

## THE POWER OF INSULTS

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*Insults work on both a structural and personal level. This Article argues that the power elite has effectively hurled insults at civil rights activists, plaintiffs and their lawyers to undermine civil rights reform. It has long been understood that the civil rights community must engage in cultural, political and legal work to attain effective reforms. But insufficient attention has been paid to how the power elite uses the cultural tool of insults to undermine these reforms*

*Limitations on effective civil rights reform range from constraints on the private attorney general model to restrictions on the work of the Legal Services Corporation to pullbacks in voting rights. Insults have played an important and previously unrecognized role in the creation of these limitations. After discussing the undertheorized phenomenon of the power of public insults, this Article presents a case study of defense pleadings filed in accessibility cases brought under the Americans with Disabilities Act. These pleadings reflect how defendants can use insults as part of their litigation strategy to make it difficult for plaintiffs to attain effective relief under a statute designed to create genuine structural reform.*

*Rather than worrying about whether civil rights activists should go high when the power elite goes low, this Article argues that it is crucial that civil rights statutes are constructed with a stronger foundation. Then, plaintiffs will be able withstand a barrage of insults when they seek effective relief. Straw houses are too easy to blow down.*

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INTRODUCTION .....	3
I. THE TOOLS OF STRUCTURAL REFORM.....	10
A. <i>Community Organizers</i> .....	11
B. <i>Sociologists</i> .....	13
C. <i>Contemporary Constitutional Theorists</i> .....	19
D. <i>Application to Statutory Reform</i> .....	22
II. IMPEDIMENTS TO STRUCTURAL REFORM.....	26
A. <i>A Lengthy List</i> .....	26
B. <i>Connection to Public Insults</i> .....	27
1. Private Attorney Generals as the Bounty Hunter.....	28
2. The Legal Services Corporation as a Left-Wing Political Agenda .....	32
3. The Voting Rights Act In Support of Every “Illiterate” .....	33
III. ADA CASE STUDY.....	35
A. <i>A Fragile Compromise</i> .....	35
B. <i>Litigation by Insult Prevails</i> .....	41
1. Race to Correct .....	41
2. Specific Pleading Requirements .....	43
3. Standing Arguments .....	45
C. <i>Litigation by Insult Slapped Down</i> .....	48
IV. HOW CAN CIVIL RIGHTS ADVOCATES FIGHT BACK?.....	56

## INTRODUCTION

Predictions that President Donald Trump's mockery of Christine Blasey Ford at a campaign rally<sup>1</sup> would hurt Brett Kavanaugh's chances of being confirmed to the Supreme Court underestimated the power of public insults.<sup>2</sup> Trump's mocking of Dr. Ford before a partisan political crowd was met "with laughter and applause from the crowd"<sup>3</sup> and likely helped solidify support for Kavanaugh's nomination. This Article argues that public insults can be an effective mechanism to undermine civil rights reform; thus, these mocking comments should be understood as part of a political campaign to support a conservative Supreme Court nominee and

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<sup>1</sup> Trump provided the following description of Blasey Ford's testimony at a campaign rally:

Trump, in a riff that has been dreaded by White House and Senate aides, attacked the story of Christine Blasey Ford at length – drawing laughs from the crowd. The remarks were his strongest attacks yet of her testimony. "I don't know. I don't know. Upstairs? Downstairs? Where was it? I don't know. But I had one beer. That's the only thing I remember," Trump said of Ford, as her impersonated her on stage. "I don't remember," he said repeatedly, apparently mocking her testimony.

Josh Dawsey & Felicia Sonmez, *Trump mocks Kavanaugh accuser Christine Blasey Ford*, WASH. POST, Oct. 2, 2018, [https://www.washingtonpost.com/politics/trump-mocks-kavanaugh-accuser-christine-blasey-ford/2018/10/02/25f6f8aa-c662-11e8-9b1c-a90f1daae309\\_story.html?utm\\_term=.b3111447e005](https://www.washingtonpost.com/politics/trump-mocks-kavanaugh-accuser-christine-blasey-ford/2018/10/02/25f6f8aa-c662-11e8-9b1c-a90f1daae309_story.html?utm_term=.b3111447e005).

<sup>2</sup> See Alana Abramson, *All Three Senators Who Could Decide Kavanaugh's Fate Condemn Trump's Comments on Christine Blasey Ford*, TIME, Oct. 3, 2018, <http://time.com/5413785/donald-trump-christine-blasey-ford-mocking-susan-collins/> (reporting that Republican Senators suggested that "Trump's rhetoric would not help their cause"); James Hohmann, *The Daily 202: Trump's mockery of Christine Blasey Ford underscores scorn for the #MeToo movement*, WASH. POST, Oct. 3, 2018 ("It's hard to see how such comments make it easier for the moderate Republican senators Susan Collins and Lisa Murkowski to explain coming out in support of Kavanaugh, but Trump is undeniably channeling widespread anger that many men feel on the right."). *But see* Judith Donath, *The Secret to Brett Kavanaugh's Specific Appeal*, ATLANTIC, Sept. 29, 2018 ("The nominee's transgressions, far from marking him as unfit, signal to supporters that he is untrustworthy – he is one of them.")

<sup>3</sup> Allie Malloy, Kate Sullivan & Jeff Zeleny, *Trump mocks Christine Blasey Ford's testimony, tells people to 'think of your son'*, CNN POLITICS, Oct. 3, 2018, <https://www.cnn.com/2018/10/02/politics/trump-mocks-christine-blasey-ford-kavanaugh-supreme-court/index.html>. Similarly, Anita Hill was characterized as "a little bit nutty and a little bit slutty." See Tina Nguyen, *Anita Hill was Forced to Put Up with these Incredibly Sexist Comments*, VANITY FAIR, April 7, 2016, <https://www.vanityfair.com/news/2016/04/anita-hill-sexism>.

thereby undermine various civil rights advances that are within a single vote of being eliminated by the United States Supreme Court.<sup>4</sup> The power of public insults goes well beyond humiliating a private individual such as Dr. Ford.

Public insults can work. They can be effective<sup>5</sup> in the hands of the “power elite.”<sup>6</sup> They can help create the impression of white, heterosexual, nondisabled men as victim.<sup>7</sup> They can help instill a “miasma of fear”<sup>8</sup> to terrify people from trying to vote. They may even lead to violence.<sup>9</sup> And,

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<sup>4</sup> See *ACLU Releases Report on Judge Brett Kavanaugh’s Civil Liberties and Civil Rights Record* (Aug. 15, 2018), <https://www.aclu.org/news/aclu-releases-report-judge-brett-kavannahs-civil-liberties-and-civil-rights-record> See also *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (5-4 decision overturning Texas abortion statute); *Fisher v. University of Texas*, 570 U.S. 297 (2013) (5-4 decision upholding Texas affirmative action rule in admissions); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (5-4 decision overturning state ban on same-sex marriage). Relatedly, Trump’s sexist, demeaning comments to women serve to impede structural reforms on behalf of women, most notably helping to impede the election of the first female President who had a strong feminist platform. Thus, after a debate against Hillary Clinton, the media turned to Trump’s comments about the meaning of his insult of Megyn Kelly concerning her “blood coming out of her wherever” instead of Clinton’s pro-feminist platform. See Holly Yan, *Donald Trump’s ‘blood’ comment about Megyn Kelly draws outrage*, CNN POLITICS, Aug. 8, 2015, <https://www.cnn.com/2015/08/08/politics/donald-trump-cnn-megyn-kelly-comment/index.html>.

<sup>5</sup> For discussion of why insults are effective, see Nigel Barber, Ph.D., *The Psychology of Insults*, PSYCHOLOGY TODAY, Nov. 21, 2016, <https://www.psychologytoday.com/us/blog/the-human-beast/201611/the-psychology-insults>. (the “pecking-order logic of causes the insulter to rise in status relative to the victim.”); Jeff Traiger & Daniel B. Weddle, *Cruel Curriculum: Peer-on-Peer Abuse in Law Schools*, 22 TEMP. POL. & CIV. RTS. L. REV. 301, 309 (2013) (Bullies tend to be confident and popular and often use their “wit to attack peers with cruel humor that intimidates not only the victim but those witnesses that might have come to the victim’s aid but for the fear of retaliation.”); Richard A. Friedman, *The Neuroscience of Hate Speech*, N.Y. TIMES, Oct. 31, 2018, <https://www.nytimes.com/2018/10/31/opinion/caravan-hate-speech-bowers-sayoc.html> (when “President Trump dehumanizes his adversaries, he could be putting them beyond the reach of empathy, stripping them of moral protection and making it easier to harm them.”).

<sup>6</sup> The term “power elite” was coined by C. Wright Mills. See C. Wright Mills, *THE POWER ELITE* (1956) (drawing attention to the interconnected organization of power in the United States through the corporate, military and political elite as well as celebrities). Writing in 1956, he argues that there is a “higher immorality” that “is a systematic feature of the American elite; its general acceptance is an essential feature of the mass society.” *Id.* at 343.

<sup>7</sup> See Jeremy Diamond, *Trump says it’s ‘a very scary time for young men in America,’* CNN POLITICS, Oct. 2, 2018, <https://www.cnn.com/2018/10/02/politics/trump-scary-time-for-young-men-metoo/index.html>.

<sup>8</sup> See Eli Watkins, *Stacey Abrams: Voter Suppression ‘about terrifying people’ from voting*, CNN, Oct. 14, 2018, <https://www.cnn.com/2018/10/14/politics/stacey-abrams-brian-kemp-georgia-cnntv/index.html>.

<sup>9</sup> See German Lopez, *The pipe bomb suspect made vitriolic, threatening posts against Democrats on social media*, VOX, Oct. 26, 2018, <https://www.vox.com/policy-and>

as argued in this Article, they can undermine structural civil rights reform<sup>10</sup> on behalf of women, the GLBTQ community, people with disabilities, racial minorities and other disadvantaged groups in our society, especially when those groups' advances already hang by a fragile thread. By contrast, when disadvantaged groups hurl insults, they are likely to be ineffective,<sup>11</sup> because disadvantaged groups typically lack the hierarchical structures to facilitate the effectiveness of insults over the power elite.<sup>12</sup>

Rather than understand public insults as merely unprofessional,

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[politics/2018/10/26/18028880/cesar-sayoc-pipe-bomber-twitter-facebook-social-media/](https://www.theintercept.com/2018/10/26/18028880/cesar-sayoc-pipe-bomber-twitter-facebook-social-media/); Mehdi Hasan, *Here Is a List of Far-Right Attackers Trump Inspired. Cesar Sayoc Wasn't the First – and Won't Be the Last*, THE INTERCEPT, Oct. 27, 2018, <https://theintercept.com/2018/10/27/here-is-a-list-of-far-right-attackers-trump-inspired-cesar-sayoc-wasnt-the-first-and-wont-be-the-last/> (published minutes before the shooting at Tree of Life Synagogue in Pittsburgh, Pennsylvania); Dionne Searcey and Emmanuel Akinwotu, *Nigerian Army Uses Trump's Words to Justify Fatal Shooting of Rock-Throwing Protestors*, N.Y. TIMES, Nov. 2, 2018, <https://www.nytimes.com/2018/11/02/world/africa/nigeria-trump-rocks.html?action=click&module=Top%20Stories&pgtype=Homepage>. (reporting that a Nigerian army official posted a video of Trump encouraging use of violence against rock-throwing protestors to justify its own use of violence against such protestors).

<sup>10</sup> See Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 2(1979) (“Structural reform is premised on the notion that the quality of social life is affected in important ways by the operation of large-scale organizations, not just by individuals acting either beyond or within these organizations.”). This article presumes that structural reform seeks to end the subordination of disempowered groups. See Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986) (arguing that an anti-subordination perspective rather than a formal equality perspective should guide equal protection doctrine); Ruth Colker, *Anti-Subordination Above All: A Disability Perspective*, 82 NOTRE DAME L. REV. 1415 (2007) (applying an anti-subordination perspective in the disability context); Catharine A. MacKinnon, *Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 644(1983) (arguing that the liberal state “coercively and authoritatively constitutes the social order in the interest of men as a gender”).

<sup>11</sup> See Alexi McCammond, *Red-state Democrats face GOP wrath over Kavanaugh*, AXIOS, Oct. 1, 2018, <https://www.axios.com/democrats-who-vote-no-on-kavanaugh-face-gop-backlash-e34cf3d5-9dfe-490b-85ff-3d8c39fd859e.html> (describing GOP anger and engagement over Kavanaugh nomination); Ramesh Ponnuru, *The Mob and Judge Kavanaugh*, NAT'L REV., Oct. 15, 2018, <https://www.nationalreview.com/magazine/2018/10/15/the-mob-and-judge-kavanaugh/> (criticizing Democrats for believing Kavanaugh allegations “on the flimsiest of pretexts”)

<sup>12</sup> See Traiger & Weddle, *supra* note \_\_, at 307 (emphasizing the importance of power imbalances to the success of bullying behavior). As C. Wright Mills has said: “The men of the higher circles are not representative men; their high position is not a result of moral virtue; their fabulous success is not firmly connected with meritorious ability. Those who sit in the seats of the high and the mighty are selected and formed by the means of power, the sources of wealth, the mechanics of celebrity, which prevail in their society,” C. WRIGHT MILLS, *supra* note \_\_ at 361.

demeaning conduct, or even “gaslighting,”<sup>13</sup> we need to understand them as an important tool that can help undermine already-weak civil rights. Two other examples from Trump’s effective use of public insults underscore that point. Trump’s insults<sup>14</sup> against football players who take a knee during the National Anthem is an attempt to deter these players from seeking structural change. Trump characterizes the NFL’s players’ kneeling as conveying “total disrespect”<sup>15</sup> and calls civil rights activists<sup>16</sup> “stupid”<sup>17</sup> or “low IQ.”<sup>18</sup> While the kneeling football players have been explicit that they are seeking to draw attention to racial inequality and police brutality,<sup>19</sup> Trump has insisted that the “issue of kneeling has nothing to do with race.”<sup>20</sup> His insults manage to divert attention from the fact that only three police officers have been convicted in fifteen high-profile deaths of African-American people between 2014 and 2016,<sup>21</sup> that the criminal justice system has long been known for the disparate value it

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<sup>13</sup> See Stephanie A. Sarkis, *11 Warning Signs of Gaslighting*, PSYCHOL. TODAY, Jan. 22, 2017, <https://www.psychologytoday.com/us/blog/here-there-and-everywhere/201701/11-warning-signs-gaslighting>. (“Gaslighting is a tactic in which a person or entity, in order to gain more power, makes a victim question their reality.”)

<sup>14</sup> See, e.g., Bryan Armen Graham, *Donald Trump blasts NFL anthem protestors: ‘Get that son of a bitch off the field’*, THE GUARDIAN, Sept. 23, 2017, <https://www.theguardian.com/sport/2017/sep/22/donald-trump-nfl-national-anthem-protests>.

<sup>15</sup> See Mark Osborne, Luke Barr & Dean Schabner, *Trump: ‘Standing with locked arms is good, kneeling is not acceptable’*, ABC NEWS, Sept. 24, 2017, <https://abcnews.go.com/US/nfl-players-blast-trump-kneeling-players-fired/story?id=50037845>.

<sup>16</sup> See A.J. Willingham, *Trump made two statements on Charlottesville. Here’s how white nationalists heard them*, CNN POLITICS, Aug. 15, 2017, <https://www.cnn.com/2017/08/14/politics/charlottesville-nazi-trump-statement-trnd/index.html>. (Trump criticizing violence “from many sides” after a white supremacist drove a car through a crowd of civil rights protestors, killing one person).

<sup>17</sup> See Alex Stedman, *Donald Trump Insults LeBron James’ Intelligence on Twitter*, VARIETY, Aug. 4, 2018, <https://variety.com/2018/politics/news/donald-trump-lebron-james-twitter-1202895353/> (Trump saying “Lebron James was just interviewed by the dumbest man on television, Don Lemon. He made Lebron look smart, which isn’t easy to do. I like Mike!”)

<sup>18</sup> See William Cummings, *Trump slams ‘low IQ’ Rep. Maxine Waters who called for harassment of White House officials*, USA TODAY, June 25, 2018, <https://www.usatoday.com/story/news/politics/onpolitics/2018/06/25/maxine-waters-trump-exchange/732505002/> (Trump calling Maxine Waters “an extraordinarily low IQ person”).

<sup>19</sup> See Clark Mindock, *Taking a knee: Why are NFL players protesting and when did they start to kneel?*, INDEPENDENT, Sept. 4, 2018, <https://www.independent.co.uk/news/world/americas/us-politics/taking-a-knee-national-anthem-nfl-trump-why-meaning-origins-racism-us-colin-kaepernick-a8521741.html>.

<sup>20</sup> P.R. Lockhart, *Trump’s reaction to the NFL protests shows how he fights the culture war*, VOX, Feb. 4, 2018, <https://www.vox.com/identities/2018/2/4/16967902/nfl-protests-patriotism-race-donald-trump-super-bowl>.

<sup>21</sup> See Jasmine C. Lee & Haeyoun Park, *15 Black Lives Ended in Confrontations With Police. 3 Officers Convicted*, N.Y. TIMES, Oct. 5, 2018, <https://www.nytimes.com/interactive/2017/05/17/us/black-deaths-police.html>.

attaches to the lives of whites and blacks,<sup>22</sup> and that Trump's Justice Department has systematically sought to undermine the ability of civil rights organizations to attain effective police reform.<sup>23</sup> Similarly, Trump's depiction of Haitian and African immigrants as being from "shit hole countries"<sup>24</sup> and castigation of Mexican-Americans as rapists<sup>25</sup> diverts public attention from the court decisions questioning his constitutional authority to repeal the Deferred Action for Childhood Arrivals (DACA) program.<sup>26</sup>

This Article argues that it is the *intersection* of narrow legal rights and public insults that undermines the efforts of the civil rights community to achieve effective structural change. Insults hurled by the power elite are best understood as part of a larger effort, which also include legislative and judicial strategies,<sup>27</sup> to impede structural, civil rights reform and reduce

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<sup>22</sup> P.R. Lockhart, *Trump's reaction to the NLF protests shows how he fights the culture war*, VOX, Feb. 4, 2018, <https://www.vox.com/identities/2018/2/4/16967902/nfl-protests-patriotism-race-donald-trump-super-bowl>. (Trump manages "to change the subject by casting protesting NFL players – the majority of whom are black; all of whom were drawing explicit attention to racial inequality – as a danger to the ideals of America.") See also Darren Lenard Hutchinson, "*Continually Reminded of Their Inferior Position*": *Social Dominance, Implicit Bias, Criminality, and Race*, 46 WASH. U. J. L. & POL'Y 23 (2014) (documenting history of racist criminal law enforcement); *McCleskey v. Kemp*, 481 U.S. 279 (1987) (death penalty upheld despite statistical study indicating that it was more frequently imposed on African-American defendants and defendants killing white victims than on white defendants and defendants killing African-American victims).

<sup>23</sup> See, e.g., Memorandum from Attorney General Sessions to Heads of Civil Litigation Components, United States Attorneys, Nov. 7, 2018, <https://www.justice.gov/opa/press-release/file/1109621/download>. (limiting use of consent decrees in cases involving state and local law enforcement).

<sup>24</sup> See Jen Kirby, *Trump wants fewer immigrants from "shithole countries" and more from places like Norway*, VOX, Jan. 11, 2018, <https://www.vox.com/2018/1/11/16880750/trump-immigrants-shithole-countries-norway> (referring to Haiti and Africa as "shithole countries").

<sup>25</sup> See Z. Byron Wolf, *Trump basically called Mexicans rapists again*, CNN POLITICS, April 6, 2018, <https://www.cnn.com/2018/04/06/politics/trump-mexico-rapists/index.html> (claiming that Mexican immigrants are rapists).

<sup>26</sup> See Joanna Walters, *What is Daca and who are the Dreamers?*, THE GUARDIAN, Sept. 2017, <https://www.theguardian.com/us-news/2017/sep/04/donald-trump-what-is-daca-dreamers>. See also National Immigration Law Center, *U.S. District Court in D.C. Orders That the DACA Termination Memo Be Vacated – but Not for at least 90 Days*, Apr. 25, 2018, <https://www.nilc.org/issues/daca/dc-court-orders-daca-termination-memo-vacated/>.

