Michigan Law Review

Volume 109 | Issue 6

2011

Whither the Disability Rights Movement?

Robert W. Pratt
Court of the Southern District of Iowa

WHITHER THE DISABILITY RIGHTS MOVEMENT?

*Robert W. Pratt**

LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT. By *Samuel R. Bagenstos*. New Haven & London: Yale University Press. 2009. Pp. xii, 228. $48.

INTRODUCTION

While reading this book in 2010, almost twenty years to the date after President George H.W. Bush signed the Americans with Disability Act ("ADA"), one realizes how much the world of politics has changed. It is difficult to remember a time when such major legislation passed the U.S. Senate by a vote of 91 to 6 and the House of Representatives by 377 to 28.[1] Even more surprising, as we look back to 1990, is the fact that the executive branch was controlled by a different political party than the legislative branch. Contrast this legislative record with the milieu surrounding the health care reform legislation of 2010 and the economic stimulus bill of 2009, and the overwhelming bipartisan vote on the ADA seems quite remarkable.

This unique legislative history provides the context for Professor Bagenstos's new book, *Law and the Contradictions of the Disability Rights Movement*. In his book, Bagenstos traces how the often-diverging strands of the disability rights movement coalesced to create change, and how the diversity of the movement is now inhibiting future change. In short, Bagenstos's book is about the contradictions and tensions within the disability rights movement and the law it forged. His analysis and conclusions are very insightful and appear to be drawn from both his numerous articles on the subject and his experience in the movement, including arguing several significant ADA cases before the Supreme Court. Indeed, while there are many aspects of Bagenstos's book that make it worth reading, his analysis of the movement's core contradiction, its history, and its ongoing impact are particularly helpful, even to those who have already had significant exposure to the ADA.

---

* Robert W. Pratt is the Chief Judge of the Southern District of Iowa. He has served as a U.S. district judge since July 1, 1997. Before his appointment he practiced law for twenty-five years, first as a Legal Aid Society lawyer and then as a private practitioner. His practice in both positions involved substantial disability law including social security, supplemental security, and workers compensation claims. He argued many disability cases in the Iowa appellate courts, the U.S. district courts, and the U.S. courts of appeals.

1. 136 CONG. REC. 17,364–76 (1990); 136 CONG. REC. 17,280–97 (1990).

I. A Merger of Ideas

As Bagenstos correctly points out, the ADA was a merger of ideas from both conservative and liberal voices within the disability rights movement. According to Bagenstos, traditionally conservative proponents of the ADA favored its "anti-discrimination and accommodation model" because it appealed to their desire for "independence" from the overprotectiveness of the government. To these conservatives, treating individuals as being "entitled" to "special rights" because of their medical conditions was impermissibly "paternalistic" (pp. 13–25). This idea also garnered support from disabled people seeking the "dignity of risk," or, in other words, the ability to assume personal responsibility for their lives and bear the consequences of their choices. In contrast, Bagenstos forcibly argues that liberal proponents, adhering to traditional social welfare attitudes, rallied to the ADA's protection because they saw the disabled as a class of people entitled to a protective class status, similar to that of race, gender, and age. As Bagenstos points out, this rudimentary ideological difference between the two core constituencies of the ADA lies at the heart of the contradictions in the law and in the movement.

The historical background laid out by the author helps to bring out the conflicting views of those who favored and worked for this legislation. I believe most people, including myself, were not fully aware of this history. I thought the ADA was a natural extension of other civil rights laws of the 1950s and 1960s. While this may be true in terms of legislative drafting and hearings, this view overlooks the lengthy history of local and state government actions to fully integrate the disabled into civic life. According to Bagenstos, the movement traces to the beginning of the Great Depression and the forming of the League of the Physically Handicapped in New York City, which was organized to protest discrimination by both the state and the federal government (p. 13). While New York and the federal government ultimately began passing progressive policies, believing that a disability exempted an individual from the "ordinary responsibilities" of work while entitling him to "relief" from a compassionate government, the league ultimately criticized these reforms. It began to view the money, housing, and other benefits as a stigmatizing and alienating force that pushed the disabled away from society. In other words, the league saw many progressive policies as a mere codification of discrimination and accordingly, it demanded work opportunities instead of "charity."

One note of concern, however, is that in tracing the history of the movement from the Great Depression to the present, Bagenstos overlooks some legislative efforts that greatly affected the movement. For example, he makes no mention of the expansion of the Social Security Act in the mid-1950s, which provided disability benefits to those unable to do sustained work activity. Similarly, no mention is made of the 1970s Supplemental Security Income legislation, which sought to provide subsistence entitlements to poor and disabled individuals.

