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The Americans with Disabilities Act as Welfare Reform

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THE AMERICANS WITH DISABILITIES ACT AS WELFARE REFORM

SAMUEL R. BAGENSTOS*

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INTRODUCTION

When Congress enacted the Americans with Disabilities Act (ADA) in 1990, disability rights supporters hailed the law as a radical shift in our nation's policy toward people with disabilities. Ten years later, however, the statute's impact—at least in the employment area—seems anything but radical. ADA plaintiffs are among the least successful classes of litigants in the federal courts—with a rate of (non)success that is second in futility only to that of prisoner plaintiffs.¹ Although disability rights advocates have won some important victories in the Supreme Court,² both that Court and the lower federal courts have issued a series of decisions that significantly restrict statutory coverage.³ And perhaps most important, the ADA appears to have had no significant positive effect on the rate of employment of people with disabilities.⁴

Why this gap between radical expectations and disappointing results? Many disability rights advocates and academic defenders of the ADA have a ready explanation: Employers, courts, and the general public are engaged in a “backlash” against the ADA. Unlike

1. See Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 100 (1999) [hereinafter Colker, *Windfall for Defendants*] (finding that defendants in ADA employment cases prevail at the trial level 93% of the time, and that, when such cases reach the appellate courts, defendants prevail 84% of the time); Ruth Colker, *Winning and Losing under the Americans with Disabilities Act*, 62 OHIO ST. L.J. 239, 248-57 (2001) (reviewing ADA employment discrimination decisions from the federal courts of appeals and finding: (1) in 94% of these cases, the district court's judgment favored the defendant; (2) in appeals brought by plaintiffs, the courts of appeals reversed only 12% of the time; and (3) in appeals brought by defendants, the courts of appeals reversed in whole or in part 60% of the time); *Study Finds Employers Win Most ADA Title I Judicial and Administrative Complaints*, 22 MENTAL & PHYSICAL DISABILITY L. REP. 403, 404 (1998) (observing that ADA employment plaintiffs prevail 8% of the time).

2. See, e.g., *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 690 (2001) (holding that PGA Tour must waive its “walking rule” to permit a golfer with a disability to ride a cart in its competitions); *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 587 (1999) (holding that the ADA in certain circumstances requires states to provide services to individuals with disabilities in community settings rather than in institutions); *Bragdon v. Abbott*, 524 U.S. 624, 641, 648 (1998) (holding that the ADA protects an individual with asymptomatic HIV against a dentist's discriminatory refusal to provide her treatment, unless the dentist can establish the existence of a “direct threat” to health or safety).

3. See *infra* Part I.

4. See *infra* notes 391-95 and accompanying text.

the Civil Rights Act of 1964,⁵ which was enacted ten years after the Supreme Court's decision in *Brown v. Board of Education*,⁶ and after a series of highly salient events operated to change public consciousness about the civil rights of African Americans,⁷ the ADA was enacted before the disability rights movement had a full opportunity to educate the public about the important principles that underlay the new law.⁸ As a result, employers and other entities regulated by the ADA have resisted full compliance. And courts, untutored in the basic principles of the disability rights movement, have imposed their own retrograde views of the proper response to disability on a statute that decisively rejects those views.

In his important journalistic history of the disability rights movement, published shortly after the ADA's passage, Joseph Shapiro foreshadowed the "backlash" argument.⁹ A recent article by Bonnie Tucker (coeditor of a major casebook¹⁰ and coauthor of a treatise¹¹ on disability discrimination law) gave the argument clear expression:

The ADA was enacted ahead of its time, in that much of the country is not yet ready to embrace the precepts on which the ADA is premised. And the ADA has not yet succeeded in requiring many people and entities to do what they do not wish to do—for one primary reason: many, perhaps most, courts are not enforcing the law, but instead are finding incredibly inventive means of interpreting the ADA to achieve the opposite result that the Act was intended to achieve. Judges are only

5. Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended in scattered sections of 28 U.S.C. and 42 U.S.C.).

6. 347 U.S. 483 (1954).

7. Examples include lunch counter sit-ins, the Freedom Rides, James Meredith's admission to the University of Mississippi, the protests in Birmingham, Alabama, and the March on Washington, to name a few.

8. See Linda Hamilton Krieger, *Socio-Legal Backlash*, 21 BERKELEY J. EMP. & LAB. L. 476, 488-89 (2000) (making this distinction).

9. See JOSEPH P. SHAPIRO, *NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT* 328 (1993).

10. RUTH COLKER & BONNIE POITRAS TUCKER, *THE LAW OF DISABILITY DISCRIMINATION* (3d ed. 2000).

11. BONNIE P. TUCKER & BRUCE A. GOLDSTEIN, *LEGAL RIGHTS OF PERSONS WITH DISABILITIES: AN ANALYSIS OF FEDERAL LAW* (Supp. 2001).

people, generally people without disabilities, who are not yet willing to change the rules of society to require themselves or others to act as good Samaritans. Unless a law clearly and emphatically states that people must act as good Samaritans, most judges will not interpret that law to require such action. The ADA appears to waffle on this point, and thus gives the courts sufficient leeway to reject the real principles upon which the Act was founded and to interpret the Act in a manner that is in accord with the courts' *own* values or beliefs.¹²

Tucker is far from alone. In some sense, hers is the most common view of disability rights advocates and academic supporters of the ADA.¹³

12. Bonnie P. Tucker, *The ADA's Revolving Door: Inherent Flaws in the Civil Rights Paradigm*, 62 OHIO ST. L.J. 335, 337-39 (2001).

13. See, e.g., Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19, 23 (2000) [hereinafter Diller, *Judicial Backlash*] ("[T]he pattern of narrow and begrudging interpretations of the ADA derives from the fact that the courts do not fully grasp, let alone accept, the statute's reliance on a civil rights model for addressing problems that people with disabilities face in the workplace."); Krieger, *supra* note 8, at 516 (noting that "the ADA's definition of disability has come under such powerful narrowing pressure because people do not understand that the ADA is an anti-discrimination statute rather than an entitlement program"); Susan Stefan, *Delusions of Rights: Americans with Psychiatric Disabilities, Employment Discrimination and the Americans with Disabilities Act*, 52 ALA. L. REV. 271, 272-73 (2000) (stating that "[t]here is both a public and judicial backlash against the Americans with Disabilities Act" and arguing that "[c]ourts appear to share some of the stereotypes about mental illness that motivated the passage of the Americans with Disabilities Act"); cf. SUSAN STEFAN, *HOLLOW PROMISES: EMPLOYMENT DISCRIMINATION AGAINST PEOPLE WITH MENTAL DISABILITIES* 195 (2002) ("[The ADA's] specific protections were established by Congress in the first instance, rather than being codified by Congress from pre-existing court rulings as was the case with race and gender discrimination law, and judges are therefore unfamiliar with concepts such as 'reasonable accommodation.'"); Marta Russell, *Backlash, the Political Economy, and Structural Exclusion*, 21 BERKELEY J. EMP. & LAB. L. 335, 352 (2000) ("Whatever the reasons for this judicial backlash, courts are clearly thwarting the congressional intent of the ADA by turning away disabled people who seek judicial remedies."). In a recent book, Ruth O'Brien advocates an interesting variation on this standard argument. In her view, recent decisions under the ADA reflect the continuing influence of the "whole man theory" of rehabilitation developed by Howard Rusk, Henry Kessler, and Mary Switzer in the late 1940s and the 1950s. See RUTH O'BRIEN, *CRIPPLED JUSTICE: THE HISTORY OF MODERN DISABILITY POLICY IN THE WORKPLACE* 137 (2001). Although O'Brien adds an interesting layer of historical context to the standard "backlash" story, I find her basic arguments to be dramatically undersupported. See Michael A. Stein, *Disability, Employment Policy, and the Supreme Court*, 55 STAN. L. REV. 607 (2002) (critiquing O'Brien's argument). For my purposes here, however, it should suffice to note that O'Brien, like the other "backlash" advocates, fails to account for the role of the welfare reform argument, pressed by the disability rights movement itself, in accounting for many of courts'

In this Article, I challenge that view. I agree that in many cases courts have read the ADA in a restrictive manner—unduly so, from my perspective. But I do not agree with the assertion that the courts, in reaching these restrictive decisions, “have not been receptive to the principles upon which the ADA is premised.”¹⁴ Or at least I believe the issue is much more complicated than is typically acknowledged.

When critics of decisions interpreting the ADA speak of “the principles upon which the [statute] is premised,”¹⁵ they appear to assume that those principles can be relatively uncontroversially determined. In particular, they appear to assume that the statute is premised on a particular conception of disability and the appropriate societal response to it, a conception that draws on a major strand of the thinking of disability rights advocates. Roughly put, under that conception disability consists of the quantum of disadvantage an individual experiences because of the incompatibility between that individual’s actual or perceived physical or mental condition and the societal institutions that control access to an opportunity she desires. The appropriate societal response to disability, in this view, is to rearrange the institutions that control access to opportunities and make them accessible to all individuals who are currently excluded by them. Many of the restrictive decisions of the Supreme Court and lower courts are in fact inconsistent with these principles.¹⁶

But the claim that those principles constitute the “basic premises” of the ADA is itself exceptionally problematic. While many of the disability rights advocates who assisted in drafting and lobbying for the statute shared the basic commitment to a social model of disability and society’s responsibility to alter its institutions to make all opportunities accessible to all, those who urged passage of the statute relied to a significant extent on a distinct argument that rests in some tension with these premises.¹⁷ In official reports, in congressional hearings, on the floor of Congress, and in the popular press, supporters of the proposed ADA argued that the statute was

most restrictive decisions under the ADA.

14. Tucker, *supra* note 12, at 383.

15. *Id.*

16. See *infra* Part I.

17. See *infra* Part II.

necessary to reduce the high societal cost of dependency—that people with disabilities were drawing public assistance instead of working, and that a regime of “reasonable accommodations” could move people with disabilities off of the public assistance rolls and into the workforce in a way that would ultimately save the nation money.¹⁸ This argument was asserted by individuals with disabilities who urged passage of the ADA, by the bill’s major sponsors, and by President George H.W. Bush himself.¹⁹ In short, the ADA was sold to a significant extent as a means of welfare reform.²⁰

If the “basic premise” of the ADA is seen as the imperative to reduce the cost of dependency of people with disabilities, then many of the restrictive decisions attacked by ADA supporters begin to make sense. Roughly put, those decisions limit the statute’s protections to individuals who would be largely unable to work without them, and they limit required accommodations to those that are necessary to move those individuals into the workforce in a reasonably cost-effective manner. In short, on at least one plausible account of the statute’s “basic premises,” the restrictive interpretations offered by many courts reflect a vindication rather than a betrayal of those premises.

My point is not to endorse those restrictive decisions. I share disability rights advocates’ discomfort with most of them. Rather, I seek to unearth the welfare reform basis for the ADA and demonstrate its fundamental inadequacy as a guide to disability employment policy. To the extent that the ADA has failed to achieve the goals of bringing more people with disabilities into the work-

18. See *infra* Part II.A.

19. See *infra* notes 200-56 and accompanying text.

20. In a recent book, published while this Article was undergoing the editorial process, Thomas Burke makes the same point, using strikingly similar language: “Indeed, the ADA was sold as a way to *reduce* governmental expenditures by getting people with disabilities off welfare. For the Bush and Reagan officials, the ADA was a kind of welfare reform.” THOMAS F. BURKE, *LAWYERS, LAWSUITS AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY* 95 (2002). Burke, a political scientist, recognizes the importance of the welfare reform argument to the passage of the ADA—a point largely overlooked in the legal literature. But because his focus is on understanding *why* the ADA was enacted, he does not address the connection between the welfare reform argument and the judicial “backlash” against the ADA, nor does he discuss the limitations the welfare reform argument is likely to place on the future ability of disability rights activists to achieve their goals. In this Article, I give great attention to the latter two points.

force, that failure has as much to do with inherent flaws of the ADA as with judges' refusal to accept the statute's basic premises.²¹ While civil rights protections for people with disabilities are essential to serve many purposes,²² they are not and cannot be the exclusive (or even primary) means of assuring meaningful employment for the maximum number of people with disabilities.

The issue remains an important one because, as I will demonstrate below, disability rights advocates' reliance on welfare reform arguments in lobbying for the ADA was not merely a tactical decision that had some unfortunate effects. Those arguments drew directly on a set of ideas, indigenous to the disability rights movement, that proceed under the label of "independent living." The individualistic, almost libertarian aspects of independent living thinking served a crucial purpose both in obtaining wider public support for the disability rights movement and in creating a disability rights movement in the first place. As the restrictive development of ADA case law makes clear, however, framing disability rights arguments in terms of independent living comes at a cost, for it may provide insufficient justification for the significant government interventions necessary to increase the employment rate of people with disabilities.

My argument proceeds as follows. In Part I, I set forth the disability rights critique of the case law that has developed under the ADA. I focus on three sets of cases: those involving the definition of "disability;" those involving whether individuals who have received public or private disability benefits may be deemed "qualified" individuals; and those holding that employers need not make "reasonable accommodations" to avoid stigmatizing employees

21. Both while I was a full-time practitioner and since I entered academia, I have been counsel for plaintiffs or their amici in a number of significant disability rights cases. In challenging the standard "backlash" story articulated by many disability rights activists, I recognize that some may see me as giving aid and comfort to the enemy. But I believe, to the contrary, that it is essential for those of us who sympathize with the disability rights movement to be attentive to the contradictions and pitfalls inherent in the manner in which disability rights claims have been framed, and to be open to new ways of framing those claims. On the importance of subjecting to critique the practices and ideologies even of political movements one supports, see Wendy Brown & Janet Halley, *Introduction to LEFT LEGALISM/LEFT CRITIQUE* 1, 27-28 (Wendy Brown & Janet Halley eds., 2002).

22. I have previously defended the ADA as a response to group-based societal subordination of people with disabilities. See Samuel R. Bagenstos, *Subordination, Stigma, and "Disability,"* 86 VA. L. REV. 397, 452-66 (2000).

with disabilities. After briefly describing the state of the case law in each of these areas, I show how disability rights supporters and academic defenders of the ADA have challenged the courts' decisions as rejecting the basic premises of the ADA.

In Part II, I turn to the welfare reform argument for the ADA. Examining the official reports that preceded the introduction of the original ADA bill, the internal legislative history of the statute as enacted, and contemporaneous news accounts, I show in Part II.A that the imperative of avoiding costly dependency formed an important (though hardly the exclusive) part of the public justification for the statute. In Part II.B, I re-examine the case law considered in Part I in light of that welfare reform justification for the ADA and conclude that it fits the cases quite well.

In Part III, I attempt to trace the connections between the welfare reform argument for the ADA and the goals of the independent living movement. In so doing, I rely to a significant extent on work by social scientists theorizing the issue-framing processes in which social movements engage.²³ As I explain in Part III.A, the notion of "independence" promoted by leaders of the independent living movement incorporated a strong degree of ambivalence toward disability benefits programs and other forms of direct assistance to people with disabilities. Although independent living centers and other institutional manifestations of the independent living movement have long provided individuals with disabilities assistance in advocating for the benefits to which they are entitled, many of the most prominent independent living activists have nonetheless been quite hostile toward such programs. Indeed, the welfare reform argument for disability discrimination law was first articulated in the early 1980s by independent living activists who

23. After this Article was substantially completed, I had the opportunity to read Edward Rubin's recent call for legal scholars to pay attention to the social movements literature. See Edward L. Rubin, *Passing Through the Door: Social Movement Literature and Legal Scholarship*, 150 U. PA. L. REV. 1, 3 (2001); see also William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 419 (2001) ("Law professors have a lot to learn from sociologists and political scientists who have studied social movements."). Although this Article may not have been precisely what Rubin had in mind, it responds to a similar desire to integrate the social movements literature into legal analysis. This Article is part of a broader project examining the politics of disability discrimination law. For an earlier installment, see Samuel R. Bagenstos, *The Americans with Disabilities Act as Risk Regulation*, 101 COLUM. L. REV. 1479 (2001).

saw antidiscrimination protections as an alternative to dependency-inducing welfare programs.

Building on this foundation, I show in Part III.B that disability rights activists' increasing reliance on the independent-living-derived welfare reform argument was not simply a political accommodation to a climate of fiscal conservatism and civil rights skepticism (though it was in part that). The increased reliance also served an important *internal* purpose for the disability rights movement in helping to create a cohesive collective identity of people with disabilities. Finally, in Part III.C, I suggest that the welfare reform approach that framed so much of the work of disability rights activists in their efforts to secure adoption of the ADA has imposed significant limitations on the ability of those activists to achieve their goals.

I. THE CRITIQUE: BETRAYING THE PROMISES OF THE ADA?

In this Part, I set forth the basic elements of the common critique of current ADA doctrine. The critique has focused on three areas of the law: (1) the threshold definition of "disability" that defines the class entitled to protection under the statute; (2) the practice, seemingly rejected by the Supreme Court but resilient in the lower courts, of deeming individuals who receive disability benefits unqualified and hence unprotected by the ADA; and (3) the interpretation of the statute's central mandate of "reasonable accommodation." In each of these areas, ADA defenders have charged the courts with disregarding the basic purposes of the statute.

A. *The Definition of "Disability"*

Following the model of the Rehabilitation Act²⁴ before it, the ADA protects only those individuals who have a "disability." The statute defines the term to include three conditions: (1) *actual* disability—"a physical or mental impairment that substantially limits one or more

24. Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (1973) (codified as amended at 29 U.S.C. §§ 701-796 (2000)).

... major life activities;²⁵ (2) *past* disability—"a record of such an impairment;²⁶ and (3) *perceived* disability—"being regarded as having such an impairment."²⁷ Only if an individual has one of these forms of "disability" is that individual protected against discrimination or guaranteed reasonable accommodation by the ADA.

Many disability rights advocates believe that the threshold "disability" inquiry should be treated as an essentially perfunctory hurdle that courts should quickly jump over to reach the "real" issues in an ADA case: Was the plaintiff "qualified?"²⁸ Is the plaintiff's requested accommodation "reasonable?"²⁹ Such an approach, they argue, is necessary if the ADA is to operate as a civil rights statute. Under other civil rights laws, a plaintiff's case stands or falls on her ability to do the job and the degree to which she can establish that she was deprived of an opportunity to perform because of the employer's discriminatory conduct. She need not establish how black or female she is.³⁰ So too here, these advocates argue, ADA plaintiffs should not be forced to prove how disabled they are before the court will turn to the key issues of qualification and discrimination.³¹

25. 42 U.S.C. § 12102(2)(A) (2000).

26. *Id.* § 12102(2)(B).

27. *Id.* § 12102(2)(C).

28. *See id.* § 12112(a) (protecting only "qualified individual[s] with a disability" against discrimination).

29. *See id.* § 12112(b)(5)(A) (defining discrimination to include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity").

30. Issues regarding the definition of "race" and of particular races arise at the margins of various civil rights regimes—particularly affirmative action programs. For further discussion, see MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* 45-46 (1990); Luther Wright, Jr., Note, *Who's Black, Who's White, and Who Cares: Reconceptualizing the United States's Definition of Race and Racial Classifications*, 48 VAND. L. REV. 513 (1995). But such issues—unlike the question of what is a "disability"—are hardly central to the administration of antidiscrimination laws.

31. *See, e.g.*, 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, 568-72 (1997); Arlene B. Mayerson, *Restoring Regard for the "Regarded As" Prong: Giving Effect to Congressional Intent*, 42 VILL. L. REV. 587, 589, 609-12 (1997).

The Supreme Court has decisively rejected that position, however. In a series of cases—*Sutton v. United Air Lines*,³² *Murphy v. United Parcel Service*,³³ *Albertson's, Inc. v. Kirkingburg*,³⁴ and now *Toyota Motor Manufacturing v. Williams*³⁵—the Court has made clear that it regards the threshold “disability” determination as an important device for cabining the reach of the ADA.³⁶ The Court made the point explicit in its unanimous decision in *Toyota*, which held that a plaintiff can establish a substantial limitation in the major life activity of “performing manual tasks” only by showing that her impairment “prevents or severely restricts [her] from doing activities that are of central importance to most people’s daily lives.”³⁷ Reversing a lower court decision that held that the inability to perform manual tasks associated with a single job was sufficient, the Court emphasized that the terms “substantially limits” and “major life activities ... need to be interpreted strictly to create a demanding standard for qualifying as disabled.”³⁸

The significant effects of the Court’s narrow reading of the disability definition are particularly evident in the three definition-of-disability cases the Court decided in 1999. In *Sutton*, the Court addressed the so-called “mitigating measures” issue. In determining whether a plaintiff satisfies the ADA’s “actual disability” prong, the Court ruled, courts must determine whether the plaintiff’s condition substantially limits major life activities *even after the application of mitigating measures*.³⁹ Accordingly, to the extent that the plaintiff was taking a medication or using a device that removed any substantial limitation imposed by her impairment (without imposing a substantial limitation of its own), she would not be covered under the ADA’s actual disability prong.⁴⁰

The Court applied this principle in *Sutton* to hold that twin sisters with vision of 20/200 in one eye and 20/400 in the other were

32. 527 U.S. 471 (1999).

33. 527 U.S. 516 (1999).

34. 527 U.S. 555 (1999).

35. 534 U.S. 184 (2002).

36. See, e.g., *Sutton*, 527 U.S. at 495 (Ginsburg, J., concurring) (discerning congressional “intent to restrict the ADA’s coverage to a confined, and historically disadvantaged, class”).

37. *Toyota*, 534 U.S. at 198.

38. *Id.* at 691.

39. *Sutton*, 527 U.S. at 488-89.

40. See *id.* at 481-89.

not substantially limited in the major life activity of seeing because their vision improved to 20/20 in both eyes when they used corrective lenses.⁴¹ In *Murphy*, the Court applied this principle to uphold a lower court's ruling that an individual with severe hypertension was not substantially limited in any major life activity because his condition was currently controlled by medication.⁴² And in *Albertson's*, the Court stated that the Ninth Circuit was "too quick"⁴³ to find that the plaintiff's monocular vision substantially limited the major life activity of seeing because the lower court did not take account of the way in which the plaintiff's brain adapted to the condition.⁴⁴

In all of these cases, the employers denied opportunities to the plaintiffs based on their physical impairments notwithstanding the fact that the plaintiffs were able to control the effects of their impairments through corrective measures.⁴⁵ Yet in all of these cases, the Court said that the plaintiffs' use of such corrective measures could remove them from the protection of the ADA and thus deprive them of the right to show that they were in fact qualified for the positions at issue and that their employers acted on the basis of prejudice or stereotypes.⁴⁶

Many academics and advocates have sharply criticized the *Sutton* Court's holding that the "actual disability" inquiry must take account of mitigating measures. They have argued that the Court's ruling, which rejected specific statements in the legislative history and in the interpretive guidance issued by the EEOC,⁴⁷ leaves unprotected a large number of people with conditions that Congress clearly intended to cover: epilepsy, diabetes, amputated limbs, and severe hearing impairments, for example.⁴⁸

41. *Id.* at 488-89.

42. *Murphy*, 527 U.S. at 521.

43. *Albertson's*, 527 U.S. at 564.

44. *Id.* at 564-66.

45. *See id.* at 558-60; *Murphy*, 527 U.S. at 518-20; *Sutton*, 527 U.S. at 475-76.

46. *See Albertson's*, 527 U.S. at 564-66; *Murphy*, 527 U.S. at 521; *Sutton*, 527 U.S. at 488-89.

47. *See Sutton*, 527 U.S. at 480 (quoting EEOC and Department of Justice interpretive guidance); *id.* at 499-501 (Stevens, J., dissenting) (quoting the House and Senate committee reports to the bill).

48. *See, e.g.,* Arlene Mayerson & Matthew Diller, *The Supreme Court's Nearsighted View of the ADA*, in *AMERICANS WITH DISABILITIES: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS* 124 (Leslie Pickering Francis & Anita Silvers eds., 2000);

But the critics have responded even more sharply to a different aspect of *Sutton* and *Murphy*—the Court's restrictive interpretation of the perceived disability prong of the statute's "disability" definition. In both cases, even though the employers plainly believed that the plaintiffs' physical conditions disqualified them from performing the jobs at issue, the Court held that the perceived disability prong was not satisfied because the employers did not perceive those conditions as *substantially* limiting the plaintiffs' ability to work generally.⁴⁹ Thus, in *Sutton* the Court stated, "When the major life activity under consideration is that of working, the statutory phrase 'substantially limits' requires, at a minimum, that plaintiffs allege they are unable to work in a broad class of jobs."⁵⁰ "If jobs utilizing an individual's skills (but perhaps not his or her unique talents) are available," the Court continued, "one is not precluded from a substantial class of jobs."⁵¹ Applying that standard, the Court held that the plaintiffs (airline pilots excluded from flying global jets for United) were not (and were not "regarded as") substantially limited in the major life activity of working because "there [we]re a number of other positions utilizing [their] skills" available in the workforce generally.⁵² And in *Murphy*, the Court held that the employer's perception that the plaintiff's hypertension disqualified him under federal law from driving a commercial motor vehicle—a disqualification that would have excluded the plaintiff from literally millions of jobs⁵³—was insufficient to show a perceived substantial limitation in working because the plaintiff (a mechanic) was still eligible to work in mechanic's jobs that did not require commercial motor vehicle certification.⁵⁴

Critics have seen this aspect of *Sutton* and *Murphy* as confirming and endorsing the trend in the lower courts to limit ADA protection

Aviam Soifer, *The Disability Term: Dignity, Default, and Negative Capability*, 47 UCLA L. REV. 1279, 1299-1307 (2000); Bonnie Poitras Tucker, *The Supreme Court's Definition of Disability Under the ADA: A Return to the Dark Ages*, 52 ALA. L. REV. 321, 325-26, 372-73 (2000). I have previously sought to defend the Court's mitigating-measures ruling—though not necessarily the results in all three cases in the *Sutton* trilogy—against these challenges. See Bagenstos, *supra* note 22, at 495-503.

49. See *Murphy*, 527 U.S. at 524-25; *Sutton*, 527 U.S. at 491-92.

50. *Sutton*, 527 U.S. at 491.

51. *Id.* at 492.

52. *Id.* at 493.

53. See Bagenstos, *supra* note 22, at 512.

54. See *Murphy*, 527 U.S. at 524-25.

to a relatively small group of severely disadvantaged people, a group the courts occasionally refer to as the "truly disabled."⁵⁵ Although I have not found any post-*Sutton* cases to use precisely that language, the narrow interpretation of the disability definition reflected in that term continues to prevail in the lower courts.⁵⁶ Building on the influential pre-*Sutton* critiques of the "truly disabled" idea by Robert Burgdorf and Arlene Mayerson,⁵⁷ commentators have urged that the Court's narrow reading of the "disability" definition "seriously undermine[s] the purposes and goals of the ADA."⁵⁸ To put it more colorfully, "the Supreme Court has taken many people with disabilities back to the dark ages, by permitting employers and program administrators to discriminate against such individuals at will based on irrational stereotypes and prejudice."⁵⁹ These commentators decry the Court's implication that an employer could defend an irrational refusal to hire an individual with a disability "by indicating that the individual would be capable of working at other jobs at other companies or in other fields."⁶⁰

If that implication is correct, they contend, the Court is simply treating the ADA as a disability benefits program like Social Security Disability Insurance (SSDI) that provides redistributive largesse to a disadvantaged class; it is not implementing the ADA's

55. See, e.g., *Forrisi v. Bowen*, 794 F.2d 931, 934 (4th Cir. 1986). For an argument that the decisions in the *Sutton* trilogy reflect an endorsement of the "truly disabled" cases, see Paula E. Berg, *Ill/ Legal: Interrogating the Meaning and Function of the Category of Disability in Antidiscrimination Law*, 18 YALE L. & POL'Y REV. 1, 3 (1999).

56. For a review of post-*Sutton* law in the lower courts, see O'BRIEN, *supra* note 13, at 210-17. In its principal brief in *Toyota*, the employer argued extensively that the ADA's disability definition should be read as covering only "the truly disabled," and that this limitation is inherent in the Court's decisions in the *Sutton* trilogy. See Brief for Petitioner at 3, 10-11, 18, 29-30, *Toyota Motor Mfg., Ky. v. Williams*, 534 U.S. 184 (2002) (No. 00-1089). Although the Court did not use that precise language, its statement that the ADA must "be interpreted strictly to create a demanding standard for qualifying as disabled," *Toyota*, 534 U.S. at 197, will not dispel the influence of the "truly disabled" idea. For an early criticism of *Toyota*, along the same lines as the academic criticisms of the *Sutton* trilogy, see Ruth O'Brien, *The Supreme Court's Catch-22*, RAGGED EDGE, Nos. 2 & 3, at 13 (2002).

57. See Burgdorf, *supra* note 31, at 536-46; Mayerson, *supra* note 31, at 609 & n.99.

58. Tucker, *supra* note 48, at 370.

59. *Id.* at 373. For an equally harsh criticism of the *Sutton* trilogy, see Soifer, *supra* note 48, at 1299-1312.

