

# Against First Principles\*

JERRY L. MASHAW\*\*

## TABLE OF CONTENTS

I. THE POLITICAL INCOMPATIBILITY OF FIRST PRINCIPLES AND SENSIBLE POLICY CHOICE .....	213
A. <i>Analytic Conundra in the Choice of Which Principles are First</i> .....	213
1. Liberty v. Utility in Epstein's Analysis .....	213
2. "Efficiency" v. "Rights" .....	214
B. <i>The Empirical Impossibility of Assessing Fundamental Claims</i> .....	215
1. "Liberal Property" and Race and Sex Discrimination .....	215
2. The Utility of Whom About What .....	216
3. The Radical Contingency of Efficiency Analysis .....	216
C. <i>Principles and a Pluralist Polity</i> .....	216
II. A TESTING CASE: THE AMERICANS WITH DISABILITIES ACT .....	217
A. <i>The Intuitive Plausibility of Rejecting the ADA on "First Principles"</i> .....	217
1. The Absence of a Libertarian "Property" Problem .....	218
2. The Implausibility of Utility Loss Through "Discrimination" .....	218
3. Strong Inefficiency v. Weak Rights .....	219
4. A Rawlsian Starting Point .....	220
B. <i>Analytic and Empirical Problems with the Intuitive Account</i> .....	221
1. Libertarian Property and Employment for the Disabled .....	221
2. Stereotyping and Residual Unemployment .....	222
3. Dynamic Efficiencies .....	224
III. "PRUDENTIAL" CONCERNS AND THE QUOTAS-PLUS-MARKETS SOLUTION .....	225
A. <i>Epstein's List</i> .....	225
B. <i>The Costs of Disability</i> .....	226
C. <i>Disability and Discrimination</i> .....	228
D. <i>The Quotas-Plus-Markets Solution: Fairness and Efficiency</i> .....	231
IV. A CODA ON METHOD .....	237

## INTRODUCTION

Larry Alexander's invitation to participate in this Symposium suggested that our articles should focus "on the broader questions of

---

\* Copyright 1994 Jerry L. Mashaw.  
\* Sterling Professor of Law, Yale University.

individual liberty, equality and responsibility raised by [Richard] Epstein's book [*Forbidden Grounds*].<sup>1</sup> Having accepted the invitation I do not want to deviate from Larry's instructions. Nevertheless, my discussion of these broader principles proceeds in a somewhat backhanded fashion. My basic argument is that the broad principles that underlie most such discussions can get us only so far in our analysis of appropriate public policy. Indeed, I want to argue that they often get in the way of sensible policy analysis and that we should be prepared to throw them overboard rather quickly when encountering heavy philosophical or political weather. This claim might seem quite odd in the antidiscrimination context — an arena often inhabited by claims of fundamental rights to “equality” or “basic fairness.” Nevertheless, I think Richard Epstein's book is a good example of the difficulty of developing plausible policy prescriptions while engaging in an argument from first principles.

I will begin with a general discussion of the problematics of first-principled argument in the area of sex and race discrimination, suggesting along the way the weaknesses that I find in Epstein's arguments concerning liberty, utility and efficiency as starting points for an evaluation of antidiscrimination law. I will then turn to what I take to be a testing case for my argument — the Americans With Disabilities Act (ADA).<sup>2</sup> If liberty, utility or efficiency arguments are to make headway against the status quo in antidiscrimination law, this statute should be a peculiarly inviting target. An initial review of the structure of the Act reveals that it is susceptible to attack on the multiple grounds that it violates liberty, reduces utility and creates rights that are detrimental to the attainment of allocative efficiency. Yet, even here I hope to demonstrate that there are serious analytical and empirical problems with accepting this initial, and intuitively plausible account, of the bad sense of the ADA.

While arguments from first principles do not persuade me that the Americans With Disabilities Act is a wholly undesirable statute, Epstein's complaints of a prudential sort concerning the uncertainties introduced by the statute, its potential capriciousness, waste and covert transfers, make out a more damning indictment. Even here, however, I doubt that simple repeal of the statute dominates other possible reforms. Indeed I will argue for an extension of the requirements of the ADA via explicit hiring quotas and marketable discrimination rights. But I will not argue from first principles. Such an

---

1. RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (1992) [hereinafter *FORBIDDEN GROUNDS*].

2. 42 U.S.C.A. §§ 12101-12213 (West Supp. 1993).

analysis would probably begin by instructing us that policies invoking the "Q word" are morally objectionable, as is the notion of commodifying an evil such as the "right to discriminate." Yet, a consideration of some contemporary facts about American social provision and the dynamics of American political economy suggest otherwise. The Article concludes by puzzling about the type of argument that has been made, its relationship to "principled" analysis, and its potential application to other areas of antidiscrimination law.

## I. THE POLITICAL INCOMPATIBILITY OF FIRST PRINCIPLES AND SENSIBLE POLICY CHOICE

### A. *Analytic Conundra in the Choice of Which Principles Are First*

#### 1. *Liberty v. Utility in Epstein's Analysis*

As when reading J.S. Mill, one often has to ask whether Richard Epstein is really a libertarian or a Benthamite utilitarian. In fact, like Mill, he is both, because he defines each principle in terms of the other. This leads to an abstract unity, but also a simple tautology, at the base of the Epstein argument. And, while tautologies are fundamental building blocks in mathematics, they are not very persuasive when discussing social policy.

Constrained or "moderate" libertarians must deal with the difficulty of why there should be any limits on the acting out of individual desires. Epstein makes the usual move by grounding his acceptable restrictions on liberty (the elimination of force and fraud) in the hypothetical consent of all parties to such limits.<sup>3</sup> The claim is that these limits make everyone better off. (Here "utility" satisfies the Pareto Principle.) But this consent is at best hypothetical, and almost surely counter-factual. There seems no reason to imagine that those able to deploy the greatest force or who are the most sophisticated in the uses of fraud should consent to a regime in which their most valuable assets are made valueless. There really are evils (and evil people) in the world. Assuming evil away helps to build philosophic systems (as in John Rawls' crucial non-envy assumption), but it leaves any such system exposed to a simple rejection of its behavioral presuppositions. Hence, the Epstein moderate-libertarian position tends to collapse into a utilitarian one — the losses of certain

---

3. EPSTEIN, *supra* note 1, at 1-58 (especially circa 23-27); *see also* EPSTEIN, *supra* note 1, at 75.

parties are justified because of the greater benefits to the community as a whole (assuming of course that the Kaldor-Hicks criterion is satisfied). But if rights can be sacrificed to utility given appropriate conditions then the game is up — we have become utilitarians and we are arguing about the facts, not first principles.

An attempt to reclaim the libertarian high ground reenters Epstein's argument when discussing the moral basis for utilitarianism.<sup>4</sup> The argument for utilitarianism over its competitors is grounded in the promise of the utilitarian calculus to count everyone's preferences in the same way. The claim is that utilitarianism respects autonomous preference formation. So far, so good, but this is hardly a libertarian starting point. Because utilitarianism does not command that social decision making actually respect individual preferences in the crucial sense of allowing them to "trump" general welfare calculations, the "liberty" of some is sacrificed for the good of others. If utilitarianism is to be preferred because it respects rights that it does not respect, then one is hard-pressed to know why it should be preferred.

