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TRAVELLING THROUGH TITLE III: THE DIFFICULTIES OF ACCESSING REASONABLE ACCOMMODATIONS FOR PEOPLE WITH MENTAL OR DEVELOPMENTAL DISABILITIES WHILE ON VACATION

Marie Michel*

* Special thanks to Professor Katie Eyer for her guidance on this paper. I am extremely grateful to those I interviewed, without whom this note would not be possible. I am also grateful to Tony and my family for supporting me throughout law school. This note is dedicated to people with mental and developmental disabilities, who all deserve a nice vacation.

I. Introduction

When we think of disability accommodations, we think of those accommodations that we readily see in the world around us. We think of ramps. We think of elevators. We think of walkers, canes, and wheelchairs. We also think of these accommodations as long-term, permanent structures. We think of how these aid people with disabilities in moving around their house, running errands in public places, and with working around an office environment.

What needs to be understood however, is that these accommodations represent only a part of all available disability accommodations. Not every disability is a physical disability that would be aided by special chairs and parking spaces. There are mental and developmental disabilities that require means of accommodation that may not be as apparent to another passerby. There are also temporary accommodations, impermanent installations that can be lifted when they are no longer needed. These are the types of accommodations this paper will examine. More specifically, this paper will examine the barriers to public accommodations under Title III of the ADA for people with mental or developmental disabilities while they are on vacation.

For people with disabilities, particularly mental or developmental disabilities,¹ the effort involved in embarking on a vacation may be

¹ For the purposes of this paper, I will be working with these descriptions of mental and developmental disabilities. NAT'L INSTITUTES OF HEALTH (US), INFORMATION ABOUT MENTAL ILLNESS AND THE BRAIN (2007), <https://www.ncbi.nlm.nih.gov/books/NBK20369/>. (Mental disabilities are, "a health condition that changes a person's thinking, feelings, or behavior (or all three) and that causes the person distress and difficulty in functioning. . . . [I]ncluding depression, schizophrenia, attention deficit hyperactivity disorder (ADHD) . . . and obsessive-compulsive disorder."); State of Cal. Dep't of

insurmountable because they are often denied the accommodations that would make vacationing worthwhile.²

Often their aversion to traveling is not necessarily a personal choice.³ Many dream about visiting exciting new places, and there are

Developmental Serv., *Information About Developmental Disabilities*, CA.GOV, https://www3.dds.ca.gov/General/info_about_dd.cfm (last visited Mar. 9, 2019, 3:50 P.M.) (Developmental disabilities refer “to a severe and chronic disability that is attributable to a mental or physical impairment that begins before an individual reaches adulthood. These disabilities include intellectual disability, cerebral palsy, epilepsy, autism, and disabling conditions closely related to intellectual disability or requiring similar treatment.”).

² See generally *A.L. v. Walt Disney Parks & Resorts U.S.*, 900 F.3d 1270, 1283-4 (11th Cir. 2018); *T.P. v. Walt Disney Parks & Resorts U.S., Inc.*, No. CV 15-5346-R, 2016 U.S. Dist. LEXIS 147801 (C.D. Cal. Oct. 4, 2016); *C.R. v. BSA*, 280 F. App'x 669 (9th Cir. 2008); *Alumni Cruises v. Carnival*, 987 F. Supp. 2d 1290 (S.D. Fla. 2013); u/DaffodilsTigerlilies, *Disability*, REDDIT, (Oct. 30, 2018, 10:05:28 AM), https://www.reddit.com/r/disability/comments/9sscei/people_with_cognitive_intellectual_or/; u/GrowingAutism, *Autism*, REDDIT, (Oct. 30, 2018 5:46:47 PM), https://www.reddit.com/r/autism/comments/9ssfnw/question_what_difficulties_have_you_encountered/; u/celofabrica, *Neurodiversity*, REDDIT (Nov. 2, 2018, 7:33:18 PM), https://www.reddit.com/r/neurodiversity/comments/9ssucc/people_with_cognitive_intellectual_or/.

³ While I do discuss later in this paper that the freedom and independence people with mental or developmental disabilities achieve by going on vacation, and the importance of said freedom and independence in raising self-esteem, it would be inaccurate to say that where, when, and how they travel is entirely their own personal choice. One study points out that even though people with mental or developmental disabilities can influence where they travel to, the ultimate decision maker is whoever is in control of their finances, which may mean the caretaker decides, and not the person with the disability. Certain elements of care from caretakers may also be still required during a vacation.

a number of benefits to people with disabilities traveling.⁴ Traveling can alleviate their pain and strengthen the relationships they have with others.⁵ Most importantly, travel can help people with disabilities escape the societal perception of being someone in need of care, and instead be viewed by others and by themselves as people who are capable of embarking on adventure.⁶

Inaccessibility at the destination itself also impacts the decision of where to travel. The independence people with mental or developmental disabilities do gain by traveling is still significantly more than they have in their daily lives, as they can escape their roles of ‘objects of care’ and the stigma associated with societies stereotypes about disability, as discussed later on in this paper. See Hanna Hartikka, *Travelling Despite the Disability – Experiences of Traveling with an Intellectually Disabled Person*, 31 (2014) (on file with Saimaa Univ. of Applied Sciences Bus. and Culture); Bodil Stilling Blichfeldt & Jaqueline Nicolaisen, *Disabled Travel: Not Easy, But Doable*, CURRENT ISSUES IN TOURISM, June 7, 2010, <https://www.tandfonline.com/doi/abs/10.1080/13683500903370159>; Holly Bosley Perry & Mary Kozub, *Family Travel Experiences When One Member Has A Developmental Disability*, THE COLL. AT BROCKPORT 1 (2011).

⁴ Hartikka, *supra* note 3, at 37; Blichfeldt & Nicolaisen, *supra* note 3, at 83; Perry & Kozub, *supra* note 3 at 3; Julia Isrif, *Disability Tourism – Robinson Crusoe Island as a Therapeutic Landscape and the Impacts of this Landscape on Children with Disabilities*, (June 29, 2017) (on file with NHTV Breda University of Applied Science and Wageningen, University, NL); Songee Kim & Xiran Y. Lehto, *Travel by Families with Children Possessing Disabilities: Motives and Activities*, 37 TOURISM MGMT. 13, 19 (2013).

⁵ Blichfeldt & Nicolaisen, *supra* note 3, at 87; Kim & Lehto, *supra* note 4, at 14.

⁶ Blichfeldt & Nicolaisen, *supra* note 3, at 81; Kim & Lehto, *supra* note 4, at 14; Isrif, *supra* note 4, at 12; RUTH COLKER, *THE DISABILITY PENDULUM: THE FIRST DECADE OF THE AMERICANS WITH DISABILITIES ACT 199* (New York

Yet travelling for people with disabilities is almost never as simple as purchasing a plane ticket on a whim.⁷ They are often denied the accommodations they have a right to under Title III of the Americans with Disabilities Act.⁸ The businesses behind these vacation destinations may be reluctant to provide accommodation because they can be costly and denying such accommodations is unlikely to result in a lawsuit.⁹ People with disabilities struggle to protect their rights in court. Title III claims present an overabundance of barriers for potential plaintiffs, including difficulty accessing attorneys, financial strains, and a lack of effective relief awarded by the courts.¹⁰

As difficult as it can be for people with physical disabilities to travel, people with mental or developmental disabilities face additional challenges when attempting to access accommodations while they are on vacation. What little case law there is on disability accommodations at vacation destinations is centered around wheelchair accessibility or

University Press) (2005); Courtney Abbott Hill, *Enabling the ADA: Why Monetary Damages Should Be A Remedy Under Title III of the Americans with Disabilities Act*, 59 SYRACUSE L. REV. 101, 112 (2008).

⁷ Blichfeldt & Nicolaisen, *supra* note 3, at 88.

⁸ Americans with Disabilities Act (ADA) of 1990, Pub. L. No. 101-336, § 302(b)(1)(A)(ii), 104 Stat. 327, 355 (1990); *A.L. v. Walt Disney Parks & Resorts US*, 900 F.3d at 1270; *T.P. v. Walt Disney Parks & Resorts U.S., Inc.*, 2016 U.S. Dist. LEXIS 147801, at *1; *C.R. v. BSA*, 280 F. App'x at 670; *Alumni Cruises v. Carnival*, 987 F. Supp. 2d at 1290; u/DaffodilsTigerlilies, *supra* note 2; u/GrowingAutism, *supra* note 2; u/celofabrica, *supra* note 2.

⁹ *C.R.*, 280 F. App'x at 670; *Alumni Cruises*, 987 F. Supp. at 1309.

