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SOME REFLECTIONS ON NEW YORK CITY'S DISABILITY LAW

*Robert Hammel**

I. Introduction

In an era when civil rights laws have increasingly been subject to attack and erosion, one of the few areas where protection has indisputably been expanded is the law governing disabilities. The "rights of the disabled" is a phrase which had little meaning twenty years ago but which today could serve as an index heading for countless thousands of cases, treatises, newsletters, and law review articles. One hesitates to contribute to this voluminous literature, and the purpose of this essay is thus a modest one: the goal here is merely to explore, often at a high level of generality, some distinctive aspects of disability law in general and of New York City's disability law in particular. This effort is made in the hope that clarifying some of the broad outlines of the picture will ultimately allow greater refinement to be achieved in the details of that picture.

Under the local law of New York City, the rights of the disabled are principally established by Section 8 of the City's Administrative Code.¹ This statute, which is referred to as the Human Rights Law and which the New York City Human Rights Commission is charged with enforcing, is a broad anti-discrimination statute. The general intent behind the City's Human Rights Law is to provide more expansive protection for people with disabilities than is available under state or federal law. However, as suggested below, the actual effect of these provisions may, paradoxically, be to subvert such protections.

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1. NEW YORK, N.Y., ADMIN. CODE tit. 8 (1996).

Before delving into these topics, it is useful to begin by considering disability law from the standpoint of the overall public policy goals that such statutes may be used to achieve. It is, in other words, helpful to begin by examining what ills disability law can be thought of as addressing and what impact the law may have on society.

In embarking on this task, imagine for a moment that you are an anthropologist from Mars² who has landed in New York City and that the first thing you happen to notice is that many parking areas have spaces specifically reserved for the disabled, that City buses are specially equipped to accommodate wheelchairs, and that many buildings have constructed ramps providing accessibility to people in wheelchairs. Looking around further, you also notice that many bathrooms have been modified so that they can be used by the disabled and that many street curbs at pedestrian crossings have been reconstructed so that they can be negotiated by wheelchairs. Inspired by these observations, you decide that you want to study the law that determines how, in terms of its public policy, the City deals with its disabled population. Because there are no law schools on Mars, you decide that you will first focus on what the law *does* rather than on what it *says*.

What you would quickly discover is that various efforts have been made, and significant sums of money have been spent, to make it easier for people with disabilities to participate in the City's life.³ For example, in addition to the parking places, street curbs, ramps, buses, and bathrooms that you have already observed, you would notice that braille signs have been posted in elevators, that persons proficient in sign language are frequently hired to make oral presentations accessible to the hearing-impaired, and, maybe most importantly, that numerous employers have made a wide variety of special arrangements to allow the physically challenged to perform their jobs. Based on these observations, you

2. The "thought experiment" that follows is inspired by the title, though not especially by the content, of a recent (and fascinating) book of case studies of neurological disabilities, OLIVER SACKS, AN ANTHROPOLOGIST ON MARS (1995). Sacks uses the phrase to describe how people suffering from autism face the challenge of deciphering emotional responses of "normal" people that autistic people can "interpret" but not actually feel. *See id.* at 259.

3. As numerous cases filed with the City Commission on Human Rights make clear, many obstacles (presenting difficulties often not imagined by those who are not physically-challenged) remain and impede the disabled from full realization of their potentialities. For an insightful and often moving discussion of some such obstacles, *see generally* JOHN HOCKENBERRY, MOVING VIOLATIONS: WAR ZONES, WHEELCHAIRS AND DECLARATIONS OF INDEPENDENCE (1995).

might well conclude that, as a matter of public policy, people with disabilities were entitled to have spent on their behalf greater sums (on a per capita basis) than is true for otherwise similarly situated people without disabilities. As our hypothetical Martian de Tocqueville, you might also conclude that the disabled enjoy some sort of special status—a special status that allows them to claim a proportionally greater share of society's resources than can their non-disabled counterparts.

If, as a Martian, you wished to continue your research by identifying some group that public policy treats similarly to how it deals with the disabled, you might turn your attention to military veterans.⁴ In examining the treatment of veterans, you would learn that they, like the disabled, receive various preferences. They are, for example, the recipients of special educational and health benefits; and many employers in hiring and promotion will favor a veteran over an otherwise similarly qualified non-veteran.

Having made these observations, suppose now, still in your guise as a Martian, you were asked to speculate over what the content of the law is that has produced such results. In light of your observation that special efforts are being made on behalf of the disabled and on behalf of veterans that are not made on behalf of those who do not belong to these groups, you would probably conclude that the law simply imposes affirmative obligations to assist the disabled and veterans. Thinking about the services and sacrifices that veterans have provided the country, you might reasonably conclude that the law governing the disabled was like the law respecting veterans: that in both cases it provided special benefits based on some notion that the group was specially deserving.

In the case of veterans, your Martian speculations would be largely justified. Indeed, you would discover that, on the national level alone, the law respecting veterans takes up three thick volumes of the United States Code Annotated and that the premise of these provisions is that veterans deserve, and are therefore entitled to, a large variety of benefits and preferences not accorded to non-veterans.⁵ The law respecting veterans, viewed broadly, is not directed against any specific social practices and makes no particular attempt to "punish" people who treat veterans "badly." Instead, it focuses on benefits that will be provided to veterans and speaks generally in the vocabulary of entitlements.

4. Indeed, you would discover an overlap between the two groups because some of the disabled became disabled because of their service in fighting our nation's wars.

5. 38 U.S.C.A. §§ 1-8528 (1994).

