 42 U.S.C. § 1983 remedies affords such plaintiffs much greater prospects for success. Compare Noyes v. Moyer, 829 F. Supp. 9 (N.H. 1993) (rejecting a mentally disabled plaintiff's 42 U.S.C. § 1983 claim for violation of substantive, Fourteenth Amendment Due Process rights, where law enforcement officers refused to transport plaintiff to a mental hospital and, instead, were the cause of plaintiff's physical injuries), with Hood v. City of Los Angeles, No. CV 99-0099 (U.S. Dist. Court, Cent. Dist. Cal., Sept. 14, 1999) (on file with author) (allowing a claim by the family of a mentally disabled man who was shot and killed by police officers). In Noyes, the plaintiffs failed to meet § 1983's exacting state-of-mind requirements, to show that the reason for defendant officers' refusal to assist the plaintiff's admission to a mental hospital and the ultimate acts of physical violence against the plaintiff were motivated either by a conscious disregard for the plaintiff's constitutional rights or (even more difficult) a discriminatory animus against the plaintiff's class of persons, the mentally disabled seeking state-sponsored medical care. Noyes, 829 F. Supp. at 10. Alternatively, Hood, discussed infra, involved a mentally disabled man armed with knives and attempting suicide; the Hood family was able to present prima facie evidence that the defendant police officers failed to satisfy their affirmative obligation to assist Hood, irrespective of any demonstration of the officers' intentions. Hood, No. CV 99-0099.

4 As demonstrated more fully in subpart II(A), infra, due to the statute's structure, the probability of success under a 42 U.S.C. § 1983 claim is far less than that associated with an ADA, Title II cause of action.

5 Americans with Disabilities Act, 42 U.S.C. §§ 12131-12165 (2003).

6 Its beneficiaries are, ostensibly, disabled persons living and working in America. See U.S. Dep't of Justice, The Americans with Disabilities Act Title II Technical Assistance Manual (1993), available at http://www.usdoj.gov/crt/ada/taman2.html. (visited May 13, 2004) (hereinafter Title II Technical Assistance Manual). Political discourse precludes overt denigrations of this group and legislative bodies have been uniform in showering disability rights statutes with the approval of lip service. See Bill Walsh, Florida Seniors Bearing Brunt of Election Jokes, San Diego Union-Trib., Nov. 24, 2000, at D-2 (discussing isolation of elderly people, amongst classes of the disabled, who are targets of insensitive, public humor); Alexandria Berger, Cartoonist Turns His Disability into "Shocking" Work, The

Virginian-Pilot, Nov. 26, 2001, at E-3 (discussing disabled cartoonist John Callahan and his irreverent approach to depicting life as a quadriplegic).

7 Washington v. Davis, 426 U.S. 229, 239, 96 S. Ct. 2040, 2047, 48 L. Ed. 2d 597, 607 (1976) (stating that "our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially discriminatory impact").

8 42 U.S.C. §§ 12131-12165.

9 As President Lyndon Johnson stated, "(y)ou do not take a person who, for years, has been hobbled by chains and liberate him, bring him to the starting line of a race and then say, 'you are free to compete with all the others,' and still justly believe that you have been completely fair." Lyndon B. Johnson, Commencement Address at Howard University (June 4, 1965), in The Quotable Lyndon B. Johnson 44 (Sarah H. Hayes ed., 1968).

10 The author served as legal counsel, on behalf of the plaintiffs, with respect to these two, Ninth Circuit, Central District Court of California cases. The facts in the first case, Hayes v. City of Bellflower, No. CV 00-02799 (U.S. Dist. Court, Cent. Dist. Cal., Mar. 15, 2000) (on file with author), illuminated the use of Title II to prohibit selective enforcement of zoning ordinances. See Part IV, infra. The second case, Hood v. City of Los Angeles, No. CV 99-0099 (U.S. Dist. Court, Cent. Dist. Cal., Sept. 14, 1999) (on file with author), suggests that police officers must be trained to respond to the needs of mentally disabled persons, facilitating mentally and emotionally disabled persons' right to receive comprehensive public services, including psychiatric intake for those class members who display public signs of distress. See Part V, infra. The author co-counseled the Hood case with V. James De Simone and Michael Seplow, Esq., both of Schonbrun, De Simone, Seplow, Harris and Hoffman, LLC.

