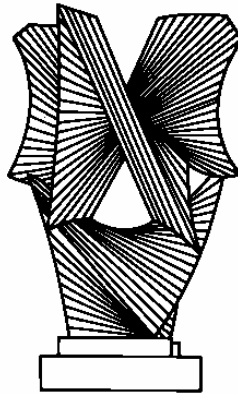


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Cost-Benefit Analysis without Analyzing Costs or Benefits: Reasonable Accommodation, Balancing and Stigmatic Harms

Cass R. Sunstein

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Cost-Benefit Analysis without Analyzing Costs or Benefits: Reasonable Accommodation, Balancing, and Stigmatic Harms

Cass R. Sunstein *

Abstract

Is an accommodation “reasonable,” under the Americans with Disabilities Act, if and only if the benefits are roughly proportional to the costs? How should benefits and costs be assessed? Should courts ask about how much disabled employees are willing to pay to obtain the accommodation, or instead how much they would have to be paid not to have the accommodation? How should stigmatic or expressive harms be valued? This essay, written for a symposium on the work of Judge Richard A. Posner, engages these questions in a discussion of an important opinion in which Judge Posner denied accommodations involving the lowering of a sink in a kitchenette and a request for telecommuting. The problem with the analysis in that opinion is that it does not seriously analyze either costs or benefits. A general lesson is that while cost-benefit balancing can helpfully discipline unreliable intuitions about the effects of requested accommodations, it can also incorporate those intuitions. Another lesson is that stigmatic harms and daily humiliations deserve serious attention as part of the inquiry into which accommodations are reasonable, and that the removal of those harms and humiliations can create real benefits. Adequate cost-benefit analyses must attempt to measure and include those benefits.

Richard Posner has been a colleague and a friend for over a quarter-century. Over the years, I have learned that there is one thing he isn't: Sentimental. A celebration of his years on the bench inevitably invites not only sentimentality but also a lot of applause; and we should certainly pause for some. (A terrible secret: Those of us who know Posner well like him. Actually we like him a lot.¹) But for this particular judge, I think, the best

* Karl N. Llewellyn Distinguished Service Professor, Law School and Department of Political Science, University of Chicago. Thanks to Christine Jolls, with whom I taught the case discussed here on two occasions; I have learned a great deal from her emphasis on expressive harms in particular. Thanks too to Robert Hahn, Jolls, Elizabeth Emens, and Sarah Lawsky for valuable comments on a previous draft.

¹ A small story: In my first year at the University of Chicago Law School, I was invited to a little dinner party at the house of Frank Easterbrook (not yet a federal judge). The party was dominated by George Stigler, a Nobel Prize winner-to-be and a major figure at the university at the time. Stigler asked me what I taught, and I responded that I taught Social Security and Welfare Law, at which point Stigler began to cast cheerful, contemptuous ridicule on the subject. In Stigler's view, no one in America was poor, because even a little money (\$7 a week, if memory serves) could go a very long way. This position seemed to me not only preposterous but also offensive, and I tried to respond; but Stigler was of course Stigler, and in addition to being a terrific debater, he wasn't always a nice man. Seeing my distress, Posner came to the

celebration is no mere celebration. I have therefore chosen to explore the topic of cost-benefit analysis and disability, with particular reference to an exceedingly influential opinion by Judge Posner.² In that case, Judge Posner understood the “reasonable accommodation” requirement of the ADA to call for a form of cost-benefit balancing—but he resolved the case without analyzing either costs or benefits.

In my view, the result of this failure was an incorrect outcome on at least one of the two central questions in the case, and possibly on both of them. But I mean to comment less on the particulars than on the general topic of cost-benefit analysis and disability. As we shall see, cost-benefit balancing has some important virtues in that domain. It helps to expose the fact that a failure to accommodate a disabled person may stem from habit or prejudice; it properly focuses attention on the issue of potential benefits to the disabled and potential costs to the employer; and it disciplines intuitions that may be insufficiently anchored in reality. But at least as practiced within the judiciary, cost-benefit analysis also has potential vices. It can operate as vessel for unreliable intuitions rather than a way of disciplining them, and it can fail to take account of an important aspect of discrimination, consisting of the daily humiliations of exclusion and stigmatization. Unfortunately, Judge Posner’s opinion shows both of these vices.

