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BOOK REVIEW

Identity as Inclusion

JEROME BRUNER†

RIGHTS OF INCLUSION: LAW AND IDENTITY IN THE LIFE STORIES OF AMERICANS WITH DISABILITIES. By David M. Engel and Frank W. Munger. *University of Chicago Press*, 2003. Pp. 272. \$19.00.

This intriguing book is best read with several perspectives in mind. From a lawyerly point of view it is a book about *rights*—about the rights of the disabled to be included in the society of the employed as required by the 1990 Americans with Disabilities Act,¹ the ADA as it is popularly called. But to leave it at that would be akin to describing *Moby Dick*² as a book about a whale! For what David Engel and Frank Munger have offered us is a fresh and humane look at the doctrine of rights itself, both as a cultural concept and a legal doctrine. Indeed, the authors mostly steer clear of litigation and court holdings and deal principally with the impact of disability rights on the lives of the disabled—especially the impact (mostly indirect) of the ADA. Their inquiry, in fact, is based principally upon lengthy interviews with sixty disabled Americans with whom they discussed the vicissitudes and opportunities created by their disabilities in their personal as well as in their working lives.

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1. 42 U.S.C. §§ 12101-12217.

2. HERMAN MELVILLE, *MOBY-DICK; OR THE WHALE* (Arion Press 1979) (1851).

The book's first conclusion, admittedly puzzling, is that while virtually all those interviewed were affected by the ADA, not a single one of them ever brought suit under its terms, or indeed ever invoked it in dealing with disability-resistant employers, potential or actual. But perhaps this is not so puzzling, after all. For surely the impact of law on everyday life is rarely ever confrontational. Rather, the law impacts on life indirectly, seldom requiring the face-off of litigation. So how then do "rights" come into the lives of the disabled?

The authors confess early on that their inquiry grew "out of an . . . inconsistency in two views of law and society in America at the turn of the new century. One view emphasizes the centrality of rights. It sees rights as a defining characteristic of American citizenship and an indispensable guarantee of life, liberty, and the pursuit of happiness."³ But there is another view that argues (to paraphrase Marc Galanter) that *legal* rights are seldom invoked by Americans who, more typically, usually tolerate or absorb perceived wrongs without overt response and most usually without consulting a lawyer or going to court.⁴ America, on this view, is a nation of "law avoiders."

The French have an ironic expression: "*les extremes se touchent*." And surely the practice of American civil rights where the disabled are concerned provides a striking example of two seemingly opposite approaches living side by side: Rights are "guaranteed," yet, as the authors remark, those very rights are "among the least invoked of all laws" though "[t]hey concern themselves not only with the legal interests of those who belong to civil society but also with the issue of membership itself."⁵ That, of course, may be the reason why rights are rarely invoked in court actions—but more of that presently. In any case, the legal invocation of civil rights remains "highly problematic" even when the rights relate to such seemingly unproblematic and

3. DAVID M. ENGEL & FRANK W. MUNGER, *RIGHTS OF INCLUSION: LAW AND IDENTITY IN THE LIFE STORIES OF AMERICANS WITH DISABILITIES* 2 (2003) [hereinafter *RIGHTS OF INCLUSION*].

4. Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) about Our Allegedly Contentious and Litigious Society*, 31 *UCLA L. REV.* 4 (1983).

5. *RIGHTS OF INCLUSION*, *supra* note 3, at 3.

non-ideological matters as age and disability, leaving aside thornier matters such as race, gender, and sexual orientation. So why are we so uptight about enforcing civil rights, even though we proclaim their quintessential "Americanness" in the very opening paragraph of our Constitution?

Surely not through absent-minded inattention! The voting rights of women surely did not go unnoticed for a century and a half before the Nineteenth Amendment, nor were we looking the other way in the half century between *Brown v. Board of Education*⁶ and *Plessy v. Ferguson*?⁷ So, how did we manage to overlook the plight of the disabled until 1990? After all, disabilities are scarcely invisible: The estimated number of physically or mentally disabled Americans ranges from 25 to 60 million with the Congressional estimate at 43 million in 1990 when the ADA became law.⁸

The first hurdle in protecting the rights of the disabled was to get America to notice that they *had* rights and that those rights were not being properly protected, a task of "consciousness raising," to revive an appropriate expression from the 1960s. We know all too well that such consciousness raising involves more than just bringing something to somebody's attention. It requires as well getting people to stop *ignoring* something they would rather not hear about, overcoming entrenched *inattention*. So how did the ADA go about doing that?

