Conceptualizing Disability Discrimination

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Date : May 17, 2010

Samuel Bagenstos, **Law & the Contradictions of the Disability Rights Movement** (Yale University Press, 2009).

In a series of law review articles written over the past decade, Professor Bagenstos has established himself as the preeminent academic voice on disability discrimination law. Indeed, the transferable utility of the conceptual insights developed and applied in these articles, in my view, warrants a claim for Bagenstos as the most important scholar of the decade in the general field of employment discrimination law. Anyone with a serious intellectual interest in discrimination law who has not read Bagenstos's articles should take the occasion of the publication of this pithy and trenchant little volume to familiarize themselves with Bagenstos's analysis of the political and intellectual assumptions underlying disability law. Those who have read Bagenstos's work will find the book not redundant, but rather a rewarding reminder and synthesis of his developing view.

The book's principal project is to highlight how the highly pluralistic disability rights movement's sometimes divergent contradictory goals and assumptions have been reflected in discrimination law. In my view, the most important tension within the movement highlighted by Bagenstos derives from a disagreement about the meaning of the social model of disability. Bagenstos notes the general agreement among disability rights advocates that disability is socially rather than medically or physically defined. There is a broad, and appropriate, understanding among these advocates that no physical or mental traits can be defined as abnormal without reference to standards dependent upon social values. These values and accompanying attitudes and the physical environment they create or at least tolerate are what pose special difficulties for some disfavored individuals. The critical intellectual divergence in the movement is over the meaning of this social model for social policy. For some, Bagenstos notes, the model supports a universalism recognizing that all of us are different in ways that warrant legal protection from discrimination. Others, however, use the model to stress the importance of special interventions to create equal opportunities for the stigmatized minority disfavored by social assumptions about what is normal. Such interventions at least in part find support from policy makers wanting to avoid what might otherwise be the social dependency of a part of the population.

Bagenstos uses this analysis in a provocative chapter on the judicial interpretation of the definition of disability in the Americans with Disabilities Act. He explains the Supreme Court's analysis in cases like *Sutton v. United Airlines* and *Toyota Motor Mfg. v. Williams*, as more consistent with the latter minority-rights than the former universalistic interpretation of the social model. He argues, for instance, that a concern only for the stigmatized minority can explain the generally maligned holding in *Sutton* that those whose life limitations are successfully mitigated are not protected by the ADA. Bagenstos's explanation does not equate to his acceptance, however. He critiques the Court's analysis in the ADA disability definition cases, and stresses the limitations of the minority-rights model for those, like the learning disabled, perhaps not stigmatized but still prevented from fulfilling their human potential by unnecessary social assumptions and institutions.

Bagenstos is pessimistic about an anti-discrimination law like the ADA being able to overcome the latter limitations. Perhaps this pessimism should be qualified a bit by the ADA Amendments Act of 2009 (ADAAA), however. Because of the publication date of the book, Bagenstos unfortunately was not able

to adapt his analysis fully to the new amendments, which he acknowledges over turn most of the holdings in the Court's decisions on the definition of disability, including the *Sutton* holding on mitigation. More importantly, in my view, the ADAAA takes a step toward the universalistic model by eliminating the requirement that an impairment substantially limit a major life activity in order to constitute a disability protecting a qualified individual from discrimination. The substantial limitation requirement, to be sure, remains for a claim requiring reasonable accommodation, and Bagenstos makes a strong argument that the reasonable accommodation mandate in the ADA is not economically distinct from the general condemnation of rational statistical discrimination by the anti-discrimination laws. Nevertheless, claims against disparate treatment on the basis of disability are conceptually distinct from claims for reasonable accommodation, and the former claims more easily resonate with politically favored civil rights rhetoric. Bagenstos is probably correct that judges will continue to limit those protected from discrimination by restrictive interpretations of the meaning of impairment, but those limitations cannot be as severe as those imposed even after the ADAAA on the substantial limitation on a major life activity definition.

There is much more in Bagenstos's rich book, some of it not directly addressed to employment law. A chapter examining the disability rights' community's stance on abortion rights, assisted suicide, and prenatal testing, for instance, connects the debates within the disability rights community to broader themes. And a final comprehensive chapter on a future agenda for the movement reminds us that employment law is only part of a political puzzle, which must fit with other important pieces – including the kind of expansion of health insurance that is promised by current legislation. Bagenstos's analytic acumen and balanced political sense can illuminate all on which they shine.

Cite as: Michael C. Harper, *Conceptualizing Disability Discrimination*, JOTWELL (May 17, 2010) (reviewing Samuel Bagenstos, **Law & the Contradictions of the Disability Rights Movement** (Yale University Press, 2009)), https://worklaw.jotwell.com/conceptualizing-disability-discrimination/.