The Law and Economics Tradition and Workers With Disabilities

BY RAVI MALHOTRA*

This article explores what legal scholars might learn from the neo-classical Law and Economics tradition in order to more effectively promote the equality rights of workers with disabilities. A long marginalized group that has to date received relatively little attention from Canadian legal scholars, people with disabilities experience systemic barriers in many aspects of society including in employment, education and transportation. The social model of disablement has identified systemic barriers in society as the primary issue responsible for the marginalization of people with disabilities. However, there has been to date little engagement in Canadian disability rights scholarship with the Law and Economics tradition and this article attempts an initial and tentative overview. Popularized by scholars such as Richard Posner, the Law and Economics tradition has become increasingly influential and seeks to use the tools offered by neo-classical economics to evaluate the efficiency of legal rules as rational actors seek to maximize their utility. Reflecting insights from both the Canadian and American experience, this article proposes to critique the tools of neo-classical Law and Economics to discern what elements might prove to be useful in empowering people with disabilities in the workplace. Through a critical appraisal of basic Law and Economics concepts such as cost-benefit analysis, statistical discrimination and the traditional neo-classical notion of unions as monopolies, some parameters are set for future inquiry.

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I. INTRODUCTION

This article provides a necessarily selective overview and analysis of the vast law and economics tradition, which has focused on comprehending the economic effects of legal rules and reforms, in order to disaggregate its components and evaluate which law and economics concepts may be appropriated in the context of accommodating workers with disabilities. Workers with disabilities have long experienced exclusion, marginalization and systemic discrimination in the workplace. In a world filled with inaccessible staircases that impede the mobility of wheelchair users, and print materials that are impossible for blind and visually impaired people to access, people with disabilities have faced considerable prejudice and barriers in every area of social life from housing to employment to education. This article’s starting point is that the social model of disablement, which focuses on how structural barriers and attitudes marginalize workers with disabilities and keep large numbers of people with disabilities in poverty, is the most useful paradigm for empowering disabled workers. The methodology in this paper is comparative, employing insights from both Canada and the United States to frame the argument. Although there are, to be sure, numerous differences in the legal frameworks of the two countries with respect to disability discrimination law in the employment context, these two modern federal constitutional democracies are also quite suitable for comparative analysis because of their general similarities. Given the importance of employment to leading a productive life with economic security, this article centres its analysis on discrimination against workers with disabilities, while bearing in mind that discrimination in other areas undermines the equality rights of people with disabilities to work.


Although many who are committed to social justice for people with disabilities have been understandably skeptical of the law and economics tradition, which often seems to dogmatically argue for less state intervention in all aspects of economic policy and legal regulation, this article suggests that a critical reading of law and economics scholarship, including an appropriately nuanced understanding of “efficiency,” offers a useful and versatile set of tools with which to analyze the policy implications of the employment problems and barriers systematically faced by workers with disabilities. By engaging with this body of work on its own terrain, this article offers advocates of social justice powerful weapons to challenge jurisprudence and policy that have left people with disabilities both in Canada and the United States impoverished and unemployed. The opportunities that this challenge provides may be simply too numerous to forego. In Part II, this article provides an overview of some of the basic key concepts of the law and economics tradition. In Part III, this article discusses how the most useful interpretations of law and economics shed light on understanding cost-benefit analysis, statistical discrimination and trade unions. This in turn allows for a more accurate understanding of disability accommodations than has previously been developed by traditional neo-classical law and economics scholars. Part IV offers some concluding thoughts.

II. AN OVERVIEW OF BASIC CONCEPTUAL TOOLS

Three influential thinkers of modern law and economics are Ronald Coase, Guido Calabresi and Richard Posner. Their writings articulate the idea that basic concepts from neo-classical economics, such as Pareto efficiency, cost-benefit analysis and transaction costs, may be cogently applied to analyze the efficiency of legal principles and their effects on rational actors that seek to maximize their utility. Consequently, these concepts can serve as guides to assist in policy making. In the words of one law and economics scholar, “[t]he economic efficiency orientation provides a perspective

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4. See e.g. Ronald Coase, “The Problem of Social Cost” (1960) 3 J.L. & Econ. 1 (demonstrating principle, known now as the “Coase Theorem,” that the initial allocation of legal entitlements is irrelevant for the efficiency of outcomes where transaction costs are zero).


from which legal rules are evaluated by the standard of whether they are wealth-maximizing, or at least wealth-enhancing, where wealth is defined as the aggregation of social valuations as measured by willingness to pay.7

One fundamental distinction in law and economics is the difference between Pareto efficiency and Kaldor-Hicks efficiency, two dramatically divergent methods of engaging in cost-benefit analysis that law and economics scholars have adapted from welfare economics. In the Pareto efficiency method, Option A is said to be superior, or "Pareto efficient" compared to Option B if no one has lower utility in Option A than in Option B and someone has higher utility in Option A.8 Although this approach is well suited for quantitative economic analysis because it is defined purely in terms of ordinal preference rankings9 and does not explicitly ground its judgments in a particular ethical theory,10 it has limited practical relevance for analyzing the impact of legal rules since, for example, it would preclude a transfer of wealth to a large group of impoverished individuals, even where this would massively benefit them and be only a trivial loss to its affluent source.11 Kaldor-Hicks efficiency occurs when the winners from a hypothetical policy change would be sufficiently enriched that they could compensate the losers enough that the losers would not object to the policy change, while still leaving enough gains to make the policy change worthwhile for the winners.12 It should be stressed that actual compensation is neither required nor generally expected when using the Kaldor-Hicks efficiency standard.13 Notwithstanding this, it is an important analytical tool for those working in the law and economics field because it identifies policies that will improve overall societal well-being.14

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9. Economists distinguish between ordinal preferences, which are focused solely on numerical rank, and cardinal preferences, which are focused on the difference of the size of the gap between one’s rank and the rank of others. See Richard H. McAdams, "Relative Preferences" (1992) 102 Yale L.J. 1 at 9–10.
10. See generally Hoffman & O’Shea, supra note 8. However, Hoffman & O’Shea comment that some theorists, including renowned economist and Nobel Laureate Amartya Sen, have questioned whether Pareto efficiency is truly compatible with a theory of liberalism. See ibid. at 367, n. 168.
11. Michael Ashley Stein, "The Law and Economics of Disability Accommodations" (2003) 53 Duke L.J. 79 at 187–88 [Stein, "Disability Accommodations"]. See also Posner, Economic Analysis, supra note 6 at 13 (commenting that "[w]hen an economist says that free trade or competition or the control of pollution or some other policy or state of the world is efficient, nine times out of ten he means Kaldor-Hicks efficient"); J.H. Verkerke, "Is the ADA Efficient?" (2003) 50 UCLA L. Rev. 903 at 912–13.
12. McAdams, supra note 9 at 4, n. 9.
13. Hoffman & O’Shea, supra note 8 at 358–59. See also Trebilcock, supra note 1 at 132.
A related concept is what has become known as the “Coase Theorem.” The Coase Theorem states that where rights are fully specified and transaction costs are zero, an efficient outcome in a dispute will be reached regardless of the initial assignment of rights.\textsuperscript{15} Two legal consequences that are frequently drawn from the Coase Theorem are: (a) the need to minimize transaction costs by defining property rights clearly and assigning them to persons likely to value them most; and (b) the need to create the allocation of resources that would be realized if transaction costs were zero.\textsuperscript{16}

