DISABILITY AND THE LAW OF WELFARE: A POST-INTEGRATIONIST EXAMINATION

Mark C. Weber[*]

Recent years have seen dramatic changes in the way persons with disabilities are treated by the government. Current programs, however, still fail to adequately meet the needs of such individuals

In this article, Professor Weber explores the law of welfare relating to persons with disabilities and examines developments in disability theory. He contrasts discrimination law with welfare law and compares three theories of disability equality—custodialism, integrationism, and post-integrationism—critiquing integration theory and developing a framework for a new theory. Professor Weber explores existing welfare programs and then concludes by proposing nine reforms, that all take into account post-integrationist insights and share the goal of shifting the costs of disability from persons who are disabled to the population as a whole.

In their prescient 1966 article, *The Disabled and the Law of Welfare*,[1] Jacobus tenBroek and Floyd Matson suggested that the paradigm for disability law was shifting, and should shift, from custodialism to integrationism. They called attention to the emerging equality movement of people with disabilities[2]—what they termed integrationism—and pointed out the potential for applying civil rights law to discrimination on the ba-

[*] *Professor of Law, DePaul University. B.A. 1975, Columbia; J.D. 1978, Yale.*

I would like to express deep gratitude to Mary Becker, Peter David Blanck, Ruth Colker, Jerold Friedland, Stan Herr, Andrea Kaufman, Mary Kate Kearney, Jerry L. Mashaw, Adam Milani, Jane Rutherford, Stephen Siegel, Morrison Torrey, and Bonnie Poitras Tucker for reviewing earlier drafts of this article. Thanks also to Janet Brewer and Victoria Napolitano for their research assistance. All opinions expressed in the article are solely the responsibility of the author.

1. Jacobus tenBroek & Floyd W. Matson, *The Disabled and the Law of Welfare*, 54 CAL. L. REV. 809 (1966).

2. The usage "people with disabilities" or "individual with a disability" seems awkward at first, but it conveys the critical idea of putting the person first and the impairment second. Accordingly, it is the usage embodied in the Americans with Disabilities Act (ADA) and other recent statutes. *See, e.g.*, 42 U.S.C. § 12111(8) (1994) (ADA); 20 U.S.C. § 1400 (1994) (Individuals with Disabilities Education Act). *See generally* ROLAND W. BURRIS, MANUAL OF STYLE FOR DEPICTING PERSONS WITH DISABILITIES 2 (State of Illinois, n.d.) (discussing usage issues).

sis of disability.[3] The authors viewed this integrationist paradigm as part of a progression from the idea that others need to care for and protect persons with disabilities—custodialism—toward the idea that persons with disabilities should assert their own rights to equal treatment.[4]

To support their position, tenBroek and Matson analyzed government welfare and rehabilitation programs, finding that although the programs had evolved, they needed to move further in the direction of promoting autonomy and self-sufficiency rather than paternalism and caretaking.[5] They foresaw difficulties with some proposed revisions in the federal welfare programs but anticipated more progressive policies in the future.[6] They outlined welfare reforms that they believed would promote autonomy.[7]

In the years since the publication of the article, and due, in part, to tenBroek and Matson's intellectual groundwork, dramatic changes have occurred in the field of disability equality.[8] A militant civil rights movement emerged in the 1960s and 1970s, which sparked extensive organizing by persons with disabilities and mounted political pressure concerning discrimination issues.[9] These efforts produced landmark laws against discrimination. The Rehabilitation Act of 1973 forbade discrimination against persons with disabilities in federally assisted activities.[10] The Education for All Handicapped Children Act of 1975 required that all children with disabilities receive a free, appropriate public education.[11] In 1990, Congress passed the Americans with Disabilities Act (ADA or the Act), outlawing disability discrimination in private employment, state

3. *See* tenBroek & Matson, *supra* note 1, at 814–16. Professor tenBroek also explored the law of torts as it relates to persons with disabilities, discussing not only the traditional issues of duty of care and contributory negligence but also the emerging statutory law forbidding construction of architectural barriers to mobility and requiring the accommodation of service animals. *See* Jacobus tenBroek, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 CAL. L. REV. 841 (1966). Professor tenBroek himself was blind and a pioneering activist for disability rights. *See id.* at 841 n.†; *see also* Carl M. Selinger, *Equal Protection and Minimum Social Benefits: An Addendum to Professor West's Abolitionist Theory*, 94 W. VA. L. REV. 157 (1991) (discussing tenBroek's work). For an updated discussion of torts and disability, see Adam A. Milani, *Living in the World: A New Look at the Disabled in the Law of Torts*, 48 CATH. U. L. REV. 323 (1999).

4. *See* tenBroek & Matson, *supra* note 1, at 816.

5. *See id.* at 826, 834–40.

6. *See id.* at 840.

7. *See id.* at 824, 835–40.

8. The influence of that article and its companion on the law of torts parallels the influence of tenBroek's book, JACOBUS TENBROEK, THE ANTI-SLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT (1951), and his coauthored article, Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341 (1949), works that profoundly affected the Warren Court's development of equal protection doctrine. *See generally* Selinger, *supra* note 3 (discussing tenBroek's contributions); Robin West, *Toward an Abolitionist Interpretation of the Fourteenth Amendment*, 94 W. VA. L. REV. 111 (1991) (employing tenBroek's historical research on the Fourteenth Amendment).

9. *See* OLIVER SACKS, SEEING VOICES: A JOURNEY INTO THE WORLD OF THE DEAF 127–63 (1990) (describing the militancy of students at Gallaudet University); JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT (1993) (describing the emergence of a civil rights movement of people with disabilities).

10. *See* 29 U.S.C. §§ 701–706 (1994).

11. *See* 20 U.S.C.A. §§ 1400–1487 (West Supp. 1999).

and local governmental services, public accommodations, public transportation, communications, and other activities.[12]

Only in very recent years have critics questioned whether new ideas are needed to advance beyond the plateau that now has been reached. Critics note that the economic state of people with disabilities has not changed much for all the civil rights they have gained. Severe levels of unemployment and poverty remain the rule.[13] The ADA has benefited only a narrow class of persons with disabilities—those who can successfully compete with others once their disabilities have been accommodated and for whom the needed accommodations do not cause the employer undue hardship. The person without the disability remains the norm in determining how far the employer must go.[14]

The economic role of people with disabilities continues to depend less on the law of employment discrimination than on the law of welfare—that is, what government benefits people are entitled to based on their poverty and their status as people with disabilities. Integrationism's improvements to the law of welfare occurred rapidly as deinstitutionalization became the norm for delivery of social services,[15] federalization of some programs occurred,[16] and work incentives increased.[17] Still, even people who receive the welfare benefits that were improved during the integrationist period live at a level far below the poverty threshold, not at a level of equality with others in society.[18] Worse, many of the welfare benefits that support people with disabilities recently have been swept away by the welfare reform movement.[19]

Reacting to the material and social condition of people with disabilities after integrationism's achievements, disability theorists have developed a new paradigm, what might be termed "post-integrationism."[20] Critics have questioned whether the goal of integration should always be pursued and have suggested that special treatment for people with disabilities remains necessary in society and in the economy.[21] They have written of new ideas of social justice that take into account the realities of disability—for example, the inevitable costs that disability imposes on the individual by reducing earning capacity and increasing necessary expenses.[22] They have proposed shifting those costs onto society as a whole.[23] They have tried to imagine a world that acknowledges the fact of

12. *See* 42 U.S.C. §§ 12101–12213 (1994).
13. *See infra* text accompanying notes 59–64.
14. *See infra* text accompanying notes 104–05.
15. *See infra* text accompanying notes 89, 288–98.
16. *See infra* text accompanying notes 256–65.
17. *See infra* text accompanying notes 305–26.
18. *See infra* text accompanying notes 390–93.
19. *See infra* text accompanying notes 332–44.
20. *See infra* text accompanying notes 151–205.
21. *See infra* text accompanying notes 157–59.
22. *See infra* text accompanying notes 113–30, 155–56, 167–68.
23. *See infra* text accompanying notes 169–86.

disability but avoids relying on norms and standards drawn with reference to the nondisabled individual.[24]

The implications of these insights for the law of employment discrimination largely remain to be developed.[25] The new ideas might call for programs that go further than outlawing discrimination as it is now conceived and toward mandatory job set asides, as are required in Europe and Japan.[26] They might include what I term "unreasonable ac-

24. *See infra* text accompanying notes 187–97.

25. The bulk of scholarship on disability law issues has developed the disability discrimination themes identified by tenBroek and Matson and has sought to contribute to the judicial and legislative development of antidiscrimination law for persons with disabilities. *See, e.g.*, Robert L. Burgdorf, Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413 (1991); Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 TEMP. L. REV. 393 (1991); Gregory S. Crespi, *Efficiency Rejected: Evaluating "Undue Hardship" Claims Under the Americans with Disabilities Act*, 26 TULSA L.J. 1 (1990); G. William Davenport, *The Americans with Disabilities Act: An Appraisal of the Major Employment-Related Compliance and Litigation Issues*, 43 ALA. L. REV. 307 (1992); Russell H. Gardner & Carolyn J. Campanella, *The Undue Hardship Defense to the Reasonable Accommodation Requirement of the Americans with Disabilities Act of 1990*, 7 LAB. LAW. 37 (1991); Charles D. Goldman, *Americans with Disabilities Act: Dispelling the Myths*, 27 U. RICH. L. REV. 73 (1992); W. Robert Gray, *The Essential-Functions Limitation on the Civil Rights of People with Disabilities and John Rawls's Concept of Social Justice*, 22 N.M. L. REV. 295 (1992); Charles P. Gurd, *Whether a Genetic Defect Is a Disability Under the Americans with Disabilities Act*, 1 ANN. HEALTH L. 107 (1992); Loretta K. Haggard, *Reasonable Accommodation of Individuals with Mental Disabilities and Psychoactive Substance Abuse Disorders Under Title I of the Americans with Disabilities Act*, 43 WASH. U. J. URB. & CONTEMP. L. 343 (1993); Stanley S. Herr, *Questioning the Questionnaires: Bar Admissions and Candidates with Disabilities*, 42 VILL. L. REV. 635 (1997); Michael B. Laudor, *Disability and Community: Modes of Exclusion, Norms of Inclusion, and the Americans with Disabilities Act of 1990*, 43 SYRACUSE L. REV. 929 (1992); Penn Lerblance, *Introducing the Americans with Disabilities Act: Promises and Challenges*, 27 U.S.F. L. REV. 149 (1992); Arlene Mayerson, *Title I—Employment Provisions of the Americans with Disabilities Act*, 64 TEMP. L. REV. 499 (1991); Stephen L. Mikochik, *The Constitution and the Americans with Disabilities Act: Some First Impressions*, 64 TEMP. L. REV. 619 (1991); John J. Sarno, *The Americans with Disabilities Act: Federal Mandate to Create and Integrated Society*, 17 SETON HALL LEGIS. J. 401 (1993); Bonnie P. Tucker, *The Americans with Disabilities Act: An Overview*, 1989 U. ILL. L. REV. 923; Floyd D. Weatherspoon, *The Americans with Disabilities Act of 1990: Title I and Its Impact on Employment Decisions*, 16 VT. L. REV. 263 (1991); C. Geoffrey Weirich, *Reasonable Accommodation Under the Americans with Disabilities Act*, 7 LAB. LAW. 27 (1991).

Student commentary also abounds. *See, e.g.*, Jeffrey O. Cooper, Comment, *Overcoming Barriers to Employment: The Meaning of Reasonable Accommodation and Undue Hardship in the Americans with Disabilities Act*, 139 U. PA. L. REV. 1423 (1991); James C. Dugan, Note, *The Conflict Between "Disabling" and "Enabling" Paradigms in Law: Sterilization, the Developmentally Disabled, and the Americans with Disabilities Act of 1990*, 78 CORNELL L. REV. 507 (1993); James V. Garvey, Note, *Health Care Rationing and the Americans with Disabilities Act of 1990: What Protection Should the Disabled Be Afforded?*, 68 NOTRE DAME L. REV. 581 (1993); Kathleen D. Henry, Note, *Civil Rights and the Disabled: A Comparison of the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990 in the Employment Setting*, 54 ALA. L. REV. 123 (1989); Lisa L. Lavelle, Note, *The Duty to Accommodate: Will Title I of the Americans with Disabilities Act Emancipate Individuals with Disabilities Only to Disable Small Businesses?*, 66 NOTRE DAME L. REV. 1135 (1991); Edward J. McGraw, Note, *Compliance Costs of the Americans with Disabilities Act*, 18 DEL. J. CORP. L. 521 (1993); Bryan P. Neal, Note, *The Proper Standard for Risk of Future Injury Under the Americans with Disabilities Act*, 46 SMU L. Rev. 483 (1992); Timothy A. Ogden, Note, *Shifting Burdens and the Americans with Disabilities Act*, 29 IND. L. REV. 179 (1995).

26. *See* 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 the creation of job setaside programs for persons with disabilities); *see also* Richard V. Burkhauser, *Lessons from the West German Approach to Disability Policy*, *in* DISABILITY & WORK 85, 88 (Carolyn L. Weaver ed., 1991) (describing the German setaside program); Eric A. Besner, Comment, *Employment Legislation for Disabled Individuals:*

commodations," modifications in work settings and processes that go further than what the ADA currently requires, modifications that impose some "due hardship" on employers.[27]

But social intervention greater than reform of employment law will be needed to bring people with disabilities to an equal place in society. Social intervention will have to affect the law of public welfare, the other social system that specifically addresses disability and its impact on the capacity of a person to provide for herself. The implications of post-integrationist ideas on the law of welfare for people with disabilities remain almost totally uncharted territory.[28]

This article explores the law of welfare for persons with disabilities as well as the developments in disability theory that call for changes in that law. Part I looks into the meaning and effects of disability, contrasting the approach of discrimination law with that of welfare law and mapping out the connection that disability has with unemployment and poverty. Part II develops the theories of disability equality, comparing custodialism, integrationism, and post-integrationism and then developing both the critique of integrationism and the outlines of a new theory. Part III takes up the existing law of welfare for persons with disabilities, and part IV lists recent developments and trends in that law. Part V considers proposals to reform the law of welfare, discussing steps that would shift the costs of disability and create something closer to functional equality for persons with disabilities. Among these new programs would be benefits based on partial disability, greater aid to supplement the

What Can France Learn from the Americans with Disabilities Act?, 16 COMP. LAB. L.J. 399, 418–19 (1995) (describing the French setaside program).

27. *See* Weber, *supra* note 26, at 147–50 (describing obligations under affirmative action programs to do more than reasonably accommodate employees with disabilities). For additional commentary on existing affirmative action laws pertaining to employment of persons with disabilities, see Kathryn W. Tate, *The Federal Employer's Duty Under the Rehabilitation Act: Does Reasonable Accommodation or Affirmative Action Include Reassignment?*, 67 TEX. L. REV. 781 (1989); Russell Baker, Note, *Affirmative Action Toward Hiring Handicapped Individuals*, 49 S. CAL. L. REV. 785 (1976).

28. A certain amount of scholarship explores the law establishing welfare and rehabilitation programs for persons with disabilities and discusses how the programs should be improved. The relatively small amount of this work that has appeared in legal publications, however, focuses almost exclusively on the particular statutes establishing the programs. Since tenBroek and Matson, few scholars have systematically studied the relationship between the existing and proposed developments in antidiscrimination law and the current and proposed law of welfare and rehabilitation. One individual who has done so is Matthew Diller, whose work is discussed *infra* in the text accompanying notes 134–49, 265–76. A recent article by Diller explores what he believes are contrary social policies embodied in welfare and antidiscrimination law as it relates to persons with disabilities. *See* Matthew Diller, *Dissonant Disability Policies: The Tensions Between the Americans with Disabilities Act and Federal Disability Benefit Programs*, 76 TEX. L. REV. 1003, 1032–48 (1998). Diller is one of a number of scholars who have addressed the specific interconnection of disability discrimination and disability benefits law presented by courts' use of estoppel to bar people who have applied for or received benefits based on total disability from asserting that they are qualified persons with disabilities under the employment provisions of the ADA. *See, e.g.*, *id.*; Heather Hamilton, Comment, *Judicial Estoppel, Social Security Benefits and the ADA: The Circuits Diverge*, 9 DEPAUL BUS. L.J. 127 (1996). The issue of the role of a disability benefits application on an ADA claim was resolved by the Supreme Court in *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795 (1999), which held that an application for benefits on the basis of total disability does not necessarily foreclose a claim that a person is a qualified individual under the employment provisions of the ADA. *See id.* at 802–03.

earnings of people with disabilities who work, modifications of recent welfare reform, and other initiatives.

I. DISABILITY'S MEANING AND EFFECTS

The meaning of disability depends on context. Legislators writing antidiscrimination statutes frequently use a broad definition of the term discrimination to protect the maximum number of individuals from unfair treatment. Courts, however, have chipped away at the expansive language and have restricted the laws' scopes. Writers of benefits statutes, on the other hand, have applied restrictive definitions to control expenditures. In both discrimination and benefits legislation, lawmakers and courts have recognized that disability is contingent. Attitudinal, environmental, and economic realities contribute to making people disabled. Limits on working and social participation imposed by both the physical and mental impairments themselves and the external conditions result in high rates of unemployment and poverty for individuals with disabilities.

A. Disability Under the Americans with Disabilities Act

The ADA defines disability as "a physical or mental impairment that substantially limits one or more [of a person's] major life activities, . . . the record of such an impairment, . . . [or] being regarded as having such an impairment."[29] Major life activities include such functions as "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, and working."[30] The Rehabilitation Act of 1973, a federal law that prohibits discrimination against otherwise qualified individuals in federally funded activities, employs a similar definition.[31]

Although these definitions seem broad in their coverage, courts and regulators have cabined them in a number of ways.[32] For example, courts have created a requirement that the employer must have regarded the candidate or employee as disabled for other jobs, in addition to the one in dispute, for the individual to be "regarded as" disabled.[33] The legislative history of the ADA indicates strongly, however, that being regarded

29. 42 U.S.C. § 12102(2) (1994). The Supreme Court has affirmed that the limits placed on reproduction by a person's asymptomatic infection with the human immunodeficiency virus (HIV) satisfy the conditions of the definition. *See* Bragdon v. Abbott, 523 U.S. 1002 (1998).

30. 29 C.F.R. § 1630.2(i) (1998).

31. *See* 29 U.S.C. § 706(8)(B) (1994); 29 C.F.R. § 1613.702 (1998).

32. An argument can be advanced that courts tend to restrain the application of legislation that calls for radical social change, *see* Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 MINN. L. REV. 265, 293–336 (1978), although my view is that the relationship between courts and legislatures is more complex, at least on disability issues, *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 (1990).

33. *See* Sutton v. United Airlines Inc, 527 U.S. 471, 478 (1999); Murphy v. United Parcel Serv., Inc., 527 U.S. 516, 519 (1999).

as disabled for the job at issue is sufficient.[34] Similarly, the legislative history gives scant support for the idea that an impairment must be long in duration,[35] and the Department of Justice initially—though unsuccessfully—opposed placing such a requirement in the regulations.[36]

The fact remains that under the common-sense definition that the federal civil rights statutes employ, large numbers of individuals are considered disabled. Using Census Bureau surveys and applying a disability standard comparable to that in the ADA, a leading authority estimates the number of people with disabilities in the United States to be between 22.9 million and 36.1 million.[37] The number is likely to increase over the next twenty years as the American population ages.[38]

B. Disability's Definition Under Benefits Programs

As described more fully below,[39] benefits programs for persons with disabilities include those administered by the United States Social Security Administration and those administered by state authorities. The Social Security programs give benefits to those persons who are unable "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected . . . to last for a continuous period" of a year or more.[40] The law presumes that earnings of $700 per month constitute substantial gainful activity;[41] earn-

34. *See* Robert L. Burgdorf, Jr., *"Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability*, 42 VILL. L. REV. 409, 449–51 (1997) (collecting sources). Burgdorf contends that courts and regulators err by focusing on the characteristics of the disability rather than the nature of the discrimination; he believes that the error is characteristic of approaches to disability that regard persons with disabilities as a specially protected class. *See id.* at 468–69.

35. *See id.* at 475 (collecting sources).

36. *See id.*

37. *See* Mitchell P. LaPlante, *How Many Americans Have a Disability?*, DISABILITY STATISTICS ABSTRACT (June 1992) <http://www.dsc.ucsf.edu/abs/ab5.html> (copy on file with the *University of Illinois Law Review*) (analyzing data from the 1990 National Health Interview Survey conducted by the Census Bureau for the National Center for Health Statistics). The government's surveys show that 22.9 million noninstitutionalized individuals are limited in a major activity due to a physical impairment lasting or expected to last at least six months. For children under five, major activity is ordinary play; for those five through seventeen, it is attending school. It is working or keeping house for persons from 18 to 69 and independent living skills for those who are older. Activities that are not considered major include civic functions, church, and recreation. An additional 10.9 million Americans who are not in institutions are estimated to be limited in those activities. The ADA, 42 U.S.C. § 12101(a)(1) (1994), carries an estimate of 43 million individuals with disabilities, but the number was the sum of those who were estimated to have various specific impairments, rather than limits on activity because of impairment. *See id.*

38. *See* Jerry L. Mashaw & Virginia P. Reno, *Overview*, *in* DISABILITY, WORK AND CASH BENEFITS 1, 27 (Jerry L. Mashaw et al. eds., 1996) (discussing the aging of the baby boom generation and anticipated increases in disability benefits caseloads).

39. *See infra* text accompanying notes 213–302.

40. 42 U.S.C. §§ 423(d)(1)(A), 1382c(3)(A) (1994).

41. *See* Substantial Gainful Activity Amounts, 64 Fed. Reg. 18,570–71 (1999) (to be codified at 20 C.F.R. §§ 404.1574(b)(2), 416.974(b)(2)).

ings of $300 per month or less create a presumption of an absence of substantial gainful activity.[42]

The definition of disability under the federal benefits programs is much more exacting than a common-sense definition or the ADA definition. The beneficiaries of the federal programs are, generally speaking, the most severely disabled. The most typical recipient of Supplemental Security Income (SSI), the federal program for individuals who are poor and have little or no work history, has mental retardation and other impairments.[43] The most typical recipient of Disability Insurance (DI), the program for those with significant work history, has a serious physical impairment and is near elderly.[44] One longitudinal study of DI program beneficiaries found that of all the individuals who joined the rolls in a given twelve-month period, over one-eighth died within two years.[45] The proportion of individuals dying during their first six months on the program is fourteen times that of persons in their first six months on the Social Security retirement benefits program.[46] Additionally, persons receiving DI tend to be older than most people in the population or the workforce. More than one-half are over age fifty when they are awarded benefits.[47] The relatively high age of the beneficiary limits the number of years that the person receives benefits before being converted to a retiree at age sixty-five.[48]

The exacting standard of disability in the federal benefit programs yields a much smaller number of Americans who are considered disabled than the number potentially covered by the ADA. Only 4.5 million individuals receive DI benefits on account of their status as disabled workers,[49] and approximately 5.2 million people receive SSI on grounds of disability.[50] The combined number of persons receiving benefits is lower than the sum of recipients of both benefits; individuals who have low assets and whose DI benefit amount is below the SSI benefit level receive benefits from both programs (although the maximum combined amount is the same as the SSI amount). Moreover, many of those receiving SSI benefits are children who would not be in the labor force even if they had

42. *See* 20 C.F.R. § 404.1574(b)(3) (1998).

43. *See* Aaron J. Prero, *Quantitative Outcomes of the Transitional Employment Training Demonstration*, *in* DISABILITY, WORK, AND CASH BENEFITS, *supra* note 38, at 273, 274 (noting that fully 29% of all recipients are entitled to payments on the basis of a primary finding of mental retardation).

44. *See* MONROE BERKOWITZ, DISABLED POLICY 194–95 (1987) (describing DI as serving mainly individuals in their fifties who are prematurely "enfeebled").

45. *See* Walter Y. Oi, *Employment and Benefits for People with Diverse Disabilities*, *in* DISABILITY, WORK AND CASH BENEFITS, *supra* note 38, at 103, 113 (citing Social Security Administration data).

46. *See* Martynas A. Ycas, *Patterns of Return to Work in a Cohort of Disabled-Worker Beneficiaries*, *in* DISABILITY, WORK AND CASH BENEFITS, *supra* note 38, at 169, 171.

47. *See id.* at 172.

48. *See id.* at 172–73.

