

**TRANSATLANTIC  
POLICYMAKING  
IN AN AGE OF  
AUSTERITY  
DIVERSITY AND DRIFT**

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THE EUROPEAN UNION AND THE DIFFUSION  
OF DISABILITY RIGHTS

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THE UNITED STATES IS RIGHTLY KNOWN AS THE NATION IN WHICH, AS ALEXIS DE Tocqueville put it nearly 170 years ago, "there is hardly a political question in the United States that does not sooner or later turn into a judicial one."<sup>1</sup> The United States has a comparatively large number of *litigious policies*, laws that promote the use of litigation in resolving disputes and implementing public policy.<sup>2</sup> American public policy uses litigious policies to address social problems that in other nations are handled solely by bureaucratic regulation and welfare programs. Thus litigation is an often-overlooked stratagem of governance in the United States, comparable to the tax credit and "private social benefit" schemes about which Jacob Hacker and Christopher Howard have written.<sup>3</sup> As they suggest, arguments about the weakness of the American state often miss techniques by which U.S. public policy steers the actions of nonstate actors. Litigious policies steer by creating incentives for private actors to implement and enforce laws, an approach that is attractive to American politicians because it serves as an alternative to an expanded welfare-regulatory state.

It should be no surprise, then, that the United States is the birthplace of a litigious approach to the problem of disability. Beginning in the 1960s and 1970s, the disability rights movement aimed to recast disability as a civil rights issue: people with disabilities, the movement argued, suffered more from social discrimination than from their impairments. Like African Americans, they were burdened by social attitudes and structural barriers that excluded them from the mainstream of social life. Further, as with African Americans, the solution to the problems of people with disabilities lay in litigation: they must be given the ability to sue for discrimination. Thus in the United States a series of disability rights laws have provided the right to sue: Section 5 of the 1974 Rehabilitation Act, the 1975 Education for All Handicapped Children Act, and, most prominent of all, the 1990 Americans with Disabilities Act (ADA). Disability rights litigation in the United

States has become commonplace, and some plaintiffs—Casey Martin, the professional golfer with a mobility disability, for example—have even become minor media celebrities.

Thus far the story of disability politics fits neatly with the familiar pattern Tocqueville and so many commentators after him have noted, as the United States has embraced a court-oriented approach to basic problems in social policy. But the past few years have seen a new development that, at least in disability policy, may undermine the portrait of American legal exceptionalism: the diffusion of antidiscrimination rights proposals and policies across the globe. Disability organizations, academic lawyers, and activists have used international conferences, publications, and the Internet to spread the key concepts of the disability rights movement. International organizations, most prominently the United Nations, have embraced the new emphasis on inclusion and participation in disability policy pioneered by the United States and have promulgated a series of resolutions and proclamations on disability rights. But many nations have gone beyond "soft" laws to enact enforceable antidiscrimination provisions. In Europe, the crowning example is the European Union's 2000 Equal Treatment in Employment and Occupation Directive. This law was nicknamed the "Horizontal Directive" because it requires all EU nations to adopt antidiscrimination laws across several grounds—not just disability, but also age, religion, and sexual orientation. The Horizontal Directive gives aggrieved individuals the right to bring a complaint against a party that discriminates.<sup>4</sup>

Like many chapters in this book, then, this one features a public policy idea—"disability rights"—that has swept across the Atlantic to fuel political discourse in both Europe and North America. Yet, as the other chapters in this book suggest, common terms of debate do not necessarily lead to convergent outcomes. Like "administrative reform" or "pension privatization," the concepts of disability rights translate differently depending on the structures of national institutions and political alignments. It seems unlikely, for example, that the Horizontal Directive, standing by itself, will lead Europe to American-style disability rights litigation. That is because most European nations thus far lack the legal machinery required to vigorously implement litigious policies. Contingency fees, large verdicts, a corps of aggressive plaintiff lawyers—the taken-for-granted requisites of litigious policy in the United States—are in short supply in Europe. Until they appear, disability rights implementation seems poised to take a different direction, indeed several different directions, among European nations. Yet, the adoption of the Horizontal Directive, and the growing embrace of antidiscrimination laws in Europe, create at least the possibility of a turn to litigation in European social policy.

Scholars in recent years have speculated about the extent to which the American emphasis on litigation could spread to Europe, creating a convergence in public policy style. They have suggested some likely "carriers." Some observers, for example, point to international commercial law, which has brought American and European lawyers into closer contact. Perhaps, it is theorized, American lawyers could infect their European colleagues with a more aggressive, enterprising approach to

the practice of law, leading to novel, more complex, and more sweeping forms of litigation.<sup>5</sup> In a globalizing, competitive economy, this more aggressive legal style may prove advantageous, so that trade liberalization and the attendant neoliberal policy style might lead to expanded litigation.<sup>6</sup> Other researchers, detecting the “judicialization of politics” in Europe, focus on the proliferation of higher-law constitutionalism and the building of national constitutional courts.<sup>7</sup> Still others look to declining trust in the executive and legislative institutions, the gradual drift from a corporatist to a pluralist mode of interest representation, or the growth of legal capacity within interest groups.<sup>8</sup>

The mechanism I focus on in this chapter is the European Union (EU). The establishment of the European Union creates in Europe some of the very same structures that in the United States promote court-oriented public policy, in particular a division of authority analogous to federalism. Federalism creates an incentive for policymakers at the national level to create rights that can be enforced against states and localities. Similarly, within the European Union, politicians at the center can claim credit for delivering benefits to constituencies while passing the burdens on to national-level governments.<sup>9</sup> By creating rights, in this case a right against discrimination on the basis of disability, politicians and bureaucrats in the European Union can satisfy constituencies, extend their role in disability policy, and build the legitimacy of their institution at minimal cost to themselves. These incentives would seem to operate in spheres far beyond disability and thus raise the specter of litigious policymaking across policy realms in Europe.<sup>10</sup> Indeed, the case of disability may be just one small part of a broad rise of “adversarial legalism” that some observers have detected in Europe, both within statutory and EU constitutional law. At the very least, the case of disability suggests that the many national-level institutional and cultural barriers to litigious policies in Europe will be matched against the interest of some EU actors in creating new rights mandates.

