

Political Justice

How Richard Bernstein won an ADA case
by fighting in the court of public opinion

By Charles Wilson

Two decades ago, very few in the American public would have seen the failure to provide a working wheelchair lift on a city bus as a civil rights violation. Our legal system had not yet extended the logic of the legacy of Martin Luther King and Rosa Parks and the 1964 Civil Rights Act—that separate amenities were inherently unequal and a violation of equal access—to those who sat in wheelchairs, who had trouble hearing, who could not see. The shift toward broader legal protections for people with disabilities owes itself in no small part to a handful of unreasonable individuals who have failed to accept pity as a viable response to disability—and who have argued instead that “benign neglect” is still, indeed, neglect.

In Detroit, a few lawyers deserve special mention for being banes of the city establishment in their work to secure equal access for people with disabilities on public buses. Their efforts required not only legal acumen but also political and personal bravery.

When Richard Bernstein sued the Detroit Department of Transportation in 2004 for its failure to repair the wheelchair lifts on the city buses, many younger residents of the city assumed it was the first time that a lawyer had tried to force the Motor City to change the way it maintained its fleet. Yet in the mid-1980s, before the disability rights movement gained larger national attention, a local attorney named Justin Ravitz had made friends with several disabled Detroiters who told him that they lived essentially under house arrest. At that time, before the passage of the Americans with Disabilities Act (ADA), less than one-third of Detroit's public buses were equipped with wheelchair lifts.

Despite the clarity of the law, however, the first 15 years of the ADA's existence have also demonstrated the extent to which many urban transit systems have skirted complying with it unless they are forced to by the threat of legal action.

eventually reach 1,000. The suit argued that the city had violated clauses mandating accessible transportation in the Michigan Handicappers Civil Rights Act of 1976. "I'm not able to spend my money like the general public," McCants would testify in January of 1988. "I can't go to church. I play wheelchair sports and I can't make all the practices... I can't visit friends. I can't go to the doctor. It's very frustrating. You almost hibernate at home."

The Ravitz case seemed a slam dunk. His clients initially won the case in Wayne County

beat," he says now of his work in the late 1980s. "Politically, at the time, I didn't have the power to demand justice."

Even before the final ruling in his case, Ravitz recognized that the law had not yet caught up with the disability rights movement. In a 1989 newspaper interview while he awaited the appeals court decision, he spoke of a "reactionary federal court system" and said that "without external pressure, either through the streets or other less radical action," lawyers wouldn't be able to win cases like his. "The trouble with relying on the courts alone is you can lose the case," he said. When he read the three-page decision against him, he realized that he had guessed exactly right.

The Special Case

On August 17, 2004, Richard Bernstein and his legal partner, David Cohen, filed a suit against the Detroit Department of Transportation and the U.S. Department of Transportation for the same reasons that Ravitz had a decade and a half ago. The suit cited evidence that nearly half of the city's lifts were routinely broken. There were ample reasons to think that Bernstein, who was only 30 years old at the time, would meet with a fate even worse than Ravitz's. The political winds were against him. The city of Detroit was projecting at the time a \$200 million-plus budget shortfall for the following year. Mayor Kwame Kilpatrick was scrambling to find ways to close the gap. The mayor would also soon propose to cut 900 city jobs and to end 24-hour bus service, eliminating certain bus routes altogether.

Sam Bernstein, a personal injury attorney and Richard's father, knew that his son would face a fierce—if not impossible—battle in trying to force the city's transit authority to spend millions to overhaul its wheelchair lifts. There were also unique political dangers

Perhaps an even smaller percentage of the lifts that existed actually worked or had drivers who knew how to operate them.

Ravitz and his legal partner, Patricia A. Stamler, decided to use video cameras to capture the experience of being disabled and without a car in the city. On a cold October morning in 1987, Ravitz and Stamler crouched in a hidden place behind a bus stop outside General Motors' headquarters. A local news crew, also hidden, trained their sights on Lewis McCants, then 45, who sat in a wheelchair. McCants had lost both legs several years earlier when a car rammed him as he loaded groceries in a supermarket parking lot. On this particular October day, three buses in a row passed McCants by as he sat shivering. The bus drivers would open the door and offer some small variation of a familiar slogan: "Sorry, you can't ride. The lifts don't work."

