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Disability Rights, Welfare Law

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Disability Rights, Welfare Law

Mark C. Weber*

Abstract

This article asks how disability rights ideas can be reconciled with—and might transform—the law of public assistance. The social model of disability forms the basis of most disability rights thinking. This model recognizes that impairments do not by themselves disable, but disability instead arises from a dynamic between a person's physical and mental conditions and society's environmental and attitudinal barriers: Paraplegia does not cause disability but for stairs, curbs, and human attitudes that limit accessibility. The social model focuses on changing the environment; its close corollary, the civil rights approach to disability, looks to anti-discrimination law to remove limits on opportunity created by society's physical places and prevailing attitudes.

The Americans with Disabilities Act embodies the civil rights approach, but it has not been successful in lifting people with disabilities out of poverty; many people with disabilities continue to need public welfare to live. This reality has led some writers to propose abandoning the emphasis on civil rights in disability law and returning to an emphasis on welfare and related interventions that typically entail a medical or charity orientation toward disability.

This article strikes out in a different direction, arguing that the civil rights approach, when thoughtfully applied, supports continued disability-specific welfare programs, and further that it supports various improvements in the law of public welfare: more in-kind assistance programs; adjustment of disability benefits qualification standards to give more attention to the disabling effects of stigma; adoption of partial disability benefits programs and reduced means testing; changes in non-disability-related welfare; expanded universal benefits; and a Disabled Worker Tax Credit. This article compares the reforms envisioned by a nuanced application of the civil rights approach with ideas about welfare derived from principles of reciprocity, universal vulnerability, and international human rights.

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Disability Rights, Welfare Law

This article considers how disability rights thinking can be reconciled with, and may transform, the law of public assistance. The conceptual premise of the disability rights movement is the social model of disability, that is, the recognition that physical and mental conditions do not themselves disable, but disability results instead from the dynamic between those conditions and environmental and attitudinal barriers.¹ Thus, paraplegia does not disable but for stairs, curbs, and attitudes that keep people who do not walk from accessing places and opportunities. This approach to disability contrasts with a medical model, which focuses on the bodily or mental condition of the individual and identifies impairment as the critical marker of disability.² The medical model directs attention to fixing the bodily or mental condition. The social model, on the other hand, focuses on the social and environmental barriers. It directs attention to changing them.³

For many thinkers and doers associated with the disability rights movement, the social model of disability moves rapidly to a civil rights approach to disability,⁴ which

¹ See Paula E. Berg, *Ill/legal: Interrogating the Meaning and Function of the Category of Disability in Antidiscrimination Law*, 18 YALE L. & POL'Y REV. 1, 9 (1999) ("This social-political model rejects the premise of the moral and biomedical perspectives that disability is inherent within the individual. . . . [I]t understands disability as contextual and relational, . . . as a broader social construct reflecting society's dominant ideology and cultural assumptions. While it acknowledges the existence of biologically based differences, the social-political model locates the meaning of these differences—and the individual's experience of them as burdensome—in society's stigmatizing attitudes and biased structures rather than in the individual.") (footnotes omitted).

² See Mary Crossley, *The Disability Kaleidoscope*, 74 NOTRE DAME L. REV. 621, 649–53 (1999).

³ See *id.* at 658–59 (discussing alterations in physical environment and social policy).

⁴ See, e.g., Michelle Fine & Adrienne Asch, *Disability Beyond Stigma: Social Interaction, Discrimination, and Activism*, 44 J. SOC. ISSUES 3, 6–14 (1988) (developing minority group model of people with disabilities); Harlan Hahn, *Advertising the Acceptably Employable Image: Disability and Capitalism*, in THE DISABILITY STUDIES READER 172, 174 (Lennard J. Davis ed., 1997) (describing a minority-group model of disability); Jacobus tenBroek & Floyd W. Matson, *The Disabled and the Law of Welfare*, 54 CAL. L. REV. 809, 814–16 (1966) (applying civil rights "integrationist" approach to disability); Jonathan C. Drimmer, Comment, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities*, 40 UCLA L. REV. 1341, 1357–58 (1993) (describing civil rights approach to disability).

recognizes that society, by erecting obstacles and refusing to remove them, imposes disadvantage on people with disabilities, just as society historically has disadvantaged other minority groups.⁵ Upholding the civil rights of persons with disabilities means removing attitudinal and environmental barriers and their effects, by legal force if necessary.⁶ The civil rights movement among people with disabilities culminated in the Americans with Disabilities Act (ADA) of 1990, which outlaws disability discrimination and legally compels employers, government, and merchants to accommodate people with disabilities.⁷

But the ADA was promoted not only on the basis of civil rights for people with disabilities. Supporters also argued that by eliminating barriers to employment it would reduce poverty among people who are disabled and diminish the need for governmental support.⁸ On that score, things have not worked out quite as anticipated. People with

⁵ Some writers draw a contrast between the social model and the civil rights model. See, e.g., Wendy Hensel, *The Disabling Impact of Wrongful Birth and Wrongful Life Actions*, 40 HARV. C.R.-C.L. L. REV. 141, 147-50 (2005); see also Ravi A. Malhotra, *The Duty to Accommodate Unionized Workers with Disabilities in Canada and the United States: A Counter-Hegemonic Approach*, 2 J.L. & EQUALITY 92, 108 (2003) (“It is important to note that there is no single, universally accepted conception of the social-political model.”); Theodore P. Seto & Sande L. Buhai, *Tax and Disability: Ability to Pay and the Taxation of Difference*, 154 U. PA. L. REV. 1053, 1071-72 (2006) (discussing “human variation” approach departing from civil rights model). In this paper, however, the social and civil rights approaches will be considered jointly.

⁶ See RUTH O’BRIEN, *CRIPPLED JUSTICE: THE HISTORY OF MODERN DISABILITY POLICY IN THE WORKPLACE* 207–21 (2001) (contrasting rehabilitation emphasis of medical approach to disability with legal emphasis of civil rights approach).

⁷ See Hensel, *supra* note 5, at 150 (“[S]ome scholars have credited the political awareness engendered by the minority model for the passage of the Americans with Disabilities Act and comparable civil rights legislation.”) (collecting sources).

⁸ See Samuel R. Bagenstos, *The Americans with Disabilities Act as Welfare Reform*, 44 WM. & MARY L. REV. 921, 926-27 (2003) (“In official reports, in congressional hearings, on the floor of Congress, and in the popular press, supporters of the proposed ADA argued that the statute was necessary to reduce the high societal cost of dependency—that people with disabilities were drawing public assistance instead of working, and that a regime of “reasonable accommodations” could move people with disabilities off of the public assistance rolls and into the workforce in a way that would ultimately save the nation money.”); *id.* at 957-75 (collecting sources).

disabilities overwhelmingly remain poor,⁹ and vast numbers continue to rely on public assistance to live.¹⁰ Poverty among people with disabilities is worse in the United States than elsewhere in the developed world.¹¹ Employment at decent wages seems the surest route to economic self-sufficiency, but whether the ADA has improved employment

⁹ Of non-institutionalized persons in the United States aged 21 to 64, 25.3% of those with a disability lived below the poverty line in 2008, whereas only 9.6% of persons without a disability did, W. Erickson et al. Disability Statistics from the 2008 American Community Survey, Cornell University Rehabilitation Research and Training Center on Disability Demographics and Statistics, <http://www.ilr.cornell.edu/edi/disabilitystatistics/reports/acs.cfm?statistic=7> (last visited Feb. 10, 2011). A different survey shows that the percentage of Americans aged 18 to 64 with a disability-related work limit who live in families with incomes below the poverty line is 28.1 as of 2008. Von Schrader et al., Disability Statistics from the Current Population Survey, Cornell University Rehabilitation Research and Training Center on Disability Demographics and Statistics, <http://www.ilr.cornell.edu/edi/disabilitystatistics/reports/cps.cfm?statistic=poverty#table> (last visited Feb. 10, 2011). The median annual income among households that include a person with a disability of ages 21-64 is \$39,600, whereas the median annual income among households that do not is \$61,200, Erickson, *supra*, <http://www.ilr.cornell.edu/edi/disabilitystatistics/reports/acs.cfm?statistic=6> (last visited Feb. 10, 2011). Relative long-term poverty rates are much high than annual rates. An expert with Mathematica Policy Research reports that people with disabilities represented 47% of people in poverty in 1997 according to an annual measure, but 65% according to a long-term measure. Peiyun She & Gina A. Livermore, *Long-Term Poverty and Disability Among Working-Age Adults*, 19 J. DISABILITY POL'Y STUDS. 244, 250-53 (2009), available at <http://dps.sagepub.com/cgi/reprint/19/4/244>.

¹⁰ To focus on just one public assistance program, 17.7% of non-institutionalized persons aged 21 to 64 reporting any disability received Supplemental Security Income (SSI) benefits in 2008: 26.1% of such persons with cognitive disabilities, 20% of those with ambulatory disabilities, 27.6% with self-care disabilities, and 28.9% with self-care disabilities. See Erickson, *supra* note 9, at <http://www.ilr.cornell.edu/edi/disabilitystatistics/reports/acs.cfm?statistic=8> (last visited Feb. 10, 2011). See generally *infra* text accompanying notes 29-42 (discussing SSI and other disability-specific welfare programs).

¹¹ SHAWN FREMSTAD, HALF IN TEN: WHY TAKING DISABILITY INTO ACCOUNT IS ESSENTIAL TO REDUCING INCOME POVERTY AND EXPANDING ECONOMIC INCLUSION 12 (Sept. 2009), available at <http://www.cepr.net/documents/publications/poverty-disability-2009-09.pdf> (“The U.S. has a higher income poverty rate for people with disabilities (using a standardized measure set at 60 percent of median adjusted disposable income and adjusted for price differences) than any other nation in Western Europe as well as Australia and Canada. A handful of nations—. . . mostly Nordic—have eliminated the disparity in poverty rates between people with disabilities and those with no disabilities.”) (citing data collected by Organization for Economic Cooperation and Development).

among people with disabilities remains uncertain.¹² The record so far in litigated ADA employment discrimination cases is discouraging.¹³

Several writers, myself included, have called attention to the shortcomings of the ADA and argued that the weaknesses illustrate the difficulty with complete reliance on social and civil rights ideas about disability.¹⁴ These authors contend that improving the economic and social status of people with disabilities requires changes in public benefits policy and other reforms that do not apply a civil rights approach of disability but instead entail social welfare ideas or other approaches—even approaches that flirt with the medical model.

Nevertheless, I for one have continued to doubt whether abandoning the social and civil rights approach is necessary or wise.¹⁵ The social model and civil rights laws

¹² See, e.g., John J. Donohue III et al., *Assessing Post-ADA Employment: Some Econometric Evidence and Policy Considerations*, Yale Law & Economics Research Paper No. 358 (Oct. 20, 2008), at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1282307 (last visited Feb. 10, 2011) (analyzing data and collecting and discussing other analyses). Measurement difficulties include adjusting for inconsistent self-identification of individuals as having disabilities as well controlling for background economic conditions. See *id.*

¹³ See Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 100 (1999) (reporting overwhelmingly high failure rates for employment claims under ADA); Ruth Colker, *Winning and Losing Under the Americans with Disabilities Act*, 62 OHIO ST. L.J. 239, 248-57 (2001) (reporting and analyzing similar findings). Some caution should be exercised on this topic, however. The record in non-employment ADA cases is more encouraging for plaintiffs, see Michael Waterstone, *The Untold Story of the Rest of the Americans with Disabilities Act*, 58 VAND. L. REV. 1807, 1826-32 (2005), and the new ADA Amendments Act (ADAAA) should eliminate one of the most vexing barriers to plaintiffs in employment cases, restrictive judicial interpretation of who is a person with a disability covered by the law, see Pub. L. No. 110-325, 122 Stat. 3553 (2008); Alex B. Long, *Introducing the New and Improved Americans with Disabilities Act: Assessing the ADA Amendments Act of 2008*, 103 NW. U. L. REV. COLLOQUY 217 (2008) (describing expansion of coverage of individuals with disabilities and other provisions in ADAAA). Moreover, considering settlements in employment cases makes the picture more positive for claimants. See Sharona Hoffman, *Settling the Matter: Does Title I of the ADA Work?*, 59 ALA. L. REV. 305, 312-19, 333-37 (2008).

¹⁴ See Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1, 54-70 (2004); Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19, 37-38 (2000); Michael Ashley Stein & Penelope J.S. Stein, *Beyond Disability Civil Rights*, 58 HASTINGS L.J. 1203, 1204 (2007); Bonnie Poitras Tucker, *The ADA's Revolving Door: Inherent Flaws in the Civil Rights Paradigm*, 62 OHIO ST. L.J. 335, 340 (2001); Mark C. Weber, *Disability and the Law of Welfare: A Post-Integrationist Examination*, 2000 U. ILL. L. REV. 889, 893.

¹⁵ So, of course, have others. See, e.g., JAMES CHARLTON, *NOTHING ABOUT US WITHOUT US* 127 (1998) (stressing continued importance of social model and civil rights).

such as the ADA place the emphasis on changing society rather than the individual. It is hard to imagine achieving true equality for people with disabilities without that shift in thinking. To achieve equality, the person with the disability must be the agent rather than the passive recipient of social interventions, the subject of the sentence rather than the object. This is what the social model is about, and that realization strongly supports a full-fledged civil rights approach to disability and disability policy.

But what of the continuing poverty and need for economic support of people with disabilities? This article suggests not departing from the social model or civil rights approach, but instead applying these ideas in a more nuanced way when looking to reform the law relating to programs to relieve poverty. The article takes the civil rights approach and asks what thinking about it in a considered fashion means for welfare law. In exploring that topic, it asks whether and how disability differs from other conditions associated with poverty. It further compares ideas about welfare and disability based on the civil rights approach to ideas that have recently appeared in the legal literature relating to poverty and impairment: constructs of reciprocity, vulnerability, and human rights.

The article acknowledges that disability-related welfare as currently constituted relies heavily on a medical model. Nevertheless, it concludes that if the civil rights approach is applied in a careful way, the conclusion will emerge that disability-specific welfare support should still be maintained. Welfare compensates for barriers created by the legacy of disability discrimination as well as that created by ongoing discriminatory behavior. More significantly, civil rights for people with disabilities entails more than the reasonable accommodations that civil rights law currently provides, and public aid

needs to make up the difference. Most significantly, the welfare system is itself part of the social environment, and application of a civil rights approach to it suggests that it creates barriers to the achievement of equality that should be removed. Specific changes that would remove barriers include expansion of in-kind assistance, adjustment to disability standards to account for stigma associated with mental disabilities, the adoption of partial disability benefits without or with only loose means tests, improvements in ordinary public welfare, possibly the adoption of expanded universal benefits, and adoption of a Disabled Workers Tax Credit.

Because of the difference that disability makes for moral hazard and work incentive concerns, welfare programs should continue to treat disability differently from other reasons for impoverishment. The reforms suggested by the civil rights approach differ from those advanced by writers who stress reciprocal social obligations when discussing welfare, as well by those who stress universal vulnerability to disability. The reforms that might be derived from international human rights ideas are a closer fit, but civil rights thinking provides as sound a basis for them as the human rights paradigm does.

Relatively few legal writers have delved into the issue of disability and welfare, though the list includes some of the most insightful.¹⁶ Nevertheless, the bulk of the writing on welfare for people with disabilities is by economists or social critics not

¹⁶ See, e.g., , REPORT OF THE DISABILITY POLICY PANEL, BALANCING SECURITY AND OPPORTUNITY: THE CHALLENGE OF DISABILITY INCOME POLICY (Jerry L. Mashaw & Virginia P. Reno eds. 1996); Bagenstos, *supra* note 14; *supra* note 8; Matthew Diller, *Dissonant Disability Policies: The Tensions Between the Americans with Disabilities Act and Federal Disability Benefit Programs*, 76 TEX. L. REV. 1003, 1005 (1998) [hereinafter, Diller, *Dissonant Disability Policies*], *Entitlement and Exclusion: The Role of Disability in the Social Welfare System*, 44 UCLA L. REV. 361, 362 (1996);. The classic work is tenBroek & Matson, *supra* note 4. For a response to Professor Diller, see Weber, *supra* note 14 at 908-12, 929-33. The same paper contains an appreciation of and reaction to tenBroek and Matson's work. See *id.* at 902-08.

associated with disability rights thinking.¹⁷ Many prominent disability studies scholars have simply avoided the debates over welfare,¹⁸ with the result that developments are conceived and managed by technocrats or politicians who have little insight about the needs, desires, and grievances of persons with disabilities.¹⁹ The result is that welfare policy is one area in which the disability rights movement slogan “Nothing about us without us” could not be further from reality.²⁰

In Part I, this article explains the civil rights approach in greater depth, asking why it should be pursued and concluding that its continued application is important. Part II describes the most important American welfare programs for people with disabilities and distinguishes those interventions from social insurance. Part III applies the civil rights approach to American public welfare, making general observations and putting forward specific initiatives that a civil rights approach would suggest. It also asks whether welfare programs should treat people with disabilities who are poor differently from others who are in need, and concludes that they should. Finally, in Part IV, the

¹⁷ Notable in this regard is Professor Richard Burkhauser, whose recent work is discussed *infra* text accompanying notes 168-75.

