

# “THE RIGHT TO LIVE IN THE WORLD”: DISABILITY YESTERDAY, TODAY, AND TOMORROW

By: Peter Blanck\*

## I. INTRODUCTION

Jacobus tenBroek understood *The Right to Live in the World*. At the dawn of disability rights advocacy, in 1966, tenBroek argued for a policy of “integrationalism,” which called for the full and equal participation in society of persons with disabilities.<sup>1</sup> Only years later would the rights-based model of disability be set out in federal laws like the Rehabilitation Act of 1973, the Individuals with Disabilities Education Act, and the Americans with Disabilities Act (ADA) of 1990.

Elsewhere, my colleagues and I, and others, suggest it is unlikely that one factor or political force explains today’s views about the rights of persons with disabilities.<sup>2</sup> It may well be that a combination of historical, economic, political, medical, and social factors explain, or perhaps are driven by, attitudes and behavior toward disabled persons. But it seems clear that history provides important clues to understanding today’s disability law and policy, and to charting a course for the future.

In the move toward disability rights, one primary period recognized in American history is when societal and medical views of disability evolved from the passage of the first civilian national Vocational Rehabilitation Act in 1920<sup>3</sup> to passage of the ADA in 1990. During this period, policy

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1. Jacobus tenBroek, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 CAL. L. REV. 841, 843 (1966) (defining the policy of integrationism as “a policy entitling the disabled to full participation in the life of the community and encouraging and enabling them to do so . . .”).

2. See generally Peter Blanck, *Civil War Pensions and Disability*, 62 OHIO ST. L.J. 109 (2001) (from which this article is drawn in part). See also CLAIRE H. LIACHOWITZ, *DISABILITY AS A SOCIAL CONSTRUCT: LEGISLATIVE ROOTS* 2, 19–41 (1988) (analyzing military pension laws and conceptions of disability); RICHARD K. SCOTCH, *FROM GOOD WILL TO CIVIL RIGHTS* (2d ed. 2001) (reviewing history of American disability rights movement).

3. See generally C. ESCO OBERMANN, *A HISTORY OF VOCATIONAL REHABILITATION IN*

innovations, notably the New Deal and the Social Security Act, won public support and sought to eradicate social problems.<sup>4</sup> Rehabilitation programs identified disabled beneficiaries as “deserving” individuals who, especially when war veterans, made sacrifices for the national interest. In his seminal work, *The Right to Live in the World*, tenBroek takes post-World War I America as his historical starting point:

The policy of integrationism is implicitly and explicitly adopted by . . . the Rehabilitation Program. Commenced in several of the states as long ago as 1918 and 1919, and given national support by Congress in 1920, that program has been enlarged in conception and increased in funding by successive legislative amendments, by the impact of World War II, by pressures from organized groups of the disabled, and by a growing sense of its importance and potentialities.<sup>5</sup>

In this closing article, I offer that the seeds of tenBroek’s vision, integrationalism as an American ideal, may be traced even further to the overlooked legacy of the American Civil War and its expansive disability pension scheme. Though not a rehabilitation or needs-based welfare scheme *per se*, the Civil War pension laws set out America’s first large-scale policy of compensation for select and “worthy disabled,” and led to an increasingly medicalized model of disability.

The post-Civil War shift toward the classification of disability laid the medical-socio-political groundwork for subsequent federal disability policies, such as the 1920 Vocational Rehabilitation Act and the Social Security system, as well as for state workers’ compensation laws.<sup>6</sup> tenBroek Symposium participants Michael Stein and Janet Lord have appropriately

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AMERICA (1965) (describing development of rehabilitation system and relation to services for veterans, and noting prior to 1920 “rehabilitation” meant payment of pensions); Adam A. Milani, *Living in the World: A New Look at the Disabled in the Law of Torts*, 48 CATH. U. L. REV. 323, 330 (1999) (concluding the 1920 vocational rehabilitation act remains the focal point of federal disability policy).

4. Cf. Theda Skocpol, *America’s First Social Security System: The Expansion of Benefits for Civil War Veterans*, 108 POL. SCI. Q. 85, 87 (1993) [hereinafter Skocpol, *Social Security*] (contrasting “economic laissez faire, and distrust of government” with the New Deal era spurred by the Great Depression). See generally Peter Blanck & Michael Millender, *Before Civil Rights: Civil War Pensions and the Politics of Disability in America*, 52 ALA. L. REV. 1 (2000) (my colleague and historian Michael Millender was the lead in developing these ideas).

5. tenBroek, *supra* note 1, at 843 (citations omitted). See also David A. Gerber, *Disabled Veterans and Public Welfare Policy: Comparative and Transnational Perspectives on Western States in the Twentieth Century*, 11 J. TRANSNAT’L L. & CONTEMP. PROBS. 77, 81 (2001) (suggesting World War I gave rise to the modern veterans’ welfare system).

6. For discussions of the evolution of rehabilitation and welfare programs, see generally ANN SHOLA ORLOFF, *THE POLITICS OF PENSIONS: A COMPARATIVE ANALYSIS OF BRITAIN, CANADA, AND THE UNITED STATES* 136, 158 (1993); Jonathan C. Drimmer, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities*, 40 UCLA L. REV. 1341, 1362–63 (1993); Mary Crossley, *The Disability Kaleidoscope*, 74 NOTRE DAME L. REV. 621, 709–10; K. Walter Hicckel, *Medicine, Bureaucracy and Social Welfare: The Politics of Disability Compensation for American Veterans of World War I*, in *THE NEW DISABILITY HISTORY: AMERICAN PERSPECTIVES* (Lauri Umansky & Paul K. Longmore eds., 2000). Cf. Ben Baack & Edward John Ray, *Federal Transfer Payments in America: Veterans’ Pensions and the Rise of Social Security*, 26 ECON. INQUIRY, 687, 688, 700 (Oct. 1988) (differentiating Congressional motivations for passage of Civil War pension scheme and Social Security Act, with pension scheme educating Congress about partisan and special interest motivations in wealth transfer programs; but noting pension program served as a “prototype of the social security system”).

credited Professor Deborah Stone for her seminal articulation that historically “[t]he very act of defining a disability category determines what is expected of the nondisabled—what injuries, diseases, incapacities, and problems they will be expected to tolerate in their normal working lives.”<sup>7</sup> Much of the impetus for today’s classification of disability still is derived from the Civil War pension scheme.

The first Jacobus tenBroek Symposium on Disability Law reflects the breadth of modern notions of disability civil rights, focusing on tenBroek’s essential influence on developments since passage of the ADA.<sup>8</sup> Symposium participants discussed topics ranging from the legal, medical, and social definitions of disability, the perceived “worthiness” of disabled beneficiaries, the nature and complexities of disability discrimination and stigma (particularly for persons with mental—that is, psychiatric—disabilities), the post-ADA disability human rights movement in the United States and worldwide, and the ongoing public and judicial pushback to disability rights. At the center of these issues is an idea, as Professor Perlin aptly commented at the Symposium, that for people with disabilities, “the opportunity for life, liberty and happiness depends almost entirely on the [tenBroek] integration mandate.”<sup>9</sup>

In a series of studies with many colleagues, I examine issues parallel to those reported at the Symposium such as the evolution of American attitudes and policy toward the disabled. However, I examine these topics as they existed almost one hundred and fifty years ago, soon after the American Civil War. There are remarkable historical parallels in tone, attitudes, and behavior to the contemporary discussion.

This article then uses as a starting point a time when tens of thousands of soldiers from the north and south were returning to their homes with disabilities never before, and perhaps never since, seen by American society in number and scope. These individuals and their families navigated a society well before notions of disability rights and advocacy existed, and at the beginnings of the medical classification of disability. Union soldiers and their families confronted a new federal bureaucracy, housed in the massive Pension Bureau, which itself was besieged by lawyers, lobbyists, and politicians.

As never before, Civil War veterans came from all walks of life and included a wave of immigrants and African Americans who sought newly promised rights from their government and benefits for their service.<sup>10</sup> Through this historical lens I hope to further illuminate ideas raised at the tenBroek Symposium about the evolution of public acceptance and equal inclusion of disabled persons into society—what tenBroek insightfully

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7. Michael Ashley Stein & Janet E. Lord, *Jacobus tenBroek, Participatory Justice, and the UN Convention on the Rights of Persons with Disabilities*, 13 TEX. J. C.L. & C.R. 172 n.38 (2008) (citing DEBORAH A. STONE, *THE DISABLED STATE* 4 (1984)); STONE, *id.* at 3 (“Medical certification of disability has become one of the major paths to public aid in the modern welfare state.”).

8. For an excellent overview, see Robert L. Burgdorf, Jr., *Restoring the ADA and Beyond: Disability in the 21st Century*, 13 TEX. J. C.L. & C.R. 241 (2008).

9. Michael Perlin, Symposium Transcript (hereinafter “ST”), at 93.

10. My colleague Michael Millender and I elsewhere examine southern Civil War veterans, who had different challenges and were not covered by the federal pension system. See Blanck & Millender, *supra* note 4, at 34–45.

understood as “integrationalism” and the right to live in the world.

Part II of this article overviews the operation of the Civil War Pension Scheme from 1862 to 1907. As mentioned, a first thesis presented is that important aspects of tenBroek’s vision of integrationalism as well as today’s conceptions of disability may be traced to the legacy of the American Civil War and its pension scheme. Part III discusses our program of empirical study on the pension laws and veterans with disabilities. A second idea presented is that, among other forces, developing attitudes—stigma, stereotypes (particularly for mental versus physical disability), perceptions of worthiness and inability to work, conceptions of malingering and feigning—and new industry players (i.e., lawyers and lobbyists, bureaucrats, and physicians) combined after the Civil War to influence public conceptions of disability in regard to veterans in particular, and subsequent disability, rehabilitation, and welfare programs in general.

Part IV examines the implications of this historical study for analysis of contemporary and future attitudes and behavior toward persons with disabilities, with emphasis on research and programs affecting the disabled in workplaces, as today’s veterans, and as global citizens. A third thesis looks at how notions of collective action, first evidenced after the Civil War and later articulated by tenBroek, underlie today’s approach to disability rights and social justice, as reflected in the recent United Nations Convention on the Rights of Persons with Disabilities. The final part places tenBroek’s contributions as crucial to past and future interpretations of disability policy and law.

## II. DEFINING DISABILITY AND THE CIVIL WAR PENSION SCHEME

What are disabilities? . . . There are very few men who could not have got a certificate of disability. . . . [T]he door of fraud was thrown wide open to let in those who were not incapacitated for self-support, and to make this virtually a service pension for all who would testify that they had some kind of a disease in their system. . . . It is safe to say that only a fraction of these “disabilities” were such as were intended by the law, loose and liberal as it was, to give title to a pension.

– Editorial, *New York Times*, 1894<sup>11</sup>

The Civil War changed how Americans thought about disability. Attitudes were shaped about and by returning disabled veterans and their families as they engaged the Civil War pension system. There were some 860,000 disabled survivors from the nearly 2.5 million members of the Union Army.<sup>12</sup> The pension scheme for disabled Union veterans became, up to that time, this nation’s largest and most medicalized

11. Editorial, *What Are Disabilities*, N.Y. TIMES, Mar. 31, 1894, at 4.

12. BENJAMIN A. GOULD, INVESTIGATIONS IN THE MILITARY AND ANTHROPOLOGICAL STATISTICS OF AMERICAN SOLDIERS 9 (1869) (discussing casualty statistics and noting UA war deaths totaled about 250,000).

welfare scheme, albeit for a select group; “never before had such an experiment been undertaken.”<sup>13</sup>

As part of a larger investigation, my colleagues and I examine the lives—from “cradle to death”—of a large sample of Union Army veterans and emerging conceptions of disability in American society after the Civil War.<sup>14</sup> The information was created by Nobel Laureate and economist, Robert Fogel, and his colleagues at the Center for Population Economics at the University of Chicago. A random sample of Union Army companies generated consists of almost 36,000 white males from the Union Army and 6,000 males from the U.S. Colored Troops, with information on their military, pension, medical, and census records.<sup>15</sup>

Much has been written about the Civil War pension laws and its two essential periods.<sup>16</sup> In the first period, from 1862 to 1890, under the “General Law System,” pension payments were based on war-related impairments. During the subsequent period from 1890 to 1907, the “Service-Based Pension System” tied pensions to length of military service and then to age, regardless of disability origin.

Briefly, the General Law<sup>17</sup> set pension benefits for those with war disabilities and established a detailed medical rating system for compensating disabilities.<sup>18</sup> Under the law claimants were rated in their “total disability” in the performance of labor.<sup>19</sup> Today, the “inability to work” model of disability remains the dominant means for assessing compensation in pension, workers’ compensation, and disability support programs.<sup>20</sup> Also, as in today’s benefit

13. John William Oliver, *History of Civil War Military Pensions, 1861–1885*, 4 BULL. U. WIS. HIST. SERIES 5 (1917). See generally MARY KLAGES, *WOEFUL AFFLICTIONS: DISABILITY AND SENTIMENTALITY IN VICTORIAN AMERICA* 10 (1999) (concluding cultural meaning of disability depends largely on social and political context); THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES* (1992) [hereinafter SKOCPOL, *SOLDIERS*]; Skocpol, *Social Security*, *supra* note 4.

14. See generally LARRY LOGUE & PETER BLANCK, *RACE, ETHNICITY, AND THE TREATMENT OF DISABILITY IN THE POST-CIVIL WAR ERA* (forthcoming, Cambridge University Press, 2009).

15. The samples are included in Robert W. Fogel et al., *Aging of Veterans of the Union Army: Military, Pension, and Medical Records, 1820–1940*, University of Chicago, Center for Population Economics, <http://www.cpe.uchicago.edu>.

16. For classic reviews of the pension laws, see generally WILLIAM H. GLASSON, *FEDERAL MILITARY PENSIONS IN THE UNITED STATES* (David Kinley ed., 1918); Oliver, *supra* note 13, at 1.

