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Janet Eriv

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PERSISTENT MISCONCEPTIONS: A RESPONSE TO ROBERT HAMMEL

Janet Eriv*

The effects and application of handicap¹ civil rights laws . . . are not well understood, despite nearly unanimous support of their overall purpose. Legal analysis and interpretation are not fully developed, and there are popular misconceptions about their requirements. As a result, many people harbor reservations, concerns, and unanswered questions about civil rights provisions that protect handicapped people: Do handicap antidiscrimination statutes only prohibit discrimination against handicapped people, or have they been interpreted and applied to provide extraordinary privileges to handicapped individuals not available to other citizens? Are handicapped people making unlimited claims on public funds to remove anything that inconveniences them?²

These words were published in 1983 by the United States Commission on Civil Rights. More than a decade has passed, during which time a nationwide disability discrimination law, the Americans with Disabilities Act of 1990 ("ADA"),³ has been enacted, and society as a whole has become much more aware of the barriers facing people with disabilities. The legal analysis and interpretation noted in the above quote were not fully developed in 1983, and have been greatly expanded since. Yet Robert Hammel's article⁴ reveals that the "popular misconceptions" referred to above persist to a disturbing extent.

This essay responds to Mr. Hammel's article. In his conclusion, Mr. Hammel opines that "'discrimination' means something differ-

* This essay is solely the work and opinion of the author in her private capacity and it should not be construed under any circumstances to represent the official opinion, policy or work product of the Mayor's Office for People with Disabilities.

1. The term "handicap" is no longer viewed as appropriate. Rather than referring to "the handicapped" or "the disabled" the term "person with a disability" appropriately places the emphasis on the person first and on the condition second.

2. UNITED STATES COMM'N ON CIVIL RIGHTS, CLEARINGHOUSE PUBLICATION 81, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 1 (1983) [hereinafter ACCOMMODATING THE SPECTRUM].

3. Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified in scattered sections of 42 U.S.C. (1994)).

4. Robert Hammel, *Some Reflections on New York City's Disability Law*, 23 FORDHAM URB. L.J. 1195 (1996).

ent in disability cases from what it means in other areas of Human Rights Law . . . that courts must create substantive rights for the disabled that are not available to other protected classes . . . [and] the disabled [one suspects] end up being awarded less relief than a straightforward assessment of their needs would otherwise justify.”⁵ A second theme in his article posits that the New York City Human Rights Law’s expansive definition of “disability” dilutes the protection that people with more serious disabilities deserve “by rendering suspect common sense notions of ‘merit’ and by making any assessment of ability potentially actionable.”⁶ The intent of this essay is to show that the various notions that pervade Mr. Hammel’s underlying themes are examples of the kinds of paternalism and attitudinal barriers that disability rights laws were adopted, in part, to counteract. Furthermore, as is explained below, some of Mr. Hammel’s conclusions are based upon unclear analyses of other civil rights laws. In regard to the second theme, it will be argued that the New York City Human Rights Law definition of disability does not inherently lead to the results Mr. Hammel suggests. This essay provides a brief overview of civil rights laws to demonstrate how disability discrimination law does fit into traditional civil rights legal analysis. It then examines more specifically some key concepts in disability rights law, suggests how experience with federal disability discrimination law may be drawn upon for the purposes of interpreting the relevant provisions in the City Human Rights Law, and comments upon some specifics in Mr. Hammel’s article. Finally, this essay concludes with thoughts for the future of the City’s disability rights law.

The history of the civil rights movement in the United States has been one of breaking down societal barriers to attain inclusion in mainstream society; regrettably, Mr. Hammel appears to lose sight of this. African-Americans and women were excluded from voting; African-Americans were shut out of White-only schools; women were deemed ineligible for many categories of jobs. The struggle continually has been for access, a level playing field and a change in mainstream attitudes. Then-Attorney General Richard Thornburgh, testifying on behalf of any civil-rights legislation, stated that “persons with disabilities are all too often not allowed to participate because of stereotypical notions held by others in society —

5. *Id.* at 1216.

