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REASONABLE ACCOMMODATION OF WORKPLACE DISABILITIES

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INTRODUCTION

The Americans with Disabilities Act of 1990 (ADA)\(^1\) differs fundamentally from Title VII.\(^2\) Both prohibit something called "discrimination," but discrimination under the ADA means something quite distinct from what it means under Title VII. Under Title VII and other antidiscrimination statutes,\(^3\) employers can safely make employment decisions if they ignore race and other protected statuses and focus solely on criteria related to productivity. If they ignore race and other protected statuses, employers cannot engage in disparate treatment discrimination. That type of discrimination only occurs if race or another protected status becomes a motivating factor in an employment decision.\(^4\) If employers focus solely on productivity-related criteria in making a decision, they cannot engage in disparate impact discrimination. That type of discrimination only occurs if a disparate impact against a protected group is not justified by concerns related to productivity.\(^5\)

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\(^3\) The models of discrimination under Title VII have become the standard throughout American discrimination law. See, e.g., RAMONA L. PAETZOLD & STEVEN L. WILLBORN, THE STATISTICS OF DISCRIMINATION § 7.02 n.1 (1998) (discussing application of the Title VII models in age discrimination cases); ROBERT G. SCHWEMM, HOUSING DISCRIMINATION §§ 10.1-10.4 (1992) (discussing application of the Title VII models in housing discrimination cases).

\(^4\) 42 U.S.C. § 2000e-2(m) (defining an "unlawful employment practice" as when "race, color, religion, sex, or national origin was a motivating factor for any employment practice"). If an employer would have acted in the same manner "in the absence of the impermissible motivating factor," the individual bringing the complaint is only entitled to limited relief. Id. § 2000e-5(g)(2)(B); see Price Waterhouse v. Hopkins, 490 U.S. 228, 244-45 (1989) (holding that "once a plaintiff in a Title VII case shows that gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed gender to play such a role"); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973) (barring pretextual employment actions under Title VII).

\(^5\) 42 U.S.C. § 2000e-2(k); see Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) (finding that "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability").
At issue here are the basic models of discrimination. The central thrust of Title VII employs a “sameness” model of discrimination, requiring employers to treat African Americans and women exactly the same as others; their race and sex must be ignored and employers must focus instead on factors related to productivity. Although the ADA uses a sameness model in part, its distinctive thrust is a “difference” model, requiring employers to treat individuals with disabilities differently and more favorably than others. Employers must treat individuals with disabilities as qualified if they “can perform the essential functions” of the job. Employers are free to treat others as qualified only if they can perform all of the functions of the job. Similarly, employers must make “reasonable accommodations” for individuals with disabilities. Sometimes these accommodations may be expensive or require significant alterations in the way a job is structured. Yet neither Title VII nor the ADA require employers to make these accommodations for others.

Our position sharply contrasts that of Professor Jolls, who recently has argued that reasonable accommodation is fundamentally similar to the discrimination models developed under Title VII, especially the disparate impact model. Part of our

6. Title VII prohibits discrimination based on race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2. For convenience, we generally refer only to race or sex discrimination in our examples.
7. See Green v. Nat’l Steel Corp., 197 F.3d 894, 897-98 (7th Cir. 1999) (declaring that an accommodation claim is so distinct from a disparate treatment claim that it must be charged separately before the Equal Employment Opportunity Commission to preserve the claim); Aka v. Wash. Hosp. Ctr., 156 F.3d 1284, 1303-05 & n.29 (D.C. Cir. 1998) (rejecting the claim that the ADA merely requires individuals with disabilities to be treated the same as similar employees); see also Pamela S. Karlan & George Rutherglen, Disabilities, Discrimination, and Reasonable Accommodation, 46 DUKE L.J. 1, 10-11 (1996) (explaining the sameness and difference models of discrimination under the ADA).
9. Id. § 12111(b)(5)(A).
10. See Martinez v. NBC, 49 F. Supp. 2d 305, 308-09, 311 (S.D.N.Y. 1999) (finding that lactation does not fall within the meaning of “disability” under the ADA and that no obligation exists ... under Title VII to provide facilities to allow a woman to breast-feed her baby); Wallace v. Pyro Mining Co., 789 F. Supp. 867, 870 (W.D. Ky. 1990), aff’d, 951 F.2d 351 (6th Cir. 1991) (“Nothing in the Pregnancy Discrimination Act or Title VII, obliges employers to accommodate the child-care concerns of breast-feeding female workers by providing additional leave not available to male workers.”).
11. Christine Jolls, Antidiscrimination and Accommodation, 115 HARV. L. REV. 642, 652-
disagreement turns on how we define important terms like "accommodation," "discrimination," and "disparate impact," but the deeper differences implicate basic conceptions of discrimination and accommodation. Exploring these differences sheds light on the developing understanding of Title VII and the ADA, with important practical consequences. In our view, Professor Jolls aligns the ADA with non-core cases of discrimination under Title VII, which threatens to impair both the growth and the strength of the accommodation model. In contrast, our conception of accommodation, which is not derivative of Title VII, stakes out a strong and independent position for this type of discrimination.

The meaning of reasonable accommodation is the ADA's "great unsettled question," and, along with the definitional question of who counts as disabled (a question we do not address here), one of its two most important ones. The duty of reasonable accommodation is the core of the ADA; it defines the scope of the Act's protections for individuals with disabilities. Determining its meaning is crucially important for courts, which are confused and inconsistent; for individuals with disabilities, who have uncertain protections; for employers, who have unpredictable obligations; and, most importantly, for society as a whole, which seeks to affirm the worth and dignity of individuals with disabilities within the constraints imposed by a well-functioning labor market.


12. For Professor Jolls' definitions of these terms, see id. at 646-51.

13. Karlan & Rutherglen, supra note 7, at 8. It is not surprising that the question is unsettled. At a comparable stage of development, the meaning of discrimination under Title VII was equally unsettled. The employment provisions of the ADA have been in effect since 1992. Ten years after the effective date of Title VII (July 1, 1965), Griggs and McDonnell Douglas had been decided only recently and were still unfamiliar. By 1975, none of the major cases on the other major models of discrimination—systemic disparate treatment and mixed-motives discrimination—had been decided. See Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (mixed-motive discrimination); Hazelwood Sch. Dist. v. United States, 433 U.S. 299 (1977) (systemic disparate treatment); Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977) (same). The Court's first pronouncements on major issues such as affirmative action and sexual harassment were still years away. See Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986) (hostile work environment claims); United Steelworkers of Am. v. Weber, 443 U.S. 193 (1979) (affirmative action by private employers).

14. The dignity and respect of individuals with disabilities was an important part of the congressional debate on the ADA. See 136 CONG. REC. 17,370 (1990) (statement of Sen. Harkin) (claiming that the essence of the ADA is to treat people "fairly and decently, as coequal in all aspects of American life"); id. at 17,033 (statement of Sen. Hatch) (remarking
Understanding reasonable accommodation is also important because the concept is likely to extend beyond the ADA into other areas of discrimination law. Our central claim in this Article is that the ADA expands on prior conceptions of discrimination. Under Title VII, as currently understood, the employer defines the job as it wishes; the law merely insists that workers and applicants for those jobs be treated without regard to race or sex. The ADA goes beyond and asks employers to restructure the jobs themselves. We suggest that, over time, this sort of inquiry will spill over into Title VII cases as well and, from there, into general conceptions of discrimination across the entire range of discrimination law.  

This Article presents a framework for thinking about the duty of reasonable accommodation. The framework is primarily economic, in that we try to identify the incentives and tradeoffs created by the statute. We recognize that Congress rejected efficiency as the guiding principle for the ADA and that the Act sometimes requires

that the ADA will provide individuals with disabilities with "the fundamental rights to equal opportunity which everyone deserves"; id. at 17,031 (statement of Sen. Durenberger) (stating that the ADA recognizes that "people with disabilities [should] be treated with the dignity and respect they deserve"); 135 CONG. REC. 19,801 (1989) (statement of Sen. Harkin) (commenting that the ADA is a "20th century emancipation proclamation for people with disabilities").  

15. This type of spillover is common and perhaps inevitable. The conceptions of discrimination developed under Title VII have spilled over into the rest of American discrimination law, see supra note 3, and indeed, into discrimination law around the world. See Shields v. E. Coomes, Ltd., [1978] W.L.R. 1408, 1416 (Eng.) (Lord Denning, C.A.) (noting that "the English [employment discrimination] legislation is based a good deal upon United States experience"); see also Rosemary C. Hunter & Elaine W. Shoben, Disparate Impact Discrimination: American Oddity or Internationally Accepted Concept?, 19 BERKELEY J. EMP. & LAB. L. 108, 112-24 (1998) (discussing the concept of disparate-impact discrimination internationally). Similarly, Professor Issacharoff has argued that job protections first recognized in the public sector have spilled over into the private sector. Samuel Issacharoff, Reconstructing Employment, 104 HARV. L. REV. 607, 616-17 (1990) (reviewing PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW (1990)). The initial trickling of spillover from the ADA to Title VII can already be seen in the literature. Candace Saari Kovacic-Fleischer, Litigating Against Employment Penalties for Pregnancy, Breastfeeding and Childcare, 44 VILL. L. REV. 355 (1999) (arguing that Title VII should be interpreted to require employers to make reasonable accommodations for pregnancy and breastfeeding).

16. This Article focuses on the meaning of reasonable accommodation, the core obligation of the ADA, and not on the broader model of disability discrimination within which the accommodation obligation sits. Because of this focus, the Article will not examine other important issues under the ADA, such as who qualifies as an individual with a disability under the Act or what remedies are appropriate for ADA violations.
inefficient actions. Nevertheless, Congress did not and could not declare that the Act would not affect incentives, nor did it declare that the Act should not get the most "bang for its buck." Our approach and its emphasis on incentives can help identify the nature of the still uncertain preferences embedded in the ADA and, once they are identified, help specify their reach and limits more precisely.

Part I begins by sketching an informal economic model of how employers choose among workers of varying productivity and costs. We use this model to distinguish two ways in which the ADA interferes with an employer's choice of workers, what we call "soft preferences" and "hard preferences."

Part II explores the justifications for soft preferences. Here, the ADA tracks other antidiscrimination statutes, and so the justifications are similar. As in Title VII's disparate treatment model, the ADA requires employers to favor money profits over any desire to indulge their prejudices against the disabled. Similarly, the ADA follows Title VII in prohibiting facially neutral practices that adversely affect the disabled, unless the employer can show the practice to be job related. The ADA, like Title VII, also prohibits statistical discrimination by employers who act on myths or even true stereotypes about the costs or productivity of the disabled.


The ADA extends beyond the Title VII models, however, by mandating hard preferences as well as soft preferences. The remainder of the Article shows how and why. Part III describes the hard preferences of the ADA and shows why they comprise a distinctive model of discrimination, known as reasonable accommodation. In some circumstances, the ADA requires employers to accommodate individuals with disabilities even though they cost more to employ than others or are able to produce less. In other words, the ADA requires a type of affirmative action to achieve its goal of integrating individuals with disabilities into the labor market as full and productive members.

Part IV examines the scope of the reasonable accommodation requirement. It first looks for statutory clues of meaning. It then examines the procedural and substantive accommodation components. Finally, it offers various ways to define the reach and limits of the accommodation requirement.

The conclusion sums up our findings and explores the factors which make us think that reasonable accommodation, in the long run, will not be confined to the ADA. Instead, we expect the expanded notion of discrimination to become part of Title VII cases as well, and of cases in virtually every other area of discrimination law.

I. MODELING SOFT AND HARD PREFERENCES

A. The Employer's Choice Between Workers

Suppose an employer wants to increase its workforce and is deciding among an array of applicants. These applicants differ in many ways, but the employer is primarily interested in two dimensions—compensation and productivity. For example, the employer may be deciding between more productive college graduates and less productive high school graduates. Other employers are also bidding for workers, and the outside wage for college graduates is higher than for high school graduates. In general terms, the employer must decide whether the greater productivity of the college graduates justifies their higher salary, which will depend on whether this employer, relative to other
employers, can make better use of college graduates than high school graduates.

An employer trying to maximize profits will employ the workers who maximize output per dollar of compensation.\textsuperscript{19} Assume, for example, that the going rate for high school graduates is $10/hour and at this firm a high school graduate (HS\textsuperscript{1}) could produce twelve widgets each hour, which sell for $1 each. The going rate for college graduates is $15/hour and at this firm a college graduate (C) could produce fifteen widgets each hour. Since the productivity per dollar cost is 1.2 for this high school graduate (12 widgets/$10 wage) and only 1 for college graduates (15/$15), the employer prefers hiring the high school graduate. The extra productivity of college graduates in widget making at this firm is not worth the higher wage they command. On the other hand, if high school graduates could only produce eight widgets at this firm (HS\textsuperscript{2}), their productivity/cost ratio would only be 0.8 (8 widgets/$10 wage). In that case, the employer would prefer college graduates.

The general principle of this example is that employers will seek the highest ratio of output to costs in making hiring decisions.\textsuperscript{20} Employers are not interested in costs or productivity standing alone, but in their relation. Figure 1 depicts the situation. Compared to college graduates at this firm, employers will prefer anyone on a higher productivity/cost line (such as HS\textsuperscript{1}) and reject anyone below the line (such as HS\textsuperscript{2}). None of this is surprising. It


\textsuperscript{20} See LAZEAR, supra note 19, at 16-17. In our model, the employer can be thought of as determining the best type of additional workers to hire to increase sales by a given amount. The model does not examine how many workers the employer should hire overall. When the labor market is in equilibrium, the cost (including wages and all other costs) of the last worker hired of each type is just worth his or her marginal product. In other words, the productivity/cost (P/C) ratio is equal to 1—which is how we have modeled the college workers in our example. If high school workers at a particular firm have P/C ratios greater than 1, the firm would hire an indefinitely large number of high school workers. At some point, presumably, the high school workers start getting in each other's way and productivity relative to cost falls below 1, restoring equilibrium by eliminating the comparative advantage of high school workers.
is merely a verbal and graphic refinement of the basic intuition that employers prefer employees who cost less and produce more. This simple model, however, illustrates how workers should be allocated among firms. Even if college graduates are more productive than high school graduates at every workplace, it does not follow that every workplace should choose college graduates over high school graduates. College graduates command higher wages, reflecting their higher general value. Employers who are relatively good at making high school graduates productive should employ high school graduates. After discussing some complications in the model, we apply it in the next section to help define reasonable accommodation under the ADA.

Figure 1: Productivity/Cost Ratio As Criterion for Choosing Workers

![Productivity/Cost Ratio Diagram]

- $15
- $12
- $8
- $10
- $15
- $1206

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The information required to determine the tradeoff between productivity and cost is easy to model, but difficult for employers to acquire in practice. On the cost axis, the employer's goal is to account for all of the costs of labor. Thus, the employer would attempt to estimate both costs that vary with hours worked, such as wages and overtime pay (variable costs), and costs that vary with the number of workers hired, such as hiring and training costs (quasi-fixed costs). Some of the costs, such as workers' compensation and health care costs, will vary depending on unknown contingencies.

The productivity axis is even more difficult for the employer to estimate. Employees who learn quickly and are willing to work hard are likely to be more productive, but these types of characteristics are difficult for the employer to predict. To estimate them better, employers may require applicants to possess certain easy-to-observe qualifications, such as a college degree or relevant work experience. Similarly, employers may engage in extensive interviews or other screening practices. Many of these practices are expensive, however, so employers will have to decide whether the improved ability to predict productivity is worth the cost of the screening practices. Sometimes they may be, at other times they may not. And even with these practices, employers find it difficult to predict productivity accurately. Productivity depends not only on the worker's personal characteristics, but also on relational factors such as the number of other workers employed by the employer and the employer's level of capital. Individual productivity is especially difficult to estimate when output is a joint product of several workers.

22. See id. at 93-96.
23. For a general discussion of the use of credentials and screening devices, see id. at 113-17.
24. See id. at 56.
The hiring calculus of employers is also difficult to determine because both costs and productivity must be estimated over time. The employer is not attempting to estimate costs and productivity at the point of hiring alone, but rather is comparing the stream of costs and the stream of productivity over the expected work life of the applicant. Some costs will be heavily weighted to the beginning of employment, such as moving costs and the costs of on-the-job training. Others, such as severance pay, will be weighted near the end of employment. Similarly, many workers will not be fully productive when they begin their employment. For example, some workers may require orientation or on-the-job training. Additionally, workers are unlikely to be consistently productive over their entire work lives.\(^{26}\) The precise time period over which the estimate must be made is also uncertain. Some employees may have long work lives with the employer, others short. Employers estimating costs and productivity must take account of these time-based differences. Instead of comparing only current wages and current productivity, for example, employers must compare the present value of the expected stream of wages over time to the present value of the expected stream of productivity over time. This complication leads to more uncertainty.

In sum, although employers operate with a great deal of uncertainty, they attempt to maximize the ratio of productivity to labor costs when they make hiring decisions. Individuals with disabilities, like everyone else, operate within this framework when they seek a job—their costs and productivity are being compared to those of others.

**B. The ADA's Labor Market Preferences**

The ADA creates labor market preferences for individuals with disabilities. It would be very surprising if it did not. The Act was

\(^{26}\) Life cycle models of employment generally assume a productivity curve that is low early in a worker's career when the worker must be monitored closely while learning important job skills, then rises gradually as the worker acquires those skills and requires less monitoring, and then declines late in the worker's career because of age and the gradual obsolescence of the worker's skills. *See generally* Ronald G. Ehrenberg & Robert S. Smith, *Modern Labor Economics* 302-06 (6th ed. 1997).
conceived and enacted to reverse the status quo and "bring persons with disabilities into the economic and social mainstream of American life." Thus, unless the ADA required individuals with disabilities to be treated more favorably than they had been previously, the central purpose of the Act could not be achieved. The ADA's clear purpose was to require employers to treat individuals with disabilities more favorably than they had been treated prior to the Act.

Preferences can take two distinct forms. "Soft preferences," as we will label them, seek to remove disadvantages. "Hard preferences" try to put disabled workers in a more advantageous position.

1. Soft Preferences

Before the ADA, some employers treated individuals with disabilities less favorably than other workers of equal productivity and cost. The Act creates a soft preference for individuals with disabilities by removing that disadvantage. This type of preference is only a preference compared to the prior status quo. Because individuals with disabilities were treated less favorably than others before the ADA, treating them the same as others now is a preference. This new treatment is a soft preference, though, because individuals with disabilities are not treated more favorably than others; instead, they are merely treated the same.

Figure 2 illustrates this type of preference. Prior to the ADA, for reasons that will be discussed below, an employer may have preferred the comparator (C) to both an individual with a disability who was willing to work for the same wage as C, but was more productive (I') and an individual with a disability who was as productive as C, but was willing to work for a lower wage (I2). This type of employer was discriminating in the classic economic sense—the employer was treating individuals with disabilities less favorably based on personal characteristics unrelated to productivity. The ADA created a soft preference for individuals

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28. See infra Part II.
29. This widely used conception of discrimination follows Gary Becker's classic taste-for-discrimination model. GARY S. BECKER, THE ECONOMICS OF DISCRIMINATION 39-42 (2d ed.
with disabilities by making this type of disadvantage in the labor market illegal. This is a real and significant preference, but it is important to note again that it is only a preference compared to the prior status quo. The soft preference of the ADA only requires employers to treat individuals with disabilities the same as others, that is, without discrimination based on personal characteristics unrelated to productivity.