At the very least, grounding utilitarianism in liberty has suffered the same fate as grounding liberty in utility. Liberty is good because it supports utility, and utility is good because it supports liberty. The argument has become circular. Thus, it is easy to argue for sacrificing more "liberty" than Epstein allows in order to increase utility; after all liberty is only good because, and to the extent that, it supports utility. This feature of a libertarian-utilitarian starting point is severely disabling when seeking to derive policy consequences from first principles. Policies are simple artifacts of the factual and behavioral assumptions plugged into one or another contractarian or utilitarian exercise in imagining alternative worlds. And, if these worlds fail to match our intuitions, we will remain unconvinced of the soundness of the derived policy prescriptions.

## 2. "Efficiency" v. "Rights"

Libertarian-utilitarian difficulties are not ameliorated by arguing in the more contemporary vernacular of either "efficiency" or "rights." Efficiency and rights theorists suffer from similar difficulties. "Efficiency" actually contains no fundamental political or moral principles at all, unless it is a "smuggled in" Pareto Principle. And, while many might agree that society should take Pareto Superior moves, that defines a vanishingly small subset of the political situations in which a plausible (Kaldor-Hicks) case can be made for social action.

---

4. EPSTEIN, *supra* note 1, at 75-76.

“Rights” theorists on the other hand must battle the twin difficulties (1) of convincing anyone who does not share their intuitions that they are not just talking about their preferences and (2) of constructing an acceptable and noncontradictory means of effecting tradeoffs when “rights” conflict. In short, starting from first principles in policy analysis seems to be a formula for getting stuck there interminably. Nobody’s first principles provide a sufficiently noncontroversial grounding for deducing acceptable policy outcomes.

### *B. The Empirical Impossibility of Assessing Fundamentalist Claims*

Even if we assumed that principled claims based on either “liberty” or “utility” provided a stable and noncontroversial foundation for policy analysis concerning antidiscrimination policy, we would immediately encounter overwhelming empirical obstacles. Neither starting point asks answerable questions.

#### *1. “Liberal Property” and Race and Sex Discrimination*

The problem of property in libertarian analysis provides a good example of the inconclusiveness of deductions from libertarian first principles. Presumably property holdings are just if (1) there was justice in their acquisition and (2) transfers thereafter have been based on consensual processes. Because we know that historically prior legal regimes unjustly allocated property holdings between blacks and whites and men and women, justice in acquisition cannot be ascribed to many initial entitlements. If that were all there were to the matter then presumably one might make an exceptionally strong libertarian argument for rectification, including, perhaps, rectification through policies like Title VII of the Civil Rights Acts. On this view the libertarian case for repeal of Title VII becomes difficult indeed.

Of course, the critical question is how initial injustice in entitlements translates into the entitlements held today by particular persons who would be asked to give up some part of those entitlements as a means for assuring equal justice. This analysis then immediately confronts the deep disagreement between those who view current arrangements as largely untainted by prior injustice and those who view them as largely explained by those prior injustices. There is no way to “test” either of these claims, which means that the crucial

empirical question asked by a libertarian starting point cannot be answered.

## 2. *The Utility of Whom About What*

Moving to utilitarianism does not provide a more tractable inquiry. We have no way of assessing the disutility of blacks from perceived inequalities as against the utilities of whites in maintaining current privileges. Almost any story about these interpersonal comparisons of utility would be plausible, while none could convince those with different empirical intuitions. We can illustrate this in the more concrete case of "efficiency" analysis.

## 3. *The Radical Contingency of Efficiency Analysis*

Translating the utilitarian calculus into an efficiency analysis does not help. There is an efficient allocation of resources for any underlying allocation of property rights. Indeed, there are many. As Ronald Coase has taught us, in its pristine form efficiency analysis simply fails to grapple with the issue of how rights should be assigned.<sup>5</sup> And, once any relaxation is made of the conditions leading to allocative efficiency, then the general theory of the second best tells us that no allocation or reallocation of rights can be known to be efficiency-enhancing. "It all depends" on contingencies that can be specified, but not demonstrated. In short, the "foundationalist" accounts of policy preferences that Epstein employs encounter the impossibility of determining critical empirical parameters. Analysis thus becomes one of choosing between alternative and highly controversial hypothetical worlds. The problem, I hasten to add, is not just Epstein's. It haunts all such philosophic forays into policy prescription and leads many philosophic types to eschew discussion of the policy implications of their moral systems. Epstein is bolder, but he cannot avoid the same problems.

## C. *Principles and a Pluralist Polity*

The inherent limitations of foundationalist accounts do not necessarily lead to the conclusion that public policy analysis should avoid all principled argumentation. To use an engineering analogy once suggested to me by my colleague Ian Shapiro, that there are a number of alternative foundations for bridges does not mean that you can build bridges without foundations. Argument in a democratic polity about policy choice does not proceed along the simple lines of "I want" or "I demand" that, but instead takes up arguments of the

---

5. Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

“we should do this because” sort. And all such arguments tend to rely on some “public value” that can at least be rationalized in terms of one or another well-understood line of moral or political foundationalism. But this reliance is usually implicit. Moreover, as is often the case when premises are not made explicit, much policy analysis and policy choice entails a jumble of implicit and potentially contradictory principles. In a pluralist polity where no “one true foundation” is adhered to, policy compromises are likely to involve the partial pursuit or realization of differing, and potentially incompatible, political premises.

The rediscovery and elaboration of this truism is often thought by policy analysts and devotees of critical legal studies to involve a brilliant insight: our public policies and legal doctrines contain fundamental contradictions! While sometimes elaborated in an insightful way, this “insight” is both banal and useless. Or, to put the matter more politely, this insight tells us nothing about the appropriate direction for policy change. Indeed, it may be the equivalent of describing an acceptable and stable compromise amongst competing values. That a policy violates some set of libertarian, utilitarian, efficiency-based or rights-based norms, without more, tells us nothing of use about the desirability of the policy. The situation could hardly be otherwise.

## II. A TESTING CASE: THE AMERICANS WITH DISABILITIES ACT

The preceding argument can, of course, be carried too far. Violation of one or another foundationalist norm may mean that it has been compromised in the clash with other norms in the construction of a particular public policy. That a public policy violates virtually any conception of any broadly-accepted normative system can mean, however, that we are in the grip of a bad public policy. Any number of defects in the policy process, ranging from the inherent limitations of “muddling through” to simple power grabs, could explain how we ended up with a policy that is indefensible from any perspective.

### *A. The Intuitive Plausibility of Rejecting the ADA on “First Principles”*

The most recent addition to our antidiscrimination laws, the Americans With Disabilities Act, might be thought to represent just such a policy. In the context of private employment, the Act requires that all employers, in effect, institute an affirmative action program

for the disabled. Employers are required to make “reasonable accommodations”<sup>6</sup> for any disabled person in the work place who is otherwise qualified to hold a particular job. They can avoid this obligation only if it would impose an “undue hardship” on the firm.<sup>7</sup> At first blush this would seem to be a simple requirement that firms transfer resources to the disabled. And, again at first blush, virtually any story attempting to justify this transfer borders on the bizarre.

### *1. The Absence of a Libertarian “Property” Problem*

A libertarian justification for such transfers would presumably begin with some story about the injustice of the acquisition of the property or the lack of fairness in the rules that governed its transfers. But it is not at all clear what sort of story could be told here. To the extent that disabilities have been created by force or fraud, libertarians would presumably support rectification from the responsible individuals or firms. But there is no suggestion of any specific rectification rationale at the base of the ADA. And, while it may well be the case that the disabled lack human capital that others have, there is no historical story of the type easily told in the cases of race or sex discrimination — that is, of a pre-existing legal regime that systematically disadvantaged the disabled class.

