

## **Disability and the Tension Between Citizenship and Social Rights**

Samuel R. Bagenstos\*

It is common to speak of three categories of rights: civil, political, and social. Although these categories have no essential or fixed meaning, they have structured much of the discussion of legal rights and social policy in American and international law. Civil rights, canonically, are those rights that inhere in citizenship. By the middle of the Nineteenth Century, when the tripartite distinction was especially important in American constitutional law, civil rights were generally understood to incorporate the core values of property, contract, and the rule of law. Political rights, canonically, are the rights to participate in the polity—most notably through voting.<sup>1</sup> As the division between civil and political rights suggests, in Britain and the United States the franchise was not initially understood as an essential element of citizenship. By the early Twentieth Century, though, both nations had enacted a universal franchise, at least as a matter of formal law.<sup>2</sup> In the United States, the trend for the last 150 years has been the expansion of the category of civil rights to occupy territory formerly treated as political or social rights<sup>3</sup>—though recent challenges to civil rights laws and developments in immigration law suggest a reversal of this trend in at least some respects.

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\* Professor of Law, University of Michigan Law School.

<sup>1</sup> See AKHIL REED AMAR, *THE BILL OF RIGHTS* 258-261 (1998); JACK M. BALKIN, *LIVING ORIGINALISM*, Ch. 11 (2011); Mark Tushnet, *The Politics of Equality in Constitutional Law: The Equal Protection Clause, Dr. Du Bois, and Charles Hamilton Houston*, 74 J. AM. HIST. 884, 886 (1987).

<sup>2</sup> For the American history of the expansion of the franchise, see ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* (2000).

<sup>3</sup> See RICHARD A. PRIMUS, *THE AMERICAN LANGUAGE OF RIGHTS* 153-174 (1999).

Social rights may be the vaguest of the three conventional categories of rights. In the American constitutional tradition, social rights were understood as rights of social interaction and intercourse—and, more to the point, as the rights that the Reconstruction Amendments did not embrace.<sup>4</sup> In T.H. Marshall's influential account, which is reflected in various international human rights instruments, social rights are something else entirely—rights to economic welfare and the means for a decent standard of living.<sup>5</sup> This essay touches on both understandings but focuses on the latter.

I think the two conceptions are in fact closely connected. In both cases the social-rights label is used by the legal community to denote a right that is contingent and not absolutely enforceable by the courts.<sup>6</sup> And, as I show below in discussing workplace accommodations for people with disabilities, social movements devote great efforts to urging that what had formerly been understood as social rights should now be considered civil rights. But my argument should be of interest even if one disagrees that there is a close connection between these conceptions of social rights.

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<sup>4</sup> See, e.g., Tushnet, *supra* note \_\_, at 887.

<sup>5</sup> See T.H. MARSHALL, *CITIZENSHIP AND SOCIAL CLASS* 8 (1950) (“By the social element I mean the whole range from the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilised being according to the standards prevailing in the society. The institutions most closely connected with it are the educational system and the social services.”); Mark Tushnet, *Civil Rights and Social Rights: The Future of the Reconstruction Amendments*, 25 *LOY. L.A. L. REV.* 1207, 1207 (1992) (“We continue to distinguish civil rights from social rights, but we take our definition of social rights from the emerging criteria of international human rights law: social rights deal with the material bases of human well-being and include the rights to shelter, to a job under decent working conditions, and to subsistence.”).

<sup>6</sup> See Tushnet, *supra* note \_\_.

Social rights have always been in tension with understandings of citizenship. In particular, this is because social rights were initially defined as precisely those rights that did *not* inhere in citizenship—and they continued not to inhere in citizenship even after political rights were absorbed into the category of civil rights. But there is more to the tension than that. Social rights, at least in the sense described by Marshall, have been in tension with citizenship because extensions of those rights have in certain circumstances been understood to *deny* full citizenship to the beneficiaries of those extensions.

This may seem a striking claim. If the international-law trend is to treat social rights as basic human rights, how can those rights *deny* full citizenship? And it is true that acceptance of social welfare rights is no longer treated in the law as in conflict with *juridical* citizenship (though this was not always true, and continuing efforts to deny immigration and naturalization rights to people who rely on welfare programs demonstrates that acceptance or enjoyment of welfare rights can in practice conflict with juridical citizenship). But social rights continue to conflict with full *social* citizenship. Again, this may seem a striking claim, as Marshall’s influential account treats enjoyment of social rights as tantamount to social citizenship.<sup>7</sup> But social citizenship, as I use the term, implies treatment by society—and not just by particular legal institutions—as a fully equal member of the community.<sup>8</sup> And people who accept or use social welfare rights are often treated, by society at large, as less entitled to participate fully in

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<sup>7</sup> See MARSHALL, *supra* note \_\_, at 8.