Having noticed the similarity between the treatment of veterans and the treatment of the disabled, and having pored over Title 38 of the United States Code, you would now probably possess some Martian confidence about what the law respecting the disabled provides. You would assume that disability law recognizes that, in a just society, the disabled need and should therefore be accorded special assistance to compensate for their disability. You might further speculate that the law serves the general welfare by recognizing that, while nobody chooses to be disabled, everybody runs the risk of becoming disabled. Therefore, everyone is better off in the knowledge that, if such a misfortune occurs, society will do what it can to minimize its impact.⁶ Because the law in this sense benefits everybody by benefitting the disabled, you would be justified in assuming that the law's principal focus is on ascertaining what the needs of the disabled are and how they can be fulfilled. If, as a Martian, your thoughts ran along such lines, you would undoubtedly be surprised in reading the statute to discover that the basic structure of the law is not framed in such affirmative terms at all.⁷

6. Disability law, of course, also serves the general welfare by helping to ensure that the talents and abilities of disabled people are not wasted but instead contribute to enriching society. It is often pointed out that people who are impaired in one way often develop special abilities in other areas that are way above average; and disability law makes it more likely that such abilities will be put to use. *See, e.g.,* SUSAN SCHALLER, *A MAN WITHOUT WORDS* 86, 198-99 (1991) (stating that deaf people are more visually adept than hearing people); SACKS, *supra* note 2, at 133 n.10 (stating blind people frequently display "hyperdevelopment of auditory-cognitive systems in the brain") and at 211 (autistic people frequently possess "prodigious powers of abstract-pattern recognition and visual analysis"); HELEN KELLER, *THE STORY OF MY LIFE* 95 (Signet ed. 1988) (stating that the fingertips of a blind and deaf person can "discover the thought and emotion which the artist has portrayed" in a work of sculpture). The Human Rights Law, which defines "disability" as any physical, medical, psychological, or mental "impairment," NEW YORK, N.Y., ADMIN. CODE § 8-102(16), does not explicitly address whether or how one should take into account this phenomenon of an impairment in one area producing a corresponding, compensating talent in another area.

7. This assertion is somewhat of an over-generalization. The City's disability law, as is further described below, in fact imposes an affirmative obligation of "reasonable accommodation." The point to be stressed here, however, is that "reasonable accommodation" is only required in conjunction with a finding that illegal discrimination has occurred. In other words, to prevail under the statute, there must be a finding of discrimination (although at the same time the statute in effect swallows its own tail by also providing that failure to provide a reasonable accommodation itself constitutes discrimination).

As the discussion below will clarify, the result of these provisions is that disability law is subject to two, somewhat contradictory, modes of analysis. On the one hand, the Human Rights Law, in its structure and throughout most of its provisions, treats disability the same as all other protected classes; no explicit distinction is drawn between disability and race, national origin, creed, or other protected statuses. The stat-

Instead of creating affirmative entitlements, the law simply says that it is forbidden to discriminate against the disabled.⁸ Unlike the law governing veterans, the Human Rights Law by its terms purports to grant no special entitlements or preferences to the disabled. It is structured so that its focus is not so much on helping the disabled as it is on penalizing those who are found to have discriminated against the disabled.

The point of the preceding discussion has been to highlight what may be a distinctively American peculiarity of the law governing the disabled; namely, that it pursues its purpose of social reform not by directly focusing on the needs of the disabled and on the benefits that should be granted to fulfill these needs, but rather by attacking discrimination. The law, in lieu of taking the direct path of simply requiring that efforts be made to ensure that the disabled be empowered to participate in the activities of society, instead treats disability like race and other protected traits and simply outlaws discrimination.

Thus, New York City's disability law is in many ways comparable to, but in other ways distinctive from, equivalent legislation elsewhere. It is the general purpose of this paper to explore these similarities and differences. In doing so, attention frequently shifts from broad concerns of a philosophic or theoretical nature to specific enforcement problems. Apart from the general goal of highlighting (and hopefully elucidating) some obscurities in the law, there is no specific "argument" that informs the observations that follow. There is, however, a unifying concern: it is how to recognize and possibly ameliorate the dilemmas which arise from implementing a law that is triggered by a finding of discrimination but that defines the protected class (against which one may not discriminate) in a vague and extremely expansive fashion.

ute simply says that it is illegal to discriminate on the basis of any of these characteristics. On the other hand, section 8-107(15)(a) of the Human Rights Law imposes on those who are forbidden from discriminating a duty to provide a reasonable accommodation for the disabled if the disability is known or should have been known; and the failure to provide such an accommodation constitutes "an unlawful discriminatory practice." Thus, on one level the statute says that all protected classes are to be treated alike, but on another level it requires that the disabled are entitled to special treatment. This confusion over whether the statute requires equal treatment or special treatment is compounded by the fact that the disabled are not the only protected class entitled to reasonable accommodation; a similar requirement of reasonable accommodation is imposed when a complainant's protected class is a religion or creed. NEW YORK, N.Y., ADMIN. CODE § 8-107(3)(a).

8. NEW YORK, N.Y., ADMIN. CODE § 8-107.

II. Disability Provisions of New York City's Human Rights Law

The local law that principally establishes the "rights" of the disabled is Title 8 of the Administrative Code of the City of New York, which is commonly referred to as the "Human Rights Law." This is, however, something of a misnomer in that the statute does not establish "rights" comparable to those, for example, in the Bill of Rights; instead, it simply outlaws discrimination on the basis of race, gender, national origin, creed, sexual orientation, age, and other such traits. Thus the only "right" it creates is the right to be free from, or compensated for, illegal discrimination. "Disability" is, of course, one of the protected classes enumerated in the Human Rights Law.

The disability provisions of the Human Rights Law are interwoven with other anti-discrimination provisions of the statute, which as a whole, is fairly lengthy. Its critical operative terms are, however, terse but vague. At its core, the disability provisions turn on three decisive terms: "discrimination," "reasonable accommodation," and, of course, "disability." In essence, the law makes it illegal both to "discriminate" against another person because of his or her "disability" and to fail to provide a "reasonable accommodation" that would allow that disabled person to function in a fashion comparable to a non-disabled counterpart. The law provides cryptic guidance as to what these critical terms mean and as to how they should be applied in specific cases.

