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EFFICIENCY REJECTED: EVALUATING "UNDUE HARDSHIP" CLAIMS UNDER THE AMERICANS WITH DISABILITIES ACT

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I. INTRODUCTION

Major pieces of civil rights legislation are expressions of fundamental and partially conflicting social aspirations. Such statutes emerge from a process of negotiation and compromise which tends to subsume rather than resolve tensions among competing normative principles. The hard choices which must be made between conflicting claims of right are consequently often left for subsequent administrative or judicial action.

An example of this is provided by the Americans with Disabilities Act of 1990[1] ("ADA"), signed into law by President Bush on July 26, 1990. The employment-related provisions of the ADA reflect a tension between the statute's goal of enhancing the occupational civil rights of disabled persons, and the sometimes conflicting goals of limiting intrusion upon the rights of their employers, and of making efficient use of

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1. Americans With Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990).

economic resources. The resolution of these conflicts under specific factual circumstances will have to be achieved through Equal Employment Opportunity Commission (EEOC) regulations and judicial decisions. This article will attempt to provide guidance for administrative officials and judges to assist them in this effort.

The ADA broadly extends the scope of the federal civil rights protections against discrimination on the basis of disability. Such protections were first provided by the Rehabilitation Act of 1973[2] ("Rehabilitation Act"), but only with regard to certain federally-funded entities or activities.[3] The ADA, however, when fully implemented will essentially extend the duties imposed by the Rehabilitation Act to most employers,[4] and to most providers of public accommodations and operators of commercial facilities,[5] broadly defined, transportation,[6] and telecommunications relay services.[7]

The ADA's employment provisions are particularly significant because of their broad coverage, their application to existing facilities as well as to new construction or major renovations,[8] and their limitation by a balancing test.[9] Those provisions impose upon covered employers not only a prohibition of discrimination against disabled employees or job applicants, but also the affirmative obligation to make "reasonable accommodations" of facilities and procedures to accommodate the special needs of disabled employees or job applicants.[10] The ADA further provides, however, that an employer need not make a particular accommodation, even though it be a reasonable one, if to do so would impose an "undue hardship" on the operation of its business.[11] The term "undue hardship" is broadly defined by the ADA to mean "significant difficulty or expense," and a non-exclusive list of factors to be considered in determining its presence or absence is provided,[12] but the statute does not specify the relative weights to be given to each of the listed factors or to

2. 29 U.S.C. §§ 701-796 (1988).
3. Section 503 of the Rehabilitation Act covers Federal contractors or subcontractors having contracts in excess of $2,500. 29 U.S.C. § 793 (1988). Section 504 covers programs conducted by a Federal executive agency or by the U.S. Postal Service, and programs or agencies that receive Federal financial assistance. 29 U.S.C. § 794 (1988).
4. Americans With Disabilities Act of 1990, Pub. L. No. 101-336, §§ 101(2), (5), 102(a) (1990).
5. *Id.* at §§ 301(2), (7), 302(a), 303(a).
6. *Id.* at §§ 201-205, 221-22, 241-246, 304.
7. *Id.* at § 401.
8. *Id.* at § 101(9), 102(b)(5).
9. *Id.* at § 102(a), (b)(5).
10. *Id.* at § 102(b)(5).
11. *Id.*
12. *Id.* at § 101(10).

competing concerns in making this determination. The ADA will consequently require the EEOC—the agency directed by the ADA to issue regulations to implement the employment provisions—and the courts to engage in subjective difficult balancing analyses to determine whether the defense should be available under specific factual circumstances.

The ADA's open-ended undue hardship defense provisions thus constitute an invitation to regulators and judges to impose their values in the disability rights context. One significant decision those persons will have to make in applying those provisions concerns the relative importance of promoting efficient resource allocation, as against the need to achieve other social objectives. There has emerged in recent decades an influential group of commentators who have argued that it should be a significant—if not over-riding—goal of our political and legal system to encourage economic efficiency, in the sense of facilitating the flow of resources and outputs to their highest valued uses.[13] These claims have sparked substantial controversy regarding whether there is an adequate normative basis for regarding economic efficiency as a desirable social goal and, if so, how that goal is to be traded-off against, or integrated with, other social objectives.[14] Some of this debate has dealt at least tangentially with the role of efficiency considerations in making disability accommodation determinations.[15] The debate is not confined to academia, but also has taken place among policy makers. Both the internal Bush Administration deliberations concerning the proper response to the initial Senate Labor and Human Relations Committee version of the ADA and the subsequent negotiations between the Administration and that Committee which led to substantial amendment of that initial draft involved considerable discussion of the proper role of economic efficiency

13. This group of commentators is commonly labeled the "law and economics" movement, and has its modern origins in the writings of Guido Calabresi and Ronald Coase in the early 1960's. *See, e.g.*, Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L. J. 499 (1961); Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960). For a general exposition of the efficiency orientation presented in terms consistent with the views shared by many (but not all) members of that group, *see* POSNER, ECONOMIC ANALYSIS OF LAW, (3rd Ed. 1986) [hereinafter POSNER].

14. *See, e.g.*, POSNER, *supra* note 13, at 3-26; Dworkin, *Is Wealth A Value?*, 9 J. LEGAL STUD. 191 (1980) [hereinafter Dworkin]; Kronman, *Wealth Maximization As A Normative Principle*, 9 J. LEGAL STUD. 227 (1980) [hereinafter Kronman]; Leff, *Economic Analysis of Law, Some Realism About Nominalism*, 60 VA. L. REV. 451 (1974) [hereinafter Leff]; and a number of articles contained in a *Hofsta Law Review* symposium and in a subsequent response issue published at 8 HOFSTRA L. REV. 485-972 (1980).

15. *See, e.g.*, Note, *Employment Discrimination Against the Handicapped and Section 504 of the Rehabilitation Act: An Essay on Legal Evasiveness*, 97 HARV. L. REV. 997, 1012-15 (1984); Note, *Accommodating the Handicapped: The Meaning of Discrimination Under Section 504 of the Rehabilitation Act*, 55 N.Y.U. L. REV. 881, 901 n. 106 (1980).

concerns in determining the availability of the undue hardship defense.[16]

This is an important question. The cost to ADA-covered employers of making the required "reasonable accommodations" could be as great as several billion dollars annually,[17] and the total cost could be sharply affected by the ease of availability of the undue hardship defense. If efficiency criteria are given significant weight in making undue hardship determinations, this could often lead to very different outcomes than those that would result if only the "deep pocket"-oriented undue hardship factors expressly listed by the ADA are taken into account in making those determinations. Efficiency considerations would tend to broaden the availability of the defense under those circumstances where the expected benefits of an accommodation are small relative to its cost, but would work to restrict its availability in instances where its expected benefits are large relative to its cost. Conversely, when viewed from the efficiency-oriented perspective, if the availability of the undue hardship defense is predicated primarily upon a showing of a lack of financial capability, rather than upon a showing of the inefficiency of an accommodation, the defense can be either over- or under-inclusive, depending upon the circumstances.

This article will focus on the question of the proper weight to be given economic efficiency concerns by the EEOC in its regulations and by judges when conducting the undue hardship balancing tests. It will be argued that the language of the statute, its legislative history, and the inapplicability in the disability employment accommodation context of the key premises underlying the efficiency orientation all indicate that little if any weight should be given to efficiency considerations in determining the availability of the undue hardship defense for ADA-covered employers.

The remainder of this article is presented in four additional Parts.

16. The author participated in these internal Administration deliberations and subsequent negotiations with Congress in his dual role as Senior Counsel and Senior Staff Economist for Law and Economics for the Council of Economic Advisers, Executive Office of the President, during the spring and summer of 1989.

17. There is substantial uncertainty regarding the costs of the accommodations required by the ADA. *See* GAO, PERSONS WITH DISABILITIES: REPORTS ON COSTS OF ACCOMMODATIONS, GAO Briefing Report GAO/H.R. Doc. No. 90-44 BR, 101st Cong. (1990). A Council of Economic Advisers study prepared during the spring of 1989 for use in internal Bush Administration deliberations estimated that the accessibility, auxiliary aids, and administrative costs alone that the employment provisions of the ADA would impose upon employers with 15 or more employees would range between $1.7 and $10.2 billion annually. *See* ECONOMIC IMPACTS OF EMPLOYMENT AND PUBLIC ACCOMMODATION OPTIONS, Council of Economic Advisers Memorandum for the Domestic Policy Council Working Group on Americans With Disabilities, at Attachment A, page 5 (unpublished manuscript on file with the author, June 14, 1989).

Part II will discuss the general features of the efficiency orientation, and will present an overview of how the ADA might be conceptually regarded as at least partially a vehicle for giving effect to economic efficiency concerns in the disability employment accommodation context. Part III will examine the text of the relevant ADA employment provisions and their legislative history, and will develop the thesis that Congress has all but ruled out the use of efficiency considerations in determining the availability of the undue hardship defense, and has made reasonably clear that primary emphasis is to be placed on the cost of an accommodation relative to the employer's financial capability. Part IV will examine in some detail how premises and assumptions underlying the efficiency orientation might be applied in the disability employment accommodation context. That Part will argue that even if the statutory provisions governing this defense are interpreted to allow some weight to be given to efficiency concerns, as a matter of law, federal regulators and the courts still should choose not to do so as a matter of policy, since the premises and assumptions which must be satisfied for economic efficiency to have normative significance are not met in the disability employment accommodation context. Part V will summarize and generalize the conclusions reached in this article.

