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DISABILITIES, DISCRIMINATION, AND REASONABLE ACCOMMODATION

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"Less equipped psychologically to 'stay the course' in the brawling arenas of business, commerce, industry and the professions, women are physically unequipped to compete in the worlds of athletics and arms."

Patrick Buchanan[1]

"I truly believe that [black baseball players] may not have some of the necessities to be, let's say, a field manager or perhaps a general manager. . . . [A] third of the [Los Angeles Dodgers] players are black. That might be a pretty good number, and deservedly so, because they're outstanding athletes. They are gifted with great musculature and various other things. They're fleet of foot . . . . Now as far as having the background to become club presidents, or presidents of a bank, I don't know."

Al Campanis[2]

The term "disability" means, with respect to an individual . . . a physical or mental impairment that substantially limits one or more of the major life activities of such individual . . . [or] being regarded as having such an impairment.

The Americans with Disabilities Act[3]

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1. *Many Feel Buchanan's Bite*, CHI. SUN-TIMES, Feb. 25, 1996, at 24 (quoting a Buchanan column from 1983).

2. Thomas Rogers, *Some Answers No One Expected*, N.Y. TIMES, Apr. 8, 1987, at B10 (quoting Apr. 6, 1987 *Nightline* interview with then-Los Angeles Dodgers Vice President for Player Personnel).

3. § 3(2), 42 U.S.C. § 12,102(2) (1994).

INTRODUCTION

Should women or African-Americans claim they are victims of discrimination on the basis of disability—because they are regarded as being physically or mentally impaired in the performance of major life activities—rather than on the basis of sex or race? At first, the question seems insulting, suggesting, as it does, that there is something aberrant or defective about not being male or white.[4] Or perhaps the question is merely pointless: if federal civil rights laws broadly prohibit discrimination on the basis of race, sex, religion, national origin, age, and disability—as they do—then what difference does it make how we categorize forbidden conduct?

But how the law defines discrimination makes a big difference in the kinds of remedies it provides. The Americans With Disabilities Act (ADA),[5] the newest comprehensive federal antidiscrimination statute, offers a fundamentally different approach to—and a fundamentally different remedy for—invidious discrimination than prior legal regimes. The older statutes generally prohibit discrimination in employment on other grounds: Title VII of the Civil Rights Act of 1964 (Title VII)[6] on the basis of race, national origin, sex and religion; the Age Discrimination in Employment Act of 1967 (ADEA)[7] on the basis of age. In language that tracks the earlier language of Title VII and the ADEA, the ADA forbids employers from taking an individual's disability into account by "limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee."[8] But unlike Title VII, the ADA also requires em-

4. *See, e.g.*, General Elec. Co. v. Gilbert, 429 U.S. 125, 136 (1976) (discussing whether pregnancy should be viewed as a disease or disabling condition); Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 69–74 (1995) (discussing how "feminine" women are devalued in the employment arena for deviating from expected masculine behavior).

5. §§ 1–514, 42 U.S.C. §§ 12,101–12,213 (1994).

6. §§ 701–16, *codified as amended at* 42 U.S.C. § 2000e to e–15 (1994).

7. §§ 1–16, *codified as amended at* 29 U.S.C. §§ 621–34 (1994).

8. ADA § 102(b)(1), 42 U.S.C. § 12,112(b)(1). *Cf.* Title VII of the Civil Rights Act of 1964 § 703(a)(2), 42 U.S.C. § 2000e–2(a)(2) (prohibiting an employer from "limit[ing], segregat[ing], or classify[ing] his employees . . . because of such individual's race, color, religion, sex, or national origin"); Age Discrimination in Employment Act, 29 U.S.C. § 623(a)(2) (prohibiting an employer from "limit[ing], segregat[ing], or classify[ing] his

ployers to take some disabilities into account by providing "reasonable accommodations" to disabled workers who request them; it defines discrimination to include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual . . . ."[9] And the potential sweep of reasonable accommodations is quite broad: beyond "making existing facilities . . . readily accessible to and usable by individuals with disabilities," accommodations may include "job restructuring, part-time or modified work schedules, . . . [or] the provision of qualified readers or interpreters . . . ."[10] Put somewhat differently, under the civil rights statutes that protect women, blacks, or older workers, plaintiffs can complain of discrimination against them, but they cannot insist upon discrimination in their favor;[11] disabled individuals often can.

Two examples clarify this point. Suppose that one "essential function"[12] of the job of sack handler is to carry fifty-pound sacks from the company loading dock to a store room. If a male worker is physically disabled by a back ailment, and thus unable to carry the sacks the full distance, the company can be required to make the reasonable accommodation of providing the worker with a dolly on which to transport the sacks.[13] By contrast, if a female worker cannot lift the same heavy cartons hoisted by her male counterparts, no accommodation is required and firing her because she cannot do the job as it then stands does not constitute imper-

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employees in any way . . . because of such individual's age").

9. ADA § 102(b)(5)(A), 42 U.S.C. § 12,112(b)(5)(A).

10. ADA § 101(9), 42 U.S.C. § 12,111(9).

11. *See* Title VII § 703(j), 42 U.S.C. § 2000e-2(j) ("Nothing contained in this subchapter shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group . . . ."). Absent a finding of ongoing or past unlawful discrimination, a plaintiff in a Title VII lawsuit is entitled to no relief at all, and certainly not to the imposition of an affirmative action plan.

12. *See* ADA § 101(8), 42 U.S.C. § 12,111(8).

13. *See* 29 C.F.R. app. pt. 1630 (1995) (Interpretive Guidance to pt. 1630) [hereinafter ADA Interpretive Guidance]. The main sets of regulations on employment of the disabled are: Regulations to Implement the Equal Employment Provisions of the ADA, 29 C.F.R. pt. 1630 (1995); Enforcement of Nondiscrimination on Basis of Handicap in Programs or Activities Conducted by the EEOC, 29 C.F.R. pt. 1615 (1995); and Implementation of Executive Order 12,250, Nondiscrimination on the Basis of Handicap in Federally Assisted Programs, 28 C.F.R. pt. 41 (1995). Additional important regulations are found in Affirmative Action Obligations of Contractors and Subcontractors for Handicapped Workers, 41 C.F.R. pts. 60–741 (1995).

missible sex discrimination.[14] As long as the heavy lifting requirement is job-related, an employer may impose such a qualification even if it excludes a disproportionate percentage of female applicants. But even if the requirement is job-related, the employer may be compelled to modify it in order not to exclude a disabled applicant who could perform the job as modified.

Consider also a job that requires its occupant to read various documents and prepare reports. The employer may be required to accommodate a blind or dyslexic worker by providing her with an assistant to read documents to her.[15] But suppose a black employee—as a direct result of having attended inferior, poorly funded public schools beset by the lingering effects of *de jure* segregation—lacks adequate reading comprehension and writing skills. Even if he could certainly understand the documents if they were read to him and could communicate his reports orally, because he is the victim of "environmental, economic, and cultural disadvantages" and "is unable to read [at the appropriate level] because he . . . was never taught to read," he is *not* disabled and therefore is not entitled to any accommodation of his impairments.[16]

We point out these contrasts between the safeguards of "traditional" civil rights laws and the protections accorded by the ADA not to show that disabled individuals are somehow receiving unwarranted benefit or even an unfair advantage over other groups that have experienced exclusion from full economic participation, but rather to suggest that the emerging law of reasonable accommodation may shed light on antidiscrimination law generally. The ADA's focus on a "flexible, interactive process"[17] of employer-employee negotiation and liberal modification of physical, logistic,

14. *See* Batyko v. Pennsylvania Liquor Control Bd., 450 F. Supp. 32 (W.D. Pa. 1978).

15. *Cf.* ADA Interpretive Guidance, *supra* note 13, § 1630.2(o) (stating that a personal assistant for a blind employee on occasional business trips may be a reasonable accommodation). *See also* Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131, 140–41 (2d Cir. 1995) (explaining that, under analogous Rehabilitation Act provisions, providing a reader to a visually impaired worker may be required because "[w]hat matters to that individual's job is not the ability to read *per se*, but rather the ability to take in, process, and act on information"). *See also infra* text accompanying notes 108-19 (discussing analogous accommodations in the *Arneson* cases).

16. ADA Interpretive Guidance, *supra* note 13, § 1630.2(j). Moreover, to the extent that his incapacity is due to general, "societal" discrimination, it may provide no basis for race-conscious affirmative action. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274–76 (1986).

17. ADA Interpretive Guidance, *supra* note 13, § 1630.9.

and attitudinal barriers that preclude full equality of opportunity may provide a model for thinking about traditional affirmative action as well.

Understanding the ADA's innovations requires close attention to the statutory text and structure. Accordingly, in Part I of this Article, we trace the sources of the ADA in previously enacted statutes, revealing both a continuity of language and a discontinuity of policy between these statutes and the ADA. Part II contrasts reasonable accommodation under the ADA with the prevailing law and practice of affirmative action in the workplace. Finally, Part III explores the relationship between conceptions of equality and the duty to accommodate and attempts both to clarify the still-murky concept of reasonable accommodation and to assist in a reconception of affirmative action.

I. THE STATUTORY ORIGINS AND STRUCTURE OF THE ADA

The central prohibitions of the ADA are all taken, directly or indirectly, from Title VII. The fundamental prohibition in the ADA is against discrimination on the basis of disability,[18] in terms that follow the corresponding prohibitions in Title VII against discrimination on the basis of race, color, religion, sex, or national origin.[19] The ADA offers a statutory definition of "discriminate" that identifies a series of seven specific sorts of behavior forbidden by the general prohibition; six items on the list are borrowed virtually intact from the language of Title VII and case law,[20] and their interpretation with respect to claims by disabled

18. *See* ADA § 102(a), 42 U.S.C. § 12,112(a) (1994).

19. *See* Title VII § 703(a)(1), 42 U.S.C. § 2000e-2(a) (1994). For ease of exposition, we use women and blacks as the protected classes in our discussion. Of course, the Civil Rights Act protects men and members of all racial groups from discrimination. *See, e.g.*, Newport News Shipbldg. & Dry Dock Co. v. EEOC, 462 U.S. 669, 682 (1983) (holding that Title VII protects both men and women against discrimination); McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 278-79 (1976) (holding that Title VII prohibits discrimination against any race).

20. Section 102(b)(1) of the ADA—the general prohibition on limiting, segregating, or classifying individuals on the basis of disability—tracks section 703(a)(2) of Title VII quite closely. *Compare* 42 U.S.C. § 12,112(b)(1) *with* 42 U.S.C. § 2000e-2(a)(2).

Sections 102(b)(2) and 102(b)(3) of the ADA are concerned with the dilution of the ADA's protections by entities other than the employer itself and the perpetuation of discrimination by entities that interact with the employer. 42 U.S.C. § 12,112(b)(2), (3). These concerns are also present in judicial interpretations of Title VII. *See, e.g.*, Meritor Sav. Bank v. Vinson, 477 U.S. 57, 72 (1986) (holding that courts should be guided by agency principles when examining employer liability under Title VII); Arizona Governing

individuals seems to flow directly from their interpretation in their original context.

