

Many of Europe's small nations, which failed to establish independent nation-states, look forward to European unification. The Corsicans, Basques, Catalans, and Irish nationalists assume that, as a self-professed multinational entity, the EC will not seek to shape a homogeneous cultural community, nor will it follow the undesirable tradition in which international organizations include only states. The EC could become a community of nations that openly recognizes the diversity of its constitutive units.

On the other hand, as technological development and economic prosperity increasingly depend on cross-national associations, assimilation is, more than ever, a feasible option. This could mean that the real test for cultural and national affiliations has arrived. Will national groups accede to pressures to melt together into a larger culture, or will they be motivat-

ed to invest in the preservation of their own cultural heritage, their language, their distinctiveness?

Individuals may, in the future, choose to surrender their particularities and assimilate into one international culture. But the need for mediating communities makes this scenario unlikely. As Mazzini rightly argued, "the individual is too weak and Humanity is too large."

— Yael Tamir

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Disability, Discrimination, and Fairness

It is widely agreed that people with disabilities are treated unfairly in our society: that they are the victims of pervasive discrimination, and that they have been denied adequate accommodation in areas ranging from housing construction to hiring practices to public transportation. As Congress declared in enacting the Americans with Disabilities Act (ADA) in 1990:

[I]ndividuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society.... [emphasis added]

Yet people with disabilities were largely bypassed by the civil rights revolution of the past generation. Congress found that "unlike individuals who have

experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination."

The ADA is intended to provide that legal recourse. It requires employers, transit systems and public facilities to modify their operations, procedures, and physical structures so as to make reasonable accommodation for people with disabilities. The ADA recognizes broad exceptions in cases where these modifications would result in "undue hardship" or pose risks to third parties. But in principle, the statute treats the failure to ensure that people with disabilities have an "equal opportunity to benefit" from a wide range of activities and services as a form of discrimination.

The ADA's anti-discrimination framework serves several important functions. It emphasizes similarities between the treatment of people with disabilities and the treatment of other minorities. It encourages society to find the source of the disadvantages experienced by people with disabilities in its own attitudes and practices, rather than in the disabilities themselves, and it supports the proposition that accommodating people with disabilities is a matter of justice, not charity.

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But the anti-discrimination model offers little guidance on how much accommodation justice requires in the face of limited resources and severe disabilities. Its requirement of equal opportunity to benefit is ambiguous, and its emphasis on remedial action by private individuals and organizations overlooks our collective responsibility for constructing a more accommodating environment. The difficult problems of social justice raised by disabilities cannot be resolved by a simple injunction against discrimination.

The Civil Rights Analogy

The ADA has obvious similarities with recent civil rights legislation. It is designed to protect members of a group long subject to exclusion and prejudice, and it does this by removing barriers to the employment and accommodation of that group. The ADA recognizes that people with disabilities have suffered from false beliefs about their capacities, just as blacks and women have, and that their exclusion has been insidiously self-perpetuating, denying them the experience needed to overcome such biases.

The tendency to devalue those with "visible differences" goes beyond overt prejudice. A recent study of the impact of disability on neo-natal treatment decisions found that doctors and parents were both more likely to decline treatment for premature infants in cases involving a disability, while denying that the disability played any role in their decisions. The researchers saw this as "testimony to the insidious depths to which social stigmas associated with disability can embed themselves in individual consciousness."

Like earlier civil rights law, the ADA recognizes that such deeply embedded prejudice will work its way into the design of social structures and practices, and that stringent measures may be necessary to root it out. The enduring and pervasive impact of prejudice has long prompted the courts to give close scrutiny to "facially neutral" policies with an adverse impact on mistreated and disfavored groups. If public officials, for example, decide that children should attend schools in their own neighborhoods, this may appear to be a neutral basis for school assignment, but in fact it perpetuates the effects of residential covenants and other discriminatory practices that have kept minority families out of affluent suburban communities. Forced busing is not intended to achieve racially diverse schools *per se*, but to undo the enduring effects of those practices. Similarly, affirmative action is not designed to achieve demographic representativeness so much as to surmount the barriers to employment left by generations of exclusion.