49. *See Social Security at a Glance*, SOC. SECURITY BULL., Winter 1997, at 113. The actual number of beneficiaries of the program is higher, because benefits are also available to spouses and dependents of the person with a disability. *See id.*

50. *See id.*

no disability. Overall, 6.7 million adults under retirement age receive DI or SSI on the basis of disability.[51]

C. Disability's Relation to Economic Conditions

Insofar as disability is related to work, its existence depends not only on a person's physical ability to do a job but also on the availability of work. When workers are scarce, employers will offer jobs to workers whom they perceive to have lower capacity to contribute to the economic enterprise than the workers they would choose if labor were abundant. Those workers whose disabilities interfere with job performance are among the most likely to be fired when an employer's profits slip, and they will have difficulty finding other work if sliding profits are a general condition. Statistics bear out these observations. Disability benefits claims rise during recessions,[52] and the Social Security program was first envisioned during the Great Depression, a period when large numbers of workers had no jobs.[53]

Although the Social Security definition emphasizes medical factors, its drafters realized that disability depends on economic conditions, technical developments, and social attitudes.[54] The antidiscrimination statutes' definition of disability would appear to be independent of the condition of the national economy; nevertheless, the prevalence of discrimination may relate to the presence of labor surpluses.[55] An employer who might otherwise be inclined to discriminate against a qualified worker will hesitate when indulging that inclination would leave the job unfilled for a long period of time.[56] Moreover, claims of discrimina-

51. *See* Disability Policy Panel, National Academy of Social Insurance, *Rethinking Disability Policy: The Role of Income, Health Care, Rehabilitation, and Related Services in Fostering Independence*, SOC. SECURITY BULL., June 24, 1994, at 56, 60.

52. *See id.* at 58 ("Disability claims have risen during every economic recession since the late 1960's—with the one exception of the early 1980's, when unprecedented retrenchment policies offset those effects."); *see also* Kalman Rupp & David Stapleton, *Determinants of the Growth in the Social Security Administration's Disability Programs—An Overview*, SOC. SECURITY BULL., Dec. 1, 1995, at 43, 52 (finding that business cycle effects overwhelm the influence of variables such as economic restructuring in the growth of disability caseloads); Ilene R. Zeitzer, *Recent European Trends in Disability and Related Programs*, SOC. SECURITY BULL., Summer 1994, at 21, 22 ("[A]ll disability programs are adversely affected by economic downturns. In other words, in times of recession, applications for disability benefits increase, often dramatically, and this in turn usually results in an increase in the number of benefits granted.").

53. *See* ARTHUR J. ALTMEYER, THE FORMATIVE YEARS OF SOCIAL SECURITY 6–10 (1966) (describing the importance of the Great Depression in demonstrating the need for long-term economic security programs).

54. *See* BERKOWITZ, *supra* note 44, at 43–49.

55. *See* Edward H. Yelin, *The Employment of People with and Without Disabilities in an Age of Insecurity*, ANNALS AM. ACAD. POL. & SOC. SCI., Jan. 1997, at 117, 127–28 (noting that persons with disabilities are a "contingent part of the labor force" employed less regularly than others).

56. On the topic of rational and irrational preferences for discrimination, see John J. Donohue III, *Is Title VII Efficient?*, 134 U. PA. L. REV. 1411 (1986); Richard A. Posner, *An Economic Analysis of Sex Discrimination Laws*, 56 U. CHI. L. REV. 1311, 1319 (1989).

tion can be expected to rise during bad economic times.[57] People are more likely to bring claims of discrimination when they lose jobs than when they suffer other harms from disability discrimination,[58] and job loss is most likely to happen in times of economic recession.

D. Disability, Unemployment, and Poverty

The economic effects of discrimination against persons with disabilities are pervasive. Specifically, many individuals cannot get jobs, and the jobs they do get are inferior to those they are qualified to perform. No jobs or poorer jobs mean no wages or lower wages, which results in impoverishment. Statistics show how people with disabilities lag behind the rest of the population in employment. Less than thirty percent of working-age people with disabilities work even part time, as opposed to almost eighty percent of working-age people without disabilities.[59] Almost three-quarters of the people with disabilities who are not working want to work.[60]

Moreover, as explained more fully below, many disabilities diminish the marginal contribution that a worker can make to the employer's business and, therefore, lead to the individual's receiving less economic reward.[61] In addition, many disabilities impose work-related and personal expenses that leave less disposable income for other uses. Environmental barriers (apart from those on the employer's premises), limits on transportation and communications, and similar factors also impede employment for many persons with disabilities.

As a result, people with disabilities are disproportionately poor; fully a third live in households that have an annual income of $15,000 or less. Only twelve percent of people without disabilities meet the same standard of need.[62] The poverty rate for adults with work disabilities (both severe or nonsevere) is three times that of the rest of the popula-

57. Employment discrimination suits increase dramatically during recessionary periods, although the impact of recessions on EEOC filings is less significant. *See* John J. Donohue III & Peter Sieligman, *Law and Macroeconomics: Employment Discrimination Litigation over the Business Cycle*, 66 S. CAL. L. REV. 709, 711 (1993) (analyzing government statistics).

58. The largest category of disability claims filed with the EEOC are discharge claims. *See* U.S. COMM'N ON CIVIL RIGHTS, HELPING EMPLOYERS COMPLY WITH THE ADA 213 (1998) (analyzing EEOC data).

59. *See* Great Lakes Disability & Bus. Technical Assistance Ctr., *Harris Poll Results*, REGION V NEWS, Spring/Summer 1998, at 1 (reporting the results of a Louis Harris Poll commissioned by the National Organization on Disability) ("Only 29% of people with disabilities of working age (18–64) work full or part-time, compared to 79% of the non-disabled population, a gap of 50 percentage points.") [hereinafter *Harris Poll Results*].

60. *See id.* ("Of those people with disabilities of working age who are not working, 72% say that they would prefer to work.").

61. *See infra* text accompanying notes 114–25.

62. *See Harris Poll Results*, *supra* note 59, at 1.

tion.[63] Even those persons with disabilities who work full time have a poverty rate three times that of full-time workers without disabilities.[64]

II. DISABILITY AND IDEAS OF EQUALITY

So far, there have been three major intellectual approaches to disability, and each has had its impact on the meaning of equality for people with disabilities. As tenBroek and Matson described in their article, the first two approaches are custodialism and integrationism. More recently, something that can be called post-integrationism has emerged. Each "ism" has influenced what courts and commentators talk about as "disability law."

A. Custodialism

Custodialism is the idea that persons with disabilities are to be sheltered—that they should be kept separate from the population at large and given charity to compensate for their inability to survive in the world on their own.[65] Custodialism is the oldest of the three approaches. Like elderly adults and dependent children, persons with disabilities received support from the medieval church and from the early modern state.[66] Yet with support came compelled separation from others, often in almshouses[67] or institutions.[68] The institutions kept people with disabilities out of sight and out of the public mind. When they were in public, they were

63. *See* Mitchell P. LaPlante et al., *Disability and Employment*, DISABILITY STATISTICS ABSTRACT (Jan. 1996) <http://www.dsc.ucsf.edu/abs/ab5.html> (copy on file with the *University of Illinois Law Review*) (according to 1995 Census Bureau data, "[w]ithin the working-age population (16–64), 30.0 percent of people with work disabilities live below the poverty level, compared to 10.2 percent of those without work disabilities"). For those whose disabilities are so severe that they cannot work at all, 35.8% have incomes below the poverty line. *See id.*

64. *See id.* (reporting respective rates of 10.3% and 2.9%).

65. *See* tenBroek & Matson, *supra* note 1, at 816.

66. *See id. See generally* Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status*, 16 STAN. L. REV. 257 (1964) (detailing the development of California's family laws).

67. *See* tenBroek & Matson, *supra* note 1, at 811 (describing the use of almshouses for custody of persons with disabilities).

68. Society at large cared little about the institutions housing persons with disabilities. Constitutional doctrine protecting the safety, habilitation, and right to medical treatment of persons with disabilities in institutions emerged only after those rights had been extended to prisoners, with the Supreme Court reasoning that persons involuntarily confined without having committed a crime were entitled to no fewer protections. *See* Youngberg v. Romeo, 457 U.S. 307, 315–16 (1982). Courts have refused to find similar rights when an individual is voluntarily confined rather than civilly committed. *See, e.g.*, Fialkowski v. Greenwich Home for Children, Inc., 921 F.2d 459, 465–66 (3d Cir. 1990). Statutory protections of institutionalized persons with disabilities were found unenforceable in *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981). In 1975, the Supreme Court did establish a right to freedom from institutionalization for an individual disabled by mental illness when he was not dangerous to himself or other people. *See* O'Connor v. Donaldson, 422 U.S. 563, 573–76 (1975).

frequently viewed not as individuals equal to others but as mere manifestations of their disabilities.[69]

Keeping persons with disabilities hidden might be a means to protect them.[70] The separation, however, more often protected those without disabilities from having to deal with the existence of anyone with a disability. Laws and the legal system created some of the most disturbing examples of compelled separation. Until 1973, Chicago had an ordinance prohibiting persons who were "deformed" and "unsightly" from exposing themselves to public view.[71] More recently, the trial judge in the mass tort litigation over birth defects said to result from the use of the drug Bendectin excluded all plaintiffs with visible deformities from the courtroom on the ground that their appearances would improperly influence the jury.[72]

Eugenics, the late nineteenth- to early twentieth-century pseudoscience of breeding optimal human beings, carried this supposed protection of the majority from the deviant to its furthest extremes. Infants with disabilities were frequently denied medical treatment in hospitals and left to die,[73] and the courts approved the compelled sterilization of individuals on the flimsiest showing of a propensity to pass disabilities on to their offspring, as in the case of *Buck v. Bell*.[74]

In the period governed by custodialism, the law frequently kept children with disabilities away from the education that would have enabled them to take a better place in society. Courts routinely approved

69. *See* Robert T. Stafford, *Education for the Handicapped: A Senator's Perspective*, 3 VT. L. REV. 71, 72 (1978) (describing the mission of special education legislation to end the "two-tiered invisibility" of children with disabilities in which the children are locked away out of sight and, when seen, are seen as manifestations of liability).

70. The separate settings in which persons with disabilities were confined, however, were frequently places of abuse. *See* Wyatt v. Aderholt, 503 F.2d 1305, 1310–12 (5th Cir. 1974) (describing filth, brutality, and malnutrition at a state institution for persons with mental retardation); New York State Ass'n for Retarded Children v. Rockefeller, 357 F. Supp. 752, 756 (E.D.N.Y. 1973) (noting reports of 1300 injuries, assaults, or fights in eight months at a state institution for children with mental retardation). For a discussion of the legal rights of persons in institutions, see *supra* note 68.

71. *See* Chicago, Ill., Code § 36-34 (1966) (repealed 1973), *cited in* Martha T. McCluskey, Note, *Rethinking Equality and Difference: Disability Discrimination in Public Transportation*, 97 YALE L.J. 863, 863–64 n.8 (1988).

72. *See In re* Bendectin Litig., 857 F.2d 290, 296 (6th Cir. 1988). For a contrasting approach, see *Helminski v. Ayerst Labatories*, 766 F.2d 208, 217 (6th Cir. 1985), which held that individuals with physical abnormalities should not be discriminated against with respect to presence in court.

73. This practice continued into the twentieth century. *See* Cook, *supra* note 25, at 403 n.74 (collecting primary sources).

74. 274 U.S. 200, 205, 207 (1927) (upholding the sterilization of woman deemed "feeble-minded," declaring that "[t]hree generations of imbeciles are enough"). This era is not entirely past. *See* Roberta Cepko, *Involuntary Sterilization of Mentally Disabled Women*, 8 BERKELEY WOMEN'S L.J. 122 (1993) (describing current practices regarding sterilization that fail to protect the rights and capabilities of women with mental disabilities); Robert L. Hayman, *Presumptions of Justice: Law, Politics, and the Mentally Retarded Parent*, 103 HARV. L. REV. 1201 (1990) (describing the prevailing presumption that persons who are mentally retarded are unfit parents and challenging its soundness). *Buck* itself was a sham case in which the attorney representing the person alleged to be unfit cooperated with the attorney representing the eugenicists. *See* Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on* Buck v. Bell, 60 N.Y.U. L. REV. 30, 56 (1985).

administrative decisions that children could not benefit from existing educational programs and, therefore, would be offered no educational services.[75] One statute even made it a crime for parents to persist in sending a child with disabilities to school after administrative exclusion.[76] In 1975, when federal legislation ordered states receiving federal funds to educate all school-aged children with disabilities, 1.75 million children of school age were denied any access to school because of their disabilities.[77] An estimated 2.5 million were in programs that did not provide them adequate education.[78]

Private conduct excluding people with disabilities matched that of public authorities. The legislative history of the ADA reports an instance where children with Down's syndrome were excluded from a private zoo on the belief that their appearances would upset the animals.[79] Jobs have been denied to individuals with cerebral palsy[80] and arthritis[81] because of the alleged discomfort that would be caused to co-workers or customers by looking at them. These examples support the truth of tenBroek and Matson's statement: "Psychologically, socially, and legally, the disabled throughout history have enjoyed among themselves a peculiar 'equality'; they have been equally mistrusted, equally misunderstood, equally mistreated, and equally impoverished."[82]

B. Integrationism

Custodialism left a legacy of prejudice and exclusion. The question for those challenging the discrimination was how to conceive a world in which people with disabilities would be equal to other members of the community. The theory they created led to huge achievements but contained its own limits as well. Moreover, it led some analysts into unrealistic, unduly narrow views about welfare policy for persons with disabilities.

75. *See, e.g.*, Department of Pub. Welfare v. Haas, 154 N.E.2d 265 (Ill. 1958); Watson v. City of Cambridge, 32 N.E. 864 (Mass. 1893); State *ex rel.* Beattie v. Board of Educ., 172 N.W. 153 (Wis. 1919). Statutes permitting administrative exclusion of children with disabilities from public school are collected and described in Richard C. Handel, *The Role of the Advocate in Securing the Handicapped Child's Right to an Effective Minimal Education*, 36 OHIO ST. L.J. 349, 351 (1974).

76. *See* Act of May 18, 1965, ch. 584, § 17, 1965 N.C. Sess. Laws 641, 643–44 (amending N.C. Gen. Stat. § 115-165).

77. *See* H.R. REP. NO. 94-332, at 11–12 (1975).

78. *See id.* Inadequate counts of children with disabilities may have rendered the congressional estimates somewhat inaccurate, but even critics of the estimates had to concede that large numbers of children were out of school. *See* William H. Clune & Mark H. Van Pelt, *A Political Method of Evaluating the Education for All Handicapped Children Act of 1975 and the Several Gaps of Gap Analysis*, LAW & CONTEMP. PROBS., Winter 1985, at 7, 15–18.

79. *See* S. REP. NO. 101-116, at 7 (1989).

80. *See* 135 CONG. REC. S10,720 (1989) (statement of Sen. Durenberger).

81. *See* H.R. REP. NO. 101-485, pt. 2, at 30 (1989).

82. tenBroek & Matson, *supra* note 1, at 814.

1. The Achievements of Integrationism

For theorists such as tenBroek and Matson, the basis of the new concept of equality lay in recognizing the role of the social environment in disability. As tenBroek and Matson noted, whatever limits the disability imposes should be no greater than those necessarily implied by a person's impairments. The disability and the limits "should be isomorphic; the 'handicap' of being blind, for example, should correspond to the visual and physical limitations of blindness, without the superimposition of additional difficulties."[83] Instead, society imposes greater limits because of "myths, stereotypes, aversive responses, and outright prejudices."[84]

These social attitudes matter. A person whose condition is manifested in facial tics or skin lesions may have no impairment in ordinary functioning at work or leisure yet frequently is considered by others to be unable to work or to conduct other daily activities. An attitude of inclusion and valuing diversity ignores differences that are not relevant to the task at hand and avoids creating disabilities. Prejudiced attitudes exacerbate them.[85]

The physical environment and adaptations of it matter as well. Technology frequently determines whether a physical or mental condition is a disability at all. The simple technology of eyeglasses is an example. Many people are functionally blind without them but rarely consider the disability they would experience if glasses had never been invented.[86] More advanced technology has the promise of rendering many other conditions less disabling in work or other settings.[87]

83. *Id.*

84. *Id.*

85. *Cf.* Peter David Blanck & Mollie Weighner Marti, *Attitudes, Behavior and the Employment Provisions of the Americans with Disabilities Act*, 42 VILL. L. REV. 345, 378 (1997) ("[I]t appears that the degree to which many companies comply with the accommodation provisions of Title I has more to do with their corporate cultures and attitudes than with the actual demands of the law.").

86. I have always believed that the elaborate chains of mistaken identity and the effective use of disguises found in Shakespeare's comedies were more convincing plot devices in the days when most adults could not see very well. Blindness plays an important role in literature of all eras but has special prominence from ancient times to the Renaissance. For a light-hearted account of life as a nearsighted person suddenly deprived of his glasses, see JAMES THURBER, *The Admiral on the Wheel*, *in* THE THURBER CARNIVAL 90 (1945).

87. One study has shown that workers with spinal cord injuries who use a computer in their employment earn as much per week as people without spinal cord injuries who do; in contrast, people with spinal cord injuries who do not use computers at work earn 35% less than comparable individuals without spinal cord injuries. *See* Alan B. Krueger, *How Will Labor Market Trends Affect People with Disabilities?*, *in* DISABILITY: CHALLENGES FOR SOCIAL INSURANCE, HEALTH CARE FINANCING, AND LABOR MARKET POLICY 163, 165 (Virginia P. Reno et al. eds., 1997). At the same time, technology may increase disability, at least in relation to employment. A worker must keep pace with a machine and will not be able to compete for a job if physical or mental limits interfere with speed of motion or thinking. That worker would have had a niche in a less technologically based economy. As the labor market opens more positions that do not require physical labor but do necessitate higher-level cognitive abilities and extensive education, persons with mobility impairments may flourish while those with some categories of mental impairments will find themselves out of work.

Proponents of integrationism believe that through the attitudinal and environmental changes compelled by antidiscrimination laws, together with the voluntary or compulsory application of technology, people with disabilities will be able to take their rightful places in the world. The ADA is a classic integrationist statute.[88] It creates legally enforceable rights against segregation. Integrated settings for public services are one of the main goals of Title II of the Act, which governs activities of state and local government.[89] Title I, which governs private employment, specifies "segregating" a job applicant or employee as a form of prohibited discrimination.[90] Title III imposes similar prohibitions on sources of public accommodation with respect to their consumers with disabilities.[91]

The Act also addresses the physical and social environment. It requires employers to provide reasonable accommodations, such as policy changes, appliances, and devices, so that employees with disabilities can perform their jobs.[92] The Act requires public accommodations to modify restrictive policies and to remove barriers to access in stores and offices.[93] It compels the provision of adapted telecommunication services to benefit persons with sensory impairments,[94] and it mandates a gradual transi-

88. Thus, Timothy M. Cook's article on the statute is aptly titled *The Americans with Disabilities Act: The Move to Integration*. *See* Cook, *supra* note 25.

89. *See id.* at 397. In *Olmstead v. L.C.*, 527 U.S. 581 (1999), the Supreme Court ruled that the public services provisions of the ADA require states to provide community-based care to persons with mental disabilities who would otherwise be placed in institutions, when the state's treatment professionals have determined that community placement is appropriate, the affected individual does not oppose the transfer to a less restrictive setting, 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 id.* at 597–607. *See generally* Stanley S. Herr, *Legal Rights and Vulnerable People*, *in* AGING, RIGHTS, AND QUALITY OF LIFE 59, 73–74 (Stanley S. Herr & Germaine Weber eds., 1999) (discussing the *L.C.* litigation and related matters concerning integrated services for persons with developmental disabilities).

90. *See* 42 U.S.C. § 12112(b)(1) (1994). The EEOC Interpretive Guidance specifies that employees with disabilities must not be segregated into separate work areas or lines of advancement and must not be required to use particular facilities, including offices and lunch rooms. *See* EEOC, ADA TITLE I INTERPRETIVE GUIDANCE § 1630.1(b)–(c) (1998).

91. The statute provides:

> It shall be discriminatory to provide an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements with a good, service facility, privilege, advantage, or accommodation that is different or separate from that provided to other individuals, unless such action is necessary to provide the individual or class of individuals with a good, service, facility, privilege, advantage, or accommodation, or other opportunity that is as effective as that provided to others.

42 U.S.C. § 12182(b)(iii). The statute also provides:

> (B) Integrated Settings
>
> Goods, services, facilities, privileges, advantages, and accommodations shall be afforded to an individual with a disability in the most integrated setting appropriate to the needs of the individual.
>
> (C) Opportunity to Participate
>
> Notwithstanding the existence of separate or different programs or activities provided in accordance with this section, an individual with a disability shall not be denied the opportunity to participate in such programs or activities that are not separate or different.

Id. § 12182(b)(iv).

92. *See id.* § 12112(b)(5)(A).

93. *See id.* § 12182(b)(2)(A).

94. *See* 47 U.S.C. §§ 225, 711.

tion to adapted public transportation.[95] Finally, it requires that new construction and alterations of existing structures meet accessibility standards, thus literally shaping the environment to accommodate persons with disabilities.[96]

Like the framers of the ADA, integrationist thinkers recognized that equal treatment for persons with disabilities is not the same as identical treatment.[97] It is not equal or fair to give each law school candidate the same printed LSAT, whether the candidate is blind or not. Some form of adaptation is needed.[98] Nevertheless, integrationist scholars hoped that once basic adaptations had been made, society would not be required to afford fundamentally different treatment to individuals with disabilities.

2. The Limits of Integrationism

This absence of requirements for fundamentally different treatment marks the limits of the integrationist theory. For example, the obligations to afford special treatment embodied in the ADA's integrationist plan all have modest stopping points. Under the Act, an employer must provide employees with disabilities with reasonable accommodations.[99] The obligation ceases, however, when it imposes undue hardship.[100] Storekeepers must only eliminate barriers whose removal is "readily achievable"[101] and need not "fundamentally alter" their services, facilities, or goods.[102] Similarly, public agencies must provide accessibility but need not fundamentally alter their services, programs, and activities.[103]

These limits on social duties to accommodate the needs of persons with disabilities demonstrate that the ADA uses the person without disabilities as the norm and measures what it requires by the effort needed to depart from that norm.[104] The person with a disability is deviant for the

95. *See* 42 U.S.C. §§ 12141–12150, 12184.

96. *See id.* § 12183 (1999) (public accommodations and commercial facilities); 28 C.F.R. § 35.151 (state and local government facilities).

97. *See, e.g.*, Cook, *supra* note 25, at 428; Michael A. Rebell, *Structural Discrimination and the Rights of the Disabled*, 74 GEO. L.J. 1435, 1437 (1986).

98. *See* Mark C. Weber, *ADA Recognizes Formal Equality Is Not Equal Enough*, HUM. RTS., Spring 1992, at 2, 2.

99. *See* 42 U.S.C. § 12112(b)(5)(A).

100. *See id.*

101. *See id.* § 12182(b)(2)(A)(iv); *see also* Karen E. Field, *The Americans with Disabilities Act "Readily Achievable" Requirement for Barrier Removal*, 15 CARDOZO L. REV. 569 (1993) (noting limits of duty).

102. *See* 42 U.S.C. § 12182(b)(2)(A)(iii).

103. *See* 28 C.F.R. § 35.130(b)(7) (1999).

104. Even integrationist approaches that appear to offer a promise of moving beyond this limit fail to do so. For example, Michael Rebell places emphasis on physical and attitudinal structures that do not take into account the needs of people with disabilities and argues for a restructuring of both the artificial environment and majority attitudes. *See* Rebell, *supra* note 97, at 1453–54. Nevertheless, he proposes limits on social duties to create equal conditions to preserve "the public fisc and the public psyche." *Id.* at 1455. Specifically, he believes that affirmative action measures and job setasides are inappropriate and place impractical obligations on society. *See id.* at 1456.

purposes of the standard, which measures people against an imaginary modal human being. Rights are conferred up to the point where the difference is too great, but the focus is on the contrast between what is "normal" and the person with a disability, who is "different."[105]

This limit in integrationist thinking imposes restrictions on the benefits that integrationist laws confer on people with disabilities. The rights embodied in the statutes may be withdrawn at the will of the "normal," who also retain the ability to control the law's operation by judicial and administrative interpretation. Moreover, the rights are limited in their very design. For example, with respect to hiring, the employer is free to hire the candidate who, in the employer's judgment, will perform the job best. Under the ADA, the employer must afford the candidate with a disability all reasonable accommodations. But if, in the judgment of the employer, the candidate with a disability remains less well-suited despite the accommodations, he or she will not get the job. The role of the law is thus marginal—only when an accommodated person with a disability is able to do the job better than others, when the person with a disability overcompensates in some way, or when the disability was merely a perceived one in the first place, will the Act call for a result different from what would have occurred before the Act.[106]

Even the Act's marginal benefit will not always be obtained because unconscious discrimination and stereotypes will frequently cloud employers' judgments.[107] Lack of familiarity breeds contempt of persons with disabilities. Employers who have not hired employees with disabilities have negative attitudes about them.[108] Surveys also show that employers' attitudes about hiring people with disabilities are highly resistant to change.[109] Cases can be brought to challenge employers' unconscious

105. *See* MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 110 (1990).

