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ECONOMICS VERSUS CIVIL RIGHTS

Bonnie O'Day[†]

INTRODUCTION

To achieve specific political and social goals, advocates for disability programs have used a series of messages about the societal role of people with disabilities. The first generation of disability programs was based on the "protectionist model," and was grounded in the beliefs that people with disabilities were abnormal and that society needed to be protected from them. The resulting policies included institutionalization and mandatory sterilization.¹

Subsequently, the "charity model" of disability emerged. Its advocates maintained that people with disabilities should be treated benevolently. The result of the model was the creation of federal income subsidy programs and hundreds of philanthropic agencies. The charity model can be characterized as the first wave of the disability movement.

The second wave of the disability movement was signalled by the development of the "rehabilitation-medical model," which attempted to ameliorate the effects of disabilities by providing training and medical intervention. This led to the establishment of physical medicine and vocational rehabilitation programs. A more recent branch of the second wave is the "minority-independent living" model. Its advocates maintain that the disabled individual is not inherently dependent; rather, disability is a social construct created by prejudicial attitudes.² Thus, under this model, the "disability problem" is remedied by the modification of environments and the enactment and enforcement of civil rights legislation.³

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¹ WOLF WOLFENBERGER, *THE ORIGIN AND NATURE OF OUR INSTITUTIONAL MODELS* 35-82 (perm. ed. rev. 1975).

² See Harlan Hahn, *Paternalism and Public Policy*, *SOCIETY*, Mar./Apr. 1983, at 36.

³ Gerben DeJong, *Independent Living: From Social Movement to Analytic Paradigm*, *ARCHIVES PHYSICAL MED. AND REHABILITATION*, Oct. 1979, at 60.

All of these models are interconnected, and certain strands of each are present in most disability legislation and programs today. Cost-benefit arguments have been an integral part of the justifying rationale for both vocational rehabilitation and civil rights approaches to disability policy. The approach first surfaced to combat the myth that people with disabilities would always burden society and it provided a justification for vocational rehabilitation programs. Cost-benefit analysis compares the cost of vocational rehabilitation with the benefits which result when a rehabilitated individual becomes employed.⁴ During the 1970s, the content of disability legislation began to reflect civil rights and equal opportunity rationales. Of course, economic considerations continued to play a major role in policy formulation.⁵

This essay examines these approaches using the ADA as an example. It argues that a new third wave approach should be developed in which civil rights considerations eclipse employer-based cost-benefit rationales as the dominant justification for disability legislation.

I. THE DIFFERENT APPROACHES

The economic and civil rights approaches to disability policy often yield conflicting legislative results. Economic arguments generally yield bipartisan support for proposed legislation, but protection for all persons with disabilities is often difficult to achieve. Conversely, the civil rights approach focuses on rights regardless of economic costs and thereby protects even the most severely disabled people. Yet, given the national deficit and the

⁴ See, e.g., Monroe Berkowitz & Edward Berkowitz, *Benefit Cost Analysis*, REHABILITATION RES. REV., at 5 (1983).

⁵ For example, an employee's right to "reasonable accommodation" under the Americans With Disabilities Act (ADA), 42 U.S.C. §§ 12101-12213 (Supp. III 1992), is limited to cases where the provision of an accommodation would not cause an "undue hardship" on the employer or business. 42 U.S.C. § 12112(b)(5)(A) (Supp. III 1992). The definition first proposed by disability advocates would have required an employer to provide accommodations for a disabled employee unless such accommodations would threaten the existence of the employer's business. That definition was ultimately rejected. See BONNIE P. TUCKER & BRUCE A. GOLDSTEIN, LEGAL RIGHTS OF PERSONS WITH DISABILITIES: AN ANALYSIS OF FEDERAL LAW 20:30 (1990 & Supps. 1991-93) (citing *Hearings Before the Senate Jud. Comm. on Labor and Human Resources and the Subcomm. on the Handicapped*, 100th Cong., 1st Sess. 90 (May 9, 10 & 16 and June 22, 1989)).

need for bipartisan support, the economic approach continues to dominate policy formation.

Even some of the strongest disability advocates continue to use the economic approach. For example, they claim that vocational rehabilitation programs are efficient because every dollar expended results in a savings to the taxpayer.⁶ Supporters of independent living and special education services justify funding for their programs based upon a cost-benefit analysis.⁷ Over the years, campaigns to encourage employers to hire people with disabilities created the image that hiring them was cost-effective. Advocates for the disabled asserted that accommodations were inexpensive and that people with disabilities would be hard-working, loyal, and permanent employees.