The seventh category of forbidden behavior—the failure to make reasonable accommodations[21]—has both a more complicated relationship with Title VII and a more complicated role within the ADA itself. The phrase "reasonable accommodation" first appeared in regulations published by the Equal Employment Opportunity Commission (EEOC) that sought to define an employer's obligation not to discriminate on the basis of religion.[22] These regulations were essentially codified by an amendment to Title VII that defined "religion" to include religious practices "unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."[23] But this seemingly broad definition of religion received a surprisingly narrow interpretation in the leading decision

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Comm. v. Norris, 463 U.S. 1073, 1086 (1983) (holding that an employer violates Title VII when it chooses a third-party fringe benefit plan that discriminates on the basis of sex).

ADA section 102(b)(4) prohibits discrimination based on the disability of a related or associated individual. 42 U.S.C. § 12,112(b)(4). A similar prohibition has been developed in Title VII and § 1981 in cases in which employees have alleged discrimination based not on their own race, but on the different race of their spouses. *See, e.g.*, Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888, 890 (11th Cir. 1986); Alizadeh v. Safeway Stores, Inc. 802 F.2d 111, 114 (5th Cir. 1986); Chacon v. Ochs, 780 F. Supp 680, 682 (C.D. Cal. 1991).

Finally, ADA sections 102(b)(6) and 102(b)(7) essentially codify the theory of disparate impact. *Compare* 42 U.S.C. § 12,112(b)(6), (7) (including as "discrimination" the use of selection criteria that screen out an individual with a disability unless the standard is job-related and consistent with business necessity) *with* Griggs v. Duke Power Co., 401 U.S. 424 (1971) (holding that Title VII prohibits employment practices with disparate impact that cannot be shown to be related to job performance) *and* Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (same). In the Civil Rights Act of 1991, Congress codified its definition of disparate impact for Title VII cases in terms quite similar to those used in the ADA. *See* 42 U.S.C. § 2000e-2(k).

21. According to ADA section 102(b)(5), discrimination includes:

> (A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or
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> (B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant . . . .

42 U.S.C. § 12,112(b)(5).

22. 29 C.F.R. § 1605.1 (1995).

23. Title VII § 701(j), 42 U.S.C. § 2000e(j).

on religious discrimination under Title VII, *Trans World Airlines, Inc. v. Hardison.*[24] Apparently to avoid constitutional questions under the Establishment Clause, the Supreme Court interpreted the duty of reasonable accommodation narrowly; it held that anything "more than a *de minimis* cost" amounted to an undue hardship.[25] As a result, although many companies undoubtedly accommodate their workers' religious commitments, they are under only a very slight legal obligation to do so.

"Reasonable accommodation" has come to mean something very different in the context of disabilities law, where the term first appeared in regulations under the Rehabilitation Act,[26] and subsequently in the statutory language of the ADA.[27] In part, this difference may reflect the very different constitutional background against which the language was to be interpreted. A legal regime that compels accommodation of religious practices raises First Amendment problems.[28] By contrast, there is no constitutional

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24. 432 U.S. 63 (1977).

25. *Id.* at 84.

26. The Rehabilitation Act of 1973 prohibits, in pertinent part, discrimination against "handicapped" individuals with regard to federal employment, federal contracts, federally funded programs, and activities conducted by recipients of federal funds; it requires "affirmative action" by federal agencies and contractors with respect to employment. Rehabilitation Act of 1973 §§ 501, 503, 504, 29 U.S.C. §§ 791, 793, 794 (1994). The regulations imposing a duty of reasonable accommodation appear in 29 C.F.R. §§ 32.13(a), 1613.704 (1995).

27. The term "reasonable accommodation" may include—

> (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
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> (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

ADA § 101(9), 42 U.S.C. § 12,111(9) (1994).

28. This would be especially true if nonreligious commitments did not entail similar obligations. *See* Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 710 n.9 (1985). In the course of holding unconstitutional a Connecticut statute that imposed an absolute duty on employers to allow workers to observe their Sabbath, the Court stated that the law

> gives Sabbath observers the valuable right to designate a particular weekly day off—typically a weekend day, widely prized as a day off. Other employees who have strong and legitimate, but nonreligious, reasons for wanting a weekend day off have no rights under the statute. For example, those employees who have earned the privilege through seniority to have weekend days off may be forced to surrender this privilege to the Sabbath observer; years of service and payment of "dues" at the workplace simply cannot compete with the Sabbath observer's absolute right under the statute. Similarly, those employees who would like a weekend day off, because that is the only day their spouses are also not working, must take a back seat to the Sabbath observer.

principle that restricts government benefits for the disabled, and scarcely one that protects the disabled from government discrimination.[29] The door was thus open for the duty of reasonable accommodation to receive a broader interpretation—and the exemption for undue hardship a correspondingly narrower interpretation—in decisions concerned with disabilities.

The exact scope of this duty remains the great unsettled question under the ADA. It is a duty surrounded by a thicket of interlocking definitions and requirements. "Reasonable accommodation" plays two roles in the ADA. First, it is integral to defining the class of protected individuals. The ADA prohibits discrimination against a "qualified individual with a disability."[30] That phrase, in turn, is defined as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[31] Thus, there are two sorts of disabled individuals protected by the ADA. A disabled individual who could perform the job in its present form, but whom the employer refuses to hire because of a mistaken belief that she cannot perform the requisite tasks or out of revulsion against the worker's disability (such as a disfiguring cosmetic condition), is simply a victim of traditional discrimination and reasonable accommodation is irrelevant to her claim.[32] By contrast, the other category of protected individuals consists of persons whose physical or mental impairments prevent

29. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446 (1985). Consequently, affirmative action on behalf of African-Americans requires a more stringent justification—strict scrutiny, *see* Adarand Constr., Inc. v. Pena, 115 S. Ct. 2097, 2113 (1995)—than affirmative action on behalf of the disabled, even though the congressional basis for acting in the two situations is similar; *see* ADA § 2, 42 U.S.C. § 12,101. This paradox follows from the deeper paradox underlying the constitutional standards for affirmative action: heightened scrutiny of discrimination against a traditionally excluded group requires heightened scrutiny of affirmative action in favor of that group.

30. ADA § 102(a), 42 U.S.C. § 12,112(a). Title II of the ADA, concerned with public services, has a similar restriction on coverage. *See* ADA §§ 201(2), 202, 42 U.S.C. §§ 12,131(2), 12,132 (coverage limited to "qualified individual with a disability"). Title III, concerned with public accommodations, does not. *See* ADA § 302, 42 U.S.C. § 12,182.

31. *See* ADA § 101(8), 42 U.S.C. § 12,111(8).

32. *See* Vande Zande v. Wisconsin Dep't of Admin., 44 F.3d 538, 541 (7th Cir. 1995) (noting that many physical or mental impairments "are not in fact disabling but are believed to be so, and the people having them may be denied employment or otherwise shunned as a consequence," and that such people, "objectively capable of performing as well as the unimpaired, are analogous to capable workers discriminated against because of their skin color or some other vocationally irrelevant characteristic").

them from performing the job in its current form, but who could perform the job if it were reconfigured in an appropriate fashion.

As to this latter group, the concept of "reasonable accommodation" figures in the definition of unlawful activity and constitutes a separate species of discrimination—its second role in the ADA. Illegal discrimination occurs when an employer fails to make reasonable accommodations unless it "can demonstrate that the accommodation would impose an undue hardship on the operation of the business . . . ."[33] Putting these tangled concepts together, the ADA declares it illegal to deny an individual an employment opportunity by failing to take account of her disability when taking account of it—in the sense of changing the job or physical environment of the workplace—would enable her to do the work.

This is a far different definition of "discrimination" than the definition embraced in other areas of employment discrimination law. Title VII, for instance, essentially takes jobs as it finds them. It defines discrimination in a negative sense: employment practices are unlawful only if they prevent individuals from doing the job as the employer defines it.[34] The failure to undertake positive steps to revamp the job or the environment does not constitute discrimination.[35] And although the Rehabilitation Act imposed a requirement of affirmative action, which was interpreted to require reasonable accommodation, it did so only for the Federal Government, federal contractors, and recipients of federal funds, not for private employers in general.[36]

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33. ADA § 102(b)(5), 42 U.S.C. § 12,112(b)(5).

34. Of course, the use of selection criteria that disproportionately exclude members of a protected class is actionable. *See* Title VII § 703(k)(1), 42 U.S.C. § 2000e–2(k)(1) (1994). But an underlying assumption of the disparate impact case law is that it is the *selection procedures*, rather than the elements of the job itself as currently configured, that have caused the disparate impact. Thus, courts have focused on the tightness of the fit between the challenged employment practice and the job itself, rather than on the nature of the job, in considering whether the challenged practice is sufficiently job related to permit the disparate impact.

35. So, for example, an employer is not required to develop flexible work hours even though a rigid work schedule may disproportionately eliminate female workers who have child-care responsibilities. *See* Joan C. Williams, *Restructuring Work and Family Entitlements Around Family Values*, 19 HARV. J.L. & PUB. POL'Y 753, 756 (1996).

36. *See* Rehabilitation Act of 1973, §§ 501, 503, 504, 29 U.S.C. §§ 791, 793, 794 (1994); 28 C.F.R. §§ 41.2, 41.53 (1995); 29 C.F.R. § 1613.704(a) (1995); 41 C.F.R. § 60–741.6(d) (1995). *See also infra* text accompanying notes 91-93 (discussing the rationale for imposing a more expansive duty of accommodation on the government).

Put in the broader context of debates over equality, the ADA embraces both a "sameness" and a "difference" model of discrimination.[37] Under the sameness model, discrimination occurs when individuals who are fundamentally the same are treated differently for illegitimate reasons. In the context of disabilities, the sameness model would condemn decisions made on the basis of "'myths, fears, and stereotypes' associated with disabilities"[38] that assume that individuals with physical or mental impairments are not equally capable of doing a particular job. For example, "a law firm could not reject an applicant with a history of disabling mental illness based on a generalized fear that the stress of trying to make partner might trigger a relapse of the individual's mental illness."[39] Nor could an employer refuse to hire an employee with a disfiguring cosmetic condition because he, other workers, or customers might be upset. In a sameness model, the decisionmaker must ignore the irrelevant characteristic. Treating every worker identically, regardless of the presence or absence of a particular disability, satisfies the sameness model of equality.

A difference model, by contrast, assumes that individuals who possess the quality or trait at issue are different in a relevant respect from individuals who don't and that "treating [them] similarly can itself become a form of oppression."[40] To paraphrase Justice Blackmun's comment in *Regents v. Bakke*,[41] in the context of disabilities, a difference model requires that "[i]n order to get beyond [an individual's disability], we must first take account of [that disability]. There is no other way. And in order to treat some persons equally, we must treat them differently."[42] The difference model, for example, would condemn an employer who applies a blanket "no dogs in the building policy" to bar a blind worker from bringing his guide dog into the building. Similarly, it would condemn an employer who holds business meetings in rooms inaccessible to individuals in wheelchairs. Reasonable accommodation clearly rests on a difference model of discrimination since it requires employers to treat some individuals—those dis-

37. For a brief and lucid description of sameness and difference models, see Daniel R. Ortiz, *Feminisms and the Family*, 18 HARV. J.L. & PUB. POL'Y 523, 524 (1995).