106. This point is developed at greater length in Weber, *supra* note 26, at 135–36.

107. *See* Sara D. Watson, *Applying Theory to Practice: A Prospective and Prescriptive Analysis of the Implementation of the Americans with Disabilities Act*, J. DISABILITY POL'Y STUD., No. 1, 1994, at 1, 7 (collecting studies of attitudes). Courts have frequently remarked on the prevalence of unconscious discrimination against persons with disabilities. *See, e.g.*, School Bd. v. Arline, 480 U.S. 273, 284 (1987) (describing "society's accumulated myths and fears about disability"); Alexander v. Choate, 469 U.S. 287, 295 (1985) (describing society's "thoughtlessness and indifference").

108. *See* Sharon E. Walters & Clora Mae Baker, *Title I of the Americans with Disabilities Act: Employer and Recruiter Attitudes Toward Individuals with Disabilities*, 20 J. REHABILITATION ADMIN. 15, 20 (1996).

109. *See* Marta W. Casper, *Seasons of Change, The Americans with Disabilities Act: Implementation in the Work Place*, 17 J. REHABILITATION ADMIN. 129, 132 (1993) (reporting on a longitudinal survey of attitudes); *see also* Alexander J. Bolla, *Distributive Justice and the Physically Disabled: Myth and Reality*, 48 MO. L. REV. 983, 989 (1983) (reporting on a study of lawyer recruiters); Mardi L. Solomon, *Is the ADA "Accessible" to People with Disabilities?*, 17 J. REHABILITATION ADMIN. 109, 115 (1993) (reporting widespread ignorance of the Act's requirements); *cf.* Marjorie L. Baldwin, *Can the ADA Achieve Its Employment Goals?*, ANNALS AM. ACAD. POL. & SOC. SCI., Jan. 1997, at 37, 52 ("Because it fails to target persons with impairments subject to the most negative attitudes, the ADA is likely to have little impact on employment and wage prospects of the workers with disabilities subject to the greatest discrimination in the labor market.").

discrimination, but prospects for success are poor.[110] Moreover, integrationism's emphasis on legally enforceable rights leaves behind those who are reluctant to assert rights, because of ignorance, irrational fear, or well-founded reluctance to disrupt existing relationships with those who have power over them.[111] Any benefits thus will go to the best off among those with disabilities.[112]

Integrationism and its embodiment in existing civil rights statutes have a further, even more fundamental limit in how the inevitable costs of disability are allocated. In their pathbreaking exposition of integrationism, tenBroek and Matson discussed the goal of having the disability impose no greater limit on an individual than it necessarily imposes, presumably in a socially enlightened and physically improved environment.[113] The nature of disability, however, is that limits will still exist and will impose costs that someone will have to bear.

Work is the primary example. Some disabilities do not interfere with work, but most do. The whole definition of disability is that it is something that restricts major life activities. Work activities are major life activities: what people do at work is carry, push, pull, speak, listen, read, write, think. Substantial limits on the ability to do those things mean less value for the employer from hiring the individual with the limits.[114] In other words, many, if not most, disabling conditions unavoidably diminish a worker's productivity, at least in the workplace as it will be structured for the foreseeable future.[115] Limits on stamina, for example, are common among individuals with disabilities and do not admit of any easy solution.[116]

110. *See, e.g.*, Darryl Van Duch, *Employers Win in Most ADA Suits*, NAT'L L.J., June 29, 1998, at B1 (reporting a survey showing that employers win 92% of ADA cases decided by judges and 86% of cases decided by the EEOC).

111. *See* David M. Engel, *Law, Culture and Children with Disabilities: Educational Rights and the Construction of Difference*, 1991 DUKE L.J. 166, 194–203; *see also* Paul Leung, *Minorities with Disabilities and the Americans with Disabilities Act: A Promise Yet to Be Fulfilled*, 17 J. REHABILITATION ADMIN. 92, 96–97 (1993).

112. Complaints filed under the ADA, like those filed under other antidiscrimination laws, are most frequently filed by those who have lost jobs, rather than those who have been denied them; hence the legal rights of the Act benefit those with close ties to the work force, typically those with chronic diseases that started in mid-life. *See* Nancy R. Mudrick, *Employment Discrimination Laws for Disability: Utilization and Outcome*, ANNALS AM. ACAD. POL. & SOC. SCI., Jan. 1997, at 53, 66–67 ("[I]t is likely that the majority of those taking advantage of the protections of the ADA are persons who have substantial labor force experience.").

113. *See* tenBroek & Matson, *supra* note 1, at 814.

114. *See* Baldwin, *supra* note 109, at 42 ("[T]he functional limitations that cause a disability also reduce worker productivity in many jobs.").

115. *See* Marjorie L. Baldwin, *Estimating Wage Discrimination Against Workers with Disabilities*, 3 CORNELL J.L. & PUB. POL'Y 276, 288–89 (1994) (noting, however, that discrimination has a more important effect in depressing earnings).

116. *See* Susan Wendell, *Toward a Feminist Theory of Disability*, *in* THE DISABILITY STUDIES READER 260, 271 (Lennard J. Davis ed., 1997) ("[M]any (perhaps most) disabilities reduce or consume the energy and stamina of people who have them and do not just limit them in some particular kind of physical activity."). Limits on stamina, like impairments of sensory capacities and cognitive faculties, will continue to constitute barriers to full competitiveness for people with many kinds of disabilities, even though physical work requirements of numerous jobs may decline because of the increased use of machines. *Cf.* Yelin,

For some workers, successful accommodation will cost employers significant amounts of money to restructure the methods by which goods and services are produced and delivered.[117] The data showing that most accommodations have low costs may simply reflect the fact that few people needing major accommodations have been hired.[118] Extraordinary effort by particular workers with disabilities has led to some remarkable successes with little in the way of special treatment, but heroic effort should be expected only from the extraordinary.[119] Few people can or will meet such a standard, and it is unrealistic and unfair to expect all workers with disabilities to put forward more effort than others must to succeed.[120] To become productive as workers and participants in society, some individuals need significant amounts of special treatment, such as medical care for chronic illnesses,[121] personal assistants,[122] and other forms of support.

Without governmental intervention that goes beyond the ADA's requirements, the bottom line is that the typical person with a disability is not likely to be hired or, if hired, will be paid a lower wage.[123] In many instances, the person will be able to perform fewer hours of work.[124] Even if the person were hired at the same wage and could work the same hours, the disability is likely to impose greater costs of living on the individual, leaving him or her worse off than similarly situated workers without disabilities.[125]

The ADA is a governmental intervention but a modest one, merely shifting some costs of disability to employers (in the form of reasonable accommodations), merchants (in the form of readily achievable removal of barriers for shopkeepers), and government itself (in the form of program accessibility). The larger costs—the inability to work or the inabil-

supra note 55, at 128 (noting that "the brute force requirements of work are much less in the contemporary economy"). As Yelin notes, much of what was once classic blue-collar labor now involves monitoring computers that regulate machines. *See id.* Although this development permits those with limits on strength and mobility to be more competitive, it further disadvantages those with deficiencies in attentiveness and intellectual processes.

117. *See* Bonnie O'Day, *Economics Versus Civil Rights*, 3 CORNELL J.L. & PUB. POL'Y 291, 299 (1994) (analyzing a accommodations study to show "that fourteen percent of accommodations cost more than $2000 and that one accommodation costs over $18,000").

118. *See id.* at 300.

119. The very statement that a person has overcome a disability simply may reinforce the stereotype that those with the disability are inferior. *See* SIMI LINTON, CLAIMING DISABILITY 18 (1998).

120. *See* Wendell, *supra* note 116, at 271.

121. *See* Sara D. Watson, *The Evolution of a Social Movement*, 3 CORNELL J.L. & PUB. POL'Y 254, 257–58 (1994) (noting that persons with chronic illness outnumber those with mobility and sensory impairments and have costly ongoing medical needs).

122. *See id.* at 259.

123. *See* Weber, *supra* note 26, at 134–35.

124. *See* Walter Y. Oi, *Disability and a Workfare-Welfare Dilemma*, *in* DISABILITY AND WORK, *supra* note 26, at 31, 40 ("[D]isability steals time. The time budgets of some disabled persons prevent them from meeting the rigid, full-time work schedules demanded by some firms.").

125. *See id.* at 37 ("[D]isability also affects the demand for goods and services. . . . The disabled make nearly three times as many physician visits a year and purchase more than four times as many prescriptions as individuals with no activity limitations.").

ity to work for as much money, for as many hours, or only with extraordinary accommodations—remain on the person with a disability,[126] who can take scant comfort in the fact that the limit imposed is isomorphic with the disability itself.[127]

So far, benefits programs are the only other social effort to shift these costs, and, as noted above, the Venn diagram of the individuals entitled to benefits on account of disability is a small circle inside the much larger circle of persons whose disabilities decrease their capacity to earn and increase their expenses.[128] Neither integrationists nor anyone else can provide a justification for leaving the costs where they fall. It is simply the way things are.[129]

Between the discrimination that will continue to elude integrationist legislation and the stubborn fact of disability itself, persons with disability are mired in poverty and unemployment. The law may set aside parking spaces for persons with mobility impairments, but the spaces will remain empty when so few individuals with disabilities have enough income to afford cars. Antidiscrimination measures, even when effective, are not enough to put persons with disabilities on the same level with others, and the integrationist model does not address the problems that lie beyond discrimination.[130]

3. Dissonant Disability Policy?

Uncritical integrationism produces yet another problem. Overstressing the potential of integrationism leads some to suggest that the

126. Some authorities have debated whether the social costs of the person with a disability who foregoes treatment should be borne (in part) by the employer in the form of the reasonable accommodation duty, suggesting a negative answer, at least under some circumstances. *See* Lisa E. Key, *Voluntary Disabilities and the ADA: A Reasonable Interpretation of "Reasonable Accommodations,"* 48 HASTINGS L.J. 75, 84 (1996); Bonnie Poitras Tucker, *The ADA and Deaf Culture: Contrasting Precepts, Conflicting Results*, ANNALS AM. ACAD. POL. & SOC. SCI., Jan. 1997, at 24, 35–36. The discussion in the text extends simply to the unavoidable costs of disability.

127. *See* Oi, *supra* note 45, at 103 ("[The Americans with Disabilities Act] has not produced the anticipated growth in employment. . . . The problem can be traced to the fact that the ADA embraced a civil rights approach to achieve its employment goal. . . . Insufficient attention was paid to the nature of a disabling condition.").

128. *See supra* text accompanying notes 29–51.

129. *Cf.* Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987) (arguing that the *Lochner*-era Supreme Court erred not in its activism but in using activist measures to enforce a rigid baseline of economic entitlements, which it wrongly considered to be unchallengeable).

130. Some authorities warn against confusing the discrimination that integrationism can address with the problems that it does not solve:

> The emphasis of the minority group model [integrationism] on discrimination and discrimination-focused remedies means that the model is of limited help in guiding needed reforms of medical, educational, and human service delivery systems to best promote independence and full social participation by people with disabilities. By characterizing all barriers faced by people with physical and mental impairments as discrimination, we risk trivializing the still-prevalent and often vicious stereotyping and exclusive practices by confounding them with the general incapacity of social systems to respond to individual variation.

Richard K. Scotch & Kay Schriner, *Disability as Human Variation: Implications for Policy*, ANNALS AM. ACAD. POL. & SOC. SCI., Jan. 1997, at 148, 156–57.

need for benefits programs for persons with disabilities will disappear with the enactment of statutes against disability discrimination. One analyst, Martynas Ycas, contends that the ADA widens the scope of allowances that have to be made for personal differences, ending the separation of persons with disabilities and those without disabilities.[131] It is incongruous, therefore, to have benefits programs that sort individuals out on the basis of disability.[132] More specifically, if the Act causes employers to reengineer jobs so that workers with disabilities can enter or reenter the labor force, there will be no need for programs based on the idea of replacing earnings lost because of disability.[133]

Another writer, Matthew Diller, argues that the policies of the ADA and disability benefits programs are "dissonant." The Act suggests that persons with disabilities retain a significant capacity to work, which requires only changes in environments and attitudes to be put to harness; accordingly, long-term income support is not justified.[134] Moreover, the separate treatment of persons with disabilities in benefits programs reinforces negative stereotypes.[135] Although some persons with disabilities may remain on benefits programs after the enforcement of the ADA, Diller finds no reason to treat their conditions as different from those of other individuals who are not part of the labor force. According to Diller, people who are out of the labor force because of lack of education, lack of skills, age (but not advanced age), or other factors ought to be provided for just as well as those with medically determinable disabilities; currently, because of disability's special status as a worthy excuse for not working, these people are not.[136] He argues that the Act's philosophy and the result of its enforcement mean that disability is no longer a special excuse.[137]

The response to these views is threefold. In the first place, as Diller acknowledges, the coverage of the ADA and existing benefits programs

131. *See* Martynas A. Ycas, *The Issue Unresolved: Innovating and Adapting Disability Programs for the Third Era of Social Security*, SOC. SECURITY BULL., Spring 1995, at 48, 55.

132. *See id.* at 55–56.

133. *See id.* at 56. Stray comments from other writers sound in the same key. *See, e.g.*, William G. Johnson, *The Future of Disability Policy: Benefit Payments or Civil Rights?*, ANNALS AM. ACAD. POL. & SOC. SCI., Jan. 1997, at 160, 170 ("The ADA's objectives for employment and the DBS [disability benefits system] emphasis on indemnity are often in conflict."); *see also* U.S. COMM'N ON CIVIL RIGHTS, *supra* note 58, at 33 (finding "contradictions between the ADA and traditional disability benefit policies").

134. *See* Diller, *supra* note 28, at 1030 ("[A]cceptance of the ADA's view that the people with disabilities should be seen as potential workers may cast doubt on the blanket exemption from the work force provided by the Social Security Act.").

135. *See id.* Diller notes, however, that the Act fails to fully embrace the idea that people with disabilities are not separate from the rest of society; the entitlement to the Act's protection only extends to individuals defined as having a disability. *See id.* at 1029.

136. *See id.* at 1079–82.

137. One of Diller's central contentions is that benefits policy should not elevate disability above other reasons for impoverishment; persons outside the labor force for other reasons should share in the same treatment. *See* Matthew Diller, *Entitlement and Exclusion: The Role of Disability in the Social Welfare System*, 44 UCLA L. REV. 361, 454–65 (1996).

are not the same.[138] Only people with the most severe, longest-lasting disabilities are covered by the federal disability programs. Only those who are "qualified"—that is, able to perform the essential functions of a job with reasonable accommodations—are protected by the ADA's employment provisions. These persons may not be the least disabled, but they are certainly not the most disabled. With changes in attitudes, environments, and work processes, the range of beneficiaries of the ADA may increase, but it is doubtful that very many of those currently on the disability rolls will benefit.[139] It thus makes little sense to abolish benefits programs that are based on disability. The people they serve still need them.[140] Significantly, although tenBroek and Matson suggested redirecting welfare efforts at self-sufficiency, their vision of integrationism was sufficiently sophisticated that they recognized that the disability-related need of persons with disabilities for benefits programs will never disappear.[141]

Second, even bringing more persons with disabilities into the work force by eliminating discrimination will not necessarily improve their earning capacities in comparison to workers without disabilities. The limits on productivity will still remain. Thus, if anything, further integration may call for an expansion of disability benefits eligibility to make the reward that persons with disabilities receive from their work efforts commensurate with the rewards that others receive from comparable effort. Estimates of current earnings of workers with a disability in the la-

138. *See* Diller, *supra* note 28, at 1079. Diller notes that some courts have confused the meaning of disability in the ADA and the Social Security Act. *See id.* at 1032–48 (citing, inter alia, *McNemar v. Disney Store, Inc*., 91 F.3d 610 (3d Cir. 1996)). Courts holding that a claim for benefits based on disability is an admission that the applicant is unable to perform the essential functions of work with reasonable accommodation ignore the reality that accommodations frequently are not provided and that job offers often are not extended to qualified individuals with disabilities. Courts also ignore the law that sets the standard for eligibility for disability benefits as something other than the inability to do any work under any circumstances. Finally, the holdings prevent the applicant from obtaining income support during a period of unemployment that may have no termination point. *See* Diller, *supra* note 28, at 1038–48. Diller goes further to argue that the disability benefits standard is less the inability to work than the excuse from being expected to work. *See id.* at 1064. *See generally* Cleveland v. Policy Management Sys. Corp., 526 U.S. 795, 805 (1999) (rejecting a special presumption that would permit a person who applied for disability benefits to bring a suit under the ADA only in limited, unusual circumstances).

139. *See* Richard V. Burkhauser, *Post-ADA: Are People with Disabilities Expected to Work*, ANNALS AM. ACAD. POL. & SOC. SCI., Jan. 1997, at 71, 79 ("It is unlikely that any of the 3.97 million workers receiving [Social Security Disability Insurance] SSDI benefits or the 3.29 million blind or disabled adults under the age of 65 who were receiving SSI benefits in December 1994 will return to work."). It is possible, however, that some social interventions might postpone the age at which some individuals with deteriorating conditions need to stop working. *See id.*; *see also* Richard V. Burkhauser & Mary C. Daly, *Employment and Economic Well-Being Following the Onset of a Disability*, *in* DISABILITY, WORK AND CASH BENEFITS, *supra* note 38, at 59, 83 (reporting a study estimating that employer-provided accommodations led to individuals' participation in the labor force for 7.5 years following the onset of a work-limiting condition, as opposed to 2.6 years without accommodations).

140. At one point, Diller states that even if problems of discrimination were fully addressed, "the disability benefit programs would still address critical social and economic dimensions of disability," *see* Diller, *supra* note 28, at 1080, but he opposes separating persons with disabilities into what he considers a false category of "deserving poor," *see id.* at 1082.

141. *See* tenBroek & Matson, *supra* note 1, at 840.

bor force demonstrate that they earn about forty percent less than those without disabilities, under current levels of accommodation.[142] Better accommodations may raise the earnings of some of those workers, but they are also likely to bring into the labor force persons whose capacity to earn is even lower. Fairness would call for the presence of some social intervention to make work pay for those individuals.[143] Possible steps in this direction are discussed in greater detail below.

Third, and in the most direct response to Diller's arguments, even in a very effectively integrated world, special benefits for individuals who cannot work or whose work contribution is significantly diminished because of disability would continue to make sense. Disability is different from other reasons for not working.[144] In almost all cases, disability is beyond the control of the individual who has the disability.[145] Although education, training, and some other characteristics arguably within the control of the individual have some impact on eligibility for disability benefits, the physical or mental condition of disability is the most important determinant.[146] Moreover, because of the disadvantage that disability entails—the inability to perform a major life activity—the prospect of benefits is not enough of an incentive to induce individuals to become disabled to obtain benefits.[147] Although leisure itself may be desirable, disability-induced leisure is not. Because few would want to suffer a severe impairment to achieve the benefits, society can afford greater disability-based benefits than other forms of support.

Disability benefits are at a higher level than other income support because they are a form of social insurance for loss of earnings due to disability. Even in a better-integrated world, people with the means to do

142. *See* Edward Yelin & Miriam Cisternas, *The Contemporary Labor Market and the Employment Prospects of Persons with Disabilities*, *in* DISABILITY, WORK AND CASH BENEFITS, *supra* note 38, at 33, 50.

143. Obviously, the price that employers in a free market system pay for labor depends not on principles of fairness but on supply and demand, and many economists attack even the exceedingly modest limits that American lawmakers have placed upon employers' decisions about wages and benefits, such as the minimum wage and family leave requirements. Nevertheless, government transfer payments may be highly appropriate as a means to ameliorate the socially disadvantageous situation of individuals who contribute their best efforts to production processes but still live in poverty.

144. Diller appears to acknowledge the underlying facts of this argument and those that follow but draws different conclusions. *See, e.g.*, Diller, *supra* note 137, at 385 (discussing the lack of incentive to be disabled purely to receive disability benefits).

145. Even if the disability were acquired by some volitional act, very few would choose to remain disabled if the option existed to end the state of disability. In contrast, many choose to avoid education or skills training that would make them more employable. For a discussion of social policies in connection with individuals who choose, for whatever reason, not to end conditions that are severely disabling, see sources cited *supra* note 126.

146. The Social Security Administration does not even consider a person's education, work history, or skills unless the person has demonstrated that he or she is not working and has a medically determinable severe impairment expected to last for twelve months or result in death. *See* 20 C.F.R. § 404.1520(b) (1998). Moreover, although past education and training may be considered under some circumstances later in the eligibility determination, education and training provided to beneficiaries have been shown to have little impact on return to the labor force.

147. It may be enough to induce a person to claim disability falsely, but that problem can be handled by the claims evaluation process.

so would still insure themselves against the decrease in their earning prospects that disability represents. As explained below, the primary federal benefits program for persons unable to work for protracted periods due to disability is designed to insure against precisely that hazard.[148] Like other forms of social insurance, its benefits are superior to those of welfare that is provided with no more than a showing of need or need plus some other status.

This form of social insurance, protection against disability-induced loss of income, is no more anomalous than any other social insurance program that covers hazards beyond a worker's control. For example, the vast majority of working persons are protected by social insurance from another anticipated hazard of earning a living—short-term unemployment due to layoffs or other reasons not the fault of the worker—through the generous (in comparison to welfare), nonmeans-tested public unemployment insurance system.[149]

The identification of the weaknesses of integrationist theory and the limits of the ADA do not negate the importance of either the theory or the legislation in advancing equality and making the world of today a better one than that of yesterday.[150] Identifying the problems of integrationism is merely the first step in developing new theories to continue the effort of securing justice for persons with disabilities.

C. Post-Integrationist Theory

Post-integrationist ideas are still in the process of creation. Even at this time, however, it is safe to say that the ideas criticize integrationism, believing its reach to be limited. The ideas move beyond recognition of the limits of integrationism to include challenges to some of integrationism's underpinnings. They also explore new ideas about what equality means and how it should be applied in the disability context. Finally, they draw insights from feminist thinking to fashion new ideas about equality for persons with disabilities.

148. *See infra* text accompanying notes 225–54 (describing the program).

149. As Diller notes, there is no social insurance and scant other governmental protection against the hazard of long-term unemployment for reasons other than disability, such as lack of education, marketable skills, or ambition. This fact reflects a social judgment that the reasons are subject to individual control to a greater extent than is disability leading to long-term unemployment or economic dislocations leading to short-term unemployment. The recent withdrawal of long-term benefits for care of dependent children likely represents a social decision that care of dependent children, by itself, is not a sufficient barrier to long-term employment to necessitate long-term support, *see* Matthew Diller, *Working Without a Job: The Social Messages of the New Workfare*, 9 STAN. L. & POL'Y REV. 19, 19–20 (1998), although it may also represent a social decision to consume resources now rather than to allocate them toward investment in children's (and society's) future well-being.

150. To quote Baron Bramwell, it is wrong to believe that "because the world gets wiser as it gets older, therefore it was foolish before." M.C. Slough, *Relevancy Unraveled* (pt. 3), 5 U. KAN. L. REV. 675, 705 (1957) (quoting Hart v. Lancashire & Yorkshire Ry., 21 L.T.R. 261, 263 (1869)).