60. Tucker, *supra* note 48, at 372; see also Mayerson & Diller, *supra* note 48, at 125 ("Imagine this logic in any other area of civil rights and it does not pass even the laugh test. No we don't hire women, Jews (fill in the blank) but you can get a job somewhere else, so what's the beef?").

civil rights focus on providing equal opportunity to all.⁶¹ As Matthew Diller puts it, the implicit message "that rather than demanding accommodations, the plaintiff should simply find a job where no alteration of the workplace would be necessary" in the end "defeats the goal of establishing equal access to the job market":

The focus on other jobs transmutes the ADA from an equal access measure into a means of providing some threshold level of access to the job market. It suggests that accommodation is only required when it is necessary to enable the plaintiff to remain in the work force—an objective that is very different from that of equal opportunity.⁶²

Encapsulating the views of these advocates, Linda Krieger argues that the fundamental disconnect between the disability-benefits orientation of decisions like *Sutton* and *Murphy* and the purported civil rights focus of the ADA arises from the fact that judges and members of the public "completely fail to understand the ADA's anti-disparate treatment agenda. They do not understand that the ADA, even with its redistributive reasonable accommodation provisions, is an anti-discrimination statute, not a social welfare benefits program like social security disability, which seeks to provide a safety net for the non-working disabled."⁶³

B. Judicial Estoppel Cases

1. The Basic Problem

Although the definition-of-disability cases have been the major target of criticism, they have not been the only target. Academics and disability rights advocates have also challenged a set of cases

61. See, e.g., Burgdorf, *supra* note 31, at 568.

62. Diller, *Judicial Backlash*, *supra* note 13, at 29.

63. Krieger, *supra* note 8, at 516; see also Anita Silvers, *The Unprotected: Constructing Disability in the Context of Antidiscrimination Law*, in AMERICANS WITH DISABILITIES: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS, *supra* note 48, at 126, 128 (arguing that the prevalence among people with disabilities of the view that "the ADA was meant to sweep away social practice that arbitrarily relegates people to inferior treatment or outcomes based on their being physically or mentally impaired" has created a "feeling of disorientation" surrounding the *Sutton* trilogy).

in which courts have held that an individual's receipt of benefits under the SSDI program (or other public and private disability benefits programs) bars that individual from pursuing a remedy under the ADA.⁶⁴

These cases, which began arising almost as soon as the ADA became effective, generally follow some variation on a standard pattern: An individual with a job acquires a disability often, though hardly always, because of a workplace injury. Soon thereafter, the individual loses her job, allegedly because the employer has discriminated on the basis of the individual's disability or failed to provide accommodation for that disability. After being fired, the individual files an application for benefits under SSDI.⁶⁵ To obtain benefits under that program, an individual must establish that she has a "disability."⁶⁶

Unlike the ADA, the Social Security Act defines "disability" generally in terms of the inability to work. Specifically, "disability" under the SSDI program is the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months."⁶⁷ And the statute appears to define "inability" quite restrictively:

An individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work.⁶⁸

64. See, e.g., Burgdorf, *supra* note 31, at 489-506, 575-80; Matthew Diller, *Dissonant Disability Policies: The Tensions Between the Americans with Disabilities Act and Federal Disability Benefits Programs*, 76 TEX. L. REV. 1003, 1032-48, 1055-59 (1998) [hereinafter Diller, *Dissonant Disability Policies*]; Diller, *Judicial Backlash*, *supra* note 13, at 30-31, 47-48.

65. See generally *McNemar v. Disney Store, Inc.*, 91 F.3d 610 (3d Cir. 1996) (reporting facts similar to the general case described in the text).

66. 42 U.S.C. § 423(a)(1) (2000).

67. *Id.* § 423(d)(1)(A).

68. *Id.* § 423(d)(2)(A).

In the typical case, the individual's benefits application proceeds at the same time as the individual sues under the ADA to obtain his or her old job back, perhaps with an accommodation. To obtain relief under the ADA, an individual must establish that he or she is "qualified."⁶⁹ The statute defines "qualified" as the condition of being able to "perform the essential functions of the employment position such individual holds or desires," even if only with a "reasonable accommodation."⁷⁰

In cases like this, in which an individual simultaneously pursues benefits under SSDI (or other public or private disability benefits programs) and relief under the ADA, a significant inconsistency may appear to exist between the two claims. How can an individual possibly assert to a court that she is a "qualified individual with a disability"⁷¹—that is, a person capable of performing the "essential functions"⁷² of her job—when she has already asserted, in sworn declarations to the Social Security Administration, that her disability has left her both "unable to do [her] previous work"⁷³ and unable to "engage in any other kind of substantial gainful work which exists in the national economy?"⁷⁴ Based on this apparent inconsistency, a number of lower courts have held that the assertion on a disability benefits application of inability to work bars an individual from proceeding on an ADA claim.⁷⁵ Some of these courts have reached this result through application of the doctrine of judicial estoppel, under which a party who asserts a position in a judicial proceeding and prevails is estopped from taking a contrary position in a subsequent proceeding.⁷⁶ Other courts have reached this result by applying a strong, but formally rebuttable,

69. *Id.* § 12112(a).

70. *Id.* § 12111(8).

71. *Id.*

72. *Id.*

73. *Id.* § 423(d)(2)(A).

74. *Id.*

75. Both Robert Burgdorf and Matthew Diller have canvassed extensively the lower-court cases addressing this issue before the Supreme Court's decision in *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795 (1999). Rather than repeat that canvass, I will simply describe the outlines of this problem and refer readers to their exhaustive footnotes. See Burgdorf, *supra* note 31, at 489-506, 551-53; Diller, *Dissonant Disability Policies*, *supra* note 64, at 1032-48.

76. See, e.g., *McNemar v. Disney Store, Inc.*, 91 F.3d 610, 616-20 (3d Cir. 1996).

presumption that representations of disability on a benefits application bar a showing that an individual is "qualified."⁷⁷

The formal doctrinal basis that the courts have used to reach these results is less important for present purposes than the results themselves and the courts' obvious impatience and even indignation with the actions of the plaintiffs.⁷⁸ In the leading case of *McNemar v. Disney Store, Inc.*,⁷⁹ the Third Circuit held that an individual who had applied for disability benefits was judicially estopped from asserting in an ADA suit against his former employer that he was a qualified individual with a disability.⁸⁰ McNemar, the plaintiff, had HIV.⁸¹ He asserted that his employer had fired him after discovering his condition.⁸² After he was fired on November 18, 1993, McNemar applied for and received federal and state disability benefits. In his applications for those benefits, he stated that he had been "unable to work because of [his] disabling condition" beginning in October 1993, the date he was diagnosed with HIV.⁸³ McNemar also signed forms containing boilerplate statements that he was "unable to work" and "unable to perform the duties of [his] regular occupation" because of his disability.⁸⁴

These quite general statements are obviously reconcilable with McNemar's assertion in his ADA suit that he was a "qualified" individual: His HIV left him "unable to work," he might say, precisely because of others' prejudiced reactions to that condition. Denial of opportunities on the basis of such prejudiced reactions, of course, is a major evil that disability discrimination law aims to address.⁸⁵ But the Third Circuit would have none of it. McNemar, the court suggested, "misrepresent[ed] important information";

77. See, e.g., *Dush v. Appleton Elec. Co.*, 124 F.3d 957, 963 (8th Cir. 1997).

78. Examining these cases in detail, Matthew Diller has found little practical difference between the two formulations. See Diller, *Dissonant Disability Policies*, *supra* note 64, at 1046-47.

79. 91 F.3d 610 (3d Cir. 1996).

80. *Id.* at 616-19.

81. *Id.* at 613.

82. *Id.* McNemar was fired ten days after his manager asked him to confirm "rumors that he had tested positive for HIV," *id.*, and two days after he had been observed taking two dollars from a company cash register to make a personal purchase. *Id.* at 613-14.

83. *Id.* at 615 n.2. McNemar applied for student loan deferment "on the basis that he was 'unable to work and earn money.'" *Id.* at 616.

84. *Id.* at 615 n.4, 616 n.5.

85. See *Sch. Bd. v. Arline*, 480 U.S. 273, 282-84 (1987).

"ma[de] false representations," "flout[ed] the exalted status that the law accords statements made under oath;" "undermine[d] the integrity of the judicial system;" and "play[ed] fast and loose with the courts."⁸⁶ Other courts have used similarly indignant language. Plaintiffs who have pursued both disability benefits and ADA claims have also been described as attempting to perpetrate "fraud"⁸⁷ or as seeking "the very height of ... unfair advantage through manipulation of the judicial process."⁸⁸

When it became evident that these "judicial estoppel" cases marked a significant trend in the lower courts, critics began to observe (correctly) that the courts' indignation against plaintiffs who simultaneously pursue disability benefits and ADA claims was misconceived.⁸⁹ For a number of reasons, an SSDI applicant's assertion that she has a "disability," as defined in the Social Security Act is not inherently inconsistent with a claim that the same individual is "qualified" for ADA purposes. Most notably, as suggested above, an individual's disability may render her "incapable" of working not because of any inherent inability but simply because of inaccessible environments, the failure to make accommodations, or exclusionary attitudes.⁹⁰ That, of course, is a crucial insight of the disability rights movement, and the ADA's provisions seek to end exclusion on such bases. The SSDI "disability" definition, however, does not assume that employers will comply with the ADA in these respects; in particular, the SSDI "disability" determination does not take account of the possibility of accommodation.⁹¹ Thus, an individual can be deemed to have a "disability" for SSDI purposes even though she would be fully able to work if provided with a reasonable accommodation.⁹²

86. *McNemar*, 91 F.3d at 620 (quoting *Ryan Operations & P.V. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 358 (3d Cir. 1996)).

87. *Harris v. Marathon Oil Co.*, 948 F. Supp. 27, 29 (W.D. Tex. 1996), *aff'd*, 108 F.3d 332 (5th Cir. 1997) (unpublished table decision).

88. *Hindman v. Greenville Hosp. Sys.*, 947 F. Supp. 215, 223 (D.S.C. 1996), *aff'd*, 133 F.3d 915 (4th Cir. 1997).

89. See, e.g., Burgdorf, *supra* note 31, at 489-506, 575-80; Diller, *Dissonant Disability Policies*, *supra* note 64, at 1032-48.

90. See *supra* notes 55-63 and accompanying text.

91. See Burgdorf, *supra* note 31, at 503-04; Diller, *Dissonant Disability Policies*, *supra* note 64, at 1040-41.

92. See Burgdorf, *supra* note 31, at 504 & n.498.

Even aside from the possibility of accommodation, an individual's assertion that she has a "disability" for purposes of SSDI does not necessarily imply that the individual is entirely unable to work. Under valid Social Security Administration regulations, many impairments (such as HIV and quadriplegia) are deemed to constitute an SSDI "disability" per se—even though many individuals with these impairments hold down jobs.⁹³ And under various work incentive programs, SSDI recipients are permitted and even encouraged to work.⁹⁴ As either a formal or an empirical matter, then, "disability" for purposes of Social Security cannot be equated with a complete inability to work, notwithstanding what appears on the face of the statutory definition.

2. *The Cleveland Decision*

Moved by the foregoing arguments, a number of lower courts rejected the holdings of their sister circuits and refused to accord disability benefits applications preclusive effect in subsequent ADA proceedings.⁹⁵ The Supreme Court granted certiorari in 1998 to resolve the conflict, and when it issued its unanimous opinion in *Cleveland v. Policy Management Systems*,⁹⁶ the Court seemed to side with the disability rights advocates. The Court held that "pursuit, and receipt, of SSDI benefits does not automatically estop the recipient from pursuing an ADA claim. Nor does the law erect a strong presumption against the recipient's success under the ADA."⁹⁷ Despite "the appearance of conflict that arises from the language of the two statutes,"⁹⁸ the Court found no *inherent* inconsistency between a claim for SSDI benefits and a suit for reinstatement under the ADA.⁹⁹ The Court found "too many situations in which an SSDI claim and an ADA claim can

93. See Diller, *Dissonant Disability Policies*, *supra* note 64, at 1038-39.

94. See *id.* at 1017-19, 1044-45.

95. See, e.g., *Rascon v. U.S. W. Communications*, 143 F.3d 1324, 1332 (10th Cir. 1998); *Griffith v. Wal-Mart Stores*, 135 F.3d 376, 381-83 (6th Cir. 1998); *Swanks v. Wash. Metro. Area Transit Auth.*, 116 F.3d 582, 586-87 (D.C. Cir. 1997).

96. 526 U.S. 795 (1999).

97. *Id.* at 797-98.

98. *Id.* at 802.

99. *Id.*

comfortably exist side by side."¹⁰⁰ As disability rights advocates had urged, the Court observed that the SSDI application process does not take account of the possibility of reasonable accommodation,¹⁰¹ that people with per se disabilities under the SSDI regulations need not show an actual inability to work;¹⁰² that under work incentive programs "the SSA sometimes grants SSDI benefits to individuals who not only can work, but are working;"¹⁰³ and that "the nature of an individual's disability may change over time,"¹⁰⁴ making an individual who could not work when he applied for SSDI benefits capable of working at the time of her ADA suit.¹⁰⁵

Although it rejected any strong presumption of inconsistency between disability benefits applications and ADA claims, the *Cleveland* Court did believe that "a plaintiff's sworn assertion in an application for disability benefits that she is, for example, 'unable to work' will appear to negate an essential element of her ADA case—at least if she does not offer a sufficient explanation."¹⁰⁶ Accordingly, it held that a plaintiff who has made such a statement must provide an "explanation of any apparent inconsistency with the necessary elements of an ADA claim"¹⁰⁷—an explanation "sufficient to warrant a reasonable juror's concluding that, assuming the truth of, or the plaintiff's good-faith belief in, the earlier statement, the plaintiff could nonetheless 'perform the essential functions' of her job, with or without 'reasonable accommodation.'"¹⁰⁸ But the Court suggested that such explanations could be readily found. It noted that the plaintiff's Supreme Court brief "explain[ed] the discrepancy between her SSDI statements that she was 'totally disabled' and her ADA claim that she could 'perform the essential functions' of her job."¹⁰⁹ The "totally disabled" statement, according to the plaintiff, was "made in a forum which does not consider the effect that reasonable workplace accommodations would have on the

100. *Id.* at 803.

101. *Id.*

102. *Id.* at 804.

103. *Id.* at 805.

104. *Id.*

105. *Id.*

106. *Id.* at 806.

107. *Id.* at 807.

108. *Id.*

109. *Id.*

ability to work” and was in any event accurate “in the time period in which [it was] made.”¹¹⁰ Without suggesting that these assertions failed to offer sufficient explanation for the apparent inconsistency, the Court remanded the case to afford the parties “opportunity in the trial court to present, or to contest, these explanations, in sworn form where appropriate.”¹¹¹

3. *The Cleveland Aftermath*

Echoing a common sentiment, Matthew Diller predicted in 2000 that the *Cleveland* decision “should put an end to the widespread practice of barring disability benefit recipients from bringing cases under Title I of the ADA.”¹¹² Unfortunately, that prediction has not come true. Two years after the *Cleveland* decision, the lower courts appear to be responding to ADA plaintiffs who simultaneously seek disability benefits in much the same way they responded before the Supreme Court spoke. Many post-*Cleveland* courts, like some pre-*Cleveland* courts, have been particularly willing to entertain plaintiffs’ explanations of the apparent inconsistencies between their applications for disability benefits and their ADA claims.¹¹³ But many others (probably the majority)¹¹⁴ appear nearly as unwilling to credit those explanations as they were before *Cleveland*. In *Motley v. New Jersey State Police*,¹¹⁵ for example, the Third Circuit reaffirmed its earlier *McNemar* “judicial estoppel” rule five months after the Supreme Court issued the *Cleveland* opinion

110. *Id.*

111. *Id.*

112. Diller, *Judicial Backlash*, *supra* note 13, at 30.

113. See, e.g., *Giles v. Gen. Elec. Co.*, 245 F.3d 474, 484-85 (5th Cir. 2001), *amended by* 245 F.3d 474 (5th Cir. 2001); *EEOC v. Stowe-Pharr Mills, Inc.*, 216 F.3d 373, 379 (4th Cir. 2000); *Norris v. Sysco Corp.*, 191 F.3d 1043, 1048-49 (9th Cir. 1999).

114. I will describe some of the leading cases in the text and footnotes that follow. See *infra* notes 115-50 and accompanying text. To get a very rough sense of the overall picture in the lower courts, I conducted a Westlaw search in November 2002 that revealed seventy post-*Cleveland* cases in which federal courts ruled (either as a sole basis for decision or as an alternative holding) on the effect of a public or private disability benefits application on a subsequent ADA claim. In forty-one of those cases (58.5% of the total number of cases), the court concluded that statements on the benefits application foreclosed the plaintiff’s ADA claim. Because this rough-cut analysis is limited to cases available on Westlaw, it likely overstates plaintiffs’ rate of success. See Colker, *Windfall for Defendants*, *supra* note 1, at 105.

115. 196 F.3d 160 (3d Cir. 1999), *cert. denied*, 529 U.S. 1087 (2000).

that supposedly put an end to such applications of judicial estoppel.¹¹⁶ In the closest that the court came to acknowledging any tension at all between *McNemar* and *Cleveland*, it suggested that *McNemar* had simply been misconstrued as imposing a per se rule of judicial estoppel regardless of the facts of the case.¹¹⁷ "To the extent that *McNemar* [was] unclear on this issue," the court sought merely to "clarify" that "consistent with *Cleveland* and the rule that every case should be decided on its individual facts, there *may be circumstances* in which a party may pursue a successful ADA claim even after he has applied for disability benefits."¹¹⁸

Although it acknowledged that there "may be [such] circumstances,"¹¹⁹ the Third Circuit did not find them in *Motley* itself. Motley, the plaintiff, was a New Jersey state police detective who had been severely injured in a work-related incident in 1990.¹²⁰ He continued to work for three years after the incident "and received exemplary performance evaluations and several commendations."¹²¹ But because of his injuries the police department did not permit him to take the physical examination that was required of any candidate for promotion.¹²² Accordingly, the department deemed Motley ineligible for promotion in each of three successive years: 1991, 1992, and 1993.¹²³ After being passed over the third time, he applied for and received a disability pension from the state in 1993. Motley's benefits application stated that "he was 'permanently and totally disabled' as a result of the events of January 1990."¹²⁴ On the basis of Motley's "detailed description of his injuries and their impact on his ability to work,"¹²⁵ the medical board that reviewed his application deemed Motley "totally and permanently incapacitated for state police officer duties."¹²⁶ Although Motley's statements, like Cleveland's, "were made in a

116. *Id.* at 165, 167.

117. *Id.* at 163.

118. *Id.* at 164 n.4 (emphasis added).

119. *Id.*

120. *Id.* at 162.

121. *Id.* at 170 (Rendell, J., dissenting).

122. *Id.* at 162; *id.* at 171 (Rendell, J., dissenting).

123. *Id.* at 162-63.

124. *Id.* at 166.

125. *Id.*

126. *Id.*

forum which does not consider the effect that reasonable workplace accommodations would have on the ability to work,"¹²⁷ the Third Circuit held that "simply averring that the statutory schemes differ is not enough to survive summary judgment in light of *Cleveland*."¹²⁸ The dissent offered an additional explanation—that Motley applied for a disability pension only after the police department, because of his disability, refused on three occasions even to consider him for promotion notwithstanding his continued outstanding performance.¹²⁹ Although the dissent did not phrase it this way, the department's conduct amounted to something like a constructive discharge—conduct that Motley sought to challenge in his ADA claim.

Motley is hardly unusual. Like the *Motley* court, a number of other lower courts appear to believe that the only kind of disability benefits claims that are compatible with ADA suits are those that consist of "a mere blanket statement of complete disability checked on a box in order to obtain ... benefits."¹³⁰ When the plaintiff's benefits application is "supported by ... additional statements concerning the type and extent of his injuries,"¹³¹ those courts are inclined to find a conflict with the subsequent ADA claim—even if the descriptions of the injuries make no reference to possible accommodations.¹³²

Indeed, post-*Cleveland* cases have precluded ADA claims even where the plaintiff made only quite general assertions of inability to work on her benefits application,¹³³ and even in cases in which the

127. *Cleveland*, 526 U.S. at 807. The majority opinion in *Motley* said that the state pension finding "presumably took the fundamental job requirements for state police officers, along with reasonable accommodations such as light duty, into consideration." *Motley*, 196 F.3d at 166. But the dissenting judge persuasively explained that such a "presumption [was] unfounded, and the majority provide[d] no authority for its conclusion." *Id.* at 171 n.8 (Rendell, J., dissenting). On the face of it, the New Jersey statutory provision under which Motley received his disability pension indicates that the possibility of reasonable accommodation is *not* taken into account. *See id.*

128. *Motley*, 196 F.3d at 166.

129. *See id.* at 171 (Rendell, J., dissenting).

130. *Id.* (Rendell, J., dissenting).

131. *Id.* at 167.

132. *See, e.g., Feldman v. Am. Mem'l Life Ins. Co.*, 196 F.3d 783, 791 (7th Cir. 1999).

133. *See, e.g., Hrobowski v. Runyon*, No. 97C 5608, 2001 WL 290193, at *4 (N.D. Ill. March 16, 2001) ("Plaintiff's sworn assertion in her application for disability benefits that she is unable to work negates her contention in this case that she can (or could) nevertheless perform the essential functions of her job.").

plaintiff identified specific reasonable accommodations for which the disability benefits process failed to account.¹³⁴ The Eighth Circuit's decision in *Lane v. BFI Waste Systems*¹³⁵ provides a good example. While employed by BFI, Lane was injured in an automobile accident in August 1996.¹³⁶ Lane took a medical leave to recover, and his doctor cleared him to return to work in November 1996.¹³⁷ When Lane sought to return, BFI initially offered him a job as a route auditor—a position he had previously held.¹³⁸ But the employer's physician determined in December 1996 that Lane would be unable, because of his injuries, to climb in and out of large garbage trucks while performing the duties of that position.¹³⁹ "Mr. Lane requested the use of the [company's] pick-up truck so he would not have to climb in and out of the large garbage trucks."¹⁴⁰ Lane previously had used a pick-up truck when he held the route auditor position, "but BFI informed him that the pick-up truck was no longer available."¹⁴¹ Subsequently, but still in December 1996, Lane requested that he be reassigned to an open dispatcher position in another district, but the company refused on the basis of a policy of filling dispatcher positions with employees who had previously served in the same district.¹⁴² On unpaid leave, Lane applied for SSDI benefits in March 1997 and ultimately received them.¹⁴³ BFI formally terminated him in December 1997.¹⁴⁴

Lane subsequently filed an ADA suit against BFI. The district court granted summary judgment to the defendant on numerous

134. See, e.g., *Martini v. Boeing Co.*, 238 F.3d 429 (9th Cir. 2000) (unpublished table decision), at 2000 WL 1367919, at *1 (holding that although the plaintiff in 1991 "qualified his SSDI application with statements that he believed he could be employed with various accommodations," his statement in 1996 that he "had been totally disabled and unable to work for the entire six years after he resigned from Boeing" was "unqualified and obviously conflicts with the claim of employment discrimination"); *Fields v. St. Bernard Parish Sch. Bd.*, No. Civ. A. 99-3396, 2000 WL 1560012, at *7 (E.D. La. Oct. 16, 2000) (reaching similar conclusions).

135. 257 F.3d 766 (8th Cir. 2001).

136. *Id.* at 768.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at 768, 770.

143. *Id.* at 768.

144. *Id.*

grounds, but the Eighth Circuit found the inconsistencies between Lane's SSDI application and his ADA claim dispositive.¹⁴⁵ Without quoting any specific statement in the SSDI application, the appellate court held that Lane "failed to address the discrepancy between his assertion that he was able to perform the essential functions of the dispatcher position and his claim of disability in his social-security application."¹⁴⁶ But the explanation was obvious: For all that appears from the court's opinion, Lane had consistently maintained since December 1996 that he could perform the auditor job with accommodation, and that he could perform the dispatcher job if the company would accommodate him by letting him transfer into it. The company simply refused to provide the requested accommodations. It was that denial of accommodation that left Lane unable to perform his previous job—and the SSDI application process assumes that other employers would not accommodate him either.¹⁴⁷ At the time Lane applied for SSDI benefits in March 1997, BFI had been refusing for three months to permit him to return to work; that he applied for those benefits nine months before BFI *formally* terminated him—a fact on which the court relied¹⁴⁸—is entirely beside the point.

My point is not that these lower courts have misread *Cleveland*. In fact, a fair argument can be made that they are being entirely faithful to that decision, though such an argument is difficult to sustain on the facts of a case like *Lane*. *Cleveland*, after all, required that plaintiffs explain the apparent inconsistency between their disability benefits applications and their subsequent assertion that they remain "qualified."¹⁴⁹ These cases simply hold that the plaintiff has failed to supply a sufficient explanation.

My point is that *Cleveland* seems to have changed very little. Many plaintiffs continue to be precluded from asserting ADA claims because of statements they earlier made on disability benefits applications—statements that are not, in principle, inconsistent with their ADA claims.¹⁵⁰

145. *Id.* at 768-69, 771.

146. *Id.* at 769.

147. *See Cleveland*, 526 U.S. at 803, 807.

148. *See Lane*, 257 U.S. at 770.

149. *Cleveland*, 526 U.S. at 806-07.

150. This result is particularly troubling because of the difficulty disabled former

4. *The Critique*

As with the definition-of-disability cases, the cases barring disability benefits recipients from asserting claims under the ADA have evoked significant criticism from academics who charge that those decisions reflect a "failure ... to fully embrace the concept of equality reflected in the ADA."¹⁵¹ In an important pre-*Cleveland* article, Matthew Diller argued that these cases demonstrate that courts persist in viewing disability "as a medically determined category that is inconsistent with work."¹⁵² By treating an assertion of "disability" as the equivalent to an admission of disqualification from work, the argument goes, these courts reveal their image of disability as inherently disqualifying. That view of disability, Diller argued, "misunderstand[s] the premises of the ADA," a statute with a "clear focus ... on reshaping societal institutions in order to change the social significance of disabilities" and make society appreciate that disability and work can readily go together.¹⁵³ Rather than viewing the ADA as a civil rights law, Diller has argued more recently, these cases show that many courts see the statute as a special benefit for people with disabilities—one that is unnecessary for those who "are already being 'taken care of' by the social welfare system."¹⁵⁴

employees may have in obtaining quality counsel—particularly in a timely enough fashion to provide advice regarding an application for disability benefits. Unadvised or poorly advised clients may, in filling out benefits applications, simply create a trap for themselves in their subsequent ADA litigation by failing to provide sufficient qualification to their assertions of disability. While high-quality counsel might be able to sidestep that trap in the subsequent litigation by providing sufficient explanation for apparent inconsistencies in the plaintiff's position, ADA plaintiffs are too often unable to retain such high-quality counsel. For an argument that ADA plaintiffs' remarkably low rate of success is largely attributable to poor lawyering, see Jeffrey A. Van Detta & Dan R. Gallipeau, *Judges and Juries: Why Are So Many ADA Plaintiffs Losing Summary Judgment Motions, and Would They Fare Better Before a Jury? A Response to Professor Colker*, 19 REV. LITIG. 505, 510-57 (2000).

151. Diller, *Judicial Backlash*, *supra* note 13, at 47-48; *see also* Burgdorf, *supra* note 31, at 551 ("Many inequities arise from decisions in which plaintiffs, who have represented that they are disabled while applying for disability benefits, are judicially estopped or otherwise precluded from contending that they are 'qualified' in the context of the ADA or Rehabilitation Act.").

152. Diller, *Dissonant Disability Policies*, *supra* note 64, at 1059.

153. *Id.*

154. Diller, *Judicial Backlash*, *supra* note 13, at 48.

C. Reasonable Accommodation Cases

Because so many courts have rejected ADA claims on threshold issues such as the definition of disability or the judicial estoppel doctrine without reaching the core question whether the defendant provided "reasonable accommodation" to the plaintiff, critics have not focused as much energy on challenging courts' interpretations of the "reasonable accommodation" requirement. But that does not mean that the courts that have reached the "reasonable accommodation" question have ruled in ways that are congenial to those who support the statute. To the contrary, disability rights advocates have found fodder for criticism in the courts' "reasonable accommodation" decisions as well.

Perhaps the best example is the Seventh Circuit's opinion in *Vande Zande v. Wisconsin Department of Administration*.¹⁵⁵ Whether because it was one of the earliest cases to flesh out the ADA's accommodation requirement, because of the stature of the author of the court's opinion (Judge Richard Posner), or because of the cogency of its analysis, *Vande Zande* has been extraordinarily influential.¹⁵⁶

Lori Vande Zande worked as a program assistant for Wisconsin's Department of Administration. She had paraplegia as a result of a spinal cord tumor, and the agency that employed her made several accommodations for her.¹⁵⁷ But the agency refused to make some

155. 44 F.3d 538 (7th Cir. 1995).

156. See, e.g., *Reed v. LePage Bakeries, Inc.*, 244 F.3d 254, 259 (1st Cir. 2001) (endorsing *Vande Zande's* interpretation of "reasonable accommodation"); *Monette v. Elec. Data Sys. Corp.*, 90 F.3d 1173, 1183 (6th Cir. 1996) (same). A Westlaw KeyCite search conducted on November 18, 2002, revealed 321 court opinions that have cited *Vande Zande*. Although the Supreme Court's opinion in *US Airways, Inc. v. Barnett*, 122 S. Ct. 1516 (2002), did not cite *Vande Zande*, it expressly relied on both the First Circuit's decision in *Reed*, a case that itself purported to follow the *Vande Zande* analysis, and the Second Circuit's decision in *Borkowski v. Valley Center School District*, 63 F.3d 131 (2d Cir. 1995) (discussed *infra* note 167), a case that applied a similar analysis to that of the *Vande Zande* court. See *US Airways*, 122 S. Ct. at 1523.