<sup>8</sup> I defend this understanding in Samuel R. Bagenstos, *Employment Law and Social Equality*, 112 MICH. L. REV. \_\_\_\_ (forthcoming November 2013).

the life of the community than those who do not accept those rights.<sup>9</sup> And this denial of full social citizenship often reflects back on the law and leads program administrators and judges to limit the juridical rights of those who rely on social welfare.

Those who have advocated expansion of social rights have therefore been forced to fight a battle on two fronts: to seek that expansion while at the same time working to ensure that it does not undermine the equal citizenship status of those who receive expanded benefits. In Anglo-American law, the disability context has been a prime theater for this two-front battle. Since at least the time of the 1601 Elizabethan Poor Law, disability has been one of the most widely accepted bases for claiming social rights.<sup>10</sup> But acceptance of those disability-specific social rights has long come at a cost to citizenship. Sometimes the cost has been to *juridical* citizenship, as acceptance of welfare has triggered an explicit denial of civil and political rights. But even when legal limitations of civil and political rights were removed, acceptance of social welfare benefits deprived people with disabilities of full *social* citizenship—of the status as full and equal members of the community. Those who are excused from the ordinary obligations of citizenship, such as the obligation to work for a living, are often understood in the popular imagination to be disentitled to the ordinary rights of citizenship.

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<sup>9</sup> My argument in this regard is much in accord with Joel Handler's discussion of "workfare" and "active labor market" policies in the United States and Europe, which he contends deny full social citizenship to those who receive benefits but cannot work. See Joel F. Handler, *Social Citizenship and Workfare in the United States and Western Europe: From Status to Contract*, 13 J. EUR. SOCIAL POL'Y 229 (2003).

<sup>10</sup> This is one of the basic arguments of DEBORAH STONE, *THE DISABLED STATE* (1984).

When it organized through the 1970s, the American disability rights movement thus confronted a dilemma. The movement's basic goal was to ensure that people with disabilities were treated as full citizens—as full and equal members of the community. An expansion of what had previously been understood as social rights—both in terms of education, health, and welfare benefits and in terms of disability-specific accommodations by schools, employers, and other governmental and economic actors—seemed necessary to achieve that goal.<sup>11</sup> But that very expansion of social rights would likely serve to underscore public attitudes that people with disabilities were not entitled to be treated as full citizens. Disability rights activists sought to fight this dilemma by working to reframe what had previously been understood as social rights into civil rights and to reframe what had previously been understood as welfare dependence into the promotion of independence. Those reframing efforts were notably, though hardly fully, successful. The story of those efforts helps to illuminate the complex and fraught relationship between social rights and citizenship.

### **I. Disability as a Ticket to Social Rights, and Out of Citizenship**

Disability has long been central to the provision of social welfare. As Deborah Stone writes, “[t]he very notion of disability is fundamental to the architecture of the welfare state.”<sup>12</sup> For centuries, Anglo-American law has provided some form of social welfare benefits for at least some classes of people who could not work. The classes have changed over time (as has the form the

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<sup>11</sup> See SAMUEL R. BAGENSTOS, *LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT* 12-33 (2009).

<sup>12</sup> STONE, *supra* note \_\_, at 12.

benefits have taken), but disability has typically been an important criterion on which the law has relied to identify the inability to work.

Medieval English vagrancy laws, ultimately codified in the Elizabethan Poor Law of 1601, imposed significant restrictions on the giving and receipt of alms, but those laws made exceptions for individuals with various conditions that we would now call disability (such as leprosy, blindness, and mobility impairments).<sup>13</sup> The more modern Poor Law Amendment Act of 1834 required recipients of poor relief to live in workhouses. The conditions in the workhouses were undesirable, as an effort to discourage people from leaving the workforce to subsist on relief. But that law provided for better workhouse conditions, and sometimes a complete exemption from the requirement to live in the workhouse, for several classes of individuals whom we would now describe as having disabilities: “the sick,” “the insane,” “defectives,” and “the aged and infirm.”<sup>14</sup> The role of the disability category under these laws was apparent—to identify, more or less objectively, a class of people who should be exempt from the ordinary societal obligation to work for a living. As Marshall described it, the Poor Law “offered relief only to those who, through age or sickness, were incapable of continuing the battle, and to those other weaklings who gave up the struggle, admitted defeat, and cried for mercy.”<sup>15</sup>

As disability welfare entered American law, the disability category served the same purposes. The first federal disability welfare system in the United States was probably the Civil War pension program. That program defined disability—and thus eligibility for benefits—as, in essence, a medical “condition

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<sup>13</sup> See STONE, *supra* note \_\_, at 35-37.

<sup>14</sup> See STONE, *supra* note \_\_, at 38-51.

