

UNIVERSITY OF CALIFORNIA
BERKELEY JOURNAL OF EMPLOYMENT AND LABOR LAW
Backlash, the Political Economy, and Structural Exclusion
copyright by Marta Russell December 28, 1998

citation: Marta Russell, *Backlash, the Political Economy, and Structural Exclusion*, 21 Berkeley J. Emp. & Lab. L.Feb. 2000.

Abstract

Just as the Civil Rights Act of 1964 produced a backlash by those who feared that minorities and women would take jobs away from them, the ADA has been subject to recent backlash by the public, our elected officials, and the courts. I argue that the backlash to the ADA has been prompted by capitalist opposition. This opposition has not only stifled any potential benefits that might have resulted from ADA enforcement, it has promoted the backlash among groups of workers who have become fearful that their own interests are in jeopardy as a result of the Act's enforcement powers. Liberal policy explanations, whether in its progressive or conservative form, fail to adequately create the conditions necessary for economic and social justice. In contrast, radical theory, which analyzes the socio-historic process of the political economy under capitalism, asserts that capitalism cannot be directed (reformed) towards a social-ethical end (which to be ethical must be stable and redistributive/collective). To succeed in reforming disability discrimination, the economic system itself must undergo serious reform. As will be explored here, the economic system is a crucial contributing factor to a backlash against civil rights laws (the ADA in particular), the poor enforcement of those laws, and the lack of economic advancement of disabled people. Despite an expanding U.S. economy the neoliberal age has brought rising inequality, a decline in workers' standard of living, greater job insecurity and growing economic anxiety. Income and wealth disparities are at their highest levels since the Great Depression. Poverty and hardship remain a persistent blight on the American landscape. This paper details how the structurally flawed political economy, sustained by a self-serving decision-making class, perpetuates poverty, inequality, underemployment, and unemployment (systematically compulsory). It demonstrates that this flawed economy which does not provide for the material needs of all, in turn, causes divisions amongst groups of workers locked in intense competition over the scarcity of decent paying jobs, health care, and shrinking benefits. It aims to delineate why a different approach is vital to remedying the predicament.

Introduction

The Americans with Disabilities Act (ADA)¹ is both a civil rights bill passed by Congress with the intent of ending employer discrimination and an economics bill, intended to increase the relative wages and employment of disabled persons by "leveling the playing field."² However, just as the Civil Rights Act of 1964 produced a backlash by those who feared that minorities and women would take jobs away from them, the ADA has been subject to recent backlash by the public, our elected officials, and the courts.

The most prominent hostility towards the ADA has come from business, though this may not technically be a "backlash" given that business largely opposed the Act from the start. For instance, the National Association of Manufacturers, the Chamber of Commerce, the American Banking Association, and the National Federation of Independent Businesses all publically voiced opposition to the ADA.³ Ongoing resistance from business interests is nonetheless significant in that it exposes the economic nature of opposition to enforcement of the Act. The year the ADA was signed, the Cato Institute, a Libertarian think tank, called on President George Bush "to ask Congress to reconsider" the ADA since from the standpoint of free enterprise, it represented a re-regulation of the economy that was harmful to business.⁴ Paul Craig Roberts, a supply-side economist at the Center for Strategic and International Studies in Washington, warned on the day the Act was signed that "[the ADA] will add enormous costs to businesses that will cut into their profits."⁵ Rick Kahler opined in a piece entitled "ADA Regulatory Black Hole" that "the ADA make[s] getting out of business look more profitable all the time",⁶ while Trevor Armbristor wrote that the ADA "has produced spectacular injustice and irrationality."⁷ In 1995, the director of regulatory studies at the Cato Institute wrote "If Congress is serious about lifting the regulatory burden from the economy, it must consider major changes in, if not outright repeal of, the ADA. And if Congress is to undo the damage already done by the act, it should consider paying reparations to cover the costs that individuals, private establishments, and enterprises have suffered under the ADA's provisions."⁸

This paper explores the backlash and hostility to the ADA by examining the relationship between politics, policy, and economics—particularly with regard to the

¹ 42 U.S.C. §12101-12213 (1994).

² "[T]he Nation's proper goals regarding individuals with disabilities are to assure . . . economic self-sufficiency[.] Discrimination. . . costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity." 42 U.S.C. §12101(a)(8)-(9) (1994).

³ See Nursing Homes, Others Want Exemptions from ADA Access, *Disability Rag*, July-Aug. 1991, at 8; Disability Issues could become political footballs, *Rep. Disability Programs*, June 22, 1995, at 104; It Could Happen, *Disability Rag*, Jan.-Feb. 1991, at 17, 18. For a fuller discussion of the ADA and business, see Marta Russell, *Beyond Ramps: Disability at the End of the Social Contract* 109-43 (1998).

⁴ See Read 'Em and Weep, *Disability Rag*, July-Aug. 1992, at 28.

⁵ Robert Shogun, Halt Bush's Tilt to Left, *Conservatives Tell GOP*, *L.A. Times*, July 14, 1990, at A26.

⁶ Rick Kahler, ADA Regulations Black Hole, *Rapid City J.*, Apr. 2, 1995, at C10. Kahler later published a retraction to this piece.

⁷ Trevor Armbrister, A Good Law Gone Bad, *Reader's Digest*, May 1998, at 145,155.

⁸ Edward L. Hudgins, Handicapping Freedom: The Americans with Disabilities Act 18 Regulation Magazine, *The Cato Review of Business and Government* Vol 2 (1995).

interests of business. I argue that the backlash to the ADA has been prompted by capitalist opposition. This opposition has not only stifled any potential benefits that might have resulted from ADA enforcement, it has promoted the backlash among groups of workers who have become fearful that their own interests are in jeopardy as a result of the Act's employment directives.

In making this argument, I claim that liberal policy explanations, whether in a progressive or conservative form, fail to adequately create the conditions necessary for economic and social justice. In contrast, radical theory, which analyzes the socio-historic process of the political economy under capitalism, asserts that capitalism cannot be directed (reformed) towards a social-ethical end (which to be ethical must be stable and redistributive/collective).⁹ To succeed in reforming disability discrimination, the economic system itself must undergo serious change. As will be explored here, the economic system is a crucial contributing factor to a backlash against civil rights laws (the ADA in particular), the poor enforcement of those laws, and the lack of economic advancement of disabled people. Despite an expanding U.S. economy the neoliberal age has brought rising inequality, a decline in workers' standard of living, greater job insecurity and growing economic anxiety. Income and wealth disparities are at their highest levels since the Great Depression. Poverty and hardship remain a persistent blight on the American landscape. This paper will detail how the structurally flawed political economy, sustained by a self-serving decision-making class, perpetuates poverty, inequality, underemployment, and systematically compulsory unemployment. It will demonstrate that this flawed economy which does not provide for the material needs of all, in turn, causes divisions amongst groups of workers locked in intense competition over the scarcity of decent paying jobs, health care, and shrinking benefits. And lastly it aims to delineate why a different approach is vital to remedying the predicament.

Equal Opportunity Ideology and Persistent Wage and Employment Gaps between Groups of Workers

In the United States civil rights laws have been enacted to surmount obstacles faced by the less powerful and minorities - women, people of color, disabled people and others. Historically such groups have experienced vast differentials in pay, income, and employment opportunities.¹⁰ In the United States, 17 million working-age people are identified as disabled.¹¹ Since there are expectations that the ADA will foster economic parity for disabled workers, it is essential to examine whether more than thirty years of civil rights has been able to bring about the expected wage and income equality and economic parity for minorities and women.

⁹ See Howard Botwinick, *Persistent Inequalities: Wage Disparity Under Capitalist Competition* (1993). See generally, Michael Perelman, *The Natural Instability of Markets: Expectations, Increasing Returns, and the Collapse of Capitalism* (1999); Paul Baran & Paul M. Sweezy, *Monopoly Capital: An Essay on the American Economic And Social Order* (1966).

¹⁰ See 42 U.S.C. §12101(a) (1994) (delineating, in introducing the purpose of the Americans with Disabilities Act, Congressional findings regarding the historical isolation and segregation of peoples with disabilities).

¹¹ Louis Harris & Assoc., *National Organization on Disability / 1998 Harris Survey of Americans with Disabilities* (1998) (commissioned for the National Organization on Disability) [hereinafter NOD / 1998 Harris Survey].

Women, minorities, and disabled persons have experienced both employment and wage discrimination resulting in their confinement to the bottom of the socio/economic pyramid. Discrimination occurs when two groups of workers with equal average productivity earn different average wages¹² or have different levels of opportunity for employment. Poverty is disproportionate amongst the 54 million Americans who have some level of disability. Census Bureau data show the poverty rate for people with no disability to be 13.5 percent compared to a poverty rate of 20.2 percent for those with disabilities.¹³ The 1998 National Organization on Disability (NOD)/Louis Harris Survey, found that fully a third (34 percent) of adults with disabilities live in a household with an annual income of less than \$15,000 compared to one in eight (12 percent) of those without disabilities - a 22 point gap.¹⁴ Furthermore, the gap between disabled and nondisabled persons living in very low income households has remained virtually constant since 1986 (four years prior to passage of the ADA).¹⁵

But the NOD/Harris Survey annual income cutoff at \$15,000 doesn't paint a complete picture of the depth of poverty some disabled persons endure. For example, since \$720 is the average per month benefit that a disabled worker received in 1998 from Social Security Disability Insurance (SSDI) and \$480 is the average federal income for the needs-based Supplemental Security Income (SSI), the real income of over 10 million disabled persons¹⁶ on these programs is between \$5,000 and \$10,000 - far below the \$15,000 mark.

Most analysts attribute these gaps largely to discrimination and seek to provide a remedy based on "equal opportunity", or equal access to employment and pay. The Civil Rights Act of 1964,¹⁷ affirmative action, the Equal Pay Act of 1963,¹⁸ and the

¹² The wage gap is a statistical indicator often used as an index of the status of women's earnings relative to men's. It is also used to compare the earnings of people of color to those of white men. Wage gap statistics can be found in U.S. Bureau of the Census' study, Money Income in the United States: 1997, (last modified Oct. 28, 1999) <<http://www.census.gov/hhes/www/income.html>> or from Census Bureau Current Population Reports, Series P-60, U.S. Commerce Department.

¹³ Special tabulation of data from the 1994 and 1995 Current Population Survey has been provided by John M. McNeil. Telephone interview with John M. McNeil, U.S. Census Bureau (Apr. 29, 1999).

¹⁴ NOD/1998 Harris Survey, *supra* note 11.

¹⁵ Census data confirms that there has been no improvement in the economic well being of disabled persons. In 1989, for instance, 28.9 percent of working age adults with disabilities lived in poverty; in 1994, the figure climbed slightly to 30.0 percent. H. Stephen Kaye, *Is the Status of People with Disabilities Improving*, Disability Statistics Abstract (Disability Statistics Center, San Francisco, Cal.), May 1998, at 2.

¹⁶ 6,212,000 persons receive Supplemental Security Income and 4 million receive Social Security Disability Insurance. Social Security Administration Basic Facts About Social Security (visited February, 8, 2000) <http://www.ssa.gov/pubs/10080.html>; 1998 SSI Annual Report, available through the Social Security Administration's [SSA] website by searching for the "1998 Annual Report" at <<http://www.ssa.gov/search/index.htm>> (visited Feb. 8, 2000).

¹⁷ Title VII of the Civil Rights Act of 1964 prohibits wage and employment discrimination on the basis of race, color, sex, religion, or national origin. 42 U.S.C. §2000e-2 (1994).

Americans with Disabilities Act¹⁹ were enacted to provide a legal means to eradicate sex, race, and disability discrimination in wage-setting and employment procurement systems.