157. See *Vande Zande*, 44 F.3d at 544. The court emphasized the employer's efforts to accommodate Vande Zande, even going so far as to itemize them within the court's opinion:

As examples, in her words, "they paid the landlord to have bathrooms modified and to have a step ramped; they bought special adjustable furniture for the plaintiff; they ordered and paid for one-half of the cost of a cot that the plaintiff needed for daily personal care at work; they sometimes adjusted the plaintiff's

other accommodations that Vande Zande believed necessary to provide her with an equal workplace experience to that of her coworkers. Of particular relevance to my discussion, the agency refused to make a minor modification to the design of Vande Zande's workplace so that she could have access to the sink in the employee kitchenette in an office building that was constructed during her tenure.¹⁵⁸ While that building was still in the midst of construction, Vande Zande complained that the sink was to be placed thirty-six inches above the floor, out of the reach of a wheelchair user. If the sink were placed two inches lower, people who use wheelchairs would be able to reach it.¹⁵⁹

Because Vande Zande raised this issue with her supervisors before the kitchenettes were built, the sink could have been placed at an accessible height without inordinate expense. Plumbing had already been installed, so the state would have had to spend about \$150 to modify the plumbing if it placed a thirty-four-inch sink in the kitchenette on her floor; if it installed thirty-four-inch sinks in all of the kitchenettes in the new building, the state would have had to spend about \$2,000.¹⁶⁰ But the state refused to install any thirty-four-inch sinks in the kitchenettes. Instead, the agency informed Vande Zande that she could use the bathroom sink on her floor (which was thirty-four inches high) to perform any of the tasks for which other employees used the kitchenette sinks.¹⁶¹

Upholding the district court's grant of summary judgment to the state employer, the Seventh Circuit held that the state was not required to install the kitchenette sink at thirty-four inches.¹⁶² The court first considered the general standards for determining whether a proposed accommodation is "reasonable." Analogizing to

schedule to perform backup telephone duties to accommodate the plaintiff's medical appointments; they made changes to the plans for a locker room in the new state office building; and they agreed to provide some of the specific accommodations the plaintiff requested in her October 5, 1992 Reasonable Accommodation Request."

Id.

158. Although the events I discuss occurred after the ADA took effect, construction on the building began before the statute's effective date, so the stringent accessibility requirements the ADA imposes on newly constructed buildings did not apply. *Id.* at 545.

159. *Id.* at 545-46.

160. *See id.* at 546.

161. *Id.*

162. *Id.*

Judge Learned Hand's test laid out in *United States v. Carroll Towing*¹⁶³ for "reasonable care,"¹⁶⁴ the court concluded that the term "reasonable accommodation" requires some kind of balance between the costs of a proposed accommodation and its benefits.¹⁶⁵ Although the court emphasized that it did not intend to require plaintiffs to provide precise quantification of the costs and benefits of their proposals—or at least that it did not intend to require such a showing in every case¹⁶⁶—it concluded that some rough proportionality between cost and benefit was essential for an accommodation to be deemed "reasonable."¹⁶⁷ Any other approach, the court argued, would be inconsistent with the ADA's purpose of reducing the social costs of disabled persons' dependency: "The preamble actually 'markets' the Act as a cost saver, pointing to 'billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.' The savings will be illusory if employers are required to expend many more billions in accommodation than will be saved by enabling disabled people to work."¹⁶⁸

Vande Zande argued that "forcing her to use the bathroom sink for activities (such as washing out her coffee cup) for which the other employees could use the kitchenette sink stigmatized her as different and inferior."¹⁶⁹ Although eliminating that stigma at a one-time cost of \$150 would appear to satisfy a requirement of rough proportionality between cost and benefit, the Seventh Circuit disagreed. Characterizing the concept of stigma as "merely an epithet," the court held that an employer has no "duty to expend even modest amounts of money to bring about an absolute

163. 159 F.2d 169 (2d Cir. 1947).

164. *Vande Zande*, 44 F.3d at 542 (citing *Carroll Towing*, 159 F.2d at 173).

165. *Id.* at 542-43.

166. *Id.* at 542 ("It would not follow that the costs and benefits of altering a workplace to enable a disabled person to work would *always* have to be quantified, or even that an accommodation would have to be deemed unreasonable if the cost exceeded the benefit however slightly.") (emphasis added).

167. *Id.* at 542 ("[A]t the very least, the cost could not be disproportionate to the benefit."). For a roughly similar approach to "reasonable accommodation," though different in some details, see *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 136-40 (2d Cir. 1995). The Second Circuit held that "an accommodation is reasonable only if its costs are not clearly disproportionate to the benefits that it will produce." *Id.* at 138.

168. *Vande Zande*, 44 F.3d at 543 (quoting 42 U.S.C. § 12101(a)(9) (2000)).

169. *Id.* at 546.

identity in working conditions between disabled and nondisabled workers.”¹⁷⁰ Instead, “[t]he duty of reasonable accommodation is satisfied when the employer does what is necessary to enable the disabled worker to work in reasonable comfort.”¹⁷¹

Critics have attacked the *Vande Zande* decision for disregarding and indeed disparaging the statute’s basic purpose of eliminating stigmatic assertions of difference between people with and without disabilities. Lennard Davis has argued that Judge Posner’s opinion treats stigma as a mere emotional injury and fails to appreciate its sociological role in creating the disadvantage experienced by people with disabilities.¹⁷² Linda Hamilton Krieger has used Judge Posner’s reference to stigma as “merely an epithet” as evidence supporting the more general assertion that judges simply do not understand the principles on which the ADA was premised:

Whatever one may think about the ultimate merits of the *Vande Zande* case, stigma is not just an epithet. That a federal circuit court judge could characterize the concept in this way gives substance to Professor Hahn’s claim that the ADA’s crabbed interpretation derives in substantial part from judges’ failure to understand the connection between stigma, structural exclusion, and discrimination in the disability rights context.¹⁷³

Here, as in the definition-of-disability and judicial estoppel contexts, commentators charge the courts with failing to understand the “true” purposes of the statute.

170. *Id.*

171. *Id.*

172. See Lennard J. Davis, *Bending Over Backwards: Disability, Narcissism, and the Law*, 21 BERKELEY J. EMP. & LAB. L. 193, 206 (2000). I have previously emphasized the importance of stigma as a target of the ADA. See Bagenstos, *supra* note 22, at 436-45. For an endorsement of a cost-benefit approach to the ADA’s “reasonable accommodation” requirement like that set forth in *Vande Zande*, see J. HOULT VERKERKE, AN ECONOMIC DEFENSE OF DISABILITY DISCRIMINATION LAW 24 (1999) (University of Virginia School of Law Legal Studies Working Paper No. 99-14, 1999). For a challenge to Verkerke’s argument on the ground that he does not account for the broader dignitary goals of the ADA, see Stewart J. Schwab & Steven L. Willborn, *Reasonable Accommodation of Workplace Disabilities*, 44 WM. & MARY L. REV. 1197 (2003).

173. Krieger, *supra* note 8, at 518.

II. THE ADA AND THE WELFARE REFORM ARGUMENT

Do the sets of cases discussed above in fact represent a betrayal? Do they demonstrate that courts have failed to appreciate the principles upon which the statute is premised, and that judges have imposed their own views of disability on the statute? In an earlier article, I argued that the ADA is best interpreted as aiming to provide a stigmatized group whose members are likely to experience systematic social disadvantage with tools to challenge practices that deny them equal opportunities to participate in the full range of economic, civic, and political affairs of the community.¹⁷⁴ Following the familiar purposivist interpretive strategy,¹⁷⁵ I argued that courts should *impute* such a purpose to the ADA for several reasons: Such a purpose fits the general structure of the statute, it connects to the goals of the disability rights movement that formed an important impetus for the passage of the statute, and it coheres with the most attractive understanding of the normative basis for civil rights law generally.¹⁷⁶ When the ADA's provisions are interpreted in the light of the general purpose I would attribute to it, many (though not all) of the cases discussed above appear to have been decided incorrectly.¹⁷⁷

But critics do not contend merely that the cases are wrongly decided because they disregard the most normatively attractive basis for interpreting the statute's provisions. By arguing that courts have failed to appreciate the principles on which the ADA was premised, and that judges have improperly imposed their own views of disability on the statute, the critics suggest that the ADA was animated by a single set of principles that can be uncontroversially identified as a matter of simple historical fact. For two reasons, one theoretical and one historical, I cannot agree. First,

174. See Bagenstos, *supra* note 22, at 445-66.

175. The most prominent discussions of that method of interpretation appear in RONALD DWORKIN, *LAW'S EMPIRE* 337-47 (1986) and HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1374-80 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

176. See Bagenstos, *supra* note 22, at 452-66.

177. In my earlier article on the *Sutton* trilogy, I argued that the Court's mitigating-measures ruling was correct, as was the bottom-line result in *Sutton*. I disagreed, however, with much of the Court's reasoning on the substantial-limitation-in-work issue in *Sutton* and argued that *Murphy* was wrongly decided. *Id.* at 495-519.

the notion that a statute—particularly one as complex and wide-ranging as the ADA—can have a single *actual* intent that can be identified as a historical matter is largely incoherent. Members of Congress may have widely varying (and perhaps even conflicting) reasons for voting in favor of any particular piece of legislation, and social choice theory demonstrates that there is no coherent basis for choosing which of these “is” the actual reason for the legislation.¹⁷⁸

Second—and my crucial point here—ADA defenders have tended to ignore the fact that, at the time the statute was proposed and debated in Congress, many of the statute’s strongest supporters justified the statute in terms that are quite compatible with the cases that ADA defenders now criticize. In particular, those supporters sold the statute as a means of avoiding the social costs of dependency by moving people off of benefits rolls and into the workforce. I call this the “welfare reform argument.” When considered in the light of *that* purpose, the cases discussed above begin to make a great deal of sense.

In this Part, I first trace the welfare reform argument in the debates that led to passage of the ADA. By examining the official reports that led to the introduction of the ADA, the legislative history of the bill as introduced, and news coverage from the time the statute was considered, I show in Part III.A that the welfare reform argument formed a significant part of the public justification for the statute as ultimately enacted. In Part III.B, I reconsider the cases discussed above and demonstrate that those cases—as well as

178. See, e.g., Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 875 (1930) (“If by the purpose of a statute we mean the actual purpose entertained by those who framed it ... this purpose is practically undiscoverable and would be irrelevant if discovered.”); Kenneth A. Shepsle, *Congress is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 INT’L REV. L. & ECON. 239 (1992) (“Legislative intent is an internally inconsistent and self-contradictory expression.”). Some have taken this point as an argument against any effort to construe a statute by attributing a purpose to it (and against the related practice of consulting legislative history as an aid to interpretation). See, e.g., Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POLY 61, 68 (1994); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 684-86 (1997). But one can accept the idea that it is incoherent to purport to identify any single purpose that “actually” motivated passage of a statute without abandoning the conventional view that judges should interpret a statute by *attributing* to it a “purpose” based on concerns of doctrinal coherence and normative attractiveness. See, e.g., DWORKIN, *supra* note 175, at 313-75 (criticizing efforts to identify legislators’ *true* intent or purpose but arguing that courts should attribute a purpose to the statute that puts “the political history including and surrounding that statute in better light”).

restrictive decisions that courts have issued on other ADA questions—are largely consistent with a welfare reform understanding of the ADA.

I offer two cautionary notes. First, I do not mean to suggest that the welfare reform argument was the only, or even the predominant, justification offered by the ADA's supporters. At every stage of the legislative process—from the government commission reports that first suggested a comprehensive disability civil rights bill to the legislative hearings and debates in Congress—supporters also (and probably primarily) urged passage of the ADA on dignitary grounds of equal opportunity and full citizenship.¹⁷⁹ But what is often obscured is that those dignitary arguments were not the only arguments for the ADA. As the unfortunate length of the discussion that follows should indicate, the more green-eyeshaded welfare reform argument formed a major part of the public justification for the statute.¹⁸⁰

Second, I should emphasize that my goal here is not to offer any final defense of the restrictive interpretations that have been made by courts. Rather, my goal is to suggest a coherent principle, consistent with a plausible account of the purposes of the ADA, that could justify those interpretations. Most scholars who criticize current interpretations of the ADA charge judges with disregarding

179. In his speech supporting passage of the conference report on the ADA, Senator Harkin (the major Senate sponsor of the ADA bill—and perhaps the most insistent welfare reform advocate, *see infra* notes 202-05, 208, and accompanying text) began by proclaiming, “[H]istory is going to show that in 1990, 26 years after the Civil Rights Act of 1964, 43 million Americans with disabilities, gained freedom, dignity, opportunity—their civil rights.” 136 CONG. REC. 17, 366 (1990) (statement of Sen. Harkin). He went on to argue that the ADA constituted the logical next step—after the abolition of slavery, the grant of suffrage to women, the passage of the Civil Rights Act of 1964, and the enactment of the Age Discrimination in Employment Act three years later—in our Nation's unfinished effort to “live[] up to the words of the Declaration of Independence and the Bill of Rights.” *Id.* There are countless examples of similar statements throughout the legislative history of the ADA. I make no attempt to catalog them all here, however, because the dignitary basis of the ADA is well understood; my aim is to show that the welfare reform argument was also important to obtaining passage of the statute.

180. I do not mean the term “public justification” in any formal way, as does Bernard W. Bell, *Legislative History Without Legislative Intent: The Public Justification Approach to Statutory Interpretation*, 60 OHIO ST. L.J. 1, 6 (1999) (arguing that statutes should be construed in accordance with their text and their “public justification” as reflected in “committee reports and floor manager statements”). I mean instead to refer more generically to the arguments offered by the ADA's proponents in public fora in which they sought to obtain support for the proposed legislation.

the statute's "true" purposes and substituting the judges' own preferred responses to disability. These scholars argue that the restrictive interpretations of the ADA can be explained by the difficulty of implementing radically norm-changing legislation—particularly where the legislation precedes the laying of a groundwork in social attitudes for the new norms.¹⁸¹ In short, these scholars explain courts' restrictive interpretations of the ADA as a simple matter of ignorance or, worse, backlash. Although some of these scholars refer to instances in which members of Congress used the welfare reform argument to justify the ADA, they do so only in passing and treat the argument as if it was not a meaningful part of the statute's public justification.¹⁸²

I do not doubt that both ignorance of and backlash against the ADA exist. But the welfare reform argument may provide a more fruitful lens through which to view the restrictive decisions challenged by scholars. At the time the ADA was being considered, the welfare reform argument for the statute was widely disseminated and promoted by disability rights activists themselves. To the extent that today's restrictive decisions represent the full flowering of that argument, the problem may lie less in a simple backlash response than in the inherent limitations of the welfare reform argument—and ultimately of the ADA itself.

181. Linda Krieger's work provides an excellent example. See Krieger, *supra* note 8, at 497-520.

182. See, e.g., Diller, *Dissonant Disability Policies*, *supra* note 64, at 1031-32 (arguing that "even at the inception of the ADA, hints of the tensions between the new law and the disability benefit programs could be discerned," and citing several invocations of the welfare reform argument during consideration of the statute, but not treating that argument as one of the major arguments asserted on the statute's behalf); Diller, *Judicial Backlash*, *supra* note 13, at 36 (stating, in a single sentence, that "[b]ecause it was anticipated that civil rights protection would enable people to leave the disability benefits rolls, the ADA was even promoted as a means of decreasing the extent of redistribution in our society").

Writing before any of the cases discussed in Part I were decided, Jonathan Drimmer criticized a century of disability law—including the ADA—for an excessive focus on economic efficiency rather than civic inclusion. Jonathan C. Drimmer, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities*, 40 UCLA L. REV. 1341, 1397-1400 (1993). Although Drimmer's piece is certainly consistent with a critique of the welfare reform case for the ADA, he does not treat the point in any detail, nor does he acknowledge the substantial role of disability rights advocates themselves in pressing that case.

A. *The Welfare Reform Argument and the ADA*

As Judge Posner pointed out in *Vande Zande*, the ADA “markets” itself as a cost-saving measure.¹⁸³ The congressional findings that introduce the statute refer to a number of statutory purposes. Most generally, they state that “the Nation’s proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals.”¹⁸⁴ The findings make clear, however, that at least one motivation for the statute was a concern with the high fiscal cost of keeping people with disabilities on disability benefits rolls. The findings state that “the continuing existence of unfair and unnecessary discrimination and prejudice” against people with disabilities “costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.”¹⁸⁵

That was not a passing or peripheral remark. Rather, during the period in which the ADA was proposed, considered, and enacted, supporters of the bill frequently invoked the costs of dependency as a major justification for antidiscrimination legislation for people with disabilities. As I have noted, the welfare reform argument was hardly the only justification offered for the statute.¹⁸⁶ But that argument was repeatedly articulated throughout the process by the entire spectrum of ADA supporters: members of Congress (both Republicans and Democrats, major sponsors and more peripheral supporters), disability organizations, disability rights and civil rights advocates, and individuals with disabilities. And these supporters articulated the argument in a wide range of fora: official reports, testimony at congressional hearings, statements on the floor of Congress, and in the broader media. A fair reading of the relevant history demonstrates that the welfare reform argument formed a major part of the public justification for the ADA.

183. *Vande Zande v. Wis. Dep’t of Admin.*, 44 F.3d 538, 543 (7th Cir. 1995).

184. 42 U.S.C. § 12101(a)(8) (2000). As I will discuss in detail in Part III, the statutory goal of “independent living” itself suggests a skepticism toward dependency-inducing reliance on benefits programs.

185. *Id.* § 12101(a)(9).

186. See *supra* notes 179-80 and accompanying text.

1. Early Signs: The Commission on Civil Rights and National Council on the Handicapped Reports

Enactment of the ADA represented the culmination of nearly two decades of official activity, beginning with enactment of the Rehabilitation Act of 1973.¹⁸⁷ Although that statute was largely devoted to an expansion of then-existing vocational rehabilitation programs, it included two novel features: a requirement that federal agencies and federal contractors take affirmative action to hire people with disabilities and advance them in employment; and a prohibition on disability-based discrimination by recipients of federal financial assistance.¹⁸⁸ The 1973 enactment of the Rehabilitation Act, and the Department of Health, Education, and Welfare's promulgation in 1977 of regulations to implement the antidiscrimination requirements of Section 504 of that Act, constituted the first significant federal initiative to guarantee civil rights to people with disabilities.¹⁸⁹

In the 1980s, two federal commissions (the Commission on Civil Rights and the National Council on the Handicapped) began to lay the groundwork for expansion of federal disability discrimination law to all of the domains covered by race discrimination law. In particular, these commissions sought to extend disability discrimination law to the hiring practices of private employers and the treatment of clients and customers by places of public accommodation—areas left largely unregulated by then-existing law. In making their case for expansion of civil rights law, both commissions relied significantly on the argument that the then-current system promoted costly dependency. Broader antidiscrimination laws, the commissions argued, would render many disability benefits expenditures unnecessary by guaranteeing employment opportunities for people who were previously forced to depend on public assistance. The Civil Rights Commission's 1983 report,

187. Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (1973) (codified as amended at 29 U.S.C. §§ 701-796 (2000)).

188. See 29 U.S.C. § 791 (2000) (applying to federal agencies); *id.* § 793 (applying to federal contractors); *id.* § 794 (applying to recipients of federal financial assistance).

189. The authoritative account of the drafting and enactment of Section 504 of the Rehabilitation Act, and of the drafting and promulgation of the statute's implementing regulations, is RICHARD K. SCOTCH, *FROM GOOD WILL TO CIVIL RIGHTS* (2d ed. 2001).

Accommodating the Spectrum of Individual Abilities, offered an elaborate defense of disability discrimination law and sought to show how that body of law reflected an application of the same basic principles as race discrimination law.¹⁹⁰ While establishing that point, the Commission apparently deemed it necessary to provide an extensive discussion of what it labeled "*The Costs and Benefits of Full Participation*."¹⁹¹ The report noted that President Kennedy had justified a more integrationist approach to mental disabilities in part by "emphasiz[ing] the economic waste resulting from previous governmental policies toward mental health and mental retardation."¹⁹² It also pointed to "numerous authorities [who] have argued that economic advantages to society support the objective of handicapped people's full participation."¹⁹³ After reviewing the costs of various efforts to integrate people with disabilities into the activities of the community—including the costs of architectural barrier removal and other accommodations—the Commission concluded that such efforts would more than pay for themselves through "large savings in reduced expenditures of public benefits programs, such as social security disability insurance, supplemental security income (SSI), and State welfare, home relief, and aid to families with dependent children."¹⁹⁴ Summarizing its conclusion, the report stated that "although the costs of integrating handicapped people into the mainstream of society may be substantial in some contexts, they are more than offset by the benefits that accrue to society."¹⁹⁵

The National Council on the Handicapped picked up the same theme in its 1986 report, *Toward Independence*.¹⁹⁶ The centerpiece of *Toward Independence* was its proposal that Congress enact a comprehensive law, "perhaps under such a title as 'The Americans

190. See U.S. COMM'N ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES (1983).

191. *Id.* at 69.

192. *Id.* at 72.

193. *Id.* at 73.

194. *Id.* at 81 n.88.

195. *Id.* at 81.

196. See NAT'L COUNCIL ON THE HANDICAPPED, TOWARD INDEPENDENCE (1986). Two years later, the renamed National Council on Disability issued a new report that included the text of the proposed Americans with Disabilities Act, which was introduced as the first ADA bill in Congress in 1988. See NAT'L COUNCIL ON DISABILITY, ON THE THRESHOLD OF INDEPENDENCE (1988).

with Disabilities Act of 1986," that would "requir[e] equal opportunity for individuals with disabilities, with broad coverage and ... clear, consistent, and enforceable standards prohibiting discrimination on the basis of handicap."¹⁹⁷ On the first page of the executive summary and again on the first page of the body of the report, the council highlighted the massive costs of disability benefits programs:

Our nation's current annual Federal expenditure on disability benefits and programs exceeds \$60 billion. This report proposes some fiscally responsible approaches for spending disability-related dollars more prudently and productively. The Council is strongly convinced that present and future costs of disability to the Nation are directly related to the degree of success we attain in reducing existing barriers, both structural and attitudinal, and in providing appropriate services to individuals with disabilities so that they may realize their full potential and become more independent and self-sufficient.¹⁹⁸

The Council thus argued that measures to reduce the dependency of people with disabilities, such as the proposed comprehensive civil rights law, would reduce those costs to the public.¹⁹⁹

2. The Welfare Reform Argument in the Congressional Hearings: Members of Congress Build the Case

When they first introduced the National Council on Disability's proposed legislation in Congress in 1988,²⁰⁰ the bill's principal House and Senate sponsors echoed the Council's cost-of-dependency

197. NAT'L COUNCIL ON THE HANDICAPPED, TOWARD INDEPENDENCE 18 (1986).

198. *Id.* at vi; see also *id.* at 1.

199. As the Council's official history of the effort to enact the ADA makes clear, the emphasis on this argument was wholly intentional. See NAT'L COUNCIL ON DISABILITY, EQUALITY OF OPPORTUNITY: THE MAKING OF THE AMERICANS WITH DISABILITIES ACT 52-55 (1997) (describing efforts to make the case that civil rights protections for people with disabilities would save the government money).

200. In 1988, after Congress had failed to act on the central recommendation of its 1986 *Toward Independence* report, the National Council on Disability issued a new report. See NAT'L COUNCIL ON DISABILITY, ON THE THRESHOLD OF INDEPENDENCE (1988). That report included the complete text of a proposed Americans with Disabilities Act. *Id.* at 26-38. The text of the Council's 1988 proposal formed the basis for the ADA bills introduced in the House and Senate that year.

theme. Tony Coelho, principal sponsor in the House, spoke of the problem in somewhat general terms: "Our entire society bears the economic burdens of this prejudice: dependency is expensive. It increases benefit entitlements and decreases productive capacity sorely needed by the American economy."²⁰¹ Tom Harkin, the principal Democratic sponsor in the Senate, was one of the most insistent proponents of the welfare reform argument throughout the bill's two-year process of consideration. In his statement on the introduction of the bill in 1988, Harkin described the "grim effects" of disability prejudice as including "unnecessary dependency costing taxpayers and private employers billions of dollars on an annual basis."²⁰²

In the hearings on the bill over the next two years, supporters repeatedly referred to the high price of disability benefits programs.²⁰³ These supporters frequently pointed to the National Council on the Handicapped's estimate that such programs cost the federal government approximately \$60 billion per year.²⁰⁴ Some

201. 134 CONG. REC. 9605 (1988) (statement of Rep. Coelho). Major Owens and George Miller, liberal Democratic representatives who strongly supported the bill, made similar statements on the House floor near the time the ADA was introduced. *See* 134 CONG. REC. 9785 (1988) (statement of Rep. Owens) ("Discrimination is a significant reason why many people with disabilities are trapped in situations of dependency—dependency which costs our Nation dearly, both in lost potential productivity and in dollars spent for support programs."); 134 CONG. REC. 9664 (1988) (statement of Rep. Miller) (arguing that opponents of the ADA should "consider the billions of dollars that result from increased dependency, demoralization, and lost opportunities").

202. 134 CONG. REC. 9382 (1988) (statement of Sen. Harkin).

203. In addition to the excerpts discussed below, *see Americans with Disabilities Act of 1989: Hearing on S.933 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Res.*, 101st Cong. 193 (1989) [hereinafter *Senate Labor Hearings*] (statement of Sen. Harkin) ("The ADA will save the Government and society billions of dollars by getting people off the dependency of social welfare, and into jobs, into restaurants, into shopping centers, and into community activities."); 134 CONG. REC. 9605 (1988) (statement of Rep. Coelho) ("Our entire society bears the economic burdens of this prejudice: dependency is expensive. It increases benefit entitlements and decreases productive capacity sorely needed by the American economy.").

204. *See Americans with Disabilities Act of 1989: Hearing on H.R. 2273 Before the Subcomm. on Select Educ. of the House Comm. on Educ. and Labor*, 101st Cong. 31 (1989) (statement of Rep. Owens) ("I do not think the American people know how much they are paying right now in terms of subsidies for people with disabilities; how we probably will decrease rather than increase the costs" and referring to estimate that "taxpayers are now paying about \$57 billion on taking care of people with disabilities."). Former Senator Weicker similarly stated:

Not only is this bill the appropriate humanitarian step for the 101st Congress,

supporters pointed to still larger estimates of the total cost of programs that "maintain[] the dependency of the disabled."²⁰⁵

At the hearings, the bill's sponsors argued that the significant funds spent on disability benefits programs "would be available for other national priorities if the disabled, who are barred from working because of the barriers of discrimination, were able to lead productive lives."²⁰⁶ Several supporters—including then-Representative Coelho, a Democratic representative from California who has epilepsy—set up antidiscrimination protections (including

the Americans with Disabilities Act makes good economic sense as well. Right now, we have a system that is based on dependence, with over \$57 billion a year in Federal funds going for social insurance benefits for disabled persons. The economic return to society when people get off the welfare rolls and become employed cannot be overstated. With two-thirds of disabled Americans unemployed, and 82 percent of those persons willing to give up benefits if they could work full-time, it can only mean a reduction in welfare dependency if those persons have real opportunities to participate in the workforce.

Senate Labor Hearings, *supra* note 203, at 216 (statement of Sen. Weicker); *see also id.* at 230 (statement of Sen. Harkin) ("Thus, ending discrimination will have the direct and immediate effect of reducing the federal government's expenditures of over \$60 billion dollars per year on disability benefits and programs premised on dependency. It will also have the immediate effect of making people with disabilities into consumers and taxpayers.").

Sandra Swift Parrino, then the Chair of the National Council, testified at the hearings on the ADA and reaffirmed the points her commission had made in its report. *See Joint Hearing on H.R. 2273, the Americans with Disabilities Act of 1989: Hearing on H.R. 2273 Before the Subcomm. Select Educ. and Employment Opportunities of the House Comm. on Educ. and Labor*, 101st Cong. 70 (1989) [hereinafter *House Select Educ. & Employment Hearings*] (statement of Sandra Parrino). Ms. Parrino stated:

ADA is critically important because its provisions are shaped to break the chains that bind many of the millions of persons with disabilities into a bondage of unjust, unwanted dependency on families, charity and social welfare. This dependency is a major and totally unnecessary contributor to public deficits and private expenditures.

Id. (statement of Sandra Parrino); *see also Americans with Disabilities Act of 1988: Joint Hearing on S. 2345 Before Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources and the Subcomm. on Select Educ. of the House Comm. on Educ. and Labor*, 100th Cong. 27-28 (1988) (statement of Sandra Parrino).

205. *Americans with Disabilities Act: Hearing Before the House Comm. on Small Bus.*, 101st Cong. 5 (1990) [hereinafter *House Small Bus. Hearings*]; *see also House Select Educ. & Employment Hearings*, *supra* note 204, at 23 (statement of Rep. Hoyer) (stating that "our Nation is spending almost \$170 billion on maintaining the dependency of the disabled"); *see Senate Labor Hearings*, *supra* note 204, at 30 (statement of Sen. Harkin) (stating that "we are spending about \$75.2 billion a year Federal cost for dependency programs for the disabled, \$75.2 billion a year" but that "there are 8.2 million people with disabilities who would like to work" and thus "give up their Government benefits").

206. *House Select Educ. & Employment Hearings*, *supra* note 204, at 23 (statement of Rep. Hoyer).

the requirement of reasonable accommodation) as an opposed alternative to benefits programs. Coelho's testimony on this point deserves to be quoted at length:

And all we are asking for is that opportunity to be productive, to be able to get on a bus, Senator Hatch, and to be able to go to work. We are not looking for welfare. We are not looking for something that other people do not have. We just want an opportunity to be able to live and be able to have an opportunity to work and to be able to go to that job and come back home and to be able to have families and to live like everybody else in this great country. Do not deny us the opportunity to be productive Americans, to be productive citizens. That is all we ask.

We know that there is going to have to be accommodations to give us our basic civil rights. We know that. We understand that. There is a cost involved. But isn't there also a cost involved with us not being able to exercise our rights? There is a tremendous cost to the Government right now in maintaining a lot of us with disabilities, because we do not have our basic rights to go out and be productive. We would rather be productive citizens, but we need your help to do it.²⁰⁷

Senator Harkin in particular emphasized the cost-of-dependency issue during the hearings in several ways. He used the facts of the lives of individual people with disabilities in an attempt to personalize the costs of keeping them on disability benefits programs.²⁰⁸ He also invited disability policy analyst Edward Berkowitz to provide an extensive delineation of dependency costs.