<sup>15</sup> MARSHALL, *supra* note \_\_, at 15.

that restricted the veteran's ability to obtain his subsistence by manual labor."<sup>16</sup> And Social Security Disability Insurance, enacted in 1956, similarly defines disability (at least as a formal matter) as a physical or mental impairment that renders an individual unable to engage in any "substantial gainful activity" in the national economy.<sup>17</sup>

One could, of course, identify the inability to work directly, by examining whether a person has knowledge, skills, and abilities that are valued by employers. Or one could identify the inability to work in a more process-oriented fashion, by considering what the person has done to find or keep a job. But our social welfare system often takes a third approach by looking for an identifiable disability as a trigger for determining whether an individual cannot work and thus deserves more generous benefits. Disability serves this function for two reasons: fault and fraud.<sup>18</sup> In a market system in which people (at least those without family money) are expected to work to make a living, providing subsistence benefits for those who are not working is inevitably threatening. If benefits are given to those who can work but choose not to, they will undermine the market system. A similar harm to the market system would occur if individuals can, by their own choices, render themselves unable to work. Architects of social welfare programs have therefore sought to limit coverage to those individuals who are not working due to no fault of their own—and who

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<sup>16</sup> Peter D. Blanck & Michael Millender, *Before Disability Civil Rights: Civil War Pensions and the Politics of Disability in America*, 52 ALA. L. REV. 1, 17 (2000); see also Theda Skocpol, *America's First Social Security System: The Expansion of Benefits for Civil War Veterans*, 108 POL. SCI. Q. 85 (1993).

<sup>17</sup> 42 U.S.C. § 423(d).

<sup>18</sup> See generally STONE, *supra* note \_\_\_\_.

can demonstrate that the condition that makes them unable to work is a genuine one.

The disability category is important not just in limiting relief but also in authorizing it—and ultimately bolstering the legitimacy of the market system. People of compassion would ask challenging questions about the system if it left people obviously destitute through no fault of their own. But people would ask at least as challenging questions about a system that allowed people who had the capacity to work obviously to live off of benefits financed by others.<sup>19</sup> And if it becomes too easy to obtain relief, and relief is too generous, the expectation that people work for a living may unravel. Those who design social welfare programs therefore need some mechanism to ensure that relief is not extended too broadly.

Disability as a trigger for relief has long been thought to solve this dilemma. People who cannot work because they have disabilities are understood to be faultless in not working. Similarly, disability has long been understood by many in the public to be an objective, biomedical category that can be used to distinguish those with “genuine” impairments from fakers.

Of course, matters are not so simple. There is a substantial question whether to attribute fault to those individuals who cannot work because of disabilities that stemmed in some respect from their own voluntary choices. One might think here about emphysema, liver cirrhosis, or quadriplegia that resulted from a drunk driving accident. These questions substantially complicate the issue of fault. And, far from being an objective, biomedical determination, the

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<sup>19</sup> See Amy L. Wax, *Rethinking Welfare Rights: Reciprocity Norms, Reactive Attitudes, and the Political Economy of Welfare Reform*, 63 L. & CONTEMP. PROBS. 257 (2000).



determination of what constitutes a disability necessarily implicates highly contested questions of value.<sup>20</sup>

These complications to the side, disability has long been understood as a key part of the solution to the problem of providing social welfare benefits in a market-oriented system. Because disability entitles people to social welfare benefits they would not otherwise have, it is often thought of as a privileged status in the law.<sup>21</sup> But as the British and American disability rights movements have argued, this seemingly privileged status is at best double-edged.<sup>22</sup> Because work is such an essential part of full membership in the community, social welfare benefits that exempt individuals from the obligation to work for a living will often be understood as excluding those individuals from the class of full citizens. By making disability a ticket out of the workforce, disability-based social welfare programs make disability a ticket out of full social citizenship. Marshall's discussion of the English Poor Laws aptly describes the social status of those who receive disability-based welfare: "The Poor Law treated the claims of the poor, not as an integral part of the rights of the citizen, but as an alternative to them—as claims which could be met only if the claimants ceased to be citizens in any true sense of the word."<sup>23</sup>

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<sup>20</sup> See Samuel R. Bagenstos, *Subordination, Stigma, and Disability*, 86 VA. L. REV. 397, 412-413 (2000); Matthew Diller, *Dissonant Disability Policies: The Tensions Between the Americans with Disabilities Act and Federal Disability Benefit Programs*, 76 TEX. L. REV. 1003, 1064 (1998); Lance Liebman, *The Definition of Disability in Social Security and Supplemental Security Income: Drawing the Bounds of Social Welfare Estates*, 89 HARV. L. REV. 833, 853 (1976).

<sup>21</sup> See STONE, *supra* note \_\_, at 28.

<sup>22</sup> See BAGENSTOS, *supra* note \_\_, at 23-25; see also STONE, *supra* note \_\_, at 173 ("While official policy elevate[s] the disabled as a class to a special, higher category of citizenship, private behavior and even official practice often betray contempt for the particular disabled individual.").

<sup>23</sup> MARSHALL, *supra* note \_\_, at 15.

