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RETURNING VETERANS AND DISABILITY LAW

*Michael Waterstone**

Federal laws and policies as they relate to the employment of people with disabilities are at war with themselves. Antidiscrimination law, primarily through the Americans with Disabilities Act, is premised on the empowering idea that people with disabilities can and should work once discriminatory societal barriers are removed. But antidiscrimination law does not work alone: There is a separate sphere of social welfare policies that provides more affirmative forms of assistance to people with disabilities. These older programs contain significant work disincentives and are often conditioned on detachment from the labor force. These divergent views of disability and employment have contributed to the low success rate in moving and keeping people with disabilities in the workforce.

The federal laws and programs for veterans with disabilities demonstrate that a more coherent policy is possible. Federal employment policy for veterans with disabilities is more integrated and encourages workforce participation through both antidiscrimination law and social welfare policies. The occasion of the largest wave of returning veterans with disabilities in recent history, combined with the renewed need to create employment opportunities for all groups in light of rising unemployment rates, creates a unique opportunity to analyze what can be learned from this more coherent framework.

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INTRODUCTION

These are interesting times in disability law. Disability has not always occupied center stage in the struggle for civil rights. Yet with the return of veterans with disabilities from Iraq and Afghanistan—the largest such wave in recent history—the disability experience is much more in the public consciousness. The outrage over conditions at the Walter Reed Medical Center was an expression of public support for the cause of wounded veterans.¹ Similarly, anyone reading the newspaper or listening to the radio recognizes the large number of human interest stories of veterans with disabilities trying to reintegrate into society.

This focus on disability comes at an important moment. In the current economic climate, policymakers will be focusing renewed attention on increasing the national employment rate. This is therefore a crucial time to be considering how to remove barriers that keep people with disabilities out of the workforce. The Americans with Disabilities Act of 1990² (ADA) has certainly created a more accessible society that has made people with disabilities a more visible presence in public life. But there is near uniform consensus that insofar as the ADA was intended to increase employment levels for people with disabilities, it has failed. This is the biggest current challenge in disability law and policy.³

1 See generally Washington Post, *Walter Reed and Beyond*, <http://www.washingtonpost.com/wp-srv/nation/walter-reed/index.html> (last visited Jan. 18, 2010) (providing stories of Iraq and Afghanistan war veterans' care and treatment after they return to the United States).

2 Pub. L. No. 101-336, 104 Stat. 327 (codified as amended in 42 U.S.C. §§ 12101–12213 (2006 & Supp. II 2008)).

3 This issue has occasioned perhaps more attention than any other in disability law scholarship. See, e.g., Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L. J. 1, 3–4 (2004) (acknowledging limits of antidiscrimination law); see also Matthew Diller, *Dissomant Disability Policies: The Tensions Between the Americans with Disabilities Act*

The ADA, of course, does not stand alone. The federal government's policy scheme relating to the employment of people with disabilities also contains a host of social support programs that provide cash payments, access to healthcare and medical goods, and job training programs. Yet the ADA and social support programs operate from very different premises. The ADA, like most employment discrimination statutes, rests on the assumption that many people with disabilities can and should work.⁴ It stakes out the normative ground that disability is socially constructed, and focuses on removing discriminatory barriers that keep people with disabilities out of the workplace (and other spheres of public life). Federal social support policies, in contrast, start from a different place. As older programs, they tend to treat people with disabilities through a medical model, seeking to objectively evaluate whether their medical situation entitles them to governmental benefits. As a result of this gatekeeping function, many of these programs are linked to an inability to work or some level of separation from the labor market. Because their underlying ideas about disability and employment are so different, antidiscrimination law and social support programs can actually work at cross purposes. As a simple example, antidiscrimination law can make it unlawful for an employer to refuse to hire someone with a disability, but the fed-

and Federal Disability Benefit Programs, 76 TEX. L. REV. 1003, 1003 (1998) (noting that disability policies “pull in different and, in some respects, inconsistent directions”) [hereinafter Diller, *Dissomant Disability Policies*]; Matthew Diller, *Entitlement and Exclusion: The Role of Disability in the Social Welfare System*, 44 UCLA L. REV. 361, 361 (1996) [hereinafter Diller, *Entitlement and Exclusion*] (describing the social welfare system as “a complex of programs that reflect a series of uneasy compromises between competing principles”); Scott A. Moss & Daniel A. Malin, *Public Funding for Disability Accommodations: A Rational Solution to Rational Discrimination and the Disabilities of the ADA*, 33 HARV. C.R.-C.L. L. REV. 197, 233 (1998) (suggesting that funding increases for disability programs would reduce accommodation discrimination); Sherwin Rosen, *Disability Accommodation and the Labor Market*, in DISABILITY AND WORK 18, 29–30 (Carolyn L. Weaver ed., 1991) (arguing for government spending on education and work training, instead of accommodations); Michael Waterstone & Michael Ashley Stein, *Disabling Prejudice*, 102 NW. U. L. REV. 1351, 1363 (2008) (noting low employment rates of individuals with mental disabilities); Mark C. Weber, *Beyond the Americans with Disabilities Act: A National Employment Policy for People with Disabilities*, 46 BUFF. L. REV. 123, 124 (1998) (“Existing legal remedies embodied in the Americans with Disabilities Act and other laws, though beneficial, do not eliminate the problem [of discrimination against those with disabilities].” (footnote omitted)); Mark C. Weber, *Disability and the Law of Welfare: A Post-Integrationist Examination*, 2000 U. ILL. L. REV. 889, 921 (stating that current programs for the disabled still fail to meet adequately the needs of disabled individuals).

4 See *infra* notes 13–16 and accompanying text.

eral government will only provide benefits (including health care, support payments, and job training) if the person does not work.

Veterans⁵ with disabilities are a subset of the general population of people with disabilities. They have always had greater popularity amongst the public and enjoyed greater political clout (at least in the short term) than the general population of people with disabilities.⁶ Since the founding of our nation, the federal government has had a stated commitment to care for its wounded warriors. One manifestation of this commitment is a more integrated policy scheme for the employment of veterans with disabilities. The laws and programs for veterans with disabilities avoid many of the work disincentives that exist in the general policy scheme, while providing additional support and resources to keep veterans with disabilities in the workforce. These policies are therefore worthy of careful study, and can offer guidance to policymakers and advocates on how a more integrated policy system might improve the employment prospects of people with disabilities. These programs may also offer a glimpse into the future, as the history of this and other countries demonstrates that programs that start as being just for veterans with disabilities can, over time, become extended to the larger population of people with disabilities.

But their status as the “deserving disabled” has not meant that employment-based strategies for veterans with disabilities have worked perfectly. Veterans with disabilities have not been able to escape many of the problems that have infected the general disability landscape. Veterans programs and commitments are chronically underfunded, administration is poor, and bureaucracies are inefficient. Veterans with disabilities do not escape stigma and suspicion. There is a sad reality at work here: the neglect of veterans with disabilities by policymakers has historically outlived the public’s immediate embrace of their service and sacrifice. This convergence with problems in the general disability legal and policy scheme helps demonstrate the serious challenges confronting policymakers in the coming years. Yet it also offers opportunities for shared advocacy for veterans and nonveterans with disabilities.

This Article proceeds in three parts. In Part I, I discuss the conflicting aims of disability antidiscrimination law and social support sys-

5 My working definition of “veteran” for this paper is the same as the Department of Veterans Affairs’ definition: “a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable.” 38 U.S.C. § 101(2) (2006).

6 DAVID A. GERBER, *DISABLED VETERANS IN HISTORY* 73 (2000).

tems, showing how the two systems often work at cross currents. In Part II, I examine the two-tier system of disability law and policy in this country: one system for veterans with disabilities and one for the general population of people with disabilities. The former offers a model of what a united system—that is, one that encourages people to work through both affirmative social support programs and antidiscrimination law—might look like. A rough comparison between employment levels of the general population of people with disabilities and veterans with disabilities suggests that this more integrated approach might be yielding some positive results. In Part III, I critique social welfare programs for veterans with disabilities, noting that they contain many problems that will look familiar to disability rights advocates. The fact that these problems exist even within this “favored population” demonstrates, I suggest, just how vexing these issues are. But this convergence of interests also offers opportunities for the communities of veterans with disabilities and nonveterans with disabilities to benefit from each other’s efforts and advocacy.

I. THE INCONSISTENT STRATEGIES OF EMPLOYMENT POLICY FOR PEOPLE WITH DISABILITIES

Federal disability policy for people with disabilities is multifaceted. Antidiscrimination law protects a person with a disability from an employer or other actor taking an adverse job action based on their disability.⁷ Said differently, statutes like the ADA express the right to be treated equally without regard to disability. Separate from antidiscrimination law, there are also more direct forms of assistance that the government provides. Categorized loosely as a “social safety net,” “social welfare policy,” or even “positive rights,” the focus is on affirmative ways the government can help people with disabilities.⁸ These federal laws and programs either directly or indirectly provide goods and services to certain people with disabilities, including cash payments, job training, and medical goods and services.

7 These types of political and civil rights have also been referred to as first-generation rights. See Michael Ashley Stein, *A Quick Overview of the United Nations Convention on the Rights of Persons with Disabilities and Its Implications for Americans with Disabilities*, 31 MENTAL & PHYSICAL DISABILITY L. REP. 679, 679 (2007) (“Broadly stated, first-generation rights are thought to include prohibitions against state interference with rights that include life, movement, thought, expression, association, religion, and political participation.”).

8 Particularly within international law, these types of rights are referred to as second-generation rights. See Stein, *supra* note 7, at 680; see also Isaiah Berlin, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118, 122 (1958) (distinguishing between “positive” and “negative” liberty).

Although there are certainly many goals of federal disability policy, one of the most prominent—if not the preeminent—priorities is to create conditions under which people with disabilities can work. This goal expressed itself powerfully in the passage of the ADA, the most complete federal statement on the rights and lives of people with disabilities. Moving people with disabilities into the labor force was a proposition that had support on both sides of the political aisle.⁹ The importance of employment to a previously marginalized group is a bedrock principle of antidiscrimination law generally, and is a proposition that has gathered popular academic support.¹⁰ The new administration appears to actively embrace this goal.¹¹

In terms of antidiscrimination law, in passing the ADA, Congress noted that people with disabilities had been continually discriminated against in employment, which had contributed to their isolation and political powerlessness.¹² Title I of the ADA attempted to remedy this pattern of unequal treatment by prohibiting discrimination on the basis of disability in the workplace.¹³ It also provided that employers must provide reasonable accommodations to qualified individuals with disabilities in the workplace.¹⁴ In these ways, the ADA (like predecessor civil rights statutes) seeks to remove barriers that keep people with disabilities from working.

Overt discrimination against people with disabilities is perhaps the easiest to describe and identify. But the ADA also has aspirations to eliminate more subtle prejudice, bias, and stigma against people

9 See, e.g., Samuel R. Bagenstos, *The Americans with Disabilities Act as Welfare Reform*, 44 WM. & MARY L. REV. 921, 953–71 (2003) (discussing the legislative history of the ADA as it relates to putting people with disabilities to work).

10 See Kenneth L. Karst, *The Coming Crisis of Work in Constitutional Perspective*, 82 CORNELL L. REV. 523, 530–34, 547–48 (1997); see also Vicki Shultz, *Essay, Life's Work*, 100 COLUM. L. REV. 1881, 1886–92 (2000) (discussing the importance of employment to the conception of the “good life”).

11 See The White House, *Disabilities*, <http://www.whitehouse.gov/issues/disabilities/> (last visited Jan. 18, 2010) (noting that one of the five guiding principles of the Obama administration’s disability policy is to “[increase] access to employment by having the federal government lead by example in hiring people with disabilities; enforcing existing laws; providing technical assistance and information on accommodations for people with disabilities; removing barriers to work; and identifying and removing barriers to employment that people with public benefits encounter”).

12 See ADA § 2, 42 U.S.C. §§ 12101(a)(3), (5), (17) (2006). The 2008 legislation removed the reference to political powerlessness. See *id.*

13 *Id.* § 102, 42 U.S.C. § 12112(a) (2006).

14 *Id.* § 102, 42 U.S.C. § 12112(b)(5)(A).

with disabilities.¹⁵ Advocates thus viewed the ADA as a tool to change perceptions of people with disabilities from objects of pity and paternalism to a minority group in possession of important civil rights. Referred to as the “civil rights model” or “minority model” of disability,¹⁶ this paradigm envisions disability as not arising from objective medical conditions, but rather from society’s response to those conditions. An individual in a wheelchair who cannot enter a building through a flight of stairs is only “disabled” because of society’s choice to not build or require ramps. Inherent in Title I of the ADA is the idea that people with disabilities *can* and *should* work, once attitudinal barriers (stereotypes and preconceptions about abilities) and environmental barriers (workplace policies and practices that are capable of modification) are removed.

Apart from antidiscrimination law, the federal government also has an extensive social welfare state for people with disabilities. This is a large and complex topic,¹⁷ and in this Article I am only focusing on government interventions that, either directly or indirectly, can influence the employment of people with disabilities. Broadly speaking, this involves cash benefits, federal health insurance, and job training programs. These programs, most of which predate the ADA, operate from a very different set of premises than antidiscrimination law.

As will be discussed in more detail below, these programs are eligibility driven, and the criteria for acceptance rests on medical assessments made of the individual.¹⁸ Would-be participants are evaluated “objectively,” with medical professionals and government bureaucrats making gatekeeping determinations as to whether an individual’s medical condition makes them eligible to receive benefits. This older model of conceiving disability, referred to as the medical model, casts people with disabilities as the passive recipients of public welfare or charity.¹⁹ This is quite different from the empowering, civil rights model embodied in the ADA. For fear of frauds or cheats (or extending the social welfare net further than is politically acceptable), most of these programs are designed to be restricted to people who at

15 See *id.* § 2, 42 U.S.C. § 12101(a)(6) (noting stigma and severe disadvantages faced by the disabled); *id.* § 2, 42 U.S.C. § 12101(b)(1) (stating the purpose of eliminating discrimination against the disabled).

16 See, e.g., BLANCK ET AL., *DISABILITY CIVIL RIGHTS LAW & POLICY* 4–5 (2005).

17 For a general treatment, see Diller, *Entitlement and Exclusion*, *supra* note 3, at 393–46 (discussing disability and the social welfare system); see also Bagenstos, *supra* note 3, at 4–5 (noting that the social welfare system contributed to achieving the goals of the disability rights movement).

18 See *infra* notes 35–37.

19 See BLANCK ET AL., *supra* note 16, at 3–4.

least at some point are so disabled that they cannot work. They therefore contain significant work disincentives or require some distance and detachment from the labor market to obtain entry into the system.

The bulk of disability welfare spending goes to four programs: Social Security Disability Insurance (SSDI), Supplemental Security Income (SSI), Medicare, and Medicaid.²⁰ SSDI was created in 1956 through an amendment to the Social Security Act.²¹ It is a federal cash benefit program, whereby benefits are paid to individuals who have a disability, defined as an “inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.”²² SSDI is limited to workers who have paid work experience of at least ten years and have paid payroll taxes into the Disability Insurance trust fund.²³ It has been characterized as “a monthly cash benefit that effectively serves as early retirement pay.”²⁴

SSI was created in 1972, also through amendments to the Social Security Act.²⁵ SSI provides cash benefits to eligible individuals with disabilities who fall below a federal means test, regardless of their work history.²⁶ An adult with a disability must meet the Social Security

20 See Bagenstos, *supra* note 3, at 11; see also Monroe Berkowitz, Professor, Rutgers University, Address at the Employment and Return to Work for People with Disabilities Conference: Federal Programs for Persons with Disabilities: To What Extent Is Employment Supported? (Oct. 31, 1996) (finding that of the over \$184 billion spent on all disability programs in 1995, over ninety percent went to health care (\$91 billion) and income maintenance (\$78 billion)). To be sure, this leaves out many social welfare programs of general applicability that impact the lives of people with disabilities. See Richard K. Scotch, *American Disability Policy in the Twentieth Century*, in *THE NEW DISABILITY HISTORY* 375, 377 (Paul K. Longmore & Lauri Umansky eds., 2001) (“[A] truly comprehensive overview of disability policy would look beyond programs specifically targeting people with disabilities to examine more generic social and economic policy realms. The vast majority of public policies that affect people with disabilities (in both positive and negative ways) were not created specifically for them.”).

21 Social Security Amendments of 1956, Pub. L. No. 84-880, §§ 101–121, 70 Stat. 807, 807–37 (codified in relevant part as amended at 42 U.S.C. §§ 401(b), 420–425 (2006)).

22 42 U.S.C. § 423(d)(1)(A).

23 See Social Security, Disability Planner: How Much Work Do You Need?, <http://www.socialsecurity.gov/dibplan/dqualify2.htm> (last visited Jan. 18, 2010).

24 See Bagenstos, *supra* note 3, at 11.

25 Social Security Amendments of 1972, Pub. L. No. 92-603, tit. III, § 301, 86 Stat. 1329, 1465–1478 (codified as amended at 42 U.S.C. §§ 1381–1383f (2006)).