My broader goal is to establish the importance of seeing those daily humiliations as imposing significant costs, which must be considered as part of the inquiry into whether a requested accommodation is “reasonable.” The proper measurement of those costs poses serious challenges. But a failure to consider them does a serious disservice both to cost-benefit analysis and to the ADA.

rescue and made some strong points, against his long-time friend Stigler, on my behalf—less from conviction, I’m sure, than out of kindness and sympathy for a floundering and somewhat humiliated young colleague, whom he barely knew at the time. (I bet that Posner won’t remember this, and if he does, I bet he’ll deny that it happened just that way. But it did.)

² See *Vande Zande v. Wisconsin Dep’t of Admin.*, 44 F.3d 538 (7th Cir. 1995). The decision has been cited 360 times. (Posner taught me, among many other things, to pay attention to citation counts.)

I. The Standard Announced

A. Facts

To begin with the facts: Lori Vande Zande suffers from a tumor of the spinal cord, and she is paralyzed from the waist down. Her condition requires her to use a wheelchair and leads to the development of pressure ulcers, which sometimes require her to stay at home for weeks at a time. Vande Zande worked for the state of Wisconsin in its housing division, performing an array of secretarial, clerical, and administrative tasks. Because of her disability, she requested a series of accommodations. Two of these were refused by the state, and they provided the basis for the litigation. One of the requested accommodations was a minor change in the kitchenette in her building, which was still under construction. Vande Zande objected that the sink and the counter in the kitchenettes were at least 36 inches high—too high for someone in a wheelchair. She wanted them to be lowered to 34 inches, a convenient height for her.

Vande Zande also wanted to work full time at home for a period of eight weeks, when pressure ulcers made it impossible for her to get to work. She suggested that the state should provide her with a desktop computer to make it possible for her to do her job from home. Her supervisor refused her request. Nonetheless, Vande Zande worked at home and proved able to do so for all but 16.5 hours during the eight-week period. She took those hours from her sick leave, which she could otherwise have carried forward. Her requested accommodation was the restoration of those 16.5 hours. On both points, Judge Posner, writing for the court of appeals, ruled against her. In his view, neither accommodation was reasonable.

B. Law

Vande Zande has become famous in large part for its reading of the “reasonable accommodation” requirement, which, in Judge Posner’s view, requires attention to both benefits and costs. This reading was hardly inevitable. The ADA does not define “reasonable accommodation,” and another provision of the statute explicitly refers to costs. Thus the ADA permits an employer not to yield to an employee’s accommodation

request if the result would be an “undue hardship,”³ which is defined to include “significant difficulty or expense”⁴ and to call for attention to the financial condition of the employer. As Judge Posner noted, it is sensible to think that a hardship on the employer is “undue” not only in the abstract, but also in relationship to the benefits.⁵ A burden on the employer might not be “undue” if it is necessary to produce large benefits for disabled workers. And if the undue hardship provision calls for an inquiry into both costs and benefits, it may seem tempting to read “reasonable accommodation” in precisely the narrow way that Vande Zande sought, as “apt or efficacious.”⁶ Perhaps the express reference to “expense” in the undue hardship provision should be taken to exclude the consideration of costs in deciding what counts as a “reasonable accommodation.”

On this view, neither benefits nor costs are part of the inquiry into what makes an accommodation “reasonable” under the ADA. The real question is whether the requested accommodation would be well-tailored to the disability in question. A modest variation on Vande Zande’s cost-blind approach would make costs relevant, but only in the restricted sense that the employer is permitted to select the most cost-effective means to the relevant end. Under this approach, there is no balancing of costs against benefits—but an accommodation is not reasonable, and hence is not required, if it is more expensive than necessary in order to accommodate the disability at issue. The employer is therefore permitted to select the preferred means of accommodation, so long as the selected means does what is necessary to accommodate the disability.

As a textual matter, an approach of this kind is entirely plausible. A cost-blind interpretation of “reasonable accommodation,” or an interpretation that speaks only in terms of cost-effectiveness, would be easy to defend, especially in view of the undue hardship provision, which might be thought to be the place where any balancing of costs and benefits must occur. Judge Posner worked hard to establish that balancing was required under *both* the undue hardship and the reasonable accommodation provisions of the statute. Unfortunately, he spent little time with the text, history, or structure of the

³ 42 USC 12111.

⁴ 42 USC 12111(10)(A).