In general, the provisions of New York City's Human Rights Law concerning disability are broadly similar to legislation in other jurisdictions. In one fundamental respect, however, New York City's statute is distinctive and possibly unique. As the result of an amendment passed by the City Council in 1991, the New York City Human Rights Law now defines "disability" as "any physical, medical, mental or psychological impairment."⁹ By contrast, the Americans with Disabilities Act¹⁰ defines disability as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual."¹¹ In short, New York City's statute contains the broadest conceivable definition of disability—a definition that subsumes *any* impairment rather than just "substantial" ones and that thereby potentially lumps together in-grown

9. NEW YORK, N.Y., ADMIN. CODE § 8-102(16).

10. 42 U.S.C. §§ 12101-102, 12111-117, 12131-134, 12141-150, 12161-165, 12181-189, 12201-213 (1994); 47 U.S.C. § 225 (1994).

11. 42 U.S.C. § 12102(2)(A).

toenails with amputated legs, upset stomachs with colostomies, and clumsiness with cerebral palsy.

III. What Does It Mean to Discriminate on the Basis of Disability?

A. The Comparison with Race Discrimination

In light of disability law's focus on discrimination as the act that triggers application of legal sanctions, it is worthwhile to explore what the concept of discrimination means as applied to the disabled. In approaching this question, one should bear in mind that American civil rights statutes are premised on a model of discrimination that arose from the history of race relations in the United States. Thus, the archetype of discrimination that civil rights statutes were originally designed to address was race discrimination of the type that was practiced most blatantly in the American South and, with varying degrees of subtlety, elsewhere in the United States. In this model of discrimination, which will be referred to here as the "racial model," the victim is denied whatever it is he or she is seeking because of the victim's race, in disregard of any other characteristic that the victim may display. The person discriminating (hereinafter sometimes referred to as "respondent") takes decisive notice of the race of the victim and refuses to take sufficient notice of anything else about the victim. It is this conduct on the part of the respondent—making relevant what should be irrelevant while treating as irrelevant factors that should be taken into account—that traditional civil rights law seeks to punish and eliminate.

Because civil rights statutes are structured in contemplation of this racial model of discrimination, it follows that their primary focus is on the conduct of the respondent and only secondarily on assessing and serving the needs of the victims of such discrimination.¹² It is instructive to compare this racial model of discrimination with the archetypal model of discrimination that underlies most disability cases. Consider the following hypothetical but alto-

12. It is this tendency of civil rights and equal protection jurisprudence to concentrate on the illegitimacy of the discriminator's conduct rather than on the needs of the victims of discrimination that helps explain the conceptual discomfort posed by affirmative action programs. In the simplest terms, it is fair to say that affirmative action looks principally at needs of the victims of discrimination, while traditional civil rights law is directed primarily against the conduct of the victimizers. For a provocative discussion of these and related topics, see Owen M. Fiss, *Groups and the Equal Protection Clause*, in *EQUALITY AND PREFERENTIAL TREATMENT* (Marshall Cohen et al. eds., 1977).

gether typical disability case. Complainant, who is chronically late for work, is, after numerous warnings, finally fired from his job despite having explained to his employer that he suffers from a medically-recognized sleep disorder. The complainant's sleep disorder is documented by competent doctors' notes, but the employer (who views the doctors' notes as merely using "medicalese" terms to refer to insomnia) refuses to exempt the employee from the punctuality rules that every other employee is required to follow. Indeed, the company documents show that every other employee with similar or even less severe records of tardiness have all been fired.

Let us examine the model of discrimination implicit in this hypothetical case. What is being alleged in this case is *not* that the employer treated the complainant differently from other employees but that the employer treated him the same. In this respect, the discrimination being alleged is the exact obverse of the discrimination contemplated by the racial model of discrimination. Here, the complainant's protected class (disabled persons) is being treated *the same* as other (non-disabled) protected classes, while in the racial model of discrimination the harm alleged is typically that one protected class is being treated *differently* from other groups. The discriminator's sin in the typical disability case is not, as in the racial model, that he or she considered the distinguishing trait of the protected class (i.e., the disability) to be relevant but that they considered it to be irrelevant.

Thus, one peculiarity of the disability model of discrimination is that it requires the respondent to treat different protected classes differently rather than treating them identically.¹³ The novelty of

13. It can, of course, be argued that the statute does not abandon the requirement of equality of treatment but simply imposes it at a higher level of generality. Thus, in the employment context, it can be argued that what disability law requires is not that everyone be given the *same* terms and conditions of employment, but rather that everyone *equally* be allowed to reach his or her full potential as an employee and *equally* be provided with such customized terms and conditions of employment as to enable him or her to reach their full potential. In this sense, the concept of discrimination in disability cases displays some parallels to "disparate impact" analysis in race and gender cases. Similarly, in the housing context, disability law, it can be argued, provides a general right of access, be it by stairway, ramp, or whatever, rather than equal opportunity to use a specific means of access. Thus, a doorman at a building may be under a legal obligation to assist a disabled person to enter a building but be under no legal obligation to provide similar assistance to any other protected class.

This capacity of disability law to be characterized as requiring such equality of treatment, albeit at this high level of generality, undoubtedly explains why the statute still operates in the terms of "discrimination." However, the point to be emphasized here is that disability is only the protected class that triggers analysis of the right

the disability model of discrimination is compounded by the frequent contention of respondents in disability cases that the complainant should not be properly recognized as disabled at all. Thus, in the hypothetical case described above, the employer is sure to contend that "insomnia," like physical laziness or mental torpor, is not a disability at all and therefore does not need to be accommodated. Again, the contrast with the racial model of discrimination is instructive. In race cases, it makes little sense for a respondent to contend that the complainant is not in fact a member of the claimed protected class; yet this is precisely the issue that lies at the heart of many disability cases.¹⁴

B. Disability and Merit

Another distinction between race discrimination and disability discrimination emerges when one considers the role "merit" plays

involved at such a high level of generality. For all other protected classes, the discriminatory denial of a "right" can be construed in lower, more mundane terms.