¹⁰ Hill, *supra* note 6, at 111-12; COLKER, *supra* note 6, at 172-80; Jeremy Holt, *Reasonable Accommodation: Who Should Bear the Burden?*, 28 STETSON L. REV. 1229, 1232 (1999); Ruth Colker, *ADA Title III: A Fragile Compromise*, 21 BERK. J. EMP. & LAB. L. 377, 393 (2000).

other accommodations for those with physical disabilities. The advocacy that advanced accessibly for people with physical disabilities in travel accommodations has not yet arisen for people with mental or developmental disabilities who want to vacation as well.¹¹

The deficiency of case precedent centered around accessing public accommodations is not the only reason people with mental or developmental disabilities have difficulty traveling. Sometimes those affected are not viewed as being genuinely disabled by travel service providers and are therefore denied accommodation.¹² Both mental and developmental disorders can present a wide array of symptoms that vary even among individuals with the same diagnoses, meaning that accommodations have to be personalized for every individual.¹³ Companies may be more reluctant to provide these accommodations because of the time intensive and expensive nature of individualized, reasonable accommodations.¹⁴ People with mental or developmental disabilities can even feel discouraged from attempting to travel to far away destinations

¹¹ Austin Considine, *Lowering the Barriers for Disabled Visitors*, N.Y. TIMES, Sept. 11, 2005, at 6; Matthew Dietz, *Litigation: Cruise Ship Accessibility After 25 Years!*, DISABILITY INDEPENDENCE GROUP BLOG (July 24, 2015, 9:20 P.M.), <https://justdigitlaw.wordpress.com/2015/07/24/litigation-cruise-ship-accessibility-after-25-years/>; *see generally* Spector v. Norwegian Cruise Line Ltd., 545 U.S. 119 (2005).

¹² u/DaffodilsTigerlilies, *supra* note 2; u/GrowingAutism, *supra* note 2; u/celofabrica, *supra* note 2; Hartikka, *supra* note 3.

¹³ *A.L.*, 900 F.3d at 1278.

¹⁴ COLKER, *supra* note 6.

because of the challenges they face receiving accommodation, even in their own neighborhoods and schools.¹⁵

Enacting new legislation will not solve these problems, since the ADA already requires companies to provide reasonable accommodations for people with mental or developmental disabilities.¹⁶ The problem is that companies often fail to comply with the existing law.¹⁷ Plaintiffs have difficulty enforcing their rights under Title III and other legislation because it is difficult for them to sue. The financial strain and time commitments involved in lawsuits prevent many plaintiffs from going to court. As long as companies know that people with mental or developmental disabilities will not sue, companies will choose to save money by denying travelers reasonable accommodations.¹⁸

Because of the individualized nature of the required accommodations, the best solution available would be to require companies to engage in the interactive process with mentally and developmentally disabled tourists. This would not only urge companies to accommodate their guests, but it would encourage people with mental or developmental disabilities or their caretakers to articulate the exact problems they encounter and share their experiences.¹⁹ This process is already being

¹⁵ u/DaffodilsTigerlilies, *r/Disability*, REDDIT, (Oct. 30, 2018 10:05:28 AM), https://www.reddit.com/r/disability/comments/9sscei/people_with_cognitive_intellectual_or/; u/DaffodilsTigerlilies, *r/Autism*, REDDIT, (Oct. 30, 2018 5:46:47 PM), https://www.reddit.com/r/autism/comments/9ssfnw/question_what_difficulties_have_you_encountered/.

¹⁶ Americans with Disabilities Act § 302(b)(1)(A)(ii).

¹⁷ COLKER, *supra* note 6, at 198.

¹⁸ *Id.* at 199.

¹⁹ Craig A. Sullivan, Article, *The ADA's Interactive Process*, 57 J. MO. B. 116 (2001); Gretchen M. Widmer, Note, *We Can Work It Out: Reasonable*

used in the context of education for disabled children and in the employment context for disabled workers.²⁰ It is also a solution that the judicial system itself can implement without waiting for congressional action.²¹

First, this article will discuss why it is important that people with disabilities receive the mental, emotional, and social benefits that come with travel. Second, it will explain why people with mental or developmental disabilities are refused reasonable accommodations. Third, it will further elaborate why people who are denied reasonable accommodations often do not sue to protect their rights. Fourth, and finally, this article will discuss how to fix these issues in our judicial system by requiring that the parties engage in the interactive process, to ensure that people with mental or developmental disabilities have full access to their rights while traveling.

I. Vacationing Improves the Lives of People with Mental or Developmental Disabilities by Benefitting Them Mentally, Emotionally, Physically, and Socially.

A. Vacationing Improves the Mental, Emotional, and Physical Wellbeing of People with Mental or Developmental Disabilities.

Vacationing can remarkably improve the mental, emotional, and physical health of people with mental or developmental disabilities. Vacations can aid these individuals by reducing their pain, increasing their

Accommodation and the Interactive Process Under the Fair Housing Amendments Act, 2007 U. ILL. L. REV. 761 (2007).

²⁰ Sullivan, *supra* note 19, at 116; Widmer, *supra* note 19, at 761.

²¹ Sullivan, *supra* note 19, at 118; Widmer, *supra* note 19, at 770-73.

physical skills, improving their intellectual development, encouraging their emotional growth, and providing them with a chance to improve their social skills. For families with disabled family members, vacationing may lead to improved relationships within the family unit.

Vacations are known for helping families grow closer together and strengthening each person's social skills and life skills,²² but these benefits are more pronounced when at least one family member has a disability, especially if that disability is a developmental disability.²³ Research has shown that if one child has a developmental disability and one or more of their siblings do not, there is increased stress in the family.²⁴ Negative experiences between sibling have been reported in families where one child is disabled and the other is not.²⁵ Parents

²² Kim & Lehto, *supra* note 4, at 13-14. This article does not specify what disabilities the children participating had, meaning that there is no way to guarantee that all of students had mental or developmental disabilities and not just physical disabilities. However, it is known that at least 194 out of 214 children attending one special education school participating in the study had learning disabilities. The phrase 'learning disabilities' refers to a subset of developmental disabilities. See *Learning and Developmental Disabilities Research and Resources*, COLLABORATIVE ON HEALTH AND ENVIRONMENT (Mar. 23, 2020 at 7:52 PM), <https://www.healthandenvironment.org/environmental-health/health-diseases-and-disabilities/learning-and-developmental-disabilities-research-and-resources>. Additionally, about 84% of the children participating overall had learning or developmental disabilities. Therefore, we can assume a substantial majority of the children in this study had mental or developmental disabilities, making the findings relevant for the purposes of this paper.

²³ *Id.* at 13-15.

²⁴ *Id.* at 13, 19.

²⁵ *Id.*

have reported feeling guilty for investing more time with their disabled children than their nondisabled children, which puts strain on the overall family dynamic.²⁶ Family vacations can help to relieve this tension and increase a sense of “togetherness” in the family unit.²⁷

Vacationing has physical benefits for people with disabilities as well. Vacationing offers opportunities for people to test the limits of their physical abilities, to develop new physical skills, to encourage healing, and to alleviate their pain.²⁸ One study found that people with disabilities often traveled not just out of a sense of ‘wanderlust’ but in search of what they named ‘suncure’. Participants sought out the sun on holiday because feeling the warmth of the sunlight relieved the aches and pains their disability caused.²⁹ Traveling to new places can also offer opportunities for crucial physical development, particularly for people with developmental disabilities.³⁰ Vacations can provide an opportunity for these individuals to build upon their physical abilities and gain confidence.³¹ The physical benefits vacations can bring are

²⁶ *Id.*

²⁷ *Id.* at 19. Increasing the sense of “togetherness”, or family closeness” was identified as the second most important motivator for leisure travel in these families.

²⁸ While this study focuses on people with physical disabilities, it can be analogized to apply to people with cognitive and developmental disabilities because they too are stereotyped by society and often believe they cannot travel because they do not see others traveling. They also, as this paper goes into, concern themselves with disability accommodations. Kim & Lehto, *supra* note 4, at 13, 16; Blichfeldt & Nicolaisen, *supra* note 3, at 87.

²⁹ Blichfeldt & Nicolaisen, *supra* note 3, at 87.

³⁰ Kim & Lehto, *supra* note 4, at 19.

³¹ *Id.* at 19.

prioritized in situations where a family member has a disability, so much so that it is second only to increasing family connections.³²

Improving one's own mental health is another major benefit to vacationing. In one study it was discovered that a major motivating factor for people with disabilities to travel was so that they could have the chance to get away from their caretakers as a means of escaping everyday life and obtaining a sense of personal privacy.³³ Vacations provide a break from everyday routine and responsibilities.³⁴ Traveling is also used as a method for building self-confidence because exploring new destinations often presents opportunities for people to reevaluate their own abilities and chances to strive for new achievements.³⁵ Vacations also encourage emotional growth, intellectual development, and the expansion of creative thinking,³⁶ which may be especially true for people with mental disabilities.³⁷

Taking trips, particularly in groups, can be a way to facilitate the development of important social skills.³⁸ Children with disabilities on vacation will have a chance to practice getting along with others and to gain a sense of belonging, which is harder to achieve in everyday life

³² *Id.* at 17.

³³ Blichfeldt & Nicolaisen, *supra* note 3, at 86; Treva Lind, *Respite Home Offers Overnight Stays for Adults With Special Needs*, DISABILITYSCOOP, (May 31, 2018), <https://www.disabilityscoop.com/2018/05/31/respite-home-special-needs/25138/>.

³⁴ Kim & Lehto, *supra* note 4, at 19.

³⁵ *Id.*

³⁶ Kim & Lehto, *supra* note 4, at 19; Isrif, *supra* note 4, at 12.

³⁷ Kim & Lehto, *supra* note 4, at 19; Isrif, *supra* note 4, at 12.

³⁸ Kim & Lehto, *supra* note 4, at 19; Isrif, *supra* note 4 at 10.

due to the obstacles society places in the way of disabled children's social development.³⁹ Even visiting to glance at new faces can be therapeutic for people with disabilities.⁴⁰ This is a highly anticipated benefit of travel for people with mental disabilities; people with mental disabilities were asked what activities they would like to do on their holiday, and "meet new people" was recorded as being the number one response.⁴¹

A. Accommodating Disabled People When They Travel Provides Social Benefits by Humanizing Their Existence.

People with mental or developmental disabilities who chose to travel can improve their self-esteem, gain independence, and break down social barriers and perceptions about what it means to be disabled in our society.