¹⁸ The point in the text should not be overstated. In recent years, there has been a modest resurgence of interest in welfare issues among disability rights scholars. See, e.g., JENNIFER L. ERKULWATER, *DISABILITY RIGHTS AND THE AMERICAN SOCIAL SAFETY NET* (2006) (considering welfare policy in light of disability rights concerns); Peter Blanck & Helen A. Schwartz, *Guest Editor's Introduction*, 26 *DISABILITY STUD. Q.* 1, 5 (2006) (describing responses to poverty among persons with disabilities as increasingly important issue). In international discussions, concerns about poverty of people with disabilities and appropriate government responses to it are often addressed under the topic of “human security.” See, e.g., Anita Ghai, *Guest Editorial: Human Security, Social Cohesion, and Disability*, 5 *REV. DISABILITY STUD.* 10, 10 (2009) (“[H]uman security is understood as security of survival (morality/injury, health), security of livelihood (food, water, energy, environmental needs, shelter, and economic security), and dignity (basic human rights, capacity, participation).”).

¹⁹ See ERKULWATER, *supra* note 18, at 171. A parallel complaint has been voiced with respect to poor people and technocratic welfare policy. See Julie A. Nice, *Forty Years of Welfare Policy Experimentation: No Acres, No Mule, No Politics, No Rights*, 4 *NW. J.L. & SOC. POL'Y* 1, at 24 (2009) (“While the rise of the social policy domain provided hope for a solution to poverty, social policy instead contributed to the problem. Many multi-disciplinary scholars have documented ways in which welfare policy itself has reflected entrenched political interests and wielded its own political influence. In short, these sobering critiques have demonstrated how welfare policy experimentation has perpetuated the neglect of poor people.”) (footnote omitted).

²⁰ This line provides the title for James Charlton’s remarkable book. CHARLTON, *supra* note 15.

article takes up other approaches to welfare and disability, and contrasts the implications of the civil rights approach with those of approaches based on reciprocity, vulnerability, and human rights.

I. Why a Civil Rights Approach to Disability?

At the core of the disability rights movement is the insight that physical or mental conditions do not themselves disable, but instead that environmental and attitudinal barriers keep people with physical and mental conditions from full and equal participation in society's daily life.²¹ Once the problem of equality for people with disabilities is externalized from the individual to the society, it can be addressed by social means. A cascade of ideas follows. Some involve rejection of ordinary ways of thinking: no longer regarding an individual as the sum of his or her disabilities but rather as a person;²² leaving decisions about whether and how to accept medical treatment or rehabilitation up to the individual rather than to social control;²³ and abandoning the effort to force people with disabilities to adjust psychologically to their supposed limits. Others involve positive steps: using legal means to require physical accessibility and changes to standard operating procedures; creating welcoming environments; altering production systems and legal rules to permit full participation.

²¹ See *supra* notes 1-7 and accompanying text (collecting sources on social model).

²² Hence the person-first language ("people with disabilities" rather than "the disabled") incorporated in statutes such as the ADA and used in this article, even though some disability rights authors have moved away from it in recent years.

²³ A few sources suggest limiting protections of the disability discrimination laws when individuals do not change themselves so as to reduce some effects of their impairments, see, e.g., Lisa E. Key, *Voluntary Disabilities and the ADA: A Reasonable Interpretation of "Reasonable Accommodations,"* 48 HASTINGS L.J. 75 (1996); cf. Jeannette Cox, *"Corrective" Surgery and the Americans with Disabilities Act*, 46 SAN DIEGO L. REV. 113, 115 & n.6 (2009) (collecting sources and criticizing position), but no such provision has ever been enacted into the ADA. The rare cases in which individuals with disabling conditions willfully avoid medical interventions tend to generate commentary, but that is due in no small part to their exceptionality. For a discussion of individuals with autism who do not wish treatment and oppose the search for a "cure," see Francisco Ortega, *The Cerebral Subject and the Challenge of Neurodiversity*, 4 BIOSOCIETIES 425 (2009).

The social model of disability has been criticized as having “essentially no policy implications,” in the sense that even a person who accepts its insights might still feel that trying to change the individual with the disability or doing nothing at all may be more desirable than changing various features of the environment.²⁴ But simply opening up the option of changing the environment broadens the range of social choices; moreover, it highlights the injustice of refusing to change attitudes and conditions when that can be done.²⁵ The point is not that a medical model is necessarily inaccurate. Disability can of course be viewed as a medical problem, and people with disabilities routinely rely on medical interventions, as do others.²⁶ Rather, the purpose of the social model of disability is to broaden what is considered when pressing for reform.²⁷ The reason to move from the social model to an approach focused on civil rights is to promote the realization that reforms to eliminate the attitudinal and physical barriers society imposes are a matter of fundamental social justice and legal policy. Viewed in this way, the model may have much to say about which welfare reforms to advance. The civil rights approach—identifying societal sources of disadvantage and looking for legal and policy

²⁴ Adam M. Samaha, *What Good Is the Social Model of Disability?*, 74 U. CHI. L. REV. 1251, 1251 (2007).

²⁵ See Mark C. Weber, *Disability Rights, Disability Discrimination, and Social Insurance*, 25 GA. ST. UNIV. L. REV. 575, 593-95 (2009) (noting that social and civil rights approaches do not exclude personal adaptation but expand options for social reform and illuminate injustices in maintaining current practices; collecting sources).

²⁶ The observation that the sun moves around the earth is no less true than the observation that the earth moves around the sun. It all depends on which point of view one adopts and what one does with the observation. Professor Elizabeth Emens makes the point with respect to the social model:

Few disability scholars or activists embrace a pure social model. Most recognize that not all disability is culturally constructed, but that culture still creates much of the disability associated with what we consider impairments. This middle-ground position recognizes that there can be pain or difficulty associated with disability, and that sometimes disability does require more resources or more support than other states of being, but still emphasizes that much of what makes disability disabling is the way the world is currently constructed.

Elizabeth F. Emens, *Integrating Accommodation*, 156 U. PA. L. REV. 839, 882 (2008).

²⁷ See ERKULWATER, *supra* note 18, at 30-31 (noting role of social model in shifting focus of advocacy groups towards changes in social environment); O'BRIEN, *supra* note 6, at 207-21 (contrasting rehabilitation emphasis of medical approaches to disability with legal emphasis related to civil rights approach).

solutions to them—further enriches the discussion by placing law reform front and center.

II. Current Welfare Programs for Persons with Disabilities

The public welfare system for people with disabilities is less well known than it might be, and it is surprisingly complex.²⁸ To be fully understood once the system is described, it needs to be distinguished from social insurance programs such as Social Security Disability Insurance and Medicare.

A. Major Sources of Income Support and Related Benefits

The half-dozen most important sources of public assistance for people with disabilities are the following:

1. *Supplemental Security Income and State Supplements.* Individuals qualify for Supplemental Security Income (SSI) cash assistance if they are poor and meet an exacting disability standard such that they cannot perform work that is deemed substantial gainful activity, because of a medically determinable physical or mental impairment expected to last for a continuous period of a year or result in death.²⁹

Currently, the monthly payment is \$674³⁰ and the asset limit is \$2000.³¹ State

²⁸ This description is less than comprehensive, given the variety of state and local programs and discretionary nature of many federal ones. For a thorough description of major disability programs in the United States, including those that fall in the category of public assistance, see Robert Silverstein, *Emerging Disability Policy Framework: A Guidepost for Analyzing Public Policy*, 85 IOWA L. REV. 1691, 1700-04 (2000).

²⁹ 42 U.S.C. § 423(d)(1)(A) (2006). The disability standard for Social Security Disability Insurance and SSI is the same, and is set out in the Social Security Act and regulations. *See* 42 U.S.C. § 1382 (2006). SSI's disability and resources rules differ for children. *See generally* Social Security Online, Understanding Supplemental Security Income SSI for Children, <http://www.ssa.gov/ssi/text-child-ussi.htm> (last visited Feb. 10, 2011) (describing standards).

³⁰ Social Security Online, Understanding Supplemental Security Income SSI Benefits, <http://www.ssa.gov/ssi/text-child-ussi.htm> (last visited Feb. 10, 2011). For a couple, the amount is \$1,011. *Id.* The monthly benefit amount is not quite the same as the income standard, but it is close. With limited exceptions, all but \$20 of unearned income counts dollar for dollar against the monthly payment for a recipient; all but the first \$65 of earnings and half the earnings over \$65 count against it. Social Security Online, Understanding Supplemental Security SSI Income, <http://www.ssa.gov/ssi/text-income-ussi.htm>

governments may provide a small supplement to the amount.³² Currently, about 6.3 million Americans receive SSI because of disability.³³ Payments run to \$3.4 billion annually.³⁴

The disability standard is extreme.³⁵ Work that generates \$980 per month generally constitutes substantial gainful activity, so nearly all persons with regular, even low-wage employment are automatically excluded.³⁶ In the disability determination process, primary attention is given to whether the applicant has a medical condition listed in the federal regulations.³⁷ A person may qualify without having a listed impairment, but the standards are challenging to meet unless a person is near-elderly.³⁸ Almost 60%

(last visited Feb. 10, 2011). Hence to qualify for benefits a person must have an income well below the poverty line, which is \$10,890 yearly (\$902.50 per month) for an individual who constitutes a single family unit. *See* The 2011 HHS Poverty Guidelines, <http://aspe.hhs.gov/poverty/11poverty.shtml> (last visited Feb. 10, 2011).

³¹ For a couple, the amount is \$3,000; the asset limit excludes a home, household goods, personal effects, burial spaces, and one vehicle. *See generally* Social Security Online, Understanding Supplemental Security SSI Resources, <http://www.ssa.gov/ssi/text-resources-ussi.htm> (last visited Feb. 10, 2011) (discussing resources limits).

³² *See* Social Security Online, Understanding Supplemental Security Income SSI Benefits, <http://www.ssa.gov/ssi/text-benefits-ussi.htm> (last visited Feb. 10, 2011) (discussing state supplements).

³³ Office of Retirement and Disability Policy, Social Security Administration, SSI Recipients, by State or Other Area, December 2008, http://www.ssa.gov/policy/docs/statcomps/ssi_sc/2008/table01.pdf (last visited Feb. 10, 2011).

³⁴ Office of Retirement and Disability Policy, Social Security Administration, Amount of Payments, by State or Other Area, December 2008, http://www.ssa.gov/policy/docs/statcomps/ssi_sc/2008/table02.pdf. People who have worked enough during the period before becoming disabled to qualify for Social Security Disability Insurance but whose Disability Insurance benefits amount is very low are entitled to receive both Disability Insurance and SSI. For these people, SSI supplements the Disability Insurance payment, hence the term “Supplemental Security Income.”

³⁵ Many experts share this assessment. *See, e.g.,* Mark Nadel et al., *Disability, Welfare Reform, and Supplemental Security Income*, SOC. SEC. BULL., No. 3, 2003-04, at 14, 16 (“The SSI disability test (for individuals aged 18 and older) is the same test used for Social Security Disability Insurance and is quite stringent.”).

³⁶ *See id.* The current substantial gainful activity threshold is listed at Social Security Online, 2010 Social Security Changes, <http://www.socialsecurity.gov/pressoffice/factsheets/colafacts2010.htm> (last visited Feb. 10, 2011). The substantial gainful activity disqualifier does not apply to persons who are blind. *See* Social Security Online, Understanding Supplemental Security Income if You Are Disabled or Blind, <http://www.ssa.gov/ssi/text-disable-ussi.htm#sgact> (last visited Feb. 10, 2011).

³⁷ *See* 20 C.F.R. § 404, subpart P, app. 1 (2010).

³⁸ *See* EDWARD D. BERKOWITZ, *DISABLED POLICY* 194-95 (1987) (noting that disability standard captures individuals who are in their fifties, not yet eligible for Social Security retirement benefits but “prematurely enfeebled.”).

of SSI applications are denied.³⁹ Of those claims that are eventually accepted, nearly a third are approved only after an administrative appeal following initial denial.⁴⁰ As might be predicted given the severity of the standard and the fact that SSI recipients lack the significant work history needed for the higher-benefits, non-means-tested Social Security Disability Insurance Program, a significant proportion of the SSI population has severe mental retardation.⁴¹ Large numbers of recipients have never worked in competitive wage employment, though some work in sheltered or supported employment settings that generate only meager earnings.⁴²

³⁹ Social Security Online, SSI Annual Statistical Report 2008, http://www.socialsecurity.gov/policy/docs/statcomps/ssi_asr/2008/table69.html (reporting 42.9% allowance rate for 18-64 year olds in 2007) (last visited Feb. 10, 2011).

⁴⁰ Nadel et al, *supra* note 35, at 17.

⁴¹ Aaron J. Prero, *Quantitative Outcomes of the Transitional Employment Training Demonstration*, in DISABILITY, WORK AND CASH BENEFITS 273, 274 (Jerry L. Mashaw et al. eds., 1996) (reporting tally of 29% of SSI recipients with a primary disability of mental retardation). By contrast, typical recipients of Social Security Disability Insurance are in their fifties or early sixties, have weak educational backgrounds, and have experienced serious injury or chronic disease. See BERKOWITZ, *supra* note 38, at 194-95.

⁴² See L. Scott Muller et al., *Labor-Force Participation and Earnings of SSI Disability Recipients: A Pooled Cross-Sectional Times Series Approach to the Behavior of Individuals*, SOC. SEC. BULL., No. 1, 1996, at 22, 34-36 (1996). Researchers with the Institute for Community Inclusion analyzed Social Security Administration data from 2007 and reported a somewhat lower fraction of SSI recipients who have “intellectual disabilities,” 21%, as opposed to the 29% indicated *supra* note 41; they state that 15% of SSI recipients with intellectual disabilities work compared to 6% of those with other disabilities. Frank A. Smith & John Butterworth, *Work Incentives and SSI Recipients with Intellectual Disabilities* (July 2009), http://www.statedata.info/datanotes/datanote.php?article_id=286 (last visited Feb. 10, 2011). A Social Security researcher reports a smaller overall percentage of SSI recipients working (5.7%) but confirms that the occupational categories are limited and the earnings received are low. Jeffrey Hemmeter, *Occupations of SSI Recipients Who Work*, SOC. SEC. BULL. No. 3, 2009, at 47, 47 (“According to SSA, 5.7 percent (or 357, 344) of the working-age (18-64) SSI population worked in December, 2007. These individuals tend to have low wages; average earnings from wages were \$597 in December.”) (reference omitted). Hemmeter reports that the most common occupations include “production (16 percent), transportation and material moving (15 percent), and buildings and grounds cleaning and maintenance (15 percent) Many SSI recipients also work in office and administrative support occupations (13 percent)” *Id.* at 54. As he notes, “The wages of individuals in the occupations in which SSI recipients are commonly employed are very low, even among [employees who are] nonrecipients [of SSI].” *Id.* at 62. An analysis of data from 2002 found that 10.3% of SSI recipients between the ages of 18-64 reported earnings. Anne DeCesaro & Jeffrey Hemmeter, *Characteristics of Noninstitutionalized DI and SSI Program Recipients*, Research and Statistics Note. No. 2008-02, Jan. 2008, at 1, 16 (table 6), <http://www.ssa.gov/policy/docs/rsnotes/rsn2008-02.pdf> (last visited Feb. 10, 2011). Some of the discrepancies over the fraction of SSI recipients who work may be due to the sporadic nature of the employment. A snapshot of who is working at any given time can be expected to yield a lower number than a survey of who has worked in the past year. Discrepancies may also be accounted for on the basis of whether the data include recipients who are institutionalized, which may lower the percentage employed.

2. *Developmental Disability and Mental Illness Programs.* Both the federal government and the states have programs that provide a range of assistance for individuals with mental impairments. Of particular importance is the federal-state initiative for Home and Community Based Services (HCBS), also known as the Medicaid Waiver program. This program takes money that Medicaid would otherwise pay for nursing home care and uses it to fund small-group residential and in-home supportive services.⁴³ The services vary from state to state. In Illinois, for example, the program funds Community Integrated Living Arrangements (CILAs), residences with eight or fewer adults with developmental disabilities or mental illness living in a supervised home environment, and as well as intermittent, family, or foster care.⁴⁴

Some states are quite creative in the options they provide under these programs and extend assistance to individuals with physical disabilities as well. To quote a report from the United States Department of Health and Human Services:

To increase community support options, New Jersey started a new Medicaid HCBS waiver that, for the first time in New Jersey, covers self-directed services, assisted living, and adult family care in addition to traditional in-home services. The wide range of services allows older people and people with physical disabilities to move from one type of

⁴³ See Suzanne Crisp et al., *Money Follows the Person and Balancing Long-Term Care Systems: State Examples*, U.S. Dep't of Health & Human Servs., Sep. 29, 2003, at 2, <http://www.cms.hhs.gov/PromisingPractices/Downloads/mfp92903.pdf> ("HCBS Waiver Program allows states to provide a wide array of community-based options for individuals who meet the states' functional eligibility criteria for institutional placement. HCBS Waiver services became more available after 1994 when the Health Care Financing Administration . . . removed the 'cold bed requirement' that required states to document the availability of an empty or closed institutional bed for each waiver participant in order to show a waiver's cost neutrality.") (last visited Feb. 10, 2011).