Yet what does the data show at the end of the century? The U.S. Census Bureau's Current Population Survey (March 1998) shows that the income gap was most recently altered for the black population between 1993 and 1997, when black median family incomes rose from 57 to 61 percent of white levels and the bottom 80 percent showed wage gains relative to the rest of the population.²⁰ But the gap widened for Hispanic workers who saw their median family incomes fall from 69 to 60 percent of white levels between 1979 and 1997.²¹

Studies show that there were periods of substantial progress after passage of the Civil Rights Act of 1964 and adjunct affirmative action programs leading to declining racial discrimination between 1965 and 1975.²² But the movement toward racial equality stagnated and eventually weakened after the mid-1970s.²³ From 1972 (earliest year available) to 1999 the unemployment rate for blacks has fluctuated between 7.1 percent and levels as high as 21.7 percent of the population.²⁴ During the same period, white

¹⁸ Pay equity demands that the criteria used by employers to set wages must be sex and race neutral. The Equal Pay Act of 1963 prohibits unequal pay for equal or "substantially equal" work performed by men and women. 29 U.S.C.A. §206(d) (1994). Title VII of the Civil Rights Act of 1964 prohibits wage and employment discrimination on the basis of race, color, sex, religion, national origin. 42 U.S.C. §2000e-2 (1994). In 1981, the Supreme Court made it clear that Title VII is broader than the Equal Pay Act and prohibits wage discrimination even when jobs are not identical. See *County of Washington v. Gunther*, 452 U.S. 161, 177-81 (1981).

¹⁹ Title I of the Americans with Disabilities Act prohibits disability discrimination in employment. 42 U.S.C. §12101-117 (1994).

²⁰ U.S. Census Bureau, Current Population Survey (March 1998) (visited Feb. 8, 1999) <<http://www.census.gov/hhes/www/income98.html>> [hereinafter U.S.C.B., Current Population Survey]; Historical Income Tables -Families, Table F-5, Race and Hispanic Origin of Householder - - Families by Mean and Median Income, 1947-1998 (last modified Nov. 10, 1999) <<http://www.census.gov/hhes/income/histinc/f05.html>> [hereinafter U.S.C.B., Historical Income Tables]. For a discussion of empirical evidence on earnings gaps and discrimination for Hispanics, see Gregory DeFreitas, *Inequality at Work: Hispanics in the U.S. Labor Force* (1991).

²¹ U.S.S.B., Current Population Survey, *supra* note 20; U.S.C.B., Historical Income Tables, *supra* note 20.

²² For a time-series discussion of black/white earnings ratios, see John Donohue & James Heckman, *Continuous Versus Episodic Change: The Impact of Civil Rights Policy on the Economic Status of Blacks*, 29 *J. Econ. Literature* 1603 (1991); Peter Gottschalk, *Inequality, Income Growth, and Mobility: The Basic Facts*, 11 *J. of Econ. Persp.* 21, 28-29 (Spring 1997). Gottschalk demonstrates that the earnings gap between blacks and non-blacks narrowed between the early 1960s and 1975, but progress ceased after this point.

²³ William A. Darity Jr. & Patrick L. Mason, *Evidence on Discrimination in Employment: Codes of Color, Codes of Gender*, 12 *J. of Econ. Persp.* 63, 76 (Spring 1998).

²⁴ See U.S. Bureau of Labor Statistics, *Labor Force Statistics from the Current Population Survey*, (last modified Feb. 1, 1999) <<http://www.bls.gov/webapps/legacy/cpsatab.2.htm>> [hereinafter U.S.B.L.S., Labor

unemployment ranged from a high of 8.1 percent to a low of 3.3 percent, while Hispanic unemployment ranged from 16.9 percent to 6.4 percent.²⁵ Blacks and Hispanics continue to experience higher levels of unemployment and receive lower wages than whites. While the median white worker earned \$19,393, the median black earned only \$15,348 and the median Hispanic even less, \$13,150.²⁶

Although the wage gap between men and women is shrinking, this change cannot be attributed to equal pay laws. Since 1973, much of the change in the wage gap has resulted from the fall in men's real earnings; white and black men's earnings have gradually moved down while white women's earnings have gradually risen, exceeding the earnings of black men in 1991.²⁷ The U.S. Department of Labor reports that after the recession in the early 1990's, women's earnings failed to show the steep gains exhibited during the 1980's in comparison to wages earned by men²⁸ and concludes the movement towards pay equity has slowed. A telling measure of pay equity can be found in median hourly wages; the median woman earned \$9.63 per hour in 1997, while the median man earned \$14.39.²⁹ Narrow or wide, the wage gap has persisted for over 45 years, during which Equal Pay laws were active for thirty six.³⁰

Wage gap studies do not traditionally trace comparable data for disabled people, but unpublished data from John McNeil of the Census Bureau shows a negative association between earnings and disability. In 1995, workers with disabilities holding part time jobs (disabled persons are more likely to work part time) earned on average only 72.4 percent of the amount nondisabled workers earned annually.³¹ Such wage differentials were observed for disabled persons working full time. Median monthly income for people with work disabilities averaged about \$1,511 and \$1880 in 1995 - as

Force Statistics]. The Census does not count the prison population as unemployed. 70 percent of the prison population is black. Adding in the incarcerated population as unemployed - almost 8% of all black adult males - changes the unemployment rate for black men from the reported 6.7% in December 1998 to 16.5%. Angela Davis, Speech at California State University, Fullerton (Mar. 23, 1999). Cf. Robert Cherry, Black Men Still Jobless, Dollars and Sense 43, 43 (Nov.-Dec. 1998).

²⁵ See U.S.B.L.S., Labor Force Statistics, supra note 24.

²⁶ See U.S. Census Bureau, Historical Income Tables - People, Table P-4: Race and Hispanic Origin of People (both sexes combines) by Median and Mean Income: 1947 to 1998, (last modified Nov. 10, 1999)

<<http://www.census.gov/hhes/income/histinc/p04.html>>.

²⁷ See Women's Bureau, U.S. Dept of Labor, Facts on Working Women: Earnings Differences Between Women and Men, (visited Dec. 28, 1999)

<http://www.dol.gov/dol/wp/public/wb_pubs/wagegap.2.htm>.

²⁸ Id. Between 1980 and 1990 the ratio of hourly earnings climbed by 13.1 percentage points; between 1990 and 1997 it climbed by only 2.9 points. Between 1980 and 1990 the annual ratio climbed by 11.4 points, but between 1990 and 1996 the ratio climbed by only 2.2 percentage points. Between 1980 and 1990 the weekly earnings ratio climbed by 7.5 percentage points; between 1990 and 1997 the ratio climbed 2.5 percentage points. Id.

²⁹ Electronic mail from Heather Boushey, N.Y.C. Housing Authority, to Marta Russell (Apr. 22, 1999) (on file with author).

³⁰ See Women's Bureau, supra note 27.

³¹ H. Stephen Kaye, supra note 15, at 2.

much as 20 percent less than the \$1,737 to \$2,356 earned by their counterparts without disabilities.³²

Of greater significance is the chronic unemployment of disabled people. A 1998 Survey by the National Organization on Disability/Louis Harris found that among working age adults with disabilities (18 to 64), three out of ten (29 percent) work full or part-time compared to eight of ten (79 percent) of those without disabilities, a gap of fifty percentage points.³³ The unemployment rate for disabled people remains much higher than for the population as a whole, with only one-quarter of persons with severe disabilities working.³⁴ The overall combined (severe and nonsevere) disabled unemployment rate is 65-71 percent.³⁵ Among disabled people who are not employed, 79 percent of working age disabled persons report that they would prefer to work.³⁶ Still, John McNeil of the Census Bureau finds that disabled persons are less likely to have a job than people with no disability. For those ages 21 to 64 with no disability the likelihood of having a job is 82.1 percent.³⁷ For people between ages 21 and 64 with a non-severe disability, the rate is 76.9 percent; the rate drops to 26.1 percent for those with a significant disability.³⁸

Material progress for women and minorities appears to be incremental at best while wage inequality among similarly skilled workers, vast income disparities, wage gaps, and poverty persist. After thirty years of federal anti-discrimination legislation, it is valid to conclude that although there is evidence that the Civil Rights Act of 1964 did make a difference in the *extent* of racial and gender discrimination, neither civil rights laws nor successful affirmative action programs have produced the complete economic equality desired by advocates of employment rights.³⁹ Proponents of affirmative action

³² Id.

³³ NOD/1998 Harris Survey, *supra* note 11. See generally Laura Trupin et al., Trends in Labor Force Participation Among Persons with Disabilities, 1983-1994, Disability Statistics Report (June, 1997) (Disability Statistics Ctr., San Fran., Cal).

³⁴ President's Committee on Employment of People with Disabilities, Employment Rate of People with Disabilities Increases Under the American with Disabilities Act (last modified July 22, 1996) <<http://www.dol.gov/pcepd/press/summer96/statistic.htm>>.

³⁵ Employment rates are 11 percent for those with a very severe disability, 14 percent for those who are very or somewhat severely disabled, and 29 percent for those with any disability. See National Organization on Disability, Americans with Disabilities Still Face Sharp Gaps in Securing Jobs, Education, Transportation, and in Many Areas of Daily Life (last modified July 23, 1998) <<http://www.nod.org/presssurvey.html>>.

³⁶ Id at 15.

³⁷ See John M. McNeil, Americans With Disabilities: 1994-95 > (visited Dec. 29, 1999) <<http://www.blue.census.gov/hhes/www/disable/sipp/disab9495/oldasc.htm>>. See also National Institute on Disability and Rehabilitation Research, Chartbook on Work and Disability in the United States (1998) (visited Dec. 29, 1999) <http://www.infouse.com/disabilitydata/workdisability_1_2.html>.

³⁸ See McNeil, *supra* note 37.

³⁹ See Jonathan S. Leonard, The Impact of Affirmative Action Regulation and Equal Employment Law on Black Employment, J. Econ. Persp. at 47, 47-63 (Fall 1990); John Donohue III & James Heckman, Continuous Versus Episodic Change: The Impact of Federal Civil Rights Policy on the Economic Status of Blacks, 29 J. Econ. Literature 1603 (1991).

today, who are arguing against its abolition say only that gains made will be *eroded*, not that the program has achieved economic parity for minorities. Affirmative action has not proven to be a major solution to poverty or a sufficient means to equality.⁴⁰

Though only ten years have passed since the passage of the ADA, there is no reason to believe that disabled people will fare better in terms of outcomes after the ADA than did women and minorities following the passage of civil rights laws and affirmative action. The reasons are both similar and distinct.

Every redistributive measure, including civil rights laws, involve political compromise between the public and the powerful interests of big business and big government. The ADA in particular faces some extraordinary limitations as a direct result of the political climate in which it was produced and enacted.⁴¹ The philosophical momentum for social justice which spurred the Civil Rights Act and subsequent progressive court decisions in the 1960s was well into decline by the 1990s. For example, in the era following passage of civil rights laws in 1957, 1960, 1964, and 1968, the Republicans made dramatic inroads into democratic victories which forged the civil rights movement, established the Office of Economic Opportunity and initiated the war on poverty during the Great Society. Presidents Reagan and Bush dismantled the entire Community Services Administration, responsible for driving much of the 1960s social change agenda by advancing human services, occupational safety, consumer protection, and environmental laws.⁴²

On the way out were civil rights and entitlements, replaced by a conservative thrust to reduce "big bad government." The dominant agenda of the 1970s and 1980s was bolstered by corporate goals which emphasized globalization and political dominance of government.⁴³ Increased international capital mobility and liberalized international trade have resulted in more power to management at the expense of labor.⁴⁴ Conservative forces targeted regulations for repeal or rollback which, in their view interfered with business.⁴⁵ Economic policy in the post-1979 period moved decisively toward creating a more laissez-faire, deregulated economy.⁴⁶ Industries such as transportation and communications have been deregulated. Social protections, including safety, health, and environmental regulations, the minimum wage, government transfer payments (welfare), and the unemployment insurance system all

⁴⁰ See, e.g., Cornel West, *Race Matters* 95 (1993).

⁴¹ For conservative opposition to government regulation see R. P. O'Quinn, *The Americans With Disabilities Act: Time for Amendments*, *Cato Institute Policy Analysis* No. 158 (Aug. 9, 1991); Brian Doherty, *Unreasonable Accommodation*, *Reason Magazine* 18 (Aug.-Sept. 1995).

⁴² Russell, *supra* note 3, 109-16.

⁴³ See Nicholas Lemann, *The Promised Land* 218 (1992); Michael Parenti, *Democracy for the Few* 99-119, 271 (1995).

⁴⁴ These objectives were accomplished, in part, through the promotion of policies such as the North Atlantic Free Trade Agreement and General Agreement on Tariffs and Trade. See Parenti, *supra* note 43, at 67-75, 80. See generally Jeff McMahan, *Reagan and the world: Imperial policy in the New cold War* (1984).

