

# Juries and the Disabled

Hon. Donovan W. Frank and  
Brian N. Aleinikoff

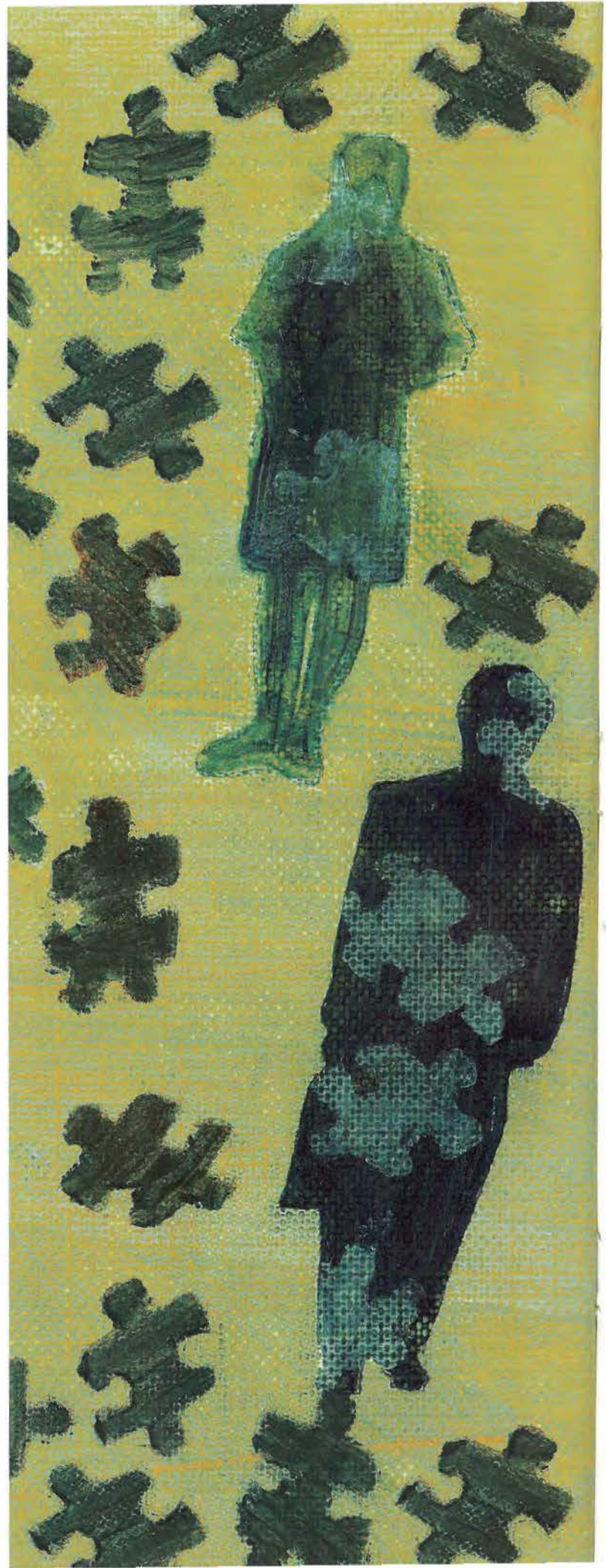
Jury selection for the six-day civil case had just concluded. Unexpectedly, neither party's counsel used a peremptory challenge or made a motion to strike for cause. The presiding judge, Hon. Donovan W. Frank, was impressed with the lawyers because the final jury included a blind juror and the trial would include a large number of documents. The lawyers agreed to ensure that any testifying witness who used a document would take extra measures and explain the contents of the document.

Through five days of testimony, the trial proceeded as expected. After each party rested, without objection from the lawyers, the court instructed the jurors that during deliberations, jurors must read aloud the contents of any document that they were reviewing and discuss it thoroughly for the benefit of the blind juror.

The jury returned a fair and proper verdict. During a meeting with Judge Frank in his chambers after the jury was dismissed, members of the jury proclaimed, "Some of us were surprised that a blind juror could be selected and serve on a jury in a trial like this. We now know we were wrong." "Judge, she saw things we did not see. We were a better jury with her." "Some of us did not realize that we were carrying around negative stereotypes and, I guess you would say, misconceptions about individuals who are blind." The jury foreperson concluded with this remark: "I think I speak for most of the jury panel when I say that this experience has opened our eyes. Thank you."