11 Lane v. Tennessee, 315 F.3d 680 (6th Cir.), cert. granted in part, Tennessee v. Lane, 539 U.S. 941 (2003). In Lane, the plaintiffs are seeking to vindicate their literal "right of access" to the court facilities in the state of Tennessee. The plaintiffs alleged that they had been denied the benefit of access to the courts, excluded from courthouses and court proceedings by an inability to access the physical facilities. Lane, 315 F.3d at 683.

12 In Hayes, a facially neutral ordinance, as well as a municipality's variance application scheme, was determined by a unanimous jury to be pretext for the decision maker's desire to keep an autistic child's play space "out of the public view." See Part IV, infra.

13 The plaintiffs in Lane sought access to courthouses as defendants and witnesses in order to exercise due process rights guaranteed by the Fourteenth Amendment. See Part III, infra.

14 Because the municipal representatives most frequently make the first public contact with mentally disabled and emotionally disturbed persons, the plaintiffs in Hood suggested that police officers had a responsibility to be trained in appropriate intervention and intake procedures. See Part V, infra.

15 315 F.3d 680 (6th Cir. 2003).

16 No. CV 00-02799 (U.S. Dist. Court, Cent. Dist. Cal., Mar. 15, 2000) (on file with author).

17 No. CV 99-0099 (U.S. Dist. Court, Cent. Dist. Cal., Sept. 14, 1999) (on file with author).

18 539 U.S. 941, 123 S. Ct. 2622, 156 L. Ed. 2d 626 (2003).

19 531 U.S. 356, 121 S. Ct. 955, 148 L. Ed. 2d 866 (2001) (holding that Title II is not an example of constitutionally sound remedial legislation, pursuant to section 5 of the Fourteenth Amendment).

20 See Part V, infra.

21 Quern v. Jordan, 440 U.S. 332, 341, 99 S. Ct. 1139, 1145, 59 L. Ed. 2d 358, 367 (1979).

22 Clark v. Cal., 123 F.3d 1267, 1269-70 (9th Cir. 1997), cert. denied sub nom. Wilson v. Armstrong, 524 U.S. 937 (1998).

23 Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691, 98 S. Ct. 2018, 2036, 56 L. Ed. 2d 611, 636 (1978).

24 Ky. v. Graham, 473 U.S. 159, 166, 105 S. Ct. 3099, 3105, 87 L. Ed. 2d 114, 122 (1985), remanded sub. nom. Graham v. Wilson, 791 F.2d 932 (6th Cir. 1986).

25 City of Canton v. Harris, 489 U.S. 378, 389, 109 S. Ct. 1197, 1205, 103 L. Ed. 2d 412, 427 (1989).

26 Pembaur v. City of Cincinnati, 475 U.S. 469, 483, 106 S. Ct. 1292, 1300, 89 L. Ed. 2d 452, 465 (1986).

27 States are immune from liability under 42 U.S.C. § 1983 (2000). Under the Ex Parte Young doctrine, plaintiffs can bring suit against certain agents of the state. 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908); see also Agua Caliente Band of Cahuilla Indians v. Hardin, 223 F.3d 1041, 1045 (9th Cir. 2000) (stating that the Eleventh Amendment does not bar "suits for prospective injunctive relief against state officers, sued in their official capacities, to enjoin an alleged ongoing violation of federal law"), cert. denied, 532 U.S. 958 (2001).

