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# Dealing with Diversity: Changing Theories of Discrimination

Deborah Calloway

*University of Connecticut School of Law*

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# DEALING WITH DIVERSITY: CHANGING THEORIES OF DISCRIMINATION

DEBORAH A. CALLOWAY\*

This talk is based on an article that I am working on concerning the changing concept of equality and discrimination in employment discrimination law. I appreciate this opportunity to share my preliminary thoughts on this subject with you today.

The concept of equality as a desirable social goal dates back, at least, to the Greek city-states.<sup>1</sup> The Athenian concept of equality, however, was limited<sup>2</sup> and in those limitations it is possible to identify issues regarding equality that remain unresolved to this day.<sup>3</sup>

Citizens of Athens “enjoy[ed] equality—before the law, in discussion of public affairs and in access to public office.”<sup>4</sup> But citizenship in Athens was limited to men who met certain qualifications. Excluded were “all women, [as well as] farmers, laborers, mechanics, freedmen, slaves and aliens.”<sup>5</sup> These groups were denied participation in public affairs on the basis of their status or citizenship.

\* Deborah Calloway is currently on the faculty of the University of Connecticut School of Law where she teaches Legal Regulation of the Employment Relationship and Employment Discrimination Law. Previously, she clerked for Judge Spottswood Robinson on the United States Court of Appeals for the D.C. Circuit and was an attorney at the law firm of Wald, Harkrader and Ross in Washington, D.C., where she specialized in labor and employment issues. She has co-authored two books on employment law: *Cases and Materials on Employment Law* (1993) and *Cases and Materials on Employment Discrimination Law* (1994). In addition, she has published a number of articles dealing with employment discrimination law. She received her undergraduate degree in Psychology, *cum laude*, Phi Beta Kappa, from Middlebury College and she received her Law Degree, *cum laude*, from Georgetown University Law Center where she served on the Board of the *Georgetown Law Journal*.

<sup>1</sup> See RAPHAEL SEALEY, *THE ATHENIAN REPUBLIC* 5-31 (1987) (discussing varying levels of equality among citizens and non-citizens of Athens).

<sup>2</sup> See *id.*

<sup>3</sup> See generally J. PETER EUBEN ET AL., *ATHENIAN POLITICAL THOUGHT AND THE RECONSTRUCTION OF AMERICAN DEMOCRACY* 61-66 (1994) (addressing similarity of inequality between Athenian times and present day).

<sup>4</sup> PHELPS BROWN, *EGALITARIANISM AND THE GENERATION OF INEQUALITY* 16-19 (1988).

<sup>5</sup> See *id.* at 289-90. “All these men may well have been equal and free in many respects, but the majority of the population, including women, children, metics, and slaves, most certainly was not.” *Id.*

The mass exclusion of classes of individuals from equal enjoyment of the full benefits and responsibilities of citizenship was deemed consistent with a concept of equality, because equal treatment meant that persons were entitled to what they deserved. Those who merited equal treatment were entitled to have it,<sup>6</sup> but inequality also was thought to be just and right for those who were unequal.<sup>7</sup> The excluded groups were justly excluded because they were inferior, innately,<sup>8</sup> or by education or occupation. For example, women and slaves were considered naturally to be inferior and therefore appropriately subject to being ruled.<sup>9</sup>

The Athenian concepts of equality and inequality raise questions that continue to plague nations seeking to meet the needs of diverse populations.<sup>10</sup> Should perceived or real group differences justify different treatment based on group membership? What does equality mean—equal treatment, equal opportunity, equal results or all three? Should equality extend to economic as well as political rights?

In the United States, for much of this century, attention has focused primarily on the first issue—combatting discrimination based on membership in a group. The Declaration of Indepen-

<sup>6</sup> See *id.* at 293-97 (discussing rights of Athenian citizens).

<sup>7</sup> ARISTOTLE'S POLITICS III, ix 1280 a7 (1981 ed.) "[I]ndiscriminate equality for all amount[s] to inequality . . ." *Id.*; PLATO, THE LAWS VI 757 (1988 ed.).

