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Labor Markets, Rationality, and Workers with Disabilities

Michael Ashley Stein[†]

I.

THE PARADIGM OF RATIONAL MARKET DECISIONS AND THE PUZZLE OF UNEMPLOYED WORKERS WITH DISABILITIES

Legal theorists with faith in the principles of the neoclassical economic model of the labor market assert that antidiscrimination statutes are inefficient and unnecessary. They characterize a statute or regulation that preempts an employer's considered personal choice and directs that some other applicant be hired or promoted as introducing inefficacy into the employment equation. A core belief in market rationality also leads these commentators to deny that state regulation of hiring decisions can be a corrective policy. Instead, addressing imbalances through legislative intercession is seen as a needlessly distributive method that is inferior both to allowing labor market dynamics to restore a nondiscriminatory balance, and to nonregulative incentives, such as job programs or cost-spreading through the tax system.¹

As applied by law and economics practitioners, the comprehensive normative goal of the neoclassical economic model is to achieve legal regimes whose efficiency mirrors those attained in an ideal market of perfectly competitive equilibrium. Under this scheme, the term "efficient" (or "pareto efficient") refers to the most optimal outcome, or the one having the greatest utility. It is in large part differences about how to determine what solutions are efficient that separates the various approaches within law and economics.² Thus, the discipline encompasses several distinct strands of thought, including welfare economics,³

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[†] Assistant Professor, College of William & Mary School of Law (designate). I am indebted to Bernard Black, Peter Blanck, Richard Craswell, John Donohue, Marcel Kahan, Mark Kelman, Linda Krieger, Anita Silvers, Michael Wald and David Weisbach for sharing their thoughts on this paper. Gratitude for comments is also due my erstwhile colleagues at a work in progress seminar at Stanford Law School, the participants of the symposium sponsored by this journal, and those attending a panel presentation at the annual Law & Society conference. The librarians at Stanford Law School far exceeded their usual standards for excellence in providing research support.

1. Excellent exegeses are offered in Stewart J. Schwab, *The Law and Economics Approach to Workplace Regulation*, in *GOVERNMENT REGULATION OF THE EMPLOYMENT RELATIONSHIP* 91 (Bruce E. Kaufman ed., 1997), and in RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 349, 349-75 (5th ed. 1998).

2. Duncan Kennedy and Mario Rizzo push this assertion further, contending that methodological approaches can be maneuvered to yield desired outcomes. See Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 *STAN. L. REV.* 387 (1981); Mario Rizzo, *The Mirage of Efficiency*, 8 *HOFSTRA L. REV.* 641 (1980).

3. See generally Allan M. Feldman, *Welfare Economics*, in JOHN EATWELL ET AL., *THE NEW PALGRAVE: THE WORLD OF ECONOMICS* 713 (1998); *WELFARE ECONOMICS AND THE THEORY OF THE STATE* (William J. Baumol ed., 2d

Kaldor-Hicks economics,⁴ wealth-maximizing law and economics,⁵ feminist law and economics,⁶ behavioral law and economics,⁷ expressive law and economics,⁸ and what may be loosely termed "progressive" law and economics.⁹ How each branch confronts a given inquiry will depend upon the relevance and weight that it places on particular preferences as criteria. Thus, Richard Posner's study of gender implications in the workplace¹⁰ was considered deficient by Gillian Hadfield for not adequately inquiring into the impact that regulations on sexuality have on women's role determinations.¹¹

With this interpretation of factors that affect efficiency in mind, I now turn to the question of how well Title I of the Americans With Disabilities Act (ADA)¹² conforms to the neoclassical economic paradigm. The assumption that informs Title I, as well as more traditional prohibitions against discrimination in employment, is that imposing these regulations will equalize employment opportunities for targeted groups. But empirical studies of post-ADA employment effects highlight a phenomenon that is puzzling. Although analyses suggest that employing workers with disabilities can be cost effective,¹³ and despite a burgeoning economy in which the unemployment rate for most categories of workers has plummeted,¹⁴ unemployment of working-age individuals with disabilities appears not to have similarly diminished.¹⁵ From the point of view of

ed. 1965).

4. See generally Allan M. Feldman, *Kaldor-Hicks Compensation*, in 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 417 (Peter Newman ed., 1998).

5. This strand is primarily identified with academicians from the University of Chicago Law School.

6. This school is identified by the work of Gillian K. Hadfield, cited *infra* note 11, as well as the works featured in the publication FEMINIST ECONOMICS.

7. See generally Symposium, *The Legal Implications of Psychology, Human Behavior, Behavioral Economics, and the Law*, 51 VAND. L. REV. 1499 (1998).

8. See Robert Cooter, Comment, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585 (1998).

9. See Susan Rose-Ackerman, *Progressive Law And Economics and the New Administrative Law*, 98 YALE L.J. 341 (1988) (presenting a perspective of law and economics including Duncan Kennedy's scholarship as well as the "liberal" law and economics of Richard Markovits and Bruce Ackerman that Kennedy criticizes); see also Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981).

10. See RICHARD A. POSNER, *SEX AND REASON* (1992).

11. See Gillian K. Hadfield, *Flirting with Science: Richard Posner on the Bioeconomics of Sexual Man*, 106 HARV. L. REV. 479, 499-502 (1992) (book review). In a similar vein, Hadfield takes to task the circular reasoning used by those law and economics scholars who explain gender wage differentials by reference to the historical household structure without also questioning the existence of this arrangement. See Gillian K. Hadfield, *Households at Work: Beyond Labor Market Policies to Remedy the Gender Gap*, 82 GEO. L.J. 89 (1993); Gillian K. Hadfield, *Bias in the Evolution of Legal Rules*, 80 GEO. L.J. 583 (1992).

12. 42 U.S.C. § 12101 (1994).

13. See discussion *infra* notes 40-41 and 56-76.

14. For example, the overall unemployment rate decreased to 4.2%, a 29-year low, for the month of August 1999. See *Unemployment Drops to 4.2 Percent*, ASSOCIATED PRESS, Sept. 3, 1999, available in 1999 WL 22040469.

15. Two recent studies report that the post-ADA employment rate of workers with disabilities has moderately declined relative to that of workers without disabilities. See generally DARON ACEMOGLU & JOSHUA ANGRIST, CONSEQUENCES OF EMPLOYMENT PROTECTION? THE CASE OF THE AMERICANS WITH DISABILITIES ACT (National Bureau of Econ. Research Working Paper No. 6670, 1998); Thomas DeLeire, *The Wage and Employment Effects of the Americans with Disabilities Act* (1997) (unpublished mimeograph on file with author). I qualified these results in the text because of an ongoing empirical examination of post-ADA employment effects that I am conducting with John J.

scholars applying the neoclassical labor market paradigm to Title I, the clearest explanation of this phenomenon seems to be that the studies reporting the cost effectiveness of employing the disabled are incorrect (even if only overstated). Following from this explication is the conclusion that selecting workers with disabilities over nondisabled workers is an inefficient practice.

In this essay, I examine and assess the arguments made by proponents of the view that the inefficiency of employing workers with disabilities is a deterrent to their inclusion in the labor market. If these arguments are sound, then rational market forces appear to be inexorably at work to attenuate the strategy embodied by Title I of the ADA. To the contrary, however, I will identify a market failure that prevents certain employers from reaching rational labor market decisions by creating a "taste for discrimination"¹⁶ in which the costs of including people with disabilities in a workforce are perceived as being greater than they really are. Further, I will propose an improved manner for assessing the efficiency of employing workers with disabilities and consider what this method implies regarding the rationality of Title I's strategy. Finally, I will show that the failure of the existing neoclassical economic model, as well as the Title I critiques that rely on this model, is attributable at least in part to the societal misconceptions about people with disabilities that are built into the model's assumptions.¹⁷ That is, far from being neutral or objective, these critiques actually sanction and perpetuate the very irrational biases the ADA was designed to correct.¹⁸

II.

FLAWED ASSUMPTIONS

The neoclassical economic model of the labor market begins from the premise that markets for goods and services operate rationally. As part of this postulate it is assumed that markets set their own prices, free bargaining is the norm, and knowledge is completely and symmetrically disseminated, resulting in correct end values for commodities. Under this theory, market forces discipline employers and their self-destructive tastes against particular groups by driving those employers from the market. This economic Darwinism occurs because employers' discriminatory practices of declining to hire particular types of employees despite their greater utility adds to business costs, and thus diminishes their profit margins. Exercising distaste also raises the net-product margin of nondiscriminatory competitors who engage same-group employees at reduced wage levels.