38. ADA Interpretive Guidance, *supra* note 13, § 1630.2(l).

39. *Id.* § 1630.2(r).

40. Ortiz, *supra* note 37, at 524.

41. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

42. *Id.* at 407 (separate opinion of Blackmun, J.).

abled persons who would be qualified if the employer modified the job to enable them to perform it—differently than other individuals.

The key question in an ADA case normally involves the question of what, if any, accommodations the employer must make. This brings into play the final relevant piece of the ADA's statutory structure—the concept of "undue hardship." The ADA obligates an employer to make reasonable accommodations unless it "can demonstrate that the accommodation would impose on undue hardship on the operation of the business."[43] Although the ADA treats "reasonable accommodation" and "undue hardship" as definitionally distinct, and it would technically be possible for an accommodation both to be reasonable and to be unduly burdensome, as a practical matter the two concepts operate in tandem: courts that find a particular accommodation to be "reasonable" are unlikely to exempt employers from undertaking it, and courts that find a particular accommodation to pose an "undue hardship" are correspondingly unlikely to demand that an employer shoulder it.[44] Like "reasonable accommodation," "undue hardship" is an open-ended concept.[45] The legislative history makes clear that

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43. ADA § 102(b)(5)(A), 42 U.S.C. § 12,112(b)(5)(A) (1994).

44. *See, e.g.*, School Bd. v. Arline, 480 U.S. 273, 287 n.17 (1987) (containing dictum that accommodation is unreasonable if it imposes undue hardship); Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131, 138 (2d Cir. 1995) (stating defendant's burden of showing accommodation to be unreasonable merges with the burden of showing undue hardship). *But see* Vande Zande v. Wisconsin Dep't of Admin., 44 F.3d 538, 542–43 (7th Cir. 1995) (noting that some accommodations not imposing undue hardship might nonetheless be unreasonable).

45. 42 U.S.C. § 12,111(10) states:

> (A) In general. The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).
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> (B) Factors to be considered. In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include—
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> > (i) the nature and cost of the accommodation needed under this chapter;
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> > (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
> >
> > (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
> >
> > (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

Congress intended to impose no definite rules about what constitutes undue hardship, for instance, in terms of a certain percentage of the pay for the position in question.[46] Like reasonable accommodation, undue hardship must be determined on the facts of each case.

The distinction between reasonable accommodation and undue hardship survives mainly in the procedural form of allocating the burden of proof between the disabled individual and the employer.[47] The plaintiff bears the burden of showing that reasonable accommodation is possible.[48] Once such an accommodation

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46. *See* 136 CONG. REC. H2470, H2475 (daily ed. May 17, 1990) (rejecting an amendment that would have established a presumption of undue hardship at 10% of annual salary); H.R. REP. NO. 101-485, pt. 3, at 41 (1990) (rejecting per se rule of undue hardship). *See also* Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131, 144 (2d Cir. 1995) (Newman, J., concurring) ("Congress ma[de] very clear its desire to help some group of disadvantaged persons but le[ft] very unclear how it expects its legislative solution to be implemented in a courtroom.").

In any event, this sort of proposal would fail to account correctly for the cost of an accommodation, which must be amortized over the duration of the plaintiff's employment, as well as the employment of other disabled individuals who also benefit from the accommodation. It would also fail to consider the benefits that an employer gains from an accommodation that increases the productivity of a disabled worker.

47. The courts of appeals are in some disarray over the relationship between the two concepts and the extent of the plaintiff's burden of proof. *Compare, e.g.,* Mantolete v. Bolger, 767 F.2d 1416, 1423-24 (9th Cir. 1985) (citing Prewitt v. United States Postal Serv., 662 F.2d 292, 308 (5th Cir. 1981)) (placing the burden of proving an inability to accommodate on the employer) *and* Barth v. Gelb, 2 F.3d 1180, 1187 (D.C. Cir. 1993) (when a federal administrative agency invokes the affirmative defense of undue hardship, it must bear the burden of persuasion on that issue) *with* Vande Zande v. Wisconsin Dep't of Admin., 44 F.3d 538, 543 (7th Cir. 1995) ("The employee must show that the accommodation is reasonable.") *and* Gilbert v. Frank, 949 F.2d 637, 642 (2d Cir. 1991) ("Once the plaintiff has made a prima facie case that she or he is otherwise qualified by showing the ability to perform the essential functions of the job with some reasonable accommodation, the burden shifts to the employer to show that no reasonable accommodation is possible.") The most extensive discussion and analysis of the varying approaches courts have taken to the procedural aspects of reasonable accommodation and undue hardship appears in the majority and concurring opinions in *Borkowski v. Valley Cent. School District*, 63 F.3d 131, 135-140, 144-48 (2d Cir. 1995), written by Judges Calabresi and Newman, respectively.

48. This requirement is well developed in the Rehabilitation Act case law. *See, e.g.,* Gardner v. Morris, 752 F.2d 1271, 1280 (8th Cir. 1985); Treadwell v. Alexander, 707 F.2d 473, 478 (11th Cir. 1983). One further case has suggested that the plaintiff bears this initial burden only in cases against recipients of federal funds under section 504, but not in cases against the Federal Government under section 501. *See* 29 U.S.C. §§ 791, 794 (1994); Overton v. Reilly, 977 F.2d 1190, 1194 (7th Cir. 1992).

In ADA cases, there is some disagreement as to what "reasonable" means and therefore what sort of showing the plaintiff must make with respect to the availability of an accommodation. *See Borkowski*, 63 F.3d at 138, which recognizes that:

is identified, the employer bears the burden of showing that it would result in undue hardship.[49] These differences in emphasis correspond to differences in the parties' access to information: the disabled individual is better acquainted with how his disabilities can be overcome, the employer with how much various accommodations cost.[50] Wholly apart from the procedural consequences of allocating the burden of proof on these issues, an important substantive goal of the statute is to encourage the parties to share this information in negotiations over possible accommodations.

Application of the ADA thus depends on the interaction of four factors: the individual's particular disability; the essential functions of the job she seeks to perform; the possible accommodations that would enable her to do the job; and the burden that those accommodations would impose on the employer. The very complexity of the calculus means that ADA cases are likely to be intensely context-specific. Moreover, the manageability of the factors will vary from case to case. The individual's disability and the universe of potentially available accommodations cannot be changed, at least over the short run in which most cases are decided. The essential functions of the job and the level of burden on the employer are more likely to be contested.[51] They are also

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> "Reasonable" is a relational term: it evaluates the desirability of a particular accommodation according to the consequences that the accommodation will produce. This requires an inquiry not only into the benefits of the accommodation but into its costs as well. We would not, for example, require an employer to make a multi-million dollar modification for the benefit of a single individual with a disability, even if the proposed modification would allow that individual to perform the essential functions of a job that she sought. In spite of its effectiveness, the proposed modification would be unreasonable because of its excessive costs. In short, an accommodation is reasonable only if its costs are not clearly disproportionate to the benefits that it will produce.

Id. (citation omitted).

49. *See* Hall v. United States Postal Serv., 857 F.2d 1073, 1080 (6th Cir. 1988); *Gardner*, 752 F.2d at 1280; *Treadwell*, 707 F.2d at 478; *Prewitt*, 662 F.2d at 308. These Rehabilitation Act cases rely on a regulation allocating the burden of proof on the issue of undue hardship that was codified as part of the ADA. *See* 29 C.F.R. § 1613.704(a) (1995); ADA § 102(b)(5)(A), 42 U.S.C. § 12,112(b)(5)(A).

50. *See Borkowski*, 63 F.3d at 140–41 (explaining allocation of the burden of proof on undue hardship by the fact that "the employer has far greater access to information than the typical plaintiff, both about its own organization and, equally importantly, about the practices and structure of the industry as a whole").

51. *See, e.g., Borkowski*, 63 F.3d at 140–41 (discussing the question whether "classroom management—the ability to maintain appropriate behavior among the students—[is] an essential function of a tenured library teacher's job" and setting out a framework for answering questions regarding the essential functions of particular jobs).

likely to be mutually dependent. The essential functions of the job can be changed by job restructuring, one of the reasonable accommodations listed in the statute. Since virtually any job could be changed to compensate for any disability—just by tailoring its requirements to what the disabled individual could do—the crucial question is whether some particular job modification is reasonable.[52] As almost a definitional matter, this comes down to the question whether the job restructuring causes undue hardship to the employer. Because of questions like these, the ADA, unlike traditional discrimination law, is centrally concerned with the affirmative obligations of employers. This emphasis illustrates the profound differences between reasonable accommodation and antidiscrimination as methods of regulation.

II. REASONABLE ACCOMMODATION, AFFIRMATIVE ACTION, AND DISPARATE IMPACT

Reasonable accommodation is affirmative action, in the sense that it requires an employer to take account of an individual's disabilities and to provide special treatment to him for that reason. One might therefore expect that a quarter-century of experience with race- and sex-based affirmative action would bear closely on how to design and implement plans for disabled workers. But a number of key differences make reasonable accommodation under the ADA a distinct, and novel, form of special treatment. These differences may also suggest ways in which we might reexamine certain aspects of affirmative action law.

In contrast to affirmative action on the basis of race or sex, accommodation is far likelier to involve *personalized* special treatment. One needn't be an essentialist to conclude that, at least when it comes to affirmative action in employment, the law does not recognize "degrees" of being female or black that call for giving differently constructed preferences to some female or black employees than to others.[53] Disability, however, is different. The

52. Employers are not required to accommodate disabled individuals by eliminating essential functions from the job. *See, e.g.*, Tuck v. HCA Health Servs., Inc., 7 F.3d 465, 472 (6th Cir. 1993); Bradley v. University of Tex. M.D. Anderson Cancer Ctr., 3 F.3d 922, 925 (5th Cir. 1993).