Its first step was to make matters *explicit*, to make alive again what had previously been deadened by being "taken for granted." It took as its major and detailed aim to eliminate the "major areas of discrimination faced *day-to-day* by people with disabilities."⁹ Title I specifically prohibits not only discrimination in hiring but also any failure to provide "reasonable accommodations" to a disabled person who is otherwise qualified.¹⁰ And that

6. 347 U.S. 483 (1954).

7. 163 U.S. 537 (1896).

8. See 42 U.S.C. § 12101(a)(1).

9. *Id.* § 12101(b)(4) (emphasis added).

10. *Id.* § 12112(b)(5)(A).

includes "making existing facilities . . . readily accessible"¹¹ as well as restructuring work routines and schedules, modifying equipment if necessary, and even providing "appropriate" qualifying examinations for employment candidates.¹² Its aim, in a word, was to bring the employment of the disabled into the realm of the quotidian and the possible.

Providing, of course, that the necessary measures for doing so do not impose "undue hardship" on an employer.¹³ And our authors note wryly that neither "undue hardship" for the employer nor "reasonable accommodations" for the disabled employee lend themselves to strict and easily enforceable definition!¹⁴

Yet, despite such ambiguities, the ADA has proved to be an effective extension of the rights paradigm to problems of the disabled—even if it has been rarely invoked in law suits. Indeed, most observers agree that it has even changed the cultural climate in which the disabled must live.

Little wonder, then, that our authors decided to extend their inquiry beyond the usual "legal impact" analysis. They wisely decided to explore "how newly enacted civil rights, such as those in the ADA, become interwoven with the life histories and the legal consciousness of individuals who might assert them."¹⁵ And it was with this aim in view that they conducted their interviews, making every possible effort to assure that their interviewees were "representative," though there were only sixty of them. Half were physically disabled and confined to wheel chairs, the other half disabled by learning disabilities (principally dyslexia); half were women, the rest men; a third were high school seniors just starting their work lives, another third in their early twenties at an early stage in their careers, and a last third were in mid-life. They ranged from lawyers to manual workers.

11. *Id.* § 12111(9)(A).

12. *Id.* § 12111(9)(B).

13. *Id.* § 12111(10)(B).

14. See RIGHTS OF INCLUSION, *supra* note 3, at 121, 155.

15. *Id.* at 7.

The authors' approach to interviewing was open-ended, in keeping with their general quest:

[W]e invited the interviewees to use their own language to describe their life histories, beginning with early childhood experiences, and including recollections of family and early education, the onset or diagnosis of disability, the formation of ideas about careers and adult life, influential mentors, job training, early work experience, problems, conflicts, and achievements.¹⁶

Legal issues (and the ADA specifically) were not brought up until the very end of the interview (unless interviewees brought them up themselves).

The book's basic thesis—perhaps its main conclusion too—is best put in the authors' own words:

Rights can transform the sense of self simply by increasing individuals' perception of their own worth, or by reminding them of opportunities they could pursue if they could assume reasonable accommodations and nondiscriminatory behavior by employers.¹⁷

So how do rights-guaranteeing *laws* manage this miracle, how do they get “inside” the psyches of the disabled—even into the psyches of their potential and actual employers and their coworkers?

Well, the first conclusion is that the miracle reveals itself in many different guises, often quite indirectly. And, as already noted, it is rarely effected by a law suit invoking the ADA, or even by threatening employers with the Act's powers. The ADA, rather, seems to have served as a catalyst, reversing “the historically sanctioned process of defining jobs in terms of prepackaged sets of tasks and in terms of the ideal worker who can perform those tasks according to routines specified by the employer.”¹⁸ It is by this means that it has changed the cultural landscape of work for the disabled.

To appreciate this change, we need to have a closer look at what rights struggles are usually assumed to be about.

16. *Id.* at 8.

17. *Id.* at 11.

18. *Id.* at 17.

Virtually any struggle for rights, in the classic view, pits a class of individuals who aspire for some rare resource against others who believe themselves to have a legitimized or a taken-for-granted right to that same resource. That is the bare knuckles of it. Presumably, it is the function of a system of laws to devise means for preventing or adjudicating such face-offs.

Yet we know that to rely *exclusively* on a system of laws to accomplish this end would surely be futile, for Equal Protection Clauses and Bills of Rights do not operate in a cultural vacuum. For if a system of laws is to be effective, it must somehow be congruent with a people's way of thinking and feeling and resolving differences. As H.L.A. Hart once put it, laws do not succeed when they leave those affected feeling "strangers" to it.¹⁹ Laws, somehow, must be in keeping with our *identities* as individuals—they must be *our* laws.

