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Introduction

The American's with Disabilities Act (ADA) requires private employers to offer reasonable accommodation to disabled persons capable of performing the core elements of a job.[1] These employment-related "accommodation mandates"[2] have come under attack by economists and economically-minded legal scholars.[3] The

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1. *See* American's with Disabilities Act, 42 U.S.C. § 12112(b)(5)(A) (2000).

2. *See generally* Christine Jolls, *Accommodation Mandates*, 53 STAN. L. REV. 223 (2000) (discussing the effect of the mandates on the accommodated workers).

3. *See, e.g.*, RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 349, 480-94 (1992); Mark Kelman, *Market Discrimination and Groups*, 53 STAN. L. REV. 833, 840-55 (2001); Sherwin Rosen, *Disability Accommodation and the Labor Market*, *in* DISABILITY AND WORK: INCENTIVES, RIGHTS, AND OPPORTUNITIES 18 (Carolyn Weaver ed., 1991) [hereinafter DISABILITY AND WORK]. *Contra* Jolls, *supra* note 2, at 290-300; Michael Ashley Stein, *Labor Markets, Rationality and Workers with Disability*, 21 BERKELEY J. EMP. & LAB. L. 314 (2000) (arguing that accommodating disabled workers is not

main thrust of the attack focuses on efficiency: The claim is that the costs of implementing the statutory commands outweigh the benefits.

Efficiency-based objections to the workplace accommodation mandates stand in contrast to responses to other parts of the ADA. The statute requires that facilities open to the public, including restaurants, businesses, hotels, and transportation, be made accessible to the disabled.[4] Although these access mandates have been criticized as unwieldy and unfair to businesses, efficiency-based attacks have been muted. Whether *these* mandates increase net social welfare—or whether they just effect a redistribution of a fixed or shrinking pie towards the disabled and away from others—has not been a central issue in the debate. For one thing, it is hard to deny that these accommodations will require business owners to spend money without any guarantee of recouping their costs.[5] Thus, businesses will almost certainly find themselves out-of-pocket to some extent. Second, the efficiency of mandated access is not easy to calculate, since it

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burdensome for employers).

4. 42 U.S.C. § 12182(a).

5. Although enhanced business from disabled customers may sometimes help mitigate the cost of providing access by increasing profits, I am unaware of any serious claim that this will invariably make up for the costs of providing access.

requires putting a price on enhancements in the quality of lives for disabled people with diverse afflictions and preferences. For these reasons, as well as others, supporters and detractors of access mandates may be less resistant to assigning as much or more importance to distributional priorities and simple justice as to efficiency concerns.

With respect to employment mandates, in contrast, it is understandable that "simple justice" might take a back seat. Labor markets are a key part of a productive economy that is geared towards generating wealth. There is a strong assumption—at least in some quarters—that labor markets produce the greatest amount of wealth overall when they operate along free market lines to the greatest possible extent. An employment regime that maximizes the size of the pie is desirable because it generates the potential to make *everybody* better off. Even if the well-off (and able-bodied) benefit more, reallocation from winners to losers can turn a Kaldor-Hicks efficient situation into a Pareto-superior one.[6] Thus, although the intangible or indirect benefits

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6. For a discussion of the basics of Pareto and Kaldor-Hicks efficiencies, see generally RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 1.2 (5th ed. 1998); *see also infra* note 20 and accompanying text (discussing pros and cons of regulating directly instead of allowing free markets to operate and redistributing surplus resources through tax and transfer programs).

of ADA-mandated inclusiveness in employment should not be ignored,[7] the fear is that the tangible and intangible benefits the ADA brings to disabled workers may be outweighed by potentially significant economic costs overall. So powerful is the pull of the efficiency goal for labor markets that even supporters of the ADA are at pains to show that the statute advances efficiency and that the employment mandates are cost-effective for employers and for society overall. There is a reluctance to embrace head-on the position that if all of us—or even some of us—must sacrifice wealth, welfare, or utility to put disabled people to work and to integrate them into the mainstream workforce, those goals are worth the price.

While ultimately reserving judgment on whether emphasis on the efficiency of ADA job mandates is warranted, this Article assumes the importance of that goal as a given. The Article argues that many analyses of the cost-effectiveness of ADA

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7. *See, e.g.*, Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1 (2000) (arguing that participation in paid work is a key component of social citizenship and a full and satisfying life in the community); Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881 (2000) (same); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001) (same).

employment mandates suffer from a narrowness of scope and a lack of social and political realism that impede a clear picture of the statute's true economic consequences. The confusion has led efficiency-conscious ADA supporters to make strained and overly optimistic assertions about the productivity of the disabled. I argue that these efforts are unnecessary. One can defend the ADA without assuming that every disabled job-seeker is as productive as otherwise qualified able-bodied persons or can be made so through accommodation. Rather, the argument is that the ADA may eventually improve social welfare under a more plausible and modest assumption: Many disabled persons, even if somewhat less productive than the rest of the population, can nevertheless be productively employed.

In offering an analysis of the cost-effectiveness of the ADA, this Article assumes the following social and legal background conditions: First, our society will honor a minimum commitment to provide basic support to those who cannot support themselves through no fault of their own. This includes medically disabled persons who, regardless of their potential productivity with or without special accommodation, may be regarded by employers as unqualified for available jobs as currently structured.[8]

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8. Disability law grants benefits to those unable to perform any job, not to those whom employers are simply unwilling to hire.

Second, labor markets, both by custom and by law, do not operate according to perfect neoclassical principles. Although deviations from the ideal can be traced to many sources, some distortions in labor markets are deliberately imposed by minimum wage and equal pay statutes that set an effective floor on compensation that may perturb or inflate wage structures at many levels. In addition, information deficits and customary practices grounded in the operation of human psychology may keep employers from paying market-clearing wages that reflect each employee's individual marginal productivity in a particular job. Rather, compensation for a job may reflect the average productivity of a narrow band of "qualified" individuals. But disabled persons who

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The standard for benefits in practice is not so pure, since there is potential in the law for overinclusiveness. This is partly due to the use of a standing "listing" of conditions that establishes entitlement regardless of actual work potential, and partly to the system's inability accurately to distinguish between inability to do the job and the failure to get hired to do the job. As a result, disability benefits may sometimes be paid to persons who are unemployed for the latter reason as well as the former. In addition, some disabled workers cannot work at any job without accommodation. But a person need not prove that failure to accommodate him is unlawful to qualify for benefits. *See* note 24, *infra*.

are otherwise “qualified” may deviate from that average significantly, if only because they require costly accommodations that detract from their net productivity. The end result may be that employers must hire many of the disabled at wages that exceed what they are really worth on a market geared to marginal productivity.

These two background conditions—society’s commitment to provide subsistence to the “worthy” poor, and imperfect labor markets that tend to overcompensate the disabled—may combine to produce a situation in which, absent the legal commands of the ADA, employers will shun some disabled workers who could be productively employed, and the taxpayer will end up supporting them. If markets were perfectly efficient, disabled persons capable of producing net value would be hired at a market clearing wage that reflects all costs and benefits for the employer, including any “extra” costs of employing them. This means they would be hired at a level of compensation that reflects their “true” marginal productivity, even if that level is less than it would be if they were not disabled. But if, as hypothesized, employers will find themselves paying more than that, many of these persons will not be hired. To be sure, some employers will shun disabled workers due to irrational fears, stereotypes, and unwarranted assumptions about their ability to function on the job. Some discrimination against the disabled can

thus be characterized as “irrational” statistical discrimination. But this discussion assumes that some significant portion of this unwillingness to hire is traceable to a rational form of statistical discrimination: employer decisions are based in part on accurate assumptions about shortfalls in productivity, exacerbated by factors militating towards “sticky” or excessive compensation.