Other disability advocates assert that disability programs and legislation should be based solely upon civil rights principles. These "minority model" advocates view persons with disabilities as members of a minority group, limited by discrimination and prejudice rather than by physical or sensory conditions. They argue that nothing inherent in being disabled makes an individual dependent and non-productive. Echoing the claims of civil rights leaders of past decades, they assert that limitations faced by the disabled are solely the result of stereotypes. Thus, a radical civil rights approach — mandating non-discrimination and equal access for all regardless of cost — is the only way to solve the disability problem.

The economic and civil rights messages, when combined into a single piece of legislation, can serve many purposes. The ADA is a case in point. During the debate over the ADA, civil rights arguments were used persuasively to provide a moral justification for the law. A complementary rights-based argument established people with disabilities as an identifiable and disadvantaged constituency — similar to women and minorities — which should be afforded similar protection under the law.

Disability advocates also stressed that equal rights for people with disabilities could be provided relatively inexpensively.⁸ They echoed earlier vocational rehabilitation advocates by

⁶ See, e.g., Berkowitz & Berkowitz, *supra* note 4, at 5.

⁷ See, e.g., EDWARD BERKOWITZ, *DISABLED POLICY, AMERICA'S PROGRAM FOR THE HANDICAPPED* 163-67 (1987) (discussing the prevalence of cost-benefit analysis in government attempts to effect employment of the disabled).

⁸ See, e.g., Susan F. Rasky, *How the Disabled Sold Congress on a New Bill of Rights*, N.Y. TIMES, Sept. 17, 1989, at E5 ("[B]illions of tax dollars a year

asserting that the minimal costs of access and accommodation would be recouped by employers as people with disabilities became superior long-term employees. They also asserted that these costs would be recovered through increases in the tax base as more people with disabilities left the welfare rolls and went to work. These economic arguments helped ensure passage of the ADA, but many economists have predicted that the resulting law will primarily benefit those who need the least amount of assistance: those with less severe or less complicated disabilities. Thus, ultimately, the solid foundation of protections secured by the rights-based arguments was severely limited by the inclusion of exceptions required to satisfy financial cost-benefit considerations.

II. THE ADA: AN EXAMPLE OF THE CONFLICT BETWEEN RIGHTS AND ECONOMICS

Enacted in 1990, the ADA prohibits discrimination against Americans with disabilities with respect to employment, public services, and public accommodations. The ADA provides "a clear and comprehensive national mandate for the elimination of discrimination" against this previously under-protected population.⁹ The employment provisions of the ADA, however, provide a snapshot of the conflict between rights-based and economics-based arguments. They demonstrate how cost considerations limit the ADA's impact on employment for the people with the most substantial disabilities.

Under the ADA, an individual with a disability is one who has a physical or mental impairment that substantially limits the performance of one or more major life activities, is regarded as having such an impairment, or has a record of such an impairment.¹⁰ Disability, therefore, is viewed as a product of

are likely to be saved in federal aid to disabled people who would rather be working").

⁹ 42 U.S.C. § 12101(b) (Supp. III 1992). Although the Rehabilitation Act of 1973, 29 U.S.C. §§ 791-794 (Supp. IV 1992), prohibits discrimination on the basis of disability by federal agencies, federal contractors, and recipients of federal financial assistance, and although some states have enacted legislation barring discrimination on the basis of disability, the protection offered by such statutes remains limited.

¹⁰ 42 U.S.C. § 12102(2) (Supp. III 1992). See generally TUCKER & GOLDSTEIN, *supra* note 5, at 20:3-12 (describing who qualifies as disabled under the ADA); *id.* at 4:1 (discussing who falls under the disability umbrella

the interaction between the individual and her environment. The definition is left deliberately general. Specific disabilities — such as traumatic brain injury, cerebral palsy, or manic depression — are not listed in the Act. Whether these disabilities substantially limit one or more major life activities must be determined on a case by case basis.¹¹

The ADA prohibits employment discrimination against people with disabilities by employers who have twenty-five or more employees — fifteen or more beginning July 26, 1994.¹² To be protected under the Act, the disabled employee must satisfactorily perform the essential functions of her job,¹³ meet all the appropriate educational and skill requirements, and be "otherwise qualified"¹⁴ for the job. Employers may not discriminate against persons with disabilities in hiring, firing, promotion, wages, or any other privilege or benefit of employment.¹⁵

The ADA requires employers to provide "reasonable accommodations" for qualified individuals with disabilities.¹⁶ Through the reasonable accommodation requirement, the ADA compels employers to adapt to an individual's disability at all stages of the employment process, from pre-employment testing to hiring and promotions.¹⁷

under § 504 of the Rehabilitation Act).

