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Inclusion by design

*Thinking beyond a civil rights paradigm*

1.1 PAULI: AGE 28

Pauli was a passenger in an automobile being driven by his mother when they were hit by a drunk driver.<sup>1</sup> The accident left Pauli unable to walk, paralyzed from the waist down. That was 11 years ago. Today, at age 28, Pauli has just been promoted to junior partner of a local management consulting firm.

While he finishes his work for the day, Pauli looks forward to attending a celebratory party for all the newly promoted people in the firm. The party is being held later this night at the home of the firm’s senior partner. Pauli organizes his desk, makes a call to request a wheelchair-accessible bus, freshens up in the men’s room, and then rolls himself down the hallway to the elevator. He makes his way out the front door of his building and rolls his wheelchair down the sidewalk to the curb cut, where he crosses the street to wait for the wheelchair-accessible bus that will take him to his home. Two regular city buses that cover his route come and go while Pauli waits the 40 minutes that will be required on this day for the accessible bus to arrive with one other passenger already on it. As Pauli waits for his bus, he thinks about the way his life has changed since that accident 11 years ago. In his wheelchair, life is so much different from the time when he played football, ran track, and danced with his high school sweetheart at the junior prom. Although those memories are cherished, he has since adjusted to a new life and reflects positively on the many changes that have recently improved his quality of life, such as curb cuts, accessible buses, roll-in entrances to buildings, bathrooms with lower sinks and light switches, and new building designs with doorways and facilities that provide adequate space for moving and manipulating his wheelchair.

<sup>1</sup> Robin Paul Malloy, *Inclusion by Design: Accessible Housing and Mobility Impairment*, 60 HASTINGS L. J. 699 (2009).

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He knows that such changes have come slowly and that there is a need for additional design changes, but he also appreciates the increasing community awareness of the need for greater accessibility. While acknowledging that much work needs to be done, Pauli feels lucky because his office is in a new building with many inclusive design features, which was not the case in his prior job location, nor is it the case in many of the office buildings downtown, some of which were built 40 or more years ago and have done a poor job of updating. Pauli also feels fortunate because the city, after threats of litigation, recently purchased two new wheelchair-accessible buses, and he now enjoys being able to take advantage of one of the few bus routes served by such a bus, even if service is often slower than that provided by the regular city bus service. The city still has not looked at demographic trends and the need for future bus routes, but at least Pauli can see improvements in transportation and building designs that are beneficial to many people with low functional mobility, not just people in wheelchairs. Within a few minutes, the bus arrives, and Pauli, aware of all the hard work that has gone into becoming a junior partner, rolls onto the bus and is headed home.

After arriving at home, Pauli changes for the party and, together with his wife, drives to the home of the senior partner. The senior partner lives in a newly developed suburban neighborhood to which Pauli has never been before. By the time they locate the partner's home, there are already a number of cars parked along the street. From their car, they can hear the music of laughter and joyful conversation spilling out into the neighborhood. They park the car and head toward the front of the house. There are no sidewalks in the neighborhood, and Pauli's wheelchair does not work well in the soft grass, so they make their way down the center of the street and past the wall of parked cars. Pauli's sense of excitement dissipates, and his gut wrenches as he looks out at a tiered three-level stone sidewalk terracing up the front lawn to a porch with a two-step entry to a relatively narrow front door. Disheartened, but with a well-practiced smile on her face, Pauli's wife goes to the front door to inquire about another, more suitable entrance to the house.

As she waits at the door, she cannot help but notice the way in which the warm glow of the party inside contrasts with the sullen lines of distress on Pauli's face. The senior partner comes to the door and offers her regrets for not thinking about the issue of Pauli's access to her home. She pauses and thinks for a minute about the entrance from the garage, but that too has steps – three steps up from the garage to the main living room – and the doorway is too narrow. Finally, she suggests that Pauli roll around the side of the house, past the line of garbage cans, and come in through the rear mud room. "This," she says, "is the door we use to let the dogs in and out. I am sure that they won't

mind.” She goes on to explain that there is only one step at this entrance and that she will send several guests back to help lift Pauli through the doorway – the only doorway in her home wide enough to accommodate a wheelchair. Pauli makes his way past the trash cans thinking of all the family gatherings and all the college and Super Bowl parties hosted at homes in which the same old issue arises. He wonders to himself if people anguish as much over “having” to invite him to their homes as he does over being invited.

