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FOREWORD: A SYMPOSIUM ON INDIVIDUAL RIGHTS AND REASONABLE ACCOMMODATIONS UNDER THE AMERICANS WITH DISABILITIES ACT

Mark C. Weber*

I am glad to have the opportunity to introduce the *DePaul Law Review's* Symposium entitled *Individual Rights and Reasonable Accommodations Under the Americans with Disabilities Act*. The subject of disability and the law has a long and checkered history. As a general matter, the law has approached disability as a defect to be remedied—either fixed or compensated, say by the tort system in the case of accidental injuries.¹ Or, often more ominously, it has approached disability as a form of deviancy, making mental illness or developmental disability a ground for civil commitment² or denial of civil rights.³

Only in recent generations, after the civil rights revolution in other fields and path-breaking scholarly work by Jacobus tenBroek⁴ and others,⁵ has a more truthful and more useful approach emerged. The current generation of scholars and advocates recognizes that disability is a natural state, that the modal human being does not exist, and that

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1. See, e.g., CHARLES T. MCCORMICK, *HANDBOOK ON THE LAW OF DAMAGES* § 86 (1935) (discussing damages for impairment of earning capacity from personal injury).

2. See, e.g., *O'Connor v. Donaldson*, 422 U.S. 563, 574-76 (1975) (discussing standards for involuntary civil commitment on the ground of mental illness).

3. See, e.g., *Buck v. Bell*, 274 U.S. 200, 207 (1927) (permitting involuntary sterilization of woman alleged to be developmentally disabled).

4. Jacobus tenBroek & Floyd W. Matson, *The Disabled and the Law of Welfare*, 54 CAL. L. REV. 809 (1966); Jacobus tenBroek, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 CAL. L. REV. 841 (1966).

5. Among the works that deserve mention in this regard are: MARTHA MINOW, *MAKING ALL THE DIFFERENCE* (1990); LAURA F. ROTHSTEIN, *RIGHTS OF PHYSICALLY HANDICAPPED PERSONS* (1984) (succeeded by LAURA F. ROTHSTEIN, *DISABILITIES AND THE LAW* (1992)); BONNIE P. TUCKER & BRUCE A. GOLDSTEIN, *LEGAL RIGHTS OF PERSONS WITH DISABILITIES* (1990 & Supp. 1995); Robert L. Burgdorf, Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413 (1991); Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 TEMP. L. REV. 393 (1991).

disability occurs as much because of absence of adaptation as anything else.⁶

This absence of adaptation (or its occasional presence) is more a matter of the social, economic, and political environment than of the physical one. What constitutes a disability changes over time just as society does. In a world in which few could read or needed to, dyslexia was not disabling. Before the development of eyeglasses, many people had visual disabilities who today would not be considered disabled at all. Preindustrial production processes had many niches for people who had to work more slowly or for shorter hours than others. Postindustrial production may offer some of the same opportunities.

To address the social dimension of disability, leading scholars have turned their attention to law's impact on social practices and attitudes regarding people with disabilities. The participants in this Symposium join in this scholarly enterprise. They explain how the legal requirements of the Americans with Disabilities Act interplay with economics, how these provisions change—or fail to change—insurance practices, how they affect attitudes and practices about inpatient psychiatric hospitalization, how they alter the debate about physician-assisted suicide, and how they relate to laws and mores of industrial relations.

Professor Peter David Blanck's contribution to this Symposium addresses the market failure that occurs when attitudes towards disability cause an artificially low value to be assigned to the value of the labor of person with disabilities.⁷ Title I of the Act is a measured response to this problem, requiring equal employment treatment of persons with disabilities who are qualified for jobs if provided reasonable accommodation. He points out that the costs of accommodation are typically slight and capable of being amortized over a long period, that accommodations frequently confer unexpected benefits on the business by facilitating the activities of customers and of workers without disabilities, and that subsidies are often available to defray what costs exist. Indirect or administrative costs are also low. He provides empirical evidence to refute contrary claims, which are based wholly on neoclassical economic theory.

6. See, e.g., Martha T. McCluskey, Note, *Rethinking Equality and Difference: Disability Discrimination in Public Transportation*, 97 YALE L.J. 863, 873 (1988); see also Martha Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 14 n.19 (1987) (describing the human role in creating physical barriers).

7. See Peter David Blanck, *The Economics of the Employment Provisions of the Americans with Disabilities Act: Part I—Workplace Accommodations*, 46 DEPAUL L. REV. 877 (1997).

In her Symposium contribution, Professor Bonnie Poitras Tucker takes on the issue of insurance and the Americans with Disabilities Act.⁸ She analyzes a series of issues, all of which are of major significance in determining what impact the Act will have on insurance practices. She further provides a detailed example of how the prohibition against the use of subterfuges to deny coverage applies in the situation where an insurer refuses to pay for cochlear implants.