¹¹ See EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, A TECHNICAL ASSISTANCE MANUAL ON EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICANS WITH DISABILITIES ACT II-4 to II-8 (1992) [hereinafter EEOC TECHNICAL ASSISTANCE MANUAL].

¹² 42 U.S.C. § 12111(5) (Supp. III 1992).

¹³ When determining what job functions are "essential," numerous factors are considered, including the employer's judgment. If an employer has prepared a written job description, it shall be evidence of the essential functions of the job. 42 U.S.C. § 12111(8) (Supp. III 1992); see also 29 C.F.R. § 1630.2(n) (1993).

¹⁴ An "otherwise qualified" person with a disability is one who, with reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. 42 U.S.C. § 12111(8) (Supp. III 1992).

¹⁵ 42 U.S.C. § 12112(a) (Supp. III 1992).

¹⁶ 42 U.S.C. § 12112(b)(5)(A)-(B) (Supp. III 1992).

¹⁷ *Id.*

The term "reasonable accommodations" encompasses a wide variety of job adaptations. Specific examples of reasonable accommodations might include:¹⁸

(1) Job restructuring: For example, a secretary with a visual disability who cannot file printed material could exchange duties with another employee;

(2) Modifying work schedules: Examples include adjusting the work schedule for a mobility impaired person who relies on public transportation that is only available on a limited schedule, or for a person with a disability who requires time off for medical appointments or periodic rest;

(3) Making employment facilities physically accessible: Examples include barrier removal, the installation of ramps, or widened doorways;

(4) Acquiring or modifying equipment: Examples include adaptive hardware and software for blind or visually impaired persons or telecommunication devices for the deaf (TDDs);

(5) Providing readers, interpreters and assistants to help persons with disabilities perform job related tasks; and

(6) Reassigning an employee who becomes disabled to another existing, vacant position.

The rights-based requirement for the provision of reasonable accommodations in the ADA is substantially limited by economic considerations. Employers need not provide an accommodation that would "fundamentally alter" the nature of the business.¹⁹ Further, an employer need only provide accommodations that would not constitute an "undue hardship"²⁰ — defined as "an action that involves significant difficulty or expense."²¹ Whether a particular accommodation constitutes

¹⁸ EEOC TECHNICAL ASSISTANCE MANUAL, *supra* note 11, at III-16 to III-21 (1992).

¹⁹ This "fundamental alteration" defense is adapted from case law decided under § 504 of the Rehabilitation Act, 29 U.S.C. § 794 (Supp. IV 1988). See TUCKER & GOLDSTEIN, *supra* note 5, at 5:8-13 (discussing the development of the fundamental alteration and substantial modification exceptions to the requirement that employers accommodate persons with disabilities); *South-eastern Community College v. Davis*, 442 U.S. 397, 413-14 (1979) (upholding a college's refusal to modify its existing nursing education program to accommodate a prospective student with a major hearing disability because such modifications would have compromised the essential nature of the nursing program).

²⁰ 42 U.S.C. § 12112(b)(5)(A) (Supp. III 1992).

²¹ 42 U.S.C. § 12111(10)(A) (Supp. III 1992).

an undue hardship is determined on a case by case basis, considering factors such as the nature and cost of the accommodation, the overall financial resources of the employer, and the impact of the accommodation on the employer's overall operation.²²

The impact on the employer is a primary factor in determining whether an accommodation is reasonable. Thus, larger employers with significant resources must provide a higher level of accommodation than smaller businesses with fewer employees. At first glance, this rationale seems sensible, as a large corporation can more easily absorb accommodation costs.

The problem, however, with the economic rationale underlying the ADA is that, by undervaluing important civil rights considerations, many potential employers are excluded from coverage. The Act does not apply to businesses having fewer than fifteen employees.²³ Also, accommodations for people with more severe disabilities are more expensive and may not be protected, since the necessary accommodations may not be considered "reasonable."

