Book Review: Disabled Policy: America’s Programs for the Handicapped

Jerry L. Mashaw
Yale Law School

Follow this and additional works at: https://digitalcommons.law.yale.edu/fss_papers

Part of the Law Commons

Recommended Citation
https://digitalcommons.law.yale.edu/fss_papers/1144

This Article is brought to you for free and open access by the Yale Law School Faculty Scholarship at Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship Series by an authorized administrator of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.
contains much constructive thought from some of the best minds in the field as to how the law can be adapted to facilitate more cooperation and less industrial warfare in the future.

Leroy S. Merrifield
Lobingier Professor Emeritus
National Law Center
The George Washington University
Washington, D.C.


This somewhat mistitled book deals much less with labor relations and employment practices in construction than with the public regulation of those practices. Its avowed purpose is to guide the reader through the "distinct and arcane body of labor law" that has grown up around the industry. The book addresses topics that have special application to construction (hiring halls, double-breasting, prevailing wage laws, secondary boycotts, "hot cargo" agreements) as well as some more general subjects (duty to bargain, wages and hours legislation, EEO, workplace safety). It is more a desk manual than a scholarly treatise, long on description and short on analysis or critique. An apt subtitle would be, "Everything the Construction Manager Should Know About Labor and Employment Law."

Given its objective, the book succeeds. Most legal topics important to construction labor matters are covered, usually with remarkable thoroughness. (The only omission that occurs to this reviewer is the regulation of pension funds.) There is, of course, the problem of timeliness, since much of the discussion focuses on what are often volatile applications of statutory language and Supreme Court holdings by lower courts and administrative agencies, and even by the time this review sees print the book will be four years old. To the extent that Construction Labor Relations is looked upon by users as an authoritative guide to current law on a narrow issue, it may be wanting. To the extent the effort is seen, as the author represents it, as "outlining" the basic labor and employment policy issues dealt with by administrative agencies and courts and [providing] a framework for evaluating events after [the book's] publication," it will serve admirably for some time.

Howard G. Foster
Professor of Industrial Relations
State University of New York
Buffalo

Economic and Social Security and Substandard Working Conditions


Disabled Policy operates at two distinct levels. First, the book is a history of American programs for the disabled (sometimes called "the handicapped"). The programs discussed are workers' compensation, Social Security disability pensions, vocational rehabilitation, and the programs that promote "independent living" for the handicapped, particularly the anti-discrimination provisions of section 504 of the Rehabilitation Act of 1973. Berkowitz divides these programs into two groups: the "ameliorative" programs—workers' compensation and disability insurance—and the "corrective programs"—vocational rehabilitation and programs promoting rights for the handicapped. Each program is discussed in turn.

As a brief political history of America's major disability programs, the book is quite successful. Berkowitz has an engaging style and is attentive to the sometimes bizarre events and strong personalities that make legislative politics so intriguing. I find his treatment of events that I know well somewhat cavalier, but this is a minor complaint about a history that is quite brief, yet broad in its sweep and interesting in its detail. Less forgivable, in my view, are the omission of any discussion of veterans' programs (from which the more general disability programs might learn a great deal) and a somewhat irritating tendency to swing back and forth in time, thus requiring the reader to work quite hard to maintain a sense of the chronology of events. Nevertheless, there is much to learn from Berkowitz's account of how our current disability programs were developed.

The second level of Berkowitz's story is policy analytic rather than historical. And here he takes an approach with which I am deeply
unsympathetic, an approach so common in public policy debates that I am tempted to give it a generic title: "The Basic Contradiction Thesis." This thesis almost always takes the same form.

First, the analyst notes that public programs in a particular policy domain have multiple purposes. Second, he or she notes that not all of these purposes can be achieved simultaneously. Third, the analyst points out that one or more of the programs under discussion are failing to live up to their stated goals or aspirations (a statement that is, of course, always true of every program). Next, the gap between aspiration and accomplishment is ascribed to the basic (or "inherent," or "fundamental") contradiction in the programmatic goals that have been chosen. Finally, there is a call for a unified vision that will permit us to cure the defects in existing policies.

The basic contradiction is stated quite early in Disabled Policy:

When disability policy is viewed whole, a fundamental contradiction appears. Simply put, this nation spends most of the money allocated to disability on programs that provide the handicapped tickets out of the labor force. At the same time, policymakers fund training programs and pass civil rights laws as an inducement for the handicapped to enter the labor force. Because disability has been subsumed under so many different headings, the contradiction goes largely unnoticed.

As is customary with contradiction theorists, Berkowitz also finds other anomalies or disjunctions between or among the programs under analysis. For example, the fact that the existing programs use at least three different definitions of disability or handicap is also seen as a barrier to "a more rational disability policy." And there are, of course, contradictions within the programs themselves. The continuance of a significant level of legal dispute concerning workers' compensation awards contradicts a basic purpose of that program, to reduce litigation. The Social Security disability program retains its strange administrative arrangement, adjudication almost wholly by state agencies, in the face of an obvious desire to establish a national program of income maintenance. Vocational rehabilitation programs only reluctantly attempt to rehabilitate those most in need of their services. Section 504 seems to treat as discrimination distinctions that would generally be thought to be based on real differences in situation. And so on.

