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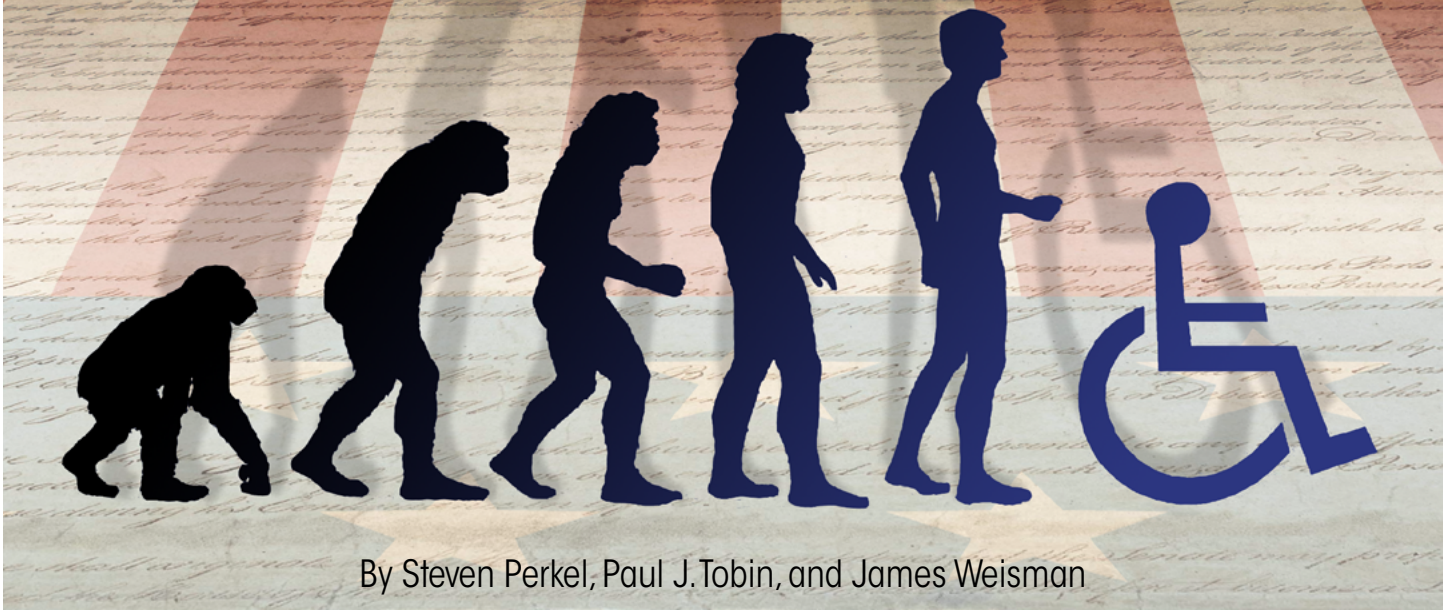
Disability Wrongs, Disability Rights



By Steven Perkel, Paul J. Tobin, and James Weisman

On **April 30, 2006** Stephen Colbert addressed the White House Correspondents and President and Mrs. Bush. During this speech when referring to where truth lies, Colbert pointed to his stomach and stated, "right down here in the gut." Colbert went on to mention a "truthy" mainstay of American culture – the myth of self-sufficiency that exemplifies an ableist ideology by saying "I believe in pulling yourself up by your own bootstraps. I believe it is possible - I saw this guy do it once in Cirque de Soleil. It was magical."[1] These quotes are examples of "truthiness", a neologism that Colbert introduced during his first television show and which was voted Merriam Webster's Word of the Year in 2006:

"Merriam-Webster's #1 Word of the Year for 2006:

Truthiness (noun)

1: "truth that comes from the gut, not books" (Stephen Colbert, Comedy Central's "The Colbert Report," October 2005)

2: "the quality of preferring concepts or facts one wishes to be true, rather than concepts or facts known to be true" (American Dialect Society, January 2006)" [2]

People who embrace "truthiness" according to Colbert embrace ideas and issues that feel true to them. They are gut thinkers and they put forth their ideas, beliefs and policies regardless of the facts by asserting the defense "that is how I see it. I have a right to my opinion and we will just have to agree to disagree." Gut thinkers rely on truthiness regardless of facts, critical analysis, and arguments that prove them wrong.[3] Gut thinkers are a clear threat to our justice system and the policy-making process. Gut thinkers are a dangerous force in litigation and policy making.

