LIBERTARIANISM, ENVIRONMENTALISM, AND UTILITARIANISM: AN EXAMINATION OF THEORETICAL FRAMEWORKS FOR ENFORCING TITLE I OF THE AMERICANS WITH DISABILITIES ACT

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INTRODUCTION

The Americans with Disabilities Act of 1990[1] ("ADA" or "Act") is the product of two competing and mutually exclusive paradigms. Part of the Act is written as a declaration of rights: disabled people have a *right* to assimilate into mainstream society; they have a *right* to access public and private buildings; they have a *right* to equal employment opportunities. Cost, as when ameliorating race and sex discrimination, should be irrelevant; no amount of cost savings justifies discrimination on the basis of race,[2] sex,[3] or disability. But disability differs from race and sex; disability may create a difference justifying differential treatment. Such treatment may be positive (e.g., imposing on an employer a duty to provide reasonable accommodation to an employee), or it may be negative (e.g., justifying not hiring the employee). Thus, the Act is tempered to at least some degree by a second paradigm, efficiency, which expressly limits the "rights" paradigm and is embodied in the ADA by the "undue hardship" exception to an employer's duty to provide reasonable accommodation to its employees. The Act defines both "reasonable accommodation" and "undue hardship" broadly and provides that both be examined on a case-by-case basis. Because both phrases thus constitute an open invitation to regulators and judges to impose their own values

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1. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990) [hereinafter ADA or Act].

2. *See* United States v. N.L. Indus., 479 F.2d 354, 366 (8th Cir. 1973) (rejecting an employer's argument that avoiding the increased training expense of changing employment practices is a business purpose that will validate the racially differential effects of an otherwise unlawful business practice); United States v. St. Louis-San Francisco Ry., 464 F.2d 301, 310 (8th Cir. 1972), *cert. denied sub nom.* United Transp. Union v. United States, 409 U.S. 1107 *and cert. denied*, 409 U.S. 1116 (1973) (requiring an employer to create and implement a costly and extensive retraining program); Robinson v. Lorillard Corp., 444 F.2d 791, 799 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971), *and cert. dismissed sub nom.* Tobacco Workers Int'l Union v. Robinson, 404 U.S. 1007 (1972) (requiring company to change discriminatory seniority system despite the likelihood that such a change would precipitate a costly strike).

3. *See, e.g.*, UAW v. Johnson Controls, 499 U.S. 187 (1991) ("The incremental costs of hiring women cannot justify discriminating against them.").

into the disability rights context,[4] it is particularly important to formulate a theoretical framework for examining the degree to which efficiency considerations limit the ADA's conferral of rights.

This Article examines the interplay between the competing paradigms of rights and efficiency as they relate to the employment provisions of the ADA. Part I gives an overview of the Americans with Disabilities Act and its legislative precursors. Part II contains a comprehensive analysis of the meaning of and the exceptions to reasonable accommodation and undue hardship. Parts III-V analyze the Act from a variety of theoretical viewpoints which commentators have advanced to guide both our national disability policy and the future interpretation of the ADA. Part III examines the Act from Richard Epstein's libertarian model, which advocates an absolute freedom of contract. Part IV considers Harlan Hahn's environmental model, which argues that disability is a social construct and that the purpose of disability law is to transform our living environment so that it is fully accessible to everyone. Hahn's model provides the "rights"-based paradigm for interpreting the ADA.

As noted above, the ADA's "rights" paradigm is tempered by cost and efficiency considerations. Part V examines three different proposed applications of the efficiency paradigm. The first analyzes and criticizes Richard Posner's assertion that antidiscrimination laws such as the ADA are inherently inefficient because they reduce total social welfare. The second examines statistical discrimination. Proponents of this theory argue that disability creates a difference which justifies differential treatment. The third application of the efficiency paradigm uses efficiency to measure the point at which an accommodation becomes an undue hardship. Adoption of this application would excuse employers from accommodating disabled employees whenever the aggregate costs of accommodation exceed the aggregate benefits.

The Conclusion of this Article ties all three paradigms together and concludes that although each contributes significantly to

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4. Gregory S. Crespi, *Efficiency Rejected: Evaluating "Undue Hardship" Claims Under the Americans with Disabilities Act*, 26 TULSA L.J. 1, 3 (1990).

understanding parts of the ADA, none of the models alone either adequately explain congressional motivation in passing the Act or provide clear guidance for the Act's future interpretation. The Act's lack of a single theoretical foundation, coupled with its reliance on a case-by-case application of the law, creates unnecessary indeterminacy which disserves employers and the disabled alike.

I. Origin and Overview of the ADA

A. Title VII

Title VII[5] prohibitions against employment discrimination do not extend to discrimination based on disability,[6] despite several attempts in the late 1970's and early 1980's to amend title VII to include the disabled.[7] Proponents of such an amendment pointed out the similarities in sources of discrimination,[8] such as active hostility, ignorance, indifference, and misconceptions about the abilities of the group.[9] Proponents also noted that both the disparate treatment[10] and disparate impact[11] models of title VII were appropriate for analysis of disability discrimination.[12]

Opposing amendments to title VII were, in part, civil rights groups who feared that subjecting the statute to substantive amendments might risk dilution of the statute's civil rights guarantee.[13] Further, commentators pointed to fundamental

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5. 42 U.S.C. §§ 2000e-2–e-17 (1990).

6. Title VII prohibits discrimination on the basis of race, color, sex, religion, or national origin.

7. *See, e.g.*, H.R. Rep. No. 370, 99th Cong., 1st Sess. at 1 (1985); S. Rep. No. 316, 96th Cong., 1st Sess. (1979).

8. Jeffrey O. Cooper, Comment, *Overcoming Barriers to Employment: The Meaning of Reasonable Accommodation and Undue Hardship in the Americans with Disabilities Act*, 139 U. Pa. L. Rev. 1423, 1427 (1991).

9. United States Comm'n on Civil Rights, Accommodating the Spectrum of Individual Abilities 24-25 (1983) [hereinafter Accommodating the Spectrum].

10. *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (establishing the order and allocation of proof in disparate treatment cases).

11. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (establishing the order and allocation of proof in disparate impact cases).

12. *See* Cornelius J. Peck, *Employment Problems of the Handicapped: Would Title VII Remedies be Appropriate and Effective?*, 16 U. Mich. J.L. Ref. 343, 348-350 (1983).

13. Robert L. Burgdorf Jr., *The Americans with Disabilities Act: Analysis and*

differences between the disabled and the traditional recipients of title VII protection.[14] First, title VII does not offer remedies appropriate for disability discrimination. "The prohibition on disparate treatment [for example] merely requires the use of employment criteria that are not tainted with bias . . . ."[15] Remedies such as individualized reasonable accommodation and the removal of architectural, transportation, and communication barriers would not be available under traditional title VII analysis.[16] Second, disability may create a difference in one's ability to perform a given job,[17] particularly if employers are not under a duty to provide reasonable accommodation. Title VII standards are likely to be useless to the disabled individual because employment criteria that have a disparate impact are quite likely to meet the business necessity[18] exception.[19] Consequently, one federal district court judge concluded:

> [T]he Title VII and Title IX models were not automatically adaptable to the problem of discrimination against the handicapped, but involved a very different undertaking. Indeed, attempting to fit the problem of discrimination against the handicapped into the model remedy for race discrimination is akin to fitting a square peg into a round hole . . . .[20]

B. Section 504 of the Rehabilitation Act

The Rehabilitation Act of 1973 ("Rehabilitation Act")[21] was

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Implications of a Second-Generation Civil Rights Statute, 26 HARV. C.R.-C.L. L. REV. 413, 429 (1991); *see also* Ellen Saideman, Title I of the ADA from a Historical Perspective, Address before the Cornell Journal of Law and Public Policy Symposium on Enabling the Workplace (Mar. 28, 1992) (videotape on file with the Cornell Journal of Law and Public Policy).

14. *See, e.g.*, ACCOMMODATING THE SPECTRUM, *supra* note 9, at 86-87.

15. *See* Cooper, *supra* note 8, at 1429.

16. *See* Burgdorf, *supra* note 13, at 430 n.92; NATIONAL COUNCIL ON THE HANDICAPPED, TOWARD INDEPENDENCE 35-39 (1986) [hereinafter TOWARD INDEPENDENCE].

17. *See* Alexander v. Choate, 469 U.S. 287, 298 (1985) ("the handicapped typically are not similarly situated to the nonhandicapped . . ."); *contra infra* notes 151-89 and accompanying text.

18. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971) (permitting the use of facially neutral criteria that have a disparate impact on a protected class if those criteria constitute a "business necessity").

19. Cooper, *supra* note 8, at 1429.

20. Garrity v. Gallen, 522 F. Supp. 171, 206 (D.N.H. 1981).

21. Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355, 357, § 2, *reprinted in* 1973 U.S.C.C.A.N. 409, 410 (codified as amended at 29 U.S.C. §§ 701-94 (1988)).

enacted to provide vocational rehabilitation for the handicapped.[22] Section 504 was intended to prevent discrimination against handicapped individuals by affording them equal opportunities in federally funded programs.[23] Originally an "inconspicuous part" of the Rehabilitation Act,[24] section 504 only became significant several years after its enactment, when the Department of Health, Education, and Welfare ("H.E.W.") empowered the Office of Civil Rights to draft implementing regulations for the Rehabilitation Act.[25]

A section 504 plaintiff establishes a prima facie case of discrimination by showing that she was: 1) an individual with a handicap within the meaning of the Rehabilitation Act; 2) qualified for the job but for her handicap; 3) denied a job, promotion, or raise for which she applied; and 4) excluded solely because of her handicap.[26] Once the plaintiff has established a prima facie case, the burden shifts to the employer to show either that the plaintiff was not otherwise qualified,[27] or that any possible accommodation would cause the employer undue hardship.[28] Finally, the plaintiff has the opportunity to rebut the employer's contention of undue hardship by showing that the proposed accommodation is, indeed, reasonable.[29]

Section 504 does not explicitly provide to employers the undue hardship defense.[30] This defense was provided by H.E.W. regulations, which state that a recipient of federal financial assistance "shall make reasonable accommodation" to otherwise

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22. *See* 119 CONG. REC. 24,571 (1973).

23. S. REP. NO. 1297, 93d Cong., 2d Sess. 38 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6373, 6388.

24. Julie Brandfield, Note, *Undue Hardship: Title I of the Americans with Disabilities Act*, 59 FORDHAM L. REV. 113, 116 n.25 (1990) (citing RICHARD K. SCOTCH, FROM GOOD WILL TO CIVIL RIGHTS 1 (1984)).

25. The regulations were not implemented until 1978. SCOTCH, *supra* note 24, at 80.

26. *See* Arneson v. Heckler, 879 F.2d 393, 396 (8th Cir. 1989); Copeland v. Philadelphia Police Dep't, 840 F.2d 1139, 1148 (3d Cir. 1988), *cert. denied*, 490 U.S. 1004 (1989); Gardner v. Morris, 752 F.2d 1271, 1280 (8th Cir. 1985); Prewitt v. United States Postal Service, 662 F.2d 292, 309-10 (5th Cir. 1981).

27. Southeastern Community College v. Davis, 442 U.S. 397, 406 (1979) (holding that an otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap).

28. *Arneson*, 879 F.2d at 393, 397-98.

29. *Id. See also Prewitt*, 662 F.2d at 292, 310.

30. Gregory S. Crespi, *Efficiency Rejected: Evaluating "Undue Hardship" Claims Under the Americans With Disabilities Act*, 26 TULSA L.J. 1, 15 (1990).

qualified handicapped employees or applicants unless that accommodation "would impose an undue hardship on the operation of its program."[31] The regulations specify three factors which courts are to consider in determining whether an accommodation imposes an undue hardship: "(1) The overall size of the recipient's program with respect to number of employees, number and type of facilities, and size of budget; (2) The type of the recipient's operation, including the composition and structure of the recipient's workforce; and (3) The nature and cost of the accommodation needed."[32]

These regulations provide little indication of precisely when a hardship becomes "undue."[33] One commentator termed them "an ambiguous list of unweighted characteristics"[34] that, another commentator noted, give courts the freedom to create widely varying pictures of undue hardship.[35] Courts have done just this.[36] Each case turns on its own facts,[37] and courts use "undue hardship" to label any accommodation that they have already decided not to impose on an employer.[38]

Another shortcoming of the Rehabilitation Act is its limited scope.[39] Section 501 requires affirmative action in federal employment, section 503 requires affirmative action programs by federal contractors receiving more than $10,000, and section 504 prohibits discrimination in federally funded programs.[40] This

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31. 45 C.F.R. § 84.12(a) (1990).

32. 45 C.F.R. § 84.12(c) (1990).

33. *See* Brandfield, *supra* note 24, at 118.

34. William G. Johnson, *The Rehabilitation Act and Discrimination Against Handicapped Workers: Does the Cure Fit the Disease?*, *in* DISABILITY AND THE LABOR MARKET 242, 260 (Monroe Berkowitz and M. Anne Hill eds. 1986).

35. Note, *Employment Discrimination Against the Handicapped and Section 504 of the Rehabilitation Act: An Essay on Legal Evasiveness*, 97 HARV. L. REV. 997, 1002-03 (1984) [hereinafter *Employment Discrimination Against the Handicapped*].

36. *See* Steven William Gerse, Note, *Mending the Rehabilitation Act of 1973*, 1982 U. ILL. L. REV. 701, 713, 717 (1982).

37. *See* Crespi, *supra* note 30, at 13.

38. *See Employment Discrimination Against the Handicapped supra* note 35, at 1011.

39. For a broad treatment of the limitations of the Rehabilitation Act, see TOWARD INDEPENDENCE, *supra* note 16, at 6-14.

40. *See* Pub. L. No. 93-112, 87 Stat. 300, 393-94, *codified in* 29 U.S.C. §§ 791, 793-94 (1990).

narrow coverage precludes the effectiveness of the Rehabilitation Act in combating general societal discrimination against the disabled.[41]

C. Status of Disabled Americans[42]

By almost any definition, Americans with disabilities are uniquely underprivileged and disadvantaged. They are much poorer, much less educated, and have less of a social life, fewer amenities, and a lower level of self-satisfaction than other Americans.[43]

Congressional findings in the ADA indicate recognition that discrimination against individuals with disabilities persists and is pervasive throughout all facets of life.[44] This discrimination includes outright intentional exclusion; the discriminatory effects of barriers in architecture, transportation, and communication; overprotective rules and policies; failure to make modifications to existing facilities and practices; exclusionary qualification standards and criteria; segregation; and relegation to lessee services, programs, activities, benefits, and jobs.[45]

The status of disabled Americans in employment is documented by a 1986 nationwide Harris poll.[46] Two-thirds of working age people with disabilities are unemployed, a rate which exceeds all other demographic groups under age sixty-five.[47] This extraordinary unemployment rate is not a result of the unwillingness of the disabled to work,[48] poor performance,[49]

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41. *See infra* notes 42-52 and accompanying text.

42. *See generally* Burgdorf, *supra* note 13, at 415-26; ACCOMMODATING THE SPECTRUM, *supra* note 9, at 17-45.

43. *To Guarantee a Work Opportunity For All Americans, and for Other Purposes, 1987: Hearing on S.777 Before the Subcomm. on Employment and Productivity and Subcomm. on the Handicapped*, 100th Cong., 1st Sess. 9 (1987) (Statement of Humphrey Taylor).