People with disabilities are subjected to a wide array of harmful stereotypes. These stereotypes are pervasive, and many disabled people become devalued and victimized as a result.⁴² Stereotypes about people with disabilities can include that they "do not have human feelings and emotions . . . are unable to feel basic physical sensations, such as pain, cold and hunger, do not make any worthwhile contributions to society

³⁹ Kim & Lehto, *supra* note 4, at 19; Isrif, *supra* note 4, at 10-11.

⁴⁰ Perry & Kozub, *supra* note 3, at 3.

⁴¹ Hartikka, *supra* note 3, at 26.

⁴² *Dehumanization, Discrimination, and Segregation*, DISABILITY JUSTICE, <https://disabilityjustice.org/justice-denied/dehumanization-discrimination-and-segregation/> (last visited Mar. 9, 2019, 7:36 P.M.); NAT'L INSTITUTES OF HEALTH (US), *supra* note 1.

and . . . are incapable of making decisions for themselves.”⁴³ Those who hold these discriminatory beliefs may view people with disabilities as “less than human” and think that “they should not be allowed to control their finances, own a home, develop serious emotional relationships, experience normal sexual feelings, or control their own reproductive decisions.”⁴⁴ These stereotypes impact a wide range of people with disabilities but are most often applied to people with developmental disabilities.⁴⁵ Children with disabilities may have the added detriment of having their opinions silenced and being objectified in the eyes of others.⁴⁶ Disabled children may be unable to voice their thoughts on their condition, even to researchers studying their disability, who often direct their questions to the child’s caretaker rather than to the child themselves.⁴⁷

Traveling for vacation offers people with disabilities the chance to be seen outside of these stereotypes, and instead as individuals. Vacations can provide an opportunity to be seen as something other than an, “object of care,” someone who’s definitive trait as a person is their reliance on others.⁴⁸ Instead of being a dependent person who needs to be taken care of extensively, people with disabilities can elect to become tourists and freely make their own choices.⁴⁹ When a disabled traveler

⁴³ *Dehumanization, Discrimination, and Segregation*, *supra* note 42; *Faculty*, DISABILITY JUSTICE, <https://disabilityjustice.org/faculty/> (last visited Mar. 9, 2019, 7:38 P.M).

⁴⁴ *Dehumanization, Discrimination, and Segregation*, *supra* note 42.

⁴⁵ *Id.*

⁴⁶ Isrif, *supra* note 4, at 6-7.

⁴⁷ *Id.*

⁴⁸ Blichfeldt & Nicolaisen, *supra* note 3, at 86.

⁴⁹ Hartikka, *supra* note 3, at 37.

proves to themselves that they can travel on their own, it can increase their self-esteem.⁵⁰ This makes it critical that tourists are able to have a sense of independence through guaranteed accessibility at the locations they visit.⁵¹

There is also a sociological benefit achieved when a traveler with a disability sees other travelers with disabilities. Seeing other tourists with disabilities helps dismantle the idea that disabilities are necessarily limiting.⁵² It has been shown before that people who cannot come to terms with newfound disabilities and the way they impact their day to day lives will avoid going out in public places, which naturally excludes the idea of traveling.⁵³ However disability is defined in part by the context of society, and seeing travelers with disabilities enjoying vacations helps to redefine disability in the eyes of those who are also

⁵⁰ A participant in one study noted that traveling increased her self-esteem: “It has to do with: Can I do this? Will it be ok? Will it turn out to be fine? And you really feel you have explored yourself if something happens and you make it.” See Blichfeldt & Nicolaisen, *supra* note 3, at 79, 87.

⁵¹ Even though travel can be freeing to people with disabilities, people with other conditions that require constant care might not find it as liberating, and this could discourage them from travel. One person in a study mentioned that he avoided traveling with his family without a helper, because that forces his family to assist him during the vacation, which takes away from their leisure time. See Blichfeldt & Nicolaisen, *supra* note 3.

⁵² One participant in a study echoed the sentiments of others when he stated that one of his primary reasons for traveling was, “to see that there are others like you – with a handicap. That others that are like you can do . . . this [go on holiday].” See Blichfeldt & Nicolaisen, *supra* note 3, at 79, 86; Perry & Kozub, *supra* note 3, at 3.

⁵³ Blichfeldt & Nicolaisen, *supra* note 3, at 79, 87.

disabled.⁵⁴ Vacationing acts as a way to overcome social barriers of exclusion, particularly for children with disabilities.⁵⁵

People with disabilities, more so than people without disabilities, travel because they long for freedom and independence. Many people with disabilities value freedom when traveling just as much if not more so than their nondisabled counterparts do.⁵⁶

II. People with Mental or Developmental Disabilities Experience Difficulties Accessing Accommodations or are Denied Accommodations Outright, Discouraging Them from Vacationing.

A. People with Mental or Developmental Disabilities Can Be Denied Reasonable Accommodations for their Mental or Developmental Disabilities, and Sometimes are Denied Service Outright.

People with mental or developmental disabilities may be denied reasonable accommodations when travelling, sometimes for no reason at all. This is despite the fact that these institutions are required to

⁵⁴ See *id.*; Perry & Kozub, *supra* note 3, at 3 (“A powerful way of countering stereotypes about mental illness occurs when members of the public meet people who are effectively managing a serious mental illness. . . . Interaction with people who have mental illnesses challenges a person's assumptions and changes a person's attitudes about mental illness.”); see NAT’L INSTITUTES OF HEALTH (US), *supra* note 1.

⁵⁵ Isrif, *supra* note 4.

⁵⁶ Hartikka, *supra* note 3.

provide such accommodation under Title III of the ADA.⁵⁷ These refusals to reasonably accommodate can last throughout the duration of the trip.⁵⁸

Different disabilities have different symptoms that may or may not be impacted by certain circumstances and each disability may require different accommodations to be comfortable in a new environment.⁵⁹ For example, noisy hotels can bother people with Asperger's Syndrome.⁶⁰ People with autism might also benefit from soothing color schemes in the décor, or safety kits and special locks to ensure the safety of children with autism.⁶¹

⁵⁷ Americans with Disabilities Act (ADA) of 1990, Pub. L. No. 101-336, § 302(b)(1)(A)(ii), 104 Stat. 327, 355 (1990).

⁵⁸ One couple not only had trouble receiving accommodation on the airplane, they have had to leave their vacation destinations early due to lack of accommodation. In one such instance, they recall how one time they tried to rent a room on the first floor of a hotel because their wife didn't respond well to riding in elevators. The hotel placed the couple on the seventeenth floor and refused to change their room. *See u/celofabrica, supra* note 2.

⁵⁹ One person on the autistic spectrum said that while they do not have trouble flying on airplanes, their wife who suffers from PTSD does. When they request seats to sit next to her to provide support, airlines refuse to make the accommodation and they end up missing their flight. As they put it, "simple requests like sitting next to her are often treated like asking to drive the plan[e]." *See id.*

⁶⁰ Gabrielle Russon, *Vacation Rentals Catering To People With Autism*, DISABILITYSCOOP (Dec. 18, 2018),

<https://www.disabilityscoop.com/2018/12/18/vacation-rentals-autism/25831/>.

⁶¹ *Id.*

People with mental or developmental disabilities may be discriminated against and barred from services entirely, before they even have the chance to request accommodation. Nowhere is this clearer than in the hotel industry. In 2009, Hilton Hotels Corporation was sued for refusing to make their hotel rooms more accessible for people with disabilities.⁶² More recently in 2018, Airbnb made its services more disability friendly.⁶³ This decision came about on the heels of a study from Rutgers University indicating that Airbnb discriminated against travelers who stated they had a disability.⁶⁴ The study found that while 75% of travelers who did not say they were disabled were approved by hosts,

⁶² Equal Rights Ctr. v. Hilton Hotels, No. 07-1528, 2009 U.S. Dist. LEXIS 126645, at *3 (D.D.C. Mar. 25, 2009). One hotel patron had received multiple confirmations from the hotel ensuring that he would have an accessible room, only to arrive and find that no accessible rooms were available due to hotel renovations. Michelle Diamant, *Hilton Agrees To Boost Disability Accommodations At Hotels*, DISABILITYSCOOP (Nov. 9, 2019), <https://www.disabilityscoop.com/2010/11/09/hilton-hotels-accessibility/11154/>.

⁶³ Shaun Heasley, *Airbnb Rolls Out New Features For Those With Disabilities*, DISABILITYSCOOP (Mar. 20, 2018) <https://www.disabilityscoop.com/2018/03/20/airbnb-new-features-disabilities/24877/>. Airbnb does not fall under Title III of the ADA, as it is both a residential home as well as a place of lodging with five rooms or less, see Hugo Martin, *Airbnb hosts are more likely to reject guests with disabilities, study finds*, L.A. TIMES (June 6, 2017), <https://www.latimes.com/business/la-fi-airbnb-disabilities-20170606-story.html>; Americans with Disabilities Act (ADA) of 1990, Pub. L. No. 101-336, §§ 301(2)(A). (7)(A) (1990). This example was used to show how people with disabilities are discriminated against while trying to access lodging, not as an example of a violation of the ADA.