The neo-classical law and economics tradition has attracted numerous critiques and only a modest sampling of the argumentation and commentary can be provided here.\textsuperscript{17} More specific critiques of its relevance for labour markets and antidiscrimination are provided in Part III. Duncan Kennedy has maintained that the very concept of efficiency is simply incoherent and easily manipulated, allowing a case to be made that a particular policy change is or is not efficient, depending on the essentially ethical or political objectives of the analyst. Kennedy argues that one could frame an efficiency problem concerning the legality of slavery as how much A would pay to ensure that B could not be enslaved, or how much A would ask to give up an existing right that B not be enslaved.\textsuperscript{18} He furthermore asserts that “[t]here will (virtually always) be some entitlement background constellation that generates wealth effects so massive as to render any particular legal resolution of a particular situation inefficient.”\textsuperscript{19}

Another difficulty is that calculations that are made in a full general equilibrium context, where parties must simultaneously decide questions of distribution and allocation, are so complex as to be indeterminate.\textsuperscript{20} This is evident because con-
sumers are both factor owners and consumers, and entrepreneurs are both factor owners and consumers as well. Consequently, it is impossible to decide allocation prior to distributional questions because the distribution of wealth affects the supply of factors and the composition of demand to render the result to be indeterminate and meaningless.\footnote{Kennedy, "Cost-Benefit Analysis," \textit{ibid.} at 440-41.} Morton Horwitz similarly has suggested that the bias of the law and economics school in favour of the distributional status quo is blatant.\footnote{Horwitz, "Science or Politics?," \textit{supra} note 17 at 906. It should be noted that Horwitz' 1980 piece is also not without what now seems in retrospect to be rather serious misjudgments regarding the staying power of the law and economics school (commenting that "I have the strong feeling that the economic analysis of law has 'peaked out' as the latest fad in legal scholarship and that it will soon be treated by the historians of legal thought like the writings of Lasswell and McDoogal" at 905).} As it is heavily reliant on a supposedly neutral and scientific conception of efficiency, its bias is apparent when it becomes clear that efficiency is a function of a particular, typically highly non-egalitarian, distribution of wealth that already exists in society.\footnote{\textit{Ibid.} at 911-12. See also Leiter, \textit{supra} note 20 at 308 (observing that "[p]erhaps . . . the ascendancy of economics as a force in public policy has much more to do with its ability to rationalize policies that tangibly benefit ruling groups in American society than with its empirical and cognitive credentials.").}

Other arguments have gone even further to thoroughly interrogate and deconstruct the very foundations of the neo-classical law and economics school. For instance, the notion of Pareto efficiency only makes sense if one is able to conclusively say when a party has higher utility in one situation resulting in an improvement compared with another. If one cannot do this, then there is no sound way of distinguishing whether a particular scenario is Pareto efficient. It is also deeply problematic to automatically assume that any change in utility reflects a conscious choice, in response to an incentive, for that shift in utility. While defenders of neo-classical law and economics typically argue that it involves a mere reporting of observed data with no epistemologically complex value judgments,\footnote{Kelman, \textit{Critical Legal Studies}, \textit{supra} note 18 at 127-28.} the interpretation of choices inevitably involves categorization. An observation that a customer again and again returns to buy a certain brand of candy bar presumes that the relevant category distinction here is the desire for a particular product brand rather than, say, brands with a particular colour of packaging.\footnote{\textit{Ibid.} at 128-29.} In other words, background norms and value judgments about society play a crucial role in interpreting observations of changes in utility. This can have subtle and problematic implications for a marginalized group where, for example, an employer's preference for a certain type of employee may mask hidden requirements, such as good tennis skills for corporate getaways, which have profoundly negative implications for workers with disabilities.

A related issue is the reality that utility maximization cannot so easily account for complex psychological outlooks, for example actors that are entirely rational but...
are genuinely ambivalent about their choices or even subsequently regret them. This sort of preference reversal is hardly surprising given that the brutality of the real world involves considerably more complexity and elements of coercion than the utility maximizing models based on rational actors and stable preferences would allow.26 As Mark Kelman remarks, "people make choices in circumstances that are not explicitly attributable to any particular person's conduct but that seem to influence or pressure them to make choices that are unsatisfying."27 There is also the "sour grapes" phenomenon whereby actors' preferences adapt to reflect what is actually available. One intriguing illustration of adaptive preferences is arguably the relative disinterest of many American workers in collective bargaining. This may, in fact, actually reflect that workers perceive that membership in a union is not a realistic option and therefore adapt their preferences to what is actually available.28

Moreover, desires for a particular end may be neither momentary nor long-established, but rather may be simply learned behaviour that changes over time in response to external events—a possibility that would undermine many of the assumptions of neo-classical law and economics.29 Indeed, some of the most fascinating and productive recent scholarship, often labeled "behavioural law and economics" and originating in work by psychologists Daniel Kahneman and Amos Tversky, has been attempting to reconcile neo-classical law and economics with a more psychologically sophisticated understanding of human behaviour.30 This work has sought to construct a more realistic and robust model that will generate more accurate predictions and, in turn, more appropriate law reform projects.31 With this overview in mind, the next part examines what law and economics has to say about debates in labour markets generally and disability accommodations specifically.

26. Ibid. at 129-31.
27. Ibid. at 131-32. Kelman arguably anticipated many of the trends in behavioural law and economics by many years. See e.g. Mark Kelman, "Choice and Utility" [1979] Wis. L. Rev. 769 at 783-95 (discussing role of habit, regret and duress in economic choices); Mark Kelman, "Consumption Theory, Production Theory, and Ideology in the Coase Theorem" (1979) 52 S. Cal. L. Rev. 669 at 678 (arguing that the Coase Theorem as a falsifiable hypothesis is wrong). But see Matthew Spitzer & Elizabeth Hoffman, "A Reply to 'Consumption Theory, Production Theory, and Ideology in the Coase Theorem'" (1980) 53 S. Cal. L. Rev. 1187 (maintaining Kelman's evidence is insufficient to demonstrate that Coase Theorem is wrong).
28. Cass R. Sunstein, "Legal Interference with Private Preferences" (1986) 53 U. Chicago L. Rev. 1129 at 1146-50. Another illustration directly relevant to this article's argument is the sobering possibility that Canadian youth with physical disabilities may "prefer" enrollment in community colleges because architectural barriers at universities are so widespread.
29. Kelman, Critical Legal Studies, supra note 18 at 130.
III. LAW AND ECONOMICS MODELS AND DISABILITY ACCOMMODATIONS

A. An Overview

Before one can explore the implications of law and economics for the labour market of workers with disabilities, it is necessary to understand some basic principles relating to disability discrimination law in Canada and the United States, as well as some of the ways in which the jurisprudence differs in the two countries. Discrimination on the basis of disability is prohibited under section 15 of the Charter of Rights. It is also prohibited in the provisions of the various provincial and territorial human rights codes that ban discrimination on the basis of, inter alia, disability and that are accorded quasi-constitutional status in Canadian law. An employer has a duty to accommodate employees with disabilities up to the point of undue hardship and this is a duty that must be interpreted in light of principles of substantive equality. The employer must undertake an analysis of the individual accommodation needs of the disabled employee. While this is not the appropriate place for a full length treatise on legal doctrine, disability is extremely broadly defined in Canadian jurisprudence. As Michael Lynk has observed, disability encompasses a very wide range of conditions and does not even necessarily require the existence of a physiological impairment, so long as the complainant is perceived by society as having a disability. This is entirely consistent with the social model of disablement that disability rights advocates espouse.