I certainly would not claim that the programs under discussion are without flaws, indeed serious ones. Nor would I deny that some of those problems may be the result of contradictory features or tendencies within or among programs. My point is only this: to call attention to the contradictions in policies does not make a major contribution to either policy analysis or political reform. All programs are compromises. Hence, all programs contain "contradictions." Moreover, these contradictions are not accidental. They respond to sets of political preferences. Unless those political preferences have changed, to point out a contradiction is not to point out a mistake that will lead political actors to do better next time around.

Berkowitz makes much of the tension between the ameliorative programs, which provide incentives to withdraw from both the work force and other mainstream activities, and the corrective programs, the primary aim of which is to reintegrate the handicapped into society. He recognizes, however, that workers who are "prematurely old" and for whom the only sensible public policy is a pension require programs different from those for handicapped persons who need rehabilitative services and the relaxation of environmental barriers in order that they can live lives closer to the non-handicapped norm. The question is how to structure and implement policy such that it sorts individuals into the appropriate groups. Appropriate sorting of potential beneficiaries is monumentally difficult, as the literature on disability adjudication has been at great pains to explain. But noting that this problem rests on a "contradiction" does not advance the ball.

Disabled Policy has, however, another policy theme that seems much more fruitful. Berkowitz is convinced that American public policy has paid too much attention to the ameliorative side of disability policy and too little to corrective measures that would rehabilitate or "mainstream" the handicapped. In this he may be right. Unfortunately, the arguments for that position in his book are too underdeveloped to be entirely convincing.

Similarly, Berkowitz's proposals in his final chapter—for example, to begin experience-rating Social Security Disability Insurance, to shift more of our effort from individual rehabilitation to creating the conditions for independent living, and to make the pension system more flexible to include interim benefits—may well point us in an appropriate direction. But the facts and figures that inhabit Berkowitz's programmatic histories do not provide a solid foundation upon which to build such recommendations. In that sense, the
political history gets in the way of the policy analysis. Perhaps the attempt to do political history and reformist policy analysis simultaneously confronts, well—dare I say it?—a basic contradiction.

Jerry L. Mashaw

William Nelson Cromwell
Professor of Law
Professor, Institute for Social and Policy Studies
Yale University


Monroe Berkowitz—the Dean of economists in the field of disability policy—and his colleague M. Anne Hill have edited a very good collection of papers on the interaction of labor market policies and policies targeted on disabled workers. The papers were first presented at an April 1985 conference. Although the book is not free of the unevenness characteristic of conference volumes, the papers in it have clearly been polished in response to discussants' comments and carefully edited. In addition, the editors include a helpful overview essay.

The primary purpose of the volume is to elaborate the "economic model" of disability and to propose research consistent with that model. Emphasized by the economic model are the important roles of economic incentives, human capital, and demographic and socioeconomic variables in explaining the several aspects of labor market performance affecting working-age people with disabilities. Four broad subjects are covered by the papers: (1) Social Security Disability Insurance and workers' compensation policies and their effects on the supply of and the demand for the labor services of impaired workers; (2) the potential of public programs designed to efficiently increase the job opportunities of disabled workers (including an evaluation of the costs of displacing able-bodied workers that are appropriately charged to such programs); (3) the economic effects of regulations designed to reduce barriers to the employment of impaired workers (the "accommodation" and "discrimination" issues); and (4) the lessons for U.S. disability policy of the efforts by the western European welfare states to deal with both income support and employment policies targeted on the disabled. The papers are a mix of "review and critique" essays, policy analysis, and new research, but nearly all of them attempt both to draw the lessons of what is learned (or known) for policy and to identify research priorities.

As in most conference volumes, some papers are gems, moving the field along or bringing to light important research findings. In this book, my favorites are papers by Carolyn Weaver, Jonathan Leonard, John Worrall and Richard Butler, and Robert S. Smith.

Weaver's policy analysis essay examines the Social Security Disability Insurance program using an insurance model. In this framework, a wide variety of issues are encountered—moral hazard, adverse selection, measurement of the degree of disablement, disincentives for work, and administrative control in a public supply context. Weaver convincingly demonstrates that the most important problems confronted by existing social legislation arise largely because both Congress and the program's administrators fail to consider the program from an insurance perspective.

Leonard reviews the rapid decline in the labor force participation rates of older men and the large number of studies that have attempted to identify the causal role of public disability-related transfers. Leonard effectively explicates and critiques several econometric studies on this subject, and also calculates and compares the various elasticities yielded by those studies (an analysis that could have been enhanced by somewhat more guidance on the relative "believability" of the various estimates). Although the estimates have a wide range, they all point to rather sizable labor supply reductions attributable to the generosity of expected benefits relative to labor market income. Leonard concludes that the growth of benefits relative to potential earnings "can explain nearly half of the puzzling decline in labor force participation rates" (p. 84). My own reading of that literature, with adjustments for the relative strengths of the various studies, suggests that the impact Leonard ascribes to rising benefits is at the upper limit of plausible estimates.

Worrall and Butler do much the same for the workers' compensation program as Leonard does for disability insurance. Claim filing, the duration of nonwork spells, and probably risk-taking and injuries all appear to be sensitive to the level of expected benefits. The studies Worrall and Butler examine appear to be weaker methodologically than those reviewed by Leonard; again, however, the reader