If potentially productive disabled persons are kept out of the market by employers’ fears of excessive costs, they will have to find support elsewhere. As a practical matter, many persons with a medical condition impeding job performance, if unable to find work, will be granted benefits financed at taxpayer expense. Society as a whole foots the bill through social welfare programs that shunt resources to the “deserving” unemployed. Indeed, the very existence of a safety net for the unemployed disabled tends to pull marginal disabled workers out of the workforce, adding to the legal and labor market factors already discussed. The effect of these factors on social norms surrounding work will also play a role. The more numerous the disabled unemployed, the more substantial and salient the benefits program that supports them; As more disabled persons leave the workforce for the disability rolls, others will feel more comfortable joining them (and more comfortable pursuing employment opportunities less vigorously).

In sum, a society without the ADA would be one in which many

of the potentially productive disabled would not expect to work, or would be unable to find work tailored to their tastes and skills. Because so many would be unemployed, non-work would be normatively more acceptable. This would cause the costs of staying out of the workforce to be further reduced, which would only accelerate a norm shift towards non-work.

The ADA "corrects" this situation by mandating the accommodation and employment of disabled persons, albeit at an inflated wage in some cases. This saves the taxpayers the costs of supporting them in idleness, but at some cost to the employer who must hire them and accommodate them at an inefficient wage. Arguably the "able-bodied" employees who are displaced or whose terms of employment are otherwise distorted by the ADA's effects on labor markets, pay some of this cost as well. If the disabled employee is productive enough, however, the result could be net positive for society as a whole. Thus, although employers in real labor markets will sometimes be unwilling to hire and accommodate potentially productive disabled persons, it might still be in society's interests that those persons work even if they are paid more than they are worth, because otherwise the rest of us must support them if they do not earn a "living wage."

On this view, the ADA can be seen as a way for taxpayers to unload some of the costs of supporting the disabled population onto employers who, in turn, may try to impose those costs on

other groups, such as non-disabled employees and consumers. In effect, the ADA operates as a mechanism for the broad range of taxpayers to impose “negative externalities” on employers and the business community. This situation introduces the possibility of a disconnect between what is in employers’ interest (refusing to hire or accommodate many productive disabled persons at prevailing rates of pay) and what is good for society as a whole (putting the productive disabled to work). In effect, the ADA has the potential to create a divergence between social and private benefits. Although that divergence does not make inefficiency inevitable, it does pose the danger of an inefficient result in some cases. As explained more fully below, the potential arbitrariness and unfairness implicit in this aspect of the ADA scheme suggests that the ADA may stand in need of reform more on fairness rather than on efficiency grounds.

It should be noted, however, that this analysis is based on the somewhat idealistic assumption that employers actually comply with ADA requirements, either because they obey the law spontaneously or because enforcement is effective enough to make the mandates stick. If employers can be forced to comply with ADA mandates, and those mandates, by hypothesis, impose costs on employers that they would otherwise choose to avoid, then the ADA would be expected to cause an increase in the number of disabled persons with jobs. Whether the ADA has in fact had that effect is

currently a subject of intense study and scholarly debate.[9] If,

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9. *Compare* Daron Acemoglu & Joshua D. Angrist, *Consequences of Employment Protection? The Case of the Americans with Disabilities Act*, 109 J. POL. ECON. 915, 917, 949 (2001) (attributing findings of reduced employment levels of disabled persons to the high costs of accommodation), *with* Julie Hotchkiss, A Closer Look at the Employment Impact of the Americans with Disabilities Act 23 (Mar. 2002) (unpublished manuscript, on file with author) (providing evidence that the reduction in the employment rate among the disabled is actually a product of "a reclassification of non-disabled labor force non-participants as disabled" in order to evade the increased stringency of welfare reform and take advantage of more generous disability benefits). *See also* Douglas Kruse & Lisa Schur, *Employment of People with Disabilities Following the ADA*, *in* PROCEEDINGS OF THE 54TH ANNUAL MEETING (Industrial Relations Research Assoc. ed., 2002) (forthcoming fall 2002) (manuscript at 27, on file with author) (suggesting that the evidence on the effects of the ADA do not clearly prove either an increase or a reduction in employment levels for the disabled). An inherent difficulty that potentially skews a reduction in employment levels for the disabled). An inherent difficult that potentially skews research data is the continuing lack of a clear-cut definition of disability. *Id.* at 27; *see also*, Thomas Hale, *The Lack of a*

as some assert, the ADA has caused a decline in employment among the disabled, that is most likely due to imperfect enforcement which allows employers to evade the mandate by hiring fewer disabled persons.[10] But that evasive tactic also suggests that compliance with the ADA hiring and accommodation requirements is, indeed, expensive for many employers, and that employers will find it easier to avoid hiring disabled workers than to recoup their added costs by paying those workers less.[11]

Disability Measure in Today's Current Populations Survey, MONTHLY LAB. REV., June 2001, at 38, 39 (noting that the definition of disability found in the March CPS supplement, which is a commonly used source of data for these ADA claims, is distinctly different from the ADA definition)).

10. *See* J.H. Verkerke, *Is the ADA Efficient?*, U.C.L.A. L. REV. (forthcoming 2003) (manuscript at 40, on file with author) (discussing the academic argument that the difficulty of enforcement causes levels of employment among the disabled to fall).

11. *See* Christine Jolls, *supra* note 2, at 260 (describing tactics employers can use to pass the costs of accommodation on to workers, with the effectiveness of such tactics depending on the "bite" of equal pay vs. nondiscrimination requirements). The ADA may be even more costly for employers in medium sized firms, which are nonetheless large enough to be covered by the statute.

=S1Conditional Reciprocity and the Commitment to the “Deserving” Unemployed

I have elsewhere explored the idea of conditional reciprocity as a principle of social organization that commands widespread political support in the United States and in modern industrial societies generally.[12] A system of distribution based on social reciprocity principles can be viewed as an informal insurance scheme whereby the community pledges minimum support to certain groups during periods of economic misfortune or distress.

These firms will find it more difficult to pass costs on to employees. *See* Verkerke, *supra* note 11, at 917. In fact, some employers may defy the ADA by avoiding hiring the disabled despite effective enforcement if they view accommodation measures as more costly than the threat of ADA-related litigation. *See id.* (noting that “disemployment effects also appear to have been larger in states in which there have been more ADA-related discrimination charges”).

12. *See* Amy L. Wax, *A Reciprocal Welfare Program*, VA. J. SOC. POL’Y. & L. 477 (2001); Amy L. Wax, *Rethinking Welfare Rights: Reciprocity Norms, Reactive Attitudes, and the Political Economy of Welfare Reform*, 63 LAW & CONTEMP. PROBS. 257 (2000) (offering an evolutionary theory of how these entrenched attitudes arise); *see also* Amy L. Wax, *Something for Nothing, the Liberal Case Against Welfare Work Requirements* (forthcoming Emory L.J., Winter 2003).