26 42 U.S.C. § 1382. The current resource limit for eligibility is \$2000. See Social Security Administration, Understanding Supplemental Security Income—SSI Resources, <http://www.ssa.gov/ssi/text-resources-ussi.htm> (last visited Feb. 3, 2010).

definition of disability, including an inability to do any substantial gainful activity.²⁷ The current benefit is \$674 per month for someone who lives alone.²⁸ SSDI benefits are more generous than SSI, reflecting a stratification of people with disabilities (workers over non-workers) that is not unique to the United States.²⁹

Medicare was established in the 1965 amendments to the Social Security Act.³⁰ It is a federal health insurance program which operates as a companion to Social Security. Broadly speaking, it covers inpatient hospitalization, including stays in a skilled nursing facility (Part A), outpatient treatment (Part B), the option of receiving benefits through private health insurance plans (Part C) and a prescription drug benefit (Part D).³¹ After two years on SSDI, an individual with a disability becomes eligible for Medicare coverage.³² Medicaid, also enacted as part of the 1965 amendments to the Social Security Act, is a federal-state cooperative program that provides medical benefits of different types to various needy populations. States do not have to participate in Medicaid, but all do.³³ States have flexibility in deciding what populations they have to cover and what benefits they will provide, although the Medicaid statute does have several requirements in terms of coverage and services. In most states, an individual who meets the Social Security Act's definition of disability can receive Medicaid coverage.³⁴

Both the cash benefit programs (SSI and SSDI) and health insurance programs (Medicare and Medicaid), and the interaction between them, have been criticized for creating incentives for people to not return to work.³⁵ To receive Medicare, someone of working

27 42 U.S.C. § 423(d)(1)(A).

28 See Social Security Administration, Understanding Supplemental Security Income—SSI Benefits, <http://www.ssa.gov/ssi/text-benefits-ussi.htm> (last visited Feb. 3, 2010).

29 See, e.g., Sagit Mor, *Between Charity, Welfare, and Warfare: A Disability Legal Studies Analysis of Privilege and Neglect in Israeli Disability Policy*, 18 YALE J.L. & HUMAN. 63, 66 (2006) (noting similar stratification in Israel).

30 Social Security Amendments Act of 1965, Pub. L. No. 89-97, 79 Stat. 286 (codified as amended at 26 U.S.C. § 6053 (2006) and in scattered sections of 42 U.S.C.).

31 See *id.*; Medicare Prescription Drug, Improvement and Modernization Act of 2003, Pub. L. No. 108-173, 117 Stat. 2066 (codified as amended in scattered sections of 42 U.S.C. and 26 U.S.C.).

32 42 U.S.C. §§ 423(b)–(c)(1) (2006).

33 See Bagenstos, *supra* note 3, at 12 n.31.

34 See 42 U.S.C.A. § 1396 (West 2009); see also KAISER COMM'N ON MEDICAID & THE UNINSURED, MEDICAID'S ROLE FOR PEOPLE WITH DISABILITIES 12 (2003).

35 See Bagenstos, *supra* note 3, at 32 (“[P]ublic health insurance programs themselves impose serious impediments to the participation of people with disabilities in the labor force.”); see also GOV'T ACCOUNTABILITY OFFICE, VOCATIONAL REHABILITATION

age has to prove through the SSDI process that they are unable to work, and then must wait two years (without working) for eligibility. Even if someone could work, the “psychological investment” in the notion that they are unable to do so makes it hard to leave the SSDI rolls, as does fear of not receiving (or being terminated from) Medicare coverage.³⁶ Medicaid and SSI create similar disincentives. Although Medicaid rules vary across states, those Medicaid beneficiaries who receive SSI (roughly seventy-eight percent by one account³⁷) must have established that they have a disability and fall below income and resource thresholds. This too creates an investment in not working.³⁸

In response to criticism of this emphasis on non-work, legislators have begun to enact some revisions. In 1999, Congress passed the Ticket to Work and Work Incentives Improvement Act³⁹ (TWWIIA), which allows people with disabilities who leave the SSDI rolls to retain Medicare eligibility for eight and a half years.⁴⁰ After that point, Medicare eligibility is lost. TWWIIA also provides for an expedited reinstatement of Medicare or Medicaid recipients who, after a period

5 (2007) (“Complexities inherent to the DI and SSI programs have been criticized for creating disincentives for beneficiaries to leave the rolls in favor of work.”); NAT’L COUNCIL ON DISABILITY, *SHARING THE RISK AND ENSURING INDEPENDENCE* 4 (1993) (“People with disabilities often forego employment opportunities in order to maintain public health insurance.”); Richard V. Burkhauser et al., *The Transformation in Who Is Expected to Work in the United States and How it Changed the Lives of Single Mothers and People with Disabilities* 2 (Mich. Retirement Research Ctr., Working Paper No. 2008-187, 2008), available at <http://ssrn.com/abstract=1337651> (“[P]ublic policies toward working age people with disabilities continued to be based on the expectation that they could not and thus would not work, even if given incentives to do so.”); Kajal Lahiri et al., *A Model of Social Security Disability Insurance Using Matched SIPP/Administrative Data 3–8* (Apr. 22, 2008) (unpublished manuscript), available at <http://ssrn.com/abstract=1136483> (describing their study showing that disability insurance has a small work disincentive effect).

36 See Bagenstos, *supra* note 3, at 64 (acknowledging negative effect of the ADA on employment for people with disabilities); see also Gerben DeJongg & Ian Basnett, *Disability and Health Policy: The Role of Markets in the Delivery of Health Services*, in *HANDBOOK OF DISABILITY STUDIES* 610, 628 (Gary L. Albrecht et al. eds., 2001) (noting that many disabled people believe their access to medical services has gotten worse under Medicare).

37 See KAISER COMM’N ON MEDICAID & THE UNINSURED, *supra* note 34, at 12. Some states have invoked the 209(b) option, whereby states are permitted to use more restrictive criteria for certain Medicaid services than the federal government’s SSI eligibility standards. Eleven states currently use this option. See Bagenstos, *supra* note 3, at 33 n.135.

38 See Bagenstos, *supra* note 3, at 33.

39 See 42 U.S.C. § 426(b) (2006).

40 *Id.*

of time in the labor market, become unable to work again.⁴¹ Finally, TWWIA limits the degree to which work activity can be used to prove that a recipient no longer has a disability.⁴² Similarly, if an SSI recipient with a disability returns to work, medical benefits under Medicaid are not ended until the recipient's monthly income exceeds the sum of the monthly SSI cash benefit, any impairment-related work expenses, and the monthly cost of Medicaid benefits and publicly funded attendant care services previously paid to the recipient.⁴³ Although positive steps, these patchwork attempts at overhaul have not yet moved large numbers of people off the SSI or SSDI rolls.⁴⁴ Some states have also begun to experiment with Medicaid waivers, whereby they can provide non-medical services to help people better integrate into the community. So, for example, states can request a home- and community-based waiver to allow for adaptations or alterations to an automobile or van that is a participant's primary means of transportation.⁴⁵ But not many states have taken advantage of this waiver, and these provisions are by their nature experimental—not systemic—and are limited both in duration and the populations they serve.⁴⁶

Job training and support has traditionally not had a prominent place in the American policy scheme, reflecting a preference for antidiscrimination law.⁴⁷ Even today, there is little in the way of a

41 *Id.* § 423(i).

42 *Id.* § 421(m).

43 *Id.* § 1382h; 20 C.F.R. § 416.260 (2009).

44 See GOV'T ACCOUNTABILITY OFFICE, MODERNIZING FEDERAL DISABILITY POLICY 1 (2007), available at <http://www.gao.gov/new.items/d07934sp.pdf> (noting low rates of return to work for individuals with disabilities receiving cash and medical benefits); see also GEN. ACCOUNTING OFFICE, SSA DISABILITY: PROGRAM REDESIGN NECESSARY TO ENCOURAGE RETURN TO WORK 39–47 (1996), available at <http://www.gao.gov/archive/1996/he96062.pdf> (noting that the benefit structure provides disincentives to low-wage work and impedes the return to work); PAUL K. LONGMORE, WHY I BURNED MY BOOK AND OTHER ESSAYS ON DISABILITY 255 (2003) (“TWWIA is only an incremental move toward the removal of work penalties . . . [it] does not institute permanent, comprehensive nationwide reform to eliminate work disincentives from SSI and SSDI.”); Robert B. Friedland & Alison Evans, *People with Disabilities: Access to Health Care and Related Benefits*, in DISABILITY, WORK AND CASH BENEFITS 357, 369 (Jerry L. Mashaw et al. eds., 1996) (noting that “[current Medicaid policy] does not . . . address the motivation to go on Medicaid in the first place”).

45 See Ctrs. for Medicare & Medicaid Svcs., HCBS Waivers—Section 1915(c), [http://www.cms.hhs.gov/MedicaidStWaivProgDemoPGI/05_HCBSWaivers-Section1915\(c\).asp](http://www.cms.hhs.gov/MedicaidStWaivProgDemoPGI/05_HCBSWaivers-Section1915(c).asp) (last visited Feb. 3, 2009) (noting that waivers are for three-year periods, and are available only to people at risk of institutionalization).

46 See *id.*

47 See Stein, *supra* note 7, at 679–80.

national job training program for people with disabilities.⁴⁸ The federal government spends billions of dollars on vocational rehabilitation for people with disabilities, but most of this money funds programs run by states.⁴⁹ This is not necessarily a bad thing in and of itself, but there is little in the way of systematic evaluation of different states' effectiveness.⁵⁰ What does exist suggests that vocational rehabilitation programs have not worked well.⁵¹ These programs have been frequently criticized as being poorly integrated with other federal programs.⁵² Most importantly, by design, they service a limited pool of people. To be eligible for state-administered federally funded job

48 See *id.* at 680; see also Bob Dole, *Are We Keeping America's Promise to People with Disabilities?—Commentary on Blanck*, 79 IOWA L. REV. 925, 929 (1994) (noting the ineffectiveness of existing job training programs).

49 The Federal Vocational Rehabilitation Program has been administered by the Department of Education since 1973. In 2005, 80 state Vocational Rehabilitation Agencies were provided \$2.6 billion on federal funds, serving about 1.2 million people. See GOV'T ACCOUNTABILITY OFFICE, *supra* note 35, at 2. The most recent vocational rehabilitation program comes under the auspices of TWWIA. Under TWWIA, an SSDI recipient can receive a "ticket" to purchase employment training services from a qualified Employment Network (EN). See 20 C.F.R. § 411.300 (2009). Ticket program services include the provision of case management, workplace accommodations, peer mentoring, job training, and transportation assistance. Ticket holders can assign their tickets to a public or private EN willing and able to provide services. *Id.* § 411.140. Most have used their tickets to participate in state vocational rehabilitation agencies. See TICKET TO WORK AND WORK INCENTIVES ADVISORY PANEL, SOC. SEC. ADMIN., ANNUAL REPORT TO THE PRESIDENT AND CONGRESS (2002), available at www.ssa.gov/work/panel/panel_documents/annual_report.html. Some disability rights advocates claim that private ENs serve populations of the least disabled, leaving the state vocational rehabilitation agencies to bear a greater burden of serving individuals with more involved disabilities and costly service needs. See *id.*

50 The Department of Education only tracks employment and earning outcomes for three months after former SSI recipients leave Vocational Rehabilitation. GOV'T ACCOUNTABILITY OFFICE, *supra* note 35, at 2.

51 See GEN. ACCOUNTING OFFICE, VOCATIONAL REHABILITATION 2–3 (1993) (finding that only five to seven percent of eligible people with disabilities were served by state-federal vocational rehabilitation programs, and that most vocational rehabilitation clients received only modest services). Another Government Accountability Office (GAO) study tracked SSI and SSDI beneficiaries who completed vocational rehabilitation from 2000 to 2003. It found that approximately forty percent of disability beneficiaries (SSI and SSDI) increased their earnings after completing a VR program, thirty-two percent did not have any earnings, and another twenty-eight percent had fewer earnings. Most (eighty-eight percent) of the beneficiaries' earnings remained below the annualized substantial gainful activity level, meaning they did not come off the SSI or SSDI rolls. See GOV'T ACCOUNTABILITY OFFICE, *supra* note 35, at 6.

52 See Scotch, *supra* note 20, at 383; see also EDWARD BERKOWITZ, DISABLED POLICY 155–63 (1987) (discussing the need for vocational rehabilitation programs to move the disabled toward independence).

training programs an individual generally must still be within the SSA's definition of disability, meaning that she must make a threshold demonstration of her inability to maintain substantial gainful employment.⁵³ This leaves out the crucial population of people with disabilities who may be able to work for stretches, but for various reasons may leave and reenter the labor market.

The ADA, with its civil rights approach, identifies a community of people with disabilities who are capable of working once barriers are removed and reasonable accommodations are made. Yet social welfare law ignores this group. The federal government's social support programs are tailored for an elderly population for whom returning to the workplace is not a high priority.⁵⁴ The practical problem is that antidiscrimination law stops short of providing the affirmative assistance people with disabilities need to enter and stay in the workforce. At its best, the ADA can stop an employer from irrationally choosing not to hire someone with a disability, or can compel an employer to make a reasonable workplace modification to allow the individual with a disability to perform their job. Yet the ADA does nothing to help this individual confront other structural barriers,⁵⁵ like getting health insurance if the employer does not provide it (or provides inadequate coverage to meet that person's needs), getting transportation to their job,⁵⁶ or becoming trained for the job in the first place.⁵⁷

53 See GEN. ACCOUNTING OFFICE, *supra* note 51, at 2 ("To be eligible for [vocational rehabilitation], a person must have (1) medical certification of a physical or mental disabling condition, and (2) evidence that the condition is a substantial impediment to employment."). TWWIA services are typically limited to people with disabilities who have initially qualified for Medicare and Medicaid, meaning they must have had a period of nonemployment.

54 See Bagenstos, *supra* note 3, at 64 ("Medicare was designed for a nonworking elderly population and does not well serve the interest of people with disabilities in community integration and access to the labor market."); see also THEODORE R. MARMOR, *THE POLITICS OF MEDICARE* 153 (2d ed. 2000) (1973) ("[T]he structure of the benefits themselves, providing acute hospital care and intermittent physician treatment, was not tightly linked to the special circumstances of the elderly as a group. Left out were provisions that addressed the particular problems of the chronically sick elderly: medical conditions that would not dramatically improve and the need to maintain independent function rather than triumph over discrete illness and injury.").

55 See Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 2, 15 (2006).

56 See Bagenstos, *supra* note 3, at 26; see also Robert A. Katzmann, *Transportation Policy*, in *THE AMERICANS WITH DISABILITIES ACT* 214, 216 (Jane West ed., 1991) (stating that a 1997 Department of Transportation study revealed that 7.4 million individuals with disabilities are "constrained to some extent from using public transportation").

If this person is actually able to work, they may become ineligible for public health insurance and will almost certainly lose any cash payments they receive from the federal government to help offset the cost of their unique transportation or other medical needs.

More theoretically, but equally troubling, are the mixed messages these different policies send. The ADA was an attempt to get employers (and everyone else) to view people with disabilities as capable of work if societal barriers were removed. This is undermined by a social welfare system that penalizes work and treats people with disabilities as passive and subservient to medical professionals who serve as gatekeepers of their benefits.

When viewed in this light, it is not surprising that the federal government's employment policies for people with disabilities are not working well. Even after the passage of the ADA, employment rates for people with disabilities have remained stagnant. Although commentators have disputed the accuracy of various data showing constant and even declining employment levels, by this point there is near uniform consensus that insofar as Title I of the ADA was intended to move people with disabilities into the workforce, it has been a failure.⁵⁸ People with disabilities in Title I cases have also been amongst the least successful of civil plaintiffs; only prisoners have done worse.⁵⁹ The federal government's National Health Information Survey, for example, found that when disability is defined as an impairment that imposes limitations on any life activity, the employment rate for working-age people with disabilities declined from 49% in 1990 to 46.6% in 1996.⁶⁰ Similarly, a 2000 Harris Survey of working-age people with

57 The ADA is actually quite explicit that it will not provide these types of affirmative assistance: it contains an explicit carve-out for discrimination in insurance policies from its coverage. See 42 U.S.C. § 12201(c) (2006).

58 See generally DAVID C. STAPLETON & RICHARD V. BURKHAUSER, *THE DECLINE IN EMPLOYMENT OF PEOPLE WITH DISABILITIES* 301–02 (2003) (suggesting that while “the track record of the [ADA] appears dismal for improving the employment opportunities of individuals with disabilities,” such an assessment may be premature because no close analysis of the “ADA qualified disabled” has been done); see also Samuel R. Bagenstos, *Has the Americans with Disabilities Act Reduced Employment for People with Disabilities?*, 25 BERKELEY J. EMP. & LAB. L. 527 (2004) (reviewing STAPLETON & BURKHAUSER, *supra*).