Donohue III; see also Susan Schwochau & Peter David Blanck, *The Economics of the Americans with Disabilities Act: Part III: Does the ADA Disable the Disabled?*, 21 BERKELEY J. EMP. & LAB. LAW 271 (2000) (expressing strong doubts about the technical accuracy of these studies).

16. The seminal writing on "distaste" is GARY S. BECKER, *THE ECONOMICS OF DISCRIMINATION* 39-45 (2d ed. 1971).

17. Cf. Michael Ashley Stein, *Design Dynamics of ADA Title I* (unpublished manuscript on file with the author) (exploring other possible causes for Title I's arrested development).

18. For an application of this theory in another context, see William M. Landes, *The Economics of Fair Employment Laws*, 76 J. POL. ECON. 507 (1968).

Resting on this foundation, the neoclassical economic paradigm posits that in the context of a rational labor market employers hire workers with the greatest net productivity. This utility is calculated by subtracting total labor cost from total production benefit. Since workers with disabilities require costly inputs in the form of accommodations, an employer, if sufficiently unconstrained so that she can act of her own rational preference, would logically choose non-disabled employees.

The most thorough criticism of Title I from a law and economics perspective was published by Richard Epstein after passage of the ADA, but prior to promulgation of its regulations.¹⁹ Although therefore somewhat precipitous, because successive literature closely follows Epstein's position in applying the neoclassical economic labor market model,²⁰ elucidating his arguments will yield an understanding of how those who utilize similar assumptions assess Title I.²¹ For facility of reference, these views (with his courteous permission) will be attributed directly to Epstein. At the same time, however, my criticisms of Epstein are apropos to other law and economics practitioners to the extent that they adopt normative assumptions common to the neoclassical economic model, for example the belief in an existing rational marketplace for labor services.²²

Epstein advances three main reasons for believing that the potential benefits associated with reasonable accommodations are inherently less than the costs they engender. First, it is in the nature of disability that those individuals are less productive than their able-bodied counterparts. Second, providing accommodation—that is, giving a disabled worker something her able-bodied peers do not receive as a means of ameliorating her impairments—must be costly. Third, the employment of workers with disabilities extracts yet a further cost when co-workers and customers respond with “awkward” and “unpleasant” feelings, which as “preferences should not be blithely condemned as irrational.”²³

When employers are forced to hire disabled employees against their own considered judgment, these employers are made to internalize costs that they would not have otherwise borne. Consequently, according to Epstein, Title I

19. See RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 480-94 (1992) [hereinafter *FORBIDDEN GROUNDS*].

20. See, e.g., Mark A. Schuman, *The Wheelchair Ramp to Serfdom: The Americans with Disabilities Act, Liberty, and Markets*, 10 ST. JOHN'S J. LEGAL COMMENT. 495 (1995); Christopher J. Willis, *Title I of the Americans with Disabilities Act: Disabling the Disabled*, 25 CUMB. L. REV. 715 (1994-1995); Steven B. Epstein, *In Search of a Bright Line: Determining When an Employer's Financial Hardship Becomes "Undue" Under the Americans with Disabilities Act*, 48 VAND. L. REV. 391 (1995); Ron A. Vassel, *The Americans With Disabilities Act: The Cost, Uncertainty and Inefficiency*, 13 J.L. & COM. 397 (1994); Steven F. Stuhlbarg, *Reasonable Accommodation Under The Americans with Disabilities Act: How Much Must One Do Before Hardship Turns Undue?*, 59 U. CIN. L. REV. 1311 (1991); Thomas H. Barnard, *The Americans with Disabilities Act: Nightmare for Employers and Dreams for Lawyers?*, 64 ST. JOHN'S L. REV. 229 (1990); Gregory S. Crespi, *Efficiency Rejected: Evaluating "Undue Hardship" Claims Under the Americans with Disabilities Act*, 26 TULSA L.J. 1 (1990).

21. See *FORBIDDEN GROUNDS*, *supra* note 19, at 480-94.

22. I want to stress that I am not imputing Epstein's vision of anti-discrimination laws to all other variations within the discipline of law and economics. The only implication which should be drawn is that publications which have so far arisen from the field adopt, in large measure, Epstein's position.

23. *FORBIDDEN GROUNDS*, *supra* note 19, at 486-87.

accommodations are inherently inefficient because they reduce the utility the employer is able to achieve. Title I's requirements are also unfair because they compel private employers to bear the costs of an inefficient social policy. Epstein therefore concludes that the current exclusion of people with disabilities from the employment sphere is the result of rational decisionmaking, not of prejudice or statistical discrimination.²⁴

According to Epstein, a better solution towards achieving the same end of altering historical imbalances in the labor market would be to abrogate the ADA so as to allow the market to function normally. In this circumstance, employees with disabilities could underbid the true value of their services or decline health insurance coverage as a way of offsetting their accommodation costs. If necessary, the state could create incentives for accommodating disabled workers by spreading those costs through the tax structure or by directly issuing vouchers to employers.²⁵ Finally, Epstein maintains that specific industries and plant locations could be chosen as "centers" of accommodation. By concentrating workers with disabilities at such sites, there is increased likelihood that physical plant or equipment accommodations will see repeated usage. According to Epstein, this last option "far from being seen as handicap ghettoization, will be regarded as a sensible effort to economize on public funds."²⁶

Four principal theoretical flaws undermine Epstein's application of neoclassical economic principles to Title I. First, and in turn undermining each of the subsequent three postulates, is his unconditional acceptance of the neoclassical economic labor market model. This paradigm, far from being neutral, adopts and perpetuates many of the same irrational biases the ADA was designed to correct. Second, it is assumed that to employ an individual with a disability requires significant workplace accommodation. Epstein maintains this conjecture even though many accommodations involve only minimal or no cost, and some occasion positive benefits. Third, the appraisal presumes that policymakers ought to factor in the costs of provoking negative feelings in other employees even when these are engendered by biased tastes. That is, Epstein does not introduce any consideration to distinguish costs occasioned by behavior influenced by insupportable or mistaken beliefs from the costs of justified or sustainable ones. Fourth, the analysis is incomplete because Epstein considers only internalized costs associated with workplace accommodations, and ignores both concomitant internalized and external benefits.

24. *Id.* at 487 ("In light of the business realities of the situation, the popular treatment of the disabled cannot simply be dismissed as prejudice or bigotry.").

25. Approbation of grant programs is also shared by commentators advocating on behalf of the disabled. See Scott A. Moss & Daniel A. Malin, *Public Funding For Disability Accommodations: A Rational Solution to Rational Discrimination and the Disabilities of the ADA*, 33 HARV. C.R.-C.L. L. REV. 197 (1998); Sue A. Krennek, *Beyond Reasonable Accommodation*, 72 TEX. L. REV. 1969 (1994). An appraisal of these programs is offered in ALBERTO MARTINI & SHARON ARNOLD, PROGRAMS PROVIDING SUBSIDIZED EMPLOYMENT TO DISADVANTAGED WORKERS: A REVIEW OF THEIR EFFECTIVENESS (Mathematica Policy Research Paper No. 7725-400, Feb. 1990).

26. FORBIDDEN GROUNDS, *supra* note 19, at 494.

A. Over-Reliance on the Neoclassical Model

The first flaw in Epstein's account is his unqualified approbation of the neoclassical economic model. As set forth above, this paradigm posits that employers acting rationally will hire and maintain workers with the greatest net productivity, while employees who act irrationally will be disciplined by market forces and ultimately driven from competition. This premise, which is taken as a standard economic assumption by many law and economics practitioners, has questionable factual and normative elements as applied to the reality of disabled workers' experiences in the labor market.²⁷ In explaining this assertion, the scholarship of Cass Sunstein²⁸ and John Donohue²⁹ is instructive.

There is a factual objection to applying the neoclassical labor market model to disabled workers. To begin with, the standard neoclassical economic model is premised on complete and symmetrical distribution of information to all actors within a given market. Yet not all markets function equally in this respect. Accordingly, although the neoclassical economic account of information dissemination might be true of financial markets whose extensive "reporting" requirements are rigorously enforced by the Securities and Exchange Commission, no parallel structure exists in the labor market. Similarly, the liquidity of financial market commodities does not extend to the market for employment services, where the value of individual workers is difficult to disaggregate.