207. *Senate Labor Hearings*, *supra* note 203, at 7 (statement of Rep. Coelho); *see also House Select Educ. & Employment Hearings*, *supra* note 204, at 131-32 (statement of Rep. Rahall) (tallying the costs "America's taxpayers have been paying to keep the disabled out of our workforce," including "billions of dollars for food, clothing, shelter, medical and other basic services so that disabled persons would be kept on welfare and out of everybody's way").

208. At one point in the hearings, for example, Senator Harkin stated:

If we use Danny as a case study, I'll show you the cost of dependency. If Danny's parents had taken the advice of their doctor, and put Danny in an institution, Danny's mother thinks that he would still be in an institution today. Today, it costs \$200 per day to be in an institution. If Danny lived in an institution for his entire life, let's say for 65 years, the cost would be \$4,745,000. Danny wants to work and live in his own apartment. Let's give him and other persons with disabilities that chance by passing the ADA.

Senate Labor Hearings, *supra* note 203, at 232-33 (statement of Sen. Harkin).

In his testimony, Berkowitz estimated the costs of public and private disability benefits programs at approximately \$170 billion per year.²⁰⁹ In written questions submitted after the hearings, Senator Harkin asked a number of the witnesses for "an estimate of the net dollars we can save by opening up employment opportunities on a fair basis to persons with disabilities and thereby reducing dependency."²¹⁰ The witnesses' responses, which estimated that current disability benefits programs imposed significant costs and that increasing opportunities for people with disabilities would result in substantial net benefits, were included in the hearing records.²¹¹

3. The Welfare Reform Argument in the Congressional Hearings: Disability Rights Activists Emphasize the Point

Members of Congress were not the only ones who pointed to the cost savings that would arise from reducing dependency. Activists with disabilities and disability rights lawyers frequently emphasized this point as well.

Such appeals followed a distinguished tradition in disability rights advocacy. In 1980, Frank Bowe²¹² published a book that extensively made the case that the elimination of structural, environmental, and attitudinal barriers to the integration of people with disabilities would more than pay for itself by obviating many current expenditures on disability benefits programs.²¹³ When the Reagan Administration took office the next year, it embarked on a program of regulatory reform spearheaded by then-Vice President Bush. One of the first targets of this program was the set of regulations adopted to implement Section 504 of the Rehabilitation Act of 1973. The still-emergent disability rights community responded fiercely to this threat to what was, at that time, the most

209. *Id.* at 370-74 (statement of Edward Berkowitz).

210. *Id.* at 410, 436-37.

211. *See id.* at 410 (statement of Harold Russell); *id.* at 436-37 (statement of Arlene Mayerson).

212. Bowe was the executive director of the American Coalition of Citizens with Disabilities, the major disability rights lobbying group at that time.

213. *See* FRANK BOWE, *REHABILITATING AMERICA: TOWARD INDEPENDENCE FOR DISABLED AND ELDERLY PEOPLE* (1980).

important law prohibiting disability-based discrimination.²¹⁴ Evan Kemp was a major "point person" for the disability community in its efforts to defend the Section 504 regulations. Kemp, a Republican who was then serving as the director of the Nader-affiliated Disability Rights Center, made a national name for himself in 1981 by attacking Jerry Lewis' Labor Day telethon for its role in propagating patronizing stereotypes of pity and fear of people with disabilities.²¹⁵ Making his case to Bush and his counsel, C. Boyden Gray, against the rollback of Section 504's regulations, "Kemp used a conservative argument. Disabled people wanted independence, Kemp told Bush. They wanted to get out of the welfare system and into jobs."²¹⁶ Bush found this argument (backed by significant political mobilization in the disability community) persuasive, and his Task Force on Regulatory Relief ultimately decided to make no changes to the Section 504 regulations.²¹⁷

By the time of the hearings on the ADA, the welfare reform argument was a standard part of disability activists' repertoire. In their testimony, those activists drew on that argument extensively. Justin Dart, a disability activist and a wealthy Republican, testified before the House Education and Labor Committee that "cost and

214. For a description of these events, see STEPHEN L. PERCY, *DISABILITY, CIVIL RIGHTS, AND PUBLIC POLICY: THE POLITICS OF IMPLEMENTATION* 88-96 (1989).

215. See Evan J. Kemp, Jr., *Aiding the Disabled: No Pity, Please*, N.Y. TIMES, Sept. 3, 1981, at A19. For a discussion of the attack on the Jerry Lewis telethon, see SHAPIRO, *supra* note 9, at 20-24. For further discussion, see the three pieces on the telethon issue in the *Ragged Edge* collection: Anne Finger, ... *And the Greatest of These is Charity*, in THE RAGGED EDGE: THE DISABILITY EXPERIENCE FROM THE PAGES OF THE FIRST FIFTEEN YEARS OF THE DISABILITY RAG 115 (Barrett Shaw ed., 1994) [hereinafter RAGGED EDGE COLLECTION]; Mary Johnson, *A Test of Wills: Jerry Lewis, Jerry's Orphans, and the Telethon*, in RAGGED EDGE COLLECTION, *supra*, at 120; Julie Shaw Cole & Mary Johnson, *Time to Grow Up*, in RAGGED EDGE COLLECTION, *supra*, at 131.

216. SHAPIRO, *supra* note 9, at 121. Edward Berkowitz described the events this way:

The handicapped rights movement leader Evan Kemp argued that their goals and those of the Reagan administration were not dissimilar: Both accused big government of stifling initiative; both believed in welfare only for the truly needy; both denounced paternalistic government; and both were "antibureaucratic." In short, both believed in independence.

EDWARD D. BERKOWITZ, *DISABLED POLICY: AMERICA'S PROGRAMS FOR THE HANDICAPPED* 222 (1987).

217. See BERKOWITZ, *supra* note 216, at 222-23; PERCY, *supra* note 214, at 95-96; SHAPIRO, *supra* note 9, at 120-21. For Evan Kemp, the successful fight against the rollback of the Section 504 regulations led to personal success as well. When Bush became president, he appointed Kemp Chair of the EEOC.

physical responsibility provide the strongest possible arguments for the Americans with Disabilities Act."²¹⁸ He continued:

ADA is an authentic issue for conservatives. It is the status quo discrimination and segregation that are unaffordable, that are preventing persons with disabilities from becoming self-reliant and that are driving us inevitably toward the economic and moral disasters of giant, paternalistic welfare bureaucracies. Businesses, families, taxpayers, are already paying unaffordable and rapidly escalating billions in public and private funds to maintain ever increasing millions of potentially productive Americans in unjust, unwanted dependency.²¹⁹

In testimony before the Senate Labor Committee, Dart estimated the net benefit of the ADA to the federal budget as "hundreds of billions" of dollars.²²⁰ Testifying before the House Judiciary Committee, James Brady—the former Reagan press secretary paralyzed by John Hinckley's bullet—endorsed the views of President Eisenhower, who had initially opposed a broad Social Security Disability Insurance program.²²¹ "Eisenhower warned us that such programs increase the dependency of disabled people. He urged instead that it would be far better if people with disabilities became taxpayers and consumers and thus reduce the terrible costs to society."²²² "That conservative point of view," Brady testified, "is

218. *House Select Educ. & Employment Hearings*, *supra* note 204, at 57 (statement of Justin Dart). Justin Dart, who recently passed away, provided profoundly important leadership to the disability rights cause throughout his life. It is fair to say that his efforts were crucial in the campaign to enact the ADA. Whatever my disagreements with the welfare reform argument, I do not mean in any way to cast doubt or aspersions on the importance of Dart's leadership and achievements.

219. *Id.* at 57-58 (statement of Justin Dart); *see also Senate Labor Hearings*, *supra* note 203, at 19-20 (statement of Justin Dart).

220. *See Senate Labor Hearings*, *supra* note 203, at 256 (statement of Justin Dart) ("The appropriate question in regard to the economic impact of ADA is not 'how much will it cost?,' or even 'how much will it save?,' but rather, 'how much will it profit the nation in the long run?' the probable answer is, 'hundreds of billions.'").

221. *See BERKOWITZ*, *supra* note 216, at 73 (discussing Eisenhower's opposition).

222. *Americans with Disabilities Act: Hearing on H.R. 2273 Before the Subcomm. on Civil & Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong. 40 (1989) [hereinafter *House Judiciary Hearings*] (statement of James Brady).

embodied in the purposes of the Americans with Disabilities Act today.”²²³

It might not be surprising that self-described conservative Republicans would justify the ADA in these terms, but Dart and Brady were hardly alone. Other individuals with disabilities also testified about the demeaning nature of dependence on disability benefits programs and the high dependency costs that society could avoid by giving people with disabilities the opportunity to work without discrimination.²²⁴

223. *Id.* (statement of James Brady).

224. Greg Fehribach testified:

At the age of 31, I will pay more tax per capita than 60 percent of Americans. Because I have had an opportunity, I will not cost the taxpayers on the average between \$2,000 and \$5,000 per month for my care and maintenance.

A.D.A. will give other disabled Americans an opportunity that I have already had. A.D.A. will allow disabled Americans the privilege of paying income tax. It will prevent them from using the welfare system for their care and maintenance.

Americans with Disabilities Act of 1989: Hearing on H.R. 2273 Before the Subcomm. on Select Educ. of the House Comm. on Educ. & Labor, 101st Cong. 8 (1989) [hereinafter House Select Educ. Comm. Hearings] (statement of Greg Fehribach). Janna Shishler similarly testified:

My current position with the Federal Government has allowed me to become a self-supporting, tax paying member of society.

I no longer receive a regular Social Security check or assistance for vocational rehabilitation. My salary is sufficient to permit me to hire and pay the personal attendant who assists me each morning.

I believe that I am not an exception to the rule. The majority of persons with disabilities do not relish the thought of sitting day after day in a bedroom or nursing home.

The expense of maintaining nursing care for the disabled may be drastically reduced by implementing job training and opening access to employment for the Americans With Disabilities Act.

Id. at 38 (statement of Janna Shishler). Laura Cooper noted in her testimony:

Aside from the human dignity and productivity benefits that will obtain from the ADA, there will also be a direct financial benefit to the Federal Government and to employers. In my case, when I was finally able to obtain permanent employment, I no longer had to collect my monthly Social Security disability payment, Medicare benefits or vocational rehabilitation funding.

Instead, I became a productive, taxpaying citizen and consumer, able to support the domestic and medical and other bills I incurred, through salary and benefits obtained on my job. Even though the Federal benefits I was receiving before I became employed, were pretty minuscule compared to those received by most persons with severe disabilities, only 4 years after going to work, I now estimate that the net, direct and positive financial impact on the Federal Government due to my employment alone is approximately \$40,000 to \$50,000 per year.

House Judiciary Hearings, supra note 222, at 153-54 (statement of Laura Cooper). And Amy Dimsdale testified:

Disability rights lawyers made the same points. Arguing on behalf of the proposed statute's provisions that required accessible public transportation—and tying the debate over the ADA to the nation's then seemingly perpetual budget crisis—Timothy Cook stated, "If we get people off of public assistance and paying taxes, it unquestionably is going to bring down the deficit."²²⁵ Arlene Mayerson tied the proposed statute's accommodation requirement directly to the reduction of welfare dependency: "[F]or many disabled people the willingness to accommodate can make the difference between fruitful employment and welfare."²²⁶

Lex Frieden, a longtime disability rights activist who was then serving as executive director of the renamed National Council on Disability, summed up the welfare reform argument for the ADA. After noting the \$60 billion estimated annual cost of disability benefits programs and observing that less than \$3 billion of that total was spent on programs to promote independence, Frieden declared, "The purpose of this legislation is to change all that."²²⁷ Later in his testimony, Frieden reemphasized the point, "it is exactly to cease the costly dependency of people with disabilities that the Americans with Disabilities Act was conceived by the National Council on Disability."²²⁸ Even advocates of civil rights more generally, like the Reverend Jesse Jackson and Washington civil rights institution Joseph Rauh, argued that the ADA would save the nation money by moving people with disabilities from welfare into the workforce.²²⁹

I feel useless, powerless, and demeaned. And I know I am not alone. Most of my friends with handicaps experience the same exhausting process. It is enough to make someone give up and accept lifelong dependency on benefits instead of productive work. I know many educated, capable, and intelligent disabled people who have given up in this way.

Discrimination hurts not only those with disabilities whose potentially productive lives go wasted, but the rest of society as well, because everyone pays the price for economic dependency.

I do want to work, like millions of my fellow disabled Americans want to work.

I am not asking for charity. I am asking for opportunity.

Senate Labor Hearings, supra note 203, at 29-30 (statement of Amy Dimsdale).

225. *Senate Labor Hearings, supra* note 203, at 171 (statement of Timothy Cook).

226. *Id.* at 337 (statement of Arlene Mayerson); *see also House Small Bus. Hearings, supra* note 205, at 157.

227. *Senate Labor Hearings, supra* note 203, at 22 (statement of Lex Frieden).

228. *Id.* at 107 (statement of Lex Frieden).

229. *See House Select Educ. & Employment Hearing, supra* note 204, at 28 (statement of

4. *The Welfare Reform Argument on the House and Senate Floors*

After all the attention that the welfare reform argument received in the hearings, the various committee reports that accompanied the ADA to the House and Senate Floors predictably placed significant reliance on it. The reports of both the Senate Labor and Human Resources Committee and the House Education and Labor Committee cited the National Council on Disability's \$60-billion per year figure and argued that "discrimination results in dependency on social welfare programs that cost the taxpayers unnecessary billions of dollars each year."²³⁰

When the ADA bill reached the floor, the debates contained numerous invocations of the now-familiar argument that the ADA would save the government money by moving people with disabilities off the disability benefits rolls and into the workforce. As he had in his statement on introducing the bill and throughout the hearings, Senator Harkin again emphasized the \$60 billion annual cost of existing disability benefits programs.²³¹ "The ADA," he said, "will save the Government and society billions of dollars by getting people off the dependency/social welfare rolls and into jobs, into restaurants, into shopping centers and into community activities."²³² Steny Hoyer, who had taken over as the bill's principal House sponsor when Tony Coelho left Congress, emphasized the same points,²³³ as did other Democratic supporters of the bill in both the

Jesse Jackson) ("We spend \$170 billion a year on disabled adults—too much of it is spent maintaining dependency and activity.... When we open work places, we empower men and women; we also save money."); *id.* at 49 (statement of Joseph Rauh) ("In sum, the employment provisions of the ADA reflect sound public policy, to allow persons with disabilities to contribute their skills, to become taxpayers and not to force qualified people who want to work and who can work onto the welfare rolls.").

230. H.R. REP. NO. 101-485, pt. 2, at 43 (1990); *see also* S. REP. NO. 101-116, at 16 (1989).

231. *See* 135 CONG. REC. 19,800, 19,803 (1989) (statements of Sen. Harkin).

232. *Id.* at 19,804 (statement of Sen. Harkin); *see also id.* at 8508 (statement of Sen. Harkin) (repeating the \$60 billion figure and stating that "the ADA will substantially reduce the costs of dependency of individuals with disabilities").

233. Representative Hoyer stated:

But the costs of discrimination are tallied from both sides. By discrimination against the disabled, we lose the productive talents and imaginations of millions of able-disabled Americans. Our Nation spends almost \$170 billion a year on

House²³⁴ and the Senate.²³⁵ Republican supporters of the bill also urged attention to the ADA's promise as a means of saving money by reducing dependency on disability benefits. This was true of both moderates²³⁶ and conservatives.²³⁷

maintaining the dependency of the disabled; more than \$75 billion of that comes directly from the Federal Government. Yet these people want to work.

136 CONG. REC. 10,856 (1990) (statement of Rep. Hoyer).

234. *See id.* at 11,438 (statement of Rep. Collins) ("By denying access to transportation, we keep millions of disabled citizens out of the workforce and locked in a state of unwanted dependency. That dependency costs our Nation \$300 billion annually, and we can't afford it any longer."); *id.* at 11,455 (statement of Rep. Wolpe) ("The forced dependency of our increasing population of people with disabilities has resulted in escalating economic burdens on Government, business, families, and taxpayers. It has been estimated that excluding 10 million citizens with disabilities from the workplace costs our society about \$300 billion annually."); *id.* at 10,874 (statement of Rep. Kleczka) ("Removing barriers to full participation by disabled individuals in everyday life will create direct and tangible benefits for the American economy. More disabled persons working increases earnings, lessens dependence on the Social Security system, increases spending on consumer goods, and increases revenues."); *id.* (statement of Rep. Hawkins) ("Today, there are millions of our fellow citizens who have a disability. As a group, they suffer the highest rates of unemployment and the highest rate of dependence on government services.").

235. *See, e.g.*, 136 CONG. REC. 19,898 (1989) (statement of Sen. Simon) (arguing that the "overwhelming costs of not enacting the ADA included [m]ore than \$100 billion a year [that] is being spent by Government to sustain people with disabilities in welfare situations"); *id.* at 19,897 (statement of Sen. Kerry) ("Conversely, dependence resulting from limiting access and opportunity, not only strips a measure of dignity from capable individuals, but in terms of social services, lost wages, and wasted human potential, represents an enormous social and economic cost."); *id.* at 10,795 (statement of Sen. Lieberman) ("Dependency and nonproductivity is expensive. We are all better off if everyone who wants to work is able to work."); *id.* at 19,893 (statement of Sen. Leahy) ("Every year, we spend billions of dollars on disability benefits for people who can and want to work, but can find no employment.... If we remove barriers to work for the disabled, we can turn welfare payments into tax receipts."); *id.* at 19,891 (statement of Sen. Riegle) (arguing that "the costs of not eradicating discrimination will exceed those of complying with this act" because the "\$60 billion per year that the Federal Government now spends on dependency in the form of disability benefits and programs will only escalate"); *id.* at 19,808 (statement of Sen. Kennedy) (noting that the Nation spent "\$169.4 billion in dependent care expenditures for working age people with disabilities," and arguing that under the ADA "people with disabilities will be independent, rather than dependent members of our society"); *see also id.* at 8517 (statement of Sen. Simon); *id.* at 8518-19 (statement of Sen. Kerry).

236. *See, e.g.*, 136 CONG. REC. 17,369 (1990) (statement of Sen. Durenberger) ("And we cannot afford to pay welfare benefits to people who can work and who want to work but are unable to because they are regarded as not being fit enough to work. The ADA will give people with disabilities the level playing field they need to become a full member of society."); *id.* at 13,011 ("Frankly, the present and future costs of disability to the country without this legislation would be much greater than any cost of this bill. Increased independence means increased productivity and greater self-sufficiency.").

237. *See, e.g.*, 135 CONG. REC. 19,890 (1989) (statement of Sen. Dole) ("The eradication of

5. *The Welfare Reform Argument in the Media*

The foregoing discussion should make clear that the statutory finding referred to by Judge Posner in *Vande Zande* was not simply a throwaway. Even before the statute was introduced in Congress, disability rights advocates and federal commissions were laying the groundwork for the argument that comprehensive federal civil rights legislation would save the federal government money by moving people with disabilities off benefits rolls and into the workforce. In the hearings and debates in Congress, the ADA's supporters repeatedly emphasized the welfare reform argument. One did not have to be a close follower of the congressional hearings and debates, however, to detect the argument that the ADA would save money by moving people off disability benefits rolls. In both the national and the local media, news stories, editorials, and letters to the editor all repeatedly invoked this welfare reform argument.

The coverage of the statute in the *New York Times* is typical. In an editorial applauding the new statute on the day after President Bush signed the ADA into law, the *Times* noted the following "crucial" point about the costs and benefits of implementing the statute: "The Federal Government now spends \$57 billion every year on benefits for the disabled. That figure will surely shrink if the disabled have greater access to jobs."²³⁸ A year earlier, while the ADA bill was pending on the Senate floor, the *Times* ran an op-ed by James Brady entitled *Save Money: Help the Disabled*.²³⁹ In that piece Brady argued, as he had in the congressional hearings, that the ADA "could save taxpayers billions of dollars by outlawing discrimination, putting disabled people on the job rolls and thereby reducing Government disability payments."²⁴⁰ After the Senate passed the legislation, the *Times* ran a letter to the editor written by Tom Harkin headed *How to Help the Disabled Pay Their Own Way*.²⁴¹ Harkin concluded his letter with the following comment:

discrimination in employment against persons with disabilities will result in a stronger work force and lessen dependency on the welfare system.").

238. *A Law for Every American*, N.Y. TIMES, July 27, 1990, at A26.

239. James S. Brady, *Save Money: Help the Disabled*, N.Y. TIMES, Aug. 29, 1989, at A19.

240. *Id.*

241. Tom Harkin, Letter to the Editor, *How to Help the Disabled Pay Their Own Way*, N.Y.

"For too long, taxpayers have been writing a blank check (last year's was for \$57 billion) to keep the disabled dependent, when clearly they want to be contributing members of society. With the Senate's strong approval of the bill, we all begin to get our money's worth."²⁴² Nor was the *Times*' treatment of this point limited to the editorial page. In two long news pieces in 1989—a front-page article in August, shortly after the Senate Labor Committee had approved its version of the bill,²⁴³ and a "week in review" article in December, after ultimate passage of the law became "virtually certain"²⁴⁴—*Times* reporters referred prominently to the ADA supporters' argument that the statute would save money by reducing welfare dependency.²⁴⁵

Other national newspapers and national wire services gave similar prominence to the welfare reform argument. In October 1989, for example, during the Senate debate, the *Wall Street Journal* ran a pro-ADA letter to the editor by then-Attorney General Dick Thornburgh.²⁴⁶ The second paragraph of the letter, which provided Thornburgh's major substantive reason for enacting the statute, rested entirely on the welfare reform argument:

For too long federal policy has provided massive financial resources for income-support programs to maintain individuals with disabilities in a state of dependency. The new disability legislation, on the other hand, will promote the independence of people with disabilities to enable them to enter into the mainstream of American life. By removing barriers to full

TIMES, Oct. 3, 1989, at A22.

242. *Id.*

243. See Susan F. Rasky, *Bill Barring Bias Against Disabled Holds Wide Impact*, N.Y. TIMES, Aug. 14, 1989, at A1.

244. Jason DeParle, *Realizing the Rights of the Disabled*, N.Y. TIMES, Dec. 17, 1989, § 4, at 1.

245. See *id.* ("In fact, [the ADA's] backers predict that it will make money. They say the Government now spends \$60 billion a year to help support disabled people, including some eight million who want work but can't find it. The law will help transfer them from welfare ledgers to tax rolls."); Rasky, *supra* note 243 (quoting Sen. Harkin as stating that "[t]he economic benefits to society in terms of reductions to the deficit from getting people off welfare, out of institutions and onto the tax rolls cannot be ignored"). In the DeParle article, the dependency-cost argument appears in the third paragraph, as the major substantive argument for passage of the bill. See DeParle, *supra* note 244.

246. Dick Thornburgh, Letter to the Editor, *Toward Independence for the Disabled*, WALL ST. J., Oct. 6, 1989, at A13.

participation by disabled individuals, the bill will have direct and tangible benefits for the economy. The result will be more disabled people working, increased earnings, less dependence on the Social Security system, increased spending on consumer goods and increased tax revenues.²⁴⁷

At roughly the same time, the Scripps-Howard News Service distributed an op-ed by Senator Harkin, which ran in newspapers across the country.²⁴⁸ That op-ed reiterated the welfare reform arguments Harkin had made in the hearings, on the Senate floor, and in his letter to the editor of the *New York Times*.²⁴⁹ Some months later, after the measure passed the Senate, both the *Washington Post* and *USA Today* ran op-ed pieces written by individuals with disabilities that featured the welfare reform argument.²⁵⁰ And throughout the two-year process during which Congress considered the ADA, national wire services ran numerous stories that highlighted arguments that the proposed statute would reduce dependency on disability benefits programs and save the government money.²⁵¹

247. *Id.*

248. See, e.g., Tom Harkin, Editorial, *It Won't Cost Us Much to Accommodate the Disabled*, DALLAS MORNING NEWS, Oct. 8, 1989, at A39, available at 1989 WL 6120388.

249. *Id.*

250. See Dale Brown, Editorial, *Putting the Handicapped to Work*, WASH. POST, Jan. 21, 1990, at B8 ("Discriminating against people with disabilities adds to the deficit. The United States spends more than \$60 billion a year, paying people to stay home."); Edward A. Eckenhoff, Editorial, *Law Can Provide Relief to the Disabled*, USA TODAY, May 7, 1990, at A10, available at 1990 WL 7562646 ("Most importantly, when people with disabilities are employed, they pay into the system rather than having the system pay for them.... Economically, it will mean more people spending more money, which means more jobs and income for everyone.").

251. See David Bauman, GANNETT NEWS SERV., Sept. 27, 1988 (reporting "[d]isabled Americans['] descriptions of] their unwanted dependency on families, charity and social welfare"); *Enactment of Disabilities Act Nears*, TULSA WORLD, Dec. 10, 1989, at B8, available at 1989 WL 7345089 (referring to "the economic benefits of putting the disabled into the economic mainstream," to the "8.2 million disabled Americans who wanted to work and were unemployed in 1986," and to the "nearly \$60 billion a year" price tag for disability benefits payments); Robert Greene, *Conservatives Question Impact Effect of Disability Legislation*, AP, Feb. 7, 1990, available at 1990 WL 5990441 ("[Evan] Kemp said more than 8 million disabled Americans could be brought into the work force through the employment-protection provisions of the law, saving the government \$300 billion in welfare and other payments."); *President Signs Disabilities Act 2000 Cheer Long-Awaited Independence*, L.A. DAILY NEWS, July 27, 1990, at N1, available at 1990 WL 5475017 (reporting on the ceremony in which President Bush signed the ADA into law) ("Bush said taxpayers now spend almost \$200 billion annually

Local newspapers got into the act as well. Many ran editorials and op-eds or letters to the editor (often written by people with disabilities themselves) that urged passage of the ADA and relied significantly on welfare reform arguments.²⁵² A number of papers

to support Americans with disabilities—in effect, to keep them dependent. When given the opportunity to be independent, they will move proudly into the economic [mainstream] of American life.”).

252. See, e.g., Yael Hana Bethiem, Editorial, *A Little Help Sets Disabled Free*, ARK. GAZETTE, Dec. 7, 1989, at 11B, available at 1989 WL 6917955.

[E]ven now, there are roadblocks and disincentives to my working. Since it is very cost-effective to assist me to work rather than to have me stay on disability payments, the disincentives don't make sense....

... Rather than forcing disabled people to enter nursing homes or lead restricted lives due to inaccessibility and lack of assistance, it makes sense to support changes that allow people with disabilities to work.

Id.

The most compelling arguments relate to the toll exacted when 37 million people with severe disabilities are denied access to the world around them. While the human suffering can only be imagined, economists supply the financial bottom line: In 1986, the country spent \$169 billion for the working-age disabled population. Regrettably, most of it was spent to subsidize inactivity.

Business and the Disabled, LOUISVILLE COURIER-J., Sept. 5, 1989, at 10A.; see also Dan Casady, Editorial, *Disabilities Bill is Civil Rights Move for the 1980s*, ST. PETERSBURG TIMES, June 25, 1989, at 2, available at 1989 WL 6609630 (“The economic benefits to society in terms of reductions in the deficit from getting people off welfare, out of institutions, and on the tax rolls cannot be ignored. This bill must be part of our strategy to get our nation's economic house in order.”); Editorial, *Civil Rights for the Disabled*, ARK. GAZETTE, Sept. 26, 1989, at B6, available at 1989 WL 6909512.

Whatever the costs, society will benefit by inviting millions into fuller participation in the economic life of the nation. Now, government spends \$60 billion a year caring for the disabled. The unemployment rate among the handicapped is 70 percent. By removing their second handicap—barriers and discrimination in the workplace—millions will become productive, not dependent.

Id.; Douglas Familaro, Letter to the Editor, *Ignorant Attitude*, CHI. SUN-TIMES, Jan. 21, 1990, at 44, available at 1990 WL 4380940.

Millions of disabled people are presently unemployed and depend on the federal government's disability checks which cost the U.S. taxpayers \$60 billion to \$100 billion a year. Half of employed disabled people earn \$15,000 or less per year because of their disabilities. The Americans with Disabilities Act will greatly help to improve our economy by placing disabled people into decent jobs with reasonable pay.

Id.; John R. Garrison, Letter to the Editor, *Disabilities Act*, CHI. TRIB., Jan. 15, 1990, available at 1990 WL 2935400 (“The long-term economic benefits of getting people with disabilities off welfare rolls and into mainstream society outweigh those minimal costs.”); James A. McMahon, Editorial, *Disabled Need Opportunity*, OMAHA WORLD-HERALD, May 4, 1990, available at 1990 WL 5247771 (“These minimal costs are more than justified when you consider the fact that \$300 billion is spent annually to care for our disabled citizenry who are

pursued a local angle on the story. These papers wrote pieces about individual local residents with disabilities who urged passage of the ADA so that they could escape dependency,²⁵³ local events at which disability rights activists spoke of the imperative to eliminate dependency,²⁵⁴ local studies delineating the fiscal benefits of providing employment to people with disabilities,²⁵⁵ and the positions of local legislators who supported the ADA with welfare reform arguments.²⁵⁶

In short, anyone who even casually followed the debate over the proposed ADA legislation, whether in a national newspaper or in the local papers, was likely to have been exposed to the welfare reform argument. Although that argument was far from the only substantive justification the statute's backers offered, and it may not even have been the predominant one, it played a major role in the public campaign to enact the ADA.

currently excluded from employment—that represents an average of \$1,200 for every man, woman and child.”).

