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DISABILITY RIGHTS, DISABILITY DISCRIMINATION, AND SOCIAL INSURANCE

Mark C. Weber*

INTRODUCTION

Are statutory social insurance programs, which provide contributory tax-based income support to people with disabilities, compatible with the disability rights movement's ideas? Central to the movement that led to the Americans with Disabilities Act¹ is the insight that physical or mental conditions do not disable; barriers created by the environment or by social attitudes keep persons with physical or mental differences from participating in society as equals.² This civil rights model of disability contrasts with medical

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1. 42 U.S.C.A. §§ 12101–12213 (West 2008).

2. See, e.g., Michelle Fine & Adrienne Asch, *Disability Beyond Stigma: Social Interaction, Discrimination, and Activism*, 44 J. SOC. ISSUES 3, 6-14 (1988) (developing and elaborating on minority group model of people with disabilities); Harlan Hahn, *Advertising the Acceptably Employable Image: Disability and Capitalism*, in THE DISABILITY STUDIES READER 172, 174 (Lennard J. Davis ed., 1997) (describing a minority-group model of disability); Jacobus tenBroek & Floyd W. Matson, *The Disabled and the Law of Welfare*, 54 CAL. L. REV. 809, 814–16 (1966) (applying civil rights “integrationist” approach to disability); Jonathan C. Drimmer, Comment, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities*, 40 UCLA L. REV. 1341, 1357–58 (1993) (describing civil rights model of disability); see also 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, 9 (1999) (“This social-political model rejects the premise of the moral and biomedical perspectives that disability is inherent within the individual. . . . [I]t understands disability as contextual and relational, . . . as a broader social construct reflecting society’s dominant ideology and cultural assumptions. While it acknowledges the existence of biologically based differences, the social-political model locates the meaning of these differences—and the individual’s experience of them as burdensome—in society’s stigmatizing attitudes and biased structures rather than in the individual.”) (footnotes omitted). It is possible to draw distinctions among various forms of social, civil rights, and minority group models, but that step is not necessary for developing the argument in this Article. See generally *infra* text accompanying notes 88–95 (discussing social model in greater depth, including recent criticisms).

models, which frame disability as a bodily or mental defect or condition.³

The conflict between the civil rights approach and insurance seems apparent. A person takes out insurance to deal with tragedy, such as premature death, or damage, such as accidental harm to an automobile or home. Social insurance, for example, the United States Social Security old-age and disability programs, consists of government-run insurance to cover risks of advanced age and disability for which the private market has not provided affordable coverage.⁴ But the civil rights approach to disability posits that disability is not a risk, not a tragedy, and not a damage or defect.⁵ Instead it is a maladaptation of society to human variation.⁶

Does there remain a justification for programs such as disability insurance? Is there even a justification for expansion of social insurance, for example, to establish partial disability pensions or expanded health coverage, a justification that is compatible with disability rights ideas? This Article will answer yes to both questions. It will suggest expansion of social insurance based on the recognition that society at present imposes physical and attitudinal harms whose costs to individuals with disabilities should be publicly insured.

Most legal commentary on disability issues concerns itself with the Americans with Disabilities Act (ADA) and its role in combating disability discrimination,⁷ particularly employment discrimination.⁸

3. See *infra* text accompanying notes 89–91 (discussing variations on civil rights model).

4. See *infra* text accompanying notes 29, 58. Those without high incomes also lack the ability to accumulate private savings to cover long-term disease or disability, or even old-age. See *infra* text accompanying notes 45–46, 55, 127.

5. This approach to disability as something other than a tragic condition manifests itself in challenges to various legal developments, such as actions for wrongful life brought on behalf of infants born with disabilities that could have been detected by genetic testing, see Wendy Hensel, *The Disabling Impact of Wrongful Birth and Wrongful Life Actions*, 40 HARV. C.R.-C.L. L. REV. 141, 142 (2005), and damages awards for hedonic loss stemming simply from the fact of long-term disability, see Samuel R. Bagenstos & Margo Schlanger, *Hedonic Damages, Hedonic Adaptation, and Disability*, 60 VAND. L. REV. 745, 748 (2007). Moreover, it manifests itself in attitudes among disability advocates that are often ambivalent and sometimes hostile to the idea of social welfare payments on the basis of disability. See *infra* notes 11, 89, 91.

6. See *infra* text accompanying notes 89–91 (discussing civil rights approach to disability).

7. Recent articles of interest on the topic of disability discrimination, particularly employment discrimination, include Jill C. Anderson, *Just Semantics: The Lost Readings of the Americans with*

The social welfare aspects of disability law have been neglected in this debate, despite the salience of income support issues to persons with disabilities and their families.⁹ Over the past ten years, however, a number of legal scholars have taken up the topic of disability-related social interventions other than employment discrimination law,¹⁰ and one prominent writer has gone so far as to call social welfare the “Future of Disability Law.”¹¹ This Article adds to the current discussion by exploring social insurance from a disability rights perspective.

Part I of this Article takes up social insurance in general, defining it and describing Social Security Disability Insurance, the principal American social insurance program for individuals with disabilities.

Disabilities Act, 117 YALE L.J. 992, 995–97 (2008); Bradley A. Arehart, *When Disability Isn't “Just Right”*: *The Entrenchment of the Medical Model of Disability and the Goldilocks Dilemma*, 83 IND. L.J. 181, 182–83 (2008); Carrie Griffin Basas, *Back Rooms, Board Rooms—Reasonable Accommodation and Resistance Under the ADA*, 29 BERKELEY J. EMP. & LAB. L. 59, 60–61 (2008); Seth D. Harris, *Disabilities Accommodations, Transaction Costs, and Mediation: Evidence from the EEOC's Mediation Program*, 13 HARV. NEGOT. L. REV. 1, 2–7 (2008); Sharona Hoffman, *Settling the Matter: Does Title I of the ADA Work?*, 59 ALA. L. REV. 305, 306–07 (2008); Jamie L. Ireland & Richard Bales, *Title II of the Americans with Disabilities Act of 1990 and Its Prohibition of Employment Discrimination*, 28 N. ILL. U. L. REV. 183, 184–87 (2008); Dustin Riddle & Richard Bales, *Disability Claims for Alcohol-Related Misconduct*, 82 ST. JOHN'S L. REV. 699, 703 (2008); Michael Selmi, *Interpreting the Americans with Disabilities Act: Why the Supreme Court Rewrote the Statute, and Why Congress Did Not Care*, 76 GEO. WASH. L. REV. 522, 522 (2008). A helpful guide to the basic disability discrimination law and some of the most important of the discrimination scholarship is RUTH COLKER, *THE LAW OF DISABILITY DISCRIMINATION* (6th ed. 2007); see also MARK C. WEBER, *UNDERSTANDING DISABILITY LAW* (2007) (analyzing basic doctrine and leading cases).

8. See Michael Waterstone, *The Untold Story of the Rest of the Americans with Disabilities Act*, 58 VAND. L. REV. 1807, 1811–12 (2005) (discussing tendency of legal scholarship on ADA to emphasize employment discrimination).

9. Although much of the disability studies scholarship that relates to law focuses on discrimination, social welfare policy is an emerging disability studies topic. See Peter Blanck & Helen A. Scharz, *Guest Editor's Introduction*, 26 DISABILITY STUD. Q. 1, 5 (2006) (describing “the economic reality that an unacceptably high proportion of persons with disabilities in the U.S. and abroad live in poverty” as an increasingly important issue in disability studies).

10. See, e.g., Matthew Diller, *Dissonant Disability Policies: The Tensions Between the Americans with Disabilities Act and Federal Disability Benefit Programs*, 76 TEX. L. REV. 1003, 1005 (1998); Matthew Diller, *Entitlement and Exclusion: The Role of Disability in the Social Welfare System*, 44 UCLA L. REV. 361, 362 (1996); Mark C. Weber, *Beyond the Americans with Disabilities Act: A National Employment Policy for People with Disabilities*, 46 BUFF. L. REV. 123, 124 (1998).

11. See generally Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1 (2004). An article that makes similarly broad claims for the importance of social welfare law and suggests extensive policy reforms is Mark C. Weber, *Disability and the Law of Welfare: A Post-Integrationist Examination*, 2000 U. ILL. L. REV. 889, 940–43 (2000).

Disability Insurance contrasts with welfare initiatives, which fall outside the social insurance definition. Part II discusses the rationale for social insurance, as opposed to the other public interventions that address disability and additional hazards of life in a free market economy. It relates social insurance to work, noting the significance of the Social Security Disability Insurance work history requirement. Part III asks about the specific role of social insurance against disability in the contemporary economy. Part IV poses, and tries to answer, the question whether social insurance against disability is fully consistent with a civil rights model of disability. Part V proposes expansion of social insurance for persons with disabilities and explains how this step is consistent with a civil rights approach to disability.

I. WHAT IS SOCIAL INSURANCE?

The term “social insurance” is most commonly used for mandatory government programs that provide monetary protection against risks associated with living in an industrial or post-industrial society in which income typically derives from paid work.¹² Principles of social insurance, as opposed to relief or welfare programs,¹³ include: (1)

12. See BRITANNICA ONLINE ENCYC., SOCIAL INSURANCE, <http://www.britannica.com> (last visited Aug. 11, 2008) ; *National Academy of Social Insurance, What Is Social Insurance?*, http://www.nasi.org/info-url_nocat2708/info-url_nocat_show.htm?doc_id=50066 (last visited Jan. 21, 2009).

