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THE ESSENTIAL-FUNCTIONS LIMITATION ON THE CIVIL RIGHTS OF PEOPLE WITH DISABILITIES AND JOHN RAWLS'S CONCEPT OF SOCIAL JUSTICE

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I. INTRODUCTION

The enactment on July 26, 1990, of the Americans with Disabilities Act of 1990[1] ("ADA") promises without question to extend a new measure of equality to some forty-three million Americans with disabilities,[2] just as civil rights legislation of a generation earlier has mandated equal treatment for citizens regardless of race, color, religion, sex, or national origin,[3] or age.[4] The ADA extends to the private sector, under the expansive scope of the Commerce Clause,[5] and to state and local governments, under section five of the fourteenth amendment,[6] those rights previously created through its predecessor of seventeen years, section 504 of the Rehabilitation Act of 1973.[7]

Congress created the ADA partially because the reach of the Rehabilitation Act is relatively restricted, extending under the Spending Clause[8] only to those people with disabilities engaged in programs or activities "receiving Federal financial assistance,"[9] while two closely related sections

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This article was substantially completed in August, 1991; with the exception of the Civil Rights Act of 1991, *infra* note 221, it reflects the law in force at that time.

1. Pub. L. No. 101-336, 104 Stat. 327, designated as S. 933 and H.R. 2273 in the 101st Congress, 1st and 2d sessions (1989-90) (to be codified at 42 U.S.C. §§ 12101-12213 and 47 U.S.C. § 225 and § 611).

2. *See* Americans with Disabilities Act, § 2(a)(1), 104 Stat. 327, 328 (to be codified at 42 U.S.C. § 12101(a)(1) (1991)) [hereinafter "ADA"].

3. The Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1981).

4. The Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623 (1985).

5. U.S. CONST. art. I, § 8, cl. 3.

6. U.S. CONST. amend. XIV, § 5; *see* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (permitting Congress to abrogate the states' sovereign immunity under section 701(a) of title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(a) (1981), under this constitutional provision); *see also* 42 U.S.C.A. § 12202 (West Supp. 1991) (abrogating sovereign immunity).

7. 29 U.S.C. § 794 [hereinafter section 504]; *see also* § 501(b), 29 U.S.C. § 791(b) (applying nondiscriminatory standard to federal agencies) and § 503, 29 U.S.C. § 793 (applying it to federal contractors). These three sections of the Rehabilitation Act are generally regarded as interchangeable for purposes of nonjurisdictional analysis and will be so treated here. *See, e.g.*, Crewe v. United States Office of Personnel Management, 834 F.2d 140, 141 (8th Cir. 1987) (treating section 501, section 503, and section 504 as parallel provisions prohibiting discrimination against handicapped persons); S. REP. No. 116, 101ST CONG., 1ST SESS. 31 (1989) ("reasonable accommodations" consistently treated in sections 501, 503, and 504).

8. U.S. CONST. art I, § 8, cl. 1.

9. 29 U.S.C. § 794.

of the Rehabilitation Act extend only to such persons employed by federal agencies or by federal contractors.[10] "Congress limited the scope of [section] 504 to those who actually 'receive' federal financial assistance because it sought to impose [section] 504 coverage as a form of *contractual* cost as a form of the recipient's agreement to accept federal funds."[11] Under the ADA, though, Congress has gone beyond this contractarian approach to jurisdiction and has now imposed the duty to recognize rights of persons with disabilities by operation of law. Now people with disabilities will enjoy pervasive protection of their rights across a broad range of governmental and private sector activities,[12] just as persons of other groups have enjoyed from the very inception of the statutory recognition of their civil rights in the 1960s, there remains a difference, perhaps an ineradicable one, between the legal treatment of people with disabilities and of other protected groups that sets recognition of the former's civil rights apart.

The very traits which require people with disabilities to be protected from discrimination also may prevent them from functioning in employment and from participating in programs or receiving benefits.[13] The history of the ADA, unlike the other great civil rights statutes such as the Civil Rights Act of 1964,[14] expressly begins with the conditional premise "that persons with disabilities should not be excluded from job opportunities *unless they are actually [i.e., naturally] unable to do the job.*"[15] In this respect the Act is unlike other legislation that addresses discrimination involving race, national origin, sex, or age, where the main obstacle to full enjoyment of rights is removal of irrational stigmas and stereotypes of a social nature. There the assumption is that once social or other artificial barriers are dispelled, persons with the protected traits will become like other persons in the work force who are evaluated without prejudice and whose acceptance is not otherwise blocked by natural obstacles. Under the ADA and section 504 the need to erase stereotypes is joined by the seemingly intractable problem of how to treat the physical or mental disability of the person, which is neither social, artificial, nor irrational, but simply a "stubborn fact" of nature itself imbedded in that person's life experience.[16]

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10. *See* §§ 501 and 503 of the Rehabilitation Act of 1973, 29 U.S.C. §§ 791, 794; *see also* note 7, *supra*.

11. United States Dept. of Transp. v. Paralyzed Veterans of America, 477 U.S. 597, 605 (1986) (emphasis added); *see also* Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 632 n.13 (1984) ("Congress apparently determined that it would require contractors and grantees to bear the costs of providing employment for the handicapped as a *quid pro quo* for the receipt of federal funds.")

12. 42 U.S.C.A. § 12101(b)(4) specifically invokes the commerce clause and fourteenth amendment powers. *See also* 42 U.S.C.A. § 12111(5)(A) (including "affecting commerce" in definition of "employer").

13. Gittler, *Fair Employment and the Handicapped: A Legal Perspective*, 27 DE PAUL L. REV. 953, 967 (1978); Note, *Accommodating the Handicapped: The Meaning of Discrimination Under Section 504 of the Rehabilitation Act*, 55 N.Y.U. L. REV. 881, 883 (1980) [hereinafter N.Y.U. Note].

14. 42 U.S.C. § 2000e to -15 (1964).

15. H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 3, at 31 (1990) (emphasis added).

16. *Cf.* A.N. WHITEHEAD, *Process and Reality* in 1927-28 GIFFORD LECTURES xiv, 129, 219 (D. Griffin & D. Sherbourne, eds. 1978).

The central legal concept used to appraise this element of natural necessity that resists total elimination under the impact of law has grown up in the regulations and case law under section 504[17] and has been continued in the ADA.[18] The concept is that of "the essential functions of the job [or program, etc.]."[19] This concept sets out the nonstereotypical, natural, and thus physical requirements that a person with a disability must be able to meet or perform to attain equality. No analogue exists for other groups suffering discrimination, save perhaps for the very limited exception of the bona fide occupational qualification ("BFOQ").[20]

The impact of BFOQ on other groups has been comparatively minor, while "essential functions" dominates disabilities law. The "essential functions" concept, with its correlative terms "reasonable accommodation" and "undue hardship," which signify adjustments to vary the root concept's applications, measures the very extent to which the person with a disability must overcome ever present natural necessity to achieve equality both under the law and, to a practical extent, in his or her own life experience. Viewed from this perspective, as a response to largely invariable natural conditions, the concept of essential functions promises to be a legal impediment to the achievement of equality, one of the premier values in our law and culture. It is most appropriate, therefore, to subject the essential-functions test to prescriptive analysis under a normative approach to equality and social justice.

John Rawls's *A Theory of Justice*[21] is deeply imbued with equality as the essential component of social justice. The work is preeminent in its field among American philosophers; "[p]olitical philosophers now must either work with Rawls's theory or explain why not."[22] Aside from its pre-eminence, Rawls's work is expressly and undeniably normative in its thrust and thus stands in sharp contrast to prevailing American legal positivism, which does not require law to "reproduce or satisfy certain demands of morality."[23] It thus addresses the moral component inherent in justice and equality often omitted in legal analysis but so critical to the application of the ADA.

Rawls's philosophy of "justice as fairness" is, however, a *measured* brand of egalitarianism. While intangible liberties and rights are to have an equal distribution among all citizens,[24] material goods may be distributed unequally provided that certain conditions are met.[25] What these

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17. School Bd. of Nassau County, Fla. v. Arline, 480 U.S. 273, 287 n.17 (1987).
18. 42 U.S.C.A. § 12111(8).
19. *Id.*
20. This concept has been used to justify discrimination against the protected class as such, because of its members' shared natural traits, when such a gross exclusion is shown to be "reasonably necessary to the essence of the business." Western Air Lines, Inc., v. Criswell, 472 U.S. 400, 413 (1985) (quoting Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 236 (5th Cir. 1976)) (emphasis omitted).
21. J. RAWLS, A THEORY OF JUSTICE (1971).
22. N. NOZICK, ANARCHY, STATE AND UTOPIA 183 (1974).
23. H.L.A. HART, THE CONCEPT OF LAW 181 (1961).
24. J. RAWLS, *supra* note 21, § 11, at 61; § 16, at 97.
25. *Id.* § 11, at 61; § 82, at 546.

"conditions" are and whether they may justify or condemn the operation among people with disabilities of the "essential-functions" standard is in large part the subject of analysis to follow. Rawls also sets up the requirement of a dynamic principle of self-development to undergird justice as fairness,[26] and that principle will be used to probe the essential-functions issue and related matters.

The ADA and its precursor, section 504, will consequently be examined by probing their shared concept of "essential functions" against the normative background of Rawlsian principles of justice and equality. The principal and critical norms of Rawls will be reflected in his treatment of distributive justice for material goods, as well as in his theory of self-development. For manageability in assessing the two statutes, the inquiry narrows to employment matters, or title I of the ADA, and to section 504 of the Rehabilitation Act of 1973.[27] The latter, though certainly concerned with employment, also reaches discrimination in elementary and secondary education, higher education, access to public facilities, mass transportation, and the allocation of health and welfare services.[28] Occasionally, therefore, cases under section 504 dealing with non-employment matters will also be considered, albeit the focus remains on employment discrimination and how this issue is treated, particularly in title I of the ADA.

The principal purpose of this article is to illumine from a normative perspective the concepts that have contributed to fashioning the legally recognized civil rights of people with disabilities and to provide a selective and prescriptive review of the law, old and new. With some qualifications, especially in the area of self-development, the findings are that the law, old and new, continues to resist the assimilation of persons with natural disabilities to a station of economic equality (even as qualified by Rawls), and that the inflexibility of the essential-functions test is perhaps the major legal barrier to the achievement of equality unimpeded by such disabilities.

II. THE ROLE OF "ESSENTIAL FUNCTIONS" IN THE REHABILITATION ACT OF 1973 AND IN THE AMERICANS WITH DISABILITIES ACT OF 1990

According to Aristotle, the philosopher who is most identified as the philosopher of essence, "[t]he essence of each thing is what it is said

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26. *Id.* § 65, at 426-28.

27. 29 U.S.C.A. § 794.

28. Note, *Mending the Rehabilitation Act of 1973*, 1982 U. ILL. L. REV. 701, 704. Titles II and III of the ADA also cover a broad spectrum of non-employment programs and activities in both the public and private sectors. *See* 42 U.S.C.A. § 12132, H.R. REP. No. 485, 101st Cong., 2d Sess. pt. 2, 84 (1990) (extending such protection against discrimination in public services as already found under section 504 of the Rehabilitation Act); *see also* 42 U.S.C.A. § 12181(7)(A)-(L) (covering a wide variety of accommodations in the private sector, including private schools); H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 2, 99-100 (1990). Many of the principles discussed in this article could be applicable to titles II and III, but the article does not expressly take up these non-employment provisions.

to be . . . in virtue of itself."[29] Spinoza, another philosopher of essence, stated, "I consider belonging to the essence of a thing that, which being given, the thing is necessarily given also, and, which being removed, the thing is necessarily removed also."[30] This approach to the term "essence" has been carried into the law where it has been defined "that which makes something what it is."[31] The thread of meaning here attributable to "essence" and its derivative form "essential" is the meaning followed or assumed throughout that which follows.

A. "Essential Functions" Under Section 504 of the 1973 Act

1. The Statute and Its Regulations

Section 504 does not speak of an essential-functions requirement. Rather, it provides in relevant part:

> No *otherwise qualified individual* with handicaps . . . as defined in section 706(8) of this title [29 U.S.C. § 706(8)], shall . . . by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[32]

The regulations of the Department of Health, Education and Welfare, however, changed the expression "otherwise qualified individual" to "qualified handicapped person"[33] and then defined the latter as "a handicapped person who, with *reasonable accommodation*, can perform the *essential functions* of the job."[34] Employers were found to have a duty to "make *reasonable accommodations* to the known physical or mental limitations" of such a person with a disability unless to do so would result in "*undue hardship*" to the employer.[35] "The standard which evolve[d] [from the italicized terms in these 1977 regulations, as molded in the courts] requires that a handicapped individual be able to perform safely and efficiently the essential functions of the job with reasonable accommodation," though without undue hardship to the employer.[36] In the first major case construing section 504, however, the United States Supreme Court appeared to read the duty of accommodation out of the statute with a harsh ruling requiring an applicant with a disability to

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29. ARISTOTLE, *Metaphysics* 1029b4, in THE BASIC WORKS OF ARISTOTLE 786 & n.8 (R. McKeon ed. 1968).

30. SPINOZA, *The Ethics*, Pt. II, Def. II at 82 (Elwes trans. 1955).

31. Borneo Sumatra Trading Co. v. United States, 311 F. Supp. 326, 337 (Cust. Ct. 1970) (quoting from *Webster's New World Dictionary of the American Language*).

32. 29 U.S.C. § 794(a) (emphasis added).

33. 45 C.F.R. § 84.4 (1977).

34. *Id.* § 84.3(k)(1).

35. *Id.* § 84.12(a); *see* Note, *Employment Discrimination against the Handicapped and Section 504 of the Rehabilitation Act: An Essay on Legal Evasiveness*, 97 HARV. L. REV. 997, 1010 & nn. 79-82 (1984) [hereinafter Harvard Note]; Gittler, *supra* note 13, at 960 n.21. (emphasis added).

36. Gittler, *supra* note 13, at 980; *cf.* S. REP. No. 116, 101st Cong., 1st Sess. 21 (1989) (indicating that the 1977 DHEW regulations continue to apply in construction of the ADA).

meet an essential requirement of a program without *any* adjustment or accommodation.[37]

2. The Case Law Development of "Essential Functions"

a. The Supreme Court Trilogy

In a trilogy of cases the Supreme Court has developed the concept of essential functions and related notions as they exist under the Rehabilitation Act and now appear in the ADA. Beginning in *Southeastern Community College v. Davis*,[38] Justice Powell, writing for a unanimous Court, found that "[a]n otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap."[39] Despite some ambiguity in the phrase "in spite of," the Court appears to have meant the term to apply in a narrow sense to require the applicant to meet all the requirements of the program, no allowance being made for her disability.[40] Here, the disability was a severe hearing impairment which raised both a question of qualifications and a safety issue as well about whether the applicant should become a practicing nurse. The Court held that the applicant's accommodative restriction to a modified nursing program confined to non-clinical classes, where her deafness would not interfere with her progress, would constitute an impermissible "*fundamental alteration* in the nature of [the] program . . . far more than the 'modification' the regulation [45 C.F.R. § 84.44(a) (1978)] [allows for academic programs.]"[41] The Court went on to state that section 504 does not permit affirmative action, apparently confusing that term with the "accommodation" or "modification" ostensibly allowable under the administrative regulations complementing section 504. Yet, in dicta, the Court closed with the statement that "situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory."[42] Such a duty to modify could *never* arise, though, where it would entail "substantial modifications . . . to accommodate a handicapped person."[43] The concept of essential functions, though never expressly mentioned by the Court, would thereafter remain free from and independent of any concept of *fundamental* or *substantial* alterations as limitations in its scope. This same restriction on the amount of accommodation owed to a person with a disability is part of the ADA.[44]

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37. *See* Southeastern Community College v. Davis, 442 U.S. 397 (1979).
38. 442 U.S. 397 (1979).
39. *Id.* at 406.
40. *Cf.* N.Y.U. Note, *supra* note 13, at 884.
41. *Southeastern*, 442 U.S. at 410 (emphasis added).
42. *Id.* at 412-13 (discussing sections 501 and 503 of the Rehabilitation Act, 29 U.S.C. § 791, § 793, which expressly refer to affirmative action); *see* N.Y.U. Note, *supra* note 13, at 886.
43. *Southeastern*, 442 U.S. at 413.
44. S. REP. No. 116, 101st Cong., 1st Sess. 33 (1989); H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 2, at 64 (1990).

In *Alexander v. Choate*,[45] the Supreme Court held that, even though reductions in Medicaid medical benefits would have a disparate impact on the people with disabilities of Tennessee, these persons were not entitled to remedial action because the "process [of addressing the needs of such disparate-impacted persons] could lead to a wholly unwieldy and administrative burden."[46] Thus the Court declined to grant people with disabilities any additional benefits.

The Court did, however, use the occasion to reinterpret its opinion in *Southeastern*. The rejected "fundamental alteration" of *Southeastern* was "far more than the reasonable modification the statute or regulations required . . . . [W]hile a grantee need not be required to make 'fundamental' or 'substantial' modifications to accommodate the handicapped, it may be required to make 'reasonable' ones."[47] Moreover, the use of the term "affirmative action" and its denigration "referred to those 'changes' . . . that would constitute 'fundamental alteration[s] in the nature of a program' . . . rather than to those changes that would be reasonable accommodations."[48]

> After *Alexander* it is [therefore] clear that the phrase "otherwise qualified" has a paradoxical quality; on the one hand, it refers to a person who has the abilities or characteristics sought by the grantee [*i.e.*, the applicant or employee can perform all the essential functions]; but on the other, it cannot refer only to those already capable of meeting all the requirements [*i.e.*, "in spite of his handicap"] or else no reasonable requirement could ever violate [section] 504, no matter how easy it would be to accommodate handicapped individuals who cannot fulfill it.[49]

The "paradox" arises because of the re-emergence as a distinct notion of "reasonable accommodation" from its identification with the concept of "affirmative action" in *Southeastern*. After *Alexander*, reasonable accommodation became the means by which essential functions may be modified to permit their performance by the "otherwise qualified," so long as that accommodation does not impinge too far on those functions. If it does so, it may become an impermissible fundamental alteration and, thus, as the law has developed, an "undue hardship."

