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Tackling Disability Discrimination in the United Kingdom: The British Disability Discrimination Act

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INTRODUCTION

The social position of disabled people in the United Kingdom, as elsewhere in the developed world, has changed dramatically in the past twenty years. Disabled people are no longer forced into confinement in long-term institutions, increasingly more disabled children are being educated in mainstream schools, and employment rates for disabled people are rising.¹ Despite these improvements there is still considerable evidence to suggest that disabled people in the United Kingdom are subjected to discrimination.² Research, for example, suggests that disabled people are more likely to be out of work, with estimates suggesting that only approximately half of disabled people are employed—compared with approximately 80% of the non-disabled population³—and that those who are employed are more likely to work as manual laborers and in lower-status occupations than in managerial, professional, and highly skilled

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1. See generally DISABILITY RIGHTS COMM'N, FIVE YEARS OF PROGRESS (2005), available at http://www.drc-gb.org/pdf/4008_404_annual2005_DRC_Impact_Report_2005.pdf.

2. See generally DISABLING BARRIERS—ENABLING ENVIRONMENTS (John Swain et al. eds., 2d ed. 2004).

3. OFFICE FOR NAT'L STATISTICS, FOCUS ON SOCIAL INEQUALITIES 36 tbl.3.21 (Penny Babb et al. eds., 2004), available at http://www.statistics.gov.uk/downloads/theme_compendia/fosi2004/Work.pdf.

occupations.⁴ The same research also suggests that the average gross hourly pay of disabled employees is about 10% less than that of non-disabled employees,⁵ and that disabled people are twice as likely as non-disabled people to have no qualifications.⁶ The Disability Rights Commission (DRC) reports that nearly nine in ten disabled Londoners have been subjected to harassment.⁷ “[D]isabled people are less likely to own their own homes, and are twice as likely to be social housing tenants,” which suggests that “a significantly higher number of disabled people are experiencing inequality in relation to assets.”⁸

Research on the discrimination experienced by disabled people in the United Kingdom is not new and stretches back to at least the 1970s. The report of the Silver Jubilee Access Committee (SJAC) (established in 1977), *Can Disabled People Go Where You Go?*, noted instances of discrimination against disabled people and recommended further investigations.⁹ This led to the founding of the Committee on Restrictions Against Disabled People (CORAD) in 1979. This committee was charged with the task of establishing whether disabled people encountered discrimination in their everyday lives, and if so to make further recommendations as to how this could be tackled.¹⁰ The report concluded that discrimination was widespread.¹¹

Later, Colin Barnes’ comprehensive exploration of discrimination against disabled people added weight to the evidence that disabled people are a marginalized constituency.¹² Barnes clearly showed how

4. *Disabled People in Britain*, LAB. MARKET TRENDS, Sept. 2005, http://findarticles.com/p/articles/mi_qa3999/is_200509/ai_n15717200.

5. *Id.*

6. *Id.*

7. DISABILITY RIGHTS COMM’N, COMMENTS ON THE EQUALITIES REVIEW INTERIM REPORT 3 (2006), available at <http://www.drc-gb.org/disabilitydebate/priorities/documents/TheEqualitiesReview.pdf> (last visited Mar. 6, 2007).

8. *Id.*

9. See generally SILVER JUBILEE ACCESS COMM., *CAN DISABLED PEOPLE GO WHERE YOU GO?* (1979).

10. Disability Rights Commission, About Us, http://www.drc.org.uk/emailbulletin/bulletin_42.asp (last visited Mar. 6, 2007).

11. *Id.*

12. See generally COLIN BARNES, *DISABLED PEOPLE IN BRITAIN AND DISCRIMINATION* (1991).

disabled people in the United Kingdom were discriminated against in a wide range of settings, such as employment, housing, schooling, and transport. More recent research has merely served to reinforce this view.¹³

This evidence of such widespread discrimination was used by organizations of disabled people for the politicization of disability and the problems experienced by disabled people. It led to the development of what Mike Oliver termed the “social model of disability,” which has come to dominate disability politics in the United Kingdom and beyond.¹⁴ Put simply, this model argues that disability does not arise because of an impairment or medical condition, but is the consequence of social organization.¹⁵ That is, disabled people are disabled not by their bodies but rather by the fact that society is organized so as to exclude people with impairments. The social model is a structural analysis based on the notions that disabled people are an oppressed minority group and that disability is a collective experience. It closely follows Marxist and early second-wave feminist paradigms of social relations. Therefore, the problem of disability is located within society, and the way to reduce disabilities is to alter the social and physical environment. As this Article shows, the focus on the social model dominates the disability movement in the United Kingdom and has served as the underpinning of the critique of disability discrimination legislation over the past decade.

As documented below, the Disability Discrimination Act (DDA or the “Act”)¹⁶ was introduced reluctantly by the government of the United Kingdom in 1995 in an attempt to rectify the discrimination experienced by disabled people and to meet the demands of the growing disability movement.¹⁷ The DDA was the first European

13. See generally DISABILITY RIGHTS COMM’N, *supra* note 1.

14. MICHAEL OLIVER & BOB SAPEY, *SOCIAL WORK WITH DISABLED PEOPLE* 21 (2d ed. 1999).

15. See MICHAEL OLIVER, *THE POLITICS OF DISABLEMENT: A SOCIOLOGICAL APPROACH* 22 (1990).

16. Disability Discrimination Act, 1995, c. 50 (Eng.).

17. The long title of the Act states: “to make it unlawful to discriminate against disabled persons in connection with employment, the provision of goods, facilities and services or the disposal or management of premises; to make provision about the employment of disabled persons; and to establish a National Disability Council.” *Id.*

anti-discrimination legislation for disabled people. Since the passage of this Act, the European Union enacted a directive in 2000¹⁸ that prohibited discrimination on the grounds of disability; now most countries in the European Union have introduced disability discrimination laws. Generally, such legislation has been passed very recently. For example, the Dutch¹⁹ and Belgian acts²⁰ were passed in 2003. As this legislation is so recent, it is currently untested by either case law or practice. This contrasts with the position in the United Kingdom that, like Ireland, has had anti-discrimination laws in effect for a considerable period and for which there is now a body of literature describing how it operates in practice. Much of this research suggests that the DDA is weak, often inappropriately applied and misinterpreted.²¹ There is also evidence to suggest that the other barriers to the effective implementation of the DDA include the cost and ease of access to legal representation. Such barriers disproportionately affect claimants rather than respondents or defendants.²²

This Article provides an overview of the development of disability discrimination legislation in the United Kingdom over the past two decades. While highlighting early attempts to challenge the practice in the employment context, this Article also explores the more recent adoption of a framework for anti-discrimination legislation. Although the United Kingdom has made significant progress in integrating an anti-discrimination agenda into key areas of social life, attitudinal and structural change has been considerably slower. This Article seeks first to unravel the key debates underpinning legislative change. Discussion then moves to an exploration of the critique of the United Kingdom legislation from the disability movement. This highlights a

18. 2000 O.J. (L 303) 16. More generally, the articles establish a general framework for equal treatment in employment and occupation. *Id.*

19. Wet van 3 April 2003 tot Vaststelling van de Wet Gelijke Behandeling op Grond van Handicap of Chronische Ziekte, Stb 2003, 206.