⁴⁴ Social Security Online, POMS Section SI 00815.052CHI, <https://secure.ssa.gov/poms.nsf/lnx/0500815052CHI> (last visited Feb. 10, 2011) ("The CILA program for individuals having a developmental disability is funded by the Adult Home and Community-Based Services Medicaid Waiver under the Social Security Act 1915 (c).").

service to another seamlessly. For people not eligible for Medicaid, the state started a state-funded in-home services program in which participants pay a sliding scale fee for self-directed and traditional in-home services.⁴⁵ Other states have equally inventive arrangements,⁴⁶ though having an adequate number of slots for non-institutional placements remains an unfulfilled goal.⁴⁷ Wisconsin has created a legislative entitlement to services in the least restrictive setting, but the state remains exceptional in this regard.⁴⁸ Under the Americans with Disabilities Act, a conditional right to services in community settings applies to persons with mental retardation or mental illness who would otherwise be served in institutions.⁴⁹ Local funding may also support community-based assistance for individuals with mental impairments.⁵⁰

3. *Other Disability-Specific Programs.* Additional programs assist people with specific disabilities. The Traumatic Brain Injury program is one example. It provides competitive grants to states to assist children and adolescents with that condition; support

⁴⁵ Crisp et al., *supra* note 43, at 6.

⁴⁶ For general information on this topic, see The Clearinghouse for Home and Community Based Services, <http://www.hcbs.org/> (last visited Feb. 10, 2011). The vitality of these programs depends, of course, on continued state funding to match the Medicaid dollars.

⁴⁷ See, e.g., Unlock the Waiting Lists, Ga. Council on Dev. Disabilities, <http://www.unlockthewaitinglists.com/facts.html> (last visited Feb. 10, 2011).

⁴⁸ This entitlement is subject to various limits, including funding. See WIS. STAT. ANN. § 51.61(1)(e) (2010); see Crisp et al., *supra* note 43, at 12 (interpreting Wisconsin legislation as entitlement to home and community based services).

⁴⁹ *Olmstead v. L.C.*, 527 U.S. 581, 607 (1999) (“States are required to provide community-based treatment for persons with mental disabilities when the State’s treatment professionals determine that such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities.”); see Mark C. Weber, *Home and Community-Based Services, Olmstead and Positive Rights: A Preliminary Discussion*, 39 WAKE FOREST L. REV. 269 (2004) (discussing ADA right to services in community settings).

⁵⁰ See, e.g., Illinois Community Mental Health Act, 405 ILL. COMP STAT. 20/0.1-13 (2010), and County Care for Persons with Developmental Disabilities Act, 55 ILL. COMP. STAT. 105/0.01-13 (2010).

may include in-kind services and income maintenance.⁵¹ There are also provisions in the income tax law that exempt or provide deductions or credits for certain items that are of particular significance to people who have disabilities, sometimes only those with specific disabilities, such as blindness: exclusion of Supplemental Security Income and veterans' disability benefits and of some insurance and damages amounts; a tax credit on disability retirement; the extra standard deduction for people who are blind; exemption of impairment-related work expenses from restrictions on miscellaneous itemized deductions; the deduction for extraordinary medical expenses; and the credit for household and dependent care services.⁵² In a sense, these tax expenditures may be viewed as a form of public welfare for people with disabilities. Then again, nearly every tax exemption, deduction, or credit may be viewed as a form of welfare for someone,⁵³ as may the progressive structure of federal income taxation as a whole.⁵⁴ Nevertheless, the possibility of using the tax system to provide support to people with disabilities should not be ignored, and will be considered further below.⁵⁵

4. *Rehabilitation Services.* Another category of aid for people with disabilities is the cluster of grants and services primarily governed by the Rehabilitation Act of 1973⁵⁶ and funded by the federal government, in some instances with matching state contributions. This category includes such things as job training and education,

⁵¹ 42 U.S.C. §§ 280b-1 to -4 (2006). *See generally* Tenn. Dep't of Health, Traumatic Brain Injury Program, <http://health.state.tn.us/TBI/index.htm> (last visited Feb. 10, 2011) (describing available services).

⁵² For an illuminating discussion of this topic, see Seto & Buhai, *supra* note 5, at 1105-38 (2006) (analyzing impact of various tax provisions on people with disabilities).

⁵³ But not all of these meet the definition, for some deductions and exclusions are regarded instead as a means to more accurately count what amount of money received is actual income available for consumption. *See id.* at 1079.

⁵⁴ *See id.* at 1084 (discussing progressive taxation as income redistribution, whereas exclusions, credits, and deductions are equivalent to off-budget government expenditures).

⁵⁵ *See infra* text accompanying notes 151-53 (discussing proposed Disabled Worker Tax Credit).

⁵⁶ 29 U.S.C. §§ 701-796l (2006).

supported employment of various types, and independent living services programs. It is a close question whether these programs are better classified as education or welfare. Job training seems educational, even though a program may furnish living stipends or grants for the purchase of equipment. Others aspects of rehabilitation programs seem more like public assistance, particularly open-ended supported-employment subsidies or independent-living support.⁵⁷ Means tests are generally not applied to Rehabilitation Act programs, although the assistance usually is available only when other funding streams do not exist, and for many services the sliding scale fees that recipients must pay mimic a means test.⁵⁸

5. *Medical Assistance.* Thirty-two states and the District of Columbia automatically provide Medicaid coverage to recipients of SSI; those provisions cover 80% of all SSI recipients nationally.⁵⁹ The remaining states make SSI recipients eligible for Medicaid if they satisfy a means test based on updated standards applied by the state's aid-to-disabled-persons program before SSI was implemented in 1974.⁶⁰ Under work incentive provisions, it is possible to retain Medicaid eligibility while earning more than the SSI means test would permit for cash assistance, but the individual must previously have received SSI, must still meet the disability standard, must need Medicaid in order to work, and must have a gross income that is below a state threshold, subject to various

⁵⁷ For a comprehensive description of Rehabilitation Services programs, see REHABILITATION SERVS. ADMIN., U.S. DEP'T OF EDUC., ANNUAL REPORT FISCAL YEAR 2005 (2009), *available at* <http://www2.ed.gov/about/reports/annual/ras/2005/ras-2005-annual-report.pdf>.

⁵⁸ See 34 C.F.R. § 361.54 (2010) (establishing rules for financial participation of recipients of vocational rehabilitation services based on financial need).

⁵⁹ DeCesaro & Hemmeter, *supra* note 42, at 2. Of course, some of these recipients are persons who satisfy the means test and are over 65 but do not have a disability.

⁶⁰ 42 U.S.C. § 1396a(f) (2006). This provision is frequently referred to by the relevant section number of Public Law No. 92-603, 86 Stat. 1329 (1973), section 209(b).

individualized adjustments.⁶¹ Medicaid is funded partly by the federal government and partly by a state match, as determined by an elaborate formula.⁶² As noted above, Medicaid provides funding for a wide range of independent living services, making eligibility for it even more important than the necessity of meeting immediate medical needs would suggest.

6. *Non-Disability-Specific Assistance.* There also exists a baseline of welfare programs that do not have disability-specific qualifications. Because the disability standard for SSI is extreme, and many individuals, particularly those with mental impairments, have difficulty navigating the disability-specific system, these programs serve numerous people who would be considered disabled by an ordinary observer.⁶³ Poor people caring for dependent children may receive Temporary Assistance for Needy Families (TANF), generally time-limited cash support that is funded partly by the federal government and partly by the states and is the successor to the Aid to Families with Dependent Children (AFDC) program.⁶⁴ Some states and localities make temporary or longer term assistance available to individuals simply on the basis that they are in need; these programs are often referred to as general assistance,⁶⁵ or, if tightly time-limited,

⁶¹ 42 U.S.C. § 1382h(b) (2006). *See generally* Social Security Online, Continuing Medicaid Eligibility (Section 1619(B)), at <http://www.ssa.gov/disabilityresearch/wi/1619b.htm> (last visited Feb. 10, 2011) (listing thresholds).

⁶² For an updated list of state matching percentages, see Henry J. Kaiser Family Foundation, Federal Matching Assistance Percentage, <http://www.statehealthfacts.org/comparetable.jsp?ind=184&cat=4&rgnhl=25> (last visited Feb. 10, 2011).

⁶³ *See* Nadel et al., *supra* note 35, at 14 (“Various surveys since its enactment show that between 32 percent and 44 percent of TANF [Temporary Assistance for Needy Families] recipients . . . report having impairments or chronic health problems.”) (collecting and analyzing studies); *see also* Cydney Gillis, Gregoire Signs General Assistance Reform Bill, 3,600 People to Be Cut, Real Change, <http://www.realchangenews.org/index.php/site/archives-blog/4015/> (last visited Feb. 10, 2011) (describing planned renaming of Washington State general assistance program as “Disability Lifeline”).

⁶⁴ 42 U.S.C. §§ 601-679c (2006).

⁶⁵ *See, e.g.*, Cal. Dep’t of Soc. Servs., General Assistance or General Relief, <http://www.dss.cahwnet.gov/cdssweb/PG132.htm> (last visited Feb. 10, 2011) (describing county system of general assistance); Minn. Dep’t of Human Servs., General Assistance Program,

transitional assistance.⁶⁶ The Supplemental Nutrition Assistance Program (SNAP) is the successor to food stamps and provides support for food purchases by poor people.⁶⁷

Various other in-kind subsidies include housing aid and other social services programs.⁶⁸

Of special relevance is the Earned Income Tax Credit (EITC), which provides annual cash assistance from the Internal Revenue Service for people who work, effectively functioning as a limited negative income tax that phases out as individuals' earnings increase.⁶⁹ The EITC rewards work effort by those whose power to command market wages is low. It also makes up for some of the regressiveness of the Social Security payroll tax, without explicitly breaking the connection between Social Security contributions and benefits that is part of the philosophy of social insurance.⁷⁰

B. The Contrast Between Welfare and Social Insurance Programs

The discussion above excludes Social Security Disability Insurance (SSDI) and Workers Compensation. These social insurance programs provide income for persons who have lost it due to disability, but they differ from welfare in that the recipient contributed through taxes to a public fund so as to insure against the risk of disability (or in the case of workers compensation, had the employer provide payments or coverage in lieu of taxes). They are thus closely analogous to private insurance, but for the fact that

http://www.dhs.state.mn.us/main/idcplg?IdcService=GET_DYNAMIC_CONVERSION&RevisionSelectionMethod=LatestReleased&dDocName=id_002558 (last visited Feb. 10, 2011) (describing state system);

⁶⁶ See, e.g., Dep't of Human Servs., General Assistance/Transitional Assistance,

<http://www.dhs.state.il.us/page.aspx?item=30368> (last visited Feb. 10, 2011) (describing system of temporary benefits).

⁶⁷ 7 U.S.C. §§ 2011-2036 (2006).

⁶⁸ See generally Connecting the Disability Community to Information & Opportunities, Disability*gov, <http://www.disability.gov/> (last visited Feb. 10, 2011) (providing list and links for relevant programs); Accessible & Affordable Housing Options, Disability*gov, <http://www.disability.gov/housing> (last visited Feb. 10, 2011) (describing housing assistance).

⁶⁹ 26 U.S.C. § 32 (2006).

⁷⁰ See generally Francine J. Lipman, *Enabling Work for People with Disabilities: A Post-Integrationist Revision of Underutilized Tax Incentives*, 53 Am. U.L. Rev. 393, 443 (2003) (discussing origins and purposes of EITC).

the premiums are collected by the government in taxes or their equivalent and benefits are set by legislation.⁷¹ As with private insurance, no means test applies, and the level of return in the form of payments is roughly proportional to the amounts paid in.⁷² To qualify for SSDI, a person must have worked for a sufficient period of time in his or her lifetime and in the years immediately before the onset of disability.⁷³

Social insurance acts as a mandatory employee benefit and a work incentive.⁷⁴ It also makes up for a market failure: At the time of creation of the program, few private insurers offered disability insurance due to fear of adverse selection.⁷⁵ SSDI benefits are usually much higher than SSI amounts.⁷⁶ In earlier work, I have pointed out that

⁷¹ See Weber, *supra* note 25, at 578-80 (collecting sources); Weber, *supra* note 14, at 924-28, 930 (collecting additional sources).

⁷² There are maximums, minimums, and a modest redistribution to aid the lowest earners. See Weber, *supra* note 25, at 580-81

⁷³ See 42 U.S.C. § 414 (2006). See generally Social Security Online, Understanding Supplemental Security Income Social Security Entitlement, <http://www.ssa.gov/ssi/text-entitle-ussi.htm> (last visited Feb. 10, 2011) (discussing work requirements for benefits). A person who is the minor child or the spouse of an eligible individual may also receive benefits, as may some other relations. Younger workers who become disabled may meet a lower work history threshold. People who would be eligible for benefits if they became disabled today are considered “fully and currently insured.” About three-quarters of working-age Americans have this insured status. Kalman Rupp et al., *Disability Benefit Coverage and Program Interactions in the Working-Age Population*, SOC. SEC. BULL., No. 1, 2008, at 1, 9 (2008) (relying on 1996 data).

⁷⁴ EDWARD D. BERKOWITZ, ROBERT BALL AND THE POLITICS OF SOCIAL SECURITY 23 (2005). Professor Evelyn Brodtkin makes the important point that welfare programs can nevertheless be a substitute for social insurance for those individuals who work but whose employment is so unstable that they never quite qualify for programs such as unemployment insurance. See Evelyn Z. Brodtkin, *Requiem for Welfare*, DISSENT, Winter, 2003, available at <http://www.dissentmagazine.org/article/?article=532> (“One of the little appreciated virtues of the old welfare is that it served as a sort of unemployment insurance for these lower wage workers excluded from regular unemployment insurance by their irregular jobs. Welfare cushioned the layoffs, turnover, and contingencies that go with the territory.”).

⁷⁵ BERKOWITZ, *supra* note 38, at 52-53; John R. Kearney, *Social Security and the “D” in OASDI: The History of a Federal Program Insuring Earners Against Disability*, SOC. SEC. BULL., No. 3, 2006, at 1, 3 (2006). Modern private disability insurance generally wraps around the government program and requires application for government benefits.

⁷⁶ The average monthly payment to disabled workers was \$1064 in 2009. In addition, benefits may be available for spouses, children, and survivors. See Social Security Online, Fast Facts & Figures About Social Security, 2009, http://www.ssa.gov/policy/docs/chartbooks/fast_facts/2010/fast_facts10.html#oasdi (last visited Feb. 10, 2011).

providing social insurance is generally consistent with the civil rights approach to disability, despite some surface contradictions.⁷⁷

III. Disability Welfare Reconsidered in Light of the Civil Rights Approach

What would application of the civil rights approach say about public welfare and potential changes to disability-related welfare programs? That question may be answered at a general or a more specific level.

A. General Observations from Applying the Civil Rights Approach

At the most general level, it may be useful to trace disability welfare's connection to the medical model, to ask whether welfare on the basis of disability is compatible with the civil rights approach at all, and to consider recent welfare reform efforts in light of civil rights thinking.

1. *Disability-Related Welfare and the Medical Model.* Disability-related welfare relies heavily on medical model ideas.⁷⁸ The qualifying standards for benefits are framed in medical terms, with listings of medical conditions, even specification of medical test results.⁷⁹ The major programs originated long before the social model gained currency.⁸⁰ Welfare constitutes the alternative to employment for those deemed medically incapable

⁷⁷ See Weber, *supra* note 25, at 592-600. But see Sagit Mor, *Between Charity, Welfare and Warfare: A Disability Legal Studies Analysis of Privilege and Neglect in Israeli Disability Policy*, 18 YALE J.L. & HUMAN. 63, 63-64 (2006) (challenging divide between social insurance programs and general disability based welfare on ground that preferential treatment of people who are veterans or who have work histories reinforces hierarchies based on negative social attitudes towards disability).

⁷⁸ See DEBORAH A. STONE, *THE DISABLED STATE* 90-117 (1984) (tracing history of reliance on medical determinations in disability welfare).

⁷⁹ See Frank S. Bloch, *Medical Proof, Social Policy, and Social Security's Medically Centered Definition of Disability*, 92 CORNELL L. REV. 189, 225 (2007) (noting pervasive and increasing focus on medical proof of disability in Social Security standards). Even the functional disability tests that come into play when a claimant does not meet the medical listings are merely an adaptation of a medically based standard. See ERKULWATER, *supra* note 18, at 227 ("While functionalism folded into disability certification some consideration of social context and individual disadvantage, it was essentially an adaptation of the medical perspective."). The ADA's definition of impairment, of course, is also a medical concept, although the statute broadens the concept of disability beyond the medical by including record of impairment and regarded as having an impairment. See 42 U.S.C. § 12102(2)(B)-(C) (2006).

⁸⁰ See generally Weber, *supra* note 14, at 924-30 (detailing history of federal disability programs).

of participating in the larger society by working.⁸¹ SSI fulfills this description in its requirement that the applicant withdraw from the labor force completely and not engage in substantial gainful activity.⁸²

Unlike social insurance programs, which society views as an earned entitlement, welfare conjures images of charity and begging.⁸³ People support others because of feelings of pity, but it is precisely those feelings of pity which the disability rights movement has targeted as an obstacle to true social equality.⁸⁴ Disability-related welfare could in this sense be viewed as the extreme manifestation of the medical model and a prime candidate for change.

2. *Applying the Social Model Thoughtfully.* An unreflective application of a social model or civil rights approach might yield the conclusion that all attention should be directed to eliminating prejudicial attitudes and environmental barriers. Once those problems are addressed, disability-related welfare can fade away or be folded into the general social safety net, such as it is.⁸⁵ But even the most limited civil rights interpretation would be incomplete if it failed to recognize and address the legacy of discrimination—underinvestment in education, diminished expectations, the absence of

⁸¹ See Stein & Stein, *supra* note 14, at 1206 (“Historically, society viewed persons with disabilities through a medical model that considered ‘handicapped’ individuals as naturally excluded from mainstream culture. Due to this medical based pathology disabled persons have been . . . systematically excluded from social opportunities, as in . . . receiving social welfare benefits in lieu of employment.”); see also Lance Liebman, *The Definition of Disability in Social Security and Supplemental Security Income: Drawing the Bounds of Social Welfare Estates*, 89 HARV. L. REV. 833, 843 (1976) (“[T]he medical disability requirement becomes an attempt to draw a line between voluntary and involuntary employment.”).