Figure 2: Soft and Hard Preferences
Under the ADA

2. Hard Preferences

Preferences, however, can take another form, which we call hard preferences. Hard preferences require employers to engage in "affirmative action" by treating individuals with disabilities more favorably than other workers with better cost and productivity
characteristics. These hard preferences are central to several key obligations of the ADA, such as the duty of reasonable accommodation, the undue hardship limitation, and the obligation to consider only the ability to perform essential job functions. This discussion focuses on the duty of reasonable accommodation.\footnote{The ADA also contains a number of other important obligations, such as restrictions on segregation, employment tests, and medical examinations and inquiries. 42 U.S.C. §§ 12112(b)(1), 12112(b)(7), 12112(d)(2000). Discussion of these other obligations is outside the scope of this Article.}

In terms of Figure 2, the ADA would mandate a hard preference if it forced an employer to choose a disabled worker below the comparator line. As we shall see, the ADA in general gives a hard preference to disabled workers like D\textsuperscript{1}, who are equally productive but more costly than the comparator. Only in certain situations, however, will the ADA mandate a hard preference for disabled workers like D\textsuperscript{2}, who are less productive but no more costly than the comparator.

II. JUSTIFYING SOFT PREFERENCES

The ADA was not written on a social \textit{tabula rasa}. It was a response to labor market conditions that produced very bad outcomes for individuals with disabilities, such as non-employment rates of sixty-six percent and median household incomes near the poverty line.\footnote{H.R. REP. NO. 101-485, pt. II, at 32 (1990), \textit{reprinted in} 1990 U.S.C.C.A.N. 303, 314.} The justifications for the labor market preferences of the ADA have to be read against the backdrop of those conditions. One has to first explore the primary causes of the problems faced by individuals with disabilities in the labor market. Only then can one evaluate the justifications for the labor market preferences of the ADA.

This Part examines why individuals with disabilities may face adverse labor market outcomes for reasons unrelated to their individual productivity. The ADA attempts to rectify these disadvantages with soft preferences. In large part, the justifications for soft preferences track the standard justifications for Title VII's preferences. Part III examines how the labor market also penalizes
workers whose disabilities lower their individual productivity. The ADA attempts to rectify these disadvantages with hard preferences. Bifurcating the analysis into causes of disadvantage and justifications for preferences is problematic for several reasons. First, the causes of the labor market problems faced by individuals with disabilities are many and diverse. For tractability we analyze the causes one at a time, even though the causes have complex and often reinforcing relationships with each other. Employer aversion, for example, may mean that individuals with disabilities have less work experience than others, producing lower average productivity and resulting in statistical discrimination.\footnote{A number of articles discuss how statistical discrimination can interact with other factors to produce a self-fulfilling prophecy of lower labor market outcomes for women. See Mayer G. Freed & Daniel D. Polsby, \textit{Privacy, Efficiency, and the Equality of Men and Women: A Revisionist View of Sex Discrimination in Employment}, 1981 AM. B. FOUND. RES. J. 585, 633-35; McCaffery, supra note 25, at 615-24; see also Gary S. Becker, \textit{Human Capital, Effort, and the Sexual Division of Labor}, 3 J. LAB. ECON. S33, S42 (1985) (arguing that gender discrimination, even if small in magnitude, may produce large wage disparities between men and women).} This phenomenon discourages individuals with disabilities from investing in their human capital, thus justifying and intensifying continued employer aversion.\footnote{See Cass R. Sunstein, \textit{Three Civil Rights Fallacies}, 79 CAL. L. REV. 751, 761 (1991).} Second, the population of individuals with disabilities is diverse. It consists of persons with a wide variety of distinct health conditions and functional limitations, in contrast to African Americans and women, who are members of protected classes because they possess a single characteristic common to the entire group.\footnote{See Marjorie L. Baldwin, \textit{Can the ADA Achieve its Employment Goals?}, 549 ANNALS AM. ACAD. POL. & SOC. SCI. 37, 38 (1997).} The problems facing different segments of the population protected by the ADA differ significantly, and we will not often refine our analysis to account for these types of differences.\footnote{A number of studies have shown that the intensity of prejudice varies by type of impairment. See John L. Tringo, \textit{The Hierarchy of Preference Toward Disability Groups}, 4 J. SPECIAL EDUC. 295, 303-05 (1970); Harold E. Yuker, \textit{The Disability Hierarchies: Comparative Reactions to Various Types of Physical and Mental Disabilities} (1987) (unpublished working paper, Hofstra University) (on file with authors).} Third, although many of the points made could be supported (or undermined) by empirical research, this discussion will be primarily a theoretical examination of possible justifications for the ADA. Even with these shortcomings, the analysis is valuable. The
goal here is *not* to prove that the ADA is justified or unjustified on economic grounds. The goal is to provide a labor market framework for thinking about the proper legal meaning of reasonable accommodation.

A. Employer Aversion

Some employers dislike dealing with disabled workers. Doing so makes them uncomfortable. This employer aversion is the disability equivalent of misogyny or racism. This type of discrimination is not based on concerns about monetary costs or productivity. The employer does not think that a particular individual with disabilities costs more to employ or is less productive, nor does the employer think (either rightly or erroneously) that individuals with disabilities as a group are less able as employees. The employer simply prefers not to employ them.

Employer aversion against individuals with disabilities is common and well documented, although it varies dramatically by disability. Epilepsy, for example, generally entails little or no functional limitations (because it is largely controllable by medication) and yet is viewed quite negatively. In contrast, arthritis generally imposes nontrivial functional limitations and yet is viewed positively, relative to other disabilities. Adverse employer attitudes towards individuals with disabilities play an important role in producing adverse labor market outcomes.

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Psychic costs are true costs, even for employers. If an employer faces psychic costs from employing a disabled worker, it would prefer to add those costs to the pecuniary costs. Because of the extra psychic costs, an employer will choose the nondisabled over the disabled worker if both have the same productivity and monetary costs. The result is that disabled workers will have lower wages than equally productive nondisabled workers, or must work in segregated workforces, or both. 39

The ADA, like Title VII, attempts to force employers to ignore these psychic costs. An employer violates the ADA when it makes a decision because of personal aversion. This is one form of the ADA's soft preference for disabled workers. The ADA’s soft preference forces employers to consider only monetary costs and true productivity of disabled workers, rather than the psychic costs of aversion or reduced productivity due to aversion by employers themselves, coworkers, or customers.

How can the ADA’s anti-aversion soft preference be justified? Many observers find this aspect of the ADA to be uncontroversial, compared to the hard preference requirement of reasonable accommodation. But Title VII’s analogous anti-aversion soft preferences have created a heated debate in recent years. 40 It is therefore worth applying the arguments and counterarguments to the ADA, before moving on to more difficult issues of justifying other aspects of the ADA.

The problem of justifying an anti-aversion law arises from whether and how to credit the preferences of bigots. Bigots are willing and able to accept reduced profits or wages (or higher prices in the case of customers) for the freedom to discriminate, and this

39. This type of analysis derives from BECKER, supra note 29, at 153. See also William M. Landes, The Economics of Fair Employment Laws, 76 J. POL. ECON. 507, 509-12 (1968) (predicting that fair employment laws increase a minority’s wages relative to those of the majority by adding costs to employers for violations of these laws).

willingness and ability may exceed the gains to those suffering from discrimination. If so, a law banning bigotry is inefficient.\textsuperscript{41} Efficiency analysis is used to determine what laws will maximize satisfaction of all the individual preferences in society. In the context of the ADA’s soft preference, the classic economic approach is to ask what law will maximize both the interest of individuals with disabilities to be treated in the workplace based on their productivity and the interest of employers in satisfying their aversion to those individuals. Viewed in this way, the ADA is likely to be inefficient because it interferes with the unrestrained bargaining that best maximizes both sets of preferences.\textsuperscript{42}

Several responses to this inefficiency claim are possible. First, one can argue on fairness grounds that psychic costs from employer aversion to the disabled should not count in the social calculus about the appropriateness of the ADA. The primary role of employers should be to make money by making cost-effective hiring decisions, not to indulge in discriminatory tastes. If employer aversion is discounted, the ADA’s soft preference has only winners (the disabled persons who can now compete on neutral grounds of productivity and monetary cost) and no “legitimate” losers. Employers’ prior indulgence in their aversion to the disabled is illegitimate, as are the gains of “neutral” nondisabled workers who

\textsuperscript{41} This is the Kaldor-Hicks formulation of efficiency in which those who gain from a law could compensate those who lose and still be better off. Unlike Pareto efficiency, the Kaldor-Hicks concept of efficiency contemplates winners and losers. See Allan M. Feldman, \textit{Kaldor-Hicks Compensation,} in \textit{2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW} 417 (Peter Newman ed., 1998). Kaldor-Hicks is the most common conception of efficiency used in legal analysis. See Richard A. Posner, \textit{ECONOMIC ANALYSIS OF LAW} 15 (5th ed. 1998) (noting that ninety percent of references to efficiency in policy analysis are to Kaldor-Hicks efficiency). However, the appropriate definition of efficiency and the concept’s usefulness in legal analysis are controversial. See Jules L. Coleman, \textit{MARKETS, MORALS, AND THE LAW} 96-97, 130-32 (1988); Guido Calabresi, \textit{The Pointlessness of Pareto: Carrying Coase Further,} 100 \textit{Yale L.J.} 1211, 1212 (1991); Gary Lawson, \textit{Efficiency and Individualism,} 42 \textit{Duke L.J.} 53, 55-58 (1992). See generally Louis Kaplow & Steven Shavell, \textit{Fairness Versus Welfare,} 114 \textit{Harv. L. Rev.} 961, 1377 (2001) (“Even though the Kaldor-Hicks test is not appropriate as a matter of principle, the test can be quite useful because ... it often is sensible for legal policy analysis to focus on efficiency.”).

\textsuperscript{42} For an argument along these lines that prohibiting discrimination is inefficient, see Donohue, \textit{Efficient,} supra note 40, at 1402-23; John J. Donohue III, \textit{Prohibiting Sex Discrimination in the Workplace: An Economic Perspective,} 56 \textit{U. Chi. L. Rev.} 1337, 1344-47 (1989) [hereinafter Donohue, \textit{Prohibiting Sex Discrimination}]. In both these articles, Professor Donohue presents the inefficiency argument, but then proceeds to critique it.
benefitted from the employers' prior indulgence. The law is therefore efficient once the fairness discounting argument is accepted.

Some prominent economists not usually known for advocacy of government intervention in markets have accepted this discounting argument. Nevertheless, many commentators are worried by the circularity of the argument—relying on the law itself to argue that some of the costs of the law should be ignored—and its potentially broad scope, because all laws can be justified if their costs are ignored on "fairness" grounds. As John Donohue has pointed out, this circularity is like arguing that laws prohibiting abortion prior to Roe v. Wade were efficient because the existence of the laws reflects a societal consensus that costs to women wanting abortions should be ignored.

A related argument for the ADA's anti-aversion preferences is that the statutory goal is to change the preferences of employers. Such a goal cannot be criticized on efficiency grounds. If the ADA's primary effect is to reduce employer aversion to hiring individuals with disabilities, the ADA may be efficient given the post-ADA set of preferences, even though it would be inefficient if the pre-ADA set of preferences continued to exist. The ability of law to function as a preference-shaping mechanism, rather than simply as a preference-accumulation mechanism, is becoming increasingly well recognized. There is considerable evidence that Title VII has changed existing preferences about the proper role of women and

43. See, e.g., Landes, supra note 39, at 548 ("Psyche losses to whites should not be deducted from benefits, because by passing a fair employment law society is saying, in effect, that the psyche income from discrimination that accrues to whites should not enter society's social welfare function."); see also George J. Stigler, The Optimum Enforcement of Laws, 78 J. POL. ECON. 526, 527 (1970) (using Gary S. Becker's work on social gains to propose rational methods of enforcing criminal laws).

44. 410 U.S. 113 (1973).

45. Donohue, Prohibiting Sex Discrimination, supra note 42, at 1343-44.

The ADA operates in an area where the preexisting bias was less central to ideological beliefs and often less conscious. Thus, the ADA may operate to change employer aversion even more quickly.

In addition to altering employer preferences, the ADA may also alter the preferences of disabled individuals. If the ADA improves working conditions and enhances the self-esteem of individuals with disabilities as intended, they may become more productive and more willing to enter the workforce. Thus, these effects of the ADA may mean that it is efficient to hire individuals with disabilities after the Act improves their productivity and willingness to enter the workforce, even if it was inefficient to hire them before.48

Finally, the ADA's anti-aversion goal can be justified even if one does not try to change preferences and weights them all equally. First, one can argue that third parties suffer psychic harm by living in a society that tolerates exclusionary bargains between bigoted employers and nondisabled employees. The argument strikes at the heart of the assumption that voluntary contracts promote overall welfare, by showing that unregulated employment contracts affect third parties.49 Second, one can argue that the market tends to drive out bigots in the long run and the ADA merely (or efficiently) helps in speeding that process. The general argument that markets will even theoretically drive out all discrimination is problematic at best,50 as is the specific argument that an antidiscrimination law

47. See, e.g., Paul Burstine, Discrimination, Jobs, and Politics: The Struggle for Equal Employment Opportunity in the U.S. Since the New Deal 141 (1988) (explaining that the number of people who consider African Americans to be equal to whites has increased since 1964); Andrea H. Beller, The Impact of Title VII of the Civil Rights Act of 1964 on Women's Entry into Nontraditional Occupations: An Economic Analysis, 1 Law & Ineq. 73, 80-82 (1983) (finding that Title VII improved women's access to nontraditional jobs); James J. Heckman & J. Hoult Verkerke, Racial Disparity and Employment Discrimination Law: An Economic Perspective, 8 Yale L. & Pol'y Rev. 276, 277-80 (1990) (noting that Title VII played a significant role in improving wages and occupational status of African Americans).

48. Cf. Donohue, Prohibiting Sex Discrimination, supra note 42, at 1348-55 (noting that even slight shifts in demand curves can yield large benefits).

49. Cf. Donohue, Reply, supra note 40, at 531 (arguing that Title VII would be efficient, even under very conservative assumptions, if every American were willing to pay five dollars once to live in a society that limited racial discrimination).

50. See Schwab, supra note 29, at 572-82.
can efficiently speed the process. But those arguments need not detain us here.

In sum, one cause of discrimination against individuals with disabilities is employer aversion. Under classic economic analysis, the ADA would be presumptively inefficient in frustrating the ability of employers to act on this aversion, but three arguments justify the ADA here. First, the psychic interest of employers in discriminating should not be given any value in the efficiency analysis. Second, the goal of the ADA is to change employer preferences, which by definition cannot be criticized on efficiency grounds. Third, the ADA may enhance efficiency by responding to psychic costs of third parties outside the employer-employee relationship or by speeding the transition to a nondiscriminatory state.

B. Employer Ignorance About Productivity

Employers may also treat individuals with disabilities less favorably than others because of ignorance about their true productivity. Whereas the disability-averse employers discussed in the previous section were invidious, the employers of this section are ignorant. Their collective ignorance is not neutral, however. Because of age-old myths or stereotypes, the employers discussed in this section generally believe that disabled workers are less productive, relative to their costs, than they truly are.

Myths and misconceptions about the low productivity or high costs of individuals with disabilities are common. Many believe

51. See the exchange between Posner and Donohue, supra note 40.
52. These general arguments—according no weight to discriminatory preferences, viewing the law as an attempt to change preferences, and addressing psychic costs to third parties—also apply if labor market disadvantages arise, not because employers themselves are prejudiced, but because they are attending to the prejudices of customers or other employees. See Donohue, Prohibiting Sex Discrimination, supra note 42, at 1347 n.34. In addition, because employers may perceive aversion by customers or other employees as an extra cost of hiring individuals with disabilities, the ADA can be viewed as imposing a hard preference which prohibits an employer from relying on this type of cost. See infra Part III.
53. See Bruce G. Link et al., The Effectiveness of Stigma Coping Orientations: Can Negative Consequences of Mental Illness Labeling be Avoided?, 32 J. HEALTH & SOC. BEHAV. 302 (1991); Cressida Manning & Peter D. White, Attitudes of Employers to the Mentally Ill, 19 PSYCHIATRIC BULL. 541 (1995); Jean-François Ravaud et al., Discrimination Towards
these inaccurate views are a major source of discrimination against the disabled, and that a major purpose of the ADA is to break through these employer myths by forcing employers to hire disabled persons.\textsuperscript{54} Once employers do so, under this vision, they will see that disabled workers are more productive than they originally thought.

In some cases, the ADA preferences may correct for entrenched notions of normality that skew employer perceptions of cost and productivity.\textsuperscript{55} Employers make many kinds of “accommodations” for new employees. Employers see some accommodations, such as paying for moving expenses, as “normal,” while they view others, such as one-time accommodations to individuals with disabilities, as “abnormal.” Even though both types of accommodations may impose the same costs on employers, employers may be more willing to pay “normal” costs, or, equivalently, may be more willing to ignore them in their hiring calculus. This normality bias harms individuals with disabilities by perpetuating a myth that they are more costly. Similarly, employers may treat certain productivity gaps, such as improper prior training, as “normal,” while treating others such as inability to do nonessential functions because of a disability, as “abnormal.” In this context, one can view the ADA’s preference as an attempt to break down the myths and to equalize the treatment of normal and abnormal costs and productivity gaps.

Erroneous myths of this type, however, can last only if a market failure causes employers to systematically ignore profitable opportunities to hire undervalued workers. Any employer who


\textsuperscript{54} See Sch. Bd. v. Arline, 480 U.S. 273, 284 (1987) (noting Congress’ acknowledgment that “society’s accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment”); Siefken v. Vill. of Arlington Heights, 65 F.3d 664, 666 (7th Cir. 1995) (“Congress perceived that employers were basing employment decisions on unfounded stereotypes.”); see also Peter David Blanck & Mollie Weighner Marti, \textit{Attitudes, Behavior and the Employment Provisions of the Americans with Disabilities Act}, 42 VILL. L. REV. 345 (1997).

ignores or defies the myths and hires the disabled would have a competitive advantage on other employers.

The most plausible market-failure story here emphasizes the public goods nature of information. For an individual employer, the costs of testing the myth that the disabled have unfavorable productivity/cost ratios may swamp the expected gains. First, diversity amongst the population of individuals with disabilities makes it costly to evaluate productivity accurately. Second, the public goods nature of information about productivity undermines incentives for employers to seek out better information. Although information about the productivity of individuals with disabilities is not a pure public good, it does exhibit both characteristics of a public good: nonexcludability and nonrivalry of benefits. The information exhibits nonexcludability because it would be very difficult and expensive for an employer who gathers the information to keep others from using it. Although an employer could attempt to limit access to the information or charge for it, individuals with disabilities and advocacy groups on their behalf have strong interests in disseminating it. The information would likely leak out as individuals with disabilities talked about their work experiences and began to move naturally from job to job. The information also exhibits nonrivalry; use of it by one employer does not diminish its value to other employers. As a result, the entire market may be underinformed because every employer has incentives to wait for other employers to pay to develop better information. Thus, the

56. See supra notes 23-25 and accompanying text. Diversity within the group of individuals with disabilities increases the costs of acquiring information about productivity. If all individuals with disabilities had the same productivity, an employer would only need to expend the amount required to determine productivity for one individual to determine productivity for all. At the other extreme, complete heterogeneity would require resources to be expended on each individual. Consequently, as heterogeneity in the group of individuals with disabilities increases, so does the cost of acquiring information about their productivity.

