# JACOBUS TENBROEK LAW SYMPOSIUM KEYNOTE ADDRESS

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Robert Bork said, "'You can't legislate morality.' Indeed . . . we legislate little else."[1]

John Adams said, "In my many years I have come to a conclusion that one useless man is a shame, two is a law firm, and three or more is a congress."[2]

These reflections indicate that the law is controversial, and its place within society is equally controversial. Perhaps as much has been written about the nature of justice as almost any other topic.

Many authorities believe that the law sets forth the synthesized standard of minimum behavior acceptable among human beings.[3] One of the functions of law is to classify people and property. The improper classification of human beings is known as discrimination,[4] which when described in these terms looks so innocent, so non-confrontational.

What is the value of a human being? How is the value of one human being to be compared with the value of another? These questions have been addressed by the legal systems through the millennia. They are at the heart of the question of discrimination and integration.

In the Code of Hammurabi, one of the world's oldest legal codes, disability is not mentioned, but the code does declare that, "If [a man] put out the eye of a man's slave . . . he shall pay one-half of its value."[5] A slave without two eyes does still have value, perhaps half the value that the slave had before being injured. A slave was worthy of classification in the Code, but disabled people were not of sufficient importance to be given a place in the statutes.

In 1966, Dr. Jacobus tenBroek, a blind lawyer and constitutional scholar who founded the National Federation of the Blind in 1940, published an article in the *California Law Review* entitled, "The Right to Live in the World: The Disabled in the Law of Torts."[6] In this article, Dr.

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* President of the National Federation of the Blind. The symposium was hosted by the National Federation of the Blind in its Jernigan Institute in Baltimore, Maryland.

1. ROBERT BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 246 (1990).

2. Wikiquote, http://en.wikiquote.org/wiki/John_Adams.

3. *See, e.g.*, Elliot N. Dorff, To Do the Right and the Good: A Jewish Approach to Modern Social Ethics 272 (Jewish Publication Society 2002).

4. Jacobus tenBroek, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 CAL. L. REV. 841 (1966).

5. CODE OF HAMMURABI § 199 (1700 B.C.).

6. tenBroek, *supra* note 4.

tenBroek espouses the fundamental proposition that the disabled possess the same right to live in the world as all other human beings and that this right is necessary to the principle of equality, also shared by the disabled.[7] After stating this essential proposition, Dr. tenBroek says that the policy of the United States is that the disabled have protection equivalent to all others under the law to live, work, and otherwise enjoy the rights of participation in the community with all others.[8] He observes, however, that the courts have frequently interpreted the law to abrogate or at least to limit severely this policy.[9] His conclusion is that the courts do not oppose the policy of integration for the disabled. Rather, he believes that the courts do not know this policy exists. Dr. tenBroek states that in some cases the possession of a disability has been regarded as evidence of contributory negligence[10] or assumption of the risk that may be considered by a jury.[11] Although disabled people have a right to be in the world, the risk of injury while exploring that world falls on disabled people, who should know better than to be in such a dangerous place. The driver who runs over a blind person might argue that if the blind person could have seen the car coming, the blind person would not have stepped into its path. Consequently, it is the blind person's fault for being there at all.

Dr. tenBroek points out that the right to be abroad in the land is no right at all unless the interpretations of the doctrines of law take into account the realities of disability.[12] Thus, the law should take notice that the blind cannot see (or see very well), that the deaf cannot hear (or hear very well), and that wheelchair users cannot walk (or walk very well). To say that wheelchair users have equal access to public buildings but that the only way into them is up a flight of stairs is to confront the disabled with an ironic proposition. This reminds me of the position taken by the U.S. State Department before 1990.[13] The State Department said that all applicants for employment were given equal consideration.[14] All were expected to take and pass an entrance examination. The entrance examination was offered only in print. The State Department said that it did not discriminate against the blind because it offered blind people the same opportunity to take the test that it offered the sighted. Those blind people who offered to take the test by using a reader were told that this could not be done. All applicants were expected to take the examination by reading a printed document with their own eyes. "No discrimination," said the State Department; everybody has an equal opportunity under precisely equal conditions to take the test.[15]