As litigation consultants and attorneys we have an ethical obligation to avoid arguments and policies that are based on "truthiness", bias, stereotypes and misinformation.[4] We do this in court proceedings through voir dire, the application of rules that demand arguments be based on legitimate facts and through judicial oversight. However, despite best efforts there are times when "truthiness", bias, misinformation and ideological arguments influence litigation, legislation and the regulatory process. The authors of this article caution litigation consultants and attorneys to be particularly aware of "truthiness" whenever matters involve concepts of disabilities, or its contrasting and more prevalent belief system of ableism.

Ableism is an ideology that values able-bodied individuals

and devalues persons with disabilities. Ableism can be thought of as a lens through which people are viewed as inferior by virtue of their non-normative physical, emotional or cognitive status (deficits) instead of being valued for their capacities and humanity. Ableist ideology frames disability as a medical "problem" to be "treated" in an effort to find a "cure."[5] In this discriminatory understanding of disability, people with disabilities are viewed as deficient and dependent because of their diagnoses and related impairments. Ableist attitudes reflect a fear of, an aversion to, or discrimination or prejudice against people with disabilities.[6] Historically, not being "able-bodied" has often been perceived as an economic threat to the collective and contradicted the deeply held American values of autonomy and economic self-sufficiency.

Eugenics, Truthiness and Disability Policy in America

For many years preceding the industrial revolution, persons with disabilities were scorned, ostracized, institutionalized and not provided equal protection before the law. We need only study the words of Justice Oliver Wendell Holmes, writing the majority opinion for the Supreme Court of the United States (SCOTUS) in Buck v. Bell (274 U.S. 200, 1927) for an example of how eugenics, a popular application of Anglo-Saxon supremacy philosophy and pseudo-science, set a legal precedent allowing the involuntary sterilization of thousands of men and women in more than twenty-seven states.

Carrie Buck was the daughter of Emma Buck, a widowed mother of three. Emma Buck supported herself through prostitution and charity until her children were taken from her and she was institutionalized. Carrie went to live with the Dobbs family and progressed normally through five years of school. When Carrie was in the sixth grade, she was pulled from school so she could assume an increased load of household duties for the Dobbs and for neighbors to whom she was "loaned."[7] At age 17, Carrie claimed she had been raped and became pregnant. Years later, she revealed her rapist to be Mr. and Mrs. Dobbs' nephew.[8]

Mr. Dobbs, the local peace officer who was responsible for institutionalizing Emma, wanted Carrie and "her shame" removed from his home. He filed commitment papers with local authorities claiming that Carrie was feebleminded, epileptic or both and coincidentally that he could no longer afford to look after her. Carrie was given an I.Q. test, which revealed she had a mental age of 9. As soon as Carrie gave birth to a daughter, Vivian, the Dobbs' had Carrie committed to the Virginia Colony for the Epileptic and Feebleminded ("Colony") and the Dobbs' took custody of Vivian.

The Colony was the same institution where Carrie's mother had been confined and found to have a mental age of 8. The staff of the Colony and in particular Dr. Albert Sidney Priddy – the Colony's superintendent – concluded that Carrie had inherited feeblemindedness from her mother and that her recently born daughter Vivian had undoubtedly inherited the same affliction. He recommended that Carrie be sterilized because she was feebleminded and a moral delinquent. Priddy, a devout believer in the eugenics movement, saw Carrie's situation as the perfect test case for Virginia's recently passed sterilization law – a law that Priddy helped author and coax through the Virginia legislature.

Dr. Priddy's recommendation to sterilize Carrie was approved by the Colony's Board of Directors. Aubrey Strode was hired as counsel to represent the Colony and a former Colony Board Member and friend of Strode and Priddy, Irving Whitehead, was retained to represent Carrie. Whitehead was also a staunch eugenicist and founder of the Colony. "Whitehead, Priddy and the board [of the Colony] voiced satisfaction that the case was proceeding as planned. He had betrayed his client, defrauded the court, and set in motion a series of events that history has uniformly condemned."[9] Priddy and Whitehead would test Virginia's new sterilization law in the courts.

