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## In Search of a Bright Line: Determining When an Employer's Financial Hardship Becomes "Undue" Under the Americans with Disabilities Act

Steven B. Epstein

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# **In Search of a Bright Line: Determining When an Employer's Financial Hardship Becomes "Undue" Under the Americans with Disabilities Act**

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*Steven B. Epstein*

48 Vand. L. Rev. 391 (1995)

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*The employment provisions of the Americans with Disabilities Act have been fully effective since July 26, 1994. These provisions require all employers with fifteen or more employees to reasonably accommodate the disabilities of job applicants and employees. Reasonable accommodation can be very expensive: one in every twenty accommodations now being made costs more than \$5,000. Although the ADA permits employers to refuse to make accommodations that would cause an "undue hardship," neither the statute nor its implementing regulations provide meaningful guidance regarding how great an accommodation expense must be before the point of "undue hardship" is attained. Consequently, neither employers nor employees can be sure what level of accommodation the ADA requires.*

*This Article argues that for the ADA to achieve its central objective of integrating millions of Americans with disabilities into the labor force, a very precise definition of "undue hardship" must be developed. The Article therefore constructs a quantitative methodology for making undue hardship determinations; the methodology utilizes a private employer's net working capital, net profit, and the size of its labor force to establish the precise point of undue hardship for any proposed accommodation. This methodology is designed to ensure that private employers maintain the ability to maximize profit, and that lower-paid employees are entitled to reasonable accommodation expenditures equal to those of higher-paid employees. By enabling employers and employees to determine their financial obligations and entitlements without resorting to litigation, the proposed methodology would truly facilitate the integration of millions of Americans with disabilities into the workforce.*

# In Search of a Bright Line: Determining When an Employer's Financial Hardship Becomes "Undue" Under the Americans with Disabilities Act

*Steven B. Epstein\**

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"[T]he bill is a swamp of imprecise language; it will mostly benefit lawyers who will cash in on the litigation' that will force judges to, in effect, write the real law."

Statement of Representative Norman D. Shumway  
prior to House passage of the ADA.<sup>1</sup>

"The ADA is a legislative Rorschach test, an inkblot whose meaning and significance will be determined through years of costly litigation."

Statement of Senator William Armstrong upon  
the ADA's passage in Congress.<sup>2</sup>

"Fears that the ADA is too vague or too costly and will lead to an explosion of litigation are misplaced."

Statement of President George Bush upon signing  
the Americans with Disabilities Act into law.<sup>3</sup>

## I. INTRODUCTION

Acme Products has an opening in its sales division. It advertises for the \$40,000/year position and begins to interview applicants. On paper, one applicant's credentials shine over all the rest. At her interviews, this applicant's enthusiasm, energy, and commitment impress everyone with whom she would work. As her prospective sales manager begins to make an offer, the applicant mentions that she has a disability—she has very poor vision and is, in fact, legally blind. Her disability prevents her from driving, reading documents, and using ordinary computers. To accommodate her disability, she reveals, she will need an assistant to drive her to sales calls and read documents; she also will need a specialized computer to allow her to perform word processing and formulate spreadsheets. These accommodations will cost \$5,000 annually. The sales manager postpones

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1. 135 Cong. Rec. E3064 (daily ed. Sept. 18, 1989) (quoting *The Lawyers' Employment Act*, Wall St. J. A18 (Sept. 11, 1989) (editorial)).

2. 136 Cong. Rec. S9694 (daily ed. July 13, 1990).

3. 26 Weekly Comp. Pres. Doc. 1165 (July 26, 1990), reprinted in 1990 U.S.C.C.A.N. 601.

making the offer and calls Acme's legal department to determine the scope of Acme's obligations in this situation. Much to the sales manager's surprise and chagrin, the legal department reports that, because of the vagueness of a critical provision of the governing federal statute, it cannot offer any concrete guidance regarding Acme's legal obligation to make these accommodations.

That federal statute is the Americans with Disabilities Act of 1990 ("ADA").<sup>4</sup> The ADA's employment provisions, Title I,<sup>5</sup> have been in full force and effect since July 26, 1994.<sup>6</sup> Congress intended for Title I to facilitate the transition of eight million Americans with disabilities from the disability welfare system into the labor market.<sup>7</sup>

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4. Pub. L. No. 101-336, 104 Stat. 327 (1990), codified at 42 U.S.C. §§ 12101-12213 and 47 U.S.C. §§ 225, 611 (Supp. 1993).

5. The ADA contains separate titles addressing four distinct areas in which new legal remedies are provided to people with disabilities who encounter discrimination: Title I—employment, 42 U.S.C. §§ 12111-12117; Title II—public services, 42 U.S.C. §§ 12131-12165; Title III—public accommodations, 42 U.S.C. §§ 12181-12189; and Title IV—telecommunications, 47 U.S.C. § 225. Housing discrimination against the disabled is proscribed by the Fair Housing Act Amendments of 1988 ("1988 FHAA"), Pub. L. No. 100-430, 102 Stat. 1619 (1988), codified at 28 U.S.C. §§ 2341, 2342 (Supp. 1992), 42 U.S.C. §§ 3601, 3602, 3604-3608, 3610-3614, 3615-3619, 3631 (1988). This Article focuses exclusively on Title I of the ADA.

6. Title I became effective for employers with 25 or more employees on July 26, 1992, two years after President Bush signed the ADA into law. 42 U.S.C. § 12111(5)(A). Title I became effective for employers with 15 to 24 employees on July 26, 1994. *Id.* The second "phase-in" period was intended to allow small businesses to learn from the experiences of larger employers. See 136 Cong. Rec. H3070-71 (daily ed. May 24, 1990) (recording House debate and vote on LaFalce-Campbell Amendment). Employers with fewer than 15 employees are not covered by the ADA. 42 U.S.C. § 12111(5)(A). Fifteen employees is also the statutory threshold for employer compliance with Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e(b) (1988). The EEOC estimates that 86% of the nation's workforce—86 million employees—is now covered by the ADA. EEOC News Release, *Disabilities Act Expands to Cover Employers with Fifteen or More Workers*, 1994 WL 376729, \*1 (located in E.E.O.C. database) (July 18, 1994).

7. Forty-nine million Americans are disabled. John M. McNeil, *Americans with Disabilities: 1991-92*, Current Population Reports P70-33 at 16 (U.S. Bureau of the Census, 1993). Over 13 million people with disabilities 21 to 64 years of age are unemployed. That is 48% of the disabled population in that age bracket. *Id.* at 62. A 1986 Lou Harris poll determined that approximately 8.2 million Americans with disabilities want to work but cannot find a job. Nearly half of them attributed their employment status to discrimination. National Council on Disability, *Implications for Federal Policy of the 1986 Harris Survey of Americans with Disabilities* 19 (1988); Senate Committee on Labor and Human Resources, *The Americans With Disabilities Act of 1990*, S. Rep. No. 101-116, 101st Cong., 1st Sess. 8 (1989); House Committee on Education and Labor, *Americans With Disabilities Act of 1990*, H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 2, at 32 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 314. "The practical effect of the ADA's employment provisions—assuming that they are enforced adequately—could be to enable over eight million workers with disabilities to enter the work force, thereby removing those individuals from government subsidy rolls and empowering them to become contributing, taxpaying members of society." Bonnie P. Tucker, *The Americans with Disabilities Act of 1990: An Overview*, 22 N.M. L. Rev. 13, 46 (1992) (symposium issue).

In 1994, another Harris Poll was taken to measure progress since the 1986 survey and since enactment of the ADA. The results were much the same, if not worse: the number of unemployed people with disabilities in the 16- to 64-year-old age bracket increased from the

To achieve that objective, Congress mandated that employers governed by Title I "reasonably accommodate" the disabilities of job applicants and employees.<sup>8</sup> Reasonable accommodation will often require employers to make financial expenditures to modify their facilities, purchase special equipment, or hire readers or interpreters.<sup>9</sup> A disabled employee's right or entitlement to such accommodations under Title I is limited only to the extent that they would cause an employer an "undue hardship."<sup>10</sup>

Most employers will not be asked to make accommodations as expensive as the ones requested of Acme Products, but some will. A recent study found that nine percent of all accommodations made under Title I cost employers \$2,001 to 5,000, while another five percent cost employers greater than \$5,000.<sup>11</sup> For example, a visually impaired insurance agent required an \$8,200 voice-synthesized computer. A legally blind paralegal applicant required a \$12,000 reading machine.<sup>12</sup> And, for office workers with severely impaired physical

1986 survey from 66% to 68%; the portion of that group that reported a desire to work increased from 66% to 79%. Humphrey Taylor, *Americans with Disabilities Make Gains in Education But Are No More Likely to be Working in 1993 Than They Were in 1986*, 45 *The Harris Poll* 1994, 4-5 (July 25, 1994). Combining the 1993 census numbers with the 1994 Harris Poll numbers, the number of unemployed people with disabilities in the 21 to 64 age bracket who want to work is currently over 10 million.

8. 42 U.S.C. § 12112(b)(5)(A), (B).

9. 42 U.S.C. § 12111(9); 29 C.F.R. § 1630.2(o)(2) (1994). The 1994 Lou Harris poll determined that 26% of the working-age disabled population needs special equipment or technology to work effectively. Taylor, 45 *The Harris Poll* 1994 at 2 (cited in note 7).

10. 42 U.S.C. § 12112(b)(5)(A); 29 C.F.R. § 1630.9(a).

11. As of September 30, 1994, the President's Committee on Employment of People with Disabilities' Job Accommodation Network ("JAN") had compiled data showing that of the accommodations it assisted employers with since October 1992, 18% were cost-free, 50% cost \$500 or less, 10% cost between \$501 and \$1,000, 8% cost between \$1,001 and \$2,000, 9% cost between \$2,001 and \$5,000, and 5% cost greater than \$5,000, with a mean accommodation expense of \$992. JAN, *Accommodation Benefit/Cost Data*, 4 (Sept. 30, 1994). In 1988, the JAN had reported that of the thousands of accommodations it had recommended for disabled employees between 1984 and 1988, 31% were cost-free, 38% cost less than \$500, 19% cost between \$500 and \$1,000, and 12% cost between \$1,000 and \$5,000. James G. Frierson, *Employer's Guide to the Americans with Disabilities Act* 103-04 (BNA, 1992) (citing JAN, *In the Mainstream*, Min. Report #4 (July-Aug. 1988)). The JAN's cost figures may be somewhat lower than reality because costs associated with making structural changes to the workplace—which can be very expensive—tend to be underreported in JAN's data. Interview with D.J. Hendricks, JAN (Dec. 6, 1994). Both a 1982 study sponsored by the U.S. Department of Labor and a 1990 study sponsored by the Government Accounting Office found that 8% of pre-ADA accommodations they studied involved costs greater than \$2,000. U.S. Dep't of Labor, 1 *A Study of Accommodations Provided to Handicapped Employees by Federal Contractors* 28-29 (1982) ("*Employees Accommodation Study*"); U.S. Gov't Accounting Office, *Persons with Disabilities, Reports on Costs of Accommodations*, Report No. B-237003 (1990). Similar studies are addressed at note 179 and accompanying text.

12. Frierson, *Employer's Guide to the Americans with Disabilities Act* at 106-07 (citing examples of accommodations that predated enactment of the ADA). See also Michael C. Collins, *The ADA and Employment: How it Really Affects People with Disabilities*, 28 *Gonzaga L. Rev.*

functions, a Prab Voice Command I package, which includes a computer, special monitor, voice-controlled keyboard, robotic arm, printer, telephone system, and a workstation custom designed for wheelchair use, retails for about \$50,000.<sup>13</sup> Indeed, prior to the ADA's enactment, the Bush Administration's Council of Economic Advisers estimated that Title I would require covered employers to spend between \$1.7 and \$10.2 billion annually to accommodate disabled employees.<sup>14</sup>

Significantly, a large percentage of the 666,000 private businesses now covered by Title I<sup>15</sup> had never before been required by federal or state law to allocate financial resources to accommodate employees with disabilities.<sup>16</sup> These businesses have little experience

209, 213-14 (1992-93) (symposium issue) (describing accommodations ranging from \$800 to \$7,000).

13. In 1989, this device sold for \$49,500. Frierson, *Employer's Guide to the Americans with Disabilities Act* at 107.

14. Gregory S. Crespi, *Efficiency Rejected: Evaluating "Undue Hardship" Claims Under the Americans with Disabilities Act*, 26 Tulsa L. J. 1, 4 n.17 (1990). The EEOC's estimate of annual reasonable accommodation costs that Title I will require was radically lower—\$16.4 million. 56 Fed. Reg. 8578, 8584 (1991). In the Author's opinion, the EEOC's estimate was grossly off the mark. See note 185.

15. The EEOC estimates that 264,000 businesses were covered by the initial phase-in of Title I (25 or more employees) and that an additional 402,000 fell within Title I's ambit when coverage was extended to employers with 15 or more employees on July 26, 1994. EEOC News Release, 1994 WL 376729 at \*1 (cited in note 6).

16. Indeed, the central purpose behind the enactment of Title I was to bring these private employers under the ambit of federal disability discrimination law. See 135 Cong. Rec. S10,711 (daily ed. Sept. 7, 1989) (recording the statement by Sen. Harkin that "[t]he ADA extends civil rights protections for people with disabilities to cover employment in the private sector. . ."); S. Rep. No. 101-116 at 19 (stating that "there are still no protections against discrimination by employers in the private sector") (cited in note 7). See also 42 U.S.C. § 12101(a)(4) (finding that "unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination").