44. 42 U.S.C. § 12101(a)(2)-(3)(Supp. II 1991).

45. 42 U.S.C. § 12101(a)(5) (Supp. II 1991).

46. *See* Burgdorf, *supra* note 13, at 415-16, 420-22 (citing LOUIS HARRIS AND ASSOCIATES, THE ICD SURVEY OF DISABLED AMERICANS: BRINGING DISABLED AMERICANS INTO THE MAINSTREAM (1986)).

47. *Id.* at 420.

48. Two-thirds of those not working want to work. *Id.*

49. *Id.* Individuals with disabilities tend to maintain above average work attendance and productivity. *Id.* at 420, 421 n.41.

expensive insurance premiums,[50] or the cost of accommodation,[51] but instead appears to be due predominantly to discrimination.[52]

D. Response of the Americans with Disabilities Act

To rectify the inferior status of disabled Americans,[53] Congress in 1990 promulgated the Americans with Disabilities Act. One of the initial hurdles to such legislation was defining who the Act would cover.

1. *Who is Protected*

"The term 'disability' means, with respect to an individual- (A) a physical or mental impairment that substantially limits one or more life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."[54] The first prong of the ADA's tripartite definition of disability includes physiological disorders, cosmetic disfigurement, and mental or psychological disorders.[55] Disability under this prong is to be determined without regard to mitigating factors such as medicines or assistive or prosthetic devices.[56]

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50. *Id.* at 421.

51. According to a 1982 study measuring the cost of accommodating employees under the Rehabilitation Act, 51% of accommodations can be provided without cost to the employer, 30% of the accommodations which impose costs can be provided for less than $500, and only 8% of accommodations cost over $2000. GAO, PERSONS WITH DISABILITIES REPORT ON COSTS OF ACCOMODATIONS 19-20 (1990) (citing 1 BERKLEY PLANNING ASSOCIATES, A STUDY OF ACCOMODATIONS PROVIDED TO HANDICAPPED EMPLOYEES BY FEDERAL CONTRACTORS 28-31 (1982)).

52. *See* Burgdorf, *supra* note 13, at 421 n.37, citing, *inter alia*, a report by the President's Committee on Employment of People with Disabilities finding that forty-five different studies conclude that the discriminatory attitudes of employers are the predominant reason why people with disabilities do not have jobs. Burgdorf also discusses a Harris survey reporting that three-fourths of business managers admit that people with disabilities often encounter job discrimination from employers, and the conclusion of Frank Bowe that employer attitudes toward workers with disabilities are "less favorable than those . . . toward elderly individuals, minority group members, ex-convicts, and student radicals." *See* LOUIS HARRIS AND ASSOCIATES, THE ICD SURVEY II: EMPLOYING DISABLED AMERICANS 12 (1987); FRANK BOWE, HANDICAPPING AMERICA: BARRIERS TO DISABLED PEOPLE (1978); William G. Johnson, *The Rehabilitation Act and Discrimination Against Handicapped Workers: Does the Cure Fit the Disease?, in* DISABILITY AND THE LABOR MARKET 242, 245 (Monroe Berkowitz & M. Anne Hill eds. 1986).

53. 42 U.S.C. § 12101(a)(6) (Supp. II 1991).

54. 42 U.S.C. § 12102(2) (Supp. II 1991).

55. 29 C.F.R. § 1630.2(h)(1)-(2) (1992).

56. 29 C.F.R. app. § 1630.2(h) (1992).

Mere physical characteristics such as eye color, left-handedness, or height or weight within "normal" range are not covered; nor are environmental, cultural, or economic disadvantages such as poverty, lack of education, or a prison record.[57] Major life activities include, but are not limited to, caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.[58]

The purpose of the second prong of the definition—having a record of such an impairment—is to ensure that people are not discriminated against because of a history of disability.[59] For example, former cancer patients may not be discriminated against on the basis of their prior medical history.[60] This provision also protects persons who have been misclassified as disabled, e.g., as having a learning disability.[61]

The purpose of the third prong of the definition—regarded as substantially limited in a major life activity—is to protect an individual discriminated against due to the "myths, fears, and stereotypes" associated with disabilities.[62] The regulations adopt the findings of the Supreme Court in the section 504 case of *School Board of Nassau County v. Arline*,[63] in which the Court stated that "society's accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from actual impairment."[64]

2. *Scope of Coverage*

The broad coverage of the ADA far surpasses the limited scope of the Rehabilitation Act. When fully implemented, the antidiscrimination provisions of the ADA will extend to employment,[65] public services,[66] public transportation,[67] public

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57. *Id.*
58. 29 C.F.R. § 1630.2(i) (1992).
59. 29 C.F.R. app. § 1630.2(k) (1992).
60. *Id.*
61. *Id.*
62. 29 C.F.R. app. § 1630.2(1) (1992).
63. 480 U.S. 273 (1987) (finding a schoolteacher with tuberculosis a "handicapped person" within the meaning of the Rehabilitation Act).
64. *Arline*, 480 U.S. at 284.
65. 42 U.S.C. §§ 12111-12117 (Supp. II 1991).
66. 42 U.S.C. §§ 12131-12134 (Supp. II 1991).
67. 42 U.S.C. §§ 12141-12165 (Supp. II 1991).

accommodations and commercial facilities,[68] and telecommunication.[69] This Article focuses on employment.

3. *Employment*

The ADA's general rule against employment discrimination states that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[70] To aid in interpretation, the ADA also provides several rules of construction, explaining that discrimination by a covered entity includes: 1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of the applicant or employee; 2) participating in a contractual or other arrangement that has the effect of subjecting a covered entity's applicant or employee to discrimination; 3) using standards, criteria, or methods of administration that either negatively disparately impact the disabled or that perpetuate the discrimination of others; 4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association; 5)(A) not making reasonable accommodation to the known limitations of an otherwise qualified individual, unless doing so would impose an undue hardship on the covered entity; 5)(B) denying employment opportunities to an otherwise qualified individual on the basis of the need to provide reasonable accommodation to that individual; 6) using qualification standards, employment tests, or other selection criteria that tend to screen out either a disabled individual or a class of disabled individuals unless such standards, tests, or criteria are job-related and consistent with business necessity; and 7) selecting and administering tests that discriminate against individuals with impaired sensory,

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68. 42 U.S.C. §§ 12181-12189 (Supp. II 1991).
69. 47 U.S.C. § 225(c) (Supp. II 1991).
70. 42 U.S.C. § 12112(a) (Supp. II 1991).

manual, or speaking skills, unless such skills are the factors that the test purports to measure, in which case the employer must show that the skills are job-related and consistent with business necessity.[71]

The purpose of title I is thus to rectify the inferior status of disabled Americans and to provide to them a "meaningful equal employment opportunity,"[72] i.e., an opportunity to attain the same level of performance as is available to able-bodied people.[73] Part II of this Article will examine in more detail the duty imposed by the Act on employers, as well the exceptions to that duty afforded by the Act.

II. Reasonable Accommodation and Undue Hardship

A. Reasonable Accommodation

As noted above, title I of the ADA defines discrimination as "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability."[74] This is the textual basis of the employer's duty to provide reasonable accommodation to applicants and employees.

The Equal Employment Opportunity Commission Regulations to title I ("EEOC Regulations") delineate three categories of reasonable accommodation.[75] First, an employer must modify

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71. 42 U.S.C. § 12112(b) (Supp. II 1991).
72. H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 2, at 66 (1990).
73. *Id.*
74. 42 U.S.C. § 12112(b) (Supp. II 1991).
75. "Reasonable accommodation" has become a term of art in the context of Title VII religious discrimination. In Trans World Airlines v. Hardison, 432 U.S. 63 (1977), the Supreme Court interpreted the undue hardship limitation of EEOC regulations as not requiring employers to "reasonably accommodate" workers' religious beliefs if doing so would impose more than a de minimis cost. The report of the House Commission on Education and Labor expressly rejected the application of this de minimis approach to reasonable accommodation under the ADA:

> The Committee wishes to make it clear that the principles enunciated by the Supreme Court in TWA v. Hardison, U.S. 63 (1977) [sic] are not applicable to this legislation . . . [U]nder the ADA, reasonable accommodations must be provided unless they rise to the level of "requiring significant difficulty or expense" on the part of the employer, in light of the factors noted in the statute—i.e., a significantly higher standard than that articulated in *Hardison*.

H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 2, at 68 (1990).

or adjust the job application process to allow an otherwise qualified disabled applicant to be considered for the position. Second, the employer must modify or adjust the work environment, or the manner in which the job is customarily performed, to enable a qualified individual with a disability to perform the essential functions of that position.[76] Third, the employer must make modifications or adjustments to enable disabled employees to enjoy equal benefits and privileges of employment as are enjoyed by able-bodied employees.[77]

The duty of an employer to provide reasonable accommodation to disabled applicants does not include a duty of affirmative action. The Supreme Court, in the section 504 case of *Alexander v. Choate*,[78] clarified this distinction by observing:

> Our use of the term affirmative action in this context has been severely criticized for failing to appreciate the difference between affirmative action and reasonable accommodation; the former is said to refer to a remedial policy for the victims of past discrimination, while the latter relates to the elimination of existing obstacles against the handicapped.[79]

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76. The ADA imposes on employers the duty to modify both the work environment and the job itself. Examples of altering the environment include making the workplace, break rooms, restrooms, training rooms, and employer-provided transportation accessible to disabled employees and applicants. Employers are not required to provide "personal use" items. Thus, while employers must provide telephone headsets, magnifiers, readers, and interpreters, they need not provide hearing aids, eyeglasses, or guide dogs. *See* 29 C.F.R. app. § 1630.2(o) (1992); H.R.REP. No. 485, 101st. Cong., 2d Sess., pt. 2, at 64 (1990).

Examples of altering the job itself include altering when or how the function is performed, reallocating marginal job functions, and reassigning the disabled employee to another position. Employers are not required to reallocate essential job functions, and the reassignment option is strictly limited to avoid segregation or discrimination. *See* 29 C.F.R. app. § 1630.2(o) (1992); H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 2, at 64 (1990).

The ADA does not require the employer to provide reasonable accommodation to an employee or applicant if the only way to do so entails curing the disability. Thus, employers are not required to provide rehabilitation for alcoholism or drug addiction; nor are they required to pay for an eye operation. *See* 135 CONG. REC. S1078 (1989) (statement of Senator Harkin).

77. 29 C.F.R. § 1630.2(o)(1)(i)-(iii) (1992).

78. 469 U.S. 287 (1985) (holding that Tennessee's reduction in the number of annual inpatient hospital days that state medicaid would pay hospitals on behalf of medicaid recipients did not violate § 504 of the Rehabilitation Act despite the reduction's disparate impact on disabled persons).

79. *Alexander*, 469 U.S. at 300 n.20.

Courts are thus unlikely to read an affirmative action requirement into the statutory duty of employers to act affirmatively by reasonably accommodating disabled individuals.[80] Such a reading is consistent with Congressional intent.[81]

B. Exceptions to the Employers' Duty to Provide Reasonable Accommodation

The ADA provides four exceptions to an employer's duty to provide reasonable accommodation to applicants or employees. First, an employer need not accommodate a disabled applicant or employee who, even absent the disability, is unqualified for the job. Second, an employer does not have to accommodate an individual who, even with the accommodation, would be unable to perform the essential functions of the job. Third, an employer need not provide accommodation if the individual, or the accommodation itself, would pose a direct threat to the health or safety of other individuals. Fourth, an employer need not provide an accommodation that would impose an undue hardship on the employer or the operation of its business.

1. *Otherwise Qualified*

An employer need not accommodate a disabled applicant or employee who, even absent the disability, is unqualified for the job.[82] EEOC regulations define a qualified individual as one who "satisfies the requisite skill, experience, education and other job-related requirements of the employment position

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80. For a more detailed discussion of this issue see Jeffrey O. Cooper, Comment, *Overcoming Barriers to Employment: The Meaning of Reasonable Accomodaton and Undue Hardships in the Americans with Disabilities Act*, 139 U. PA. L. REV. 1423, 1431-41 (1991).

81. *See* H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 2, at 56 (1990) ("The employer has no obligation under this legislation to prefer applicants with disabilities over other applicants on the basis of disability.").

82. The general rule against discrimination states that "[n]o covered entity shall discriminate against a *qualified individual* with a disability . . . ." [emphasis added]. 42 U.S.C. § 12112(a) (Supp. II 1991).

such individual holds or desires . . . ."[83] If a law firm requires all incoming lawyers to have graduated from an accredited law school and to have passed the bar examination, the firm need not accommodate a disabled individual who has not met these selection criteria; such an individual is not otherwise qualified for the position.[84]

A harder case arises, however, when an employee claims that an applicant or employee is not otherwise qualified for the position because the applicant cannot, even with reasonable accommodation, perform the "essential functions" of the position. This scenario is discussed in the next section.

2. *Essential Functions*

An employer is not required by the ADA to accommodate an applicant or employee unless that accommodation will enable the applicant or employee to perform the essential functions of the position.[85] Application of this "essential functions" requirement indicates two competing congressional concerns: Congress did not want to force employers to hire employees who could not perform the job,[86] but simultaneously wished to avoid giving employers the opportunity to define the job so rigidly so as to unnecessarily exclude[87] disabled applicants

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83. 29 C.F.R. § 1630.2(m) (1992).

84. H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 2, at 65 (1990); 29 C.F.R. app. § 1630.2(m) (1992).

85. The Act defines a "qualified individual with a disability" (i.e., one covered by title I of the Act) as "an individual with a disability who, with or without reasonable accommodation, can perform the *essential functions* of the employment position . . . ." 42 U.S.C. § 12111(8) (Supp. II 1990) (emphasis added)). *See also* 29 C.F.R. § 1630.2(o)(1)(ii) (1992) (Reasonable accommodation includes "modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the *essential functions* of the position (emphasis added)). For application of the essential functions" requirement under section 504 of the Rehabilitation Act, *see* School Bd. v. Arline, 480 U.S. 273, 287 n.17 (1987).

86. *See* H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 2, at 55-56 (1990).

87. For example, in Griggs v. Duke Power Co., 401 U.S. 424 (1971), an employer imposed a requirement that all applicants pass a written test. The employer, which prior to the passage of title VII had refused to hire African-Americans, imposed the written test requirement immediately after title VII went into effect, but did not require white incumbents to pass the test. Although the Court held

merely because of their inability to perform purely peripheral tasks.[88] Congress compromised by stating that courts must consider the employer's definition of essential job functions, but that this consideration is neither conclusive nor presumptive.[89]

The Equal Employment Opportunity Commission ("EEOC") subsequently issued a non-exclusive, non-conclusive list of factors for determining whether a particular function is essential.[90] A court must consider (i) the employer's judgment as to which functions are essential; (ii) written job descriptions prepared before advertising or interviewing applicants for the job; (iii) the amount of time spent on the job performing the function; (iv) the consequences of not requiring the incumbent to perform the function; (v) the terms of a collective bargaining agreement; (vi) the work experience of past incumbents in the job; and/or (vii) the current work experience of incumbents in similar jobs.[91]

3. *Safety*

An employer need not reasonably accommodate an applicant or employee if doing so would pose a "direct threat"[92] to the

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that the test violated title VII because of its disparate impact on African-Americans, the facts recited above strongly indicate that the employer introduced the test specifically to exclude African-Americans. By this analysis, disparate treatment would have been a more appropriate standard for evaluating the employer's actions. Similarly, employers may attempt to circumvent the ADA by imposing highly detailed, overly-restrictive job descriptions, which may have the same effect (disparate impact) as overt discrimination.