<sup>27</sup> Thus, it is no surprise that Trump's Justice Department is not pursuing civil rights cases on behalf of African-Americans but instead is seeking to undermine Harvard's affirmative action policies by supporting a case accusing Harvard of discriminating against Asian-American applicants. See Katie Benner, *Justice Dept. Backs Suit Accusing Harvard of Discriminating Against Asian-American Applicants*, N.Y. TIMES, Aug. 30, 2018, <https://www.nytimes.com/2018/08/30/us/politics/asian-students-affirmative-action-harvard.html?ref=collection%2Fbyline%2Fkatie-benner>.

civil rights advances to one-person-at-a-time token remedies.

Congress, the courts, and cultural tactics play a role in making structural reform difficult. Congress, for example, enacted broad-ranging reform by requiring public spaces to be accessible through the passage of Title III of the Americans with Disabilities Act (“ADA”),<sup>28</sup> while also limiting plaintiffs to injunctive relief<sup>29</sup> even though such relief is unlikely to be effective at spurring broad-based structural reform.<sup>30</sup>

Similarly, under ADA Title III, the courts narrowed the availability of class action lawsuits, narrowed interpretations of standing requirements, and imposed restrictions for attaining prevailing party status to qualify for attorney fees, undermining the ability of plaintiffs to use ADA Title III to attain structural reform.<sup>31</sup>

Public insults have also played an important and undertheorized role in narrowing relief under civil rights statutes. ADA defendants, for example, attack plaintiffs and their lawyers by using insulting terms such as: “nuisance” lawsuits, “gam[ing]” or “plaguing” the system, “drive-by” litigators, “abusive” tactics, “shakedown” litigation, and “hired guns.”<sup>32</sup> These tactics are especially effective when combined with the strategy of insisting that plaintiffs fit a narrow type of “perfect victim,”<sup>33</sup> because they

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<sup>28</sup>The Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213.

<sup>29</sup> See 42 U.S.C. § 12188(a)(2) (injunctive relief provision). For further discussion, see *infra* Part III.

<sup>30</sup> See generally National Council on Disability, HAS THE PROMISE BEEN KEPT? FEDERAL ENFORCEMENT OF DISABILITY RIGHTS LAWS, Oct. 31, 2018, [https://www.ncd.gov/sites/default/files/NCD\\_Federal-Enforcement\\_508.pdf](https://www.ncd.gov/sites/default/files/NCD_Federal-Enforcement_508.pdf) (describing ineffectiveness of federal oversight of accessibility issues).

<sup>31</sup> See *infra* Part II.

<sup>32</sup> Using those search terms on Westlaw, the author located 725 pleadings involving ADA Title III lawsuits (file available from author upon request). For examples of the use of these insults, see *infra* Part III.

<sup>33</sup> See, e.g., Stewart Chang, *Feminism in Yellowface*, 38 HARV. J. L. & GENDER 235 (2015) (showing how lawyers need to try to fashion their clients into the perfect victim in order to attain immigration relief); Jayashri Srikantiah, *Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law*, 87 B.U. L. REV. 157, 195 n. 213(2007)(documenting the perfect victim problem in human trafficking cases); Jasmine E. Harris, *Sexual Consent and Disability*, 93 N.Y.U. L. REV. 480, 491 (2018)( documenting how the legal system makes it difficult to attain relief for victims of sexual assault who are mentally disabled even though “people with disabilities experience sexual assault or rape at a rate of more than three times that of people without disabilities.”); Ruth Colker, *Blaming Mothers: A Disability Perspective*, 95 B.U. L. Rev. 1205 (2015) (showing how school districts seek to blame mothers to avoid liability under special education laws). But see DEVON W. CARBADO

deflect attention from the need for structural reform. For example, criticism of plaintiffs who use wheelchairs as “drive-by” plaintiffs when they sue a large number of establishments deflects attention from the larger question of why shouldn’t a person who uses a wheelchair drive by hotels and restaurants to see which ones are inaccessible? A lawsuit can attain structural reform by making the entity accessible for many other wheelchair users rather than merely benefit the individual plaintiff. But defendants, the courts and the media disparage plaintiffs with disabilities unless they fit a very narrow prototype<sup>34</sup> – a local resident who uses a wheelchair, visits the nearby entity on a daily basis, and repeatedly, politely requests that the entity make itself accessible so that plaintiff can access it with a nondisabled companion who will assist with any “minor” inconveniences.<sup>35</sup> These strategies force plaintiffs to inefficiently seek advances one plaintiff at a time against one business at a time.

This Article seeks to offer an understanding of the effectiveness of public insults in undermining civil rights advances. Part I will briefly recount the political left’s understanding of how to attain effective legal change through a combination of cultural, political and legal strategies. While that literature frequently focuses on constitutional reform, Part I will seek to apply this literature to the statutory context. Part I argues that the literature on civil rights reform has insufficiently theorized the role that public insults play in undermining both constitutional and statutory civil rights advances. In order to have a model of civil rights reform, one must consider the tools available to the power elite to undermine those advances.

Part II will tell the story of how Congress, the courts and society have combined to undermine structural reform through cultural, political and legal strategies. After briefly listing some of the legal rules that make structural reform difficult, Part II will focus on how the use of public insults, in many instances, enhanced these limiting tools. These limiting tools were developed in response, in part, to a bullying public discourse about the importance of civil rights advances.

Rather than merely catalogue these limiting tools at a general level, Part III will document the pernicious effectiveness of many of these tools

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& MITU GULATI, *ACTING WHITE? RETHINKING RACE IN “POST-RACIAL” AMERICA* (2013) (questioning whether perfect victim model is effective).

<sup>34</sup> See generally Adam A. Milani, *Wheelchair Users Who Lack “Standing”*: Another Procedural Threshold Blocking Enforcement of Titles II and III of the ADA, 39 WAKE FOREST L. REV. 69 (2004).

<sup>35</sup> See *infra* Part III.

in ADA Title III accessibility litigation. By requiring public accommodations to be accessible, ADA Title III is a legislative arena where Congress has required structural reform; nonetheless, Title III litigation provides a compelling illustration of the failure of structural reform due to interconnected cultural, political and legal strategies used by the power elite. In response to the onslaught of insults hurled at plaintiffs and their attorneys, Congress has even sought to further weaken the enforcement scheme.<sup>36</sup>

Part IV will consider how civil rights advocates can more effectively attain genuine structural reform despite this barrage of public insults. Michelle Obama has famously said “When they go low, we go high”; by contrast, Eric Holder has said “When they go low, we kick them!”<sup>37</sup> This Article supports neither approach, arguing instead that the best protection against public insults is a stronger structural home. Civil rights need a firmer foundation, so they can withstand public insults.

## I. THE TOOLS OF STRUCTURAL REFORM

Community organizers, sociologists, and contemporary constitutional theorists agree that civil rights activists need cultural, political and legal tools to attain effective structural reform, although they differ how those tools should work together.<sup>38</sup> Community organizers emphasize the importance of grass-roots work while constitutional theorists emphasize how legal tools can build on those grass-roots efforts. Both fields struggle to explain how to respond to the power of insults from

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<sup>36</sup> See H.R. 620, 115<sup>th</sup> Congress, 2<sup>nd</sup> Session, Jan. 24, 2017, <https://www.adatitleiii.com/wp-content/uploads/sites/121/2018/02/hr620-text.pdf>. (requiring lengthy notice period).

<sup>37</sup> See Carla Herreria, *Eric Holder Revises Michelle Obama’s Famed Quote: ‘When They Go Low, We Kick Them’*, HUFFPOST, Oct. 10, 2018, [https://www.huffingtonpost.com/entry/eric-holder-amends-michelle-obama-mantra\\_us\\_5bbe767ce4b054d7ddef4a8d](https://www.huffingtonpost.com/entry/eric-holder-amends-michelle-obama-mantra_us_5bbe767ce4b054d7ddef4a8d).

<sup>38</sup> See, e.g., GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2008) (arguing that courts can be effective producers of significant social reform when certain conditions exist such as support from some citizens and low levels of opposition from all citizens and certain conditions exist that can induce compliance); FRANCES FOX PIVEN & RICHARD A. CLOWARD, *POOR PEOPLE’S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL* (1977) (recognizing the explosive power of grassroots defiance); DEVON W. CARBADO & MITU GULATI, *ACTING WHITE?: RETHINKING RACE IN “POST-RACIAL” AMERICA* (2013) (arguing that anti-discrimination law has only helped a subset of African-Americans who are not “too black” in that they are not racially salient as African-Americans); MARK ENGLER & PAUL ENGLER, *THIS IS AN UPRISING: HOW NONVIOLENT REVOLT IS SHAPING THE TWENTY-FIRST CENTURY* (2016) (describing conditions under which nonviolent revolt, rather than more mainstream tactics, can help attain change).

the power elite.

This Article adds another dimension to thinking about the difficulties of attaining long-lasting reform. It is important to recognize that the power elite will be working hard to further narrow the victories attained by the political left, and that their work will be made easier by the inherently narrow nature of the initial civil rights victory. If we recognize that the victories achieved by civil rights activists are likely to be narrow and individualistic, then we can be better prepared to recognize the power and potential of the power elite's response to narrow them further. While some of the scholarly work on civil rights reform recognizes that the power elite can undermine or impede advances,<sup>39</sup> none of this scholarship considers the *interaction* between the limited scope of victory attained by civil rights activists and the ability of the power elite to engage in the power of insults.

#### A. Community Organizers

A community-organizing icon, who is sometimes characterized as the father of community organizing,<sup>40</sup> was Saul Alinsky who authored *Reveille for Radicals*<sup>41</sup> in 1946 and *Rules for Radicals*<sup>42</sup> in 1971. He argued for indigenous radicalism based on community action with aphorisms such as “ridicule is man’s most potent weapon” and “a tactic that drags on too long becomes a drag.”<sup>43</sup> Although Alinsky did not participate in formal party politics, he influenced both Barack Obama and Hillary Clinton.<sup>44</sup> Clinton’s senior thesis at Wellesley College focused on Alinsky; she interviewed him for her project.<sup>45</sup> Obama was attacked for being a follower of the radical icon.<sup>46</sup>

In addition to catchy aphorisms, Alinsky also believed in the

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<sup>39</sup> See ROSENBERG, *supra* note \_\_\_\_, at 12 (contrasting the failure of the civil rights campaign in Albany, Georgia with later successes).

<sup>40</sup> See Dylan Matthews, *Who is Saul Alinsky, and why does the right hate him so much?*, VOX, July 19, 2016, <https://www.vox.com/2014/10/6/6829675/saul-alinsky-explain-obama-hillary-clinton-rodham-organizing>.

<sup>41</sup> SAUL ALINSKY, *REVEILLE FOR RADICALS* (1946), available at [https://historyofsocialwork.org/1946\\_Alinsky/1946%20-%20Saul%20Alinsky%20-%20Reveille%20for%20Radicals.pdf](https://historyofsocialwork.org/1946_Alinsky/1946%20-%20Saul%20Alinsky%20-%20Reveille%20for%20Radicals.pdf).

<sup>42</sup> SAUL ALINSKY, *RULES FOR RADICALS: A PRAGMATIC PRIMER FOR REALISTIC RADICALS* (1971).

<sup>43</sup> See *Saul Alinsky’s 13 Tried-and-True Rules for Creating Meaningful Social Change*, OPEN CULTURE (Feb. 21, 2017), <http://www.openculture.com/2017/02/13-rules-for-radicals.html>.

<sup>44</sup> See Dylan Matthews, *Who is Saul Alinsky, and why does the right hate him so much?*, VOX, July 19, 2016, <https://www.vox.com/2014/10/6/6829675/saul-alinsky-explain-obama-hillary-clinton-rodham-organizing>.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

importance of community networks and, in 1940, founded the Industrial Areas Foundation (IAF), a national network of local faith and community-based organizations.<sup>47</sup> Today, the organization has more than fifty affiliates<sup>48</sup> and claims success for helping to raise the minimum wage, making housing more affordable and increasing the availability of meals on wheels.<sup>49</sup> It is a model based on civic action, including disruptive tactics and strong networks of community organizing groups. And, as reflected in the continuing work of IAF, it has achieved much success.<sup>50</sup>

While Alinsky believed strongly in community *organizing*, he did not align himself with any political *movement*. Alinsky's successor, Edward Chambers, aptly explained "[W]e're not building movements. Movements go in and out of existence. As good as they are, you can't sustain them. Everyday people need incremental success over months and sometimes years."<sup>51</sup> For Alinsky, the formula for success was building "democratic power among people seeking to improve the conditions of their own lives."<sup>52</sup> Rather than expect quick, short-term results, community organizers motivated by Alinsky's tenets understood the need to persist for the long-term to attain sustainable reform.

In recent years, his work has inspired Tea Party organizers.<sup>53</sup> Not surprisingly, disruptive tactics can be effective when pushed by any political perspective. While Alinsky prided himself on being nonpartisan in orientation, his tactics could arguably be even more successful when harnessed by a stridently partisan organization such as the Tea Party. The Tea Party is credited with pulling the Republican Party to the political right and undercutting Obama's presidency; it became part of the power elite as

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<sup>47</sup> See Industrial Areas Foundation (IAF), <http://www.industrialareasfoundation.org> (last visited Dec. 11, 2018).

<sup>48</sup> See *Find an IAF Affiliate Near You*, <http://www.industrialareasfoundation.org/affiliate-members#all> (last visited Dec. 11, 2018).

<sup>49</sup> See Industrial Areas Foundation (IAF), <http://www.industrialareasfoundation.org> (last visited Dec. 11, 2018).

<sup>50</sup> In a conversation with Arlene Mayerson, Directing Attorney of the Disability Rights Education & Defense Fund on January 5, 2019 in New Orleans, Louisiana, I learned that early disability rights activists were trained to follow the Alinsky organizing principles to resist attempts by the federal government to restrict enforcement of Section 504 of the Rehabilitation Act of 1973. For discussion of some disability rights protests under the Alinsky model, see Brittany Shoot, *The 1977 Disability Rights Protest that Broke Records and Changed Laws*, Nov. 9, 2017, <https://www.atlasobscura.com/articles/504-sit-in-san-francisco-1977-disability-rights-advocacy>.

<sup>51</sup> EDWARD T. CHAMBERS, *ROOTS FOR RADICALS: ORGANIZING FOR POWER, ACTION, AND JUSTICE* 80-81 (2004).

<sup>52</sup> See ENGLER & ENGLER, *supra* note \_\_\_\_, at 38.

<sup>53</sup> See *supra* note \_\_\_\_.

it became incorporated within the Republican Congressional majority.<sup>54</sup> Their success suggests that Alinsky's tenets may be even more effective when harnessed by the power elite, because they can build on their pre-existing, hierarchical structural advantages.

### B. *Sociologists*

Writing in 1977, sociologists Frances Fox Piven and Richard A. Cloward disputed the widely held notion, furthered by Alinsky, that successful social movements needed long-standing, formal organizational structures.<sup>55</sup> In a painstakingly careful study, they traced why some poor people's movements succeeded while others failed. They disputed the widely held notion that formal organization of the lower classes is a necessary component of attaining power. The flaw, they argued, is that it is "possible to compel concessions from elites that can be used as resources to sustain oppositional organizations over time."<sup>56</sup> They contended that the formal organizational structures usually fade after a period of advocacy ends and, when they do not fade, that the formal organization that remains has abandoned the oppositional politics that gave rise to their existence in the first place.<sup>57</sup> The organizers typically "blunt[] or curb[] the disruptive force which lower-class people were sometimes able to mobilize."<sup>58</sup>

Their work proposed a new understanding of how political transformations can take place. Rather than focus on building a national mass-based movement to attain reform, they argued that local organizations can attain local victories through a series of disruptions which, in turn, may require a federal response. For example, they argued that the Southern Christian Leadership Conference (SCLC) engaged in "mass defiance of caste rules, followed by arrests and police violence" but "did not build local organizations to obtain local victories."<sup>59</sup> While recognizing that this tactic left local people unorganized and vulnerable to retaliation by whites, and arguably rested on a strategy of "create a crisis and pray," they argued that it worked.<sup>60</sup> They claimed that that strategy

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<sup>54</sup> See Vanessa Williamson, Theda Skocpol & John Coggin, *The Tea Party and the Remaking of Republican Conservatism*, [https://scholar.harvard.edu/files/williamson/files/tea\\_party\\_pop\\_0.pdf](https://scholar.harvard.edu/files/williamson/files/tea_party_pop_0.pdf) (last visited Dec. 11, 2018).

<sup>55</sup> FRANCES FOX PIVEN & RICHARD A. CLOWARD, *POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL* (1977).

<sup>56</sup> *Id.* at xi.

<sup>57</sup> *Id.* at xi.

<sup>58</sup> *Id.* at xii.

<sup>59</sup> *Id.* at 283.

<sup>60</sup> *Id.* at 282-83.

resulted in the “literal fragmenting of the regional foundation of the Democratic Party” to force legislative concessions to African-Americans. By contrast, they argued such success would not have come about if organizers waited for local organization of the southern black poor on a national scale.<sup>61</sup> They therefore provided a “bottoms-up” account of political disruptions to explain how transformations could occur at the national level even if local disruptors would face retaliation by power elites at the local level. Unlike Alinsky, their theory accounted for the response by the power elite although the strategies of the elite were not a primary focus of their study.

Their work, too, may strengthen our understanding of the power of the Tea Party Movement. Like the Occupy Wall Street movement, the Tea Party Movement may be criticized for not having a clear national agenda. They were initially decentralized and splintered. Yet, like Piven and Cloward may have projected, they attained enormous political power and may have helped lead to the later rise of Donald Trump. By contrast, the Occupy Wall Street Movement seemingly disappeared and cannot point to any distinct political or legal developments. While Michael Levitin has argued that the Occupy Wall Street movement has regrouped around a variety of causes,<sup>62</sup> no one would describe it as having achieved as much impact on the American landscape as the Tea Party movement. Thus, Piven and Cloward may be correct to argue that an initial national movement is not essential to an organization’s success, but we need an explanation for why the Tea Party could harness political disruptions so much more effectively than the Occupy Wall Street movement.

Implicitly disagreeing with Piven and Cloward, Todd Gitlin argues that the lack of a national network and connection to conventional political actors may explain the failure of the Occupy Wall Street movement.<sup>63</sup> While recognizing that Occupy did garner some small victories, he argued: “absent an extended strategy, experienced networks, and a stabilizing organizational structure, Occupy cannot parlay small victories into action for long-term potential.”<sup>64</sup> Arguably, the Tea Party has attained greater success than Occupy Wall Street because of its willingness to back candidates who would run for political office and align themselves with a

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<sup>61</sup> *Id.* at 283.

<sup>62</sup> See Michael Levitin, *The Triumph of Occupy Wall Street*, THE ATLANTIC, June 10, 2015, <https://www.theatlantic.com/politics/archive/2015/06/the-triumph-of-occupy-wall-street/395408/>.

<sup>63</sup> Todd Gitlin, *Occupy’s predicament: the moment and the prospects for the movement*, 64 BRIT. J. SOC. 3 (2013).

<sup>64</sup> *Id.* at 22.

traditional political party. Although they may have begun as a splintered and decentralized movement, they were willing to align themselves with the more traditional Republican party and its power elite.

Thus, Daniel Kreiss and Zeynep Tufekci argue that a group needs to align itself with an organizational structure to be successful. In contrast to Piven and Cloward, they argue that the civil rights movement “developed a tactical repertoire that was distinct from the political valuation of the organizational form and decision-making structure of the movement.”<sup>65</sup> They argue that the civil rights movement and the Occupy Wall Street movements, while both decentralized, also had a different concept of “leadership”<sup>66</sup> with Occupy Wall Street’s insistence on using a horizontal leadership strategy leading to its demise. By contrast, they argue that the Tea Party activists worked with the Republican Party and conservative media outlets to achieve legislative victories. Kreiss and Tufekci argue that “social transformation can only exist through some engagement with institutional politics that makes change durable.”<sup>67</sup> Similarly, Amanda Pullman argues that part of the success of the Tea Party lies in the fact that they had “considerable resources, in the form of monetary support, organizational structures, and access to popular media ... [as well as] two established conservative organizations, Freedom Works and Americans for Prosperity.”<sup>68</sup> Thus, the views of Pullman, Gitlin, Kreiss and Tufekci question the account offered by Piven and Cloward. They agree with the necessity of cultural transformations to attain political success but also contend that interaction with institutional politics, as well as conventional economic resources, is necessary to make change durable.