28 Parratt v. Taylor, 451 U.S. 527, 535, 101 S. Ct. 1908, 1913, 68 L. Ed. 2d 420, 428 (1981), overruled on other grounds by Daniels v. Williams, 474 U.S. 327, 330-31 (1986); see Pitchell v. Callan, 13 F.3d 545, 546-47 (2d Cir. 1994); Gregory v. City of Rogers, 974 F.2d 1006, 1009 (8th Cir. 1992), cert. denied, 507 U.S. 913 (1993); Harvey v. Harvey, 949 F.2d 1127, 1130 (11th Cir. 1992); Crumpton v. Gates, 947 F.2d 1418, 1420 (9th Cir. 1991); Quezada v. County of Bernalillo, 944 F.2d 710, 714 (10th Cir. 1991); Christian v. Belcher, 888 F.2d 410, 414 (6th Cir. 1989); Wong v. Stripling, 881 F.2d 200, 202 (5th Cir. 1989), later proceeding sub. nom. Wong v. Garden Park Cmty. Hosp., Inc., 565 So. 2d 550 (Miss.), reh'g denied, No. 07-CA-58994, 1990 Miss. Lexis 508 (Miss. Aug. 8, 1990), summary judgment granted sub nom. Wong v. Stripling, 700 So. 2d 296 (Miss. 1997).

29 Lugar v. Edmunson Oil Co., 457 U.S. 922, 924, 102 S. Ct. 2744, 2747, 73 L. Ed. 2d 482, 487 (1982).

30 Albright v. Oliver, 510 U.S. 266, 271, 114 S. Ct. 807, 811, 127 L. Ed. 2d 114, 122 (1994) (quoting Baker v. McCollan, 443 U.S. 137, 144 n.3, 99 S. Ct. 2689, 2695 n.3, 61 L. Ed. 2d 433, 442 n.3, remanded sub. nom. McCollan v. Tate, 601 F.2d 903 (5th Cir. 1979)); see McGregor v. La. State Univ. Bd. of Supervisors, 3 F.3d 850, 867 (5th Cir. 1993), cert. denied, 510 U.S. 1131 (1994); Crumpton v. Gates, 947 F.2d 1418, 1420 (9th Cir. 1991); Estate of Himelstein v. City of Fort Wayne, 898 F.2d 573, 575 (7th Cir. 1990).

31 Lewellen v. Metro. Gov't, 34 F.3d 345, 347 (6th Cir. 1994), cert. denied, 115 S. Ct. 903 (1995).

32 See Part III, infra.

33 See Part III, infra. Any demonstration of negligence, relative to the defendants' state of mind, would fall short of establishing a prima facie case. Daniels v. Williams, 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986).

34 42 U.S.C. § 12131(1) (2003).

35 Id. § 12132.

36 Id. § 12131(2).

37 According to the remaining portions of Title II, states and other public entities are also precluded from the engagement of discrimination in public transportation, affirmatively requiring public entities to provide access to the disabled in most such facilities. See 42 U.S.C. §§ 12131-12165.

38 See 42 U.S.C. § 12134; 28 C.F.R. §§ 35.101-.190 (2002).

39 28 C.F.R. § 35.130(d).

40 Id.

41 Id. §§ 35.130(b)(3)(i)-(ii) & 35.130(b)(4)(i).

42 Id. § 35.130(b)(8).

43 Id. § 35.130(b)(7).

44 42 U.S.C. § 12133.

45 For example, a stringent standard of accessibility applies to facilities on which construction began after January 26, 1992. “Each such facility must be ‘readily accessible to and usable by individuals with disabilities,’ and generally must satisfy a detailed set of accessibility guidelines.” Brief for the Private Respondents at 1-2, Tennessee v. Lane, No. 02-1667, 2003 WL 22733904 (Nov. 12, 2003) (quoting 28 C.F.R. § 35.151(a)(1)) (citing 28 C.F.R. § 35.151(c)) (citations omitted). This provision is based in part “on the premise that accessibility features are exceptionally inexpensive when incorporated in a facility's initial design.” Id. at 2.

For facilities built before 1992, Congress was slightly more lenient: “The existing-facility provisions require only that a state ‘operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities.’” Id. (quoting 28 C.F.R. § 35.150(a)). Accommodations contemplated by this legislative scheme, include “redesign of equipment, reassignment of services to accessible buildings, (providing) aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities.” 28 C.F.R. § 35.150(b)(1); see Brief for the Private Respondents at 2, Lane, 2003 WL 22733904.

46 42 U.S.C. § 12205.