13. A contrast may also be drawn between, on the one hand, social insurance benefit programs financed by payroll or other dedicated taxes and, on the other, tax expenditure schemes, which indirectly subsidize benefits by granting tax exemptions. The present American system of allowing tax exemptions for employee group plan health insurance premiums is an example of the latter. Andrea Louise Campbell, *Americans' Views on Public Benefits and Costs*, *National Academy of Social Insurance*, May 29, 2008, http://www.nasi.org/usr_doc/Campbell_NASI_Presentation_05_29_08.pdf. Another mechanism of financing benefits is placing mandates on employers (or employees) without providing tax breaks or other subsidies, forcing the target of the regulation to pay. Like tax expenditure plans, this may mask the real cost of the public policy. Lawrence H. Thompson, *The Advantages and Disadvantages of Different Social Welfare Strategies*, 57 SOC. SEC. BULL. 1, 3, 10, (1994). Nevertheless, employer mandates and various current and proposed tax expenditure programs may be highly beneficial aspects of public policy with regard to persons with disabilities. See generally Francine J. Lippman, *Enabling Work for People with Disabilities: A Post-Integrationist Revision of Underutilized Tax Incentives*, 53 AM. U. L. REV. 393 (2003) (discussing tax incentives); Mark C. Weber, *Beyond the Americans with Disabilities Act: A National Employment Policy for People with Disabilities*, 46 BUFF.

entitlements are work-related, based on work history or the contribution of specific amounts of taxes, and sometimes on current connection to the work force; (2) means tests (maximums for outside income and assets) are not used, or are used only sparingly; (3) the program is contributory in the sense that it is largely or fully supported by specific taxes, typically taxes on wages that the potential beneficiaries pay; (4) participation is universal and compulsory, to avoid adverse selection and to have effects that are neutral with regard to changes of employer or employment; (5) rights to benefits are clearly defined by law.¹⁴

Social insurance as a political development is usually traced to Otto von Bismarck's institution of old-age pensions and other benefit programs in Germany in the 1880s in order to undermine support for socialism.¹⁵ Workers' compensation for industrial accidents was first introduced in the United States at the state government level. Between 1911 and 1920, state legislatures in forty-five states passed workers' compensation laws.¹⁶ Unemployment insurance also began at the state level,¹⁷ but the Federal Social Security Act of 1935¹⁸ was

L. REV. 123, 171 (1998) (discussing employer mandates); *see also* Theodore P. Seto & Sande L. Buhai, *Tax and Disability: Ability to Pay and the Taxation of Difference*, 154 U. PA. L. REV. 1053, 1056 (2006) (analyzing impact of various tax provisions on people with disabilities). *See generally* David A. Weisbach, *A Welfarist Approach to Disabilities*, Aug. 2007, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1008985. (noting that under welfarist economics principles, income tax adjustments constitute best form of redistribution of resources to persons with observable disabilities, but supporting in-kind provision of public goods such as architectural modifications, in general and with respect to persons whose disabilities are not observable).

14. OFFICE OF RESEARCH, EVALUATION AND STATISTICS, U.S. SOC. SEC. ADMIN. SOCIAL SECURITY PROGRAMS IN THE UNITED STATES 8–10 (1997).

15. *See* PAUL H. DOUGLAS, SOCIAL SECURITY IN THE UNITED STATES 242 (2d ed. 1939) (describing German program); *see also* BRITANNICA ONLINE ENCYC., *supra* note 12 (“The first compulsory social insurance programs on a national scale were established in Germany under Chancellor Otto von Bismarck: health insurance in 1883, workmen’s compensation in 1884, and old-age and invalidity pensions in 1889.”). In their history of United States social insurance and related policy initiatives, Edward Berkowitz and Kim McQuaid place less emphasis on European antecedents and greater emphasis on the late nineteenth and early twentieth century American institution of private employer programs providing security to workers against losses from injury, disease, and unemployment, as well as promoting company housing and stock ownership, all as a means to uplift industrial workers and promote loyalty. EDWARD BERKOWITZ & KIM MCQUAID, CREATING THE WELFARE STATE: THE POLITICAL ECONOMY OF TWENTIETH-CENTURY REFORM 11–34 (1988).

16. BERKOWITZ & MCQUAID, *supra* note 15, at 46 (collecting sources).

17. *Id.* at 111.

the key development in American social insurance. It ushered in a universal program of old-age security and a federal-state unemployment insurance program, created non-contributory, means-tested welfare programs, and set the groundwork for future social insurance programs such as Disability Insurance¹⁹ and Medicare,²⁰ as well as modern federal and federally assisted welfare for needy people with disabilities who lack connection to the workforce.²¹

Social Security Disability Insurance (DI) is the most significant American social insurance program affecting working-age persons with physical or mental disabilities.²² As with Social Security for retirement in old age, workers contribute payroll taxes, which employers match with their own contributions; these amounts constitute the Social Security Disability Trust Fund.²³ In order to be deemed “insured” for purposes of the disability program, a person must have worked a sufficient number of calendar quarters (based not on actual quarters of work but on earnings from work per year) during his or her lifetime and before the onset of disability.²⁴ Then if the person cannot “engage in any substantial gainful activity²⁵ by

18. Pub. L. No. 74–271, 49 Stat. 620 (1935) (codified as amended at 42 U.S.C. §§ 301–1397jj (2000 & Supp. V 2006)).

19. See John R. Kearney, *Social Security and the “D” in OASDI: The History of a Federal Program Insuring Earners Against Disability*, 66 SOC. SEC. BULL. 3, 1 (2006) (describing history of Disability Insurance program).

20. See EDWARD D. BERKOWITZ, ROBERT BALL AND THE POLITICS OF SOCIAL SECURITY 120–63 (2005) (describing history of Medicare program).

21. See *id.* at 207–09 (describing development of Supplemental Security Income program).

22. For a comprehensive description of various disability programs in the United States, including those that provide income support and in-kind assistance, see Robert Silverstein, *Emerging Disability Policy Framework: A Guidepost for Analyzing Public Policy*, 85 IOWA L. REV. 1691, 1700–04 (2000).

23. See 26 U.S.C. § 3111(a) (2000). The fund exists on the books of the Social Security Administration, but is not computed separately for general federal budget accounting purposes. In a sense the fund is imaginary because it is invested in United States government bonds, which economically is the same as the government never issuing the bonds; current payroll tax payments fund current disability insurance benefits, essentially establishing what is termed a pay-as-you-go system. See Weber, *supra* note 11, at 925 (collecting sources).

24. 42 U.S.C. § 414 (2000). About three-quarters of the working-age population has “insured” status. Kalman Rupp et al., *Disability Benefit Coverage and Program Interactions in the Working-Age Population*, 68 SOC. SEC. BULL. 1, 9 (2008) (using 1996 data).

25. Generally speaking, substantial gainful activity is that which earns more than an average of \$940 per month net of impairment-related work expenses, as of 2008. Social Security Online, *Substantial Gainful Activity*, (last visited Oct. 17, 2007), <http://www.ssa.gov/OACT/COLA/sga.html>. With regard to the DI program (but not the SSI program), the amount is higher for persons who are blind. *Id.* Special

reason of any medically determinable physical or mental impairment which can be expected . . . to last for a continuous period” of a year or result in death,²⁶ the person is entitled to monthly payments in an amount roughly proportional to past taxed earnings, within established benefit limits.²⁷ In June, 2008, the number of persons receiving DI was 7,912,000, at an average monthly amount of \$1,004.20 (average spousal and children’s benefits amounts were \$266.50 and \$299.30, respectively).²⁸ There is a modest redistribution effect in which persons who are at the lower end of the benefits scale get slightly more compared to their contributions than those at the higher end do, but that is not inconsistent with social insurance principles; payouts need not be strictly proportional to pay-ins as long as some essential connection exists between benefits and work-related tax contributions.²⁹

Individuals who receive DI are eligible for Medicare Part A, which covers hospital costs and a few other medical expenses, and Medicare Part B, which covers doctor bills and other medically necessary and preventive services subject to various costs, after twenty-four months on DI.³⁰ They are also eligible to participate in prescription drug coverage under Medicare Part D.³¹ Because the basic Medicare benefit is supported by the Medicare payroll tax,³² it too qualifies as

rules and exceptions exist with respect to the application of the substantial gainful activity test. 20 C.F.R. § 404.1574 (2008).

26. 42 U.S.C. § 423(d)(1)(A) (2000).

27. 42 U.S.C. § 423(d)(4)(A) (2000). Limited benefits are also available to spouses and children. There is a five-month waiting period from the onset of disability to when DI payments begin. Social Security Online, Social Security Handbook (last revised Jan. 30, 2006), http://www.socialsecurity.gov/OP_Home/handbook/handbook.05/handbook-0502.html.

28. See Office of Policy, U.S. Soc. Sec. Admin., Monthly Statistical Snapshot, http://www.socialsecurity.gov/policy/docs/quickfacts/stat_snapshot/ (last visited Aug. 13, 2008).

29. See BERKOWITZ & MCQUAID, *supra* note 15, at 135–36 (discussing similar situation with regard to old-age benefits). Of course, even in private insurance, payouts are at most only roughly proportional to premiums paid.

30. The most lucid explanation of Medicare eligibility and benefits is found in Centers for Medicare & Medicaid Services, Medicare & You (2009), available at <http://www.medicare.gov/Publications/Pubs/pdf/10050.pdf>. The statutory citation for the program is 42 U.S.C. §§ 1395–1395iii (2000 & Supp. V 2006).

31. See sources cited *supra* note 30.

32. The Medicare Part A payroll tax is 1.45%, DI is 0.9%, and Old-Age and Survivors Insurance is 5.3%. These are matched by employers, and self-employed persons pay both shares. For all but the

social insurance, and is part of the package that persons who meet the disability standard receive in return for the tax contributions taken from their paychecks during their working careers.

As social programs go, DI is middle-aged. In 1934–35, President Franklin Roosevelt’s Committee on Economic Security proposed social insurance for temporary disability and urged further study of social insurance for permanent disability.³³ Unemployment insurance, old-age insurance, and federal support for welfare programs proved to be higher priorities, however, and disability insurance was not part of the original Social Security Act of 1935.³⁴ Even the Economic Security Committee’s proposal for a federal-state health insurance program fell by the wayside.³⁵ American Medical Association opposition to health insurance initiatives spilled over into opposition to a national disability insurance program,³⁶ but Presidents Roosevelt and Truman continued to voice strong support for social insurance for disability.³⁷ Initial dissent by private insurance interests declined over time.³⁸ In the early 1950s, Congress approved a program called the “Disability Freeze,” in which workers who became disabled after working long enough to earn old-age Social Security benefits at retirement received protection from loss of old-age benefits as a result of low or no earnings in the years between disability and retirement age.³⁹ The freeze demonstrated that a federal disability-

Medicare Part A assessment, taxable earnings are capped at \$102,000 per year in 2008. Office of Policy, U.S. Soc. Sec. Admin., Program Highlights, 2007–2008, http://www.socialsecurity.gov/policy/docs/quickfacts/prog_highlights/ (last visited Aug. 13, 2008).