II. Overview of the Efficiency Orientation and its Application to the Disability Employment Accommodation Context

The economic efficiency orientation provides a perspective from which legal rules are evaluated by the standard of whether they are wealth-maximizing, or at least wealth-enhancing, where wealth is defined as the aggregation of social valuations as measured by willingness to pay. Stated in non-technical terms, a law is efficiency-enhancing to the extent that it facilitates the allocation of resources and outputs to their highest valued uses. More precisely, a law is efficient if it allows a set of economic actors with particular initial resource endowments to interact so as to maximize their aggregate wealth, subject to the resource and technology constraints they individually and collectively face.

Proponents of the efficiency orientation, as a general matter, are predisposed to disfavor governmental intervention into market processes. It can easily be shown that a set of perfectly competitive markets will

facilitate efficient, wealth-maximizing transactions among the participants in those markets.[18] Under conditions of perfect competition, such transactions will occur and will take place costlessly among fully informed parties, all costs and benefits will be internalized, and efficiency cannot be further enhanced by laws that compel particular transactions.[19]

In the real world, however, market transactions take place at a cost to participants, and have external impacts upon non-participants. The market participants must first acquire information concerning the markets for the items traded and for related items, and concerning the circumstances facing those persons similarly situated and those on the other side of those markets. They must then engage in negotiations with those other parties concerning quantities, prices, payment systems, and mechanisms to internalize positive and (if required by law) negative externalities. These costs for a particular mutually advantageous transaction may exceed the increase in wealth that will result for the participants. If so, that transaction will not take place, and the market is said to "fail." A rule of law which imposes upon two or more parties the duty to engage in a mutually advantageous transaction which otherwise would not have taken place, because of high transaction costs, will correct that market failure and increase the wealth of each of those parties without reducing the wealth of any other parties (assuming that no other persons are adversely affected by the transaction, and that adoption and enforcement of the rule is essentially costless), and will thus enhance efficiency. For adherents of the efficiency orientation, such a law is a good law, despite its coercive aspects.

It is certainly possible to characterize the ADA's reasonable accommodation/undue hardship employment provisions as rules at least partially intended to enhance efficiency by correcting such market failures, and to argue that they should be implemented with this goal in mind. Under this characterization, the relevant "market" is the locus of decisions concerning which particular "reasonable accommodations" will be provided by employers for disabled employees and job applicants. The "buyers" of these accommodations are those disabled employees and applicants that believe they have a positive probability of benefiting from them at some point in time, and those other members of the public who

18. *See, e.g.*, Polinsky, *Economic Analysis as a Potentially Defective Product: A Buyer's Guide to Posner's* Economic Analysis of Law, 87 HARV. L. REV. 1655, 1665-69 (1974).

19. *See, e.g.*, Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960).

perceive that they will also derive some expected benefit from those accommodations, either because of a possibility of being benefitted as customers or employers of accommodated disabled workers, or because of a perceived possibility of themselves becoming disabled, or for purely altruistic reasons. The "sellers" of those accommodations are the employers who are required by the ADA to provide those accommodations if they are not unduly burdensome.[20] The market for reasonable accommodations has "failed" because the costs of conducting informed negotiations between an employer who is being asked to make a particular reasonable accommodation and all of the persons who expect to benefit from that accommodation, and of designing and implementing mechanisms for excluding non-payers from the benefits of that accommodation are, in many instances, so large as to exceed the aggregate benefits that would result had all the affected parties been able to agree on the accommodation measure, a mechanism for excluding non-payers, and a corresponding set of payments that would together produce expected net gains for all.[21]

The ADA employment provisions can consequently be regarded as a relatively inexpensive substitute for such negotiations and payment mechanisms which will arguably remedy the market failure, enhance economic efficiency and increase total social wealth if they are interpreted to require employers to make a reasonable accommodation if and only if its aggregate benefits exceed its cost. Where the cost of an accommodation exceeds its benefits, however, the employer should be able, under this interpretation of the purposes of the ADA, to invoke the undue hardship defense to avoid making the accommodation, since otherwise an inefficient activity will take place which will reduce total wealth.

The question explored by this article is whether it is appropriate for EEOC and the courts to accept the above characterization of the ADA's employment provisions as intended at least partially as a means to cure market failures, and consequently implement them in a manner intended to achieve a more efficient resource allocation. I will argue that it is more appropriate to reject that characterization and instead interpret and apply those provisions so as to enhance the occupational rights of disabled individuals without regard to economic efficiency consequences. The

20. The "seller" group might also include the small group of misanthropic persons who feel they derive some benefit from non-accommodation of disabled potential employees. It is an open question whether misanthropic preferences should be accorded weight in determining the efficiency of social arrangements.

21. Including, perhaps, the misanthropes.

next part of this article will attempt to demonstrate that Congress intended that regulators and the courts apply this latter interpretation.

III. THE TEXT AND LEGISLATIVE HISTORY OF THE ADA

A. *The Relevant Text*

Title I of the ADA covers employment relationships.[22] Section 102(a) prohibits employers from discriminating against qualified individuals with disabilities.[23] Under Section 102(b)(5)(A), the term "discriminate" includes:

> not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity . . . .[24]

The term "reasonable accommodation" is defined at Section 101(9) to include:

> (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
> (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.[25]

The term "undue hardship" is defined and a relevant factor list provided at Section 101(10):

> (A) IN GENERAL. — The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).
> (B) FACTORS TO BE CONSIDERED. — In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include —
> (i) the nature and cost of the accommodation needed under this Act;
> (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the

22. Americans With Disabilities Act of 1990, Pub. L. No. 101-336, §§ 101-106, 104 Stat. 327, 330-337 (1990).
23. *Id.* at § 102(a).
24. *Id.* at § 102(b)(5)(A).
25. *Id.* at § 101(9).

number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.[26]

The undue hardship definition and factor list, while it does not specify economic efficiency to be a relevant factor, does not expressly preclude consideration of efficiency consequences. According to the statutory text, the factors to be considered in making an undue hardship determination "include" the nature and cost of the accommodation sought, the financial resources and number of employees of the relevant facility and entity, the financial and other impacts of the accommodation upon the facility, the overall size and other characteristics of the entity's business, and the composition and structure of its workforce. Those particular factors do not suffice for making judgments as to the efficiency of an accommodation; such a determination would also require information concerning the size of the resulting benefits. Since the specified list of factors is not expressly made exclusive, however, there is some room to argue that other factors not listed and relevant to efficiency consequences may also be considered. The statutory language mandating consideration of several factors that are irrelevant to an efficiency determination (such as the size of the facility's financial resources), however, suggests that economic efficiency considerations are regarded by Congress as, at most, one of several competing concerns to be balanced.

While the undue hardship definition and relevant factor list leaves the role of efficiency consequences somewhat unclear, ADA Section 501(a), in terse fashion appears to constrain the role of efficiency concerns in at least some of the undue burden determinations called for by the ADA to be no greater than the limited role those concerns have played in the jurisprudence interpreting the comparably-worded Federal agency regulations implementing Sections 501 and 504 of the Rehabilitation Act.[27] Section 501(a) of the ADA states the following:

26. *Id.* at § 101(10).
27. *See infra* notes 47-63 and accompanying text.

> Except as otherwise provided in this Act, nothing in this Act shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790 et seq.) or the regulations issued by Federal agencies pursuant to such title.[28]

The meanings of Sections 101(10) and 501(a) are made more transparent by their legislative history, as will be discussed below.

B. *The Legislative History*

1. Congressional Action on the ADA

Since the early 1980's Congress has been presented with studies and testimony arguing that current Federal and state laws are inadequate to address the problems of discrimination faced by persons with disabilities.[29] The introduction of the Americans with Disabilities Act of 1988 (S. 2345) led to further joint House-Senate subcommittee hearings on these issues, but the bill failed to win passage.[30] President Bush, in his 1988 campaign, took a strong stand in favor of a "mainstreaming" approach involving expanded civil rights protections for the disabled. In 1989, the past year's disability legislation was reintroduced in the Senate in substantially similar form as S. 933, and was referred to the Senate Committee on Labor and Human Relations. Following further hearings and extensive negotiations with representatives of the Bush Administration, S. 933 was favorably reported out of this Committee in substantially amended form by a 16-0 vote on August 2, 1989.[31] It subsequently passed the Senate without amendment on September 6, 1989, by a vote of 76 to 8, with 16 abstentions.[32]

After Senate passage S. 933 was introduced into the House of Representatives as H.R. 2273, and was subsequently referred to each of the four House committees having jurisdiction over one or more of the areas covered by the legislation. After each of these committees passed the bill with minor amendments,[33] the House Rules Committee ironed out minor

28. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 501(a), 104 Stat. 327, 369 (1990).

29. S. Rep. No. 116, 101st Cong., 1st Sess. 4 (1989).

30. *Id.*

31. *Id.* at 1.

32. 135 Cong. Rec. S10,803 (daily ed. Sept. 8, 1989).