20. Belgium transposed European Union Directive 2000/78/EC into federal law by Act on February 25, 2003 to combat discrimination.

21. See generally Carol Woodhams & Susan Corby, *Defining Disability in Theory and Practice: A Critique of the British Disability Discrimination Act 1995*, 32 J. SOC. POL'Y 159 (2003).

22. See J. HURSTFIELD ET AL., *DISABILITY RIGHTS COMM'N, MONITORING THE DISABILITY DISCRIMINATION ACT (DDA) 1995: PHASE 3*, at 72 (2004).

broader focus on the definitions applied, and contrasts the approach taken by successive British governments with other international frameworks. The Article concludes by arguing that the focus of anti-discrimination legislation needs to move beyond issues of definition and instead integrate a stronger emphasis on promoting the civil rights of disabled people and recognizing the diversity of identities.

THE BACKGROUND OF DISABILITY DISCRIMINATION LEGISLATION IN THE UNITED KINGDOM

The DDA received Royal Assent in 1995 and came at the end of a long period of activism by disabled people through the 1980s and early 1990s. Two important pieces of legislation preceded this Act: the Disabled Person (Employment) Act,²³ passed in 1944, and the Chronically Sick and Disabled Persons Act (CSDPA), passed in 1970.²⁴ Although the former was introduced in an attempt to meet the needs of the returning veterans that were wounded during the Second World War, it did not limit itself solely to the needs of disabled war veterans. The aim of this Act was primarily to bestow rights upon disabled people attempting to interact in the labor market and, through this, to claim full citizenship.²⁵ Driven as much by a desire to reduce costs to the state as to give rights to disabled people, this Act contained three main measures. It introduced training and resettlement programs, required employers with over twenty employees to recruit a certain quota of their workforce from registered disabled people, and established sheltered workshops.²⁶

None of the aims of the Act were fully achieved. The training and resettlement schemes failed to address the needs of disabled workers.²⁷ The quota system was never fully enforced.²⁸ Though it seemed to work initially, by the end of the 1960s it became clear that

23. Disabled Persons (Employment) Act, 1944, 9 & 10 Geo. 6, c. 10 (Eng.).

24. Chronically Sick and Disabled Persons Act, 1970, c. 44 (Eng.).

25. ANNE BORSAY, *DISABILITY AND SOCIAL POLICY IN BRITAIN SINCE 1750: A HISTORY OF EXCLUSION* 135–37 (2005).

26. Disabled Persons (Employment) Act, 1944, 9 & 10 Geo. 6, 10, §§ 2–3, 9, c. 10 (Eng.).

27. See STEVE HUMPHRIES & PAMELA GORDON, *OUT OF SIGHT: THE EXPERIENCE OF DISABILITY 1900–1950*, at 132–33 (1992).

28. BORSAY, *supra* note 25, at 135–37.

the government was unwilling to enforce the legislation and many companies simply ignored it.²⁹ By 1978 only 37% of companies fulfilled their quota obligations, and only nine prosecutions under the Act had occurred.³⁰ Sheltered workshops could not fulfill their dual role of resettling workers and being economically viable. Despite these weaknesses the Disabled Person (Employment) Act framed disability employment policies in the United Kingdom for over thirty years.

The CSPDA, introduced in 1970 by Alf Morris, a major figure in the later development of the DDA, was the second major piece of legislation that preceded the DDA. The CSPDA compelled local authorities to familiarize themselves with the number of disabled people in their areas,³¹ to publicize services offered to disabled people,³² to provide community services to disabled people,³³ and to regard the needs of disabled people in the design of public buildings.³⁴ It is this last element that is the most important, as it was the first attempt to legally enforce access rights for disabled people. The wording of the relevant section of the CSPDA states:

Any person undertaking the provision of any building or premises to which the public are to be admitted, whether on payment of otherwise, shall, in the means of access both to and within the building or premises, and in the parking facilities and sanitary conveniences to be available (if any), make provision, in so far as in the circumstances both practicable and reasonable, for the needs of members of the public visiting the building or premises who are disabled.³⁵

Its legal effectiveness was ultimately dissipated by the phrase “in so far as in the circumstances both practicable and reasonable.”³⁶ It could not withstand legal scrutiny and fell at its first legal challenge

29. *Id.* at 136.

30. *Id.*

31. Chronically Sick and Disabled Persons Act, 1970, c. 44, § 1 (Eng.).

32. *Id.* § 2.

33. *Id.* § 3.

34. *Id.* § 4.

35. *Id.*

36. *Id.*

in 1971.³⁷ However, it was politically important and its intention was clear—all buildings should be accessible.

These two acts are important as they set the agenda for much that was to follow. The emphasis on employment laid down in the Disabled Person (Employment) Act shows how much of the United Kingdom government's thinking was about returning disabled people to work, or as Ludwig Guttman, one of the early pioneers of rehabilitation in the United Kingdom put it, "transform[ing] a hopeless and helpless spinally paraly[z]ed individual into a tax payer."³⁸ The CSDPA was also used by many as a means to deny disabled people further access legislation.³⁹ The weaknesses in the acts and their failures to substantially improve the lives of disabled people also go some way toward explaining the suspicion felt by many disabled people over the DDA, which is discussed later.

