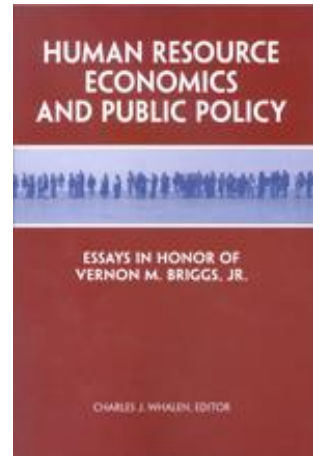




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Seth D. Harris
U.S. Dept. of Labor



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The Misdirected Debate over the Economics of Disabilities Accommodation

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Vernon Briggs is an unabashed advocate for government regulation of labor markets. Of course, his advocacy has focused primarily on immigration policy (Briggs 1996, 2003; Briggs and Moore 1994). Even if labor markets operate efficiently, he has said, efficiency is not the paramount value in American society. Fairness, equal employment opportunity, and the self-sufficiency of working families are important values that deserve equal respect in debates over labor-market policies (Briggs 1984).

Yet Briggs's arguments do not depend exclusively on a normative appeal. Consistent with his training in institutional economics, and his gentle-but-firm contrariness, Briggs stresses that labor markets do not always operate efficiently. In such cases, he advocates conscientiously designed and properly implemented government intervention to improve efficiency (Briggs 2003). According to Briggs, labor regulation "forces managers to manage," rather than to reflexively slash labor costs in search of competitive advantage (Briggs 1987). A central insight of Briggs's scholarship is that regulation can redirect competition toward more productive and socially desirable outcomes.

This chapter applies Briggs's insight to the economics of workplace accommodations mandated by the Americans with Disabilities Act (ADA). The ADA's Title I prohibits employment discrimination against any "qualified individual with a disability."¹ Along with discrimination's more traditional forms,² the ADA defines "discrimination" to include the failure to provide a "reasonable accommodation" to a worker with a known impairment as long as the employer will not suffer an "undue

hardship.” An accommodation can be any change to a physical environment, work schedule, or job responsibilities that allows a worker with a disability to perform the essential job functions or enjoy the same privileges and benefits as co-workers.

The ADA and its accommodation mandate have been criticized as government meddling in otherwise smoothly operating and efficient labor markets. The attack begins with the premise that accommodations raise employers’ costs of hiring workers with disabilities. Critics argue the ADA’s accommodations mandate contributes to joblessness by pricing workers with disabilities out of the labor market. The result is a tempting man-bites-dog narrative about labor-market regulation harming its intended beneficiaries. In fact, this is the reasoning behind at least two commentators’ calls for the ADA’s repeal (DeLeire 2000; Epstein 1992).

Briggs would skewer this type of argument if it were attempted in his scholarly arena. In this chapter, I follow his lead and respond in a similar manner. I will examine certain neoclassical economic assumptions and others that are too seriously flawed to justify the central role they have played in the debate over disabilities accommodations. In essence, this debate began with the wrong premise and, as a result, ruminated over wrong conclusions. These flawed premises have distracted attention from likelier causes of the low and declining employment rate among workers with disabilities—that is, the hypotheses that should have been the debate’s starting point. After reviewing how this debate went wrong, I will suggest hypotheses that should have been, and should be, at the center of the debate over the economics of disabilities accommodations.³

THE ADA’S EFFECT ON THE EMPLOYMENT OF WORKERS WITH DISABILITIES

Virtually all statistical measures show that workers with disabilities are employed at a much lower rate than workers without disabilities,⁴ and there is little debate over the decline in their employment rate since the ADA was enacted (Burkhauser, Houtenville, and Rovba forthcom-

ing; Stapleton and Burkhauser 2003). Instead, the scholarly debate has focused on whether the ADA contributed to the employment rate's decline. From its earliest days, scholars and judges have predicted that the ADA's accommodation mandate would make workers with disabilities more expensive to employ than workers without disabilities and, therefore, less appealing to employers (Barnard 1992; *Borkowski v. Valley Central School District* 1995; Calloway 1995; Donohue 1994; Epstein 1992; Issacharoff and Nelson 2001; Kelman 1999, 2001; McGowan 2000; Rosen 1991; Schwab and Willborn 2003; *Vande Zande v. Wisconsin Department of Administration* 1995). This prediction has been central to the debate.

In particular, this prediction served as the basis for the hypotheses tested by two early and important studies finding a causal relationship between the ADA's passage and a decline in the employment rate. Daron Acemoglu and Joshua Angrist (2001) and Thomas DeLeire (2000) studied data from the Current Population Survey and the Survey of Income and Program Participation, respectively. Acemoglu and Angrist found a decline in the employment rate among both men and women with disabilities between the ages of 21 and 39 beginning in the two years immediately after the ADA took effect in 1992. DeLeire found a substantial decline in the employment rate of men with disabilities beginning in 1990—immediately after the ADA was passed, but two years before it took effect. The proximity of the ADA's passage and the employment-rate decline, and analyses which purported to exclude other potential causes for the decline, led Acemoglu and Angrist and DeLeire to infer a causal relationship between the law and the decline.