In the final case of the trilogy, *School Board of Nassau County, Florida v. Arline*,[50] the Court decided the dual but closely related questions of: (1) whether a person with a contagious disease (there, tuberculosis) could be considered a "handicapped person" within the meaning of section 504; and (2) whether such a person, if covered, would pose such a threat to the health and safety of others that she would not be "otherwise

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45. 469 U.S. 287 (1985).
46. *Id.* at 298.
47. *Id.* at 300.
48. *Id.* at 300 n.20.
49. Brennan v. Stewart, 834 F.2d 1248, 1261 (5th Cir. 1988).
50. 480 U.S. 273 (1987).

qualified" for the job (there, teaching elementary school).[51] Having found that a person with tuberculosis is covered by section 504, the Court cryptically held that "[a] person who poses *a significant risk* of communicating an infectious disease to others in the workplace will not be *otherwise* qualified . . . if *reasonable accommodation* will not eliminate that risk."[52] Accordingly the question of health and safety, like more conventional employment requirements, could be considered part of the essential functions of the job for which "[t]he basic factors to be considered . . . are well established:"[53]

> In the employment context, an otherwise qualified person is one who can perform "the essential functions" of the job in question. 45 CFR § 84.3(k) (1985). When a handicapped person is not able to perform the essential functions of the job, the court must also consider whether any "reasonable accommodation" by the employer would enable the handicapped person to perform those functions. *Ibid.* Accommodation is not reasonable if it either imposes "undue financial and administrative burdens" on a grantee . . . or requires "a fundamental alteration in the nature of the program."[54]

This statement by the Court is the classic formulation of the essential-functions standard and the permissible means of its adjustment. It plainly shows, however, that, while reasonable accommodation is a valid means by which an otherwise qualified person with a disability may become able to perform the essential functions of a job, such an accommodation may never amount to a change either an "undue . . . burden" or a "fundamental alteration" that will make the position in question something which it essentially is not. The concept of essential functions, therefore, retains "a core notion of functional competence and efficiency but at the same time indicates a zone of marginal incapacity that an employer must either tolerate [if nonessential] or accommodate [if essential, but subject to acceptable adjustment.]"[55]

b. "Essential Functions" in the Lower Courts

The lower federal courts have generally acknowledged the role of the essential-functions concept as developed by the Supreme Court in resolving section 504 disputes. In *Strathie v. Department of Transportation*,[56] for instance, the Third Circuit had to decide whether wearing a hearing aid would be acceptable as a reasonable accommodation to permit a school bus driver, qualified in every other respect, to operate a bus. Asserting the position that no accommodation is reasonable that "would require either a modification of the essential nature of the program, or [that

51. *Id.* at 287.
52. *Id.* at 287 n.16 (emphasis added).
53. *Id.* at 287.
54. *Id.* at 288 n.17.
55. Harvard Note, *supra* note 35, at 1011.
56. 716 F.2d 227 (3d Cir. 1983).

would] impose an undue burden on the recipient of federal funds,"[57] the court noted that the "first step in resolving this dispute must be to ascertain the essential nature of the school bus driver licensing program."[58] It then developed the essential nature of the requirements through its own judicial inquiry, and not through mere acceptance of the licensing authority's definition. The court vacated and remanded for further proceedings under the judicially fashioned standard after exhaustively reviewing and rejecting the state agency's grounds for not accepting the hearing aid as a reasonable accommodation for hearing loss.

In *Prewitt v. United States Postal Service*,[59] the Fifth Circuit, in one of the earliest disparate impact[60] cases under the Rehabilitation Act, introduced the concept of *business necessity*, taken from title VII jurisprudence, as a means by which the Postal Service could justify ostensibly neutral physical requirements for employees' lifting and reaching capacities. Those requirements—selection criteria for work performance that could have an adverse impact on people with disabilities—may, the court held, be justified by proof from the employer that the challenged criteria are "job-related, *i.e.*, that they are required by 'business necessity.' "[61] The court had earlier found that the complaining employee "might . . . be entitled to relief . . . [as] a victim of 'disparate impact' discrimination if he was rejected even though he could have performed the essentials of the job if afforded reasonable accommodation."[62] The business necessity defense (when properly validated) is consequently another means to defend the integrity of the employer's essential functions, here in the context of discriminatory impact caused by facially neutral job performance criteria. Of course, the employer's duty of reasonable accommodation may permit the employee with a disability some *limited* advance across the normal perimeters of those functions, even as justified by business necessity.

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57. *Id.* at 231.

58. *Id.*

59. 662 F.2d 292 (5th Cir. 1981) (brought under section 501 of the Rehabilitation Act of 1973, 29 U.S.C. § 791).

60. *See* EEOC Final Regulations for ADA, title I [hereinafter EEOC ADA Regulations] 29 C.F.R. § 1630.15(b) & (c) app. (1991) ("Disparate impact means . . . that uniformly applied criteria have an adverse impact on an individual with a disability or a disproportionately negative impact on a class of individuals with disabilities."); *cf.* Smith v. Barton, 914 F.2d 1330, 1339-40 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 2825 (1991) (distinguishing between section 504 cases based on disparate treatment (discriminatory intent) and disparate impact). The Final Regulations for title I of the ADA were promulgated by the Equal Employment Opportunity Commission too late to be fully analyzed in this article. References are included to the major regulations affecting the discussion for the convenience of the reader.

61. Prewitt v. United States Postal Serv., 662 F.2d at 306 (citing Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971); Albermarle Paper Co. v. Moody, 422 U.S. 405, 425 (1985)). *But cf.* Wards Cove Packing Co., Inc., v. Atonio, 109 S. Ct. 2115, 2126 (1989) (retaining business necessity defense in title VII cases but requiring the employee to retain the burden of persuasion to show that criteria are not job related). *See infra* notes 206-23 and accompanying text.

62. *Prewitt*, 662 F.2d at 305.

In *Hall v. United States Postal Service*,[63] another Postal Service case involving physical criteria (lifting requirements), the Sixth Circuit confirmed the limited capacity of reasonable accommodation to satisfy the requirement of performing essential functions:

> To some extent, these inquiries [into the employee's ability to perform essential functions, and the employer's duty to grant a reasonable accommodation] are interrelated in that courts have held that an employer . . . is not required to accommodate a handicapped individual by *eliminating* one of the essential functions . . . . *In other words, an accommodation that eliminates an essential function of the job is not reasonable* . . . .[64]

These leading cases from three courts of appeal—all cited with approval in the legislative history of the ADA[65]—continue along with Supreme Court precedent to show that the essential-functions standard is an exclusionary concept, predicated on natural ability to perform the job or to participate in the program, which is impervious to all change in favor of the people with disabilities except through a restricted degree of accommodation.

3. Assessments of the Commentators

As already noted, one commentator has referred to the essential-functions standard as "retain[ing] a core notion of functional competence and efficiency but [with] a zone of marginal incapacity."[66] "The distinction between essential and nonessential functions, however, is ultimately artificial . . . and the use of the categories tends to reify present structures . . . ."[67] Thus the problem becomes "how to articulate a principled limit on the right to accommodation,"[68] *i.e.*, the space to be given the "zone of marginal incapacity." Under this approach *Strathie*[69] and *Prewitt*[70] are held out as "impos[ing] significant duties on employers,"[71] though their treatment of a hearing aid as a possible accommodation for a bus driver with hearing loss,[72] and of a minor workplace modification (*e.g.*, lowering legs of shelves where the employee had to reach)[73] to effect an employer's accommodation in its criteria for lifting and reaching, respectively, hardly

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63. 857 F.2d 1073 (6th Cir. 1988) (determined under sections 501 and 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 791, § 794).

64. *Id.* at 1078 (first emphasis in original; second added) (citation omitted).

65. S. REP. No. 116, 101st Cong., 1st Sess. 27 (1989); H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 3, at 42 & nn.31-32 (1990); *see Prewitt*, 662 F.2d at 305 (placing burden of persuasion on employer to demonstrate business necessity); *cf. Wards Cove Packing Co., Inc.*, 109 S. Ct. at 2126 (placing same burden on employee under title VII); *see infra* notes 205-19 and accompanying text.

66. Harvard Note, *supra* note 35, at 1011; *see supra* text accompanying note 55.

67. Harvard Note, *supra* note 35, at 1011-12.

68. *Id.* at 1010.

69. 716 F.2d 227; *see supra* text accompanying note 56.

70. 662 F.2d 292; *see supra* text accompanying note 59.

71. Harvard Note, *supra* note 35, at 1006 & n.55.

72. *Strathie*, 716 F.2d at 231-34.

73. *Prewitt*, 662 F.2d at 305.

seem to impose exceptional duties on employers at all. The accommodations resisted by employers in those cases seem so unremarkable, even banal, that it is difficult to conceive how the concrete gains opened to employees with disabilities in those cases can be touted as "significant," though the respective courts' treatment of doctrine did in principle subject employers to a modicum of control over their powers to reject people with disabilities.

Another commentator has approached the issue through the concept of "surmountable impairment barriers" and "insurmountable impairment barriers."[74] Distinct from social bias and stigma, these are types of physical barriers faced by people with disabilities because of their natural disabilities: surmountable ones can be overcome, with accommodation; unsurmountable ones cannot be overcome and if they are constitutive of essential functions, they will block employment or advancement.[75] The categories are largely unhelpful and even tautological: if a person with a disability cannot perform an essential function even with accommodation, that function is *ipso facto* "insurmountable." The term "insurmountable" adds no new meaning to the concept of essential functions, for the structure of the job or other position and the extent to which it can be compromised dictate the term's meaning.[76] Nor does another commentator seem to add anything to our understanding by stating that section 504 looks to "the individual's actual capability, and the feasibility of accommodating that person [in a particular program]"[77] where the issue is the very justice of the logically prior essential-functions concept itself. Again, the individual's utilizable natural powers are given definition in relation to the structure of the job, which is controlling.

B. "Essential Functions" in the Americans with Disabilities Act of 1990

The Americans with Disabilities Act of 1990—and particularly title I on employment,[78] the direct subject of inquiry here—is modeled directly and almost entirely on section 504 of the Rehabilitation Act of 1973, its case law, and its regulations.[79] Thus, in complete continuity with the Rehabilitation Act, the ADA provides that:

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74. N.Y.U. Note, *supra* note 13, at 884.

75. *Cf. Prewitt*, 662 F.2d at 305 & n.19 (suggesting that only "surmountable barriers" essential to the job can be eliminated through reasonable accommodation) (citing N.Y.U. Note, *supra* note 13, at 883-84).

76. *See infra* notes 377-78 and accompanying text.

77. Note, *Accommodating the Handicapped: Rehabilitating Section 504 After Southeastern*, 80 COLUM. L. REV. 171, 175 (1980) [hereinafter Columbia Note].

78. 42 U.S.C.A. §§ 12101-12111.

79. *Hearings on S. 933, To Establish a Clear and Comprehensive Prohibition of Discrimination on the Basis of Disability, Before the Subcommittee on the Handicapped of the Senate Comm. on Labor and Human Resources*, 101st Cong., 1st Sess. 38 (1989) (ADA [title I] modeled after section 504 employment regulations) (statement of Arlene B. Mayerson, Disabilities Rights Education and Defense Fund) [hereinafter Senate Hearings]; *id.* at 42 (codified section 504 regulations provide definitions in the ADA) (statement of Sen. Harkin); *id.* at 54 (attempt in framing ADA is to "track what section 504 has done [and] what the Supreme Court has said in these cases") (statement of

> [t]he term "qualified individual with a disability" means 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.[80]

The statute itself, however, does not define "essential functions," leaving its meaning to be inferred from context, legislative history, and case law.

The new legislation then goes on to add the following language of seemingly new import:

> For purposes of this title, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.[81]

The provision, however, makes virtually no perceptible change in existing law. It is well established that under the Rehabilitation Act the court determines what the essential functions of the job are,[82] and the new provision does not in fact change this practice, granting no presumption of validity to the employer's perspective,[83] and continuing to require that "the judge must ultimately decide what constitutes the essential functions of the job."[84]

The legislative history makes it plain that the essential-functions concept is designed to be exclusionary if people with disabilities are unable to perform a core of requirements:

Sen. Harkin); *Americans with Disabilities Act of 1989: Hearings on H.R. 2273 Before the House Comm. on the Judiciary and Its Subcomm. on Civil and Constitutional Rights*, 101st Cong., 1st Sess. 213, 225 (1989) (statement of Attorney General Thornburgh that ADA's employment provisions "closely follow" section 504 of the Rehabilitation Act of 1973) [hereinafter House Judiciary Comm. Hearings]; S. REP. No. 116, 101st Cong., 1st Sess. 26 (1989) (section 101(7) of S. 933 ["essential functions"] based on sections 501 and 504 of 1973 Act), 27, 30, 34, 38 (citation of section 504 case law); H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 2, at 56-57, 65, 71, 84 (1990); H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 3, at 32-33 (section 504 regulations define "essential functions" in section 101(7) of H.R. 2273), 41, 42 nn.31 & 32, 45, 46 (section 504 case law cited); 136 CONG. REC. H2427 (daily ed. May 17, 1990) (fundamental concepts of ADA not new but derived largely from section 504, its implementing regulations, and Civil Rights Act of 1964) (remarks of Rep. Goodling), 136 CONG. REC. H2428 (daily ed. May 17, 1990) (ADA based on sections 503 and 504 of the 1973 Act) (remarks of Rep. Bartlett); 135 CONG. REC. S10778 (daily ed. Sept. 8, 1989) (ADA standards exist already in Rehabilitation Act) (Remarks of Sen. Dole).

80. 42 U.S.C.A. § 12111(8) (emphasis added); *see* EEOC ADA Regulations, *supra* note 60, 29 C.F.R. § 1630.2(m).

81. 42 U.S.C.A. § 12111(8).

82. Hall v. United States Postal Service, 857 F.2d 1073 at 1079 (6th Cir. 1988); *see also Strathie*, 716 F.2d at 231 (by implication).

83. H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 3, at 33 (1990) (House Judiciary Comm. rejected an amendment that would have created a presumption in favor of the employer's determination of essential functions); *see* EEOC ADA Regulations, *supra* note 60, 29 C.F.R. § 1630.2(n) (Appendix) & (Rulemaking history) (EEOC rejected request to make employer's judgment of essential factors into a presumption and limited it to simply relevant evidence).

84. S. 933, 101st Cong., 2d. Sess., 136 CONG. REC. S9686 (daily ed. July 13, 1990) (remarks of Sen. Harkin, chief sponsor of S.933, explaining conference report results). *But cf.* Statement of U.S. Chamber of Commerce, Senate Hearings 53, 284-85 ("We suggest that the concept of essential functions of a job makes no sense and ought to be eliminated from the bill. . . . It is too substantial an intrusion on the legitimate prerogative of employers to ask federal agencies, the courts and juries to define which aspects of a particular job are 'essential' and which are not.") (Statement of Zachary Fasman).

> The phrase "essential functions" means job tasks that are fundamental and not marginal. The point of including this phrase within the definition of a "qualified individual with a disability" is *to ensure that employers can continue to require that all applicants and employees, including those with disabilities, are able to perform the essential, i.e., non-marginal functions of the job.*[85]

As to the meaning of "marginal" requirement, a hypothetical example is offered of the requirement (however misguided) that an employee have a driver's license merely to run an occasional errand and to give some assurance that the employee's capacity to drive to work will reduce his tardiness.[86] Because inability to perform such a marginal function is couched in the legislative history as an invalid reason for refusing to hire a person with disabilities, the Congress from this perspective may have intended the marginal/essential distinction to be protective of people with disabilities instead of exclusionary of them.[87] Thus, an applicant or employee who cannot perform a marginal or nonessential requirement may not validly be discharged or discriminated against; when such margins are discarded, though, for the non-marginal or essential nature of the job, the perspective changes.

The predominance of the exclusionary purpose of the central concept itself also follows from the inclusion of the other terms from section 504 complementing "essential functions." "Reasonable accommodation"[88] is included, as well as "undue hardship"[89] and the affirmative defense

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85. S. REP. No. 116, 101st Cong., 1st Sess. 26 (1989); H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 2, at 55 (1990) (emphasis added); *see also* H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 3, at 32 (1990) (not discrimination to use selection criterion unperformable if criterion concerns essential aspect of job); S. 933, 101st Cong., 2d. Sess., 136 CONG. REC. S10751 (daily ed. Sept. 7, 1989) ("Essential functions is defined as 'job tasks that are fundamental and not marginal' ") (remarks of Sen. Kennedy); *see generally* EEOC ADA Regulations, *supra* note 60, 29 C.F.R. § 1630.2(m) ("fundamental job duties").

86. S. REP. No. 116, 101st Cong., 1st Sess. 33 (1989); *see* EEOC ADA Regulations, *supra* note 60, 29 C.F.R. § 1630.2(o) app. (employer may be required to "reallocate" marginal job functions, but not essential functions).

87. S. REP. No. 116, 101st Cong., 1st Sess. 26 (1989); H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 2, at 55 (1990) (same and including marginal requirement example of driver's license in a non-driving job).

88. 42 U.S.C.A. § 12111(9). This provides that the term "reasonable accommodation" may include:

> (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
> (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.

See EEOC ADA Regulations, *supra* note 60, 29 C.F.R. § 1630.2(o).

89. 42 U.S.C. § 12111(10) defines "undue hardship" as "an action requiring significant difficulty or expense, when considered in light of the[se] factors:

> (i) the nature and cost of the accommodation needed under this Act;
> (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;

of "business necessity."[90] Indeed, the last is directly incorporated into the controlling statutory measure of allowable discrimination: "[i]n determining what constitutes the essential functions of the job, consideration should be given to the employer's judgment regarding what functions are essential as a matter of *business necessity*."[91] Section 102(a)(5) of the ADA then ties these terms together by defining unlawful discrimination to mean, in part, either:

> (A) not making *reasonable accommodations* to the known physical or mental limitations of an otherwise qualified individual with a disability [defined as one who can perform the *essential functions* with or without such accommodations] who is an applicant or employee, unless [the] covered entity can demonstrate that the accommodation would impose an *undue hardship* on the operation of [its] business; or,
>
> (B) denying employment opportunities to . . . an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make *reasonable accommodations* to the physical or mental impairments of the [individual].[92]

This statutory treatment of "essential functions" reveals the concept to be in complete conformity with the formula presented in *School Board of Nassau County, Florida v. Arline*[93] and the remaining case law and the regulations under section 504 of the Rehabilitation Act of 1973—just as proclaimed in the recent ADA's legislative history.[94] The essential-functions concept remains a "core notion of functional competence and efficiency"[95] subject in the name of equality to modest adjustment only. Congress left no doubt of the correctness of this construction of its intent when it gave assurances "that this legislation does not require an employer to make any modification, adjustment, or change in a job description

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> (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 work-force of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities to the covered entity.

See EEOC ADA Regulations, *supra* note 60, 29 C.F.R. § 1630.2(p).

90. 42 U.S.C. § 12113(a) providing, *inter alia*, that it may be:
> a defense to a charge of discrimination under the Act that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out . . . an individual with a disability has been shown to be job-related and consistent with business necessity and such performance cannot be accomplished by reasonable accommodations.

See EEOC ADA Regulations, *supra* note 60, 29 C.F.R. § 1630.15(c); *see also* 29 C.F.R. § 1630.7.

91. S. REP. No. 116, 101st Cong., 1st Sess. 26 (1989) (emphasis added).

92. 42 U.S.C.A. § 12112(b)(5)(A) & (B) (emphasis added).

93. 480 U.S. 273, 288 n.17 (1987); *see supra* text accompanying note 54.

94. *See supra* note 79 and accompanying text.

95. *See* Harvard Note, *supra* note 35, at 1101; *supra* text accompanying notes 55 & 66.

or policy that . . . would fundamentally alter the essential functions of the job in question."[96] The law of essential functions accordingly remains exclusionary of those whose disabilities touch upon this fundamentally unalterable core notion.

III. THE RUDIMENTS OF JOHN RAWLS'S JUSTICE AS FAIRNESS: THE ORIGINAL POSITION AND THE TWO PRINCIPLES OF JUSTICE

In justice as fairness, John Rawls emphasizes the greater importance of the public distribution of intangible rights in contrast to the distribution of material goods. Indeed, he argues that the distribution of the former—"basic liberties of citizens" such as "freedom of speech and assembly"[97]—must be absolutely equal for all, while "the distribution of wealth and income need not be equal [though] it must be to everyone's advantage."[98] The scheme of equally distributing basic liberties, moreover, must not be compromised by the relinquishment of those liberties for economic gain. Such an exchange of freedom for material goods is not normally to be allowed,[99] and this foreclosure typifies the general preference of Rawls for Kantian principles of noumenal autonomy, involving unconditional respect for the rights of the person, against Lockean attention to the rights concerned with ownership and distribution of material property. This preference for the nonmaterial notwithstanding, it is necessary to concentrate initially on Rawls's justification for the unequal distribution of material income and benefits, because this distribution of material goods—and not that of intangible liberties—is the one which the operation of the essential-functions concept places in issue. Only after this prescriptive analysis of economic distribution is performed does the inquiry turn to the realm of the predominantly nonmaterial through an analysis of the critical primary social good of self-respect.

