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

Michael Ashley Stein

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

Michael Ashley Stein*

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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

* Assistant Professor, College of William & Mary School of Law. I am grateful to Eric Kades for his comments and to the National Institute on Disability and Rehabilitation Research for supporting this research.

1. Siegfried Sassoon, *Does it Matter?*, in *THE WAR POEMS OF SIEGFRIED SASSOON* 91 (Rupert Hart Davis ed., 1983). My thanks for this reference to law librarian and poet Stephen Blaiklock.

2. Legal definitions of disability cannot be disaggregated from their individual contexts. See, e.g., Anita Silvers & Michael Ashley Stein, *Disability, the Supreme Court, and Equal Protection: Standing at the Crossroads of Progressive and Retrogressive Logic in Constitutional Classification*, 35 U. MICH. J.L. REFORM (forthcoming 2002). For a general context-specific assessment, see SIMI LINTON, *CLAIMING DISABILITY: KNOWLEDGE AND IDENTITY* (1998).

3. By way of comparison, an outstanding exception in another historical discipline is the empirically-based ROBERT WILLIAM FOGEL & STANLEY L. ENGERMAN, *TIME ON THE CROSS: THE ECONOMICS OF AMERICAN NEGRO SLAVERY* (1974).

4. See, e.g., DOUGLAS C. BAYNTON, *FORBIDDEN SIGNS: AMERICAN CULTURE AND THE CAMPAIGN AGAINST SIGN LANGUAGE* (1996) (describing the nineteenth century conflict between oralism and manualism in deaf education in the United States).

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 disability⁶ under the modern civil rights paradigm.⁷ Peter Blanck and Chen Song's article⁸ is part of a continuing study of the experiences of disabled Civil War veterans⁹ and applies empirical

5. Seminal, and thus frequently cited, is RICHARD K. SCOTCH, *FROM GOOD WILL TO CIVIL RIGHTS: TRANSFORMING FEDERAL DISABILITY POLICY* (2d ed. 2001). Also notable (and more recent) is *THE NEW DISABILITY HISTORY: AMERICAN PERSPECTIVES* (Paul K. Longmore & Lauri Umansky eds., 2001).

6. For instance, few studies delve into the voluntary provision of accommodations by employers. Several of the exceptions were conducted by Blanck and his associates. See, e.g., PETER DAVID BLANCK, *COMMUNICATING THE AMERICANS WITH DISABILITIES ACT, TRANSCENDING COMPLIANCE: 1996 FOLLOW-UP REPORT ON SEARS, ROEBUCK AND CO.* (1996); PETER DAVID BLANCK, *THE EMERGING ROLE OF THE STAFFING INDUSTRY IN THE EMPLOYMENT OF PERSONS WITH DISABILITIES: A CASE REPORT ON MANPOWER INC.* (1998).

7. This is a recurring theme among those interested in disability policy. See NAT'L COUNCIL ON DISABILITY, *ACHIEVING INDEPENDENCE: THE CHALLENGE FOR THE 21ST CENTURY—A DECADE OF PROGRESS, IN DISABILITY POLICY, SETTING AN AGENDA FOR THE FUTURE* 6 (1996) (calling for more practical research in order to better evaluate future policy objectives). An especially well informed treatment of the paradigm is Robert Silverstein, *Emerging Disability Policy Framework: A Guidepost for Analyzing Public Policy*, 85 IOWA L. REV. 1691 (2000).

8. Peter David Blanck & Chen Song, "With Malice Toward None: With Charity For All": *Civil War Pensions for Native and Foreign-Born Union Army Veterans*, 11 TRANSNAT'L L. & CONTEMP. PROBS. 1 (2001) [hereinafter *Native and Foreign-Born*].

9. See Peter David Blanck & Chen Song, *Civil War Pension Attorneys and Disability Politics*, 35 U. MICH. J.L. REFORM (forthcoming 2002) [hereinafter *Disability Politics*]; Peter David Blanck, *Civil War Pensions and Disability*, 62 OHIO ST. L.J. 108 (2001) [hereinafter *Civil War Pensions and Disability*]; Peter David Blanck & Michael Millender, *Before Disability Civil Rights: Civil*

analysis to illustrate longstanding themes that remain relevant.

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."¹⁰ 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.¹¹ 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.¹²

Applying Blanck and Song's empirical framework¹³ to present disability law raises questions about employment discrimination claims arising under the Americans with Disabilities Act (ADA).¹⁴ 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,¹⁵ a level of failure second only to that of prisoner plaintiffs.¹⁶ To date, only one commentator, Ruth Colker, has empirically analyzed these Title I claims.¹⁷ Colker concludes that

War Pensions and the Politics of Disability in America, 52 ALA. L. REV. 1 (2000) [hereinafter *Before Disability Civil Rights*]. Future work will include an examination of African-American pension recipients. See *Native and Foreign-Born*, *supra* note 8, at 71.

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.

14. 42 U.S.C. §§ 12101-13 (1994).

15. *Study Finds Employers Win Most ADA Title I Judicial and Administrative Complaints*, 22 MENTAL & PHYSICAL DISABILITY L. REP. 403 (1998).