A simple syllogism supports these studies' hypotheses. Workers with disabilities need accommodations while workers without disabilities do not. Accommodations cost money; therefore, employing workers with disabilities costs more than employing workers without disabilities. Rational employers seek to maximize profits, which, assuming capital is fixed, result from a worker's net productivity (i.e., productivity minus labor costs). Since workers with disabilities bear higher labor costs because of their accommodations, and the accommodations can be assumed to make these workers only as productive as their co-workers without disabilities, workers with disabilities return lower net productivity to their employers. As a result, employers will not hire

them. Only a short logical step is needed to conclude that the ADA's accommodation mandate has caused the employment rate among workers with disabilities to decline. I have called this the "rational-choice" view of the decline in the employment rate for workers with disabilities (Harris 2007a). It justifies employers' choices to eschew workers with disabilities as economically rational.

As with most simply stated economic assertions, the devil is in the details. I challenge two assumptions that are necessary to the rational-choice view. For the purpose of focusing on these assumptions, I will accept that accommodations impose costs that cause the net productivity of workers with disabilities to be lower than that of workers without disabilities. Even when this premise is accepted, the key assumptions supporting the rational-choice view are seriously flawed. Because of these flaws, the rational-choice view can explain, at most, only a small fraction of circumstances in which employers might be asked to provide accommodations to a worker with a disability. Thus, it offers a shaky foundation for any scholar's hypothesis regarding the employment rate for all workers with disabilities.

Competitive Markets and Perfect Information

The first and most important assumption underlying the rational-choice view is that workers' accommodation requests and employers' accommodation decisions occur in perfectly competitive labor markets (Acemoglu and Angrist 2001; Donohue 1994; Jolls 2000). In such markets, there are no transaction costs or other factors interfering with employers' profit-maximization calculations, and net productivity will drive the decision to hire workers without disabilities, rather than workers with disabilities. Yet, perfectly competitive labor markets are not ubiquitous, if they exist at all.

Many incumbent employees bargain with their employers in an "internal labor market" characterized by barriers to competition. Only "external labor markets," in which job applicants and prospective employers search for each other, are presumed to be freely competitive (Harris 2007a). Since internal labor markets are not perfectly competitive, the rational-choice view cannot describe the effects of many incumbent employees' accommodations. To the contrary, as demonstrated by several empirical studies and my own internal labor-market

analysis, incumbent employees with disabilities do not necessarily return lower net productivity for their employers than employees without disabilities—in some cases, they yield more (Blanck 1997, forthcoming; Harris 2007a; Hendricks et al. 2005; Schartz et al. 2006). Therefore, the prediction that accommodations will ordinarily price workers with disabilities out of internal labor markets is inaccurate. Thus, the rational-choice view is not relevant to workers with disabilities in internal labor markets.

A presumed characteristic of competitive markets, including external labor markets, is perfect information. Employers are assumed to know everything they need to know to make efficient hiring decisions, including which workers have disabilities and what accommodations they require. Yet information about disabilities and accommodations may not flow freely. Workers who roll their wheelchairs or bring a service animal into a job interview necessarily disclose their impairments. But most employers are not similarly alerted that a prospective employee has epilepsy, diabetes, HIV, vision or hearing limitations, mental disabilities, intellectual and learning disabilities, or other impairments. The ADA does not require job applicants to disclose their impairments and prohibits employers from requesting such information except in limited circumstances.⁵

Further, even when they know a worker has an impairment, employers may not always know whether an impairment requires accommodation. In some cases, it may be obvious. Workers in wheelchairs will very likely need ramps or elevators to access upper-level floors. In other cases, it is less obvious. For example, a worker with cerebral palsy may or may not need an accommodation depending upon factors that the employer may not be able to assess during a job interview, even if the employer knows what those factors are. Only those workers who request an accommodation during the hiring process are effectively forced to disclose that they have an impairment requiring an accommodation.

Thus, workers may have impairments that are unknown to their prospective employers or, even if known, may not require accommodation. Changes in these workers' employment rate cannot be blamed on the costs of their accommodations because, by definition, employers cannot factor those costs into their hiring decisions. The rational-choice view is not relevant to workers with hidden disabilities or workers who

do not need accommodation or whose need for accommodation is not apparent.

Many workers acquire impairments after they have been hired. Some suffer industrial accidents or illnesses, and others suffer injury or illness not related to work. Still others experience impairments that are the natural effects of aging or disease. There is substantial evidence that workers in these categories represent a large percentage of all workers with disabilities. For example, incumbent employees, not applicants for jobs, bring a large majority of the ADA charges filed with the U.S. Equal Employment Opportunity Commission (Schwab et al. forthcoming). Also, in 2005, 1.2 million incumbent employees in the private sector suffered workplace illnesses or injuries requiring recuperation away from work beyond the day of the incident (Sengupta, Reno, and Burton 2007). Data drawn from the 1992 Health and Retirement Study, a survey of Americans between the ages of 51 and 61, found that 36 percent of people in that age range with work-limiting impairments acquired those impairments because of an accident, injury, or illness at work. Thirty-seven percent of Social Security Disability Insurance (SSDI) recipients in the same age group were disabled because of an accident, injury, or illness at work (Reville and Schoeni 2003–2004).