### REFRAMING DISABILITY POLICY

“Disability” is a huge problem for any polity. Depending on how one defines disability—and there are seemingly as many definitions as there are disabilities—as many as one in five Americans count as disabled.<sup>11</sup> In Europe, one recent report produced a report finding that 13 percent of people within the EU nations were disabled.<sup>12</sup> Whatever the estimate, disability is a huge social problem. People with disabilities can be considered the largest and poorest “minority” in the United States and, along with the elderly, the biggest consumer of state services. Monroe Berkowitz, in an analysis of the 1995 federal budget, estimated that nearly \$184 billion dollars are spent on people with disabilities, roughly half on health care and a little less than half on income maintenance.<sup>13</sup> In Europe, as pressure on the welfare state has grown, the expanding cost of disability pensions has been an increasing concern. The most notorious example is The Netherlands, where by the early 1990s more than one of every seven people of working age was collecting

disability benefits, and nearly 5 percent of gross national product was consumed by disability income transfer programs.<sup>14</sup>

Traditional policy responses to disability are all based on the notion that disabled people are helpless victims who need aid, either from the state, the family, or helping institutions. The three main tracks of disability policy in the twentieth century were compensation, institutionalization, and rehabilitation. Each of these tracks shares the core premise that disabled people are defective; the response is either compensation for lost wages, segregation from the normal, or rehabilitation to fix the problem. The disability rights movement has attempted to reframe disability as a matter of discrimination. The key premise of the movement is that people with disabilities are disabled more by attitudinal and physical barriers than by their impairments. Failing to accommodate people with disabilities is not merely bad manners or uncharitable policy, but a violation of the norm of equal treatment. The solution is to create a right against discrimination and allow disabled people to sue for violations of their rights. The easiest way to sum up all this is to think of disability as a problem society creates rather than a problem individuals have—a so-called “relational” view of inequality.<sup>15</sup>

In the United States, this movement is sometimes summarized as “from needs to rights” or “from charity to rights.”<sup>16</sup> In Europe, where there is a much stronger tradition of social rights—rights to welfare payments, technical aids and treatment—it really is a matter of “rights to rights.” The differences between the two sets of rights, social and civil, are substantial, however. Social rights are more general norms of state behavior that are not individually enforceable. Civil rights claims are individual demands that can be brought to a court or agency for enforcement and can involve claims against nonstate actors. Moreover, many of the theorists of the civil rights movement argue that the welfarist approach is part of the problem; people with disabilities need to be treated as capable of work. If the civil rights model becomes dominant, all the traditional components of disability policy will have to be rethought and reorganized. Thus, although the reframing of disability is, even in the United States, still in its infancy, it has the potential to transform every aspect of disability policy.

### DISABILITY RIGHTS IN THE UNITED STATES

How did American disability activists, not a particularly strong constituency, enact into law a major social reform? The story of the American disability rights movement has now been well chronicled by both academics and journalists.<sup>17</sup> Disability historians have located various struggles against forms of disability discrimination throughout the twentieth century—for example, campaigns by the blind to allow guide dogs on public transportation, or protests over inadequate job opportunities for people with disabilities in New Deal work programs.<sup>18</sup> A leader of the blind community, law professor Jacobus ten Broek, conceptualized disability in part as a problem of legal rights and discrimination back in the

1960s.<sup>19</sup> But most would concede that the disability rights movement became coherent only after the passage of the 1973 Rehabilitation Act. Stuck into this omnibus law, the main vehicle for federal funding of rehabilitation programs, was Section 504, a single sentence that passed by unnoticed by nearly everyone:

no otherwise qualified individual in the United States . . . shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal assistance.

The initiative for Section 504 came from liberals in Congress and their staffs.<sup>20</sup> They first considered amending the Civil Rights Act of 1964 to bar discrimination on the basis of disability but reconsidered, either because they feared the consequences of opening up the act for amendment or because they recognized that disability was distinctive enough to merit separate treatment. In the hands of the civil rights division of the Department of Health, Education and Welfare, charged with writing the regulations based on Section 504, and the federal courts, called on to interpret it, this obscure sentence became a full-fledged antidiscrimination law. The Ford and Carter administrations held up implementation of Section 504 regulations, but the Carter administration relented after a celebrated moment in the history of the disability rights movement: a cross-disability sit-in at a San Francisco federal building.

In the wake of Section 504, a disability rights movement, complete with academic theorists and a public law organization (the Disability Rights Education and Defense Fund) styled after the National Association for the Advancement of Colored People (NAACP) grew up. The premises of the disability rights model were enunciated and began to be diffused, first in the disability community and among civil rights advocates, then in the wider policy and academic circles. Section 504 covered only federal agencies and those receiving federal funds. In the aftermath of Section 504, a number of state laws creating a general right against discrimination were enacted, but for disability activists these laws were piecemeal, often weakly enforced, and thus unsatisfactory.

Moreover, implementation of Section 504 was considered weak, and there was a backlash against it in the early Reagan administration. In the midst of this, disability activists hit on a marvelous strategy for advancing their rights message. They found that they could pitch the disability rights model to Reaganites as a kind of welfare reform: disability welfare programs, they told Reagan administration officials, reduce disabled people to dependency. By empowering disabled people and releasing them from the chains of government handouts, disability rights laws would launch disabled people "toward independence."<sup>21</sup>

That became the basis of a strong alliance between disability activists and Reagan and Bush administration officials. A Reagan administration commission drafted the first (more radical) version of the ADA, and George H. W. Bush endorsed it during his 1988 presidential campaign. Bush's endorsement foreclosed debate over the basic premises of the ADA; after the ADA was introduced into

Congress, business interests picked away at the edges of the bill but never contested the rights frame, and the law was enacted with bipartisan support in 1990.

