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## Digital Accessibility in the Hospitality and Tourism Industry: Legal and Ethical Considerations

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DIGITAL ACCESSIBILITY IN THE HOSPITALITY  
AND TOURISM INDUSTRY: LEGAL AND  
ETHICAL CONSIDERATIONS

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ABSTRACT

*Federal law requires accessibility for public sector websites. What about the web pages and apps of hotels, restaurants, and tourism providers? The Americans with Disabilities Act may cover private sector websites if they are considered a place of public accommodation, but the law is unclear. This Article will provide an overview of the legal responsibilities of operators to provide accessibility to persons with disabilities, discuss the World Wide Web Consortium's guidelines for web accessibility, and argue that the hospitality and tourism industry has a unique ethical obligation to fill in the gap where the legal system has failed this population.*

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## INTRODUCTION

Smartphone users topped three billion in 2018, and are projected to reach 3.8 billion by 2021.<sup>1</sup> People use their computers and smartphones to access the Internet to shop, read news and sports stories, watch movies and television, send email, connect with friends and family on social media, and even earn degrees; in sum, the number of users worldwide is staggering.<sup>2</sup> But what about accessibility to this virtual marketplace for people with disabilities that make comprehension of the information challenging? A 2016 Pew Research Center study reports that disabled Americans are about three times as likely as those without a disability to never go online; 20 percent are less likely to subscribe to home broadband and own a traditional computer, a smartphone or a tablet; 17 percent are less likely to have high-speed Internet at home; and 29 percent are less likely to use the Internet daily.<sup>3</sup> Unfortunately, all too often, accessibility for persons with disabilities is not a consideration when developers create websites and apps for private entities.

From 2009 to 2017, hotel gross bookings in the United States grew from \$116 billion to \$185 billion, while digital innovation and technology reshaped the travel and hospitality industry in that same relatively short period of time.<sup>4</sup> American adults with disabilities spend more than \$17 billion dollars each year on travel.<sup>5</sup>

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<sup>1</sup> Dean Takahashi, *Smartphone users will top 3 billion in 2018, hit 3.8 billion by 2021*, VENTURE BEAT: NEWZOO (Sept. 11, 2018), <https://venturebeat.com/2018/09/11/newzoo-smartphone-users-will-top-3-billion-in-2018-hit-3-8-billion-by-2021/> [<https://perma.cc/UM42-RPLM>].

<sup>2</sup> See Andy C, *Top 10 Smartphone Uses*, MOBILES (July 25, 2017), <https://www.mobiles.co.uk/blog/top-10-smartphone-uses/> [<https://perma.cc/LWK4-U52H>]; Carmel DeAmicis, *You can earn this entire bachelor's degree on a mobile device*, PANDO (Jan. 29, 2014), <https://pando.com/2014/01/29/you-can-earn-this-entire-bachelors-degree-on-a-mobile-device/> [<https://perma.cc/84Z4-JJ22>].

<sup>3</sup> Monica Anderson & Andrew Perrin, *Disabled Americans are less likely to use technology*, PEW RESEARCH CENTER: NEWS IN THE NUMBERS (Apr. 7, 2017), <https://www.pewresearch.org/fact-tank/2017/04/07/disabled-americans-are-less-likely-to-use-technology/> [<https://perma.cc/JFZ4-S2AP>].

<sup>4</sup> *2019 US Travel and Hospitality Outlook*, DELOITTE 1, 2 (2019), <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/consumer-business/us-consumer-2019-us-travel-and-hospitality-outlook.pdf> [<https://perma.cc/Q6G8-M5FF>].

<sup>5</sup> *Web Accessibility and the Hotel Industry*, BUREAU OF INTERNET ACCESSIBILITY: ACCESSIBILITYBLOG (June 12, 2018), <https://www.boia.org/blog/web-accessibility-and-the-hotel-industry> [<https://perma.cc/TV83-NN8Y>].

Fifty-three percent of adults with disabilities report staying in a hotel or motel within the past two years.<sup>6</sup> Often there is a correlation between aging and disabilities; therefore, because travel is a primary activity for older retirees, it is essential for them to be able to obtain reliable information from the Internet, which serves as the main source for consuming tourist information.<sup>7</sup> What are the industry's legal and ethical obligations for digital accessibility to its websites?

Federal law requires accessibility for *public sector* websites.<sup>8</sup> The Rehabilitation Act requires federal agencies to make electronic and information technology accessible to people with disabilities.<sup>9</sup> The Assistive Technology Act of 1998 requires all states to give written assurances of compliance with the Rehabilitation Act to receive grants for statewide programs of technology-related assistance for individuals with disabilities.<sup>10</sup> But what about nongovernmental entities, such web pages associated with hotels, restaurants, and tourism providers? The Americans with Disabilities Act *may* cover private sector websites if they are considered a *place of public accommodation*, but the law is unclear.<sup>11</sup> This Article will provide an overview of the legal responsibilities of operators to provide accessibility to persons with disabilities, discuss the World Wide Web Consortium's guidelines for web accessibility, and argue that

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<sup>6</sup> *Hotel Websites: Accessibility is a Selling Point*, ESSENTIAL ACCESSIBILITY (June 9, 2017), <https://www.essentialaccessibility.com/blog/hotel-websites-accessibility/> [<https://perma.cc/CH5W-AJSS>].

<sup>7</sup> See Trinidad Domínguez Vila et al., *Website accessibility in the tourism industry: an analysis of official national tourism organization websites around the world*, 40 DISABILITY & REHABILITATION 2895, 2903 (2018).

<sup>8</sup> See Sofia Enamorado, *Do Your State's Laws Require Section 508 Accessibility Compliance?*, 3PLAYMEDIA (June 3, 2019), <https://www.3playmedia.com/2018/09/24/do-your-states-laws-require-section-508-compliance/> [<https://perma.cc/8DSA-3ZVM>].

<sup>9</sup> Rehabilitation Act of 1973, Pub. L. No. 93-112, § 508, 87 Stat. 355 (codified as amended at 29 U.S.C. § 974d(a)(1)(A)(i) (2012)); see also GSA: SECTION508.GOV (updated Nov. 2018), <https://www.section508.gov/manage/laws-and-policies> [<https://perma.cc/F8UN-KTFD>].

<sup>10</sup> See Assistive Technology Act of 1998, Pub. L. No. 105-394, § 101, 112 Stat. 3643 (1998).

<sup>11</sup> See Kim Krause Berg, *Website Accessibility & the Law: Why Your Website Must Be Compliant*, SEARCH ENGINE JOURNAL (Jan. 9, 2019), <https://www.searchenginejournal.com/website-accessibility-law/285199/#social> [<https://perma.cc/YV97-G8V8>].

the hospitality and tourism industry has a unique social responsibility opportunity to fill in the gap where the legal system has failed this population.

## I. DISABILITY DISCRIMINATION UNDER FEDERAL LAW

### A. *The Interpretation of Title III of the ADA*

The Americans with Disabilities Act of 1990 (ADA) addressed discrimination against individuals with disabilities so that people with disabilities could be active and productive members of society, undeterred by artificial barriers.<sup>12</sup> Title III of the Act prohibits discrimination based upon a disability in the provision of “goods, services, facilities, privileges, advantages, or accommodations of *any place of public accommodation*.”<sup>13</sup> Denying persons with disabilities the opportunity to participate in programs or services (or providing separate, but unequal, goods or services) constitutes illegal discrimination.<sup>14</sup> The phrase “public accommodation” lists categories of establishments, some of which include the hospitality industry, such as *places of lodging, establishments serving food or drink, places of exhibition or entertainment*.<sup>15</sup>

The law directs courts to construe the definition of public accommodation liberally to afford the disabled equal access to the wide variety of establishments available to persons who do not have disabilities.<sup>16</sup> Although Congress passed the ADA before services and products were available through the Internet, it intended that the ADA address not only physical barriers, but also communication barriers, and that the ADA be dynamic, keeping pace with the rapidly changing technology.<sup>17</sup> One purpose of the statute was to provide “a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”<sup>18</sup>

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<sup>12</sup> 42 U.S.C. § 12101(a)(7) (2012).

<sup>13</sup> 42 U.S.C. § 12182(a) (2012) (emphasis added).

<sup>14</sup> *See id.* §§ 12182(b)(1)(A)(i)–(iii).

<sup>15</sup> *See* 42 U.S.C. § 12181(7) (emphasis added).

<sup>16</sup> *See* PGA Tour, Inc. v. Martin, 532 U.S. 661, 667 (2001).

<sup>17</sup> Gorecki v. Hobby Lobby Stores, Inc., No. CV 17-1131-JFW(SKx), 2017 WL 2957736, at \*4 (C.D. Cal. June 15, 2017).

<sup>18</sup> 42 U.S.C. § 12101(b)(1) (2012).

In keeping with this notion, several commentators urge an interpretation that recognizes the Internet as a place of public accommodation.<sup>19</sup> A district court in Massachusetts held that Netflix's web-only video streaming business could be considered a place of public accommodation under Title III of the ADA, reasoning that it was irrelevant that the statutory language of the ADA did not specifically include web-based services because they did not exist when Congress passed the legislation in 1990, and that Congress intended the act to be responsive to changes in technology.<sup>20</sup> The Seventh Circuit took a similar position in a case that did not involve the Internet, suggesting that the critical inquiry should be whether or not the entity provides goods and services that are open to the public.<sup>21</sup> Similarly, in determining whether or not a business that did not serve walk-up clients was a place of public accommodation, the First Circuit concluded that the term is not limited to actual, physical places,<sup>22</sup> as did the Second Circuit.<sup>23</sup>

Some courts, however, seemingly interpret the statute as only covering physical places.<sup>24</sup> A federal district court concluded that Southwest.com was not covered under the ADA, reasoning that the unambiguous language of the statute does not include

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<sup>19</sup> See John Grady & Jane Boyd Ohlin, *The Application of Title III of the ADA to Sport Websites*, 14 J. LEG. ASPECT SPORTS 145, 145–46 (2004); Carrie L. Kiedrowski, *The Applicability of the ADA to Private Internet Websites*, 49 CLEVELAND ST. L. REV. 720, 723 (2001); William Lynch, *The Application of Title III of the Americans with Disabilities Act of 1990 to the Internet: Proper E-Planning Prevents Poor E-Performance*, 12 COMM'LAW CONSPECTUS: J. COMM. L. POL'Y 245, 246 (2004).

<sup>20</sup> See *Nat'l Assoc. for the Deaf v. Netflix*, 869 F. Supp. 2d 196, 196, 200–01 (D. Mass. 2012); see also *Nat'l Fed. of the Blind v. Scribd Inc.*, 97 F. Supp. 3d 565, 573 (D. Vt. 2015) (denying a motion to dismiss based on the reasoning advanced by the Massachusetts district court and the ADA's mandate to construe the remedial statute broadly).

<sup>21</sup> See *Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557, 559 (7th Cir. 1999). The Seventh Circuit asserted that facility owners, including owners of websites, cannot exclude disabled persons from using the facility in the same way that the nondisabled do. *Id.*

<sup>22</sup> See *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12, 19 (1st Cir. 1994); see also *Access Now, Inc. v. Blue Apron, LLC*, No. 17-cv-116-JL, 2017 WL 5186354, at \*3 (D. N.H. Nov. 8, 2017).

<sup>23</sup> See *Pallozzi v. Allstate Life Ins. Co.*, 198 F.3d 28, 31–32 (2d Cir. 1999) (concluding that practices of insurers could be covered because the term “place of public accommodation” was not limited to situations involving physical access).

<sup>24</sup> See *Access Now, Inc. v. Sw. Airlines*, 227 F. Supp. 2d 1312, 1314 (S.D. Fla. 2002).

websites among the definitions of places of public accommodation, and that an expansion of the ADA to cover virtual spaces would create new rights without well-defined standards.<sup>25</sup> Some scholars support this viewpoint, arguing that the ADA does not support an extension to cyberspace and challenging Congress to enact alternative legislation to ensure web accessibility.<sup>26</sup> Others call for amendments to make explicit the standards of accessibility expected of private Internet websites.<sup>27</sup>

Another interpretation holds that the ADA only covers those websites that serve as a conduit for the provision of goods and services provided by physical places of public accommodation.<sup>28</sup> In concluding that the ADA did not apply to Netflix or Ebay, the Ninth Circuit posited that websites are not places of public accommodation because they are not connected to physical places, implying that the absence or presence of a nexus to a physical place of public accommodation was significant.<sup>29</sup> In non-Internet cases, the Third and Sixth Circuits favored the nexus framework as well.<sup>30</sup> Some

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<sup>25</sup> *Id.* at 1318. The Eleventh Circuit dismissed the appeal because the district court's decision only addressed whether or not a website was a place of public accommodation, whereas, on appeal, the plaintiffs raised the question of whether or not Southwest.com was covered by Title III because of its "nexus" with Southwest Airlines' "travel service," a question further complicated by the specific exemption that Title III gives to airlines. *See Access Now, Inc. v. Sw. Airlines*, 385 F.3d 1324, 1329 (11th Cir. 2004). The Eleventh Circuit subsequently seemed to embrace the argument made on appeal by the plaintiffs in a different case where the issue was presented. *See also infra* note 47.

<sup>26</sup> *See* Kelly E. Konkright, Comment, *An Analysis of the Applicability of Title III of the Americans with Disabilities Act to Private Internet Access Providers*, 37 IDAHO L. REV. 713, 745–46 (2001); Patrick Maroney, *The Wrong Tool for the Right Job: Are Commercial Websites Places of Public Accommodation Under the Americans with Disabilities Act of 1990?*, 2 VAND. J. ENT. L. & PRAC. 191, 204 (2000).