CAMPAIGNING FOR CHANGE: DEVELOPMENTS IN THE 1980S AND 1990S

The 1980s were an important time in the United Kingdom for disability activism and the development of a campaign for anti-discrimination legislation. By this time, group control by disabled people had become a defining issue in transforming attitudes at this time and disability rights organizations had increased significantly in number.⁴⁰ Globally, the Disabled People's International had been set up and national coordination was facilitated through the British

37. SELWYN GOLDSMITH, *DESIGNING FOR THE DISABLED* 210 (1976).

38. SUSAN GOODMAN, *SPIRIT OF STOKE MANDEVILLE: THE STORY OF SIR LUDWIG GUTTMANN* 165 (1986).

39. For example, Tom Baldry, the then-Minister for the Disabled, in reply to a parliamentary question on disability access, stated:

Section 4 of the Chronically Sick and Disabled Persons Act 1970 and section 4 of the Chronically Sick and Disabled Persons (Northern Ireland) Act 1978 oblige those who provide buildings which are visited by members of the public to make provision for disabled people. In addition, the Government have introduced provisions within building regulations for the benefit of such people. These provisions apply predominantly to new buildings and some extensions.

548 PARL. DEB., H.C. (5th ser.) (1994) 548.

40. See JANE CAMPBELL & MIKE OLIVER, *DISABILITY POLITICS: UNDERSTANDING OUR PAST, CHANGING OUR FUTURE* 19–20 (1996).

Council of Disabled People (BCODP). Indeed, activism in the United States was highly influential at this time, with the escalation of “self-help” programs introduced across key American universities, such as the University of California at Berkeley and the University of Illinois, to support students with severe impairments.⁴¹ These programs acted as an impetus for changing attitudes in the United Kingdom.⁴²

As disability activism in the United Kingdom grew in the early 1980s, a sustained push for comprehensive anti-discrimination legislation took hold. However, this was a slow process, with fourteen attempts made to get such legislation through Parliament prior to the eventual adoption of the DDA in 1995.⁴³ Demands for legislation called for the removal of institutional discrimination from all aspects of the social life of disabled people. This included areas such as fully accessible public transportation, equal opportunities in education, employment, and training, access to non-segregated housing, and full inclusion and participation in daily life, thereby also challenging cultural and attitudinal barriers.⁴⁴

Despite the long-term failure to secure legislation, a strong cross-disability lobby emerged in pursuit of this goal. Individual politicians from across the political spectrum formed a committee in 1979 to examine a wide range of institutional and structural issues surrounding disability.⁴⁵ However, in spite of their initial optimism, the changing political climate following the election of the Conservative Government in 1979 curtailed any chances of gaining a meaningful anti-discrimination statute.⁴⁶

Since the mid-1980s, a major check to the development of anti-discrimination legislation hinged on three arguments put forth by the then Conservative Government. It was first maintained that there was

41. See DORIS ZAMES FLEISCHER & FRIEDA ZAMES, *THE DISABILITY RIGHTS MOVEMENT: FROM CHARITY TO CONFRONTATION* 33–48 (2001).

42. CAMPBELL & OLIVER, *supra* note 40, at 51.

43. BRIAN DOYLE, *DISABILITY DISCRIMINATION: THE NEW LAW* 1 (1996).

44. John Evans, Chairperson, European Network on Indep. Living, Campaign for Civil Rights Legislation: The Direct Payments Act and the Disability Discrimination Act (DDA) (Oct. 1996), <http://www.independentliving.org/docs2/enilevans9610.html> (last visited Jan. 15, 2007).

45. See DOYLE, *supra* note 43, at 2.

46. Ken Davis, *Disability and Legislation: Rights and Equality*, in *BEYOND DISABILITY: TOWARDS [sic] AN ENABLING SOCIETY* 124, 124 (Gerald Hales ed., 1996).

no evidence of discrimination against disabled people and that the CSDPA provided the necessary cover;⁴⁷ second, that the cost of implementation was too expensive; and third that such a law would be unworkable.⁴⁸ Clearly these rationales for rejecting legislation were unacceptable to the disability movement. Moreover, around this time the enactment of the Americans with Disabilities Act (ADA) in 1990, under a Republican administration, added considerable impetus to the United Kingdom campaign, as did the passing of a similar act in Australia in 1992.⁴⁹ In New Zealand in 1993 the Human Rights Act explicitly addressed the civil rights of disabled people.⁵⁰ Directives and recommendations passed by the European Union also gave some assistance to the disabled people's movement in its campaign for anti-discrimination legislation in the United Kingdom.⁵¹ While such international pressures were important, the driving force for the DDA came from internal political pressures.⁵²

In response to the obstacles put forth by the conservative British government, the BCODP sought to challenge them through research targeted at exploring the extent and nature of disability discrimination in the United Kingdom. As detailed earlier, their findings were published in Barnes' study, *Disabled People in Britain and Discrimination*.⁵³ This provided the most extensive quantitative and qualitative research on the pervasiveness of discrimination. Government denial of disability discrimination prevailed up until the launch of the study, but could not prevail when the study showed that discrimination against disabled people was widespread.

Therefore, by the mid-1990s, pressure to develop anti-discrimination legislation had greatly increased. Alongside lobbying from organized groups, direct action from disabled people added to the campaigning role. Indeed, part of the effectiveness of this strategy rested in the growing media interest in the disability movement.

47. See DOYLE, *supra* note 43, at 2.

48. *Id.*

49. See CAROLINE GOODING, *DISABLING LAWS, ENABLING ACTS: DISABILITY RIGHTS IN BRITAIN AND AMERICA* (1994).

50. See Human Rights Act 1993 (N.Z.).

51. See, e.g., Council Recommendation 86/379, 1986 O.J. (L 225) 43 (EC).

52. See DOYLE, *supra* note 43, at 4.

53. See BARNES, *supra* note 12.

Historically it always had been problematic to get publicity for and media coverage of disability issues in the United Kingdom. But through direct action demands disability issues obtained a much higher public and political profile.⁵⁴

In light of the growing profile of disability activism, the Conservative Government came under intense pressure to bring in disability rights-based legislation. This came at the end of 1994 through the introduction of the Disability Discrimination Bill—which later formed the DDA. However, despite the shift, the framework for this legislation has been widely criticized.⁵⁵ As discussed in the next section, this criticism centered on the limited protection offered and the terms of reference in which the Act was framed.