Next, contrary to the neoclassical labor market account, empirical studies conducted both before and after passage of the ADA clearly demonstrate the persistence of employment discrimination as an obstacle to labor market opportunities for workers with disabilities.³⁰ In analyzing the effects of employer practices, these studies, which assume information asymmetry in the labor market, glean the effects of non-statistical (or economically rational) behavior from that caused by prejudice. In other words, they separate the consequences of decisions arising from the use of indicators which substitute reliable generalizations about group characteristics from those which either wrongly assume or overestimate the existence of those characteristics. In the case of workers with disabilities, existing misconceptions about disabled workers that substitute for less easily obtainable accurate information tend to sway estimates of indicators that are meant to signal appraisals of productivity and accommodation cost. Additionally, even if

27. A particularly good treatment of the generally weak predictive value of this model is Christine Jolls et al., *A Behavioral Approach to Law & Economics*, 50 STAN. L. REV. 1471 (1998).

28. See Cass R. Sunstein, *Why Markets Don't Stop Discrimination*, in REASSESSING CIVIL RIGHTS 23 (Ellen F. Paul et al. eds., 1991).

29. For two particularly good examples of Donohue's reasoning, see John J. Donohue III, *Prohibiting Sex Discrimination in the Workplace: An Economic Perspective*, 56 U. CHI. L. REV. 1337 (1989); John J. Donohue III, *Is Title VII Efficient?*, 134 U. PA. L. REV. 1411 (1986).

30. See, e.g., Marjorie Baldwin & William G. Johnson, *Labor Market Discrimination Against Men with Disabilities*, 29 J. HUM. RESOURCES 1 (1994); Marjorie Baldwin et al., *Gender Differences in Wage Losses from Impairments: Estimates from the Survey of Income and Program Participation*, 29 J. HUM. RESOURCES 865 (1994); William G. Johnson & James Lambrinos, *Wage Discrimination Against Handicapped Men and Women*, 20 J. HUM. RESOURCES 264 (1985).

economically rational indicators were substituted for biased ones, a market failure would continue because employers' discriminatory behavior would be rewarded as efficient (and conversely, a system requiring economically empowered employers, rather than economically disempowered employees, to bear cost differentials incurred by disregarding rational economic discrimination may arguably be more efficient from a social welfare standpoint). Thus, the baseline assumption that employers act in a rational manner while seeking to maximize their own profits appears empirically invalid.

Moreover, the neoclassical economic model asserts that once discriminatory practices are observed, employers who exercise distaste are disciplined by market forces that reduce their profit margins while increasing those of their nondiscriminatory competitors. As with the first premise, this theory has not been empirically demonstrated. Indeed, logical application of the neoclassical economic paradigm would recount that prior to 1964, when federal antidiscrimination laws injected inefficiency into the dynamics governing private employment relationships, discriminatory firms would have been either penalized or driven from competition. I am unaware of any empirical evidence that supports this position. To the contrary, United States markets have historically evinced various forms of unpunished discriminatory behavior. Consequently, there is no proof for a belief in the self-corrective force of competitive market pressures in the labor field.

There is also a normative objection to utilizing neoclassical economic principles to examine the dynamics of disabled participation in the labor market. Accepting this paradigm would not discipline irrational behavior and restore the employment market to a nondiscriminatory equilibrium. Instead, reliance on competitive pressure as advocated in neoclassical economic analyses would perpetuate market failure by reinforcing the stereotypes Title I was meant to counteract. This is because the neoclassical economic paradigm uses as its baseline a status quo designed by an empowered majority that has already absorbed existing prejudices and made them endogenous to future decision making. Hence, any analysis that assumes market neutrality has reflexively erected obstacles to antidiscrimination principles that are entrenched in the same stereotypes those civil rights statutes seek to alter. Whether embracing these stereotypes is an unconscious,³¹ semi-conscious,³² conscious,³³ or cognitively biased³⁴ decision

31. See, e.g., Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (offering two different psychological explanations for unconscious racism).

32. See, e.g., Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1358-59 (1988) (arguing that in addition to unconscious thought, racism forms a hegemonic force in American society, one in which blacks have been created as a subordinated "other").

33. See, e.g., Alan David Freeman, *Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978) (asserting that civil rights statutes are actually used by the white majority to legitimate the very racial inequality and oppression they were meant to remedy).

34. An especially perceptive approach is Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995), which argues that many prejudiced employment-based decisions arise from unintentional categorization-related decision errors rather

remains hotly debated, as does the issue of whether preferences are fixed³⁵ or malleable.³⁶ For now, however, it is sufficient to say that accepting the neoclassical economic model's view that existing prejudicial preferences built into the marketplace are neutral will only serve to continue those stereotypes.

Within the context of Epstein's Title I analysis, propagation of disability-related biases would result from his recommendation that deference be paid to the distastes of both third parties and employers, even under a regime in which the ADA was itself abrogated. In the case of third-party distaste, whether arising from co-workers or customers, market pressure will foster, rather than eliminate, discrimination. This is because the inclusion of third party distaste into the efficiency equation will necessarily cause employers to factor into their decisions the very prejudices that Title I endeavors to avoid. Furthermore, it would be unusual, from a methodological standpoint, to defer to preferences of nonmarket third-party actors.

As for employers, Epstein's claim that workers with disabilities could either underbid the value of their services or forego health insurance benefits as a way of capturing accommodation costs would, if heeded, also perpetuate market failure. Working for lower remuneration or benefits might indeed be an inducement for nondiscriminatory employers to engage workers with disabilities. However, it would also reinforce the devaluation of those individuals beget by unfounded stereotypes, and so continue market failure. Acceding to employers' distastes by bribing them through reduced compensation also reduces whatever social good and external benefits can arise from equal pay and occupational dignity. In addition, because the prospect of recovering the cost of education and training is influenced by prevailing market conditions, disabled individuals will lose utility as a result of their reduced willingness to invest in their own human capital. Finally, the loss of health care coverage is considered a major disincentive for disabled workers to leave public assistance programs and enter the workplace.³⁷ This is underscored by the fact that Congress recently voted to extend the length of time preceding the cutoff of these benefits following gainful employment.³⁸ Thus, having workers with disabilities bargain away insurance coverage as a means of increasing labor market participation would only further sustain an existing market failure.

than intentionally discriminatory motivations.

35. See, e.g., George J. Stigler & Gary S. Becker, *De Gustibus Non Est Disputandum*, 67 AM. ECON. REV. 76 (1977).

36. See, e.g., AMITAI ETZIONI, *THE MORAL DIMENSION: TOWARD A NEW ECONOMICS* (1988).

37. See Marjorie L. Baldwin, *Can the ADA Achieve its Employment Goals?*, 549 ANNALS AAPSS 37 (1997); Richard V. Burkhauser, *Post-ADA: Are People with Disabilities Expected to Work?*, 549 ANNALS AAPSS 37, 71 (1997). Pre-ADA assessments addressing the same issue include JERRY L. MASHAW & VIRGINIA P. RENO, *DISABILITY, WORK AND CASH BENEFITS* (1989), MONROE BERKOWITZ & M. ANNE HILL, *DISABILITY AND THE LABOR MARKET: ECONOMIC PROBLEMS, POLICIES, AND PROGRAMS* (1986), and JONATHAN S. LEONARD, *LABOR SUPPLY INCENTIVES AND DISINCENTIVES FOR THE DISABLED* (National Bureau of Econ. Research Working Paper No. 1174, 1985).

38. See Robert Pear, *Senate Approves Health Care for Disabled*, N.Y. TIMES, June 17, 1999, at A28; *Testimony Before the Subcomm. on Soc. Sec., Committee on Ways and Means, House of Representatives*, 106th Cong. (1999) (statement of Cynthia M. Fagnoni, Director of Education, Workforce, and Income Security Issues, Health, Education, and Human Services Division).

B. Miscalculating Productivity

The second systemic flaw in Epstein's account is his tripartite assumption that because disabled employees are by nature less productive than their non-disabled counterparts, they require accommodations, and that these accommodations are inherently costly. Empirical studies have not established the prevalence of the need for accommodation among disabled workers across the labor market. It is reasonable to assume that some percentage of employees with disabilities will require accommodations. The size of this group will depend upon the individual circumstances of present or prospective employees, the degree to which an employer's worksite and processes are already accessible, and how the term "disabled" is conceived³⁹ or measured.⁴⁰ There is, however, no reason to suspect that every employee with a disability requires an accommodation, and counterexamples to any such broad generalization are abundant.