<sup>8</sup> See ARISTOTLE'S POLITICS *supra* note 7, at 1.1260a9-14.

The free rules over the servile in one way, the male over the female in another, and the man over the child in yet another. All the partners possess the elements of the human mind, but they possess them in different ways. The slave does not have the faculty of deliberation at all. The female has it but in an indefinite form. The child has it but in an imperfect form.

*Id.*

<sup>9</sup> See RICHARD GARNER, LAW & SOCIETY IN CLASSICAL ATHENS 84 (1987).

A woman, like a piece of property, was always under legal control of some man; and if he should die in her lifetime, she and whatever was attached to her passed to the next male relative in the same elaborate order of succession used for any other property.

*Id.*

<sup>10</sup> ARISTOTLE'S POLITICS, *supra* note 7, I, v, 1254 bs, b16. The Greek philosophers also debated whether the right to equality includes economic as well as political equality. Aristotle thought not: "[w]hile there is certainly some advantage in equality of possessions for the citizens as a safeguard against faction, its efficacy is not really very great. In the first place discontent will arise among the more accomplished people, who will think they deserve something better than equality . . ." *Id.* at II, vii, 1267 a37; VI, v 1320 a17; II, vii, 1266 b24. See generally EUBEN ET AL., *supra* note 3, at 252-264 (applying Athenian ideology to society with diverse populace). The author asks the question:

[H]ow can America—a polyglot society with one of the most varied and ambiguous mixture of peoples, races, and religions in human history, a county of some 250 million people—learn to be more democratic from Athens—a country of at most 50,000 citizens at its population peak?

*Id.* at 253.

dence stated that "all men are created equal."<sup>11</sup> However, like the Athenians, the men who drafted the United States Constitution did not see the concept of equality as inconsistent with limiting rights on the basis of group membership. The Constitution itself recognized limits on equal access to the most basic human right, liberty, by depriving Congress of the power to prohibit the importation of slaves until 1808<sup>12</sup> and by prohibiting states from freeing runaway slaves.<sup>13</sup> Similarly, women were not entitled to the most basic political right, the right to vote, until the ratification of the 19th Amendment in 1920.<sup>14</sup>

It was not until the Civil Rights Movement breathed new life into the Equal Protection Clause of the Fourteenth Amendment<sup>15</sup> that distinctions based solely on race and gender began to be perceived as unacceptable. The American consensus that intentional and mindless discrimination is morally outrageous has its roots in the Civil Rights Movement. The southern system of segregation fell of its own weight. No unsubstantiated concept of racial inferiority was capable of justifying the extreme inequities imposed by southerners on African Americans—widespread lynching<sup>16</sup> as well as separate and inferior facilities, including bathrooms, schools, lunch counters, water fountains, jobs, public accommodations, seats on buses, and housing.<sup>17</sup>

<sup>11</sup> See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). "We hold these Truths to be self-evident, that all Men are created equal." *Id.*

<sup>12</sup> See U.S. CONST. art. I, § 9, cl. 1. Article One, section 9 states that "[t]he Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight." *Id.*

<sup>13</sup> See U.S. CONST. art. IV, § 2, cl. 3, *repealed by* U.S. CONST. amend. XIII. Article Four, section 2 provided that "[no] Person held to Service or Labor in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labor, but shall be delivered up on Claim of the Party to whom such Service or Labor may be due." *Id.*

<sup>14</sup> See U.S. CONST. amend. XIX. The Nineteenth Amendment provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex." *Id.*

<sup>15</sup> See U.S. CONST. amend. XIV. The Fourteenth Amendment provides that "[N]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." *Id.*

<sup>16</sup> See Amii Larkin Barnard, *The Application of Critical Race Feminism to the Anti-Lynching Movement: Black Women's Fight Against Race and Gender Ideology, 1892-1920*, 3 UCLA WOMEN'S L.J. 1, 6 (1993) (noting that over 3000 African-Americans were murdered by lynching from 1882 to 1923).

