

## COMPARATIVE DISABILITY EMPLOYMENT LAW FROM AN AMERICAN PERSPECTIVE

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### I. INTRODUCTION

American disability employment law underwent a series of profound transformations during the twentieth century. At the century's beginning, disability law was essentially a scheme of social welfare that sought to provide for injured veterans of first the Civil War and then World War I.<sup>1</sup> After World War I, the law began to incorporate the idea of rehabilitation and the return to productive activity for people with disabilities—beginning with those injured in war, and then extending to people with disabilities more generally.<sup>2</sup> In the 1950s, the creation of Social Security Disability Insurance and the federal Aid to the Permanently and Totally Disabled program cemented the social-welfare orientation of disability law.<sup>3</sup> Under these programs, the law made disability a ticket out of the workforce, an exemption from the ordinary societal obligation to work for a living.<sup>4</sup>

But the enactment of the Rehabilitation Act of 1973 marked the start of a significant shift in American disability law, from a welfare orientation to a civil rights orientation.<sup>5</sup> Instead of treating people with disabilities as members of the “deserving poor,” entitled to

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1. *See, e.g.*, THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES 102–51 (1992) (Civil War pensions); DEBORAH STONE, THE DISABLED STATE 75 (1984) (World War I war risk insurance).

2. *See, e.g.*, Richard K. Scotch, *American Disability Policy in the Twentieth Century*, in THE NEW DISABILITY HISTORY: AMERICAN PERSPECTIVES 375, 381–83 (Paul K. Longmore & Lauri Umansky eds., 2001).

3. *See, e.g.*, EDWARD K. BERKOWITZ, DISABLED POLICY: AMERICA'S PROGRAMS FOR THE HANDICAPPED 41–78 (1987).

4. *See id.* at 4 (“Simply put, this nation spends most of the money allocated to disability on programs that provide the handicapped with tickets out of the labor force.”).

5. *See, e.g.*, RICHARD K. SCOTCH, FROM GOOD WILL TO CIVIL RIGHTS: TRANSFORMING FEDERAL DISABILITY POLICY (2d ed. 2001); Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1 (2004).

charity and an exemption from the obligation to work, American disability law began to treat people with disabilities as full citizens, entitled to participate equally in all community activities—including, crucially, the life of work. Although the civil rights provisions of the Rehabilitation Act resulted from an act of elite policy entrepreneurship rather than of grassroots activism, their enactment catalyzed a new, militant disability rights movement.<sup>6</sup> Through grassroots protests, litigation, and insider lobbying, disability rights activists fought to assure that the new civil rights provisions would be implemented, and they soon turned to a new goal: the enactment of a comprehensive disability antidiscrimination law.<sup>7</sup> After a sustained campaign by disability rights activists and their allies, Congress enacted the new law, the Americans with Disabilities Act (ADA), in 1990. The ADA—with requirements of antidiscrimination and reasonable accommodation for people with disabilities in public and private employment, government operations, and the sale of retail goods and services<sup>8</sup>—seemed to represent the consolidation of a new, integrationist understanding of disability policy. Under this model, the basic goal of disability law was to eliminate the barriers (physical and social) that separated people with disabilities from the economic and civic opportunities generally received by the public. Although the old disability welfare programs remain on the books, creating what Professor Matthew Diller has rightly labeled “dissonance,”<sup>9</sup> the civil rights model has powerfully influenced the way public officials, lawyers, and disability rights activists understand the goals of American disability policy.

Similar transformations—frequently inspired by the example of the ADA, but at the same time deriving from indigenous movements of people with disabilities—have occurred throughout the world. None of these transformations has been identical to the transformation in American disability employment policy. Notwithstanding the differences, however, the overall trend is clear: across the industrialized world, disability policy is increasingly being reoriented from caretaking to work-promoting, from segregationist to integrationist, and from welfare to civil rights. Yet American scholars have made no sustained effort to assess what lessons other countries’

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6. See SCOTCH, *supra* note 5, at 51–59, 82–120.

7. See, e.g., JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT 105–41 (1993).

8. See 42 U.S.C. §§ 12112, 12132, 12182.

9. Matthew Diller, *Dissonant Disability Policies: The Tensions Between the Americans with Disabilities Act and Federal Disability Benefit Programs*, 76 TEX. L. REV. 1003, 1007 (1998).

experiences may hold for disability policy in the United States.<sup>10</sup> That is a shame, because the experience of other nations could prove an invaluable aid to formulating disability policy in America. Other nations' experiences can illuminate paths not taken here, and they can highlight common problems in disability policy and alternative ways of solving them.

This brief essay, in which I have been asked to respond to the papers submitted for this symposium, is not the place to engage in a sustained comparative examination of disability policies. My goal is more modest: By reflecting on the symposium papers, I hope to highlight some of the dimensions along which a comparative approach would shed light on important issues in the design and interpretation of American disability law. In particular, I focus on two key areas of inquiry. First, what policy tools best advance the increasingly important goals of integration and empowerment for people with disabilities? Second, what is the conception of "disability" that should underlie a disability employment law regime, and how can that conception advance or undermine integrationist goals? In confronting these issues, I make no effort to offer any ultimate answers. Instead, I hope to highlight the additional research and policy questions that a comparative analysis provokes.