<sup>27</sup> *See* Ali Abrar & Kerry J. Dingle, Note, *From Madness to Method: The Americans with Disabilities Act Meets the Internet*, 44 HARV. C.R.-C.L. L. REV. 133, 171–72 (2009).

<sup>28</sup> *See* *Gomez v. Bang & Olufsen Am., Inc.*, No. 1:16-cv-23801--LENARD, 2017 WL 1957182, at \*3 (S.D. Fla. Feb. 2, 2017) (holding that a website unconnected to a physical location is generally not a place of public accommodation under the ADA).

<sup>29</sup> *See* *Cullen v. Netflix, Inc.*, 600 Fed. App'x 508, 509 (9th Cir. 2015); *see also* *Earll v. Ebay, Inc.*, 599 Fed. App'x 695, 696 (9th Cir. 2015); *Young v. Facebook*, No. 5:10-cv-03579-JF/PVT, 2010 U.S. Dist. LEXIS 116530, at \*7–8 (N.D. Cal., Oct. 25, 2010) (applying the same reasoning to Facebook).

<sup>30</sup> *See* *Ford v. Schering-Plough Corp.*, 145 F.3d 612, 612–13 (3d Cir. 1998) (concluding that while insurance offices may constitute places of public accommodation, insurance policies are not, particularly if the benefits accrue via employment with



scholars endorse this approach and support the applicability of the ADA to the virtual environment, at least where the website has a connection, or *nexus*, to a physical place of public accommodation.<sup>31</sup>

In *National Federation of the Blind v. Target Corp.*, a district court in the Ninth Circuit concluded that the plaintiffs stated a claim only if the inaccessibility of Target.com impeded the full and equal enjoyment of goods and services offered in Target stores; however, if the information and services on Target.com were unconnected to goods and services offered in actual Target stores, there was no claim under Title III of the ADA.<sup>32</sup> The court noted that Title III “applies to the services of a place of public accommodation, not services *in* a place of public accommodation.”<sup>33</sup> The case settled and was not appealed, although several commentators examined the reasoning.<sup>34</sup>

One recent district court opinion synthesized several other district court decisions to develop a rubric for determining if there is a sufficient nexus to a place of public accommodation.<sup>35</sup> Relevant

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no nexus to the insurer’s office); *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1010 (6th Cir. 1997) (concluding that a benefit plan offered by an employer is not a good offered by a place of public accommodation); *see also* *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1115 (9th Cir. 2000) (applying a nexus analysis to conclude that an insurance company administering an employer provided disability policy was not a “place of public accommodation” under Title III).

<sup>31</sup> *See* Justin D. Petruzzelli, *Adjust Your Font Size: Websites are Public Accommodations Under the Americans with Disabilities Act*, 53 RUTGERS L. REV. 1063, 1067 (2001); Nancy J. King, *Website Access for Customers with Disabilities: Can We Get There From Here?* 7 UCLA J.L. & TECH. 6, 61–64 (2003); Richard E. Moberly, *The Americans with Disabilities Act in Cyberspace: Applying the “Nexus” Approach to Private Internet Websites*, 55 MERCER L. REV. 963, 967 (2004).

<sup>32</sup> *Nat’l Fed’n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 956 (N.D. Cal. 2006).

<sup>33</sup> *Id.* at 953 (emphasis added); *see also, e.g.*, *Castillo v. Jo-Ann Stores, LLC*, 286 F. Supp. 3d 870, 881 (N.D. Ohio 2018) (holding that there was no need to determine whether the website was a place of public accommodation because the factual allegations were sufficiently specific to show some connection between the website and the physical place); *Reed v. CVS Pharmacy, Inc.*, No. CV 17-3877-MWF (SKx), 2017 WL 4457508, at \*3 (C.D. Cal. Oct. 3, 2017) (concluding that plaintiff adequately alleged a violation of the ADA by showing a connection); *Rios v. N.Y. & Comp., Inc.*, No. 2:17-cv-04676-ODW(AGRx), 2017 WL 5564530, at \*4 (C.D. Cal. Nov. 16, 2017) (finding factual allegations sufficiently specific to show some connection between the website and the physical place).

<sup>34</sup> *See* Casey D. Marshall, *Disability and Accessibility: Applying ADA Title III to the Internet*, BENCH & BAR MINN. 24, 25 (2014); Trevor Crowley, *Wheelchair Ramps in Cyberspace: Bringing the Americans with Disabilities Act into the 21st Century*, 2013 B.Y.U. L. REV. 651, 673–74 (2013).

<sup>35</sup> *See* *Gomez v. Gen. Nutrition Corp.*, 323 F. Supp. 3d 1368, 1376 (S.D. Fla. 2018).

factors posited include whether or not the inaccessible website: (1) provides an ability to purchase or preorder products; (2) prevents the full use and enjoyment of services of the public accommodation; (3) provides more than just information about the store; (4) impedes access to the physical location; and (5) facilitates use of the physical stores.<sup>36</sup> Applying this framework, the Florida district court concluded that General Nutrition Corporation's website was a place of public accommodation because the website facilitates the use of the physical stores by providing (1) a store locator; (2) the ability to purchase products remotely; and (3) information about promotions and deals; therefore, the website operated as a gateway to the physical stores and was covered by Title III.<sup>37</sup>

Given the split of authority and the legal uncertainty about liability, several high-profile cases have settled.<sup>38</sup> For example, in April of 2015, the Department of Justice (DOJ) entered into a settlement agreement with edX Incorporated to remedy alleged violations of the ADA concerning the inaccessibility of its website to individuals with disabilities (<http://www.edx.org>) and its platform for providing massive open online courses (MOOCs).<sup>39</sup> Also, in *National Federation of the Blind v. HRB Digital LLC*, the plaintiffs settled after alleging that H&R Block's website and mobile applications denied them accessibility to tax preparation services because H&R Block (1) failed to code its website to make it accessible to individuals who have vision, hearing and physical disabilities; and (2) failed to accommodate individuals with disabilities, who use assistive technologies (e.g., screen reader software, refreshable Braille displays,

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> See, e.g., *Andrews v. Blick Art Materials*, 286 F. Supp. 3d 365, 365 (E.D.N.Y. 2017) (arising from consumer's inability to purchase art products on the retailer's website).

<sup>39</sup> *Justice Department Reaches Settlement with edX Inc., Provider of Massive Open Online Courses, to Make its Website, Online Platform and Mobile Applications Accessible Under the Americans with Disabilities Act*, DEPT. JUST.: OFF. PUB. AFF. (Apr. 2, 2015), <http://www.justice.gov/opa/pr/justice-department-reaches-settlement-edx-inc-provider-massive-open-online-courses-make-its> [https://perma.cc/AGU6-V3YZ]. The settlement required edX to modify its website, platform, and mobile applications to conform to Web Content Accessibility Guidelines (WCAG) 2.0 AA, industry guidelines for making web content accessible to users with disabilities. *Id.* For a discussion of the guidelines, see *infra* notes 85–106 and accompanying text.

keyboard navigation and captioning).<sup>40</sup> Recently, in *Haynes v. Hooters of America*, the Eleventh Circuit Court of Appeals held that a business's agreement to remediate its website in a prior, private settlement did not render moot subsequent actions seeking the same relief,<sup>41</sup> which opens the door in that jurisdiction for subsequent lawsuits by other plaintiffs not party to the settlement.<sup>42</sup>

### *B. Recent Hospitality Industry Cases*

In addition to the *Hooters* case, there have been several other recent cases involving website accessibility within the hospitality and tourism industry.<sup>43</sup> In a case involving Busch Gardens and SeaWorld, a district court recently reiterated the position supported by some courts and commentators that online websites are not places of public accommodation, justifying its conclusion on its observations that the Internet is located in no particular geographical location; is available to anyone anywhere in the world; and does not act as a barrier to a specific, physical, concrete space.<sup>44</sup>

In contrast, in *Haynes v. Dunkin' Donuts*, a blind plaintiff, who relied on screen reading software, was unable to use the website for Dunkin' Donuts because it was not compatible with his or any other screen reading software.<sup>45</sup> The Eleventh Circuit, in denying Dunkin' Donuts' motion to dismiss for failure to state a claim, observed that the website was a service that permitted the use of Dunkin' Donuts' shops, which are places of public accommodation.<sup>46</sup> As a result, the court concluded that whatever goods and services Dunkin' Donuts offers, even if they are intangible, are a part of its place of public accommodation, and therefore it

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<sup>40</sup> See Nat'l Fed'n of the Blind v. HRB Digital LLC, No. 1:13-cv-10799-GAO, at \*2 (D. Mass. Mar. 6, 2014); *Justice Department Seeks to Intervene in Lawsuit Alleging H&R Block's Tax Preparation Website Is Inaccessible to Individuals with Disabilities*, Press Release, DEP'T. JUST.: OFF. PUB. AFF. (Nov. 25, 2013), <http://www.justice.gov/opa/pr/justice-department-seeks-intervene-lawsuit-alleging-hr-block-s-tax-preparation-website/> [https://perma.cc/G3FC-NE4T].

<sup>41</sup> *Haynes v. Hooters of Am.*, 893 F.3d 781, 784 (11th Cir. 2018).

<sup>42</sup> See *id.*

<sup>43</sup> See *Kidwell v. Fla. Comm'n on Hum. Rels.*, No. 2:16-cv-403-FtM-99CM, 2017 U.S. Dist. LEXIS 5828, at \*1 (M.D. Fla. Jan. 17, 2017).

<sup>44</sup> *Id.* at \*12–13.

<sup>45</sup> *Haynes v. Dunkin' Donuts LLC*, 741 Fed. App'x 752, 753 (11th Cir. 2018).

<sup>46</sup> *Id.* at 754.

cannot discriminate against people on the basis of a disability.<sup>47</sup> In another case brought by a blind litigant against Dave & Buster's, there was a toll-free number to call if there were problems with accessibility for screen readers; nevertheless, the plaintiff questioned whether or not a phone line and a receptionist to answer it satisfied the ADA, also questioning if the notice was even accessible to screen reader users.<sup>48</sup> In denying Dave & Buster's motion for summary judgment, the district judge concluded that there was insufficient evidence to determine if the website guaranteed "full and equal enjoyment" of the restaurant's services as required under the ADA.<sup>49</sup>

Similarly, in a case brought against Domino's Pizza, a blind plaintiff, who could not use screen reader software on the company's website to place an order, sued for discrimination, seeking compliance with version 2.0 of the World Wide Web Consortium's Web Content Accessibility Guidelines.<sup>50</sup> The plaintiff further contended that Domino's mobile application did not permit him to access the menus on his iPhone using the iPhone's *VoiceOver* assistive software program.<sup>51</sup> The district court granted the defendant's motion to dismiss, primarily because of the absence of accessibility regulations, and not based upon any interpretation of the ADA's provisions.<sup>52</sup> The court admonished Congress, the Attorney General, and the Department of Justice to take action to set minimum web accessibility standards for the benefit of the disabled community.<sup>53</sup> The court cautioned that regulations and technical assistance were necessary to determine by which obligations a regulated individual or institution must abide in order to comply with the ADA because the judicial imposition of "the requirements urged by Plaintiff would violate Defendant's right to due process."<sup>54</sup> In contrast, in *Robles v. Pizza Hut, Inc.*, the court reached the opposite

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<sup>47</sup> *Id.*

<sup>48</sup> See *Gorecki v. Dave and Buster's, Inc.*, No. CV 17-1138 PSG (AGRx), 2017 WL 6371367, at \*5 (C.D. Cal. Oct. 10, 2017).

<sup>49</sup> *Id.* at \*6 (referencing 42 U.S.C. § 12182(a) (2012)).

<sup>50</sup> *Robles v. Domino's Pizza, LLC*, No. 42 CV 16-06599 SJO, 2017 WL 1330216, at \*1 (C.D. Cal. Mar. 20, 2017). For a discussion of the guidelines, see *infra* notes 66–75 and accompanying text.

<sup>51</sup> *Robles*, 2017 WL 1330216, at \*1

<sup>52</sup> *Id.* at \*7–8.

<sup>53</sup> *Id.* at \*8.

<sup>54</sup> *Id.* at \*6.

conclusion on the defendant's due process claim because, unlike the Domino's case, the Pizza Hut case did not ask for compliance with any specific standards;<sup>55</sup> thus, the court did not find defendant's due process arguments persuasive.<sup>56</sup>

Previously, during the Obama Administration, the DOJ had announced that it would finalize regulations to explain what constitutes accessible website content for public accommodations in the private sector by fiscal year 2018, but they were not completed.<sup>57</sup> A settlement of ADA litigation against Carnival Cruise Lines by the DOJ included an obligation to make the covered websites accessible,<sup>58</sup> suggesting that, at the time, the Department considered there to be a legal duty to make private websites accessible.<sup>59</sup> Further, in June 2015, the DOJ filed statements of interest in two lawsuits filed by the National Association of the Deaf against Harvard University and the Massachusetts Institute of Technology, alleging that they failed to caption the thousands of videos posted to their various websites, which again suggests that the Department considered that Title III's mandate of accessibility reached the online programming of private universities.<sup>60</sup> However, the Trump Administration has not continued these efforts,

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<sup>55</sup> See *Robles v. YUM! Brands, Inc.*, No 2:16-cv-08211-ODW(SS), 2018 WL 566781, at \*2, \*4 (C.D. Cal. Jan. 24, 2018) (finding that Pizza Hut's website and mobile app are both subject to accessibility regulations under the ADA).