14. To elaborate on this distinction, it is worth noting that it would be a defense for a respondent to prove in a race case that he or she did not *perceive* the complainant to be a member of the claimed protected class. Interestingly, in a disability case under the City's statute, equivalent proof that the respondent did not perceive the complainant to be disabled would not be dispositive. The City's Human Rights Law, unlike the Americans with Disabilities Act, 42 U.S.C. § 12101, requires a respondent to provide reasonable accommodation even when the disability is not known to the respondent if the respondent *should* have known of the disability. Thus, under the City Human Rights Law, if a respondent proves that it did not know of a complainant's disability, the next inquiry that must be made is whether the respondent *should* have perceived the complainant to be disabled. There is no counterpart to such an inquiry in the ordinary circumstances of a race case—no tribunal would penalize an employer for mistakenly believing that, and behaving as if, a member of a racial minority actually belonged to the same protected class as did a majority of the work force. That such an inquiry would be inconceivable in a racial context highlights the differences between the racial model of discrimination and the disability model.

Recent sociological studies respecting race to some extent mirror a similar phenomenon to that implicit in the expanded definition of disability embodied in the Human Rights Law. Americans have become increasingly likely to identify themselves, at least for census purposes, as being of "mixed blood" with ancestors of various races and national origins. See Lawrence Wright, *Annals of Politics: One Drop of Blood*, NEW YORKER, July 25, 1994 at 46-55. Although this development has intriguing psychological, sociological, and political implications, it is not likely to have significant impact on classic race discrimination cases because, as noted above, such cases turn not on the reality of what protected class the complainant belongs to but simply on the racial perceptions of the respondent. To the extent that a "redneck" or anti-Semite believes (and acts on the belief) that the proverbial "one drop" of African-American or Jewish blood makes a person Black or Jewish, the racial model of discrimination continues to apply with full force.

in our society.¹⁵ As already noted, a basic premise of civil rights law in the area of race is that a person's race is utterly irrelevant as a component of "merit." Indeed, under federal law, race can never serve as a bona fide occupational qualification for a position.¹⁶ Accordingly, when an employer in fact considers an applicant's race, one can presume that something illegitimate and improper is occurring. Because there is no correlation between a person's race and a person's ability to perform a job, the law rightly sends the message that an employer must simply consider the person's legitimate, job-related qualifications and will be punished for considering illegitimate characteristics such as the person's race. Except for disability, the same proposition holds true for all the other protected classes under the Human Rights Law: one's protected class is and ought to be irrelevant as a qualification for any benefit. If an applicant's protected class was taken into consideration, such consideration is evidence that the decision that ensued may have been contaminated by improper motives. Merit is a reflection of one's abilities and achievements; not of one's protected class. Ordinarily there is no legitimate reason why a person's protected class ought to have been considered at all.

With respect to disability, however, it cannot be asserted that one's disability is necessarily irrelevant to a person's capacity to perform a job or qualify for a benefit. To state the obvious, the very fact that one is "disabled" means that one might not be "able" to perform a task with the same facility as that of a non-disabled person. Because in this sense, a disability is relevant in assessing how well an applicant might be able to perform a job, the law is in something of a quandary in determining the extent to which a disability may be taken into account in assessing a person's qualifications. On the one hand, since discrimination on the basis of disability is prohibited, one is tempted to treat disabilities in the same manner as other protected characteristics (such as race) and hold that the fact that an applicant is disabled should not be considered at all. On the other hand, as was just pointed out, it is impossible to assess an applicant's capacity to do a task without at least potentially exploring that applicant's incapacities.

The tension between these two principles explains the detailed and often counter-intuitive regulations that the EEOC has promul-

15. "Merit" is being used here simply as a shorthand to refer to one's qualifications for a benefit. It should not be understood as carrying with it any broader implications of moral or personal worthiness.

16. *Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1308 (7th Cir. 1989).

gated concerning pre-employment inquiries under the American with Disabilities Act.¹⁷ These regulations generally try to delineate the boundary between where, on the one hand, it is permissible to inquire about an applicant's abilities and where, on the other, such questions will be deemed to inject potentially discriminatory motives into the hiring process. Especially noteworthy for purposes of the present discussion is the following question and answer from the new guidelines:

Q. May an employer ask questions about an applicant's impairments?

A. Yes, if the particular question is not likely to elicit information about whether the applicant has a disability. It is important to remember that not all impairments will be a disability: an impairment is a disability only if it substantially limits a major life activity. So an employer may ask an applicant with a broken leg how she broke her leg. Since a broken leg normally is a temporary condition which does not rise to the level of a disability, this question is not likely to disclose whether the applicant has a disability. But, such questions as "Do you expect the leg to heal normally?" or "Do you break bones easily?" would be disability-related. Certainly an employer may not ask a broad question about impairments that is likely to elicit information about disability, such as "What impairments do you have?"¹⁸

Thus, under federal law, it seems an employer can inquire about a candidate's abilities (and in the process possibly learn about impairments) but is not allowed to take into account any substantial impairments that might be construed to be disabilities. In general, only *after* an applicant is chosen for a position can one explore whether and what sort of reasonable accommodation may be required.

One of the underlying principles embedded in the EEOC Pre-Employment Guidelines, it can be argued, is that a potential employer may inquire about those characteristics of a candidate that, if relied upon by the employer as the basis for a hiring decision, would not be actionable under the Americans with Disabilities Act, but that the employer is not permitted to inquire about those

17. The EEOC issued interim regulations in May, 1994 on "Pre-Employment Disability-Related Questions and Medical Examination"[hereinafter "EEOC Pre-Employment Guidelines"] that were the object of much criticism, particularly by employers. Revised regulations were issued by the EEOC on October 10, 1995 that are somewhat more straightforward than the ones they replace but are by no means self-evident.

18. EQ. EMPL. COMPL. MAN. (Callaghan) N:2321, 101.

characteristics that would be actionable if they influenced a hiring decision. Thus, because it is permissible under the federal statute to discriminate on the basis of "impairments," it is permissible to ask narrow questions about impairments. However, because it is not permissible to discriminate on the basis of "substantial impairments," (which is to say, a "disability"), it is not permissible to ask about them.