33. The House Education and Labor Committee was the first of these committees to act, approving a slightly amended version of H.R. 2273 on November 14, 1989 by a 35-0 vote. 8 *BNA Emp. Rel. Weekly* 71 (January 15, 1990). The House Energy and Commerce Committee followed with a 40-3 approval vote of its version on March 13, 1990. 8 *BNA Emp. Rel. Weekly* 357 (March 19, 1990). The House Public Works and Transportation Committee gave its version of the legislation its endorsement by a 45-5 vote on April 3, 1990. 8 *BNA Emp. Rel. Weekly* 581 (May 7, 1990). The House

differences in the committee versions and sent the bill to the House floor, where on May 22, 1990 it was overwhelmingly approved by a vote of 403-20.[34] A joint House-Senate conference committee subsequently reconciled the two versions of the ADA,[35] and the conference committee draft was approved by the House on July 12, 1990,[36] and by the Senate on July 13, 1990.[37] The bill was signed into law by President Bush on July 26, 1990.[38]

2. Interpreting Certain Ambiguities of the ADA in Light of Its Legislative History

The text of the ADA, as noted above in Part III.A., is ambiguous in at least two ways with regard to the availability and application of the undue hardship defense. First, it is not entirely clear from the text of ADA Section 501(a) whether its prohibition against use of a lesser standard of coverage than set forth by the Rehabilitation Act and its implementing regulations is intended to apply only when the ADA is enforced against persons already covered by the Rehabilitation Act. If so, this would allow use of a lesser standard of coverage for employers not subject to the Rehabilitation Act. It may be, however, that this prohibition is intended to apply more broadly to all ADA enforcement efforts.

The language of Section 501(a) does not preclude the former interpretation, which would allow the undue hardship defense to be made more easily available to employers first covered by the ADA than to employers already subject to the Rehabilitation Act. One argument for such an interpretation of Section 501(a) is based upon the recognition that the Rehabilitation Act, at least in theory if not always as a practical matter, is for many employers an "opt-out" statute that they can elect to avoid by declining Federal funds. This opt-out feature allows these employers to avoid incurring accommodation costs they perceive as excessive without having to undergo the risks of litigation of the undue

Judiciary Committee followed suit on May 2, 1990 by a 33-3 vote. 8 *BNA Emp. Rel. Weekly* 587 (May 7, 1990).

34. 8 *BNA Emp. Rel. Weekly* 677 (May 28, 1990).

35. The joint conference committee accepted language contained in the House version of the bill in 79 of the 81 instances in which the House and Senate versions differed. 8 *BNA Emp. Rel. Weekly* 837 (July 2, 1990). The House versions of the undue hardship definition and factor list were accepted in lieu of the different but substantively very similar Senate versions.

36. 8 *BNA Emp. Rel. Weekly* 901 (July 16, 1990).

37. *Id.*

38. 8 *BNA Emp. Rel. Weekly* 965 (July 30, 1990).

hardship issue under that statute and its implementing regulations. Accommodation measures which are perceived by employers as excessively costly are likely, in many instances, to also be inefficient, although there is no necessary correlation between high costs and inefficiency. The Rehabilitation Act's opt-out feature thus acts as a crude sort of efficiency check on the accommodations it requires.

The ADA, in contrast, does not allow employers to opt out from its coverage, and its undue hardship defense is consequently more crucial to some employers than is the comparable defense provided by the regulations implementing the Rehabilitation Act. Thus, from an efficiency-oriented perspective, it may be advisable to allow a more liberal use of the undue hardship defense under the ADA than under the Rehabilitation Act, at least with regard to inefficient accommodation measures. Under the logic of this view, however, the defense should be more liberally available under the ADA than under the Rehabilitation Act for all ADA-covered firms, since no opting out is possible, and not merely to those firms not previously subject to the Rehabilitation Act requirements. This position, however, is inconsistent with the text of ADA Section 501(a), which at the least expressly prevents any relaxation of coverage standards for firms subject to the Rehabilitation Act. This inconsistency indicates that the rationale of the opt-out argument for relaxed ADA standards was not implicitly embraced by Congress when adopting that Section.

A second possible basis for interpreting Section 501(a) to allow for differential availability or application of the undue hardship defense for different classes of employers, based upon their Rehabilitation Act coverage status, is the argument that efficiency criteria are more appropriate standards for guiding the conduct of wholly private employers than for the conduct of those public or (at least partially) publicly-funded employers subject to the Rehabilitation Act. From this perspective, economic criteria should be given less weight when scrutinizing the activities of public or publicly-funded entities that are often trying to advance a broad set of social policies, some of which are not readily susceptible to evaluation in economic terms, than when evaluating the actions of more narrowly economically-oriented, purely private entities. This could be accomplished by giving more weight to efficiency concerns when applying the ADA to newly-covered employers than when applying it to Rehabilitation Act-covered entities, a practice arguably consistent with the text of Section 501(a).

These arguments for incorporating either lesser or differential undue hardship standards into the ADA were discussed during the intense negotiations between the Senate Committee on Labor and Human Resources and members of the Bush Administration prior to its original 1989 Senate passage. They ultimately proved to be unpersuasive; the Senate Committee on Labor and Human Resources Committee Report ("Committee Report") on the original Senate version of S. 933 clearly shows that the Committee (and, subsequently, the adopting Congress) implicitly rejected those arguments and intended that a uniform standard of coverage identical to that developed under the Rehabilitation Act jurisprudence be applied to all ADA-covered employers:

"[The term "undue hardship"] is derived from and should be applied consistently with interpretations by Federal agencies applying the term set forth in regulations implementing sections 501 and 504 of the Rehabilitation Act of 1973."[39]

The second major ambiguity of the ADA's employment provisions noted above in Part III.A. derives from the failure to specify the relative weight to be accorded to efficiency concerns as compared to other factors in making undue hardship determinations. The very comprehensive and heavily negotiated[40] Committee Report, however, goes on to discuss the application of the undue hardship defense factors in a fashion which makes clear the Committee's intent to carry forward into the ADA's employment provisions, and apply to all classes of employers, the "deep pocket"-oriented regulatory standards developed under the Rehabilitation Act:

> The weight given to each factor in making the determination as to whether a reasonable accommodation nonetheless constitutes an "undue hardship" will vary depending on the facts of a particular situation and turns on both the nature and cost of the accommodation in relation to the employer's resources and operations. In explaining the "undue hardship" provision, the Department of Health, Education, and Welfare explained in the appendix accompanying the [Rehabilitation Act] section 504 regulations (42 Fed. Reg. 22676 et. seq, May 4, 1977):
>
> > Thus, a small day-care center might not be required to expend more than a nominal sum, such as that necessary to

39. S. Rep. No. 116, 101st Cong., 1st Sess. 36 (1989).

40. *See supra* note 16.

> equip a telephone for use by a secretary with impaired hearing, but a large school district might be required to make available a teacher's aide to a blind applicant for a teaching job. Further, it might be considered reasonable to require a State welfare agency to accommodate a deaf employee by providing an interpreter, while it would constitute an undue hardship to impose that requirement on a provider of foster home care services.
>
> The mere fact that an employer is a large entity for the purposes of factor (l), should not be construed to negate the importance of factors (2) and (3) in determining the existence of undue hardship.[41]

The Senate floor debate preceding passage of S. 933 indicates that the entire Senate understood that the ADA's reasonable accommodation/undue hardship provisions were intended to codify the Rehabilitation Act regulations and jurisprudence on these questions. Senator Harkin, in reporting out S. 933 from the Senate Labor and Human Relations Committee, stated that this legislation:

> [A]dopts many standards and interpretations from the original HEW regulations implementing section 504 of the Rehabilitation Act of 1973, including the obligation to provide a reasonable accommodation unless it would result in an undue hardship.[42]

In response to a question from Senator Helms as to when the costs of a reasonable accommodation would rise to the level of an undue hardship, Senator Harkin read to him portions of the above-quoted language[43] from the Report. He also made the following statement in response to another very similar question from Senator Helms:

> What I presume you mean is, if a blind person came in for a job, and said "You must provide a reader for me." Well, if I had Tom Harkin's pharmacy out in Adel, Iowa, I could not afford that. That would probably be an undue hardship so I would not have to do that. On the other hand, if it was IBM, maybe that would be something that could be done.[44]

This quote further indicates that Senator Harkin had embraced the ADA's incorporation of the "deep pocket"-oriented undue hardship factors given primary weight by the Rehabilitation Act regulations and jurisprudence (as will be discussed below). There were comments made on the Senate floor by both Senators Helms and Humphrey that indicated

41. S. Rep. No. 116, 101st Cong., 1st Sess. 36 (1989).
42. 135 Cong. Rec. S10,714 (daily ed. Sept. 7, 1989).
43. *See supra* note 41 and accompanying text.
44. 135 Cong. Rec. S10,773 (daily ed. Sept. 8, 1989).

their concerns that the ADA's undue hardship criteria were vague and would provoke considerable litigation,[45] but neither comment suggested that they regarded the ADA provisions as anything other than codifications of the Rehabilitation Act standards.

The undue hardship definition and factor list ultimately adopted by the ADA differ slightly from the definition and factor list contained in the original Senate version of S. 933 and discussed in the accompanying Committee Report and subsequent floor debate.[46] However, the changes made to those provisions are without substantive impact, and there is no indication in the legislative history that they were intended to alter the original thrust of S. 933 to carry forward the undue hardship jurisprudence developed under the Rehabilitation Act.