William Sloane Coffin Jr. stated, "Diversity may be the hardest thing for a society to live with, and perhaps the most dangerous thing for a society to be without." Indeed, there are few ideas in a democratic society that would not benefit from diverse perspectives. The unique outlooks that different people bring to complex situations form the cultural building blocks of understanding, thoughtfulness, and reason. How different people examine and perceive the same facts allows for an interpretation that might otherwise be lost.

Why would such diverse views not be essential to any fair and impartial process, particularly a trial before a jury of one's peers? Given the traditionally limited access people with disabilities have had to jury service, this is a question that groups advocating for equal rights for people with disabilities have been asking for decades. And while many are certain of the benefits that people with disabilities would bring to a jury, many more naively question the abilities of people with disabilities to be fair and impartial. Whether



it is because people simply hesitate to trust what they do not understand, or because prejudices and negative stereotypes shape decisions, the fact remains that people with disabilities have largely been restricted from jury service.

Fortunately, with the passage of legislation such as the Americans with Disabilities Act (ADA), and the growing influence of people with disabilities nationwide, many states have enacted legislation that does not allow litigants to discriminate against people with disabilities when selecting a jury. The question, however, remains as to whether people with disabilities really do have equal access to a fundamental right (and duty) that all Americans should enjoy.

This article will explore how courts and legislators have traditionally treated jurors with disabilities, the steps that are being taken to allow individuals with disabilities to serve on juries, the impediments people with disabilities still face regarding jury service, and the overall importance of diversity in a jury.

### Historical Overview

Historically, many courts disqualified persons with disabilities from serving on juries.<sup>1</sup> Indeed, individuals with disabilities were presumed to be unsuitable for jury service, and many states had statutes that categorically disqualified people with disabilities from serving on a jury.<sup>2</sup> Courts and legislators expressed concern that allowing a person with a disability to serve might impinge a defendant's constitutional right to a fair and impartial jury, and thus to receive a fair trial as guaranteed by the Due Process Clause of the Constitution.<sup>3</sup> To many, a juror who cannot receive and evaluate evidence through their physical senses, or mental process evidence as a so-called nondisabled individual can, deprives a defendant of his basic Due Process rights. One court noted:

While trial by jury is constitutionally implanted in our system of justice, an individual's interest in serving on a jury cannot be held a fundamental right. The guarantee of the Sixth Amendment is primarily for the benefit of the litigant—not persons seeking service on the jury; and even though lawfully qualified, a citizen may not demand to serve on a jury. At most, the citizen is entitled to be considered for jury service. His interest in becoming a juror is clearly secondary to the interests of the litigants in securing an impartial jury, as shown by the traditional exclusion of prospective jurors for cause or upon peremptory challenge.<sup>4</sup>

Questions about the burdens a court might face in accommodating jurors with disabilities provided another justification for excluding people with disabilities from jury service. Surely it cannot be inexpensive to provide an interpreter to a deaf juror or visual aids to the blind juror. Due Process and unreasonable burden concerns placed a heavy strain on the fundamental right of all Americans to serve on a jury, which, as the Supreme Court has noted “is [the] most significant opportunity to participate in the democratic process.”<sup>5</sup>

### Concern Grows Regarding Individuals' with Disabilities Access to Jury Service

With the implementation of the Rehabilitation Act of 1973, the ADA, the U.S. Courts Accommodations Policy of 1995, revised ABA recommendations, and a growing voice from advocates of people with disabilities,<sup>6</sup> access to jury service for people with disabilities has begun to expand.<sup>7</sup> As one court noted, “The Rehabilitation Act and the ADA were enacted to prevent old-fashioned and unfounded prejudices against disabled persons from interfering with those individuals' rights to enjoy the same privileges and duties afforded to all United States citizens.”<sup>8</sup> Even with these movements, however, equal access to juries for people with disabilities largely remains dependent on individual state's legislation.