253. See, e.g., Pete Slover, *Bill Favoring Disabled Workers Hailed*, HOUS. CHRON., Aug. 29, 1989, available at 1989 WL 2754256 (discussing congressional testimony of Eric Reed, a local resident with quadriplegia).

254. See, e.g., Wendy Diller, *James Brady Calling on Corporate America Urges Hiring of the Disabled*, RECORD OF NORTHERN N.J., May 17, 1989, at E1, available at 1989 WL 5210410 (quoting James Brady's speech to workers at a local company) (“There are 8.2 million people with disabilities who are working age and want to work. It is much more cost-effective to have them employed as productive tax contributors and not tax consumers.”); Olive Talley, *Disabled People Rally for Civil Rights*, DALLAS MORNING NEWS, April 30, 1988, at 34A, available at 1988 WL 5317870 (describing rally at Dallas' City Hall) (“We are not asking that society support us, but we are demanding our right ... to participate in and support society,” spokesman Justin Dart told the crowd as an interpreter signed for the deaf.”).

255. See Myron S. Waldman, *Rights Bill for 43 Million: After 4 Years of Talks, Act Nears Last Hurdles*, NEWSDAY, Mar. 5, 1990, at 5, available at 1990 WL 3320331 (discussing recent survey “of 100 disabled workers hired by New York-area companies,” which found that, in a recent year, these workers paid about \$400,000 in taxes while not collecting about \$500,000 in government benefits they previously received).

256. Lori Baker, PHOENIX GAZETTE, Dec. 19, 1989, at A1 (discussing local activists' and legislators' positions on the proposed ADA and quoting then-Senator DeConcini as saying: “[b]y giving Americans with disabilities as much access to independence as we can—instead of doling out checks and pushing them aside—we will bring far-reaching benefits to all Americans”); David C. Beeder, *Called ‘Greatest Achievement’ Harkin: Disabilities Bill Backed*, OMAHA WORLD-HERALD, Aug. 8, 1989, available at 1989 WL 3038067 (discussing Senator Harkin's role as principal sponsor of the ADA and reporting that “[Harkin] said enactment of the bill could reduce the \$57 billion spent annually by the federal government on disability benefits and dependency programs”).

B. The Welfare Reform Argument and the Courts

When the cases discussed in Part I are reconsidered in the light of the welfare reform argument that provided such a significant portion of the public justification for the ADA, they seem a great deal more understandable. In this section, I hope to show how those cases actually fit quite comfortably with the welfare reform argument. If that is true, then it is much more difficult simply to blame courts for imposing their own views on the statute and disregarding the "true" purposes of the ADA. To the extent that the current body of case law is problematic, the fault may lie as much in the welfare reform argument that was so prominent in the efforts to obtain passage of the statute.²⁵⁷

1. Definition-of-Disability Cases

If the ADA is understood as a means of saving society money by moving people off of disability benefits rolls and into the workforce, on whom should the statute bestow its protections? One obvious answer is that the statute should focus on protecting those people who would be unable to work—and thus dependent on public assistance—without antidiscrimination and accommodation protection. On this view, the statute should not protect people who otherwise have a good chance of finding employment, even if discrimination and denial of accommodation deprives them of some

257. Although I did not discuss them in Part I because they have not been as significant a focus of the academic critique of the Supreme Court's ADA jurisprudence, the welfare reform argument also fits another pair of controversial ADA rulings: the holding in *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 577-78 (1999), that employers of commercial truck drivers may require all of those drivers to comply with the federal government's general visual acuity standards even when the government has granted a particular driver a waiver from those standards; and the holding in *Chevron USA, Inc. v. Echazabal*, 122 S. Ct. 2045, 2051-53 (2002), that an employer may exclude an individual with a disability based on a threat he poses to his own health, even if he poses no risk whatsoever to customers and coworkers. (Full disclosure: I represented Echazabal in the Supreme Court.) Both of these decisions can be criticized—the former because it creates a broad and unjustified exemption from the reasonable accommodation principle, see Bagenstos, *supra* note 22, at 1504-05 n.101, and the latter because it disregards a clear statutory purpose to override paternalistic exclusions of people with disabilities. But both cases involved an apparent mismatch between a particular employee and a particular type of job, rather than a disability that rendered the plaintiff more broadly unemployable. Thus, under the welfare reform view, the ADA was not necessary in those cases, and the Supreme Court not surprisingly ruled for the employers.

opportunities they find very desirable. *Sutton, Murphy, Toyota*, and the lower court cases that limit ADA coverage to “the truly disabled” can be read as drawing a very similar line between those who could find work without the ADA and those who need ADA protection to avoid dependency on disability benefits programs. Indeed, some of the most objectionable aspects of these cases seem to rely on this very distinction.

Sutton stated that “[i]f jobs utilizing an individual’s skills (but perhaps not his or her unique talents) are available, one is not precluded from a substantial class of jobs”²⁵⁸ and hence has no “disability” embraced by the ADA.²⁵⁹ The Court further stated that an individual cannot satisfy the “regarded as” portion of the disability definition simply by “say[ing] that if the physical criteria of a single employer were *imputed* to all similar employers one would be regarded as substantially limited in the major life activity of working *only as a result of this imputation*.”²⁶⁰ These statements make no sense if the goal of the ADA is to provide a socially stigmatized group equal access to the workplace by affording protection against prejudice and stereotypes.²⁶¹ If taken seriously, these statements would shield the employer who harbors the most extreme prejudices or acts on the most idiosyncratic stereotypes. An employer who believes that all people with harelips are too mentally impaired to operate computers,²⁶² or who simply finds such people unsightly, could put up a “No Harelips Need Apply” sign and defend any lawsuit on the basis of the very extremism of his views. “Sure I don’t like harelips,” the owner could say, “but I’m not telling anybody else they can’t hire them. Just let those people apply for jobs where their kind will be accepted.” Such a defense would never be permitted under race or gender civil rights statutes, which aim

258. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 492 (1999).

259. See *id.* at 491 (stating that the ADA definition of disability’s “substantially limits” prong is fulfilled if “at a minimum ... plaintiffs allege they are unable to work in a broad class of jobs”).

260. *Id.* at 493.

261. I have so argued, though I believe that these statements are properly characterized as dicta. See Bagenstos, *supra* note 22, at 507-08, 515-17.

262. This “spread effect”—in which people readily assume that an impairment that affects one body function is broadly disabling—is one of the most common forms of disability prejudice. See Bagenstos, *supra* note 22, at 423-24.

to provide equal access to the *full* range of opportunities in society, but the Court's statements in *Sutton* would appear to allow it.²⁶³

If, however, the ADA is not seen as an equivalent to the Civil Rights Act of 1964, but as an effort to reduce social costs by moving people from disability benefits rolls into the workforce, then these statements in *Sutton* seem less incongruous. "If jobs utilizing an individual's skills (but perhaps not his or her unique talents) are available,"²⁶⁴ then the ADA is not necessary for the plaintiff to avoid dependency. She can stay off the disability benefits rolls by taking one of the available jobs. ADA protection of such a plaintiff, therefore, does nothing to reduce the \$60 billion annual cost of disability benefits programs to public budgets. Similarly, there is no reason to *impute* one employer's exclusion to other employers, because an individual will not be forced to the dependency rolls on the basis of a single employer's misperceptions.²⁶⁵

Krieger and Diller have criticized decisions like *Sutton* for assuming that the ADA is simply another disability benefits program and for applying to that statute the same criteria of necessity and moral worth that our political culture generally requires for inclusion in such benefits programs.²⁶⁶ When the ADA is viewed as a disability benefits program, Diller has written, "the case law has a certain coherence, although not the coherence intended by the framers of the law."²⁶⁷ The foregoing discussion suggests that Krieger and Diller's argument is misplaced. If courts took seriously the welfare reform argument articulated by *the statute's framers and supporters* in the campaign to enact the ADA,

263. Bonnie Tucker, as well as Arlene Mayerson and Matthew Diller, make this point. See *supra* note 48 and accompanying text.

264. *Sutton*, 527 U.S. at 492.

265. This point highlights a crucial problem with the welfare reform approach from the standpoint of proper interpretation of the statute: The approach completely fails to account for the "regarded as" prong of the statutory definition of "disability." My primary interest here, however, is not in whether the welfare reform argument represents a *correct* interpretation of the statute, but instead in whether it can provide a coherent principle that describes the shape of the case law.

266. See Diller, *Judicial Backlash*, *supra* note 13, at 48-49; Krieger, *supra* note 8, at 516-17. For excellent discussions of the necessity and moral worth criteria applied to disability benefits programs, see DEBORAH A. STONE, *THE DISABLED STATE* (1984); Matthew Diller, *Entitlement and Exclusion: The Role of Disability in the Social Welfare System*, 44 *UCLA L. REV.* 361 (1996).

267. Diller, *Judicial Backlash*, *supra* note 13, at 48.

decisions like *Sutton* would not be justified simply on the ground that the ADA is "just another benefits program" that had to be limited to morally worthy recipients. Instead, such decisions would be justified on the ground that the ADA is a regime enacted specifically as a cost-saving *alternative* to existing benefits programs. A welfare reform approach would treat the ADA as a way of getting people out of benefits programs and into the workforce, not as a way of getting job accommodations for people who would be in the workplace regardless. Such an approach would adopt a narrow interpretation of "disability," but not simply because of a general societal view that disability benefits programs should be kept within tightly cabined bounds. It would adopt a narrow interpretation of disability to focus the statute on its target population. Much of the case law challenged by ADA defenders fits this model very well.

To be sure, the Supreme Court's definition-of-disability cases are not explicit on this point.²⁶⁸ Indeed, at least two aspects of the Court's definition-of-disability jurisprudence suggest that the Court has not had the welfare reform argument in mind in reaching the outcomes it has. First, the Court has been quite reticent to hold that working is a "major life activity" under the statute.²⁶⁹ Second, in the

268. Some of the welfare reform attitude, however, seems to lurk just below the surface in some lower court cases, that both Diller and I have criticized, that pejoratively characterize accommodation requests by people with relatively minor impairments as requests for a "handout" or an unfair "competitive advantage." See *Bagenstos*, *supra* note 22, at 470 & n.277 (quoting *Roth v. Lutheran Gen. Hosp.*, 57 F.3d 1446, 1460 (7th Cir. 1995) (affirming denial of relief to medical resident who sought to be excused from working long shifts as an accommodation for his strabismus (crossed eyes) and explaining that the court would not "allow[] an individual with marginal impairment to use disability laws as bargaining chips to gain a competitive advantage")); Diller, *Judicial Backlash*, *supra* note 13, at 48 & n.170 (quoting *Hileman v. City of Dallas*, 115 F.3d 352, 354 (5th Cir. 1997) ("We refuse to construe the ... Act as a handout to those who are in fact capable of working in substantially similar jobs.") (alteration in original) (footnote omitted)).

269. See *Toyota Motor Mfg. v. Williams*, 534 U.S. 184, 200 (2002) ("Because of the conceptual difficulties inherent in the argument that working could be a major life activity, we have been hesitant to hold as much, and we need not decide this difficult question today."); *Sutton*, 527 U.S. at 492. The *Sutton* Court reserved the question of whether "working" is a major life activity but noted:

[T]here may be some conceptual difficulty in defining "major life activities" to include work, for it seems "to argue in a circle to say that if one is excluded, for instance, by reason of [an impairment, from working with others] ... then that exclusion constitutes an impairment, when the question you're asking is, whether the exclusion itself is by reason of handicap."

Toyota case the Court rejected the Sixth Circuit's attempt to tie the major life activity of performing manual tasks to tasks performed at the workplace.²⁷⁰ The *Toyota* Court explained that the ADA's definition of disability applies not only in employment discrimination cases, but also in cases involving public transportation and places of public accommodation.²⁷¹ This broad application, the Court believed, "demonstrates that the definition is intended to cover individuals with disabling impairments regardless of whether the individuals have any connection to a workplace."²⁷² In its words, at least, the Court thus appears to reject the notion that statutory coverage should be tied to the inability to work without accommodation.

But my point is not about the *intentions* of the Justices who joined these opinions. It is about the pattern of the Court's holdings. If that pattern fits the welfare reform argument for the ADA—as I have argued that it does—then critics of the Court's decisions must do more than simply assert that the Court has betrayed the statute's promises. They must marshal a normative argument against the welfare reform principle as a benchmark for understanding the statute.

2. *Judicial Estoppel Cases*

If one sees the ADA as an alternative to disability benefits programs, the judicial estoppel cases make sense as well—at least in a general way. The welfare reform argument posits a choice between benefits and ADA protection, and the plaintiffs in these cases have made their choice. They have chosen dependency, and, the argument would go, they should not get the benefits of workplace accommodation as well. Although I have not discovered any case that has explicitly made this point, the extreme animosity some courts have shown to ADA plaintiffs who previously received benefits seems clearly to reflect such a perspective.

One might find that perspective shortsighted and ultimately counterproductive because it fails to address the reality of ADA

Id. (alterations in original).

270. See *Toyota*, 184 U.S. at 200-01.

271. *Id.*

272. *Id.*

plaintiffs' situations. People apply for disability benefits because they are in a desperate position. They want to find work, but they need to eat in the interim. If application for and receipt of such benefits operates as a waiver of the right to accommodations that are necessary for reentry into the workforce, then the judicial estoppel rule effectively turns short-term desperation into long-term dependency. Moreover, the fear that judicial estoppel is necessary to prevent people from "double-dipping" on regular employment and the disability benefits system is overblown. To the extent that an individual earns income by working, her disability benefits payments decrease. Eventually, she will lose eligibility for those benefits entirely.²⁷³ It is, therefore, not fair to characterize people who receive both workplace accommodations and disability benefits as imposing a double burden on society.

These are powerful points, but if the goal is to reduce the social costs of dependency on disability benefits programs they are not ironclad. First, it is important to understand that the SSDI program does not decrease benefits by a dollar for every dollar the recipient earns at work. Rather, the recipient can work for a nine-month "trial work period" and receive full SSDI benefits regardless of earnings.²⁷⁴ For the next thirty-six months, the recipient will receive disability benefits in any month in which her earnings fall below the "substantial gainful activity" level.²⁷⁵ Additionally, for ninety-three months (nearly eight years) after the trial work period the recipient will continue to receive Medicare pursuant to the Ticket to Work and Work Incentives Improvement Act of 1999.²⁷⁶ These benefits were designed as work incentives, which may save the government money by moving long-time disability insurance recipients into the workforce. But when benefits are extended to people who have been

273. For elaboration of these points, see Diller, *Dissonant Disability Policies*, *supra* note 64, at 1044-45.

274. See 42 U.S.C. § 422(c)(4) (2000); 20 C.F.R. § 404.1592(a) (2002).

275. See 20 C.F.R. § 404.1574(b)(2) (2002). This level is currently set by regulation at \$700 per month. *Id.*

276. See Ticket to Work and Work Incentives Improvement Act of 1999, Pub. L. No. 106-170, 113 Stat. 1860 (1999) (codified as amended in scattered sections of 42 U.S.C.).

only briefly unemployed,²⁷⁷ courts might reasonably think that they simply provide a subsidy for work that would take place anyway.²⁷⁸

Moreover, students of disability benefits programs have arrived at a consistent empirical finding: "[D]isability benefit[s] recipients only rarely return to work."²⁷⁹ If that is right, then an effort to avoid the social costs of dependency should focus on keeping people off of the disability rolls in the first place.²⁸⁰ To this end, the judicial estoppel doctrine makes it costly for people—particularly those who intend their stay on the disability rolls to be a short-term prelude to a return to work—to receive disability benefits. If they accept such benefits, then the judicial estoppel doctrine effectively makes them give up the chance to go back to work with reasonable

277. In *Barnhart v. Walton*, 122 S. Ct. 1265 (2002), the Supreme Court held that the Social Security Administration reasonably interpreted the Social Security Act to deny SSDI and SSI benefits to an individual whose inability to perform substantial gainful activity lasted for less than twelve months. *Id.* at 1270. Crucial, however, to the Court's decision, and the application of the Social Security Administration regulation to which the Court deferred, was the fact that the SSDI applicant had returned to work *before* the adjudication of his benefits application. *Id.* at 1269-70. An individual can apply for SSDI benefits *before* twelve months have passed since he has become unable to work. If the applicant has remained unemployed through the time of the agency's determination of his application, and the agency determines, prior to the end of the twelve-month period, that the inability to work "can be expected to last" for twelve months, 42 U.S.C. § 423(d)(1)(A) (2000), then the applicant will be entitled to benefits—including a "trial work" period after five months of unemployment. *See id.* § 422(c).

278. Cf. Hilary Williamson Hoynes & Robert Moffitt, *The Effectiveness of Financial Work Incentives in Social Security Disability Insurance and Supplemental Security Income: Lessons from Other Transfer Programs*, in *DISABILITY, WORK, AND CASH BENEFITS* 189, 206 (Jerry L. Mashaw et al. eds., 1996) (arguing that the effects of financial work incentives on the number of participants in disability benefits programs are ambiguous). Hoynes and Moffitt specifically argue that while such incentives encourage some people to leave the benefits rolls in order to work, they encourage others to stay on the rolls in order to take advantage of the incentives, and still others to enter the benefits rolls for similar reasons. *Id.*

279. Diller, *Dissonant Disability Policies*, *supra* note 64, at 1065; *see also* GEN. ACCOUNTING OFFICE, *SOCIAL SECURITY: DISABILITY PROGRAMS LAG IN PROMOTING RETURN TO WORK* 1 (Mar. 1997) ("[N]ot more than 1 in 500 DI beneficiaries, and few SSI beneficiaries, have left the rolls to return to work.").

280. *See* GEN. ACCOUNTING OFFICE, *supra* note 279, at 19; 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 278, at 59, 77-86. For a tepid (at best) defense of the ADA in precisely these terms, *see* Richard V. Burkhauser, *Lessons From the West German Approach to Disability Policy*, in *DISABILITY AND WORK: INCENTIVES, RIGHTS, AND OPPORTUNITIES* 85, 85 (Carolyn L. Weaver ed., 1991) ("Although I have a number of reservations with the ADA, the law does have a positive attribute, which is that it seeks to keep people who become work-impaired on the job; through its job accommodation mandate it intervenes before these workers have left their jobs and become trapped in the disability system.").

accommodation. By making receipt of disability benefits more costly, the doctrine thus provides an incentive for people to stay off the benefits rolls. When viewed in the *ex post* perspective of one who has already elected to apply for disability benefits, such a rule may look like it locks people into dependency. When viewed, however, from the *ex ante* perspective of one who wants to work but is deciding whether to go on the disability rolls for a short time, the judicial estoppel rule may actually decrease dependency.

I do not mean to endorse these policy judgments. To my mind, expansion of public subsidies for work by people with disabilities would be a good thing, and it is not clear to me that people who need disability benefits to survive will, or should, refuse to apply for them out of a desire to preserve the right to get an ADA lawsuit past summary judgment. It should nonetheless be clear from this analysis that the judicial estoppel cases can be defended without indulging the retrograde assumption that disability is "a medically determined category that is inconsistent with work."²⁸¹ Nor need these cases be seen as treating the ADA as just another disability benefits program, one that is unnecessary for people who "are already being 'taken care of' by the social welfare system."²⁸² Rather, these cases can be seen as reflecting a view that accords with the attitudes of many welfare reformers: Disability is entirely consistent with work, work is to be preferred to receipt of disability benefits programs, and people with disabilities should therefore be prodded to make the choice to work.²⁸³ Although Diller does not appear to appreciate the full significance of the welfare reform argument in the effort to enact the ADA,²⁸⁴ he does acknowledge that the ADA's "philosophy that individuals with disabilities have a greater potential to work than had been previously realized" can readily be seen to justify "measures that serve as 'disincentives' to benefit recipients."²⁸⁵ To the extent the judicial estoppel cases seek to impose such disincentives, they need not be read as reflecting—and

281. Diller, *Dissonant Disability Policies*, *supra* note 64, at 1059.

282. Diller, *Judicial Backlash*, *supra* note 13, at 48.

283. See Burkhauser, *supra* note 280, at 85.

284. See *supra* note 182 and accompanying text (discussing Diller's brief acknowledgement that the welfare reform argument was asserted during congressional consideration of the ADA).

285. Diller, *Dissonant Disability Policies*, *supra* note 64, at 1068-69.

indeed are best read as rejecting—a model of the ADA as just another benefits program and of disability as a medical status incompatible with work.

3. Reasonable Accommodation Cases

Reasonable accommodation cases such as *Vande Zande*²⁸⁶ are of course the easiest to understand in welfare reform terms. *Vande Zande* is explicit on the point. Judge Posner's opinion for the Seventh Circuit in that case directly ties its cost-benefit analysis of reasonable accommodation to the statutory finding that "markets' the Act as a cost saver."²⁸⁷ If the purpose of workplace accommodation is understood as moving people off disability benefits rolls and into the workforce, the more objectionable aspects of the *Vande Zande* opinion make sense. An accommodation that does more than "enable the disabled worker to work in reasonable comfort"²⁸⁸ saves society nothing in terms of dependency costs. Although it may eliminate a stigmatic injury, such injuries have no effect on the public budget and are therefore irrelevant from an welfare reform perspective. Accordingly, from that perspective, any amount of money spent on such an accommodation, no matter how small, represents a deadweight societal loss.

I have previously argued that the ADA is best understood as an effort to give a stigmatized, socially disadvantaged group the tools to challenge that stigma and social disadvantage. The anti-stigma project is thus central to the ADA as I would read it.²⁸⁹ But Davis and Krieger overreach when they argue that *Vande Zande* represents an instance of a judge ignoring the *true* principles that underlie the ADA and instead imposing on the statute his *own* understanding of disability, one totally foreign to the Act's drafters.²⁹⁰ Judge Posner is, of course, a longtime advocate of cost-benefit analysis in the law, and the welfare reform understanding that underlies *Vande Zande* undoubtedly appealed to him for that

286. *Vande Zande v. Wis. Dep't of Admin.*, 44 F.3d 538 (7th Cir. 1995).

287. *Id.* at 543.

288. *Id.* at 546.

289. See Bagenstos, *supra* note 22, at 418-66.

290. See *supra* notes 172-73 and accompanying text (presenting Davis and Krieger's arguments).

reason. The discussion above, however, should make clear that this understanding of the ADA was not foreign to the statute's drafters.²⁹¹ Rather, it was a crucial part of the argument made by the statute's strongest supporters. Any criticism of cases like *Vande Zande*—like any criticism of the definition-of-disability and judicial estoppel cases discussed above—must take on the welfare reform argument repeatedly propounded by disability rights supporters.

III. THE WELFARE REFORM ARGUMENT AND THE INDEPENDENT LIVING MOVEMENT

If the restrictive decisions interpreting the ADA can be understood as implementing the welfare reform argument that formed such a significant part of the legislative case for the ADA, the question remains: Where did that argument come from? One obvious possibility might be that the welfare reform argument was a purely opportunistic way of hoodwinking conservatives into supporting a fundamentally radical law. As I will discuss below, there is something to that suggestion: Disability rights advocates increasingly relied on welfare reform arguments as the political climate turned toward fiscal retrenchment and against extension of civil rights policies in the late 1970s and the 1980s.²⁹² There can be little doubt that those advocates believed that their increasing reliance on such arguments represented the most effective strategy for appealing to the conservatives, neoconservatives, and neoliberals who now held the balance of power in Washington.

But this is not simply a tale of activists trapped by their own rhetoric. The welfare reform argument for the ADA was not simply an opportunistic tool to obtain the support of newly-ascendant conservatives in Washington. Rather, it derived from and drew heavily on a movement indigenous to the disability community—a movement that was a key staging ground for and that provided important leadership to the broader disability rights movement. That movement, the *independent living movement*, incorporated several strands of thinking that were notable for their ambivalence

291. See discussion *supra* Part II.A.

292. See *infra* Part III.B.1.

toward disability benefits programs.²⁹³ The welfare reform arguments for the ADA picked up on and extended the criticisms of benefits programs that were immanent in the ideology of many (though not all) independent living advocates. To the extent that the welfare reform argument has led to undesirably narrow interpretations of the ADA, the problem may not lie solely with the courts—or even with disability rights advocates' tactical choice to use that argument to sell the ADA. The problem may instead lie within a set of foundational ideas of the disability rights movement itself. As I hope to show, the independent living movement reflects a curious combination of libertarian and social democratic thought. Where, as in the selling of the ADA, the libertarian aspects of independent living thinking receive the lion's share of emphasis, the result likely undermines the ability to achieve the goals virtually all disability rights activists share.

In this Part, I elaborate that argument. Part III.A provides an overview of the independent living movement, with a particular focus on its origins and the ambivalence it expresses toward disability benefits programs. In Part III.B, I argue that disability rights activists increasingly adopted the idea of "independent living" as what social movement theorists call a "collective action frame." The welfare reform argument represented a particular, hardly inevitable, instantiation of that frame, one that strongly resonated with both conservative legislators and people with disabilities themselves. Useful as it was for the emergent disability rights movement, however, the move to the welfare-reform/independent-living frame had a cost, which I discuss in Part III.C. Because much of the agenda of the disability rights and independent living movements can be readily characterized as a call for costly redistribution and constant government intervention on behalf of people with disabilities, a focus on avoiding dependency costs can be used to delegitimize and undermine that agenda. That, I fear, is a significant part of what has happened in the interpretation of the ADA.

293. See Judith E. Heumann, *Independent Living Movement: Organizing for an Active, Disabled Old Age* (1994), at <http://www.independentliving.org/toolsforpower/tools28.html> (last visited Jan. 28, 2003).

A. *The Independent Living Movement*

1. *The Origins of the Independent Living Movement*

Most knowledgeable observers trace the origins of the independent living movement to the early 1970s.²⁹⁴ Around that time, people with disabilities in a number of communities around the country came together in local organizations known as "independent living centers." The first independent living center, the Center for Independent Living in Berkeley, California, began as an organization of students with disabilities at the University of California.²⁹⁵ The first of those students, Ed Roberts, was admitted to the university in 1962. As a result of polio, contracted when he was fourteen, Roberts used a wheelchair and spent substantial amounts of time in an iron lung. Although the university initially sought to revoke its acceptance of Roberts when it learned of his disability, the institution relented after a doctor at the Cowell Hospital, located on campus, proposed to house him on a floor of that facility. Several other college-aged people with disabilities who used wheelchairs learned of Roberts' arrangement and, in the next few years, obtained admission to the university as well. Like Roberts, these students were housed in the Cowell Hospital.

Perhaps owing to the political consciousness of the times, particularly on the Berkeley campus, the students who resided at Cowell Hospital began to see their situation in largely political

294. See, e.g., BERKOWITZ, *supra* note 216, at 197-207; JAMES I. CHARLTON, NOTHING ABOUT US WITHOUT US: DISABILITY OPPRESSION AND EMPOWERMENT 130-31 (1998); CHAVA WILLIG LEVY, A PEOPLE'S HISTORY OF THE INDEPENDENT LIVING MOVEMENT (Ctr. on Indep. Living, U. of Kan., 1988), available at <http://www.independentliving.org/docs5/ILhistory.html> (last visited Jan. 28, 2003); Gerben DeJong, *Defining and Implementing the Independent Living Concept*, in INDEPENDENT LIVING FOR PHYSICALLY DISABLED PEOPLE 4, 8 (Nancy M. Crewe & Irving Kenneth Zola eds., 1983); SHAPIRO, *supra* note 9, at 49-54; Steven E. Brown, *Freedom of Movement: Independent Living History and Philosophy* (Inst. on Disability Culture, 2000), at <http://www.ilru.org/ilnet/files/bookshelf/freedom/freedomindex.html> (last visited Jan. 28, 2003).

295. The story of the Center for Independent Living has been frequently told. The information in the remainder of this paragraph and the next two is taken from BERKOWITZ, *supra* note 216, at 200-01; Levy, *supra* note 294; Edward V. Roberts, *A History of the Independent Living Movement: A Founder's Perspective*, in PSYCHOSOCIAL INTERVENTIONS WITH PHYSICALLY DISABLED PERSONS 231, 234-39 (Bruce W. Heller et al. eds., 1989); SHAPIRO, *supra* note 9, at 44-58; Brown, *supra* note 294.

terms.²⁹⁶ They organized a political group called the "Rolling Quads" and urged the university to eliminate the architectural barriers that prevented wheelchair users from moving freely about the campus. They also organized a student-run class entitled "Strategies of Independent Living." With a grant from the Federal Office of Education, the Cowell residents launched the "Physically Disabled Students' Program" (PDSP) in 1970. That organization, run by and for students with disabilities, aimed to provide such students with the services they would need to lead independent lives that were integrated into the broader community. Services included attendants to assist in dressing, personal hygiene, and other activities of daily living, as well as prompt and reliable wheelchair repair services—a necessity for wheelchair users who sought to live in the community.

From the beginning, people with disabilities from both the Berkeley student body and the broader community sought to participate in the PDSP's services. The organizers of the program soon decided to create a new organization that was designed to serve the community at large. That organization, the Center for Independent Living (CIL), was incorporated in 1972. The founders of Berkeley's CIL sought to create an organization controlled by and serving people with diverse disabilities, which would provide "services that [people with disabilities could] control on their own terms, and [would be] dedicated to independence and the transcendence of other institutions."²⁹⁷ Moreover, instead of providing care and maintenance of people with disabilities those services would promote independence from medical and rehabilitation institutions. Above all, the Center dedicated itself to the principle of consumer control—the principle that people with disabilities should control the services they receive.

At roughly the same time, independent living centers began to spring up throughout the country. In 1972, the same year that Berkeley's CIL was incorporated, disability activists in Houston started a cooperative living project that was dedicated to the same

296. Berkowitz attributes some of the Cowell residents' political consciousness to the fact that many of the people who worked at the hospital in positions as orderlies and the like were conscientious objectors to the Vietnam War who were performing alternative service in lieu of being drafted. See BERKOWITZ, *supra* note 216, at 200.

