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Convention and Competence: Disability Rights in Sports and Education

In the last six months, federal district courts have issued decisions in two highly publicized cases alleging discrimination on the basis of disability. In one, the Professional Golfers Association (PGA) was ordered to allow Casey Martin, a talented contender with a serious leg impairment, to use a golf cart in its championship tournaments, in contravention of its existing rules. In the other, Boston University (BU) was permitted to maintain its foreign language requirement without exceptions for learning-disabled students after a court-mandated faculty committee determined that the requirement was "fundamental to the nature of a liberal arts degree" at that university.

Both cases were brought under Title III of the Americans with Disabilities Act (ADA), which prohibits discrimination in "public accommodations," a term which covers a wide range of facilities, institutions, and organized activities. Both addressed the same issue under Title III: Was the proposed exception a "reasonable modification," or would it "fundamentally alter the nature" of the good, service, or activity in question?

The drafters of the ADA expected the meaning of "reasonable modification" to be fleshed out in the courts, and the two rulings were made in the context of the distinct bodies of case law governing organized sports and higher education. Still, the cases *look* similar, at least from the distance of a newspaper report, and so it may seem puzzling that they were resolved differently. Why should the PGA not be allowed to decide that walking is fundamental to tournament play, if BU is

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allowed to decide that a foreign language requirement is fundamental to its liberal arts program?

Several explanations suggest themselves. The courts may be more deferential to the judgment of faculty committees, given the greater prestige of academics and the long tradition of university self-government, than to professional athletic associations. The nature of Casey Martin's disability was clear and undisputed, while the diagnosis of "learning disability" on which the BU students' ADA claim rested remains deeply controversial. Finally, the opportunities available to the plaintiffs in the two cases were strikingly different. While there is only one PGA Tour (the most prestigious of the four tours offered by the PGA, and arguably the most prestigious in golf), there are lots of places to obtain a liberal arts degree—some more prestigious than BU, and many not requiring two years of a foreign language. For these reasons, the courts may have been more inclined to require inclusiveness and accommodation on the part of the PGA, while holding BU to a less demanding standard.

Ultimately, however, we cannot explain the appearance of inconsistency, or assess the merits of these decisions, without some understanding of how the ADA defines discrimination and what it requires for its redress.

What the ADA Demands

In enacting the ADA, Congress found that people with disabilities had been systematically denied "the opportunity to compete on an equal basis" by pervasive discrimination, involving not only "outright intentional exclusion" but also "architectural, transportation, and communication barriers," "exclusionary qualification standards and criteria," and the "failure to make modifications to existing facilities and practices." The ADA thus treats discrimination against people with disabilities as, in part, a sin of commission—the imposition of exclusionary practices and standards—and, in part, a sin of omission—the failure to remove barriers and to make reasonable modifications. This understanding of discrimination reflects a recognition that our society has deliberately or negligently excluded its disabled members from a wide range of activities by structuring those activities in a way that makes them needlessly inaccessible.

Eliminating such structural discrimination often requires significant changes in the physical and social environment. The most visible accommodations required by the ADA are the design features that ensure access for people in wheelchairs or people who are blind: curb-cuts, ramps, accessible entrances and bathrooms, braille signs, and computers that read their

own screens aloud. But the ADA also requires less tangible accommodation, in the "design" of jobs, tasks, and activities. As one recent law review article observes, "By contrast to earlier prohibitions against discrimination, the ADA incorporates a more explicit understanding of the contingency of existing job configurations: that they need not be structured the way that they are. Rather than taking job descriptions as a given, reasonable accommodation doctrine asks how the job might be modified to enable more individuals to perform it."

The demand for restructuring may make the ADA look more "affirmative" than other civil rights laws; the measures required to accommodate people with disabilities appear more extensive, and less directly linked to the redress of prior intentional discrimination, than those required to protect the rights of women and minorities. But in fact, the changes mandated by the ADA are more circumscribed than those mandated by other civil rights legislation. For example, the ADA requires job restructuring only for those disabled individuals "otherwise qualified" to perform the job's "essential functions." Moreover, it requires modifications only if they are "reasonable," if they do not impose an "undue burden," and, to bring us back to the present cases, if they do not "fundamentally alter the nature" of the activity, good, or service being offered.