The New York City Human Rights Commission, with resources considerably more limited than those of the EEOC, has not attempted to issue analogous pre-employment guidelines. It is, however, instructive to consider how the principles embedded in the Federal guidelines would operate under the City statute and, in particular, to consider what the impact would be of the City statute's expansive definition of "disability." If a potential employer is not allowed to ask about a characteristic upon which it would be illegal to base a hiring decision, what is it that an employer in New York City may safely inquire about in assessing a candidate for a job? Because under the Human Rights Law, if one follows its wording strictly, any "physical or mental impairment" is a "disability," the answer to the proceeding question is a problematic one. Virtually any physical or mental condition—be it clumsiness, shortness of breath, lack of stamina, slow-wittedness, or whatever—can be construed to be an "impairment." Presumably a potential employer could ask a candidate about talents and special abilities while being careful not to touch upon shortcomings or inadequacies that could be construed to be impairments. However, the dividing line between "abilities" based on talents and inabilities based on minor physical defects or ailments (i.e., "disabilities") may be difficult to discern.

Consider in this context two applicants being interviewed for a job as a typist, each of whom has taken a typing test and achieved respective scores of forty-five and fifty words per minute. Suppose the first applicant, who obtained the lower score, honestly and convincingly states: "I try absolutely as hard as I can, I push myself to my limits; but, no matter how hard I try, I simply can't type faster than forty-five words per minute." It can easily be argued that such a statement puts the employer on notice that the first applicant suffers from an "impairment" (of what the Human Rights Law labels "the musculoskeletal system") and that a choice in favor of the second, faster candidate may be deemed to have been motivated by a discriminatory intent based on the first applicant's disability.

Indeed, whenever a well-motivated candidate falls short of some achievable standard, the very fact that the person is well-motivated suggests that a physical impairment of some sort is in play. Furthermore, if a person is not well-motivated it is equally reasonable to argue that a "mental impairment" is responsible for this lack of motivation. A scrupulous employer, informed of the City law's definition of disability, may be at a loss in deciding what constitutes "merit" in a candidate and what constitutes a "disability." A company which discriminates in its hiring by making offers to candidates whom it considers to have the greatest abilities may be deemed by the law to have discriminated against other candidates with impaired abilities. The more closely it is examined, the more elusive becomes the line under the City statute between "merit," which it is legal to consider, and "disability," which must be ignored.

The only adjudicated case in the City Human Rights Commission that addresses this question offers little guidance in how to solve this conundrum. That case, *Manitta v. New York City Police Dep't*,¹⁹ was brought by a candidate for appointment as a New York City Police Officer who was rejected on the grounds that he was "psychologically unsuitable" for police work because he displayed "low stress tolerance."²⁰ Manitta's complaint alleged that the Police Department had illegally discriminated against him on the basis of his "perceived disability."²¹ The Law Enforcement Bureau argued at the hearing that "low stress tolerance" was a mental impairment that qualified as a disability under the Human Rights Law.²² In a cryptic explanation, the Administrative Law Judge rejected the Bureau's argument, concluding that:

[notwithstanding the revised Code's lack of clarity regarding what constitutes a disability . . . [t]o accept the Bureau's formulation would be to find in advance, as a matter of law, that any disqualification based on a finding of either physical or psychological unsuitability would be tantamount to a finding of 'disability.' . . . '[U]nsuitability' . . . does not necessarily mean 'disability' (or perception thereof).²³

As a matter of common sense, there is some appeal to *Manitta's* effort to construct a "safe harbor" category of "unsuitability" in

19. Compl. No. E-93-0679, Rec. Dec. & Ord. (N.Y.C.C.H.R. Aug. 2, 1994).

20. *Id.* at 3-4.

21. *Id.*

22. *Id.* at 9-10.

23. *Id.* at 10.

order to prevent the Human Rights Law, as amended, from turning every shortcoming into an "impairment" and thus into a "disability." However, the problem with the decision is that it contains no suggestion whatsoever as to how to distinguish between a characteristic that should be construed to be an "impairment" and one that should simply be deemed to be a lack of "suitability." The most plausible distinguishing criterion that comes to mind is one involving volition: a characteristic that is under the volitional control of a candidate could be subsumed under the rubric "suitability," while one outside a candidate's volitional control would be an "impairment."²⁴ Whatever its superficial plausibility, this formulation merely restates the issue without solving it. The core of the dilemma is deciding what is and what is not under a candidate's volitional control. Is Mr. Manitta's "low stress tolerance" or a typist's low typing speed or an avid skier's history of broken limbs within each person's control or outside it? Neither volition nor suitability is a sufficiently specific concept to provide guidance as to what should or should not be construed to be a disability. In the absence of a clear definition of disability, it is impossible to state with certainty what characteristics can legitimately be considered by a would-be employer as "merit" and what characteristics need to be either ignored or considered solely in the context of exploring reasonable accommodations. Accordingly, it is not clear how one might adapt the principles embedded in the EEOC Pre-Employment Guidelines to fit the provisions of the City Human Rights Law. In sum, this exercise illustrates the broader proposition that the boundaries of the protected class of disability under the City statute—the protected class whose members have the right not to be discriminated against because of their inclusion in the protected class—will remain indistinct. One can only say that the class is large and that in many cases its members may not be easy to identify.

24. It may be relevant to note that, generally speaking, the common identifying feature of protected classes is that the characteristic that defines the protected class is deemed, either as a biological fact or as a matter of social policy, to be outside the volitional control of the member of that class. Thus, race, gender, national origin, age, and other such traits are all accidents of birth; while creed and sexual orientation are either in fact beyond volitional control or are relegated by social policy to the area of individual autonomy into which society should not intrude.

IV. The Effects of the Expanded Definition of "Disability"

It should be apparent from the preceding discussion that the City Council's decision to expand the definition of "disability" to include *any* physical or mental impairment whatsoever further erodes the role that a finding of "discrimination" plays in adjudicating disability cases. To the extent that a protected class is not discretely defined, it becomes increasingly problematic to identify and to analyze discrimination on the basis of that protected class. The very word "discrimination" is derived from the Latin word meaning "to divide or distinguish," and the concept makes little sense when it is applied to traits that we either fail to perceive or that we all share. The Human Rights Law is intended to eliminate discrimination on the basis of disability; yet, as the discussion below will further illustrate, it is not at all apparent what state of mind on the part of the respondent is necessary to support a finding of discrimination. The fact that all disabilities are covered—whether or not they are apparent and whether or not they have traditionally been the object of social opprobrium—obscures the psychological model of disability discrimination that is contemplated by the law.