<sup>17</sup> See generally F. Michael Higginbotham, *Sins From the Past and Lessons For the Future: Eliminating Apartheid in South African Public Accommodations and the Challenge to an Enlightened Judiciary*, 12 B.U. INT'L L.J. 2, 2 (1994) (noting inferior eating and waiting facilities, and absence of hot meals for blacks).

Civil Rights leaders waged a public relations campaign designed to force white Americans to look at African Americans as individual human beings with hopes and dreams and a range of abilities not unlike their own.

On August 28, 1963, Dr. Martin Luther King voiced his hope that Black Americans would one day be judged, not "by the color of their skin, but by the content of their character."<sup>18</sup> Dr. King's eloquent vision of America's future captured the hearts of the American people and the essence of a concept of equality that has dominated legal, political, academic, moral and popular thought for nearly 30 years—equality means judging people on the basis of their individual merits, not on the basis of stereotypical assumptions associated with their membership in a group.

Title VII of the Civil Rights Act,<sup>19</sup> the first comprehensive statute prohibiting discrimination in employment, was a product of the Civil Rights Movement. Enacted in 1965, Title VII prohibits employers from "discriminat[ing] against any individual . . . because of such individual's race, color, religion, sex or national origin."<sup>20</sup> By its terms, Title VII was primarily concerned with eliminating employment decisions made on the basis of group membership, thus encouraging decisions based on merit. Today, color blind, merit-based employment decisions are supported by a substantial majority of our population.<sup>21</sup>

A more recent *Los Angeles Times* poll reveals that Americans continue to strongly support color and gender-blind, merit-based hiring.<sup>22</sup> Although those polled expressed general support for affirmative action by a margin of fifty-two percent to twenty-nine percent,<sup>23</sup> when asked whether qualified minorities and women

<sup>18</sup> Dr. Martin Luther King, Jr., *I Have a Dream*, Speech Delivered at the Lincoln Memorial, Washington, D.C. (Aug. 28, 1963) (transcript available at the John Henry & Mary Louise Dunn Bryant Foundation: Los Angeles).

<sup>19</sup> 42 U.S.C. § 2000e-1 to 2000e-17 (1981) (amended 1988).

<sup>20</sup> 42 U.S.C. § 2000e-2(a) § 703(a).

<sup>21</sup> Barry Bearak & David Lamb, *Revolution Incomplete*, L.A. TIMES, Mar. 8, 1987, at 1. In 1987, the *L.A. Times* reported the results of 40 years of surveys by national pollsters on racial attitudes. *Id.* The results show a dramatic shift from bigotry to tolerance. *Id.* "In 1944, only 44% of whites said blacks deserved an equal chance at any kind of job, but by 1972, the total had climbed to 97 percent." *Id.*

<sup>22</sup> See Cathleen Decker, *The Times Poll; Most Back Anti-Bias Policy But Spurn Racial Preferences*, L.A. TIMES, Mar. 30, 1995, at A1 (discussing recent poll of Americans' views on race and gender employment discrimination and affirmative action).

<sup>23</sup> See *id.* The author states that during the month the article was written "the percentage in favor of affirmative action slipped 3 points, while the percentage opposing it climbed by 10, for a 52%-29% margin." *Id.*

should receive preferences over equally qualified white male candidates, more than seventy percent of those responding said no.<sup>24</sup> Although the *L.A. Times* did not ask whether respondents favored preferences for equally qualified males and whites, it is highly likely that the ninety-seven percent opposed figure discovered in 1972 continues to hold.

What explains the overwhelming support for merit based hiring and opposition to decisions based on race, sex and other protected characteristics? The most obvious and fundamental answer is that making decisions based on membership in a group, rather than on individual qualifications, is perceived as fundamentally unfair. Discrimination is unfair because group membership does not accurately predict individual merit, and the individual has no control over membership in the group (immutable characteristics), or has exercised a fundamental right in choosing to become a member of the group (such as religion).