C. *Section 504 of the Rehabilitation Act*

It is thus clear that Congress intended that the ADA's undue hardship defense be interpreted and applied to all employers in a manner consistent with the federal agency regulations that provide employers with an undue hardship defense under the Rehabilitation Act. An examination of the Rehabilitation Act jurisprudence reveals that little if any weight has been given to efficiency concerns in undue hardship determinations made pursuant to those regulations.

1. Legitimacy of the Rehabilitation Act's Regulations' Undue Hardship Defenses and Relevant Factor Lists

Section 504 of the Rehabilitation Act is couched in general terms and does not specifically provide for an undue hardship defense. That statute prohibits the exclusion of "otherwise qualified" handicapped persons, by reason of a handicap, "from the participation in. . .any program

45. *Id.* at S10,773, S10,783.

46. The original Senate version of S. 933 contained the following language corresponding to Section 101(10) of the final version of the ADA:

> (A) In general. - The term "undue hardship" means an action requiring significant difficulty or expense.
>
> (B) Determination. - In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include-
>
> (i) the overall size of the business of a covered entity with respect to the number of employees, number and type of facilities, and the size of the budget;
>
> (ii) the type of operation maintained by the covered entity, including the composition and structure of the workforce of such entity; and
>
> (iii) the nature and cost of the accommodation needed under this Act.

S. Rep. No. 116, 101st Cong., 1st Sess. 35-36 (1989). The final version differs primarily in the greater emphasis placed upon the characteristics of the specific facility to be modified.

or activity receiving Federal financial assistance or. . .any program or activity conducted by any Executive agency," as well as the denial of the "benefits" of such programs or activities, and any "discrimination" in such programs.[47] This statute as originally adopted did not contain any provisions calling for Federal agencies to promulgate implementing regulations.[48] However, on April 28, 1976, President Ford issued Executive Order No. 11,914,[49] directing the Secretary of Health, Education and Welfare to co-ordinate the implementation of Section 504 by the various federal departments and agencies. The lead agencies responsible for enforcing that law—initially the Department of Health, Education and Welfare (now the Department of Health and Human Services (HHS)) and subsequently the Department of Justice (DOJ)—and numerous other federal agencies subsequently promulgated such regulations, and their right to do so has never been seriously challenged.

The HHS Section 504 regulations, adopted in 1977,[50] state in Subpart B dealing with employment practices that a recipient of Federal financial assistance "shall make reasonable accommodation" to otherwise qualified handicapped employees or applicants unless that accommodation "would impose an undue hardship on the operation of its program."[51] These HHS regulations were the genesis of the undue hardship concept and language. The regulations went on to state:

> In determining pursuant to paragraph (a) of this section whether an accommodation would impose an undue hardship on the operation of a recipient's program, factors to be considered include:
> (1) The overall size of the recipient's program with respect to number of employees, number and type of facilities, and size of budget;
> (2) The type of the recipient's operation, including the composition and structure of the recipient's workforce; and
> (3) The nature and cost of the accommodation needed.[52]

This undue hardship defense and list of relevant factors provided the basis for comparable regulations issued by a number of other Federal agencies,[53] including the DOJ,[54] and for the language now incorporated by the employment provisions of the ADA.

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47. 29 U.S.C. § 794 (1982).
48. The Rehabilitation Act was subsequently amended in 1978 to require Federal agencies to promulgate such regulations as necessary to implement the amendments made to it by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. 29 U.S.C. § 794 (1982).
49. 41 *Fed. Reg.* 17,871 (1976).
50. 45 C.F.R. Part 84 (adopted April 28, 1977).
51. 45 C.F.R. § 84.12(a) (1990).
52. *Id.* at § 84.12(c).
53. *See, e.g.*, 5 C.F.R. §§ 900, 701-710 (1990) (Office of Public Management); 7 C.F.R. §§ 15 b.1-

The Supreme Court initially construed Section 504 of the Rehabilitation Act and its implementing regulations in *Southeastern Community College v. Davis*.[55] The issue in *Davis* was the meaning of the term "otherwise qualified handicapped person" in the employment context, and the case did not squarely present the question of the legitimacy of imposing affirmative employer obligations or making available an undue hardship defense. That opinion contained dicta, however, which suggested that affirmative obligations could not be imposed upon employers by regulation if those obligations resulted in "undue financial and administrative burdens."[56] Subsequent to the *Davis* holding, at least two circuit courts have applied this limitation upon a showing that one of the two "undue burdens" there mentioned would be created as a result of the accommodation sought under Section 504.[57]

In 1984, the DOJ issued additional regulations implementing Section 504 for its internally-funded activities which stated that an "undue burden" defense was broadly available to entities even outside of the employment context covered by the HHS regulations and other federal regulations allowing the undue hardship defense.[58] Those DOJ regulations consequently provoked controversy, and were defended as consistent with and mandated by the position taken by the Supreme Court in *Davis* and by subsequent lower court decisions in the employment context.[59] This controversy, however, relates only to the availability of an undue burden defense outside of the employment context, and not to the applicability of that defense (or, equivalently, the undue hardship defense) with regard to employer accommodations, which is generally accepted.

The Supreme Court, in 1985, revisited Section 504 in *Alexander v. Choate*,[60] another employment case, stating that "while a grantee need not be required to make 'fundamental' or 'substantial' modifications to accommodate the handicapped, it may be required to make 'reasonable'

.42 (1990) (Department of Agriculture); 10 C.F.R. §§ 4.101-.233 (1990) (Nuclear Regulatory Commission); 10 C.F.R. §§ 1040.61-.74 (1990) (Department of Energy); 13 C.F.R. §§ 113.1-.8 (1990) (Small Business Administration); 14 C.F.R. §§ 1251.100-.400 (1990) (National Aeronautics and Space Administration); 15 C.F.R. §§ 8 b.1-.25 (1990) (Department of Commerce).

54. 28 C.F.R. §§ 42.501-.540 (1990).

55. 442 U.S. 397 (1979).

56. *Id.* at 412.

57. *Dopico v. Goldschmidt*, 687 F.2d 644 (2nd Cir. 1982); *APTA v. Lewis*, 655 F.2d 1272 (D.C. Cir. 1981).

58. 28 C.F.R. Part 39 (adopted Sept. 11, 1984).

59. *Id.* at "Supplementary Information."

60. 469 U.S. 287 (1985).

ones."[61] In 1987, in *School Board of Nassau County v. Arline*,[62] a Florida case involving employment accommodations under Section 504, the Supreme Court opinion included a long footnote endorsing use of the undue hardship defense, and use of the factors listed in the HHS regulations as relevant to determining the availability of that defense.[63] It is thus clear that the undue hardship defense and list of relevant factors now is regarded as a legitimate implementation of Section 504 of the Rehabilitation Act, at least in the employment context.

2. Application of the Undue Hardship Defense Under The Rehabilitation Act

Since the ADA text and legislative history clearly call for implementation of the undue hardship defense in parallel fashion with the application of that defense under the Rehabilitation Act Section 504 regulations, it is necessary to examine the Rehabilitation Act undue hardship cases to determine the relative weight to be given each of the relevant factors. None of the above-cited Supreme Court cases have involved a balancing of the factors listed in the regulations as relevant for an undue hardship determination. Several circuit courts, however, have conducted such a balancing analysis, at least in abbreviated fashion.

In *APTA v. Lewis*[64], the issue was the validity of Department of Transportation regulations implementing Section 504 in the public transit context. The D.C. Circuit Court of Appeals there cited *Davis* as establishing the "undue financial and administrative burdens" criteria for determining the limits of the Section 504 requirements, and applied that criteria to strike down those regulations solely because of the large financial burdens they imposed:

> Applying these standards to public transit, we note that at some point a transit system's refusal to take modest, affirmative steps to accommodate handicapped persons might well violate Section 504. But DOT's rules do not mandate only modest expenditures. The regulations require extensive modifications of existing systems and impose extremely heavy financial burdens on local transit authorities. . .The regulations themselves recognize that some changes will be "extraordinarily expensive. . ." These are the kind of burdensome modifications that the

61. *Id.* at 300.

62. 480 U.S. 273 (1985), *reh'g denied*, 481 U.S. 1024, *on remand* 692 F. Supp. 1286 (M.D. Fla. 1988).

63. *Id.* 288 n. 17.

64. 655 F.2d 1272 (D.C. Cir. 1981).

Davis Court held to be beyond the scope of section 504.[65]

The *APTA* court did not engage in the comparison of accommodation costs with the size of the resulting benefits that would be necessary to give weight to efficiency considerations in its analysis.

In *Dopico v. Goldschmidt*,[66] a case also involving Section 504 claims in the public transit context, the Second Circuit Court of Appeals remanded for evaluation of the transit systems' undue hardship claims, stating that with regard to the degree of accommodations required under Section 504, courts were "bounded [sic], after *Davis*, by a general proscription against 'massive' expenditures."[67] The opinion contained no language stating that "massiveness" was to be defined with reference to the size of resulting benefits, as an efficiency orientation would suggest to be appropriate.