1.2 ANN: AGE 15

Sally and Jim have a 15-year-old daughter, Ann, born with a mobility-impairing condition necessitating the use of a wheelchair or scooter.<sup>2</sup> Ann attends the public school, which provides an inclusive and open environment. Ann is a good student, and with the aid of her motorized scooter, she is able to get around the school and participate in some school activities, such as helping to manage the school track team and playing an instrument in the band. Ann has many friends and is well liked by her classmates. All of this is good, but there is a problem: Ann never gets invited to anyone’s home for a play date or a sleepover, or for general socializing, not because of personal discrimination but because of exclusion by design in the homes of her classmates and friends. Although her home is a model of accessibility, there are no sidewalks in her neighborhood, and her school friends and extended family members do not have homes able to easily and safely accommodate her use of a wheelchair. Thus, Ann lives in a partitioned world of public inclusion at school and social exclusion after school. Ann lives in a space of truncated social relationships, and indirectly, her parents’ relationships are also hindered, as they find it increasingly difficult to visit others who occupy exclusionary housing units. The implications of these truncated relationship networks are isolating and stigmatizing for everyone but perhaps more so for young school-age children and teenagers, because reciprocal social networking is so important to a healthy self-image and to their proper social development.

1.3 CELIA: AGE 74

Celia, a 74-year-old woman, until recently has been living independently in her own home.<sup>3</sup> Celia had lived in the same home for 50 years, ever since she was married to her now deceased husband. She had six children while living in that house and has many cherished memories of the people and events that

<sup>2</sup> *Id.* at 701.    <sup>3</sup> *Id.*

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filled the home with love and laughter over the years. Now, at age 74, Celia has difficulty living in her home. Celia suffers from arthritis in her joints and occasionally loses feeling in her right foot, causing minor interference with keeping her balance. With her arthritis and her foot problem, she is no longer able to navigate the five concrete steps that lead into and out of her home. Inside of her home, she struggles with the layout of the house, which has all three bedrooms and the only bathroom on the second floor. There is a 12-step stairway between the main floor of the house and the second floor. On flat surfaces she is fine and does not need, or use, either a walker or a wheelchair. Doctors estimate that Celia has many years ahead of her and that she would be able to live independently in her home for several more years if it were not for the presence of so many stairs. Celia prefers to age in place, but she recently had to sell her home and move 10 miles away to a senior living facility in a nearby town because her town has none. This facility is easier to navigate, but it removes her from a neighborhood populated with families and people of all ages and places her in an environment where everyone is her age and older. As was the case with her private residence, the neighborhood by the nursing home has no sidewalks and no form of public transportation.

She misses looking out her window and watching the neighborhood children play and seeing the new moms and dads proudly pushing carriages with newborn babies along the sidewalk. She misses the joy of participating in front yard neighborhood chatter and of the children coming around on Halloween and singing carols at Christmas. The hardest thing to deal with is the realization that in addition to having to leave her own home after so many years, she is no longer able to visit the homes of her children, grandchildren, nephew, sister, and friends, who all reside nearby but occupy houses that are not readily accessible because of entry steps and internal stairways. Despite her lack of need for a wheelchair or even a walker, Celia finds that almost every home that she used to visit now represents a barrier to the normalcy of her prior pattern of social interaction. Celia misses the opportunity to visit the homes of the people she cares so much about and finds herself prematurely disconnected from many of the important social networks that she had enjoyed over the years.