THE DISABILITY DISCRIMINATION ACT OF 1995

The DDA addressed the problems of discrimination against disabled people in employment, the provision of goods and services, and in the disposal and management of premises and land. It also, in its original format, provided some protection in the areas of education and transportation, although this was very limited and these two areas were specifically excluded from much of the legislation. For example, education and transportation were specifically excluded from Part III of the Act, which refers to access to goods and services. The DDA applied throughout the whole of the United Kingdom, with some modifications in Northern Ireland.

It was, in its original formation, seen by many within the disability movement and beyond as “confused, contorted[,] and unsatisfactory.”⁵⁶ It was felt to be a hurried piece of legislation that was aimed more at silencing domestic political forces.⁵⁷ Or, as Brian Doyle describes it, “a dissembling law, not an enabling statute . . . [;] the legislative process has been used to thwart the genuine ambitions

54. Evans, *supra* note 44.

55. See, e.g., MICHAEL OLIVER & COLIN BARNES, *DISABLED PEOPLE AND SOCIAL POLICY: FROM EXCLUSION TO INCLUSION* (1998); Caroline Gooding, *Disability Discrimination Act: From Statute to Practice*, 20 *CRITICAL SOC. POL’Y* 533 (2000); Evans, *supra* note 44.

56. CAROLINE GOODING, *BLACKSTONE’S GUIDE TO THE DISABILITY DISCRIMINATION ACT 1995*, at 1 (1996).

57. *Id.*

of law reform and to control (but not satisfy) the social pressures that feed these ambitions.”⁵⁸ It is to looking at some of these critiques of the DDA that this Article now turns.

DEFINING DISABILITY: ISSUES FROM THE DDA

A distinctive feature of the DDA in comparison to other United Kingdom equality legislation, such as equal opportunities legislation with regard to gender (the Sex Discrimination Act of 1975⁵⁹) and race equality legislation (the Race Relations Act of 1976⁶⁰), is that it only provides protection for a discrete and narrowly defined population. Definitions within the legislation rest on a medicalized definition of disability. Under the terms of the Act, a claimant must first establish that he or she is “disabled” or has been in the past.⁶¹ For the purposes of the Act, a person is considered to have a disability if he or she “has a physical or mental impairment which has substantial and long-term adverse effect on his [or her] ability to carry out normal day-to-day activities.”⁶² According to the Act, “disability” is therefore assessed by providing parameters with regard to three key aspects of the definition. These are:

- (1) what is a physical or mental impairment;
- (2) what is meant by a person’s ability to carry out day-to-day activities; and
- (3) when might that impairment have a substantial and long-term adverse effect upon the ability to carry out normal day-to-day activities.

Significantly, the rigid parameters set out in the Act contrast with the Sex Discrimination Act of 1975 and the Race Relations Act of 1976, which prohibit discrimination against anyone on grounds of

58. Brian Doyle, *Enabling Legislation or Dissembling Law? The Disability Discrimination Act 1995*, 60 MOD. L. REV. 64, 78 (1997).

59. Sex Discrimination Act, 1975, c. 65 (Eng.).

60. Race Relations Act, 1976, c. 74 (Eng.).

61. Disability Discrimination Act, 1995, c. 50 (Eng.).

62. *Id.* § 1(1).

gender or race. This has been one of the main hurdles facing applicants under the Act.⁶³

The definition is broadly similar to the approach taken in the ADA, although, in the United Kingdom, the courts have tended to be less restrictive in their interpretation of this definition.⁶⁴ For example, the use of mobility aids or other aids which might mitigate the individual's impairment have not been used in the determination of whether an individual is disabled, as has been the case in the United States Supreme Court.⁶⁵ Other rulings have also served to make it much more difficult for plaintiffs to establish that they are disabled in America under the ADA. These include a "strict interpretation of what a major life activity is,"⁶⁶ and it is now very difficult for American plaintiffs to establish that they "are regarded as" disabled.⁶⁷

While the ADA was seen by many in the United Kingdom as exemplary, the Supreme Court's interpretation of this legislation has vastly weakened its impact.⁶⁸ Guidance provided to the courts by United Kingdom Ministers have made it clear that courts were not to take as strict an interpretation as found in the United States,⁶⁹ and that people with an impairment whose effects are controlled or limited by medication or technical aid are still considered disabled.⁷⁰

Ministerial thinking behind the tight definition in the Act was based on two principles. First, it was claimed that the legislation

63. Gooding, *supra* note 55, at 534.

64. See DISABILITY RIGHTS COMM'N, DEFINITION OF DISABILITY: CONSULTATION DOCUMENT 32 (2006), available at http://www.drc-gb.org/pdf4000_706_4018_467con6.pdf.

65. See, e.g., NANCY LEE JONES, CONG. RESEARCH SERV., THE AMERICANS WITH DISABILITIES ACT (ADA): THE DEFINITION OF DISABILITY 2-4 (2006), available at http://www.opencrs.com/rpts/RL33304_20060309.pdf (last visited July 20, 2006).

66. *Id.*

67. *Id.*

68. See generally NAT'L COUNCIL ON DISABILITY, POLICY BRIEF SERIES: RIGHTING THE ADA PAPERS NO. 7, THE IMPACT OF THE SUPREME COURT'S ADA DECISIONS ON THE RIGHTS OF PERSONS WITH DISABILITIES (2003) (describing the impact of litigation on the ADA), available at <http://www.ncd.gov/newsroom/publications/pdf/decisionsimpact.pdf> (last visited Sept. 4, 2006).

69. See, e.g., DEP'T FOR WORK & PENSIONS, DISABILITY DISCRIMINATION ACT: GUIDANCE ON MATTERS TO BE TAKEN INTO ACCOUNT IN DETERMINING QUESTIONS RELATING TO THE DEFINITION OF DISABILITY (2005), available at <http://www.drc-gb.org/docs/DefnOfDisability.doc>.

70. *Id.* at 13.

