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## Disabilities

### The Legal Genealogy of the Duty to Accommodate American and Canadian Workers with Disabilities: A Comparative Perspective

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#### INTRODUCTION

Legal scholars of the Americans with Disabilities Act (ADA) of 1990<sup>1</sup> are well aware that judicial interpretation of Title I<sup>2</sup> of the ADA has been fraught with enormous difficulties for plaintiffs with disabilities. Under Title I, employees with disabilities are entitled to a variety of reasonable accommodations such as making facilities readily accessible, job restructuring, or modifying work schedules.<sup>3</sup> An individual has a disability under the ADA if he or she has a physical or mental impairment that substantially limits one or more of

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1. Americans with Disabilities Act, 42 U.S.C. § 12101 (2000).

2. Title I prohibits employment discrimination on the basis of disability by employers with fifteen or more employees. *Id.* §§ 12111–12117.

3. *Id.* § 12111(9).

that individual's major life activities, a record of such an impairment, or is regarded as having such an impairment.<sup>4</sup> As legal scholar Ruth Colker has documented, defendants have won the vast majority of employment discrimination cases under the ADA.<sup>5</sup> Indeed, a virtual cottage industry has sprung up in the law reviews devoted to evaluating alternative explanations for the persistence of courts to rule against disabled plaintiffs in what many scholars regard as a judicial backlash against the ADA.<sup>6</sup> Samuel Bagenstos has persuasively argued that disability rights advocates lobbying for the passage of the ADA themselves articulated a conservative philosophy that stressed how the ADA could be seen as a measure that would keep people with disabilities off of the welfare rolls.<sup>7</sup>

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4. *Id.* § 12102(2).

5. Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.—C.L. L. REV. 99, 99–100 (1999) (noting analysis of cases showing defendants winning more than 93% of reported cases at the trial level); Ruth Colker, *Winning and Losing Under the Americans with Disabilities Act*, 62 OHIO ST. L.J. 239, 248 (2001) (showing that, according to studies, appeals by defendant employers were far more likely to be successful than appeals by plaintiffs); *see also* Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19, 20 (2000) (noting that the ABA Commission on Physical and Mental Disability Law reached the same conclusions).

6. *See, e.g.*, Robert L. Burgdorf, Jr., “Substantially Limited” Protection from Disability Discrimination: *The Special Treatment Model and Misconstructions of the Definition of Disability*, 42 VILL. L. REV. 409, 529–33 (1997) (arguing that reasonable accommodation should not be misunderstood as special treatment); Diller, *supra* note 5, at 40 (suggesting the existence of backlash against conceptions of equality that require differential treatment); Arlene B. Mayerson, *Restoring Regard for the “Regarded as” Prong: Giving Effect to Congressional Intent*, 42 VILL. L. REV. 587, 609–10 (1997) (suggesting that courts have wrongly required plaintiffs to demonstrate the inability to work at jobs other than the job at issue in the litigation); Marta Russell, *Backlash, the Political Economy, and Structural Exclusion*, 21 BERKELEY J. EMP. & LAB. L. 335 (2000) (exposing the capitalist opposition to the ADA); Bonnie Poitras Tucker, *The ADA’s Revolving Door: Inherent Flaws in the Civil Rights Paradigm*, 62 OHIO ST. L.J. 335 (2001) (suggesting the inherent conflict between the civil rights paradigm and the duty to provide accommodation); Bonnie Poitras Tucker, *The Supreme Court’s Definition of Disability Under the ADA: A Return to the Dark Ages*, 52 ALA. L. REV. 321, 349 (2000) [hereinafter Tucker, *Supreme*] (arguing that the Supreme Court’s rule requiring plaintiffs to undertake mitigating measures is “more concerned with requiring people with disabilities to pull themselves up by their bootstraps” than recognizing civil rights). *But see* Sharona Hoffman, *Corrective Justice and Title I of the ADA*, 52 AM. U. L. REV. 1213, 1223–26 (2003) (arguing that the definition of disability in the ADA is unclear).

7. Samuel R. Bagenstos, *The Americans with Disabilities Act as Welfare Reform*, 44 WM. & MARY L. REV. 921, 927 (2003) (observing that “the ADA was sold to a significant extent as a means of welfare reform”).

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In this Article, I seek to provide a different perspective on this dilemma by analyzing the origins of the duty to accommodate people with disabilities in Canadian law in order to present a counter-factual argument on why the duty to accommodate has not flourished in American law. Comparative legal approaches have the merit of shedding fresh light on old legal problems that might not otherwise be considered.<sup>8</sup>

The duty to accommodate workers with disabilities in Canadian law has its origins in the duty to accommodate religious minorities in the workplace<sup>9</sup> as well as, ironically, the American legal theory of the disparate impact of discrimination.<sup>10</sup> As this principle of accommodation gradually began to be applied in numerous cases involving workers with disabilities, Canadian judges, human rights adjudicators, and labor arbitrators were readily able to grasp the concept of reasonable accommodations and to intelligently apply it to a variety of disability discrimination cases. These cases included disputes over seniority systems, pregnancy and maternity leave, and termination.<sup>11</sup> While the Canadian interpretation of the duty to accommodate workers with disabilities is *far* from perfect, it is evident that Canadian courts are far more generous to disabled workers than their American counterparts in the field of employment.<sup>12</sup>

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8. See, e.g., Stanley S. Herr, *Reforming Disability Nondiscrimination Laws: A Comparative Perspective*, 35 U. MICH. J.L. REFORM 305 (2001) (comparing disability rights legislation in the United States, the United Kingdom, and Israel); Rosemary C. Hunter & Elaine W. Shoben, *Disparate Impact Discrimination: American Oddity or Internationally Accepted Concept?*, 19 BERKELEY J. EMP. & LAB. L. 108, 111 (1998) (analyzing the reception of disparate impact doctrine outside the United States and commenting, “The international marketplace of legal ideas provides a means of testing the value of a concept . . .”).

9. See, e.g., Colleen Sheppard, *Of Forest Fires and Systemic Discrimination: A Review of British Columbia (Public Services Employee Relations Commission) v. B.C.G.S.E.U.*, 46 MCGILL L.J. 533, 544 (2001) (“[The Canadian] paradigm for thinking about adverse effect discrimination is religion and employment.”).

10. Hunter & Shoben, *supra* note 8, at 119–20.

11. Michael Lynk, *A Hardy Transplant: The Duty to Accommodate and Disability Rights in Canadian Labour Law*, 49 LAB. L.J. 962, 965 (1998) [hereinafter Lynk, *Hardy*] (describing the development of the duty to accommodate); Michael Lynk, *Disability and the Duty to Accommodate: An Arbitrator’s Perspective*, in 1 LAB. ARB. Y.B. 51, 58–61 (Kevin Whitaker et al. eds., 2002) [hereinafter Lynk, *Disability*] (describing the wide scope of the duty to accommodate in Canadian law).

12. See *infra* note 87 and accompanying text. I subsume both Canadian human rights

In contrast, American jurisprudence on the duty to accommodate religious minorities in the workplace has had a completely different and rather truncated history.<sup>13</sup> This no doubt reflects, in part, the complex historical legacy of the First Amendment and the potentially contradictory effects of the Establishment and Free Exercise Clauses.<sup>14</sup> Consequently, American jurists have been deprived of the opportunities for the intellectual cross-fertilization that permitted Canadian courts to develop a robust concept of reasonable accommodation in the field of disability discrimination. The duty to accommodate drafted into the ADA by Congress was closely associated in the minds of judges and the bar with the abridged and aberrant Title VII duty to accommodate workers with religious beliefs.<sup>15</sup> Despite congressional intent expressed in the statutory language to mandate significant changes in American workplaces and specific statements by Congress that the duty to accommodate under the ADA ought not to be interpreted in the same fashion as the narrow Title VII duty to accommodate, the duty to accommodate workers with disabilities emerged after the passage of the ADA as an anomaly, puzzling and unfamiliar to American judges.<sup>16</sup>

The intent of this exercise in tracing the legal genealogy of the concept of the duty to accommodate is not to advocate direct transplantation of Canadian jurisprudence into American disability rights law, especially because a crucial basis for the Canadian developments was transplantation of the American doctrine in the first place.<sup>17</sup> Moreover, Canadian disability rights advocates would readily attest to the myriad of physical and attitudinal barriers that remain in Canadian society. Rather, exploring the contours of the Canadian path to social justice and equality for people with disabilities provides a clearer understanding of why there has been

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adjudicators and labor arbitrators under the term “courts” because of their significant role in adjudicating disability discrimination cases in Canada.

13. See *infra* Part II.

14. *Id.*; see U.S. CONST. amend. I.

15. S. Elizabeth Wilborn Malloy, *Something Borrowed, Something Blue: Why Disability Law Claims Are Different*, 33 CONN. L. REV. 603, 627 (2001).

