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Accommodations and the ADA: Unreasonable Bias or Biased Reasoning?

Harlan Hahn†

I.

INTRODUCTION

Among the cleavages marked by gender, age, race or ethnicity, and sexual orientation that divide members of modern society, perhaps few schisms have produced more superficial agreement—and more covert conflict—than the faint, wavering, but ineluctable line that separates self-identified persons with disabilities and the dominant or supposedly non-disabled majority. Many of the latter claim to be sympathetic and even supportive regarding the aspirations of disabled citizens. Some experts expound at length on the benefits of the latest treatments or assistive devices for the disabled person. Only a few have expressed open criticism or opposition to the principle of equal rights for Americans with disabilities. Nonetheless, many activists in the disability rights movement may react with a knowing glance, a meaningful smile, a slight shake of the head, and a muttered aside: “They just don’t get it, do they?”

This lack of understanding has also been evident in the failure to reach a

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1. To avoid confusion and misunderstanding, it must be mentioned first that there are major differences in the nature of documentation that both reflect and influence the contrasting perspectives of law and the social sciences. According to conventional assumptions, lawyers should follow a seemingly relentless logic derived from settled precedents and supported by legal authority. By contrast, many social scientists view judicial rulings as simply another form of public policy shaped by social and political values rather than by inexorable rationality. Hence, they are engaged in a continuing search for innovative approaches, creative break-throughs, and speculative leaps from earlier paradigms; and their citations are designed to demonstrate the limitations as well as the evidence represented by existing information. Moreover, they often believe that proposed solutions to persistent problems are molded by distinct experiences instead of objective reasoning. Thus, the common, though often unspoken, perception that the rights of disabled citizens under the Americans with Disabilities Act (ADA) extend beyond the rights granted other individuals fails to encompass a recognition of “taken-for-granted” or unacknowledged aspects of the environment that bestow significant advantages upon non-disabled people and corresponding disadvantages upon persons with disabilities. And of course features that contribute to this kind of biased reasoning are never fully documented.

consensus about the meaning of concepts and terms that are crucial to an interpretation of the Americans with Disabilities Act (ADA).\(^3\) Disabled and non-disabled persons frequently seem to be “talking past each other.” The superficial discussion of issues that appear to evoke agreement, but are actually the source of deep-seated conflict, has masked an accurate appreciation of public, judicial, and other reactions to the ADA. The distinction between impairment and disability has been obscured. Legal definitions have emphasized functional attributes instead of stigma and unfavorable attitudes as a major sources of discrimination. And lawyers and judges have displayed a strong resistance to research based on the “minority group” model of disability. As a result, controversies about the ADA have been shaped by a “disabling discourse” rather than by discourse about disability.

An important part of this miscommunication probably can be ascribed to non-disabled domination of the interpretation of the ADA. Citizens with disabilities have been largely excluded from this process. Whereas few analysts would contend that laws prohibiting discrimination on the basis of gender and race or ethnicity should be implemented without consulting the experience of women or African Americans, respectively, a similar recognition has not been extended to the disabled minority. Furthermore, the non-disabled monopoly over major decisions about the ADA can be accurately characterized by the concept of paternalism. These circumstances not only legitimate patterns of subjugation between non-disabled and disabled portions of the population, but they also simultaneously deny the existence of such subordination. Major Supreme Court decisions about disability rights, therefore, have been decidedly unfavorable to the interests of this segment of society. Such judgments have ignored the many advantages conferred on the non-disabled and the disadvantages imposed on people with disabilities by features of the environment that are virtually invisible or taken for granted. In fact, judicial opinions have increasingly seemed to suggest that the protection granted Americans with disabilities constitutes a kind of unreasonable bias which extends beyond the guarantees bestowed on other individuals. No attention is devoted to the biased reasoning produced by the failure to consider the benefits bequeathed to the non-disabled or the penalties inflicted on disabled citizens by the existing milieu.

The covert hostility and paternalism that permeates public and judicial perspectives has, of course, tended to perpetuate the unequal status of disabled persons. One means of redressing this oppression might be achieved through adherence to the principal of Equal Environmental Adaptations which would seek to “level the playing field” by permitting disabled citizens to enjoy benefits commensurate with the advantages given the non-disabled in an unaccommodating environment. Perhaps the most essential prerequisite for this change would be the development of a new dialogue about disability based on candid opposition rather than paternalistic sentiments. In the absence of such debate, the prospect of ameliorating the problems of disabled Americans through the ADA might be

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considered problematic.

II. DISABLING DISCOURSE

Misunderstandings about social issues seldom emerge in a vacuum. Any attempt to comprehend the nature and origins of divided views about disability rights, therefore, must be founded on an enhanced appreciation of the radically different hermeneutics through which non-disabled and disabled people frame the pertinent questions. Much of this discord has revolved about the definition of disability.

A. Disability and Impairment

One of the most fundamental differences between disabled and non-disabled groups revolved about the description of the principal problem encountered by people with disabilities. While dominant segments of the population tend to believe that these difficulties stem primarily from internal traits, an increasing proportion of disabled persons feel that their main impediments are located in the external environment. This dichotomy seems to parallel the distinction between impairments—which are equated with physiological, anatomical, or mental abnormality or loss—and disabilities, which frequently involve an admixture of bodily and environmental attributes. For those who have never had any experience with disability, blame for threatened interference with favorite or essential activities is usually concentrated on the fear of an organic impairment. People who live with disability, however, are preoccupied by the challenge posed by environmental barriers to increased social participation. Most non-disabled persons do not appear to understand the powerful influence upon their consideration of disability that is exerted by the traditional model of impairments, which also contributes to the continued subordination of disabled individuals.

The imprint of this fear of impairment is evident in the widespread tendency to view disability as a medical or an economic problem. Perhaps the earliest and most widely adopted understanding of disability in public policy is related to the definition of an inability to earn a livelihood, which has been used in social welfare legislation in America since a law passed by the Continental Congress during the Revolutionary War. Perhaps the most popular perception of disability, however, is derived from a medical model which equates impairments with diagnostic classifications labeled by etiological considerations or by parts of the body. Examples of such diagnostic classifications include Polio and Down Syndrome (relating to etiology) or paraplegia and vision impairment (relating to a part of the body).
finding cures for many impairments (that often reduces the physician to the passive role of monitoring or evaluating the progress of chronic difficulties) or in permitting public agencies to discover an empirical correlation between various types of impairments and the ability to work. ⁷ Both medical and work definitions, however, assess impairments almost exclusively as a functional concern; both regard disability as a limitation or loss. According to this view, by definition, disabled people suffer from a deprivation of occupational as well as physical or mental capacities, which deprivation reduces their status and worth as human beings.

The only remedies that have been developed to address disability as an impairment or functional problem are embodied in the concepts of medical and vocational rehabilitation. ⁸ Neither solution has been particularly satisfactory even for the most ardent proponents of these disciplines. Despite the best efforts of physicians and a host of other health professionals, for example, most chronic impairments are permanent; they cannot be “fixed” or repaired completely. Until the advent of bionic sales catalogues, therefore, the average disabled person will never approximate the standards of ordinary or “normal,” let alone optional, functioning. Similarly, much of the success of the federal-state vocational rehabilitation program can be attributed to a process of “creaming,” through which job placement services were devoted primarily to the most cooperative, the least needy, and the least disabled clients, ⁹ at least prior to the reversal of priorities mandated by the Rehabilitation Act of 1973.¹⁰ The unemployment rate for adults with enduring impairments, most of whom are anxious and able to work, has remained at an extraordinarily high level (approximating two-thirds) in the United States as well as in other advanced industrial nations.

Medical personnel and rehabilitation counselors have sought to alleviate the functional burdens of impairment primarily through private or public charities. Many people with disabilities have been especially critical of “telethons” and similar events, often hosted by non-disabled celebrities such as Jerry Lewis, that not only depict an image of disabled children and adults as helpless or pathetic creatures but that also raise funds almost exclusively for medical research or “cures,” thereby reinforcing the presumption that the elimination of the impairment (or the disabled individual?) is the sole appropriate solution to this problem. Yet politicians and professional interest groups have never endorsed a program comparable to Medicare for Americans with disabilities. In fact, since disabled

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persons seldom can secure entry-level employment that pays a sufficiently high salary or that offers group insurance covering "pre-existing conditions," many disabled citizens can only meet their continuing medical expenses by qualifying for programs such as Supplemental Security Insurance (SSI) or Social Security Disability Insurance (SSDI) that create "dismotivational inefficiencies" by providing health care needed to survive in exchange for the promise of unending joblessness. As a result, the disabled minority has become one of the few groups in the "deserving poor" that can use enforced idleness to become culturally legitimate recipients of donations either through welfare benefits or through begging.