Though 48 state statutes proscribed discrimination against the disabled in the private sector by the time of the ADA's enactment, 21 of those statutes did not require reasonable accommodation. See Alaska Stat. § 18.80.220 (1986 & Supp. 1989); Conn. Gen. Stat. § 46a-60 (1986 & Supp. 1989); Fla. Stat. § 760.10 (1986 & Supp. 1990); Ga. Code Ann. § 34-6A-4 (Supp. 1989); Haw. Rev. Stat. § 378-2 (1985 & Supp. 1989); Ind. Code § 22-9-1-13 (1976 & Supp. 1980); Kan. Stat. Ann. § 44-1009 (1986 & Supp. 1989); Ky. Rev. Stat. Ann. § 207.170 (Michie/Bobbs-Merrill 1989); 5 Me. Rev. Stat. Ann. § 4572 (1964 & Supp. 1989); Md. Ann. Code art. 49B § 16 (1986 & Supp. 1989); Neb. Rev. Stat. § 48-1104 (1988); Nev. Rev. Stat. § 613.340 (1986 & Supp. 1989); N.H. Rev. Stat. Ann. § 354-A:7 (1966 & Supp. 1989); N.J. Stat. Ann. § 10:5-12 (West 1976 & Supp. 1989); N.Y. Exec. Law § 296 (McKinney 1982 & Supp. 1990); Ohio Rev. Code Ann. § 4112.02 (Anderson 1980 & Supp. 1988); 25 Okla. Stat. § 1302 (1981); S.C. Code Ann. § 43-33-530 (Law Co-op, 1987); Teun. Code Ann. § 8-50-103 (1988 & Supp. 1989); Tex. Labor Code Ann. §§ 1.01-10.05 (Vernon 1987 & Supp. 1988); Utah Code Ann. § 34-35-6 (1988 & Supp. 1989). Moreover, four statutory schemes placed monetary limits on the costs employers were required to expend to reasonably accommodate employees with disabilities. See 19 Del. Code Ann. § 722(6)(d)(1) & (2) (Supp. 1988) (stating that undue hardship exists if employer must spend greater than five percent of the disabled employee's salary on accommodation); La. Rev. Stat. Ann. § 2253(19) (West 1982 & Supp. 1988) (stating that private employers are not required to

analyzing the accommodations needed by employees with disabilities;<sup>17</sup> they have even less experience drawing the line that divides legally mandated accommodations from those which would cause them an undue hardship. With so much riding on the meaning of "undue hardship," one would expect to find precise and detailed language in the ADA or its implementing regulations outlining specifically when the point of undue hardship is reached.<sup>18</sup> The statute, however, and implementing regulations promulgated by the Equal Employment Opportunity Commission ("EEOC"),<sup>19</sup> go essentially no further than to define undue hardship as a "significant difficulty or expense."<sup>20</sup> It appears that Congress consciously adopted this vague standard with the expectation that the courts would ultimately define its contours.<sup>21</sup>

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spend any money on reasonable accommodations); N.C. Gen. Stat. § 168A-3(10)(a)(6) (1987) (stating that undue hardship exists if the employer must spend greater than five percent of the disabled employee's salary on accommodation), discussed at note 209; Va. Code § 51.5-41(C)(2) (1987) (limiting reasonable accommodation costs to \$500 per employee). Therefore, only 23 of the 48 statutes provided for reasonable accommodation and undue hardship in a fashion similar to the ADA. See Ariz. Rev. Stat. Ann. § 41-1461(8)(d) (1985 & Supp. 1989); Cal. Gov't Code § 12440(a) (West 1980 & Supp. 1990); 1988 Colo. Rev. Stat. § 24-34-402(1)(b); D.C. Code § 1-2512 (1987 & Supp. 1989); Idaho Code § 67-5902(16)(d) (Supp. 1989); Ill. Rev. Stat. ch. 68, § 2-102 (1989); Iowa Code § 216.6 (1988); Mass. Ann. Laws ch. 151B § 4(16) (Michie/Law Co-op 1989); Mich. Comp. Laws Ann. § 37.1102 (West 1985) (this statute has since been radically amended, see note 268); Minn. Stat. Ann. § 363.03(6) (West 1991); Mo. Rev. Stat. § 213.010(10) (1983 & Supp. 1990); Mont. Code Ann. § 49-2-101(15)(b) (1989); N.M. Stat. Ann. § 28-1-7(J) (1978 & Supp. 1987); N.D. Cent. Code § 14-02.4-02(16)(d) (Supp. 1989); Or. Rev. Stat. § 659.425 (1987); 43 Pa. Cons. Stat. Ann. § 955 (Purdon 1964 & Supp. 1989); R.I. Gen. Laws § 28-5-7(1)(D) (1986 & Supp. 1989); S.D. Cod. Laws § 20-13-23.7 (1987 & Supp. 1989); 21 Vt. Stat. Ann. § 495d(12)(C) (Equity 1987 & Supp. 1989); Wash. Rev. Code § 49.60.180 (1987); W. Va. Code § 5-11-9 (1966 & Supp. 1989); Wis. Stat. § 111.34(1)(b) (1988 & Supp. 1989); Wyo. Stat. § 27-9-105(d) (1977 & Supp. 1989).

17. See Barbara A. Lee, *Reasonable Accommodation Under the Americans with Disabilities Act: The Limitations of Rehabilitation Act Precedent*, 14 Berkeley J. Empl. & Lab. L. 201, 203 (1993).

18. Such "safe-harbor" regulations have become increasingly common in highly regulated industries to protect the regulated community from unknowingly violating the law. See, for example, 12 C.F.R. §§ 18.11, 350.11 (1994) (establishing safe-harbor banking regulations); 26 C.F.R. §§ 1.61-1 et seq. (1994) (establishing safe-harbor tax regulations); 29 C.F.R. § 2510.3-2(g)(2) (1993) (establishing safe-harbor regulations relating to pension benefits); 40 C.F.R. § 300.1100 (1994) (establishing safe-harbor regulations concerning lender liability for violation of Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA")). Indeed, safe-harbor regulations protect builders from liability for violation of the ADA's twin sibling, the 1988 FHAA, so long as they comply with the relatively clear regulatory guidelines provided by the Department of Housing and Urban Development. 24 C.F.R. § 25, app. III to Subchapter A (1994). Unlike builders attempting to comply with the 1988 FHAA, however, employers attempting to comply with Title I of the ADA are not provided any safe-harbor guidelines regarding their obligation to reasonably accommodate employees with disabilities.

19. 29 C.F.R. §§ 1630.1-1630.16 (1994).

20. 42 U.S.C. § 12111(10); 29 C.F.R. § 1630.2(p)(1).

21. See notes 220-31 and accompanying text.



This Article focuses on the financial component ("significant . . . expense") of the undue hardship standard as it applies to private, for-profit employers.<sup>22</sup> It argues that Congress's adoption of this vague standard was a serious mistake, principally because the standard fails to define legal obligations and rights sufficiently to inform covered businesses and their employees with disabilities of the nature and extent of those obligations and rights. Congress has failed to supply any meaningful guidance regarding how far employers must go in accommodating disabled employees before the point of undue hardship is attained. Businesses that fail to correctly ascertain that point will be subject to liability for discrimination.<sup>23</sup> In reality, therefore, the vague standard compels employers to capitulate to employees' demands for accommodation, or take their chances that a court's interpretation of this vague standard will mirror their own. Furthermore, job applicants and employees are left in the awkward position of not knowing what accommodations they can rightfully demand from their employers. This situation will assuredly result in tense, if not hostile, relations between employers and employees with disabilities. Indeed, in the two years following Title I's effective date for employers with twenty-five or more employees, approximately 30,000 charges of ADA discrimination were filed, one-quarter of which involved reasonable accommodation issues.<sup>24</sup> The bottom line is that the vagueness of the undue hardship standard will, in all likelihood, frustrate the fulfillment of Title I's central goal: integrating millions of Americans with disabilities into the workforce.

Criticism abounds over Congress's and the EEOC's refusal to formulate concrete undue hardship guidelines, with commentators expressing fears that employer compliance with Title I will be impos-

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22. It will be left to others to analyze the parameters of the administrative component ("significant difficulty") of the undue hardship standard. This Article focuses exclusively on private, for-profit employers because issues regarding undue hardship are much more significant to those employers than to public or non-profit employers, see notes 210-19 and accompanying text, and because most public and non-profit employers have already been exposed to the reasonable accommodation obligation and undue hardship standard for many years, see notes 59-81 and accompanying text.

23. Since 1991, this liability has included not only the panoply of equitable remedies available under Title VII, 42 U.S.C. § 12117(a) (Supp. 1993), but also compensatory and punitive damages up to \$300,000. 42 U.S.C. § 1981a(b)(3)(D) (Supp. 1993). See notes 220, 229 and accompanying text.

24. As of June 30, 1994 (less than two years following the ADA's effective date), 29,720 charges of Title I discrimination had been filed with the EEOC, 25% of which included a charge that an employer had failed to reasonably accommodate an employee with a disability. *Disabilities Act: Greater Activism, Awareness Mark ADA as Law Extends to Small Employers*, Daily Lab. Rep. C-1, C-1 (July 26, 1994).

sible, financially ruinous, or both.<sup>25</sup> Yet no legislative or regulatory proposals have been advanced to date to clarify the point at which an employer's obligation to accommodate reaches the level of undue hardship.<sup>26</sup> This Article proposes a model that satisfies that objective

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25. See, for example, Lisa A. Lavelle, Note, *The Duty to Accommodate: Will Title I of the Americans with Disabilities Act Emancipate Individuals with Disabilities Only to Disable Small Businesses?*, 66 Notre Dame L. Rev. 1135, 1193-94 (1991) (stating that "[t]he fear is that the duty to hire individuals with disabilities . . . will prove to be so costly and burdensome as to destroy small businesses"); Gerald T. Holtzman, Kyle L. Jennings, and David J. Schenk, *Reasonable Accommodation of the Disabled Worker—A Job for the Man or a Man for the Job*, 44 Baylor L. Rev. 279, 279 (1992) (stating that the ADA "promises to be both a source of new litigation worries and a potential compliance nightmare for large and small businesses alike"); Thomas H. Barnard, *The Americans with Disabilities Act: Nightmare for Employers and Dream for Lawyers?*, 64 St. John's L. Rev. 229, 252 (1990) (commenting that "[t]he ADA, while well-conceived and well-intended, will place an onerous burden on employers"); David Harger, Note, *Drawing the Line Between Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act: Reducing the Effects of Ambiguity on Small Business*, 41 U. Kan. L. Rev. 783, 791 (1993) (stating that "[t]he deliberate failure of Congress to provide clarification of reasonable accommodation and undue hardship is wholly insensitive to small businesses"); George C. Dolaty, Comment, *The Future of the Reasonable Accommodation Duty in Employment Practices*, 26 Colum. J. L. & Soc. Probs. 523, 547 (1993) (noting that "[w]ith insufficient guidelines as to how much accommodation is enough, there is the possibility that overall cost, both to employers and to the judicial system, may eventually outweigh the considerable social benefits of the ADA"); Floyd D. Weatherspoon, *The Americans with Disabilities Act of 1990: Title I and its Impact on Employment Decisions*, 16 Vt. L. Rev. 263, 282 (1991) (stating that "[t]he difficulty of complying . . . seems not to be a result of employers having a recalcitrant disposition toward such laws, but that it is difficult to identify what constitutes reasonable accommodation and what sufficiently establishes undue hardship"); Edwina Allison Wilson, *Practical Considerations for Compliance Under the Americans with Disabilities Act*, 28 Gen. L. Rev. 265, 282 (1992/93) (symposium issue) ("[t]his lack of guidance can be detrimental to employers").

26. Four student authors have made such proposals. See Julie Brandfield, Note, *Undue Hardship: Title I of the Americans With Disabilities Act*, 59 Fordham L. Rev. 113, 131 (1990) (suggesting a definition of undue hardship that is related to the effect of the accommodation on profitability and morale, discussed in note 277; Jeffrey O. Cooper, Comment, *Overcoming Barriers to Employment: The Meaning of Reasonable Accommodation and Undue Hardship in the Americans with Disabilities Act*, 139 U. Pa. L. Rev. 1423, 1454 (1991) (proposing a test under which undue hardship exists if the cost of of the accommodation would "either (a) substantially impair the ability of the employer to produce goods or provide services, or (b) impose such a high cost that the employer would be forced to compensate by reducing the overall workforce), discussed in note 306; Dolaty, Comment, 26 Colum. J. L. & Soc. Probs. at 548-49 (proposing a statutory definition of undue hardship based on the overall operating costs of the employer and customary expenditures for like employees); Steven F. Stuhlberg, Comment, *Reasonable Accommodation Under the Americans with Disabilities Act: How Much Must One Do Before Hardship Turns Undue*, 59 U. Cin. L. Rev. 1311, 1346-47 (1991) (proposing a complex test for determining the maximum cost of accommodations that an employer would be required to make both per applicant and per year), discussed in note 289.

Others have waged broad-scale attacks on Title I generally. Professor Richard A. Epstein (no relation), for example, rejects Title I as "simply another way of seizing partial control of a business from its firm managers and of forcing a redistribution of wealth off the public balance sheet." Richard A. Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Law* 488 (Harvard U., 1992). Epstein argues that Title I should be replaced with a government grant system focused on concentrating employees with disabilities in certain workplaces. *Id.* at 493. Similarly, Professor Jerry L. Mashaw argues that Title I is "deeply-flawed" in part because it "mandates expenditures by private parties now assumed to be bad actors." Jerry L. Mashaw,

while striking a fair balance between the interests of people with disabilities and their employers.