16. *Id.* at 628.

17. Lynk, *Hardy*, *supra* note 11, at 963 (noting how the Supreme Court of Canada specifically adopted American jurisprudence).

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such significant resistance to accepting reasonable accommodation requirements in American jurisprudence.<sup>18</sup> Also, by demonstrating how the notion of disability accommodation is unexceptionally regarded in a foreign but geographically proximate jurisdiction with a common law heritage and shared history, this exploration aims to resist the interpretations that regard the ADA as a statute that simply redistributes resources.<sup>19</sup>

In Part I, I trace the history of the concept of reasonable accommodation in leading Supreme Court of Canada decisions, and demonstrate how accommodation of workers with religious beliefs remained central to the development of the jurisprudence and helped make decision-makers more comfortable in adopting a broader theory of equality.<sup>20</sup> I contrast this in Part II with American jurisprudence on the duty to accommodate workers with religious beliefs, which has been plagued by concerns that the mandatory nature of reasonable accommodation in the workplace may infringe the Establishment Clause.<sup>21</sup> I conclude in Part III with some brief reflections on the implications of the argument.

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18. See, e.g., Samuel R. Bagenstos, "Rational Discrimination," *Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825 (2003) (challenging the distinction between antidiscrimination and accommodation mandates). But see Stewart J. Schwab & Steven L. Willborn, *Reasonable Accommodation of Workplace Disabilities*, 44 WM. & MARY L. REV. 1197 (2003) (arguing that reasonable accommodation must be regarded as distinct from Title VII antidiscrimination).

19. See Bagenstos, *supra* note 18, at 827 (noting critics who regard the ADA as a mandated benefits program). I nevertheless remain sympathetic to the perspective that *all* jurisprudence and statutes redistribute and allocate resources in some sense. See Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 888–90 (1987) (noting the arbitrary manner in which a particular right during the *Lochner* era was characterized as positive or negative). I simply reject the specious distinctions between the ADA and other civil rights legislation that are so common.

20. See *infra* Part I.

21. See *infra* Part II.

## I. THE DUTY TO ACCOMMODATE IN CANADIAN LAW

### *A. Key Background Factors*

Perhaps one of the central ironies of this Article is that Canadian human rights law struggled valiantly in the 1970s to adopt insights from United States courts to challenge what was then a very conservative body of precedents regarding discrimination in Canada.<sup>22</sup> One of these American doctrines was the disparate impact theory of discrimination, first articulated by the United States Supreme Court in *Griggs v. Duke Power Co.*<sup>23</sup> In *Griggs*, the Supreme Court unanimously held that the use of aptitude tests and a high school diploma requirement had a disparate impact on African American job applicants and therefore violated Title VII of the Civil Rights Act of 1964<sup>24</sup> notwithstanding the employer's lack of discriminatory intent.<sup>25</sup> It was not uncommon for provincial human rights tribunals in Canada in the 1970s to apply the disparate impact theory developed in *Griggs* in human rights complaints, only to have conservative courts later overturn the tribunal's decision on the grounds that a complainant must demonstrate an employer's intent to discriminate.<sup>26</sup>

Each Canadian province and territory, as well as the federally regulated sector, has human rights tribunals, specialized bodies that hear complaints made under the relevant jurisdiction's human rights code. These statutes prohibit discrimination on various grounds and entitle an individual to file a complaint with the relevant human rights commission which, in most provinces, investigates the complaint and attempts to mediate a settlement where appropriate.<sup>27</sup>

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22. Hunter & Shoben, *supra* note 8, at 119.

23. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

24. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

25. *Griggs*, 401 U.S. at 436.

26. Hunter & Shoben, *supra* note 8, at 119.

27. John-Paul Alexandrowicz, *A Comparative Analysis of the Law Regulating Employment Arbitration Agreements in the United States and Canada*, 23 COMP. LAB. L. & POL'Y J. 1007, 1028-29 (2002). However, British Columbia has abolished its human rights commission and maintained only a human rights tribunal. Philip Bryden & William Black, *Mediation as a Tool for Resolving Human Rights Disputes: An Evaluation of the B.C. Human Rights Commission's Early Mediation Project*, 37 U. BRIT. COLUM. L. REV. 73, 74 (2004). A

If the commission cannot settle a meritorious complaint, it may refer the complaint to an independent administrative tribunal specializing in human rights to adjudicate the complaint. Only in the relatively small number of cases where parties seek and are granted judicial review do courts become involved in ruling on human rights complaints.<sup>28</sup>

A fortuitous convergence of factors in the early 1980s allowed a robust duty to accommodate to develop in Canadian jurisprudence. Canada adopted a new constitution in 1982, including the Canadian Charter of Rights and Freedoms.<sup>29</sup> The Charter revolutionized the Canadian judiciary's traditionally conservative approach and led to the propagation of a number of new constitutional principles relating to equality, including the interpretation of human rights legislation as having quasi-constitutional status and the acceptance by Canadian courts that equality of opportunity does not always entail identical treatment.<sup>30</sup> Indeed, the Charter was the first constitutional document explicitly to enshrine equality for people with disabilities<sup>31</sup> after grassroots mobilization by disability rights activists remedied its deliberate exclusion from an earlier draft of the Charter.<sup>32</sup>

Moreover, the enumeration of "disability" as a ground for discrimination in a newly drafted constitution pre-empted arguments

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bill that heralds significant changes to Ontario's human rights system, which would have negative effects for individuals alleging discrimination, including the possible imposition of user fees in some cases, has been enacted by the Ontario legislature and Royal Assent was granted on December 20, 2006. See Human Rights Code, R.S.O., ch. H.19 (1990), amended by 2006 S.O., ch. 30 (Can.), available at [http://www.e-laws.gov.on.ca/DBLaws/Source/Statutes/English/2006/S06030\\_e.htm](http://www.e-laws.gov.on.ca/DBLaws/Source/Statutes/English/2006/S06030_e.htm). For a critique, see *What's Wrong with Bill 107?*, DAWN ONTARIO, July 5, 2006, <http://dawn.thot.net/aoda-july5-06.html#1>.

28. Alexandrowicz, *supra* note 27, at 1029, 1052. Human rights commissions in Canada, which enjoy true independence, should not be confused with American employer—controlled arbitrations.

29. Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.).

30. Lynk, *Hardy*, *supra* note 11, at 963.

31. Sarah Armstrong, *Disability Advocacy in the Charter Era*, 2 J.L. & EQUALITY 33, 35 (2003). However, the equality rights provision in the Charter did not take effect until 1985. Part I of the Constitution Act, being Schedule B to the Canada Act 1982, ch. 11, § 32(2) (U.K.).

32. WILLIAM BOYCE ET AL., A SEAT AT THE TABLE: PERSONS WITH DISABILITIES AND POLICY MAKING 49–65 (2001); David Lepofsky, *The Long, Arduous Road to a Barrier-Free Ontario for People with Disabilities: The History of the Ontarians with Disabilities Act—The First Chapter*, 15 NAT'L J. CONST. L. 125, 144–46 (2004).

for developing different levels of scrutiny for the various grounds of discrimination, which would have amounted to a hierarchy of rights.<sup>33</sup> While the Charter only applies in cases involving state action,<sup>34</sup> human rights legislation typically covers all services customarily available to the general public.<sup>35</sup> Ontario, Canada's most populous province, also prohibited disability discrimination in its human rights code in 1982, although again only after a concerted lobbying effort by disability rights activists.<sup>36</sup>

In the Charter era, labor arbitrators have acquired the ability to apply human rights jurisprudence, enabling unionized workers to obtain remedies against all prohibited grounds of discrimination (including disability discrimination) in the expedited and efficient forum of arbitration. Accordingly, arbitrators' decisions frequently reflect an intricate understanding of human rights and discrimination.<sup>37</sup> Given the comparatively high union density rate in Canada<sup>38</sup> this is no small victory.

The first Supreme Court of Canada decision to analyze comprehensively the issue of accommodation in the workplace in the context of religion was *Ontario Human Rights Commission v. Simpsons-Sears, Ltd. (O'Malley)*,<sup>39</sup> a decision that was released in 1985, *three years* after the enactment of the charter. In this case disability rights activists were fully aware of the confluence of issues and both the Canadian Association of the Mentally Retarded and the cross-disability advocacy organization, the Coalition of Provincial

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33. This dramatically contrasts with the American constitutional experience, which has reviewed alleged discrimination on the basis of disability using the deferential "rational basis" test, rather than the stricter scrutiny applied in race discrimination cases. *See, e.g., City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985).

34. Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11, § 32 (U.K.). For a recent discussion by the Supreme Court of Canada, see *R. v. Advance Cutting & Coring Ltd.*, [2001] S.C.R. 209, 307 (Can.).

35. *See, e.g., Canadian Human Rights Act*, R.S.C., ch. H 6, § 5 (1985).