Moreover, although the area needs greater and more representative study,⁴¹ available empirical data suggest that accommodating workers with disabilities engenders little or no cost. For example, a study examining 500 accommodations made by Sears, Roebuck & Co. over the twenty-year period 1978-96 found that nearly all of the accommodations were made at minimal cost.⁴² Results of the Sears Study are corroborated by those of the Job Accommodation Network, which reported the typical cost of accommodation as \$200,⁴³ and by other appraisals showing similarly moderate costs.⁴⁴ Another analysis concluded that the cost of

39. A recent and pertinent example is the limitation upon the use of mitigating measures in determining disability expressed by the Supreme Court in their recent troika of decisions. See *Sutton v. United Airlines, Inc.*, 527 U.S. ___, 119 S. Ct. 2139 (1999); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. ___, 119 S.Ct. 2133 (1999); *Albertsons, Inc. v. Kirkingburg*, 527 U.S. ___, 119 S. Ct. 2162 (1999). Justice O'Connor's numerical discussion in *Sutton* is particularly illuminating. See *Sutton*, 119 S. Ct. at 2142.

40. Estimated by Congress to be 43 million at the time of the ADA's passage, see 42 U.S.C. § 12,101 (1994), recent appraisals are as high as 55 million. See *U.S. Census, Current Population Survey ("CPS")* (visited Feb. 20, 2000), available at <<http://www.census.gov/hhes/www/disable/disabcps.html>>. See generally Alberto Martini, *Why Estimates of the Number of Persons with Disabilities Who Want to Work Diverge so Widely* (Mathematica Policy Research Paper No. 7984-001) (May 1991); SAAD Z. NAGI, *THE CONCEPT AND MEASUREMENT OF DISABILITY IN DISABILITY POLICIES AND GOVERNMENT PROGRAMS 1* (Edward D. Berkowitz, ed. 1979).

41. "Adequate economic data examining the effect of the population of young, qualified persons with disabilities able to join the work force is not available." Peter David Blanck, *Employment Integration, Economic Opportunity, and the Americans with Disabilities Act: Empirical Study from 1990-1993*, 79 IOWA L. REV. 853, 918 (1994); see also Frederick C. Collignon, *Is the ADA Successful? Indicators for Tracking Gains*, 549 ANNALS AAPSS 129 (1997); NATIONAL COUNCIL ON DISABILITY, *ACHIEVING INDEPENDENCE: THE CHALLENGE FOR THE 21ST CENTURY 6* (1996).

42. Specifically, from 1978-92, the average out-of-pocket expense for an accommodation was \$121; from 1993-96, that average dropped to \$45. From January 1, 1993 to December 31, 1995, 72% of accommodations required no cost, 17% carried an expenditure of less than \$100, 10% cost less than \$500, and 1% required outputs of between \$500-\$1,000. See PETER DAVID BLANCK, *COMMUNICATING THE AMERICANS WITH DISABILITIES ACT, TRANSCENDING COMPLIANCE: 1996 FOLLOW-UP REPORT ON SEARS, ROEBUCK AND CO.* 17 (Annenberg Washington Program Publication, 1996) [hereinafter SEARS STUDY].

43. See PRESIDENT'S COMMITTEE ON THE EMPLOYMENT OF PEOPLE WITH DISABILITIES, *REPORT TO CONGRESS ON THE JOB ACCOMMODATION NETWORK* (July 26, 1995) (visited Feb. 20, 2000), available at <<http://www.jan.wvu.edu/english/congress.htm>>.

44. See, e.g., Laura Koss-Feder, *Spurred by the Americans with Disabilities Act, More Firms take on Those Ready, Willing and Able to Work*, TIME MAG., Jan. 25, 1999, at 82A (citing James Geletka, Executive Director of the

accommodating disabled workers was equal to that of acclimating nondisabled workers.⁴⁵ Nevertheless, the fact that these studies report the activities of only a minority of corporations, when similar practices would compel more widely spread efficient corporate planning, evidences a market failure.

Lastly, it is not accurate to assume that disabled workers are by nature less productive than their counterparts free of disabilities, although this may be true for some individuals with disabilities, just as some nondisabled workers are less productive than the majority of disabled ones. In terms of statutory protection, a disabled worker is not considered "qualified" under Title I unless she can perform the essential job functions of her chosen occupation, either with or without accommodation. A disabled employee who satisfies the requirements of her position without accommodation is equally as productive as her non-disabled peers. When she needs accommodations to accomplish integral activities, the existence and degree of her relatively lower net productivity is affected by her ability to accomplish nonessential job functions, as well as the value of those supplementary services to her employer.⁴⁶ It bears noting, however, that forty years of pre-ADA empirical studies indicate comparable overall productivity levels between disabled and non-disabled workers.⁴⁷ For example, statistics from the U.S. Office of Vocational Rehabilitation indicate that 91% of disabled workers were rated either "average" or "better than average," the same rating given to non-disabled workers.⁴⁸ Judging from the shortage of disability awareness⁴⁹ and management programs⁵⁰ instituted by corporations as part of their business practices, human resource managers seem unaware of this information. This scarcity further denotes an information asymmetric; under a neoclassical economic model, companies with access to this information would act on these favorable economic incentives and

Rehabilitation Engineering and Assistive Technology Society of America for the proposition that most workplace accommodations cost less than \$200); PETER DAVID BLANCK, *THE EMERGING ROLE OF THE STAFFING INDUSTRY IN THE EMPLOYMENT OF PERSONS WITH DISABILITIES: A CASE REPORT ON MANPOWER INC.* 7 (Annenberg Washington Program Publication, 1998) (reporting that accommodation costs were "minimal") [hereinafter *MANPOWER*]; Rita Thomas Noel, *Employing the Disabled: A How and Why Approach*, 44 *TRAINING & DEVELOPMENT J.* 26, 31 (1990) (reporting that about 80% of accommodations cost less than \$500).

45. See LOUIS HARRIS & ASSOCIATES, *THE ICD SURVEY II: EMPLOYING DISABLED AMERICANS* (1987) (conducted for the National Organization on Disability).

46. Thus, the ADA is not affirmative action in the sense of requiring the preferential hiring of less or nearly qualified workers. See generally Chai R. Feldblum, *The (R)evolution of Physical Disability Anti-discrimination Law: 1976-1996*, 20 *MENTAL & PHYSICAL DISABILITY L. REP.* 613 (1996).

47. The literature is reviewed in Reed Greenwood & Virginia Anne Johnson, *Employer Perspectives on Workers with Disabilities*, 53 *J. REHABILITATION* 37 (1987).

48. See Rick A. Lester & Donald W. Caudill, *The Handicapped Worker: Seven Myths*, 41 *TRAINING & DEV. J.* 50-51 (1987); George E. Stevens, *Exploding the Myths About Hiring the Handicapped*, 63 *PERSONNEL* 57, 59 (1986).

49. See, e.g., JOHN G. VERES III & RONALD R. SIMS, *HUMAN RESOURCE MANAGEMENT AND THE AMERICANS WITH DISABILITIES ACT*, chs. 8-9 (1995); SHEILA H. AKABAS ET AL., *DISABILITY MANAGEMENT* (1992); FRANK BOWE & JAY ROCHLIN, *THE BUSINESS-REHABILITATION PARTNERSHIP: AN ARKANSAS REHABILITATION AND RESEARCH TRAINING CENTER PROJECT* (1983); JACK R. ELLNER & HENRY E. BENDER, *HIRING THE HANDICAPPED: AN AMACOM RESEARCH STUDY* (1980).

50. See *THE ADA AT WORK: IMPLEMENTATION OF THE EMPLOYMENT PROVISIONS OF THE AMERICANS WITH DISABILITIES ACT: A STUDY BY SOCIETY FOR HUMAN RESOURCE MANAGEMENT* (1999).

promote greater employment among the disabled.

C. Weighting Distaste

A third systemic flaw in the Epstein view is its account of co-worker and client distaste when calculating the costs of employing people with disabilities. Although law and economics assessments are expected to account for all possible costs and benefits when assessing efficiency, it is atypical when calculating social good to give weight to preferences arising from socially undesirable criteria (for example, illegal tastes).⁵¹ Consequently, deferring to prejudicial irrationalities about disabled workers is a controversial method of applying conventional law and economics criteria. Such inclusion would also result, as was shown above, in continuation of the same biases that Title I was meant to counteract. At the very least, Epstein needs to justify such atypical accession to irrational preferences. Furthermore, his focus on disability as the exclusive cause of distaste felt by one worker for another posits a depth of ignorance about human reactions, as well as the kind of information void that Epstein claims does not exist in a rational workplace.