As in the case of job applicants with undisclosed impairments or impairments that do not clearly require accommodation, employers could not have made hiring decisions about workers with after-hiring impairments on the basis of accommodations costs. It would have been impossible for employers to know at the hiring stage which workers would need accommodations because of the onset of after-hiring impairments. The rational-choice view is again irrelevant.

In sum, disabilities accommodations issues are not characterized by perfect information in a long list of circumstances. The rational-choice view offers no insight into an employment-rate decline among workers whose disabilities are hidden at the time of hiring, whose prospective employers do not know that their visible impairments require accommodation, or who develop their disabilities any time after hiring (Harris 2007a). For the rational-choice hypothesis to prove true, the employment-rate decline would have to be explained without considering these large groups of workers with disabilities.

It may well be possible to construct an efficiency argument about the ADA's accommodation mandate and workers with disabilities. The

argument would likely resemble the debate over statistical race and sex discrimination (Aigner and Cain 1977). Briefly stated, employers may rationally prefer to hire workers without disabilities if assessing the net productivity of workers with disabilities is systematically more costly than assessing the net productivity of workers without disabilities. In the context of disabilities accommodations, the argument would likely depend on an assertion that the costs of determining whether and to what extent workers with disabilities need accommodations are greater than the costs of assessing the net productivity of workers without disabilities.

A full discussion of the statistical-discrimination argument is beyond the scope of this chapter, but two preliminary insights are worth considering. First, as the debate over statistical race and sex discrimination has shown, these arguments do not invariably lead to the rational-choice view's preferred conclusion; it is possible to envision situations in which antidiscrimination policy yields greater economic efficiency than a market shaped by statistical discrimination (Lundberg and Startz 1983; Schwab 1986). Second, like the rational-choice view itself, a statistical-discrimination argument would be relevant only to those workers whose need for accommodation is known to their prospective employers at the hiring stage. In order for employers rationally to prefer low-transaction-cost workers over high-transaction-cost workers, employers must be able to categorize workers correctly. Workers with hidden disabilities would be misclassified into the low-transaction-cost group, as would workers who acquire disabilities after hiring. Thus, at best, a completely successful statistical-discrimination argument would relate to a limited number of cases. Like the rational-choice perspective, the statistical-discrimination argument has nothing to say about workers with hidden disabilities, workers with visible impairments but hidden accommodation needs, and workers who develop impairments after being hired.

In any event, the syllogism that has dominated the debate over the economics of disabilities accommodation was not built on statistical-discrimination arguments. It relied instead on an assumption of perfect information. Eliminating this assumption necessarily makes the rational-choice view irrelevant to the employment prospects of large numbers of workers with disabilities. The next section discusses ad-

ditional workers with disabilities whose employment status cannot be described by the rational-choice view.

Assuming Workers with Disabilities Would Be Employed without Accommodations

A second assumption underlying the rational-choice view is that workers with disabilities would have found jobs if the ADA did not mandate reasonable accommodations. If there were a causal relationship between the costs of accommodations and employers' decisions not to hire workers with disabilities, then it would also have to be true that the employment rate among workers with disabilities would have remained flat or increased in the absence of the accommodation mandate.⁶ In other words, some workers with disabilities must have been able to get jobs in the absence of the accommodation mandate but then unable to get them once the accommodation mandate took effect. This assumption is the essential stepping-stone from the premise that accommodations bear positive costs and the hypothesis that the ADA's accommodation mandate caused disemployment effects. It is also deeply problematic, as a straightforward thought exercise focused on the ADA's text will disclose.

The ADA's definition of the class of workers it protects—"qualified individual with a disability"—illustrates why this causal link is unlikely in a large set of cases. A "qualified individual" is a worker who, with or without accommodations, can perform the essential functions of the job she holds or desires. However, in its definition of "discrimination," the ADA makes clear that employers are not merely obligated to accommodate workers so that they can perform the essential functions of their jobs. Employers must also accommodate workers so that they can enjoy the privileges and benefits of their workplace. Thus, the ADA protects three classes of workers with a disability:

Group 1—workers who can perform the essential functions of their jobs without accommodation *and* do not need accommodation to enjoy the privileges and benefits of their workplace;

Group 2—workers who can perform the essential functions of their jobs only with accommodation; and

Group 3—workers who can perform the essential functions of their jobs without accommodation *but* need accommodation to enjoy the privileges and benefits of their workplace.

The question is: Which of these workers might have gotten jobs in a world *without* an ADA accommodation mandate but could not get jobs in a world *with* one?