### *2. The Implausibility of Utility Loss Through “Discrimination”*

That this statute is a good way to deal with utility losses from underutilization of the disabled also seems problematic. It may well be that the disabled will gain benefits from being employed, but we still must answer the question of whether those benefits exceed the costs of providing employment. In straightforward economic terms the argument is surely odd. Because “nondiscriminating” employers presumably must provide the same salaries for the disabled as for the nondisabled, as well as finance their “accommodation” in the work place, the cost to the firm and to society as a whole from providing employment for the disabled will be greater than the economic benefits received by the disabled person. Or so it would appear if labor and other markets are already reasonably efficient.

To be sure there may be noneconomic benefits to the employed disabled person as well. Employment may increase the disabled person’s feelings of self-worth, autonomy, and so on. The question is why we should believe that these benefits exceed the economic costs

---

6. Americans With Disabilities Act of 1990, 42 U.S.C.A. § 12112(b)(5)(A) (West Supp. 1993).

7. *Id.*



to others of providing this opportunity, combined with whatever noneconomic disbenefits are felt by those who must work with and accommodate disabled persons. One can certainly imagine some fairly high levels of disutility being incurred by the nondisabled population.

Employers, for example, may feel an acute sense of injustice and demoralization in carrying out their obligations under the statute. This would be particularly true if they believed that this sort of mandate was simply a disguised and unfair tax that the government did not have the courage to levy directly. Moreover, since the degree of accommodation required of any particular employer will be a function of what disabled persons or populations make claims upon it, the incidence of this tax may be highly capricious. One should also not lose sight of the costs to fellow employees who may be required to work with people who have communicable diseases, or aesthetically unpleasant deformities, or who have awkward (or even disruptive) personality traits. (We may wish that others did not have these negative reactions to physical or mental impairments, but in an utilitarian calculus everyone's preferences count.)

### 3. *Strong Inefficiency v. Weak Rights*

For most persons "discrimination" is also an intuitively unlikely candidate for explaining the disadvantaged position of the disabled in the work place. Because the disabled are not able, or are less able, to do certain things, things that the "abled bodied" can do, it seems sensible to think that they usually will stand further back in the labor queue than do the nondisabled. That their employment and wage rates are lower would seem to represent not discrimination, but the merit selection generally thought necessary in a competitive economy.

If these are our beliefs, then we likely will believe also that the disabled have a weak claim to a "right" of the antidiscrimination variety. Looking at the history of Anglo-American social welfare policy, dating back as far as the Poor Laws, there seems to be a consistent pattern of *favoring* the disabled in certain respects, not disfavoring them.<sup>8</sup> The disabled have long been considered the "deserving poor" and society has sought, in various ways, to ameliorate their plight. The notion that there has been some systematic social policy or social practice of discriminating against the disabled will

---

8. See generally DEBORAH A. STONE, *THE DISABLED STATE* (1984).

strike most people as simply untrue. There is thus a “weak” rights claim here. Indeed, stopping discrimination against the disabled will strike many observers as the definition of a nonproblem. When combined with a strong intuition that differentiation in the work place between the able and disabled is based on straightforward and sensible economic efficiency considerations, the case for the ADA seems implausible.

#### 4. *A Rawlsian Starting Point*

A demand for reasonable accommodation of the needs of the handicapped is superficially much more plausible when premised on certain alternative foundations. The Rawlsian difference principle that requires social arrangements constructed such that they optimize the position of the least advantaged<sup>9</sup> might provide a strong prima facie claim for special efforts on behalf of the disabled in all walks of life. There are, of course, well-known difficulties with identifying precisely who the least advantaged are in the Rawlsian system, in determining whether the particular arrangements envisioned would in fact optimize their total well-being given possible declines in aggregate wealth, and theoretical concerns with the strong risk-averseness presuppositions of the Rawlsian original position.

With respect to the physically or mentally disabled, however, the Rawlsian case for collective ameliorative action seems relatively strong. We are talking about conditions usually not brought about by the “fault” of the least-advantaged parties, the disabilities involved are those that all would like to avoid (and therefore have some claim to be a part of the definition of the “least-advantaged” position), and the widespread desire to ensure against the consequences of disability suggests that risk averseness is hardly an implausible posture with respect to this sort of misfortune. Indeed, it is almost certain that nearly everyone will experience some physical or mental limitation during some period, perhaps some substantial period, of their lives. Estimates made at the time that the ADA was passed suggested that some 43 million Americans suffered from a disabling condition at any one point in time.<sup>10</sup> Over the life cycle, some limitation on our ability to engage in the normal activities of life will be the fate of most of us.

I do not, however, want to pursue the Rawlsian or other similar perspectives at this juncture. That there is an alternative foundation for a statute like the Americans With Disabilities Act suggests only

---

9. JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

10. *THE AMERICANS WITH DISABILITIES ACT: FROM POLICY TO PRACTICE* 6 (Jane West ed., 1992).

the implausibility of concluding from other, dissimilar, first principles that the statute cannot be justified. This form of argument, however, simply leads us back to a debate about first principles — a debate that I have argued is unlikely to lead to consensus. I want, instead, to emphasize that even starting from the premises that Richard Epstein's analysis features, liberty, general welfare and efficiency, it is difficult to conclude that the Americans With Disabilities Act is fundamentally wrongheaded. In short, I want to reiterate in this context my claim that first principles are a treacherous place to start in thinking about the problems of the disabled in American society. Arguing from Epsteinian first principles is, at best, inconclusive.

## *B. Analytic and Empirical Problems with the Intuitive Account*

### *1. Libertarian Property and Employment for the Disabled*

While our prior account of the libertarian perspective on property acquisition and transfer was adequate so far as it went, it may not have gone far enough. Libertarians may, indeed, have a special concern with insuring the opportunity to work. To the extent that libertarian property ideas are dependent upon the Lockean notion of legitimate acquisition, there may be no alternative but work ("mixing" labor with resources), plus noncoerced transactions, to legitimate property holding.

To be sure, this does not commit libertarians to an antidiscrimination vision of facilitating the work opportunities of the disabled. It, nevertheless, might suggest the legitimacy of collective action to equalize starting points in the race to acquire property through "mixing one's labor" with it. For the power of the Lockean idea lies primarily in its vision of there being enough and the same left for all. But what this property consists of and how one mixes one's labor with it is crucial. In short, without a specification of available technologies, the idea of labor and of property remains vague. Both will depend on shifts in technologies and market preferences. In short, the "fairness" of transactions becomes crucial.

A libertarian need not conclude that the work-for-pay marketplace structures transactions fairly in relation to "the disabled." We have previously assumed that "disability" was a self-defining category. But, obviously, it is not. What we take to be the demands of particular jobs, or the abilities or disabilities of persons in relation to them,

depend importantly on how jobs are structured and what technologies are allocated to various human-machine tasks. To some degree these determinations are made by competitive forces in the marketplace. But to a substantial degree they are not, or at least not as imagined in standard exercises in comparative statics. In short, our prior assumption that employing the disabled could not generate efficiency or welfare gains may be unfounded. Employers who have pioneered in employing the handicapped often report economic gains from their efforts at reconceptualizing jobs or tasks in ways that enable persons with various types of disabilities.

