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Book


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_Crippled Justice_ tells the story of the disability rights movement that began in the 1940s and 1950s. Although there are many books and articles that discuss the foundations of Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990 (ADA), this is the first book that extends that discussion back to the earlier times.

Chapter 1 begins the story in World War II, tracing the values and ideas that eventually were cultivated into the rehabilitation movement, including the whole-man theory advocated by Howard Rusk and Henry Kessler. This is not the “medical model of disability” that is often criticized by the modern theorist Harlan Hahn. Instead, it is a “much more sweeping and ambitious plan that medicalized not just disability but the whole of society. Rehabilitation was promoted to ensure the health of the individual and that of society. According to them, an un-rehabilitated person could weaken and erode society's health” (27-28).

Chapters 2 and 3 discuss the rehabilitation movement up to the 1960s. O'Brien argues that the federal government was adamantly opposed to employment rights for individuals with disabilities as part of this movement. Chapters 4, 5, and 6 cover the modern disability rights era. O'Brien draws on the work of others to describe how Section 504 was created in a rather unintentional atmosphere of rights protection. She shows how the federal government was not prepared to enforce this provision after its enactment. Her discussion of legal decisions under Section 504 and the ADA suggests that the courts have always had a very narrow conception of who should be protected by these statutes.

O'Brien again takes up the “whole man theory” in the afterword, claiming that recent court decisions under the ADA have returned us to this theory of rehabilitation. Courts feel comfortable now “probing and investigating every minute detail about how a person can mitigate his or her disability. Instead of asking who is whole and can be brought back into the work force because they compensate for their respective impairments, the federal court judges allow into the courtroom only those they regard as ‘unwhole’ to protest employment discrimination” (25).

Although I enjoyed the book and learned a great deal about the disability rights movement from the 1940s through the 1960s, I have some *1044 reservations about O'Brien's discussion of the ADA. She borrows from
my work (Colker 1999) to argue that the “lower federal courts decided 94 percent of all litigation in the employer's favor” even before the Supreme Court's recent decisions offering a narrow interpretation of the ADA (14). In the afterword, she expands on this argument to state that the figures changed to 71 percent after the Supreme Court's mitigating measures rulings (217). (The mitigating measures cases narrowed the definition of disability by finding that an individual is disabled only if he or she has a substantial limitation in the ability to perform one or more major life activities after using mitigating or corrective devices, such as eyeglasses.) Her support for this figure is the “168 cases the author found in the federal courts that were issued from June 1999 until May 2000” (275).

The problem with that argument is that no one (including me) knows what decisions all of the lower federal courts have made, especially the lower trial courts. In my study that she cites, I report that “defendants prevail in more than 93 percent of reported ADA employment discrimination cases decided on the merits at the trial court level. Of those cases that are appealed, defendants prevail in 84 percent of reported cases” (Colker 1999: 100). In a section of my article that O'Brien does not mention, I discuss the methodological problems that arise when one examines litigation outcomes. I expound on these methodological problems in a later article (Colker 2001: 244-247), concluding with the following observation: “There is no way that someone who relies on computerized search techniques can have the perspective of the district court judge, because the majority of filings result in settlement and many decided cases do not result in opinions made available to the public. I therefore cannot claim that my research gives us much, if any, insight on the perspective of the district court judge” (ibid.: 247). For that reason, I focus my discussion of the empirical data on appellate courts whose decisions are more widely available and whose decisions create important precedent. I am alarmed, however, by the tendency of the media and researchers to continue to misreport the trial court figure with which I have never had much confidence.

But even if one were to assume that the trial court data are reasonably accurate, the question would be what do we learn from that figure? What I find interesting about the data, particularly the appellate court data with which I have more confidence, is that they are so consistent over time. As I report in a recent article, defendants have prevailed in approximately 86.5 percent of ADA appellate, employment discrimination cases that are available on Westlaw for the period January 1994 through 30 July 1999 (Colker 2002). I found very little fluctuation in that rate during that period. Given that plaintiffs' lawyers frequently take cases on a contingency fee basis, the question that arises is why are plaintiffs' lawyers consistently miscalculating their chance of success? Irrespective of whether the courts are hostile or receptive to ADA cases, we should expect plaintiffs' lawyers to pursue only those cases that they are confident will be successful. I speculate that the problem for plaintiffs' lawyers is that the ADA is a moving target that is increasingly heading in a pro-defendant direction. Hence, as soon as plaintiffs' lawyers adjust their behavior in order to increase their success rate, the courts create new legal hurdles that make it even more difficult to prevail. The mitigating measures cases, for example, can be understood as part of that moving target story. As plaintiffs' lawyers began to use the ADA with some success to attain positive results for their clients, the Supreme Court readjusted the statute to make it harder to prevail. The consistent nature of the pro-defendant data is what is so interesting rather than the actual value of those figures.

Viewed in that light, it would be interesting if O'Brien is correct that the trial court results have changed from 94 percent pro-defendant to 71 percent pro-defendant since the Supreme Court decided the mitigating measures cases. Because O'Brien gives the reader no indication of her research methodology to arrive at that figure, it is hard to have confidence in its accuracy. There have been hundreds of remands to the trial courts after the Supreme Court's decisions in the mitigating measures cases. I would expect that most of those cases would have settled with a voluntary dismissal because the plaintiffs' lawyers would have realized that there was little point in continuing to proceed in the light of the more stringent definition of disability reflected in the Court's
mitigating measures rulings. If O'Brien's statistic is correct, then we have seen plaintiffs adjust their litigation behavior rationally in response to the Supreme Court rulings to pursue court cases that were meritorious and should not be voluntarily dismissed. The fact that plaintiffs may have correctly modified their litigation behavior, however, does not tell us that the courts are growing more receptive to their claims. It simply may mean that the target has stopped moving so that plaintiffs can properly adjust their litigation behavior.

In sum, I did very much enjoy O'Brien's book for its discussion of the early history of the disability rights and rehabilitation movements. I would simply caution readers to take her consideration of statistical evidence with a grain of salt.

*1046 References