II. THE ADA IN THE COURTS

Bagenstos's discussion of several key historical Supreme Court cases interpreting the ADA also provides useful insight into the core contradiction inherent in the disability rights movement. As an initial matter, Bagenstos notes that the Supreme Court has never adopted a "universalist approach," which would require both antidiscrimination and accommodation measures for any physical or mental difference (p. 24). Instead the Court, especially in more recent cases, has adopted an admittedly "demanding standard," requiring that a plaintiff show a "substantial limitation" by demonstrating that his impairment either prevents or severely restricts him from doing activities that are of central importance to most individuals' daily lives. As Bagenstos persuasively argues, the failure to adopt such a standard lies more with the failure of the movement to come to a consensus itself, rather than with the judiciary, because universalist measures "would have almost certainly not passed" in Congress. Additionally, Bagenstos's often-harsh critique of more recent cases by the Supreme Court reveals the diversity in the movement. Bagenstos believes the Court's jurisprudence essentially holds that those who can obtain work, even with assistive devices and medication, should do so, thereby limiting society's financial assistance to only those who absolutely cannot obtain employment. This approach coincides with the antipaternalistic and independent mentality of the conservative strand of the movement.[2] Finally, in discussing discrimination against the disabled and

---

2. One minor criticism I have of Bagenstos's analysis of Supreme Court jurisprudence is his decision not to discuss *School Board v. Arline*, 480 U.S. 273 (1987), which interpreted the Rehabilitation Act of 1973 (the "RA"). In *Arline*, the Court found that a school teacher afflicted with the contagious disease of tuberculosis was a "handicapped individual" within the meaning of the RA. *Id.* In so holding, the Court set forth an expansive view of individuals protected by the RA and spoke about congressional concern for the "handicapped," as well as the attempt to combat the effects of the public's " 'archaic attitudes and laws' " toward the disabled. *Id.* at 279 (quoting S. REP. No. 93-1297, at 50 (1974)). To me, the Court's analysis and concern sheds light on the congressional thinking behind the adoption of the ADA.

A careful reading of *Arline* tells us much about the congressional history of legislating in the disability area. As the *Arline* Court tells us, the RA was originally intended to remedy unfairness in the employability of disabled persons. *Id.* at 278 n.3. After reviewing the Department of Health, Education, and Welfare's attempts to devise regulations to implement the RA, however, Congress found such a focus "too narrow to deal with the range of discriminatory practices in housing, education, and health care programs which stemmed from stereotypical attitudes and ignorance about the handicapped." *Id.* (citing S. REP. No. 93-1297, at 16, 37–38, 50). Accordingly, Congress expanded the RA in 1974 to define the term "handicapped individual" to include, "[A]ny person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." *Id.* at 278–79 (quoting 29 U.S.C. § 706(7)(B) (1974)). When it enacted the ADA, Congress specifically noted as follows:

> The first purpose is to make applicable the prohibition against discrimination on the basis of disability, currently set out in regulations implementing section 504 of the Rehabilitation Act of 1973, to all programs, activities, and services provided or made available by state and local government or instrumentalities or agencies thereto, regardless of whether or not such entities receive Federal financial assistance.

H.R. REP. No. 101-485(II), at 84 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 366. In keeping with the "extension" of the RA, Congress defined "disability" using virtually identical language to that used to define "handicapped individual" under the RA. *See* 42 U.S.C. § 12102 (2006). Moreover, in

the requirement of accommodating such individuals, he draws a very important and, I think, frequently overlooked distinction. An antidiscrimination requirement demands that an employer disregard an individual's protected class status and treat that individual as he would anyone else. An accommodation requirement, by contrast, requires that the employer take account of the individual's protected class status and treat that individual in a way he might not treat anyone else. Personally, I tend to favor the accommodation concept because it is much like the remedy of affirmative action, in that an individual with impairments cannot be expected to compete with an otherwise able-bodied individual without some accommodation.

Bagenstos provides further insight into the ongoing, rudimentary contradiction in the movement by focusing on relatively current social and legal issues that have divided the community. For example, Bagenstos provides an interesting discussion of the controversy surrounding end-of-life and quality-of-life decisions through the 2005 Terri Schiavo case (p. 100). Despite the near unanimous claims from all sides that they were acting in her best interests and against the proverbial "big government," some favored legislation to preserve her life while others viewed such measures as paternalistic governmental and societal pressure intruding on her right to make personal medical decisions. Similarly, he details the split in the disability-rights community in the wake of the Supreme Court's decision a few years earlier in *Chevron U.S.A., Inc. v. Echazabal*.[3] In that case, a worker was denied employment by his employer because of a liver condition that doctors said would be exacerbated by continued exposure to toxins at the refinery where he worked. The Equal Employment Opportunity Commission had promulgated a regulation that permitted the employer to defend on the basis that the worker's impairment or disability itself would pose a "direct" threat to his health. The worker argued that this was discrimination. The employer defended the regulation, and the Supreme Court upheld it. Again, this seems like a classic example of Bagenstos's observations about paternalism and his "dignity of risk" argument. Many liberals view the holding as a rejection of years of work meant to guarantee safer workplaces for the vulnerable and to provide a check on corporate power to have workers toil in unsafe environments.