But if this is true, then it is also true that the structure of jobs or tasks that confront many disabled persons are both arbitrary (in the sense that they need not have been constructed in that fashion in order to maintain efficiency or competitiveness) and malleable. Is it then clear that restructuring the legal rules governing the marketplace of work, so that firms must turn their attention to developing job conceptualizations that enable the employment of the handicapped, is foreclosed on libertarian grounds? Are job categories that define capacities in ways that are less inclusive than they could be part of a set of fair-transactions rules for the acquisition and transfer of property? Indeed some aspects of shop or office design (the width of aisles, the height of desks or machines, the use of oral rather than visual signals or vice versa) could be seen as locking the disabled out of the workplace, *i.e.*, as a coercive denial of access to the capital and organizational resources necessary to be productive. Epstein's strong demands for force or fraud as grounds for justifying rectification thus might be satisfied with respect to refusals to hire disabled persons based on their incapacity, given the existing organization of work.

## 2. *Stereotyping and Residual Unemployment*

Our prior utilitarian calculation may also have been unimaginative. We implicitly assumed, for example, that employers make decisions based on employee or applicant abilities *without error*. But, some (or many) disabilities may lead to forms of over-generalization or stereotyping that cause employers to avoid hiring otherwise able, but impaired, persons. Hence, we may be paying large social costs in lost productivity that could be avoided.

There is substantial evidence both in the United States and abroad that impairment is only a partial explanation for the unemployment of many disabled persons.<sup>11</sup> Approximately 700,000 persons are rejected each year in the United States for Social Security disability

---

11. See generally *DISABILITY AND THE LABOR MARKET* (1986); Leo Aarts et al., *The Dutch Diseases: Lessons for U.S. Disability Policy*, 15 REG. 75 (Spring 1992).

benefits on the ground that they are fit to do jobs that are available in substantial numbers in the national economy.<sup>12</sup> Yet a very small percentage of these rejected applicants are ever again employed for substantial wages. Much of the residual unemployment of impaired persons may not be explicable except in terms of employer stereotyping. If so, a substantial number of persons are being excluded from the job market — persons who could be productive contributors to overall social product. The purely economic losses here may be enormous.

The intangible costs and benefits of forcing greater access to the workplace for the disabled may also have been misdescribed in our prior discussion. While there surely will be employee concerns about the spread of communicable diseases, and perhaps also some anxiety associated with working with the mentally ill or impaired, there can also be a significant “upside” to associations between the “disabled” and the nonimpaired. After all, the story of courageous individuals overcoming handicaps to be productive workers and citizens is standard moralistic fare. Might not the day-by-day association with disabled persons provide similar inspirations for the abled-bodied workforce, thus raising general levels of morale, motivation, and productivity in the workplace?

We should also not forget that accommodations made to deal with the special needs of the “disabled” may very well benefit others who are not so classified. Under prior legislation there has been a massive public works program to make the sidewalk-street interface at intersections more accessible to the wheelchair-bound population. This is only about one percent of the population of the United States, and it is highly likely that only a fraction of the wheelchair-bound in fact routinely use the sidewalks for locomotion in wheelchairs. Nevertheless, these user-friendly ramps have been a great boon to others. Shoppers with market baskets, parents with children in strollers, the blind — even robustly able-bodied bicyclists — are but a few of many beneficiaries of this easier transition from sidewalk to street, and vice versa.

Similar spillover benefits have been made available by the demand of the wheelchair-bound that elevators in addition to escalators be built into public transportation facilities such as the Washington D.C. Metro system. And, wider aisles in factories and offices may provide the opportunity to use robotic mail delivery systems and

---

12. COMMITTEE ON WAYS & MEANS, 102D CONG., 2D SESS., GREEN BOOK 65 (Comm. Print 1950) (1992 was the last year for which statistics are available).

other labor saving devices. But enough of speculative benefits. The general point is simply this: The benefits of accommodating one or another disability may have significant positive externalities for others. A cost-benefit analysis that looks only at total cost in relation to the benefits to those classified as "disabled" may miss a large number of gains that should be counted on the benefit side of the equation.

### 3. *Dynamic Efficiencies*

Having a public program that labels people as "disabled" and then concludes from that labeling that they have a "right to work" may also produce some significant dynamic efficiencies over time. Our pre-1990 programs for the disabled were generally, if not uniformly, of a type that used the "disability" label as a ticket out of the workforce. Many knowledgeable students of these programs believe that the labeling process encouraged people to take up the "disabled role," with costs not only to their productivity, but also to their long-term health and well-being. A program which links disability with a right to work by contrast strongly reinforces the combination of responsibilities with rights — a combination that many believe to have been sadly missing from American social welfare efforts of the past. To the extent that this linkage encourages more of the disabled than now show up in the unemployment statistics to seek continued achievement in productive work, rather than a pension out of the work force, the national economy is further strengthened.

In addition, Michael Porter has argued persuasively that a nation's regulatory programs can provide a strong impetus for developing technologies and processes that will find wider and wider markets as these regulatory approaches are mimicked by others around the world.<sup>13</sup> Many nations are finding themselves fiscally strained by the need to support a growing population of disabled adults. Processes and technologies developed by American firms to "accommodate" disabled American workers may find ready markets in the coming years as other nations attempt to shift their social policies in the direction of keeping the disabled within the workforce rather than giving them tickets out of it. From this perspective, giving the employee a "right" to avoid discrimination on the basis of disability may have a strong pragmatic justification. While "discrimination," with its connotations of "ill will," may in some sense mischaracterize the attitudes of employers who have stereotypic images of the disabled, demanding an end to those stereotypes nevertheless harnesses the ingenuity of the private sector to the task of making

---

13. MICHAEL PORTER, *THE COMPETITIVE ADVANTAGE OF NATIONS* 647-53 (1990).

the disabled population more productive.

In short, while we began with the notion that there was little to be said for the Americans With Disabilities Act from any normative perspective, the situation turns out to be more complex than we originally imagined. Readers may, of course, find many of my hypothesized benefits highly speculative. They involve dynamic stories of legal taste-shaping that are surely optimistic. (They nevertheless resonate with some common experience — the extraordinary shift in consumer demand for automobile safety following legal safety requirements is an obvious contemporary example.) But the controversiality of these speculations again reinforces my basic point: When normative perspectives ask unanswerable questions, plausible stories might be offered for an extremely broad range of results.

### III. PRUDENTIAL CONCERNS AND THE QUOTAS-PLUS-MARKETS SOLUTION

#### A. *Epstein's List*

At the very end of his discussion of the Americans With Disabilities Act, Epstein concludes:

At bottom [there] are only two pure forms of legislation — productive and redistributive. Antidiscrimination legislation is always of the second kind. The form of the redistribution is covert; it is capricious, it is expensive, and it is wasteful. The ADA fares no better than other forms of antidiscrimination laws, and perhaps worse. It too should be repealed, whether or not some subsidy for disabled persons is retained.<sup>14</sup>

These sentences bear close examination. First, the argument Epstein derives from his basic dichotomy is both over- and underdrawn. Underdrawn in the sense that there is really only one form of legislation — redistributive. To the extent that legislation (or the enunciation of “new” common law principles for that matter) does anything, it rearranges rights, privileges, immunities, statuses, or the like. There will be both beneficiaries and disbeneficiaries of those rearrangements.

