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WRONG

HOW LAW CORRUPTS  
THE STRUGGLE FOR EQUALITY

RICHARD THOMPSON FORD



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## Entitlement and Advantage

Now you want me to tell you my opinion on autism . . . ? A fraud, a racket. For a long while we were hearing that every minority child had asthma . . . Why was there an asthma epidemic amongst minority children? Because I'll tell you why: the children got extra welfare if they were disabled, and they got extra help in school. It was a money racket . . . Now the illness du jour is autism. You know what autism is? I'll tell you what autism is. In 99 percent of the cases, it's a brat who hasn't been told to cut the act out. That's what autism is . . . Everybody has an illness . . . Stop with the sensitivity training. You're turning your son into a girl and you're turning your nation into a nation of losers.

**O**n July 16, 2008, the radio talk show host Michael Savage managed to offend parents of disabled children, racial minorities, and women in less than a minute and a half—an accomplishment that his rivals Rush Limbaugh and Glenn Beck can only aspire to. The group Autism United demonstrated in front of the New York radio station that carries Savage's program. One of his sponsors, the

insurance company Aflac, promptly gave Savage some unwelcome sensitivity training: it pulled its advertising from his program, explaining that the company found “his recent comments about autistic children to be both inappropriate and insensitive.” Criticism was almost unanimous among doctors, child psychologists, disability rights advocates, parents, and pundits alike. Several local stations dropped Savage’s program in response to public outrage.

Savage is a provocateur—deliberately insulting and extreme, with a loose regard for factual accuracy. According to the clinical psychologist Catherine Lord, autism is “just like epilepsy or . . . diabetes or a heart condition. [Savage’s comments are] like blaming the child with a heart condition for not being able to exercise.”<sup>1</sup> Savage eventually backpedaled, saying his remarks were “hyperbole,” designed to draw attention to the problem of fraudulent diagnosis. He agreed to devote another show to the subject so that parents of autistic children and others could air dissenting views.

Savage, like Limbaugh and Beck, is conservative and contentious, but he is also idiosyncratic—often unexpectedly thoughtful, even cerebral. While Limbaugh and Beck are activists for conservative politicians and causes, Savage is distinguished by a kind of crotchety ennui. As contemptuous of other conservatives as he is of liberals (he called Glenn Beck a “hemorrhoid with eyes”), he treats partisan politics with an aloof disdain: “You’ll have to go to one of the other talk-show hosts to get ‘Obama’s a Ma-a-arxist’ and ‘McCain is a wa-a-ar hero.’”<sup>2</sup> As a result, where other conservative talk show hosts are annoyingly predictable, Savage’s off-the-cuff ramblings and intemperate tirades are often surprising and intriguing, and they often contain at least a grain of truth. For instance, Dr. Lord admitted that mild autism is vaguely defined and can be a catchall diagnosis for children with behavioral problems who fit no other category. A year and a half after Savage’s remarks, the psychiatrists in charge of writing the fifth edition of the *Diagnostic and Statistical Manual of Mental Disorders* announced that they were considering folding several types of mild autism—such as

Asperger's syndrome and pervasive developmental disorder—into a single broad category—autism spectrum disorder—reflecting a new understanding that autism is not a single disorder but rather a range of conditions, from severe mental disabilities to mild emotional abnormalities that can come with extraordinary mental gifts.

There's a professional consensus that severe autism is a discrete neurobiological condition, but mild cases can be hard to distinguish from less well-defined conditions, such as attention deficit hyperactivity disorder (ADHD) and other vaguely defined "learning disabilities." Here, diagnosis is difficult and contestable, and expert opinions differ. "We're fairly good about making the diagnosis of kids who are classically autistic, but as you move away from that specific disorder, it gets harder . . . [F]or kids who are of average, close to average or above average intelligence, it is difficult to sort out what is eccentricity versus what is a real social deficit," said Dr. Lord.<sup>3</sup>

Federal law doesn't reflect a continuum that includes mild autism and learning disabilities along with eccentricity and poor concentration. For legal purposes, a disability is a discrete condition: either you have it, and therefore have a right to an array of special concessions and extra help, or you don't. The law doesn't define learning disabilities with precision, but it does provide a partial definition: "a severe discrepancy between achievement and intellectual ability."<sup>4</sup> In practice, this means that learning disabilities are diagnosed, in large part, by identifying a gap between a child's performance in academic settings and the performance one would expect of a child of his or her age and IQ.