33. See e.g. in Ontario, Human Rights Code, R.S.O. 1990, c. H-19, s. 1.

34. Michael Lynk, "Disability and the Duty to Accommodate: An Arbitrator’s Perspective" [2001–2002] Labour Arbitration Yearbook 51 at 58 [Lynk, "Disability and the Duty to Accommodate"]. The duty to accommodate is also a requirement for other grounds of discrimination, such as race and gender, but this is far beyond the scope of this article.

35. Ibid. at 60.

cates have articulated as the best paradigm for understanding disability discrimination. Physiological conditions such as HIV, alcoholism, drug and tobacco addiction, mental health conditions such as panic attacks, and learning disabilities such as dyslexia are just a few examples of many conditions which must be accommodated in the workplace by the employer and, where applicable, the union.\textsuperscript{37} This extends the principles of disability accommodation in Canada far beyond the conventional images of a wheelchair user or a blind person who uses a guide dog.

The content of the duty to accommodate workers with disabilities is also a very significant one in Canadian law, reflecting the broad conceptions of equality in Canada. The employer has a very high threshold to meet before it can convince a human rights tribunal or labour arbitrator that it has reached the point of undue hardship. Workplace practices, rules and regulations are subject to scrutiny and must be altered if it can be shown that they can be modified for the individual worker with a disability without imposing undue hardship on the employer.\textsuperscript{38} Only where accommodation is impossible to accomplish without undue hardship will an employer be exonerated.\textsuperscript{39}

By contrast, the American jurisprudence has repeatedly interpreted the definition of disability under Title I of the Americans with Disabilities Act (ADA)\textsuperscript{40} very narrowly, excluding large numbers of people who would be classified as having disabilities under Canadian law from protection under the ADA.\textsuperscript{41} The ADA defines a person with a disability as one who (a) has a physical or mental impairment that substantially limits one or more major life activities; or (b) has a record of such a physical or mental impairment; or (c) is regarded as having such a physical or mental impairment.\textsuperscript{42} Numerous court decisions in the United States have granted summary judgments to employers, or otherwise denied claims by people who were found not to have disabilities, because they were able to continue to work despite having such serious conditions as cancer, strokes and multiple sclerosis.\textsuperscript{43} Moreover, empirical studies of court decisions have demonstrated that employees filing suit under the ADA very rarely win, in many cases because physiological issues are determined by courts not to qualify as disabilities.\textsuperscript{44} While this article cannot probe the complex

\textsuperscript{37} Lynn, "Disability and the Duty to Accommodate," \textit{ibid} at 62–63.
\textsuperscript{38} \textit{Ibid.} at 58–60.
\textsuperscript{39} \textit{Ibid.}
\textsuperscript{40} 42 U.S.C. §§ 12101–12213 (1993) [ADA]. Title I deals with employment.
\textsuperscript{41} See e.g. Bonnie Poitras Tucker, "The Supreme Court's Definition of Disability Under the ADA: A Return to the Dark Ages" (2000) 52 Ala. L. Rev. 321 at 325–26 (discussing how American courts have used the mitigating measures doctrine to exclude people with disabilities who use medication or assistive devices from ADA coverage).
\textsuperscript{43} Matthew Diller, "Judicial Backlash, the ADA, and the Civil Rights Model" (2000) 21 Berkeley J. Emp. & Lab. L. 19 at 24–25.
\textsuperscript{44} See e.g. Ruth Colker, "The Americans with Disabilities Act: A Windfall for Defendants" (1999) 34 Harv. C.R.-C.L.L. Rev. 99.
genealogical reasons why American courts have had such difficulty with understanding the need to interpret the duty to accommodate workers with disabilities in a substantive way and have largely confined themselves to a conception of formal equality,\(^{45}\) it is important to recognize the divergence between American and Canadian jurisprudence.

What does the law and economics tradition have to say about disability accommodations? For the purposes of this discussion, this article takes the perspective that one is employing a relatively broad definition of disability, similar to that accepted in Canadian human rights jurisprudence, to consider the needs of a diverse population that has myriad disabilities, not just the stereotypical wheelchair user. Such disabilities may or may not result in a requirement of accommodations. It is undoubtedly true that much of the law and economics literature has been highly skeptical of the provision of disability accommodations to employees, especially where the private sector is expected to bear the costs of installing a ramp at an entrance or redesigning a workstation.\(^{46}\) This is hardly surprising, as neo-classical proponents of the law and economics school typically envisage any sort of government “intervention” in the economy that undermines the role of the market as the primary source for the allocation of resources as inefficient and therefore illegitimate. Indeed, the most orthodox proponents of neo-classical law and economics regard market efficiency as the basis for jurisprudential morality in general.\(^{47}\) Hence, Posner famously conceptualizes unions as a labour monopoly or worker cartel designed to limit the supply of labour to ensure that the employer cannot use competition amongst workers in order to keep the cost of labour low.\(^{48}\)

The effect of the formation of unions is therefore to create both winners and losers. On the one hand, workers employed in unionized industries and newly employed workers at firms seeking a substitute for union labour gain a premium through increased wages. Similarly, shareholders of firms whose competitors are newly unionized, and therefore are likely to be eventually obliged to pay higher

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salaries and benefits, also gain a premium. On the other hand, consumers who purchase goods manufactured with union labour pay a premium as do shareholders in those industries. Workers who were no longer needed as a result of a decline in employment, given the union-induced increase in wage rates, also pay a premium through unemployment.

B. Neo-Classical Critiques of Title VII

Neo-classical law and economics scholars have also regarded Title VII of the Civil Rights Act of 1964, the foundational civil rights statute in the United States that prohibits, inter alia, racial discrimination, as arguably inefficient as applied to labour markets on a number of grounds. They include the argument that, due to past discrimination in the educational sphere, African-Americans are generally less productive than their Caucasian colleagues. Moreover, proponents of this school of thought reason that the high information costs of determining whether a specific African-American employee is more productive than the median make it inefficient to produce individual judgments. Therefore, what is known as statistical discrimination, or the reliance on statistics about the average of a particular group as proxy variables to make decisions about the merits of employees in particular cases, is justified. Advocates of neo-classical law and economics typically regard a requirement against statistical discrimination as inefficient because they claim that it shifts salaries away from the optimal wage.

Another effect of Title VII predicted by neo-classical law and economics advocates is that fewer African-Americans would be employed because Title VII is regarded as acting as a tax on the hiring of African-Americans by making it more costly to fire them, even though neo-classical law and economics scholars simulta-


neously have argued that the “disparate impact” test, the basis for many Title VII discrimination cases, makes it difficult for African-American plaintiffs to successfully prove that a hiring or firing decision was discriminatory. While neo-classical proponents acknowledge that the wages of some African-American workers are likely to have increased at least somewhat as a result of Title VII, it has been suggested that when one takes into account the impact of a likely reduction in employment levels of African-Americans, the overall effect on the African-American community is possibly negative.

C. The Concept of “Intervention” in the Free Market

One crucial question that must be considered in understanding disability accommodations is how problematic the notion of “intervention,” as conceived by neo-classical law and economics scholars, is in the first place. This concept mistakenly presumes that the background norms in place are somehow natural and that the existing body of regulations and distribution of wealth and resources in society are fair and non-coercive. Hence, any policy proposal, such as human rights legislation or employment equity, is subject to rigorous examination because it is disrupting what is otherwise seen as a virtuous system that automatically allocates resources efficiency where they do the most good. This would apply as well to specific measures designed to increase accessibility, such as government expenditures to offer subsidies for companies to pay for sign language interpretation to deaf workers, or tax deductions to allow businesses to allocate funds to retrofit buildings that are inaccessible to wheelchair users. Equally importantly, the neo-classical law and economics paradigm tends to subject to thorough scrutiny and critique policy interventions that enhance equality for marginalized groups, while largely ignoring the fact that state intervention has always been a crucial factor in fostering the appropriate investment climate.