## II. THE TOOLS OF DISABILITY EMPLOYMENT INTEGRATION

In the twentieth century, American disability employment policy embraced—at different times and in different ways—three principal goals. One was essentially custodial—to take care of people whose disabilities made them "unable" to care for themselves.<sup>11</sup> That goal was reflected in local systems of poor relief, in pension programs for disabled veterans, and, after the middle of the century, in the federal Social Security disability system. Second, disability employment policy often aimed at improving the productivity of individuals with disabilities, thereby reducing their dependence on charity and the

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10. The rare American law review articles devoted to comparative study of disability law include 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); Katharina C. Heyer, *The ADA on the Road: Disability Rights in Germany*, 27 *LAW & SOC. INQUIRY* 723 (2002) [hereinafter Heyer, *ADA on the Road*]; Katharina Heyer, *From Special Needs to Equal Rights: Japanese Disability Law*, 1 *ASIAN-PAC. L. & POL'Y J.* 7:1 (2000) [hereinafter Heyer, *From Special Needs*]; Lisa Waddington, *Reassessing the Employment of People with Disabilities in Europe: From Quotas to Anti-Discrimination Laws*, 18 *COMP. LAB. L.J.* 62 (1996).

11. See Jacobus tenBroek & Floyd W. Matson, *The Disabled and the Law of Welfare*, 54 *CAL. L. REV.* 809, 815–16 (1966).

public dole. The vocational rehabilitation programs that began after World War I and were fully institutionalized by the 1950s were sold as a means of achieving this goal.<sup>12</sup> Finally, since the late 1960s, American disability employment law has increasingly been governed by what Jacobus tenBroek called “a policy of integrationism—that is, a policy entitling the disabled to full participation in the life of the community and encouraging and enabling them to do so.”<sup>13</sup> The ADA, which gives people with disabilities a general right to be free from discrimination and to demand reasonable accommodations from their employers, is the most prominent expression of that policy (though the statute’s backers argued that the ADA would also serve the goal of moving people with disabilities off of the welfare rolls).<sup>14</sup>

As the contributions to this symposium show, disability employment policy in other countries tends to serve these three goals as well. Just as in the United States, disability policy in each of the four countries studied has generally moved from a more custodial approach to a more work-promoting and integrationist approach in recent years. Thus, Italy has moved from a strong emphasis on disability pensions to an increased focus on job placement and work assistance for individuals with disabilities.<sup>15</sup> Germany has moved from heavy reliance on an ineffective employment quota system to an increasing emphasis on providing government aid to help people with disabilities work (and even the enactment of some limited civil rights laws).<sup>16</sup> Australia and England have adopted full-scale civil rights laws.<sup>17</sup> Those laws, like the ADA, prohibit discrimination against people with disabilities and, crucially, require that employers provide what the Australian and British Disability Discrimination Acts call “reasonable adjustments” for people with disabilities. As a recent

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12. See RUTH O'BRIEN, *CRIPPLED JUSTICE: THE HISTORY OF MODERN DISABILITY POLICY IN THE WORKPLACE* (2001).

13. Jacobus tenBroek, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 CAL. L. REV. 841, 843 (1966).

14. See Samuel R. Bagenstos, *The Americans with Disabilities Act as Welfare Reform*, 44 WM. & MARY L. REV. 921, 957–75 (2003).

15. See Edoardo Ales, *Disability in Italy: The Legal Concept*, 24 COMP. LAB. L. & POL'Y J. 609 (2003).

16. See Fiona Geist, Bernd Petermann & Volker Widhammer, *Disability Law in Germany*, 24 COMP. LAB. L. & POL'Y J. 563 (2003).

17. See Glenn Patmore, *The Disability Discrimination Act (Australia): Time for Change*, 24 COMP. LAB. L. & POL'Y J. 533 (2003); Gavin Mansfield & John Bowers, *Disabled Persons Under the Disability Discrimination Act 1995*, 24 COMP. LAB. L. & POL'Y J. 631 (2003).

OECD report concludes, these examples reflect a broader trend in disability policy in industrialized nations.<sup>18</sup>

But while the overall trend in disability policy is clearly away from custodialism and toward integrationism, there are substantial differences in the means by which different countries have sought to achieve integration. In particular, European countries have traditionally placed heavy reliance on employment quotas to move people with disabilities into the workforce,<sup>19</sup> an approach that has never had political traction in the United States.<sup>20</sup> A number of American commentators, dissatisfied with the ADA, have looked to the European quota systems as a model for achieving integration of people with disabilities in the United States. These commentators have leveled two basic criticisms against the ADA's general requirement that employers provide "reasonable accommodations" to employees and applicants. Some contend that the requirement is unfair because it distributes its burdens unevenly among morally similar employers.<sup>21</sup> Others contend that the ADA is simply incapable of achieving a significant increase in employment for people with disabilities.<sup>22</sup> Quota systems may seem to address these criticisms by distributing the burdens of disability accommodations equally across employers and assuring that an increasing number of people with disabilities will be employed. Economically-minded American commentators have been particularly attracted to a tradable quota system modeled on the German levy-grant approach, in which those

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18. See ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT [OECD], TRANSFORMING DISABILITY INTO ABILITY: POLICIES TO PROMOTE WORK AND INCOME SECURITY FOR DISABLED PEOPLE 139-54 (2003).

19. See Lisa Waddington & Matthew Diller, *Tensions and Coherence in Disability Policy: The Uneasy Relationship Between Social Welfare and Civil Rights Models of Disability in American, European, and International Employment Law*, in DISABILITY RIGHTS LAW AND POLICY: INTERNATIONAL AND NATIONAL PERSPECTIVES 241, 256 (Mary Lou Breslin & Sylvia Yee eds., 2002).