An information asymmetry also exists as to the distastes of employers and third parties towards workers with disabilities. While empirical surveys of Fortune 500 executives,⁵² senior executives,⁵³ and co-workers⁵⁴ uniformly report favorable attitudes to employing disabled individuals, available data fails to evince significant increases in the relative employment rate among disabled individuals. Two alternative conclusions can be drawn from this apparent paradox: either cognitive dissonance causes the individuals surveyed to believe they favor disabled employment when in reality they do not, or those interviewed truly do espouse pro-disabled sentiments, but because of an information asymmetry this preference does not manifest itself when these individuals act aggregately as corporations.

51. In addition to Epstein, one article averred that additional externalities, all negative, should be considered at greater length when weighing the reasonableness of Title I accommodations. See Jason Zarin, Note, *Beyond the Bright Line: Consideration of Externalities, the Meaning of Undue Hardship, and the Allocation of the Burden of Proof Under Title I of the Americans with Disabilities Act*, 7 S. CAL. INTERDIS. L. J. 511 (1998). This distaste is addressed on a sociological level in Harlan Hahn, *Advertising the Acceptably Employable Image: Disability and Capitalism*, 15 POL'Y STUD. J. 551 (1987).

52. See Joel M. Levy et al., *Attitudes of Executives in Fortune 500 Corporations Towards the Employability of Persons with Severe Disabilities: Industrial and Service Corporations*, 24 J. APPLIED REHABILITATION COUNSELING 19-31 (1994).

53. A 1995 survey of senior corporate executives found that 89% supported plans to increase the number of workers with disabilities their companies employed. See LOUIS HARRIS & ASSOCIATES, THE N.O.D./HARRIS SURVEY ON EMPLOYMENT OF PEOPLE WITH DISABILITIES 24 (1995) (conducted for the National Organization on Disability).

54. In a 1991 survey, 68% of those polled said they would support policies that increase the number of disabled workers, 65% responded that they would not have any problems with disabled co-workers, and 77% said they would not be concerned if their boss was a seriously disabled person. See LOUIS HARRIS & ASSOCIATES, PUBLIC ATTITUDES TOWARDS PEOPLE WITH DISABILITIES 13 (1991) (conducted for the National Organization on Disability).

D. Ignoring Concurrent Benefits

Fourth, in assessing the efficiency of Title I accommodations, Epstein focuses exclusively on costs affecting individual employers and does not take into account benefits that positively impact the statute's efficiency.⁵⁵ The three main costs that Epstein associates with Title I are set forth above: (1) disabled employees are naturally less productive than their able-bodied counterparts, (2) workers with disabilities therefore require accommodations, and (3) providing accommodations engenders great expenses, including negative externalities. However, a balanced and complete analysis of Title I should also take into account positive benefits—both those directly internalized and those arising through externalities—that impact disabled employment. The fact that economic analyses have not yet realized the existence of counterweighing factors, some of which are set forth in the next section, further illustrates the existence of an informational market failure.

III.

THE UTILITY OF EMPLOYING WORKERS WITH DISABILITIES

There are positive external benefits to consider when assessing the potential economic effect of a disabled worker on a given firm. These externalities are not all readily quantifiable. Considering the impact of these benefits will not result in all accommodations being seen as economically efficient, but should render a more balanced calculus.⁵⁶

The most immediately quantifiable benefits are those internalized by employers due to savings in recruitment, training, and replacement expenses.⁵⁷ One federally funded agency found that for every dollar spent on accommodation, companies saved an average of fifty dollars in net benefits.⁵⁸ Another survey reported that 60% of disabled workers remained with their job placement as opposed to only 40% of able-bodied workers, and that the average cost of each job turnover was \$2,800.⁵⁹ Moreover, empirical evidence corroborates that workers with disabilities have absenteeism rates equal to or lower than their nondisabled

55. For instance, for individuals aged 16 to 64, the Census reported that the overall employment rate of people with disabilities improved 0.3 percentage points during the period 1991-94, rising from 52.0% in 1991 to 52.3% in 1994. See Michael Ashley Stein, *Employing People with Disabilities: Some Cautionary Thoughts for a Second Generation Civil Rights Statute in EMPLOYMENT, DISABILITY, AND THE AMERICANS WITH DISABILITIES ACT: ISSUES IN LAW AND PUBLIC POLICY* (Peter David Blanck ed., 2000).

56. See Michael Ashley Stein, *Law & Economics and ADA Title I Accommodation Costs* (unpublished manuscript on file with the author) (addressing how the efficiency of accommodation costs might be measured).

57. See generally Peter David Blanck & Mollie Weighner Marti, *Attitudes, Behavior and the Employment Provisions of the Americans with Disabilities Act*, 42 VILL. L. REV. 345 (1997); Peter David Blanck, *The Economics of the Employment Provisions of the Americans with Disabilities Act: Part I - Workplace Accommodations*, 46 DEPAUL L. REV. 887 (1997).

58. See *President's Committee on Employment of People with Disabilities*, JOB ACCOMMODATION NETWORK REPORTS 10 (1994); see also James G. Frierson, *The Legality of Medical Exams and Health Histories of Current Employees under the Americans with Disabilities Act*, 17 J. REHABILITATION ADMIN. 83, 86 (1993) (describing how one company saved \$4 million, and another \$310,000 annually, by providing necessary accommodations).

59. See MANPOWER, *supra* note 44, at 29 (1998); AKABAS ET AL., *supra* note 49, at 261.

peers.⁶⁰ The rational economics of hiring workers with disabilities is also validated by anecdotal accounts.⁶¹

In addition, according to Peter Blanck, many accommodations produce desirable "ripple effects."⁶² Among such desirable consequences are higher productivity,⁶³ greater dedication,⁶⁴ better identification of qualified candidates for promotion,⁶⁵ fewer insurance claims, reduced post-injury rehabilitation costs,⁶⁶ improved corporate culture,⁶⁷ and more widespread use of available technologies.⁶⁸

Among the external benefits to employers that are less immediately quantifiable are public cost savings, including reduction of disability-related public assistance obligations estimated at \$120 billion annually.⁶⁹ Hiring people with

60. See, e.g., Gretchen Adams-Shollenberger & Thomas E. Mitchell, *A Comparison of Janitorial Workers with Mental Retardation and Their Non-Disabled Peers on Retention and Absenteeism*, 62 J. REHABILITATION 56 (1996); Dolores Ondusko, *Comparison of Employees with Disabilities and Able-Bodied Workers in Janitorial Maintenance*, 22 J. OF APPLIED REHABILITATION COUNSELING 19-24 (1991); Rick A. Lester & Donald W. Caudill, *The Handicapped Worker: Seven Myths*, 41 TRAINING & DEVELOPMENT J. 50-51 (1987); J.E. Martin et al., *Work Attendance in Competitive Employment: Comparison between Employees Who Are Non-Handicapped and Those Who Are Mentally Retarded*, 23 MENTAL RETARDATION 142-47 (1985).

61. For example, Shelley Donald Coolidge, *Fewer With Disabilities at Work Since Passage of Civil Rights Act*, CHRISTIAN SCI. MONITOR (Economy Section), Mar. 7, 1995 at 1, describes the experience of Carolina Fine Snacks which provided pork skins to the 1992 GOP convention. Prior to hiring a disabled worker, the company had an 80% turnover rate and a 20% absenteeism rate. With more than half the company's workers now having a disability, there exists almost no absenteeism, and the turnover rate has been reduced to 5%. *Id.*

62. See MANPOWER, *supra* note 44, at 29.

63. See Patricia M. Owens, *Employee Disabilities Needn't Impair Profits*, WALL ST. J., June 7, 1999, at A22 ("Savvy employers have figured out that a can-do attitude for employees with impairments is good for profits and productivity."); see also *Greyhound Employs Bethpage Industries for Mailing*, PR Newswire, Aug. 19, 1998; Jill Leovy, *Despite Law, Jobs Are Scarce for Disabled*, L.A. TIMES, Mar. 20, 1995, at A1; AKABAS ET AL., *supra* note 49, at 260.

64. See, e.g., Stuart Silverstein, *With Help From New Technology, More Disabled Join the Work Force*, L.A. TIMES, Oct. 25, 1998 at C5 (quoting Jon Irvin, EarthLink's President, as saying that "What you find are employees who probably are more focused and more dedicated to doing quality work."); see also John King, *Commercial Support Services Helps Special Workers Gain Sense of Dignity, Independence*, S.F. CHRON., Nov. 21, 1998, at A17; Stacy Lam, *Business Win [sic] Awards for Inclusive Hiring*, MACON TELEGRAPH, Oct. 7, 1998, at 6; Kathryn Moss, *Point-Counterpoint: American Disabilities Act Statute Brings Better Lives to Thousands*, CHAPEL HILL HERALD, Aug. 17, 1997, at 5.