33. EDWIN E. WITTE, THE DEVELOPMENT OF THE SOCIAL SECURITY ACT 208 (1963) (reproducing report).

34. See DOUGLAS, *supra* note 15, at 84–125 (describing history of Social Security legislation).

35. Kearney, *supra* note 19, at 2–3.

36. BERKOWITZ & MCQUAID, *supra* note 15, at 172. The American Medical Association had been receptive to federal disability insurance prior to the health insurance proposal. EDWARD BERKOWITZ, DISABLED POLICY 186 (1987).

37. Experts within and outside the Social Security Administration, including Arthur Altmeyer and Edwin Witte, pushed the disability proposal. See Kearney, *supra* note 19, at 5.

38. See Interview by Peter A. Corning with Roswell Perkins, at 28, 86-92 (Oral History Research Office, Columbia Univ., Soc. Sec. Admin. Project, Part IV, No. 160, (Apr. 2, 1966)). Perkins was Assistant Secretary of Health, Education and Welfare during the Eisenhower Administration. Some industry opposition remained, however. See Kearney, *supra* note 19, at 7–8.

39. Dating this program is something of a challenge. Congress passed a freeze bill in 1952, but in a House-Senate compromise, it was never put into operation. See BERKOWITZ, *supra* note 36, at 71–72. In

based insurance program was workable,⁴⁰ and in 1956 Congress established the DI program essentially as it exists today.⁴¹ The one major modification came in 1960, when Congress removed the original requirement that a recipient of benefits had to be fifty years old. The Eisenhower administration had opposed the DI program at first, but not vigorously, and eventually supported the elimination of the age minimum.⁴² In 1965, Congress established Medicare as a natural complement to existing Social Security cash programs, manifesting what historians Edward Berkowitz and Kim McQuaid term Social Security's "halo effect."⁴³

Persons who do not meet the DI earnings requirements before onset of disability, and who are poor, may qualify for Supplemental Security Income (SSI), as may persons who are poor and whose DI amount is lower than the SSI amount plus a \$20 income disregard.⁴⁴ The SSI payment for an eligible individual is \$637 per month as of 2008.⁴⁵ Eligibility is measured by both income and assets.⁴⁶ The SSI

1954, Congress passed a bill that actually went into effect. *Id.* at 72. Roswell Perkins supported the freeze. Kearney, *supra* note 19, at 8–9.

40. Other civilian disability-related programs, such as one for civil-defense workers, also proved workable, and this bolstered the DI proposal. Kearney, *supra* note 19, at 6, 9–10.

41. Pub. L. No. 84–880, 70 Stat. 815 (1956).

42. Roswell Perkins described Secretary Folsom of HEW as torn over whether to support the DI program. Interview by Peter A. Corning, *supra* note 38, at 28. Secretary Flemming led the support for removing the age requirement. BERKOWITZ, *supra* note 36, at 109–10.

43. BERKOWITZ & MCQUAID, *supra* note 15, at 212.

44. Social Security Online, Can I Receive Social Security Benefits and SSI?, <http://ssa-custhelp.ssa.gov/> (last visited Apr. 23, 2008) (Enter search text "Can I receive Social Security benefits and SSI?" and then click on associated link). Persons who are poor and over 65 may also qualify for SSI, and need not show disability. *Id.* If they have worked enough in their lifetimes to qualify for Social Security's old-age insurance, they will receive SSI only if their social insurance retirement amount is very low.

45. *Id.* An eligible couple receives \$956. Because many recipients also are paid DI or have other limited sources of income, the average benefit amount is \$492 per month as of June, 2008. See Office of Policy, U.S. Soc. Sec. Admin., Monthly Statistical Snapshot, http://www.socialsecurity.gov/policy/docs/quickfacts/stat_snapshot/ (last visited Aug. 13, 2008).

46. The income test depends on the state in which the person lives, and includes a number of disregards and income-deeming rules; assets other than one's home, car, family burial plots and small life insurance and burial funds generally cannot exceed \$2000 (\$3000 for a couple). Social Security Online, Supplemental Security Income, <http://www.socialsecurity.gov/pubs/11000.html#part1> (last visited June, 2007).

program applies the same disability standard as DI,⁴⁷ but the population it serves differs in important respects. DI's earnings requirements and the operation of its disability standards cause the benefit largely to go to individuals in their fifties and early sixties who have weak to modest educational backgrounds and are, in the words of one analyst, "prematurely enfeebled" due to injury or disease.⁴⁸ SSI largely serves individuals whose disabling conditions have been with them since birth; large numbers have mental retardation.⁴⁹ Many SSI recipients work, often at sheltered or supported employment jobs.⁵⁰ States may provide supplements for SSI amounts.⁵¹ In most states, persons on SSI automatically qualify for medical assistance under the Medicaid program.⁵²

SSI emerged in 1973, the only surviving part of the guaranteed annual income proposals then current in discussions of welfare reform.⁵³ It replaced federally assisted state income support for impoverished elderly persons and individuals with permanent and total disabilities.⁵⁴ SSI is not a true social insurance program, for it is funded out of general federal revenues rather than a dedicated tax on earnings and it is means-tested, that is, eligibility is subject to income and asset restrictions.

47. 42 U.S.C. § 1382 (2000). The substantial gainful activity test for blind persons is the same as that for persons with other disabilities, however. *See supra* note 25 (describing test).

48. *See* BERKOWITZ, *supra* note 36, at 194–95.

49. *See* Aaron J. Prero, *Quantitative Outcomes of the Transitional Employment Training Demonstration*, in *DISABILITY, WORK AND CASH BENEFITS* 273, 274 (Jerry L. Mashaw et al. eds., 1996) (reporting that 29% of SSI recipients receive payments on basis of primary finding of mental retardation).

50. *See* L. Scott Muller et al., *Labor-Force Participation and Earnings of SSI Disability Recipients: A Pooled Cross-Sectional Times Series Approach to the Behavior of Individuals*, 59 *SOC. SEC. BULL.* 22, 34–36 (1996) (noting prevalence of sheltered and supported employment among SSI recipients).

51. Social Security Online, *supra* note 44.

52. *See* 42 U.S.C. § 1396(a) (2000); Social Security Online, Understanding Supplemental Security Income, <http://www.ssa.gov/ssi/text-other-ussi.htm> (last visited Mar. 21, 2009).

53. BERKOWITZ & MCQUAID, *supra* note 15, at 207.

54. *See id.* (discussing operation of program and sources of political support).

II. THE RATIONALE FOR SOCIAL INSURANCE

Widespread concern over the poverty of elderly persons and workers who suffered industrial accidents or were temporarily displaced from wage employment fueled political support for social insurance programs.⁵⁵ Social insurance seemed an attractive means to undercut the left wing, not just in Bismarck's Germany but also in the Depression-era United States, where mainstream politicians were alarmed at Townsend Clubs and support for other share-the-wealth schemes.⁵⁶ Politicians also recognized that if public programs employed a tax specifically dedicated to the relevant benefits, citizens

55. DOUGLAS, *supra* note 15, at 5–21 (discussing demand for old-age security and unemployment protection); see ARTHUR J. ALTMAYER, *THE FORMATIVE YEARS OF SOCIAL SECURITY* 4 (1968) (discussing Franklin Roosevelt's support for workers' compensation, old-age pensions, and unemployment insurance while still in New York state government); WITTE, *supra* note 33, at 21 (quoting charge of Federal Committee on Economic Security staff in 1934 to "devote its major attention" to "protection of the individual against dependency and distress," including "accident insurance, health insurance, invalidity insurance, unemployment insurance, retirement annuities, survivors' insurance, family endowment, and maternity benefits."); see also Nancy J. Altman, *Social Security and the Low-Income Worker*, 56 AM. U. L. REV. 1139, 1140 (2007) ("Before Social Security, people worked as long as they could hold jobs. But this was an insecure state of affairs. The fast pace of many jobs 'wears out its workers with great rapidity. The young, the vigorous, the adaptable, the supple of limb, the alert of mind, are in demand . . . Middle age is old age.' Once older workers lost their jobs, they could seldom find new ones. Older people almost never had sufficient savings to last until death.") (quoting E.T. DEVINE, *MISERY AND ITS CAUSES* 125 (1909), as quoted in ABRAHAM EPSTEIN, *FACING OLD AGE* 20–21 (1922)) (footnotes omitted).