At times, this denial of full citizenship has been drawn expressly in the law. Beginning with the 1834 Poor Law, British subjects who received poor relief were denied the franchise. The Medical Relief (Disqualification Removal) Act of 1885 gave the right to vote for Parliament to individuals receiving medical (in today's terms, disability-based) relief, but others receiving poor relief had to wait until 1818 to be enfranchised.<sup>24</sup> In the United States today, echoes of that earlier practice of disenfranchisement persist, particularly for individuals who receive benefits due to mental disabilities and for whom courts have appointed guardians.<sup>25</sup>

At times, the denial of full citizenship has been instantiated in the practices of government agencies. Caseworkers assessing initial or continued eligibility for welfare benefits—including disability welfare benefits—have overridden standard boundaries of privacy. They have directed individuals with disabilities to undergo particular medical treatments. They have often disregarded the choices and decisions of individuals with disabilities themselves. And they have justified these actions because the disability welfare recipients are living on the public dole.<sup>26</sup>

At times, the denial of full citizenship has resulted from pervasive social stigma. Whether or not reflected in formal law or the practices of government agencies, there is a broad public sense that people who rely on disability welfare are to be suspected of malingering and mooching. Many members of the public hold to the notion that disability is easily and often faked, and that it is often

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<sup>24</sup> See Eric Briggs, *The Myth of the Pauper Disqualification*, 13 SOC. POL'Y & ADMIN. 138, 138 (1979).

<sup>25</sup> See, e.g., *Missouri Protection & Advocacy Services, Inc. v. Carnahan*, 499 F.3d 803 (8th Cir. 2007).

<sup>26</sup> See BAGENSTOS, *supra* note \_\_\_, at 22.

used as an excuse to get out of the ordinary obligations of citizenship.<sup>27</sup> This set of public attitudes is as much about welfare as it is about disability. People who rely on welfare or relief have been subjected to stigma since at least the time of the English Poor Laws.<sup>28</sup> Disability as a trigger for relief might initially be thought to lessen the stigma—because people understand disability as objectively determinable and as indicating a lack of fault. But the reliance on disability as a trigger for relief may actually have the opposite effect. Associating disability with welfare leads the stigma attached to welfare recipients to reflect back on people with disabilities generally. This is a central reason why American disability rights activists urged a move away from welfare and public benefits as an approach to disability.<sup>29</sup>

However instantiated, social rights for individuals with disabilities often lead to a loss of social citizenship status for those same individuals. This is the basic dilemma of categorical social welfare programs in a market-oriented system. Because disability has so frequently served as a trigger for receipt of social welfare benefits—and people with disabilities do in fact rely on those benefits—that dilemma has served as a persistent obstacle to full citizenship for people with disabilities. The remainder of this essay discusses two possible approaches for managing that dilemma.

## **II. Universal Contributory Social Insurance as Affirming Citizenship?**

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<sup>27</sup> See Cary LaChen, *Achy Breaky Pelvis, Lumber Lung and Juggler's Despair: The Portrayal of the Americans with Disabilities Act on Television and Radio*, 21 BERKELEY J. EMP. & LAB. L. 223 (2000).

<sup>28</sup> See MARSHALL, *supra* note \_\_, at 15 (“The stigma which clung to poor relief expressed the deep feelings of a people who understood that those who accepted relief must cross the road that separated the community of citizens from the outcast company of the destitute.”).

<sup>29</sup> I press this point extensively in Samuel R. Bagenstos, *The Americans with Disabilities Act as Welfare Reform*, 44 WM. & MARY L. REV. 921 (2003).

In his classic work on citizenship and social rights, T.H. Marshall contended, consistent with the argument I have just made, that poor-law-type relief deprives its recipients of social citizenship. But, he argued, universal contributory social insurance provides a solution to this problem. When everyone has the opportunity to pay into a social insurance program, and benefits are paid to broad subsets of those who contributed—subsets in which most people can expect to become members at one point or another—social rights no longer serve a divisive function in society. Instead of dividing the world into “makers” and “takers,” to use the language that is popular in American politics today, Marshall contended that universal, contributory social insurance binds society together and affirms the social citizenship of those who receive it.<sup>30</sup> Many of the architects of the American social welfare state held to a similar view. They believed that “programs for the poor are poor programs.”<sup>31</sup> When poor people are singled out for particular benefits, they argued, the beneficiaries become stigmatized and the benefits become politically vulnerable.<sup>32</sup> They thus argued that, where possible, welfare programs should be framed as universal, contributory social insurance schemes. Many adherents to this point of view have believed, however, that the less visible rules of

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<sup>30</sup> See MARSHALL, *supra* note \_\_, at 33 (“Equalisation is not so much between classes as between individuals within a population which is now treated for this purpose as though it were one class. Equality of status is more important than equality of income.”).

<sup>31</sup> See MARTHA DERTHICK, *POLICYMAKING FOR SOCIAL SECURITY* 217 (1979); see also JACOB S. HACKER, *THE DIVIDED WELFARE STATE: THE BATTLE OVER PUBLIC AND PRIVATE SOCIAL BENEFITS IN THE UNITED STATES* 40 (2002) (calling this belief “ubiquitous” among observers and policymakers).