Mark and Paul Engler have tried to apply the insights of Alinsky and Piven/Cloward to some recent social and political movements. Drawing on the importance of political disruptions, they tell the story of how what they call “nonviolent revolt” has helped shape successful civil rights movements.<sup>69</sup> They tell many stories of successful civil rights advocacy, showing how seemingly polarizing tactics combined with community activism helped change public attitudes and laid the groundwork for

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<sup>65</sup> Daniel Kreiss and Zeynep Tufekci, *Occupying the Political: Occupy Wall Street, Collection Action, and the Rediscovery of Pragmatic Politics*, 13 CULTURAL STUDIES ↔ CRITICAL METHODOLOGIES 163 (2013).

<sup>66</sup> *Id.* at 163.

<sup>67</sup> *Id.* at 165.

<sup>68</sup> Amanda Pullman, *Social Movement Theory and the ‘Modern Day Tea Party’*, 8/12 SOC. COMPASS 1377, 1379 (2014).

<sup>69</sup> MARK ENGLER & PAUL ENGLER, *THIS IS AN UPRISING: HOW NONVIOLENT REVOLT IS SHAPING THE TWENTY-FIRST CENTURY* (2016).

successful civil rights reforms. One chapter tells the transformation from a time of anti-immigrant vitriolic to the embrace of the so-called DREAMers staying in the United States. The story begins in 2005 when Representative Sensenbrenner proposed “a reactionary piece of immigration legislation that would have instated harsh penalties for unauthorized presence in the United States, erected a seven-hundred-mile fence along the border ... and criminalized those assisting undocumented immigrants in obtaining food, housing, or medical services.”<sup>70</sup> The story continues with Minuteman volunteers in 2005 bragging to a reporter that they wanted to kill all immigrants crossing the border illegally. “You break into my country, you die,” they reportedly said.<sup>71</sup> And the story recounts how Fox News’ Lou Dobbs “warned that hordes of unwashed immigrants would bring plagues of tuberculosis, malaria, and even leprosy” to the United States.<sup>72</sup>

Focusing on the power of polarizing tactics, Mark and Paul Engler then explain how immigration rights activists effectively responded. They argue that huge mass protests by immigrant rights activists brought a political sea change. Right wing candidates entered the general elections “facing down an energized bloc of the immigrant rights movement’s active public supporters.”<sup>73</sup> Immigration activists staged a hunger strike at the Denver office of Obama for America, pushing President Obama to issue executive orders in favor of the DREAMers.<sup>74</sup> “Polarization,” they argued, paid “dividends.”<sup>75</sup> They end this chapter with the hope that James Sensenbrenner will reverse himself and say “I’m sorry” to the DREAM Act students.<sup>76</sup> Further, they suggest that “it is possible that the polarized extremism of the Minutemen may soon look just as archaic and bigoted as the White Citizens’ Councils that thrived, for a brief moment, thanks to the ‘unwise and untimely’ clashes generated by the civil rights movement.”<sup>77</sup>

Unfortunately, we know that the story told by Englers has not had a continuous and straight path to success. Sensenbrenner’s 2018 web page proclaims his strong support for many of the measures he first supported

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<sup>70</sup> *Id.* at 214.

<sup>71</sup> *Id.* at 216.

<sup>72</sup> *Id.* at 216.

<sup>73</sup> *Id.* at 219.

<sup>74</sup> *Id.* at 219-223.

<sup>75</sup> *Id.* at 219.

<sup>76</sup> *Id.* at 223.

<sup>77</sup> *Id.* at 223.

in 2005.<sup>78</sup> In a 2016 interview, Minuteman co-founder, Jim Gilchrist, “insists that it was his group’s actions that led to the conservative fervor over cracking down on illegal immigration. He traces the current Republican discourse on the issue – Donald Trump’s infamous wall, the renewed interest in revoking birthright citizenship, and the calls for mass deportations back to his movement.”<sup>79</sup> And, in November 2018, in response to Trump’s warning about U.S. security being threatened by Central American caravans of migrants, the Texas Minutemen announced that they were going to the border to stop the caravans from moving through Mexico.<sup>80</sup> While the Englers tell a story of a movement that borrowed from Alinsky’s commitment to ground-up community organizing and Piven/Cloward’s commitment to disruptive measures, and had some short-term success, the Englers were not able to recount a movement that generated the kind of long-term success that these various theorists thought was possible.

Possibly, Mark and Paul Engler should have foreseen how power elites, such as Donald Trump, would use the strategies that they claimed could be effective. Englers argued that conflict and disruption are important tools for change. They argued that “successful movements are often celebrated as heroic and noble” but “while they are still active, their tactics are never beloved by all. Accepting that reality is part of using conflict and disruption as tools for change.”<sup>81</sup> Thus, Trump garnered a huge amount of free publicity during the Presidential campaign with his statements that promoted conflict and disruption. His lack of civility received constant criticism. As predicted by Englers, he made “people uncomfortable.”<sup>82</sup> People talked about holding their nose while voting for him due to his lack of civility. But, at the end of the day, he beat the more conventional candidate who “preferr[ed] to look moderate and

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<sup>78</sup> <https://sensenbrenner.house.gov/issues/immigration> (last visited Dec. 11, 2018). See also <https://sensenbrenner.house.gov/press-releases-statements?ID=B49BEF18-C222-4193-BB17-91343C23785A> (supporting the ending of the DACA program)(last visited Dec. 11, 2018).

<sup>79</sup> See Meredith Hoffman, *Whatever Happened to Arizona’s Minutemen?*, VICE, March 22, 2016, [https://www.vice.com/en\\_us/article/xd7jmn/what-happened-to-arizonas-minutemen](https://www.vice.com/en_us/article/xd7jmn/what-happened-to-arizonas-minutemen).

<sup>80</sup> See Mary Lee Grant & Nick Miroff, *U.S. militia groups head to border, stirred by Trump’s call to arms*, WASH. POST, Nov. 3, 2018, [https://www.washingtonpost.com/world/national-security/us-militia-groups-head-to-border-stirred-by-trumps-call-to-arms/2018/11/03/ff96826c-decf-11e8-b3f0-62607289efee\\_story.html?utm\\_term=.bd169eefbfdf](https://www.washingtonpost.com/world/national-security/us-militia-groups-head-to-border-stirred-by-trumps-call-to-arms/2018/11/03/ff96826c-decf-11e8-b3f0-62607289efee_story.html?utm_term=.bd169eefbfdf).

<sup>81</sup> ENGLER & ENGLER, *supra* note \_\_\_\_, at 223.

<sup>82</sup> *Id.* at 223.

reasonable.”<sup>83</sup>

Thus, we should understand Trump’s success as being part of a broader social movement, with goals for structural change, which were reflected by the Minutemen in 2005. The Minutemen were not just a bunch of vigilantes. They wanted a wall, they wanted immigrants deported, they even wanted immigrants to be executed at the border.<sup>84</sup> Similarly, Trump had his message: build a wall, make America great again, get out of free trade deals.<sup>85</sup> Although critics argue that Trump is not disciplined because he sends out tweets at early morning hours criticizing his opponents in highly personal terms,<sup>86</sup> he is arguably consistent and disciplined. His opponents know (and fear) his insults.<sup>87</sup> With discipline, he managed to turn the detractors of Brett Kavanaugh into an “angry mob.”<sup>88</sup> He is a case study on how “moderate and reasonable” loses to “rude and rash.”<sup>89</sup>

Trump’s success at social disruption should make us ask whether those kinds of disruptive forces are even more powerful when marshaled by the power elite. This Article will argue that it is possible to disrupt civil rights progress through the power of insults because civil rights progress

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<sup>83</sup> *Id.* at 223.

<sup>84</sup> See Janet I. Tu & Lornet Turnbull, *Minutemen watch U.S.-Canada border*, SEATTLE TIMES, Oct. 4, 2005, <https://www.seattletimes.com/seattle-news/minutemen-watch-us-canada-border/> (describing goals of Minutemen to deter illegal immigration and report employers who hire illegal immigrants); *Minutemen, Other Anti-Immigrant Militia Groups Stake Out Arizona*, SOUTHERN POVERTY LAW CENTER, June 27, 2005, <https://www.splcenter.org/fighting-hate/intelligence-report/2005/minutemen-other-anti-immigrant-militia-groups-stake-out-arizona-border>. (describing tactics of vigilante militias).

<sup>85</sup> See Linda Qiu, *Donald Trump’s top 10 campaign promises*, POLITIFACT (July 15, 2016), <https://www.politifact.com/truth-o-meter/article/2016/jul/15/donald-trumps-top-10-campaign-promises/>.

<sup>86</sup> See Charles M. Blow, *Donald Trump’s Lack of Discipline and Discernment*, N.Y. TIMES, OCT. 27, 2016.

<sup>87</sup> Christopher Cadelago, *Nickname and shame: Trump taunts his 2020 Democratic rivals*, POLITICO, <https://www.politico.com/story/2018/10/02/2020-democrats-trump-nicknames-856800>, Oct. 2, 2018 (“People close to Trump say he’s convinced that the nicknames and other public ridicule he employed against the likes of Bush and Rubio shaped public opinion against them and – maybe more important – got inside their heads and rattled their confidence as candidates.”)

<sup>88</sup> See Matt Viser & Robert Costa, *‘An angry mob’: Republicans work to recast Democratic protests as out-of-control anarchy*, WASH. POST, Oct. 8, 2018, [https://www.washingtonpost.com/politics/an-angry-mob-republicans-work-to-recast-democratic-protests-as-out-of-control-anarchy/2018/10/08/c8648e8a-cb13-11e8-a3e6-44daa3d35ede\\_story.html?noredirect=on&utm\\_term=.79333418e665](https://www.washingtonpost.com/politics/an-angry-mob-republicans-work-to-recast-democratic-protests-as-out-of-control-anarchy/2018/10/08/c8648e8a-cb13-11e8-a3e6-44daa3d35ede_story.html?noredirect=on&utm_term=.79333418e665).

<sup>89</sup> See Bobby Azarian, *The Psychology Behind Donald Trump’s Unwavering Support*, PSYCHOLOGY TODAY, Sept. 13, 2016, <https://www.psychologytoday.com/us/blog/mind-in-the-machine/201609/the-psychology-behind-donald-trumps-unwavering-support>. (explaining why Trump retains support despite or because of his insulting behavior).

hangs by such a narrow thread. What the Englers describe as immigration success was merely a couple of Executive Orders signed by President Obama that could quickly be erased by President Trump.<sup>90</sup> The immigration rights community was not able to attain lasting immigration legislation during the eight years of the Obama Presidency. While it took years for Obama to sign a pro-immigrant executive order, it only took about a week for the Trump administration to sign its first immigration executive order banning many refugees from entering the United States.<sup>91</sup> Had immigration reform been attained through legislation, it would have been more difficult for Trump to reverse course. And, of course, Trump continued to use anti-immigrant rhetoric after amassing the power of the Presidency with the power to issue Executive Orders; insults continued as an important tool of the power elite.<sup>92</sup>

### C. *Contemporary Constitutional Theorists*

Community organizers and sociologists are not the only theorists to understand the importance of cultural work, along with legal and political work. Contemporary constitutional theory also tries to account for the importance of cultural forces to attain successful legal transformations. Their work, too, arguably provides an insufficient account of the ability of the power elite to undermine civil rights advances. Reva Siegel, for example, argues that cultural forces work alongside the law to help transform the Supreme Court's understandings of the U.S. Constitution. She tells a compelling story of how the social and political activism of the feminist movement helped propel the Supreme Court to recognize sex as a quasi-suspect class under the Constitution despite the failure of the states to amend the Constitution by ratifying the ERA.<sup>93</sup> Her work, however, does not provide an adequate explanation for why the power elite was so successful in planting fear of women being drafted or raped in gender-neutral bathrooms if the ERA were to be ratified. The power elite's cultural disruptions are an important part of the challenges to attaining gender

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<sup>90</sup> See Lazaro Zamora, *Obama's Immigration Executive Actions: Two Years Later*, BIPARTISAN POLICY CENTER (Dec. 9, 2016) ("Some programs were created through guidance memoranda, agency policy, or operational changes that can be easily revoked or changed by the new administration").

<sup>91</sup> See Steve Almasy & Darran Simon, *A Timeline of President Trump's Travel bans*, CNN, Mar. 30, 2017, <https://www.cnn.com/2017/02/10/us/trump-travel-ban-timeline/index.html>

<sup>92</sup> See Massoud Hayoun, *A Federal Judge Rules that Trump's Immigrant Policy was Racist, but Rights Advocates Remain Concerned for the Future*, PACIFIC STANDARD, Oct. 5, 2018, <https://psmag.com/social-justice/federal-judge-rules-trump-immigrant-policy-racist>.

<sup>93</sup> Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323 (2006).

equity.

Further, not everyone accepts this story of constitutional litigation working in lockstep with cultural forces to attain long-term legal and political success. In her response to Siegel, Robin West argues that the recognition of gender as a quasi-suspect class has not resulted in the kind of broad structural reform that feminists have long sought.<sup>94</sup> The state still does not subsidize childcare, paid pregnancy leave is not a legal right, reproductive choices are increasingly limited and under attack, and the wage gap between women and men stubbornly persists as comparable worth cases continue not to be recognized by the courts. Alinsky and Piven/Cloward would likely not be surprised at West's account of the difficulties of attaining success in this area because they would not expect a top-down litigation approach to be successful at attaining lasting reform. West embraces the importance of more ground-up cultural work to attain lasting reform but does not fully account for the difficulty of responding to the power elite's domination of the cultural mindset.

While these theorists are useful in emphasizing the importance of ground-level disruptions to help attain political and legal changes, their theories fail to account for some additional insights offered by this Article. One reason that top-down, litigation approaches are rarely effective is that the U.S. legal system has built-in rules and policies that heavily favor narrow, individualistic remedies rather than structural reform. Further, and equally importantly, these built-in headwinds to civil rights victories make it especially easy for the power elite to harness public insults to derail whatever victories may be achieved. It is the *intersection* of narrow political/legal rules and public insults that undermines the efforts of the civil rights community. Thus, Siegel may be correct about the important victories attained by constitutional litigation, but she overstates these successes, because she fails to account for the ability of the power elite to undermine narrowly crafted victories.

This observation is critically important to understand the current political and legal moment. Many people are aghast at Trump's use of public insults to derail civil rights reform and have suggested that the political left should engage in similar tactics.<sup>95</sup> Yet, when civil rights activists descend on the U.S. Senate to hold Senators accountable for their

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<sup>94</sup> Robin West, *Constitutional Culture or Ordinary Politics: A Reply to Reva Siegel*, 94 CALIF. L. REV. 1465 (2006).

<sup>95</sup> For a description of the range of approaches that have been suggested by the political left, see Conor Friedersdorf, *Why Can't the Left Win?*, ATLANTIC, May 4, 2017, <https://www.theatlantic.com/politics/archive/2017/05/why-cant-the-left-win/522102/>.

failure to respect a woman's claim of sexual assault, they are minimized as an "angry mob."<sup>96</sup> The power elite has on its side a Constitution that was deliberately crafted to allow a minority of the country's population decide who sits on the Supreme Court,<sup>97</sup> to prevent a "radical left-wing mob"<sup>98</sup> from attaining power and voice. Thus, it is no surprise that the grass-roots organizers who opposed Kavanaugh are characterized as the ones who are "un-American" or need to "grow up"<sup>99</sup> rather than those who are using anti-democratic forces to ram through Supreme Court candidates whose views are well outside the mainstream of U.S. society.<sup>100</sup> The U.S. Constitution has always been crafted to keep white, propertied men in power;<sup>101</sup> it is not based on the democratic principles reflected in grass-roots organizing.

Constitutional law has many built-in limitations that make structural reform exceedingly difficult. For example, the U.S. Constitution is often interpreted to reflect a narrow conception of formal equality<sup>102</sup> and state action,<sup>103</sup> which are difficult to use if you are seeking to attain structural reform. A formal equality model fails to order effective remedies such as

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<sup>96</sup> See Jessica Taylor & Ayesha Rascoe, *Republicans Seize on 'Angry Mob' Mantra to Keep Their Midterm Base Fired Up*, NPR, OCT. 10, 2018, <https://www.npr.org/2018/10/10/656396084/republicans-seize-on-angry-mob-mantra-to-keep-their-midterm-base-fired-up>.

<sup>97</sup> The President nominates Supreme Court justices who are confirmed with the "advice and consent" of the United States Senate. U.S. CONST. Art. II, § 2, cl. 2.

<sup>98</sup> See Melanie Zanona & Scott Wong, *Democrats see hypocrisy in GOP attacks on 'liberal mob'*, THE HILL, 2018 WL 499690 (Oct. 10, 2018); Kyle Balluck, *Trump praises McConnell: He 'stared down the angry left-wing mob' to get Kavanaugh confirmed*, THE HILL, 2018 WL 4951210 (Oct. 14, 2018).

<sup>99</sup> See Eli Rosenberg, *'Grow up': Orrin Hatch waves off female protestors demanding to speak with him*, WASH. POST, OCT. 5, 2018, [https://www.washingtonpost.com/politics/2018/10/05/grow-up-orrin-hatch-waves-off-female-protesters-demanding-speak-with-him/?utm\\_term=.803ce1eb6dbd](https://www.washingtonpost.com/politics/2018/10/05/grow-up-orrin-hatch-waves-off-female-protesters-demanding-speak-with-him/?utm_term=.803ce1eb6dbd).

<sup>100</sup> See Robert Barnes & Emily Guskin, *More Americans disapprove of Kavanaugh's confirmation than support it, new poll shows*, WASH. POST, Oct. 12, 2018, [https://www.washingtonpost.com/politics/more-americans-disapprove-of-kavanaughs-confirmation-than-support-it-new-poll-shows/2018/10/12/18dbf872-cd93-11e8-a3e6-44daa3d35ede\\_story.html?utm\\_term=.1dc57ff6be77](https://www.washingtonpost.com/politics/more-americans-disapprove-of-kavanaughs-confirmation-than-support-it-new-poll-shows/2018/10/12/18dbf872-cd93-11e8-a3e6-44daa3d35ede_story.html?utm_term=.1dc57ff6be77).

<sup>101</sup> See Andrew Prokop, *Why the Electoral College is the absolute worst, explained*, VOX, Dec. 19, 2016, <https://www.vox.com/policy-and-politics/2016/11/7/12315574/electoral-college-explained-presidential-elections-2016>.

<sup>102</sup> For a discussion of how Justice Ginsburg has attempted to depart from this model of formal equality, see Shira Galinsky, *Returning the Language of Fairness to Equal Protection: Justice Ruth Bader Ginsburg's Affirmative Action Jurisprudence in Grutter and Gratz and Beyond*, 7 N.Y.C. L. REV. 357 (2004).

<sup>103</sup> For a description of the state action doctrine as "born of overt racial discrimination," see Isaac Saidel-Goley & Joseph William Singer, *Things Invisible to See: State Action & Private Property*, 5 TEX. A & M L. REV. 439 (2018).

busing and the elimination of urban/suburban boundaries, thus allowing white flight to re-segregate our nation's public schools.<sup>104</sup> A narrow state action doctrine might overturn a state statute that outlaws abortion but cannot be used to require the state to fund abortions for poor women.<sup>105</sup> If structural change requires a state that funds health care, housing and education for everyone, it remains difficult to use an individual-rights based constitutional law system to achieve those kinds of vital goals.

One response to this problem is to say that political and cultural transformations not only need to precede legal changes (as Bivens/Cloward would argue) but also must *follow* such changes. Thus, after *Brown*, it was more important than ever for parents to work hard to fund the public schools and insure a high-quality education for their children, as well as fight privatization of education. After *Roe*, it was more important than ever for activists to make sure that doctors are trained in how to perform abortions and legislation is passed to fund abortion services, as well as to fight anti-abortion efforts. The individualistic nature of the constitutional right does not preclude the political left from finding other forums for pushing for an extension of that right to attain structural reform.

Trump may be an obvious and recent case study of the power of “rude and rash” but he is not the only example. “Rude and rash,” or what this Article calls the power of insults, has helped stall many areas of civil rights reform. It is possible for civil rights advances to be undermined through public insults when the underlying statutory scheme reflects a narrow conception of individual rights. While this Article will focus on the ability of public insults to help derail a disability-rights statutory scheme, this observation could likely be applied to many other civil rights areas, like immigration law, where the civil rights victory was so narrow and fragile that retrenchment was easy when coupled with a powerful bully pulpit.

#### *D. Application to Statutory Reform*

Much of the literature on the difficulties of civil rights reform has focused on constitutional law. This Article focuses on the challenges of *statutory* reform. Like constitutional law, civil rights legislation is often not built with a strong foundation to attain structural reform. And, after

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<sup>104</sup> See *Milliken v. Bradley*, 418 U.S. 717 (1974) (refusing to require inter-district remedies to promote racial integration).