In exchange for this guarantee, individuals in these groups owe a duty to not call upon group resources unnecessarily and to achieve self-support through their own efforts to the extent possible through reasonable effort on the labor market. As I have noted elsewhere, this principle amounts to "recognizing the community's duty to make up any shortfall between what persons can command on their own in the market or through private arrangements [with other productive persons] and an amount sufficient to support a minimally decent standard of living."[13] Under these circumstances, the collective, in effect, undertakes to act as a surety of basic subsistence on the condition that individuals make a reasonable effort to minimize the assistance needed through self-help efforts. What constitutes a "reasonable effort" depends on myriad economic and social conditions as well as conventions about how hard people are expected to work, which in turn depends on how much effort most people actually expend on their own behalf.[14]

What does reciprocity have to do with the ADA and the assessment of the efficiency of workplace mandates? Our social welfare system generally—and our policies towards the disabled specifically—are deeply informed by the logic of reciprocity, which has far-reaching political currency, resonance, and

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13. Wax, *A Reciprocal Welfare Program*, *supra* note 10, at 486.

14. *Id.*

support.[15] Consequently, we must accept that our society is not prepared to abandon any person afflicted with a medically recognized condition that impedes his ability to support himself. If that person's affliction prevents him from finding work or earning enough to live, society is pledged to provide him with sufficient resources for dignified survival.

What this means for our purposes is that any analysis of the efficiency of putting disabled persons to work, whether through accommodation mandates or otherwise, must be assessed in light of society's collective commitment to the disabled. The alternative to mandates is not a free-for-all in which the public washes its hands of the disabled and leaves them to their own devices. Rather, the fallback is a determination to devote a certain portion of collective resources to support disabled persons who fail at independence because existing labor markets provide inadequate outlets for their productive efforts. Indeed, the default position in the United States prior to the enactment of the ADA was a standing offer of benefits for disabled persons who were "unqualified" for existing jobs.[16] Employers were under no

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15. *See* Samuel Bowles & Herbert Gintis, *Is Equality Passe? Homo Reciprocans and the Future of Egualitarian Politics*, BOSTON REV., Dec.-Jan. 1999, at 4, 4.

16. *See, e.g.*, Social Security Disability Benefits Reform Act of 1984, 42 U.S.C.A. § 423(d)(1)(A) (West 1991) (defining the term

legal obligation to hire or accommodate these persons, and very often did neither. But society was willing to step in and take up the slack left by businesses' unwillingness to hire or accommodate.

The resources set aside for the needy disabled are generated mostly through some form of taxation. Federal support for the disabled, for example, is supplied through Supplemental Security Income (SSI), which is a means-tested program financed from general tax revenues.[17] Another important source of benefits is the Old Age, Survivors, and Disability Insurance (OASDI) Program.[18] Although OASDI is a work-based, insurance-style program that is financed through shared worker-employer contributions, it contains significant elements of redistribution, with revenues collected from wealthy, healthy, high-earning employees helping to support disabled former workers and their disabled and non-disabled dependents.[19] State programs, often financed through general taxation, also play some role.[20]

"disability" as an "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment").

17. Social Security Act, 42 U.S.C. § 1382h (2002).

18. 42 U.S.C. § 401(a).

19. *Id.*

20. *See, e.g.*, Helen Hershkoff & Stephen Loffredo, *The Rights of*

The key questions for assessing the ADA's efficiency are not whether these resources will be forthcoming from the group, but how much money the group would have to supply if there were no ADA, and how that burden would be distributed. Also important is the issue of whether there are any cost-effective methods for reducing the amount of resources the group must provide or for generating more resources overall for distribution. In other words, assuming that the public will honor its implicit pledge to provide disabled persons with some minimum level of public support regardless of whether they work or not, is the system we have in place for making good on that commitment as cost-effective as it could be? In answering that question, it must not be forgotten that the workers the ADA requires employers to hire and accommodate are not completely unproductive individuals. Rather, they are individuals who, although perhaps less productive than others who qualify for similar jobs, are still capable of producing value through their efforts.[21]

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the Poor (1997) at 98-105: *id.* at 99 (describing states' general assistance programs for "poor people who are unable to find jobs or are unable to work.").

21. *See, e.g.*, Scott A. Moss & Daniel A. Malin, Note, *Public Funding for Disability Accommodations: A Rational Solution to Rational Discrimination and the Disabilities of the ADA*, 33 HARV. CIV. R. & CIV. LIB. L. REV. 197, 203-04 (1998) (suggesting that

=S1Labor Market Distortions: Why Compensation for the Disabled May be Inflated

Because markets do not operate perfectly, compensation does not always reflect productivity. Real-life labor markets are characterized by deviations from what theory predicts would be observed with perfectly "market clearing" compensation. Persistent unemployment and hiring hierarchies or "queues" within the ranks of the unemployed have not been fully explained, but are thought to result in part from wage structures that fall short of the neoclassical ideal. Long-standing customs and practices, ill-understood quirks specific to labor markets, or the operation of human psychology contribute to these patterns. Morale problems arise from excessive differentiation in the categorization of workers doing similar jobs. Workers do not like to see their wages cut in response to economic downturns and expect rising trajectories of pay over time.[22] Moreover, the

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disability discrimination "affect[s] all taxpayers, who finance public benefits for the unemployed disabled[,]" but noting that such discrimination can be regarded as a "harmful externality" only if some who receive benefits while out of the labor force are capable of working productively).

22. *See* TRUMAN E. BEWLEY, WHY WAGES DON'T FALL DURING A RECESSION ch. 21 (1991) (discussing the disproportionate effect of wage reduction on worker morale); BEHAVIORAL LAW AND ECONOMICS (Cass R. Sunstein ed.,

difficulty of monitoring productivity and other information deficits make it hard for employers to assess each worker's true worth accurately, which impedes precise, individualized "price discrimination" in setting compensation levels. Legal rules, such as minimum wage laws and equal pay legislation, introduce additional distortions by preventing employers from paying some workers—including some disabled workers with depressed productivity—what they are worth. All of these factors impede employers' ability to adjust wages to reflect productivity in real time for disabled and non-disabled workers alike.

Practices dictating that workers at the same job category receive similar compensation despite non-trivial differences in productivity may be particularly important in the case of the disabled. Significant differences in pay for disabled workers hired into designated jobs, even in the absence of any legal proscription on discrimination against them, may prove awkward in light of prevailing norms. Although some employers might be able to place persons who are less productive due to a disability into lower-paying or less demanding job categories than they would occupy if not disabled, that option will not always be a feasible one. For example, a large urban law firm might not be

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2000); *see also* Bruce Kaufman, *Expanding the Behavioral Foundations of Labor Economics*, 52 INDUS. & LAB. REL. REV. 361 (1999).

comfortable hiring an academically adept deaf Harvard Law graduate as an "assistant" for half the salary paid to classmates hired as "associates." If that option is uncomfortable, the firm may avoid hiring the blind associate altogether.

To be sure, there are other factors at work that are specific to the disabled. Employers harbor misconceptions about the disabled that prevent them from acting "rationally." There is evidence that cognitive distortions, stereotyping, and the excessive saliency of disabilities[23] interfere with employers' ability to assess disabled job candidates accurately and further undermine rational economic choices.[24] Thus, some employers who

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23. *See* Malin and Moss, *supra* note 19, at 206-09 (discussing rational actors' over-estimation of the benefits of discriminating); Michelle A. Travis, *Perceived Disabilities, Social Cognition, and "Innocent Mistakes,"* 55 VAND. L. REV. 481 (2002).