<sup>56</sup> *Id.* at \*4–5.

<sup>57</sup> Anne M. Estevez et al., *DOJ Delays ADA Regulations For Accessibility Of Private Websites To 2018*, NAT'L L. REV. (Dec. 7, 2015), <http://www.natlawreview.com/article/doj-delays-ada-regulations-accessibility-private-websites-to-2018> [<https://perma.cc/PR2S-BBF8>].

<sup>58</sup> *Settlement Agreement Between the United States of America and Carnival Corp.*, DOJ No. 202-17M-206 (July 23, 2015), [http://www.ada.gov/carnival/carnival\\_sa.html](http://www.ada.gov/carnival/carnival_sa.html) [<https://perma.cc/L9PF-RM79>].

<sup>59</sup> Minh N. Vu & Paul H. Kehoe, *Justice Department Applies ADA Title III To Carnival's Cruise Ships, Website, and Mobile App in a Landmark Settlement*, SEYFARTH SHAW LLP: ADA TITLE III NEWS & INSIGHTS (Aug. 13, 2015), <https://www.adatitleiii.com/2015/08/justice-department-applies-ada-title-iii-to-carnivals-cruise-ships-website-and-mobile-app-in-a-landmark-settlement/> [<https://perma.cc/6PK6-NLZJ>].

<sup>60</sup> Statement of Interest of the United States, Nat'l Ass'n. of the Deaf v. Harvard U., Civil Action No. 3:15-cv-30023-MGM (D. Mass. June 25, 2015), available at [http://www.ada.gov/briefs/harvard\\_soi.pdf](http://www.ada.gov/briefs/harvard_soi.pdf) [<https://perma.cc/8NTH-H9LT>]; Statement of Interest of the United States, Nat'l Ass'n. of the Deaf v. Mass. Inst. Tech, No. 3:15-cv-300024-MGM (D. Mass. June 25, 2015), [http://www.ada.gov/briefs/mit\\_soi.pdf](http://www.ada.gov/briefs/mit_soi.pdf) [<https://perma.cc/62BZ-GYU7>].

and nothing signals an interest by the Administration in website accessibility.<sup>61</sup>

Commentators argue for more clarity to balance the rights of aggrieved individuals with the need to discourage abusive litigation that does not advance the goals of the ADA, as well as for standards that will lead to more effective change in web accessibility and decrease the impact of conflicting judicial decisions.<sup>62</sup> Although the legal requirements for private sector web accessibility are unclear, as a practical matter, universal principles currently exist that can apply to the accessibility needs in a multitude of differing contexts for disabled users.<sup>63</sup> These guidelines were adopted in several settlement agreements, have been referenced by courts, and have formed the basis of the DOJ's proposed rule-making initiative, as well.<sup>64</sup> What are these guidelines, who developed them, and what barriers do they aim to eliminate?

## II. IMPAIRMENTS AND ACCESSIBILITY DESIGN

### A. Impairments

There are four classes of impairments: *visual*, *auditory*, *mobility*, and *cognitive*.<sup>65</sup> *Visual impairments* range from a complete inability to see a computer screen to a need to adjust the

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<sup>61</sup> Arjeta Albani, Comment, *Equality in the Age of the Internet: Websites Under Title III of the Americans with Disabilities Act*, 13 J. BUS. & TECH. L. 97, 114–15 (2017).

<sup>62</sup> Helia Garrido Hull, *Vexatious Litigants and the ADA: Strategies to Fairly Address the Need to Improve Access for Individuals with Disabilities*, 26 CORNELL J.L. & PUB. POL'Y 71, 81–82, 91 (2016); Deeva V. Shah, *Web Accessibility for Impaired Users: Applying Physical Solutions to Digital Problems*, 38 HASTINGS COMM. & ENT. L.J. 215, 227, 234 (2016).

<sup>63</sup> *Web Content Accessibility Guidelines (WCAG) 2.0*, W3C, <http://www.w3.org/TR/WCAG20/> [<https://perma.cc/HZ59-ES6T>] [hereinafter *WCAG 2.0*].

<sup>64</sup> Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43460 (proposed July 26, 2010); Daniel Sorger, *Writing the Access Code: Enforcing Commercial Web Accessibility without Regulations under Title III of the Americans with Disabilities Act*, 59 B.C. L. REV. 1121, 1140 (2018).

<sup>65</sup> *Introduction to Web Accessibility: People with Disabilities on the Web*, WEBAIM, <http://webaim.org/intro/> [<https://perma.cc/PQ7M-2SX7>] (emphasis added).

base font size (Small, Medium, Large, etc.) to read the page.<sup>66</sup> Age-related impairments include reduced contrast sensitivity, color perception, and near-focus, which makes it difficult to read a web page.<sup>67</sup> A screen reader, such as JAWS, is a software program that reads the contents of the screen aloud to a user and assists users with total lack of vision.<sup>68</sup> Users who do not require screen readers are accustomed to glancing at the left or right column of a page to find navigation links.<sup>69</sup> In contrast, screen readers are sequential, starting at the beginning of the HTML file and reading to the end, so the webpage must be structured to facilitate that progression.<sup>70</sup>

*Auditory impairments* range from complete deafness to a slight loss of hearing, difficulty in hearing a conversation when there is background noise, or difficulty hearing certain sound frequencies.<sup>71</sup> Approaches to mild hearing problems incorporate the ability to adjust the audio volume and ensure that audio recordings are reasonably free from background noise.<sup>72</sup> Closed-captioning videos are another assistive approach for making a web video accessible to users with more serious auditory impairments.<sup>73</sup> Other assistive technologies include providing transcripts of audio content, media players that display captions with options to adjust the text size and colors of captions, and options to stop or pause the content.<sup>74</sup>

*Mobility impairments* make it difficult to use a computer keyboard or mouse.<sup>75</sup> Mobility impairments can include “weakness and limitations of muscular control (such as involuntary

<sup>66</sup> *How People with Disabilities Use the Web: Diverse Abilities and Barriers* (Visual), W3C, <https://www.w3.org/WAI/people-use-web/abilities-barriers/> [<https://perma.cc/FZA2-7PBU>].

<sup>67</sup> *Web Accessibility and Older People: Meeting the Needs of Ageing Web Users*, W3C, <http://www.w3.org/WAI/older-users/> [<https://perma.cc/9MLQ-8YWJ>].

<sup>68</sup> *Blindness Solutions: JAWS*, FREEDOM SCIENTIFIC, <https://www.freedomscientific.com/Products/Blindness/JAWS> [<https://perma.cc/R4DB-775X>].

<sup>69</sup> *Visual Disabilities: Blind*, WEBAIM, <https://webaim.org/articles/visual/blind> [<https://perma.cc/NKZ6-EQ6R>].

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

<sup>71</sup> *How People with Disabilities Use the Web: Diverse Abilities and Barriers* (Auditory), W3C, <https://www.w3.org/WAI/people-use-web/abilities-barriers/> [<https://perma.cc/FZA2-7PBU>] (last updated May 15, 2017).

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

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

<sup>74</sup> *Id.*

<sup>75</sup> *Introduction to Web Accessibility: People with Disabilities on the Web*, WEBAIM, <http://webaim.org/intro/> [<https://perma.cc/PQ7M-2SX7>].

movements including tremors, lack of coordination, or paralysis), limitations of sensation, joint disorders (such as arthritis), pain that impedes movement, and missing limbs.”<sup>76</sup> Assistive technologies for people with motor impairments include voice recognition software, eye tracking, adaptive keyboard, oversized trackball mouse, mouth stick, head wand, and single-switch access.<sup>77</sup>

*Cognitive impairments* affect the ability to process and understand the content of a web page.<sup>78</sup> Potential barriers include web pages with insufficient time limits to respond or complete tasks, missing orientation cues or other navigational aids, as well as inconsistent and unpredictable page navigation.<sup>79</sup> Approaches used to make web pages more accessible to this population include ensuring the content of the page is clear and easy to read, minimizing or eliminating distracting animations on the page, and providing non-text alternative versions of the content.<sup>80</sup>

Although there are challenges for users with disabilities, through proper design, disabled users do not have to be disadvantaged in cyberspace. For example, CAPTCHAs, which verify that a user is human to protect against automated spam, can be a challenge for visually impaired users; however, Google’s *No CAPTCHA reCAPTCHA*, eliminates the need for text by asking the user whether she is a robot.<sup>81</sup> Pop-up windows enabled by JavaScript create difficulties, although they either can be avoided altogether or implemented in an accessible way with sufficient testing.<sup>82</sup> For a blind person, websites that use a map are “akin to being in a wheelchair and encountering a flight of stairs”; however, an alphabetical listing of cities or states alleviates the challenge.<sup>83</sup> In summary, suggestions

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<sup>76</sup> *How People with Disabilities Use the Web: Diverse Abilities and Barriers* (Physical), W3C, <https://www.w3.org/WAI/people-use-web/abilities-barriers/> [<https://perma.cc/FZA2-7PBU>].

<sup>77</sup> *Motor Disabilities: Assistive Technologies*, WEBAIM, <http://webaim.org/articles/motor/assistive> [<https://perma.cc/FJ5Y-39YY>].

<sup>78</sup> *How People with Disabilities Use the Web: Diverse Abilities and Barriers* (Cognitive), W3C, <https://www.w3.org/WAI/people-use-web/abilities-barriers/> [<https://perma.cc/FZA2-7PBU>].

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> Ryan C. Brunner, *Websites as Facilities Under ADA Title III*, 15 DUKE L. & TECH. REV. 171, 183–84 (2017).

<sup>82</sup> *Id.* at 188–89.

<sup>83</sup> DeAnn Elliott, *The Challenges of Surfing While Blind*, WALL ST. J., July 27, 2015, at A11.



to address these categories of disabilities include: (1) providing text alternatives (or ALT Tags) to graphics, animations, and videos; (2) ensuring text labels are used for all buttons and calls to action; (3) providing text descriptions to all internal and external links; (4) making web pages that are navigable without a mouse; (5) allowing for longer time to complete a task for persons with a motor or cognitive disability; and (6) providing easily resizable text.<sup>84</sup> The following section discusses the prevailing set of guidelines for implementing user-friendly, accessible websites to address the four categories of impairments.

### *B. Guidelines for Addressing Impairments*

The most widely used standard for providing guidelines on implementing accessibility solutions to these impairments and for measuring their success is the Web Content Accessibility Guidelines (WCAG) 2.0, which was developed by the World Wide Web Consortium (W3C).<sup>85</sup> The W3C is an international community working to develop standards so that the web should be accessible to everyone, whatever their physical or mental characteristics.<sup>86</sup> This goal requires several components to work together: *Web Content, Authoring Tools, User Agents, and Assistive Technologies*.<sup>87</sup> *Web Content* includes the informational content, such as text, images, forms, and multimedia, markup codes, scripts, and applications, as well as the HTML, CSS markup code, and Javascript scripting codes used to build the web page.<sup>88</sup> *Authoring Tools* are software or services used to produce web content, such as code editors that create and edit the page markup, as well as high-level content management systems which must work in a way that does not create barriers for users to access the pages.<sup>89</sup> *User Agents* consist of software used

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<sup>84</sup> *Hotel ADA Website Compliance—What You Need to Know*, HOSPITALITYNET (Feb. 20, 2018), <https://www.hospitalitynet.org/news/4087008.html> [<https://perma.cc/V29J-HNMW>].

<sup>85</sup> *WCAG 2.0*, *supra* note 63.

<sup>86</sup> *About W3C*, W3C, <http://www.w3.org/Consortium> [<https://perma.cc/ZU6R-A2Q8>].

<sup>87</sup> *Accessibility Principles*, W3C, <https://www.w3.org/WAI/fundamentals/accessibility-principles/> [<https://perma.cc/J5UN-DY8U>].

<sup>88</sup> *Web Content Accessibility Guidelines (WCAG) Overview*, W3C, <https://www.w3.org/WAI/standards-guidelines/wcag/> [<https://perma.cc/79PY-WS2W>].

<sup>89</sup> *Authoring Tools Accessibility Guidelines (ATAG) Overview*, W3C, <https://www.w3.org/WAI/standards-guidelines/atag/> [<https://perma.cc/75F7-VTBF>].

to access web content, such as desktop graphical browsers, voice browsers, mobile phone browsers, multimedia players, plug-ins, and some assistive technologies used for the functional capabilities of individuals with disabilities.<sup>90</sup> *Assistive technologies* include screen magnifiers, synchronization with speech tools, screen readers, text-to-speech software, speech recognition software, alternative keyboards, and alternative pointing devices.<sup>91</sup> In sum, web page creators use *authoring tools* to create *web content* in a way that allows *user agents* working with *assistive technologies* to make the content accessible to persons with any of four categories of impairments: visual, hearing, mobility, and cognitive.<sup>92</sup>

The WCAG 2.0 was accepted as a standard in 2008 and succeeded the WCAG 1.0 standard published in 1999.<sup>93</sup> Compared to the earlier 1.0 standard, the WCAG 2.0 is designed to be more applicable to different types of technology and to be more precisely testable with both manual and automatic testing.<sup>94</sup> In 2012, the WCAG 2.0 was accepted as the ISO International Standard ISO/IEC 40500.<sup>95</sup> The International Organization for Standardization (ISO) is an independent, nongovernmental membership organization, and the world's largest developer of voluntary international standards.<sup>96</sup>

Rather than being organized by impairment, the WCAG 2.0 is based on four principles that must be fulfilled for a web page to be accessible: the web page must be (1) Perceivable; (2) Operable; (3) Understandable; and (4) Robust.<sup>97</sup> For a web page to be *Perceivable*, it must be presentable to users in a way they can perceive the content, regardless of sensory or cognitive limitations that might require

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<sup>90</sup> WCAG 2.0, *supra* note 63.