<sup>32</sup> See William H. Simon, *Rights and Redistribution in the Welfare System*, 38 *STAN. L. REV.* 1431, 1441 (1986).

contributory programs can be crafted to achieve meaningful redistribution without undermining this goal.<sup>33</sup>

Driven by this view, many social welfare programs for people with disabilities in the United States in have taken the form of contributory social insurance programs. One such program is Social Security Old Age Insurance, enacted in 1935. That program is not explicitly targeted to disability or poverty at all. Rather, it provides retirement benefits to people who have worked and paid into the system for a sufficient period of time. Yet it is designed in significant respect to provide a living for those individuals who can no longer be expected to work due to the disabilities attendant to aging. In 1956, Congress expanded Social Security to cover disability directly through SSDI—even for those who had not yet reached the retirement age. In so doing, Congress merely took the next logical step from its original Old Age Insurance program. We set the retirement age where we do in part because we believe that many people will be unable to continue working at that point due to the physical and mental conditions that they have acquired through the years. If an individual who has contributed payroll taxes into the system acquires those conditions sooner than the average person and as a result is unable to work, the basic principles of the system suggest that she should be entitled to “early retirement” benefits.<sup>34</sup>

It is the universal, contributory nature of Social Security Disability Insurance that is understood to affirm social citizenship. Because everybody has the chance to pay into the system, that system sends a message that disability

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<sup>33</sup> See THEDA SKOCPOL, *SOCIAL POLICY IN THE UNITED STATES: FUTURE POSSIBILITIES IN HISTORICAL PERSPECTIVE* 259-272 (1995).

<sup>34</sup> See EDWARD D. BERKOWITZ, *DISABLED POLICY: AMERICA’S PROGRAMS FOR THE HANDICAPPED* 41-78 (1987).

insurance is not a special privilege for a lucky few, but a basic entitlement of citizenship. And because people cannot receive SSDI unless they have paid into the system, the benefits are more readily understood as insurance that people have paid for, rather than as welfare or a handout. The universal, contributory structure of SSDI thus frames the system as a solidaristic response in which each of us pays for protection against the risks of life that we all face.

But matters are not so simple. Even the universalist, contributory social insurance form of SSDI threatens in practice to undermine the social citizenship status of people with disabilities. In part, this is because the disability category continues to serve, under that program, as a ticket out of the workforce. Because work remains a key means of proving oneself a full member of society, anyone who is excused from working—even if he or she previously did work for a living—risks substantial stigma.<sup>35</sup>

To some extent, the degree of stigma will depend on the cause of the disability. Those who experience obvious physical disabilities as a result of military service or other particularly dangerous and important work may experience social approval and gratification. But even those individuals will likely experience stigma if they remain out of the workforce for an extended period of time. And those who have mental illness or less obvious physical disabilities are often stigmatized—even if they acquired their conditions through military service or other dangerous and important work. The fears of fakery and fault compound the stigma attached to work disability and lead legislators, judges, and program administrators to narrowly constrict and vigorously guard the boundaries of the class that is eligible for relief.

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<sup>35</sup> See generally Bagenstos, *Employment Law*, *supra* note \_\_.

Recent media controversies regarding SSDI highlight this problem. Even though the program is an essentially universal system of contributory social insurance, it has still been the subject of harsh, and to a large extent unfair, media criticism. That criticism has asserted that SSDI permits undeserving people to freeload off of the public dole. Criticism in the media has walked hand in hand with proposals to cut SSDI benefits and tighten eligibility standards.

Consider a recent NPR story that drew wide attention.<sup>36</sup> The piece spoke in alarmist tones about the “skyrocket[ing]” number of “Americans who are on Disability.”<sup>37</sup> It also expressed great skepticism regarding whether the “disability” category adequately screens in those who have clearly defined conditions that prevent them from working—and adequately screens out those who can work. Thus, the piece discussed the “squish[iness] of the disability category.”<sup>38</sup> It focused on conditions like high blood pressure, back pain, and mental illness, which trigger receipt of SSDI for some people but do not limit others’ ability to work.<sup>39</sup> The piece also highlighted the way that rates of applications for disability seem to rise and fall with the strength of the macro-economy, even though there is little reason to think that changes in economic conditions should have such a great effect on working-age individuals’ medical conditions.<sup>40</sup>

The NPR story triggered a great deal of discussion and concern throughout the news media over exploding SSDI rolls. That is not particularly