In practice, employers probably place potential employees into quality classes (e.g., individuals without disabilities, individuals with mobility limitations, individuals with mental disabilities) that assume both lower productivity and higher information costs as the level of disability increases. Cf. Alan Schwartz & Louis L. Wilde, Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis, 127 U. Pa. L. Rev. 630, 659 (1979) (noting that the problem consumers face in searching for heterogeneous goods is solved in part by segmenting goods into quality classes that are recognized by both firms and consumers).

market equilibrium may be that all employers wait for the information to be developed, and so the information is never produced.\textsuperscript{58}

The ADA changes this set of incentives for employers. An employer violates the ADA if it fails to hire a more productive individual with a disability because of ignorance about either the individual’s productivity or the average productivity of individuals with that type of disability. Ignorance about true productivity at the time of hire is no defense. Thus, the ADA requires employers to seek out better information, even if it would be individually rational to act in ignorance instead.\textsuperscript{59}

The key to the economic efficiency of the ADA on this point is the difference between individual and social benefits and the rational urge of employers to free ride on other employers. Ignorance may be economically rational for each individual employer. The cost of developing better productivity information may exceed the benefits any individual employer would obtain by hiring the more productive individuals with disabilities. The benefits to society overall, however, may exceed the costs of developing the information. The benefits to society overall would include both benefits to the individual employer from the higher productivity of the individual investigated and benefits to other employers who, because of the public goods nature of the information, can free ride on the information to hire other productive individuals with disabilities.

The existence of free riders alone, however, does not demonstrate that individual employers will not develop accurate information on their own, without any impetus from the ADA. If even a few employers experiment and discover the high productivity of

\textsuperscript{58} See MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 145-46 (1965); SANDLER, \textit{supra} note 57, at 8-9.

\textsuperscript{59} Requiring private parties to develop information is one of the two common legislative responses to inefficiencies that arise when information is unavailable because of a collective action problem. The other common response is for the government to collect the information itself. See DOUGLAS G. BAIRD ET AL., \textit{GAME THEORY AND THE LAW} 189-91 (1994). The government fulfills the information collection function in part by attempting to be a model employer of the disabled, thereby running experiments to test the productivity of disabled workers given a chance to work. One can justify the ADA’s mandate that private employers also conduct experiments because the diversity amongst individuals with disabilities and amongst the types of employers who might be interested in employing them prevents the government-as-employer from being a complete and adequate laboratory.
individuals with disabilities, this information will be used by other employers as well, because it is nonexcludable.

To use the language of collective goods theory, if a privileged group exists, it will develop productivity information despite some free riders. A privileged group is an “individual or coalition whose benefits from collective action exceed the associated costs, even if these costs are solely borne by the individual or coalition.” Assume, for example, that a very large employer anticipates repeated use of the productivity information about disabled workers once it is gathered. If the benefits of gathering the information exceed the costs for that individual employer, it will gather the information which will then be available for free use by all other employers. Ironically, the public goods nature of the information means that the weak (small employers) can take advantage of the strong (large employers); large employers bear all of the costs of developing information that is then used by others. In the United States economy, of course, the largest employer is the government, and the government has committed itself actively to employ disabled persons. This “privileged” employer, then, may be sufficient to break a cycle of myth about disabled workers. If so, the information producing role of the ADA is unnecessary.

In sum, the employer ignorance rationale for the ADA has limited force. Forcing employers to engage in costly experiments is not profit maximizing for individual employers; employers must develop information at an expected cost that will exceed expected benefits. For society, however, the ADA may well be efficient. Because information tends to be a public good, other employers may free ride on the information to hire more productive employees. The efficiency balance depends on whether the external benefits to other employers exceed the difference between the costs and benefits for the individual employer. This justification for the ADA should not be pushed too far, however. At its core, the argument is no different than the argument that employers have only a limited incentive to discover whether copper or tin is a more cost effective input for widgets because the knowledge that tin is better will quickly spread to competitors. This may be so, but one would need to know much

60. Sandler, supra note 57, at 9.
more before advocating a law that forces widget producers to use both copper and tin so that society can find out.

C. Employer Knowledge of Average Productivity

Individuals with disabilities may also suffer workplace disadvantages, not because employers are ignorant about their productivity, but because they are all too aware of it. If the average productivity of a certain class of individuals with disabilities (relative to their wage) is lower than that of other workers and if it is too expensive for employers to make individual determinations of productivity within that class, the profit maximizing employer will rely on the lower average productivity and refuse to hire individuals with disabilities, even if many are excellent workers. This is known as statistical discrimination. Because it is expensive to distinguish a particular, productive individual with a disability from the class of persons with similar disabilities who have lower average productivity, the employer is better off relying on the statistical stereotype. The distinction between the myths of the previous section and the stereotypes of this section is that myths are false. Stereotypes, on the other hand, are true on average, even though they may not apply to all individuals in the group.

The ADA makes statistical discrimination illegal. Reasonable accommodation requires an individual evaluation of individuals with disabilities, even if the employer’s own calculus indicates that the cost of the evaluation exceeds the likely benefits. A showing

61. Statistical discrimination was first identified by Edmund Phelps and Kenneth Arrow. Kenneth J. Arrow, The Theory of Discrimination, in DISCRIMINATION IN LABOR MARKETS 3 (Orley Ashenfelter & Albert Rees eds., 1973); Edmund S. Phelps, The Statistical Theory of Racism and Sexism, 62 AM. ECON. REV. 659 (1972). It has been widely discussed in both economic and legal scholarship on employment discrimination. In the economic literature, see, for example, LESTER C. THUROW, GENERATING INEQUALITY: MECHANISMS OF DISTRIBUTION IN THE U.S. ECONOMY 170-77 (1975); Dennis J. Aigner & Glen G. Cain, Statistical Theories of Discrimination in Labor Markets, 30 INDUS. & LAB. REL. REV. 175 (1977); Shelly J. Lundberg & Richard Startz, Private Discrimination and Social Intervention in Competitive Labor Markets, 73 AM. ECON. REV. 340 (1983); Stewart J. Schwab, Is Statistical Discrimination Efficient?, 76 AM. ECON. REV. 228 (1986). In the legal literature, see, for example, Donohue, Reply, supra note 40, at 531-33; McCaffery, supra note 25, at 608-15. For applications of the idea to disability discrimination, see Moss & Malin, supra note 18, at 201-03; Willis, supra note 18, at 742-47.
that a certain class of individuals with disabilities is less productive on average than other applicants is not a defense under the ADA. Indeed, statistical discrimination was specifically mentioned in the ADA's legislative history as one type of prohibited discrimination.62

Statistical discrimination, like discrimination based on rational ignorance, is profit maximizing for individual employers, but may not be efficient overall. Statistical discrimination may distort the incentives of individuals with disabilities to invest in their productivity. To the extent that they are going to be treated as an average member of the group with their disability, their incentives to invest in their productivity are undermined. Individuals with disabilities would be less likely to pursue educational opportunities and engage in other activities that would make them more productive members of society. Thus, society would lose the benefits that individuals with disabilities could have contributed had they invested more in their human capital. If those losses are larger than the gains to employers from engaging in statistical discrimination, the ADA's prohibition of statistical discrimination is efficient.63

Highly productive individuals in a group with low average productivity will try to escape the stereotype. One way to do so is for highly productive individuals with disabilities to invest more in their human capital than they would otherwise to signal that they do not share their disability group's average lower productivity.64 For example, if a college degree is easier for highly productive workers to obtain than for less productive workers, the degree may signal greater productivity and allow individuals to break the stereotype. In this case, government intervention is not needed.

Although extra investment is plausible in many situations, several factors make this an unlikely solution to the problem of statistical discrimination against the disabled. First, even if this type of extra investment occurs, the individual would continue to


63. For this story in the economic literature, see THUROW, supra note 61; Lundberg & Startz, supra note 61; Schwab, supra note 61. For this story in the legal literature, see Donohue, Reply, supra note 40.

64. The classic model of signaling as a way of escaping stereotypes comes from A. MICHAEL SPENCE, MARKET SIGNALING: INFORMATIONAL TRANSFER IN HIRING AND RELATED SCREENING PROCESSES (1974).
have the disability and suffer from the perception of average lower productivity. Within any investment class, for example, people with college degrees, the individual would continue to suffer from statistical discrimination. Although the extra investment may signal that the individual is more productive than others without the investment (here people without college degrees), the individual could never escape the general effect of statistical discrimination.

Second, individuals with disabilities must make an extra investment to signal equal productivity. As Edward McCaffery has said with regard to women, which could equally apply to individuals with disabilities,

it is as if the market were telling women that they could get high quality jobs, just like [men], but first they had to pay $50,000. The fact that the barrier could be overcome, so that women could get the jobs, hardly justifies ignoring the existence of the barrier altogether.65

Third, this story assumes that productivity information is imperfect (knowable, but unknown to one party) rather than incomplete (neither known, nor knowable).66 With imperfect information, individuals with disabilities can make the extra investments required to disclose inherently knowable information about their productivity to employers. The knowability assumption of imperfectness, however, may not apply. Much of the information relevant to productivity in labor markets is inherently unknowable and, hence, must be estimated statistically. For example, precise information about an individual’s future attendance or health prospects simply cannot be known—it must be estimated.67

65. McCaffery, supra note 25, at 613. Analogizing McCaffery’s story to the present context, individuals with disabilities make the investment and get high quality jobs, but are disadvantaged because they are required to expend resources on the extra investment. Alternatively, individuals with disabilities may decide that the returns from the extra investments are not worth the cost, so the investments would never be made. SPENCE, supra note 64, at 176 (“The productivity gains attributable to the information content of market signals may or may not justify the resource cost. Certainly one cannot assume that signaling is more efficient than no-signaling.”).

66. See McCaffery, supra note 25, at 612-13 (citing ERIC RASMUSEN, GAMES AND INFORMATION: AN INTRODUCTION TO GAME THEORY 51-60 (1989)).

Similarly, the extra investment required to disclose productivity in labor markets may be on-the-job experience. If so, and if individuals with disabilities are unable to acquire on-the-job experience because of preexisting statistical discrimination, the information is unknowable and, hence, incomplete. For these reasons, individuals with disabilities are unlikely to be able to take steps on their own to counter the disadvantage they suffer from statistical discrimination. Legal intervention may be necessary to break the inefficient cycle.

In sum, profit maximizing employers may statistically discriminate against individuals with disabilities, relying on the lower average productivity of the group and refusing to incur the extra costs of assessing individual productivity. The story here is similar to the story against blacks and women. The ADA, like Title VII, makes it illegal for employers to engage in statistical discrimination that may foster efficiency.

One aspect of the ADA’s ban on statistical discrimination avoids a potential problem of other discrimination laws. In addition to banning statistical discrimination, other discrimination laws restrict testing, interviews, and other information that does not "perfectly individuate" workers. A perverse consequence is that these restrictions encourage employers to rely on cruder, less individuated stereotypes. By contrast, the ADA encourages employers to interview individuals with disabilities and discuss alternatives as part of the reasonable accommodation duty. As a result of this encouragement of an express dialogue between employer and worker about disability (in contrast to Title VII’s near prohibition of any dialogue about race or sex), the ADA allows greater individuation and avoids some of the perverse encouragement of statistical discrimination.

III. REASONABLE ACCOMMODATION (HARD PREFERENCES) AS A DISTINCT MODEL

The image underlying soft preferences is that of a disabled individual who was not evaluated according to his true productivity

68. THUROW, supra note 61, at 176.
69. See EPSTEIN, supra note 40, at 40.
and costs. The employer incurred extra psychic costs in employing the disabled worker, erroneously thought that disabled workers were less productive or more costly than they truly are, or stereotypically lumped highly productive workers together with other, less productive workers. The ADA's soft preferences protect workers who are misperceived in these ways because of their disabilities.

The ADA, however, extends beyond these soft preferences. Suppose an employer accurately assesses the individual productivity and costs of a disabled worker and determines that the productivity/cost ratio is less than that of a nondisabled, competing worker. Sometimes, the ADA allows the employer to hire the other worker. At other times, however, the ADA requires a hard preference for the disabled worker. If employing an individual with a disability is more expensive due to the costs of accommodation or because the applicant is less productive because he cannot perform nonessential functions, the employer would violate the ADA by refusing to hire that individual. The ADA requires employers to ignore both the costs of accommodation and any productivity achieved through the performance of nonessential functions unless the accommodation is unreasonable or an undue hardship. These are the hard preferences of the ADA.

70. See Smith v. Midland Brake, Inc., 180 F.3d 1154, 1168 (10th Cir. 1999) (noting that an employer may hire a faster typist "notwithstanding the fact that the slower typist has a disability"); Norcross v. Sneed, 755 F.2d 113, 119 (8th Cir. 1985) (disallowing a disability claim where the employer hired a more qualified nondisabled candidate); Martin v. General Mills, Inc., No. 95-C-2846, 1996 WL 648721, at *12 (N.D. Ill. Nov. 5, 1996) ("The ADA does not require an employer to retain a less productive employee."); Dexler v. Tisch, 660 F. Supp. 1418, 1428 (D. Conn. 1987) (noting that a "significant loss of efficiency is not required" by the Rehabilitation Act of 1973 when, even though individual with a disability could perform the job, it took him much longer to do it); see also S. REP. NO. 101-116, at 26 (1989) (using the typing example to make the point that an "employer is still free to select the most qualified applicant available and to make decisions based on reasons unrelated to the existence or consequence of a disability").

A. Reasonable Accommodation in the Labor Market: Costs, Productivity, and a Puzzle

From the employer’s perspective, the costs of accommodation are simply another cost (along with wages, employer taxes, and fringe benefits) of hiring a worker. The ADA creates a hard preference for individuals with disabilities because it requires employers to ignore accommodation costs. Figure 3 illustrates the effects of this preference. The comparator (C) in the figure is paid a wage of $15 per hour and produces fifteen widgets per hour. The first of three individuals with disabilities (I\textsuperscript{1}) has the same productivity as C, but requires an accommodation costing $3 per hour. In the absence of the ADA, the employer would prefer C because C produces the same number of widgets for a lower total cost, and thus has a higher productivity/cost ratio. The ADA, however, requires the employer to ignore the cost of reasonable accommodations in making employment decisions. Thus, the ADA creates a hard preference for individuals with disabilities because it requires the employer to treat C and I\textsuperscript{1} as equal even though C has a productivity/cost advantage.
The second individual with a disability ($I^2$) also requires an accommodation costing $3 per hour, but $I^2$ is more productive than $C$ and produces eighteen widgets per hour. In the absence of the ADA, the employer would be neutral between $C$ and $I^2$. For both, the ratio of total productivity to costs is $1$ ($C = 15/15; I^2 = 18/18$). Once again, however, the ADA requires the employer to ignore the cost of the accommodation. Thus, the ADA requires the employer to favor $I^2$ as having a higher productivity/cost ratio (treating $I^2$ as a 18/$15$ worker). Again, the ADA creates a hard preference because the employer would violate the ADA unless it hired $I^2$ instead of $C$, even though the two are equal from a labor market perspective.

Finally, a third individual with a disability ($I^3$) is also more productive than $C$, and produces eighteen widgets per hour. This time the accommodation cost is considerably greater—$9 per hour
rather than $3 per hour. In the absence of the ADA, the employer would clearly prefer to hire C. C’s productivity/cost ratio is still 1, whereas I^3’s is 0.75 (18/$24). Unless the costs of accommodation become unreasonable or impose an undue hardship, the ADA requires the employer to ignore them. Thus, the employer must treat I^3’s productivity/cost ratio as identical to that of I^2, by not counting the extra $9 per hour accommodation. Once again, the ADA creates a hard preference by requiring the employer to prefer I^3 to C, even though a profit-maximizing employer prefers C.

One puzzle with the ADA is that it favors cost accommodations more than productivity accommodations. In general, the ADA mandates a hard preference for disabled persons who are more costly but as productive as other workers. The ADA does not mandate a hard preference for disabled persons who are no more costly but less productive than other workers. The market would treat these two types of persons as equivalent, but the law does not.

Figure 3 illustrates this puzzle. Compare applicant I^4 to I^1. Both have productivity/cost ratios of 0.83. Applicant I^1 produces as much as the nondisabled comparator, but costs the employer twenty percent more. Applicant I^4 costs no more than C, but C produces twenty percent more. This could arise, for example, with a disability that reduces productivity and has no known accommodation. The employer is indifferent between the two individuals with disabilities, and would prefer C to either of them. Yet the ADA treats the two applicants very differently. The ADA gives I^1 a hard preference, requiring the employer to ignore the accommodation costs and to treat I^1 and C the same. The ADA gives no hard preference to I^4, and would let the employer choose C instead. As a further illustration of the puzzle, the employer would least like to hire I^3 of all the individuals identified in the figure, because of the large costs of accommodation. As long as the accommodation is reasonable, however, the ADA would require the employer to rank I^3 first (tied with I^2, and above C).

72. See cases cited supra note 70; see also Peter David Blanck, The Economics of the Employment Provisions of the Americans with Disabilities Act: Part I—Workplace Accommodations, 46 DePaul L. Rev. 877, 894 (1997) (remarking that the ADA “does not require the employer to hire or retain a qualified individual with a covered disability, regardless of the need for accommodation, over an equally or more qualified individual without a disability”).
One resolution of this puzzle is to deny it by arguing that the law does force employers to accommodate workers with lower productivity through the “essential functions” doctrine. The ADA only protects qualified individuals with a disability, defined as persons who can perform the “essential functions” of the job. An employer must treat an individual with disabilities as qualified if she can perform the essential functions, even if she cannot perform all of the functions of the job. From a labor market perspective, the ability to perform a variety of job functions is one component of productivity. In the absence of the ADA, employers would consider all aspects of productivity, and would tend to favor the worker who can perform essential and nonessential functions. The ADA’s “essential functions” requirement, however, requires employers to compare the productivity of disabled and other workers only along their essential functions. An individual with a disability must be treated as equal to another worker if both can perform the essential functions of the job equally, even if only the other worker can make an additional contribution to productivity by performing nonessential functions. Returning to Figure 3, if the productivity gap between C and I arises from nonessential functions, the ADA would require the employer to treat the two applicants as equivalent, despite I’s lower overall productivity, just as the ADA requires the employer to treat C and I as equivalent, despite I’s greater overall costs.

The essential functions doctrine only alters the outcome in some circumstances—namely those in which the individual with a disability’s productivity in essential functions equals that of other workers, even if his “full” productivity is somewhat less. When a disability lowers the productivity in essential functions, the puzzle remains. For example, if an individual with a disability is ten percent less productive in the essential functions of a job, the employer need not accommodate. However, the employer must accommodate an equally productive worker with ten percent greater costs.

A second resolution is to admit that the ADA treats costs and productivity differently, and then justify the difference. One justification is that costs generally can be identified with fair precision and reported on a standard cardinal measure. Productivity, on the other hand, is much more varied in how it is measured and is often not amenable to a cardinal measure at all. Compared to costs, courts would have great difficulty policing a mandate that employers reasonably accommodate deficient productivity. It is one thing to have a court determine whether two applicants were equally productive or qualified; it places a far greater burden on courts to determine whether one applicant is ten percent or thirty percent less productive.

A third resolution is more political. Advocates for the disabled emphasize that disabled persons can contribute as much to the economy as nondisabled workers, with the helping hand of reasonable accommodation. This is consistent with our meritocratic ideal that jobs should go to the most qualified applicant. The argument that less productive workers with lesser costs are functionally equivalent to more productive, greater cost workers may fail to persuade politically. The ADA’s sponsors and proponents may have been reluctant to expand the command of reasonable accommodation for fear of undermining overall support.

In sum, the ADA requires two types of accommodation. It requires employers to spend resources to accommodate disabled workers who can be as productive as other workers. It also requires employers to examine relative productivity only for the essential functions of the job. These two hard preferences are central to a proper understanding of the ADA. If the ADA’s key obligations are viewed as less than hard preferences, they simply cannot carry the load intended for them, which is to ensure that individuals with disabilities are afforded a fair opportunity to participate fully in the labor market.

B. Stylized Hypotheticals under the ADA and Title VII

Three stylized hypotheticals will help to bring the ADA’s hard preferences into better focus and highlight differences between the ADA’s reasonable accommodation model and Title VII’s disparate treatment and disparate impact models.
Consider first a bare-bones hypothetical highlighting differences between reasonable accommodation and disparate treatment. An employer entertains job applications and rejects two applicants, the first because she is a woman, the second because she has a disability. Do the rejected applicants have good claims?