59 See Ruth Colker, *Winning and Losing Under the Americans with Disabilities Act*, 62 OHIO ST. L.J. 239, 240 (2001) (showing that defendants prevail in ninety-three percent of Title I cases at the trial level that are appealed); see also Amy Allbright, *ABA Special Feature: 2007 Employment Decisions Under the ADA Title I—Survey Update*, 32 MENTAL & PHYSICAL DISABILITY L. REP. 335, 335 (2008) (showing that in 2007, 95.5% of Title I cases had pro-employer outcomes).

60 When disability is defined as a diagnosed impairment, the employment rate for working-age men with disabilities fell from 84.7% in 1990 to 77.3% in 1996, and

disabilities showed that only thirty-two percent of people with disabilities reported being employed compared with eighty-one percent of the general population.⁶¹ Another researcher has found that from 1989 to 2000, the employment rate for men with disabilities fell twenty-two percent, while that of men without disabilities fell by only one percent.⁶² During this same period, the employment rates of women with disabilities fell by one percent while the rate of women without disabilities increased.⁶³ Most recently, using data from the 2007 American Community Survey, the employment rate of working-age people with disabilities was 36.9%, while the employment rate of working-age people without disabilities was 79.7%.⁶⁴ As might be expected given high rates of non-work, working-age adults with disabilities are increasingly becoming poorer and less economically self-sufficient than the general population.⁶⁵

Various causes have been offered to explain this phenomenon. Some commentators have argued that the Supreme Court's limiting construction of the definition of disability has dramatically undercut the statute's effectiveness.⁶⁶ Others argue that the true cause of the ADA's ineffectiveness is its lack of popular acceptance when passed

stayed relatively stagnant at just above 63% for working-age women. See H. STEPHEN KAYE, IMPROVED EMPLOYMENT OPPORTUNITIES FOR PEOPLE WITH DISABILITIES 9 & fig.1 (2003), available at http://dsc.ucsf.edu/view_pdf.php?pdf_id=27.

61 See NAT'L ORG. ON DISABILITY, 2000 N.O.D./HARRIS SURVEY OF AMERICANS WITH DISABILITIES 27 (2000). There are older findings with similar results. As early as 1996, commentators were asserting that the employment of people with disabilities actually had deteriorated in relation to other groups. See Walter Y. Oi, *Employment and Benefits for People with Diverse Disabilities*, in DISABILITY, WORK AND CASH BENEFITS, *supra* note 44, at 103, 121 (suggesting that the percentage of disabled individuals with jobs had fallen from thirty-three percent in 1986 to thirty-one percent in 1996).

62 See DAVID C. STAPLETON ET AL., HAS THE EMPLOYMENT RATE OF PEOPLE WITH DISABILITIES DECLINED? 1 (2004), available at <http://digitalcommons.ilr.cornell.edu/edicollect/92>.

63 *Id.*

64 See REHABILITATION RESEARCH & TRAINING CTR. ON DISABILITY DEMOGRAPHICS & STATISTICS, CORNELL UNIV., 2007 DISABILITY STATUS REPORT 24 (2008), available at <http://www.ilr.cornell.edu/edi/disabilitystatistics/>.

65 See Burkhauser et al., *supra* note 35, at 1.

66 See, e.g., Robert L. Burgdorf, Jr., "Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability, 42 VILL. L. REV. 409, 415 (1997) (discussing courts' misconstructions of the ADA's definition of disability); Arlene Mayerson & Matthew Diller, *The Supreme Court's Near-sighted View of the ADA*, in AMERICANS WITH DISABILITIES 124, 124-25 (Leslie Pickering Francis & Anita Silvers eds., 2000) (arguing that the Supreme Court's narrow reading of the ADA leads to absurd results and inequality); Aviam Soifer, *The Disability Term: Dignity, Default, and Negative Capability*, 47 UCLA L. REV. 1279, 1299-1307 (2000) (discussing courts' restrictive interpretations of the "regarded as" definition).

(which continues to this day),⁶⁷ or its limited enforcement tools that have been exacerbated by the lack of public enforcement and Supreme Court decisions which are hostile to private enforcement.⁶⁸ Still others suggest that antidiscrimination law has severe limits, and other more structural barriers are the real reason people with disabilities have not had more success integrating into the workforce.⁶⁹

In this Article, I do not directly wade into the debate as to why the ADA has been ineffective, although I have done so in previous work.⁷⁰ My goal here is to focus on the lack of integration between antidiscrimination law and social welfare policies; specifically, their contradictory attitudes toward moving people with disabilities into the workforce. Examining the laws and policies for veterans with disabilities gives an example of a system which takes a more coherent approach and avoids many of the work disincentives described above.

II. DIFFERENT POPULATIONS AND A TWO-TIERED LEGAL AND POLICY SCHEME

In this Part, I will explore the separate legal and policy spheres occupied by veterans with disabilities and the general population of people with disabilities. First, I will place the creation of a two-tiered system in historical perspective. Next, I will examine the differences between these tiers, explaining how the veteran-specific scheme deploys both antidiscrimination law and social welfare policies in a more integrated manner than does general disability policy. I will conclude by offering some observations on how the policy scheme for veterans with disabilities seems to be yielding positive results for the employment prospects of its members.

A. *Different Populations*

Every conflict leads to the return of wounded soldiers,⁷¹ and the wars in Iraq and Afghanistan are no exception. Veterans with disabili-

67 See Michael Selmi, *Interpreting the Americans with Disabilities Act: Why the Supreme Court Rewrote the Statute, and Why Congress Did Not Care*, 76 GEO. WASH. L. REV. 522, 547 (2008).

68 See Michael Waterstone, *A New Vision of Public Enforcement*, 92 MINN. L. REV. 434, 437–38 (2007); see also Michael Ashley Stein & Michael Waterstone, *Disability, Disparate Impact, and Class Actions*, 56 DUKE L.J. 861, 884–85 (2006) (discussing the lack of public enforcement).

69 See Bagenstos, *supra* note 3, at 3; see also Bagenstos, *supra* note 55, at 15–20 (discussing structural barriers and possible structural solutions).

70 See Waterstone, *supra* note 68, at 438–41.

71 War has been referred to as the “most abiding cause of disability in human history.” David A. Gerber, *Disabled Veterans and Public Welfare Policy: Comparative and*

ties from these conflicts are returning home in large numbers.⁷² Because of military and medical advances, soldiers are surviving battlefield injuries that would have killed them in previous wars.⁷³ Whereas before they would not have come home at all, these soldiers are returning back to the United States with short- and long-term disabilities.⁷⁴ These numbers will keep growing. The nature of these wars has yielded greater than ever numbers of soldiers suffering from traumatic brain injury.⁷⁵ Whereas in previous wars, major depression or posttraumatic stress disorder may not have been counted as injuries, today soldiers are returning with these recognized disabilities in high numbers.⁷⁶

As a matter of internal line drawing (within each group) and external line drawing (how they are treated by outside forces, includ-

Transnational Perspectives on Western States in the Twentieth Century, 11 *TRANSNAT'L L. & CONTEMP. PROBS.* 77, 78 (2001). According to the Department of Veterans Affairs, World War I yielded 204,002 non-mortal woundings, World War II yielded 671,846, and the Vietnam War yielded 103,284. See DEP'T OF VETERANS AFFAIRS, *AMERICA'S WARS* (2008), available at <http://www1.va.gov/opa/fact/docs/amwars.pdf>.

⁷² Precise numbers can be hard to come by. According the U.S. Department of Defense, as of October 17, 2009, 41,114 soldiers had been "wounded in action" while serving in Iraq, Afghanistan, and surrounding duty stations. See DEF. MANPOWER DATA CTR., *CASUALTIES BY MILITARY SERVICE COMPONENT* (2009), http://siadapp.dmdc.osd.mil/personnel/CASUALTY/gwot_component.pdf.

⁷³ In the global war on terror, the "wounded-to-killed ratio" is 16:1 (meaning that there are sixteen wounded servicemen for every fatality). See Linda Bilmes, *Soldiers Returning from Iraq and Afghanistan: The Long Term Costs of Providing Veterans Medical Care and Disability Benefits* 2 (John F. Kennedy Sch. of Gov't Faculty Research Working Paper Series, No. RWP07-001, 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=939657. This is the highest ratio in U.S. history. In Vietnam, there were 2.6 injuries per fatality, and in World Wars I and II, there were fewer than two wounded servicemen per death. *Id.* For slightly different statistics, see Ronald Glasser, *A War of Disabilities: Iraq's Hidden Costs Are Coming Home*, *HARPER'S MAG.*, July 1, 2005, at 59 ("Eight soldiers have been wounded for every one killed, about double the rate in Korea, Vietnam, and the Gulf War.").

⁷⁴ See Glasser, *supra* note 73, at 59 ("The percentage of soldiers who have undergone amputations is twice that of any of our past military conflicts; nearly a quarter of all the wounded suffer from traumatic head injuries, far more than in our other recent wars. These are soldiers who have survived Improvised Explosive Devices (IEDs) and car bombs, who are living with mangled limbs, eye injuries, and brain damage.").

⁷⁵ See *id.* This can lead to memory loss, short attention span, muddled reasoning, headaches, confusion, anxiety, depression, and irritability.

⁷⁶ A *New England Journal of Medicine* study from July 2004 found that roughly one in six soldiers who had served in Iraq suffered from major depression, general anxiety, or posttraumatic stress disorder. See Charles Hoge, *Combat Duty in Iraq and Afghanistan, Mental Health Problems, and Barriers to Care*, 351 *NEW ENG. J. MED.* 13, 13 (2004).

ing the government), the populations of people with disabilities and veterans with disabilities have always been somewhat distinct.⁷⁷ The general disability “community,” to the extent that there is one, is a complex blend of discrete subcultures with their own individual experiences, histories, geographies, and social classes.⁷⁸ In contrast, using war as a common experience, disabled veterans have been a more cohesive social force.⁷⁹

These groups have also been treated differently by exogenous forces, including the public and policymakers. Veterans with disabilities have been viewed by the public as the “deserving” disabled.⁸⁰ Most recently, stories of returning veterans with disabilities acclimating to their new lives have been quite prevalent in the media.⁸¹ In the

77 Of course, as scholars have noted, the two concepts of definitions—internal and external line drawing—are inextricably linked. Thus, how a power structure in society defines a given group impacts that group’s definition of itself. See Mor, *supra* note 29, at 66 (noting how the Israeli government’s line drawing amongst populations with disabilities facilitates line drawing within these groups); see also Stein & Waterstone, *supra* note 68, at 894–85 (discussing gender and race as artificial constructs).

78 The social movement of people with disabilities has moved more slowly than other minority groups. See RICHARD K. SCOTCH, FROM GOOD WILL TO CIVIL RIGHTS 31–32 (1984) (noting that this community does not exist unless it is consciously built, and comparing the lack of political community to the cohesiveness of disabled war veterans); see also GERBER, *supra* note 6, at 5 (2000) (“[T]he experience of civilian disability has been individual and family-based as well as local, and that the isolation of the experience of being disabled under such circumstances has hindered the development of identities, organizations, and politics based on disability.”).

79 See Ann Hubbard, *A Military-Civilian Coalition for Disability Rights*, 75 MISS. L.J. 975, 987 (2006) (“[M]any of them identify more with other veterans, with whom they share formative wartime experiences, than with disabled civilians, with whom they share day-to-day peacetime experiences.”); see also GERBER, *supra* note 6, at 25 (noting the “collective” nature of disabled veterans’ experiences which are rooted in historical events, the participation and injury in a war).

80 See Hubbard, *supra* note 79, at 992 (“Even to people who remain unresponsive to many claims of disability, returning soldiers are the ‘deserving disabled.’ They acquired their disabilities in the service of their country, and the country owes them a debt of gratitude” (footnote omitted)); see also GERBER, *supra* note 6, at 3 (discussing how the modern state has endowed disabled veterans with recognition as a group worthy of continuing assistance and entitlements).

81 See, e.g., Glasser, *supra* note 73; Fred R. Conrad, *Among the Finishers: The Freedom Team*, N.Y. TIMES, November 7, 2005, at F8 (exhibiting photographs of disabled veterans competing in New York City Marathon); Joel Currier, *Staying in the Game*, ST. LOUIS POST-DISPATCH, June 17, 2004, at C1 (showcasing the twenty-fourth annual National Veterans Wheelchair Games); Pauline Jelinek, *Pentagon Moves to Reduce Stigma of Mental Counseling*, USA TODAY, May 1, 2008, http://www.usatoday.com/news/topstories/2008-04-30-3925413338_x.htm (noting the changing policies for veterans seeking security clearances); Pauline Jelinek and Lolita Baldor, *Military Officers May Use YouTube, MySpace to Cut Troop Stigma About Mental Health Therapy*, STAR-

nonveteran community, generally speaking, people with disabilities have struggled over media portrayals. They have traditionally been presented as objects of pity,⁸² fakers,⁸³ or opportunists hoping to cash in on litigation.⁸⁴ Significantly, however, these stereotypes have not attached to the news coverage of veterans. Rather, these stories come closer to a narrative of disability that the disability rights community has preferred: stories of how society should change the environment to accommodate difference (a bedrock principle of the social model of disability),⁸⁵ people with disabilities participating in cultural and community activities,⁸⁶ and, when need be, positively resorting to litigation to vindicate their civil rights.⁸⁷ When social services are not adequately provided to veterans with disabilities, press accounts permeate with outrage.⁸⁸

TRIBUNE (Minneapolis/St. Paul), May 2, 2008, at 17; Monica Scandlen, *Tailoring Pools to Special Needs*, ORLANDO SENTINEL, March 11, 2007, http://articles.orlandosentinel.com/2007-03-11/business/DISABLED11_I_ramp_florida_pools_pools_and_spas; Deborah Sontag, *Injured in Iraq, a Soldier Is Shattered at Home*, N.Y. TIMES, April 5, 2007, at A1 (relating the story of a blind and disabled Iraq war veteran who returned home only to become a criminal); Beth Sussman, *Disabled Iraq Veterans Stay in the Race: Triathlons Let Them Run, Bike and Swim to Recovery*, USA TODAY, May 31, 2007, at 88; Shaun Tolson, *Iraq Vets Get on Track*, BOSTON HERALD, April 1, 2007.

82 See, e.g., JOSEPH P. SHAPIRO, NO PITY 12–40 (1993) (discussing cultural images of persons with disabilities as objects of pity).

83 See, e.g., Michael Waterstone, *Disability and Prejudice: A Case for Extended Protections*, JURIST, Aug. 4, 2008, <http://jurist.law.pitt.edu/forumy/2008/08/disability-and-prejudice-case-for.php> (discussing statements of talk radio host Michael Savage referring to children with autism as “frauds and brats,” and suggesting that the high levels of asthma impacting minority children were because “the children got extra welfare if they were disabled” (internal quotation marks omitted)).

84 See, e.g., Cary LaCheen, *Achy Breaky Pelvis, Lumber Lung and Juggler’s Despair: The Portrayal of the Americans with Disabilities Act on Television and Radio*, 21 BERKELEY J. EMP. & LAB. L. 223, 223–25 (2000) (discussing the negative portrayal of the ADA in media).

85 See Scandlen, *supra* note 81 (discussing how pools are being adapted to veterans with disabilities).

86 See Conrad, *supra* note 81 (disabled veteran participating in NY marathon); Sussman, *supra* note 81 (disabled veterans participating in triathlons).

87 See *Day to Day: VA Sued Over Mental Health Care* (NPR radio broadcast June 18, 2008), available at <http://www.npr.org/templates/story/story.php?storyId=91639452> (discussing Disability Rights Advocates’ lawsuit on behalf of disabled veterans against the Department of Veterans Affairs); see also Neil MacFarquhar, *In Federal Suit, 2 Views of Veterans’ Health Care*, N.Y. TIMES, April 22, 2008, at A21 (same).

