Missouri Law Review

Volume 48
Issue 4 *Fall 1983*

Article 4

Fall 1983

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DISTRIBUTIVE JUSTICE AND THE PHYSICALLY DISABLED: MYTH AND REALITY

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When I consider how my light is spent
Ere half my days, in this dark world and wide,
And that one talent which is death to hide
Lodged with me useless, though my soul more bent
To serve therewith my Maker, and present
My time account, lest He returning chide,
"Doth God exact day-Labor, light denied [?]"

John Milton[1]

By 1652, at the age of forty-four, John Milton was totally blind. He was a prolific literary craftsman of Renaissance England. Yet his attitudes on blindness do not reflect those of his time. Milton's answer to his rhetorical question is "no"; God does not require from man what he has not equipped him to do. For God to exact day-Labor from man were He to deny the necessary light would be unjust under any definition.

Justice is perverted when its intention is unachieved or, like Milton's query, when its goals are frustrated by impossibility. In the latter case, to say there is justice when it cannot occur is hypocrisy. Unfortunately, many physically disabled persons face Milton's dilemma. This Article focuses on the myth in distributive justice when it is applied to help the disabled overcome their handicaps. The myth is that John Rawls's theory of distributive justice[2] creates greater access to the private marketplace when applied to physically disabled persons in the workplace. The fact is that the theory shrouds the reality that the private marketplace is dominated by theories of economic utility and efficiency. All that applied distributive justice can deliver for the physically disabled is forced mainstreaming into the public sector only.

This Article has three parts: a synoptic view of distributive justice; the assumed relationship of distributive justice to moral motivations for grant-

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1. *On His Blindness,* in AN ANTHOLOGY OF WORLD POETRY 1107 (M. Van Doren ed. 1928).

2. J. RAWLS, A THEORY OF JUSTICE (1971).

in-aid programs, such as the Rehabilitation Act of 1973;[3] and some attitudes about the physically disabled as they emerge from applied distributive justice.

Rawls's theory of distributive justice supposes that all who constitute society, when placed behind a "veil of ignorance"[4] (a hypothetical time before each knows his place in society),[5] will prefer a set of arrangements that improves the lot of the worst off in society; this assumes that each is averting a risk.[6] The choice evolves from one of two principles:[7] one requires equality in the assignment of basic rights; the other holds that social and economic equalities are just only if they result in benefits for everyone, particularly the least advantaged.[8] Injustice occurs when equalities do not benefit all.[9] There is no injustice, according to this theory, if a few earn greater benefits, provided that the disadvantaged enjoy some improvement.[10]

Two serial principles form the basis for distributive justice:[11] "All social values—liberty and opportunity, income and wealth, and the basis of self respect—are to be distributed equally unless an unequal distribution of any, or all, of these values is to everyone's advantage."[12] This concept of a distribution of the primary goods in society does not limit or restrict the numerous possibilities of inequality. When members of society give up a right through distribution to the least advantaged, it is plausible that they might be compensated by resulting social gain, improving everyone's position[13] and resulting in justice, according to Rawls.

Rawls contrasts his theory of "justice with fairness" with utilitarianism.[14] The essence of utilitarianism is "that society is rightly ordered, and therefore just, when its major institutions are arranged so as to achieve the greatest net balance of satisfaction summed over all the individuals belong-

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3. Pub. L. No. 93-112, 87 Stat. 355 (codified as amended in scattered sections of 29 U.S.C.).

4. J. RAWLS, *supra* note 2, at 12.

5. R. POSNER, AN ECONOMIC ANALYSIS OF LAW 346 (2d ed. 1977).

6. *Id.* at 349.

7. J. RAWLS, *supra* note 2, at 14.

8. *Id.* at 14-15.

9. *Id.* at 62.

10. *Id.* at 15.

11. *Id.* at 60. There are two "principles of justice":

> First: each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.
>
> Second: social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all.

Id.

12. *Id.* at 62, 303.

13. *Id.* at 62.

14. *Id.* at 52.

ing to it."[15] If justice, according to Rawls, is the protection of the equal rights of all over a collective social good, he must supplant utility, which requires some men to accept lower expectations so that others may receive greater advantages.[16]

Finally, Rawls extends social contract theory to bargain and agreement "on the principles of justice for the basic structure of society."[17] This agreement must precede any decision about background institutions which form government.[18] Thus, justice becomes the first virtue of social institutions.[19]

Critics argue that the underlying principles of Rawlsian justice have no relationship to socio-economic causation.[20] Above all, the complex formulations of his justice theory are "in the end a theory of pure distribution."[21] The most important primary good in the Rawlsian distribution scheme is self-respect or self-esteem—a realization of life goals.[22]

Rawlsian distributive justice is praised for supplying a theoretical and philosophical justification for previously unsupported political beliefs held by many well-intentioned people.[23] His work's widespread readership, acclaim, and attention are due largely to a substantial political creed built on a theory of justice which is really a moral policy.[24] Vocational rehabilitation is one area that distributive justice theory offers a philosophical justification for political action.