56. William Haber & Wilbur J. Cohen, *Theory and Philosophy of Social Security*, in *READINGS IN SOCIAL SECURITY* 38, 39 (William Haber & Wilbur J. Cohen eds., 1948). Francis Townsend, a retired doctor, gained immense popularity with his plan that everyone over age sixty receive a federal pension of \$200 per month as long as the recipient spent the entire sum by the end of the month. See BERKOWITZ & MCQUAID, *supra* note 15, at 114 ("Although the Townsend program was bizarre economics, it made very good politics."); WITTE, *supra* note 33, at 95–96 ("The thousands of letters which the members [of the House of Representatives] received in support of the plan worried them greatly. With the exception of probably not more than half a dozen members, all felt that the Townsend plan was utterly impossible; at the same time they hesitated to vote against it."). Townsend was by no means the only "thunder on the left." DOUGLAS, *supra* note 15, at 69–83 (using term to describe Townsend movement as well as proposal for federal all-inclusive unemployment compensation at 100% of prevailing wages); see ALTMAYER, *supra* note 55, at 10 ("The President was, of course, concerned about the Townsend Plan. But he was even more concerned about Senator Huey Long's "share the wealth" movement."). Long's amorphous every-man-a-king proposal called for widespread redistribution of financial resources from rich to poor. *Id.*

would feel an entitlement to the payouts and would oppose efforts to repeal the programs or diminish benefits.⁵⁷

On a more abstract level, the rationale for government-run, compulsory and universal social insurance is the absence of a viable market for private insurance for dangers such as industrial disease, periodic unemployment, old-age, chronic illness, and disability.⁵⁸ In general, private insurers have been reluctant to offer coverage in these areas, at least in the absence of government programs underwriting the worst of the risks.⁵⁹ They fear adverse selection by which only those most prone to the conditions will opt for coverage.⁶⁰ With regard to unemployment and some of the other risks, they fear that the availability of benefits presents a moral hazard to engage in conduct that leads to the payout.⁶¹ The alternative of personal savings

57. See Andrea Louise Campbell & Kimberly J. Morgan, *Financing the Welfare State: Elite Politics and the Decline of the Social Insurance Model in America*, 19 *STUD. AM. POL. DEV.* 173, 173 (2005) (“Levied over a broad swath of the population, these [payroll] taxes generate a large amount of revenue, yet are politically acceptable because people see them as payments that entitle them to benefits in return.”). President Roosevelt was quoted as saying, “With those taxes in there, no damn politician can ever scrap my social security program.” ARTHUR M. SCHLESINGER, JR., *THE AGE OF ROOSEVELT: THE COMING OF THE NEW DEAL* 308–09 (1959). The entitlement is political rather than legally vested, however. During the Red Scare, the Supreme Court upheld the termination of Social Security benefits of people who had been deported for being communists, even though being a communist was lawful activity at the time. *Flemming v. Nestor*, 363 U.S. 603, 608–21 (1960). The dissents protested that the withdrawal of benefits violated the First Amendment, *id.* at 621 (Black, J., dissenting), constituted a bill of attainder, *id.* at 628 (Douglas, J., dissenting), and violated the prohibition against ex post facto laws and imposition of punishment without a judicial trial, *id.* at 634 (Brennan, J., dissenting, joined by Warren, C.J., and Douglas, J.). See generally Karen M. Tani, *Flemming v. Nestor: Anticommunism, the Welfare State, and the Making of “New Property,”* 26 *LAW & HIST. REV.* 379, 406 (2008) (commenting on connection of case to later constitutional law developments).

58. Some companies tried to self-insure their workers or purchase insurance for them in the era preceding the New Deal, but eventually many corporate leaders supported public programs to achieve the same result. See BERKOWITZ & MCQUAID, *supra* note 15, at 14–31 (describing early private efforts), 60–66 (describing later private efforts); 106–23 (describing significant corporate support for public efforts, despite major opposition from other business elements).

59. See BERKOWITZ, *supra* note 36, at 52–53 (noting prohibitive rates for disability insurance prior to institution of federal program); Kearney, *supra* note 19, at 3 (“During the Great Depression . . . [m]any companies stopped selling disability insurance, others failed financially, and the remainder made changes in their . . . practices to make themselves less vulnerable to loss. Sales of disability insurance began to increase after 1940, but the policies were very restrictive.”).

60. See Advisory Council on Soc. Sec., *Permanent and Total Disability Insurance*, in *READINGS IN SOCIAL SECURITY*, *supra* note 56, at 421, 422; see also DOUGLAS, *supra* note 15, at 257–62 (discussing adverse selection of risks in private pension plans).

61. Regarding moral hazard arguments, see Tom Baker, *On the Genealogy of Moral Hazard*, 75 *TEX. L. REV.* 237, 252–60 (1996). Arguments based on moral hazard have frequently been leveled at

is unrealistic given the demands of wage-earning individuals to spend their money on current needs.⁶² The other alternative is outright government redistribution of resources, a serious threat to the existing order.⁶³

In recent years, there have been some challenges to social insurance, primarily to the old-age retirement program. The main complaints are that the program has too great a redistribution effect and does not generate returns as high as private retirement accounts would achieve.⁶⁴ These refrains were far more common in the early 1990s than they are today, and the recent poor performance of the equities market suggests that the time for privatizing proposals has passed.⁶⁵ Moreover, recent demographic trends are making the economics of the retirement trust fund look more optimistic than had once been projected,⁶⁶ very modest alterations are all that will be

unemployment insurance. *See, e.g.*, DOUGLAS, *supra* note 15, at 78–79 (discussing early federal unemployment insurance proposal offering payment at 100% of prevailing wage rates).

62. *See* DOUGLAS, *supra* note 15, at 3–7. Moreover, assuming private insurance were available and some individuals failed to purchase the insurance based on a calculation of their own marginal utility, the government might nevertheless maximize public welfare by providing insurance to all. *See* Weisbach, *supra* note 13, at 66.

63. *See* Theodore R. Marmor & Jerry L. Mashaw, *Understanding Social Insurance: Fairness, Affordability, and the “Modernization” of Social Security and Medicare*, 15 ELDER L.J. 123, 126 (2007) (“Indeed, a strong historical case can be made that beginning with Otto von Bismarck’s social insurance initiatives in the late nineteenth century, the social provision of income protection against these risks has been a fundamental precondition for the flourishing of industrial capitalism. Looked at historically, social insurance is a deeply conservative idea, the major viable alternative to state socialism.”) (footnote omitted).

64. *See, e.g.*, Stuart M. Butler & Maya MacGuineas, *Rethinking Social Insurance*, THE HERITAGE FOUNDATION (Feb. 19, 2008), <http://www.heritage.org/Research/budget/wp021908.cfm> (“The single greatest threat to the fiscal health of the United States is the runaway growth of the nation’s major retirement and health care entitlement programs.”); Martin Feldstein, *Rethinking Social Insurance*, NAT’L BUREAU OF ECON. RESEARCH, <http://www.nber.org/feldstein/aeajan8.pdf> (last visited Aug. 10, 2008) (“[T]he major forms of social insurance could be improved by shifting to a system that combines government insurance with individual investment-based accounts . . .”).

65. Professors Campbell and Morgan contend that support for social insurance approaches has always remained strong among the American population as a whole, but that the views of some of the affluent policy-making elites have shifted away from support for payroll taxes over time. Campbell & Morgan, *supra* note 57, at 174.

66. OFFICE OF THE CHIEF ACTUARY, U.S. SOC. SEC. ADMIN., THE 2008 OASDI TRUSTEES REPORT (2008), available at http://www.ssa.gov/OACT/TR/TR08/IV_LRRest.html#239829 (“The estimated deficits for the OASI, DI, and combined OASDI programs in this report are improved as compared to those shown in last year’s report for the longer valuation periods.”); *see* Paul Krugman, Look and Feel 15 Years Younger!, *The Conscience of a Liberal*, <http://krugman.blogs.nytimes.com/2008/03/25/look-and-feel-15-years-younger/> (Mar. 25, 2008) (“In fact, however, the [Social Security] actuarial balance

needed to keep the program solvent and retain its slight redistribution effect.⁶⁷ Similarly modest changes could ensure the actuarial soundness of the DI fund well into the future.⁶⁸ Despite the aging of the population, there is some reason to believe that disability benefits applications will decrease due to projected long-term declines in industrial injuries and disease as the American economy shifts further over time from manufacturing to services.⁶⁹ With regard to DI, the idea of private accounts is hardly an appealing alternative to social insurance, given that individuals are unlikely to have the time to save adequate amounts before the onset of disability.⁷⁰

Social insurance also functions as a compulsory employee benefit. It rewards work and creates an incentive for people to keep working. The requirement of a baseline of work history and current labor force attachment gives individuals a reason to become employed and stay in the workforce in order to obtain benefits should they no longer be able to work.⁷¹ When benefits are pegged strongly to contributions, as

has been improving rather than worsening. It's now better than it's been since 1993. What this tells us is that projections made in the mid-to-late 1990s were, in the light of subsequent revisions, way too pessimistic. Moral: Social Security's financial problem is relatively minor. It doesn't deserve the emphasis it receives from most pundits.").

67. See Altman, *supra* note 55, at 1153–60 (suggesting retention of existing earned income tax credit, restoring maximum taxable wage base to 90% of wages in covered employment, considering conversion of estate tax as structured in 2009 into Social Security taxes in 2010, and allowing government to invest some of trust fund amount in private equity funds, as Railroad Retirement Board currently does).

68. See Stephen C. Goss, *The Financial Outlook for the Social Security Disability Insurance Program*, 66 SOC. SEC. BULL., No. 3, 2005–06, at 47, 51–52 (discussing possible reallocation of retirement and disability components of payroll tax, alteration of application of vocational criteria in disability definition, and return-to-work initiatives).

69. Kalman Rupp & David Stapleton, *Determinants of the Growth in the Social Security Administration's Disability Programs—An Overview*, 58 SOC. SEC. BULL. 43, 51 (1995) ("The short-term effect of economic restructuring is thought to increase applications, because disabled workers who lose their manufacturing jobs may choose to apply for disability benefits rather than find new work in the service sector. The long term effect may be to decrease applications, however, because service sector workers are less susceptible to disabling injuries and illnesses."). Sources on the shift from manufacturing to services abound. *E.g.*, A. Michele Dickerson, *Consumer Over-Indebtedness: A U.S. Perspective*, 43 TEX. INT'L L.J. 135, 137 (2008).

70. Patrick Wiese, *Financing Disability Benefits in a System of Individual Accounts: Lessons from International Experience* (Jan. 1, 2006), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1151238.

71. BERKOWITZ, *supra* note 20, at 23 ("By tying the payments to working, the incentive for people to work could be preserved, and an American welfare state might be instituted that maintained the efficiency of America's capitalist economy."). Some in the disability rights community have questioned the attitude that paid employment should be the overriding goal for all persons with disabilities. *See*,

with Disability Insurance and Old-Age Insurance, there is an incentive to work at higher-income employment to maximize the payout when disability or retirement occurs.⁷² Moreover, if catastrophic events such as the death, inability to work, or prolonged hospitalization of a family breadwinner would wipe out the resources of even the most prudent saver, incentives to work hard and engage in prudent saving are turned upside down. Social insurance to cover the worst costs of those events places incentives back where they belong.