But, what is wrong about basing decisions on group membership? Even if the decision is incorrect and inefficient, why is it judged wrongful, morally repugnant, and unfair? First and foremost, race-based decisions are an attack on dignity. Given the history of slavery and racial discrimination in this country, rejecting an applicant because he is black carries with it a presumption of hostility, hate and negative stereotyping. The decision is an assault on dignity, because it is presumed by its victim to be motivated by a desire to keep talented blacks subservient or to be based on the assumption that blacks are inferior in some way. It is insulting because a rejection based solely on race denies the rejected person his or her individuality. It is dehumanizing.<sup>25</sup>

<sup>24</sup> See *id.* Results of the survey showed that "72% opposed racial preferences, compared to 22% who supported them. Similarly, 70% opposed gender preferences, while 25% supported them." *Id.*

<sup>25</sup> Consider the words of Professor Patricia J. Williams describing her response to being excluded from a New York City shop on the basis of her race:

I was enraged. At that moment I literally wanted to break all the windows of the store and *take* lots of sweaters for my mother. In the flicker of his judgmental gray eyes, that sales child had transformed my brightly sentimental, joy-to-the-world, pre-Christmas spree to a shambles. He snuffed my sense of humanitarian catholicity, and there was nothing I could do to snuff his, without making a spectacle of myself.

I am still struck by the structure of power that drove me into such a blizzard of rage. There was almost nothing I could do, short of physically intruding upon him, that would humiliate him the way he humiliated me. No words, no gestures, no prejudices of my own would make a bit of difference to him; his refusal to let me into the store . . . was an outward manifestation of his never having let someone like me into the realm of his reality. He had no compassion, no remorse, no reference to me; and no desire to

An employment decision rejecting a white applicant pursuant to an affirmative action plan does not carry with it quite the same insult. The white applicant is rejected, not because he or she is hated or presumed to be inferior, but rather to serve the broader social interest in remedying past discrimination and diversifying the work place.<sup>26</sup>

To be sure, there are instances in which race or gender-based decisions are stigmatizing as when an enterprise dominated by African Americans declines to hire whites because they are disliked, or a battered women's shelter rejects a male applicant on the stereotypical assumption that men, as a group, are insensitive. Preferential hiring that stigmatizes whites or men, however, is the exception rather than the rule.

Why then is a race or gender-based preference so controversial and objectionable even when its purpose is to diversify a previously segregated workplace? Race and gender-based hiring that gives preference to less qualified minorities and women obviously raises efficiency concerns. The intensity of feeling over reverse discrimination stems from a sense that decisions unrelated to merit are unfair because the more qualified applicant deserves the job.

Part of the American ethos is a rejection of class-based privilege. Immigrants flock to America because it is perceived as a land of opportunity where it is possible to work hard and get ahead. It is an ideal shared by Americans themselves, a defining characteristic of what it means to be American. Individuals are rewarded on the basis of merit rather than on the basis of class or birthright. Therefore, it seems fundamentally unfair to deny rewards to a more qualified individual. Race and gender-based decisions rejecting qualified applicants fail to reward merit and are therefore perceived as unfair whether the decision favors or disfavors women and minority group members.

Laws prohibiting race and gender discrimination enjoy broad support because discrimination is viewed as morally wrong and

acknowledge me even at the estranged level of arm's-length transactor. He saw me only as one who would take his money and therefore could not conceive that I was there to give him money.

<sup>26</sup> See Michel Rosenfeld, *Affirmative Action, Justice, and Equalities: A Philosophical and Constitutional Appraisal*, 46 OHIO ST. L.J. 845, 919 (1985) (discussing government-sponsored affirmative action programs as necessary to compensate and reintegrate blacks).

unfair on the grounds that it is insulting and fails to reward individual merit. Laws prohibiting discrimination also are consistent with public policy in that they promote efficiency by encouraging employers to rely on job-related employment criteria and by enheartening minorities and women to acquire job skills.