53. There is, of course, a rich theoretical literature challenging the essentialist premise. *See, e.g.*, Pamela S. Karlan & Daniel R. Ortiz, *In a Diffident Voice: Relational Feminism, Abortion Rights, and the Feminist Legal Agenda*, 87 NW. U. L. REV. 858, 859 n.4 (1993) (citing sources). There is also a fair amount of case law involving, for example,

administrative regulations provide an extensive but not necessarily exhaustive list of quite dissimilar physical and mental impairments that may rise to the level of disability.[54] Some impairments may affect a number of workers in roughly similar fashion—for example, a staircase may pose a similar barrier to all employees who are unable to walk or to climb stairs—and thus may be amenable to "wholesale" solutions. But many will not. The severity of the impairment may vary dramatically from individual to individual: for example, aural disabilities range from profound deafness to mild hearing loss. Moreover, the relevant effect of any particular disability also depends critically on the particular aspects of the job at issue: a worker with no legs may face quite different difficulties in a job that requires substantial mobility than in one that is entirely desk-bound. Many accommodations involve such "retail" solutions specific to particular workers: a worker with no hands may require an assistant to turn the pages of books he reads,[55] while an employee with a back ailment may require a mechanical device to help her lift things.[56] Finding an appropriate job for an individual with a particular disability, which may have its own unique manifestations and severity, requires a case-by-case analysis. It cannot be accomplished by using a wholesale approach that treats all disabled individuals as fungible members of a protected

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claims by women that they were discriminated against for being too "feminine" or not feminine enough, *see, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228, 234–35 (1989); Thorne v. City of El Segundo, 726 F.2d 459, 466–67 (9th Cir. 1983); *see also* Case, *supra* note 4, at 36–74, or blacks who claim that they were discriminated against on account of their being "darker" or "lighter" than other blacks, *see, e.g.*, Walker v. Secretary of the Treasury, 713 F. Supp. 403, 405–08 (N.D. Ga. 1989). Our point is simply that the law as presently constituted would not require different *degrees* of affirmative action for, say, particularly feminine women or dark-skinned blacks. Of course, many affirmative action plans that take race or sex into account may distinguish among potential beneficiaries—for example, an employer might choose a black applicant who comes from a disadvantaged background over an equally qualified black applicant from a more privileged family, but that choice involves an *additional* selection criterion—disadvantage—rather than a determination that one applicant is more "black" than the other.

54. 29 C.F.R. § 1630.2(h) (1995) states that qualifying impairments may include:

> Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or . . . [a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

55. *See* ADA Interpretive Guidance, *supra* note 13, § 1630.2(o)(z)(ii).

56. *See id.*

class.[57] Accommodation, in contrast to class-based affirmative action, thus occurs through a case-by-case adjustment of the individual and the job. This fine-grained analysis has profound implications for compliance, enforcement, and the practical limits of the duty to accommodate.

A. *Compliance*

Several critical implications for the practical operation of reasonable accommodations stem from their individualized character. Accommodations are likely to involve "relational" behavior, as opposed to the "discrete" preferences involved in most race- and sex-based affirmative action programs.[58] Most such programs involve preferential access to available positions, training opportunities, and the like. The benefit to a particular worker is thus fairly circumscribed: a woman receives a particular position, for example, even though she had lower test scores than a male applicant,[59] or a black worker becomes eligible for promotion with less time in grade than his white counterparts.[60] But once given the job, the beneficiary of the affirmative action program is expected to perform the job as previously defined. By contrast, although some reasonable accommodations may involve only modification of selection criteria[61] or a one-time expenditure of funds to alter the

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57. Where a general approach is appropriate, as with access to public transportation and public accommodations, Congress has addressed those through specific requirements that eliminate barriers for the disabled, as in Titles II and III of the ADA. *See* ADA §§ 201–46, 42 U.S.C. §§ 12,131–65 (1994) (Title II); ADA §§ 301–09, 42 U.S.C. §§ 12,181–89 (1994) (Title III). These are, in a sense, affirmative action programs, but they have nothing to do with labor markets. These general measures can also be required of employers, as indeed they have been by Title II of the ADA, to the extent that an employer is a public entity, and indirectly by Title III, to the extent that an employer provides public accommodations which must be modified for the general public and therefore for workers as well.

58. For elaborations of the contrast between discrete and relational behavior in a variety of contexts, see generally Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089 (1981) (contrasting relational contracts with standard contracts); Pamela S. Karlan, *Discrete and Relational Criminal Representation: The Changing Vision of the Right to Counsel*, 105 HARV. L. REV. 670 (1992) (describing the difference between discrete and relational relationships in the context of criminal law).

We use "relational" here to refer to this quality of ongoing, incompletely specified agreements, as opposed to Judge Calabresi's use of "relational" in *Borkowski*, 63 F.3d 131, 139 (2d Cir. 1995), to describe the comparative nature of the inquiry into what accommodations are required.

59. *See, e.g.*, Johnson v. Transportation Agency, 480 U.S. 616, 619–26 (1987).

60. *See, e.g.*, United Steelworkers v. Weber, 443 U.S. 193, 207–08 (1979).

61. *See* ADA § 101(9)(B), 42 U.S.C. § 12,111(9)(B) (reasonable accommodation may

physical environment, many place continuing responsibilities on the employer. Accommodations may, for example, involve regular expenditures, such as the provision of personal assistants or repeated adjustment of work schedules. Successful accommodation often requires ongoing negotiation and cooperation between the company and the worker, in a process far more interactive than that involved in race- or sex-based affirmative action.

Yet another distinction between reasonable accommodation and standard affirmative action exists in the different use they make of labor market data. The starting point for most race- and sex-based affirmative action plans is a firm-specific numerical imbalance: a deficit in the proportion of some group in the employer's work force as compared to the proportion of that group in the relevant segment of the labor market. Sometimes an imbalance is the product of the employer's own prior intentional discrimination.[62] More often, however, the imbalance is not the product of purposeful disparate treatment, but rather results from the screening out of women or minorities at a higher rate by a facially neutral employment criterion. Preferential treatment is designed to overcome the disparate impact that would otherwise result. Labor market data is critical to determining in the first instance whether there is a legally cognizable disparate impact—without knowing what proportion of the qualified applicant pool is female, for example, it would be impossible to tell whether a particular test screened out women at a higher rate than

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include "appropriate adjustment or modifications of examinations"). *See also* ADA § 102(b)(6), 42 U.S.C. § 12,112(b)(6), noting that unlawful discrimination includes

> using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity.

See also ADA § 102(b)(7), 42 U.S.C. § 12,112(b)(7), noting that unlawful discrimination may include

> failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

62. *See, e.g.*, United States v. Paradise, 480 U.S. 149, 154–67 (1987) (emphasizing the employer's pattern of discrimination which created an imbalance).

men—and to tailor an affirmative action plan that provides a permissible, rather than an excessive, degree of preference. Consequently, much of the disagreement—both in disparate impact litigation under Title VII and in challenges to affirmative action plans—centers on issues regarding the appropriate labor market.[63]

By contrast, labor market information plays virtually no role under the ADA. Thus, for example, affirmative action under the Rehabilitation Act does not require federal contractors to undertake the sort of labor market analysis that Executive Order 11,246 has required with respect to groups protected by Title VII.[64] Moreover, it is not entirely clear how the conventional sort of labor market analyses could even be performed. Census data do not reveal the proportion of those with particular skills or with specific disabilities in the general labor market, let alone calibrate the degrees or combinations of particular impairments with various labor market qualifications. An alternative source of labor data, an employer's records about applicants for its jobs, rarely reveals the proportion of disabled individuals in the applicant pool because of the restriction upon inquiries into disabilities imposed by the ADA itself.[65] And because the Constitution imposes no requirement that the government justify affirmative action for the disabled with the sort of detailed showing required before affirmative action on account of sex or race is permitted, labor market data are less critical in any event.

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63. *See, e.g., Johnson*, 480 U.S. at 616, 632–33 (1987) (distinguishing between relevant labor markets for jobs which require no special expertise versus jobs which require special skills or training); *Weber*, 443 U.S. at 208–09 (1979) (stating that the percentage of blacks employed by a local plant should approximate the number of blacks in the local labor market); *id.* at 209–11 (Blackmun, J., concurring) (arguing that it is necessary to compare the percentage of minorities in the available labor market with the percentage of minorities employed to see if there is an "arguable violation" of Title VII); Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 312–13 (1977) (finding that in order to determine underrepresentation of blacks in teaching positions, it is necessary to compare the percentage of blacks employed in the district with the percentage of qualified black teachers in area labor market); Eric Schnapper, *The Varieties of Numerical Remedies*, 39 STAN. L. REV. 851, 856, 862 (1987).

64. 3 C.F.R. 339, 340–41 (1964–65), *reprinted as amended*, 42 U.S.C. § 2000e (1994); 41 C.F.R. § 60–2.10 (1995).

65. ADA § 102(d)(2)(A), 42 U.S.C. § 12,112(d)(2)(A) (providing, with certain exceptions, that "a covered entity shall not . . . make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability").

B. *Enforcement*

The relational nature of accommodations and the irrelevance of labor market data also have implications for the enforcement of the ADA. Where other prohibitions against discrimination rely upon more or less rigorous models of class-wide statistical proof, the ADA takes a more flexible and individualized approach. Although the ADA adopts the theory of disparate impact in almost the same terms in which it is now codified under Title VII,[66] the ADA has not preserved the central function of the theory as a means of recovery through class actions. Litigation under the ADA instead responds to the complexities in the inherently unique circumstances of many disabled individuals. Few of the cases brought under the ADA are class actions, and fewer still rely upon the theory of disparate impact.

While increasing reliance upon individual actions is found throughout employment discrimination law,[67] the interaction of individualized litigation with individualized compliance is particularly significant under the ADA. With the possible exception of actions supported by advocacy groups for the disabled, individual actions are likely to be brought only if they provide a significant probable return to a disabled individual and to her attorney. The benefits from litigation have to be compared to the benefits of a settlement with the employer or those from seeking employment elsewhere. In cases of reasonable accommodation, these benefits depend upon the difference between the accommodation, if any, offered by the employer and the minimal accommodation acceptable to the employee. In an important restriction on relief, compensatory and punitive damages are available only upon proof that the employer has made no good faith effort at all to accom-

66. The theory of disparate impact imposes liability upon employers for neutral practices that result in a disproportionate adverse impact upon minority groups or women. If the plaintiff proves such disparate impact, the burden of proof shifts to the employer to justify the practice as "job related for the position in question and consistent with business necessity." Civil Rights Act of 1991 § 105(a), 42 U.S.C. § 2000e-2(k). The ADA uses exactly the same terms to define the employer's burden of justifying practices that disproportionately screen out disabled individuals. *See* ADA § 102(b)(6), 42 U.S.C. § 12,112(b)(6).

67. *See* John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 984 (1991).

modate the plaintiff.[68] In order to limit damages, then, employers are likely to offer some accommodation.[69]

For these reasons, when the plaintiff and her attorney sit down to weigh the prospective return from litigation against the value of the job with the accommodation offered by the employer, they are likely to accept less than maximal accommodation. A job with regular compensation, even under less than optimal conditions, has advantages over an uncertain recovery of money and injunctive relief in litigation. The relative advantage of settlement over litigation may be even greater for disabled individuals than it is for other litigants. First, their ability to search for another job and to obtain another accommodation may be compromised by their disability. Second, the alternative of accepting the employer's accommodation but continuing to litigate leaves them under the threat of retaliation, to which, again, they are more vulnerable than other employees. As our discussion of the relational nature of many accommodations suggests, disabled employees may depend upon the employer for effective implementation of an accommodation they have received. The net effect of these calculations for most disabled individuals is to bias their choice of jobs and their range of acceptable accommodations in a conservative direction. Most, but of course not all, disabled individuals will seek jobs that they can perform well with minimal accommodations. This restricted range may not fully satisfy the goal of equal opportunity that Congress officially espoused as among the purposes of the ADA. But it is an inevitable consequence of relying upon individual actions to enforce individualized claims for reasonable accommodation.