36. Kaye Joachim, *Seniority Rights and the Duty to Accommodate*, 24 QUEEN'S L.J. 131, 134 (1998). Ontario's prohibition of disability discrimination occurred only after a concerted lobbying effort by disability rights activists. *See Lepofksy, supra* note 32, at 140–44.

37. Lynk, *Disability, supra* note 11, at 51–52.

38. Morley Gunderson, *Ten Ingredients of Labour Policy for the New World of Work*, 28 CANADIAN PUB. POL'Y 117, 119 (2002).

39. *Ont. Human Rights Comm'n v. Simpsons-Sears, Ltd. (O'Malley)*, [1985] 2 S.C.R. 536 (Can.).



Organizations of the Handicapped (now known as the Council of Canadians with Disabilities), successfully obtained intervener status and thus were allowed to make submissions to the Supreme Court in *O'Malley*.<sup>40</sup>

### B. O'Malley

In *O'Malley*, the Supreme Court of Canada unanimously ruled that a major retailer discriminated against a retail clerk belonging to the Seventh Day Adventist Church on the basis of her creed because it would not accommodate her principled refusal to work during the Sabbath (Friday nights and Saturdays) which occurred during the retailer's busiest sales periods.<sup>41</sup> The Court overruled the human rights tribunal and all appellate courts which had all originally found in favor of the retailer.<sup>42</sup> The Court held that the employer's actions violated the provision of the Ontario Human Rights Code that prohibited discrimination on the basis of creed.<sup>43</sup> There is no equivalent to the American Establishment Clause<sup>44</sup> in Canadian constitutional law. In fact, provincial funding for specified religious minorities to build parochial schools is constitutionally entrenched under the terms of the Constitution Act of 1867, Canada's founding constitutional document.<sup>45</sup> Therefore, the Supreme Court was not constitutionally limited concerning any improper establishment of religion and, absent the constitutional shackles of an Establishment Clause, was free to address the substantive issues in the case.

How did the Supreme Court of Canada reach a conclusion so at odds with the legal reasoning of the courts and human rights tribunal below it? The Court ruled, in an opinion by Justice McIntyre, that

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40. *Id.* at 545.

41. *Id.* at 560.

42. *Id.* at 542–45.

43. *Id.* at 545.

44. *See infra* Part II.

45. Constitution Act, 1867, 30 & 31 Vict. ch. 3, § 93 (U.K.), as reprinted in R.S.C No. 5 (Appendix 1985); Grant Huscroft, *Canadian and New Zealand Perspectives on the Separation of Church and State*, 41 BRANDEIS L.J. 507, 508–12 (2003). The arbitrary character of this framework can be seen by the fact that only Protestants in Roman Catholic-majority provinces and Roman Catholics in Protestant-majority provinces were entitled to such rights. *Contra* Lemon v. Kurtzman, 403 U.S. 602 (1971) (ruling that state funding of teachers in religious schools violated the Establishment Clause).

intent is not a required element to establish a claim of discrimination on the basis of creed or religion. The Court reasoned that, in many cases, establishing proof of employer intent would be an insurmountable problem for employees claiming discrimination and that identical treatment could result in inequality.<sup>46</sup> This decision was supplemented by a subsequent Supreme Court of Canada decision where the Court, considering whether a requirement that members of the British Columbia bar be Canadian citizens was discriminatory, observed that identical treatment frequently led to serious inequality.<sup>47</sup> *O'Malley* therefore articulated the notion of adverse effect discrimination where a rule that is not discriminatory on its face still effectively has a disproportionate or disparate impact on a particular group protected under human rights legislation.<sup>48</sup> While a rule prohibiting, for example, Latinos from employment in a workplace would clearly constitute direct discrimination, a minimum height standard for police officers that happened to have a disproportionately negative impact on female applicants (who are shorter than men on average) would be classified as adverse effect discrimination.<sup>49</sup> In reaching this conclusion, the Court explicitly relied on the United States Supreme Court's decision in *Griggs* and referred as well to the 1972 congressional amendment to the Civil Rights Act that established that the duty to accommodate prohibited discrimination based on religious observance and practice.<sup>50</sup>

Moreover, the Court asserted a liberal construction of human rights legislation, undoubtedly influenced by the recent adoption of the 1982 Charter of Rights.<sup>51</sup> Finally, the Court allayed employers' concerns that adopting this right would lead to judicial chaos by creatively adapting language from the Ontario Human Rights Code that provided a defense for defendants accused of discrimination. The defense stipulates that once a complainant has set out prima facie evidence of adverse effect discrimination, the employer may show

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46. Ont. Human Rights Comm'n v. Simpsons-Sears, Ltd. (*O'Malley*), [1985] 2 S.C.R. 536, 549 (Can.).

47. Law Soc'y of B.C. v. Andrews, [1989] 1 S.C.R. 143, 164 (Can.).

48. *O'Malley*, [1985] 2 S.C.R. at 551.

49. *Id.* at 551-52.

50. *See infra* Part II.

51. *O'Malley*, [1985] 2 S.C.R. at 546-47.

that the workplace rule constitutes a bona fide occupational qualification (BFOQ) that could not be altered without experiencing undue hardship.<sup>52</sup> In this case, the Court found that the employer, which had presented no such evidence, had not demonstrated that its workplace rule constituted a BFOQ and, therefore, to alter the rule would cause undue hardship.<sup>53</sup> As such, the Court found for the plaintiff.<sup>54</sup>

### C. Bhinder

In making the argument that religious cases played an important role in fostering Canadian legal doctrine I am not implying that there was a linear development of the law in favor of a broad and substantive duty to accommodate either workers with religious beliefs or with disabilities. Setbacks certainly occurred. In *Bhinder v. Canadian National Railway Co.*,<sup>55</sup> a contemporaneous decision to *O'Malley*, a Sikh electrician alleged that a new work rule requiring him to wear a hard hat at work violated his rights under the Canadian Human Rights Act<sup>56</sup> because his religion prohibits the removal of his turban.<sup>57</sup> The Supreme Court upheld a decision of the federal court of appeal that had set aside a decision of the human rights tribunal, finding that the employer had discriminated against Bhinder on the basis of religion.<sup>58</sup>

In an opinion also written by Justice McIntyre, the majority concluded that once a bona fide occupational requirement (BFOR) has been found to exist, there is no legal duty for the employer to accommodate.<sup>59</sup> In order to qualify as a BFOR, a workplace rule must meet both an objective and a subjective test.<sup>60</sup> The rule must

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52. *Id.* at 552, 555. The terms bona fide occupational qualification and bona fide occupational requirement (BFOR) are used interchangeably by Canadian courts and therefore I will do so as well.

53. *Id.* at 559–60.

54. *Id.*

55. *Bhinder v. Canadian Nat'l Ry. Co.*, [1985] 2 S.C.R. 561 (Can.).

56. Canadian Human Rights Act, R.S.C., ch. H 6 (1985).

57. *Bhinder*, [1985] 2 S.C.R. at 566. This complaint was made under the federal Canadian Human Rights Act because railways are one of the few federally regulated industries.

58. *Id.* at 589.

59. *Id.* at 589–90.

60. *Ont. Human Rights Comm'n v. Borough of Etobicoke*, [1982] S.C.R. 202, 208 (Can.).

relate to the performance of the work at hand and be reasonably necessary to ensure the efficient and economical performance of the job, without endangering the employee, fellow workers, or the general public.<sup>61</sup> The rule must also be applied honestly, in good faith, and with a sincere belief that it is in the interest of reasonably efficient work performance with safety considerations in mind.<sup>62</sup> There must be no indication that the rule is adopted to circumvent the purpose of human rights legislation.<sup>63</sup> The Court held that the employer's hard hat rule, designed to improve safety in the workplace, qualified as a BFOR.<sup>64</sup>

On the one hand, this ruling continued to apply the *Griggs* disparate impact framework, known as adverse effect discrimination in Canadian law.<sup>65</sup> However, the Court reasoned that because of differences in the statutory language between the Ontario and federal human rights legislation there cannot be a duty to accommodate if the workplace rule in question constitutes a BFOR.<sup>66</sup> At no point did the Court analyze any negative implications of establishing rights related to religion because such an approach is outside the Canadian paradigm of constitutional interpretation.

#### D. Central Alberta Dairy Pool

As legal commentators have noted, *O'Malley* was silent on the critical question of what actually constitutes undue hardship.<sup>67</sup> This was largely because the employer in that case had not made any arguments addressing the issue.<sup>68</sup> In *Alberta Human Rights*

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61. *Id.*

62. *Id.*

63. *Id.*

64. *Bhinder v. Canadian Nat'l Ry. Co.*, [1985] 2 S.C.R. 561, 587–88 (Can.).

65. *Id.* at 589.