20. See STEPHEN L. PERCY, DISABILITY, CIVIL RIGHTS, AND PUBLIC POLICY: THE POLITICS OF IMPLEMENTATION 207 (1989) (describing Carter Administration's decision not to impose numerical goals for disability employment on federal contractors).

21. See Samuel Issacharoff & Justin Nelson, *Discrimination with a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act?*, 79 N.C. L. REV. 307, 344-54 (2001); Jerry L. Mashaw, *Against First Principles*, 31 SAN DIEGO L. REV. 211, 230-31 (1994).

22. See Mark C. Weber, *Beyond the Americans with Disabilities Act: A National Employment Policy for People with Disabilities*, 46 BUFF. L. REV. 123, 135-38 (1998). I have a lot of sympathy for that argument, for reasons I explain in Bagenstos, *supra* note 5. I do not, however, agree with those commentators who believe that the ADA will have a net negative effect on employment among people with disabilities. See Samuel R. Bagenstos, *Has the Americans with Disabilities Act Reduced Employment for People with Disabilities?*, 25 BERKELEY J. EMP. & LAB. L. 527 (2004).

employers who fail to meet their quota must pay a fine that will be used to subsidize those employers who meet or exceed their quota.<sup>23</sup>

But American commentators who have praised European-style quota systems have paid little attention to the actual effects those systems have had when implemented. As Fiona Geist, Bernd Petermann, and Volker Widhammer show, the German system has proved less and less effective in moving people with disabilities into the workforce. During a period when the law required employers to fill six percent of their positions with people who have "severe handicaps," the percentage of people with such conditions who were actually employed in Germany fell from a high of 5.9% in 1982 to 3.7% in 1999.<sup>24</sup> As Lisa Waddington has shown in the pages of this journal, Germany's experience is hardly unique:

[M]ore than fifty years' experience with the quota system has revealed that systems which are not effectively enforced have little or no effect in terms of generating employment, while those which are based on the levy-grant system are incapable of meeting the set targets in this period of high unemployment, at least where the levy is set at a low level. The political will does not exist to enforce quota systems, or to set a high levy, and it cannot be expected that the performance records of quotas will improve.<sup>25</sup>

Even when quota systems have succeeded in assuring that many people with disabilities will be hired for some job, they have failed to achieve the basic goal of integration. After all, those systems require only that businesses *hire* people with disabilities; they do not require that people with disabilities be integrated at all levels of the workforce. In Germany, for instance, the regime constructed by the quota system "remains highly segregated and continues to isolate people with severe learning or developmental disabilities into a vast network of sheltered workshops."<sup>26</sup>

For these reasons, many politically active people with disabilities in countries with quota systems have turned their efforts toward the adoption of laws that embrace the antidiscrimination model of the

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23. For discussion of the German system, see Geist, Petermann & Widhammer, *supra* note 16, at 595-96. For American commentators who have voiced some support for a tradable quota system for disability employment, see Issacharoff & Nelson, *supra* note 21, at 355-357; Mashaw, *supra* note 21, at 232-33; Weber, *supra* note 22, at 159-74.

24. Geist, Petermann & Widhammer, *supra* note 16, at 597. The quota was lowered to five percent in 2000. See Heyer, *ADA on the Road*, *supra* note 10, at 729.

25. Waddington, *supra* note 10, at 100.

26. Heyer, *ADA on the Road*, *supra* note 10, at 729. As Heyer notes, implementation of a similar quota system in Japan has led to the same sort of segregated outcome, in which employers have "compl[i]ed with the quota by establishing special 'barrier-free' subsidiary companies.;" Heyer, *From Special Needs*, *supra* note 10, at 7:8.

ADA.<sup>27</sup> Many disability rights activists contend that quota systems send the wrong message: “that most workers with a disability are less valuable economically and less productive, and that, if such workers are to be integrated into the (semi-)open labor market, employers need to be obliged to hire them.”<sup>28</sup> They contend that civil rights laws, by contrast, send the message that “people with disabilities are able to compete for and win jobs on their own merit, as long as they are provided with equal opportunities.”<sup>29</sup> And by applying at all levels of an occupational hierarchy, civil rights laws serve as a more powerful tool of integration—a goal of fundamental importance for disability rights advocates.<sup>30</sup>

Whether moved by pressure from disability rights activists or for their own internal policy reasons, many European governments are moving away from a quota model toward an ADA-inspired model of antidiscrimination and accommodation.<sup>31</sup> Great Britain abolished its disability employment quota when it adopted the Disability Discrimination Act in 1995.<sup>32</sup> Germany has recently adopted a series of disability antidiscrimination laws, though those laws do not reach private sector employment.<sup>33</sup> The European Union has moved decisively in the same direction. A Council Directive issued in 2000 provides that “[E]mployers shall take appropriate measures, when needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer.”<sup>34</sup>

While many American commentators seem to be giving up on the ADA as a tool of achieving employment and integration for people with disabilities, nations throughout the industrialized world are increasingly invoking the ADA as a model for their disability

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27. Katharina Heyer provides a vivid account of such disability rights activism in Germany. See Heyer, *ADA on the Road*, *supra* note 10, *passim*.

28. Waddington & Diller, *supra* note 19, at 260.

29. *Id.* at 261.

30. On integration as a basic goal of civil rights law, particularly disability rights law, see Samuel R. Bagenstos, “Rational Discrimination,” *Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 843–44 (2003).