88. *See* H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 2, at 71 (1990). The distinction between "primary duties" and "peripheral duties" has been much-litigated in the context of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-19 (1988). Section seven of the FLSA requires employers to pay overtime to an employee who works more than 40 hours per week. Section 13(a)(1) exempts from the maximum hour provision "bona fide executive, administrative, or professional" positions. Each of the three exceptions requires ascertaining what constitutes the employee's "primary duty." *See* Dalheim v. KDFW-TV, 918 F.2d 1220 (5th Cir. 1990) (defining an employee's "primary duty" as the work performed by the employee that is of "principal value" to the employer, regardless of whether that work encompasses more than 50% of the employee's work-time).

It remains to be seen whether the FLSA distinction between primary and peripheral duties will be applied to the essential functions exception.

89. *See* H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 3, at 33 (1990); Cooper, *supra* note 8, at 1442-43.

90. *E.g.*, if an employee is hired to proofread documents, the ability to read is an essential function of that job. *See* 29 C.F.R. app. § 1630.2(n)(1992).

91. 29 C.F.R. § 1630.2(n)(3)(i)-(vii) (1992).

92. 42 U.S.C. § 12113(b) (Supp. II 1991).

health or safety of other individuals in the workplace.[93] The EEOC Regulations place a heavy burden on an employer who uses safety concerns to justify a discharge or a refusal to hire.[94] Such an employer may not rely on remote or speculative evidence, subjective perceptions, irrational fears, patronizing attitudes, or stereotypes.[95] The employer must analyze the risks[96] on a case-by-case basis; statistical probability is irrelevant.[97] The employer must also consider whether a reasonable accommodation would reduce the risk to a reasonable level.[98]

4. *Undue Hardship*

Title I of the ADA imposes no duty to accommodate where the employer can demonstrate that the accommodation "would impose an undue hardship on the operation of the [employer's] business."[99] "Undue hardship" refers to any accommodation that would be unduly costly, extensive, substantial, disruptive,

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93. *Id.* The statutory language seems to preclude a paternalistic employer from refusing to hire an applicant with a disability for what the employer perceives to be the applicant's own good. *See* 42 U.S.C. § 12101(a)(5) (Supp. II 1991) (citing "overprotective rules and policies" as an obstacle to be overcome); Cooper, *supra* note 80 at 1448, n.146.

The EEOC Regulations, on the other hand, would allow an employer to reject such an applicant:

> An employer is also permitted to require that an individual not pose a direct threat of harm to his or her own safety or health. If performing the particular functions of a job would result in a high probability of substantial harm to the individual, the employer could reject or discharge the individual unless a reasonable accommodation that would not cause an undue hardship would avert the harm.

29 C.F.R. app. § 1630.2(r) (1992).

94. *See supra* notes 92-93 and accompanying text; *see also infra* note 95 and accompanying text.

95. *See* 29 C.F.R. app. § 1630.2(r) (1992).

96. The regulations list four factors which the employer must consider:

(1) the duration of the risk;
(2) the nature and severity of the potential harm;
(3) the likelihood that the potential harm will occur; and
(4) the imminence of the potential harm.

Id.

97. *Id.*

98. *See* 42 U.S.C. § 12113(a) (Supp. II 1990); H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 2, at 76 (1990); Cooper, *supra* note 80, at 1448.

99. 42 U.S.C. § 12112(5)(A) (Supp. II 1990).

or that would fundamentally alter the nature or operation of the business.[100]

As with the undue hardship exception to section 504 of the Rehabilitation Act, it is difficult to delineate precisely when a hardship becomes "undue." Congress rejected several proposals that would have made this determination significantly easier. The original version of the Act stated that an accommodation would be reasonable unless it threatened the continued existence of the employer's business.[101] Confronted by strident opposition by business interests,[102] Congress retreated and adopted the present balancing approach. Congress subsequently rejected an amendment that would have imposed a ceiling of ten percent of the employee's annual salary as the upper limit for what an employer must do to provide reasonable accommodation to the employee.[103] Instead of promulgating a bright-line test,[104] Congress instead decreed that each case shall turn on its own facts.[105]

The undue hardship test is composed of six factors: the first four established by Congress in the text of the Act; the fifth added by the EEOC in the regulations to the Act; and the

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100. 29 C.F.R. app. § 1630.2(p) (1992).

101. *See* Bonnie P. Tucker, *The Americans With Disabilities Act: An Overview*, 1989 U. ILL. L. REV. 923, 927 (1989).

102. *Id.*

103. 136 CONG. REC. D619 (1990).

104. In the context of public accommodations and commercial facilities, a covered entity must alter those accommodations and facilities so they are accessible to persons with disabilities. Where alterations are made to an area of a facility that contains a primary function, the covered entity must provide an accessible path of travel to the altered area unless doing so would be "disproportionate" to the overall cost and scope of the alterations. 42 U.S.C. § 12183(a)(2) (Supp. II 1990). House committee reports suggest that a standard of thirty percent of the alteration costs would be appropriate. H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 3, at 64 (1990); Burgdorf, *supra* note 13, at 477-78. Though this 30% standard cannot be directly applied to undue hardship or reasonable accommodation, it may provide a ballpark figure for Congressional intent.

Despite Congressional contemplation of 30%, Justice Department regulations declare that "Alterations made to provide an accessible path of travel will be deemed disproportionate to the overall alteration when the cost exceeds 20% of the cost of the alteration to the primary function area." 28 C.F.R. § 36.403(f)(1) (1992).

105. *See* H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 2, at 58, 67, 70 (1990).

sixth indicated in the Act's legislative history. First, courts must consider the nature and cost of the accommodation.[106] Both the legislative history and the EEOC regulations make clear that only net cost—not gross cost—is relevant.[107] If outside funds or tax credits are available to the employer to induce or subsidize accommodation, these revenues must be subtracted from the total cost of the accommodation.[108] Similarly, courts must discount the total cost by the amount the applicant or employee is willing to pay.[109]

Second, courts must examine the financial resources of the local facility.[110] Third, courts must consider the financial resources of the covered entity as a whole. For example:

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106. 42 U.S.C. § 12111(10)(B)(i) (Supp. II 1990).

107. *See* 29 C.F.R. app. § 1630.2(p) (1992).

108. H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 2, at 69 (1990) ("To the extent that such monies [state vocational rehabilitation agency, or federal, state, or local tax deductions or credits] pay or would pay for only part of the cost of an accommodation, only the non-reimbursed portion of the cost of an accommodation—the final net cost to the entity—may be considered in determining undue hardship.").

109. *Id.* ("[T]he employer must pay for the portion of the accommodation that would not cause an undue hardship if, for example, the applicant or employee pays for the remainder of the cost of the accommodation."). *See also Id.* at 70 (A covered entity "cannot refuse to hire a qualified applicant where the applicant is willing to make his or her own arrangements for the provision of such an accommodation . . . .").

This poses the ugly specter of forcing a disabled employee to pay for her own accommodation, even if the accommodation is necessitated because of an inhospitable environment for which the employer is responsible. Theoretically, the prospect of an applicant or employee paying for an accommodation would only be implicated if the accommodation imposes an undue hardship where, absent the financial input by the applicant or employee, she would not have gotten the job anyway. Richard Epstein would point out that, if the transaction occurs, both parties will be better off than they would have been absent the transaction. *See* Richard Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357, 1359 (1983) [hereinafter *A Common Law for Labor Relations*]. However, it is not difficult to imagine an employer demanding such concessions from applicants and employees whose requests for accommodation do not pose an undue hardship, particularly when, as will often be the case, the cost to the applicant of challenging the employer's demand for concessions, or the opportunity cost of looking elsewhere for a job, is greater than the costs of acquiescing to the employer's demands.

110. 42 U.S.C. § 12111(10)(B)(ii) (Supp. II 1991); 29 C.F.R. app. § 1630.2(p) (1992) ("[C]onsideration of the financial resources of the employer or other covered entity as a whole may be inappropriate because it may not give an accurate picture of the financial resources available to the particular facility that will be actually required to provide the accommodation.").

> [A] small day-care center might not be required to expend more than a nominal sum, such as that necessary to equip a telephone for use by a secretary with impaired hearing, but a large school district might be required to make available a teacher's aide to a blind applicant for a teaching job.[111]

Fourth, courts must examine the type of operations of the covered entity and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the covered entity. Rather than an independent factor, this appears to be relevant for determining whether the court should focus more on the financial resources of the particular facility (factor two) or on the financial resources of the covered entity as a whole (factor three). For example, if the financial relationship between a franchisor and an independently owned and operated franchisee is limited to payment of an annual franchise fee, only the financial resources of the franchisee would be considered in determining whether or not providing the accommodation would constitute an undue hardship.[112]

EEOC regulations add a fifth factor to the undue hardship test: the impact of the proposed accommodation on the operation of the facility, including the ability of other employees to work and the facility's ability to conduct business.[113] For example, it may be an undue hardship to maintain wheelchair accessibility at a construction worksite where the site's terrain and building structure change daily as construction progresses.[114]

The legislative history imposes a sixth factor: the number of employees or applicants[115] that will potentially benefit from the accommodation.[116] For example, a ramp installed for a new employee with a wheelchair will also benefit future mobility-impaired applicants and employees.[117]

The undue hardship provision is to be applied just as it is currently applied under section 504[118] which, as noted above,[119]

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111. H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 2, at 67 (1990).
112. 29 C.F.R. app. § 1630.2(p) (1992).
113. 29 C.F.R. § 1630.2(p)(2)(v) (1992).
114. H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 2, at 69-70 (1990).
115. Customers are not mentioned, but I see no logical reason why they should be excluded from consideration.
116. H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 2, at 69 (1990).
117. *Id.*
118. H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 2, at 67, 70 (1990).
119. *See supra* notes 33-38 and accompanying text.

provides no constructive guidance. Congress has thus imposed a ceiling of bankruptcy[120] and a floor of de minimis,[121] but between these two extremes Congress has left courts with broad discretion and a mandate to proceed on a case-by-case basis.[122] The remainder of this article will examine various theoretical models to which courts may turn for guidance in interpreting the Act.

III. Libertarian Model

A. Explanation of the Model

The goal of libertarianism is to maximize private autonomy. This is secured, in Richard Epstein's[123] view, by the freedom to contract with whomever and for whatever[124] one pleases.[125] In the employment context, an individual has an absolute right to own her own person and to possess, use, and dispose of her labor on whatever terms she sees fit.[126] Government exists only to enforce contracts and to police the narrow exceptions to the freedom of contract.[127] Private property is sacred and largely inviolable.[128] This social framework boasts of two major

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120. *See supra* note 101 and accompanying text.

121. *See supra* note 75.

122. *See supra* note 105 and accompanying text.

123. Epstein's writing often is an amalgam of libertarianism and utilitarianism. In this section, I focus on his libertarian bent; I discuss utilitarianism in Part V.

124. Epstein does admit to a few exceptions, including contracts induced by force, fraud, or infirmity (these exceptions are to be read extremely narrowly); contracts which impinge on public duties; contracts with third party effects; and non-lockstep contracts. *See* Richard Epstein, *In Defense of Employment at Will*, 51 U. Chi. L. Rev. 947, 952 n.11, 979-82 (1984) [hereinafter *Employment at Will*]; Richard Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 Yale L.J. 1357, 1359 (1983) [hereinafter *A Common Law For Labor Relations*].

125. Epstein, *A Common Law for Labor Relations, supra* note 124, at 1357-58.

126. *Id.* at 1364. The right of disposition includes only the right to offer her services on whatever terms and conditions she sees fit; it does not include a reciprocal obligation on the part of another to accept her offer. *Id.* at 1365.

127. *Id.* at 1357.

128. *See, e.g.*, Richard Epstein, Takings: Private Power and the Power of Eminent Domain (1985). Epstein recognizes the government's power of eminent domain, but argues that a qualification on that right—that the government must

benefits: it maximizes private autonomy[129] and, since freely-entered contracts leave everyone better off than they were before,[130] everyone benefits.[131]

B. Libertarian Reaction to Antidiscrimination Legislation

1. *Redistribution of Wealth*

If Steven Willborn's tenets about "minimal terms" are correct, the ADA will redistribute resources from nondisabled employees to disabled employees. Minimal terms, according to Willborn, are nonwaivable substantive terms of employment required by

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pay for what it takes—indicates an underlying respect for private property, and concludes, *inter alia*, that transfer payments from rich to poor, such as welfare programs, are unconstitutional "takings." He contrasts with this vision that of public-interest advocates who "abandon any conception of private entitlements . . . and thereby allows far greater latitude for government action." Epstein, *A Common Law for Labor Relations, supra* note 124, at 1361.

129. Epstein, *A Common Law for Labor Relations, supra* note 124, at 1359.

130. *Id.* at 1360.

131. Epstein uses a derivation of the Pareto formula to reach this conclusion. The Pareto formula, used primarily by welfare economists to evaluate alternative social states, posits that if no person in state A is worse off than she was in state B, and at least one person is better off in state A than she was in state B, then state A must be judged superior to state B. Epstein's implicit assertion is that where the relevant universe involves only two self-interested parties, any voluntary contract satisfies the test, as the agreement is formed only if it makes both sides better off than they were before. *See* Richard Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 5, 8-10 (1988).

Epstein's analysis relies on two assumptions. First, he assumes that all contracts, in the end, benefit both parties. In the real world, they often do not. A person may purchase a factory that manufactures phonographs one day before compact disc technology is discovered. Epstein is unclear what role, if any, government would play in rectifying the inequities of this situation. Epstein might argue that in the long run, everyone would benefit if the government refused to intervene except to enforce the contract. However, this utilitarian response is quite different from his Pareto-style libertarian argument of individualized benefits.

Second, he assumes the status quo ante is the baseline against which change should be measured. Instead of comparing the post-contract status of the parties with the pre-contract status of the parties, the proper comparison may be between the pre-contract status of the parties and the status of the parties under a different set of legal rules. Earning 50 cents per hour in a Matamoros sweatshop may be better than being unemployed; earning $5.00 per hour under a minimum wage law is, arguably, better still.

government.[132] Employers are generally neutral about the imposition of such terms, since they bear little or none of the cost. While facially such terms appear as a wage increase to employees borne by employers, economic forces will in the long run drive employers to offset this wage increase with wage decreases elsewhere in the wage package,[133] leaving employees no better, or perhaps worse, off than they were before the imposition of the minimal term.[134]

Though workers *net* an identical wage after the imposition of a minimal term as they did beforehand, the distribution of that wage among workers may be altered by the minimal term. For example, an employer will shift the cost of a minimal term requiring paid maternity leave to all workers in the form of a general wage decrease. The benefits of the term, however,

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132. Steven L. Willborn, *Individual Employment Rights and the Standard Economic Objection: Theory and Empiricism*, 67 NEB. L. REV. 101, 102 (1988). Willborn explicitly excludes anti-discrimination legislation from his definition of minimal terms. Referring to racial discrimination, he argues that anti-discrimination legislation is distinguishable from minimal terms because minimal terms raise an employer's labor costs, while anti-discrimination legislation does not. *Id.* at 111 n.39. This distinction, while perhaps valid for traditional title VII discrimination, is not applicable to the ADA. While it may be true that title VII provisions outlawing racial discrimination do not impose additional monetary costs on employers, the ADA provisions requiring reasonable accommodation most certainly do. *See infra* text accompanying notes 228-30.