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68. *See* 42 U.S.C. § 1981a(a)(3):

> In cases where a discriminatory practice involves the provision of a reasonable accommodation pursuant to section 102(b)(5) of the Americans with Disabilities Act of 1990 . . . damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

69. Moreover, a plaintiff's inability to obtain a significant recovery will likely make the case unattractive to attorneys because even though attorney's fees are available, and will not be directly tied to the amount of financial recovery, they will be correlated with the relief obtained by the plaintiff. The plaintiff's success on the merits is the key determinant of reasonable hours under the lodestar method, which awards the product of reasonable hours and a reasonable hourly rate. *See* Hensley v. Eckerhart, 461 U.S. 424, 434–36 (1983).

The ADA also demands a distinctive sort of judicial evaluation. As we have already seen, the ADA calls for a far more individualized process of fitting individuals to jobs than the antidiscrimination and affirmative action principles of Title VII. While it is certainly possible that this case-by-case approach to enforcement could deteriorate into purely ad hoc judicial decisionmaking, precedent counteracts this tendency, both at the level of formal legal doctrine and by providing the parties with templates of reasonable accommodation for settlement and compromise. Accommodations imposed, or approved, in prior cases simplify the process of later negotiations over accommodations for other employers and employees. With the accumulation of decisions, the adequacy of any particular accommodation will become both better known to the parties and more easily evaluated by a court.

In contrast, no doubt largely in response to the specter of so-called reverse discrimination lawsuits (a cloud completely absent from the ADA horizon), conventional affirmative action programs have been designed and evaluated as if they were standardized bureaucratic procedures. To pass judicial muster, they have been hedged with increasing restrictions which can only be satisfied by formal procedures. Affirmative action on the basis of race must be justified as a remedy for "manifest racial imbalance" and "old patterns of racial segregation and hierarchy" and perhaps ouly for past discrimination by the employer; it must not "unnecessarily trammel the interests of the white employees," for instance, by requiring them to be laid off.[70] Despite language favoring flexible forms of affirmative action over rigid quotas,[71] courts have also condemned decisions that favor black applicants in the absence of any formal affirmative action plans.[72]

The ADA does not suffer either from the constitutional strictures imposed on race- and sex-based affirmative action or the threat of claims of reverse discrimination. Accordingly, reasonable accommodation of the disabled has developed with fewer formal procedures and less suspicion. A similar approach might be worth

70. United Steelworkers v. Weber, 443 U.S. 193, 208–09 (1979).

71. *See, e.g.*, Johnson v. Transportation Agency, 480 U.S. 616, 631–41 (1987); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 315–20 (1978) (separate opinion of Powell, J.).

72. *See* Lilly v. City of Beckley, 797 F.2d 191, 195 (4th Cir. 1986); Lanphear v. Prokop, 703 F.2d 1311, 1315 (D.C. Cir. 1983); Lehman v. Yellow Freight Sys., Inc., 651 F.2d 520, 526–27 (7th Cir. 1981).

trying under Title VII. Formal affirmative action plans may be no less necessary, but the flexibility inherent in these plans might be more openly acknowledged. In particular, just as reasonable accommodation defuses a claim of discrimination against the disabled, so too, training and education for individual workers might count as a defense to claims of discrimination. Any such defense need not be absolute to be effective; it need only provide employers with an incentive to respond to the aspirations of minority and female employees. Uniform special treatment of these employees might be replaced by adjustment to the distinctive abilities and needs of particular individuals. Whether or not this proposal would be effective in practice, there is no doctrinal reason to exclude devices that work under the ADA from consideration under other employment discrimination statutes. But before the duty of reasonable accommodation can be applied to other statutes, its meaning must first be determined under the ADA, the question to which we now turn.

III. EFFICIENCY, EQUALITY, AND THE CONTENT OF REASONABLE ACCOMMODATION

Justifications for fair employment laws have long converged at the intersection of efficiency and equality. Supporters of fair employment laws have argued, for example, that these laws overcome inefficiencies in the labor market that come from underemployment of productive workers.[73] Sometimes, the efficiency rationales are more general still; for example, one argument raised in favor of the Civil Rights Act of 1964 was that it would strengthen America's position vis-a-vis the emerging nations of Africa and Asia.[74] In some sense, the equality rationale begins where the efficiency argument leaves off: even if it would be efficient in a strictly economic sense to discriminate against a particular class of

73. *See generally* John J. Donohue, III, *Is Title VII Efficient?*, 134 U. PA. L. REV. 1411 (1986) (supporting Title VII as means of legal intervention which facilitates operation of market and furthers objective of wealth maximization); J. Hoult Verkerke, *Free to Search*, 105 HARV. L. REV. 2080, 2087 n.20 (1992) (citing sources) (reviewing RICHARD EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS (1992)).

74. *See* Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988); *Civil Rights-Public Accommodations: Hearings on S. 1732 Before the Sen. Comm. on Commerce*, 88th Cong. 283–99 (1963) (testimony of Secretary of State Dean Rusk).

workers,[75] it would nonetheless be unfair to base employment decisions on the particular trait that they share. There are a variety of reasons why certain characteristics may be placed out of bounds: their historic use as vehicles for oppression or mistreatment; the lack of individual control over possession or alteration of the trait ("immutability"); or a desire to encourage individuals to acquire or possess the quality.[76] Much of the time, neither supporters nor opponents of fair employment laws are entirely clear about whether their arguments derive from efficiency or equality or from a mix of the two concepts, let alone about what notion of efficiency or equality they are espousing. This imprecision matters since, for example, we might tolerate imposing higher costs on employers to protect black workers from statistical discrimination than we would to protect smokers.

The ADA generally, and the duty of reasonable accommodation specifically, share this general amalgam of efficiency and equality justifications. Reasonable accommodation, in any of its forms, requires the employer to incur some expense. Occasionally, perhaps frequently, the subsidy turns out to be a good investment for the employer. The cost of a reasonable accommodation may pay for itself in the greater productivity of the disabled worker. Or it may have externalities beyond the disabled worker, by, for example, enabling other workers to be more productive as well or by attracting customers who would otherwise not have been able or inclined to patronize the firm. If the duty of reasonable accommodation were confined to such cases, then it could be easily interpreted and implemented entirely according to a model of economic efficiency.[77] Accommodations would be required only to the

75. This might be true if the group is, on average, less productive than the workforce as a whole and determining the productivity of group members on an individual basis is costly, or if the productivity of other workers were to decline because of their antipathy toward working with members of the group. *See* RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 33–35, 40–41, 66-69 (1992).

76. For an interesting discussion of the way in which constructivism, essentialism, choice, and determinism may interact to create identifiable classes, see Daniel R. Ortiz, *Creating Controversy: Essentialism and Constructivism and the Politics of Gay Identity*, 79 VA. L. REV. 1833, 1838–43 (1993).

77. For one description of this theory, see Judge Posner's opinion in *Vande Zande v. Wisconsin Department of Administration*, 44 F.3d 538, 543 (7th Cir. 1995) ("The preamble [to the ADA] actually 'markets' the Act as a cost saver, pointing to 'billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.' § 12,101(a)(9).").

extent that they were justified by the savings from employing disabled workers. The ADA, in effect, would have performed a service for employers by requiring them to do what they should have been doing all along. Under this view, the ADA counteracts the effects of inertia and statistical discrimination against the disabled. It requires employers to neglect disabilities as a signal of the lack of productivity (or the increased expense) of disabled employees. In this pure efficiency account, the spurious signal results from a history of past discrimination against the disabled that makes it more difficult for employers to accurately assess their productivity, even when it is as high as that of other employees.

But while an efficiency rationale might explain the ADA's prohibition on discrimination against disabled individuals who require no accommodation, it cannot explain the ADA's requirement of reasonable accommodation. The signal from a genuine disability is not wholly spurious.[78] A disability, as defined under the ADA, means a "physical or mental impairment that substantially limits one or more of the major life activities" of an individual.[79] An individual who is limited in a "major life activity" might well be limited in some aspect of a given job. Less obviously, even if many disabled workers would not be limited with respect to a particular job, employers still might incur higher costs to accurately assess the productivity of the disabled than other applicants for employment. Even before the passage of the ADA, some employers found such expenditures to be profitable and hired the disabled,[80] but it hardly follows, after the enactment of the ADA, that all employers now find such expenditures to be profitable. If the innovations required by the ADA were generally efficient, they would have been more widely adopted without its enactment.

The ADA could—and undoubtedly did—cause employers to adopt some practices that efficiency should have caused them to adopt earlier. Ignoring stereotypes, eliminating physical barriers to the handicapped, revising tests and requirements with an adverse

78. *See Vande Zande*, 44 F.3d at 541.

79. ADA § 3(2)(A), 42 U.S.C. § 12,102(2)(A) (1994). "Disability" also means "a record of such an impairment" or "being regarded as having such an impairment." ADA § 3(2)(B), (C), 42 U.S.C. § 12,102(2)(B), (C). These definitions, especially the last, are directed at mistaken stereotypes of disability, such as various forms of disfigurement or a history of disability.

80. *See* H.R. REP. NO. 101-485, pt. 2, at 33-34, 45-46 (1990) (recounting instances of inexpensive accommodations made by employers before passage of the ADA).

effect upon the disabled—any of these steps might be innovations that any particular firm might have overlooked simply out of inertia. What does not follow is that all of these steps for every employer can be justified solely on grounds of increasing efficiency.[81]

The duty of reasonable accommodation must therefore be justified on broader grounds. The broad goals articulated by Congress are "equality of opportunity, full participation, independent living, and economic self-sufficiency" for the disabled.[82] These goals presuppose a comparison with individuals who are not disabled: to the extent possible, the disabled should be given the same opportunities as those who are not disabled. Equality of opportunity subsumes the other goals listed by Congress because those other goals, such as "independent living," presuppose a standard of independence enjoyed by individuals without disabilities. Equality of opportunity in the broad sense—not confined to equality of opportunity in employment, where the phrase is typically used—encompasses the opportunity to lead as valuable and satisfying a life as the rest of the population.

Wholly apart from this official statement of legislative purpose, the ADA cannot be explained except in terms of some ideal of equality. Otherwise, the elaborate and expensive requirements of the statute must be questioned as implausible attempts to achieve efficiency or sentimental (and perhaps disingenuous) extensions of charity to an organized special interest group. The prohibitions against discrimination and the requirements of accommodation, to be found throughout the statute, require more than efficiency and less than charity. They require some costs to be borne by all of society or by particular employers for the unique benefit of the disabled, but they do not require unlimited generosity.

Taking equal opportunity as the fundamental goal of the ADA hardly resolves all the pressing questions about what it actually requires. It does, however, give rise to two distinct, and in some respects more manageable, questions. First, what conception of equal opportunity does the ADA apply to the disabled? Sec-

81. If this non sequitur is concealed in Title I, concerned with employment, it is apparent in Titles II and III, concerned with barriers to the disabled in public programs and public accommodations. *See* ADA §§ 222, 304, 42 U.S.C. §§ 12,142, 12,184 (vehicles acquired by public and private transit companies must be accessible to the disabled with no exceptions for cost). These requirements are imposed despite, not because of, considerations of overall cost in accommodating the disabled.