31. See Waddington, *supra* note 10, at 81–99.

32. Mansfield & Bowers, *supra* note 17, at 631.

33. See Heyer, *ADA on the Road*, *supra* note 10, at 754–756.

34. Council Directive 2000/78/EC, art. 5 of 27 November 2000, Establishing a General Framework for Equal Treatment in Employment and Occupation. For a discussion of this provision, see Richard Whittle, *The Framework Directive for Equal Treatment in Employment and Occupation: A Disability Rights Perspective*, 27 EUR. L. REV. 303 (2002). For a progress report on its implementation, see EUROPEAN COMM’N, DIRECTORATE-GENERAL FOR EMPLOYMENT AND SOCIAL AFFAIRS, EQUALITY AND NON-DISCRIMINATION IN AN ENLARGED EUROPEAN UNION 11–12 (2004).

employment law. As two European commentators have put it, the ADA “has had such an enormous impact on foreign legal development that one is tempted to say that the international impact of this law is larger than its domestic effect.”<sup>35</sup> Of course, that fact alone does not make the ADA’s critics wrong. There are indeed serious limitations on the ability of antidiscrimination and accommodation rules to overcome all of the obstacles that exclude people with disabilities from work,<sup>36</sup> though there are good reasons to believe that the ADA will, on balance, improve the disability employment picture.<sup>37</sup> But comparative analysis helps to show that the limitations on other policy tools may be even more severe. Such analysis should, in particular, provoke skepticism of the tradable quota system that has been so attractive to technocratic American commentators.

### III. WHAT IS “DISABILITY”?

Both disability law doctrine and disability law scholarship devote an enormous amount of effort to the foundational question of what is a “disability.” The disability definition serves a gatekeeping function in disability law. In regimes driven by the goals of caretaking or supporting work, that definition identifies the class of people entitled to special benefits; in regimes driven by the goals of civil rights and integration, the definition identifies the class of people entitled to reasonable accommodations and protections against discrimination. But whatever the goals of the regime, the disability definition delineates the boundaries of disability law.

The legal definition of “disability” is particularly important because there is no generally accepted meaning of the term. In both American law and common usage, it “can refer to an enormously diverse array of conditions,” and it embraces a large number of different definitions.<sup>38</sup> Drawing on work in the emerging discipline of disability studies, one may speak, generally, of two basic models for defining disability.<sup>39</sup> The so-called “medical model” conceptualizes disability as a physical or mental condition that inheres in the body of the disabled person. The so-called “social model” defines disability as

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35. Theresia Degener & Gerard Quinn, *A Survey of International, Comparative, and Regional Disability Law Reform*, in *DISABILITY RIGHTS LAW*, *supra* note 19, at 3, 20.

36. *See* Bagenstos, *supra* note 5, at 23–54.

37. *See* Bagenstos, *supra* note 22.

38. Samuel R. Bagenstos, *Subordination, Stigma, and “Disability,”* 86 VA. L. REV. 397, 405 (2000).

39. *See, e.g., id.* at 427–29.

resulting from an interaction between a person's physical or mental characteristics and an inaccessible or inhospitable physical or social environment. Although virtually all disability laws in industrialized nations reflect some mixture of these two models, there are important differences in emphasis. These differences, in turn, have consequences for the efficacy of disability laws, as well as for their effects on the perception of disability among people with disabilities and the public at large.

A. *American Disability Law: A Hesitant Move Away From the Medical Model*

American law continues to define disability in terms that resonate most strongly with the medical model, although the Rehabilitation Act and the ADA reflect an incomplete move toward the social model. The Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI) programs define "disability" in almost entirely medical terms: "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."<sup>40</sup> That definition appears to treat disability as a condition that resides entirely within the disabled person, a medical condition that in and of itself renders the person unable to work. In reality, of course, the issue is more complicated. Very few disabilities render an individual entirely incapable of working. Thus, when officials who determine eligibility for SSDI or SSI "purport to decide that an individual is incapable of working, they are in fact deciding that the severity of her impairments makes it unjust to require her to work."<sup>41</sup> But that value judgment is made in an entirely *sub rosa* manner. As a formal matter, the SSDI/SSI disability inquiry remains a medical one. Claimants must adduce the testimony of medical professionals in support of their claims of disability, and they must frame their arguments in terms of inability to work rather than the injustice of requiring them to work.

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40. 42 U.S.C. § 423(d)(1)(A).

41. Bagenstos, *supra* note 38, at 413; see Lance Liebman, *The Definition of Disability in Social Security and Supplemental Security Income: Drawing the Bounds of Social Welfare Estates*, 89 HARV. L. REV. 833, 853 (1976) (SSDI/SSI disability definition in practice "incorporates common expectations and shared values about what infirmities a person *ought* not to have to bear and keep working"); Diller, *supra* note 9, at 1064 ("SSA's disability determinations represent social judgments about who should be expected to work, rather than findings of medical fact").