1. Critiques of the Premises of Integrationism

Post-integrationist ideas about disability are critical of what Sara Watson describes as "the image that all people with disabilities [are] easily employable and would happily remain employed at the same jobs forever, that disability [is] desirable, and that people with disabilities [are] a tight-knit minority with similar views."[151] That image was crucial to combat the handicapping message of the segregationist era that disability was tragic, that it meant the end of employability, and that people with disabilities were simply the manifestations of diverse medical syndromes.[152] Now, however, it is equally important to recognize that disability is far more complex and cannot be addressed simply by an integrationist message,[153] just as barriers to employment cannot be addressed simply by reasonable accommodation.[154]

As noted above, critics have pointed to the stubborn fact that, for many persons with disabilities, participation in the working economy necessitates significant structural changes, for which someone will have to pay the bill.[155] Specialized treatment that looks much different from simple integration will be needed before those individuals can be successful.[156]

Writers on deafness have cast doubt on the value of integration itself, stressing the threat to cultural identity that forced integration entails.[157] They view those deafened early in life who have chosen to communicate in sign and to participate in deaf culture as a linguistic minority, rather than a disability grouping.[158] Other disability theorists question the value of integrationism's goal of personal independence, asking whether it is part of a value system that wrongly devalues interrelationships of dependency among people in society.[159]

The idea that disability is a private matter, to be protected by measures such as the ADA's confidentiality provisions, has also come under question.[160] Identification by disability may be something other than the

151. Watson, *supra* note 121, at 254.

152. *See id.*

153. *See Discrimination on the Basis of Disability: The Need for a Third Wave Movement*, 3 CORNELL J.L. & PUB. POL'Y 253, 253 (Bonnie P. Tucker ed., 1994). For a criticism of some of the these arguments' premises, see JAMES I. CHARLTON, NOTHING ABOUT US WITHOUT US: DISABILITY OPPRESSION AND EMPOWERMENT 127 (1998), which argues that abandonment of integrationist goals is at best premature.

154. *See supra* text accompanying notes 123–27.

155. *See supra* text accompanying notes 126–29.

156. *See supra* text accompanying notes 114–18.

157. *See* Harlan Lane, *Constructions of Deafness*, *in* THE DISABILITY STUDIES READER, *supra* note 116, at 153, 161.

158. *See id.* at 154–55. For a critical perspective on some aspects of this position, see Bonnie P. Tucker, *Deafness—Disability or Subculture: The Emerging Conflict*, 3 CORNELL J.L. & PUB. POL'Y 265 (1994). For an opinion that questions integration in the context of other disabilities, see Wendell, *supra* note 116, at 261.

159. *See* Wendell, *supra* note 116, at 261.

160. *See id.* at 266–67; *see also* Rosemarie Garland Thomson, *Feminist Theory, the Body, and the Disabled Figure*, *in* THE DISABILITY STUDIES READER, *supra* note 116, at 279, 284–85 (describing the "politics of self-naming;" some individuals, for example, embrace the term "cripple").

necessary evil needed to determine who is covered by special education or antidiscrimination laws. It may be necessary for political organizing and cultural development, particularly for obtaining control of the institutions that profoundly affect the lives of persons with disabilities.[161] The need may exist for a "strategic essentialism," which allows identification by disability separate from the mainstream and demands a response based on the difference.[162]

Some theorists reject integrationism's implied premise that the current condition of persons with disabilities is primarily due to outmoded social ideas or failure of imagination and empathy and instead tie the negative treatment of people with disabilities to the capitalist economic system.[163] They argue that liberation will not come until the economic system is replaced with one based on something other than profit.[164] Although pursuit of profit in a system not already structured for persons with disabilities may leave those with disabling conditions in the economic dust, there is room in a mixed economic system, such as that of the United States, for actions that can ameliorate the conditions and produce meaningful progress.[165] Other free-market countries have made significant advances in legal and social protections that the United States has not achieved.[166]

Nevertheless, the argument rests on a telling observation: a world that is oriented around persons with disabilities as much as it is now structured around persons without them would be a radically different

161. *See* CHARLTON, *supra* note 153, at 148–49 (describing the role of "intermediate institutions" in the lives of persons with disabilities).

162. Thomson, *supra* note 160, at 283. On the uses—and limits—of group identification in efforts to achieve justice, see MARTHA MINOW, NOT ONLY FOR MYSELF: IDENTITY, POLITICS, AND THE LAW 30–58 (1997).

163. *See* CHARLTON, *supra* note 153, at 23, 48–50; Harlan Hahn, *Advertising the Acceptably Employable Image: Disability and Capitalism*, *in* THE DISABILITY STUDIES READER, *supra* note 116, at 172, 173, 184–85; *see also* Ruth Colker, *Hypercapitalism: Affirmative Protections for People with Disabilities, Illness and Parenting Responsibilities Under United States Law*, 9 YALE J.L. & FEMINISM 213, 215 (1997) (identifying the root problem with the treatment of persons with disabilities as American-style capitalism, which "needlessly relies on an individualistic philosophy without sufficiently considering the basic family and medical needs of workers in our society"). Robert Burgdorf has furnished oblique support to Colker's view with his suggestion that European-style job setasides for people with disabilities are inconsistent with American attitudes about self-reliance. *See* Burgdorf, *supra* note 34, at 585.

164. *See supra* note 163. Socialist societies in Eastern Europe, however, were hardly exemplary in the treatment they afforded persons with disabilities. Under its form of socialism, Sweden has been a leader in educational and social services for persons with disabilities. Yet this is hardly unique. Other European countries with mixed economies have adopted similarly aggressive programs compelling private employers to make jobs available to people with severe disabilities, as has Japan. *See* Weber, *supra* note 26, at 169–70 (describing programs).

165. As for government benefit programs, helpful incremental measures that are fully consistent with a mixed economy and appear politically possible are discussed *infra* text accompanying notes 348–423.

166. *See* Colker, *supra* note 163, at 225–36 (drawing comparisons on the scope of employment protection for persons with disabilities between the United States and other industrialized countries with mixed economies); *see also* Weber, *supra* note 26, at 170–71 (drawing similar comparisons regarding employment setaside programs).

world from the present one,[167] and the costs of getting to that state will reduce economic surplus both during the transition and forever. Until that end state is achieved, the status quo is accurately characterized as one of oppression[168] of the people currently forced to bear the bulk—or in some cases the totality—of the costs of disability, the persons with the disabling conditions.

2. New Ideas About Equality

To move beyond the reasonable-accommodation paradigm associated with integrationism may require new ideas of what equality means. One scholar, Harlan Hahn, argues that equality requires society to confer an equal benefit on all persons, regardless of disability.[169] Hahn focuses on the role of the sociopolitical and physical environment in creating disability and contends that equality should take the form of equal environmental adaptations: the environment should confer the same degree of benefit on all persons, regardless of disability.[170] Stairs are provided for people whose knees bend; elevators should be provided for those whose do not. The stairs give no benefit to those who cannot use them, just as indoor lights give no benefit to persons who are totally blind, sound transmission gives no benefit to those who are deaf, and chairs give no benefit to those who wheel their own. All of those environmental adaptations serve someone else, an imaginary modal individual.[171] To treat persons with disabilities equally, society should provide adaptations that give persons with disabilities comparable opportunities to display, use, and profit from their capacities and skills.[172] As Hahn notes: "[t]he problem is not indifference to the needs of workers with disabilities; instead, the basic difficulty stems from widespread ignorance of the unequal implications of everyday surroundings."[173] To equalize the implications, buildings should have ramps for wheelchairs, and telecommunication companies should provide tactile or auditory communications for blind persons and visual ones for deaf persons. Universal design methods hold promise for delivering equal benefits, but equal adaptation should be provided even when it must be specifically tailored to a person's disability.[174]

167. *Cf.* Weber, *supra* note 32, at 364–77 (describing the radical consequences intended by the sponsors of the Education of All Handicapped Children Act and the judicial interpretations that reduced its impact).

168. *See* CHARLTON, *supra* note 153, at 4–5 (characterizing the conditions of persons with disabilities as a state of "disability oppression"); *see also* LINTON, *supra* note 119, at 9 (describing the "oppression of disabled people").

169. *See* Harlan Hahn, *Equality and the Environment: The Interpretation of Reasonable Accommodations" in the Americans with Disabilities Act*, 17 J. REHABILITATION ADMIN. 101 (1993).

170. *See id.* at 103.

171. *See id.* at 103–04.

172. *See id.* at 104.

173. *Id.* at 104.

174. *See id.*

Perhaps for rhetorical purposes, Hahn has linked his views to proposed interpretations of the ADA, but his ideas are more closely connected to a post-integrationist paradigm than the integrationist one embodied in the Act.[175] Far from requiring only reasonable accommodation up to the point of undue hardship, Hahn's approach places great responsibilities on employers and others to change physical surroundings and social expectations. In a few contexts, the responsibilities may be extreme. How, for example, can reasonable accommodations create sensory adaptations for a person piloting a jet airplane who is deaf and blind? That question also suggests that a more narrow theory might be required to avoid social expenditures that are futile or exceed what majoritarian institutions could be induced to support.[176]

Nevertheless, Hahn makes the crucial point that the existing social and physical environment showers good things on what one of his sources describes as "the average person, plus or minus half a standard deviation."[177] That treatment is unequal to the treatment afforded the rest, and if persons with disabilities are to be treated fairly, something more needs to be done.[178]

A number of writers have developed disability equality ideas based on John Rawls's book, *A Theory of Justice*.[179] If an individual did not know what natural endowments she might have in life,[180] she would choose distributive principles that she would be willing to live with if she had a severe disability.[181] The distribution of value would not necessarily be one of total equality, for the person behind the veil of ignorance would allow for incentives and other inequalities that work to the advantage of all.[182] Nevertheless, if the person is as adverse to risk as people typically are, she would choose a distribution of the good things in life that would take into account the likelihood that she would have a severe

175. *See* Mark C. Weber, *Comment on Hahn*, 17 J. REHABILITATION ADMIN. 107, 108 (1993); Note, *Toward Reasonable Equality: Accommodating Learning Disabilities Under the Americans with Disabilities Act*, 111 HARV. L. REV. 1560, 1561 (1998) ("Despite its absolutist civil rights rhetoric, the [Americans with Disabilities] Act seeks only to make the playing field *reasonably* level. People in wheelchairs get entrance ramps to access buildings; they do not get to walk.").

176. *See* Weber, *supra* note 175, at 108.

177. Hahn, *supra* note 169, at 103 (quoting the statement of an urban planner).

178. For these reasons, although Hahn himself describes his theory as one viewing persons with disabilities as a minority group and stresses the connection with other civil rights models, *see id.* at 101; *see also* Hahn, *supra* note 163, at 174 (describing his "minority-group model of disability"), his theory seems more closely linked to the critique of existing integrationist ideas and laws. For another example of an approach that styles itself as part of the civil rights model but argues for a fundamental reorientation of all aspects of society to confer equal opportunity on persons with disabilities, see 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).

179. JOHN RAWLS, A THEORY OF JUSTICE (1971).

180. *See id.* at 17–22 (describing this standpoint as the "original position").

181. *See* R. George Wright, *Persons with Disabilities and the Meaning of Constitutional Equal Protection*, 60 OHIO ST. L.J. 145, 171–72 (1999).

182. *See* RAWLS, *supra* note 179, at 61.

disability.[183] If a society were to attempt to become a just society under this description of social justice, it might well engage in significant redistribution to persons with severe disabilities, not only supplementing their incomes but also setting aside jobs and reorienting social services, recreational activities, the physical environment, and intangibles that confer self-respect to provide as much benefit for persons with disabilities as for anyone else.[184] This approach to a just society would supplant the customary social cost-benefit analysis when considering the demands of the social contract with regard to persons with disabilities.[185]

A Rawlsian theory of disability equality is post-integrationist in that it calls for significant redistributive responses to the fact of disability. Far from merely eliminating discrimination on the basis of stereotypes and failure to afford reasonable accommodation, it calls for special treatment to equalize the well-being of those with disabilities and those without them, subject only to differences that a person would agree to if she did not know whether she would be the person with the most severe of disabling conditions.[186]

183. *See* Gray, *supra* note 25, at 309–18, 351 (suggesting that persons behind a veil of ignorance would be unlikely to consent to the limits on employer duties contained in the ADA).

184. *See* Jerry L. Mashaw, *Against First Principles*, 31 SAN DIEGO L. REV. 211, 220 (1994). Mashaw applies Rawls's ideas in this way:

> With respect to the physically or mentally disabled, . . . the Rawlsian case for collective ameliorative action seems relatively strong. We are talking about conditions usually not brought about by the "fault" of the least-advantaged parties, the disabilities involved are those that all would like to avoid (and therefore have some claim to be a part of the definition of the "least-advantaged" position), and the widespread desire to ensure against the consequences of disability suggests that risk averseness is hardly an implausible posture with respect to this sort of misfortune.

Id. For other sources applying Rawls's ideas to the law of disability, see Alexander J. Bolla Jr., *Distributive Justice and the Physically Disabled: Myth and Reality*, 48 MO. L. REV. 983, 983–85 (1983), which notes that vocational rehabilitation services are justified under a Rawlsian theory; Crespi, *supra* note 25, at 27, which notes that the Act wisely rejects premises of wealth maximization in application of the undue burden test. One source criticizes Rawls on the ground that his theory, faithfully applied, would cause "excessive redistribution" to people with disabilities, and so the theory has to be wrong. *See* Mark S. Stein, *Rawls on Redistribution to the Disabled*, 6 GEO. MASON L. REV. 997, 997–98 (1998). A recent discussion of these topics provides a libertarian defense of disability rights, relying not on Rawls's ideas but on society's duty to guarantee basic human autonomy. *See* Carlos Ball, *Autonomy, Justice, and Disability*, 47 UCLA L. REV. 599 (2000).

185. *See* Crespi, *supra* note 25, at 24–27 (criticizing the cost-benefits approach); *see also* LINTON, *supra* note 119, at 50 ("In the current climate in the United States of managed health care, there is a deep fear among disabled people that our lives will be weighed on an economic scale."). Comparable concerns motivate the opposition of many in the disability community to assisted suicide, *see* Stephen L. Mikochik, *Assisted Suicide and Disabled People*, 46 DEPAUL L. REV. 987, 1001 (1997), and to abortion based on predictions of disability, *see* Ruth Hubbard, *Abortion and Disability: Who Should and Who Should Not Inhabit the World?*, *in* THE DISABILITY STUDIES READER, *supra* note 116, at 187, 199–200; *see also* Thomson, *supra* note 160, at 286, 291 n.18. *See generally* Adam Milani, *Better Off Dead than Disabled?: Should Courts Recognize a "Wrongful Living" Cause of Action When Doctors Fail to Honor Patients' Advance Directives?*, 54 WASH. & LEE L. REV. 149 (1997) (discussing a disability-rights perspective in connection with a wrongful living cause of action).

186. *See* Gray, *supra* note 25, at 351; Mashaw, *supra* note 184, at 220; *see also* Stein, *supra* note 184, at 1009–12 (criticizing the theory on this account). The best-known criticisms of Rawls stress such matters as practicality, doubts whether the ignorant individual would be adverse to the risk of being the worst off in society, and concerns over whether political and civil rights would be preserved under the social arrangements that would result from application of the theory. *See, e.g.*, H.L.A. Hart, *Rawls on Liberty and Its Pri-*

Other recent explorations of equality attempt to solve the dilemma of the need to separate individuals and treat them differently to achieve fairness. They stress ideas such as social relationships and antisubordination. Martha Minow's work on inclusion, exclusion, and law advocates moving away from analyses based on categories of people.[187] The differences among individuals will always be present, but society and the law should focus less on differences and more on relationships.[188] If the needs of the people involved can be addressed by an alteration of the relationship, that solution may be preferable to one resulting from the sorting out of conflicting rights.[189] Using the standpoint of persons with disabilities highlights relationships, calls into question the inevitability of existing practices, and opens up new solutions.[190] Applied to disability issues, the theory suggests that the problem of fairness is not simply one of avoiding discrimination or of promoting integration. Instead, it is one of identifying the relationships that affect the well-being of persons with disabilities, examining the justice of the relationships, and modifying them to increase social choices and balance power among the persons involved.[191]

Ruth Colker and others have suggested in their writings that antisubordination should be the touchstone of legal equality, arguing that the elimination of hierarchy is what is important, not necessarily the elimination of different treatment.[192] In other words, no group should have a

ority, 40 U. CHI. L. REV. 534, 551–54 (1973); *see also* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 206–07 (1974) (putting forward individualism-based criticisms). *See generally Symposium on John Rawls's Political Liberalism*, 69 CHI.-KENT L. REV. 549–842 (1994) (discussions of Rawls's recent work). Others criticize Rawls's idea that the individual he perceives as withdrawing from her own life history to make the terms of the social contract is really an accurate abstraction of the human being; the individual Rawls describes seems more closely to resemble the Enlightenment-era imperial self, who is stuck in his own cultural and historical context. *See* MINOW, *supra* note 105, at 154; *see also id.* at 153 (questioning whether the decontextualized, abstract concept of human beings ever includes women). Of course, there are also those who attack the premise that equality-based social arrangements are ever desirable. *See, e.g.*, J.R. Lucas, *Against Equality*, 40 PHILOSOPHY 138 (1965). Despite the potential flaws of Rawls's approach, his arguments and those of disability theorists who build on them may carry considerable persuasive force among persons drawn to a libertarian or contractarian view of society. Rawls's elaborations of his theory leave unclear whether he considers those with disabilities to be the beneficiaries of significant redistribution if his theory were put into action. *See, e.g.*, Gray, *supra* note 25, at 312–13 n.121 (discussing Rawls's later writings); Stein, *supra* note 184, *passim* (same).

187. *See* MINOW, *supra* note 105, at 173–224.

188. *See id.* at 224.

189. *See id.* at 338–39 (applying an analysis of relationships to questions about undertaking surgery on a child with a severely disabling condition over the parents' objections).

190. *See id.* at 375–76.

191. *See id.* at 350 & n.1 (examining a judicial decision regarding the medical treatment of a child with a severe disability). In a similar vein, James Charlton has urged that emphasis be placed on increasing the social and political power of persons with disabilities. As one activist he quotes declares, "The struggle shouldn't be for integration, but for power. Once we have power, we can integrate whenever we want." CHARLTON, *supra* note 153, at 127 (quoting Carol Gill).

192. *See* Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986) [hereinafter, Colker, *Anti-Subordination*] (distinguishing current approaches based on antidifferentiation from the preferable approach of antisubordination). Antisubordination ideas are found elsewhere in feminist legal literature, *see, e.g.*, Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373 (1986), and in critical race scholarship, *see, e.g.*, Cheryl I. Harris, *Whiteness as*

subordinated status because of its lack of power in society.[193] Different treatment that perpetuates subordination is bad, whereas different treatment that redresses subordination is good.[194] Persons with disabilities have long been a subordinate group, with little economic and political power.[195] To the extent that power has been exercised on their behalves, it has largely been that of people providing professional and caretaking services, whose interests may not always include the self-realization of their clients.[196] Even the recent political success in the passage of the ADA is unlikely to enhance significantly the economic power of persons with disabilities as a group, although it certainly benefits particular individuals with disabilities.[197]

Applied to persons with disabilities, an antisubordination approach would call for whatever treatment is necessary for people with disabilities as a group to obtain sufficient power to end their disadvantaged status. These steps would push far beyond the reasonable accommodation duties of the integrationist approach embodied in the ADA.

3. Comparisons to Feminist Thought

Professors Minow and Colker make women's status a major example of the application of their equality theories. Indeed, the comparison of the development of women's equality ideas to ideas about disability equality is instructive. Early in the current era of the movement for women's legal equality, prominent theorists assumed that equality would come into being when women were treated the same as men who were similar in their qualifications or activities. They believed there should be formal equality under the law in work and social settings.[198] Over time, however, many commentators observed that existing institutions and practices employ reference points that are stereotypically male; although those points of reference disadvantage many women, they have no claim to be superior to any other standards.[199]

Property, 106 HARV. L. REV. 1707, 1761–66, 1768–69, 1784–91 (1993). Catharine MacKinnon's pioneering work on the "dominance approach" placed the focus on power imbalance of "male supremacy" and "the subordination of women to men." CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 43 (1987); *see also* CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 106–07 (1979) (criticizing approaches based on same treatment and special treatment of women). Colker also has applied her ideas in the context of persons whose identities do not fit neatly into some of the categories ordinarily used in civil rights law. *See* Ruth Colker, *Bi: Race, Sexual Orientation, Gender, and Disability*, 56 OHIO ST. L.J. 1 (1995).

193. *See* Colker, *Anti-Subordination*, *supra* note 192, at 1007.

194. *See, e.g.*, *id.* at 1029–34.

195. *See id.* at 1005 n.8 (noting that antisubordination ideas can be applied to the treatment of any "historically subjugated group," including persons with disabilities).

196. *See* CHARLTON, *supra* note 153, at 92–97 (discussing the divergence of interests of care providers and persons with disabilities).

197. *See supra* text accompanying notes 106–27 (discussing the operation of the ADA in employment).

198. *See, e.g.*, Ruth Bader Ginsburg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1 (1975).

199. *See, e.g.*, Mary E. Becker, *Prince Charming: Abstract Equality*, 1987 SUP. CT. REV. 201, 228 (1987).

To provide treatment that is fair, reference points need to be shifted or removed altogether. Some writers have proposed alternative views of equality that take into account the specific reality of gender and the biological and social differences between men and women.[200] One crucial difference between men and women that these feminist theorists have identified is that women currently bear the inevitable social costs of reproduction and child rearing to a degree that is greatly disproportionate to that borne by men.[201] Nevertheless, because the work, foregone cash income, and missed opportunities for other activity have traditionally been part of the social role of women, the disproportion is politically invisible.[202]

The comparison of the social situation of women to that of persons with disabilities reveals numerous similarities. People with disabilities are forced to deal with the cost of disability, just as women are forced to bear the cost of reproduction and child rearing. There is no particular reason for that allocation; it is just the way things are. Moreover, under the social roles that both women and people with disabilities play, there are subtle and less subtle aspects of denigration and subordination. Simi Linton has noted the tendency to ascribe similar characteristics of dependency, emotionality, passivity, and immaturity to both women and persons with disabilities, a phenomenon that she terms the "feminization of disability."[203] Susan Wendell has observed that:

> Feminists are grappling with issues that disabled people also face in a different context: Whether to stress sameness or difference in relation to the dominant group and in relation to each other; whether to place great value on independence from the help of other people, as the dominant culture does, or to question a value-system which distrusts and disvalues dependence on other people and vulnerability in general; whether to take full integration into male dominated/able-bodied society as the goal, seeking equal power with

200. *See, e.g.*, Herma Hill Kay, *Models of Equality*, 1985 U. ILL. L. REV. 39; Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 955 (1984) (calling for a focus on "sex-based physical differences"). Others have argued that no single, abstract standard of equality meets all situations and that particular situations call for specific solutions, irrespective of their "equality." *See, e.g.*, Becker, *supra* note 199, at 202; Patricia A. Cain, *Feminism and the Limits of Equality*, 24 GA. L. REV. 803, 806 (1990) (suggesting that equality as such should be less important than pursuit of self-definition and self-determination); Catherine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281 (1991) (rejecting theories based on the formal equality of men and women and on the special treatment of women). Accordingly, the dominance and antisubordination approaches criticize reliance either on formal equality or on different treatment based on physical and social differences and call for a change in power relations. *See supra* notes 192–97 and accompanying text. Another approach is that of cultural feminism, including advocacy of a realignment of values and social structures to replace those of patriarchy. *See* Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81, 140–42 (1987) (criticizing both equality-oriented and dominance-subordination theories).

201. *See* Martha L.A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181, 2211 (1995); Martha Albertson Fineman, *The Inevitability of Dependency and the Politics of Subsidy*, 9 STAN. L. & POL'Y REV. 89, 91–92 (1998); MacKinnon, *supra* note 200, at 1313.

202. *See supra* note 201.

203. LINTON, *supra* note 119, at 100.

> men/able-bodied people in that society, or whether to preserve some degree of separate culture, in which the abilities, knowledge and values of women/the disabled are specifically honored and developed.[204]

Like some forms of feminist theory, disability theory may conclude that the latter of each of these options must be pursued to obtain justice.[205]

4. Summary and Conclusions

The exploration of post-integrationist theory leads to several conclusions about disability and how society should respond to it: (1) in the world of today and in any foreseeable world of tomorrow, disability carries costs that will inevitably be borne by someone; (2) integrationist measures, such as the ADA, have limits in what they can accomplish for persons with disabilities because the measures use persons without disabilities as a social norm for the integration they promote; (3) welfare programs based on identification of disability will continue to be important simply for the survival of many persons with disabilities; (4) key premises of integrationism — the desirability of blending into the nondisabled population and making social and economic limits isomorphic with bodily ones — are questionable; (5) ideas of equal environmental adaptations, justice as fairness, balancing of social relations, and antisubordination call for significant redistribution of power and material resources in favor of persons with disabilities; and (6) just as some feminist thinkers have developed theories that call for rearranging differential social burdens in an effort to achieve real progress in women's equality, disability theory needs to embrace the notion that disability is a relevant difference for social policy.