⁶⁴ Heasley, *supra* note 63.

only 43% of travelers who said they had cerebral palsy had similar success.⁶⁵

That's not to say that every hotel or lodging website discriminates against those with mental or developmental disabilities. VillaKey maintains a disability friendly website that includes places to stay for people with autism, where accommodations can range from soothing neutral colors to permitting service dogs on the premises.⁶⁶ The Sheraton Park Hotel revitalized everything, from their restaurants to their gift shop, to accommodate people with autism and ensure that their stay is easier.⁶⁷ While more hotels and places of lodging are making themselves more accessible for people with autism, the cited examples here are smaller than ubiquitous chains like the Hilton.⁶⁸ In order to make vacationing easier for people with mental or developmental disabilities, the big names in the industry need to embrace accessibility as much as their small-time competition has so far. And as the Hilton shows, the best way to get these big names to comply is to bring them to court.

B. Companies May Refuse to Accommodate for People
with Mental or Developmental Disabilities Until They
are Sued in Court.

⁶⁵ Martin, *supra* note 63.

⁶⁶ Russon, *supra* note 60.

⁶⁷ Joseph Pimentel, *Hotel Looks To Make Stays Easier For Guests With Special Needs*, DISABILITYSCOOP (Aug. 15, 2017), <https://www.disabilityscoop.com/2017/08/15/hotel-stays-special-needs/24029/>.

⁶⁸ Russon, *supra* note 60; Diamant, *supra* note 62; Equal Rights Ctr. v. Hilton Hotels, 2009 U.S. Dist. LEXIS 126645; Joseph Pimentel, *supra* note 67.

Companies tend to ignore their obligations under Title III of the ADA to provide reasonable accommodations for people with mental or developmental disabilities because it is cheaper for them to do so and they are unlikely to be sued for such violations.

One possible reason for the refusal to accommodate people with mental or developmental disabilities is that companies are unwilling to invest in such reasonable accommodations. It is likely that the frugal business decision form them is to wait until the business is sued for its lack of compliance instead of complying from the beginning of the ADA's enactment.⁶⁹ Hilton Hotels continued to build and operate hotels that were not accessible well after the ADA was enacted.⁷⁰ Only after the Hilton was sued for its noncompliance with the ADA were its locations made more accessible.⁷¹ Even in jurisdictions where states offer monetary damages for violations of statutes resembling Title III of the ADA, the meager damages juries tend to award may still make ADA noncompliance the cheaper alternative.⁷²

⁶⁹ COLKER, *supra* note 6.

⁷⁰ *Equal Rights Ctr.*, 2009 U.S. Dist. LEXIS 126645, at *25-26. One of the arguments Hilton presented was that any hotel it built prior to January 26, 1993 when the ADA was passed did not have to comply with the ADA Standards for Accessible Design. This argument was brought up in a 2009 case, meaning that Hilton had operated these hotels without complying to those standards for about sixteen years. The court pointed out that if those hotels had been altered since that date, they had to be altered to meet those standards. The Hilton had altered at least one of those hotels within this time, since one of the plaintiffs had been denied access to an accessible room due to hotel renovations. Diamant, *supra* note 62.

⁷¹ Diamant, *supra* note 62.

⁷² COLKER, *supra* note 6.

One could argue that businesses in the tourism industry should be motivated to make vacation destinations as accessible as possible in order to profit from the patronage of mentally or developmentally disabled persons.⁷³ But that increase in tourism flow would come at the price, a price that consists not only of the financial costs of providing the accommodation but in the time and resources it would take to provide the accommodation.⁷⁴

One example of this view comes from *Alumni Cruises v. Carnival Corp.*, where Carnival Cruise Corp. (“Carnival”) entered into a business arrangement with Autism on the Seas, an organization that guarantees accommodations for a wide variety of mentally and developmentally disabled travelers as well as guarantees that the cruise line will provide accommodations.⁷⁵ Carnival did accommodate in some

⁷³ *Id.*; *Cruising For One and All*, ROYAL CARIBBEAN CRUISES (Nov. 30, 2016), <http://www.rclcorporate.com/cruising-for-one-and-all/>. Ron Pettit, who at the time acted as senior manager for disability inclusion and Americans with Disabilities Act compliance at Royal Caribbean Cruises, explained that “people with disabilities are incredibly brand loyal, once they find a company that works for them, they’re loyal.” One study from 2015 shows “that adults with disabilities spend \$17.3 billion annually on their own travel, up from \$13.6 billion in 2002. Since they typically travel with one or more other adults, the economic impact is actually double, the study found, or \$34.6 billion.”

⁷⁴ COLKER, *supra* note 6, at 183-84; *Carnival Corp.*, 987 F. Supp. 2d. at 1298, 1304. Carnival Cruise lines made this argument in *Alumni Cruises v. Carnival Corp.*, where they claimed these accommodations were an undue burden that would fundamentally alter the services they offer. The court rejected this argument. *Id.*

⁷⁵ *Carnival Corp.*, 987 F. Supp. 2d at 1296. Autism on the Seas assists the families of people with disabilities and clients struggling “with autism, Down

respects, but did not make all the accommodations requested, claiming that they presented an ‘undue burden’ on the financial and administrative aspects of its business.⁷⁶ Curiously Carnival neglected to provide evidence to substantiate the existence of this “undue burden.”⁷⁷ Autism on the Seas pointed out that Carnival did not meet all of the accommodations that had been requested, and that “Carnival is either averse to provide or unwilling to acknowledge that such accommodations are required by law.”⁷⁸ Carnival appeared to affirm that assertion, because at no point during the litigation proceedings did Carnival attempt to argue that the modifications Autism on the Seas proposed were unnecessary to mentally or developmentally disabled travelers.⁷⁹

Another reason businesses may be comfortable not abiding by the ADA is that such businesses are unlikely to suffer any consequences for their continuing violations. For reasons that will be discussed more in depth later on in this paper, plaintiffs struggle to litigate their claims due to financial burdens and difficulty securing an attorney for their case.⁸⁰ It is true that the Attorney General can bring Title III claims against corporations, but the Attorney General’s office cannot handle the volume of cases they receive, and therefore people with mental or developmental disabilities cannot rely on this option.⁸¹

Syndrome, cerebral palsy, Asperger’s Syndrome, and other cognitive, intellectual and developmental disabilities.”

⁷⁶ *Id.* at 1298.

⁷⁷ *Id.*

⁷⁸ *Id.* at 1296.

⁷⁹ *Id.* at 1290, 1304.

⁸⁰ *See supra* section IV(A).

⁸¹ Hill, *supra* note 6, at 112.

Companies therefore may concern themselves more with lawsuits from physically disabled plaintiffs, specifically people who use wheelchairs, than they worry about lawsuits coming from mentally or developmentally disabled plaintiffs. In the past disability advocacy organizations have taken claims to court arguing for greater wheelchair accessibility, so people who use wheelchairs have more case precedent to support their claims.⁸² In comparison, not much case law exists for mentally or developmentally disabled persons who want reasonable accommodations under the ADA.

C. The Courts Struggle with Providing Reasonable Accommodations for People with Mental or Developmental Disabilities Because They Only View the Circumstances Set Forth from a Nondisabled Perspective.

Issues arise in the court system for people with mental or developmental disabilities because judges impose their nondisabled perspectives on the case before them. This means that the highly individualized nature of these claims will be swept under the rug, and that the courts will misidentify what the person's disability is and construct their reasoning based around this misconception.

One problem with providing reasonable accommodations for people with mental or developmental disabilities is the necessity for accommodations to be highly individualized. In prior cases this need for individualization was ignored. For example, *T.P. v. Walt Disney Parks & Resorts U.S., Inc.* is a case where the families of 27 plaintiffs argued that Disney failed to properly accommodate for children with mental

⁸² *Id.*; Considine, *supra* note 11, at 6; Dietz, *supra*, note 11; *Spector*, 545 U.S. 119.

and developmental disabilities. Many of these plaintiffs are not only on the autism spectrum, they have other disabilities as well, including seizure disorders, apraxia of speech, cerebral palsy, and sensory disorders.⁸³ These conditions need to be met with different levels of accommodation and more individualized care. Yet the court in this case each plaintiff as the same, as if the same reasoning is sound in each circumstance. Recently the courts have begun to recognize the need for individualized accommodation. For example, while the lower court in *A.L. v. Walt Disney Co.* did not discuss the need for individualized accommodation, the appellate court discussed the variations in symptoms among the plaintiffs on the autism spectrum and which symptoms were recognized as a common and defining feature of autism throughout its analysis.⁸⁴

Courts will often ignore what accommodations a mentally or developmentally disabled person actually needs in favor of what the court thinks they need when it comes to providing mentally or developmentally disabled people with reasonable accommodations is that at times the accommodations will not address the person's actual needs, but rather addresses what the court believes are the person's actual needs.⁸⁵

⁸³ *T.P. v. Walt Disney Parks & Resorts U.S.*, No. 6:14-cv-1897-Orl-22GJK6, 2016 U.S. Dist. LEXIS 149171 (M.D. Fla. Sep. 22, 2016).

⁸⁴ *A.L. v. Walt Disney Parks & Resorts US, Inc.*, 900 F.3d 1270 (11th Cir. 2018).