The Rehabilitation Act and the ADA appear to take a broader view. Under those statutes, an individual has a disability in any one of three circumstances: if she has “a physical or mental impairment that substantially limits one or more of [his or her] major life activities”;<sup>42</sup> if she has “a record of such an impairment”;<sup>43</sup> or if she is “regarded as having such an impairment.”<sup>44</sup> By extending the definition of disability to those who do not currently have substantially limiting impairments, but who once had or are perceived as having them, the “regarded as” and “record” provisions incorporate the major insight of the social model of disability. They reflect a recognition “that society’s accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.”<sup>45</sup>

Even under the Rehabilitation Act and the ADA, however, the “disability” determination remains largely medicalized. This point is most obvious when one considers the first prong (often referred to as the “actual disability” prong) of the statutory definition. That prong treats a person as having a disability if she actually has an “impairment that substantially limits one or more . . . major life activities.” Authoritative interpretations have read the term “impairment” as a purely medical concept.<sup>46</sup> Although “substantially limits” could be given content in a way that looks to society’s disabling responses to impairments,<sup>47</sup> courts have generally read that term as referring to serious physical or mental limitations that flow directly from an individual’s diagnosis.<sup>48</sup> Because both the “regarded as” and “record” prongs are tied to the existence of a (perceived or past) substantially limiting impairment, these aspects of the medical model creep into analysis under those two prongs as well. An individual will not be covered simply because someone regards her as “disabled” in general; she must be regarded as having an impairment that satisfies the law’s substantial limitation criteria.<sup>49</sup> For that reason, the (social-model) “regarded as” and “record” prongs cover far less ground in practice than one might initially think, and the (medical-model) “actual disability” prong remains the most important.

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42. 42 U.S.C. § 12102(2)(A).

43. 42 U.S.C. § 12102(2)(B).

44. 42 U.S.C. § 12102(2)(C).

45. *Sch. Bd. v. Arline*, 480 U.S. 273, 284 (1987).

46. *See, e.g., Bragdon v. Abbott*, 524 U.S. 524, 633-37 (1998).

47. *See, e.g., Bagenstos, supra* note 38, at 446.

48. *See, e.g., Toyota Motor Mfg., Inc. v. Williams*, 534 U.S. 184, 197-99 (2002).

49. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489-94 (1999).

A number of criticisms might be leveled at the medical orientation of American disability law. When it treats disability as a largely medical category, many disability rights activists argue, the law sends the message that the problem of disability is best fixed by treating the individual with a disability rather than reforming societal institutions.<sup>50</sup> A medical model systematically calls attention to and entrenches the idea that people with disabilities are in some “real” sense different from people without them.<sup>51</sup> And by requiring disability claimants to prove that they are truly limited in performing important societal tasks before they may obtain the law’s protection, that model is disempowering.<sup>52</sup>

On the other hand, incorporating a looser, social-model inspired definition of disability might lead to a number of problems. As the disability definition grows broader, the burden disability law places on private industry grows through its direct regulatory effects as well as the litigation costs it imposes.<sup>53</sup> A broader definition might also sap disability discrimination law of political support by granting protection to people whose physical differences do not impose any real social or economic disadvantage. And a looser definition might well open the way to fakery.<sup>54</sup> As Deborah Stone has demonstrated, the people who crafted the Social Security Disability Insurance system made a conscious choice to adopt a medicalized model of disability, and they did so largely to allay fears of malingering.<sup>55</sup> Experience in other nations can shed light on these issues.

### B. *The Medical Model in German, Italian, and British Disability Law*

The disability definition in American law thus remains largely driven by the medical model. The other contributions to this symposium show that the medical model continues to exert a powerful influence on the disability law of other nations as well. Indeed, in a number of those nations, the disability definition is even more

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50. See, e.g., Bagenstos, *supra* note 38, at 427.

51. See, e.g., Robert L. Burgdorf, “Substantially Limited” Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability, 42 VILL. L. REV. 409, 525 (1997).

52. See, e.g., Bagenstos, *supra* note 38, at 472–73. For a general discussion, outside of the disability context, of the ways in which the process of civil rights litigation can be disempowering for plaintiffs, see KRISTIN BUMILLER, THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS 78–108 (1988).

53. See, e.g., Bagenstos, *supra* note 38, at 483–84.

54. See, e.g., Craig S. Lerner, “Accommodations” for the Learning Disabled: A Level Playing Field or Affirmative Action for Elites?, 57 VAND. L. REV. 1043, 1106–10 (2004); Ruth Shalit, *Defining Disability Down*, NEW REPUBLIC, Aug. 25, 1997, at 16.

55. See STONE, *supra* note 1, at 82–83, 87.

consistent with the medical model than is the definition used in American law. As Fiona Geist, Bernd Petermann, and Volker Widhammer describe it, for example, Germany's disability definition is almost entirely driven by the medical model. That definition speaks in terms of deviation from species-typical behavior, terms that treat disability as a condition that inheres in the person rather than society.<sup>56</sup> To be sure, the definition also requires that an individual's "participation in societal life [be] restricted"<sup>57</sup>—a requirement that seems to match the "inability to work" condition in the American SSDI definition. As with the SSDI definition, however, the medical aspect predominates.<sup>58</sup> And by separately labeling people with disabilities with progressive degrees of handicap, such as the "severely handicapped" or those with a "disability degree" (a reduction in their working capacity) of "at least 50%,"<sup>59</sup> those of "equal status" to the severely handicapped (those with "a degree of disability of less than 50% but more than 30% percent"),<sup>60</sup> and those who merely have a "disability"—the law seems to send the message that it is the disability, not societal choices, that makes an individual with a disability unable to work. The Italian system, described by Professor Ales, relies on a medical model of "disability" in quite similar ways.<sup>61</sup>

The German and Italian systems of disability law thus offer a chance to explore the challenges American disability rights activists have leveled against the medical model of disability. In both Germany and Italy, medical-model definitions have been deployed in the service of policies such as pensions and quotas that have treated people with disabilities as fundamentally separate from the mainstream working community.<sup>62</sup> But there remains the question whether that connection is necessary: Can a definition of disability inspired by the medical model be effective in achieving the goals of

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56. Geist, Petermann & Widhammer, *supra* note 16, at 575–76.