297. *Id.* at 201.

basic principles.²⁹⁸ Other disability activists founded the Boston Center for Independent Living in 1974.²⁹⁹ Today, there are approximately 400 independent living centers throughout the United States. Although each center is different, as befits "a profoundly local movement, bred of the specific needs of individual communities as divergent as Berkeley and Columbus,"³⁰⁰ most independent living organizations subscribe to several fundamental premises. "These premises include the notion that each individual is different and unique; that people with disabilities are the most knowledgeable experts about our own needs and issues; and that programs serving disabled people should be designed to serve all disability groups."³⁰¹ As analyzed by Gerben DeJong, one of the movement's most important chroniclers, the independent living movement drew heavily on the civil rights, consumerism, self-help, demedicalization, and deinstitutionalization movements of the 1970s for several basic ideas: that discrimination is what prevents people with disabilities from achieving full integration into the community, that people with disabilities rather than medical and rehabilitation professionals should decide what services they receive and how they receive them, and that people with disabilities should have the opportunity to make their own decisions about their lives, bearing whatever risks those decisions entail.³⁰²

298. See Rita A. Varela, *Changing Social Attitudes and Legislation Regarding Disability*, in *INDEPENDENT LIVING FOR PHYSICALLY DISABLED PEOPLE*, *supra* note 294, at 28, 43.

299. See *id.*

300. BERKOWITZ, *supra* note 216, at 202; see also DeJong, *supra* note 294, at 8-9 (stating that "[e]ach center offers its own unique blend of advocacy and consumer services"); Varela, *supra* note 298, at 34 (stating that the "motif of local autonomy became a characteristic of the independent living programs that emerged in Berkeley, Houston, and Boston" and arguing that "[i]ndependent living in America ... was never an orchestrated campaign" but was instead "a movement").

301. Brown, *supra* note 294; see also Roberts, *supra* note 295, at 238-39 (describing basic characteristics of independent living centers as: (1) demanding self-determination and control by people with disabilities; (2) providing education to people with disabilities to improve their self-image and to the public at large to demonstrate "the potential of people with even the most severe disabilities to live independent, productive lives with dignity and respect;" (3) coordinating advocacy to fight discrimination and promote participation of people with disabilities in the community; and (4) providing services to all regardless of age or category of disability).

302. DeJong, *supra* note 294, at 11-20; see also Peg Nosek et al., *A Philosophical Foundation for the Independent Living and Disability Rights Movements*, ILRU 30-31 (Occasional Paper No. 1, 1982) (stating that the "element of administrative and policy control by philosophically sophisticated disabled individuals" was "the most significant difference

For a variety of reasons, the independent living movement became a major driving force behind the broader disability rights movement of the 1970s and 1980s. For one thing, "most of the early disability rights leaders were identified with CILs."³⁰³ The Berkeley Center for Independent Living, in particular, self-consciously positioned itself to groom disability rights leaders.³⁰⁴ The Berkeley CIL also organized the most significant protest of the early disability rights movement—a twenty-eight-day sit-in in the San Francisco office of the U.S. Department of Health, Education, and Welfare to protest Secretary Joe Califano's refusal to sign the regulations implementing Section 504 of the Rehabilitation Act.³⁰⁵ Even after these early days, the independent living movement continued to play a major role in the disability rights movement by providing staging areas for disability activists in communities throughout the country, a network through which those activists could share information, and, perhaps most important, organizations with paid staff who could support disability rights activities.³⁰⁶ Given the significant institutional role of the independent living movement in broader disability rights struggles, it should hardly be surprising that "the philosophy of independent

between the true independent living program and the traditional rehabilitation institutions").

303. CHARLTON, *supra* note 294, at 132.

304. For example, leaders of the Berkeley CIL encouraged Judy Heumann, then a young disability rights activist in New York, to move to Berkeley to attend graduate school and become involved in the disability community there. See SHARON BARNARTT & RICHARD SCOTCH, *DISABILITY PROTESTS: CONTENTIOUS POLITICS 1970-1999*, at 61 (2001); SHAPIRO, *supra* note 9, at 58. Heumann became a major national leader of the disability rights movement and served in the Clinton Administration as Assistant Secretary of Education for Special Education and Rehabilitative Services.

305. For a discussion that focuses on the role of the Berkeley CIL in the successful "sign 504" protest, see Roberta Ann Johnson, *Mobilizing the Disabled*, in *SOCIAL MOVEMENTS OF THE SIXTIES AND SEVENTIES* 82 (Jo Freeman ed., 1983). See Roberts, *supra* note 295, at 235 ("It was no coincidence that the most effective sit-in occurred in the birthplace of the independent living movement. Here, the coalition of people with varied disabilities was a working reality, not a theory.").

306. See, e.g., BARNARTT & SCOTCH, *supra* note 304, at 60-61; BERKOWITZ, *supra* note 216, at 207; CHARLTON, *supra* note 294, at 132; Sharon Groch, *Free Spaces: Creating Oppositional Consciousness in the Disability Rights Movement*, in *OPPOSITIONAL CONSCIOUSNESS: THE SUBJECTIVE ROOTS OF SOCIAL PROTEST* 65, 87-93 (Jane Mansbridge & Aldon Morris eds., 2001); SCOTCH, *supra* note 189, at 178; Richard K. Scotch, *Politics and Policy in the History of the Disability Rights Movement*, 67 *MILBANK Q.* 380, 394 (1989).

living formed much of the basic philosophical underpinnings of the larger [Disability Rights Movement].³⁰⁷

2. The Independent Living Movement and the Nature of "Independence"

At the heart of the independent living movement was the sometimes ill-defined concept of "independence." Although participants in the movement had a variety of understandings of what would constitute "independence," many of the versions of that concept elaborated by those participants reflected a good deal of ambivalence toward public welfare benefits for people with disabilities. The welfare reform case for the ADA drew directly—though, I should make clear, not inevitably—on these "independent living" critiques of the disability benefits system.

A major goal of the independent living movement was to redefine the notion of "independence." Although the term might in our society generally connote *physical* independence—the ability to move about and perform tasks of daily life without assistance—movement activists sought to define "independence" in terms of agency, freedom from paternalistic institutions, and the ability to live a full life in the community.³⁰⁸ Independent living centers thus

307. CHARLTON, *supra* note 294, at 132; see also Johnson, *supra* note 305, at 90 ("The development of an independent living philosophy was essential for birthing a social movement of the disabled—not only because of its emphasis on pride and autonomy for the disabled but because it took disabled people out of their isolation and brought them together in large numbers."). In their extensive empirical analysis of disability protests, Barnartt and Scotch start from the premise that civil rights and independent living represent distinct demands and even distinct social movements. See BARNARTT & SCOTCH, *supra* note 304, at 32-44. For reasons discussed above, I think it clear that civil rights and independent living demands represent intertwined strands of the same disability rights movement. Indeed, Barnartt and Scotch themselves suggest that the messages of civil rights and independent living are intertwined. They note:

People with impairments have to be seen as people who wish for, and can live independent, fulfilling, and self-supporting lives. They have to become viewed as people who constitute a minority group that has suffered from a lack of civil rights in order for an extension of the frame of civil rights to be possible.

Id. at 35. In the end, Barnartt and Scotch appear to conclude that their empirical analysis does not support their premise of two separate movements. *Id.* at 136 ("One hypothesis has been that there are at least two social movements occurring concurrently in the disability community, a disability rights movement and an independent living movement. But the evidence for this claim is not strong.").

308. Ed Roberts, one of the founders of the independent living movement recalled:

define "independence" in terms of the ability of people with disabilities to make their own choices concerning how to live their lives, what services to receive, and how and where to receive them.³⁰⁹ Even if people with disabilities need assistance in personal hygiene, transportation, or other activities in order to live in the community and make these choices, that need not compromise their independence. Rather, independent living advocates believe that such assistance actually *promotes* independence, so long as those who provide the assistance are subject to the control and direction of the individuals with disabilities who receive it. As one analyst put it, the independent living movement treats independence as consisting in "decisional" rather than "executorial" autonomy.³¹⁰

Independent living activists often tell personal stories about the moment they came to understand that this "decisional" conception of independence was the most important one. Elias Cohen relates a particularly arresting story in this vein from one of the individuals who pressed the welfare reform argument during the hearings to consider the ADA, longtime activist Lex Frieden:³¹¹

When he left his parents' home after having had an accident in which he suffered a spinal cord injury, his parents drove him to an independent living center so that he could learn to live on his own. When evening came, he sought an attendant to help him get into bed. He wheeled along the hall and came to another disabled chap and asked if somebody could help him get into bed. The other fellow pointed to a man with long hair, wearing blue jeans and a chambray shirt. Lex wheeled over to him and said, "Will you help me go to bed?" The fellow said, "Sure! Where's your room?" and Lex said, "Over there." The man just stood

The students in the DSP conceived the idea of "independent living," which to them meant active participation in society—working, having a home, raising a family, and generally sharing in the joys and responsibilities of community life. Independent living meant freedom from isolation and institutionalization; it meant the ability to choose where to live, how to live, and how to carry out the activities of daily living that most able-bodied people take for granted. It meant taking the responsibility for political action and charting a new way of life.

Roberts, *supra* note 295, at 237.

309. See, e.g., Nosek et al., *supra* note 302, at 3 ("Judy Heumann states, 'To us, independence does not mean doing things physically alone. It means being able to make independent decisions. It is a mind process not contingent upon a "normal" body.'").

310. Elias A. Cohen, *What is Independence?*, GENERATIONS, Winter 1992, at 49.

311. See *supra* notes 227-28 and accompanying text.

there and didn't do anything. Lex asked, "Would you come with me and help me?" And the fellow accompanied him to the room—and just stood there. "Would you lift me onto the bed?" Lex asked, and the fellow said, "Sure," and he lifted him onto the bed, but he didn't do anything. Lex said, "Would you please put my feet up onto the bed?" and the fellow said, "Sure." Lex thought the fellow was stupid and couldn't understand what was going on. As he later told the story, Lex commented, "I had to ask him to take off my shoes, take off my shirt. I thought, maybe he isn't stupid, maybe he's stoned. But when I was in bed, in my pajamas, I realized that was the first time I had undressed myself since my accident."³¹²

For Frieden, then, the embrace of decisional independence was psychologically empowering; it enabled him to "undress himself" again, as he had before his accident.

Other independent living activists focus on a separate aspect of their embrace of decisional independence—the realization that they could open up additional time for productive activities in the community once they stopped trying physically to perform all of the tasks of daily living. Ed Roberts reports:

One of my therapists insisted that I learn to feed myself. Meals took hours, and I was always exhausted when they were over. I realized then that I could either use my time to feed myself or have an attendant feed me, allowing me to spend the time saved to go to school. I went to school.³¹³

As DeJong summarizes the lesson, "A person who can get dressed in fifteen minutes with human assistance and then be off for a day of work is more independent than the person who takes two hours to dress and then remains homebound."³¹⁴

312. Cohen, *supra* note 310, at 49.

313. Roberts, *supra* note 295, at 234. Similarly, Irving Kenneth Zola recounts that he had learned in rehabilitation "to push [him]self to the maximum of [his] physical capability," including to walk wherever he wanted to go, "[n]o matter that it took [him] five times as long to get there, or that [h]e slipped along the way, or that [he] arrived at [his] destination cramped and exhausted." But those exhausting walks did not leave him "really independent." Irving Kenneth Zola, *Toward Independent Living: Goals and Dilemmas*, in *INDEPENDENT LIVING FOR PHYSICALLY DISABLED PEOPLE*, *supra* note 294, at 344, 345.

314. DeJong, *supra* note 294, at 24; see also Adrienne Asch, *Disability, Bioethics, and*

Personal assistance compromises independence, in this view, only when it requires that the individual with a disability subject him or herself to the control and direction of the personal assistant, a parent, or a welfare or rehabilitative bureaucracy. A substantial portion of the business of independent living centers thus consists of providing a clearinghouse to match individuals who wish to work as personal assistants with individuals who need such assistance. Importantly, it is the individual with a disability who retains control over hiring, firing, terms and conditions of employment, as well as the direction of the workday.³¹⁵ In addition, much of the advocacy agenda of the independent living movement revolves around efforts to secure funding for consumer-controlled personal assistance.³¹⁶

Such a position is not inherently antagonistic to the provision of cash and in-kind benefits to people with disabilities. To the contrary, so long as benefits are distributed in a way that leaves the individual recipients with maximum control over their own lives and gives them the greatest chance to live and work in the community, such benefits can be seen as promoting, rather than hindering, independence as the independent living movement defines it. Independent living advocates have often viewed disability benefits in precisely those terms.³¹⁷

Human Rights, in HANDBOOK OF DISABILITY STUDIES 297, 313 (Gary L. Albrecht et al. eds., 2001) ("Disability rights adherents contend that independence need not be viewed in physical terms; rather, self-direction, self-determination, and participation in decision making about one's life are more genuine and authentic measures of desirable independence or, better, interdependence."); Irving Kenneth Zola, *Developing New Self-Images and Interdependence*, in INDEPENDENT LIVING FOR PHYSICALLY DISABLED PEOPLE, *supra* note 294, at 49, 58 ("The Independent Living Movement argues that it is more important for us to have full control over our lives than over our bodies. We will give up doing some things for ourselves if we can determine when and how they are to be done.").

315. See BERKOWITZ, *supra* note 216, at 201 (describing the operations of the Berkeley CIL); Varela, *supra* note 298, at 43 (listing attendant care as one service closely identified with independent living centers).

316. For example, the National Council on Independent Living played a major role in advocating for the Medicaid Community-based Attendant Services and Supports Act of 2001 (MiCASSA), S. 1298, 107th Cong. (2001), and predecessor bills that would expand federal funding for personal assistance services. Cf. *Micassa Summary*, at <http://www.ncil.org/micassa1298.htm> (last visited Sept. 4, 2002) (providing bill summary and text, as well as gathering bill supporter information).

317. See DeJong, *supra* note 294, at 12 ("[D]isabled persons have become aware that benefit rights are prerequisites to living in a community setting. Without income assistance benefits or attendant care benefits, many disabled persons would be involuntarily confined to long-term care facilities.").

Acceptance of disability benefits has even been institutionalized in the movement. Much of the work at independent living centers involves efforts to give people with disabilities information and other tools to advocate for the benefits to which they are entitled.³¹⁸ Moreover, some independent living centers have been careful to hold down the wages they pay to employees with disabilities, to ensure that those individuals do not exceed the Social Security Administration's "substantial gainful activity" threshold and accordingly become ineligible for continued receipt of benefits.³¹⁹

In that sense, the independent living movement had a strongly social-democratic dimension—one that would lead to significant support for existing disability benefits programs. But that element coexisted with other sets of ideas that could easily lead to a strong skepticism of disability benefits programs.³²⁰ For one thing, many independent living movement activists frequently identified welfare and charity as prime impediments to independence. Such programs, in the view of the more radical of these activists, "buy off" people with disabilities by keeping them out of the community and out of the workforce in exchange for guaranteed maintenance by the state.³²¹ In language that generally recalled the New Left critique of welfare bureaucracies,³²² these independent living activists argued that disability benefits programs subordinate people with disabilities, leaving them subject to the control of welfare agencies and "helping professionals," and in an inferior status in society at large.³²³ In a more libertarian vein, others emphasized that welfare

318. See Varela, *supra* note 298, at 43-44 (listing the provision of information on income and benefits rights as a service closely identified with independent living centers).

319. See Roberts, *supra* note 295, at 237 ("Employees of the center earned only as much as was allowed within the limitations of various disability benefits. They could not afford to take full-time pay for full-time work because it would not make up for the loss of medical benefits.").

320. See Cheryl Rogers, *The Employment Dilemma for Disabled Persons*, in *IMAGES OF THE DISABLED, DISABLING IMAGES* 117, 120-21 (Alan Gartner & Tom Joe eds., 1987).

321. *Id.* at 120.

322. For an account of this critique, as absorbed by "welfare rights" advocates of the 1960s and 1970s, see William H. Simon, *The Invention and Reinvention of Welfare Rights*, 44 MD. L. REV. 1, 2-3 (1985).

323. See CHARLTON, *supra* note 294, at 93; Nosek et al., *supra* note 302, at 9-10. Consider the bitterness of this description by four leaders of the independent living movement:

Aggressive programs of coercions and disincentives are used to force a majority of disabled individuals into certain traditional, subservient roles: clowns; self-centered, disability obsessed misfits; faithful subjects for weak, insecure mini-

and disability benefits programs make people with disabilities dependent on the state rather than on their own industry.³²⁴ Even if some kinds of disability benefits programs might theoretically avoid compromising the independence of benefits recipients, a vocal group of independent living adherents harshly attacked the existing institutions of the disability welfare state. Because those same institutions remained in place when the ADA was under consideration, there should be little wonder that independent living activists' efforts to enact the new statute would dovetail with that critique of the disability welfare system.

In addition, as the rhetoric of "independence" suggests, many adherents to the independent living movement continually and insistently urged an ethic of self-help and individual responsibility.³²⁵ *Individuals* with disabilities, these adherents argued, must take responsibility for their own lives and actions.³²⁶ As Peg

monarchs; grateful recipients of the good deeds of ineffectual part-time saints; smiling, modest, uncomplaining, thankful Uncle Toms with white canes; sweet Aunt Patsys in wheelchairs—everyman's reliable inferiors, society's eternal children.

Id. at 9.

324. See Nosek et al., *supra* note 302, at 7 (describing benefits programs as "devoted to the support of non-productive, often counter-productive dependence"); *id.* at 11 ("Continuation of our present policy—involving massive, inefficient subsidies which support large segments of the population in relatively idle dependency—threatens to destroy that dynamic, democratic socioeconomic mechanism which has made possible a culture of unprecedented optimism, opportunity and productivity.").

325. See CHARLTON, *supra* note 294, at 127 (arguing, as a veteran leader of the independent living movement, that self-help and self-determination form the core principles of disability rights); Zola, *supra* note 314, at 49 (describing the independent living movement as "but the latest incarnation of an old theme in American life—the idea of self-help"). Foreign students of the American disability movement have seen this point clearly. See Jerome E. Bickenbach, *Disability Human Rights, Law, and Policy*, in HANDBOOK OF DISABILITY STUDIES, *supra* note 314, at 565, 576 ("From the beginning of the movement, disability advocates in the United States adopted and made their own the culture of individualism To reject stereotypes of infirmity and childlike dependency, they believed it essential that people with disabilities strive for independence and self-sufficiency."); Tom Shakespeare & Nick Watson, *Making the Difference: Disability, Politics, and Recognition*, in HANDBOOK OF DISABILITY STUDIES, *supra* note 314, at 546, 550 ("A large element of the movement in North America has stemmed from consumerism and self-help; for example, in the independent living centers, this emphasis plays a large part. This is a particularly American tradition of self-reliance and individual rights.").

326. For example, Peg Nosek and her coauthors argue:

[T]he individual will benefit by adopting a working hypothesis that he is the locus of the problem and the solution in the sense that he is, within the reality of his conscious universe, the only one who can initiate change and perceive its

Nosek, Yayoi Narita, and Justin and Yoshiko Dart put it, "[t]he essence of independence—of human fulfillment—and the foundation of equality is not the granting of rights and benefits by others, but the establishment of self-discipline and self-reliance"³²⁷

For individuals with disabilities to assume personal responsibility for their lives, on this view, they must make choices and bear the consequences of those choices. To DeJong, this "dignity of risk" is of central importance: "The dignity of risk is the heart of the IL movement. Without the possibility of failure, the disabled person lacks true independence and the ultimate mark of humanity, the right to choose for good or evil."³²⁸ Independent living activists urged that the empowerment and flourishing of people with disabilities would be best advanced by a regime in which people with disabilities had the opportunity to develop their skills, test them in the world, and succeed or fail according to their talents.

Emphasis on personal responsibility and the "dignity of risk" could, of course, accord with the continued receipt of some forms of public and personal assistance. Those kinds of assistance that enable people with disabilities to leave segregated institutions and their homes and enter the workforce are quite consistent with such an emphasis. There is, however, an enormous tension between the major disability benefits programs—which excuse people with disabilities from the obligation to work and pay them a steady cash benefit simply because they have a disability—and the notion that individuals with disabilities should test their skills in the world and

results. Therefore, the individual can be said to bear a complete responsibility for solving his own and society's problems.

Nosek et al., *supra* note 302, at 14 (emphasis omitted).

327. *Id.* at 22.

328. DeJong, *supra* note 294, at 20; see also CHARLTON, *supra* note 294, at 128 (stating that the principles of self-help and self-determination "are not without risk:" "[t]hey tend to promote a go-it-alone approach that would require people to actually take control of their lives, an endeavor for which many people with disabilities are not prepared"); Varela, *supra* note 298, at 44 (noting that when independent living movement leaders write about independence "they stress choice, risk, and self-determination"); Zola, *supra* note 313, at 351-53 (stressing the importance of risk-taking to fulfillment and independent living). A "definition of independent living," circulated by the Independent Living Resource Utilization Center (ILRU), states: "Independent living has to do with self-determination. It is having the right and the opportunity to pursue a course of action. And, it is having the freedom to fail—and to learn from one's failures, just as nondisabled people do." *An American Definition of Independent Living*, at <http://www.independentliving.org/toolsforpower/tools8.html> (last visited Jan. 28, 2003).

experience the "dignity of risk." DeJong, for example, has described activists' views in a way that leaves very little room for traditional benefits programs:

The IL movement rejects the behavioral expectations created by both the sick role and its derivative, the impaired role, asserting that the disabled do not want to be relieved of their familial, occupational, and civic responsibilities in exchange for childlike dependency. In fact, the movement considers any such "relief" tantamount to denying the disabled both their right to participate in the life of the community and their right to full personhood.³²⁹

In this context, it is hardly surprising to hear leaders of the independent living movement speak approvingly of such things as moving "from a welfare mentality to one that has seen [people with disabilities] become contributing, productive members of society."³³⁰ It could not be accidental that independent living activists, who challenged the existing disability welfare state as creating dependency, adopted the same rhetoric of personal responsibility as have the advocates of trimming back the welfare state more generally.³³¹

329. DeJong, *supra* note 294, at 18. British activists with disabilities beginning in the early 1970s took a similar view of disability benefits programs. See, e.g., MICHAEL OLIVER & COLIN BARNES, *DISABLED PEOPLE AND SOCIAL POLICY: FROM EXCLUSION TO INCLUSION* 80 (1998) (arguing that disability activists in the early 1970s began to understand "that a national disability income might itself be exclusionary; if disabled people were to be provided with an adequate income without working, there would be no need to include disabled people in the labour market and in the workforce").

330. Roberts, *supra* note 295, at 239-40. Bickenbach similarly notes:

In this environment of individual rights and the rejection of paternalistic state agencies, human rights advocates have tended to be highly suspicious of entitlement programming, especially income support and welfare policies, and have argued instead for economic self-sufficiency, usually in the form of remunerative employment. The aim was to make people with disabilities competitive in the open labor market and to give them a fair and equal opportunity to get and keep a job.

Bickenbach, *supra* note 325, at 576.

331. "Personal responsibility" has long been a buzzword for welfare reformers, one given pride of place in the title of the 1996 welfare reform bill, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 42 U.S.C.). On the focus on "responsibility" among welfare reformers, see NEIL GILBERT, *TRANSFORMATION OF THE WELFARE STATE: THE SILENT SURRENDER OF PUBLIC RESPONSIBILITY* 63-65 (2002).

As the disability rights movement began its push for the ADA in the late 1980s, an influential strand of "independent living" thinking thus stood in an extremely tenuous relation with existing disability benefits programs. With its attack on the dependency-creating aspects of disability benefits programs, and its insistence that prejudice and environmental barriers constituted the principal obstacles to the full community participation of people with disabilities,³³² that strand of independent living thinking contained the seeds of the welfare reform argument for the ADA.

Indeed, for years several independent living activists had been calling attention to the high public costs of disability benefits programs and the need for people with disabilities to move off of the disability benefits rolls and into the workforce. These activists, speaking and writing largely for an audience of people with disabilities rather than the broader political community, often made precisely the same welfare reform arguments that would achieve such prominence in the public campaign to enact the ADA. As early as 1982, a group of movement leaders prepared a paper entitled *A Philosophical Foundation for the Independent Living and Disability Rights Movements*.³³³ That paper, which the Independent Living Resource Utilization Project circulated to independent living centers throughout the country, repeatedly invoked the welfare reform argument in almost the same form it would take in the campaign to enact the ADA. The paper drew attention to the high public cost of dependence on disability benefits programs³³⁴ and argued that society "cannot afford not to" end its policy of "massive, inefficient subsidies which support large segments of the population in relatively idle dependency"³³⁵ In so doing, the paper explicitly opposed the independent living agenda to the "give me' socialist" view "that 'society' should and can provide certain benefits to each human with no corresponding obligation on the part of the

332. See, e.g., DeJong, *supra* note 294, at 22 ("According to the IL paradigm ... the problem resides in an environment that includes the rehabilitation process, the physical environment, and the social control mechanisms of society-at-large.").

333. Nosek et al., *supra* note 302.

334. See *id.* at 7 (stating that disability benefits payments had "grown from \$59.1 billion in 1970 to an estimated \$210 billion in 1980" and that "this situation, already a major factor in public deficits and inflation, could become an uncontrollable socioeconomic disease").

335. *Id.* at 11.

individuals."³³⁶ In bringing together independent living activists' critique of dependency-creating benefits programs and those activists' agenda for equal opportunity, the *Philosophical Foundations* paper represents one of the first statements of the welfare reform argument that would emerge so forcefully later in the decade.³³⁷

B. The Utility of Avoiding Dependency

The welfare reform argument for the ADA, then, did not come from nowhere. It arose from a set of ideas, internal to the disability rights movement, that represented one possible answer to the question: What is independent living? But why did the leaders of the campaign to enact the ADA choose to frame their arguments so significantly in independent-living/welfare reform terms? Why focus on "independence"—particularly the more libertarian conception of "independence"—and not just "equality" or "integration"?

During the last two decades, social movement scholars have increasingly turned their attention to the process by which social movements frame issues to mobilize constituents and achieve collective goals. This literature draws on the idea of a "frame" popularized among sociologists by Erving Goffman's 1974 book *Frame Analysis*.³³⁸ To Goffman, "frames" are the schemata of interpretation that people use to make sense of their experiences, and to answer the question "What is it that's going on here?"³³⁹ As Goffman argues, such frames inherently highlight some aspects of a situation while making others effectively invisible or irrelevant, at least temporarily.³⁴⁰ Much of his book is devoted to an analysis of

336. *Id.* at 44.

337. Notably, one of the authors of the *Philosophical Foundations* paper was Justin Dart, who would later deploy the welfare reform argument to great effect in the congressional hearings to consider the proposed ADA. See *supra* notes 218-20 and accompanying text.

338. ERVING GOFFMAN, *FRAME ANALYSIS: AN ESSAY ON THE ORGANIZATION OF EXPERIENCE* (1974). Goffman was quick to clarify that he did not invent the concept of the "frame." *Id.* at 7 (crediting the concept to many others, and specifically crediting the use of the term "frame" to Gregory Bateson).

339. *Id.* at 8, 10-11; see also Rubin, *supra* note 23, at 17 ("A frame is a problem-solving scheme that individuals employ to make sense of their environment. For social movement scholars, frame analysis serves to explain how individuals develop shared perceptions that serve as a basis for action, thus melding individual motivation with organizational structures.").

340. See GOFFMAN, *supra* note 338, at 241-46 (discussing "out-of-frame activity").

intentional efforts by individuals to manipulate and change the frames that others will bring to bear on a particular slice (or, in Goffman's word, "strip") of activity.³⁴¹

Recent social movement theorists have applied the idea of a "frame" to the activities of social movement actors. These theorists tend not to engage directly with Goffman's analysis. Frequently citing Goffman, however, they have argued that one significant aspect of social movement activity is the creation and dissemination of "collective action frames"—ways of interpreting the world that encourage support for a movement's program among potential adherents and other relevant audiences.³⁴² Although these theorists have been regrettably imprecise in defining what kind of collection of ideas would constitute such a "frame,"³⁴³ their analysis provides

341. See *id.* at 83-200, 378-438.

342. Sources I have found useful include: William A. Gamson, *Constructing Social Protest*, in *SOCIAL MOVEMENTS AND CULTURE* 85, 89-104 (Hank Johnston & Bert Klandermans eds., 1995) [hereinafter Gamson, *Constructing Social Protest*]; William A. Gamson, *The Social Psychology of Collective Action*, in *FRONTIERS IN SOCIAL MOVEMENT THEORY* 53, 65-74 (Aldon D. Morris & Carol McClurg Mueller eds., 1992) [hereinafter Gamson, *The Social Psychology of Collective Action*]; Scott A. Hunt et al., *Identity Fields: Framing Processes and the Social Construction of Movement Identities*, in *NEW SOCIAL MOVEMENTS: FROM IDEOLOGY TO IDENTITY* 185, 185-204 (Enrique Laraña et al. eds., 1994); Hank Johnston & Bert Klandermans, *The Cultural Analysis of Social Movements*, in *SOCIAL MOVEMENTS AND CULTURE*, *supra*, at 3, 8-9; Bert Klandermans, *The Social Construction of Protest and Multiorganizational Fields*, in *FRONTIERS IN SOCIAL MOVEMENT THEORY*, *supra*, at 77, 80, 85-94; Doug McAdam, *Culture and Social Movements*, in *NEW SOCIAL MOVEMENTS*, *supra* at 36, 37-45; David A. Snow & Robert D. Benford, *Ideology, Frame Resonance, and Participant Mobilization*, 1 *INT'L SOC. MOVEMENT RES.* 197 (1988) [hereinafter Snow & Benford, *Ideology*]; David A. Snow & Robert D. Benford, *Master Frames and Cycles of Protest*, in *FRONTIERS IN SOCIAL MOVEMENT THEORY*, *supra*, at 133, 135-41; Sydney Tarrow, *Mentalities, Political Cultures, and Collective Action Frames: Constructing Meanings Through Action*, in *FRONTIERS IN SOCIAL MOVEMENT THEORY*, *supra*, at 174, 186-92; SIDNEY TARROW, *POWER IN MOVEMENT: SOCIAL MOVEMENTS, COLLECTIVE ACTION AND POLITICS* 118-34 (1994); Mayer N. Zald, *Culture, Ideology, and Strategic Framing*, in *COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS: POLITICAL OPPORTUNITIES, MOBILIZING STRUCTURES, AND CULTURAL FRAMINGS* 261, 261-74 (Doug McAdam et al. eds., 1996); William A. Gamson, *Political Discourse and Collective Action*, 1 *INT'L SOC. MOVEMENT RES.* 219, 220-28 (1988) [hereinafter Gamson, *Political Discourse*]. David A. Snow et al., *Frame Alignment Processes, Micromobilization, and Movement Participation*, 51 *AM. SOC. REV.* 464 (1986).