17. *DIGEST OF PENSION LAWS, DECISIONS, RULINGS, ORDERS, ETC. 1885* (Frank Curtis & William Webster eds., 1885) (referencing Act of July 14, 1862—General Law System).

18. Skocpol, *Social Security*, *supra* note 4, at 93; ROBERT W. FOGEL, *PUBLIC USE TAPE ON THE AGING VETERANS OF THE UNION ARMY, VERSION S-0 (ADVANCE RELEASE), SURGEON’S CERTIFICATES, OHIO, PENNSYLVANIA, NEW YORK AND ILLINOIS REGIMENTS, 1860–1940, DATA USER’S MANUAL 135–36* (1996) [hereinafter *DATA USER’S MANUAL*]; see also GLASSON, *supra* note 16, at 125 (quoting statutory changes requiring that “[t]he claimant must show that his disability was incurred as the direct consequence of the performance of his military duty”).

19. Skocpol, *Social Security*, *supra* note 4, at 93; *DATA USER’S MANUAL*, *supra* note 18, at 135. Under the General Law, certain war-related conditions or diseases were compensated regardless of total inability to work. For instance, a Northern army private in 1862 received a maximum of \$8 per month for being rated as “totally disabled.” A veteran whose disability was rated as less than “total” received a proportion of the total amount of \$8. For purposes of compensation, the system defined fractional rates of total disability. A lost finger or small toe was compensated by a prescribed rating of 2/8 totally disabled, with a corresponding pension allotment of \$2 per month. A lost eye or thumb, or a single hernia, resulted in a 4/8 rating of total disability with a corresponding award of \$4 per month. For a review of the compensation system and citations, see Blanck, *supra* note 2, at 118–19.

20. *DATA USER’S MANUAL*, *supra* note 18, at 135–36 (citing H.R. Rep. No. 43-1, pt. 5 at

schemes, the Civil War Pension Bureau hired physicians to rate claimants' disabilities, who categorized them by disease and severity.

In 1873, the "Consolidation Act" expanded the General Law to compensate veterans for service-related conditions or diseases that later caused disabilities.<sup>21</sup> Given the state of medical knowledge of the day about disease progression, the 1873 Act led to controversy as to how disability was to be defined and rated for pension compensation.<sup>22</sup> Increasingly, the definition and classification of disability came into question and was contested.<sup>23</sup> The press sought to expose alleged pension fraud, with the view that the Pension Bureau was a partisan machine and its funding went for exaggerated and feigned disabilities.<sup>24</sup> News stories described "bogus" disabilities contrived by pension claim agents and lawyers who stood to profit from successful claims.<sup>25</sup> Indeed, by the late 1880s, pensions granted under the General Law were greater for diseases claimed as a result of the war than for actual war injuries.<sup>26</sup>

In 1879, the pension law allowed the use of arrears—or back pension payments—to attract "deserving" veterans who had not applied for pensions, which further added fuel to pension growth and controversy.<sup>27</sup> The Arrears Act enabled veterans to receive pensions the bureau found should have been granted as a result of war service, and to be paid from the time of their discharge from the army.<sup>28</sup> With a new flood of veterans applying for and receiving disability-based pensions,<sup>29</sup> the "soldier vote," and its political voice through the Grand Army of the Republic (G.A.R.), was reinvigorated.<sup>30</sup> This development generated predictable resistance along partisan lines, with the G.A.R. and its Republican machine in favor of pension expansion, and the Democrats, comprised of large numbers of immigrants and southerners,

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661 (1874)). See also DORA L. COSTA, *THE EVOLUTION OF RETIREMENT, AN ECONOMIC HISTORY 1880–1990*, at 36 (1998) (noting that inability to participate in the labor force became the standard means for compensation in subsequent American pension and support programs).

21. Blanck, *supra* note 2, at 118. See also Ryan Sewell et al., *Union Army Veterans with Hearing Loss and the Evolution of Disability in America During 1862–1920*, 114 *LARYNGOSCOPE: J. TRILOGICAL SOC'Y* 2147, 2151 (Dec. 2004) (illustrating noise-induced hearing loss occurring later in life as a result of wartime gun fire).

22. See GLASSON, *supra* note 16, at 136–39 (discussing related problems). See also COSTA, *supra* note 20, at 61 (stating that because nineteenth-century medicine could not cure chronic conditions, estimated disease rates for Union Army pension claimants were based on the assumption that a specified chronic condition was permanent).

23. Cf. STONE, *supra* note 7, at 12 (noting difficulty by physicians in agreeing on the components of a disability and different definitions of disability by governmental program).

24. *A Movement for Pension Reform*, *N.Y. TIMES*, Sept. 8, 1875, at 5.

25. Editorial, *N.Y. TIMES*, Jan. 26, 1881, at 4.

26. See GLASSON, *supra* note 16, at 138 (citing data on pensions granted from 1865 to 1888).

27. *Id.* at 150–53 (discussing Arrears legislation); see also *id.* at 128, Fig. 3 (illustrating expenditures and numbers of pensioners from 1866 to 1907).

28. *Id.* at 164–65 (discussing the 1879 Arrears Act); STUART CHARLES MCCONNELL, *GLORIOUS CONTENTMENT: THE GRAND ARMY OF THE REPUBLIC, 1865–1900*, at 149 (1992) (noting that the Arrears Act did not alter the classification scheme for awarding pensions on the basis of war-related disability).

29. See MARY R. DEARING, *VETERANS IN POLITICS: THE STORY OF THE G.A.R.* 250 (1952) (noting that the Arrears Act also enhanced the political importance of the Pension Bureau).

30. See Heywood T. Sanders, *Paying for the "Bloody Shirt": The Politics of Civil War Pensions*, in *POLITICAL BENEFITS: EMPIRICAL STUDIES OF AMERICAN PUBLIC PROGRAMS* 137, 139–40 (Barry S. Rundquist ed., 1980) (discussing the emergence of G.A.R. and ties to Republican and Democratic parties).

opposed to it.<sup>31</sup>

The G.A.R. was not a disability lobby. Its primary goal was to replace the General Law with pensions based solely on military service, regardless of disability origin.<sup>32</sup> The only Democratic President elected following the Civil War until Woodrow Wilson, Grover Cleveland, contested the legitimacy and fairness of the pension scheme, let alone an expanded system based on military service.<sup>33</sup> In 1887, Cleveland vetoed a bill that would have provided pensions primarily on the basis of honorable military service, regardless of disability origin, which led to his loss of the soldier vote, and with it, the presidency in 1888 to Benjamin Harrison.

In his veto message of the proposed service pension bill, President Cleveland played on the idea (as we see even today) that disability benefits lead to malingering and fraud (i.e., disability equals dependency, weakness, and dishonesty). Cleveland wrote:

In the execution of this proposed law under any interpretation, a wide field of inquiry would be opened for the establishment of facts largely within the knowledge of the claimants alone; and there can be no doubt that the race after the pensions offered by this bill, would not only stimulate weakness and pretended incapacity for labor, but put a further premium on dishonesty and mendacity.<sup>34</sup>

Fulfilling his promise to the decisive soldier vote, newly elected Republican, Benjamin Harrison, was quick to sign into law the Disability Pension Act of 1890,<sup>35</sup> which preceded almost by one hundred years to the day passage of the ADA.<sup>36</sup> Around 1890, coinciding with the expanded pension law and industrialization, along with the growth of early institutions and vocational training programs for the disabled, other areas of legislation involving the definition of disability first began to consider the concept of rehabilitation.<sup>37</sup>

31. Skocpol, *Social Security*, *supra* note 4, at 102 (arguing Arrears Act originated from lobby by pension attorneys who collected \$10 application fees and noting that before 1879, the average claim filing was \$1,600 per month, and after the 1879 Arrears Act, the average filing was more than \$10,000 per month). For newspaper stories, see *Arrears of Pensions*, N.Y. TIMES, Nov. 12, 1881, at 4; *The Time's Pension Articles: The Plundering by Greedy Pensioners and Speculators Should Stop*, N.Y. TIMES, May 2, 1894, at 4.

32. GLASSON, *supra* note 16, at 204–05 (describing social and political forces, and legislative history of 1890 Act).

33. MCCONNELL, *supra* note 28, at 149 (noting that in the 1880s, electoral support for the two major parties was equally divided and the presidential elections of 1880 and 1884 were decided by small margins with the G.A.R. votes crucial to the outcomes). See also *id.* at 152 (commenting that Harrison campaigned on the pledge that this was “no time to be weighing the claims of old soldiers with apothecary’s scales”).

34. GLASSON, *supra* note 16, at 210 (quoting President Cleveland’s veto message, and noting that Cleveland believed that the tax revenues needed to fund the law would obstruct his plan for reform of the federal taxation system).

35. *Id.* at 204, 225 (describing legislative history of 1890 Act and commenting on the political advantage gained by the Republicans on the pension debate).

36. The law is referred to as the Disability Pension Act of 1890 or Dependent Pension Act of 1890.

37. See Brad Byrom, *A Pupil and a Patient: Hospital-Schools in Progressive America*, in THE NEW DISABILITY HISTORY: AMERICAN PERSPECTIVES 133 (Lauri Umansky & Paul K. Longmore eds., 2000) (discussing emergence of rehabilitation approach to disability). See also GLASSON, *supra* note 16, at 235 (noting the 1890 Act also extended pensions to veterans’ widows).

The 1890 Disability Pension Act expanded pensions to include physical and mental disabilities not related to wartime experience.<sup>38</sup> Disability for pension eligibility continued to be defined by an individual's incapacity to perform labor, but for veterans "who are now or who may hereafter be suffering from a mental or physical disability of a permanent character, not the result of their own vicious habits."<sup>39</sup> The 1890 Act was to become, up to that time, the most costly welfare measure "ever passed by any legislative body in the world."<sup>40</sup> William Glasson, a Progressive-era and southern scholar, famously complained:

[The 1890 Act] was a measure calculated to bring about dependence on public aid and the simulation of bodily ills on the part of those who were in ordinary physical condition for their time of life and well able to care for themselves. There was every encouragement to the ex-soldiers to discover in themselves, and magnify, ailments which would have been little noticed but for the pension laws.<sup>41</sup>

Glasson's views typified the backlash message that many "non-worthy" disabled, or those feigning disability, were seeking dependence based on their exaggerated conditions.

By 1893, pensioners numbered almost one million, consuming nearly half of the federal budget.<sup>42</sup> Claims of excess, fraud, and corruption were widespread. Pensions were said to be windfalls to the "undeserving" disabled. Stigmatized and less understood disabilities, mostly mental and infectious conditions, were harshly criticized.<sup>43</sup> The rhetoric became detached from the actual workings of the law, and indeed from the behavior of disabled persons themselves. In our studies, for instance, we find little evidence of claimed widespread fraud by the examining surgeons and claimants.<sup>44</sup>

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and dependent children, further extending its social welfare implications).

38. DATA USER'S MANUAL, *supra* note 18, at 140–41 (summarizing the 1890 law's requirements of military service for ninety days during the Civil War); GLASSON, *supra* note 16, at 236 (the 1890 Act required the veteran be honorably discharged).

39. See STONE, *supra* note 7, at 90–99 (1984) (discussing historical conceptions of the legitimacy and deservingness of disabled persons); *id.* at 91–110 (discussing attitudes in late nineteenth century medical community about disability and deservingness, and the evolution of the concept of the "inability to work" as a means for developing a scheduled needs-based system of governmental compensation). See also Blanck, *supra* note 2, at 125 (presenting findings on limited tendency by examining physicians to report vicious habits).

40. Skocpol, *Social Security*, *supra* note 4, at 114; GLASSON, *supra* note 16, at 233.

41. GLASSON, *supra* note 16, at 237; *id.* at 236 ("Pensions were provided for the highly paid but rheumatic lawyer, for the prosperous business man hurt in a street accident, for the ex-soldier public official with heart disease, and for the mechanic who had lost a hand in an industrial accident.").

42. DATA USER'S MANUAL, *supra* note 18, at 147–51 (charts summarizing growth in the pension system); Skocpol, *Social Security*, *supra* note 4, at 114; see also Maris A. Vinovskis, *Have Social Historians Lost the Civil War? Some Preliminary Demographic Speculations*, in TOWARD A SOCIAL HISTORY OF THE AMERICAN CIVIL WAR 25 (Maris A. Vinovskis ed., 1990).

43. See Donald Lee Anderson & Godfrey Trygve Anderson, *Nostalgia and Malingering in the Military During the Civil War*, 28(1) PERSP. BIOLOGY & MED. 156–66 (1984) (citing W. Keen, et al., *On Malingering, Especially in Regard to Simulation of Diseases of the Nervous System*, 48 AM. J. MED. SCI. 367 (1894)). In 1907, the 1890 Act was replaced by the Service and Age Pension system that granted pensions on age (62 years or older) and length of military service.