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would not be credible if it did not adopt such a policy.⁷¹ Second, unlike race and gender legislation in the United Kingdom, the DDA is not symmetrical in that non-disabled people do not have the same degree of protection under the terms of the Act as disabled people.⁷² This has the benefit of allowing positive discrimination. So, for example, under United Kingdom legislation, employers are free to target recruitment campaigns solely at disabled people. A drawback for disabled people is that this approach has necessitated very tight, precise definitions of “disability.” To be protected under the Act, disabled people must first prove that they are disabled within the exact terms of the legislation.⁷³ Failure to prove that a claimant is disabled is the single most common reason for claims under the DDA to fail.⁷⁴ Research by Sarah Leverton for the United Kingdom’s Department of Work and Pensions showed that the most common reason for rejecting a claim was that the applicant was not considered disabled under the terms of the Act, cited in 26% of all unsuccessful cases.⁷⁵

DEVELOPING THE DDA: CHANGES UNDER THE NEW LABOUR PARTY GOVERNMENT

Despite the symbolic importance of securing anti-discrimination legislation for disabled people in the United Kingdom, the DDA was strongly criticized.⁷⁶ As stated, the focus on an individualized and medical model of disability has been seen as an important obstacle. Likewise, the failure in the early years of implementation to establish an enforcement body to support discrimination claims was widely

71. DOYLE, *supra* note 43, at 15.

72. *See generally* LOUISE CURTIS, DISABILITY RIGHTS COMM’N, DDA MASTERCLASS: 4 MAY 2006, CURRENT ISSUES IN DISABILITY DISCRIMINATION LAW (2006) (describing what employers cannot do in regard to recruiting), *available at* http://www.drc-gb.org/pdf/Louise_Curtis_DDA_paper.pdf.

73. SARAH LEVERTON, DISABILITY RIGHTS COMM’N, MONITORING THE DISABILITY DISCRIMINATION ACT 1995 (PHASE 2): IN-HOUSE REPORT, at v (2002), *available at* <http://www.dwp.gov.uk/asd/asd5/IH91.pdf> (last visited Mar. 6, 2007).

74. *Id.*

75. *Id.*

76. *See, e.g.*, OLIVER & BARNES, *supra* note 55; Gooding, *supra* note 55.

attacked from both the disability movement and the then-oppositional Labour Party.⁷⁷

Coverage of the DDA also revealed other significant limitations. At the outset of its implementation in 1996, coverage was strictly limited, applying only to the fields of employment, services, and the sale or rental of property.⁷⁸ Further, provisions to tackle discrimination in employment only applied to employers with more than twenty employees.⁷⁹ This limit replicates the threshold applied in the Disabled Person (Employment) Act. The DDA in its original form also excluded key occupations such as members of the armed forces, prison officers, barristers, firefighters, employees working wholly or mainly aboard ships, aircraft, or hovercraft, and police officers.⁸⁰ As a result of this ruling, the majority of employers—over 90%—were not covered by the Act. Moreover, exemptions could be easily claimed if they could demonstrate that adjustments would damage their business. In addition, the prohibition on discrimination in the provision of goods and services did not apply to education or transportation services.⁸¹ The DDA aimed to tackle discrimination in education by compelling schools and other educational institutions to provide information about opportunities available to disabled students.⁸²

Section 4 of the DDA makes it “unlawful for an employer or their employees to treat someone less favo[r]ably in interviews, offers of employment, [and] terms and conditions of employment.”⁸³ It therefore requires employers to make “reasonable adjustments” to avoid less favorable treatment.⁸⁴

The election of the Blair government in 1997 brought with it a commitment to widening the provisions set out in the DDA. This initiated a series of changes to the coverage and definitions of

77. GOODING, *supra* note 56, at 1.

78. *Id.*

79. Disability Discrimination Act, 1995, c. 50, § 7(1) (Eng.).

80. *Id.* § 64(5)–(7), sched. 8.

81. See LEVERTON, *supra* note 73, at 27 (also noting this number was reduced to fifteen in 1998).

82. Disability Discrimination Act, 1995, c. 50, § 29–31 (Eng.).

83. See LEVERTON, *supra* note 73, at 29–30.

84. See GOODING, *supra* note 49, at 17.

disability discrimination in United Kingdom law, resulting in new legislation in 2005. This series of changes began in 1999 through the establishment of the DRC.⁸⁵ The duties of the DRC were to help eliminate discrimination against and promote equal opportunities for disabled people, encourage good practice, and keep under review the workings of the DDA.⁸⁶ The DRC also played an active role in supporting the discrimination claims of disabled people by providing legal advice and information. It also initiated a more prominent campaigning forum to promote disability issues.

Other changes saw a widening of coverage across key areas of public life. In employment, initial restrictions which only extended the “reasonable adjustments” ruling to businesses with over twenty employees were removed.⁸⁷ Likewise, the focus on discrimination in the provision of goods and services was extended from October 2004 to ensure that businesses made physical alterations to their premises to overcome access barriers.⁸⁸ However, this change remained lodged within the guise of “reasonable adjustments.”

Another important development to the DDA under the Labour Party centered on the extension of protection to education. As a response to the work of the Disability Rights Task Force⁸⁹ (set up by the Labour Party) the notable absence of protection within education for disabled people was addressed. Recommendations were formalized in the Special Educational Needs and Disability Act of 2001 (SENDA)⁹⁰ and Part IV of the DDA.⁹¹ These recommendations set out two key duties of educational providers:

85. Disability Rights Commission Act, 1999, c. 17 (Eng.).

86. *Id.* § 2(1).

87. The Disability Discrimination (Exemption for Small Employers) Order 1998, 1998, S.I. 1998/2618, § 2 (U.K.).

88. The Disability Discrimination (Providers of Services) (Adjustment of Premises) (Amendment) Regulations 2004, 2004, S.I. 2004/1429, §1(1) (U.K.).

89. DISABILITY RIGHTS TASK FORCE, FROM EXCLUSION TO INCLUSION: A REPORT OF THE DISABILITY RIGHTS TASK FORCE ON CIVIL RIGHTS FOR DISABLED PEOPLE (1999), available at <http://www.leeds.ac.uk/disability-studies/archiveuk/disability%20rights%20task%20force/From%20exclusion%20to%20inclusion.pdf>.

90. Special Educational Needs and Disability Act, 2001, c. 10 (Eng.).

91. Disability Discrimination (Prescribed Periods for Accessibility Strategies and Plans for Schools), 2002, S.I. 2002/1981 (U.K.).

- not to treat disabled students or prospective disabled students less favorably;⁹² and
- to make reasonable adjustments to avoid putting disabled students at a substantial disadvantage.⁹³

However, the second duty is limited in the following ways:

- reasonable adjustment duties do not require the responsible body to provide auxiliary aids and services; and
- reasonable adjustment duties do not require the responsible body to make alterations to the physical features of the school.⁹⁴

Clearly the key focus of the policy changes set out in SENDA is the notion of making “reasonable adjustments.” This includes coverage such as ensuring that teaching and assessment materials are accessible to all children (for example, materials should be printed in large font for students with visual impairments, or in simplified formats for those with learning difficulties).⁹⁵ In addition, schools have to ensure that classes are in locations which are accessible by disabled students.⁹⁶ This could simply mean transferring a class to a ground floor location to enable accessibility to any child with a physical impairment.