24. This suggests that repealing minimum wage laws and other legal reforms would probably only solve some of the problems that lead to idleness among the potentially productive disabled, with the resulting loss of their wealth-producing capacities. Cognitive distortions, misperceptions, inaccurate generalizations, and stereotypes would continue to operate regardless of whether the law encourages hiring the disabled by making it easier to pay employees what they are worth. This

fail to hire the disabled will be moved by irrational misconceptions about productivity. Others, however, will respond to *rational* fears that disabled workers will not prove cost-effective. Some employers who would willingly make cost-effective, productivity-enhancing accommodations if they believed they could recoup those costs by adjusting pay levels for accommodated workers would fail to do so if compensation is artificially inflated. If that happened, some significant number of potentially productive disabled persons would not be hired at all in the absence of the ADA. The result would be that the productive capacity of the passed-over disabled workers would never be utilized. Assuming that in many cases net productivity would be greater than zero, that loss is a deadweight loss.

=S1The Subsistence Guarantee and Imperfect Labor Markets: How Do These Affect “Real Efficiency”?

To illustrate how taking the subsistence guarantee in combination with labor market distortions and “sticky compensation” as a baseline can change the efficiency calculus for requiring workplace accommodation of the disabled, consider the following hypothetical example. Suppose disabled person Mr. A

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observation adds weight to the argument herein that employers should be required by law to take on workers whose productivity is positive although perhaps less than that of their able-bodied counterparts.

receives $500 per month in disability benefits, and assume that social convention would recognize $500 as the amount necessary to maintain him at a minimally decent standard of living. The award of benefits is supposed to be based on a finding that no job currently exists in the economy for which Mr. A is now qualified, given his education, age, and skills.[25] Since, under current law, the disability finding need not consider the obligation of employers under the ADA to alter job requirements to accommodate disabled workers,[26] the finding of disability reflects the inability to perform existing jobs in an "unaccommodated" job market. In practice, however, the finding is also made against the backdrop of laws that would block an employer from paying Mr. A a wage below a minimum amount, even if that lower wage appropriately reflected Mr. A's net lower

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25. *See supra* note 8 (discussing concept that benefits eligibility is in practice broader than the law strictly allows); *see also* Jerry L. Mashaw, *Against First Principles*, 31 SAN DIEGO L. REV. 211 (1994).

26. *See* Cleveland v. Pol'y Mgmt. Sys. Corp., 526 U.S. 795, 796 (1999) ("[T]he SSA does not take into account the possibility of 'reasonable accommodation' in determining SSDI eligibility"); Matthew Diller, *Dissonant Disability Policies: The Tensions Between the Americans with Disabilities Act and Federal Disability Benefit Programs*, 76 TEX. L. REV. 1003 (1998).

productivity on the job as well as the costs of accommodating him to enable him to be (more) productive. Even if Mr. A's actual performance would entitle him to a salary above the minimum, the employer may not feel free to reduce Mr. A's compensation to a level significantly below that received by other employees performing similar jobs. Thus, an employer X could easily find himself paying Mr. A more than he is "worth," such that employing Mr. A is a net loss for X. Although Mr. A is capable of generating a net positive output and employing him could potentially be profitable, employer X may nevertheless resist hiring him because employing him is in fact not profitable at the wage the employer would be forced to pay.

Enforcing an accommodation mandate can make sense, however, even if the employer would still lose money by employing Mr. A. Suppose that employer X has vacancies for a job that ordinarily pays $600 per week. Suppose that if X spends nothing to accommodate Mr. A in the workplace, Mr. A's productivity on that particular job, were he to be hired, would be so low that it would be worth paying him only $200 per week. If X were to invest $50 per week in accommodation-related measures involving job restructuring, special equipment, and the like, Mr. A's output would be doubled from $200 to $400. After paying for the accommodation, it would be cost-effective for X to hire Mr. A at a higher salary of $350 per week.

It follows that if the law requires that X hire Mr. A, it will be cost-effective to accommodate him. If Mr. A is not accommodated to the tune of $50 per week, his productivity will be considerably lower. An expenditure of $50 per week doubles Mr. A's productivity and justifies raising his salary from $200 to $350. Since X is constrained to pay him $600, the accommodation expenditure is worthwhile from the employer's point of view, since without it the employer would pay him $400 per week more than he is worth ($600 - $200), whereas with the accommodation, the employer will be out only $250 per week ($600 - ($400 - $50)). For the very same reason, however—that is, because the accommodation enhances Mr. A's productivity by more than the cost of the accommodation—hiring and accommodating Mr. A is efficient overall. Without the accommodation, society as a whole will forgo the *net* gain in utility from Mr. A's accommodated effort on the job. Therefore, assuming that we require that Mr. A be hired, he should be hired with accommodation.

Should we demand that employer X hire Mr. A, even at a potentially inflated wage, and even if employing Mr. A at $600 per week might not be cost-effective *for that employer*? If we look in isolation at the economics of X's workplace hiring decision, it is understandable why critics of the ADA might suggest that hiring Mr. A and accommodating his disability are not "efficient" moves. But that assertion fails to take into

account the divergence the ADA creates in this case between private and public costs. What is inefficient for the employer is efficient for society as a whole.

We start with the understanding that the option of paying Mr. A $350 after expending $50 on accommodation—the cost-effective strategy—is not open to X. The pay for the job into which Mr. A is hired is $600. Even if that is well above the minimum wage, we assume that the employer would find it difficult to pay less. It goes without saying that if X must pay that amount to a person in that job, he would prefer to hire a nondisabled person who can generate a profit at that wage, rather than Mr. A, who generates a loss. By hiring Mr. A, the employer will suffer a loss from employing someone whose productivity does not justify his cost. The employer might try to recoup those lost profits in several ways. If some of his workers are supplied inelastically, the employer will try to pass on the costs by reducing other workers' average wage; or, if labor is supplied elastically, he will lay off nondisabled workers from jobs in which they would otherwise be efficiently employed.[27] Alternatively, some productive workers might be forced to reduce their hours of work.

The overall result of these compensatory moves is a net

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27. *See generally* Sherwin Rosen, *Disability Accommodation and the Labor Market*, *in* DISABILITY AND WORK, *supra* note 3, at 18.

reduction in total wealth or welfare for that employer and/or his workers. It could be argued that this net reduction will never come to pass: the fact that hiring Mr. A hurts employer X will excuse that employer from hiring him in the first place. The ADA does not require employers to hire disabled workers who are a losing proposition. But, based on this hypothetical, it is far from clear that courts would apply the law this way in cases like this. The fact that Mr. A performs his job inefficiently does not necessarily prevent him from persuading a court that he can perform the job's core requirements. And the accommodation that allows him to perform more efficiently may not look like it imposes an "undue burden" on these facts. If Mr. A is not unproductive, and the suggested accommodations enhance his productivity significantly, requiring the employer to make them may appear quite reasonable, especially in light of what Mr. A actually earns.

That the employer would possibly end up losing money on Mr. A does not mean, however, that employing him is inefficient overall. Although hiring Mr. A may not be cost-effective for the employer within the constraints established by law and the reality of the workplace, it may be efficient for society as a whole if Mr. A goes to work. The analysis cannot be complete without factoring in the money that must inevitably be collected from taxpayers and disbursed by the public to support Mr. A if he

cannot find a job, go to work, and contribute his productive efforts to generating the wealth necessary to support himself. If X does not hire Mr. A, Mr. A will remain idle. If he remains idle, his potentially productive contribution will be entirely lost. If that contribution is lost, society must foot the entire bill for his support without any cost sharing or mitigation. In effect, Mr. A loses the opportunity to help defray his own cost of living, and that burden falls entirely on others.