44. Blanck, *supra* note 2, at 126–27.



Despite evidence to the contrary, many disabled veterans were portrayed as scamming the system, bilking the public treasury and trust.<sup>45</sup> *World's Work* magazine published a series of articles entitled *The Pension Carnival* with titles such as *Staining a Nation's Honor-Roll with Pretense and Fraud* and *Favorite Frauds for Tricking the Treasury: Particular Cases of Masqueraders, Rogues, Perjurers, Fake-Veterans, and Bogus Widows in the Merry Game of Swindling the Government*.<sup>46</sup>

Disabled pensioners were mocked in newspaper articles and editorials, and the legitimacy of their disabilities questioned.<sup>47</sup> Stories of pensioners as “physically normal and capable” but receiving pension awards appeared as the case of the dance-instructor, the bicyclist, and the “strongest man in town.”<sup>48</sup> One typical editorial commented claimants drawing pensions “have for years been drunken loafers, indulging in all sorts [of] excesses, [and] are drawing disability which is the result of [their] own vicious habits.”<sup>49</sup> Another editorial bemoaned:

The scramble is not being made by men who did most of the fighting, but by the camp-followers, the coffee-coolers and the bummers, who reflected on the good name of the real soldier during the war and who now by their unceasing demands for more pensions are endangering the pensions of the worthy and deserving . . . [T]he skulkers who had suffered neither hardships, danger nor disease, became more powerful numerically, and they began to clamor for their rights . . . regardless of the question whether pensions were deserved or needed.<sup>50</sup>

In complex ways, the identity and definition of disability was tied in the public's mind to the character and moral fiber of veterans.<sup>51</sup> Disabled pensioners with “legitimate” war wounds were cast as a “righteous core of a

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45. See, e.g., Leonard Woolsey Bacon, *A Raid upon the Treasury*, 6 FORUM 540 (Jan. 1889); H.V. Boynton, *Fraudulent Practices of the Pension Sharks: Uselessness of Pension Attorneys*, 42 HARPER'S WKLY. 230 (1898); William M. Sloane, *Pensions and Socialism*, 42 CENTURY 179 (1891); Henry W. Slocum, *Pensions: Time to Call a Halt*, 12 FORUM 646 (1892); John DeWitt Warner, *Half a Million Dollars a Day for Pensions*, 15 FORUM 439 (1893); *The Pension Arrears Bill*, N.Y. TIMES, June 27, 1878, at 4.

46. See Charles Francis Adams, *Pensions—Worse and More of Them*, 23(2) WORLD'S WORK 188 (1911); 23(3) WORLD'S WORK 327 (1912); 23(4) WORLD'S WORK 385 (1912). These and other articles are described in SKOCPOL, SOLDIERS, *supra* note 13, at 272–77.

47. See GLASSON, *supra* note 16, at 210 (commenting that the *New York Times* was a leader in denouncing the Disability Pension Act of 1890).

48. *Some Unique Pensioners*, N.Y. TIMES, Apr. 11, 1894, at 1–2.

49. *The Time's Pension Articles: the Plundering by Greedy Pensioners and Speculators Should Stop*, N.Y. TIMES, May 2, 1894, at 4.

50. *Further Views of Pension List Revision*, 156 N. AM. REV. 618 (1893). Edwin Godkin, founder of *The Nation*, wrote the result of pension lobbying “has been to sprinkle knaves and loafers throughout villages, to make fraud, and perjury, and malingering seem harmless and even soldierly.” Edwin Godkin, *The Sanctity of the Grand Army*, NATION, Apr. 25, 1895, at 318–19, *quoted in* MCCONNELL, *supra* note 28, at 35.

51. MICHAEL B. KATZ, IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA 3–4 (1986) (discussing tension in American history to assist able-bodied poor); David Matza & Henry Miller, *Poverty and Proletariat*, in CONTEMPORARY SOCIAL PROBLEMS 641–73 (R. Merton & R. Nisbet eds., 4th ed. 1976) (discussing stigma associated with “undeserving poor” and “welfare chiseling” imputed to the poor, and that the “deserving poor” constantly have to prove their worth).

generation of men.”<sup>52</sup> The legitimately disabled and their families deserved public support, and were not in need of charity.<sup>53</sup> The severely, physically war-disabled were particularly worthy beneficiaries, as compared to those with mental disabilities (for instance, those with “nervous” disorders or what we label today as post-traumatic stress disorder (PTSD)).<sup>54</sup> All this labeling, classifying, and what historian Larry Logue has called “the moral economy of veterans benefits,”<sup>55</sup> was linked to “a morass of fraud, a bottomless pit of extravagance” embodied by the pension system.<sup>56</sup> Those blamed were veterans who feigned or exaggerated disability, with a supporting cast of pension examiners, certifying surgeons, claim agents, and lawyers.<sup>57</sup>

### III. DISABILITY AND THE RIGHT TO LIVE IN THE WORLD, 150 YEARS

AGO

No doubt, the Civil War affected society’s views of a new class of disabled men in American society, which also impacted their widows and children. What may we learn from this period in history that is relevant today? Of particular importance today is unearthing deep ideas about disability and worthiness, dependency and malingering, acceptable and abnormal mental disability, and disability advocacy versus frivolous litigating. At the core of each of these dimensions of tension are ideas about disability and “social identity,” to use Professor Erving Goffman’s terminology.<sup>58</sup> In his seminal work, *Stigma: Notes of the Management of Spoiled Identity*, Goffman explores the roots of stigma and social identity, which are tied to “bodily signs of a physical disorder;” indeed, stigma has been defined by “bodily signs designed to expose something unusual and bad about the moral status of the signifier.”<sup>59</sup>

In our studies, much like today, discrediting and stigmatizing attitudes about disability after the Civil War were shaped by prejudice, ethnicity and race, the medical model, as well as by bureaucratic factors, attorney advocacy and lobbying, and economics.<sup>60</sup> Though not conclusive, our findings suggest a relation between negative stigma toward

52. SKOCPOL, SOLDIERS, *supra* note 13, at 149.

53. *Id.* at 143.

54. ERIC T. DEAN, JR., SHOOK OVER HELL: POST-TRAUMATIC STRESS, VIETNAM, AND THE CIVIL WAR 144 (1987); Charles W. Shields, *Pensions and Socialism*, 42 CENTURY 179 (1891); *Arrears of Pensions*, N.Y. TIMES, Nov. 12, 1881, at 4.

55. LOGUE & BLANCK, *supra* note 14.

56. *The Democrats and the Pensions*, N.Y. TIMES, Dec. 9, 1898, at 6; *Spoils Unevenly Divided*, N.Y. TIMES, Mar. 27, 1894, at 1–2 (arguing system perpetuates “wimpyness”). For views that honorable veterans, despite their disability, would not accept pensions, see generally *Degradation by Pensions—the Protest of Loyal Volunteers*, 12 FORUM 423 (1891); *Half a Million Dollars a Day for Pensions*, 15 FORUM 439 (1893); *Our Pension System*, 150 N. AM. REV. 663 (1890); *Pensions: Time to Call a Halt*, 12 FORUM 646 (1892); *Pensioner’s Diseases*, N.Y. TIMES, Apr. 2, 1894, at 4; *Pensions for Everybody*, N.Y. TIMES, July 11, 1895, at 4; *Pensions: The Law and Its Administration*, 86 HARPER’S MONTHLY 235 (1893); *The New Pension Raid*, 69 NATION 1779 (1899); *Their Pensions Increase*, N.Y. TIMES, Mar. 31, 1894, at 1–2.

57. Oliver, *supra* note 14, at 42.

58. ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 1 (1963).

59. *Id.* (and for “bodily signs of physical disorder”).

60. *Cf. id.* at 3 (stating stigma “refers to an attribute that is deeply discrediting”).

certain disabilities and pension outcomes. Pensioners with visible or “less obscure” injuries from gunshot wounds (the “War Worthy”) comprised the greatest proportion of claims, especially early after the war. Not surprisingly, bodily war wounds were subject to less attitudinal prejudice and less likely to be rejected by the Bureau. By comparison, veterans with less visible and less understood conditions were subject to particular attitudinal prejudice and skepticism, and were more likely to be denied pensions outright. This penalty was found for those with so-called “nervous” mental conditions, with strong attitudinal distinctions drawn between physical and mental impairments.<sup>61</sup>

Among other areas, our historical studies examine the roots of attitudinal stigma toward veterans with mental disabilities. As discussed in the closing part of this article, contemporary investigations show that today’s veterans with post-traumatic stress disorder (PTSD) and mental conditions are among those with the highest war-related injuries and most stigmatized impairments.<sup>62</sup> At the tenBroek Symposium, Professor Michael Perlin described the roots of stigma facing persons with mental disabilities as being based on the longstanding prejudice he calls “sanism,” whereby “able-bodied society feels existential anxiety towards people with [mental] disabilities, and that anxiety’s at the core of . . . irrational prejudices that cause and are reflected in prevailing social attitudes . . . .”<sup>63</sup>

We find even with the broadening of pension policy after 1890, which in effect created a welfare program for older veterans, those with mental disabilities stigmatized by society were more likely to be rejected from the system. Others suggested, as the pension system became more open, and as prodded by pension lawyers and the G.A.R., more veterans with stigmatized disabilities took the risk of rejection.<sup>64</sup> In turn, this may have fed into the prevalent attitudinal skepticism about disability worthiness and scamming the system, creating a self-fulfilling prophecy. Cynicism, or at least skepticism, about a system that incentivized the unworthy disabled not to work was famously observed by Civil War General M. M. Trumbull:

If pension laws are potent in the making of diseases, pensions themselves have the opposite effect—they cure them. There is nothing that promotes longevity like a pension.<sup>65</sup>

Remarkably, one hundred years later, Deborah Stone described essentially the same views:

[The] rapid growth in the disability insurance program is attributed primarily to an increase in *use* of the program, and the main reason for that increase is thought to be that benefits

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61. Peter Blanck, *Americans with Disabilities and their Civil Rights: Past, Present, Future*, 66 U. PITT. L. REV. 687, 691 (2005); cf. Michael Waterstone & Michael Stein, *Disabling Prejudice*, 102 NW U. L. REV. 1351, 1363–66 (2008) (discussing nature of disability stigma and prejudice associate with mental health impairments).

62. See notes and accompanying text, *infra* Part V.

63. Perlin, ST, at 95–96.

64. Blanck, *supra* note 2, at 198 & n.286 (ideas from Mario Sanchez).

65. M. M. Trumbull, *Pensions for All*, 35 POPULAR SCI. MONTHLY 721, 724 (1889) (“‘Veteran diseases’ are those miraculous ailments which rage unsuspected in the bodies of old soldiers until seductive pension laws bring them to the notice of the sufferers.”).

are too generous.<sup>66</sup>

No doubt, doctors' classifications of veterans were affected by the developing attitudes and stigma toward disability, normality and worthiness.<sup>67</sup> During this period examining doctors worked at the beginnings of a new medical and scientific approach to illness and disability, driven in part by rising workplace injuries from industrialization. Goffman relates that "the medical profession is likely to have the special job of informing the infirm who he is going to have to be."<sup>68</sup> Professor Stein similarly has noted that tenBroek observed more often than not disability has less to do with impairment and much to do with societal and bureaucratic attitudes.<sup>69</sup> Yet, despite negative attitudes of the day and pressure from the bureaucrats to label those as medically worthy or unworthy, we find that examining pension doctors questioned the legitimacy of veterans' disabilities in relatively few cases.<sup>70</sup>

Veterans' social statuses also affected their disability pensions. Ethnicity was tied to views of deservingness and moral worth, which were linked to nativistic views after the Civil War.<sup>71</sup> Although we uncover no apparent disparity by nativity when veterans were accepted to the pension system, foreign recruits with disabilities were significantly less likely to apply for a pension in the first place.<sup>72</sup> Compared to the native born, non-native veterans, and particularly Irish immigrants, had a substantially lower likelihood of applying for pensions. Fifty years after the peak of the Civil War pension scheme, tenBroek unearthed the prejudice and stigma facing other ethnic minorities, in this case the anti-foreignism facing Japanese-Americans during and immediately after World War II.<sup>73</sup>

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66. STONE, *supra* note 7, at 170.

67. LOGUE & BLANCK, *supra* note 14 (noting, however, a contentious process between the Pension bureaucrats and the examining physicians, who each often had different definitions of disability). See also Douglas C. Baynton, *Disability and the Justification of Inequality in American History* 35, in *THE NEW DISABILITY HISTORY: AMERICAN PERSPECTIVES* (Lauri Umansky & Paul K. Longmore eds., 2000) (historian suggesting that "the concept of normality" began in America in the mid-1800s and was linked to beliefs of industrialization and social Darwinism).

68. GOFFMAN, *supra* note 58, at 35.

69. ST, at 74. Cf. GOFFMAN, *supra* note 58, at 2–3 (discussing labeling and categorization of people with disabilities).

70. Blanck, *supra* note 2, 165–66 (analysis performed on examining surgeons' notes for roughly 6,600 pension claimants, searching for reference to the terms "malingering," "deadbeat," "fake," and "fraud," and finding these terms were used by surgeons in only six of the 6,596 cases studied, representing .09% of the sample.). Cf. Larry Logue & Peter Blanck, "Benefit of the Doubt": *African-American Civil War Veterans and Pensions*, 38 J. INTERDIS. HIST. 377, 394 (2008) (finding although physicians were more skeptical of African Americans than of white pension applicants, the physicians were more likely to give black veterans the benefit of the doubt than were Pension Bureau officials; and seeing a notation of service in the U.S. Colored Troops on an application was enough to set Pension Bureau reviewers against the applicant).

71. Cf. Gerber, *supra* note 5, at 80 (commenting "analysis must include an effort to understand the experience of becoming disabled and the agency of disabled veterans on their own behalf. . . . [I]t is necessary to pay close attention to the ways that class, race, gender, and ethnicity intersect with military, medical, rehabilitation, and state institutions to form cohorts of disabled veterans."). See also Baynton, *supra* note 67, at 45 (discussing that in the late 1800s, with immigration to America on the rise, ethnic prejudice was tied to attitudes about disability).

72. Peter Blanck & Chen Song, "With Malice Toward None: With Charity Toward All": *Civil War Pensions for Native and Foreign-Born Union Army Veterans*, 11 J. TRANSNAT'L LAW & CONTEMP. PROBS. 1, 43 (2001).