65. See Thomas W. Hale et al., *Persons with Disabilities: Labor Market Activity 1994*, MONTHLY LAB. REV., Sept. 1998, at 3 (relating that the disabled are less likely to work in high-paying positions relative to non-disabled); cf. David Charny & Mitu Gulati, *Efficiency Wages, Tournaments, and Discrimination: A Theory of Employment Discrimination Law for "High Level" Jobs*, 33 HARV. C.R.-C.L. L. REV. 57 (1998) (finding that current anti-discrimination laws are largely ineffective in altering employers' behavior in promotion to "high level" jobs, thus causing employees subject to discrimination to alter their goals, and resulting in under-investment in human capital).

66. SEARS STUDY, *supra* note 42, at 16-17.

67. *Id.*

68. See Heidi M. Berven & Peter David Blanck, *The Economics of the Americans with Disabilities Act Part II: Patents and Innovations in Assistive Technology*, 12 NOTRE DAME J. L. ETHICS & PUB. POL'Y 9, 85-89 (1998).

69. See DAVID I. LEVINE, *REINVENTING DISABILITY POLICY 1* (Institute of Industrial Relations Working Paper No. 65, 1997). One report estimated that for every one million disabled people employed, there would be as much as a \$21.2 billion annual increase in earned income, a \$2.1 billion decrease in means-tested cash income payments, a \$286 million annual decrease in the use of food stamps, a \$1.8 billion decrease in Supplemental Security Income payments, 284,000 fewer people using Medicaid and 166,000 fewer people using Medicare. See Patricia Digh, *People with Disabilities Show What They Can Do*, HR MAG., June 1998, at 144 (citing Rutgers economist Douglas Kruse).

disabilities has also been shown to be beneficial to taxpayers' burdens⁷⁰ and the national economy.⁷¹ These economic benefits, which were clearly a Congressional concern when passing the ADA,⁷² are recognized by a minority of companies.⁷³

Finally, intangible benefits also flow from the extension of employment sphere protection to disabled individuals. Although the effects of such protections upon individual employers are more difficult to quantify, these advantages may nonetheless maximize the collective good. These benefits include placing people with disabilities in a position to exercise all the responsibilities of citizenship,⁷⁴ acknowledging that capable individuals have a "right" to work,⁷⁵ permitting the disabled to achieve dignity through labor and productivity,⁷⁶ and realizing the value of a diverse society.⁷⁷ The value of these gains, as well as what any of them is worth to individual employers, is not necessarily negligible even if it is unclear. The expenses extracted for achieving these benefits must therefore be closely evaluated in any determination of whether to place such costs upon employers rather than spread them through taxes or other state-governed devices. Nevertheless, employers arguably benefit individually from a collective climate in which citizens value the identities they achieve from being productive more than they do the relief of being excused from productivity.

How and when to allocate the costs of maintaining a culture of productivity raises a host of issues, including criticisms of those law and economics studies utilizing wealth as a value,⁷⁸ the continuing debate surrounding commodification,⁷⁹ questions about the perspective of policymakers,⁸⁰ and differences of opinion on the

70. See NISH, THE JWOD PROGRAM: PROVIDING COST SAVINGS TO THE FEDERAL GOVERNMENT BY EMPLOYING PEOPLE WITH DISABILITIES (Feb. 6, 1998) (reporting that the federal government saved \$1,963,206 annually by employing 270 people with disabilities); CALIFORNIA DEPT. OF REHABILITATION MENTAL HEALTH COOPERATIVE PROGRAMS, TAXPAYER RETURN STUDY (Oct. 1995) (finding that for every disabled person employed, California taxpayers saved an average of \$625/month in costs).

71. See Thomas N. Chirakos, *Aggregate Economic Losses from Disability in the United States: A Preliminary Assay*, 67 MILBANK Q. 59 (1989).

72. "By giving people the opportunity to become self-sufficient we are . . . decreasing the amount of Federal money being spent to support individuals with disabilities and increasing tax revenue." 136 CONG. REC. S9684, 9688 (1990) (statement of Senator Durenberger); see also S. REP. NO. 101-116, at 16-17 (1990); 136 CONG. REC. S9684, 9688 (1990); S. REP. NO. 101-116, at 4 (1989).

73. See IMPLEMENTATION OF THE EMPLOYMENT PROVISIONS OF THE AMERICANS WITH DISABILITIES ACT: A SURVEY OF THE WASHINGTON BUSINESS GROUP ON HEALTH (Apr. 1999) (showing that 42% of companies surveyed realized these economic benefits).

74. See JUDITH N. SHKLAR, *AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION* 63-101 (1991).

75. See Gregory S. Kavka, *Disability and the Right to Work*, 9 SOC. PHIL. & POL'Y 262 (1992).

76. See Mark C. Weber, *Beyond the Americans with Disabilities Act: A National Employment Policy for People with Disabilities*, 46 BUFF. L. REV. 123, 129 (1998).

77. See Elizabeth Clark Morin, Note, *Americans with Disabilities Act of 1990: Social Integration Through Employment*, 40 CATH. U.L. REV. 189, 194-195 (1990).

78. See JULES L. COLEMAN, *MARKETS, MORALS AND THE LAW* (1988); Ronald Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191 (1980); Anthony T. Kronman, *Wealth Maximization as a Normative Principle*, 9 J. LEGAL STUD. 227 (1980).

79. See generally Richard Craswell, *Incommensurability, Welfare Economics, and the Law*, 146 U. PENN. L. REV. 1419 (1998).

80. See Susan Rose-Ackerman, *Law and Economics: Paradigm, Politics, or Philosophy*, in *LAW AND ECONOMICS* 3 (Nicholas Mercuro ed., 1998); SUSAN WENDELL, *THE REJECTED BODY: FEMINIST PHILOSOPHICAL*

advantages of investing in human capital.⁸¹ Regardless of how these issues are resolved, an account that educates both employers and economists about some of the difficult-to-quantify benefits listed above is far more consistent with our traditional thinking about the personal and social value of productivity than a narrow construction of social motivation which it assumes, counterfactually, that the statute "would not be necessary if these [accommodations] were beneficial to employers, as they automatically act in ways that promote their self interests."⁸²

IV.

MARKET FAILURE AND PEOPLE WITH DISABILITIES

In this section I show why disability can evoke irrational market behavior with respect to employment. The assertion of market failure within the employment relationship is not unique. Econometric,⁸³ economic,⁸⁴ and civil rights⁸⁵ sources have all given rise to claims that imperfect information undermines the rationality of hiring decisions. Additionally, there is an ongoing debate⁸⁶ over the issue of whether and when to characterize decisions made in the context of imperfect information based on "indicators" believed to evaluate future performance as statistical (and discriminatory)⁸⁷ or rational (and predictive).⁸⁸ There are also examples of employers failing to capitalize on other economically beneficial actions,⁸⁹ which would happen as a matter of course under an application of the

REFLECTIONS ON DISABILITY 117 (1996).

81. Compare Gary S. Becker, *Investment in Human Capital: A Theoretical Analysis*, 70 J. POL. ECON. 9 (1970), with Ruth Colker, *Hypercapitalism: Affirmative Protections for People with Disabilities, Illness and Parenting Responsibilities under United States Law*, 9 YALE J.L. & FEM. 213 (1997). For an international perspective, see CLEMENT FUEST & BERND HUBER, WHY DO COUNTRIES SUBSIDIZE INVESTMENT AND NOT EMPLOYMENT? (National Bureau of Economic Research Working Paper No. 6685, 1998), and RUTH COLKER, AMERICAN LAW IN THE AGE OF HYPERCAPITALISM (1997).

82. Thomas H. Barnard, *Disabling America: Costing Out the Americans with Disabilities Act*, 2 CORNELL J.L. & PUB. POL'Y 41, 58 (1992).

83. See, e.g., Marjorie Baldwin & William G. Johnson, *Labor Market Discrimination Against Men with Disabilities*, 29 J. HUM. RESOURCES 1 (1994); Marjorie Baldwin et al., *Gender Differences in Wage Losses from Impairments: Estimates from the Survey of Income and Program Participation*, 29 J. HUM. RESOURCES 865 (1994); William G. Johnson & James Lambrinos, *Wage Discrimination Against Handicapped Men and Women*, 20 J. HUM. RESOURCES 264 (1985).