The ADA's requirement of "reasonable accommodation" serves many of the same remedial functions, helping to overcome the enduring effects of conscious and unconscious discrimination. As Gregory Kavka notes, the rationales for affirmative action under earlier civil rights law are equally applicable to reasonable accommodation under the ADA: to establish the kinds of role models and "old-boy" networks that dominant groups now enjoy; to correct for the systematic errors in evaluation that result from stereotyping and over-generalization; and to compensate for the effects of past and ongoing injustice, such as exclusion from relevant training.

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On the other hand, the assumption that any adverse impact can be traced to prejudice, hatred, contempt, or devaluation — to what Ronald Dworkin has called "invidious discrimination" — is clearly less tenable for disability than for race or ethnicity. The ADA itself recognizes that the physical endowment of people with disabilities contributes to their disadvantage: the statute defines disability as "physical or mental impairment" that "substantially limits [the impaired person's] pursuit of major life activities." Thus, while the ADA rightly holds the attitudes and practices of the larger society responsible

for much of the limitation experienced by people with disabilities, it also recognizes an objective category of biological impairment; a person whose major life activities were limited *only* by other people's attitudes or practices would be "disabled" only in a derivative sense. The disadvantages experienced by people with disabilities arise from the interaction of their physical conditions and their social environment; those disadvantages can rarely be attributed to biology *or* social practice alone.

But this understanding of disability raises a critical question about the meaning of "equal opportunity to benefit" under the ADA. In one obvious sense, we assure equal opportunity by removing *legal* barriers to entry or access. (Keep in mind that legal barriers have, in the not-too-distant past, been oppressive and pervasive: in an era when one of the great liberal Supreme Court justices could declare that "three generations of imbeciles is enough," people with disabilities were often forbidden to work, to marry, to have children, or even to be seen in public.) Yet equal opportunity conceived as freedom from legal restriction is clearly inadequate to encompass the kind of accommodations to which people with disabilities seem entitled. A more demanding notion of equal opportunity would require us to undo the effects of invidious discrimination, past and present, *de jure* and *de facto*. But even this would fail to address the severely constricted opportunities available to many people with disabilities.

A much stronger sense of equal opportunity is suggested by the ADA's mandate to eliminate "architectural barriers" and other structural impediments to access and mobility. In order to provide equal opportunity in this sense, we must remove not only barriers imposed intentionally by law and prejudice, but also barriers imposed incidentally by designs and structures that ignore the needs of people with disabilities. We must reconstruct the social world to better accommodate the range of abilities of those who inhabit it.

Structural Accommodation and Equal Opportunity

This stronger conception of equal opportunity emerges from the feminist critique of earlier civil rights laws, with their focus on invidious discrimination. Many feminists argue that the design of physical structures and social practices to accommodate one group – able-bodied males – denies equal opportunity to everyone else. The structures and practices of our society embody a dominant norm of healthy functioning, just as they embody a dominant norm of male functioning. As Susan Wendell argues:

In North America at least, life and work have been structured as though no one of any importance in the public world... has to breast-feed a baby or look after a sick child.... Much of the world is also structured as though everyone is physically strong... as though everyone can walk, hear and see well....



*A paraplegic sportsman riding a monoski
Photograph by Bruce Barthel
National Handicapped Sports*

The public world provides stairs to the able-bodied so that they can overcome the force of gravity; it is less consistent about providing ramps so that paraplegics can do the same. To build stairs for the one group without building ramps for the second denies the latter equal opportunity to benefit.

This position was anticipated a generation ago by Jacobus tenBroek, who argued that the right of people with disabilities "to live in the world" required comprehensive changes in our physical and social order: not just in the design of buildings and public spaces, but in the duties of care owed by "abled" pedestrians, drivers, common carriers, and property owners to people with disabilities as they travel in

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public spaces. The refusal to make these changes denies people with disabilities their right to live in the world — the same right that was denied to blacks and women when they were excluded from public facilities.

However, providing equal opportunity for people with disabilities involves a more ambiguous and problematic commitment than the example of stairs and ramps might suggest. Ramps cost little more than stairs and are useful for people of widely varying abilities. The same is true for most of the design standards mandated by the ADA. These standards were developed more than 30 years ago, when tenBroek was writing, and their prompt implementation at that time would have probably brought about dramatic improvements in mobility and access at very slight cost.