The woman has a good Title VII disparate treatment claim. This is explicit, intentional discrimination because of sex. The only defense under Title VII would be that sex was a bona fide occupational qualification (BFOQ). Importantly, cost complaints that women are more expensive are not part of a BFOQ defense. The only question is whether all or substantially all women cannot perform the job at hand, or whether it is impossible to test on an individual basis. Courts narrowly construe the BFOQ test so as not to swamp Title VII's general command to ignore the sex of workers.

The disabled worker may also have a good claim, but it is much more fragile than the woman's claim. The ADA prohibits employers from considering disability in an invidious or stereotypical way. Unlike Title VII, however, the ADA contemplates that employers will often consider disability in a legitimate way. Indeed, as we shall discuss, the reasonable accommodation mandate requires employers to consider disability. The employer can avoid ADA liability if the worker cannot perform the essential requirements of the job, even with reasonable accommodation, or if the reasonable accommodation would be an undue hardship on the employer. The reasonable accommodation inquiry is different in kind from the BFOQ inquiry. Most importantly, cost considerations are the heart of the matter under the ADA, while they are banned under Title VII. Mere consideration of sex exposes an employer to considerable

76. UAW v. Johnson Controls, Inc., 499 U.S. 187, 210 (1991) (“The extra cost of employing members of one sex, however, does not provide an affirmative Title VII defense for a discriminatory refusal to hire members of that gender.”) (citing L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 716-18 & n.32 (1978)).
79. See infra Part III.D.
80. See id.
risk of a Title VII violation; the BFOQ exception is very narrow.\footnote{1235}
Consideration of disability, on the other hand, merely opens the
door to ADA analysis; reasonable accommodation and undue
hardship often provide a defense to liability.

Consider a second hypothetical illustrating the difference
between the ADA's reasonable accommodation approach and Title
VII's disparate impact model. Suppose a job requires frequent
lifting of eighty pound sacks. The employer screens applicants by
testing whether they can lift an eighty-pound sack. A woman and
a person in a wheelchair are rejected because they could not lift the
sack. How do their claims fare?

The woman has a clear but weak impact claim under Title VII.
She can likely show that the test has a disparate impact on women.
But the employer has a good defense that the test is job related
and consistent with business necessity.\footnote{1236} If the employer can show
this, the woman's claim is defeated. The court will not inquire into
whether the eighty pound sacks could be split into forty pound
components. Title VII examines the test, not the job. By contrast,
the rejected disabled applicant can challenge the job itself. The
ADA's reasonable accommodation requirement requires the
employer to consider dividing the eighty pound sacks as a method
of accommodation.\footnote{1237}

A third hypothetical presents a more plausible possibility that
Title VII, like the ADA, explicitly imposes costs on employers.
Consider a situation in which an employer refuses to hire a
female salesperson because customers would be less willing to buy
from her. Following Becker's analysis\footnote{1238} and the airline hostess

\footnote{1235. The contrast between Title VII and the ADA is even sharper with respect to race
discrimination. The BFOQ exception in Title VII does not extend to race. Instead of the
limited BFOQ defense available for sex discrimination, there is no statutory defense for race
discrimination. See William R. Bryant, Note, Justifiable Discrimination: The Need for a
Statutory Bona Fide Occupational Qualification Defense for Race Discrimination, 33 Ga. L.
Rev. 211 (1998) (arguing that race is sometimes relevant to employment decisions and,
therefore, that the BFOQ defense ought to be extended). But see Miller v. Tex. State Bd. of
Barber Exam'rs, 615 F.2d 650, 652-54 (5th Cir.), cert. denied, 449 U.S. 891 (1980) (indicating
in dicta that a race BFOQ may be appropriate in some circumstances).


\footnote{1237. See id. § 12111(9)(B) (listing job restructuring as a type of reasonable
accommodation); Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 1112-13 (8th Cir. 1995)
(noticing that ADA § 101(9)(B) may require employer to restructure mechanic's job).

\footnote{1238. BECKER, supra note 29, at 75-81 (applying general discrimination model to

cases, the first blush approach to this is that Title VII prohibits not only discrimination by employers directly, but also employer attempts to cater to customer (or co-employee) discrimination. Therefore, the employer's refusal to hire would be illegal. However, this would impose costs on the employer in much the same way as the ADA does, in this case by requiring the employer to hire an employee who will be less productive. The problem with this argument is that Title VII does not require the employer to hire the woman and absorb these costs. Although the airline hostess cases have language indicating that employers cannot attend to the discriminatory preferences of customers, the holding in the cases was that the employer could not demonstrate that male hostesses would be less effective. When employers can prove that employees of a particular sex will be less productive because of discriminatory customer preferences, they win the cases. Once again, Title VII shies away from imposing costs on employers.

More generally, Title VII's soft preferences model and the ADA's hard preferences model differ in the express economic burden imposed on employers. A legislator supporting Title VII could say with a straight face that Congress imposed no costs on employers. An employer who hires the most qualified person without regard to race or sex will not violate Title VII's prohibition of disparate treatment and will see increases in profits as well. Title VII's disparate impact model allows employers to use any test that is job
discrimination by customers.

85. E.g., Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 389 (5th Cir. 1971) (holding that a female only requirement for flight attendant was not a BFOQ under Title VII), cert. denied, 404 U.S. 950 (1971).

86. Note that because of the puzzling distinction in the ADA between cost accommodations and productivity accommodations, the ADA may not require an accommodation for the less productive employee in the hypothetical. In the hypothetical, the employee is less productive, and hence, not entitled to any accommodation.

87. Diaz, 442 F.2d at 387-88.

88. Id. at 388-89.

89. EEOC v. Univ. of Tex. Health Sci. Ctr., 710 F.2d 1091, 1097 (5th Cir. 1983) (finding it permissible to hire people under the age of forty-five as campus police officers because they are better able to deal with students); Fesel v. Masonic Home of Del., 447 F. Supp. 1346, 1354 (D. Del. 1978), aff'd, 591 F.2d 1334 (3d Cir. 1979) (upholding refusal to hire male nursing home attendants because of customer preference for females).

90. In this case, the ADA also would not impose these particular costs on the employer, but only because of its puzzling distinction between cost accommodations and productivity accommodations, not because of a general statutory policy against imposing costs.
related and consistent with business necessity. If the test is not job related, it is not helping the employer's profitability anyway.

As applied, of course, Title VII's impact is more complex. Employers often complain bitterly about the costs imposed by Title VII. But the first cut is that Title VII imposes no costs. This differs dramatically from the ADA's reasonable accommodation model. Congress consciously and deliberately required employers to spend money to accommodate disabled workers. Although Congress thought the costs were worthwhile, no one can claim with a straight face that the ADA imposes no costs on employers.

C. Professor Jolls and the Equivalence of Accommodation and Antidiscrimination

In an important article, *Antidiscrimination and Accommodation*, Professor Jolls has staked out a different position on the nature of the accommodation model. In sharp contrast to our approach, Professor Jolls does not see the accommodation model as a distinct model. Rather, she finds "simply ... no way, as a factual matter, to distinguish [certain] aspects of antidiscrimination from requirements of accommodation." Jolls defines accommodation broadly to mean

a legal rule that requires employers to incur special costs in response to the distinctive needs ... of particular, identifiable demographic groups of employees, such as individuals with (observable) disabilities, and imposes this requirement in circumstances in which the employer has no intention of treating the group in question differently on the basis of group membership....

Because Title VII disparate impact cases impose costs on employers based on distinctive traits of identifiable groups, Jolls argues these cases are functionally equivalent to accommodation cases.

We have two basic responses to Jolls' position. One response questions Jolls' two-part definition of accommodation as entailing

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special costs to a group without an intent to treat the group differently. The other response emphasizes the difference between judicial restructuring of jobs (typical of ADA accommodation cases but not Title VII cases) and judicial scrutiny of selection procedures (typical of Title VII cases). Being the careful scholar she is, Jolls anticipates our responses, but we remain unconvinced. Our disagreement is of the "cup half full or half empty" variety. Where Jolls sees connections between accommodation and impact cases (and clearly there are some), we see differences (and clearly there are some). We believe most current cases support our viewpoint. As our conclusion states, however, we predict that courts will increasingly import ADA accommodation principles into Title VII cases. Jolls sees courts already doing this, while we think she is a decade early.

The standard judicial remedy in a Title VII disparate impact case requires the employer to change the policy or standard for everybody, not just the protected group. For example, to take the facts from the famous Griggs case, if a high school diploma requirement has a disparate impact on blacks that cannot be justified by business necessity, a Title VII court would order the employer to drop the requirement for whites as well as blacks. By contrast, a successful ADA reasonable accommodation case requires the employer to take special steps to a particular group, but not for everybody.

As a counterexample to this standard difference, Jolls points to the Title VII no-beard cases, where courts have allowed employers to continue a no-beard policy for white workers even while courts exempt black workers with pseudofolliculitis barbae from the policy.93 The Title VII no-beard cases look like accommodation cases. But Jolls concedes that the "more usual approach in the disparate impact arena outside of the no-beard cases"94 is to strike down the practice for everyone. She argues that even the standard judicial remedy is accommodation, however, because it makes one group more costly to employers than another.95 Maybe so, but the expressly tailored remedy in the typical accommodation case (e.g.,

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93. See id. at 653-56.
94. Id. at 655.
95. Id. at 655-56.
pay for a reader for a blind employee\textsuperscript{96}) strikes us as qualitatively different than the workplace-wide remedy in the usual disparate impact case.

Second, and more importantly, Jolls disagrees with our argument that Title VII generally examines selection criteria, while only the ADA's accommodation requirement looks to restructuring jobs themselves. Jolls argues that Title VII cases sometimes involve job restructuring as well. From our vantage point, the vast bulk of Title VII cases only scrutinize selection criteria, and allow the employer to define the job any way it wants. In a few areas, we concede, some Title VII cases scrutinize job characteristics, but even in these areas the courts are extremely reluctant to do so. By contrast, forcing employers to restructure jobs is the core of the ADA.

Professor Jolls discusses four examples to illustrate her position: grooming rules, job selection criteria, English-only rules, and pregnancy. All of these examples share the same limitations. We focus first on Professor Jolls' discussion of grooming rules to highlight the differences in our positions and, we think, to illustrate the strength of our claim that accommodation is a distinct model. We then look more briefly at the other examples.

Professor Jolls' prototypical case of facially-neutral grooming rules is \textit{Bradley v. Pizzaco of Nebraska, Inc.}\textsuperscript{97} In \textit{Bradley}, the employer required employees to be clean-shaven. The plaintiff satisfied the court that this requirement had a disparate impact on black men because they disproportionately have a skin condition which makes shaving impossible. The court then rejected the employer's business justification that the no-beard rule was necessary because the public reacted negatively to delivery men with beards.\textsuperscript{98}

Professor Jolls argues that this case, which applies Title VII's disparate impact doctrine, is indistinguishable from an accommodation requirement. First, she says, the employer did not intend to treat members of a particular group of employees differently because of group membership. Second, she argues that because of


\textsuperscript{97} 939 F.2d 610 (8th Cir. 1991) (Bradley I); 7 F.3d 795 (8th Cir. 1993) (Bradley II). Jolls' discussion of Bradley is taken from Jolls, supra note 11, at 653-66.

\textsuperscript{98} Bradley II, 7 F.3d at 798-99.
the employer's concern about public reaction to bearded delivery men, the rule had a business justification and, thus to abrogate the rule would impose real financial costs on the employer. 99

Let us consider both of these reasons, in the context of a comparable, hypothetical disability claim. Let us say that Pizzaco of Nebraska also had a rule that pizza delivery employees must walk up driveways, and thus could not use wheelchairs. 100

Professor Jolls argues first that the court's treatment of the no-beard rule is like an accommodation claim because the employer had no adverse intent. This claim is curious because disability cases with no adverse intent are rare, maybe nonexistent. 101 An employer with a no-wheelchairs rule clearly would be intending to discriminate against this class of individuals with disabilities, even if the employer also had business reasons for the rule. The important point here, however, is the significantly different consequences adverse intent has in our two cases. If the employer had acted with the intention to treat black men differently in Bradley, the employer would have lost, period. No business justification would have been considered because no business justification will justify intentional discrimination. When the employer acts with adverse intent in our no-wheelchairs hypothetical, the evidence merely leads to a consideration of the employer's business justification. The employer may or may not lose, depending on the strength of its justification and the nature of

100. The hypothetical is similar to PGA Tour, Inc., v. Martin, 532 U.S. 661 (2001), in which the Supreme Court struck down the PGA's rule against golf carts in professional tournaments as applied to Casey Martin, a professional golfer suffering from a circulatory disorder that made walking difficult. Martin was not an employment case. Rather, it concerned the public accommodation title (Title III) of the ADA. The Court determined that Martin was a “customer” of the PGA's tournaments and thus was covered by Title III, and that allowing him to use a golf cart was not a modification that would “fundamentally alter the nature” of professional golf tournaments. Id. at 681-82.
101. As under Title VII, a disability case without evidence of adverse intent would appear as a disparate impact case. But even though the ADA explicitly recognizes disparate impact as a cognizable model of discrimination under the Act, almost no ADA disability disparate impact cases exist. The leading disability disparate impact case cited in the textbooks is still Alexander v. Choate, 469 U.S. 287 (1985), a pre-ADA case which rejected a disability disparate impact claim under the Rehabilitation Act when the state of Tennessee reduced the number of inpatient days its Medicaid program would pay hospitals.
accommodations it could make. This strikes us as a significant difference, not an equivalence.

Professor Jolls' second point is that, because the no-beard rule had a business justification, requiring the employer to abandon it imposed real economic costs on the employer and, therefore, the case was like an accommodation case. The court's holding in Bradley, however, is that the no-beard rule did not have a business justification. Professor Jolls says that the rule did have a business justification because the employer presented a survey indicating that up to twenty percent of the employer's customers "would react negatively" to a delivery person wearing a beard. But the court rejected the study as not showing significant customer apprehension regarding beards, and in any event involving customer preference rather than Domino's ability to make or deliver pizzas. The court found it "[significant]" that the survey made "no showing that customers would order less pizza" if Domino's allowed beards, which suggests that the court would have upheld the no-beard rule if the study could have demonstrated that it imposed a real economic cost.

Compare the court's actual result with the likely result in our alternative hypothetical. If the employer could not show that accommodating nonambulatory delivery people would impose economic costs, the employer's rule clearly would be struck down. This result is analogous to the no-beard result. On the other hand, if the employer could show that accommodating delivery people who could not walk would impose $X worth of costs, the employer might or might not be required to absorb those costs, depending on whether they were reasonable. This was not the case the Bradley court faced. Instead, the court found that the employer had failed to demonstrate that rejection of the no-beard rule would impose any costs. But the court's dicta clearly indicated that the rule would have been upheld if it had imposed costs on the employer in the form of lower pizza sales.

102. Bradley II, 7 F.3d at 798-99.
103. Id. at 799 ("Even if the survey results indicated a significant customer apprehension regarding beards, which they do not, the results would not constitute evidence of a sufficient business justification defense for Domino's strict no-beard policy.").
104. Id.
More generally, as Professor Jolls says, the no-beard cases blur the line between selection criterion and job restructuring. A clean-shaven face is both a criterion for hiring and part of the job. But it is not an important part of the job (or, to use the ADA’s language, an essential function of the job) because it merely responds to customer preferences—a notorious justification for employer practices throughout discrimination law. More importantly for us, the no-beard cases demonstrate the courts’ reluctance to restructure jobs. If the beards truly would harm an employer’s bottom-line profits, courts will not interfere with the employer’s no-beard rule. This reluctance to interfere differs dramatically from the courts’ approach to ADA accommodation cases involving job restructuring. It also differs from the courts’ approach in Title VII selection criteria cases, where courts are far more willing to strike down employer policies unless the employer demonstrates a very clear business justification.

Cases challenging facially neutral hiring tests—Professor Jolls’ second example—also fail to persuade us that impact and accommodation cases are closely linked. These fact patterns create the most familiar type of disparate impact claim. Our basic point is that these (often successful) challenges to selection criteria differ fundamentally from challenges to job structures (which are often successful in ADA reasonable accommodation claims but much less successful in Title VII cases). Jolls emphasizes that when these Title VII selection-criteria cases succeed, they can impose real costs on employers, just as successful accommodation cases can impose real costs on employers. But antitrust cases can also impose real costs on firms. That does not make them like accommodation cases. And although we agree that successful disparate impact cases can impose costs on employers (even though in theory striking down a test that is not job related should benefit employers rather than impose costs), the interesting question is which type of cases have the highest burden and thus impose the greatest costs. As we survey the cases, the burden is highest in abstract testing cases (the classic example being IQ tests) where the employer believes that higher test-scorers are better workers, but cannot demonstrate it to a court. Courts are more lenient on employers when the test and

the job are more intertwined. Thus, courts in disparate impact cases are most intrusive on employer selection procedures when the procedures differ greatly from the job, and least intrusive when a court order might require restructuring the job. Accommodation cases, by contrast, focus on restructuring the job.

To see the reluctance of courts to discard tests that are closely related to the job, consider *Lanning v. Southeastern Pennsylvania Transportation Authority*, a case highlighted by Professor Jolls. Here, the employer required applicants for transit police officers to run 1.5 miles in twelve minutes, arguably a job related criteria because they might have to chase suspects on foot. Women filed a disparate-impact lawsuit. Professor Jolls emphasizes that the appellate court reversed a judgment for the employer and remanded the case for a determination of business necessity. The trial court ultimately found for the employer, however, thus making this a weak case for demonstrating that disparate impact cases financially burden employers (other than through litigation costs). More importantly, throughout the litigation there was no hint that the employer should restructure the job so that police officers would not have to chase suspects so long on foot. The entire inquiry was whether this was indeed a job requirement, and if so whether the twelve minute test was related to it. This inquiry differs dramatically from an ADA accommodation inquiry, which would center on, rather than bypass completely, the question of whether employers could accommodate officers who cannot chase suspects over long distances.

The height and weight requirements at issue in *Dothard v. Rawlinson* also illustrate the reluctance of courts to restructure jobs. In that case, the Supreme Court struck down an employer’s minimum height and weight requirements for prison guards, which had a disparate impact on women. The employer argued the requirements were related to strength, but the Court reasoned that the employer could directly test for strength if that were truly a necessary part of the job. Interesting is Justice Rehnquist’s concurrence, in which he argued that the employer would have won.

106. 181 F.3d 478 (3d Cir. 1999).
108. Id. at 331.
109. Id.
if it had argued that the appearance of strength—rather than strength itself—was part of the job. In that case, large height and weight would directly be part of the prison guard's job, and thus untouchable under Title VII. Title VII would strike down, however, height and weight requirements that merely test for job attributes.

Professor Jolls' third example involves the litigation around English-only rules. In these cases, the employer imposes the English language as an element of the job, which has a disparate impact on the basis of national origin. The plaintiffs in these Title VII cases ask courts to strike down the English language rules, which would be a job restructuring along the reasonable accommodation model rather than simply a changing of the selection criterion which is the hallmark of disparate impact litigation. Thus, if plaintiffs generally succeeded in the English-only cases, we would agree with Professor Jolls that they provide an example of the blurring of the disparate impact and accommodation models. But plaintiffs have been largely unsuccessful here. Professor Jolls emphasizes two settled cases where the employer agreed to change its English-only job requirements, but Jolls herself cites at least five cases where courts upheld English-only rules. The case law seems to be against the example here that would equate the disparate impact and accommodation models.