<sup>105</sup> See *Harris v. McRae*, 448 U.S. 297 (1980) (refusing to require government to fund abortions under Medicaid).

legislation is enacted that is inherently limited in its ability to attain structural reform, it may be even easier for the power elite to further limit that legislation through cultural, political and legal tools, including public insults. While the specific mechanisms that make statutory litigation a limited avenue for structural change are often different from the mechanisms that make constitutional litigation a limited vehicle, they share many of the same fundamental challenges in seeking broad-based effective remedies. Thus, it is easy to find examples that reflect that civil rights advocacy has led to narrow civil rights advances, helping, for example, only the African-American who “acts white.”<sup>106</sup>

This Article will use a disability case study to show how a limited statutory right when combined with a vociferous campaign of public insults can greatly limit what, on paper, appeared to be a significant civil rights victory. In response to a broad-based political campaign, Congress and administrative agencies enacted a statute and promulgated regulations that, on paper, should create a more accessible society. Beginning in 1992, The Americans with Disabilities Act required all new construction and significantly altered facilities to meet stringent accessibility requirements.<sup>107</sup> Although these rules have arguably changed the default rules regarding expectations of accessibility, it also easy to find violations of these simple rules everywhere. Curb cuts, while typically installed, are also often in disrepair.<sup>108</sup> Voting facilities are often inaccessible and many voting machines do not permit individuals with visual impairments to vote independently.<sup>109</sup> When people make hotel reservations, they can only hope that the hotel meets their request for an accessible room, and that the room is genuinely accessible.<sup>110</sup> It continues to be impossible to make a

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<sup>106</sup> See MARK ENGLER & PAUL ENGLER, *THIS IS AN UPRISING: HOW NONVIOLENT REVOLT IS SHAPING THE TWENTY-FIRST CENTURY* (2016) (describing conditions under which nonviolent revolt, rather than more mainstream tactics, can help attain change).

<sup>107</sup> See 42 U.S.C. §§ 12181-12189.

<sup>108</sup> See Winnie Hu, *For the Disabled, New York's Sidewalks Are an Obstacle Course*, N.Y. TIMES, Oct. 8, 2017, <https://www.nytimes.com/2017/10/08/nyregion/new-york-city-sidewalks-disabled-curb-ramps.html>; Disability Rights Advocates, *Court Report Confirms Dismal State of Sidewalks for Disabled New Yorkers* (Aug. 10, 2017), <https://dralegal.org/press/court-report-confirms-dismal-state-sidewalks-disabled-new-yorkers/> (reporting that eighty percent of New York City sidewalks are not ADA compliant).

<sup>109</sup> See Matt Vasilogambros, *How Voters with Disabilities Are Blocked From the Ballot Box*, PEW (Feb. 1, 2018), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/02/01/how-voters-with-disabilities-are-blocked-from-the-ballot-box>.

<sup>110</sup> See Vilissa Thompson, *(In)Accessible Rooms: The Biggest Lie Told by the Hotel Industry*, RAMP YOUR VOICE (January 12, 2017), <http://rampyourvoice.com/2017/01/12/inaccessible-rooms-biggest-lie-told-hotel-industry/>.

reservation at a restaurant on the assumption that one can actually enter the front door and use the restroom if one uses a wheelchair, crutches or a cane.<sup>111</sup>

The power elite has been tremendously successful at harnessing its cultural, political, and legal tools to undermine this attempt to attain structural change. As this Article will argue, this effort by the power elite can even be successful when the underlying right appears to be broadly structural in nature. While one *might* have thought that the point of making a hotel accessible to its guests was so that everyone could have an expectation of visiting that hotel and enjoying its facilities, the courts have interpreted that right as only applying to the lone guest who has been denied access and wants to return when the particular impediment to entry has been eliminated. In other words, a potential structural right has been transformed into a highly individualistic right. How could that happen? This Article argues it happens through collaboration between cultural, political and legal tools. This collaboration may be especially effective in the hands of the power elite because of the inherent bias towards limited, individualistic rights built into the legal system in both statutory and constitutional law. This collaboration may also be effective because of the willingness of the popular press to accept the story told through insults of greedy, undeserving people with disabilities.

Like other civil rights struggles, the affected community has not just sat on its hands and accepted the public insults. Building on Alinsky training,<sup>112</sup> the disability rights community held a 28-day sit-in at a San Francisco federal building to force the federal government to issue regulations to enforce Section 504 of the Rehabilitation Act,<sup>113</sup> engaged in many public demonstrations through ACTUP in support of people with AIDs to change public policy on available medication<sup>114</sup> and, most recently, engaged in mass demonstrations to stop Congress from repealing

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<sup>111</sup> See David Perry, *Restaurants Haven't Lived Up to the Promise of the Americans with Disabilities Act*, EATER, May 31, 2017, <https://www.eater.com/2017/5/31/15701042/american-disabilities-act-restaurants-compliance>.

<sup>112</sup> Conversation with Arlene Mayerson on January 5, 2019 in New Orleans, LA.

<sup>113</sup> See Kitty Cone, *Short History of the 504 Sit in*, Disability Rights Education & Defense Fund, <https://dredf.org/504-sit-in-20th-anniversary/short-history-of-the-504-sit-in/> (last visited Dec. 11, 2018).

<sup>114</sup> See Douglas Crimp, *Before Occupy: How AIDS Activists Seized Control of the FDA in 1988*, THE ATLANTIC, Dec. 6, 2011, <https://www.theatlantic.com/health/archive/2011/12/before-occupy-how-aids-activists-seized-control-of-the-fda-in-1988/249302/>.

important aspects of the Affordable Care Act.<sup>115</sup> The disability rights community has long been active and even belligerent.<sup>116</sup>

But the disability right community's belligerent activism has not been effective at maintaining a positive image of the importance of accessibility reform. "Drive by litigation" is the dominant theme covered by the media.<sup>117</sup> And the story of disability activism is largely absent from the many books and articles written about civil rights work. One explanation, which is consistent with an argument made by Michael Waterstone,<sup>118</sup> is that the success of the disability rights community in enacting the ADA may also explain its failure to attain effective, structural reform that could resist the onslaught of insults. Waterstone argues that passing a major piece of legislation by "flying under the radar" is ultimately ineffective because "society cannot be transformed if it is not paying sufficient attention."<sup>119</sup> While Waterstone mostly focused on the employment discrimination provisions of the ADA, his argument would be equally helpful in understanding the lack of public commitment to the physical changes to structures that would be necessary to implement ADA Title III. He argues that because disability is a more "amorphous group identity than that found in other civil rights movements," that it may be especially difficult for those who "are not necessarily natural allies" to urge a particular vision forcefully for what might constitute equality.<sup>120</sup> Drawing on Reva Siegel's work, Waterstone argues that the passage of the ADA failed to be the result of the kinds of civil rights conflict that Siegel argued was essential to the attainment of civil rights transformations.<sup>121</sup> If Waterstone is correct, then disability activists have an especially difficult challenge to enact and then enforce legislation that creates broad structural

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<sup>115</sup> See Maya Rhodan, *Protestors Got Dragged Out of a Hearing on the Republican Health Care Bill*, TIME, Sept. 25, 2017, <http://time.com/4956397/graham-cassidy-republican-health-care-protests/>.

<sup>116</sup> See Colin Deppen, *Why People With Disabilities Are Protesting Like Hell*, HUFFPOST, Oct. 11, 2018, [https://www.huffingtonpost.com/entry/people-with-disabilities-protest\\_us\\_5baa3d65e4b07dc0b87e1264](https://www.huffingtonpost.com/entry/people-with-disabilities-protest_us_5baa3d65e4b07dc0b87e1264).

<sup>117</sup> Even liberal media often accept the use of the term "drive-by lawsuits." See, e.g., Evan Gibbs, *Stopping Drive-By Lawsuits*, ABOVE THE LAW, OCT. 2, 2017, <HTTPS://ABOVETHELAW.COM/2017/10/STOPPING-DRIVE-BY-LAWSUITS/>.

<sup>118</sup> See Michael E. Waterstone, *The Costs of Easy Victory*, 57 WM. & MARY L. REV. 587 (2015).

<sup>119</sup> *Id.* at 591.

<sup>120</sup> *Id.* at 591. While recognizing that no civil rights community is monolithic, he argues that disability is especially diffuse because it is made up of different communities with different impairments who "have not had much in common and have not worked together (or even gotten along) as a social or political matter." *Id.* at 605.

<sup>121</sup> *Id.* at 599.

changes to society. Their own community, with its diffuseness, is an additional impediment to structural reform.

The structural impediments to reform, especially in the disability context, may make it especially difficult for the civil rights community to withstand the verbal onslaughts from the power elite. To understand these challenges, we need to better understand how limited statutory, civil rights structures can combine with public insults to undermine civil rights reform, as next discussed in Part II.

## II. IMPEDIMENTS TO STRUCTURAL REFORM

### A. A Lengthy List

Many legal and political devices can help undermine effective structural reform and others have documented some of those consequences.<sup>122</sup> This Article adds two dimensions to that prior discussion. First, it lists many of the legal doctrines and rules that undermine effective structural reform. The size of the list is important, itself, because it reflects the success of the power elite to limit civil rights advocacy. Second, this Article focuses on a few of these doctrines and rules to show how their development and use are tied to public insults.

The list of doctrines and rules to preclude structural reform is long: class action limitations in *Wal-Mart Stores, Inc. v. Dukes*,<sup>123</sup> standing and mootness rules,<sup>124</sup> limitations on attorney fees in *Buckhannon Board &*

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<sup>122</sup> On the challenges of attaining attorney fees, see, e.g., Jeffrey S. Brand, *The Second Front in the Fight for Civil Rights: The Supreme Court, Congress, and Statutory Fees*, 69 TEX. L. REV. 291 (1990) (discussing difficulties in attaining attorney fees in civil rights cases); Julie Davies, *Federal Civil Rights Practice in the 1990s: The Dichotomy Between Reality and Theory*, 48 HASTINGS L. J. 197 (1997) (discussing difficulties of civil rights practice); Karen M. Klotz, *The Price of Civil Rights: The Prison Litigation Reform Act's Attorney's Fee-Cap Provision as a Violation of Equal Protection of the Laws*, 73 TEMP. L. REV. 759 (2000) (describing onerous limitations imposed by the Prison Litigation Reform Act); Lawrence D. Rosenthal, *Adding Insult to No Injury: The Denial of Attorney's Fees to "Victorious" Employment Discrimination and Other Civil Rights Plaintiffs*, 37 FLA. ST. U. L. REV. 49 (2009) (discussing difficulty of attaining attorney fees when plaintiff recovers nominal damages)

<sup>123</sup> 131 S. Ct. 2541 (2011).

<sup>124</sup> See Gene Nichol, *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301 (2002). See also Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 229 (1990) (arguing that "the unstated acceptance of the private rights model leads to a refusal to

*Care Home v. West Virginia Department of Health and Human Services*,<sup>125</sup> not allowing Legal Services Corporation to participate in class actions,<sup>126</sup> withdrawing DOJ power to enforce Voting Rights Act in *Shelby County v. Holder*,<sup>127</sup> private attorney general model of enforcement of many civil rights statutes,<sup>128</sup> only allowing private plaintiffs to attain injunctive relief in suits against the state,<sup>129</sup> precluding a private right of action to enforce disparate impact regulations,<sup>130</sup> arbitration provisions that keep plaintiffs out of court and not able to attain precedent,<sup>131</sup> impediments to prison litigation through the Prison Litigation Reform Act,<sup>132</sup> restrictive pleading rules,<sup>133</sup> and the barriers to habeas relief.<sup>134</sup> After all these attempts to narrow the list of potential plaintiffs to a beleaguered and underfunded few, it is no surprise that the defense bar would then seek to strike down the lone remaining plaintiff with strategies such as insulting the plaintiff and their lawyer. That discussion comes next with a more focused discussion of the interplay between limited legal strategies and the power of insults.

### B. *Connection to Public Insults*

As listed above, there are many procedural devices and legal rules that limit the ability of the civil rights community to use the courts to attain structural reform. The role of public insults in strengthening these limiting tactics, however, has not been previously recognized. There is not space in

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recognize the cognizability of collective rights and collective harms”)

<sup>125</sup> 532 U.S. 598 (2001) (enforcing arbitration clauses for claims alleging employer violated Fair Labor Standards Act).

<sup>126</sup> See Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 504(a), 110 Stat. 1321, 50 (1996).

<sup>127</sup> 570 U.S. 529 (2013).

<sup>128</sup> See *infra* Part II(C)(1).

<sup>129</sup> See Ruth Colker, *The Section Five Quagmire*, 47 UCLA L. REV. 653 (2000).

<sup>130</sup> See *Alexander v. Sandoval*, 532 U.S. 275 (2001).

<sup>131</sup> See *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018)

<sup>132</sup> See, e.g., John Boston, *The Prison Litigation Reform Act: The New Face of Court Stripping*, 67 BROOK. L. REV. 429 (2001) (describing the Prison Litigation Reform Act as creating a code of special restrictive rules for prison litigants to create unequal justice under the law).

<sup>133</sup> See Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L. J. 1 (2010) (criticizing how recent decisions have made it exceedingly difficult for a plaintiff to have a meaningful day in court).

<sup>134</sup> See, e.g., Leah M. Litman, *Legal Innocence and Federal Habeas*, 104 VA. L. REV. 417 (2018) (arguing for an expanded conception of innocence if federal habeas jurisprudence).

one article to connect each of these twelve tactics to the use of public insults; this Part will focus on just three of these devices: (1) the limitations of a private attorney general model of civil rights enforcement, (2) limitations on the use of the Legal Services Corporation to attain class-wide relief, and (3) the erasure of civil rights history to justify limitations in the use of the Voting Rights Act. Because the Americans with Disabilities Act uses a private attorney general model to attain accessibility, Part III of this Article will continue this story of the effectiveness of public insults to derail civil rights enforcement.

### 1. Private Attorney Generals as the Bounty Hunter

Under the private attorney general model of law enforcement, plaintiffs are permitted to use private lawyers to secure their rights and those lawyers, in turn, are allowed to attain attorney fees if their client prevails.<sup>135</sup> Because their clients are often poor and may not be entitled to large financial remedy awards, this model, in theory, benefits low-income plaintiffs. Although contingency fees may work in some areas of the law, where large awards are possible, contingency fees are not viable in many civil rights cases.<sup>136</sup> Without this model, government would need to have a much larger role in the enforcement of rights, especially for low-income clients. The awarding of attorney fees overturns the “American rule” under which all sides bear their own legal expenses.<sup>137</sup>

While the private attorney general model of law enforcement for civil rights violations has been around since the enactment of the Civil Rights Act of 1964, it did not receive much critical attention until John Coffee published his article in 1983 entitled “Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working.”<sup>138</sup> His focus was on anti-trust litigation but he suggested that the problems in that arena by using private attorney generals could eventually extend to civil rights litigation. In many ways, he predicted how

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<sup>135</sup> See William B. Rubenstein, *On What a “Private Attorney General” Is – And Why It Matters*, 57 VAND. L. REV. 2128 (2004) (describing various forms of the private attorney general model).

<sup>136</sup> As will be discussed in Part III, *infra*, only injunctive relief is available under ADA Title III. See 42 U.S.C. § 12188(a)(1); 28 C.F.R. § 36.501(a).

<sup>137</sup> See John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person’s Access to Justice*, 42 AM. U. L. REV. 1567 (1993).

<sup>138</sup> John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215 (1983).

courts would cut back on the ability of lawyers to earn a living as private attorney generals because of the perceived sense that they were “bounty hunters” rather than high-minded public interest lawyers. “Bounty hunters” was clearly a powerful slur that would undermine the otherwise positive image of private lawyers using litigation to further the public good.

Professor Coffee gives Judge Frank credit for coining the term “private attorney general” in 1943.<sup>139</sup> “[H]is felicitous phrase conferred an intellectual legitimacy on practices that otherwise were scorned by the established bar as champerty and maintenance.”<sup>140</sup> Coffee recognized the importance of the characterization of the lawyer’s role in such work. “Much can hang on the choice of words, and the phrase ‘private attorney general’ is as value-loaded in an affirmative sense as the term ‘bounty hunter’ is in a negative one. Both terms, however, represent only different sides of the same legal coin.”<sup>141</sup> Not surprisingly, Coffee’s work was soon cited in cases in which courts considered whether so-called private attorney general lawsuits should be able to move forward and the appropriate size of attorney fees awarded to plaintiff’s counsel for their successful work.<sup>142</sup>

In 2003, Michael Selmi built on Coffee’s work to argue that the private attorney general model in class action lawsuits has enriched lawyers while not producing meaningful change for their clients.<sup>143</sup> Then, in 2007, Michael Waterstone write an article entitled “A New Vision of Public Enforcement”<sup>144</sup> in which he looked at whether the private attorney general model is effective in ADA litigation. He observes that the private attorney general model, which was incorporated in the early civil rights laws, had support from liberals and conservatives. “Conservatives championed the role of the private attorney general because it privatized enforcement, thus shrinking the role of the federal government, and liberals supported private actors enforcing civil rights because it freed up civil rights enforcement from any conservative political agenda or

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<sup>139</sup> *Id.* at 216 n. 1 (citing *Associated Industries of New York State, Inc. v. Ickes*, 134 F.2d 694, 704 (2<sup>nd</sup> Cir. 1943)).

<sup>140</sup> *Id.* at 217.

<sup>141</sup> *Id.* at 218.

<sup>142</sup> *See, e.g., BTZ, Inc. v. Great Northern Nekoosa Corp.*, 47 F.3d 463, 466 n.3 (1<sup>st</sup> Cir. 1995); *In re General Motors Corporation Pick-Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768 (3<sup>rd</sup> Cir. 1996)

<sup>143</sup> Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and Its Effects*, 81 TEX. L. REV. 1249, 1331-32 (2003).

<sup>144</sup> Michael Waterstone, *A New Vision of Public Enforcement*, 92 MINN. L. REV. 434 (2007).

administration.”<sup>145</sup> In other words, the private attorney general model was a neo-liberal conception of law reform under which economic incentives in a private marketplace would be used to attain civil rights remedies.

At the time these rules were embedded in federal law, public interest lawyers could use the class action procedural device while working for the federally-funded Legal Services Corporation.<sup>146</sup> Although the private attorney general model may not have made civil rights enforcement dependent on the political views of the executive branch, it did make them dependent on the continued funding of LSC and the viability of the class action lawsuit by LSC lawyers. But, as discussed below, that rule soon changed; LSC may not bring class action litigation.

Waterstone argues that the cure for this problem of underenforcement through the private attorney general model is to have more public enforcement.<sup>147</sup> He argues that there needs to be a “public commitment to systemic litigation” especially in areas, like disability accessibility, where “the profit motive for plaintiffs and private attorneys is low, noncompliance appears to be systemic, there is an absence of case development, and individual plaintiffs will have standing difficulties in challenging various forms of discrimination.”<sup>148</sup>

While Waterstone’s argument has much appeal, it suffers from the problem of seeing public enforcement through the executive branch as immune from the cultural and political problems highlighted in this Article as reflected in the practice of public insults. As Samuel Bagenstos has argued, the public enforcement model is dependent on an executive branch that wants to enforce the civil rights laws.<sup>149</sup> In the current political moment where DOJ is using its systemic enforcement authority to threaten the rights of voters,<sup>150</sup> reverse affirmative action,<sup>151</sup> and place children

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<sup>145</sup> *Id.* at 442.

<sup>146</sup> *Id.* at 443.

<sup>147</sup> *Id.* at 497.

<sup>148</sup> *Id.* at 497.

<sup>149</sup> See Samuel R. Bagenstos, *The Perversity of Limited Civil Rights Remedies: The Case of “Abusive” ADA Litigation*, 54 UCLAL. REV. 1 (2006).

<sup>150</sup> See Inae Oh, *Trump Threatens “Maximum Criminal Penalties” In Possible Attempt to Suppress Votes*, MOTHER JONES, Nov. 5, 2018, <https://www.motherjones.com/politics/2018/11/trump-voter-fraud-midterms-threat/>. (“On the eve of the midterm elections, President Donald Trump said he ordered law enforcement officials to monitor the virtually nonexistent problem of voter fraud, warning that ‘maximum criminal penalties’ would be leveled against anyone found attempting to cast a ballot illegally.”)