⁵ Vande Zande, 44 F.3d at 534.

⁶ *Id.* at 542.

ADA; he did not carefully analyze the conventional sources of interpretation in order to establish that in context, an accommodation is not “reasonable” if it imposes large costs and offers small benefits. He certainly did not show that the best understanding of the text, at the time of enactment, was that an accommodation would be unreasonable if the costs exceeded the benefits. Instead, he pointed to the linguistic possibility that “reasonable” softens the duty to accommodate, and he emphasized that in the ADA, the term might have the same meaning as in the law of negligence, where both benefits and costs are relevant.⁷ Saying little more, Judge Posner essentially asserted that the same is true under the reasonable accommodation provision of the ADA. But is it so clear that the statutory term “reasonable,” in the context of a ban on disability discrimination, should be taken in the same way as the concept in tort law? The Supreme Court has yet to rule on the question, though an approach akin to Judge Posner’s has come to dominate the doctrine in the lower courts.⁸

C. Puzzles and Valuations

Let us suppose that Judge Posner is right; certainly his conclusion is not ruled out by the text, and it is plausibly more sensible than any alternative. But even if so, his conclusion raises many puzzles. Must the benefits of accommodation be turned into monetary equivalents? If so, must courts rely on the criterion of private willingness to pay? Should courts ask how much a disabled person is willing to pay for the accommodation in question—even though the payment, if there is to be one, will come from the employer? What if the employee is poor, and is not able, and therefore is not willing, to pay much for an accommodation?

An even more puzzling question: Should courts ask, not how much a disabled person is willing to pay for an accommodation, but how much he or she would demand in return for not being accommodated? Does willingness to pay (WTP) generate the right number, or instead willingness to accept (WTA)? In this domain, it is entirely predictable that there would be a large disparity between WTP and WTA. A disabled employee may not be willing to pay a great deal to receive some accommodations; but the same

⁷ Id.

⁸ See, e.g., *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131 (2d Cir 1994).

employee might demand a lot to be deprived of them. One reason is the existence of wealth effects: If the assignment of the right significantly affects the relative wealth of the parties, WTP and WTA may well diverge.⁹ A more important reason is the endowment effect: Because people tend to place a higher value on goods they antecedently hold, WTA is often higher than WTP.¹⁰ For lowering the sink in *Vande Zande*, it is plausible to think that the plaintiff would demand a great deal to give up any entitlement that she might have, whether or not she would be willing to pay a lot for it in the first instance.

More generally, it would seem quite odd to say that an accommodation will be deemed “reasonable” only if an employee is willing to pay an amount that exceeds, or is at least proportional to, the costs incurred by the employer. It might even seem odd to say that an accommodation is reasonable only if the cost to the employer is roughly proportional to the amount that the employee would demand in return for not receiving the accommodation. But if WTP and WTA are not relevant, what is? Should we focus on welfare as such, rather than monetary measures, if those measures point in the wrong direction from the standpoint of welfare¹¹?

Judge Posner does not address these questions. He does say that in interpreting the accommodation requirement, courts (or juries) do not have to proceed in the same way as do economists at the Office of Management and Budget. The costs and benefits do not “always have to be quantified.”¹² (But if not always, at least sometimes, or perhaps often; and Judge Posner did not say when not, and why not.) Moreover, an accommodation would not be “deemed unreasonable if the cost exceeded the benefit however slightly. But, at the very least, the cost could not be disproportionate to the benefit.”¹³ The words “at the very least” are suggestive. They indicate the need for a serious inquiry into both costs and benefits. But how is the assessment of “disproportionality” to be made, and to

⁹ See Richard Posner, *Economic Analysis of Law* 56 (5th ed. 1998).

¹⁰ See, eg, Daniel Kahneman et al., *Experimental Tests of the Endowment Effect and the Coase Theorem*, 90 *J Polit Ec* 1325 (1990); Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 *Nw. U. L. Rev.* 1227 (2003).

¹¹ For an emphasis on the normative priority of welfare to monetized costs and benefits, see Matthew Adler and Eric A. Posner, *New Foundations of Cost-Benefit Analysis* (2006); Cass R. Sunstein, *Willingness to pay or Welfare?* (unpublished manuscript 2006).

¹² 44 F.3d at 534.