In contrast to the weakness of Title VII disparate impact claims against English-only rules, consider how an ADA challenge to such a rule might fare. Suppose a worker could show he was psychologically unable to speak at all because he was prevented from speaking his native language at work. This worker would be substantially impaired in the major life activity of talking, and the court would presumably make a serious inquiry into whether the employer could reasonably accommodate him by modifying the English-only rule. Unless the English-only rule is extremely important to the business (and everyone has doubts about this), the ADA claim would be strong.

110. Id. at 339 (Rehnquist, J., concurring).
111. Id. at 340 (Rehnquist, J., concurring).
112. Jolls, supra note 11, at 688-90.
Professor Jolls' final example, the pregnancy cases, are perhaps the most important. Courts restructuring jobs to accommodate the needs of pregnant (or breastfeeding) women might significantly alter workplace relations. Professor Jolls admits that the leading cases do not support her view, but she thinks they are mistaken. Nevertheless, the cases do represent the current state of the law. To our mind, the hesitancy of courts to uphold disparate impact pregnancy claims is the reluctance of courts to restructure jobs under Title VII. In the pregnancy cases, courts require employers to treat pregnant women as favorably as other similarly disabled employees, but do not require special accommodation. Summarizing the recent Title VII pregnancy cases, a leading treatise finds two themes. First, "that pregnant employees are entitled to treatment equal to that given to similarly situated nonpregnant employees," but second, "that special accommodation or preference relating to pregnancy is not required." In the Title VII pregnancy cases, then, courts view accommodation as very

113. Id. at 660-65.
114. See Byrd v. Lakeshore Hosp., 30 F.3d 1380, 1383 (11th Cir. 1994) (finding a violation of the Pregnancy Discrimination Act where employer fired pregnant employee for using ten days of sick leave, while allowing sick leave to nonpregnant employees).
115. See Dormeyer v. Comerica Bank-Illinois, 223 F.3d 579, 583 (7th Cir. 2000) (Posner, J.) (upholding summary judgment for employer who fired pregnant employee for absenteeism, declaring that "concept of disparate impact does not stretch to subsidize a class of workers"); Garcia v. Woman's Hosp. of Tex., 143 F.3d 227 (5th Cir. 1998) (upholding employer's refusal to allow pregnant nurse to return to work when her doctor advised her not to lift over 150 pounds, because employer applied same lifting requirement to nonpregnant employees); Urbano v. Cont'l Airlines, Inc., 138 F.3d 204 (5th Cir. 1998) (holding that airline was not required to provide a light-duty assignment for ticketing agent with pregnancy-related lower back discomfort because light-duty jobs were not given to other workers injured while off duty); Armstrong v. Flower Hosp., Inc., 33 F.3d 1308 (11th Cir. 1994) (affirming summary judgment for employer who fired pregnant home health care nurse who refused to treat HIV patient, declaring that Congress intended the pregnancy discrimination amendments to Title VII to end discrimination against pregnant employees, but not to require preferential treatment); Troupe v. May Dep't Stores Co., 20 F.3d 734, 738 (7th Cir. 1994) (Posner, J.) (upholding summary judgment for employer who fired pregnant employee chronically absent because of morning sickness, reasoning that disparate impact liability was not a warrant for favoritism); Fields v. Bolger, 723 F.2d 1216 (6th Cir. 1984) (declaring that nothing in Title VII compels an employer to prefer for alternative employment a pregnant employee unable to perform her full range of duties).
different from the disparate treatment or impact models of discrimination, and not part of the statute's mandates.

That Title VII does not require special accommodation is even clearer in breastfeeding cases, and other maternity cases not directly related to the mother's medical condition. Courts are extremely reluctant to entertain claims that Title VII requires employers to lengthen breaks or otherwise assist working mothers. For example, in *Fejes v. Gilpin Ventures, Inc.*, the court summarily dismissed a worker's Title VII claim when the employer refused to provide a part-time schedule to accommodate a nursing mother. While the court entertained claims of possible violations of the Family and Medical Leave Act, it declared that Title VII does not require accommodation of child-care concerns. The courts' hostility to accommodation in these cases contrasts sharply with the serious way in which courts in *ADA* cases investigate whether employers can alter job schedules to accommodate workers with disabilities.

Our central criticism is not that there are no commonalities between antidiscrimination and accommodation. Rather, as we see it, the central thrust of antidiscrimination and accommodation are different, and accommodation imposes greater and more explicit burdens on employers. Under Title VII's disparate impact doctrine, the courts explicitly look for economic costs. If found, the analysis ends and the employer wins. Accommodation is different. The courts also examine economic costs imposed on employers but, when found, the analysis has just begun. The *ADA*, at its core, requires employers to absorb these costs unless they are unreasonable or create an undue hardship; Title VII, at its core, avoids imposing these costs on employers.

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117. 960 F. Supp. 1487 (D. Colo. 1997); see also Barrash v. Bowen, 846 F.3d 927 (4th Cir. 1988) (upholding employer's rejection of request for six-month maternity leave, declaring that an employee is not entitled to dictate managerial decisions affecting the employment relationship).


119. *Id.*

120. Although approaching the issue from a different perspective, Samuel Issacharoff and Justin Nelson generally agree with us. They find that the "overwhelming sweep" of *ADA* cases do not concern "discrimination simpliciter," but rather "a claimed failure to redistribute in the form of accommodation." Samuel Issacharoff & Justin Nelson, *Discrimination with A Difference: Can Employment Discrimination Law Accommodate the Americans with*
D. Comparing Preferences Elsewhere

The ADA's hard preferences can also be brought into better focus by comparing them with preferences elsewhere in employment law. In the law generally, preferences of the same general type as the ADA's, which require actors to ignore certain information in making decisions, are common, which suggests that the mere presence of the preferences should not produce skepticism. Compared to other preferences in employment law, however, the ADA's are unusual.

Title VII itself contains hard preferences in an attenuated sense. To the extent race or sex may be a signal of productivity, the argument could be made that Title VII imposes a hard preference because it prohibits reliance on that signal. That is, by prohibiting statistical discrimination, Title VII requires employers to ignore information relevant to productivity. Even viewed in this way, however, Title VII's hard preference is distinct and softer than the ADA's. First, Title VII prohibits using race and sex as a signal of productivity when the employer relies on the group's characteristics as a proxy for individual productivity. Title VII, however, does not prohibit reliance on the productivity characteristics of individual women or members of minority groups. Indeed, one of the primary goals of Title VII is to encourage precisely that type of individual consideration. The ADA's preference, in contrast, is stronger because it prohibits not only use of disability as a group-based proxy for productivity, but also use of the productivity characteristics of individual workers with disabilities. For example, consider the treatment of pregnancy under Title VII. Although an

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Disabilities Act?, 79 N.C. L. REV. 307, 311 (2001). Thus, even though Title VII and the ADA overlap, "only the ADA finds its primary statutory concern in the anticipated shift of resources to its intended beneficiaries." Id. at 357.

121. See, e.g., Expedited Funds Availability Act, 12 U.S.C. § 4003(c)(2) (2000) (forbidding banks from relying on "any class of checks or persons" in extending time for payment of checks); Fair Credit Reporting Act, 15 U.S.C. § 1681b (2000) (limiting information that can be disclosed on credit reports); Fed. R. Evid. 404 (limiting character evidence); id. 408 (limiting evidence of settlement negotiations); id. 410 (denying admissibility of pleas); id. 412 (curtailing evidence of past sexual behavior); id. 501 (governing privileges); Conn. Gen. Stat. Ann. § 38a-447 (West 2000) (proclaiming that similar to restrictions in other states, race cannot be used to make distinctions or rate determinations in life insurance).

122. See supra Part II.C.
employer cannot rely on stereotypical notions about pregnancy in making a decision about an employee, it can act adversely if it bases its decision on the particular circumstances of the worker and the productivity needs of the business. The ADA, in contrast, not only requires the employer to refrain from making stereotypical, group-based assumptions about the productivity of individuals with disabilities, it also requires the employer to ignore information about the cost and productivity of particular individuals with disabilities. Specifically, the ADA requires employers, in making hiring and firing decisions, to ignore the cost of reasonable accommodations required by an individual worker and to ignore the individual worker's poor productivity in nonessential functions of the job.

Viewing Title VII's prohibition of statistical discrimination as a hard preference highlights differences in the underlying assumptions of the two acts. Under Title VII, a primary underlying assumption of the law is that race and sex are irrelevant to productivity. The assumption is so strong that it applies even in circumstances where it may not be true as a prophylactic against more widespread violations. In contrast, the ADA's preference relies on the assumption that disability is relevant to costs and productivity. Employers are required to make reasonable accommodations because, without them, individuals with disabilities may not be as productive as others. Employers may consider only the ability to perform the essential functions of the job because individuals with disabilities may not be able to perform all functions. Under Title VII, employers are required to ignore race and sex even when it may be relevant to productivity because in the

124. For an early and important articulation of this assumption, see Owen M. Fiss, A Theory of Fair Employment Laws, 38 U. CHI. L. REV. 235 (1971).
125. See, e.g., L.A. Dep't of Power & Water v. Manhart, 435 U.S. 702, 722-23 (1978) (finding that employers cannot use the fact that women live longer than men to require larger pension contributions from women); Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1276-77 (9th Cir. 1981) (noting that the reluctance of Latin American and Southeast Asian customers to conduct business with women did not justify the company's failure to promote a woman to an international marketing position); Ferrill v. Parker Group, Inc., 967 F. Supp. 472, 476 (N.D. Ala. 1997) (holding that an employer cannot match black and white callers with similar voters in a "get out the vote" effort).
vast majority of cases it is not, and the rule avoids having to engage in difficult inquiries to determine if employers used race and sex legitimately (for example, as a signal of productivity) or illegitimately. Under the ADA, employers are required to ignore information about the cost and productivity of individuals with disabilities because of the assumption that the information will be true and relevant so often that, unless employers were legally required to ignore it, individuals with disabilities would be at too severe a disadvantage in the labor market.

The ADA's preferences are also distinct from laws which require employers to ignore information in a variety of insurance situations. For example, employers must ignore the utility of sex in predicting longevity when establishing a pension system, the potential extra costs of preexisting conditions when offering health insurance, and the costs of pensions when making many employment decisions. These are hard preferences. Employers, if permitted, would use the prohibited information to predict the cost of employing (or continuing to employ) an individual. For example, a preexisting medical condition is likely to increase the cost of employing an individual and the imminent vesting of a pension will increase the cost of retaining an employee. Employers may prefer to use the information to avoid, or at least minimize, those costs.

These Title VII hard preferences are also distinct from the hard preferences under the ADA in two fundamental ways. First, the Title VII preferences usually apply in an insurance context when a primary object is the pooling of risks. In these contexts, the laws prohibit employers from relying on certain factors to separate individuals from a broader pool, for example, sex in separating women from the general pension pool or preexisting conditions in separating individuals from a health insurance pool. Limiting

128. Id. § 1140; see Reichman v. Bonsignore, Brignati & Mazzotta, P.C., 818 F.2d 278, 281 (2d Cir. 1987) (holding that employer violated ERISA by discharging employee ten months before pension was due to vest, decreasing pension benefits by $60,000); Nemeth v. Clark Equip. Co., 677 F. Supp. 899, 910 (W.D. Mich. 1987) (holding that in deciding which of two plants to close, employer would have violated ERISA if difference in pension benefits had been determining factor).
employers in this way is controversial. Because the individual and social value of the insurance derives directly from the pooling itself, however, those problems and justifications are distinct from those applying to the ADA. Although the ADA prohibits insurance pooling uses of information about disabilities, it also prohibits employers from relying on individualized information in situations where value does not derive principally from the pooling itself. Justifications for these restrictions must go beyond the information pooling arguments. Second, these types of preferences often arise in the context of long-term relationships. Requiring employers to refrain from firing employees shortly before vesting, for example, must occur in a relationship that is long enough for vesting to be imminent. Once again, limiting employers in that context is not uncontroversial, but the arguments are distinct from those under the ADA. Legal regulation of long-term relationships is directed at problems that pervade those relationships, such as uncertainty and asymmetrical performance. They are not the primary problems to which the ADA is directed.

In summary, the ADA’s hard preferences are not unique to employment law, but the nature and context of the hard preferences are distinguishable from other hard preference situations, such as situations involving insurance pooling or long-term relationships. This means that the justifications for the ADA’s preferences are likely to be different than those for preferences established elsewhere.


130. See Interim Enforcement Guidance on the Application of the Americans with Disabilities Act of 1990 to Disability-Based Distinctions in Employer Provided Health Insurance, EEOC Compl. Man. (CCH N-915.002 (June 8, 1993)).

131. See, e.g., Ehrenberg & Smith, supra note 26, at 302-06; Samuel Issacharoff & Erica Worth, Is Age Discrimination Really Age Discrimination?: The ADEA’s Unnatural Solution, 72 N.Y.U. L. Rev. 780 (1997).
E. Reasonable Accommodation and Affirmative Action

Proponents of the ADA often resist labeling the ADA's hard preferences as affirmative action. Their reluctance seems to be a political strategy given the controversy about affirmative action in other areas. Nevertheless, it muddies thinking to deny what is a central thrust of the ADA. To avoid a stingy interpretation, it would be better to acknowledge that the ADA is designed to grant preferences, even preferences that can be characterized aptly as "hard preferences" or as "affirmative action," and to articulate the argument in favor of those preferences.

Viewing reasonable accommodation as affirmative action is an important part of the heritage of the ADA. When the ADA was enacted in 1990, reasonable accommodation was a concept used under two different federal statutes. Reasonable accommodation had been a part of Title VII since 1972 when it was inserted to modify the prohibition on religious discrimination in employment. By 1990, the Supreme Court had already interpreted the requirement to impose only very minimal obligations on employers.

More importantly, reasonable accommodation was a concept used under the Rehabilitation Act of 1973. The Rehabilitation Act does not explicitly use the phrases "reasonable accommodation" or "undue hardship." Rather the statute requires agencies and federal contractors to engage in "affirmative action" to hire and advance individuals with disabilities. In clarifying what affirmative action

132. See, e.g., Blanck, supra note 72, at 887-98; Paul Steven Miller, EEOC's Enforcement of the ADA in the Second Circuit, 48 SYRACUSE L. REV. 1577, 1581-83 (1998).
133. Important contributions to the affirmative action debate have adopted this strategy. Rather than deny the existence or strength of affirmative action, they have acknowledged it and defended it as appropriate. See Deborah C. Malamud, Affirmative Action, Diversity, and the Black Middle Class, 68 U. COLO. L. REV. 939 (1997); Jed Rubenfeld, Affirmative Action, 107 YALE L.J. 427 (1997).
135. See Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 68-69 (1986) (holding that an employer meets his obligation by offering any reasonable accommodation even if the employee would prefer another one); Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977) (holding that employers are not obligated to make any accommodation which would impose anything more than a de minimis cost).
137. 29 U.S.C. §§ 791, 793 (2000); see Affirmative Action Obligations of Contractors and
meant, the Department of Labor introduced the terms "reasonable accommodation" and "undue hardship." These terms then went beyond the affirmative action regulations and were used by other agencies and the courts to help delineate the meaning of the Rehabilitation Act's general nondiscrimination provision. Thus, the concept of reasonable accommodation under the Rehabilitation Act was initially conceived as an important component of the Rehabilitation Act's affirmative action requirement and only later inserted into the Act's conceptualization of the general non-discrimination obligation.

When Congress inserted the reasonable accommodation language into the ADA, it explicitly rejected the weak interpretation of the concept under Title VII. Instead, Congress explicitly accepted the much more forceful interpretation of the concept under the Rehabilitation Act. The Rehabilitation Act, then, not Title VII, is the parent of the ADA's reasonable accommodation requirement. Moreover, the Rehabilitation Act's version of the concept was originally conceived as a mechanism for fulfilling that Act's explicit affirmative action requirement. The lineal descent is clear; affirmative action is the grandparent of the ADA's reasonable accommodation requirement.

Subcontractors § 741.4(c), 39 F.R. 20,566, 20,568 (1974) (articulating accommodation and hardship concepts, effective immediately but inviting comments); Affirmative Action Obligations of Contractors and Subcontractors for Handicapped Workers § 741.5(c), 40 F.R. 39,887, 39,889-90 (1975) (revising of accommodation and hardship concepts based on comments).

138. The Department of Health, Education, and Welfare also indicated its intention to borrow concepts from the Department of Labor, Nondiscrimination on the Basis of Handicap, 41 F.R. 20,296, 20,300-01 (1976), and incorporated those concepts into its final rule, Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting from Federal Financial Assistance, § 84.12, 42 F.R. 22,676, 22,680 (1977).


141. Id. at 70-71 (1990) (suggesting that under the ADA, reasonable accommodation "should be applied just as it is applied under [the Rehabilitation Act]"); see also ADA § 501, 42 U.S.C. § 12201 (2000) (noting that nothing in the ADA "shall be construed to apply a lesser standard than the standards applied under [the Rehabilitation Act]"). See generally Alan D. Schuchman, Note, The Holy and the Handicapped: An Examination of the Different Applications of the Reasonable-Accommodation Clauses in Title VII and the ADA, 73 IND. L.J. 745 (1998).
The ADA requires employers to provide reasonable accommodation to individuals with disabilities and ignore the costs of accommodation in comparing employees. This hard preference was not intended to be costless.\textsuperscript{142} Although many and perhaps most accommodations are cheap,\textsuperscript{143} others are expensive.\textsuperscript{144} To deny this thrust of the ADA risks a stingy interpretation of the Act which would permit only low cost accommodations. Once again, the better approach is to accept the hard preferences of the ADA and to admit frankly that they are similar to, and perhaps even stronger than, "affirmative action," and then to articulate clearly and forcefully the justifications for the ADA's preferences. In the next section, we discuss the scope of and justifications for the reasonable accommodation requirement.

\textsuperscript{142} H.R. REP. NO. 101-485, pt. II, at 67-68 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 349-50 (emphasizing the significance of the expected burden under ADA by contrasting it with the limited burden under Title VII for religious discrimination); H.R. REP. NO. 101-485, pt. III, at 39-43 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 462-65 (recognizing that reasonable accommodation and undue hardship are intended to impose a "significant, as opposed to a de minimus or insignificant, obligation on ... employers").

\textsuperscript{143} See Frederick C. Collignon, The Role of Reasonable Accommodation in Employing Disabled Persons in Private Industry, in DISABILITY AND THE LABOR MARKET 196 (Monroe Berkowitz & M. Anne Hill eds., 1986) (finding in pre-ADA study of federal contractors that 51\% of accommodations cost nothing, 30\% cost less than $500, and only 8\% cost more than $2,000); Peter David Blanck, Transcending Title I of the Americans With Disabilities Act: A Case Report on Sears, Roebuck and Co., 20 MENTAL & PHYSICAL DISABILITY L. REP. 278, 278 (1996) (stating that between 1993 and 1996, 72\% of Sears' accommodations cost nothing, 27\% cost less than $500, and only 1\% cost more than $500; the average cost was $45); President's Committee on Employment of People with Disabilities, Job Accommodation Network (JAN) Reports (Oct.-Dec. 1994) (noting that two-thirds of accommodations cost less than $500). These studies tend to underestimate accommodation costs because they focus on direct outlays for accommodation and not on indirect costs, such as the personnel costs required to structure the accommodation. Consequently, the studies represent a lower-bound estimate of accommodation costs.

\textsuperscript{144} See, e.g., Lyons v. Legal Aid Soc'y, 68 F.3d 1512, 1517 (2d Cir. 1995) (rejecting the district court's grant of the motion to dismiss and noting that providing a parking space costing fifteen to twenty-six percent of monthly salary may be a reasonable accommodation); Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131, 140-41 (2d Cir. 1995) (holding that providing a teaching assistant may be a reasonable accommodation); Nelson v. Thornburgh, 567 F. Supp. 369, 382 (E.D. Pa. 1983), aff'd, 732 F.2d 146 (3d Cir. 1984), cert. denied, 469 U.S. 1188 (1985) (finding that providing a reader costing about one-quarter of annual salary is a reasonable accommodation).
IV. REASONABLE ACCOMMODATION: SCOPE AND JUSTIFICATION

Although the ADA requires employers to accommodate disabled workers, the mandate is clearly bounded. Employers must not make any and all accommodations, but only reasonable ones. Employers must ignore costs and productivity differences up to the point of reasonableness, but exactly where is that point? In this Part, we describe and justify the scope and limits of the ADA's reasonable accommodation mandate.