These exceptions make the antidiscrimination mandate of the ADA a good deal more conservative than it initially appears, but they still demand a bracing exercise in institutional self-examination. They require employers, public and private service providers, and, ultimately, the courts to decide what constitutes the essential functions of a job or the fundamental nature of an activity, good, or service. Because the functions of a job, the requirements for a degree, the rules of a game or social practice depend to a large extent on convention, habit, and the practical imperatives of bygone eras, it will often be difficult to say whether they are essential, or why. And because the ADA places the burden of proof on those who seek to maintain exclusionary practices, the difficulty of establishing that such practices are essential will often work to the benefit of those demanding accommodation.

Demonstrating Competence

If the implementation of the ADA has been complicated by uncertainty about the essential nature of various activities, goods, or services, it has also been complicated by uncertainty over what constitutes competence or qualification in those persons who are excluded from them. Formally, the second concern might not appear independent of the first: the competence or qualification of a person with a disability

would seem to depend on the essential requirements of the job or the fundamental nature of the activity. But competence is not always assessed with reference to the requirements of a particular task or job. We will sometimes be more certain about a person's talent for achieving the outcomes associated with an activity than about the activity's fundamental nature; even those who claimed that walking was fundamental to the PGA Tour conceded that Casey Martin had already shown himself to be a formidable golfer. It may also be that our understanding of an activity's fundamental nature will be decisively *shaped* by our convictions about an individual's achievement. If we are more certain of the consummate skill that Casey Martin displays in playing golf than we are about the specific skills which golf requires, we may deny that the highest-level professional golf could possibly require any skill that Martin lacks. Along with his defenders, we may conclude that the PGA Tour is essentially a shotmaking competition.

There is a second reason why the assessment of competence is so uncertain: competence is more likely to

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have been attained and exhibited in some domains than in others. This may be the most striking contrast between the PGA and BU cases. Golfers who seek to compete in the PGA Tour will have had abundant opportunity to demonstrate their talent in other tournaments, while students at a liberal arts college most likely have promise rather than actual accomplishments to show. Admittedly, some college students can boast a Westinghouse Science Prize or a poem published in the *New Yorker*. But they are the exception. A liberal arts education offers few venues for precocious achievement, and talent in its specific domains may simply take longer to cultivate and display. The PGA case thus appears closer than the BU case to the ADA's paradigm injustice of a talented person with a disability denied an opportunity to "participate in, and contribute to, society."

In saying this, we do not mean to suggest that the ADA requires plaintiffs to display competence as clearly as Casey Martin did. Indeed, most people who claim discrimination based on disability will probably fall somewhere between Martin and the BU students, with achievements more concrete than the students' but less compelling than Martin's. Our suggestion is simply that in close or disputed cases—particularly cases where the fundamental nature of the activity is at

all uncertain—plaintiffs are more likely to prevail if they can clearly display competence or qualification in the activities from which they have been excluded.

The “Fundamental Nature” Test

However unfair Casey Martin’s exclusion from the PGA Tour might have appeared, it might not have been illegal if walking were indeed fundamental to the highest-level professional play. On this point, there was conflicting and ambiguous evidence. The PGA rules clearly stated that contestants were to walk the course, and some players regarded that as a formidable challenge in hot, humid weather and difficult terrain. But walking was not (otherwise) part of the

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competition: players did not get lower scores for faster walking, and no minimum pace or time was specified. Moreover, many players felt that walking was actually advantageous, giving them a feel for the course they would lack if they rode in a cart. Finally, the fact that other tournaments permit carts did not settle the issue of how to regard the walking requirement in the PGA Tour. That requirement may be seen as gratuitous, since walking is deemed essential in no other tournament, or, no less plausibly, as a defining requirement of the PGA Tour, distinguishing it from other tournaments.

Behind this specific clash of interpretations lies the more general question of how the courts could ascertain the fundamental nature of a conventional activity like PGA Tour golfing. This question invites comparison with the inquiry mandated under Title I of the ADA as to whether a given requirement is an “essential function” of a job. Title I prohibits employers from refusing to hire or retain “otherwise qualified” individuals on the basis of their disabilities; an individual is otherwise qualified if she can perform the “essential functions” of the job with reasonable accommodation. If the person with a disability cannot perform an essential function even with accommodation (such as the provision of assistive technology), the individual is not qualified.

Though many of the functions that people with disabilities cannot perform are clearly incidental to the jobs they seek to do, such as walking up a flight of stairs to work as a computer programmer, there is often disagreement about whether a particular function is incidental or essential (e.g., is the ability to

quickly analyze a fact pattern and apply complex rules essential to lawyering, or is speed incidental, and extra time on bar examinations therefore a reasonable accommodation for applicants with learning disabilities?). Such questions—which were rarely asked before civil rights laws forced employers to address them—will sometimes be difficult to answer. But generally they can be resolved by examining a company’s past practice, its productive and financial goals and constraints, and the practice of similar organizations: Does the employer really need this employee to perform this function in order to maintain its productivity or market share, comply with OSHA or EPA standards, or increase its dividends?