A few weeks later, after gathering more videotaped evidence and building a broader case, Ravitz and Stamler filed a class-action suit against the Detroit Department of Transportation on behalf of 18 disabled plaintiffs and a class of wheelchair users that would

Circuit Court in 1988. The jury awarded the plaintiffs \$2.8 million in what was thought at the time the largest disability rights verdict ever. Yet a state appeals court would overturn the decision two years later. The reversal came in an abrupt three-page ruling that did not even cite a single case of legal authority. The presiding judge argued that Ravitz's clients were not discriminated against because of their disabilities. He argued instead that the plaintiffs faced discrimination because they happened to be sitting in wheelchairs. It was the wheelchairs themselves that were difficult to lift onto the buses, the opinion stated, not the people. Therefore, the complaint did not fall under the jurisdiction of the Michigan Handicappers Civil Rights Act.

Speaking of the decision today, Ravitz still feels angry. "It was a cowardly opinion," he says. Yet the Michigan State Supreme Court refused to hear the case. Ravitz suspects the court acted out of deference to the popular Mayor Coleman Young and his cash-strapped city. To install and maintain working lifts would have cost the city millions of dollars. "I wasted a lot of time pursuing legal cases that were more than just, and still getting

involved with this case as well as legal ones. The Bernstein family had close ties with the Democratic Party in Michigan, and to sue the city over the bus system was to not only set the family at odds with the city's Democratic mayor, but also, potentially, the state's Democratic governor. At a closed meeting before Richard decided to take the case on, Sam asked his son whether he was prepared for how the case might impact the family. Richard reminded his father that he had told him that in every lawyer's life, there is often one special case that is important to do, regardless of the cost and whether it was actually winnable. Richard said that this was that case for him.

"O.K., we'll do it," Sam said. "We'll spend the money and do it."

For Richard, this case was also personal. Blind from birth, he had worked his way through the University of Michigan (where he graduated Phi Beta Kappa) and through Northwestern University School of Law. He was able to practice law by having the case histories read to him over and over again by attorney David Cohen until he had memorized them. He had benefited from the resources that had allowed him to pursue what he wanted to do. He wanted to extend those opportunities to others who might not have as much. Legally, Bernstein was operating at a distinct advantage to Ravitz. His case fell under the legal framework of the ADA, the landmark 1990 legislation that one advocate has justifiably called "the Magna Carta, the Bill of Rights, and the Declaration of Independence for Disabled People." Title II of the law mandated accessible public transportation for people with disabilities. If the city was found in violation, it would not be able to receive federal funds from the U.S. Department of Transportation.

Despite the clarity of the law, however, the first 15 years of the ADA's existence have also demonstrated the extent to which many urban transit systems have skirted complying with it unless they are forced to by the threat of legal action. Soon after he filed his suit, Bernstein figured out that he had better not forget the lesson that Ravitz had learned the hard way in 1990. He realized that part of winning this case inside the courtroom would require exerting political pressure outside of it.

A Sad and Tired Argument

As soon as the case was filed, Bernstein spoke to the local media at every opportunity. He spoke in the language of civil rights, even as a white lawyer fighting against the policies of an African-American mayor. He tied the failure of the bus lifts to the leadership of Mayor Kilpatrick, who was in the early stages of what would become a bitterly contested reelection campaign. Drawing on the broader public support for disability rights issues forged since the passage of the ADA, Bernstein sought to make Kilpatrick's failure to repair the bus lifts a political liability.

The city's strategy from the very beginning seemed to be to stall Bernstein's suit in

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an attempt to circumvent it. One tactic the city's lawyers used in their initial answer to the complaint was to neither admit nor deny such simple things as 1) whether the city of Detroit was in fact a city, or 2) whether the city had established a bus system. These non-answers presented Bernstein with the task of actually proving those things himself. Bernstein figured that the city was trying to bury him in paperwork to buy some time.