This is a similar argument to the one currently being offered by the

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7. *Id.* at 851.
8. *Id.*
9. *Id.* at 852.
10. *Id.* at 877.
11. *Id.* at 867.
12. *Id.* at 859.
13. Barbara Pierce, *Victory in the Foreign Service: The Department of State Finally Opens its Doors to Blind Candidates*, 34 THE BRAILLE MONITOR 133, 133–34 (1991).
14. *Id.* at 3–5.
15. *Id.*

Apple company. Apple has created the iPhone, which they claim is one of the most important and useful pieces of technology to provide access to information that has ever been invented.[16] This device is not usable by the blind. Before it had been manufactured and distributed, the National Federation of the Blind encouraged Apple to make it usable by blind people. Apple refused. When we later complained about the inaccessibility of the product, Apple said that it was fundamentally a visually-oriented product that could not be used by the blind. Because this product is fundamentally visually-oriented, Apple said there is no requirement to make it usable by blind customers. Apple did not comment on the reality that gaining information from the screen of a cell phone can be done in nonvisual ways. Gaining information is not fundamentally a visually-oriented activity. The law must recognize that there are alternative methods of accessing physical facilities or information systems.

As part of his effort in 1966, Dr. tenBroek drafted a Model White Cane Law, which has been adopted in a number of states.[17] That law declares it to be the policy of the state that the blind and otherwise disabled have a right to be in any public place to which members of the public are invited, subject only to the restrictions and limitations applicable to all persons. Carrying a white cane is permitted, but not carrying it is not to be regarded as evidence of contributory negligence.

In 1973, the Rehabilitation Act became law.[18] Title 5 of this act lists a number of civil rights protections for the disabled. Section 504 prohibits discrimination in any activity receiving federal financial assistance. This provision has been amended to apply to the federal government. Under section 504 of the act, an individual may sue for enforcement.

In 1990, the Americans with Disabilities Act was adopted.[19] This act dramatically expanded the civil rights protections available to disabled individuals. Many of the principles incorporated within the civil rights sections of the Rehabilitation Act were included in the Americans with Disabilities Act. One of these principles is that reasonable accommodation must be an element of policy when considering disabled individuals. If an alternative method of achieving a similar result can be used, reasonable accommodation principles require it. Arguments like the one used by the State Department—that print is the only available method for taking a test when an effective alternative would be to use a reader, Braille, or recorded forms for the examination—is evidence of discrimination. In 1998, amendments to section 508 of the Rehabilitation Act were adopted to require technology purchased by the United States government to be accessible to the disabled.[20] Undoubtedly, additional legislation is needed.

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16. Press Release, Apple Corporation, Apple Reinvents the Phone with the iPhone (Jan. 9, 2007), *available at* http://www.apple.com/pr/library/2007/01/09iphone.html).

17. tenBroek, *supra* note 4, at 918–19.

18. Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (2000).

19. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (1994).

20. Rehabilitation Act of 1973, § 508; 29 U.S.C. § 794d (2000).

The current classification of disabled individuals often assigns them a place in our society which does not provide equal opportunity. The language of the Fourteenth Amendment to the Constitution of the United States provides that "no State shall . . . deprive any person of life, liberty, or property."[21] Disabled people, however, do not have equal access to all of the activities of life, all of the advantages to be gained through the acquisition of property, or all of the benefits of liberty that come as a necessary part of the full enjoyment of equality. The Constitution of the United States has been inadequate in encouraging full integration and equal opportunity for the disabled.