The duty not to treat disabled pupils less favorably for a reason relating to their disability without justification also has important implications. Significantly, it means that a disabled student may not be discriminated against in admissions, exclusions, or the provision of any education-related service. However, there are some circumstances where it may be lawful to treat a disabled student less favorably for a reasons relating to his or her disability.⁹⁷ For example, if the presence of a disabled child might have a detrimental effect on the education of other children (if, for instance, the disabled student behaves disruptively or violently) then the school might be justified

92. Special Educational Needs and Disability Act, 2001, c. 10, § 11-25 (Eng.).

93. *Id.*

94. SHEILA RIDDELL, SPECIAL EDUCATIONAL NEEDS 59 (2002).

95. Special Educational Needs and Disability Act, 2001, c. 10, § 20 (Eng.).

96. *Id.* § 15.

97. *Id.* § 27.

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in educating the child elsewhere.⁹⁸ But at a local government level it would have to be demonstrated that the school had taken all reasonable steps to include the child, such as staff training, making curriculum adjustments, or offering appropriate support to the student.⁹⁹ Failure to take these steps could implicate the local authority's actions as being unlawful.

The 2005 amendments to the DDA¹⁰⁰ have, therefore, been enacted to attempt to rectify other identified weaknesses in the Act, in particular its reactive nature.¹⁰¹ There is an urgent need for a more proactive enforcement approach to anti-discrimination legislation.¹⁰² The fact that the DDA is based on civil rather than legal law means the government does not initiate prosecutions but that the person who has experienced the discrimination must bring a legal case themselves. Clearly, many cannot afford to do so, and although the DRC does sponsor a number of legal cases, there is inevitably a limit to how many it can fund.

These amendments to the Act also place a duty on the public sector to actively promote equality of opportunity for disabled people.¹⁰³ The new duty focuses on tackling institutional discrimination and compels public sector organizations to take action to ensure that its policies and practices do not disadvantage disabled people.¹⁰⁴ This duty extends to staff, customers, and visitors. Under the terms of the code, organizations should make sure that "those aspects of their functions which have most relevance to disabled people" are addressed at the outset.¹⁰⁵ This is not a passive duty, but one that requires active steps so as to ensure the inclusion of disabled people. Organizations also have to take steps to ensure genuine and

98. *Id.*

99. *Id.*

100. Disability Discrimination Act, 2005, c. 13 (Eng.).

101. J. HURSTFIELD ET AL., *supra* note 22, at 14.

102. Alan Roulstone & Jon Warren, *Applying a Barriers Approach to Monitoring Disabled People's Employment: Implications for the Disability Discrimination Act 2005*, 21 *DISABILITY & SOCIETY* 115, 128 (2006).

103. Disability Discrimination Act, 2005, c. 13 (Eng.).

104. *See generally* Disability Discrimination (Public Authorities) (Statutory Duties), 2005, S.I. 2005/2966 (U.K.).

105. *DISABILITY RIGHTS COMM'N, THE DUTY TO PROMOTE DISABILITY EQUALITY: STATUTORY CODE OF PRACTICE: ENGLAND AND WALES*, at para. 2.39 (2005).

meaningful engagement with disabled people.¹⁰⁶ The involvement of disabled people is therefore a key principle of the general duty to promote disability equality:

When assessing whether due regard has been paid to the need to combat discrimination and to promote equal opportunities for disabled people it will be helpful to first assess the relevance of the issue to the promotion of disabled people's equality—and the involvement of disabled people will be key to this. Once this is established an assessment can then be made as to whether, in the light of the degree of relevance, sufficient weight has been given to the need to promote equal opportunities for disabled people.¹⁰⁷

CRITIQUES OF THE DDA: ISSUES FOR THE UNITED KINGDOM DISABILITY MOVEMENT

Despite the implementation of the DDA (as amended), there remain a number of concerns with the legislative framework. Primarily, for many within the United Kingdom disability movement, the way that disability is defined represents a fundamental flaw with the legislation, and the failure of the DDA to adopt a social model approach to definitions of disability has been a major criticism of the Act.¹⁰⁸ Both the Disability Rights Task Force¹⁰⁹ and the 2003 review of the DDA carried out by the DRC¹¹⁰ also point to the issue of definitions as a significant defect in the legislation. The latter review, despite not proposing any change in the definition, resulted in a large number of responses calling for a revision of the definition to reflect the social model of disability.

Critics of the DDA claim that the definitions set out in the Act have reinforced the medical model of disability by linking

106. *Id.* para. 3.13.

107. *Id.*

108. OLIVER & BARNES, *supra* note 55, at 90.

109. DISABILITY RIGHTS TASK FORCE, *supra* note 89, at 113.

110. DISABILITY RIGHTS COMM'N, DISABILITY EQUALITY: MAKING IT HAPPEN: FIRST REVIEW OF THE DISABILITY DISCRIMINATION ACT 1995, at 84 (2003).

impairment with the ability to carry out day-to-day activities.¹¹¹ This is done without allowing for social or physical environmental variables which may exaggerate or alleviate the effects of disability.¹¹² Moreover, the proof of disability as required by the definition relies on the measurement and medical assessment of the lack of functional abilities as they relate directly to the impairment.¹¹³ As a consequence, the focus is often on an individual's impairment, rather than the allegation of discrimination. For example, under the original definition people infected with HIV or diagnosed with multiple sclerosis or cancer were not automatically covered, as they do not necessarily have an effect on the person's ability to carry out "normal" activities.¹¹⁴ The original omission of this group might have been due to reluctance of governments to acknowledge that disability discrimination might have a social origin.

The medicalized definition of a disabled person also had a strong impact on tribunal and employer practices.¹¹⁵ Indeed, reliance on this framework was seen to individualize the experience of disability, thereby shifting the ethos of legislation away from collective rights.¹¹⁶ Furthermore, the initial absence of an enforcement mechanism for the DDA implied that the policy structure, wider society, and all disabled persons were suitably placed to effectively challenge discrimination.