Or to put it bluntly, there is no such thing as a free market. The East Asian economies are a prime and particularly famous example of state subsidies for investment capital, but they certainly exist in North America as well. By stigmatizing intervention, neo-classical law and economics scholars implicitly accept that the widespread lack of wheelchair access and sign language interpretation in Canadian and American workplaces is natural and inevitable.

Finally, the traditional approach to intervention betrays the dependency of neo-classical analysts and policy makers on a rather impoverished conception: methodological individualism. This mode of analysis interprets rational actors as distinct and fully autonomous rather than interrelated through a complex series of endogenous and exogenous factors that may constantly alter preferences and choices. Rejecting methodological individualism allows one to better understand the need and importance of policy interventions that can alter preferences, including, over time, the desirability of hiring workers with disabilities.

D. Cost-Benefit Analysis

Cost-benefit analysis, another cornerstone in the neo-classical law and economics tradition and of particular importance in evaluating the implications of accommodating workers with disabilities, has also been subjected to substantial and devastating criticism. First, cost-benefit analysis presupposes the existence of revealed preferences without any coherent theory as to how such preferences arise. Yet, it is not always evident that one is accurately interpreting the psychological basis of the choices that sup-

posedly rational actors make on the basis of willingness to pay data.\textsuperscript{63} Second, cost-benefit analysis prevents one from developing a theory of practical reasoning because the model presumes an inherently and inevitably incomplete thinking process, that dismisses the need for cogently and convincingly articulating a theory of practical reasoning, in favour of expedient reliance on revealed preferences, as determined by the marketplace. Yet without practical reasoning, cost-benefit analysis simply analyzes the original variables without any reflection on how objectives might be adjusted and revised as a result of new data and interaction with others.\textsuperscript{64}

For example, the objective of making public services wheelchair accessible, which is essential to enable people with mobility impairments to participate in the labour market, may be so unwieldy as to result in no policy development at all. Through further reflection and reasoning based on a continuously changing situation, this goal might be modified as establishing time lines for various sectors and formulating accessibility standards that can be systematically implemented over a specified period of time. In fact, this is the very approach adopted in the \textit{Accessibility for Ontarians with Disabilities Act, 2005}\textsuperscript{65} recently enacted by the Ontario Legislature.\textsuperscript{66}

A third problem is that cost-benefit analysis provides no principled methodology for resolving incommensurable values.\textsuperscript{67} “Incommensurability” may be defined as a situation where “the relevant goods cannot be aligned along a single metric without doing violence to our considered judgments about how these goods are best characterized.”\textsuperscript{68} If expensive physical modifications to a small business made it fully

\begin{itemize}
\item \textsuperscript{63} See Richardson, “The Cost-Benefit Standard,” supra note 47 at 145.
\item \textsuperscript{64} Ibid, at 144–52.
\item \textsuperscript{65} S.O. 2005, c. 11.
\item \textsuperscript{66} For an overview of the long grassroots campaign to convince various Ontario governments to pass disability rights legislation, see M. David Lepofsky, “The Long, Arduous Road to a Barrier-Free Ontario for People with Disabilities: The History of the \textit{Ontarians with Disabilities Act—The First Chapter}” (2004) 15 N.J.C.L. 125.
\item \textsuperscript{68} Sunstein, “Incommensurability,” ibid. at 796 [emphasis removed].
\end{itemize}
accessible to both employees and customers with mobility impairments, but resulted
in increased costs that persuaded the management to lay off some workers, cost-
benefit analysis does not articulate any way of deciding on an appropriate choice.
Similarly, deliberation may produce a conclusion that a particular objective, such as
physical accessibility in workplaces, is not merely a means to an end, such as higher
labour market participation by people with disabilities, but rather a valuable end in
itself as a human right. 69 Without deliberation, however, modifications of goals can-
not be made. The marginalization of people with disabilities shapes debates in public
policy on incommensurable values to the disadvantage of people with disabilities
seeking accommodations and equality.

E. Statistical Discrimination
Another important consideration is the policy argument for prohibiting statistical dis-
crimination developed by more critical practitioners of the law and economics trad-
tion. This argument consists of multiple strands including the fact that a significant
percentage of any group, such as African-Americans, subjected to statistical discrim-
ination will actually be more productive than many members of the majority group.
Thus, the application of statistical discrimination, essentially based on stereotyping,
is profoundly unfair to them. 70 Furthermore, statistical discrimination may lead to
unwarranted wage disparities for minority groups because the alternative jobs that
they are able to obtain may involve a greater pay differential than the productivity dif-
ference between the groups, even if one were to accept the evaluation mechanisms as
completely neutral. 71 The prohibition of statistical discrimination can also enhance
society’s efficiency under certain circumstances. 72 For instance, Lundberg and Startz
have constructed a mathematical model illustrating that allocative efficiency actually
increases when laws prohibiting discrimination are in place, due to a more efficient
use of training costs that may be a scarce resource for many economic actors. 73

A related issue is the concern that workers affected by statistical discrimina-
tion may be cognizant of the discrimination and consequently make fewer invest-
ments in human capital, leading to a dysfunctional result for both workers and
employers and the reinforcement of the glass-ceiling phenomenon that relegates

to appreciate that accommodation for people with disabilities, at least in the context of public transporta-
tion, may be based in rights discourse. See Richardson, “The Cost-Benefit Standard,” supra note 47 at 160.
70. David Charny & G. Mitu Gulati, “Efficiency-Wages, Tournaments, and Discrimination: A Theory of
72. Ibid.
73. Shelly J. Lundberg & Richard Startz, “Private Discrimination and Social Intervention in Competitive Labor
minority workers and women to entry-level positions in disproportionate numbers.\textsuperscript{74} Such a situation would actually provide a clear incentive to market actors that statistical discrimination is a profit maximizing strategy, generating a vicious circle where the marginalization of stigmatized workers, whether on the basis of race or disability, would become self-fulfilling.\textsuperscript{75} There is also concern that actuarial standards, that are the basis for decisions that rely on statistical discrimination, may themselves be profoundly biased and illegitimate because of historic discrimination against the particular groups in question.\textsuperscript{76} Finally, its long role in marginalizing members of minority groups renders statistical discrimination a highly suspect tool.\textsuperscript{77}