88 One clear example of this was the national furor over the conditions at Walter Reed Hospital, originally reported on by *The Washington Post*. See Dana Priest & Anne Hull, *Army Fixing Patients’ Housing: Changes Underway at Walter Reed*, WASH. POST, Feb. 20, 2007, at A1 (describing difficulties at having repairs done at the Walter Reed Army Medical Center); Dana Priest & Anne Hull, *Hospital Investigates Former Aid Chief: Walter*

In step with public opinion, from the founding of our nation, politicians and policymakers have also operated from a stated desire to care for returning veterans of foreign wars.⁸⁹ Perhaps the seminal statement regarding disabled veterans came in President Lincoln's second inaugural address, when Lincoln challenged a divided nation to "bind up the nation's wounds, to care for him who shall have borne the battle and for his widow and his orphan."⁹⁰ This is still the operat-

Reed Official Had Own Charity, WASH. POST, Feb. 20, 2007, at A1 (describing how chief of Walter Reed had his own charity); Dana Priest & Anne Hull, *Hospital Officials Knew of Neglect: Complaints About Walter Reed Were Voiced for Years*, WASH. POST, Mar. 1, 2007, at A1 (discussing how patients had been complaining about conditions for years); Dana Priest & Anne Hull, *The Hotel Aftermath: Inside Mologne House, the Survivors of War Wrestle with Military Bureaucracy and Personal Demons*, WASH. POST, Feb. 19, 2007, at A1 (describing conditions at Mologne House for wounded veterans); Dana Priest & Anne Hull, *'It Is Not Just Walter Reed': Soldiers Share Troubling Stories of Military Health Care Across U.S.*, WASH. POST, Mar. 5, 2007, at A1 (describing similar concerns about conditions at Virginia hospitals); Dana Priest & Anne Hull, *Soldiers Face Neglect, Frustration at Army's Top Medical Facility*, WASH. POST, Feb. 18, 2007, at A1; Dana Priest & Anne Hull, *Swift Action Promised at Walter Reed: Investigations Urged as Army Moves to Make Repairs, Improve Staffing*, WASH. POST, Feb. 21, 2007, at A8 (discussing White House intentions to repairs facilities and improve staffing at Walter Reed Medical Center). But that is just one example of this phenomenon and the tenor of reporting; there are others. See, e.g., Susan Bysiewicz, Op-Ed, *Help Our Veterans Vote*, N.Y. TIMES, Aug. 11, 2008, at A17 (criticizing the Department of Veterans Affairs for issuing a directive banning nonpartisan voter registration drives at federally financed nursing homes, rehabilitation centers, and shelters for homeless veterans); Editorial, *The Suffering of Soldiers*, N.Y. TIMES, May 11, 2008, at A11 ("Several years into a pair of wars, the Department of Veterans Affairs is struggling to cope with a task for which it was tragically unready: the care of soldiers who left Afghanistan and Iraq with an extra burden of brain injury and psychic anguish. The last thing they need is the toxic blend of secrecy, arrogance and heedlessness that helped to send many of them into harm's way."). The larger political context to which these veterans are returning cannot be ignored. In past wars—namely Vietnam—there was a public tendency to equate a war's unpopularity with its returning troops. Generally speaking, this has not happened in the wars in Iraq and Afghanistan, where politicians and celebrities have been quick and effusive in their praise of the troops.

89 See CLAIRE H. LIACHOWITZ, *DISABILITY AS A SOCIAL CONSTRUCT* 23 (1988) (noting that despite then-General Washington's efforts to persuade Congress to promise all officers half pay for their lifetimes, only half pay for seven years was ultimately obtained).

90 See Abraham Lincoln, Second Inaugural Address (Mar. 14, 1865), available at <http://www.bartleby.com/124/pres32.html>. One of the earliest written records of disability policy in this country is a statement from Robert Burns Brown, the commander in chief of the veterans lobby for the Grand Army of the Republic, at a 1907 U.S. House of Representatives Hearing of the Committee on Pensions on the subject of disabled veterans of the Civil and Mexican-American Wars. Brown cast his request in terms of the moral obligation the country owed its disabled veterans: "We are not here easing for that that [*sic*] we ought not to have, for we represent a class of men

ing principle of the Department of Veterans Affairs (VA). From the outset of the Union, this has led to laws and programs that are unique to veterans with disabilities.⁹¹

Politicians and policymakers have not wanted to be on the wrong side of disabled veterans.⁹² For practical purposes, this favored political position has meant that veterans with disabilities and the general population of people with disabilities have existed in separate policy

who in the days of their youth surrendered to this Government the best service they had . . . And very good authority could be cited to show that every survivor of the war of three years' service gave up about thirteen years of his life. Many of them are maimed, and they have been handsomely provided for by the American Congress. Some are blind, and they have been cared for. Many are crippled by rheumatic troubles, but they have not been cared for as we think they ought to be." Scotch, *supra* note 20, at 375 (alteration in original).

91 Actually, these laws even predate the founding of our Union. A 1636 Plymouth Colony declaration provided that "if any that shall goe returne maimed and hurt he shall be mayntayned competently by the colony during his life." THE COMPACT WITH THE CHARTER AND LAWS OF THE COLONY OF NEW PLYMOUTH 44 (William Brigham ed., Dutton & Wentworth 1836). The first Continental Congress passed the first law concerning wounded soldiers on August 26, 1776, providing that these soldiers would "receive such monthly sum toward his subsistence as shall be judged adequate by the assembly or other representative body of the state where he belongs or resides, upon application to them for that purpose, provided the same doth not exceed his half pay." 5 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 703 (Worthington Chauncey Ford ed., 1906) (discussing colonial and early national laws). See generally LIACHOWITZ, *supra* note 89, at 21-24. Veterans with disabilities from the Civil War period enjoyed the political support of the Republican Party and faced a largely sympathetic bureaucracy. Veterans and their advocates were able to maneuver their individual claims to obtain strikingly high approval rates of meeting the federal government's definition of disability. See Peter David Blanck & Michael Millender, *Before Disability Civil Rights: Civil War Pensions and the Politics of Disability in America*, 52 ALA. L. REV. 1, 5 (2000).

92 One example of this involves the tax-free status of veterans' disability payments. In 1981, Ron Pearlman, a treasury official, met with a group of disabled veterans led by Chad Colley, a national commander of the Disabled American Veterans. See JEFFREY H. BIRNBAUM & ALAN S. MURRAY, SHOWDOWN AT GUCCI GULCH 80 (1987). The veterans were disturbed by a Treasury proposal to tax their disability payments. Pearlman asked one of the veterans: "Why should veterans disability payments be treated differently than any other income?" *Id.* (internal quotation marks omitted). The veterans "were accustomed to being catered to in the nation's capital, and they had never heard anything like this The veterans left his office and went on the warpath, calling all their allies in the White House and on Capitol Hill." *Id.* Ultimately, the veterans prepared a full-page advertisement to run in the *New York Times*, *The Washington Post*, and *USA Today* with a huge picture of Commander Colley in a wheelchair. In bold letters, the top said: "What's So Special About Disabled Veterans?" In smaller type below, it read: "That's what a top Treasury official said to Chad Colley." *Id.* The proposal was dropped.

worlds.⁹³ Veterans with disabilities have had access to favorable laws, programs, and services that are limited to their ranks.⁹⁴ For long stretches of our history the general population of people with disabilities (especially those with congenital disabilities) was viewed as having some innate moral flaw, and they were therefore undeserving.⁹⁵ Even during that same time period, however, veterans who became disabled during war were entitled to public support and assistance in the form of military pensions.⁹⁶ It was seen as less acceptable for disabled veterans, a largely white male population, to be relegated to poverty and powerlessness.⁹⁷ When competition for scarce resources becomes a factor, veterans with disabilities consistently come out on top.⁹⁸

93 This differential treatment by the government has reinforced the creation and maintenance of a separate disabled veterans community. See GERBER, *supra* note 6, at 25 (noting how ongoing relationship with government helps formulate disabled veterans' group identity).

94 See *id.* at 12 (noting the gap between programs for disabled veterans and disabled civilians); see also *id.* at 13 ("The boundaries of civilian and veterans assistance have been well patrolled by governments both friendly to the veteran and eager to contain costs by limiting especially generous assistance only to them.").

95 See, e.g., K. Walter Hickel, *Medicine, Bureaucracy, and Social Welfare: The Politics of Disability Compensation of American Veterans of World War I*, in THE NEW DISABILITY HISTORY, *supra* note 20, at 236, 241 ("Until the late nineteenth century, disability and its economic effects of unemployment, poverty, and dependence were often regarded as a preordained fate, a divine stigma incurred at birth, or a result of individual moral flaws and self destructive habits Reflecting this view, government agencies and private charities directed their attention to disabled children."); see also SHAPIRO, *supra* note 82, at 12–40 (exploring historical conceptions of disability in the United States).

96 See *supra* note 91. There were also federally funded hospitals providing care to mentally ill sailors and soldiers. See Hickel, *supra* note 95, at 241.

97 See Hickel, *supra* note 95, at 242; see also GERBER, *supra* note 6, at 12 ("In contrast to social provisioning for the poor, even when assistance to veterans is means-tested, it has come to be governed by understandings that the dignity of those to whom it is given must be preserved and that their provision is an entitlement.").

98 See ANN DARNBROUGH, 8 HEALTH MATTERS 16–17 (1991) ("[A]fter a war or conflict the disabled veterans, cast in the role of heroes, gain the spotlight. Financial benefits and concessions and special employment arrangements provided by the state may be awarded to returning soldiers. People disabled by war are commonly treated as a separate category by governments . . .").

This phenomenon is not limited to the United States.⁹⁹ Sagit Mor has extensively studied Israeli disability policy.¹⁰⁰ Mor's study finds that hierarchies of welfare benefits in Israel (and other countries) systematically favor disabled veterans and disabled workers, often at the expense of people with congenital disabilities or disabled through other factors.¹⁰¹ The view that Israel cares for its citizens with disabilities (which Mor challenges as largely being a myth) is more prevalent with regard to the Israel Defense Forces disabled veterans, "who enjoy a most privileged position in terms of social glory, extensive benefits, a powerful organization, and a strong political lobby."¹⁰² Mor ultimately understands this two-tiered system as an expression of Israel's national values and power structures in society.¹⁰³

B. Two-Tiered Employment Policy

Veterans with disabilities have access to specialized antidiscrimination law which protects their hybrid status as people with disabilities who are also veterans. Veterans with disabilities also have access to disability compensation payments, more robust job training programs, and greater access to medical care that is not as directly tied to an inability to work. In the sections that follow, I will give a basic overview of the different laws and programs for veterans with disabilities. In the following section, I will offer a more nuanced comparison between these policies and the general disability scheme.

Veterans with disabilities are free to proceed with employment discrimination claims under Title I of the ADA. Many have, although veterans with disabilities do not appear to be more successful than any other class of ADA litigants.¹⁰⁴ But veterans with disabilities also have

99 See Gerber, *supra* note 71, at 85 ("Disabled veterans have been a particularly well-organized segment of modern society, and in democracies with interest-group politics, they have influenced and stimulated state activity."); see also GERBER, *supra* note 6, at 11 ("Most Western societies historically have had at least two parallel tracks for providing assistance to those construed to be in need, one for veterans and another for the general civilian population.")

100 See generally Mor, *supra* note 29 (analyzing Israeli disability policy).

101 *Id.* at 64.

102 *Id.* at 65.

103 *Id.* at 66.

104 See, e.g., *Agnew v. Heat Treating Servs. of Am.*, No. 04-2531, 2005 WL 3440432, at *6 (6th Cir. Dec. 14, 2005) (dismissing claim by disabled former Marine suing his employer for failure to reasonably accommodate him because he did not meet the statute's definition of disability); *Armstrong v. Rolm A. Siemans Co.*, No. 97-1222, 1997 WL 705376, at *2 (4th Cir. Nov. 13, 1997) (dismissing claim of disabled Vietnam veteran suing for failure to accommodate him because his claim was outside the limitations period); *Jackson v. Dana Corp.*, No. 98-5431, 1999 WL 1018241, at *9-10 (E.D.

protections under the Uniformed Services Employment and Reemployment Rights Act¹⁰⁵ (USERRA). The USERRA prohibits employers from discriminating against employees or applicants on the basis of military status or military obligations. The USERRA has a disability-specific provision applying to persons with disabilities incurred or aggravated during military service.¹⁰⁶ Part of this provision echoes the general USERRA rule that veterans with these types of disabilities, like other former members of the military, cannot be discriminated against.

But the USERRA also contains some disability-specific protections that go somewhat beyond the ADA. The USERRA requires employers to make reasonable efforts to assist a veteran who is returning to employment in becoming qualified for the job, including training or retraining for employment positions.¹⁰⁷ In contrast, the ADA has been relatively powerless in getting employers to take a broad view of creating accommodations for employees with disabilities; rather, courts have narrowly cabined accommodations to those which are strictly "job-related."¹⁰⁸ As discussed above, the ADA's effectiveness has also been limited by a narrow interpretation of the statute's definition of disability.¹⁰⁹ But under the USERRA, employers may have to provide reasonable accommodations to individuals whose service-related impairments may not allow them to meet the ADA's definition of disability.¹¹⁰ The lack of a vacancy does not excuse prompt placement of eligible persons into a job under the USERRA, even if an incumbent has to be reassigned.¹¹¹ And an employer must take a set of specific steps to place a veteran with a disability who is no longer

Pa. Nov. 9, 1999) (ruling against disabled Vietnam veteran suing for failure to accommodate because he failed to present evidence contradicting defendant's legitimate reasons for termination); *Baxter v. Nw. Airlines, Inc.*, No. 96 C 2060, 1998 WL 603121, at *6 (N.D. Ill. Sept. 4, 1998) (ruling that disabled Vietnam Veteran suing for failure to accommodate failed to produce evidence sufficient to meet prima facie ADA case).

105 38 U.S.C. §§ 4301-4334 (2006).

106 *Id.* § 4313 (a)(3).

107 *Id.* § 4313.

108 See Bagenstos, *supra* note 3, at 42-50.

109 See, e.g., Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB. L. 91, 91-92 (2000).

110 See Kathryn S. Piscitelli, *Veterans' Employment Rights: Keeping in Step with USERRA's Legion of Changes*, LAB. L.J. 387, 400 (1995) (noting that USERRA does not import the ADA's definition of disability).

111 *Id.* In contrast, ADA case law has come out the opposite way, and courts have held that neutral seniority or job placement policies are not proper subjects of reasonable accommodation requests. See *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 403 (2002) (refusing to let the ADA "trump" seniority policies); *Huber v. Wal-Mart Stores*,

qualified for their initial job. In contrast, the ADA offers no protections for an individual with a disability who is not “qualified.”¹¹² Finally, although not disability specific, the USERRA applies to all employers, not just those who employ over fifteen employees (the ADA limit).¹¹³

The social welfare scheme for veterans is extraordinarily complicated. There are several large texts devoted to just explaining different programs.¹¹⁴ It is not my ambition here to survey all of that material. Rather, I will focus on programs that most directly impact the employment of veterans with disabilities. The largest program is the veterans’ disability benefits system.¹¹⁵ This program’s intent is to compensate for a reduction in quality of life due to service-connected disability and to provide compensation for average impairment in earnings capacity. The disability must be service-connected, meaning that it has to be the result of an illness, disease, or injury incurred or aggravated while the soldier was on active military service.¹¹⁶ To qualify, a veteran must apply to the Veterans Benefits Administration, where their claim is evaluated to make sure it is service-connected. If it is, the claims administrator evaluates the veteran’s impairments and assigns a “degree” that the veteran is disabled, ranging from 10% to 100%.¹¹⁷ The current monthly rate for 10% disabled is \$117, while 100% is \$2527, with the different rates in between having corresponding payments ranging between those figures.¹¹⁸ These monthly pay-

Inc., 486 F.3d 480, 483 (8th Cir. 2007) (concluding that the ADA does not require job reassignment policies).

112 See, e.g., *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555, 579–80 (1999) (holding that the employer was not required to make an accommodation for one employee who was not otherwise qualified).

113 See Piscitelli, *supra* note 110, at 400.

114 See, e.g., DEP’T OF VETERANS AFFAIRS, FEDERAL BENEFITS FOR VETERANS’ DEPENDENTS AND SURVIVORS (2008), available at <http://www1.va.gov/opa/vadocs/fedben.pdf>; NAT’L VETERANS LEGAL SERVS. PROGRAM, VETERANS BENEFITS MANUAL (Barton F. Stichman & Ronald B. Abrams eds., 2007); VETERANS FOR AM., THE AMERICAN VETERANS AND SERVICEMEMBERS SURVIVAL GUIDE (2008), available at www.veteransforamerica.org/wp-content/uploads/2008/12/survival-guide.pdf.

115 In 2005, the United States paid \$23.4 billion annually in disability entitlement payments to veterans from previous wars, including 611,729 veterans from the first Gulf War, 916,220 veterans from Vietnam, 161,512 veterans from the Korean War, 356,190 veterans from World War II, and 3 veterans from World War I. See Bilmes, *supra* note 73, at 6–7.

116 See 38 U.S.C. § 101(16) (2006); 38 C.F.R. §§ 3.1(k), 3.303(a) (2009).

117 These percentage ratings “represent as far as can practically be determined the average impairment in earning capacity resulting from such diseases and injuries and their residual conditions.” 38 C.F.R. § 4.1 (2009).