In response to Judge Posner's argument that anti-discrimination legislation does in fact increase an employer's labor costs (*see infra* notes 203-05 and accompanying text), Willborn attempts to distinguish minimal terms on yet another ground: that minimal terms increase both the cost of labor to employers *and* the effective wages of workers, while anti-discrimination laws increase the cost of labor to employers without raising the effective wages of workers. Willborn at 111 n.39. Again, although this analysis may be applicable to traditional title VII discrimination, it is not to the ADA. On aggregate, title VII will not change the effective wages of workers, as gains by protected classes will be balanced by the losses of others. The reasonable accommodation requirement of the ADA, however, imposes on employers a cost, the benefit for which accrues directly to disabled individuals. The ADA thus does raise the effective wages of workers, and once again Willborn's distinction fails. Thus, to the extent that the ADA is a mere anti-animus-discrimination statute, Willborn is correct to say that it is not a minimal term; to the extent that the ADA requires reasonable accommodation, however, Willborn's minimal terms analysis applies.

133. Willborn, *supra* note 132, at 114-15.

134. Employees may be said to be worse off because the final wage package is different than the one for which they otherwise would have bargained.

accrue entirely to women, effectively redistributing resources from men to women. Similarly, while employers will shift the costs of reasonable accommodation to all workers, the benefits will accrue to the disabled person. The ADA will thus redistribute resources from nondisabled employees to disabled employees.

A fundamental tenet of libertarianism is that law is (or should be) neutral, and that the only legitimate purpose of government is to protect equally the private rights of individuals, be they rich or poor.[135] Libertarians thus disfavor the conscious redistribution of wealth,[136] and would disfavor the ADA to the extent it has this effect.

2. *Enhancing Individuals' Freedom to Contract*

Antidiscrimination laws may enhance private party contracting in two ways. First, the laws may take economic externalities into account in order to counter perceived economic dislocations that cannot be rectified by agreement due to high transaction costs.[137] Since this is a utilitarian argument, discussion of it will be deferred until Part V.[138]

Second, antidiscrimination laws may enhance private party contracting by giving the discriminated-against party the opportunity to contract freely. The *Heart of Atlanta Motel*[139] and *Ollie's Barbecue*[140] cases, for example, gave African-Americans the freedom to contract for overnight lodging and restaurant meals. Similarly, the ADA will give many disabled individuals the freedom to sell their labor in the employment market.[141]

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135. *See, e.g.*, Epstein, *A Common Law for Labor Relations, supra* note 124, at 1361.

136. *See e.g.*, Epstein, *A Common Law for Labor Relations, supra* note 124, at 1361 ("To be sure, the common law theory developed here finds no place for the redistribution of wealth from rich to poor so characteristic of the modern [welfare] state.").

137. *Id.* at 1381.

138. *See infra* notes 190-280 and accompanying text.

139. 379 U.S. 241 (1964) (holding that a motel's refusal to provide lodging to African-Americans violated section 201(a) of the Civil Rights Act of 1964).

140. Katzenbach v. McClung, 379 U.S. 294 (1964) (holding that a restaurant's refusal to extend sit-down service to African-Americans violated § 201(a) of the Civil Rights Act of 1964).

141. *See* UNITED STATES COMM'N ON CIVIL RIGHTS, ACCOMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 69-72 (1983).

Epstein rejects this argument, stating that the right to dispose of one's labor as one likes "must be understood to include only the right to offer one's services on whatever terms and conditions one sees fit. In good Hobbesian fashion, the appetite of every person determines the appropriate terms of exchange."[142] This laissez-faire approach admits of no restrictions save tort principles and contract law.[143] Applicants have the right to offer their services for whatever they believe the market will bear; employers may purchase, or decline to purchase, those services based on any criteria or no criterion at all. If an employer has no desire to hire a laborer for more than $3.50 per hour, he is not compelled to hire an applicant who offers her labor for $4.00. If an employer's hiring practices reflect a distaste for African-Americans or disabled individuals or women, Epstein's reasoning allows him the liberty to hire only white nondisabled men.

In his recently published *Forbidden Grounds*,[144] Epstein, for the first time, articulates clearly his position on antidiscrimination legislation. Reasoning that antidiscrimination laws are fundamentally inconsistent with freedom of contract,[145] Epstein advocates the wholesale repeal of all antidiscrimination laws, including title VII and the ADA.[146]

Libertarians *must* reject antidiscrimination legislation, because such rules force some parties to contract unwillingly with others. The decision in *Ollie's Barbecue*, for example, forced the restaurant to serve African-Americans despite the restaurant's

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142. Epstein, *A Common Law for Labor Relations*, *supra* note 124, at 1365.

143. *Id.* at 1357.

144. RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS (1992).

145. *Id.* at 3 ("An antidiscrimination law is the antithesis of freedom of contract, a principle that allows all persons to do business with whomever they please for good reason, bad reason, or no reason at all."). *See also Id.* at 4 ("The antidiscrimination principle acts as a powerful brake against this [libertarian] view of freedom of contract and the concomitant but limited role of the state. By its nature the antidiscrimination principle is interventionist . . . .").

146. *Id.* at 9 ("[T]he entire apparatus of the antidiscrimination laws in Title VII should be repealed insofar as it appeals to private employers. . . . My view . . . is meant to apply to criteria of race, sex, religion, national origin, age, and handicap."). *See also Id.* at 484 ("Like everyone else, the disabled should be allowed to sell their labor at whatever price, and on whatever terms, they see fit.").

clear preference to forego such transactions. This example starkly illustrates the principal contradiction of libertarianism: it fails to recognize that the social order, itself created and maintained by non-neutral[147] legal rules, excludes broad segments of society from the ability to contract freely, and thereby deprives these people of the very benefits—individual autonomy and increased wealth—that libertarianism claims to maximize. Just as the advantages of individual autonomy were meaningless in 1963 to road-weary African-Americans looking for a night's lodging in Atlanta, the freedom to make a million dollars is not worth a cent to a disabled individual whom no one will employ. To paraphrase Samuel Gompers, libertarians guarantee workers an academic and theoretic liberty which they do not want by denying them the rights to which they are entitled.[148]

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147. The absence of antidiscrimination legislation in the face of obvious discrimination is not indicative, as Epstein claims, of neutral government policy. The decision not to legislate would itself constitute a non-neutral policy that would legitimate, perpetuate, and reinforce discrimination.

The Legal Realists, arguing in the context of property distribution, reached the same conclusion: that law, far from being neutral, protects and strengthens prior property distribution. *See, e.g.*, MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1880-1960, 170 (1992) ("[A]bove all, Realism is a continuation of the Progressive attack on the attempt of nineteenth-century Classical Legal Thought to create a sharp distinction between the law and politics and to portray law as neutral, natural, and apolitical."), *and* Robert Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603, 606 (1943) ("One chooses to enter into any given transaction to avoid the threat of something worse—threats which impinge with unequal weight on different members of society.").

See also Morris Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 587 (1933):

> To put no restrictions on the freedom to contract would logically lead not to a maximum of individual liberty but to contracts of slavery, into which, experience shows, men will "voluntarily" enter under economic pressure—a pressure that is largely conditioned by the laws of property. Regulations, therefore, involving some restrictions on the freedom to contract are as necessary to real liberty as traffic restrictions are necessary to assure real freedom in the general use of our highways.

The realists thus concluded that since law is not and can never be neutral, it ought to be employed for some socially useful end, such as a more equitable distribution of resources. *See* Horowitz, *supra* at 198.

But see Epstein, *A Common Law for Labor Relations*, *supra* note 124, at 1372 ("It is quite enough that the contracts leave the parties better off than they were before. It is too much to ask of any system of rules that it correct whatever asserted social imbalances exist before the contract formation.").

148. Samuel Gompers, A Brief and Appeal to the Members of the United States Senate and the House of Representatives. (Washington, D.C., 1914).

C. Role of Libertarianism in Interpreting the ADA

The legislative history of the Act demonstrates that Congress did not intend to destroy managerial discretion in the hiring and firing of employees. For example, if two applicants for a position as typist are an individual with a hearing impairment who requires a telephone headset with an amplifier, and an individual without a disability, both of whom have the same typing speed, the employer would be permitted to reject the disabled applicant for reasons not related to the disability.[149] The employer is not permitted, however, to reject the disabled applicant because of his disability, or because of the reasonable accommodation with which the employer must provide him.[150]

The libertarian freedom of contract is thus unchanged by the ADA exclusive of issues related to disability. On the other hand, libertarianism has no significant role in interpreting a statute the purpose of which was to eliminate employers' liberty to discriminate against the disabled.

IV. Environmental Model

A. Explanation of the Model

Harlan Hahn, working before the passage of the ADA, applied the realist critique of libertarianism to disability policy. As the Realists said that law is not neutral,[151] that the law legitimizes and protects prior distributions of property,[152] and that there is no a priori reason why the law (and thus the distribution of property) could not be changed,[153] so Hahn and other environmentalists argue that disability law is not neutral,[154] that our

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149. H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 2, at 56 (1990).
150. *Id.*
151. *See supra* note 147.
152. *Id.*
153. *Id.*
154. *See* Claire H. Liachowitz, Disability As A Social Construct 1, 5 (1988) ([D]isability is a complex of constraints that the able bodied population imposes on the behavior of physically impaired people; "disability is a result of the various social constructions that *force* handicapped individuals into a position of deviance.").

concept of disability is created and defined by public policy,[155] and that laws and policy can and should be changed.[156]

Hahn's argument that disability is a social construct is well-summarized in *Accommodating The Spectrum*:

> [This view] emphasizes that societal actions and prejudice restrict opportunities for people with mental and physical limitations; the selection of architectural options other than ramps, elevators, or wide doors is the cause of handicap discrimination. Proponents of this view hold that there are no handicapped people—that it is society that "handicaps" people. Ignorant of their abilities and designed to operate without them, societal choices are seen as excluding people with handicaps.[157]

Thus, if all the world had ramps and elevators, individuals confined to a wheelchair would not be "dis-abled" from functioning like everyone else. They are only disabled because we have constructed a world in which they cannot maneuver.

Current public policy assumes that there exists, as if decreed by natural law, a certain minimal level of abilities needed to sustain a "normal" quality of life.[158] Implicit in this is an assumption of the biological inferiority of those who do not measure up,[159] which is thought to justify segregating, institutionalizing, sterilizing, denying medical treatment to, or otherwise excluding these individuals from the rest of society.[160]

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155. Hahn defines public policy as "whatever governments and private institutions choose to do or not to do." Harlan Hahn, *Disability Policy and the Problem of Discrimination*, 29 AM. BEHAV. SCIENTIST 293, 294 (1985). Claire H. Liachowitz, another advocate of the environmental model, explains that the public policy approach emphasizes that impairment is an outcome of political and social decisions rather than medical limitations. LIACHOWITZ, *supra* note 154, at xi.

156. *See infra* notes 159-63 and accompanying text; *see also* LIACHOWITZ, *supra* note 154, at 7 ("social structures and norms can and should adapt to the individual").

157. UNITED STATES COMM'N ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 86 (1983) [hereinafter ACCOMMODATING THE SPECTRUM].

158. Hahn, *supra* note 155, at 296.

159. *Id.* at 304; *see also* LIACHOWITZ, *supra* note 154, at 1 (noting that much disability legislation is the product of commonly-held views that "biological deficiency confers social deficiency and that handicapped people deserve (perhaps desire) a place outside of the mainstream of society").

160. For example, through the maintenance of architectural barriers or the denial of equal education, employment opportunities, or transportation services. *See generally* ACCOMMODATING THE SPECTRUM, *supra* note 157, at 17-66 (providing a general discussion of discrimination against disabled individuals).

Current policy, then, has been either to exclude the disabled or to teach them to "overcome" their disabilities by surmounting environmental obstacles;[161] the existence of such obstacles has not been questioned.[162] Hahn urges a redefinition of the baseline[163] from which we view disability. He posits that the level of abilities which we assume necessary for the sustenance of a decent quality of life is arbitrary and dependent wholly on public policy. Environments are not fixed or immutable. Environments can be changed so they necessitate greater or lesser amounts of individual ability; institutions and job requirements can be altered to accommodate persons with varying types of functional skills.[164] As the Supreme Court said in the title VII case of *Griggs v. Duke Power Co.*:[165]

> Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. On the contrary, Congress has now required that the posture and condition of the job-seeker be taken into account. It has—to resort again to the fable—provided that the vessel in which the milk is proffered be one all seekers can use.[166]

Hahn's vision, then, is the construction of "an environment designed to meet the needs of everyone, that does not contain any implicit prerequisite concerning the capacities necessary to survive or to engage in social life," in which "the significance of functional losses could be virtually obliterated."[167] The key to developing such a society is the realization that two people, one standing and one in a wheelchair, located at the base of the steps leading up to the Supreme Court building, are similarly situated—they both want to get through the door.

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161. Hahn, *supra* note 155, at 300, 302, 310.
162. *Id.*
163. For a general discussion of baselines, *see* Jack M. Beermann and Joseph William Singer, *Baseline Questions in Legal Reasoning; The Example of Property in Jobs*, 912 GA. L. REV. 911, 913, 923-25 (1989).
164. Hahn, *supra* note 155, at 297.
165. 401 U.S. 424 (1971).
166. *Griggs*, 401 U.S. at 424, 431 (establishing the order and allocation of proof in disparate impact cases).
167. Hahn, *supra* note 155, at 303.

B. Textual Support in the ADA

Much of Hahn's analysis concerning the environmental causes of disability is reflected in the text of the ADA. For example, Congress found that:

> individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals . . . .[168]

This finding indicates a congressional conclusion that inability to function, alone, does not explain the inferior status of disabled Americans. This congressional language constitutes a powerful argument that the Supreme Court should re-think its declaration that disability does not constitute a suspect classification.[169]

The text of the Act further indicates Congressional support for Hahn's environmental approach by imposing on employers, as part of the reasonable accommodation requirement, a duty to modify both the work environment[170] and the functions of the job itself.[171]

The ADA duties to modify the work environment and job functions are extensive and mitigated only by the undue hardship exception, which eschews a strict cost-benefit analysis and instead adopts an approach deferential to disabled complainants. Of the six factors which courts must consider before making a determination of undue hardship, two focus on cost,[172] three on ability to pay,[173] and one on the quantum of benefit.[174] The

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168. 42 U.S.C. § 12101(a)(7) (Supp. II 1990).

169. In City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985), the Supreme Court reasoned that because the retarded were not similarly situated to other citizens, and because protective legislation proved they were not politically powerless, the mentally retarded did not constitute a suspect class. The Court did, however, find certain discriminatory acts invidious under the rational basis test.

170. *See supra* note 76.

171. *See supra* notes 85-91 and accompanying text.

172. Factors one (nature and cost of the accommodation) and five (the impact of the proposed accommodation on the operation of the facility). *See supra* notes 106-09 and 113-14 and accompanying text.