¹³ *Id.*

be disciplined? Perhaps Judge Posner believes, not implausibly, that intuition will be enough to show, in contested cases, whether the costs are much higher than the benefits. But it is easy to imagine difficult cases; as we shall, *Vande Zande* is itself an example.

In analyzing the reasonable accommodation requirement in this way, Judge Posner carves out two independent places for consideration of costs and benefits in disability cases. First, employees “must show that the accommodation is reasonable in the sense both of efficacious and of proportional to costs.”¹⁴ Second, the employer can show “that upon more careful consideration the costs are excessive in relation either to the benefits of the accommodation or to the employer’s financial survival or health.” The second idea has distinctive importance, because an employer is allowed to establish that even though benefits and costs are proportionate, and indeed even if costs are smaller than benefits, there is an undue hardship by virtue of a risk to the employer’s “financial survival or health.”¹⁵

By ensuring such a significant overlap between “undue hardship” and “reasonable accommodation,” Judge Posner’s reading might well be challenged. Perhaps it would have been more natural to interpret “reasonable accommodation” to require efficacy and cost-effectiveness, and to leave cost-benefit balancing to the provision that clearly invites it (“undue hardship”). But Judge Posner’s interpretation is certainly plausible, and if it cannot easily be shown to be clearly right, it is also hard to demonstrate that it is wrong.

II. The Standard Applied

My principal complaint lies elsewhere. Recall that *Vande Zande* wanted two things. She wanted the sinks to be lowered, at least on her floor, and she wanted her 16.5 hours of sick leave back. Wisconsin could hardly claim that yielding to those requests would represent an undue hardship; its only hope was to claim that these accommodations would be unreasonable. To assess that claim, Judge Posner’s opinion requires us to know something about benefits and costs. What would be the cost of these accommodations, and what would be the benefits?

¹⁴ Id. at 543.

¹⁵ Id.

A. Of Sinks and Stigmas

Here is what Judge Posner says. For the kitchenette, Wisconsin would have had to spend \$150 to lower the sink on Vande Zande's floor; for all the kitchenettes, the cost of lowering the sinks would have been \$2000 (or perhaps less).¹⁶ Judge Posner recognizes that \$150 is not a lot of money, but he nonetheless rules in favor of the state, on the ground that an employer does not have "a duty to expend even modest amounts of money to bring about an absolute identity in working conditions between disabled and nondisabled workers."¹⁷ But this claim is a conclusion, not an argument. If we are engaging in cost-benefit analysis, why not? Where is the disproportion between the costs and benefits? Judge Posner mentions an undeniably relevant point, which is that Vande Zande had an available bathroom on her floor, one that also had an easily accessible sink. For this reason, the costs of the inaccessible kitchenette sink were lower than they might otherwise have been. If Vande Zande needed to use a sink, perhaps she should be required to use the one in the bathroom, not the one in the kitchenette. But she responded, very reasonably, that she wanted to use the kitchenette, not the bathroom, for such activities as washing out her coffee cup. In any case most employees could use the kitchenette as well as the bathroom. Hence Vande Zande objected that relegating her to the bathroom "stigmatized her as different and inferior."¹⁸ Removing that stigma, and the relevant inconvenience, certainly would have been beneficial to her.

Judge Posner was willing to "assume without having to decide" that emotional barriers to full integration into the workplace "are relevant."¹⁹ (If we are engaged in cost-benefited analysis, why assume without deciding? It seems clear that emotional barriers are real costs, and potentially high ones.) But here, he concluded that separate but equal was unobjectionable—even if it was not quite equal. The obvious question is: Why? Recall that the cost of lowering the kitchenette on Vande Zande's floor would be \$150. Surely it was an inconvenience to Vande Zande, at best, to have to go to the bathroom when she wanted to use the kitchenette. Surely it was unpleasant, and possibly much worse, to be excluded in this way—to be unable to use a kitchenette that was generally in

¹⁶ Id. at 546.

¹⁷ Id.

¹⁸ Id.

¹⁹ Id.

use. Why was the loss to Vande Zande worth less than \$150—or for that matter, less than \$2000, if she sought to have access to all the kitchenettes in the building²⁰? Where was the cost-benefit analysis? If the state had offered her \$150 pay her off, would she have accepted it? Is that the right question?