But other opportunities to benefit do not come so cheaply. Technology sometimes offers considerable benefits, but only at enormous cost: one thinks of the devices that allow Stephen Hawking to "speak." More often, perhaps, the benefits of costly technology are slight or uncertain. Does the failure to provide quadriplegics with the latest advances in robotics deny them equal opportunity? We could spend indefinitely more on robotic research and equipment, but no matter how much we spent, the opportunities of some quadriplegics would remain severely constricted.

More broadly, we cannot reasonably expect to raise all people with disabilities to a level of functioning where they can receive the same benefit from facilities and services as able-bodied people. There are many areas of employment, transit, and public accommodation where it would be impossible to achieve absolute equality in the opportunity to benefit, and where significantly reducing inequalities in the opportunity to benefit would exhaust the resources of those charged with the task of equalization.

In addressing the issue of how much a decent society should spend to improve the opportunities of people with disabilities, an equal opportunity standard is either hopelessly ambiguous or impossibly demanding. Within the ADA, moreover, there is an unresolved tension between the equal opportunity standard it affirms and the degree of inequality that will remain acceptable under its regulatory guidelines. For example, although the public transit provisions of the statute speak of equal opportunity, the accompanying regulations will leave most people with disabilities with a far greater burden of mobility than most able-bodied people. Perhaps the regulations should require more. But however much they required, they would fall short of assuring equal mobility.

The fact of biological impairment, recognized by the ADA in its definition of disability, makes the notion of "equal opportunity to benefit" problematic. This is a serious defect in a statute that treats the denial of such opportunity as a form of discrimination.

Disability and Biological Misfortune

Recognizing impairments as biological disadvantages raises the question of the extent to which a decent society must accommodate natural misfortune. Such misfortune matters greatly in determining fair treatment within the smaller unit of the family. Consider, for instance, the father's dilemma presented by Thomas Nagel:

Suppose I have two children, one of which is quite normal and quite happy, and the other of which suffers from a painful handicap.... Suppose I must decide between moving to an expensive city where the second child can receive special medical treatment and schooling, but where the family's standard of living will be lower and the neighborhood will be unpleasant and dangerous for the first child — or else moving to a pleasant semi-rural suburb where the first child... can have a free and agreeable life.... [Suppose] the gain to the first child of moving to the suburb is substantially greater than the gain to the second child of moving to the city. After all, the second child will also suffer from the family's reduced standard of living and the disagreeable

environment. And the educational and therapeutic benefits will not make [the second child] happy but only less miserable. For the first child, on the other hand, the choice is between a happy life and a disagreeable one.

Because the second child is worse off, his interests have a greater urgency than those of the first child. Moving to the city would be the more egalitarian decision, and, if the difference in benefit to the two children is only slight, the fairer decision. But the urgency of the second child's interests does not give

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them absolute priority; we would think it unfair to the first child to reduce him to the same level of misery as the second for very slight gains in the second child's well-being.

This dilemma is writ large in the allocation of educational resources for children with learning disabilities. Special education is very expensive, and many financially strapped school systems find that providing more than minimal benefit to severely disabled children would require drastic cutbacks in other programs, such as honors classes for gifted students. Yet the Education for All Handicapped Children Act of 1975 (EHA) mandates "free appropriate education" for all children, regardless of ability. This mandate has been variously interpreted to mean that children with disabilities must receive "some educational benefit," that they must receive benefit "commensurate" with that accorded to normal children, or that they must receive the "maximum possible" benefit.

William Galston makes a powerful argument for a commensurate benefit standard:

In spite of profound differences among individuals, the full development of each individual — however great or limited his or her natural capacities — is equal in moral weight to that of every other.... [A] policy that neglects the educable retarded so that they do not learn how to care for themselves and must be institutionalized is, considered in itself, as bad as one that deprives extraordinary gifts of their chance to flower.

But technology makes "natural capacity" and "full development" very elastic notions, and this raises serious problems for a standard of equal opportunity that requires a comparison of actual and potential development.