6. *Id.*

notions that have, in large measure, been created by ignorance and maintained by fear.”⁷

Civil-rights law identifies classes of individuals and prohibits the denial of opportunities or services on the basis of one’s membership in a protected class. Title VII of the Civil Rights Act of 1964, as an example, states:

It shall be an unlawful employment practice for an employer—
 (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or
 (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.⁸

Courts have held that both intentional discrimination and neutral policies that have the effect of discriminating are impermissible. Numerous “disparate treatment” and “disparate impact” cases demonstrate these principles.⁹ In *Griggs v. Duke Power Co.*, the seminal disparate impact case, the United States Supreme Court interpreted the Congressional intent behind Title VII in the following way:

It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to “freeze” the status quo of prior discriminatory employment practices.¹⁰

Thus, the goal of nondiscrimination provisions is to permit equal opportunity on an individual basis, and to prohibit both the denial of opportunity based upon stereotypes as well as adverse actions

7. *Americans with Disabilities Act of 1989: Hearings on S. 995 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources*, 101st Cong., 1st Sess. 201 (1989) (statement of Hon. Richard C. Thornburgh, Attorney General of the United States).

8. 42 U.S.C. § 2000e-2(a) (1994).

9. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

10. *Griggs*, 401 U.S. at 429-30.

based upon one's protected class status. Mr. Hammel criticizes disability laws as requiring substantive rights rather than equal treatment,¹¹ but this issue of providing a level playing field is not unique to disability discrimination. In general, remedies have required equal treatment; however, it is important to note that, in pre-ADA civil rights law, some courts have held that identical treatment does not result in true equality of opportunity. In order not to discriminate against (or to provide equal opportunity to) children whose primary language is not English, for example, the Supreme Court held that a school system was required under Title VI of the Civil Rights Act of 1964 to provide bilingual education.¹² The Court stated that there was no equality of treatment by providing the same books and facilities to all students irrespective of whether they understand English.¹³ To do so, the Court held, effectively foreclosed the students from any meaningful education.¹⁴

Pre-ADA civil rights laws also have required reasonable changes in policies or procedures to accommodate certain protected class members. In the area of nondiscrimination on the basis of religion, reasonable accommodations for religious observances that would not impose an undue hardship on an employer may be required.¹⁵ Indeed the term "religion" is broadly defined as "all aspects of religious observance and practice."¹⁶ Determining whether a complainant actually holds a religious belief or follows a religious practice, and therefore is covered by the statute, is part of developing a case based on religious discrimination.¹⁷ Where it is found that an employee does follow religious practices, an employer may have to change work schedules, or provide flexible work times, in order to accommodate those practices. However, an employer need not take action that would result in an undue hardship. Collective bargaining agreements, as well as the impacts on other employees, are factors that may be considered.¹⁸

Another concept that courts have struggled with in the pre-ADA civil rights arena is that of who is "qualified." Much attention has

11. Hammel, *supra* note 4, at 1214-15.

12. *Lau v. Nichols*, 414 U.S. 563, 564-65 (1974).

13. *Id.* at 566.

14. ACCOMMODATING THE SPECTRUM, *supra* note 2, at 99-100 (citing *Lau*, 414 U.S. 563).

15. 42 U.S.C. § 2000e(j) (1994).

16. *Id.*

17. See *Welsh v. United States*, 398 U.S. 333, 339-40 (1970); *United States v. Seeger*, 380 U.S. 163, 176 (1965).

18. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 79-81 (1977).