343. See Zald, *supra* note 342, at 261 ("[T]he notion of strategic framing is quite vague in terms of its constituent elements and general processes."). William Gamson refers to "issue packages" as consisting of a core "frame" for interpreting events and "a number of different condensing symbols that suggest the core frame and positions in shorthand, making it possible to display the package as a whole with a deft metaphor, catch-phrase, or other symbolic device." Gamson, *Political Discourse*, *supra* note 342, at 222. Many other scholars

important insight into the mobilizing role of ideas—shaped by the movements themselves—in social movement activity.³⁴⁴ As these scholars emphasize, collective action frames are consciously created by social movement actors, but they do not arise spontaneously from the minds of those actors. Rather, framing is an “act[] of cultural appropriation.”³⁴⁵ Successful collective action frames draw on the existing political culture at the same time they seek to transform it.³⁴⁶ And importantly, a social movement will rarely have any single, uncontroverted collective action frame. Rather, the framing process is itself a locus of intramovement contest.³⁴⁷

In this section, I draw on the frame analysis literature of recent social movement theory to explore why the welfare reform arguments assumed such prominence in the campaign to enact the ADA. I suggest that the adoption of an independent-living/welfare reform frame served a number of purposes for disability rights leaders. Most obviously, such a frame promised to resonate with mainstream

seem to use the term “frame” to encompass these “condensing symbols” as well. *See, e.g.,* TARROW, *supra* note 342, at 122; Zald, *supra* note 342, at 262. Pamela Oliver and Hank Johnston have recently criticized social movement scholars who take a framing perspective for failing to take account of both the cognitive roots of framing processes and the role of ideology in transmitting political ideas. *See* Pamela E. Oliver & Hank Johnston, *What a Good Idea! Ideologies and Frames in Social Movement Research*, 5 *MOBILIZATION* 37 (2000).

344. In this, the “frame analysis” perspective represents a response to the widely endorsed “resource mobilization theory” of social movement activity, which argues that the resources available to potential social movements—and not the ideas they articulate—are the crucial determinants of movement emergence and success. *See, e.g.,* John D. McCarthy & Mayer N. Zald, *Resource Mobilization and Social Movements: A Partial Theory*, 82 *AM. J. SOC.* 1212 (1977).

345. McAdam, *supra* note 342, at 37-38; *see also* Zald, *supra* note 342, at 266 (“Social movements exist in a larger societal context. They draw on the cultural stock for images of what is an injustice, for what is a violation of what ought to be.”).

346. *See* Tarrow, *supra* note 342, at 189-92; *see also* TARROW, *supra* note 342, at 122 (“Out of a cultural toolkit of possible symbols, movement entrepreneurs choose those that they hope will mediate among the cultural underpinnings of the groups they appeal to, the sources of official culture and the militants of their movements—and still reflect their own beliefs and aspirations.”).

347. *See* Gamson, *Constructing Social Protest*, *supra* note 342, at 89-90 (“Movements may have internal battles over which particular frame will prevail or may offer several frames for different constituencies.”); William A. Gamson & David S. Meyer, *Framing Political Opportunity*, in *COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS*, *supra* note 342, at 275, 283 (“[I]t is comparatively rare that we can speak sensibly of the movement framing. It is more useful to think of framing as an internal process of contention within movements with different actors taking different positions.”); Zald, *supra* note 342, at 270 (discussing intramovement contests over framing).

political leaders and the general public at a time of fiscal crisis and increasing public impatience with the demands of minority groups. Less obviously, but more interestingly, the adoption of such a frame helped to mobilize people with disabilities to associate themselves with and support a broad-based disability rights movement.

This argument is not of merely historical interest. If it is correct, my argument suggests that the contention that courts have imposed their *own* views on the ADA is even more problematic than I have suggested above. To the extent that the courts have implemented the welfare reform idea itself framed by influential participants in the disability rights movement, they have implemented an idea that played an important role in cementing together a disability rights movement in the first place. If the welfare-reform/independent-living frame also limits the prospects of the disability rights movement, as I argue below in Part III.C., its importance to the movement will nonetheless make it particularly difficult to get beyond.

1. Resonance with Mainstream Politicians and the General Public

Although social movement scholars have devoted their greatest efforts to examining the power of collective action frames to mobilize potential movement constituents, they have also noted the importance of those frames in obtaining support from mainstream political leaders and the broader public.³⁴⁸ The disability rights movement's increasing reliance on an independent-living/welfare reform frame throughout the 1980s clearly served this latter function.

As I noted above, the concept of "independence," and the particular focus on eliminating the costly dependence of people with disabilities on public benefits programs, rose to prominence in disability rights advocates' arguments in the early 1980s. Frank Bowe's 1980 book, *Rehabilitating America*, presented the most sustained version of the argument, and disability rights advocates

348. See, e.g., McAdam, *supra* note 342, at 37-38; Snow et al., *supra* note 342, at 465 n.2.

relied heavily on that argument to fight then-Vice President Bush's proposed rollback of the Section 504 regulations.³⁴⁹

In one of the leading articles on social movement framing processes, David Snow and his colleagues argue that social movements often follow a strategy of "frame extension"—an effort to bring new constituents and grievances within an established and successful collective action frame.³⁵⁰ One might therefore have expected disability rights leaders to rely on a simple extension of the civil rights frame that had been so successful in supporting the expansion of the rights of racial minorities in the 1960s and of women in the 1970s—and they certainly did to some extent. Sharon Groch, for example, argues that the disability consciousness of early disability rights/independent living leaders drew directly on the "oppositional consciousness created by African Americans and brought to the public's attention during the Black civil rights movement of the 1950s and 1960s."³⁵¹ Sharon Barnartt and Richard Scotch make a similar argument.³⁵² These scholars are clearly correct that disability rights/independent living leaders were influenced by and drew from the civil rights frame, if in some respects³⁵³ their story is too pat.

As I have attempted to argue, however, the picture is more complicated than Groch and Barnartt and Scotch suggest. I do not deny that the civil rights frame has played an important role in the disability rights movement. Social movements rarely can be said to have a single frame; the act of framing is often very much contested within the movement.³⁵⁴ But the deliberate decision by many disability rights leaders to move beyond the civil rights frame and toward a focus on welfare reform and independent living seems to be particularly important to understanding the trajectory of that movement.

349. See *supra* notes 212-17 and accompanying text.

350. See Snow et al., *supra* note 342, at 472.

351. Groch, *supra* note 306, at 88.

352. See BARNARTT & SCOTCH, *supra* note 304, at 18-20.

353. See Groch, *supra* note 306, at 90 (stating that Ed Roberts did not begin to see disability as a civil rights issue until he spent time in 1974 teaching African-American students and that, similarly, Judy Heumann "crystallize[d] her oppositional consciousness" when she tutored a group of African-American students while in college).

354. See *supra* note 347 and accompanying text.

As the 1970s gave way to the 1980s, the civil rights frame presented difficulties for the disability rights movement. A series of developments during the 1970s—the implementation of school busing in the North, the rise of disparate-impact theories of discrimination, and the widening implementation of affirmative action, to name the most obvious ones—all combined with a tight economy to make civil rights policies increasingly controversial in the public at large.³⁵⁵ Increasing opposition to the extension of civil rights policies was a major factor in the election of Ronald Reagan in 1980.³⁵⁶

The agenda of disability rights leaders would extend the civil rights frame even further in the same controversial direction. Instead of simply seeking the elimination of invidious, intentional discrimination, disability rights leaders demanded that individuals with disabilities receive reasonable accommodations on the job—accommodations to which nondisabled employees would not necessarily be entitled.³⁵⁷ Disability rights leaders also demanded elimination of architectural and transportation barriers to the full integration of people with disabilities in the community. As the extensive, harshly-fought battle for accessible public transportation that began in the 1970s made clear, removal of such barriers could be costly and would arouse the opposition of well-organized, well-funded interests.³⁵⁸

At a time when deregulatory ideas were ascendant, and much of the public was impatient with minority groups' claims for ever-expanded entitlements in the name of civil rights, a simple extension of the civil rights frame did not hold out substantial

355. For an excellent discussion that connects this point to broader difficulties faced by liberals and the Democratic Party, see THOMAS BYRNE EDSALL & MARY D. EDSALL, *CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS* 101-04, 122-29 (1991).

356. *See id.*

357. *See* BERKOWITZ, *supra* note 216, at 221 (noting backlash against accommodation requirement); PERCY, *supra* note 214, at 73-75 (discussing controversy over accommodation requirement).

358. On the controversy over the removal of architectural and transportation barriers generally, see BERKOWITZ, *supra* note 216, at 217-22; PERCY, *supra* note 214, at 106-28; SCOTCH, *supra* note 189, at 98-100. On the enormous controversy over accessible public transportation, see BERKOWITZ, *supra* note 216, at 219-21; ROBERT A. KATZMANN, *INSTITUTIONAL DISABILITY: THE SAGA OF TRANSPORTATION POLICY FOR THE DISABLED passim* (1986); PERCY, *supra* note 214, at 129-59.

prospects of success.³⁵⁹ Indeed, the Reagan Administration made clear from the very beginning the risks the new political currents posed for disability rights advocates. As discussed above, the regulations implementing Section 504 were among the first targets of Vice President Bush's new Task Force on Regulatory Relief.³⁶⁰ To combat these developments, disability rights advocates had to move beyond the civil rights frame.

Disability rights leaders self-consciously aimed to solve these problems by couching their demands in terms of the elimination of dependency and the promotion of independence.³⁶¹ Such a frame

359. See, e.g., JOHN D. SKRENTNY, *THE MINORITY RIGHTS REVOLUTION* 265-75 (2002) (arguing that the ease of the analogy between black civil rights and disability civil rights accounted for the quiet passage of the nondiscrimination provisions of the Rehabilitation Act of 1973, but that the high costs of disability rights became obvious during the statute's implementation in the 1970s and 1980s). Writing in 1987, Edward Berkowitz described the differences between the disability rights movement and "earlier civil rights movements" as "significant," and noted "The black civil rights movement a decade earlier had reduced the cost of public accommodations in the South by reducing the need to have one facility for blacks and another for whites." BERKOWITZ *supra* note 216, at 221. He continued:

To admit James Meredith's handicapped counterpart to a university would cost money rather than save it. It would mean that the physical plant would need to be expanded or modified, and it would require the university to pay the administrative costs of complying with the federal regulations. Legal advisors to the American Council of Education warned that Section 504 would produce "sheaves of unread, unnecessary paper." Few people argued that way in Meredith's case. In the intervening decade, however, inflation had driven the cost of education to the point where major social initiatives, such as accommodating the handicapped, were subjected to substantial criticism because they were perceived to be costly.

Id. at 221-22 (footnote omitted). Barnartt and Scotch, who assert that the disability rights movement merely extended the civil rights frame, acknowledge that the fact that "civil rights for persons with disabilities might cost something" represented a major difference from the goals of the African-American civil rights movement. BARNARTT & SCOTCH, *supra* note 304, at 35. They argue, however, that the distinction required only a simple "modification" of the civil rights frame. *Id.* at 35-36. To the contrary, I contend that this fact pushed toward adoption of a substantially new frame.

360. See BERKOWITZ, *supra* note 216, at 222-23; PERCY, *supra* note 180, at 88-96; SCOTCH, *supra* note 189, at 170-71; SHAPIRO, *supra* note 9, at 120-24.

361. See BERKOWITZ, *supra* note 216, at 222 (noting that the disability rights movement "was increasing its political sophistication by learning how to temper and tailor its rhetoric"); *id.* ("In the past, leaders had spoken of entitlements and inherent rights. Now, with the arrival of Reagan and George Bush, who led an important Task Force for Regulatory Relief, the leaders stressed independence."); see also Gareth H. Williams, *The Movement for Independent Living: An Evaluation and Critique*, 17 SOC. SCI. MED. 1003, 1005 (1983) (arguing that the popularity of the independent living idea "is given strength by the way in which it happens to fit in with the prevalent ideology of robust conservative individualism").

enabled the movement to harness a related aspect of the conservative politics of the early 1980s. When President Reagan took office, he rode (and later fed) a wave of resentment of public spending—particularly spending on welfare programs.³⁶² As Reagan's large tax cut and defense buildup left the federal budget in a seemingly perpetual state of deficit, the pressure on domestic spending rose even more. In part due to the President's continuing attacks on the subsidization of idleness and dependency, the pressure on welfare spending was particularly intense. The Social Security disability system did not escape these pressures. In keeping with its welfare reform agenda, the Reagan Administration sought very early to tighten eligibility for the Social Security disability programs, though its efforts were ultimately thwarted by Congress and the courts.³⁶³

In this context, the value of the welfare-reform/independent-living frame to disability rights leaders should be obvious. To achieve their goals, disability rights leaders could almost endorse the wave of fiscal conservatism and opposition to welfare programs. They could say that people with disabilities do not want to be dependent on disability benefits; "they simply want to work." Unlike a presentation of disability rights laws as the logical next step in the increasingly fragile expansion of civil rights protections, the presentation of disability rights laws as a means of achieving independence resonated strongly with the ascendant conservative ethic of individualism, self-reliance, and fiscal restraint. As I noted above, that presentation seemed to resonate with then-Vice President Bush and his counsel C. Boyden Gray when Evan Kemp used it to oppose the rollback of the Section 504 regulations.³⁶⁴ And the ability of disability rights leaders successfully to frame the issue as one of independence versus dependence likely accounts for the

Thus, I think that Jerome Bickenbach is wrong when he writes, "*Without intending to*, American disability advocates sent messages that clearly resonated with the growth of neoconservatism that went on to dominate the political landscape during the 1980s and 1990s." Bickenbach, *supra* note 325, at 576 (emphasis added). It seems to me the appeal to neoconservatives was quite intentional.

362. See, e.g., EDSALL & EDSALL, *supra* note 355, at 129-31, 136, 148, 152-53.

363. For a discussion of this episode, see BERKOWITZ, *supra* note 216, at 124-51; SUSAN GLUCK MEZEY, NO LONGER DISABLED: THE FEDERAL COURTS AND THE POLITICS OF SOCIAL SECURITY DISABILITY 76-87, 121-39, 147-68 (1988).

364. See SHAPIRO, *supra* note 9, at 121.

unusually large degree of support that the ADA drew from legislators of the Republican party.³⁶⁵

2. *Resonance with People with Disabilities*

But the welfare-reform/independent-living frame was not useful as a way of obtaining external political support in a conservative era. It was useful as well as a way of mobilizing support for the disability rights movement among people with disabilities themselves. This is an extremely important point, for it demonstrates that the adoption of the independent living frame was not simply a strategic decision of a monolithic community, which could be judged on its net utility in achieving the community's external goals. Rather, adoption of that frame by disability rights leaders represented a very important step in *creating* the disability community itself.

Students of the disability movement in America have consistently noted a major obstacle to widespread mobilization of people with disabilities: Historically, social institutions have divided people with disabilities into separate categories and groups based on the particular impairments they have. People with blindness, deafness, mobility impairments, mental illness, and mental retardation (and, in more recent times, HIV) have each dealt with separate, impairment-specific government programs, charitable institutions, and lobbying organizations. This division into separate institutions had an effect on the consciousness of individuals with disabilities, who often did not perceive or acknowledge that they had anything in common with people who had different impairments. The

365. There are of course other reasons for the surprisingly bipartisan support for the ADA. The most notable of these are: (1) the "hidden army" phenomenon (i.e., the fact that many legislators of both parties have disabilities themselves or have close family relationships with people with disabilities), see SHAPIRO, *supra* note 9, at 117-20; and (2) the opportunistic alliance, beginning in the mid-1980s, between the disability rights movement and the anti-abortion movement to oppose the practice of withholding medical treatment from newborns with disabilities, see BERKOWITZ, *supra* note 216, at 223. Still, the focus of disability rights leaders on getting individuals off of the welfare rolls and into the workforce clearly resonated with a number of participants in the process. Cf. NAT'L COUNCIL ON DISABILITY, EQUALITY OF OPPORTUNITY, *supra* note 199, at 55 ("This fiscal conservatism was crucially important for securing the later success of the ADA. It demonstrated that efforts to improve the lives of persons with disabilities could coincide with fiscal restraint, and thus win the support of skeptical members of Congress.").

resulting fragmentation of the disability community diluted its political strength and led to counterproductive struggles for resources among different impairment-specific groups.³⁶⁶

When the modern American disability rights movement began in the early 1970s, movement leaders believed that a significant part of their task was to forge a collective identity of "people with disabilities" from this disparate collection of impairment-specific identities.³⁶⁷ In this, the disability rights movement was hardly

366. On the political and cultural fragmentation of people with disabilities into impairment-specific groups, see GARY L. ALBRECHT, *THE DISABILITY BUSINESS: REHABILITATION IN AMERICA* 281 (1992) ("[P]ersons with disabilities, their parents, and friends have constituted self-help groups around such conditions as colostomies, multiple sclerosis, AIDS, and diabetes. These diverse groups, while sharing common interests, do not constitute a united lobby. Rather they seek their own objectives, often competing with one another for resources."); BARNARTT & SCOTCH, *supra* note 304, at 66 ("Because the self-interests of people with impairments are potentially as different as the impairments themselves, mobilization is difficult, perhaps more so than it was in the women's movement or the civil rights movement."); JOHN B. CHRISTIANSEN & SHARON N. BARNARTT, *DEAF PRESIDENT NOW! THE 1988 REVOLUTION AT GALLAUDET UNIVERSITY* 217 (1995) (stating that "[i]n general, the disability rights movement has been somewhat fragmented into groups representing different disabilities" and that "[o]ne of the most glaring instances of this fragmentation is the fact that the movement for deaf rights has not followed the same course as have other parts of the disability rights movement"); SCOTCH, *supra* note 189, at 31-34 (describing proliferation of impairment-specific disability organizations through the 1960s); SHAPIRO, *supra* note 9, at 126 ("The disability rights movement spanned a splintered universe. There are hundreds of different disabilities, and each group tended to see its issues in relation to its specific disability."); Groch, *supra* note 306, at 67 (arguing that this fragmentation has "hampered the development of a broad-based oppositional consciousness among" different "subgroups of the disability community"); Johnson, *supra* note 305, at 91 (arguing that the separation of people with disabilities into impairment-specific "subcultures" "tended to prevent their wholesale participation in and identification with a general disability movement"); Roberts, *supra* note 295, at 233 ("This [charity-based] approach has also specialized disabilities thereby leading to a fragmentation of the disabled community and its supporters. (The charities devoted to cerebral palsy have little common cause with charities devoted to the hearing impaired, for example.)"); Scotch, *supra* note 306, at 382-85 (describing the fragmentation and dispersion of people with disabilities); Zola, *supra* note 314, at 57 ("While organizing around specific diseases may occasion great success in raising research monies, it has divided our strength and caused one disease group to vie against another. This has led not only to overspecialization of services but also to underdevelopment of our consciousness.").

367. See, e.g., ALBRECHT, *supra* note 366, at 282 (arguing that the disability "movement will become more powerful if individuals transcend such specific identities as blindness or spinal cord injury and generalize to the shared social position of all people with disabilities"); see also SIMI LINTON, *CLAIMING DISABILITY: KNOWLEDGE AND IDENTITY* 12 (1998) (claiming that the disability movement has sought "to build a coalition of people with significant impairments, people with behavioral or anatomical characteristics marked as deviant, and people who have or are suspected of having conditions, such as AIDS or emotional illness, that make them targets of discrimination").

unique. Many scholars in recent years have emphasized the role of the formation of collective identity in the activity of social movements. Theorists who write about the so-called "new" social movements have particularly emphasized this point. They argue that the formation of collective identity is an important goal—an endpoint in itself—for such movements.³⁶⁸ Other scholars have persuasively argued that the formation of collective identity is an important task for *all* social movements—not necessarily as an end in itself, but as a "strategic step" in achieving the movement's broader social goals.³⁶⁹ Writing specifically of "movements for the liberation or integration of negatively privileged status groups," David Snow and his colleagues have argued that "the success of their mobilization efforts ... rests in part on effecting changes in the way their potential constituents view not only their life situation, but also themselves."³⁷⁰

The frame of "independent living" offered a means of aiding the effort to forge a collective identity of people with disabilities, for the frame promised to resonate with a broad group of people with a wide range of conditions. For one thing, the independent living frame possessed what David Snow and Robert Benford have termed "experiential commensurability."³⁷¹ It seemed to accord with the experiences of a large number of people with diverse impairments. The wheelchair users who left Cowell Hospital were not the only ones who sought independence from medical and other professionals

368. See, e.g., ALBERTO MELUCCI, *NOMADS OF THE PRESENT: SOCIAL MOVEMENTS AND INDIVIDUAL NEEDS IN CONTEMPORARY SOCIETY* 30-36 (1989); cf. Eskridge, *supra* note 23, (discussing interplay between law and identity-based social movements). Rubin contends that this "emphasis on individual identity formation" is "the principal theme that distinguishes the Continental approach [to social movement theory] from the resource mobilization perspective of American scholarship." Rubin, *supra* note 23, at 41.

369. Gamson, *Social Psychology of Collective Action*, *supra* note 342, at 58-61; see also Debra Friedman & Doug McAdam, *Collective Identity and Activism: Networks, Choices, and the Life of a Social Movement*, in *FRONTIERS IN SOCIAL MOVEMENT THEORY*, *supra* note 342, at 156 (arguing that collective identity can serve as a form of selective incentive that overcomes barriers to mobilization); Gamson, *Constructing Social Protest*, *supra* note 342, at 100-01; Hunt et al., *supra* note 342, at 185 ("[I]dentity constructions, whether intended or not, are inherent in all social movement framing activities."); Klandermans, *supra* note 342, at 88-89 (arguing that changes in understandings of collective identity alter potential movement adherents' perceptions regarding the justice of existing arrangements and hence promote mobilization).

370. Snow et al., *supra* note 342, at 475.

371. Snow & Benford, *Ideology*, *supra* note 342, at 208-09.

who attempted to run their lives. Blind activists in organizations like the National Federation of the Blind and the American Council of the Blind also sought to escape dependence on rehabilitation professionals and charities that controlled and limited their opportunities.³⁷² People with mental retardation, confined to congregate institutions throughout the country, organized the self-advocacy group "People First" to seek freedom from institutionalization and the constant control of institution staff.³⁷³ People with psychiatric disabilities, too, sought deinstitutionalization, and many sought the establishment of consumer-controlled alternatives to the physician-dominated mental health system.³⁷⁴ Even the culturally Deaf, who used the capital "D" to indicate that they considered themselves a linguistic minority rather than a group of people with physical impairments, and whose embrace of separatism sat uneasily with the movement's general aim of integration, could get behind a program of "independence."³⁷⁵ For they too sought to escape the control of professionals who thought they knew what was best (in this case, professionals who forced individuals with hearing impairments to struggle to speak orally and read lips, rather than permitting them to speak sign language).³⁷⁶ Although there were many differences among these groups, all sought to make their own decisions concerning their lives, with all the risks that would entail. All sought freedom from professionals and welfare bureaucracies that paternalistically made

372. See Groch, *supra* note 306, at 76-77; see also ROBERT A. SCOTT, *THE MAKING OF BLIND MEN* 108-10 (1969) (describing "the independent blind"); FRED PELKA, *THE DISABILITY RIGHTS MOVEMENT* 216-17 (1997). Although the independent living frame surely had appeal for blind activists, it has not been wholly successful in integrating adherents of the National Federation of the Blind into the broader disability movement. See, e.g., Groch, *supra* note 306, at 77 (describing Federationists' opposition to becoming a part of a "pan-disability movement").

373. See SHAPIRO, *supra* note 9, at 184-210.

374. See JUDY CHAMBERLIN, *ON OUR OWN: PATIENT-CONTROLLED ALTERNATIVES TO THE MENTAL HEALTH SYSTEM* (1978); see also DeJong, *supra* note 294, at 19 (noting that "[t]he trend to deinstitutionalization is one that cuts across many disabling conditions").

375. On divisions between the culturally Deaf and people with disabilities generally, see BARNARTT & SCOTCH, *supra* note 304, at 49-51; Harlan Lane, *Construction of Deafness*, in *THE DISABILITY STUDIES READER* 153, 154-68 (Lennard Davis ed., 1997).

376. See Lane, *supra* note 375, at 164 (arguing that both "culturally Deaf people" and "people with disabilities" seek "to promote their construction of their identity in competition with the interested (and generally better funded) efforts of professionals to promote their construction").

decisions for them. All sought self-reliance rather than dependence on the state or charity.³⁷⁷

Moreover, people with disabilities remain members of the broader society. Ideas like independence and self-reliance have deep cultural resonance in America. The founding of our nation took the form of a declaration of *independence*, after all, and ideas of rugged individualism are firmly embedded in our culture.³⁷⁸ People with a wide range of impairments were likely to be moved by appeals to such resonant cultural concepts.³⁷⁹ In addition, the self-help and demedicalization movements extended throughout the culture, to people with no impairments at all as well as those with both minor and major impairments.³⁸⁰ Any constituent of these movements thus became a potential constituent of the welfare-reform/independent-living frame, regardless of whether she had an impairment that was theretofore considered a "disability."

Finally, it is worth noting that not all people with disabilities—even politically active people with disabilities—are liberal Democrats or supporters of civil rights generally.³⁸¹ The focus on

377. See, e.g., Jean Flatley McGuire, *Organizing From Diversity in the Name of Community: Lessons From the Disability Civil Rights Movement*, 22 POLY STUD. J. 112, 119 (1994) ("The development of similar ideologies, and especially the evolution of self-empowerment, further linked the various constituencies. People First and other consumer-empowerment efforts organized within virtually every disability. The groups reflected a jointly held commitment to autonomy and self-determination, although the expression of these ideals varied considerably.").

378. See, e.g., Nancy M. Crewe, *Freedom for Disabled People: The Right to Choose*, in INDEPENDENT LIVING FOR PHYSICALLY DISABLED PEOPLE, *supra* note 294, at 357 (arguing that the "very name of the Independent Living Movement" resonates with a concept of freedom that is "dear to [the] heart and mythology" of our nation); see also Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1886-87 (2000) ("Historically and theoretically, what we have called for in citizens is the perceived capacity for 'independence.'").

379. See, e.g., Gamson, *Political Discourse*, *supra* note 342, at 227 (arguing that social movement "packages" or frames are more potent when they resonate with broader cultural themes); Snow & Benford, *Ideology*, *supra* note 342, at 210-11 (arguing that the power of a frame to mobilize adherents depends to some extent on "narrative fidelity," i.e., "the degree to which proffered framings resonate with cultural narrations, that is, with the stories, myths, and folk tales that are part and parcel of one's cultural heritage").

380. On the wide penetration of these movements, see ALBRECHT, *supra* note 366, at 287; DeJong, *supra* note 294, at 13-15.

381. See Andrew I. Batavia, *Ideology and Independent Living: Will Conservatism Harm People with Disabilities?*, 549 ANNALS AM. ACAD. POLIT. & SOC. SCI. 10, 11 (1997) (arguing that "[t]he disability community is not the monolith that is often portrayed in policy debates" and supporting that argument with Harris survey data showing "that, while 48 percent of people with disabilities consider themselves Democrats, about as many—44 percent—say that they

independence and self-reliance provided a way of appealing to the more conservative people with disabilities without alienating those who held more liberal orientations.

In short, the welfare-reform/independent-living frame served a very useful *internal* purpose for the disability rights movement: It helped to create the collective identity of "people with disabilities." Not all people with disabilities experienced people cringing or recoiling from them in public. (Think of people with hidden disabilities like mental illness or HIV). Nor did all people with disabilities experience discrimination in employment or transportation. (Think of people with mental retardation confined in institutions or many people with blindness). Nor did they all seek full integration into the broader community. (Think of the culturally Deaf). But people in all of these groups sought "independence" from the control of professionals, welfare bureaucracies, and charity. And people in all of these groups sought the opportunity to succeed or fail according to their own choices.

C. The Limits of Welfare Reform

The welfare-reform/independent-living frame, then, has been enormously useful for the disability rights movement. It has played a crucial role both in generating external political support for the movement's goals and even in creating a disability rights movement in the first place. But that success has come with a cost. In Parts I and II above, I argued that the welfare reform argument provides ammunition for the substantial body of cases in which courts have substantially limited the effect of the ADA. In this section, I want to suggest that the restrictive case law under the ADA reflects a more general problem with the welfare-reform/independent-living frame: The frame works best in justifying interventions for those people with disabilities who are already, in the words of the National Council on the Handicapped report proposing the ADA, "On The Threshold of Independence."³⁸² As many have remarked, these are precisely the sort of people who created the independent

are not Democrats; 25 percent are Republicans; and 19 are Independents"). See generally CHARLTON, *supra* note 294, at 121-22 (describing diverse political orientations of disability rights activists).