Means-tested programs that lack work-relatedness are welfare, and fall outside the definition of social insurance.⁷³ Popular, judicial, and other sources have strongly resisted the concept of welfare rights, despite the efforts of advocates to portray what is more often called “assistance” as “entitlements.”⁷⁴ Critics have rarely and

e.g., Sunny Taylor, *The Right Not to Work: Power and Disability*, MONTHLY REV., Mar. 2004, available at <http://www.monthlyreview.org/0304taylor.htm> (“Western culture has a very limited idea of what being useful to society is. People can be useful in ways other than monetarily.”). The present discussion does not challenge the social desirability of work incentives, in the form of either wages or benefits such as disability insurance.

72. See J. Douglas Brown, *Developments in the Social Security Program*, in READINGS IN SOCIAL SECURITY 127 (1945) (“But any effective system of social security must enhance incentive [to work], whenever possible, rather than impair it This can be done through social insurance under which eligibility and benefits are related to past earnings and productivity”).

73. OFFICE OF RESEARCH, EVALUATION AND STATISTICS, U.S. SOC. SEC. ADMIN. SOCIAL SECURITY PROGRAMS THROUGHOUT THE WORLD vi-vii (1997) (distinguishing social insurance systems from means-tested programs limited to needy applicants); see ALTMAYER, *supra* note 55, at 5 (describing origins of Social Security Act) (“While social insurance was regarded as the chief instrumentality to be relied on protection against want, it was recognized that it would be necessary to supplement this protection in a certain proportion of cases by providing public assistance in accordance with individual needs.”).

74. See *Dandridge v. Williams*, 397 U.S. 471, 487 (1970) (“[T]he intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court. The Constitution may impose certain procedural safeguards upon systems of welfare administration But the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients.”); see also Elizabeth Pascal, *Welfare Rights in State Constitutions* (2008), http://works.bepress.com/elizabeth_pascal/1/ (“Although nearly two dozen state constitutions contain some type of affirmative guarantee of welfare rights, state courts are extremely reluctant to enforce these rights.”) (abstract). The welfare rights concept is a frequent target of neoconservative movement writers. See, e.g., David Kelley, *Last Rites for Welfare Rights?*, CATO INST., Nov. 10, 1998, http://www.cato.org/pub_display.php?pub_id=5788. Other sources note the popular or political resistance to welfare rights without editorializing. See, e.g., Amy L. Wax, *Rethinking Welfare Rights: Reciprocity Norms, Reactive Attitudes, and the Political Economy of Welfare Reform*, L. & CONTEMP. PROBS., Winter-Spring 2000, at 257, 258 (2000) (“Establishing an unassailable right to welfare was

unsuccessfully challenged existing social insurance and the popular view that it constitutes an entitlement.⁷⁵

III. SOCIAL INSURANCE AGAINST WHAT?

The obvious answer to the question of what social insurance ought to insure against is whatever insecurities ordinary citizens fear and the market does not readily offer to insure. The historical record indicates that in the United States those risks are industrial accidents and disease; temporary unemployment due to reasons that are beyond employees' control; inability to work due to advanced age; inability to work due to disability; and various attendant medical and related costs.⁷⁶ In other developed countries (and to some extent in the United States), programs also protect against life hazards such as temporary illness and partial disability.⁷⁷

Social insurance insures against discrimination as well as the specific risks that are the programs' focus. This point at first seems counterintuitive, but an analysis of the programs shows that some of the hazards against which they protect are more the social attitudes that keep people from working to support themselves than the

once an important goal of legal academics and activists, but is no longer.”); John Arthur O’Connor, *From Welfare Rights to Welfare Fights: Neo-Liberalism and the Retrenchment of Social Provision* (2002) (unpublished Ph.D. dissertation, University of Massachusetts) (<http://scholarworks.umass.edu/dissertations/AAI3056266/>) (describing reaction against welfare rights in several countries).

75. *But see supra* text accompanying notes 73–74 (describing recent reaction against some forms of social insurance or its expansion); *see also supra* note 57, at 608–21 (discussing *Flemming v. Nestor*).

76. *See* BERKOWITZ, *supra* note 20, at 23 (noting of influential early Social Security Advisory Committee report that “[t]he basic idea that animated the report was that contributory social insurance should be used to defend the nation against the inherent insecurities of the modern economy.”).

77. *See* Weber, *supra* note 11, at 945 (collecting sources regarding European programs). In the United States, workers compensation programs allow partial disability benefits, often in the form of benefits for a specified number of benefit weeks proportional to the gravity of the impairment. *See* Peter S. Barth, *Compensating Workers for Permanent Partial Disabilities*, 65 SOC. SEC. BULL. 16–17 (2003–04) (collecting data on state programs). Veterans Administration benefits also provide partial disability pensions. Interestingly, a few people criticized presidential candidate John McCain for receiving these benefits based on his war injuries, but there is little general political opposition to the payment of partial disability awards to injured veterans. *See Why is John McCain Getting \$58,000 in Disability (Taxfree)?*, COFFEE STAINED NEWS, June 10, 2008, <http://coffeestainednews.wordpress.com/2008/06/10/why-is-john-mccain-getting-58000-in-disability-taxfree/>.

physical or mental inability to do what work requires. The Disability Insurance program recognizes that people over 55 with a limited education may still be capable of performing various jobs, but are highly unlikely to be hired for them, and so the program applies a laxer standard for eligibility for that group.⁷⁸ Early sources on social security for old age recognized the difficulty of being hired when a person is elderly even if that individual is perfectly capable of working, just as they recognized the increased likelihood of physical and mental decline with age.⁷⁹ Even some government welfare programs are in reality a form of protection against discrimination, and that fact helps explain their historical trajectory. For example, from the 1930s to the 1990s, Aid to Families with Dependent Children (AFDC) provided long-term assistance to mothers who lacked the support of a man and who faced overwhelming discrimination on the basis of sex if they looked for wage employment.⁸⁰ As the social perception about the prevalence of sex discrimination changed, the political support for paying anything but

78. See 20 C.F.R. § 404.1562 (2008) (“If you have a severe, medically determinable impairment(s) (see §§ 404.1520(c), 404.1521, and 404.1523), are of advanced age (age 55 or older, see § 404.1563), have a limited education or less (see § 404.1564), and have no past relevant work experience (see § 404.1565), we will find you disabled. If the evidence shows that you meet this profile, we will not need to assess your residual functional capacity or consider the rules in appendix 2 to this subpart.”). A relaxed standard also applies for persons with a marginal education and work experience of thirty-five or more years of nothing but arduous unskilled physical labor. 20 C.F.R. § 404.1562(a) (2008). These provisions appear to take into account the reality of discrimination against aging workers in the physical labor employment market.

79. See, e.g., DOUGLAS, *supra* note 15, at 5–6 (noting decline in employment of elderly workers as industry replaced farm employment; also noting difficulty of elderly persons in finding work after losing jobs).

80. Until quite recently, employment discrimination against women was the legal rule rather than the unlawful exception. See, e.g., *Goesaert v. Cleary*, 335 U.S. 464, 467 (1948) (upholding law barring most employment of women bartenders); *Radice v. New York*, 264 U.S. 292, 293 (1924) (upholding law forbidding women from employment in restaurants late at night); *Bradwell v. Illinois*, 83 U.S. 130, 130 (1872) (upholding bar against women practicing law). The prohibition on sex discrimination in employment in the Civil Rights Act of 1964 was inserted as an amendment by opponents of the bill in order to defeat the race discrimination provisions. See *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1082, 1085 (7th Cir. 1984) (describing prohibition on sex discrimination as “the gambit of a congressman seeking to scuttle adoption of the Civil Rights Act.”). Although Congress called the bluff of the opponent, that event occurred more than a generation after the adoption of federally supported welfare for mothers who lacked a husband or other man to support their children.

short-term support to single mothers declined⁸¹ and AFDC was replaced with a program of temporary assistance to needy families.⁸²

IV. SOCIAL INSURANCE AND THE CIVIL RIGHTS MODEL OF DISABILITY

The role of social insurance in protecting against the harms of discrimination brings the discussion back to the civil rights model of disability. This model, sometimes thought of as the minority group or social relations approach, employs the insight that conditions often thought of as disabling do not themselves disable. Instead, barriers created by the environment or by social attitudes keep persons with physical or mental differences from full and equal participation in society.⁸³ This model contrasts with the medical model, which focuses on the individual's departures from the physical or mental norm in accounting for disability.⁸⁴ The medical model suggests an emphasis on fixing the individual with a disability through medical treatment; the civil rights model places the emphasis on fixing the

81. Without linking the phenomenon to changing perceptions regarding the prevalence of sex discrimination, Professor Wax observes that support for traditional AFDC declined with changes in social expectations and the feeling that needs should be met by collective resources only when the needs are not the result of an individual's voluntary decisions. Wax, *supra* note 74, at 275 ("Because the program was confined to single parents with children, it denied benefits to most able-bodied men. The expectation that able-bodied women would work was not part of the program's design at its inception. On the contrary, the program implemented the understanding that single mothers should personally care for their children, which required them to depend on public support. Twenty-five years after the enactment of the AFDC legislation, however, the consensus that single mothers should depend on the government began to fade as more mothers started to work and the number of out-of wedlock births exploded.").

82. As part of the 1996 federal welfare revisions, the Temporary Assistance to Needy Families (TANF) program replaced AFDC. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996). In the absence of a hardship exception (which no more than twenty percent of recipients may be granted), an individual may receive aid for no more than five years in his or her lifetime. 42 U.S.C. § 608(a)(7)(A), (C) (2000).