118 For the complete current benefit scenario, see *infra* note 190.

ments are tax free, and are not subject to reduction based on future employment. The disability compensation system has always had broad political support, and the VA has viewed it as forming the “bedrock of its existence.”¹¹⁹

The disability compensation system also offers a gateway for an important transportation benefit. Veterans with service-connected disabilities are entitled to a specific VA benefit directed to the purchase price of a new or used automobile or other conveyance.¹²⁰ Veterans with certain disabilities are also entitled to special equipment to adapt an automobile to accommodate their disability.¹²¹ This includes, but is not necessarily limited to, automatic transmission, power steering, power breaks, power windows, power seats, special equipment necessary to assist the veteran into or out of the vehicle, as well as modifications to the size of the vehicle’s interior if the veteran’s physical condition requires it.¹²²

Another program is the Veterans Administration Pension system. Veterans with low incomes who are permanently or totally disabled, or are sixty-five years or older, may be eligible for monetary support if they have ninety days or more active military service, at least one day of which was during a period of war.¹²³ There is no requirement that the disability be service connected. These payments are made to bring a veteran’s total income (including other retirement or Social Security income) to a level set by Congress. The VA pension program is “designed to supplement the income of disabled veterans who had to give up career opportunities while they served their country during a time of war.”¹²⁴ This program is strictly means tested.¹²⁵ As of 2005, for example, the maximum annual pension rate was \$10,929, meaning that a veteran earning more than that amount would not qualify for any pension benefits (correspondingly, if a veteran’s income was zero, she would be eligible for a pension of up to \$10,929).¹²⁶

A third major program bearing on employment is the Veterans Administration Health Care system. The VA operates the nation’s

119 See NAT’L VETERANS LEGAL SERVS. PROGRAM, *supra* note 114, at 58–59.

120 38 U.S.C. §§ 3901, 3902 (2006); 38 C.F.R. § 3.808 (2009).

121 38 U.S.C. § 3902; 38 CFR § 3.808(c). The eligible disabilities are the loss, or permanent loss of use, of one or both feet, one or both hands, permanent impairment of vision in both eyes, or ankylosis of one or both knees or one or both hips. 38 C.F.R. § 3.808(b).

122 38 C.F.R. § 17.157 (2009).

123 38 U.S.C. §§ 1513, 1521(a), (j) (2006).

124 See NAT’L VETERANS LEGAL SERVS. PROGRAM, *supra* note 114, at 451.

125 38 U.S.C. § 1522(a) (2006).

126 See NAT’L VETERANS LEGAL SERVS. PROGRAM, *supra* note 114, at 455.

largest integrated health care system, with more than 1400 sites of care, including hospitals, community clinics, nursing homes, and readjustment counseling centers, as well as other facilities.¹²⁷ The VA provides medical care to nearly five million veterans each year, including primary and secondary care.¹²⁸ Veterans must first enroll in the VA healthcare system. At that point, they are categorized into one of eight priority groups which dictates their access to services. Veterans with service-connected disabilities rated above fifty percent and/or deemed unemployable due to service-related conditions are in the top priority group, veterans with service-connected disabilities rated thirty to forty percent are in the second priority group, and veterans with service-connected disabilities rated ten to twenty percent are in the third priority group.¹²⁹ Some services are free; for others, there is a co-pay depending on the level of disability and means-testing of the veteran. Combat veterans have special access to free health care independent of means testing.¹³⁰ Veterans who are enrolled at the first three priority levels will receive free hospital and outpatient care for treatment of service-connected disabilities, or for treatment of any disability if they have a compensable service-connected disability.¹³¹ Whereas in the past veterans even at zero percent disability ratings were eligible for free VA hospital care for any condition,¹³² the law is now clear that the VA shall furnish treatment only to the “extent and in the amount provided in advance in appropriations Acts.”¹³³

Finally, veterans have access to the Vocational Rehabilitation and Employment Program.¹³⁴ This assists veterans who have service-connected disabilities with obtaining and maintaining employment. To

127 See DEP’T OF VETERANS AFFAIRS, *supra* note 114, at 1.

128 See NAT’L VETERANS LEGAL SERVS. PROGRAM, *supra* note 114 at 675.

129 See DEP’T OF VETERANS AFFAIRS, *supra* note 114, at 2–3.

130 See National Defense Authorization Act For Fiscal Year 2008, Pub. L. No. 110-181, § 1631, 122 Stat. 3 (2008) (codified as amended at 10 U.S.C. § 1071 (2006 & Supp. 2008)).

131 38 U.S.C. § 1710(a) (2006); 38 C.F.R. § 17.108(d)–(e) (2009).

132 See NAT’L VETERANS LEGAL SERVS. PROGRAM, *supra* note 114, at 677.

133 See Veterans Health Care Eligibility Reform Act of 1996, Pub. L. No. 104-262, § 101(a)(4), 110 Stat. 3176 (codified as amended at 38 U.S.C. 1710(a)(4) (2006)); see also NAT’L VETERANS LEGAL SERVS. PROGRAM, *supra* note 114, at 678 (“[The] phrasing clearly means that even an eligible veteran does not have an unqualified right—an entitlement—to VA hospital care. The right to care is specifically dependent upon the resources available to the VA.”).

134 38 U.S.C. §§ 3100–3121 (2006). General information on the Vocational Rehabilitation and Employment Program Services for veterans can be found at Dep’t of Veterans Affairs, Vocational Rehabilitation & Employment Service, <http://www.vba.va.gov/bln/vre/index.htm> (last visited Nov. 15, 2009).

be eligible for this program, a veteran must have a service-connected disability rated at least twenty percent with an employment handicap, or rated ten percent with a serious employment handicap.¹³⁵ After entitlement is established, the disabled veteran and a counselor work together to develop a rehabilitation plan.¹³⁶ The VA pays the cost of all programs. These plans fall into five “tracks.” These include reemployment with a previous employer, rapid access to employment (for individuals who already have the necessary skills to be competitive in the job market in an appropriate occupation), self employment (for individuals who have limited access to traditional employment, need flexible work schedules, or who require more accommodation in the work environment), employment through long-term services (for individuals who need specialized training and/or education to obtain and maintain employment), and independent living services (for veterans who are not currently able to work and need rehabilitation services to live more independently).¹³⁷ Generally, veterans must complete a program within twelve years, although this can be extended on a case-by-case basis.¹³⁸ While participating in these programs, veterans can receive an additional subsistence allowance, based on the rate of attendance (full or part time), the number of dependents, and the type of training.¹³⁹

C. *Two-Tiered Results?*

Comparing the disability policy scheme for veterans and nonveterans with disabilities is in one sense an apples to oranges comparison. Veterans with disabilities are a discrete population that both the federal government and the public have made an explicit and implicit guarantee to support. In contrast, the general population of people with disabilities is larger and more diffuse. Although at various points the federal government has undertaken the task of creating equal

135 38 U.S.C. § 3102.

136 38 C.F.R. § 21(b)(3) (2009).

137 See DEP'T OF VETERANS AFFAIRS, *supra* note 114, at 20–21.

138 38 U.S.C. § 3103(a), (c).

139 See DEP'T OF VETERAN AFFAIRS, *supra* note 114, at 24–27 (giving current rates). In addition to these public programs, some intensive privately funded job training programs for veterans have also begun to spring up, often with high levels of success. See, e.g., Erinn Connor, *Basic Training*, DAILY ORANGE (Syracuse Univ.), at 1 (Sept. 14, 2007), available at <http://media.www.dailyorange.com/media/storage/paper522/news/2007/09/14/Feature/Basic.Training-2968313.shtml> (discussing privately funded entrepreneurship program at Syracuse University's Martin J. Whitman School of Management).

opportunity for this group, important pieces of their welfare have been left to the states or completely unattended.

But my objective is not to argue that what is good for the goose is necessarily good for the gander, or that veterans-specific programs should be imported whole cloth into the general disability policy landscape. Rather, veterans programs can offer important insights on what types of policies could be more effective at moving people with disabilities into the workforce: a goal the federal government has continuously identified as worthy of a federal response. To this end, veterans programs provide support for both a broader conception of antidiscrimination law and complementing it with social welfare programs that reduce structural barriers to employment.

There has not been much litigation under the USERRA, and almost none on its disability-specific provisions.¹⁴⁰ This may be because employers are quick to correct their actions when they learn about their obligations under the USERRA.¹⁴¹ Litigating against veterans may not be as attractive as litigating against other potential plaintiffs. In one sense, at its core, the USERRA is not too dissimilar from the ADA. Both fundamentally prohibit discrimination in employment on the basis of disability. Yet the USERRA takes some important steps that the ADA does not. The ADA makes discrimination unlawful, but tightly draws the line between discrimination and more affirmative forms of assistance an employer might provide. The USERRA expressly moves beyond that line. By requiring employers to participate in job training and helping an employee to become qualified, the USERRA implicitly recognizes that strict antidiscrimination,

140 There are only eighty-six cases in Westlaw that mention “disability” and “USERRA.” Of these, only a handful involve plaintiffs with disabilities whose disability is integral to their claim. None have been successful. *See, e.g.*, *McKee v. U.S. Postal Serv.*, 206 F. App’x 996, 999 (Fed. Cir. 2006) (finding that plaintiff did not show he was treated more harshly than nonveterans); *Wade v. U.S. Postal Serv.*, 157 F. App’x 268, 270 (Fed. Cir. 2005) (denying relief because plaintiff did not point to any evidence that defendant’s conduct violated USERRA); *Wright v. Dep’t of Veterans Affairs*, No. 98-3328, 1999 WL 1212017, at *5 (Fed. Cir. Dec. 15, 1999) (refusing to hear USERRA claims on appeal when plaintiff raised disability issue for first time); *Jones v. N.Y. City Hous. Auth.*, No. 05 Civ. 8104, 2006 WL 1096804, at *5 (S.D.N.Y. Apr. 25, 2006) (denying claim because plaintiff did not adequately allege his disability).

141 *See* Pam Belluck, *After Duty, New Chance for Old Job*, N.Y. TIMES, June 21, 2008, at A11 (“Thousands of calls about USERRA have been made in recent years to the Pentagon’s office of Employer Support of the Guard and Reserve, said David Patel, the office’s director of national operations. The office fielded 13,000 calls in 2007, and nearly 8,000 so far this year. Most, Mr. Patel said, are resolved quickly by reminding the service member or employer of the law’s requirements.”).

even with a reasonable accommodation requirement, may not go far enough. As more reservists are returning home from war to their interrupted careers and there are more USERRA cases,¹⁴² it will be interesting to observe the efficacy of these provisions.

There are very salient differences in social support policies that make veterans programs worthy of careful study. The veterans disability compensation system can be viewed as having overlapping aims with the federal SSDI system, in that it provides cash benefits to workers who are no longer able to work (or work in the same way) as they were before injury.¹⁴³ Yet there are key differences that make the veterans system a more effective tool. With SSDI, the initial qualification process is all or nothing: either a person can work or they cannot.¹⁴⁴ If they can, they do not receive benefits; if they cannot, they do. As will be discussed below, this all-important benefit determination carries with it access to job training programs and public health insurance.¹⁴⁵ In contrast, the veterans disability compensation system is more precise and graduated. A veteran's service-connected disability is evaluated at what percent it impairs employment, and even at lower levels benefits are paid and access to job training services and health-care is permitted.

There are also significant differences in compensation levels and the ability to maintain benefits, as might be expected given veterans' favored status. The level of earnings before an injury does not impact the VA disability compensation that a veteran receives as a result of her disability.¹⁴⁶ In contrast, SSDI payments are directly tied to an employee's pre-injury earnings.¹⁴⁷ Of equal importance, someone who goes back to work and achieves substantial gainful activity will eventually lose their SSDI payments. In contrast, VA disability compensation benefits are paid for life, and future employment does not influence payment levels.¹⁴⁸ The work disincentives are therefore dramatically different: it is completely legitimate, for compensation pur-

142 See Dan Van Bogaert, *Employees Returning from Military Leave: Newest Potential Legal Liability for Employers*, 33 EMP. REL. L.J. 61, 67-68 (2008) (recommending practices employers should take to fulfill ethical and legal duties with respect to employee repatriation).

143 Another parallel could be drawn to workman's compensation, which seeks to compensate workers for injuries incurred in the workplace. I have not analyzed these parallels in this paper, largely because workman's compensation is primarily an area of state legislation and regulation.

144 See *supra* notes 22-24 and accompanying text.

145 See *infra* notes 169-74, 178-82 and accompanying text.

146 See DEP'T OF VETERANS AFFAIRS, *supra* note 114, at 15-16.

147 42 U.S.C. § 1382 (2006); Bagenstos, *supra* note 3, at 12.

148 See DEP'T OF VETERANS AFFAIRS, *supra* note 114, at 15-16.

poses, for a veteran with a high disability rating to maintain full-time employment.¹⁴⁹

The veterans disability pension system can be viewed as a rough analogue to SSI. They are both means-tested programs that attempt to give people who are unable to work a minimum level of subsistence. Both of these programs are premised on an inability to work, and substantial gainful employment will defeat eligibility under either.¹⁵⁰ Similarly, income earned below the benefit level reduces benefits in both programs. But the benefit levels between the two programs are different, giving veterans with disabilities an increased opportunity to maintain some level of employment without losing benefits completely. The SSI monthly cash benefit for an individual who lives alone is \$674 (or \$8088 annually).¹⁵¹ For veterans, the base monthly rate for a veteran without dependants is approximately \$931 (or \$11,181 annually).¹⁵² The means test for veterans is more complicated than the bright-line determination for SSI, but the leading handbook on veterans advocacy opines that the VA rarely denies a claim for a pension where the individual's net worth is under \$80,000.¹⁵³ In contrast, the SSI level is \$2000.¹⁵⁴

Another difference is health care, a traditional source of difficulty for people with disabilities. People with disabilities often have difficulty obtaining private insurance, both because it is so linked to employment,¹⁵⁵ and even when it is not, private insurers will deny cov-

149 See NAT'L VETERANS LEGAL SERVS. PROGRAM, *supra* note 114, at 477 ("This focus on the average person makes it legitimate, for compensation purposes, to rate a claimant who has a substantial and gainful full-time job as totally 100 percent, disabled based on the objective criteria in the rating schedule.").

150 See *id.* at 477 ("As the VA interprets and applies its pension regulations, if a pension claimant is substantially and gainfully employed, he or she will be denied entitlement to pension."); see also *Faust v. West*, 13 Vet. App. 342, 356 (2000) (giving the definition of substantial gainful employment as "one that provides annual income that exceeds the poverty threshold for one person, irrespective of the number of hours or days that the veteran actually works and without regard to the veteran's earned annual income prior to his having been awarded a [disability] rating"). For SSI, the basic eligibility criteria for an adult with a disability is the inability to engage in substantial gainful activity.

151 Social Security Administration, *supra* note 28.

152 See DEP'T OF VETERANS AFFAIRS, *supra* note 114, at 30. Unlike SSI, there are also increased benefits for dependents and for veterans that need aid and attendance. So, for example, a veteran who needs regular aid and attendance and has one dependent would receive \$22,113 annually. *Id.*

153 See NAT'L VETERANS LEGAL SERVS. PROGRAM, *supra* note 114, at 456.

154 Social Security Administration, *supra* note 26.

155 See, e.g., NAT'L COUNCIL ON DISABILITY, *supra* note 35, at 11 ("The employment-based private insurance system adversely affects access to private health insurance,

erage for preexisting conditions.¹⁵⁶ And public insurance, which people with disabilities are disproportionately directed to, contains significant work disincentives.¹⁵⁷ As discussed above, people with disabilities with Medicaid and Medicare coverage have traditionally been afraid to seek employment for fear of losing their insurance.¹⁵⁸ Even with recent legislation like TWWIA, the ability to obtain public insurance is tied to an initial complete inability to work.¹⁵⁹

Even when available, both the private and public insurance schemes are ill suited to enable people with disabilities to live independently and seek employment. If private insurance is available, it poorly serves the needs of people with chronic disabilities by not covering the services they most need for independence and health.¹⁶⁰ Private insurance tilts toward acute, as opposed to chronic care, and treatments are usually required to be medically necessary.¹⁶¹ Private insurance will typically not pay for long term therapy as a continuing response for a chronic condition, nor durable medical equipment and assistive technology.¹⁶² Coverage for hearing aids and prostheses are often difficult, if not impossible, to get under private insurance.¹⁶³

particularly for individuals with disabilities who are self-employed or employed by small firms.”).

156 *Id.* (“Medical underwriting and preexisting-condition exclusions restrict access to private insurance for persons with disabilities and may constitute a discriminatory practice.”).

157 *Id.* (“The public health insurance system in the United States fosters dependence rather than independence and isolation rather than integration.”).

158 *See supra* notes 35–38 and accompanying text.

159 *See supra* notes 35–38 and accompanying text.

160 *See* Bagenstos, *supra* note 3, at 27.

161 *Id.* at 30. For a discussion of the “medical necessity” standard and how it adversely impacts the needs of people with disabilities, NAT’L COUNCIL ON DISABILITY, *supra* note 35, at 3–5; *see also* Peter D. Jacobson et al., *Defining and Implementing the Medical Necessity in Washington State and Oregon*, 34 INQUIRY 142, 151–52 (1997) (“[M]edical necessity is not well-suited for the severely disabled or the chronic care populations, where problems often deal with social necessity, such as keeping people independent.”).

162 *See* Bagenstos, *supra* note 3, at 28–30; *see also* LISA I. IEZZONI, *WHEN WALKING FAILS* 241 (2003); NAT’L COUNCIL ON DISABILITY, *supra* note 35, at 13 (“Health-related services that help maintain or substantially improve an individual’s level of functioning, such as assistive devices and personal assistance, are rarely covered by insurance; if these services are covered, the coverage is often restricted in amount, duration, and scope.”).