D. Disability Theory and the Compass of Disability Law

As Jacobus tenBroek noted, disability law encompasses both welfare law — government benefits — and what he termed torts — standards of care and similar issues in traditional tort cases[206] as well as statutory and constitutional torts of unfair discrimination.[207] Of course, a complete account of the law of disability would be much broader and includes mat-

204. Wendell, *supra* note 116, at 261. Some, however, have questioned the responsiveness of current feminist theory to the situation of women with disabilities. *See* Anita Silvers, *Reprising Women's Disability: Feminist Identity Strategy and Disability Rights*, 13 BERKELEY WOMEN'S L.J. 81 (1998); *see also* Thomson, *supra* note 160, at 284–86 (discussing sexuality with regard to women with disabilities).

205. *See* Thomson, *supra* note 160, at 281–86 (noting the need for disability discourse to embrace the category of disability and other difference-type ideas).

206. *See* tenBroek, *supra* note 3, at 847–48. Space considerations prevent a fuller discussion in this article, but the more traditional issues of tort law continue to have special importance to persons with disabilities. For a recent exposition of this topic, see Milani, *supra* note 3.

207. *See* tenBroek, *supra* note 3, at 848.

ters of criminal responsibility, competence to make contracts, insurance, telecommunications, immigration, health law, land use regulation, and reproductive rights apart from discrimination. Any legal issue that could be of importance to anyone is of importance to people with disabilities, and because of the social position of people with disabilities, the issue will carry special concerns when disability comes into play. Nevertheless, if one focuses solely on welfare law and discrimination, it is possible to highlight the legal implications of different approaches to disability.

Under custodialism, disability law was largely the law of welfare, in the sense of the law of public charity. Statutes pertaining to persons with disabilities were found under the "charities and public welfare" heading of the statute books,[208] and cases and other legal materials took up such issues as the liability of relatives for the care of persons with mental retardation or other disabling conditions[209] or questions of which localities had the responsibility to support those individuals.[210] The need for income support because of disability received significant attention in the literature surrounding the passage of the Social Security Act, although its importance was secondary to that of poverty of the elderly.[211]

As civil rights ideas began to emerge and ideas of integrationism started to take root, cases and legal materials developed the law of enforced separation of persons with disabilities, such as civil commitment of persons with mental illness, and explored other issues related to concepts of social deviance, such as the insanity defense. Commentators concerned about integrationism stressed disability discrimination issues, almost to the exclusion of welfare law. The emphasis on discrimination fits closely into the integrationist approach to disability equality, which is preoccupied with placing individuals with disabilities into the positions that they would have if there were no discrimination on the basis of disability unrelated to one's actual contribution to economic enterprise. Only recently has disability law become the subject of law school courses, but the courses do not cover welfare issues; they focus instead on discrimination.[212] To the extent that issues of welfare law have been ex-

208. *See, e.g.*, ILL. REV. STAT. ch. 23 §§ 1-1 to -1025 (1991) ("Charities and Public Welfare").

209. *See* Mark C. Weber, *The End of Responsible Relative Liability*, 54 EXCEPTIONAL CHILDREN 171 (1987) (describing litigation over charges to parents for residential education of children with disabilities).

210. The English Poor Laws regulated this field, and, as one authority has noted, Britain's Poor Relief Act of 1601 "did more than influence American laws—for the first 150 years of the colonies' existence, it was American law." NORA GROCE, THE U.S. ROLE IN INTERNATIONAL DISABILITY ACTIVITIES: A HISTORY AND LOOK TOWARDS THE FUTURE 7 (1992), *quoted in* LINTON, *supra* note 119, at 47.

211. *See infra* notes 226–55 and accompanying text.

212. The two leading casebooks are RUTH COLKER & BONNIE POITRAS TUCKER, THE LAW OF DISABILITY DISCRIMINATION (2d ed. 1998) and LAURA F. ROTHSTEIN, DISABILITY LAW (1995). The leading treatises are LAURA F. ROTHSTEIN, DISABILITIES AND THE LAW (1992) and BONNIE P. TUCKER & BRUCE A. GOLDSTEIN, LEGAL RIGHTS OF PERSONS WITH DISABILITIES (1990); the West nutshell on disability discrimination is BONNIE POITRAS TUCKER, FEDERAL DISABILITY LAW (2d ed. 1994). That all those books cover only discrimination law and yet all but one have the all-encompassing title of "disability law" demonstrates the total identification of disability law with disability discrimination law, at least until very recently.

plored, they have been those of the procedural regularity of the welfare system and other issues that sound in civil rights.

A challenge of the post-integrationist era will be taking the law of disability, as it relates both to welfare and to discrimination, to a new understanding. That understanding must recognize that welfare, broadly conceived, is and will remain important, no matter what developments occur in the law of disability discrimination.

III. THE EXISTING LAW OF WELFARE FOR PERSONS WITH DISABILITIES

The contemporary law of welfare for persons with disabilities comprises Social Security programs and other subsidy efforts. Social Security programs have specific standards and goals relating to disability and its economic impact. Examination of the other programs that provide support for those with disabilities demonstrates specific social goals that include reintegration into work, general support to prevent destitution, and social compensation for some categories of disabling injuries.

A. Disability Insurance and Supplemental Security Income Benefits

For persons with severe disabilities who are not working, the national government's Social Security programs provide means of support. The two most important programs are Disability Insurance and Supplementary Security Income. A description of the programs and an account of their history and philosophy explain their respective roles as a social insurance mechanism and a relatively low-stigma welfare program for persons with disabilities. Analysis of the programs' role in a market economy illustrates the interrelationship of the benefits standards and the incentive to work before and after disability.

1. The Disability Insurance and Supplementary Security Income Programs

The Disability Insurance (DI) system works on the basis of contributions and entitlements. Employees in the United States contribute Social Security payroll taxes, which are matched by employer contributions.[213] When an individual has earned a sufficient amount during specified time periods, the person is considered "insured" for Social Security purposes.[214] If the individual becomes disabled, he or she is entitled to monthly benefits in an amount that will be smaller or larger based upon the contributions made, within statutory limits.[215] Currently, 4.5 million individuals receive DI benefits,[216] with an average amount of $804

213. *See* 26 U.S.C. § 3111a (1994).
214. *See* 42 U.S.C. § 414.
215. *See id.* § 423.
216. *See Social Security at a Glance*, *supra* note 49, at 113.

per month.[217] After a waiting period, the individual qualifies for federally assisted health insurance under the Medicare program. Dependents of the worker also receive benefits.

Persons who have not worked long enough or recently enough to be considered insured for purposes of DI may still receive monthly checks if they meet the DI disability standard, although the benefit amount is so low as to be barely above subsistence. Under the Supplemental Security Income (SSI) program, eligibility depends both on the inability to work because of a disabling condition and a means test.[218] Individuals must have less than two thousand dollars in assets; unearned income reduces SSI benefits dollar-for-dollar (after a $20 monthly disregard).[219] At the present time, 5.2 million people receive SSI on the basis of disability.[220] The maximum monthly payment for an individual, as of 2000, is $512.[221] In most states, persons on SSI automatically qualify for necessary medical treatment under the Medicaid program;[222] its costs are shared by the federal government and the states.[223] Persons who qualify for SSI ordinarily also will be entitled to food stamps.

Governmental outlays for DI and SSI are significant. The combined amount exceeds $50 billion annually.[224]

2. The History and Philosophy of DI and SSI

DI is one of the original social security programs proposed during the New Deal, and it reflects a traditional social insurance approach to the problem of poverty among persons who become disabled.[225] Because of negative self-selection among persons opting for private disability insurance, few companies offered it, and rates were prohibitive;[226] moreover, workers with other pressing needs rarely set money aside or otherwise provided for chronic disease, disabling injury, or even old age.[227]

The mandatory government program corrects the market deficiency, essentially by requiring all workers and their employers to purchase government-administered mutual insurance. Payroll taxes are the premium and are invested in government bonds, just as insurance com-

217. *See* Alice Ann Love, *Social Security to Increase* (Oct. 19, 1999) <http://www.abcnews.go.com/sections/business/DailyNews/social security991019.html> (on file with the *University of Illinois Law Review*).

218. *See* 42 U.S.C. § 1382.

219. *See id.* § 1382a(b)(2)(A).

220. *See Social Security at a Glance*, *supra* note 49, at 113.

221. *See* Love, *supra* note 217.

222. *See* 42 U.S.C. § 1396a.

223. *See id.* § 1396d(b).

224. *See* Robert Pear, *Proposal Aims at Returning Disabled Workers to Jobs*, N.Y. TIMES, Jan. 13, 1999, at A12 (citing government figures).

225. *See* MICHAEL J. GRAETZ & JERRY L. MASHAW, TRUE SECURITY: RETHINKING AMERICAN SOCIAL INSURANCE 87–90 (1999).

226. *See* BERKOWITZ, *supra* note 44, at 52–53.

227. *See* PAUL H. DOUGLAS, SOCIAL SECURITY IN THE UNITED STATES 3–7 (2d ed. 1939).

panies invest their premium revenue in securities.[228] Benefits are paid out based on the levels of premiums paid in.[229] The comparison is far from perfect, however. The DI program did not wait to build up a separate capital reserve before beginning to pay benefits.[230] Even the Social Security trust fund itself is an illusion, because government purchase of government bonds is indistinguishable from the government never having issued the bonds in the first place.[231] The system is one of tax and spend.[232] Moreover, benefits are set politically, not by contract, and are subject to congressional increase, decrease, or elimination rather than being vested at a set amount.[233] In general, this difference from ordinary insurance has worked to the benefit of recipients, because benefits are indexed for inflation, and the base level has occasionally been raised. On the other hand, the absence of guarantees has worked to the detriment of some beneficiaries who have lost benefits for political reasons.[234]

The philosophy of social security worldwide is that it operates as a publicly operated, comprehensive system of contributory insurance against all the major economic hazards of life, from the cradle to the grave.[235] DI is just one of the programs of social security; also included are retirement benefits, unemployment insurance, subsistence welfare benefits, and, in most of the industrialized world, temporary disability benefits, partial disability benefits, and universal health insurance.[236] Many countries' social security systems include workers' compensation programs and rehabilitation services.[237]

228. *See* tenBroek & Matson, *supra* note 1, at 818.

229. *See* BERKOWITZ, *supra* note 44, at 47.

230. *See* ALTMEYER, *supra* note 53, at 248–49 n.*. As Altmeyer notes, the contribution rate was set at a rate much higher than actually needed, and benefits were expanded in 1958 and 1960 without any increase in the payroll deductions. *See id.*

231. This fact was apparent from the outset. As economist (and later Senator) Paul Douglas noted, if the government actually used the buying back of bonds to avoid raising other taxes, and the persons who would otherwise be paying those taxes actually spent the money on productive investments, the imaginary reserve would operate in about the same fashion that a private reserve would. Of course, there was no evidence that the government and the would-be taxpayers would behave as predicted. *See* DOUGLAS, *supra* note 227, at 388–95.

232. Interestingly, the current proposal to invest some of the Social Security reserves in the stock market actually would bring at least part of the funds into a more concrete existence. *See generally* Erin Arvedlund, *ABCNews.com: Wall Street Questions Clinton Social Security Plan* (Jan. 21, 1999) <http://more.abcnews.go.com/sections/business/dailynews/socialsecurity-market9900120.html> (copy on file with the *University of Illinois Law Review*) (describing the investment proposal and criticisms of it).

233. *See* tenBroek & Matson, *supra* note 1, at 820.

234. A striking example is the termination of benefits to aliens deported on the ground that they had once been members of the Communist Party, even though membership was not illegal at the time. *See* Flemming v. Nestor, 363 U.S. 603, 611 (1960) (rejecting claims that termination violated constitutional obligations).

235. Reportedly, President Franklin Roosevelt was irritated that the phrase "cradle to grave security" became associated with Lord Beveridge, who designed the British social security system, rather than with him. *See* ALTMEYER, *supra* note 53, at 4–5.

236. *See* OFFICE OF RESEARCH, EVALUATION AND STATISTICS, SOCIAL SECURITY ADMIN., SOCIAL SECURITY PROGRAMS THROUGHOUT THE WORLD ix–xxiv (1997) [hereinafter WORLD SOCIAL SECURITY PROGRAMS].

237. *See id.* at xxi–xxii.

By the broadest definition, social security embraces programs that are not contributory and not self-supporting;[238] even the American DI and Social Security retirement programs determine eligibility not based on the taxes paid but on the earnings that presumably led to the taxes. Both are redistributive in that they give out proportionately higher benefits to those who earned less.[239] But the key programs in the American Social Security system — DI and retirement benefits — have contributions at their core.[240] The worker pays in based on earnings and draws out at retirement or, if disabled before retirement, from that point until retirement age. Moreover, the benefits level rises to a maximum amount, proportional to the earnings that are taxed, up to a maximum earnings level.[241]

The American Social Security system, like that of other countries, derived from the system of social palliatives initiated by Bismarck at the end of the nineteenth century to undermine the political base of the German socialists.[242] The Depression galvanized support for federally supported income maintenance efforts and made programs based on contributions attractive to many conservatives fearful of radical wealth redistribution schemes.[243] President Roosevelt strongly favored contributory social insurance as protection against the hazards of human life; he preferred social programs that were self-supporting, rather than funded by general tax revenues, feeling that they were more consistent with the virtue of thrift.[244]

238. *See* ALTMEYER, *supra* note 53, at 5 (noting multiple meanings of the term).

239. *See* DOUGLAS, *supra* note 227, at 163.

240. *See* OFFICE OF RESEARCH, EVALUATION, AND STATISTICS, SOCIAL SECURITY ADMIN., SOCIAL SECURITY PROGRAMS IN THE UNITED STATES 10 (1997) [hereinafter U.S. SOCIAL SECURITY PROGRAMS] (listing the contributory nature of Social Security as a fundamental principle "largely responsible for the program's widespread acceptance and support").

241. The proportion is not exact; although benefits always rise with higher earnings, a higher fraction of lower paid workers' earnings is replaced. Moreover, minimum benefits, certain special benefits, and dependents' benefits all introduce disproportionality to accomplish other various income support objectives. *See id.* at 17–20; *see also* tenBroek & Matson, *supra* note 1, at 819 (declaring that "[t]he insurance principle is honored more in the propaganda than the reality" in light of these distortions).

242. *See* DOUGLAS, *supra* note 227, at 242 (describing German social insurance). Douglas made the interesting point that the system should cover the broadest possible spectrum of workers even when immediate political considerations do not demand it. *See id.* He noted that shopkeepers, farm workers, and others excluded from the industry-based German programs eventually acted on their envy of the industrial workers' benefits by supporting the Nazi movement. *See id.* The term "social security" is of American origin and was coined to distinguish American proposals, which entailed modest redistribution and public subsidies, from the German social insurance system, where benefits were adjusted actuarially to worker contributions. *See generally* William Haber & Wilbur J. Cohen, *Theory and Philosophy of Social Security*, *in* READINGS IN SOCIAL SECURITY 38, 39 (William Haber & Wilbur J. Cohen eds., 1948) (describing the origin of the term in 1933 and ascribing it to Abraham Epstein of the American Association of Social Security).

243. *See* Haber & Cohen, *supra* note 242, at 6–7. The Townsend plan of pensions for retired workers was the principal threat. *See id.* at 69–83.

244. The preference matched President Roosevelt's conformance to the stereotype of extreme personal frugality among the very rich. Observers laughed at the delight he displayed in the number of shaves he got from a single razor blade or the number of years he wore the same sweater. *See* ALTMEYER, *supra* note 53, at 11.

President Roosevelt was right. Social Security entitlements based on work and contributions fit easily within the general system of incentives for work. The benefits rise to match the increased contributions that higher-paid workers make and the increased obligations they accumulate.[245] Like the minimum wage or the Family and Medical Leave Act, minimum contributory social benefits are a form of regulation of the contract between the individual worker and the employer, rather than a form of poor relief.[246]

DI was a relative latecomer to the American Social Security system. President Roosevelt proposed a disability insurance program in his 1944 budget message, and President Truman gave the proposal his strong endorsement in a special report in 1947.[247] Neither President Roosevelt nor President Truman, however, secured the necessary votes in Congress; President Truman put most of his political capital behind national health insurance, and the efforts of private insurance companies and the American Medical Association to defeat that proposal blocked disability protection as well.[248] Congress did approve a modification of the Social Security retirement program dubbed the "freeze:" workers who incurred a disability after having worked long enough to be covered for retirement purposes were protected from loss of benefits from having no or low wages in the years between disability and retirement age.[249] The freeze operated successfully, undercutting the argument that disability standards were unworkable.[250] Finally, in 1956, over modest opposition from the Eisenhower administration,[251] Congress passed DI.[252] The plan was

245. *See* Arthur J. Altmeyer, *Ten Years of Social Security*, *in* READINGS IN SOCIAL SECURITY, *supra* note 242, at 79, 83.

246. *See* Edwin E. Witte, *What to Expect of Social Security, in* READINGS IN SOCIAL SECURITY, *supra* note 242, at 58, 61–62.

247. *See* ALTMEYER, *supra* note 53, at 148–49, 159. Lower-level officials floated the program in the 1930s, but the administration had reservations about financing the plan at the same time that the retirement pension program was beginning and unveiled the proposal gradually over several years. *See id.* at 90–91, 103.

248. *See id.* at 159–60, 185; BERKOWITZ, *supra* note 44, at 69. Before the national health insurance proposal emerged, the American Medical Association had supported disability benefits. *See id.* at 186. There was also some insurance industry opposition to disability insurance per se, independent of its linkage to the national health insurance proposal. This opposition diminished in the 1950s. *See* Interview by Peter A. Corning with Roswell Perkins, Department of Health, Education, and Welfare during the Eisenhower administration, New York, N.Y., at 28, 86–92 (Oral History Research Office, Columbia University, Social Security Administration Project, Part IV, No. 160, Apr. 2, 1966) [hereinafter Roswell Perkins Interview]. A strong opponent of the program was M. Albert Linton of the Provident Mutual Insurance Company, who raised objections based on federalism and the prediction that the program would balloon in times of high unemployment. *See Disability Assistance for the Needy*, *in* READINGS IN SOCIAL SECURITY, *supra* note 242, at 440–49 (memorandum of dissent by two members of the Senate Advisory Council on Social Security).

249. A freeze bill passed in 1952, but, as a result of a House-Senate compromise, it was not put into operation. *See* ALTMEYER, *supra* note 53, at 195–99; BERKOWITZ, *supra* note 44, at 71–72. An effective version passed in 1954. *See id.* at 72.

250. *See* Diller, *supra* note 137, at 401.

251. Roswell Perkins, who had chief responsibility within the Eisenhower administration for liaison with Congress on disability benefits issues, described the decision to oppose the institution of cash benefits as a difficult one, despite widespread opposition to the proposal among congressional Republicans. *See*

sold as an early retirement mechanism; to qualify, a worker had to be fifty years old and meet the disability standard.[253] In 1959, Health, Education, and Welfare Secretary Arthur Flemming announced his support for removing the age requirement,[254] and Congress did so in 1960.[255]

The other program of federal income support for persons with disabilities, SSI, is the descendent of a welfare program for aged persons and persons with disabilities that had been run by the states with partial federal subsidies beginning in the 1930s.[256] In a concession to the movement in the early 1970s for a guaranteed annual income for poor persons, the federal government took over the full costs and administration of the program and established a national benefit amount.[257] It imposed the same disability definition as that used in the DI program.[258] States retain a role in both DI and SSI by making initial determinations of disability.[259] Some states supplement the SSI amounts, at least for certain beneficiaries.[260]

SSI and other means-tested programs not supported by worker contributions are something of a stepchild of the social security movement. Architects of social insurance programs saw the need for programs to keep people from starving if they could not support themselves[261] but felt the programs would be abused if the income and assets standard or benefits were too high.[262] They believed that wage-based contributory programs were more consistent with ordinary incentives and with the idea of rewarding individual contribution to the social product. The analogy to private insurance appealed to them, but they recognized that private in-

Roswell Perkins Interview, *supra* note 248, at 28 (quoting Perkins as declaring that "Secretary Folsom tortured himself for weeks over this").

252. *See* Pub. L. No. 84-880, 70 Stat. 815 (1956) (codified as amended at 42 U.S.C. § 423 (1994)).

253. *See id*.

254. *See* BERKOWITZ, *supra* note 44, at 109–10.

255. *See* Pub. L. No. 86-778, 74 Stat. 967 (1960) (codified as amended at 42 U.S.C. §§ 402, 403(e), 416, 422, 423).

256. In the original 1935 Social Security Act, Congress created a program of federal assistance for states paying their own old-age benefits to the poor (either pensions or welfare benefits) and for federal grants to the aged poor in states without programs. *See* DOUGLAS, *supra* note 227, at 117–19, 151–57. In 1950, Congress extended matching funds to state programs to assist individuals who were totally and permanently disabled. *See* BERKOWITZ, *supra* note 44, at 85.

257. *See* 42 U.S.C. §§ 1381–1385 (1994 & Supp. III 1997); BERKOWITZ, *supra* note 44, at 84–86; Diller, *supra* note 137, at 434–43.

258. As Diller has observed, the net effect was probably to heighten disability standards in the United States, although the emphasis of the Social Security standard on the inability to do paid work may have enhanced the prospects for eligibility among those whose disabilities rendered them unable to get a job but who could still do housework. *See* Diller, *supra* note 137, at 441–42.

259. *See* 42 U.S.C. § 1382c(a)(3)(F). This opportunity for state government patronage as well as for a measure of local control helped consolidate political support for the program but led to some disparity in the application of disability standards. *See* BERKOWITZ, *supra* note 44, at 72, 77–78, 81–83.

260. *See* U.S. SOCIAL SECURITY PROGRAMS, *supra* note 240, at 86–87 (describing state supplement programs).

261. *See* DOUGLAS, *supra* note 227, at 169–70 (describing old-age assistance). *See generally* tenBroek & Matson, *supra* note 1, at 817 (contrasting social insurance and other assistance).

262. *See* tenBroek & Matson, *supra* note 1, at 821–22 (linking modern ideas about means testing to the Elizabethan poor laws).

surance could not meet the need. Adverse selection caused a market failure for private disability insurance plans.[263] Many advocates of contributory disability insurance felt that people who had worked for significant portions of their lives until shortly before the onset of impairment were more deserving of support and less likely to feign the inability to work.[264] They also knew that contribution-based programs would enjoy higher levels of political support because all workers would feel a vested interest in the benefits for which they felt they had paid.[265]

The large gap between average benefits levels for DI and SSI maintains the SSI program's inferior status, though administration by the same agency as that serving the entire earning population, the indexing of SSI benefits for increases in the cost of living, and even the title of the program itself elevates its status somewhat above other public welfare programs.[266] Matthew Diller is correct in concluding that persons with disabilities so severe that they qualify for SSI are privileged over public assistance recipients generally.[267]

Nevertheless, Diller is incorrect in contending that DI and SSI regard disability as an excuse not to work, rather than a determination of an inability to work.[268] An excuse could be used or not used without financial penalty.[269] But under the programs as they exist, persons who meet the disability eligibility standards for DI or SSI while somehow continuing in their jobs do not have the option to work and receive benefits. Under DI's rules, not engaging in substantial gainful activity is a prerequisite for being on the program, and one cannot stay on the program long after one begins to engage in gainful activity.[270] Work incentive provi-

263. *See* Advisory Council on Social Security, *Permanent and Total Disability Insurance*, *in* READINGS IN SOCIAL SECURITY, *supra* note 242, at 421, 422 ("More than 60 life-insurance companies offer such protection, but few individuals purchase it. The cost is high, the terms on which it is sold are restrictive, and most life-insurance companies no longer follow aggressive sales policies with respect to [it].").

264. *See* Diller, *supra* note 137, at 378.

265. Hence President Roosevelt's famous quote: "With those [payroll] taxes in there, no damn politician can ever scrap my social security program." ARTHUR M. SCHLESINGER, JR., THE AGE OF ROOSEVELT: THE COMING OF THE NEW DEAL 309 (1958).

266. *See* Diller, *supra* note 137, at 438–39. Indexing is a particularly important advantage. *See id.* at 445. Although SSI benefits started and stayed low, they did not fall in value with the inflation of the 1970s and 1980s in the way that other income subsidies did. Maximum benefits under the old Aid to Families with Dependent Children program fell 51% in real value from 1970 to 1996. *See* J. Robert Kerry, *Welfare Reform: Economic Security for the Next Century*, 9 STAN. L. & POL'Y REV. 13, 15 (1998).