173. Factors two (the financial resources of the local facility), three (the financial resources of the covered entity as a whole), and four (the type of operations of the covered entity). *See supra* notes 110-12 and accompanying text.

174. Factor six (the number of employees or applicants that will potentially benefit from the accommodation). *See supra* notes 115-17 and accompanying text.

quantum of benefit, however, cannot be used to diminish a disabled person's claim; it is only relevant if it *augments* a claimant's argument that an accommodation should be provided.[175]

The undue hardship test provided by the ADA thus boils down to cost versus the employer's ability to pay. The case history of section 504 of the Rehabilitation Act supports this interpretation. Cost is generally weighed not against benefit, but rather against the overall budget of the local facility or covered entity. For example, in *Nelson v. Thornburgh*,[176] the district court compared the cost of providing part-time readers to vision-impaired plaintiffs against the $300 million annual budget of the defendant, the Pennsylvania Department of Public Welfare, and concluded that the cost of the readers did not constitute an undue hardship.[177]

C. Limitations on the Application of the Environmental Model

The environmental model provides limited assistance in interpreting the ADA due both to the text of the Act and to the nature of disability. An obvious textual limitation is the Act's concern with the cost of accommodation. Indications of cost-benefit analysis pervade both the Act[178] and its legislative history.[179] The undue hardship exception focuses on cost,[180] a consideration anathema to other civil rights legislation,[181] and is a far cry from the "Thou shall" or "Thou shalt not" mandate of a statute based entirely on Hahn's environmental model. One commentator, noting that no other antidiscrimination law seriously considers cost, concluded that the ADA "is not a civil rights law."[182]

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175. H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 2, at 69 (1990).

176. 567 F. Supp. 369 (E.D. Pa. 1983), *aff'd*, 732 F.2d 146 (3d Cir. 1984), *cert. denied*, 469 U.S. 1188 (1985).

177. *Nelson*, 567 F. Supp. at 380.

178. *See, e.g.*, 42 U.S.C. § 12101(a)(9) (Supp. II 1990) ("discrimination . . . costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity").

179. H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 2, at 43-47 (1990) (concerning the fiscal costs of discrimination).

180. *See supra* notes 106-17 and accompanying text.

181. *See supra* notes 2-3 and accompanying text.

182. Bob Holdsworth, *Exploring Policy Issues of Title I of the ADA: A Personal Perspective*, Address before the Cornell Journal of Law and Public Policy Symposium on Enabling the Workplace (Mar. 29, 1992) (videotape on file with Cornell Journal of Law and Public Policy).

The text of the ADA contains several additional exceptions fundamentally incompatible with attempts to read the Act as a Hahnsian principled mandate to design and build a universally-accessible environment. The Helms and Armstrong amendments, for example, exclude twelve conditions from the ADA's protection.[183] The Act also exempts from accessibility requirements buildings that have fewer than three stories or that have less than 3000 square feet per story, unless the building is a shopping center, a shopping mall, or an office of a health care provider.[184] It further exempts from accessibility requirements all "private clubs or establishments exempted from coverage under Title II of the Civil Rights Act of 1964."[185]

The nature of disability also limits the application of a strict environmental model. Congress avoided the "Thou shall/Thou shalt not" approach because Congress recognized that some applicants' disabilities render them unable to perform some jobs regardless of the assistance provided.[186] The United States Commission on Human Rights, noting that "those who stress the social causes of handicaps frequently concede that there are some individuals whose functional limitations prevent their participation,"[187] concluded that "all human physical and mental abilities occur in spectrums ranging from superb to nonexistent and that social contexts define the extent to which people with physical or mental limitations participate in society."[188] Even Hahn recognizes that environmental change may not make society open to absolutely everyone: "[P]ublic leaders have a responsibility to

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183. The term "disability" does not include:
(a) homosexuality or bisexuality;
(b) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments or other sexual disorders;
(c) compulsive gambling, kleptomania, or pyromania; or
(d) psychoactive substance use disorders resulting from current use of illegal drugs.

42 U.S.C. § 12211 (Supp. II 1990).

184. 42 U.S.C. § 12183(b) (Supp. II 1990).

185. 42 U.S.C. § 12187 (Supp. II 1990).

186. *See supra* notes 82-91 and accompanying text.

187. ACCOMMODATING THE SPECTRUM, *supra* note 157, at 86-87.

188. *Id.* at 87.

state . . . the maximum extent to which a society can be adapted to meet the needs of its members."[189]

V. Utilitarian Models

Utilitarian models provide a perspective from which decisions are made based on whether they enhance aggregate wealth. In doing so, the models account for both the benefits of reasonable accommodation, which Hahn emphasizes, and the costs, with which employers are concerned.

A. Discrimination Based on Animus and Ignorance

1. *The Model*

Gary Becker[190] in 1957 pioneered the application of neoclassical economic theory to animus- and ignorance- based discrimination.[191] The consequence of employer discrimination, as shown in Figure 1, is to reduce the demand for African-American labor.[192] The

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189. *Id.*

190. Gary S. Becker, The Economics Of Discrimination 44 (2d ed., 1971).

191. Becker, a true economist, uses money as the measure of discrimination, and defines discriminating behavior as a person acting *as if* she were willing to forfeit income in order to avoid certain transactions. The "as if" formulation serves to include not only persons who discriminate because of animus, but also those who discriminate because they are ignorant of the discriminated-against group's true efficiency. *See* Becker, *supra* note 190, at 14, 16. This definition excludes statistical discrimination (discussed *infra* at notes 227-55 and accompanying text). Both ignorant discriminators and statistical discriminators engage in identical activity: they evaluate an individual based on the perceived characteristics of a group to which the individual belongs. The only discernable difference between ignorant discriminators and statistical discriminators is that the latter generalize accurately while the former inaccurately underestimate the efficiency of the group and, therefore, of the individual.

Becker analyzes animus- and ignorance- based discrimination in terms of discrimination against African-Americans. In explaining his model, I retain his focus on African-Americans rather than substituting the disabled as the discriminated-against group. I do this to emphasize that Becker's model focuses on animus- and ignorance- based discrimination, which is commonly associated with discrimination against African-Americans, as opposed to discrimination based on economically significant difference, which is more often associated with discrimination against the disabled. The latter type of discrimination—statistical discrimination—is discussed *infra* at Part V-B.

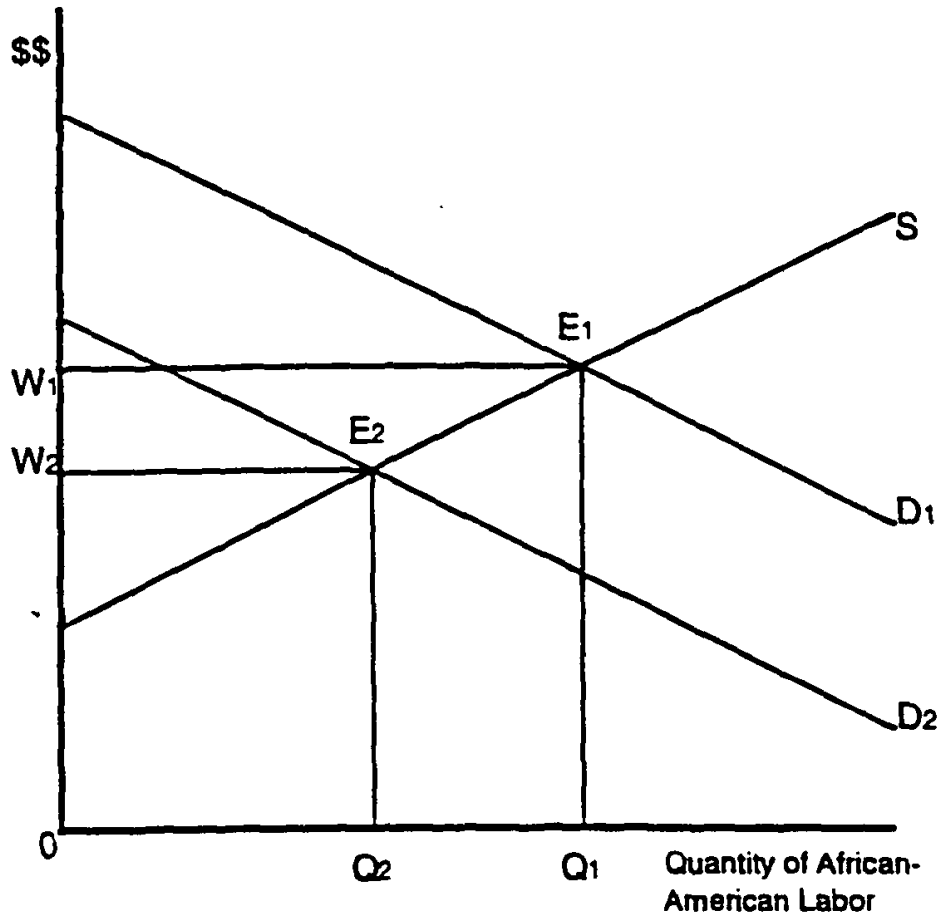
192. One may also say that employer discrimination shifts the supply curve for African-American labor upward. The effects are identical. *See* John J. Donohue III, *Is Title VII Efficient?*, 134 U. Pa. L. Rev. 1411, 1415-17 (1986).

In the following figure (S) indicates the supply curve; (D1) indicates the demand curve in a non-discriminatory market; (D2) indicates the demand in a discriminatory market; (E1) and (E2) represent the market equalibrium reached by intersecting the supply and demand curves; (W) indicates wage rates; and (Q) indicates the quantity of African-American Labor.

equilibrium reached in a nondiscriminatory labor market is illustrated by the intersection of S and D*1*, which creates a wage rate W*1*, for Q*1* African-American workers. Discrimination introduces an extra cost[193] to hiring African-American labor in addition to the wage: a discriminator must pay not only the monetary wage, but also a non-monetary cost associated with hiring an employee for whom the employer has a distaste. Demand for African-American labor consequently falls, creating a new demand curve, D*2*, which establishes a new equilibrium wage rate W*2* for Q*2* African-American workers. The impact of employer discrimination on African-American workers is obvious: both wages and the quantity of employment decrease.[194]

Figure 1[195]

Short-Term Impact of Employer Discrimination on African-American Labor



193. Donohue likens this extra cost to a tax on each African-American worker hired, the revenues from which are thrown away. *Id.* at 1417 n.17.

194. *See generally* BECKER, *supra* note 190, at 39-54.

195. Figure 1 is similar to one provided by Donohue, which itself is based on Becker's analysis. *See* Donohue, *supra* note 192, at 1417.

Assuming that industries are competitive and that they have identical linear and homogeneous production functions,[196] nondiscriminating companies are more efficient than discriminating ones, and hence will be more profitable and will tend to expand relative to other companies.[197] This occurs for two reasons. First, nondiscriminating employers will have lower labor costs. While discrimination lowers the wages and quantity of employment for African-American workers, it has the opposite effect on white workers. Reduced demand for African-American workers, caused by discrimination, forces employers to look elsewhere for employees, thereby increasing demand and, as illustrated by Figure 2, bidding up the price of labor and raising the quantity of employment as well.[198] Nondiscriminating employers will hire cheaper African-American labor, at wage W*B*, while discriminating employers will hire expensive white labor at wage W*W*. Nondiscriminating employers will thereby incur lower labor costs, gaining a competitive advantage over their bigoted competitors.[199]

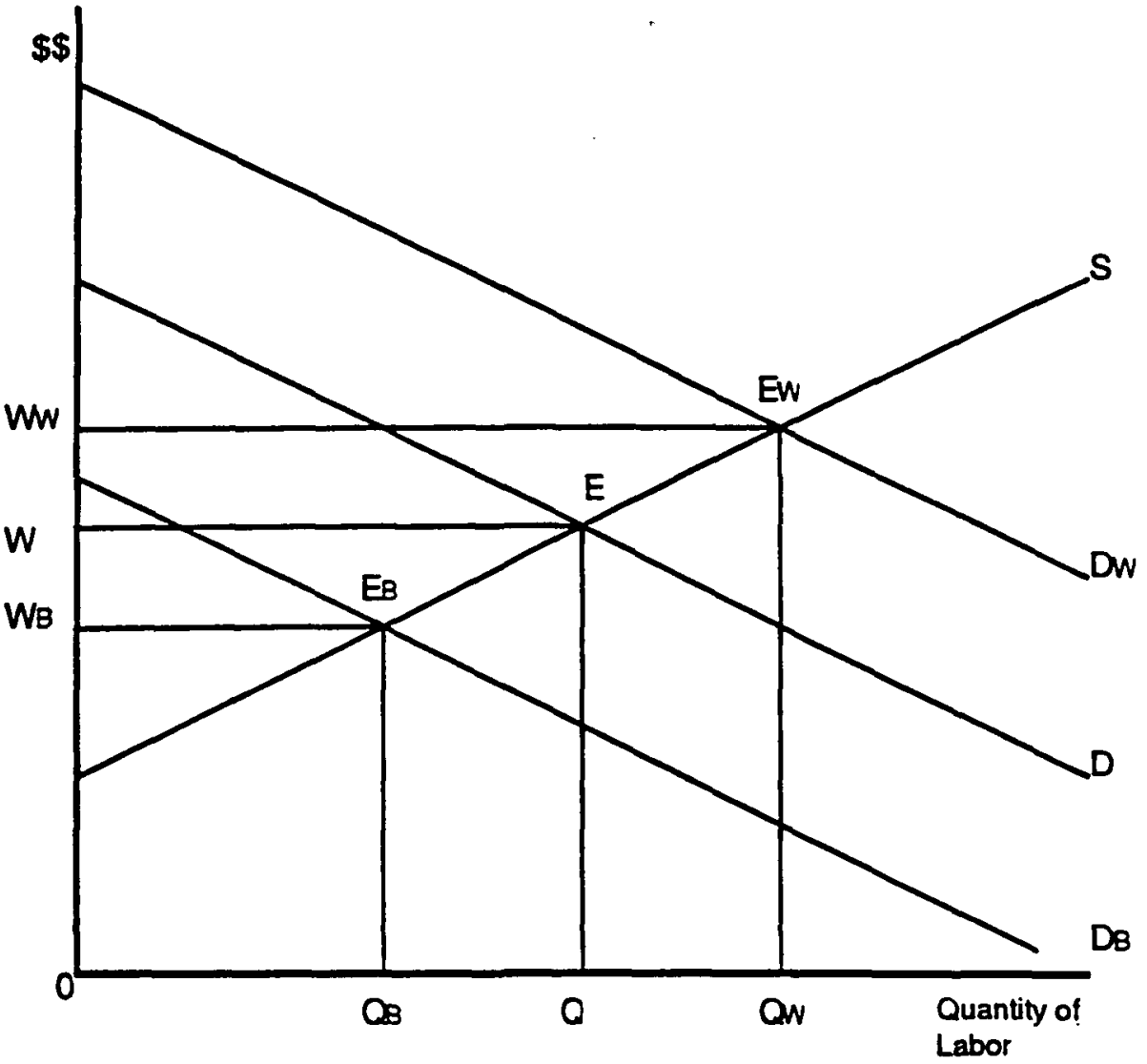
196. Further, the ease (and pace) with which non-discriminating companies expand will depend on the relationship of unit costs to output (i.e., if unit costs are independent of output, expansion is easy; if costs rise sharply with output, expansion is difficult). Nonetheless, eventually, discrimination should approach zero. BECKER, *supra* note 190 at 44.