In 1924, Buck v. Priddy was argued in the Circuit Court. Strode called eight witnesses and presented one witness' written expert testimony. Those testifying alleged that Carrie had inherited her mother's feeblemindedness. Vivian, Carrie's infant daughter, then eight months old was described "as not quite a normal baby".[10] The claim was made that three generations of Buck women inherited feeblemindedness and moral turpitude. Because Carrie had one illegitimate baby, she was characterized as being the probable potential parent of [more] socially inadequate offspring according to Dr. Joseph "Sterilization" DeJarnette, an expert witness for the Colony.[11] The fact that Carrie's pregnancy was the result of an alleged rape was disregarded. Priddy claimed that Carrie "would cease to be a charge on society if sterilized". Priddy, like DeJarnette asserted that sterilizing Carrie "would remove one probable potential source, of likewise afflicted [as feebleminded] offspring… without detriment to her general health and that her welfare and that of society shall be promoted by her sterilization."[12]

Whitehead offered no meaningful defense for Carrie in this collusive challenge of the Virginia sterilization law. He neglected to point out Carrie's church attendance and normal progress in elementary school. While Whitehead knew he would have to argue on his client's behalf in higher courts, he did not zealously argue to protect Carrie's interests. Their intention was to exhaust the gamut of appellate courts to affirm Virginia's eugenics sterilization law. In 1925, Whitehead petitioned the Virginia Supreme Court of Appeals, which ultimately upheld the lower Circuit Court. By this time Priddy had died and Dr. James H. Bell – Priddy's assistant – became superintendent of the Colony hence the change in the case caption to Buck v. Bell. Committed to testing the validity of the Virginia law, the U.S. Supreme Court (SCOTUS) was Whitehead's next step.

In his brief to SCOTUS, Whitehead half-heartedly claimed that the Virginia law was void because it denied Carrie due process and equal protection before the law as guaranteed by the Fourteenth Amendment. Strode, on the other hand, vigorously argued that Carrie had been given "a great deal of due process" citing the administrative and clinical "protections" offered by the Virginia law. Justice Holmes writing the three-page

majority opinion of the Court offered:

> *"There can be no doubt that so far as procedure is concerned the rights of the patient are most carefully considered, and…every step in this case was taken in scrupulous compliance with the statute…"*
>
> *(Buck v. Bell, 274 U.S. 207 (1927))*

The Court also rejected Whitehead's claim regarding a violation of the right to equal protection by finding that the mandatory Virginia sterilization law treated all individuals like Carrie in a similar manner.

Justice Holmes agreed with the philosophy of eugenics, as did seven other Justices that society must be protected. He wrote "[i]t is better for all the world, if instead of waiting to execute offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind… Three generations of imbeciles are enough." (Buck v. Bell, 274 U.S. 207, 1927)

In October of 1927 Dr. Bell surgically sterilized Carrie Buck and then released her from the Virginia Colony for the Epileptic and Feebleminded. Carrie went on to marry, be widowed and then become remarried. Later recollections of her minister, neighbors, friends, and health care providers plus letters she wrote to the Virginia colony seeking custody of her mother all suggest Carrie was truly not "feebleminded." Little Vivian, while being raised by the Dobbs', enrolled in school and earned a place on the honor roll until, at the age of eight, she died of an infectious disease.[13]

Fast Forward to the Present

The scientific community has discredited the ""truthy"" pseudoscience of eugenics, yet many negative biases, attitudes and stereotypes about being disabled are historically rooted in eugenics. With passage of the American with Disabilities Act in 1990, progress was made to protect the civil rights of persons with disabilities from discrimination. However, truthiness in the form of prejudice, misinformation, bias and stereotypes about persons with disabilities remain a part of the fabric of American history and a significant challenge today.

The Americans with Disabilities Act of 1990 (Pub. L. 101-336, 104 Stat. 327, 42 U.S.C. §§ 12101 et seq.)

The purpose of the Americans with Disabilities Act of 1990 (ADA) is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities". (42 U.S.C. §§12101 (b)(1))

The Act's preamble states "… individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society." (Emphasis added, 42 U.S.C. §§12101 (a)(7))

While the ADA provides a framework and guidance to eliminate discrimination on the basis of disability, truthiness influences outcomes in litigation and in social policy.