Epstein's point should probably be understood as an argument that certain redistributions of rights, privileges, or immunities may be justified because of the probability that they will lead to a more productive use of national or aggregate resources, whereas others are “purely redistributive.” In Epstein's moral universe the latter forms of legislation would be relatively difficult to justify because of the

---

14. EPSTEIN, *supra* note 1, at 494.

limited grounds upon which a claim of injustice might be premised — that is, that someone has been deprived of an entitlement through force or fraud. Although I have argued above that it may make sense to analogize the restrictions on work force participation by disabled persons to a lockout or forcible prevention of participation in workplace activities, I will not press that point further. The boundaries of force or fraud are fuzzy and evolving, and we might argue forever about where socially constructed force ends and the simple “nature of things” begins. Ultimately we would need some additional moral theory upon which to justify our respective definitions.

I prefer instead to pursue the question of whether the ADA might be justified as productive legislation, notwithstanding the obviously redistributive means that it employs. Some arguments along this line have been made already in the discussion of the possible aggregate social benefits of the ADA and its potential dynamic efficiencies. Let me provide a little further evidence of the possible productivity gains that might result from this legislation before turning to the concerns about uncertainty, covert transfers, capriciousness and waste that Epstein raises. I will treat these concerns as prudential arguments against the good sense of the Americans With Disabilities Act, that is, as reasons to believe that the Act will not be productive even if it might have been so. I will then turn to the question of what reforms, short of repealing the Act, might address the catalogue of complaints that Epstein raises.

### *B. The Costs of Disability*

The importance of keeping disabled persons in the workforce can hardly be overstated. The cost to the national economy of dependency based on medical impairment are large and rising rapidly. The costs of the Social Security Disability Program in 1960 were \$2.7 billion. They had risen to \$28.5 billion in fiscal year 1991 and are projected to be \$38.2 billion by 1997. (All amounts are in constant 1991 dollars.) When the \$11.7 billion in SSI disability payments are added to the \$28.5 billion for DI insurance in 1991, the total cost is just over \$40 billion, projected to rise to nearly \$60 billion by 1997.<sup>15</sup> If one adds to these costs the costs of Medicare and Medicaid insurance for which DI and SSI beneficiaries qualify, these amounts are very substantial.

Direct expenditure figures, of course, fail to take account of the opportunity costs of having impaired persons out of the workforce. It

---

15. CONGRESSIONAL RESEARCH SERVICE, STATUS OF DISABILITY PROGRAMS OF THE SOCIAL SECURITY PROGRAM, Tables 40-41, September 8, 1992 [hereinafter CRS REPORT].



is very difficult to estimate those opportunity costs. Because the disability payments represent something like a forty percent replacement rate for wages of disability beneficiaries, one might perhaps double the gross expenditure levels as an estimate of productivity foregone on the assumption that an aggressive program of reintegrating impaired persons into the workforce might return them, on average, to 80 percent of their former productivity.

This assumption is of course highly controversial, as is the \$300 billion figure for lost productivity that was often intoned in the debates surrounding the ADA. People receiving disability benefits have very serious medical impairments. Predictions about their productive capacities are treacherous. However, we also know that people who would be classified as *per se* disabled under the Social Security Administration's medical listings regulations, without taking into account their age, education or prior work experience, are nevertheless at work.<sup>16</sup> Hence, it is clear that something other than simple medical impairment creates the status of a disability beneficiary.

Prior attempts to untangle the contribution of various factors to the incidence of "disability" in the Social Security Act's meaning of that term have been disappointing. The level of applications for benefits clearly involves the interaction of the level of medical impairment in the population, the performance of the economy and the generosity of the benefits program. This is true for disability systems other than our own as well. Nevertheless, taking these factors into account leaves a substantial proportion of the change in the disability caseloads over time unexplained.<sup>17</sup>

Congress has been quite sensitive to the possibility that disability benefits programs themselves induce a substantial decline in the work effort. Over the past decade, for example, a number of adjustments have been made in both insurance (DI) and means-tested (SSI/DI) disability programs to reinforce work incentives.<sup>18</sup> Perhaps the most important of these are the ability of disability recipients to

---

16. There are no data directly measuring the extent of work by this group. We do know, however, that of persons reporting severe work limitations about 12% are currently in the work force. U.S. DEP'T OF EDUC., NDRR, DISABILITY ABTRACT #4, at 2 (May 1992).

17. See generally Leo J.M. Aarts & Philip R. DeJong, Dutch Social Disability Insurance (mimeo 1992) (paper prepared for FISS Conference, Rotterdam, Oct. 19-20, 1992) (on file with author).

18. A summary of these complicated provisions appears in SOCIAL SECURITY ADMINISTRATION, PUB. NO. 64-030, RED BOOK ON WORK INCENTIVES (June 1991).

engage in trial work periods which do not reduce their disability benefits and the opportunity to continue eligibility for Medicare and Medicaid even if they leave the disability rolls entirely.

To date these efforts have not produced significant results. Indeed, the period 1990-1992 has seen a rapid escalation of both applications and awards.<sup>19</sup> Meanwhile, the numbers of people leaving the rolls because of (1) recovery or (2) transfer onto the Social Security Pension System (at age 62 or 65) have sharply declined.<sup>20</sup> The latter is true because the disabled population is becoming younger (mysteriously). The former clearly should *not* be true with a younger disabled population, but probably results from recent policy changes which de-emphasize the review of cases to purge the rolls of persons who can now work. One should not imagine, however, that an aggressive attempt to remove "recovered" recipients from the pension program holds out much prospect for reducing the growth in disability beneficiaries. Congress attempted this in the early 1980s and met such stiff legal and political resistance that it beat a hasty retreat.<sup>21</sup> (There is much evidence that these efforts were hamfisted at best. Many recipients were being removed from the rolls who had virtually no prospect of obtaining gainful employment.)

While the Social Security Administration is currently experimenting with some aggressive outreach programs to try to supplement the activities of vocational rehabilitation agencies in the states, and thereby put impaired persons back to work, there is little reason to believe that these experiments will have significant effects. Only so much can be done by working on the supply side of the market for impaired workers. The demand side is equally important, and it is here that the Americans With Disabilities Act attempts to make a contribution.

### C. *Disability and Discrimination*

It is fanciful, of course, to ascribe all of the unexplained variance in the growth of the disabled population to employer resistance to hiring the impaired, *i.e.*, discrimination against the disabled. So far as I can determine, no one has any idea what the contribution of discrimination is to the unemployment of impaired persons. The evidence that was used in the reports and hearings related to the Americans With Disabilities Act stops very far short of demonstrating discrimination against the handicapped.<sup>22</sup> It is well understood that

---

19. CRS REPORT, *supra* note 15, charts 19 & 21.

20. *Id.* at chart 11.

21. See generally Jerry L. Mashaw, *Disability Insurance in an Age of Retrenchment: The Politics of Implementing Rights*, in *SOCIAL SECURITY: BEYOND THE RHETORIC OF CRISIS* 151-76 (Theodore R. Marmor & Jerry L. Mashaw eds., 1988).

22. See H.R. REP. NO. 101-485, 101st Cong., 2d Sess., pt. 2 (1990); S. REP. NO.

the unemployment rates among the handicapped are dramatically higher than rates of unemployment for nonhandicapped people. The lower educational accomplishments of the handicapped and other indicators of social restrictions are also well documented.<sup>23</sup> Congress seems to have given enormous significance to a Louis Harris poll which ascribed the unemployment of 8.2 million people to the existence of a disability that they believed should not prevent them from holding a full-time job. That same poll also found large majorities of top managers (72%), equal opportunity officers (76%), and department heads/line managers (80%) who thought that individuals with disabilities often were discriminated against.<sup>24</sup> These sentiments were, of course, echoed by activists for the disabled community.<sup>25</sup> These data and testimony, combined with testimony concerning the often low costs of accommodating the disabled, seem to have convinced Congress that the disabled were being subject to widespread discrimination in employment.