<sup>91</sup> *Id.*

<sup>92</sup> *Introduction to Web Accessibility: People with Disabilities on the Web*, WEBAIM, <http://webaim.org/intro/> [<https://perma.cc/PQ7M-2SX7>].

<sup>93</sup> WCAG 2.0, *supra* note 63.

<sup>94</sup> *How WCAG 2.0 Differs from WCAG 1.0*, W3C: W3C WEB ACCESSIBILITY INITIATIVE, <http://www.w3.org/WAI/WCAG20/from10/diff.php> [<https://perma.cc/LC3U-QY6Y>].

<sup>95</sup> Shawn Henry, *WCAG 2.0 is now also ISO/IEC 40500!*, W3C BLOG (Oct. 15, 2012), <http://www.w3.org/blog/2012/10/wcag-20-is-now-also-isoiec-405/> [<https://perma.cc/2DNE-C5MJ>].

<sup>96</sup> *About ISO*, INT'L ORG. FOR STANDARDIZATION, <http://www.iso.org/iso/home/about.htm> [<https://perma.cc/EUM2-3ETX>].

<sup>97</sup> WCAG 2.0, *supra* note 63.

the use of an assistive technology.<sup>98</sup> For a web page to be *Operable*, interface components must allow the user to navigate it successfully when employing any of the variety of assistive technologies used to access the page.<sup>99</sup> The information and operation of the user interface must be *Understandable* for users who may function on a wide range of cognitive levels.<sup>100</sup> For the page to be *Robust*, the content of the page must be clear and able to be interpreted reliably with all of the available assistive technologies, as well as with future technologies.<sup>101</sup> The WCAG 2.0 states that, if any of the four principles are not met, users with disabilities will not be able to use the page.<sup>102</sup>

To complement the four standards, the WCAG 2.0 provides twelve guidelines with *testable* criteria for assessing the accessibility compliance of a website.<sup>103</sup> Each guideline lists detailed aspects to specify precisely what is required to pass the success criteria, and each technology-neutral success criterion is framed as something that will be either true or false when a test is run.<sup>104</sup> Success criteria fall into one of the following conformance categories: Level A; Level AA; and Level AAA; with Level A representing the minimal level of conformance and Level AAA the highest.<sup>105</sup> As a result, the WCAG 2.0 provides an operable, detailed, and test-based standard for assessing web page accessibility for any web page.<sup>106</sup>

### C. Mobile Accessibility

While there are no separate guidelines for mobile accessibility, there are nuances and challenges presented by the small

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<sup>98</sup> *Introduction to Understanding WCAG 2.0*, W3C WORKING GROUP NOTE, <http://www.w3.org/TR/UNDERSTANDING-WCAG20/intro.html#introduction-fourprincs-head> [<https://perma.cc/46RG-GWPX>].

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* See *WCAG 2.0*, *supra* note 63.

<sup>104</sup> *Introduction to Understanding WCAG 2.0*, W3C WORKING GROUP NOTE, <http://www.w3.org/TR/UNDERSTANDING-WCAG20/intro.html#introduction-fourprincs-head> [<https://perma.cc/46RG-GWPX>].

<sup>105</sup> *WCAG 2.0*, *supra* note 63.

<sup>106</sup> *Id.*

screen. The most recent update to the guidelines, the Web Content Accessibility Guidelines (WCAG) 2.1 released June 5, 2018, covers a wide range of recommendations to make Web content more accessible on desktops, laptops, tablets, and mobile devices.<sup>107</sup> For users of mobile devices, WCAG 2.1 provides updated guidance on support for user interactions using touch, complex gestures, and the unintended activation of an interface.<sup>108</sup> It also extends contrast requirements to graphics, and adds new requirements for text and layout customization to support better visual perception.<sup>109</sup> For users with cognitive, language, and learning disabilities, the update includes a requirement to provide information about the specific purpose of input controls to support timeouts due to inactivity.<sup>110</sup>

The Mobile Accessibility Task Force of the W3C Web Accessibility Initiative also is developing more specific and updated guidance on mobile accessibility.<sup>111</sup> There is already a growing market for low-cost digital solutions for disabled consumers, and app designers are developing a variety of technologies, such as touch-to-speak technology, which offer the “same capabilities as expensive purpose-built equipment at a fraction of the cost.”<sup>112</sup> Many accessibility principles for websites apply to mobile development, and many mobile operating systems (OS) offer either specific guidance on developing accessible mobile apps or have accessibility features already built into the operating software; for example, Apple’s *VoiceOver* operates as a screen reader, *Zoom* lets users magnify an app’s entire screen as opposed to individual elements, and Purple Communications’ *ClearCaptions* (available for Android devices and iPhones) include captioning services.<sup>113</sup> In an effort to increase

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<sup>107</sup> Andrew Kirkpatrick & Michael Cooper, *WCAG 2.1 Is a W3C Recommendation*, W3C WEB ACCESSIBILITY INITIATIVE BLOG (June 5, 2018), <https://www.w3.org/blog/2018/06/wcag21-rec/> [<https://perma.cc/F3V5-72HM>].

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Mobile Accessibility at W3C*, W3C WEB ACCESSIBILITY INITIATIVE, <https://www.w3.org/WAI/mobile/> [<https://perma.cc/UF7E-AUT5>].

<sup>112</sup> Philippa Willitts, *How apps are changing the face of accessibility*, THE DAILY DOT (Dec. 11, 2015, 2:23 PM), <http://www.dailydot.com/debug/accessibility-apps-disability-tools/> [<https://perma.cc/37M9-WEZN>].

<sup>113</sup> See John Moore, *Mobile Apps and Accessibility*, DIGITAL INNOVATION GAZETTE, [http://www.digitalinnovationgazette.com/uiux/mobile\\_apps\\_and\\_accessibility/](http://www.digitalinnovationgazette.com/uiux/mobile_apps_and_accessibility/) [<https://perma.cc/6R5Q-ZRES>].

the mobility, efficiency, and independence of transportation for riders who are blind or have low vision, Uber provides VoiceOver iOS technology and wireless braille display compatibility, and provides assistive technology such as visible and vibrating alerts for riders who are deaf or hard of hearing.<sup>114</sup>

While the WCAG guidelines may translate into the mobile arena reasonably well, the legal analytical framework may be different for websites and mobile apps. A website has a URL *address* that the user enters to “go to,” analogous to a street address of a physical place of public accommodation; however, a mobile app does not have that sense of place.<sup>115</sup> The user fires it up on the phone without entering a URL, and it runs, drawing resources from around the web using processes that are not visible to the user.<sup>116</sup> Therefore, even if ADA regulations or judicial decisions ultimately classified websites as places of public accommodations under the ADA, mobile apps still might be distinguishable and not analogous to websites from a legal perspective.

*The Twenty-First Century Communications and Video Accessibility Act* (“CVAA”) established (with limits) a statutory right of accessibility to hardware, software, internet browsers, smartphones, and video content providers.<sup>117</sup> It required the Federal Communications Commission (FCC) to implement regulations to ensure that providers and manufacturers of advanced communications services and video programming make their products accessible to people with disabilities, including the facilitation of deaf and hearing-impaired individuals’ access to video programming broadcast over the Internet.<sup>118</sup> After its passage, digital accessibility regulations governing the airline and healthcare sectors were promulgated, with the Department of Transportation (DOT) promulgating a rule requiring commercial air carriers to implement

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<sup>114</sup> *Accessibility at Uber: Overview*, UBER, <https://accessibility.uber.com/> [<https://perma.cc/ZL9Q-YMGT>].

<sup>115</sup> See Summerfield, *Mobile Website vs. Mobile App: Which is Best for Your Organization?*, <https://www.hswsolutions.com/services/mobile-web-development/mobile-website-vs-apps/> [<https://perma.cc/W3GZ-LPXH>].

<sup>116</sup> See generally *id.*

<sup>117</sup> See *Twenty-First Century Communications and Video Accessibility Act of 2010*, Pub. L. No. 111-265, 124 Stat. 2795 (2010).

<sup>118</sup> See Courtney L. Burks, *Improving Access to Commercial Websites Under the Americans with Disabilities Act and the Twenty-First Century Communications and Video Accessibility Act*, 99 IOWA L. REV. 363, 382 (2013).

WCAG 2.0 AA in 2013, and the Department of Health and Human Services (HHS) requiring implementation of WCAG 2.0 AA on Medicaid managed care provider websites in 2016.<sup>119</sup>

What good is the CVAA's mandated accessibility for hardware, software, internet browsers, and smartphones without something accessible to access? Do the requirements of that statute perhaps implicitly recognize an obligation to make the websites accessible? An argument that a right of access (to hardware, software, browsers, smartphones, and video content providers) inherently implies a right to access information with those tools replicates the reasoning of commercial speech's constitutional protection which acknowledges the right of consumers to access information in tandem with the right of businesses to speak truthfully. As Justice Marshall observed, the "freedom to speak and the freedom to hear are inseparable; they are two sides of the same coin."<sup>120</sup> The Supreme Court recognized that the intended recipients of commercial speech have an undeniable interest in receiving information that may be useful in consumer decision-making and recognizing society's "strong interest in the free flow of commercial information."<sup>121</sup> So perhaps there is some support for such an access/accessibility argument in the mobile arena given the CVAA.

Nevertheless, given that the question of whether or not websites are covered under Title III of the ADA is still unresolved under existing law after over a decade of litigation, it likely would take additional regulations or statutes to require mobile app accessibility under federal law, which is unlikely forthcoming in the immediate future.<sup>122</sup> In the absence of clear regulations or directives from courts, the number of lawsuits seeking relief for inaccessible websites has increased dramatically from 57 filed in 2015 to 262 filed in 2016 to 751 filed in 2017, with no promise of abatement.<sup>123</sup> More

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<sup>119</sup> See Daniel Sorger, *Writing the Access Code: Enforcing Commercial Web Accessibility without Regulations Under Title III of the Americans with Disabilities Act*, 59 B.C. L. REV. 1121, 1136 (2018) (citations omitted).

<sup>120</sup> *Kleindienst v. Mandel*, 92 S. Ct. 2576, 2588 (1972) (Marshall, J., dissenting).

<sup>121</sup> *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 96 S. Ct. 1817, 1827 (1976).

<sup>122</sup> See generally *ADA Conformity: It's more than just lawsuits*, HOSPITALITYNET (Apr. 25, 2017), <https://www.hospitalitynet.org/news/4082342.html> [<https://perma.cc/48AE-65WX>] [hereinafter HOSPITALITYNET].

<sup>123</sup> See Jennifer Pitino, *Is Your Website ADA Compliant?*, 60 ADVOCATE 35, 36 (2017).

than 240 lawsuits have been filed in the hospitality industry alone since 2015, with plaintiffs receiving damage awards,<sup>124</sup> although the key remedy sought typically is remediation.<sup>125</sup>

### III. OTHER CONSIDERATIONS CONCERNING LIABILITY

#### A. *Costs and the ADA's Undue Burden Caveat*

The ADA requires an entity operating public accommodations to make reasonable modifications in its policies for individuals with disabilities.<sup>126</sup> There are limitations, however. First, the statute permits eligibility criteria that screen out disabled individuals when it is necessary for the provision of the services or facilities offered.<sup>127</sup> Second, if modifying policies, practices, and procedures would fundamentally alter the services or accommodations offered, then changes need not be made.<sup>128</sup> Third, the statute does not mandate auxiliary aids if providing them would result in an “undue burden.”<sup>129</sup> Only the third exception is relevant to the issue of accessibility for websites.

Although it is unclear if the ADA mandates compliance under federal law for nongovernmental websites,<sup>130</sup> it is unlikely that ensuring accessibility for the websites would be considered cost-prohibitive or overly burdensome for most places of public accommodation.<sup>131</sup> “Although it is harder to retrofit accessibility onto old websites, adding new content in an accessible way is fairly straightforward, especially when guided by flexible, predictable standards like those set out in WCAG 2.0.”<sup>132</sup> Moreover, costs to comply with the WCAG 2.0 have dropped considerably with the development of accessible mobile touch screens, built-in mobile accessibility, content-management systems with good accessibility support, free caption editors and automated captioning tools, along

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<sup>124</sup> See HOSPITALITYNET, *supra* note 122.

<sup>125</sup> See *Gil v. Winn-Dixie Stores, Inc.*, 257 F. Supp. 3d 1340, 1350 (S.D. Fla. 2017) (ordering remediation measures).

<sup>126</sup> 42 U.S.C. § 12182(b)(2)(A)(ii) (2012).

<sup>127</sup> See *id.* § 12182(b)(2)(A)(i).

<sup>128</sup> See *id.* §§ 12182(b)(2)(A)(ii)–(iii).

<sup>129</sup> See *id.* § 12182(b)(2)(A)(iii).

<sup>130</sup> See *supra* notes 12–41 and accompanying text.

<sup>131</sup> See *supra* notes 12–41 and accompanying text.