⁴⁵ See generally Lawrence Mishel et al., *The State of Working America 1998-1999* (Economic Policy Institute 1999); William Wolman & Anne Colamosca, *The Judas Economy: The Triumph of Capital and the Betrayal of Work* (1997).

⁴⁶ See generally Michael Parenti, *Democracy for the Few* (1995); Hudgins, *supra* note 8.

have been weakened.⁴⁷ The ADA was no exception. It was watered down substantially to achieve congressional consensus and Bush's presidential approval in 1990.⁴⁸

A 1997 comparative study between the pre-ADA state and federal disability anti-discrimination laws shows that civil rights laws have not produced the gains in employment rates, wage rates, or employment opportunities for disabled people that advocates expected.⁴⁹ Nine years after the passage of the ADA, national employment surveys show no real statistical gain in employment. One study suggests that proportion of working-age adults with disabilities who are employed has declined since 1986, when one in three (34 percent) were working.⁵⁰

Positive outcomes from disability civil rights are further compromised by the lack of mandatory affirmative action following the ADA for disabled persons. Though there is controversy over how much affirmative action contributed to the gains made by women and minorities, there is little doubt that when accompanied by adequate enforcement, affirmative action has had a positive impact in opening previously closed doors.⁵¹ This is especially pertinent given the plaintiff's overall lack of success in the courts where employers have been charged with disability discrimination. Studies show that in the first eight years, defendants (businesses) overwhelmingly prevailed in ADA employment cases at both the trial and appellate court levels.⁵² Law professor Ruth Colker states that this outcome is "worse than results found in comparable areas of the law; only prisoner rights cases fare as poorly."⁵³ (This phenomena is discussed further in the Business and Profits segment of this paper.)

To be truly "equal" all biases must be eradicated. Whether the ADA has created an "equality of opportunity" for disabled workers in the capitalist economy will be explored further below. Aside from the traditional biases or social influences that determine one's access to the goods of society such as where one was educated, the family's economic status, and the environment in which one was raised,⁵⁴ disabled workers (as distinct from women and minorities) face economic bias and labor market discrimination due to business accounting practices which weigh standard (nondisabled)

⁴⁷ Mishel et al., *supra* note 45, at 25.

⁴⁸ See Russell, *supra* note 3, at 113-21.

⁴⁹ For an analysis on the impact of state and federal civil rights legislation on the employment and wages of disabled persons, see Nancy Mudrick, *Employment Discrimination Laws for Disability: Utilization and Outcome*, *Annals Am. Acad. Pol. & Soc. Sci.*, Jan. 1997, at 53, 53-70.

⁵⁰ 1998 NOD/Louis Harris Survey, *supra* note 11; see also National Institute on Disability and Rehabilitation Research, U.S. Dept of Education, *Trends in Labor force Participation among Persons with Disabilities, 1983-1994* (Disability Statistics Report 10).

⁵¹ An important study revealing the near unanimous opinion among economists of the positive impact of government anti-discrimination programs on income of African-Americans can be found in John Donohue & James Heckman, *supra* note 39, at 1603-43. Richard B. Freeman's paper, *Changes in the Labor Market for Black Americans, 1948-72*, 1 *Brookings Papers on Econ. Activity* 67, 67-120 (1973), was among the first to identify government anti-discrimination programs as a source of progress.

⁵² See Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 *Harv. C.R.-C.L. L. Rev.* 99, 100 (1999).

⁵³ *Id.*

⁵⁴ See Gregory Mantsios, *Class in America: Myths and Realities*, in Paula S. Rothenberg, *Race, Class, and Gender In the United States* 210-13 (1998).

costs of labor against nonstandard (disabled) costs of labor. Such business accounting calculations foreshadow the continuation of a gap in pay and employment opportunities for disabled individuals.

Despite over thirty years of liberal reform via federal equal opportunity laws, substantial race, gender and disability based inequality remain in the American economy. Both racial and gender employment and earnings inequalities have declined since the enactment of civil rights legislation in the 1960s, but studies show that such reductions in inequality have been uneven, incomplete and unstable (reversible).⁵⁵ On balance, the extent of inequality for women, people of color and disabled persons can be viewed as a measure of the political success of liberal ideology where the activities of the courts and government enforcement agencies either serve to advance or roll back liberal regulations promoting equality.

Competition: Labor Market and Structural Inequality

The common explanation given by mainstream economists for inequality of wages and employment opportunities between races and genders is twofold. First, individual workers experience differences in productivity-linked characteristics (called a human capital gap). Second, they experience differences in treatment due to discrimination. The dominant or human capital view is that individuals exhibit skill and educational differences due to skill-biased technological changes which cause the widening gap in pay, and that by increasing education and technological training, these differentials will be overcome.⁵⁶

The neo-classical supply and demand theory of competition holds that the labor market will equalize pay and employment differentials. Pay inequality is explained as a natural result of the spread of information technologies (the computer revolution) which create differences in skills; those most trained in these new fields reap the benefits in pay from the transformation in the workplace while those without such training fall behind.⁵⁷ Supply and demand theory asserts that this is so because the pressures of the marketplace, what Adam Smith called the “invisible hand”, direct the activities of individuals, and serve as a self-regulating mechanism for wages, prices, and

⁵⁵ See Donald Tomaskovic-Devy, *Race, Ethnic, and Gender Earnings Inequality: The Sources and Consequences of Employment Segregation*, (visited Dec. 29, 1999) <<http://www.ilr.cornell.edu/GlassCeiling/14/14front.html>>.

⁵⁶ Scholars such as Robert J. Samuelson, William E. Becker, Donald A. Hicks, and William J. Baumol are representative of this point of view.

⁵⁷ See Robert Topel, *Factor Proportions and Relative Wages: The Supply-side Determinants of Wage Inequality*, *J. Econ. Persp.* 55, 69 (Spring 1997). Topel states that:

Wage inequality has risen in modern economics because rising demands for skills have made talented people more scarce. As in other market situations, this “problem” of a demand-driven rise in price contains the seeds of its own solution. Supply is more elastic in the long run than in the short run. Rising returns to skill encourage people to invest in human capital, which in the long run will increase the proportion of skilled workers in the labor force.

Id; see also Robert Z. Lawrence, *Single World, Divided nations?: International trade and OECD labor markets* 129 (1996).

production. In practice, the demand for workers trained in technological fields will encourage more workers to seek such training eventually equalizing wage differentials over the long run.

A substantial body of work challenges the notion that human capital, quality of education, and years of work experience can adequately explain the wage differentials and employment patterns which remain prominent in the economy.⁵⁸ For instance, research by economists Jared Bernstein and Lawrence Mishel shows that skill-biased technological change cannot account for wage disparity. Throughout the 1990s, average starting wages for college graduates, the most technically advanced and computer-literate workers on the labor market, fell by 7 percent.⁵⁹ New engineers and computer scientists were offered 11 percent and 8 percent less respectively in 1997 than their counterparts received entering the market in 1989.⁶⁰ This flatly contradicts claims that more education and skill training will equalize pay differentials. Furthermore, productivity rates, which should be exploding if the computer revolution were generating huge returns for high-tech skills, grew no faster in the 1990s than in the 1980s.⁶¹ Economists James Galbraith, Claudia Goldin and Lawrence Katz show that the readjustment of incomes to a wider and more equal distribution of skill levels for the overall workforce failed to happen in the past and is not happening in today's economy.⁶²

Studies show that competitive market forces did not eliminate discriminatory practices in the decades leading up to the passage of the Civil Rights Act of 1964 (which remained until the federal adoption of antidiscrimination laws)⁶³ and that discrimination has managed to sustain itself, both in the U.S. and elsewhere, for generations at a time.⁶⁴ Research by Martin Carnoy concludes that while blacks narrowed the

⁵⁸ See, e.g., Darity & Mason, *supra* note 23, at 2; James K. Galbraith, *Created Unequal: The Crisis in American Pay* (1998). See generally Jared Bernstein, *Where's the Payoff?: The Gap Between Black Academic Progress and Economic Gains* (Economic Policy Institute 1995). For an economist's explanation of why blacks have narrowed the human capital gap between blacks and whites, yet slid further behind in average earnings see Martin Carnoy, *Faded Dreams: The Politics of Economics and Race in America* (1994).

⁵⁹ See Mishel et al., *supra* note 45, at 162.

⁶⁰ *Id.* at 30.

⁶¹ *Id.* at 26-27, 198.

⁶² Galbraith, *supra* note 58, 50-88 (1998). There was no systematic change in skill premiums within industries during the period 1920 to 1947, despite a large increase in the supply of educated labor during this time. See Claudia Goldin & Lawrence Katz, *The Decline of Non-Competing Groups* (1995); Claudia Goldin & Lawrence Katz, *The Origins of Technology-Skill Complementarity* (1996).

⁶³ See Gottschalk, *supra* note 22. Gottschalk shows that the earnings gap between blacks and non-blacks narrowed between the early 1960s and 1975, but progress ceased after this point. Carnoy shows that three dominant views of economic differences between blacks and whites—that blacks are individually responsible for not taking advantage of market opportunities, that the world economy has changed in ways that puts blacks at a tremendous disadvantage compared to whites, and that pervasive racism is holding blacks down—do not adequately explain why blacks initially made large gains before falling back in the 1980s and 90s. See Carnoy, *supra* note 58.

⁶⁴ Darity & Mason, *supra* note 23, at 83-84.

educational gap separating them from whites, they slid further behind in average earnings.⁶⁵

Some analysts attribute inequality gaps not to individual ineptitude but in large measure to labor segregation. Estimates of the hard figures on inequality by James L. Westrich, Massachusetts Institute for Social and Economic show that there is a hierarchical division of labor within the labor force. For example, women are numerous at the bottom of the economic pyramid and scarce at the top: while 23.7 percent of women earn less than \$10,000 (a result of both low pay and part-time status), just 12.8 percent of men earn so little. While 58.7 percent of women earn under \$23,000, only 36.3 percent of men do; and 9.9 percent of men earn over \$75,000, compared to only 2.6 percent of women.⁶⁶

A study by Donald Tomaskovic-Devy for the U.S. Department of Labor's Glass Ceiling Commission at Cornell University found that while part of the wage gap results from differences in education, experience or time in the workforce, a significant portion can not be explained by any of those factors.⁶⁷ His findings revealed that "differences in human capital, investments in education and training by individuals explain a small proportion of the gender gap and about a third of race/ethnic earnings inequalities, but that substantial earnings inequalities are not a function of gender or race/ethnic differences in education, labor market experience or firm tenure."⁶⁸ Instead, these gaps are attributable to the social division of labor, a systematic underpayment and occupational segregation of people because of their sex or race.⁶⁹

Tomaskovic-Devy shows that "not only is there racial and gender discrimination against individuals, but as a result of employment segregation, jobs that become associated with particular racial or gender categories tend to be organizationally stereotyped and valued accordingly."⁷⁰ As jobs become stereotypically female or minority, there is a tendency in many workplaces to provide lower wages and less opportunity for skill training and promotions. He concludes that the confinement of "many women of all ethnic backgrounds and minority men to lower quality jobs *than they can perform*" is a direct cause of gender and race/ethnic earnings inequalities.⁷¹

Economist James Galbraith challenges the supply and demand theory that people are, in fact, paid in proportion to the value of what they produce. Galbraith shows that power, and particularly market or monopoly power, changes with the general level of demand, the rate of growth, and the rate of unemployment.⁷² He explains that "in periods of high employment, the weak gain ground on the strong; in periods of high unemployment, the strong gain ground on the weak."⁷³ In this view,

⁶⁵ Carnoy, *supra* note 58.

⁶⁶ Letter from James L. Westrich, Massachusetts Institute for Social and Economic Research, to Marta Russell 1 (Apr. 23, 1999) (on file with author).

⁶⁷ Tomaskovic-Devy, *supra* note 55.

⁶⁸ *Id.*

⁶⁹ See *id.*

⁷⁰ *Id.*; see also Paula S. Rothenberg, *Race, Class, and Gender In the United States* 234-235 (1998).

⁷¹ Tomaskovic-Devy, *supra* note 55 (emphasis added).