While Dr. King's vision of merit based equality enjoys broad support, any vision of equality defined in one dimension, creates inequalities in other dimensions.<sup>27</sup> Dr. King's vision defines equality as equal treatment of similarly qualified individuals. This concept of equality justifies denying employment opportunities to individuals who are not as bright, physically able or skilled.<sup>28</sup> It defines unequal treatment based on physical and mental abilities, education and skills, as equal and therefore justifiable.<sup>29</sup>

Despite the overwhelming political consensus and economic efficiencies supporting merit-based equality, philosophers have long questioned the moral basis of inequality based on "merit."<sup>30</sup> Why should an individual who is fortunate enough to have been born physically fit and cognitively gifted "deserve" the rewards of a good job? His innate intelligence and physical health are not the result of hard work. He was just lucky. Even if we assume that he has worked to make the best of his innate abilities, does he "deserve" a good life if his ability to capitalize on his talents was enhanced by his good fortune at being born into a stable middle class family and community that helped him to develop? The American system of merit-based equality causes and justifies substantial disparities in employment opportunities based on physical and mental abilities and education.

In the context of race and gender discrimination, Congress and the various courts have struggled with the problem of providing "equal" employment opportunities to individuals who approach the competition for good jobs with different abilities and skills. First, when pregnant women sought protection from discrimina-

<sup>27</sup> See generally SEN. AMARTYA, *INEQUALITY REEXAMINED* (1992).

<sup>28</sup> See Rosenfeld, *supra* note 26, at 919. The author stated that:

If each person is to be treated equally according to his or her merit, equality will require that those whose merits are alike be treated alike, but that those whose merits are different be treated differently . . . a failure to treat those with different merit unequally would undermine the implementation of the principle: To each according to his or her merit.

*Id.*

<sup>29</sup> See generally Rosenfeld, *supra* note 26, at 849-50.

<sup>30</sup> See, e.g., JOHN RAWLS, *A THEORY OF JUSTICE* 11-17 (1971).

tion, Congress responded with an amendment that addressed the job-related limitations associated with pregnancy by guaranteeing pregnant women the same treatment as other similarly disabled workers.<sup>31</sup>

Second, minorities and women have challenged the employer's use of employment criteria that disproportionately exclude minorities and women. In *Griggs v. Duke Power Co.*,<sup>32</sup> black employees challenged, as unfair, a high school diploma as a prerequisite for employment opportunities, especially in a social context in which blacks were deprived of one by state mandated discrimination in education.<sup>33</sup>

In *Dothard v. Rawlinson*,<sup>34</sup> minimum height and weight requirements for selecting prison guards eliminated most women.<sup>35</sup> The Court's response to the challenges presented in *Dothard* was to create a new theory of discrimination, disparate impact.<sup>36</sup> This theory preserves merit-based equality by prohibiting the use of employment criteria that disproportionately excludes minorities and women, but only if those criteria are not job related and a business necessity.<sup>37</sup> Inequality resulting from job related criteria is permitted.

Finally, the Court has considered the legality of voluntary affirmative action plans adopted by employers trying to equalize

<sup>31</sup> See The Pregnancy Discrimination Act of 1978, Pub. L. No. 9-555, 92 Stat. 2076 (1978) amending Title VII to include Section 701(k), which provides that:

The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected by similar in their ability or inability to work.

*Id.*

<sup>32</sup> 401 U.S. 424 (1971).

<sup>33</sup> *Id.* at 430.

<sup>34</sup> 433 U.S. 321 (1977).

<sup>35</sup> See *id.* at 329-30.

<sup>36</sup> See *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 645 (1989). Pursuant to the disparate-impact theory, "a facially neutral employment practice may be deemed violative of Title VII without evidence of the employer's subjective intent to discriminate, which is required in a 'disparate-treatment' case." *Id.*; see also Rosemary Alito, *Disparate Impact Discrimination Under the 1991 Civil Rights Act*, 45 RUTGERS L. REV. 1011, 1013-19 (1993) (discussing burdens placed on both parties in disparate impact discrimination action).

<sup>37</sup> See Alito, *supra* note 36, at 1016-17. The author discussed that:

Disparate impact discrimination is proved if: (1) plaintiff 'demonstrates' that defendant uses a particular employment practice that causes a disparate impact, and (2) defendant fails to demonstrate that the challenged practice is job-related for the position in question and consistent with business necessity.