The disability rights movement lacked fearsome political resources, but its leaders wisely mustered their few advantages. Disability activists had a handy template for both the problem and the solution to disability. They drew on the experiences and imagery associated with the civil rights movement and analogized the problems of disabled people to those of African Americans, in the process gaining the support of the civil rights lobby. The activists were able to sustain this recasting of disability in large part because of the unity of the disability lobby. Despite the extraordinary diversity of the community of people with disabilities, disability groups held together largely on the need for a rights law. But most of all, disability activists benefited from the political virtues of their proposal. The civil rights remedy they suggested had the great advantage of costing the federal government relatively little; by extending rights, politicians transferred most of the costs of the rights laws to state and local governments and the private sector. Indeed, disability activists were able to convince conservatives in the Reagan and Bush administrations that the ADA would save the federal government in the long run because it would help move disabled people off welfare to work. As a result, the ADA, a major social reform, was adopted relatively quickly and by large majorities in both houses of Congress.<sup>22</sup>

Implementation has proven another matter. ADA enforcement has deeply disappointed disability activists, as federal courts have interpreted the law narrowly and, in so doing, created a series of barriers for plaintiffs. Moreover, the law has not led to the wholesale transformation of traditional disability policy as its most vigorous advocates had hoped. Supplemental Security Income (SSI) and Social Security Disability Income (SSDI), the two main disability welfare programs, have ballooned in the years following the ADA's enactment, and employment among people with disabilities has continued to fall.<sup>23</sup> Yet in the rest of the world the ADA is considered a groundbreaking law. This is no accident, as American activists have consciously attempted to export the disability rights model, using international organizations, conferences, and field visits to convey the rights message.

#### DIFFUSION TO EUROPE

The effort to export the disability rights message was successful in generating international attention. European disability activists made pilgrimages to the main centers of disability activism in the United States, particularly Berkeley, California, to learn the precepts of the "disability rights model." The arguments and techniques of American disability activists were spread through academic writings and international disability conferences. Lobbied by disability nongovernmental organizations (NGOs), international organizations—most prominently the United Nations—created proclamations and resolutions endorsing the civil rights approach, such as

the 1993 "Standard Rules on the Equalization of Opportunities for Persons with Disabilities."

Yet by 2000, within Europe only Britain, Ireland, and Sweden had civil disability rights laws. Some other nations had largely symbolic constitutional or criminal provisions protecting against discrimination, but American-style antidiscrimination laws, where they had been proposed, had been stalled. The slow progress of European disability activists at the national level is unsurprising. They started in an even weaker position than their counterparts in the United States. In Europe, there is no strong civil rights tradition, and in many nations, no civil rights template at all. Thus, unlike their American colleagues, European disability rights activists had a much tougher time explaining their argument to policymakers. They faced the daunting prospect of building antidiscrimination laws and institutions from the ground up, rather than simply building on established practices. (Sweden and Britain, two of the three nations that adopted rights laws, had already built antidiscrimination enforcement agencies covering gender and race.) Moreover, in contrast with the relatively unified American disability rights movement, in most European nations there are strong, state-supported disability organizations that are ambivalent about, if not hostile to, the civil rights approach. Disability rights activists were sometimes insurgents within their own disability community.<sup>24</sup> For some European disability policy leaders, the whole idea of a judicially based, rights-oriented approach to disability was considered a noxious foreign import.

And yet as national-level rights campaigns were being thwarted, a small network of academics and activists, probably no more than a few dozen, proved far more successful at the EU level. Their campaign began in the early 1990s. Within the European Union, British disability activists were the first to raise nondiscrimination issues, according to European Commission staff. The British campaign for a disability rights law had begun in the 1980s, and the British activists, like their American counterparts, had an evangelical zeal to expand the scope of antidiscrimination policy. Their pleas for action, however, were met by a powerful argument: the treaties that establish the European Union simply did not grant it power in this realm. In Euro-speak, disability rights laws were beyond the European Union's "competence." Indeed, under the traditional view, disability was a matter of "social policy"—welfare, rehabilitation, and education—a realm in which the European Union was supposed to play only a minor role. The place of the European Union in social policy was a matter of great disagreement and some fluidity, but deliberations surrounding the Maastricht Treaty had emphasized "subsidiarity," leaving less room for EU social policy initiatives.<sup>25</sup>

Nevertheless, nondiscrimination advocates found a way to move forward. As part of a broader policy initiative on social exclusion and joblessness in Europe, the European Union had created a series of "action programs" that funded conferences and information sharing on disability-related issues. The early action programs were criticized for wasting money on ill-considered projects and for failing to involve people with disabilities. This was addressed in "Helios II," a package of grants for research and cross-national consultation on the problems of unemployment among people with disabilities. It was Helios II money that created the Euro-

pean Disability Forum (EDF), an association of member-state disability groups dedicated to the civil rights model.<sup>26</sup> The formation of the EDF was a key move. It became a central resource for European disability rights activists, tying them together in a network and providing a clearinghouse for idea-sharing and advocacy. EDF lobbied both the European Commission and Parliament, producing reports and research designed to promote the disability rights message and arguing that a Europe-wide solution to disability discrimination was appropriate.<sup>27</sup> The first sign of success was a 1993 green paper on European social policy that argued that segregation of people with disabilities, "even with adequate income maintenance and special provision, is contrary to human dignity."<sup>28</sup> This was followed by the Commission's 1994 white paper, the first EU publication to mention discrimination in connection with disability. The white paper also specifically mentions "the positive experience of the European Disability Forum" in building accessibility for people with disabilities.<sup>29</sup> Thus with the arrival of EDF at the EU, disability began to be seen as a matter fit for nondiscrimination policies, a mechanism that the European Union had before considered only in the context of race and gender.

With growing support from within the European Commission, disability rights advocates lobbied to expand EU competence to cover antidiscrimination measures during the 1997 revisions to the EU treaty in Amsterdam. Groups representing racial and ethnic minorities, gays and lesbians, and religious minorities also lobbied for nondiscrimination powers. Although there was discussion about creating a treaty-based, quasiconstitutional right against discrimination, treaty negotiations stopped well short of this. The Amsterdam Treaty did, however, produce Article 13, which specifically granted the European Union competence to take action on discrimination across a range of grounds, including disability.