83. See *infra* text accompanying notes 87–95 (describing model).

84. Much recent writing discusses the role of the norm or normal in separating out persons with disabilities and assigning them inferior roles. See, e.g., LENNARD J. DAVIS, BENDING OVER BACKWARDS: DISABILITY, DISMODERNISM, & OTHER DIFFICULT POSITIONS 116–18 (2002) (noting role of normal, contrasted with role of ideal, in separating persons with disabilities from others); MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 173–224 (1990) (suggesting movement away from emphasis on classification of individuals and towards emphasis on relations among people).

environment by eliminating physical and attitudinal barriers.⁸⁵ In the most common illustration, the medical model would stress rehabilitation of a person with paraplegia,⁸⁶ or if that cannot succeed, persuading the person to accept his or her limits and adjust psychologically to them. The civil rights model would point out that the disabling condition is not, or at least not simply, the paraplegia, but the fact that stairs, curbs, and other artificial obstacles prevent the movement of persons who have to rely on wheelchairs or other mobility aids to get around. The model would stress altering the environment.⁸⁷

There are writers who distinguish between what they term a social model, which embodies the basic insight about how the social environment or attitude interacts with physical or mental traits of individuals to cause “disability,” and what they call a civil rights model, which proceeds from that insight to note that society imposes a disadvantage on persons with disabilities in much the same way that it does on other minorities, and prescribes social solutions (such as the ADA and other civil rights laws) to end the disadvantage.⁸⁸ For purposes of the discussion here, however, the social model and the civil rights model will be considered together as the civil rights model.

Some recent writing challenges various aspects of the civil rights model or its applications,⁸⁹ but the model has been the critical

85. See Mary Crossley, *The Disability Kaleidoscope*, 74 NOTRE DAME L. REV. 621, 649–53 (1999).

86. See RUTH O'BRIEN, CRIPPLED JUSTICE: THE HISTORY OF MODERN DISABILITY POLICY IN THE WORKPLACE 207–21 (2001) (contrasting rehabilitation emphasis of medical approaches to disability with legal emphasis related to civil rights approach).

87. See Crossley, *supra* note 85, at 658–59 (discussing alterations in physical environment and social policy).

88. See Hensel, *supra* note 5, at 147–50. See generally Ravi A. Malhotra, *The Duty to Accommodate Unionized Workers with Disabilities in Canada and the United States: A Counter-Hegemonic Approach*, 2 J.L. & EQUALITY 92, 108 (2003) (“It is important to note that there is no single, universally accepted conception of the social-political model.”).

89. E.g., James Leonard, *The Equity Trap: How Reliance on Traditional Civil Rights Concepts Has Rendered Title I of the ADA Ineffective*, 56 CASE W. RES. L. REV. 1, 9 (2005); Marta Russell, *Backlash, The Political Economy, and Structural Exclusion*, 21 BERKELEY J. EMP. & LAB. L. 335, 336 (2000) (criticizing liberal policy assumptions behind ADA); Michael Ashley Stein & Penelope J.S. Stein, *Beyond Disability Civil Rights*, 58 HASTINGS L.J. 1203, 1203 (2007) (finding limits in social model and putting forward disability human rights paradigm, which builds off social-model, development-rights,

development in thinking about disability for more than a generation.⁹⁰ It was an essential part of the intellectual groundwork that led to the ADA.⁹¹ The model has recently received criticism on the ground that, at least in its unadorned form as the social relations approach, it does not justify policy prescriptions for changing the physical and social environment: Even one who accepts the model's insight might still conclude, from a libertarian, utilitarian, or even egalitarian perspective, that trying to change the individual or even doing nothing, would be preferable to some environmental changes.⁹² This point seems obvious. Many, perhaps most, middle aged persons are disabled from reading fine print. Nobody proposes that all reading materials (the environment and its artificial barrier) be made large-print when the easy personal adaptation of reading glasses (an individual, medical-appliance fix) is available. The point of the social relations or civil rights model is instead that paying attention to the role of the environment opens up the option of changing social conditions and attitudes and demonstrates the injustice of refusing to do so when changes in the environment would be justified under

and capabilities ideas); Bonnie Poitras Tucker, *The ADA's Revolving Door: Inherent Flaws in the Civil Rights Paradigm*, 62 OHIO ST. L.J. 335, 340 (2001) (noting limits on civil rights approach as embodied in ADA); Weber, *supra* note 11, at 889, 893, 940 (suggesting need for "post-integrationist" approach); *see also* Ruth Colker, *Anti-Subordination Above All: A Disability Perspective*, 82 NOTRE DAME L. REV. 1415, 1417 (2007) ("An absolutist integrationist perspective disserves the disability community by supporting an inappropriately high threshold for the development and retention of disability-only services and institutions."). Others have defended the model. *See, e.g.*, JAMES I. CHARLTON, NOTHING ABOUT US WITHOUT US: DISABILITY OPPRESSION AND EMPOWERMENT 127 (1998) (defending minority group-civil rights model of disability).

90. In a highly influential 1966 article, Jacobus tenBroek and Floyd Matson foreshadowed the development of the civil rights model by contrasting "custodialism" with "integrationism." *See* tenBroek & Matson, *supra* note 2, at 816.

91. *See* Hensel, *supra* note 5, at 150 ("[S]ome scholars have credited the political awareness engendered by the minority model for the passage of the Americans with Disabilities Act and comparable civil rights legislation.") (collecting authorities); *see also* Weber, *supra* note 11, at 903–04 (discussing connection between insights of civil rights approach and terms of ADA). Others have noted that the model provided a new basis for self-awareness and shared identity for persons with disabilities. *See, e.g.*, JENNIFER L. ERKULWATER, DISABILITY RIGHTS AND THE AMERICAN SOCIAL SAFETY NET 29 (2006).

92. Adam Samaha, *What Good Is the Social Model of Disability?*, 74 U. CHI. L. REV. 1251, 1285–1306 (2007).

whatever social philosophy one embraces.⁹³ For those committed to egalitarian ideals, significant environmental changes are indicated.⁹⁴ This is why the model moves so seamlessly from social relations to civil rights, and why the civil rights model is so crucial in discussing modern policy prescriptions.⁹⁵

The paradox of one policy prescription—social insurance—for the civil rights model is that the civil rights model postulates that disability is by no means a hazard of life, but instead an inevitability of life. It need not lead to separation from the work force, except for the stubborn failure of employers to adapt their workplaces and attitudes. One would think that it hardly makes sense to insure against the benighted attitudes of employers.

But then again, perhaps it does. Although it might be nobler to take arms against a sea of troubles and by opposing end them, individuals still need government programs that keep them from suffering the worst effects of discrimination's slings and arrows. As noted, even traditional programs in the form of old-age pensions and welfare for impoverished families are to a significant degree addressed to discrimination. It is eminently sensible to make social insurance available to people with disabilities—a class of individuals who experience pervasive discrimination in employment.⁹⁶

93. See ERKULWATER, *supra* note 91, at 30–31 (noting role of social model in shifting focus of advocacy groups towards changes in social environment).

94. See, e.g., CHARLTON, *supra* note 89, at 89–91 (stressing importance of social safety net).

95. This is not to deny that there may be an imperfect fit with traditional concepts of civil rights developed in the sex and race context when the civil rights model is applied to employment discrimination. See Leonard, *supra* note 89, at 32–34. But see Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 579, 579 (2004) (stressing comparison of ADA obligations with duties to avoid race and sex discrimination that also impose costs on employers); Samuel R. Bagenstos, "Rational Discrimination," *Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 826, 830 (2003) (same).

96. Professor tenBroek, with his usual prescience, understood the role of public support in compensating for disability discrimination. In a contribution to the debate over welfare and social insurance for people with disabilities, he and Professor Richard Wilson observed:

[C]ertainly special weight must be given to the circumstances of those who are kept out of the labor market so largely by social arrangements and public attitudes. This is the case of many of the disabled. Do not they have a right which derives from the social barriers which prevent their engaging in productive labor? . . . [I]s it not a reciprocal duty on the part of organized society to keep the path to the labor market free of socially created road blocks? If society fails to discharge this duty and men are thereby prevented from

There is the drawback, of course, that the availability of the social insurance eliminates the most powerful incentive to press for social change to end discrimination on the basis of disability. No one should be surprised that the existence of a social program eliminating the worst risks of an undesirable situation might undercut support for doing anything about the situation. One economic study even purports to show that the availability of generous old-age pensions and unemployment insurance in European countries correlates negatively with support for revolution in those countries.⁹⁷ But social insurance in its current form is not so fully compensatory that it takes away all the incentive to push to end discriminatory practices and attitudes.

Moreover, social insurance protects against risks other than discrimination on the part of employers.⁹⁸ Even if somehow the problem of diminished economic opportunity for people with disability due to discrimination were solved, and increasingly experts in the legal field doubt that the problem will be solved,⁹⁹ simply living with a disability is expensive. Services and items that make life easier (or even possible) are under the control of the medical establishment, and medical costs must be paid;¹⁰⁰ work time must

engaging in productive work, should not society compensate for its remissness and nonperformance by according a right of equal status to those who have thereby been denied access to the main social and economic channels of the community?

Jacobus tenBroek & Richard P. Wilson, *Public Assistance and Social Insurance – A Normative Evaluation*, 1 UCLA L. REV. 237, 248–49 (1954).

97. Robert MacCulloch, Does Social Insurance Help Secure Property Rights? (2001), Soc. Sci. Research Network, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=265436.

98. See *supra* text accompanying notes 15–59 (discussing social insurance’s role in protecting against income loss because of disability or other reasons).

99. See Ruth Colker, *Winning and Losing Under the Americans with Disabilities Act*, 62 OHIO ST. L.J. 239, 240 (2001) (statistical analysis reporting poor plaintiff success rate in ADA employment cases); Louis S. Rulli & Jason A. Leckerman, *Unfinished Business: The Fading Promise of ADA Enforcement in the Federal Courts Under Title I and Its Impact Upon the Poor*, 8 J. GENDER, RACE & JUST. 595, 595–96 (2005) (reporting low success rate in Eastern District of Pennsylvania); Waterstone, *supra* note 8, at 1826 (contrasting failure rate in employment litigation with successes in non-employment ADA enforcement). This situation may, of course, be ameliorated by the recently enacted ADA Amendments Act of 2008, Pub. L. 110-325, 122 Stat. 3553 (2008).