A. The ADA's Articulation of the Reasonable Accommodation Model

The ADA's language itself is the place to begin exploring reasonable accommodation. Unfortunately, the Act provides only a general structure for analysis and gives little guidance to help define its scope and limits. Despite this limitation, courts have begun to articulate a vision of reasonable accommodation that contains both procedural and substantive obligations.

The ADA makes reasonable accommodation central to three important inquiries in disability cases. First, the statute prohibits discrimination only against a "qualified individual with a disability."\textsuperscript{145} A qualified individual, in turn, is defined as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the job."\textsuperscript{146} Second, employers are required to make "reasonable accommodations to the known physical or mental limitations" of qualified individuals with disabilities.\textsuperscript{147} Third, employers are not required to make an accommodation if they can "demonstrate that the accommodation would impose an undue hardship on the operation of the business."\textsuperscript{148}

Beyond indicating when the words "reasonable accommodation" should be intoned in the analysis, however, the ADA is not very helpful. The ADA's definition of "reasonable accommodation" says that it "may include" making facilities accessible, restructuring

\textsuperscript{146} Id. § 12111(8) (emphasis added).
\textsuperscript{147} Id. § 12112(b)(5)(A).
\textsuperscript{148} Id.
jobs, acquiring or modifying equipment, "and other similar accommodations." The "may include" language undercuts most of the guidance that might otherwise have been provided by the definition. Reasonable accommodation may include the listed items, but then again it may not. It depends, but we are not told on what. Moreover, because reasonable accommodation "includes" the listed items, an infinite array of other accommodations may also be reasonable.

The ADA's definition of undue hardship is better, but it sheds little light on the focus of this Article, the meaning of reasonable accommodation. Undue hardship means an action "requiring significant difficulty or expense" when considered in light of factors such as the nature and cost of the accommodation, the financial resources of the employer, and the nature of the employer's operations. Considered independently, this definition is better than the one for reasonable accommodation for two reasons. First, it provides a base: An undue hardship is an action requiring significant difficulty or expense. The ADA's reasonable accommodation definition lacks such a base. Second, the definition indicates that the list of relevant factors in the undue hardship definition must be considered in every case. The definition says that the factors to be considered "include" the factors, in contrast to the reasonable accommodation definition which says that the evaluation "may include" the factors listed there. Like the definition of reasonable accommodation, however, the definition of undue hardship does not indicate that the listed factors are the only factors to consider: An infinite array of other, unspecified factors may also be relevant.

149. Id. § 12111(9).
150. "[R]eality" encompasses millions of facts, and unless we have a legal rule with which to sift the material from the immaterial, we might as well examine the facts through a kaleidoscope. Which facts matter, and why? A legal approach calling on judges to examine all of the facts, and balance them, avoids formulating a rule of decision.
152. Id. § 12111(10)(B).
153. Id. § 12111(9).
The ADA's treatment of undue hardship provides only very modest help in refining the meaning of reasonable accommodation. Consider the four possible relationships between reasonable accommodation and undue hardship shown in Figure 4. In quadrants A and D, both undue hardship and reasonable accommodation cut in the same direction. Consequently, the results in both quadrants are obvious and uninteresting. Analysis of quadrants B and C, however, promises clues to the meaning of reasonable accommodation. Consider quadrant B first: The accommodation is reasonable, but imposes an undue hardship on the employer. The ADA provides a clear answer to the ultimate result in this quadrant: The employer need not make the accommodation.\textsuperscript{154} The ADA also hints that the quadrant is not a null set, that is, that cases actually exist which would fit into this quadrant. The statute says employers must make a reasonable accommodation unless the employer can demonstrate "that the accommodation" would impose an undue hardship.\textsuperscript{155} Presumably, "the" accommodation is the reasonable one mentioned immediately before, rather than some other one. Similarly, in quadrant C, the statute provides a clear answer (the employer need not make unreasonable accommodations, even if they do not impose an undue hardship) and hints that this quadrant is not a null set either.

**Figure 4. The Relationship Between Undue Hardship and Reasonable Accommodation**

<table>
<thead>
<tr>
<th>Hardship</th>
<th>Acceptable</th>
<th>Undue</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reasonable</td>
<td>A</td>
<td>B</td>
</tr>
<tr>
<td>Unreasonable</td>
<td>C</td>
<td>D</td>
</tr>
</tbody>
</table>

\textsuperscript{154} Id. § 12112(5)(A).
\textsuperscript{155} Id.
Quadrants B and C, then, provide modest help in thinking about the meaning of reasonable accommodation. The statute implies that the dividing line between accommodations that are reasonable and unreasonable is not the same as the dividing line between hardships that are acceptable (due?) and undue. Courts that have held that undue hardship provides the upper boundary for reasonable accommodations are wrong. But the statute provides no guidance on the important question: What is the interaction between the two concepts within those quadrants? In quadrant B, that question is: How is it possible that a reasonable accommodation can impose an undue hardship? Would not an undue hardship mean that the accommodation itself had to be unreasonable? In quadrant C, the question is less paradoxical, but perhaps even more crucial to the meaning of reasonable accommodation: If an accommodation can be unreasonable even if it does not impose an undue hardship, just how is one to evaluate reasonableness? Not, presumably, based on the effect on the employer because that is the undue hardship analysis. But if not based on that, then based on what? The language of the ADA provides no answers to these questions.

In sum, the ADA provides an overall framework for thinking about reasonable accommodation, but only limited guidance on its precise boundaries. The legislative history indicates that this is precisely as Congress intended: Congress intended to leave the details to the courts, as it did under Title VII. In a promising way, the courts have begun to assume the task of filling in the details by delineating procedural and substantive aspects of the accommodation duty.

156. See e.g., Walton v. Mental Health Ass’n of Southeastern Pa., 168 F.3d 661, 670 (3d Cir. 1999) (stating that reasonable accommodation and undue hardship showings “merge” into one inquiry); Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131, 138 (2d Cir. 1995) (stating that reasonable accommodation and undue hardship are “the same thing”).

157. See 136 CONG. REC. H2470, H2475 (daily ed. May 17, 1990); H.R. REP. No. 101-485, pt. III, at 41-42 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 464-65 (“By including a number of factors [in the definitions of reasonable accommodation and undue hardship,] the Committee intends to establish a flexible approach [through which determinations] ... must be made on a case-by-case basis.”); see also Borkowski, 63 F.3d at 144 (stating that Congress made “very clear its desire to help some group of disadvantaged persons but [left] very unclear how it expects its legislative solution to be implemented in the courtroom”).
B. Reasonable Accommodation as Procedure: The Interactive Process

The developing concept of reasonable accommodation includes a procedural component. As some courts have begun to recognize, once triggered, reasonable accommodation requires employers to engage in an "interactive process" to explore accommodation possibilities. Employers are to analyze the job and its essential functions, consult with the individual with a disability about the precise job related limitations imposed by the disability and about potential accommodations which would permit performance of the job's essential functions, and consider the individual's preferences in selecting and implementing an appropriate accommodation.

The procedural component of reasonable accommodation finds support in several of the economic justifications for the preferences of the ADA. Accommodation as procedure would further the ADA's goal of eliminating adverse decisions because of employer aversion. As interaction increases, people are more likely to act

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158. This Article focuses on the meaning of reasonable accommodation under the ADA. It does not answer the related question of when the duty is triggered. In general, the duty is triggered when the employer is notified of a disability, although many variations are possible. 29 C.F.R. app. § 1630.9 (1998) ("Once a qualified individual with a disability has requested provision of a reasonable accommodation, the employer must make a reasonable effort to determine the appropriate accommodation."). For variations, see Browning v. Liberty Mut. Ins. Co., 178 F.3d 1043, 1047-49 (8th Cir. 1999) (holding that the duty is not triggered if it is clear that the employee could not perform the essential functions of the job); Bultemeyer v. Fort Wayne Cmty. Sch., 100 F.3d 1281, 1285-86 (7th Cir. 1996) (holding that a duty may be triggered even if the employee, because of a mental disability, does not notify the employer); White v. York Int'l Corp., 45 F.3d 337, 362-63 (10th Cir. 1995) (holding that a duty is not triggered even though the employer was notified of the disability because it would have been impossible for individual to perform essential functions of the job).

159. Although some courts have begun to recognize the requirement, the courts are split on the issue. Compare Bultemeyer, 100 F.3d at 1286, and Taylor v. Principal Fin. Group, Inc., 93 F.3d 155, 165 (5th Cir. 1996) (recognizing an "interactive process" requirement), with Willis v. Conopco, Inc., 108 F.3d 282, 285 (11th Cir. 1997), and White, 45 F.3d at 357 (rejecting an "interactive process" requirement). See generally Alysa M. Barancik, Comment, Determining Reasonable Accommodation Under the ADA: Why Courts Should Require Employers to Participate in an "Interactive Process," 30 Loy. U. Chi. L.J. 513 (1999).

160. 29 C.F.R. app. § 1630.9 (1998); Barnett, 157 F.3d at 756 (Fletcher, J., dissenting).


162. See supra Part II.A.
on the basis of the substance of the interaction, rather than on thoughtless or subconscious aversion. In this way, the forced interaction of the procedural component would reduce adverse decisions caused by employer aversion quite directly. Similarly, forced interaction may contribute to the ADA's goal of changing the preferences of employers. Complying with the ADA's procedural obligations may inform employers of the strengths and potential of individuals with disabilities and, consequently, reduce employer aversion based on myth and stereotype.

Accommodation as procedure is supported even more strongly by the ADA's goal of reducing disadvantage because of employer ignorance about productivity. Employer ignorance about productivity may well maximize profits for every individual employer (because the costs of acquiring information exceed the expected payoffs) and yet be inefficient for society overall. The procedural component of reasonable accommodation requires individual employers to investigate the productivity of individuals with disabilities and, hence, permits society to reap benefits that would otherwise be lost: the productivity of individuals with disabilities who are more productive than others and yet would not be hired absent the ADA's procedural requirement.

In a similar way, the ADA's procedural obligation is supported by the ADA's approach to statistical discrimination. As with employer ignorance about productivity, it may be profit maximizing for every individual employer to engage in statistical discrimination and yet be inefficient for society overall. The procedural requirement breaks this cycle and creates a proper set of incentives for individuals with disabilities to invest in their own productivity. The labor market works more efficiently with the requirement and, even more importantly, it permits individuals with disabilities to assume a


164. See supra notes 46-47 and accompanying text.


166. See supra Part II.B. for the foundation of this and the following paragraphs.
fuller role in the labor market and claim their rightful place as important and productive members of the labor force.

Accommodation as procedure also provides important support for its companion, substantive reasonable accommodation. Substantive reasonable accommodation, discussed below, defines the reach of the ADA’s hard preferences, the extent to which employers must hire individuals with disabilities even though they may be more costly to employ or less productive than others. The procedural aspect of accommodation cannot answer the substantive question: At what point do extra costs or lower productivity mean that employers no longer have a duty to accommodate? The procedural aspect can, however, ensure that employers have sufficient information to evaluate their compliance with the ADA’s substantive obligations.

Beyond providing an information base, however, the procedural component of reasonable accommodation is unconnected to the substantive component. Figure 5 illustrates the possibilities. Quadrants A and D again present obvious and unproblematic situations of compliance and violation of the ADA, respectively. Quadrants B and C both present situations in which the employer has violated the ADA. In Quadrant B, the employer has fulfilled all of its procedural obligations, but has failed to provide a required substantive accommodation. For example, an employer might fully consult with a blind applicant for employment and determine that a reader was necessary to permit the applicant to perform the job, and yet fail to provide the reader even though the accommodation was reasonable and would not impose an undue hardship. The employer’s procedural fidelity does not insulate it from its substantive obligation to make the presumptively reasonable substantive accommodation. Similarly, in Quadrant C, the employer has satisfied its substantive obligations, but failed procedurally. For example, the employer may have made an accommodation which satisfies its substantive obligation, even though it did not engage in a proper interactive process or, similarly, the employer may be able to prove that, even if it had engaged in an interactive process, no reasonable substantive accommodation was possible. Once again, however, the employer’s

compliance with one part of its obligations, in this case its substantive obligation, does not insulate it from responsibility for a violation of its other obligations, its procedural obligations.

**Figure 5. Possible Combinations of the Procedural and Substantive Components of Reasonable Accommodation**

<table>
<thead>
<tr>
<th>Substantive Component</th>
<th>Procedural Component</th>
</tr>
</thead>
<tbody>
<tr>
<td>Satisfied</td>
<td>Satisfied</td>
</tr>
<tr>
<td></td>
<td>A</td>
</tr>
<tr>
<td>Violated</td>
<td></td>
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<tr>
<td></td>
<td>C</td>
</tr>
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<td></td>
<td>D</td>
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</table>

Some courts have refused to recognize a procedural component of the reasonable accommodation obligation because of Quadrant C. The Ninth Circuit has said a procedural component would produce an "oddity" if employers who had provided an adequate substantive accommodation could nevertheless be held liable for a procedural shortcoming.\(^{168}\) The Eleventh Circuit has said that it is unwilling "to punish employers" for failing to comply with the procedural obligation in situations where no substantive accommodation is possible.\(^{169}\) The courts have not seemed to recognize that these are general consequences of procedural obligations, not ones unique to the ADA. Constitutional due process, for example, can produce the same "oddities" and "punishments," as can the procedural requirements of fiduciary obligation in pension law.\(^{170}\) One point

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168. Barnett v. U.S. Airways, Inc., 196 F.3d 979, 993 (9th Cir. 1999), **vacated en banc on other grounds**, 201 F.3d 1256 (9th Cir. 2000).


170. The test of prudence in modern pension law is largely procedural. See, e.g., Donovan v. Cunningham, 716 F.2d 1455, 1467 (5th Cir. 1983) (finding that courts should focus on the fiduciary’s investigation of an investment “rather than on an evaluation of the merits alone”); Donovan v. Mazzola, 716 F.2d 1226, 1232 (9th Cir. 1983) (framing the issue as whether the
here is that the courts are justified in rejecting the procedural aspects of the ADA on these grounds only if they are also willing to reject on the same grounds important aspects of constitutional due process, the law of fiduciary duty, and other areas of the law. The broader point is that the procedural aspect of the accommodation duty is not a new and unique obligation formulated for the ADA. Instead, it fits within a strong tradition of recognizing a procedural obligation as an important component of a set of obligations designed to protect important interests. Under the ADA, one would expect to see few cases fitting within Quadrant C, in part because the damages would be limited. But neither that, nor perceived oddities or punishments, undermine the importance and centrality of procedural obligation to the ADA’s general duty of reasonable accommodation.

Other courts have recognized the ADA’s procedural obligation, but interpreted it to impose roughly equivalent consultative obligations on both employers and individuals with disabilities. Courts have sanctioned employers who have failed to engage in an interactive process and individuals with disabilities who have failed to engage properly. The equivalence suggested by the phrase

trustees “employed the appropriate methods to investigate the merits of the investment”). See generally BEVIS LONGSTRETH, MODERN INVESTMENT MANAGEMENT AND THE PRUDENT MAN RULE 110 (1986) (“[P]rudence is a test of conduct and not performance [and] the most promising vehicle for accomplishing that shift is a paradigm of prudence based above all on process.”); SUSAN P. SEROTA, ERISA FIDUCIARY LAW 372 (Susan P. Serota et al. eds., 1995) (noting that courts have stated the test of prudence “largely in procedural terms”).

This conceptualization of prudence produces exactly the same type of “oddities” feared by the Ninth Circuit. In one of the leading cases, for example, the court found that fiduciaries violated their fiduciary duties primarily because of procedural shortcomings, yet there were no damages because the investments outperformed their benchmarks. Donovan v. Bierwirth, 680 F.2d 263, 271-74 (2d Cir. 1982) (finding fiduciary violations); Ford v. Bierwirth, 636 F. Supp. 540, 542 (E.D.N.Y. 1986) (finding no damages because of the investments’ performance).

171. In the Ninth Circuit’s situation, damages would be limited because the employer has provided a legally sufficient substantive accommodation, so the only damages would be any limited ones available for failure to comply with the ADA’s procedural requirement. Similarly, in the Eleventh Circuit’s situation, damages would be limited because the employer can demonstrate that, even if proper procedures had been followed, no reasonable substantive accommodation would have been possible. Once again, the only damages available would be the limited ones caused by the procedural failure alone. For a discussion, see Steven L. Willborn, A Nested Model of Disability Discrimination (1999) (unpublished manuscript, on file with authors).

172. See supra notes 54-55, 68 and accompanying text; Gaston v. Bellingrath Gardens &
"interactive process," however, is improper. The employer's obligation is a part of the reasonable accommodation duty, which is imposed only on employers and not on individuals with disabilities. Any obligations of individuals with disabilities must be based on other types of legal obligation, such as waiver or estoppel, with much higher thresholds before legal consequences can attach. Thus, analysis of the interactive process should focus on the employer's obligations. Those obligations may be affected by the reactions of the individual with disability, but that does not justify prejudice against the individual based on standards significantly lower than those for waiver and estoppel. The individual's reactions can be used to calibrate the reasonableness of the process followed by the employer; as an individual with a disability becomes progressively less able or willing to participate in the process, the employer's procedural obligations should diminish. The focus, however, should always be on the nature and extent of the employer's obligation; individuals with disabilities have no obligations to engage in the interactive process, other than the minimal ones of avoiding waiver or estoppel.