The first ADA case to be decided by the U.S. Supreme Court, Bragdon v. Abbott (524 U.S. 624 (1998)), concerned an HIV-positive woman seeking dental assistance. Bragdon refused to treat Abbott. His gut told him that both he and his staff would be in danger if they provided dental services to Abbott in an office setting. Bragdon dismissed scientific information and expert guidance produced by the Center for Disease Control which stated that ordinary precautions (i.e. eye protection, mask and gloves) were all that were necessary to treat her safely. Truthiness about the perceived risk of treating an HIV-positive individual without extraordinary measures determined the dentist's behavior. The Supreme Court found that Abbott was disabled and was therefore entitled to protection under the ADA.

Based on thirty-years of experience as a civil rights attorney for people with disabilities, James Weisman asserts that truthiness usually mitigates against an equitable result for people with disabilities. For example, James tells the story of a wheelchair user's attempt to use a public pool in her community. She was told she could only use the pool between 12-2pm on weekdays (low use hours) and in order to do so she had to pass a swimming test administered by a lifeguard. Non-wheelchair users were granted access to the pool at all hours regardless of their proficiency in swimming.

The truthiness (i.e., the gut belief) expressed by the pool operators about swimmers who use wheelchairs outside of the pool is that they cannot swim and would be dangerous to themselves and everyone else in a public pool because they would distract the lifeguards. It did not matter that the law prohibited limiting access to a place of public accommodation for a specific minority of people with disabilities because it was a discriminatory practice.

In another example, Mayor Michael Bloomberg of New York City, responding to a reporter's inquiries about why the City opposed making its "Taxi of Tomorrow" wheelchair accessible, stated that it would be a dangerous condition for wheelchair users when they attempt to hail cabs.[14] On other occasions, the Mayor asserted that the ride in an accessible cab would be uncomfortable for able-bodied passengers.[15] Finally, the Mayor also held (and this is our personal favorite) that people using wheelchairs would "sit too far from the driver to establish a "dialogue" and therefore will be poor tippers."[16] It is clear to disability rights advocates that the Mayor holds "truthy" beliefs about people with disabilities (and also about taxis and the conversations held in taxis between the driver and his or her passengers.)

Mayor Bloomberg has never stated a cogent reason for opposing accessible taxis yet City policy appears to follow the Mayor's gut instinct, which in the absence of other stated reasons, appears to have been the basis of his opposition. The resulting legislation and litigation has taken years and has severely limited the transportation, mobility and

employment opportunities for people with disabilities. The attitudes and beliefs of the Mayor regarding people with disabilities has had real-world implications upon people with disabilities. New York City has only 231 accessible cabs out of a fleet of more than 13,000. Had the fleet been fully accessible, as they are in London, England, they could have provided a safe, affordable option to evacuate people with disabilities in advance of Hurricane Sandy. However, people with disabilities were placed at even greater risk when New York City shut down the paratransit system well in advance of other mass transit options, leaving many people stranded and unable to evacuate.

"Truthy" underestimations of the abilities of people with disabilities and their capacity to enjoy a high quality of life makes for bad public policy, discriminatory employment practices and unnecessarily separate facilities and programs. These policy outcomes create great social expense to society and to people with disabilities. When similar "truthy" beliefs influence the decision making of jurors, litigators, judges or policy makers, the impact upon people with disabilities can be devastating.

Exploring Disability (Ableism) in Litigation and Public Policy: Can Litigation Consultants Help?

Andrew M. Sheldon, JD, PhD is an experienced trial consultant with specific experience in civil rights murder cases and a broad knowledge of trial consulting. In Sheldon's paper, Defending Racially Charged Cases: Advice from a Trial Consultant's Perspective, written with Matthew McCusker, they posit that:

> *"[I]t has long been our experience that racial bias is such a common source of dispute between employers and employees, between colleagues and coworkers, that it is not likely to recede as a source of litigation anytime soon. A century ago, mentioning a belief in racial equality may have raised an eyebrow or worse in mixed company. Today, outwardly expressing any racial prejudice has become socially unacceptable and can lead to serious rebuke. However, this clearly does not mean that an internal bias does not still exist in many Americans."*[17]

As evidenced by Mayor Bloomberg, the recent outward expression of biases and "truthy" beliefs about people with disabilities has not yet "led to serious rebuke." Yet as surely as racial biases can be the basis for dismissing a prospective juror for cause during voir dire, so too must the discriminatory biases concerning ableism and disability held by jurors, litigators, judges and policy makers be recognized and addressed if justice is to be served.