73. JACOBUS TENBROEK, EDWARD BARNHART, & FLOYD MATSON, *PREJUDICE, WAR, AND THE CONSTITUTION* (3d ed. 1968).

Not surprisingly, our studies of Civil War pensions show discrimination on the basis of race. Historian Larry Logue and I examine the disparities facing African-American Civil War veterans.<sup>74</sup> Almost two hundred thousand African-Americans served in the Union Army, most had been liberated from Southern states and joined the Union Army in the later years of the war. Similar to our findings for immigrants and those with stigmatized disabilities, as the pension law became more inclusive, black veterans increasingly applied and subjected themselves to the “moral cost containment.”<sup>75</sup>

All else equal, black veterans were less than one-third as likely as white veterans to be approved for pensions during the General Law and less than half as likely under the expanded 1890 law. Historian Donald Shaffer finds that, among other barriers, the pension bureaucratic process disadvantaged poorer and less literate black veterans who had difficulty proving their claims.<sup>76</sup> Black veterans also were often subjected to “special examinations” to prove their pension worthiness. The Pension Bureau complained of widespread fraud by the pension lawyers against African-American veterans, such that “[d]ue to fear . . . the negro hands over his whole money, and these agents help themselves to whatever they see fit.”<sup>77</sup>

Whatever the cause, the end result of this discrimination was that, compared to whites, lower pension payments were linked to a shorter life expectancy for African-American veterans. Veterans fortunate enough to receive pensions had their lives extended.<sup>78</sup> Martin Salm finds this same outcome for increases in Civil War veteran life expectancy across socioeconomic status and for those living in urban and rural areas, but particularly for poorer individuals and those living in rural areas.<sup>79</sup> Salm concludes that “government transfers such as veteran pensions can not only improve the quality of life for beneficiaries, but can also substantially extend their length of life.”<sup>80</sup>

Besides attitudes and social characteristics, other post-war social dynamics shaped (and were shaped by) conceptions of disability, and undoubtedly affected longevity. One high profile element was the new attorney bar that came to represent veterans in their quest for pensions. Never before had attorney advocates been involved in a federal program of such social and political scale, ostensibly to help disabled veterans

74. Logue & Blanck, *supra* note 70, at 377–99.

75. *Id.* at 397–98.

76. DONALD R. SHAFFER, *AFTER THE GLORY: THE STRUGGLES OF BLACK CIVIL WAR VETERANS 122–24* (Univ. Kansas Press, 2004).

77. Oliver, *supra* note 13, at 34 (quoting report of pension official).

78. Larry Logue & Peter Blanck, “*There Is Nothing That Promotes Longevity Like A Pension: Public Policy and Mortality of Civil War Union Army Veterans*,” 39 *WAKE FOREST L. REV.* 49, 49 (2004) (finding after the immediate post-war years, generous pensions were related to improved chances of survival; and the more contact with physicians, the longer the veterans were likely to live). See also Baynton, *supra* note 67, at 39 (discussing the complex relationship between attitudes about race and disability after the Civil War).

79. Martin Salm, *The Effect of Pensions on Longevity: Evidence from Union Army Veterans*, IZA Discussion Paper No. 2668 (Mar. 2007), at 5–6 (finding pensions also increase longevity for acute (e.g., infectious diseases) and non-acute or chronic conditions), available at <http://ssrn.com/abstract=977517>.

80. *Id.* at 25.

pursue monetary gain, public acceptance, and recognition.<sup>81</sup> Many contemporary historians, such as Herbert Agar, have denounced the practices of pension attorneys: “As a result [of the pension scheme] claim agents traveled the country looking for ex-soldiers who had something the matter with them and persuading them to blame it on the war.”<sup>82</sup>

Claim agents and their attorney partners lobbied Congress for expansion of the pension system.<sup>83</sup> They reached veterans through newspapers and pamphlets. Perhaps the most prominent disability pension advocate was George Lemon, a wounded and decorated Union Army veteran himself.<sup>84</sup> Lemon emphasized that all veterans had “been comrades in a mighty struggle for the preservation of the Nation’s existence,” and their comradeship united “[n]ative and foreign born, Catholic and Protestant, Jew and Catholic, black and white.” Though, as we know, pension equity for veterans did not quite work out this way.

Lemon was commissioned a captain in the 125th New York Infantry and wounded in 1863. For his war wounds, he received a pension of \$10 per month commencing in 1865, which was raised to \$15 per month in 1870. Around this time, Lemon handled the financial accounts of other officers and served as a clerk in the U.S. Treasury Department. This eventually led Lemon to the pension business. Lemon’s genius was in his publication of the *National Tribune*, a weekly journal he started and owned that became the largest and most influential veterans’ newspaper.<sup>85</sup> By 1885 the Tribune had 112,000 paid subscribers. During this time, Lemon was handling some 125,000 pension claims, more cases than the other Washington, D.C. attorneys combined. In 1888, Lemon was chairman of the finance committee for the inauguration of President Benjamin Harrison, himself a distinguished Civil War veteran and pension advocate. By 1889, according to the *Washington Post*, Lemon’s pension law firm was the largest pension business in the country, and the largest corporation in Washington, D.C.

Like Lemon, other prominent attorneys were owners of pro-

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81. Peter Blanck & Chen Song, *Civil War Pension Attorneys and Disability Politics*, 35 U. MICH. J. L. REV. 137, 140 (2002).

82. HERBERT AGAR, *THE PRICE OF UNION* 582 (1950). With passage of the General Law, the Pension Bureau allowed veterans to hire lawyers to handle their application. Attorney fees were fixed at \$10 per application and paid regardless of whether the Bureau approved the application. The more soldiers who applied for pensions, the greater the attorneys’ profits, since it was a volume business.

83. See GLASSON, *supra* note 16, at 172 n.2 (citing Secretary of Treasury Sherman, commenting in 1879 that the Arrears Act “was not demanded by the pensioners, but by the claim agents, and will work great inequality. Those whose disability was not developed for years after the war will get as much as those who suffered daily from wounds and sickness”).

84. This section derived from PETER BLANCK & LARRY LOGUE, *CIVIL WAR PENSION ATTORNEYS—GEORGE LEMON*, *ENCYCLOPEDIA OF AMERICAN DISABILITY HISTORY* (forthcoming 2008). See DEARING, *supra* note 29, at 194, 268–69 (1959) (discussing Lemon and the activities of pension attorneys as well as pensions and politics generally); Donald L. McMurry, *The Political Significance of the Pension Question, 1885–1897*, 9 MISS. VALLEY HIST’L REV. 19–36 (Jun. 1922) (same).

85. For research guide, see Richard A. Sauer, 1 “TO CARE FOR HIM WHO HAS BORNE THE BATTLE”: RESEARCH GUIDE TO THE CIVIL WAR MATERIAL IN THE NATIONAL TRIBUNE: 1877–1884, at xi (1995) (“In a climate which was not always friendly to returning veterans, the National Tribune was meant to be a friend, an advocate, and a forum for their voices.”).

pension newspapers and pamphlets, and they mined the potential for profitability in the expanding business.<sup>86</sup> Lemon and the pension attorneys were leading advocates of generous pension laws, lenient pension commissioners, and the G.A.R. In 1889, the *Washington Post* editors wrote that Lemon was the man “the old soldiers always felt they could turn to when in trouble.” President Harrison’s well known Commissioner of Pensions, James Tanner—”Corporal Tanner” who had lost both legs in the war—, was a close friend of Lemon and a former pension claim agent.<sup>87</sup>

The backlash came against the pension lawyer’s activities during the later part of the nineteenth century when partisan tides changed and critics denounced Lemon and other pension attorneys as parasites responsible for defrauding the government and their clients of hundreds of millions of dollars—“[Mr. Lemon] who receives \$25,000 to \$45,000 a month as fees from pensioners, [has] blood taken from the soldiers whom they pretend to love . . . .”<sup>88</sup> Pension lawyers, said some in Congress, are “vampires who suck the very life-blood of the poor dependent pensioners . . . [and] “parasites.”<sup>89</sup>

Whether Lemon and other disability pension attorneys were dedicated advocates or shrewd businessmen, they helped grow America’s first major disability welfare system. For years to come, however, Lemon and his cohort colored the rise of America’s organized legal profession, as well as conceptions of disability advocacy and its place in the social welfare system. To this day, in the veterans’ pension system, attorney fees are limited and tightly watched.<sup>90</sup>

With all this complexity and social dynamics in play, it is hardly surprising that Pension Bureau officials saw themselves as the last line of defense for the public trust and treasury. Perhaps this is why, as Larry Logue suggests, pension bureaucrats fell back on comfortable biases about disability worthiness, and ethnicity, race, lawyers’ and lobbyists’ motivations, and other like views in reaching their ultimate decisions.<sup>91</sup>

Ironically, although claimants hired pro-Republican pension lawyers at high rates, we find a substantial reduction in attorney usage when a Republican majority was present in the state of the claimant’s application; presumably, with the Republicans in power it was easier to

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86. For an interesting array of Civil War pension lawyer documents such as flyers, booklets and newsletters, and critical cartoons and editorials, see LARRY DEWITT, *SOCIAL INSURANCE IN THE GILDED AGE / PROGRESSIVE ERA* (Dec. 2003), available at <http://www.larrydewitt.net/SSinGAPE/lawyer.htm>.

87. GLASSON, *supra* note 16, at 226–28, 248 (noting Tanner resigned under pressure that he had been overly generous in pension awards; but in 1904 President Roosevelt appointed Tanner to a political post and in 1905 he was elected commander-in-chief of the G.A.R.).

88. *Id.* at 214 (quoting House debate statement by Mr. Bragg).

89. Oliver, *supra* note 13, at 33 (quoting Mr. Benjamin, Chairman of Committee on Invalid Pensions).

90. See Letter to All VA Regional Offices and Centers, from Bradley G. Mayes, Director, Compensation & Pension Service, Department of Veterans Affairs (June 6, 2007), available at [http://www.vawatchdog.org/07/nf07/nfJUN07/JUNFILES/Attorney\\_fee\\_documents.doc](http://www.vawatchdog.org/07/nf07/nfJUN07/JUNFILES/Attorney_fee_documents.doc) (discussing attorney fee requirements in the Veterans Benefits, Health Care, and Information Technology Act of 2006, Public Law 109-461).

91. LOGUE & BLANCK, *supra* note 14. See also Oliver, *supra* note 13, at 40 (claiming veterans often conspired with examining doctors and lawyers to secure fraudulent claims).

get a pension and higher dollar awards. Also, veterans with less stigmatized disabilities, such as those with musculo-skeletal rather than mental conditions, were less likely to use attorneys and enjoyed better pension outcomes. Indeed, claimants with obvious and visible conditions actually lowered their probability of being granted a pension ruling increase when they used attorneys.<sup>92</sup>

With the soldier vote organized through the G.A.R. and stoked by the lawyers, further recognition came from the Republican Party.<sup>93</sup> A new relationship was forged among the federal government, veteran advocates and their lobbying organizations. Historian Eric Foner believes in the late 1800s the Civil War pension system both solidified the Republican Party's patronage system and identified a new "broad constituency committed to maintaining the integrity of the national state . . . ."<sup>94</sup>

In many ways, these earlier notions of veterans' collective political action were akin to tenBroek's later conception that the primary means to end disability-based social exclusion was through the fight for participatory justice.<sup>95</sup> In paraphrasing tenBroek, Professor Stein says:

[tenBroek] went beyond identifying the sources of disability-based exclusion to argue that the appropriate remedy for this historical phenomena was participatory justice. . . . [I]ndividuals cannot flourish without joining with other humans in some sort of collective activities. . . . The right to live in the world entailed not only physical access to areas of public accommodation but even more importantly a basic right indispensable to participation in the community, a substantive right to which all are fully and equally entitled.<sup>96</sup>

The G.A.R.'s activities and the soldier voter block kept veterans' wartime sacrifices in the public consciousness ("the bloody shirt"), and their lawyer advocates and lobbyists played an important role in the expansion of the pension system. Pension awards were tied to local political party dominance and loyalty—"Democrats were rather scarce in the organization."<sup>97</sup> In all its partisan complexity—the G.A.R. lobby, the

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92. One explanation for the finding that attorneys hindered pension outcomes is those with less severe disabilities or weaker claims were more likely to hire attorneys. We tested this by controlling for claimants' disability severity in hernia applications. Even controlling for disability severity, attorney usage did not increase chances of favorable pension outcomes. This finding is complicated by factors related to the partisan nature of the pension system, such that the substantial reduction in attorney usage when a Republican (or neutral) majority vote was present in the state of the claimant's application.

93. RICHARD FRANKLIN BENSEL, SECTIONALISM AND AMERICAN POLITICAL DEVELOPMENT 1880–1980, at 62–62 (1984) (associating the efforts of the Grand Army of the Republic with the Republican party objectives, and arguing "[t]he [Republican] machine that supported industrialization used the protective tariff to produce revenue which then was distributed, in a fashion that encouraged fraudulent [UA pension] claims, to hundreds of thousands of Civil War veterans and their survivors.").

94. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 23 (1988) (citation omitted).

95. See Stein, ST, at 75 (making this point).

96. *Id.* at 76.

97. GLASSON, *supra* note 16, at 238; *id.* at 264–65 (discussing tie between pension lawyers like George Lemon and the G.A.R.). See also Larry M. Logue, *Union Veterans and Their*



lawyers and their newspapers, the disabled heroes and villain shirkers—the Civil War pension scheme contributed to the idea that there was, as tenBroek would articulate later, a right to participation in the community by the disabled.

In our forthcoming book, “Race, Ethnicity, and the Treatment of Disability in the Post Civil War Era,” Larry Logue and I pay particular attention to how veterans’ experiences with the federal government extended beyond the pension system toward community action and integration.<sup>98</sup> As early as the U.S.-Mexican War (1846–48), Ulysses S. Grant writes in his memoirs that commanding General Scott used tributary payments to help establish the first soldier homes in Washington, D.C. and elsewhere.<sup>99</sup> These early homes were modeled after similar efforts in Europe.

After the Civil War, Congress partially motivated by the political potential of the “soldier vote,” set up a network of communal homes for Union veterans with disabilities or for those who had lived in poverty. These homes were prominently integrated into the community and meant to be distinguished from stigmatized “asylums” and poorhouses of the day.<sup>100</sup> By 1900, a network of “Old Soldier” homes, formally the “National Home for Disabled Volunteer Soldiers,” assisted tens of thousands of veterans in finding homes. Historian Patrick Kelley notes that “cultural attitudes molded during this period permanently shaped the evolution of veterans’ care in the United States.”<sup>101</sup> The National Homes thus contributed to emerging views about community integration and support for those deserving and aging veterans who made sacrifices for the country.