Concerns about the cost to employers having fewer than fifteen employees — businesses which form the backbone of the American entrepreneurial system — led to their exemption from the employment requirements under the Act. Thus, the majority of businesses are not covered by the ADA or any other federal civil rights legislation.²⁴

Small firms represent the most favorable employment situation for many disabled people because they are more likely to hire part-time workers. Access to part-time employment is important to persons with disabilities for various reasons. For some, medical restrictions — such as fatigue — confine them to part-time work. Others must limit the number of hours they work in order to comply with statutory income requirements, so that they will not lose publicly funded medical insurance, which private employers may not otherwise provide.²⁵ In addition, because small firms are located more uniformly in urban and

²² 42 U.S.C. § 12111(10)(B) (Supp. III 1992); 29 C.F.R. § 1630.2(p)(2)(v) (1993).

²³ 42 U.S.C. § 12111(10)(B) (Supp. III 1992).

²⁴ See, e.g., Civil Rights Act of 1964, 42 U.S.C. § 2000e(e) (1988) (exempting businesses which employ fifteen or fewer workers).

²⁵ See Sara D. Watson, *An Alliance at Risk: The Disability Movement and Health Care Reform*, AM. PROSPECT, Winter 1993, at 60-61.

suburban neighborhoods and in rural communities, they are more readily accessible. In sum, cost considerations restrict the ADA's protection against discrimination for people seeking jobs in what may be their most favorable employment situations.

Even for employers that are covered under the ADA, the cost-benefit driven reasonable accommodation provision serves to exclude many disabled people. While statistics on the costs of reasonable accommodations — set forth in Tables 1 and 2 — show that most accommodations are relatively inexpensive, they also show that a substantial number of adaptations may be out of the reach of small employers.

TABLE 1
Employers' Reported Costs of
Accommodations for People with Disabilities²⁶
October 1, 1992 — December 31, 1993

Amount	Percent
\$ 0	15
1 - 500	52
500 - 1,000	11
1,001 - 1,500	5
1,501 - 2,000	3
2,000+	14

Mean = \$1,052²⁷ Median = \$250 N = 211

²⁶ JOB ACCOMMODATION NETWORK, A SERVICE OF THE PRESIDENT'S COMMITTEE ON EMPLOYMENT OF PEOPLE WITH DISABILITIES 13 (1994) (unpublished manuscript on file with the *Cornell Journal of Law and Public Policy*). The Job Accommodation Network (JAN) provides information on accommodations for employees with disabilities. To derive these statistics the Job Accommodation Network sent surveys to 1,169 employers who sought information from the Network. Survey questions assessed satisfaction with Network services, whether an accommodation was provided, and the costs and benefits of the accommodation.

Costs of accommodations included purchasing adaptive equipment, additional training and hiring a reader, sign language interpreter, or personal assistant. Of the 1,169 surveys sent, 567 (48%) were returned. Thirty-six percent of the 535 responding to the question, "Did you use the information provided by JAN to make an accommodation?" answered affirmatively. 211 answered the question, "How much did the accommodation cost you to make?" and 114 answered the question, "How much money did the company save because of the benefits you indicated?" *Id.* at 13-14.

²⁷ One accommodation costing \$18,000 caused the mean to rise substantially above the median.

TABLE 2
Employers' Reported Benefits of
Accommodations for People with Disabilities²⁸
October 1, 1992 — December 31, 1993

Amount	Percent
\$ 0	3
1 - 2,500	24
2,500 - 5,000	14
5,001 - 7,500	10
7,501 - 10,000	7
10,000+	42

Mean = \$16,142 Median = \$7,250 N = 114

Advocates using economic analysis cite these data to assert that people with disabilities can be accommodated in the workplace relatively cheaply.²⁹ The data show that fifty percent of all accommodations can be provided for less than \$500, and that eighty-five percent of accommodations cost less than \$2,000. These data also reveal that the median cost of an accommodation is about \$250. Based on mean costs and benefits, every dollar invested in an accommodation brings \$15.34 in benefits over the long run.³⁰ This analysis may give potential employers the impression that it is "cheap" to accommodate people with disabilities.