Professor Michael Perlin's contribution asks whether the Americans with Disabilities Act bears on the rights of hospitalized psychiatric patients to have voluntary sexual interaction and to refuse antipsychotic medication.⁹ His conclusion that the Act protects these rights relies significantly on the statement in the Americans with Disabilities Act that people with disabilities are a discrete and insular minority and that statement's implication that classifications based on disability have to be evaluated under elevated constitutional scrutiny.¹⁰

The argument is a simple and powerful one.¹¹ Its force as a legal proposition may depend on what the U.S. Supreme Court decides in the current challenge to the Religious Freedom Restoration Act as exceeding Congress' power to interpret the Fourteenth Amendment.¹² If Congress has the power to adopt a strengthened interpretation of the First Amendment's free-exercise clause under section five of the Fourteenth Amendment, it would appear to have the power to raise

8. See Bonnie Poitras Tucker, *Insurance and the ADA*, 46 DEPAUL L. REV. 915 (1997).

9. See Michael L. Perlin, "Make Promises by the Hour": *Sex, Drugs, the ADA, and Psychiatric Hospitalization*, 46 DEPAUL L. REV. 947 (1997).

10. 42 U.S.C. § 12101(a)(7) (1994).

11. Though I find much of Professor Perlin's legal interpretation persuasive, I question his interpretation of the Bob Dylan song that furnishes his title. As I understand this particular verse of the song, the singer is praising his lover for being indifferent to the rituals of conventional courtship (at least as practiced by suitors other than the singer). Thus the longer excerpt, as I recall it, is: "People carry roses./ Make promises by the hour./ My love she laughs like the flowers./ Valentines can't buy her."

I have shared this footnote with Professor Perlin. He reports that he is pleased that I found his legal analysis persuasive, but is troubled that I have not been equally persuaded by his interpretation of the lyrics in question. His letter states, "*Love Minus Zero* is an elegiac tribute to a mysterious and winsome woman who, in the heart of the 1960's, has adopted a *persona* that approximates that of the protagonist of a nineteenth century romantic novel. Certainly, *her* promises are ones to take seriously." Personal communication with Michael L. Perlin (Apr. 30, 1997).

12. The pending case, *Flores v. City of Boerne*, 73 F.3d 1352 (5th Cir. 1996), *cert. granted sub nom. City of Boerne v. Flores*, 117 S. Ct. 293 (1996), raises the issue of whether Congress constitutionally may require that elevated standards of protection be afforded free exercise of religion against otherwise neutral governmental action. Commentary on this subject includes: Jay S. Bybee, *Taking Liberties with the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 VAND. L. REV. 1539 (1995); Jonathan Kieffer, Comment, *A Line in the Sand: Difficulties in Discerning the Limits of Congressional Power as Illustrated by the Religious Freedom Restoration Act*, 44 U. KAN. L. REV. 601 (1996).

the equal protection and due process standard of review for governmental decisions classifying on the basis of disability.¹³

Professor Stephen Mikochik's Symposium piece evaluates the arguments in favor of permitting physician-assisted suicide and concludes that they are unsound.¹⁴ He raises a particularly strong challenge to the contention that the state's interest in preserving life diminishes when a patient is terminally ill or comatose, reasoning that the view flies in the face of the Fourteenth Amendment's guarantee of equal protection of the laws for all persons. He argues that these views depreciate the worth of the life of individuals with disabilities.

Professor Lisa Key considers the difficult issue of whether considerations of co-worker morale might ever create such an undue hardship at the workplace that an employer would be justified in refusing an otherwise reasonable accommodation.¹⁵ She draws analogies to the protection of seniority systems under Title VII of the Civil Rights Act of 1964 and to the treatment of accommodation of religious beliefs under that statute.

Some issues might be considered in conjunction with the reasoning she puts forward. Seniority is given special protection under the terms of Title VII, so consideration of that aspect of worker expectations under Title VII may not be very informative with regard to the proper interpretation of the Americans with Disabilities Act, which lacks any seniority protections. Moreover, as Professor Key acknowledges, Congress intended to give a different meaning to the reasonable accommodation duty in the Americans with Disabilities Act from that found in Title VII's religion provision.

It would hardly be a surprise that accommodations made for employees with disabilities might affect co-worker morale. Significantly, however, complaints based on stereotypes or prejudice are as likely to cause hardship to the employer as those with better justification. Since effects on morale that arise from prejudice should be ignored under any analysis, the real question is whether any other objections concerning unequal treatment should count toward the burden of showing undue hardship. To answer this question, it is necessary to acknowledge that the central mission of the Americans with Disabili-

13. Some of the implications of Congress' attempt to enforce the Fourteenth Amendment by enacting the Americans with Disabilities Act are considered in Stephen L. Mikochik, *The Constitution and the Americans with Disabilities Act: Some First Impressions*, 64 TEMP. L. REV. 619 (1991).