#### 1.4 TIFFANY: AGE 65

Tiffany is 65 years old and lives in a small city, on the third floor of a walk-up apartment building. She no longer drives, and she uses a cane when she walks because of an injury to her right leg. In recent years, going up and down the stairway to her third-floor apartment has become increasingly difficult. As life

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in the city has changed over time, Tiffany has witnessed the increase in broken sidewalks and the closing up of the downtown drug store, grocery store, and two restaurants, which, in her younger days, were all located within a three-block radius of her home. Tiffany finds it to be increasingly difficult to live independently because of where she is located.

The nearest grocery store, drug store, and restaurant are located several miles away in a suburban shopping center. The shopping center features a new store that is fully accessible. Housing costs in the suburb are too high for Tiffany to afford. The public transit system provides service between the neighborhood of her home in the city and the suburban shopping center, but the four-mile trip takes two hours and requires two transfers. Once in the suburb, there are no sidewalks in the town because property owners do not want to pay for them, and they worry about having to keep them free of snow during the four months when snow is typically on the ground. Across a six-lane highway from the shopping center is a hair salon and a movie theater, but Tiffany has never had the courage to cross the busy road that slices through the town on the way into the city. The grocery store, although fully accessible and having won awards for its inclusive design, is still very difficult for Tiffany to access and enjoy because it is poorly integrated into the surroundings that she must navigate to get there in the first place. Similar difficulties arise when Tiffany attempts to visit the city-based senior citizen's center and when she wishes to visit her local church; sidewalks are in disrepair, and crossing streets is difficult because of traffic and because few intersections have safe crosswalks. Even getting in and out of her home is difficult, because it is an apartment in an older building that still has a difficult stairway to climb. The problem is magnified during winter months, when very few of the sidewalks are properly cleared of snow. Tiffany has found that neither city nor suburban living is necessarily ideal for a person with low functional mobility and living without an automobile.

Unfortunately, the experiences of Pauli, Ann, Celia, and Tiffany are not unique. Their experiences are shared each day by millions of people representing almost 20 percent of American families, and their particular situations simply illustrate the broader set of problems arising from the fact that functional mobility levels vary among people.<sup>4</sup> They also illustrate the fact that many communities are doing a less than ideal job of planning for inclusive design. As indicated in these narratives, we see examples of communities

<sup>4</sup> *Id.*; QI WANG, U.S. DEP'T OF COM., REPORT NO. CENSR-23, DISABILITY AND AMERICAN FAMILIES: 2000, at 4 (2005), available at <http://www.census.gov/prod/2005pubs/censr-23.pdf>. See also LINDA L. NUSSBAUMER, INCLUSIVE DESIGN: A UNIVERSAL NEED 4–6 (2012).

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failing to provide adequate planning for accessible bus routes, neglecting the building and repairing of sidewalks, making inadequate provision for senior housing, and failing to make streets safe for easy crossing. In short, poor planning is leaving many of our communities inaccessible even as we declare more and more rights to access.

Without good land use planning, people using walkers, wheelchairs, and crutches, for example, or people dealing with debilitating arthritis as well as hip and knee conditions may have difficulty navigating a home, a neighborhood, or a community. Lack of sidewalks, barriers to entranceways, narrow hallways, the presence of steps, and busy streets can all make mobility more difficult and less safe. A key to making our communities safer and more inclusive is in recognizing that mobility issues relate not only to the functional ability of individuals but also to the design of the natural and built environments in which they live. Good planning and zoning require careful evaluation of demographic trends and available resources to address the needs of residents with declining functional mobility and a desire to age in place. This calls for comprehensive planning that looks at patterns of property development, changes in local and regional demographics, and the connectivity of people and places across the entire community.<sup>5</sup> As such, functional mobility issues are ones that inherently involve choices regarding property development and land use regulation. This means that accessibility is a land use issue as well as a civil rights matter.