Civil rights laws entitle *all* disabled people to special accommodations and services: a blind person might require an exam to be administered orally or written in Braille; a paraplegic might require voice-recognition software or transcription. These accommodations let the disabled reach their potential. Children with learning disabilities are also legally entitled to accommodations and services that other children are not, such as special tutoring and extra time

on exams. In theory, just as a blind person needs Braille, a Seeing Eye dog, or a cane to overcome his blindness, a person with ADHD may need extra time to get organized and overcome his inability to concentrate.

But there are some important differences between severe disabilities like blindness and milder learning and behavioral disabilities. First, conspicuous disabilities often trigger reflexive animus or prejudice. Many employers wrongly assume disabled people can't work, and businesses discriminate against them because of squeamishness and irrational aversion. A business that refuses to accommodate a disabled person might secretly wish to exclude him. Milder disabilities don't trigger such reflexive prejudice because, for the most part, they are not conspicuous: typically an employer learns of a learning or an emotional disability only when an employee seeks an accommodation for it. Second, most of the accommodations that people with severe disabilities need wouldn't help a non-disabled person at all. A sighted person wouldn't benefit from having an exam written in Braille; an able-bodied person wouldn't get much of an edge from using voice-recognition software or a professional transcriber. By contrast, people with learning and emotional disabilities often enjoy extra time on competitive exams, costly one-on-one tutoring, and exemptions from discipline for disruptive behavior—things that would benefit anyone. Finally, unlike blindness or a physical disability, many learning disabilities are hard to define objectively; as Dr. Lord admits, they are on a continuum with ordinary “eccentricity.” Put these together and you have a recipe for gaming the system: no one would suggest that an eccentric person with a wandering mind has a right to extra time on a timed exam, but someone with ADHD does—and the two can be hard to distinguish. This doesn't suggest that civil rights for people with mild cognitive disabilities are a “racket,” but it does suggest that they have the potential to encourage opportunism and can lead to unwarranted advantages.

Suppose two children achieve low scores on a competitive timed

exam: one has a diagnosed learning disability, and the other doesn't. Suppose both of the children's scores would improve dramatically if they had extra time to complete the exam. Is it fair to give one student extra time and not the other? Maybe. In theory, the extra time isn't an advantage for the person with a learning disability; it's just the way he copes with his disability. But if the disability is on a continuum with garden-variety poor concentration, then in fairness *anyone* with poor concentration should be entitled to extra time in proportion to the severity of his concentration deficit. This would, of course, defeat the purpose of a timed exam, which is to test not only skills and knowledge but also the ability to perform quickly.

The Harvard medical student Sophie Currier became a heroine to advocates of breast-feeding in 2007 when she demanded and eventually won the right to a breast-pumping break during a medical licensing exam. No hothouse flower, Currier first took the exam—widely considered to be one of the most challenging of all professional qualification exams—when eight months pregnant and came just short of a passing score. Currier chose to nurse her newborn baby as most experts in the medical profession she was poised to join recommend. But she still needed to pass the exam in order to start her residency at Massachusetts General in the fall. So she asked the National Board of Medical Examiners to give her a break—specifically, an extra hour each day to express and store her breast milk. The board refused, informing Currier that it would accommodate only disabilities as defined by the Americans with Disabilities Act.