Once again, the best way to clarify this point is to contrast the disability model of discrimination with the racial model. At the heart of the racial model of discrimination was the recognition, denied by the Supreme Court in the "conniving legalisms"²⁵ of *Plessy v. Ferguson*²⁶ but acknowledged by it in *Brown v. Board of Education*,²⁷ that racial discrimination had the effect, and it could therefore be presumed the intent, of imposing a "badge of inferiority"²⁸ on the victims of discrimination and that people who engaged in racial discrimination were practicing one or another form of bigotry. This bigotry, presumed to exist in the mind of the respondent in the racial model of discrimination, can take extreme forms, such as the segregationist belief that races should be strictly separated, or milder forms, such as a general distaste for interacting with people who are "different." Whatever its precise incarnation, the racial model of discrimination, arising as it does from this nation's shameful history of invidious and stigmatizing racial discrimination, is directed against this type of "color-conscious" thinking.

25. This apt phrase is lifted from Richard Kluger's discussion of Supreme Court cases upholding Jim Crow laws. See RICHARD KLUGER, *SIMPLE JUSTICE* 314 (1975).

26. 163 U.S. 537 (1896).

27. 347 U.S. 483 (1954).

28. See *Brown*, 163 U.S. at 551.

To what extent, it can be asked, has a similar form of invidious, stigmatizing discrimination been practiced against the disabled? At least with respect to severe disabilities, the “handicapped” (to use a term that is becoming anachronistic precisely because of its pejorative overtones) have been subjected to bias, prejudice, antagonism, condescension, and ostracism that rival in intensity the treatment that has been accorded to other despised minorities.²⁹ All too many employers, landlords, and storekeepers found it not only “inconvenient” but affirmatively distasteful to deal with a paraplegic or a deaf person or some equivalently physically-challenged person. The City Human Rights Law, along with analogous federal legislation such as the Americans with Disabilities Act, sends a long overdue message that such attitudes (and the behavior that stems from such attitudes) will not be tolerated.

In these respects, then, the disability model of discrimination, insofar as it applies to severe and apparent disabilities, seems largely analogous to the racial model of discrimination: both models are premised on a recognition that the respective protected classes have been viewed as “discrete and insular minorities” subject to invidious discrimination.³⁰

This picture changes, however, when one considers the post-1991 expanded definition of “disability” in the Human Rights Law. As a result of the amendment, there is an increasing number of cases at the Human Rights Commission where the disability alleged is a sprained ankle, a sore throat, or some other such minor ailment. Everyday experience does not allow one to believe that the respondent in such circumstances harbors a bias or prejudice against people who suffer from such common ailments—indeed, it is impossible to imagine a respondent who has not him- or herself

29. Extensive literature can be cited to support this proposition. For some recently published examples, see generally HOCKENBERRY, *supra* note 3; HARLAN L. LANE, *THE MASK OF BENEVOLENCE: DISABLING THE DEAF COMMUNITY* (1992); LESLIE FIEDLER, *FREAKS: MYTHS AND IMAGES OF THE SECRET SELF* (1978). See also JOSEPH P. SHAPIRO, *NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT* 25 (1994).

30. “Discrete and insular minorities” is a phrase that originated in constitutional law as a justification for heightened scrutiny under the Equal Protection Clause. See *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938). To the extent that anti-discrimination statutes can be seen as “mini-equal protection clauses,” see Fiss, *supra* note 13, at n.23, the concept is germane here. Just as, under the Equal Protection Clause, legislative motives become increasingly suspect to the extent that the group affected is a discrete and insular minority, so under the Human Rights Law the discriminatory motives of a respondent are more likely to be maligned when the complainant’s protected class is discrete and insular.

suffered from such ailments.³¹ In this sense, the “discrimination” at issue here is not based on the same sort of “we-they” considerations that form the basis of the racial model of discrimination and that also come into play in dealing with more severe disabilities.³² What can truly be said of racial discrimination and of similar forms of bigotry—that they utterly erode the core values of equality and human dignity on which American civilization rests—cannot be said of those who are intolerant of the everyday ailments that bedevil us all or of those who, rightly or wrongly, suspect others of malingering.³³ Because the conduct involved in these everyday disability cases is not as odious as the conduct that traditional civil rights statutes were intended to reach, it is not surprising that the remedies that have resulted from such cases have often tended to be unclear in focus. As is suggested below,³⁴ remedies for violations of disability law are considerably more confused and less pre-

31. As the United States Court of Appeals for the Fourth Circuit has observed in this context,

[i]t would debase [the] high purpose [of fighting discrimination against the disabled] if the statutory protections available to those truly handicapped could be claimed by anyone whose disability was minor and whose relative severity of impairment was widely shared. Indeed, the very concept of an impairment implies a characteristic that is not commonplace and that poses for the particular individual a more general disadvantage in his or her search for satisfactory employment.

Forrisi v. Bowen, 794 F.2d 931, 933 (4th Cir. 1986).

32. The point here is that the universe of “cold-sufferers” (for example) is neither discrete nor insular, because all of us have and all of us will continue to suffer from sporadic colds. By contrast, race is an example of complete discreteness and insularity, because we all will remain the race that we happen to be. Severe disabilities fall between these two extremes, because it is statistically unlikely, but by no means impossible, that any particular person will become severely disabled.

Another protected class under the Human Rights Law that often poses conceptual problems similar to those arising in disability cases is age. It is not uncommon for a complaint to allege age discrimination when, for example, some variant of the following has occurred: the 40 year-old complainant is passed over for promotion by the 42 year-old supervisor and a 38 year-old employee is promoted instead. The fact that the protected trait, age, exists over a continuum that we all share frequently results in factual allegations that strain the traditional “we-they” elements of discrimination.