Part II of this Article exposes the vague undue hardship standard in the ADA's statutory and regulatory provisions. Part III explores the ADA's legislative history to determine what Congress intended when it adopted this standard. Part IV identifies the rationales relied on by Congress in selecting this vague standard over a more precise standard advocated by the business lobby. These rationales are examined under the bright light of history, and are rejected as flawed. Part IV concludes that history, logic, and sound public policy demand that the vague undue hardship standard be discarded in favor of a precise, quantitative standard.

Part V returns to the drawing board, and refocuses on the ADA's legislative history with an eye toward the broad moral principles Congress embraced in adopting the undue hardship standard. Part V then uses those principles as a foundation upon which a completely new, quantitative model of undue hardship is constructed. Part VI puts the new model to the test. It first employs Professor Colon Diver's "precision calculus" to measure whether the model proposed actually achieves the optimal level of precision.<sup>27</sup> Part VI then applies the model to several American corporations, using publicly available data, to determine whether it clearly defines the scope of disabled employees' new rights and employers' new obligations in a manner that fairly balances the interests of people with disabilities and their employers. The Article concludes by urging that the ADA

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*Against First Principles*, 31 San Diego L. Rev. 211, 231 (1994). He proposes that Title I be discarded in favor of:

explicit quota requirements for employers with a market in "rights to discriminate" against the disabled. In broad outline this scheme is quite simple: estimate the number of disabled workers who might with reasonable accommodation be employed; divide that number by the total number of workers in the economy; and require that each employer hire that percentage of its workforce from the pool of "disabled" workers. Employers who fail to hire their share of disabled workers would have to buy a waiver from employers who are employing more than their share.

*Id.* at 232.

The Author rejects both of these proposals out of hand, for their starting points embrace a society in which discrimination against the disabled is a socially acceptable form of behavior and in which the goal is to ghettoize people with disabilities in certain industries, rather than attempting to integrate them into the vocational and economic mainstream. Indeed, Professor Mashaw's solution of bartering employment of disabled workers for cash harkens back to a day when slaves were auctioned at the public square. The ADA appropriately attempts to accelerate our collective social conscience in the exact opposite direction.

27. See generally Colon S. Diver, *The Optimal Precision of Administrative Rules*, 93 Yale L. J. 65 (1983).

be amended to transform the presently vague undue hardship standard into one resembling the quantitative model proposed.

## II. THE VAGUE STANDARD

Title I of the ADA protects "a qualified individual with a disability" from discrimination regarding any term, condition, or privilege of employment.<sup>28</sup> An employee is a "qualified individual with a disability" if, "with or without reasonable accommodation," she "can perform the essential functions of the . . . position" at issue.<sup>29</sup> "Reasonable accommodation" consists of any alteration in the work environment which enables a disabled employee to enjoy equal employment opportunities with non-disabled employees.<sup>30</sup> Examples of reasonable accommodation listed in the statute 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.<sup>31</sup>

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28. 42 U.S.C. § 12112(a); 29 C.F.R. § 1630.4. "Disability" is defined as a physical or mental impairment that substantially limits one or more of a person's major life activities, a record of such impairment, or being regarded as having such impairment. 42 U.S.C. § 12102(2); 29 C.F.R. § 1630.2(g).

29. 42 U.S.C. § 12111(8). The regulations further define a "qualified individual with a disability" as "an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position." 29 C.F.R. § 1630.2(m). "Essential functions" are defined as "the fundamental job duties of the employment position the individual with a disability holds or desires" and "does not include the marginal functions of the position." 29 C.F.R. § 1630.2(n)(1).

30. 29 C.F.R. app. § 1630.2(o) (1994). See EEOC, *Technical Assistance Manual for the Americans with Disabilities Act* ("EEOC Manual") § 3.3 at III-2 (Warren Gorham Lamont, 1992) (stating that "[r]easonable accommodation is a modification or adjustment to a job, the work environment, or the way things usually are done that enables a qualified individual with a disability to enjoy an equal employment opportunity"). The reasonable accommodation obligation requires that an employee be given the opportunity to attain the same level of performance as similarly situated employees without disabilities: the goal is to remove physical or structural barriers which would prevent the employee from fully performing the essential functions of the position. 29 C.F.R. app. § 1630.9 (1994). However, the reasonable accommodation obligation does not require an employer to provide adjustments or modifications to assist the individual throughout her daily activities, such as provision of a prosthetic limb, wheelchair, or eyeglasses, unless such items are specifically related to the employment at issue. *Id.*

31. 42 U.S.C. § 12111(9). See 29 C.F.R. § 1630.2(o)(2). Other examples listed in the regulations include making employer-provided transportation, break rooms, training rooms, and

Whether a particular form of assistance is required as a reasonable accommodation must be determined on a case-by-case basis.<sup>32</sup> An employer need not make the "best" accommodation possible under the circumstances; its obligation ends with providing an accommodation sufficient to meet the job-related needs of the employee. Therefore, the employer may choose the least expensive or simplest accommodation that is effective for the purposes intended.<sup>33</sup>

Title I renders it illegal for an employer to refuse to make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability unless the employer can demonstrate that making the accommodation would cause an "undue hardship" on the operation of its business.<sup>34</sup>

- (A) 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 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

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restrooms accessible; providing reserved parking spaces; and providing personal assistants, such as a page turner for an employee with no hands or a travel attendant to assist a blind employee on occasional business trips. 29 C.F.R. app. § 1630.2(o) (1994); S. Rep. No. 101-116 at 31 (cited in note 7); H.R. Rep. No. 101-485, pt. 2 at 62, pt. 3 at 39 (cited in note 7), reprinted in 1990 U.S.C.C.A.N. 445, 462 (listing other accommodations). In addition to expensive assistive equipment, illustrated in notes 12-13 and accompanying text, the provision of readers, interpreters, and other personal assistants can be very expensive, inasmuch as it requires paying a second salary to assist the employee with the disability.

32. See 29 C.F.R. app. § 1630.9 (describing the reasonable accommodation process).

33. *Id.*

34. 42 U.S.C. § 12112(b)(5)(A); 29 C.F.R. § 1630.9(a). See 29 C.F.R. § 1630.15(d) (characterizing "undue hardship" as a defense to reasonable accommodation). Likewise, it is a discriminatory employment practice under the ADA for an employer to reject an employment applicant for a position, or fire an employee, solely because hiring or retaining that individual would necessitate reasonable accommodation. 42 U.S.C. § 12112(b)(5)(B); 29 C.F.R. § 1630.9(b). The need to accommodate cannot legally enter into an employer's decision regarding hiring, discharge, or promotion unless the accommodation would cause an undue hardship. 29 C.F.R. app. § 1630.9(b).

- (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.<sup>35</sup>

“Significant difficulty or expense” is further defined in the regulations as any accommodation that would be “unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business.”<sup>36</sup> The regulations also reveal that undue hardship under the ADA is significantly different from undue hardship in religious accommodation cases under Title VII of the Civil Rights Act of 1964.<sup>37</sup> “To demonstrate undue hardship pursuant to the ADA . . . an employer must show substantially more difficulty or expense than would be needed to satisfy the ‘de minimis’ Title VII standard of undue hardship.”<sup>38</sup>

In addition to the four undue hardship factors outlined in the statute, a fifth is contained in the regulations: “The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility’s ability to conduct business.”<sup>39</sup> The list of

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35. 42 U.S.C. § 12111(10); 29 C.F.R. § 1630.2(p)(2). The distinction between “facility” and “covered entity” subsumed within the second, third, and fourth factors relates to business establishments that operate more than one structural facility. In that situation, the undue hardship analysis begins with a factual determination of whether there is a sufficient financial nexus between the business enterprise as a whole and the facility in question to base the ultimate determination on the resources of the larger enterprise rather than the smaller facility. For instance, in a simple franchisor/franchisee relationship, the financial resources of the franchisee will be determinative. 29 C.F.R. § app. 1630.2(p) (1994). In contrast, if a business owns several stores and operates them all centrally from the home office using the financial resources of the organization as a whole, the resources of the central enterprise will be determinative. *EEOC Manual* at § 3.9 (cited in note 30). See H.R. Rep. No. 101-485, pt. 2 at 68-69 (cited in note 7) (stating that the court will examine the practical realities of the situation). The theory of “piercing the corporate veil” should be equally applicable in the ADA undue hardship context as it is in the corporate liability context. See generally David H. Barber, *Piercing the Corporate Veil*, 17 *Williamette L. Rev.* 371 (1981); Jonathan M. Landers, *A Unified Approach to Parent, Subsidiary, and Affiliate Questions in Bankruptcy*, 42 *U. Chi. L. Rev.* 589 (1975); Wilson McLeod, *Shareholders’ Liability and Workers’ Rights: Piercing the Corporate Veil Under Federal Labor Law*, 9 *Hofstra Lab. L. J.* 115 (1991); Rebert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 *Cornell L. Rev.* 1036 (1991).

36. 29 C.F.R. app. § 1630.2(p). *EEOC Manual* at § 3.9, III-12; S. Rep. No. 101-116 at 35 (cited in note 7); H.R. Rep. No. 101-485, pt. 2 at 67.

37. 29 C.F.R. app. § 1630.15(d) (1994). See 42 U.S.C. §§ 2000e(j) (1988) (describing undue hardship for religious accommodation).

38. 29 C.F.R. app. § 1630.15(d). See note 170 and accompanying text for further discussion of the comparison between undue hardship under Title VII and undue hardship under Title I of the ADA.

39. 29 C.F.R. § 1630.2(p)(2)(v). However, an employer cannot claim undue hardship merely because an accommodation has a negative impact on the morale of other employees. 29 C.F.R. app. § 1630.15(d).

factors contained in the statute and regulations was not meant to be exclusive.<sup>40</sup> Another factor which might be considered in determining undue hardship is the number of present and future employees who will benefit from the proposed accommodation.<sup>41</sup> However, the fact that an accommodation benefits only one person does not weigh in favor of a finding of undue hardship.<sup>42</sup> Furthermore, an employer may not claim undue hardship simply because the cost of an accommodation is high in relation to an employee's wage or salary.<sup>43</sup> Ultimately, whether a particular accommodation will cause an employer an undue hardship must be determined on a case-by-case basis,<sup>44</sup> and the "burden is on the employer to demonstrate that the needed accommodation would cause an undue hardship."<sup>45</sup>

Before an employer may refuse to make a reasonable accommodation because of undue hardship, it must consider whether alternative accommodations are possible which would not cause an undue hardship.<sup>46</sup> In addition, the portion of the cost which would be borne by sources unaffiliated with the employer, such as vocational rehabili-

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40. H.R. Rep. No. 101-485, pt. 2 at 69 (cited in note 7).

41. *Id.* Moreover, "[t]he terms of a collective bargaining agreement may be relevant in determining whether an accommodation would impose an undue hardship." *EEOC Manual* at § 3.9 (cited in note 30).

42. H.R. Rep. No. 101-485, pt. 2 at 69.

43. *EEOC Manual* at § 3.9, III-15 (cited in note 30). "[T]o demonstrate that the cost of an accommodation poses an undue hardship, an employer would have to show that the cost is undue as compared to the employer's budget. Simply comparing the cost of the accommodation to the salary of the individual with a disability in need of the accommodation will not suffice." 29 C.F.R. app. § 1630.15(d). For further discussion of the unavailability of this defense, see note 200.

44. 29 C.F.R. app. § 1630.15(d); *EEOC Manual* at § 3.9; H.R. Rep. No. 101-485, pt. 3 at 42 (cited in note 7). "[A]n accommodation that poses an undue hardship for one employer at a particular time may not pose an undue hardship for another employer, or even for the same employer at another time." 29 C.F.R. app. § 1630.15(d). Subsequent to the enactment of the ADA, Congress enacted the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991), codified at 42 U.S.C. § 1981a (Supp. 1993), which, among other things, affords a jury trial right to persons claiming entitlement to compensatory or punitive damages under the Title I of the ADA. 42 U.S.C. § 1981a(c)(1), (d)(1)(B) (Supp. 1993). It is unclear to what extent, if any, the undue hardship determination is to be left to the jury. In view of the sparse statutory and regulatory gloss on the undue hardship standard, it is difficult to conceive of a jury instruction which would both: (1) provide meaningful guidance to the jury; and (2) be premised on existing law. Nevertheless, in *Dutton v. Johnson County Board of County Commissioners*, 868 F. Supp. 1260 (D. Kan. 1994), the Court apparently submitted the question of undue hardship to the jury, which "implicitly found that allowing plaintiff to supplement his annual sick leave with unscheduled vacation leave would not be an undue hardship, as that term is defined in the ADA, for the Johnson County Public Works Department." *Id.* at 1264-65. See note 159.

45. H.R. Rep. No. 101-485, pt. 3 at 42. See 29 C.F.R. app. § 1630.15(d) (describing what the employer must show to prove undue hardship).

46. See 29 C.F.R. § 1630.2(o)(1)-(3) (describing several reasonable accommodations and the process of determining additional reasonable accommodations).

tation agencies,<sup>47</sup> or which would be offset by tax deductions or credits,<sup>48</sup> is not to be considered as a cost to the employer.<sup>49</sup> Even if an employer can successfully demonstrate that the *total* net cost of an accommodation would impose an undue hardship on its business, it is nevertheless obligated to pay for the *portion* of the accommodation which would not impose an undue hardship; the employee must then be given the opportunity to cover the remaining expense either with her own funds or with the assistance of external sources.<sup>50</sup> It is in this provision that the unworkability of the vague undue hardship standard is immediately apparent, for this provision necessarily assumes that the definition and factors discussed above can actually be translated into dollars and cents.<sup>51</sup> How else could an employer determine that its obligation to accommodate an employee's disability extends to only \$1,500 of a \$2,000 proposed accommodation?<sup>52</sup>

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47. In many cases a state rehabilitation agency, a public interest group such as the Braille Institute, or the employee, will pay part or all of the cost of the accommodation. For example: In 47 placements of visually impaired workers arranged by the Sensory Aids Foundation of Palo Alto, California, the employer paid for the accommodation device in only 14 cases and shared the cost in 3 other cases. In 27 cases a state vocational rehabilitation agency or public interest group paid the cost, while in another 3 cases the employee provided the accommodation device.