82. ADA § 2(a)(8), 42 U.S.C. § 12,101(a)(8).

ond, how should that conception inform the duty of reasonable accommodation?

A. *Insuring Equality*

A promising model for thinking about the meaning of equal opportunity for the disabled is an insurance market. There are a variety of insurance schemes in the real world to protect against disability, typically paying the disabled approximately 60% of their previous pay.[83] Other forms of insurance, such as worker's compensation coverage, medical insurance, and Social Security disability benefits, also cover the risk of disability.

Existing coverage schemes, however, cannot fully inform our understanding, since they necessarily reflect a variety of contingent inequalities. Individuals who know they are prone to certain forms of disability may either invest more heavily in certain kinds of insurance than the average person or, conversely, may be unable to purchase coverage; wealthy individuals may have more disposable income to allocate toward insurance than poor ones; endowment effects may lead individuals to purchase coverage in order to maintain a standard of living for which they would not have been willing to pay previously. For these reasons, we need to place individuals, in the device created by John Harsanyi[84] and made famous by John Rawls, behind "a veil of ignorance."[85] We need to examine how rational individuals would provide for the risk of disability in the absence of any knowledge whether they will be, or are likely to become, disabled themselves. Behind a veil that deprives them of this knowledge, they will make more impartial decisions.

Would rational individuals, who do not know whether they will be disabled, insure themselves against the risk of disability? In an important article on the concept of equality, Ronald Dworkin has persuasively argued that they would.[86] Although Dworkin's idealized insurance model is not free from difficulties—as, of

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83. *See* AMERICAN LAW INSTITUTE, 1 ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY: THE INSTITUTIONAL FRAMEWORK 172 (1991).

84. *See* John C. Harsanyi, *Cardinal Utility in Welfare Economics and in the Theory of Risk-Taking*, 61 J. POL. ECON. 434, 434–35 (1953).

85. JOHN RAWLS, A THEORY OF JUSTICE 136–42 (1971).

86. *See* Ronald Dworkin, *What Is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283, 296–304 (1981).

course, Rawls' theory of justice is not[87]—it argues quite powerfully for compensation of the disabled as a central component of equality and, in particular, that the level of compensation should be pegged in some manner to the average amount of resources that individuals would otherwise enjoy.

In our imaginary world, disabled persons might spend their insurance benefits in a variety of ways. Some individuals might decline employment altogether and live solely on their insurance. Other individuals might choose to work at jobs they could perform despite their disability. Still others might invest some of their benefits in devices or services that would enable them to perform jobs that their disability would otherwise prevent them from doing: for example, a deaf person might hire an interpreter or a person with a weak back might invest in a hand truck.[88] For a variety of reasons, disabled individuals might sometimes pay employers to make such investments.[89] Put in terms of the ADA, some insurance payments would be transferred to employers to induce them to make reasonable accommodations. Within the limits provided by their insurance benefits, disabled individuals would be entitled to a range of choices between leisure and work and among different types of work that other individuals could perform.

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87. The device of bargaining behind a veil of ignorance has attracted criticism on many different grounds: whether parties have a stable identity and interests under a veil of ignorance; the justification for selecting different personal characteristics to be obscured by the veil of ignorance, particularly personal conceptions of the good; the extent to which the parties may be averse to or may prefer risk; or exactly who is represented by the parties behind the veil. For a survey of these criticisms and response, see generally JOHN RAWLS, POLITICAL LIBERALISM 289–371 (1993).

88. In fact, we might imagine in our hypothetical world that the participants would choose an insurance scheme that provides vouchers that can be used to purchase accommodations rather than cash benefits. *Cf.* Verkerke, *supra* note 73, at 2085–86 (suggesting that we might also expect to see a preference for subsidies that provide job opportunities rather than simply transfer payments because "[a] job contributes significantly to an individual's personal identity and sense of human dignity" while "welfare payments create feelings of dependency and stigmatize recipients as social and economic failures").

89. The latter course would make more sense in some circumstances: for example, large-scale capital items that might benefit many workers (such as making locations physically accessible), or situations in which the employer's market power enabled it to acquire the necessary items more cheaply.

For some accommodations, on the other hand, the employee can more cheaply adjust to her disability than the employer. Using a hearing aid at work, for example, costs an employee little, if anything, in addition to the cost of purchasing and using one outside of work.

Assuming that the participants in our veiled world would choose some form of insurance against disability, we come to a subsidiary question with important implications for the ADA: should the cost of accommodating disabled individuals be borne by employers, and if so, in what amount? Remember that the parties are behind a veil of ignorance; thus, in addition to being uninformed as to whether they will be disabled, they also are unaware of whether they will be employers or employees.[90] Because they may be employers, rather than disabled employees, the parties would almost certainly assign only part of the cost of insurance to any individual employer. An unfunded duty that employers accommodate disabled workers is therefore likely to fall far short of the level of equal opportunity that a more broadly cast social insurance scheme would produce. It follows that in a regime of unsubsidized reasonable accommodation, the range of jobs available to the disabled and their opportunities for employment would be narrower than in a world of full social subsidy or insurance.

Stepping out from behind the veil of ignorance, we find ourselves in a society that does not offer disabled individuals anything like a fully compensatory employment subsidy—through payment of extra work-related expenses, provision of aids or services that would overcome their impairments, or reimbursements to potential employers for the higher costs of employing disabled individuals. Nonetheless there are traces of the idealized response to disability in the statutory scheme. For example, the Rehabilitation Act of 1973 imposes a heavier duty of accommodation on the Federal Government and federal contractors than on covered entities more generally.[91] Invoking the language of the EEOC regulations under the Act, many courts have recognized "[t]hat the Federal Government shall become a model employer of handicapped individuals."[92] Under the insurance model, this reasoning makes sense be-

90. The former category obviously extends beyond involvement in active management to include, for example, being shareholders in particular corporations or beneficiaries of pension funds invested in a particular company's stock.

91. *See* Rehabilitation Act of 1973 §§ 501, 503, 29 U.S.C. §§ 791, 793 (1994); *see also* Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131, 142 n.5 (finding that section 501 "requires federal employers to take affirmative steps (above and beyond reasonable accommodation) to hire individuals with disabilities, an obligation that is not imposed on [other covered entities]").

92. 29 C.F.R. § 1613.703 (1995); *See, e.g.*, Hall v. United States Postal Serv., 857 F.2d 1073, 1077 (6th Cir. 1988); Mantolete v. Bolger, 767 F.2d 1416, 1421 (9th Cir. 1985);

cause the Federal Government, as compared to private employers, is better able to spread the cost of accommodation across society generally.[93] Similarly, the "undue hardship" proviso recognizes that it is sometimes unfair to place the entire burden of accommodating an individual's disability on a particular employer. Thus, whatever Congress's professed aspirations for the disabled, as a practical matter the equality that will be attained under the ADA is a rough approximation, rather than an exact reproduction, of the employment options and choices open to the most fortunate or proficient individuals in the labor market.

Our hypothetical insurance market might also have implications for equality theory more generally. It suggests, for example, some connections between the sameness and difference conceptions of equality: individuals will seek to insure against differences that affect their ability to lead equivalently satisfying lives, and will do so by subsidizing through insurance members of the community who incur the misfortune of not being "normal."[94] And it may even suggest why the duty to accommodate disabilities is expressed more expansively than the corresponding prohibitions against race- and sex-based discrimination: most people may actually feel themselves to be behind a veil of ignorance with respect to disability—since they recognize that even if they are not now disabled they may one day be so—while for race or sex, individuals' endowments are both known and for all practical purposes immutable.

Gardner v. Morris, 752 F.2d 1271, 1280 (8th Cir. 1985).

93. The same rationale might apply to federal contractors, assuming that they can pass the costs of greater accommodations back to the Federal Government, although this reasoning has not been applied to them because of the absence of a private right of action. Claims against federal contractors can be brought only under section 503, 29 U.S.C. § 793 (1994), which does not give rise to a private right of action. *See, e.g.*, Davis v. United Air Lines, Inc., 662 F.2d 120, 125 (2d Cir. 1981); Brown v. Sibley, 650 F.2d 760, 763, 772 (5th Cir. 1981); Fisher v. City of Tucson, 663 F.2d 861, 862 (9th Cir. 1981).

Claims against the Federal Government are expressly authorized by section 505, 29 U.S.C. § 794a (1994). Despite the broader coverage and generally more stringent provisions of the ADA, the Rehabilitation Act might nevertheless continue to provide greater protection to disabled individuals employed by the Federal Government or federal contractors.

94. *See* Dworkin, *supra* note 86, at 300.

B. *Judging Accommodation*

As we saw in Part II, a variety of factors militate in favor of negotiated, rather than fully litigated, accommodations. The relatively low cost of many modifications,[95] the safe harbor against damages provided to employers who negotiate in good faith,[96] and the risks attendant on litigation all make it likely that employers will offer accommodations. At the same time, the relatively high search costs and dislocation expenses faced by many disabled individuals make it likely that they will accept the employer's proffered accommodation, even if it is far from perfect. In these cases, employer and employee essentially share the costs of the disability. The net effect of the parties' incentives is to create a bargaining range; the minimum accommodation the employee is willing to accept is less than the most extensive accommodation the employer is willing to undertake. The high cost to both parties of breaking off the negotiations keep them at the bargaining table and enable them to reach agreement on an accommodation that falls far below the maximum required by law. In effect, the parties substitute experimental accommodations and the information learned from these efforts for litigation as a means of resolving their differences.

For this reason, the reported cases may give a skewed picture of what accommodation requires, since they present scenarios in which the costs of the requested accommodation are high, in which no comparable job (and in the limiting case, no job at all) is available from another employer, or both.[97] Suppose, for example that a nurse suffers an injury that renders her completely deaf.[98]

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95. *See, e.g.*, RUTH COLKER, THE LAW OF DISABILITY DISCRIMINATION: CASES AND MATERIALS 86 (1995) (reporting that a study of accommodations undertaken by Sears, Roebuck from 1978–92 revealed that "the average cost per reasonable accommodation for employees with disabilities was $121.42, and that 301 of 432 (69%) of accommodations required no cost at all").

96. *See* 42 U.S.C. § 1981a(3) (1994).

97. And even in many of the reported cases, the employer has offered a variety of accommodations which either the plaintiff found insufficient or the defendant found ultimately inadequate to produce an acceptable performance. *See* Vande Zande v. Wisconsin Dep't of Admin., 44 F.3d 538, 543 (7th Cir. 1995); Arneson v. Heckler, 879 F.2d 393, 397 (8th Cir. 1989), *modified after remand*, Arneson v. Sullivan, 946 F.2d 90, 91 (8th Cir. 1991) (discussed *infra* text accompanying notes 108–19).