These questions have broader implications. A standard difficulty with cost-benefit analysis is that it may neglect costs and benefits that are not easily measured.²¹ The emotional barriers to full integration are certainly difficult to turn into monetary equivalents, or otherwise to use for purposes of formal or informal cost-benefit analysis. But we could imagine a contingent valuation study that would make some progress. Imagine that wheelchair-bound people were asked: “How much would you be willing to pay to ensure the accessibility of a sink in a kitchenette on the floor on which you work?” One problem with this question is that it does not seem to track the goals of the ADA, which is not best understood to require accommodations only to the extent that disabled people are willing to pay (enough) for them. A better question for a contingent valuation study might be, “How much would you have to be paid in order to accept a situation in which the sink in the kitchenette on the floor on which you work is inaccessible?” In any case, the marginal value of a dollar will often be significantly lower for employers than for employees. Should we be speaking in terms of welfare instead of dollars, at least when dollars are an inadequate measure of welfare?

Whatever the best answers to such questions, the analysis should pick up emotional as well as material harm. One difficulty with the contingent valuation questions is that the answers of a single employee might tell us too little; perhaps third parties would be benefited by the accessible sink.²² But at least the answers to that question would provide some discipline on the inclination to trivialize, or alternatively to exaggerate, the emotional or stigmatic harm of failures to accommodate. The broader point is that even if measurement is difficult, a failure to consider that harm is not defensible. If the cost of a lowering the sink were \$10,000, Judge Posner’s conclusion would certainly qualify as sensible; does it so qualify when the cost was \$150?

²⁰ Note too that an accessible kitchenette would have created benefits for other people in wheelchairs. On third party benefits and the ADA, see Elizabeth Emens, *forthcoming*.

²¹ For an attempt to respond to this problem in an important context, see *Fear Assessment: Cost-Benefit Analysis and the Pricing of Fear and Anxiety*, 79 *Chicago-Kent L. Rev.* 977 (2004).

²² See Emens, *supra* note.

B. Of Telecommuting and Teamwork

Now let us turn to the question of telecommuting and sick leave. Vande Zande had hoped that the state would allow her to work at home, providing her with a computer for that purpose; she sought a return of the 16.5 hours of sick leave for the work that she was unable to do without the computer. Judge Posner rejected her claim, largely on the broad ground that Wisconsin was under no obligation to allow Vande Zande to telecommute at all. In his view, most jobs call for “team work under supervision,” and there would be a substantial reduction in performance if employees worked at home.²³ Judge Posner recognized that with advances in technology, this “will no doubt change.”²⁴ But at the present time, employers are not required to permit disabled workers to telecommute, because “their productivity inevitably would be greatly reduced.”²⁵ Because of the inevitable and large reduction in production, it was only in “a very extraordinary case” that a jury could be asked to decide on the reasonableness of a refusal to allow an employee work at home.²⁶ Judge Posner adds that the expected cost of the loss to Vande Zande must “surely be slight,” because it is possible that she will not ever need the 16.5 hours of sick leave.²⁷

Talk about casual empiricism! If the question is whether the costs of the accommodation are disproportionate to the benefits, we might want to make some kind of serious inquiry into both costs and benefits. What is the evidence that if workers telecommute, “their productivity will inevitably be greatly reduced?” In assessing benefits, do we ask how much disabled people are willing to pay to telecommute? Or do we ask much they would have to be paid to be denied the right to telecommute? More particularly: What is the evidence that Vande Zande’s own productivity was reduced? Did her productivity fall during the eight-week period in which she worked at home? What, in fact, is the nature of her job, such that “team work under supervisors” is required? It would seem important to ask and answer that question to assess her request to telecommute. But Judge Posner does not inquire.

²³ 44 F.3d at 544.

²⁴ *Id.*

²⁵ *Id.* at 545.

²⁶ *Id.*

²⁷ *Id.*

With respect to the benefits of the accommodation: What do we know about Vande Zande's history, such that the loss of 16.5 hours of sick leave can be dismissed as a "slight" loss? In light of her medical problems, a certain number of hours of sick leave would appear to be more important to her than to most people. What, in fact, is the monetary value of 16.5 hours of sick leave? Recall that Vande Zande wanted the use of a desktop computer for a period of eight weeks; if she had been accommodated, she would not have had to use her sick leave. How much would it have cost Wisconsin to provide such a computer? Surely the cost would be low; perhaps it would be close to nothing. (Perhaps the state, like many large employers, had an extra computer in an unused office.) If we are engaging in casual empiricism, we might offer a speculation: The cost of six weeks of use of a computer, or of restoration of 16.5 hours of sick leave, is not "disproportionate" to the benefit. This conclusion might be strengthened if we focus, with particularity, on Vande Zande's particular condition.