been paid to "bona fide occupational qualifications" (BFOQ) and "business necessity." BFOQ is a narrow affirmative defense that is available in religion, sex or national origin cases. Examples where a BFOQ defense would be raised include the exclusion of females from warehouse work because the job involves lifting 100 pounds or the refusal to hire females as security guards in men's prisons. The employer would need to demonstrate that all, or substantially all, women cannot perform the job in question.¹⁹ In one case where a job was deemed strenuous by an employer and therefore not open to women, the Fifth Circuit looked to the specific duties in question and to how frequently they were performed.²⁰ Accordingly, it is impermissible under Title VII to refuse to hire individuals on the basis of stereotyped characterizations of the sexes.²¹ A separate but easily confused defense is that of "business necessity," applicable where work criteria exist that are apparently neutral but exclude members of one sex at a rate higher than for the other. In those cases, an employer would have to show why the criteria are necessary to perform the job.²²

Disability-rights laws do indeed build on the concepts that have been developed in our legislative and judicial systems. The statement that "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"²³ misses the distinction between identical treatment and equal opportunity. An analysis of protected class status is found in religious discrimination cases, thus belying the assertion that, "[t]he novelty of 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."²⁴ A requirement of reasonable accommodations, which is at the core of many disability cases, also has an analogy in religious discrimination cases. Again, Mr. Hammel's discussions on qualification and merit omit references to applicable gender cases. While not all the legal analyses from other kinds of civil rights cases can be applied automatically,

19. BARBARA LINDEMANN SCHLEI & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 358-59 (2d ed. 1983).

20. *Weeks v. Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228, 234 (5th Cir. 1969).

21. *Dothard v. Rawlinson*, 433 U.S. 321, 333 (1977).

22. SCHLEI & GROSSMAN, *supra* note 19, at 359.

23. Hammel, *supra* note 4, at 1202.

24. *Id.* at 1202-03.

they are instructive when looking at disability rights laws — including the City's provisions.

The disability-rights movement developed separately from other civil rights movements. Rehabilitation programs were established when soldiers returned from World War I. Medical advances allowed many more veterans to survive. Continuing medical advances in the twentieth century have dramatically increased the numbers and lifespan of individuals with disabilities. In 1935, President Franklin D. Roosevelt established Social Security which included the first program of permanent assistance to adults with disabilities. World War II led to further expansion of rehabilitation programs and, in 1948, discrimination on the basis of physical disability was prohibited in federal civil service employment.²⁵ The Rehabilitation Act of 1973²⁶ was a broad federal funding bill for a variety of services including medical care, independent living centers and vocational training. Just prior to its enactment, some civil rights language, similar to provisions in the Civil Rights Act of 1964, was added. A significant provision was Section 504, which prohibits discrimination on the basis of disability in employment or in the provision of services by entities receiving federal financial assistance. Section 504's language tracks similar provisions in Title VI of the Civil Rights Act of 1964, which bans discrimination on the basis of race, color or national origin in federally assisted programs.²⁷ Congress relied on its previous experience with civil rights legislation when it enacted Section 504, and the section's origin probably was based on unsuccessful proposals to amend Titles VI and VII of the Civil Rights Act of 1964 to include disability provisions.²⁸ It took political protests similar to those in other civil rights movements to finally force the signing in 1977 of Section 504 implementing regulations.²⁹ In 1990, the ADA was signed into law, expanding disability rights nationwide to prohibit discrimination by certain public accommodations, government entities and employers regardless of funding sources. The ADA both incorporates and

25. ACCOMMODATING THE SPECTRUM, *supra* note 2, at 21.

26. Pub. L. No. 93-112, 87 Stat. 355 (codified as amended beginning at 29 U.S.C. § 701 (1994)).

27. 42 U.S.C. § 2000d (1994).

28. ACCOMMODATING THE SPECTRUM, *supra* note 2, at 49-50 n.26.

29. The regulations, *inter alia*, prohibit employers from using any employment test or other selection criterion that screens out or tends to screen out individuals with disabilities unless the test or criterion is shown to be job related. This provision is based on the Title VII concepts as set forth in *Griggs*, 401 U.S. 424. ACCOMMODATING THE SPECTRUM, *supra* note 2, at 152 n.61.

builds upon Section 504, by including almost verbatim portions of its detailed implementing regulations. This guidance should not be ignored when interpreting our local law.