57. *Id.* at 575.

58. *See id.* at 17 ("The term 'disability' cannot be understood by simply using the sociological part of the definition. The medical part is considered to be dominant by the legislator, because it is the only requirement indicating the degree of disability.").

59. *Id.* at 21.

60. *Id.* at 24.

61. *See* Ales, *supra* note 15, at 617 ("[M]edical examination and diagnosis constitute the core of the assessment of invalidity [under the Ordinary Invalidity Grant]."); *id.* ("Also in case of PIA [Permanent Inability Annuity] medical diagnosis can be considered a crucial element for the definition of what is called, in this case, inability."); *id.* at 618 (noting that even under the more integrationist 1992 statute the disability determination process largely retains the medical model of Italy's earlier disability pension programs).

62. *See, e.g.,* Heyer, *ADA on the Road*, *supra* note 10, at 727–728 ("German disability policy follows a difference or special-treatment doctrine, providing for disability needs in segregated settings, such as special schools, sheltered workshops, or assisted-living centers.").

social integration? In this regard, the German experience may prove particularly enlightening. Since 2000, Germany has enacted three separate statutes that aim at integration and empowerment of people with disabilities.<sup>63</sup> These laws prohibit discrimination and require reasonable accommodation by public entities and places of public accommodation.<sup>64</sup> But they continue to employ a medicalized definition of “disability.”<sup>65</sup> As experience under Germany’s new integrationist regime develops, analysts might fruitfully explore whether the disability definition, as American disability rights advocates would predict, impedes the achievement of integrationist goals.

The British Disability Discrimination Act (DDA) might provide even more interesting information on this question. In their contribution to this issue, Mansfield and Bowers demonstrate that the British DDA’s disability definition relies on a medical model.<sup>66</sup> Under that definition, disability generally turns not on societal reactions to a particular medical condition but to the limitations the condition inherently imposes on an individual’s “ability to carry out normal day-to-day activities.”<sup>67</sup> In this respect, the British definition is quite similar to the “actual disability” prong of the disability definition under the Rehabilitation Act and the ADA. However, where American disability antidiscrimination laws incorporate a measure of the social model by protecting those who are merely “regarded as” having disabling impairments, the British DDA includes no equivalent “regarded as” provision.<sup>68</sup>

British disability rights activists have sharply criticized the medical orientation of their DDA’s disability definition.<sup>69</sup>

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63. See Heyer, *ADA on the Road*, *supra* note 10, at 755.

64. See Geist, Petermann & Widhammer, *supra* note 16, at 574–75; Heyer, *ADA on the Road*, *supra* note 10, at 755–756.

65. See Geist, Petermann & Widhammer, *supra* note 16, at 575–81; Heyer, *ADA on the Road*, *supra* note 10, at 756.

66. Mansfield & Bowers, *supra* note 17, at 635–36. For further discussion of the medical nature of the British DDA’s disability definition, see DISABILITY RIGHTS COMM’N, MONITORING THE DISABILITY DISCRIMINATION ACT (DDA) 1995, PHASE THREE 258–259 (2004).

67. Mansfield & Bowers, *supra* note 17, at 633, quoting Disability Discrimination Act, 1995, c. 50 § 1(1) (Eng.).

68. The British DDA does, however, cover individuals who had disabilities in the past, coverage that is analogous to the “record” prong of the disability definition under the ADA and Rehabilitation Act. See Mansfield & Bowers, *supra* note 17, at 645.

69. See Mairian Corker, *The U.K. Disability Discrimination Act: Disabling Language, Justifying Inequitable Social Participation*, in AMERICANS WITH DISABILITIES: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS 357, 358–359 (Leslie Pickering Francis & Anita Silvers eds., 2000); Phil Lee, *Shooting for the Moon: Politics and Disability at the Beginning of the Twenty-First Century*, in DISABILITY STUDIES TODAY 139, 153 (Colin Barnes et al. eds., 2002).

Government reports suggest that the definition has had disempowering and demoralizing effects on at least some individuals with disabilities, by requiring them to show that they suffer “real” limitations before they are entitled to relief.<sup>70</sup> More systematic examination of this question would illuminate the dimensions of the problem. For example, how many individuals with disabilities who experience discrimination are deterred from initiating DDA proceedings because they do not wish to go through the process of establishing their disabilities? And how many individuals who do initiate DDA proceedings ultimately report that they are demoralized by the experience of establishing their disabilities? What effect does the experience of going through a DDA proceeding have on their subsequent conduct—whether in terms of employment decisions or decisions to invoke workplace rights? Through (a largely sociological) exploration of issues such as these, researchers can gain some purchase on the question whether a statute can succeed in promoting integration and empowerment for people with disabilities while employing a definition of disability rooted in the medical model.