A problem confronting many communities, however, is that there is little attention directed at planning for accessibility and aging in place. This is because mobility impairment and inclusive design are not typically thought of as planning and zoning issues. Instead, they are treated as a matter of civil and constitutional rights. Although civil and constitutional rights are involved in protecting people with disabilities from unlawful discrimination, there is also a need to understand accessibility and aging in place as planning and land use issues. Unfortunately, the disability rights literature is almost exclusively framed by the concerns of civil rights law and the desire to eliminate

<sup>5</sup> See PHILIP R. BERKE & EDWARD JOHN KAISER, *URBAN LAND USE PLANNING* (2006); WILLIAM H. HUDNUT III, *CHANGING METROPOLITAN AMERICA: PLANNING FOR A SUSTAINABLE FUTURE* (2008); JAMES A. LAGRO JR., *SITE ANALYSIS: LINKING PROGRAM AND CONCEPT IN LAND PLANNING AND DESIGN* (2001); *PLANNING REFORM IN THE NEW CENTURY* (Daniel R. Mandelker ed., 2004); JOHN RATCLIFFE ET AL., *URBAN PLANNING AND REAL ESTATE DEVELOPMENT* (3d ed. 2009); JEROME G. ROSE, *LEGAL FOUNDATION OF LAND USE PLANNING: TEXTBOOK/CASEBOOK AND MATERIALS ON PLANNING LAW* (1979); ATLANTA REG'L COMM'N, *LIFELONG COMMUNITIES: A REGIONAL GUIDE TO GROWTH AND LONGEVITY, EXECUTIVE SUMMARY*, [http://www.atlantaregional.com/File%20Library/Aging/ag\\_llc-regional-guide.pdf](http://www.atlantaregional.com/File%20Library/Aging/ag_llc-regional-guide.pdf) (last visited Dec. 2, 2013).

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discrimination on the basis of disability, in ways analogous to matters of race.<sup>6</sup> This approach has facilitated a design process heavily driven by remedial regulation of detailed construction guidelines and a case-by-case exercise in “planning by litigation.” For example, regulations are passed requiring sidewalks to have curb cuts, and lawsuits are brought to make communities provide those cuts, but little planning may go into determining the best locations for sidewalk development as the community grows and changes over time.<sup>7</sup> Likewise, lawsuits are brought to establish the rights to an accessible sidewalk and an accessible public bus system, but these rights to access may be of little value to a resident living in a community with no plans for any sidewalks or public buses.<sup>8</sup>

Planning for the dynamic and changing needs of our communities is important. This includes planning for the needs of people with mobility impairment and for those who desire to age in place. Planning should be by design and with intention, not simply in response to litigation. Therefore, this book seeks to explain the issues of mobility impairment and of aging in place in terms of the way they might look through the lens of a property development and zoning professional. In this regard, the undertaking is one of reclaiming an active role for local and regional governments in the coordination of land uses by making a case for intentional planning and zoning to address issues of mobility impairment and aging in place. This is done by addressing these issues in terms of a proper exercise of the police powers in advancing and protecting the public health, safety, welfare, and morals. This is the traditional legal foundation for local zoning and planning, and when properly exercised, it can enhance the civil rights of people with disabilities because it produces a more thoughtful, coherent, and inclusive approach to property development and land use. Reclaiming a strong role for local and regional government regulation under the police powers adds to our ability to successfully build inclusive design communities; it does not subtract from a civil rights agenda for people with disabilities.

A corollary to the need for more active and intentional planning is a need to evaluate the coordination of land uses with reference to the public health,

<sup>6</sup> See generally, e.g., PETER BLANCK ET AL., *DISABILITY CIVIL RIGHTS LAW AND POLICY* (2004); LAURA ROTHSTEIN, *DISABILITY LAW: CASES, MATERIALS, PROBLEMS* (3d ed. 2002).

<sup>7</sup> See *Frame v. City of Arlington*, 657 F.3d 215 (5th Cir. 2001). See also ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* (2003). Kagan’s point is much like my own in that he identifies a tendency for Americans to approach problems via litigation rather than by planning.