47 See Parts III-V, infra. Title II plaintiffs can be more aggressive than their 42 U.S.C. § 1983 counterparts because they do not have to “read the minds” of defending public entity representatives. As long as the plaintiffs are able to demonstrate their factual disability and non-accommodation, they will be able to make out a prima facie case.

48 531 U.S. 356, 121 S. Ct. 955, 148 L. Ed. 2d 866 (2001) (holding Title I of the ADA, which governs employment discrimination against the disabled, to

be an incongruent congressional attempt to abrogate states' Eleventh Amendment immunity under section 5 of the Fourteenth Amendment).

49 473 U.S. 432, 435, 10 S. Ct. 3249, 87 L. Ed. 2d 313, 315 (1985).

50 Garrett, 531 U.S. at 366.

51 Id.

52 Id. at 360.

53 Popovich v. Cuyahoga County Court, 276 F.3d 808, 814(6th Cir.), cert. denied, 537 U.S. 812 (2002) (citing Lassiter v. Dep't Soc. Servs., 452 U.S. 18, 27, 101 S. Ct. 2153, 2161, 68 L. Ed. 2d 640, 648 (1981)).

54 City of Boerne v. Flores, 521 U.S. 507, 520, 117 S. Ct. 2157, 2164, 138 L. Ed. 2d 624, 631 (1997).

55 Garrett, 531 U.S. at 374.

56 See Franklin L. Ferguson, Jr., Preserving Prometheus' Precious Gift: Title II of the Americans with Disabilities Act Imposes Affirmative, Anti-Discrimination Obligations Upon Municipalities, Providing a Seemingly Unwelcome Model for the Enforcement of Traditional Civil Rights Legislation, 18 Nat'l Black L.J. Part IV (forthcoming Apr. 2004) (discussing the constitutionality of Title II in the wake of cases interpreting congressional remedial legislative power under section 5 of the Fourteenth Amendment, from City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985) to Garrett, 531 U.S. 356).

57 Id.

58 See Civil Rights Cases, 109 U.S. 3, 3 S. Ct. 18, 27 L. Ed. 835 (1883) (Harlan, J., dissenting); Plessy v. Ferguson, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896) (Harlan, J., dissenting); United States v. Guest, 383 U.S. 745, 86 S. Ct. 1170, 16 L. Ed. 2d 239 (1966) (Brennan, J., dissenting); City of Cleburne, 473 U.S. at 432 (Marshall, J., dissenting). For a discussion of Justice Thurgood Marshall's Fourteenth Amendment prescience, see Ferguson, supra note 56.

59 109 U.S. 3, 3 S. Ct. 18, 27 L. Ed. 835 (1883).

60 Civil Rights Cases, 109 U.S. at 16.

61 See generally id. at 3; Plessy, 163 U.S. at 537; Screws v. United States, 325 U.S. 91, 65 S. Ct. 1031, 89 L. Ed. 1495 (1945); Guest, 383 U.S. at 745; Washington v. Davis, 426 U.S. 229, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976); City of Cleburne, 473 U.S. at 432; Seminole Tribe of Fla. v. Fla., 517 U.S. 44, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996); Flores, 521 U.S. at 507; Garrett, 531 U.S. at 356.

62 Civil Rights Cases, 109 U.S. at 61-62 (Harlan, J., dissenting).

63 426 U.S. 229, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976).

64 Washington, 426 U.S. at 242.

65 Id. at 243.

66 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896).

67 See Plessy, 163 U.S. at 546-47.

68 Though he was a slaveholder himself, Justice John Marshall Harlan was an avid defender of Black rights. Harlan believed the Civil War Amendments,

including the Fourteenth Amendment, were crafted to include Black citizens as part of the American social compact.

His belief in equality did not mean he thought the races were equal. To the contrary, Harlan clearly believed in the superiority of the white race: more specifically, the white race guided by protestant virtue. This image held that, although whites may have possessed the political power to hold blacks down, they reduced their own dignity and thus their own superiority by doing so.

Linda Przybyszewski, The Republic According to John Marshall Harlan 98 (1999).