The ADA's accommodation mandate should not have affected hiring decisions about workers in Group 1. Since neoclassical economics assumes that the productivity of workers hired in external labor markets is fungible, Group 1's members should have been able to offer prospective employers the same net productivity as workers without disabilities. Without any need for accommodation, their labor costs would be the same. The cost of hiring these workers should not have increased—and, therefore, their net productivity would not decrease—as a result of the accommodation mandate. Thus, both before and after the ADA's mandate took effect, Group 1's members should have been employed at the same rate as workers without disabilities, and the rational-choice view cannot explain any change in these workers' employment rate.

The ADA's accommodation mandate also likely had no effect on the employment rate of Group 2's members, but for the opposite reason. These workers would not have secured their jobs in the absence of the ADA's accommodation mandate because they could not perform their jobs' essential functions without accommodation. Simply, they were unqualified absent accommodations and the law would not have required employers to hire them.⁷ By contrast, the accommodation mandate made employment possible for this group at the same time it raised the costs of hiring them. Thus, at worst, the accommodation mandate cannot have had a disemployment effect for these workers, and at best, it may have boosted their employment prospects.

Proponents of the rational-choice view might argue that the ADA changed these workers' job-match expectations. Workers with disabilities might have applied for jobs that they would not have otherwise sought because the prospect of accommodations made these jobs either possible or more desirable. One illustration of this effect might be a worker with a chronic back injury who would not have applied for a job that entails handling heavy packages absent an accommodation mandate. The existence of an accommodation mandate creates a possi-

bility that the employer would provide a mechanical lift, which, in turn, might encourage that worker with a back injury to apply. If so, then the argument would be that the accommodation (here, the mechanical lift) would make the worker with a back injury more expensive to hire than a worker without a back injury. Thus, the worker with the back injury would not win the job in a competition with workers without disabilities.

Even if evidence of this kind of change in job-search behavior were found, it would offer only tepid support for the rational-choice view. There is no reason to believe that Group 2's failure to secure these newly available jobs would cause them to abandon the labor market in a world with an accommodation mandate. Yet, a decline in their employment rate depends upon just that response. More likely, these workers would remain in the labor market and seek out jobs they could perform without accommodations, just as they would in the absence of the ADA's accommodation mandate.

If such workers remained in the labor market, then the most that can be said is that workers with disabilities who were inspired to seek new types of jobs by the ADA's accommodation mandate might have suffered longer spells of unemployment due to a larger number of unsuccessful job searches. Thus, the likeliest effect would have been a modest decline in the employment rate for some period of time after the ADA's effective date followed by a flattening out or a rebound to the pre-ADA employment rate over time. The decline would result from the longer unemployment spells, and the rebound would result from workers with disabilities learning from their experiences and applying for jobs that they could perform without accommodations. Yet, studies of the employment rate do not show a shallow dip in the employment rate after the ADA followed by a rebound in the following years. They show a steady decline after the ADA became law (Acemoglu and Angrist 2001; Burkhauser, Houtenville, and Rovba forthcoming; DeLeire 2000).

Group 3 may contain the only individuals whose employment prospects can be explained by the rational-choice view. Similar to Group 1's members, workers in this group would have been able to perform the essential functions of their jobs without accommodation in the absence of the ADA and, therefore, would have been able to offer prospective employers the same net productivity as workers without disabilities

both before and after the ADA became law. Yet, we must assume that Group 3's members saw their labor costs increase and their net productivity decrease because their employers were required to provide non-productivity-related workplace privileges and benefits. Thus, the ADA's accommodation mandate might have caused profit-maximizing employers to prefer workers without disabilities to workers in Group 3, but not to workers in Group 1 or Group 2. In other words, the rational-choice view might explain a decline in Group 3's employment rate but not the employment rates of the other two groups.

Disclosing the flaws in these two assumptions shows that the number of workers with disabilities whose employment prospects might be explained by the rational-choice view is quite small. At most, it might explain changes in the employment rate of 1) workers who were in the external labor market, had impairments at the time of hiring, and those impairments and the workers' needs for accommodation were known to their prospective employers, and 2) workers who could perform the essential functions of their jobs without accommodation but who need an accommodation to enjoy the privileges and benefits of their workplace. In both cases, the prospective employers considering hiring these workers must then also have been able to assess accurately these workers' need for these kinds of accommodations. Simply describing these limitations illustrates the very narrow arena in which the rational-choice view might operate. It is too thin a reed to support the hypothesis that the ADA's accommodations mandate caused a decline in the employment rate of all workers with disabilities.