⁸⁵ *See T.P.*, 2016 U.S. Dist. LEXIS 149171 at *2, *18. In this case the court mistakes difficulty in deviating from routine, a common symptom for individuals on the autistic spectrum, with a preference for not being idle. The Court states that T.P. was capable of handling disruptions of routine without having a meltdown some of the time, and he could change routine when a ride closes or if he is running out of time to visit every attraction. According to the Court, this indicates that the Disability Access Service (DAS) system, Disney's

This type of fallacy can also lead judges and lawyers to draw faulty comparisons that fail to illustrate the issues and barriers that people with disabilities face.⁸⁶ In turn this reasoning leads to judges and finders of fact to view accommodations that are ineffective for the person requesting them to be effective or even to provide a better experience than what an unaccommodated person without any disabilities would be able to receive.⁸⁷ This assumption can also lead to courts believing that any

disability accommodation system, accommodates for his disabilities by allowing him to avoid being idle. *A.L. v. Walt Disney Parks & Resorts US, Inc.*, 900 F.3d 1270, 1296-7 (11th Cir. 2018). The appellate court disagreed with the trial court and changed its analysis to focus more on the alleged disability according to the plaintiffs, not what the trial court and the defendant alleged the disability to be.

⁸⁶ See *T.P.*, 2016 U.S. Dist. LEXIS 149171 at *3-4, *18-19. The problem alleged in this case was that people on the autistic spectrum cannot comprehend wait times, and that lack of comprehension aggravates the symptoms of their disability. Therefore, they are unable to wait. The DAS system did not eliminate a significant amount of wait time, it took off about ten minutes and otherwise allowed them to physically leave the line. The argument presented was that T.P. can wait for up to twenty-five minutes in line and was able to wait for hours in a car, which the court took as further support of the idea that idling was the problem as opposed to the wait itself. Any evidence of self-control in a different situation and environment on behalf of the plaintiff then, in the Court's eyes, is sufficient enough evidence to negate the need for accommodation.

⁸⁷ See *T.P.*, 2016 U.S. Dist. LEXIS 149171 at *17-18. The court here claimed that disabled individuals utilizing the DAS system not only received an equivalent experience to that of a nondisabled tourist, but that disabled individuals were arguable granted a better experience. This better experience is because nondisabled guests will not only have to wait for attractions, they will have to

accommodation is a reasonable accommodation so long as the accommodation itself exists.⁸⁸

III. People with Mental or Developmental Disabilities Struggle to Fight for Their Right to Reasonable Accommodations While on Vacation Because of Financial Burdens and Stereotypes Regarding People with Mental or Developmental Disabilities.

- A. Because Title III of the ADA Offers No Monetary Damages, People with Mental or Developmental Disabilities Have a Hard Time Paying Attorney's Fees, Meaning That the Financial Commitment is Often Poses Too Great a Burden to Make Litigation Worthwhile.

People with mental or developmental disabilities who want to sue under Title III of the ADA might struggle with litigation expenses, both during the court process and in paying awards to the defendant if they lose, and they struggle with retaining an attorney.

Under Title III of the ADA, save for instances where the Attorney General brings the claim as well, injunctive relief is not necessarily enough to make a mentally or developmentally disabled person fight for their rights in a court of law. The financial and emotional burdens

wait in line, whereas disabled tourists can roam freely around the park while they wait.

⁸⁸ See *T.P.*, 2016 U.S. Dist. LEXIS 149171 at *20. The court argued that by virtue of DAS's existence, Disney did accommodate for individuals with disabilities. The court failed to consider if inadequate or even useless accommodation was still accommodation under the ADA, even in their dicta.

brought on by litigation may not be worth it to force a company to comply with a law it should have abided by in the first instance.⁸⁹

Title III claims are expensive to litigate. A mentally or developmentally disabled person may be hesitant to bring their claim if they are living on Social Security. The law states that anyone receiving assistance from Social Security can never have over \$2,000 in liquid financial assets at any given time, provided they are not married or living with their parents.⁹⁰ Even if the person in question is saving for new medical equipment, a vacation for their honeymoon, or so that they can pay their attorney, disabled people on Social Security cannot for any reason have more than \$2,000 without losing their Social Security benefits until they fall back under that threshold.⁹¹

Even if a mentally or developmentally disabled person can afford an attorney, that doesn't mean getting a lawyer is easy for them. Lawyers often have more incentives to take on cases that don't deal with Title III. Other claims can offer attorney's fees and other types of

⁸⁹ Hill, *supra*, note 6, 110-11; u/Antreas, *Autistic*, Reddit (Oct. 30, 2018, 6:56 P.M.), https://www.reddit.com/r/Autistic/comments/9st13m/people_with_cognitive_intellectual_or/ (As one person with a disability stated, "[s]elf-advocating for oneself is difficult and suing is usually out of the realm of possibility for most adults on the spectrum, because we are chronically low on the income scale in this economy.").

⁹⁰ Bethany K. Laurence, *How Much Can I Have in Assets and Still Be Eligible for Disability Benefits?*, DISABILITYSECRETS, <https://www.disabilitysecrets.com/how-much-can-i-have-in-assets-and-get-disability.html> (last visited Mar. 8, 2019); *Understanding Supplemental Security Income SSI Resources*, Social Security Administration, <https://www.ssa.gov/ssi/text-resources-ussi.htm> (last visited Mar. 8, 2019).

⁹¹ Understanding, *supra* note 90.

monetary damages that the attorney access through a contingency fee.⁹² Since Title III limits the available remedies to only attorney's fees these cases are less desirable for lawyers to take on, making it harder for plaintiffs to find representation.⁹³

The only way to get monetary damages from a Title III case is for the case to be brought by the Attorney General.⁹⁴ However, the Attorney General's office limits the number of Title III claims it is willing to take.⁹⁵ There are not enough lawyers who work for the department to litigate all of these potential claims, and so they on average only settle one Title III claim a month.⁹⁶

The difficulty in securing an attorney is not the only concern plaintiffs have when plaintiffs bring their claims to court. Under the Federal Rules of Civil Procedure, a plaintiff can be ordered to pay the

⁹² COMMENT: *Let's Put the Contingency Back in the Contingency Fee*, 49 SMU L. Rev. 1639, 1646 ("In addition to personal injury cases, the contingency fee has been employed in class actions, collection matters, antitrust actions, shareholder derivative suits, corporate reorganizations, tax proceedings, condemnation actions, will contest litigation, debt collections, environmental actions, civil rights claims - including employment discrimination, - and stockholders' suits. Further innovative use of the contingency fee has included use in defending tort claims, lien foreclosures, and ejectment suits.").

⁹³ Hill, *supra* note 6, at 111 ("Attorneys' fees are available, but they can be collected only at the end of the litigation and only if the plaintiff is deemed a prevailing party. The possibility of collecting fees at the end of litigation makes it impossible to set up contingency agreements that might enable those individuals unable to afford an attorney to bring a Title III claim to nevertheless retain a lawyer on their behalf.").

⁹⁴ Hill, *supra* note 6, at 111-112.

⁹⁵ *Id.* at 112.

⁹⁶ *Id.* at 112.

litigation costs of the defendant should the defense prevail at trial.⁹⁷ This rule applies to plaintiffs with mental or developmental disabilities as well, as shown in the case *L.D.J. v. Walt Disney Parks & Resorts US, Inc.* In this case a plaintiff who was diagnosed with autism and lived off of family funds and Social Security was ordered to pay \$1,027.02 to the Walt Disney Corporation for costs incurred in court.⁹⁸ The courts will at times consider the inequities inherent in forcing a plaintiff who lives off social welfare benefits to pay full cost for a case brought on their behalf by someone else.⁹⁹ Yet the courts avoid considering the inherent inequity in forcing plaintiffs whose only source of income is a Social Security check to pay for the litigation costs of a corporation as massive as Disney.

In light of a plaintiff's financial situation, such as living off of Social Security, courts will consider reducing owed fees, but will not waive them in their entirety.¹⁰⁰ The court in *L.D.J.* cites the "well-reasoned" decision in *Jessup v. Miami-Dade County*, where a \$36,800 cost award was reduced by 45% for a plaintiff with no other meaningful

⁹⁷ 42 U.S.C. § 2000a-3 (2010).

⁹⁸ *L.D.J. v. Walt Disney Parks & Resorts US*, No. 6:14-cv-1926-Orl-22GJK, 2017 U.S. Dist. LEXIS 112185, at *19, *36 (M.D. Fla. July 19, 2017).

⁹⁹ *Id.* at *19-20 ("... there was a sound basis for denying full costs and recommended that the Court exercise its discretion not to impose costs on Plaintiff because 'the equities favor not imposing costs on an incompetent, disabled minor for a lawsuit brought by someone else on her behalf.' District courts considering cost awards against non-prevailing parties who were disabled and subsisting on Social Security benefits have frequently taken into account the parties' reliance on Social Security disability payments, lack of employment, and indigent status in determining the cost award and ordered a significant reduction.")

¹⁰⁰ *Id.* at *9-10, *22.

assets besides Social Security benefits and food stamps amounting to \$810 per month.¹⁰¹ This person lived month to month with no possible future employment opportunities, and still ended up having to pay \$20,240 at the end of their trial.¹⁰²

The idea behind making plaintiffs pay for at least some the defendant's costs is to create a deterrent effect that prevents frivolous claims from being brought to trial.¹⁰³ Isn't the difficulty in hiring an attorney enough of a deterrent? Given that there is little to no financial incentive to bring a claim under Title III of the ADA, how necessary is this artificial deterrent in the justice system?

B. Stereotypes about People with Mental or Developmental Disabilities Make It Harder for Plaintiffs to Win Their Title III Cases.