Armed with the Amsterdam Treaty, disability rights advocates worked within the European Commission to draft a "directive"—a rule requiring nations to make rules. In late 1999, two directives were proposed by the European Commission.<sup>30</sup> The first, covering racial and ethnic discrimination, was broad in scope, governing goods and services, employment, and education. The second, the Horizontal Directive, covered more grounds (religion, sexual orientation, age, and disability) but governed only employment and professional education. The campaign for an EU antidiscrimination measure gained ground during the controversy over the appointment of Jorge Haider to a position in the Austrian cabinet. Haider was a populist right-wing Austrian parliamentarian whose party was widely seen as racist. The Haider appointment served to highlight the new politics of race in Europe, and EU officials resolved to make a strong antiracist statement. The race directive was enacted in June 2000, just seven months after it was introduced.<sup>31</sup> To a large extent, proponents of nondiscrimination policies on other grounds (religion, sexual orientation, age, and disability) simply followed in the wake of the strong push for antiracist action, and the Horizontal Directive was enacted four months later, in October 2000.<sup>32</sup>

The Horizontal Directive gave member nations until 2003 to create enforcement systems, but they can get a waiver for age and disability until 2006. The Directive does not specify what procedural form enforcement should take. It could

be administrative or judicial, or some combination of both. The directive also does not require that compensation be paid to victims, but it does provide substantive standards. It specifies that penalties for discriminatory conduct must be “effective, proportionate and dissuasive.”<sup>33</sup> Moreover, the disability antidiscrimination policy must include some requirement for “reasonable accommodation” of people with disabilities, as in the ADA, and it must forbid “indirect” as well as direct discrimination—provisions that, though seemingly neutral, disproportionately burden people with disabilities. The directive is just one way in which nondiscrimination ideas have influenced EU policy and, some observers think, is not necessarily the most consequential in the short run. That is because it is a “framework” directive, which merely instructs member states that they must take “effective” action against discrimination and specifies some standards. The directive does not create a right against discrimination at the EU level, and it is not clear what the remedy will be if the actions taken by member states are deemed “ineffective.” But the directive is part of a series of actions at the EU level that is changing the terms in which disability policy is debated within Europe.

Already the move to a rights model of disability has spurred the adoption of further laws, some with greater immediate impact than the Horizontal Directive. For example, a new transportation directive requires that member states make their buses accessible to wheelchairs.<sup>34</sup> Disability activists now know that if they are blocked within their home nations, they can lobby the European Union instead, hoping to get a rule that they can then enforce at the national level—the so-called “boomerang” maneuver that Margaret Keck and Kathryn Sikkink have identified in their study of transnational advocacy.<sup>35</sup> Finally, through the creation of the European Disability Forum, the European Union has brought together disability activists from around Europe who can help mobilize EU directives and standards within their home countries. EDF officials have drafted a second, more far-reaching disability directive that would, like the ADA, go beyond employment to cover the accessibility of transport and public facilities, a key concern of the disability rights movement—and a potentially much more expensive matter for national governments.<sup>36</sup>

### THE EUROPEAN UNION AS RIGHTS MANUFACTURER

The progress that disability rights activists have made in the European Union can be traced to several factors. First, disability advocates to a large extent rode in the slipstream of growing concern about racism and discrimination on the basis of ethnicity. Once this concern generated the energy necessary to enact an anti-discrimination directive for race, the sponsors of the Horizontal Directive, including disability activists, found their path already paved for them.

Second, there simply was no strong opposition to the reframing of disability as a civil rights issue. The main employer organizations never mounted a campaign against the Equal Treatment Directive, and most member nations that might have

had their doubts chose not to push the issue in a visible way. The lack of *visible* opposition to disability rights proposals is a pattern one sees in all the polities in which such proposals have reached the legislative agenda. Once an issue is conceived as a matter of rights, it is not easy for politicians or even interest groups to oppose them. This may be doubly true when politicians are attempting to “deny rights” to people with disabilities, a particularly difficult enterprise. There are scattered criticisms of the turn to nondiscrimination rights in disability policy, but no one has yet mounted a coherent campaign against it. This is a striking illustration of the fact that new policy ideas, even when advanced by weak political forces, can gain ground when there is no politically effective argument against them.

Perhaps most important for the success of disability advocates, however, was a congruence between their agenda and that of EU officials. The transformation of disability into a matter of civil rights coincided with the institutional interests of the European Union in at least two respects.<sup>37</sup> First, the protection of rights has become a legitimating project for the European Union. With criticism of the European Union’s corruption, bureaucracy, and lack of accountability continuing, many have argued that the European Union needs to go beyond its founding mission of lowering barriers to economic exchange in Europe to reshape its image. One new mission is the protection of rights. There is much talk within the European Union of building a “European citizenship” and much discussion about what that would involve. As T. H. Marshall famously observed, citizenship and rights are intimately related, and some have argued that the creation of EU-protected rights could become part of the foundation of a new European identity.<sup>38</sup> A European Commission committee report in 1996 concluded that “[i]nclusion of civic and social rights in the Treaties would help to nurture [European] citizenship and prevent Europe from being perceived as a bureaucracy assembled by technocratic elites far removed from daily concerns.”<sup>39</sup> In 2000, the European Union adopted a nonbinding Charter of Fundamental Rights;<sup>40</sup> some version of this bill of rights may one day be part of a grand constitutional reform that is being proposed for the union. Below the grand level of the charter, meanwhile, smaller rights are regularly being manufactured at the European Union. Although, for example, the U.S. Congress recently decided not to enact an “airline passengers bill of rights,” the European Union now has such a law, and its provisions are prominently displayed at all European airports. The airline law may be mere symbolism, but it is symbolism that builds the image of the European Union as a rights protector. Similarly, and more substantively, with the passage of the two discrimination directives, the European Union has put itself at the forefront of civil rights protection in Europe—and for gays and lesbians, religious minorities, people with disabilities, and the other groups protected, the European Union suddenly looks like much more than a trade liberalizer.

EU officials have a more specific interest in disability rights. The embrace of disability rights has greatly enlarged the EU role in disability policy. As long as disability was defined in traditional ways, there was little role for EU involvement in member state policies. The European Union does not have competence to intervene in social security matters, or education, or caregiving, or even most aspects of

labor policy. Until the 1997 Amsterdam Treaty, the European Commission's Social Affairs Directorate, the unit responsible for disability, could only sponsor research or initiate information sharing among member states. By embracing the rights model, the directorate suddenly had a new mission, one entirely compatible with founding EU principles. If the problem of disability resulted from social exclusion and discrimination, then it was a matter of market barriers, and the European Union has lots of experience in knocking down such barriers. Disability has become one of a number of policy areas in which the Social Affairs Directorate has justified a stronger role for itself by focusing on exclusion.<sup>41</sup> As Employment and Social Affairs Commissioner Anna Diamantopoulou has argued, because "social exclusion imposes costs which an inclusive society can avoid," social policy has become economic policy.<sup>42</sup> This redefinition of disability as an issue of economic competitiveness has a venerable tradition at the European Union: it parallels the primary rationale for EU-level action on gender equality that began in the 1970s. A series of court rulings and directives on gender equality were justified as market integration measures. In the absence of EU-level action, it was argued that nations that continued to discriminate against women might gain a competitive advantage over their more egalitarian neighbors.<sup>43</sup> As with gender, in disability EU action on discrimination has been justified as compatible with the European Union's founding goal of market liberalization.