⁷² Galbraith, *supra* note 58, 37-49.

⁷³ *Id.* at 266. Two mainstream economists have produced evidence that - all things being equal - unemployment depresses wages. See David Blanchflower & Andrew Oswald,

inequality is a product of differential power, rather than differential skill. This concept is consistent with Adam Smith who observed that “masters [capitalists] are always and every where in a sort of tacit, but constant and uniform combination, not to raise the wages of labour above their actual rate.”⁷⁴ Smith keenly perceived the tendency towards monopoly power of capital, writing that “masters too sometimes enter into particular combinations to sink the wages of labour even below this rate.”⁷⁵ Smith understood capitalists to generally have greater power over wages than workers, but saw that the relationship changes with the employment rate. For example, Smith asserts that “the scarcity of hands occasions a competition among masters, who bid against one another in order to get workmen, and thus voluntarily break through the natural combination of masters to not raise wages.”⁷⁶ A shortage of labor forces capitalists to raise wages.

Marxist economic theory provides further insight. Marx’s theory of surplus value posits that profit lies in the ability of capitalists to pay less for labor power than the actual value the worker will impart to the commodities they help to produce.⁷⁷ Profit, as such essentially resides in underpaid labor. Marx defines competition as a tendency toward equalization of profit margins, leading to monopolies as the consequence of competition rather than its antithesis.⁷⁸

Marxist interpretations link economic competition to discrimination in the work place. As economists William Darity and Patrick Mason explain “race and gender exclusion are used to make some workers less competitive for the higher paying positions. This approach emphasizes that the major elements for the persistence of discrimination are racial or gender differences in the access to better paying jobs within and between occupations.”⁷⁹ Racial inequality, then, can be traced to the economic system that generates it.⁸⁰

Disabled persons encounter similar power differentials in the labor market. Richard Epstein, a leading economist in the Law and Economics school, admits that disabled persons “have been subject to unfair treatment in the marketplace” but holds that this is due to government interference with the control of their labor in the competitive process.⁸¹ Epstein argues that “the disabled should be allowed to sell their labor at whatever price, and on whatever terms, they see fit” and sees the free market as the appropriate mechanism. He states that “the minimum wage laws and various kinds of ostensible safety and health regulations can impose a greater burden on them

The Wage Curve (1994); see also Heather Boushey, Unemployment, Pay, and Race, *Left Bus. Observer* 3, 3 (July 1998).

⁷⁴ Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* 28 (J. Shield Nicholson ed. 1901) (1776).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ See Karl Marx, *1 Capital* 270-80 (Ben Fowkes trans., Vintage Books 1st ed. 1977) (1867).

⁷⁸ *Id.* at 929

⁷⁹ Darity & Mason, *supra* note 23, at 86-87.

⁸⁰ See West, *supra* note 40; Oliver Cromwell Cox, *Caste, Class, and Race: A Study in Social Dynamics* (1948).

⁸¹ Richard Epstein, *Forbidden Grounds: the Case Against Employment Discrimination Laws* 484 (1992).

[disabled persons] than on others. Repeal those laws as well."⁸² Epstein believes that in a de-regulated competitive market, disabled peoples' labor would fall below minimum wage because it is worth less.

This idea is not novel. Section 504 of the Rehabilitation Act of 1973 provided that federally-financed institutions are required to pay a "fair" or "commensurate" wage to disabled workers, but they are not required to meet even minimum wage standards.⁸³ The traditional sheltered workshop is the prototype for justifying below-minimum wages for disabled people, based on the theory that such workers are not able to keep up with the average widget sorter. 6,300 such U.S. workshops employ more than 391,000 disabled workers, some paying 20 to 30 percent of the minimum wage; as little as \$3.26 an hour and \$11 per week.⁸⁴ Any nonprofit employer is allowed to pay subminimum wage to disabled employees under federal law, if the employer can show that the disabled worker has "reduced productive capacity."⁸⁵ In reality, workers with disabilities know that they are sometimes paid less, not because they lack productive capacity but because of the nature of segregated employment.⁸⁶

Republican legislator Scott Baugh latched onto the subminimum wage concept for disabled workers by drafting legislation in 1996 that would allow employers to hire disabled workers at a "special minimum wage" without the minimal and very subjective "protection" of having to show that the prospective employee is "less productive" than a nondisabled one.⁸⁷ Any disabled person could be considered "less productive," and theoretically a sub-minimum wage or wage below nondisabled in any pay category could be used to lower the wage floor while women and minorities are used to hold it down.

In the neo-classical view, markets are efficient ethical generators and distributors of wealth. According to this theory, blame for the phenomena of the wage gap falls on the individual himself. If one fails to keep up with changes in the workplace, the argument goes, it is because of their shortcoming rather than the functioning of the labor market. If a worker is less productive, it is their fault and they do not deserve a minimum wage (and certainly not a living wage) for their labor. A materialist analysis contends that the labor market is a social construct where marginalization of certain groups works to the advantage of the business class.

In the next three segments, I will examine some structural mechanisms which permit or encourage discriminatory practices: how "disability" is a social creation, (i.e. how workers with disabilities are made less competitive by capitalist business practices), how the capitalist system reproduces unemployment, and how workers competing in such a labor market are pitted against one another in ways that undermine the collective power of labor.

The Business Backlash, Labor and Profits

⁸² Id. at 484.

⁸³ See Richard K. Scotch, *From Good Will to Civil Rights: Transforming Federal Disability Policy* 102 (1984).

⁸⁴ William Branigin, "Legally Blind, Legally Underpaid," *Washington Post* Dec. 12, 1999 at C08.

⁸⁵ Russell, *supra* note 3, at 137.

⁸⁶ Id Branigin at C08. The Post story quotes blind workers who do not have reduced productive capacity but are paid below minimum wage.

⁸⁷ Russell, *supra* note 3, at 137.

Two years after the ADA was signed into law, economist Richard Epstein devoted an entire chapter of Forbidden Grounds to opposing the concept of civil rights for disabled persons.⁸⁸ Starting from the premise that the ADA constitutes redistributive interference with the market, he concludes that the ADA should be repealed.⁸⁹ Epstein's sentiments echo those emanating from the business sector at large.

In a report on the performance of the Equal Employment Opportunity Commission (charged with enforcing Title I prohibiting discrimination in employment), the U.S. Civil Rights Commission concludes that enforcement of the ADA has fallen short in several important areas⁹⁰ and successful implementation has been inconsistent and in some instances, elusive.⁹¹ A recent study by the American Bar Association's Commission on Mental and Physical Disability Law shows that disabled workers bringing discrimination suits are unlikely to succeed in court. Of the more than 1,200 cases filed under Title I of the ADA since 1992, disabled employees prevailed only 8 percent of the time.⁹² A study by Professor Ruth Colker of the Ohio State University College of Law confirms these results, finding that employers successfully defend more than 93 percent of reported ADA employment discrimination cases at the trial court level and succeed in 84 percent of cases appealed.⁹³

The U.S. Civil Rights Commission reports that one of the most persistent criticisms of the ADA has been that employers are forced to pay too high a price to comply with employment provisions.⁹⁴ While it is clear that disabled workers should not be denied civil rights simply because employers may incur costs while attempting to comply with the ADA, business objections are informative and reveal labor market mechanisms endemic to capitalism. Business practices demonstrate that the economic structure does generate obstacles to the employment of disabled people. Equal opportunity law has failed in this aspect to provide a sufficient remedy for economic discrimination.

The goal of business is to make profits. The basis of capitalist accumulation is the business use of surplus labor from the work force of skilled labor in a way which generates profits.⁹⁵ Typical business accounting practices weigh the costs of employment against profits to be made. Productive labor, or exploitation of labor, means simply that labor is used to generate a surplus value based on what business can gain from the worker productivity against what it pays in wages, health care, and

⁸⁸ Epstein, *supra* note 81, at 480-94.

⁸⁹ *Id.* at 494.

⁹⁰ United States Commission on Civil Rights, *Helping Employers Comply with the ADA: An Assessment of How the United States Equal Employment Opportunity Commission Is Enforcing Title I of the Americans with Disabilities Act III* (1998).

⁹¹ *Id.* at 2-8. The commission's explanations for the difficulties include high workloads, insufficient resources, huge backlogs of cases, lack of staffing, failure to monitor underlying agencies and lack of policy clarification of heavily disputed clauses in the ADA. *Id.* at 241-69.

⁹² Study Finds Employers Win Most ADA Title I Judicial and Administrative Complaints, 22 *Mental and Physical Disability L. Rep.* 403, 404 (May-June 1998). They concluded that of the 760 decisions in which one party or the other prevailed, employers prevailed in 92.11% of those cases. *Id.*

⁹³ Ruth Colker, *supra* note 52, at 99-100.

⁹⁴ U.S. Commission on Civil Rights, *supra* note 90, at 4-5.

⁹⁵ See Marx, *supra* note 77, at 270-80.

benefits (the standard costs of having an employee).⁹⁶ The surplus-value created in production is then appropriated by the capitalist.⁹⁷ The worker receives wages, which in theory covers socially necessary labor, or what it takes to reproduce labor-power every working day.⁹⁸

The employer will resist any extra-ordinary or nonstandard operation cost. From a business perspective, the hiring or retaining of a disabled employee represents nonstandard additional costs when calculated against a company's bottom line. Epstein endorses this point of view, stating that employment provisions of the ADA are a "disguised subsidy"⁹⁹ and that "successful enforcement under the guise of 'reasonable accommodation' necessarily impedes the operation and efficiency of firms."¹⁰⁰

Whether real or *perceived* in any given instance, employers continue to express concerns about increased costs in the form of providing reasonable accommodations,¹⁰¹ anticipate extra administration costs when hiring nonstandard workers, and speculate that a disabled employee may increase worker's compensation costs in the future.¹⁰² Employers, if they provide health care insurance at all,¹⁰³ anticipate elevated premium costs for disabled workers.¹⁰⁴ Insurance companies and managed care health networks often exempt "pre-existing" conditions from coverage or make other coverage exclusions based on chronic conditions, charging extremely high premiums for the person with a history of such health care needs.¹⁰⁵ Employers, in turn, tend to look for ways to avoid providing coverage to cut costs.¹⁰⁶ In addition, employers characteristically assume that they will encounter increased liability¹⁰⁷ and lowered productivity from a disabled worker.¹⁰⁸

⁹⁶ See *id.* at 293-306.

⁹⁷ See *id.* at 293.

⁹⁸ See *id.* at 274-75.

⁹⁹ Epstein, *supra* note 81, at 485.

¹⁰⁰ *Id.* at 484.

¹⁰¹ 69% of employers that provided accommodations spent nothing or less than \$500, 9% spent between \$2,001 and \$5,000, and 3% spent over \$5,000. President's Committee on Employment of People with Disabilities, *Costs and Benefits of Accommodations* (last modified July 1996) <<http://www50.pcepd.gov/pcepd/pubs/ek96/benefits.htm>>.

¹⁰² See Marjorie Baldwin, *Can the ADA Achieve Its Employment Goals?* *Annals Am. Acad. Pol. & Soc. Sci.* 42, 49 (Jan. 1997).

¹⁰³ One in five workers are uninsured. The primary reason workers are not insured is because health care benefits are not offered by employers. The coverage rate has decreased in the past decade, dropping from 73% in 1989 to 67% in 1996. Kaiser Family Foundation, "Employer Health Benefits 1999 Annual Survey," p. 30.

¹⁰⁴ See U.S. Commission on Civil Rights, *supra* note 90, at 134-35.

¹⁰⁵ See William Johnson, *The Future of Disability Policy: Benefit payments or Civil rights?*, *Annals Am. Acad. Pol. & Soc. Sci.* 171 (Jan. 1997); see also Baldwin, *supra* note 102, at 47.

¹⁰⁶ Employers have been abandoning responsibility for providing healthcare. See Olveen Carrasquillo et al., *A Reappraisal of Private Employer's Role in Providing Health Insurance*, *New Eng. J. Med.* 1999, 109, 109-114.