In *Treadwell v. Alexander*[68] at issue was the duty of the Army Corps of Engineers to restructure the allocation of employee job duties so that a person handicapped by heart and nervous conditions could serve as a seasonal park technician. The district court had previously concluded that it would have been necessary for the Corps to require other park technicians to perform many of the plaintiff's duties had he been hired, and that this would have been unduly burdensome to the Corps, given the fact that only two to four other Corps workers would be available at any given time to perform all necessary duties in the particular 150,000 acre park involved, and given the limited resources available to the Corps. The Eleventh Circuit Court of Appeals affirmed the lower court opinion, without citing any need for consideration of the size of the benefits to the plaintiff had he been accommodated.

The history of *Rhode Island Handicapped Action Committee v. Rhode Island Public Transit Authority*,[69] another public transit case, shows with unusual clarity the judicial reluctance to incorporate efficiency criteria into the reasonable accommodation/undue hardship analysis. The plaintiffs there challenged several actions of the defendant transit agency as violative of its Section 504 duty to accommodate the disabled. The district court applied the efficiency criterion in its analysis, although it did not label it as such:

65. *Id.* at 1278 (footnotes omitted).
66. 687 F.2d 644 (2d Cir. 1982).
67. *Id.* at 653.
68. 707 F.2d 473 (11th Cir. 1983).
69. 549 F.Supp. 592 (D.R.I. 1982), *rev'd in part, vacated in part*, 718 F.2d 490 (1st Cir. 1983).

> This inquiry necessarily involves balancing the overall costs and benefits, both long and short range, that the relief would confer on both the plaintiff and the defendant. If the overall costs are reasonable in light of the anticipated benefits, and the burdens imposed are not 'undue,' then. . .relief should be granted. . . .[70]

The district court later in its opinion made clear that efficiency was not the sole criterion considered in the determination, and that it was relevant only in the assessment of the necessity for making accommodations that were already found to not impose "massive" costs upon the employer:

> Section 504 requires neither 'massive' expenditures nor modifications that would result in 'undue' administrative burdens. . .Thus, even if the benefit to the handicapped of a modification to an existing transportation system would be substantial, § 504 does not require that it be instituted if doing so would jeopardize the effectiveness of that transportation system in any serious way.[71]

The district court, however, reemphasized the importance of efficiency criteria for determinations made within the "massive" expenditure constraint:

> The cost of remedying the discrimination [in this instance] against the handicapped simply cannot be called 'massive' or 'undue'. . .I therefore hold that RIPTA shall purchase the 42 buses complete with wheelchair lifts. . .[T]he cost of $139 per bus for the 42 new buses about to be purchased is insubstantial when compared to the benefit of having those buses equipped with two bays. . .The Court does not believe, however, that the cost of retrofitting the 34 buses purchased in 1981 justifies the expense of $1,200 plus labor per bus.[72]

The district court consequently conditioned the requirement to provide accommodations (in the non-massive expenditure context) on satisfaction of cost/benefit criteria which approximate the efficiency standard. However, this efficiency-oriented approach was subsequently rejected by the First Circuit Court of Appeals which reversed the lower court:[73]

> The cost-benefit test articulated by the district court does not provide the type of predictable standard upon which courts and administrators can rely to prevent judgments from being mere personal predilections. The suggested test requires a balancing of costs and benefits: if the overall costs seem to the court reasonable in light of the anticipated

70. 549 F.Supp. at 607.
71. 549 F.Supp. at 610-611 (footnotes omitted).
72. 549 F.Supp. at 614.
73. 718 F.2d 490 (1st Cir. 1983).

> benefits, and the financial and administrative burdens seem not undue, then a failure to make a particular purchase will constitute 'discrimination' prohibited by section 504. . .While we agree that it is a desirable goal to help the handicapped become active in the social, economic, and political affairs of the community, we are at a loss to place a price tag or value on such participation. . . .The absence of hard data in this case forced the district court to offer an educated guess as to where the balance of costs and benefits should lie. . . .under this test it would remain uncertain whether the next purchase of buses should include chairlifts, and if so, how many.
>
> . . .We conclude, therefore, that the district court erred in ordering affirmative relief based on its own cost-benefit analysis. . .[74]

What was rejected in *Rhode Island Action Committee*, strictly speaking, was not the use of a cost/benefit framework to ascertain the contours of the undue hardship defense, but instead the more restricted use of cost/benefit criteria to determine the reasonableness of measures that did not require such massive expenditures as to be unduly burdensome. However, the criticisms of the cost/benefit framework articulated by the First Circuit Court of Appeals in this opinion are as applicable to use of those criteria to draw the undue hardship line as they are to determine "reasonableness" within that limit.

There is one circuit court case that provides slender support for use of efficiency criteria in ascertaining the existence of an undue hardship. In *New Mexico Association for Retarded Citizens v. New Mexico*[75], the plaintiffs sought to require the State of New Mexico to provide certain special education services for handicapped children. The Tenth Circuit Court of Appeals stated in dictum:

> Such accommodation is required only when it does not generate undue financial or administrative hardship. . . . In this regard, it seems apparent under [*Davis*] . . . that the greater the number of children needing the particular special education service, the more likely that failure to provide the service constitutes discrimination. This is so because the more children in need of the service, the more the benefits of that service outweigh its cost.[76]

The most comprehensive judicial analysis to date regarding the application of the undue hardship criteria under Section 504 is presented in *Nelson v. Thornburgh*,[77] a district court case from the Third Circuit. In

74. *Id.* at 498-99.
75. 678 F.2d 847 (10th Cir. 1982).
76. *Id.* at 854.
77. 567 F.Supp. 369 (E.D. Pa. 1983) *aff'd*, 732 F.2d 146 (3d. Cir. 1984), *cert. denied*, 469 U.S. 1188 (1985).

that action, several blind plaintiffs sought to require the Department of Public Welfare of the State of Pennsylvania to hire part-time readers so that they could adequately perform their duties as income maintenance workers for that Department. The district court estimated that the cost of each part-time reader for each plaintiff would be approximately $6,600 per year; about 30% of the $21,000 annual salary paid to a typical plaintiff.

In analyzing the availability of the undue hardship defense, the court first quoted the HHS regulations' list of factors to be considered, and then quoted the following portion of Appendix A to the HHS regulations:

> The weight given to each of these factors in making the determination as to whether an accommodation constitutes undue hardship will vary depending on the facts of a particular situation. *Thus, a small day-care center might not be required to expend more than a nominal sum, such as that necessary to equip a telephone for use by a secretary with impaired hearing, but a large school district might be required to make available a teacher's aide to a blind applicant for a teaching job. Further, it might be considered reasonable to require a state welfare agency to accommodate a deaf employee by providing an interpreter while it would constitute an undue hardship to impose that requirement on a provider of foster home care services.*[78]

Having given special emphasis to the "deep pocket" factors listed in the HHS regulations, the court proceeded to compare the cost of providing part-time readers to the $300 million annual budget of the Department, and not surprisingly concluded that the cost of readers did not impose an undue hardship.[79] The court did offer some dicta which suggests that it might approve of the application of cost/benefit criteria where such criteria pointed towards requiring certain accommodations:

> [T]he additional dollar burden [of paying for part-time readers] is a minute fraction of the [Department's] personnel budgets. Moreover, in enacting section 504, Congress recognized that failure to accommodate handicapped individuals also imposes real costs upon American society and the American economy. . . .When one considers the social costs which would flow from the exclusion of persons such as plaintiffs from the pursuit of their profession, the modest cost of accommodation—a cost which seems likely to diminish, as technology advances and proliferates—seems, by comparison, quite small.[80]

78. *Id.* at 380.
79. *Id.*
80. *Id.* at 382 (footnote omitted).

The opinion, however, offers no support for the application of cost/benefit or efficiency criteria where they would favor allowing use of the undue hardship defense.

A review of the case law applying the undue hardship defense under Section 504 of the Rehabilitation Act thus reveals that there is very little support for giving weight to efficiency criteria. The thrust of those cases is clearly to implement the "deep pocket" policy articulated by the HHS regulations' factor list and Appendix thereto. That policy indicates that a reasonable accommodation must be made, regardless of the size of benefits that will result, so long as the cost of the accommodation is not unduly large relative to the overall financial capacity of the employer.

D. *Summary*

The legislative history of the ADA makes clear the Congressional intent that the undue hardship defense be uniformly applied to all employers in the same fashion and with the same standards as has been the comparable defense available under the Rehabilitation Act regulations. The case law articulating those regulations almost completely rejects the use of efficiency criteria as a relevant factor in making undue hardship determinations. Consequently, it appears that the ADA undue hardship defense should be interpreted so as to give primary emphasis to the deep pocket oriented factors expressly listed in the statute, and that little, if any, weight should be given to efficiency concerns.

IV. THE PREMISES AND ASSUMPTIONS UNDERLYING THE EFFICIENCY ORIENTATION AS APPLIED IN THE DISABILITY EMPLOYMENT ACCOMMODATION CONTEXT

Even if the ADA's employment provisions are interpreted to allow EEOC and the courts, as a matter of law, to give some weight to efficiency concerns, there remains the question whether it is wise social policy for them to do so. It will be argued in this Part that the premises underlying the economic efficiency orientation are not satisfied in the disability employment accommodation context, and consequently no weight should be given to efficiency concerns by regulators and judges, even if the statute is interpreted to permit them to do so.