84. See, e.g., DAVID NEUMARK, LABOR MARKET INFORMATION AND WAGE DIFFERENTIALS BY RACE AND SEX (National Bureau of Economic Research Working Paper No. 6573, 1998); Sunstein, *Why Markets Don't Stop Discrimination*, *supra* note 28.

85. See, e.g., Richard Delgado, *Rodrigo's Roadmap: Is the Marketplace Theory for Eradicating Discrimination A Blind Alley?*, 93 NW. U. L. REV. 215 (1998); DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992).

86. See, e.g., Stewart J. Schwab, *Is Statistical Discrimination Efficient?*, 76 AM. ECON. REV. 228 (1986).

87. See generally Dennis J. Aigner & Glen G. Cain, *Statistical Theories of Discrimination in Labor Markets*, 30 IND. & LAB. REL. REV. 175 (1977).

88. See generally Richard A. Posner, *The Efficiency and the Efficacy of Title VII*, 136 U. PA. L. REV. 513, 516 (1987).

89. For instance, high efficiency electrical equipment available through negawatt acquisition programs. See Bernard S. Black & Richard J. Pierce, Jr., *The Choice Between Markets and Central Planning in Regulating the U.S. Electricity Industry*, 93 COLUM. L. REV. 1341, 1359-1361 (1993).

neoclassical economic labor market model.

The neoclassical economic model that informs Epstein's analysis has a theoretical error in that it incorporates market failure by reproducing two societal informational flaws about people with disabilities. First, there is the focus on disability as causing reactions that may be ecumenically human. Second, the model imposes a medical rather than a social account of disability. Acceptance of these paired misapprehensions is occasioned by a pervasive lack of accurate knowledge about people with disabilities, and further exacerbated by the distinctive chronicle of their civil rights empowerment. That these fallacies continue to exist, even to the extent that they are diffused through scholarly discourse, underscores the need for raising social consciousness about Americans with disabilities. This information must be disseminated if market failure is to be corrected.

Epstein's view on Title I incorporates society's perception that disability is central to determinations which can also be universally human. One example is the positing of awkward feelings which, it is imagined, will be engendered in non-disabled individuals who have to interact in a work situation with a disabled worker. These feelings could arise when either customers or co-workers have not yet been enculturated to disability. Nevertheless, the ways in which a worker approaches her job—for instance, her personality and demeanor—are factors irrespective of disability that ultimately determine the comfort of interaction. To illustrate, an able-bodied sadist would function poorly in a customer relations department and associate poorly with peers because of his conduct rather than his physical differences. Similarly, we may expect that, ultimately, the rational responses of others will be influenced by whether individuals with disabilities conduct themselves in the ways that disagreeable people without disabilities do, or whether they behave agreeably.

Additionally, reacting negatively to the difference of disability is not inherently different from parallel historic responses by the dominant majority to the exclusion of other groups: for instance, a patient's discovery that not all doctors are male and that he is about to be examined by a woman urologist; or that for the first time in your life the professor who will determine your course grade, and perhaps your future career, is a person of color. As for distaste, one of the (now discarded) arguments for failing to offer women equitable career opportunities in police positions was the distaste expressed by officers' wives at the thought of their husbands spending long hours in a patrol car in the company of other women. If third-party distaste had influenced assessments of that statute's efficacy, the antidiscrimination measure would have been undermined by the same prejudices it sought to remedy.

It is also inaccurate to suppose that the ADA differs wholly from other civil rights statutes, and is uniquely expensive in that it compels accommodations. Requiring changes of practice or environment in order to function optimally, even when not economically efficient, is not exclusive to the disabled. Famously, the inclusion of women in most parts of the military workforce required expenditures to increase inventoried uniforms and equipment. Members of both genders under

the Family Medical Leave Act,⁹⁰ and members of certain religious groups under the Civil Rights Act of 1964 (Title VII),⁹¹ are legally entitled to forms of accommodation.⁹² To varying degrees, all civil rights integration involves expenditures.⁹³ Moreover, because of standard business practice dynamics, workers can regularly receive various kinds of accommodations that are unrelated to any recognized civil right.⁹⁴

Epstein's analysis also mirrors a perspectival flaw of mainstream society by implicitly adopting a "medical model" of disability.⁹⁵ Under a medicalized account of disability, people with disabilities are cast in two alternative, yet dichotomous roles: the pitiable poster child and the inspirational "supercrip."⁹⁶ The pitiable poster child is an image created to inspire the exercise of charity by instilling potential donors with pity for unfortunate children. Because of its emotional appeal, the cute and courageous poster child who smiles through his or her "tragic" fate is the most beloved American symbol of disability. The flip side of the pitiable poster child is the supercrip. If science, supported by telethon money, can not cure the scourge of disability, then society demands the disabled to cure themselves through hard work, determination, and pluck.⁹⁷ The medical model heavily influenced legislation passed in the earlier part of the century, especially those statutes stressing vocational rehabilitation as a means of "overcoming" disability through productive employment. One notable example is the post-World War I Smith-Sears Act which mandated vocational rehabilitation programs in an attempt to ameliorate disabling war injuries.⁹⁸

In contrast to the medical model, the social model—also sometimes called the civil rights or minority model—tracks the empowerment movements of the 1950s and 1960s which sought to eradicate discrimination posited on the biological

90. 29 U.S.C. § 2601 (1994).

91. Pub. L. No. 88-352, §§ 701-16, 78 Stat. 241, 253-66 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (1994)).

92. Some would extend this assertion to women under the Pregnancy Discrimination Act. *See generally* Peter David Blanck & Corinne R. Butkowski, *Pregnancy-Related Impairments and the Americans with Disabilities Act*, 25 OBSTETRICS & GYNECOLOGY CLINICS OF N. AM. 435 (1998); Samuel Isaacharoff & Elyse Rosenblum, *Women and the Workplace: Accommodating the Demands of Pregnancy*, 94 COLUMB. L. REV. 2154 (1994).

93. For example, the parallel costs incurred by a desegregated all-white firm losing clients and members, a formerly all-male corporation having to build womens' restroom facilities, or a uniformly (acknowledged) heterosexual company extending benefits to same-sex partners.

94. For instance, allowing a parent to attend his daughter's soccer match.

95. *See generally* RICHARD BRYANT TREANOR, *WE OVERCAME: THE STORY OF CIVIL RIGHTS FOR DISABLED PEOPLE* (1993); CLAIRE H. LIACHOWITZ, *DISABILITY AS A SOCIAL CONSTRUCT: LEGISLATIVE ROOTS* (1988).

96. The term "supercrip" is used by Joseph P. Shapiro in *NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT* 12-16 (1993). What follows is drawn from SHAPIRO at 12-16 and from Michael Ashley Stein, *From Crippled to Disabled: The Legal Empowerment of Americans With Disabilities*, 43 EMORY L.J. 247, 249-52 (1994).

97. *See* SHAPIRO, *supra* note 96; Stein, *supra* note 96.

98. Vocational Rehabilitation Act, ch. 107, Pub. L. No. 65-178, 40 Stat. 617 (1919). A work still in progress that promises to break new ground is Peter David Blanck, *Civil War Pensions, Civil Rights, and the Americans with Disabilities Act* (unpublished manuscript on file with author).

differences of blacks and women.⁹⁹ According to this account, inequalities foisted upon the disabled because of their exclusion from social interaction (including work) have been the result of socially constructed practices rather than the outgrowth of natural phenomena.¹⁰⁰ For example, architectural constructions which exclude a portion of the population, as in restrooms which are not accessible to wheelchair users, may be viewed as a "natural" condition by the majority non-disabled class. Yet, because there is no absolute reason why a "universal design" which can give access to a restroom for all users should not equally be the norm, the social model perceives the distinction as artificial and the result of an unjust social arrangement.