Disabled Civil War veterans also were given preferences in federal employment, as veterans are today, and many disabled veterans worked at the pension bureau or the customs service.<sup>102</sup> Yet, federal jobs after the Civil War were hard to come by as veterans with and without disabilities were able to apply.<sup>103</sup> At least to some degree, tenBroek’s important ideas of community and economic participation may have been derived from Civil War veterans’ enhanced opportunities to have a home and job, a degree of “participation in the life of a community,” and

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*Government: The Effects of Public Policies on Private Lives*, 22 J. INTERDISC. HIST. 411, 424 (1992); SHAFFER, *supra* note 76, at 143–44 (discussing the G.A.R. and black veterans’ membership); STONE, *supra* note 7, at 184 (noting importance of interest groups who benefit from disability programs).

98. LOGUE & BLANCK, *supra* note 14.

99. ULYSSES S. GRANT, 1 PERSONAL MEMOIRS 162–63 (1885).

100. Hugh Rockoff, *The Changing Role of America’s Veterans* 11 (NBER Working Paper 8595) (Nov. 2001) (discussing in 1865 establishment of “National Asylum” for disabled veterans, which in 1873 became the “National Home for Disabled Volunteer Soldiers,” as also known as the “Old Soldiers Home”), available at <http://www.nber.org/papers/w8595>. See also PATRICK J. KELLY, CREATING A NATIONAL HOME: BUILDING THE VETERANS’ WELFARE STATE, 1860–1900, at 91–93 (1997) (discussing goal to distinguish National Homes from asylums and the poorhouse).

101. KELLY, *supra* note 100, at 2 (1997); *id.* (noting the National Home system was the “direct bureaucratic forbear of the vast medical system . . . operated today as the Department of Veterans Affairs”) (citation omitted).

102. DEARING, *supra* note 29, at 16, 186; GLASSON, *supra* note 16, at 211.

103. KELLY, *supra* note 100, at 56–57.

the dignity of independence and recognition.<sup>104</sup>

Political scientist Harlan Hahn believes a society's view of disability may be understood through social forces and attitudes, public policy, and political events, such as I have described surrounding the Civil War pension scheme. Historian David Gerber goes further to suggest today's attitudes may be found in an examination of the social construction of disability and veterans' pension programs historically: "The story of disabled veterans is not complete without analyzing the ways representation and discourse transform functional impairments into fixed handicaps or disabilities in various historical environments."<sup>105</sup>

Study of evolving attitudes about contemporary disability laws and policies thus may be enhanced by an appreciation of the experiences of disabled Americans historically. The pension scheme with all its partisan faults provided a chance for the disabled "to make their political influence felt and [was] a unifying focus for the disability rights movement."<sup>106</sup> Civil War veterans became part of a unique and never before seen "affiliation cycle," in which they accepted, to use sociologist Erving Goffman's approach, "special opportunities for in-group participation."<sup>107</sup> In a similar vein, Professor Stein observed at the symposium:

Professor tenBroek[‘s] . . . calls for participatory justice preceded contemporary notions of diversity by half a century and extended to racial and economic categories as well as to individuals with disabilities. If you had to put a one-sentence characterization on his work, we could say it was the pursuit of social justice through equality and participation.<sup>108</sup>

The voter block of today's community of people with disabilities continues to impact disability law, increasingly by focusing their efforts to influence areas such as discrimination in employment, transportation, health care, and technology. At the tenBroek Symposium, Professor Dinerstein spoke of the social challenges facing the disability community today:

[I]t's not really possible to examine the state of disability law without also assessing the societal conditions that people with disabilities face. . . . Even the most artfully drafted and sensitively interpreted statutes cannot create equality where discrimination exists nor change widespread retrograde attitudes overnight. So law is both a product of that society but it contributes to the possibility of social change.<sup>109</sup>

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104. Stein, ST, at 76–77 (making this connection to tenBroek's writings).

105. See Gerber, *supra* note 5, at 80 (discussing limitations of prior empirical study of war pension schemes).

106. Dinerstein, ST, at 21–22.

107. GOFFMAN, *supra* note 58, at 38. Cf. McMurry, *supra* note 84, at 21 (pensioners have a "distinct class consciousness").

108. Stein, ST at 72.

109. *Id.* at 16–17.

In the final part, I address several attitudinal, social and structural challenges facing the disabled today and the right to live in the world.

#### IV. THE RIGHT TO LIVE IN THE WORLD TODAY AND TOMORROW, AND LESSONS FROM THE PAST

The Civil War pension scheme evolved within a unique ecosystem of attitudes about disability combined with partisan, economic, and social forces that in many ways parallel challenges and tensions in the world today.<sup>110</sup> Stigma and discrimination against disability affected pensions even when the system was drafted as neutral. Political advantage made the disabled an easy target in calls for social reform. Lawyers, physicians, and bureaucrats often distorted the operation of the system, sometimes for personal gain.

All this occurred at a time when social norms about disability had not developed and advocacy for disability rights and social justice was non-existent.<sup>111</sup> Yet, this also was a time of new group affiliation and identity for the disabled that in many ways transcended ethnicity, race, and socioeconomic status. This birth of a collective identity and participatory action occurred not just for veterans, but also for others with disabilities and their families—through new schools for the deaf, the blind, and in other settings—touched by the emerging medical model. Still evident, however, was segregation and discrimination.<sup>112</sup>

With this unprecedented array of factors, it is not surprising a political and social backlash to the Civil War pension system occurred that affected notions of disability worthiness and advocacy for decades to come, indeed perhaps until the beginnings of the rights-based approach embodied in the ADA. Professor Theda Skocpol’s seminal analysis articulated the underlying partisan attacks and pushback to the credibility of disabled veterans, saying that “[b]ecause the very successes of Civil War pensions were so closely tied to the workings of patronage democracy, these successes set the stage for negative feedbacks that profoundly affected the future direction of U.S. social provision.”<sup>113</sup>

But it must not be overlooked that tens of thousands of disabled Civil War veterans—white and black, immigrants and natives, across the spectrum of physical and mental disability—and their families fought for their newfound right to participate and to live in the world, albeit through striving for economic advantages from pensions. Perhaps for the first time in U.S. history, disability en masse was linked to notions of the right to participate in our democracy. Professors Hubbard and Burgdorf comment:

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110. See generally Charles J. Finocchiaro, *Constituent Service Agency Decision Making and Legislative Influence on the Bureaucracy in the Post Civil War Era* (unpublished manuscript on file with author, 2008) (discussing pension bureaucracy and patronage politics).

111. Burgdorf, *supra* note 8, at 247 (“[A]fter the Civil War, disabled veterans had employed pressure tactics, political activities, and court actions in their efforts to obtain and enforce pension rights.”).

112. William N. Myhill, *The First One Hundred Years of Special Education in America? 1817 to 1925*, KNOL, Aug. 2008, available at <http://knol.google.com/k/william-myhill/>.

113. SKOCPOL, *SOLDIERS*, *supra* note 13, at 59.

Advocacy by and on behalf of disabled veterans of the Union Army following the Civil War is, in large part, the genesis of the contemporary struggle of people with disabilities for social and economic recognition.<sup>114</sup>

And through their advocacy, they contributed to broad social and political understandings of what it means to be “disabled”—a question that continues to spark controversy today.<sup>115</sup>

There is much to learn about present and future disability law and policy from history.<sup>116</sup> Disability historians Paul Longmore and Lauri Umansky believe that, throughout modern American history, “public policy contributed significantly to the transformation of disability from a series of pathological medical conditions to a politicized status, identity, and set of interrelated interest groups.”<sup>117</sup> The Civil War pension scheme certainly influenced views of subsequent welfare reform, in particular, the advent of the Social Security system. Professors Baack and Ray conclude that “the prior legislative history and administrative experience with the veterans’ pension program increased the likelihood that in the context of the Great Depression a coalition could be formed to enact a Social Security Act.”<sup>118</sup> In this and other ways, collective action and perceived social identity (portrayed both good and bad) of disabled veterans and their families contributed to the evolution of the modern welfare system.

In this part, I overview three areas ripe for future examination that are central to “the right to live in the world.” In many ways these topics transcend disability and are linked more generally to attitudes about employment, today’s American disabled veterans, and global opportunities in human and economic rights.<sup>119</sup> In this discussion, I draw on our work at the Burton Blatt Institute (BBI), through which we aim to enhance a global strategy to advance the economic, social, and civic empowerment of people with disabilities.<sup>120</sup>

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114. Ann Hubbard, *A Military-Civilian Coalition for Disability Rights*, 75 MISS. L.J. 975, 979 (2006) (citing prior historical research by this author; citing also K. Walter Hinkel, *Medicine, Bureaucracy, and Social Welfare: The Politics of Disability Compensation for American Veterans of World War I*, in *THE NEW DISABILITY HISTORY: AMERICAN PERSPECTIVES* 228, 236 (Paul K. Longmore & Lauri Umansky eds., 2001)).

115. Cf. Burgdorf, *supra* note 8, at 246 (“My best guide in trying to contribute toward a future disability law agenda will be signposts from the past and present.”).

116. Rockoff, *supra* note 100, at 16 (commenting that although the establishment of the Social Security system in the 1930s “was mainly a product of the Great Depression, it also owed a great deal to the Civil War pension”); *id.* (citing Baack & Ray, *supra* note 6, at 687–702 (arguing that the effect of Civil War pension experience influenced Congress in Social Security passage debates about old age pensions and lobbying for benefits)).

117. Lauri Umansky & Paul K. Longmore, *Disability History: From the Margins to the Mainstream*, in *THE NEW DISABILITY HISTORY: AMERICAN PERSPECTIVES* 5 (Lauri Umansky & Paul K. Longmore eds., 2000) (reflecting a rich and larger literature in disability studies, which has addressed, among other issues, disability inclusion and empowerment).

118. Baack & Ray, *supra* note 6, at 701.

119. See Michael Perlin, “*Through the Wild Cathedral Evening*”: *Barriers, Attitudes, Participatory Democracy, Professor tenBroek, and the Rights of Persons with Mental Disabilities*, 13 TEX. J. C.L. & C.R. 415, 418 (2008) (“We must go beyond the law and focus also on the issues of attitudes.”).

120. Burton Blatt Institute (2008), available at <http://bbi.syr.edu>. Burton Blatt was a pioneer of the disability rights movement. Blatt’s seminal work—*Christmas in Purgatory*—arose from visits with colleague Fred Kaplan, who wore a hidden camera on his belt, to the back wards of state institutions for persons with mental retardation. Peter Blanck, *The Burton Blatt Institute*:

### A. *Employment*

Jacobus tenBroek understood that attitudinal, political, and economic motivations affect society’s view of disability, with their ties to stigma, conceptions of worthiness, and acceptance or backlash in American law and policy. In “The Right to Live in the World,” tenBroek wrote “disability more often than not play[s] little role in determining [integration in society] . . . . Rather, that judgment for the most part results from . . . public attitudes, attitudes which not infrequently are quite erroneous and misconceived.”<sup>121</sup> This dynamic, as Goffman and other sociologists have analyzed, is essentially a function of the “politics of identity.”<sup>122</sup> Social identity, quite naturally for all “out-groups,” oscillates between acceptance and rejection. Certainly, since passage of the ADA the disabled community has seen both great advances in civil rights and strong attitudinal backlash.<sup>123</sup>

Our historical and contemporary research illustrates the dynamics, or what Professor Ruth Colker calls the “pendulum,”<sup>124</sup> of disability identity and affiliation in society, which often is reflected in public portrayals. Earlier, I referenced critical news stories about disabled Civil War veterans and their pension system. Today, we observe similar articles and editorials such as *In the Land of the ADA, the One-eyed Man Is King* or *Under the ADA, We May All Be Disabled*, by those that call the ADA a “Lawyers’ Employment Act.”<sup>125</sup> ADA critic Walter Olson writes, “Few laws have done as much as the Americans with Disabilities Act to make a note from your doctor something you can take to the bank.”<sup>126</sup> Then, as now, persons with mental disabilities are singled out: “As moderns we take care to avoid the fear, moralism, and other negative views that used to grip earlier generations when they contemplated the demons of human nature. And so the disabled-rights

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*Centers of Innovation on Disability at Syracuse University*, 56 SYR. L. REV. 201, 204 (2005).

121. tenBroek, *supra* note 1, at 842. tenBroek commented that these negative attitudes include:

public imaginings about what the inherent physical limitations must be; public solicitude about the safety to be achieved by keeping the disabled out of harm’s way; public feelings of protective care and custodial security; public doubts about why the disabled should want to be abroad anyway; and public aversion to the sight of them and the conspicuous reminder of their plight.

*Id.*; cf. Marc Maurer, ST, at 5 (noting the “improper classification of human beings is known as discrimination. When described in these terms, [it] looks so innocent, so nonconfrontational. What is the value of a human being? How is the value of one human being to be compared with the value of another?”).

122. GOFFMAN, *supra* note 58, at 123.

123. Michelle A. Travis, *Lashing Back at the ADA Backlash: How the Americans with Disabilities Act Benefits Americans Without Disabilities*, 76 TENN. L. REV. (forthcoming Winter 2009).

124. See generally RUTH COLKER, *THE DISABILITY PENDULUM: THE FIRST DECADE OF THE AMERICANS WITH DISABILITIES ACT* (2005) (analyzing judicial backlash).

125. For these and other critiques see Trevor Armbrister, *A Good Law Gone Bad*, READER’S DIG., May 1998, at 145 (claiming that a flood of frivolous ADA lawsuits has clogged the courts); Walter K. Olson, *available at* <http://www.manhattan-institute.org/html/olson.htm> (listing editorials in the Wall Street Journal) (last visited Aug. 31, 2008).