There are a number of normative premises and behavioral assumptions implicit in the belief that economic efficiency is a legitimate social goal of at least instrumental value, and that such efficiency is best obtained through market or market-simulating mechanisms. The key

premises and assumptions are: the appropriateness of the use of a willingness to pay measure of value; the assumption of rational behavior; the appropriateness of the use of the Kaldor-Hicks efficiency criterion rather than the more stringent Pareto criterion; and the assumption that adequate data will be available to establish the relevant magnitudes needed for an efficiency determination.[81] Each of these premises or assumptions will be examined below to demonstrate their implausibility in the disability employment accommodation context.

A. *The Willingness to Pay Measure of Value*

The devotees of the economic efficiency orientation take the crucial initial step needed to allow them to ascribe normative value to laws on the basis that those laws enhance efficiency when they postulate an ultimate measure of social desirability—labeled "value"—and then define the measure of the value of any item as the largest amount of money anyone would pay for it (or, alternatively, the amount of money its owner would have to be paid to part with it willingly).[82] "Wealth" is defined as the aggregation of individual valuations.[83] Money is thus made the measure of all things; wealth is defined as the highest social end

81. There are other assumptions implicit in the use of the economic efficiency standard that may not always be satisfied, and that if not met will result in that criterion having undesirable properties. One such assumption is that persons will put the same value on items whether they are selling them or purchasing them. If, however, persons value items more if they already have them than if they are purchasing them, thus exhibiting an "irrational" attachment to current possessions (which may, however, be quite rational given wealth effects; *see* Harrison, *Egoism, Altruism and Market Illusions: The Limits of Law and Economics*, 33 U.C.L.A. L. REV. 1309, 1357-59 (1986); Rizzo, *The Mirage of Efficiency*, 8 HOFSTRA L. REV. 641, 648-49 (1980)), then it is possible that a shift from resource allocation A to resource allocation B, as well as a reverse shift from resource allocation B to resource allocation A, will each be wealth-reducing and consequently inefficient. This potential property of the efficiency criterion is known as "path-dependence" and is regarded as undesirable. *See* Dworkin, *supra* note 14, at 192; Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 S. CAL. L. REV. 669, 678-685, (1979). If, alternatively, persons value goods more highly when they are purchasing them than when they already have them (perhaps due to an "irrational" envy effect), application of the efficiency criterion could lead to an oscillation between two resource allocations, with each shift enhancing efficiency, given the changes in valuations that result. *See* Dworkin, *supra* note 14, at 192; Scitovsky, *A Note on Welfare Proposition in Economics*, 9 REV. ECON. STUD. 77 (1941). Cyclicity is a highly undesirable property for an evaluative criteria. Another implicit assumption is that increasing efficiency in one micro-context will enhance efficiency globally. It has, however, been demonstrated that this will not always be the case, depending on the pattern of inefficiencies existing elsewhere in the economy. *See* Rizzo, *The Mirage of Efficiency*, 8 HOFSTRA L. REV. 641, 652-53 (1980); Lipsey &. Lancaster, *The General Theory of the Second Best*, 24 REV. ECON. STUD. 11 (1957). Most critics of the efficiency criterion, however, have based their attacks upon the shortcomings inherent in the premises and assumptions discussed in the text, perhaps because the other assumptions referred to in this footnote appear relatively plausible in at least some important contexts in which the efficiency criterion is applied.

82. POSNER, *supra* note 13, at 11; POSNER, THE ECONOMICS OF JUSTICE (1981) at 60-61.

83. POSNER, THE ECONOMICS OF JUSTICE (1981) at 60-61.

since it is the aggregation of all value, and nothing has any value except insofar as it is so characterized by a person willing to pay that sum. This principle of defining value as based exclusively upon the interaction of human desires and financial capabilities has been insightfully described by Arthur Leff as "the neo-Panglossian move"[84] made by law-and-economics writers to avoid having to grapple seriously with the fundamental philosophical question of what constitutes value.

The raison d'etre of the efficiency orientation is that efficient laws will maximize aggregate social wealth. The appeal of the economic efficiency orientation consequently hinges upon the acceptance of the proposition that wealth, so defined, is something that we should seek to maximize through our social arrangements. This proposition has long been subjected to two severe criticisms. The first major objection is that there may in fact exist objective standards of value independent of personal preferences that are capable of human cognizance and that should be taken into account in determining value.[85] Under the willingness to pay theory of value such objective standards are given force only to the extent they are incorporated into valuations made by people with means. Moreover, to the extent that such standards cannot be expressed in monetary terms they will not be reflected at all in valuations. Similarly, any personal preferences that cannot be reduced to monetary equivalents will be ignored in value calculations.[86]

The standard rejoinder to these kinds of objections, of course, is that there is unfortunately no consensus on how to definitively determine the nature of these objective standards, if indeed they exist at all, and the best way to proceed under the circumstances is to embrace the working assumption that all values are ultimately subjective, and can be adequately expressed in monetary terms, and to allow each person to determine what is valuable and act accordingly, so long as he or she engages in mutually advantageous exchange relationships rather than coercive behavior.[87] In effect, it is conceded that the use of an efficiency standard represents the abandonment of the seemingly futile effort to ascertain objectively valid principles of valuation or quantify non-economic preferences. Some commentators nevertheless find the abandonment of the

84. Leff, *supra* note 14, at 456.

85. *See, e.g.*, Leff, *supra* note 14, at 455-56; Michelman, *A Comment on Some Uses and Abuses of Economics in Law*, 46 U. CHI. L. REV. 307, 311 (1979).

86. Rizzo, *The Mirage of Efficiency*, 8 HOFSTRA L. REV. 641, 648-49 (1980).

87. *See generally* Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979).

quest for objective standards wrong or at least premature, and on this account accord no normative authority to the efficiency criterion.[88]

A second and perhaps even more troubling objection to the willingness to pay measure of value is that the values persons assign to items are crucially dependent upon their initial endowments.[89] In a market system, prices and resource allocations are determined by the interaction of these endowment-based personal valuation structures, and can be crudely but fairly accurately described as being established through a continuing "one dollar, one vote" referendum. A market system in which the initial endowments are highly concentrated may result in a radically different structure of personal valuations, prices, and resource allocations than will an otherwise identical system that is characterized by a level distribution of initial endowments. As a consequence, a set of laws may result in a resource allocation that is relatively efficient with respect to the structure of personal valuations arising from the existing distribution of initial endowments, but that may be inefficient—perhaps highly so—with respect to the structure of personal valuations that would arise from a different distribution of initial endowments. To the extent one harbors reservations about the legitimacy of use of the existing distribution of initial endowments as a normative baseline for resource allocation decisions, one should be hesitant to embrace an evaluative criteria that endorses a legal rule solely on the basis that it maximizes wealth in relation to the structure of personal valuations arising out of the suspect initial distribution.[90]

The fact that a resource allocation that is efficient with regard to the existing distribution of initial endowments will be, in general, inefficient with respect to any other initial distribution is a serious problem that sharply limits the appeal of efficiency as a normative standard.[91] One defense that can be offered in favor of the efficiency orientation is the argument that there exists no consensus on what changes in the distribution of initial endowments would be desirable, if any, and that, in lieu of such a consensus, the only practical default assumption is to assume the existing initial distribution is an appropriate normative baseline for measuring efficiency. This defense, however, is at bottom unresponsive to

88. *See generally* Dworkin, *supra* note 14; Kronman, *supra* note 14.

89. *See, e.g.*, Kronman, *supra* note 14, at 240; Michelman, *A Comment on Some Uses and Abuses of Economics in Law*, 46 U. CHI. L. REV. 307, 311 (1979).

90. Kronman, *supra* note 89, at 240.

91. POSNER, *supra* note 13, at 13.

criticisms that the efficiency approach cannot generate evaluative standards unless its baseline structure of initial endowments and personal valuations can first be justified on normative grounds.

These criticisms of the use of a willingness to pay measure of value appear intuitively to have particular force in the disability employment accommodation context. One suspects that among those persons who believe that there are objective standards of valuation independent of personal preferences, a significant proportion also believe that such standards have implications for the valuation of conduct intended to enhance basic civil rights, and that such standards perhaps cannot be adequately expressed through monetary measures. One also suspects that among those persons who would favor a distribution of initial endowments that differs from the existing distribution, a significant proportion would favor reallocations which would increase the aggregate wealth of disabled persons,[92] and consequently would also increase the aggregate willingness to pay for disability employment accommodations (under the plausible assumption that such accommodations are a "normal" good in economic terms). As a result, it is likely that a goodly proportion of those persons who, for one reason or another, harbor reservations about the normative significance of an efficiency standard that is based on a willingness to pay theory of valuation would be particularly reluctant to endorse the application of that standard in this context. While the merits of these reservations certainly cannot be established by counting noses, the fact that such reservations are likely to be fairly widely shared is a datum that should not be disregarded by those responsible for deciding how great an emphasis should be placed upon efficiency concerns.

B. *The Assumption of Rational Behavior*

The economic efficiency orientation also incorporates the conventional microeconomic assumption that persons act as rational maximizers of their self-interest, however they define it. If one believes, however, that irrational economic behavior is widespread and cumulatively significant, one will have reservations about attempting to maximize wealth through use or simulation of market mechanisms, even absent concerns about the legitimacy of defining efficiency with regard to a valuation structure based upon the willingness to pay measure of value.