Mayor Kwame Kilpatrick then announced in early 2005 that he planned to use the federal money the city was still receiving to buy 120 new buses that year—buses he said would replace the existing ones and put the city into compliance with the ADA and render the lawsuit moot. Bernstein shot back that the real trouble was that the city had no system in place for the proper maintenance of the buses and that buying more buses without such a system would mean only a temporary respite at best from the problems that were now confronting disabled riders.

Bernstein had worked hard to earn a reputation as a lawyer of integrity and ability. Kilpatrick tried to post other, more negative labels upon him, some of which occasionally stuck. The mayor pulled out an old playbook from Detroit city politics and started to cast this as a city-suburban issue. On Detroit's WWJ-AM Radio in late February of 2005, Kilpatrick maintained that Bernstein was "ignorant" and that he was a good example of "suburban guys coming into our community to raise up the concerns of people when this administration is going to the wall on this issue about disabled riders."

"All I want to do is fix the city buses," Bernstein responded in the press the next day. "Mayor Kilpatrick wants to make this a suburbs versus city issue. That is a sad and tired argument. My clients are all city residents who want to ride the bus. Even if they were suburban, they still have a right to ride the bus."

Yet even as Bernstein was fighting Kilpatrick on the radio and television, he was also facing rising expenses and the potential of a very costly and time-intensive discovery process. He feared what a document dump might be like in this case. It might require rooting through hundreds and hundreds of maintenance records and trying painstakingly to prove when buses had working lifts and when they didn't.

Ultimately, the broad attention accorded the case in the local media reaped rewards in ways that Bernstein could not have anticipated. A lawyer at the U.S. Department of Justice who read of the case contacted Bernstein and soon offered to intervene. What had begun as *Lawrence Dilworth, et al v The City of Detroit* became by late April of 2005 *The United States of America v The City of Detroit*. The city still denied a violation of the ADA, however, and the initial hearings dragged on through the summer and early fall of 2005. It looked likely that the case could go to trial.

Bernstein's ultimate break in the case would have far more to do with the politics outside of it than anything that ever happened in the courtroom. When Detroit resident Rosa Parks died in late October, only a couple of weeks shy of the election, Mayor Kilpatrick arranged several tributes in her

honor. His elaborate praise of Parks had an odd resonance to some observers, since the bus lawsuit was still pending. On the Friday before Election Day, at the end of the last news cycle before the election, Kilpatrick announced an agreement that acceded to almost all of Bernstein's and the Department of Justice's demands. Drivers and mechanics would be re-trained on how to use the lifts, the city would retire buses with lifts that did not work, current lifts would be repaired, and a mechanism would be put in place to ensure the lifts were working properly over time.

What Justin Ravitz had begun, Richard Bernstein's case had achieved, at least on paper. Mayor Kilpatrick's office insisted that the timing was not political, but Bernstein remains convinced otherwise to this day. Kilpatrick had ended the case on his own terms. He won the election the following Tuesday by six points.

Built-in Inequities

Bernstein sees the victory in the Detroit ADA case as part of an encouraging trend. In April of this year, a similar accord to the one in Detroit was struck with the Massachusetts Bay Transportation Authority in Boston. At the same time, he worries about the demands that these kinds of cases make, and how they have to be waged as much like political campaigns as legal ones. He suspects that few firms have the sort of resources that were at his disposal.

"With the ADA, you see firms taking on small scale cases, but not the large cases," he told me over coffee in Manhattan in April. "They worry that they will be crushed like the little guys who take on the large-scale environmental cases. It's like how they bury the guy in the movie *Disclosure*." Indeed, the victory in Boston was made possible only by an outlay of \$800,000 by a legal aid firm,

and Bernstein estimates that in Detroit—even with the U.S. Department of Justice intervening in March—the case cost his father's firm upwards of \$250,000.

"Judges have to take into account the built-in economic inequities in these cases," he said. "In this bus case, what if the Department of Justice had not come in?" We should consider another question: What if there hadn't been brave lawyers like Bernstein, Cohen, Ravitz, and Stamler in the first place? ♦



Charles Wilson first wrote about Richard Bernstein for The Washington Post in October 2005. He is the co-author, with Eric Schlosser, of the young adult book Chew On This: Everything You Don't Want to Know

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