Finally, most plans to ameliorate functional impairments devised by medical and vocational rehabilitation have depended on individual rather than collective action. The reliance of professionals upon clinical methods is clearly indicated by the fact that rehabilitation specialists borrowed from psychiatry and psychology instead of the social sciences to promote an assumption that the socially and economically marginal status of disabled persons stemmed from a lack of motivation and emotional adjustment. One of the few medical approaches to disability that extended beyond the boundaries of the human body imposed by clinical techniques was the pernicious doctrine of eugenics that resulted in tragedies such as the Supreme Court decision upholding the constitutionality of involuntary sterilization in *Buck v. Bell*, as well as scientific concepts justifying the extermination of millions of disabled persons in the Holocaust. Ironically, public health has displayed more concern about the prevention of impairments than about the fate of disabled people. Similarly, even though the growth of disability roles has been influenced less by the prevalence of impairments than by broad trends in the labor force that might be altered through changes in employment programs, economic approaches to rehabilitation have tended to focus primarily on individual counseling and on vocational interest and aptitude instead of public policy.

Most judicial decisions about disability rights in the ADA and related measures have steadfastly clung to the dubious proposition that the problems of disabled citizens are a direct result of their impairments. One major source of this confusion of disability and impairments probably can be ascribed to the failure of disabled people to surmount an initial hurdle to their social and political recognition, namely, they have frequently been unsuccessful in refuting implicit or explicit allegations of biological inferiority. Hence, by definition, people with disabilities are inherently unequal because they are functionally impaired. Both the

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12. For a critique of this orientation, see Paul Abberly, *Disabled People and "Normality," in Enabling Barriers-Enabling Environment* 107-115 (John Swain et al. eds., 1993).
13. 274 U.S. 200 (1927). One eminent constitutional scholar characterized the final paragraph of this opinion by Justice Oliver Wendell Holmes, Jr., by saying, "Seldom has so much questionable doctrine been compressed into five sentences of a Supreme Court opinion." C. Herman Pritchett, *The American Constitution* 538 (1977).
dictates of meritocratic principles and the nature of their limitations often form the foundations of assumptions that support arguments to prevent disabled citizens from claiming rights equivalent to their non-disabled counterparts.

The struggle to rebut accusations of organic inferiority is a process that other minority groups have had to sustain in order to secure eventual legal protection. Since the nineteenth century, even the most advanced scientific thinking and research has been molded by debates about the alleged intellectual inferiority of African-Americans and other minorities, and Supreme Court opinions were infused with extraordinarily patriarchal and paternalistic stereotypes about women. The history of classic judicial opinions that bear the imprint of the dominant conceptual paradigms of the era in which these cases were decided underscores the realization that information or conclusions which appear to be neutral or impartial actually are based on knowledge that is socially and culturally determined. In fact, the tendency to treat impairment and disability as synonymous probably can be traced, in part, to the overwhelming power that has been vested in scientific interpretations of physical traits in western society since the eighteenth century. There are, of course, many other theoretical perspectives on disability. There is reason to believe, therefore, that courts can disentangle the concepts of impairment and disability as readily as they became intertwined in earlier analysis.

Part of the difficulty of unraveling the concepts of impairment and disability, however, probably can be attributed to the misunderstanding provoked by the three-pronged definition of disability in the ADA. By stressing limits on “major life activities” to the neglect of other elements of the ADA definition, courts have virtually folded the later two spikes into the first spur so that the question of defining whether or not a plaintiff has a disability is determined almost exclusively by disputes about the loss of a major life activity. Apparently reflecting the confusion of impairment and disability, judges have tended to ignore the prongs of the definition which can be construed to prohibit discrimination against someone who is “regarded as having such an impairment” or who has “a record of such impairment.” In 1987, the Supreme Court held that a teacher who had been forced to bear the stigma of an earlier diagnosis of tuberculosis was entitled to protection from discrimination based on disability. In Bragdon v. Abbott,
however, the Court returned to a strictly functional understanding of disability by
deciding that an asymptomatic person infected with HIV could bring suit under the
ADA because her impairment interfered with her capacity for reproduction, which
was, for her, a major life activity. As a result of this confusion over the various
ADA prongs, legal conflict about the ADA ban against discrimination has
degenerated into rather mundane disputes about whether a worker can be fired for
wearing eyeglasses, for taking medication for hypertension, or for a vision
impairment in one eye.24

The tendency to equate disability and impairment has done much to
undermine the effectiveness of the ADA. There is little evidence that the statute
has ended the long-standing practice of using disability as a means of permitting
personnel officers to sort out job applications and to exclude unwanted candidates
for employment. In addition, weakness in the implementation of the ADA by the
courts have been ascribed to the disproportionate selection of cases involving
relatively minor or insignificant disabilities.25 The effort to resolve questions about
the hypothetical link between types of impairments and judicial outcomes,
however, might require the use of techniques such as detailed interviewing and
narrative analysis26 that extend beyond simply quantitative studies. One in-depth
analysis of the accounts of employment discrimination cases launched by ten
workers with mobility impairments, most of whom were eventually defeated in
court and fired from their jobs, disclosed that they were left with little more than
the hope that the ADA might bring increased justice to other citizens with
disabilities in the future.27 These findings lend at least some credence to the
speculation that the characteristics of the plaintiffs may have been a less important
determinant of the litigation than the social, political, and legal values of non-
disabled employers, attorneys, and judges who have scant personal awareness or
education concerning the prejudice and discrimination encountered by disabled
Americans. Efforts to expand public knowledge and to improve judicial decisions
regarding the ADA, therefore, could be facilitated by the development of a new
understanding of the nature and meaning of disability.

B. A New Definition of Disability

Judicial interpretations of ADA definitions have not established a foundation

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24. These issues were placed before the Supreme Court in 1999 in Sutton v. United Airlines, Inc., 527 U.S._,
   119 S.Ct. 2139 (1999); Murphy v. United Parcel Serv., 527 U.S._, 118 S.Ct. 2133 (1999); and Albertsons Inc. v.
   Kirkburg, 527 U.S._, 119 S.Ct. 2162 (1999), respectively.
25. There is, of course, often a tendency for some lawyers to seize upon new statutes to present novel
   arguments that have not been successful. Before leaving office, Evan Kemp expressed the opinion that an inordinate
   number of early ADA lawsuits involved relatively frivolous, trivial matters such as “halitosis and hangnails.”
   Telephone Interview with Evan J. Kemp, Jr., Chairman of the EEOC (Aug. 28, 1991) (notes on file with author).
26. See, e.g., David M. Engel & Frank W. Munger, Rights, Remembrance, and the Reconciliation of Difference,
27. John Anthony White, Jr., The Role of Occupation and Adaptation in Ritual Transformation: An Ethnograph
   Study of Ten People with Mobility Impairments Using Title I of the ADA to Fight Employment Discrimination (1998)
for major advances in disability rights. On the contrary, the conceptual confusion that permeates this issue has sometimes been exploited to defeat the goals of disabled citizens. Perhaps the clearest examples of these machinations are the cases in which employers have urged courts to invoke the doctrine of estoppel to dismiss the ADA suits of disabled workers who had previously received Supplemental Security Income (SSI) or payments from Social Security Disability Insurance (SSDI).\(^{28}\) Decisions upholding this viewpoint have relied upon the discrepancy between the definition of "work disability" which permits individuals to secure SSI or SSDI benefits if they are unable to engage in substantial gainful activity or to qualify for employment, and the ADA definition of impairments limiting "major life activities" which allows persons to seek "reasonable accommodations."\(^{29}\) This contention is clearly inconsistent with the intent of the ADA to reduce unemployment among people with disabilities and to encourage them to return to the productive workforce. The application of the notion of estoppel to the tension between SSI or SSDI definitions and the meaning of disability in the ADA also subverts several specific provisions of social welfare laws that are designed to promote remunerative work for disabled people, such as vocational counseling, "trial work periods," and PASS (Plan to Achieve Self Sufficiency) programs. Perhaps most importantly, these contradictions have been created by public policy rather than individual motivation; and citizens with disabilities should not be penalized for paradoxes that can only be rectified by legislators.