267. *See* Diller, *supra* note 137, at 444–48.

268. *See id.* at 386.

269. Such an interpretation might be placed on the rule that retirement benefits are payable to persons over age 70, who may receive the full amount of their benefits, regardless of earnings. Other persons' retirement benefits are reduced on the ground that the purpose of the retirement program is to replace earnings that are lost because the person no longer is in the workforce. *See* U.S. SOCIAL SECURITY PROGRAMS, *supra* note 240, at 12 (explaining rules and rationales).

270. *See infra* text accompanying notes 308–10 (describing the trial work period, the extended period of eligibility, and collecting sources). To summarize that discussion: a beneficiary may engage in a trial work period of up to nine months (not necessarily consecutive). If, at the end of the nine months, the person is engaging in substantial gainful activity, benefits may continue for three months. For an additional three years, benefits will be paid for any month in which earnings fall below the substantial gainful activity amount. Medicare benefits are provided for 39 months and may be purchased after that time. Work ex-

sions make matters slightly more complicated with SSI,[271] but because the benefit levels are so low, the reality is that the individuals who both work and receive benefits are those who cannot compete in the ordinary labor market, typically persons with extremely low-wage jobs, such as those in sheltered settings.[272] Individuals who earn more than the benefits amount but still earn relatively little find themselves without any benefits.

Moreover, the low level of SSI benefits itself belies the idea that the recipient is honorably excused from the obligation to work. If that were the nature of the program, the benefit would, in tenBroek's words, "[make] possible a standard and circumstance of living not conspicuously different from that enjoyed by the rest of the community."[273] In fact, the standard is a subpoverty one— about seventy percent of the federal poverty level.[274]

The more accurate interpretation is that DI really is insurance. It replaces total or very near-total loss of employment income due to disability. An individual with the most severe impairments who earns even $8400 a year does not qualify for benefits.[275] By contrast, SSI is simply a relatively low-stigma welfare program for those with disabilities who are not working at a level that will support themselves and are not likely to be working at that level no matter how much effort they expend.

3. Disability Benefits Policy in a Market Economy

Diller is also in error in arguing that disability welfare policy is shaped by the perceived threat to the market economy that a more liberal disability standard would pose. He contends that benefits tied to a very exacting disability standard that is apparently based on medical factors (an accurate description of the SSI and DI test) are less of a threat to the market economy than welfare in general. Persons who meet the test, therefore, receive higher levels of support than other persons who do not

penses that relate to the beneficiary's disability are deducted from earnings to determine substantial gainful activity. These provisions all operate as work incentives, at least in comparison to the situation if benefits ceased the moment the beneficiary engaged in substantial gainful activity. For the definition of substantial gainful activity, see *supra* notes 40–42 and accompanying text.

271. *See infra* text accompanying notes 311–20 (describing SSI work incentives and collecting sources). To summarize: in the SSI program, $65 of earned income a month may be excluded in addition to a $20 disregard for any kind of income. Then, SSI benefits go down by one dollar for every two dollars earned. There are also provisions for the deduction of some impairment-related employment expenses and other amounts. Provisions exist under which Medicaid eligibility may be retained after cash benefits cease. *See* U.S. SOCIAL SECURITY PROGRAMS, *supra* note 240, at 85.

272. *See* Prero, *supra* note 43, at 277 (reporting that in the control group of a work training demonstration project for SSI recipients, the mean annual earnings were $225).

273. Jacobus tenBroek & Richard B. Wilson, *Public Assistance and Social Insurance— A Normative Evaluation*, 1 UCLA L. REV. 237, 263 (1954).

274. *See infra* note 392 and accompanying text.

275. *See supra* notes 42–43 and accompanying text. This statement is slightly oversimplified. The amount of earnings that ordinarily demonstrates substantial gainful activity (SGA) is $700 a month, with earnings of less than $300 a month generally demonstrating the absence of SGA. *See id.* Blind persons have a different test, with a $1,000 level for SGA. *See* 20 C.F.R. § 404.1584 (1998).

have an employment niche in the economy, that is, the general population on welfare.[276] But the existence of an identical disability definition for the DI and SSI programs belies that description. Persons with severe impairments qualify either for a middle-class standard of living or one barely above starvation, based not on degree of disability or on whether their condition is medically determinable but on past connection with the labor force.

What the American system really pays attention to—what it rewards—is prior work. The system's incentives induce individuals to work hard before they become disabled because if they do, they will enjoy a far better lifestyle after disability than if they had not been employed consistently at a high earnings level.[277] If their accumulated earnings before the onset of disability are low, their DI benefits will also be low; they may also be eligible for SSI, but the SSI will go down one dollar for every DI dollar received.

This is not to deny that very high benefits available on a lax or wholly subjective definition of disability would undermine incentives to work and thus impede the flow of labor into the economy.[278] But the SSI benefit level is hardly a threat to capitalism, and it would not become one even if it were substantially higher or available to a broader group than it is now. The DI program's true work incentives are those applicable to people before they become disabled, and they are quite consistent with market incentive structures. By providing employees a guarantee of a reasonable lifestyle after disability, it induces them to work now, and in that way it facilitates the infusion of labor into the economy. It operates in the same fashion as the payment of wages and other employee benefits in general.[279]

Nor is the recognition that disability is a social concept, rather than a medical term, any perceived threat to the market economy. Policy makers have always recognized that disability is not objective and not

276. *See* Diller, *supra* note 137, at 459 (discussing SSI).

277. *See* J. Douglas Brown, *Developments in the Social Security Program*, *in* READINGS IN SOCIAL SECURITY, *supra* note 242, at 121, 127 ("But any effective system of social security must enhance incentive, wherever possible, rather than impair it. . . . This can be done through social insurance under which eligibility and benefits are related to past earnings and productivity, and to probably future wages as well.").

278. Such a system existed in Holland until fairly recently and had the predicted effects. *See* Leo J.M. Aarts & Philip R. deJong, *European Experiences with Disability Policy*, *in* DISABILITY, WORK AND CASH BENEFITS, *supra* note 38, at 129, 149. It has been replaced by one with a stricter disability standard (although not as strict as that in the United States), lower benefits, work incentives, and employer obligations to hire persons with disabilities. *See id.* at 156; *see also* Philip R. deJong, *U.S. Disability Policy from a European Perspective*, *in* DISABILITY: CHALLENGES FOR SOCIAL INSURANCE, HEALTH CARE FINANCING, AND LABOR MARKET POLICY, *supra* note 87, at 28, 33–34 (discussing Dutch initiatives to shift costs to employers).

279. It may be questioned whether this incentive is effective for the average worker or whether its impact is either overwhelmed by the buying power of the wages that a decent job supplies or outweighed by the loss of present income that FICA taxes represent. The FICA tax rate is now much higher than it was at the inception of the various American Social Security programs and likely pushes some low-wage workers into the underground economy. *Compare* I.R.C. § 3101 (1994) (establishing a FICA tax rate of 7.65%), *with* I.R.C. § 3101 (1982) (establishing rates of 4.95% to 6.20% for various years).

solely a medical concept; they have acknowledged that it is sensitive to economic factors.[280] The rules for the DI system have recognized from the very start that advancing age combines with physical or mental impairment to make the employment chances of older persons with impairments unrealistically low.[281] Eligibility has been defined accordingly.

The narrow, medically dependent definition of disability shows a stinginess in both the contributory social insurance system and the welfare system, and the low or nonexistent amounts of nondisability-related welfare create dire incentives to sell one's labor if one does not meet the standard. Nevertheless, work incentives for persons with disabling conditions do not determine the structure of the program. In fact, many SSI recipients do work, but their work is in sheltered workshops with minimal productivity and commensurately low, subpoverty wages.[282] Moreover, the population on DI that might be expected to be most responsive to work incentives is under age fifty, but support for the age restriction for DI eligibility collapsed only three years into the operation of the program and did so under an administration that had opposed the program in the first place. Social Security planners realize that work incentive provisions for DI are not very effective, and although they occasionally cite the high level of benefits as an obstacle,[283] more often they stress the severity of the impairments of the eligible population.[284]

Government budgetary priorities are more important in determining benefit structures than are expectations about work for those who already have disabilities. A disability standard that is not as strict as the one currently employed would require an increase in budget allocations. To maintain DI as a self-supporting program, payroll taxes would need to rise above their historically high level of 15.3%.[285] SSI would absorb more of general revenues. At a time when retirement income needs are threatening to bankrupt the imaginary trust fund, it will require a hard fight to have DI draw a larger share of the payroll tax receipts. And al-

280. *See supra* note 52.

281. *See* BERKOWITZ, *supra* note 44, at 46–47.

282. *See* Richard V. Burkhauser & David C. Wittenburg, *How Current Disability Transfer Policies Discourage Work: Analysis from the 1990 SIPP*, 7 J. VOCATIONAL REHABILITATION 9, 15 (1996) (reporting a survey showing that 10.2% of sampled persons receiving SSI received earnings from work in the previous month); 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. SECURITY BULL., Mar. 1, 1996, at 22, 34–36 (discussing the prevalence of sheltered and supported employment among working SSI recipients); *see also supra* note 274 and accompanying text (detailing the low level of labor earnings of employed SSI recipients).

283. *See, e.g.*, John C. Hennessey & L. Scott Muller, *The Effect of Vocational Rehabilitation and Work Incentives on Helping the Disabled-Worker Beneficiary Back to Work*, SOC. SECURITY BULL., Spring 1995, at 15, 23 (noting that benefits create disincentives to work).

284. *See* Ycas, *supra* note 46, at 184.

285. That percentage breaks down to 7.65% paid by the worker and 7.65% paid by the employer, with a 6.2% rate applicable only to includible income below a specified ceiling and 1.45% applicable to all includible income. *See* 26 U.S.C. § 3111 (1994 & Supp. III 1997).

though the federal budget has finally achieved a surplus,[286] strong efforts will be needed for SSI recipients to prevail in the mad grab now going on for the excess dollars. Indeed, the Clinton administration has eyed the money for an emergency infusion into Social Security retirement benefits.[287]

B. Other Subsidies

In-kind benefits and cash benefits other than DI and SSI and their related medical assistance provisions also provide aid to persons with disabilities. Most of these benefits fall outside the ambit of the Social Security Administration; their beneficiaries may or may not meet the daunting standard of impairment severity that DI and SSI impose.

One category of benefits is rehabilitation services, which are provided to persons with disabilities to enable them to benefit in terms of employability.[288] The services are funded through a federal-state match and include vocational evaluation, job training, work adjustment, educational programs, and other activities related to employment.[289] The program serves about one million people a year.[290] The standard for eligibility for the services is that the applicant has a disability and can benefit in terms of an employment outcome from rehabilitation services;[291] states, however, cannot meet the needs of all whom apply. Instead, they must give priority to persons with severe disabilities and establish an order of selection spelling out the priority of specific categories of persons who are eligible.[292] The program is widely regarded as successful,[293] although complaints have arisen concerning the practice of some programs to identify the highest-functioning individuals and provide them with services, knowing that they will easily gain employment and make the pro-

286. *See Budget Surplus Announced* (Jan. 6, 1999) <http://www.abcnews.go.com/sections/us/DailyNews/budget990106.html> (copy on file with the *University of Illinois Law Review*).

287. *See id.* (quoting President Clinton as stating that "[b]efore we consider any new spending or tax cuts, first we must set this surplus aside until we save Social Security for the 21st century"); *see also Clinton: 'State of Our Union is Strong'* (Jan. 19, 1999) <http://www.cnn.com/ALLPOLITICS/stories/1999/01/19/sotu/> (copy on file with the *University of Illinois Law Review*) (describing the proposed use of 62% of the budget surplus to bolster retirement funding).

288. *See* 29 U.S.C.A. § 701 (West 1998).

289. *See id.* § 721.

290. *See* 1992 REHABILITATION SERVS. ADMIN., U.S. DEP'T OF EDUC. ANN. REP. app. C-1 (listing the number of persons served as 949,557).

291. *See* 29 U.S.C.A. § 705(20). An employment outcome may include supported employment or other outcomes besides full-time employment in the ordinary competitive market, as appropriate for the individual. *See id.* § 705(5).

292. *See id.* § 721(a)(5)(A).

293. *See* 1992 REHABILITATION SERVS. ADMIN., U.S. DEP'T OF EDUC. ANN. REP. 26, 34 (describing the successful rehabilitation of persons with severe disabilities).

gram look good, while rejecting those with more severe impairments who need services more and have statutory priority.[294]

Work programs are also provided to some persons with disabilities, typically defined as categories of adults with developmental disabilities and similar conditions.[295] These programs provide opportunities to earn a limited income, contribute to the economy, and spend time constructively. Sales of the items and services produced generate some of the money to run the programs, although state, local, and private funds usually supplement the market revenue. Adults with developmental disabilities also may be eligible for shelter in group homes and similar facilities, with the costs funded in part by SSI and in part by other public subsidies.[296] Federal and state sources also fund case management and other social work initiatives to match eligible individuals with the necessary services.[297] Independent living centers, an innovation that began with the student disability rights movement at Berkeley, are run by persons with disabilities and receive partial government support to assist with integration of individuals into work and social settings and to help them obtain public and private services to make this integration possible.[298]

C. General Public Support Programs

Because of the gap between the extreme degree of disability needed to qualify for DI and SSI and the degree of ability needed to integrate smoothly into the labor economy, many individuals with disabilities must rely on general public relief programs. The programs are of several types.

States or localities have traditionally provided general assistance to anyone with insufficient income and assets,[299] and these programs have supported many persons with disabilities who did not meet federal disability standards or could not find their way through the bureaucratic maze to establish eligibility. Under the Social Security Act of 1935, the Aid to Families with Dependent Children (AFDC) program gave cooperatively funded federal-state aid to impoverished parents of dependent children.[300] After the implementation of DI and SSI, the program continued to support persons with disabilities in dependent child families who did not qualify for benefits under the federal standards.[301] In most states,

294. *See* Mark C. Weber, *Towards Access, Accountability, Procedural Regularity and Participation: The Rehabilitation Act Amendments of 1992 and 1993*, J. REHABILITATION, July 1994, at 21–25 (discussing recent statutory initiatives to improve the vocational rehabilitation program's effectiveness).

295. *See* 42 U.S.C. §§ 6000–6083 (1994 & Supp. III 1997).

296. *See id.* §§ 8011–8013.

297. *See id.* § 6001(24) (describing case management and service coordination).

298. *See* 29 U.S.C.A. §§ 796f-1 to 796f-6 (West 1999).

299. *See* U.S. SOCIAL SECURITY PROGRAMS, *supra* note 240, at 103–04. As of 1994, programs existed in 32 states and four territories. *See id.* at 104.

300. *See* Social Security Act of 1935, ch. 531, §§ 401–406, 49 Stat. 627–29.

301. *See* 42 U.S.C. §§ 601–687 (1994), *repealed by* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified at 42 U.S.C. § 601(b)).

eligibility for AFDC carried automatic eligibility for Medicaid.[302] Food stamps provided extra help to anyone who was poor enough to qualify and thus also gave aid to persons with disabilities.[303] Recent welfare reform efforts, however, have torn away much of the safety net that these programs created.[304]

D. Workers' Compensation, Tort Recoveries, and Private Insurance

A final category of income maintenance might be thought of as nonpublic support, although it operates within structures established by government. Workers' compensation laws provide cash damages and ongoing support for occupational injuries and diseases.[305] Most countries consider workers' compensation arrangements to be part of the social security package they offer to all citizens who have worked. Workers' compensation is simply a specialized program for those who are disabled on the job.[306] In the United States, workers who are temporarily or permanently, partially or fully, disabled from workplace injuries receive, in aggregate, $43,376,200,000 each year in benefits.[307]

In the United States, and to a lesser degree in other countries, the tort system provides compensation in a similar fashion for some other kinds of disabling injuries. Finally, private insurance, often provided as part of a package of employee benefits, plays a highly significant role in maintaining the standard of living of some persons who incur disabilities.

IV. DEVELOPMENTS AND TRENDS IN WELFARE LAW FOR PERSONS WITH DISABILITIES

Recent developments in the law of welfare for persons with disabilities include major initiatives to enhance the work incentive provisions in DI and SSI and some steps to increase beneficiary choice and flexibility in rehabilitation services. More ominously for persons with significant disabilities, but whose conditions are not so severe that they qualify for income support from DI and SSI, the programs that once provided protection against destitution have recently been limited or repealed altogether.

302. *See id.* § 1396a(a)(10)(C)(i).

303. *See* 7 U.S.C. § 2014 (1994 & Supp. IV 1998).

304. *See* U.S. SOCIAL SECURITY PROGRAMS, *supra* note 240, at 3–7 (describing program changes and developments).

305. *See supra* Part IV.

306. *See* WORLD SOCIAL SECURITY PROGRAMS, *supra* note 236, at xx (describing these programs as "[t]he oldest and most widespread form of social security").

307. *See* U.S. SOCIAL SECURITY PROGRAMS, *supra* note 240, at 109.

A. DI and SSI

The recent story with respect to DI and SSI is the enhancement of work incentives. The DI program has long permitted beneficiaries to engage in a nine-month trial work period, during which the beneficiary retains eligibility even if earnings exceed the substantial gainful activity amount.[308] More recently, Congress provided for an extended period of eligibility beyond the trial work period. During this three-year period, benefits end but will automatically resume in any month during which the individual's work is below the substantial gainful activity level, after the deduction of impairment-related work expenses.[309] Individuals receiving DI who return to work are eligible to retain their Medicare insurance for at least thirty-nine months following the trial work period; they may then purchase Medicare coverage.[310]

The SSI program provides an incentive to work by ignoring up to sixty-five dollars of earned income in any month, in addition to twenty dollars of unearned income.[311] After that amount has been reached, the SSI payment diminishes by one dollar for every two dollars of earnings. SSI payments and Medicaid eligibility may be retained after the individual's earnings exceed the level of substantial gainful activity until earnings exceed the amount that would reduce the SSI payment to zero, as long as the beneficiary still has the disabling impairment.[312] Even under those circumstances, payments and Medicaid eligibility may continue if the person meets the SSI asset standards, and the government finds that the individual would be seriously inhibited from continuing employment without Medicaid, and his earnings do not permit the purchase of equivalent benefits.[313]

Under both the SSI and DI programs, beneficiaries may exclude from their countable income the expenses related to achieving employment. The Plan for Achieving Self-Support (PASS) allows SSI recipients up to thirty-six months of setting aside income for expenses relating to training, equipment, or services connected to a specific employment goal.[314] Impairment-Related Work Expenses (IRWE) are deducted from

308. *See* 42 U.S.C. § 422(c)(4)(A).

309. *See id.* § 423(e)(1). *See generally* John C. Hennessey, *Job Patterns of Disabled Beneficiaries*, SOC. SECURITY BULL., Winter 1996, at 3–4 (describing the trial work period and an extended period of eligibility).

310. *See supra* note 309; *see also* U.S. SOCIAL SECURITY PROGRAMS, *supra* note 240, at 14 (describing Medicare extensions).

311. *See* 42 U.S.C. §§ 1382a(3)(A), 1382a(4)(A).

312. *See id.* § 1382h.

313. *See id. See generally* U.S. SOCIAL SECURITY PROGRAMS, *supra* note 240, at 85 (describing SSI work incentives). Some states are considering waivers from otherwise applicable Medicaid requirements to permit individuals to receive Medicaid even after this point has been reached. *See, e.g.*, A.B. 495, 222d Sess. (N.Y. 1999).

314. *See* 42 U.S.C. § 1382a(b)(4)(B); 20 C.F.R. § 416.1226 (1999).

earned income for an unlimited period of time under both DI and SSI.[315] Recent evaluative work comments favorably on these programs.[316]

The newest set of work incentives is found in the Ticket to Work and Work Incentives Improvement Act of 1999.[317] The law funds states to allow workers with disabilities to buy Medicaid coverage even though their incomes would place them above eligibility cutoffs.[318] Medicaid's coverage of necessary medical expenses may be extended to personal attendant services, which are of special importance to individuals reentering the work force.[319] Medicare eligibility may be retained for more than thirty months after the termination of DI eligibility.[320] The Clinton administration also proposed a one-thousand-dollar annual tax credit to help persons whose disabilities entail extra transportation or adaptive technology costs if they are to work.[321]

The Act also includes something called the "ticket-to-work."[322] Under this plan, rehabilitation providers who successfully place individuals in jobs get bonuses consisting of a portion of the disability benefits the individuals otherwise would have received.[323]

At the same time that the government has increased the work incentives in the Social Security system and proposed still more, it has eliminated or narrowed eligibility for some classes of beneficiaries. As of January 1, 1997, persons whose drug addiction or alcoholism is a contributing factor material to a finding of disability no longer qualify for DI or SSI.[324] In addition, Congress has changed the standards for children's eligibility for SSI benefits, requiring children to meet the medical listing of

315. *See id.* § 1382c(a)(3)(E) (Supp. II 1996) (SSI); 20 C.F.R. § 404.1576(b) (1998) (DI).

316. *See* Michael D. West et al., *Use of Social Security Work Incentives by Supported Employment Agencies and Consumers: Findings from a National Survey*, 7 J. VOCATIONAL REHABILITATION 117, 123 (1996); William D. Halloran, *Supplemental Security Income: Benefits and Incentive Provisions to Assist People with Severe Disabilities Toward Economic Self-Sufficiency*, AM. REHABILITATION, Spring 1991, at 21, 21.

317. Pub. L. No. 106-170, 113 Stat. 1860 (1999) (to be codified in scattered sections of 42 U.S.C.).

318. *See id.* § 201, 113 Stat. 1860, 1891–94; s*ee* Marc Lacey, *Clinton Signs Law to Help Workers with Disabilities*, N.Y. TIMES, Dec. 18, 1999, at A10; *see also* Pear, *supra* note 224, at A12.

319. *See* Ticket to Work and Work Incentives Improvement Act, § 203(b)(2)(A), 113 Stat 1860, 1895; *see also* Pear, *supra* note 224, at A12 (describing the importance of attendant services).

320. *See* Ticket to Work and Work Incentives Improvement Act, § 203, 113 Stat. 1860, 1894; *see also* Robert Pear, *Clinton Proposes Aid for Disabled Returning to Jobs*, N.Y. TIMES, Nov. 30, 1998, at A1 (describing the proposal for the law).

321. *See* Pear, *supra* note 224, at A12 (describing the proposal); *see also Clinton Pushes Health Care Plan for People with Disabilities*, CNN INTERACTIVE (Jan. 13, 1999) <http://www.cnn.com/HEALTH/9901/13/Clinton.disabilities.02/> (copy on file with the *University of Illinois Law Review*).

322. Pub. L. No. 106-170, §§ 101-122, 113 Stat. 1860, 1863–91 (1999); *see also Clinton Pushes Health Care Plan for People with Disabilities*, *supra* note 321 (describing the plan).

323. *See* Pub. L. No. 106-170, §§ 101–122, 113 Stat. at 1863–91. *See generally* BALANCING SECURITY AND OPPORTUNITY: THE CHALLENGE OF DISABILITY INCOME POLICY 3 (Jerry L. Mashaw & Virginia P. Reno eds., 1996) (executive summary of a report of the Disability Policy Panel of the National Academy of Social Insurance proposing the ticket-to-work plan); Monroe Berkowitz, *Linking Beneficiaries with Return-to-Work Services*, *in* DISABILITY: CHALLENGES FOR SOCIAL INSURANCE, HEALTH CARE FINANCING, AND LABOR MARKET POLICY, *supra* note 87, at 41 (describing and supporting the ticket-to-work plan).

324. *See* 42 U.S.C. §§ 423(d)(2)(C) (DI), 1382c(a)(3) (SSI) (Supp. III 1997)).

impairments to receive support.[325] Many noncitizens also have lost eligibility for SSI benefits under recent restrictive legislation.[326]

B. Other Programs

In the Rehabilitation Services program, recent statutory changes have enhanced the choices of services available to eligible beneficiaries.[327] A 1992 innovation required that an array of goals, services, and service providers be presented to the individual who is seeking assistance and that choices within that array be honored.[328] The most recent iteration of the statute allows for individual vouchers that may be used to obtain job training from any qualified provider the participant chooses.[329]

The government also has increased its support for independent living centers in their mission to provide mutual aid and self-help opportunities for persons with severe disabilities. Recent amendments to the funding provide that a state council with a majority of persons with disabilities designs the state's plan for delivery of the services in conjunction with the state agency overseeing the services.[330] This innovation gives both a constructive voice and effective veto power to people with disabilities in the design of the services.[331]

325. *See id.* § 1382c(a)(3); *see also* Walker v. Apfel, 141 F.3d 852, 854 (8th Cir. 1998) (applying the restriction to affirm the denial of benefits to a child with mental retardation); Robert L. Raper, *An Advocate's Guide to Childhood Disability Under the New Supplemental Security Income Standard*, 6 KY. CHILDREN'S RTS. J. 1, 4–9 (1998) (explaining the new standard for disability for children).