Armed with the rights model, EU officials can now attack problems such as inaccessible transport systems and public facilities, and discrimination in the marketplace. If disability is a matter of rights and discrimination, then the European Union, and in particular the European Commission, has a central role to play in European disability policy.<sup>44</sup> The development of the Horizontal Directive, and the disability rights agenda at the European Union, nicely fits Mark Kleinman's description of the way the Commission has expanded its powers in social policy:

The Commission has shown itself to be an "adept strategist", a "purposeful opportunist". . . . It utilizes the skills and advantages of a bureaucracy, promoting marginal, incremental change. Day by day, through drafting regulations, Eurocrats construct a public policy formulation for further envisaged integration. Hence, non-binding "soft" law creates preconditions for further action. The Commission's research funding role is crucial in expanding the agenda. Having commissioned relevant research, it is able to act at politically opportune moments.<sup>45</sup>

#### COMPARISONS/CONCLUSIONS

Scholars have identified federalism as a significant cause of litigious policymaking within the United States. Federalism means that in at least some policy realms the center cannot directly command subnational units. In the United States, for example, policing and schooling are primarily local matters, and the at-

torney general and secretary of education are relatively powerless to command local police and school districts. There are only two techniques national officials can use to steer localities in these realms: bribery, through the provision of federal aid, and regulation, through the creation of rights. The attraction of the second strategy is clear. By creating rights, politicians at the center do good things for constituencies at little cost to themselves. For activists, meanwhile, the rights strategy allows them to simultaneously make progress across many subnational units—the alternative, of reforming each local unit one by one, is a Herculean task. Thus, the rights strategy in the ADA attracted both disability activists and conservatives in the Bush and Reagan administrations.

The development of the European Union as a social policymaking institution makes it analogous in some respects to the national government in the United States, and thus creates the same incentives for activists and policymakers. The European Union has limited budgetary resources and cannot possibly make a significant impact on a huge policy realm such as disability by spending money. Its main power is to regulate.<sup>46</sup> By embracing disability rights, European Commission staff and European Parliament politicians have vastly expanded their power over the disability field, at little cost. They do not even have to worry much about enforcing the regulations they enact, because those tasks are delegated to national governments—and to private litigants. EU officials get all the credit and little of the blame if the implementation process proves controversial. For disability rights activists, meanwhile, the European Union represents a new political opportunity structure that has led to a new form of organization, the transnational European Disability Forum.<sup>47</sup> The forum has created new capacities and resources for disability activists in Europe, facilitating information sharing among national-level disability groups, the development of new policy proposals, and coordination of political efforts. Taken together, the relationship of the forum, disability-sympathetic parliamentarians, and EC staff is beginning to resemble the "public interest triangle" that scholars observed in the 1960s and 1970s in the United States. Each side of the triangle supports the expansion of disability rights and reinforces the efforts of the others.

Further, the case of disability shows that smart, creative activists are reframing social issues as matters of rights while the opposition is more or less dormant—a pattern observed in the United States during the "rights revolution."<sup>48</sup> Indeed, R. Dan Kelemen detects the beginnings of an "EU rights revolution" in Europe, of which disability is just one small component.<sup>49</sup> The most celebrated area of expanding litigation is EU constitutional law, and the development of EU constitutional law offers intriguing parallels to the story told in this chapter. The European Union became "constitutionalized" by rulings at the European Court of Justice (ECJ) that gave private parties the right in some cases to enforce the treaty agreements that form the basis of the European Union. This supplemented the main mechanism for keeping member nations in line with their treaty obligations, the European Commission's infringement process. Because the European Commission cannot handle all the infringement complaints that come before it, it has

encouraged private parties to bring such complaints to court and more generally has conducted a campaign to advise citizens, firms, and public interest groups of the opportunity to vindicate European rights in court.<sup>50</sup> Here we see the common element with the disability case: a lack of capacity at the EU level is addressed by giving private parties the right to bring claims against nations. Just as in the United States, the creation of rights to litigate is a way by which a weak center can nonetheless steer the periphery. Multiply this mechanism across realms such as the environment, securities regulation, and civil rights, and it does not seem far-fetched to forecast that courts and law will play a growing role in European social policy.<sup>51</sup>

Yet, there is good reason to be skeptical that American-style adversarial legalism will cross the Atlantic, because European legal systems offer an array of barriers to potential plaintiffs—and alternatives to litigation. Implementation of the Horizontal Directive, for example, will be mediated by national-level legal institutions and practices that discourage litigation. Those institutions and practices vary across Europe, so that implementation, rather than converging on the American model, will likely diverge. Some nations, such as Britain and The Netherlands, have preexisting administrative institutions designed to handle discrimination complaints and will adapt these institutions to meet the requirements of the Horizontal Directive. Others will start from scratch and build a combination of administrative and litigation mechanisms. The case of Sweden, the first continental European nation to adopt a disability rights law that allows individuals to sue, is instructive. Although individual Swedes have the right to bring lawsuits, implementation of the discrimination law is mainly through trade unions and through a specialized government mediator, the disability ombudsman. Sweden, like most European nations, has a “loser pays” rule so that unsuccessful plaintiffs incur not only their own legal fees but also those of defendants. Loser-pays systems can under some circumstances encourage litigation, because they allow plaintiffs with small but worthy claims to proceed, knowing that they will win lawyers’ fees in addition to a court judgment. But a loser-pays system can also discourage risk-averse plaintiffs, particularly if there is no exception built in for plaintiffs who have few resources to pay a defendant’s fees in the event of a loss. Moreover, Swedish law provides comparatively small winnings for a successful plaintiff. Swedish discrimination law has no provision for punitive damages, and “pain and suffering” awards are, by American standards, tiny. There is no provision for an injunction ordering an employer to hire (or rehire) a successful plaintiff and only limited ability to claim lost wages. Because the disability ombudsman and the trade unions have greater capacity than individuals, they can, despite these obstacles, more credibly threaten to sue, but even they are likely to resort to litigation in only a tiny percentage of cases.