92. Since disabled persons, as a class, have below-average wealth and incomes, and consequently face a greater-than-average probability of being reduced to pauperhood, measures which tend to increase their aggregate wealth would likely be supported both by Rawlsians and by persons who favor more egalitarian wealth distributions, among others.

The behavioral assumption of rationality is unfortunately tautological and non-falsifiable under conventional economic measurement techniques because an actor's actual market behavior is the only observable factor regarded as relevant, and the unobservable underlying structure of valuation is inferred from that behavior under an assumption of rationality. The behavior is therefore by definition rationally consistent with those inferred valuations. A falsifiable (and consequently meaningful) statement of the rationality assumption would assert that individuals act to maximize their self-interests with those self-interests being defined by some criteria independent of the behavior to be evaluated for its rationality.[93] For example, the defining criteria might be a person's own articulation of where his self-interests lie, or such an articulation modified to take into account psychological or sociological factors that distort articulations or perceived preferences away from "true" self-interests.[94] An assumption of rationality stated this way would be amenable, at least in theory, to empirical testing through comparison of self-interests, so defined, with actual market behavior. Unfortunately, there is no consensus on how to measure a person's "true" self-interests independent of his actual market behavior, and therefore there is no accepted empirical test of the rationality hypothesis. There is not even agreement on how to conceptualize the boundaries of the entity whose self-interests are to be ascertained independent of his actual market behavior. For example, is the "self" to be equated with the conscious ego alone, or should unconscious drives which are known to strongly shape behavior also be taken into account in some fashion in defining the limits of the "self" and its corresponding interests?[95] If so, how is this to be done?

It is thus merely an article of faith that persons rationally act in accord with some meaningful definition of their self-interest. That faith underlies the assumption that perfectly competitive markets will generate efficient outcomes, and that laws which mandate mutually desired market transactions that would otherwise be prevented by high transactions costs will consequently enhance efficiency. Such faith seems misplaced in

93. Rizzo, *The Mirage of Efficiency*, 8 HOFSTRA L. REV. 641, 643 (1980).

94. *See, e.g.*, Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI-KENT L. REV. 23, 25, 35-40 (1989); Harrison, *Egoism, Altruism, and Market Illusions: The Limits of Law and Economics*, 33 UCLA L. REV. 1309 (1986); Leff, *supra* note 14, at 470-74. *See also* West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384 (1985) (emphasizing Kafka's insights that persons often consent to authoritarian relationships that are inconsistent with autonomy and personal growth).

95. *See, e.g.*, Leff, *supra* note 14, at 474; West, *supra* note 94.

the disability employment accommodation context. The rationality assumption does there appear relatively plausible with regard to many of the larger, economically-oriented entities who will be asked under the ADA to incur substantial expenses to provide reasonable accommodations to disabled employees and applicants.[96] However, the "buyers" of any particular accommodation are, as previously noted, the entire class of persons who believe they may beneficially utilize or otherwise be benefitted by the accommodation with a positive probability, as well as those persons who ascribe positive value to the accommodation on purely altruistic grounds.[97] It appears implausible to assume that, in a hypothetical negotiation over accommodation that would establish its "value," the actual behavior of "buyers" would accurately reflect their underlying self-interests, given the very small significance of any particular accommodation to almost any specific "buyer". Those self-interests appear more likely to be subsumed by the "noise" of whatever "irrational" factors are influencing those persons at the moment of the (hypothetical) negotiations. As a result, the aggregate willingness to pay for an accommodation that would be expressed in such a hypothetical negotiation may diverge from the sum that would be offered if all parties acted rationally. Consequently, an accommodation judged to be efficient (and hence imposed under the ADA if applying efficiency criteria) based upon a proxy measure of that hypothetical aggregate willingness to pay may not actually be wealth-maximizing. This possibility severely limits the appeal of the efficiency standard in this context. The need for accurate proxy measures of hypothetical behaviors to apply the efficiency criterion is also troubling, and will be discussed more fully in Section IV.D. below.

C. *The Kaldor-Hicks Efficiency Criterion*

In a system of perfectly competitive markets each transaction will not only increase total wealth, but will also increase the wealth of each of the participants to the transaction. This is an obvious corollary of the assumption of rationality and of the fact that all market participation is voluntary, in a sense. Therefore, when a legal rule is implemented to cure a market failure resulting from high transaction costs, it can do so fully only if it imposes upon the parties to the "failed" transaction not

96. Except, perhaps, to the extent that "rationality" on the part of those entities would require that they take into account the potential subsidies that may be available from misanthropic persons who benefit from non-accommodation of the disabled if accommodations are refused. *See supra* note 20.

97. *See supra* note 92 and accompanying text.

only the exchange of the items involved, but also the potentially complex structure of payments that the parties would have agreed to make had it been possible to costlessly negotiate the transaction and exclude non-payers.

The economic efficiency criterion with the strongest claim to normative value—though still subject to the criticisms of the efficiency orientation discussed above in IV.A. and B.—is a standard which requires that to be regarded as efficiency-enhancing a legal rule must not only increase aggregate wealth, but also increase the wealth of all parties affected by it. Few if any legal rules, however, would be determined to be efficiency-enhancing under this rigorous standard, which is known as the "Pareto improvement" criterion.[98] This is so because the same substantial information and non-payer exclusion requirements that often make complex multi-party transactions too costly to accomplish through markets, will usually also make it prohibitively costly to design and enforce legal rules that would determine and implement the complex payment systems needed to charge properly all beneficiaries and compensate all persons adversely affected, so as to replicate precisely the hypothetical failed transactions and benefit all parties involved.

The practical uselessness of the Pareto improvement criterion as an evaluative standard has resulted in the development and widespread use[99] of an alternative and much more relaxed criterion of economic efficiency technically known as the Kaldor-Hicks criterion, and more commonly known as the "potential Pareto improvement" criterion.[100] A legal rule, to satisfy this criterion, must generate aggregate benefits that exceed total losses imposed, so that it would be possible, in theory, for the gainers to compensate the losers sufficiently so that all affected persons benefit—a Pareto improvement—if such a compensation plan could be costlessly implemented. It must be emphasized, however, that the Kaldor-Hicks criterion does not take into account whether such theoretical compensation payments actually take place.

The use of the Kaldor-Hicks criterion rather than the Pareto improvement criterion to assess the efficiency of a law is a move which has significant adverse implications for the normative value of any efficiency determinations reached. Some commentators are willing to set aside their reservations concerning the use of the willingness to pay measure of

98. POSNER, *supra* note 13, at 12-13.

99. Michelman, *Norms and Normativity in the Economic Theory of Law*, 62 MINN. L. REV. 1015, 1020 (1978); POSNER, THE ECONOMICS OF JUSTICE (1981) at 92.

100. POSNER, *supra* note 13, at 12-13.

value to endorse all legal rules that are efficiency-enhancing by the Pareto improvement criterion, i.e., legal rules that cure market failures by imposing transactions which both increase aggregate wealth *and* increase the wealth of all affected individuals.[101] Laws that increase everyone's wealth, however restrictively that term is defined, have intuitive appeal, and one can accept Pareto improvements as valuable without having to implicitly accept utilitarian premises which allow for interpersonal welfare comparisons. It is a significant further step, however, to embrace laws that impose transactions which increase total wealth, but which also create both winners and losers. It is much more problematic to conclude that it is appropriate to impose losses on some to benefit others, without regard to the incidence of the gains and losses, merely because the total "value" of the gains exceeds the total "value" of the losses. Such a utilitarian approach is subject to the devastating and oft-repeated criticism that it fails to take seriously the differences between persons.[102]

The Kaldor-Hicks criterion is an attempt to apply a measure of efficiency that is more useful for comparative evaluation of alternative legal rules than the pristine Pareto improvement criterion which few, if any, rules can satisfy. The Kaldor-Hicks criterion also appears to avoid having to descend into the utilitarian morass of complex and highly subjective interpersonal welfare comparisons. However, the Kaldor-Hicks criterion does not truly avoid the interpersonal welfare comparison problem, but instead resolves it implicitly by treating a dollar of value gained as an exact offset to a dollar of loss, regardless of the distribution of these gains and losses across the population. In economic jargon, this is equivalent to an acceptance of a utilitarian premise that accords primary normative significance to the amount of total utility, and acceptance of a further assumption of equal and constant marginal utilities of wealth across the affected population. Some influential commentators have found this resolution of the interpersonal welfare comparison problem to be arbitrary and unsatisfactory, and thus reject the use of the Kaldor-Hicks criterion as a meaningful evaluative criteria.[103]

The responses offered to these criticisms of the premises underlying the Kaldor-Hicks criterion by its defenders are not entirely convincing, but are not without some intuitive appeal. One defense commonly asserted is that some explicit or implicit utilitarian standard for making

101. *See, e.g.*, Kronman, *supra* note 14, at 232-235. *But see also* West, *supra* note 94.

102. Kronman, *supra* note 14 at 232; Coleman, *The Normative Basis of Economic Analysis: A Critical Review of Richard Posner's* THE ECONOMICS OF JUSTICE, 34 STAN. L. REV. 1105, 1116 (1982).