*Id.*

employment opportunities for less qualified groups.<sup>38</sup> The Court's tentative departure from a strict equality principle, permitting but not requiring voluntary affirmative action and hiring preferences in limited circumstances, is currently the subject of intense national political debate.<sup>39</sup>

In some respects, the Americans with Disabilities Act (the "ADA") is no different than other anti-discrimination statutes. It prohibits individual and systemic disparate treatment<sup>40</sup> of qualified individuals with disabilities, and it prohibits the use of non-job related employment criteria that have a disparate impact on individuals with disabilities.<sup>41</sup>

Discrimination against individuals with disabilities is morally reprehensible for the same reasons as discrimination on the basis of race or gender. It is unfair and an assault on dignity when a qualified individual with a disability is denied employment on the basis of unsubstantiated stereotypical assumptions of inferiority<sup>42</sup> or because the employer perceives the disability as offensive. Like decisions based on race or gender, decisions based on disabilities are unfair, in part, because having a disability is a factor over which the individual has no control.

The ADA, however, does more than require employers to treat individuals with disabilities in the same way as other similarly qualified applicants or workers. The ADA imposes on employers

<sup>38</sup> See, e.g., *United Steelworkers v. Weber*, 443 U.S. 193, 193 (1979); *Johnson v. Transportation Agency*, 480 U.S. 616, 616 (1987).

<sup>39</sup> See generally, Daniel Seligman, *The Scrutinizers (US Supreme Court Fails to End Affirmative Action)*, 132 FORTUNE 170, 170 (1995) (arguing that *Adarand's* failure to create bright-line rule necessitates Congressional action to end affirmative action); Stephen Wermiel, *Supreme Court, in 6-3 Vote, Backs Hiring Goals to Correct Sex Bias*, WALL ST. J., Mar. 26, 1987 (detailing reactions to Supreme Court's decision that public employers, as well as private employers, may implement voluntary affirmative action plans).

<sup>40</sup> See Ronald Turner, *Thirty Years of Title VII's Regulatory Regime: Rights, Theories, and Realities*, 46 ALA. L. REV. 375, 430 (1995). The author notes that with disparate treatment "the employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin."

<sup>41</sup> See 42 U.S.C. § 12112(a) (Supp. V 1993). The ADA provides that:

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

*Id.*

<sup>42</sup> See Jonathan C. Drimmer, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy For People with Disabilities*, 40 UCLA L. REV. 1341, 1343 (1993). The author discusses how "[i]n a culture that values the 'protestant work ethic' as well as a strong mind and body, people with disabilities are commonly viewed as deficient and inferior" and "people with disabilities have often been treated as inherently inferior, and removed from mainstream society." *Id.*

an obligation to provide reasonable accommodations<sup>43</sup> to make it possible for disabled individuals to perform essential job functions and to secure equal enjoyment of all terms and conditions of employment.<sup>44</sup>

The concept of reasonable accommodation is not entirely new. Title VII requires employers to accommodate the religious needs of employees.<sup>45</sup> The concept of accommodating religion, however, has been severely restricted by the courts to avoid conflicting with the First Amendment<sup>46</sup> prohibition against establishing religion.<sup>47</sup> Reasonable accommodation also is required in the Rehabilitation Act. The ADA's reasonable accommodation provision, however, has a much greater impact because the ADA applies to nearly all employers.<sup>48</sup>

What policy justifications support requiring employers to accommodate individuals with disabilities? Most individuals with disabilities are not responsible for their condition or are not capable of changing their condition. Reasonable accommodations provided by an employer may make the difference between living in poverty on public assistance, and living a productive self-sufficient lifestyle with a higher standard of living.