Remarkably, some progressive scholars, such as Mark Kelman, who are otherwise sharp critics of neo-classical law and economics, have made the argument that statistical discrimination is inappropriate in the case of canonical discrimination against, for instance, visible minorities, but is appropriate in the case of reasonable accommodations of workers with disabilities. This is one component of a broader American debate about reasonable accommodations of disabilities as a legitimate form of anti-discrimination law, that has largely been avoided in Canada given its broader conceptions of equality.\textsuperscript{78} They make the argument that in the first category, which they often refer to as anti-discrimination and which includes a requirement of intent under American jurisprudence, the effect of the rule against statistical discrimination is merely to impose capitalist rationality on the workplace, which perfects the market and facilitates the enforcement of rights. Each employee is simply valued on the basis of his or her embodied net marginal product. However, in the case of reasonable accommodations for workers with disabilities, the extra costs that may arise mean that, in their view, statistical discrimination against people with disabilities is justified because people with disabilities are making claims related to distributive justice.\textsuperscript{79} Another argument, related to the utilitarian literature on preference

\begin{itemize}
\item \textsuperscript{75} Charny & Gulati, \textit{ibid}.
\item \textsuperscript{77} Willborn, "The Disparate Impact Model," \textit{supra} note 53 at 820.
\item \textsuperscript{78} For an overview, see Carlos A. Ball, "Preferential Treatment and Reasonable Accommodation Under the Americans with Disabilities Act" (2004) 55 Ala. L. Rev. 951. See also Stein, "Same Struggle, Different Difference," \textit{supra} note 56. This article uses the term "canonical discrimination" to distinguish racial discrimination from claims that are regarded, in the American context, as newer.
\item \textsuperscript{79} Mark Kelman, "Market Discrimination and Groups" (2001) 53 Stan. L. Rev. 833 at 835, 852.
\end{itemize}
laundering, is that preferences which generate gains by injuring or mistreating others should not count as a legitimate component in creating a social welfare function. Therefore, statistical discrimination in cases of intentional discrimination ought to be prohibited, while it ought to be permitted in the case of disability accommodation. Finally, anti-discrimination legislation is regarded as a market-perfecting intervention that enhances market efficiency, whereas disability accommodations are seen as redistribution that imposes real social costs and must compete with other potential uses for the funds.

Yet, as Samuel Bagenstos has so capably demonstrated, these arguments ignore the fact that the distinctions between these categories are actually far more unstable than theorists such as Kelman think. For instance, restrictions on intentional discrimination limit the preferences of bigoted or racist customers. It is conceptually difficult to distinguish such state-sanctioned restrictions on intentional discrimination on the basis of race or gender from employers who refuse to accommodate people with disabilities affected by statistical discrimination. In many cases, a racist or sexist customer preference may not represent an explicit desire to subordinate people of colour or women, but simply a much more amorphous willingness to adhere to the status quo. If this argument holds true, there would be no grounds for distinguishing an employer’s failure to accommodate a disabled employee from customer racism that is clearly prohibited by both Title VII and human rights jurisprudence in Canada. Second, one can easily demonstrate that injuries are generated by both discriminatory conduct on the part of employers and by a failure to reasonably accommodate employees, as both categories involve subordinated groups.

Third, a distinction between discrimination and accommodation on the basis that the former efficiently perfects the market while the market merely redistributes resources, ignores the reality that the provision of reasonable accommodations is likely, in the long term, to generate increased human capital investment by workers with disabilities. Eventually, this likely translates into increased employment for a group largely outside the labour market and a reduction of people with disabilities who are on social assistance. Similarly, Kelman’s interpretation of a worker’s net marginal product in the case of race or gender ignores the economic benefits that certain workers may contribute as a consequence of racist or sexist attitudes on the part of customers, that alter what one might regard as the affective cultural meaning of the work product.

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80. Ibid. at 854, n. 38.
81. Ibid. at 853–55.
84. Bagenstos, supra note 82 at 885–89.
85. Ibid. at 892–93.
Yet the costs of reasonable accommodations are arbitrarily and inconsistently seen as detracting from a disabled worker's net marginal product. Finally, the assumption that disability accommodations are merely redistribution that must be evaluated separately fails to consider the fact that there have been a variety of proposals that contemplate the taxation of racial discrimination as an alternative to ineffective anti-discrimination laws. For all these reasons, the case against statistical discrimination applies equally in the case of accommodating workers with disabilities. A critical interpretation of law and economics can play a valuable role in rejecting statistical discrimination by examining the policy implications and evaluating the relevant jurisprudence, using the very same tools as more conventional law and economics scholars.

F. Unions and Monopolies

The issue of unions as monopolies has also been very controversial. This is particularly important because of the relatively high union density rate in Canada and because, through grievance arbitration, unions may offer particularly advantageous protections to workers with disabilities who may be at greater risk of discipline and discharge by the employer. Therefore, it is vital to get an adequate understanding of the debates within law and economics with respect to unions. More specifically, the Posnerian conception of collective bargaining as a labour monopoly has been questioned by critical proponents and theorists of law and economics. Accordingly, the neo-classical observation that in a perfectly competitive economy, any wage increases as a result of unionization would result in either the loss of unionized jobs or the bankruptcy of unionized firms, has been challenged and critiqued. In reality, several economic effects enable unions to win higher wages for their members without devastating results for the employer. Advocates of workers with disabilities need to be able to engage fully in

86. Ibid. at 893–96.
87. Ibid. at 896–98. In other words, there certainly are redistributive implications to disability accommodations as there are with respect to laws prohibiting racial discrimination.
89. See generally Lynk, "Disability and the Duty to Accommodate," supra note 34.
these debates, so that they can work in tandem with trade union activists to intelligently guide strategies, based on a comprehensive understanding of the labour relations circumstances in specific workplaces. One possibility is employer “rents” on capital. A rent may be defined as “any payment for a resource in excess of what would be necessary to entice the owner of the resource to bring it into employment in a perfectly competitive market.”

Such employer rents include market power rents that stem from an employer’s oligopolistic or monopolist practices in the product market. If there are barriers to entry that limit the ability of competitors to successfully encroach on an oligopolist or monopolist firm, and there are barriers to entry in the labour market in that industry, wage increases for union members and price increases for the firm’s products may be secured from market power rents without any concerns that the workers will be replaced, or that the employer will lose market share or be unable to raise capital.

Another possibility is productivity increases as a result of unionization. Unionization is associated with productivity increases because long-term contracts generate efficiency gains through reduced costs associated with improved monitoring of shirking on the job, greater firm-specific capital investment, a reduction of quit rates and increased morale as workers are accorded a collective voice.

One study found that in manufacturing industries in the United States, lower quit rates under collective bargaining accounted for approximately one-fifth of the estimated increase in productivity. At the same time, unionization was not universally correlated with productivity increases, which varied depending on the specific industrial context. This underscores the need for disability rights activists to work with trade unionists to study particular workplaces using the tools of law and economics, while challenging the neo-classical presuppositions.

A number of alternative theories have been proposed to explain why unionization is associated with productivity increases. First, the “union shock effect” postulates that every firm has some inefficiencies due to ineffective monitoring of management, and the emergence of a union may generate a chain of events that increases productivity. For instance, the increased costs associated with unionization may act as a shock to encourage the elimination of the inefficient aspects of the firm in order to maintain productivity. Alternatively, unionized employees may increase efficiency as they identify,
with less fear of speaking out as a result of some measure of protection under collective bargaining, methods of enhancing productivity and reducing waste in the workplace.97

Another approach is to apply internal labour market theory to evaluate the impact of unionization on productivity. It suggests that unionization enables the effective enforcement of long-term implicit contracts in labour markets.98 Such long term contracts defer increased compensation until later in an employee’s career in order to limit shirking by employees, and to compensate them for firm-specific investments that have over time rendered them less employable on the labour market.99 Unions allow better enforcement because without the grievance procedures and other safeguards associated with unionization, there is always the real danger of an employer reneging on a contract and thereby capturing all the gains of the employee’s firm-specific investments without having to make any payments.100 A close study of internal labour market theory would enable disability rights activists to assess how changes in job tenure in many industries may or may not affect the provision of reasonable accommodations for disabled workers.