197. *Id.* at 44-45.

198. *Id.* at 21-22.

199. *Id.* at 44-45.

Figure 2
Short-Term Impact of Employer Discrimination on African-American and White Labor



The second reason nondiscriminating companies are more efficient than discriminating ones is advanced by John Donohue, but is wholly consistent with Becker's analysis:

> [Suppose] a discriminatory employer earns a monetary return of 12% on her capital from hiring black workers, but she feels only as well off from this enterprise as she would with an 8% return because of the psychic cost of discrimination. If this employer would invest her capital in a money market fund, earning for example 10%, she would give up her business and earn 10%. The discriminatory employer would try to sell her business to the highest bidder. Although she would not care whether the buyer possessed discriminatory attitudes, the purchaser who is willing to pay the

> highest price will tend to be a nondiscriminator. This follows from the fact that a discriminator would view the business as an asset that yields an 8% annual return, whereas a nondiscriminator would view it as an asset that yields a 12% annual return. As a result, Becker's prediction that discriminators would be driven from the market would be effectuated.[200]

For these reasons, competition will eventually drive discriminators from the market and restore the nondiscriminatory equilibrium E*1* (Figure 1).[201] Antidiscrimination legislation is therefore, in the long run, unnecessary.[202]

The efficiency of antidiscrimination legislation in the short run is far more controversial. According to Beckerian analysis, such legislation is harmful because it reduces total social welfare. Judge Richard Posner points out that the costs to discriminatory whites of associating with African-Americans are real costs for which whites are willing to pay, and that a law requiring such association does nothing to reduce those costs.[203] Since E*2* by definition represents the point of wealth[204] maximization, any departure from E*2* will reduce total social welfare, and antidiscrimination legislation is therefore in the short run socially harmful.[205]

Donohue disagrees, arguing instead that by adding a legal penalty to the market penalty for discriminating, anti-

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200. Donohue, *supra* note 192, at 1423 n.31.

201. BECKER, *supra* note 190, at 44-45.

202. Donohue, *supra* note 192, at 1423.

203. Judge Posner concedes that these costs "are morally unworthy of consideration in the formulation of public policy." Nonetheless, he points out that this is not an *efficiency* justification for antidiscrimination legislation, since the legislation does nothing to eliminate these costs. Richard A. Posner, *The Efficiency and the Efficacy of Title VII*, 136 U. PA. L. REV. 513, 513 (1987).

204. Wealth includes both monetary forms (wages) and non-monetary forms (the costs of associating with persons with whom one does not wish to associate).

205. Judge Posner explains:

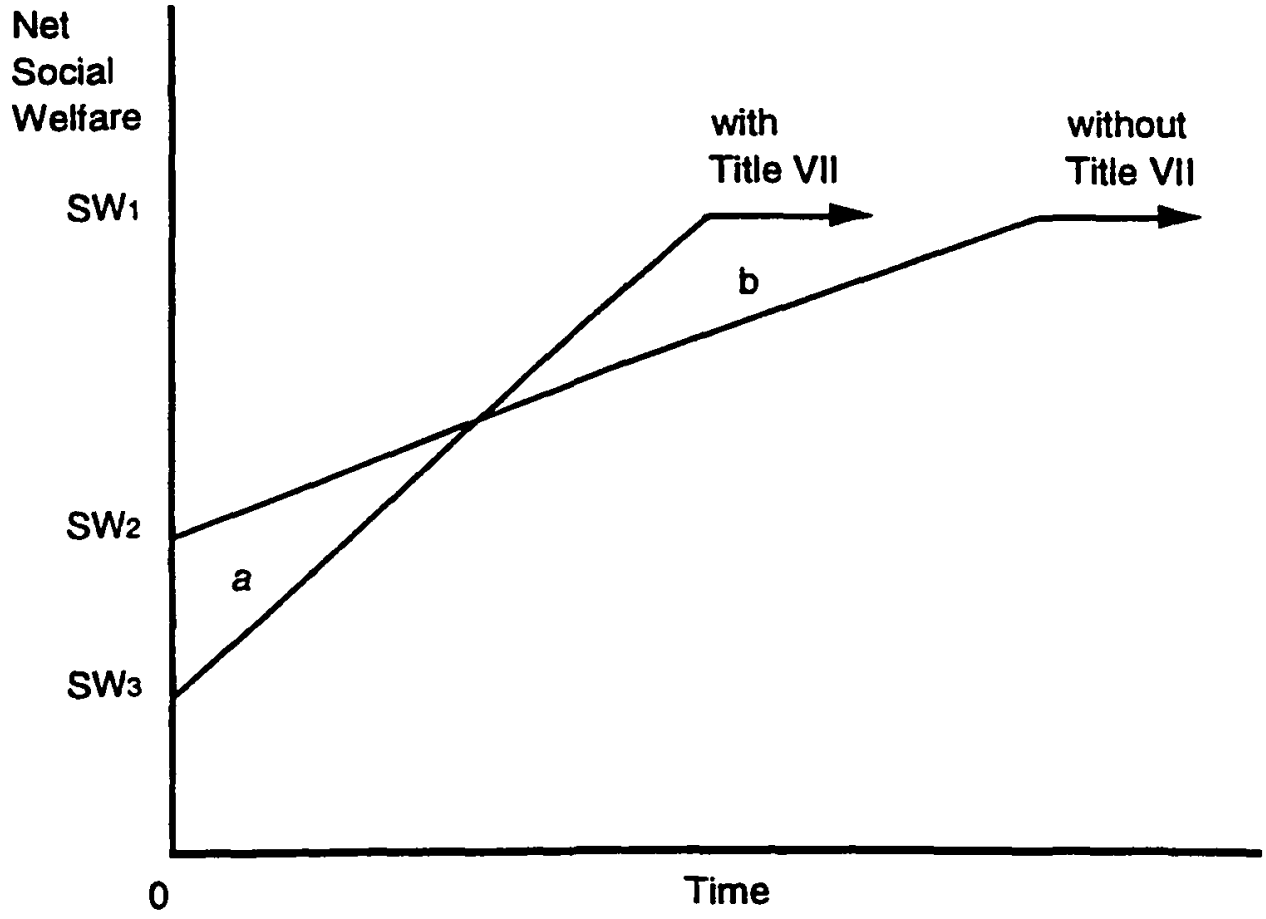
> [T]he elimination of discrimination may impose no pecuniary costs . . . but it will impose nonpecuniary costs in the form of an association distasteful to the whites. And the costs are unlikely to be offset by the gains of black workers for whom the jobs in the firm are superior to their alternative job opportunities or by the economic advantages that increased trading with blacks brings to the firm and hence to its customers; if there were such offsetting gains, the blacks would probably have been hired without legal pressure.

RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 622-23 (3d ed. 1986).

discrimination legislation accelerates the long-term market trend toward the nondiscriminatory equilibrium E*1*. Figure 3 illustrates Donohue's depiction of the changing level of net social welfare. Without Title VII, net social welfare begins at SW*2*, which is the level established in Figure 1 by E*2*. As time passes and discriminatory employers are driven from the market,[206] social welfare increases because the psychic cost of discrimination is eliminated.[207] Social welfare eventually settles at SW*1*, which is the level established in Figure 1 by E*1*.

Figure 3[208]

Time Path of Social Welfare With and Without Title VII



206. *See supra* notes 191-97 and accompanying text.
207. Donohue, *supra* note 192, at 1423.
208. *Id.* at 1424.

Since the initial impact of antidiscrimination legislation is to reduce net social welfare,[209] the initial net social welfare associated with title VII is lower than that created by the market, and is labeled SW*3*. But because title VII adds costs to a discriminating company above those imposed by the market,[210] discriminating firms will exit the market more quickly with title VII than without it.[211] Thus, while imposing a short-term loss in net social welfare, title VII is quicker than the market to drive social welfare up to SW*1* and, so long as area *b* is greater than area *a*, title VII enhances net social welfare.[212]

Judge Posner rejoins by pointing out two assumptions Donohue makes.[213] First, Donohue assumes that the costs of enforcing antidiscrimination laws are negligible.[214] Because such costs may be significant,[215] they should be added to area *a* (or subtracted from area *b*) before *a* and *b* are compared to determine whether title VII enhances social welfare. Second, Donohue assumes that title VII effectively reduces employment discrimination. If it does not, the costs of enforcement constitute a dead weight loss.[216]

2. *Criticism*

a. Assumption of Rational Behavior[217]

Economists assume all firms are efficiency-maximizing. This is not necessarily true; it may well be that all firms are

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209. *See supra* notes 203-05 and accompanying text.
210. Donohue, *supra* note 192, at 1424-30.
211. *Id.* at 1427.
212. *Id.*
213. Judge Posner also makes two other arguments, one of which (that it is inefficient to scrap existing technology faster than the market dictates) is easily refuted by Donohue, and the other of which (that Donohue's theory fails to take into account statistical discrimination) is more appropriately discussed in the next section. *See generally* Posner, *supra* note 203, at 515-16; John J. Donohue III, *Further Thoughts on Employment Discrimination Legislation: A Reply to Judge Posner*, 136 U. PA. L. REV. 523 (1987).
214. Donohue, *supra* note 192, at 1421, n.26; Posner, *supra* note 203, at 514.
215. Both Judge Posner and Donohue trade numbers, none of which appear particularly convincing. *See* Donohue, *supra* note 213, at 545-48; Posner, *supra* note 203, at 514.
216. Posner, *supra* note 203, at 513, 516-21.
217. Problems with the assumption of rational behavior are well-illustrated by

inefficient to some degree. If so, then firms can essentially pick and choose their inefficiencies without fear that a single minor inefficiency will cause them to lose their market share. If, for example, all firms discriminate, none need fear losing market share to a nondiscriminating competitor. This phenomenon may be exacerbated by the distance between the board room and hiring personnel; as that distance increases, profit-maximizing directors have less control over hiring and firing decisions, which may thus be made based on factors other than marginal productivity.

Further, directors may not always be profit-maximizers. Firms often sacrifice profits for the easy life of harmonious labor relationships, or the satisfaction from being a wage leader in the community[218]—goals at odds with profit maximization.

The willingness and ability of firms to tolerate the inefficiencies imposed both by market forces and by antidiscrimination legislation is further supported by the persistence of discrimination in the face of such costs. Animus- and ignorance- based discrimination is not rational behavior,[219] particularly when it is associated with market and legal forces that should, according to efficiency theorists, drive a firm out of business.[220] Mary Becker, responding to economists' attempts to reconcile their assumption of rational behavior with the tenacity of discrimination, reasoned that "[p]erhaps ['rational'] means only doing what satisfies one's preferences,

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the observations of Robert Browne:

> Records suggested . . . that a slave was consistently willing to pay more for his freedom than the market value placed on him by a slave owner. From a strict market point of view, this was clearly a pathetically irrational act on the part of the slave. It apparently derived, as one writer wryly put it, from the slave's excessively sentimental attachment to his own body.

Robert S. Browne, *The Economic Case for Reparations to Black America*, 62 AM. ECON. REV. 39 (1972).

218. *See* Bruce E. Kaufman, *The Postwar View of Labor Markets and Wage Determination, in* HOW LABOR MARKETS WORK 155, 157, 175 (Bruce E. Kaufman ed., 1988).

219. *See* Mary E. Becker, *Needed in the Nineties: Improved Individual and Structural Remedies for Racial and Sexual Disadvantages in Employment*, 79 GEO. L.J. 1659, 1664 (1991) (noting that "racism and misogyny are deeply irrational emotions").

220. *See supra* notes 196-202 and accompanying text.

even when the result is self-destruction. At this point, however, 'rational' does not have any meaning; it is tautological. What one does is rational because one does it."[221] This led one efficiency theorist to conclude that Becker's model "must have some limitation."[222]

b. Appropriateness of Using Willingness to Pay as a Measure of Value

Efficiency theorists also assume that all valuations can be reduced to money and that willingness to pay is a proper measure of value.[223] This is inappropriate in the context of discrimination for two reasons. First, a person's ability to pay is based in large part on her initial endowment of wealth. Victims of past discrimination are likely to have a disproportionately small share of total social wealth; this is particularly true of disabled individuals.[224] In Judge Posner's market-driven economy, disabled individuals would bear the cost of accommodation and the removal of barriers by, for example, being paid less than their able-bodied co-workers.[225] Because of their impecunious status (caused in large part by past discrimination), disabled individuals are likely to be unable to afford this burden. Further, the fairness of imposing it on them is questionable: why should they be forced to pay for the removal of a barrier which society has erected (either consciously or from indifference) to exclude them from the market? Even assuming the barrier is endemic to the disabled

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221. Becker, *supra* note 219, at 1664.

222. Kenneth Arrow, *The Theory of Discrimination*, *in* DISCRIMINATION IN LABOR MARKETS 3, 10 (Ashenfelter & Rees eds., 1973).

223. *See* BECKER, *supra* note 190; POSNER *supra* note 205, at 11.

224. People with disabilities are twice as likely as other Americans to live in poverty. Half of the people with disabilities live in households having an annual income of $15,000 or less—double the proportion of people without disabilities. In 1988, the average yearly earnings of men with disabilities were 36% less than earnings of non-disabled men; women with disabilities earned 38% less than non-disabled women. Robert L. Burgdorf, Jr., *The Americans With Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 422 (1991).

225. *See supra* note 194 and accompanying text; *see also infra* notes 229-32 and accompanying text.

person, one may nevertheless question the fairness of imposing differing pay scales for equal work.

c. Propensity for Attitudinal Change

The neoclassical theory of discrimination, particularly its conclusion that title VII is inefficient, assumes that discriminatory attitudes are immutable. If, on the other hand, social legislation decreases employers' taste for discrimination,[226] the imposition of a statute will hasten the long-term market trend toward the efficient nondiscriminatory equilibrium while simultaneously decreasing the costs to discriminatory employers of associating with the discriminated-against group. Cass Sunstein offers an example in a law requiring the use of seatbelts:

> Suppose that the costs of initial use are quite high; when drivers and passengers first buckle the belts, they do so unwillingly. Suppose too that the costs associated with buckling decrease sharply once one has gotten into the habit. In such circumstances, the subjective costs of buckling will shrink. Regulation is then far from futile; after a change in preferences, people will not try to counteract it.[227]

This is illustrated graphically by Figure 4 in a derivation of Donohue's net social welfare chart. Area *b* is much larger than in Figure 3 and area *a* is much smaller; this analysis presents a much more compelling efficiency rationale for implementing title VII and the Americans with Disabilities Act.