<sup>151</sup> See Erica L. Green, Matt Apuzzo & Katie Benner, *Trump Officials Reverse Obama’s Policy on Affirmative Action in Schools*, N.Y. TIMES, July 3, 2018,

who cross the border into detention centers,<sup>152</sup> it is hard to see public enforcement as a panacea. The same forces that have shrunk the effectiveness of the private attorney general model have captured the executive branch. Civil rights advocates cannot escape to another branch of government when one seems to be closed, because the same cultural and political forces that have closed one branch have infected the other branch. In fact, when the government is most closed to civil rights concerns, and enforcement is most needed, a public enforcement model would be weakest. This problem does not just permeate new cases that might be brought but permeates existing litigation that has not yet been resolved.<sup>153</sup>

Nonetheless, it is important, as well documented in Waterstone's work, to recognize that the "bounty hunter" charge from Coffee in 1983 has now permeated the public's conception of the private attorney model of enforcement, including the civil rights arena. In statutory schemes that permit prevailing parties to attain attorney fees, plaintiffs' lawyers often battle against a conception of them as greedy, bounty hunters. Under state law, courts have explicitly referred to the possibility that private attorney generals would be "bounty hunters" in refusing to recognize a right to attorney fees for prevailing parties.<sup>154</sup> The ADA case study in Part III will

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<https://www.nytimes.com/2018/07/03/us/politics/trump-affirmative-action-race-schools.html>. ("The Trump administration said Tuesday that it was abandoning Obama administration policies that called on universities to consider race as a factor in diversifying their campuses, signaling that the administration will champion race-blind admissions standards.")

<sup>152</sup> See Grace Segers, *Feds holding 12,800 migrant children in detention centers, report says*, CBS NEWS, Sept., 13, 2018, <https://www.cbsnews.com/news/feds-holding-12800-migrant-children-in-detention-centers-report-says/>.

<sup>153</sup> See, e.g., *Department of Fair Employment and Housing v. Law School Admission Council, Inc.*, No. 12-cv-01830-JCS, 2018 WL 1156605, at n. 4 (N.D. Cal. March 5, 2018) (observing that Department of Justice failed to take a position on a contempt motion in a case in which they were one of the original plaintiffs).

<sup>154</sup> See *State Board of Tax Commissioners v. Town of St. John*, 751 N.E.2d 657, 662 (Ind. 2001) (denying taxpayers request for attorney fees after state's real property assessment scheme declared unconstitutional; expresses concern about "bounty hunters"); *Stephenson v. Bartlett*, 177 N.C. App. 239, 244 (Ct. Appeals 2006) (rejecting attorney fees due to concern about "bounty hunters" in public interest litigation); *League of Women Voters of Florida v. Detzner*, 188 So.3d 68, 72 (Dist. Ct. App. Fla. 2016) (expressing concern about "bounty hunters" in rejecting argument for attorney fees); *Consumer Defense Group v. Rental Housing Industry Members*, 137 Cal App.4th 1185, 1189 n.1 (Ct. Appeal, 4th Dist., Div. 3, Cal. 2006) (lawsuit against apartment owners for failure to warn consumers of exposure to carcinogens in violation of Proposition 65; awarding of attorney fees to plaintiffs found to be "objectively unconscionable"; "At oral argument, Anthony G. Graham proudly proclaimed that he was a 'bounty hunter. The statute was created for me.' We will have more to say about exactly who Proposition 65 was created for later, but it wasn't bounty hunters.")

provide many examples of that occurring.

## 2. The Legal Services Corporation as a Left-Wing Political Agenda

In 1996, Congress included the following language in LSC's funding statute: "None of the funds appropriated ... to the Legal Services Corporation may be used to provide financial assistance to any person or entity ... that initiates or participates in a class action suit."<sup>155</sup> This restriction has continued in each subsequent year. On the state level, many states have what are called "IOLTA" programs where the interest earned from lawyers' trust funds are made available for public interest work. Many states have imposed similar rules on the use of IOLTA funds.<sup>156</sup>

At one time, class action lawsuits brought by legal services corporations were a useful means of attaining structural change. For example, Community Legal Services of Philadelphia is funded by the Philadelphia Bar Association, not the Legal Services Corporation, so it can bring class action litigation.<sup>157</sup> It has used its ability to bring class action lawsuits to attain reform of Medicaid rules, protect people's ability to stay in their homes, and challenge the impact of credit rules on people with criminal records.<sup>158</sup> These kinds of cases, which cannot be brought by LSC's, have had an enormous impact on their community.

The LSC funding restriction is typical of the kinds of compromises that the political left has to accept in order to retain any judicial tools. Legal services lawyers agreed "to give up the class-action suits as part of a compromise with Republicans in Congress, who had threatened to cut off all or most of the organization's Federal financing."<sup>159</sup> This is a classic example of the political left needing to accept a narrow model of reform in order to sustain any kind of progressive work.

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<sup>155</sup> Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 504(a), 110 Stat. 1321, 50 (1996).

<sup>156</sup> See *Fact Sheet: The Restriction Barring LSC-Funded Lawyers from Bringing Class Actions*, BRENNAN CENTER FOR JUSTICE (Sept. 26, 2003), <https://www.brennancenter.org/analysis/fact-sheet-restriction-barring-lsc-funded-lawyers-bringing-class-actions>.

<sup>157</sup> See *Community Legal Services*, <https://clsphila.org/about-cls> (last visited Dec. 11, 2018).

<sup>158</sup> See *About Community Legal Services, 2002-present*, <https://clsphila.org/about-cls/2002-present> (last visited Dec. 11, 2018).

<sup>159</sup> See Don Van Natta, Jr., *Legal Services Wins on Suit For the Poor*, N.Y. TIMES, Dec. 27, 1996, <https://www.nytimes.com/1996/12/27/nyregion/legal-services-wins-on-suit-for-the-poor.html>.

The power elite has deployed public insults to justify these restrictions on the LSC. “Conservative political pundits and some members of Congress argue that class action ‘promote a left-wing political agenda.’”<sup>160</sup> Rather than defend its right to use the law to further a politically left agenda, LSC supporters contend “that the group simply helps protect the rights of poor people and that class-action suits on behalf of large numbers of plaintiffs are the group’s most powerful weapon.”<sup>161</sup>

Further, the power elite has argued that class-action lawsuits are a waste of scarce resources, apparently accepting the misconception that lawyers, rather than their clients, often benefit from class action litigation.<sup>162</sup> They therefore insulted the lawyers who bring these lawsuits by impugning their motives. But lawyers who work for LSC never can pocket legal fees for themselves, and the relief they often seek is “injunctive relief that benefits all class members by putting a stop to illegal activity.”<sup>163</sup> Of course, LSC’s, like all legal entities, are better able to do their work if they collect legal fees. Such fees can be available when a lawyer obtains relief for their client, including injunctive relief. When faced with these allegations of improper motives, LSC lawyers find themselves unable or unwilling to defend their right to collect money to be able to continue this kind of important work. They have to fit into a charity model where legal organizations scrape by to do this kind of work and do not take steps to make their organization financially sustainable.

### 3. The Voting Rights Act In Support of Every “Illiterate”

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<sup>160</sup> See *Fact Sheet: The Restriction Barring LSC-Funded Lawyers from Bringing Class Actions*, BRENNAN CENTER FOR JUSTICE, Sept. 26, 2003, <https://www.brennancenter.org/analysis/fact-sheet-restriction-barring-lsc-funded-lawyers-bringing-class-actions>. See also See Don Van Natta, Jr., *Legal Services Wins on Suit For the Poor*, N.Y. TIMES, Dec. 27, 1996, <https://www.nytimes.com/1996/12/27/nyregion/legal-services-wins-on-suit-for-the-poor.html>. (“many conservatives contend that the nonprofit Legal Services Corporation has a left-wing agenda”)

<sup>161</sup> See Don Van Natta, Jr., *Legal Services Wins on Suit For the Poor*, N.Y. TIMES, Dec. 27, 1996, <https://www.nytimes.com/1996/12/27/nyregion/legal-services-wins-on-suit-for-the-poor.html>.

<sup>162</sup> *Id.*

<sup>163</sup> See *Fact Sheet: The Restriction Barring LSC-Funded Lawyers from Bringing Class Actions*, BRENNAN CENTER FOR JUSTICE (Sept. 26, 2003), <https://www.brennancenter.org/analysis/fact-sheet-restriction-barring-lsc-funded-lawyers-bringing-class-actions>.

In *Shelby County v. Holder*,<sup>164</sup> the Supreme Court ruled that Section 4(b) of the 1965 Voting Rights Act was unconstitutional. That provision contained the coverage formula that determined which jurisdictions were subject to preclearance by the U.S. Department of Justice (DOJ) before they could implement any changes in their voting laws or practices. By eliminating the coverage formula, the Court implicitly ended preclearance review by DOJ under Section 5 of the Voting Rights Act before voting laws or practices are changed in states with a history of discrimination in voting.

The Supreme Court's decision reflects a disarming inattention to the serious history of voting discrimination in the United States. This case stemmed from Shelby County in *Alabama* -- the "site of the 'Bloody Sunday' beatings of civil-rights demonstrators that served as the catalyst for the VRA's enforcement."<sup>165</sup> As recently as 2011, there was alarming evidence available, through records of racial insults by lawmakers, to demonstrate the continued need for vigilance. Recording devices worn by state legislators revealed "Members of the state Senate derisively refer to African-Americans as 'Aborgines'" and express concern that if a particular referendum were placed on the ballot that "every black, "every illiterate" would come out to vote.<sup>166</sup> Although the Supreme Court was made aware of that direct evidence of racial animus existing in Alabama at the time of this lawsuit, the Court hid behind a supposed lack of evidence to justify the preclearance rules.

Justice Ginsburg's dissent makes clear the relationship between the Court's ruling and the effect on continuing structural reform: "Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet."<sup>167</sup> As predicted by Justice Ginsburg, the effect of this decision has been devastating to voting rights for many racial minorities because many states, such as Georgia, have enacted voting restrictions that might have had trouble withstanding the previous preclearance rules due to their disparate impact against African-American voters.<sup>168</sup>

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<sup>164</sup> 570 U.S. 529 (2013).

<sup>165</sup> 570 U.S. at 581 (Ginsburg, J., dissenting).

<sup>166</sup> *Id.* at 584.

<sup>167</sup> *Id.* at 590.

<sup>168</sup> See Mark Niesse, Maya T. Prabhu & Jacquelyn Elias, *Voting precincts closed across Georgia since election oversight lifted*, POLITICALLYGEORGIA (Aug. 31, 2018), <https://politics.myajc.com/news/state--regional-govt--politics/voting-precincts-closed-across-georgia-since-election-oversight-lifted/bBkHxptlim0Gp9pKu7dfn/>

With the lack of preclearance review, and a Justice Department that is no longer concerned about voting rights suppression itself, the *Shelby County* decision is an open license to aggressively restrict the voting rights of poor and minority voters. The Brennan Center has found “that previously covered states have purged voters off their rolls at a significantly higher rate than non-covered jurisdictions.”<sup>169</sup> The *Shelby County* decision simply provided one more nail in the coffin of structural change. Even with a change to an administration more interested in protecting minority voters rights, the Justice Department will have limited tools protect the voting rights of minority voters. In order to reverse this change, civil rights activists would have to convince Congress to enact a statutory provision that could withstand scrutiny from an increasingly conservative Supreme Court.

### III. ADA CASE STUDY

#### A. A Fragile Compromise

When ADA Title III was introduced as a bill in 1988,<sup>170</sup> it provided for compensatory damages for accessibility violations. Disability rights advocates argued that Congress should adopt the compensatory damages model available under Fair Housing Act (FHA),<sup>171</sup> which prohibits discrimination in the sale or rental of housing to any buyer or renter and permits compensatory and punitive damages rather than the more limited injunctive relief model available under Title II of the Civil Rights Act of 1964.<sup>172</sup> Nonetheless, injunctive relief<sup>173</sup> was ultimately enacted in exchange for a broad list of covered entities. As Senator Harkin acknowledged on the floor of the Senate, the ADA co-sponsors agreed “to cutback the remedies included in the original bill in exchange for a broad scope of coverage ... in other words to extend protections to most commercial establishments large and small open to the public.”<sup>174</sup> He

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<sup>169</sup> *The Effects of Shelby County v. Holder*, BRENNAN CENTER FOR JUSTICE (Aug. 6, 2018).

<sup>170</sup> See H.R. 4498, 100<sup>th</sup> Cong. § 405 (1989).

<sup>171</sup> Fair Housing Act of 1968, 42 U.S.C. § 3602(h).

<sup>172</sup> See 42 U.S.C. § 2000a (prohibition against discrimination or segregation in places of public accommodation).

<sup>173</sup> See 42 U.S.C. § 12188(a)(2) (providing for injunctive relief in private suits by affected parties).

<sup>174</sup> 135 CONG. REC. 19,803 (1989).

characterized this decision as a “fragile compromise.”<sup>175</sup>

Thus, ADA Title III provides broad rules that require accessibility at a range of facilities open to the public along<sup>176</sup> with a limited statutory remedy,<sup>177</sup> as a result of a fragile compromise.<sup>178</sup> This enforcement compromise exposes the rules to an onslaught of public insults to limit effective relief. Accordingly, the key remedy typically sought in such litigation is a court order requiring defendants to make their facility accessible. Such a court order, in turn, can create an opportunity for plaintiff’s attorney to collect attorney fees as a prevailing party. Under the Supreme Court’s attorney fee jurisprudence, it is not enough that they were a “catalyst” to causing the defendant to make accessibility improvements (before filing a lawsuit); they need a favorable court order.<sup>179</sup> If a defendant succeeds in delaying litigation through stalling tactics, and corrects the inaccessibility before a hearing is held on the case, the defendant can avoid both an injunction and attorney fees.<sup>180</sup>

The discussion below will show that the use of insults by defendants is rampant in ADA litigation. Defendants attack the defendant, his or her lawyer, and brag about their own good faith in wanting to maintain an accessible structure. These insults do not always work but they are part of the environment that plaintiffs and their lawyers know they need to contend with in order to prevail. Plaintiff’s attorneys are often wary of bringing ADA accessibility cases for fear that they will be castigated as “drive-by litigators.”<sup>181</sup> The media largely furthers this tale of insults, likely creating implicit bias at all stages of the judicial process.

Anderson Cooper ran a story for CBS’ 60 Minutes on December 4,

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<sup>175</sup> *Id.*

<sup>176</sup> The definition of “public accommodation” covers twelve categories of entities, ranging from Laundromats to bowling alleys. See 42 U.S.C. § 12181(7) (defining “public accommodations”). In addition, the term “commercial facilities” is defined as “facilities (a) that are intended for nonresidential use; and (b) whose operations will affect commerce.” *Id.* § 12181(2). Prohibitions against discrimination do not generally apply to all commercial facilities. See *id.* § 12182(a). The accessibility requirements for new construction and alterations, however, do apply to commercial facilities as well as public accommodations. See *id.* § 12183.

<sup>177</sup> 42 U.S.C. § 12188(a).

<sup>178</sup> See Ruth Colker, *ADA Title III: A Fragile Compromise*, 21 BERKELEY J. EMP. & LAB. L. 377 (2000).

<sup>179</sup> See *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001).

<sup>180</sup> See *infra* Part IIIB.

<sup>181</sup> Conversation with Arlene Mayerson on January 5, 2019 in New Orleans, LA.

2016 castigating so-called “drive-by” lawsuits.<sup>182</sup> Cooper’s piece was largely devoted to interviewing business owners who complained about complying with the ADA’s accessibility rules. A few sentences are offered to retired Department of Justice section chief of the Disabilities Rights Section, John Wodatch, who tries to explain why the requirements in the law are important but then, in an attempt to seem reasonable, concedes that some lawsuits may be “shakedowns or frivolous.”<sup>183</sup> Cooper emphasized that aspect of Wodatch’s comments instead of his statement that businesses have had 25 years notice to comply with the ADA but still maintain many inaccessible features.<sup>184</sup> Although Cooper spent hours interviewing disability rights attorney Lainey Feingold and Ingrid Tisher, a woman with muscular dystrophy, who offered a very strong defense of ADA accessibility lawsuits, Cooper did not use that footage to air their remarks. Tischer was especially incensed because Cooper used her image in the coverage without using her words. She complained: “60 Minutes came to OUR house, used us, and told the world people with disabilities are either dupes, greedy, or both.”<sup>185</sup> Rather than offer balanced coverage, CBS merely responded to complaints about their unbalanced coverage with a brief statement that “disabled viewers criticize 60 Minutes story” with handful of links to tweets they had received, some of which supported the original story (and were not from self-identified disabled viewers).<sup>186</sup>

*The Hill* ran an opinion piece of November 13, 2017 entitled “‘Drive-by’ lawsuits under disabilities statute costing economy.”<sup>187</sup> *Forbes* Magazine published a guest post by Ken Barnes in December 14, 2017 entitled “Congress Should Take Action on ADA ‘Drive-By’ Lawsuits.” Barnes is described as the executive director of “Citizens Against Lawsuit Abuse.”<sup>188</sup> Thus, the media onslaught against accessibility litigation permeated the mainstream media, the financial media and the political

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<sup>182</sup> *What’s a “Drive-By Lawsuit”?*, 60 MINUTES (Dec. 4, 2016), <https://www.cbsnews.com/news/60-minutes-americans-with-disabilities-act-lawsuits-anderson-cooper/>

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> See Robyn Powell, *Here’s What 60 Minutes Got Wrong About Everything*, YAHOO!, Dec. 12, 2016, <https://www.yahoo.com/news/heres-60-minutes-got-wrong-220018024.html>.

<sup>186</sup> See *Disabled Viewers Criticize 60 Minutes Store*, 60 MINUTES, Dec. 8, 2016, <https://www.cbsnews.com/news/disabled-viewers-criticize-60-minutes-story/>.

<sup>187</sup> See John McMickle, *‘Drive-by’ lawsuits under disabled statute costing economy*, THE HILL, Nov. 13, 2017, <https://thehill.com/opinion/finance/360079-drive-by-lawsuits-under-disabilities-statute-costing-economy>.

<sup>188</sup> See Ken Barnes, *Congress Should Take Action on ADA ‘Drive-By’ Lawsuits*, FORBES, Dec. 14, 2017, <https://www.forbes.com/sites/realspin/2017/12/14/congress-should-take-action-on-ada-drive-by-lawsuits/#58b568e6f6fa>.

media. Rather than understand that private attorneys are the primary mechanism for enforcing ADA Title III and that the rampant continued lack of compliance makes it possible for lawyers to sue multiple businesses for violations, these media accounts criticize lawyers for being effective at using the ADA's enforcement mechanism. Playing on the notion that people with disabilities are incompetent to assess their own needs, the news stories play on the trope that these lawyers are taking advantage of disabled plaintiffs purely for their own financial gain through attorney fees. Lost in these stories is that Congress decided *not* to permit compensatory and punitive damage awards for the disabled plaintiffs so that only their lawyers could attain financial awards.

The responses to this media onslaught cannot be found in widely available media networks. Instead, one would have to look for blog entries from the Equal Rights Center<sup>189</sup> or attend a distance education event sponsored by the ADA National Network.<sup>190</sup> One has to look in obscure media outlets like the *Times Herald-Record*<sup>191</sup> to find quotes from disability activists who focus on the importance of such lawsuits. As one disability rights advocate said: "If a black man was denied access to a business on the basis of being black, we wouldn't get upset at the individual, we'd get upset at society for allowing 30 businesses to discriminate on the basis of his minority status. But when it comes to a person with a disability, we suddenly think it's frivolous."<sup>192</sup> Senator Jeff Flake used the CBS story to push his bill that would make it even more difficult to bring accessibility lawsuits.<sup>193</sup>

The media onslaught against the ADA's accessibility requirements is a perfect example of how public insults are especially effective when a legal rule hangs by a narrow thread. The Cooper segment emphasized that a few states allow plaintiffs in accessibility lawsuits to seek modest compensatory damages and ignored the overwhelming majority of states

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<sup>189</sup> See Katherine Pearson, Director of Accessibility Rights, <https://equalrightscenter.org/response-drive-lawsuits/> (last visited Dec. 11, 2018).

<sup>190</sup> See *An Update on ADA Drive-by Lawsuits*, ADA NATIONAL NETWORK (Nov. 15, 2017), <https://adata.org/event/update-ada-drive-lawsuits>.

<sup>191</sup> See Daniel Axelrod, *Local woman sues 5 businesses over ADA violation claims*, TIMES HERALD-RECORD, April 9, 2017, <https://www.recordonline.com/news/20170409/local-woman-sues-5-businesses-over-ada-violation-claims>.