ALTERNATIVE EXPLANATIONS FOR THE DECLINING EMPLOYMENT RATE OF WORKERS WITH DISABILITIES

If the rational-choice view is not the likeliest explanation for the employment-rate decline among workers with disabilities, what might have been a better hypothesis with which to begin the debate over workplace disabilities accommodations? Answering this question requires the pursuit of two different paths. The first path starts with the premise that the results of the Acemoglu and Angrist and DeLeire studies are ac-

curate—that is, these studies captured a statistically significant decline in the employment rate for working-age people with disabilities associated with the ADA’s passage or effective date. Recent studies have also found a decline in the employment rate that is roughly proximate to the ADA’s effective date (such as Donohue et al. forthcoming), so this premise should be taken seriously. Pursuing this path requires looking beyond the ADA’s accommodation mandate for causes that might explain the association between the ADA’s passage and the employment-rate decline that followed.

The second path begins with the premise that any decline in the employment rate among workers with disabilities was not associated with the ADA. Rather, this path assumes that Acemoglu and Angrist, DeLeire, and others examined only one segment of a long-term decline in the employment rate that is unrelated to the ADA. Several critiques of the Acemoglu and Angrist and DeLeire studies have raised doubts about the accuracy of their results, so this premise may also be legitimate (Bound and Waidmann 2000; Burkhauser, Houtenville, and Rovba forthcoming; Kruse and Schur 2003). If so, then pursuing this path requires finding explanations for a long-term employment-rate decline that is unrelated to the ADA’s accommodation mandate. In the following sections, each path will be pursued to its logical conclusion.

Path 1: Assuming the Employment-Rate Decline Was Associated with the ADA

In 2004, Christine Jolls and J.J. Prescott produced a landmark study of the ADA’s effects on the employment rate of working-age Americans with disabilities (Jolls and Prescott 2004). The study disaggregated the effects of the ADA’s prohibition of traditional forms of discrimination from its accommodation mandate. It compared the post-ADA employment rate in states that had pre-ADA employment discrimination regimes that both prohibited the traditional forms of discrimination and mandated accommodations (ADA-like states) with 1) states lacking any pre-ADA disability anti-discrimination laws (no protection states) and 2) states prohibiting the traditional forms of discrimination without mandating accommodations (no accommodation mandate states). Thus, in “no protection” states, all of the ADA’s protections for workers with

disabilities were an innovation, and in “no accommodation mandate” states, only the ADA’s accommodation mandate was an innovation.

Looking at the years immediately following the ADA’s passage, Jolls and Prescott found that the employment rate for workers with disabilities in the “no accommodation mandate” states was 10 percent lower than in the group of “ADA-like” states. They found no comparable gap between the “ADA-like” and “no protection” groupings. These results led Jolls and Prescott to conclude that the ADA’s accommodation mandate, but not the prohibitions on traditional discrimination, had caused a short-term decline in the employment rate for workers with disabilities (Jolls and Prescott 2004).

The Jolls and Prescott study does not, however, support the rational-choice view. The rational-choice view would have suggested a steady disemployment effect, not the short-term decline found by these scholars. Jolls and Prescott suggest that accommodations costs “may well have been exaggerated or particularly salient in employers’ minds just after the ADA’s enactment.” Contrary to the rational-choice view’s assumption of *rationality*, employers may have reacted *irrationally* to the perceived costs of accommodations (Jolls and Prescott 2004).

My own analysis of survey responses by participants in the U.S. Equal Employment Opportunity Commission’s (EEOC) mediation program (i.e., workers alleging discrimination and their employers) lends some support to Jolls and Prescott’s explanation for the employment-rate decline (Harris 2007b). The responses suggest that mediators faced additional barriers when assisting employers and employees who were negotiating over disabilities accommodations as compared with negotiations over any other employment discrimination issue, including other types of disabilities discrimination charges. One of those added barriers was employers’ apparent bias against workers’ disabilities accommodations charges. When asked to remedy other allegations of employment discrimination, including other types of disabilities discrimination, employers agreed to solutions proposed in negotiations that were “realistic.” In negotiations over accommodations, however, employers were less able or willing to consider new information and new proposals that would lead to settlement. As a result, employers were less likely to agree to an accommodation even if they considered it “realistic.” This evidence suggests that employers voluntarily participating in the

EEOC's mediation program systematically doubted the legitimacy of workers' requests for disabilities accommodations, regardless of their merits.

In sum, even assuming some relationship between the ADA's enactment and an employment-rate decline for workers with disabilities, the rational-choice view does not necessarily offer the strongest hypothesis explaining this association. Instead, there is evidence supporting a hypothesis that employers' irrational response to accommodating workers with disabilities contributed to, or even caused, any post-ADA employment-rate decline. Of course, anti-discrimination statutes like the ADA are intended to protect against just this kind of irrationality. There may be enforcement problems with the ADA, but there does not appear to be a conceptual problem.

The irrationality hypothesis has another important advantage over the rational-choice view: it is relevant beyond a narrow group of workers. Employers' negative reaction to workplace accommodations could easily have affected workers in any labor market with any kind of impairment regardless of whether an accommodation was actually required. It would not have been bound by the ADA's scope and the state of employers' knowledge. Thus, an irrationality hypothesis may well have been a better starting place than the rational-choice view for the debate over the economics of disabilities accommodations.