⁸² It shares this characteristic with Social Security Disability Insurance. In both programs, however, the description is not complete due to work incentives for people who are current recipients of benefits. See *infra* text accompanying notes 114-18 (discussing work incentives).

⁸³ As tenBroek and Matson observed, modern public welfare is the direct descendent of the almshouse. See tenBroek & Matson, *supra* note 4, at 811.

⁸⁴ Hence the title of Joseph P. Shapiro’s book, *NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT* (1993) (describing origin of disability rights movement and struggle for passage of legislation).

⁸⁵ See Diller, *Dissonant Disability Policies*, *supra* note 16, at 1030, 1082.

infrastructure—that disables people with physical and mental impairments,⁸⁶ utterly apart from whatever effects the impairments themselves might impose.⁸⁷

In addition, even the most rigid version of a civil rights approach must bow to the fact that anti-discrimination efforts do not always succeed, or at least do not succeed quickly. Twenty-one years after the ADA, disability discrimination remains, and employment at a living wage remains elusive for many.⁸⁸ It is perfectly consistent with civil rights to provide assistance to people who are the victims of ongoing discrimination. I have made the point elsewhere that welfare often functions as a form of insurance against discrimination.⁸⁹ For example, Aid to Families with Dependent Children supported mothers who did not have other sources of support and who faced pervasive sex discrimination in obtaining employment.⁹⁰ As social perceptions about the prevalence of sex discrimination altered, political support for providing anything but

⁸⁶ Professor Stein notes with respect to underinvestment, “Like other self-fulfilling prophesies, this is a Catch-22: certain workers are disadvantaged in the workplace because they are believed to have lower net productivity values. In turn, those workers invest less in their own human capital because they believe that they will be disadvantaged in the workplace.” Michael Ashley Stein, *Disability Human Rights*, 95 CAL. L. REV. 75, 116 n.202 (2007).

⁸⁷ In this vein, tenBroek and Matson wrote of disability and impairment becoming “isomorphic” in the sense that “the ‘handicap’ of being blind, for example, should correspond to the visual and physical limitations of blindness, without the superimposition of additional difficulties.” tenBroek & Mattson, *supra* note 4, at 814. Yet they recognized the continued need for disability-specific welfare programs and put forward proposals for improving them. *See id.* at 836 (discussing work incentive income exemptions), 840 (“[O]ne of the most notable developments in thirty years of public assistance has been the failure of its categories to wither away [P]ublic assistance [is] a long-range system with an independent rationale and a constructive function Public assistance must be directed toward opportunity as well as security—geared to employment and self-support as well as to relief.”).

⁸⁸ *See supra* text accompanying notes 12-13 (discussing uncertain effects of ADA on employment and low success rate in employment litigation)

⁸⁹ Weber, *supra* note 25, at 591 (also noting role of old-age assistance as insurance against age discrimination and collecting authorities).

⁹⁰ Obviously, this account is by no means a complete explanation for the rationale of welfare for families with dependent children. For a provocative look at the origins of federally supported assistance to mothers see THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES* 311-20 (1992). For an account of the extent to which the most blatant sex discrimination was taken for granted less than a generation ago, see GAIL COLLINS, *WHEN EVERYTHING CHANGED: THE AMAZING JOURNEY OF AMERICAN WOMEN FROM 1960 TO THE PRESENT* (2009).

short-term assistance to single mothers withered, and with it, the AFDC program.⁹¹ It is hardly a retreat from anti-discrimination efforts to recognize that public assistance on the basis of disability needs to continue as long as discrimination on the basis of disability persists.⁹²

As a more basic matter, however, the civil rights approach does not have to be a rigid or traditional anti-discrimination construct. It employs an analogy to civil rights against race and sex discrimination, but it is not in its thrall. Equality lies in treating what is different differently as much as in treating what is the same the same. Sources that advocate moving past the civil rights approach assume that “reasonable” accommodations are all that can be demanded.⁹³ It is as though the ADA as drafted is as far as the civil rights goes.

But the civil rights approach does not have to stop at reasonableness’ edge, even if the analogy to race or to sex discrimination becomes gradually more attenuated as one moves beyond the limits of reasonable accommodation.⁹⁴ “Reasonable” accommodation continues to use the non-disabled person as the norm, allowing only a restricted range of

⁹¹ See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996). In the absence of a hardship exception (which no more than 20% of a state’s recipients may be granted), an individual may receive aid for no more than five years in his or her lifetime. 42 U.S.C. § 608(a)(7)(A), (C) (2000).

⁹² See Jacobus tenBroek & Richard P. Wilson, *Public Assistance and Social Insurance—A Normative Evaluation*, 1 UCLA L. REV. 237, 248-49 (1954) (discussing role of public assistance in compensating people kept out of labor market by attitudes of disability discrimination). Of course, the availability of social palliatives may diminish support for more fundamental solutions, but benefits are low enough that plenty of incentive remains to challenge discrimination when it occurs. See Weber, *supra* note 25, at 596.

⁹³ See Samuel R. BAGENSTOS, *LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT* 8-10 (2009); Stein & Stein, *supra* note 14, at 1208-12; Weber, *supra* note 14, at 907-08 (collecting additional sources to date).

⁹⁴ Stein and Stein state that the social model is tied “to a rigid concept of formal justice that narrowly treats similarly situated people as alike,” and does not support modifications beyond those conventionally deemed reasonable, but they suggest that the civil rights agenda could embrace second-generation rights that include positive equal opportunity measures. Stein & Stein, *supra* note 14, at 1210. In my view, the problem is neither with the social model or the civil rights model, but rather with the limit of “reasonableness” evaluated from the standpoint of those without disabilities.

departures from that norm.⁹⁵ That is hardly civil rights for persons with disabilities and it is certainly not equality for persons with disabilities. The norm lies somewhere between disability and non-disability. Better yet would be to dispense with the norm altogether.⁹⁶ In a society not relying on norms, the emphasis would be placed on relationships rather than on deviations from some standard.⁹⁷ To return to the social model's basics, the relationship that needs exploration is that between the individual who has a disability and the people who have power over the physical and attitudinal environment that currently limits the potential of persons with disabilities.

At the most fundamental level, what needs to be recognized is that the welfare system itself is part of that human-created environment, and stereotyped attitudes towards people with disabilities shape it just as they do the wage economy and other aspects of society.⁹⁸ More progressive attitudes would reshape welfare, but would not necessarily abandon it or even curtail it, no more than they would other social institutions, such as the market or the legal system, which are also affected by prejudiced attitudes.⁹⁹ Welfare

⁹⁵ See O'BRIEN, *supra* note 6, at 137 (discussing application of able-bodied norm in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979))

⁹⁶ See MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* 123-224 (1991); cf. LENNARD J. DAVIS, *ENFORCING NORMALCY: DISABILITY, DEAFNESS, AND THE BODY* 24 (1995) (stating that idea of norms developed in nineteenth century, displacing convention of measuring individuals against ideals that no human, disabled or not, could achieve).

⁹⁷ See MINOW, *supra* note 96, at 224.

⁹⁸ Paul Longmore made the general point with regard to disability related benefits programs: "[I]n actual practice, programs have usually operated on the assumption that people with every sort of disability are incapable and irresponsible regarding management of their own lives. In tandem, this presumed personal and social incompetency, along with the putative moral defectiveness of disabled people make necessary, make inevitable, their placement under professional supervision." PAUL K. LONGMORE, *Why I Burned My Book*, in *WHY I BURNED MY BOOK AND OTHER ESSAYS ON DISABILITY* 230, 242 (2003). For an engaging discussion of the role of fair hearings in the contest between caseworker control and efforts of welfare recipients to maintain dignity, see Felicia Kornbluh, *Redistribution, Recognition, and Good China: Administrative Justice for Women Welfare Recipients Before Goldberg v. Kelly*, 20 YALE J.L. & FEMINISM 165 (2008).

⁹⁹ Prejudice against people with disabilities long predates welfare programs for them. Professor Bjorn Hvinden states, "[O]ne can argue that categorization, exclusion and segregation as societal reactions to persons who are not conforming with or fulfilling specific social norms have existed much longer than modern forms of redistributive disability provisions," thus raising the question whether welfare programs

programs may help promote autonomy, security, and personal dignity, all conditions that the disability rights movement is striving to achieve. As Norwegian social researcher Bjorn Hvinden points out, there are “positive gains for people with disabilities of having clear entitlements to income transfers and other redistributive disability provisions, *e.g.* in terms of creating conditions for personal fulfillment, autonomy and social participation.”¹⁰⁰ Moreover, an increase in a person’s income usually raises that person’s esteem in the eyes of others,¹⁰¹ and there is no reason to believe that this is any less so for people with disabilities or if the income increase derives from better designed public programs.¹⁰²

3. *The Social Model and Welfare Reform.* Thinking associated with the social model and the disability rights movement—specifically, the goal of maximizing choice, autonomy, privacy, and dignity—contrasts with a single-minded focus on work incentives, which is the character of recent welfare reform for persons with disabilities. The aim of disability rights as a movement is not integration into the workforce for integration’s sake but integration into society for the sake of dignity and equality of

affect attitudes or simply reflect them. See Bjorn Hvinden, *Redistributive and Regulatory Disability Provisions: Incompatibility or Synergy?*, in 1 EUROPEAN YEARBOOK OF DISABILITY LAW 5, 14 (Gerard Quinn & Lisa Waddington eds., 2009).

¹⁰⁰ *Id.* at 15; see also FELICIA KORNBLUH, THE BATTLE FOR WELFARE RIGHTS 50 (2007) (discussing support for guaranteed annual income based on rights to dignity and social inclusion).

¹⁰¹ This idea is sometimes traced to Max Weber, who wrote extensively about social status. See Yoram Weiss & Chaim Fershtman, *Social Status and Economic Performance*, 42 EUR. ECON. REV. 801, 804 (1998), available at http://dinhvutrangngan.com/teaching/Social_Economics/Social_Interaction/Weiss%20Fershtman_1998.pdf (“Weber considered ‘status situation’ (claim for honor) and ‘market situation’ (claim for money income) as two interlocked systems of rewards. Money brings status and status brings economic power. Yet, the two are quite distinct . . .”) (citing MAX WEBER, *ECONOMY AND SOCIETY* 305 (Guenther Roth & Claus Wittich eds., Univ. of Cal. Press 1978) (1922)).

¹⁰² See PAUL H. DOUGLAS, *SOCIAL SECURITY IN THE UNITED STATES* 100 (2d ed. 1939) (noting opposition by Southern congressmen to national standards for federally supported state old-age welfare due to fear that higher payments would raise social status of African-American recipients).

people with disabilities.¹⁰³ Individuals should not be valued merely for their role in the mainstream wage economy; instead, they deserve to be honored for their intrinsic value as human beings.¹⁰⁴ Even if some individuals can never throw off enough marginal production value under current economic arrangements to justify their hiring to a potential employer, they should not be excluded from participation in the community's bounty as a consequence.¹⁰⁵ People who sell their labor in the traditional way frequently

¹⁰³ Professor Ruth Colker, for example, stresses anti-subordination as the guiding principle. Ruth Colker, *Anti-Subordination Above All: A Disability Perspective*, 82 NOTRE DAME L. REV. 1415 (2007). Although I disagree with Colker's position regarding separate education and remain skeptical of some other applications she makes of her ideas, I believe that her broader point that distinct social treatment often promotes equality is correct and significant. See Mark C. Weber, *A Nuanced Approach to the Disability Integration Presumption*, 156 U. PA. L. REV. PENNUMBRA 174 (2007) (responding to Colker's challenge to presumptive integration in educational settings of children with disabilities with children who do not have disabilities). Some additional sources are critical of integration as a means to the broader goals of dignity and equality. See Susan Wendell, *Toward a Feminist Theory of Disability*, in THE DISABILITY STUDIES READER 260, 261 (Lennard J. Davis ed., 1997); see also CHARLTON, *supra* note 15, at 127 (quoting Carol Gill) ("The struggle shouldn't be for integration, but for power. Once we have power, we can integrate whenever we want."); cf. Colker, *supra* at 1417 ("An absolutist integrationist perspective disserves the disability community by supporting an inappropriately high threshold for the development and retention of disability-only services and institutions."). Writers on deafness frequently question the value of integration and express concern over its threat to the culture surrounding deafness and expression through sign language. See, e.g., Harlan Lane, *Constructions of Deafness*, in THE DISABILITY STUDIES READER, *supra*, at 153, 161. But see Bonnie P. Tucker, *Deafness—Disability or Subculture: The Emerging Conflict*, 3 CORNELL J.L. & PUB. POL. 265 (1994) (criticizing position).

¹⁰⁴ Stein, *supra* note 86, at 106 ("Ensuring the dignity of disabled people . . . entails recognizing them for their intrinsic value as people and not as a means toward other ends. This dignitary perspective compels societies to acknowledge that persons with disabilities are valuable because of their inherent human worth rather than their net marginal product."); see ROD MICHALKO, THE DIFFERENCE THAT DISABILITY MAKES 156 (2002) ("Industrialization refigures participation in society as contribution to it. Those interpreted as not possessing the ordinary body-of-functions are judged unable to make a living and thus unable to contribute to society."); Iris Marion Young, *Autonomy, Welfare Reform, and Meaningful Work*, in THE SUBJECT OF CARE 40, 42 (Eva Feder Kittay & Ellen K. Feder eds. 2002) ("[Current] welfare practice relies on [the] positive value that everyone should make a social contribution, but . . . it wrongly reduces making a social contribution to having a job."); Sunny Taylor, *The Right Not to Work: Power and Disability*, MONTHLY REV., March 2004, <http://www.monthlyreview.org/0304taylor.htm> ("Western culture has a very limited idea of what being useful to society is. People can be useful in ways other than monetarily. . . . Disabled people have to find meaning in other aspects of their lives . . ."); see also Sheena Brown, *Back to Normal? Reclaiming Productive Citizenship – A Familiar Conversation*, 5 REV. DISABILITY STUD. 27 (2009) (noting extreme effort exerted by individual with disability to conform to standards of normal behavior and absence of economic reward; further noting role of consumption of goods and services in driving economy).

¹⁰⁵ Taylor, who has multiple disabilities to her limbs, cites her own situation: "I, like many people, will never make a good waitress, secretary, factory worker, or bus driver (unless there were massive and expensive adaptations to the bus I was driving) It is hard to think of a vocation where my contribution would be desirable in a cost-benefit analysis." Taylor, *supra* note 104. See generally MICHALKO, *supra* note 104, at 21-22 (quoting Joseph Stubbins) ("The toughest item on the agenda of disability is that

give far less than they receive in pay, benefits, and status,¹⁰⁶ and often the rewards they receive from work are in no small part due to the efforts of others.¹⁰⁷ People living off inherited wealth or the generosity of rich relatives have a place as full members of society.¹⁰⁸ A narrow focus on employment as normalization would distort the current welfare system for people who have disabilities.¹⁰⁹

Welfare innovation based on the civil rights approach contrasts with the temporary-benefits, just-long-enough-to-fix-the-dysfunctional-recipient attitude of the welfare reform movement of the 1980s and 1990s. One of the hallmarks of welfare reform has been to make benefits time limited. A lifetime cap of five years applies to the

modern America has no need for most disabled persons.”); *id.* at 58-59 (paraphrasing Paul Abberly) (“[A]pproaches to . . . disability . . . that stress entree into the labor market and work force for disabled people maintain current dominant values of social organization and work as well as of disability.”).

¹⁰⁶ The multi-million dollar annual salaries of some finance executives during the period before the recent recession have brought this reality into sharp relief. *See generally* Stephen Labaton & Vikas Bajaj, *In Curbing Pay, Obama Seeks to Alter Corporate Culture*, N.Y. TIMES, Feb. 4, 2009, <http://www.nytimes.com/2009/02/05/us/politics/05pay.html?scp=3&sq=executive%20salaries%20compensation&st=cse> (“In announcing executive pay limits on Wednesday, President Obama is trying to hold the financial industry accountable to taxpayers while aiming to change an entrenched corporate culture that endorses outsize bonuses and perks that often bear little relationship to corporate performance.”).

¹⁰⁷ Perhaps the clearest example for a legal audience is that of a law firm partner who profits from the work of associates, but other instances abound. *See, e.g.,* Jane Rutherford, *Duty in Divorce: Shared Income as a Path to Equality*, 58 FORDHAM L. REV. 539, 560-61 (1990) (describing the contribution of one spouse to the ability to earn of other spouse: “Certain tasks need to be done: laundry, cooking, cleaning, childcare and earning. There is a financial incentive to shift homemaking jobs to the lower earner to maximize the earning potential of the unit. Indeed, the economic welfare of the family unit may depend on the willingness of family members to provide services to each other at no charge.”).

¹⁰⁸ Maybe more than full members, as the celebrity of Paris Hilton demonstrates. Complaints about the idle rich are rarely heard these days. *Cf.* Noah Zatz, *What Welfare Requires from Work*, 54 UCLA L. REV. 373, 389 n.64 (2006) (“[F]ar more concern is directed at the potential earnings disincentive effects of government transfers than at the analogous possibility that inheritance or intrafamilial transfers will diminish work effort.”). The popularity of the effort to abolish the estate tax also demonstrates the enduring social acceptability of living off the wealth generated by others so long as the transfer payments fall outside the welfare system.