The principles of justice as fairness reflect an original contractarian method of choosing terms of social association and cooperation. The assumption is that such terms or principles "are the principles that *free and rational persons* . . . would accept in an *initial position of equality*"[100]—an initial position where the deep inequalities which normally affect men's lives are given no weight. Because these inequalities as they exist in actual society "cannot possibly be justified by an appeal to the notions of merit or desert,"[101] justice as fairness "nullifies the accidents of natural endowment and the contingencies of social circumstances."[102] As Rawls

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96. S. REP. No. 116, 101st Cong., 2d Sess. 33 (1989); H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 2, at 64 (1990); *see* EEOC ADA Regulations, *supra* note 60, 29 C.F.R. § 1630.2(o) app. ("An employer . . . is not required to reallocate essential functions"); *see* note 86, *supra*.

97. J. RAWLS, *supra* note 21, § 11, at 61.

98. *Id.*

99. *Id.*

100. *Id.* § 3, at 11 (emphasis added).

101. *Id.* § 2, at 7.

102. *Id.* § 3, at 5.

puts it, "the natural lottery in native assets"[103] should not be allowed to impose lesser life prospects on some, resulting in an outcome quite arbitrary from a moral perspective.[104] To deny justice becomes either to refuse to acknowledge another as equal, or willingly "to exploit the contingencies of natural fortune and happenstance for [one's] own advantage."[105]

The "initial position of equality" from which fair principles emerge is a hypothetical status quo, resembling the state of nature in social contract theory, called the "original position." In the original position, conditions are imposed "to represent equality between human beings as *moral persons*."[106] As one of these conditions of equality meant to serve as a corrective for the initial arbitrariness of the natural distribution of talents, a "veil of ignorance" is spread over all, depriving each of exploitable knowledge of his actual social position or natural endowments.[107] The original position serves as both an expository and a justificatory device that explains and grounds "the principles of justice . . . which rational persons concerned to advance their interests would consent to as equals when none are known to be advantaged or disadvantaged by social or natural contingencies."[108] The original position and its emergent principles indeed have a kind of Kantian *a priori* rational ground which establishes men as free and equal rational beings in their moral relations, a ground acknowledged by Rawls.[109] That *a priori* ground in reason appears to be the same as found in Kant's concept of *common sense*:

> [B]y the name *sensus communis* is to be understood the idea of a *public* sense, *i.e.*, a critical faculty which in its reflective act takes account (*a priori*) of the mode of representation of everyone else, in order, *as it were*, to weight its judgment with the collective reason of mankind, and thereby avoid the illusion arising from subjective and personal conditions which could readily be taken for objective, an illusion that would exert a prejudicial influence on its subject.[110]

Rawls associates contingencies, such as the exploitative results of the natural lottery, with Kant's critique of illusory, subjective judgments, but justice as fairness with the collective reason of mankind.

Two more concepts must be briefly described: representative man and primary social goods. Representative man (or "person") is simply a heuristic construct by which to measure the satisfactions and expectations of various social groups of which such a man is a typical part, and primarily of the least advantaged group—a group that weighs heavily in

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103. *Id.* § 17, at 104.
104. *Id.* § 12, at 74.
105. *Id.* § 59, at 384.
106. *Id.* § 4, at 19 (emphasis added).
107. *Id.* § 24, at 136-41.
108. *Id.* § 4, at 19.
109. *Id.* § 40, at 251-57.
110. I. KANT, THE CRITIQUE OF JUDGMENT § 40, at 151 (C. Meredith trans. 1952).

Rawls's theory.[111] Primary social goods are broad categories of things simplified to eliminate the quirks of individual tastes and desires, so that they may be assumed as desirable by and useful to any rational man no matter what his life plan.[112] They are rights and liberties, opportunities and powers, income and wealth, and the very special sense of one's own worth or self-respect.[113] The distribution of income and wealth in connection with the difference principle forms the basis here of the first Rawlsian analysis of section 504 and of the ADA. Self-respect, encompassing a vital intangible element to the formation of the social compact among rational and equal men, will form the basis of the second analysis.

The two principles of justice as fairness, as tentatively formulated, and as already foreshadowed, are these:

> First: each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.
> Second: social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be *to everyone's advantage*, and (b) attached to positions and offices [of society] open [in a real sense] *to all*.[114]

Though Rawls places ultimate priority on the first, the initial concern here, as already noted, is with the second principle insofar as it guides the distribution of wealth and income. The issue is whether it is likely that persons who view themselves as equals in the hypothetical original position would ever consent to the unequal distribution of wealth and income through the operation of the essential-functions concept. This query is the same as whether Rawls's difference principle, as qualified by fair equality of opportunity, supports or rejects the legally enacted notion of essential functions.

IV. THE DIFFERENCE PRINCIPLE AND FAIR EQUALITY OF OPPORTUNITY

Assuming that equality in the basic liberties is established, and that equality of opportunity makes the positions and offices of society in a real sense open to all, under Rawls's philosophy:

> the higher expectations of those better situated are just if and only if they work as part of a scheme which improves the expectations of the least advantaged members of society. The intuitive idea is that the social order is not to establish and secure the more attractive prospects of those better off unless doing so is to the advantage of those less fortunate.[115]

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111. J. RAWLS, *supra* note 21, § 8, at 44; § 12, at 64.
112. *Id.* § 11, at 62; § 15, at 92-93.
113. *Id.* § 11, at 62; § 15, at 92.
114. *Id.* § 11, at 60 (emphasis added).
115. *Id.* § 13, at 75.

This is a preliminary statement of the "difference principle," a further elaboration of that part of the second principle of justice as fairness requiring material goods to be distributed "to everyone's advantage." The difference principle is to be the measure of economic justice for the concept of essential functions. The first step in the analysis is to determine whether people with disabilities may qualify as the representative "least advantaged members of society."

A. People With Disabilities as the Least Advantaged Group

1. Representative Social Groups

In applying the two principles of justice, one takes the position of certain representative individuals and evaluates the functioning of justice from their perspective. For the distribution of basic rights and liberties, the representative people are citizens, because citizenship is itself defined by these very rights and liberties as required by the first principle of justice as fairness: the principle of equal liberty. For the distribution of wealth and income, the representative people become "those who stand for the various levels of well-being,"[116] because these are defined by the distribution of wealth and income. These latter representative people, conceptually required for "judging social and economic inequalities,"[117] are harder to define, especially those analytically comprising the least fortunate group. Rawls offers several possibilities for this group: selection of a social position, such as unskilled worker, and then counting as representative those persons with average income and wealth within this group; or selection in terms of relative income and wealth alone.[118] He also suggests an alternative selection of the least advantaged as those with "fixed natural characteristics" upon which the unequal distribution of goods is founded.[119] Finally, Rawls makes it plain that it is not necessary "to think of the least advantaged as literally the worst off individual[s]" but rather as a plausible embodiment of this "practicable" and necessary concept.[120] Under these conditions, and by either the socio-economic or natural-disadvantage standard, people with disabilities can constitute Rawls's least advantaged group.[121]

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116. *Id.* § 16, at 96.
117. *Id.* § 16, at 97.
118. *Id.* § 16, at 98.
119. *Id.* § 16, at 99.
120. *Id.* § 16, at 98; *see also id.* § 8, at 44 ("[T]he specification of [the least advantaged] group is not very exact and certainly our prudential judgments likewise give considerable scope to intuition, since we may not be able to formulate the principle which determines them.")
121. In a later writing, Rawls has attempted a reformation of the least advantaged group as persons in three overlapping groups:

> The least advantaged are defined very roughly, as the overlap between those who are least favoured by each of the three main kinds of contingencies. Thus this group includes persons whose family and class origins are more disadvantaged than others, whose natural endowments have permitted them to fare less well, and whose

2. The Status of People with Disabilities

The Rehabilitation Act defines "individual with handicaps" as any person "who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities; (ii) has a record of such impairment, or (iii) is regarded as having such impairment."[122] The definition under the ADA is virtually identical.[123] The regulations define "major life activities" as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[124] "Impairments" covered include mental disorders[125] and a full range of physical ailments, including infectious diseases.[126] This range of naturally acquired physical and mental traits has caused people with disabilities to have diminished civil rights and lower socio-economic status. The Rawlsian term "natural lottery" as used throughout this inquiry refers to the process of acquiring these impairments through natural necessity, whether by birth, disease, accident, or old age.[127]

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fortune and luck have been relatively less favorable, *all within the normal range.* J. RAWLS, *A Well-Ordered Society* (1975) in PHILOSOPHY, POLITICS & SOCIETY 6, 11 (P. Laslett & J. Fishkin eds., 5th series 1979) (emphasis supplied). This modified definition would also seem to apply to persons whose socio-economic and legal statuses evidence their inferior fortune, natural endowments, and class background. *See infra* notes 131-39 and accompanying text. Of course, people with disabilities need not be the only or even predominant group found to "overlap . . . the three main kinds of contingencies" in this formulation, any more than in A THEORY OF JUSTICE they need comprise the least advantaged group to the exclusion of other persons disadvantaged in the distribution of primary goods.

What is puzzling about Rawls's reformulation is its inclusion in the least advantaged of only those "within the *normal range* . . . so that the problems of special health care and of how to treat the mentally defective do not arise." J. RAWLS, *A Well-Ordered Society*, *op. cit.* (emphasis supplied). Rawls suggests that these persons are excluded because, otherwise, consideration of their plights would "distract our moral perception by . . . arous[ing] pity and anxiety," *id.*, and thus somehow skew the operation of justice in the basic structure. It is implausible, however, that Rawls means to deny such persons the status of equality as free and moral persons when they have such "deep inequalities." J. RAWLS, *supra* note 21, § 2, at 7. It is more reasonable to believe that, even were those "outside the normal range" excluded from the calculations in the application of the difference principle, they would *a fortiori* be entitled to equal or greater benefits than those allotted to the "normal" disadvantaged.

122. 29 U.S.C. § 706(8)(B).

123. 42 U.S.C.A. § 12102(2) provides as follows: "The term "disability" means, with respect to an individual—(A) a physical or mental impairment that substantially limits one or more of the major life activities of an individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." *See* EEOC ADA Regulations, *supra* note 60, 29 C.F.R. § 1630.2(g).

124. 45 C.F.R. § 84.3(j)(2)(ii), *quoted in* School Bd. of Nassau County, Florida v. Arline, 480 U.S. 273, 280 (1987); *see* EEOC ADA Regulations, *supra* note 60, 29 C.F.R. § 1630.2(i) ("Major Life Activities"); § 1630.2(j) ("Substantially limits"); *cf.* Daley v. Koch, 892 F.2d 212, 215 (2d Cir. 1989) (police officer with "poor impulse control" did not have "a substantial limitation of a major life activity" and therefore was not an "individual with handicaps" within the meaning of section 504 and its regulations).

125. *See* Doe v. Region 13 Mental Health-Mental Retardation Comm'n, 704 F.2d 1402, 1408 & n.6 (5th Cir. 1983); *see also* EEOC ADA Regulations, *supra* note 60, 29 C.F.R. § 1630.2(h)(2).

126. *See Arline*, 480 U.S. 273.

127. *Cf.* Rebell, *Structural Discrimination and the Rights of the Disabled*, 74 GEO. L.J. 1435, 1440 (1986).

a. Lower Legal Status of People with Disabilities

In *City of Cleburne v. Cleburne Living Center*,[128] the United States Supreme Court held that the constitutional rights of people with disabilities to equal protection of the laws are given less protection than any other group suffering discrimination, except the similarly treated aged, when it prescribed the lowest level of scrutiny—the "rational-basis" standard—for people with disabilities under the Equal Protection Clause.[129] Congress reacted to *Cleburne* by inserting into the factual findings of the ADA the substance of Justice Stone's famous footnote four in *United States v. Carolene Products Co.*[130] It is unclear whether Congress intends this statement, invoking Justice Stone's rationale for closer scrutiny to protect the rights of "discrete and insular" groups, to affect judicial treatment of the rights of people with disabilities.

What is clear, however, is that Congress has relegated the rights of people with disabilities to an inferior status, with lesser rights than those created for other groups by its legislation. For example, collective bargaining agreements made pursuant to section 8(a)(5) of the National Labor Relations Act[131] may not be used by a union or employer to discriminate in employment practices protected under title VII.[132] Yet a collective bargaining agreement can block a reasonable accommodation otherwise required under section 504.[133] Congress further intends that this disparity continue to an indeterminate extent under the ADA.[134] While

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128. 473 U.S. 432 (1985).

129. It has been suggested that, when the votes of two concurring Justices and three dissenters in *Cleburne* are considered, the vote was for a level of scrutiny more elevated than minimum scrutiny. *See* Brennan v. Stewart, 834 F.2d 1248, 1258.

130. 304 U.S. 144, 152-53 n.4 (1938). In an opinion giving some guidelines for rational-basis review of economic legislation, Justice Stone added in footnote 4, *inter alia*, that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied on to protect minorities, and which may call for a corresponding searching judicial inquiry." Congress has used the same key language in finding that "individuals with disabilities are a *discrete and insular minority* . . . subjected to a purposeful unequal treatment, and relegated to a position of political powerlessness in our society." 42 U.S.C.A. § 12101(a)(7) (emphasis added).

131. 29 U.S.C. § 158(a)(5).

132. *See* Parson v. Kaiser Aluminum & Chem. Corp., 575 F.2d 1374, 1389 (5th Cir. 1978), *cert. denied*, 441 U.S. 968 (1979).

133. Carter v. Tisch, 822 F.2d 465, 467 (4th Cir. 1987); Jasany v. United States Postal Serv., 755 F.2d 1244, 1251-52 (6th Cir. 1985); Daubert v. United States Postal Serv., 733 F.2d 1367, 1369-70 (10th Cir. 1984). To the extent that these federal employers may have been relying *sub silentio* on the policy of section 703(h) of title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h), which protects federal agencies and the Postal Service from charges of otherwise unlawful racial, sexual, and national origin discrimination because of the operation of seniority systems in assigning employees, their reliance on section 703(h) in these cases was misplaced. Section 703(h) does not apply to people with disabilities. Moreover, if for some reason unexplained in these cases the Rehabilitation Act defers to bona fide seniority systems (as the legislative history of the ADA shows is the Congressional intent, in part, for this new legislation, *see infra* text accompanying note 135), this fact would reveal the intent to allow discrimination against people with disabilities far more than against the groups in section 703(h). The discrimination is greater because of the peculiar dependence of people with disabilities on transfers or other adjustments within the workplace as reasonable accommodation to ease the burden of their naturally dysfunctional status. Section 703(h) only addresses discrimination based on social stereotype, not natural disability.

134. S. REP. No. 116, 101st Cong., 1st Sess. 32 (1989).

the employer is forbidden to "use a collective bargaining agreement to accomplish what it would otherwise be prohibited from doing under the [Act]," "[t]he collective bargaining agreement *could be relevant . . . as a factor* . . . in determining whether a given accommodation [especially a job transfer governed by seniority] is reasonable."[135] Moreover, Congress, by continuing the employer's cost justification defense of undue hardship under the ADA, has erected a barrier to people with disabilities that conflicts with the long-standing rule that cost is not a permissible defense under title VII.[136] In short, the right to accommodation—the very right which is supposed to ameliorate the harshness of the essential-functions test—can be totally or partially foreclosed by rights established under other statutes or by a defense peculiar to prospective or actual employers of people with disabilities. Neither of these legal positions or defenses adequately addresses such persons' peculiar problem of natural disability.

b. Lower Socio-Economic Status of People with Disabilities

In addition to a lower level of legal protection, Americans with disabilities have a lower socio-economic status. They are, according to a recent Louis Harris poll, "notably underprivileged and disadvantaged . . . . Historically, the inferior economic and social status of disabled people has been viewed as an inevitable consequence of the physical and mental limitations imposed by disability."[137] People with disabilities experience "the most extreme unemployment, poverty, psychological abuse, and physical deprivation experienced by one segment of our society."[138] The entire legislative history is replete with this viewpoint. The legislation itself bears the finding that "people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally."[139]

The socio-economic basis adduced here, just as their inferior rights under law, and their natural infirmities legally defining them, make it altogether fitting to treat people with disabilities under the assumptions of Rawls's system as the least advantaged representative group, whose expectations may now be examined under the difference principle.

B. The Emergence of the Difference Principle

The difference principle and its ultimate counterpart, equality of fair opportunity, emerge as the preferred normative precepts over their al-

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135. *Id.* (emphasis added); *cf.* EEOC Disability Act Regulations, *supra* note 60, 29 C.F.R. § 1630.2(n)(3)(v) & app. (terms of collective bargaining agreement may be evidence of essential functions).

136. City of Los Angeles v. Manhart, 435 U.S. 702, 716-17 & nn. 31-32 (1978), *aff'd*, UAW v. Johnson Controls, Inc., 111 S. Ct. 1196, 1209 (1991).

137. H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 3, at 25 (1990).

138. Senate Hearings, *supra* note 79, at 19 (statement of Justin Dart, Chairperson Task Force on the Rights and Empowerment of Americans with Disabilities).

139. 42 U.S.C.A. § 12101(a)(6).

ternatives, the principle of efficiency and equality of careers open to talents, in the course of a review of their respective roles in four stages of development: the system of natural liberty, liberal equality, aristocracy, and a final maturity in democratic equality. The stages are generated through deriving two separate meanings from equivocation in each of the terms "everyone's advantage" and "equally open to all," found in the second principle of justice as fairness.[140] The difference principle and equality of fair opportunity are themselves distinct branches of the equivocal meaning of "everyone's advantage" and "equally open to all," respectively, and as such become components in the stages. These terms and their relation are represented in the table below.[141]

"EVERYONE'S ADVANTAGE"

"Equally Open"	Principle of Efficiency	Difference Principle
Equality as careers open to talents	System of Natural Liberty	Natural Aristocracy
Equality as equality of fair opportunity	Liberal Equality	Democratic Equality

Three stages—the system of natural liberty, liberal equality, and democratic equality—are vital to the explication of the difference principle. Each stage will be examined in turn.

1. The System of Natural Liberty

The system of natural liberty combines efficiency in the sense of Pareto optimality (representing one meaning of "everyone's advantage") with a market-dominated open social system in which "careers are open to talents,"[142] taken from "equally open to all." The system adjusts to the initial distribution of talents and abilities, income and wealth, with little or no effort to correct those initial inequalities that Rawls finds "so arbitrary from a moral point of view."[143] Only a kind of formal equality of opportunity is preserved through the same legal rights of access,[144] without any substantive assurance that access to advancement *in principle* will lead to *actual* attainment of office or position.