The terms of our hypothetical suggest that Mr. A's efforts are worth *something*—he is capable of achieving substantial net positive productivity by working, and in particular by working at the job we have identified at employer X. Even if he is not accommodated, his net productivity is hardly negligible, as evinced by X's judgment that it would be worth paying him $200 per week to perform the job at issue. He is even more productive if certain changes were made in the job or at the workplace. A $50 accommodation causes his productivity to jump to a level that would justify a $350 per week salary.

But a society committed to Mr. A's subsistence will make sure, as noted above, that he receives at least $500 per week. If X does not hire Mr. A and he cannot find work, he will receive $500 in government benefits. That $500 will be collected through taxation of some kind. Depending on the type of levy chosen, that money will come out of the pockets of workers (through income

taxes or worker contribution taxes); consumers (through sales taxes); property owners (through property taxes); or other citizens (through user fees). Although the employer himself will be out of pocket $250 per week by employing and accommodating Mr. A at a wage of $600, the taxpayers will gain $500, for a net savings to society overall of $250. What makes up the difference is the value generated by Mr. A if he goes to work, which is lost if he does not. Although taxpayers win and employer X loses, the net result is positive. In other words, the ADA requirement that Mr. A be hired and accommodated may, under those circumstances, produce a result that is more cost-effective than not imposing those mandates.

Economists will object that this analysis is too simple: the hiring mandate will introduce costly “distortions” in labor markets that must be factored into the equation. It can be argued, however, that our hypothetical does fully account for such distortionary effects. The equation is arguably complete by looking at Mr. A’s productivity (utilized or forgone), the employer’s costs of compensation and accommodation, and society’s bill for supporting Mr. A if he is not employed. By calculating the employer’s out-of-pocket costs from hiring Mr. A instead of a more productive non-disabled worker, our example would appear to account for the loss in productivity that results from that mandated displacement. To be sure, the employer may well try to

pass on the extra costs to his other employees or to consumers. But that does not alter the conclusion that hiring Mr. A still looks worthwhile from the point of view of the system as a whole, despite the costs it imposes on businesses who employ the disabled.

When examined in light of the forgoing analysis, the ADA's predicted effects on total social wealth and well-being become less clear cut and more equivocal and contingent. The claim here is not that the ADA will always be efficient, but only that the ADA's purportedly negative effects on overall social welfare are not as obvious as free-market, neoclassical economists suggest. In predicting that mandates that disturb the "rational" operation of labor markets will always produce welfare-reducing inefficiencies, these analysts conveniently overlook the fact that, without the ADA, many disabled persons might be wastefully unemployed and would require support from the rest of us. Factoring in these observations suggests that the answer to whether the ADA is efficient may depend on many contingent facts about labor market structures and disabled workers' skills. Although the mandates might generate a net loss in some circumstances, in others they would not. The question comes down to whether and when the "distortions" created by requiring employers to hire the disabled at prevailing levels of compensation for designated positions will outweigh the public

savings that result when disabled persons are enabled to contribute to their own support.

In attempting to get a handle on whether the ADA ends up making society as a whole better or worse off, it may help to look in more detail at the burden imposed on the able-bodied population with or without the statute in place. As noted above, some of the costs of supporting disabled people in the absence of the ADA will be paid through programs that are formally structured as worker self-insurance, such as OASDI. The costs of other programs, such as SSI and state benefits programs, are met out of general tax revenues. As noted, despite its designation as an "insurance" program, OASDI has a systematic redistributive component. Therefore, the public commitment to supporting the disabled visits an effective "wage reduction" on many or most workers in the form of the taxes necessary to support these disbursements.

On one side of the equation are the losses that may result from forcing employers to hire disabled workers—costs that non-disabled workers may be forced to bear on the front end in the form of lower pay, less desirable jobs, shorter working hours, or increased unemployment. But absent the ADA, non-disabled workers will bear costs on the back end in the form of higher taxes that are needed to fund the disability programs that support unemployed disabled workers. The tax-and-transfer option may

itself have distortive effects: transfer payments can reduce incentives for the disabled to seek work aggressively,[28] which may depress levels of employment and productivity even further. Taxes on the working population that are used to fund disability benefits also reduce incentives to work, which further increases the costs of any alternative to an ADA-type regime. The question once again comes down to whether the magnitude of the costs on one side of the ledger will necessarily be greater than those on the other, taking into account the welfare of workers and the burdens and benefits on the system overall. The analysis cannot look in isolation at the effect of the ADA on labor markets. It must also consider the existence of alternative programs for the disabled. The situation must be analyzed as a whole.

To be sure, a complete analysis of whether the overall effects of the tax-and-transfer option are likely to be better or worse than direct regulation through the ADA must take account of a broader debate on the relative virtues of redistribution through direct regulation versus paying subsidies from taxes collected on the proceeds of unregulated markets.[29] The ADA

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28. *See generally* Mashaw, *supra* note 23.

29. *See, e.g.*, Louis Kaplow & Steven Shavell, *Should Legal Rules Favor the Poor? Claifying the Role of Legal Rules and the Income Tax in Redistributing Income*, 29 J. LEGAL STUD. 821 (2000); Chris William Sanchirico, *Taxes Versus Legal Rules as Instruments for*

shunts resources towards the disabled by regulating the workplace to make jobs more available to them, whereas traditional benefits leave the employment sphere (relatively) undisturbed, and transfer funds collected through taxes directly to disabled persons. The tax-and-transfer alternative appears superior on the assumption that mandated hiring of the disabled effects a one-for-one displacement of more productive, able-bodied persons. Although those persons must pay part of their earnings to help support the disabled, it makes more sense to tax the more productive to support the less productive than to allow the latter to displace the former in the workforce.

A large body of literature exists that compares regulatory and transfer options, but suffice it to say that the virtues and vices of the alternatives are a matter of some contention. The conventional wisdom that tax-and-transfer is more efficient than direct regulation is based on ideal assumptions about well-functioning markets and economically rational behavior. That position has not gone unchallenged and its validity is acknowledged to vary depending on setting and circumstance.[30] When, as with disability programs, the options are superimposed on a regulated or less than perfectly rational market scheme, the advantages of transfers over direct regulation cannot be

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Equity, 29 J. LEGAL STUD. 797 (2000).

30. *See* articles cited *supra* note 27.

predicted ahead of time. In particular, it is far from clear that hiring the disabled will effect a proportional reduction in work by the more productive able-bodied that will cause net losses to exceed gains. Morevoer, the discussion so far has taken no account of the social and psychological benefits of workplace participation that accrue to the disabled under the ADA but not under the tax-and-transfer regime, and which must be charged in the ADA's favor.[31]

At bottom, however, theoretical insights cannot be dispositive: which route costs more in the context of disability policy is ultimately an empirical matter. Contingent factors that may affect the comparative efficiency of regulatory and transfer alternatives in the disability setting include the prevalence of different types of disabilities, the spectrum of jobs that are available in the economy, the productivity of people with various disabilities as they perform available jobs, and the technology that develops to accommodate those persons. Other contingent factors include: the cost of those accommodations, the effect of those accommodations on productivity, the costs of supporting disabled persons who do not work, and the generosity of benefits. Also potentially important are the incentive effects on work

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31. It should be added, however, that those benefits may be counterbalanced by the loss of leisure that more work for the disabled entails.

effort for different segments of the population from the taxation needed to support generous benefits programs and the incentive effects on the disabled from receiving benefits. Finally, it is not clear that the sum total of jobs is fixed, to the point that employment for the disabled spells unemployment for others. Rather, an increase in the effective supply of labor might result in more persons being employed overall.

