Comment:

Moving Forward, Some Thoughts on Strategies

Michael S. Wald†

I have the unenviable task of saying something new at the end of a really insightful two-day conference. I will not try to do that. Rather, I will try to pull together some of the themes that have been raised by many speakers and that, I believe, must be taken into account in deciding future strategies. In doing that, I want to highlight what has been said by others, in various ways, as to the complexity of the task that the disability rights movement faces in trying to accomplish the many things that people have called for at this conference.

To begin with, as has been pointed out repeatedly, from its inception the disability rights movement has adopted a civil rights moral framework and a civil rights legal approach. There are many sound tactical and moral reasons for adopting this approach. But the disability rights movement is trying to do something unique in civil rights law. Civil rights law, for the most part, tries to prevent discrimination based on a person’s characteristics, such as race or gender. It seeks to eliminate treatment based on “group” membership. In contrast, the ADA requires decisions that are situational, elastic, flexible, discretionary—trying to make individual characteristics relevant, rather than irrelevant. That makes it very hard to fit into the legal, and also philosophical, framework of civil rights laws, as they have been developed in this country. Civil rights law has been resistive to focusing on difference, in part because those who want to deny civil rights often claim that the group is “disabled” in some sense—that blacks are not competent, that gays cannot raise children, that women are not able to do certain things. For the disability community to stress civil rights, it will be necessary to develop a new language to describe a new type of right.

Second, the disability rights movement has taken on an even more difficult task; it is not just trying to use and expand traditional civil rights law, but to develop within the United States a new social justice vision of how people ought to be accepted and how we ought to think of each other—a vision that everybody is entitled to an individualized plan that will allow them to fully participate in the economic, political, and social life of their communities. As Professor Scotch has said, creating an inclusive social vision is a challenging task under any circumstances. It is particularly challenging in the United States, which has had such an individualistic, rather than communitarian, notion of responsibility for

† Professor of Law, Stanford University.
peoples’ well-being. We have not incorporated the poor into our society. We have not incorporated people of color. We are a non-redistributional society and Americans consistently emphasize that they do not want to be a redistributional society. Many Americans believe that what makes us great is that we can rise up without government help.

Thus, it will require developing a powerful moral vision to overcome this orientation. As the movement tries to create a new social vision, it must confront the fact that social visions are always going to be contested. New social visions do not come easily to any kind of society. You must expect opposition, strong opposition. In order to do this, it is necessary to mobilize large numbers of people to fight for this social vision.

As has been pointed out, such mobilization will require new strategies. Most of the major legislative achievements of the disability rights movement to date, including the ADA, were passed without a great public debate. While there was some political mobilization around all of the various pieces of major legislation, this mobilization did not include large parts of the public not directly affected by the legislation. Some of the major laws were passed without real debate as to the meaning of major statutory provisions; it was not clear what was really being asked for. The strategists tried to draft “consensus” documents that hid a lot of lack of consensus. Recently Chai Feldblum, in another context, wrote a very perceptive article on gay and lesbian rights, responding to an article by Tom Stoddard, who had argued that advocates should use legislative, rather than litigation, means to achieve social change because movements get more moral weight from legislation than from a court’s decision. Chai argued that for legislation to accomplish this, it must be grounded in moral terms. If advocates avoid the hard moral questions, the public will ultimately resist the legislation.

Another major problem facing the movement is that, to a large degree, it has tried to initiate social change through the legal system. And while law can be very enabling, reliance on legal strategies can also be a problem in bringing about social change. It can deter, rather than bring about, political mobilization. In addition, to win a legal victory frequently requires framing issues in ways that may undermine the kind of moral claims that people want to make. Finally, under the ADA, litigation will consist of a lot of individual cases; it is really hard to build a movement in this manner. Future advances will require developing grassroots political activity, in addition to using the courts.

A final barrier to moving forward is that the disability movement is now taking on the hardest task confronting social movements—which is to alter the private sector. Most social movements have focused on altering the activities of government. While governments often are resistive to change, government is a relatively easy target. As we know from the consumer area, when you are trying to get changes in how the business sector functions, you face better organized and funded opposition, progress is slower. Thus, I am not surprised that many people

here believe that there has been little progress since the ADA was passed, given that the ADA focuses on the private sector.

What can one do in the face of these barriers? I can only echo the points others have made here. First of all, it does seem to me that building coalitions is essential. Coalition-building must take place both within the disability movement and with those outside of the disability movement. Within the disability community it is necessary to bring in more people—those with mental illness, those with HIV—groups whose claims have been contested within the disability community, as well as outside of it. With regard to external coalitions, advocates need to think about who are the others who have the same kinds of concerns with developing a social vision that is inclusive—women, gays and lesbians, the poor. This type of social vision needs to be created not by any one group, but by multiple groups, because no one group will be able to do that successfully. In addition, there needs to be a search for new allies. There needs to be thinking about unions. There needs to be thinking about businesses. Bringing in people with different perspectives, seeing where their issues come from, and trying to build coalitions with them, seems to me to be essential.

Certainly, as has been emphasized, a media strategy has to be part of any kind of mobilization effort.

Finally, the movement must change the way society thinks about disability, yet not be too threatening. Deborah Stone has written some very interesting pieces arguing that groups seeking social change must create new causal stories that redefine the situation they are trying to change. One of the things that she points out, that I think is right, is that new paradigms cannot be so ultimately threatening to the position of others that they will be rejected out-of-hand. Thus, while I might agree with Larry Paradis’s comments that some of our problems lie in capitalism, we are not going to end capitalism. Successful strategies need to reframe how the mainstream conceives of issues, not seek to replace the mainstream.

The last thing I want to emphasize is something that everybody in this room knows better than I, but we often forget about. There was a lovely article written by Gary Bellow in the Harvard Civil Liberties Review a few years ago on political lawyering, called Steady Work. The essence of it was that the only way we get change is being in for it in the long haul. It is steady, hard, difficult work. Getting legislation passed or winning court cases often is the easiest part. The real problems are in the implementation stage. In the end, the rewards are in the doing as often as in the achievements. I am really honored to be able to be associated with all of the people here who have been in the doing, and have learned a great deal—thank you for the opportunity.

---