<sup>132</sup> Brunner, *supra* note 81, at 195.

with built-in accessibility checkers for documents.<sup>133</sup> While costs for achieving Level AAA may remain somewhat expensive, Level A and AA can be implemented in a relatively affordable manner, with captioning a video, audio describing a video, and live captioning being the more costly endeavors.<sup>134</sup>

Additionally, companies sell software to identify compliance gaps with the WCAG 2.0 to assist in compliance efforts and grading accessibility.<sup>135</sup> In the hospitality industry specifically, for example, Travel Tripper provides auditing and monitoring services for Hotel websites to achieve and maintain compliance with WCAG Level AA standards.<sup>136</sup> For a fee, Travel Tripper helps hotels deliver fully accessible booking and browsing experiences for users with disabilities.<sup>137</sup>

Of course, costs are relative and can be considered in determining whether or not compliance would be an undue burden under the ADA. In a recent case brought by a blind patron, who could not access Winn-Dixie's website to retrieve coupons or refill prescriptions online, the plaintiff estimated the cost of modification to the company's website to allow access would be around \$37,000, while Winn-Dixie estimated the costs at \$250,000.<sup>138</sup> Those costs could be substantial in some situations. However, in this case, the district court judge concluded that whether the costs were \$37,000 or \$250,000, the expense "pales in comparison to the \$2 million Winn-Dixie spent in 2015 to open the website and the \$7 million it spent in 2016 to remake the website for the Plenti program."<sup>139</sup>

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<sup>133</sup> See Scott Hollier, *Web accessibility has never been more affordable*, ACCESS IQ (June 3, 2015), <https://web.archive.org/web/20150713050921/http://www.accessiq.org/news/w3c-column/2015/06/web-accessibility-has-never-been-more-affordable> [<https://perma.cc/UWU2-AJP7>].

<sup>134</sup> See *id.*

<sup>135</sup> See, e.g., *Simplify your accessibility*, TENON, <https://tenon.io/> [<https://perma.cc/T2QZ-BAJQ>]; *Web Accessibility—ADA Compliance*, MONSIDO, <http://monsido.com/features/web-accessibility/> [<https://perma.cc/E63C-7B9M>].

<sup>136</sup> *ADA Compliance*, TRAVEL TRIPPER, <https://www.traveltripper.com/solutions/ada-compliance-hotel-websites/> [<https://perma.cc/2FUC-6C6L>].

<sup>137</sup> *Id.*

<sup>138</sup> See *Gil v. Winn-Dixie Stores, Inc.*, 257 F. Supp. 3d 1340, 1344, 1347 (S.D. Fla. 2017).

<sup>139</sup> *Id.* at 1347.



*B. A Subtle Compliance Mandate for the Hospitality Industry*

Businesses in the hospitality industry that operate in multiple states are ripe for forum shopping, a practice which permits plaintiffs to pick the jurisdiction with the most favorable perspective on whether or not the ADA embraces an accessibility mandate.<sup>140</sup> Because most of the hospitality industry businesses will have a nexus to a physical place, the only jurisdictions which would not require accessibility would be those which have interpreted Title III very narrowly as only covering physical places.<sup>141</sup> Moreover, if the website is interactive, allowing consumers to book rooms or order food, then jurisdiction likely may be maintained in those jurisdictions with favorable decisions on accessibility under state long-arm statutes.<sup>142</sup> In other words, even though the physical place may be located in a jurisdiction that narrowly interprets the statute, a nonresident defendant from jurisdiction that adopts a broader reading could maintain jurisdiction by seeking the services offered.

In reality, then, franchisees and other chain operators, as well as entities that host interactive websites, already are subject to liability for noncompliance and should ensure accessibility.<sup>143</sup> Granted, a higher court could conclude that Title III's coverage is limited to physical places, but that closure could be a long time coming, if at all. Further, the issue of a legal mandate in any jurisdiction for mobile apps is virtually nonexistent.<sup>144</sup> As noted previously, it is

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<sup>140</sup> See generally CORNELL WEX LEGAL DICTIONARY, [https://www.law.cornell.edu/wex/forum\\_shopping](https://www.law.cornell.edu/wex/forum_shopping) [<https://perma.cc/R5Y-MR8Y>].

<sup>141</sup> See *supra* notes 26–27 and accompanying text.

<sup>142</sup> See Richard E. Kaye, *Internet Web site activities of nonresident person or corporation as conferring personal jurisdiction under long-arm statutes and due process clause*, 81 A.L.R. 5th 41 § 6 (2000); see also *Bird v. Parsons*, 289 F.3d 865, 874 (6th Cir. 2002) (operating a website can support the exercise of personal jurisdiction over a nonresident defendant consistent with the Due Process clause if the website is sufficiently interactive with residents of the state).

<sup>143</sup> See Connor Choate, *Franchise Activities Result in Personal Jurisdiction over Franchisee*, AMERICAN BAR ASSOCIATION (June 30, 2016), <https://www.americanbar.org/groups/litigation/committees/trial-practice/practice/2016/alpen-rose-dairy-baskin-robbins/> [<https://perma.cc/FQU9-476P>].

<sup>144</sup> See Alexandra McDonald, Jason McDonell & Caroline Mitchell, *Mobile Apps: Redefining the Virtual California Economy and the Laws that Govern it*, JONES DAY, <https://www.jonesday.com/-/media/files/publications/2015/10/mobile-apps-redefining-the-virtual-california-econ/files/mobile-apps/fileattachment/mobile-apps.pdf> [<https://perma.cc/8NFD-3QFZ>].

unlikely the “place” concept of the ADA is analogous to mobile operating systems;<sup>145</sup> however, liability might still attach under the ADA in jurisdictions in which courts focus on the statute’s “full and equal enjoyment” mandate, and which define the appropriate inquiry as being whether or not the entity provides goods and services that are open to the public, or facilitates their offering.<sup>146</sup> Even assuming there could be liability, without regulatory guidance, what standards for accessibility are applicable? Presumably, both courts, as well as ultimately the U.S. Access Board,<sup>147</sup> would adopt the WCAG Guidelines, but there is no guarantee, nor is there finality from the W3C on mobile app accessibility.<sup>148</sup>

Admittedly, neither the federal judiciary interpreting the ADA, nor supplemental Congressional legislation, nor regulations promulgated by the Justice Department clearly establish a national legal mandate for accessibility for disabled users in the virtual marketplace for goods and services, including clients of the hospitality industry.<sup>149</sup> One scholar has argued that First Amendment jurisprudence and the theories of democratic governance and self-fulfillment support Web accessibility for the disabled.<sup>150</sup> Another observer, in recognizing the need for equal access to the mainstream economy, proposed that large-scale litigation, state attorney general action, and state laws should be used to usher in commercial web accessibility as per globally accepted standards.<sup>151</sup> Given the absence of a clear legal directive, should the hospitality industry embrace an ethical duty to recognize a good faith obligation to conform to WCAG 2.0 accessibility guidelines? Litigation is costly;

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<sup>145</sup> See *supra* notes 111–21 and accompanying text.

<sup>146</sup> See *supra* note 19 and accompanying text.

<sup>147</sup> “The Access Board is an independent federal agency that promotes equality for people with disabilities through leadership in accessible design and the development of accessibility guidelines and standards.” *About the U.S. Access Board*, U.S. ACCESS BOARD, <https://www.access-board.gov/the-board> [<https://perma.cc/UQQ4-UT99>].

<sup>148</sup> MOBILE ACCESSIBILITY: HOW WCAG 2.0 AND OTHER W3C/WAI GUIDELINES APPLY TO MOBILE (Kim Patch, Jeanne Spellman & Kathy Wahlbin eds. 2015), <https://www.w3.org/TR/mobile-accessibility-mapping/> [<https://perma.cc/CQ3Y-3NUL>].

<sup>149</sup> See, e.g., HOSPITALITYNET, *supra* note 122.

<sup>150</sup> See Victoria Smith Ekstrand, *Democratic Governance, Self-Fulfillment and Disability: Web Accessibility Under the Americans with Disabilities Act and the First Amendment*, 22 COMM. L. & POL’Y 427, 449–50, 457 (2017).

<sup>151</sup> See Sorger, *supra* note 119, at 1147–52.

perhaps businesses should use precious resources for a nonlegal and more productive response instead.

#### IV. EXTRAJUDICIAL NORMATIVE DUTIES & MORAL DEVELOPMENT

##### A. Overview

The lodging sector of the hospitality and tourism industry is an early and notable leader in recognizing an ethical mandate for inclusiveness.<sup>152</sup> The historical development of innkeeper law recognized that innkeepers had a public calling that requires all members of the public to be served.<sup>153</sup> Even before Congress passed Title II of the Civil Rights Act of 1964, which prohibits racial and religious discrimination in places of public accommodation,<sup>154</sup> innkeepers had a common law duty to provide lodging for everyone who could contract for the service, unless the patron was filthy, intoxicated, disorderly, or had a communicable disease.<sup>155</sup>

When a traveler presents himself at an inn, it is the duty of the innkeeper to accommodate him if he be a fit person to be admitted and receive accommodation; it being the innkeeper's duty to receive into his house all strangers and travelers who may call for entertainment, provided he has rooms, and they tender him a reasonable sum for the accommodation demanded.<sup>156</sup> This duty dates to medieval times when the dangers of travel necessitated a safe refuge open to all seekers.<sup>157</sup>

Although this common law duty only attaches to the lodging sector of the industry, the keystones of the industry as a whole are customer service and hospitality.<sup>158</sup> These anchoring principles

<sup>152</sup> See, e.g., JOHN E. H. SHERRY, *THE LAWS OF INNKEEPERS: FOR HOTELS, MOTELS, RESTAURANTS, AND CLUBS* 38 (3d ed. 1993).

<sup>153</sup> See *id.*

<sup>154</sup> "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination on the ground of race, color, religion, or national origin." 42 U.S.C. § 2000a(a) (2006).

<sup>155</sup> See SHERRY, *supra* note 152, at 49, 51.

<sup>156</sup> *Nelson v. Boldt*, 180 F. 779, 780 (E.D. Pa. 1910) (upholding jury charge on common law duty).

<sup>157</sup> See SHERRY, *supra* note 152, at 4–5.

<sup>158</sup> See DAVID A. FENNELL & DAVID CRUISE MALLOY, *CODES OF ETHICS IN TOURISM: PRACTICE, THEORY, SYNTHESIS* 47–49 (2007) (discussing "best practice in tourism" and the focus on customer needs that is at the heart of best

are shared by all segments of the industry: lodging, food and beverage, travel and tourism and recreation.<sup>159</sup> As one former president and CEO of a Las Vegas casino and resort put it: “I believe that hospitality and service are one and the same ... both provide an umbrella for treating people first of all with dignity and then giving them an experience that exceeds their expectations.”<sup>160</sup> Danny Meyer, owner of Union Square Hospitality group put it this way:

Service is the technical delivery of a product—or how well you do your job. Hospitality is how the delivery of that product makes its recipient feel—or *who you are* while you do your job. Service is a monologue—we decide how we want to do things and set our own standards for service. Hospitality, on the other hand, is a dialogue.<sup>161</sup>

Hospitality and customer service, as recognized imperatives, uniquely position the hospitality and tourism industry to embrace an ethical duty to serve all members of the public who can contract for the services offered, much like the common law duty of innkeepers.<sup>162</sup> These guiding principles suggests that, like the statutory language of the ADA, each sector of the industry should strive to ensure that all customers are treated with dignity and provided *full and equal enjoyment* of the services offered, and that such an inclusive approach should extend to conduits that facilitate their offerings, such as websites and apps.<sup>163</sup>

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practices); Giuseppe Pezzotti, *The Essence of Hospitality and Service*, in THE CORNELL SCHOOL OF HOTEL ADMINISTRATION ON HOSPITALITY: CUTTING EDGE THINKING AND PRACTICE 5 (Michael C. Sturman, Jack B. Corgel & Rohit Verma eds., 2011).

<sup>159</sup> See Peter Novak, *What Are The 4 Segments Of The Hospitality Industry*, HOSPITALITYNET (Apr. 24, 2017), <https://www.hospitalitynet.org/opinion/4082318.html> [<https://perma.cc/NKZ6-EQ6R>] (stating that there are four sectors of hospitality industry: (1) food and beverage, (2) travel and tourism, (3) lodging, and (4) recreation).

<sup>160</sup> Pezzotti, *supra* note 158, at 15.

<sup>161</sup> *Id.* at 16 (emphasis in original).

<sup>162</sup> See *Nelson v. Boldt*, 180 F. 779, 780 (E.D. Pa. 1910).

<sup>163</sup> 42 U.S.C. § 12182(a) (2012) (emphasis added). “No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.” *Id.*

The following sections will analyze this ethical commitment as an extrajudicial normative duty and how such a duty may help industrywide moral development. This analysis will begin by developing our analytical framework. This analytical framework, or more accurately, moral philosophy framework, will employ contractualism as developed by Harvard Philosopher T. M. Scanlon.<sup>164</sup> Scanlon's philosophy was heavily influenced by the social justice theories of John Rawls,<sup>165</sup> the deontological moral theories of Immanuel Kant,<sup>166</sup> and contractarianism as specifically developed by Jean-Jacques Rousseau.<sup>167</sup> The moral framework of Scanlon's contractualism will then be applied to analyze the ethical responsibilities of the hospitality and tourism industry to disabled patrons. The final analysis of moral agency and responsibility will be further informed by Professor Lawrence Kohlberg's Stages of Moral Development<sup>168</sup> and the stakeholder orientation of Corporate Social Responsibility.<sup>169</sup>

### *B. The Analytical Framework*

The construct of our analytical framework begins in the field of moral philosophy where we adopt and explain contractualism, our philosophical method of analyzing and assigning moral responsibility to the actions of moral agents—for our purposes these moral agents are companies and their management teams in the hospitality and tourism industry.<sup>170</sup> This philosophical construct is reinforced through our application of moral-development theory from the field of psychology.<sup>171</sup> Lastly, we turn to the field

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<sup>164</sup> See generally T. M. SCANLON, *WHAT WE OWE TO EACH OTHER* (1998).