Sweden’s use of the ombudsman is distinctive, but its plaintiff-unfriendly legal institutions are typical of Europe. Just the lack of a contingency fee—where plaintiff lawyers agree to be paid through a percentage of the winning verdict—represents a major barrier to American-style rights litigation.<sup>52</sup> Could policymakers in

the European Union, frustrated with the barriers faced by plaintiffs in discrimination cases, intervene to alter national legal practices toward the more litigious American policy style? In several prominent cases in the late 1980s and early 1990s, the ECJ appeared to do just that. For example, in *Marshall II*, a British cap on awards in sex discrimination cases was struck down because, the ECJ concluded, it made EU antidiscrimination laws ineffective.<sup>53</sup> In *Francoovich*, the ECJ held Italy responsible for failing to properly transpose a directive and granted damages to a plaintiff damaged by this failure.<sup>54</sup> For a time it appeared that the requirement of an “effective” remedy could become a lever for harmonization of national legal systems. But in subsequent cases, the ECJ appears to have backed off, and the resulting case law on remedies and procedure is complex, even contradictory.<sup>55</sup> Thus, according to Lisa Conant, “national courts have tremendous discretion over remedies and individuals face unpredictable procedural requirements” in vindicating EU-based rights, and attempts by the European Commission to harmonize rules for remedies and state liability have been turned back by the member nations.<sup>56</sup> Although EU institutions have pushed European legal systems in a slightly more litigious direction, it would take a rather large shove to make disability rights enforcement a court-centered enterprise in Europe. Indeed, disability may be one of the realms in which convergence toward American adversarial legalism is *least* likely, because the legal institutions required to advance it seem most fundamental and resistant to change. Convergence toward the American experience would require the European Union to mandate vastly expanded remedies, abolition of restrictions on contingency fees, and modification of the loser-pays rule. Kelemen sees several developments that could facilitate litigation, including liberalized rules of standing, changes in the organization of law firms, and expansions in government-supplied legal aid.<sup>57</sup> These developments may encourage some disability organizations to bring cases (and employers and managers to defend such lawsuits vigorously), but they are not likely to make nondiscrimination litigation attractive to private parties.

That, however, is not the end of the story. The embrace of nondiscrimination law in Europe can have substantial effects even in the absence of a “litigation explosion.” The consequences depend on whether the nondiscrimination ideal, now enshrined in a modest law, will be extended further to reshape other aspects of disability policy. The Horizontal Directive was, even for the national governments, a relatively easy step, because it involved no great governmental costs and no disruption of existing programs. Disability advocates are now pressing for a nondiscrimination law covering programs and services, a policy that might involve huge expenses and much greater social change, especially in transportation. Beyond this, there is the question of whether the nondiscrimination ideal will penetrate European labor and welfare policy. As many observers have noted, there is a tension between the civil rights approach to disability and the traditional social welfare disability policies of Europe.<sup>58</sup> Politics often live with such tensions, and there is no reason to believe that there will be a grand collision between the



rights and social welfare models. But there may be smaller crashes. For example, the sheltered-workshops and wage-subsidy programs that help raise the level of employment among people with disabilities in many European nations do not grant participants standard labor law protections and thus may run afoul of antidiscrimination laws. It is quite conceivable that a judge at the national level, or even at the European Court of Justice, might one day rule them illegal. Even in the absence of widespread American-style discrimination litigation, then, a few key cases might challenge the basic premises of the social welfare approach to disability. At that point there would be no question of the power of the nondiscrimination ideal in European disability policy.

### NOTES

1. Alexis de Tocqueville, *Democracy in America*, trans. George Lawrence, ed. J. P. Mayer (New York: Harper and Rowe), 167.
2. Thomas F. Burke, *Lawyers, Lawsuits and Legal Rights: The Battle over Litigation in American Society* (Berkeley: University of California Press, 2002); Robert A. Kagan, *Adversarial Legalism: The American Way of Law* (Cambridge, MA: Harvard University Press, 2001); and Robert A. Kagan and Lee Axelrad, *Regulatory Encounters: Multinational Corporations and American Adversarial Legalism* (Berkeley: University of California Press, 2000).
3. Jacob S. Hacker, *The Divided Welfare State: The Battle over Public and Private Social Benefits in the United States* (New York: Cambridge University Press, 2002); Christopher Howard, *The Hidden Welfare State: Tax Expenditures and Social Policy in the United States* (Princeton, N.J.: Princeton University Press, 1997).
4. European Commission, *Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation*, [2000] O.J. L. 303/16.
5. Bryan Garth and Yves Dezalay, "Merchants of Law as Moral Entrepreneurs: Constructing International Justice from the Competition for Transnational Business Disputes," *Law and Society Review* 29 (1995):27-64.
6. Robert A. Kagan, "Should Europe Worry about Adversarial Legalism?" *Oxford Journal of Legal Studies* 17 (1997):1.
7. Alex Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (New York: Oxford University Press, 2000).
8. C. Neil Tate and Torban Vallinder, eds., *The Global Expansion of Judicial Power* (New York: New York University Press, 1995); Charles R. Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Chicago: University of Chicago, 1998).
9. Kagan, *Adversarial Legalism*; Burke, *Lawyers, Lawsuits and Legal Rights*, 15.
10. R. Dan Kelemen's chapter on environmental policymaking in this book raises this specter in another context.
11. Using questions from federal surveys—the Survey on Income and Program Participation, the Current Population Survey, and the National Health Interview Survey—one can estimate the percentage of people with disabilities widely, from a low of 8.2 per-

cent to a high of 21.5 percent. Richard V. Burkhauser, Andrew J. Houtenville, and David C. Wittenberg, "A User Guide to Current Statistics on the Employment of People with Disabilities," paper presented to the Conference on the Persistence of Low Employment Rates of People with Disabilities—Cause and Policy Implications, October 18-19, 2001, Washington, D.C., table 1A. The preamble of the ADA, enacted in 1990, claims there are 43 million people with disabilities (U.S. Code, vol. 42, sec. 12101(a)1). On the complexity of operationalizing "disability," see Glenn T. Fujiura and Violet Rutkowski-Kmitta, "Counting Disability" in *Handbook of Disability Studies*, ed. Gary Albrecht et al. (Thousand Oaks, CA: Sage Publications, 2001), 69-96.