Dr. tenBroek's article suggested that a policy of integration be adopted as one of the elements of law with respect to the disabled. The objective was to achieve equality of opportunity for the disabled. Implicit within Dr. tenBroek's argument (and a part of the philosophy which I urge to be implemented in civil rights litigation) is the notion that disabled individuals have value equivalent to that of the non-disabled, and that the performance to be expected of disabled persons is of equivalent value to the performance of the non-disabled. Equality of opportunity is essential; equality of result is unjustified. Equality of opportunity cannot be achieved unless the policy of integration recognizes the variation of characteristics involved in disability.

After the adoption of section 504 of the Rehabilitation Act, regulations to implement this section were drafted by the Department of Health, Education, and Welfare.[22] These regulations required reasonable accommodation from covered entities.[23] In the case of disabled employees, employers were expected to make modifications to the employment standards which might be required for the employee to perform the work in question if a reasonably similar result could be achieved thereby. For example, if a blind person were taking messages for sighted people, the employer might be required to buy a typewriter for the use of the blind employee. Blind people are often not competent to take messages in handwriting. Although a typewriter might cost much more than a box of pens, in the circumstances of a job requiring a person to take messages, the purchase of a typewriter might be reasonable.

What is reasonable to request from an employer became the subject of almost endless discussion in certain circles. Could an employee alter a job because that employee has a disability? How much change is a reasonable change, and how much change alters the position altogether? How much cost must an employer bear, and how much is beyond reasonableness? Blind people do not use light, but sighted people do. Is the installation of light fixtures for the sighted a reasonable accommodation? The rules established for interpretation of section 504 said that an accommodation need not be made if to make it would cause an undue hardship on the employer[24] or if to make it would alter the

21. U.S. CONST. amend. XIV, § 1.
22. 34 C.F.R. §§ 104.1–104.61 (2007); 45 C.F.R. §§ 84.1–84.61 (2005).
23. 34 C.F.R. § 104.12; 45 C.F.R. § 84.12.
24. U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 396 (2002).

fundamental nature of the job in question.[25]

In 1988, the U.S. Court of Appeals for the D.C. Circuit decided the case of *Carter v. Bennett*.[26] This case held that though reasonable accommodation is required, the accommodations requested by the employee are not necessarily required of the employer.[27] The employer is required to make such accommodations as may be necessary to permit the employee to perform the essential functions of the job in question.[28] If a requested accommodation places an undue burden on the employer, the employer must demonstrate this to avoid the requirement of providing the accommodation.[29] The burden of demonstration then shifts to the employee to show that the requested accommodation is not unduly burdensome.[30]

This case states what appears to me to be a reasonable set of principles. The court made no holding, however, on the set of facts and the standard enunciated by the Department of Education. The plaintiff in the case was a blind person who was serving in the Office of Civil Rights.[31] Those employed in this office to answer letters from members of Congress or the public were required by the standards of productivity to produce twelve letters per week.[32] However, the blind employee, as a reasonable accommodation for his employment, was expected to produce only six letters per week.[33] His supervisors found his work unsatisfactory, and he was dismissed from employment. The court upheld his dismissal.[34] However, the court did not comment on the reasonable accommodation standard put in place by the Department of Education.

The reasonable accommodation standard required that blind employees produce no less than precisely fifty percent of the productive work expected of sighted employees.[35] To say that such a standard is reasonable is to accuse the blind of being non-productive. No rational employer would accept such a standard, and if such a standard becomes a recognized part of so-called non-discrimination principles, no blind employee can expect a job except as a matter of charity.

That differences exist between the able-bodied and the disabled is manifest. However, the disabled and the able-bodied are not essentially different from one another in the characteristics that make people what they are. Disabled people are a cross-section of the community of human beings. We are as bright and as dull, as energetic and as lazy, as generous and as parsimonious, and as fun-loving and as boring as anybody else. Sometimes we do our work or pursue our avocations in a

25. Pulcino v. Federal Express, 9 P.3d 787, 795 (Wash. 2000).
26. 840 F.2d 63 (D.C. Cir. 1988).
27. *Id.* at 67.
28. *Id.*
29. *Id.* at 65.
30. *Id.* at 65–66.
31. *Id.* at 64.
32. *Id.* at 68.
33. *Id.*
34. *Id.*
35. *Id.*

way different from the able-bodied, but our productivity must be as great as that expected from others, or the thought of equality for us is a myth.