C. Substantive Reasonable Accommodation: Defining Reasonableness

The ADA requires more than procedure. It also imposes substantive obligations. After the procedures are completed, employers must provide accommodations and they must ignore the contributions of nonessential functions to productivity. The ADA's substantive obligations have an impact when they require employers to hire an individual with a disability even though they reasonably predict, after fulfilling procedural obligations, that the individual will cost more to employ or be less productive than another candidate. These are the ADA's hard preferences, which

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Home, Inc., 167 F.3d 1361, 1363-64 (11th Cir. 1999); Mole v. Buckhorn Rubber Prod., Inc., 165 F.3d 1212, 1217-18 (8th Cir. 1999); D'Amico v. City of New York, 132 F.3d 145, 151-52 (2d Cir. 1998); see also Bultemeyer v. Fort Wayne Cmty. Sch., 100 F.3d 1281, 1285 (7th Cir. 1996) (noting that "both parties bear responsibility" for engaging in the interactive process); 29 C.F.R. app. § 1630.9 ("It is the responsibility of the individual with a disability to inform the employer that an accommodation is needed.").

are an integral and undeniable part of the structure of the ADA. Defining their scope is the central problem of the Act, and a very difficult one.\textsuperscript{174} When must the extra cost of an accommodation be ignored? And when does it become significant enough to permit an employer to rely on it in making an adverse employment decision? When does a job function contribute so little to productivity that it is nonessential and must be ignored? And when does it contribute enough to permit the employer to base employment decisions on a candidate's ability to perform it? Courts and commentators have generally emphasized that these issues are very fact specific and that decision makers should be guided by "common sense."\textsuperscript{176} That is to say, they have not provided much guidance at all.\textsuperscript{176}

The ADA itself provides a promising, if cryptic, answer to this central problem: Reasonableness. Employers must provide (almost)\textsuperscript{177} all reasonable accommodations, but need not provide any unreasonable ones. Reasonableness is a ubiquitous and resonant word in American law,\textsuperscript{178} and yet the courts and commentators in ADA cases have treated it, curiously, as a free-standing and virtually standardless modifier.\textsuperscript{179} That is a mistake. The reach of

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\item \textsuperscript{174} Professors Karlan and Rutherglen have pointed out that the problem is difficult because its resolution depends on the interaction of four factors which can vary significantly from case to case: the individual's particular disability, the essential functions of the job, the possible accommodations that would enable the individual to do the job, and the burden the accommodations would impose on the employer. Karlan & Rutherglen, supra note 7, at 13.
\item \textsuperscript{175} See, e.g., Jovanovic v. In-Sink-Erator Div., 201 F.3d 894, 899-900 (7th Cir. 2000); Barber v. Nabors Drilling USA, Inc., 130 F.3d 702, 707 (5th Cir. 1997); Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131, 139 (2d Cir. 1995); see also Senator Tom Harkin, The Americans with Disabilities Act: Four Years Later – Commentary on Blanck, 79 IOWA L. REV. 935, 937 (1994) (commenting that the ADA "creates flexible, common sense standards designed to avoid undue hardship and to promote reasonable solutions").
\item \textsuperscript{176} See Lance Liebman, Too Much Information: Predictions of Employee Disease and the Fringe Benefit System, 1988 U. CHI. LEGAL F. 57, 81 (recognizing the lack of guidance and calling on the legal community to "bring ourselves to quantify or otherwise bound what we mean by reasonable accommodation").
\item \textsuperscript{177} The exception, of course, is that employers need not provide even reasonable accommodations if they impose an undue hardship. See supra Part IV.
\item \textsuperscript{178} Professor Fletcher, for example, has noted that the words "reasonable" and "reasonably" modify more than 100 different words in the Uniform Commercial Code, the Model Penal Code, and the Restatements. George P. Fletcher, The Right and the Reasonable, 98 HARV. L. REV. 949, 949 n.1 (1985). That, of course, is merely the tip of the proverbial iceberg.
\item \textsuperscript{179} Occasionally, a court or commentator will briefly allude to the fuller resonance of the term "reasonableness," but never in any depth and not yet in the ways suggested in this
the ADA’s accommodation duty can be better defined by calling on a deeper and more sophisticated conception of reasonableness.

Reasonableness as used in American law, especially tort law, carries with it a cluster of concepts which could help to refine the meaning of reasonable accommodation. First, reasonableness is a standard, not a rule. Compared to rules, standards give less ex ante guidance to parties, but avoid over- and under-inclusiveness problems.180 Standards contemplate a wide-ranging search for factors relevant to the determination at issue,181 while rules typically focus on one or a few factors. Several attempts have been made to make the ADA’s accommodation requirement more rule-like, for example by providing that only accommodations costing less than $500 need be made.182 But the ADA’s task of matching the myriad of individuals with varying disabilities with the most appropriate workplaces requires examination of a wide range of factors. These factors include cost as a critical component, but also include the benefit to the individual with a disability, the demands of the job, the structure of the workplace, and a host of other factors. The search for relevant factors should not be confined to the interests of the individual with a disability, the cost of the

Article. See Vande Zande v. Wis. Dep’t of Admin., 44 F.3d 538, 542-43 (7th Cir. 1995) (alluding to tort law, but rejecting the analogy); Karlan & Rutherglen, supra note 7, at 32 (noticing the torts analogy, but rejecting it because the ADA requires more than efficiency).


181. Fletcher, supra note 178, at 951-54.

accommodation, the burden on the employer, the reactions of co-employees or customers, or, indeed, to any defined set of considerations. Instead, the concept of reasonableness entails recognition that a wide range of interests are potentially at stake and that those interests may vary from case to case.\textsuperscript{183} Drawing on this element of reasonableness provides the proper context for ADA decision making. The decision maker should not focus unduly on any one set of interests, such as employer costs or the rights of individuals with disabilities, but instead should engage in a full and wide-ranging consideration of multiple, complex, and often conflicting interests.

Over time, one would hope that certain patterns will develop in the cases and that the reasonableness standard will become somewhat predictable or rule-like. Courts could hold, as a matter of law, that one type of accommodation is reasonable in nearly every situation, or that another type is unreasonable. As examples in this direction, Judge Posner has held as a matter of law that working at home would be a reasonable accommodation required by the ADA only in “very extraordinary” cases,\textsuperscript{184} and the Supreme Court has held that seniority almost always trumps reasonable accommodation claims.\textsuperscript{185} In doing so, these courts fulfill the vision of Justice Holmes, who predicted that as courts gain experience in a particular area the amorphous reasonableness standard would give way to specific rules.\textsuperscript{186} Whether reasonableness standards evolve in this way is debatable. Justice Holmes’ most infamous torts rule as a judge was his requirement that cars “stop, look, and listen” at all railroad crossings.\textsuperscript{187} The rule was sufficiently clear but called for unreasonable behavior in many situations. Justice Cardozo gutted the rule a few years later, emphasizing “the need for caution

\begin{footnotes}
\item[183] The interests are likely to vary across cases because of the extreme heterogeneity both of individuals with disabilities and of workplaces. See Kaplow, supra note 180, at 563-64 (arguing that heterogeneity supports the use of a standard rather than a rule).
\item[184] Vande Zande, 44 F.3d at 545.
\item[186] O. W. HOLMES, JR., THE COMMON LAW 111 (1881) (“[T]he featureless generality, that the defendant was bound to use such care as a prudent man would do under the circumstances, ought to be continually giving place to the specific one, that he was bound to use this or that precaution under these or those circumstances.”).
\end{footnotes}
in framing standards of behavior that amount to rules of law."\textsuperscript{188} The current draft of the Third Restatement follows Cardozo's logic, suggesting that patterns that seem to recur and to call for a consistent rule often break down on closer inspection.\textsuperscript{189} Thus, given the diversity of disabilities and of workplaces in this country, one should not expect much of a movement towards rules.

A second concept of reasonableness is its strong notion of duty.\textsuperscript{190} People are reasonable when they fulfill their duty of care towards others, and unreasonable when they do not. The ADA establishes an analogous duty of extra care towards individuals with disabilities. Both of these duties—tort law's general duty of care and the ADA's more specific duty of extra care—are difficult to specify in practice because of the large variety of circumstances in which they can arise. Thus, although the mere existence of a duty does not specify its extent, tort law's nuanced solutions to the problem of defining the scope of the duty of care can help in addressing the closely analogous problem under the ADA.\textsuperscript{191}

Third, and most importantly, reasonableness implies a perspective and methodology for engaging in this wide-ranging inquiry to determine the scope of duty: One must act as a reasonable person would in similar circumstances. The reasonable person (RP) is an attractive construct in disability law for the same reasons tort law was attracted to it. RP is objective. RP directs the decision maker's

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189. \textsc{Restatement (Third) of Torts: General Principles} \S 5, cmt. d (Discussion Draft, 1999) ("What looks at first to be a constant or recurring issue of conduct in which many parties engage may reveal on closer inspection many variables that can best be considered on a case-by-case basis.").
190. Duty has been a controversial subject in torts scholarship, but it remains an important concept in the courts and in treatises. For an excellent review of the controversy, see John C.P. Goldberg & Benjamin C. Zipursky, \textit{The Moral of MacPherson}, 146 U. Pa. L. Rev. 1733 (1998) (arguing that the academic critique of duty is unconvincing and that the concept should be reinvigorated in tort law). See also Gregory C. Keating, \textit{Reasonableness and Rationality in Negligence Theory}, 48 Stan. L. Rev. 311 (1996) (developing a social contract conception of the duty of care). Regardless of its status in tort law, however, it is valuable here for the contribution it can make in disability law.
191. Recent scholarship on duty in tort law affirms the analogy between the two types of duty. Professors Goldberg and Zipursky have identified a conception of duty that emphasizes the relationship-sensitive and noninstrumental nature of tort duty. Goldberg & Zipursky, \textit{supra} note 190, at 1825-42. Similarly, duty under the ADA is strongly relationship-sensitive (responsive to the particular circumstances of both the individual with a disability and of the employer) and contains significant noninstrumental elements.
\end{flushleft}
attention away from the passions of the stakeholders to the dispute, which are often strong, conflicting, and incommensurable, and toward a neutral perspective. RP balances interests as an average member of the community would. When RP speaks, community standards are set. An individual case is no longer only about the particular circumstances of that case, which are infinitely variable, but also about the standard of conduct which the community demands. The essence of the reasonableness command is that the actor treat the interests of others as seriously as his own. The costs and benefits of all people in the community should be valued equally.

Although tort law's reasonable person framework helps frame the scope of the ADA's reasonable accommodation requirement, the real question is how far to push it. We proceed in two steps. We begin by exploring how the narrow, cost-benefit approach (often called the BPL analysis) would apply to the ADA. We then expand the approach by considering how an avoiding dependency, external benefits analysis would be added to the mix.

1. BPL Analysis

In tort law, an important strain of scholarship envisions the reasonable person as one who takes precautions if and only if the burden (B) of doing so is less than the cost of accidents that would occur if the precautions were not taken (L), discounted by the probability (P) of an accident occurring. A person who does not take precautions when \( B < P \times L \) is unreasonable and therefore will be found negligent and liable for the resulting accidents. But a person is reasonable in failing to take an overly costly precaution (when \( B > P \times L \)) and will not be held liable even when an accident occurs from the failure to take the precaution. For example, suppose a precaution would burden the actor $200 and reduce the victim's expected accident costs by $1000. Tort law will declare the actor who failed to take these precautions to be negligent. But if the precaution burden is $2000 and the expected accident reduction

$1000, the failure to take the precaution is reasonable. Under this approach, negligence law forces the actor to weigh the costs and benefits of his actions, including the harm he inflicts on others. By doing so, tort law induces the actor to take all cost-justified safety precautions, even when they benefit strangers. If the costs outweigh the benefits, however, the actor injures without legal liability, and the victim bears the costs of these accidents not worth preventing.

How would the BPL approach apply to reasonable accommodation of the disabled? The reviewing court would compare the burden of the accommodation to the employer (B) against the gains to the disabled worker (L), discounted by the likelihood of the accommodation achieving its goals (P). Thus, if the accommodation would cost the employer $200 and have an eighty percent chance of benefitting the person with a disability by $1000, the BPL analogy would label the accommodation reasonable and require it. On the other hand, if the accommodation would cost the employer $2000 and have an expected benefit of $800, the accommodation is unreasonable and need not be undertaken.

One problem is that the "P" part of the BPL analogy is imperfect, because one rarely thinks of an accommodation as having a risk of not working. This is only a minor problem, however. The torts BPL approach can be easily generalized to a cost-benefit approach that compares the burden of the accommodation to the gains to the disabled worker. Uncertainty of either cost or benefit can be put into the balance when appropriate.

A larger problem is finding a common metric to compare burdens and gains. The costs to the employer are largely financial, and usually can be readily quantified. An easy case would be the cost of constructing a ramp for a wheelchair. But one must also consider indirect burdens and benefits, which are trickier to quantify. For example, the ramp may slow deliveries into the building, leading to reduced sales. Or it may provide access to a new class of customers who need the ramp. Even here, however, conceptually the ultimate measure of burden is the net reduction of profits, both direct and indirect, of making the accommodation.

Quantifying the gains to the worker is harder. Much of the gain, of course, is financial. If the accommodation allows the disabled worker to obtain a job that pays $30,000, whereas without the accommodation the highest paying job he could secure pays
$20,000, the worker gains $10,000. Comparing worker financial gains to employer burdens is straightforward enough. The less tangible gains to the workers arising from a greater sense of worth, productivity, and self-fulfillment that a good job can bring are more difficult to quantify. How should these be measured? The normal economic approach is to ask (at least conceptually) how much the individual would be willing to pay for the gains of the better job, or to ask how little the individual with the better job would accept to agree to take the lesser job (which may include unemployment). The willingness-to-pay answer may differ significantly from willingness-to-accept, and when it does the cost-benefit analysis can be ambiguous. But one should not demand of the BPL analysis an exactness of figures. For example, Judge Posner, when discussing the reasonable person analogy to disability law in the well-known Vande Zande case, emphasized that the approach only calls for rough comparisons, not exact dollars. Judge Posner wrote:

It would not follow [from employing the tort reasonable person analogy] that the costs and benefits of altering a workplace to enable a disabled person to work would always have to be quantified, or even that an accommodation would have to be deemed unreasonable if the cost exceeded the benefit however slightly. But, at the very least, the cost could not be disproportionate to the benefit.... [An employer] would not be required to expend enormous sums in order to bring about a trivial improvement in the life of a disabled employee.\textsuperscript{195}

Most problematic for the torts analogy is that the torts vision of controlling externalities works best when the actor and victim are strangers who are unable to bargain over the amount of safety the actor should provide. The traffic accident is the paradigmatic tort example of accidents between strangers. Of course, much of tort law involves claims between persons in a contractual relationship, the most prominent examples being products liability and medical

\textsuperscript{193} For a recent discussion of whether to employ willingness-to-pay or willingness-to-accept in the context of conducting a cost-benefit analysis for an environmental project, see Richard O. Zerbe, Jr. & Linda J. Graham, The Role of Rights in Benefit Cost Methodology: The Example of Salmon and Hydroelectric Dams, 74 WASH. L. REV. 763 (1999).

\textsuperscript{194} Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 542-43 (7th Cir. 1995).

\textsuperscript{195} Id. at 542-43.
malpractice. Economic scholars have long puzzled over the appropriate role of tort law in these contractual settings. The employer-employee relationship is likewise contractual, complicating the torts analogy.

Because employers and workers are not strangers unable to bargain, the puzzle is why a mandatory or coercive disability law is needed at all. If the goal of the BPL interpretation of the ADA is to force employers to adopt all cost-effective accommodations that benefit the worker more than they cost the employers, employers should be willing to do this without legal compulsion. All that is needed is that the worker be willing to pay for the accommodation, which, by definition, she is willing to do if the accommodation is reasonable in BPL terms. For example, if the employer’s cost of accommodation is $500 and the gain to the disabled worker is $5000, measured by the worker’s willingness-to-pay or willingness-to-accept, both the employer and the worker benefit by making the accommodation and reducing the disabled worker’s wage by any amount between $500 and $5000. The ADA is not needed for the parties to reach this agreement, because it benefits both sides.

One answer to this puzzle could be that workers cannot accept lower wages. The ADA is a response to other rigidities in the labor market which make it illegal or impractical for the employee to accept lower wages. For example, minimum wage laws make it impossible for some disabled workers to accept lower wages. So could an interpretation of the ADA which made wage differences between disabled and nondisabled workers illegal. Equally important are the norms prevalent in many industries preventing wage differences for workers in the same job category. If this is the case, it may be that removing the barriers to more flexible wages is a better policy response to the problem than a mandatory accommodation requirement.

In any event, the inflexible wage answer cannot cover all situations. The BPL analysis seems to be missing something.

196. See, e.g., EPSTEIN, supra note 40, at 40.
2. Avoiding-Dependence Analysis

One of the presumed major gains from the ADA is that disabled persons will become productive members of the workforce, reducing the need for costly social welfare programs. As economists estimate that the marginal excess burden of raising additional tax revenue is as high as fifty-six percent, raising taxes to fund social welfare programs can be incredibly wasteful if the same goals can be accomplished through other means. Indeed, the preamble to the Americans with Disabilities Act emphasizes that “unfair and unnecessary discrimination [against] people with disabilities ... costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.”

When an employer accommodates a disabled person, under this vision, not only do the employer and disabled person benefit, but the government fisc is preserved as well. Should these gains count in the reasonable accommodation calculus? The argument that these gains should count is that the ADA simply forces employers to recognize a positive externality of their decision to accommodate. Not only does the worker gain, but society gains as well.

Consider the following example. Suppose an accommodation would cost $2000 per year. The disabled person currently receives...


199. ADA § 2(a) (9), 42 U.S.C. § 12101(a) (9) (2000). Savings in welfare costs were also a recurrent theme during congressional debates on the ADA. See 136 CONG. REC. 17,369 (1990) (statement of Sen. Durenberger) (stating that the U.S. government cannot afford to pay welfare benefits to people who can and want to work); 136 CONG. REC. 17,294 (1990) (statement of Rep. Oberstar) (contending that society pays the costs when the disabled are not permitted to work and noting that the ADA will produce three dollars in benefits for every one dollar expended); 136 CONG. REC. 11,455 (1990) (statement of Rep. Wolpe) (suggesting that forced dependency of individuals with disabilities has resulted in escalating economic burdens for government of about $300 billion annually); 136 CONG. REC. 11,447 (1990) (statement of Rep. Hawkins) (arguing that ADA will permit individuals with disabilities to be taxpayers and help reduce federal deficit, instead of being dependent on other taxpayers); 135 CONG. REC. 19,808 (1989) (statement of Sen. Kennedy) (remarking that welfare costs for disabled persons were $169 billion and suggesting that the ADA will permit them to work and pay taxes rather than receive benefits).
Social Security disability benefits of $10,000 per year. After the accommodation, the worker could increase employer revenues by $11,000 per year. Is it reasonable to incur this accommodation? In the absence of legal compulsion, a profit maximizing employer will not make the accommodation. The worker presumably would not accept wages of less than $10,000, leaving only $1000 of gross profit from the hire, which is not enough for the employer to cover the accommodation costs. Overall, however, society prefers the accommodation. Assuming a marginal excess burden of thirty percent in the United States, society saves $3000 in losses, because the government no longer needs to raise $10,000 in taxes to support our hypothetical employee. Incurring a $2000 accommodation expense so the disabled person can produce $11,000 is cheaper than incurring a $3000 tax distortion loss whereby the worker produces nothing.

It is important to remember that the $2000 cost in this example is per year. These costs are easy to evaluate for some accommodations, such as readers for the blind. When evaluating a one-time, fixed-cost accommodation, such as a wheelchair ramp, however, an employer must divide its cost by the number of years the employee is expected to work. In addition, some fixed-cost accommodations may benefit other disabled workers, thus saving society even more. Although this introduces more uncertainty into the calculations, the basic point is that society would like the employer in our example to spend considerably more than $2000 if the accommodation benefits several individuals with disabilities for several years.

Now let us use this general framework, but permit the cost of the required accommodation to vary. This will enable us to think about the possible scope of "reasonable" accommodations. At one level, the required accommodations might fall into a range which would permit a wage meeting two conditions: (1) the employee would be willing to work at that wage, and (2) the employer could profit from it. In our example, the employee would be willing to work for any

200. In December 2000, the average monthly SSI/SSDI benefit was $786.40, which is equivalent to $9,436.80 per year. See SOCIAL SECURITY ADMINISTRATION, ANNUAL STATISTICAL REPORT ON THE SOCIAL SECURITY DISABILITY INSURANCE PROGRAM, 2000 tbl. 9, available at http://www.ssa.gov/statistics/di_ear/2000/sect1b.html#t9 (last visited Feb. 6, 2003).
amount in excess of $10,000 assuming, unrealistically, that the psychic costs of working over leisure exactly balance the psychic gains from productive work. The employer will still obtain a profit at any wage below $11,000. Therefore any accommodation costing under $1000 would fall into this range.