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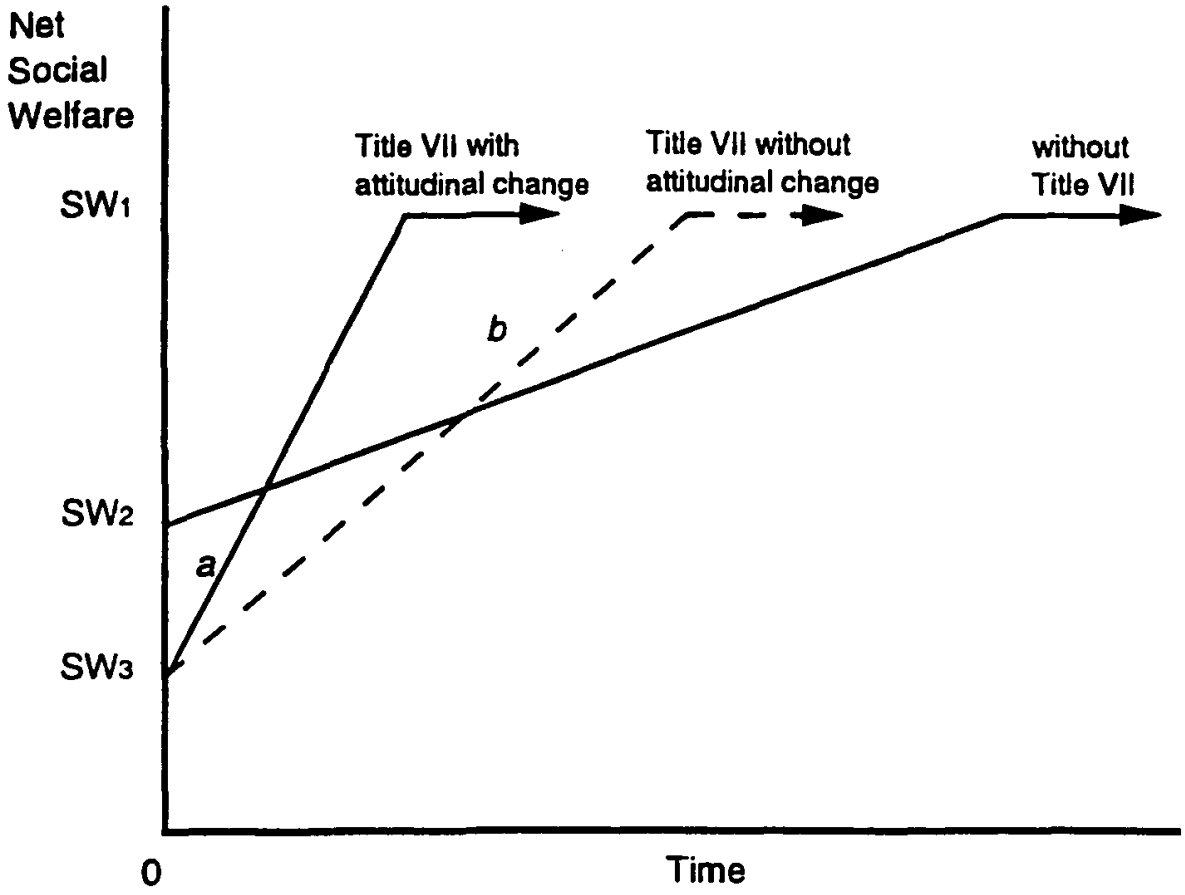
226. The power of law to shape judicial attitudes is illustrated by Glanville Williams: "It was not necessary to hang many gentlemen of quality before the understanding became general that dueling was not required by the code of honor." Glanville Williams, *Consent and Public Policy*, 1962 CRIM. L. REV. 74, 77.

227. Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1137 (1986).

Figure 4
Time Path of Social Welfare Assuming Propensity for Attitudinal Change



3. *Application to the ADA*

Utilitarian theorists argue that nondiscriminating firms are more efficient and therefore more profitable than their discriminatory competitors; in the long run, nondiscriminating firms will replace discriminating firms, and antidiscrimination legislation is thus unnecessary. The passage of the ADA, coupled with specific findings that discrimination against handicapped persons persists, signifies a Congressional conclusion that, even assuming market forces will eventually drive discriminators from the market, our society has not yet reached such a nondiscriminatory equilibrium. The ADA may thus constitute either a wholesale rejection of the utilitarian argument, or a conclusion akin to Donohue's that antidiscrimination legislation will beneficially accelerate the long-term market trend toward nondiscrimination.

B. Statistical Discrimination[228]

1. *The Model*

Becker assumes that African-American labor is readily substitutable for white labor. This assumption of substitutability may not always be true in the disability context;[229] disability often creates a difference which may manifest itself in increased costs to an employer.[230] For example, a disability may make an employee less efficient, imposing a cost on the employer in lost production; or the employer may have to build a ramp, imposing a direct cost. In a free market, a nondiscriminatory employer might pay disabled applicants *as a class* a lower salary to compensate the employer for this cost. Though this might

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228. Edmund Phelps, the progenitor of statistical discrimination theory, likens the practice to a traveller in a strange town faced with choosing between taking dinner at the hotel and dinner somewhere in town:

> If he makes it a rule to dine outside the hotel without any prior investigation, he is said to be discriminating against the hotel. Though there will be instances where the hotel cuisine would have been preferable, the rule represents a rational behavior—it maximizes expected utility—if the cost of acquiring evaluations of restaurants is sufficiently high and if the hotel restaurant is believed to be inferior at least half the time.

Edmund S. Phelps, *The Statistical Theory of Racism and Sexism*, 62 AM. ECON. REV. 659 (1972).

229. Commentators until now, excepting Sunstein's one-sentence comment *infra* at note 230, have applied statistical discrimination exclusively to race and sex discrimination. Because I agree with Schwab's argument that statistical discrimination in the context of race may in fact be a smokescreen for animus discrimination (*see infra* notes 251-53 and accompanying text), I will explain the model exclusively in terms of handicap discrimination. Phelps also applied statistical discrimination theory to race but, unlike Judge Posner, concluded that "Discrimination is no less damaging to its victims for being statistical. And it is no less important for social policy to counter." Phelps, *supra* note 228, at 601.

230. *See* Cass R. Sunstein, *Three Civil Rights Fallacies*, 79 CAL. L. REV. 751, 756 (1991) ("For the handicapped . . . real differences call for differential treatment."); Frederick C. Collignon, *The Role of Reasonable Accommodation in Employing Disabled Persons in Private Industry*, *in* DISABILITY AND THE LABOR MARKET 196, 206 (Monroe Berkowitz and M. Anne Hill eds., 1986):

> [T]he accommodation provision recognizes that some disabled persons will *not* be as productive as other workers *unless* the accommodation occurs. If the accommodation is costly to the employer, then the accommodated worker, if employed at the same wage, will cost the employer more in a given job than another qualified applicant who does not require accommodation.

be unfair to some disabled employees whose employment did not impose a cost on the employer, it might nevertheless be efficient because it approximates the marginal productivity of each worker while avoiding the information costs of evaluating each worker individually. Antidiscrimination legislation making such disparate pay illegal presents employers with a choice: either incur the information costs of ascertaining the marginal productivity of individual workers, or lump all workers together regardless of productivity. If the former is true, the employer will be inefficient compared to other firms able to avoid the information costs.[231] If the latter prevails, the employer is faced with another lose-lose choice. She may reduce non-disabled workers' wages to the level of disabled workers' wages, in which case non-disabled workers would receive less than their market wage and would go elsewhere. Alternatively, she may raise disabled workers' wages to the level of non-disabled workers' wages, in which case she will pay many of her disabled workers more than their marginal product; under these circumstances, she has the incentive to employ fewer disabled workers, and will try to circumvent the antidiscrimination statute.[232] It may therefore be more efficient,[233] according to statistical discrimination theorists, to allow employers to generalize an individual's marginal productivity according to membership in a group, and to pay that individual accordingly.

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231. Assuming that some firms are able to do so.

232. *See, e.g.* Larry Alexander, *What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies*, 141 U. PA. L. REV. 149, 172-73 (1992) ("Given that proxy discrimination reflects a rational attempt to satisfy unbiased and otherwise morally proper preferences, it will be difficult to suppress legally. Moreover, attempts at legal suppression will likely stimulate the invention and use of more ingenious proxies that correlate highly with the forbidden proxies.").

233. The resulting gain in efficiency may be allocative instead of absolute, as Stuart Schwab explains:

> Much of the gain [from statistical discrimination] is simply distributive, however. Other firms, left with a smaller pool of qualified workers, will suffer productive losses. Statistical discrimination increases overall output only if it encourages talented workers to work more, if it causes workers to be sorted for comparative advantage, or if it allows productive efficiencies from reorganizing individual firm's production processes.

Stuart J. Schwab, *Stereotypes, Imperfect-Information Theories, and Statistical Discrimination* 12 (1981) (unpublished Ph.D. dissertation, University of Michigan).

2. *Criticism*

a. Underinvestment in Human Capital

Some neoclassical economists disagree, arguing that in the long run such generalizations may be inefficient.[234] Since individuals are treated as average members of a class whether or not they invest in human capital, they have no incentive to so invest. Take, for example, the common perception that deaf individuals are undereducated compared to their hearing counterparts. Employers, because of this discriminatory assumption, might refuse to incur the information costs of conducting individualized inquiries into the education level of each applicant, and instead may simply assume that deaf individuals are undereducated. If the stereotype is true — if, on average, deaf individuals are actually undereducated compared to hearing individuals — the employer's assumption might be rational (efficiency maximizing) *from the employer's perspective* because it avoids the costs of individualized inquiry. However, the assumption has the pernicious effect of destroying the economic incentive of a deaf individual to invest in her own education, because regardless of her actual education, she will be treated as if she were undereducated. Society is deprived of the returns on this would-be investment,[235] and long-term efficiency is thereby reduced.[236] According to this argument, antidiscrimination legislation prevents such underinvestment in human capital and, where the losses from underinvestment are greater than the efficiency gains from statistically discriminating,

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234. *See* Shelly J. Lundberg & Richard Startz, *Private Discrimination and Social Intervention in Competitive Labor Markets*, 73 AM. ECON. REV. 340, 346-47 (1983); Stuart J. Schwab, *Is Statistical Discrimination Efficient?*, 76 AM. ECON. REV. 228, 233 (1986).

235. Since this societal loss is external to the employment transaction, statistical discrimination will continue, absent legal constraints, despite the inefficiency. The argument, therefore, is not that the market will eliminate statistical discrimination, but is rather that the inefficiency justifies antidiscrimination legislation to correct market failure. *See* Schwab, *supra* note 233, at 12; Cass R. Sunstein, *Why Markets Don't Stop Discrimination*, 8 SOC. PHIL. & POL'Y 22, 31 (1991).

236. Sunstein, *supra* note 235, at 29-31; Mark Kelman, *Concepts of Discrimination in "General Ability" Job Testing*, 104 HARV. L. REV. 1158, 1160-61, 1232-33 (1991); Alexander, *supra* note 232, at 170-71 n.21.

is efficiency-maximizing.[237] Economists are, however, far from unanimous in endorsing antidiscrimination legislation as efficiency-enhancing.[238]

b. Inequitability

The inequitability of statistical discrimination is well illustrated by Lester Thurow's medical school hypothetical example.[239] Assume that 95% of all male entrants to medical school graduate, and that 95% of male graduates practice medicine. Further assume that only 90% of female entrants graduate, and that 90% of female graduates practice medicine. A rational (efficiency-maximizing) school would accept only men, because 90.25% (.95 x .95) of male entrants will graduate, while only 81% (.90 x .90) of female entrants will graduate. This efficiency-enhancing activity produces two distinct inequities.

First, it is unfair to the 81% of women who would have practiced medicine. Statistical discrimination is similarly unfair to individuals in the employment context, because it creates differences in earnings that are unrelated to individual

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237. Schwab, *supra* note 234, at 233.

238. Donohue & Heckman, for example, challenge Lundberg & Startz's underinvestment in human capital argument on four grounds:

First, they argue that employers can easily differentiate between workers with different amounts of schooling. This argument may be taken a step farther: an employer will only statistically discriminate when she seeks to hire employees for non-skilled jobs; applicants for skilled jobs will be individually screened in the application process, making the incremental costs of acquiring individualized information negligible or nonexistent.

Second, Donohue & Heckman argue that even if deaf individuals dissuaded from extra study because they earn a lower return on their additional investment in schooling, they also will suffer a smaller opportunity cost, since the greatest monetary loss associated with pursing more education is foregone earnings. If returns and costs are diminished in the same proportion, statistical discrimination will not affect human capital investment decisions.

Third, even assuming that deaf individuals in education, the situation can easily be remedied by education subsidies.

Fourth, they point to statistics showing that African-Americans earn greater returns than their white counterparts for each additional year of schooling as empirical evidence that underinvestment in human capital is not occurring in the context of race discrimination. John J. Donohue III and James J. Heckman, *Re-Evaluating Federal Civil Rights Policy*, 79 GEO. L.J. 1713, 1723-28 (1991).

239. LESTER C. THUROW, GENERATING INEQUALITY: MECHANISMS OF DISTRIBUTION IN THE U.S. ECONOMY 204 (1975).

productivity.[240] This reasoning was adopted by the Supreme Court in the Title VII case *Los Angeles Dept. of Water & Power v. Manhart*,[241] which held illegal the Department's disparate treatment of women by the Department's requirement that women make larger contributions than men to a pension fund, justified on the ground that women, on average, outlive men. The Court, holding the Department's requirement invalid, reasoned that even a true generalization about a class cannot justify class-based disparate treatment based on stereotype, because the generalization would have an adverse impact on individual class members who do not possess the characteristic.[242] The ADA adopts this approach by requiring employers to engage in individualized inquiries concerning the abilities of job applicants.[243]

Second, the medical school's discriminatory admissions policy is unfair to women as a group: though there is only a 9.25% difference in the male/female probabilities of practicing medicine, the resulting statistical discrimination creates a 100% difference in their chances of becoming doctors. This same effect occurs in the employment context when the wage difference between the job in question and the next best job exceeds the value of the average productivity difference between the discriminated-against group and the nondiscriminated-against group.[244] This group effect is particularly odious when it occurs to a group which has historically been victimized by animus discrimination.[245]

c. Self-perpetuating Nature of the Discrimination

Statistical discrimination is self-perpetuating in four ways. First, the differences that make disparate treatment efficient may themselves be the product of prior statistical discrimination. Sunstein, referring to the human capital argument, explains

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240. *See, e.g.*, Steven L. Willborn, *The Disparate Impact Model of Discrimination: Theory and Limits*, 34 AM. U. L. REV. 799, 820 n.106 (1985).

241. 435 U.S. 702 (1978).

242. *Manhart*, 435 U.S. at 708.

243. *See supra* note 105.

244. Willborn, *supra* note 240, at 820.

245. David A. Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 GEO. L.J. 1619, 1627-28 (1991); Willborn, *supra* note 240, at 820.

that because of existing discrimination, the discriminated-against group will underinvest in human capital; as a result, the statistical rationality of discriminatory behavior increases, and employers will be more likely to discriminate. This will cause investments to decrease still further, resulting in a "vicious circle or spiral."[246]

Second, the tendency of private preferences to adapt to the status quo[247] may lead both discriminators and victims to accept, or even embrace, the effects of discrimination.[248] This also may exacerbate underinvestment in human capital.

Third, employers' behavior may elicit the very differences that make statistical discrimination efficient. Employers might, for example, assign disabled persons to routine tasks and dead-end jobs, in which a particular disabled person's skills remain invisible to the employer. In response to such working conditions, a rational employee might quit or work less diligently, demonstrating the very behavior—higher turnover and lower work involvement—that was used to justify the original discriminatory assignment.[249]

Fourth, cognitive dissonance may contribute to the self-perpetuating nature of statistical discrimination. Since individuals are more likely to attend to and retain information that conforms to their stereotypes and to ignore information that does not fit their expectations,[250] employers are likely to focus on the substandard performance of some disabled individuals while ignoring the superstandard performance of others.

d. Statistical Discrimination as a Smokescreen for Animus Discrimination

Stuart Schwab posits that statistical discrimination may simply be thinly-disguised animus. Firms may claim to use group

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246. Sunstein, *supra* note 230, at 758; *see also* Sunstein, *supra* note 235, at 31.