From the beginning of section 504 jurisprudence, the Supreme Court has taken the approach of "evenhanded treatment of . . . handicapped

140. J. RAWLS, *supra* note 21, § 12, at 65. Rawls states, "[s]econd, social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to *everyone's advantage*, and (b) attached to positions and offices [equally] *open to all*." *Id.* § 11, at 60 (emphasis added).
141. *Id.* § 12, at 65.
142. *Id.* § 12, at 66.
143. *Id.* § 12, at 72.
144. *Id.*

persons," an approach which reflects the formalistic approach to equal opportunity.[145] Even when the Court corrected[146] the earlier misimpression that it gave in *Southeastern Community College v. Davis*, which had seemed to enter "accommodation" along with "affirmative action"[147] in a common tomb, the Court nonetheless held in *Alexander v. Choate* that "section 504 does not require the State to alter [its] definition of the [Medicaid] benefit being offered *simply to meet the reality that the handicapped have greater medical needs.*"[148] The upshot is that people with disabilities were permitted to participate in a medical program equally with people without disabilities, but not on a level commensurate with the disproportionate results of the "natural lottery." This is formal, "even-handed"[149] equality which takes little or no account of inequalities generated by unmerited natural contingencies.[150]

Discrimination against people with disabilities because of social stigma or stereotype is forbidden in part by statutory language protecting one who is even "*regarded* as having . . . an impairment . . . substantially limit[ing] one['s] . . . major life activities."[151] The Supreme Court has construed this provision:

> By [writing] the definition of "handicapped individual" to include . . . those who are *regarded as impaired* and who, as a result, are substantially limited in a major life activity, Congress acknowledged that society's accumulated myths and fears about disability . . . are as handicapping as are the physical limitations that follow from actual impairment.[152]

Lower federal courts have also found their mission under the Rehabilitation Act to include protecting people with disabilities from the effect of "misinformed stereotypes."[153] Indeed, the Seventh Circuit has gone so far as to hold that whether a plaintiff with a disability "could handle the work [of an academic program]" was not the issue. Rather, "[j]ust as title VII of the Civil Rights Act of 1964 ensures only equal treatment . . . so the Rehabilitation Act requires only a stereotype-free assessment of the person's abilities . . . ."[154] The ADA, too, is bottomed on the

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145. Southeastern Community College v. Davis, 442 U.S. 397, 410 (1979); *see* Columbia Note, *supra* note 77, at 183 & n.78.

146. Alexander v. Choate, 469 U.S. at 300-01 nn.20 & 21.

147. *Southeastern*, 442 U.S. at 410-12; N.Y.U. Note, *supra* note 13, at 885-86. Sections 501(b) and 503(a) of the Rehabilitation Act, 29 U.S.C. §§ 791(b), 793(a), do require genuine affirmative action; *see, e.g. Southeastern*, 442 U.S. at 410-11; Ryan v. FDIC, 565 F.2d 762 (D.C. Cir. 1977).

148. Alexander v. Choate, 469 U.S. at 303 (emphasis added).

149. *Id.* at 304.

150. *But cf.* United States v. Trustees of the Univ. of Ala., 908 F.2d 740, 746 (11th Cir. 1990) (implicitly even-handed approach of section 504 regulation used to strike down means test required for provision of auxiliary aids, thus assuming *economic* equality of students with disabilities).

151. 29 U.S.C. § 706(8)(B) (emphasis added); *see* 42 U.S.C.A. § 12102(2)(C).

152. *Arline*, 480 U.S. at 284; *cf. Southeastern*, 442 U.S. at 405 n.6 (commenting similarly on same provision in the Rehabilitation Act).

153. Mantolete v. Bolger, 767 F.2d 1416, 1422 (9th Cir. 1985); *see also Arline*, 772 F.2d 759, 765 (11th Cir. 1985), *aff'd*, 480 U.S. 273 (1987); Pushkin v. Regents of the Univ. of Colo., 658 F.2d 1372, 1386 (10th Cir. 1981).

154. Anderson v. University of Wis., 841 F.2d 737, 741 (7th Cir. 1988). Accommodation was apparently not an issue.

premise that much discrimination against people with disabilities is "the result of discriminatory policies based on unfounded, outmoded stereotypes and perceptions,"[155] and adopts the same provision, forbidding such discrimination, from the Rehabilitation Act.[156]

From the point of view of both efficiency and "careers open to talents," stereotypes are simply irrelevant characteristics that must be discarded so that the "essential person" can compete on the basis of his natural and cultivated skills. Rawls characterizes social and sexual prejudice as "irrational."[157] Laws like title VII strip away these irrational "accidents" of prejudice from the substantial person, but "leave[] the organization of work, and thus the delineation of the talents appropriate to careers, to the operation of the marketplace."[158]

The ideal of this model of anti-discrimination law drawn from title VII is that essential man (or woman), stripped of all stereotypes or other characteristics irrationally or immaterially attributed to him (or her), will either fit the essential functions of the job or not. Thus, in the section 504 case *Stutts v. Freeman*,[159] the Eleventh Circuit ruled that an employer had to use a testing procedure which would accurately reflect the ability of the plaintiff with a disability to operate heavy equipment, not one which focused on a trait (dyslexia) that affected his ability to read but was unrelated to the job.[160]

The model does not work well, however, when the cause of discrimination against a person with a disability does not substantially consist of stereotypes or irrelevant traits, but rather of his natural inability to perform the essential functions in question. Here the essential man does not fit those essential functions. Without an adequate accommodation to his unequal standing founded on natural disability and not simply on social mischaracterization, the person with a disability will remain bound to the impact of his natural misfortune, regardless of how much irrational and unessential prejudice is dispelled. To the extent, therefore, that section 504 has worked, and the ADA will work to dispel stereotypical discrimination against people with disabilities, the law serves a necessary and salutary purpose, but not the sufficient one of addressing inequalities naturally, and not merely socially, acquired.

Courts in many section 504 cases have simply not provided adequate modifications, *i.e.*, accommodations, that could place a person with a

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155. H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 3, at 25 (1990).

156. 42 U.S.C.A. § 12112(2)(C); *see also* S. REP. No. 116, 101st Cong., 1st Sess. 23-24 (1989) (adopting *Arline* position on 29 U.S.C. § 706(8)(B) [as amended]); EEOC ADA Regulations, *supra* note 60, 29 C.F.R. § 1630.5 app. (no restrictions allowed "on the basis of stereotypes and myths about the individual's disability").

157. J. RAWLS, *supra* note 21, § 25, at 149.

158. Harvard Note, *supra* note 35, at 1004.

159. 694 F.2d 666 (11th Cir. 1983).

160. *Id.* at 668-69; *see* H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 2, at 71-72 (1990) (characterizing sections 102(b)(5) and (6) of the new legislation, 42 U.S.C.A. § 12112(b)(5), (6), as pertaining to avoidance of disparate-impact discrimination through invalid use of selection criteria); *see also* Carter v. Casa Cent., 849 F.2d 1048 (7th 1988) (medical evidence showed that a woman with a disability could perform the essential duties of the job without regard to stereotypes).

disability on an equal footing in the operation of the market or in the structure of governmental benefit programs. Thus "[*Alexander v.*] *Choate* and [*Southeastern Community College v.*] *Davis* . . . contemplate a continuum in which some *modest modifications* may be necessary to avoid discrimination but other more substantial modifications are not required by section 504."[161] The "even-handed" approach avowedly taken by the Supreme Court in these two cases would, if strictly followed, take no account of the disabling effects of the natural lottery. To take another example, the inflexibility of the lower federal courts in refusing to order accommodation when it would interfere with the terms of a collective bargaining agreement[162] shows an unwillingness to readjust the settled efficiency of the status quo to account for natural inequality. Even such a highly regarded case[163] as *Strathie v. Department of Transportation*[164] simply opened to a bus driver with a hearing loss the possibility of maintaining his employment by wearing a hearing aid. Within the range of accommodation, and allowing for the needs of safety, this action must surely be considered modest given the existing technology.[165]

2. The Liberal Interpretation

The liberal interpretation (or liberal equality) as found in Rawls's system adopts the principle of fair equality of opportunity as a supplement to "careers open to talents." Under this principle "those with [similar abilities and skills] should have similar [life chances] . . . regardless of their initial place in the social system . . . ."[166] This interpretation thus improves upon the system of natural liberty by addressing inequality founded on income and class. "[I]t still permits [however,] the distribution of wealth and income to be . . . decided by the outcome of the natural lottery."[167]

It is difficult to find cases under section 504 that would illustrate Rawls's concept of adjustment to this more substantive equality. In *Alexander v. Choate*[168] the Court did demonstrate a willingness to treat

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161. Americans Disabled for Accessible Public Transportation (ADAPT) v. Skinner, 881 F.2d 1184, 1192 (3d Cir. 1989) (en banc) (emphasis added).

162. *See supra* note 133 and accompanying text.

163. *See* H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 2, at 57, 74 (1990).

164. 716 F.2d 227 (3rd Cir. 1983).

165. The grudging and often minimal nature of accommodation afforded by the courts under section 504 is further shown, *e.g.*, in Nathanson v. Medical College, 926 F.2d 1368, 1383-87 (3d Cir. 1991), where the court remanded for a determination of whether "*closer parking* and *a straight back chair*" would constitute a reasonable accommodation for a student with an injured back. *Id.* at 1386 (emphasis supplied); *see also* Rothschild v. Grottenthaler, 907 F.2d 286, 293 (2d Cir. 1990) (court allowed deaf parents' sign interpreters at school expense to attend conferences about their normal children's schoolwork and deportment, but not to attend one child's graduation (held nonessential)); *cf.* EEOC ADA Regulations, *supra* note 60, 29 C.F.R. § 1630.2(*o*) (Appendix) (". . . other accommodations could include the use of accrued paid leave or providing additional unpaid leave . . . making employer provided transportation accessible, and providing reserved parking spaces").

166. J. RAWLS, *supra* note 21, § 12, at 73.

167. *Id.* § 12, at 73-74.

168. 469 U.S. 287 (1985).

people with disabilities as subject to benign rather than simply invidious discrimination and thus subject to legal protection under the disparate impact theory.[169] It also showed the willingness to exhume the concept of positive accommodation from where it had been entombed with affirmative action in *Southeastern*.[170] It refused, though, to allow them a level of medical benefits commensurate with their greater physical needs.[171] To consider the extent to which further inroads have been made against the arbitrary effects of the natural lottery, it is necessary to look at the operation of the difference principle under the democratic interpretation.

3. The Democratic Interpretation

The democratic interpretation (or democratic equality) as presented by Rawls retains fair equality of opportunity as the specific meaning of "equally open to all" but substitutes the difference principle for simple efficiency as the meaning of "everyone's advantage." Together the two principles each have consequences distinct from what each would otherwise have alone.[172] "According to the difference principle, . . . initial inequality in life prospects . . . is justifiable only if the difference in expectation is to the advantage of the representative man who is worse off, [here, the person with the disability.]"[173] "[T]he greater [material] expectations [for primary goods] allowed to entrepreneurs encourages them [, however,] to do things which raise the long term prospects of the [least disadvantaged.] Their better prospects act as incentives so that the economic process is more efficient."[174] Rawls further suggests that a strictly equal division of material goods would be irrational if inequality could indeed give more to all.[175] Here, in treating an unequal distribution of material goods as the necessary entrepreneurial incentive to increase overall production, Rawls follows Locke who argues that "different degrees of Industry were apt to give Men Possessions in different proportions" and thus an incentive to produce (for Locke, the invention of money; for Rawls, the no more subtle incentive of entrepreneurial motives) "gave them the opportunity to continue to enlarge them."[176]

The replacement of simple efficiency with the difference principle leads the second principle of justice as fairness now to read: "Social and economic inequalities are to be arranged so that they are both (a) to the *greatest*

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169. *Id.* at 295-97.
170. *Id.* at 301 & n.20.
171. *Id.* at 303-04, 308.
172. J. RAWLS, *supra* note 21, § 14, at 83.
173. *Id.* § 13, at 78.
174. *Id.*
175. *Id.* § 82, at 546.
176. J. LOCKE, *The Second Treatise of Government, An Essay Concerning the True Original, Extent, and End of Civil Government*, in TWO TREATISES OF GOVERNMENT, ch. v, § 48, at 343 (P. Laslett ed. 1960).

benefit of the least advantaged and (b) attached to offices and positions open to all under conditions of fair equality of opportunity."[177] Fused in this manner, fair equality of opportunity and the difference principle constitute democratic equality, whose effect on the natural lottery and the resultant inequality of people with disabilities must now be measured.

The difference principle, together with fair equality of opportunity, requires some adjustments to be made for natural differences in order to defeat the arbitrary effects of the natural lottery. An illustration of how this theoretical approach might be applied in practice is to be found in the Fourth Circuit's version of *Davis v. Southeastern Community College*,[178] where it held that an applicant with a hearing impairment was to be reconsidered for a nursing program "without regard to her hearing disability,"[179] "by focusing [instead] upon her academic and technical qualifications."[180] The Supreme Court, of course, reversed what would otherwise have been the most favorable standard to people with disabilities—one that would have discounted their physical inequalities entirely.[181] In a case decided shortly after the Supreme Court's *Southeastern* decision, the Tenth Circuit applied a modified disparate impact analysis to rule that a young doctor with multiple sclerosis be admitted to a residency program for which it found him "otherwise qualified."[182] Though a great deal of the bias against the plaintiff was stigmatized in nature, there is some indication that the court also discounted the very physical condition itself.

Other cases reflect some flexibility toward accommodating an applicant or employee with a disability through provision of readers and special equipment and substantial reduction in the workload of the employee,[183] court instructions to reconsider significant accommodations (including quiet work space and clerical assistance) at first refused by the employer,[184] by requiring a government agency to supply its employees who are blind with half-day readers and special braille encoded equipment,[185] or through making some minor adjustments in workplace equipment (such as lowering shelves that an employee with an impairment is required to reach).[186] These cases, among the most sensitive of section 504 jurisprudence in

177. J. RAWLS, *supra* note 21, § 13 at 83 (emphasis added to show the change in the principle as tentatively formulated); *see supra*, notes 114, 140 and accompanying text.

178. 574 F.2d 1158 (4th Cir. 1978), *rev'd*, 442 U.S. 397 (1979).

179. *Id.* at 1160.

180. *Id.* at 1161.

181. Southeastern Community College v. Davis, 442 U.S. 397 (1979).

182. *Pushkin*, 658 F.2d at 1385-87. The court noted that section 504 "itself does not contemplate either a disparate treatment or a disparate impact analysis." *Id.* at 1385.

183. Carter v. Bennett, 840 F.2d 63, 67-68 (D.C. Cir. 1988).

184. Arneson v. Heckler, 879 F.2d 393, 397 (8th Cir. 1989), *on remand*, Arneson v. Sullivan, 946 F.2d 90 (1991).

185. Nelson v. Thornburgh, 567 F. Supp. 369, 376 (E.D. Pa. 1983), *aff'd mem.*, 732 F.2d 146 (3d Cir. 1984), *cert. denied*, 469 U.S. 1188 (1985) (cited favorably in H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 3 at 41 (1990)).

186. *Prewitt*, 662 F.2d at 305.

accommodating the physical limitations of people with disabilities, do not clearly indicate whether the essential-functions concept and the difference principle are compatible. Their range of reasonable accommodations is both ambiguous and largely uninformative, without further analysis of whether people with disabilities receive economic justice as measured by the difference principle.

The Americans with Disabilities Act of 1990 and its legislative history provide some additional evidence of the extent to which physical inequalities of people with disabilities must legally be accommodated.

Reasonable accommodation and its defensive counterpart and limitation, undue hardship, are not to be measured under the ADA by the standard for religious accommodation in title VII established in *Trans World Airlines, Inc. v. Hardison.*[187]

> In *Hardison*, the Supreme Court concluded . . . an employer need not accommodate persons with religious beliefs if the accommodations would require more than a *de minimis* cost for the employer. By contrast, under the ADA, reasonable accommodations must be provided unless they rise to the level of "requiring significant difficulty or expense [the statutory definition of undue hardship now at § 101(10)]"—[a] higher standard [than *Hardison* because] of the crucial role that reasonable accommodation plays in ensuring meaningful employment opportunities for people with disabilities.[188]

The Senate Report on the ADA lists three mechanical devices, each costing under fifty dollars, which could serve as reasonable accommodations, with the proviso that more expensive accommodations may be needed for the blind and deaf.[189] Indeed, the nominal cost of many accommodations was a recurrent theme in the consideration of the legislation.[190] On the other hand, one of the House Committee reports indicates that "[a]daptive equipment or software may enable a person with no arms or a person with impaired vision to control [a] computer and access information."[191] The report then goes on to adopt the approach of a section 504 case that approved similar aids to employees who are blind (including provision of readers and computers capable of operating in braille) at a substantial cost, though not significant relative to the employer's entire budget.[192]

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187. 432 U.S. 63 (1977), *cited in* S. REP. No. 116, 101st Cong., 1st Sess. 36 (1989); H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 2, at 68 (1990).

188. H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 2, at 68 (1990); *accord* H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 3, at 40 (1990).

189. S. REP. No. 116, 101st Cong., 1st Sess. 10 (1989).

190. Senate Hearings, *supra* note 79, at 17 ($10 computer chip will provide closed captioning to the hearing impaired); *id.* at 218 (no cost to adjust desk for wheel-chair bound person) (1989) (remarks of Sen. Harkin).

191. H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 3, at 33 (1990).

192. *Id.* at 41 (adopting Nelson v. Thornburgh, 567 F. Supp. 369 (E.D. Pa. 1983), *aff'd mem.*, 732 F.2d 146 (3d Cir. 1984), *cert. denied*, 469 U.S. 1188 (1985)).

Amid these indicators which illuminate how deeply a reasonable accommodation can invade the essential functions of the position without producing undue hardship, three events in the legislative history of the ADA give a somewhat more definite indication. The first event occurred in the previous Congress, where a proposed ADA—designated S. 2345—was introduced with the following provision:

> The failure or refusal to remove architectural, transportation, and communication barriers, *and to make reasonable accommodations . . .* shall not constitute an unlawful act of discrimination on the basis of handicap if such barrier removal or accommodation would fundamentally alter the essential nature, or *threaten the existence of, the program, activity, business, or facility in question.*[193]

This provision, known as the "bankruptcy provision," was dropped when the bill was reintroduced in the next Congress, and was replaced with the concept of "undue hardship"[194] as a limitation on reasonable accommodation. The second event occurred when the House of Representatives, during floor debate on the ADA bill eventually enacted, rejected a proposed amendment that would have capped the cost of an accommodation at ten percent of the annual salary of each affected applicant or employee with a disability.[195] Though there were apparently several reasons for its rejection,[196] a leading reason was that "it unfairly switches the focus away from the resources of the employer and onto the annual salary of the employee."[197] Finally the third event occurred when Congress passed section 101(9) of the ADA. That section provides that consideration must be given to "the overall financial resources [and] size of the business" to determine whether an accommodation is reasonable (*i.e.*, not an undue hardship).[198]

The upshot is that undue hardship is a variable measure that is dependent upon "the size of the employer's operation and the cost of the accommodation."[199] The depth to which an accommodation will be allowed without triggering the defense of undue hardship "turns on both the nature and cost of the accommodation in relation to the employer's resources and operations."[200] "Only those accommodations which would require significant difficulty or expense when considered in light of the

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193. S. 2345, 100th Cong., 2d Sess. § 7(a)(1) (1988) (by Sen. Weiker) (emphasis added).

194. Senate Hearings, *supra* note 79, at 90 (remarks of Sen. Harkin).

195. H.R. 2273, 101st Cong., 2d. Sess., 136 CONG. REC. H2470-75 (daily ed. May 17, 1990).

196. *Cf. id.* at H2472 (remarks of Rep. Bartlett) (amendment would damage employer by setting a floor; tax credit is better way to protect and/or recompense employers).

197. *Id.* at H2474 (remarks of Rep. Payne of Virginia).

198. 42 U.S.C.A. § 12111(9)(B)(iii).

199. S. 933, 101st Cong., 2d Sess., 135 CONG. REC. S10773 (daily ed. Sept. 7, 1989) (remarks of Sen. Harkin).

200. S. REP. No. 116, 101st Cong., 1st Sess. 36 (1989); *cf.* EEOC ADA Regulations, *supra* note 60, 29 C.F.R. § 1630.15(d) app. (". . . to demonstrate that the cost of an accommodation poses an undue hardship an employer would have to show that the cost is undue as compared to the employer's budget." Alternatively, the employer may show that an accommodation would be "unduly disruptive" to its business operations).

size, resources and structure of the employer would be considered an undue hardship."[201] In no event, though, is an employer required to make expenditures that would threaten the efficient operations of its business.