66. *Id.* at 589–90. In fact, *Bhinder* was the leading precedent in most Canadian jurisdictions because most relevant legislation contained BFOR defenses. See Alvin J. Esau, "Islands of Exclusivity": *Religious Organizations and Employment Discrimination*, 33 U. BRIT. COLUM. L. REV. 719, 780 (2000).

67. Katherine Swinton, *Accommodating Equality in the Unionized Workplace*, 33 OSGOODE HALL L.J. 703, 713 (1995).

68. *Ont. Human Rights Comm'n v. Simpsons-Sears, Ltd. (O'Malley)*, [1985] 2 S.C.R. 536, 559–60 (Can.).

*Commission v. Central Alberta Dairy Pool*,<sup>69</sup> another Supreme Court of Canada decision dealing with workplace accommodations in the religious context, the Court elaborated on the principles set out in *O'Malley* and rectified the confusion wrought by *Bhinder*. In *Dairy Pool*, the Court allowed an appeal from lower court decisions that had overturned the decision of a human rights board of inquiry ruling that the complainant had been discriminated against in violation of Alberta's human rights statute.<sup>70</sup> The Court restored the board of inquiry's decision that the employer had violated the employee's human rights by failing to accommodate his requests for time off during days of religious significance.<sup>71</sup>

The complainant in *Dairy Pool* worked at a milk processing plant.<sup>72</sup> After converting to a religious denomination that observed a Saturday Sabbath, the complainant requested his Sabbath as a holiday and his employer agreed.<sup>73</sup> He also requested two days around Easter as a holiday, including the Monday following Easter, and offered to work extra days to make up the lost time.<sup>74</sup> The employer granted him one of these days but maintained that Mondays were particularly busy days at the plant.<sup>75</sup> The employer warned the complainant that a failure to report on the Monday following Easter would result in his dismissal.<sup>76</sup> When the complainant failed to show up, he was immediately terminated.<sup>77</sup> Although he was successful with his human rights complaint before a board of inquiry, appellate courts overruled its decision on the grounds that, under *Bhinder*, there was no duty to accommodate because the employer's work schedule constituted a BFOR.<sup>78</sup>

The majority of the Supreme Court of Canada, in an opinion by Justice Wilson, held that the application of *Bhinder* was illogical because it was unclear that the failure to use a hard hat actually posed

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69. *Alta. Human Rights Comm'n v. Cent. Alta. Dairy Pool*, [1990] 2 S.C.R. 489 (Can.).

70. *Id.*

71. *Id.* at 521.

72. *Id.* at 494.

73. *Id.* at 494–95.

74. *Id.* at 495.

75. *Id.*

76. *Id.* at 495–99.

77. *Id.* at 496.

78. *Id.* at 500.

a genuine safety risk, and because the whole point of establishing the category of adverse effect discrimination was to permit accommodation.<sup>79</sup> Therefore, a rigid rule prohibiting accommodation when the challenged workplace regulation constitutes a BFOR was counterproductive and illogical. Accordingly, the Court partially overruled *Bhinder*,<sup>80</sup> holding that the employer had a duty to accommodate the complainant.<sup>81</sup> The facts presented a clear instance of adverse effect discrimination, and the employer had not suffered undue hardship in attempting to accommodate the complainant.<sup>82</sup> Again, the religious nature of the complainant's request was relevant only in the sense that discrimination on the basis of religion was a prohibited ground under the province's human rights legislation.<sup>83</sup>

How far does this duty to accommodate extend? The Court articulated six factors to consider when evaluating whether a requested accommodation constitutes undue hardship.<sup>84</sup> These factors, which have become a touchstone for subsequent legal analysis in disability discrimination cases, are (i) financial cost, (ii) impact on a collective bargaining agreement, (iii) problems of employee morale, (iv) interchangeability of the workforce and facilities, (v) size of the employer's operations, and (vi) safety.<sup>85</sup> The relative weight accorded to each factor varies depending on the facts of a particular case.<sup>86</sup>

#### *E. Refining the Disability Rights Jurisprudence*

Disability rights jurisprudence has applied the Supreme Court of Canada's decision in *Dairy Pool* in the context of providing reasonable accommodations to workers with disabilities in increasingly complex and sophisticated ways.<sup>87</sup> Indeed, an arbitration

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79. *Id.* at 512–13.

80. *Id.* at 516–17.

81. *Id.* at 520–21.

82. *Id.*

83. Individual's Rights Protection Act, R.S.C., ch. I 2, § 7(1) (1980).

84. *Dairy Pool*, [1990] 2 S.C.R. at 520–21.

85. *Id.*

86. Lynk, *Disability*, *supra* note 11, at 64–65.

87. See, e.g., Marilyn Ginsburg & Catherine Bickley, *Accommodating the Disabled: Emerging Issues Under Human Rights Legislation*, 1 CANADIAN LAB. L.J. 72 (1992).

board held that a nurse with back injuries ought to be accommodated even though the employer insisted that she could not perform any of the available nursing jobs.<sup>88</sup> The arbitration board held that the employer was required to examine how, without suffering undue hardship, it could modify or rebundle any of the existing nursing jobs so that the disabled nurse could return to work.<sup>89</sup> An arbitration panel employed a similarly broad interpretation of disability rights, holding that a worker who experienced epileptic seizures while working at his job as a quality control tester in a Coca-Cola bottling plant had to be reinstated and accommodated.<sup>90</sup> The arbitrator held that, although there was some risk of serious injury to the plaintiff, he was entitled to decide whether to assume the risk of working in the plant.<sup>91</sup>

These illustrations are not intended to present a comprehensive portrait of the duty to accommodate workers with disabilities in Canadian law. Rather, they confirm how, once established, the existing body of law relating to accommodating religious minorities was effectively and creatively adapted by advocates for workers with disabilities to secure vital accommodations. Having the luxury of judicial officials, human rights adjudicators, and arbitrators accustomed to the expansive notion of accommodation and equality established in the law of religious minorities, it was relatively easy to make the discursive leap to disability discrimination. Nevertheless, some issues, such as the confusing and ambiguous distinction between adverse effect and direct discrimination, remained. For instance, a workplace rule imposing a mandatory pregnancy test could be characterized as either direct discrimination against women or a neutral rule affecting all workers which has an adverse effect on women. Given that the duty to accommodate may or may not apply

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88. Calgary Dist. Hosp. Group & United Nurses of Alta., [1994] 41 L.A.C. 319, 326–27 (Can.).

89. *Id.*; see also Lynk, *Disability*, *supra* note 11, at 70–71.

90. T.C.C. Bottling Ltd. & R.W.D.S.U., [1993] 32 L.A.C. 73, 91–94 (Can.).

91. *Id.*; see also Lynk, *Disability*, *supra* note 11, at 72 (discussing the significance of the *T.C.C. Bottling* arbitration case). *Contra* Chevron U.S.A., Inc. v. Echazabal, 536 U.S. 73 (2003) (holding that an employer was entitled under the ADA to reject an applicant with liver disease on the grounds that his health posed a direct threat to the applicant).

depending on how this arbitrary and unstable distinction is resolved, this issue caused many observers considerable consternation.<sup>92</sup>

The expansive interpretation of disability accommodations reached its climax in the Supreme Court of Canada's decision in *British Columbia Public Service Employee Relations Commission v. B.C.G.S.E.U. (Meiorin)*.<sup>93</sup> In this case, the Court restored an arbitrator's decision that an aerobic fitness standard for firefighters constituted adverse effect sex discrimination because it disproportionately affected female firefighters.<sup>94</sup> The case is rightly regarded as a landmark decision because it developed a new test that eliminated the often difficult and arbitrary distinction between adverse effect and direct discrimination.<sup>95</sup> Under the *Meiorin* test, a decision-maker must make three inquiries: (i) whether the employer adopted the challenged standard for a purpose rationally connected to the performance of the job; (ii) whether the employer chose the standard in an honest and good faith belief that it was required to fulfill the work related purpose; and (iii) whether the standard is reasonably necessary in that it would be impossible to accommodate an individual employee without imposing undue hardship upon the employer.<sup>96</sup> The employer must pass all three parts of the test in order to demonstrate undue hardship.<sup>97</sup>

There is a remarkable shift in the ruling from the idea of accommodation as an exception to a sensible norm made for specific atypical individuals to challenging the legitimacy of the entire rule or standard in a given workplace in order to include religious minorities and people with disabilities as a welcome part of the community on an equal basis.<sup>98</sup> This is illustrated by the Court's thoughtful discussion of methods of challenging systemic discrimination<sup>99</sup> and

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92. Sheppard, *supra* note 9, at 538–39 (analyzing the Supreme Court of Canada's decision in *Meiorin*).

93. B.C. Pub. Serv. Employee Relations Comm'n v. B.C.G.S.E.U. (*Meiorin*), [1999] 3 S.C.R. 3 (Can.).

94. *Id.* at 44–45.