Frierson, *Employer's Guide to the Americans with Disabilities Act* at 101 (cited in note 11) (citing Sensory Aids Foundation Study).

48. Tax benefits allowed under the Internal Revenue Code for compliance with federal disabilities laws include a tax deduction of up to \$15,000 a year for removal of qualified architectural or transportation barriers, I.R.C. § 190 (1994), a tax credit of up to \$5,125 a year for the provision of reasonable accommodations by small businesses, I.R.C. § 44 (1994), and a tax credit of up to \$2,400 a year for the employment of individuals with "targeted" disabilities. I.R.C. § 51 (1994). For a more detailed discussion of these tax benefits, see *EEOC Manual* at § 3.11a, III-34-6 (cited in note 30).

49. 29 C.F.R. app. § 1630.2(p). Hence, it is only the proposed accommodation's "net cost" to the employer that is material to the undue hardship analysis. *Id.*; *EEOC Manual* at § 3.9, III-12-13. See S. Rep. No. 101-116 at 36 (cited in note 7) (discussing the employer's obligation to pay for the portion of the reasonable accommodation not causing undue hardship). See also H.R. Rep. No. 101-485, pt. 2 at 69 (cited in note 7).

50. 29 C.F.R. app. §§ 1630.2(p), 1630.15(d); *EEOC Manual* at § 3.1, III-1; S. Rep. No. 101-116 at 36; H.R. Rep. No. 101-485, pt. 2 at 69. The regulations and *EEOC Manual* are silent regarding whether the employer and employee may contract for a reduction in wages in exchange for the employer providing funds to accommodate the disabled employee beyond the point of undue hardship. The Author suspects that the EEOC and courts will frown on such agreements if the employer reduces the employee's salary to recoup the entire accommodation expense. Nevertheless, to the extent such contracts are negotiated at arm's length *after* the employer has agreed to commit significant resources to accommodate the disabled employee, the EEOC and courts should be willing to accept such arrangements to allow disabled employees to secure otherwise unattainable accommodations.

51. "It follows that, in order to comply fully with the ADA, an employer would have to know to the penny the exact point at which an accommodation would become an undue hardship." Stuhlberg, 59 U. Cin. L. Rev. at 1316 n.23 (cited in note 26).

52. The *EEOC Manual* provides: "For example: If the cost of an assistive device is \$2,000, and an employer believes that it can demonstrate that spending more than \$1,500 would be an



Unfortunately, nothing in the statute or regulations provides the calculus for such a translation. Rather, from the statute and regulations we glean only that undue hardship is something more than a de minimis expenditure—one which is significant, unduly costly, extensive, substantial, or disruptive in light of the nature and resources of the business where the employee with a disability is to work. This is the “standard” from which hundreds of thousands of private employers will have to draw the line between illegal discrimination and legitimate claims of undue hardship. To better understand how this standard evolved, we will now explore the ADA’s legislative history.

### III. WHAT WAS CONGRESS THINKING?

Why did Congress leave the definition of undue hardship so vague? No explanation is provided in the statute itself. Indeed, one of the central purposes listed in the ADA is antithetical to such a vague standard: “to provide *clear, strong, consistent, enforceable standards* addressing discrimination against individuals with disabilities.”<sup>53</sup> To properly analyze the legislative thinking which underpinned the ADA’s hazy undue hardship standard, we must first acquaint ourselves with the ADA’s older sibling, the Rehabilitation Act of 1973,<sup>54</sup> for it was in the wake of the Rehabilitation Act that the concept of undue hardship first evolved.

#### A. *Undue Hardship Under the Rehabilitation Act*

##### 1. The 1973 Act and Amendments

In 1964, Congress opened the doors to full membership in society to Americans of all colors, nationalities, religions, and gender by enacting the Civil Rights Act of 1964.<sup>55</sup> It was not until 1973, how-

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undue hardship, the individual with a disability should be offered the option of paying the additional \$500.” *EEOC Manual* at § 3.9, III-16 (cited in note 30).

53. 42 U.S.C. § 12101(b)(2) (emphasis added). Congress also intended for the regulations drafted to implement Title I to be “comprehensive and easily understood.” 56 Fed. Reg. 35,726 (1991).

54. Pub. L. No. 93-112, 87 Stat. 355 (1973). The discussion of the act in this Article will focus on §§ 501, 503, and 504 of Title V, 87 Stat. 390, 393, 394 (1973), codified as amended at 29 U.S.C. §§ 791, 793, 794 (Supp. 1992) respectively.

55. Pub. L. No. 88-352, 78 Stat. 241 (1964), codified at 42 U.S.C. §§ 1971, 1975a-1075d, 2000a et seq. (1988).

ever, that Congress even nudged those doors ajar<sup>56</sup> to Americans with disabilities by enacting the Rehabilitation Act of 1973.<sup>57</sup> The stated goal of the Rehabilitation Act was notable only for its modest scope: "to develop and implement, through research, training, services, and the guarantee of equal opportunity, comprehensive and coordinated programs of vocational rehabilitation and independent living, for individuals with handicaps in order to maximize their employability, independence, and integration into the workplace and community."<sup>58</sup>

Section 501 of the Rehabilitation Act requires all federal departments and agencies to conceive and implement affirmative action plans for the hiring, placement, and advancement of individuals with disabilities.<sup>59</sup> Section 503 requires entities that contract with the federal government for more than \$10,000 to use affirmative action to employ people with disabilities.<sup>60</sup> Only Section 504 contains a specific antidiscrimination mandate: "No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . ."<sup>61</sup> Section 504 prohibits discrimination not only in employment, but also in educa-

56. One commentator has noted that: "While section 504 [of the Rehabilitation Act] has unlocked the door for handicapped persons to enter the mainstream of society, it has failed in its goal of opening that door wide." Bonnie P. Tucker, *Section 504 of the Rehabilitation Act After Ten Years of Enforcement: The Past and the Future*, 1989 U. Ill. L. Rev. 845, 915.

57. Congress had actually passed a similar version of the Rehabilitation Act in 1972, only to be vetoed twice by President Nixon. Steven William Gerse, Note, *Mending the Rehabilitation Act of 1973*, 1982 U. Ill. L. Rev. 701, 704. See 8 Weekly Comp. of Pres. Doc. 1579 (Oct. 27, 1972) (explaining President Nixon's reasons for vetoing the Rehabilitation Act of 1972); 9 Weekly Comp. of Pres. Doc. 302 (Mar. 27, 1973) (explaining President Nixon's objections to the Senate version of the Rehabilitation Act of 1972).

58. Rehabilitation Act § 2, 87 Stat. at 357. Regarding employment, one stated purpose of the Rehabilitation Act was to "promote and expand employment opportunities in the public and private sectors for handicapped individuals and to place such individuals in employment." *Id.*

59. 29 U.S.C. § 791(b) (1988).

60. 29 U.S.C. § 793(a) (Supp. 1993). Until October 1992, the amount had been \$2,500.

61. 29 U.S.C. § 794(a) (Supp. 1993), as amended by Rehabilitation Act Amendments of 1974, Pub. L. No. 98-516, 88 Stat. 1617 (1974), Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, 106 Stat. 4344 (1992). This language was obviously extracted from Title VI of the Civil Rights Act of 1964, which provides in pertinent part that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (1988). See *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 277-78 & n.2 (1987) (discussing Congress's intent to pattern § 504 after Title VI) (discussed in notes 100-05 and accompanying text).

tion, public facilities, mass transportation, and in the allocation of health and welfare services.<sup>62</sup>

Section 504 was enacted into law with neither implementation provisions nor authorization for promulgation of regulations;<sup>63</sup> it was also enacted without any definitive legislative history or guidance.<sup>64</sup> In recognition of this oversight, when Congress amended Section 504 in 1974, it clarified that this section "constitutes the establishment of a broad government policy that programs receiving Federal financial

62. 29 U.S.C. § 794(b) (1988). See generally Bonnie P. Tucker and Bruce A. Goldstein, *Legal Rights of Persons with Disabilities: An Analysis of Federal Law* ch. 3, 5, 6, 7, 10, 11 (LRP, 1990 and Supps. 1991-94).

63. As one student author has commented:

Section 504 . . . stands naked within the Rehabilitation Act. It is unaccompanied by any implementation provisions. Nothing within the Rehabilitation Act indicates whether section 504 is merely a grand statement of national policy or a specific mandate for the creation of an extensive body of civil rights regulations. No authority is delegated to any agency to promulgate or enforce regulations under the Act. This silence must be contrasted with the language of section 503 of the Rehabilitation Act, which, in forbidding discrimination against the handicapped by government contractors, contains a detailed explanation of the implementing regulations to be drafted.

Mark F. Engehretson, Note, *Administrative Action to End Discrimination Based on Handicap: HEW's Section 504 Regulation*, 16 Harv. J. on Legis. 59, 63 (1979).

64. *Id.*; Resalie K. Murphy, Note, *Reasonable Accommodation and Employment Discrimination Under Title I of the Americans with Disabilities Act*, 64 S. Cal. L. Rev. 1607, 1616 (1991). Indeed, not a word about this section was uttered by a single member of Congress in any of the hearings or floor debates which preceded its enactment. Richard K. Scotch, *From Good Will to Civil Rights: Transforming Federal Disability Policy* 53 (Temple U., 1984); Brandfield, 59 Fordham L. Rev. at 116 n.27 (cited in note 26). Even most groups concerned with disability issues did not take note of § 504 at the time of its enactment. *Id.* at 52. The only reference to § 504 in the legislative history of the Rehabilitation Act was an eloquent statement from a representative of the National Federation of the Blind at a subcommittee hearing:

[T]he provision . . . prohibiting discrimination against the physically and mentally impaired in any Federally assisted program is of major consequence to all disabled people as they strive to surmount the difficulties and disadvantages of their disabilities and endeavor to attain a normal, productive and fulfilling life.

This civil rights for the handicapped provision . . . brings the disabled within the law when they have been so long outside of the law.

It establishes that because a man is blind or deaf or without legs, he is not less a citizen, that his rights of citizenship are not revoked or diminished because he is disabled.

But most important of all, the civil rights for the handicapped provision . . . creates a legal remedy when a disabled man is denied his rightful citizenship rights because of his disability.

It gives him a legal basis for recourse to the courts that he may seek to remove needless barriers, unnecessary obstacles and unjustified barricades that impede or prevent him from functioning fully and in full equality with all others.

Rehabilitation Act, 1973, Hearings on S.7 Before the Subcomm. on the Handicapped of the Senato Comm. on Labor and Public Welfare, 93d Cong., 1st Sess. 282-83 (1973). See Scotch, *From Good Will to Civil Rights* at 54-55.

assistance shall be operated without discrimination on the basis of handicap."<sup>65</sup> Nevertheless, the Act remained ineffective in helping to bring people with disabilities into the mainstream of society until 1978, when additional amendments were enacted.<sup>66</sup> Among other things, the 1978 amendments extended Section 504's antidiscrimination mandate to federal executive agencies and the United States Post Office,<sup>67</sup> and granted handicapped individuals a private right of action for violation of Section 504.<sup>68</sup> The remedies provided by this new right of action included injunctions, affirmative rehiring, back pay, and attorney fees.<sup>69</sup> Moreover, without expressly stating so, the 1978 amendments implied that the Rehabilitation Act required covered employers to reasonably accommodate employees unless doing so would be excessively costly: "In fashioning an equitable or affirmative action remedy under [Section 501], a court may take into account the reasonableness of the cost of any necessary work place accommodation. . . ."<sup>70</sup>

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65. Rehabilitation Act Amendments of 1974, S. Rep. No. 93-1297, 93d Cong., 2d Sess. 39 (1974), reprinted in 1974 U.S.C.C.A.N. 6373, 6390. See Comment, *Section 504 of the Rehabilitation Act: Analyzing Employment Discrimination Claims*, 132 U. Pa. L. Rev. 867, 870 (1984) (noting the effect of the 1974 amendment as "after-the-fact" legislative history). As the discussion to this point already indicates, the preferred vernacular for discussing issues related to people with disabilities has changed over the years. To the extent possible, the Author uses the currently preferred vernacular, which favors the word "disability" over "handicap," and refers to people with disabilities as "people first." However, when quoting the language used by others in an earlier historical period, the Author has left the vernacular of that period undisturbed.

66. Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 ("1978 Amendments"), Pub. L. No. 95-602, 92 Stat. 2955 (1978), codified in scattered sections of 29, 32, 42 U.S.C.

67. 1978 Amendments, § 119(2), 92 Stat. 2955, 2982 (current version at 29 U.S.C. § 794(a) (Supp. 1993)). The amendments did not, however, make § 504's antidiscrimination mandate applicable to government contractors, the only truly private employers covered by the Rehabilitation Act.