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<sup>36</sup> See Chana Joffe-Walt, *Unfit for Work: The Startling Rise of Disability in America*, available at <http://apps.npr.org/unfit-for-work>.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

surprising. In times in which many believe that we face a fiscal crisis, the piece drew attention to what it presented as a major contributor to that crisis. Yet the story was unfair in many respects. It overstated the degree to which SSDI had merely substituted for the AFDC program that Congress eliminated in 1996, and it suggested a far greater degree of fraud in claiming or determining disability than the evidence appears to support.<sup>41</sup> What is more interesting for my purposes, though, is not the fairness of the NPR story's portrayal, but the way the entire controversy demonstrates that the universal, contributory structure of SSDI does not insulate that program from being attacked in precisely the same way that a targeted welfare program is attacked. In earlier budget-cut fights, SSDI was able to escape the cuts that welfare programs experienced. (As I'll discuss below, though, it is an open question whether this outcome resulted from the program's universal, contributory structure or, instead, the charitable feelings that the public harbors towards people with disabilities.) The reaction to the recent NPR story—one echoed in debates among policymakers and politicians, as well as across the media—shows the limits of universalism as a strategy to protect the social citizenship status of recipients of disability benefits. Even if everyone contributes to the system at some point, those who stop contributing and start drawing benefits will trigger suspicion regarding whether they have a sufficiently good excuse for leaving the workforce. That disability is not a purely objective, medical status, but instead incorporates value-laden questions

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<sup>41</sup> See Dean Baker, *Planet Money Misses the Boat on Social Security Disability*, available at <http://www.cepr.net/index.php/blogs/beat-the-press/planet-money-misses-the-boat-on-social-security-disability>; Harold Pollack, *Misleading Trends with Benefits*, available at <http://tcf.org/blog/detail/misleading-trends-with-benefits>.



involving how to deal with people who have limited opportunities in the labor market only heightens the stigma and suspicion.

The award of cash benefits to individuals who are deemed unable to work—even those who have contributed to the system in the past—also leads to paternalism. Thus, the recipients of SSDI benefits have sometimes been subject to a legal presumption of incompetence. Courts often find individuals who receive SSDI unqualified for workplace accommodations under the ADA.<sup>42</sup> And benefits are often paid not to the individual with a disability directly but to a “representative payee,” who has substantial practical control over the individual’s financial choices.<sup>43</sup> And where the public is paying for the living expenses of individuals with disabilities, program administrators feel empowered and entitled to control the day-to-day lives of those individuals. Jacobus tenBroek and Floyd Matson put the point starkly: “the recipient is told *what* he wants as well as *how much* he is wanting.”<sup>44</sup>

Moreover, universal, contributory social insurance cannot provide all people with disabilities everything they need to become full participants in society. For one thing, many people acquire disabilities at birth or during childhood—well before they have an opportunity to contribute to a social insurance system. The United States has responded by creating separate means-tested welfare programs for people who acquire disabilities as children. The Supplemental Security Income program is the most prominent in this regard.

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<sup>42</sup> For a discussion of the case law, see Bagenstos, *ADA as Welfare Reform*, *supra* note \_\_, at 936-944.

<sup>43</sup> See Reid K. Weisbord, *Social Security Representative Payee Misuse*, 117 PENN ST. L. REV. 1257 (2013).

<sup>44</sup> Jacobus tenBroek & Floyd W. Matson, *The Disabled and the Law of Welfare*, 54 CAL. L. REV. 809, 831 (1966).

Perhaps not surprisingly, SSI coverage has been exceptionally politically controversial. Rather than being treated as a form of universal social insurance, SSI is often treated in public discourse—even more than is SSDI—as a form of welfare, whose recipients should be suspected of mooching off of the system. The recent media discussion of Social Security disability included exceptionally harsh criticism of SSI. Both the NPR story and a roughly contemporaneous piece from liberal New York Times columnist Nicholas Kristof accused parents of making their children do worse in school so they could be designated as having disabilities and make their families eligible to receive benefits checks.<sup>45</sup>

But there is a more fundamental problem with relying on universal, contributory social insurance programs to affirm the citizenship status of people with disabilities. Benefits programs such as SSDI and SSI are ultimately exceptionally limited tools. They can provide for basic human needs, but only to a limited extent. And they do not assist people with disabilities to become full contributors to and participants in the broader society. To do so requires more than cash benefits, and it requires benefits that are obviously targeted at people with disabilities. For these reasons, disability rights activists—in the United States and in the UK—have harshly criticized a response to disability that relies on providing cash benefits to those who are deemed unable to work. They argue that a reliance on such disability welfare programs merely buys off a potentially troublesome group and therefore relieves pressure to make more fundamental changes to society to achieve integration and equality.<sup>46</sup> In the terms I am using in this essay, disability rights activists argued that cash benefits for disability—

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<sup>45</sup> See Joffe-Walt, *supra* note \_\_; Nicholas D. Kristof, *Profiting from a Child's Illiteracy*, N.Y. TIMES, Dec. 7, 2012.

<sup>46</sup> See BAGENSTOS, *supra* note \_\_, at 23-25.

whether through contributory social insurance programs or not—were an obstacle to full social citizenship. Whether or not one goes so far, it should be clear that contributory social insurance programs have not fully integrated people with disabilities into the status of full social citizens.