95. Sheppard, *supra* note 9, at 538–39.

96. *Meiorin*, [1999] 3 S.C.R. at 32–33.

97. *Id.*

98. *Id.* at 25 (“[I]f a standard is classified as being ‘neutral’ at the threshold stage of the inquiry, its legitimacy is never questioned.”).

99. *Id.* at 24–27.



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the Court's eloquent insistence that employers "must build conceptions of equality into workplace standards."<sup>100</sup> Moreover, the third branch of the *Meiorin* test is a demonstrably high standard to meet.<sup>101</sup>

Supreme Court of Canada decisions since *Meiorin* have continued to promote an innovative substantive concept of equality. In *British Columbia Superintendent of Motor Vehicles v. British Columbia Council of Human Rights*,<sup>102</sup> the Supreme Court of Canada applied *Meiorin* to a claim that a blanket rule prohibiting people with homonymous hemianopia, a visual impairment, from holding driver's licenses violated such a person's rights under the British Columbia Human Rights Code.<sup>103</sup> The Court, in allowing the complainant's appeal, held that this prohibition was not reasonably necessary to accomplish the goal of highway safety when feasible alternatives, such as individualized testing, were readily available.<sup>104</sup> Another important Supreme Court of Canada decision providing an expansive conception of disability discrimination was *Quebec Human Rights and Youth Rights Commission v. Montreal*.<sup>105</sup> In this case, the Court held that various plaintiff employees with medical conditions which caused no functional limitations whatsoever were still entitled to file disability discrimination complaints under Quebec's Charter of Human Rights and Freedoms.<sup>106</sup> The Court sensitively articulated a broad definition of disability that did not require the presence of functional limitations and permitted decision-makers to consider a subjective perception of disability.<sup>107</sup> While many challenges certainly remain and barriers for people with disabilities in Canada continue to be profound,<sup>108</sup> Canadian courts have demonstrated

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100. *Id.* at 38.

101. See, e.g., Lynn A. Iding, *In a Poor State: The Long Road to Human Rights Protection on the Basis of Social Condition*, 41 ALTA. L. REV. 513, 518 (2003) (arguing that a defendant must meet a very high impossibility standard under the third branch of the *Meiorin* test).

102. *B.C. Superintendent of Motor Vehicles v. B.C. Council for Human Rights*, [1999] 3 S.C.R. 868 (Can.).

103. *Id.* at 869–73.

104. *Id.* at 887–92.

105. *Que. Comm'n of the Rights of the Person & the Rights of Youth v. Montreal*, [2000] 1 S.C.R. 665 (Can.).

106. *Id.* at 691.

107. *Id.* at 697.

108. For an anthology presenting a critical perspective of the state of disability policy in

promising signs on the issue of workplace accommodations in an otherwise bleak policy environment for advocates of social justice.<sup>109</sup>

## II. THE DUTY TO ACCOMMODATE IN AMERICAN LAW

### *A. Origins of the Duty to Accommodate*

The American experience with regard to the issue of accommodating religious minorities in the workplace is a dramatic contrast. I argue in this section that the jurisprudential stillbirth of American religious accommodation law precluded the creative applications that were illustrated in the discussion of Canadian disability rights law in Part I. I stress that the purpose of this part is not to provide a comprehensive treatment of the complex and voluminous debates surrounding the scope of the Establishment Clause.<sup>110</sup> Rather, I seek only to demonstrate that the narrow interpretations of the duty to accommodate workers with disabilities under the ADA have, in part, to do with the fact that cross-fertilization with the duty to accommodate workers' religious beliefs was never possible because this jurisprudence has not reached fruition.

Within a few years of the passage of Title VII in 1964,<sup>111</sup> the Equal Employment Opportunity Commission (EEOC) released the first guidelines for the prohibition of religious discrimination under Title VII.<sup>112</sup> The guidelines stated that employers had a duty to accommodate religious employees and prospective employees without suffering undue hardship.<sup>113</sup> These guidelines received an initially frosty reception by the courts which, for example, rejected

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Canada, see generally CRITICAL DISABILITY THEORY: ESSAYS IN PHILOSOPHY, POLITICS, POLICY, AND LAW (Dianne Pothier & Richard Devlin eds., 2006). I have authored a chapter in this book.

109. See Fiona Sampson, *Globalization and the Inequality of Women with Disabilities*, 2 J.L. & EQUALITY 16 (2003) (outlining the negative impact of globalization for Canadian women with disabilities).

110. For a typical discussion of the scope of the Establishment Clause, see Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555 (1991).

111. 42 U.S.C. § 2000(e) (2000).

112. Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605.2 (2004).

113. *Id.*

claims by religious employees that they could not work overtime.<sup>114</sup> Congress, at the instigation of West Virginia Senator Jennings Randolph, amended Title VII in 1972 to include an explicit duty to accommodate in subsection 701(j) and to provide a broad definition of “religion” that includes religious observance and practice.<sup>115</sup> Nevertheless, despite the release of new EEOC guidelines in 1980,<sup>116</sup> judicial interpretation of the duty to accommodate has remained restrictive as courts struggle with giving effect to both the Free Exercise Clause and the Establishment Clause.<sup>117</sup> In one glaring and extreme example, a district court held that where a Jehovah’s Witness plaintiff claimed that he could not perform required work duties involving the raising and lowering of the American flag, inquiry into the tenets of a plaintiff’s religion violated the Establishment Clause and Title VII was therefore unconstitutional.<sup>118</sup> Although the Third

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114. See *Dewey v. Reynolds Metals Co.*, 429 F.2d 324, 335 (6th Cir. 1970), *aff’d per curiam*, 402 U.S. 689 (1971), stating “Congress did not intend that employers or labor organizations should be harassed with respect to claims not involving discrimination.” This quotation speaks volumes about the depth of analysis of American courts at the time, notwithstanding the Supreme Court’s pre-Title VII decision in *Sherbert v. Verner*, 374 U.S. 398 (1963), that South Carolina violated the Free Exercise Clause by denying the appellant unemployment compensation because her faith as a Seventh-Day Adventist prohibited her from working on Saturdays. *But see* *Cummins v. Parker Seal Co.*, 516 F.2d 544 (6th Cir. 1975), *aff’d per curiam*, 429 U.S. 65 (1976) (ruling that Title VII did not violate the Establishment Clause).

115. Debbie N. Kaminer, *Title VII’s Failure to Provide Meaningful and Consistent Protection of Religious Employees: Proposals for an Amendment*, 21 BERKELEY J. EMP. & LAB. L. 575, 583–85 (2000) [hereinafter Kaminer, *Failure*]; Debbie N. Kaminer, *The Work-Family Conflict: Developing a Model of Parental Accommodation in the Workplace*, 54 AM. U. L. REV. 305, 333–34 (2004) [hereinafter Kaminer, *Work-Family*]; Robert A. Caplen, Note, *A Struggle of Biblical Proportions: The Campaign to Enact the Workplace Religious Freedom Act of 2003*, 16 U. FLA. J.L. & PUB. POL’Y 579, 585 (2005).

116. Karen Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII*, 76 TEX. L. REV. 317, 385–87 (1997).

117. Roberto L. Corrada, *Religious Accommodation and the National Labor Relations Act*, 17 BERKELEY J. EMP. & LAB. L. 185, 255 (1996). “Although a legislative enactment favoring religion over private interests may survive an Establishment Clause challenge, it is evident that such a law must be extremely limited to pass constitutional muster.” *Id.* In this Article, I have ignored Title VII cases dealing with the accommodation requirements that a worker pay union dues because such payments violate his or her religious beliefs.

118. *Gavin v. Peoples Natural Gas Co.*, 464 F. Supp. 622, 632 (W.D. Pa. 1979), *vacated*, 613 F.2d 482 (3d Cir. 1980). The district court in *Gavin* reasoned that if an individual is able to determine his own beliefs, the amendment would create due process problems, which, in conjunction with other case law, “might lead to the result that only those with easily recognizable, or common, religious beliefs would be protected.”

Circuit Court of Appeals vacated and remanded this decision<sup>119</sup> it still illustrates how courts, mindful of the constitutional dictates of the Establishment Clause, are reluctant to give broad interpretation to Title VII's duty to accommodate.

### B. Hardison

The United States Supreme Court has rarely addressed the issue of religious accommodation in the workplace and the scope of the undue hardship defense. In perhaps the most well-known decision on this issue, *Trans World Airlines, Inc. v. Hardison*,<sup>120</sup> the Court held that there was no violation of the duty to accommodate under Title VII when a newly converted member of the Worldwide Church of God was dismissed from his employment as a clerk at the airline's maintenance base after he refused to work a shift that conflicted with his Saturday Sabbath.<sup>121</sup> The employer had successfully accommodated the worker in a previous position through a shift change, but he transferred to a better job where his seniority, as negotiated between the employer and the union was inadequate to win him shifts that complied with his religious beliefs.<sup>122</sup> The employer maintained that it would be unacceptable for the plaintiff to work only four days per week because he performed essential work that had to be completed.<sup>123</sup> Additionally, bringing in an employee from another department to cover the shift would under staff another crucial operation of the airline and constitute undue hardship.<sup>124</sup> Finally, the employer maintained that it was undue hardship for it to hire someone at premium wages who did not normally work on Saturdays.<sup>125</sup>

The majority opinion, written by Justice White, overturned the decision of the Court of Appeals for the Eighth Circuit and held that

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119. *Id.*

120. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977).