¹⁰⁹ *See* ERKULWATER, *supra* note 18, at 242 (“Orienting the focus of disability policy so squarely on the right to equal access and to work to the exclusion of the right to welfare risks making gainful employment and economic self-sufficiency the overriding measure of personal worth. This could have the unintended and unfortunate effect of devaluing and ‘maintaining and intensifying the exclusion’ of those who will never join the productive economy.” (internal quotation of Paul Abberley)). Professor Kornbluh has noted that the recent emphasis on anti-poverty policies designed to make work pay embody a bias against disability and gender “inherent in a wage-work-centric approach to preventing and healing the social problem of poverty.” Felicia Kornbluh, *Is Work the Only Thing That Pays? The Guaranteed Income and Other Alternative Anti-Poverty Policies in Historical Perspective*, 4 NW. J. L. & SOC. POL’Y 61, at *5 (2009).

vast number of TANF recipients,¹¹⁰ and many states have imposed shorter limits.¹¹¹

Where they exist, state general assistance programs are frequently limited to a period of a few months, after which there is no public support at all.¹¹² Just as people with disabilities have come to recognize that many disabling conditions are susceptible only to societal interventions and not medical ones, welfare should adjust to the fact that many individuals need long-term assistance, not just temporary support. Disability is not an obstacle to be overcome in a transformative moment, but rather a condition to be lived with, one whose negative impact on one's life depends on the response of society, including the society's support systems.¹¹³ Historically, disability-related welfare programs have provided long-term assistance. Disability rights ideas entail resistance to the implied fix-the-individual message of "reforms" that would impose time limits on aid.

¹¹⁰ 42 U.S.C. § 608(a)(7)(A) (2006) (establishing 60 month limit on TANF assistance, subject to limited exceptions).

¹¹¹ See Brodtkin, *supra* note 74 (reporting that in nineteen states, lifetime limits for TANF receipt are less than federal maximum of sixty months).

¹¹² See, e.g., General Relief/General Assistance, Placer County, Cal.

http://www.placer.ca.gov/Departments/hhs/public_assistance/GeneralRelief.aspx (last visited Feb. 10, 2011) (describing three-month limit on aid for each twelve month period).

¹¹³ See MICHALKO, *supra* note 104, at 61-71 (describing "social suffering" of living with disability in world as currently constituted).

Work incentives are not necessarily a bad thing, and may be a very good thing.¹¹⁴ In particular, the ability to retain some benefits—and even more importantly for many people, Medicaid eligibility—while working is critical to people currently on SSI or other programs who are trying to reintegrate into the labor force.¹¹⁵ Existing work incentives, however, apply only to people who are already on welfare programs. There is no provision for obtaining assistance while staying on the job, perhaps at reduced hours or diminished productivity and earnings while experiencing an episodic or worsening physical or mental condition.¹¹⁶ Presumably, policy makers are worried that too many people who are currently among the working wounded would take advantage of such programs. But the present arrangements, by forbidding eligibility for those making even

¹¹⁴ The connection to public aid programs is attenuated, but one work incentive that would be beneficial would apply to employers—imposing job set-asides on larger companies for people with severe disabilities. See Jerry L. Mashaw, *Against First Principles*, 31 SAN DIEGO L. REV. 211, 232 (1994) (“I would propose . . . explicit quota requirements for employers with a market in ‘rights to discriminate’ against the disabled. In broad outline this scheme is quite simple: estimate the number of disabled workers who might with reasonable accommodation be employed; divide that number by the total number of workers in the economy; and require that each employer hire that percentage of its workforce from the pool of ‘disabled’ workers. Employers who fail to hire their share of disabled workers would have to buy a waiver from employers who are employing more than their share.”). Mashaw defends the proposal against the position that it reinforces ideas of pity or charity, stating that the policy takes into account the needs and abilities of those other than the modal, able-bodied human; to pay attention to those needs is “‘simple justice,’ not charity or pity.” *Id.* at 235; see also Mark C. Weber, *Beyond the Americans with Disabilities Act: A National Employment Policy for People with Disabilities*, 46 BUFF. L. REV. 123, 166-74 (1998) (proposing job set-asides and collecting sources on programs in Europe and elsewhere). Professor Bagenstos reiterates his opposition in recent writing. See BAGENSTOS, *supra* note 93, at 137. On the other hand, Professor Erkulwater writes positively of such programs and finds them well aligned with an approach to disability that focuses on removing barriers and maximizing integration. See ERKULWATER, *supra* note 18, at 236-37; see also Stein & Stein, *supra* note 14, at 1227-37 (endorsing job quota programs).

¹¹⁵ Of course, if the recent health care reform legislation succeeds in making affordable private insurance available to more people with disabling conditions, Medicaid eligibility might become less crucial than it is now. See generally Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1311, 124 Stat. 119, 173 (2010) (establishing expanded private coverage options).

¹¹⁶ Individuals with disabilities who return to work after having received Social Security Disability Insurance typically report working at jobs for a different employer, with a lower level of exertion, for fewer hours, and for less pay, than the jobs they had before. Evan S. Schechter, *Industry, Occupation, and Disability Insurance Beneficiary Work Return*, SOC. SEC. BULL., No. 1, 1999, at 10, 15. This suggests that if partial support were provided while a person is still working, the transition to full benefits could be avoided altogether for some individuals as they moved to less demanding but lower paying roles in the same workplace. People returning to employment report that accommodations from employers are of critical importance, and that the most important accommodations are assistance with the work, training in new skills, special equipment, and schedule modifications. *Id.* at 18-19.

\$980 a month, force people to stop working altogether in order to obtain needed support. Studies indicate that once a person has quit working, workforce reintegration becomes increasingly more difficult.¹¹⁷ On the other hand, there often is much more flexibility in postponing departure from the labor force if adequate financial and in-kind supports are provided.¹¹⁸

B. Specific Reforms Suggested by the Civil Rights Approach

Beyond these general observations, there are some specific points to note about the impact of applying a civil rights paradigm to welfare initiatives.

1. *In-Kind Support.* Programs that pay for in-home attendants and for specialized housing, recreational, and employment support fit well with a social approach to disability. They change the environment in which people with disabilities operate into one that is more accommodating, more accessible. They permit integration into community living settings and work. In particular, attendant services comport with the realization that rehabilitation to allow people with disabling conditions to do things for

¹¹⁷ See Am. C. Occupational & Envtl. Med., *Preventing Needless Work Disability by Helping People Stay Employed*, 48 J. ENVTL. MED. 972, 976 (2006) (“[T]he odds for return to full employment drop to 50/50 after 6 months of absence. Even less encouraging is the finding that the odds of a worker ever returning to work drop 50% by just the 12th week. The current practice of focusing disability management effort on those who are already out of work rarely succeeds.”). Much of the responsibility lies with employers to provide accommodations to enable workers to stay working, see *id.* at 980-81 (commenting on need for employers to modify work to accommodate workers with impairments), but welfare systems could help solve the problems with, for example, partial disability benefits.

¹¹⁸ Accommodations in the form of reduced hours, lighter workloads, and modified equipment keep people working, often for years, when they would otherwise quit and claim disability benefits. Marjorie L. Baldwin & William G. Johnson, *Dispelling the Myths about Work Disability*, in NEW APPROACHES TO DISABILITY IN THE WORKPLACE 39, 52 (Terry Thomason et al. eds. 1998) (collecting and analyzing sources); see also Richard V. Burkhauser, *Post-ADA: Are People with Disabilities Expected to Work*, ANNALS AM. ACAD. POL. & SOC. SCI., Jan. 1997, at 71, 79-80 (collecting studies to show that accommodations are unlikely to induce persons currently receiving disability benefits to return to work but may have effect of prolonging work careers of those with disabilities). Nevertheless, as Professor Zatz notes, programs that have time-limited incentives for current recipients of aid who become employed at least theoretically reduce transfer payments over the long term as income disregards and fractional benefits reductions phase out for a particular recipient. Zatz, *supra* note 108, at 409. Given the progressive nature of many disabilities and the strictness and age-relatedness of the standards for current disability assistance programs, however, it is less than clear that these effects will be achieved for large numbers of people with disabilities.

themselves may be less important than allowing the person with the disability to direct someone else to accomplish the task in a shorter period of time or with less effort.¹¹⁹

There is concern that providing in-kind support of this type is less desirable than simply providing cash to purchase the services directly (or not, if the person chooses). Forcing the aid to be used only for a specific purpose may seem patronizing. But the ultimate importance of in-kind assistance of this type to achieving equal participation in work and society outweighs whatever patronizing effects might occur. Moreover, in-kind programs are attractive politically, for they draw support from supplier groups.¹²⁰ Food programs enjoy significant congressional support from farm state representatives backed by agricultural lobbies.¹²¹ Housing programs receive support from construction interests.¹²² No advocate of independence for persons with disabilities can afford to ignore opportunities for strategic alliances with those who are self-interested in providing needed services.¹²³

¹¹⁹ See Bagenstos, *supra* note 8, at 991-94 (discussing autonomy as directing performance of tasks rather than doing them oneself), 995-1000 (discussing supportive programs).

¹²⁰ It should be noted that programs oriented towards giving cash rather than services may have an appeal for free-market conservatives in addition to whatever appeal they might have for those seeking to maximize the choices of people with disabilities. See Kornbluh, *supra* note 109 at *46 (“[A] guaranteed income program that would allow individual recipients to decide for themselves how and where to spend their money might appeal to conservatives and libertarians in ways that traditional liberal social programs, such as those to build or subsidize housing or help families purchase healthy food, are unlikely to do.”); see also David A. Weisbach, *A Welfarist Approach to Disabilities*, Aug. 2007, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1008985 (last visited Feb. 10, 2011) (noting that under welfarist economics principles, income tax adjustments constitute best form of redistribution of resources to persons with observable disabilities, but supporting in-kind provision of public goods such as architectural modifications, in general and with respect to persons whose disabilities are not observable).

¹²¹ See JAMES C. OHLS & HAROLD BEEBOUT, *THE FOOD STAMP PROGRAM: DESIGN TRADEOFFS, POLICY, AND IMPACT* 162 (1993); James D. Weill, What the Food Stamp Program Can Teach Us About Fighting Poverty, *Spotlight on Poverty*, <http://www.spotlightonpoverty.org/news.aspx?id=801b809e-84a6-415f-9b41-42065d63c945> (last visited Feb. 10, 2011) (“Food stamps bring to the table the support of disparate sectors, including the agriculture industry, food companies, grocery retailers, financial institutions that are EBT vendors, and the food bank and food pantry network.”).

¹²² See PAUL E. PETERSON ET AL., *WHEN FEDERALISM WORKS* 152 (1986) (describing political support for housing programs).

¹²³ This topic may be more complex than it appears, however. Managers and work forces of institutions often wield significant political power, whereas in-home care attendants in the United States are unlikely to

As noted above, significant in-kind support already exists in the form of home and community-based services programs.¹²⁴ These should be expanded, and not limited as they currently are to providing only those services that are less costly than nursing home care.¹²⁵ HCBS should not be viewed as a Medicaid cost-cutting measure or a substitute for nursing homes, but as a vital support for equality for people with disabilities.¹²⁶

2. *Adjusting Disability Standards.* The civil rights approach suggests that the standard for disability should account for the stigma that keeps people who might otherwise be able to work from doing so. If attitudes are what disables, then the attitudes should affect the coverage of disability benefits laws.¹²⁷ Cross-national data suggest that people with mental disabilities—intellectual disability and mental illness—face overwhelming obstacles to employment.¹²⁸ Some social scientists note that conditions that begin in childhood tend to be met with more stigma and discrimination, limiting opportunities for schooling and employment for those who have them.¹²⁹ If low-stigma impairments can be identified, disability standards for those conditions might

be unionized and often hold their jobs for only short periods of time, diminishing their ability to influence politics; therefore even if unionization entails greater labor costs, it may be wise for disability activists to support union organizing among attendants. See Ravi Malhotra, *Empowering People with Disabilities*, NEW POLITICS, Summer 2006, at 41, available at <http://newpolitics.mayfirst.org/fromthearchives?nid=209>.

¹²⁴ See *supra* text accompanying notes 43-50 (discussing HCBS).

¹²⁵ The nursing home lobby may be an obstacle in this regard, as may some other interests that prefer institutional settings for people with disabilities. See BAGENSTOS, *supra* note 93, at 142.

¹²⁶ As noted above, states and localities also contribute funding for in-kind services. See *supra* text accompanying note 50. The modest tax base of smaller governmental units should not limit services. Greater federal support is imperative.

¹²⁷ Professor Bagenstos in earlier work suggested that stigma could be the defining characteristic of disability, but in recent writing has stepped back somewhat from that position. See BAGENSTOS, *supra* note 93, at 50.

¹²⁸ See ORG. FOR ECON. COOPERATION & DEV., *SICKNESS, DISABILITY AND WORK: KEEPING ON TRACK IN THE ECONOMIC DOWNTURN 10* (2009), available at <http://www.oecd.org/dataoecd/42/15/42699911.pdf> (“People suffering from mental conditions are typically 30-50% less likely to be employed than those with other health problems or disability.”).

¹²⁹ See Baldwin & Johnson, *supra* note 118, at 46-47 (citing blindness, cerebral palsy, deafness, and mental retardation), 56 (stating that “persons with illnesses or injuries that occur at birth or early in life [such as] [m]ental or emotional conditions, sensory, and mobility limitations [are] the group likely to face the most severe prejudice and discrimination in the labor market” compared with people whose disabilities occur later in life).

conceivably be raised.¹³⁰ Moreover, as noted above, the existing standard for SSI is severe and does not encompass the entire class of persons who face overwhelming challenges earning a living under current levels of job accommodations. Hence application of a social model would suggest a laxer standard, even if departure from what is primarily a medical approach would be unrealistic at the present time.

Embracing the civil rights idea that people with disabilities are a single minority group, not a collection of various medical diagnoses, may also suggest fewer disability-category distinctions, hence fewer programs for people with specific kinds of disabilities. The resources might instead be put into more widely available forms of support. There should be concerns over the politics of this approach, however. People with disabilities are traditionally organized politically along impairment-specific lines,¹³¹ and if programs for individual disabilities are deemphasized, there may be less support provided overall. Ideally, one disability should not be favored over another if people with both face similar barriers in accessing the means of self-support.

3. *Partial Disability Assistance and Limits on Means Testing.* In other writing, I have proposed the adoption of partial and temporary disability benefits as part of an expanded social insurance system.¹³² Suitably reduced partial and temporary benefits should also be available for people without sufficient connection to the work force to qualify for social insurance but who have similarly disabling conditions, with the application of no or only a loose means test. Civil rights ideas regarding disability point

¹³⁰ See Jerry L. Mashaw, Book Review, 20 J. HEALTH POL. POL'Y & L. 225, 229 (1995) ("The young, intelligent, and well-educated person with quadriplegia is likely, over time, to see workplace changes that allow him or her to accommodate (even transcend) limitations on mobility, stamina, or dexterity. On the other hand, the high school-trained person with schizophrenia and the 55-year-old manual laborer with arthritis are more difficult to accommodate.").

¹³¹ See Leslie Ward & Virginia Abernethy, *Background, Enactment, and Implementation of P.L. 94-142*, 60 PEABODY J. EDUC. 1, 10-12 (1983) (discussing example of political support for special education law).

¹³² See Weber, *supra* note 14, at 943-47.

in this direction. Partial support without stringent income or asset restrictions would encourage people with limits on strength, agility, stamina, or concentration to work as many hours as possible, and to combine earned income with a government supplement to maintain a decent standard of living. The benefits would thus compensate for some of the costs of disability imposed by a maladaptive environment. The benefits would also encourage people to stay working as long as they can even while experiencing the onset of conditions that might in time prevent any work in the economy as currently constituted.¹³³ Benefits need not be a substitute for working, but instead can amplify work efforts.

Partial disability benefit systems are not unusual. Veterans Administration, workers compensation, and tort system payments all may be based on partial disability.¹³⁴ Partial disability programs are common in Europe.¹³⁵ There are opponents of the initiative who argue that partial disability benefits are costly and have led to administrative difficulties in the workers compensation context,¹³⁶ but the potential social gains are great.

When programs offer high levels of support, means tests may be needed, but their use should be discouraged.¹³⁷ Professor Paul Longmore's moving account of burning his book illustrates the difficulty with means tests that trigger benefits ineligibility or

¹³³ See ERKULWATER, *supra* note 18, at 237 (noting that European partial disability benefits and temporary sickness benefits keep people at work or pursuing rehabilitation, and that such strategies are more successful than promoting return to work after complete termination of work and application for full disability benefits).

¹³⁴ See Weber, *supra* note 14, at 943-45 (collecting sources).

¹³⁵ See *id.* at 945 (describing programs and collecting sources); see also ERKULWATER, *supra* note 18, at 237 ("Germany and Sweden recognize degrees of disability and pay partial as well as full benefits.").