16. See generally Ruth Colker, *Winning and Losing Under the Americans with Disabilities Act*, 62 OHIO ST. L.J. 239, 253 n.37 (2001) [hereinafter *Winning and Losing Under the ADA*]; Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 100 n.10 (1999) [hereinafter *Windfall for Defendants*].

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,¹⁸ a vast majority of courts instead have deferred to employers' assertions of essentiality.¹⁹ Courts have thus ruled, time and again, on motions for summary judgment that, as a matter of law, plaintiffs were unqualified for their positions.²⁰

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?²¹ What effect, if any, does representation by attorneys from different backgrounds make?²² 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.²³

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 Approach*, 101 COLUM. L. REV. 458 (2001).

20. Parallel data was previously presented in *Report of the Ninth Circuit Gender Bias Task Force*, 45 STAN. L. REV. 2143 (1993).

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* 193 (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 article²⁴ 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

24. David A. Gerber, *Disabled Veterans and Public Welfare Policy: Comparative and Transnational Perspectives on Western States in the Twentieth Century*, 11 TRANSNAT'L L. & CONTEMP. PROBS. 77 (2001) [hereinafter *Public Welfare Policy*]. Very few such comparisons exist among the essays in the edited collection. See *id.* Disjuncture between the individual essays contributed by a broad array of scholars, especially one aimed at fostering comparative study, is not unexpected (or disappointing) in an introductory enterprise. See Michael Ashley Stein, *Private Law and Social Inequality in the Industrial Age*, AM. J. LEGAL HIST. (forthcoming) (book review).

25. *Public Welfare Policy*, *supra* note 24, at 78 n.1.

26. *DISABLED VETERANS IN HISTORY* (David A. Gerber ed., 2000).

27. Other synthetical works which Gerber relies and praises are EDWARD T. DEVINE, *DISABLED SOLDIERS AND SAILORS: PENSIONS AND TRAINING* (1919) and DOUGLAS C. MCMURTIE, *THE EVOLUTION OF NATIONAL SYSTEMS OF VOCATIONAL REEDUCATION FOR DISABLED SOLDIERS AND SAILORS* (1918). Also deserving of particular approbation are Deborah Cohen, *Will to Work: Disabled Veterans in Great Britain and Germany After the First World War*, in *DISABLED VETERANS IN HISTORY*, *supra* note 26, at 295 and DEBORAH COHEN, *THE WAR COME HOME: DISABLED VETERANS IN BRITAIN AND GERMANY, 1914-1939* (2001) [hereinafter *THE WAR COME HOME*].

28. See *Public Welfare Policy*, *supra* note 24, at 78, *passim*.

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?³² What support systems, either economic or social, were in place?³³ And what was the effect of cultural ideology upon these systems' efficacy?³⁴

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.³⁵ 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.³⁶ 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.³⁷ By the same token, national policymakers only recently acknowledged this complex association³⁸ 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.³⁹

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.

35. Two distinguished economists raised this issue independently. *See* Marjorie L. Baldwin, *Can the ADA Achieve Its Employment Goals?*, 549 *ANNALS AM. ACAD. POL. & SOC. SCI.* 37, 49-51 (1997); Richard V. Burkhauser, *Post-ADA: Are People with Disabilities Expected to Work?*, 549 *ANNALS AM. ACAD. POL. & SOC. SCI.* 71, 75 (1997).

36. *But see* Michael Ashley Stein, *Empirical Implications of Title I*, 85 *IOWA L. REV.* 1671 (2000).

37. *Id.*

38. *See, e.g.*, FIRST REPORT OF THE PRESIDENTIAL TASK FORCE ON EMPLOYMENT OF ADULTS WITH DISABILITIES, RE-CHARTING THE COURSE (1998), available at http://www.dol.gov/_sec/programs/ptfead/rechart.htm; Michael Ashley Stein, *Disability and Post-ADA Employment Effects: Alternative Approaches to Traditional Economic Analysis*, in *EMERGING WORKFORCE ISSUES: W.I.A., TICKET TO WORK, AND TRANSITION 95* (L. Robert McConnell ed., 2001).

39. Full details of the increase in the allowable Substantial Gainful Activity level (SGA) under Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI) are set forth in a White House press release. *See* Press Release, White House, Clinton-Gore Administration Announces New Action Promoting Home and Community Based Services and Housing Options for People with Disabilities (July 25, 2000), available at http://www.dol.gov/_sec/programs/ptfead/pressreleases/072500bpr.htm. Further information on SGA and trial work period changes is available through the Social Security Administration's website at <http://www.ssa.gov/pressoffice/newsga.htm> (last visited Feb. 2, 2002).

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

40. For critical overviews, see Marian Corker, *The U.K. Disability Discrimination Act: Disabling Language, Justifying Inequitable Social Participation*, in AMERICANS WITH DISABILITIES, *supra* note 23, at 357; Melinda Jones & Lee Ann Bassar Marks, *A Bright New Era of Equality, Independence and Freedom: Casting an Australian Gaze on the ADA*, in AMERICANS WITH DISABILITIES, *supra* note 23, at 371.

41. The Forum's website can be accessed in English at <http://www.edf-feph.org/en/welcome.htm> (last visited Feb. 2, 2002).

42. See generally 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: ISSUES IN LAW, PUBLIC POLICY, AND RESEARCH 51 (Peter David Blanck ed., 2000).