Against the uncertainty of how these factors stack up in practice, no one option is clearly superior in every circumstance. It is at least reasonable to conclude that mandating the hiring of disabled workers and reducing the employment tax burden generally might sometimes prove better than taxing able-bodied workers to support the idle, even if some able-bodied persons work fewer hours under the mandate. If many disabled persons will not find work without the ADA, and if that in turn discourages other disabled persons from pursuing employment by making non-work more normatively acceptable, the forgone productivity of the unemployed disabled population could potentially impose considerable social costs and overwhelm countervailing efficiency gains.

It may be objected that the hypothetical case of Mr. A above has been rigged to indulge the rosy assumption that hiring and accommodating him will be cost-effective for society overall. Mr. A, however, is not necessarily representative of most disabled

persons. Does the ADA operate efficiently for disabled persons who are less productive than Mr. A, or who do not improve productivity with accommodation, or who require expensive accommodations that may outweigh productivity gains? If accommodation costs exceed productivity gains, adding someone to the labor force would appear to be a losing proposition not only for the employer but also for the system as a whole. The divergence between private and social costs disappears and net gains become negative. At the extremes, even a complete deregulation of wage markets would offer no relief: the person simply costs more to put to work than to maintain in idleness outside the labor market. In that case, hiring and accommodating a disabled worker would make no economic sense at all.

Consider the example of Mr. B, who produces negligible value without special accommodation and would not be worth hiring into any job at any rate of pay under those circumstances. Assume further, however, that an accommodation that costs $200 per week enables Mr. B to produce slightly more than $150 in value for that period. If there were no accommodation costs, or if those costs were subsidized, the employer would pay him $150 per week. Factoring in accommodation costs, the employer is guaranteed to be out at least $50 per week. It should be clear that employing Mr. B can never be cost-effective, regardless of the level of compensation and type and degree of accommodation, so even a zero

pay rate would fail to make employing him economically worthwhile. Unlike with Mr. A, employing Mr. B in the job at issue will produce a deadweight loss *overall* regardless of the rate of pay. Not only will the employer lose money, but the system as a whole will too.

It is important to note, however, that *even in these circumstances* taxpayers might choose to mandate that employers hire and accommodate Mr. B. That is, taxpayers might vote to bring persons like Mr. B within the scope of the ADA, despite the fact that this would be the inefficient result in that setting. The key here is to realize that the ADA permits taxpayers to externalize or shift costs from themselves onto employers. Their incentive to do so exists in settings in which the ADA operates efficiently (as with Mr. A) or inefficiently (as with Mr. B). The point once again is that Mr. B's cost of support—say $500—must be paid by someone. If Mr. B is hired by employer X and paid $Y dollars, that means that fewer dollars must be supplied by the public to support Mr. B. If $Y is less than $500 (that is, less than a subsistence wage), the public saves at least ($500-$Y). The taxpayer still comes out ahead, even if the government agrees to "supplement" Mr. B's meager salary with a benefits payment worth ($500 - $Y). If $Y (which is Mr. B's salary) is greater than $500, the taxpayers are spared the entire cost of Mr. B's support. In either case, the cost to the employer is $Y + $50 and

the total cost to the system is ($500 - $Y) + ($Y + $50), or $550. Although taxpayers save money, they have shifted the expense of Mr. B's upkeep to the employer, who must now bear an "inefficient" extra $50 burden. It makes no sense for Mr. B to go to work at a net cost of $550 to the system when he will cost the system only $500 if he doesn't work. Because the ADA invites the public to impose a negative "externality" on employer X in this case, however, it is no surprise that the outcome is an inefficient one. This is just one example of a setting in which a transaction that generates a negative externality yields an inefficient result.

To be sure, it could be argued that the "undue burden" language in the ADA might excuse the employer from hiring and accommodating Mr. B on these facts. After all, the accommodation negates Mr. B's effective productivity. However, if the compensation paid to Mr. B significantly exceeds his productivity and dwarfs the costs of accommodating him, and if the accommodation does indeed boost his productivity (even though it does not do so cost effectively), This might create the impression that the accommodation is efficient overall. So the outcome of any challenge to ADA-mandated employment plus accommodation on facts like these is not a forgone conclusion.

Yet another possibility worth considering is that of a disabled person who is productive at a low level without

accommodation, but whose productivity could be enhanced by an accommodation that is prohibitively expensive. For example, suppose Mr. C could produce $50 worth of value without a requested accommodation, but $100 with a $200 proposed accommodation. If Mr. C must be paid more than $50, the employer loses either way. This scenario differs from that posed by Mr. B, however: society only loses under the latter scenario (accommodation for Mr. C), but not under the former (no accommodation), although the employer will be out-of-pocket under both scenarios. Thus, despite its positive effect on gross productivity, the accommodation the employee seeks has a negative effect on net productivity and should not be made. Yet it is unclear whether the ADA would get the right result here or whether accommodation would be excused under these circumstances. A person whose productivity is greater than zero but not very high might demand an expensive accommodation that enhances his gross productivity significantly (but reduces his net productivity overall) because it appears to make him a more valuable employee. Although granting that request makes little economic sense, the accommodation may seem worthwhile to a court if it makes the disabled person appear to be producing more. Once again, the court might be misled if the person’s relatively low productivity is masked by his (inflated) compensation. The costs of the requested accommodation may not be very large relative to

the employee’s apparent worth as reflected by that yardstick, which is salient to courts.

Consider the example of a blind lawyer hired by a large urban law firm. A reader or assistant may enable the lawyer to do legal work, but the assistant may prove so expensive that the productivity gains are effectively wiped out. Yet because the lawyer is paid many times what the assistant earns, and the assistant undeniably enhances the lawyer’s output, the accommodation may appear reasonable. Once again, the picture presented to a court will be colored by a level of pay for the job that is geared to what most able-bodied lawyers earn. And there may be some blind lawyers who more than earn their keep despite the costs of assisting them. But whether a demand for accommodation in cases like this would pass muster under the ADA depends on how the court analyzed the issue. It is not hard to imagine how a result that is cost-ineffective even by the criterion of “real efficiency” might emerge.

=S1Disability, Low Ability, and Reciprocal Obligations

In addition to its implications for the design of disability policies and the wisdom of the ADA, the discussion so far suggests broader ramifications for policies regarding unskilled labor generally.

As noted above, central to the idea of reciprocation in the social and economic sphere is the view that the collective should

commit to bringing all individuals up to a baseline level of well-being, provided those persons make some reasonable effort to contribute to their own support through work.[32] Conditions other than medical disabilities, such as low skills and unfortunate life circumstances, can compromise a person's ability to meet labor market demands and to achieve minimum levels of economic well-being through work in the paid economy. Factors that cause poor performance in the labor market include inadequate education, deficient upbringing, low intelligence, lack of talent, bad luck, drug addiction, and imprudent choices. At least some of these might be regarded as effectively outside a person's control. Persons with some of these problems and deficiencies might be regarded as "deserving" of assistance within the reciprocity paradigm. Even those whose current prospects have been compromised by poor past choices might be regarded as entitled to help under a less exacting version of the reciprocity principle that makes room for forgiveness and second chances.[33]

In any event, there will always be some apparently "able-bodied" persons who cannot realistically achieve self-sufficiency through work despite good faith efforts and a strong desire to participate in the workforce. Some workers are unable to find

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32. *See* Wax, *A Reciprocal Welfare Program*, *supra* note 10, at 477, 478-85.