¹³⁶ Jerry L. Mashaw & Virginia Reno, *Social Security Disability Insurance: A Policy Review*, in NEW APPROACHES TO DISABILITY IN THE WORKPLACE, *supra* note 118, at 262. The authors view the Disabled Workers Tax Credit as a better alternative. *Id.*

¹³⁷ See Jacobus tenBroek, *The New Look in Social Security—Utopia or Myopia*, 6 HASTINGS L.J. 34, 34-35 (1954) ("[M]eans test restrictions . . . destroy self-respect and efforts towards rehabilitation.").

reductions. After earning a Ph.D. and writing a history of the cultural treatment of George Washington, Longmore learned that the royalties from his book sales would be counted as unearned income, making him ineligible for the SSI assistance he needed to live.¹³⁸ He staged a protest at which he burned his book, and was joined by a crowd condemning the irrationality of taking away support when people engage in extraordinary effort and make valuable social contributions.¹³⁹ Although new work incentive programs have somewhat improved the situation that confronted him, the incentives remain limited.¹⁴⁰

4. *Improvements in Non-Disability-Specific Welfare.* As noted above, many people who would be considered disabled by any ordinary observer subsist on general public welfare rather than disability-specific programs.¹⁴¹ Improvements in these programs would thus greatly benefit people with disabilities, at least as the class is ordinarily understood as opposed to how it is defined by SSI's standards. As suggested above, the social model of disability runs counter to the quick-fix, improve-the-aid-recipient approach that time limits on welfare benefits embody. In fact, aid recipients with disabilities do not magically get "fixed." One study revealed that TANF recipients who had persistent physical health problems were much more likely to be on TANF for more than forty months than others.¹⁴² Parents of a child with a disability are also much more likely to spend long periods of time on the program than those whose children do

¹³⁸ LONGMORE, *supra* note 98, at 151.

¹³⁹ *Id.* at 252-53.

¹⁴⁰ See *supra* text accompanying notes 114-18 (discussing current work incentives). Longmore's book never had the sales he or his publisher anticipated, so in fact the royalties did not create a problem for his SSI eligibility. LONGMORE, *supra* note 98, at 256. His case is perhaps the first time an author was glad that his book did not sell.

¹⁴¹ See *supra* text accompanying notes 63-70 (describing role of ordinary public welfare with respect to people with disabilities).

¹⁴² Kristin S. Seefeldt & Sean M. Orzol, *Watching the Clock Tick: Factors Associated with TANF Accumulation*, 29 SOC. WORK RES. 215, 224-25 (2005).

not have disabilities.¹⁴³ Eliminating the time restrictions for TANF and state aid programs for people with disabling conditions would thus be a policy improvement that would be suggested by a sensible attitude towards disability.¹⁴⁴

Although families with a parent or child who has a disability are most likely to be in desperate need of TANF, they may also be vulnerable to difficulties with the bureaucracy that administers that program. In general, TANF recipients who are poorly educated, in severe poverty, and have never been married—characteristics that correlate to some degree with those of people with severely disabling conditions—are more likely to be cut off welfare for failure to comply with procedural steps such as documentation requirements.¹⁴⁵ Therefore, reforms that reduce the paperwork burdens and the culture of imposing sanctions would be of great benefit to people with disabilities.¹⁴⁶

5. *Universal Benefits.* Some programs, such as the newly passed (if embattled) health care reform,¹⁴⁷ confer benefits on everyone, but are of particular importance to people with disabilities who find themselves dependent on SSI for Medicaid coverage and whose dependence creates disincentives to jeopardizing eligibility. Universally available benefits thus promote integration. What is more, they do not single out people

¹⁴³ *Id.* at 224.

¹⁴⁴ See Amy L. Wax, *Rethinking Welfare Rights: Reciprocity Norms, Reactive Attitudes, and the Political Economy of Welfare Reform*, LAW & CONTEMP. PROBS, Winter/Spring 2000, at 257, 286 (“In the initial stages of reform, strict work requirements and time limits succeeded in shrinking the rolls by encouraging the most able and least troubled welfare recipients to wean themselves from public support As welfare reform progresses, only the hard-core cases are left on the rolls. Fewer and fewer of the remaining recipients can, in any realistic sense, do much more to help themselves.”).

¹⁴⁵ See Evelyn Z. Brodtkin & Malay Majmundar, *Organizations and Exclusion: An Inquiry into Bureaucratic Proceduralism and Welfare Exits*, Nat’l Poverty Ctr. Working Paper Series No. 08-05, at 15 (Feb. 2008), http://npc.umich.edu/publications/u/working_paper08-05.pdf (last visited Feb. 10, 2011) (“The probability of procedural exit was greater for claimants who were high school dropouts, never-married, and in deep poverty [T]here was a weaker relationship to ethnicity and none to race.”).

¹⁴⁶ See Nadel, *supra* note 35, at 14 (“[S]tudies of results in the states have consistently found that [TANF] families with reported disabilities or health problems were sanctioned at a higher rate than were other families.”).

¹⁴⁷ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

with disabilities as a specially treated category and so do not confer stigma the way disability-only programs may.¹⁴⁸ Many leading writers favor universal programs because of their ability to capture a broader base of political support for maintaining and improving benefits over time,¹⁴⁹ but the tortuous history of health care reform itself indicates that universal benefits programs may be difficult to enact. Access to affordable medical insurance without preexisting condition exclusions and benefits caps was the single greatest priority for people with disabilities with respect to universal benefits programs.¹⁵⁰ If that has now been achieved, attention will likely focus on implementation of that entitlement rather than new universal benefits initiatives.

6. *Disabled Workers Tax Credit.* An incremental reform that would provide significant help to people with disabilities and is consistent with disability civil rights ways of thinking is the Disabled Workers' Tax Credit (DWTC). The DWTC is modeled on the Earned Income Tax Credit, or EITC, which provides low-income workers a credit against taxes, and typically gives a cash award in the form of a tax refund for a low-wage worker.¹⁵¹ The DWTC would furnish an analogous tax credit for workers whose disabilities meet a threshold, rewarding their efforts and making up for some of the

¹⁴⁸ See BAGENSTOS, *supra* note 93, at 144 (suggesting that support for disability-specific social welfare programs rely on and reinforce attitudes that people with disabilities are incapable of assisting themselves and less than full citizens, thus universal policies recognizing vulnerability of all people to disability are preferable).

¹⁴⁹ See, e.g., WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* 118-20 (1987); Theda Skocpol, *Targeting Within Universalism: Politically Viable Policies to Combat Poverty in the United States*, in *THE URBAN UNDERCLASS* 411, 427-29 (Christopher Jencks & Paul E. Peterson eds., 1991) (suggesting universal benefits with lesser-known features assisting classes of needy persons). Some critics note that except for Aid to Families with Dependent Children, programs targeted specifically to poor people have a better record than the supporters of universal programs acknowledge. See, e.g., Robert Greenstein, *Universal and Targeted Approaches to Relieving Poverty: An Alternative View*, in *id.*, at 437, 438-40 (discussing counterexamples and attributing continuing poverty to economic considerations).

¹⁵⁰ See Weber, *supra* note 14, at 953-54 (stressing importance of medical coverage in promoting movement to working economy for many people with disabilities).

¹⁵¹ See generally *supra* text accompanying notes 69-70 (discussing EITC).

discrimination and lack of accommodation currently reducing their earning power. It would bring their income closer to a normal living standard. It would likely be far more effective than existing work incentives for people who receive SSI, because it would phase out more gradually. Moreover, it would be available to people who have never been on the SSI program, keeping them in the workforce even if their hours and pay levels diminish due to a progressive impairment.¹⁵² Since the program would be administered through the tax system, it would lack the stigma of public welfare, and thus would be consistent with the goals of supporting people with disabilities in ways that depart from the stereotyping effects of current welfare programs. Providing assistance of this type to people with disabilities who work is becoming increasingly popular throughout the world.¹⁵³

C. Should Disability Matter?

How does disability differ from other reasons for poverty, and should the differences matter with regard to welfare policy? The proposals advanced above rely on disability as a unique basis for public support that justifies specific programs and specialized considerations. There are justifications for thinking of disability in this way

¹⁵² See Weber, *supra* note 14, at 947-49 (advocating DWTC). Professor Mashaw has written in support of this proposal. Mashaw & Reno, *supra* note 136, at 254-55. A researcher for the Center for Economic and Policy Research suggests expanding the EITC to provide special benefits on the basis of disability. FREMSTAD, *supra* note 11, at 16 (“Consideration should be given to providing supplements to both the EITC and Child Tax Credit for workers with disabilities and people caring for family members with disabilities. The United Kingdom’s Working Tax Credit, which is similar to the Earned Income Tax Credit, includes such an additional benefit for people with disabilities.”). Similarly, Professor Lipman suggests treating people with disabilities in the same fashion as people with a dependent child under the EITC to provide a work incentive and to compensate for some of the costs of having a disability. Lipman, *supra* note 70, at 447-51. Professor Burkhauser has also advocated a DWTC. Burkhauser, *supra* note 118 (Annals), at 81-82.

¹⁵³ See ORG. FOR ECON. COOPERATION & DEV., *supra* note 128, at 19 (noting “a slow shift in fundamental conceptualisation from disability to ability starting in a small number [of] countries, which is refocusing operational policy around what people with health problems can still do at work and developing supports and entitlements that empower them in this regard. . . . There are encouraging signs in a number of countries of new thinking in terms of partial work capacity rather than incapacity.”); *id.* at 19-20 (describing programs).

and treating people with disabilities differently from people who are poor for other reasons.

The constant concern about public support is the fear that people offered public aid will reduce their own efforts to support themselves. Disability, however, is different in this regard.¹⁵⁴ Leisure may be desirable, but few would acquire a disability in order to obtain it.¹⁵⁵ Moreover, the obstacles to employment for people with disabilities are the nature of the wage economy as it currently exists, the less than adequate protections against discrimination, the legacy of discrimination, and above all, the “reasonableness” limit of the duty to accommodate. The barrier to self-support for people with disabilities is not the moral hazard to not work but, as the social model recognizes, the physical and attitudinal environment.

Of course, many of those who are poor for reasons other than disability and its interaction with the environment also face social disadvantage. One obvious part of the attitudinal environment that limits the earning potential of people who do not have physical or mental disabilities is racial and sexual prejudice and stereotyping.¹⁵⁶ Even for persons not impeded by that barrier, there may be the barrier of underinvestment in

¹⁵⁴ See Amy L. Wax, *Disability, Reciprocity, and “Real Efficiency”: A Unified Approach*, 44 WM. & MARY L. REV. 1421, 1445-46 (2003) (“Although the recognition of an obligation to assist persons who are needy despite their best efforts would seem to extend to those unable to command a living wage due to low ability or lack of skills as well as to those with a medical disability, in actual practice there may be reasons to accord these categories distinct treatment. It is often easier to establish the link between low productivity and a medical cause than between low productivity and lack of native talent because it is harder to distinguish the latter from plain old laziness or from dysfunction that is amenable to an exercise of will. There is irreducible moral hazard in recognizing entitlement to assistance for failure on the job market without an objectively verifiable cause.”).

¹⁵⁵ See Amy L. Wax, *A Reciprocal Welfare Program*, 8 VA. J. SOC. POL’Y & L. 477, 510 (2001) (“Most people will not inflict an unpleasant physical or mental limitation on themselves as the price for public support.”).

¹⁵⁶ See Skocpol, *supra* note 149, at 412 (“[T]oday one still hears voices such as Roger Wilkins’s argument that because the black poor are ‘different,’ special antipoverty policies should be devised for them alone.”) (citing Roger Wilkins, *The Black Poor Are Different*, N.Y. TIMES, Aug. 22, 1989, at A23).

productive capacity, perhaps because of ingrained low expectations or inadequate support from parents or schools in supplying resources for the individual's development.¹⁵⁷

What is noteworthy, however, is that except for the social attitudes, for which the civil rights approach is designed and to which it surely applies, the most obvious fix is an individual one: the investment of capital in the form of education, moral support, and opportunities to gain transferable experience. Neither welfare policy nor other public policy dictates that the same measures be undertaken for people impoverished by underinvestment in their human capital in comparison to those for whom the barriers are not personal but truly—there is no other term as apt—environmental.¹⁵⁸

Another way of stating the same point is to recognize that although the way to increase participation in the work force by persons with disabilities is to promote accommodation, even accommodations more burdensome than currently considered “reasonable,” improving the position of persons who are poor for other reasons requires other measures, at least some of which are under the direct control of the people who are poor.¹⁵⁹ For example, acquisition of high school and junior college education could

¹⁵⁷ In addition, responsibilities for children or other dependents may produce constraints on integration into employment that compare to those facing people with disabilities. I thank Evelyn Brodtkin for this point

¹⁵⁸ See Wax, *supra* note 155, at 510 (“Poor skills [in contrast to disability] seem more amenable to correction through self-development. This applies not just to the skills that depend most directly on intellectual firepower, (the “hard skills” of technical expertise and job-related know-how) but even more so to the “soft skills” that seem to matter most to employers (such as punctuality, reliability, appearance, good manners and a positive attitude).”). It should be noted, however, that Professor Wax appears to support similar treatment by the welfare system for people with disabilities and people who fail to achieve self-sufficiency for other reasons despite reasonable efforts. See *id.* at 513. This position may be criticized on the ground that it fails to consider the desirability of continuing incentives for self-investment for those who can take advantage of them.

¹⁵⁹ Some accommodations may be helpful, however. One source indicates that making exceptions to policies against workplace tardiness—a very modest accommodation—facilitates employment success for mothers who need child care. See Susan J. Lambert, *Lower-Wage Workers and the New Realities of Work and Family*, 562 ANNALS OF AMER. ACAD. OF POLI. & SOC. SCI. 174, 177 (1999). This compares closely to relaxing rigid clock-in policies for persons with disabilities who cannot get to work at a predictable hour because of chancy accessible transportation or intermittent flare-ups of medical conditions.

enormously improve the employment and wage-level prospects of many poor persons.¹⁶⁰

Where good opportunities for education exist (something that is by no means universal for people in poor communities), it makes sense to shape welfare policy to create incentives to take them.¹⁶¹

As known by those who work in the field of education for individuals with disabilities, however, educational opportunities for students with significant disabling conditions are weak throughout the United States.¹⁶² The Supreme Court has interpreted the law that applies to public primary and secondary education of children with

¹⁶⁰ See Michael Selmi, *Unions, Education, and the Future of Low-Wage Workers*, 1 U. CHI. LEGAL F. 147, 165-78 (2009) (collecting empirical studies) (discussing benefit to potential low-wage workers of completing high school, and ideally obtaining associate degrees); *id.* at 174 (“Certainly one way to improve the labor market prospects of high school graduates is to get these individuals to attend, and ideally to finish, a community college.”).

¹⁶¹ Of course, this does not justify leaving post-welfare reform public aid programs as they are. A greater emphasis on encouraging education would yield significant long- and short-term benefits. See Martha F. Davis, *Learning to Work: A Functional Approach to Welfare and Higher Education*, 58 BUFF. L. REV. 1 (2010) (advocating redesign of welfare programs to build individual human capital).

¹⁶² National data indicate that at current levels of services and support, students with disabilities mainstreamed into general education have difficulty keeping up, even those whose impairments are solely in vision or hearing, *see* OFFICE OF SPECIAL EDUC. PROGRAMS, U.S. DEP’T OF EDUC., GOING TO SCHOOL: INSTRUCTIONAL CONTEXTS, PROGRAMS, AND PARTICIPATION OF SECONDARY SCHOOL STUDENTS WITH DISABILITIES 6-31 (2003) (“Between 89% and 99% of students in all disability categories except mental retardation have teachers who expect them to keep up with others in their general education classes. Fewer actually do keep up; however, there is a wide range Gaps between the percentages of students who are expected to keep up and the percentages who actually do range from 9 percentage points for students with hearing impairments and 10 percentage points for students with visual impairments to 30 percentage points for students with mental retardation or other health impairments and 33% for students with emotional disturbances ($p < .05$)”), to the point where their work slips below grade level, *see id.* at 5-6 (“The percentage of students with disabilities who are in general education academic classes that are performing at grade level ranges from 70% of students with visual impairments to 83% of students with learning disabilities or hearing impairments ($p < .05$). Youth with hearing impairments are the least likely to be in classes that are functioning below grade level (10%); students with mental retardation, traumatic brain injuries, or multiple disabilities are more than twice as likely to be in such classes (20% to 27%, $p < .05$). Very small percentages of students in most categories are in advanced placement or honors classes”). Seven out of eight high school students with disabilities are more than a year behind grade level. OFFICE OF SPECIAL EDUC. PROGRAMS, U.S. DEP’T OF EDUC., THE ACHIEVEMENTS OF YOUTH WITH DISABILITIES DURING SECONDARY SCHOOL 4-3 to 4-4 (2003) (“[C]omparison of teacher-reported standardized test performance with students’ actual grade level reveals that students with disabilities are an average of 3.6 years behind expected performance for their grade level in both reading and mathematics. In both subjects, only about one in eight students with disabilities are at grade level, above grade level, or less than one grade level behind. Another fifth are 1 to 2.9 grade levels behind, two-fifths are 3 to 4.9 grade levels behind, and one-fourth are five or more grade levels behind.”). These figures have not changed since the late 1980s. *See id.* at 4-4.

disabilities to require only access to beneficial services, not educational services on a level of parity with those given to other children.¹⁶³ For post-secondary education, there is no entitlement to services at all,¹⁶⁴ and the nondiscrimination duty that applies to colleges is merely that of reasonable accommodation up to a limit of fundamental alteration of programs.¹⁶⁵ Even that modest standard has nearly always been applied in a way that affords deference to the accommodation decisions of the educational institution.¹⁶⁶ This is not to say that the educational opportunities available to poor people in general should be left as they are. The opportunities are far from ideal and ought to be improved. It is simply to say that the incentive policies embodied in welfare law should be different with regard to persons with ready access to education that will markedly increase earning power and those without such access.¹⁶⁷

In a recent paper, Richard Burkhauser and his co-authors note that the economic situation of single mothers improved when welfare reform made benefits more difficult to

¹⁶³ *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982). Some courts have imposed more expansive duties, *see* Mark C. Weber, *The Transformation of the Education of the Handicapped Act: A Study in the Interpretation of Radical Statutes*, 24 U.C.-DAVIS L. REV. 349, 377-400 (1990), but *Rowley*'s standard remains the dominant force on questions of the law's interpretation. *See, e.g., J. L. v. Mercer Island Sch. Dist.*, 575 F.3d 1025, 1037 (9th Cir. 2009) (reaffirming *Rowley* standard).

