War, Society, and Disability: Some Thoughts on Applying Under-Utilized Methodologies

Michael Ashley Stein
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I. INTRODUCTION .................................................................................................................. 107
II. THE CIVIL WAR PENSION SYSTEM ........................................................................ 108
III. TRANSNATIONAL POST-WORLD WAR I EXPERIENCES ......................................... 111
IV. CONCLUSION .................................................................................................................... 113

I. INTRODUCTION

Does it matter?—losing your sight? . . .
There’s such splendid work for the blind;
And people will always be kind,
As you sit on the terrace remembering
And turning your face to the light.1

Traditional analyses of the socio-legal2 phenomenon of being classified as “disabled” have largely ignored two useful methodological tools, namely, empirical and transnational analysis.3 Consequently, while existing examinations of the effect that the “disability” taxonomy has upon individual members of a given society add significantly to our knowledge of this experience (from intra-group4 as well as pan-disability5 perspectives), they

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fail to address many pertinent questions. Among such questions are the following:

When certain people become legislatively empowered to receive state-sponsored support because of their disability status, will access to those benefits be conditional upon factors exogenous to their classification? And if so, how?

Or, more globally, whether the effects of being called "disabled" are universal or local? And how (if at all) do such categorizations, and the bureaucracies supporting and reinforcing them, reflect a given society's expectations regarding the (in)ability of those classified individuals to contribute to social good?

These questions are far too broad to be resolved in this or any other volume. Nevertheless, the two articles featured in this symposium initiate an important dialogue on aspects of these questions. The articles also demonstrate, respectively, the utility of empirical and transnational research in developing more comprehensive and complete perspectives on the historical significance of disability.

II. THE CIVIL WAR PENSION SYSTEM

Too little empirical investigation has been conducted on the intersection of culture, society, and conceptions of disability under the modern civil rights paradigm. Peter Blanck and Chen Song's article is part of a continuing study of the experiences of disabled Civil War veterans and applies empirical
Three important themes emerge from Blanck and Song's work: notions about the social and legal definition of disability, the influence of economic and political climate on that definition, and the effect of attitudinal backlash and blame upon claims to pensions. First, Blanck and Song demonstrate that in many cases the definition of disability employed, and the particular stigma related to the type of disability claimed, were predictive of pension awards, that is, of perceptions of "worth." Second, they show that particular political pressures and changes in the pension laws themselves accounted for increased pension applications by persons who were claimed to have more marginal—meaning, less morally deserving—impairments. Third, they conclude that one significant consequence of the immense expansion of the disability pension scheme was subsequent hostility aimed at the pension system and its recipients.

Applying Blanck and Song’s empirical framework to present disability law raises questions about employment discrimination claims arising under the Americans with Disabilities Act (ADA). The American Bar Association reported that over the period of 1992-97, approximately eight percent of Title I claimants were victorious at the trial court level, a level of failure second only to that of prisoner plaintiffs. To date, only one commentator, Ruth Colker, has empirically analyzed these Title I claims. Colker concludes that...

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10. See Native and Foreign-Born, supra note 8, at 51-53, 59-70. In cases of mental disorders, the correlation could be as highly predictive of pension award success as was their actual disability severity. Id.

11. Id. at 9. The attempts by the then-Republican party to carry the soldier vote during close national elections near the end of the nineteenth century are the most overt examples. See id.

12. Id. at 5-11. Thus, both Democrats and progressive Republicans vilified the creation of a new society of persons with long-term dependency. See Native and Foreign-Born, supra note 8, at 5-11.

13. The empirical framework originated in and was utilized in Blanck's own work. See Disability Politics, supra note 9; Civil War Pensions and Disability, supra note 9; Before Disability Civil Rights, supra note 9; Native and Foreign-Born, supra note 8.


17. Winning and Losing Under the ADA, supra note 16; Windfall for Defendants, supra note 16. In contrast, a theoretical literature relating to these losses is developing. For example, philosopher Anita Silvers and I argue elsewhere that the ADA's definition of disability, drawn from the predecessor Rehabilitation Act, reinforces the accreted socio-legal conception of...
although the determination of which job functions are essential in any given
dispute may seem at first blush the proper province for a factual
determination by a jury, a vast majority of courts instead have deferred to
employers' assertions of essentiality. Courts have thus ruled, time and
again, on motions for summary judgment that, as a matter of law, plaintiffs
were unqualified for their positions.

Colker's work, while a valuable contribution to the literature for pointing
out possible abuse of the summary judgment device, leaves unanswered
many questions that are appropriate for analysis under Blanck and Song's
methodology. For example, is there a relation between types of disabilities,
their attendant stigmas, and the likelihood of successfully prosecuting an
employment discrimination claim? What effect, if any, does representation
by attorneys from different backgrounds make? Is the Equal Employment
Opportunity Commission more successful in prosecuting claims? What is the
relation between the cost of the workplace accommodation sought and success
at trial? Clearly, empirical research into ADA litigation effects is a rich and
almost untouched field, ripe for future research.

disability as incapability. See Silvers & Stein, supra note 2; see also Samuel R. Bagenstos, The
Selling of the Americans with Disabilities Act and the Limits of “Independent Living”
(unpublished manuscript, on file with author) (reconciling the win/loss rate and especially
Supreme Court opinions with the notion of “avoiding-dependency”); Aviam Soifer, Essences,
Better Angels, and the ADA: Accommodating the Public Interest in Garrett, Martin, and Mutual
of Omaha (unpublished manuscript, on file with author) (asserting that the Supreme Court
chooses ADA cases based, in part, on their narrow and outlier qualities).