¹⁰⁷ Disabled persons may be classified and written up as a "risk" in private insurance. See 42 U.S.C.A. §12111(c) (1994). Disabled persons may be deemed a "direct threat," or a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation. The direct threat defense is spread out over several

Prejudice-based disability discrimination, resting on employer assumptions that the disabled person cannot do the job or on employer-resistance to hiring a blind, deaf, mobility or otherwise impaired person just as they might not want to hire blacks or women, undoubtedly contributes significantly to the high unemployment rate of disabled people.¹⁰⁹ Disabled workers also face inherent economic discrimination within the capitalist system, stemming from employers' expectations of encountering additional nonstandard production costs when hiring a disabled worker as opposed to hiring a worker with no need for special accommodation, environmental modifications, liability insurance, maximum health care coverage or even health care coverage at all.

Using this analysis, the prevailing rate of exploitation determines who is "disabled" and who is not. Disability thus represents a social creation which defines who is offered a job and who is not. An employee who is too costly (significantly disabled) will not likely become (or remain) an employee at all. Census data tends to support his view. For working-age persons with no disability the likelihood of having a job is 82.1 percent.¹¹⁰ For people with a non-severe disability, the rate is 76.9 percent; the rate drops to 26.1 percent for those with a significant disability.¹¹¹ In today's highly competitive business climate, it can fairly be asserted that business managers and owners will not cut into their profits for moral, noble or socially just purposes to lower the disabled unemployment rate.

In liberal capitalist economies, redistributionist laws which, if enforced, will cost business are necessarily in tension with business interests, which resist such cost-shifting burdens. Writing for the 7th Circuit in 1995, Judge Richard Posner relates the business schematic of cost/benefit analysis to the ADA:

If the nation's employers have potentially unlimited financial obligations to 43 million disabled persons, the Americans with Disabilities Act will have imposed an indirect tax potentially greater than the national debt. We do not find an intention to bring about such a radical result in either the language of the Act or its history. The preamble actually "markets" the Act as a cost saver, pointing to "billions of dollars in unnecessary expenses resulting from dependency and nonproductivity." §12101(a)(9). The savings will be illusory if employers are required to expend many more billions in accommodation than will be saved by enabling disabled people to work.¹¹²

Civil rights traditionally demand equal treatment, requiring that disabled people be treated the same as nondisabled people. In the case of employment and disability, however, civil rights within a capitalist paradigm envisions equal treatment while failing to acknowledge economic discrimination. This fatal oversight ensures that laws such as

sections of the ADA, and can be used as a defense to certain Title I (employment discrimination) and Title III claims (for discrimination by public accommodations).

¹⁰⁸ See Baldwin, *supra* note 102, at 46-47.

¹⁰⁹ The ADA is patterned on the minority group model of prejudice. See Chai R. Feldblum, *Employment Protections*, Milbank Q. 82 (Winter 1991); 42 U.S.C.A. §12101(a)(7) (1994).

¹¹⁰ See McNeil, *supra* note 37; see also National Institute on Disability and Rehabilitation Research, *supra* note 37.

¹¹¹ See McNeil, *supra* note 37.

¹¹² *Vande Zande v. State of Wisconsin Dep't. of Admin.*, 44 F.3d 538, 543 (7th Cir. 1995) (ruling in favor of employer-defendant).

the ADA will necessarily fall short of accomplishing employment goals. For equal opportunity to be *truly* equal, biases (including economic biases) must be eradicated. A government committed to providing such opportunities could “level the playing field” to compensate for economic discrimination by employers. It could ensure ongoing health care for disabled persons (preferably within a disability sensitive universal health care system not linked to employment status), subsidize job accommodations, and allow other subsidies to reimburse businesses that hire or retain employees with disabilities. Government enactment of severe and immediate penalties on employers (including government employers) who balk at providing job accommodations in a timely manner could serve as a backup measure to further advance disabled workers’ access to jobs.

There is ideological tension between remedies which grant subsidies and civil-rights type remedies which legally mandate that employers comply with anti-discrimination statutes. Under the ADA, employers are required to provide access and accommodations as a matter of individual right.¹¹³ By contrast, subsidies provide a government offset to business costs based on the notion that it is in the government’s (and society’s) interest to see that disabled persons are employed. Disability rights groups and activists (myself included) have favored the civil rights approach over subsidies, but given the economic discrimination inherent in capitalism, can we afford to remain fixed in our belief that civil rights will provide timely relief for those disabled persons seeking employment redress in the courts? Will the courts initiate an economic revolution which forces business to provide accommodations?

So far, disabled plaintiffs have faced great difficulty prevailing in court on key issues. The U.S. Commission on Civil Rights notes that many disability experts ascribe the problem in judicial and administrative confusion over interpretation of Title I statutes.¹¹⁴ Legal and policy experts within the disability rights movement have observed that correct enforcement is proving problematic. Arlene Mayerson, an attorney with the Disability Rights Education and Defense Fund, characterizes ADA case law as “hyper technical, often illogical interpretations of the ADA” which have generated a “disturbing trend” of court precedents.¹¹⁵

Robert Burgdorff, Jr., one of the drafters of the ADA, concludes that “legal analysis has proceeded quite a way down the wrong road.”¹¹⁶ Burgdorff points to a judicial tendency to view ADA plaintiffs as seeking *special benefits and treatment* instead of equal rights.¹¹⁷ This perception makes it easier for courts to deny relief to ADA plaintiffs. Whatever the reasons for this judicial backlash, courts are clearly thwarting the congressional intent of the ADA by turning away disabled persons who seek

¹¹³ There are exceptions, such as when compliance would create an “undue hardship” on the business’s finances. 42 U.S.C.A. §12112(b)(5)(a).

¹¹⁴ U.S. Commission on Civil Rights, *supra* note 88, at 5-6 (September 1998). Employers have been abandoning responsibility for providing healthcare. See Carrasquillo et al., *supra* note 106, at 109.

¹¹⁵ Arlene B. Mayerson, *Restoring Regard for the Regarded As Prong: Giving Effect to Congressional Intent*, 42 Vill. L. Rev. 587, 587, 612 (1997).

¹¹⁶ Robert Burgdorff, Jr., *Substantially Limited Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability*, 42 Vill. L. Rev. 409, 585 (1998).

¹¹⁷ See *Id.* at 413-414.

judicial remedies. The interests of business and conservative anti-regulatory factions appear to have the upper hand.

It is reasonable to view consistently negative court outcomes as an extension of the business backlash against the ADA, and a particularly harmful one at that. Employers remain victorious in court. The American Bar Association's Commission on Mental and Physical Disability Law reports that while employers have complained the most of unfair treatment under the ADA, "the facts strongly suggest the opposite: employees are treated unfairly under the Act due to myriad legal technicalities that more often than not prevent the issue of employment discrimination from ever being considered on the merits."¹¹⁸ Ruth Colker concludes that the courts are deploying strategies that result in "markedly pro-defendant outcomes under the ADA" by "abusing the summary judgement device"; judges are making decisions that should go to the jury.¹¹⁹ Procedurally, she explains, this results in pro-employer outcomes because juries, traditionally more hospitable to civil rights, are not hearing the cases.¹²⁰

Others contributing to the BJELL ADA Backlash symposium have written at length on these matters. To briefly explain here, legitimate plaintiff cases are thwarted when medical conditions are not granted the legal standing of "disability" under the law and when courts fail to comprehend equal rights as applied to disablement or to understand the purpose of reasonable accommodations.

Workers pay a heavy personal price when employers contest disablement or refuse badly needed access modifications, reasonable accommodations and/or removal of work barriers and choose instead to put up a fight in court. When, for example, an employee cannot work without an accommodation and the employer does not readily provide one, the worker is often unable to perform her job and is fired.¹²¹ Common sense would dictate that when the worker has a protracted court battle ahead of her to enforce her right to an accommodation but no paycheck in the mail, the last practical resort is to go onto disability benefits. Yet employers use a worker's qualification for disability benefits to undermine discrimination cases against them. Under the Social Security Administration's (SSA) definition of disablement, a worker is qualified for benefits if he/she cannot work; SSA does not consider whether the employee could continue to work if the employer provided a reasonable accommodation. The employer, contesting the worker's discrimination suit, holds that if the worker claims he/she cannot work for purposes of claiming disability benefits, they *cannot* work and therefore the discrimination suit is moot.¹²²

In the spring of 1999, this issue was brought before the Supreme Court in Cleveland v. Policy Management. Systems Corp.¹²³ There, the plaintiff became disabled, asked for but was denied a reasonable accommodation, then lost her job due to failure to perform. The plaintiff subsequently successfully applied for Social Security

¹¹⁸ Study Finds Employers Win Most ADA Title I Judicial and Administrative Complaints, 22 Mental & Physical Disability L. Rep. 403, 404 (1998).

¹¹⁹ Ruth Colker, *supra* note 52, at 101.

¹²⁰ *Id.* at 101-102.

¹²¹ See, e.g., Matthew Diller, Judicial Backlash, the ADA, and the Civil Rights Model, 21 Berk. J. Emp. Lab. L. 1 (2000).

¹²² See Matthew Diller, Dissonant Disability Policies: The Tensions Between the Americans with Disabilities Act and Federal Disability Benefit Programs, 76 Tex. L. Rev. 1003, 1007-08 (1998).

¹²³ 526 U.S. 795 (1999).

disability benefits. The plaintiff sued the employer for failure to comply with the ADA. The Supreme Court granted certiorari to decide

“whether an ADA plaintiff’s representation to the [Social Security Administration] that she was ‘totally disabled’ created a rebuttable presumption sufficient to judicially estop her later representation that, for the time in question, with reasonable accommodation, she could perform the essential functions of her job.”¹²⁴

The justices ruled in *Cleveland* that application for and receipt of SSDI benefits does not automatically estop a recipient from pursuing an ADA claim or erect a strong presumption against the recipient’s ADA success. However, it held that to survive a summary judgment motion an ADA plaintiff cannot ignore her SSDI contention that she was too disabled to work, but must explain why that contention is consistent with her ADA claim that she can perform the essential functions of her job, at least with reasonable accommodation.¹²⁵ Under this holding, therefore, both parties will have the opportunity to present or contest the plaintiff’s explanation. Furthermore, a plaintiff may argue that her SSDI statement of total disability was made in a forum that does not consider the effect that a reasonable workplace accommodation would have on ability to work. She may also argue that statements were reliable at the time they were made.¹²⁶

The Supreme Court ruling is beneficial from the plaintiff’s perspective. It does not, however, preclude the employer from firing the worker first and does not guarantee a favorable outcome for the disabled employee. The court warned that “in some cases an earlier SSDI claim may turn out genuinely to conflict with an ADA claim.”¹²⁷ It remains to be seen how workers with disabilities will fare.

If *Cleveland* was a step forward, the Supreme Court took two steps back with rulings in the next three ADA employment cases: *Sutton v. United Airlines*,¹²⁸ *Murphy v. United Parcel Service*,¹²⁹ and *Albertsons v. Kirkingburg*.¹³⁰ At issue in these cases was the meaning of disability under the ADA.

Significantly narrowing the scope of the law by use of these three cases, the Court ruled that correctable physical limitations (such as nearsightedness or high blood pressure) do not qualify as disabilities under the ADA and do not entitle plaintiffs to sue under Title I, regardless of whether they were fired because of such conditions. The Court distinguished between workers whose disabilities can be mitigated through corrective equipment or medicine and those workers whose disabilities cannot.

But what does “mitigated” imply? The dissenting Justices in *Sutton* did not overlook the possibility that the majority’s opinion in that case could be read to include the very people the Court maintained that the ADA protected.¹³¹ Joined by Justice Breyer, Justice Stevens suggested that under the majority’s ruling, the Act would not even protect people who had lost limbs in industrial accidents or while in armed service

¹²⁴ *Id.* at 974.

¹²⁵ *Id.* at 977-78.

¹²⁶ *Id.* at 977.

¹²⁷ *Id.* at 976.

¹²⁸ 527 U.S. 457 (1999) (corrective lenses and myopia).

¹²⁹ 527 U.S. 516 (1999) (medication-controlled hypertension).

¹³⁰ 527 U.S. 555 (1999) (monocular vision).