What do we need to compete with others in the activities of living, working, and studying? We need access to the programs, activities, public facilities, and sources of information that others enjoy. We need acceptance of the reality that our talents are valuable and that we have contributions to make. We need to be recognized for the people we are. We need sufficient understanding of the special characteristics that we possess to enable the members of the public to value the alternative methods we use to accomplish our work. We need to be seen as sufficiently valuable to the community that we are welcomed within it.

Access to public buildings is not sufficient in itself. We must be expected to be a part of the activities within them once we are admitted to the buildings.

Equality of opportunity requires access to sources of information and the means to manipulate that information. What does equal access to information mean? The disabled have been seeking answers to this question for a long time. Is it necessary for all material produced for a public meeting to be presented in Braille? Is this necessary even if no indication has been given that any blind people who have learned to read Braille are planning to attend that meeting? Do all public meetings include a requirement that interpreters for the deaf be present, even if no indication has been made that deaf people will attend? Should all television programs be made with interpretation included for the deaf? Should all television programs be made with audible descriptions included for the blind? Can a library of print books be maintained without having somebody available to read the material to a blind patron who wishes to use the library? Can a department store place goods on its shelves labeled in print with no method for a blind person to learn what those goods are? Can a museum create a display of paintings without providing an audio description for the blind? Can a chamber orchestra produce an evening of Baroque music without providing a visual description for the deaf? Can a computer company sell a machine that provides access to the Internet without configuring it so that it can present the information audibly for the blind? A coherent set of answers to these questions can illustrate what equality of opportunity means for the disabled.

Some of our most well-known public buildings incorporate grand staircases, which help give them their striking appearance. The law does not prohibit the building of such staircases, but it does require such buildings to have entrances that can be used by people who are not able to climb the stairs. Furthermore, although some have tried to implement such a standard, it is, in my opinion, not acceptable to tell the disabled that everybody else may enter at the front door, but disabled people are expected to go around back to enter the building where the garbage goes out.

It is hard for me to imagine a visual description of an orchestral performance adequate to convey to the deaf the sound of the music. It is also hard for me to imagine an audible description of a painting that will

capture the nuance of light and shadow that, I am told, is frequently an element of art. Many people have told me that they cannot imagine how the average blind person can do the average job in the average place of business effectively. Is my inability to imagine a visual orchestral performance or an audible description of a painting an admission of incapacity, or does this reflect comprehension of something real? I expect to be open to new ideas regarding the integration of my fellow human beings into society, and I believe that this should be one element of the law.

In 2002, the Department of the Treasury was charged with discrimination for producing non-tactile currency.[36] Judge James Robertson ruled in 2006 that discrimination had occurred.[37] At the heart of his decision is the statement that the blind cannot identify currency by touch.[38] Blind people must employ a sighted human being or use a technological device to identify the currency.[39] At the time the judge's decision was made, such technological devices were not always accurate.[40] The judge's conclusion was that the blind cannot use the currency independently and that the knowing production of this non-tactilely identifiable currency is an act of discrimination.[41]

The cost of reconfiguring the currency system of the United States is estimated at hundreds of millions of dollars.[42] However, we live in a country with hundreds of millions of dollars, and we must answer the question: Do we want to spend the dollars to change the form of those dollars for the blind? If we do, what will be the benefit to society, and is it worth the price? If we do not, what will be the cost to society in human degradation? That blind people use the currency of the United States everyday is abundantly obvious. The judge's assertion that we are denied the benefits of our participation in a program of the federal government is overstated. What are the implications of such a decision? Do all objects need to be identifiable by touch to avoid the charge of discrimination? Are there any limits to such an assertion?