121. *Id.* at 81. For a detailed discussion, see Corrada, *supra* note 117, at 195–201.

122. *Hardison*, 432 U.S. at 67–68.

123. *Id.* at 68–69.

124. *Id.*

125. *Id.*

the employer and union did not breach Title VII.<sup>126</sup> The majority concluded that the EEOC guidelines, the wording of the statute, and the legislative history were not useful guides in evaluating the extent of the duty to accommodate.<sup>127</sup> The Court applied its own analysis, concluding that the duty to accommodate does not require an employer to take measures inconsistent with a collective bargaining agreement, such as disrupting the seniority system.<sup>128</sup> Therefore, any accommodation cost that is greater than a *de minimis* expense for the employer constitutes undue hardship because it treats employees differently on the basis of religious belief.<sup>129</sup>

Justice Marshall, joined by Justice Brennan, dissented.<sup>130</sup> He argued that even though a requested accommodation involves treating religious employees differently, it need not be automatically rejected.<sup>131</sup> Moreover, although questioning whether the majority's definition of undue hardship under Title VII was too restrictive,<sup>132</sup> the dissent determined that the cost of accommodations in this case, that is the costs of a replacement or of transferring the plaintiff back to his original department,<sup>133</sup> would have been *de minimis*.<sup>134</sup>

The majority's decision to construct a narrow duty to accommodate is based on an utterly impoverished conception of the meaning of equality.<sup>135</sup> Interpreting legal doctrine is hardly a science; rules are not fixed in stone to be read by courts as if they had some pre-determined meaning. As the legal realists so famously demonstrated, the interpretation of the scope of any given legal rule is inevitably a reflection of the particular facts of a case and the broader policy issues at stake.<sup>136</sup> A great deal of indeterminacy in the

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126. *Id.* at 83–85.

127. *Id.* at 74–75.

128. *Id.* at 79.

129. *Id.* at 84–85.

130. *Id.* at 87.

131. *Id.* at 87–88 (Marshall, J., dissenting) (noting that the majority's interpretation “makes a mockery of the statute”). The dissent concluded that, given the facts, it was not necessary to resolve the complex First Amendment issues in this case. *Id.*

132. *Id.* at 92.

133. *Id.* at 95–96.

134. *Id.* at 92.

135. *See id.* at 84–85 (majority opinion) (finding substantively different treatment among workers on the basis of religion to be unacceptable).

136. Gerald B. Wetlaufer, *Systems of Belief in Modern American Law: A View from*

application of any given legal principle or precedent is therefore unavoidable because they are malleable.<sup>137</sup> This however, also means that decision-makers must stay within a certain framework to shape the contours of the law in accordance with their conception of the broader policy issues in play.

Along these lines, the majority in *Hardison* was unwilling to infringe upon seniority rights that had been established as a result of negotiations authorized under and regulated by the Railway Labor Act.<sup>138</sup> In fact, the Court noted that seniority provisions are always included in collective bargaining agreements and described those agreements as constituting the core of national labor policy.<sup>139</sup> Although the Court only obliquely referred to the Establishment Clause,<sup>140</sup> I think that it is fair to assert that it was very clearly a factor in formulating the narrow duty to accommodate at every stage of its analysis.<sup>141</sup> The constant fear that any legal rights given to accommodating workers with religious beliefs might illegitimately infringe upon the constitutional dictate that Congress not establish any religion understandably led the Court to act cautiously in delineating the rights of religious workers. Truncated at an early moment of life, the possibility for a comprehensive and sophisticated duty to accommodate jurisprudence that might have influenced later ADA case law on accommodation thus died at birth.

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*Century's End*, 49 AM. U. L. REV. 1, 75 (1999) ("Legal realists seem predisposed to construct legal premises by reference to the particular factual circumstances of a case, to in—the—world policies and purposes attributed to the authors of textual authority, and to the decision-makers' own understanding of the public interest, often as informed by the social sciences."). But see Brian Leiter, *American Legal Realism*, in THE BLACKWELL GUIDE TO PHILOSOPHY OF LAW AND LEGAL THEORY 50, 52 (William Edmundson & Martin Golding eds., 2004) ("[The legal realist] claim cannot be . . . that any strict or loose construal of precedent is *always* valid. It must only be that lawyers and judges have this interpretive latitude often enough to inject a considerable degree of indeterminacy into law.").

137. See Michael J. Gerhardt, *The Limited Path Dependency of Precedent*, 7 U. PA. J. CONST. L. 903, 938 (2005) ("The indeterminacy of the law is widely accepted among legal scholars.").

138. 29 U.S.C. §§ 151–167 (2006); see, e.g., Corrada, *supra* note 117, at 196.

139. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 79 (1977).

140. *Id.* at 69–70 n.4.

141. See Malloy, *supra* note 15, at 627–28; Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 704 (1992) ("A more burdensome accommodation requirement [in *Hardison*] would violate the Establishment Clause.").

### C. Ansonia and Estate of Thornton

The second United States Supreme Court decision to consider the scope of Title VII's duty to accommodate workers with religious beliefs was *Ansonia Board of Education v. Philbrook*.<sup>142</sup> In *Ansonia*, the Court reviewed a decision of the Court of Appeals for the Second Circuit reversing the district court's ruling that a schoolteacher failed to demonstrate a violation of his civil rights under Title VII when his employer prohibited him, in compliance with a collective bargaining agreement, from taking paid leave to participate in religious observances for more than three days per year.<sup>143</sup> The plaintiff was a member of the Worldwide Church of God, which required him to miss work on approximately six mandatory holy days per year.<sup>144</sup> He consequently lost pay on these additional days and also had to fund the cost of a substitute teacher.<sup>145</sup> He proposed a number of solutions including using personal leave days for religious observance, notwithstanding the terms of the collective bargaining agreement. Alternatively, he suggested that he receive full pay for the additional days of religious observance.<sup>146</sup>

The district court held that the plaintiff had failed to show a violation of Title VII because he had not been placed in a position where he had to choose between violating the tenets of his religion or losing his job.<sup>147</sup> A majority of the Court of Appeals for the Second Circuit reversed and remanded for further proceedings.<sup>148</sup> It held that a prima facie case of discrimination is established where: (a) an employee's bona fide religious belief conflicts with an employment requirement, (b) the employee has informed the employer of the belief, and (c) the employee was disciplined for failing to comply with the requirement despite the conflict.<sup>149</sup> The Court of Appeals ruled that the plaintiff had demonstrated all of these conditions, and

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142. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986).

143. *Id.* at 62–66.

144. *Id.* at 62–63.

145. *Id.* at 64–65. The plaintiff attempted other solutions to get around the collective bargaining agreement including scheduling medical appointments on holy days. *Id.* at 64.

146. *Id.*

147. *Id.* at 65.

148. *Id.*

149. *Id.* at 65–66.

that where there are conflicting ideas about the most appropriate accommodation the employee's requested accommodation ought to be selected unless it amounts to undue hardship.<sup>150</sup> It remanded the case for determination of whether the employee's proposed accommodation actually constituted an undue hardship.<sup>151</sup>

The United States Supreme Court majority, in an opinion by Chief Justice Rehnquist, held that an employer meets its obligations to accommodate a religious employee under Title VII wherever it offers the employee a reasonable accommodation.<sup>152</sup> The employer need not demonstrate that the employee's preferred accommodation constitutes undue hardship.<sup>153</sup> Therefore, the Court upheld the decision of the Court of Appeals, though with a different line of reasoning that rejected the substantive duty to accommodate suggested in the EEOC guidelines themselves.<sup>154</sup> The Supreme Court remanded the case to the district court to determine whether the accommodation constituted undue hardship.<sup>155</sup> *Ansonia* is even more restrictive than *Hardison* because, under *Ansonia*, the employer does not even have to consider the accommodation proposed by the employee.<sup>156</sup> In light of such a restrictive interpretation it is unsurprising that the duty to accommodate did not flourish.

Justice Marshall dissented in *Ansonia*, arguing for a more comprehensive interpretation to the scope of the duty to accommodate in concordance with his dissent in *Hardison*.<sup>157</sup> The dissent argued that where the employer proposed accommodations do not fully resolve the conflict between the worker's religion and his employment obligations, the employer should be bound to consider any reasonable proposals made by the employee up to the point of undue hardship.<sup>158</sup> Unlike the majority, Justice Marshall granted

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150. *Id.* at 66.