### **III. Pursuing Social Rights That Advance Social Citizenship**

But disability rights advocates cannot abandon disability-based benefits. Because of workplace discrimination, inaccessible facilities, and failure to provide reasonable accommodations—if not because of the disabilities themselves—many people with disabilities are unable to find work on the competitive market. Cash benefits accordingly will remain necessary for the foreseeable future. And, for many people with disabilities, to enter the workforce will itself require substantial public investment: in health insurance, to remove the most significant obstacle to employment for people with disabilities; in personal assistance services, to assist people with disabilities to get out of bed and to work; in assistive technology, to enable people with disabilities to perform work-related tasks; and in accessible transportation, to enable people with disabilities to get to the workplace in the first place.<sup>47</sup> All of these public investments are well understood as social rights.

Indeed, even the requirement of workplace accommodation might well be understood as a form of social rights. The line between civil and social rights, as I noted before, has always been a contested and changing one. Disability rights activists have long argued that the requirement of workplace accommodation is best understood as a civil right that represents nothing more than the application

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<sup>47</sup> See BAGENSTOS, *supra* note \_\_, at 128-129.

of nondiscrimination principles to disabilities.<sup>48</sup> And, indeed, there are substantial congruences between nondiscrimination requirements like those regarding race and sex and accommodation requirements for disability. For one thing, as many disability rights activists argue, employers accommodate valued (nondisabled) employees all the time. They provide chairs for employees to sit in, desks that fit the typically-sized nondisabled employee, and so forth. Employers also often provide many individualized accommodations for particular nondisabled employees. A workplace that took people with disabilities seriously as potential workers would extend similar accommodations to the disability context. It would not, for example, have an entrance that can be traversed only by stairs. And it would include desks and equipment to accommodate its employees with disabilities, just as it includes desks and equipment that accommodate its nondisabled employees. Although this might entail some additional costs, even basic antidiscrimination laws require employers to assume additional costs in the interest of promoting an integrated workplace.<sup>49</sup>

Nonetheless, requirements of workplace accommodation often feel quite different than more traditional antidiscrimination requirements. In many of their applications, accommodation requirements demand that employers treat individuals with disabilities differently than they do other employees. Some of the exclusion of people with disabilities from the workplace can be cured by

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<sup>48</sup> For extensive efforts to establish the substantive point, see Samuel R. Bagenstos, *"Rational Discrimination," Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825 (2003); Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 579 (2004).

<sup>49</sup> I explore these points in some detail in Bagenstos, *"Rational Discrimination," supra* note \_\_.

universal design. A workplace with a ramp and no stairs at the front treats people with disabilities identically to people without disabilities and is accessible to all, for example. But some exclusions cannot be overcome without individualized accommodation. For example, it may be impossible to design a workplace so that all file cabinets are within reach of a wheelchair user. In such circumstances, a person who uses a wheelchair who applies for a secretarial job might demand and be granted an exemption from the requirement that the incumbent engage in filing (at least if filing is not too central a task for the particular job). The filing task will then be reallocated to another worker, who may resent what she understands as the special treatment that the wheelchair-using worker receives.

The dilemma remains significant. In order to participate fully in community life—including, notably, the workforce—many people with disabilities need to rely on government interventions. Those interventions include health care provision, personal assistance services, accessible technology and transportation, and workplace nondiscrimination and accommodation requirements. But those very government interventions can readily be understood by the public as “special rights,” which are highly vulnerable in the political process, are narrowly and grudgingly administered, and ultimately undermine the goal of achieving full social citizenship for people with disabilities.<sup>50</sup>

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<sup>50</sup> On the political difficulties confronted by those who seek rights characterized as “special,” see Karen Engle, *What’s So Special About Special Rights?*, 75 *DENV. U. L. REV.* 1265 (1998); Peter J. Rubin, *Equal Rights, Special Rights, and the Nature of Antidiscrimination Law*, 97 *MICH. L. REV.* 564 (1998).

The disability rights movement has sought to avoid this dilemma through a clever reframing strategy—a strategy that has had real, though limited, success. That strategy was to invoke and redefine the concept of independence. Instead of speaking of *physical* independence, disability rights movement advocates urged that what was more important was *decisional* independence—“the ability of people with disabilities to make their own choices concerning how to live their lives, what services to receive, and how and where to receive them.”<sup>51</sup>

“[A]ssistance in personal hygiene, transportation, or other activities,” far from compromising decisional independence, actually promotes it, “so long as those who provide the assistance are subject to the control and direction of the individuals with disabilities who use it.”<sup>52</sup> This notion of independence, as an organizing principle or frame for the disability rights movement’s arguments, played a key role in developing support for the movement through the 1980s. Civil rights policy was becoming increasingly controversial in American politics at that time, with great suspicion regarding the extension of new civil rights. Deregulatory positions were ascendant as well, and so were efforts to cut the federal budget. In this political context, the independence frame gave disability rights activists a tool with which to argue for additional rights and services without suggesting that they were merely extending the already controversial civil rights project still further. Whatever costs attended to disability accommodations, movement activists argued, would be more than offset by the financial benefit to society of avoiding the need for disability welfare—not to mention the moral benefit to individuals with disabilities of enabling them to

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<sup>51</sup> BAGENSTOS, *supra* note \_\_, at 25.