But I am not at all sure that Judge Posner was wrong to hold against Vande Zande on the sick leave issue. The problem is that he did not seriously ask the questions that, on his view, the statute required. Instead he relied on a kind of intuition, to the effect that workers must be supervised—just as he relied on the even less helpful (because platitudinous and irrelevant) intuition that employers need not "expend even modest amounts of money to bring about an absolute identity in working conditions between disabled and nondisabled workers." In the very case in which Judge Posner established that a kind of cost-benefit analysis lies at the heart of the requirement of reasonable accommodation, he did not analyze costs and benefits, and he certainly made no systematic effort to compare the two.

III. The Lessons

Might we draw some broader lessons?

A. Juries

A tempting lesson is that the reasonableness of the requested accommodations might well have been left to the jury—a conclusion that would have more general implications. If the lowering of the sink and the telecommuting questions presented

problems on which reasonable people might differ, perhaps the jury should have been asked to solve them, after being presented with the right instruction. In defense of this course of action, it might be thought that the conscience of the community is properly brought to bear on the difficult questions about whether the costs were disproportionate to the benefits.

On the other hand, there are serious risks here. It is possible that the jury would have been excessively sympathetic to a disabled person, responding to her general situation rather than the particular issue. Perhaps the focus on the particular person would distort application of cost-benefit analysis, or any other test, in a way that would result in pro-plaintiff rulings that would be difficult to justify. Or perhaps the same prejudice and stereotyping that motivated the ADA would rematerialize at the level of jury judgments. Perhaps hostility to disabled people, or indifference to their situation, would distort the application of cost-benefit analysis, or any other test, in a way that would result in pro-defendant rulings that would be hard to justify. These risks are sufficient to raise real questions about the idea that the hardest ADA issues should be settled by juries, certainly where cost-benefit analysis of any kind is involved.

We need to know much more about how juries handle questions submitted to them under the ADA.²⁸ There is a great deal of room for further conceptual and empirical work here. But in my view, the most important lessons of *Vande Zande* lie elsewhere. The first involves the value of cost-benefit analysis; the second involves its limitations.

B. Costs, Benefits, and Intuitions

In the context of disability and elsewhere, both employers and public officials (not excluding judges) often have exceedingly strong intuitions, suggesting the impracticality or even absurdity of claims for accommodation. Consider those who seek medical leave for a certain period, or who need a special parking space, or who need a flexible and adjusted schedule at work, or who need help in lifting heavy objects, or who are infected with some kind of disease. Many such people might seem, to some, to be essentially incapable of working, and either before or after the ADA, their request might

²⁸ For relevant discussion, see Brian Prestes, *Disciplining the Americans with Disabilities Act's Direct Threat Defense*, 22 *Berkeley J. Emp. & Lab. L.* 409 (2001).

be resisted because of its novelty and because of baseless fears of contagion or nearly baseless fears of spiraling costs (and also because of an absence of empathetic identification with those who suffer from the relevant conditions). A great virtue of cost-benefit analysis, or a proportionality test, is that it puts the resistance to its proof. Perhaps employers and public officials have been insufficiently imaginative. Having produced practices that fit the majority who are not disabled, there is a natural resistance to changing them for the benefit of people whose basic capacities are (often wrongly) in doubt.

There are two qualifications. First, an accommodation might be required under the ADA even if its costs outweigh its benefits—as Judge Posner signals in *Vande Zande*. (The ADA does not enact Mr. Kaldor-Hicks’ understanding of economic efficiency.²⁹) Even if the cost of an accommodation is (say) \$2500, an employer might be required to make the accommodation, as (for example) by hiring personal assistants.³⁰ Judge Posner calls for a rough proportionality test, not a cost-benefit test. Second, market pressures should provide some help here. If disabled people are truly able to provide benefits in excess of costs, they might well be hired. Unfortunately, there are many obstacles to this happy story of self-correcting markets, not least because of prejudice on the part of employers, employees, and customers alike.³¹

A signal virtue of some kind of weighing of costs and benefits is that it can demonstrate that erroneous intuitions, or hostility and prejudice, are beneath the surface. How much of a burden would have been imposed by eight weeks of telecommuting? Why not lower sinks to 24 inches, so that they can be used by people with wheelchairs—especially if the cost is usually around \$150? A virtue of an inquiry into costs and benefits, and of a comparison of the two, is that it makes it possible to test intuitions, and practices, by reference to reality.