151. *Id.*

152. *Id.* at 68.

153. *Id.*

154. *Id.* at 69.

155. *Id.* at 70.

156. Sharon Rabin-Margalioth, *Anti-Discrimination, Accommodation, and Universal Mandates—Aren't They All the Same?*, 24 BERKELEY J. EMP. & LAB. L. 111, 127–28 (2003).

157. *Ansonia*, 479 U.S. at 73–74 (Marshall, J., concurring in part and dissenting in part).

158. *Id.* at 72–73; see also Kaminer, *Failure*, *supra* note 115, at 595–96 (analyzing Marshall's *Ansonia* dissent).



appropriate weight to the EEOC guidelines, noting that the Court itself had recently relied on them.<sup>159</sup> Therefore, he would have remanded the case for factual findings with respect to both the employer's leave policies and the reasonableness and potential hardship of the plaintiff's proposals.<sup>160</sup> Justice Marshall's proposed substantive duty to accommodate might have positively influenced the development of ADA jurisprudence if it had been followed by a majority of the Court.

In *Estate of Thornton v. Caldor*,<sup>161</sup> a majority of the Court, in an opinion by Chief Justice Burger, held that a Connecticut statute that allowed workers the right not to work on the Sabbath and to obtain remedies for actions taken by employers in response to such refusals was unconstitutional.<sup>162</sup> The Court held that by placing the interests of Sabbath observers above secular interests, the Connecticut statute violated the Establishment Clause.<sup>163</sup> This ruling again blocked the possibility of developing the notion of accommodation through case law, a discursive practice that might have assisted courts in understanding the duty to accommodate when it was later mandated under the ADA.

#### D. Other Courts

The same inflexible and unimaginative interpretations that guided the *Hardison*, *Ansonia*, and *Estate of Thornton* decisions may be seen in Title VII duty to accommodate cases that came before lower courts. For instance, in *United States v. Board of Education for the School District of Philadelphia*,<sup>164</sup> the Court of Appeals for the Third Circuit held that the firing of a Muslim schoolteacher who wore Muslim attire to her workplace was justified because it would constitute undue hardship under Title VII's duty to accommodate by exposing the school board to liability under a Pennsylvania state law requiring public school teachers to refrain from wearing religious

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159. *Ansonia*, 479 U.S. at 73–74.

160. *Id.* at 75.

161. *Estate of Thornton v. Caldor*, 472 U.S. 703 (1985).

162. *Id.* at 710–11.

163. *Id.* at 709–11.

164. *United States v. Bd. of Educ. for the Sch. Dist. of Phila.*, 911 F.2d 882 (3d Cir. 1990).

clothing and insignia.<sup>165</sup> The court held that that the goal of creating an atmosphere of religious neutrality was legitimate and justified the firing of the teacher.<sup>166</sup> Because the undue hardship bar was set so low, the Title VII duty to accommodate jurisprudence never truly flourished, and decisions such as this one, where a teacher's attire hardly constitutes a major employer accommodation and would be costless, became enshrined in law.

In an even more puzzling case, a district court held that the employer did not violate its Title VII duty to accommodate when it refused to allow a Sikh restaurant manager an exemption from its national grooming policy that prohibited beards, a policy that conflicted with the manager's religious beliefs.<sup>167</sup> The court expressed concern that such an exemption constituted an unreasonable preference, even though the beard had unique religious significance for the Sikh plaintiff. Indeed, the court went so far as to announce that, had it been required to reach the question, it would have held that Title VII may not be constitutionally applied to require the defendants to accommodate the plaintiff.<sup>168</sup> It is hard not to see the Establishment Clause lurking in the background here, subverting potentially creative solutions that could facilitate a substantive duty to accommodate workers with religious beliefs.

#### *E. Title VII Jurisprudence and the ADA*

Decisions in lower courts regarding the duty to accommodate religious employees indicate that many of the problems that would later arise in ADA jurisprudence reflect limitations that the Title VII duty to accommodate jurisprudence did not resolve.<sup>169</sup> For instance, a minority of courts have held that an employee's duty to cooperate with the employer in finding a reasonable accommodation extends to

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165. *Id.*; see also Engle, *supra* note 116, at 392–93.

166. *Philadelphia*, 911 F.2d at 890.

167. *EEOC v. Sambo's, Inc.*, 530 F. Supp. 86 (N.D. Ga. 1981).

168. *Id.* at 92; see also Engle, *supra* note 116, at 394.

169. For more general arguments that the interpretation of the ADA has been marred by the improper use of Title VII jurisprudence, see Samuel A. Marcossan, *Of Square Pegs and Round Holes: The Supreme Court's Ongoing "Title VII-ization" of the Americans with Disabilities Act*, 8 J. GENDER RACE & JUST. 361 (2004).

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where an employee may be required to compromise her or his religious beliefs.<sup>170</sup> Thus, in *Chrysler Corp. v. Mann*,<sup>171</sup> the Court of Appeals for the Eighth Circuit, in reversing a district court's ruling that the employer discriminated against the plaintiff, held that the employee wrongfully refused to compromise his religious beliefs.<sup>172</sup> This is particularly revealing because it betrays an attitude that religious beliefs reflect a malleable, conscious choice by the religious plaintiff that may be altered on a whim. Religion may be contrasted with other characteristics such as race which courts tend to regard as immutable.<sup>173</sup>

Moreover, the same reasoning which seeks to establish the artificial and misconceived dichotomy between status and conduct mars much of the dysfunctional ADA jurisprudence on mitigating measures. Mitigating measures are appliances, medications, and even the body's own compensating mechanisms.<sup>174</sup> In a trilogy of cases that have been criticized by many advocates of people with disabilities,<sup>175</sup> *Sutton v. United Air Lines, Inc.*,<sup>176</sup> *Murphy v. United Parcel Service, Inc.*,<sup>177</sup> and *Albertson's, Inc. v. Kirkingburg*,<sup>178</sup> the United States Supreme Court formulated a complex set of rules narrowing the definition of disability for ADA purposes to account for the effect of mitigating measures.<sup>179</sup> These cases suggest that a disabled person who refuses to use recommended mitigating measures that ostensibly reduce that person's impairment must demonstrate that the refusal was objectively reasonable in order to

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170. Kaminer, *Failure*, *supra* note 115, at 599.

171. *Chrysler Corp. v. Mann*, 561 F.2d 1282 (8th Cir. 1977).

172. *Id.* at 1286; *see also* *Johnson v. Halls Merch., Inc.*, 49 F.E.P. Cases 527 (W.D. Mo. 1989) (ruling that an employee who prefaced many sentences with references to Jesus may have had a duty to compromise her religious beliefs).

173. Kaminer, *Failure*, *supra* note 115, at 599. Some scholars have suggested the distinction between status and conduct has undermined Title VII jurisprudence. *See* Engle, *supra* note 116, at 353 ("For the most part, then, a line between status and volitional conduct separates employer actions that are prohibited by Title VII from those that fall under the discretion of the employer, outside of Title VII's scope.").

174. Mark C. Weber, *The Americans with Disabilities Act and Employment: A Non-Retrospective*, 52 ALA. L. REV. 375, 378 (2000).

175. *See, e.g.*, Tucker, *Supreme*, *supra* note 6.

176. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999).

177. *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999).

178. *Albertson's Inc. v. Kirkingburg*, 527 U.S. 555 (1999).

179. Tucker, *Supreme*, *supra* note 6, 370-72.

qualify as having a disability.<sup>180</sup> The failure of courts to establish strong, theoretically grounded, and well-articulated rights for religious minorities under Title VII cascaded into the problematic ADA jurisprudence.

Worse, ADA jurisprudence has occasionally relied on case law narrowly interpreting Title VII's duty to accommodate workers with religious beliefs, particularly when seniority rights under a binding collective bargaining agreement conflict with the ADA's duty to accommodate.<sup>181</sup> In *Eckles v. Consolidated Rail Corp.*,<sup>182</sup> the Court of Appeals for the Seventh Circuit held that the ADA does not require disability accommodations that are inconsistent with the collective bargaining agreement.<sup>183</sup> In *Eckles*, a yardmaster with epilepsy sought an exemption from the collective bargaining agreement's seniority provision in order to work on a shift, at the expense of a more senior employee, that better met his disability accommodation needs. The union initially agreed to accommodate, but ultimately refused.<sup>184</sup> The plaintiff sued the employer and the union under the ADA.<sup>185</sup> Although the ADA's duty to accommodate is based on Title VII's duty to accommodate workers with religious beliefs,<sup>186</sup> the Senate and House reports on the ADA make clear that the *de minimis* standard in *Hardison* was not to apply to the ADA.<sup>187</sup> Nevertheless, the Seventh Circuit inexplicably relied on the narrow Title VII duty to accommodate workers with religious beliefs in concluding that there was no duty to accommodate the plaintiff's disability because of the rigid rule that reasonable accommodation requirements must yield to seniority rights under the parties'

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180. *Id.* at 372.