National attention on rehabilitation began in 1918 with a proposal directed toward veterans.[25] In 1920, Congress passed an act promoting vocational rehabilitation for persons disabled in industry or in any legitimate occupation.[26] This act, one of the country's oldest grant-in-aid programs, is the progenitor of our recent rehabilitation schemes. Since the act became law, over three million people have been rehabilitated, at a cost effectiveness ratio ranging from 1:3 to 1:5.[27] The political justification for these appropriations, made during a time of national economic distress, was the

15. D. SCHAEFER, JUSTICE OR TYRANNY? A CRITIQUE OF JOHN RAWLS'S "THEORY OF JUSTICE" 21 (1979).

16. *Id.* at 22. *See* J. RAWLS, *supra* note 2, at 178.

17. D. SCHAEFER, *supra* note 15, at 24.

18. J. RAWLS, *supra* note 2, at 11.

19. *Id.* at 586.

20. R. WOLFF, UNDERSTANDING RAWLS 202 (1977). *See also* Tushnet, *Post Realist Scholarship*, 15 J. SOC'Y PUB. TCHRS. L. 20 (1980).

21. R. WOLFF, *supra* note 20, at 210.

22. J. RAWLS, *supra* note 2, at 440.

23. D. SCHAEFER, *supra* note 15, at 5.

24. *Id.* at 9.

25. *See* Vocational Rehabilitation Act, ch. 107, 40 Stat. 617 (1918).

26. Vocational Rehabilitation Act, ch. 219, 41 Stat. 735 (1920) (repealed 1973).

27. S. REP. NO. 93-318, 93d Cong., 1st Sess. 10-11, *reprinted in* 1973 U.S. CODE CONG. & AD. NEWS 2073, 2084-85.

need to serve "a very needy portion of the population."[28] As these programs expanded, critics charged that they failed to reach the most needy—the severely handicapped.[29] Rehabilitation programmers used ease-of-service as a criterion for selecting the target population, excluding many who were difficult to reach.[30] The result was functional utilitarianism.

The goal of rehabilitation services is to improve the lives and the livelihoods of those served.[31] The Rehabilitation Act of 1973 mandates that the target population include the most severely handicapped;[32] this is a departure from utilitarianism and a switch to functional serving of the worst off. Though Congress intended that the program remain vocationally oriented, it recognized that some people were so severely handicapped that they may never achieve employment. Nevertheless, the severely handicapped were not to be denied services.[33] If this new emphasis were placed into the scheme of distributive justice, the Act's history would confirm that it benefits all, while serving the worst off. Although the severely handicapped may never be employed, providing services to them may free members of the handicapped individual's family to return to employment. The result would be increased tax revenues and a rise in the family's standard of living.[34] These gains are collective benefits, realized consistently with the Rawlsian model. Whatever the moral impetus, the social legislation is justifiable independent of political beliefs.

Many well-intentioned people seek to force society (particularly the economic sector) to mainstream the physically disabled into the private sector. Their arguments[35] are based primarily on utilitarianism. Proponents of forced private sector mainstreaming suggest expanding Title VII of the

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28. *Id.* at 10, *reprinted in* 1973 U.S. CODE CONG. & AD. NEWS at 2085.

29. A "severe handicap" means

> the disability which requires multiple services over an extended period of time and results from amputation, blindness, cancer, cerebral palsy, cystic fibrosis, deafness, heart disease, hemiplegia, mental retardation, mental illness, multiple sclerosis, muscular dystrophy, neurological disorders (including stroke and epilepsy), paraplegia, quadriplegia and other spinal cord conditions, renal failure, respiratory or pulmonary dysfunction.

29 U.S.C. § 706(12) (1976).

30. S. REP. NO. 93-318, 93d Cong., 1st Sess. 12, *reprinted in* 1973 U.S. CODE CONG. & AD. NEWS 2073, 2092-95.

31. *Id.* at 10, *reprinted in* 1973 U.S. CODE CONG. & AD. NEWS at 2078.

32. *See* 29 U.S.C. § 701(1) (1976).

33. S. REP. NO. 93-318, 93d Cong., 1st Sess. 12, *reprinted in* 1973 U.S. CODE CONG. & AD. NEWS 2073, 2092.

34. *Id., reprinted in* 1973 U.S. CODE CONG. & AD. NEWS at 2092-93. *See* Note, *Potluck Protections for Handicapped Discriminatees: The Need to Amend Title VII to Prohibit Discrimination on the Basis of Disability*, 8 LOY. U. CHI. L.J. 814, 825 (1977).