100. Walter Y. Oi, *Disability and a Workfare-Welfare Dilemma*, in *DISABILITY AND WORK* 31, 37 (Carolyn L. Weaver ed., 1991) (“The disabled make nearly three times as many physician visits a year and purchase more than four times as many prescriptions as individuals with no activity limitations.”).

also be lost for the privilege of incurring the expense.¹⁰¹ If attendant services are needed for ordinary life activities, that cost must be borne.

Perhaps these risks too should be characterized as discrimination. In a society committed to the principle of anti-subordination, the ordinary costs of survival would not be placed on a stigmatized class of individuals when the very weight of the costs contributes to their social disadvantage.¹⁰² Expenses associated with adapting to structures of society created without people with disabilities in mind would decline if an anti-subordinationist society replaced the structures with better alternatives.¹⁰³

But conceptualizing the costs as discrimination does not pay them. At the present time, few programs other than social insurance exist to take the expense of appliances, attendants, and anything but the limited accommodations covered by the Americans with Disabilities Act off the shoulders of people with disabling conditions.¹⁰⁴ As Professor Bagenstos and others have noted, courts have been particularly solicitous that employers are free from any requirement to fund accommodations that are not directly related to the task of performing the job at the workplace.¹⁰⁵ Social insurance is one of the few sources that currently occupies the cost-shifting role. Given its

101. *Id.* at 40 (“Disability steals time.”).

102. See Colker, *supra* note 89 (discussing anti-subordination as a theory and as applied to disability); cf. Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1004–05 (1986) (developing anti-subordination principle for evaluating social policies in connection with sex and race inequality).

103. See Colker, *supra* note 89, at 1447 (stating that anti-subordination would dictate placing costs of humane institutions for persons with severe disabilities on society as a whole).

104. Financial and in-kind costs associated with living with a disability in society as presently constituted may also be borne by relatives and other caregivers, of course, but similarly few mechanisms exist to shift these costs from the persons on whom they currently fall. See Eva Feder Kittay et al., *Dependency, Difference and the Global Ethic of Longterm Care*, 13 J. POL. PHIL. 443, 443 (2005) (discussing caregiving).

105. Bagenstos, *supra* note 11, at 35 (“The ‘job-related’ rule plainly rules out a number of accommodations that could be provided at reasonable cost and without undue hardship and that, while necessary to enable many individuals to work, also provide off-the-job benefits.”). Accommodations that have been rejected include assistive technology to enable an employee to get to work, medical treatment and rehabilitation to enable a person to perform work, and additional training to facilitate a new job when the person cannot perform the current one due to disability; the provision of personal assistance off the job is far beyond what courts will require. *Id.* at 36 (collecting cases).

political attractiveness and durability, it may be the mechanism of choice for future expansion of cost-shifting.

Moreover, the societies in which social insurance systems are found are those in which people must sell their labor in exchange for the means of living. Disability often, though not always, diminishes what persons with disabilities may have to offer in the labor market.¹⁰⁶ Limits on stamina reduce the hours that a person can trade for wages.¹⁰⁷ If some classes of jobs that require physical strength or mental capacity of one or another sort are off the bargaining table for a given individual, that person is forced to settle for employment that may not pay as well as other work. At the extremes, highly mechanized societies where the fastest growing sectors of the economy sell information and intellectual products may offer few opportunities to those with severe cognitive impairments, creating an ongoing likelihood of very low wage employment or no employment at all.¹⁰⁸ Structural conditions of this type are not easily amenable to change in a free market system where demand for and supply of labor dictate which jobs are available at what rates of pay.¹⁰⁹ Recognition

106. Obviously, some individuals may, by superhuman effort, compensate for job-related limits, but public policy should not be based on the requirement that people put forth heroic efforts over long periods of time. Moreover, relying on the “overcomer” image of people with disabilities advances the idea that people with disabilities, while “inspirational,” are still are to be “patronized, pitied, and excluded for being different.” Drimmer, *supra* note 2, at 1354. That a person has overcome something suggests an inferiority of the person with whatever has to be overcome. SIMI LINTON, CLAIMING DISABILITY 18 (1998).

107. Susan Wendell, *Toward a Feminist Theory of Disability*, in THE DISABILITY STUDIES READER 260, 271 (Lennard J. Davis ed., 1997) (“[M]any (perhaps most) disabilities reduce or consume the energy and stamina of people who have them and do not just limit them in some particular kind of physical activity.”); see also Beth Torgerson, *I’m Sick and Tired of Being Sick and Tired: Living with Post-Viral Fatigue*, 20 DISABILITY STUD. Q. 54, 54 (2000) (describing reality of chronic disabling condition).

108. See Disability Policy Panel, Nat’l Acad. of Soc. Ins., *Rethinking Disability Policy: The Role of Income, Health Care, Rehabilitation, and Related Services in Fostering Independence*, 57 SOC. SEC. BULL. 56, 61 (1994) (“Structural changes in the labor market have long-term effects on employment opportunities for particular subgroups of workers, including those with disabilities. On the one hand, analysis of earnings level trends show[s] a declining demand for workers with limited educations and job skill. . . . On the other hand, the shift from manufacturing to service sector jobs is projected to increase jobs for well-educated workers which would mean that highly skilled workers with physical disabilities will have better opportunities to find work. At the same time, workers with cognitive limitations or mental illness may still have difficulty finding work.”).

109. This situation, of course, exacerbates the problem of persons whose disabilities prevent them from entering the labor market or persisting there long enough to obtain coverage under social

of this fact and altering policy to account for it may entail a departure from the civil rights model, of course.¹¹⁰ A realist might say that, at least in a market economy, the disabling conditions are disabling, and that is that. But reading the civil rights model at its broadest, it might be observed that one of the disabling environmental barriers is that for most people support does not come without the sale of labor, and one of the disabling attitudes is the belief that conditions cannot change. Thus the civil rights model of disability remains the appropriate lens through which to view the problem after all. The solution, however, may still be social insurance.

There remains the concern—directly tied to the problem the civil rights model tries to solve—that social insurance reinforces the impression that disability is a medical condition, and a pitiable one at that: Social insurance protects against the loss of income caused by the medically determined defect in the person with the disability (albeit in relation to social attitudes and conditions).¹¹¹ Defects mean disadvantage in society. For just this reason, some disability advocates hesitate to endorse enhanced publicly funded benefits, including expanded social insurance.¹¹² It might be noted, however, that economic security per se helps elevate the social status of those

insurance. Their needs must be met by other initiatives. See *infra* text accompanying notes 115–133 (describing difficulties with extending social insurance model to provide support to persons without adequate prior connection to work force).

110. This is the premise of Weber, *supra* note 11.

111. See Frank S. Bloch, *Medical Proof, Social Policy, and Social Security's Medically Centered Definition of Disability*, 92 CORNELL L. REV. 189, 190 (2007) (discussing role of medical proof in disability determinations).

112. See ERKULWATER, *supra* note 91, at 61 (“[In the 1980s and 1990s], some disabled activists, particularly those affiliated with the independent living movement, were ambivalent about endorsing enhanced social welfare programs, a division within the disabled community that impeded advocacy efforts to present a united front on behalf of an expanded safety net . . . As some disability rights activists pointed out, social welfare programs were premised on the assumption that a disabled person was helpless, and the state offered support out of a sense of charity or pity.”); see also Samuel R. Bagenstos, *The Americans with Disabilities Act as Welfare Reform*, 44 WM. & MARY L. REV. 921, 997–98 (2003) (“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 experience the ‘dignity of risk.’”). But see CHARLTON, *supra* note 89, at 90 (stressing importance of public programs in permitting full social participation by persons with disabilities); Bagenstos, *supra*, at 991–95 (noting support among people with disabilities for assistance programs that support independence, such as attendant services).

identified by a given characteristic,¹¹³ a fact that suggests that greater support from social insurance may make disability seem less pitiable. Attitudes towards people who are elderly are less condescending, less pitying, than they were before those individuals had an independent source of income.¹¹⁴ A similar change might occur if more individuals with disabilities were covered by social insurance and received more livable amounts from it.

V. EXPANDING SOCIAL INSURANCE

Only a fraction of persons with disabilities currently receive benefits from American social insurance programs, largely because eligibility is tied to the hazard of unemployment on account of disability and all those who engage in substantial gainful activity are ineligible.¹¹⁵ The standard for disability is also very severe.¹¹⁶ In fact, of all the individuals placed on the DI rolls in a given year, one-eighth die within two years.¹¹⁷ The proportion of individuals who die during their first six months on DI is fourteen times that of retirees during their first six months on the Social Security old-age insurance

113. SPECIAL TASK FORCE, SEC'Y OF HEALTH, EDUC. & WELFARE, WORK IN AMERICA. 34-36 (1973) (finding that income is principal determinant of social status).

114. This reality illustrates that basic point that steady income—from whatever source—raises social standing. Conversely, desire to keep groups subordinated can become a reason to oppose income support. Paul Douglas noted with regard to the original Social Security bill that senators and representatives from the South opposed efforts to set national standards for federally supported state welfare payments to the elderly because of fear that higher payments would raise the social status of African-Americans receiving the benefits. *See* DOUGLAS, *supra* note 15, at 100. Social Security payments have vastly improved the economic lot of elderly persons. Altman, *supra* note 55, at 1142 (“The reduction in the poverty rate of the elderly is directly due to Social Security.”).

115. Under some circumstances recipients may be able to resume working under work incentive programs for a period of time while collecting reduced benefit amounts. *See* Kearney, *supra* note 19, at 20 (collecting information regarding existing work incentives).

116. *See, e.g.,* Tommasetti v. Astrue, 533 F.3d 1035, 1044 (9th Cir. 2008) (affirming denial of benefits on ground that applicant failed to meet eligibility standard on basis of diabetes and back pain); Eichstadt v. Astrue, 534 F.3d 663 (7th Cir. 2008) (affirming denial of benefits on ground that applicant failed to meet eligibility standard on basis of fibromyalgia); Bradley v. Astrue, 528 F.3d 1113 (8th Cir. 2008) (affirming denial of benefits on ground that applicant failed to meet eligibility standard on basis of HIV).