There appears to be a pressing need to seek judicial attention and acceptance for a sociopolitical definition of disability as the product of interaction between individuals and the environment.\(^{30}\) From this perspective, the major problems confronted by people with disabilities can be traced to the restraints imposed by a disabling environment instead of personal defects or deficiencies. This conceptualization can be applied to the architectural barriers that impede the activities of persons with mobility impairments and to the communication barriers that restrict people with sensory impairments. In a world adapted to the needs and interests of everyone, functional limitations (or impairments) would be virtually non-existent. In surroundings adapted to an increasing range of human capabilities, such restrictions would be diminished. Obstacles exist, therefore, because the present environment was basically designed for "the average person plus or minus half a standard deviation."\(^{31}\) The configurations of the existing environment confer significant rewards on the non-disabled and corresponding penalties on citizens

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\(^{28}\) This issue was accepted for review by the U.S. Supreme Court in 1998 in *Cleveland v. Policy Management Sys.*, 526 U.S. 795 (1999).


with disabilities. This sociopolitical definition, which became the foundation for legislation such as the ADA, has allowed a recognition that disabled people comprise a disadvantaged group subjected to discrimination and entitled to legal and constitutional protection.

Perhaps the principal explanation for the continued tendency by the courts to muddle the assessment of discrimination under the ADA by treating disability as little more than an impairment can be traced to the failure of the judiciary to adopt, or even to acknowledge, the sociopolitical perspective. Features of the human-made environment that segregate disabled citizens from the rest of the population have not been decreed by immutable natural laws, nor were they produced by historical happenstance or coincidence. They represent conscious choices that had the effect of including some groups, such as the dominant segments of society, and excluding others who were “different” or disabled. Disability thus is essentially similar and certainly analogous to other physical characteristics such as skin color, ethnic features, and sex that are perceived either through casual observation or close inspection. These bodily traits have been used by humans as bases for differentiating and discriminating against other people; they form the foundation for prejudices derived from cultural meanings that have evolved through centuries. In the case of people with disabilities, bigotry or bias is evoked either by visible bodily differences or by stigmatizing labels attached to physiological attributes. Through the process of labeling, people with so-called “hidden” as well as obvious disabilities become the targets of discrimination. As a result, visibility and labeling might be identified as the key elements in a sociopolitical definition of disability that is not dependent on the concept of impairment.

The sociopolitical definition also focuses on the attitudinal environment as the principal source of the barriers confronting people with disabilities. Ironically, this

32. In many respects, the sociopolitical approach is comparable to the definition of disability formulated years ago in Great Britain by the Union of the Physically Impaired Against Segregation (UPIAS):

In our view, it is society which disables physically impaired people. Disability is something imposed on top of our impairments by the way we are unnecessarily isolated and excluded from full participation in society.... Thus we define impairment as lacking part or all of a limb, or having a defective limb, organ or mechanism of the body; and disability as the disadvantage or restriction of activity caused by a contemporary social organisation which takes no or little account of people who have physical impairments and thus excludes them from participation in the mainstream of social activities. Physical disability is therefore a particular form of social oppression.

MICHAEL OLIVER, UNDERSTANDING DISABILITY 22 (1996).

33. This analysis parallels, in some respects, the discussion of “difference” in MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW (1990). Instead of focusing on a “social relations” approach or “situated knowledge” that reflects the perception of the observed and the observer, however, the emphasis on visibility and labeling as the primary object of discrimination seems to allow distinction to be drawn between the investigator and the subject, and perhaps by extension between impairment and disability, that would permit an empirical study of the bodily variations that elicit prejudice. Moreover, Minow’s discussion follows and endorses the comparative approach to the study of political identity and discrimination indicated in her later book, MARTHA MINOW, NOT ONLY FOR MYSELF: IDENTITY, POLITICS, AND THE LAW (1997).


35. Labeling and visibility could be viewed as an operational measure of “record” and “regarded” in the ADA definition. 42 U.S.C. § 12102 (1994); cf. Mayerson, supra note 21.
phenomenon, which often seems to escape the attention of non-disabled researchers, has been a major concern of disabled persons. "When groups of disabled people are asked about the greatest obstacle they confront, the reply usually comes back in a single chorus: 'attitudes.'" The apparent neglect by the judiciary of attitudes that produce discrimination against citizens with disabilities is somewhat remarkable especially in view of the enormous accumulation of evidence which reveals that visible or labeled differences frequently provoke feelings of antipathy and avoidance. Some researchers have identified such a propensity in infants, a phenomenon known as "stranger anxiety" which may originate in the first year of life. Another taxonomy has suggested that the origins of discrimination on the basis of disability could be attributed either to "existential anxiety"—the dread that such a phenomena might affect an observer especially in the process of aging—or to "aesthetic anxiety"—the fear of the alien, strange, displeasing, unattractive, or "different." Adverse reactions to people with disabilities appear to be elicited largely by visible or labeled traits which appear to transform the disabled individual into the unfamiliar "Other."

A classic study of social interactions revealed that disabled adults usually felt obliged to reduce the unspoken discomfort of non-disabled individuals which was also disclosed, in experimental settings, by detectable physiological responses. Perhaps the most compelling documentation of the displeasure and uneasiness aroused by the visible signs of disability, however, was provided by the unfavorable reactions of non-disabled children and adults to a series of drawings of

36. At a symposium on disability sponsored by the American Enterprise Institute, the chairman of the EEOC commented on papers presented by four economists for their "failure to recognize the tremendous prejudice against disabled people that exists in our society." Evan J. Kemp, Jr., Disability in Our Society, in DISABILITY AND WORK 57 (Carolyn L. Weaver ed., 1991). The implications of such an orientation for the assessment of employment discrimination are indicated by the following statement by two other economists in a book with the same title when they contrasted their approach to the views of most disability rights advocates:

To them, equal access is a fundamental principle, and its achievement is to be secured as a matter of right, irrespective of cost. An alternative point of view, however, is that the 'equal access' goal differs little from other important objectives in the disability area, such as efficiently sharing the cost of impairments or undertaking efficient investments to reduce the cost of disability. In this perspective, the costs of securing more equal access must be set off against the benefits that a reduction in inequality conveys. And no absolute level of access inequality is to be set as inviolable.

RICHARD V. BURKHAUSER & ROBERT A. HAVEMAN, DISABILITY AND WORK 82 (1982). Many other nondisabled professionals have endorsed the belief that equality for citizens with disabilities is an acceptable goal as long as it does not entail financial costs or impinge on the traditional prerogatives that they have enjoyed. See, e.g., MARK KELMAN & GILLIAN LESTER, JUMPING THE QUEUE (1997).


42. See, e.g., Robert Kleck, Emotional Arousal in Interactions with Stigmatized Persons, 19 PSYCHOL. REP. 1226 (1966); Robert Kleck et al., The Effects of Physical Deviance upon Face-to-Face Interaction, 19 HUM. REL. 425 (1966).
young people with obvious disabilities. These studies appeared to yield more clear and convincing proof of bias and aversion than the famous Clark and Clark study of doll preferences cited by the Supreme Court in footnote eleven of the Brown v. Board of Educ. opinion. Perhaps the most important point to be made about these attitudes, however, is that they are usually held by non-disabled people. Thus the divisions between African-American and whites, men and women, and Latinos and Anglos are replicated by the distinction created by visible and labeled disabilities. This unavoidable fact not only belies the allegation that non-disabled people are not opposed to the goals of the disabled minority, but it also indicates the powerful vested interests that underlie the relationship of dominance and subordination between these segments of the population.