33. *See id.*

employment or full-time employment. Others can only secure and hold down jobs that do not pay enough to maintain themselves or support a family. Like many of the disabled, such persons are potentially productive and thus, in some sense, employable, but not economically independent. A commitment to social reciprocity recognizes a collective obligation to make up the difference between what these "bottom-rung" workers can command on the market and what is necessary to secure a minimally decent standard of living. As noted, reciprocity appears to create a kind of sliding scale of obligation that commits society to maintaining a floor below which no one will be allowed to fall so long as he expends reasonable efforts on his own behalf. If a person's relatively low productivity prevents him from achieving independent self-support, the collective must somehow close the gap.

How can that be done? Several existing and proposed programs are consistent with honoring this commitment and its conditions. Congress has recently expanded and revised the Earned Income Tax Credit (EITC), which represents a scheme for "supported work." The EITC boosts worker income above a minimum threshold through tax abatements and refundable tax credits.[34] The EITC comports roughly with reciprocity principles by offering help only to those who enter the paid labor market. Proposals for wage

34. *See* 26 U.S.C. § 32 (2000).

subsidies for low income workers operate along similar lines: by reserving benefits for workers, they recognize the importance and value of work but make good on a collective commitment to raise workers above the poverty line.[35] Exactly how these programs should be designed and administered, and which options are most consistent with our theoretical and political obligations, are debatable questions. Moreover, the difficulties of administering such proposals without creating wasteful windfalls and generating perverse incentives are well-known and have been extensively reviewed elsewhere.[36] The basic idea, however, is that every

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35. *See* EDMUND PHELPS, REWARDING WORK: HOW TO RESTORE PARTICIPATION AND SELF SUPPORT TO FREE ENTERPRISE (1997); *But see generally* Anne Alstott, *Work vs. Freedom*, 108 YALE L. J. 967 (1999) (critiquing wage and job subsidy proposals, including Phelps's ideas).

36. *See, e.g.*, EPSTEIN, *supra* note 3, at 480-94 (proposing a grant to set up "special workshops" for the disabled); PHELPS, *supra* note 33, at 35 (designing governmental wage subsidies to minimize employer incentives to lower wages); Alstott, *supra* note 33 (discussing windfalls to employers as well as other administrative issues and information problems surrounding wage subsidies); Mashaw, *supra* note 23 (arguing that replacing the ADA with a mandate requiring the employment of the disabled will better society); Moss & Malin, *supra* note 19, at 197 (discussing the problem of "buying the base," which "refers to the

person who fulfills social expectations by performing a reasonable amount of labor should be able to take care of basic needs. The route to accomplishing this goal may be difficult, but the principle is clear enough.

Although the recognition of an obligation to assist persons who are needy despite their best efforts would seem to extend to those unable to command a living wage due to low ability or lack of skills as well as to those who cannot support themselves due to a medical disability, in actual practice there may be reasons to accord these categories distinct treatment. It is often easier to establish the link between low productivity and a medical cause than between low productivity and bona fide "low ability," because it is harder to distinguish lack of native talent from plain old laziness or the type of dysfunction that is amenable to an exercise of will. There is irreducible moral hazard in recognizing entitlement to assistance for failure on the job market without an objectively verifiable cause. Moreover, the reasons why persons without obvious disabilities fail in the job market are a matter of hot dispute, with opinions differing on whether poor performance is mostly due to volitional factors or to a combination of innate and environmental conditions that are

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possibility that the funding program will merely bankroll [those] accommodations that would have been made in the absence of funding." *Id.* at 234).

beyond persons' effective control. The fault lines in these debates implicate deep disagreements about human responsibility itself. Some deny that people should be penalized by a welfare system when behaviors such as educational failure, drug use, criminal conduct, or bearing children too early or outside of marriage tend to compromise employability. Others adhere to the more traditional view that, because these behaviors are within the individual's effective control, their consequences should not give rise to standing entitlements to public assistance.

Assuming, however, that at least some forms of job failure can fairly be regarded as not a worker's "fault" or as effectively beyond a worker's control, it is unclear why society should not treat the causes of those failures like medical disabilities for purposes of redistribution and support. But the similarities between the disabled and some persons who fail at self-support for other reasons for which they are not entirely responsible suggests that the treatment accorded these groups should converge in more ways than one. If some of the non-disabled who perform poorly in the job market should be treated like the disabled by being offered public help if they need it, then why should not the disabled be treated like the non-disabled in other respects? Non-disabled persons are expected to seek and perform work to the extent they are able. If they fail despite reasonable efforts through no fault of their own, society

supports them. But the support is forthcoming only on the assumption that they have already tried and failed. They are not excused from working altogether simply by virtue of possessing traits that make it difficult for them to find work, or to earn enough to be entirely self-supporting.

Why then, do we not expect the same from medically disabled persons as well? It is particularly hard to see why *persons with conventional disabilities* should ever be categorically excused from expending the reasonable efforts towards self support that we routinely expect from persons who have difficulties on the job market for other reasons. Persons whose paucity of marketable skills prevent them from obtaining jobs that pay enough to support themselves or their families, regardless of the cause of that deficit, are nonetheless expected to go to work. This expectation suggests that we should jettison the notion that being afflicted with a medical disability necessarily excuses a person from work. To be sure, the question of whether a medically disabled person should be expected to work makes no sense if a medical disability is defined strictly as a condition that prevents a person from doing any work at all in the paid economy. But, as already noted, the group of persons who end up receiving disability benefits even under this legal definition almost certainly includes some who could do existing work, and many more who could work productively *if accommodated*. The

question is whether recognition of such a duty also entails a responsibility on society's part to alter jobs to accommodate the disabled.

There has been much debate in the wake of the ADA about whether disabled persons have a "right" to work.[37] Very little discussion has been devoted to whether disabled persons should be obligated to work towards the goal of self-support just like other persons. Reciprocity principles suggest that the disabled should be treated the same as everyone else, subject to the standing collective pledge to make up for the difference between what they can achieve by dint of their own efforts and what they need. Asking that the disabled try to work, however, gives rise to a further question: Does accepting disabled persons' duty to work if they can entail an obligation by society to make work available to them by redesigning existing jobs? Which alternative comports best with reciprocity's requirements: excusing persons with medical impairments from working altogether if they cannot

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37. *See, e.g.*, Diller, *supra* note 24 (arguing that the ADA created a "right to work"); Gregory S. Kavka, Disability and the Right to Work, *in* AMERICANS WITH DISABILITIES: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS 186-187 (Leslie Francis & Anita Silvers eds., 2000). *Contra, e.g.*, EPSTEIN, *supra* note 3; WALTER OLSON, THE EXCUSE FACTORY: HOW EMPLOYMENT LAW IS PARALYZING THE AMERICAN WORKPLACE (1997).

manage to obtain jobs within existing labor markets, or striving to put as many people as possible to work by requiring employers to make the kinds of accommodations that would enable more disabled persons to work and work productively?

The latter seems more effectively to vindicate the notion that everyone should exert reasonable efforts to contribute something to social production and self-maintenance. Reciprocity stresses mutual obligation. Moreover, recognizing that disabled persons should work and that society should accommodate them would in practice enhance the sum total of social resources by shifting the disabled as a group away from a norm of non-work towards one of work. Disability benefits programs, as the last bastion for the severely impaired, would shrink in size, as the social expectation for most disabled persons would be employment of some kind.