*C. Embracing the Social Model in Australia and (to a Lesser Extent) Britain*

Comparative analysis can also illuminate the effects of employing a disability definition that goes farther than the ADA's in incorporating the insights of the social model. Even the British DDA's disability definition, which is strongly informed by the medical model and for the most part is narrower than the definition in the ADA, incorporates the social model in two respects that go beyond the ADA. First, British law establishes an irrebuttable presumption that severe disfigurement imposes a substantial and adverse effect on day-to-day activities; as Mansfield and Bowers note, that presumption necessarily rests on the idea that “the social attitudes of society” impose limitations on people with disfigurements.<sup>71</sup> Second, British law provides that the determination whether an individual has a “disability” must generally be made without taking account of any mitigating or corrective measures the individual uses to accommodate the effects of his or her impairment. The only exception to this principle applies when an individual uses eyeglasses or contact lenses to correct a vision impairment; in such cases, the question is whether

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70. See DISABILITY RIGHTS COMM'N, MONITORING THE DDA, *supra* note 66, at 177–178.

71. Mansfield & Bowers, *supra* note 17, at 640–41.

the individual is disabled even while using those mitigating measures.<sup>72</sup> By divorcing the disability determination from the actual physical effects of an individual's impairment, British law's general refusal to take account of mitigating measures stands in some tension with the medical model of disability. Indeed, the British mitigating measures rule seems to be rooted instead in the notion that impairments become disabling not because of their physical effects but because of the social stigmas attached to them. The exception for people who use corrective lenses makes the connection to that social-model idea particularly clear; as Mansfield and Bowers point out, "a significant number of people wear such visual aids and therefore there is little chance of any stigma being attached to it."<sup>73</sup>

In both of these respects, the DDA's definition of disability is broader than the definition used under the ADA and the Rehabilitation Act. The mitigating measures issue has been particularly contentious in the United States. The Supreme Court has specifically held that "if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures—both positive and negative—must be taken into account when judging whether that person is 'substantially limited' in a major life activity and thus 'disabled' under the" ADA.<sup>74</sup> Although disability rights advocates have attacked that decision on the ground that it improperly ties the ADA to a medical model of disability,<sup>75</sup> others have suggested that the decision was necessary to prevent a flood of disability claims.<sup>76</sup> The British experience provides a way of testing that assertion. Government reports have found that failure to satisfy the definition of disability is the most common reason that employment tribunals rule against DDA claimants<sup>77</sup>—just as the failure to satisfy the definition of disability is an extremely common reason for federal courts to rule against ADA plaintiffs.<sup>78</sup> Although this evidence is merely suggestive, and far more investigation of the

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72. *Id.* at 644–45.

73. *Id.* at 645. For a similar suggestion in a discussion of American law, see Bagenstos, *supra* note 38, at 497.

74. *Sutton v. United Air Lines*, 527 U.S. 471, 482 (1999).

75. The general tenor of their reaction is well captured in the title of a piece by Bonnie Tucker. See Bonnie Poitras Tucker, *The Supreme Court's Definition of Disability Under the ADA: A Return to the Dark Ages*, 52 ALA. L. REV. 321 (2000).

76. See, e.g., Issacharoff & Nelson, *supra* note 21, at 320–21.

77. See DISABILITY RIGHTS COMM'N, DISABILITY EQUALITY: MAKING IT HAPPEN 64 (2003).

78. See, e.g., 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?*, 19 REV. LITIG. 505, 517 (2000).

question is necessary, it gives reason to doubt the claim that the Supreme Court's mitigating-measures ruling was necessary to prevent an avalanche of ADA claims.

The Australian experience may prove an even more fruitful source of information. Australia's Disability Discrimination Act (DDA) employs a much broader disability definition than that used in the ADA. As Professor Patmore shows, the Australian DDA covers anyone who has, once had, "may . . . in the future" have, or is believed to have, any of the following: "total or partial loss of the person's bodily or mental functions," "total or partial loss of a part of the body," "the presence in the body of organisms causing disease or illness," "the presence in the body of organisms capable of causing disease or illness," "the malfunction, malformation or disfigurement of a part of the person's body," "a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction," or "a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour."<sup>79</sup>

The Australian definition thus goes beyond the ADA's in several respects. First, it includes not only present, past, or perceived impairments, as does the ADA; it includes possible future impairments as well. Second, unlike the ADA, it does not require that the impairment have any immediately harmful effect on an individual's body.<sup>80</sup> Finally, it does not require any showing that the impairment (actually or as perceived) limits (or limited or will limit) important life activities; the impairment alone is sufficient. In that last respect, the Australian DDA tracks the original version of the bill that became the ADA.<sup>81</sup> The National Council on the Handicapped, which drafted the original ADA provision, urged that such a broad disability definition would properly focus the attention of courts and litigants on the alleged discriminatory conduct of the defendants, not on the physical or mental limitations of the plaintiffs. In the face of opposition, legislative advocates for the ADA ultimately made the

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79. Disability Discrimination Act, 1992 § 4 (Austl.); see Patmore, *supra* note 17, at 541.

80. Compare *Bragdon v. Abbott*, 524 U.S. 624, 637 (1998) ("In light of the immediacy with which the [HIV] virus begins to damage the infected person's white blood cells and the severity of the disease, we hold it is an impairment from the moment of infection."), with DDA (Austl.) § 4 (disability includes not only "the presence in the body of organisms *causing* disease or illness" but also "the presence in the body of organisms *capable* of causing disease or illness") (emphasis added).