Returning now to Engel and Munger, they properly remind us that the disabled, like the rest of us, must also create their own identities, the "Selves" at the center of their subjectivity. But Identities are created not just from the inside out, autochthonously. One's identity also grows out of one's relations with family, friends, colleagues, community, and employers. And this creates a special problem for the disabled in view of the obvious fact that one's disability has a strong effect on how others view him or her. Being taken as helplessly and irreparably disabled is bound to diminish and demean one's identity.

One's identity, of course, develops and alters over time. Whether disabled or not, we continue to elaborate and nourish our selfhood, and do so principally through narrative—through stories we tell ourselves about our lives, past, present and future.²⁰ For though our "Selves" may be at the center of our stories, "Others" are there as well, members of the cast of characters in our life stories. As our authors neatly sum it up, "The interactive process of identity formation shapes a sense of self that is consistent with inclusion or exclusion in mainstream society."²¹ This

19. H. L. A. HART, *THE CONCEPT OF LAW* (1961).

20. See, e.g., JEROME BRUNER, *MAKING STORIES: LAW, LITERATURE, LIFE* (2002).

21. *RIGHTS OF INCLUSION*, *supra* note 3, at 44.

“dialectic of telling and living life” provides a “space” within us for those others that we relate to, live with, grow up with, work next to.

As our authors put it, identity formation and narrative are what shape our lives—and often misshape the lives of the disabled. If an ADA is to be effective, it must achieve its ends by affecting both these processes. For the disabled, the critical question is the extent to which disability overshadows other elements of their identity. If a disabled person falls victim to such “overshadowing,” he or she no longer has the “space” in which legally assured disability rights can become active. Under such circumstances, they even lose the will to recognize that they have “rights” or that they have been deprived of them. Losing the will to tell stories even robs them of the means for exploring possibilities in the present or the future.

Add one other element: stigma. There is something about seeing oneself as *irreparably* disabled that (at least in the mind of the disabled) sets one apart. As Robert Murphy, a gifted anthropologist who became quadriplegic, put it: “We are subverters of an American ideal, just as the poor are betrayers of the American Dream. And to the extent that we depart from the ideal, we become ugly and repulsive to the able-bodied. People recoil from us”²² In the end, and lacking positive assist, the disabled come to feel themselves as “liminal.”²³ As Murphy puts it, “eyes are averted and people take care not to approach wheelchairs too closely.”²⁴

Yet, what is so movingly apparent in the book’s lengthy autobiographical interviews (and especially in the comments that disabled interviewees offered when they were given an opportunity to read transcripts of what they had said) is that there are *indeed* many, many ways in which the disabled can be helped, kept from being overwhelmed and liminalized by their disabilities. Despite adversity, the coping disabled manage to nurture their identities and extend their life narratives. And the process continues through their whole lives. For, as the authors put

22. *Id.* at 53 (quoting ROBERT F. MURPHY, *THE BODY SILENT* 116-17 (1987)).

23. *Id.*

24. *Id.* (quoting MURPHY, *supra* note 22, at 135).

it, identity formation is *recursive*—“not only does identity determine how and when rights become active, but rights can also shape identity.”²⁵ For those who do not succumb to hopelessness, rights go on enriching their self-perception, enabling them to envision more ambitious career paths. It is the very existence of the ADA that seems to help in this subtle process.

Engel and Munger note two sets of circumstances that affect an individual's capacity to engage in social interactions or to narrate their life stories in ways that are likely to enhance or diminish the role of rights. First among these are the personal attributes of the disabled person himself or herself: Resiliency, ambition, perseverance, creativity, congeniality, and courage, or whatever it is that makes it possible for a disabled person to form and keep an identity that is not dominated by a sense of disablement. Fear of stigmatization, of course, is the enemy of all these desirable traits. When a disability is invisible, as with dyslexia, the “option to conceal” can undo the benefits given by ADA rights. Yet, it is also the case that some wheelchair users are made to feel *too* visible and simply withdraw.

But equally important are the social circumstances of the disabled person. Yes, family matters greatly, as do race, class, and gender. But the authors wisely warn us away from overly deterministic or reductionist conclusions. For, indeed, the interviews reveal again and again that family, class, race, and gender do matter, but always in some highly particular way. They matter principally by restricting or enriching the “discourses” to which the disabled have access. And these discourses are often idiosyncratic: They may be organized around issues of racial justice, or “free market” access, or religious faith, any of which may give the disabled confidence and heightened awareness of their rights. One of the most touchingly ironic interviews, for example, was with a disabled man who disapproved of “government intervention” (like the ADA) as politically insupportable—yet gained courage from his contrary conviction that each person must operate on their own!