Currier wasn't the first woman to get a less-than-nurturing reaction to her nursing. Until recently, nursing an infant in public was considered indecent exposure and could result in citation or even arrest. Businesses and employers not only refused to accommodate nursing mothers but often deliberately embarrassed them or asked

them to leave. The problem isn't a relic of the era of three-martini lunches and cars with tail fins either. In October 2006, Emily Gillette was flying with her husband and twenty-two-month-old daughter on a Freedom Airlines flight from Burlington, Vermont. Freedom Airlines didn't give Gillette the freedom to feed her baby; instead, a flight attendant barked, "You need to cover up. You are offending me," and thrust a blanket into Gillette's hand. Gillette balked: "No thank you. I will not put a blanket on top of my child's head." The flight attendant kicked her off the flight. In response Gillette filed a complaint against the airline with the Vermont Human Rights Commission. Her story inspired over eight hundred women to stage a "nurse-in" at thirty-nine airline ticket counters nationwide.<sup>5</sup> This wasn't the first time lactation took on the character of social protest: a year earlier women staged a "nurse-in" in front of ABC studios after Barbara Walters spoke unapprovingly about a woman nursing her baby on a flight.

A growing number of women have decided that Mother Nature is a more wholesome provider than Gerber or Nestlé and nurse their newborns for a year or longer. In reaction to social squeamishness about breast-feeding and widespread ignorance of its many virtues, some have become "lactivists," proselytizing to pregnant women and young mothers about the benefits of the breast, lobbying for policy changes to accommodate nursing mothers, and agitating against inhospitable businesses and employers. Their goal is to reverse the decades-long trend toward bottle-feeding, which they see as the result of a conspiracy among hubristic scientists, perverse moralists who eroticize the female breast, and callous industrialists anxious to get new mothers back on assembly lines and behind desks. While breast-feeding was, for obvious reasons, almost universal before the Industrial Revolution, it declined throughout the twentieth century: by 1972 only 22 percent of American mothers nursed their infants.<sup>6</sup> Lactivists reject the notion of better living through technology and cite mounting evidence that breast-fed

children are less susceptible to illness and emotionally healthier than those who receive only manufactured formula. Scandals involving contaminated baby formula and conspiracies to foist costly baby formula on an impoverished third world have only strengthened their resolve and increased their numbers.

Medical opinion has shifted decisively in favor of nursing: the American Academy of Pediatrics decided in 1997 to recommend that mothers breast-feed their infants for six months. The U.S. Department of Health and Human Services started a campaign to encourage breast-feeding. Public opinion followed quickly, and today bottle-feeding is tantamount to child abuse among the Bugaboo stroller set. As mothers found themselves caught between the old-school squeamishness of blanket-wielding prudes and a trendy new obligation to breast-feed, some feminists began to wonder whether the new ethos was a totem for women's liberation or a Trojan horse. Hanna Rosin complained in *The Atlantic*: "In Betty Friedan's day, feminists felt shackled to domesticity by the unreasonably high bar for housework, the endless dusting and shopping and pushing the Hoover around . . . When I looked at the picture on the cover of [Dr.] Sears's *Breastfeeding Book*—a lady lying down, gently smiling at her baby and *still in her robe*, although the sun is well up—the scales fell from my eyes: it was not the vacuum that was keeping me and my twenty-first-century sisters down, but another sucking sound."<sup>7</sup>

Nursing requires a significant commitment. Nursing mothers must either feed their children directly or express the milk every several hours; failure to do either can lead to painful engorgement, infections, and a reduction in the milk supply. The National Women's Health Information Center helpfully suggests to working mothers of newborns: "Let your employer know that you are breastfeeding and explain that, when you're away from your baby, you will need to take breaks throughout the day to pump . . . Ask where you can pump at work, and make sure it is a private, clean, quiet area . . . If

your direct supervisor cannot help you with your needs . . . go to your Human Resources department to make sure you are accommodated.”<sup>8</sup>

Or, failing that, go to court. *Sophie Currier v. National Board of Medical Examiners* wasn't even a close contest in the end. The National Board of Medical Examiners, with their creaky old rules and their hand-wringing about the integrity of their precious exam, didn't have a chance against the sisterhood of virtuous lactation—a powerful fusion of modern feminism and the Victorian cult of pure womanhood, backed by the American Academy of Pediatrics, with Angelina Jolie as glamorous spokesmodel. Currier lost her sex discrimination lawsuit at the trial court but won handily on appeal: Judge Gary Katzmann held that “in order to put the petitioner on equal footing as the male and non-lactating female examinees, she must be provided with sufficient time to pump breast milk.”<sup>9</sup>