126. WALTER K. OLSON, *THE EXCUSE FACTORY: EMPLOYMENT LAW IS PARALYZING THE AMERICAN WORKPLACE* 134 (1997).

movement has found it easy to include mental as well as physical frailty in its crusade.”<sup>127</sup>

Similar ambivalence is reflected in judicial interpretations of the ADA, as judges have narrowed the law regarding the inclusion and equal rights of people with disabilities. Professor Robert Dinerstein commented at the Symposium: “Too often, the full potential [of disability law] has gone unrealized as court interpretations ha[ve] blunted the spirit of these statutes. . . . [W]e have hardly [addressed] the myths, fears, and stereotypes associated with the word disability and the people to whom we apply that label.”<sup>128</sup> Judicial attitudes about disability law combine with a “blame the victim” mindset, which continues to condemn or at least patronize disabled people on the basis of their status.<sup>129</sup> Professor Selmi writes of the ADA, reminiscent of older attitudes:

[T]o the extent the ADA was perceived as providing statutory protections to lazy workers, malingerers, and whiners—those who have a difficult time coping with the everyday stresses of the workplace—it was a virtual certainty that courts would cut back on the statute to eliminate those protections. In fact, that is what happened.<sup>130</sup>

One central theme of the tenBroek Symposium was the importance to continually question such negative attitudinal underpinnings of disability.

Today’s disabled leaders at the forefront of advocacy often are cast as frivolous and serial litigators, supported by fee-driven attorneys.<sup>131</sup> As before, persons with disabilities who litigate for their rights and their lawyer advocates are seen as a root of the “problem” in the system. One editorial writer complains:

I fear . . . that many able-bodied Americans are latching onto the Americans with Disabilities Act. If these parasites keep filing lawsuits claiming eligibility under a law designed to remedy discrimination against people with genuine shortcomings—and winning—how soon before there’s a national backlash that unfairly encompass the blind, the lame, and others with serious handicaps.<sup>132</sup>

Whether at the height of the Civil War pension system or, for instance, in today’s workplace, disability advocacy is not easily accepted and old tensions emerge: active social participation or acceptance of welfare charity,

127. *Id.* at 122.

128. ST, at 11–13; cf. 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, 523 (2008) (discussing ADA judicial backlash thesis and suggesting alternative explanation that courts interpreted the law properly). See also Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERK. J. EMP. & LAB. L. 19, 22, 23 (2000) (arguing the case for judicial backlash against the ADA).

129. Cf. Maurer, ST, at 23 (“[T]he disabled should avoid being depicted as obvious of charity and we should reject the notion that we are victims.”).

130. Selmi, *supra* note 128, at 544 (citations omitted).

131. Blanck & Song, *supra* note 81, at 139.

132. Michelle Stevens, Editorial, *Disability Law Falls Down*, CHI. SUN TIMES, Sept. 20, 1998, at 37.

and rights-based advocacy or prey to “parasite” lawyers. Professor Sam Bagenstos examines so-called “abusive and extortionate litigation” under the ADA and contrary to popular belief he concludes:

[I]n a large majority of the cases brought by serial ADA plaintiffs, the defendants were in fact violating the statute. But in a large and growing number of cases brought by those plaintiffs, judges have shown little concern for whether the defendants were violating the law. Rather, they have dismissed suits . . . on what they believe to be the abusive litigation practices of the plaintiffs and their counsel . . . Judges have thus picked up on (and given further life to) a set of arguments leveled against “abusive” ADA litigation in the popular discourse.<sup>133</sup>

In fact, we know relatively little about the nature of ADA disputes and their related costs and settlements. Most ADA disputes, whether in the employment or public accommodation arena, do not proceed to formal litigation and are resolved informally, often with benefit to all parties.<sup>134</sup> More information is needed to debunk popular myths that disabled individuals and their advocates abuse or misuse the law. This line of study may show the costs and potential benefits of resolving disability-related disputes in productive ways.

Despite contrary findings, critics argue the ADA civil rights approach hurts the integration of people with disabilities in the labor market, daily life, and in their right to live equally in the world.<sup>135</sup> Dr. Marc Maurer observed at the Symposium that the “current classification of disabled individuals often assigns to them a place in our society which does not provide equal opportunity.”<sup>136</sup> Clearly, these deep-rooted attitudinal and systemic issues need to be addressed. Indeed, reports suggest that negative stigma toward people with disabilities in general, and with mental disabilities, in particular, are rising.<sup>137</sup> One of America’s leaders of the modern disability rights

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133. Samuel R. Bagenstos, *The Perversity of Limited Civil Rights Remedies: The Case of “Abusive” ADA Litigation*, 54 UCLA L. REV. 1, 3 (2006) (citations omitted); *id.* at 7 (“Critics have attacked serial ADA litigation as burdening the courts with unnecessary suits that line the pockets of plaintiffs’ attorneys without actually improving access.”); *id.* at 15–16 (“The controversy over serial ADA litigation highlights the continuing ambivalence about civil rights law as a profit-making enterprise. But the legal system must get past that ambivalence if civil rights laws are to be enforced. The private, profit-making bar has proven essential to civil rights enforcement.”). See also Laura Rothstein, *Strategic Advocacy in Fulfilling the Goals of Disability Policy: Is the Only Question How Full the Glass Is?*, 13 TEX. J. C.L. & C.R. 405 (2008) (discussing backlash to perceived serial ADA litigation).

134. Early studies of ADA implementation generally support this point. See Peter Blanck, *Communicating the Americans with Disabilities Act: Transcending Compliance, A Case Report on Sears Roebuck & Co.* (Annenberg Washington Program, 1994), available at <http://bbi.syr.edu/blanck/pubs85-94.htm> (finding less disability litigation than was predicted or expected at Sears soon after ADA passage, and concluding that this fact reflects a positive corporate culture that supports informal dispute and problem solving).

135. See Stephen J. Dubner & Steven D. Levitt, *Freakonomics, Unintended Consequences*, N.Y. TIMES, Jan. 20, 2008 (citing economic studies of the ADA and employment that subsequently have been rebutted), available at [http://www.nytimes.com/2008/01/20/magazine/20wwln-freak-t.html?pagewanted=1&\\_r=2&sq=acemoglu&scp=1](http://www.nytimes.com/2008/01/20/magazine/20wwln-freak-t.html?pagewanted=1&_r=2&sq=acemoglu&scp=1).

136. Marc Maurer, ST, at 10. See generally Marc Maurer, *Keynote Address*, 13 TEX. J. C.L. & C.R. 157 (2008).

137. Karen M. Markin, *Still Crazy After All These Years: The Enduring Defamatory Power*

movement, John Kemp, asked at the Symposium:

So how disenfranchised are we going to be in the future? Probably more and more unless we somehow resolve the very difficult problem that we're facing with regard to employment opportunities, social networking, commerce, buying things.<sup>138</sup>

U.S. courts continue to find people with impairments such as cancer as “too healthy,” or persons with mental illness or retardation as “not impaired enough” to be covered by the ADA.<sup>139</sup> This trend led to efforts to re-establish ADA disability rights. House Majority Leader Steny Hoyer, Congressman Jim Sensenbrenner, and Senators Tom Harkin and Arlen Specter introduced draft bills to enact the ADA Restoration Act of 2007 (subsequently called the “ADA Amendments Act of 2008”), to return the ADA’s definition of disability to its original intent and effectiveness.

The ADA Amendments Act (H.R. 3195) finds “people with physical or mental impairments having the talent, skills, abilities, and desire to participate in society are frequently precluded from doing so because of *prejudice, antiquated attitudes*, or the failure to remove societal and institutional barriers.”<sup>140</sup> In introducing the House bill, Congressman Hoyer noted, “the Supreme Court has improperly shifted the focus of the ADA from an employer’s alleged misconduct, on to whether an individual can first meet—in the Supreme Court’s words—a ‘demanding standard for qualifying as disabled’.”<sup>141</sup> Andrew Imparato, CEO of the American Association of Persons with Disabilities (AAPD), noted at the symposium that while “the ADA is a floor of equal opportunity . . . we have to build a house based on the principles that underlie the ADA. ADA restoration to a large extent is

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*of Mental Disorder*, 29 L. & PSYCH. REV. 155, 155 (2005) (citing 1999 Surgeon General’s report that “stigma surrounding mental disorder has intensified over the past forty years”). Dinerstein added:

We have not made a dent in the unacceptably high level of unemployment for people with disabilities . . . . Children with disabilities continue to be subjected to inadequate and under-funded special education programs . . . . Too many individuals with psychosocial and intellectual disabilities continue to be confined in large institutions . . . and denied important rights of citizenship because of the systematic denials of their legal capacity. . . . Efforts to design services and supports around the needs and express wishes of people with disabilities . . . [are] too often held back by misdirected funding.

Robert Dinerstein, ST, at 12–13.

138. John Kemp, ST, at 73.

139. Peter Blanck, et al., *Individuals with Cancer in the Workforce and Their Federal Rights*, in *CANCER SURVIVORSHIP AND WORK* (Michael Feuerstein, ed.) (forthcoming 2009) (discussing cases); see *Littleton v. Wal-Mart Stores*, No. 05-12770, 2007 WL 1379986 (11th Cir. May 11, 2007) (plaintiff with mental retardation not substantially limited in major life activities of learning, social interaction, or working). See generally PETER BLANCK, ET AL., *DISABILITY CIVIL RIGHTS LAW AND POLICY: CASES AND MATERIALS* (2005) (discussing case law).

140. H.R. 3195, § 2(a)(3), available at [http://thomas.loc.gov/home/gpoxmlc110/h3195\\_1h.xml](http://thomas.loc.gov/home/gpoxmlc110/h3195_1h.xml).

141. Press Release, Steny Hoyer, *Hoyer Introduces Americans with Disabilities Restoration Act of 2007* (July 26, 2007), available at <http://hoyer.house.gov/Newsroom/index.asp?ID=955&DocumentType=Press+Release> (quoting *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184, 198 (2002)).



about restoring that floor.”<sup>142</sup>

One area in which attitude change may be accelerating is in the private employment sector, particularly reflected in corporate attitudes, though overall employment rates for persons with disabilities remain exceedingly low.<sup>143</sup> Historically, as Deborah Stone and others have shown, our society’s disability law and policies have been based on justifying nonparticipation in the workforce.<sup>144</sup> As early as the Civil War era, disability pension eligibility turned on the incapacity to perform manual labor. Stone notes that such disability categorization was to justify “circumstances under which [disabled] individuals cannot be held at fault for not working.”<sup>145</sup> This, in turn, led to longstanding and often unjustified attitudes in the private sector about the relation of disability to a lack of productivity, and worse, the tendency to feign disability to get out of work. In today’s definition of disability, “deception [feigning or malingering] has become part and parcel of the concept itself.”<sup>146</sup>

To help unpack these assumptions, Professors Lisa Schur, Doug Kruse, Joe Blasi, and I are conducting a series of studies examining corporate practices and collective attitudes in the employment of persons with disabilities.<sup>147</sup> We conducted the first large-scale exploration of the experiences and attitudes of employees with disabilities. We find that people with disabilities face important disparities at work, including lower pay and benefits, and less job security. These “disability gaps” contribute to negative evaluations of company treatment by workers with disabilities, and their higher turnover and lower levels of job satisfaction. A self-fulfilling prophecy is thereby established.

But our studies also suggest disability gaps vary substantially across companies and worksites in ways showing that workplace attitudes play an important role in employment outcomes. In workplaces where employees report high levels of company fairness and responsiveness, there are no significant differences between employees with and without disabilities on measures of job satisfaction, company loyalty, willingness to work hard, and turnover intention. By contrast, in worksites where employees perceive lower levels of company fairness and responsiveness, employees with disabilities have especially low levels of job satisfaction, loyalty, and willingness to work hard, and express greater turnover intentions. The findings point to company attitudes and culture having a large influence on the employment of persons with disabilities.

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142. Andrew Imparato, ST, at 80. Congress passed the House and Senate bills on September 17 and signed the Act into law on September 25, 2008. Robert Pear, *Congress Passes Bill with Protections for Disabled*, N.Y. TIMES, Sept. 18, 2008, at A1; Press Release, ADA Watch and the National Coalition for Disability Rights Praises Advocates and Policymakers as President Bush Signs ADA Amendments Act into Law, ADAWatch.org (Sept. 25, 2008) (on file with author).

143. Richard V. Burkhauser & David C. Stapleton, *Introduction*, in THE DECLINE IN EMPLOYMENT OF PEOPLE WITH DISABILITIES: A POLICY PUZZLE 4 (David C. Stapleton & Richard V. Burkhauser eds., 2003); Susan Schwochau & Peter Blanck, *Does the ADA Disable the Disabled?: More Comments*, 42 INDUS. RELATIONS 67, 78 (2003).

144. STONE, *supra* note 7, at 22.

145. *Id.*

146. *Id.* at 28.

147. Lisa Schur, et al., *Is Disability Disabling in All Workplaces?: Disability, Workplace Disparities, and Corporate Culture*, INDUS. REL. (forthcoming 2009).

Additional research is needed to explore the relationship between corporate culture and the experiences of employees with disabilities. Dr. Maurer commented that “[e]quality of opportunity cannot be achieved unless a recognition of the variation of characteristics involved in disability becomes a part of the policy of integration.”<sup>148</sup> To further such objectives, a valuable next step is underway at BBI. Supported by the U.S. Department of Labor’s Office of Disability Employment Policy (ODEP), our research consortium is developing standardized case studies of disability, corporate culture, and best practices.

The ODEP study is the first of its kind to help companies systematically develop and benchmark corporate culture, policies, training, promotion, and hiring programs that benefit people with disabilities and the companies themselves. Enhanced understanding of corporate attitudes and the experiences of employees with disabilities may help to improve employment rates, working conditions, and, importantly, the social acceptance of people with disabilities as capable contributors in the workplace. AAPD head, Andrew Imparato, commented at the Symposium:

Our right to be in the world [will be achieved] . . . when to a large degree we are in the mainstream economically, and that is about employment, whether it’s having our own businesses or working for other companies.<sup>149</sup>

Two prominent misperceptions in the business community, among others, will need to be confronted for people with disabilities to fully enter the economic mainstream. First, as mentioned, research and practical strategies must demonstrate that disability does not necessarily equate with less productivity, or even higher health-care costs. Our initial findings from the ODEP study shows that inclusive companies understand that “values often equate with value;” that is, developing a diversified workforce, including people of all abilities who are qualified for their jobs, translates to economic value to the organization. This premium may be realized in terms of improved productivity, job retention, injury prevention, and hiring.