103. *See, e.g.*, Kronman, *supra* note 14, at 238-239.

interpersonal welfare comparisons is a practical necessity for evaluating the desirability of laws, and that the assumption implicit in the Kaldor-Hicks standard that aggregate social wealth should be maximized is the appropriate one to make in the absence of a consensus indicating otherwise, particularly if one believes that other desirable social ends will also be enhanced by following a policy of wealth maximization.[104] A problem with this argument is that even if one accepts the fundamental utilitarian premises underlying the use of a total utility-based social welfare function, which many do not, it can be argued with at least as much plausibility that an assumption of declining marginal utility for all individuals is in greater accord with popular sentiment, and that under this alternative assumption Kaldor-Hicks efficiency would be without normative significance even to persons who accept a utilitarian framework.

A more powerful argument in favor of the Kaldor-Hicks criterion can be advanced based on the observations that all persons are affected by a large number of laws intended to remedy various market failures, and that each person benefits from some of these laws and is burdened by others in essentially random fashion. Since each rule passing muster under the Kaldor-Hicks standard increases aggregate wealth, over a large class of Kaldor-Hicks efficiency-enhancing laws having largely independent effect distributions it is statistically probable that most affected persons will be net gainers. Thus, the set of Kaldor-Hicks efficiency-enhancing laws, viewed as a single body, likely passes (or almost passes) muster even under the more stringent Pareto improvement criterion. Therefore, the use of the Kaldor-Hicks criterion to evaluate particular laws is justified.[105]

This argument—in essence a claim that the distributional consequences of a set of wealth-enhancing laws will tend to "all even out"—has intuitive appeal. Although it is likely to be impossible to verify this claim empirically, some critics who reject utilitarianism altogether in favor of rights-based ethical standards may still contend that the potential existence of even one net loser robs the Kaldor-Hicks standard of all normative authority.[106] This point aside, however, even if the Kaldor-

104. POSNER, *supra* note 13, at 14-15; POSNER, THE ECONOMICS OF JUSTICE at 65-76 (1981). *But see* West, *supra* note 94.

105. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487, 491-497 (1980); Coleman, *The Normative Basis of Economic Analysis: A Critical Review of Richard Posner's* THE ECONOMICS OF JUSTICE, 34 STAN. L. REV. 1105, 1112-1113 (1982).

106. *See, e.g.*, Dworkin, *supra* note 14, at 200; Rizzo, *The Mirage of Efficiency*, 8 HOFSTRA L. REV. 641, 657-658 (1980); Polinsky, *Economic Analysis As A Potentially Defective Product: A Buyer's*

Hicks criterion does endorse only aggregate Pareto improvements in the context of repeated applications to a large set of laws, it is still not clear that it provides a sufficient normative basis for giving approval to a particular law that may have adverse consequences for particular individuals when those individuals have not previously expressed a willingness to accept those losses on the basis of the "all evens out" rationale. The question of when such consent may be reasonably implied leads into fundamental and unresolved questions of political authority that are outside the scope of this article.[107]

The Kaldor-Hicks criterion is thus revealed to have a very tenuous normative grounding. Its claim to legitimacy is particularly weak in the disability employment accommodation context. The allowance of a set of undue hardship defense claims which individually and collectively satisfy the Kaldor-Hicks criteria of aggregate wealth maximization may well impose substantial losses upon some group of disabled persons. It is not at all obvious that the set of other Kaldor-Hicks efficient laws that are independently implemented will collectively be sufficient to offset those impacts, given that the losses imposed on some disabled individuals by the set of sustained undue hardship defense claims may be as substantial as a total loss of their employment opportunities. There could be one or more net losers whose burdens could be justified only by resort to a total utility-based utilitarian calculus which is inconsistent with widely shared jurisprudential attitudes concerning the ethical primacy of individual rights.

D. *The Assumption of Adequate Data*

The argument in favor of the economic efficiency orientation is further premised on the operational assumption that it will be possible to establish the relevant cost and benefit magnitudes with sufficient precision to make efficiency determinations.[108] The disability employment accommodation context, however, poses very serious conceptual and practical difficulties for such measurements.

To assess the efficiency of an activity it is necessary for each beneficiary to ascertain the value he places upon those benefits, as measured by the sum he would be willing to pay to avoid foregoing those benefits. For

Guide to Posner's Economic Analysis of Law, 87 HARV. L. REV. 1655, 1680 (1974); Coleman, *supra,* note 105.

107. *See, e.g.,* Coleman, *supra* note 105, at 1117-1131; West, *supra* note 106.

108. *See, e.g.,* Rizzo, *supra* note 106.

each person burdened by an activity it is necessary to determine the amount he would be willing to pay to be relieved from those burdens. Only if the aggregate value of the benefits exceeds that of the costs can the activity be said to be efficient even in the limited Kaldor-Hicks sense. The relevant willingnesses to pay, of course, are those that would be evidenced by actions taken in a hypothetical costless negotiation involving all affected parties, and not those articulated or otherwise evidenced in another setting.

The costs of a particular accommodation to an employer can be fairly easily established, and this cost figure would seem to generally serve as an adequate proxy for the willingness to pay behavior that the (presumably economically rational) employer would exhibit in a hypothetical negotiation. The measurement of the benefits of an accommodation poses far greater difficulties, however, since the class of beneficiaries includes all persons with a perceived positive probability of benefitting from that accommodation. This class thus would include the many disabled persons who might at some time avail themselves of a particular accommodation, those able-bodied persons who perceive that they might benefit as employers or customers of accommodated disabled workers, or who subsequently become disabled in a fashion such that they themselves may directly benefit from the accommodation, and those persons who perceive that they would benefit on purely altruistic grounds from the accommodation. On a conceptual level, it is not clear what behavior of each class of those beneficiaries might serve as an adequate proxy for the willingness to pay that they would exhibit in a hypothetical negotiation, even assuming that they would all act rationally in such a negotiation when, for most persons, only minuscule expected benefits are at stake.[109] On a practical level, even were it possible to define the relevant proxy behavior, it would not be feasible to attempt to measure those benefits for each member of this vast class of diffuse minor beneficiaries.

The economic efficiency orientation, even if accepted as valid in principle, seems capable of practical application only in instances where the costs and benefits of an activity are both concentrated among a relatively small group of persons, most or all of whom are significantly impacted. Otherwise, the measurement problems appear to be virtually

109. The preferences revealed through disability insurance purchases, for example, would provide information only with regard to the willingness to pay for possible future compensation for losses resulting from disability, and not with regard to willingness to pay for employer accommodations for disabled workers.

insurmountable.[110] The disability employment accommodation context, however, is one in which the benefits are exceedingly diffuse, and thus is particularly poorly suited for application of efficiency measures.

E. *Summary*

The economic efficiency orientation to the implementation and evaluation of legal rules is based on a number of key premises and assumptions which appear quite problematic in the disability employment accommodation context. First, the use of a willingness to pay measure of value and wealth is open to severe criticism as philosophically inadequate and insensitive to issues of distributional justice, dimensions that are here particularly relevant. Second, the implicit assumption of rational behavior appears implausible in the context of a very large class of diffuse minor beneficiaries. Third, the conventional use of the Kaldor-Hicks rather than the Pareto efficiency criterion requires the acceptance of highly debatable utilitarian premises. Finally, it is likely to be impossible to obtain the data needed to make an efficiency determination in this context.

V. CONCLUSION

This article has examined the role that considerations of economic efficiency should play in determining the availability of the undue hardship defense provided by the employment provisions of the newly-enacted ADA. The conclusion reached is that the text of the statute, its legislative history, and the severe normative and operational shortcomings of the efficiency orientation in the disability employment accommodation context all indicate that efficiency concerns should be given little or no weight by EEOC or the courts in making these determinations.

The analysis presented above in Part IV of this article, however, has broad implications that extend well beyond the disability rights context. It is apparent that considerations of economic efficiency play, or are at least claimed to play, a substantial role in many administrative, legislative, and judicial decisions. It is not generally recognized by lawyers and other non-economists how many questionable premises and dubious assumptions are implicit in the widely accepted proposition that economic efficiency and wealth maximization are desirable social goals. Examination of these premises and assumptions in the disability employment accommodation context starkly reveals their shortcomings. Moreover, the

110. Rizzo, *supra* note 106 at 642; Schmalbeck, *The Justice of Economics: An Analysis of Wealth Maximization as a Normative Goal*, 83 COLUM. L. REV. 488, 504-506 (1983).

criticisms of the most crucial premises underlying the efficiency criterion— the validity of the willingness to pay theory of value and the legitimacy of the Kaldor-Hicks efficiency criterion—are quite robust, in the sense that they apply with considerable force even when the efficiency analysis is conducted in classic market contexts where the rationality assumption is more plausible and the cost/benefit measurement difficulties are more tractable.

The severity of the problems inherent in the application of economic efficiency criteria suggests that efficient resource allocation should perhaps be rejected as a valid social goal except under those highly restrictive circumstances where valuation and distributional issues are of minor import and where Pareto improvements are possible. Such a comprehensive rejection, of course, would have economic and political significance in that it would remove one of the primary justifications for relying heavily upon markets and simulated market mechanisms as allocative tools, and would consequently increase the comparative appeal of non-market allocative mechanisms. It would also vitiate one of the major justifications for social recognition of private property rights, which is that such rights are an essential precondition for markets to function effectively. A general repudiation of the economic efficiency orientation could lead to a re-examination of some of the most fundamental principles of our economic and social order, with potentially far-reaching consequences.