69 Plessy, 163 U.S. at 554 (Harlan, J., dissenting).

70 Id. at 556 (Harlan, J., dissenting).

71 Id. at 555 (Harlan, J., dissenting).

72 Id. at 557 (Harlan, J., dissenting).

73 Id. at 560 (Harlan, J., dissenting).

The present decision, it may well be apprehended, will not only stimulate aggressions, more or less brutal and irritating, upon the admitted rights of colored citizens, but will encourage the belief that it is possible, by means of state enactments, to defeat the beneficent purposes which the people of the United States had in view when they adopted the recent amendments of the Constitution by one of which the blacks of this country were made citizens of the United States and of the States in which they respectively reside, and whose privileges and immunities, as citizens, the States are forbidden to abridge.

Id. (Harlan, J., dissenting).

74 Id. at 559 (Harlan, J., dissenting).

75 383 U.S. 745, 782-83, 86 S. Ct. 1170, 1192-93, 16 L. Ed. 2d 239 (1966).

76 Guest, 383 U.S. at 777-78 (Brennan, J., dissenting).

77 Id. at 779 (Brennan, J., dissenting).

78 Id. at 784 (Brennan, J., dissenting) (footnotes omitted).

79 473 U.S. 432, 469, 105 S. Ct. 3249, 3279, 87 L. Ed. 2d 313, 330 (1985) (Marshall, J., dissenting).

80 City of Cleburne, 473 U.S. at 469 (Marshall, J., dissenting) (quoting City of Cleburne, 473 U.S. at 446) (footnotes omitted).

81 See Ferguson, supra note 56, at n.27 (citing Castellano v. City of New York, 142 F.3d 58 (2d Cir. 1998) (applying Title II to an employment benefits discrimination claim); Holmes v. Tex. A & M Univ., 145 F.3d 681 (5th Cir. 1998) (applying Title II to a claim of employment discrimination); Doe v. Univ. of Md. Med. Sys. Corp., 50 F.3d 1261 (4th Cir. 1995)). If Garrett's holding is applied to Title II of the ADA, that provision would meet the same fate as Title I of the ADA, invalidation with respect to claims against states.

82 Such a judicial course would be a mistaken one. See, e.g., Ferguson, supra note 56, at n.19 (arguing that the legislative histories supporting Titles I and II of the ADA are sufficiently diverse to justify independent, distinctive Equal Protection analyses).

83 276 F.3d 808, 814 (6th Cir.), cert. denied, 537 U.S. 812 (2002).

84 315 F.3d 680 (6th Cir. 2003).

85 Brief for the Private Respondents at 7, Tennessee v. Lane, No. 02-1667, 2003 WL 22733904 (Nov. 12, 2003) (citing Romer v. Evans, 517 U.S. 620, 633, 116 S. Ct. 1620, 1628, 134 L. Ed. 2d 855, 866 (1996)).

86 Id. at 7-8.

87 Id. at 38 (quoting United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 478, 115 S. Ct. 1003, 1018-19, 130 L. Ed. 2d 964, 986-87 (1995)).

88 Id.

89 Id. at 10.

90 Id. at 15 (citing Reynolds v. Sims, 377 U.S. 533, 597, 84 S. Ct. 1362, 1400, 12 L. Ed. 2d 506, 547-48 (1964) (Harlan, J., dissenting)).

91 Id. at 43 (citing Reynolds, 377 U.S. at 561-62; Doe v. Rowe, 156 F. Supp. 2d 35, 51-56 (D. Md. 2001)); see also 42 U.S.C. § 12101(a)(3) (2003).

92 Brief for the Private Respondents at 1-2, Lane, 2003 WL 22733904 (quoting Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 571, 100 S. Ct. 2814, 2824, 65 L. Ed. 2d 973, 986 (1980)).

93 Lane v. Tennessee, 315 F.3d 680, 682 (2003).

94 Brief for the Private Respondents at 45, Lane, 2003 WL 22733904 (quoting Romer, 517 U.S. at 633); see also U.S. Comm'n on Civil Rights, Accommodating the Spectrum of Individual Abilities 39 (1983).