68. 1978 Amendments, § 120(a), 92 Stat. 2955, 2982, codified at 29 U.S.C. § 794(a) (1988). See Gerse, 1982 U. Ill. L. Rev. at 705 (cited in note 57) (discussing the remedies available under § 504). These amendments also created a private right of action under § 501. 1978 Amendments, § 120(a), 92 Stat. 2955, 2982 (current version at 29 U.S.C. § 794a(a) (Supp. 1993)). The amendments did not, however, create a private right of action under § 503, which, to this day, requires aggrieved individuals to pursue administrative claims through the Department of Labor. 29 U.S.C. § 793(b) (Supp. 1993). See, for example, *D'Amato v. Wisconsin Gas Co.*, 760 F.2d 1474, 1483-84 (7th Cir. 1985) (discussing lack of private right of action under § 503); *Hodges v. Atchison, Topeka & Santa Fe Ry.*, 728 F.2d 414, 416 (10th Cir. 1984) (holding that the legislative history does not support a private right of action under § 503); *Painter v. Horne Bros., Inc.*, 710 F.2d 143, 144 (4th Cir. 1983) (holding that there is no private right of action under § 503); *Beam v. Sun Shipbuilding & Dry Dock Co.*, 679 F.2d 1077, 1078 (3d Cir. 1982) (holding that there is no private right of action under § 503).

69. 29 U.S.C. § 794(a). See 42 U.S.C. § 2000e-5(g) (Supp. 1993) (incorporating remedies provisions of Title VI of the Civil Rights Act of 1964).

70. 1978 Amendments, § 120(a), 92 Stat. 2955, 2982. "Although this amendment explicitly applies only to discrimination against federal employees, it would be incongruous to construe

## 2. Administrative Regulations

Section 504 sat idly in the United States Code until the 1976 case of *Cherry v. Mathews*.<sup>71</sup> In that case, plaintiff sued to require the Department of Health, Education, and Welfare ("HEW") to promulgate regulations to enforce Section 504's antidiscrimination mandate. The district court ruled in plaintiff's favor, holding that "[t]he statute's discrimination prohibitions were certainly not intended to be self-executing. . . . Congress contemplated swift implementation of § 504 through a comprehensive set of regulations."<sup>72</sup> In response to *Cherry*, President Gerald Ford issued an executive order requiring HEW to promulgate regulations "to provide for consistent implementation within the Federal Government of Section 504. . . ."<sup>73</sup> HEW assigned drafting responsibility to its Office of Civil Rights,<sup>74</sup> which published Section 504's first set of implementing regulations in April, 1977.<sup>75</sup>

The administrators in HEW's Office of Civil Rights believed that merely requiring handicapped persons to be treated equally

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section 504 to require accommodation, whatever the cost, given legislative concern with the costs of compliance in federal employment." Mark E. Martin, Note, *Accommodating the Handicapped: The Meaning of Discrimination Under Section 504 of the Rehabilitation Act*, 55 N.Y.U. L. Rev. 881, 900 (1980).

71. 419 F. Supp. 922 (D. D.C. 1976).

72. *Id.* at 924.

73. Exec. Order No. 11,914, 3 C.F.R. § 117 (1977). See Tucker, 1989 U. Ill. L. Rev. at 846 n.7 (cited in note 56) (discussing the events surrounding HEW's promulgation of regulations under § 504, including the decision in *Cherry*).

74. Brandfield, 59 Fordham L. Rev. at 116 & n.28 (cited in note 26); Engebretson, 16 Harv. J. on Legis. at 66-67 (cited in note 63).

75. 42 Fed. Reg. 22,688 (1977), codified at 45 C.F.R. § 84.1-.61 (1989); Timothy M. Cook, *The Scope of the Right of Meaningful Access and the Defense of Undue Burdens Under Disability Civil Rights Laws*, 20 Loyola L.A. L. Rev. 1471, 1482 (1987). The political battle to force the secretary of HEW to sign these regulations is well chronicled in Joseph P. Shapiro, *No Pity: People with Disabilities Forging a New Civil Rights Movement* 64-69 (Times Books, 1993), which should be consulted generally for further insights into the political movement which led to enactment of the ADA. These regulations applied only to recipients of HEW grants. In January 1978, HEW promulgated a second set of regulations designed to be used by all other federal agencies as a model from which to promulgate regulations governing § 504 compliance among their own grantees. 43 Fed. Reg. 2136 (1978), codified at 45 C.F.R. § 85 (1993). See Engebretson, 16 Harv. J. on Legis. at 68 n.36 (noting that HEW's regulations were presumably to be used as a model). Since these regulations were issued, 54 additional federal agencies have promulgated regulations pursuant to § 504. Stuhlberg, 59 U. Cin. L. Rev. at 1328 n.71 (cited in note 26). See, for example, 5 C.F.R. §§ 900, 701-710 (1994) (Office of Public Management); 7 C.F.R. §§ 15b.1-.42 (1994) (Department of Agriculture); 10 C.F.R. §§ 4.101-.233 (1994) (Nuclear Regulatory Commission); 10 C.F.R. §§ 1040.61-.74 (1994) (Department of Energy); 13 C.F.R. §§ 113.1-.8 (1994) (Small Business Administration); 14 C.F.R. §§ 1251.100-.400 (1994) (National Aeronautics and Space Administration); 15 C.F.R. §§ 8 b.1-.25 (1994) (Department of Commerce); 28 C.F.R. §§ 42.501-.540 (1993) (Department of Justice).

would not eliminate discrimination against them.<sup>76</sup> Thus, the regulations they promulgated defined a "qualified handicapped person" under Section 504 as one "who, with *reasonable accommodation*, can perform the essential functions of the job in question."<sup>77</sup> The regulations provided, however, that reasonable accommodation is not required if "the recipient can demonstrate that the accommodation would impose an *undue hardship* on the operation of its program."<sup>78</sup> Although the regulations did not define undue hardship, they did specify three factors to be considered in determining whether a proposed accommodation would impose an undue hardship on a recipient of federal financial assistance:

- (1) The overall size of the recipient's program with respect to number of employees, number and type of facilities, and size of budget;

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76. Murphy, 64 S. Cal. L. Rev. at 1616 (cited in note 64). See generally Scotch, *From Good Will to Civil Rights* at 82-120 (cited in note 64). The administrators explained their conclusions as follows:

There is overwhelming evidence that in the past many handicapped persons have been excluded from programs entirely or denied equal treatment, simply because they are handicapped. But eliminating such gross exclusions and denials of equal treatment is not sufficient to assure genuine equal opportunity. In drafting a regulation to prohibit exclusion and discrimination, it became clear that different or special treatment of handicapped persons, because of their handicaps, may be necessary in a number of contexts in order to ensure equal opportunity. Thus, for example, it is meaningless to "admit" a handicapped person in a wheelchair to a program if the program is offered only on the third floor of a walk-up building. Nor is one providing equal educational opportunity to a deaf child by admitting him or her to a classroom but providing no means for the child to understand the teacher or receive instruction.

These problems have been compounded by the fact that ending discriminatory practices and providing equal access to programs may involve major burdens on some recipients. Those burdens and costs, to be sure, provide no basis for exemption from section 504 or this regulation: Congress' mandate to end discrimination is clear. But it is also clear that factors of burden and cost had to be taken into account in the regulation in prescribing the actions necessary to end discrimination and to bring handicapped persons into full participation in federally financed programs and activities.

Department of Health, Education and Welfare, Final Rnle, 42 Fed. Reg. 22676 (1977).

77. 45 C.F.R. § 84.3(k)(1) (1993) (emphasis added). HEW also published regulations requiring reasonable accommodation under § 501. See 29 C.F.R. § 1613.704(a) (1994).

78. 45 C.F.R. § 84.12(a) (1993) (emphasis added). The undue hardship defense was also incorporated into the § 501 regulations. See 29 C.F.R. § 1613.704(a) (1994). Both the reasonable accommodation and undue hardship concepts were derived from the regulations promulgated in 1977 by the Department of Labor to implement § 503: "A contractor must make a reasonable accommodation to the physical and mental limitations of an employee or applicant unless the contractor can demonstrate that such an accommodation would impose an undue hardship on the conduct of the contractor's business." 41 C.F.R. § 60-741.6(d) (1993). See Engebretson, 16 Harv. J. on Legis. at 83 (cited in note 63) (stating that the Office of Civil Rights used regulations issued by the Department of Labor).

- (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.<sup>79</sup>

The regulations further provided that "[t]he 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."<sup>80</sup> HEW provided examples in the regulatory appendix of how the undue hardship regulation might be applied:

[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. . . .<sup>81</sup>

This regulatory framework served as the foundation of the undue hardship standard as it moved from the regulatory to the judicial arena.

### 3. Supreme Court Decisions

The Supreme Court has never squarely addressed the meaning of undue hardship under the Rehabilitation Act. Nevertheless, three of the Court's Rehabilitation Act decisions are germane to a discussion of undue hardship. In *Southeastern Community College v. Davis*,<sup>82</sup> a hearing-impaired woman sought admission into defendant college's nursing program. Her application was rejected because defendant determined that her disability made it unsafe for her to practice as a nurse. The district court concluded that plaintiff was not an "otherwise qualified handicapped individual" protected against discrimination by § 504.<sup>83</sup> Relying on the HEW regulations, the United States Court of Appeals for the Fourth Circuit reversed. The Fourth Circuit "suggested that § 504 required 'affirmative conduct' on the part of [defendant] to modify its program to accommodate the

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79. 45 C.F.R. § 84.12(c) (1993). The undue hardship factors for § 501 are identical. See 29 C.F.R. § 1613.704(c) (1993). All three factors are imbedded in the undue hardship factors contained in the ADA. See text accompanying note 35.

80. 45 C.F.R. § 84, app. A ¶ 16 (1993).

81. *Id.*

82. 442 U.S. 397 (1979).

83. *Id.* at 403 (quoting 29 U.S.C. § 794).

disabilities of applicants, 'even when such accommodations become expensive.'<sup>84</sup>

In a decision that would later be widely criticized by disabled rights advocates and commentators,<sup>85</sup> the Supreme Court reversed. It first stated that Section 504 does not require educational institutions "to disregard the disabilities of handicapped individuals or to make *substantial modifications* in their programs to allow disabled persons to participate."<sup>86</sup> The Court interpreted the Rehabilitation Act's reference to an "otherwise qualified person" to mean "one who is able to meet all of a program's requirements in spite of his handicap."<sup>87</sup> Plaintiff contended that defendant could have accommodated her handicap by providing individual supervision by faculty members when she attended patients, and by dispensing with the necessity of some required courses.<sup>88</sup> She argued that the HEW regulations applicable to educational institutions<sup>89</sup> required such accommodations.<sup>90</sup> The Court disagreed: "Whatever benefits [plaintiff] might realize from such a course of study, she would not receive even a rough equivalent of the training a nursing program normally gives. Such a *fundamental alteration* in the nature of a program is far more than the 'modification' the regulation requires."<sup>91</sup>

The most confusing and problematic aspect of the Court's decision was a discussion about affirmative action. Recognizing that Congress had mandated affirmative action by federal employers under Section 501, and that no similar language was included in Section 504, the Court concluded that "neither the language, purpose, nor

84. *Id.* at 404 (quoting *Davis v. Southeastern Community College*, 574 F.2d 1158, 1162 (4th Cir. 1978)) (emphasis added by the Author).

85. See, for example, Judith Welch Wegner, *The Antidiscrimination Model Reconsidered: Ensuring Equal Opportunity Without Respect to Handicap Under Section 504 of the Rehabilitation Act of 1973*, 69 Cornell L. Rev. 401, 457-58 (1984) (criticizing the *Davis* court for failing to articulate a reliable standard for accommodation); Martin, 55 N.Y.U. L. Rev. at 885-86 (cited in note 70) (criticizing the *Davis* court for confusing accommodation with affirmative action); Murphy, 64 S. Cal. L. Rev. at 1623 (cited in note 64) (arguing that the *Davis* court undermined the obligation to accommodate); Donald Jay Olenick, Note, *Accommodating the Handicapped: Rehabilitating Section 504 After Southeastern*, 80 Colum. L. Rev. 171, 185-86 (1980) (stating that the Court overlooked the distinctions between affirmative action and accommodation); Pamela Huessy Simon, Comment, *Employment Discrimination—Analyzing Handicap Discrimination Claims: The Right Tools for the Job*, 62 N.C. L. Rev. 535, 554-56 (1984) (arguing that the *Davis* court avoided an analysis of accommodation).

86. *Davis*, 442 U.S. at 405 (emphasis added).

87. *Id.* at 406.

88. *Id.* at 407.

89. 45 C.F.R. § 84.44.

90. *Davis*, 442 U.S. at 408-09.

91. *Id.* at 410 (emphasis added). The Court further stated that if the regulations could be interpreted to require the modifications sought by plaintiff, "they would constitute an unauthorized extension of the obligations imposed by that statute." *Id.*



history of [Section] 504 reveals an intent to impose an affirmative-action obligation on all recipients of federal funds.”<sup>92</sup> While surely a correct statement, the Court appeared to lump affirmative action together with reasonable accommodation, and implied that Section 504 did not require even reasonable accommodation:

We do not suggest that the line between a lawful refusal to extend affirmative action and illegal discrimination against handicapped persons will always be clear. It is possible to envision situations where an insistence on continuing past requirements and practices might arbitrarily deprive genuinely qualified handicapped persons of the opportunity to participate in a covered program. Technological advances can be expected to enhance opportunities to rehabilitate the handicapped or otherwise to qualify them for some useful employment. Such advances also may enable attainment of these goals *without imposing undue financial and administrative burdens upon a State*. Thus, situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory.<sup>93</sup>

The Court ruled against plaintiff, holding that “[i]t is undisputed that [plaintiff] could not participate in [defendant’s] nursing program unless the standards were substantially lowered. Section 504 imposes no requirement upon an educational institution to lower or to effect *substantial modifications* of standards to accommodate a handicapped person.”<sup>94</sup>

The Court revisited *Davis* in *Alexander v. Choate*,<sup>95</sup> a case involving Tennessee’s reduction of annual inpatient hospital days reimbursable by Medicaid. The Court observed that *Davis*:

struck a balance between the statutory rights of the handicapped to be integrated into society and the legitimate interests of federal grantees in preserving the integrity of their programs: while a grantee need not be required to make “fundamental” or “substantial” modifications to accommodate the handicapped, it may be required to make “reasonable” ones.<sup>96</sup>

In a lengthy footnote, the Court acknowledged that its use of the phrase “affirmative action” in *Davis* failed to appreciate the distinction between true remedial affirmative action on the one hand and reasonable accommodation to remove barriers on the other.<sup>97</sup>

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92. *Id.* at 411.