Disability also has played the predominant role in the development of the concept of stigma, which was probably best explained by Goffman when he wrote, "By definition, of course, we believe the person with a stigma is not quite human." Through the process of stigmatizing, individuals are deprived of their humanity, which can be regarded as an even more severe loss than the denial of legal rights imposed on citizens who become the victims of intolerance or bigotry. In fact, disability has been described as "the most severely stigmatized" of all physical differences. Even though notions of stigma and difference have been elaborated in subsequent studies, these ideas have never been effectively integrated into legal battles concerning prejudice and discrimination. Contentions about attitudinal discrimination against people with disabilities, however, seem to be as firmly supported by empirical evidence as arguments that have been made on behalf of other minority groups.

C. The Minority Group Model

The sociopolitical definition is the foundation of the minority group model of disability which contends that disabled Americans are entitled to the same legal and constitutional protection as other disadvantaged groups. This concept actually has an extensive history. In 1953, a major study published by the Social Science


44. See Kenneth B. Clark & Mamie P. Clark, Racial Identification and Preference in Negro Children, in READINGS IN SOCIAL PSYCHOLOGY 551-560 (Guy E. Swanson et al. eds., 1952).


47. See Lerita M. Coleman, Stigma: An Enigma Demystified, in THE DILEMMA OF DIFFERENCE 214 (Stephen C. Ainlay et al., eds., 1986).


49. For a more detailed presentation of this analysis, see Harlan Hahn, Antidiscrimination Laws: The Minority Group Perspective, 14 BEHAV. SCI. & L. 41 (1996).

Research Council endorsed “the very general assumption that in American culture physically disabled persons, like Negroes and children, for example, have the position of an underprivileged minority.” Safilios-Rothschild wrote in 1970 “that the concept of the minority group can be applied in the case of the disabled despite minor differences.” A decade later a pioneering report on youth with disabilities for the Carnegie Council on Children, which was based exclusively on the “minority group” model, appeared under the ironic title, The Unexpected Minority. As a result, the first Harris survey found in 1986 that 45 percent of Americans with disabilities felt that disabled persons are a minority group in the same sense as blacks and Hispanics and 74 percent reported “a sense of common identity with other disabled people.”

There are undoubtedly several reasons for the resistance that the courts have displayed toward the minority group model. The definitions of functional impairments and work disability are embedded in older and more established government programs than the sociopolitical view supporting anti-discrimination laws that must be administered by lawyers and judges. In addition, disabled people traditionally have lacked a sense of generational continuity or a shared history that would otherwise have facilitated the dissemination of information about prejudice and oppression. At least until the growth of the disability rights movement, they were commonly burdened by feelings of humiliation and shame that prevented them from drawing upon their own experience to investigate patterns of discrimination.

Part of the responsibility for the reluctance to adopt the minority group model also must be imposed on social scientists. The realization that disabled people constitute a minority group has only been somewhat acknowledged in medical sociology; it has not yet gained wide acceptance in the academic disciplines or fields which concentrate on the study of social inequality, bigotry, and discrimination. A popular textbook on racial and cultural minorities, for example, specifically excluded the “physically handicapped,” even though the authors admitted that such research “can help us to develop a more general theory of discrimination.” Attention has been diverted both from the examination of discrimination in the everyday lives of persons with disabilities and from the analysis of the conduct of the non-disabled portion of the population that produce this form of discrimination. As a result, reticence about accepting the minority

52. SAFILIOS-ROTHSCHILD, supra, note 9, at 114-115.
group model has deprived attorneys and judges of a solid foundation for legal arguments concerning discrimination against citizens with disabilities.  

Increased analysis of issues derived from the minority group paradigm could persuade the courts to focus on many dimensions of ADA litigation that might otherwise be neglected or ignored. In fact, the major postulates of the “minority group” model have been described as follows: (a) the basic problems of disabled persons stem from social attitudes; (b) all facets of the environment are molded by public policy; and (c) policies that have an adverse effect on people with disabilities are a reflection of widespread social attitudes and values. Two important implications can be drawn from these postulates. First, aspects of the environment that have a discriminatory impact on citizens with disabilities cannot be ascribed solely to accident or coincidence. Beneath the level of conscious exploitation, the configurations of the existing milieu reflect the faintly discernible relations of power and privilege that divide disabled and non-disabled segments of society. Social structures were designed to enhance the prestige and authority of the non-disabled, but they were not planned “without any mind to” the needs and interests of people with disabilities. Persons with visible or labeled differences stemming from impairments have existed throughout history, and they have usually been the objects of ridicule or scorn. Instead of assuming that environmental barriers to this group occurred as a result of random influences, it would seem unreasonable to believe that, in constructing human habitats, the dominant non-disabled majority was not affected by the motivation to subordinate and separate itself from such people.  

Second, the surroundings created by public policy have almost invariably conferred advantages upon the non-disabled portion of the population and disadvantages on the disabled minority. In a society where non-disabled persons have always had the virtually unchallenged power to determine the shape of the social environment, any other result would seem nearly inconceivable. Yet, the task of discovering the advantages bestowed on the non-disabled may be even more difficult than the endeavor to identify the disadvantages faced by Americans with disabilities. Perhaps most significantly, these benefits are such an integral facet of

58. It does not seem inconceivable, for example, that an empirical investigation could be designed to study the degree and extent of avoidance, prejudices, and other forms of discriminatory behavior elicited by variations in the visible or labeled physical characteristics reflected by obvious or hidden disabilities. The difficulty, of course, is that the overwhelming preoccupation with the study of functional impairments has diverted interest and resources from the pursuit of this kind of research.

59. For a discussion of the inordinate emphasis placed on walking in this society from the perspective of a wheelchair user, for example, see OLIVER, supra note 33, at 96-109.

60. This analysis parallels, in some respects, the discussion of stigma theory and unconscious racism in Charles R. Lawrence III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 STANFORD L. REV. 317 (1987).

61. Perhaps the clearest, though not the most costly, example is chairs which, for wheelchair users who are considerate enough to bring our own, represent a significant concession to the nondisabled segment of society. Although chairs may comprise a sizable portion of the budget for many facilities, their expense is relatively trivial in comparison with the enormous economic and other rewards bequeathed to the nondisabled by a milieu shaped almost exclusively for their benefit.
the existing environment that they are “taken-for-granted” are largely invisible and unnoticed. The advantages granted to non-disabled people by this environment, however, are extremely relevant to the attempt to establish a standard for evaluating equality between the disabled and non-disabled segments of the population. Any effort to assess the issue of equal rights for citizens with disabilities without considering these “taken-for-granted” privileges would be both incomplete and highly prejudicial.

III. NON-DISABLED DOMINATION OF THE DISCOURSE

Perhaps the principal reason for the tendency of courts to ignore the basic sources of discrimination against disabled persons in ADA controversies can be traced to the characteristics of the major participants in public discussions about disability. The assessment of this proposition seems especially relevant in a post-modernist age permeated by the philosophical tenets of discursive analysis. In general, words and thoughts bear the imprint of the groups or individuals who express them; hence, they may be expected to shape legal assessments of common features of the lives of adults with disabilities such as unemployment and discrimination. The difficulty, of course, is that the discourse of disability has

62. The question might be asked: What accounts for these environmental inequities, and why are they so widely ignored? The answer to the first portion of the question seems comparatively simple: Nondisabled people throughout history have been relatively powerful, and persons with disabilities have always been numbered among the powerless. The response to the second part also seems rather straightforward: The advantages accruing to the nondisabled are taken for granted. The explanation for this relative neglect can also be partially attributed to the concept of paternalism discussed below in text accompanying infra notes 73-76.

63. To a non-lawyer, an appropriate reply to the relentless demand to resolve dilemmas that have puzzled philosophers for centuries by furnishing a simple and precise definition of equality might be summed up by the common-sense formula: Equal=equal. More technical and complex efforts to parse the meaning of this word in the manner that seems to appeal to lawyers are discussed below. At a minimum, however, attempts to apply the principle of equality to litigation concerning the status of disabled and nondisabled citizens must be devoid of any assumptions of biological inferiority; and it should fulfill the obligations indicated by the familiar phrase, “a level playing field.” Thus, to speak of an “accommodation duty” in the ADA as though it represented an extension beyond the advantages granted to nondisabled persons, or a special favor to disabled citizens, is a serious misinterpretation of the concept of equal rights. In a fundamental sense, the legal responsibility to provide “reasonable accommodations” merely reflects an effort to level the playing field. To querulous critics who may insist on an exact definition of the limits of such accommodations, reference can only be made to the research contemplated in footnote 36. An empirical investigation of the aversion reflected by reactions to visible and labeled bodily differences could be used to define the boundaries of physical characteristics that are especially deserving of the legal protection available in antidiscrimination laws. Beyond this point, the argument becomes tedious and unproductive.