33. There are dozens of cases in the Commission where the disability alleged is of the minor ailment variety and where what really seems to be going on is that the employee has been fired because of a (often well-founded) suspicion that he or she is malingering. If, on the occasion that led to the firing, the employee was in fact sick, the termination may be illegal even if the employee has a record of previous malingering. Because an employer is liable if it should have known of a disability and because a minor ailment can constitute a disability under the Human Rights Law, the employer may be found to have violated the statute if it did not first explore the feasibility of accommodating the employee's claimed illness. *NEW YORK, N.Y., ADMIN. CODE § 8-107(15)(a)*.

34. *See infra* Part V.

dictable than remedies for other violations of the Human Rights Law. An exploration of this aspect of disability law will further clarify some of the *sui generis* aspects of this area of law.

V. Remedies

The evolution of disability law, accelerated by the expanded definition of "disability," has, as the preceding discussion suggests, dissolved some of the core content of the concept of discrimination. It is hardly surprising that these developments have had some spillover effect on the law of remedies.

To illustrate the problems that can arise in trying to fashion remedies for disability claims, it is useful to begin by examining some specific examples of cases that have recently sparked debate in the Law Enforcement Bureau of the City Commission. The single most prevalent claim presented in disability cases at the Commission is that the owner of a building failed to make that building accessible.³⁵ The remedy in such cases, provided it is not too costly in light of the financial resources of the building, is to install a ramp or some equivalent means of making the building accessible. There is nothing especially problematic about such cases, but interesting questions arise as one deals with variants of these "one-step" cases.

A fairly common variant are cases where the tenant of an upper-floor of a building without an elevator becomes disabled so that it is difficult or impossible for the tenant to climb the stairs to her apartment. In these cases, the Commission has agreed that the landlord, in lieu of exploring whether it would be an "undue hardship" to install an elevator, may reasonably accommodate the disabled tenant by making available an approximately equivalent apartment on a lower floor. Such remedies would seem to be a fairly straightforward application of the principles of law that govern the "one-step" cases. Recently, however, a complaint was filed in the Law Enforcement Bureau that reveals that these legal principles are by no means self-evident. The complainant in this case, who will be called Smith,³⁶ is a Bronx resident in City housing and is being treated for a disability, which makes it difficult for Smith to travel to a particular hospital in Manhattan. The complaint alleges

35. Such cases are commonly referred to as "one-step cases," because typically the premises in question have at least one step at the entranceway that cannot be negotiated by a wheelchair.

36. Although these complaints are a matter of public record, pseudonyms are used here and other identifying details are changed in order to avoid subjecting disabled complainants to public attention which they may not seek.

that the City Housing Authority, by failing to put Smith at the top of the list of applicants for City housing at a site close to the hospital in Manhattan, discriminated against Smith because of her disability.

At first blush, one might be inclined to view the Smith case as closely analogous to those cases where a disabled tenant is moved from an upper to a lower floor of a walk-up apartment. In each case, it is a single landlord who controls all the apartments; and, arguably, the only difference between the two situations is that in one case the move involved is vertical while in the other it is horizontal. It is a plausible interpretation of the law to hold that the landlord, who is on notice of Smith's disability, must reasonably accommodate Smith by moving her to the building closest to the hospital. Yet, intuitively, this result seems inequitable; and it sheds light on the nebulous nature of remedies in disability law to explore this case further.³⁷

One objection to ordering the City to put Smith at the top of the waiting list for public housing at the building near the medical facility is that doing so infringes on the rights of those who are ahead of her on that list. The Housing Authority is, after all, indifferent as to who occupies a particular apartment, and it does not "hurt" the Housing Authority to order one tenant rather than another to be placed in a particular apartment. It is thus not the Housing Authority, but other prospective tenants who "pay" for the remedy that Smith is being awarded. They are paying for Smith's award by being denied the opportunity to move into units as soon as they would otherwise be able to. Whatever its superficial logic, this objection is actually spurious, because accepting its logic would eliminate all reasonable accommodations under disability law. All disability cases implicate the same logic: the money a respondent uses to build a ramp, to modify a bathroom, or to provide some other reasonable accommodation is money that might otherwise have been used to provide salary increases, a coffee machine, a new paint job, or some other benefit for those who are not disabled. In this respect, the only distinctive aspect of the Smith case is that the existence of a waiting list identifies with unusual clarity the specific

37. To reiterate the argument made above, one troubling aspect of disability law that this case illustrates is the content of the term "discriminate." It is a peculiar use of the word to say that Smith's landlord is "discriminating" against her by treating her the way all the other tenants are treated. As the discussion below suggests, the case is also troubling because there is no straightforward criterion to determine what remedy is appropriate.

sacrifices that others are being called upon to make. However, this feature of the case is plainly just a difference of degree rather than of kind from other disability cases.

A more fundamental objection that can be raised to the proposed remedy in the Smith case is that the remedy is broader than the right it is intended to vindicate. Under the terms of the Human Rights Law, the reasonable accommodation to which a disabled person is entitled is one that enables the complainant "to satisfy the essential requisites of a job or *enjoy the right or rights in question*."³⁸ The Smith case poses the question of what right or rights are being granted by a provider of housing. As already mentioned, the law is clear that the sale or lease of an apartment carries with it the granting of a right of access to that apartment—a right that the disabled are entitled to enjoy if such access can be effectuated by installation of a ramp or some other reasonable accommodation. But does this right of access *to* an apartment also include a right of access *from* the apartment *to* necessary medical treatment, without which the "right" to the apartment would be meaningless? If so, does this expanded right also include the right of access to other real or purported necessities of modern life such as food stores, jobs, or places of worship?