If a society were a family, some loss of educational benefit to the most gifted students might seem justified in a school system intent upon enhancing opportunity for students with disabilities. But even in that case, an allocation that left the most gifted at the same low level of educational development as the most grievously disabled would seem grossly unfair. And it is not clear that even the modest sacrifices that would be appropriate within a family would be appropriate for the larger society; perhaps one feature that distinguishes families from larger, impersonal social units is a greater concern for the welfare of each member than for each one's share of external resources.

Clearly, biological misfortune raises issues about the meaning of fair treatment that the ADA's anti-discrimination framework gives us little guidance in resolving. That framework also limits the social response to disabilities by imposing the costs of accommodation primarily on individuals. As we saw in the case of special education, the larger society may not always be able to bear such costs. But in other cases, burdens that would be excessive for an individual or agency may well be reasonable for a city or state. An individual should not have to plead undue hardship in order to avoid costs properly imposed on the community; a person with disabilities should not be denied accommodation because it

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imposes an undue hardship on an individual employer.

A recent analysis of the employment provisions of the ADA predicted that its anti-discrimination framework would have the effect of confining its benefits to a "disability elite" — those workers "who have the least serious disabilities and the strongest education, training, and job skills." Because employers have to bear the costs of accommodation, they will "skim the 'cream' of the population with disabilities," bypassing those with more severe and debilitating conditions. In order to help those with the

most serious and pervasive disabilities, the government must significantly increase its investments in welfare, employer subsidies, and job training. But such measures are matters of distributive justice, and the fact that they are not among the remedies mandated by the ADA suggests the limitations of the anti-discrimination model upon which the current law rests.

Nevertheless, the specific provisions of the ADA on employment, transit, and public accommodation reflect, in Chief Justice Earl Warren's famous phrase, "the evolving standards of decency that mark the progress of a maturing society." To say that the question of fair treatment for people with disabilities does not have an obvious or final answer is not to say that we cannot reach a consensus on what fairness requires at our level of affluence and technological development. The ADA represents a major step towards achieving such a consensus.

— David Wasserman

Sources: S. Trowers-Crowley, *ADA Primer: A Concise Guide to The Americans With Disabilities Act of 1990* (Prentice Hall, 1990); Daryl Evans, "The Psychological Impact of Disability and Illness on Medical Treatment Decisionmaking," *Issues in Law & Medicine*, vol. 5, no. 3 (1989); Gregory S. Kavka, "Disability and the Right to Work," *Social Philosophy & Policy*, vol. 9, no. 1 (1992); Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977); Ron Amundson, "Disability, Handicap, and the Environment," *Journal of Social Philosophy*, vol. 23, no. 1 (1992); Michael A. Rebell, "Structural Discrimination and the Disabled," *Georgetown Law Journal*, vol. 74 (1986); Susan Wendell, "Toward a Feminist Theory of Disability," *Hypatia*, vol. 4, no. 2 (1989); Jacobus tenBroek, "The Right to Live in the World: The Disabled in the Law of Torts," *California Law Review*, vol. 54 (1966); Thomas Nagel, "Equality," in *Readings in Social and Political Philosophy*, edited by Robert M. Stewart (Oxford University Press, 1986); William Galston, *Liberal Purposes: Goods, Virtues, and Diversity in the Liberal State* (Cambridge University Press, 1991); Richard V. Burkhauser, "Beyond Stereotypes: Public Policy and the Doubly Disabled," *The American Enterprise* (September/October 1992).

Defining Basic Benefits: Oregon and the Challenge of Health Care Reform

On March 19, the Clinton administration approved Oregon's proposal to extend Medicaid benefits to thousands of poor people who are currently ineligible for the program while limiting Medicaid coverage of health services to include only those that are judged to be most effective. The Medicaid reform is part of a larger plan designed to assure access to health care for all of the state's residents. The Bush administration had rejected an earlier version of the Oregon proposal, ruling that it violated provisions of the Americans With Disabilities Act (ADA). But Bill Clinton endorsed the proposal

during the presidential campaign, and in February he promised the nation's governors that he would be open to innovations in the Medicaid system, which operates with state and federal funds.

The decision to allow implementation of the Oregon proposal comes at a time when a White House task force is developing a national health care reform plan. The two goals of this task force are the same ones that Oregon officials have been pursuing since their own reform process began in 1989: to secure health care for all citizens and to gain control of rising health care costs.