The Rehabilitation Act of 1973 (Rehabilitation Act) provides that “[n]o otherwise qualified individual with a disability ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.”<sup>9</sup> Regulations issued under the Rehabilitation Act clarify that the operations of federal and state courts fall within the purview of the Rehabilitation Act because courts are considered instrumentalities of state or local governments.<sup>10</sup> The Rehabilitation Act has been applied to prevent the striking of a deaf juror from the jury pool.<sup>11</sup>

On July 26, 1990, Congress enacted the ADA “to provide a comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”<sup>12</sup> With this act, “Congress envisioned a society that is more inclusive, more diverse, more accommodating, and more equitable for persons with mental and physical disabilities.”<sup>13</sup> The ADA extended the Rehabilitation Act's antidiscrimination protection for disabled individuals to all government functions, including the courts, regardless of whether they receive federal funding.<sup>14</sup> The ADA provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”<sup>15</sup>

The ADA's mandate covers government entities under Title II, which requires public entities to provide individuals with disabilities equal access to state and local government services, programs, and facilities, including state court programs, and jury service.<sup>16</sup> The ADA has been applied to prevent the striking of a blind juror from the jury pool.<sup>17</sup> The Eighth Circuit has noted that the ADA “is intended to combat the effects of archaic attitudes, erroneous perceptions, and myths that work to the disadvantage of persons with or regarded as having disabilities.”<sup>18</sup>

Further, the Judicial Conference of the Administrative Office of the U.S. Courts has adopted a policy that federal courts will “provide reasonable accommodations to persons with communications disabilities” found to be legally qualified to serve as jurors under the Jury Act.<sup>19</sup> For example, if the court deems someone with a communication disability qualified, federal courts will provide them with

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“reasonable accommodations” such as sign language interpreters or other appropriate auxiliary aids or services, at no charge to the deaf participants.<sup>20</sup> Courts must also honor a juror’s choice of auxiliary aid or service, “unless [the court] can show that another equally effective means of communication is available, or that the use of the means chosen would result in a fundamental alteration in the nature of the court proceeding or in undue financial or administrative burden.”<sup>21</sup>

Finally, the ABA has sought to apply the standards of the ADA. The ABA recommends that the privilege and responsibility of jury service should extend to “[a]ll persons, except minors, non-citizens, non-residents of the jurisdiction, convicted felons whose civil rights have not been restored, and those who are not able to communicate in the English language.”<sup>22</sup> Further, the ABA has constructed specific questions for judges to ask that should help them avoid removing jurors based on misconceptions or stereotypes.<sup>23</sup> For example, the guide recommends that judges conduct side bars with the individual with the disability to determine how a particular disability would affect that juror’s ability to serve.<sup>24</sup> This is of particular importance in regards to mental disabilities. As a gatekeeper, the judge must ensure that prospective jurors can understand the issues at trial, determine credibility, and deliberate fairly and impartially.

Following these guidelines, states no longer statutorily exclude persons from jury service based on specific disabilities.<sup>25</sup> In fact, jurisdictions have begun to heed the ABA’s standards and pass laws that protect jurors from discrimination based on speculation and prejudice, reasoning that a disability does not hinder a person’s ability to serve as a juror.<sup>26</sup> Both state<sup>27</sup> and federal<sup>28</sup> legislatures have enacted statutes that prohibit the exclusion of individuals with disabilities from serving on juries.

### **Why Access to Jury Service for People with Disabilities Remains Limited**

Despite the enactment of these policies, however, access to the jury system for people with disabilities remains limited for two reasons. First, the pool from which juries are drawn severely limits the potential number of people with disabilities who receive jury summonses.<sup>29</sup> The Supreme Court has held that “the American concept of the jury trial contemplates a jury drawn from a fair cross section of the community.”<sup>30</sup> But, the vast majority of states

draw jury pools from driver’s license and/or voter registration lists.<sup>31</sup> Yet, query the number of people with disabilities who have driver’s licenses or are registered to vote.<sup>32</sup>

Second, a person with a disability’s ability to serve on a jury is largely in the hands of the attorneys in any particular case due to the use of peremptory challenges.<sup>33</sup> In *Batson v. Kentucky*, the Supreme Court held that peremptory challenges could not be based on a juror’s race.<sup>34</sup> The Court held that the prosecutor’s use of peremptory challenges to remove black individuals from the jury pool violated, *inter alia*, the defendant’s equal protection rights under the Fourteenth Amendment.<sup>35</sup> In *J.E.B. v. Ala. ex rel. T.B.*, the Supreme Court expanded the racial restriction to protect women.<sup>36</sup> In both cases, the Court found that the state’s ability to strike individual jurors based on race or gender with peremptory challenges is subject to the Equal Protection Clause.<sup>37</sup>