<sup>165</sup> See generally JOHN RAWLS, *A THEORY OF JUSTICE* (Otfried Höffe ed., Joost den Haan trans., Brill 2013) (1971).

<sup>166</sup> See generally IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* (Allen W. Wood ed. trans., Yale University Press 2002) (1785).

<sup>167</sup> See generally JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* (Jonathan Bennet, trans., 2017) (1762), <https://www.earlymoderntexts.com/assets/pdfs/rousseau1762.pdf> [<https://perma.cc/4289-SPK7>].

<sup>168</sup> See James Rest, Elliot Turiel, & Lawrence Kohlberg, *Level of Moral Development as a Determinant of Preference and Comprehension of Moral Judgments Made by Others*, 37 *J. PERSONALITY* 225, 225–26 (1969).

<sup>169</sup> See, e.g., Kenneth E. Goodpaster, *Corporate Responsibility and its Constituents*, *THE OXFORD HANDBOOK OF BUSINESS ETHICS* 126 (George G. Brenkert & Tom L. Beauchamp eds., 2010).

<sup>170</sup> See SCANLON, *supra* note 164, at 153.

<sup>171</sup> See Lawrence Kohlberg, *The Claim to Moral Adequacy of a Highest Stage of Moral Judgment*, 70 *J. PHIL.* 630, 630 (1973).

of applied business ethics to understand the assignment of moral responsibility and proscribe remedies to moral shortcomings. In this last component of our construct, we employ the stakeholder orientation of corporate social responsibility (CSR) that allows the analysis to reach deeper insights of the results of the analysis conducted in the first two components of the framework.

### 1. *Contractualism*

In his seminal work, *What We Owe to Each Other*, T. M. Scanlon introduces a moral philosophy he names contractualism.<sup>172</sup> While comprehensive in its approach (accounting for reasons, values, well-being, wrongness, responsibility, promises, and relativism) Scanlon summarizes this new line of moral reasoning with the following short passage: “[i]t holds that an act is wrong if its performance under the circumstances would be disallowed by any set of principles for the general regulation of behavior that no would could reasonably reject as a basis for informed, unforced general agreement.”<sup>173</sup>

For Scanlon, the focus on “wrong acts” is important in his construct.<sup>174</sup> As can be seen by his chosen title of this seminal work, *What We Owe to Each Other*, Scanlon’s moral philosophy is relational.<sup>175</sup> For his construct to be justified, there must be reciprocal respect of the moral agency of all parties.<sup>176</sup> It is here that we begin to see the connection of this moral philosophy framework to the anchoring principles of customer service and hospitality—it is indeed dialogue that both are concerned with at a foundational level. Therefore, Scanlon’s focus on “wrong acts” is a focus on the breaking of that reciprocal respect of autonomy and moral agency.<sup>177</sup> At this juncture of Scanlon’s construction of his moral philosophy of contractualism is where we observe the influences of the moral philosophy of Jean-Jacques Rousseau’s contractarianism.<sup>178</sup> The “wrong act” is what contractarians would deem a

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<sup>172</sup> *Contractualism*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2018), <https://plato.stanford.edu/entries/contractualism/> [<https://perma.cc/5KEP-CH8J>].

<sup>173</sup> SCANLON, *supra* note 164, at 153.

<sup>174</sup> *Id.* at 147–48, 153.

<sup>175</sup> *Id.* at 191, 271–72.

<sup>176</sup> *Id.*

<sup>177</sup> *See id.* at 271–72.

<sup>178</sup> *See* ROUSSEAU, *supra* note 167, at 3 (stating that “common liberty is an upshot of the nature of man” and developing the relational nature of the formation of society that is not based upon mere force).

breach of the social contract.<sup>179</sup> To place such analysis in the language of the hospitality and tourism industry, the “wrong act” would be deemed a service failure and, therefore, inhospitable.<sup>180</sup>

Scanlon’s analysis is divergent from contractarianism in that he does not see the formation of the initial contract as an arm-length transaction informed by mutual self-interest where one negotiates to maximize his or her own utility in a zero-sum game.<sup>181</sup> Instead, contractualism reasons that the motivating force for a moral agent to enter the contract is when, in pursuit of his or her own self-interests, those self-interests are reasonably justifiable to others<sup>182</sup> (i.e., “no one could reasonably reject as a basis for informed, unforced general agreement.”<sup>183</sup>). Again, this formulation is well in line with the goals of customer service and hospitality as discussed previously.<sup>184</sup>

This core tenet of the *justifiable pursuit* of self-interest reveals the Kantian influence on Scanlon’s construct.<sup>185</sup> Specifically, it reveals the confluence of thought from the *Categorical Imperative’s Second Formulation* (that requires we treat every rational being as an end, not a mere means)<sup>186</sup> and *Third Formulation* (that requires we treat every rational being as having a self-legislating autonomous will).<sup>187</sup> In his analysis of values, however, Scanlon expands his construct beyond Kant’s formulations: “respecting the value of human (rational) life requires us to treat rational creatures only in ways that would be allowed by principles that they could not reasonably reject insofar as they, too, were seeking

<sup>179</sup> *Id.* at 6 (discussing the basic trade-off in the social contract between liberty and security, and how changes in the agreement render the social contract “null and void”).

<sup>180</sup> Jeff Joireman et al., *It’s All Good: Corporate Social Responsibility Reduces Negative and Promotes Positive Responses to Service Failures Among Value-Aligned Customers*, 34 J. PUB. POLICY & MKTG. 32, 33 (2015) (defining service failures as occurring “when service falls short of expectations”).

<sup>181</sup> *See supra* note 172.

<sup>182</sup> SCANLON, *supra* note 164, at 153.

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

<sup>184</sup> *See* Terri Miller, *Evolution of the Hotel CRM*, HOSPITALITYNET (Jan. 10, 2019), <http://www.hospitalitynet.org/opinion/4091466.html> [<http://perma.cc/QU7X-KZ8W>].

<sup>185</sup> *See supra* note 172.

<sup>186</sup> IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 35 (Jonathan Bennett trans., 2017), <https://www.earlymoderntexts.com/assets/pdfs/kant1785.pdf> [<https://perma.cc/PJ95-ZCHE>].

<sup>187</sup> *Id.* at 45.

principles of mutual governance which other rational creatures could not reasonably reject.”<sup>188</sup>

Thus, contractualism does not require actual agreement but simply requires an “ideal of hypothetical agreement which contractualism takes to be the basis of our thinking about right and wrong.”<sup>189</sup> As a moral philosophy that provides an analytical framework for the ethical analysis of this Article’s extant problem, contractualism is, therefore, optimal in that it bridges the gap between deontology and teleology. In other words, it accounts for moral motivation (*i.e.*, intent) and also for outcomes (*i.e.*, consequences).<sup>190</sup> It honors and respects the dignity and agency of others, and aims to maximize utility, “giving them an experience that exceeds their expectations,” all while allowing for the pursuit of self-interests.<sup>191</sup> In defending the ideal of the hypothetical agreement, Scanlon explains:

Why accept this account of moral motivation? I accept it, first, because it seems to me to be phenomenologically accurate. When I reflect on the reason that the wrongness of an action seems to supply not to do it, the best description of this reason I can come up with has to do with the relation to others that such acts would put me in: the sense that others could reasonably object to what I do (whether or not they would actually do so) .... “Being moral” in the same sense described by the morality of right and wrong involves not just being moved to avoid certain actions “because they would be wrong,” but also being moved by more concrete considerations such as “she’s counting on me” or “he needs my help” or “doing that would put them in danger.” A morally good person is sometimes moved by “the sense of duty” but more often will be moved directly by these more concrete considerations, without the need to think that “it would be wrong” to do otherwise.<sup>192</sup>

This view of moral motivation, drawing the source of such moral motivation from the ethical principal of the ideal of hypothetical justifiability to others (instead of avoidance of sanction, reciprocity, interpersonal relationships, or adherence to social norms)

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<sup>188</sup> SCANLON, *supra* note 164, at 106.

<sup>189</sup> *Id.* at 155.

<sup>190</sup> *See id.* at 222.

<sup>191</sup> Pezzotti, *supra* note 158, at 15 (quoting David Hanlon, former president and CEO of Rio Casino/Las Vegas).

<sup>192</sup> SCANLON, *supra* note 164, at 105–06.



is consistent with much of the literature on the “culturally universal invariant sequence of stages of moral judgment” developed by Professor Lawrence Kohlberg and his colleagues.<sup>193</sup>

## 2. Kohlberg’s Stages of Moral Development

Kohlberg’s stages of moral development, as they have come to be known, presents three levels consisting of six stages.<sup>194</sup> The first level, the preconventional level, consists of stage 1: the punishment-and-obedience orientation and stage 2: the instrumental-relativist orientation.<sup>195</sup> The second level, the conventional level, consists of stage 3: the interpersonal concordance or “good boy—nice girl” orientation and stage 4: the law and order orientation.<sup>196</sup> The third level, the postconventional, autonomous, or principled level, consists of stage 5: the social-contract legalistic orientation and stage 6: the universal-ethical-principle orientation.<sup>197</sup> These six stages of moral development have been succinctly described by one commentator as follows:

1. A person simply avoids breaking rules in order to avoid punishment;
2. One becomes aware of the consequences of actions; reciprocity becomes a guiding norm and one follows rules if they are beneficial—what is right is relative;
3. Conventional reasoning develops, which means that people realize the conventional morality is important for the maintenance of society and is performed in order to be a good friend or a good teacher...;
4. [This stage] takes things one step further of how one should act in order to benefit the entire society and not simply maintain the relationships within which one is in...;
5. Stage five looks at the underlying principles that give rise to the rules of society and prioritizes those principles in the event of a conflict of conventional norms and laws;

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<sup>193</sup> Kohlberg, *supra* note 171, at 630.

<sup>194</sup> *Id.* at 631–32.

<sup>195</sup> *Id.* at 631.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 631–32.

6. Stage six is more of a theoretical ending point in which one acts purely in accord with ethical principles apart from conventional sources.<sup>198</sup>

Contractualism's ethical principal of the *ideal of hypothetical justifiability*, therefore, is buttressed as a method of ethical analysis by residing in Kohlberg's sixth stage.<sup>199</sup> The orientation of stage six is focused on universal ethical principles and doing the right thing for the sole motivation of it being right and not to avoid punishment or gain a reward; because it is socially expected or legally required; or because it is a higher principal that is agreed upon by society in a social contract.<sup>200</sup>

### *3. The Stakeholder Orientation of Corporate Social Responsibility*

The third and final component of our analytical framework is provided by the stakeholder orientation of Corporate Social Responsibility (CSR). CSR may be defined as a business approach that encourages companies to be more aware of the impact of their business on society.<sup>201</sup> It has further been defined as "actions that appear to further some social good, beyond the interests of the firm and that which is required by law."<sup>202</sup> Companies practicing CSR, for example, may go beyond legal requirements in an effort to contribute to the general social welfare, and are more likely to have transitioned from a shareholder orientation to a stakeholder orientation.<sup>203</sup> CSR inspires a company to affirmatively embrace policies which result in the entity being viewed as being a good corporate citizen.<sup>204</sup> "Engagement in CSR should be motivated not

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<sup>198</sup> See TIMOTHY L. FORT, *THE VISION OF THE FIRM* 37–38 (1st ed. 2014).

<sup>199</sup> See Kohlberg, *supra* note 171, at 632.

<sup>200</sup> See *id.* at 630–32, 634, 637.

<sup>201</sup> *Definition of corporate social responsibility (CSR)*, FINANCIAL TIMES LEXICON, [http://markets.ft.com/research/Lexicon/Term?term=corporate-social-responsibility--\(CSR\)](http://markets.ft.com/research/Lexicon/Term?term=corporate-social-responsibility--(CSR)) [<https://perma.cc/N84T-PCRQ>].

<sup>202</sup> Joireman et al., *supra* note 180, at 32.

<sup>203</sup> Klaus J. Zink, *Stakeholder Orientation and Corporate Social Responsibility as a Precondition for Sustainability*, 16 *TOTAL QUAL. MGMT. & BUS. EXCELLENCE* 1041, 1046–47 (2005).

<sup>204</sup> Knowledge@Wharton, *Why Companies Can No Longer Afford to Ignore Their Social Responsibilities*, *TIME BUSINESS*, <http://business.time.com/2012>

only with the focus on return on investment but a genuine desire to create positive change in society.”<sup>205</sup>

CSR is arguably a normative proposition in that it implicitly recognizes that if business has the power to alleviate social ills, such as discrimination, then businesses should strive to do so—tempered with the reality of the profit-making goals of the entity—particularly in the context of its stakeholders.<sup>206</sup> With respect to making websites and apps accessible, assuming that the costs are indeed reasonable, the potential for market expansion that could offset such costs makes the tension between alleviating social ills and maximizing profits less of an issue. It certainly seems reasonable to assume that the cost associated with making websites and mobile apps accessible would be much less than the costs of alterations for physical structures mandated under the ADA.<sup>207</sup>

Appropriate cues for business entities seeking to model good behavior often are taken from global initiatives.<sup>208</sup> In the context of accessibility, Article 9 of the United Nations Convention on the Rights of Persons with Disabilities requires member parties to take appropriate measures to ensure that persons with disabilities have access to information and communications, including technologies and systems.<sup>209</sup> Measures include promoting “access for persons with disabilities to new information and communications technologies and systems, including the Internet,” as well as promoting “the design, development, production and distribution of accessible information and communications technologies and systems at an early stage, so that these technologies and systems become accessible at minimum cost.”<sup>210</sup>

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/05/28/why-companies-can-no-longer-afford-to-ignore-their-social-responsibilities/[https://perma.cc/5ATJ-DTUH].