66. One political theorist has stated that to understand the meaning of disability “is to describe its location in a field of discursive relations and thereby to locate those persons or groups of persons who control the responsibility prescriptions that attend and constitute the disabled role.” Michael J. Shapiro, Disability and the Politics of Constitutive Rules, in CROSS NATIONAL REHABILITATION POLICIES: A SOCIOLOGICAL PERSPECTIVE 87 (Gary L.
long been dominated by non-disabled professionals such as rehabilitation specialists and other so-called experts. Disabled people themselves have never been able to express more than a thin and faint voice in debates about their own problems. The opinions of people with disabilities have often been excluded from this dialogue. Even the disability rights movement has had less influence on the interpretation and implementation of the ADA than many of its members expected.

Perhaps the most important determinant of future controversies about the ADA might be the willingness of potential plaintiffs to identify with the disabled minority. In a society where so many taken-for-granted facets of the environment favor their non-disabled peers, most disabled individuals have been socialized to believe that they can only compete on equal terms by relentless striving through overcompensation, or in the nomenclature of the disability community, by becoming "supercrips." They have not been encouraged to request accommodations, and many have found it difficult to initiate legal action on the basis of a physical trait that they have been taught to "overcome." Yet the effect of court decisions about the ADA may fundamentally depend upon the ability of disabled citizens to achieve a delicate balance between a positive sense of self-esteem and a critical view of society, which seems necessary to sustain a continued struggle for equality and justice.

Many disability professionals still act as though they are more qualified to speak on behalf of citizens with disabilities than disabled people themselves. Yet social workers or service providers appear to have little familiarity with the ADA. Judicial rulings also may be affected by the dearth of lawyers who specialize in ADA litigation. In particular, the development of case law on this subject has been plagued by fragmentation resulting from the tendency of early decisions about disability rights to be shaped by the concerns of individual plaintiffs rather than by a coordinated and cohesive strategy. The outcome of disputes about the ADA could be crucially influenced by the proportions of non-disabled and disabled persons who become involved as litigants, attorneys, and judges. Thus, there appears to be significant support for the proposition that court decisions about statutes prohibiting discrimination on the basis of disability may be shaped as much by differences in the experiences of major groups in the judicial process as by substantive considerations related to the interpretation of specific provisions of the


67. For a general—and early—appraisal of implementing the ADA, see IMPLEMENTING THE AMERICANS WITH DISABILITIES ACT (Lawrence O. Goslin & Henry A. Beyer eds., 1993) and IMPLEMENTING THE AMERICANS WITH DISABILITIES ACT (Jane West, ed., 1996).


IV. THE HEGEMONY OF PATERNALISM

Perhaps the most serious and intractable hindrance to the advancement of the rights of people with disabilities is represented by the concept of paternalism which often appears not only to justify the powerful position of non-disabled persons but also to conceal the comparatively powerless status of the disabled minority. In many respects, paternalistic attitudes may be a natural extension both of non-disabled domination of the discourse about disability and of the persistence of assumptions concerning the alleged biological inferiority of people with disabilities. While research in the social sciences has revealed a deep-seated animosity toward citizens with visible or labeled disabilities,73 hardly anyone permits their true feelings about these traits to become conspicuous. Non-disabled opposition to the interests of disabled Americans is almost invariably covert instead of open or public. The implicitly patronizing sentiments and the slight tone of condescension that sometimes creep into relationships between the non-disabled and disabled individuals or groups are also revealed by the tendency to interpret disability as a personal tragedy74 and as an appropriate subject of charity. Perhaps most importantly, the cultural conventions implanted by paternalism constitute an almost indefinite means of perpetuating the social and political oppression of citizens with disabilities.

In many respects, paternalism may be an even more formidable obstacle in the struggle for equality than direct conflict or even hostility. Paternalism often engenders a climate of deceit and hypocrisy that makes it difficult for leaders of the disability rights movement to challenge the opinions of non-disabled professionals who claim to be acting in the best interests of this beleaguered minority.75 But there does not appear to be any reason to think that issues concerning disability rights are any less likely to involve conflicting political interests than other controversies. Hence, there is little wonder that there is a “backlash” against the ADA; what seems unexpected is that many people are surprised by it. Some critics in the disability rights movement might contend that unfavorable assessments of the ADA simply reflect the animosity toward the disabled minority that many non-

72. To avoid misinterpretation, it must be emphasized that this statement is purely speculative. It does seem consistent, however, with the theoretical orientation implied by discursive analysis and with the biased or skewed analysis of major issues in the interpretation of ADA created by the nondisabled domination of the discourse of disability. Hence, the failure to consider the advantages or disadvantages produced by “taken-for-granted” features of the environment and the neglect of the sociopolitical definition of disability can be traced to the differences between the experiences of disabled persons and the dominant participants in this discussion.

73. See the research cited in footnotes 43 and 54, supra.


75. Nondisabled individuals frequently seem to have an almost insatiable desire (or need?) to “help” people with disabilities. This generalization seems to apply with equal effect to judges and legal analysis as well as physicians and bureaucrats.
disabled persons have harbored in their hearts and minds for years. Some disabled advocates may even welcome this development as an initial break through the veneer of paternalism that has surrounded the analysis of disability rights. The candid acknowledgment of disagreement and opposition would contribute to a healthy debate about the interpretation of the ADA. As an antidote to the deep hostility that may be manifested as backlash, it could be necessary to promote a frank dialogue, which may evoke discord but which might even lead to an increased understanding of the principle of equal rights for Americans with disabilities.

V. JUDICIAL ATTITUDES TOWARD DISABILITY RIGHTS

Perhaps the most crucial manifestation of the sentiments of non-disabled professionals can be found in the unfavorable attitudes toward disability rights displayed by Justices of the United States Supreme Court in almost all of the major cases that they have decided about this issue.

The concept of paternalism is especially crucial to an interpretation of the position taken by the Supreme Court on the constitutional status of disabled citizens. Ironically, this question encouraged the Justices to investigate whether public opinion about disability is basically positive or negative. The leading case on this issue is, of course, *Cleburne v. Cleburne Living Ctr.* At issue in *Cleburne* was the validity of the City's requirement that the Cleburne Living Center obtain a special use permit in order to build and operate a group home for the mentally retarded. The Court concluded that, though the City's actions would be scrutinized only under a rational basis test, the City's requirements were not rational and the requirement violated the Cleburne Living Center's Equal Protection rights. Writing for the Majority, Justice White there ignored the judicial convention of avoiding the discussion of issues not essential to the resolution of the case. Instead, he engaged in an extensive assessment of whether or not distinctions in the law based on disability should be constitutionally suspect under the Equal Protection clause of the Fourteenth Amendment. Although White acknowledged that mentally retarded persons had been subjected to a long history of discrimination and that they lacked the strength to change their subjugation through the political process, he refused to admit that they are powerless. As evidence for this judgment, White referred to numerous State and Federal laws, such as the Developmental Disabilities Assistance and Bill of Rights Act and the

76. Perhaps it needs to be made clear that this perspective is also speculative. It is not attributed to any, specific individual. It simply reflects an opinion that some individuals might form especially after years of struggle in the disability rights movement.
78. *Id. at 435.*
79. *Id.*
80. *Id. at 445.*
Education of the Handicapped Act, that had been enacted to help retarded citizens.\textsuperscript{81} But he also claimed that such persons possessed a "reduced ability to cope with and function in the everyday world."\textsuperscript{82} The discrepancy between the assertion about decreased capacities and the conclusion that members of this group are not powerless clearly indicates that the passage of the legislation was achieved primarily by non-disabled leaders acting on behalf of persons who bear the label of retardation rather than by retarded citizens themselves. This need to rely upon others to produce such accomplishments is, of course, one of the defining features of a paternalistic relationship. The approval of government proposals mentioned by White was not due to the endorsement of people in the diagnostic category; rather, the adoption of such policies was based principally on the support of non-disabled experts. Dependence on this sort of paternalistic alliance does more than prevent members of a disadvantaged group from participating in decisions about their fate. There is also a serious risk that the dominant element in such a coalition might eventually abandon the cause or act contrary to the interest of this group. The danger of such a possibility did not appear to trouble Justice White who argued that "because both State and Federal Governments have recently committed themselves to assisting the retarded, we will not presume that any legislative action, even one that disadvantages retarded individuals, is rooted in considerations that the Constitution will not tolerate."\textsuperscript{83} Disabled or retarded citizens were effectively foreclosed from shaping their own destiny or challenging the decisions made on their behalf by spokespersons from the dominant segment of society. Thus, the concept of paternalism played a pivotal role in the decision by the Supreme Court which denied the disabled minority heightened scrutiny under the Constitution.