35. *See, e.g.,* Yuckman, *Employment Discrimination and the Visually Impaired,* 39 WASH. & LEE L. REV. 69 (1982).

Civil Rights Act of 1964[36] to reach where the Rehabilitation Act of 1973 and other legislation do not.[37] The proponents' goals conform to the theory of distributive justice:

> However much mingled with talk about burden on commerce, however much buttressed with common law precedents and founded in history, however much explicitly designed to strike down discriminations based on race, color, religion, national origin and sex, however much a product of the modern-day civil rights revolution, aimed principally at securing equal rights . . . , the statutes of the states in their present form, the Civil Rights Act of 1964, the congressional debates and proceedings on it, and the judicial opinions validating its constitutionality—all, implicitly and explicitly, necessarily and unavoidably, are built upon a recognition of the absolute importance to the nation, community and individual, of persons having, holding, and enjoying rights of access to the community and to the public, quasi-public, and private instrumentalities necessary to make those rights effective.[38]

It is unlikely that more-intrusive legislation would be welcomed by the private sector; it would meet with intense resistance because of competing economic theories. The reformer's cry is not one of justice so much as it is one of fairness. This plea is compatible with distributive justice. According to Rawls, "justice as fairness" operates to account for obligations distinct from natural duties.[39] The latter apply without regard to voluntary acts.[40] For example, "we have a natural duty not to be cruel and a duty to help one another [in a crisis], whether or not we have committed ourselves to these actions."[41] Obligation, as we know it in classical contract theory, is imposed on each individual and is "just" when the two principles of justice are satisfied and the individual "has voluntarily accepted the benefits of the scheme [of justice] or has taken advantage of the opportunities it offers to advance his interests."[42]

The goal of the fairness argument is to obligate the private sector to mainstream the physically disabled; through the scheme of distributive justice "we are not to gain from the cooperative efforts of others without doing our fair share."[43] To do otherwise would unjustly enrich those receiving the benefit, and forced mainstreaming would be necessary to avoid injustice.

An unsolved critical issue, however, is how to overcome the difficulty in mainstreaming the physically disabled who are also victims of a social

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36. 42 U.S.C. §§ 2000e, 2000e-2 (1976).

37. *See* tenBroek, *The Right to Live in the World: The Disabled in the Law of Torts,* 54 CALIF. L. REV. 841 (1966).

38. *Id.* at 850-51.

39. J. RAWLS, *supra* note 2, at 111.

40. *Id.* at 114.

41. *Id.*

42. *Id.* at 342.

43. *Id.* at 343.

handicap. " 'A disability is a condition of impairment, physical or mental, having an objective aspect that can usually be described by a physician. . . . A handicap is the cumulative result of the obstacles which disability interposes between the individual and his maximum functional level.' "[44] The myths and misperceptions about the physically disabled socially handicap them, imposing added burdens, only to be assumed away by Rawls. A blind lawyer's status in the marketplace should be equal to the sighted attorney's, but in reality his status is "a reflection of underlying attitudes and assumptions concerning disability and of social policies based upon those attitudes,"[45] thereby imposing a handicap.

The impetus for this inquiry comes from interviews with lawyer-recruiters. The recruiter asserts that a physically disabled lawyer, particularly one who is blind, would be rejected by clients on the basis of diminished professional competency due to the physical disability. This conclusion is based on the recruiter's perceptions of attitudes toward disabled attorneys, an attitude supposedly held by the public. If this perception is correct, it is inevitable that the private sector is virtually closed to voluntary mainstreaming of the physically disabled attorney. But if the attitudes are misperceived by recruiters, as the following study reveals, they become myth and, like their predecessors,[46] need debunking.

Distributive justice begins with selective benefit. By identifying the worst off, we choose those most needing help to overcome barriers in equal opportunities; this theory applied gives helpful direction to rehabilitation programs. The Rawlsian idea that we choose behind the veil of ignorance calls for objectivity to rule out our own biases based on experience or individual position. Rawls's first situation, before the veil is lifted, is hypothetical and cannot be easily simulated by the researcher.[47] Therefore, the following assumption premises the attitude survey: those without a physical disability are more likely to approximate the position behind the veil when ranking worst off within the group of the disabled.

The consumers of legal services and private sector lawyer-recruiters polled in our survey[48] categorized the blind as the worst off among the

44. tenBroek & Matson, *The Disabled and the Law of Welfare,* 54 CALIF. L. REV. 809, 814 (1966) (quoting B. HAMILTON, COUNSELING THE HANDICAPPED IN THE REHABILITATION PROCESS 17 (1950)).