¹⁶⁴ *See* 20 U.S.C. § 1401(9)(C) (2006) (defining guaranteed free, appropriate public education to include preschool, elementary school, and secondary school).

¹⁶⁵ *See Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 409-10 (1979) (holding that accommodations needed by deaf student nurse exceeded those required by law).

¹⁶⁶ *Zukle v. Regents of Univ. of Cal.*, 166 F.3d 1041 (9th Cir. 1999); *McGregor v. La. State Univ. Bd. of Supervisors*, 3 F.3d 850 (5th Cir. 1993); *Wynne v. Tufts Univ. Sch. of Med.*, 932 F.2d 19 (1st Cir. 1991). *But see Pushkin v. Regents of Univ. of Colo.*, 652 F.2d 1372 (10th Cir. 1981) (refusing to afford deference).

¹⁶⁷ *Cf. Selmi*, *supra* note 160, at 174 ("I believe that many individuals who fail to finish or advance beyond high school should be held responsible for their choices. Holding them responsible does not mean that we should neglect these individuals, but it does mean that we should not center our labor policies around those who may have simply made short-sighted or bad choices, so long as they had equal opportunities to make better choices. This is, of course, the most important and difficult question, namely how to differentiate those who make bad choices from those who did not have the same access, or resources that would enable them to make different and better choices. My point here is that we should not assume that individuals who fail to invest sufficiently in education are all the product of circumstances. Some certainly are, but it is important to keep in mind that not all are and that, as a matter of social policy, it will likely be near impossible to provide meaningful work to those who have failed to complete, or move beyond, high school.").

obtain, pushing those individuals into employment.¹⁶⁸ The authors of the paper contrast the improved economic wellbeing of single mothers after welfare reform with the stagnant economic condition of working-age persons with disabilities who generally remained outside the labor force while receiving slightly increased public benefits over the same time period.¹⁶⁹ They ultimately suggest that a “pro-work set of policy incentives” similar to the benefit restrictions from welfare reform would cause individuals with disabling conditions to improve their own household incomes.

This policy prescription does not consider the structural barriers to employment for persons with disabilities, and ignores the fact that the disability programs whose benefits slightly increased in the relevant time period reach only the most severely impaired of the population of persons with disabilities.¹⁷⁰ Punitive “incentives” are unlikely to accomplish anything with respect to employment of persons with disabilities.

¹⁶⁸ Richard V. Burkhauser et al., *The Transformation of Who Is Expected to Work in the United States and How It Changed the Lives of Single Mothers and People with Disabilities* (2008), <http://ssrn.com/abstract=1337651> (last visited Feb. 10, 2011). Professor Zatz cites research that suggests less rosy outcomes for those who obtain paid work under the threat of reduced welfare benefits. Zatz, *supra* note 108, at 403 & n.127. He also cites research casting doubt on the long-term benefits of work incentive programs in comparison to welfare programs that do not embody those features. *See id.* at 411-12 & nn.146-54; *see also* Peter B. Edelman, *Changing the Subject: From Welfare to Poverty to a Living Income*, 4 NW. J.L. & SOC. POL’Y 14 (2009) (“Proponents of the 1996 [welfare reform] law point to the fact that about sixty percent of the women who left the rolls in the years following the law’s enactment went to work, although that number has declined significantly since 2000. Many women did go to work, but only about half of those who found jobs escaped poverty. A key reason so many women went to work was because jobs were widely available in the unprecedented hot economy of the late 1990s, a state of affairs that no one foresaw or could have foreseen when the law was passed.”) (footnotes omitted).

¹⁶⁹ *See* Burkhauser et al., *supra* note 168. Additional citations are omitted because the work is unpaginated. Burkhauser has previously advocated other means to treat people with disabilities similar to how other people who are poor are treated under welfare reform regimes. *See* Burkhauser, *supra* note 118, at 82 (suggesting time limits on benefits).

¹⁷⁰ Contrary to Burkhauser’s predictions, data from a comparison of European countries demonstrate that lower spending on redistributionary programs based on disability is associated with greater poverty among the population who have severely disabling conditions. *See* Hvinden, *supra* note 99, at 18 (“[W]e find a clear negative relationship between the level of spending on redistributive disability provisions and the proportion of persons with severe disabilities with a disposable income below the poverty line (Pearson correlation = -.68)”; *see also* Fremstad, *supra* note 11, at 12 (“[A] number of EU [European Union] nations—including all of Nordic nations—and Canada have higher levels of employment among people with disabilities than the United States.”) (analyzing Organization for Economic Cooperation and Development data).

In fact, increasing benefits may be a more effective strategy. A recent survey of European countries compared expenditures on redistribution to people with disabilities (as a fraction of countries' gross domestic product) and employment of people with disabilities.¹⁷¹ The study found "a clear positive correlation between the level of spending on redistributive disability provisions and the employment rates of respondents with severe disabilities."¹⁷² The author notes that many expenditures in the high-spending countries actively promote integration into the work force ("training, services for independent living, . . . vocational rehabilitation, technical aids . . . , wage subsidies, etc."), and that direct cash assistance at relatively generous levels facilitates employment by individuals who have the capacity to work only on a part-time basis.¹⁷³ In the United States, significant structural change in the economy would greatly help the potential self-support of people with disabilities,¹⁷⁴ but that goal entails legal and economic reform, not welfare reform.¹⁷⁵

¹⁷¹ Hvinden, *supra* note 99, at 19-21.

¹⁷² *Id.* at 19 (reporting Pearson correlation of .70); *see also id.* at 20 (noting that analysis included controlling for disparate reporting of percentages of persons with severe disabilities in different countries).

¹⁷³ *Id.* at 20; *see also id.* at 21 (finding "a clear and positive relationship between the spending on what has been classified as 'cash benefits' and employment rates (Pearson correlation = .55) . . ."). A higher level of benefits means that a person will be able to qualify for assistance even though having some income, as from part-time employment, particularly if the benefits program uses a phase-out as a work incentive.

¹⁷⁴ *See* ORG. FOR ECON. COOPERATION & DEV., *supra* note 128, at 17 ("The increasingly global nature of many industries has resulted in a shifting of production to locations wherever inputs, including labour, are cheaper. As a consequence, tolerance is falling for workers who are not highly productive in a particular job or who do not fit an ideal performance standard as the latter has become more and more narrowly defined. The end result is that workers who are not as productive due to health or other impairments are becoming priced out of the equation, and many of the niche jobs that they once occupied are disappearing."). It should be noted that this report appears generally to be more supportive of various means of reduction in benefits program growth than in altering production processes, however. *See id.* at 18. *But see id.* at 18 n.7 ("[T]he vast majority of health problems labelled as disabilities, do not render an individual severely incapacitated, but rather impair functioning in a fixed or episodic fashion. This means affected workers can continue to work if there is sufficient flexibility for them at the workplace to alter their duties or periodically reduce working hours when symptoms flare up.").

¹⁷⁵ The provision of accommodations and institution of job setasides would go far in this regard. On accommodations, *see* Mark C. Weber, *Unreasonable Accommodation and Due Hardship*, 62 FLA. L. REV. 1119 (2010) (advocating more demanding interpretation of accommodation requirements). As indicated previously, a notable number of SSI recipients do work, often in sheltered or supported employment, but

IV. Welfare Under the Civil Rights Approach as Opposed to Other Constructs

It remains to compare the results of applying civil rights ideas of disability to public welfare with the results that obtain when other theories are applied. In the legal literature regarding disability and public support, three leading ideas are those of reciprocity, vulnerability, and human rights.

A. Reciprocity

One writer who has put much thought into developing a modern theory of welfare law is Professor Amy Wax. Although her work on welfare does not advance any specific model of disability or disability rights, she provides a thorough analysis of public aid programming, and at various points she comments on the implications of her ideas with regard to people with disabilities.¹⁷⁶ The general proposition is that the public wants to furnish welfare to recipients who genuinely are not able to support themselves,¹⁷⁷ but public backing for assistance depends on that person making “a good faith effort to function as a net contributor to collective resources maintained for mutual security.”¹⁷⁸ This “conditional reciprocity” principle generally obligates people to work to support

the work is at such low wages that they still need and qualify for benefits. *See supra* note 42 and accompanying text (discussing statistics on SSI recipients’ employment).

¹⁷⁶ Professor Wax’s writing includes a discussion of the ADA and its relationship to the provision of public welfare. She notes that there is a public commitment “to devote a certain portion of collective resources to support disabled persons who cannot become independent because existing labor markets provide inadequate outlets for their productive efforts.” Wax, *supra* note 154, at 1429. An implicit medical model is at work here, as might be expected for any description of how public welfare for persons with disabilities currently operates. *See id.* at 1428-29 (“[W]e must accept that our society is not prepared to abandon any person who has a medically recognized condition that impedes his ability to support himself. If that person’s condition prevents him from finding work or earning enough to live, society is pledged to provide him with sufficient resources for dignified survival.”).

¹⁷⁷ Wax, *supra* note 144, at 271 (terminal ellipsis omitted).

¹⁷⁸ *Id.* at 276. The passage quoted relates to the application of the reciprocity principle to intact working poor families who receive assistance.

themselves and “charge[s] those who receive public assistance with the duty to respond in kind by making (or having at some point made) contributions.”¹⁷⁹

Wax’s ideas yield varying results when applied to people with disabilities in need of public assistance. For example, Wax would require an attempt at work by all or nearly all persons with disabilities: “It is hard to see why *persons with conventional disabilities* should ever be categorically excused from expending the reasonable work effort that we routinely expect from persons who have difficulties on the job market for other reasons.”¹⁸⁰ She elaborates:

Persons whose paucity of marketable skills prevent[s] them from obtaining jobs that pay enough to support themselves or their families, regardless of the cause of that deficit, are nonetheless expected to go to work. This expectation suggests that we should jettison the notion that having a medical disability excuses nonwork altogether.¹⁸¹

Her reciprocity paradigm dictates, however, that there should be a matching duty to accommodate, maybe supported by public funding, and she is willing to excuse accommodation and “perhaps” excuse even attempts at work for people who are “at the extremes.”¹⁸²

¹⁷⁹ Wax, *supra* note 155, at 481-82. For a comprehensive critique of reciprocity as a basis for work requirements for welfare eligibility, see Zatz, *supra* note 108, at 445-51.

¹⁸⁰ Wax, *supra* note 154, at 1446-47. The italics for “with conventional disabilities” apparently are there to emphasize that persons with profound disabilities would be exempt from the work-attempt requirement.

¹⁸¹ *Id.* at 1447.

¹⁸² *Id.* at 1448. Wax asserts that: “There is a general consensus that the disabled, the young, and many of the elderly are entitled to at least partial support from the public because they are dependent through no fault of their own.” Wax, *supra* note 155, at 482. This statement suggests that the requirement of a work attempt is imposed to force potential aid recipients to demonstrate that they are truly disabled. If the demonstration is made, however, then work contribution is excused. Thus the term “conditional reciprocity.” *Id.* (“The principle of conditional reciprocity addresses head on the problem of individuals who, by virtue of their meager abilities or incapacities, are not invited to participate in voluntary economic exchanges and can make no net contribution to the social surplus. . . . [T]he duty to contribute attaches only to those who are able to expend productive effort, and only to a degree that is reasonable in light of the

The idea of forcing work effort, even if it is economically wasteful under current levels of accommodation, conflicts with a civil rights approach to disability, which instead focuses on changing the physical and attitudinal environment or, failing that, compensating for its deficiencies. Under Wax's approach, a person with a disability must demonstrate how much he or she is willing to be inconvenienced as the price of obtaining support, even when that demonstration appears to be more one of submission than productivity.¹⁸³ If moral hazard is the concern, the better strategy would be creating economically useful work and making it pay a reasonable wage. Better still would be encouraging some form of social contribution, but not social contribution narrowly defined as attempted employment in the economy as it currently exists.¹⁸⁴ Under a civil rights approach to disability, the goal is not employment simply for employment's sake.¹⁸⁵

Nevertheless, there is some harmony between Professor Wax's concrete proposals and the insights developed from application of a civil rights approach to disability. For example, Wax entertains the idea of partial disability benefits, and that is consistent with

person's abilities and endowments as well as social practices and conventions relating to work.”). She acknowledges an obligation of public support for the “profoundly disabled.” *Id.* at 484. Yet she appears ultimately to hedge her bets on whether society should expend resources to permit someone to perform a job even when the person has such low productive capacity that there is a net economic loss. *Id.* at 515 (“[T] there is no definitive answer to this question for the general run of cases.”).

¹⁸³ Nevertheless, Wax may be identifying a strong human inclination here to support those who are willing to inconvenience themselves even when the inconvenience does not actually achieve anything. Witness the popularity of charity events in which sponsors agree to support a cause based on someone's walking a certain number of miles, dancing a certain number of hours, participating in a footrace, etc.

¹⁸⁴ See Young, *supra* note 104, at 48 (“Many jobs are arguably socially wasteful, even directly harmful in their effects. At the same time, many unpaid or poorly paid activities contribute centrally to the social good.”)

¹⁸⁵ See *supra* text accompanying notes 114-18 (discussing misguided punitive work incentive efforts).

a welfare policy that promotes integration into society and diminishes the stigma of disability.¹⁸⁶

B. Vulnerability

Professor Ani Satz has recently published a thoughtful article suggesting that Professor Martha Fineman's theory about universal vulnerability should be applied to disability law.¹⁸⁷ Satz observes that all people are "one curb step away from disability."¹⁸⁸ Disability occurs when vulnerability is realized, and disability may enhance other vulnerability. Satz contends that "appealing to universal vulnerabilities removes the stigma of needing assistance and improves protections for all"¹⁸⁹ She suggests that workers with disabilities and other workers subject to at-will employment share a common vulnerability, as do people with disabilities who need health care and others who may fall ill. Government should address vulnerability, taking the pressure off the individual who is disabled but also taking some responsibilities from entities such as employers, who under a civil rights approach must bear the burden of adapting the environment to change structural inequalities.¹⁹⁰ Satz would adopt a "mixed social and civil rights approach" to address vulnerability to disability in a variety of contexts,

¹⁸⁶ Wax, *supra* note 154, at 1449 ("We should consider moving away from benefits programs that rely on bright-line, all-or-nothing findings of disability, and which excuse work and pledge complete support for those who meet the threshold criteria while offering no assistance to those who do not. Although creating categories of partial disability is potentially very cumbersome and might be rejected on administrative grounds alone, it should be taken seriously and examined carefully as more consistent with the priorities identified here.").

¹⁸⁷ Ani B. Satz, *Disability, Vulnerability, and the Limits of Discrimination*, 83 WASH. L. REV. 513 (2008). Whereas Wax focuses on welfare, making comments on how her ideas bear on disability, Satz focuses on disability and makes observations about how her analysis affects some aspects of welfare, mostly government-provided medical benefits.

¹⁸⁸ *Id.* at 530; see Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 12 (2008).

¹⁸⁹ Satz, *supra* note 187, at 530-31.

¹⁹⁰ *Id.* at 532.

including work.¹⁹¹ She believes that relying on solely a civil rights approach fragments social protections against the vulnerability that is heightened by disability.¹⁹² Her reform of health care would not apply the civil rights approach, but instead would apply social welfare ideas.¹⁹³

According to Satz, Social Security Disability Insurance addresses vulnerability across various settings by extending wage and medical supports, but she notes that it employs a protected-class or eligibility-category approach, limiting benefits to when vulnerability to disability has become disability.¹⁹⁴ In contrast, Social Security retirement benefits are, she states, “premised in part on the recognition of the high probability of manifest vulnerability at a certain age without the need for individual determination of impairment.”¹⁹⁵ Professor Satz in other writing contends that someone who by reason of disability performs tasks effectively but in atypical ways (manipulating objects with the feet, say, when others would use hands) has a valid claim for resources to

¹⁹¹ *Id.* at 533.

¹⁹² *Id.* at 534. She points out that vulnerability does not necessarily change with specific contexts (work, recreation, etc.), although current legal protections are different in those settings. She also notes that accommodations in the private sphere (an example might be personal assistance at home) affect participation in the public sphere (for example, the ability to get to work on time in condition to contribute optimally). Stigma and poorly adapted social and physical structures are found across contexts. *See id.*

¹⁹³ *Id.* at 552. Unlike health care, work does not lend itself to universal coverage, and so would be treated differently.

¹⁹⁴ *Id.* at 542.