98. *Cf.* Southeastern Community College v. Davis, 442 U.S. 397, 403–04, 414 (1979) (holding that a deaf individual who applied for admission to a clinical nursing program was not an "otherwise qualified handicapped individual" within the meaning of section

Should the hospital be required to accommodate her by providing her with a sign language interpreter so that she can communicate instantaneously with patients and other staff? Although the statutory language suggests that the question whether provision of an interpreter would impose an undue hardship rests entirely on the difficulty or expense faced by the employer,[99] surely the worker's other employment options should matter to the analysis. In many cases, there may be a wide range of other jobs that a disabled individual could fill despite her disability, and some of these jobs might require no, or only minimal, expenditures for an accommodation by the employer. What is essential for one job, or what creates a risk of injury, may be inessential for another job. For instance, another employer might more easily accommodate the nurse by providing her with written instructions, instead of the translator for emergency situations required by the hospital. In economic terms, a high cost of accommodation faced by one employer might not be faced by the others to which the disabled individual could apply. Would we make a societal judgment that equality still requires that she be allowed to continue in her chosen career? Especially if the gap between being a nurse and accepting alternative employment is entirely a function of the two jobs' non-monetary satisfactions, is it clear that we achieve greater equality by redistributing the hospital's resources from other uses to accommodating this particular individual? Given the general difficulties in measuring and compensating for loss of personal satisfaction, it is doubtful that an equality-seeking insurance market would provide this type of insurance. It would seek instead to rely on some measure of equal resources and relative costs.

An approach that takes into account the relative ability of various participants to minimize the costs of a worker's disability and that relies on fine-grained case-by-case analysis to determine the employer's obligations resembles, in some important respects, the common-law process of developing and applying standards of negligence. As Chief Judge Posner recently explained, in the course of teasing out the relationship between reasonable accommodations and undue burdens:

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504 of the Rehabilitation Act when her disability would preclude her from functioning safely and effectively).

99. *See* ADA § 101(10)(B), 42 U.S.C. § 12,111(10)(B) (1994).

> "Reasonable" may be intended to qualify (in the sense of weaken) "accommodation," in just the same way that if one requires a "reasonable effort" of someone this means less than the maximum possible effort, or in law that the duty of "reasonable care," the cornerstone of the law of negligence, requires something less than the maximum possible care. . . . Even if an employer is so large or wealthy—or, like the principal defendant in this case, is a state, which can raise taxes in order to finance any accommodations that it must make to disabled employees—that it may not be able to plead "undue hardship," it would not be required to expend enormous sums in order to bring about a trivial improvement in the life of a disabled employee.[100]

More broadly, the substantive standard for reasonable accommodation, the wide range of factors that are relevant to the issue of undue hardship, and the procedures for enforcement through individual claims in court, all suggest an analogy to the law of negligence. The law of negligence, too, requires reasonable conduct, and implicitly requires no undue burden; it, too, is usually applied on the facts of each case; and it, too, is usually enforced through individual claims. One striking contrast, of course, is that the law of negligence, on most interpretations, requires only efficient reduction of risk. Negligence law places the loss on the party, either plaintiff or defendant, who could have reduced the risk that caused the harm to the plaintiff at the least cost.[101] As we have suggested, reasonable accommodation under the ADA involves a more wide-ranging perspective. It requires more than efficient reductions of risk, since it demands equal opportunity for the disabled, although in a form limited by the employer's ability to bear the cost of accommodation that in some respects resembles the notion of efficient risk reduction in negligence law.

Moreover, the employers' duty to confer with disabled individuals over requested accommodations might be seen as a sort of information-forcing rule for avoiding the losses resulting from disabilities. Employers who failed to confer were almost invariably held liable under the Rehabilitation Act (or similar provisions in state statutes).[102] Conversely, employees must inform their em-

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100. *Vande Zande*, 44 F.3d at 542–53 (emphasis and citations omitted).

101. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 169–73 (5th ed. 1984).

102. *See, e.g.*, Stutts v. Freeman, 694 F.2d 666, 669 (11th Cir. 1983); Morris Mem'l

ployer of their disability in order to trigger the duty to accommodate and they are under an obligation to reveal medical information necessary for devising an accommodation.[103] Together these requirements force the parties to negotiate over proposed accommodations and to find one most suitable for the disabled employee and least costly for the employer.

In some cases, however, a worker's impairment may be general, rather than firm- or occupation-specific. Or the available jobs she can perform without accommodation or with the accommodations employers are willing to offer may be far less lucrative than a job that would require a costly accommodation. As the costs of accommodation increase, so do the search costs of a disabled individual. As these costs increase, the range of jobs that the individual can fill becomes narrower and the effort needed to find those jobs becomes correspondingly greater. The issues confronted by the parties and the courts also become more intractable. At the extreme, they face an all-or-nothing choice: if this employer is not required to accommodate, then no employer is and the entire cost of adjusting to the disability is borne by the disabled individual; conversely, if the employer is required to accommodate, it bears the entire cost solely because of the unilateral choice of the disabled individual to apply for one of its jobs. This difficult choice cannot be avoided, although it can be postponed in several different ways.

The first, and least desirable way, arises from the dynamics of private enforcement. Even outside the ADA, most employment discrimination claims are brought on behalf of incumbent employees.[104] Applicants for employment bring few such claims. Perhaps the pattern of litigation under the ADA might be different because of the higher search costs of disabled plaintiffs who would seek alternative employment. On the other hand, few of the re-

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Convalescent Nursing Home, Inc. v. West Virginia Human Rights Comm'n, 431 S.E.2d 353, 359 (W. Va. 1993); Cain v. Hyatt, 734 F. Supp. 671, 682–83 (E.D. Pa. 1990); Trimble v. Carlin, 633 F. Supp. 367, 370 (E.D. Pa. 1986); Crane v. Dole, 617 F. Supp. 156, 159 (D.D.C. 1985).

103. *See* ADA § 102(b)(5)(A), 42 U.S.C. § 12,112(b)(5)(A) (duty to accommodate applies only to "the *known* physical or mental limitations of an otherwise qualified individual" (emphasis added)); *see also* Carter v. Watkins, 995 F.2d 305 (D.C. Cir. 1993) (undisclosed migraine headaches); Phelps v. Field Real Estate Co., 991 F.2d 645, 647 (10th Cir. 1993) (undisclosed AIDS under state disabilities law); Taub v. Frank, 957 F.2d 8, 11 (1st Cir. 1992) (undisclosed drug addiction).

104. *See* Donohue & Siegelman, *supra* note 67, at 1015–16.

ported cases under the Rehabilitation Act involve applicants for employment. Almost all involve plaintiffs with longstanding relationships with an employer, mostly in a position from which they were discharged or in a position in which they worked before they became disabled, sought a promotion, or were transferred.[105] These individuals have more at stake in their position with the employer, better access to evidence of possible accommodations, and larger claims and greater resources with which to attract an attorney to represent them. Applicants for employment, who most need legal assistance, are least likely to find it. It follows that many of their claims will not be brought and they will be forced to incur the costs of searching for another job simply by default. Employers will therefore be relatively free to reject their applications without discussion of possible accommodations simply by offering some pretextual reason, unrelated to the applicant's disability, for their decision. Not much can be done to alleviate this structural defect of private enforcement, apart from subsidizing legal assistance to the disabled, either through public enforcement actions or forms of legal aid.

A second means of delaying the confrontation with hard cases under the ADA is to follow the strategy of the Rehabilitation Act and recognize the government, and perhaps government contractors, as exemplary employers of the disabled. A disabled individual denied employment by a private firm could then seek government employment. This strategy might also result in economies of scale in providing accommodation as more disabled individuals obtain government employment and receive similar accommodations. In addition to spreading the cost of accommodation over society generally, such an approach also spreads the cost of developing new accommodations and the cost of litigation over what accommodations are required in hard cases. Of course, the cost-spreading rationale for an enhanced duty of accommodation by the government also prevents precedent developed in government cases from being applied directly to private employers. Experience in accommodations in government employment might nevertheless reveal the cost of accommodations that might justifiably be imposed upon private employers.

The third means of postponing a decision on the outer limits of the duty to accommodate is to require provisional accommoda-

105. *See, e.g., infra* text accompanying note 110.

tions by the employer, followed by an analysis of how well the employee has performed with this form of assistance. Many cases under the Rehabilitation Act, even those against the Federal Government, have ultimately found no duty for additional accommodations based on the partial accommodations already provided to the employee. Either these accommodations have proved to be sufficient in the court's judgment, so that no further accommodation was required,[106] or the employee's performance did not improve with prior accommodations and so was not likely to do so with greater accommodations.[107] It also is possible, of course, that a temporary accommodation may prove to be inadequate.

One example of a case that approaches—if it does not exceed—the outer limits of reasonable accommodation is *Arneson v. Heckler*.[108] Arneson worked as a claims representative for the Social Security Administration (SSA), interviewing claimants to obtain application information, advising claimants of their eligibility for benefits, and helping to determine their entitlement to benefits. He suffered from apraxia, a disability which interfered with a variety of cognitive and linguistic skills. He was easily distracted; he had an impaired ability to concentrate and to perform motor and cognitive tasks simultaneously; he also had difficulty understanding spoken and written language, problems acquiring and working with information, and poor handwriting and organizational skills. For the last of these impairments, he was given assistance in organizing his work. For the remainder, he was given his own office and a telephone headset. These accommodations helped him to perform, but when he accepted a voluntary transfer to a different location, he lost his office and his work deteriorated. After repeated warnings from his supervisor that his work was unsatisfactory, he was discharged for seventy-five instances of inadequate performance.

Arneson filed a claim under the Rehabilitation Act and, after a trial, the district court granted judgment for the SSA. The Eighth Circuit, with one judge dissenting, reversed and remanded

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106. *See, e.g.*, *Watkins*, 995 F.2d at 305; Guice-Mills v. Derwinski, 967 F.2d 794, 798 (2d Cir. 1992); Shea v. Tisch, 870 F.2d 786, 789–90 (1st Cir. 1989).

107. Lucero v. Hart, 915 F.2d 1367, 1372 (9th Cir. 1990); Carter v. Bennett, 840 F.2d 63, 67–68 (D.C. Cir. 1988); Adrain v. Alexander, 792 F. Supp. 124, 126 (D.D.C. 1992).

108. 879 F.2d 393 (8th Cir. 1989) [*Arneson I*], *modified after remand*, Arneson v. Sullivan, 946 F.2d 90 (8th Cir. 1991) [*Arneson II*].

for reconsideration of whether two sorts of accommodation—transfer back to his original office or the provision of a personal assistant—would enable Arneson to perform the job and, if they would, whether they would nonetheless constitute an undue burden on the SSA.[109] Accommodation through transfer raised relatively straightforward issues.[110] If Arneson's former position were still open and available, the cost of this accommodation would have been small, and the SSA would have been required to bear it. If, however, there were no equivalent positions available in a more propitious location, then the costs of transfer to the SSA would have posed an undue hardship, since it was conceded that Arneson simply could not do the job uuless a private office was once again available for him.[111]

The second accommodation raised a more difficult question. The court of appeals recited the rule, repeated in many cases, that the employer was not "required to hire another person capable of actually performing Arneson's job."[112] Yet it also relied on a

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109. *See Arneson I*, 879 F.2d at 397–98.