12. European Disability Forum, *Disability and Social Exclusion in the European Union: Time for Change, Tools for Change* (2002). A recent OECD report estimates that 14 percent of working-age people in OECD nations are disabled. OECD, *Transforming Disability into Ability: Policies to Promote Work and Income Security for Disabled People* (2003), chart 3.1, 24.

13. Cited in Richard Scotch and Sharon N. Barnartt, *Disability Protests: Contentious Politics, 1970-1999* (Washington, DC: Gallaudet University Press, 2002), 275.

14. Leo J. M. Aarts, Richard V. Burkhauser, and Philip R. de Jong, "Introduction and Overview" in *Curing the Dutch Disease*, ed. Leo J. M. Aarts (Brookfield, VT: Avebury, 1996), table 1.1, 5; table 1.2, 7. On policy responses to the "Dutch Disease," see Wim Van Oorschot and Kees Boos, "The Battle against Numbers: Disability Policies in The Netherlands" in *Disability Policies in European Countries*, ed. Wim van Oorschot and Bjorn Hvinden (The Hague, Netherlands: Kluwer, 2001), 53-71.

15. Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (Ithaca: Cornell University Press, 1990).

16. A variant is the title of Richard Scotch's book on Section 504, *From Good Will to Civil Rights* (Philadelphia: Temple University Press, 1984).

17. Scotch and Barnartt, *Disability Protests: Contentious Politics, 1970-1999*; Thomas F. Burke, "On the Rights Track: The Americans with Disabilities Act," in *Comparative Disadvantages? American Social Regulation and the Global Economy*, ed. Pietro Nivola (Washington, DC: The Brookings Institution, 1997); Doris James Fleischer and Frieda Zames, *The Disability Rights Movement: From Charity to Confrontation* (Philadelphia: Temple University Press, 2001); Robert A. Katzmann, *Institutional Disability: The Saga of Transportation Policy for the Disabled* (Washington, DC: Brookings Institution Press, 1986); Ruth O'Brien, *Crippled Justice: The History of Modern Disability Policy in the Workplace* (Chicago: University of Chicago Press, 2001); Joseph P. Shapiro, *No Pity: People with Disabilities Forging a New Civil Rights Movement* (New York: Times Books, 1993).

18. Paul K. Langmore and David Golberger, "The League of the Physically Handicapped and the Great Depression: A Case Study in the New Disability History," *Journal of American History* 87 (2000):888-922.

19. Jacobus ten Broek, "The Right To Live in the World: The Disabled and the Law of Torts," *California Law Review* 54 (1966):846.

20. Katzmann, *Institutional Disability*, 46-47; Scotch, *From Goodwill*, 41-43.

21. National Council on the Handicapped, *Toward Independence* (1988).

22. Burke, "On the Rights Track."

23. Richard V. Burkhauser, Marcy C. Daly, and Andrew J. Houtenville, "How Working Age People with Disabilities Fared over the 1990s Business Cycle," paper presented at the National Association on Social Insurance Conference on Ensuring Health and Income Security for an Aging Workforce, January 26-27, 2000, Washington, D.C.

24. Douwe Van Houten and Conny Bellemakers, "Equal Citizenship for All: Disability Policies in The Netherlands: Empowerment of Marginals" (unpublished manuscript, 2002).

25. Mark Kleinman, *A European Welfare State? European Union Social Policy in Context* (New York: Palgrave, 2002), 90. Writing in 1995, Paul Pierson and Stephan Liebfried argued, "The institutional, political, cultural and technical barriers to extending EU social policy are high." Nonetheless, Pierson and Liebfried foresaw several mechanisms that would lead to the continued expansion of EU social policymaking. Paul Pierson and Stephan Liebfried, "The Making of Social Policy," in *European Social Policy: Between Fragmentation and Integration* (Washington, DC: Brookings Institution Press, 1995), 11. Some of the mechanisms Pierson and Liebfried describe, in particular the role of EU organizations in advocating social policy expansion and the activity of nonstate European-level actors, are important in my account of disability politics. But the key mechanism in my narrative is the redefinition of disability policy as a matter of either trade liberalization or fundamental human rights.

26. Lisa Waddington, "The European Community's Response to Disability," in *Disability, Diversability and Legal Change*, ed. Melinda Jones and Lee Anne Bassar Marks (London: Kluwer, 1999), 139–52; Gerard Quinn, "The Human Rights of People with Disabilities under EU Law," in *The EU and Human Rights*, ed. Philip Alston (London: Oxford University Press, 2000), 303–10.

27. For example, disability advocates established a "European Day of Disabled Persons" and used the organizing committee to publish a report focusing on discrimination against people with disabilities and the lack of a European remedy (European Day of Disabled Persons 1995, *Invisible Citizens: Disabled Persons' Status in the European Treaties*, December 7, 1995; European Day of Disabled Persons 1996, *Towards the Equalisation of Opportunities for Disabled People: Into the Mainstream?* 1996).

28. European Commission, *Green Paper: European Social Policy—Options for the Union*, COM(93)551 final.

29. European Commission, *White Paper: European Social Policy: A Way Forward for the Union*, COM(94)333 final.

30. *Proposal for a Council Directive Establishing a General Framework for Equal Treatment in Employment and Occupation*, COM(99)565 final.

31. Mark Bell, *Anti-Discrimination Law and the European Union* (New York: Oxford University Press, 2002), 74.

32. Bell, *Anti-Discrimination Law and the European Union*, 113.

33. *Council Directive 2000/78/EC of 27 November 2000*, Article 17.

34. *Council Directive 2001/85/EC of 20 November 2001*.

35. Margaret E. Keck and Kathryn Sikkink, *Activists beyond Borders: Advocacy Networks in International Politics* (Ithaca, NY: Cornell University Press, 1998).

36. *The EDF Proposal for a Disability-Specific Directive*. [www.edf-feph.org/en/policy/nondisc/nondfipol.htm](http://www.edf-feph.org/en/policy/nondisc/nondfipol.htm).

37. Deborah Mabbett and Helen Bolderson, "A Significant Step Forward? EU Social Policy and the Development of a Rights-Based Strategy for Disabled People" (unpublished manuscript, 2002).