A few key concepts in disability law bear brief introduction. While volumes have and could be written about them, the following is provided as a brief review. On the federal level, the ADA defines "disability" to mean a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment.³⁰ The City's Human Rights Law defines that same term as any physical, medical, mental or psychological impairment, and also provides protection to those who have a history of or are regarded as having such impairments.³¹

Generally, an "accommodation" is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities.³² Only "reasonable accommodations" are required; unlimited expenses need not be incurred, nor do actions need to be taken that would enable an employee to reach his or her full potential, as contended by Mr. Hammel.³³ An accommodation is not reasonable if it imposes an "undue hardship" which, in general, means significant difficulty or expense incurred by a covered entity. No set dollar amounts or formulas are provided, but the factors to be considered are included in both the ADA's implementing regulations and case law. Reasonable accommodations are required only for a "qualified individual" to perform "essential job functions." Essential functions are the fundamental job duties and not the marginal ones.³⁴ The inquiry into whether a job duty is essential is not intended to second guess the employer nor to require him or her to lower job performance standards.³⁵ These approaches similarly are applicable under New York City's Human Rights Law.

The Interpretive Guidance on Title I of the ADA states that:

30. 42 U.S.C. § 12102(2)(A).

31. NEW YORK, N.Y., ADMIN. CODE § 8-102.16 (1996).

32. Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. app. pt. 1630 at § 1630.2(n) (1996) [hereinafter Interpretive Guidance].

33. Hammel, *supra* note 4, at 1213 n.13.

34. 29 C.F.R. § 1630.2 (1996); Haysman v. Food Lion, 893 F. Supp. 1092, 1101 (S.D. Ga. 1995).

35. Milton v. Scrivner, Inc., 53 F.3d 1118, 1125 (10th Cir. 1995); Interpretive Guidance, *supra* note 32, at § 1630.2(n); U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, THE AMERICANS WITH DISABILITIES ACT TITLE I TECHNICAL ASSISTANCE MANUAL I-2.39(a) (Jan. 1992).

The ADA thus establishes a process in which the employer must assess a disabled individual's ability to perform the essential functions of the specific job held or desired. While the ADA focuses on eradicating barriers, the ADA does not relieve a disabled employee or applicant from the obligation to perform the essential functions of the job. To the contrary, the ADA is intended to enable disabled persons to compete in the workplace based on the same performance standards and requirements that employers expect of persons who are not disabled.

However, where that individual's functional limitation impedes such job performance, an employer must take steps to reasonably accommodate, and thus help overcome the particular impediment, unless to do so would impose an undue hardship.³⁶

In a case concerning whether providing an aide to a disabled teacher is a reasonable accommodation under Section 504, the Second Circuit Court of Appeals articulated the essential function analysis as follows:

But is classroom management — the ability to maintain appropriate behavior among the students — an essential function of a tenured library teacher's job? We might intuitively think so. But Section 504 does not permit us to rely on intuition — indeed, unthinking reliance on intuition about the methods by which jobs are to be performed and how an individual's disabilities relate to those methods is among the barriers that the Rehabilitation Act was designed to overcome. To avoid unfounded reliance on uninformed assumptions, the identification of the essential functions of a job requires a fact-specific inquiry into both the employer's description of a job and how the job is actually performed in practice.³⁷

As should be evident by now, these concepts of essential function and reasonable accommodation are not peculiar to disability rights law. What makes disability cases more complex is that disability is often tied to functional limitations, so that disability discrimination law cannot be completely neutral or indifferent to the defining characteristic. The public policy of full participation requires acknowledging and accommodating varying physical and mental functional abilities. As in other areas of discrimination law, there needs to be treatment which creates a level playing field — not mindless application of simplistic remedies. There must be a

36. Interpretive Guidance, *supra* note 32, at Background.

37. *Borkowski v. Valley Central School District*, 63 F.3d 131, 140 (2d Cir. 1995) (citations omitted).