The inquiry may be less straightforward when a person with a disability seeks access to an activity, good, or service rather than a job. Formally, the language of Title I (regarding employment) and Title III (regarding public accommodations) is quite similar. Where the former requires “reasonable accommodation,” the latter requires “reasonable modification”; both make an exception for undue burdens. And much as an employer is not required to accommodate a person with a disability who cannot perform the essential functions of the job, an organization is not required to modify the activity, good, or service it offers if that change would “fundamentally alter [its] nature.” If walking indisputably had as incidental a role in golfing as it has in computer programming, the Casey Martin case would be an easy one under either section of the ADA.

The demand for reasonable modification suggests that the ADA recognizes the same contingency in the “existing configurations” of activities like sports and education as it does in employment. But the contingency in such activities is different from that found in jobs. Sports are conventional in a way that jobs are not (or are not generally thought to be). Their features are not dictated by the external objective of making a product or a profit, but are shaped by tacit consensus and informal practice of the participants themselves. Education falls somewhere in the middle: closer to employment if we see it in more instrumental terms as job training; closer to sports if we see it as a constituent of a good, cultured, or civilized life, e.g., “Part of being an informed and cultured member of our society is having learned (or at least having been exposed to) a foreign language or the Classics of Western Civilization.”

The more conventional character of sports, and arguably of education, may appear to make them more flexible, more amenable to modification, than the production- or profit-driven operations of a business. But their conventional nature is double-edged. The rules and practices that define a sport or a liberal arts education may be in some sense arbitrary, but they

Making Exceptions

One issue close to the surface but rarely discussed in cases like these is why we should have to choose between excluding people with disabilities from an activity, or altering its rules and conventions for everyone so that people with disabilities can be included. Why not simply make an exception to those rules or conventions for participants with disabilities? What does it matter if a few people are allowed to depart from the conventions that govern a sport or an academic program?

The most obvious concern is that exceptions would give some participants an unfair advantage, thereby imposing an undue burden on the others. Suppose that Casey Martin won a game on the PGA Tour by one stroke, pulling ahead on the final hole to beat a player exhausted by walking a long course on a hot, humid day. Or suppose that the two top seniors at BU had equal GPAs, but that one was a learning-disabled student who had gotten A's in foreign culture but would probably have gotten C's or D's in a foreign language, the other a non-LD student who had gotten B's in a foreign language but would probably have gotten A's in foreign culture. Would it be fair to award Casey Martin the trophy, and to make the learning-disabled student valedictorian?

A second concern is that exceptions would alter the fundamental nature of an activity. Clearly, this could happen if an "exception" were available to all—and if there were some advantage to non-disabled participants in the alternative way of engaging in the activity. But it could also happen even if the exception were limited to disabled participants, since our notion of what constitutes achievement in that activity would be affected by their success. BU, for instance, would be hard-pressed to claim that two years of a foreign language were integral to its conception of a liberal arts education if several of its recent valedictorians were learning-disabled students who lacked that coursework.

Operating in a legal framework somewhat different from the ADA, an Ontario court faced both of these concerns when it was asked to decide whether the province's Youth Bowling Council could exclude Tammy McLeod, a girl with cerebral palsy, from tournament play. Tammy aimed and released the ball down a ramp rather than holding it in her hand. The judge concluded that the girl was "not able, because of handicap, to perform the essential act of bowling—manual control and release of the ball." Under the ADA, such a finding would have settled

the matter: By analogy with Title I, the employment section, the bowling council would not be required to include Tammy if she was unable, even with accommodation, to perform the essential functions of the sport. But under the Ontario Human Rights Code, as the judge interpreted it, the bowling council *was* required to include her. A person with a disability is entitled to accommodation whether or not she can perform the essential functions of an activity, so long as the accommodation does not impose a hardship on the organizers or on other participants. In this case, the judge ruled that there was no hardship: Tammy's device gave her "no competitive advantage over others" (since it did not allow her to impart speed or spin to the ball), and her use of it did not require other bowlers to alter their manner of play in the slightest.