181. Malloy, *supra* note 15, at 630–40 (2001) (discussing *Eckles v. Consol. Rail Corp.*, 94 F.3d 1041 (7th Cir. 1996)); see also Ravi A. Malhotra, *The Duty to Accommodate Unionized Workers with Disabilities in Canada and the United States: A Counter-Hegemonic Approach*, 2 J.L. & EQUALITY 92, 129–32 (2003); Condon A. McGlothlen & Gary N. Savine, *Eckles v. Consolidated Rail Corp.: Reconciling the ADA with Collective Bargaining Agreements: Is This the Correct Approach?*, 46 DEPAUL L. REV. 1043 (1997).

182. *Eckles v. Consol. Rail Corp.*, 94 F.3d 1041 (7th Cir. 1996).

183. *Id.* at 1051 (“[T]he ADA does not require disabled individuals to be accommodated by sacrificing the collectively bargained, bona fide seniority rights of other employees.”).

184. *Id.* at 1044.

185. *Id.*

186. Malloy, *supra* note 15, at 627.

187. *Eckles*, 94 F.3d at 1048–49.

collective bargaining agreement.<sup>188</sup> The majority of circuits have reached the same conclusions as the Seventh Circuit in *Eckles*.<sup>189</sup> Clearly, the narrow Title VII duty to accommodate jurisprudence has cast a long, dysfunctional shadow on ADA jurisprudence.

*F. Renaud and Barnett: A Pair of Contrasts*

Finally, the profound limitations of *Hardison*, *Ansonia*, and their progeny are demonstrated by contrasting them with both Canadian jurisprudence on the accommodation of a religious employee requesting an accommodation inconsistent with the collective bargaining agreement and the similar problem of when a duty to accommodate under the ADA violates an established seniority system. The Supreme Court of Canada addressed this question in *Central Okanagan School District No. 23 v. Renaud*.<sup>190</sup> The Court in *Renaud*, overturning a decision of the British Columbia Court of Appeal, held that both an employer and a union discriminated against a school custodian who was a Seventh Day Adventist when the employer dismissed him from his job after the union blocked its attempt to construct a work shift that would have complied with his religious obligations but would have also violated the collective bargaining agreement at the same time.<sup>191</sup> The Court, in an opinion by Justice Sopinka, held that both the union and the employer have a clear duty to accommodate the employee where the union is a party to discrimination.<sup>192</sup> A union may discriminate simply through its acquiescence to a discriminatory rule in the collective bargaining agreement, or by impeding an employer's attempt to accommodate a

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188. Malloy, *supra* note 15, 633–34. The Court exercised dubious judgment in relying on the Rehabilitation Act, the more restrictive statute that governed disability discrimination prior to the enactment of the ADA.

189. Willis v. Pac. Mar. Ass'n, 244 F.3d 675, 680 (9th Cir. 2001); Davis v. Fla. Power & Light Co., 205 F.3d 1301, 1307 (11th Cir. 2000); Feliciano v. Rhode Island, 160 F.3d 780, 787 (1st Cir. 1998); Cassidy v. Detroit Edison Co., 138 F.3d 629, 634 (6th Cir. 1998); Kralik v. Durbin, 130 F.3d 76, 81–83 (3d Cir. 1997); Foreman v. Babcock & Wilcox Co., 117 F.3d 800, 810 (5th Cir. 1997); Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 1114 (8th Cir. 1995); Milton v. Scrivner, Inc., 53 F.3d 1118, 1125 (10th Cir. 1995).

190. Cent. Okanagan Sch. Dist. No. 23 v. Renaud, [1992] 2 S.C.R. 970 (Can.).

191. *Id.* at 970–71.

192. *Id.* at 989–90.

member.<sup>193</sup> Moreover, the Court explicitly rejected the *de minimis* standard for evaluating undue hardship in *Hardison* in favor of a more substantive duty to accommodate.<sup>194</sup> This broad duty to accommodate paved the way for the same principles to be applied in disability rights cases.

In contrast, in *U.S. Airways, Inc. v. Barnett*,<sup>195</sup> a United States Supreme Court decision concerning the conflict between seniority rules and the duty to accommodate workers with disabilities under the ADA, the majority, in an opinion by Justice Breyer, held that while accommodation requests that violate seniority rules are generally unreasonable, plaintiffs could demonstrate special circumstances which warrant a breach of the seniority policies.<sup>196</sup> In *Barnett*, an airline cargo handler injured his back and requested a transfer to a mailroom position that would better accommodate his physical disabilities.<sup>197</sup> Although he was transferred, he did not have sufficient seniority to prevent more senior employees from bidding for his highly coveted mailroom position, and he consequently lost his job.<sup>198</sup> Remarkably, this was not a negotiated seniority system; it was imposed by the employer.<sup>199</sup> Yet, the Court was clear that accommodations generally could not unreasonably interfere with seniority systems.<sup>200</sup> Worse, it relied partially on the poorly reasoned Seventh Circuit decision in *Eckles*.<sup>201</sup> This narrow view of the scope of the ADA has been the typical judicial interpretation of the statute. However, this interpretation was not inevitable. An interpretation based on a more comprehensive duty to accommodate was possible. The judicial failure to develop a duty to accommodate in American

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193. *Id.* at 990–91. Nevertheless, the Court acknowledged that the employer is usually in a better position to implement accommodations, since it is in charge of the workplace. *See id.* at 992.

194. *Id.* at 983 (“[T]here is good reason not to adopt the ‘*de minimis*’ test in Canada. *Hardison* was argued on the basis of the establishment clause of the First Amendment of the U.S. Constitution and its prohibition against the establishment of religion.”).

195. *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002).

196. *Id.* at 394.

197. *Id.*

198. *Id.*

199. *Id.* at 404.

200. *Id.* at 394 (holding that “the seniority system will prevail in the run of cases”).

201. *Id.* at 403–04.

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jurisprudence should be seen as partially intertwined with the failure of the Title VII religious accommodation duty to flourish.

## CONCLUSION

In this Article, I have attempted to document, through an examination of Canadian legal developments, how the truncated development of the duty to accommodate workers with religious beliefs in America has been one contributing factor to the current dysfunctional state of ADA jurisprudence. Ironically, at least one court has ruled that the Title VII duty to accommodate is itself unconstitutional under the Supreme Court's tedious Eleventh Amendment jurisprudence.<sup>202</sup> This speaks volumes about the state of civil rights law in the United States. It is not certain that initiatives such as the Workplace Religious Freedom Act (WRFA) currently before Congress<sup>203</sup> (which would broaden the duty to accommodate contained in subsection 701(j)<sup>204</sup>), even if enacted and upheld as constitutional,<sup>205</sup> would do much at this late date to influence the development of an already compromised ADA jurisprudence. Moreover, I am far from unaware that many social justice advocates would strongly oppose any weakening of the Establishment Clause. In the long term, if the Establishment Clause dilemma can be overcome, I believe that using the campaign for the WRFA and the broadening of religious accommodation to alter judicial interpretations of the ADA holds greater potential to educate the public about more expansive conceptions of equality than constantly battling those who regard legislation such as the ADA as inefficient economic interventions.<sup>206</sup>

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202. *Holmes v. Marion County Office of Family & Children*, 349 F.3d 914, 921–22 (7th Cir. 2003).

203. Workplace Religious Freedom Act, S. 677, 109th Cong. (2005).

204. Kaminer, *Work-Family*, *supra* note 115, at 338; Monica Davey & Pam Belluck, *Pharmacies Balk on After—Sex Pill and Widen Fight*, N.Y. TIMES, Apr. 19, 2005, at A1.

205. *See City of Boerne v. Flores*, 521 U.S. 507 (1997) (striking down the Religious Freedom Restoration Act of 1993 as unconstitutional), *superseded by statute*, Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803.

206. *See, e.g.*, RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (1992).

Nevertheless, the WRFA is a stopgap measure. The need to convince policy makers to adopt a much broader and richer conception of equality is evident. Courts should appreciate that equality does *not* necessarily mean identical treatment in order for disabled people and religious minorities to flourish. While Canadian jurists should be grateful for the importation of profoundly influential American insights into disparate impact analysis during the tumultuous 1970s,<sup>207</sup> the Canadian conceptions of substantive equality developed since those days can teach our American cousins much. Even without having adopted federal ADA-type legislation, Canadian jurisprudence has managed to make significant strides on equality for workers with disabilities.

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207. For a classic account of social protest from below in one major American city in the early 1970s, see generally DAN GEORGAKAS & MARVIN SURKIN, *DETROIT: I DO MIND DYING* (2d ed. 1998).