Third, it has been suggested that certain public goods, such as safety standards, would not be produced in an efficient quantity in the absence of collective bargaining because workers would find themselves faced with a “prisoner’s dilemma,” where a tendency toward individual maximization and consequent free-riding effects would generate a sub-optimal result. A prisoner’s dilemma refers to a concept derived from game theory scholarship whereby there is a divergence between collective and individual interests. In the prisoner’s dilemma, two accused persons face probable conviction on a minor offence arising from the same incident but probable acquittal for a much more serious charge provided they simply remain silent. The Crown offers each prisoner the option of a very minimal sentence if he or she provides evidence implicating the other. Consequently, while they rationally ought to remain silent and maximize their collective good, each has an individual incentive to provide the evidence that will result in a conviction for the other party. If each prisoner seeks to maximize his or her individual interest, both will be convicted, vividly illustrating how individual and collective interests diverge.101 Unionization eliminates concerns over free-riding and therefore enables workers to lobby for a more efficient quantity of key public goods.102

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97. Ibid. at 431. See also Mark Barenberg, “Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production” (1994) 94 Colum. L. Rev. 753.
101. Ibid. at 443. There are many variants of the prisoner’s dilemma; I have selected a typical example for illustrative purposes and have adapted it to conform with Canadian legal procedures.
102. Ibid. at 432–33.
Finally, without unions, dissatisfied workers have no opportunity to air grievances and must take the drastic step of quitting in order to demonstrate their unhappiness with the employer. Unionization has the simultaneous advantages of allowing a forum for workers to voice their grievances through official structures and remain on the job. Consequently, unionized workers are able to identify problems in the workplace that may be rectified to enhance productivity, while at the same time, the employer is spared the considerable costs of having to locate, hire and train new employees.103

If one accepts that rents of various kinds and productivity increases associated with unionization allow for the potential of wage increases because of the creation of a cooperative surplus, one can then model Coasean bargaining104 between unions and employers that demonstrates how they will struggle over the distribution of the generated surplus while seeking to maximize its size.105 Instead of responding to a union wage demand by substituting more capital for labour, Coasean bargaining allows the employer to achieve an optimal solution that does not necessarily result in less employment and may even generate greater employment, because reductions in the labour used would generally reduce the size of the surplus.106 Moreover, strategic bargaining that is unanticipated by neo-classical models occurs over the distribution of the surplus in the form of disputes concerning the enforcement of the collective agreement. Specifically, the parties engage in risky tit-for-tat activities, often the type predicted by game theories such as the prisoner’s dilemma, that waste a portion of the surplus in the hope of demoralizing the other side and capturing a larger proportion of the remaining surplus.107 All of these tools can be used to evaluate bargaining over provisions in collective agreements relating to disability accommodations.

G. Law and Economics and Disability Rights Law

In the context of disability rights law, neo-classical law and economics commentators in the United States have insisted that Title I of the ADA, which requires the provision of reasonable accommodations in employment to people with disabilities, ought to be repealed because it will make it harder for the majority of people with disabilities who are currently out of the labour market to gain employment.108 Indeed, a

103. Ibid. at 433.
104. Coasean bargaining may be defined as negotiation that exhausts all benefits of trade. See ibid. at 423, n. 16.
105. Ibid. at 436–40.
106. Ibid. at 480–81 (noting at 481 that “where the union is more willing to trade wages for employment so that the contract curve leans to the right, the union in essence spends a portion of the employees’ share of the cooperative surplus to increase the number of job openings above the competitive level.”).
107. Ibid. at 442–50.
108. For typical examples, see Schuman, supra note 46; Willis, supra note 46; Vassel, supra note 46. See also Steven B. Epstein, “In Search of a Bright Line: Determining When an Employer’s Financial Hardship Becomes ‘Undue’ Under the Americans with Disabilities Act” (1995) 48 Vand. L. Rev. 391 at 452–64 (arguing that the undue hardship defence under the ADA is too vague and must be reformulated).
major controversy has erupted in the disability policy community, with some scholars suggesting that the ADA has been responsible for an increase in unemployment among people with disabilities.109 Some of the alleged deficiencies of the ADA include increased litigation costs, increased compliance and accommodation costs, increased taxes to fund the additional expenditures of the Equal Employment Opportunity Commission (EEOC) to enforce the law, and increased health costs to employers in a society where there is no universal health care program.110 Orthodox neo-classical law and economics scholars, such as Richard Epstein, have gone so far as to maintain that workers with disabilities are less productive than their able-bodied counterparts. Furthermore, he maintains that the ADA interferes with the legitimate right of employers not to hire employees with disabilities who may generate awkward or unpleasant reactions from customers or co-workers, and consequently delay the pace of transactions and result in increased costs that change the terms of trade.111 Given the support of many orthodox neo-classical law and economics scholars for statistical discrimination as economically rational in the context of the employment of racial minorities and women,112 it is apparent that many would also object to the fact that reasonable accommodations under the ADA, as well as under Canadian human rights jurisprudence, must be determined in the context of an individualized process,113 even if not all would be as dogmatically libertarian as Epstein.

However, the anti-regulation perspective, while certainly far from marginal in legal discourse, fortunately does not exhaust the contributions of the law and economics scholarship on disability accommodations. A critical law and economics paradigm sheds genuine light on the barriers facing workers with disabilities and on how to get more impoverished people with disabilities into the labour market in the first


110. Willis, supra note 46 at 725–29.


112. See supra note 53 and accompanying text.

place. For instance, some scholars, such as Michael Stein, have proposed what might be characterized as a "heterodox law and economics" model to distinguish different classes of reasonable accommodations, a foundational concept in both Canadian and American disability rights law. Such models generally identify deficiencies that require modification to the standard neo-classical model to better reflect the social reality of workers with disabilities, and overcome significant deficits that distort how workers with disabilities are regarded, so that the models may be fruitfully employed in the context of disability. For example, informational asymmetries with respect to workers with disabilities render labour markets far less efficient than one might imagine. Similarly, the traditional neo-classical literature tends to underestimate the productivity of workers with disabilities. Finally, the orthodox neo-classical framework wrongly accepts the status quo labour market as acceptable and neutral. Each of these points may be elaborated in the context of the Canadian and American labour markets.

With respect to the inefficiency of labour markets, there are serious informational asymmetries regarding the use of two distinct federal tax credits offered to employers in the United States to hire workers with disabilities, as well as regarding a tax deduction available to make an employer's premises physically accessible to the public which, of course, has spillover effects for employees with disabilities. Whereas the neo-classical model is predicated on an ideal flow of information between contracting parties, data provided by the General Accounting Office indicates that very few businesses used any of these tax options. For instance, only one out of every 686 corporations and only one out of 1,570 individuals also affiliated with a business reported the disabled access credit on their tax returns in 1999. The disabled access credit allows qualifying small businesses to elect to receive a 50% tax credit of up to $5,000 per tax year or 50% of up to $10,000 in access-related expenditures beyond the first $250. Yet survey data suggests that corporate executives of major American corporations are relatively open to the idea of hiring employees with disabilities.


115. Stein, "Disability Accommodations," supra note 11 at 124-27. This trilogy is taken from Stein's work.

116. Ibid. at 124-27.


118. Ibid. at 415-16. The Canadian taxation system offers similar credits to employers of disabled workers, but research on these policies and their usage patterns appears to be at a very tentative stage. See David G. Duff, "Disability and the Income Tax" (2000) 45 McGill L.J. 797 at 869-73.