¹³¹ 527 U.S. 457, 471 (Stevens, J., dissenting).

to their country. He pointed out that “[w]ith the aid of prostheses, coupled with courageous determination and physical therapy, many of these hardy individuals can perform all of their major life activities just as efficiently as an average couch potato . . . [but] [i]f the Act were just concerned with their present ability to participate in society, many of these individuals’ physical impairments would not be viewed as disabilities . . . [and] many of these individuals would lack statutory protection from discrimination based on their prostheses.”¹³² The dissenters accused the Court of making the ADA’s safeguards “vanish when individuals make themselves more employable by ascertaining ways to overcome their physical or mental limitations,” adding that “many of these individuals would lack statutory protection from discrimination based on their prostheses.”¹³³

Indeed, the majority opinion in Sutton presents workers with an unclear pathway for future employer/worker disputes. If one is not disabled because one’s condition is “correctable” with medication, wheelchairs, prostheses, hearing aids, insulin, etc., how can one expect to receive a reasonable accommodation which depends on being defined as “disabled”? Yet employers can continue to fire workers because of performance limitations caused by such unaccommodated “non-disabilities.” Additionally, employers may still conclude that a person is too disabled to work, even though under the law they are not disabled enough to be protected by the ADA. The ruling thus creates a catch-22 for ADA plaintiffs: if one is disabled enough to sue, one is too disabled to work. The employer can fire the worker with a disability and the ADA is effectively withdrawn from those left under its auspices since if one is able to work, one has no grounds to sue.

The National Chamber of Commerce Litigation Center called the decision “an incredibly significant victory for the business community.” Business groups filing *amicus curie* briefs urged the Court to consider “the impact its decision in this case may have beyond the immediate concerns of the parties to the case.”¹³⁴ The National Association of Manufacturers asserted that “like sexual harassment last year, disability discrimination is the major employment law issue on the Supreme Court’s docket this year. Manufacturers should not be forced to pay damages, including punitive damages, to individuals who can lead normal lives with medication or corrective lenses.”¹³⁵ The American Trucking Association and the Equal Employment Advisory Council (a nonprofit association made up of more than 315 major companies) joined the *amicus* brief.

In a 7-2 vote the Supreme Court decided to deny a speciously defined group of disabled workers the ability to legally contest employment discrimination. As a result, many workers deserving of protection could be eliminated from the work pool and thwarted in their efforts to obtain a job or advance in their careers.

For these reasons, greater government intervention in this precarious period is not only justified but essential to achieve positive outcomes for workers with disabilities. Government provision of ongoing health care, reasonable accommodation

¹³² *Id.* at 473.

¹³³ *Id.*

¹³⁴ Brief Amici Curiae of the Equal Employment Advisory Council, the U.S. Chamber of Commerce, and the Michigan Manufacturers Association in support of respondents, at 4.

¹³⁵ NAM Urges Court Not to Expand the Americans with Disabilities Act, NAM News Release (Nat’l Ass’n Mfr., Wash., D.C.), Mar. 24, 1999, at 1.

costs and other subsidies would simply remove the issue of added cost from the employer's calculus when deciding to hire or retain disabled workers. Successful intervention promises to lessen the burden on disabled workers otherwise forced to litigate in courts that are hostile to the rights of disabled individuals or that view "disability equal rights" as a subsidy to unfairly be paid by business.

However, these proposals must come with two qualifiers. First, such reforms would likely be stop-gap measures that could yield more job placement for disabled persons but (as the next segments will show) cannot alone significantly impact disability unemployment in the overall political economy. Second, subsidies risk augmenting acrimony and division within the labor force.

The Job Gap: Compulsory Unemployment

Traditionally, disabled people have been placed in that unemployable category of people James O'Connor refers to as the "surplus population," irrelevant to the current political/economic system.¹³⁶ Now that more disabled people can work (provided that economic employment disincentives and Social Security work penalties are removed and adequate quality health care made available), there is the potential for many to join what Marx calls the "reserve army of labor."¹³⁷ This includes the official unemployed and all those parts of the population, whether part of the work force at a given time or not, who might become part of the work force if the demand for them grew. The surplus population and reserve army overlap; the slums of Mexico City are part of the U.S. reserve army of labor - and they are also a surplus population.

The liberal notion of "equal opportunity" presents the illusion that it can resolve the unemployment issue; if civil rights can rid the world of discrimination then everyone can get a job, work hard, and make it to the top. But the American capitalist paradigm creates the reserve army of labor and the surplus population by design, leaving large numbers of people unemployed and in poverty. Economists believe that a threshold of unemployment is necessary to avoid inflation and maintain the health of the American economy. Nobel laureate William Vickrey, in his presidential address to the American Economics Association in 1993, called this "one of the most vicious euphemisms ever coined," the so-called 'natural' unemployment rate.¹³⁸

The theory of a natural rate of unemployment, or nonaccelerating inflation rate of unemployment (NAIRU) has dominated macroeconomics for nearly 25 years.¹³⁹ Its effects can also be observed on Wall Street. When news of the creation of 705,000 jobs in February 1996 hit the press, the Dow Jones industrial average tumbled 3 percent in a matter of hours.¹⁴⁰ The *Wall Street Journal* clarified matters, explaining that "fears that

¹³⁶ James O'Connor, *The Fiscal Crisis of the State* 161 (1973).

¹³⁷ Marx, *supra* note 77, at 589-592, 600-601; see also Karl Marx, *The Grundrisse* 491 Penguin edition, transl. Martin Nicolaus, 1973 (trans. 1858) (1973). The reserve army of labor has historically included women and minority workers.

¹³⁸ Sheila D. Collins et al., *Jobs for All, A Plan for the Revitalization of America* 10 (1994) (quoting Vickrey).

¹³⁹ See Milton Friedman, *The Role of Monetary Policy*, *Am. Econ. Rev.* 1, 1-17 (Mar. 1968); see also Michael Perelman, *The Pathology of the U.S. Economy: The Costs of a Low-Wage System*, 40 (1993).

¹⁴⁰ Suzanne McGee, *Anxiety That Jobs Data Will Show Economy is Growing at Healthy Clip Weighs on Traders*, *Wall St. J.*, June 5, 1996, at C22 (quoting a U.S. Bureau of Labor Statistics Report).†

employment data will confirm that the economy is growing at a faster rate than central bankers find acceptable continue to weigh on the market ...¹⁴¹

The number of people affected by the “natural unemployment rate” must be made a significant part of the discussion about unemployment. The Bureau of Labor Statistics puts official unemployment at 5.9 million (1999),¹⁴² but another 3.3 million people work part-time when they would rather have a full time job and 4.5 million who need jobs are off the recording charts because they gave up looking and are not counted.¹⁴³ The real jobless rate is closer to 13.7 million or 9.5 percent of the population -- more than twice the official rate.¹⁴⁴

If disabled people are added in,¹⁴⁵ the jobless rate increases substantially. 17 million working-age people have disabilities, 5.2 million of whom are working.¹⁴⁶ The Economic and Social Research Institute says “2.3 million disabled people who are not working could now be working with workplace accommodations.”¹⁴⁷ According to the 1998 NOD/Harris survey, seven out of ten among those with disabilities age 16-64 who are not employed say that they would prefer to be working - about 7.8 million people.¹⁴⁸ If the 72 percent unemployed disabled people are factored in, the total

¹⁴¹ Id.

¹⁴² See Davis, *supra* note 26.

¹⁴³ The figure is adjusted for the official definition of “employed.” Under current U.S. definitions of unemployment, one must be actively looking for work to count as unemployed. If one has given up the search for work as hopeless, he is not counted as jobless. In addition, U.S. unemployment statistics may tend to undercount the poor and unemployed more than most European statistics. The BLS uses headcount rather than full-time equivalent (FTE) to account for employment. Since a person who is employed only 10 hours a week counts the same as one who is employed 40 hours a week, significant numbers of the under-employed can skew the employment rates upward as compared to the FTE approach. See David Dembo & Ward Morehouse, *The Underbelly of the U.S. Economy: Joblessness and the pauperization of Work in America* 13 (1995).

¹⁴⁴ In 1997, 16.8 million worked full-time, year round, yet earned less than the official poverty level for a family of four. This represents 18 percent of full time workers. Roughly one in four women and one in seven men who had full-time jobs year-round earned less than the poverty level for a family of four. These estimates are calculated from the U.S. Census Bureau, *supra* note 12, at 38-41.

¹⁴⁵ Workers only marginally attached to the labor force-like the 10 million disabled persons on disability benefits - don't enter into the unemployment calculation. The Current Population Survey focuses on the civilian noninstitutional population over age 16. If a person fits this criteria, CPS determines if they are in the labor force or not in the labor force (NLF). If they are in the labor force, then they are employed or unemployed. If they are neither employed nor unemployed (but still in the civilian noninstitutional population over age 16) they are considered NLF. The NLF population is not, however, separately identified on the basis of their disability status, so the only estimate available of how many disabled people might join the labor force comes from a survey such as NOD/Harris.

¹⁴⁶ 10.8 million people with disabilities are not currently in the labor force. Trupin et al., *supra* note 33.

¹⁴⁷ Jack A. Meyer & Pamela J. Zeller, *Kaiser Comm'n on Medicaid and the Uninsured, Profiles of Disability: Employment and Health Coverage* 9 (1999).

¹⁴⁸ NOD/1998 Harris Survey, *supra* note 11.

number of unemployed could rise by as many as 7.8 million. In addition, there are indications that disabled people may be significantly underemployed, preferring to work full-time but only employed part-time. Between 1981-93, the proportion of pwds working full-time declined by 8 percent while disabled people disproportionately experienced a large increase in numbers working part-time for both economic and noneconomic reasons.¹⁴⁹

Essentially, about 20 million working people are condemned, by federal anti-inflationary policies, to either compulsory unemployment or employment at low wages. Keynesian scholars such as Robert Eisner, William Vickrey and James Galbraith argue, however, that a policy of full-employment is necessary to equalize the wealth of society. In *Created Unequal, the Crisis in American Pay*, Galbraith shows that the less-than-full-employment strategy has resulted in greater inequality (low wages)¹⁵⁰ and a dangerous polarization within our society. Galbraith concludes that while many commitments are necessary to maintain full employment, maintenance of low, stable interest rates is fundamental, and as long as the Federal Reserve sees interest rates as a weapon in the war against inflation full employment will be sacrificed.¹⁵¹ In order to reduce inequality, Galbraith argues for "sustained full employment, stable and low interest rates, a higher minimum wage, and reasonable price stability",¹⁵² all of which he (and others) believe can be accomplished by means other than the current Federal Reserve strategy.¹⁵³

For our purposes it suffices to understand that whether the unemployment rate is at 4 percent, 6 percent, or 10 percent the capitalist system, as is, produces jobless casualties: the reserve army of labor buoys or provides the underpinning support for those who are employed. Radical theory maintains that this can only cause, directly or indirectly, greater job insecurity and divisions amongst the working class because the economy fails to meet peoples material needs.¹⁵⁴

Job Insecurity and the Fixed Pie Syndrome

According to a new quarterly nationwide survey of U.S. workers inaugurated in August 1998 by Rutgers University's Heldrich Center for Workforce Development and the University of Connecticut's Center for Survey Research & Analysis, some 59 percent of respondents say they are very concerned about job security for "those

¹⁴⁹ Edward Yelin & Patricia Katz, *Making Work More Central to Work Disability Policy*, 72 *Milbank Q.* 593-619 (1994).

¹⁵⁰ When unemployment is high, inequality rises, when unemployment is low, inequality tends to fall. Galbraith, *supra* note 58, at 148. See generally Doug Henwood, *Wall Street: How It Works and for Whom* (1997); Dean Baker, *The Impact of mis-Measured Inflation on Wage Growth* (Economic Policy Institute 1998).

¹⁵¹ See Henwood, *supra* note 149, at 219; Wolman & Colamosca, *supra* note 45, at 141-166.

¹⁵² See Wolman & Colamosca, *supra* note 45, at 213.

¹⁵³ For Galbraith's solutions, which are too involved to outline here, see *id.* at 263-270.