¹⁹⁵ *Id.* at 543. The insurance aspects of both the retirement and disability programs of Social Security make them quite directly premised on a vulnerability approach. Workers pay into a government trust fund during their wage-earning days for coverage against the chance of disability and for the likelihood of survival of the worker and dependents into the worker’s old-age. These risks are universal. But if the vulnerability thesis is limited to an insurance concept, many will be excluded from protections because their disabilities are such that, without major changes in employment structures, they will not be able to work enough to get coverage. *See Weber, supra* note 25 at 580-81. The retirement program is also a form of forced saving, with modest redistribution features. *See id.* at 586-87. Satz, of course, applies vulnerability ideas more broadly than the social insurance example illustrates.

promote a “normal opportunity range.”¹⁹⁶ Satz supports government subsidies for employee accommodations that are unusually expensive.¹⁹⁷

Apart from those observations about Social Security and subsidies for accommodations, Satz does not discuss disability-related income-support programs. She does, however, consider health care programs, writing that access to health care is a universal vulnerability issue rather than an issue of disability. She works from the vulnerability and social welfare premises to advocate moving away from government insurance schemes that limit their benefits to specific groups, such as people with disabilities who receive Medicare with their Social Security Disability Insurance benefits, and toward comprehensive government coverage of health needs.¹⁹⁸

As noted previously, a civil rights approach to disability supports universal benefits programs. Universal benefits are the least likely to convey stigma and the easiest for individuals with disabilities to use without fear of discrimination.¹⁹⁹ But a civil rights approach might go farther and call for enhanced medical benefits programs for persons with disabilities even if truly universal coverage proved politically impossible. Singling out individuals with disabilities and affording them government-funded medical or other benefits while employed eliminates one basis for “rational discrimination” in hiring people who might be perceived as a drain on employee insurance funds,²⁰⁰ thus

¹⁹⁶ See Ani B. Satz, *A Jurisprudence of Dysfunction: On the Role of “Normal Species Functioning” in Disability Analysis*, 6 YALE J. HEALTH POL’Y L. & ETHICS 221, 254 (2006); see also *id.* at 263 (“[T]here seem to be strong normative reasons for considering alternative modes of functioning when compensating persons with disabilities.”).

¹⁹⁷ Satz, *supra* note 187, at 557.

¹⁹⁸ *Id.* at 561.

¹⁹⁹ See *supra* text accompanying notes 147-50; cf. Weber, *supra* note 14, at 954 (advocating government medical insurance for workers with disabilities on general social welfare premises).

²⁰⁰ In *Dewitt v. Proctor Hospital*, 517 F.3d 944 (7th Cir. 2008), the court considered the case of a nurse who contended that she lost her job because her husband’s disability was perceived as a drain on the employer’s benefits funds. The court upheld the claim for violation of the ADA’s associational

reinforcing the mandate of the ADA and promoting integration into employment of people with disabilities.²⁰¹ Special benefits could also be viewed as a form of government-supported compensation to make up for past societal discrimination against people with disabilities, in line with a civil rights approach. This different treatment in pursuit of functional equality aligns well with a civil rights approach that does not limit its compass to reasonable accommodation as that term is conventionally interpreted.²⁰²

C. Human Rights

Professor Michael Stein advocates an approach to disability that departs from the social model and civil rights in favor of something he calls “disability human rights.” Stein stresses that the proper approach should take into account positive rights to education, safety, and support as well as negative rights such as freedom from discrimination.²⁰³ He cites the recognition of a positive right to social and material

discrimination provision, though a concurring opinion by Judge Posner argued that discharging an employee because of disproportionate use of benefits by a dependent with a disability was rational conduct and would not constitute disability discrimination. *See id.* at 953 (Posner, J., concurring). Government support for the health benefits for individuals with disabilities would eliminate the incentive for the employer’s conduct, irrespective of whether the conduct is considered an ADA violation.

²⁰¹ As Satz observes, however, it does fragment social protections when others have need for protection as well. This may make it a less desirable option than universal care. Satz, *supra* note 187, at 566. Satz points out the high per-capita cost of the current, fragmented system in comparison to universal systems of other countries, though it may be noted that keeping down costs in either a fragmented or a universal system will require cost controls Congress has so far been reluctant to pursue aggressively.

²⁰² As Satz correctly notes, the duties the ADA currently establishes with regard to employee health care benefits are extremely weak. Satz, *supra* note 187, at 563. If the Posner position in *Proctor* were adopted they would be weaker still. Moreover, under current interpretation of disability discrimination duties applicable to government, care-rationing policies may badly disadvantage persons with disabilities. *See Alexander v. Choate*, 469 U.S. 287 (1985) (upholding limits on Medicaid said to disproportionately harm persons with disabilities); Satz, *supra*, at 565-66 (discussing Oregon Medicaid program’s limits on benefits). Elsewhere in her article, Satz points out that limits on protections afforded by the ADA are not so much difficulties with the social model of disability but with the constricted version of it in the ADA as interpreted. *Id.* at 546 (“The problem [of narrow disability protections] is not with the social model of disability, but with its current application under the ADA. It is the restricted scope of the environment rather than the concept of disability as socially constructed, or a civil rights approach more generally, that undermines protections. Within the civil rights framework, vulnerability to socially constructed disability may be understood to exist continuously and to extend across contexts instead of being situational.”).

²⁰³ *See also* ERKULWATER, *supra* note 18, at 242 (“[T]he negative conception of disability rights rings hollow for those individuals who are so disabled or otherwise disadvantaged that they may never be able to work. For them, the social safety net is a vital prerequisite to community integration.”). The positive rights

development in academic sources discussing international human rights law,²⁰⁴ and in several recent United Nations instruments.²⁰⁵ The 2007 Convention on the Rights of Persons with Disabilities embodies both negative rights against discrimination and positive rights to development.²⁰⁶

described by Stein bear a similarity to Franklin Roosevelt's "Second Bill of Rights": the right to a useful and remunerative job, the right to earn enough to provide adequate food, clothing and recreation, the right to a decent home, the right to adequate medical care, the right to adequate protection from the economic risks of old age, sickness, accident, and unemployment, and the right to a good education. Many of these made their way into the Universal Declaration of Human Rights of 1948. *See generally* CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* (2004) (discussing rights catalogued in Roosevelt's 1944 State of the Union address and their resonance in later developments); *see also* William E. Forbath, *The Politics of Race, Rights, and Needs—And the Perils of a Democratic Victory in Post-Welfare America: Some Reflections on the Work of Felicia Kornbluh*, 20 *YALE J.L. & FEMINISM* 195, 195-96 (locating positive rights in New Deal ideology).

²⁰⁴ *See* Stein, *supra* note 86, at 95 & n.103 (citing Philip Alston, *Making Space for New Human Rights: The Case for a Right to Development*, 1 *HARV. HUM. RTS. Y.B.* 3 (1988); Henry J. Steiner, *Social Rights and Economic Development: Converging Discourses?*, 4 *BUFF. HUM. RTS. L. REV.* 25 (1998); James C.N. Paul, *The Human Right to Development: Its Meaning and Importance*, 25 *J. MARSHALL L. REV.* 235 (1992); Anne Orford, *Globalization and the Right to Development*, in *PEOPLE'S RIGHTS* 127 (Philip Alston ed., 2001)).

²⁰⁵ As Stein observes, the Convention on Elimination of All forms of Discrimination Against Women, G.A. Res. 34/180, at 193, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/36 (Dec. 17, 1979), and the Convention on the Rights of the Child, G.A. Res. 44/25, at 166, U.N. GAOR, 45th Sess., Supp. No. 49, U.N. Doc. A/44/49 (Nov. 20, 1989), recognizes positive rights. Stein, *supra* note 86, at 96. The Convention on the Rights of the Child requires meaningful access to education, rehabilitation, and health care. *Id.* (citing Convention at art. 23, para. 1).

²⁰⁶ *See generally* Convention on the Rights of Persons with Disabilities, G.A. Res. 61/1, U.N. GAOR, 61st Sess., Supp. No. 49, U.N. Doc. A/RES/61/106 (Jan. 24, 2007), *available at* <http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf> (reproducing text of convention). With regard to negative rights, *see, e.g., id.*, at art. 5 ("Equality and non-discrimination"); art. 12 ("Equal recognition before the law"); art. 22 ("Respect for privacy"). With regard to positive rights, *see, e.g., id.* at art. 19 ("States Parties . . . shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of [the right to live independently and be included in the community], including by ensuring that . . . (b) Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community . . ."); art. 20 (requiring states parties to facilitate personal mobility at reasonable cost and access to quality, affordable mobility aids, devices, assistive technology and live assistance); art. 24 (requiring states parties to ensure "an inclusive education system at all levels . . . directed to . . . the development by persons with disabilities of their personality, talents, and creativity, as well as their mental and physical abilities, to their fullest potential."); art. 25 (requiring provision of "health services needed by person with disabilities specifically because of their disabilities"); art. 27 (requiring steps to ensure access to technical and vocational guidance and training, opportunities for self-employment, and opportunity for entrepreneurship, and public employment, and requiring states parties to "Promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives, and other measures"); *see also infra* text accompanying notes 220-21 (discussing Convention's recognition of right to adequate standard of living). The Convention currently has 144 signatory nations and 88 ratifying nations. The United States has signed but not ratified the convention. *See* United Nations Enable, <http://www.un.org/disabilities/countries.asp?navid=12&pid=166> (last visited Feb. 10, 2011).

Under human rights theory, the entitlement of persons to these things derives from common humanity,²⁰⁷ rather than actual or potential²⁰⁸ contribution to the society in reciprocity for benefits, or even from shared vulnerabilities as members of the community.²⁰⁹ Stein draws from the work of Amartya Sen and Martha Nussbaum, but amends their approaches to advocate entitling each person “to the means necessary to develop and express his or her own individual talent.”²¹⁰ Whereas Nussbaum recognizes ten categories of human functioning and declares that governments have the responsibility to give people the opportunity to function up to a level of adequacy in all,²¹¹ Stein holds that some persons with disabilities, particularly those with intellectual disabilities, lack the capacity ever to achieve population-typical functioning in all

²⁰⁷ See Stein, *supra* note 86, at 106 (“The dignitary perspective compels societies to acknowledge that persons with disabilities are valuable because of their inherent human worth rather than their net marginal product.”). See generally Tom Koch, *The Difference that Difference Makes: Bioethics and the Challenge of Disability*, 26 J. MED. & PHIL. 697, 697-98 (2004) (contrasting bioethical approaches that assume people with physical or cognitive limits lose personhood as and full social protections with those who assign full personhood to every individual). Stein and Stein contrast affording protection to people “due to traits that essentialize their humanity, like rationality,” as opposed to “because they exist as humans” and endorse the latter position, Stein & Stein, *supra* note 14, at 1215, a position also embraced by Koch, *supra* at 711-13.

²⁰⁸ Refusing to place the importance on an individual’s capacity to contribute to the society is critical to the distinction from Nussbaum’s capabilities approach. See Stein, *supra* note 86, at 77.

²⁰⁹ Stein points out that a disability human rights approach, complete with recognition of both positive and negative rights, is embodied in what was at the time he was writing the draft International Convention to Promote and Protect the Rights and Dignity of Persons with Disabilities. See Stein, *supra* note 86, at 84.

²¹⁰ Stein, *supra* note 86, at 77. Carlos Ball also draws on Nussbaum and Sen in his defense of social interventions to provide rights and benefits to people with disabilities, emphasizing that these interventions are necessary for people with disabilities to have the freedom and opportunity to exercise personal autonomy, a critical capability for a good life and one society is obliged to protect. Carlos Ball, *Autonomy, Justice, and Disability*, 47 U.C.L.A. L. REV. 599, 635-51 (2000). Professor Ball distinguishes autonomy as to important life decisions and choices from simple independence, and points out that “The autonomy of able-bodied individuals—no less than the autonomy of the disabled—is *dependent* on a social framework that guarantees the exercise of basic functional capabilities.” *Id.* at 646. The social protections that other persons need and receive are taken for granted, whereas those needed by people with disabilities are not. *Id.*

²¹¹ The capacities are life, bodily health; bodily integrity; senses, imagination, and thought; emotions; practical reason; affiliation; coexistence with other species and the environment; participation in control over the political environment; and material resources. MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* 78 (2000). These capabilities are said to constitute truly human, as opposed to sub-human life. *Id.* at 72. Insisting on levels of adequacy or human typicality for each category of capability prevents tradeoffs between, say, material resources and political participation. In recent work, Professor Nussbaum has discussed the application of her approach to, inter alia, people with disabilities. See MARTHA C. NUSSBAUM, *FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP* (2006).

categories, but argues that they should not be denied human dignity as a result.²¹² Full social inclusion should not depend on functional capacity. Government should afford assistance to people with disabilities if they cannot perform adequately in one area so that they can develop talents in other areas at a level exceeding that typical of others.²¹³

Stein considers the social model of disability and the civil rights approach embodied in the ADA, but rejects it in favor of his disability human rights paradigm. Both civil rights and disability human rights have the goal of social inclusion, but Stein believes that it is better to adopt a paradigm that combines civil and political rights to equal treatment with economic, social, and cultural rights to equal opportunity, and he believes that only disability human rights does that.²¹⁴ In an elaboration of the model, Professor Stein and Penelope Stein argue that a civil rights approach does not adequately address inequality that exists because of past practice that is reflected in such things as workplace cultures and hierarchies.²¹⁵ Their position is that civil rights based on the application of the social model as currently conceived and developed will never go far enough. Even if social conventions change to entail use of universal design principles, some people with severe or unusual disabilities will not be included; even if reasonable accommodation is provided, some people will require much more.²¹⁶

Stein's initial article on disability human rights does not contain much application of his ideas to welfare programs, but he notes that it would violate the principles of disability human rights to have "presumably well-intentioned yet paternalistic welfare

²¹² Stein, *supra* note 86, at 101-04.

²¹³ See Stein & Stein, *supra* note 14, at 1224 ("A person with autism, for instance, may have a special talent for math but little capacity for social empathy. That individual has a right to resources for education and vocational training to develop their math talent above the species typical level, and a right to gainful employment that makes use of that talent even if the cost is economically unreasonable.").

²¹⁴ Stein, *supra* note 86, at 92.

²¹⁵ Stein & Stein, *supra* note 14, at 1209.

²¹⁶ *Id.* at 1210.

systems that provide subsistence to people with disabilities in lieu of workplace participation”²¹⁷ In their later article, Stein and Stein decry the weakness of federal job training efforts for people with disabilities and the reluctance to enact programs to permit persons receiving public assistance to maintain medical benefits while beginning employment.²¹⁸ Their application of the human rights approach centers more on employment than on welfare, although some initiatives they embrace relate closely to public assistance efforts. In particular, they advocate expanded vocational training; government-provided employment services including assistance with transportation, wage subsidies, and tax credits; targeted employment quotas; marketing initiatives to change cultural attitudes; support for self-employment; and perhaps the reservation of occupational categories to people with various disabling conditions.²¹⁹ The Convention on the Rights of Persons with Disabilities, which embodies a disability human rights approach, recognizes the right of persons with disabilities to “an adequate standard of living for themselves and their families.”²²⁰ That right includes “adequate food, clothing and housing,” and “the continuous improvement of living conditions,” as well as access by people with disabilities who live in poverty to government assistance with disability-related expenses, including training, counseling, financial assistance, and respite care.²²¹

²¹⁷ Stein, *supra* note 86, at 103-04. Moreover, he suggests extension of his human rights principles to categories of people that include the poor, and he applauds allocation of resources to the poor not on the basis of the most effective allocation of the resources, but rather on the needs of particular individuals and the development of their talents. *Id.* at 118-20. Stein points out the overlap between the categories of poverty and disability, the “tremendous prevalence of poverty among people with disabilities, women, and ethnic minorities.” *Id.* at 119 (footnotes omitted). “Recalibrating the aim of the human rights discourse as a response to individual need would develop the capacity of all individuals on the basis of their inherent worth and potential.” *Id.* at 120.

²¹⁸ Stein & Stein, *supra* note 14, at 1211-12.

²¹⁹ *Id.* at 1227-37.

²²⁰ See Convention, *supra* note 206, art 29, para. 1.

²²¹ *Id.* at para. 2.

My response to this approach is simply disagreement whether abandoning civil rights is needed to reach the conclusions the Steins draw. If a more nuanced civil rights approach is applied, and the limits of social responsibility are not merely those of “reasonable” accommodation, the same policy prescriptions and more might be endorsed without retreating from civil rights. True, the comparison to traditional civil rights law—that embodied by title VII of the Civil Rights Act,²²² for example—diminishes when a condition holding back people with disabilities, such as inaccessible transportation or the absence of affordable health insurance, cannot be attributed to a single actor analogous to a racist or sexist employer.²²³ But in the area of public welfare, the target actor is the government as a whole, which has the ability to change social arrangements as well as the responsibility for the presence or absence of assistance programs and their characteristics. Civil rights thus can encompass what some writers would call “second-generation rights”²²⁴ for people with disabilities.

Conclusion

Applying the disability civil rights approach to public aid does not call for abandonment of welfare interventions, much less disability-specific welfare programs. The approach instead calls for reshaping welfare so as to promote equality, autonomy, and personal dignity, and to permit more successful integration into the working economy where that can be achieved. Some of the initiatives suggested here will entail costs, and though the costs may be mitigated by enhancement to productivity, they are

²²² 42 U.S.C. §§ 2000e to 2000e-17 (2006).

²²³ See Stein, *supra* note 86, at 93 & n.96.

²²⁴ Cf. Padideh Ala'i, *A Human Rights Critique of the WTO*, 33 GEO. WASH INT'L L. REV. 537, 537 n.1 (2001) (referring to “the growing acceptance of ‘second-generation rights,’ i.e., economic, social and cultural rights”).

not justified by that and should be undertaken even if they increase public expenditures.

They are justified by human dignity and equality, which is what civil rights ought to protect.