93. *Id.* at 412-13 (emphasis added).

94. *Id.* at 413 (emphasis added and footnote omitted).

95. 469 U.S. 287 (1985).

96. *Id.* at 300.

97. *Id.* at 300 n.20. The Court downplayed its confusing rationale in *Davis* noting that “[r]egardless of the aptness of our choice of words in *Davis*, it is clear from the context of *Davis* that the term ‘affirmative action’ referred to those ‘changes,’ ‘adjustments,’ or ‘modifications’ to

Significantly, the Court squarely recognized, as it had failed to in *Davis*, that "to assure meaningful access, reasonable accommodations in the grantee's program or benefit may have to be made."<sup>98</sup> Moreover, whereas in *Davis* the Court questioned the validity of the HEW regulations, in *Alexander* the Court acknowledged that those regulations provide "an important source of guidance on the meaning of [Section] 504."<sup>99</sup>

The Court's most recent treatment of Section 504 came in *School Board of Nassau County, Florida v. Arline*,<sup>100</sup> its only analysis to date of how that section applies to the employment sector. Plaintiff, who taught elementary school for thirteen years, was fired because she had contracted tuberculosis.<sup>101</sup> The case centered on whether plaintiff was "handicapped" under Section 504, and if so, whether she was "otherwise qualified" for the teaching position. The Court concluded that plaintiff was handicapped,<sup>102</sup> but that further findings of fact were required to determine if she was also otherwise qualified.<sup>103</sup> In a footnote, the Court explained how *Davis* and *Alexander* would apply to Section 504 employment discrimination claims:

In the employment context, an otherwise qualified person is one who can perform "the essential functions" of the job in question. When a handicapped person is not able to perform the essential functions of the job, the court must also consider whether any "reasonable accommodation" by the employer would enable the handicapped person to perform those functions. Accommodation is not reasonable if it either imposes "undue financial and administrative bur-

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existing programs that would be 'substantial' or that would constitute 'fundamental alteration[s] in the nature of a program . . . ' rather than to those changes that would be reasonable accommodations." *Id.* (citations omitted). Thus, the Court suggested that anything beyond reasonable accommodation would be considered remedial affirmative action beyond the scope of § 504.

98. *Id.* at 301.

99. *Id.* at 304 n.24. The Court had previously embraced the HEW regulations in *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 634 (1984). In *Alexander*, the Court relied on the regulations to support its conclusion "that reasonable adjustments in the nature of the benefit offered must at times be made to assure meaningful access." 469 U.S. at 301 n.21.

100. 480 U.S. 273 (1987).

101. *Id.* at 276.

102. *Id.* at 285-86. On this issue, the Court concluded "that the fact that a person with a record of a physical impairment is also contagious does not suffice to remove that person from coverage under § 504." *Id.*

103. *Id.* at 289. In a footnote, the Court observed that:

[a] person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk. The Act would not require a school board to place a teacher with active, contagious tuberculosis in a classroom with elementary school-children.

*Id.* at 287 n.16.

dens" on a grantee, or requires "a fundamental alteration in the nature of [the] program. . . ."104

Significantly, the Court equated the above language with the regulatory concept of "undue hardship": "where reasonable accommodation causes undue hardship to the employer, failure to hire or promote the handicapped person will not be considered discrimination."<sup>105</sup>

#### 4. Lower Court Decisions

The Rehabilitation Act literature traditionally has focused on six cases that discuss the undue hardship standard in the employment context.<sup>106</sup> Of these cases, *Nelson v. Thornburgh*<sup>107</sup> is the most widely discussed, and was actually cited in the legislative

104. *Id.* at 287 n.17 (citations omitted) (quoting 45 C.F.R. § 84.3(k) (1985) and *Davis*, 442 U.S. at 412, 410).

105. *Id.* at 287-88 n.17 (quoting 45 C.F.R. § 84, app. A at ¶ 16). The Court also referred approvingly to the undue hardship factors contained in 45 C.F.R. § 84.12(c). *Id.* See text accompanying note 79.

106. Several other cases have addressed undue hardship in the educational setting. See, for example, *New Mexico Ass'n for Retarded Citizens v. State of New Mexico*, 678 F.2d 847, 855 (10th Cir. 1982) (remanding the case because the district court did not analyze the cost of modifying the educational services for the handicapped); *Tatro v. State of Texas*, 625 F.2d 557, 564-65 (5th Cir. 1980) (holding that § 504 required a school system to catheterize a student who suffered from spina bifida every three to four hours and that such accommodation would not cause an undue financial burden); *Camenisch v. University of Texas*, 616 F.2d 127, 133 (5th Cir. 1980) (holding that § 504 required a college to provide a sign language interpreter for a deaf student), vacated on other grounds, 415 U.S. 390 (1981); *Kohl v. Woodhaven Learning Ctr.*, 672 F. Supp. 1226, 1248 (W.D. Mo. 1987) (holding that § 504 required a vocational skills school to admit a hepatitis carrier to its training program despite the necessity of expenditures of \$6,500 immediately and \$4,000 annually to inoculate employees), rev'd, 865 F.2d 930 (8th Cir. 1989); *Espino v. Besteiro*, 520 F. Supp. 905, 914 (S.D. Tex. 1981) (holding that the analogous Education for All Handicapped Children Act of 1975, 20 U.S.C. §§ 1400-1420 (Supp. IV 1992), required a school district to expend \$5,700 annually to accommodate a multi-handicapped child by providing a fully air-conditioned classroom).

Other cases have addressed the financial scope of the reasonable accommodation obligation on transportation systems. See, for example, *Rhode Island Handicapped Action Committee v. Rhode Island Public Transit Authority*, 718 F.2d 490, 499 (1st Cir. 1983) (holding that § 504 did not require a transit system to install wheelchair lifts on the system's 42 new buses at a cost of over \$320,000); *Dopico v. Goldschmidt*, 687 F.2d 644, 653 (2d Cir. 1982) (holding that § 504 required a city to expend \$6 million of a \$490 million federal capital and operating subsidy for mass transit to modify a transit system to accommodate wheelchair users); *American Public Transit Association v. Lewis*, 655 F.2d 1272, 1280 (D.C. Cir. 1981) (striking down DOT regulations implementing § 504, which required, among other things, that every new bus purchased by a transit system include a \$12,000-\$15,000 wheelchair lift); *Eastern Paralyzed Veterans Association of Pennsylvania v. Sykes*, 697 F. Supp. 845, 852-54 (E.D. Pa. 1988) (holding that an issue of material fact existed as to whether § 504 required a city transit system to spend \$18.7 million out of a \$535 million annual operating budget to install elevators at the 24 stations on a subway line).

107. 567 F. Supp. 369 (E.D. Pa. 1983), aff'd, 732 F.2d 146 (3d Cir. 1984).

history of the ADA.<sup>108</sup> In *Nelson*, three blind income-maintenance workers brought suit under Section 504 against their employer, the Pennsylvania Department of Public Welfare ("DPW"). Plaintiffs were unable to perform the essential functions of their paperwork-intensive jobs without the assistance of readers. Prior to filing suit, plaintiffs had hired part-time readers and paid the readers' salaries out of their personal funds.<sup>109</sup> Plaintiffs claimed that DPW's refusal to pay for the part-time readers, or to provide mechanical devices to enable them to accomplish reading functions on their own, constituted discrimination in violation of Section 504.<sup>110</sup> DPW defended on the ground that providing such accommodations would have imposed an undue hardship on its operations.<sup>111</sup>

The district court found as a fact that the proposed mechanical devices would not have been sufficient to permit plaintiffs to perform the essential functions of their jobs.<sup>112</sup> It further found that the cost of providing the part-time readers would have been \$6,638 per plaintiff per year,<sup>113</sup> about thirty percent of plaintiffs' \$21,379 to \$22,804 salaries.<sup>114</sup> The court analyzed the three undue hardship factors provided in the regulations<sup>115</sup> and noted that they "do not spell out precisely" how the defense of undue hardship can be established.<sup>116</sup> It concluded, however, that the examples provided in the regulatory appendix were directly on point and controlling:

Applying the regulations to the facts of this case reveals that the answer called for by the regulations is clear. "[T]he provision of readers" is an express HHS example of reasonable accommodation. Moreover, in view of DPW's \$300,000,000 administrative budget, the modest cost of providing half-time readers, and the ease of adopting that accommodation without any disruption of DPW's services, it is apparent that DPW has not met its burden of showing undue hardship. To be sure, DPW's financial resources are limited. But there is no principled way of distinguishing DPW on this basis from the large school

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108. See H.R. Rep. No. 101-485, pt. 3 at 41 (cited in note 7) (stating that *Nelson* adopts a flexible approach to determining whether an accommodation is an undue hardship).

109. *Nelson*, 567 F. Supp. at 370.

110. *Id.* at 371.

111. *Id.*

112. *Id.* at 376.

113. *Id.*

114. *Id.* at 373 & n.7.

115. See text accompanying note 79.

116. *Nelson*, 567 F. Supp. at 379.

district employing an aide for a blind teacher, or from the state welfare agency providing an interpreter for a deaf employee.<sup>117</sup>

The court therefore ordered DPW to provide plaintiffs with half-time readers as a reasonable accommodation of their handicaps.<sup>118</sup>

The *Nelson* court concluded that the undue hardship standard did not preclude having a second employee assist a disabled employee in performing her job. The court in *Treadwell v. Alexander*<sup>119</sup> came to the exact opposite conclusion. In *Treadwell*, plaintiff sought a position as a seasonal park technician for the United States Army Corps of Engineers ("Corps") shortly after undergoing a quadruple coronary bypass surgery in which a pacemaker was implanted; his application was rejected because of his disability.<sup>120</sup> The evidence established that if plaintiff were hired as a park technician, it would have been necessary for other technicians to perform many of his duties. Only two to four other technicians would have served the 150,000-acre park while plaintiff was on duty.<sup>121</sup> The district court concluded that such "doubling up," in view of the agency's "limited resources," would have imposed an undue hardship on the agency.<sup>122</sup> Relying on the three undue hardship factors contained in the Section 501 regulations, the court of appeals affirmed.<sup>123</sup>

The court in *Arneson v. Heckler*<sup>124</sup> reached a decision that straddled the *Nelson* and *Treadwell* courts' rationales. Plaintiff was a claims representative for the Social Security Administration ("SSA") who became afflicted with a neurological disorder that impaired his ability to concentrate while performing cognitive and motor functions.<sup>125</sup> Although the SSA initially accommodated plaintiff by relocating his desk to a private office and providing him with a telephone headset to enable him to use both hands while talking, he was subsequently transferred to a new branch office, where he was again placed in a large room with other claims representatives. That branch at-

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117. *Id.* at 380 (footnotes omitted) (quoting 45 C.F.R. § 84, app. A at ¶ 16). The court failed to note that the examples provided in the HEW regulatory appendix were all qualified by the language that such accommodations "might" be necessary. See text accompanying note 81.

118. *Nelson*, 567 F. Supp. at 384.

119. 707 F.2d 473 (11th Cir. 1983).

120. *Id.* at 474.

121. *Id.* at 478.

122. *Id.* The district court's opinion is reported at 27 F.E.P. Cases (BNA) 543 (S.D. Ga. 1981). The district court did not substantiate this "limited resources" description with any analysis of the agency's budget, employees, or costs.

123. *Treadwell*, 707 F.2d at 478.

124. 879 F.2d 393 (8th Cir. 1989).

125. *Id.* at 394-95.

tempted to accommodate him by moving his desk to the back of the common work area and by providing him a telephone headset similar to the one he had used previously.<sup>126</sup> Plaintiff's work performance began to deteriorate, and he was given the choice of being dismissed or applying for voluntary disability retirement; he chose the latter.<sup>127</sup> Plaintiff sued the SSA claiming discrimination under Section 501 of the Rehabilitation Act. The district court granted judgment for the SSA.<sup>128</sup>

On appeal, plaintiff argued that if he had been properly accommodated, his work performance would have been satisfactory. He contended that three accommodations were needed: (1) a telephone headset like the one provided; (2) a quiet workplace; and (3) clerical assistance to proofread his work.<sup>129</sup> The SSA argued that the second accommodation requested was infeasible because of the limited workspace at that branch office and that the third accommodation would essentially have required "hiring two people to do the job of one."<sup>130</sup> The Eighth Circuit reversed and remanded for additional findings noting that the trial court had failed "to determine the cost of such accommodations and the impact they would have on the operation of the SSA office" and whether "additional funding may be available to offset the cost to the SSA."<sup>131</sup> Although the court noted that "it is beyond the expectations of the Rehabilitation Act that the SSA be required to hire another person capable of actually performing [plaintiff's] job,"<sup>132</sup> it implied that, if all plaintiff needed to enable him to perform his job was a part-time proofreader, such an accommodation would not have imposed an undue hardship on the SSA.<sup>133</sup> The court concluded by imploring the SSA as a federal government agency to be "a model employer of the handicapped" and to make "whatever reasonable accommodations are available."<sup>134</sup>

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126. *Id.* at 395.