117. Walter Y. Oi, *Employment and Benefits for People with Diverse Disabilities*, in *DISABILITY, WORK AND CASH BENEFITS* 113 (Jerry L. Mashaw et al. eds., 1996) (analyzing Social Security Administration data).

program.¹¹⁸ The degree of disability demanded is extreme in comparison to that required by disability insurance programs in other countries.¹¹⁹ Given the severity of the existing disability standard, and the low level of SSI benefits for persons who lack long-term connection to the work force before becoming disabled, it is no surprise that the prevalence of poverty among adults with disabilities that affect work is three times that of the general population.¹²⁰ A lower disability threshold would be desirable, and would hardly undermine the incentives to work that currently exist in the national economy.¹²¹

In addition, far more individuals who realistically should be considered persons with disabilities ought to receive non-means-tested partial disability, temporary disability, and sick leave insurance, benefits provided almost universally in advanced countries other than the United States for persons with an adequate pre-disability connection to the work force. In other developed countries, free or low cost medical care is also taken for granted,¹²² and introduction of that reform in the United States would be a

118. Martynas A. Ycas, *Patterns of Return to Work in a Cohort of Disabled-Worker Beneficiaries*, in *DISABILITY, WORK AND CASH BENEFITS* 169, 171 (Jerry L. Mashaw et. al. eds., 1996).

119. See ERKULWATER, *supra* note 91, at 237.

120. Mitchell P. LaPlante et al., *Disability and Employment*, Disability Statistics Abstract (Jan. 1996), available at dsc.ucsf.edu/view_pdf.php?pdf_id=13. Fully 34% of people with disabilities live in households with annual incomes of \$15,000 or less. Phoebe Ball et al., *Breaking the Cycle of Poverty: Asset Accumulation by People with Disabilities*, 26 *DISABILITY STUD. Q.* No. 1 (2006) (citing 2005 Harris Poll data). One-fifth of wheelchair users live in poverty. H. Stephen Kaye et al., *Wheelchair Use in the United States*, <http://dsc.ucsf.edu/publication.php> (last visited Mar. 21, 2009) (abstract of May 2002 article).

121. See Weber, *supra* note 11, at 951 (proposing lower DI-SSI disability standard); cf. Jerry L. Mashaw, 20 *J. HEALTH POL. POL'Y & L.* 225, 226 (1995) (book review) (reviewing Edward H. Yelin, *Disability and the Displaced Worker* (1993)) (describing existing DI benefits, “[I]t is peculiar to imagine that a person who can continue to work will instead leave work to seek disability benefits that pay (on average) one-third of the mean wage, require a six-month waiting period for application, a two-year waiting period for medical benefits, and provide any benefit to fewer than one-half of those who apply.”).

122. See OFFICE OF RESEARCH, EVALUATION AND STATISTICS, U.S. SOC. SEC. ADMIN. *supra* note 73, at xviii-xix (describing medical benefits programs).

See generally Julie Rovner, In Switzerland, An Easier Path for the Disabled,

<http://www.npr.org/templates/story/story.php?storyId=93098547&ft=1&f=1001> (contrasting experience of families with autistic children in Switzerland with national health and disability insurance, as opposed to United States).

tremendous help to persons with disabilities who now must pay enormous portions of their incomes for medical costs or private insurance.

Temporary disability insurance was part of the agenda of early social insurance advocates.¹²³ Opposition by the medical establishment derailed national health insurance, and took temporary disability with it.¹²⁴ Partial disability benefits never had a chance for a full hearing in the United States, despite their prevalence elsewhere in the developed world.¹²⁵ Partial and temporary disability insurance programs should return to the agenda of social reformers.¹²⁶ Significantly, these programs may prove popular even in an era that views entitlements with skepticism. They are, after all, tied to work, and if means tests are not employed, will maximize incentives to work.¹²⁷ The success of the resistance to privatizing United States

123. See WITTE, *supra* note 33, at 208; *President's Message to Congress on Social Security Expansion*, 1948 U.S.C. CONG. SERV. 2489, 2490–91.

124. See *supra* text accompanying notes 57–58 (discussing history of New Deal social insurance proposals).

125. As noted, partial disability benefits are also the rule in the United States with regard to impairments related to specific causes, as with service-connected benefits for veterans, injuries and diseases at work covered by workers' compensation, and tortious injuries. See Weber, *supra* note 11, at 943–45 (collecting relevant sources).

126. See *id.* at 943–47 (discussing policy advantages of partial disability benefits). Interestingly, an expert panel convened by the National Academy of Social Insurance at the invitation of the House Ways and Means Committee's Social Security Subcommittee supported the concept of temporary disability insurance, but believed that Congress would not pass such a program at the time the panel met in the early 1990s. Jerry L. Mashaw & Virginia Reno, *Social Security Disability Insurance: A Policy Review*, in *NEW APPROACHES TO DISABILITY IN THE WORKPLACE* 245, 261 (Terry Thomason et al. eds., 1998). The panel noted the appeal of partial disability benefits, but was concerned about potential costs and did not advocate that step. *Id.* at 262.

127. Work incentive programs have been the major innovation in the DI and SSI programs in recent years. See Weber, *supra* note 11, at 936–38 (describing work incentives). The key work incentive, of course, is simply the absence of a means test. A means test is an obvious barrier to earning income or accumulating assets. Asset accumulation is critical to ensuring long-term economic well-being. Although some mechanisms exist to permit earning income and accumulating minimal amounts of assets, significant loosening of existing restrictions will permit more people to escape poverty. See Ball et al., *supra* note 120. SSI assets limits discourage savings and encourage unwise spending habits. Douglas A. Martin, *The ADA and Disability Benefits Policy*, 6 J. DISABILITY POL'Y STUD. 1, 6 (1995). As Professor Bloch notes, carefully designed social insurance reforms can provide incentives to build the employment capacity of persons with disabilities and facilitate integration (or reintegration) into the work force. Frank S. Bloch, *Disability and the Contract for Income Support in the Modern Welfare State* (Sept. 20, 2007), <http://ssrn.com/abstract=1022982>. Professor tenBroek, who was a strong opponent of means tests, commented on the psychological harms of imposing harsh conditions on assistance, "Just as the habits of freedom are not learned by experiencing slavery, so ambition is not learned by destitution,

Social Security shows the lasting foundation of support for contributory social insurance.

Partial and temporary disability insurance will cost money, but the same reforms that could put the Social Security trust funds on a sounder footing could be used to finance an expansion of benefits. Moreover, non-means-tested partial benefits would be an exceedingly powerful work incentive, because a person will no longer have to completely drop out of the work force to obtain necessary support when a medical condition arises or worsens.¹²⁸ Experts identify delay in leaving the work force as the critical area in which work incentives can conserve DI expenditures.¹²⁹

Whether the potential support for expansion of social insurance is broad enough to extend coverage to the hazards of unemployment or sub-subsistence employment by those whose congenital or early-acquired disabilities prevent them from ever entering the labor force is another matter. At the moment, these persons are covered by the means-tested Supplemental Security Income program, which applies the same test for total disability as the Disability Insurance program but generally provides much lower benefits, only about 70% of the federal poverty level.¹³⁰ It is possible to view as an ordinary life hazard the risk of a lifelong condition that makes it difficult or impossible to enter the labor market as that market currently exists. But in the absence of a connection to the labor force for that individual, the traditional rationale of social insurance is lacking.¹³¹

self-management by authoritarian controls, incentive by denying the hope of gain, or self-respect by second-class citizenship.” tenBroek & Wilson, *supra* note 96, at 299 (discussing mandatory rehabilitation programs).

128. See Monroe Berkowitz, *Reflections of the Honoree*, NATIONAL ACADEMY OF SOCIAL INSURANCE, June 21, 2006, available at http://www.nasi.org/usr_doc/MonroeBerkowitz_NASI_Presentation_06_21_06.pdf (suggesting breaking link between work test and benefits eligibility).

129. See, e.g., Mashaw & Reno, *supra* note 126, at 254–55 (advocating tax changes to create incentives to stay at work after onset of disabling condition).

130. See Weber, *supra* note 11, at 950 (detailing calculation).

131. Professor Liebman pointed this out a generation ago:

We could assume that all persons undertake to pay insurance premiums if and when they work, and that the promise to pay these premiums is consideration for an insurance contract by which society agrees to protect against the possibility that an individual will . . . be disabled throughout his life and so never achieve a status of taxpaying

Benefits for disabled adult children of deceased, retired, and disabled wage-earners are perhaps the closest the current American system comes to covering persons with no connection to the work force under the social insurance, as opposed to the welfare, rubric.¹³² Thus even vastly greater development of social insurance along conventional lines will not provide economic security to all persons with disabilities.¹³³ This drawback should not, however, obscure the real gains to be made by pressing for expansion of social insurance when enhancement would benefit persons with disabilities.

CONCLUSION

Contributory social insurance occupies an important role in the economy and society. It protects people against the hazards of modern life while encouraging their long-term participation in the work force. Disability-related social insurance protects against the loss of income that comes from disability, but it also protects against the harms of discrimination that stem from the social barriers that block persons with disabilities from reaching their full potential in the workplace. For this reason, it is consistent with a civil rights approach to disability, a model that recognizes the importance of environmental and attitudinal obstacles in making physical and mental differences disabling.

Expansion of social insurance is similarly consistent with recognition that artificial barriers disable. Temporary and partial disability insurance will do more to ease the effects of discrimination than the current social insurance system can achieve, and may have incidental effects in raising the economic participation and social

productivity. That this social insurance concept has not been adopted indicates that we may be unwilling to regard as insurance a scheme that does not require a connection between an individual's actual contributions and the benefits he will receive.

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, 841 (1976).

132. See 42 U.S.C. § 402(d)(1)(F)–(G) (2000) (providing for continued child's benefits into adulthood for covered individual's dependent children with disabilities).

133. For this reason, significant changes in disability-related and other non-social insurance welfare programs are desirable. See Weber, *supra* note 11, at 950–51.

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status of persons with disabilities. Too few persons with disabilities have a long-term connection to the work force for social insurance to alleviate the economic woes of the entire population of persons with disabilities, but social insurance is a key component of economic security for persons with disabilities and would become a still more useful one if expanded.