<sup>205</sup> Manisha Singal & Yinyoung Rhou, *Corporate Social Responsibility in the Hospitality Sector*, BOS. HOSPITALITY REV. (Jan. 27, 2017), <https://www.bu.edu/bhr/2017/01/27/hospitalitycsr/> [https://perma.cc/J88W-ZPT2].

<sup>206</sup> Daniel T. Ostas & Stephen E. Loeb, *Teaching Corporate Social Responsibility in Business Law and Business Ethics Classrooms*, 20 J. LEG. STUD. EDUC. 61, 64 (2002).

<sup>207</sup> See 28 C.F.R. §§ 36.401–406 (2017) (2010 ADA Standards for Accessible Design).

<sup>208</sup> See Knowledge@Wharton, *supra* note 204.

<sup>209</sup> UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS, art. 9, § (1), <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#9> [https://perma.cc/79AR-9N9E].

<sup>210</sup> *Id.* art. 9, §§ (2)(g)–(h).

Aside from an ethical responsibility for accessibility as being part of corporate citizenship, self-interest also serves as a motivation.<sup>211</sup> Ensuring accessibility is good for business because it increases the number of users able to interact with the site, thus increasing potential exposure, customers, and profits.<sup>212</sup> Moreover, “accessibility overlaps with many best practices already in place, like responsive design and search engine optimization, and case studies show that accessible websites see increased audience reach and better search results.”<sup>213</sup> An inaccessible website in e-commerce markets results in “lost customers as clicks and page views are missed, inventory is not purchased, and reservations are not made.”<sup>214</sup>

Most hotel chains, such as Choice International, as well as independent hotels, such as Hotel Petaluma in California, pride themselves on their website’s accessibility and use compliance with the WCAG guidelines as a marketing strategy.<sup>215</sup> New entrants to the market, like Airbnb, have placed pressure on the hospitality and tourism industry through their online business models that are disrupting normal modes of service transactions in favor of a sharing economy that is transacted digitally.<sup>216</sup> Airbnb’s mission, for example, “to create a world where anyone can belong anywhere, and that includes travelers with disabilities” is manifest in their WCAG compliant app and website design.<sup>217</sup>

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<sup>211</sup> Zachary Parker, *Defending Against the Undefined: Commercial Websites’ Violations of the Americans with Disabilities Act*, 85 UMKC L. REV. 1079, 1108 (2017).

<sup>212</sup> *Id.*

<sup>213</sup> Anna Chandler, *Americans with Disabilities Act (ADA) Title III and Your Website*, GO LOCAL INTERACTIVE, <http://golocalinteractive.com/blog/news/americans-with-disabilities-act-ada-title-iii-and-your-website/> [<https://perma.cc/9ZMH-EHCQ>].

<sup>214</sup> Meredith Mays Espino, *Website Accessibility for Persons with Disabilities: The Why & How*, BUS. L. TODAY, AM. BAR ASSOC. (Dec. 2016), [http://www.americanbar.org/publications/blt/2016/12/07\\_espino.html](http://www.americanbar.org/publications/blt/2016/12/07_espino.html) [<https://perma.cc/7RWL-U9Q5>].

<sup>215</sup> *Choice Hotels Cares About Accessibility*, CHOICE HOTELS, <https://www.choicehotels.com/accessibility>; *Hotel Petaluma Cares About Accessibility*, HOTEL PETALUMA, <https://www.hotelpetaluma.com/ada-accessibility-amenities-services-facilities> [<https://perma.cc/PUE3-8G6A>].

<sup>216</sup> Christine Birkner, *Here’s How Airbnb Disrupted the Travel Industry*, ADWEEK (May 26, 2016), <https://www.adweek.com/brand-marketing/heres-how-airbnb-disrupted-travel-industry-171699/> [<https://perma.cc/JU4T-6PNQ>].

<sup>217</sup> *Making Travel More Accessible*, AIRBNB (Nov. 16, 2017), <https://press.airbnb.com/making-travel-more-accessible/> [<https://perma.cc/4UCP-593N>].

Yet, from our construct, such motivations fall in a pre-conventional instrumental-relativist orientation. As with Scanlon's construct of contractualism, motivation is a foundational principal of analysis.<sup>218</sup> While there is nothing inherently wrong with a company pursuing competitive advantage and profit, its motivation is key to addressing its responsibility. A genuine and authentic adoption of CSR and its stakeholder orientation is a rejection of the zero-sum game that is at the heart of the shareholder orientation that it aims to replace.<sup>219</sup> Therefore, let us now turn to a full application of our analytical framework, one that is more aligned to properly motivated CSR and stakeholder orientation within contractualism and Kohlberg's Stages of Moral Development.

### *C. Moral Agency and Responsibility: An Examination of Moral Development*

Executives in the hospitality and tourism industry face more than the conflicting patchwork of legal regulatory pressures as examined in our legal analysis discussed previously.<sup>220</sup> There are indeed extrajudicial normative social forces at play that are placing pressure on their decision making.<sup>221</sup> Returning to our central thesis that the hospitality and tourism industry has a unique social-responsibility opportunity to fill in the gap where the legal system has failed this population, we will now apply our analytical framework to this thesis to identify the ethical obligations for digital accessibility to the industry's websites and apps. To assist us in this analysis we will apply our framework to examine the *National Federation of the Blind v. Target Corp.* case,<sup>222</sup> as well as to the post-litigation partnership of these litigants. The reasoning in *Target* relied in part on what appears to be the emerging consensus that requires some sort of nexus between a physical place or at least to the full and equal enjoyment of products or services offered by a physical place of accommodation.<sup>223</sup>

In revisiting *Target*, we assess management's actions through their moral motivation and the ideal of hypothetical agreement.

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<sup>218</sup> See Kohlberg, *supra* note 171, at 631.

<sup>219</sup> See David Millon, *Two Models of Corporate Social Responsibility*, 46 WAKE FOREST L. REV. 523, 539 (2011).

<sup>220</sup> See *supra* notes 12–61 and accompanying text.

<sup>221</sup> See Birkner, *supra* note 216.

<sup>222</sup> Nat'l Fed'n of the Blind v. Target Corp., 452 F. Supp. 2d 946 (N.D. Cal. 2006).

<sup>223</sup> See *supra* notes 32–37 & 45–49 and accompanying text.

*Target* is serving as our exemplar for three reasons: (1) it is the leading case that established the nexus test that occupies the compromise position between the more extreme tests as discussed previously; (2) the moral development of Target Corporation's management in relation to this litigation is an exemplary demonstration of moral development in the broader service industry; and (3) in spite of the fact that *Target* is not a hospitality and tourism case, the Target Corporation is in the service industry's retail segment, which shares the principles of customer service and hospitality that apply to the service industry's hospitality and tourism segment.<sup>224</sup> For these three reasons, *Target* is an ideal case for the application of our analytical framework and our analysis.

*1. Moral Development—Target Corporation as a Negative Moral Exemplar*

Scanlon's construct of the ideal of hypothetical agreement begins with the construct of "respecting the value of human (rational) life", which requires us to assess the moral responsibility of the Target Corporation by asking if their treatment of the plaintiffs in this case would be allowed by principles that any rational and similarly situated individual "could not reasonably reject insofar as they, too, were seeking principles of mutual governance which other rational creatures could not reasonably reject."<sup>225</sup> In other words, in addressing our minds to the question of right or wrong vis-à-vis Target's actions "what we are trying to decide is, first and foremost, whether certain principles are ones that no one, if suitably motivated, could reasonably reject."<sup>226</sup>

A satisfyingly efficient way to conduct this analysis is to simply state the fact that a lawsuit was brought by the plaintiffs and,

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<sup>224</sup> See NEW JERSEY DEP'T OF LABOR AND WORKFORCE DEV., INDUSTRY CLUSTER—FOCUS (May 5, 2019), [https://www.nj.gov/labor/lpa/pub/empecon/empeconomy\\_index.html](https://www.nj.gov/labor/lpa/pub/empecon/empeconomy_index.html) [<https://perma.cc/N3SR-TXP5>] (recognizing the link between the leisure, hospitality, and retail segments of the service industry and tourism through the creation of the Leisure, Hospitality, and Retail Industry Cluster (LHR Cluster). The LHR Cluster is one of eight economic development clusters that the state has identified as "the engines that drive job expansion and attract new businesses in New Jersey.").

<sup>225</sup> SCANLON, *supra* note 164, at 106.

<sup>226</sup> *Id.* at 189.

therefore, Target's actions lack the requisite agreement. Remember, however, we are seeking the "ideal of hypothetical agreement," not actual agreement.<sup>227</sup> This begs the question then, what "principles" are at issue in the Target case? As stated previously, the nexus test formulated by the *Target* Court concluded that the plaintiffs stated a claim only if the inaccessibility of Target.com impeded the full and equal enjoyment of goods and services offered in Target stores.<sup>228</sup> However, if the information and services on Target.com were unconnected to goods and services offered in actual Target stores, then there was no claim under Title III of the ADA.<sup>229</sup> The Court noted that Title III "applies to the services *of* a place *of* public accommodation, not services *in* a place of public accommodation."<sup>230</sup>

This analysis of the legal issue as it relates to the judicial normative proscriptions of the federal statute is not our concern in this section. Legal principles, in this way, are much narrower and are equivalent to a strict deontological rule. For our purposes of assigning moral responsibility, the *principles* are the nonjudicial normative proscriptions that are much broader than legal or deontological moral rules. Indeed, Scanlon states: "[p]rinciples, as I will understand them, are general conclusions about the status of various kinds of reasons for action."<sup>231</sup> He goes on to explain that "... principles may rule out some actions by ruling out the reasons on which they would be based, but they also leave wide

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<sup>227</sup> *Id.* at 155.

<sup>228</sup> Nat'l Fed'n of the Blind v. Target Corp., 452 F. Supp. 2d 946, 956 (N.D. Cal. 2006).

<sup>229</sup> *See id.* at 953, 956; *Castillo v. Jo-Ann Stores, LLC*, 286 F. Supp. 3d 870, 878 (N.D. Ohio 2018); *Rios v. New York & Co.*, No. 2:17-cv-04676-ODW(AGRx), 2017 WL 5564530, at \*3 (C.D. Cal. Nov. 16, 2017); *Reed v. CVS Pharmacy, Inc.*, No. CV 17-3877-MWF (SKx), 2017 WL 4457508, at \*3 (C.D. Cal. Oct. 3, 2017); *see also Crowley*, *supra* note 34, at 667.

<sup>230</sup> *Target Corp.*, 452 F. Supp. 2d at 953 (emphasis in original). Other decisions have also focused on the nexus or connection to a physical place. *See, e.g., Castillo*, 286 F. Supp. 3d at 881 (holding that there was no need to determine whether the website was a place of public accommodation because the factual allegations were sufficiently specific to show some connection between the website and the physical place); *Rios*, 2017 WL 5564530, at \*4 (finding factual allegations sufficiently specific to show some connection between the website and the physical place); *Reed*, 2017 WL 4457508, at \*3 (concluding that plaintiff adequately alleged a violation of the ADA by showing a connection).

<sup>231</sup> SCANLON, *supra* note 164, at 199.

room for interpretation and judgment.”<sup>232</sup> This approach leaves room for a deeper analysis of motivations. Furthermore, remember that CSR requires the furtherance of “some social good, beyond ... that which is required by law.”<sup>233</sup>

What principle or principles supported Target’s justification of its inaccessible website? The thrust of Target’s argument, according to legal pleadings from the case, was that they were simply not required to provide accessibility for their online presence because the ADA “is limited to physical barriers.”<sup>234</sup> This has been a common refrain in both business litigation and legislation aimed at removing barriers based on immutable characteristics such as race, gender, disability and most recently sexual orientation and gender identification.<sup>235</sup> The argument posits: I have no obligation to even be in business; therefore, I should have no obligation to serve any particular person. The moral principle advanced by Target, therefore, was a lack of a duty or obligation.<sup>236</sup> Stated in a more positive way, the moral principle may be framed as freedom to exercise independent choice.<sup>237</sup>

From our analysis of whether this principle is “one[ ] that no one, if suitably motivated, could reasonably reject”<sup>238</sup> we may find it easy to say that a suitably motivated person could reasonably reject this principle in this circumstance. This justification is clearly objectionable to disabled persons and their sense of autonomy and dignity, in that it does not respect the value of human life and mutual governance and is, thus, counter-relational. To understand such an objection, consider this analysis in the broader framework of

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

<sup>233</sup> See Joireman et al., *supra* note 180, at 32.

<sup>234</sup> Pls. Opp’n to Def. Target Corporation’s Mot. to Dismiss at 13, *Nat’l Fed’n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946 (N.D. Cal. 2006).

<sup>235</sup> Daniel Goldstein & Gregory Care, *Disability Rights and Access to the Digital World: An Advocate’s Analysis of an Emerging Field*, 59 *FED. LAW* 54, 54 (2012) (discussing the emergence of litigation on accessibility to spaces outside the typical physical barrier litigation).

<sup>236</sup> See Pls. Opp’n to Def. Target Corp.’s Mot. to Dismiss, *supra* note 234, at 14.

<sup>237</sup> While many of these arguments based on race, gender, and sexual orientation have an underlying religious freedom component, there is no such religious freedom argument known to the authors in the case of online accessibility of a business to disabled persons.