careful parsing out of the essential functions, the legitimate qualification standards, and the qualifications and abilities of the individual to perform those essential functions with or without reasonable accommodations.³⁸

In the discussion of qualifications and merit, the appendix to the ADA Title I regulations anticipates one of Mr. Hammel's examples in which he suggests it would be impermissible to select the applicant without a disability who types faster over an applicant with a disability with a slower typing speed for a typist position:³⁹

If an employer requires its typists to be able to accurately type 75 words per minute, it will not be called upon to explain why an inaccurate work product, or a typing speed of 65 words per minute, would not be adequate If an employer does require accurate 75 word per minute typing . . . it will have to show that it actually imposes such requirements on its employees in fact, and not simply on paper. It should also be noted that, if it is alleged that the employer intentionally selected the particular level of production to exclude individuals with disabilities, the employer may have to offer a legitimate, nondiscriminatory reason for its selection.⁴⁰

Reasonable accommodations are to be provided to "qualified" individuals with disabilities. Mr. Hammel refers to merit as a reflection of one's abilities and achievements, not of one's protected class.⁴¹ Mr. Hammel appears to be in a quandary regarding how merit applies to people with disabilities. The goal of disability rights law is to focus on the "abilities" of a person with a disability and not make presumptions about that person's limitations. Legitimate questions should focus on abilities and qualifications and not on impairments.⁴² The definition of disability or impairment should not impact on the concept of merit. As Mr. Hammel points out, an Administrative Law Judge deciding a case under the revised City Human Rights Law concluded that unsuitability does not necessarily mean disability.⁴³

While the City Human Rights Law definition of disability is intentionally broader than that of the ADA, it was not intended to be

38. Similarly, in terms of participating in programs, a qualified individual with a disability may be entitled to reasonable modification of policies or practices.

39. Hammel, *supra* note 4, at 1206-07.

40. Interpretive Guidance, *supra* note 32, at § 1630.2(n).

41. Hammel, *supra* note 4, at 1203-04.

42. *Cf. id.* at 1205-06.

43. *Id.* at 1207 (quoting *Manitta v. New York City Police Dep't*, Compl. No. E-93-0679, Rec. Dec. and Ord. (N.Y.C.C.H.R. Aug. 2, 1994)).

read in a vacuum; there is much material, case law and interpretive guidance which can be instructive. In particular, the term "impairment" is left undefined in the City Human Rights Law. Without acknowledging it as such, Mr. Hammel himself cites a case which contains a useful definition of the term "impairment" for City Human Rights Law purposes:

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.'⁴⁴

In addition to questioning how qualification standards can be maintained when applied to people with disabilities, Mr. Hammel's repeated references to the needs of "the disabled" and the need to provide benefits, indicates a lack of understanding of the distinction between providing a level playing field and conferring special benefits. The Congressional findings in the ADA refer to the discriminatory effects of architectural, transportation and communication barriers.⁴⁵ Office buildings with stairs leading to the entrances and buses without lifts are examples of barriers which will prevent some individuals who use wheelchairs or other assistive devices from having a job, because they cannot travel to work and enter into the workplace. These barriers can make the difference between a person leading an independent life, contributing to society and to the economy, or being dependent on governmental benefits (Mr. Hammel's comment that the provision of such accessibility features makes it less difficult for "the disabled" to participate in the City's life greatly understates the situation). Providing equal opportunity in the context of disability rights requires a recognition of the existence of and then the removal of barriers - both attitudinal and physical barriers.

Mr. Hammel's argument demonstrates further weakness when he cites the provision of parking spaces, buses, bathrooms, curbs and jobs accessible for people with disabilities, concluding that an observer from Mars would assume "that the disabled enjoy . . . a

44. *Id.* at 1211 n.31 (quoting *Forrisi v. Bowen*, 794 F.2d 931, 934 (4th Cir. 1986)).