163 Regarding hearing aids, *see* Bonnie Poitras Tucker, *Access to Health Care for Individuals with Hearing Impairments*, 37 HOUS. L. REV. 1101, 1147 (2000). *See also* Micek v. City of Chi., No. 98 C 6757, 1999 WL 966970, at *6 (N.D. Ill. Oct. 4, 1999) (stating that a plaintiff born with a hearing impairment was denied coverage for speech therapy “because his condition was chronic and significant improvement

The general public insurance programs, while slightly better, suffer from many of the same systemic flaws in terms of the type of coverage they provide. Medicare uses a “medical necessity” standard similar to private insurers.¹⁶⁴ Medicare will deny reimbursement for mobility aids and power wheelchairs to recipients who can move around in their houses without them.¹⁶⁵ Augmentative communication or personal assistance services also often fail to satisfy Medicare’s medical necessity criteria.¹⁶⁶ Medicare has also historically limited home health services (including personal assistance, physical and occupational therapy, and speech and language pathology) to people who are confined in their homes.¹⁶⁷ The broader theoretical failure of Medicare and Medicaid to service an independent population capable of taking steps toward self-sufficiency has been well documented.¹⁶⁸

Although veterans with disabilities do not have greater access to private health insurance, their public insurance system facilitates greater opportunity for independence and access into the labor market. Veterans with disabilities have access to many assistive therapies and durable medical goods through the VA healthcare system. The importance of these services to seeking and maintaining employment

could not be shown within sixty days”). Regarding prostheses, see NAT’L LIMB LOSS INFO. CTR., FIRST STEP 46–54 (2003). See also EEOC v. Hinsdale Hosp., No. 98-C-3482, 1999 WL 495480, at *5 (N.D. Ill. June 30, 1999) (holding that hospital’s refusal to pay for employee’s replacement prosthesis did not violate the law).

164 See 42 U.S.C. § 1395y(a)(1)(A) (2006) (limiting reimbursement to items or services that are “reasonable and necessary for the diagnosis or treatment of illness or injury or to improve the functioning of a malformed body member”); see also COMM. ON A NAT’L AGENDA FOR THE PREVENTION OF DISABILITIES, INST. OF MEDICINE, DISABILITY IN AMERICA 227 (Andrew M. Pope & Alvin R. Tarlov eds., 1991) [hereinafter IOM, DISABILITY IN AMERICA] (“Medicare, the public insurance program for the elderly and people with disabling conditions, uses a standard of ‘‘medical necessity’’ that has been adopted by most private insurers. Assessed by this standard, assistive technologies are likely to be dismissed as ‘not primarily medical in nature’ or as ‘convenience items.’”).

165 See Bagenstos, *supra* note 3, at 65. If a recipient uses this equipment for purposes of traveling outside their home, it is deemed a “convenience item.” See IZZONI, *supra* note 162, at 250; see also 42 U.S.C. § 1395x(n) (providing coverage for durable medical equipment only when it is used in the patient’s home).

166 See Bagenstos, *supra* note 3, at 65; see also IOM, DISABILITY IN AMERICA, *supra* note 164, at 257 (“In many cases, assistive technologies instrumental to maintaining an independent lifestyle and often essential to preventing secondary conditions do not satisfy the criteria on the Medicare screening list for durable medical equipment. When the importance of, for example, augmentative communication devices or personal hygiene aids is not recognized, dependence is fostered, which can lead to institutionalization.”).

167 See 42 U.S.C. § 1395f(a)(2)(C).

168 See *supra* note 54.

cannot be overemphasized.¹⁶⁹ So, for example, veterans receiving VA care for any condition may receive VA prosthetic appliances, equipment, and services including home respiratory therapy, artificial limbs, orthopedic braces and therapeutic shoes, wheelchairs, powered mobility, crutches, canes, walkers, and other durable medical equipment or supplies.¹⁷⁰ The VA will also provide hearing aids for veterans who receive compensation for a service-connected disability or a disability pension.¹⁷¹ The VA is a recognized world leader in many of these areas. Its budget for prosthetics and sensory aids for fiscal year 2008 is \$1.6 billion, and it serves over 1.9 million veterans in this capacity.¹⁷² The VA also provides for home improvements and structural changes, and adaptive equipment for automobiles, to veterans with service-connected disabilities.¹⁷³ For veterans who receive disability compensation for service-connected disabilities, the VA also provides non-institutional home-based healthcare and therapies that exceed what is covered under Medicare.¹⁷⁴ Antidiscrimination law, which can at its best operate to eliminate overt barriers and reduce stigma, offers none of these more affirmative forms of assistance.¹⁷⁵

169 See, e.g., LONGMORE, *supra* note 44, at 230–58. Professor Longmore, an individual with a disability, paid his personal assistants and ventilators through funds provided by California’s In-Home Supportive Services Program (under the California Medicaid program, Med-Cal). To qualify for this, he needed to stay within the income limits for SSI and SSDI. Rather than go over those limits, Professor Longmore poignantly demonstrates how he was forced to burn his book, *The Invention of George Washington* (1988), because his royalty earnings would have rendered him unable to stay in the Medical program.

170 See DEP’T OF VETERANS AFFAIRS, *supra* note 114, at 9; see also 38 C.F.R. § 17.150 (2009) (all veterans enrolled in the VA health care system are eligible for all needed prosthetics, medical equipment, and supplies); NAT’L VETERANS LEGAL SERVS. PROGRAM, *supra* note 114, at 729–31 (noting access for veterans to “full array of special devices and aids that would enable them to be more independent and mobile in and out of the home”).

171 See DEP’T OF VETERANS AFFAIRS, *supra* note 114, at 9; see also 38 C.F.R. § 17.149 (providing hearing aids to veterans eligible under 38 C.F.R. § 17.149(b)); NAT’L VETERANS LEGAL SERVS. PROGRAM, *supra* note 114, at 730–31 (listing the cost free sensorineural aids, including necessary eyeglasses, contact lenses, and hearing aids, that available to veterans with a range of compensable service-connected conditions).

172 See Press Release, Dep’t of Veterans Affairs, Fact Sheet: VA Prosthetics and Sensory Aids (Jan. 2009), available at www1.va.gov/opa/fact/pros-sensory.asp.

173 See DEP’T OF VETERANS AFFAIRS, *supra* note 114, at 11 (“VA provides up to \$4,100 for service-connected veterans . . . to make home improvements necessary for the continuation of treatment or for disability access to the home and essential lavatory and sanitary facilities.”).

174 See NAT’L VETERANS LEGAL SERVS. PROGRAM, *supra* note 114, at 719–23.

175 As Samuel Bagenstos has explained, “[The ADA does] not require the employer to provide in-home personal-assistance services or transportation to enable

Even states that choose to exercise Medicaid waivers to help participants live independently do not provide assistance to a wide swath of people with disabilities that need crucial support to work. So, for example, the state of Iowa has a home- and community-based waiver for the physically disabled which includes home and vehicle modifications.¹⁷⁶ But this waiver is limited to individuals who would otherwise require a nursing facility level of care,¹⁷⁷ which leaves out many individuals with physical disabilities who could participate in the job market if they only had access to accessible vehicles to transport them to work.

As will be discussed below, access to many of the services for veterans with disabilities is so constrained by chronic underfunding and administrative failures that in many cases it may be more theoretical than real. Nevertheless, eligibility for these VA health care services is more expansive than the equivalent public insurance programs in important ways. To get Medicare and Medicaid coverage, an individual must make an initial investment in not working. If they are able to eventually work, even after TWWIA, their coverage may eventually be jeopardized. In contrast, veterans who receive disability compensation at any level, even ten percent, are entitled to access to the VA health care system including the above-mentioned services. Veterans with disability ratings of over ten percent have priority for VA health-care, with veterans with over fifty percent ratings having the highest priority. Although co-pays may be required, their access to these services is not put at risk by seeking and maintaining employment.

There are also differences in the quality of vocational rehabilitation programs, and the extent to which they are deployed to help veterans with disabilities enter and stay in the workforce. Vocational rehabilitation has a long pedigree in this country, dating back to the early 1900s, when programs for civilians (disabled workers) and veterans were both established.¹⁷⁸ Yet even then, veterans with disabilities

an individual with a disability to get to work, nor do they require the employer to provide the individual with health insurance coverage that is as adequate as he or she can receive through Medicaid." Bagenstos, *supra* note 3, at 4.

176 See IOWA DEP'T OF HUMAN SERVS., ARE HOME & COMMUNITY BASED SERVICES RIGHT FOR YOU? 5-7 (2006), <http://www.ime.state.ia.us/docs/HCBSbrochure102606.pdf>.

177 See *id.*; see also Letter from James G. Scott, Assoc. Reg'l Adm'r for Medicaid & Children's Health, Dep't of Health & Human Servs., to Kevin Concannon, Dir., Iowa Dep't of Human Servs. (July 23, 2007), available at <http://www.cms.hhs.gov/MedicaidStWaivProgDemoPGI/downloads/IA0345R0200.zip>.

178 In the aftermath of the World War I, Congress enacted the Smith-Sears Act "[t]o provide for vocational rehabilitation and return to civil employment of disabled persons discharged from the military or naval forces." Vocational Rehabilitation Act

received differential treatment and were held to standards that were more lenient than other disabled civilians.¹⁷⁹ The two systems have continued along markedly different routes. Vocational rehabilitation programs for veterans, though not always administered perfectly or funded adequately, have consistently been a policy area the federal government has viewed strategically and as part of its mandate.¹⁸⁰ Although, as will be discussed below, there is a lack of systematic evaluation of effectiveness, what evidence exists suggest that they work.¹⁸¹ In contrast, programs for civilians with disabilities have been largely delegated to the states. To the extent it exists, evidence on their actual effectiveness is sporadic and depressing.¹⁸² The veterans vocational rehabilitation programs are better coordinated, better funded, and more long-term.¹⁸³

of 1918, Pub. L. No. 65-178, ch. 107, 40 Stat. 617 (amended 1920). The National Vocational Rehabilitation Act of 1920, the Smith-Fess Act, extended these vocational rehabilitation principles to civilians. National Vocational Rehabilitation Act of 1920, ch. 219, Pub. L. No. 66-236, 41 Stat. 735 (codified as amended at 29 U.S.C. §§ 701-796 (2006)). This law attempted to “provide for the promotion of vocational rehabilitation of persons disabled in industry or in any legitimate occupation and their return to civil employment” and offered services to people “who, by reason of a physical defect or infirmity, whether congenital or acquired by accident, injury, or disease, [are], or may be expected to be, totally or partially incapacitated for remunerative occupation.” *Id.* at ch. 219, §§ 1-2.

179 See LIACHOWITZ, *supra* note 89, at 37 (“The Industrial Rehabilitation Act of 1920 shows handicapped civilians disproportionately held to standards of economic utility and more negatively labeled than wounded soldiers.”).

180 The most recent statement of these priorities can be found at 38 U.S.C. § 4102 (2006), enacted in its current form in 2002:

The Congress declares as its intent and purpose that there shall be an effective (1) job and job training intensive services program, (2) employment placement service program, and (3) job training placement service program for eligible veterans and eligible persons and that, to this end policies and regulations shall be promulgated and administered by an Assistant Secretary of Labor for Veterans’ Employment and Training . . . so as to provide such veterans and persons the maximum of employment and training opportunities . . . [and] to implement all efforts to ease the transition of servicemembers to civilian careers that are consistent with, or an outgrowth of, the military experience of the servicemembers.

Id.

181 See PRESIDENT’S COMM’N ON CARE FOR AMERICA’S WOUNDED WARRIORS, SERVE, SUPPORT, SIMPLIFY 21 (2007) [hereinafter PRESIDENT’S COMM’N], available at <http://www.veteransforamerica.org/wp-content/uploads/2008/12/presidents-commission-on-care-for-americas-returning-wounded-warriors-report-july-2007.pdf> (“Veterans who qualify for and complete VA’s Vocational Rehabilitation and Employment program achieve good results in the short run.”).

182 See *supra* notes 51-53 and accompanying text.

183 See *supra* notes 136-39.

Again, there is a key difference in access to these programs between the two populations. Whereas access to vocational rehabilitation programs has been limited to the general population of people with disabilities who initially qualify for SSDI or SSI and have made an initial investment in not working, veterans with disabilities have access to job training programs even at low levels of service-related disabilities.¹⁸⁴ It is noteworthy that the improvements to vocational rehabilitation access made with laws like TWWIA mirror what was already happening with comparable veterans programs.¹⁸⁵

In sum, veterans have access to programs that do not contain the same work disincentives that are inherent in general disability programs. Through the VA, they have a more integrated network of options, including needed health care and job training options. This of course leads to the “payoff” question: is this working? Sadly, there is no clear answer. There are no precise studies comparing employment levels of veterans with disabilities to the general population of people with disabilities. The only entity that gathers information relevant to both groups is the Census Bureau and Bureau of Labor Statistics’s Current Population Survey (CPS). The 2006 CPS numbers, which define a work disability as “an impairment that prevents working or limits the kind or amount of work” that an individual can do,¹⁸⁶ show that 22.6% of individuals with disabilities are in the labor force, compared with 76.7% of people without disabilities.¹⁸⁷ The employment rate for individuals with disabilities is 19.7%, compared to 73% for individuals without disabilities.¹⁸⁸ And the unemployment rate for people with disabilities is 12.8%, compared with 4.7% for people without disabilities.¹⁸⁹ In contrast, according to 2007 numbers released by the Department of Labor and also used by the CPS, 48.2% of veterans with service-connected disabilities (defined as veterans with over a

184 See *supra* note 135.

185 These include a more client-centered approach, more localized services, and a longer period of support for plan participants. See Robert Silverstein, *One-Stop Career Centers and the New Ticket to Work and Self-Sufficiency Program*, NAT’L CTR. ON WORKFORCE & DISABILITY, Aug. 1, 2002, http://www.onestops.info/article.php?article_id=136&subcat_id=61.

186 See U.S. Census Bureau, *Uses and Limitations of CPS Data on Work Disability* (Sept. 1, 2006) (unpublished manuscript), available at <http://www.census.gov/hhes/www/disability/cps/cpstablexplanation.pdf>.

187 See U.S. Census Bureau, *Labor Force Status—Work Disability Status of Civilians 16 to 74 Years Old, by Educational Attainment and Sex: 2006 (2007)*, <http://www.census.gov/hhes/www/disability/cps/cps206.xls>.

188 See *id.*

189 *Id.*

10% VA disability rating)¹⁹⁰ are in the labor force, compared with 54.7% of veterans with no service-connected disability.¹⁹¹ Veterans with service-connected disabilities have an employment rate of 46.5%, compared to an employment rate of 52.8% of veterans without service-connected disabilities.¹⁹² And veterans with service-connected disabilities have an unemployment rate of 3.4%, compared with an unemployment rate of 3.5% of veterans without service-connected disabilities.¹⁹³ These numbers are demonstrated in Table 1 below.

To the extent that these numbers demonstrate that veterans with disabilities are having more success in the employment arena than the general population of people with disabilities, this holds true when looking more precisely at veterans and nonveterans with more severe disabilities. Of the general population of people with severe work disabilities, 9.2% are in the labor force, the employment rate is 7.4%, and the unemployment rate is 18.8%.¹⁹⁴ Of veterans with more severe disabilities, 27.2% are in the labor force, the employment rate is 25.7%, and the unemployment rate is 5.8%.¹⁹⁵ These numbers are demonstrated in Table 2 below.

There are many caveats to these numbers. In a sense, they are an apples to oranges comparison.¹⁹⁶ Although the source of both sets of

190 See *supra* notes 117–19 and accompanying text. The current criteria for rating the severity of various disabilities are available at U.S. Department of Veterans Affairs website. See U.S. Dep’t of Veterans Affairs, VBA 38 CFR—Book C, available at <http://warms.vba.gov/bookc.html> (last visited Jan. 20, 2010).

191 Press Release, Bureau of Labor Statistics, U.S. Dep’t of Labor, Employment Situation of Veterans: 2007, tbl. 5 (Apr. 10, 2008), available at http://www.bls.gov/news.release/archives/vet_04102008.pdf. This table contains the employment status of veterans eighteen years and over by presence of service-connected disability, reported disability rating, period of service, and sex, as of August 2007, and is not seasonally adjusted. *Id.*

192 *Id.*

193 *Id.*

194 See U.S. Census Bureau, *supra* note 187. In the Current Population Survey, if a person answers “yes” to several questions, they are tabulated as having a “severe” disability. These questions ask if they are currently not in the labor force because of a disability, if they did not work at all in the previous year because of illness or disability, if they are under sixty-five years old and covered by Medicare, and if they are under sixty-five and received SSI in the previous year. See U.S. Census Bureau, Uses and Limitations of CPS Data on Work Disability 1–3 (unpublished manuscript), available at <http://www.census.gov/hhes/www/disability/cps/cpstablexplanation.pdf>.