Interpreted in a light favorable to accommodation and flexibility, section 504 case law and the recent legislative history show a tendency by the courts or an intent by Congress to carry accommodation for the benefit of people with disabilities beyond a minimal level where necessary, but never in a way that substantially encroaches on the inner operational structure, the essential functions, of the firm, agency, or program.

While it is clear this approach provides considerable assistance to persons with disabilities in some instances, and while some range of genuine consequential costs to the employer may often be incurred, it is doubtful that the difference principle's democratic and egalitarian criterion—that "[s]ocial and economic inequalities . . . be arranged . . . to the greatest benefit of the least advantaged"[202]—has been uniformly satisfied. There does not seem to be allowance made for sufficient amelioration of the fixed natural inabilities of people with disabilities. For further resolution of this issue, it is necessary to turn to other aspects of Rawls's theory.

C. *Characteristics of the Difference Principle as Norms of Distribution*

"[T]he difference principle is a strongly egalitarian conception in the sense that unless there is a distribution that makes [all] persons better off . . . an equal distribution is to be preferred."[203]

> We see then that the difference principle represents, in effect, an agreement to regard the distribution of natural talents as a common asset and to share in the benefits of this distribution . . . . Those who have been favored by nature . . . may gain from their good fortune only on terms that improve the situation of those who have lost out.[204]

Because Rawls regards the distribution of natural abilities as a collective asset to be managed to mitigate the arbitrariness of initial inequalities created by the natural lottery, the role of efficiency and of technocratic values, as the norms by which assets created through these natural abilities are distributed, declines in his system.[205]

1. Business Necessity and the Burden of Proof

The concept of business necessity is the aspect of disability law under the Rehabilitation Act and the ADA that most resembles Rawls's concept of natural necessity or circumstance, except that business necessity under

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201. H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 3, at 41 (1990).
202. J. RAWLS, *supra* note 21, § 13, at 83.
203. *Id.* § 13, at 76.
204. *Id.* § 17, at 101.
205. *Id.* § 29, at 179; § 17, at 101.

the existing law is viewed from the employer's perspective and reflects the need to adjust to necessity in order to maintain efficiency, not the need to transcend necessity by overcoming the social and economic consequences of natural inequalities. Nonetheless, the treatment of business necessity, through the legal limitation of its permitted influence on enlarging or maintaining the scope of essential functions, reflects to a degree the law's recognition that some concessions must be made to the natural impediments of people with disabilities. The most dramatic way in which this treatment can be seen is through the assignment of the burden of proof for business necessity.

Business necessity is closely related to, and yet distinct from, the concept of undue hardship. Thus business necessity is asserted by the employer as a defense in disparate impact cases, to show that the job standards (frequently technical selection criteria) offered as indicia of essential functions are actually job-related, and therefore valid.[206] Undue hardship, on the other hand, becomes appropriate as a defense after the scope of essential functions has been settled and serves to rebut the employee's demand for reasonable accommodation, in connection with those functions, by alleging excessive cost or hardship.[207] In *Prewitt v. United States Postal Service*,[208] the Fifth Circuit assigned the burden of proof on both business necessity and undue hardship ("inability to accommodate") to the employer.[209] In assigning the burden of proof the court held that this term includes the burden of persuasion for both defenses, as well as the burden of production.[210] Several courts have since followed *Prewitt* in holding that the employer bears the burden of proof on business necessity and/or undue hardship.[211] There had, however, for some time been "an open question [under title VII and antidiscrimination law generally] as to the nature of the burden that shifts to the defendant: whether it is a burden of persuasion or simply one of coming forward

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206. 42 U.S.C. §§ 12112(b)(6), 12113(a).

207. 42 U.S.C.A. §§ 12111(10), 12112(b)(5)(A); *cf.* S. REP. No. 116, 101st, 1st Sess. 27, 38 (1989) (explaining the difference between business necessity and undue hardship).

208. 662 F.2d 292 (5th Cir. 1981).

209. *Id.* at 306-08.

210. *Id.* at 305-06 (citing Griggs v. Duke Power Co., 401 U.S. 424 (1971)); *see* Note, *Accommodating the Handicapped: Rehabilitating Section 504 After Southeastern*, 80 COLUM. L. REV. 171, 189-90 (1980).

211. Carter v. Bennett, 840 F.2d 63, 65-66 (D.C. Cir. 1988) (undue hardship); Jasany v. United States Postal Serv., 755 F.2d 1244, 1250 (6th Cir. 1985) (undue hardship); Mantolete v. Bolger, 767 F.2d 1416, 1423 (9th Cir. 1985) (undue hardship); Treadwell v. Alexander, 707 F.2d 473, 475-78 (11th Cir. 1983) (business necessity and undue hardship); Gardner v. Morris, 752 F.2d 1271, 1280 (8th Cir. 1985) (undue hardship); Bentivegna v. United States Dep't of Labor, 694 F.2d 619, 621-22 (9th Cir. 1982) (business necessity; not citing *Prewitt*). *But cf.* Doe v. New York Univ., 666 F.2d 761, 776 (2d Cir. 1981) (plaintiff bears ultimate burden of persuasion, but arguably under a disparate treatment theory). *See also* Smith v. Barton, 914 F.2d 1330, 1339-40 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 2825 (1991) (distinguishing disparate treatment theory and its allocation of the burden of proof from disparate impact theory); Doherty v. Southern College of Optometry, 862 F.2d 570, 573 (6th Cir. 1988), *cert. denied*, 493 U.S. 810 (1989) (citing split in circuits on allocation of burden of proof under section 504, though distinguishing between disparate treatment and disparate impact cases).

with the evidence."[212] This uncertainty remained, at least for title VII, until June 5, 1989, when the Supreme Court handed down its decision in *Wards Cove Packing Co. v. Atonio*,[213] in which the Court rejected the construction of *Griggs v. Duke Power Co.*[214] placing the burden of persuasion for business necessity on the employer. Instead, the Court in *Wards Cove* placed it on "the disparate-impact plaintiff."[215] The *Wards Cove* decision necessarily cast deep aspersions on the validity of the burden allocations of *Prewitt*, particularly the one for business necessity, which the Fifth Circuit had bottomed on *Griggs*.[216]

In the legislative history of the ADA, Congress has made it plain that it wants the *Prewitt* allocations applied to the ADA. The text of the House Judiciary Committee Report states that "the burden is on the employer to demonstrate that the needed accommodation would cause an *undue hardship*" and goes on to refer to the employer's requirement to "demonstrate that . . . a facially neutral qualification standard [with] discriminatory effect on persons with disabilities . . . is job related and required by *business necessity*."[217] Both references were followed by a citation to *Prewitt*.[218] The approach of the Senate Labor and Human Resources and the House Education and Labor Committees was more indirect but just as decisive. The texts of their committee reports identify the sections of the ADA containing the enforcement procedures involved with undue hardship and business necessity, and then mandate that the burden of proof be allocated under these sections in the same manner as for certain existing agency regulations under section 504 "as of June 4, 1989"—the day before *Wards Cove*.[219] Those regulations, when examined, reveal a discussion of "[e]mployment criteria" that lend themselves to disparate impact analysis for which the business necessity defense could be appropriate.[220] Under this congressional treatment of pre-*Wards Cove* section 504 law, the courts will almost certainly be thrown on back to the *Prewitt* allocation under the ADA.[221]

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212. B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1328 (1983).

213. 490 U.S. 642 (1989).

214. 401 U.S. 424 (1971).

215. *Wards Cove*, 490 U.S. at 660; *see id.* at 672 (Stevens, J., dissenting with three other Justices and stating that he "always believed that the *Griggs* opinion correctly reflected the intent of the Congress that enacted title VII.").

216. *Prewitt*, 662 F.2d at 306.

217. H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 3, at 42 (1990) (emphasis added).

218. *Id.* at 42 nn.31 & 32.

219. S. REP. No. 116, 101st Cong., 1st Sess. 38 (1989) (citing sections of S. 933 which became sections 102(b)(1), (5)(A), and (6) of the Act); H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 2, at 72 (citing sections of H.R. 2273 which became sections 102(b)(1), (5), and (6) of the Act).

220. *See* 45 C.F.R. § 84.13 (Rev. ed. Oct. 1991) ("Employment criteria"); 28 C.F.R. § 42.512 (Rev. ed. July 1991) ("Employment criteria").

221. The Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 137 Cong. Rec. S15273, 1991 WL 22185 (Nov. 21, 1991), does not specifically address the *Wards Cove* issue in connection with the ADA. Section 105 of the 1991 legislation resolves this issue for title VII by adding a new subsection (k)(1)(A) to section 703 of the 1964 Act (42 U.S.C. § 2000e-2). *See* S. 1745, 101st Cong., 2d. Sess., 136 CONG. REC. S15276 (daily ed. Oct. 25, 1991), *reprinted in* 1991 U.S. CODE CONG. & ADMIN. NEWS 767, (remarks of Sens. Danforth, Kennedy, and Dole, indicating that *Griggs* is

In following the congressionally mandated burden of proof under the ADA, "the courts must be wary that business necessity is not confused with mere expediency."[222] In so doing the courts will mitigate the effects of the natural lottery by forcing employers and agencies to assume the burden of proving that arbitrariness in their selection and workplace policies has been duly excised, reducing unnecessary barriers to economic equality. Of the change in the title VII burden wrought in *Wards Cove*, one critic has said, "*Wards Cove* radically reduces the value of [a plaintiff's] prima facie case by turning upside down the burden of proof on the question of business necessity . . . . [Now] the burden on the plaintiff to prove the required negative [that the practice does not serve the employer's legitimate goals] is extremely heavy."[223] The location of the burden of proof in the ADA is thus an important concession to the requirements of the difference principle, for in placing the burden on the employer to explain the force of necessity in shaping the essential functions of the workplace, the ADA recognizes that those who share more in the distribution of wealth and income have the onus to justify their unequal position.

2. Redress

Here it may be appropriate to mention the influence of the principle of redress, which—though not the same as the difference principle—requires that the system of justice as fairness take its special claims into account. The rationale behind redress is that those with undeserved natural inequalities are entitled to some compensation.[224] While the principle of redress certainly furthers the amelioration of the effects of the natural lottery, the concept has generally not been followed under existing law, nor does the newly enacted law envisage such an effect. In *Alexander v. Choate*,[225] for example, the Court insisted that the class of people with disabilities in Tennessee accept the same level and amount of benefits as all others. No account was taken of their natural inequalities.[226] This kind of "even-handed" approach, wherever it persists, will remain an obstacle to redress as such, and to its incorporation into the operation of the difference principle.

3. Efficiency and Productivity

The difference principle moderates the scope of operation of the principle of efficiency but may in principle coincide with efficiency when it is indeed impossible to make any one representative person better off without making the expectations of the least advantaged representative

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reinstated). Section 107(a) of the ADA, 42 U.S.C. § 12117(a), which incorporates certain enforcement procedures from title VII, does not, however, include a reference to section 703 of the Civil Rights Act of 1964.

222. Bentivegna v. United States Dep't of Labor, 694 F.2d 619, 621-22 (9th Cir. 1982).

223. Karst, *Private Discrimination and Public Responsibility: Patterson in Context*, 1989 S. CT. REV. 1, 34 (footnote omitted).

224. J. RAWLS, *supra* note 21, § 17 at 100.

225. 469 U.S. 287 (1985).

226. *Id.* at 309.

man worse off. Pareto optimality and the accommodation of natural inequality through operation of the difference principle can thus be theoretically reconciled, under ideal conditions of justice.[227] Under less than ideal conditions of justice, however, such compatibility is unachievable because "[j]ustice is prior to efficiency and requires some changes that are not efficient."[228] Indeed, the difference principle "transforms the aims of [society] so that the total scheme of institutions no longer emphasizes social efficiency and technocratic values."[229]

The qualities that fit the employees, with or without disabilities, to perform the essential functions of the job are efficiency and productivity. "An employer subject to section 504 who denies an individual employment *because of a handicap* must show that the criteria used are job related and that the applicant could not *efficiently* perform the essentials of the job."[230] The Bush Administration exhorted the Congress during its consideration of the ADA to give "[c]oncerns for the economic efficiency of America's businesses . . . due weight."[231] Under these concerns "each employee or prospective employee [is treated] as a vehicle for performing tasks and maximizing profits."[232] The concept of essential functions is therefore defined—from the employer's perspective—by these requirements of efficiency and performance, and all qualities promoting these requirements tend to carry a presumption of reasonableness, while all counterproductive factors are *ipso facto* burdensome.

Efficiency can also be the *raison d'etre* in the administration of social programs. The Supreme Court, for example, has held that:

> to require that the sort of broad-based distributive decision at issue in this case always be made in the way most favorable, or least disadvantageous, to the handicapped, even when the same benefit is meaningfully and equally offered to them, would be to impose a virtually *unworkable requirement* on state Medicaid administrators.[233]

This approach to the distribution of benefits tends to resemble the utilitarian view of justice (opposed by Rawls), according to which it does not matter "how [a] sum of satisfactions is distributed . . . [so long as it] yields the maximum fulfillment."[234] The "even-handed" distribution of medical benefits promotes this maximization goal by reducing significantly the administrative costs of conducting an otherwise weighted distribution, through eliminating the adjustments and calculations of different persons' needs.[235] "The nature of the decision . . . is not, therefore, materially different from that of an entrepreneur deciding how

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227. J. RAWLS, *supra* note 21, § 13, at 79.
228. *Id.* § 13, at 79-80.
229. *Id.* § 17, at 101.
230. Simon v. St. Louis County, Mo., 735 F.2d 1082, 1084 (8th Cir. 1984) (emphasis added).
231. Senate Hearings, *supra* note 79, at 196 (statement of Attorney General Thornburgh).
232. Harvard Note, *supra* note 35, at 1005.
233. *Choate*, 469 U.S. at 308 (emphasis added).
234. J. RAWLS, *supra* note 21, § 6, at 26.
235. *Choate*, 469 U.S. at 308-09.

to maximize his profit by producing this or that commodity . . . . The correct decision is essentially a question of efficient administration. [It] does not take seriously the distinction between persons."[236]

Thus the essential-functions concept "retains a core notion of functional competence and efficiency"[237] subject only to reasonable accommodation for the person with a disability whose capacity for efficient productivity has been reduced. "Reasonable" in this context, however, means "non-burdensome" or "limited." In the concomitant presumption favoring efficiency lies the failure to serve the difference principle: the requirements of efficiency are in principle, if not in fact, permitted to retain priority as a norm in the workplace over the requirements of justice as fairness.

D. Essential Functions as an Exclusionary Concept

1. Exclusion through Analogy to the Concept of BFOQ

The concept of essential functions has an analogue in the law of employment discrimination in the theory of BFOQ (bona fide occupational qualification),[238] which actually permits, on a narrow basis, discrimination because of sex, national origin and religion,[239] and age.[240] Race and color cannot be the basis of BFOQ.[241] Establishment of a BFOQ permits an employer to discriminate against the protected class on the basis of the very trait for which its members otherwise receive protection under the law. Thus the Supreme Court has ruled that "discrimination based on sex is valid only when the *essence* of the business operation would be undermined by not hiring members of one sex exclusively,"[242] and that the "class [must] possess a trait precluding safe and efficient job performance that cannot be ascertained by means other than knowledge of the applicant's membership in the class."[243]

Two factors make the relation between essential functions and BFOQ one of close analogy but not identity: (1) The exclusion of a person with a disability from a job or a benefit requires an individualized inquiry into his abilities.[244] Rejection for undifferentiated reasons is not permitted simply on the basis of his perceived membership in a particular class, as it would be for women or older workers under BFOQ. Nonetheless,

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236. J. RAWLS, *supra* note 21, § 6, at 27.

237. *See* Harvard Note, *supra* note 35, at 1101; *supra* text accompanying note 55.

238. *See supra* note 20 and accompanying text..

239. Civil Rights Act of 1964, 42 U.S.C.A. § 2000e-2(e) (1964).

240. Age Discrimination in Employment Act, 29 U.S.C. § 623(f)(1) (1985).

241. SCHLEI AND GROSSMAN, *supra* note 212, at 302-03.

242. Dothard v. Rawlinson, 433 U.S. 321, 333 (1977) (quoting Diaz v. Pan Am. World Airways, Inc. 442 F.2d 385, 388 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971)) (emphasis in original).

243. Western Air Lines v. Criswell, 472 U.S. at 414-15 (citing Usery v. Tamiami Trail Tours, Inc. 531 F.2d 224, 235 (5th Cir. 1976)).

244. *See, e.g.*, Hall v. United States Postal Serv., 857 F.2d at 1073 (citing Arline v. School Bd. of Nassau County, 772 F.2d 795, 764-65 (11th Cir. 1985), *aff'd*, 480 U.S. 273 (1987)); *see also* S. REP. NO. 116, 101st Cong., 1st Sess. 27 (1989); H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 2, at 57 (1990).

essential-functions exclusion is trait-related in its effect on the class as a whole, just as the BFOQ. (2) The essential-functions test, moreover, operates *broadly* in many circumstances—whenever there is threat of fundamental alteration or undue hardship—to exclude people with disabilities,[245] while the BFOQ exclusion "was in fact meant to [operate as] an *extremely narrow* exception [in very limited circumstances] to the general prohibition" of discrimination against the protected class.[246] The upshot is that, when allowance is made for the fact that the impact of exclusion varies according to individual differences in kind and degree of disability,[247] people with disabilities as a class suffer from the broadest legal exclusion from employment and from society of any group otherwise protected from discrimination by law. The essential-functions concept works much like a BFOQ but remains at the center of disabilities law, not—like the BFOQ concept—at the periphery of those branches of antidiscrimination law where the presumption is strongly against trait-related bias. And while the BFOQ itself is construed narrowly in those branches of law where it is expressly recognized, it is the *exceptions* to its analogue of essential functions that are construed narrowly—"marginally"—leaving the central concept standing broadly.

2. Exclusion from the Rawlsian Social Minimum

Essential functions constitute a barrier permeable only by reasonable accommodation where "reasonable" generally means "insubstantial,"[248] "limited,"[249] or "modest."[250] The kinds of accommodations made to people with disabilities have ranged from extremely modest adjustments to some significant, though not fundamental, changes to the workplace.[251] In the final analysis, accommodations under restrictions with such an inelastic barrier like the essential-functions barrier do not, on the whole, satisfy the difference principle.

Rawls recognizes that socio-economic inequalities like those revealed by the modest scope given to reasonable accommodation, and by the paradoxical qualities of essential functions in relation to the BFOQ concept, must be addressed by the major institutions of society. One method he proposes to redress these kinds of inequalities is through the governmental guaranty of a social minimum income, predominantly through "a graded income supplement (a so-called negative income tax)."[252] The

245. *See, e.g.*, sources cited *supra* notes 49, 54, 55, & 57 and accompanying text.

246. Western Air Lines v. Criswell, 472 U.S. at 412 (citing Dothard v. Rawlinson, 433 U.S. at 334)) (emphasis added).

247. *Cf.* Rebell, *supra* note 127, at 1438 (1986) ("the handicapped do not constitute a coherent group sharing common physical, psychological, or cultural characteristics").

248. Alexander v. Choate, 469 U.S. at 300.

249. Doherty v. Southern College of Medicine, 862 F.2d at 575 (". . . limited obligation to make reasonable accommodation . . .").

250. ADAPT v. Skinner, 881 F.2d at 1192.

251. *See* case cited *supra* notes 183-87 and accompanying text.