110. The cost of searching for a job with a different employer figures in the overall cost of denying an accommodation to the disabled individual. It also figures in another line of cases under the Rehabilitation Act, those concerned with an employer's duty to diminish such costs by transferring the individual to another job in its operations. *See* Barbara A. Lee, *Reasonable Accommodation Under the Americans with Disabilities Act: The Limitations of Rehabilitation Act Precedent*, 14 BERKELEY J. EMP. & LAB. L. 201, 219–23 (1993). Most cases under the Rehabilitation Act denied any absolute right to transfer, *see, e.g., Shea*, 870 F.2d at 789; Carter v. Tisch, 822 F.2d 465, 467–69 (4th Cir. 1987), although a reasonable right to transfer according to regular company policy was recognized by the Supreme Court, *see* School Bd. of Nassau County v. Arline, 480 U.S. 273, 289 n.19 (1987). The right to a reasonably available transfer has been expansively interpreted in some cases, *see, e.g.*, Miller v. Runyon, 77 F.3d 189, 192–93 (7th Cir. 1996); Buckingham v. United States, 998 F.2d 735, 740 (9th Cir. 1993); Bates v. Long Island R.R., 997 F.2d 1028, 1035–36 (2d Cir. 1993), and is required by a recent regulation applicable to federal agencies, 29 C.F.R. § 1614.203(g) (1995) (generally requiring reassignment to vacant positions in the same commuting area). The ADA itself recognizes "reassignment to a vacant position" as one possible accommodation, without, however, resolving the question of undue hardship. ADA § 101(a), 42 U.S.C. § 12,111(9) (1994). As we have seen, disabled individuals face higher costs of searching for a job than other employees. Where the employer's cost of accommodation by job transfer is less than the amount it would cost the worker to find another job in the open market, the employer should generally be required to make the transfer. On the other hand, if the costs to the employer of a transfer are greater than the costs of the worker's job search, then the worker ought to bear the cost, as he is able to minimize the total costs of adjusting to the disability.

111. *See Arneson I*, 879 F.2d at 396–97. On remand, the issue of office transfer became one of merely providing Mr. Arneson with office space. *See Arneson II*, 946 F.2d at 92.

112. *Arneson I*, 879 F.2d at 397; *accord* Gilbert v. Frank, 949 F.2d 637, 644 (2d Cir.

contrary principle that "the federal government should be a model employer of the handicapped and should be required to make whatever reasonable accommodations are available."[113] These opposed principles do not do much to solve the real problem: how much of the plaintiff's job must be given over to an assistant as a reasonable accommodation? "All" is too much. "More than by a private employer" is uninformative. The eventual solution developed in *Arneson* was to require similar assistance to that given blind employees in the form of readers.[114] This result was aided significantly by fortuitous technological changes in Arneson's job; in the course of the litigation, the SSA had computerized its operations and "an individual with no computer experience and the ability to use two fingers can now function as a claims representative. This new system itself seem[ed] to be an accommodation that [would] eliminate Arneson's 'motor awkwardness' and 'difficulties in writing.'"[115]

The result in *Arneson* follows the pattern of imposing only a fraction of the cost of disability payments on the employer. This pattern is evident even in the cases requiring employment of a personal assistant and even when the employer is the government.[116] The decision in *Arneson* also reveals the tentative and experimental nature of any accommodation. The court of appeals explicitly left open the possibility that Arneson could be discharged if his performance remained inadequate after the required accommodations were put in place.[117] The cost of experimenting

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1991) (holding that "reasonable accommodation" does not mean elimination of any of the job's essential functions); Chiari v. City of League City, 920 F.2d 311, 318 (5th Cir. 1991) (stating that after the accommodation the employee must still be able to perform the job's "essential functions"); Treadwell v. Alexander, 707 F.2d 473, 478 (11th Cir. 1983) (holding that requiring other employees to perform many of the disabled employee's duties would impose an "undue hardship" on the employer); Coleman v. Darden, 595 F.2d 533, 540 (10th Cir. 1979) (holding that while the ability to read was not specifically listed as a requirement for a job as research analyst, the announced duties of the position made it clear that literacy was required and that the employer was justified in neither appointing a blind person to the position nor hiring someone to read the materials for the blind person because the ability to read was critical to the job).

113. *Arneson I*, 879 F.2d at 398.

114. *See Arneson II*, 946 F.2d at 92–93.

115. *Id.* at 92.

116. *See, e.g.*, Carter v. Bennett, 840 F.2d 63, 67–68 (D.C. Cir. 1988) (finding that provision of reader for 18 hours a week to legally blind employee constitutes reasonable accommodation).

117. *Arneson II*, 946 F.2d at 93.

with this accommodation—which might have been considerable—was properly borne by the government in the first instance for the reasons of cost spreading referred to earlier. An accommodation developed by the government can form a standard for accommodations by private employers, much as the practice of providing blind employees with readers was used as a standard in *Arneson* itself.

There will always be cases in which it is hard to determine whether the cost of accommodation is too great. Indeed, *Arneson* itself might be wrong, as the dissenting judge thought.[118] On the other hand, in rejecting an absolute ceiling on accommodation of 10% of the employee's salary, Congress also rejected a bright line test of undue hardship.[119] Instead of searching for another such test that Congress has not yet rejected, it makes more sense to provide a structure for considering the factors that Congress has already approved. By emphasizing the financial resources of the employer and the nature of its operations, these factors broadly support a search for the least costly means of accommodation undertaken jointly by the employer and the disabled individual. Moreover, the continued obligation of the Federal Government to serve as a model employer provides a source for the technological and managerial innovations necessary to accommodate the disabled. As these innovations spread to the private sector, both the cost of any one accommodation and the unfairness of imposing it upon any single employer are likely to diminish. Just as hard cases are certain to arise, so too, are the developments that increase the range of accepted accommodations and the corresponding range of opportunities for the disabled.

C. *Reasonable Accommodation and Affirmative Action*

The insights gained from fleshing out the meaning of reasonable accommodation in disability cases present an opportunity to rethink employment discrimination law more generally. By contrast to earlier prohibitions against discrimination, the ADA incorporates a more explicit understanding of the contingency of existing job configurations: that they need not be structured the way that they are. Rather than taking job descriptions as a given, reason-

118. *Arneson I*, 879 F.2d at 398–400 (Whipple, J., dissenting).
119. *See supra* note 46 and accompanying text.

able accommodation doctrine asks how the job might be modified to enable more individuals to perform it. The doctrine asks the employer to accommodate the job to the individual, rather than demanding that individuals accommodate themselves to the job or forgo it altogether. A revised model of affirmative action can be developed from this understanding of jobs as contingent assemblies of tasks and responsibilities that can be changed to accommodate the needs of individual employees.

At the same time, as our discussion of the analogy to disability insurance suggests, the ADA recognizes a second, deeper contingency that powerfully affects individuals' employment opportunities: much of a person's ability to perform a job depends on faculties beyond her control, faculties whose absence society might seek to offset. In the broader context of antidiscrimination law, these insights about contingency might be used to encourage employers to restructure positions to expand the pool of available workers. For example, employers might offer increasingly flexible scheduling options that would enable more women with childcare responsibilities to undertake particular jobs. And courts might be more receptive to employers' attempts to bring traditionally underrepresented racial or ethnic minorities into desirable jobs once they perceive underrepresentation as the product of a host of contingent factors rather than the application of supposedly objective, merit-based criteria.[120] Perhaps the very way in which particular jobs are structured is in part the product of stereotyped beliefs about racial and ethnic minorities or women. In particular, targeted training and education programs that seek to bring previously absent groups into a particular work force should be subjected to less judicial skepticism.

The individualized adjustments required by the duty of reasonable accommodation lead away from the formalities and generalizations that have plagued traditional forms of affirmative action on the basis of race and sex. Accommodations worked out largely in negotiations between individual employers and employees are necessarily tailored to their own particular circumstances. Under the ADA, the extent—and even the existence—of an accommodation depends on the needs of the individual employee

120. *See* DeFunis v. Odegaard, 416 U.S. 312, 327–30, 340–41 (1974) (Douglas, J., dissenting) (arguing that the need for racial preferences in admission to law school could be avoided by ending reliance on objective tests such as the LSAT).

and the requirements of the particular job. Reasonable accommodation does not perpetuate the stereotypes that it is designed to counteract. In traditional affirmative action plans, the same stereotypes that reinforce patterns of discrimination have supported the charge that affirmative action plans stigmatize the very groups that they are supposed to help. Individual members of minority groups, whether or not they actually have benefited from these plans, are assumed to have succeeded only because they have received preferential treatment.[121] Reasonable accommodation as an individualized form of affirmative action dispels the fallacy in this argument. Recognition of a general need for affirmative action on behalf of an entire group does not require uniform preferences for everyone in the group—or any preferences at all for some members of the group. Employees from the same racial or ethnic group, but with different levels of education, might receive varying forms of training, from quite extensive to none at all. So, too, varying benefits might be extended to women depending on the extent of their childcare responsibilities.

Moreover, adopting the ADA's fine-grained focus on case-by-case adjustment of the individual and the job dovetails with the courts' increasing reliance on individualism in antidiscrimination law. If "the heart" of equal treatment is "the simple command" to treat persons "as individuals, not as simply components of a racial, religious, sexual or national class,"[122] then antidiscrimination law should allow employers to respond to the particularized needs of individual women and racial minorities for adjustments to job requirements that incumbent male or white workers have satisfied.

Finally, the ADA's recognition that the affirmative action involved in reasonable accommodations can readily be distinguished from impermissible discrimination should give pause to courts who purport to see no difference between affirmative action on the basis of race or sex and invidious discrimination on these grounds. The fact that traditional prohibitions on discrimination and innovative forms of affirmative action can coexist under the

121. *See* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2119 (1995) (Thomas, J., concurring in part and concurring in the judgment).

122. Miller v. Johnson, 115 S. Ct. 2475, 2486 (1995) (quoting Metro Broadcasting v. FCC, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting) (internal quotation marks omitted)).

ADA suggests that the same may be true for employment discrimination law more generally.

CONCLUSION

A careful look at the duty of reasonable accommodation under the ADA reveals its similarities to and differences from preexisting doctrines of employment discrimination law. The ADA's innovations are profound; the law departs from a finding of prior wrongful discrimination as the predicate for affirmative relief for identified individuals, and imposes a duty to accommodate without a prior finding of wrongdoing. Thus the ADA imposes a kind of liability without fault. Nevertheless, it has several structural similarities to the law of negligence, especially in requiring a case-by-case analysis of what constitutes a reasonable accommodation and an undue hardship. We have suggested how this analogy to negligence might be developed, not in the service of overall economic efficiency but in determining the most effective way to spread the costs of disabilities, both in providing immediate assistance to the disabled and in developing new accommodations for the future.

The broader implications of the duty of reasonable accommodation result from its break with the concept of discrimination as ordinarily understood. The duty does not presuppose a finding of prior discrimination, a general affirmative action plan, or any constitutional standards of adequacy. If the duty of reasonable accommodation succeeds for the disabled, it suggests that we might consider a similar model for members of other protected classes. Perhaps an open-ended responsibility to enable all workers to enjoy equal employment opportunities by taking account of the particular way in which their membership in a protected class has impaired their full participation in the economy would do more to end the continuing effects of past discrimination than the current combination of broad negative prohibitions and bureaucratic classwide preferences.