195 See Press Release, *supra* note 191, at tbl.5. For purposes of this comparison, I have used veterans with over a sixty percent disability rating as having more severe disabilities.

196 The intent behind each question categorizing someone as having a disability is to assess whether a person has some impairment that limits or restricts work. But the vehicles to address those underlying issues are different: the general population sur-

numbers is the CPS, they were gathered in different surveys.¹⁹⁷ The employment statistics (both these and others) for the general population of people with disabilities has been greatly criticized for their shifting and imprecise definitions of disability,¹⁹⁸ and the CPS itself has taken the position that its “work disability” questions are “not designed or tested with the intent of measuring disability.”¹⁹⁹ That said, there are responses to some of these issues which may make the data sufficient to establish the rather modest claim that that veterans with disabilities seem to be doing better in the labor market than non-veterans with disabilities, even at the severe disability level.²⁰⁰ First, most of the criticism of the work disability statistics has been centered on the difference between how CPS defines disability and the definition of disability under the ADA.²⁰¹ Unlike other researchers, I am not using them primarily for this purpose. Second, veterans without disabilities participate in the labor market in fewer numbers than the general population of people without disabilities, and have a lower employment rate. So it is particularly interesting that veterans with disabilities do *better* in labor market participation and employment rate than the general population of people with disabilities.²⁰² Third, I was unable to locate any other credible sources of information to compare employment levels for veterans and nonveterans with disabilities.

vey directly asks about impairments that impact work, while the veterans-specific numbers use disability ratings (which get at the same issue) as a proxy for that question.

197 The demographics also do not line up perfectly between the two groups. The general numbers include individuals sixteen to seventy-four years old, while the veterans-specific numbers include individuals eighteen years old and older.

198 See, e.g., Douglas Kruse & Lisa Schur, *Does the Definition Affect the Outcome?*, in *THE DECLINE IN EMPLOYMENT OF PEOPLE WITH DISABILITIES* 279, 282–91 (David C. Stapleton & Richard v. Burkhauser eds., 2003); see also Kaaryn Gustafson, *Disability, Fluidity, and Measuring Without Baselines*, 75 *MISS. L.J.* 1007, 1009–17 (2006) (scrutinizing the various measures of the ADA’s impact on employment of disabled individuals).

199 See U.S. Census Bureau, *supra* note 186, at 1.

200 The Department of Labor has noted this success for veterans, highlighting the similar unemployment rates for veterans with and without disabilities. See Press Release, *supra* note 191, at tbl.5.

201 See Kruse & Schur, *supra* note 198, at 282–91; see also Peter Blanck et al., *Calibrating the Impact of the ADA’s Employment Provisions*, 14 *STAN. L. & POL’Y REV.* 267, 275 (2003) (noting that the CPS data “define[s] disability more narrowly than the ADA because [it] focus[es] on impairments that limit work activity, rather than any major life activity”).

202 *But see* Greg A. Greenberg & Robert A. Rosenheck, *Are Male Veterans at Greater Risk for Nonemployment than Nonveterans?*, *MONTHLY LAB. REV.*, Dec. 2007, at 23, 23 (finding that veterans as a group do not have a higher risk of nonemployment than their nonveteran peers).

Apart from these data reliability issues, there are other variables which might explain the discrepancies. Affirmative-action policies for veterans are likely playing some role. There has been little political acceptance for affirmative-action policies for people with disabilities (or other groups). In the global context, there are other countries that take different approaches and have embraced job set-asides and similar programs.²⁰³ This has been resisted for people with disabilities, and at least one prominent commentator has suggested such an idea should be a “nonstarter” in the United States.²⁰⁴ Nevertheless, there is some history of using the federal government as a vehicle to employ people with disabilities. Section 501 of the Rehabilitation Act requires federal agencies to develop affirmative action programs for hiring, placement, and advancement of persons with disabilities.²⁰⁵ Just before he left office, President Clinton issued Executive Order 13,163, which had a mandate to hire an additional 100,000 federal employees with disabilities within five years.²⁰⁶ This Order ultimately failed in its goals.²⁰⁷ The Randolph Sheppard Act,²⁰⁸ first passed by Congress in 1936, gives preference to blind persons to operate vending facilities on public property.²⁰⁹

In contrast, there are more robust affirmative action policies for veterans (and veterans with disabilities in particular) within the federal government.²¹⁰ Many state and local employers have similar poli-

203 See Lisa Waddington, *Reassessing the Employment of People with Disabilities in Europe: From Quotas to Anti-Discrimination Laws*, 18 COMP. LAB. L.J. 62, 81–99 (1996) (examining quota systems in European countries).

204 See Bagenstos, *supra* note 3, at 73 (“I think that job set-asides for people with disabilities, an approach favored by a number of commentators, ought properly to be a nonstarter.” (footnote omitted)).

205 29 U.S.C. § 791(b) (2006).

206 See Exec. Order No. 13,163, 65 Fed. Reg. 46,563 (July 26, 2000).

207 See Obama for Am., Barack Obama and Joe Biden’s Plan to Empower Americans with Disabilities, *available at* <http://www.barackobama.com/pdf/DisabilityPlanFactSheet.pdf> (last visited Jan. 21, 2010) (pledging to reinstate Executive Order Number 13,163, see *supra* note 206).

208 Act of June 1, 1936, c. 638, § 1, 49 Stat. 1559 (codified as amended at 20 U.S.C. 107–107f (2006)).

209 See 20 U.S.C. §§ 107–107f (2006).

210 See U.S. Office of Pers. Mgmt., Disabled Veterans Affirmative Action Program (DVAAP), *available at* <http://www.opm.gov/veterans/dvaap.asp> (last visited Jan. 21, 2010) (“Most departments and agencies in the Federal Government are required to have an affirmative action program for the recruitment, employment, and advancement of disabled veterans. The law requires agencies to develop annual Disabled Veterans Affirmative Action Program (DVAAP) Plans.”).

cies.²¹¹ These programs appear more effective than the Section 501 plans requiring all federal agencies to hire people with disabilities. Again working from different surveys, the 2007 CPS data demonstrates that 33.1% of employed veterans with disabilities work in government positions (16.3% in federal government and 16.9% in state and local government),²¹² compared with the U.S. Census Bureau's 2007 American Community Survey data showing that 15.2% of the employed general population of people with disabilities work in government positions (3.0% in the federal government, and 4.8% in state and local governments).²¹³ So while these policies cannot explain the total differences between the two groups, they clearly play some role.

The subset of veterans with disabilities may also be disproportionately made up of men, and would also be made up exclusively of people who at one point in their lives were employable (meaning they served in the military). There are clearly different cultural constructs for veterans and nonveterans with disabilities. The former have well-established support and advocacy networks that the latter may not. Just as importantly, the stigma that attaches to the general disability classification (and may consciously or unconsciously impact employer decisions) may be tempered by a desire to be patriotic and hire a veteran. And without being able to control by type of disability, any comparisons may be misleading. It is well documented that discrimination on the basis of mental disability is the most pervasive and hardest type of discrimination to address.²¹⁴

These are all interesting possibilities, and are worthy of further study. But although it would undoubtedly help, my assertion that the federal government's policies regarding employment and disability should be more integrated does not rest on any empirical conclusion that veterans' higher employment levels are caused by better integra-

211 See, e.g., BUREAU OF LAND MGMT., ALASKA STATE OFFICE, DISABLED VETERANS AFFIRMATIVE ACTION PROGRAM PLAN FISCAL YEAR 2007 (2006), available at http://www.blm.gov/pgdata/etc/medialib/blm/ak/aktest/equal_employment_opportunity.Par.20573.File.dat/DVAAP%20AK%20FY07.pdf. Similarly, New York state law exempts veterans with disabilities from many local restrictions on street vending. For example, New York City caps the total number of general vending licenses at 853 (there is a waiting list of thousands), but New York state law preempts local law and exempts disabled veterans from this limitation. See N.Y. GEN. BUS. LAW § 35 (McKinney 2009).

212 Press Release, *supra* note 191, at tbl.6.

213 U.S. Census Bureau, 2007 Selected Economic Characteristics for the Civilian Noninstitutionalized Population by Disability Status (Sept. 2007), http://factfinder.census.gov/servlet/STTable?_bm=Y&-qr_name=ACS_2007_1YR_G00_S1802&-ds_name=ACS_2007_1YR_G00_&-state=st&-lang=en.

214 See Waterstone & Stein, *supra* note 3, at 1359–77 (discussing discrimination against the disabled in the workplace).

tion of veterans programs. Regardless of other contributing variables, I firmly believe that the project of reducing work disincentives in social welfare programs has value and should be pursued. Although my focus on veterans programs is unique, I am not alone in this assertion.²¹⁵ Federal law has an important expressive function, especially concerning the messages it sends about disadvantaged groups.²¹⁶ Government social welfare programs that expressly and implicitly equate disability with non-work exacerbate the very same stigma that the ADA and civil rights model seek to eradicate. People with disabilities are told they can and should work, yet are kept under the control of gatekeepers who incentivize non-work. If and when they attempt to work, they can actually be left in a worse position.

The existing inconsistent general strategies are clearly not working.²¹⁷ If employment levels of people with disabilities are to be raised, the full panoply of federal programs need to be available to the larger population of people with disabilities identified by the ADA. The success of some veterans' social welfare interventions should be used as a tool by disability advocates to keep federal disability policy moving in a direction it is in some ways already headed. Laws like TWWIA, which move the general disability policy closer to the alignment found in veterans programs, should be continued and expanded. Social security benefits and Medicaid eligibility can and should borrow from the veterans disability compensation system, and become a more graduated system, not relying on a restrictive all or nothing definition of work.²¹⁸ And, like the USERRA, antidiscrimination law could incorporate a more expansive conception of "qualified," and better link employer-based and federally provided job training programs.

In the next Part, I turn to a critique of federal programs for veterans with disabilities. Although they have attractive features, they are

215 See Bagenstos, *supra* note 3, at 63; see also Stein, *supra* note 7, at 679–80 (discussing the U.N. Convention on the Rights of Persons with Disabilities); GOV'T ACCOUNTABILITY OFFICE, *supra* note 35, at 5 (reporting on the impact of vocational rehabilitation services); GOV'T ACCOUNTABILITY OFFICE, *supra* note 44, at 8–10 (reporting participants suggestions to remove disincentives for those with disabilities to work).

216 See Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649, 1652 (2000) (discussing the relationship between legal signals and societal expectations); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2021–25 (1996).

217 See *supra* notes 58–65 and accompanying text.

218 See Mark C. Weber, *Disability Rights, Disability Discrimination, and Social Insurance*, 25 GA. ST. U. L. REV. 575 (2009) (arguing that expanding social insurance is consistent with a civil rights approach to disability).

far from perfect. In fact, they suffer from flaws in design and implementation that have parallels in the larger world of general disability policy. This convergence, I suggest, offers opportunities for shared advocacy between the two groups.

III. LOOKING AHEAD

It is not the intent of this Article to suggest that programs for veterans with disabilities are perfect or should be incorporated whole cloth into the general federal disability policy scheme. As will be explored below, programs for veterans with disabilities have serious problems, many of which should look familiar to the disability community. At various points, veterans programs also rely on a medical model of disability, whereby medical professionals screen for eligibility and make recommendations for the care of people with disabilities. Despite the fact that the VA is supposed to be a sympathetic forum for veterans with disabilities, many veterans believe the relationship is overly adversarial. And the combination of inefficient administration and underfunding on federal commitments has been so extreme as to completely deny access to needed and promised services for many veterans. The existence of these problems in federal programs narrowly targeted to serve a favored population demonstrates the vexing issues that confront disability policy generally. But this also creates areas of interest convergence where veterans and nonveterans with disabilities can continue to push for needed reforms.

From the time of the Civil War, systems to deliver benefits to veterans have been reliant on medical professionals as screeners.²¹⁹ As is now a common recognition in disability rights scholarship, this creates skewing toward the cultural beliefs of medical professionals, and pays insufficient attention to environmental and social factors which can themselves create disabling conditions.²²⁰ The work of Peter Blanck and others has shown that veterans returning from the Civil War received less (if any) compensation for mental disabilities than physi-

219 See Blanck & Millender, *supra* note 91, at 2–3.

220 One clear example of this is the significant difference in disability compensation ratings provided by the Department of Defense (DOD) and the VA. The VA often provides higher ratings, despite the fact that the two organizations are supposed to be employing the same rating system. The different cultures of the two organizations contributes to these divergent results. See VETERANS' DISABILITY BENEFITS COMM., HONORING THE CALL TO DUTY 259–67 (2007); see also U.S. GEN. ACCOUNTABILITY OFFICE, DOD AND VA: PRELIMINARY OBSERVATIONS ON EFFORTS TO IMPROVE CARE MANAGEMENT AND DISABILITY EVALUATIONS FOR SERVICEMEMBERS 2–5 (2008), <http://www.gao.gov/new.items/d08514t.pdf> (discussing a pilot program by the DOD and VA to streamline the disability evaluation process).

cal disabilities, based on suspicion of mental illness at the time by medical professionals.²²¹ This medical model also creates a subservient relationship between people with disabilities and those who purport to serve their interests.²²²

This problem has continued to the present day. It is only recently that PTSD and similar mental disabilities have been taken seriously for purposes of disability compensation screenings. Even now, the VA is still slow to recognize and provide effective treatment for veterans with mental illness.²²³ Relying on medical professionals creates stress in disability evaluations, which contributes to the delay that veterans face when navigating the VA system. In some ways, this problem is intractable to any social welfare benefit program that attempts to limit its application to certain populations while fearing opening it up to others.²²⁴ It certainly has its parallels with the Social Security Administration's disability evaluation, which is also largely based on medical evidence. Even more flexible attempts to define disability for purposes of antidiscrimination law have seemingly circled back to a medical-based definition, much to the chagrin of disability rights advocates who envisioned the ADA as embracing a social model of disability.²²⁵

221 See Blanck & Millender, *supra* note 91, at 3–5. See generally Peter Blanck, *Civil War Pensions and Disability*, 62 OHIO ST. L.J. 109, 129–96 (2001) (providing a detailed analysis of the Civil War pension system and public attitudes about disability).

222 See Blanck & Millender, *supra* note 91, at 2 (“[T]he medical model cast disabled people in a subordinate role in their encounters with doctors, rehabilitation professionals, psychologists, and social workers who aimed to ‘help them’ adjust to a society structured around the convenience and interests of the nondisabled.”); see also SHAPIRO, *supra* note 82, at 63, 112 (noting that few governmental or charitable programs for people with disabilities are controlled by the disabled); Michael Ashley Stein, *From Cripple to Disabled: The Legal Empowerment of Americans with Disabilities*, 43 EMORY L.J. 245 (1994) (reviewing SHAPIRO, *supra* note 82); Jonathan C. Drimmer, Comment, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities*, 40 UCLA L. REV. 1341, 1345–55 (1993) (describing the stigma and social roles imposed on the disabled as a result of the medical model).

223 See Rich Daly, *New Freedom Commission Members Assess Report's Impact*, PSYCHIATRIC NEWS, May 5, 2006, at 1 (2006) (containing the testimony of Dr. Frances Murphy, Undersecretary for Health Policy Coordination at the VA, noting that mental health and substance abuse care are simply not accessible at some VA facilities, and, even where available, the waiting lists render that care virtually inaccessible); see also PRESIDENT'S COMM'N, *supra* note 181, at 8 n.9 (noting the need for the DOD and VA to improve treatment for PTSD and mental illness, and reduce stigma associated with these diseases).

224 See generally Diller, *supra* note 3, at 1010–55 (examining the tension between the ADA and federal disability benefit programs).

225 Part of the ADA's definition of disability is that an individual is disabled if they are “regarded as” having a physical or mental condition that substantially limits one

Veterans health care, disability compensation systems, and job training programs have also been relentlessly criticized for their lack of integration, chronic underfunding, and poor administration.²²⁶ These problems have been exacerbated by the current conflicts, which were not adequately planned and budgeted for by the federal government.²²⁷ Veterans do not have access to VA health care and services until they receive their disability rating,²²⁸ and the VA is currently averaging 180 days to process claims and has a backlog of 600,000 claims.²²⁹ The armed services and the VA have been criti-

or more major life activities. See 42 U.S.C. § 12102(2)(A) (2006). Many people instrumental in the ADA's passage hoped this provision to incorporate a social model of disability, whereby an individual can be considered disabled if society's response to that individual's perceived impairments itself creates a disabling condition. See Feldblum, *supra* note 109, at 91–92 (noting various definitions of “handicap” under the Rehabilitation Act of 1973 and stating that the Supreme Court has appeared to adopt the social model); Arlene B. Mayerson, *Restoring Regard for the “Regarded As” Prong: Giving Effect to Congressional Intent*, 42 VILL. L. REV. 587, 587 (1997) (criticizing judicial interpretations of the statute that narrow the definition of disability). By nearly every account, this has been a failure, and the inquiry has circled back to a more medicalized definition. See Bradley A. Areheart, *When Disability Isn't “Just Right”: The Entrenchment of the Medical Model of Disability and the Goldilocks Dilemma*, 83 IND. L.J. 181, 192 (2008).