247. For a general discussion of private preference and the law, *see* Sunstein, *supra* note 230.

248. Sunstein, *supra* note 230, at 759.

249. William T. Bielby and James N. Baron, *Men and Women at Work: Sex Segregation and Statistical Discrimination*, 91 AM. J. SOC. 759, 792 (1986); *see also* Alexander, *supra* note 232, at 170; DAVID A. J. RICHARDS, FOUNDATIONS OF AMERICAN CONSTITUTIONALISM 279-81 (1989).

250. Bielby and Baron, *supra* note 249, at 792.

averages to impartially predict productivity merely as a mask to hide underlying prejudicial motives.[251] Alternatively, employers may use small differences in groups to justify large difference in treatment that are in fact invidiously motivated.[252] This criticism rejects the premise that discriminating employers are non-prejudiced; this type of behavior is properly analyzed pursuant to the Beckerian model of animus- and ignorance-based discrimination.[253]

3. *Application to the ADA*

The legislative history of the ADA indicates clearly that Congress intended to proscribe statistical discrimination. Looking at the ADA as a whole, the Report of the House Committee on Education and Labor stated:

> [C]overed entities are required to make employment decisions based on facts applicable to individual applicants or employees, and not on the basis of presumptions as to what a class of individuals with disabilities can or cannot do.
>
> The Act is premised on the obligation of employers to consider people with disabilities as individuals and to avoid prejudging what an applicant or employee can or cannot do on the basis of that individual's appearance or any other easily identifiable characteristic, or on a preconceived and often erroneous judgment about an individual's capabilities based on the "labeling" of that person as having a particular kind of disability.[254]

In addition to this broad rejection of statistical discrimination, Congress specifically rejected the use of statistical probability for determining when an applicant or employee poses a "direct threat" to the safety of co-employees;[255] Congress also specifically

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251. Schwab, *supra* note 233, at 10; *see also* Alexander, *supra* note 232, at 170:

> One who realizes that his biases cannot be justified on their own terms, such as one who realizes the invalidity of his judgment that blacks are inherently morally inferior, may, rather than relinquish the judgment fully, merely replace it with a belief that blacks very frequently have trait X, trait X being a perfectly respectable basis for discrimination. Thus, many irrational proxies are the products of bias-driven tastes for certain erroneous beliefs.

252. Schwab, *supra* note 233, at 10.

253. *See supra* notes 190-91 and accompanying text.

254. H.R. REP. No. 485, 101st Cong., 2d Sess., pt. II, at 58 (1990).

255. *See supra* note 92-98 and accompanying text.

stated that determinations of "undue hardship" are to be made on a case-by-case basis.[256]

C. Use of Efficiency Criteria to Measure Undue Hardship

1. *The Model*

Thus far, Part V of this Article has examined the two utilitarian models of discrimination—animus and statistical discrimination — and has evaluated antidiscrimination legislation according to the tenets of these models. The Article will shift focus, assume the existence of antidiscrimination legislation, and evaluate the application of the utilitarian paradigm to the undue hardship exception to reasonable accommodation.

Gregory Crespi explains that the utilitarian orientation provides a test for when a proposed accommodation poses an undue hardship to an employer.[257] In this view, market failure occurs when the transaction costs of conducting informed negotiations between an employer who is being asked to make an accommodation and the beneficiaries of the accommodation (principally the job applicant) exceed the aggregate benefits that would result had the accommodation taken place. The ADA may correct such market failure both by acting as a substitute for such negotiations and by providing a payment mechanism; the Act will enhance economic efficiency by increasing total social wealth if it is interpreted to require employers to make a reasonable accommodation when and only when the aggregate benefits of such accommodation exceed the aggregate costs.[258] By this definition, the undue hardship defense would be available to employers whenever the total costs of an accommodation exceed the total benefits.

2. *Criticism*

a. Picking Winners and Losers

Crespi argues that efficiency justifications for policy options are always illegitimate if they create "losers." He notes that

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256. *See supra* note 105 and accompanying text.

257. *See generally* Gregory S. Crespi, *Efficiency Rejected: Evaluating "Undue Hardship" Claims Under the Americans With Disabilities Act*, 26 TULSA L.J. 1, 5-8 (1990). Crespi does not advocate adoption of such a perspective.

258. *Id.*

under a Pareto formula, which requires every individual to be better off after the rule than she was before,[259] few if any rules would pass muster.[260] He therefore abandons it in favor of the Kaldor-Hicks criterion, which merely requires that aggregate benefits exceed aggregate losses. In the long run, many such rules are passed, and since each person benefits from or is burdened by each rule randomly, each individual receives a net benefit from the passage of the rules and, if the rules are viewed aggregately instead of individually, they pass muster even under the Pareto formula.[261]

Crespi rejects proposals to apply Kaldor-Hicks criterion to undue hardship determinations for two reasons. First, he argues that even one net loser robs the standard of all normative authority.[262] While it is true that one net loser would rob the Kaldor-Hicks criterion of its claim to meet the Pareto formula, this is a far cry from losing all normative authority; it may still, with some legitimacy, claim to be a better standard than any other. It is certainly more definite than Crespi's own standard of a concern for the "ethical primacy of human rights."[263]

Second, Crespi argues that rules should be examined individually, not in the aggregate. An individual rule, he notes, will have adverse consequences on some individuals who may not have consented to those losses on the basis of the "it all evens out" rationale of Kaldor-Hicks. Crespi concludes from this that because the rule lacks the consent of the losers, it is illegitimate.[264] He offers as an example the undue hardship provision of the ADA: if undue hardship were defined according

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259. *See supra* note 131 and accompanying text.

260. Crespi, *supra* note 257, at 30.

261. *Id.* at 32; *see also* A. Mitchell Polinsky, *Economic Analysis as a Potentially Defective Product: A Buyer's Guide to Posner's Economic Analysis of Law*, 87 HARV. L. REV. 1655, 1680 (1974).

262. Crespi, *supra* note 256, at 32.

263. *Id.* at 33.

264. Crespi cites for this argument several commentators, the original and leading of which is A. Mitchell Polinsky. Polinsky's argument is that one cannot use the Kaldor-Hicks criterion to avoid all discussion of distributional effects; even under the "it all evens out" approach there may be net losers who cannot be ignored as a matter of policy. Polinsky never claims, as does Crespi, that this makes the rules themselves illegitimate. *See* Polinsky, *supra* note 261, at 1680.

to Kaldor-Hicks, some disabled individuals who might be accommodated under the "ethical primacy of human rights" standard "lose" because they are not accommodated under an efficiency standard.[265] Interpreted this way, the undue hardship rule would be, by Crespi's argument, illegitimate.

Crespi's analysis contains several flaws. First, the individuals Crespi labels as "losers" only lose vis-a-vis his own standard. If the status quo is adopted as the baseline, they lose nothing; their status remains the same. Second, a rule's legitimacy is not dependent on the consent of "losers." We do not scrap rules just because one person disagrees with them. Nor is the rulemaking system as a whole dependent on the consent of every component member. Third, any attempt to construct such a system would paralyze the rulemaking process. What rule has no losers? What rule has no non-consenting losers? Fourth, Crespi gives no hint as to why his standard is any more legitimate than the efficiency standard he rejects. If his standard were adopted instead of the efficiency criterion, some disabled individuals would be losers vis-a-vis Hahn's even-more-liberal environmental standard. By Crespi's own argument, this would render his standard illegitimate. One can infinitely postulate ever-more-inclusive standards until they become farcical, admitting of mute opera singers and severely retarded nuclear physicists.

Fifth, Crespi neglects to account for employers, who may be losers as well. Again, this depends on where one draws the baseline. If we draw it from the status quo, then any employer upon whom the Act imposes a cost by requiring an accommodation is a loser. The Kaldor-Hicks criterion accounts for these losses and balances them against benefits to, *inter alia*, disabled individuals. Crespi does not account for these costs at all.

Perhaps Crespi proposes to establish a new baseline entirely: one premised solely on the "ethical primacy of human rights." But by doing this, he assumes that an individual's right to an equal employment opportunity trumps an employer's right to property. He gives no justification for this assumption. More

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265. Crespi, *supra* note 256, at 33.

importantly, since he gives no indication that the losers created by this new baseline have consented to its imposition, his argument fails on precisely the same grounds as those that he used to reject the Kaldor-Hicks criterion. Neither the reasonable accommodation requirement nor the use of efficiency to evaluate undue hardship can therefore be rejected merely because they produce winners and losers.

b. Measuring Costs and Benefits

A more valid criticism of using cost-benefit analysis to evaluate undue hardship is the difficulty of quantifying costs and benefits. Crespi points out that although the costs of a particular accommodation are ascertainable,[266] measuring the benefit is far more problematic.[267] The initial problem concerns the large and disparate group of beneficiaries, which includes 1) the disabled applicant; 2) the many disabled persons who might at some time avail themselves of the accommodation; 3) non-disabled persons who perceive that they might benefit as employers or customers or friends of accommodated disabled persons; 4) non-disabled persons who subsequently become disabled and thereby directly benefit from the accommodation; 5) non-disabled persons whose fear of disability is diminished by the knowledge that the disability will not precipitate isolation and dependence; and 6) those persons who perceive that they would benefit on purely altruistic grounds from the accommodation. It is difficult to imagine what behavior might serve as a proxy for the willingness to pay that each of these classes would exhibit in a hypothetical negotiation, even assuming that they all would act rationally.[268]

Even measuring the benefit to the disabled applicant is problematic. The ability of the disabled to pay is distorted by

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266. According to a 1982 study measuring the cost of accommodating employees under the Rehabilitation Act, 51% of accommodations can be provided without cost to the employer; 30% of the accommodations which impose costs can be provided for less than $500; only 8% of accommodations cost over $2000. BERKELEY PLANNING ASSOCIATES, A STUDY OF ACCOMMODATIONS PROVIDED TO HANDICAPPED EMPLOYEES BY FEDERAL CONTRACTORS, VOLUME I: STUDY FINDINGS 28-31 (1982) (cited in GAO, H.R. Doc. No. 90-44BR, 101st Cong., 2d Sess. at 19-20 (1990)).

267. Crespi, *supra* note 257, at 34.

268. *Id.*

poverty which is caused in large part by past discrimination.[269] Preferences may be artificially distorted by the presence of legal rules, such as the existence of welfare-type payouts and rehabilitation programs. For example, the historical focus on teaching disabled persons to "overcome" their disabilities by surmounting environmental obstacles, instead of focusing on changing the environment, may cause disabled persons to value rehabilitation over environmental change to a greater extent than they would have absent the prior policy. Preferences are often a function of legal rules; when this is true, legal rules (and judicial valuations of preference) cannot be evaluated by reference to preferences.[270]

3. *Application to the ADA*

Costs and benefits, while clearly relevant to a determination of undue hardship,[271] are merely two of the six factors courts must consider. Courts must also examine the financial resources of the local facility,[272] the financial resources of the covered entity as a whole,[273] the type of operations in which the covered entity is engaged,[274] and the impact of the proposed accommodation on the operation of the facility.[275] These "deep-pocket"[276] factors are incompatible with a pure cost-benefit analysis approach to determining undue hardship.

Congress intended the undue hardship provision in the ADA to be applied just like section 504 of the Rehabilitation Act.[277] Section 504 case law almost universally rejects the application of efficiency criteria[278] in favor of the deep pocket factors articulated in the section 504 regulations.[279] Cost is usually a significant factor in courts' decision. Benefit is also important;

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269. *See supra* notes 223-25 and accompanying text.
270. Sunstein, *supra* note 227, at 1137.
271. *See supra* notes 106-22 and accompanying text.
272. *See supra* note 110 and accompanying text.
273. *See supra* note 111 and accompanying text.
274. *See supra* note 112 and accompanying text.
275. *See supra* notes 113-14 and accompanying text. This may also be interpreted as a component of cost.
276. Crespi, *supra* note 257, at 23.
277. *See supra* note 118 and accompanying text.
278. Crespi, *supra* note 257, at 23.
279. *See supra* note 176 and accompanying text.

however, courts generally require only that there *be* a significant benefit, not that it necessarily outweigh cost.[280] Cost is generally weighed not against benefit, but rather against the overall budget of the local facility or covered entity.[281]

CONCLUSION

No single paradigm suffices either to explain Congressional motivation in passing the Act or to guide future interpretation of the Act's strictures. The libertarian model helps explain language reaffirming managerial discretion, but its "absolute freedom of contract" tenet is fundamentally incompatible with the ADA's requirement that employers not discriminate on the basis of disability. The environmental model encompasses the "rights"-based paradigm for interpreting the ADA. It provides significant guidance for ascertaining legislative intent and for interpreting the employer's duties to provide reasonable accommodation and to modify both job functions and the work environment. However, the Act's focus on the costs of accommodation and its creation of an undue hardship defense indicate that the environmental model cannot suffice as the exclusive model from which judges may deduce the meaning of the Act. There are three possible applications of the utilitarian paradigm. Of these, two—"animus and ignorance discrimination" and statistical discrimination—are either explicitly or implicitly rejected by the Act's text and/or legislative history. The third—the use of cost-benefit analysis to determine when a proposed accommodation becomes an undue hardship, appears useful, and finds some support in the Act's text and legislative history. The difficulty of quantifying costs and benefits, however, limits the practical usefulness of this model.

The lack of a single, unifying paradigm to guide future interpretation of the ADA is problematic because it is not apparent from the text of the Act how individual cases should be decided. Instead of providing bright-line tests, Congress and the EEOC created multi-factored standards for analysis and declared that courts must apply the standards on a case-by-

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280. *See supra* notes 175-77 and accompanying text.
281. *Id.*

case basis.[282] There is, for example, a seven-factor standard for deciding when a job function is essential, a four-factor standard for deciding when an employee threatens the safety of other workers, and a six-factor standard for deciding when an employer's duty of reasonable accommodation imposes an undue hardship on that employer.

These "ambiguous lists of unweighted characteristics"[283] provide no constructive guidance to courts trying to apply these standards to concrete cases, and will create the same indeterminacy that currently plagues section 504 cases. A legal approach telling judges to examine all the facts and balance them avoids formulating a rule of decision. People are entitled to know the legal rules before they act, yet under the standards articulated by Congress no one can know where she stands until litigation has been completed and the last appeal rejected.[284] Such indeterminacy breeds litigation that Congress could have avoided by creating a bright-line test, such as the proposal to impose a ceiling of ten percent of an employee's annual salary as the upper limit for what an employer must do to provide reasonable accommodation to the employee. Litigation imposes stiff costs and high risks on both parties to a lawsuit, costs and risks which disabled persons are disproportionately unable to bear. Indeterminacy may be good business for employment litigators, but it is bad law.

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282. *See supra* note 105 and accompanying text.

283. *See supra* note 34.

284. For a general criticism of balancing approaches, *see* Secretary of Labor v. Lauritzen, 835 F.2d 1529, 1539 (7th Cir. 1987), *cert. denied sub nom.* Lauritzen v. McLaughlin, 488 U.S. 898, *reh'g denied* 488 U.S. 987 (1988) (Easterbrook, J., dissenting).