While data on employer use of tax credits or wage subsidies in Canada is extremely limited, one major concern is that a similar credit in Canada may result in employment patterns that correlate to the short length of the tax credit, as there is no incentive for the profit-maximizing employer to keep on a disabled employee at the end of the fiscal year. In Canada, there has been much criticism of the tax treatment of attendant care services, which provide assistance to people with disabilities with activities of daily living such as bathing, dressing and toileting, because claiming the cost as a tax credit may require fragmenting the expenses among a number of highly technical and different provisions. Furthermore, the Income Tax Act prevents a disabled person from hiring a spouse as an attendant, an anachronistic and unfair provision apparently designed to prevent income splitting, dating from the days before women entered the labour market in large numbers. The regulations in place also betray a disturbing bias reflecting the medical model, in that tax credits for nursing home residents are more generous than for those individuals with high levels of disability using personal care attendants to live in the community, as the former category permits credits for recreational expenses whereas the latter category does not. Such an arbitrary tax distortion inevitably undermines the ability of people with disabilities to remain in the labour market.

The neo-classical belief in the market’s ability to self-regulate should it display an irrational “taste” for discrimination, as theorized by economists such as Gary Becker, is also highly questionable. In Becker’s model, discrimination is a factor unrelated to worker productivity that may be measured by a coefficient that indicates the propensity of the employer, whether or not as a result of pressure from customers or other employees, to discriminate based on the cost of discrimination. The theory predicts that under conditions of perfect competition, only the least discriminatory firms would survive. Yet the persistence of racial discrimination in the labour market undermines the belief of the neo-classical law and economics tradition in a self-regulating market. Moreover, the Becker “taste for discrimination” model acknowledges that it is minorities such as African-Americans who are most harmed, as measured by a loss of income, by discriminatory tastes because they play a subordinate role within the economy and therefore are more drastically affected by exclusion.
The lack of empirical evidence that businesses in the United States that engaged in racist hiring practices, prior to the enactment of the 1964 Civil Rights Act, experienced economic penalties that reduced their profit margins or drove them out of the marketplace, suggests there exist market failures that effectively foster patterns of systemic discrimination. Since there is considerable evidence that employment discrimination remains a substantial problem for workers with disabilities, the existence of market failures and imperfect information calls into question the merits of a purely neo-classical law and economics model. Simply put, the theory must be revised to fit the evidence and thereby foster the most robust law and economics analysis.

On the question of the productivity of workers with disabilities, there are a number of germane deficiencies in the neo-classical model. First, there is a widely held conception among legal scholars that workers with disabilities tend to be less productive than their able-bodied counterparts and that reasonable accommodations are generally expensive. Yet equivalent claims suggesting, for instance, that women are less productive than men have generally been rejected by both progressive legal scholars and empirical studies. Certainly some employees with disabilities may be less productive than their able-bodied counterparts, but this is hardly always the case. The limited empirical data available, confined admittedly to somewhat dated studies of the public sector, indicates that an overwhelming majority of workers with disabilities were generally rated equally or more productive to their able-bodied colleagues. Moreover, there has been little reflection on the impact

127. Supra note 51.
129. See e.g. Schwochau & Blanck, ibid. at 272; Marjorie L. Baldwin, "Can the ADA Achieve Its Employment Goals?" (1997) 549 The ANNALS of the American Academy of Political and Social Science 37 at 43–48.
131. See e.g. Willis, supra note 46 at 726–27. While Willis himself cites the EEOC statistics suggesting that the average reasonable accommodation only costs US$261, he goes on to cast doubt that reasonable accommodations will in fact be inexpensive due to, inter alia, the fact that undue hardship is measured with respect to an employer’s resources and larger employers may consequently have to spend considerably more on accommodations. But Congress specifically considered and rejected an amendment that would have limited accommodations to no more than ten percent of an employee’s salary. See Heidi M. Berven & Peter David Blanck, "Assistive Technology in the Workplace and the Americans with Disabilities Act" in Blanck, Employment, Disability, supra note 114, 329 at 344.
133. Stein, "Disability Accommodations," supra note 11 at 131–32 (noting a study of the U.S. Office of Vocational Rehabilitation indicating that 91 percent of workers with disabilities were rated to be either "average" or "better than average," matching the productivity levels of able-bodied colleagues).
that appropriate accommodations may have in enhancing the productivity levels of workers with disabilities. Therefore, assessments of workers with disabilities who have not been provided accommodations may dramatically understate their productivity levels. These accommodations need not be lavish. One American study conducted by the Job Accommodations Network found that approximately 86 percent of accommodations cost under $2,000 and 95 percent cost under $5,000. The median cost was only $200 while the mean cost was $992. Yet perceptions that accommodations are costly have been endemic, undoubtedly assisted by myths about the unreasonableness of the ADA generally propagated by the media.

Finally, the tendency of neo-classical law and economics theorists to accept labour markets as they currently exist as natural inevitably means a concomitant acceptance of structural barriers that impose real difficulties for workers with disabilities. Most people do not question the ubiquitous computer screens that transmit information that is essential for the workplace but are often not accessible to people who are blind or have learning disabilities. Stairs are another example of a barrier that prevents participation by wheelchair users and others with mobility impairments. Installing an elevator after the fact is clearly economically inefficient, but the entire fact situation only arises because we still largely see inaccessible structures as the normal standard rather than embracing barrier-free universal design that provides access equally to all. This line of argument tracks the issues raised by the social model of disablement, suggesting that prejudicial preferences that are built into the capitalist marketplace must be rejected and denaturalized, not endorsed as neutral.

As noted above, reasonable accommodations may also be subjected to a law and economics approach and classified accordingly, using these market imperfections to distinguish different ethical outcomes requiring different responses. Rather than drawing a sharp hierarchy between gender or racial equality rights covered by legislation such as Title VII, on the one hand, and reasonable accommodations under the ADA, the law and economics tradition and workers with disabilities.

134. Ibid. at 132–33. See also Karlan & Rutherford, supra note 114 at 23 (noting that "the cost of a reasonable accommodation may pay for itself in the greater productivity of the disabled worker.").

135. Epstein, "Undue Hardship," supra note 108 at 394; Burt Perrin Associates, Lessons Learned from Evaluation of Disability Policy and Programs (Ottawa: HRDC, 1999) at 24, online: Human Resources and Social Development Canada <http://www.hrsdc.gc.ca/en/cs/sp/edd/reports/1999-000363/dp99tl.pdf>. One factor that must however be kept in mind is that the time that managers must spend to review and supervise the implementation of accommodations is a cost that must be assessed in evaluating accommodations. I thank Professor Morley Gunderson for drawing this point to my attention.


139. The American literature is filled with such statements. For an example from even a relatively progressive author attempting to make arguments about the importance of intersectional identity including disability, see e.g. Samuel A. Marcosson, "Of Square Pegs and Round Holes: The Supreme Court's Ongoing 'Title VII-ization' of the Americans with Disabilities Act" (2004) 8 J. Gender Race & Just. 361.
Michael Stein has cogently argued that reasonable accommodations may be analyzed through a continuum of: (i) wholly efficient accommodations; (ii) socially efficient accommodations; and (iii) wholly inefficient accommodations.\(^{140}\)

Wholly efficient accommodations are those that an employer would find profitable on its own accord to adopt, as they enhance productivity and are Pareto optimal.\(^ {141}\) They include both: (a) voluntarily made accommodations that employers elect to provide to workers with disabilities that they have hired at their own expense; and (b) quasi-voluntary accommodations that are made as a result of human rights complaints alleging disability discrimination in Canada or ADA litigation in the United States. In other words, quasi-voluntary accommodations rely on legal remedies to rectify market failures.\(^{142}\) Socially efficient accommodations are those that are Kaldor-Hicks efficient but not Pareto efficient. Employers gain profits by hiring employees who require such accommodations, but they gain less than if they were to hire their able-bodied counterparts.\(^{143}\) Socially efficient accommodations include both: (a) semi-efficient accommodations that are stipulated as reasonable accommodations under the law; and (b) social benefit gain efficient accommodations that would constitute undue hardship for an individual employer to provide, but would enhance overall social welfare if the employer were compensated through public funds to enable the disabled person to participate in the labour market.\(^{144}\) Wholly inefficient accommodations are those that ought not to be funded at all because they reduce the social welfare of society.\(^{145}\)