38. T. H. Marshall, *Citizenship and Social Class* (Cambridge: Cambridge University Press, 1950); Philippe C. Schmitter, "The Scope of Citizenship in a Democratized European Union," in *European Citizenship: Between National Legacies and Postnational Projects*, ed. Klaus Eder and Bernhard Giesen (New York: Oxford, 2001), 86–121.

39. *For a Europe of Civic and Social Rights*, report by Comité des Sages, cited in Catherine Bernard, "Article 13: Through the Looking Glass of Union Citizenship," in *Legal Issues of the Amsterdam Treaty*, ed. David O'Keefe and Patrick Twomey (Portland, OR: Hart Publishing, 1999), 376.

40. *Charter of Fundamental Rights*, [www.europarl.eu.int/charter/defaultflen.htm](http://www.europarl.eu.int/charter/defaultflen.htm).

41. Bryan Wendon, "The Commission as Image-Venue Entrepreneur in EU Social Policy," *Journal of European Public Policy* 5 (June 1998):339–53.

42. Anna Diamantopoulou, European Commissioner for Employment and Social Affairs, "New Social Trends in Europe," speech to the Foreign Correspondent's Club of Japan, Tokyo, Japan, March 7, 2000.

43. Mark Bell describes the premises of the "market integration model" of EU anti-discrimination rights in his book, *Anti-Discrimination Law and the European Union*, 7–12.

44. Interview with European Commission staff.

45. Kleinman, *A European Welfare State?* 121.

46. Laura Cram, "Calling the Tune without Paying the Piper? Social Policy Regulations: The Role of the Commission in European Community Social Policy," *Policy and Politics* 21 (1993):135–46.

47. On the role of political opportunity structures in social movement theory, see Sidney Tarrow, "States and Opportunities: The Political Structuring of Social Movements," in *Comparative Perspectives on Social Movements: Political Opportunities, Mobilizing Structures, and Cultural Framings*, ed. Doug McAdam, John D. McCarthy, and Mayer N. Zald (Cambridge: Cambridge University Press, 1996).

48. See generally Marc K. Landy and Martin A. Levin, eds., *The New Politics of Public Policy* (Baltimore: Johns Hopkins University Press, 1995).

49. R. Daniel Kelemen, "The EU Rights Revolution: Adversarial Legalism and European Integration," in *The State of the European Union: Law, Politics, and Society*, ed. Tanja A. Borzel and Rachel A. Cichowski (New York: Oxford University Press, 2003), 221–34.

50. Tanja A. Borzel, "Guarding the Treaty: The Compliance Strategies of the European Commission," in *The State of the European Union: Law, Politics, and Society*, ed. Tanja A. Borzel and Rachel A. Cichowski (New York: Oxford University Press, 2003), 205; Lisa Conant, *Justice Contained: Law and Politics in the European Union* (Ithaca, NY: Cornell University Press, 2002), 78.

51. Kelemen suggests another way in which the structure of the EU encourages the use of courts: the multiple-veto structure of EU institutions both makes it hard to revise policies once enacted into law and gives bureaucrats considerable discretion. This in turn encourages legislators to draft detailed laws and use courts to try to enforce them. Kelemen, "The EU Rights Revolution," 223. Robert A. Kagan and I have proposed similar accounts to explain the use of litigation in American public policy; see Burke, *Lawyers, Lawsuits and Legal Rights*, and Kagan, *Adversarial Legalism: The American Way of Law*.

52. David S. Clark reports that although the contingency fee is "making inroads," it is still banned in most civil law countries. Clark, "Comparing the Work and Organization of Lawyers Worldwide: The Persistence of Legal Traditions," in *Lawyers' Practice and Ideals: A Comparative View*, ed. John J. Barcelo and Roger C. Cramton (The Hague, Netherlands: Kluwer, 1999), 143–44.

53. Case C271/91 *Marshall v. Southampton & South West Area Health Authority* [1993] ECR I-4367.

54. Cases C-6 and 9/90 *Francovich and Bonifaci v. Italy* [1991] ECR I-5357.

55. Takis Tridimas, "Enforcing Community Rights in National Courts: Some Recent Developments," in *The Future of Remedies in Europe*, Claire Kirkpatrick, ed. (Portland, OR: Hart Publishing, 2000), 35–50.

56. Lisa Conant, *Justice Contained*, 61.

57. Keleman, "The EU Rights Revolution," 225–29.

58. See, for example, Lisa Waddington and Matthew Diller, "Tensions and Coherence in Disability Policy: The Uneasy Relationship between Social Welfare and Civil Rights Models of Disability in American, European and International Employment Law," in *Disability Rights Law and Policy: International and National Perspectives* (New York: Transaction, 2002), 241–308.



## THE HARE AND THE TORTOISE REVISITED

*The New Politics of Risk Regulation in Europe and the United States*

DAVID VOGEL

### INTRODUCTION

IN THIS CHAPTER, I DESCRIBE AND EXPLAIN AN IMPORTANT SHIFT IN THE PATTERN OF consumer and environmental protection policies in Europe and the United States. From the 1960s through the early 1990s, American regulatory standards tended to be more comprehensive, risk averse, and innovative than in either individual European countries or in the European Union (EU). However, since the mid-1990s, the reverse has often been the case: during the last fifteen years, a number of significant regulatory standards promulgated by the European Union have been more comprehensive, risk averse, and innovative than those adopted by the United States.

To borrow Lennart Lundqvist's formulation, which he used to contrast American and Swedish air pollution control standards during the 1970s, since around 1990 the American "hare" has been moving forward at a tortoise pace, while the pace of the European "tortoise" more closely resembles that of a hare.<sup>1</sup> To employ a different metaphor, in a number of significant respects European and American regulatory politics have traded places. Previously, regulatory issues were more politically salient and civic interests more influential in the United States than in most individual European countries or the European Union. More recently, the reverse has been true. Consequently, over the last ten to fifteen years, the locus of policy innovation with respect to many areas of consumer and environmental regulation has passed from the United States to Europe.

In an essay published in 1990 titled "American Exceptionalism and the Political Economy of Risk," Jasanoff writes that while "the U.S. process for making risk decisions impressed all observers as costly, confrontational . . . and unusually open to participation," in Europe, "policy decisions about risk, remained, as before, the