252. J. RAWLS, *supra* note 21, § 43, at 275.

greater priority of justice as fairness and the difference principle over mere market efficiency requires this step. "There is with reason strong objection to the competitive determination [as the sole factor] of total income, since this ignores the claims of need and an appropriate standard of life."[253] This institutional mechanism proposed by Rawls for assaying and distributing the social minimum is different in important respects from the operation of existing anti-discrimination law designed to promote equality through employment and not a social minimum as such. Yet both mechanisms—income allocation and employment practices—address the distribution of material goods through a competitive market system whose operation should yield to and be tamed by the difference principle. Accordingly, it seems equally appropriate to set the same social minimum level for people with disabilities under the current legal regime banning discrimination against them in employment, as Rawls sets for the least advantaged in his postulated income transfer mechanism.[254] In this context, the Rawlsian measurement may now be presented:

> Once the difference principle is accepted . . . it follows that the minimum is to be set at that point which, taking wages into account, maximizes the expectations of the least advantaged group. By adjusting the amount of transfers . . . it is possible to increase or decrease the prospects of the more disadvantaged.
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> . . .
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> Assuming for the moment that a just savings principle is available which tells us how great investment should be, the level of the social minimum is determined. Suppose for simplicity that the minimum is adjusted by transfers paid for by proportional expenditure (or income) taxes. In this case raising the minimum entails increasing the proportion by which consumption (or income) is taxed [or, by analogy, increasing the proportion which essential job functions of employers must give way to reasonable accommodation.] Presumably as this fraction becomes larger there comes a point beyond which one of two things happens. Either the appropriate savings cannot be made *or the greater taxes [or, by analogy, the costs of greater reasonable accommodation] interfere so much with economic efficiency that the prospects of the least advantaged . . . are no longer improved but begin to decline. In either event the correct minimum has been reached. The difference principle is satisfied and no further increase is called for.*[255]

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253. *Id.* § 43, at 277.

254. Richard Epstein argues, "The ADA sets an implicit tax for the benefit of the disabled . . . provid[ing] enormous implicit subsidies that are paid for by employers and common carriers in the first instance and by everyone else once these costs are passed along." Epstein, *Disabilities and Discrimination* 8 (1990), *reprinted in* SOCIAL PHILOSOPHY AND POLICY CENTER. Insofar as the critique impliedly reproves the Congress for not financing accommodation of people with disabilities at least in part from public tax funds—especially where smaller businesses are involved—the author is inclined to agree. In this manner the cost of accommodation could be more equitably distributed throughout the society and not unduly levied against one class of employers. The author is, of course, generally opposed to the voluntaristic approach reflected in Epstein's overall analysis of the disabilities issue.

255. J. RAWLS, *supra* note 21, § 44, at 285-86 (emphasis added).

The upshot of Rawls's argument is plain enough: there has to be a point at which social redistribution of primary goods (principally income and wealth) to the least advantaged becomes inefficient or counterproductive. Anyone who accepts the principle of Pareto optimality (or any other generally recognized concept of efficiency) would see that redistribution of social wealth is always potentially inefficient. Rawls can be understood as simply restriking a moderate but new and normative balance between transfers and aggregate economic efficiency. The balance is "moderate" because it bears the influence of Lockean material acquisitiveness in permitting some inequalities in this particular context to remain, yet "new" as applied in this particular context because it is materially different from the balance struck under the existing essential-functions standard.[256]

The operation of the essential-functions test, now structured in the ADA just as in the past, indeed will not permit this Rawlsian minimum level to be reached. The refusal of Congress to place a ceiling on the degree of reasonable accommodation[257] does not indicate the contrary. Significantly, this rejection of a limitation on reasonable accommodation has been placed hand-in-hand with approval of a case-law approach to the delimiting concept of undue hardship, an approach which favors "balancing the needs of the handicapped with budgetary realities" and which further favors accommodation when "the additional dollar burden is a *minute fraction* of the . . . budget[]."[258] Only a provision like that of Senate Bill 2345 rejected in the previous Congress, discounting ordinary costs as a limiting defense by requiring accommodation to the point of "threat[ing] the existence of . . . the program . . . [or] business . . . in question,"[259] would approach attaining the level for the satisfaction of the difference principle set by Rawls. The Supreme Court's holding in *City of Los Angeles v. Manhart*[260] that no cost justification defense is permitted to violations of title VII[261] is highly consistent with both Rawls and the failed legislation. Indeed, the Court in *United Auto Workers v. Johnson Controls, Inc.*[262] has both reaffirmed the principle of no cost justification defense under title VII, while expressly reserving decision on

256. I am indebted to my friend Jonathan Eddison for these insights.

257. *See* source cited *supra* note 195 and accompanying text.

258. Nelson v. Thornburgh, 567 F. Supp. at 379, 382 (emphasis supplied) (cited in H.R. REP. No. 485, 101st Cong., 2d. Sess., pt. 3, at 41 (1990) together with Judiciary Committee's rejection of 10 percent limit on reasonable accommodation); *see also* United States v. Trustees of the Univ. of Ala., 908 F.2d at 751 ("In light of [the university's] annual transportation budget of $1.2 million, an expenditure of $15,000 [plus certain incidental rental fees] for vans [for transporting students with disabilities] is not likely to cause an undue financial burden on [the university.]"); Dopico v. Goldschmidt, 687 F.2d 644, 650 (2d Cir. 1982) (six million dollars for people with disabilities out of total New York City receipts of federal mass transit assistance of $490 million "is not 'massive' either in absolute terms or relative to [New York] City's total receipt[s]").

259. S. 2345, 100th Cong., 2d Sess. § 7(a)(1) (1988); *see supra* text accompanying note 193.

260. 435 U.S. 702; *see also* Arizona Governing Comm. v. Norris, 463 U.S. 1073, 1084 n.14 (1983) (Marshall, J.).

261. *Manhart*, 435 U.S. at 716-17 & nn.31, 32.

262. UAW v. Johnson Controls, Inc., 111 S. Ct. 1196 (1991).

the "case in which costs would be so prohibitive as to threaten the survival of the employer's business."[263] Like Rawls and Senate Bill 2345—but unlike the undue hardship cost defense carried forward in section 101(10) of the ADA—the title VII approach, if applied to disabilities, would remain open to a high degree of reasonable accommodation limited only by the outermost boundaries of business efficiency.

The difference principle, as already noted, requires that "[s]ocial and economic inequalities are to be arranged so that they are . . . to the *greatest* benefit of the least advantaged."[264] The old and new laws would meet this criterion only "if there is no *feasible alternative* . . . under which the expectations of [people with disabilities] would be greater."[265] In the light of Rawls's own prescriptive finding that the difference principle requires a social minimum whose establishment has priority over the entrepreneurial demands of efficiency, the availability of a feasible alternative—like Senate Bill 2345 or the model of title VII itself—cannot be discounted. For these reasons the essential-functions concept continues to exclude people with disabilities unfairly from an adequate share of society's material benefits by subjecting them to the vagaries of the natural lottery without compensating provisions in the distribution of income and wealth.

V. THE PRIMARY GOOD OF SELF-RESPECT AND THE ARISTOTELIAN PRINCIPLE

For Rawls the theory of right and justice is founded on the notion of reciprocal relations among *equal moral persons*.[266] Moral persons are defined as capable of having a concept of the good *as expressed in a rational plan of life* and a sense of justice.[267] Thus "[t]he capacity for moral personality is a sufficient condition for being entitled to social justice."[268] Self-respect, in the sense of our own worth, is the primary social good—essential to the pursuit of a rational life plan. It includes a person's "secure conviction that his conception of his good, his plan of life, is worth carrying out."[269] In applying the difference principle the parties include self-respect in the prospects of the least advantaged.[270] Indeed, the parties in the original position of equality would wish to avoid at almost any cost the conditions that undermine this most important primary good.[271] Without it, there is nothing but despair and nihilism, and no rational life plan would seem worth carrying out.

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263. *Id.* at 1209.
264. J. RAWLS, *supra* note 21, § 14, at 83 (emphasis added).
265. Scanlon, *Rawls' Theory of Justice*, in READING RAWLS 169, 192 (N. Daniels ed. 1973) (emphasis added).
266. J. RAWLS, *supra* note 21, § 74 at 485.
267. *Id.* § 77, at 505.
268. *Id.*
269. *Id.* § 67, at 440.
270. *Id.* § 54, at 362.
271. *Id.* § 67, at 440.

The basis for self-respect, as the main primary good, is not in one's income share but in the "publicly affirmed distribution of rights and liberties."[272] It is not only the loss of the external rewards of wealth and privilege that may be unjust but also the loss of "experiencing the *realization of self* which comes from a skillful and devoted exercise of social duties."[273] Although the distribution of material goods is permitted on an unequal basis (as governed by the difference principle), self-respect is associated with the equal distribution of the basic liberties and their normative priority over "material means that are relegated to a subordinate place."[274] Nonetheless, the distribution of material goods must not be neglected lest a form of social envy arise, divisive of society and disruptive of self-esteem.[275] To avert such divisiveness and loss of self-esteem, the institutions of justice as fairness require a social minimum of income.[276]

The "Aristotelian Principle" is a natural fact that rational life plans must take into account.[277] That principle is summarized as follows: "other things being equal, human beings enjoy the exercise of their realized capacities . . . and this enjoyment increases the more the capacity is realized, or the greater its complexity."[278] The principle underlies the drive toward satisfaction of the desire for "*variety and novelty of experience*,"[279] and points to the conclusion that "rational plans of life normally provide for the *development of at least some of a person's powers*."[280] The latter aspect of the principle is derived from Aristotle's concept that we acquire or actualize our moral virtues "by first exercising them,"[281] while the former elements of variety and diversity of experience are consistent with process thought as expressed by Charles Hartshorne: "The basic value is the intrinsic value of experiencing, as a unity of feeling . . . and exhibiting harmony or beauty . . . . [H]armony is not, however, a sufficient condition of great value. There must also be intensity. And intensity depends upon contrast, the amount of diversity integrated into an experience."[282] The Aristotelian Principle, requiring the growth of and diversity in the experience of each person, is thus a condition *sine quo non*—through its essential place in the rational life plans of moral and equal persons—for establishing the reciprocal relations of equality upon which justice as fairness is founded. Neither could the intrinsically valued

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272. *Id.* § 82, at 544.
273. *Id.* § 14, at 84 (emphasis added).
274. *Id.* § 82, at 546.
275. *Id.* § 82, at 545; § 81, at 535.
276. *Id.* § 43, at 275; *see also supra* notes 252-55 and accompanying text.
277. *Id.* § 65, at 428-29, 432; § 67 at 440.
278. *Id.* § 65, at 426.
279. *Id.* § 65, at 427 (emphasis added).
280. *Id.* § 79, at 523 (emphasis added).
281. ARISTOTLE, *Nichomachean Ethics* ii, 1, 1103a26-b2, in BASIC WORKS OF ARISTOTLE 952 (R. McKeon, ed. 1968).
282. C. HARTSHORNE, *The Aesthetic Matrix of Value*, in CREATIVE SYNTHESIS AND PHILOSOPHIC METHOD 303 (1983).

primary good of self-respect be realized without the satisfaction of the principle.

Though people with disabilities will no longer be characterized here as the "least advantaged representative group," because that designation is reserved for analysis under the difference principle, the legislative history of the ADA is nonetheless replete with evidence of the demeaned status of people with disabilities that touches directly on their privation of self-respect. Dr. I. King Jordan, President of Gallaudet University, testified before the Senate Committee that, "Discrimination occurs in every facet of disabled people's lives . . . . *It destroys healthy self-concepts*, and it slowly erodes the human spirit."[283] Another witness for people with disabilities stated, "This forced acceptance of second-class citizenship has stripped us as disabled people of pride and dignity."[284] A young woman, a college graduate, told of five years of unsuccessful search for employment: "I feel useless, powerless, and demeaned. And I know I am not alone."[285] These testimonies, and others, confirm Rawls's observations that "[w]ithout [self-respect] nothing may seem worth doing, or if some things have value for us, we lack the will to strive for them."[286]

The law corresponding to the requirement of the primary good of self-respect, and in turn to the Aristotelian Principle and its concept of the enrichment of experience and the realization of human capacities, pertains to the promotion of the self-development of people with disabilities through participation in educational and in other programs, as well as in employment. The emphasis turns from purely economic enrichment to enrichment of experience. A major theme is the actual inclusion (or "mainstreaming") of people with disabilities in socially enriching activity, as opposed to "warehousing" or segregating them. The legislative history of the ADA supports integration of people with disabilities, with one committee stating that " 'the goal [is to] eradicate the 'invisibility of the handicapped.' ' "[287] Whether the body of the law under section 504 and the ADA faithfully and amply support this aim is the final subject of inquiry.

A. "A Direct Threat to the Health and Safety of Others"

Rawls's fundamental norm of equality insists that each person have the conditions of realizing his capacities and of enriching his experiences so that he may be constituted as a moral person with the primary good of self-respect. One of the primary ways in which people with disabilities have been denied the conditions of self-realization has occurred through

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283. Senate Hearings, *supra* note 79, at 13 (testimony of I. King Jordan) (emphasis added).

284. S. REP. No. 116, 101st Cong., 1st Sess 16 (1989) (statement of Judith Neuman).

285. Senate Hearings, *supra* note 79, at 29 (1989) (statement of Amy Dimsdale).

286. J. RAWLS, *supra* at note 21, § 67 at 440.

287. H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 3, at 50 (1990) (quoting ADAPT v. Skinner, 881 F.2d at 1204 (Mansmann, J., concurring and dissenting)); *see* also H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 2, at 58 (1990).

Various non-employment activities and programs are also covered by the ADA through its titles II and III, *see supra* note 28, but only title I and its employment discrimination provisions are included expressly in the discussion which follows.

their exclusion and segregation from work places, programs, and social groups because of allegations that they pose a threat to the health and safety of others. The express terms of the Rehabilitation Act originally addressed no such exclusionary grounds. It was amended, first in 1978, to exclude from coverage of the Rehabilitation Act current alcohol or drug abusers unable to perform their jobs or who pose a threat.[288] In 1987, however, Congress amended the Rehabilitation Act generally to permit anyone "who by reason of [a currently] contagious disease or infection, would constitute a direct threat to the health or safety of others [or] who . . . is unable to perform the duties of the job" to be excluded from employment or other activities.[289] This last amendment, now found at section 7(8)(C) of the Rehabilitation Act, was a codification of the Supreme Court's holding in *Arline*,[290] discussed below. The same or similar provisions have been written into the ADA.[291] In what follows, section 7(8)(C) and the balance of other integrative provisions of the Rehabilitation Act and the ADA are measured by their promotion of Rawls's requirement of self-respect through self-development.[292]

1. The Initial Exclusionary Decisions of the Supreme Court

In *Southeastern Community College v. Davis*,[293] the Supreme Court considered whether a woman with a serious hearing disability might be

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288. Rehabilitation Comprehensive Services, and Developmental Disabilities Amendment of 1978, Pub. L. No. 95-602, § 122(a)(7), 92 Stat. 2984-85 (codified at 29 U.S.C. § 706(8)(B)). Section 104 of the ADA, to be codified at 42 U.S.C. § 12114, governs the use of illegal drugs and section 512 of the ADA, codified at 29 U.S.C. § 706(8)(C) and other scattered subsections of section 706, amends the Rehabilitation Act to conform substantially to these new standards.

289. Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, § 9, 102 Stat. 31-32, § 7(8)(C) of the Rehabilitation Act (codified at 29 U.S.C. § 706(8)(C)).

290. *Cf.* S. REP. No. 64, 100th Cong., 1st Sess., 27-28 (1987), reprinted in [1988] U.S. Code Cong. & Admin. News 3, 29-30 (rejection of proposed amendment to overturn *Arline*); *see, e.g.*, Judiciary Comm. Hearings, *supra* note 79, at 72-73 (statement of Chai R. Feldblum, representing American Civil Liberties Union).

291. U.S.C.A. § 12111(3), § 12113(b): *see* H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 3, 34 (1990) (definition of "direct threat" meant to codify *Arline*); *see also* H.R. CONF. REP. No. 558, 101st Cong., 2d Sess. 58 (1990) (making standard apply to all applicants and employees, not just to those with "contagious" diseases, by removal of any reference to "contagious disease or infection" found in section 7(8) (C) of the Rehabilitation Act); S. 933, 101st Cong., 2d. Sess., 136 CONG. REC. S9686 (daily ed. July 13, 1990) (remarks of Sen. Harkin explaining that provision is intended to codify *Arline*); *cf.* S. REP. No. 116, 101st Cong., 1st Sess. 40 (1989) (section 103(b) of then S. 933, with reference to "contagious diseases," meant to codify *Arline*).

292. In a controversial interpretation, *see* Holmes, *U.S. Rules to Let Employers Reject Disabled Over Safety*, N.Y. Times, July 23, 1991, § 1, at 8, col. 5, the EEOC has extended the concept of "direct threat" to include "a significant risk of substantial harm to the health or safety of the *individual* [as well as] others." EEOC ADA Regulations, *supra* note 60, 29 C.F.R. § 1630.2(r) & (Appendix) (emphasis added). Although there is some case law support for this position, *see*, Chiari v. City of League City, 920 F.2d at 317; Meese v. Davis, 865 F.2d 592 (3d Cir. 1989) (per curiam), *aff'g*, 692 F. Supp. 505, 520 (E.D. Pa. 1988); Mantolete v. Bolger, 767 F.2d at 1422-23; Gardner v. Morris, 752 F.2d at 1281, the ADA provides simply that "direct threat" means "a significant risk to the health and safety of *others simpliciter*." 42 U.S.C. § 12111(3) (emphasis added); *see also*, 42 U.S.C. § 12113(b) ("... health or safety of *other individuals in the workplace*" (emphasis supplied). Neither is the EEOC construction supported in the legislative history, S. REP. No. 116, 101st Cong., lst Sess. 27 (1989) ("direct threat to the health or safety of *others*") (emphasis added)); H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 2, at 56 (1990); H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 3, at 34, 45 (1990), nor by the leading case, *Arline*, 480 U.S. at 287 n.16. This matter, though, is not specifically put at issue here.

293. 442 U.S. 397 (1979).

regarded as an "otherwise qualified handicapped individual" under section 504 of the Rehabilitation Act. The Court found that safety, as well as other factors, was a major consideration: it was indisputable that "the ability to understand speech without reliance on lipreading is necessary *for patient safety* . . . ."[294] The Court further found that legitimate physical criteria may be part of the essential requirements for admission to a program such as a nursing program.[295]

The Court relied in particular on a note to the regulations that, in order to explain the administrative interpretation of the statutory term "*otherwise* qualified handicapped person" simply as "qualified handicapped person," used the example of "a blind person possessing all the qualifications for driving a bus except sight"[296] to show why an applicant must have *all* "physical qualifications . . . *essential* to participation in particular programs."[297] The reasoning was that a literal construction of the statutory term modified by "otherwise" would permit one to be "qualified" under section 504, even if one were missing an unqualifiedly *essential* trait—such as *sight* for a bus driver or, by analogy, *hearing* for a nurse. The administrative position failed to account for disabling traits of a less severe nature which would not prevent the person with a disability from becoming "otherwise" qualified through reasonable accommodation.[298] Because the Court accepted as its own this inflexible example of a bus driver who is blind without allowance for a less extreme situation where the missing trait(s) is(are) found to be less critical, and implicitly analogized it to a nurse who is hearing impaired, its conclusion that any concession to the applicant's handicap would amount to an impermissible "fundamental alteration"[299] was foregone.

In *Alexander v. Choate*,[300] the Court—acting on its construction of the broad purposes of section 504 of the Rehabilitation Act, and not on any express terms of the Act—found that meaningful access by people with disabilities to a state Medicaid program is defined by the same access extended to the people without disabilities. "[T]he State is not required to assure the handicapped 'adequate health care' by providing

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294. *Id.* at 407 (emphasis added).