²⁹ Cf. *Lochner v. New York* (Holmes, J., dissenting) (“The Constitution does not enact Mr. Herbert Spencer’s Social Statics”). Of course Kaldor and Hicks were two different economists, not one, but perhaps we can merge them to echo Holmes as faithfully as possible.

³⁰ See *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 142 (2d Cir. 1995).

³¹ See Cass R. Sunstein, *Why Markets Don’t Stop Discrimination*, 8 *Soc. Phil. & Pol’y* 21 (1991).

C. Intractable Intuitions and Stigmatic Harms

Nonetheless, Judge Posner held against Vande Zande—with a brisk, conclusory, and inadequate analysis of the issue of telecommuting, and a brief, conclusory, and quite unconvincing analysis of the issue of lowering the sinks. This presents a bit of a puzzle, because Judge Posner is ordinarily far more systematic with both costs and benefits. The explanation, I believe, lies in two places, both of which require qualification of the most ambitious claims of cost-benefit enthusiasts in this domain (and perhaps elsewhere).

The first problem is that cost-benefit analysis might incorporate intuitions rather than disciplining them. Without a method for calculating costs or benefits, analysts are likely to rely on their own hunches and speculations. Recall Judge Posner’s casual empiricism with respect to telecommuting, with his suggestion that workers need to perform in teams with supervisors, lest their productivity be “greatly” diminished. The most sympathetic reading of this discussion is that he is, in fact, doing a form of cost-benefit analysis, with a (reasonable) judgment that the costs of telecommuting are likely to be high. (Put to one side the fact that Vande Zande would have been satisfied with the restoration of her 16.5 hours of sick leave.) But there appears to be no systematic evidence on that question. Without such evidence, a judge—even one sympathetic to cost-benefit analysis and to empiricism—is likely to fall back on intuitions. Unfortunately, those intuitions may be a product of some kind of prejudice, in the form not of bigotry, but of an insufficiently reflective belief that standard workplace practices—even those that come down hard on disabled people—are entirely reasonable. If so, cost-benefit analysis, used to help determine which accommodations are “reasonable,” does not cure the underlying problem. On the contrary, it incorporates and perpetuates that problem.

The second problem is at least as fundamental. With respect to the lowering of the sink, Vande Zande had two concerns. The first was practical: If the goal is to wash a coffee cup, or to get a drink of water, it is probably most pleasant and convenient to be able to use a kitchenette, not the bathroom. The second involved stigma. If most people are able to use the sink in the kitchenette, it is not merely convenient to be able to use that sink; it is stigmatizing and in a way humiliating to have to use the bathroom instead. Judge Posner trivialized these concerns. But for an employee, the use of the sink, in the

kitchenette on the floor, may be a matter of daily routine, and it is no light thing to have to resort to the place in which employees generally do other sorts of things (not to put too fine a point on it). To this extent, the harm in *Vande Zande* was expressive and symbolic.

Cost-benefit analysis cannot easily take such harms on board. But there is no question that those harms greatly matter; people may be willing to pay a great deal to avoid them, or demand a great deal not to be subjected to them. (I think that in any case, their value was at least \$150 in *Vande Zande*.) It is plausible to say that what most matters is welfare, not willingness to pay, and the willingness to pay of disabled workers may not give a sufficient account of the welfare effects of stigma and humiliation. There is no question that an adequate analysis of costs and benefits would count expressive and symbolic harms, because their welfare effects are real and sometimes large.

If an understanding of “reasonable accommodation” does not attend to expressive harms, it does a serious disservice to both adequate cost-benefit analysis and the ADA.³² Here, I believe, is the most basic problem with Judge Posner’s opinion in *Vande Zande*; and it is a problem to be avoided in future treatments of the requirement of reasonable accommodation.

Readers with comments should address them to:

Professor Cass Sunstein
University of Chicago Law School
1111 East 60th Street
Chicago, IL 60637
csunstei@uchicago.edu

³² Cf. note 1, *supra*.

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