Second, research is needed to reinforce existing findings that workplace accommodations create a value proposition and an economic benefit to an organization that outweighs costs. Studies support this proposition,<sup>150</sup> yet attitudinal resistance to accommodations remains in many companies. Given the tight labor force, economic empowerment and advancement for people with disabilities will need to be supported by a change in values and policy about the inclusion and abilities of all people in the private and public sectors.

### *B. Today’s Veterans of the Middle East Wars*

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148. Marc Maurer, ST, at 11–12.

149. Andrew Imparato, ST, at 87.

150. Helen Schartz, et al., *Workplace Accommodations: Evidence-Based Outcomes*, 27 WORK 345, 351–52 (2006); Helen Schartz, et al., *Workplace Accommodations: Empirical Study of Current Employees*, 75 MISS. L.J. 917, 937–42 (2006).

Wars create a cohort of disabled veterans who on their return seek a measure of gratitude and inclusion in society. America is now engaged in another war, with casualties mounting. Since 2001, more than 1.6 million men and women have served in Iraq or Afghanistan.<sup>151</sup> Within one year of their return, one third of these veterans were treated for Post-Traumatic Stress Disorder (PTSD) as a primary mental health diagnosis.<sup>152</sup> More than fifty thousand soldiers have non-mortal war wounds.<sup>153</sup> The social and economic issues associated with war stressors, and particularly subsequent mental disability, is substantial.<sup>154</sup> Professor Hubbard writes:

[For Iraq War veterans] . . . the incidence of amputations and multiple wounds is striking, and stress- and trauma-related psychological disorders threaten to disrupt the lives of tens of thousands of veterans and their families. As veterans come home and make the transition to civilian life, some of their toughest obstacles could be society’s physical and attitudinal barriers to people with physical or mental impairments. The injury or illness itself may be less disabling than the inaccessible public and private spaces and the fears, prejudices and closed minds they encounter.<sup>155</sup>

In an important study of PTSD from the Civil War to the Vietnam War, Eric Dean finds veterans’ claims for PTSD are disfavored by the pension bureau and the Veterans Administration (VA).<sup>156</sup> As we illustrate in our Civil War studies, impairments that were less visible or less understood, such as those related to mental conditions, were subject to particular criticism in the press and by the public.<sup>157</sup> Mental illnesses and infectious diseases, for instance, are ranked as impairments that are especially subject to severe prejudice, while orthopedic injuries and more visible conditions are subject to less prejudice in pension determinations. Dean similarly finds that although a Civil War veteran’s physical war injuries may produce mental health conditions, “a veteran who suffered no physical wounds or diseases and was anything short of stark, raving mad and yet complained of mental problems

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151. *Veterans for Common Sense v. Peake*, No. C-07-3758, 2008 WL 2610242, at \*8 (N.D. Cal. June 25, 2008).

152. *Id.*

153. Linda Bilmes, *Soldiers Returning from Iraq and Afghanistan: The Long-term Costs of Providing Veterans Medical Care and Disability Benefits* 2 (Kennedy School Working Paper, RWP07-001) (Jan. 2007) (noting as of September 30, 2006, more than 50,500 U.S. soldiers have suffered non-mortal wounds in Iraq and Afghanistan), available at <http://ksgnotes1.harvard.edu/Research/wpaper.nsf/rwp/RWP07-001>.

154. See Markin, *supra* note 137, at 155 (stating that stigma associated with mental disorder impacts the productivity of market economies). In addition, many veterans today are surviving traumatic brain injuries, which require substantial rehabilitation and mental health resources. As applied to Civil War veterans, see Chulhee Lee, *Health And Wealth Accumulation: Evidence from Nineteenth-Century America* (NBER Working Paper 10035) (Oct. 2003) (suggesting that the economic costs of the Civil War were much greater when adding the adverse effects of wartime on veterans’ physical and mental health), available at <http://www.nber.org/papers/w10035>. See generally Samuel R. Bagenstos, *Subordination, Stigma, and “Disability”*, 86 VA. L. REV. 397 (2000) (arguing for a subordination-focused analysis to resolving ADA cases that involve plaintiffs with heavily stigmatized or misperceived impairments).

155. Hubbard, *supra* note, at 975 (citation omitted).

156. DEAN, *supra* note 54, at 144.

157. Blanck, *supra* note 2, at 109 (citations omitted).

originating in the war would have been regarded as a malingerer in this era.<sup>158</sup> It is likely that the Civil War veteran with mental illness or PTSD also was excluded from the community Old Soldiers Homes.

The issues surrounding PTSD, stigma, and VA services came to a head when, in 2008, the U.S. district court for the Northern District of California ruled in a landmark case, *Veterans for Common Sense v. Peake* (“VCS”), brought by veterans of the Middle East Wars with service-related PTSD and traumatic brain injuries.<sup>159</sup> Though the court ruled it did not have jurisdiction to address the issues raised, it adopted findings on the failings of the Department of Veterans Affairs health care and adjudication systems for disabled veterans.<sup>160</sup> The court cited a study by the RAND Corporation finding that for some 300,000 veterans of Iraq and Afghanistan, almost one in five has PTSD, and that half of those who seek treatment receive “minimally adequate care.”<sup>161</sup>

We have a new generation of disabled veterans, men and women, who will again navigate the challenges associated with return to society, work, housing, family life, and attitudinal stigma.<sup>162</sup> Unfortunately, the Government Accountability Office (GAO) finds the Social Security Administration (SSA) and the VA still lack a modern concept of disability: “[F]ederal disability programs remained grounded in outmoded concepts that have not been updated to reflect the current state of science, medicine, technology, and labor market conditions.”<sup>163</sup> At the tenBroek Symposium, Andrew Imparato articulated the problem:

[The] biggest issue that we face in . . . equality of opportunity, full participation, independent living and economic self-sufficiency are our four largest federal programs that serve people with disabilities, Social Security, Supplemental Security Income, Medicaid and Medicare. Those four programs are based on a definition of eligibility

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158. DEAN, *supra* note 54, at 159.

159. See *Veterans for Common Sense v. Peake*, No. C-07-3758, 2008 WL 2610242, at \*25 (N.D. Cal. June 25, 2008) (recognizing the plight of disabled veterans with post-traumatic stress disorder and traumatic brain injuries from the Middle East Wars, but holding the court did not have jurisdiction to address these issues). The court noted, “The mission of the VA is: ‘To care for him, who has borne the battle and for his widow and for his orphan.’ . . . Defendants concede that the VA not only has a ‘broad obligation,’ but also a ‘moral imperative [ ] to provide medical care to the men and women who have served our country.’” *Id.* at \*7.

160. See Disability Rights Advocates, *Judge Rules that Vets in PTSD Case Should Seek Relief from Congress—Vets Resolve to Appeal* (Jun. 25, 2008), available at [http://www.dralegal.org/downloads/cases/Veterans/PTSD\\_final\\_press\\_release.DOC](http://www.dralegal.org/downloads/cases/Veterans/PTSD_final_press_release.DOC) (discussing the case).

161. *Veterans for Common Sense*, No. C-07-3758, at \*9–10 (finding high suicide rates for veterans as a result of PTSD and depression). See also TERRI TANIELIAN & LISA H. JAYCOX (eds.), *INVISIBLE WOUNDS OF WAR: PSYCHOLOGICAL AND COGNITIVE INJURIES, THEIR CONSEQUENCES, AND SERVICES TO ASSIST RECOVERY 21* (Rand Corp., 2008) (“[T]he bloodiest war the United States ever fought was the Civil War, in which 324,511 soldiers of about 2.2 million serving in the Union forces died.”).

162. *Veterans for Common Sense*, No. C-07-3758, at \*7 (finding “there are approximately 25 million veterans in the United States today. . . . As of May 2007, between 5 and 8 million of these veterans were enrolled with the VA. . . . On any given night in the United States, it is estimated that 154,000 veterans are homeless.”).

163. Gov’t Accountability Office, *Federal Disability Programs: More Strategic Coordination Could Help Overcome Challenges to Needed Transformation*, GAO-08-635, May 20, 2008, at Highlights, available at <http://www.gao.gov/new.items/d08635.pdf>.

that goes back to 1956. . . . [W]e are in 2008 requiring 18-year-olds with significant disabilities to go down to the federal government and swear that they’re unable to work in order to get support. That’s immoral. It’s wrong. And it’s something that we have to fix. . . . \$300 billion a year gets spent through those four programs [and] under the current trend lines by 20/20 according to GAO, we will be spending \$1 trillion a year on those programs. That industry . . . is not controlled by disabled people. There are a lot of folks who are making money . . . and who are not particularly interested in transforming the status quo.<sup>164</sup>

The agencies that Imparato mentions together administer the largest federal disability programs. Yet, these same agencies continue to define disability and the incapacity to work primarily on notions dating from the Civil War era.<sup>165</sup>

Unlike prior wars when the most disabilities resulted from disease, dysentery, and infection, advances in medicine and war technologies allow many soldiers to survive battlefield injuries.<sup>166</sup> The cohort of returning soldiers from Iraq and Afghanistan with disabilities has an average age of twenty-five years and limited education and employment experiences.<sup>167</sup> With history as an unfortunate guide, disability likely will affect their long-term employment, health and social status, and life expectancy.<sup>168</sup> The effects of war-stressors are particularly hurtful to these younger and less educated veterans.<sup>169</sup> Studies suggest the link among war injuries, resultant PTSD, and shorter lives. In a study of Civil War veterans, Professors Costa and Kahn likewise show greater wartime stress to be associated with higher mortality rates at older ages.<sup>170</sup>

New demonstration programs for veterans with disabilities focus on return-to-work, social competences, independent living, and economic self-sufficiency. In 2007, the Whitman School of Management at Syracuse University in partnership with BBI established the “Entrepreneurship Bootcamp for Veterans with Disabilities” to offer free programs to disabled

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164. Imparato, ST, at 82.

165. *Id.*; Gov’t Accountability Office, *supra* note 163, at 6 (as in the Civil War pension scheme, the VA’s current disability program compensates veterans for “average loss in earning capacity” from war injuries or conditions incurred or aggravated during military service. The VA uses a medical model “ratings schedule” for disability benefits and the loss of earning capacity associated with the disability); Sewell et al., *supra* note 21, at 2152.

166. See Burton Blatt Institute, *Entrepreneurship Boot Camp for Veterans with Disabilities* (2007), available at [http://bbi.syr.edu/projects/ebv\\_veterans\\_bootcamp.htm#applyebv](http://bbi.syr.edu/projects/ebv_veterans_bootcamp.htm#applyebv).

167. See Bilmes, *supra* note 153, at 3 n.5 (average age of a military personnel is 25 years, with current life expectancy rates of 65 years).

168. Gerber, *supra* note 5, at 87 (2001). See also, Anderson & Anderson, *supra* note 43, at 24 (VA veterans war wounds reduced their later chances for wealth accumulation); *id.* at 15 (citing contemporary studies suggesting PTSD in veterans has long-term negative effects on mortality).

169. Cf. Anderson & Anderson, *supra* note 43, at 26 (finding for VA veterans that wartime injuries and stressors were particularly hurtful to less skilled workers).

170. Dora L. Costa & Matthew E. Kahn, *Health, Stress, and Social Networks: Evidence from Union Army Veterans* 17 (NBER Working Paper Series, No. 14053) (June 2008) (interestingly, the mortality effect was mitigated by the cohesiveness of a combat unit), available at <http://www.nber.org/papers/w14053>.

veterans of Iraq and Afghanistan.<sup>171</sup> BBI helps provide training on business ventures and asset accumulation. The program involves online and onsite courses focused on entrepreneurship. The program was so successful that in 2008, its second year of operation, three other universities around the country adopted the materials to sponsor similar programs at no cost to the veterans.

As mentioned, despite advances and demonstration projects like the disabled veterans entrepreneurship boot camp, SSA and VA “eligibility criteria fall short of fully incorporating a modern understanding of technology and labor market changes,” as well as the rights-based approach to disability benefits and inclusion in society.<sup>172</sup> In light of the ADA and its Amendments Act of 2008, there is an opportunity to model disability rights principles to ensure full reintegration into society for today’s veterans.<sup>173</sup> Professor Hubbard suggests, “[T]hroughout our nation’s history, veterans and civilian disability rights advocates alike have contributed to advances in medicine and disability policy and informed our collective understanding of disability.”<sup>174</sup> Even the Civil War Old Soldiers Homes came to symbolize for veterans and others, as Patrick Kelly found, “the role of family and community at the very center of American national life.”<sup>175</sup>

Perhaps, as after World War II, a reinvigorated and comprehensive GI Bill of Rights is needed to aid young veterans with disabilities, and their families, readjust and reintegrate into society. Syracuse University Chancellor Nancy Cantor observed that after World War II, the university enrolled 10,000 veterans, tripling university enrollment.<sup>176</sup> Such “Scholarship in Action” educational and employment opportunities are paramount to allow veterans and their families to accumulate assets and remain out of poverty.

There are more than two million American veterans now receiving disability benefits.<sup>177</sup> As the case since the Civil War, these benefits provide for “a reduction in quality of life due to service-connected disability” and “provide compensation for average impairment in earnings capacity” on the basis of disability severity.<sup>178</sup> Our challenge is to ensure the concepts of disability civil rights—economic empowerment and community integration, and not old concepts of “incapacity” or “impairment” to work, and stigma toward mental disability—will be embraced with collective action by veterans who seek their “right to live in the world.”

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171. Burton Blatt Institute, *supra* note 166.