127. *Id.*

128. *Id.*

129. *Id.* at 397.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* at 397-98.

134. *Id.* at 398. On remand, the district court determined that hiring a proofreader would not have accommodated plaintiff and that only hiring another claims representative capable of performing his job (at an annual cost of \$26,000 to \$34,000) would have sufficed. *Arneson v. Heckler*, 53 F.E.P. Cases (BNA) 963, 966 (E.D. Mo. 1990). The district court concluded that such an accommodation "would place an undue financial hardship" on the SSA. *Id.* at 967. The Eighth Circuit again reversed, directing that, if necessary, plaintiff be provided with a reader similar to readers provided to other disabled employees of the SSA. The court made clear,

An analysis of *Gardner v. Morris*<sup>135</sup> muddies the water even further. Plaintiff, a civil engineer with the Corps, suffered from a manic-depressive disorder. His application for a promotion and transfer to Saudi Arabia was rejected following a psychiatrist's report which concluded that the medical facilities in Saudi Arabia were not capable of accommodating plaintiff's condition, and that the nearest competent physician was a one-hour flight, or thirteen-hour drive, away.<sup>136</sup> The district court granted judgment for plaintiff on his Section 501 claim.<sup>137</sup> The Eighth Circuit began its analysis by noting that plaintiff's suit was grounded on both Sections 501 and 504 of the Rehabilitation Act. Because it determined that Section 501 provides federal employees an equal or greater measure of relief than provided by Section 504, the court analyzed plaintiff's claim exclusively under Section 501<sup>138</sup> and focused on that section's regulations governing reasonable accommodation and undue hardship.<sup>139</sup>

Plaintiff argued that the Corps could have reasonably accommodated his psychiatric condition and allowed for his promotion and transfer to Saudi Arabia by providing a written set of instructions to doctors in Saudi Arabia to be followed in the event a manic episode occurred.<sup>140</sup> The court of appeals concluded, however, that the only accommodation which would have permitted plaintiff to work in Saudi Arabia without a serious risk to his own health would have been for the Corps to set up a facility in Saudi Arabia sufficient to treat plaintiff's condition. The court held that such an accommodation would have imposed an undue hardship on the Corps:

Certainly it would be unreasonable to require the Corps to construct a hospital to accommodate [plaintiff's] handicap. Hiring a full-time physician and providing on-site laboratory facilities are also not the type of reasonable accommodations envisioned by Congress when it enacted the Rehabilitation Act. The cost of such accommodations . . . would be unreasonable.<sup>141</sup>

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however, that the reader provided should not be someone actually capable of performing plaintiff's job. *Arneson v. Sullivan*, 946 F.2d 90, 93 (8th Cir. 1991).

135. 752 F.2d 1271 (8th Cir. 1985).

136. *Id.* at 1275-76.

137. *Id.* at 1277.

138. *Id.* at 1277-78. The court also noted that unlike § 504, § 501 requires federal employers to engage in affirmative action and "to be a model employer of the handicapped." *Id.* at 1280. Nonetheless, the court did not consider whether the Corps had lived up to the goal of affirmative action in its treatment of plaintiff.

139. *Id.* at 1280, 1283.

140. *Id.* at 1281.

141. *Id.* at 1284.

The court reversed the decision of the district court in its entirety.<sup>142</sup>

Finally, two cases involving disabled applicants for Post Office jobs, *Bey v. Bolger*<sup>143</sup> and *Dexler v. Tisch*,<sup>144</sup> further scrambled the undue hardship picture. In *Bey*, plaintiff, who had a history of cardiovascular disease, was denied reinstatement to the position of distribution clerk with the Postal Service. Plaintiff claimed that he could have been accommodated by being assigned to "light-duty" status.<sup>145</sup> The court held that defendant successfully demonstrated that "an accommodation could not have been reasonably made due to an undue hardship on the operation of its program because of the nature of the Postal Service's operation, the composition of its workforce, and the nature and the cost of any accommodation."<sup>146</sup> The court found that only a limited number of light-duty status positions were available, and that those positions were reserved for employees who had five years of Postal Service experience or were injured on the job.<sup>147</sup> Plaintiff satisfied neither condition. The court concluded that "[t]he Postal Service is not required under the law to offer 'light duty status' positions to every person who applies because of the individual's handicap. Such an outcome would result in an extraordinary cost and would hamper the operation of the Postal Service."<sup>148</sup>

In *Dexler*, plaintiff, who suffered from achondroplastic dwarfism resulting in his being only four feet, five inches tall, applied for an entry-level position with the Post Office as a clerk or mail handler. His application was rejected for the stated reason that his handicap would have prevented him from adequately performing the required job functions.<sup>149</sup> At trial, experts for plaintiff testified that a \$300 step stool or a platform would have permitted him to perform the essential job functions.<sup>150</sup> The district court nevertheless concluded that under Section 504, plaintiff was "not qualified for the job in spite of his

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142. *Id.* A recent decision of the United States Court of Appeals for the District of Columbia Circuit arrived at a similar result. See *Barth v. Gelb*, 2 F.3d 1180, 1188-89 (1993) (upholding the denial of a diabetic's request for transfer to a Voice of America foreign service position, finding that such a transfer would have caused undue hardship on the agency's overseas operations).

143. 540 F. Supp. 910 (E.D. Pa. 1982).

144. 660 F. Supp. 1418 (D. Conn. 1987).

145. *Bey*, 540 F. Supp. at 919.

146. *Id.* at 927. These are the three § 501 undue hardship factors contained in 29 C.F.R. § 1613.704(c). The court also found that defendant had satisfied its burden of establishing that reasonable accommodation was not possible without endangering plaintiff's own health and safety because of his uncontrolled hypertension and cardiovascular disease. *Id.* at 926.

147. *Id.* at 927.

148. *Id.*

149. *Dexler*, 660 F. Supp. at 1420.

150. *Id.* at 1423.



handicap.”<sup>151</sup> The court assumed that the issue of reasonable accommodation was relevant only to plaintiff’s Section 501 claim, and therefore focused exclusively on the Section 501 regulations.<sup>152</sup> The court concluded that even if a step stool or platform were used, plaintiff’s job still would have required restructuring by reassigning the task of unloading trucks to another employee.<sup>153</sup> The court also found that plaintiff’s use of a step stool would have caused a safety risk and would have impaired productivity because of the time required to constantly move it into position,<sup>154</sup> and that a platform would have been even less useful than a step stool because it would have been more cumbersome to move.<sup>155</sup> The court then quoted the three undue hardship factors and concluded “that the suggested accommodations would impose an undue hardship on the Postal Service.”<sup>156</sup> From an administrative standpoint, the court determined that plaintiff’s restructured job would have often left him without work to do and that he could not have performed certain tasks without the aid of a taller co-employee. The court concluded that “[w]hile the actual cost of the [step stool or platform] would not be large,” use of either would have caused plaintiff to be less efficient than his co-employees.<sup>157</sup> Citing *Bey*, the court stated that “[s]uch a significant loss of efficiency is not required as part of reasonable accommodation under the Rehabilitation Act.”<sup>158</sup> It held that “[w]hile none of these hardships is conclusive or overwhelming, taken together they demonstrate that accommodating [plaintiff] would unduly interfere with the operation of the New Britain Post Office.”<sup>159</sup>

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151. *Id.* at 1426.

152. *Id.* at 1426-27. In fact, the court’s analysis was backwards. Section 501 requires affirmative action; § 504 requires reasonable accommodation. See text accompanying notes 59 and 77.

153. *Dexler*, 660 F. Supp. at 1424.

154. *Id.* at 1423.

155. *Id.* at 1424.

156. *Id.* at 1427.

157. *Id.* at 1428.

158. *Id.*

159. *Id.* at 1429. Several other § 504 employment cases at least tangentially addressed undue hardship issues. See, for example, *Guice-Mills v. Derwinski*, 967 F.2d 794, 797-98 (2d Cir. 1992) (holding that it would have been an undue hardship for a hospital to accommodate a head nurse’s disability by allowing her to report to work at 10:00 a.m. instead of 8:00 a.m.); *Carter v. Bennett*, 840 F.2d 63, 68 (D.C. Cir. 1988) (affirming the district court’s decision that an employer who provided a visually impaired employee with a special reading machine, a tape recorder, and a Braille typewriter was not also required to provide the employee with a voice-synthesized computer and other additional accommodations); *Strathie v. Department of Transportation*, 716 F.2d 227, 234 (3d Cir. 1983) (remanding the case for a determination on whether accommodating a hearing-impaired school bus driver by allowing him to continue driving with a hearing aid would create a safety risk, notwithstanding a state requirement that drivers

It was against this historical backdrop that Congress debated how to define undue hardship under the ADA. We shall now turn our attention to that debate.

*B. Legislative History of the ADA's Undue Hardship Provision*<sup>160</sup>

When Senator Lowell Weicker first introduced the ADA in April, 1988, he did not dispute that enactment of the bill would entail substantial financial costs. He stated boldly, however, that "the costs

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should have excellent hearing); *Prewitt v. U.S. Postal Service*, 662 F.2d 292, 308 & n.22 (5th Cir. 1981) (rejecting the de minimis test for undue hardship and holding that the burden of proof is on the employer to establish undue hardship); *Davis v. Frank*, 711 F. Supp. 447, 454 (N.D. Ill. 1989) (holding that a deaf plaintiff could be accommodated without undue hardship if his employer provided cards containing frequently used words, trained his coworkers in sign language, and provided a special computer keyboard to facilitate written communication); *Harrison v. Marsh*, 691 F. Supp. 1223, 1231 (W.D. Mo. 1988) (holding that a secretary disabled by a radical mastectomy could be accommodated by less demanding typing requirements without undue hardship); *American Federation of Government Employees, Local 51 v. Baker*, 677 F. Supp. 636, 639 (N.D. Cal. 1987) (holding that an employer could accommodate employees at a coin-checking plant without undue hardship by hiring a rehabilitation specialist to help disabled employees adjust to a newly-instituted individual-station system); *Crane v. Dole*, 617 F. Supp. 156, 163 (D. D.C. 1985) (holding that the plaintiff's hearing impairment should be accommodated with a special phone designed to amplify voices, but not by hiring additional personnel or modifying schedules); *Fitzgerald v. Green Valley Area Educational Agency*, 589 F. Supp. 1130, 1137 (S.D. Iowa 1984) (holding that a preschool must accommodate a teaching applicant by eliminating the requirement that he also drive a school bus, even if doing so required hiring an independent carrier to transport students); *Upshur v. Love*, 474 F. Supp. 332, 342 (N.D. Cal. 1979) (holding that § 504 did not require a school district to hire an aide to assist a blind applicant for an administrative position).

To date, only three ADA cases have addressed whether a proposed accommodation would cause an employer undue hardship. In *Dutton v. Johnson County Board of County Commissioners*, 859 F. Supp. 498, 509 (D. Kan. 1994), the district court denied defendant's motion for summary judgment which in part contended that allowing the plaintiff to use vacation time to cover unscheduled absences due to migraine headaches would cause an undue hardship on the defendant's operations. The court ruled that the defendant had not established that the plaintiff's unscheduled absences were "unduly disruptive." *Id.* at 508. The case was then tried to a jury, which apparently rejected defendant's undue hardship defense. See note 44. In its order reinstating plaintiff, the court held that this finding was "properly supported by the evidence," in view of the fact that "defendant put on no evidence at trial which indicated any significant hardship flowing from such an accommodation." *Dutton v. Johnson County Board of County Commissioners*, 868 F. Supp. 1260, 1265 & n.5 (D. Kan. 1994).

In *Schmidt v. Safeway, Inc.*, 864 F. Supp. 991, 997 (D. Ore. 1994), the district court rejected defendant's contention that providing the plaintiff, an alcoholic truck driver, with a leave of absence to pursue rehabilitation, in lieu of termination would have caused an undue hardship. The court noted that defendant failed to support this defense with evidence of "economic impact upon the company or disruption of its operations." *Id.*

In *Ethridge v. Alabama*, 860 F. Supp. 808, 816 n.20 (M.D. Ala. 1994), the district court concluded that requiring a police department to employ a person whose disability prevented him from safely handling a firearm would cause the department an undue hardship.

160. For a detailed and comprehensive legislative history of the ADA, see Bernard D. Reams, Jr., et al., *Disability Law in the United States: A Legislative History of the Americans with Disabilities Act of 1990, Public Law 101-336* (Heim, 1992); G. John Tysse, ed., *The Legislative History of the Americans with Disabilities Act* (LRP, 1991).

associated with this bill are a small price to pay for opening up our society to persons with disabilities."<sup>161</sup>

The initial draft of the ADA did not contain an undue hardship provision, much less a definition. Rather, the original version of the ADA provided that "[t]he failure or refusal . . . to make reasonable accommodations . . . shall not constitute an unlawful act of discrimination on the basis of handicap if such . . . accommodation would fundamentally alter the essential nature, or threaten the existence of, the program, activity, business, or facility in question."<sup>162</sup> Although this provision tracked much of the Supreme Court's dicta in *Davis*, *Alexander*, and *Arline*, business interests quickly labelled it the "bankruptcy provision" and opposed it vigorously.<sup>163</sup> The ADA's sponsors began to fear that retaining this provision would jeopardize the bill's ultimate passage. Thus, in the spirit of compromise, the sponsors transformed the "bankruptcy provision" into the current undue hardship provision—"significant difficulty or expense."<sup>164</sup>

The committee reports offer little guidance regarding how great Congress intended an expense to be before it becomes "significant," and therefore an undue hardship. The reports initially noted that the ADA undue hardship standard "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."<sup>165</sup> The committee reports also incorporated the examples of undue hardship contained in the original HEW regulations.<sup>166</sup> The House Judiciary Committee

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161. 134 Cong. Rec. S5109 (daily ed. April 28, 1988).