18. The Federal Rules of Civil Procedure are clear that there must exist “no genuine issue as to
any material fact and that the moving party is entitled to judgment as a matter of law” in order
to grant a motion for summary judgment. FED. R. CIV. P. 56(c).

19. Thus, the courts reinforce one commentator's assertion of subtle discrimination in other
contexts. See Susan Sturm, Second Generation Employment Discrimination: A Structural

20. Parallel data was previously presented in Report of the Ninth Circuit Gender Bias Task

21. Several commentators claim, rightly, that psychiatrically disabled people suffer higher levels
of stigma than do physically disabled ones. See, e.g., SUSAN STEFAN, UNEQUAL RIGHTS:
DISCRIMINATION AGAINST PEOPLE WITH MENTAL DISABILITIES AND THE AMERICANS WITH
DISABILITIES ACT (2000). How this stigma translates, if at all, into predictable success rates for
employment discrimination claims remains unclear.

22. Specifically, do disability rights-based firms succeed more than personal injury attorneys
who use the ADA as an additional rather than central claim?

23. For a comment on misapplication (and/or nonuse) of empirical data, see Michael Ashley
Stein, Labor Markets, Rationality, and Workers with Disabilities, 21 BERKELEY J. EMP. & LAB. L.
314 (2000); Michael Ashley Stein, Market Failure and ADA Title I, in AMERICANS WITH
DISABILITIES: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS 183 ( Leslie
Pickering Francis & Anita Silvers eds., 2000) [hereinafter AMERICANS WITH DISABILITIES].
III. TRANSNATIONAL POST-WORLD WAR I EXPERIENCES

An essential departure point of David Gerber’s article\(^{24}\) is his observation of the absence of a single “interpretive history of disabled veterans.”\(^{25}\) Attempting to fill this lacuna, Gerber edited a volume of essays on the subject,\(^{26}\) from which his present work draws broad transnational comparisons.\(^{27}\) Noting the prevalence of war as “an ancient and common feature of human civilization,” and the attendant gradual development of consciousness that states were accountable to their veterans,\(^{28}\) Gerber compares the ways in which states responded to the large numbers of injured soldiers after the “Great War.”\(^{29}\) Specifically, Gerber applies a comparative/transnational perspective to five areas:

1. the experiences of the nation-states in addressing their individual crises of handling disabled veterans;
2. the desired goals of the nation-states in effectuating policies;
3. the programs initiated in response to these goals;
4. the implementation of these policies; and
5. the veterans’ agency in relation to these programs and policies.\(^{30}\)

The questions and issues Gerber raises involve the moral responsibility individual nation-states felt (or did not feel) they had toward their veterans and how this influenced their policies.\(^{31}\) Did those states create incentives or

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29. *Id.* at 87 (explaining that the number of injured soldiers in the “Great War” included some one and a half million Germans, a million French, and three-quarters of a million British).

30. *Id.* at 88, passim.

31. *Id.* at 79. For example, were pensions the result of collective guilt/responsibility? *Id.*
disincentives for their veterans to undertake vocational rehabilitation and return to work? 22 What support systems, either economic or social, were in place? 23 And what was the effect of cultural ideology upon these systems' efficacy? 24

Transmuting Gerber's analytical template to the present highlights the central issue of whether after the ADA's passage, people with disabilities are expected to work. 25 Legal, economic, and political examinations of post-ADA employment effects upon workers with disabilities generally fail to appreciate the connection between increased labor market participation and environmental factors exogenous to the statute. 26 These latter considerations include the availability of health care, accessibility of public transportation, existence of job training programs, the extent of governmental agencies' commitment toward enforcing anti-discrimination provisions, and the consequences of employer attitudes and public opinion toward people with disabilities. 27 By the same token, national policymakers only recently acknowledged this complex association 28 by announcing a series of policy initiatives intended to allow people with disabilities currently receiving Social Security disability-related benefits to earn more income without losing cash benefits. 29

32. Public Welfare Policy, supra note 24, at 89-93. Britain, for example, reformed a system that initially created disincentives. See id. at 91. On this subject, Gerber raises twelve related issues. See id. at 92-93.

33. See id. at 93-99 (noting that veterans groups played opposite roles in both Britain and Germany); THE WAR COME HOME, supra note 27.

34. See Public Welfare Policy, supra note 24, at 95-96. For example, the Germans employed a "Spartan insistence on effort and determination." See DEVINE, supra note 27, at 294.


36. Id. at 93-99 (noting that veterans groups played opposite roles in both Britain and Germany); THE WAR COME HOME, supra note 27.


39. Id.
Moreover, what can be learned from the experiences of other countries, like Britain and Australia, that have modeled their disability-related anti-discrimination statutes after the ADA?\(^{40}\) Ironically, just as U.S. policymakers have begun to examine the type of supplemental work initiatives utilized by certain European countries, the European Disability Forum is lobbying the European Union to promulgate an anti-discrimination employment provision modeled after Title I. As proposed, this provision would operate in addition to whatever subsidies the fifteen countries of the Union individually furnish.\(^{41}\)

IV. Conclusion

The two articles in this symposium exemplify the need for and utility of empirical and transnational studies developing more thorough and comprehensive perspectives on the historical significance of being classified as “disabled.” Blanck and Song’s article looks beneath the surface of the Civil War pension system to uncover environmental factors impacting the efficacy of one administered benefits system. Applying their rigorous empirical methodology to the ADA will enable researchers to better understand what underlies judicial resistance to Title I claims today. Gerber’s piece highlights some advantages to comparative study in understanding the more global issue of how societies have in the past, or should in the present or future, design disability-related systems which impact the labor market participation of their recipients. Viewing the ADA from this larger context facilitates inquiry into whether Title I actually is “working” and, more crucially, whether in fact it has even been designed to do so.\(^{42}\)

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