172. Gov’t Accountability Office, *supra* note 163, at 1.

173. Hubbard, *supra* note 114, at 975 (making this point). For an important comparative analysis with parallel views, see generally Sagit Mor, *Between Charity, Welfare, and Warfare: A Disability Legal Studies Analysis of Privilege and Neglect in Israeli Disability Policy*, 18 *YALE J.L. & HUMAN* 63 (2006).

174. Hubbard, *supra* note 114, at 986.

175. Kelly, *supra* note 100, at 25; *id.* at 200 (noting thereby that “the National Homes prepared the way for the later expansion of both the U.S. welfare and the U.S. warfare states”).

176. See Nancy Cantor, *The Two-Way Street of Scholarship in Action*, Mar. 18, 2008, at 8–9 (discussing Syracuse University’s leadership on the GI Bill after WW II and the same needs today, and her program of “Scholarship in Action”), available at [http://www.syr.edu/chancellor/speeches/2wayst\\_SIA\\_University\\_Address\\_031808.pdf](http://www.syr.edu/chancellor/speeches/2wayst_SIA_University_Address_031808.pdf).

177. See Bilmes, *supra* note 153, at 6–7 (noting 24 million living veterans, of whom 11% receive disability benefits; and \$23.4 billion paid in annual disability entitlement pay).

178. *Id.* at 7 (quoting definitions as Congressional intent).

C. *Global Opportunities in Human and Economic Rights*

The aspiration for the right to live in the world is now global. Professor Stein, Maria Reina, and others at the tenBroek Symposium view the United Nations Convention on the Rights of Persons with Disabilities as a testament to tenBroek’s vision for a world of collective action and participatory justice for persons with disabilities. The purpose of Article 8 of the Convention is to

raise awareness throughout society, . . . and to foster respect for the rights and dignity of persons with disabilities; [to] . . . combat stereotypes, prejudices and harmful practices relating to persons with disabilities, . . . in all areas of life; [and to] promote awareness of the capabilities and contributions of persons with disabilities.<sup>179</sup>

Michael Stein and Janet Lord believe that tenBroek’s “right to live in the world” is a “central feature of the values underlying the United Nations Convention.”<sup>180</sup> But as Professor Perlin asked, “To what extent [will] the Convention . . . change underlying attitudes?”<sup>181</sup>

Particularly in developing countries, persons with disabilities are stigmatized, segregated, less educated, and poor.<sup>182</sup> In developing countries, people with disabilities lack basic life sustaining supports, which contributes to declines in overall health and life expectancy. Deon Filmer finds “basic facts about disability, poverty, and schooling in developing countries are unknown or have not been systematically addressed.”<sup>183</sup> Filmer finds disability associated with poverty, in large part, because children with disabilities are less likely to receive education that allows them to participate in the economy, earn incomes, and pursue economic self-sufficiency.<sup>184</sup> World Bank researchers, Jeanine Braithwaite and Daniel Mont, similarly conclude that in India, for instance, “poor prospects for education and employment among disabled people, and the intense stigma that they often face, are expected to drive them into poverty.”<sup>185</sup>

One organization addressing such issues is the Global Partnership on Disability and Development (GPDD), which was created to promote the inclusion of persons with disabilities and their families in development aid

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179. United Nations Convention on the Rights of Persons with Disabilities art. 8, opened for signature Mar. 30, 2007, G.A. Res. 61/106, U.N. Doc. A/RES/61/106 (entered into force Apr. 3, 2008).

180. Stein & Lord, *supra* note 7.

181. Perlin, ST, at 97–98.

182. Deon Filmer, *Disability, Poverty, and Schooling in Developing Countries: Results from 14 Household Surveys*, 22 WORLD BANK ECON. REV. 141, 141 (2008), available at <http://ssrn.com/abstract=1146055>; Jeanine Braithwaite & Daniel Mont, *Disability and Poverty: A Survey of World Bank Poverty Assessments and Implications* 12 (SP World Bank Discussion Paper 0805) (Feb. 2008) (noting limitations of existing data on disability and poverty), available at <http://siteresources.worldbank.org/DISABILITY/Resources/280658-1172608138489/WBPovertyAssessments.pdf>.

183. Filmer, *supra* note 182, at 142 (finding that disability associated with lower school participation, which increases chances of poverty in adulthood).

184. *Id.* at 159.

185. Braithwaite & Mont, *supra* note 182, at 12.

and assist in poverty reduction strategies.<sup>186</sup> The GPDD was established by a task force with assistance from the World Bank. BBI is hosting the GPDD's Secretariat and supports its organizational development and promotion. The GPDD charter states:

Poverty alleviation in developing countries . . . requires that disability issues be explicitly taken into account and that people with disabilities participate actively in international and national economic and social development efforts. This process and result is known as "inclusive development." . . . The Objective of the GPDD is to combat the social and economic exclusion and impoverishment of people with disabilities and their families in developing countries.<sup>187</sup>

The GPDD brings together global stakeholders to promote the integration and economic empowerment of individuals with disabilities. The GPDD is helping to develop programs for access to education, employment, transportation, technology, and communications.<sup>188</sup> As part of its mission, the GPDD is seeking to change attitudes and stereotypes about people with disabilities around the world, in ways consistent with the goals of the UN Convention.<sup>189</sup>

As the UN Convention on human rights and social model of disability is adopted, inclusive approaches to development strategies may result.<sup>190</sup> A most prominent leader in the field, Professor Gerard Quinn, suggests that economic development strategies and disability rights must be part of a country's political process, and that one major goal of the UN Convention is to spur this connection.<sup>191</sup> Reminiscent of tenBroek's conceptions of democratic engagement and participatory justice, Quinn believes the UN Convention's values of freedom from stigma and discrimination, independence in living, and economic self-sufficiency "frame disability issues as issues of justice."<sup>192</sup>

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186. For information on the GPDD, see Burton Blatt Institute, *María Verónica Reina* (2007), <http://bbi.syr.edu/staff/reina/>; Global Partnership for Disability & Development (GPDD), *Feature: GPDD Welcomes Maria Reina as the 1st Executive Director* (2008), available at <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTSOCIALPROTECTION/EXTDISABILITY/0,,contentMDK:21036173~pagePK:210058~piPK:210062~theSitePK:282699,00.html>; Global Partnership for Disability & Development, *Charter* (adopted May, 6, 2008) [hereinafter "GPDD Charter"] (on file with author).

187. GPDD *Charter*, *supra* note 186, at 1.

188. *Id.*

189. See María Verónica Reina et al., *Defying Double Discrimination*, 8 GEORGETOWN J. INT'L AFFAIRS 95, 98 (2007) (discussing, for instance, Convention Article 8—Awareness-Raising about stereotypes, negative perceptions, and social prejudices).

190. Daniel Mont, *Measuring Disability Prevalence* 36 (SP World Bank Discussion Paper 0706) (Mar. 2007), available at <http://siteresources.worldbank.org/DISABILITY/Resources/Data/MontPrevalence.pdf>.

191. Gerard Quinn, *Resisting the 'Temptation of Elegance': Can the Convention on the Rights of Persons with Disabilities Socialise States to Right Behaviour?* 10 (Working Paper) (Aug. 5, 2008) (on file with author).

192. Gerard Quinn, *The UN Convention on the Rights of Persons with Disabilities: A Declaration of Independence for Persons with Disabilities in the 21st Century*, Keynote Presentation at 21st Rehabilitation International Global Conference, Quebec City, Canada (Aug. 2008) ("[T]raditional functions of rights, to protect, to give voice, to dismantle arbitrary barriers and to ensure that social supports are part of the solution and not part of the problem—all come into play.") (on file with author).



Like tenBroek’s earlier vision, Quinn sees a “deeper reason” for the UN Convention that addresses:

a chronic failure of politics in the past. . . . a failure in the political process to frame disability as an issue of justice and rights. Its legacy has been a large volume of unjust and discriminatory laws and practices around the world which have yet to be undone. . . . [T]he convention [i]s a means—among others—of correcting for that failure—as something that not only helps roll back that legacy but that also points to a new practice of disability politics. . . . I do not believe that undoing this legacy is enough. We have to find ways to use the convention to put in place a different dynamic of disability politics—one that will not produce such laws in the first place.<sup>193</sup>

It is apparent how far disability politics has come when we reflect on the Civil War pension scheme, which did not frame disability as an issue of “justice and rights,” to use Quinn’s notions, but rather as one of charity, deservingness, and, later, welfare and rehabilitation. Yet, as earlier advances have faced backlash and recoil, the UN Convention is facing similar pushback and challenges in implementation.<sup>194</sup>

To further the goals of the UN Convention, along with the GPDD model for economic empowerment and social justice, BBI is continuing work for the National Institute on Disability and Rehabilitation Research (NIDRR) on “Asset Accumulation and Economic Self-Sufficiency.”<sup>195</sup> There is perhaps no other single global policy issue that captures the potential of civil and human rights as does the emerging field of asset-development policy, with its potential to enable social, civic, and economic participation for persons with disabilities and others living in poverty.

Economic empowerment policy transcends traditional “income maintenance” and other charitable, medical, and welfare “inability to work measures” that have anchored disability policy since the Civil War era.<sup>196</sup> The ability to own and accumulate assets through employment, entrepreneurship and other means is a right of citizenship, which promotes community inclusion and social participation, education, and increases in health and life functioning.<sup>197</sup> Yet, our studies and those of others reveal that people with disabilities continue to be excluded from these opportunities.<sup>198</sup>

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193. *Id.*

194. *Id.* (stating his main idea that “the convention [should be used] less as a means for coercing States and more as a powerful tool for enabling its revolutionary insights to percolate into the political process (by ‘persuasion’ and ‘socialisation’) and hence transform the political process to the point that justice and rights for persons with disabilities is seen as the primary departure point and not an annoying distraction.”)

195. See Burton Blatt Institute, *BBI Projects* (2007), available at <http://bbi.syr.edu/projects/>.

196. Steven Mendelsohn, *Role of the Tax Code in Asset Development for People with Disabilities*, 26 *DISABILITY STUD. Q.* (2006), available at [www.dsqsds.org](http://www.dsqsds.org).

197. For seminal work in this area, see Michael Sherraden, *Assets and the Poor: A New American Welfare Policy* (1991); Michael S. Barr & Michael W. Sherraden, *Institutions and Inclusion in Saving Policy*, in *BUILDING ASSETS, BUILDING CREDIT: BRIDGES AND BARRIERS TO FINANCIAL SERVICES IN LOW-INCOME COMMUNITIES* (N. Retsinas & E. Belsky, eds., 2005).

198. See Phoebe Ball et al., *Breaking the Cycle of Poverty: Asset Accumulation by People*

There is no simple solution to the global challenges facing individuals with disabilities to escape poverty and advance their economic self-sufficiency and community participation. Our research team is focusing on strategies related to educational support, economic policy reform, and government aided savings and micro loan programs. As long as disability is viewed as a problem to cure or as an incapacity to participate in the labor force, and not tied to rights and justice issues, the potential for individuals with disabilities to accumulate assets and the right to live in the world will be stymied.<sup>199</sup> The longer term solution is to build links across education, economic development, community participation, and positive attitudes about disability in the United States and globally.

## V. CLOSING

Yesterday and today, the world confronts prejudice, stigma, and ambivalence toward persons with disabilities. Conceptions of “worthiness,” “capacity,” and “advocacy” remain tied to the definition of disability.<sup>200</sup> Meanwhile, the global population of persons with disabilities is growing, with war, natural disasters, and poverty affecting hundreds of millions of people. John Kemp commented at the tenBroek Symposium:

This [debate] is about us [the disability community] being proud of who we are. . . . We should be expecting more. We should be expecting more and getting more from companies, from our governments and from ourselves. We should be expecting more and getting it.<sup>201</sup>

These remarks remind us of our history—the Civil War pension scheme and subsequent veteran’s rehabilitation and Social Security programs with their focus on incapacity and the disability industry they generated.<sup>202</sup> They also warn of the challenges ahead to create higher expectations. Today’s children and young adults, many who are veterans, are the first generation who will not know a world without the ADA nor without the UN Convention on Disability Rights. Will the stubborn legacies of disability and exclusion, unworthiness, and incapacity continue, or will this generation develop values toward equal rights and inclusion? Either way, disability is no

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*with Disabilities*, 26 *DISABILITY STUD. Q.* (2006), available at [http://www.dsqsds.org/2006\\_winter\\_toc.html](http://www.dsqsds.org/2006_winter_toc.html).

199. For this reason, much of our work also focuses on strategies for veterans. See *supra* Part IV.B.

200. Cf. STONE, *supra* note 7, at 172 (noting the political dimensions of disability include “worthiness or desert,” “incapacity,” and “clinical methods”); see also Samuel R. Bagenstos, *The Future of Disability Law*, 114 *YALE L.J.* 1, 3–4 (2004) (discussing political and structural barriers in the American social welfare system facing people with disabilities).

201. Kemp, ST, at 79.

202. See David A. Gerber, *Injury, Identity, and the State in the Experience of Disabled Veterans in Twentieth Century Western Nations*, 36 *J. SOC. HIST.* 899, 899 (Jul. 2003) (commenting that “[V]eterans, and especially disabled veterans, . . . became both a project of the modern Western welfare state and pioneers on the frontiers of social welfare policy.”); *id.* at 912 (“[The] root of [the] problem [facing the disabled] is often less the functional limitations posed by impairment than the reluctance of the able-bodied majority to integrate people with disabilities into the social systems of daily life.”).

longer invisible to the world’s political, social and economic process.<sup>203</sup>

Leadership and new leaders are needed for positive change in “the right to live in the world” for people with disabilities. This shift from the *status quo* must be informed by history’s limitations. Future generations will continue to benefit greatly from the work of Professor Jacobus tenBroek and his right to live in the world because, as tenBroek said, “Without that right, that policy, that world, it is no living.”<sup>204</sup>

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203. See Quinn, *supra* note 192 (noting that in the past, disability “reflected and rested on a deeper invisibility in the political process”).

204. tenBroek, *supra* note 1, at 918.