Contemplating the "slippery slope" aspects of the right that Smith is asserting, one might be tempted to answer the preceding questions in the negative. Further reflection, though, makes it unclear that one can logically draw a sharp distinction between access *to* an apartment and access *from* an apartment. Consider, for example, an employment case where a disabled bank teller needs to be assigned to a particular branch of that bank in order to be near a medical facility where he periodically receives treatment. Absent an undue hardship on the employer entailed by such an assignment, the bank would be required to assign the disabled teller to that branch if doing so would allow the employee to meet the essential requisites of the job. If an employer is legally obliged to provide access *from* the place of employment *to* necessary medical treatment, it is hard to argue that a provider of housing should be allowed to sustain a lesser burden. Both as a factual and a legal matter, there would not seem to be any material difference between a bank's various branches and a landlord's various apartment buildings.

38. NEW YORK, N.Y., ADMIN. CODE § 8-107(15)(a) (emphasis added).

For present purposes, it is not necessary to try to resolve these contradictions; it is enough to underline the point that determining remedies in disability cases seems particularly problematic. There is something about disability law that seems to result in more discretion and less guidance in fashioning remedies than in other areas of discrimination law. In understanding why this is so, it is instructive once again to compare the law of remedies in disability law with the archetype of race discrimination. In race cases, the wrong involved is the respondent's failure to treat one race like another; and the remedy that is required to repair this wrong is obvious: accord one race the treatment that is accorded the other.³⁹ The law need not specify the exact details of how the victimized race be treated; it need only command that, whatever the treatment, the two races be treated alike. In disability cases, however, the wrong is precisely having treated the disabled the same as the non-disabled. What the law requires is that the disabled be treated differently from the non-disabled, and it is thus the task of the law to specify what the content of that new and different treatment must be. In race cases the remedy is essentially procedural ("behave as you wish except just make sure you behave the same towards people of every race"); in disability cases the remedy is substantive ("this is how you must behave towards the disabled regardless of how you treat other protected classes"). In race cases there is an independent measure of how the complainant must be treated; namely, the treatment that is accorded by the respondent to races other than complainant's. In disability cases, as the discussion of the Smith case illustrates, there is no such independent measure; and the law must look to other criteria to determine the nature of appropriate remedy.⁴⁰

This point can be stated in slightly different terms: namely, disability law requires courts to determine the substantive content of rights while other areas of discrimination law allows the respondent to determine the substantive content of rights and relegates to the courts the easier task of ensuring that the enjoyment of rights (whatever someone else determines them to be) simply not be conditioned upon a person's protected class. Thus, only disability

39. See *supra* notes 12-14 and accompanying text.

40. The Human Rights Law offers a little, but limited, help in this endeavor. It provides, in pertinent part, "any person prohibited by the provisions of this section from discriminating on the basis of disability shall make reasonable accommodation to enable a person with a disability to satisfy the essential requisites of a job or enjoy the right or rights in question provided that the disability is known or should have been known by the covered entity." NEW YORK, N.Y., ADMIN. CODE § 8-107 (15)(b).

cases can pose the question of the *Smith* case of whether the lease to an apartment includes a substantive right to be near a medical facility or a grocery store. The landlord, after all, has already answered this question in the negative—it determines apartment assignments on a first-come, first-served basis and does not solicit or consider information about whether an applicant wants or needs to be near a particular location. It is only because Smith's protected class is disability that the law will second-guess the landlord's determination of what right is or is not included in the lease; it would not do so if Smith's complaint were predicated on any other protected class. Similarly, the remedy in a disability case is unique—the fact that Smith is entitled to have an apartment near her doctor's office does not mean that members of other protected classes are also entitled to such apartment assignments. In contrast, in all other areas of discrimination law, if one protected class is entitled to a particular benefit, by the very definition of discrimination, all protected classes are equally entitled to it.

VI. Conclusion and Admonition

The preceding observations have been informed by a number of underlying themes. Maybe the most basic is that “discrimination” means something different in disability cases from what it means in other areas of the Human Rights Law. The distinctive but nebulous meaning of “discrimination” in disability cases is exacerbated by the unclear definition of the protected class itself and is further confused by the fact that courts must create substantive rights for the disabled that are not available to other protected classes. The overall result of these mutually-interacting trends is probably less than ideal. The disabled end up being awarded less relief than a straightforward assessment of their needs would otherwise justify, while the rigor and utility of concepts developed in other areas of discrimination law are bruised in the effort to apply them to circumstances where they do not necessarily fit.

A second theme that runs through the preceding observations is that the City Human Rights Law's expansive definition of “disability” as including any physical or mental impairment ends up diluting the protection that the seriously disabled deserve. It does so by rendering suspect common sense notions of “merit” and by making any assessment of ability potentially actionable. As a result, it is no longer clear what “disability” means; and, more importantly, it is no longer clear what “discrimination on the basis of disability” means. Instead of reaching conduct that is motivated by bigotry,

pernicious stereotyping, and unfairness, the liberalized definition of "disability" makes it all too easy for the law to be applied to conduct that may at worst be negligent and that often is not morally repugnant at all. The nebulous nature of "reasonable accommodation" and other remedies that are authorized by the statute compound the confusion caused by the vague definition of "disability." Some of the more outlandish disability cases that have been filed with the City Commission, cases premised in the assertion that one or another minor ailment is a "disability," lend support to the contention that the disability provisions of the Human Rights Law are no longer instruments in the fight against invidious discrimination but rather are simply devices to create a City-wide "sick leave" policy. The overall result may or may not be a desirable one, but it is a peculiar destination to reach by the path of "anti-discrimination" law.

A Martian might be puzzled by all this. In a better society, the Martian might suggest, one would begin by looking at the needs of the disabled and at how these needs most efficaciously might be met; and one would be dedicated to fulfilling these needs whether or not the disabled were being victimized by discrimination. An admonition would, however, be in order for such a Martian: no matter how compelling the moral, philosophical, and practical justifications for the Martian's suggestions may be, our society does not at present seem to be in a political condition to accept them. Altruism, even self-interested altruism, seems to be signally absent from the spirit of the day; and, in the absence of such an idealistic commitment, it must suffice to help the disabled by including them in the civil rights movement that, despite some erosion, seems to enjoy general political support. A blunt instrument is better than none at all; and, unless and until something better comes along, New York City's Human Rights Law will continue to be used aggressively to advance the interests of the disabled.