Cultural stereotypes about overly litigious disabled plaintiffs cause barriers to arise under Title III that make it harder for mentally or developmentally disabled people to bring claims in good faith.

The artificial barriers that people with mental or developmental disabilities face are frequently embedded in current legislation, possibly because politicians and business owners are afraid that companies will be subject to the whims of potential disabled plaintiffs.¹⁰⁴

¹⁰¹ *Id.* at *21; *Jessup v. Miami-Dade Cty.*, No. 08-21571-CIV, 2011 U.S. Dist. LEXIS 7836, at *8-10 (S.D. Fla. Jan. 27, 2011).

¹⁰² *See L.D.J.*, 2017 U.S. Dist. LEXIS 112185 at *21; *see also Jessup*, 2011 U.S. Dist. LEXIS 7836, at *8-10.

¹⁰³ *See L.D.J.*, 2017 U.S. Dist. LEXIS 112185 at *9-10, *22.

¹⁰⁴ COLKER, *supra* note 6, at 182.

The stereotype of the sue-happy disabled person is completely divorced from the reality of disability law. There is a belief that people with disabilities will sue random businesses to make easy money,¹⁰⁵ this is obviously false. Title III doesn't permit plaintiffs to recover monetary damages of any sort if the suit isn't brought through the Attorney General, let alone grant them a lucrative payday.¹⁰⁶

Another common misconception plays into the stereotyped helplessness of people with mental or developmental disabilities.¹⁰⁷ This stereotype frames people with disabilities as the victims of greedy attorneys who are constantly on the lookout for massive jury awards, only to take all the award money at the end, leaving the disabled person destitute.¹⁰⁸ Clint Eastwood notably voiced this view,¹⁰⁹ stating, "what happens is these lawyers, they come along and they end up driving off in a Mercedes and the disabled person ends up driving off in a

¹⁰⁵ Jake Flanagan, *Republicans think disabled Americans are gaming the system, so they want to make the ADA harder to enforce*, QUARTZ (June 6, 2017), <https://qz.com/994853/republicans-in-congress-think-the-americans-with-disabilities-act-is-too-easy-to-game-so-they-want-to-make-it-harder-to-enforce/>; Alison Stateman, *Lawsuits by the Disabled: Abuse of the System?*, TIME MAG. (Dec. 28, 2009), <http://content.time.com/time/nation/article/0,8599,1866666,00.html>.

¹⁰⁶ Americans with Disabilities Act (ADA) of 1990, Pub. L. No. 101-336, § 308, 104 Stat. 327, 365 (1990).

¹⁰⁷ Dehumanization, *supra* note 42; NAT'L INSTITUTES OF HEALTH (US), *supra* note 1.

¹⁰⁸ Anna, *Let's Bust Some Myths: People with disabilities just want to sue the world into compliance*, FWD/FORWARD (Dec. 30, 2009), <http://disabledfeminists.com/2009/12/30/lets-bust-some-myths-people-with-disabilities-just-want-to-sue-the-world-into-compliance/>.

¹⁰⁹ COLKER, *supra* note 6, at 171.

wheelchair.”¹¹⁰ In reality, attorneys are likely to receive meager amounts of cash from these court decisions. There is no motivation for them to “prey on helpless disabled people,” so to speak. In many cases, their clients are not well-off and it is impossible to contract for contingency fees if injunctions are the only available relief.¹¹¹

This stereotype of the disabled court enthusiast is just that – a stereotype.¹¹² People with disabilities are only as likely to sue as people without disabilities.¹¹³ This rings true for all variations of disabilities, including mental or developmental disabilities.¹¹⁴

¹¹⁰ *Id.*

¹¹¹ Laurence, *supra* note 90; Understanding, *supra* note 90; u/Antreas, *supra* note 89. One person stated that, “[s]elf-advocating for oneself is difficult and suing is usually out of the realm of possibility for most adults on the spectrum, because we are chronically low on the income scale in this economy.” *Id.*

¹¹² Anna, *supra* note 108. As one disability rights activist frames it: “Most of the people I know with disabilities don’t have the time/energy/inclination/spoons to sue about an accessibility issue.” *Id.*

¹¹³ *Id.* “People with disabilities are really no more sue-happy than your average person. Some people with disabilities, just like some average citizens, call their lawyer whenever there’s a problem – because they have a lawyer to call. Others stoically press on through life. Others write letters, to editors . . . It’s almost like ‘disabled people’ don’t all react the same way to things, and have a variety of ways of dealing with ‘adversity.’” *Id.*

¹¹⁴ u/abhuman, *Disability*, REDDIT (Oct. 30, 2018, 5:36 PM), https://www.reddit.com/r/disability/comments/9sscei/people_with_cognitive_intellectual_or/. People with mental or developmental disabilities may in some instances be even more averse to litigation than the average nondisabled person. As one person recounts, “[b]eing autistic, one of the things I struggle with is self-advocacy. I tend to ‘go with the flow’ and rely upon people who have a

C. The Injunctive Relief Available Under Title III of the ADA is an Inadequate Remedy for Cases Where Reasonable Accommodations are Denied to People with Mental or Developmental Disabilities.

Under Title III of the ADA, plaintiffs cannot collect monetary damages such as compensatory damages unless the suit is brought by the Attorney General, and cannot collect punitive damages in any situation.¹¹⁵ Plaintiffs with private counsel bringing Title III claims can only seek attorney's fees and injunctive relief,¹¹⁶ which judges grant narrowly to avoid exceeding the power of the law, leaving plaintiffs with inadequate relief.

In the two landmark cases for ADA Title III claims, *Bragdon v. Abbot* and *PGA Tour v. Martin*, the plaintiffs received the injunctive claims they sought.¹¹⁷ Indeed, these plaintiffs had no desire for anything

responsibility to fulfill it, even though from experience I should know better, because doing so helps keep interpersonal interactions to a minimum.”

¹¹⁵ Americans with Disabilities Act (ADA) of 1990, Pub. L. No. 101-336, § 308, 104 Stat. 327, 363-365 (1990).

¹¹⁶ *Id.*; Jonathan Hilburg, *Proposed rollback of Americans with Disabilities Act is permanently stalled*, THE ARCHITECTS NEWSPAPER, (Apr. 6, 2018), <https://archpaper.com/2018/04/rollback-americans-with-disabilities-act-stalled/>; Erin Vallely, *How the ADA Will be Hurt by ADA Education and Reform Act of 2017*, CTR. FOR DISABILITY RIGHTS,

<http://cdrnys.org/blog/disability-politics/how-the-ada-will-be-hurt-by-ada-education-and-reform-act-of-2017/> (last visited Mar. 9, 2019).

¹¹⁷ COLKER, *supra* note 6, at 166-68; *Bragdon v. Abbott*, 524 U.S. 624 (1998); *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001).

more than court granted injunctive relief.¹¹⁸ The plaintiff in *Bragdon v. Abbot* could have claimed ten thousand dollars under a complementary state law but elected not to pursue that path because she was litigating her case to fight discrimination against HIV positive patients in the medical field, not because she suffered any injury.¹¹⁹ The fact that she may have lacked standing to sue because she did not have an injury was never adjudicated because both parties wished to win the case on the merits.¹²⁰ The plaintiff in *PGA Tour v. Martin* had obtained an injunction at the trial court level which was upheld pending the outcome of his case in the appellate courts.¹²¹ This injunction was granted in time to prevent him from experiencing any injury, so all he needed from the Supreme Court was for them to uphold his injunction.¹²² These circumstances do not apply to the majority of Title III litigants, who have injuries that may require some form of monetary compensation to be made whole again.¹²³

¹¹⁸ COLKER, *supra* note 6, at 166-68; *Bragdon v. Abbott*, 524 U.S. 624 (1998); *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001).

¹¹⁹ COLKER, *supra* note 6, at 166-67; *see generally Bragdon*, 524 U.S. 624.

¹²⁰ COLKER, *supra* note 6, at 166-67; *see generally Bragdon*, 524 U.S. 624.

¹²¹ COLKER, *supra* note 6, at 167-68; *see generally PGA Tour, Inc.*, 532 U.S. 661.

¹²² COLKER, *supra* note 6, at 166-67; *see generally PGA Tour, Inc.*, 532 U.S. 661.

¹²³ *Betancourt v. Federated Dep't Stores*, 732 F. Supp. 2d 693, 699 (W.D. Tex. 2010); Arlene Haas, *Essential Guide to ADA Title III Enforcement: Private Party Lawsuits*, BURNHAM (Jan. 10, 2017, 8:00 AM), <https://www.burnham-nationwide.com/final-review-blog/essential-guide-to-ada-title-iii-enforcement-private-party-lawsuits>. A plaintiff must be able to allege an injury in

Furthermore, courts do not have a lot of power to grant injunctive relief.¹²⁴ Injunctive relief is all that is offered for Title III claims, but judges tend to rule narrowly so that they do not exceed their limited powers.¹²⁵ Judges are also more comfortable granting prohibitory injunctions, whereby they require a defendant to stop an action, than they are mandatory injunction, whereby they require a defendant perform an action.¹²⁶ This is likely because the law in general tries not to compel its citizens or entities to do anything through legislation in order to preserve their personal freedom. Under that inference, it would make sense that courts would assign prohibitory injunctions against businesses engaging in racial discrimination under the Civil Rights Act, because that would require businesses to stop refusing services to African Americans.¹²⁷ Judges would then be more hesitant to assign mandatory injunctions to businesses that refuse to provide reasonable accommodations because it would be forcing them provide a service against the businesses' own decisions. Even though Title III of the ADA already compels companies to provide mentally and developmentally disabled patrons with reasonable accommodation, what proves an accommodation to be reasonable and who is responsible for suggesting the

order to have standing in a Title III cases. The plaintiffs with these injuries need monetary remedies.