Path 2: Assuming the Employment-Rate Decline Was Not Associated with the ADA

There has been substantial criticism of the research methods employed in the studies of both DeLeire and Acemoglu and Angrist. Early critics argued that the studies did not look beyond the ADA's accommodations mandate so as to properly exclude other possible (even likely) causes of the employment-rate decline among workers with disabilities (Bound and Waidmann 2000; Kruse and Schur 2003). These criticisms would not apply to Jolls and Prescott's cross-state comparison, however (Jolls and Prescott 2004). Any factor with national reach that Acemoglu and Angrist or DeLeire might not have considered fully would have affected employment rates in all states, not merely in "no accommodation mandate" states where Jolls and Prescott found an employment-rate de-

cline. Any critique of the work of Acemoglu and Angrist or DeLeire must also take Jolls and Prescott's study into account.

A recent study revisited the data set used by Acemoglu and Angrist (Burkhauser, Houtenville, and Rovba forthcoming). Burkhauser and his colleagues raised questions about the work of Acemoglu and Angrist that may also extend to Jolls and Prescott's results. First, they reconsidered the population of workers studied. Acemoglu and Angrist studied working-age people who answered "yes" to the following question on the March Current Population Survey in any of the years from 1988 to 1997: "Does [respondent] have a health problem or a disability which prevents him/her from working or which limits the kind or amount of work he/she can do?" (Acemoglu and Angrist 2001). Burkhauser, Houtenville, and Rovba (forthcoming) considered only those workers who answered "yes" in at least two consecutive years; that is, the workers that were the likeliest to be protected by the ADA. This change eliminated Acemoglu and Angrist's evidence of a sharp post-ADA employment-rate decline. While Burkhauser, Houtenville, and Rovba did not also revisit the Jolls and Prescott (2004) study, the pair's data addressed the same group of workers considered by Acemoglu and Angrist. Thus, like Acemoglu and Angrist, Jolls and Prescott's results may also be too sensitive to the definition of "disability" to capture a genuine relationship between the ADA's accommodation mandate and the employment-rate decline.

Second, Burkhauser and his coauthors expanded the time horizon studied to encompass pre-ADA business cycles. They found equivalent employment-rate declines during earlier economic slumps. Economic recession, not the ADA's passage, might have explained Acemoglu and Angrist's post-ADA employment-rate decline. Burkhauser and his coauthors conclude that the employment rate among working-age people with disabilities began its decline long before the ADA became law and lasted long after. Thus, other hypotheses about the causes of the employment rate's decline—hypotheses unrelated to the ADA—should be considered.

They posit that the declining employment rate among working-age people with disabilities is associated with increased reliance on SSDI and Supplemental Security Income (SSI). SSDI provides cash support to people with substantial work histories who have serious or

deadly impairments and cannot engage in “substantial gainful activity” in the national economy.⁸ People with disabilities or blindness who do not have substantial work histories receive SSI benefits.⁹ Studying the households of men with disabilities, Burkhauser, Houtenville, and Rovba found that earnings have represented a declining portion of household incomes over the past 24 years, while SSDI and SSI benefits have represented a growing portion.

One explanation for this increasing reliance on SSDI and SSI is that these programs’ eligibility standards were relaxed in the mid 1980s (Burkhauser, Houtenville, and Rovba forthcoming). More readily accessible SSDI and SSI benefits influence more workers’ reservation wages. Workers with disabilities can be expected to choose SSDI or SSI benefits over work when the value of those benefits, discounted by the transaction costs associated with obtaining the benefits, exceeds the workers’ likely wages. Yet, SSDI and SSI benefits are low: \$981.40 per month on average for SSDI beneficiaries in November 2007 and only \$519.90 per month on average for working-age SSI beneficiaries in January 2009 (U.S. Social Security Administration 2007, 2009). These cash benefits alone cannot explain the large number of workers with disabilities who have left the labor market.

Three other factors may have also played a contributing role: an educational-attainment gap between workers with and without disabilities, the unavailability and inadequacy of employer-provided health insurance, and workplace and labor-market discrimination.

Educational attainment

Workers’ educational attainment affects both their wages and their employment levels. In 2005, workers with high-school diplomas had an 80 percent higher unemployment rate than workers with bachelor’s degrees. The unemployment rate for workers without high-school diplomas was nearly triple that of workers with bachelor’s degrees. Further, in 2005, workers with bachelor’s degrees earned 61 percent more than workers with high-school diplomas. Workers with bachelor’s degrees earned more than double the amount earned by workers without high-school diplomas (U.S. Department of Labor 2008).

Adults with disabilities have less education than adults without disabilities. In 2005, adults with disabilities were more than twice as likely

as adults without disabilities to have less than a high-school degree. High-school dropout rates among Americans aged 16–24 and students with disabilities have both declined; however, in 2006–2007, 10 percent of students without disabilities dropped out of high school compared with 15 percent of students with disabilities (Individuals with Disabilities Act 2007; National Center for Education Statistics 2009).¹⁰ Further, adults with disabilities were only one-third as likely as adults without disabilities to have at least a bachelor's degree (Rehabilitation Research and Training Center on Disability Demographics and Statistics 2007).