Although many believe that disability should be treated similarly to race and gender, and thus receive equal protection from discrimination, the Court has yet to expand such constitutional safeguards.<sup>38</sup> Without such special classification, “[p]arties still may remove jurors who they feel might be less acceptable than others on the panel.” To be sure, even with the mandates of the ADA and the recommendations of the ABA, unlike gender and race, people with disabilities are not subject to the shield of the Equal Protection Clause.<sup>39</sup>

While persons with disabilities certainly view themselves as a cognizable group subject to the protections of the Equal Protection Clause, many states do not feel the same way.<sup>40</sup> This raises the question of why a person with a disability should not have the right to realize the privilege to serve on a jury. What makes a person with a disability any less impartial and fair? Does accommodating a juror with a disability cast an undue burden on the court? By embodying the ideals of justice and impartiality, is it not the responsibility of the justice system to accommodate these individuals? An argument certainly exists that the presence of a person with a disability on the jury helps, not hurts, the ability of a party to receive a fair trial.

### **Conclusion**

Most Americans have only two chances to ensure their voices are heard—when they vote and when they serve on a jury. While a jury trial “contemplates a jury drawn from a fair cross section of the community,”<sup>41</sup> legislators, the bar, and the bench alike have not allowed a large contingent of qualified, American citizens to perform their civic duty of serving on a jury. The important social policy of adhering to the law throughout a trial “argues against automatically foreclosing members of an important segment of our society from jury duty” merely on the basis of their disabilities.<sup>42</sup> Persons with disabilities must be allowed to share the honor and privilege of jury service in the same manner as other citizens and it is the responsibility of the bench, the bar, and the legislature to ensure equal access to jury service for people with disabilities. Justice requires no less. **TFL**

Hon. Donovan W. Frank was appointed to the federal bench by President William Clinton and took the oath of office on Nov. 2, 1998. Judge Frank was the 31st federal judge selected for Minnesota, succeeding Judge David S. Doty. Throughout his career, Judge Frank has vigorously advocated for the rights of persons with disabilities. In recognition of such advocacy, Judge Frank has received numerous prestigious awards, such as the Paul G. Hearne Award for Disability Rights from the American Bar Association and the Luther Granquist Systems Change Award from the Arc Minnesota. Judge Frank also serves on numerous boards and committees, both at the federal and state level, which seek dignified and equal treatment for people with disabilities. Further, Judge Frank frequently presents CLE's and appears on public television to speak about the importance of diverse workforces, disability discrimination, and the right to equal justice for people with disabilities. Brian N. Aleinikoff is an associate in the intellectual property litigation group at Robins, Kaplan, Miller & Ciresi LLP in Minneapolis, Minn. He obtained his J.D. from the University of Wisconsin Law School in 2011, his M.S. from Tufts University in 2007, and his B.A. from Carleton College in 2006.

## Endnotes

<sup>1</sup>See, e.g., *Eckstein v. Kirby*, 452 F. Supp. 1235, 1243 (E.D. Ark. 1978); Matthew J. Crehan, *The Disability-Based Peremptory Challenge: Does it Validate Discrimination Against Blind Prospective Jurors?*, 25 N. Ky. L. Rev. 531, 533 (1998).

<sup>2</sup>See, e.g., Ark. Code § 16-31-102 prior to 1994 amendment, which disqualified persons whose "sense of seeing or hearing are substantially impaired"; *Lewis v. Crews*, 282 N.Y.S.2d 83, 85 (N.Y. Sup. Ct., 1967).

<sup>3</sup>U.S. CONST. amend. XIV, § 1 (mandating that no state shall "deprive any person of life, liberty or property, without due process of law"). See also Crehan, *supra* note 1 at 537-38.

<sup>4</sup>*Adams v. Sup. Ct. of San Diego Cnty.*, 524 P.2d 375, 379 (Cal. 1974). See *Jones v. New York City Transit Author.*, 483 N.Y.S.2d 623, 627 (N.Y. Civ. Ct.). Cf. *United States v. Dempsey*, 830 F.2d 1084, 1088 (10th Cir. 1987).

<sup>5</sup>*Powers v. Ohio*, 499 U.S. 400, 407 (1991).

<sup>6</sup>See, e.g., Brief in Support of National Association of the Deaf, et al. as Amici Curiae Supporting Appellant, *Ohio v. Speer*, 925 N.E.2d 584 (Ohio, 2010).