This links into broader issues around self-identification, disability, and how legislation reflects the diversity of disabled identities and categorizations. Many people in the United Kingdom covered by the DDA do not consider themselves disabled. In a recent study, less than half of the applicants interviewed originally defined themselves as being disabled.¹¹⁷ Many thought that disabled people were those who

111. OLIVER & BARNES, *supra* note 55, at 90.

112. GOODING, *supra* note 56, at 1.

113. Disability Discrimination Act, 1995, c. 50, § 1(1), sched. 1 (Eng.).

114. This anomaly has now been removed. Disability Discrimination Act, 2005, c. 13, § 18(6)(a) (Eng.). Anyone with cancer, multiple sclerosis, or HIV is now protected against unfair treatment in the workplace, education, housing, or in accessing services from the point of diagnosis. *Id.*

115. Woodhams & Corby, *supra* note 21, at 162.

116. *Id.*

117. J. HURSTFIELD ET AL., *supra* note 22, at 60.

used wheelchairs or who had a sensory impairment.¹¹⁸ People with mental health problems, diabetes, a bad back, cancer, or other health problems did not consider themselves covered by the Act.¹¹⁹ Only one-third of those who eventually took legal action knew that they were covered by the DDA prior to initiating their case.¹²⁰ This is, in part, due to common cultural perceptions of disability that the current definition serves to reinforce.

The same study also found that the need for applicants to prove that they are disabled and therefore covered under the terms of the DDA was costly, upsetting, and stressful.¹²¹ This was particularly the case for people with mental health problems, where it was felt that it was harder to prove that the impairment had a substantial or long term effect on a person's day-to-day activities.¹²²

Critics of the definition also point to other international examples of disability discrimination legislation that has adopted a less medical perspective.¹²³ They argue for an approach that focuses on the discrimination itself rather than the characteristics of the person discriminated against.¹²⁴ This is, broadly, the approach taken in both Ireland and Australia, where the definition of disability is much wider in scope than that adopted in the legislation of either the United Kingdom or the United States.¹²⁵ In this legislation a social model approach to discrimination is adopted, while at the same time adopting a medical definition of disability.¹²⁶ Disability is viewed as arising from social barriers to participation. For example, the Australian Act defines disability as:

- (a) total or partial loss of the person's bodily or mental functions; or

118. *Id.*

119. *Id.* at 61.

120. *Id.* at 62.

121. *Id.* at 14.

122. *Id.* at 100.

123. See, e.g., David Goss et al., *Disability and Employment: A Comparative Critique of U.K. Legislation*, 11 INT'L J. HUM. RESOURCE MGMT. 807 (2000).

124. *Id.* at 809.

125. See Disability Discrimination Act, 1992, pt. 1, § 4 (Austl.); Employment Equality Act, 1998 (No. 21/1998) (Ir.) available at http://www.irishstatutebook.ie/1998_21.html (last visited Jan. 20, 2007).

126. See *id.*

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- (b) total or partial loss of a part of the body; or
- (c) the presence in the body of organisms causing disease or illness; or
- (d) the presence in the body of organisms capable of causing disease or illness; or
- (e) the malfunction, malformation or disfigurement of a part of the person's body; or
- (f) a disorder or malfunction that results in the person learning differently from a person without the disease or malfunction; or
- (g) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behavior[.]r¹²⁷

A recent review of the Australian legislation argued that “this definition . . . ‘avoids unproductive disputes over whether a person with a disability fitted a particular impairment category’, as can happen under other anti-discrimination Acts”¹²⁸ In contrast to both the United Kingdom and the United States there appears to be little legal time devoted to assessing whether a person was covered by the Act, the focus instead being on whether a discriminatory act had occurred. It is worth noting that the Law Society in the United Kingdom has also supported a widening of the definition along the lines of the Australian legislation.¹²⁹ A move to a more broad definition would bring the DDA legislation in line with other British anti-discrimination legislation, such as the Sex Discrimination Act and the Race Relations Act. However, there are still some who suggest that the Australian legislation was too medical in that disabled people were still defined on the grounds of having an

127. Disability Discrimination Act, 1992, pt. 1, § 4 (Austl.).

128. 1 AUSTRALIAN GOVERNMENT PRODUCTIVITY COMMISSION, INQUIRY REPORT NO. 30, REVIEW OF THE DISABILITY DISCRIMINATION ACT 1992, 373 (2004).

129. United Kingdom Parliament, Supplementary Memorandum from the Law Society (DDB 135), available at <http://www.publications.parliament.the-stationary-office.co.uk/pa/jt200304/jtselect/jtdisab/82/4032408.htm> (last visited July 26, 2006).

impairment.¹³⁰ They suggested that a new definition should be developed that does not use either the term “disability” or “impairment.”¹³¹ Their approach is similar to that proposed by the previously mentioned BCODP.

The BCODP is a national umbrella organization for groups of disabled people. They have proposed the Disabled Peoples’ Rights and Freedoms Bill: A Bill to Prohibit Discrimination Against Disabled People, Enforce Their Human Rights, and for Connected Purposes.¹³² This bill attempts to apply a social model understanding to the definition of disability. Disability is defined as “the outcome of the interaction between a person with an impairment or health condition and environmental factors and a ‘disabled person’ is a person with an impairment or health condition who encounters disability.”¹³³ Impairment is “a characteristic and condition of an individuals’ body or mind which, unsupported, has, does or will limit that individual’s personal or social functioning in comparison with someone who has not got that characteristic or condition.”¹³⁴ Environmental factors make up the physical, social, and attitudinal environment in which people live and conduct their lives. While there is much in this definition to be commended, in British law one needs an agent who has been discriminated against and, if one is to apply anti-discrimination legislation, one must clearly be able to prove the grounds under which that discrimination took place. Clearly, the DDA meets these requirements, while the bill proposed by the BCODP does not. The approach suggested by the BCODP also runs the danger of confusing disability discrimination with other sources of social disadvantage, losing the focus on disabled people.

130. 1 AUSTL. GOV’T PRODUCTIVITY COMM’N, *supra* note 128, at 374.

131. *Id.*

132. See The British Council of Disabled People, Disabled People’s Rights and Freedom Bill—Draft, <http://www.bcodp.org.uk/campaigns/rightsfreedomsbill.shtml> (last visited Mar. 6, 2007).