95 Brief for the Private Respondents at 45, Lane, 2003 WL 22733904 (citing Americans with Disabilities Act of 1989: Hearings Before Senate Comm. on Labor & Subcomm. on the Handicapped, 101st Cong. 488 (1989) (quoting Illinois Attorney General Neil Hartigan).

96 Id. at 46 (citing Troxel v. Granville, 530 U.S. 57, 66, 121 S. Ct. 2054, 2060, 147 L. Ed. 2d 49, 57 (2000)).

97 Id. at 47-48 (stating that “persons who have epilepsy, and a variety of other disabilities, are frequently inappropriately arrested and jailed and often ‘deprived of medications while in jail”’).

98 See Popovich v. Cuyahoga County Court, 276 F.3d 808, 815 (6th Cir.), cert. denied, 537 U.S. 812 (2002).

99 Id. at 815.

100 276 F.3d 808 (6th Cir.), cert. denied, 537 U.S. 812 (2002).

101 Popovich, 276 F.3d at 815; see also Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981) (involving provision of counsel for an indigent parent).

102 Popovich, 276 F.3d at 815.

103 Id.

104 Id. at 815-16.

105 Brief for the Private Respondents at 8, Lane, 2003 WL 22733904 (quoting 28 C.F.R. § 35.150(a) (2002)).

106 315 F.3d at 680.

107 Brief for the Private Respondents at 4, Lane, 2003 WL 22733904 (quoting Comm'n on the Future of the Tennessee Judicial System, Final Report 31 (1996)).

108 Id. at 21 (citing U.S. Comm'n on Civil Rights, Accommodating the Spectrum of Individual Abilities 39 (1983)).

109 Id. at 4.

110 Id.

111 Id.

112 Id. at 4-5.

113 Id. at 5.

114 Id. at 5-6.

115 Id. at 6.

116 Id.

117 Brief for the Private Respondents at 7-8, Lane, 2003 WL 22733904.

118 Id. at 16 (quoting Faretta v. Cal., 422 U.S. 806, 819 n.15, 95 S. Ct. 2525, 2535 n.15, 45 L. Ed. 2d 562, 572 n.15 (1975)).

119 Id. (quoting Boddie v. Connecticut, 401 U.S. 371, 379, 91 S. Ct. 780, 786-87, 28 L. Ed. 2d 113, 119-20 (1971)); see also Popovich v. Cuyahoga County Court, 276 F.3d 808, 813-14 (6th Cir.), cert. denied, 537 U.S. 812 (2002).

120 Brief for the Private Respondents at 16, Lane, 2003 WL 22733904 (quoting M.L.B. v. S.L.J., 519 U.S. 102, 122, 117 S. Ct. 555, 567, 136 L. Ed. 2d 473, 491 (1996)).

121 531 U.S. 356, 121 S. Ct. 955, 148 L. Ed. 2d 866 (2001).

122 Id. at 15 n.5.

123 Id. (citing Bush v. Gore, 531 U.S. 98, 105-06, 121 S. Ct. 525, 530, 148 L. Ed. 2d 388, 398-99 (2000)).

124 Id. at 6-7.

125 Id. at 7.

126 276 F.3d 808 (6th Cir.), cert. denied, 537 U.S. 812 (2002).

127 Brief for the Private Respondents at 7, Lane, 2003 WL 22733904 (citing Popovich, 276 F.3d 808).

128 No. CV 00-02799 (U.S. Dist. Court, Cent. Dist. Cal., Mar. 15, 2000) (on file with author).

129 Plaintiffs' Trial Brief, Hayes v. City of Bellflower, No. CV 00-02799 (on file with author); see also 42 U.S.C. § 12131(2) (2003). Section 12131(2) states:

> The term “qualified individual with a disability” means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in

programs or activities provided by a public entity.

Id. The Title II Technical Assistance Manual states:

The first category of persons covered by the definition of an individual with a disability is restricted to those with “physical or mental impairments.” Physical impairments include - . . . (p)hysiological disorders or conditions . . . affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs. . . .

Specific examples of physical impairments include . . . speech, and hearing impairments. . . .

Mental impairments include mental or psychological disorders, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

Title II Technical Assistance Manual, supra note 6, § II-2.2000.