45. *Id.* at 814.

46. Other unfounded myths include that: (1) insurance rates will skyrocket, (2) adjustment to the workplace will involve considerable expense, (3) the company's safety record will be jeopardized, (4) handicapped people will not be as productive as unimpaired workers. HERMANN & WALKER, HANDBOOK OF EMPLOYMENT RIGHTS OF THE HANDICAPPED: SECTIONS 503 AND 504 OF THE REHABILITATION ACT OF 1973, at 5-6 (1978).

47. *See* Howe & Roemer, *Rawlsian Justice as the Core of A Game,* 71 AM. ECON. REV. 880, 880-81 (1981).

48. The author conducted a survey during the winter of 1983. Populations surveyed included: (1) 100 lawyer-recruiters, (2) 200 non-lawyers (general public),

physically disabled. This is due largely to the degree they perceived the blind person's dependency upon others. Each group majority also believed that the blind should receive financial aid if benefits were limited to only one category of disability, correlating their attitudes with those they identified as the worst off.

Those in the public population felt that society would benefit if the disabled were taught to care for themselves, including employment training, underscoring a basic principle of Rawls's justice. Yet, the recruiter population viewed society as prejudiced against hiring the disabled because of the amount of workplace disruption that would be caused. This research further indicates that if the private sector were required to hire a disabled lawyer, the lawyer-recruiters would least prefer a blind attorney because of *their* deep concern for the possible disruption of the workplace. In sum, the perceptions that the lawyers attribute to society are really their own attitudes, and not those of the general public. The latter group, given the same choice, indicated they would least prefer to hire a mute lawyer.

The lawyer's perception of public attitudes that the disabled lawyer's professional competency is greatly diminished by his disability is not widely held and can be labeled myth. Of those polled who had consulted a lawyer, 84% believed or held out the possibility that blind attorneys could have successfully handled their cases. Eighty-seven per cent of the same group responded in a like manner about a blind lawyer handling most legal matters. Finally, a majority of the lawyers conceded that firm clients may view the firm hiring a disabled attorney with little or no dismay. This view is, no doubt, correct.

Whatever shortcomings are conjured in the pragmatic use of distributive justice theory, it serves as a useful matrix for studying attitudes toward the physically disabled. This limited study shows how assumptions without foundation plague legal thought.

Nevertheless, economic efficiency guides the private marketplace and there is little incentive, moral or legal, practical or theoretical, to draw this sector to employ the physically disabled attorney. According to distributive justice theory, the result is everyone's problem; yet practically, it is no one's to solve. Some are stimulating private placement through consortium ef-

(3) 27 blind law students, and (4) 147 members of the American Blind Lawyers Association. Although populations (3) and (4) were surveyed nationwide, the bias of groups (1) and (2) may be limited to the Southeast, so further national study is warranted. The author adopted the following value of attitude surveys: "In forcing attitudes into a scale some restructuring is done to the thought process. Attitude scales should be regarded only as the roughest approximation of the way in which attitudes actually exist in the personality of individuals." F. Saunders, "Attitudes Towards Handicapped Persons—A Study of the Differential Effects of Fine Variables" 3 (Ph.D. dissertation (1969), available in Florida State University Library). The data from the study support the conclusion that the prejudice against handicapped lawyers lies with lawyer-recruiters rather than with the general public.

forts,[49] appealing to peer enforcement for voluntary mainstreaming.

A recent federal study of private employers and the handicapped reproaches forced mainstreaming, while lauding the virtues of the private sector:

> An emphasis on stringent enforcement, if undertaken, must be accompanied by the knowledge that it would change the climate of current attitudes, which are fairly favorable and sympathetic toward the disabled. A punitive approach might increase employment among firms currently hiring few disabled persons but this must be weighed against the loss of good will and affirmative action in many firms which are the result of favorable attitudes, including the belief that handicapped workers are likely to be extremely reliable and highly motivated. Since hiring the handicapped is good business and also has moral sanction in the belief of employers, self-enforcement has many more advantages for achieving government objectives that it may have with other groups needing affirmative action.[50]

In deference to John Milton, light is not denied this generation: some still choose darkness while lip-serving affirmative action and justice.

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49. *See* Voorhees, *Handicapped Lawyers and the Private Sector,* 68 A.B.A. J. 1595, 1596 (1982).

50. U.S. DEPARTMENT OF LABOR, EMPLOYMENT STANDARDS ADMINISTRATION, A STUDY OF ACCOMMODATIONS PROVIDED TO HANDICAPPED EMPLOYEES BY FEDERAL CONTRACTORS: INTERIM PROGRESS REPORT, EXECUTIVE SUMMARY vii (1981).