The paternalistic sentiments that permeate public consideration of disability issues have been revealed in numerous ways. The plan for Supplemental Security Income was the only part of Nixon's welfare reforms to be approved by Congress by an overwhelming vote. Other laws such as Section 504 of the Rehabilitation Act of 1973 were adopted without pressure from organized interests,\textsuperscript{84} even though the struggle over the formulation of administrative regulations to implement these statutory requirements instigated the birth of the modern disability rights movement.\textsuperscript{85} Relatively few elected representatives seem willing to admit that they voted against the interests of disabled people, despite the failure of citizens with disabilities to form powerful voting blocs in their constituencies. As a result, crucial battles over equal rights for Americans with disabilities have shifted from the legislative branch, where they might receive at least a modicum of media attention, to the judiciary and to the subterranean world of the bureaucracy, where the struggle usually focuses on funding and implementation instead of abstract

\textsuperscript{81} Id. at 443-44.
\textsuperscript{82} Id. at 442.
\textsuperscript{83} Id. at 446.
\textsuperscript{84} See Richard K. Scotch, From Good Will to Civil Rights: Transforming Federal Disability Policy 139 (1984).
principles.\textsuperscript{86} The paternalistic milieu surrounding disability issues, therefore, has impeded public disclosure of the failure of government officials to secure the full enforcement of statutes such as the ADA.

The concept of paternalism has also seemed to produce some slight variations in the Supreme Court’s interpretation of public attitudes toward people with visible or labeled disabilities. These inconsistencies appear to parallel the contradictions implicit in \textit{Cleburne}, where Justice White found that mentally retarded Americans were not “powerless,” even though he admitted that they had endured a history of stigma and discrimination which precluded them from altering their subordinate status through the political process.\textsuperscript{87} Two years later, in \textit{School Board of Nassau County v. Arline}, Justice Brennan endorsed the statement by Congress which acknowledged that “society’s accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.”\textsuperscript{88} Although they were both speaking for a majority of the high Court, Justice Brennan’s opinion in \textit{Arline} contrasts sharply with the view expressed by White in \textit{Cleburne} when he stated that “the distinctive legislative response, both national and state, to the plight of those who are mentally retarded demonstrates . . . that the lawmakers have been addressing their difficulties in a manner that belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary.”\textsuperscript{89}

Perhaps most significantly, in \textit{Alexander v. Choate},\textsuperscript{90} which upheld a “disparate impact” instead of an “intent” test for assessing discrimination against people with disabilities, Justice Marshall contended that such bias was “most often the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect.”\textsuperscript{91} What appears to be missing from many interpretations of the ADA is a realization that stigmatizing or prejudicial attitudes toward visible or labeled disabilities are often an even greater impediment to disabled citizens than functional impairments, that these attitudes are usually held (but seldom expressed in public) by members of the dominant or non-disabled majority, that such attitudes are frequently permeated by paternalistic feelings, and that bias or animosity is as often the product of a purposefulness (which may barely reach the level of consciousness) as it is of neglect or mindlessness.\textsuperscript{92} From this perspective, the legal and cultural meaning of differences that are reflected by visible and labeled disabilities become as relevant to judicial decisions as

\begin{footnotes}
\item[87] See supra notes 77-83 and accompanying text.
\item[88] School Bd. of Nassau County v. Arline, 480 U.S. 273, 284 (1987).
\item[90] 469 U.S. 287 (1985).
\item[91] Id. at 295. Perhaps part of the difficulty with this analysis stems from the belief that “disparate impact” is the only test which can be invoked to prevent injurious inequalities that result from policies enacted through good motives. Little attention has been devoted by the courts to the possibilities that serious harm can be inflicted by laws adopted as a result of paternalistic feelings or noble intentions. See, e.g., Lawrence, supra note 60.
\end{footnotes}
distinctions based on race or ethnicity, gender, sexual orientation, or age.

The dominant discourse between the non-disabled public and disabled citizens has been shaped by the tendency to confound functional impairments and disability. Yet the Supreme Court has even refused to grant disabled Americans the rights that would flow naturally from a medical understanding. In Youngberg v. Romeo, Justice Powell spoke for the Court in holding that a disabled person’s constitutional interest in freedom had to be balanced against “the demands of an organized society.” He concluded that treatment imposed on the disabled plaintiff was judicially acceptable as long as it reflected the judgment of a qualified expert. In a statement setting a standard so vague and so low that it could evoke a shudder from many disabled individuals, Powell explained that the “decision, if made by a professional, is presumptively valid; liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment.” Although Powell believed that the plaintiff’s request for the training necessary to ensure “safety and freedom from restraints” allowed the justices to avoid the “difficult question” of whether or not a disabled citizen has a constitutional right to any type of habilitation or treatment, he seemed to think that disabled individuals must assume the burden of proving unethical—if not illegal—intent in a confrontation with a non-disabled professional. Justices Blackmun, Brennan, and O’Connor agreed that the plaintiff should defer to the judgment of professionals, but they believed that he was entitled to the training needed to maintain self-care skills. Chief Justice Burger, in a separate concurring opinion, said that he “would hold flatly that respondent has no constitutional right to training, or ‘habilitation’ per se.” The unanimous judgment of the Supreme Court, therefore, may have been based on a rather dim view of the plaintiff’s biological inferiority and his prospects for improvement; but it did not seem to reflect a strong belief either in the legal rights of disabled citizens or in the effectiveness of medical treatment.

In another case involving a resident of the Pennhurst State Hospital in Pennsylvania, Justice Rehnquist employed what some observers might regard as a specious rationale to contend that the Developmentally Disabled Assistance and Bill of Rights Act of 1975 did not extend any rights to disabled Americans after all. In his analysis of legislative intent, Rehnquist alleged that the statute was simply a federal-state spending bill which conferred no substantive rights to citizens with disabilities. In the dissent, Justice White, joined by Brennan and Marshall, also

94. Id. at 320.
95. See id. at 322.
96. Id. at 323.
97. Id. at 318.
98. Id. at 328-329.
99. Id. at 329.
examined the legislative history of the law and concluded that the enactment had "substantive significance" which extended beyond mere "encouragement." Part of White's analysis was based on the contention that Congress had modeled the 1975 mandate on the Civil Rights Act of 1964. Nonetheless, Justice Rehnquist managed to persuade enough justices to endorse his view to void the carefully enumerated guarantees in the Developmentally Disabled Bill of Rights Act. Even though health measures appear to comprise the most popularly-and judicially-approved method of dealing with the problem of disability, the Supreme Court held that disabled Americans have no legal right to medical treatment.

The Supreme Court decision that most clearly demonstrates the refusal to deviate from the rigid requirements imposed by non-disabled standards of equality is, of course, Southeastern Community College v. Davis. Since the plaintiff in the case was already a trained nurse with a hearing impairment who was merely seeking to upgrade her certification, the principal arguments seemed to revolve around the allegation that her acceptance as a student in the nursing program might jeopardize the safety of patients. Justice Powell upheld the college in rejecting her application because her admission allegedly might produce a "fundamental alteration in the nature of [the] program." Beneath the surface of these phrases there seemed to lurk the image of a judicial "horror story" of patients unable to summon attention as they called desperately for help with their dying breath. Yet neither the nursing instructors, the college administrators, the attorneys in the case, nor the Supreme Court justices appeared to possess the imagination to realize that patients might not be able to muster the volume to gasp for help with a dying breath that could be readily heeded by a nurse with perfect hearing, that such a patient might be more likely to have the strength to move a finger slightly to flick a switch to start a system of flashing lights, and that a nurse with a hearing impairment would be more alert to such lights than colleagues attuned to vocal sounds. Hence, in an environment adapted to the needs of people who communicate through visual as well as verbal means, the nurse with a hearing impairment might actually be better able to respond to an emergency than many other professionals. As for the college's argument that it could not provide individual supervision, there would seem to be compelling reasons to indicate that the faculty should include teachers or interpreters who could employ multiple methods of communication through sign language as well as oral speech. The justices seemed to imply that even a slight deviation from a model designed exclusively for a non-disabled person could be construed as a special favor to people with disabilities.