The judge went on to say, however, that if use of the ramp *had* given Tammy a competitive advantage, or if she were to adopt a more sophisticated device, the bowling council might well be allowed to exclude her. In effect, he ruled that Tammy could participate as long as she was not competitive. He gave her permission only to engage in a loosely parallel activity alongside real bowlers, in which she was unlikely to obtain a higher score than the real bowlers, and unlikely to be regarded as having won a bowling game even if she did. Though she could be a participant in some attenuated sense, she could never be a contender. This resolution is ironic in a case where the judge emphasized the inherently competitive nature of sports: "All sport at all levels involves competition; all participants strive to win." It may have been a fair resolution for a youth tournament, where winning is not the only thing, but if so, the decision was fair for reasons that belied its stated rationale.

It will, of course, be as difficult to say when an alternative way of performing an activity confers an unfair advantage as it is to say whether it departs from the fundamental nature of that activity. From the moment he began to dance around Sonny Liston in Las Vegas, to the moment he had the ropes loosened in the Kinshasa ring to defeat George Foreman with his rope-a-dope, Muhammed Ali was accused of gaining unfair advantage or threatening the fundamental nature of heavyweight boxing; he is now almost universally regarded as having improved it. A cart on a PGA Tour golf course is surely closer to looser ropes in a boxing ring than to ramps in a bowling alley. But closer cases and difficult judgment calls will inevitably attend the integration of people with disabilities.

may also acquire a non-instrumental value that few job descriptions possess. The ADA's exemption for modifications that fundamentally alter the nature of an activity, good, or service can be seen as protecting, perhaps too categorically, the attachments and expectations that develop around conventional activities.

In the BU case, the court deferred to the considered judgment of a faculty committee that the foreign language requirement was essential to a liberal arts education at Boston University. There was ample precedent for this deference in other cases addressing the fundamental nature of an academic or professional program, based in part on the tradition of academic autonomy. (Indeed, that deference might have been greater if the BU president had not provoked the controversy with a wholesale attack on his school's program for students with learning disabilities and on the very idea of accommodating such disabilities.) Such deference may look elitist if we see the nature of a liberal arts degree as no less conventional than a golf tournament—why should academics be allowed to judge which of their conventions are fundamental while sports organizers must yield to the court's judgment? It will look a little less elitist if we see the requirements for a liberal arts degree as instrumental—developing the skills needed to succeed in civic or commercial life outside the academy (or within it, as professors). But the university might be reluctant to justify its foreign language requirement in instrumental terms. If the question is whether students perform better at various life pursuits with the minimal proficiency that two years of a foreign language confer, the BU faculty has no more expertise than other educators in providing an answer. Rather, the university may see the foreign language requirement as an essential constituent of a liberal education *as BU defines it*. In that case, its authority to impose the requirement is a matter of prerogative, not expertise.

Protected Values

We would like to conclude with some reflections on the values that may be protected by the "fundamental nature" exception of Title III. If the law were simply concerned with equitably distributing the costs of reasonable accommodation and modification among people with disabilities, employers, public accommodations, and the larger society, it is not clear why it would need such an exception in addition to that for "undue burden," as well as the overall requirement of reasonableness. If a public accommodation can modify its activity, service, or good without undue burden, what does it matter that the modification alters its fundamental nature?

This impatience with convention is found in some feminist writing on sports, which challenges the need

for rules that limit the participation and success of women. Thus, Janice Moulton maintains:

As it is now, athletes are used to adjusting their play to rule changes, and systems of scoring now exist to allow players at different levels to compete together. Informal games of many kinds are played with whoever shows up, and every school athlete has played in such games. The rules are freely revised to take into account the number of players, the playing field . . . , the level of skill, and anything else that is considered important. People who object to making changes in the standard rules may not realize how very often such rules are altered in practice.

As anyone who has followed the protracted controversies about rule changes in many sports will appreciate, however, players and spectators are often fiercely attached to the status quo, and regard even minor changes as threats to the integrity of the sport. Changes far subtler than those needed for the inclusion of people with various disabilities might well alter the style of play and the character of the game. The point is not that such changes would make the sport intrinsically better or worse, or would impose any tangible burden on the players, spectators, or organizers, but that they would alter familiar and cherished conventions. Moulton recognizes how sports talk pervades our social lives and civilization, but fails to recognize how much of that talk concerns the very details she would so readily alter in the interest of greater inclusiveness. It is not the improvised pick-up games that are debated in the barbershops and the tabloids; it is organized sports with highly specific rules and other conventions, a knowledge and acceptance of which is presupposed in the spirited discourse Moulton observes. This hardly renders those conventions sacrosanct, but it does suggest that changes can be wrenching and disruptive.