<sup>192</sup> *Id.*

<sup>193</sup> See *Flake Introduces Bill to Stop Abuse of ADA*, Press Releases (Sept. 29, 2016), <https://www.flake.senate.gov/public/index.cfm/2016/9/flake-introduces-bill-to-stop-abuse-of-ada>.

where only injunctive relief is available.<sup>194</sup> And Congress' reaction to such adverse publicity is to see to add a notice requirement to ADA Title III that would make such lawsuits virtually impossible in the future because private plaintiff's lawyers would have no way to obtain fees for bringing such lawsuits if the business decides to remedy their accessibility problems within 180 days of receiving specific notice of the accessibility barriers (even though Congress put them on notice in 1990 of the need to remove such barriers).<sup>195</sup>

The accessibility bill is misleadingly called the "ADA Education and Reform Act."<sup>196</sup> Businesses would be exempt from an ADA lawsuit if they can show they are making "substantial progress" in remedying the specific defects alleged by the plaintiffs. It would encourage businesses to fail to be accessible until they are sued and, even then, the disabled plaintiffs would have to wait as long as six months to earn the right to possibly enter the business. As the ACLU said in its analysis of the bill: "Businesses have had more than enough "notification" to comply with disability rights law. People with disabilities deserve equal access today — civil rights should not be delayed or tied up in bureaucratic red tape."<sup>197</sup> Nonetheless, this bill passed the House of Representatives in 2018 by a 225 to 192 vote, with 12 Democrats voting in favor of the bill.<sup>198</sup> The fragile thread that continues to require businesses to be accessible is therefore at risk of pulling apart entirely. The pattern of public insults overwhelms the ability of the disability rights community to defend a statute that can determine whether they have the ability to leave their home and go to a local supermarket or

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<sup>194</sup> See generally Southeast ADA Center, *Disability Rights and Public Accommodations: State-by-State* (Feb. 2011), <https://adasoutheast.org/publications/ada/public-accommodations-disability-rights-state-by-state-Final.pdf>. For example, California allows plaintiffs to obtain \$4,000/violation plus punitive damages and attorney's fees. See Unruh Civil Rights Act, California Civil Code, § 52(a) and (b).

<sup>195</sup> See H.R. 620, ADA Education and Reform Act of 2017, 115<sup>th</sup> Congress (passed House by a vote of 225 to 192 on February 15, 2018), <https://www.congress.gov/bill/115th-congress/house-bill/620/all-actions?overview=closed&q=%7B%22roll-call-vote%22%3A%22all%22%7D>.

<sup>196</sup> See H.R. 620, ADA Education and Reform Act of 2017, 115<sup>th</sup> Congress (2017-2018), <https://www.congress.gov/bill/115th-congress/house-bill/620>.

<sup>197</sup> Tyler Ray, *Congress Wants to Change the Americans with Disabilities Act and Undermine the Civil Rights of People with Disabilities*, ACLU Sept. 6, 2017), <https://www.aclu.org/blog/disability-rights/congress-wants-change-americans-disabilities-act-and-undermine-civil-rights>.

<sup>198</sup> See J. Colin Knisely, *House Passes Changes to Title III of the ADA*, DUANE MORRIS BANKING LAW (Feb. 22, 2018), <https://blogs.duanemorris.com/bankinglaw/2018/02/22/house-passes-changes-to-title-iii-of-the-ada/>.

restaurant.

One key factor in the defeat of the ADA Education and Reform Act was Senator Tammy Duckworth's eloquent op-ed opposing this measure in the *Washington Post*.<sup>199</sup> As a well-respected member of the Senate who "lost [her] legs when an RPG tore through the cockpit of the Black Hawk helicopter [she] was flying over Iraq," she was able to counter comments from other politicians that ADA violations are not "significant."<sup>200</sup> It is hard to know if grass roots efforts to defeat the Education and Reform Act would have been successful without the additional support of a well-respected and disabled politician. Duckworth's role shows the importance of the civil rights community also having access to the power elite to sustain its hard-won structural reforms. Duckworth was able to counter Democratic Representative Jackie Speier's description of the ADA Title III litigation as merely "gotcha stuff."<sup>201</sup>

It is no surprise that this pattern of public insults has also permeated ADA accessibility litigation. While not always successful at causing a judge to rule in favor of a defendant (where the accessibility violations are blatant), these attacks increase the costs of litigation and make it more difficult for lawyers to attain reasonable attorney fees for their work. In some cases, however, they cause judges to deny class action certification, limit standing and create inappropriate notice requirements. Public insults are important in their breadth and intensity even when they do not always attain a complete victory by the defendant. In assessing the power of these public insults, it is important to remember that courts virtually never conclude that the plaintiff's complaints are non-meritorious. Further, the courts have available Rule 11 sanctions, and even awards to defendants as the prevailing party, if plaintiffs' litigation is truly abusive.<sup>202</sup>

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<sup>199</sup> See Tammy Duckworth, *Congress wants to make Americans with disabilities second-class citizens*, WASH. POST, Oct. 17, 2017 ("This offensive legislation would segregate the disability community, making it the only protected class under civil rights law that must rely on "education" – rather than strong enforcement – to guarantee access to public spaces."), [https://www.washingtonpost.com/opinions/congress-is-on-the-offensive-against-americans-with-disabilities/2017/10/17/f508069c-b359-11e7-9e58-e6288544af98\\_story.html?utm\\_term=.6b7f9d30f328](https://www.washingtonpost.com/opinions/congress-is-on-the-offensive-against-americans-with-disabilities/2017/10/17/f508069c-b359-11e7-9e58-e6288544af98_story.html?utm_term=.6b7f9d30f328).

<sup>200</sup> *Id.*

<sup>201</sup> See Mike DeBonis, *House passes changes to Americans with Disabilities Act over activists' objections*, WASH. POST, Feb. 15, 2018, [https://www.washingtonpost.com/powerpost/house-passes-changes-to-americans-with-disabilities-act-over-activists-objections/2018/02/15/c812c9ea-125b-11e8-9065-e55346f6de81\\_story.html?utm\\_term=.06335b1e142c](https://www.washingtonpost.com/powerpost/house-passes-changes-to-americans-with-disabilities-act-over-activists-objections/2018/02/15/c812c9ea-125b-11e8-9065-e55346f6de81_story.html?utm_term=.06335b1e142c).

<sup>202</sup> See, e.g., *Schutts v. Bently Nevada Corp.*, 966 F. Supp. 1549 (D. Nev. 1997); *Seawright v. Charter Furniture Rental, Inc.*, 39 F. Supp.2d 795 (N.D. Tex. 1999); *Bergeron v. Northwest*

Inaccessibility is still a low hanging fruit, making it possible for some lawyers to file numerous lawsuits. Yet, these lawyers are described as the villains for pointing out the continued pattern of egregious violations. As Samuel Bagenstos has said, it is “inaccurate to say that ‘legitimate ADA advocates’ should want to get accessibility problems fixed without worrying about whether they will get paid.”<sup>203</sup> “Attorneys who handle serial ADA litigation are thus likely to be among the few lawyers for whom public accommodation cases are cheap enough and lucrative enough to be economically worthwhile.”<sup>204</sup> These lawyers are put in this position by Congress and the courts, not by their unreasonably needy determination to get paid for their work yet the media casts the story of disabled as villain. What the media and some courts characterize as serial litigation could more properly be described as litigation based on expertise. These lawyers and their clients should be considered heroes rather than bounty hunters.

## B. Litigation by Insult Prevails

### 1. Race to Correct

A successful tactic used by defendants is to rush to correct alleged violations and then argue that plaintiffs’ attorneys should not attain any attorney fees for bringing these problems to the defendant’s attention.<sup>205</sup> The most favorable precedent on this issue for plaintiffs is the Eleventh Circuit decision in *Sheely v. MR Radiology Network*,<sup>206</sup> in which the court found that a defendant’s voluntary cessation of a challenged practice does

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Publications, Inc., 165 F.R.D. 518 (D. Minn. 1996); *Footman v. Cheung*, 341 F. Supp.2d 1218 (M.D. Fla. 2004) (granting motion by defendant for Rule 11 sanctions and attorney fees); *Montoyo-Rivera v. Pall Life Sciences PR, LLC*, 245 F. Supp.3d 337 (D. Puerto Rico 2017) (imposing Rule sanctions on plaintiff’s lawyer for filing duplicative action)

<sup>203</sup> Bagenstos, *supra* note \_\_\_, at 18.

<sup>204</sup> Bagenstos, *supra* note \_\_\_, at 23.

<sup>205</sup> *See, e.g., Access 4 All. v. BAMCO VI*, No. 11-61007-CIV, 2012 WL 33163 at \* 5 (S.D. Fla. Jan. 6, 2012) (concluding that case is moot because “there is nothing in the record to suggest that Defendant’s ADA non-compliance was a continuing and deliberate practice”); *Kallen v. J.R. Eight*, 775 F. Supp.2d 1374, 1379 (S.D. Fla. 2011)(it is untenable for plaintiff “to suggest that once the renovations are completed they could be undone”); *National Alliance for Accessibility v. Walgreen*, No. 3:10-CV-780-J-32-TEM., 2011 WL 5975809 at \*3(M.D. Fla. Nov. 28, 2011) (finding “it is ‘absolutely clear’ that the ADA violations identified by Plaintiffs cannot ‘reasonably be expected to recur.’”)

<sup>206</sup> 505 F.3d 1173 (11<sup>th</sup> Cir 2007).

not deprive a federal court of its power to determine the legality of the practice.

Even in the Eleventh Circuit, however, district courts have routinely found ADA accessibility cases to be moot and denied attorney fees, especially in cases against large corporate defendants who can quickly marshal resources to try to solve any accessibility issues alleged in a complaint, and then ask for sympathy for their decades-long failure to comply.<sup>207</sup> One good example is an accessibility lawsuit filed against Walgreen's Lake City, Florida store by the National Alliance for Accessibility.<sup>208</sup> Plaintiffs alleged that the store had numerous architectural barriers such as inaccessible parking spaces, entrance access, paths of travel and restroom facilities.<sup>209</sup> All of these accessibility problems were visible. In fact, Walgreens hired an expert shortly after the suit was filed who submitted a report that detailed instances of noncompliance.<sup>210</sup> As the court noted (as a factor in Walgreens' favor), the defendant never argued that it was originally in compliance.<sup>211</sup>

Citing *Sheely*, the district court examined whether the conduct was isolated or unintentional, whether cessation of offending conduct reflected a "genuine change of heart or timed to anticipate suit," and whether defendant had acknowledged liability to determine whether to dismiss the case as moot.<sup>212</sup> Even though Walgreens had a duty since the ADA was enacted in 1990 to ensure that such apparent accessibility defects were not present, and readily found the violations once a lawsuit was commenced, the court concluded that Walgreen's violations were "unknowing and unintentional."<sup>213</sup> It found that Walgreens' expenditure of "substantial resources to makes its store ADA-compliant" shows that it "genuinely attempted to comply with the law"<sup>214</sup> rather than as a ploy to avoid attorneys' fees and costs. Although ignorance of the law is usually not considered to be a valid defense, Walgreens convinced the court that their conduct was unknowing and unintentional because they simply bothered to not look at obvious violations (until they were sued). Further, the court concluded the defendant would be vigilant to make sure that violations did

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<sup>207</sup> See *supra* note \_\_\_\_.

<sup>208</sup> National Alliance for Accessibility v. Walgreen, No. 3:10-CV-780-J-32-TEM., 2011 WL 5975809 (M.D. Fla. Nov. 28, 2011).

<sup>209</sup> *Id.* at \*1.

<sup>210</sup> *Id.* at \*1.

<sup>211</sup> *Id.* at \*3.

<sup>212</sup> *Id.* at \*2.

<sup>213</sup> *Id.* at \*3.

<sup>214</sup> *Id.* at \*3.

not occur in the future even as these modifications might deteriorate and need updating. One of the modifications was “fixing cracks in a curb ramp.”<sup>215</sup> Anyone who has walked around outside knows how common it is for curb ramps to be in disrepair and how important safe curb ramps are for someone who uses a wheelchair or a cane. While prior precedent purportedly put the burden of proof on the defendant to demonstrate that they are unlikely to be out of compliance in the future, the court bent over backwards to accept the defendant’s *mea culpa* explanations and determine the case was moot (and therefore not eligible for attorney fees).

## 2. Specific Pleading Requirements

ADA defendants also couple litigation by insult with narrow pleading requirements for filing lawsuits. This strategy is particularly effective because of the “rush to repair” problem created by the narrow attorney fee rules described above.

For example, in *Oliver v. Ralphs Grocery Company*,<sup>216</sup> A.J. Oliver sued Ralphs Grocery Company and Cypress Creek Company alleging that a Food 4 Less grocery store was not ADA compliant. In his complaint, Oliver indicated that he uses a motorized wheelchair and found eighteen separate architectural barriers to using the facility.<sup>217</sup> Seeking to avoid paying attorney fees as a result of this successful litigation, Ralphs began eliminating many of these architectural barriers.<sup>218</sup> Four months after the deadline had passed to file an amended complaint, Oliver filed an expert report identifying approximately twenty architectural barriers at the Food 4 Less store. His lawyer explained “that his delays in identifying the barriers at the facility were part of his legal strategy: he purposely ‘forces the defense to wait until expert disclosures (or discovery) before revealing a complete list of barriers,’ because otherwise a defendant could remove all the barriers prior to trial and moot the entire case.”<sup>219</sup>

Plaintiff’s strategy failed. The district court refused to consider the new barriers listed in the expert’s report and mooted the barriers that were

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<sup>215</sup> *Id.* at \*3.

<sup>216</sup> 654 F.3d 903 (9<sup>th</sup> Cir. 2011).

<sup>217</sup> *Id.* at 905.

<sup>218</sup> *Id.* at 906.

<sup>219</sup> *Id.* at 906 n.7.

already remedied.<sup>220</sup> The court of appeals affirmed these rulings.<sup>221</sup>

Defense counsel used litigation by insult to persuade the courts to grant its motion for summary judgment. Defense accused plaintiff's lawyer of using a "common ploy" of attempting "to thwart defendants from fixing all alleged barriers and mooting his ADA claims." Further, defense counsel criticized plaintiff's counsel for filing "over a thousand ADA cases in the Southern District of California alone, and is frequently reprimanded for not sufficiently identifying alleged barriers, misleading the court regarding applicable case law, lying about his client's disability, and coaching his clients to lie."<sup>222</sup> In support of the argument that plaintiff's counsel is "frequently reprimanded," the motion cited one example of a court awarding the defendant attorney fees in a case involving a different plaintiff.<sup>223</sup> Further, there was no suggestion in this case that the newly alleged defects were erroneous; the expert report was allegedly not timely. The passage of ADA Title III in 1990 two decades ago was not sufficient notice to defendants of the need to conduct their *own* accessibility audit to determine if they were in compliance with federal law. Instead, plaintiff's case is dismissed for waiting four *months* to conduct an accessibility audit of defendant's business after filing suit.

But these arguments were possible (and successful) because of the limited relief available under ADA Title III due to general pleading problems (stemming from rigid pleading rules<sup>224</sup>), attorney fee problems due to *Buckhannon*,<sup>225</sup> and the limited availability of only injunctive relief under federal law. It is impossible to attain injunctive relief if a problem is cured; but if the plaintiff does not detail all the barriers that need to be cured then the plaintiff fails to meet the required pleading rules. In other words, the success of litigation by insult depended on the pre-existing procedural rules that made accessibility cases very difficult to bring. Without narrow pleading rules and strict attorney fee requirements, a court may have been able to fend off the insults as scurrilous and irrelevant.

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<sup>220</sup> *Id.* at 906.

<sup>221</sup> *Id.* at 911.

<sup>222</sup> See Appellee Ralphs Grocery Company's Answer Brief, 2010 WL 4316229 (9<sup>th</sup> Cir. Filed March 5, 2010), in *A.J. Oliver v. Ralphs Grocery Company*, No. 09-56447 (9<sup>th</sup> Cir. 2010) at \*6.

<sup>223</sup> *Id.* (citing *Peters v. Winco Foods, Inc.*, 320 F. Supp.2d 1035 (E.D. Calif. 2004)).

<sup>224</sup> See Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L. J. 1 (2010) (criticizing how recent decisions have made it exceedingly difficult for a plaintiff to have a meaningful day in court).

<sup>225</sup> See *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001).

Instead, they supported the defendant's arguments.

### 3. Standing Arguments

Defendants also ridicule so-called serial litigants by suggesting that they could not possibly be interested in visiting lots of businesses in their neighborhood. For example, Glen Coleman openly acknowledges that he is a plaintiff who files numerous barriers to access lawsuits under the ADA. In seeking to have his case dismissed, the defendant restaurant argues that it is implausible that he might want to return to fourteen different establishments including five eating establishments "and even a funeral home."<sup>226</sup> The defendant also insisted that plaintiff's status as a "serial ADA litigant" meant that he should have to allege and prove "more than an intent to return to places previously visited."<sup>227</sup>

Although that strategy did not result in the claim against the restaurant being dismissed, it has worked in many other lawsuits.<sup>228</sup> In *Rosenkrantz v. Markapoulos*,<sup>229</sup> the court insisted that the plaintiff must detail concrete plans for when he might want to return to the defendant hotel. Unlike nondisabled individuals, the district court was not willing to entertain the likelihood that he might travel "hundreds of miles" to visit defendant's hotel.<sup>230</sup> Because the court only saw the purpose of the litigation as making it possible for only the listed plaintiff to visit the hotel

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<sup>226</sup> *Coleman v. Chin Ju Pritchett d.b.a. New Star Restaurant*, No. 5:05-cv-0040-RS-MD (N.D. Fla. April 14, 2006).

<sup>227</sup> *Id.* at \*6.

<sup>228</sup> *See, e.g., Access for America, Inc. v. Associated Out-Door Clubs, Inc.*, 188 Fed. Appx. 818, 2006 WL 1746890 at \*\*1-2 (11<sup>th</sup> Cir. 2006) (affirming dismissal based on lack of standing for not demonstrating "any reasonable chance of his revisiting the Track, other than 'someday'; dissent criticizing majority of requiring too specific an intention to return especially in light of plaintiff's assertion that he "traveled to the Track six or eight times per year for the last three years."); Defendant's Motion to Dismiss and Memorandum of Law in Support Thereof, *Access for America, Inc. v. Associated Out-Door Clubs, Inc.*, No. 8:04CV-650-T-17-EAJ, 2004 WL 2742009 (M.D. Fla. May 10, 2004) (arguing that this "case is yet another example of the 'cottage industry' into which ADA-related litigation has evolved"; describing plaintiff as a "serial plaintiff"); Defendant's Memorandum of Law in Support of its Motion to Dismiss Plaintiffs' Complaint for Lack of Subject Matter of Jurisdiction, 2004 WL 2742208, No. 8:04CV653-T-24TBM (M.D. Fla. 2004) (successful motion to dismiss in which defendant argued that plaintiff has no plan to return to defendant's hotel because he has filed numerous lawsuits, lives about 100 miles away from this property, and has limited income selling "pencils in front of grocery stores and post offices").

<sup>229</sup> 254 F. Supp.2d 1250, 1252-52 (M.D. Fla. 2003).

<sup>230</sup> *Id.* at 1253.

(rather than the disability community generally), it was not willing to let plaintiff's case withstand a motion to dismiss. Similarly, the court dismissed Steven Brother's lawsuit against a hotel chain because he lived several hundred miles away from the hotel chain and could only allege a general intent to return to the facility.<sup>231</sup> The court found it appropriate in its statement of facts to mention plaintiff's low income and receipt of social security checks and food stamps.<sup>232</sup>

The Florida court was so disturbed by Mr. Brother's attempt to use the ADA to make hotels accessible that it offered these remarks after dismissing his case:

If history is any guide, then William Charouhis and his clients will adjust to this ruling so that their future filings satisfy Article III's standing requirements. When that occurs, this Court (respecting the separation of powers) will be obligated to allow such cases to proceed.

This being said, it should be emphasized that the system for adjudicating disputes under the ADA cries out for a legislative solution. Only Congress can respond to vexatious litigation tactics that otherwise comply with its statutory frameworks. Instead of promoting "conciliation and voluntary compliance[.]" the existing law encourages massive litigation. *See Rodriguez v. Investco, LLC*, 305 F.Supp.2d 1278, 1281 (M.D.Fla.2004) (footnote omitted). "[P]re-suit settlements[.]" after all, "do not vest plaintiffs' counsel with an entitlement to attorney's fees" under the ADA. *Id.* at 1282 (internal citation omitted). Moreover, the means for enforcing the ADA (attorney's fees) have become more important and desirable than the end (accessibility for disabled individuals). *See Id.* at 1285 (finding a litigious ADA Plaintiff represented by William Charouhis "merely a professional pawn in an ongoing scheme to bilk attorney's fees from the Defendant"). This is particularly the case in the Middle District of Florida where the same plaintiffs file hundreds of lawsuits against establishments they purportedly visit regularly. This type of shotgun litigation undermines both

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<sup>231</sup> Steven Brother v. Tiger Partner, LLC, 3331 F. Supp.2d 1368, 1371 (M.D. Fla. 2004).