<sup>7</sup>See, e.g., *Galloway v. Sup. Ct.*, 816 F. Supp. 12, 23 (D.D.C. 1993). See also *People v. Guzman*, 478 N.Y.S.2d 455, 460 (N.Y. Sup. Ct., 1984).

<sup>8</sup>*Id.*

<sup>9</sup>29 U.S.C. § 794(a).

<sup>10</sup>See 28 C.F.R. § 42.501-505.

<sup>11</sup>In *DeLong v. Brumbaugh*, the U.S. District Court for the Western District of Pennsylvania held that excluding a deaf person from the jury violated Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, 703 F. Supp. 399, 402, 404-05 (W.D. Pa. 1989).

<sup>12</sup>42 U.S.C. § 12101(b)(1).

<sup>13</sup>Kristi Bleyer, *Access to Jury Service for Persons with Disabilities*, 19 MENTAL AND PHYSICAL DISABILITY L. REP. 249 (1995).

<sup>14</sup>42 U.S.C. § 12132.

<sup>15</sup>*Id.*

<sup>16</sup>*Id.*

<sup>17</sup>See *supra* note 6.

<sup>18</sup>*Wooten v. Farmland Foods*, 58 F.3d 382, 385 (8th Cir. 1995) (internal quotation omitted).

<sup>19</sup>Vol. I, Administrative Manual, Chapter III, "General Management and Administration, Guide to Judiciary Policies and Procedures" (1995).

<sup>20</sup>*Id.* ¶ 2.

<sup>21</sup>*Id.*

<sup>22</sup>Am. Bar Ass'n, *Principles for Juries and Jury Trials*, at Standard 2 (2005).

<sup>23</sup>See Kristi Bleyer, et al. *Into the Jury Box: Disability Accommodation Guide for State Courts* (1994).

<sup>24</sup>*Id.*

<sup>25</sup>Arkansas, the last state to do so, prior to 1994, disqualified persons whose "sense of seeing or hearing are substantially impaired." Ark. Code § 16-31-102.

<sup>26</sup>See *People v. Caldwell*, 603 N.Y.S.2d 713, 715 (N.Y. Crim. Ct.).

<sup>27</sup>See, e.g., Or. Rev. Stat. § 10.030(4) (2011); S.D. Codified Laws § 16-13-10 (2012); Minn. Stat. § 593.32, subd. 1 (2012); R.I. Gen. Laws § 9-9-1.1 (2012); Wis. Stat. § 756.001(3) (2012).

<sup>28</sup>The Jury Selection and Service Act of 1968, which provides the structure for selecting federal juries, states that an individual is qualified to serve on a jury unless he or she "is incapable, by reason of mental or physical infirmity, to render satisfactory jury service." 28 U.S.C. § 1865 (b)(4).

<sup>29</sup>Bleyer, *supra* note 13, at 249.

<sup>30</sup>*Taylor v. Louisiana*, 419 U.S. 522, 527 (1975).

<sup>31</sup>*Id.*

<sup>32</sup>The American Bar Association seeks to expand the sources from which jurors are selected, stating, "The jury source list and the assembled jury pool should be representative and inclusive of the eligible population in the jurisdiction. The source list and the assembled jury pool are representative of the population to the extent the percentages of cognizable group members on the source list and in the assembled jury pool are reasonably proportionate to the corresponding percentages in the population." Am. Bar Ass'n, *Principles for Juries and Jury Trials*, at Standard 10.

<sup>33</sup>See generally Crehan, *supra* note 1, at 533.

<sup>34</sup>476 U.S. 79 (1985).

<sup>35</sup>*Id.* at 86-89.

<sup>36</sup>511 U.S. 127, 146 (1994).

<sup>37</sup>*Id.*; *Batson*, 476 U.S. at 86.

<sup>38</sup>See Mary A. Lynch, *The Application of Equal Protection to Prospective Jurors with Disabilities: Will Batson Cover Disability-Based Strikes?*, 57 ALB. L. REV. 289, 340 (1993).

<sup>39</sup>See Colo. Rev. Stat. 13-71-105 (2012).

<sup>40</sup>See Bleyer, *supra* note 13, at 249-50.

<sup>41</sup>*Taylor*, 419 U.S. at 527.

<sup>42</sup>*United States v. Dempsey*, 830 F.2d 1084, 1091 (10th Cir. 1987).