<sup>8</sup> See *Midgett v. Tri-County Metro. Transp. Dist.*, 254 F.3d 846 (9th Cir. 2001).

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safety, welfare, and morals. This traditionally means looking at *use* and not at how a property is owned (e.g., public vs. private ownership or individual vs. corporate ownership) and not considering the particular identity or characteristics of the user.<sup>9</sup> Thus, the race and religion of a property user are not material, nor is the question of if the property is owned by an individual, a partnership, a corporation, or a not-for-profit organization. Moreover, it is important in the planning process to distinguish the coordination of land use from the development of guidelines for inclusive design. These are two different functions, and as is explained in Chapter 4, inclusive design guidelines may be more appropriately and effectively handled at a national level, while coordination of land use and approval of property development may best be handled at the state and local levels. Design guidelines are more akin to building codes than to land use regulation, and in this book, references to local government authority to control land use include the traditional concerns for regulating not only use but lot area, height, bulk, density, appearance, and other matters typically covered by the police power. Consequently, planning for more accessible communities involves a careful consideration of both design and land use.

When we look at community planning from this perspective, the lack of inclusive design in our residential neighborhoods becomes apparent. Many single-family residential properties have barriers to safe and easy access and navigation. This is problematic because residential uses make up a significant portion of land uses in many communities. A reason for this lack of accessibility is that federal disability law, while pervasive in its guidelines for public buildings, places of public accommodation, and multifamily housing, has little to say about private, single-family residential homes.<sup>10</sup> The lack of strong inclusive design standards for all residential properties perpetuates problems of low accessibility for many residents and weakens the sustainability of our neighborhoods because it hinders the opportunities for social interaction and participation.

One problem to address in planning with respect to residential uses is that the legal system frames the discourse of accessibility to residential housing in terms of a dichotomy between the private and public spheres, with the home understood as private space – a space of intimate relationships, a space easily

<sup>9</sup> FGL & L Prop. Corp. v. City of Rye, 66 N.Y.2d 111 (1985); Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Mugler v. Kansas, 123 U.S. 623, 667–668 (1887). See JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW 1–5 (3d ed. 2007); DANIEL R. MANDELKER, LAND USE LAW § 1.04 (5th ed. 2003).

<sup>10</sup> See Malloy, *supra* note 1. See also *infra* Chapter 3.



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hidden from public view, and a space carrying high expectations of privacy.<sup>11</sup> The concern for protecting privacy in the home, however, is not a sound basis for treating privately funded housing as devoid of a legitimate public interest. Although the home may be understood as a private space, where the occupants enjoy the legal expectations of privacy, a right to exclude, and a right of association, the housing structure itself, as a physical place, is in some respects a quasi-public place because it is an integrated part of the broader built environment and imposes itself on the community in ways that are physical, environmental, and aesthetic. Therefore, it is important not to conflate the two ideas (house and home), because they are not one and the same, and failure to keep this in mind hinders one's ability to understand the difference between a concern for privacy in the home and accessibility of the house.

Distinguishing private, single-family residential homes from other properties in terms of requirements for accessible design is not based on a concern for the public health, safety, welfare, and morals, because such a concern would seemingly seek to make all properties safe and easy to navigate. A distinction based on how a property is owned, as a public building or a place of public accommodation rather than a single-family residence, for instance, has little intrinsic relationship to the question of safety and ease of use in design. As an integrated part of a "complete community," all buildings, including single-family residential homes, should be safe and easy to enter and navigate. The legal distinctions made with respect to regulation of accessibility in single-family residential housing relative to other types of uses are political. They are political distinctions that have something to do with striking a compromise between competing interest groups: disability rights advocates and residential housing interests. Whereas disability rights advocates look to the federal government to impose regulations for greater access on local communities, real estate professionals worry about the impact of added design and construction costs on housing affordability and about the potential for local voter pushback if residential homeowners have to spend their own resources to upgrade or retrofit current residential housing to achieve greater levels of accessibility.<sup>12</sup>