The application of law changes with changing circumstances. This is necessary for the development of society. It is said, that the law of negligence is a product of the Industrial Revolution.[43] The law of civil rights came from the abolition of slavery[44] and the alteration of conscience and class associated with the labor movement.[45] The disability rights law adopted in the United States and copied in many other countries,[46] and now incorporated in a United Nations

36. Am. Council of the Blind v. Paulson, 463 F. Supp. 2d 51, 52 (D.D.C. 2006).
37. *Id.* at 63.
38. *Id.* at 53–54.
39. *Id.* at 53.
40. *Id.* at 55.
41. *Id.* at 62.
42. *Id.* at 61–62.
43. *See, e.g.*, G. EDWARD WHITE, TORT LAW IN AMERICA 15–17 (1980).
44. *See* tenBroek, *supra* note 4, at 841.
45. Martin Luther King, Jr., Address Before the AFL-CIO Constitutional Convention (Dec. 11, 1961).
46. Disability Discrimination Act, 1995, c. 50 (Eng.), *available at*

convention,[47] is based almost entirely on civil rights. Whether this body of law will be a blessing or a curse depends only in part on the language of the statutes.

In 1966, Dr. tenBroek declared that a proper understanding of the reality of disability would demand a policy of integration of disabled people within society.[48] He expected that the disabled who are being integrated would have certain obligations.[49] If integration carries with it a burden out of proportion to the advantages to be gained, the policy will fail, and the law will find a method of employing the language of integration without giving effectiveness to it. The judges will say one thing and do another.

Some disabled people seek retribution in the legal system. The argument they make is something like this: I am disabled; disability has been used from the beginning of time to exclude those with disabilities from participation in activities of society; I am not participating in the activities I desire; those conducting such activities have an obligation to make them accessible to me; they have not done this to my satisfaction; they owe me a place in their program. The element that is left out of this chain of reasoning is the concept of performance. Those who seek inclusion within society must demonstrate sufficient value to justify being included. Society should offer equal opportunity for participation. Society need not provide equal participation.

The disability rights movement has been promoted by disabled people. Most of the judges and the legislators who have written the language of the laws and judicial decisions regarding disability have been nondisabled. The plaintiffs and the people who urged the adoption of the laws, however, have been disabled. How the laws are interpreted in the future will be determined, in large measure, by the plaintiffs who claim the protection of the law and, more particularly, by the counsel who represent them.

It is up to us to decide what we want the world to be. Whether it is a hellish or a heavenly place will depend on the actions we take. We must claim only as much as is fair and reasonable, and not more. Most judges do not understand disability. Mystery surrounds this subject, and in an effort to have some recognition of the basic ability of disabled people, outlandish claims are sometimes made. Can the blind feel color, hear the vibrations of the visual spectrum, identify people by smell? Some have said we can.

I recommend what Dr. tenBroek urged, a policy of integration.[50] We should demand all those accommodations that are necessary to achieve this policy. We should demand that information sources be made readily available to us. We should be given access to physical

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http://www.opsi.gov.uk/acts/acts1995/ukpga_19950050_en_1.

47. Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, U.N. Doc. A/RES/61/106 (Dec. 13, 2006), *available at* http://untreaty.un.org/English/notpubl/IV_15_english.pdf.

48. tenBroek, *supra* note 4, at 843.

49. *Id.*

50. *See* tenBroek, *supra* note 4.

locations, and we should expect to participate in the programs that occur within those public places. At the same time, we should expect to pull our weight. We should avoid claiming that because we possess some disability somebody else owes us something without our being required to earn the right to full participation. Nevertheless, that right should always be available to us, and we should always be prepared to fight for it whenever somebody tries to take it from us.

We should avoid being depicted as objects of charity, and we should reject the notion that we are victims. Victims don't fight back, and they aren't fun to be with. We do, and we are. We should demonstrate the strength we have, and we should demand to be recognized for the people we are. This is the attitude that will gain for us the recognition we deserve as the fun-loving, inspiring, valuable people we are.