¹⁵⁴ For insecurity and polarization of the working class see generally O'Connor, *supra* note 135; Michael Perelman, *The Pathology of the U.S. Economy: The Costs of a Low-Wage System* (1993); Sheldon Danziger & Peter Gottschalk, *America Unequal* (1996).

currently at work."¹⁵⁵ An additional 28 percent indicate they are "somewhat concerned."¹⁵⁶

Reports on U.S. job trends show that workers have reason for concern. Workers appear less likely to be able to count on long-term employment which in the past provided steady wage growth, fringe benefits and long-term job security. Jobs have grown more insecure in the 1990s as the share of workers in "long-term jobs" (those lasting at least 10 years) fell from 41 percent in 1979 to 35.4 percent in 1996, with the worst deterioration having taken place since the late 1980s.¹⁵⁷ Corporate mergers and downsizing have contributed to job cuts or company shutdowns which cost nearly 30 percent of U.S. workers their jobs from 1990 to 1995.¹⁵⁸ Merger-related layoffs soared in 1998 to nearly double the level of 1997, reflecting a slew of high-priced mergers and acquisitions.¹⁵⁹ Job cuts resulting from mergers totaled 73,903 in 1998, up 99.6 percent from the 1997 total of 37,033.¹⁶⁰ In addition, the Bureau of Labor Statistics' survey of company payrolls shows that only 1.9 million jobs were added in 1998 compared with 2.2 million for the same period a year prior--a 14 percent slower growth rate.¹⁶¹ *Business Week* reports the slowdown hasn't raised the jobless rate yet since fewer new workers are joining the labor force, but concludes that if job cuts continue at their current pace, today's 4.5 percent official unemployment rate may soon drift higher.¹⁶² So far this has not occurred.

Underemployment, a broader measure of lack of employment success in the labor market, hovered at 10.1 percent for 1995.¹⁶³ For some economists this is a much more troubling statistic because it represents part-time workers who could not find full-time jobs and "discouraged workers" who wanted jobs but had been discouraged by their lack of success, subsequently leaving the labor force and dropping off the unemployment rolls.

To understand job-loss anxiety, it is necessary to know what happens to a worker's material reality when they are fired from a job. Workers have difficulties finding new employment with more than one third still out of a job when interviewed one to three years after their displacement.¹⁶⁴ Workers rarely regain the old wage and are often forced to take jobs pay averaging about 13 percent less than the old job.¹⁶⁵ An increasing percentage of workers are working part-time jobs, from 13 percent of all jobs in 1957 to more than 19 percent or nearly 20 million people in 1993.¹⁶⁶ Others try to

¹⁵⁵ Gene Koretz, *Economic Trends: Which Way Are Wages Headed?*, *Bus. Wk*, Sep. 21, 1998, at 26.

¹⁵⁶ *Id.*

¹⁵⁷ See Mishel et al., *supra* note 45, at 7.

¹⁵⁸ *Cognetics Annual Report on Job Demographics*, Council on International and Public Affairs, 2 (Winter 1997).

¹⁵⁹ Aaron Bernstein, *Is the Job Engine Starting to Sputter?*, *Bus. Wk.* (Oct. 5, 1998).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ Mishel et al., *supra* note 45, at 221.

¹⁶⁴ *Id.* at 8.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

make ends meet with two or more part-time jobs. In 1997 more than 7.9 million people worked more than one job.¹⁶⁷

In the 1990s the “contingent” workforce has grown; almost 30 percent of workers in 1997 were employed in situations that were not regular full-time jobs - independent contracting and other forms of self-employment such as temporary agency labor or day labor.¹⁶⁸ The number of workers employed by temporary agencies almost doubled, rising from 1.3 percent in 1989 to 2.4 percent in 1997.¹⁶⁹ Temporary workers on average earn less than workers with comparable skills and backgrounds who work in regular full-time jobs and are less likely to receive health or pension benefits.¹⁷⁰

Displaced workers are facing increased job insecurity, lowered career expectations, lowered wages, and less control over their financial futures. Such economic trends have been linked to intergroup tensions. Increased intergroup disparities and divisiveness arise out of worsening economic conditions and increased competition for scarce resources.¹⁷¹ Job insecurity can convert to a scarcity mentality, the thinking that “there is not enough to go round.”

Although employers are not required to hire disabled people under affirmative action, disabled persons seeking work (as many as 7.8 million) and those potentially coming off public benefit programs under the social Security Return-to-Work program represent an influx of new competition joining the ranks of labor. Women on welfare transitioning into jobs¹⁷² are similarly positioned, both as a group of potential workers moving from the surplus population to work and as an undereducated workforce.¹⁷³

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, which ended federal welfare entitlements and enshrined welfare-to-work as a primary goal of federal welfare policy, illuminates the backlash experience. Welfare reform can be viewed through the lens of the zero-sum game theory, holding that under U.S. capitalism one group benefits absolutely at the expense of the other. When some

¹⁶⁷ Thomas Amirault, Characteristics of Multiple Jobholders, 120 Monthly Lab. Rev. Online, (Mar. 1997) (visited Feb. 8, 2000) <<http://www.bls.gov/opub/mlr/1997/03/art2exc.htm>>.

¹⁶⁸ Mishel et al., *supra* note 45, at 21.

¹⁶⁹ *Id.* at 21.

¹⁷⁰ See generally U.S. Gen. Accounting Office, GAO Report no. hrd-91-56, Workers at Risk: Increased Numbers in Contingent Employment Lack Insurance, Other Benefits (1991).

¹⁷¹ See Sheryl L. Lindsley, Communicating Prejudice in Organizations, in *Communicating Prejudice* 187-205 (Michael L. Hecht et al. eds., 1998).

¹⁷² Since January 1993, the number of people on welfare rolls has fallen 48% to 7.3 million nationally with three-quarters of the drop coming since the measure became law in 1996. Clinton Asks Business to Hire More From Welfare Rolls, Aug. 3, 1999, (visited Feb. 8, 2000) <<http://cnn.com/ALLPOLITICS/stories/1999/08/03/welfare/>>.

¹⁷³ 42.7 percent of disabled persons enrolled in highschool do not graduate. U.S. Dept. of Education, H. Stephen Kaye, “Education of Children with Disabilities,” Disability Statistics Abstract No. 19 July 1997 at p 2. Only 6.3 percent of all students enrolled in undergraduate post-secondary institutions (1992-1993) had a disability. Of these, 46.3 percent were attending school full time (compared to 52.9 percent of nondisabled students. See Thomas D. Snyder, National Center for Education Statistics, 96 The Digest of Educ. Stat. 133 (1996).

workers gain, others will lose; when some workers get a job, others will be displaced. Radical or Marxist theory asserts that employers deliberately exploit the least powerful workers (minorities) to increase profits and to divide the workers and keep the wage floor down.¹⁷⁴

Two years after the enactment of welfare reform, both worker displacement and increased worker exploitation are already having an impact. Jon Jeter reported that women coming off welfare are competing with, and in some cases, displacing other low wage workers under the "subsidized employment" plan.¹⁷⁵ Under this plan, the state pays a company to hire someone in the program at minimum wage. At the Omni Inner Harbor Hotel in Baltimore, for instance, social service workers placed 13 jobless women into welfare-to-work jobs. During her 90-day probation, each woman wipes, dusts and vacuums on eight-hour shifts, five days a week, just as regular housekeepers paid \$6.10 per hour. In return, she receives \$410 a month in welfare benefits from the state and a \$30 weekly stipend from the Omni Inner Harbor Hotel. The hotel saves the difference.¹⁷⁶

According to Jeter, the entry of subsidized workers has increased co-worker tension at the hotel where regular low-wage employees have formed a union among the 300 bellmen, housekeepers, doormen and kitchen workers to improve their wages and benefits.¹⁷⁷ Jeter explains the twofold threat to co-workers: not only can subsidized welfare workers undercut regular worker wages and possibly interfere with union goals of better wages and benefits, but they raise the question of whether management will hire the welfare recipient as a permanent worker and displace a regular employee.¹⁷⁸ The welfare-to-work program has added even more uncertainty to an uneasy coexistence between groups of working poor in Maryland and across the nation, who fear the loss of their jobs to a cheaper workforce.

Welfare advocate Laura Riviera explains the effect of subsidized employment under the Wisconsin welfare-to-work program, called a model for welfare reform by the Clinton administration. "Women are introduced to other employees as "the W-2 participant. Knowing that this person is required to work at the company for free, employees automatically feel threatened by this person," says Riviera. "This sets up a situation where it is very difficult for that person to get along well with other employees no matter how hard she tries," she adds.¹⁷⁹

Riviera reports that she has heard from many women who were working and barely making ends meet until welfare reform began. "They were pushed out of their minimum wage jobs by these less expensive employees provided by the state and are now in the W-2 program."¹⁸⁰

Similar job displacement has occurred under the workfare grant program in New York City, where the recipient receives a predetermined amount of money and in

¹⁷⁴ John E. Roemer, *Divide and Conquer: Microfoundations of a Marxian Theory of Wage Discrimination*, 10 *Bell J. Econ.* 695, 695-96 (1979).

¹⁷⁵ Jon Jeter, *Room for Working Poor In Welfare's New Deal?*, *Wash. Post*, Mar. 15, 1997, at A01.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *See Id.*

¹⁷⁹ Electronic mail from Laura L. Riviera to Thomas Kruse (June 1, 1998) (on file with author).

¹⁸⁰ *Id.*

turn must work in a “volunteer” position assigned by the caseworker. When Steven Greenhouse conducted interviews with more than 50 workfare workers and visited more than two dozen work sites, he found that many workfare participants had taken the place of city workers.¹⁸¹ He reports that

In many municipal agencies, the city has shrunk its regular work force and increased the number of workfare participants. The Sanitation Department's work force slid from 8,296 in 1990 under Mayor David N. Dinkins to 7,528 in early 1994, when Mr. Giuliani took office, then down 16 percent more last year, to 6,327. Today, the department employs more than 5,000 workfare laborers, who wear bright orange vests, sweeping streets and doing other tasks around the city.¹⁸²

According to Greenhouse, workfare recipients are doing much of the work once performed by departed city employees. The 34,100 people in the city's Work Experience Program constitute a low-cost labor force that does a substantial amount of the work that had been done by municipal employees before Mayor Rudolph W. Giuliani reduced the city payroll by about 20,000 employees, or about 10 percent.¹⁸³

Jeter reported similar conflicts in the *Washington Post*. In Baltimore, officials at Patterson High School decided last year not to renew the contract with the janitorial company that cleaned the building and are now looking for welfare recipients to do the work, in part because “their rates would be cheaper.”¹⁸⁴ A job-training program in Alabama requires some welfare recipients to work for more than four months without pay for employers such as Continental Eagle, a cotton gin manufacturer near Montgomery.¹⁸⁵

Other sources of workfare labor are being sought as well. In New York City, for example, the Giuliani administration plans to extend workfare to homeless shelters, making workfare and other requirements a condition of shelter for the 4,600 families and 7,000 single adults in New York City's homeless shelter system.¹⁸⁶

While the stated intent of welfare reform is to move those on welfare into work and thereby lower federal and city welfare outlays, participating businesses receive a net gain from welfare reform: having a captive workforce who can be pushed into lower wage jobs, whether permanently or temporarily, keeps wages low and increases business profit margins. An insidious fiscal benefit to government has also emerged - undercutting regular worker salaries cuts city service budgets and generates a surplus at the expense of the poorest parts of the workforce.¹⁸⁷

¹⁸¹ Steven Greenhouse, Many Participants in Workfare Take the Place of City Workers, N.Y. Times, Apr.13, 1998; see also Steven Greenhouse, Union to Sue Giuliani Administration Over Use of Welfare Recipients in Jobs, N.Y. Times, Feb. 4, 1999.

¹⁸² Id.

¹⁸³ Id.

¹⁸⁴ Jon Jeter, Room for Working Poor In Welfare's New Deal? Wash. Post, Mar. 15, 1997, at A01 (referring to statement by the building's custodian).

¹⁸⁵ Id.

¹⁸⁶ Nina Bernstein, New York City Plans to Extend Workfare to Homeless Shelters, N.Y. Times, Feb. 20, 1999.