295. *Id.* at 406-07 (citing 45 C.F.R. pt. 84 App. A, p. 405 (1978)); *see also* Columbia Note, *supra* note 77, at 80.

296. *Southeastern*, 442 U.S. at 407 n.7 (quoting 45 C.F.R. pt. 48, App. A, p. 405 (1978)) (emphasis added).

297. *Id.* at 407 (emphasis added).

298. The EEOC in its final regulations for title I of the ADA continues to make the very same error of ignoring an infinite variety of shadings in disabilities between two extreme and inflexible positions held out as dispositive. Compare its treatment of a paraplegic "otherwise qualified" to be a certified public accountant (thus requiring no testing of his physical or natural abilities because of the total lack of any connection between his naturally disabled state and his professional qualifications) 29 C.F.R. § 1630.2(m) app. with a legally blind security guard for whom an employer would have no duty to provide an assistant to do the guard's duties requiring sight (thus putting in issue a natural disability going to the core of the job function, with virtually no basis for adjustment or accommodation). 29 C.F.R. § 1630.2(o) app.

299. *Southeastern*, 442 U.S. at 410.

300. 469 U.S. 287 (1975).

them with more coverage than the nonhandicapped."[301] This decision, like *Southeastern*, views the capacities and needs of people with disabilities from an inflexible perspective and rejects the conditions to satisfy those capacities and needs when an unambiguous but unduly rigid standard seems to offer itself. This inflexibility and failure to consider the range of exigencies of people with disabilities thus can appear under the appealing standard of "evenhanded distribution" of *Alexander*, or under the purported absolute need for safety in the nursing profession of *Southeastern*. The paradox is that both decisions are exclusionary of people with disabilities, yet contradict each other in the perceived treatment of natural necessity: *Southeastern* bows to the necessities of acceptable medical care for other persons, but *Alexander* refuses to acknowledge "the reality that the handicapped have greater medical needs."[302]

2. Reasonable Deference and Its Rejection

In *Doe v. Region 13 Mental Health-Mental Retardation Commission*,[303] Ms. Doe, who was severely depressed, worked in a mental health center, where she was acknowledged to have an exemplary work record; but her constant suicide threats raised fears of what the impact of her possible suicide might be on her patients, and she was finally terminated for this reason.[304] After analyzing *Southeastern* and finding support in its holding that a person with a disability must "meet *all* of a program's requirements," the Fifth Circuit held that, in the absence of discriminatory intent, "section 504 . . . support[s] a *reasonable deference* to the decisions [of this nature] made by administrators of federally funded programs."[305]

The Fifth Circuit in *Doe v. Region 13* also followed[306] the Second Circuit's decision in *Doe v. New York University*.[307] There a young female medical student with serious psychiatric and mental disorders, was—after a lengthy and episodic period of association with the medical school—finally denied readmission despite her subsequent apparent successful recovery and unblemished interim professional career as a high level staff aide for a federal department in Washington.[308] The Second Circuit upheld this action by the medical school, finding that "if the handicap could *reasonably* be viewed as posing a *substantial risk* that the applicant would be unable to meet its reasonable standards, the institution is not obligated by the act to *alter, dilute, or bend* them."[309] It significantly added that "considerable *judicial deference* must be paid to the evaluation made by the institution itself."[310] The refusal here to permit a "substantial risk"

301. *Id.* at 309.
302. *Id.* at 303.
303. 704 F.2d 1402 (5th Cir. 1983).
304. *Id.* at 1404-07.
305. *Id.* at 1410 (citing *Southeastern*, 442 U.S. at 406) (emphasis added).
306. *Id.* at 1410-12.
307. 666 F.2d 761 (2d Cir. 1981).
308. *Id.* at 761-770.
309. *Id.* at 775 (emphasis added).
310. *Id.* at 776 (emphasis added).

is related to the notion of forbidding a fundamental alteration to the essential functions of a job, because a substantial risk could putatively threaten the essential nature of a program or job. The further fact that neither the Fifth nor the Second Circuit in either of the *Doe* cases found any ultimate merit in the employee's exemplary work record or in the applicant's rehabilitation indicates that their approach of rational deference does not give ample judicial recognition to the individual's powers of, and need for, self-realization.[311] A "substantial (or significant) risk" test was later adopted by the Supreme Court in *Arline*, but without a "reasonable deference" component,[312] and the Court's treatment of the concept there has been indicative of its decline.

The rational deference test has indeed not been well regarded. In *Pushkin v. Regents of the University of Colorado*,[313] a case decided even before *Region 13*, a young doctor was denied admission to a psychiatric residency program on the virtual grounds that his physical handicap, multiple sclerosis, would trigger psychological reactions in the doctor himself and in his patients—reactions detrimental to the therapeutic needs of those patients in the program.[314] The Tenth Circuit, in the process of affirming the doctor's court ordered admission, rejected an argument that equal protection rational-basis style analysis requiring proof of discriminatory intent should be applied in considering section 504.[315] It held instead that "[t]he mere fact that the University acted in a rational manner is no defense to an act of discrimination."[316] The Third Circuit, while acknowledging that "administrators are . . . entitled to some measure of judicial deference," has in *Strathie v. Department of Transportation*,[317] rejected "broad judicial deference resembling that associated with the [constitutional] 'rational basis' test [that] would substantially undermine Congress's intent in enacting section 504 that stereotypes or generalizations not deny handicapped individuals equal access to federally-funded programs."[318]

The real demise of the rational-deference standard of review began with *Alexander v. Choate*'s express allowance of disparate impact theories in 1985.[319] In *Brennan v. Stewart*,[320] the Fifth Circuit limited its earlier *Region 13* standard of reasonable deference by pointing out that a person with a disability is no longer required under *Alexander* to meet *all* job

311. There is at least one instance where rational-basis analysis has been successful in guaranteeing rights to people with disabilities. In Sullivan v. City of Pittsburgh, 811 F.2d 171, 185 (3d Cir. 1987), *cert. denied*, 484 U.S. 849 (1987), the court held under the equal protection clause that there was no rational basis for a city ordinance designed to close alcoholic treatment centers. The same relief was also granted under section 504. *Sullivan*, 811 F.2d at 181-84.

312. *See* cases cited *infra* notes 321, 324-32 and accompanying text.

313. 658 F.2d 1372 (10th Cir. 1981).

314. *Id.* at 1386-87.

315. *Id.* at 1384.

316. *Id.* at 1383.

317. 716 F.2d 227, 231 (3d Cir. 1983).

318. *Id.* at 231.

319. 469 U.S. 287, 295-97 (1975).

320. 834 F.2d 1248 (5th Cir. 1988).

or program requirements (as plausibly required in *Southeastern*) because reasonable accommodation, supported by disparate impact theory, might be required upon that person's initial failure to meet them all. The implication seems to be that the rational-basis test does not identify unintentional discrimination, because such discrimination may be considered rational insofar as it follows facially neutral job requirements but fails to accommodate people with disabilities where they can be accommodated.[321] The problem arises because requirements based on performance appear rational, yet tend to track the measures of ability established by the natural lottery, with a resultant disparate impact on people with disabilities.

The other reason for the demise of this standard of review is simply that "the determination of whether the employer violated [section 504] is to be made by the trial court *de novo* . . . . 'To approach [the Act] by applying the rational basis test, would be to reduce that statute to nothingness' "[322] by reducing the court's role to that of a rubber stamp. Similarly, the First Circuit, in *Wynne v. Tufts University School of Medicine*,[323] has held in this vein that, where an institution had dismissed a student with dyslexia for failure to perform acceptably on multiple-choice examinations, the institution "had the obligation of demonstrating [by the relevant facts] that its determination that no reasonable way existed to accommodate [the student's] inability to perform adequately on written multiple-choice examinations was a reasoned, professional academic judgment, not a mere ipse dixit."[324]

3. The *Arline* Test

In *School Board of Nassau County, Florida v. Arline*,[325] the Supreme Court had to determine: (1) whether a public school teacher with tuberculosis, a potentially contagious disease, was an "otherwise handicapped individual" within the meaning of sections 504 and 7(7)(B) of the Rehabilitation Act; and (2) whether she was "otherwise qualified" to teach elementary school despite her possible threat to the health of others.[326] Having decided the first question in the affirmative, the Court quickly moved to tie its analysis of the second issue to a general formulation of the essential-functions concept and its related terminology

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321. *Id.* at 1261-62.

322. Montolete v. Bolger, 767 F.2d 1416, 1433 (9th Cir. 1985) (quoting from Puskin v. Regents of Univ. of Colo., 658 F.2d 1372, 1372 (10th Cir. 1981)); *see also* Jacobson v. Delta Airlines, Inc., 742 F.2d 1202, 1205-06 (9th Cir. 1984), *cert. denied*, 471 U.S. 1062 (1985) ("actions challenged under the Rehabilitation Act should be given 'rigorous scrutiny' ") (quoting Bentivegna v. U.S. Dep't of Labor, 694 F.2d 619, 621 (9th Cir. 1982)); *cf. Arline*, 480 U.S. at 288 (requiring the district court to "conduct an individualized inquiry and make appropriate findings of fact," a procedure inconsistent with rational deference). *See generally* Gentemann, *After School Board of Nassau County v. Arline: Employees with AIDS and the Concern of the "Worried Well,"* 37 AM. U.L. REV. 867, 906 (1988).

323. 932 F.2d 19 (lst Cir. 1991) (en banc).

324. *Id.* at 27.

325. 480 U.S. 273 (1987).

326. *Id.* at 274.

of "reasonable accommodation," "undue hardship," and "fundamental alteration." It described these terms as "the basic factors to be considered in conducting this inquiry."[327] The Court then gave a specific two part test for evaluating danger to others: "A person who poses [1] a *significant risk* of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job [2] if reasonable accommodation will not eliminate that risk."[328] The elements for conducting the medical portion of this test were taken from the American Medical Association's *amicus* brief, and these elements required findings of fact about the (1) nature, (2) duration, and (3) severity, of the risk, as well as (4) the probability of transmission of the disease.[329] The Court also found deference to the reasonable findings and judgments of public health officials to be appropriate,[330] but by implication ruled out rational deference to the employer's determination.[331] It then found that "in light of these medical findings," the next step is to determine "whether the employer could reasonably accommodate the employee under the established standards for that inquiry [*i.e.*, the essential-functions concept and its corollary terms]."[332] Because the district court had not made the required medical findings, the Court remanded the cause.

The *Arline* test has been highly regarded and was adopted by Congress in both the Rehabilitation Act[333] and in the ADA.[334] The actual and potential strength of this test in keeping people with disabilities integrated in society, as further discussed below, makes it a strong complement to justice as fairness. It is a fine legacy of its author, Justice William Brennan.

4. Threats to Safety or Risk of Future Injury

The lower courts, in the absence of direct statutory direction from section 504 of the Rehabilitation Act, have formulated standards for threats to safety other than contagious diseases. Section 103(b) of the ADA has now abolished the distinction and instituted a single test applicable to all applicants or employees who pose "a *direct threat* to the health and safety of other individuals in the workplace" without reference to "contagious disease or infection."[335] These cases decided under section

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327. *Id.* at 287 & n.17; *see supra* text accompanying note 54 for text of formulation.

328. *Arline*, 480 U.S. at 288 n.16 (emphasis added). The court acknowledged that the test is similar to that used in the lower courts for noncontagious disorders in, *e.g.*, Doe v. New York University, 666 F.2d 761, 775. (2d. Cir. 1981).

329. *Arline*, 480 U.S. at 288.

330. *Id.*

331. *See id.* at 287 ("requiring the district court to 'conduct an individualized inquiry and make appropriate findings of fact', a procedure inconsistent with rational deference").

332. *Id.* at 288.

333. Civil Rights Restoration Act of 1987, *supra* note 289.

334. *See* sources cited *supra* note 290.

335. H.R. CONF. REP. No. 558, 101st Cong. 58 (1990) (emphasis added); *see* sources cited *supra* note 290.

504 will still carry precedential weight under the new ADA, insofar as they are consistent with the finding of a "direct threat" manifested in "a *significant risk* to the health and safety of others that cannot be eliminated through reasonable accommodation"—a codification of the *Arline* standard.[336]

In *Strathie* the Third Circuit favored as its standard the term "appreciable risk" to protect the safety of school bus passengers from a driver who wore a hearing aid, rather than "the highest level of safety" claimed as the standard by the agency.[337] The choice of the first standard, which the court found adequately protected the safety of the passengers, was calculated to allow a reasonable accommodation to be made for the benefit of the driver with a disability. The Second Circuit has used a standard of "reasonably [capable of] of posing a substantial risk."[338] This formulation has also come into use in a somewhat different class of cases where the employer or administrator has claimed that *future* risk of injury to others justified unfavorable action toward the person with a disability.

The court in *E.E. Black, Ltd. v. Marshall*[339] formulated the issue, without resolving it, when it considered whether a man with a latent back anomaly was covered under section 503 of the Rehabilitation Act, though his injury did not then prevent him from working. Finding coverage, the court then touched on the primary issue: "The court has no doubt that in some cases a job requirement that screens out qualified handicapped individuals on the basis of possible future injury, could be both consistent with business necessity and safe performance of the job."[340]

The Ninth Circuit tentatively resolved the issue two years later in *Bentivegna v. United States Department of Labor*.[341] There the issue was whether a diabetic could safely perform building construction work. Noting that "[a]ny qualification based on the risk of future injury must be examined with special care . . . since almost all handicapped persons are at greater risk from work-related injuries,"[342] it held that "the possibility of long-term health problems [must be] supported by evidence adequate to establish the direct connection between the particular job qualifications applied and the consideration of business necessity and safe performance that the Act requires."[343]

The same court refined its standard in *Mantolete v. Bolger*[344] when it considered whether a woman applicant with an excellent work history

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336. 42 U.S.C.A. § 12111(3) (emphasis added); *see also* sources cited *supra* note 290.
337. *Strathie*, 716 F.2d at 232, 243.
338. Doe v. New York Univ., 666 F.2d 761, 775 (2d Cir. 1981); *see supra* note 309 and accompanying text; *see also* New York State Ass'n for Retarded Children v. Carey, 612 F.2d 644, 650 (2d Cir. 1979).
339. 497 F. Supp. 1088 (D. Haw. 1980).
340. *Id.* at 1104.
341. 694 F.2d 619 (9th Cir. 1982).
342. *Id.* at 622.
343. *Id.* at 623.
344. 767 F.2d 1416 (9th Cir. 1985).

but with epilepsy could safely perform her essential job functions and operate a mechanical letter sorter with the Postal Service. The court first rejected the argument that mere "elevated risk" of injury frames the correct inquiry.[345] It found instead the proper question to be "whether, in light of the individual's work history and medical history, employment of that individual would pose a *reasonable probability of substantial harm*, [to himself and others]."[346] The court went on to add the requirement that the Postal Service make reasonable accommodation to permit the applicant to meet the essential requirements of the job "without a reasonable probability of substantial injury to the applicant or others."[347]

This test for future injury—especially as formulated in the pre-*Arline* cases of *Bentivegna* and *Mantolete*—reflects that a more searching inquiry will be made as to the effects of the disability than under a standard of mere "elevated risk," and that allowance for possible reasonable accommodation will be part of that inquiry. In these respects it is consistent with *Arline* and its codification in the ADA. There seems, however, to remain the same defect also found at the heart of the essential-functions concept *vis-a-vis* the difference principle: the test of probable substantial or significant harm may protect too extensively a core of functions from change or accommodation required to offset the natural lottery.

5. Recognition of the Need for Social Inclusion

In several cases the essential-functions approach and its variant for contagious diseases set forth in *Arline* has worked remarkably well to spare people with disabilities the psychic deprivation of social isolation. In *Chalk v. United States District Court*,[348] for example, a county department of education in California had barred Chalk, diagnosed as having Acquired Immune Deficiency Syndrome ("AIDS"), from classroom teaching and reassigned him to an administrative position where he had no contact with people. He applied for a preliminary injunction under section 504. After a careful review of the nature of AIDS infection under the *Arline* "significant risk" test, the court credited the scientific evidence that AIDS is transmitted only through intimate sexual contact, exposure to blood or other infected bodily fluids, or prenatal exposure, and found none of these risks to exist "to individuals exposed through close, non-sexual contact with AIDS patients."[349] The court further absolved Chalk

345. *Id.* at 1421-22 (rejecting an interpretation that its opinion in *Bentivegna*, 694 F.2d 619, 623 n.3 (9th Cir. 1982), supplies this standard).

346. *Mantolete*, 767 F.2d at 1422 (emphasis added); *cf.* Chiari v. City of League City, 920 F.2d 311, 317 (5th Cir. 1991) (citing *Mantolete*, the court found that a building inspector with poor balance attributable to Parkinson's disease posed "A substantial risk [of] injur[y] [to] himself and, possibly, [to] others").

347. *Mantolete*, 767 F.2d at 1423.

348. 840 F.2d 701 (9th Cir. 1988); *see also* Martinez v. School Bd. of Hillsborough County, Florida, 861 F.2d 1502, 1506 (11th Cir. 1988) (also applying the *Arline* "significant risk" standard to AIDS victim).

349. *Chalk*, 840 F.2d at 706.

from having to disprove his own contagious threat in the classroom by "completely certain" scientific proof, characterizing that standard as an "impossible burden of proof," and setting instead the standard of "reasonable medical judgments of public health officials"—the standard of *Arline*.[350]

The Department of Education, however, argued that Chalk was not entitled to a preliminary injunction because he could demonstrate no irreparable injury. The court of appeals rejected such an approach limited to Chalk's lack of any monetary loss.

> [T]he court below focused on the monetary loss to Chalk and concluded that he was no worse off than before the reassignment. This approach failed to consider the nature of the alternative work offered Chalk. Chalk's original employment was teaching hearing impaired children in a small-classroom setting, a job for which he developed special skills beyond those normally required to become a teacher. His closeness to his students and his participation in their lives is a source of tremendous personal satisfaction and joy to him and of benefit to them. The alternative work to which he is now assigned is preparing grant proposals. The job is "distasteful" to Chalk, involves no student contact, and does not utilize his skills, training, or experience. Such non-monetary deprivation is a substantial . . . irreparable . . . injury.[351]

Congress has cited *Chalk* as the exemplar of protection for AIDS patients under the ADA[352] and has unequivocally stated that the Act is intended to cover persons infected with Human Immunodeficiency Virus (HIV), the infectious agent in AIDS.[353]

At least one additional court, after applying the *Arline* test for safety to others, has followed *Chalk* in this respect by its determination that excluding a twelve-year-old with AIDS from a regular classroom environment, and restricting him to homebound instruction, caused him to suffer "loss of self-esteem" and deprived him of his "need to interact socially with other children and adults as part of his . . . emotional development."[354] The court pointedly added, "That the student who has contracted AIDS will likely die does not detract from the importance of this need."[355] Nor has this recognition of the need for social inclusion been simply an offspring of *Arline* in 1987. In 1979 the Second Circuit held under section 504 that the exclusion of approximately forty mentally retarded students who were hepatitis carriers from regular public school classes could not be validly bottomed on a claim that they posed a health

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350. *Id.* at 707-08.

351. *Id.* at 709.

352. S. REP. No. 216, 101st Cong., 2d Sess. 34 (1989); H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 2, at 65 (1990); H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 3, at 46 (1990).

353. S. REP. No. 116, 101st Cong., 1st Sess. 22 (1989); H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 2, at 51-52 (1990); H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 3, at 28 & n.18 (1990).