Little attention thus far has been paid by the courts to the vast range of "taken-for-granted" configurations of the environment that bestow advantages upon the non-disabled and that impose distinct penalties upon citizens with disabilities. The

101. Id. at 42 (White, Brennan, and Marshall, J.J., dissenting).
102. Id. at 36.
104. Id. at 410.
oppression is so ubiquitous that it seems to underscore the fundamental importance of Jacobus tenBroek's simple plea for "the right to live in the world." Discrimination against disabled people is not only more pervasive than other forms of bias in the existing environment, but it also may be especially difficult to prove to the satisfaction of the judiciary. After courts determine that a worker meets the ADA definition of disability, for example, judges must find that the individual is "otherwise qualified" in order to proceed with an investigation of employment discrimination. The phrase was probably inserted into the statute to deflect lawsuits that might, in the present context, seem frivolous or outlandish such as the fear that a blind person might want to become a bus driver. The conjunction of a restricted functional definition of disability and the clause about qualifications forms a narrow gauntlet through which disabled plaintiffs must pass in order to file lawsuits under the ADA. If employees are qualified, they are not disabled; and if they are disabled, they must not be qualified. The conjunction of these terms obviously produces difficulty in proving that the actions of an employer were prompted by discriminatory attitudes rather than by evaluation of a lack of ability. Nonetheless, these requirements could also be interpreted as an opportunity for judges to assess the legal implications of the inequities resulting from "taken-for-granted" features of the present environment. One method of accomplishing this task is indicated by the requirements of employment tests specified by the ADA: "Employers must select and administer employment tests in a manner that will ensure that such tests accurately reflect the skill or aptitude of the applicant or employee, rather than reflecting any impaired sensory, manual or speaking skills." This criterion is designed to provide a setting in which aptitude can be distinguished from functional impairments, but a similar standard could be constructed in an almost experimental context to permit employers to differentiate between true abilities and the stigmatizing effects of visible and labeled bodily differences in the evaluation of disabled and non-disabled workers. The close passageway created by provisions of the ADA concerning qualifications and


106. The phrase, of course, originally appeared in section 504 of the Rehabilitation Act of 1973. 29 U.S.C. § 794 (1994). The EEOC regulations defining a similar clause in Title I of the ADA stipulate that a "qualified individual with a disability" is someone "who satisfies the... job-related requirements... and who, with or without reasonable accommodation, can perform the essential functions of such position." 29 C.F.R. § 1630.2 (m).

107. BONNIE PORTRAS TUCKER, FEDERAL DISABILITY LAW IN A NUTSHELI 94 (1998). The need to disentangle these elements is not an easy goal, but perhaps the principal obstacles to the fulfillment of this objective are the constraints on the human imagination imposed by the restrictive contours of the existing environment:

Clearly, when considering whether some action or situation is an instance of discrimination on the basis of ability, the trick is to distinguish ability to do the relevant things from ability to do irrelevant things. But, given that so many places and activities are structured for people with a narrow range of abilities, telling the two apart is not always easy.


108. Efforts to erect distinctions between abilities and impairments and between abilities and visible or labeled bodily differences in judicial appraisals of employment evaluations may be a difficult, though not impossible, task. It should, however, be supported by basic research. See supra notes 58 and 63.
discrimination seems to make a detailed examination of the concept of equality almost inescapable.

The principal Supreme Court case which examined the question of disability and equality directly was the litigation surrounding Amy Rowley, an 8-year-old student with a hearing impairment whose parents had asked her school to provide a sign-language interpreter.109 Speaking on behalf of five members of the Court, Justice Rehnquist asserted that the concept of a “free appropriate public education” in the Education of All Handicapped Children Act of 1975110 simply required “that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child.”111 In a school of this type where teachers seldom know more than the most rudimentary forms of sign language,112 Amy Rowley may have had few chances to develop her intellectual skills, even though she managed to receive passing marks and to be advanced from grade to grade. Nonetheless, Rehnquist claimed that the law was designed to offer the disabled student no more than a “basic floor of opportunity.”113 He declared that “the right of access to free public education ... is significantly different from any notion of absolute equality of opportunity regardless of capacity.”114 In a concurring opinion, however, Justice Blackmun stated that equality could only be determined by a comparison of disabled and non-disabled students. He thought that “the question is whether Amy’s program, viewed as a whole, offered her an opportunity to understand and participate in the classroom that was substantially equal to that given her non-handicapped classmates.”115 Similarly, in a dissent joined by Brennan and Marshall, Justice White endorsed “the conclusion that the Act intends to give handicapped children an educational opportunity commensurate with that given other children.”116

The notion of parity seems to comprise an appropriate benchmark for interpreting the clause regarding “reasonable accommodations,” which is undoubtedly the most important provision in Title I of the ADA. Although some economists and other commentators initially proposed that this provision of the law ought to be characterized as measures which do not impose an “undue hardship” on employers,117 the meaning of the former phrase has not yet been definitively settled by the Supreme Court. One interpretation of reasonable accommodations is embodied in the principle of Equal Environmental Adaptation, which has been defined as follows:

111. 458 U.S. at 200.
113. 458 U.S. at 201.
114. Id. at 199.
115. Id. at 211 (emphasis in original).
116. Id. at 214 (Brennan, Marshall, and White, J.J., dissenting).
117. See the studies by some four economists published in Weaver, supra note 36, and discussed briefly in that same footnote.
To establish a standard of equality that does not require mastery of the present environment, courts can adopt a definition of 'reasonable accommodations' based on the concept of Equal Environmental Adaptations. This standard is based on the benefits bequeathed to the non-disabled by conventional features of the present milieu as well as the disadvantages imposed on citizens with disabilities. Any discrepancy between the existing environment, which has been designed to suit the non-disabled, and an environment adapted for people with disabilities is a source of inequality. At a minimum, these features of the environment should be commensurate. Reasonable accommodations is the legal method of reconciling a disparity between these dimensions, and Equality of Environmental Adaptations is the standard for interpreting this statutory requirement.\textsuperscript{118}

There are, of course, various legal or philosophical meanings that can be attached to the basic standard of equality.\textsuperscript{119} Such conceptualizations range from the notion of equality of opportunity\textsuperscript{120} to equality of results\textsuperscript{121} which is frequently designed to ensure that public or private programs or services yield comparable outcomes for different groups, and even equal shares as measured by the extent to which such groups enjoy equivalent social or economic benefits from available services.\textsuperscript{122}

Many of the special favors bestowed upon non-disabled individuals are so omnipotent and inconspicuous that lawmakers, attorneys, judges, and members of the public may not even acknowledge them. Analysis of the unique advantages granted to non-disabled people by “taken-for-granted” facets of the existing

\textsuperscript{118} Harlan Hahn, New Trends in Disability Studies: Implications for Educational Policy, in INCLUSION AND SOCIAL REFORM: TRANSFORMING AMERICA'S CLASSROOM 325 (Dorothy Kezner Lipsky & Alan Gartner eds., 1997).

\textsuperscript{119} For a discussion of several definitions, see id. at 324-327.

\textsuperscript{120} The difficulty of applying this standard to cases involving disability rights has been described as follows: According to this perspective, the basic conditions of equality in ‘the race of life’ are satisfied as long as all of the contestants are lined up evenly at the starting line. In an analogy that is especially compatible with the American economic system, the outcome of this competition is supposedly determined by the principles of meritocracy that have seemingly been reflected in educational policy by a questionable belief in innate intelligence. But this metaphor ignores the context or the environment in which the competition is conducted. If the lane of the race track assigned to disabled contestants is filled with obstacles, for example, the competition can hardly be considered fair. And, for most disabled children and adults, the obstacles presented by architectural inaccessibility, communication barriers, the effects of stigmatizing attitudes, and the demands of a discriminatory environment often appear to be almost insurmountable. The solution, of course, is to ‘clear the track’ by changing the environment instead of the person. 