<sup>11</sup> See generally LORNA FOX, *CONCEPTUALIZING HOME: THEORIES, LAW AND POLICIES* (2007). In this book, Dr. Fox suggests that the idea of home has evolved in social meaning but that, in many ways, law has had difficulty in distinguishing the idea of "home" from the physical structure of the house. *Id.* LORNA FOX O'MAHONY ET AL., *THE IDEA OF HOME IN LAW: DISPLACEMENT AND DISPOSSESSION* (Lorna Fox O'Mahony & James A. Sweeney eds., 2010).

<sup>12</sup> For every 1 percent increase in the cost of housing, roughly 1 million people are cut out of the market for homeownership, according to the National Association of Home Builders, and many consumers may not see the need for pervasive inclusive design guidelines as long as they perceive it as related to only 1 percent of the population. In speaking on this topic to

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Another way of understanding the relative hands-off approach to regulating single-family residential homes is from a market perspective. From this perspective, one might suggest that federal disability law functionally treats single-family residential housing like other private consumption goods, presuming that individuals are empowered by market forces to bargain for socially optimal housing outcomes. This assumption would be consistent with Adam Smith's notion of the "invisible hand," which assumes that self-interested individuals will make choices that advance the public interest even though it is no part of their original intention.<sup>13</sup> This means that there is a presumed invariance between public and private marginal costs and marginal benefits.<sup>14</sup> If this is true, we do not need regulatory guidelines for accessible housing because private individuals dealing with private home builders will bargain for the optimal social outcome in housing design. The problem is that we know that this assumption is not true. We know that such things as transactions costs, wealth effects, the tragedy of the commons, asymmetrical information, poorly defined property rights, and cognitive assessment problems create variance between the pursuit of individual self-interest and optimal social outcomes.<sup>15</sup> It is not clear, therefore, that the actual outcome of market bargaining with respect to housing design produces socially optimal results in terms of accessibility and the public health, safety, welfare, and morals.

In addition to being consistent with a market-based presumption about the power of self-interested individuals to effectively coordinate inclusive design standards and land uses on their own, the distinctions that have been made between public and private places in the current law of inclusive design are consistent with a civil rights approach to disability. In civil rights law, we

various groups, the pushback as to residential housing is surprisingly negative. There tends to be a negative response directed at keeping government out of one's private space and avoiding yet further costs imposed by government regulations. *Households Priced Out by Higher House Prices and Interest Rates*, Nat'l Ass'n of Home Builders, [www.nahb.org/generic.aspx?genericContentID=40372](http://www.nahb.org/generic.aspx?genericContentID=40372) (last visited Sept. 23, 2013); see also AFFORDABLE HOUSING AND PUBLIC-PRIVATE PARTNERSHIPS 215 (Nestor M. Davidson and Robin Paul Malloy eds., 2009).

<sup>13</sup> ROBIN PAUL MALLOY, *LAW AND MARKET ECONOMY: REINTERPRETING THE VALUES OF LAW AND ECONOMICS* 90 (2000); ROBIN PAUL MALLOY, *LAW IN A MARKET CONTEXT: AN INTRODUCTION TO MARKET CONCEPTS IN LEGAL REASONING* 27–30 (2004); Robin Paul Malloy, *Adam Smith in the Courts of the United States*, 56 *LOY. L. REV.* 33 (2010); Robin Paul Malloy, *Mortgage Market Reform and the Fallacy of Self-Correcting Markets*, 30 *PACE L. REV.* 79 (2009).

<sup>14</sup> See sources cited *supra* note 13.

<sup>15</sup> See ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* (3d ed. 2000); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (7th ed. 2007); OZ SHY, *THE ECONOMICS OF NETWORK INDUSTRIES* (2001); MALLOY, *LAW AND MARKET ECONOMY*, *supra* note 13; MALLOY, *LAW IN A MARKET CONTEXT*, *supra* note 13.