Another circumstance in all this is sheer *timing*—the *when* of an accident, or of a diagnosis, or of the recognition

25. *Id.* at 242.

of disability. For one woman, early onset of her physical disability meant that she benefited from a long period of preparation for self-sufficiency in a middle class family. She finally achieved a professional career. For another, a man whose disability came later, he was able to draw on his existing professional credentials and connections to lift him over his crisis.²⁶ Yet, there are also interviews with people who were effectively isolated by early onset, as well as those who were smashed by a late onset, feeling they had been irreversibly thrown off their familiar course.

The learning disabled, by the way, were somewhat different from those who were wheelchair-bound, perhaps because dyslexia and other learning difficulties have only begun to be understood and differentiated from mere "backwardness" or "laziness." More likely, it is that such disabilities are thought of as "mental" and therefore given somewhat shorter shrift. Or perhaps it is that they have to be detected earlier for effective rehabilitation.

I wish our authors had said more about the wider responsibilities that the community could undertake on behalf of the disabled, particularly where learning disabilities are concerned. Their interviewees often have devastating things to say about their experience in "special education" classes for the learning disabled and, by general agreement, their quality varies widely. Surely, more could be done in that sphere. But when the motive for reducing school expenditures is to reduce taxes, it is almost inevitable that education for the learning disabled will be among the first to suffer.

Return finally to legal issues and "legal consciousness." Our authors say, "We do not dispute the importance of . . . [legal] doctrinal battles, but we think they provide an extremely limited and at times distorted picture of the difference the ADA has made."²⁷ They take the view that a much broader, individually oriented approach is needed if we are to appreciate the full benefits of the ADA. It is the "context-creating effects" of rights laws that matter, particularly their effectiveness in providing the disabled with a sense of inclusion in the broader society. For it is this sense of inclusion that keeps us on our way toward an

26. *Id.* at 198-202.

27. RIGHTS OF INCLUSION, *supra* note 3, at 250.

uncrippled identity, and keeps alive the will to make stories for ourselves about new and promising possibilities.

But one cannot resist asking, when all is said and done, whether Engel and Munger have fully recognized the *reverberating* power of such rights legislation as the ADA. Granted, many of their disabled interviewees never so much as mention the ADA in their stories. But perhaps our authors underestimate how strong a background part the Act played in their interviewees' appraisal of their employment chances. Knowing it was "there" makes a difference. Just as knowing *Brown v. Board of Education*²⁸ was "there" made a difference to local school boards and local petitioners negotiating local problems. And so too with sex discrimination laws: Employers learn to keep in mind that they are "there" when the next round of promotions comes due.

Statutes and court holdings have powerful, indirect, and often concealed ways of resolving problems and dilemmas that exist in any society. Let me offer an example. Anthony Amsterdam and I have argued that American society seems always hung up between two rather contradictory value orientations—what we called The American Creed and The American Caution: Give everybody an equal chance, but watch out for those who might take advantage of it.²⁹ And so with the ADA: Give the disabled their chance at a job, but only if it does not create "undue hardship" for the employer. So the ADA helps swing the balance toward more ingenuity about "reasonable accommodations" and less patience with employers' "undue hardship" claims. Laws and court holdings, however seldom they may provoke or encourage litigation, do have subtle ways of changing our ways of looking at the world. Americans may indeed be "law avoiders," but they are *not* insensitive to the legal climate.

Let me end with a quibble. Despite the ADA's admittedly good effects, Engel and Munger are very far from concluding that we in America are now launched upon a continual evolution toward greater rights consciousness where the disabled are concerned. "Our interviewees report

28. 347 U.S. 483 (1954).

29. See ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* (2000).

that the ADA's employment rights have been neither uniformly beneficial nor uniformly harmful. Instead, the effects have varied dramatically and are dependent far less on the formal qualities of the law than on the evolving identities of its beneficiaries and the social circumstances of their lives."³⁰ I found myself somewhat puzzled by this point. I finally concluded that they meant, simply, that the ADA had not solved all the problems that beset the disabled. Does *any* law ever solve *all* the problems that have accrued over the years—indeed centuries—before its passage? Particularly such subtle problems as identity formation? Law too is a “recursive” process, to use the authors' favorite term. Its task is to alter prevailing conditions so that we may develop a better sense of what is needed next. I apologize for this final quibble and bring it up principally to express my agreement with the authors' assessment of the ADA's general success, but also to remind them that long-neglected problems take more than a single legislative Act to be resolved—particularly problems as deeply personal as those of the disabled.

30. RIGHTS OF INCLUSION, *supra* note 3, at 245.