45. 42 U.S.C. § 12101(a)(5).

special status that allows them to claim a greater percentage of society's resources than can their non-disabled counterparts."⁴⁶ Much remains inaccessible, and many people with disabilities are excluded from a greater portion of facilities than "their nondisabled counterparts." Which is really the privileged class? Providing the accommodations of which Mr. Hammel complains is hardly the same as providing "benefits" to people enjoying special status. Rather, it is the partial removal of societal barriers to mainstream participation that have served to isolate members of an historically disfavored group. Viewing barrier removal properly — as action necessary to provide meaningful opportunity — should reduce Mr. Hammel's "confusion over whether the statute requires equal treatment or special treatment"⁴⁷ Before discriminatory barriers will be removed on a widespread basis, there needs to be an understanding that they exist.

Mr. Hammel's lack of understanding of the provision of equal opportunity pales in comparison with this stereotypical extract:

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 (deaf more visually adept than hearing people) The [City] Human Rights Law . . . 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.⁴⁸

It would be equally absurd to ask whether Marlee Matlin's acting talent developed because she is deaf, or because, as everyone knows, all women have "special intuition." Likewise, one might ask whether Stevie Wonder's special musical abilities exist because he is blind, or because, as everyone knows, Blacks have "rhythm." It is hard to respond to this notion that all people with disabilities have compensating special talents. Civil rights laws certainly do not take into account stereotypical forms of behavior associated with various races and provide individual provisions for each group. To the contrary, there is generally a rather broad definition of the protected class, and the focus is on the behavior of the respondent.

Therefore, when Mr. Hammel points out "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

46. Hammel, *supra* note 4, at 1196-97.

47. *Id.* at 1198-99 n.7.

48. *Id.* at 1198 n.6.

focusing on the needs of the disabled and on the benefits that should be granted to fulfill these needs, but rather by attacking discrimination,"⁴⁹ he ignores the general framework of civil rights laws. Social reform through the "attack" on discriminators is the basis of our civil-rights law and is not peculiar to disability-rights law. As the foregoing review of civil-rights law illustrates, the laws prohibit covered entities from treating protected class members in ways which deny them equality of opportunity, and where violations are found, there is enforcement including punishment of the discriminator. The Civil Rights Act of 1991 restored the availability of compensatory and punitive damages in certain cases involving intentional discrimination on the basis of sex, religion or disability. "Legal tradition and history in the United States suggest that the law can help mold people's conduct and eradicate proscribed behavior."⁵⁰ "Punitive damages awards serve to deter certain conduct, as well as to punish."⁵¹

Furthermore, Mr. Hammel's focus on the "needs of the disabled" reveals a paternalistic attitude. He does not give insight to what help he feels "the disabled" need which would address their needs more directly than the current disability discrimination model, let alone who would be responsible for providing the benefits or who would determine what benefits were needed.

Mr. Hammel's confusion between benefits and civil rights is evident again in the comparison with veterans benefits.⁵² One needs to parse out, in a way that Mr. Hammel does not, the different bodies of law. Our legislation provides benefits, preferences, affirmative action, and nondiscrimination protection at varying levels for different protected classes. Benefits in the form of vocational training are provided to veterans with and without disabilities and to individuals (non-veterans) with disabilities; rehabilitation services are provided to veterans and other people with disabilities.⁵³ These benefits were established in part for humanitarian reasons, and in part for economic reasons. In enacting the ADA, Congress found that the nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, in-

49. *Id.* at 1199.

50. ACCOMMODATING THE SPECTRUM, *supra* note 2, at 42.

51. *Moreno v. Consolidated Rail Corp.*, 99 F.3d 782, 794 (6th Cir. 1995) (Daughtry, J., concurring in part and dissenting in part) (citing *Smith v. Wade*, 461 U.S. 30, 49, 54-55).