The obligation to accommodate, therefore, provides individuals with disabilities enhanced employment opportunities,<sup>49</sup> the dig-

<sup>43</sup> See 42 U.S.C. § 12111(9) (Supp. V 1993). The ADA defines reasonable accommodation as "making existing facilities used by employees readily accessible to and usable by individuals with disabilities." *Id.*

<sup>44</sup> See 42 U.S.C. § 12112(b) (Supp. V 1993). Discrimination against people with disabilities under the ADA "includes not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee." *Id.* Section 102(a) of the ADA prohibits discrimination against a "qualified individual with a disability." *Id.*

<sup>45</sup> See 42 U.S.C. § 2000e(j) (1988). The statute defines the term religion to include "all aspects of religious observance and practice, as well as belief." *Id.* Section 701(j) of Title VII requires employers to "reasonably accommodate an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business." *Id.*

<sup>46</sup> See U.S. CONST. amend. I. The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." *Id.*

<sup>47</sup> See, e.g., *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 60 (1986); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 63 (1977).

<sup>48</sup> See 42 U.S.C. § 12111(5)(A) (1988). The ADA defines employer as "a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of said person." *Id.*

<sup>49</sup> See Peter D. Blanck, *Employment Integration, Economic Opportunity, and The Americans With Disabilities Act: Empirical Study from 1990-1993*, 79 IOWA L. REV. 853, 868 (1994) (using empirical data to gauge effectiveness of mandated accommodation measures on employment integration and economic opportunity).

nity associated with self support, and improved quality of life.<sup>50</sup> Certainly, qualified individuals with disabilities<sup>51</sup> are as deserving of employment opportunities as equally qualified individuals who have the good fortune not to be disabled.

Mandating reasonable accommodations may reduce the cost of supporting disabled individuals and transfers the cost from the public to the private sector.<sup>52</sup> In Section Two of the ADA, Congress identified findings and purposes for the ADA consistent with these policy justifications.<sup>53</sup> Mandating reasonable accommodations for individuals with disabilities is a step in the direction of providing equality in a different dimension than that envisioned in Dr. King's speech and generally embraced by law and public opinion. Rather than provide equal treatment for individuals with similar capabilities, the ADA promotes equal employment opportunities for individuals with differing capabilities.

Equality in one dimension means inequality in another dimension. Equal employment opportunity is achieved under the ADA by mandating different treatment for individuals with disabilities; different treatment in the form of reasonable accommodations. Let me illustrate. Suppose an individual who suffers from Multiple Sclerosis seeks a job in an office building. She has difficulty walking and requests the office closest to the elevators. Although she might be entitled to this office as a reasonable accommodation, another employee forced to use crutches because of a broken leg would not be entitled to the same accommodation. The Equal Employment Opportunity Commission's interpretation of the ADA indicates that individuals who suffer from temporary disabilities are not covered by the ADA.<sup>54</sup>

Consider also, a dyslexic applicant for a civil service job who requests extra time to take the examination required for the job. Although this applicant may be entitled to an accommodation, an-

<sup>50</sup> See JANE WEST, THE EVOLUTION OF DISABILITY RIGHTS, IN IMPLEMENTING THE AMERICANS WITH DISABILITIES ACT: RIGHTS AND RESPONSIBILITIES OF ALL AMERICANS 3 (Lawrence O. Gostin & Henry A. Beyer eds. 1993) (stating that ADA seeks to establish full participation and independent living as national goals for persons with disabilities).

<sup>51</sup> See 42 U.S.C. § 12111(8) (Supp. V 1993). A qualified individual with a disability is defined as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." *Id.*

<sup>52</sup> See Blanck, *supra* note 49, at 854.

<sup>53</sup> See 42 U.S.C. § 12101 (Supp. V 1993).

<sup>54</sup> See EEOC Interpretive Guidance, 29 C.F.R. pt. 1630 § 1630.2 (1991).

other applicant with a below average I.Q., not sufficiently low to constitute a disability, would not be entitled to the same accommodation.<sup>55</sup> Consider also, an individual with a permanent back injury who is relieved of heavy lifting responsibilities as an accommodation. Another employee with the same degree of disability who suffers from a temporary back injury would not be entitled to the same accommodation.

Finally, consider an individual with achondroplastic dwarfism who seeks a job stocking shelves in a supermarket. While he might be entitled to an accommodation in the form of a rolling step ladder, another applicant who is merely short, but not sufficiently short to qualify as disabled, would have no legal recourse if the employer declined to provide the necessary equipment to permit her to do the job.