<sup>52</sup> *Id.*

make their own way in the world and avoid dependence. In that time of mythical welfare queens, the utility of such an argumentative frame was readily apparent.

Independent living has offered a frame to justify a broad array of social rights provision—including in the areas of antidiscrimination/ accommodation, health care, personal assistance service, transportation, and others. But much of its success has depended on two baseline premises. One premise is that the United States will, for charitable or humanitarian reasons if nothing else, provide costly benefits programs to those people with disabilities who cannot make their own living. The other premise is that the interventions that serve independence will cost less than the benefits payments that they avert. Only if these two premises hold will the fiscal arguments for government intervention for people with disabilities have sufficient traction. And it is the fiscal arguments that have been the key to the political success of the independence frame. They played a crucial role in securing the enactment of the ADA.<sup>53</sup> They also have helped to promote deinstitutionalization of individuals with various disabilities *and* in recent years the creation of robust infrastructures of community-based services to enable those individuals to participate more fully in civic life.<sup>54</sup>

But the two key underlying premises highlight the limitations and threat of the fiscal arguments that underlie the success of the disability rights movement's independence frame. The first premise—that the United States will continue to provide costly welfare benefits for people with disabilities who cannot make their own living has largely proven true up to this point. But to the

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<sup>53</sup> See Bagenstos, *ADA as Welfare Reform*, *supra* note \_\_\_\_.

<sup>54</sup> See Samuel R. Bagenstos, *The Past and Future of Deinstitutionalization Litigation*, 34 CARDOZO L. REV. 1 (2012).

extent that it is true, that is because many members of the public continue to have a view of people with disabilities as the proper recipients of charity—as the paradigm of the deserving rather than the undeserving poor. It was precisely that public attitude that the disability rights movement challenged as itself denying equal citizenship status to people with disabilities. But the success of the independence frame, paradoxically, depends on people continuing to hold that attitude. As I suggested earlier, when disability advocates defeated efforts to roll back Social Security disability programs in the 1980s they were successful in significant part because political actors and the public were disposed to offer charity to individuals with disabilities.<sup>55</sup>

Moreover, there are good reasons to think this first premise will prove increasingly shaky. SSDI rolls continue to expand, largely because the 2007-2009 recession drove a massive increase in unemployment, and the post-2009 recovery has done much more for those at the top of the income distribution than for those at the bottom. Workforce participation for individuals with disabilities dropped far more during the recession than for nondisabled individuals. Since then, workforce participation has recovered far less for those with disabilities than for those without them.<sup>56</sup> As the disability rolls continue to expand, and fiscal pressure—particularly surrounding “entitlement” programs like Social Security—create increased pressures for retrenchment, programs of largesse for people with disabilities are likely to be far less secure. And if Congress cuts those programs, the workplace accommodations and other interventions that are

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<sup>55</sup> See BAGENSTOS, *supra* note \_\_, at 144.

<sup>56</sup> For recent statistics, see SAMUEL R. BAGENSTOS, *DISABILITY RIGHTS LAW: CASES AND MATERIALS* 170-171 (2d ed. 2013).



sold as avoiding the need for disability benefits will look more expensive, and less attractive, by comparison.

Moreover, the second premise—that the interventions necessary to enable people with disabilities to participate fully in the community cost less than benefits programs—is only true up to a point. When that point is reached, the independence frame will no longer succeed in promoting social-rights interventions for people with disabilities. And, unfortunately, that point is very much in sight in key areas of disability policy. As deep-rooted structural barriers like the organization of our health care system, the lack of accessible transit and assistive technology, and the failure to provide personal assistance services become ever more important, the cost of integrating individuals with disabilities into the workplace will rise. As it does so, the fiscal arguments for accommodation and integration will lose their political force, and support for social rights for people with disabilities can be expected to slacken.

### **Conclusion**

The disability context highlights an important tension between social rights and citizenship. Although many commentators speak of social rights to economic welfare and a decent standard of living as an important way of affirming citizenship, there is a significant degree to which an individual's acceptance of those rights undermines society's perception of that individual as a full and equal citizen. The result is to feed social stigma and, at times, limit other legal rights of citizenship that the individual would otherwise hold. Universalism has been one strategy policymakers have employed to promote social rights while avoiding undermining social citizenship. But that strategy has had mixed results in the disability context. The American disability rights

movement has responded by affirming the role of social rights in promoting independence, providing people with disabilities the tools to make their own living, and avoiding reliance on welfare programs. Disability rights activists have obtained great success by framing their claims as ones for independence and explicitly disavowing claims for welfare. But given the cost of the interventions necessary to achieve independence for many people with disabilities who are currently out of the workforce, and broader political trends favoring fiscal retrenchment, it is unclear whether this strategy will continue to succeed.