The duty to work should arguably not be seen as absolute; rather, it runs out at the extremes. So should the duty to accommodate. There is a strong case to be made that society need not offer accommodations to the hypothetical Mr. B or Mr. C described above. That is, Mr. B or Mr. C should not be entitled to accommodations that would enhance their “productivity” viewed in isolation, if factoring in the accommodation costs generates a net loss overall. Indeed, perhaps Mr. B should be excused from work altogether, since his employment could never be cost-

effective. That is, society might elect to excuse non-work on the part of persons who are more expensive to keep at work than to support in idleness. Correspondingly, society should perhaps be relieved of the obligation to provide work to individuals who are not net productive, regardless of how much those persons want to work and how much they believe that working will benefit them. There would still be many cases, however, in which the offer of a reasonable accommodation would both enhance social welfare overall and best comport with the commands of social reciprocity. In those cases, accommodations should be forthcoming.

This discussion potentially sheds light on yet another important aspect of the debate surrounding the ADA and how it operates in real-world markets. The discussion so far suggests that a core commitment to the disabled—and to others who struggle in the world of work—need not be all-or-nothing. Rather, fidelity to the motivating principles of reciprocity would dictate a graduated response that is geared to the shortfall between what an individual can command by dint of his own efforts and the subsistence minimum. Despite the existence of minimum wage laws and the EITC, many of the disabled (as well as other non-disabled workers) cannot fully support themselves through work, either because they are unable to hold down a full-time job, or because even the minimum wage as it is supplemented through various

programs is not currently a “living wage” for some families.[38] Likewise, even in a deregulated environment and despite productivity-boosting and cost-effective accommodations, someone like Mr. A in the example above might still look to the rest of us for some assistance. By hypothesis, if A were paid a salary that reflected his true output, he would earn much less than the $600 he is assigned in the example and less than he would need to live in dignity and without want. Thus, in a perfectly free market, the non-disabled population would often be called upon to contribute some amount towards the support of persons like Mr. A to the extent their productivity does not warrant paying them enough to support themselves.

Moves towards deregulating worker compensation—such as the repeal of the minimum wage and equal pay laws so desired by free-marketeers—would likely require society to pay more, not less, to honor its obligations towards the “worthy” poor. Of course, not every disabled person will require assistance to achieve an acceptable standard of living. Some workers, even assuming their disability compromises their productivity, might still earn enough even on a deregulated wage market to cover basic needs. The reciprocity paradigm does not demand that these individuals be brought up to the level of compensation received by everyone

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38. *See* Wax, A *Reciprocal Welfare Program*, *supra* note 10, at 477, 501-09 (discussing this problem of the “working poor”).

in the same job category. Rather, it contemplates something more modest: that all persons be guaranteed a decent minimum if they put forward what is deemed a reasonable effort to support themselves through work, and their failure to earn enough to live on is not their fault.

These insights suggest a number of directions for modifying and revising national policy for the disabled and for low wage workers generally. First, the government should take seriously a commitment to subsidize the earnings of the disabled as part of a broader, unified approach towards guaranteeing that *all* low income workers who satisfy certain minimum requirements receive an adequate income.[39] Second, we should consider moving away from benefits programs that rely on bright-line, all-or-nothing findings of disability, and which excuse work and pledge complete

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39. Those minimum requirements may justly vary for different subgroups. For example, it may not be reasonable to expect mothers of young children and persons with certain types of medical problems to work as many hours as able-bodied, single, childless adults. *See* Wax, *A Reciprocal Welfare Program*, *supra* note 10, at 477, 491-97; *see also* Amy L. Wax, *Something for Nothing*, *supra* note 10. For a different perspective on a unified approach to policy for low income workers, see Matthew Diller, *Entitlement and Exclusion: The Role of Disability in the Social Welfare System*, 44 UCLA L. Rev. 361 (1996).

support for those who meet the threshold criteria while offering no assistance to those who do not. Although creating categories of partial disability is potentially very cumbersome and might be rejected on administrative grounds alone, it should be taken seriously and examined carefully as more consistent with the priorities identified here. Third, there should be a renewed emphasis on rehabilitation, vocational counseling, and job placement for the disabled, as well as on programs to educate employers and help them integrate and utilize disabled workers more effectively. Such programs are more consistent with a baseline expectation that all persons belong in the workforce unless clearly unsuited to any kind of gainful employment.

Finally, the ADA must be reassessed in light of a basic structure that imposes on employers the costs of mandates that benefit society as a whole. As noted earlier in this Article, the ADA is not necessarily inefficient overall, given the basic safety net and regulatory programs to which our society is committed. Rather, its principal design flaw is that it forces employers to pay costs that should arguably be borne by everyone. Against the backdrop of real-life labor markets and society's pledge to help the disabled, the ADA effectively ends up shifting costs from taxpayers to employers. As noted, employers will not always be able to adjust compensation downward towards a "market-clearing wage" for those of their disabled employees who are not

as productive as others. This generates a “disconnect” between employers’ lack of interest in hiring the disabled, and society’s (and taxpayers’) interest—whether cost-effective or not, depending on circumstances—in putting disabled persons to work to help defray their burden of support. What is rational and cost-effective for society as a whole or, alternatively, for taxpayers who must pay the cost of disability benefits programs—which is to have disabled persons “earn their own way” or at least appear to do so —may not always be cost-effective for the employer. But even when putting disabled persons to work is not efficient for the system as a whole, taxpayers may still (perversely) want to off-load the costs of supporting the disabled on private employers by enforcing hiring mandates.

That employers who save society money by hiring the disabled may end up losing money themselves suggests that the employer mandates embodied in the ADA are vulnerable to political abuse. One point of this essay is that these externalities may sometimes create an efficient result. Sometimes, however, they will not, and there is no inherent guarantee that they will have a happy outcome in every case or in most cases. The balance between efficiency and inefficiency will in part depend on how courts construe the ADA’s commands. Because taxpayers enjoy a benefit at the expense of employers under the ADA regardless of whether the outcome is cost-effective, political forces might tilt towards

overly generous mandates. That is a result worth guarding against. The cost shifting inherent in the ADA should be more forthrightly acknowledged and more thought should be given to measures that will alleviate the burdens the ADA imposes on businesses.

The analysis presented here supports the view that the employer mandates of the ADA lack fundamental fairness and place too onerous a burden on employers. Reform in the precise terms of the ADA and in its enforcement– by, for example, relaxing the standard of reasonable accommodation or modifying the definition of core ability to perform the job to give more leeway to employers—may help a little, but can only take us so far. Where putting more disabled persons to work makes economic sense, it may be better to try to find ways to help employers defray the costs of accomplishing that goal. In this vein, Richard Epstein has proposed grants to businesses willing to hire and accommodate the disabled.[40] Other proposals to subsidize the hiring of low-productivity workers[41] might be extended to the disability context. Leaving aside the pragmatic pros and cons of specific proposals, however, the main purpose of this essay is to show how the current design of the ADA can be faulted for confounding the true costs and benefits of the valuable social project of

40. EPSTEIN, *supra* note 3, at 493-94.

41. *See* PHELPS, *supra* note 33, at 35.

enabling the disabled to contribute to their own support. Greater transparency in the assessment of the consequences for everyone of the mandates that are currently in place, although perhaps not fully achievable, might inspire a more careful rethinking of the ADA’s design and effects.