130 See 42 U.S.C. § 12132 (2003).

131 Lincoln County v. Luning, 133 U.S. 529, 530, 10 S. Ct. 363, 364, 33 L. Ed. 766, 767 (1890). Neither Hayes nor Hood v. Los Angeles, see Part V, infra, involve state defendants, implicating local municipalities instead. Issues including the appropriate level of scrutiny, pursuant to equal protection analysis, the affirmative obligations imposed upon governmental entities and the stark discrepancies between interpretation of the ADA relative to traditional civil rights statutes, however, were well-illuminated by these cases. See also subpart II(B), supra.

132 Bd. of Trustees of the Univ. of Ala. v. Garrett, 531 U.S. 356, 369, 121 S. Ct. 955, 965, 148 L. Ed. 2d 866, 879 (2001).

133 Plaintiff's Trial Brief, Hayes, No. CV 00-02799 (on file with author).

134 Id.

135 Id.

136 Id.

137 Id.

138 Id.

139 Id.

140 Id.

141 Id.

142 Id.

143 Id.

144 Id.

145 Id.

146 Id.

147 Kuzinich v. County of Santa Clara, 689 F.2d 1345 (9th Cir. 1982).

148 Barber v. Municipality of Anchorage, 776 P.2d 1035, 1040 (Alaska), cert. denied, 493 U.S. 922 (1989); see also Romer v. Evans, 517 U.S. 620, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996).

149 Snowden v. Hughes, 321 U.S. 1, 8, 64 S. Ct. 397, 401, 88 L. Ed. 497, 503 (1944).

150 This was a crucial aspect of the case. Through Title II, Congress has decided that non-accommodation, in the absence of a demonstration that such accommodation would significantly alter a governmental entity's delivery of services, constitutes irrational behavior, even under a rational basis scrutiny. It does not matter that decisions are made without “invidious” intent; they are still defined by Congress as discriminatory, in the context of Title II. See also subpart II(B), supra.

151 According to Dare v. California, it is questionable whether the Hayes family should have been required to apply for a variance at all, let alone be required to pay for the process. 191 F.3d 1167, 1175 n.6 (9th Cir. 1999). The accommodation they sought was reasonable, would have cost the municipality little, and would have resulted in no alteration of the municipality's program.

152 Declaration in Support of Plaintiff's Post-Trial Brief at 1, Hayes v. City of Bellflower, No. CV 00-02799 (on file with author). There was testimony at the hearing disavowing the existence of any anti-autism animus. One declarant said he “had an autistic child” of his own, attempting to emphasize the “neutrality” of the decision not to accommodate the Hayes family. Id.

153 Id. During pre-trial negotiations in Hayes, it became evident that the unstated objective was to eliminate the possibility of Jack Hartman playing in the front yard, in an area exposed to the public street and sidewalk. Alternatives proposed by the city consistently suggested the erection of “opaque,” more aesthetically pleasing barriers, the removal of Jack's playing space to “more recessive” (out of sight) portions of the property, or the relocation of the home entirely.

154 Id.

155 Plaintiff's Trial Brief at 1, Hayes, No. CV 00-02799 (on file with author).

156 See, e.g., Bay Area Addiction Research & Treatment, Inc. v. City of Antioch, 179 F.3d 725 (9th Cir. 1999) (city zoning ordinance); Crowder v. Kitagawa, 81 F.3d 1480 (9th Cir. 1996) (state dog quarantine policy); Heather K. v. City of Mallard, 946 F. Supp. 1373 (N.D. Iowa 1996) (city ordinance regulating trash burning).

157 S.E. Community College v. Davis, 442 U.S. 397, 412-13, 99 S. Ct. 2361, 2370, 60 L. Ed. 2d 980, 992 (1979).

158 Zimmerman v. Oregon Dep't of Justice, 170 F.3d 1169, 1175 (9th Cir. 1999) (citing 42 U.S.C. § 12132 (2003)).

159 42 U.S.C. § 12131(2).

160 Weinreich v. Los Angeles County Metro. Transp. Auth., 114 F.3d 976, 978 (9th Cir. 1997) (citing 42 U.S.C. § 12132) (emphasis removed).