Students with disabilities are less likely than their counterparts without disabilities to enroll in some form of postsecondary education. They are significantly less likely to enroll in a four-year program rather than a two-year degree program and less likely to graduate with a bachelor's or associate's degree (Horn, Bertold, and Bobbitt 1999). Although few workers with disabilities have bachelor's degrees, those with degrees have generally comparable employment rates and salaries to those of baccalaureates without disabilities, and they enrolled in graduate school at similar rates, at least within the first year after earning a bachelor's degree (Horn, Bertold, and Bobbitt 1999). Nonetheless, because of this educational attainment gap, workers with disabilities were more likely to be unemployed and more likely to compete for jobs with wages at or around the level of SSDI benefits. Simply put, less education means higher unemployment, lower wages, and a greater incentive to seek SSDI benefits.

This educational attainment gap is not new, but its importance may have increased as the American economy has demanded ever-higher levels of education from workers.¹¹ Educational attainment among workers with disabilities has not kept pace with these demands. As a result, it is possible that workers with disabilities have become less employable, as a group, over the past two decades. If so, the educational attainment gap and the growing importance of education in the American economy might help to explain the continuing decline in the employment rate for workers with disabilities.

Discrimination

As Jolls and others have observed, workers who are likely to suffer discrimination in the labor market face lower returns to their human

capital investments and, as a result, are likely to pursue less education (Donohue and Heckman 1991; Jolls 2004). Jolls suggested that workers with disabilities might have exited the labor market to increase their investments in human capital after the ADA promised an end to discrimination (Jolls 2004). Yet, it is not clear that this is what happened. In fact, there is evidence that some workers with disabilities faced rising discrimination. Instead of choosing labor-market participation over education, such workers may have pursued a third option—leaving the labor market to join the SSDI rolls.

The Supreme Court drastically narrowed the scope of the ADA's coverage beginning in the late 1990s. As a result, large numbers of workers with disabilities were left without protection against workplace or labor-market discrimination (*Albertson's, Inc. v. Kirkingburg* 1999; *Murphy v. United Parcel Service* 1999; *Sutton v. United Airlines* 1999; *Toyota Motor Mfg. v. Williams* 2002; *Trustees of the University of Alabama v. Garrett* 2001). Without the ADA's protections, workers with disabilities might have rationally opted for the certainty of SSDI and SSI rather than a discriminatory competition they could not win. Those who chose to compete likely did not invest adequately in education because it would yield returns more likely to be unnaturally suppressed by discrimination. In turn, their low level of education likely resulted in worse labor-market outcomes. This rising risk of unremedied discrimination and its effects on both labor-market participation and human capital acquisition may also help explain the continuing employment rate decline among working-age people with disabilities.

Health care

For adults with disabilities, the absence of health insurance can mean irrevocable physical and mental health deterioration. Many people with disabilities need regular care and supervision of their condition by doctors and specialists. Without health insurance, they must pay for these services out of pocket and, as a result, might forego or delay the medical care they need (Williams et al. 2004). Yet, the crumbling employer-provided health insurance system does not provide workers with disabilities adequate relief from this risk. Forty-five million Americans had no health insurance in 2007 (Denvas-Walt, Proctor, and Lee 2008). The number of employees with employer-provided insurance in 2007

has only increased by less than a thousand since 1999 (U.S. Census Bureau 2008), and the percentage of employers providing insurance has remained at about 60 percent since 2004 (Kaiser Family Foundation, Health Research and Educational Trust, and Center for Studying Health System Change 2008, p. 6). Meanwhile, the cost of health insurance to workers has risen substantially: for example, the employee's share of a family premium has doubled since 2000, averaging \$3,354 in 2008 (Kaiser Commission on Medicaid and the Uninsured 2008, p. 15).

Workers often lack health insurance because they have lost a job or changed jobs (Committee on the Consequences of Uninsurance 2004). The COBRA system, which allows some laid-off workers to buy into their former employers' health-insurance plans, has proven to be too limited and too expensive.¹² Furthermore, employees with disabilities who find their jobs transformed from full time with benefits to part time without benefits get no protection from COBRA. Even those with insurance may not have adequate benefits. Workers with disabilities are more likely to need specialized health care and to have chronic medical conditions requiring more services, such as frequent doctor's visits or hospitalizations, and larger amounts of prescription drugs. Yet private health insurance plans are structured around providing insurance to relatively healthy people and, as a result, do not take into account the needs of people with disabilities (Crowley and Elias 2003).