¹²⁴ COLKER, *supra* note 10.

¹²⁵ *Id.*

¹²⁶ Mark D. Bradshaw, *INJUNCTIONS – A Practical Guide To One Of The Law's Most Powerful Tools*, STEVENS & LEE: NEWS AND RESOURCES (Jan. 1, 2002), <http://www.stevenslee.com/injunctions-a-practical-guide-to-one-of-the-laws-most-powerful-tools/>.

¹²⁷ Colker, *supra* note 10, at 394-95.

reasonable accommodation is often fact specific and highly debated.¹²⁸ The lack of clear guidelines for what a reasonable accommodation consists of would likely cause judges to avoid issuing mandatory injunction. Plaintiffs then not only fail to receive any monetary relief, they may receive too little injunctive relief to make their advocacy worthwhile.¹²⁹

IV. The Best Solution to This Problem is for the Courts to Require that the Parties Engage in the Interactive Process.

- A. If Courts Require Companies and Vacationers to Engage in the Interactive Process, Accommodations Can Be Individualized and Made More Effective for People with Mental or Developmental Disabilities.

The interactive process has been required in the courts under a wide variety of situations centering around disability accommodations. The interactive process is used to accommodate for disabled employees and disabled residents.¹³⁰ This process engages both the person with the disability and the administrative figure in charge and compels them to fully discuss what accommodations the person with the disability needs

¹²⁸ Holt, *supra* note 10, at 1232 (“Proper allocation of the burdens of production and persuasion with regard to ‘reasonable accommodation’ has emerged as one of the most problematic issues yet to be resolved under the ADA.”); Alex B. Long, *The ADA's Reasonable Accommodation Requirement and Innocent Third Parties*, 68 MO. L. REV. 1, 1 (2003).

¹²⁹ Colker, *supra* note 10, at 379-80.

¹³⁰ Sullivan, *supra* note 19; Widmer, *supra* note 19.

and what the administration is able to provide.¹³¹ To begin the interactive process, the person in need of accommodation must inform the administrative agent of their disability and request accommodation.¹³² From there, the two parties engage in a conversation about how the disability limits that individual and what methods of accommodation would alleviate those limitations while at the same time avoid unnecessary disruption of the administration's function and efficiency.¹³³ Both the administrative agent and the disabled individual have a burden to make this discussion as interactive and productive, in order to reach the most effective solution.¹³⁴

The interactive process would benefit travelers with disabilities and the companies who run and maintain vacation destinations. The interactive process offers both parties the opportunity to vocalize their interests and concerns to reach the most effective form of accommodation through the exchange of information. It also would aid in clearing up the vague and often ineffectual enforcement of the language of Title III by clearly identifying the burdens and liabilities of each party. These

¹³¹ Douglas R. Andres & Clay D. Creps, *The Interactive ADA Accommodation Process*, 6 BULLIVANT HOUSER BAILY EMPLOYMENT UPDATE No. 1 (2001), republished in *MEDIATE*, <https://www.mediate.com/articles/bullivant.cfm>. This source explains the interactive process in the context of employment law, which makes sense since employment is one of the most common areas where we see the courts utilizing the interactive process. Other than the employment law specific terms such as "employers" and "employees," this is the basic framework for what the interactive process would look like for forming a reasonable accommodation between a disabled tourist and a company.

¹³² Sullivan, *supra* note 19, at 116; Widmer, *supra* note 19, at 762-63.

¹³³ Sullivan, *supra* note 19, at 117; Widmer, *supra* note 19, at 762-63.

¹³⁴ Sullivan, *supra* note 19, at 130; Widmer, *supra* note 19, at 775.

discussions are also a faster method of reaching a desired accommodation, and time is of the essence for many vacationers.

This process is used when both parties have information that the other needs in order to make a situation work.¹³⁵ That is true when it comes to providing individualized accommodations for people with mental or developmental disabilities on vacation. The company who operates the vacation destination has no knowledge about what that specific visitor needs for an accommodation because the accommodations needed vary from individual to individual even among those with the same conditions.¹³⁶ The travelers likewise do not know what accommodations can be made by the company to make their stay easier and which accommodations are unfeasible.¹³⁷ The interactive process would allow for the exchange of information between both parties, and a compromise can be reached.¹³⁸

The interactive process has proven to be useful in other circumstances outside of accessing reasonable accommodations for vacations where the existing legislation is hard to understand and difficult to enforce on its own.¹³⁹ Title III of the ADA has this problem when it comes

¹³⁵ Sullivan, *supra* note 19, at 116.

¹³⁶ A.L. v. Walt Disney Parks & Resorts US, Inc., 900 F.3d 1270 (11th Cir. 2018).

¹³⁷ Andres & Creps, *supra* note 131.

¹³⁸ Sullivan, *supra* note 19, at 117.

¹³⁹ Widmer, *supra* note 19, at 761, 764, 776, 780-81. For example, the Federal Rehabilitation Act of 1973 was considered to be a flawed statute in that “many of its provisions were toothless and vague.” See Widmer, *supra* note 19, at 761, 764. While the interactive process was not implemented as a solution to this problem directly, the application of this process has furthered the goals of the legislation. See Widmer, *supra* note 19, at 761, 776; John R. Autry,

to vacationers with mental or developmental disabilities. It is difficult for plaintiffs to bring their claims at all, and the only remedies typically available are attorney's fees and injunctive relief.¹⁴⁰ There is also not a lot of case law available that is focused on refusing or granting reasonable accommodations for people with mental or developmental disabilities when they are on vacation.¹⁴¹ The interactive process can aid in identifying which parties are responsible for the lack of accommodation

Reasonable Accommodation under the ADA: Are Employers Required to Participate in the Interactive Process? The Courts Say "Yes" but the Law Says "No", 79 CHI. KENT L. REV. 665, 666-68. Congress never explicitly stated what process needs to be used for providing reasonable accommodation, only that people with disabilities are entitled to reasonable accommodations. See Widmer, *supra* note 19; 29 C.F.R. § 1630. The Equal Employment Opportunity Commission's Interpretive Guidance recommends the interactive process for deciding on a reasonable accommodation. Widmer, *supra* note 19, at 765.

¹⁴⁰ See Americans with Disabilities Act §308, *supra* note 115; see Hillburg, *supra* note 116; see Valley, *supra* note 116.

¹⁴¹ This is not to suggest that these cases don't exist because reasonable accommodations are not being refused to people with mental or developmental disabilities. There can be other reasons why not many people with mental or developmental disabilities sue for refused accommodations, but there is insufficient data to explain why this is the case. One possible reason could be that the litigation process is more taxing than simply avoiding scenarios where accommodation is not available, in this case choosing not to take a vacation at that destination. One disability rights advocate explained this reasoning for why people with disabilities didn't sue every time they found a place to be inaccessible, and did so by using mostly anecdotal evidence, because, "the plural of anecdote is not data, but strangely, there isn't a lot of data available on 'people not suing for accessibility-related issues.' This isn't something pollsters ask." See Anna, *supra* note 108.

and who is liable for not meeting their burden.¹⁴² In particular, the ability to ascertain that one or both of the parties exhibited ‘bad faith’ in their negotiation for accommodations is particularly useful in addressing this kind of accommodation dilemma. Companies may be unwilling to cooperate and make reasonable accommodations because it is easier to not accommodate, and they often avoid accountability for these refusals.¹⁴³ Tourists with mental or developmental disabilities on the other hand are often stereotyped as career plaintiffs constantly on the lookout for potential lawsuits.¹⁴⁴ The interactive process would help ensure that if a company tries to take the easy way out by dodging accommodation requests that they will be held accountable for that decision while at the same time assuaging the public that these claims are being brought in earnest and not as a way for a lawyer to make some easy money.

The interactive process can offer quick path toward a solution.¹⁴⁵ This is particularly important because vacations by their nature are limited in time. One of the major impediments for travelers with mental or developmental disabilities to receive accommodations is that it takes a great deal more planning and preparation for them to go on vacation than it does for nondisabled tourists.¹⁴⁶ The interactive process would reduce the time it takes for disabled travelers to take a trip, which in turn would encourage more people with mental or developmental disabilities

¹⁴² Widmer, *supra* note 19, at 777-78; Sullivan, *supra*, note 19, at 120; Beck v. Univ. of Wisconsin Bd. of Regents, 75 F.3d 1130, 1135-36 (7th Cir. 1996).

¹⁴³ See *supra* Section III(C) of this paper.

¹⁴⁴ See *supra* Section IV(B) of this paper.

¹⁴⁵ Sullivan, *supra* note 19, at 117.

¹⁴⁶ Blichfeldt & Nicolaisen, *supra* note 3, at 88; Perry & Kozub, *supra* note 3.

to travel.¹⁴⁷ The interactive process can take a while in other areas where accommodation is required such, such as in the employment context,¹⁴⁸ but these are situations where long-term accommodations that take a while to implement are being requested.¹⁴⁹ On vacations, tourists are by and large passive consumers who would not request structural changes for a brief stay if they are not necessary. Vacations are also short enough in time that temporary solutions that would not be acceptable in the long term are not only possible but ideal accommodations.