326. Under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, SSI eligibility was generally limited to American citizens residing in any of the states, the District of Columbia, or the Northern Mariana Islands. Noncitizens who could receive benefits included some classes of refugees or persons granted asylum, *see* 8 U.S.C. § 1612(a)(2)(A)(i)–(v) (Supp. IV 1998); active duty or retired American military personnel and their families, *see id.* § 1612(b)(2)(C)(i)–(ii) (Supp. IV 1998); and lawful permanent residents of the United States who can be credited with 40 quarters of earnings under Social Security. *See id.* § 1612(a)(2)(B)(i)–(ii) (Supp. IV 1998). *See generally* U.S. SOCIAL SECURITY PROGRAMS, *supra* note 240, at 83 (describing developments). Under the Balanced Budget Act of 1997, SSI eligibility was restored for legal immigrants in the United States before the 1996 Act. *See* 8 U.S.C. § 1612. Recently, President Clinton has proposed restoring SSI to legal immigrants who entered the United States after the passage of the 1996 Act, have been here for five years, and incurred a disability after entry. *See* Michael Janofsky, *Legal Immigrants Would Regain Aid in President's Plan*, N.Y. TIMES, Jan. 25, 1999, at A1.

327. *See generally* Weber, *supra* note 294, at 21 (describing recent developments in the Rehabilitation Services program).

328. *See* Rehabilitation Act Amendments of 1992, § 123(b), Pub. L. No. 102-569, 106 Stat. 4344, 4376–77 (codified at 29 U.S.C. § 722(b)(2)(B)).

329. *See* Workforce Investment Act of 1998, Pub. L. No. 105-220, § 404, 112 Stat. 936, 1155 (to be codified at 29 U.S.C. § 722).

330. *See* Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, §705, 106 Stat. 4357, 4446 (codified at 29 U.S.C. § 796d).

331. *See* Weber, *supra* note 294, at 22.

C. General Public Welfare

Many states have either abolished general assistance or placed severe restrictions on how long any one person may receive aid.[332] These curtailments can be expected to further impoverish many people whose disabilities impede their ability to work. Studies show that a high percentage of general assistance recipients have chronic illnesses, even if their conditions are not always severe enough to meet the Social Security standard of disability.[333]

These cutbacks have not gone unchallenged. A class of general assistance recipients failed in their claim that Hawaii's one-year time limit for general assistance eligibility based on disability violated the ADA.[334] The Ninth Circuit ruled that even though a separate general assistance program provided aid to persons with dependent children without any duration limit, differential benefits in separate public aid programs are not a form of discrimination that the ADA prohibits.[335] A challenge to duration limits for disability-based general assistance succeeded in New Mexico, however, with the New Mexico Supreme Court drawing a distinction between the separate aid programs of Hawaii and the unitary general assistance program in New Mexico.[336] The court ruled that discrimination within a unitary general assistance program violated the ADA.[337] Of course, in the typical situation of an across-the-board abolition of general assistance or a uniform duration limit, the challenge would have to rely on the argument that the negative impact on persons with disabilities violates the ADA. A similar strategy was unsuccessful in Rehabilitation Act litigation over medical assistance cutbacks in the 1980s.[338]

In 1996, Congress replaced the old AFDC program with Temporary Assistance to Needy Families (TANF).[339] Like many contemporary general assistance programs, TANF carries a duration limit for eligibility. An individual may receive aid for no more than five years in a lifetime unless the person meets the state's hardship exemptions.[340] These exemptions,

332. *See, e.g.*, ARIZ. REV. STAT. ANN. § 46-233 (West 1997) (establishing a time limit for general assistance); FLA. STAT. ANN. § 414.35 (West 1998) (establishing a time limit for emergency assistance); 305 ILL. COMP. STAT. ANN. 5/6-11 (West 1998) (establishing time limits for transitional assistance).

333. *See* Diller, *supra* note 137, at 449–51 (citing studies from Michigan, Ohio, Maryland, and other states).

334. *See* Does 1-5 v. Chandler, 83 F.3d 1150 (9th Cir. 1996).

335. *See id.* at 1155.

336. *See* Weaver v. New Mexico Human Servs. Dep't, 945 P.2d 70, 75 (N.M. 1997).

337. *See id.*

338. *See* Alexander v. Choate, 469 U.S. 287 (1985) (rejecting a disparate-impact challenge to medical assistance restrictions under the Rehabilitation Act of 1973).

339. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105; *see also* 42 U.S.C. §§ 601–687 (1994) (repealed 1996) (Aid to Families with Dependent Children Program).

340. *See* 42 U.S.C.A. § 608(a)(7)(A), (C) (West 1998).

however, may be given to no more than twenty percent of recipients.[341] Moreover, the new program has numerous work requirements[342] and has no disability exception to the basic rule compelling recipients to work after two years of benefits.[343]

Like the developments in state general assistance, the TANF changes in family assistance will render destitute significant numbers of individuals who are now poor because their disabilities make their potential contribution to the economy so low that the wages they earn do not meet the needs of their families even at a subpoverty level. The exacting disability standards of the federal programs and the work or duration requirements of state and state-federal programs create a wide gap for people with disabilities to fall through. Federal bureaucratic requirements (the application process, gathering of documentation, the necessity for appeals, and strict deadlines for the appeals) also keep eligible people from Social Security-administered support.[344]

V. REFORMING THE LAW OF WELFARE FOR PERSONS WITH DISABILITIES

The evaluation of welfare law for persons with disabilities suggests that the law should be reformed, although in directions somewhat different from those in which the law is now headed. It is necessary first to consider the insights of post-integrationist thinking about disability equality and then propose steps based on the wisdom of those ideas.

A. Post-Integrationist Insights on Welfare Law for Persons with Disabilities

Post-integrationist ideas help to evaluate the recent changes in welfare law for persons with disabilities. More significantly, these ideas can help fashion the outlines of a meaningful program of law reform.

The enhanced work incentive provisions adopted and proposed for DI and SSI are sensible integrationist measures designed to increase participation by persons with severe disabilities in the working economy. Given that these programs' beneficiaries are those with the severest of disabilities, expectations may be higher than justified, but there is no

341. *See id.* § 608(a)(7)(C)(ii).

342. *See, e.g.*, *id.* §§ 607–609.

343. *See id.* § 602(a)(1)(A)(ii) (West 1998); Diller, *supra* note 137, at 454 (discussing the work provisions of TANF).

344. The bureaucratic difficulties can be considerable. *See* Linda G. Mills & Anthony Arjo, *Disability Benefits, Substance Addiction, and the Undeserving Poor: A Critique of the Social Security Independence and Program Improvements Act of 1994*, 3 GEO. J. ON FIGHTING POVERTY 125, 128 (1996) (detailing the difficulties of establishing eligibility for disability benefits and describing the process as burdensome and lengthy); *see also* Leonard Adler, *SOS for SSI: The Unfulfilled Promise to Homeless Americans*, 1 GEO. J. ON FIGHTING POVERTY 304, 312 (1994) (describing the difficulties homeless people have with establishing SSI eligibility).

harm from unrealized ambition, provided that income support is not revoked in anticipation of successes that are unlikely to occur.

Support for the independent living movement and expansion of client choice and control of services in rehabilitation programs help in the advance from integrationism to a post-integrationist world. These measures increase the power of people with disabilities, identified as people with disabilities, over their relationships with the economy and the society at large.

Unrealistic expectations for work among those with less-than-total disability may be an integrationist error underlying some of the changes in general welfare programs that have restricted or eliminated the eligibility of many individuals. Policy makers cannot blithely assume that antidiscrimination measures have been, or can be, effective at integrating into the working economy all persons whose disabilities are not so severe that they meet the DI-SSI severity standard. Post-integrationist insights include the fact that people with disabilities are very diverse in their disabilities as well as in their relationships with the job market. Moreover, the insights recognize that disability, including that short of the severest disability, reduces economic contribution and reward now and in any foreseeable world. The costs of disability of those fifteen million people or more who have disabilities but who are not eligible for SSI or DI, their lower income, and their higher expenditures are now reallocated, if at all, only by general welfare programs that have been decimated over the last several years. Steps must be taken to remedy that condition.

A post-integrationist America would not just remedy the recent changes in the welfare laws. Instead, it would build on existing benefit programs, on programs found elsewhere in the world, even on old ideas that were once discarded, to fashion a structure to provide for the needs of people with disabilities. Almost like post-modernist art, literature, or architecture, post-integrationist programs need to draw ideas from every era to produce structures responsive to contemporary needs.

Reallocating the inevitable costs of disability is an overriding mission of post-integrationist welfare policy for persons with disabilities. Even if all discriminatory barriers fall, there still will be a need for income support. Of course, the barriers are unlikely to fall, and support will be needed for that reason as well. The programs to be pursued should enhance both earned and unearned income to make up for the hardship now borne by persons with disabilities themselves.

Closely linked to support that reallocates disability's costs is support at a level that equates with what others obtain through comparable work effort and provides people with disabilities with enough of a living to participate fully in the life of their communities. James Charlton has correctly identified basic aspects of the social safety net as human rights, needed for participation in society on something approaching a plane of

equality.[345] The proposals should recognize the diversity of people with disabilities and address the problems of the broad class who have impairments but whose impairments do not meet the standards of DI or SSI. These people are the truly subordinated, those who, especially now, face both incomplete workplace integration and a shattered structure of welfare support.

Embracing post-integrationist ideas and advocating programs based on them will create risks. It might be feared that special treatment for persons with disabilities that extends beyond the limits of integrationist laws will reinforce harmful stereotypes or lead to a political backlash. There are good reasons, however, not to fear. As for stereotypes, one fact that currently reinforces negative ideas about people with disabilities is the invisibility caused by absence from the workplace and the rest of public life.[346] If post-integrationist reforms can bring people with disabilities into the workplace, opportunities will exist for co-workers, co-consumers, and others to adjust their attitudes to reality.[347] Existing measures have not been very successful; post-integrationist measures should be tried. A boost in the income of people with disabilities, from jobs or benefit programs or both, will enhance their role in the marketplace, another setting in which invisibility is now the rule.[348]

As for backlash, that is a risk of any meaningful reform.[349] It is a reality of the welfare system that is now in place.[350] It is impossible to foresee whether changes in the welfare system that shift some of the unique costs now imposed on persons with disabilities would increase a negative reaction. Partly to reduce the chances of backlash, the steps proposed here, although linked to post-integrationist ideas, are incremental in nature and are consistent with maintaining market incentives and the structures of a contemporary mixed economy.

B. Priorities for Reform

Priorities for reform of welfare law for persons with disabilities would take into account the post-integrationist insights about the costs of disability and about the diversity of people with disabilities. The propos-

345. *See* CHARLTON, *supra* note 153, at 89–91.

346. *See* Stafford, *supra* note 69, at 72 (describing the invisibility that results from the exclusion of children with disabilities from school).

347. *See* Laudor, *supra* note 25, at 943 (describing the benefit of enhancing the presence of persons with disabilities in public settings).

348. Studies indicate that increases in economic status increase an individual's acceptance by others. *See* SPECIAL TASK FORCE TO THE SECRETARY OF HEALTH, EDUCATION AND WELFARE, WORK IN AMERICA 34–36 (1973).

349. On the topic of backlash against the ADA, see Symposium, *Backlash Against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies*, 21 BERKELEY J. EMP. & LAB. L. 1 (2000). On the topic of backlash against the feminist movement and feminist reforms, see SUSAN FALUDI, BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN (1991), which catalogues hostile reactions to efforts for the advancement of women.

350. *See supra* text accompanying note 332–44 (describing recent cutbacks in welfare).

als would address the income needs of persons with partial disabilities, both in general and with respect to earnings from employment. Other reforms would put some realism into SSI standards and increase the dignity of life possible when a person is supported solely by SSI. They would reform the recent welfare reform efforts, so as to take into account the real and unique situation of people whose earning capacity is diminished but not totally eliminated by disability.

Additional priorities for reform would proceed from the premise that the working economy, even in the ADA's integrationist regime, remains oriented to the imaginary modal human being. Post-integrationist steps would induce employers to make room for everyone and would ease their burden in doing so.

The following sets forth nine proposals for reforming welfare law for persons with disabilities, in accordance with the themes discussed above.

1. Partial Disability Benefits

A mechanism to improve the economic well-being of persons with disabilities without penalizing work effort is to provide nonmeans-tested partial disability benefits from Social Security. Subsidies of this type would compensate for the fact that persons with disabilities, even if not totally disabled and not desperately poor, are generally not able to earn what they would if they had no disability. Their conditions limit their marginal product in comparison to what the same person would be able to generate without the disability; hence their pay is less. Moreover, nearly any disabling condition imposes additional costs and demands time for self-care that could otherwise be spent earning more money. Partial disability benefits would compensate for these conditions. At the same time, they would not discourage persons with disabilities from participating in the labor force and earning as much as they can while there. Unlike the current regime of total disability benefits, there would be no incentive to stay out of the labor force to demonstrate that the disability prevents the individual from working.

The proposal for partial disability payments is hardly without precedent. For example, fractional disability benefits are provided to individuals with disabling, but not totally disabling, injuries under American programs for veterans and injured workers and under European social security systems.

Under the United States Veterans' Benefits Act,[351] the government pays fractional benefits to veterans with partial disability arising out of

351. 38 U.S.C. §§ 101–8527.

military service.[352] Benefits for wartime disability compensation range from approximately one hundred dollars per month for ten percent disability to approximately two thousand dollars per month for complete disability.[353] Family allowances are also available to those with a thirty percent or higher disability rating.[354] Some criticism of the veterans' benefit system appears in the psychiatric literature. The criticisms primarily target the high level of benefits for individuals who have 100% disability ratings, suggesting that the quest to achieve full benefits may lead to unnecessarily dependent behavior.[355] Although the studies cannot distinguish between behavior that simply qualifies a veteran for full benefits and behavior actually induced by the prospect of full benefits, they concede that partial disability benefits do not have the same effects. One study notes that veterans with fractional disability ratings who continue to be productive workers (albeit at a lower level than if they had no impairment) have higher self-esteem and less anger than individuals whose total disability rating would be jeopardized by participation in the labor force.[356]

State workers' compensation programs also feature monetary benefits based on partial, permanent disability.[357] States base the amount of benefits for work-related injuries and diseases on the loss of earning capacity, on the degree of physical impairment, or on some combination of the two.[358] There is no need to show that the disability is total or that all future work is impossible to obtain benefits. Compensation for partial disability has been a characteristic of workers' compensation from the earliest programs at the beginning of the twentieth century.[359] Workers' compensation has its critics, but the criticisms focus not on permanent, partial disability benefits but on the stinginess of benefit levels in general[360] or on alleged abuse of the entire workers' compensation system by persons claiming emotional impairments and other conditions that are

352. For a recent discussion of the operation of veterans' benefits in general, see Kevin J. Dalton, Comment, *Gulf War Syndrome: Will the Injuries of Veterans and Their Families Be Redressed?*, 25 U. BALT. L. REV. 179, 222–27 (1996).

353. *See* 38 U.S.C. § 1114(j).

354. *See id.* § 1115.

355. *See* Douglas Mossman, *Veterans Affairs Disability Compensation: A Case Study in Counter-therapeutic Jurisprudence*, 24 BULL. AM. ACAD. PSYCHIATRY L. 27 (1996) (relying primarily on anecdotal evidence); Joseph L. Perl & Marvin W. Kahn, *The Effects of Compensation on Psychiatric Disability*, 17 SOC. SCI. MED. 439 (1983) (presenting the results of a survey); *see also* William H. Campbell & Michael H. Tueth, *Misplaced Rewards: Veterans' Administration System and Symptom Magnification*, 336 CLINICAL ORTHOPAEDICS & RELATED RES. 42, 45 (1997) (discussing nonparticipation in the labor force and drug use associated with the highest levels of veterans' benefits compensation). The absence of any satisfactory control group in these studies leaves open the question of whether the negative behaviors of the veterans with 100% disability ratings are caused by the severity of their impairments rather than the need to hold onto the total disability qualification.

356. *See* Perl & Kahn, *supra* note 355, at 441.

357. *See* ARTHUR LARSON, WORKERS' COMPENSATION LAW § 51.10 (2d ed. 1992).

358. *See id.* §§ 51.11–.18.

359. *See id.* §§ 51.13–.14.

360. *See, e.g.*, *id.* § 2.50.

difficult to verify clinically.[361] The latter problem is amenable to solution by stricter fraud enforcement[362] and the careful use of medical standards in making eligibility determinations. Its existence does not undermine the merit of giving financial benefits based on partial, rather than total, disability, and there are no serious proposals to abolish that aspect of the system. Of course, the tort system, from which the workers' compensation system derives, compensates partial disability as well, although it employs lump sums awarded by courts instead of monthly or weekly benefits distributed by an administrative arm of the government.[363]

In Europe, social security systems typically provide partial disability benefits if the individual has an impairment with effects severe enough to meet a threshold of loss of work capacity. For example, in Finland, if the individual has a forty percent or greater permanent loss of earning capacity, a partial pension will be paid based on the worker's previous earnings.[364] Israel's[365] and Norway's[366] thresholds are fifty percent, but their programs are similar. Germany, France, the Netherlands, and Sweden all pay partial disability benefits based either on the loss of earnings that occurred when the beneficiary became disabled or the difference between the beneficiary's earnings and those that could be expected by a comparably trained individual in the same occupation who does not have the beneficiary's disability.[367] Sweden has four disability categories, depending on the percentage of residual employment capacity and provides fractional or full benefits accordingly.[368]

The logistics of determining the degree of a person's disability are difficult but hardly insurmountable. The Department of Veterans Affairs, European social security programs, workers' compensation administrations, and the American tort law system have successfully made these determinations for generations. For more than twenty-five years, the American Medical Association has produced an authoritative book detailing clinically observable indicators of the severity of impairment and attaching estimated percentages to which an individual with the specified

361. *See, e.g.*, Gary T. Schwartz, *Waste, Fraud, and Abuse in Workers' Compensation: The Recent California Experience*, 52 MD. L. REV. 983, 996–1003 (1993).

362. *See id.* at 1004–06, 1014–15 (describing the step-up of California fraud detection activity).

363. *See* CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 86 (1935) (describing recovery for partial loss of earning capacity due to tortious injury).

364. *See* WORLD SOCIAL SECURITY PROGRAMS, *supra* note 236, at 125 (1997).

365. *See* H. Ariel, *On the Realization of the Rights of Invalids According to the Israeli National Insurance Law*, *in* DISABILITY 11, 11–13 (Amnon Carmi et al. eds., 1984).

366. *See* A. Kjønstad, *Assessment of Disability*, *in* DISABILITY, *supra* note 365, at 84, 97.

367. *See* Zeitzer, *supra* note 52, at 22.

368. *See* Aarts & deJong, *supra* note 278, at 139. Michael Graetz and Jerry Mashaw are skeptical of proposals for social insurance for partial disability, citing the "Dutch Disease" of uncontrolled benefit costs; they believe such a system works only if there are a limited set of beneficiaries and aggressive management efforts. *See* GRAETZ & MASHAW, *supra* note 225, at 217–18. A counterargument would rely on the experience of other European countries and the American workers' compensation and tort systems.

degree of impairment has lost the capacity to carry out activities of daily life.[369]

Of course, a sophisticated system would have to consider the impact of the individual's age, prior work, and ability to change careers, as well as the degree of physical incapacity.[370] A dancer who suffers a permanent leg injury may lose a greater percentage of earning capacity than an assembly line worker who has the same condition, but if the dancer has a strong general education or the ability to acquire one, the situation may be reversed. Nevertheless, the existence of medical consensus on determinations of physical impairment provides a starting point for both cases. The degree to which other factors are used will be a compromise between, on the one hand, the ease of administration and neutrality of incentives[371] afforded by a plan based on degree of physical incapacity and, on the other, the greater individual fairness of one based more on vocational history and capacity.[372]

Social insurance is a good vehicle for providing these partial disability subsidies. Just as a rational individual would desire to insure against complete disability, so, too, that person would choose to insure against partial disability, a far more likely occurrence. But no significant market exists for the insurance. Likely adverse selection by those with medically risky conditions makes individual purchase of policies uneconomical. The alternative of a welfare program with means testing would impose stigma and would limit political support.

It is unclear why the United States failed to adopt partial disability benefits during the formative years of American Social Security. Somehow, the political constellations never lined up correctly. Obtaining any disability program was hard enough; planners may have felt they lacked the votes to get a partial benefits program through Congress. In the 1930s and 1940s, Congress showed no serious interest in enacting temporary disability benefits, one of the original proposals of Social Security's

369. *See, e.g.*, AM. MED. ASS'N, GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT (4th ed. 1993).

370. *See id.* at 2; *see also* Anne B. Long & Robert S. Brown Jr., *Workers' Compensation: Introduction for Physicians*, VA. MED. Q., Apr.-June 1995, at 108, 109–10 (discussing the use of the American Medical Association Guides in connection with other considerations).

371. Ideally, the plan would not affect the incentives for an individual to acquire training to maximize income and satisfaction in employment. Conditioning higher benefits on the worker's low educational levels or obsolete skills may undermine those incentives. *See* Barry T. Hirsch, *Incentive Effects of Workers' Compensation*, 336 CLINICAL ORTHOPAEDICS & RELATED RES. 33, 40 (1997). Nevertheless, to achieve its goals, the plan would have to compromise between fairness to the less educated and the maintenance of incentives.

372. Persuasive commentary criticizes as unfair the recently adopted workers' compensation statutes in Kentucky and West Virginia, which rely on degree of physical impairment to the near exclusion of individual vocational factors. *See* H. Douglas Jones & Kenneth J. Dietz, *House Bill 1, Kentucky's New Workers' Compensation Act: A Comparison of Injury Disability Determinations Under the Old and New Acts*, 24 N. KY. L. REV. 203, 205–10 (1997); Emily A. Spieler, *Assessing Fairness in Workers' Compensation Reform: A Commentary on the 1995 West Virginia Workers' Compensation Legislation*, 98 W. VA. L. REV. 23, 147–52 (1995).

advocates.[373] Partial disability benefits might have appeared even less likely to succeed.

Financing these benefits through Social Security would mean either that the payroll tax rate would increase slightly or that existing forms of benefits would diminish slightly. Alternatively, the earnings cap on Social Security taxes might be raised or eliminated. Currently, taxes to fund retirement and disability benefits are collected only on the first $72,600 of an individual's earned income.[374] The entire amount of wages could be made subject to the tax,[375] as it currently is for the Medicare portion of the assessment.[376]

2. Disabled Worker Tax Credit

A proposal that combines enhanced income support with positive work incentives is the "disabled worker tax credit" (DWTC),[377] modeled on the Earned Income Tax Credit (EITC) program.[378] The EITC gives a low-income worker a credit against taxes. The worker may receive the credit in cash if the credit exceeds the worker's tax liability.[379] Benefits phase in as the worker's earned income rises, reach a maximum point, then phase out as the income goes still higher.[380] The program creates a

373. *Cf. President's Message to Congress on Social Security Expansion*, 1948 U.S.C. CONG. SERV. 2489, 2490–91 (unsuccessfully proposing temporary disability benefits).

374. *See* Alice Ann Love, *Social Security Barely Budges* (Oct. 16, 1998) <http://www.abcnews.go.com/sections/business/DailyNews/ss981016/index.html> (copy on file with the *University of Illinois Law Review*).

375. Eliminating the salary cap for Social Security tax contributions would increase revenue generated by about 12%. *See* Regina T. Jefferson, *The Earned Income Tax Credit: Thou Goest Whither? A Critique of Existing Proposals to Reform the Earned Income Tax Credit*, 68 TEMP. L. REV. 143, 159 (1995). The principal basis of political opposition to such a step would be that it would further attenuate the relationship between the amount the individual pays in as taxes and the amount that individual ultimately receives as benefits at retirement or disability. Some relationship needs to exist to justify funding the benefits through the Social Security system. *See supra* text accompanying notes 245–46 (describing the political attraction of providing benefits through Social Security).

376. *See* U.S. SOCIAL SECURITY PROGRAMS, *supra* note 240, at 21. Currently, the employee's portion of the tax for disability and retirement benefits is 6.2% of the first $62,700 of earnings, and the employee's portion of the Medicare benefits tax is 1.45% of all earnings. Employers match these contributions. *See id*.