<sup>232</sup> *Id.* at 1369.

the spirit and purpose of the ADA.<sup>233</sup>

This example sheds light on the strength of the power elite's interconnected strongholds that can undermine effective civil rights reform. The defense bar does not even need to engage in litigation by insult when the courts, themselves, fail to see the value in private attorneys trying to use disabled plaintiffs to make facilities more accessible. The district court's diatribe against the plaintiff is symptomatic of the broader failure to understand how the ADA's accessibility standards are enforced. There is no governmental entity making sure that hotels, for example, have adequate accessible rooms. These problems are only discovered one plaintiff at a time. Rather than be castigated as a serial plaintiff, Steven Brother and his lawyer, William Charouhis, could be thanked for their willingness to investigate and determine which hotels are not accessible. But, instead, suits like theirs are often dismissed because the disabled plaintiff does not have a credible claim of an interest to re-visit the facility.<sup>234</sup>

The requirement that plaintiffs visit every facility owned by a defendant can have a chilling effect on accessibility litigation. In *Campbell v. Moon Palace, Inc.*,<sup>235</sup> defendant's motion for summary judgment argued that plaintiff was an improper "serial plaintiff" and requested that entire case be dismissed on that theory. Although defendants did not attain a dismissal, the stringent legal standard developed in that case then caused the dismissal of other accessibility cases. For example, in *Access 4 All v. Starbucks Corp.*,<sup>236</sup> the plaintiff alleged ADA violation in 18 Starbucks locations within the Southern District of Florida, but also listed approximately 300 other locations within Florida as containing similar violations. Defendant contended that plaintiffs lack standing because they had no evidence to substantiate their contention that they personally encountered any barriers to access at any of the 304 locations identified in

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<sup>233</sup> *Id.* at 1375.

<sup>234</sup> *See, e.g.*, *Brothers v. Rossmore Tampa Limited Partnership*, 2004 WL 3609350 at \*4 (M.D. Fla. Aug. 19, 2004) ("Plaintiff's professed intent to return to Defendant-hotel lacks credibility"); *Brother v. CPL Investments, Inc.*, 317 F. Supp.2d 1358 (S.D. Fla. 2004) (judgment for hotel owner, dismissing suit); *D'Lil v. Best Western Encina Lodge & Suites*, 2006 WL 197142 (C.D. Cal. Jan. 12, 2006)(dismissing on standing grounds); *Access 4 All, Inc. v. Wintergreen Commercial Partnership Ltd.*, 2005 WL 2989307 (N.D. Tex. Nov. 7, 2005) (dismissing on standing grounds); *Molski v. Mandarin Touch Restaurant*, 385 F. Supp.2d 1042 (C.D. Calif. 2005) (dismissing on standing grounds).

<sup>235</sup> No. 11-60274-CIV, 2011 WL 4389894 (S.D. Fla. Sept. 21, 2011).

<sup>236</sup> No. 11-61010-CIV, 2012 WL 602603 (S.D. Fla. Feb. 23, 2012).

the complaint. In this case, Starbucks claimed to have a policy of requesting patrons to move from a wheelchair accessible table when someone needed access to such a table. Of the stores that plaintiffs visited, they also found other violations such as sloped parking, a transaction counter that was too high, lack of accessible tables, a bathroom door opening the wrong way and too-narrow bathroom corridor. The court refused to find plaintiffs had standing at any location they did not visit despite an expert report that documented lack of accessibility at numerous locations. Their list of violations was criticized for being “exhaustive and overbroad.”<sup>237</sup> The court cited *Campbell v. Moon Palace* for the proposition that the plaintiffs needed to identify and produce evidence of each and every barrier they personally encountered. An expert report was not a sufficient basis for proceeding with the lawsuit. That kind of impossible hurdle shut down what the court considered to be improper serial litigation. Again, it reflects the limitation with a private mode of enforcement; only a government entity can pursue that kind of systemic theory.

### C. *Litigation by Insult Slapped Down*

While one can find instances where the litigation by insult strategy does not succeed, this strategy still serves to exhaust and delay the attainment of justice. Lengthy lawsuits or appeals are needed to remedy simple accessibility violations, sending the message to plaintiff attorneys that this kind of litigation is rarely worth the effort.

Where defendants have allegedly remedied the defects raised in the plaintiff’s lawsuit before trial, plaintiffs may find themselves needing to survive years of litigation merely to overcome the mootness argument. For example, in *Pereira v. Ralph’s Grocery*,<sup>238</sup> plaintiff sued twenty-three grocery stores on January 17, 2007, in Southern California that allegedly did not provide sufficient access to persons who use wheelchairs or scooters for mobility. The parties agreed that defendant corrected all of the accessibility issues raised in plaintiff’s complaint, yet plaintiff argued the case was not moot because the challenged conduct could be expected to recur. Plaintiff argued that “over time parking lots will need to be restriped and handicapped and accessible signage will need to be repaired and/or

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<sup>237</sup> *Id.* at \* 6.

<sup>238</sup> No. CV 07-841 PA (FFMx), 2007 WL 7543254 (C.D. Cal. Oct. 25, 2007).

replaced.”<sup>239</sup> Defense attorney Gregory Hurley, who represents defendants in these cases,<sup>240</sup> argued that the case should be mooted because the court could readily believe that his client intended to fully comply with the ADA in the future.

The district court accepted the mootness argument, finding: “Plaintiffs allege ADA violations that are of a physical nature, not due to an ineffective policy. For example, Plaintiffs alleged that the placement of toilets and the disabled parking signage violate the ADA, not that Defendant failed to enforce a policy to keep an accessible grocery store check-out line staffed.”<sup>241</sup> The argument that the facility *may* fall out of compliance was not considered sufficient to overcome the mootness problem. Thus, the court concluded, the plaintiff could not establish that the inaccessibility would be reasonably expected to recur even though the *Friends of the Earth* Court had said that the burden was on the *defendant* not the plaintiff to show that they were unlikely to fall out of compliance in the future.

In an unpublished, 2-1 decision, the Ninth Circuit reversed the district court.<sup>242</sup> Writing for the majority, Judge Kozinski found that the “defendant’s ‘voluntary cessation of allegedly illegal conduct’ did not moot this case” and that the plaintiff had standing to challenge all the disability-related barriers.<sup>243</sup>

Although the court of appeals reversed the district court in *Pereira*, many other courts have ruled for defendants in similar ADA cases, thereby precluding plaintiffs’ lawyers from attaining any attorney fees for their work in bringing accessibility violations to the attention of various defendants.<sup>244</sup>

It is common for defendants to try to accuse all defendants of being

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<sup>239</sup> *Id.* at \*5.

<sup>240</sup> cite

<sup>241</sup> *Id.* at \*4.

<sup>242</sup> *Pereira v. Ralphs Grocery Company*, 329 Fed. Appx. 134, 2009 WL 2039121 (9<sup>th</sup> Cir. 2009) (before Chief Judge Kozinski, Circuit Judge Pregerson and District Judge Quist).

<sup>243</sup> *Id.* at \*\*1.

<sup>244</sup> *See, e.g., Access 4 All. v. BAMCO VI*, No. 11-61007-CIV, 2012 WL 33163 at \* 5 (S.D. Fla. Jan. 6, 2012) (concluding that case is moot because “there is nothing in the record to suggest that Defendant’s ADA non-compliance was a continuing and deliberate practice”); *Kallen v. J.R. Eight*, 775 Supp.2d 1374, 1379 (it is untenable for plaintiff “to suggest that once the renovations are completed they could be undone”); *National Alliance for Accessibility v. Walgreen*, No. 3:10-CV-780-J-32-TEM., 2011 WL 5975809 at \*3 (finding “it is ‘absolutely clear’ that the ADA violations identified by Plaintiffs cannot ‘reasonably be expected to recur.’”)

serial plaintiffs, even when the facts do not support that allegation. For example, Daniel Sharp brought five legal actions using the law firm of Barbosa, Metz & Harrison.<sup>245</sup> Three complaints were against restaurants and one was against a nursing home where he stayed for an extended period of time. Sharp uses a wheelchair and each complaint appears to be based on obvious, important problems such as inaccessible tables, lack of accessible parking, inaccessible path of travel, and inaccessible restrooms. At the initial stages of these cases, the defendants used the law firm of Greenburg, Traurig, which would aggressively proceed through insult by litigation, trying to argue that plaintiff did not have standing to bring this kind of claim.

Each of their motions for summary judgment begin with the same broadside against plaintiff and his lawyers:

Unfortunately, there are increasingly widespread reports of vexatious ADA litigation. Courts have described these disability access lawsuits as ‘shakedown schemes’ for statutory damages and attorney’s fees .... ‘The abuse is a kind of legal shakedown scheme ... the unscrupulous law firm sends a disabled individual to as many businesses as possible in order to have him or her aggressively seek out all violations of the ADA.’ .... Of course, ‘this type of shotgun litigation undermines both the spirit and purpose of the ADA,’ *id.*, and ‘brings into disrepute the important objectives of the ADA by instead focusing public attention on the injustices suffered by defendants forced to expend large sums to amount defenses to groundless or hyper-technical claims.’<sup>246</sup>

From this broad claim, Defendant then argued that plaintiff did not have standing because he “is a serial ADA plaintiff who has at least 4 ADA lawsuits currently pending. Plaintiff’s counsel specializes in these drive-by lawsuits and has brought a myriad of them on behalf of a flock of

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<sup>245</sup> See Sharp v. Balboa Islands, 900 F. Supp.2d 1084 (S.D. Cal. 2012); Sharp v. Islands Restaurant-Carlsbad, 900 F. Supp.2d 1114 (S.D. Cal. 2012); Sharp v. Islands California Arizona LP, 900 F. Supp.2d 1101 (S.D. Cal. 2012); Sharp v. Covenant Care, LLC, 288 F.R.D. 465 (S.D. Cal. 2012); Sharp v. Waterfront Restaurants, No. 99-CV-200 TW (AJB), 1999 WL 1095486 (S.D. Cal. Aug. 2, 1999).

<sup>246</sup> Defendants’ Memorandum of Points and Authorities in Support of their Motion for Summary Judgment or, in the Alternative, Summary Adjudication, Sharp v. Balboa Islands, No. 3:11-CV-00675-W-BLM, 2012 WL 13049198 (S.D. Cal. March 9, 2012).

plaintiffs.”<sup>247</sup> Defendant’s lawyer cut and pasted this same sentence in another case against different defendants.<sup>248</sup> The plaintiff in this case filed five cases, not hundreds, and the claims in each of the lawsuits were meritorious.

Defendant then piled on the insults by saying that Sharp was not disabled because “he admitted that he could stand with parallel bars, and within the past six months was able to walk approximately 22 feet with the aid of a walker.”<sup>249</sup> The defendant also criticized Sharp for excessive drinking, as if his alleged drinking habits somehow made defendants’ establishment accessible. The plaintiff had to waste valuable resources to persuade the court that Sharp was clearly disabled as someone who required parallel bars or a walker to ambulate.<sup>250</sup>

Defendants also use litigation by insult to seek to impose a backdoor notice requirement. A good example is *Rudder v. Costco Wholesale Corporation*.<sup>251</sup> The law firm of Metz and Harrison represented Christie Rudder in this case. Rudder is an individual with a disability who sustained various injuries in an automobile accident. She is not able to stand independently and uses a wheelchair for mobility. She appears to have been involved in six lawsuits involving accessibility problems that she has experienced: lack of accessibility at a supermarket,<sup>252</sup> drug store,<sup>253</sup> a local restaurant,<sup>254</sup> a hotel,<sup>255</sup> and a nearby transportation entity.<sup>256</sup>

The *Costco* case was a suit against many businesses at a local parking

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<sup>247</sup> Defendant’s Opposition to Motion for Summary Judgment, *Sharp v. Balboa Islands*, No. 11-CV-675W(BLM), 2012 WL 13049202 at \*2 (S.D. Cal. April 9, 2012)

<sup>248</sup> See Defendant’s Memorandum of Points and Authorities in Support of Defendant’s Motion for Summary Judgment, *Sharp v. Islands California Arizona LP*, Nos. 11CV-0671 W (BLM), 11 CV-0427 W (BLMx), 2012 WL 6865127 at \*2 (S.D. Cal. Sept. 25, 2012).

<sup>249</sup> *Sharp*, 900 F. Supp. at 1092.

<sup>250</sup> *Id.* at 1092.

<sup>251</sup> No. SACV 12-0128 AG (MLGx), 2013 WL 5509129 (C.D. Cal. Sept. 20, 2013).

<sup>252</sup> See Complaint for Injunctive Relief and Damages, *Rudder v. Fresh & Easy Neighborhood Market, Inc.*, No. SACV11-1884-JST (MIGx), 2011 WL 9372542 (C.D. Cal. Dec. 7, 2011),

<sup>253</sup> See *Rudder v. Costco Wholesale Corp.* No. SACV 12-0128 (MLGx), 2013 WL 550919 (C.D. Cal. Sept. 20, 2013).

<sup>254</sup> See *Rudder v. Marmalade Café*, Verdict for Plaintiff, 2011 WL 5055013, No. 10CV08498(GW) (C.D. Calif. June 2, 2011).

<sup>255</sup> See Opposition to Demurrer, *Rudder v. Hampton Inn*, No. 30-2015-00793966-CU-MC-CJC, 2016 WL 10616477 (Cal. Super. Nov. 4, 2016); Minute Order, *Rudder v. Pansuria*, No. 30-2015-00793966-CU-MC-CJC, 2016 WL 10599575 (Cal. Super. Aug. 11, 2016).

<sup>256</sup> See *Rudder v. Los Angeles County Metro Transportation Authority*, 114 S.Ct. 447 (1993) (denying writ of cert.)

center, with Costco being the anchor store and primary defendant.<sup>257</sup> She made two allegations that related to the site itself – lack of accessible parking and lack of accessible path of travel. The other allegations were specific to Costco. Because the parking and path of travel problems were common to all the stores at the facility, she had to name them all as defendants in the lawsuit.

Rather than acknowledge that the shopping center was out of compliance with basic rules about parking and site accessibility, the defendant attacked the right of plaintiff to name so many plaintiffs in a lawsuit about access to a shopping center, accusing plaintiff's counsel of "extort[ing] separate nuisance settlements from each of the multiple defendants."<sup>258</sup> Further, the defendant argued that the case against Costco should be dismissed "for failure to adequately provide notice to Costco" and by pulling a "bait and switch by filing a complaint and then go fishing for additional violations with her expert in tow."<sup>259</sup>

Despite the defendant's arguments about lack of notice, the original complaint alleged many of the violations that were still found to exist when the court resolved the defendant's summary judgment motion on September 20, 2013, more than a year after she filed the original lawsuit.<sup>260</sup>

The notice strategy is tied to a mootness strategy. Defendants seek to insist that plaintiff name every ADA violation at the time they file the lawsuit so that they can rush to cure each of those violations before trial and then argue mootness. Even when a plaintiff cannot get into a facility, due to an accessibility violation, the defendant seeks to argue that needed to name all potential defects in the initial lawsuit. As the Ninth Circuit has said "it would be ironic if not perverse to charge that the natural consequence of this deterrence, the inability to personally discover additional facts about the defendant's violations, would defeat that plaintiff's standing to challenge other violations at the same location that subsequently come to light."<sup>261</sup> Nonetheless, not all circuits accept this rule; as the previous section indicated, plaintiffs are often found not to have standing when they cannot allege repeated exposure to defendant's

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<sup>257</sup> See Complaint for Injunctive Relief and Damages, Rudder v. Costco Wholesale Corp. et al., No. SACV12-128-CJC, 2013 WL 550919 (C.D. Cal. Jan. 26, 2012).

<sup>258</sup> Defendant's Memorandum in Support of Defendant's Motion to Dismiss, Rudder v. Costco, No. 8:12-CV-00128 at \*3 (C.D. Cal. 2013).

<sup>259</sup> Defendant's Memorandum in Opposition of Plaintiff's Motion for Summary Judgement, at 3, Rudder v. Costco, No. 8:12-cv-00128 (C.D. Cal. 2013).

<sup>260</sup> Rudder v. Costco Wholesale Corp. et al., No. SACV 12-0128 AG (MLGx), 2013 WL 5509129 (C.D. Cal. 2013).

<sup>261</sup> Doran, v. 7-Eleven, 524 F.3d 1034, 1042 (9<sup>th</sup> Cir. 2008).

inaccessible facilities.

After vigorously attacking plaintiffs' standing and ability to represent a class, defendants then challenge plaintiffs' claims for attorney fees. The size of the attorney fee bill, of course, is related to the number of objections thrown at them by opposing counsel. Again, litigation by insult is used to lower the attorney fee petition.

A case where plaintiffs successfully deflected this strategy is *Charlebois v. Angels Baseball, LP*.<sup>262</sup> Paul Charlebois filed a complaint against Angels Baseball after he sought to attend a baseball game and have a good line of sight in the Club level, where there is also portable food service.<sup>263</sup> Plaintiff sought to certify a class of wheelchair users who have sought or would seek in the future to attend a game at the stadium. Defendants did not apparently dispute that they had insufficient number of wheelchair-accessible seats and, in particular, had very few seats in the Club section of the stadium.

This should not have been a difficult claim to certify as a class.<sup>264</sup> People who use wheelchairs, like much of the general public, might enjoy viewing a professional baseball game. And, like the general public, those people might want to sit in seats where vendors sell food. In fact, one might speculate that their need to use a wheelchair to travel, combined with the apparent inaccessibility of the newly renovated stadium, might make them more likely than the general public to seek to purchase food from a vendor who walks around the stadium. Despite the obviousness of the plaintiffs' ability to meet these requirements, defendant strongly opposed class certification and required the plaintiff to engage in extensive surveys and data analysis to certify the class.

In opposing class certification, defendant argued that plaintiffs could only establish that there were 31 potential class members who have suffered or will suffer harm from the inaccessible stadium design despite the fact that thousands of individuals attend baseball games at the stadium. After extensive litigation and fact-gathering by both sides, the court ruled: "This Court believes that attending a baseball game is more akin to attending a movie than it is to go to a golf course. Baseball is often

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<sup>262</sup> 993 F. Supp.2d 1109 (C.D. Calif. 2012).

<sup>263</sup> When he learned that there were no accessible seats in the Club level, the defendant allegedly offered to carry him to his seat which he considered to be "humiliating and insensitive." *Charlebois v. Angels Baseball, LP*, No. SACV 10-0853 DOC (ANx), 2011 WL 2610122, at \*1 (C.D. Cal. June 30, 2011).

<sup>264</sup> The general requirements that need to be met are: (1) ascertainability, (2) numerosity, (3) commonality, (4) typicality, and (5) adequacy of representation. *See id.* at \*3 - \*11.

referenced as America's favorite past-time, and given that Plaintiff's class includes future attendees, it is reasonable to presume that many wheelchair-using baseball fans will emerge as future class members based on the statistical evidence provided by Plaintiff through the shared survey and, to a limited extent, Plaintiff's supplemental data."<sup>265</sup>

The class certification skirmish was typical of the heated nature of this litigation. Thus, not surprisingly, defendants then attacked plaintiff's request for attorney fees after this case finally settled. Defendants unsuccessfully argued that attorneys at large, prestigious firms were not an appropriate comparator,<sup>266</sup> that one lawyer's fees should be reduced because another judge in another case more than four years ago had reduced his fees,<sup>267</sup> that the fees should be reduced because they were more than defendants paid their lawyers,<sup>268</sup> that one lawyer's fees should not be included because he was not counsel of record,<sup>269</sup> that the hours they worked on the complaint and motion for summary judgment were excessive,<sup>270</sup> and that some work was duplicative.<sup>271</sup> The court observed: "if Defendants had wished not to pay Class Counsel's fees, Defendants could have settled earlier."<sup>272</sup>

Nonetheless, the attorney's fee petition shows how difficult and time-consuming it can be to win a relatively straight-forward accessibility case about stadium seating. Plaintiff's request for attorney fees showed that they had devoted 1709 hours to this case even though it *settled* without litigation.<sup>273</sup> Further, as the court noted, this kind of private enforcement is essential because there is little public enforcement of disability access.<sup>274</sup> And, as noted by defendants, this strategy was partially successful against one of the lawyers in another gruesome civil rights case in which his attorney fees were somewhat reduced.<sup>275</sup>

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<sup>265</sup> *Id.* at \*9.