The ADA (as well as other legislation affecting people with disabilities) was promulgated in large measure to level a playing field which historically had discriminated against people with disabilities by imposing medicalized stereotypes.¹⁰¹ In assessing Title I, Epstein asserts that social policy affecting people with disabilities should be driven by philanthropic benevolence. As stated by Epstein, "[h]aving a disability is the source of an enormous level of personal loss" leading to "sympathies" that "tug knowingly at the heartstrings" and inspire "charitable giving and charitable services."¹⁰² It is because people with disabilities are worthy of sympathy that subsidizing their inferior work productivity is considered altruistic.¹⁰³ Thus, those following Epstein's perspective adopt the medical model's assumption that disability entails dependence, rather than the social model's rights-based presupposition that disability does not defeat an individual's entitlement to self-determination. By adopting the medical model into the calculus of what is rational, Epstein and neoclassical economists continue the methods and mythologies that the ADA was intended to cure.¹⁰⁴

99. See Paul Steven Miller, *Disability Civil Rights and a New Paradigm for the Twenty-First Century: The Expansion of Civil Rights Beyond Race, Gender, and Age*, 1 U. PA. J. LAB. & EMP. L. 511, 516-521 (1998).

100. See generally COLIN BARNES, GEOFF MERCER & TOM SHAKESPEARE, *EXPLORING DISABILITY: A SOCIOLOGICAL INTRODUCTION* (1999); MARY KLAGES, *WOEFUL AFFLICTIONS: DISABILITY AND SENTIMENTALITY IN VICTORIAN AMERICA* (1999); HERBERT C. COVEY, *SOCIAL PERCEPTIONS OF PEOPLE WITH DISABILITIES IN HISTORY* (1998).

101. Specifically, Congress enacted the ADA as a remedy to the continuing pattern "of unfair and unnecessary discrimination and prejudice" which denied "people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous." 42 U.S.C. § 12101 (a)(9) (1994).

102. *FORBIDDEN GROUNDS*, *supra* note 19, at 486.

103. On the social construction of disability and the expectations that are therefore engendered, see Matthew Diller, *Entitlement and Exclusion: The Role of Disability in the Social Welfare System*, 44 UCLA L. REV. 361 (1996); M. Ronald Buckley et al., *Perceptions of Inequity in Performance Appraisal Resulting From the Implementation of the Americans with Disabilities Act*, in *HUMAN RESOURCE MANAGEMENT AND THE ADA* 105-14 (John G. Veres III & Ronald R. Sims eds., 1995); H. McDonough, *Hiring People with Disabilities*, 37 SUPERVISORY MANAGEMENT 11 (1992).

104. The practical consequences of the contrast are nicely captured in William G. Johnson, *The Future of Disability Policy: Benefit Payments or Civil Rights?*, 549 ANNALS AAPSS 160 (1997).

V.

CHRONOLOGY OF CIVIL EMPOWERMENT

Unlike other marginalized minority groups, disabled Americans were empowered by civil rights legislation prior to a general elevation of social consciousness about their circumstances and capabilities.¹⁰⁵ In brief,¹⁰⁶ efforts to achieve the ADA's passage helped transform parallel but uncoordinated efforts of disability-specific advocacy groups and individuals to a unified disability rights movement.¹⁰⁷ Formerly, groups representing many different disabilities promoted their own issues and concerns. For instance, the massive and unyielding protest by students for appointment of a deaf president at Gallaudet University, a higher learning institution for the hearing impaired,¹⁰⁸ was entirely unconnected to the advocacy of developmentally disabled constituency of People First, which sought both integration into mainstream society and greater control for its members over the structure of their own lives.¹⁰⁹ In addition, disability rights groups often clashed with one another. For instance, the curb cuts fought for by wheelchair-users were opposed by some visually impaired people whose method of distinguishing between sidewalk and roadway was to locate the curb tactilely.¹¹⁰

The campaign for the ADA brought these fragmented organizations together.¹¹¹ However, because the history of disability rights advocacy is largely one of uncoordinated activity among disparate specifically concerned groups, people with disabilities, unlike other minority groups, have not acknowledged a single nationally recognized leadership figure (such as the Reverend Jesse Jackson), nor an established central political congress (like the N.A.A.C.P.), through which to voice their concerns and desires. Consequently, people with disabilities were empowered with civil rights absent the necessary political tools and organization for inducing a general elevation of social consciousness. Thus it is not entirely surprising that popular opinions about people with disabilities conform neither to the spirit of the legislative findings of the statute nor to the letter of assertions made by disability rights advocates.

105. See generally Jonathan C. Drimmer, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities*, 40 UCLA L. REV. 1341 (1993); Richard K. Scotch, *Politics and Policy in the History of the Disability Rights Movement*, 67 MILBANK Q. 380 (1989); RICHARD K. SCOTCH, FROM GOOD WILL TO CIVIL RIGHTS: TRANSFORMING FEDERAL DISABILITY POLICY 111-16 (1984). An especially good personal treatment is HUGH GREGORY GALLAGHER, *BLACK BIRD FLY AWAY: DISABLED IN AN ABLE-BODIED WORLD* (1998).

106. See SHAPIRO, *supra* note 96, at 184-210; Michael Ashley Stein, *From Crippled to Disabled: The Legal Empowerment of Americans With Disabilities*, 43 EMORY L.J. 247, 255-59 (1994).

107. A notable exception was the 1977 San Francisco sit-in to protest delay in promulgating Section 504's regulations. See SCOTCH, *supra* note 104, at 111-16.

108. See generally JACK R. GANNON, *THE WEEK THE WORLD HEARD GALLAUDET* (1989).

109. See VICTORIA MEDGYESI, *NO MORE B.S.: A REALISTIC SURVIVAL GUIDE FOR DISABILITY RIGHTS ACTIVISTS* (1992).

110. See SHAPIRO, *supra* note 96, at 126.

111. As noted at the time by ADA lobbyist Liz Savage, "[p]eople with epilepsy now will be advocates for the same piece of legislation as people who are deaf . . . That has never happened before. And that's really historic." See SHAPIRO, *supra* note 96, at 126-27.

Compounding these difficulties is the lamentable reality that insufficient knowledge about the ADA has been disseminated to either the general public or to people with disabilities. For instance, most members of the public assume that an ADA-covered person has a condition that limits her mobility or senses, when in fact the average Title I claimant is a middle-aged woman with a muscular-skeletal injury, most frequently in her back.¹¹² Whether this should be the typical Title I plaintiff is a valid question, but it is secondary to the observation that lack of knowledge about the nature of ADA claimants results in resistance to their claims in both academia¹¹³ and the popular media.¹¹⁴ Finally, it is worth noting that, four years after the ADA's passage, one survey revealed that only forty percent of the disabled people interviewed had either read or heard about the ADA (and by implication Title I).¹¹⁵ This problem is particularly acute among minorities with disabilities, wherein a knowledge gap corresponds to employment differentials within the disabled community.¹¹⁶ This market failure to disseminate information among those most directly affected by the ADA speaks volumes to the issue of information asymmetry.

VI.

CONCLUSION

In this essay I investigated the claim made by some proponents of law and economics analysis, that for an employer to express a rational preference for a worker with a disability over an equally qualified, or even a slightly less qualified, worker without a disability is virtually an oxymoron. Far from its being irrational for employers to suppress biases against hiring individuals who are disabled, errors that inflate the cost of doing so constitute a market failure that deters employers from reaching and executing rational decisions. It is this irrational failure of the market, rather than the imposition of irrational regulation, that has undercut the efficacy of Title I of the ADA. The conjectural deficiency of the neoclassical economic model reflects a more generalized failure: a society-wide absence of accurate information about the circumstances and capabilities of people with disabilities. The dearth of facts to inform the private determinations that constitute and are regulated by public nondiscrimination disability policy is due, in part, to a chronology unique to the disabled. The civil rights empowerment of individuals with disabilities preceded their collective political invigoration and, consequently,

112. See Marjorie L. Baldwin & William G. Johnson, *Dispelling the Myths About Work Disability in APPROACHES TO DISABILITY IN THE WORKPLACE* (Terry Thompson ed., 1998).

113. See, e.g., GARY S. BECKER & GUTTY NASHAT BECKER, *THE ECONOMICS OF LIFE* 20-22 (1997).

114. See, e.g., Walter Olson, *Under the ADA, We May All Be Disabled*, WALL ST. J., May 17, 1999, at A27.

115. See LOUIS HARRIS AND ASSOCIATES, INC., *SURVEY OF AMERICANS WITH DISABILITIES* 122 (1994) (conducted for the National Organization on Disability).

116. See William J. Hanna & Elizabeth Rogovsky, *On the Situation of African-American Women with Physical Disabilities*, 23 J. APPLIED REHABILITATION COUNSELLING 39-45 (1992) (comparing the situation of the 25% of African-American women with disabilities who were fully employed with that of the 44% of white women, 57% of African-American men, and 77% of white men with disabilities who were fully employed).

occurred prior to educating the public about the realities, both historical and contemporary, of why protection from discrimination is needed.