Regardless of whether serving the defense or prosecution of a case involving disability, Sheldon contends that community surveys, focus groups, supplemental jury questionnaires, witness preparation, trial observation and pre- and post-trial public relations issues used in cases and initiatives involving racism, can also be effectively used in litigation and policy-making involving disability. He likens the importance of these tools to their use in the civil rights murder cases and states in personal correspondence with the authors that "Isn't racism the disabling of a person based on something having to do with the color of his/her skin?"

As an example, pre-trial and community attitude surveys can help probe latent attitudes concerning attitudes and belief systems. The use of disempowering phrases such as "confined to a wheelchair", "retarded" or "crazy" can reveal a potential juror's biases regarding disability during voir dire. Trial consultants familiar with disability rights issues can be helpful in crafting voir dire questions that identify disqualifying biases.

Conclusions and Recommendations

Trial consultants can help attorneys, legislators, regulators and policy makers involved in disability rights matters overcome the historical truthiness that has characterized the American socio-political response to persons with disabilities. However, as Andy Sheldon accurately pointed out in his correspondence with the authors, it is up to the trial consulting community to inform disability rights advocates of the knowledge trial consultants have and the types of services that can be offered.

In the immediate future, beginning a dialogue between trial attorneys, disability rights lawyers and scholars, as well as consumers with disabilities are steps we recommend. Such a dialogue is also consistent with ensuring that the fruits of democracy, including equal and fair treatment before the law, is available to everyone.

Finally, we recommend lawyers and policy advocates explore the services trial consultants offer including but not necessarily limited to persuasive communication, research strategies including focus groups and community surveys as well as helping prepare members of disability rights organizations to become more effective advocates.

Illustration by Brian Patterson of Barnes & Roberts

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Paul J. Tobin, MSW, is President and Chief Executive Officer of United Spinal Association, the nation's largest membership organization for people with spinal cord injuries and disorders. Since his injury in 1993, he has worked to improve the lives of people with disabilities through public policy and community organizing. Read more about his work and that of United Spinal Association at www.unitedspinal.org.

James Weisman is the Senior Vice President and General Counsel of United Spinal Association. For 35 years he has advocated for the rights of people with disabilities including helping craft the landmark Americans with Disabilities Act of 1990 (ADA). Mr. Weisman is a founding member of the Board of Directors of the American Association of People with Disabilities (AAPD) and was appointed to the Architectural and Transportation Barriers Compliance Board (Access Board) by Bill Clinton.

Notes

[1] Colbert, Stephen. "Stephen Colbert's Take at the White House Correspondents Dinner". 2006. Transcript. Ed. Daily Kos. (October 16, 2012): Common Dreams.

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[3] Johnson, David Kyle. "Truthiness and Thinking from the Gut." Stephen Colbert and Philosophy: I Am Philosophy (and So Can You!) Ed. Schiller, Aaron Allen. Chicago, IL: Open Court Publishing Company, 2009. 288. Print.

[4] American Society of Trial Consultants. "Preamble, Ethical Principles and General Practice Guidelines". 2010. ASTC Professional Code. ASTC.

[5] Neilsen, Kim E. A Disability History of the United States: Revisioning American History. Boston, MA: Beacon Press. Print.

[6] Ibid.

[7] Black, Edwin. War Against the Weak: Eugenics and America's Campaign to Create a Master Race. New York, NY: Four Walls Eight Windows, 2003. Print. pg. 109.

[8] Ibid.

[9] Lombardo, Paul A. Three Generations, No Imbeciles: Eugenics, the Supreme Court and Buck V. Bell. Baltimore, MD: The John Hopkins University Press, 2008. Print. Pg. xi.

[10] Black, op. cit., p. 115.

[11] Lombardo, op. cit., p. 124.

[12] Ibid, p. 121.

[13] Ibid, p. 122.

[14] Duffy, Steven. "Hail No! Nissan was Ready for Handicapped Cabs, but Bloomberg Put On the Brakes." New York Observer. December 22, 2011.

[15] Gross, Courtney. "Bloomberg Pushes Back over Wheelchair-Accessible Cabs." NY1 October 21, 2011.

[16] Pressman, Gabe. "Analysis: The Mayor Has It Wrong on Cabs and the Disabled." NBC New York. October 14, 2011.

[17] Sheldon, Andrew, M & McCusker, Matt, Defending Racially Charged Cases: Advice from a Trial Consultant's Perspective.

Additional Reading

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