¹⁸⁷ One example: the Pataki administration has quietly built up a \$500 million surplus in Federal welfare money over the last two years as a result of the dramatic decline in the

Welfare reform may result in an overall lowering of the cost of labor. The Economic Policy Institute warns that the low-wage labor market is already suffering greatly, and proposals to put welfare recipients to work will drive the wages of the working poor down further. It estimates that to absorb all the welfare workers, the wages of the bottom third of the labor force would have to fall by 11 percent nationally.¹⁸⁸ Labor Secretary Alexis Herman explained that disabled workers can be put to a such purpose as well. "As President Clinton has said: The last big group of people in this country who could keep the economy going strong with low inflation are Americans with disabilities ... who are not in the workforce."¹⁸⁹ President Clinton made the macroeconomic link between welfare workers and disabled people when he told CNBC "... you can bring more people from welfare or from the ranks of the disabled into the work force [to keep inflation (wages) down]..."¹⁹⁰

While the majority of reports focus on the initial success of welfare reform in terms of numbers of people dropped from the rolls, there is a growing realization amongst state and county officials that placing all recipients into jobs is unrealistic for myriad reasons. There is also evidence that those dropped from the rolls may not be faring so well. A Wisconsin study of the transition period conducted by John Pawasarat of the University of Wisconsin at Milwaukee, found 75 percent of those hired lost their jobs within nine months.¹⁹¹ Only 28 percent sustained projected annual earnings of \$10,000 for two consecutive quarters and such work was often part-time, low-paying and quick to end.¹⁹² When the Children's Defense Fund and the National Coalition for the Homeless reevaluated the status of former welfare recipients in 1998, they found that only about 50 percent to 60 percent of those who leave welfare are working and those who work typically earn less than \$250 per week - too little to lift a family out of poverty.¹⁹³

There are not enough living wage jobs available for women being forced off welfare, and there will not be enough jobs for disabled persons wishing to work or to transition from public benefits into a job. The welfare reform experience indicates that subsidies to business can elevate co-worker tension, yet, in the case of disability and employment, subsidies for reasonable accommodations and health care *will be necessary* to level economic discrimination inherent in business accounting practices. Just as

number of people on public assistance, and expects that sum to grow to \$1.4 billion. Raymond Hernandez, *New York Gets Big Windfall From Welfare*, N.Y. Times, Feb. 9, 1999. The surplus can then be converted into tax breaks for special interest lobbies such as housing developers.

¹⁸⁸ Lawrence Mishel & John Schmitt, *Cutting Wages by Cutting Welfare: The Impact of Reform on the Low-Wage Labor Market 1* (Economic Policy Institute 1995).

¹⁸⁹ Alexis M. Herman, U.S. Secretary of Labor, Remarks Before the National Council on Independent Living, the National Association of Protection and Advocacy, and the National Council on Disability (June 24, 1999).

¹⁹⁰ Interview by Ron Insana, CNBC, with President Bill Clinton, Waterfield Cabinet Company, Clarksdale Miss. (July 6, 1999).

¹⁹¹ Jason DeParle, *Flaws Emerge in Wisconsin's Welfare-To-Work Plan*, N.Y. Times, Oct. 18, 1998, at A1.

¹⁹² *Id.* See generally Joel Dresang, *W-2 Work or Else; Food Charities Face Bigger Load Under Wisconsin Works*, *The Milwaukee J. Sentinel*, July 21, 1998, at 2.

¹⁹³ Children's Defense Fund, *After Welfare, Many Families Fare Worse* (visited Nov. 19, 1999) <<http://www.childrensdefense.org/release981202.html>>.

women coming off AFDC create increasing competition for jobs and increasing job insecurity, disabled job seekers must be aware that they too can generate resentment amongst those lacking job security who may view subsidies to disabled workers as a threat to their employment.

Though many disabled people will be entering the workforce at lower pay levels akin to the welfare to work population (due in part to the fact that large numbers of disabled people lack access to higher education), the global economy makes job insecurity a factor in the traditionally more secure educated class as well. Evidence of change can also be found in the incidence of displacement within the elite workforce. The President's Council of Economic Advisers reports that "further analysis shows that job displacement rates rose for more educated workers, so that while blue collar and less educated workers remain more likely to be displaced than others, displacement rates have clearly risen among those workers who had been previously immune from the threat of job dislocation."¹⁹⁴

Economists are beginning to see trends which indicate that white collar workers are no longer immune to neoliberal policies which emphasize free market production and increase the labor pool. As economists Anne Colamosca and William Wolman explain, globalization has produced an economy in which "the rapid worldwide spread of available skilled labor" is set "in head-to-head competition with their American counterparts."¹⁹⁵ Furthermore, the globalization of financial markets has served to lower the wage floor as employers search for low labor costs in far corners of the globe and American workers' wages shrink in response. "Capital migrates to low wage areas and the only way that it can be kept in the developed world is if wages in the developed world are kept low."¹⁹⁶

Summary and Unresolved Solutions

In part, the ADA backlash stems from the design of our economic system. Differentials in pay, income, and employment opportunities persist in the labor market despite anti-discrimination laws. Civil rights, though still necessary to counter individual acts of prejudice and discrimination, have only the power to randomly distribute the maladies of unemployment, income and wage inequality throughout the population. If everyone were equally educated and trained for jobs and civil rights were strictly enforced, millions would remain unemployed and underemployed in any capitalist system. Anti-discrimination laws cannot bridge the systemic employment gap, and individual rights cannot reach the root of the parity predicament created by the economic structure. Neither the market nor civil rights laws can undermine the structure of inequality nor prevent its reproduction.

After years of dedicated civil rights activism Dr. Martin Luther King, Jr. came to a similar conclusion. At the 1967 Southern Christian Leadership Conference convention Dr. King implored the movement to "address itself to the question of restructuring the whole of American society. There are 40 million poor people here. And one day we

¹⁹⁴ Council of Economic Advisers, Job Creation and Employment Opportunities: The United States Labor Market, 1993-1996 (visited Feb. 8, 2000) <<http://www2.whitehouse.gov/WH/EOP/CEA/html/labor.html>>.

¹⁹⁵ Wolman & Colamosca, *supra* note 45, at 87-138 (1997).

¹⁹⁶ *Id.* at 53, 141-166. See generally Bennett Harrison, *Lean and mean: The Changing Landscape of Corporate Power in the Age of Flexibility* (1994). Harrison says income polarization is a by-product of the post industrial society.

must ask the question, 'Why are there 40 million poor people in America?' And when you begin to ask that question, you are raising questions about the economic system, about a broader distribution of wealth. When you ask that question, you begin to question the capitalistic economy..."¹⁹⁷

To be effective, any solution to the backlash must address the very nature of social relations.¹⁹⁸ It must ask: What is work, who controls it, and what is its purpose? If work is controlled by the Federal Reserve, investors and Wall Street all looking to make ever higher profits from people's labor rather than trying to make the system work for all, the paradigm itself must be challenged. It then becomes imperative to ask what an economy is for - to support market-driven profits, or to sustain community bonds and elevate human participation?

To stem the tide of the backlash, which promises to grow as more workers are displaced in the global economy,¹⁹⁹ it is essential to reassert the basic radical theory principle that an economy is only working if it works *for* people, if it delivers health care, a living wage and a secure livelihood and income for every person. The exclusion of even 3 percent of the population from employment in the liberal definition of "full employment" is simply intolerable.²⁰⁰ Since private industry views unemployment as an integral part of the "normal" capitalist system (which keeps wages and inflation low and makes unemployment compulsory), people must bypass private industry and insist that government recognize the fundamental right of each person to a livelihood (full employment at a minimum of a living wage and quality disability sensitive universal health care). This must be the very cornerstone of our economic policy.

A government guarantee of full employment would require reorganizing the economy to allow everyone free choice among opportunities for useful, productive and fulfilling paid employment or self-employment. Base compensation must be set at a living real wage below which no remuneration for disabled or nondisabled workers is allowed to fall.

The wide variety and range of disablement means that some disabled persons may never be hired by businesses but would nevertheless like to be productive in their communities. In order to bring more excluded persons into the workforce, it will be necessary to expand the work environment beyond the capitalist profit motive and ensure that federal and state governments act as the employers of last resort. In addition, those unable to work for pay or find employment must have a government

¹⁹⁷ A Testament of Hope: The Essential Writings and Speeches of Martin Luther King, Jr., 245, 250 (James M. Washington ed. 1991) (quoting from King's 1967 SCLC presidential address, *Where Do We Go From Here?*).

¹⁹⁸ See John Dewey, *Democracy Is Radical*, in *The Later Works 1925-1953*, 296, 296-99 (JoAnn Boydston ed., 1987). Dewey argues against the Lockean notion of atomic individualism, suggesting instead that political philosophy must take seriously the social as a category. The individual, he says, can only be properly understood in the context of society, and must be understood this way to achieve progress.

¹⁹⁹ See Dean Baker, Robert Pollin, Gerald A. Epstein (Editors), *GLOBALIZATION AND PROGRESSIVE ECONOMIC POLICY: THE REAL CONSTRAINTS AND OPTIONS* (1999).

²⁰⁰ For an example of what a radical democratic planned future might look like see Dewey, *supra* note 196, at 296-99; Martin Carnoy & Derek Shearer, *Economic Democracy* (1980); Daniel Singer, *Whose Millennium?* (1999).

entitlement to an adequate standard of living which rises with increases in the wealth and productivity of society.

Problems of Power

Gregory Mantsios writes that “the class structure in the United States is a function of its economic system - capitalism, a system that is based on private rather than public ownership and control of commercial enterprises, and on the class division between those who own and control and those who do not. Under capitalism, these enterprises are governed by the need to produce a profit for the owners, rather than to fulfill collective needs.”²⁰¹ Inequality is traceable both to the economic system²⁰² and to the interaction between private interests and government. Liberal remedies that seek change by requiring government to enact sustained full employment, raise the minimum wage, lower interest rates, and initiate price stability still rely on the premise that these controls can occur with capitalism intact in a democratic society, when hierarchical power relations remain a crucial impediment to realizing such positive outcome.

Many have questioned the relationship between political power, monetary policy and wealth inequality in our representative democracy. There is consensus amongst these theorists (some liberal, some radical) that government has failed to stop rising inequality and contributed to the decline of labor power because it has been derelict in its duty to exercise power over private capital. The degradation of workers occurs in this age of mergers and acquisitions, bolstered by the power of speculative capital and unregulated by government precisely *because capital has control of government*.²⁰³ The enormous power of private capital over government is evident in business’s backlash against the ADA, Federal Reserve inflation management strategies primarily aimed to benefit Wall Street, the millions of dollars spent by the insurance industry to prevent a universal health care program, and both the passage and content of welfare reform legislation passed by Congress and signed by President Clinton in 1996.

After several centuries of capitalism, our society still shows no signs of allowing sustained full employment. If history provides any guide, it is safe to assume that the decision-making class will never allow it. In the 1940’s the U.S. experienced the lowest unemployment rate in its history (1 percent); directly on its heels came McCarthyism, an organized attack on socialist ideals of equitable distribution. In the 1970s, drops in wages and the standard of living coincided with a regressive decline in the power of unions, noticeable over the past few decades.²⁰⁴ Economist Michel Kalecki’s observation that labor must be kept weak to preserve profits and the class dictatorship of capital seems undeniable. Government enactment of full employment under

²⁰¹ Gregory Mantsios, *Class in America: Myths and Realities*, in Paula S. Rothenberg, *Race, Class, and Gender In the United States* 212 (1998).

²⁰² Political economist Bennett Harrison posits that income polarization is a by-product of the post-industrial society. See Bennett Harrison, *Lean and Mean: The Change Landscape of Corporate Power in the Age of Flexibility* (1997).

²⁰³ See Wolman & Colamosca, *supra* note 45, at 144-145 (1997).

²⁰⁴ See Michael Yates, *Why Unions Matter* 135-140 (1998).

capitalism can only result in an even greater crushing of labor so as to reinstate "stability" and reassert control over the economic lives of workers.²⁰⁵

Capitalist measures--whether the type promoted by free market conservatives or that of welfare liberals--fail to respond to the discrimination faced by millions of disabled Americans. Only measures that account for the existence of systemic and long-standing economic inequality will provide the necessary protections against further workplace discrimination. The present reality, however, is that disabled people are the last legally protected class to enter the workforce. They seek economic equality at a time when unemployment levels are low and downsizing and market globalization are in full force. It is in such a "positive" economic environment when business has obtained both the legal and political legitimacy necessary to discriminate in the name of work-place and market efficiency that our battle for distributive justice becomes the toughest of all.

²⁰⁵ 1 Collected Works of Michal Kalecki, *Capitalism: Business Cycles and Full Employment* (Jerzy Osiatynski ed.,1990).