The reasonable accommodation provisions of the ADA seem to run completely contrary to our understanding of equal treatment developed under other anti-discrimination statutes. Individuals are judged, not on the basis of their individual merits or needs, but rather on the basis of their membership in a group—individuals with a disability. Insofar as requiring reasonable accommodations promotes self-sufficiency and a sense of dignity for individuals with disabilities, cannot the same be said for the individual with below average intelligence who, as a result, has difficulty finding work? All of the policy reasons which support mandating reasonable accommodations for individuals with disabilities seem equally applicable to individuals with impairments or limitations beyond their control that are not sufficiently severe or chronic to qualify as disabilities within the meaning of the ADA.

If reasonable accommodations are mandated to provide access to employment opportunities, should that access be equally available to similarly situated individuals, or does this argument prove too much? Consider the impact on efficiency of guaranteeing reasonable accommodations and equal employment opportunities to all applicants. Even if reasonable accommodations enable individuals to perform the essential functions of a job they could not otherwise perform, will they be as effective as an applicant who does not require accommodation? Consider also, the costs of the accommodation and the costs of enforcing compliance. Are these

<sup>55</sup> See 29 C.F.R. pt. 1630, § 1630.2.

costs outweighed by the savings in public assistance outlays, or by the improved standard of living for accommodated individuals, or by the intangible values associated with self-sufficiency and fairness?

By my remarks and questions, I do not mean to suggest that the ADA's reasonable accommodation requirement is necessarily bad policy. I mean only to point out that it represents a different vision of equality than that under traditional anti-discrimination statutes. This new vision of equality obviously raises questions about economic efficiency, but beyond the questions of cost lie larger issues of justice and fairness.

Recognition of the right of black Americans to equal treatment changed the nation's and even the world's views on equality. The American Civil Rights Movement inspired freedom movements in South Africa and rekindled the Irish bid for political rights. In the United States, other groups sought the same protection against discrimination first accorded to black Americans. Discrimination is now prohibited by national, state and local legislation and regulations on the basis of numerous characteristics.<sup>56</sup>

Similarly, we can expect that the widespread implementation of the concept of reasonable accommodation will raise expectations among workers concerning employers' obligations to accommodate differences. For example, a pregnant woman with back problems or other physical limitations associated with her pregnancy will wonder why she is not entitled to light duty when an individual with similar limitations related to a disability covered by the ADA is entitled to that accommodation; although she may have a remedy under the Pregnancy Discrimination Amendment of Title VII. As disabled individuals are regularly accommodated in the workplace, it is likely that individuals who have low IQ's or who are substantially overweight or small in stature will also begin to expect and demand the same accommodations that disabled individuals receive as a matter of course. Their demands may lead to lawsuits under the ADA and expansive interpretation of the ADA coverage. Alternatively, their demands may take the form of

<sup>56</sup> See, e.g., D.C. CODE ANN. § 1-2501 (1994). The District of Columbia prohibits discrimination for any reason other than merit, including, but not limited to discrimination by reason of race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, matriculation, political affiliation, physical handicap, source of income, and place of residence of business. *Id.*

political action seeking new legislation expanding the concept and applicability of reasonable accommodation.

Expansive reading of the ADA definition of disability combined with demands for equal employment opportunity through workplace accommodation for individuals currently outside of ADA coverage may create a backlash against the rights granted under the ADA similar to the backlash against affirmative action. Demands for extended application of the concepts of reasonable accommodation and equal employment opportunity will challenge this society either to articulate policy reasons for distinguishing disabled individuals from others who require accommodation or to extend these rights to other similarly limited individuals. In short, the ADA's reasonable accommodation requirement and focus on equal employment opportunity raises significant questions about where, as a society, we want to go from here.

This new vision of equality can be predicted to change the expectations of individuals in the work force, so that they expect accommodations for disabilities, whether they are covered by the ADA or not. If those expectations are not met, perhaps we can foresee the possibility of a backlash against the special treatment that the ADA accords to disabled individuals. The ADA challenges us as well. It creates a new vision of equality which we need to consider in terms of its implications for other similarly situated individuals.