By contrast, SSDI and SSI beneficiaries are entitled to Medicare or Medicaid, respectively.¹³ These programs also typically provide more comprehensive coverage than private insurance. Adults with disabilities therefore have a substantial reason to seek and continue receiving SSDI or SSI benefits—comprehensive health insurance that cannot be lost or taken away as long as the beneficiary's status is maintained. Thus, the spreading entropy in the employer-provided health-insurance system, perhaps combined with the increasing importance of the education-attainment gap and declining protections against discrimination, may offer the best explanation for the continuing decline in the employment rate (among working-age people with disabilities) and the associated rise in SSDI and SSI reciprocity rates.

REDIRECTING THE DEBATE

In this chapter, I have argued that the debate over the economics of workplace disabilities accommodation began with mistaken premises, which misdirected the debate away from consideration of the likeliest causes of the low and declining employment rate among people with disabilities. In an effort to move the debate back onto the right track, I attempted to unmask the faulty assumptions skewing the current debate and proposed alternative explanations for the problems workers with disabilities encounter in the labor market. I offer these arguments in tribute to my teacher and friend Vernon Briggs, who challenged me to question orthodoxies in pursuit of progressive goals. My sincere hope is that this chapter does justice to the example he set.

Notes

1. 42 United States Code §12111(8) (2000) defines a qualified individual with a disability as “an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.”
2. In the lexicon of employment discrimination lawyers, the traditional forms of discrimination divide into two categories, “disparate treatment” and “disparate impact.” Disparate treatment arises when “the employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin.” Disparate impact involves “employment practices that are facially neutral in their treatment of different groups, but that in fact fall more harshly on one group than another and cannot be justified by business” (*International Brotherhood of Teamsters v. United States* 1977).
3. I wish to thank Marisa Baldaccini, Leanne Hamovich, Maria Ingravallo, Damien Maree, Marcelo Martinez, and Michelle Tonelli for diligent and helpful research assistance with this chapter. In addition, Melissa Stevenson’s assistance was always essential. Nonetheless, all errors are mine. New York Law School’s generous support of my research made this project and many others possible.
4. In 2007, the American Community Survey found employment rates for working-age people with and without disabilities of 36.9 percent and 79.7 percent, respectively. The Survey of Income and Program Participation found that 45 percent of working-age people with “severe disabilities” were employed in 2002, compared with 97.7 percent of working-age people without disabilities. The Bureau of Labor Statistics (BLS) published employment and unemployment rates for workers with a “disability” from the Current Population Survey for the first time in March

2009. In February 2009, the employment-to-population ratio for workers with a disability was 19.8 percent while the ratio for workers without a disability was 64.8 percent (U.S. Department of Labor 2009). Although the levels vary, the differentials are roughly consistent across statistical measures.
5. 42 United States Code § 12112(d)(2)(A)-(B) (2000) states that, with the exception of certain circumstances, an employer or hiring “entity” covered by the act “shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability . . . [However, a] covered entity may make pre-employment inquiries into the ability of an applicant to perform job-related functions.”
 6. This statement applies equally to a flat employment rate or a rising employment rate because the population of working-age people with disabilities has grown; therefore, maintaining a steady employment rate means that workers with disabilities are acquiring a larger absolute number of jobs. According to the U.S. Census Bureau, in 1995, 10.1 percent of people aged 16–64 had a work disability. In 2006, the percentage rose to 10.4 percent (U.S. Census Bureau 1995–2006).
 7. 42 U.S.C. § 12112 (b) (6) (2000) states that employers may use qualification standards to “screen out . . . individuals” as long as they are “shown to be job-related for the position in question and are consistent with business necessity.”
 8. 42 U.S.C. § 423 (d) (1) (A) (2000) states that “The term ‘disability’ means—inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment.”
 9. 42 U.S.C. § 1382c (a) (3) (B) states that under Title XVI, Supplemental Security Income for the Aged, Blind, and Disabled, one who is disabled and eligible for SSI benefits is one who is “unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work.”
 10. These data describe students who received IDEA (Individuals with Disabilities Education Act) services. Virtually all students with disabilities receive IDEA services, so these data are a reasonable proxy for all students with disabilities. In 2006–2007, 675,170 IDEA students exited high school, 100,831 of which were dropouts (Individuals with Disabilities Act 2007; National Center for Education Statistics 2009).
 11. The BLS projected in 1996–1997 that 9 of the 20 fastest growing occupations between 1994 and 2005 would require an associate’s degree or more education, while BLS projected in 2008–2009 that 12 of the 20 fastest growing occupations between 2006 and 2016 would require an associate’s degree or more education (U.S. Department of Labor 1996–1997, 2008–2009).
 12. Consolidated Omnibus Budget Reconciliation Act of 1985 (“COBRA”), 29 U.S.C. §§ 1161-1168, 42 U.S.C. §§ 300BB-1 to 300bb-1 (2000).
 13. SSDI beneficiaries are eligible for Medicare beginning 24 months after they begin receiving their benefits; see 42 U.S.C. § 1395c (2000). SSI beneficiaries are a “mandatory eligibility group” for Medicaid—that is, states are “required to provide them with health insurance under the Medicaid program” 42 CFR 435.120 (2006).

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