A more careful reading of the data, however, also reveals that fourteen percent of accommodations cost more than \$2,000 and that one accommodation costs over \$18,000. Thus, while the assertion that it is inexpensive to accommodate an individual with a disability is true most of the time, it is also true that in approximately fourteen percent of the cases, the costs of accommodations are \$2,000 or higher. The higher cost of accommodations for these latter workers is not obvious from the data and this conceals the likelihood that employers may be

²⁸ Specific benefits resulting in cost savings included: "hiring or retention of a qualified employee, eliminated cost of training a new employee, saved workers' compensation and/or other insurance costs, increased the workers' productivity, and other." JOB ACCOMMODATION NETWORK, *supra* note 26, at 14.

²⁹ Despite the pivotal role of providing accommodations to employed persons with disabilities, remarkably little is known about accommodation costs across different sectors of the economy or across disability groups.

³⁰ \$15.34 is the quotient of dividing the mean benefit (\$16,142) by the mean costs (\$1,052).

unwilling or unable to hire someone with a more severe disability who requires a higher level of accommodation.

The data is also misleading because it reflects the experience of people who are already employed. One possible explanation for the relatively low accommodation costs is that only those persons with disabilities that can be accommodated relatively cheaply have been able to obtain employment. Overall accommodation costs may rise as more people with disabilities enter the labor force.³¹

Under the ADA, employers will be responsible for bearing these rising costs. Tax credits and deductions could reduce the costs of accommodation for some employers, but a survey of 921 employers revealed that only twenty-seven percent believe that tax incentives will induce more employers to hire people with disabilities.³² Possible explanations for this attitude are that employers' lack awareness of the existence of tax incentives, that tax incentives offer no benefit to corporations whose profits are so marginal that they pay little or no taxes, and that the paperwork necessary to obtain the credit is not worth the trouble. In any case, employers bear the brunt of paying for accommodations under the ADA, even though society as a whole reaps the benefits. Whether employers will truly be willing to assume these costs remains to be seen.

CONCLUSION

Cost-benefit arguments were among the most persuasive during the legislative debate over the ADA. However, due to the cost-limiting nature of these arguments, the Act does not sufficiently protect those persons with disabilities who require a higher level of accommodation. If the second wave message about people with disabilities was that they deserved equal rights and employment opportunities and that accommodations could be provided relatively cheaply to achieve those goals, a third wave message about the efficacy of hiring and accommodating individuals with disabilities must develop.

This new message must have civil rights for persons with disabilities as its bedrock, with the understanding that some

³¹ See Thomas N. Chenkos, *The Economics of Employment*, 69 MILBANK Q. 150, 153 (Supp. 1/2 1991).

³² INTERNATIONAL CENTER FOR THE DISABLED, THE ICD SURVEY II: EMPLOYING DISABLED AMERICANS 100 (1987).

accommodations for persons with severe disabilities may be expensive and that an analysis based only on costs and benefits to employers may incorrectly suggest that some societally beneficial accommodations should not be provided. To ensure that persons with disabilities — including those with severe disabilities — are given equal access to opportunity, social policy cannot depend solely on the costs and benefits of accommodation to individual employers. To provide the societally optimal level of accommodations to individuals with disabilities, the costs and benefits to society as a whole must inform the accommodation analysis.

In applying this analysis, it is not equitable to rely solely on employers to fund necessary accommodations. If society as a whole reaps the benefits of providing equal treatment for persons with disabilities, then society as a whole must assume the costs. Shifting some of the burden of accommodation from employers to the taxpayer would benefit individuals with disabilities because employers would be more likely to hire them if they were not responsible for the full cost of providing the necessary accommodations.

Basing disability rights legislation on cost-benefit analysis raises another serious issue. Once the ADA is fully implemented — and we are probably at least a generation away from that reality — should people with disabilities continue to receive Social Security and other income subsidies based solely on the presumption that their disability renders them unable to work? At what point will policymakers act on the assumption that people with disabilities are expected to work and begin to seriously challenge the expenditures for federal disability benefit programs? While this expectation would probably have the positive result of more people with disabilities becoming self-sufficient, in some cases people with disabilities who are not able to work will be unable to receive the federal and state assistance they need.

Disability advocates must begin to think clearly about the ramifications of using narrowly defined economic arguments to justify disability-based programs and laws. While economic arguments may serve to support programs that assimilate those who are closest to the "able-bodied" norm into the larger society, they may have the unfortunate result of further isolating and segregating individuals with the most severe disabilities.