133. *Id.*

134. *Id.*

DISCUSSION

Social policies should be evaluated in terms of the benefits they deliver to disabled people and the barriers which they remove, not the language in which they are phrased. There is clear evidence to suggest that the DDA has made a significant impact on the lives of disabled people and that disabled people are beginning to receive legal protection on a level similar to that afforded by other equality legislation.¹³⁵ However, as demonstrated in this Article, there remain important gaps that have limited the DDA's wider coverage. For the disability movement it is the definitional base of the DDA—with its focus on a medical rather than social model of disability—that has been central to these shortcomings. Yet an analysis based on these doctrinal battles will present only a limited picture of the differences that new anti-discrimination legislation can make. Likewise, one could also argue that an analysis based solely on litigation strategies and on the court's interpretation of the Act's meaning will also produce a limited picture.

In looking at these debates in more detail, we draw on some recent work from America which has looked at the impact of the ADA and how, by making disabled people into rights-bearing subjects, the identities of disabled people and their ambitions are changing. It has been argued that disability rights can have a positive impact on identity in a number of ways.¹³⁶ First, they can change self perceptions.¹³⁷ Such rights make people believe that more is possible.¹³⁸ Further, such rights affect an individual's identity, giving them a basic understanding of who they are and where they belong.¹³⁹ Being excluded may seem natural and appropriate unless it is inconsistent with one's identity.¹⁴⁰ If a person believes they have a right to a job or an education then they are more likely attempt to achieve these aspirations. People will incorporate in their plans the reasonable accommodations and the non-discriminatory treatment

135. Roulstone & Warren, *supra* note 102, at 115–18.

136. See DAVID M. ENGEL & FRANK W. MUNGER, RIGHTS OF INCLUSION 40–69 (2003).

137. See *id.* at 50.

138. See *id.*

139. See *id.*

140. See *id.*

guaranteed by anti-discriminatory legislation.¹⁴¹ To this end, the inclusion of education within the remit of the DDA has been an essential step, alongside the eventual coverage of public transportation systems.

Indeed, a disability rights advocacy group, American Disabled for Accessible Public Transport, recognized this back in the 1980s when they argued that transportation, both symbolically and in reality, was a key element of the ADA.¹⁴² Without accessible public transportation, disabled people with a mobility impairment could not get out, get around, or connect with other people.¹⁴³ Without access to transportation, they argued, disabled people's expectations about becoming a fully participating member of society would be limited.¹⁴⁴

Second, and related to the above, people who interact with disabled people begin to do so within a rights-based agenda.¹⁴⁵ Anti-discrimination legislation often challenges and then shifts cultural and societal expectations.¹⁴⁶ Acts of enforcement are particularly important here. Third, institutions such as schools and universities, as they adopt anti-discrimination practices, can have a dramatic effect on the identity of children and young people who go through them. As they leave these institutions and move on to the workplace they will expect the same treatment and will attempt to ensure that they get it.

These ideas tie in neatly with, among others, those of the German political philosopher Axel Honneth¹⁴⁷ and the Canadian philosopher Charles Taylor.¹⁴⁸ These writers argue that being recognized as a rights-bearing citizen is a necessary condition for achieving

141. *See id.*

142. TO RIDE THE PUBLIC'S BUSES: THE FIGHT THAT BUILT A MOVEMENT, at viii (Mary Johnson & Barrat Shaw eds., 2001).

143. *Id.*

144. *Id.*

145. ENGEL & MUNGER, *supra* note 136, at 40–69.

146. Gooding, *supra* note 55, at 548.

147. *See* AXEL HONNETH, THE STRUGGLE FOR RECOGNITION: THE MORAL GRAMMAR OF SOCIAL CONFLICTS (1995).

148. *See* Charles Taylor, *The Politics of Recognition*, in MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 25 (Amy Gutmann ed., 1994).

subjectivity, self-realization, and self-identity.¹⁴⁹ The DDA and the ADA demand that disabled people are seen as full partners in social interaction and that they are included in all forms of social life. The ideological challenge to institutionalized actions, which construct disabled people as unequal and disparage their status, found in such anti-discrimination legislation is as important as the legislation itself. Recognition is itself a matter of justice.

The disability movement, in both the United Kingdom and the United States, has taken a more traditional approach to the issue of disability equality and has argued that social justice should be based on redistribution. Social justice for disabled people can only be achieved if all barriers to participation, including those in employment, politics, family life, and civil society are removed. There is the need to challenge the processes that create the inequality experienced by disabled people, and merely according them recognition as rights-bearing subjects fails to do this. The focus is, therefore, on material issues that prevent disabled people from participating as peers in any social arena they choose. For this reason the focus has been to challenge the perceived inadequacies in both the legislation and in the courts' interpretation of the legislation.

There are merits in both these positions, and both have their strengths and weaknesses. However, Nancy Fraser takes a more grounded approach to that found in the writings of Honneth and Taylor and argues that recognition alone cannot meet the needs of those seeking change.¹⁵⁰ Recognition is one dimension, but this must be supplemented with an approach that incorporates a notion of redistribution. Tom Shakespeare also has recently argued that disability politics is about both redistribution and recognition. He argues that “[d]isabled people suffer socio-economic injustices, such as marginali[z]ation and deprivation, as well as cultural injustices, such as non-recognition and disrespect.”¹⁵¹

149. See, e.g., *id.*

150. See NANCY FRASER & AXEL HONNETH, REDISTRIBUTION OR RECOGNITION? A POLITICAL-PHILOSOPHICAL EXCHANGE (2003).

151. Tom Shakespeare, *Disabling Politics? Beyond Identity*, 30 J. POL. & CULTURE 156, 164 (2005).

These points do not constitute a manifesto, or a new model. Neither do they provide us with new legislation nor a new legal definition of disability. There is no straightforward answer. The radical rhetoric of the social model seeks to provide a straightforward answer, but fails. The danger of the expansion of the disability group does have the potential to weaken the legislation and trivialize disablement. One of the strategies employed by those who in the past have sought to weaken anti-discrimination legislation was to broaden categories.¹⁵² However, we *do* need to focus on those who are experiencing the greatest levels of inequality. It is this that represents the biggest challenge to anti-discrimination legislation.

152. See RICHARD K. SCOTCH, FROM GOOD WILL TO CIVIL RIGHTS: TRANSFORMING FEDERAL DISABILITY POLICY 121–38 (2d ed. 2001) (referring to 1960s America as an example of this approach).