\textit{Id.} at 325.

\textsuperscript{121} The concept of equality of results for people with disabilities has been explained in the context of educational policy in the following terms:

\textit{Assuming the possibility of defining the skills and knowledge that any person might need to survive or to flourish in a suitable environment... education would continue until each student meets the required criteria... . This procedure would eliminate the need for tests that attempt to assess aptitude or potential; instead, attention would focus on the creation of standardized evaluations of demonstrated performance and on the identification of necessary or essential requirements for participation in a democratic society. This approach is based on the radical assumption that all human beings have equal dignity and worth. }

\textit{Id.} at 326.

\textsuperscript{122} A natural basis for interpreting "reasonable accommodations" might be derived from educational programs designed to establish parity or commensurate benefits for disabled and non-disabled school children. The costs such policies would be difficult to calculate, however, because little systematic attention has been devoted to ‘taken-for-granted’ advantages conferred on the non-disabled. Future research is likely to uncover many examples of inequality in this form. Ultimately, equal results may be even less expensive than equal opportunities. \textit{Id.} at 327.
environment, however, could also be especially effective means of revealing unequal features of the habitat that impose disadvantages on citizens with disabilities.\footnote{123}{Again, perhaps chairs serve as the simplest example of an unequal feature of our habitat. See supra note 61. Another clear example would be flexible work schedules which might be especially helpful to the vast number of people who have arthritic impairments that entail periods of exacerbation and remission. Many obstacles in the existing environment are a manifestation of the manner in which the nature of the economic system in America inflicts inequalities on citizens with disabilities. For an analysis of the impact of the capitalistic system on disabled people, see Marta Russell, Beyond Ramps: Disability at the End of the Social Contract (1998).} This type of investigation could promote changes in the legal understanding of many aspects of everyday life including the artificial distinction between home and work. Although courts have generally been reluctant to grant increased transportation costs\footnote{124}{But see United States v. Board of Trustees for the Univ. of Alabama, 908 F.2d 740 (1990) (holding in part that university’s bus system did not make reasonable accommodation for the transportation of handicapped students by providing left-equipped bus services four hours every day).} as part of “reasonable accommodations” in an ADA lawsuit, this expense usually results from the fact that manufacturers design motor vehicles almost exclusively for non-disabled passengers and drivers. The lack of accessible transportation frequently is a major barrier to the employment of adults with disabilities.\footnote{125}{For an analysis of disability and transportation policy, see Robert A. Katzman, Institutional Disability: The Saga of Transportation Policy for the Disabled (1986).} In an effort to fulfill public policy objectives that would allow disabled persons to join the productive labor force, judges or lawmakers might consider various additional options such as installing technological capacities to permit disabled employees to work at home when necessary and remedies to reimburse the cost of personal assistants who have been paid by the worker with a disability for employment-related duties, especially when the employer had previously refused to grant the worker’s request for reasonable accommodations.

Compliance with laws prohibiting discrimination against Americans with disabilities is an important moral and legal obligation that seems to be contradicted by statutory provisions which offer tax incentives or subsidies as a reward for obeying the law.\footnote{126}{For an analysis of such provisions, see Daniel C. Schaffer, Tax Incentives, in The Americans with Disabilities Act 293-312 (Jane West ed., 1991). The objection to such policies is primarily a moral concern that no one should be rewarded for obeying the law. This approach also seems to cheapen the ADA and to impose disrespect on the sociopolitical definition and the minority group model of disability by promoting a belief that a special inducement must be offered to persuade businesses to honor the law. At the same time, of course, there are no tax subsidies for disabled citizens who bear increased costs by living in an inhospitable environment. Disagreements about this matter reflects different political values and must be recognized as such.} In addition, to prevent the dilution of ADA requirements by lawyers who are sometimes trained to find “reasonableness” almost anywhere,\footnote{127}{To those who might think that this statement does not display the proper deference to the legal profession, it must be pointed out that a basic purpose of legal training is to equip a person to construct a rational argument to defend the position of the client in exchange for remuneration. Indeed, elements of this description are at the heart of the advocacy model.} the interpretation of laws prohibiting discrimination against disabled citizens must be guided by the compass embedded in the concept of equality.\footnote{128}{Some critics might contend that the principal of equal treatment, which stipulate that likes should be treated alike and unlikes need not be treated alike, must not be applied to disputes concerning disability. Opponents could possibly find a faint trace of assumptions concerning biological inferiority in such criticism. At a minimum, however,}
be placed on the principles of "equality" and "accommodations" instead of "reasonableness" and "individual particularity."

In addition, there needs to be a change in the status of disabled people as a minority group under the Equal Protection clause of the Fourteenth Amendment. Although some legal analysts may believe that the question was definitely settled by the opinion of Justice White in *Cleburne*, the controversy could become the focus of additional discussion. As judges begin to recognize that the main problems encountered by the disabled minority consist of stigmatizing and prejudicial attitudes about visible or labeled traits, there is always a possibility that appellate courts might engage in the rare act of changing their minds. Some researchers have contended that, since disability is not a suspect classification involving heightened constitutional scrutiny, jurists might be more favorably disposed toward affirmative action programs on behalf of persons with disabilities than other disadvantaged groups.

But arguments in favor of equal rights for citizens with disabilities under the Constitution should not be sacrificed for the sake of any other remedial action. The fear that employers might retaliate against workers who disclose health problems or disabilities may interfere with the enforcement of programs that establish timetables or goals, but the concept of individual merit is not apt to be subverted by personnel assessments that encompass environmental as well as personal attributes. More stringent forms of affirmative action such as employment quotas have even been accepted for years in European nations where experience indicates that their failure to reduce joblessness may be a product of administrative weaknesses. Furthermore, a pilot study conducted in 1978 by the Office of Federal Contract Compliance Programs of contractors covered by Section 503 of the Rehabilitation Act of 1973 found that the ninety percent of the employers were not in compliance with the law and fifty-three percent did not review job descriptions or other personnel policies that could be discriminatory. Affirmative action and related plans may be helpful in ameliorating discrimination against disabled workers, but they should not supplant the legal remedies potentially offered by the ADA and the Fourteenth Amendment.

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130. There is also a danger that the conservative justices of the Supreme Court are trying to maneuver themselves into a position to strike down the constitutionality of the ADA. I am indebted to Stephen Gold for bringing the threat to my attentions. (Telephone interview, Feb. 4, 1999).
132. An analysis for USA Today by Jury Verdict Research shows that those who file retaliation lawsuits win a higher percentage of cases than victims of age, disability, race or sex discrimination. *Flood of 'Retaliation' Cases Surfacing in U.S. Workplace*, USA TODAY, Feb. 10, 1999, at IA.
VI.
CONCLUSION

The Americans with Disabilities Act has not fulfilled many of the hopes of its proponents.\textsuperscript{134} Major Supreme Court decisions concerning disability rights have been decidedly unfavorable to the interests of this segment of the population. Many of these problems can be traced to confusion surrounding the concepts of impairment and disability, the failure of courts to adopt the sociopolitical definition of disability which focuses attention on the attitudinal environment as the principal source of discrimination against disabled citizens, and resistance to the minority group model for the assessment of these issues. Additional obstacles have resulted from non-disabled dominance of the discourse about disability and the prevalence of paternalistic sentiments toward disabled persons. To mitigate many of these barriers, the principle of Equal Environmental Adaptations, which seeks to achieve parity between the advantages bestowed on non-disabled people and the disadvantages imposed on disabled citizens in the ‘taken-for granted’ environment, is proposed as a means of interpreting the provision regarding “reasonable accommodations” in the ADA.

\textsuperscript{134} For example, Professor Ruth Colker’s research reveals that defendant employers prevailed in “94% of the [Title I] cases from which appeals were taken . . . [and] after the appeal process was completed . . . defendants continued to prevail in 82% of the cases.” Ruth Colker, ADA Title III: A Fragile Compromise, 21 BERKELEY J. EMP. LAB. L. 376, 399 (2000).