Accommodations in this range would clearly be “reasonable.” But does the ADA have any effect in this situation? Without more, the employer would be willing to hire this individual even without the ADA. Three factors indicate, despite this, the ADA may have some effect. First, without the ADA, employers may not fully consider individuals with disabilities. The Act requires employers to take a close look at individuals with disabilities and may cause employers to realize that happy outcomes like this are possible, when they would not otherwise. Second, this analysis ignores the possibility that employers are constrained in the number of workers they can hire. If an employer can hire only one worker, for example, and another, nondisabled employee were present who would also be willing to work for $10,001, the employer would prefer her to our individual with a disability who is willing to work for $10,001, but who, however, requires an accommodation costing more than $1. The ADA, however, requires employers to ignore the costs of accommodation in considering individuals with disabilities. Therefore, the ADA requires the employer to treat these two employees equally; without the ADA, the employer would favor the nondisabled applicant. Finally, the ADA prohibits wage discrimination. If nondisabled employees were only willing to work at this job for $11,000, the employer would be required to pay the individual with a disability $11,000, too. The $10,000 figure is useful for thinking about the scope of the accommodation duty and the willingness of the individual with a disability to work, but it has little relation to the market wage for the job. To the extent the market wage for the job is higher, the employer would have to pay the individual with a disability that wage and pay for the costs of accommodation.

201. See supra Part III.A.
202. We consider in the next few paragraphs whether this might require the employer to incur total costs (wages plus accommodation costs) above the employer's breakeven point of $10,000.
Now let us consider another range of possible accommodation costs. In our example, society would benefit even if accommodation costs were as high as $2999. Without accommodation, the government must raise $10,000 in taxes to pay the disability benefits. The net is -$3000, assuming a marginal excess burden of thirty percent. With an accommodation of $2999, the cost to provide employment to the individual with a disability might be $11,000 in wages plus an amount up to $2999 in accommodation costs (for a total of $13,999), but society receives $11,000 of productivity in return. The net is "only" -$2999, which is better than the no-accommodation net. Viewed in this way, the ceiling on "reasonable" accommodations would be the welfare loss that society incurs by raising taxes to pay disability benefits. Thus, this is one instance where it is better to impose mandates on employers than to provide government benefits. Further, the costs of mandates and government benefits come out of different pockets.\(^{203}\)

Reasonable accommodation requirements then can be seen as forcing the employer to internalize the dependency costs that society would otherwise feel compelled to provide. This implies both an obligation at the lower end of accommodation costs and a ceiling on the amount of the substantive accommodation required.

Calling on tort law to calibrate the reach of reasonable accommodation is obviously not without problems. Being problem free, however, is not the appropriate yardstick. Instead, the yardstick should be: How does the avoiding-dependence approach compare with the current analysis that rejects both substantive standards themselves and any analytical framework for setting them and emphasizes instead case-by-case decisions and the exercise of common sense? The current approach has led to many complaints that judges and juries require much too little of employers. One reason for that may be the standardless approach to deciding the scope of the duty of reasonable accommodation and judicial fears that, because there are no apparent limits to the duty, any generosity will result in a slippery slope towards onerous burdens. An approach to the accommodation duty which relies on traditional tort notions and which incorporates a restraint on the

\(^{203}\) See generally Summers, supra note 198, at 177 (arguing that mandated benefits are similar to publicly financed programs, but offer employers and employees greater choice).
scope of the duty may make the courts more willing to expand the
duty of reasonable accommodation. Ironically, individuals with
disabilities may be treated better under an approach to reasonable
accommodation which contains explicit limitations than they are
under an approach with no limits. Even if that is not true, the
approach provides standards and evidentiary possibilities for
shaping the contours of the duty and, consequently, for challenging
stingy exercises of discretion. Under the current, virtually
standardless approach, courts and juries are given virtually free
rein. In sum, in comparison with the current standardless approach
to reasonable accommodation, the tort-based external benefits
approach stands up quite well.

D. Paying for Accommodations: Expanding the Reach of the ADA

Substantive reasonable accommodation and undue hardship
establish the limits of employer responsibility under the ADA. The
employer must make accommodations up to the point of
reasonableness (or, if lower, up to the point of undue hardship). 204
An employer does not need to provide any accommodation to an
individual with a disability who requires greater than reasonable
accommodations to perform the essential functions of a job. If an
extra-reasonable accommodation is required, an employer is free to
take all the costs of accommodation into account in making
employment decisions and to reject the individual because of them. 205

204. Undue hardship can have one of three possible relationships with reasonable
accommodation. It can be higher, lower, or the same. Undue hardship is relevant in a case
only if its threshold is lower than the threshold of reasonable accommodation. In the rest of
this section, we assume that the level of reasonable accommodation is lower than the level
of undue hardship. This permits us to refer only to reasonable accommodation rather than
to both concepts in our discussion. We do this only for ease of explication; the actual
threshold is the lower of reasonable accommodation or undue hardship.

205. The razor's edge nature of the current view of reasonable accommodation is
problematic. If the accommodation required is substantial, but reasonable by a very close
margin, the employer must ignore the cost of accommodation in making a decision. On the
other hand, if the accommodation is greater by only a very tiny amount, but enough to cross
the razor's edge of reasonableness, the employer can consider all of the costs of
accommodation in making an employment decision, including the majority of the costs that
are reasonable.
This feature of the ADA establishes a large class of individuals with disabilities who are not protected by the Act: individuals whose disabilities prevent them from performing the essential functions of a job without extra-reasonable accommodations.\footnote{206} Given the diversity of both disabilities and jobs, however, it is likely that even individuals who are unprotected with respect to some jobs because the costs of accommodation are too high would remain under the umbrella of the Act with respect to other jobs. An individual with a severe mobility limitation, for example, may be unprotected when she applies for a construction job and yet fully protected when she applies for a store manager position.

This feature of the Act may cause some individuals with disabilities to settle for less desirable jobs which require lesser accommodations. Choosing to pursue a desirable job with high accommodation costs presents the risk that the individual will fall on the wrong side of the reasonableness divide and be unprotected by the Act. Many individuals with disabilities may settle for the safer choice of a less desirable job with lower accommodation costs that are quite clearly reasonable.\footnote{207} This phenomenon is

\footnote{206. This lack of protection is not excused by the existence of other programs which may provide assistance to individuals requiring extra-reasonable accommodations, such as Social Security Disability Insurance, which provides benefits to disabled workers, 42 U.S.C. § 423 (2000), and Supplemental Security Income, which provides benefits to the disabled poor. \textit{Id.} §§ 1381-1383. The ADA and these other disability benefit programs do not protect two wholly separate classes of individuals. Instead, some individuals eligible for disability benefits from the federal programs may also deserve protection under the ADA. \textit{Cleveland v. Policy Mgmt. Sys. Corp.}, 526 U.S. 795, 805 (1999). For an insightful discussion, see Matthew Diller, \textit{Dissonant Disability Policies: The Tensions Between the Americans With Disabilities Act and Federal Disability Benefit Programs}, 76 TEX. L. REV. 1003 (1998).}

\footnote{207. We do not imply here that there is always a correlation between desirable jobs and high accommodation costs. In many instances, the most highly desirable jobs may require the least costly accommodations. When that occurs, obviously, the individual with a disability will choose to pursue the highly desirable/low accommodation cost job. The point here is only that \textit{when a choice exists} between a desirable job with high costs and a less desirable job with lower costs, the possibility that the Act may provide no protection if the individual pursues the desirable job encourages individuals with disabilities to make the safe choice.

If this occurs, it supports an alternative interpretation of the evidence that accommodation costs are low. It would mean that the studies tell us little about the true cost of accommodating disabilities or the scope of the accommodation duty. The studies may reflect (1) requests for full accommodations, which are inexpensive, or (2) requests for less generous accommodations than the law requires. It is impossible to distinguish definitively between these two alternatives from the studies themselves. Nevertheless, the low cost of accommodations in the studies at least suggests that individuals with disabilities are
problematic because it tends to sort individuals with disabilities into jobs which require low accommodation costs, rather than into jobs which would best utilize the individual's knowledge and skills. Combined with the similar incentive employers have to select individuals with low accommodation costs, this threatens the ADA's goal of providing individuals with disabilities with a full and fair opportunity in the labor market. Full accommodation would sort individuals with disabilities into better jobs.

The ADA should be interpreted to encourage individuals with disabilities to seek the best jobs suitable for them with full or even more-than-full accommodation. This could be accomplished by a rule which permitted individuals with disabilities to pay for some of their own accommodation costs. Employers are required by the ADA to pay for all reasonable accommodations. But to the extent accommodations necessary to enable the individual to perform the essential functions of the job exceed that level, the individual requesting less than would be required to place them in their most desirable job.

208. See supra Part III.A.

209. This interpretation of the Act finds direct support in the legislative history of the ADA:

[T]he Committee wishes to make it clear that even if there is a determination that a particular reasonable accommodation will result in an undue hardship, the 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.


Curiously, despite this support in the legislative history, the EEOC's regulations only vaguely hint at the possibility that individuals with disabilities may pay for part of the cost of their own accommodations. 29 C.F.R. app. § 1630.2(p)(2)(i) (2002) (noting that undue hardship should be determined based on the "net cost of the accommodation ... taking into consideration the availability of tax credits and deductions, and/or outside funding") (emphasis added). A few commentators have alluded to the possibility. See G. William Davenport, The Americans with Disabilities Act: An Appraisal of the Major Employment-Related Compliance and Litigation Issues, 43 ALA. L. REV. 307, 326 (1992) (stating that employers must permit an individual with a disability to pay for the undue hardship portion of accommodation cost, but close judicial scrutiny should be expected); Liebman, supra note 176, at 60-62 (describing how laws are restricting employer hiring decisions when dealing with the disabled).

210. This requirement would still apply under the proposed rule. That is, an employer would violate the Act if it required an individual with a disability to pay for any of the reasonable portion of accommodations. The proposal permits individuals to pay only for portions of the accommodation cost which are extra-reasonable.
herself should be permitted to pay for the extra accommodations.211 This rule would extend the scope of the ADA's protections to individuals who would otherwise be unprotected and, even within the currently protected class, it would encourage individuals with disabilities to seek the full set of accommodations to which they are entitled.

The rule would extend the scope of the ADA by providing protection for people who require extra-reasonable accommodations to perform a job. As indicated above, currently individuals with disabilities who require extra-reasonable accommodations are not protected by the Act.212 Under this rule, however, an individual could agree to pay for the cost of accommodations in excess of the amount it is reasonable for the employer to bear. If the individual with a disability can perform the essential functions of the job with the extra accommodations, the rule would permit an individual to bring herself back within the protection of the ADA. The individual could perform the essential functions of the job (with both the employer's accommodation and the extra accommodation provided by the individual herself) and the employer would be subject only to a reasonable accommodation. The employer would violate the Act if it did not make the reasonable accommodation.213

The rule would also encourage individuals with disabilities to seek the full set of accommodations to which they are entitled. Assume, for example, an individual with a disability who is presented with two jobs, one quite desirable, but requiring an expensive accommodation, and another less desirable, but requiring an inexpensive and clearly reasonable accommodation. The argument above was that the individual may shy away from the first job because of the risk she would end up with nothing if the accommodation is determined to be extra-reasonable. The

211. The form of the payment should not matter. Thus, the individual with a disability should be able to pay by making a direct payment to the employer (or the entity providing the accommodation) or by accepting lower wages or benefits.

212. See supra note 177-79 and accompanying text.

213. Note that, although the employer is never subject to more than the costs of a reasonable accommodation, the rule would require employers to expend more on accommodations. Without the rule, the employer would have no ADA obligation to individuals who require extra-reasonable accommodations. With the rule, the employer would have an ADA obligation which is equal to the maximum accommodation which is reasonable in the circumstances.
individual may opt instead for the less desirable job with lower risk. The option of paying for the portion of the accommodation costs above the reasonable level would allow the individual to pursue the desirable job at lower risk. She could agree to pay the potentially extra-reasonable portion of the accommodation costs and thus ensure access to the better job. At a cost that the individual with a disability determines to be reasonable (otherwise she would not pay it and opt instead for the less desirable job), the rule permits her to apply for a more desirable job that maximizes the reasonable accommodation the employer must make.

The proposed rule would be unobjectionable, albeit less beneficial, in a world with perfect information. Assume that the precise cost of accommodation and the precise dividing line between reasonable and extra-reasonable accommodations are known. Under current law, an individual with a disability who requires an accommodation on the extra-reasonable side of the dividing line is unprotected by the ADA. Under the proposed view, that individual would have the

214. An individual with a disability will only be willing to pay for extra-reasonable accommodations if the expected benefits from the better job justify her investment in extra-reasonable accommodation costs. Assume, for example, that the less desirable and more desirable jobs pay $100 and $200, respectively. Assume also that the individual with a disability estimates that, without any contribution by her, there is only a .2 probability that the accommodations she needs will be determined to be reasonable. Under the old view, she is unlikely to seek the better job because the less desirable job pays $100, whereas the expected benefits of the better job are only $40 (.2 * $200). Now consider three scenarios. First, assume that a contribution of extra-reasonable costs of $80 increases the probability of getting the more desirable job to 1.0. Now the expected benefits of the more desirable job are $200 (1.0 * $200), whereas the accommodation costs are $80, producing a net expected benefit of $120. Because this exceeds the benefit of the less desirable job, the individual with a disability will agree to pay the extra-reasonable accommodation costs. Second, assume that the extra-reasonable costs required to enable the individual to perform the job are $120, rather than $80. Now the net expected benefit of the more desirable job is only $80 ($200 minus $120), which is less than the expected benefits of the "less desirable" job. The individual would be unwilling to pay the extra-reasonable accommodation costs. Third, assume that the extra-reasonable accommodation costs are $80, but that they only increase the probability of getting the more desirable job to .6. Now the expected benefits of the more desirable job are 120 (.6 * $200) and the accommodation costs are $80, producing a net expected benefit of $40. Once again, this is less than the expected benefits of the other job, so the individual would be unwilling to pay the extra costs.

215. In this circumstance, once again, the employer must pay more in accommodation costs under the proposed rule. Without the rule, the employer pays only the low accommodation cost associated with the less desirable job. With the rule, the employer must pay an amount equal to the maximum reasonable accommodation required by the law for the more desirable job.
option of paying for the cost of the extra-reasonable accommodations, the employer would be required to pay the reasonable costs, and the individual would be entitled to ADA protection. The only effect of the proposed rule would be that it better fulfills the ADA's goal of providing full and fair opportunities to individuals with disabilities. More of them would be able to take advantage of the Act's requirement that employers pay the cost of reasonable accommodations.

The proposed rule would be less beneficial in a world with perfect information because its other function—encouraging individuals to seek full accommodations—would be unnecessary. In the real world, individuals with disabilities often do not seek the full accommodations because they are uncertain about the reach of the accommodation duty. That, however, would not be a problem in a perfect information world; individuals with disabilities would know the precise extent of the employer's responsibility, as would the employer. The risk of losing would not inhibit the individual's enforcement of her rights, because there would be no risk. On the other hand, the individual would never have to sue to enforce her rights because, by assumption, the employer would also know the extent of its obligations. The proposed rule would be less beneficial

216. Analysis of the willingness of individuals with disabilities to pay for extra-reasonable accommodation costs is simplified in a world with perfect information because the probabilistic element is removed. See supra note 207. Individuals with disabilities would still only agree to pay for extra-reasonable accommodations to the extent their cost was less than the extra benefits of the job sought over the next best job in the economy, but they would know precisely the value of both jobs, the cost of accommodation, and the maximum amount of the employer's reasonable accommodation obligation. For example, assume that an individual with a disability could obtain a job paying $100, but is interested in a better job paying $120 for which she needs an accommodation. Assume also that the reasonable level of accommodation is $10. Under the old view, an individual with a disability who needed an accommodation of $11 or more would be unprotected by the Act; she would have to fall back on the job paying $100. Under the new view, an individual with a disability requiring an accommodation up to $30 would have access to the better job. An individual requiring an accommodation of $30 would be willing to pay $20 for extra-reasonable accommodations. The employer would then be required to pay the reasonable share of $10. The individual paying $20 for extra-reasonable accommodations would end up with a net income exactly equal to that of the lower-paying job; that is, her income would be $120 minus the $20 she paid herself for the extra-reasonable accommodations. The individual would be willing to pay amounts less than $20 for extra-reasonable accommodations because then she would come out ahead compared to the lower-paying job, but she would be unwilling to pay anything more than $20.
if information were perfect, but only because the assumption removes one of the problems addressed by the rule.

In the real world, one fear about the proposed rule is that, given the opening, employers may attempt to shift some of the costs of reasonable accommodations to individuals with disabilities. In the real world, the precise boundary between reasonable and extra-reasonable accommodation costs is not clear. Employers may attempt to exploit this uncertainty and require individuals with disabilities to pay more than only extra-reasonable costs. One response to this concern is that employers who do this are violating the ADA. Under both the current view of the Act and the proposed rule, employers must provide all reasonable accommodations and must ignore their cost in considering individuals with disabilities. An employer who attempts to shift its responsibilities to individuals with disabilities risks violating the Act.

Despite this legal prohibition, it is nevertheless possible that some employers may use the new rule to shift some reasonable costs to individuals with disabilities. If that occurs, that adverse outcome must be weighed against the possible positive outcomes of the proposed rule. As indicated, the likely benefits of the proposed rule will flow to individuals who are currently not protected by the Act because they require extra-reasonable accommodations and to individuals who are more likely to seek (and obtain) fuller accommodations than they would without the rule. These benefits are likely to be substantial and, of equal importance, they are directed at a needy subset of individuals with disabilities, those that require extra-reasonable accommodations and those that require (and deserve) more accommodations than they are currently receiving. In all probability, these benefits would exceed the costs of employers illegally shifting some of the reasonable portion of the accommodation burden.

This proposal for expanding the reach of the duty of reasonable accommodation is analogous to liberal proposals to ease the equal pay requirement under the sex discrimination laws. As there, the

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217. Once again, the studies showing that the accommodations currently being provided by employers are inexpensive supports the claim that individuals with disabilities are not seeking the full extent of the accommodations required by the Act. See supra note 207 and accompanying text.

218. See McCaffery, supra note 25, at 655-56; see also Robert Cooter, Market Affirmative
proposal here would expand opportunities by making it less possible for firms to refuse to hire individuals with disabilities because of the greater cost of employing them. Employers remain subject to all of the other requirements of the Act: They must engage in an interactive process, pay all the costs of reasonable accommodation, ignore those costs in making employment decisions, and so on. The new rule would simply remove another significant barrier to full workplace participation by individuals with disabilities: If they require extra-reasonable accommodations and they are willing to pay for those extra costs, the employer could no longer refuse to hire them because of the extra costs.

CONCLUSION

Although the ADA borrowed heavily from Title VII, our central claim is that the ADA's requirements extend considerably beyond those of the earlier statute. Under current Title VII law, the employer defines the job as it wishes; Title VII merely insists that workers and applicants for those jobs be treated without regard to race or sex. The ADA goes beyond Title VII by requiring employers to restructure the jobs themselves.

For example, consider again the stylized example we presented earlier of the job lifting 80-pound sacks. As long as the job is structured to require the lifting, Title VII currently does little to protect against the disparate impact that the lifting requirement has against women. Title VII questions only the test and its relation to the job as defined by the employer. Title VII does not question the employer's job description itself. This is not an isolated problem. Many jobs in the economy are not structured in women-friendly ways but, once again, that is not a problem addressed by Title VII. Title VII does not obligate employers to restructure jobs to allow women to breastfeed their babies. It does not require scheduling to make it easier for parents to attend their children's school activities. It does little, and may inhibit, efforts to accommodate pregnancy. It does not require breaking up those 80-pound sacks into 20- or 40-pound sacks.

The ADA, in sharp contrast, does demand that employers restructure jobs to accommodate individuals with disabilities, and asks courts to scrutinize the process of restructuring. Once the ADA's demand becomes more familiar, we suspect it will filter back into Title VII, and perhaps it should. After all, if employers must accommodate individuals with disabilities, why not women?

The possibility of this type of feedback heightens the need for careful thought about the scope and limits of reasonable accommodation. Reasonable accommodation is important at the moment because it affects the lives and opportunities of individuals with disabilities, but we predict the concept will have much broader application in the future. Before long, reasonable accommodation will escape the boundaries of disability law and shift our understanding of the entire constellation of discrimination law.