226 The February 2007 *Washington Post* series about the conditions at Walter Reed Hospital put many of these problems in the public consciousness. See *supra* note 88. One veterans handbook describes the situation as follows:

In Iraq, Afghanistan, Vietnam, World War II and other wars, the United States has taken men and women into military service and sent them to war. In so doing it took upon itself moral and legal obligations of the most serious nature. But the United States has not fulfilled its duties. It has breached its contract with the men and women who risked—and sometimes ruined—their lives in service to their country.

VETERANS FOR AM., *supra* note 114, at 26–27; see also Bilmes, *supra* note 73, at 19 (noting chronic underfunding of Veterans Administration).

227 See Bilmes, *supra* note 73, at 13 (“The VA curiously maintains that it can cope with the surge in demand, despite much evidence to the contrary. For the past two years, the VA ran out of money to provide health care.”).

228 See VETERANS FOR AM., *supra* note 114, at 26 (noting that servicemembers who have been separated from the military have to wait extended periods of time before getting VA support, which leads to discipline problems for these individuals); *id.* at 27 (noting that veterans must live off credit cards or loans from family during this period).

229 *Id.*; see also Bilmes, *supra* note 73, at 8 (noting that the process for approving disability compensation claims was criticized by the GAO in numerous reports even in 2000 (before the current war), which noted problems including “large backlogs of pending claims, lengthy processing time for initial claims, high error rates in claims processing, and inconsistency across regional offices”); *id.* (noting VA average of six months to process original claims in contrast to just over eighty-nine days for private sector health care/financial services claims).

cized for not making veterans aware of the benefits to which they may be entitled.²³⁰ Too often, veterans are denied eligibility and steered toward general disability programs like SSI, even though veterans benefits are superior.²³¹ Even when eligible, the waiting times and geographic restrictions for certain VA health services are so prohibitive that the VA has admitted that in many instances, veterans with disabilities are denied access to needed care.²³² Job training programs have also been criticized as having weak leadership and accountability, limited data and analysis to manage programs, a low success rate, and not having a proactive approach to serving veterans with serious employment handicaps.²³³ Underfunding, poorly integrated administration, and excessive bureaucracy are often cited as causes of these problems.²³⁴ The VA, which is by law supposed to be an accommodating forum for veterans,²³⁵ has by many estimates developed an adver-

230 See Reynolds Holding, *Insult to Injury*, LEGAL AFF., Mar.–Apr. 2005, http://www.legalaffairs.org/issues/March-April-2005/feature_holding_marapr05.msp (describing case of Tyson Johnson, who had been injured at Abu Ghraib prison: “A year after he got back to Mobile[, Alabama,] . . . Johnson overheard a few injured veterans talking at the local V.A. clinic and he learned that he could apply for disability benefits from the Department of Veterans Affairs. ‘Nobody told me nothing about it, so how was I supposed to know?’ he said. ‘To get home and be treated this way, man, it hurt me.’”).

231 See *Hearing on the Effectiveness of Federal Homeless Veterans Programs Before the Subcomm. on Oversight and Investigations of the H. Comm. on Veterans Affairs*, 106th Cong. 110 (1999) (statement of Peter H. Dougherty, Dir., Homeless Veterans Programs) (“The joint VA-SSA outreach effort conducted in New York City, Brooklyn, Dallas, and Los Angeles almost doubled the percentage of SSI awards made to veterans from 7.19 percent to 12.4 percent of the veterans contacted during the outreach effort.”).

232 See GOV'T ACCOUNTABILITY OFFICE, VA VOCATIONAL REHABILITATION AND EMPLOYMENT PROGRAM 26 (2004), available at <http://www.gao.gov/new.items/d0934.pdf>; Bilmes, *supra* note 73, at 13 (noting that the VA concedes that waiting lists are so long as to effectively deny treatment to a number of veterans.).

233 See GOV'T ACCOUNTABILITY OFFICE, *supra* note 232, at 23–29; PRESIDENT'S COMM'N, *supra* note 181, at 20 (“Unfortunately, the VA does not—and should—routinely track vocational rehabilitation participants over time to evaluate program outcomes and identify factors associated with success. As a result, it is impossible to determine which programs work best.”).

234 See VETERANS FOR AM., *supra* note 114, at 30 (“[T]he VA isn't what it should be. It's a bureaucracy. Full of programs that cover enough vets and programs that don't, full of people who care and people who don't, full of prompt responses and endless delays and full of rules, rules, rules.”); see also Bilmes, *supra* note 73, at 8 (“Most employees at VA are themselves veterans, and are predisposed to assisting veterans obtain the maximum amount of benefits to which they are entitled. However, the process itself is long, cumbersome, inefficient, and paperwork-intensive.”).

235 Federal regulations require the VA to presume a veteran was healthy when he enlisted, to help him build his case for a disability claim, and to give him the benefit of the doubt through the claims process. See Holding, *supra* note 230.

sarial relationship with those it is supposed to serve.²³⁶ These problems all have parallels in the general disability system in this country, which have consistently been criticized as underfunded, overly bureaucratic, overly adversarial, and administered in a poorly integrated fashion.²³⁷ Given these problems, and the overlap with general disability advocacy, it is unsurprising that general disability rights organizations have represented veterans in high profile litigation against the VA.²³⁸

Even if it were advisable from a theoretical perspective to incorporate veterans programs whole cloth into the general disability policy scheme, there would be substantial political hurdles to doing so. There is little reason to expect veterans, who have traditionally been a more potent and mobilized political force, to advocate for universal extension of these programs.²³⁹ But both general disability and veterans advocates have an interest in pushing for systems that are more

236 See GOV'T ACCOUNTABILITY OFFICE, *supra* note 44, at 7 (noting adversarial relationship between VA and disabled veterans); VETERANS FOR AM., *supra* note 114, at 22 (noting that VA is populated by staffers that do not pay adequate attention to veterans with special needs); see also Holding, *supra* note 230 (“[I]n no other federal agency are Americans left so vulnerable, and with so little recourse if the government breaks its promise. Veterans have only a limited right of appeal”); see also *id.* (noting financial incentives for VA officials to deny veterans’ claims).

237 See, e.g., GOV'T ACCOUNTABILITY OFFICE, *supra* note 44, at 4 (stating that some participants remarked that “there should be a federal system for disability that coordinated the many different disability programs and services, and that there was no comprehensive lifetime picture of the needs of individuals with disabilities”); *id.* at 1 (“[T]he largest federal disability programs . . . have not evolved in line with . . . larger societal changes and, therefore, are poorly positioned to provide meaningful and timely support for persons with disabilities.”); *id.* (noting likely funding shortfalls in the future).

238 In July 2007, Disability Rights Advocates, a public interest law firm that litigates high profile disability-rights cases, filed a class action lawsuit against the Veterans Administration in the Northern District of California. See *Veterans for Common Sense v. Nicholson*, No. C-07-3758 SC, 2008 WL 114919, at *1 (N.D. Cal. Jan. 10, 2008). This case alleges that the VA is violating the statutory and constitutional rights of veterans, primarily in its handling of claims for health care and disability benefits. *Id.* at *2.

239 See GERBER, *supra* note 6, at 13 (“The boundaries of civilian and veterans assistance have been well patrolled by governments both friendly to the veteran and eager to contain costs by limiting especially generous assistance only to them. They have also been patrolled by veterans themselves through their veterans advancement organizations, which have worked to ensure that the assistance given to their members was always construed as an entitlement, expanded or at least not cut, and mixed as little as possible with the civilian welfare system.”); see also *id.* at 14–15 (noting the “typical” role of the Paralyzed Veterans Association, “which did not include civilians nor broaden its work to assist civilians with spinal cord injuries”).

patient-centered and better integrated across different agencies within the federal government.²⁴⁰

Although wholesale implementation is unlikely, veterans-specific disability measures have at times benefited the larger disability community.²⁴¹ At a systemic level, veterans programs facilitate state-building, whereby states expand their operational capacities.²⁴² These programs can serve as a template that is eventually rolled out, with modifications, to a larger community of people with disabilities.²⁴³ Thus, for example, the United States' first foray into workers' compensation was similar to compensation already provided to disabled veterans.²⁴⁴ Similarly, SSDI was initially based on aspects of the civil war pension scheme.²⁴⁵ While vocational rehabilitation may have had its roots in the desire to help workers who had been injured on the job,²⁴⁶ its overall development was equally influenced by a desire to reintegrate disabled veterans into the workforce.²⁴⁷ More generally, the earliest policy expression that disability does not mean useless-

240 In August 2007, the GAO convened a forum on modernizing disability policy which was attended by employers, advocate groups, researchers, academia, and federal officials. There were representatives of both the general disability and veterans with disabilities communities. Both groups had similar complaints and suggestions for change about their respective systems. These included lack of patient-centered care, different organizations providing divergent and overlapping services, and administrative delays at different points in the respective systems. See GOV'T ACCOUNTABILITY OFFICE, *supra* note 44, at 6-17.

241 See GERBER, *supra* note 6, at 14 (noting that "the existence of a growing, if separate, disabled-veterans population, demanding rights, assistance, and group recognition, has no doubt influenced the position of all the disabled").

242 See Gerber, *supra* note 71, at 79 ("Through veterans' policy, which has often been the cutting edge of the expansion of government welfare activities, states have found it necessary to develop new institutions and programs, which have simultaneously expanded their exercise of record keeping; sorting, surveillance, and discipline of individual citizens; indexing needs of groups in the population; and maintaining large, permanent bureaucratic agencies.").

243 See LIACHOWITZ, *supra* note 89, at 19-20 (noting that the treatment of soldiers is a model for the treatment of handicapped civilians).

244 See SCOTCH, *supra* note 78, at 18-19.

245 See DEBORAH A. STONE, THE DISABLED STATE 69 (1984); see also Blanck & Milender, *supra* note 91, at 46.

246 See Gerber, *supra* note 71, at 88 (suggesting that the historic background to vocational rehabilitation was not disabled veterans, but civilian victims of industrial accidents).

247 See Drimmer, *supra* note 221, at 1363 (linking the political power of veterans with disabilities from World War I in moving vocational rehabilitation into the federal legislative arena, including passage of the Smith-Sears Act in 1918 "[t]o provide for vocational rehabilitation and return to civil employment of disabled persons discharged from the military or naval forces").

ness—an important tenet of disability policy to the present—came in a veterans-specific law from 1776.²⁴⁸ Disability groups have also been able to borrow forms of advocacy that veterans have effectively used. The work of Peter Blanck and Deborah Stone has shown how the strategies employed by claimants challenging the Social Security Administration are remarkably similar to those employed by Union Army veterans.²⁴⁹

Veterans can also increase acceptance of the disability classification more generally. Returning veterans have influenced the public's and policymakers' views of disability, often favorably.²⁵⁰ The shift away from treating people with disabilities as inevitable wards of the state and toward rehabilitation was spearheaded by veterans returning from World War I.²⁵¹ The Vietnam and Gulf Wars created recognition of war-related disabilities like posttraumatic stress disorder and disease based on environmental exposure, which were aided by understanding chronic disease in civilians.²⁵² And, more generally, veterans with disabilities helped create acceptance of the social model of disability,²⁵³ which took hold as social policy for all people with disabilities in the enactment of the ADA. Even to the extent Title I of the ADA is viewed as falling short of its goals, it has an important expressive element, whereby it states the federal government's view (and by extension, that of the polity) that people with disabilities have equal worth and are entitled to equal employment opportunities. Although this may not show up immediately in employment statistics, this expressive function is not easily dismissed.²⁵⁴ By adding their credibility and support to the general population of people with disabilities, veterans can further this expressive function. They can also help move public conceptions of disability away from the restrictive and limited view currently embodied in social welfare programs for the general population.

Advancing the general disability scheme is in veterans' self interest, as history sadly shows that the popularity of veterans fades over

248 See LIACHOWITZ, *supra* note 89, at 25 (noting that this legislation foreshadowed developments of the 1970s and 1980s).

249 See Blanck & Millender, *supra* note 91, at 47; see also STONE, *supra* note 245, at 145 (describing "malingering and feigning disability for the purpose of avoiding the draft or combat" as "part of the folklore of military medicine").

250 See LIACHOWITZ, *supra* note 89, at 31–33.

251 See SCOTCH, *supra* note 78, at 19–20.

252 See Hubbard, *supra* note 79, at 984–86.

253 See Hickel, *supra* note 95, at 252.

254 See Michael Ashley Stein, *Under the Empirical Radar: An Initial Expressive Law Analysis of the ADA*, 90 VA. L. REV. 1151, 1184–87 (2004).

time, and they gradually become subsumed into the general disability community.²⁵⁵ As Ann Hubbard has explained, “[v]eterans will have comrades and allies in the disability movement long after the Iraq War and the government’s response to it have faded from the public’s consciousness.”²⁵⁶ In this way, it is in veterans’ self interest in using their unique political status to advocate for measures that have wider benefit to the disability community.²⁵⁷ Despite the focus of this Article, employment is only one part of the equation as veterans with disabilities try to reintegrate into society. Although the VA has programs and services that can help veterans gain and keep employment, general civil rights statutes like the ADA address non-employment barriers to full citizenship, including access to other public programs (like voting, the court system, etc.) and public places (restaurants, movie theaters, etc.). To that end, it is not surprising that there are historical examples of veterans with disabilities taking key roles in the disability rights movement.²⁵⁸ Given the status of veterans with disabilities as the “deserving disabled,”²⁵⁹ it is to be expected that their interests have been invoked on issues of general applicability such as the passage of new regulations to Titles II and III of the ADA,²⁶⁰ the ADA Restoration Act of 2008,²⁶¹ and United States’ ratification of the

255 See GERBER, *supra* note 6, at 6 (“When war ends . . . and memories of it begin to fade in the general desire to return to a normal peacetime existence, the warrior hero gradually loses his luster and is reduced in stature to a beleaguered disabled man, whose needs may be perceived as an inconvenience. Thus, the generosity his government and the public showed him in the way of preferential public employment, pensions, vocational rehabilitation, prostheses, and education begins to recede.” (footnote omitted)).

256 Hubbard, *supra* note 79, at 998. Historians like Robert Whalen and legal scholars like Sagit Mor have demonstrated this phenomenon is not unique to the United States. See Robert Weldon Whalen, *Bitter Wounds* 141–70 (1984) (discussing the German experience after World War I); Mor, *supra* note 29, at 64 (discussing the Israeli experience).

257 See Hubbard, *supra* note 79, at 998–1000.

258 Senator Robert Dole, for example, who was injured in World War II, was a proponent in the passage of the Americans with Disabilities Act. See The Robert J. Dole Archive & Special Collections, In His Own Words: The Americans with Disabilities Act (ADA), <http://www.doleinstitute.org/archives/wordsDisabilities.shtml> (last visited Jan. 21, 2010).

259 See Hubbard, *supra* note 79, at 992.

260 See Robert Pear, *Administration Proposes Rules to Expand Access for the Disabled*, N.Y. TIMES, June 16, 2008, at A11 (noting that new regulations “would set more stringent requirements in many areas and address some issues for the first time, in an effort to meet the needs of an aging population and growing numbers of disabled war veterans”).

261 See Robert Pear, *House Votes to Expand Civil Rights for the Disabled*, N.Y. TIMES, June 26, 2008, at A14 (“Representative Jerrold Nadler, Democrat of New York, called

United Nations Convention on the Rights of Persons with Disabilities.²⁶²

CONCLUSION

Disability law and policy face serious challenges in the twenty-first century. Perhaps the most important is how to move people with disabilities into the workforce in greater numbers. This was a goal that had broad support on both sides of the political aisle at the time of the ADA's passage, yet it is one the federal government's policies have failed to reach. One big problem, I have suggested, is the contradictory aims of antidiscrimination law and social support policies. Programs for veterans with disabilities—a discrete population who the public and government have agreed to support in gratitude for their service to the country—show that there is another way. As they continue to modernize general disability laws and policies, policymakers would be wise to consider this example.

But despite their favored status, at the end of the day veterans with disabilities are still people with disabilities. They will face barriers and stigma as they seek to reintegrate into society. Despite the superiorities of their social safety net, they will meet with hurdles that disability rights advocates have experienced in attempting to surmount these hurdles themselves. These are hard problems, and there are no easy solutions. Yet there are opportunities for both groups to work together in attempting to solve them.

the Supreme Court reading of [the ADA] 'cramped and misguided.' Remedial legislation is needed now more than ever . . . because 'thousands of men and women in uniform are returning from Iraq and Afghanistan with serious injuries, including the loss of limbs and head trauma.'").

262 See Press Release, The White House, Remarks by the President on Signing of the U.N. Convention on the Rights of Persons with Disabilities Proclamation (July 24, 2009), available at http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-on-Rights-of-Persons-with-Disabilities-Proclamation-Signing.