<sup>238</sup> SCANLON, *supra* note 164, at 189.



Kohlberg's stages of moral development and the shareholder orientation of CSR.<sup>239</sup> The principle Target is using to justify their actions must be looked at from the standpoint of its moral motivation. When this analysis is placed within Kohlberg's stages of moral development, there is strong evidence that Target's moral motivation is at the preconventional level.<sup>240</sup> Addressing the preconventional assignment of moral motivation, Target would only remove the accessibility barriers because of the use of the coercive power of the government through a judgment or settlement of the civil litigation.<sup>241</sup> This argument places their moral motivation in Stage 1: the punishment-and-obedience orientation of the preconventional level.<sup>242</sup> At best, one could argue for Stage 2: the instrumental-relativist orientation by focusing on Target's freedom principal as focused on reciprocity as their guiding norm, and that they follow rules if they are beneficial in light of their freedom to conduct business as they see fit—in other words, what is right is relative.<sup>243</sup>

Turning to an argument for the conventional assignment of moral motivation, the most generous interpretation would be to place Target's moral motivation into Stage 3: the interpersonal concordance, or "good boy—nice girl orientation."<sup>244</sup> Yet, their actions at this stage of the litigation did not support such a generous interpretation. In this stage, people come to realize the importance of morality to the maintenance of society and are motivated to right action for the maintenance of interpersonal relationships.<sup>245</sup> Stage 3 is the ceiling for Target's moral justification in this case, but is only able to be reached through an excessively generous interpretation of Target's motivations and actions. Stage 4, the law and order orientation, advances one step past Stage 3 to how one should act in order to benefit the entire society and not simply maintain the relationships within which one is in.<sup>246</sup> There is little evidence at all to support Target's justification that would advance beyond the preconventional level of Stages 1 or 2 in Kohlberg's

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<sup>239</sup> See Ostas & Loeb, *supra* note 206, at 68.

<sup>240</sup> See Kohlberg, *supra* note 171, at 631.

<sup>241</sup> See Nat'l Fed'n of the Blind v. Target Corp., 452 F. Supp. 2d 946, 952 (N.D. Cal. 2006); Class Settlement Agreement and Release at 1, Nat'l Fed'n of the Blind v. Target Corp., 452 F. Supp. 2d 946 (N.D. Cal. 2006) (No. 06-01802).

<sup>242</sup> See Kohlberg, *supra* note 171, at 631.

<sup>243</sup> See *id.*

<sup>244</sup> *Id.*

<sup>245</sup> See *id.*

<sup>246</sup> See FORT, *supra* note 198.

theory. Target's moral motivation and the principle justifying their actions are focused on individual self-interest in a shareholder orientation and, therefore, fall short of the conventional levels of Stages 3 and 4.<sup>247</sup>

From a CSR analysis, Target's moral motivation at this point is shareholder oriented. Revisiting the previous statement that CSR implicitly recognizes that if business has the power to alleviate social ills, such as discrimination, then it should strive to do so regardless of the requirements of the law,<sup>248</sup> tempered with the reality of the profit-making goals of the entity, particularly in the context of its stakeholders.<sup>249</sup> This stakeholder orientation of CSR is missing from both Target's justifying principle of freedom to exercise independent choice, and their moral motivation that is shareholder oriented.<sup>250</sup>

Furthermore, it is in no way other-oriented in Scanlon's relational terms.<sup>251</sup> Contractualism's foundational requirement of reciprocal respect of the moral agency of all parties is clearly missing in Target's justification.<sup>252</sup> Target's justifying principle of freedom to exercise independent choice and their moral motivation that falls within the pre-conventional level of moral development falls well short of "principles ... that no one, if suitably motivated, could reasonably reject."<sup>253</sup> It is, therefore, well-reasoned to call Target's underlying actions up to the end point of litigation between the parties—the development and maintenance of an inaccessible website thereby creating barriers for the disabled—at least a service failure, and at most morally wrong.

## *2. Moral Development—Target Corporation as a Positive Moral Exemplar*

From the point of settlement of the dispute with the National Federation of the Blind, Target began a journey of moral

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<sup>247</sup> See Kohlberg, *supra* note 171, at 631.

<sup>248</sup> See Ostay & Loeb, *supra* note 206, at 64.

<sup>249</sup> *Id.* at 85.

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

<sup>251</sup> See SCANLON, *supra* note 164, at 177–78.

<sup>252</sup> *Id.*

<sup>253</sup> *Id.* at 189.

development.<sup>254</sup> Target describes their efforts in this way: “We work with advocacy groups, accessibility and usability specialists, and people with disabilities to make sure our sites function properly and that we’re going above and beyond simply following regulatory guidelines.”<sup>255</sup> This statement, from the company’s official accessibility policy, provides sound evidence of a genuine, authentic CSR approach aimed at moving the company beyond what is required by law.<sup>256</sup> Here is evidence of moral development from the pre-conventional level of Stages 1 and 2 to the conventional level of Stage 3.<sup>257</sup> The statement from Target demonstrates conventional reasoning and a recognition of the importance of conventional morality for the maintenance of society. Here, Target is demonstrating a moral motivation to move beyond what was required of it by the court and federal law to something more. It is a move from the self-interested, where freedom to exercise independent choice is the justification, to the relational, where reciprocal respect of the moral agency of all parties is the justification.<sup>258</sup>

The most drastic evidence of Target’s moral motivation and development, however, comes from Target’s partnership with the National Federation of the Blind.<sup>259</sup> What began as an adversarial relationship between Target Corporation and the National Federation of the Blind that resulted in a multimillion-dollar settlement and millions more in legal fees<sup>260</sup> has developed into Target forming “a longstanding partnership with the National Federation of the Blind to ensure that its products and services are accessible to disabled customers, particularly those who are blind.”<sup>261</sup>

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<sup>254</sup> See *Nat’l Fed’n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946 (N.D. Cal. 2006).

<sup>255</sup> *Accessibility Policy*, TARGET CORPORATION, <https://www.target.com/c/accessibility-ways-to-shop/-/N-4ynq1> [<https://perma.cc/JV9A-M2ZN>].

<sup>256</sup> See Joireman et al., *supra* note 180, at 32.

<sup>257</sup> See Kohlberg, *supra* note 171, at 631.

<sup>258</sup> *Id.*

<sup>259</sup> See *2016 Resolutions*, NAT’L FED’N OF THE BLIND, <https://www.nfb.org/resources/speeches-and-reports/resolutions/2016-resolutions> [<https://perma.cc/A2Z6-S7JK>].

<sup>260</sup> Nick Whitfield, *Target Settles Case Over Web Site Access for the Blind*, BUS. INS. 4 (source available with authors).

<sup>261</sup> *2016 Resolutions*, NAT’L FED’N OF THE BLIND, 13, <https://www.nfb.org/resources/speeches-and-reports/resolutions/2016-resolutions> [<https://perma.cc/A2Z6-S7JK>].

Target was “the first organization to partner with the National Federation of the Blind in its Strategic Nonvisual Access Partnership Program.”<sup>262</sup> This active partnership demonstrates Target’s moral development into Kohlberg’s conventional level. The benefits of participation in this program extends beyond Target and Target customers to help develop extrajudicial normative pressures on other businesses. Such benefits also extend to the development of best practices that are available not only to Target but also to their competitors for the benefit of all disabled customers.<sup>263</sup>

Jason Goldberger, Target’s chief digital officer and president of Target.com, has emphasized Target’s moral motivation to further accessibility for the disabled online:

It’s a priority for us for several reasons: First, it’s the right thing to do. If a disabled guest came into one of our stores, of course we’d work to accommodate them the best we could. It’s the same thing online. Second, there are tens of millions of people in the U.S. with disabilities—so there’s real opportunity to be had for retailers. Third, the technologies that help disabled guests with accessibility—things like voice-recognition software and other technologies designed for people who are blind or low-vision—might ultimately prove beneficial for other guests. Inclusivity is a core attribute to Target, and that’s why to me digital accessibility isn’t a nice-to-do, it’s an imperative.<sup>264</sup>

From a CSR analysis, Target has embraced CSR’s stakeholder orientation with an authentic, genuine moral motivation that ranges from the conventional level to the post conventional level.<sup>265</sup> In the wake of the litigation, Target changed course and became a leader in online accessibility in the service industry.<sup>266</sup>

Mr. Goldberger’s three reasons demonstrates several stages of moral motivation.<sup>267</sup> Mr. Goldberger’s first reason is clearly a post conventional Stage 6 “universal-ethical-principle orientation”

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<sup>262</sup> *Id.* at 14.

<sup>263</sup> See Class Settlement Agreement and Release, *supra* note 241, at 11; Target Corp., *Target Execs on Making Online, Mobile More Accessible to Everyone*, A BULLSEYE VIEW 3, <https://corporate.target.com/article/2016/09/accessibility-team> [<https://perma.cc/28VB-HMPG>].

<sup>264</sup> Target Corp., *supra* note 263, at 2.

<sup>265</sup> See Kohlberg, *supra* note 171, at 631–32.

<sup>266</sup> See Target Corp., *supra* note 263, at 2.

<sup>267</sup> See Kohlberg, *supra* note 171, at 630; Target Corp., *supra* note 263, at 2.

that aims to do the right thing simply because it is right.<sup>268</sup> Mr. Goldberger's third reason is a conventional Stage 4 orientation that aims at benefiting the entire society.<sup>269</sup> Lastly, Mr. Goldberger's second reason is a throwback to their pre-conventional thinking in looking at accessibility as a business opportunity.<sup>270</sup> This proposition is acceptable, however, in light of their overall moral motivation according to the tension in CSR between profit motive and furthering social goods.<sup>271</sup>

Target's moral motivation at this point is firmly demonstrated to be stakeholder oriented. Once again revisiting our previous statement that CSR implicitly recognizes that if business has the power to alleviate social ills, such as discrimination, then it should strive to do so regardless of the requirements of the law,<sup>272</sup> (reflected in Mr. Goldberger's reasons (1) and (3) tempered with the reality of the profit-making goals of the entity (reflected in Mr. Goldberger's reason (2), particularly in the context of its stakeholders.<sup>273</sup> Target is demonstrating strong stakeholder orientation. Target's moral development has progressed from their previous justifying principle of freedom to exercise independent choice and their moral motivation that is shareholder oriented to justifying principles of (1) doing the right thing for the sake of it being right, (2) doing the right thing to capture opportunity profits, and (3) doing the right thing because it can benefit more than just the disabled.

These moral motivations and justifying principles are other-oriented in Scanlon's relational terms.<sup>274</sup> Looking again at Contractualism's foundational requirement of reciprocal respect of the moral agency of all parties is clearly central in Target's current justification. Target's justifying principles as outlined by Mr. Goldberger are principles "that no one, if suitably motivated, could reasonably reject."<sup>275</sup> It is, therefore, well-reasoned to call Target's underlying actions since the conclusion of litigation between the parties in 2008—not only the development and maintenance of an accessible website and app but also the partnership between the

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<sup>268</sup> Kohlberg, *supra* note 171, at 632.

<sup>269</sup> *See id.* at 631.

<sup>270</sup> *See id.*

<sup>271</sup> Ostas & Loeb, *supra* note 206, at 68.

<sup>272</sup> *See id.* at 64.

<sup>273</sup> *See id.* at 68–69.

<sup>274</sup> SCANLON, *supra* note 164, at 177–78.

<sup>275</sup> *Id.* at 189.

organizations that have furthered the extrajudicial normative pressures for digital accessibility for all service industry businesses—at least hospitable, and at most morally right.

Target's example of moral development, CSR, and moral responsibility is even more salient to the hospitality and tourism segment of the broader service industry considering hospitality and tourism's focus on the keystones of customer service and hospitality as guiding principles.<sup>276</sup> These imperatives focus the moral motivation and justifying principles of the industry in all that they do, including the area of website and app accessibility. Anything short of WCAG compliance for the hospitality and tourism industry is morally questionable at best.

### CONCLUSION

Disabled individuals struggled for years for the right to access goods and services on par with nondisabled individuals.<sup>277</sup> It seems that, just as accessibility to physical places came within their grasp, the game changed. Full-fledged societal participation once again became an elusive goal, as cyberspace became the new way to access information, goods and services.<sup>278</sup> The legal right of disabled persons to access private websites and mobile apps is unclear, as the courts are split on how the ADA should be interpreted and no regulations have been promulgated.<sup>279</sup> Even without a clear legal mandate, the hospitality industry should incorporate the WACG guidelines into the designs of their websites and apps for two reasons. First, it makes good business sense because disabled users represent a sizable market share of potential customers and the WACG guidelines are reasonably attainable goals, particularly when they are incorporated at the inception. Second, as an ethical mandate, given the pervasiveness of the use of this technology in everyday life for accessing information and acquiring goods and services, disabled persons should not be excluded again. By increasing their accessibility for disabled users, businesses in the hospitality industry can increase their customer base and serve as a moral leader for the creation of a more inclusive economy.

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<sup>276</sup> Pezzotti, *supra* note 158, at 5; FENNELL & MALLOY, *supra* note 158, at 47.

<sup>277</sup> See 42 U.S.C. § 12101(a)(5) (2014).

<sup>278</sup> See Anderson & Perrin, *supra* note 3, at 1–2.

<sup>279</sup> See Pallozzi v. Allstate Life Ins. Co., 198 F.3d 28, 32 (2d Cir. 2000); Access Now, Inc. v. Sw. Airlines, Co., 227 F. Supp. 2d 1312, 1318 (S.D. Fla. 2002).