52. Hammel, *supra* note 4, at 1197-98.

53. 38 U.S.C. § 3001 *et seq.* (1994); Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.* (1994).

dependent living, and economic self-sufficiency. Congress also found that "the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity."⁵⁴ Individuals who are productive and working will add to society's resources, rather than be dependent on public assistance. Preferences, such as special consideration in appointments and promotions, are given to veterans in large measure as recognition for the service they provided to the country and the corresponding time spent away from the workforce.⁵⁵ There are various forms of affirmative action. For both veterans and qualified individuals with disabilities there are provisions requiring federal contractors to "employ and advance in employment" such individuals.⁵⁶ Where there are violations, contractors can be debarred, contrary to Mr. Hammel's contention that the law respecting veterans "makes no particular attempt to 'punish' people who treat veterans 'badly.'"⁵⁷ Section 503 of the Rehabilitation Act of 1973, as part of its affirmative action provisions, requires outreach and advertising of vacant positions in order to increase the employment of qualified individuals with disabilities. This kind of affirmative outreach is similar to that for veterans, but distinguishable from Executive Order 11246 which permits specific hiring goals based on race or gender. Then, there are civil rights provisions, as discussed throughout this essay, including Title VII of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, the ADA and the New York City Human Rights Law, all of which prohibit certain forms of behavior which, either intentionally, or effectively, discriminate against protected class members. Mr. Hammel's general comments about needs and benefits upon which he bases his conclusions that people with disabilities are afforded unusual special status in society are overly simplistic.

Furthermore, one needs to distinguish between hypothetical or pending cases offered by Mr. Hammel and his conclusions about what people with disabilities are entitled to under the City Human

54. 42 U.S.C. § 12101(a).

55. 38 U.S.C. § 4214 (1996).

56. 38 U.S.C. § 4212.

57. Hammel, *supra* note 4, at 1197.

Rights Law. The "Smith" case,⁵⁸ in which a complainant is requesting a transfer to an accessible apartment in a housing complex close to a particular hospital, raises some difficult questions regarding competing tenant rights and the limits of reasonable accommodation. There are gray areas in almost every law, and it is within the adjudicatory purview to interpret legislative meaning. The broad definition of the term disability in the City Human Rights Law does not dictate that the complainant is entitled to any apartment she requests. Once it is determined that she is within the protected class, there should then be analysis of what reasonable accommodation entails based on the particular set of facts.

Any new law invites testing in litigation. Recently the Equal Employment Opportunity Commission's policy chief on the ADA opined that the high number of charges under the ADA may be due to the general definition of disability, but did not view this as a weakness with the law. "'A by-product of the generic definition is the frivolous lawsuits. But as long as the courts reject them, this is not a problem What we see are by and large people who want to work. That's what the ADA is all about.'"⁵⁹ Congress, in passing the ADA, found that: (i) some 43,000,000 Americans have one or more physical or mental disabilities; (ii) that this number is increasing; and (iii) the failure to provide equal opportunity costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.⁶⁰ A 1994 Louis Harris & Associates poll reports that two thirds of individuals with disabilities between the ages of 16 and 64 are unemployed, and that 79% of those individuals want to work.

Clearly discrimination against people with disabilities persists and, as exemplified by our essays, remains controversial. The City Human Rights Law rightly includes nondiscrimination provisions which cover people with disabilities. Interpretive guidance could be adopted to further define "impairment." This is what is needed and not some other form of "altruism" to "advance the interests of the disabled."⁶¹ Hopefully through education and experience, society will continue to gain an understanding that the term "people with disabilities" represents a widely varied group of individuals with differing abilities who have a right to a level playing field.

58. *Id.* at 1212-16.

59. 15 BNAC COMMUNICATOR (BNA) at 14 (Winter 1996), quoting EEOC's Peggy Mastroianni.

60. 42 U.S.C. § 12101(a).

61. Hammel, *supra* note 4, at 1217.

Identical treatment is not necessarily equal treatment, but removal of existing barriers is simple nondiscrimination, as opposed to the conferral of special treatment. Once the attitudinal barriers are removed, it is much easier to have a discussion about eliminating physical barriers and providing appropriate remedies for discrimination.