Moreover, one does not have to be a fetishist about existing conventions to worry about the broad postwar trend, in work, school, and sports, toward specialization. American sports used to place a premium on endurance and versatility, just as American universities once imposed a comprehensive liberal arts curriculum. A football career required a full 60 minutes on the gridiron, on defense and offense; a B.A. once required not only proficiency in Latin and Greek, and a familiarity with the classics of Western Civilization, but also an ability to swim several laps in an Olympic-size pool. The specialization that has overtaken many domains may be a welcome trend for those with finely honed but narrow talents and capabilities. But in these domains, many well-intentioned people fight to preserve an emphasis on versatility or well-roundedness, lest the participants become technicians instead of scholars or athletes. And even those not disposed to rearguard actions may feel some sense of loss when excellence in golf is confined to shotmaking or when pitchers no longer have to come to the plate to face their opposite

numbers on the mound, leaving that task to designated hitters. Whether or not we believe that the law should attempt to take cognizance of such costs, it must recognize the danger of deforming a practice so extensively that it is no longer one in which previously excluded or included people wish to participate. At that point, the attempt to reshape the practice becomes self-defeating.

If the ADA does give weight to convention in exempting public accommodations from changes that would fundamentally alter the nature of their activities, goods, and services, this is consistent with the generally conservative and incremental character of that statute. The ADA is committed to opening up existing employment, facilities, activities, goods, and services to people with disabilities, but it was not designed to equalize opportunities in more radical ways. While the interests of people with specific disabilities might be well served by the creation of new sports emphasizing skills in which they were likely to have developed compensatory superiority—the rough analogue of a proposal made by Jane English for reducing sex inequality in sports—or of more universities like Gallaudet, the ADA requires nothing of the sort. Rather, it calls for the maximum feasible integration, and leaves it to the courts to decide whether what is of distinctive value in an enterprise can be preserved by changes that permit people with a given disability to participate, and even to compete and win. Will the singular virtues of the highest-level professional golf be compromised if players use carts to go from hole to hole? Would a BU liberal arts degree lose its special character if it were conferred without two years of a foreign language? Such questions will often be difficult ones, both for disabled individuals who seek inclusion and for institutions which are pressed to change. Nevertheless, they provoke a valuable exercise in institutional appraisal.

—Anita Silvers and David Wasserman

Sources: Pamela S. Karlan and George Rutherglen, "Disabilities, Discrimination, and Reasonable Accommodation," *Duke Law Journal*, vol. 46, no. 1 (October 1996); Ruth Shalit, "Defining Disability Down," *New Republic* (August 25, 1997); Michael Grunwald, "U.S. Launches Drive for Disabled Golfer: Justice Dept. Invokes ADA in Martin Case," *Washington Post* (August 24, 1998); Janice Moulton, "Why Everyone Deserves a Sporting Chance: Education, Justice, and College Sport," in *Rethinking College Athletics*, edited by Judith Andre and David N. James (Temple University Press, 1991); Jane English, "Sex Equality in Sports," *Philosophy and Public Affairs*, vol. 7 (Spring 1978); *Youth Bowling Council of Ontario v. McLeod*, 75 Ontario Reports (2d).

Disability, Difference, Discrimination: Perspectives on Justice in Bioethics and Public Policy

Anita Silvers, David Wasserman, and
Mary B. Mahowald,

with an afterword by Lawrence C. Becker

How should our society respond to individuals with disabilities? What does it mean to be disabled, and is a disabled person necessarily less independent and less competent than a person who is not disabled? Is a life with a disability any less worth living than a life without one? In this compelling book, three experts on disability issues, ethics, and the law address pressing issues in public policy and bioethics, including the prospect of genetic discrimination, heroic treatment of seriously impaired neonates, and how to assess the benefits and burdens of ending the segregation of people with disabilities. The authors bring leading theories of justice to bear on matters of concern to a wide variety of disciplines dealing with disability, including feminist, minority, and cultural studies, and they do so in the context of the groundbreaking Americans with Disabilities Act. *Disability, Difference, Discrimination* will be of great interest to the legal, philosophical, and medical communities engaged in ongoing debates about disability.

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"The authors offer novel and enlightening perspectives on disability and justice. I learned a lot from their different ways of approaching this difficult tangle of issues. All three essays in this volume challenge commonly accepted patterns of thought and will repay careful study."

— Richard Arneson, University of California, San Diego

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