Another approach is the use of "human capital theory" and "internal labour market" theory to evaluate the complex conflicts that arise within organizations when

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140. Stein, "Disability Accommodations," \textit{supra} note 11 at 144–78. See also Michael Ashley Stein, "Empirical Implications of Title I" (2000) 85 Iowa L. Rev. 1671 at 1674–77 (noting that available empirical accommodation studies suggest that accommodation costs to employers are "recurrently nonexistent, minimal, or even cost effective for the providing employers" at 1674); Michael Ashley Stein, "Employing People with Disabilities: Some Cautionary Thoughts for a Second-Generation Civil Rights Statute" in \textit{Blanck, Employment, Disability, supra} note 114, 51 at 57 (noting that the ADA is hardly unique among civil rights statutes in requiring expenditures). See also Thomas N. Chirikos, "Employer Accommodation of Older Workers with Disabilities: Some Empirical Evidence and Policy Lessons" in \textit{Blanck, Employment, Disability, supra} note 114, 228 at 228–57 (concluding, \textit{inter alia}, from regression analysis that productivity of workers with disabilities alone may be inadequate to generate market-based accommodations); Thomas N. Chirikos, "Will the Costs of Accommodating Workers with Disabilities Remain Low?" (1999) 17 \textit{Behav. Sci. \\& L.} 93.

141. Stein, "Disability Accommodations," \textit{ibid.} at 145–47.

142. \textit{Ibid.} at 151–52. Of course, it should be emphasized that in many cases, the employer will provide the requested accommodation as a result of the dialogue between the parties that is generated by a potential human rights complaint.


a non-unionized worker with a disability requests an accommodation that violates an employer’s self-imposed seniority system in a manner that is quite compatible with the approach articulated above. Internal labour market theory posits that employees who stay with a particular employer develop firm-specific skills that enhance their productivity while being shielded from the full forces of competition. Departing as this article has from a purely neo-classical law and economics framework, Harris therefore cogently argues that many employer-employee relationships may be characterized by a bilateral “sunk investments/delayed dividends” monopolistic dynamic, whereby employers and employees jointly invest in the fostering of firm-specific skills. This generates greater productivity for the employer in the employee’s early years in the position, along with a relatively modest salary that is below the worker’s high productivity, and, eventually, greater dividends in the form of wages and benefits that match or exceed his or her declining contribution in terms of productivity for an older employee that attains relatively significant seniority.

The efficiency created by this bargain, however, may be disrupted by the provision of an accommodation that interferes with the seniority system, potentially jeopardizing the rights of co-workers. Harris convincingly demonstrates that there is a risk that employers will consequently misuse seniority systems to deny disability accommodations that may also, as the analysis in this article demonstrates, in themselves be efficient and productivity enhancing. Employers may thereby unjustly reap a premium based on a productivity-wage differential by forcing an employee with a disability to take a lower paying job where he or she can be far more productive. While there has been relatively little research done to date on Canadian internal labour markets, Harris’ American scholarship suggests that it holds out promise, as internal labour markets are likely to remain influential even in the context of greater flexibility and international competitiveness. These models


148. Harris, ibid. at 125–26, 138.

149. Harris, ibid. at 170. This was the conclusion of Justice Breyer in U.S. Airways, supra note 146 at 404–05.

150. Harris, ibid. at 186–89.


can clearly be used to shed light on the implications of labour market policy and the provision of disability accommodations for Canadians and Americans with disabilities, to better foster acceptance of the social model of disablement and the elimination of structural barriers. Creative adaptations of law and economics theory are a fundamental part of this project.

While the implementation of substantive disability policy making in Canada has left much to be desired, one can find elements of the social model of disablement in the Supreme Court of Canada’s landmark decision in interpreting the duty to accommodate in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*. In that case, the Supreme Court held that aerobic standards for forest firefighters that arbitrarily made it virtually impossible for most women to qualify for the job were discriminatory under the British Columbia’s *Human Rights Code* because most men were able to meet the aerobic standards, while it was physiologically impossible for most women to qualify. Rather than examine how the non-standard individual could be placed into a pre-existing workplace, the merit of the employer-created standard itself was called into question and firmly rejected.5

Although not a decision involving employment accommodations, one can see similar reasoning in the recent closely decided ruling of the Supreme Court of Canada in *Council of Canadians with Disabilities v. VIA Rail Canada Inc.* In that case, a majority of five justices overturned a decision of the Federal Court of Appeal and restored a ruling of the Canadian Transportation Agency (CTA) with respect to the accessibility of railway cars purchased by Via Rail for people with mobility and other disabilities. The majority decision by Justice Abella made clear that Via Rail was required to comply with the CTA order to modify a number of railway cars and take positive steps to accommodate passengers with disabilities who were unable to use the inaccessible railway cars that Via Rail had purchased. In contrast, the dissent written jointly by Justices Deschamps and Rothstein specifically adverted to the importance of efficiency and economic viability as identified in the *Canadian Transportation Act* in concluding that the Federal Court of Appeal’s decision ought to be affirmed. The dissent reasoned that voluntary guidelines that had been accepted by the railway industry, such as the Rail Code, could not be regarded as legally binding and that therefore the CTA had wrongly interpreted its jurisdiction.

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157. Ibid. at para. 183.
158. S.C. 1996, c. 10, s. 5.
159. *Via Rail*, supra note 156 at para. 337.
160. Ibid. at paras. 346–50.
The dissent clearly accepted the status quo as the norm from which deviations permitting accessibility must be justified and subjected to a cost-benefit analysis. This replicates the worst flaws of neo-classical law and economics. A more enlightened approach would diverge from both the dissent and the majority by contemplating seriously how to enhance the mobility of customers with physical disabilities in light of some of the critiques of neo-classical law and economics that have been proposed in this article. This would entail examining not simply the implications of retrofitting trains for Via Rail’s limited budget, but assessing the impact that increased accessibility may have on enabling Canadians with disabilities to participate fully in the economy. This is not to dismiss the importance of human rights discourse. Indeed, the discussion on incommensurability above indicates how human rights values may not be sufficiently valued in traditional neo-classical law and economics analyses. But by taking the neo-classical law and economics tradition more seriously, one truly engages in the philosophical ideas that animate the dissent and responds more effectively to its concerns.

IV. Conclusion

People with disabilities remain profoundly marginalized in both Canada and the United States. In this article, it has been argued that one must fully embrace the tools of the law and economics paradigm in order to develop the complex array of policy interventions that people with disabilities require to ensure empowerment in the workplace. However, this requires that we creatively adapt and reinterpret neo-classical law and economics for the needs of equality rights by rethinking some of its central concepts. This includes re-examining how we evaluate productivity and how we assess the costs of disability accommodations. Future scholarship needs to evaluate the dynamics of accommodation costs in specific workplaces using the framework and ideas outlined in this article. This means not simply accepting a respondent’s argument that the cost of an accommodation constitutes undue hardship. This reconstruction project will go some distance toward providing the necessary empowerment for people with disabilities in the future to assume their rightful place as full citizens.

161. See supra note 67 and accompanying text.