354. Doe v. Dolton Elementary School Dist. No. 148, 694 F. Supp. 440, 447 (N.D. Ill. 1988).

355. *Id.*; *see also* Ray v. School Dist. of DeSoto County, 666 F. Supp. 1524, 1535 (M.D. Fla. 1987) (community fear and parental pressures not allowed to vitiate rights of HIV positive children).

hazard.[356] With the same words to be used in *Arline* eight years later, the court found that there was no "*significant risk* that the disease would be transmitted from one child to another."[357]

Nonetheless, protection under section 504 against AIDS or HIV-motivated discrimination can be withheld from a person so infected (or regarded as infected), when he is found to pose a significant risk of transmitting the disease. The Fifth Circuit found such a risk in *Leckelt v. Board of Commissioners of Hospital District No. 1.*[358] There, a male practical nurse, strongly suspected as an HIV carrier, "routinely administered medication, orally and by injection, changed dressings, performed catheterizations, administered enemas, and started intravenous tubes."[359] He refused, however, to submit the results of an HIV antibody test to hospital authorities, and they discharged him. Calculating the risk of transmission together with the gravity of harm, the court reasoned that:

> [e]ven though the probability that a health care worker will transmit HIV to a patient may be extremely low and can be further minimized through the use of universal precautions, there is no cure for HIV or AIDS at this time, and the potential harm of HIV infection is extremely high.[360]

The court confined its holding of exclusion to the factual findings: opportunities for transmission through known media of infection and lack of cooperation by the practical nurse.[361] Thus, the holding is both narrow and reasonable, posing no undue threat to the larger value of social inclusion.

None of these cases of social inclusion primarily involve the distribution of "external rewards . . . such as wealth and privilege" but rather focus on "experiencing the realization of self which comes from [the] . . . exercise of social duties" and actions.[362] The Aristotelian principle is served when each person is allowed to develop his powers through a free and willing participation in the social environment in a manner adapted to those powers.[363] *Chalk*, its brethren, and its progeny implicitly follow the Aristotelian principle by allowing some of the most severely disadvantaged persons to retain their links to community. Other cases, though, have not followed, or have not been able to follow, this track.

6. Social Exclusion

In *Southeastern* the Supreme Court, as already noted, cited a regulation to section 504 that adverts to the example of a "blind person" who

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356. New York State Ass'n for Retarded Children, Inc. v. Carey, 612 F.2d 644 (2d Cir. 1979).
357. *Id.* at 650 (emphasis added).
358. 909 F.2d 820 (5th Cir. 1990).
359. *Id.* at 821.
360. *Id.* at 829.
361. *Id.* at 829, 830.
362. J. RAWLS, *supra* note 21, § 14 at 84.
363. *Id.* § 79 at 523, 528, 529.

could not be qualified "for driving a bus."[364] This phenomenon has been characterized as one of "insurmountable impairment barriers" that are totally exclusionary (or nearly so), given the essential functions of the program or position for which the person seeks inclusion.[365] The cases below are selected to show how total exclusion has been decreed, even under the inclusionary standard in *Arline*, as well as to show one instance of pre-*Arline* exclusion. An analysis of the "insurmountable barrier" approach and its usefulness in this context then follows.

In *Kohl v. Woodhaven Learning Center*,[366] the Eighth Circuit addressed the arguments, advanced on behalf of a thirty-two-year-old man who was mentally retarded, blind, and an active carrier of infectious hepatitis, that he should be admitted to a facility for persons with disabilities. The principal concerns were the man's infectious condition, the debilitating and dangerous character of the disease if contracted, and the man's extremely maladaptive and antisocial behavior (with an arguably corresponding need for the therapeutic benefits of socialization available at the institution). The court applied the two-part *Arline* test to measure both threat of infection and possible accommodation of any threat to health and safety.[367] It found that the district court, in ordering admission, had underestimated the risk and gravity of contagion and did not give adequate weight to the disruption in the essential, normal operation of the institution that any attempted accommodation could create.[368] The *coup de grace*, though, was the court's holding that the "barrier of protection" offered as reasonable accommodation "would deny Kohl one of the most important therapeutic benefits of the Woodhaven program, that of social interaction with others."[369]

A different panel of the Eighth Circuit had already decided another case on the same basic principle—that accommodation self-defeating to the therapeutic needs of a person with a disability will not be ordered—when it denied the request of a sufferer of a mood disorder, who was prone to manic and depressive episodes, for a requested transfer. The transfer would have been to a remote location in Saudi Arabia without the medical facilities to treat and monitor his disorder.[370]

A contrast with cases like these, with grounds for exclusion dictated by the applicant's threat to general safety combined with other measures of her unsuitability for the requested programs or job actions, is found in the pre-*Arline* case *Doe v. New York University*,[371] previously considered. There a young woman had ultimately been denied admission to a medical school in the light of a long history of mental illness and

364. Southeastern Community College v. Davis, 442 U.S. 397, 406 n.7 (1979).
365. N.Y.U. Note, *supra* note 13, at 884.
366. 865 F.2d 930 (8th Cir. 1989), *cert. denied*, 493 U.S. 892 (1989).
367. *Id.* at 936.
368. *Id.* at 937-38.
369. *Id.* at 940.
370. Gardner v. Morris, 752 F. 2d 1271 (8th Cir. 1985). *But cf.* sources cited *supra* note 291, addressing the statutory basis of this denial of "self-defeating" accommodations under the ADA.
371. 666 F.2d 761 (2d Cir. 1981).

bizarre behavior, but for several years before the court's decision had evidently achieved recognition in another career and transcended her psychiatric problems. Under standards of considerable judicial deference to the institution,[372] and of "significant risk" tipping toward the apparently lesser standard of "appreciable risk" in some circumstances,[373] the court denied her appeal. With the demise of the "rational basis" test,[374] and the greater strength of the *Arline* test for a threat to health and safety,[375] there is some reason to think that this *Doe* might be decided differently under existing law.

The Aristotelian Principle requires the provision for "the development of least some of a person's powers."[376] The Eighth Circuit's two cases in which it excluded persons from treatment or employment very arguably comply with the principle in this respect, because in each case the powers of the affected person would not have been advanced by the requested remedy. In the Second Circuit case, though, the applicant had regenerated powers that potentially could have found fruition in medical school.

The Aristotelian reference to human powers and their development also helps to explain why the concept of "insurmountable barrier" is tautological or superfluous,[377] at least from the standpoint of Rawls. An insurmountable barrier is simply a reflection of the structuring of essential functions, a reflection that is then projected onto the person with a disability to determine whether he has the corresponding powers and skills as befit that structuring. The analysis begins and ends with the essential-functions concept, and to announce that a person faces an "insurmountable barrier" is to say nothing other than he cannot meet the essential functions of the job *as structured*, even with reasonable accommodation. Insurmountable barriers, like essential functions, disclose nothing more than a core of prerogatives that employers reserve beyond change. The use of that term, therefore, adds nothing to the discourse; and because the very purpose of the formulation of essential functions is to promote efficiency and productivity,[378] their formulation touches the person with a disability only with respect to efficiency in a particular job or program, and not with respect to other human qualities.

Rawls, of course, values justice as fairness over the simple efficiency in production of material goods.[379] Whether a "surmountable" or "insurmountable" barrier (*i.e.*, a principle of inclusion or exclusion) exists

372. *Id.* at 776.
373. *Id.* at 777.
374. *See* sources cited *supra* notes 312-24 and accompanying text.
375. *See* sources cited *supra* notes 327-32 and accompanying text.
376. J. RAWLS, *supra* note 21, § 79 at 523.
377. *See supra* notes 74-77 and accompanying text. The Fifth Circuit in Prewitt v. United States Postal Service, 662 F.2d 292 (5th Cir. 1981), and a Pennsylvania district court in Nelson v. Thornburgh, 567 F. Supp. 369 (E.D. Pa 1983), *aff'd mem.*, 732 F.2d 146 (3d Cir. 1984), *cert. denied*, 469 U.S. 1188 (1985), adopted the schema incorporating insurmountable barriers.
378. *See* sources cited *supra* notes 227-35 and accompanying text.
379. *See* sources cited *supra* note 254 and accompanying text.

should depend largely upon the powers of the individual and their projected realization—not wholly on an external standard imposed by the necessity of economic production. Cases like *Arline* and *Chalk* have approached this ideal by requiring the inclusion of persons in groups unless they must be barred by the necessity to protect against threats to safety. In these circumstances courts regard the non-productive, non-economic human needs of the affected disabled persons. Regrettably, however, Congress itself lapsed from this standard at one point in their consideration of the ADA, voting a provision based on sheer stigma not even arguably required by economic necessity.

7. Social Stigma in Consideration of the ADA

During its floor consideration of the ADA, the House of Representatives adopted an amendment that would have permitted an employer "to refuse to assign or continue to assign any employee with an infectious or communicable disease . . . to a job involving food handling," provided alternative employment was offered.[380] The sponsor, Congressman Chapman of Texas, immediately linked the purpose of the amendment to AIDS.[381] Significantly, the amendment did not require that the disease in question be contagious through the medium of food, despite judicially accepted evidence of the highest repute that AIDS is not transmitted through food.[382] One member, acknowledging no authentic basis for concern about the spread of AIDS through food, justified the adoption of the amendment because "perception is reality," and that wholly erroneous perceptions and fears of the public about AIDS had to be indulged.[383] The enactment of this amendment would have contradicted the fact that section 504 has been "carefully structured to replace such reflexive reactions to actual or *perceived* handicaps . . . based on the irrational fear that they might be contagious . . . with actions based on reasoned and medically sound judgments."[384] As for Rawls, he views measures such as these based on social stigma as "irrational" and "simply means of suppression."[385]

Fortunately, this amendment was discarded in conference and not enacted as part of the ADA.[386] Supporters of such an amendment did not, however, readily concede defeat. In parliamentary maneuvering after the conference report initially reached the Senate floor, Senator Helms offered an amendment (to instruct the conferees on recommittal) that specifically listed HIV as an infectious and communicable disease for

380. H.R. 2273, 101st Cong., 2d. Sess., 136 CONG. REC. H2478 (daily ed. May 17, 1990).

381. *Id.* (remarks of Rep. Chapman).

382. Chalk v. United States Dist. Court Cent. Dist. of California, 840 F.2d 701, 706 (1988) (quoting U.S. PUBLIC HEALTH SERVICE, SURGEON GENERAL'S REP. ON ACQUIRED IMMUNE DEFICIENCY SYNDROME 13 (1986)).

383. H.R. 2273, 101st Cong., 2d. Sess., 136 CONG. REC. H2480 (daily ed. May 17, 1990) (remarks of Rep. Douglas).

384. School Bd. of Nassau County, Florida v. Arline, 480 U.S. 273, 284-85 (1987).

385. J. RAWLS, *supra* note 21, § 25, at 149.

386. H.R. CONF. REP. No. 558, 101st Cong., 2d Sess. 59 (1990).

which a carrier could be reassigned from a food-handling position.[387] This amendment was defeated thirty-nine to sixty-one.[388] Senator Hatch offered a compromise amendment, that, without specifically naming AIDS or HIV, requires the Secretary of Health and Human Services to publish a list of infectious or communicable diseases that are transmissible through the food supply, and permitting carriers of such diseases to be reassigned.[389] This provision was adopted and recommitted to conference, which adopted it as section 103(d)[390] of the subsequently enacted legislation. The committee of conference, meeting under the Senate's instructions to its managers, found that the Hatch amendment "appropriately carries out the letter and spirit . . . of the ADA . . . ensur[ing] that valid public health guidelines, rather than false perceptions, will determine the protections afforded under this title."[391]

B. Meaningful Access through Restorative Accommodation

In a select group of cases the courts have gone even further than ordering barriers to inclusion to be taken down and have decreed that a kind of restorative accommodation be made so that persons with disabilities can enjoy resources for self-development otherwise unavailable to them. This approach also follows Rawls's principle of redress by which "society must give more attention to those with fewer native assets."[392] The leading case is *Lau v. Nichols*,[393] was decided based on section 601 of the Civil Rights Act of 1964,[394] which in turn had been a model for section 504 of the Rehabilitation Act.[395] It concerned a non-English speaking group of Chinese-Americans who required supplemental instruction in English to relieve their language deficiency and enable them to benefit from schooling in the system into which they had recently been integrated. Justice Douglas wrote that "[u]nder these . . . standards there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education."[396] The restorative step was to "take affirmative steps to rectify the language deficiency in order to open its instructional program to these students."[397]

The Fifth Circuit has adopted the *Lau* principle in connection with section 504 in two cases where "the plaintiff [has been] able to realize

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387. S. 933, 101st Cong., 2d Sess., 136 CONG. REC. S9543 (daily ed. July 11, 1990).
388. *Id.* at S9555.
389. *Id.* at S9532.
390. H.R. 2273, 101st Cong., 2d Sess., 136 CONG. REC. H4584 (daily ed. July 12, 1990).
391. *Id.* at H4598; H.R. CONF. REP. No. 558, 101st Cong., 2d Sess. 63 (1990).
392. J. RAWLS, *supra* note 21, § 17, at 100; *see supra* note 224-26 and accompanying text.
393. 414 U.S. 563 (1974).
394. 42 U.S.C. § 2000d.
395. S. REP. No. 1297. 93d Cong., 2d Sess. 39, *reprinted in* [1974] U.S. CODE CONG. & ADMIN. NEWS at 6390.
396. *Nichols*, 414 U.S. at 566.
397. *Id.* at 568 (quoting 1970 HEW clarifying guidelines, 35 Fed. Reg. 11595 (1970)).

the principal benefits of a modified program."[398] In *Camenisch v. University of Texas*,[399] the court interpreted *Southeastern* as "not requir[ing] a school to provide services to a handicapped individual for a program for which the individual's handicap precludes him from *ever* realizing the principal benefits of the training,"[400] but ruled that such was not the case before it. The plaintiff, a graduate student who was deaf, sought an interpreter to enable him to obtain his masters degree so that in turn he might retain his employment as an educator for the deaf. Because he had already demonstrated his capacity to perform well in his profession, the court approved equitable relief under section 504. In *Tatro v. State of Texas*,[401] a four-year-old child with spina bifida sought admission to an early childhood development program in the public schools but was effectively denied access because the school authorities refused to allow for her frequent and necessary catheterizations to relieve her bladder. The court held that:

> Thus, like *Camenisch*, this case is distinguishable from *Southeastern* . . . because, with the provision of [catheterization], Amber [the child] will be able to perform well in school and thus realize the principal benefits of the school district's program. The school district's failure to provide [catheterization] therefore violates section 504.[402]

Thus in both *Camenisch* and in *Tatro* the Fifth Circuit satisfied both the Aristotelian Principle, by recognizing actual powers of development that persons with disabilities had, and the concept of redress, by restoring them to a position where they could develop those powers. It also implicitly rejected the examples of the man who is blind seeking to drive a bus[403] and the illogical metaphor of "insurmountable barriers"[404] by not applying them to the cases of two persons whose powers of self-development were either well demonstrated or, with proper nurture, completely open to the future. The court refused to accept the two educational institutions' negative assessments of these persons' powers and claims to self-development, and thus did not treat their cases as self-fulfilling prophecies bound to exclusion under the natural lottery and its tool, the essential-functions concept.

VI. CONCLUSION

If people with disabilities are to realize their authentic nature as free and moral persons, sharing in the fundamental equality that is requisite

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398. Note, *Mending the Rehabilitation Act of 1973*, 1982 U. ILL. L. REV. 701, 715.
399. 616 F.2d 127 (5th Cir. 1980), *vacated*, 451 U.S. 390 (1981).
400. *Id.* at 133 (emphasis added).
401. 625 F.2d 557 (5th Cir. 1980), *aff'd on other grounds*, 468 U.S. 883 (1984) (denying relief under section 504 where relief is available under the Education for All Handicapped Children Act of 1975, 20 U.S.C. §§ 1400-1485).
402. *Tatro*, 625 F.2d at 564-65 (footnote omitted).
403. *See* sources cited *supra* notes 296-99 and accompanying text.
404. *See* sources cited *supra* notes 74-77, 377-78 and accompanying text.

for social justice under Rawls's theory of justice as fairness, they must have the right to participate in the essential structure of the employment and career system. Their right to participate in the fair distribution of income and wealth is governed by the difference principle, which dictates that people with disabilities, as the least advantaged group, are entitled to special considerations in the unequal distribution of material goods—considerations to accommodate them for their misfortune in the natural lottery. These persons also have a right to both the material and intangible elements of self-esteem and social acceptance, which make life itself worth living.

The essential-functions standard, which is carried over from the Rehabilitation Act of 1973 by the Americans with Disabilities Act of 1990, serves these Rawlsian aims of justice—especially the difference principle—imperfectly. The essential-functions test can exclude a person from employment when his protected trait, even allowing for adjustment by reasonable accommodation, touches the essential nature of the job. The permitted level of accommodation or modification, being restricted to marginal or non-fundamental proportions of the job or program, correspondingly decrees that a person with a disability may have to satisfy his needs for material and social goods strictly from a narrow band of activities only incidentally related to the functioning economy. The restrictions on attaining integration in the community, so vital to achieving self respect, do not have quite so draconian a cast and effect, largely because of the formulation and acceptance of the *Arline* standard for exclusions grounded on threats to health or safety. Unlawful segregation or exclusion may also arise from social stigma, which is more readily controlled through law than are natural barriers to equality.

The essential-functions concept is indeed rooted in the intractable natural basis of the individual's disability. Such a natural ground is never a basis faced in laws against racial bias, and rarely is in other areas of prohibited discrimination. There the protected traits are always (or nearly always) regarded as immaterial to job performance. Only in anti-discrimination law protecting people with disabilities does the protected trait pertain to normal job performance.

"[A]ll human activities which arise out of . . . necessity . . . are bound to the recurring cycles of nature and have in themselves no beginning and no end."[405] The futility of natural necessity, the unique relation of such necessity to the problem of discrimination against people with disabilities, and the underlying relation of naturally based human needs and powers to the economic process all point toward intractability and grudging accommodation in this area of the law. Social convention, such as stigma, is more readily overcome (once there is a will to do so) than necessity itself. This fact is demonstrated by the more nearly satisfactory functioning of the law in achieving integration of people with disabilities into social programs than in achieving equal acceptance for them in the

405. H. ARENDT, THE HUMAN CONDITION 98 (1958).

economy. Thus distribution of material goods according to the Rawlsian difference principle,[406] even with retained inequalities for incentives to produce, would indeed be considered radical[407] and would be strongly resisted. Even certain forms of social stigma are not, however, so easily transcended, as when thirty-nine United States Senators voted for an amendment predicated on baseless popular prejudice against people with AIDS.[408]

One critical but (until now) little publicized provision of the ADA is that the employment sections will not become effective until July 26, 1992, two years after enactment.[409] Thus it will be well over two years beyond enactment before these sections are tested in the courts. There is no reason to think, however, that their application to people with disabilities will prove to be any more egalitarian than the judicial application of their precursor, section 504. For people with disabilities, the quest for equality and acceptance under Rawls's standard of justice as fairness at least, will remain largely unrequited.

406. *See, e.g.*, S. 2345, 100th Cong., 2d Sess. § 7(a) (1988) (by Sen. Weicker); *see supra* text accompanying notes 193 & 259.

407. *Cf.* Rebell, *supra* note 127, at 1454.

408. *See, e.g.*, S. 933, 101st Cong., 2d Sess., 136 CONG. REC. S9535 (remarks of Sen. Helms) ("The reality is that restaurant patrons are alarmed about the spread of AIDS."); *id.* at S9555 (vote on Helm amendment) (daily ed. July 11, 1990); *see supra* text accompanying notes 386-88.

409. 42 U.S.C.A. § 12111 note.