The interactive process also works well for situations where individualized accommodation is required.¹⁵⁰ Unlike with physical disabilities, where all disabled tourists can be accommodated with a single permeant solution such as the installation of a wheelchair ramp, both mental and developmental disabilities need to be accommodated differently for each person.¹⁵¹ Different people will need different kinds of accommodations to manage the same condition. Some people may need accommodations to manage their condition, but those same accommodations will aggravate the symptoms of another person with a different condition.¹⁵² It impossible for companies to provide accommodations

¹⁴⁷ See Blichfeldt & Nicolaisen, *supra* note 3, at 88; Perry & Kozub, *supra* note 3.

¹⁴⁸ Sullivan, *supra* note 19, at 117-18.

¹⁴⁹ Peyton S. Irby, Jr., *ADA Accommodations: Is Speed Essential to the Interactive Process?*, HR DAILY ADVISOR (Feb. 6, 2007), [https://hrdailyadvisor.blr.com/2017/02/06/](https://hrdailyadvisor.blr.com/2017/02/06/ada-accommodations-speed-essential-interactive-process-2/)

[ada-accommodations-speed-essential-interactive-process-2/](https://hrdailyadvisor.blr.com/2017/02/06/ada-accommodations-speed-essential-interactive-process-2/).

¹⁵⁰ A.L. v. Walt Disney Parks & Resorts US, 900 F.3d 1270 (11th Cir. 2018).

¹⁵¹ *Id.*

¹⁵² *Id.*

for every mental or developmental disability in advance, and have those accommodations meet the needs of each individual who requires them. Since there is no applicable blanket to these problems, the interactive process provides the opportunity for company representatives and people with mental or developmental disabilities to work together to reach an individualized solutions that fits their vacation needs.¹⁵³ In this way, accommodation is provided on a case-by-case basis, and travelers can enjoy their trip without feeling limited or unaccommodated.

Another great benefit to using the interactive process is that the courts can implement the interactive process without waiting for Congress to amend existing law or pass new legislation. It is unlikely that Congress will amend the ADA. The Americans with Disabilities Act of 1990 has been enacted for nearly three decades, and there is a substantial amount of case law that relies on its text. It is highly unlikely that Congress will be willing to amend it now. However, the courts are free to require agencies and travelers to engage in the interactive process simply by setting new case precedent. It does not matter that the statutory language of the ADA does not require the interactive process for these types of situations, because courts have applied the interactive process as a standard before where they found it was necessary, even when there was no mention of it in the statute.¹⁵⁴

¹⁵³ *Id.*

¹⁵⁴ Widmer, *supra* note 19, at 770. There are a few courts that have found the interactive process to be essential in determining if the accommodation was reasonable for a tenant, despite the Fair Housing Act never listing it as a requirement in its text. See *Jankowski Lee & Assocs. v. Cisneros*, 91 F.3d 891 (7th Cir. 1996). Other courts do not find the interactive process is required but can be helpful and is suggested. See *Lapid-Laurel v. Zoning Bd. of Adjustment*, 284 F.3d 442, 456 (3rd Cir. 2002).

Finally, the interactive process would provide an opportunity for people with mental or developmental disabilities or their family members to voice what their needs actually are rather than receive ineffective accommodations that companies may provide based on what the company may believe are their needs.¹⁵⁵ When it comes to accommodating for individuals with mental or developmental disabilities, administrative agents might sometimes rely on stereotypes about the condition rather than the action symptoms of a condition when imagining a solution to the problem. By giving people with mental or developmental disabilities or their families a voice in the process, the biases held by others unfamiliar with these disabilities are effectively combated and the end result will be accommodation that is both reasonable and effective.¹⁵⁶

Some companies have already implemented processes similar to the interactive process. For example, Disney has implemented its Disability Access Service Program (DAS) in its theme parks.¹⁵⁷ Guests with disabilities are issued a DAS card, which is attainable at the Guest Relations section of the park.¹⁵⁸ All the person or family member has to do is alert the assistant that there is someone with a mental or developmental disability in their group.¹⁵⁹ The guest with the mental or developmental disability has their photo taken, and the process is complete.¹⁶⁰ These cards permitted holders to visit other attractions at the

¹⁵⁵ Andres & Creps, *supra* note 131.

¹⁵⁶ *Id.*

¹⁵⁷ *A.L.*, 900 F.3d at 1276; *Disney Parks Disability Access Service Card Fact Sheet*, <https://disneyarks.disney.go.com/blog/disney-parks-disability-access-service-card-fact-sheet/> (last visited Mar. 10, 2019).

¹⁵⁸ *Id.* at 1277.

¹⁵⁹ *Id.*.

¹⁶⁰ *Id.*

park instead of waiting in line for a specific ride, coming back later at an assigned time instead of standing in a line.¹⁶¹ If the DAS program is ineffective at meeting these needs as it is, then guests can revisit Guest Relations to talk about more individualized accommodation.¹⁶² This can include planning an itinerary for the mentally or developmentally disabled guest, issuing passes for readmission to the attractions, writing on the card what the first attraction they will visit is, and providing further explanation of their system.¹⁶³

The DAS program was meant to act as an accommodation available for those with mental or developmental disabilities.¹⁶⁴ However, the DAS system was deemed ineffective at accommodating each guest. The fatal flaw of the DAS system was that it treated the conversation between the guest and Guest Services as a way to tweak their existing one-size-fits-all approach, rather than as the starting point for designing an individualized accommodation. The absence of dialogue between those with mental or developmental disabilities and those in charge of the program may have created more problems than it solved. Parents of children with autism took Disney to court, claiming they were not accommodated because Disney was not addressing the problems their children struggled with.¹⁶⁵ Children with autism are not susceptible specifically to the boredom of waiting in the line itself, which the DAS

¹⁶¹ *Id.*

¹⁶² *See A.L.*, 900 F.3d at 1279.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 1276.

¹⁶⁵ *Id.* at 1273-74.

program would ameliorate.¹⁶⁶ Children with autism struggle with the concept of waiting *at all*. It can be difficult or impossible for them to understand why they have to wait at all; why they cannot access the attraction they want immediately.¹⁶⁷ The assigned wait times DAS provides does not eliminating the wait itself, and therefore may not be enough of an accommodation to meet the requirements of Title III.¹⁶⁸ Had Disney prioritized communication first between the families of these children, a more appropriate solution could have been reached before this matter was brought to trial.

V. Conclusion

The often-heard expression “I need a vacation from this vacation” may never be truer than it is for people with mental or developmental disabilities asking for reasonable accommodations during their trip. Science has told us that vacations can bring mental, social, and physical health benefits for people with mental or developmental disabilities.¹⁶⁹ Business has told us that catering to the disabled tourist market, in the long run, can prove profitable, but an equally viable business strategy is to cut short-term costs by refusing to provide reasonable accommodations.¹⁷⁰ What the law tells us is not so clear. Title III of the

¹⁶⁶ *Id.* at 1296; *Disney Parks Disability Access Service Card Fact Sheet*, *supra* note 157; *A.L.*, 900 F.3d at

¹⁶⁷ *A.L.*, 900 F.3d at 1296-97.

¹⁶⁸ *Id.* at 1297-98.

¹⁶⁹ Isrif, *supra* note 4; Kim & Lehto, *supra* note 4, at 13.

¹⁷⁰ *Alumni Cruises*, 987 F. Supp. 2d at 1298; COLKER, *supra* note 6, at 183-84; *Cruising for one and all*, *supra* note 73.

ADA requires that people with disabilities, including mental or developmental disabilities, are entitled to reasonable accommodations when they are requested at places of public accommodation.¹⁷¹ Yet in order to enforce the statute and bring a claim, plaintiffs are asked to incur a lot of risk to gain very little reward.¹⁷²

Litigating a claim under Title III of the ADA is not meant to be an easy task for any plaintiff. The mythos surrounding people with disabilities and the lawyers who represent them resurrects barriers that prevent individuals facing discrimination from accessing their own legal protections.¹⁷³ Every person with a disability who travels for leisure is affected by this environment, but people with mental or developmental disabilities are disproportionately disadvantaged because there is so little case law for them to cite in their arguments.

This Article has maintained that the current legal doctrine surrounding public accommodation claims for people with mental or developmental disabilities hinders those who seek necessary reasonable accommodations to travel and aids companies who violate Title III of the ADA to satisfy its own personal interests. There needs to be an alteration to the current practice – through the courts requiring parties to demonstrate that they utilized the interactive process¹⁷⁴ – to make it easier for people with mental or developmental disabilities to litigate their claims in good faith. The only way to ensure reasonable

¹⁷¹ Americans with Disabilities Act (ADA) of 1990, Pub. L. No. 101-336, § 301(2)(A), 104 Stat. 327, 354 (1990).

¹⁷² Hill, *supra* note 6, at 116; Colker, *supra* note 10, at 393; COLKER, *supra* note 6, at 179-82.

¹⁷³ Flanagan, *supra* note 105; Stateman, *supra* note 105.

¹⁷⁴ Beck, 75 F.3d at 1135-36; Widmer, *supra* note 19, at 777-78; Sullivan, *supra* note 19, at 120.

accommodations are granted to those who need them is to hold the companies refusing to abide by the law accountable.¹⁷⁵

¹⁷⁵ Hill, *supra* note 6, at 109.