81. See S. 2345, 100th Cong. §§ 3(1), 4(a) (1988) (prohibiting discrimination "on the basis of handicap," a term defined to mean "because of a physical or mental impairment, perceived impairment, or record of impairment," without any limiting-major-life-activity qualification); H.R. 4498, 100th Cong. §§ 3(1), 4(a) (1988) (same).

pragmatic decision to employ a narrower definition, which required that the impairment (actually or as perceived) substantially limit major life activities.<sup>82</sup>

Many American disability rights advocates believe that the legislative decision to accept a narrower definition of disability was a Faustian bargain that has undermined the ADA's ability to achieve the goals of integration and empowerment for people with disabilities.<sup>83</sup> Australian advocates certainly believe that the broader definition of disability in their DDA "is empowering, because individuals do not need to prove their outsider status in order to use the act."<sup>84</sup> These advocates argue that a narrower definition, which had been used in a number of pre-DDA state antidiscrimination laws, "creates unnecessary confusion and limits the effectiveness of the legislation."<sup>85</sup> The broader definition, by contrast, "affirms the individual's experience of impairment" and avoids the "anomaly" that an individual whom an employer rejects as too disabled for a job may be deemed not disabled enough to challenge the employer's action.<sup>86</sup> These claims deserve systematic examination. Do claimants under the Australian DDA feel more "affirmed" than do ADA plaintiffs and claimants under the British DDA, both of whom must establish their "real" limitations to be entitled to relief? What are the effects of the different models on the likelihood that individuals will make claims of disability discrimination and, subsequently, obtain relief?

In this regard, the Australian Productivity Commission's recent review of the DDA is somewhat sobering. While the statute's broad disability definition plainly does remove a barrier to the success of discrimination claims, it does not appear to have had as significant an empowering effect as its advocates might have wanted. Victims of disability discrimination remain extremely reluctant to file complaints under the Australian DDA. The tangible costs of pursuing a claim, the time it takes to do so, and the stress of participating in the complaints process are all likely reasons.<sup>87</sup>

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82. For discussion, see generally Bagenstos, *supra* note 38, at 477.

83. For discussion of these arguments, see *id.* at 478.

84. Melinda Jones & Lee Ann Basser Marks, *A Bright New Era of Equality, Independence and Freedom: Casting an Australian Gaze on the ADA*, in *AMERICANS WITH DISABILITIES*, *supra* note 69, at 371, 374.

85. *Id.* at 375.

86. *Id.*

87. See AUSTRALIAN GOV'T PRODUCTIVITY COMM'N, *REVIEW OF THE DISABILITY DISCRIMINATION ACT 1992* at 367-75 (2004). It should be noted in this regard that under the Australian DDA—unlike under the ADA—complainants who lose may be required to pay their opponents' attorneys' fees. See *id.* at 367.

But to say that the Australian DDA's broad disability definition has not had as empowering an effect as its advocates hoped is not to suggest that it has had no empowering effect. By largely "remov[ing] the necessity of surviving a threshold test of eligibility before the law comes into effect,"<sup>88</sup> the DDA clearly makes the playing field more favorable to claimants than it would be if the statute incorporated an ADA-like definition of disability. An additional question, therefore, is whether the Australian DDA's broader protection of potential claimants comes at undue cost. Does the law encourage people who experience no real disadvantage to claim the "disability" label for the purpose of demanding accommodations that are not necessary to keep them in the workforce? Does it impose a significant regulatory or litigation burden on businesses? The Productivity Commission's report does not answer these questions directly—though the report does conclude that the DDA's benefits outweigh its costs, and that the statute's broad disability definition may actually reduce litigation burdens by eliminating the need for a costly and time-consuming inquiry into whether the claimant is disabled.<sup>89</sup> Again, more systematic examination of these questions would be worthwhile.

#### IV. CONCLUSION

In this brief essay, I have done no more than to suggest ways in which comparative analysis should provide useful information in evaluating some basic questions of disability policy: What should be the principal tools for achieving the integrationist goals at which disability policies around the world now purport to aim? And how should disability law operationalize its conception of the foundational category of "disability"? The experiences of other industrialized nations have a great deal of relevance to these questions, and researchers in the United States should give them further attention.

As the European Union proceeds to implement its directive on equal treatment in employment,<sup>90</sup> the United Nations continues to draft a convention on the rights of people with disabilities,<sup>91</sup> and the World Bank increasingly seeks to address disability issues in

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88. Jones & Basser Marks, *supra* note 84, at 374.

89. See AUSTRALIAN GOV'T, PRODUCTIVITY COMM'N, *supra* note 87, at 152–53, 297.

90. See *supra* note 34 and accompanying text.

91. See the periodically updated discussion of the drafting process that appears at <http://www.un.org/esa/socdev/enable/index.html>.

development programs,<sup>92</sup> disability policy can no longer be addressed as if it were confined to the borders of any one nation. Yet at precisely the time when an intense international conversation about disability policy has begun, the United States government seems to have taken the position that we have nothing to learn from the rest of the world.<sup>93</sup> As this symposium shows, nothing could be further from the truth. Though other nations have drawn crucial inspiration and ideas from our disability civil rights laws, we have much to learn from their disability laws as well.

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92. See the discussion of the World Bank's disability programs that appears at <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTSOCIALPROTECTION/EXTDISABILITY/0,,menuPK:282704~pagePK:149018~piPK:149093~theSitePK:282699,00.html>.

93. See Reuters News Release, Irwin Arieff, U.S. rules out signing U.N. disabled rights treaty (June 23, 2003) (*available at* <http://www.rightsforall.org/article.php?id=217>) (“[W]e hope to participate in order to share our experiences and to offer technical assistance, if desired, on key principles and elements, but—given our comprehensive domestic laws protecting those with disabilities—not with the expectation that we will become party to any resulting legal instrument.”) (quoting then U.S. Assistant Attorney General Ralph Boyd).