161 Such “neutrality” would sound the death knell for claims pursuant to 42 U.S.C. § 1983 (2003).

162 Dare v. Cal. Dep't of Motor Vehicles, 191 F.3d 1167 (9th Cir. 1999) (mandating covered entities reasonable accommodation of the identified needs of qualified persons with disabilities).

163 See Olmstead v. L.C., 527 U.S. 581, 119 S. Ct. 2176, 144 L. Ed. 2d 540 (1999).

164 Plaintiff's Trial Brief at 1, Hayes, No. CV 00-02799 (on file with author).

165 No. CV 00-02799.

166 No. CV 99-0099 (U.S. Dist. Court, Cent. Dist. Cal., Sept. 14, 1999) (on file with author).

167 Plaintiffs' Complaint for Damages, ¶ 12, Hood, No. CV 99-0099 (on file with author).

168 Id. ¶ 3.

169 Declaration of Dr. C. Boyd James, Hood, No. CV 99-0099 (on file with author).

170 Plaintiffs' Complaint for Damages, ¶ 12, Hood, No. CV 99-0099 (on file with author).

171 Id.

172 Id.

173 Id.

174 Id.

175 Id.

176 Id.

177 Title II Technical Assistance Manual, supra note 6, § II-3.8000.

178 Plaintiffs' Complaint for Damages, Hood, No. CV 99-0099 (on file with author).

179 Id.

180 Id.

181 Title II Technical Assistance Manual, supra note 6, § II-3.8000, illus. 1.

182 Deposition of Ginger Hood, at 80:11-13; 81:1-3; 23:25, Hood, No. CV 99-0099 (on file with author) (hereinafter GH Depo.).

183 Id. at 82:21-83:10.

184 Id. at 84:4-85:18.

185 Id. at 86:10-16, 86:21-87:15.

186 Id. at 87:23-88:6.

187 Id. at 89:5-17.

188 Id. at 89:18-91:12.

189 Id. at 97:8-98:1.

190 Id. at 109:1-110:20.

191 Declaration of Dr. C. Boyd James, Hood, No. CV 99-0099 (on file with author).

192 Id.

193 GH Depo., supra note 182, at 106:10-20.

194 Id. at 93:24-94:2.

195 Id. at 112:4-19; 113:2-3, 113:19-20.

196 Id. at 120:23-121:25.

197 Id. at 123:8-126:12.

198 Id. at 127:20-23.

199 Declaration of Dr. C. Boyd James, Hood, No. CV 99-0099 (on file with author).

200 Id.

201 Id.

202 Id.

203 Collings v. Longview Fibre Co., 63 F.3d 828, 832 n.3 (9th Cir. 1995), cert. denied, 516 U.S. 1048 (1996).

204 See Alexander v. Choate, 469 U.S. 287, 301, 105 S. Ct. 712, 720, 83 L. Ed. 2d 661, 669 (1985).

205 Id.

206 See, e.g., Salley v. Circuit City Stores, 160 F.3d 977 (3d Cir. 1998).

207 Id.

208 Deposition of Officer Miguel Perez, at 26:14-27:5, Hood, No. CV 99-0099 (on file with author) (hereinafter Perez Depo.).

209 Deposition of Brent Houlihan, at 13:2-11, 13:20-23, Hood, No. CV 99-0099 (on file with author) (hereinafter Houlihan Depo.).

210 Perez Depo., supra note 208, at 42:13-17; 45:24-46:5.

211 Id. at 34:13-20.

212 Id. at 27:20-29:15.

213 Houlihan Depo., supra note 209, at 115:14-19.

214 Declaration of Dr. David V. Foster, M.D., Hood, No. CV 99-0099 (on file with author).

215 Title II Technical Assistance Manual, supra note 6, § II-3.8000, illus. 2.

216 See 42 U.S.C. § 12210(a) (“For purposes of this Chapter, the term ‘individual with a disability’ does not include an individual who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.”).

217 Title II Technical Assistance Manual, supra note 6, § II-3.8000, illus. 2.

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