14. See Stephen L. Mikochik, *Assisted Suicide and Disabled People*, 46 DEPAUL L. REV. 987 (1997).

15. See Lisa E. Key, *Co-Worker Morale, Confidentiality, and the Americans with Disabilities Act*, 46 DEPAUL L. REV. 1003 (1997).

ties Act is to redefine what equality means, both at the workplace and elsewhere.¹⁶ Co-workers, like others, need to realize that different treatment is necessary in order to create true equality for individuals with disabilities. The baseline of what is a fair allocation of workplace joys and sorrows has to be adjusted when individuals come to work with limits that require reasonable accommodation. The allocation of some of the nonessential burdens of employment to those who can do them more easily is hardly unfair. It is unequal treatment needed to create functional equality.

Interestingly, there are likely side benefits for individuals without disabilities when the employer reevaluates what parts of a job are essential and makes workplace adaptations. If the employer in one of Professor Key's examples allows a worker with reactions to medication to have a flexible work schedule and the employee demonstrates her productivity under that arrangement, it is highly likely that the employer will extend the practice to workers without disabilities who make a request. If, in another of Professor Key's examples, it becomes difficult to find physically capable workers who will willingly clean the garbage bins, the employer will have an incentive to allocate capital resources to making the job less of a source of contention. Use of machines may render the job susceptible to performance by all workers, even those with less-than-average muscle strength.¹⁷

In the final Article in this Symposium, attorneys Condon McGlothlen and Gary Savine weigh in on the controversy over the interaction of the Americans with Disabilities Act and the National Labor Relations Act, evaluating the Seventh Circuit's decision in *Eckles v. Consolidated Rail Corp.*¹⁸ They support the result in *Eckles*, in which the court refused to require the employer to act contrary to a collective bargaining agreement and transfer a worker with disabilities to a

16. I make this point at greater length in Mark C. Weber, *ADA Recognizes Formal Equality Is Not Equal Enough*, HUMAN RIGHTS, Spring 1992, at 2.

17. A bit of personal narrative on this point: I had a number of manual labor jobs during the 1970s, and so I was in a good position to see the emergence of the marvelous industrial innovation, the "dumpster," a garbage bin that is emptied by machine, unlike its predecessors, which had to be upended and emptied by hand. The device saves the employer the costs of finding workers big enough to empty heavy bins, while diminishing the likelihood of worker compensation claims for hernias and back strains. Perhaps if there were an unlimited supply of workers with adequate muscle bulk and tone, the dumpster would never have been invented. But adaptations to the limits of workers are part of the nature of industrial enterprise, and new adaptations should be encouraged to permit workers to do what they can do best and most easily.

18. 94 F.3d 1041 (7th Cir. 1996) cert. denied, 65 U.S.L.W. 3647 (U.S. Mar. 21, 1997) (No. 96-7525); see Condon McGlothlen & Gary Savine, *Eckles v. Consolidated Rail Corp.: Reconciling the ADA with Collective Bargaining Agreements: Is This the Correct Approach?*, 46 DEPAUL L. REV. 1043 (1997).

job when workers higher in the seniority ladder would otherwise have first rights to the position. Nevertheless, they criticize some aspects of the court's reasoning. Their approach is a controversial one, and one that is contrary to some of the writing in the field.¹⁹

The one thread that ties all these important contributions to the development of disability law theory is their recognition that persons with disabilities are not a "them," a deviant or abnormal group, but rather that persons with disabilities are us, part of us, potentially all of us. This recognition is powerfully enabling, for it enables all the contributors to recognize the importance of preventing invidious discrimination and affirming the merit and dignity of all human beings.

19. Unlike some of the extant commentary, McGlothlen and Savine's article does not consider counterarguments based on: (1) the discriminatory impact of seniority systems, even when the systems are bona fide; (2) the fact that the Americans with Disabilities Act, unlike Title VII of the Civil Rights Act of 1964, affords no special protection to bona fide seniority systems, and unlike the Rehabilitation Act of 1973, specifically lists job transfers as a reasonable accommodation; and (3) the principle that unions, as well as employers, are under a duty to reasonably accommodate qualified individuals with disabilities. Commentaries that consider these arguments include: Susanne M. Bruyere, *The Implications of the ADA for Labor Relations, Collective Bargaining, and Contract Administration*, 17 J. REHABILITATION ADMINISTRATION 120 (1993); Joanne Jocha Ervin, *Reasonable Accommodation and the Collective Bargaining Agreement Under the Americans with Disabilities Act of 1990*, 3 DET. C.L. REV. 925 (1991); Jeffrey M. Hunter, *Potential Conflicts Between Obligations Imposed on Employers and Unions by the National Labor Relations Act and the Americans with Disabilities Act*, 13 N. ILL. U. L. REV. 207 (1993); Arlene Mayerson, *Title I—Employment Provisions of the Americans with Disabilities Act*, 64 TEMP. L. REV. 499 (1991); David S. Doty, Note, *The Impact of Federal Labor Policy on the Americans with Disabilities Act of 1990*, 1992 BYU L. REV. 1055; Barbara Kamenir Frankel, Comment, *The Impact of the Americans with Disabilities Act of 1990 on Collective Bargaining Agreements*, 22 SW. U. L. REV. 257 (1992).