The congressional conclusion may, of course, be correct, for "discrimination" as employed in the debates surrounding the ADA has a special and restricted meaning. Virtually no one suggested that the "discrimination" thought to permeate employer hiring decisions included animosity toward, or dislike of, disabled persons, or a desire to "keep them in their place." "Discrimination" against the disabled is thus imagined in terms quite unlike the explicit forms of race and sex discrimination that gave such moral force to the passage of the 1960's antidiscrimination acts on which the ADA is modeled. In the ADA Congress legislated against implicit or subliminal discrimination of a sort that may *now* characterize much racial and gender bias. To that degree, the ADA is not a "peculiar" discrimination statute. Yet the lack of any significant history of explicit legal discrimination against the handicapped gives one considerably less confidence that statistical effects, surveys of beliefs, and the opinions of advocates describe a real world of the conscious creation of barriers to the employment of the disabled.

We are hardly alone, however, in translating the rhetoric of discrimination into amelioratory public policy. The Dutch disability scheme has taken the position that anyone whose impairments limit

---

101-116, 101st Cong., 1st Sess. (1989).

23. See, e.g., U.S. COMM'N ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 29-32 (1983) and authorities cited therein.

24. *Id.*

25. See, e.g., S. REP. NO. 101-116, *supra* note 22, at 9.

his or her work ability by 25%, and who also cannot find a job, has been excluded from the labor market by employer discrimination (and should be reclassified as 100% disabled and given a disability pension). This is a generous move, but hardly one that establishes anything about the prevalence of discrimination against disabled persons. Moreover, the Dutch policy seems quite perverse in its reinforcement of the "disabled role." The length of time between losing a job because of medical difficulties and attempting to reenter the workforce is inversely related to subsequent workforce success. Because providing pensions reduces the need to continue job searches, the Dutch 100% disability classification may turn out to be a self-fulfilling prophecy. And, indeed, the Dutch are currently rethinking their whole disability scheme.

Assuming that public policy is required to address the demand as well as the supply side of this labor market does not, therefore, justify the particular way in which that problem has been addressed in the Americans With Disabilities Act. Indeed, even if we assume that some substantial portion of the disabled population's lack of success in the job market can be ascribed to employer stereotyping and failure to make reasonable accommodations for the impaired, there may be better policy instruments than the ADA.

Epstein's litany of complaints against the ADA certainly suggest that this is a flawed policy instrument. The uncertainties of its administration are very substantial. While the definition of disability under the Act seems to be quite inclusive, the questions of whether a disabled person should be determined "otherwise able to perform the job," whether a disabled person is being provided "reasonable accommodation," or whether an accommodation would cause the employer "undue hardship," introduce a host of imponderables into the implementation of the statute.<sup>26</sup> Moreover, because the enforcement mechanism is essentially that applied to Title IV of the Civil Rights Acts we might expect a very substantial amount of litigation. If that litigation is as unproductive in providing hiring and retention of the disabled as it has been in the context of race and sex discrimination during the past decade,<sup>27</sup> then these legal uncertainties will also result in very substantial waste from the perspective of everyone in society, with the possible exception of lawyers and expert witnesses.

Epstein also has some very strong arguments concerning the potential unfairness and quasi-fraudulent nature of the implicit transfers pursuant to the ADA. The incidence of the ADA antidiscrimination "tax" will depend upon the choices of impaired

---

26. See generally CAROLYN WEAVER, *DISABILITY AND WORK: INCENTIVES, RIGHTS AND OPPORTUNITIES* (1991).

27. See generally Peter Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 GEO. L.J. 1619 (1991).

applicants and potential litigants. Who pays to accommodate the needs of the disabled depends on where the disabled work or apply for work. One can easily imagine that the firms who have done the most to accommodate the disabled will be the most attractive to potential job seekers and, therefore, will bear the greatest costs of accommodation. "Bad actors" who threaten to litigate every claim, by contrast, may pay little of these costs. The implicit "tax" contained in the ADA's mandate could turn out to be particularly unfair.

Finally, because this is a mandate rather than a public subsidy, the costs of accommodation will not show up in any unified budget. They may be large or they may be small and their weight may be well- or mal-distributed, but Congress need never know or acknowledge such problems because the expenditure is "off budget." In short, Congress has taken a real problem (unemployment and low wages amongst the disabled) and, through the alchemy of "discrimination" talk, converted it into a major public policy that mandates expenditures by private parties now assumed to be bad actors. Congress has also virtually assured itself that it will never know the extent of the costs imposed and hence will never be in a position to make a responsible society-wide judgment concerning whether those costs were worth the benefits.

I agree, therefore, with Richard Epstein that the ADA is a deeply-flawed statute. I do not, however, agree that the remedy is repeal. Or, to put the matter more precisely, I do not agree that we should return to a regime in which our disability policy consists entirely of pensioning people out of the work force and providing some extremely modest efforts at increasing the supply of "able" workers through rehabilitation, vocational counseling, and the like.

#### *D. The Quotas-Plus-Markets Solution: Fairness and Efficiency?*

As the immediately prior discussion suggests, one possibility for change would be to replace the ADA with a public subsidy program. The federal government could offer employers subsidies to accommodate, retrain, and employ disabled workers. The subsidy might take the form of tax credits or direct payments, and, of course, it might be graduated and complicated to almost any degree thought appropriate.

Such a subsidy program has much to be said for it in contrast to the ADA. It does not use the epithet "discrimination" for a situation which seems rather sharply differentiable, at least historically, from traditional areas of race and sex discrimination. A subsidy takes

public responsibility for an admittedly social problem, and it provides a unified budget through which some appreciation of the costs of accommodation and reemployment of the impaired can be assessed against productivity benefits.

There may, nevertheless, be decisive objections against such a subsidized work program. We have had a lot of experience with work subsidies, and have found them extremely difficult to administer. The basic problem here is what in tax parlance is called "buying the base." It is very difficult to know that a work subsidy is going to promote activity that would not have been engaged in without it. And, if one wants to be assured that this sort of substitution is not taking place, then a very large administrative apparatus has to be put in place to attempt to sort out the deserving cases from the undeserving ones under the subsidy scheme. Work subsidies seem to involve a high proportion of waste either in the form of target inefficiency or transactions costs, and they have also been beset in the past by highly visible instances of fraud. The latter, even if afflicting a miniscule proportion of program expenditures, has a habit of destroying the public acceptability of public or subsidized work programs and ensuring their demise.

For these reasons I would propose a different solution: explicit quota requirements for employers with a market in "rights to discriminate" against the disabled. In broad outline this scheme is quite simple: estimate the number of disabled workers who might with reasonable accommodation be employed; divide that number by the total number of workers in the economy; and require that each employer hire that percentage of its workforce from the pool of "disabled" workers. Employers who fail to hire their share of disabled workers would have to buy a waiver from employers who are employing more than their share.