Pumping breast milk is time-consuming and uncomfortable: a machine must be assembled, the milk must be pumped, the machine must be cleaned so it's ready for next time (which will be roughly four hours later) and disassembled for storage, and the milk must be stored on ice so that it is still fit for the baby to drink later. This could easily consume the entire forty-five-minute standard break for the medical licensing exam, leaving Currier no time to eat or use the restroom. Pumping might not take the entire hour that Currier asked for, but any extra time wouldn't really give her an edge. She couldn't use it to think through or reconsider her answers, because the exam was administered in discrete blocks, and once a block was finished, the examinee could not return to it. The board's concern that the accommodation would compromise the exam seemed unwarranted: after all, Currier wasn't asking for extra time to take the exam itself.

But actually, she was. Currier had been diagnosed with ADHD and dyslexia; as an accommodation, she had demanded and received a full *eight hours* of additional exam time—double the normal limit. The board granted this request because ADHD and dyslexia are

recognized disabilities within the definition of the Americans with Disabilities Act. Having failed the exam once even with the extra time, Currier had come back to the board with another demand for an additional accommodation.

It was starting to look as if Currier wanted to keep changing the rules until she passed. This may explain why relatively few feminists or lactivists took up her cause. Pondering the lack of support for Currier, *Slate's* legal analyst Dahlia Lithwick complained that “if we can’t stand up for a woman with a brilliant career who is fighting to care for her babies as she chooses . . . you really have to wonder if we can stand up for anyone at all,” but worried that “it’s harder to sympathize . . . when we learn that she is already getting a whole extra day to take the test because she has ADHD and dyslexia, or that she received extra accommodation in her schooling as well . . . Suddenly . . . she isn’t a pioneer for the rights of working moms. She’s a crybaby and an opportunist.”<sup>10</sup> This lack of sympathy was widely expressed on blogs and websites devoted to working mothers and lactation rights. “This woman is a disgrace,” groused an anonymous commenter on a motherhood blog. “Not only has she failed the exam, she is expecting everyone else to fix her problems for her . . . I am a physician, a working, nursing mom, who passed her general and subspecialty boards (written and oral) while nursing without difficulty.” On another site a nursing mother complained, “As a nursing mother who has managed to get through a LOT of daylong exams without whining . . . I can only say there is a limit to special entitlements . . . Ms. Currie [*sic*] is simply an example of entitlement gone too far.” Another woman wrote, “While I sympathize with her for nursing . . . keep in mind that she did get lots of extra help [and didn’t pass the first time] . . . Is there any chance of passing the 2nd time? Maybe, with the extra 2 days she has been given for a one day test, plus the extra time given for her to lactate . . . In a way, I am glad [she won] . . . now other people will get an awareness and learn how to get . . . perks . . . when going through the educational system.”<sup>11</sup>

Doctors, on the whole, were even less sympathetic. One insisted: “The USMLE is a STANDARDIZED test to assess a minimum competency . . . If you don’t pass, then the exam is doing what it was intended to do: preventing somebody without a core knowledge of medicine [from] practicing . . . When the patient dies on the table [because the doctor is too slow] who is going to be supporting her when her excuse is ‘I needed to breast feed at that moment.’” Another echoed this macabre theme: “When your Father has a heart attack, do you want [someone who] is . . . practicing only because he/she was granted 3 months of time to pass his licensing exam while every other MD passed it in 8 hours?”<sup>12</sup>

Few observers bothered to distinguish between the accommodations Currier received for her disabilities and those she received to pump. Currier’s supporters typically treated the extra eight hours she received due to her dyslexia and ADHD as irrelevant: “If a man were to have ADHD and dyslexia . . . [and] were to also have cancer . . . he’d be given accommodations for his ADHD and dyslexia, *and* I would think that additional accommodations would be made for his cancer . . . as well.” Her critics thought that each accommodation—regardless of the justification—compromised the integrity of the exam and gave Currier an unfair advantage: “Allowing some students to have a time advantage, no matter the reason, destroys the integrity of the exam.”<sup>13</sup>



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