<sup>266</sup> 993 F. Supp.2d at 1120

<sup>267</sup> *Id.* at 1121

<sup>268</sup> *Id.* at 1123.

<sup>269</sup> *Id.* at 1124.

<sup>270</sup> *Id.* at 1124.

<sup>271</sup> *Id.* at 1125.

<sup>272</sup> *Id.* at 1125.

<sup>273</sup> *Id.* at 1116.

<sup>274</sup> *Id.* at 1114.

<sup>275</sup> See *Benham v. S & J Security and Investigation, Inc.*, No. B207420, 2010 WL 761586 (LA Superior Court March 8, 2010) (case involving false imprisonment, negligence, assault and battery, intentional infliction of emotional distress and violations of California's civil rights laws regarding the actions of security officers during an improper accusation of shoplifting).

Even when plaintiffs are successful in these kinds of cases, the defendants' tactics often involve enormous delays in the attainment of an accessible facility. Attorney Amy Robertson documents the impact of these kinds of tactics in a case challenging the inaccessibility of Cracker Barrel's parking lot.<sup>276</sup> She chose this example because a recent *amicus* brief filed in the Third Circuit by an industry trade group<sup>277</sup> described the Cracker Barrel case<sup>278</sup> with the kind of public insults that this article has amply documented. The Cracker Barrel plaintiffs were described as "clients [who] often identify a particular type of accessibility issue, and then bring the same claim over and over against different businesses,"<sup>279</sup> even though the plaintiffs eventually *prevailed* in this litigation.<sup>280</sup>

Rather than being an example of abusive litigation by *plaintiffs*, Robertson documents how it is the *defendants* that used every available stalling tactic to delay the implementation of an accessible parking lot in the Cracker Barrel litigation. Cracker Barrel's lawyers filed twenty-one separate briefs over a two-and-a-half year period while people with mobility impairments continued not to have access to their parking lots.<sup>281</sup> The *amicus* brief criticized plaintiffs who bring numerous lawsuits against the same defendant for "excessive slopes or other accessibility issues in parking lots"<sup>282</sup> without considering why these claims almost always are successful due to the underlying inaccessible design of the parking lots at these stores. The implicit message of the *amicus* brief is that the inaccessibility of parking lots is a trivial issue that does not merit litigation.

The *Amici Curiae* brief reflects the strength of the power elite. This brief was funded by three trade associations representing various convenience stores and supermarkets.<sup>283</sup> The corporate and political elite have combined to weaken the ADA by trivializing the rights protected by

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<sup>276</sup> See Amy Robertson, *ADA Defense Lawyers Prolong Litigation and Postpone Access: A Case Study of Litigation Abuse*, Feb. 7, 2018, <https://creelaw.org/ada-defense-abuse-a-case-study/>.

<sup>277</sup> See Brief of *Amici Curiae* National Association of Convenience Stores, National Grocers Association, and Food Marketing Institute in Support of Appellant-Defendant and Reversal in *Steak 'N Shake v. Mielo & Heinzl*, No. 17-2678, 2017 WL 5759712 (3<sup>rd</sup> Cir. Nov. 20 2017).

<sup>278</sup> See *Heinzl v. Cracker Barrel Old Country Stores, Inc.*, No. 2:14-cv-1455, 2016 WL 2347367 (W.D. Pa. Jan. 27, 2016).

<sup>279</sup> *Amici Curiae* Brief, *supra* note \_\_\_, at \*9.

<sup>280</sup> See *Heinzl v. Cracker Barrel Old Country Stores, Inc.*, No. 2:14-cv-1455, 2016 WL 2347367 (W.D. Pa. Jan. 27, 2016).

<sup>281</sup> Robertson, *supra* note \_\_.

<sup>282</sup> *Amicus Curiae* brief, *supra* note \_\_\_, at \*10.

<sup>283</sup> The brief was listed as being on behalf of the "National Association of Convenience Stores, National Grocers Association, and Food Marketing Institute. *Amicus Curiae* brief, *supra* note \_\_\_, at \*i.

this statute and characterizing those who try to vindicate those rights. They acknowledge that “the class action mechanism and the prospect of attorneys’ fees under federal law provide alternative incentive to bring such litigation” and therefore argue that such mechanisms should be disfavored.<sup>284</sup> They do not hide their direct attempt to undermine the statute’s underlying enforcement mechanism. They simply do not want plaintiffs to be able to use this statute effectively to force their corporate interests to modify their facilities to make them accessible.<sup>285</sup>

#### IV. HOW CAN CIVIL RIGHTS ADVOCATES FIGHT BACK?

“Fear” is the recent title of a new book about the Trump administration.<sup>286</sup> That title captures the effectiveness of the various strategies that have been historically used to scare civil rights plaintiffs from pursuing their rights.

Many people have faced violence and brutality to pave the way for structural civil rights advances. Lynchings along with race riots (instigated by whites) served to “terrorize nonwhite populations” in the late nineteenth and early twentieth centuries, primarily in the south.<sup>287</sup> In the north, “window breaking, arson, vandalism, and physical attacks” were common when blacks tried to integrate white neighborhoods in the mid to late-twentieth century.<sup>288</sup> And, of course, Martin Luther King was a victim of an assassination; as recently as 1983, Senator Jesse Helms characterized King as having a “hostility to and hatred for America.”<sup>289</sup>

These acts of hate and vandalism have terrorized African-Americans who might, for example, seek structural changes by, for example, integrating white neighborhoods. In some well-known examples that

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<sup>284</sup> *Amicus Curiae* brief, *supra* note \_\_\_\_, at \*8.

<sup>285</sup> Their effort was successful in the Third Circuit case in which the industry group filed this amicus brief. *See Mielo v. Steak ‘N Shake Operations*, 897 F.3d 467 (3<sup>rd</sup> Cir. 2018) (reversing class certification decision by district court).

<sup>286</sup> BOB WOODWARD, *FEAR* (2018).

<sup>287</sup> *See* Angela Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CAL. L. REV. 1923, 1968-69 (2000) (“Lynchings had a quasi-legal status because they could be justified as upholding legal norms. They also had a quasi-legal status because of the complicity of legal actors.”)

<sup>288</sup> Leonard S. Rubinowitz & Imani Perry, *Crimes without Punishment: White Neighbors’ Resistance to Black Entry*, 92 J. CRIM. L. & CRIMINOLOGY 335 (2001-2002).

<sup>289</sup> Remarks of Senator Jesse Helms, 129 Congressional Quarterly, S13452-S13461 (Oct. 3, 1983), [http://www.aavw.org/protest/king\\_backlash\\_abstract06.html](http://www.aavw.org/protest/king_backlash_abstract06.html).

reached the United States Supreme Court, Charles Apprendi, Jr. fired several .22-caliber bullets into the home of Mattie Harrell and her African-American family.<sup>290</sup> Similarly, a group of young white men placed a burning cross on the yard of an African-American family who moved into their predominantly white neighborhood in St. Paul, Minnesota.<sup>291</sup> After the Supreme Court struck down the city's bias crime ordinance, under which one of the perpetrators had been convicted, there was a rally by people "wearing their masks, wielding their baseball bats and clubs, waving their Confederate flags."<sup>292</sup> Black families "felt trapped" in their homes as a result of their inability to confront such violence and intimidation.<sup>293</sup> Lynchings, race riots and other hate crimes serve as a form of domestic terrorism to deter people from coming forward and trying to vindicate their civil rights. Modern acts of violence are reflective of growing tension over civil rights issues in our society.<sup>294</sup>

Thus, litigation by insult is nothing new. It is a modern version of the old story of intimidation and fear to deprive people of coming forward to secure their civil rights. It is a tactic to stop structural reform. It is not merely a personal tactic of humiliation. And, although it is not necessarily directly connected to threats of physical harm and violence, it can be.<sup>295</sup>

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<sup>290</sup> See *Apprendi v. New Jersey*, 530 U.S. 469 (2000). For further discussion, see Jeannine Bell, *Hate Thy Neighbor: Violent Racial Exclusion and the Persistence of Segregation*, 5 OHIO STATE J. CRIM. L. 47 (2007).

<sup>291</sup> See *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377 (1992). For further discussion, see Andrew Crowley, *R.A.V. v. City of St. Paul: How the Supreme Court Missed the Writing on the Wall*, 34 B.C. L. REV. 771 (1993).

<sup>292</sup> Jeannine Bell, *O Say, Can You See: Free Expression by the Light of Fiery Crosses*, 39 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 335, 337 (2004.)

<sup>293</sup> *Id.* at 337.

<sup>294</sup> In the housing area, alone, there is well-documented evidence of hate crimes as a means to avoid racial integration. See, e.g., Aric Short, *Post-Acquisition Harassment and the Scope of the Fair Housing Act*, 58 ALA. L. REV. 203 (2006); Jeannine Bell, *Hate Thy Neighbor: Violent Racial Exclusion and the Persistence of Segregation*, 5 OHIO STATE J. CRIM. L. 47 (2007); Kathleen C. Engel, *Moving Up the Residential Hierarchy: A New Remedy for an Old Injury Arising from Housing Discrimination*, 77 WASH. U. L. Q. 1153 (1999); Leonard S. Rubinowitz & Imani Perry, *Crimes Without Punishment: White Neighbors Resistance to Black Entry*, 92 J. CRIM. L. & CRIMINOLOGY 335 (2001-2002); Donald P. Green, Dara Z. Strolovitch & Janelle S. Wong, *Defended Neighborhoods, Integration, and Racially Motivated Crime*, 104 AMER. J. SOCIOLOGY 372 (1998).

<sup>295</sup> See Seung Min Kim & Felicia Sonmez, *At Montana rally, Trump praises Congressman for assaulting reporter*, WASH. POST, Oct. 19, 2018, [https://www.washingtonpost.com/politics/at-montana-rally-trump-praises-congressman-for-assaulting-reporter/2018/10/18/1e1d0d1e-d304-11e8-8c22-fa2ef74bd6d6\\_story.html?utm\\_term=.6b5dd21d852e](https://www.washingtonpost.com/politics/at-montana-rally-trump-praises-congressman-for-assaulting-reporter/2018/10/18/1e1d0d1e-d304-11e8-8c22-fa2ef74bd6d6_story.html?utm_term=.6b5dd21d852e). See also Thomas J. Scheff, *Runaway Nationalism: Alienation, Shame, and Anger* 426-39 in JESSICA L. TRACY, RICHARD W. ROBINS

This Article has shown how litigation by insult can be especially effective when civil rights hang by a narrow thread. When a statute such as ADA Title III only permits relief by private attorney generals, only allows an injunctive relief remedy, and merely requires businesses to engage in improvements that are “readily achievable,” a strategy of litigation by insult can easily undermine the entire statutory scheme. The power of this strategy to undermine any attempt for structural reform is that Congress’ response has been to seek to limit the structural scheme *even more*.

But it is not the case that the tactic of public insults inevitably succeeds even when civil rights may appear to hang by a weak thread. Although we will probably never understand why Senator John McCain saved the Affordable Care Act by a single vote in the United States Senate, one might wonder if it was his response to the bully-Trump. Douglas Holtz-Eakin, McCain’s chief domestic policy advisor, described McCain as a person who will “punch the bully for you.”<sup>296</sup> The unpopularity of the Affordable Care Act (“ACA”) may account for the Democratic midterm losses in 2010 with the barrage of ads about death panels<sup>297</sup> and other parades of horrors, but the ACA was actually quite popular by the 2018 midterms and may have helped Democrats in many races.<sup>298</sup>

The initial success of the power elite to create a negative public opinion of the ACA by using the tactics of fear is supported by research in the field of educational psychology. “Strong evidence of the persuasive power of fear appeals in political ads confirms theoretical expectations and echoes findings from a decades-old research tradition on fear appeals in public health campaigns.”<sup>299</sup> Researchers find that negative messaging stimulate “bottom-up” reasoning which is inductive rather than logical or

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& JUNE PRICE TANGNEY, eds. *THE SELF-CONSCIOUS EMOTIONS* (2007) (offering an explanation for the emergence of collective violence using a dynamic theory of nationalism).

<sup>296</sup> See Emmarie Huetteman, *McCain hated Obamacare. He also saved it*, NBC NEWS, AUG. 27, 2018, <https://www.nbcnews.com/health/obamacare/mccain-hated-obamacare-he-also-saved-it-n904106>.

<sup>297</sup> See Don Gonyea, *From the Start, Obama Struggled with Fallout from a Kind of Fake News*, NPR, Jan. 10, 2017, <https://www.npr.org/2017/01/10/509164679/from-the-start-obama-struggled-with-fallout-from-a-kind-of-fake-news>.

<sup>298</sup> See Jacob Weindling, *New Fox News Poll: Obamacare’s Popularity Is at an All Time High*, PASTE MAGAZINE, Oct. 18, 2018, <https://www.pastemagazine.com/articles/2018/10/new-fox-news-poll-obamacares-popularity-is-at-an-a.html>.

<sup>299</sup> See Ted Brader, *Striking a Responsive Chord: How Political Ads Motivate and Persuade Voters by Appealing to Emotion*, 49 AMER. J. POLIT. SCIENCE 388, 400-01 (2005).

deductive.<sup>300</sup> Thus, the initial barrage against the ACA may have fed bottom-up emotional responses, eight years of experience with the statute may have ultimately changed public opinion through a more logical inquiry. But those eight years of patience were exacted at a high price; a different vote by McCain, nearly on his deathbed, may have resulted in a different ending to this story. Slender threads are very fragile and do not always survive for eight years. Nonetheless, civil rights advocates sometimes have the stamina and strength to sustain them. Further interdisciplinary research might provide further understanding of when and how civil rights advocates can withstand a barrage of insults.

It is also important to remember that progressive change *can* happen without resort to public insults. Michelle Alexander's best-selling, poignant and fact-based account of mass incarceration in the United States<sup>301</sup> first brought important attention to this problem in 2010, with an initial print run of only 3,000 copies from the New Press.<sup>302</sup> With enormous grass-roots support from community organizers<sup>303</sup> and civil rights organizations,<sup>304</sup> important structural changes have occurred since

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<sup>300</sup> *Id.* at 402.

<sup>301</sup> See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

<sup>302</sup> *The New Jim Crow: Mass Incarceration in the Age of Colorblindness: A Case Study on the Role of Books in Leveraging Social Change*, Nov. 2014, <http://mediainpactfunders.org/wp-content/uploads/2014/12/The-New-Press-NJC-Case-Study-Nov20141.pdf>. ("Media Impact Project")

<sup>303</sup> The Media Impact Project describes the activism that was influenced her book as including: "Students Against Mass Incarceration; standing- room-only events at churches around the country (including an 800-plus audience at Abyssinian Baptist Church in Harlem); marches organized by the Campaign to End the New Jim Crow; and sponsored events featuring Michelle Alexander in partnership with a range of nonprofit organizations, including the ACLU, the Drug Policy Alliance, Demos, the NAACP, and The Sentencing Project. These events provided an opportunity to reach individuals at the front lines of advocating for policy reform." Media Impact Project, *supra* note \_\_\_\_.

<sup>304</sup> The Media Impact Project includes the following events as being influenced by Alexander's work: "In addition to events, *The New Jim Crow* also played an instrumental role in the Center for Constitutional Rights' legal preparation in advance of the seminal case, *Floyd, et al. v. City of New York, et al.*—a class action lawsuit that challenged the New York Police Department's practices of racial profiling and stop-and-frisks, with Judge Shira Scheindlin citing *The New Jim Crow* twice in her decision." Media Impact Project, *supra* note \_\_\_\_.

2010 like “banning the box” initiatives,<sup>305</sup> mass bailouts of inmates,<sup>306</sup> the curtailment of money bonds,<sup>307</sup> and the reinstatement of voting rights for convicted felons.<sup>308</sup> And Black Lives Matters has managed to sustain its work on many of these issues despite even President Trump trying to bring them down through public insults.<sup>309</sup> While the changes that Alexander helped spur are not perfect, they show that the political left, too, can attain structural change but those changes need to be strong in order to be sustained. Because, as Michelle Alexander recounts,<sup>310</sup> efforts to undermine those reforms will be immediate and need to be resisted.

Michelle Obama has said “When they go low, we go high”; by contrast, Eric Holder has said “When they go low, we kick them!”<sup>311</sup> By the time the insults start flying, however, the response may be irrelevant. This Article has argued that insults are successful because of the pre-existing weakness of the underlying right that is being attacked. Thus, it is important to have a fortress *before* the fighting begins. The better analogy may be the Three Little Pigs. The civil rights community has a straw house

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<sup>305</sup> See Beth Avery & Phil Hernandez, *Ban the Box: U.S. Cities, Counties, and States Adopt Fair Hiring Policies*, NATIONAL EMPLOYMENT LAW PROJECT (Sept. 25, 2018), <https://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/>. (33 states and over 150 cities and counties have adopted employment practices that ban questions about conviction histories on job applications).

<sup>306</sup> See Jeffery C. Mays, *500 Women and Teenagers to be Bailed Out from Rikers by Human Rights Group*, N.Y. TIMES, Sept. 19, 2018, <https://www.nytimes.com/2018/09/19/nyregion/rikers-island-inmate-population.html?module=inline>. (bail effort led by Robert F. Kennedy Human Rights group).

<sup>307</sup> See Lisa W. Foderaro, *New Jersey Alters Its Bail System and Upends Legal Landscape*, N.Y. TIMES, Feb. 6, 2017, <https://www.nytimes.com/2017/02/06/nyregion/new-jersey-bail-system.html?module=inline>. (defendants only required to post bail if they are a flight risk or are a threat to public safety).

<sup>308</sup> See Frances Robles, *1.4. Million Floridians With Felonies Win Long-Denied Right to Vote*, N.Y. TIMES, Nov. 7, 2018, <https://www.nytimes.com/2018/11/07/us/florida-felon-voting-rights.html>. (restoring voting rights for convicted felons who have served their sentences and were not convicted of murder or sexual abuse).

<sup>309</sup> See Dara Lind, *The president pulled an “All Lives Matter” on DREAMers*, VOX, Jan. 31, 2018, <https://www.vox.com/2018/1/30/16953714/trump-state-union-immigration-dream-daca>; Black Lives Matter, *In response to the State of the Union*, <https://blacklivesmatter.com/pressroom/responsestate-of-the-union/> (documenting Trump using the phrase “All Lives Matter” to under the Black Lives Matter movement).

<sup>310</sup> See Michelle Alexander, *The Newest Jim Crow: Recent criminal justice reforms contain the seeds of a frightening system of “e-carceration,”* N.Y. TIMES, Nov. 8, 2018, <https://www.nytimes.com/2018/11/08/opinion/sunday/criminal-justice-reforms-race-technology.html?action=click&module=Opinion&pgtype=Homepage>. (arguing that risk assessment algorithms are based on factors that highly correlate with race and class).

<sup>311</sup> See Carla Herreria, *Eric Holder Revises Michelle Obama Quote: ‘When They Go Low, We Kick Them,’* HUFFPOST, Oct. 11, 2018, [https://www.huffpost.com/entry/eric-holder-amends-michelle-obama-mantra\\_us\\_5bbe767ce4b054d7ddef4a8d](https://www.huffpost.com/entry/eric-holder-amends-michelle-obama-mantra_us_5bbe767ce4b054d7ddef4a8d)

that cannot withstand even a slight puff of air by the power elite. The civil rights community needs a brick house rather than a “fragile compromise.”<sup>312</sup> Then, the civil rights community need not hold its breath while waiting to see if Senator McCain will display a thumbs up or a thumbs down.<sup>313</sup>

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<sup>312</sup> Ruth Colker, *ADA Title III: A Fragile Compromise*, 21 BERKELEY J EMP. & LAB. L. 377 (2000).

<sup>313</sup> See Peter W. Stevenson, *The iconic thumbs-down vote that summed up John McCain's career*, WASH. POST, Aug. 27, 2017, [https://www.washingtonpost.com/politics/2018/08/27/iconic-thumbs-down-vote-that-summed-up-john-mccains-career/?utm\\_term=.bfacae62e67c](https://www.washingtonpost.com/politics/2018/08/27/iconic-thumbs-down-vote-that-summed-up-john-mccains-career/?utm_term=.bfacae62e67c).