In this abstract incarnation, it would appear that such a scheme could satisfy Epstein's practical objections to the ADA. Uncertainties concerning which employers had a responsibility would be eliminated, along with the capricious incidence of those responsibilities based on employee selection of employers. Much of the waste involved in litigating about such matters would be eliminated as well. Perhaps more importantly, employers for whom the costs of accommodation were high could simply buy waivers and have their responsibilities shifted to lower cost accommodators. The sale of waivers would, of course, subsidize the latter's accommodation expenses. Firms might thus specialize in accommodating particular groups of disabled workers and thus achieve economies of scale. The scheme would also promote technological innovation as employers (and others) attempted to produce accommodations at a cost below the

waiver price. If it worked, such a scheme might yield quite substantial social benefits in net productivity, while spreading the costs fairly across the population of employers.

In order to be viable, such a scheme would of course have to pass two critical tests: first, it would have to be politically acceptable. Second, we would need to understand how to implement such a scheme such that it avoids the critical failings of a standard subsidy arrangement, i.e., buying the base, fraud, and high administrative costs.

Quite frankly I do not see the same sort of political objections to quotas and marketable rights in this context that one sees to those same concepts in the context of race and sex discrimination. The statute that I have in mind is not an antidiscrimination statute. Nor does it require employers to hire certain persons "as if" they were as qualified as others who were not in the statutorily preferred category. In this context it is clearly admitted that the disabled are not as able as the able. The purpose is to provide accommodation whereby they can nevertheless be as productive as the able through a fair sharing of the social responsibility to assist them to lead productive and rewarding lives. Quotas simply do not have the same ideological loading in this context that they have in others.

Moreover, because I do not imagine this to be an antidiscrimination statute, the right that is being marketed is not really a "right to discriminate." This is a system of positive and negative incentives designed to even out the costs of a society-wide program and simultaneously to assure that it is accomplished at the least cost. Once again, it would seem odd to characterize this as employers buying up an opportunity to engage in an evil practice. Indeed, this is a scheme which recognizes that it is profitable for some and unprofitable for others to hire the disabled. It is premised on the perception that there is a need for a public goad to employers to put their minds to the question of accommodation of the disabled in a focused and (hopefully) innovative fashion. It creates a pool of money (the costs of waiver acquisition) from which profits might be gained by carrying out this social purpose. In any event, I would argue that we should, as I previously urged, put aside first principles (e.g., "quotas are an abomination" or "no one should have a right to discriminate") in the interests of making the disabled and society as a whole better off.

Critics may object to this way of proceeding on the ground that it ignores the practical necessity to provide some moral underpinning

for any action that is urged as a social responsibility. Alternatively, it may be argued that my “pragmatic” approach really smuggles in ideas of “charity” or “pity” that would be as offensive to many persons with disabilities as is the idea of “discrimination” to the employers and others who bear the costs of the ADA.

In some sense the answer to the first objection is easy. My argument has been one of social advantage, not social responsibility. And, if a moral underpinning is wanted, the Rawlsian approach would suffice, as might my reinterpretation of the demands of either libertarian or utilitarian starting points. But these answers are somewhat too easy.

I do not want to deny the moralistic intuitions that almost necessarily undergird the felt social necessity to provide ameliorative schemes for the physically or mentally disadvantaged. Indeed, policy proposals that do not respond to some widely shared notions of a moral imperative to “do something” have little realistic prospect of shouldering their way to the front of the legislative-agenda queue. Pragmatists must recognize the existence and utility of moral claims.

On the other hand, I do not want to be drawn into the position of premising my particular prescriptions on any particular foundationalist approach to normative policy argument. For I believe that the varied existing social interventions for persons with disabilities are premised on multiple — sometimes contradictory — moral foundations. And, as I indicated earlier, I also believe that on close examination any foundationalist approach will prove both normatively and empirically indecisive.

So where should the pragmatic policy analyst stand? I think just here — an apparently useful policy is supportable if plausible moral arguments can be given for it *and* it does not violate some other deeply held moral commitment. (Indeed, policies will have to pass something like this sort of test if they are to gain acceptance in the political marketplace.) The second part of this “moral-market” test, of course, brings us back to the second criticism suggested above. If promotion of the interests of persons with disabilities is not premised on the right to be free from discrimination, is it not all too easy to view any such program as an act of charity, based on pity? If so the proposal might reinforce just those perceptions of difference, leading ultimately to exclusion and alienation, that the ADA was meant to combat.

My answer is no, but the question is important and deserves a more extended treatment than can be provided here. In outline form my negative response might be justified as follows: Virtually everyone in the field of disability policy would agree that “disability” is not a characteristic of persons, but rather denotes an interaction between the physical and mental capacities of persons, their objectives,



and the demands of their external environments. The current physical and production environments that society has constructed can thus be seen as "functional" or "enabling" only in terms of some implicit norms or expectations about the needs and capacities of some modal, "able-bodied" human. These same structures and organizations are dysfunctional for many nonmodal humans simply because their needs and abilities have not been taken into account. To pay attention to these latter needs is thus an act of "simple justice," not charity or pity.

I put justice in quotation marks to signal that this is a justice claim of a particular, and broadly "compensatory," sort. In its baldest form the claim goes something like this: The failure to make better provision for those who are disadvantaged unnecessarily by physical or socioeconomic environments is a moral failing in a society. This is true because the disadvantages of the "impaired" minority often proceed from arrangements that both advantage the majority and use real social resources. As one of my wheelchair-bound friends likes to put the point. "It's perfectly all right with me if you standardize all ceiling heights at six feet and door heights at four. That's all I need, and the energy and building materials' savings would be tremendous, even if you required that all doors and aisles be a bit wider."

I will not attempt more on compensatory justice, and the appropriate way to view disabilities in this Article. After all, my basic argument is only that moral foundations should be viewed more as constraints against which to test policy intuitions than foundations upon which policies must be constructed. And, my suggestions for the reform of disability policy are meant merely to illustrate the methodological advantages of pragmatic rather than foundationalist policy analysis.

Returning to pragmatics the really hard questions come in the implementation of a quotas-plus-markets scheme. There must be some means by which people are certified as "disabled;" some means by which the costs of accommodating different sorts of disabilities are calibrated; and some monitoring system through which one can determine that the role of being disabled is not being created fraudulently by employers, employees, or the two in concert. None of these tasks is easy although I am far from convinced that they are so difficult as to render the scheme impracticable.

I will not spend a great deal of time on these implementation issues. Suffice it to say, perhaps, that there are several such systems at

work in the world, one of which has now had nearly two decades of experience.<sup>28</sup> The German Federal Republic, for example, requires that employers hire one sixth of their workers from the pool of "severely handicapped" persons. Although it does not use the market mechanism previously suggested, the German scheme requires a payment by employers who fail to hire their quota of the seriously impaired and makes those payments available as subsidies to employers who employ more than their one sixth share of the disabled. The tax-subsidy scheme is almost like a market because it is a pure pass-through from paying to receiving employers. Indeed, if the government fails to meet *its* quota, it too must make payments into the fund.

There are many complaints that the German system does not really work. One third of employers hire no severely disabled workers and 40% of employers have less than their quota. That means that 73% of German employers are not in compliance with the quota. Nevertheless, the German scheme produces very much better results in terms of employment of disabled than does our current set of arrangements. The unemployment rate for the severely disabled was estimated at 13% in 1986 versus 7.8% for the general population. By contrast the unemployment for the handicapped in the United States is estimated at 75% to 80% and drops down to about 50% only in times of very full employment. Moreover, the German Federal Government has a 6.5% overall rate of employment of the severely disabled while the *Lande*, or state governments, and the private sector each average about 4.7% of severely disabled in their work forces. As might be expected, performance is best in sectors having large businesses and significant government influence through regulation or contracting. Moreover, the Germans have achieved this level of employment of the disabled in a scheme that requires employers to pay only about \$100 per month for each worker under the quota in their work force. Most commentators believe that this payment is much too low, and that there would be major improvements if it were raised by a factor of two to four. One should note, as well, that this scheme works in a polity having special and very strenuous requirements for firing handicapped workers. Hence, one would expect a severe disincentive to hiring such workers in the first place.