382. See NAT'L COUNCIL ON THE HANDICAPPED, *supra* note 196.

living movement in the first place.³⁸³ But the frame has trouble justifying the kinds of interventions required by those people with disabilities who experience the most severe disadvantage.³⁸⁴

1. The Broad Demands of the Independent Living Movement

There is an inherent tension in the use of welfare reform arguments to serve the goals of the independent living and disability rights movements. Adherents claim to seek "independence," "self-reliance," and "self-help." But to obtain the "independence" they seek they rely significantly on assistance from third parties. This is true even if the demands of the disability rights movement are characterized in the narrowest possible terms—as a demand for protection from intentional discrimination against people with disabilities in employment, public accommodations, and government services. Even in that context, people with disabilities must depend on others to achieve "independence," for they rely on courts (and perhaps government enforcement agencies) to guarantee their right to participate in community activities.

Of course, independent living and disability rights advocates have not sought merely a traditional guarantee of "nondiscrimination." Rather, they have sought, and obtained, a guarantee that

383. Berkowitz has been most explicit on this point:

[S]ome members of the handicapped community do not identify with the independent living centers, which are geared toward people in wheelchairs or those with spinal cord injuries, post-polio, cerebral palsy, muscular dystrophy, and multiple sclerosis. "Almost every ... analyst agrees that there is a powerful physical disability orientation," says Donald Galvin, a former director of a state rehabilitation program. Roberts and Heumann have been accused of "living in a white, middle-class dream world" that excludes the poor and the aged.

BERKOWITZ, *supra* note 216, at 206 (alteration in original); *see also* Williams, *supra* note 361, at 1005 ("The core constituency of the independent living movement is young, male and 'fit' as opposed to 'frail', whereas a major feature of the social reality of disablement is the elderly female, lacking in robustness and living far from the supportive confines of university campuses.").

384. I am hardly the first person sympathetic to the disability rights movement to note difficulties with the ideas of independent living activists, though most critics have not come from this country. *See, e.g.*, Ravi Malhotra, *The Politics of the Disability Rights Movements*, 8 NEW POL. 65, 69 (2001) ("By limiting itself to accept the restrictions imposed by market forces, [the independent living movement] therefore undermined its own radical potential to empower disabled people."); Shakespeare & Watson, *supra* note 325, at 550-51 (arguing that the idea of independent living promises the least for poor and marginal individuals with disabilities); Williams, *supra* note 361, at 1005.

employers, public accommodations, and government services afford people with disabilities reasonable accommodations. Implementation of a reasonable accommodation regime adds an additional layer of "dependence." People with disabilities depend on employers and others to make (perhaps costly) changes in workplace routines to facilitate their employment, and they depend on the courts to ensure that employers make such changes.

And the demands of the disability rights movement do not stop there. Disability activists—especially those prominently associated with the independent living movement—demand publicly funded personal assistance services, to enable individuals with disabilities to live full lives in the community.³⁸⁵ They also demand publicly financed health care for people with disabilities, to eliminate the fear that going to work means losing health care benefits.³⁸⁶ As Barnartt and Scotch's extensive empirical research demonstrates, the plurality of disability protests in the last three decades have asserted demands for state-provided services like these, rather than demands for civil rights—and the proportion of service-related demands increased in the 1990s.³⁸⁷ Many of these protests involved specific demands for state money.³⁸⁸

Programs such as personal assistance services and health care are, in fact, essential if people with disabilities are to enter the workforce in substantially larger numbers and live full lives in the community. But they are also expensive, potentially lifetime entitlements. The program of the independent living movement thus requires dependence not only on courts and employers, but also on an expanded welfare state.

385. See, e.g., BARNARTT & SCOTCH, *supra* note 304, at 43 ("The independent living movement is also making monetary demands. One demand is for federal or state support for personal care attendants, in addition to, or instead of, such support for institutional care."); SHAPIRO, *supra* note 9, at 251-55 ("Personal assistance services are the new, top-of-the-agenda issue for the disability rights movement.").

386. For discussion of disability rights advocates' increasing engagement with health care issues, see Gerben DeJong & Ian Basnett, *Disability and Health Policy: The Role of Markets in the Delivery of Health Services*, in HANDBOOK OF DISABILITY STUDIES, *supra* note 314, at 610, 614-17. On the importance of guaranteed health care to remove obstacles to employment of people with disabilities, see Robert B. Friedland & Alison Evans, *People with Disabilities: Access to Health Care and Related Benefits*, in DISABILITY, WORK, AND CASH BENEFITS, *supra* note 278, *passim*.

387. See BARNARTT & SCOTCH, *supra* note 304, at 174-78.

388. *Id.* at 74, 150.

2. *The Limits of Cost-Benefit Arguments*

None of this is to disparage these broader goals of the independent living movement. I do, however, intend to suggest that the effort to use welfare reform arguments to reframe "independence" as being essentially coextensive with agency and antipaternalism becomes increasingly strained as people with disabilities must rely on more and more outside assistance to achieve that "independence." At some point, the incongruity between typical societal notions of independence and the type of independence urged by the disability rights movement is likely to render the welfare reform argument useless as a means of achieving the movement's goals in the political community at large.³⁸⁹

We may have reached that point. To now, disability rights activists have been able to manage the tension between the independent-living/welfare-reform frame and the substance of their demands by deploying cost-benefit arguments. That move is only natural. When operating against a baseline of tens of billions of dollars in annual welfare spending for people with disabilities, the most obvious way of quantifying the amount of "dependency" is by looking at bottom-line expenditure figures. Any move that decreases those expenditures on net—even if it involves some up-front cost—can easily be said to decrease dependency and therefore increase independence. The up-front cost is easily understood as an investment in independence, one that society will recoup down the line. For example, virtually nobody argues that publicly funded primary and secondary education, or publicly subsidized grants and loans for higher education, foster "dependency" on the government. As controversial as public education policy has been, the obviously investment-like nature of education funding has made it unthinkable to raise a challenge on *that* ground.

389. Social movement theorists have recognized that such "semantic tension" can limit the utility of a collective action frame. See, e.g., Snow & Benford, *Ideology*, *supra* note 342, at 210 (pointing to Clifford Geertz's analysis of the failure of labor unions to succeed in framing the Taft-Hartley Act as a "slave labor law") (quoting CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 212 (1973) ("[S]emantic tension between the image of a conservative Congress outlawing the closed shop and of the prison camps of Siberia was—apparently—too great.")).

In the welfare reform case for the ADA, disability rights activists relied heavily on the government-intervention-as-investment strategy.³⁹⁰ If people with disabilities can receive inexpensive and simple accommodations from their employers, and thereby stop drawing tens of billions of dollars in federal transfer payments for idleness, who wouldn't say that people with disabilities have become more "independent?" As recent empirical efforts to assess the impact of the ADA suggest, however, the number of people who can be drawn into the workforce by inexpensive and simple employer-provided accommodations is likely to represent only a small fraction of people with disabilities.

Two prominent empirical analyses of disability employment trends following enactment of the ADA report negative findings. Daron Acemoglu and Joshua Angrist report that implementation of the ADA was associated with a decrease in the number of weeks worked for both men and women with disabilities between ages twenty-one and thirty-nine.³⁹¹ Their analysis controls for a variety of possible alternative explanations—including, importantly, the expansion of public disability benefits programs that also occurred in the 1990s, a trend that muted but did not erase their basic negative findings.³⁹² Focusing on employment rates rather than weeks worked, Thomas DeLeire similarly found that a significant decline in the employment rate for working-age men with disabilities was associated with the enactment of the ADA.³⁹³ The authors of both papers take these results as evidence that the accommodation and firing costs imposed by the ADA have, on balance, led employers to hire fewer workers with disabilities.³⁹⁴ In a recent article, Christine Jolls argues that findings like those reported by Acemoglu/Angrist and DeLeire likely result from the implementation of the ADA's accommodation mandate in a context in which prohibitions on wage discrimination are effectively binding but prohibitions on employment discrimination are not.³⁹⁵

390. See discussion *supra* Part II.A.3.

391. See Daron Acemoglu & Joshua D. Angrist, *Consequences of Employment Protection? The Case of the Americans with Disabilities Act*, 109 J. POL. ECON. 915, 931 (2001).

392. See *id.* at 938.

393. See Thomas DeLeire, *The Wage and Employment Effects of the Americans with Disabilities Act*, 35 J. HUM. RES. 691, 700-05 (2000).

394. See Acemoglu & Angrist, *supra* note 391, at 924, 950; DeLeire, *supra* note 393, at 711.

395. See Christine Jolls, *Accommodation Mandates*, 53 STAN. L. REV. 223, 273-82 (2000).

The Acemoglu/Angrist and DeLeire results are controversial, and the studies have come under methodological attack.³⁹⁶ And it is surely too soon to conclude that the ADA has had or will inevitably have a negative effect on the employment of people with disabilities. The Acemoglu/Angrist and DeLeire studies examine trends through 1996 only, and Acemoglu and Angrist "note that the negative effects of the ADA seem to peak in 1994 or 1995."³⁹⁷ To the extent that accommodations represent one-time costs (such as the installation of a ramp), Acemoglu and Angrist acknowledge that the aggregate disincentive to hire people with disabilities should decrease over time.³⁹⁸ Accommodation costs should decrease over time in any event, as employers develop a body of information and experience regarding effective means of accommodating a range of disabilities in a range of settings. And even if accommodations costs provide and will continue to provide some disincentive to hire people with disabilities, Jolls notes that more vigorous and sure enforcement of the ADA at the hiring stage could effectively counterbalance that disincentive.³⁹⁹ Moreover, analyses like those of Acemoglu/Angrist

396. See, e.g., Susan Schwochau & Peter David Blanck, *The Economics of the Americans with Disabilities Act, Part III: Does the ADA Disable the Disabled?*, 21 BERKELEY J. EMP. & LAB. L. 271, 298-304 (2000); Michael Ashley Stein, *Empirical Implications of Title I*, 85 IOWA L. REV. 1671, 1679-80 (2000). One of the most significant aspects of this attack points to the fact that Acemoglu/Angrist and DeLeire rely on data that uses a definition of disability that does not track the definition used in the ADA. Schwochau & Blanck, *supra*, at 298-300. In particular, those studies treat "disability" as being identical to self-reported "work disability," a term defined as a "health problem or disability which ... limits the kind [or] amount of work." *Id.* at 299. In the most careful attempt so far to examine the degree to which the use of different definitions of disability affects the findings regarding the employment effects of the ADA, Douglas Kruse and Lisa Schur report that the ADA has had positive effects on individuals with disabilities who do not report a "work disability." Douglas Kruse & Lisa Schur, *Employment of People with Disabilities Following the ADA*, 41 INDUS. REL. (forthcoming 2003). The degree to which this finding undercuts the arguments of Acemoglu/Angrist, DeLeire, and Jolls is unclear. To the extent that people identify themselves as having disabilities, but not disabilities affecting the kind or amount of work they can do, they are likely not to need or request accommodations; accommodation costs are thus unlikely to be a major deterrent to hiring such individuals. Whether accommodation costs are deterring employers from hiring people with disabilities who *do* need accommodations thus probably cannot be answered on the basis of the Kruse/Schur analysis.

397. Acemoglu & Angrist, *supra* note 391, at 940. This point is particularly important given that Title I of the ADA was not fully implemented until July, 1994. See Stein, *supra* note 396, at 1679.

398. See Acemoglu & Angrist, *supra* note 391, at 940.

399. See Jolls, *supra* note 395, at 281-82. Noting that the ratio of discharge cases to hiring cases under the ADA has been about ten to one, Steven Willborn argues that the skew of ADA

and DeLeire do not take account of possible increases in efforts to enter the workforce that may result in future years from full implementation of the provisions of ADA Titles II and III, which increase educational opportunities, improve transportation, and open up a range of community activities for people with disabilities.⁴⁰⁰

But the fact that Acemoglu/Angrist and DeLeire have not finally established that the ADA will have a net *negative* effect on the employment of people with disabilities should not obscure a larger point: The ADA has not (yet) had any significant *positive* effect on the rate of employment of people with disabilities. Even as of the year 2000, it is undeniable that the nonemployment rate for people with disabilities remained extremely high: Only thirty-two percent of working-age Americans with disabilities were employed, compared with eighty-one percent of the comparable population without disabilities.⁴⁰¹ This rate of nonemployment is roughly the same as the rate that prevailed at the time that the ADA was enacted, and it persisted during a period of remarkable economic prosperity.⁴⁰² If the goal of the ADA is understood as moving people off of disability benefits rolls and into the workforce, the statute is not working out as an effective means of achieving that goal.⁴⁰³

3. *The Limits of Antidiscrimination Law*

It might be tempting to assume that the trend of restrictive decisions by courts interpreting the ADA explains the continuing low rate of employment among people with disabilities. Those

enforcement toward the discharge stage may have exacerbated the employment problem faced by individuals with disabilities. See Steven L. Willborn, *The Nonevolution of Enforcement under the ADA: Discharge Cases and the Hiring Problem*, in *EMPLOYMENT, DISABILITY, AND THE AMERICANS WITH DISABILITIES ACT 103*, 111 (Peter David Blanck ed., 2000).

400. Americans with Disabilities Act of 1990, §§ 201-310, Pub. L. No. 101-336, § 104 Stat. 327 (1990) (codified at 42 U.S.C. §§ 12131-12189 (2000)).

401. NATIONAL ORG. ON DISABILITY, 2000 N.O.D./HARRIS SURVEY OF AMERICANS WITH DISABILITIES 27 (2000).

402. See, e.g., Schwochau & Blanck, *supra* note 396, at 298-308 (2000); Stein, *supra* note 396, at 1680.

403. This outcome was predicted by Matthew Diller, who argued that the possibility of using the ADA to move significant numbers of people with disabilities off of the disability benefits rolls had been oversold. See Diller, *Dissonant Disability Policies*, *supra* note 64, at 1066-75.

decisions have surely had some effect, but it is unlikely that they represent the fundamental problem. The most pronounced restrictive trend, after all, has been in the definition-of-disability decisions, and those decisions fairly clearly target the statute's protections precisely to those who need the ADA to get into or stay in the workforce.⁴⁰⁴ Rather, it seems likely that the ADA has not significantly increased employment for people with disabilities, because antidiscrimination law—as important as it is—is an inherently limited tool in attempting to address deep structural inequalities.

The limits of antidiscrimination law seem particularly salient in the disability area. People with disabilities who are not working can be thought of as generally falling into one of two categories: those who once had gainful employment, but who became unable to work in part because they developed disabilities or their pre-existing disabilities grew worse; and those who, in part because of their disabilities, *never* had any significant work experience.⁴⁰⁵ For both of these groups, lack of access to employer-provided medical care may be a significant barrier to employment.⁴⁰⁶

Although people whose disabilities caused them to leave work will be able to obtain publicly financed medical care if they receive disability benefits, the five-month waiting period for SSDI benefits and the two-year waiting period for Medicare can create an extended period of idleness.⁴⁰⁷ Most analysts agree that the longer

404. See discussion *supra* Part II.B.1.

405. This division obviously leaves out those individuals with disabilities who experience unemployment for reasons wholly unconnected to their disabilities. I do not mean to deny that significant numbers of people exist in this category, but theirs is not a problem for a specifically *disability-oriented* employment policy.

406. See, e.g., Jerry L. Mashaw & Virginia Reno, *Overview*, in *DISABILITY, WORK, AND CASH BENEFITS*, *supra* note 278, at 1, 18 (arguing that the “substantial barriers” faced by people with disabilities in “obtaining health care coverage in private markets” makes them “difficult to hire and retain and increases their incentive to participate in public programs with relatively comprehensive attachments for health care coverage”); SUSAN STEFAN, *UNEQUAL RIGHTS: DISCRIMINATION AGAINST PEOPLE WITH MENTAL DISABILITIES AND THE AMERICANS WITH DISABILITIES ACT 78* (2001) (arguing that “much of the behavior of disabled people and their potential employers is driven by concerns about the availability and cost of health care” and that “[m]any more disabled people could work and many more employers would be willing to hire them if this threshold issue were satisfactorily addressed”); see also DeJong & Basnett, *supra* note 386, at 612-14 (describing healthcare needs of people with disabilities); Friedland & Evans, *supra* note 386, at 357-72 (elaborating on that point).

407. See, e.g., Hoynes & Moffitt, *supra* note 278, at 203 (“[E]ligibility requires that

the period of idleness, the lower the chance that an individual with a disability will return to the workforce.⁴⁰⁸ Accordingly, any effort to increase employment among this group of people with disabilities must focus on the provision of services to people who are already in the workforce but at risk of falling out.⁴⁰⁹ Some analysts even propose eliminating the waiting periods for receiving benefits.⁴¹⁰ And, of course, the government could significantly promote work among this group through a broad expansion of publicly provided health care.⁴¹¹

For people with disabilities who never had any significant work experience, the provisions of the Ticket to Work and Work Incentives Improvement Act should help to alleviate the concern with medical care. But individuals in this group often face other significant barriers to employment, including the lack of personal assistance services, assistive technology, and accessible transportation.⁴¹² Although civil rights laws remain exceptionally important, they do very little for the person who needs assistance with daily hygiene to leave the house but cannot earn enough to hire

recipients earn less than SGA during the application and waiting periods. This will act to lower employment effort.”).

408. See, e.g., Mashaw & Reno, *supra* note 406, at 11 (“[T]hose who are never forced to sever their ties to the workforce completely have considerably better success in maintaining their position in it.”); see also Walter Y. Oi, *Employment and Benefits for People with Diverse Disabilities*, in *DISABILITY, WORK, AND CASH BENEFITS*, *supra* note 278, at 103, 121 (“Given the high application costs and the SGA limits on earnings, a person who applies for DI benefits seems to be making a commitment to a more or less permanent withdrawal from the legal labor market.”).

409. See GEN. ACCOUNTING OFFICE, *supra* note 279, at 19; Burkhauser & Daly, *supra* note 280, at 77-86. The Ticket to Work and Work Incentives Improvement Act includes a provision that authorizes a demonstration project in which the Social Security Administration would provide such early intervention, but it is too soon to tell how that project will play out. See Bonnie O’Day & Monroe Berkowitz, *Disability Benefit Programs: Can We Improve the Return-to-Work Record?*, in *HANDBOOK OF DISABILITY STUDIES*, *supra* note 314, at 633, 637.

410. See, e.g., Oi, *supra* note 408, at 122.

411. See, e.g., Friedland & Evans, *supra* note 386, at 357 (“Health care reform proposals, such as those debated by President Clinton and Congress in 1994, would have eliminated many, but not all, impediments in the labor market related to health coverage. For most people with disabilities, these changes would have meant considerable improvement.”); *id.* at 373-84 (arguing that only relatively comprehensive health care reform can remove the barriers that access to health care imposes on work for people with disabilities).

412. See NAT’L COUNCIL ON DISABILITY, *ACHIEVING INDEPENDENCE* 62, 68-69 (1996); Andrew I. Batavia, *Health Care, Personal Assistance and Assistive Technology: Are In-Kind Benefits Key to Independence or Dependence for People with Disabilities?*, in *DISABILITY, WORK, AND CASH BENEFITS*, *supra* note 278, at 398-407.

a personal attendant.⁴¹³ Fixing that problem—and others like it—requires large and continuing public investment.

4. Avoiding Dependency and the Broader Independent Living Agenda

If moving more people with disabilities into the workforce requires expansion of social services spending for people with disabilities, the loosening of restrictions on disability benefits, and large public investments in personal assistance services, assistive technology, and accessible transportation, then the welfare-reform/independent-living frame will not be the means to that goal. The three sets of cases discussed in Part I of this Article provide a good example of the limitations imposed by the cost-benefit arguments that are necessary to manage the semantic tensions inherent in using a welfare reform frame to justify increased government intervention. In the judicial estoppel cases, plaintiffs seek to draw on disability benefits programs as they simultaneously seek workplace accommodations. If the accommodation mandate is supposed to be an investment in independence from disability benefits programs, it may seem like a bad bargain when an accommodation's recipient continues to draw on those programs.⁴¹⁴ In reasonable accommodation cases like *Vande Zande*, plaintiffs may readily be seen as seeking to increase their dependence by demanding that courts require employers to provide them accommodations that are unnecessary for workforce participation and hence gratuitously costly.⁴¹⁵ And the definition-of-disability cases can be seen as a generalization of the *Vande Zande* situation: Any accommodation in these cases is gratuitously expensive and increases dependence, because the plaintiffs in these cases would be

413. Although not writing about disability specifically, Vicki Schultz has recently recognized the inherent limitations of employment discrimination law as a tool for assuring meaningful employment to all. See Schultz, *supra* note 378, at 1938 ("The employment discrimination laws are not capable of generating the structural transformations necessary to create the conditions in which work can provide equal citizenship for all."). Schultz argues: "We must remake our laws—indeed, all our social institutions—to create a world in which everyone has the right to participate in paid work, with all the social support that is necessary to make that possible." *Id.*

414. See *supra* Part III.B.2.

415. See *supra* Part III.B.3.

able to work—and hence remain off the disability benefits rolls—without any assistance.⁴¹⁶

The cases discussed in Part I of this Article were interpretively controversial. That is, there was and remains substantial disagreement about whether they were even correct as a matter of statutory interpretation. But the limitations imposed by the welfare-reform/independent-living frame are perhaps even more apparent in various readings of the statute that are almost universally acknowledged to be interpretively correct. An example is the ADA's "undue hardship" provision. By limiting the scope of mandated accommodations to those that do not require "significant difficulty or expense,"⁴¹⁷ the statute plainly does not go as far as it might in requiring accommodations that would enable people with disabilities to enter and remain in the workforce. Similarly, both the statute's legislative history and the EEOC's guidance to its implementing regulations make clear that the "reasonable accommodation" duty extends only to on-the-job accommodations and not to "personal" items—even if those personal items are, like personal assistance services, essential for an individual with a disability to get to work in the first place.⁴¹⁸ To the extent that scholars who defend the ADA have discussed these matters, they have treated them as (at best unfortunate) compromises with the ADA's basic principle of full participation.⁴¹⁹ If the foregoing analysis is correct, however, those compromises may have been essential to preserve the narrative coherence of the welfare-reform/independent-living frame deployed by disability rights leaders.

And most important, the constraining effects of the welfare-reform/independent-living frame can be seen in areas of disability policy that go beyond the ADA. In particular, such a frame makes it difficult to justify disability policy initiatives that require continuing, and not just transitional, public expenditures on

416. See *supra* Part III.B.1.

417. 42 U.S.C. § 12111(10)(A) (2000).

418. See 29 C.F.R. Pt. 1630, App. § 1630.9 (2002) (citing House and Senate committee reports).

419. 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, 518-22 (1991); Drimmer, *supra* note 182, at 1400-02.

individuals with disabilities. Perhaps ironically, efforts to obtain passage of federal legislation to pay for personal assistance services—probably the most important legislative priority of the independent living movement⁴²⁰—provide the best example here. Although such legislation has been introduced in three successive Congresses, it remains stalled, largely because of concerns regarding the cost of a continuing federal entitlement to attendant services.⁴²¹ Interestingly, Senator Harkin, a major sponsor of this legislation, makes on its behalf the same cost-saving arguments he made on behalf of the ADA.⁴²²

Efforts to expand health care for workers with disabilities may provide another example of this phenomenon. In 1999, Congress enacted a sweeping bill to give people with disabilities an incentive to work by extending Medicare coverage to workers with disabilities—but even that historic legislation cuts off Medicare after eight and a half years.⁴²³ Obviously, the need for and difficulty of obtaining insurance coverage for the health consequences of one's disability can hardly be expected to be *reduced* over the course of eight and a half years.⁴²⁴ The failure to make health care coverage

420. See, e.g., 145 CONG. REC. S14641-42 (daily ed. Nov. 16, 1999) (reprinting letters from independent living and disability organizations stating that those organizations placed a high priority on passage of pending personal assistance legislation).

421. I do not mean to suggest that costs provide the only reason for the difficulty in enacting personal assistance legislation. The fact that attendant care, and resultant deinstitutionalization, would come at the expense of nursing homes and public employee unions—both powerful political actors—undoubtedly plays a role as well. But the ability of these actors to use disability rights activists' own frame of independence is obviously of help to them. Cf. Gwyneth I. Williams & Rhys H. Williams, "All We Want is Equality": *Rhetorical Framing in the Fathers' Rights Movement*, in *IMAGES OF ISSUES: TYPIFYING CONTEMPORARY SOCIAL PROBLEMS* 191 *passim* (Joel Best ed., 2d ed. 1995) (describing the utility to the fathers' rights movement of appropriating the frame of liberal feminism).

422. Compare the following discussion of attendant care legislation to Senator Harkin's efforts to sell the ADA:

A lot of people say this will cost money. Actually, it will save money. Medicaid spending on long-term care in 1997 totaled \$56 billion, but only \$13.5 billion was spent on home and community-based services. That \$13.5 billion paid for the care of almost 2 million people. In contrast, the \$42.5 billion we spent on institutional care paid for just a little over 1 million people.

146 CONG. REC. S7640 (daily ed. July 26, 2000) (statement of Sen. Harkin).

423. See Ticket to Work and Work Incentives Improvement Act of 1999, Pub. L. No. 106-170, 113 Stat. 1860 (1999) (codified as amended in scattered sections of 42 U.S.C.).

424. See, e.g., Burkhauser & Daly, *supra* note 280, at 76 ("Once one has a disability, it is relatively rare to experience a health recovery.").

for workers with disabilities permanent reflects a desire to characterize such coverage as merely transitional.

Similarly, the passage of the ADA has led many policy analysts to urge a substantial scaling-back of the Social Security disability program. These analysts say we should subsidize independence, not dependence.⁴²⁵ Legal scholars such as Matthew Diller have argued that such proposals represent an opportunistic appropriation of the rhetoric used to pass the ADA by conservatives who favor retrenchment of welfare programs generally.⁴²⁶ In Diller's words, such proposals may represent nothing more than the use of "a new vocabulary for pre-existing hostility to the disability benefit programs."⁴²⁷ But I think it is implicit in Diller's broader account that such proposals are not merely opportunistic. To a significant degree, the welfare-reform/independent-living frame necessarily undermines the legitimacy of continuing disability benefits indefinitely.

These limitations imposed by the welfare-reform/independent-living frame are significant, and they have the greatest impact on the most vulnerable individuals with disabilities. They also make the independent living frame a particularly unlikely candidate for obtaining enactment of programs that would meaningfully reduce the shockingly high nonemployment rate among people with disabilities. Such programs would require massive, ongoing public investments. Worthwhile as such programs are, they press the tensions inherent in the welfare-reform/independent-living frame

425. For a very recent example, see O'Day & Berkowitz, *supra* note 409, at 639-40 (arguing that the 1996 welfare reform law provides a proper model for reforming the Social Security disability system). See also Diller, *Dissonant Disability Policies*, *supra* note 64, at 1069-70 (collecting other similar proposals by prominent disability policy analysts).

426. See Diller, *Dissonant Disability Policies*, *supra* note 64, at 1068-70; see also Christopher G. Bell, *The Americans with Disabilities Act, Mental Disability, and Work*, in *MENTAL DISORDER, WORK DISABILITY, AND THE LAW* 203, 217-18 (Richard J. Bonnie & John Monahan eds., 1997) (arguing that the ADA will lead the public to think that people with disabilities are now all able to work, and that this will create pressure to tighten eligibility for disability benefits programs); cf. Michael Ashley Stein, *Employing People with Disabilities: Some Cautionary Thoughts for a Second-Generation Civil Rights Statute*, in *EMPLOYMENT, DISABILITY, AND THE AMERICANS WITH DISABILITIES ACT*, *supra* note 399, at 51, 56 (arguing that "as more tangible (and thus superficial) barriers to integration are ameliorated, the disabled will be open to the same criticisms currently leveled at blacks, which ascribe enduring inequities to self-inflicted culpabilities").

427. Diller, *Dissonant, Disability Policies*, *supra* note 64, at 1069.

to the breaking point. If disability rights activists are to obtain these reforms, I submit, they cannot use the same playbook that successfully brought them the ADA.

CONCLUSION

Many critics argue that the courts, in issuing rulings that take a restrictive view of the ADA's protections, are substituting their *own* views of the statute's purposes for the statute's *true* purposes.⁴²⁸ In this Article, I hope to have shown that matters are more complicated than that. Many of the rulings that disability rights advocates find most indefensible can be readily explained as implementing a statutory purpose of avoiding dependency on public benefits programs. As I have attempted to show, a wide range of proponents of the ADA strongly pressed the goal of avoiding such dependency during the period in which Congress considered the statute, and that goal formed a major part of the statute's public justification. Although I, too, disagree with many of the restrictive rulings that courts have issued when interpreting the ADA, I cannot agree that those rulings disregard the *true* purposes of the statute. They simply emphasize *one* purpose offered by the ADA's proponents at the expense of other such purposes.

This point connects, I have argued, to a deeper tension within the ideas of disability rights and independent living advocates. The independent living movement has argued for "independence" from government welfare programs at the same time as it has sought additional government programs to support that "independence." Although the movement's emphasis on avoiding dependency pointed in the same direction as its agenda of programmatic expansion during the efforts to sell the ADA, those two aspects of independent living thinking are likely to operate at cross-purposes when the movement turns (as it has) to seeking meaningful solutions to the problem of persistent unemployment among people with disabilities. To the extent that the independent living movement continues to seek to resolve this tension in favor of welfare reform arguments, as it did in the campaign to enact the ADA, that movement may

428. See *supra* notes 5-13 and accompanying text.

effectively disable itself from achieving its broader programmatic goals.