---

drafting the ADA Amendments Act of 2008, Congress expressly stated that one of the purposes of the Act was to:

> reject the Supreme Court's reasoning in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) with regard to coverage under the third prong of the definition of disability and to reinstate the reasoning of the Supreme Court in School Board of Nassau County v. Arline, 480 U.S. 273 (1987) which set forth a broad view of the third prong of the definition of handicap under the Rehabilitation Act of 1973.

ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified at 42 U.S.C. § 12101). Given these considerations and the unquestionable significance of the RA as a statutory predecessor to the ADA, I am puzzled as to why Bagenstos declined to undertake a broad discussion of *Arline*.

3. 536 U.S. 73 (2002).

III. THE FUTURE OF THE ADA

Finally, Bagenstos looks to the future of the movement, thereby providing further analysis into its internal tensions. He argues that for the movement to achieve any new legislative progress, it must understand its own pluralism, specifically by understanding the difficulty in both defining disability and deciding how our society should respond to the disabled. As a first step, Bagenstos argues for a conceptual shift away from the dominant medical model of disability to, perhaps, a more consensus-building social model. The social model views disability as a social creation; that is, a product of societal practices such as failing to cut curbs. It places the responsibility of eliminating the social and physical structures that create disability on society (Introduction).

Bringing such a change to fruition will, however, be difficult. For example, judges such as myself tend to think of discrimination in terms of evidentiary burdens, analyzing these claims in terms of direct evidence or indirect evidence. A burden-shifting analysis, however, seems contradictory to the "social model." Nevertheless, the pragmatic force of such a change might be more obtainable because the accommodation remedy in the social model is very familiar, in that it is similar to the remedies available in race, age, and gender cases.

While Bagenstos goes on to articulate additional thoughts on how the movement should progress, he highlights a critical truth about the movement and our society: it is not realistic to believe that we can eliminate discrimination against the disabled by abandoning the proverbial "welfare state," as many conservative voices suggest. Having a substantial background in legal aid and private practice involving disability law under the Social Security Act, I struggle to understand or appreciate those voices that equate accommodations or protections for the disabled with welfare, a viewpoint Bagenstos refers to as a "wariness about welfare state." I think of disability benefits under Title II of the Social Security Act as more akin to private insurance contracts, albeit under the auspices of the federal government. This is to say, the worker and his employer pay Federal Insurance Contributions Act wage taxes to the Social Security Administration, and when the worker meets certain conditions in terms of an insured status, including by meeting the statutory disability definition (inability to perform substantial work activity), the worker receives cash benefits with a medical entitlement (Medicare or Medicaid). This is not welfare, to my mind; rather, it is dignity and part of the social contract between a citizen and her government. Perhaps my view of the social contract is reflective of my personal view that a government has a duty to provide a floor of dignity for the disabled. Naturally, a contrary view or a lack of understanding of the strain endured by disabled persons may cause some to perceive the disability rights movement and governmental efforts related thereto as overly paternalistic. Regardless, as Bagenstos notes, the reality is that people with disabilities need some assistance, whether it be medical, vocational, or otherwise; and to attempt to change the lives of the disabled without this assistance is not possible. As he

does in other portions of his book, however, Bagenstos notes the tension inherent in the movement and argues that any undue interference, however well-intentioned, may erode the autonomy and dignity of the disabled. On the whole, Bagenstos aptly describes a movement that is full of contradictions because it is based upon the balancing of two diverging ideologies.

CONCLUSION

Bagenstos's book sets out many of the contradictory ideas underlying the ADA and many contradictions within the legislation itself. The book explains why academics, legislators, and the judiciary have struggled so much in attempting to determine the appropriate scope of the ADA. While Bagenstos's history of the disability rights movement is interesting and enlightening, the book concludes with what I believe is, ultimately, the only correct response to these contradictions. If we desire a country that is truly egalitarian, some level of governmental action and intervention in the private economy is necessary to ensure equality for those Americans who would otherwise be left out. While certainly we are all interested in protecting ourselves from an overabundance of governmental intrusion, the notion that legislation designed to ensure equal rights for disabled persons is overly protective or intrusive is confounding. Disabled persons are not entitled to more benefits than anybody else; they are, however, entitled to enjoy the same quality of life that nondisabled people enjoy. The obstacles of daily life make such equality difficult, if not impossible, without protections and accommodations that can be achieved and implemented only through appropriate governmental intervention. To that end, I am confident that Bagenstos's book will stimulate continued debate between those who acknowledge the shortfalls of the ADA and those who believe deeply in equality.