We might argue interminably about the advantages and disadvantages of using a tax-subsidy program versus a quota-plus-markets

---

28. This description is based on BERND FRICK, *INTERNE ARBEITSMÄRKTE UND BETREIBLICHE SCHWERBEHINDERTERBHÄFTIGUNG: THEORETISCHE ANALYSEN UND EMPIRISCHE BEFUNDE* (1992). For an earlier English language description of the general German scheme, see Martin Pfaff & Walter Huber, *Disability Policy in the Federal Republic of Germany*, in *PUBLIC POLICY TOWARD DISABLED WORKERS: CROSS-NATIONAL ANALYSES OF ECONOMIC IMPACTS* 193 (Robert H. Haveman et al. eds., 1984).

system. But, that discussion and other details of implementation should not now detain us. My purpose simply has been to sketch out a program of remediation with respect to underemployment of disabled persons that has plausible characteristics and that begins only with a problem and possible solutions, rather than with ethical or political principles from which policy prescriptions might be derived. The question that remains to be discussed is how this approach compares to the sort of analysis that is provided to us in Richard Epstein's *Forbidden Grounds*. For the argument that I want to make is ultimately about how policy should be discussed and institutions designed, not about the details of any particular scheme.

#### IV. A CODA ON METHOD

The basic premise that separates my analysis of the ADA from Epstein's is my implicit assumption that law need not find a *wrong* in order to create a *duty*. (This separates my approach from that implicit in the ADA as well.) My argument is simply that we might have a better (both wealthier and more humane) society by mandating employment of the disabled, and that a belief in the probability of social betterment is a sufficient justification for social action.

This difference in approach is philosophically fundamental. I can conceive of no meta-theory that will mediate this crucial difference between Epstein's approach and mine, or that could adjudicate who is right. His book is an extended argument for the necessity of legitimating policy prescriptions in terms of some fundamental moral theory. I simply reject the need for such a "foundationalist" approach. My argument has been that attempts at foundationalist deduction of appropriate public policies are usually inconclusive and often dysfunctional. They routinely degenerate into squabbles about burdens of proof in the face of intractable empirical uncertainty or the simple assertion of contradictory ethical verities. I often find such debates interesting, but I rarely find them useful when policy design is actually at stake. In short, when acting as a policy analyst, my basic methodological commitment is to pragmatism.

Happily for us out-of-the-closet-pragmatists, pragmatism is showing renewed signs of intellectual respectability.<sup>29</sup> Yet the revival of

---

29. The leading contemporary exponent of pragmatism is, of course, Richard Rorty. See generally RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* (1979) (esp. 357-94); RICHARD RORTY, *CONSEQUENCES OF PRAGMATISM* (1982). For a somewhat more technical discussion, see MICHAEL WILLIAMS, *UNNATURAL DOUBTS* (1991) and *GROUNDLESS BELIEFS* (1977). A multi-perspective discussion of applications

pragmatism as a presentable philosophical posture has been sufficiently recent and sufficiently controversial that I feel compelled to articulate at least a short list of the silly "consequences of pragmatism" (to use Richard Rorty's locution) that I do not believe to be a necessary part of the pragmatist's philosophic baggage.

First a pragmatic approach does not, by giving up on "proof," deny the importance of all notions of legitimacy, constitutional or otherwise, or eschew reasoned justification for policy prescriptions. "What works" has multiple dimensions and is inherently controversial. The pragmatic approach therefore has a necessary relationship to (and commitment to) policy dialogue as an instrument of policy formation and as a means for its legitimation. Principles — and arguments about the meaning of or desirability of those principles — will figure in such dialogue. The pragmatist simply rejects the notion that some necessary and sufficient set of conditions, derived from some set of agreed-upon principles, will ever determine persuasively the desirability or legitimacy of particular policies.

Second, this skepticism about the power of principles to resolve disputes is not a skepticism about the possibilities of human progress. Indeed, the pragmatist has a considerable faith (sometimes too considerable) in the power of human ingenuity and is attracted to schemes that empower broad segments of the population. This often leads to policies that are compromises, that take differing perspectives into account, and that permit variations based on local or other differences. My suggestions concerning policy toward the disabled, for example, attempt to respect the positions of the disabled who feel disadvantaged and of employers who feel that they have done nothing morally wrong. It also tries to maximize opportunities for the disabled, while minimizing social costs and avoiding their maldistribution. High-cost employers can get out by paying a fee that rewards those who have discovered how to accommodate at lower costs. No one need be branded a "discriminator" or a "victim" in order for this scheme to work.

Third, skepticism about the persuasiveness of first principles in policy debate does not lead ineluctably to moral relativism. My suggestions concerning disability policy, for example, implicitly affirm the social justice of empowering the disadvantaged. I believe a society that accepts this responsibility is morally superior to one that does not (and would be prepared to argue the point at length). But, I hasten to add, this does not commit me — or any other pragmatist — to giving special relevance to the views of those who claim to be "oppressed." The views and understandings of the disadvantaged

---

of pragmatism in legal thought appears in SYMPOSIUM ON THE RENAISSANCE OF PRAGMATISM IN AMERICAN LEGAL THOUGHT, 63 S. CAL. L. REV. 1569-1853 (1990).

may be unique, but they are not necessarily privileged. The pragmatist's moral commitments, therefore, need not be commitments to morality as understood by those whose betterment is sought through public action.

Fourth, what is pragmatically good in one context is not necessarily pragmatically good in another. Pragmatists need not exalt "technique," "science," or "process" over values or ends. The quotas-plus-markets solution, for example, may work well with respect to the disabled, but very poorly with respect to those disadvantaged by gender or race.<sup>30</sup> Questions of gender and race discrimination policy are embedded in vastly different historical, political, economic, and cultural contexts — both from the problems of the disabled and from each other. This points up another major difference between the pragmatist and the foundationalist. Whereas for Epstein, his arguments concerning race and gender discrimination produce an almost *a fortiori* set of conclusions concerning disability discrimination, the pragmatist views these issues as quite distinct and finds it neither surprising nor embarrassing to advocate different solutions to these three social ills.

Finally, the pragmatist need not be a naive optimist. Although over the years of its philosophic disgrace "Deweyite" came to be associated with "dewey-eyed," William James argued (I believe convincingly) that the pragmatist may have a better claim to being "tough-minded" in a philosophic competition with the foundationalist systems-builder.<sup>31</sup> Nevertheless, the pragmatist views politics and political action quite differently than does the deductive foundationalist. For the pragmatist, politics is action that *shifts* preferences as much as simply realizing them. Policy development thus is viewed as both socially and individually progressive. To that degree pragmatism is at base optimistic. This would be a fault, of course, if it did not in some contexts turn out to be useful.

---

30. I have analyzed the use of quotas and markets in the context of race discrimination in Jerry L. Mashaw, *Implementing Quotas*, 79 GEO. L.J. 1769 (1991).

31. WILLIAM JAMES, PRAGMATISM 13 (1975).