377. *See* BALANCING SECURITY AND OPPORTUNITY: THE CHALLENGE OF DISABILITY INCOME POLICY, *supra* note 323, at 3–4 (executive summary description of the proposal); Burkhauser & Wittenburg, *supra* note 282, at 21 (proposing DWTC as a supplement to Earned Income Tax Credit). Britain currently has a program somewhat similar to the DWTC. The government pays an allowance to persons with disabilities who meet a means test and who work at least sixteen hours a week. *See* Howard Bradley, *New Eligibility Rules for Incapacity Benefit in the United Kingdom*, SOC. SECURITY BULL., Fall 1996, at 78, 79.

378. Congress enacted the EITC in 1975. *See* Tax Reduction Act of 1975, Pub. L. No. 94-12, § 204, 89 Stat. 206, 30–32 (1975) (codified as amended at I.R.C. § 32 (1994 & Supp. III 1997)).

379. For an individual with a qualifying child, the benefit can be considerable: $2210 per year for a person with one child; $3656 for a person with two. The maximum adjusted gross income and earned income must be less than $25,760 (for an individual with one child) or $29,290 (for an individual with more than one child) for the individual to qualify for any benefits. *See* IRS, EARNED INCOME TAX CREDIT (EIC) TOPIC 601 (visited Aug. 30, 2000) <http://www.irs.ustreas.gov/prod/tax_edu/teletax/tc601.html> (copy on file with the *University of Illinois Law Review*).

380. *See id.*

significant work incentive, for it adds directly to the rewards of working.[381] It also helps overcome the regressive effects of the Social Security flat-rate payroll tax. It puts more income into the hands of the working poor.

The EITC has evoked criticism. Some eligible persons fail to take advantage of it; many misread the forms and claim incorrect amounts.[382] Some people exaggerate their earned income to collect more benefits, a fraud that works as long as the total stays within the phase-in range, and the false claimant does not get caught.[383] The incentive effects of the credit necessarily decline in the credit's phase-out range. Nevertheless, as a compromise among the competing goals of improving the lot of the working poor, rewarding work rather than inactivity, diminishing stigma, conserving available resources, and limiting amounts spent on administration, the program has been highly successful.[384] Congress has expanded the program in recent years, even though it has generally been reluctant to fund programs to benefit poor people.[385]

A DWTC would provide an analogous tax credit to workers with disabilities, rewarding their efforts to engage in work and neutralizing some of the effects of diminished earning capacity and heightened work costs caused by disability. Under the DWTC program, low-income workers who have disabilities would qualify for an amount of earned income tax credit greater than what they would obtain under the EITC program simply by virtue of being a low-income worker. In 1998, a worker without a qualifying child could qualify for no more than $341 in credit.[386] Under the proposal, a worker who has a disability would receive a greater amount and would get the amount in cash if the credit exceeded the tax liability.

The DWTC would be particularly helpful in overcoming some of the work disincentive effects felt by persons who qualify for SSI or other

381. *See* Daniel Shaviro, *The Minimum Wage, the Earned Income Tax Credit, and Optimal Subsidy Policy*, 64 U. CHI. L. REV. 405, 462 (1997) (noting the effect of (1) decreasing marginal tax rates caused by phasing out of other social benefit programs as incomes rise and (2) increasing marginal tax rates as EITC phases out). This effect is clearest for those persons who are not currently working. *See* Anne L. Alstott, *The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform*, 108 HARV. L. REV. 533, 548 & n.57 (1995). As applied to persons already in the work force, the EITC not only increases the value of work relative to leisure (giving an incentive to increase effort) but also enables the person to make the same income by working less (giving some incentive to decrease effort). *See id.* Nevertheless, the person's income continues to go up as she works more hours or moves to a higher wage level, and the increase is greater with the EITC than it would otherwise be. Even during the phase-out range, the increase is greater than if there were no EITC, although the percentage increase is less than at lower wage ranges.

382. *See* Michael J. Caballero, *The Earned Income Tax Credit: The Poverty Program That Is Too Popular*, 48 TAX LAW. 435, 461 (1995) (collecting studies).

383. *See id.* at 463 (noting that auditing resources are currently targeted at high-income taxpayers).

384. *See* Alstott, *supra* note 381, at 589 (summarizing the benefits and drawbacks of EITC and criticizing challenges to it); Jefferson, *supra* note 375, at 144 (listing the benefits of the program and discussing the need to compromise among competing goals).

385. *See* Alstott, *supra* note 381, at 533 (describing the expansion of benefits and noting that aggregate amounts to be paid under EITC as of 1997 would have exceeded those paid under AFDC).

386. *See* I.R.C. § 32 (Supp. III 1997).

existing benefit programs. A person eligible for SSI who works reaches a point where earning an additional dollar disqualifies her from receiving any cash benefits and, more importantly, ends her eligibility for Medicaid—a benefit worth over $500 a month in comparable insurance coverage.[387] Accordingly, the worker must hold a very good job to have an incentive to move completely off the program.[388] Although the DWTC would not level this "cliff" in the graph of real income plotted against wages, it would moderate it by raising the effective earnings that the wage carries.[389]

A similar proposal, but one that does not allow for direct government payments to working persons with disabilities, is to allow persons with disabilities to exempt the first $5000 or $10,000 of their income from Social Security payroll taxes.[390] The exemption proposal would increase the rewards of work, ending the disincentive to work created by the payroll tax. The exemption proposal has the drawback, however, of weakening the connection between paying Social Security taxes and qualifying for Social Security benefits. Any exemption from Social Security taxation creates that hazard. As described above, the existing tie between paying the tax and receiving eligibility for benefits is part of the political underpinning of the Social Security system. Even though the relationship is less than precise[391] and is not present at all when, for example, the individual works the hours but the employer fails to forward the taxes to the government, the rough connection makes the benefits a special form of entitlement. The EITC has carefully preserved the connection. To the extent that the EITC acts as a corrective to the regressivity of the payroll tax, it does so under a tax-and-rebate system, where the worker pays money

387. *See* Burkhauser & Wittenburg, *supra* note 282, at 19–21. A similar effect applies to DI. The benefit loss is generally larger than with SSI; on the other hand, eligibility for Medicare continues for 36 months after termination of cash benefits and after that may be purchased (at about $300 per month). *See id.*; *see also* Hennessey & Muller, *supra* note 283, at 23 (reporting some positive effects from work incentive provisions in DI but noting a disincentive from the loss of Medicare); Douglas A. Martin et al., *The ADA and Disability Benefits Policy: Some Research Topics and Issues*, J. DISABILITY POL'Y STUD., No. 2, 1995, at 1, 3–5 (describing the loss of SSI and DI benefits and accompanying medical coverage as earnings levels increase).

388. One study has indicated that a beneficiary's greater knowledge about the benefit losses and work incentive provisions under the DI program may actually diminish the likelihood that the person tries to return to work. *See* Hennessey & Muller, *supra* note 283, at 22–23.

389. *See* Burkhauser & Wittenburg, *supra* note 282, at 22.

390. Jonathan Forman has proposed that all low-income workers be extended this benefit and suggests that it might substitute for the existing EITC. He notes that exemption from Social Security taxes would also act as partial subsidy to employers, helping the targeted workers be more competitive, unlike the minimum wage, which has the opposite effect for lower-productivity employees. *See* Jonathan Barry Forman, *How to Reduce the Compliance Burden of the Earned Income Credit on Low-Income Workers and on the Internal Revenue Service*, 48 OKLA. L. REV. 63, 71–72 & n.19 (1995) (describing administrative savings over an earned income tax credit and predicting superior work-incentive effects); *see also* Caballero, *supra* note 382, at 464–65 (proposing a Social Security tax exemption for low-income workers and graduation of the tax rate).

391. As noted above, low-income workers generally receive proportionally more from Social Security than they pay, while high-income workers receive somewhat less, whether the payout occurs as disability or retirement benefits. *See supra* note 241.

into Social Security and then is reimbursed with dollars from general revenues. A greater discontinuity between work and Social Security would only undermine the political support for social insurance in America.

Like Social Security, the tax system is a mechanism for income transfer that does not carry the stigma that welfare does.[392] Hence it is attractive as a means for supplementing the economic benefits of the work activity of persons with disabilities.

3. SSI Benefits Changes

The American people can afford a higher level of benefits than what SSI provides. The SSI benefit level for a single individual is less than seventy-one percent of the poverty level.[393] Determining the total bill for raising the payment amount to the poverty level is somewhat complex because more individuals become income eligible for benefits as the amount rises. Nevertheless, a simple calculation of the cost of a thirty percent raise for 5.2 million persons receiving SSI on account of disability yields about $7.6 billion.[394] That amount is hardly small change, but it is barely seven percent of the fiscal 1999 budget surplus.[395] Drawbacks other than cost would be minimal. The severity of the disability standard employed by the SSI program minimizes whatever effects the enhanced income might have on work effort. As noted above, significant numbers of SSI recipients are adults with severe developmental disabilities who now work at sheltered workshop jobs that produce little in actual wages; there is no reason to expect that work effort to diminish.[396]

The severity of the SSI disability standard must also be addressed. The elimination of long-term welfare programs throws onto the streets many individuals who do not meet the SSI standard but whose disabilities still make work unrealistic in the current economy. In the absence of the partial disability benefits proposed above, and the faint likelihood that the trend toward abolishing welfare will be reversed, the cold facts

392. *See* Alstott, *supra* note 381, at 539 (noting the absence of stigma in EITC payments, in contrast to welfare payments).

393. This calculation is based on 1997 figures. The SSI amount that year was $5808 per year (or $484 per month). *See Social Security at a Glance*, *supra* note 49, at 113. The poverty threshold was $8183. *See* U.S. Census Bureau, *Poverty Thresholds by Size of Family and Number of Children: 1997* (last modified May 25, 1999) <http://www.census.gov/hhes/poverty/threshld/thresh97.html> (copy on file with the *University of Illinois Law Review*).

394. The calculation is made with 1997 payments for recipients of SSI who are blind (82,000 recipients, with an average benefit that year of $391 per month) and disabled (5.1 million, with an average benefit of $409 per month). *See Social Security at a Glance*, *supra* note 49, at 113. The difference between the average payment and the SSI standard reflects includible income—either small DI awards, earnings net of incentive amounts, or other support.

395. *See Budget Surplus Tops $100B*, CNN INTERACTIVE (Jan. 28, 1999) <http://cnnfn.com/hotstories/washun/wires/9901/28/surplus_wg/> (reporting an estimated budget surplus of $107 billion, rising to $131 billion in 2000).

396. *See supra* text accompanying notes 272, 282.

of destitution should occasion a review of the strictness of the DI-SSI standard of disability. The standard should be relaxed, even if that were to mean making the SSI standard less strict than the DI standard. Partial SSI benefits based on partial disability would be another solution that would provide support for those who can perform some work but whose wages will not provide a full subsistence.[397]

4. Improving Ordinary Public Assistance

Attempting to resuscitate state general assistance programs, or pushing to raise the benefits of those that still exist, is a risky strategy in a political climate in which even dependent children are no longer guaranteed support. The curtailment of those programs, however, underlines the urgency of loosening the eligibility standards for SSI and DI so that they are more closely in line with realistic expectations for working in the contemporary economy. The time limit provisions of TANF and state general assistance programs are likely to be especially disastrous for people with severe but not total disabilities who tend to float in and out of the labor force as demand for marginal workers flows and ebbs.[398] A major policy priority should be extending or eliminating the time limits on welfare for people who have partial disabilities.

A key palliative for the harsh effect expected from the demise of the AFDC program is the disbursement of welfare-to-work grants to states and localities to fund job initiatives for hard-to-place TANF recipients. The states and localities may pay for wage subsidies, on-the-job training programs, programs to provide job readiness, job placement, postemployment services, and other initiatives. At least seventy percent of the grant funds are to be spent on individuals who are long-term welfare recipients or face termination from TANF within a year and have two of the following three "labor market deficiencies": lack of a high school diploma or GED and low reading or math skills, a need for substance abuse treatment, and a poor work history.[399]

Persons with disabilities may benefit from this funding, for they are disproportionately represented in the AFDC-TANF population. Including the presence of a disability as one of the "labor market deficiencies" would be a modest change in the welfare-to-work program that would help target the funds to those most in need of them.

397. *See supra* text accompanying notes 351–76 (describing the partial disability benefits proposal).

398. *See, e.g.*, Yelin & Cisternas, *supra* note 142, at 40–42; Zeitzer, *supra* note 52, at 22.

399. The beneficiaries may also be noncustodial parents of children whose custodial parents meet those criteria.

5. Job Setasides

In other work, I have proposed that affirmative action measures be adopted to make the ADA more effective against hidden and unintentional employment discrimination.[400] I have also proposed that a fraction of governmental and private jobs be set aside for persons with severe disabilities to compensate for the inevitable competitive disadvantage that these individuals will experience in the labor market.[401] My proposal is not unique.[402] Setaside programs are nearly universal in advanced industrialized countries other than the United States.[403]

Although job setasides have been criticized as impractical[404] and paternalistic,[405] they are the one sure means of getting vast numbers of people with severe disabilities into ordinary employment and out of poverty in our lifetimes. Placing the burden on employers gives them the incentive to obtain the most productivity from the worker with a disability. The program is effectively a tax and is no more paternalistic than any other tax program. It would force employers, who by definition have a monopoly on the scarce commodity of jobs, to share some of that supply and to take up some of the costs of disability that are now borne by the persons with disabilities themselves. The long and generally successful operation of the European programs establishes that setasides are workable.[406]

6. Wage Subsidies

Wage subsidies provided under the Targeted Jobs Tax Credit (TJTC) program,[407] which gave companies tax credits for employment of persons with disabilities, welfare recipients, youths from disadvantaged families, and other categories of workers, proved to be an effective means of increasing long-term employment of the program beneficiaries.[408] This program has now been replaced with the Work Opportunity Tax Credit (WOTC).[409] Like the TJTC, the subsidies WOTC provides are small,[410] and the categories of persons with disabilities whose pay may be

400. *See* Weber, *supra* note 26, at 159–66.

401. *See id.* at 166–74.

402. *See* Mashaw, *supra* note 184, at 232–37 (proposing setasides, with market mechanisms for exchange of credits by employers who exceed hiring targets or fail to meet them).

403. *See* Weber, *supra* note 26, at 169–70 (collecting data).

404. *See* Rebell, *supra* note 97, at 1456.

405. *See* Burgdorf, *supra* note 34, at 585.

406. *See* Weber, *supra* note 26, at 169–70 & nn.227–39 (collecting studies).

407. *See* I.R.C. §§ 51–52 (1994).

408. *See* Frederick J. Tannery, *Targeted Jobs Tax Credits and Labor Market Experience* (visited Aug. 30, 2000) <http://www.epionline.org/tannery.htm> (copy on file with the *University of Illinois Law Review*).

409. *See* I.R.C. §§ 51–52 (Supp. III 1997).

410. The credit is 40% of the first $6000 of the individual's annual wages. *See id.*

subsidized are not fully inclusive.[411] The subsidies would be of greater benefit were they to cover all workers with disabilities, reimburse a greater amount of wages, and be available in cash to employers who do not pay corporate income taxes, such as nonprofit corporations and state and local governments.[412]

7. Universal Benefits

In many countries, all or nearly all people are entitled to minimum governmental benefits that include publicly funded health insurance and sick leave.[413] These benefits are of use to all citizens but are particularly useful to those persons who would have difficulty purchasing these services on the open market. With regard to health insurance, the inclusion of the entire population in the risk pool makes the per-person cost much lower than a private program, in which people who have higher health risks tend to select themselves in, and people with lower risks select themselves out.

People whose disabilities entail additional medical costs or risks would benefit tremendously from a national health insurance program. Their extraordinary medical costs would be shared with the rest of the population, and their range of life choices also would increase. For example, they would have a freer choice to leave government cash benefit programs, such as SSI, which currently are the only viable source of health coverage for those with preexisting medical conditions. They would more freely change jobs as market conditions dictate, rather than staying in the same job to ensure continued medical coverage.[414] Personal

411. Eligible persons with disabilities are SSI recipients and persons referred to the employer by a state vocational rehabilitation agency. *See id.*

412. Tax credits for paying wages do not provide incentives to entities that do not pay taxes. To create an incentive for those employers to act, the government would need to provide cash subsidies. On the topic of wage subsidies in general, see Timothy J. Eifler, Comment, *The Earned Income Tax Credit as a Tax Expenditure: An Alternative to Traditional Welfare Reform*, 28 U. RICH. L. REV. 701, 739–46 (1994), which describes the benefits to low-income workers from wage subsidies but noting the administrative complexities of expansive programs. President Clinton has recently proposed an extension of the existing tax credit program. *See* Laura Meckler, *Clinton Proposes Welfare Aid* (Jan. 26, 1999), <http://www.abcnews.go.com/sections/us/PoliticalNation/pn_welfare990125.html> (copy on file with the *University of Illinois Law Review*).

413. *See* WORLD SOCIAL SECURITY PROGRAMS, *supra* note 236, at xxx–xxxv (chart listing countries with universal medical care programs); *see also* Colker, *supra* note 163, at 240 ("[T]he typical European country provides six weeks of paid sick leave, usually at 100% of gross earnings.").

414. The Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1961 (codified at 42 U.S.C. § 300gg-1 (Supp. III 1997)), eases this situation considerably by outlawing discrimination against insurance participants and beneficiaries based on health status and disability. The law greatly curtails exclusions for preexisting conditions in employer group plans when a new employee recently had insurance through a previous employer, *see* 29 U.S.C. § 1181, 42 U.S.C. § 300gg (Supp. III 1997), and it prevents discrimination in employee contribution amounts. *See* 29 U.S.C. § 1182(b)(1), 42 U.S.C. § 300gg-1(b)(1). Nevertheless, the Act does not require group plans to cover any particular physical conditions nor does it forbid a plan from placing limits or restrictions on the amount, level, extent, nature, or benefits or coverage. *See* 29 U.S.C. § 1182(a)(2); 42 U.S.C. § 300gg-1(a)(2). Some workers with disabilities, therefore, remain likely to stay in less desirable employment because their current jobs carry adequate insurance coverage for their specific conditions while otherwise preferable jobs do not.

attendant services, which Medicaid currently funds[415] for those who are eligible, are a basic prerequisite to work for many individuals with musculoskeletal and sensory impairments who could be making significant economic contributions if employed.[416]

Moreover, some employers—especially small firms—are reluctant to hire workers with chronic medical conditions because they fear that providing medical benefits to them will be prohibitive.[417] If every worker, or at least every worker with a disability, came to the employer with a promise of publicly financed health insurance, that diffidence would disappear.[418] In fact, a permanent, nonmeans-tested guarantee of low-cost health insurance for persons with severe disabilities would make those workers attractive to companies.[419] The program might well pay for itself with the tax revenues that those workers generate, but it should be adopted in any instance.

A fully universal national health insurance program may be an unrealistic goal after the unsuccessful attempt to create one during the first Clinton administration.[420] Nevertheless, a more modest program of guaranteed health insurance for those whose disabilities pass a certain threshold of severity would be an unqualified social boon and is a worthy policy priority.

8. Subsidies for Accommodations

One mechanism to improve welfare for persons with disabilities is to provide a form of welfare to businesses. The government could pay for accommodations that private enterprises provide to new workers with disabilities. There is some risk that the subsidies would pay for what businesses would be doing anyway,[421] but such a program would neutralize the costs of hiring persons with disabilities, making it less likely that employers would covertly discriminate to save the expense of accommo-

415. *See* Pear, *supra* note 224, at A12.

416. *See* Watson, *supra* note 121, at 259 (discussing the need for a range of options with respect to the control of personal assistant services).

417. *See* U.S. COMM'N ON CIVIL RIGHTS, *supra* note 58, at 33 (quoting a statement of Carl Suter, Associate Director of Illinois Office of Rehabilitation Services: "Since one of the private sector[']s biggest fears is the cost of health insurance [for persons with disabilities], there needs to be a system prepared by federal and state governments to guarantee health benefits for persons with disabilities to open up more employment opportunities").

418. *See id.*

419. *See* Yelin & Cisternas, *supra* note 142, at 53 (noting the advantage of a program for people with disabilities seeking temporary or part-time work).

420. *See* BOB WOODWARD, THE AGENDA 398 (1994) (describing the defeat of President Clinton's universal health insurance proposal).

421. *See* Mashaw, *supra* note 184, at 232 ("The basic problem here is what in tax parlance is called 'buying the base.' It is very difficult to know that a work subsidy is going to promote activity that would not have been engaged in without it.").

dations.[422] The federal tax code currently contains two such subsidies: the Disabled Access Tax Credit, which allows small businesses a tax credit for funding accommodations in the range of $250 to $10,250 a year,[423] and an available deduction of up to $15,000 a year for removal of architectural and transportation barriers.[424]

Increasing the amount of these subsidies could be expected to increase the employment of persons with disabilities, improving their well-being without additional direct expenditures for welfare and allowing individuals to move off welfare. Expanding the subsidies beyond tax credits and deductions would provide incentives for nonprofit corporations, state and local governments, and other entities not subject to federal tax. To reach those employers, the subsidies would need to be in the form of cash, but the social benefits justify the outlay. A final improvement to the existing subsidy program would be to allow a full or partial credit for expenses not currently defined as accommodations, such as increased group health insurance premiums to cover the preexisting medical condition of a worker with disabilities, when the employer can actually demonstrate that the cost was incurred. Employers may currently be shying away from hiring people with disabilities because of the perception of increased costs of that type, beyond the expenses associated with ramping and other more traditional accommodations.

9. Minimum Employment Benefits

Another measure is what might be called "work reform" in contrast to welfare reform—in other words, legislation to require employers to fund benefits such as unemployment compensation, pension plan eligibility, and medical insurance for all workers, including those who are temporary or part-time.[425] This proposal would effectively raise the compensation of persons with disabilities whose impairments limit their work to sporadic or part-time employment. It would ensure more equal treatment of these workers at the workplace, even if their wage amounts are lower than those of employees with somewhat higher marginal economic contributions to the employer's business.

422. *See* Scott A. Moss & Daniel A. Malin, Note, *Public Funding for Disability Accommodations: A Rational Solution to Rational Discrimination and the Disabilities of the ADA*, 33 HARV. C.R.-C.L. L. REV. 197 (1998).

423. *See* I.R.C. § 44 (1994). Accommodations that are covered include removal of architectural, communication, physical, or transportation barriers; provision of readers, taped materials, interpreters or equivalent aids to communication; modification of equipment or devices; or supplying of the services, modification, materials, or equipment. *See id.*

424. *See* I.R.C. § 190. Business expenses of this type might be deductible anyway, but the provision allows the taxpayer to elect more favorable treatment than might otherwise be available for some costs. *See id.*

425. *See* Sharon Dietrich et al., *Work Reform: The Other Side of Welfare Reform*, 9 STAN. L. & POL'Y REV. 53, 59–62 (1998).

Nevertheless, these measures raise the relative cost of hiring workers as opposed to investing in machinery or not expanding production, and so they may induce some employers to make fewer hires.[426] The proposals also may induce employers to reduce salaries for those workers to pay for the benefits when the workers might prefer cash.[427] Thus, they may be a somewhat less desirable social option than some of the other steps proposed here.

VI. CONCLUSION

The proposals made in this article are incremental reform, rather than the more radical changes that a dedicated follower of Rawls or a militant proponent of antisubordination theory might support. Nevertheless, the proposals are intended as a start toward a more just society, one that is willing not only to overcome prejudiced attitudes but also to depart from integrationist principles, all to achieve a more functional social and economic equality for people with disabilities. By shifting even some of the costs of disability to the population as a whole, government policy will put into application some of the insights of post-integrationist theory and move toward more effective equality for people with disabilities.

426. Whether and to what degree the minimum wage, an analogous mandatory benefit, has this effect is the subject of debate. For a recent, comprehensive discussion, see Shaviro, *supra* note 381, which concludes that minimum wage diminishes low-wage worker employment. A commentator that applies the economic theory behind the argument against the minimum wage to an argument against other mandatory employee benefits is Maria O'Brien Hylton, *Some Preliminary Thoughts on the Deregulation of Insurance to Advantage the Working Poor*, 24 FORDHAM URB. L.J. 687 (1997).

427. Of course, the minimum wage acts as a floor for the benefits-wage substitution, but some would argue that the minimum wage also acts to reduce the employment of marginal workers. *See supra* note 426 and accompanying text.