162. S. 2345, 100th Cong., 2d Sess. § 7(a)(1) (April 28, 1988), in 134 Cong. Rec. S5112 (daily ed. April 28, 1988). Senate Minority Leader Robert Dole noted his concerns over this provision the very day the bill was introduced: "I have reservations about many aspects of this bill including the elimination of the undue hardship criteria [sic] for reasonable accommodation. . . ." 134 Cong. Rec. S5117 (daily ed. April 28, 1988).

163. Cooper, 139 U. Pa. L. Rev. at 1448 (cited in note 26); Stuhlbarg, 59 U. Cin. L. Rev. at 1323-24 n.54 (cited in note 26).

164. See Americans with Disabilities Act of 1989, Hearings before the Senate Committee on Labor and Human Resources and the Subcommittee on the Handicapped, 101st Cong., 1st Sess. 90 (1989) ("*Senate Hearings*") (remarks of Sen. Harkin) (discussing the replacement of the "bankruptcy provision" which would have required reasonable accommodations up to the point the existence of the business was threatened with the "undue hardship" standard); W. Robert Gray, *The Essential-Functions Limitation on the Civil Rights of People with Disabilities and John Rawls's Concept of Social Justice*, 22 N.M. L. Rev. 295, 323 (1992) (same); Bonnie P. Tucker, *The Americans with Disabilities Act: An Overview*, 1989 U. Ill. L. Rev. 923, 927 (1989) (same).

165. S. Rep. No. 101-116 at 36 (cited in note 7); H.R. Rep. No. 101-485, pt. 2 at 67 (cited in note 7).

166. S. Rep. No. 101-116 at 36; H.R. Rep. No. 101-485, pt. 2 at 67. See text accompanying note 81.

Report further stated that the "undue hardship" provision of Title I imposes a more substantial obligation on employers than the "readily achievable" provision<sup>167</sup> of Title III<sup>168</sup> regarding public accommodations.<sup>169</sup> Likewise, the reports established that the ADA's undue hardship test is significantly more stringent than the undue hardship test applied in Title VII religion cases:

The Committee wishes to make it clear that the principles enunciated by the Supreme Court in *TWA v. Hardison*, [432] U.S. 63 (1977) are not applicable to this legislation. In *Hardison*, the Supreme Court concluded that under [T]itle VII of the Civil Rights Act of 1964 an employer need not accommodate persons with religious beliefs if the accommodation would require more than a *de minimus* [sic] cost for the employer. By contrast, under the ADA, reasonable accommodations must be provided unless they rise to the level of "requiring significant difficulty or expense" on the part of the employer, in light of the factors noted in the statute—i.e., *a significantly higher standard than that articulated in Hardison*. This higher standard is necessary in light of the crucial role that reasonable accommodation plays in ensuring meaningful employment opportunities for people with disabilities.<sup>170</sup>

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167. 42 U.S.C. § 12181(9) ("[t]he term 'readily achievable' means easily accomplishable and able to be carried out without much difficulty or expense").

168. 42 U.S.C. §§ 12181-12189.

169. H.R. Rep. No. 101-485, pt. 3 at 40 (cited in note 7).

170. H.R. Rep. No. 101-485, pt. 2 at 68 (cited in note 7) (emphasis added). See S. Rep. No. 101-116 at 36 (cited in note 7) (emphasizing inapplicability of the standards from Title VII religion cases); H.R. Rep. No. 101-485, pt. 3 at 40 (same). Title VII provides that an employer is obligated to accommodate an employee's religious needs where such accommodations can be made without undue hardship on the conduct of its business. 42 U.S.C. § 2000e(j); 29 C.F.R. § 1605.2(b)(1) (1994). The burden is on the employer to prove that a requested accommodation would cause an undue hardship. 42 U.S.C. § 2000e(j); 29 C.F.R. § 1605.2(b)(2) (1994). In light of the above-quoted language, however, this is where the similarity between Title VII-mandated religious accommodation and ADA-mandated disability accommodation ends.

It has been suggested that employers should be entitled to claim that the *cumulative* effect of multiple accommodations would cause an undue hardship. Americans with Disabilities Act of 1989, Hearings on H.R. 2273 Before the Committee on the Judiciary and the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, 101st Cong., 1st Sess. 87-88, 133 (1989) (statements of John J. Motley, III on behalf of the National Federation of Independent Business and James A. DiLuigi on behalf of the American Hotel and Motel Association); Americans with Disabilities Act, Hearing Before the House Committee on Small Business, 101st Cong., 2d Sess. 39 (1990) ("*Small Business Hearing*") (statement of Kenneth E. Lewis on behalf of the National Federation of Independent Business); Harger, 41 U. Kan. L. Rev. at 790 n.46 (cited in note 25); Stuhlbarg, 59 U. Cin. L. Rev. at 1322 (cited in note 26). The legislative history quoted above, however, is inconsistent with the notion of cumulative undue hardship. The *Hardison* approach addresses accommodation issues individually, not cumulatively. Each disabled employee is entitled to accommodations requiring significantly more than a *de minimis* expenditure. Therefore, an employer cannot claim that in light of previous accommodations to other employees, making *any* accommodation to the next disabled employee requesting one would cause an undue hardship. *Every* disabled employee who requires reasonable accommodation is entitled to some accommodation irrespective of previous accommodations the employer has made to other employees. If it were otherwise, a disabled employee's entitlement to accommodations would depend on the mere happenstance of how

Finally, the House Judiciary Committee Report used the *Nelson* case to illustrate the concept of undue hardship, thereby implying that the extensive accommodations required in that case could be required under the ADA, notwithstanding its undue hardship provision.<sup>171</sup>

Apart from these generalities, however, Congress steadfastly rejected repeated requests from business groups and its own members to define undue hardship more precisely. As one business lobbyist stated:

We are troubled . . . that neither the current regulations nor the proposed bill provide any standard by which the obligations of an employer are to be measured. Even assuming the bill could identify all of the appropriate factors for inquiry, the term "undue hardship" is not specific and would allow the courts and agencies to create widely differing definitions based upon their subjective judgment of what is "undue" in any given situation.

For this reason, we believe it is imperative that Congress specify what standard the courts and agencies should use in determining whether an employer has satisfied its obligations under law. What is the standard by which "undue hardship" is to be measured?<sup>172</sup>

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many other disabled employees had beaten him to the punch. Congress did not intend for Title I to produce such arbitrary results. See note 175 and accompanying text for further evidence in the legislative history that employers cannot claim *cumulative* undue hardship.

171. Noting that the court in *Nelson v. Thornburgh*, 567 F. Supp. 369 (E.D. Pa. 1983), found that the "dollar burden" of paying for the part-time readers "was only a small fraction of the state agency's personnel budget," the House Judiciary Committee reasoned that absorbing that cost "would not require 'significant expense' and thus would not be an undue hardship." H.R. Rep. No. 101-485, pt. 3 at 41 (cited in note 7). The report also noted, however, that "the same accommodations may be an undue hardship for a small employer because they would require expending significant proportions of available resources." *Id.* "By selecting *Nelson* to illustrate the 'undue hardship' concept under the ADA, the legislative history underscored that substantial expenditures may be required." Arlene Mayerson, *Title I—Employment Provisions of the Americans with Disabilities Act*, 64 Temp. L. Rev. 499, 519 (1991) (symposium issue).

172. *Senate Hearings*, app. at 413 (cited in note 164) (letter from Zachary D. Fasman, on behalf of U.S. Chamber of Commerce, to Sen. Harkin (May 26, 1989)). Another business lobbyist expressed similar concerns:

The first item which troubles me, and I am sure a great many employers, is the broad, vaguely defined concepts of "reasonable accommodation" and "undue hardship." The concept of reasonableness has perplexed and eluded lawyers and lawmakers ever since it was introduced. The terms are subjective by definition; one person's reasonableness is another's undue hardship. I believe the use of these concepts, broadly defined, in this legislation will only perpetuate the overburdening of our already backlogged legal system.

What is needed is a common denominator; something that will allow for measurement and objectivity so that an employer and employee can tell when the balance has been reached or the line has been crossed. For most employers, and particularly in construction, cost effectiveness is a major factor in the analysis of what can reasonably be done to accommodate an employee. Under H.R. 2273, it is not clear how much an employer would be expected to spend, and to what lengths he or she must go in achieving accommodation.

One Congressman urged his colleagues to develop a "concrete formula":

so that an employer can know precisely how much would have to be spent in order to "reasonably" accommodate employees with physical and or mental impairments. At present, an uncertain legal standard exists as businesses must demonstrate to the satisfaction of bureaucrats or the courts that reasonable accommodation would pose an undue hardship.<sup>173</sup>

Another Congressman insisted that "business has to have some way to predict what they are responsible for, so that they can plan it and not break the law and also achieve a reasonable result for their enterprise."<sup>174</sup>

The concerns articulated by these lobbyists and legislators led to two proposed amendments in House committees. The House Education and Labor Committee considered an amendment to limit ADA expenditures to five percent of annual net profit for businesses with gross annual receipts of \$500,000 or less. The proposed amendment "failed by a wide margin."<sup>175</sup> In the House Judiciary Committee, an amendment was proposed that would have established as a per se undue hardship any proposed accommodation that exceeded ten percent of the disabled employee's annual salary. The amendment was rejected by a vote of 25-11.<sup>176</sup> This same amendment was introduced on the House floor by Representative James Olin.<sup>177</sup> The

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Hearing on H.R. 2273, The Americans with Disabilities Act of 1989, Joint Hearing before the Subcommittees on Employment Opportunities and Select Education of the House Committee on Education and Labor, 101st Cong., 1st Sess. 64 (1989) ("*Joint Hearing*") (statement of Paul D. Wharen, on behalf of Associated Builders and Contractors).

These very same sentiments were echoed by witnesses testifying before the House Committee on Small Business: "I think that business wants to work with the disabled. I am disabled and I also want to help disabled people. But I want the law to be very specific." *Small Business Hearing* at 37 (cited in note 170) (testimony of Kenneth E. Lewis, on behalf of National Federation of Independent Business). "Business is always much more at home knowing what the ground rules are, and that they are not walking on a swamp." *Id.* (testimony of Joseph J. Dragonette, on behalf of United States Chamber of Commerce).

173. *Small Business Hearing*, app. at 63 (statement of Rep. DeLay).

174. *Id.* at 37 (statement of Rep. Olin).

175. See 136 Cong. Rec. H2317 (daily ed. May 15, 1990) (statement of Rep. DeLay) (explaining the failure of the proposed spending cap). The defeat of this amendment is further evidence that Congress did not intend for employers to be able to claim *cumulative* undue hardship. See note 170 and text accompanying note 262.

176. Stuhlberg, 59 U. Cin. L. Rev. at 1339 & n.148 (cited in note 26) (citing Judiciary Committee Vote No. 477, May 1, 1990).

177. The amendment read as follows: "Excessive Cost Hardship.—For the purpose of this title, it is presumed an undue hardship if an employer incurs costs in making an accommodation which exceeds 10 percent of the salary or the annualized hourly wage of the job in question." 136 Cong. Rec. H2470 (daily ed. May 17, 1990). Representative Olin argued that "the fact of the matter is we need something tangible. We should not be passing laws that affect almost all businessmen in this country where the proprietor of that business does not know what he needs

Olin Amendment failed 187-213,<sup>178</sup> and the ADA together with its vague undue hardship provision became law shortly thereafter.

#### IV. ANALYZING CONGRESS'S RATIONALES FOR ADOPTING A VAGUE STANDARD

Why did Congress turn back every attempt by the business lobby and business-oriented legislators to increase the precision of undue hardship? The legislative history of the ADA suggests four explanations. First, Congress anticipated that, for the most part, reasonably accommodating employees with disabilities would not require employers to make anything more than trivial expenditures. Consequently, Congress regarded the business lobby's clamoring for a more precise standard as much ado about nothing. Second, Congress believed that the undue hardship concept, as it had come to exist under the Rehabilitation Act, had worked well for seventeen years. It concluded that any ambiguity which initially existed regarding its meaning and scope had been sufficiently clarified by judicial decisions. Third, to the extent that the ADA undue hardship standard is not sufficiently precise, Congress decided that courts would be better able to define the standard's parameters on a case-by-case basis than it could do in one fell swoop. Finally, Congress concluded that, because of the infinite permutations of disabilities, needs for accommodation, and levels of employer resources, a fixed standard could not possibly be applied fairly in all situations. Hence, it concluded that a flexible standard like "significant difficulty or expense" was most appropriate. We will now explore whether these rationales were supported by the evidence before Congress or by sound public policy considerations.

##### A. *Much Ado About Nothing*

Lobbyists and legislators seeking to protect the vaguely defined undue hardship standard from attacks on its imprecision argued that the standard would rarely if ever come into play under the ADA because reasonable accommodation costs under Title I would be minimal to nonexistent. For instance, the Senate Report noted:

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to do to abide by the law. It is a big mistake." *Id.* at H2475. For further discussion regarding this amendment, see notes 251-60 and accompanying text.

178. 136 Cong. Rec. at H2475 (daily ed. May 17, 1990). If 14 representatives had switched their negative votes to affirmative votes, the amendment would have passed.

Costs to businesses for reasonable accommodations are expected to be less than \$100.00 per worker for 30% of workers needing an accommodation, with 51% of those needing an accommodation requiring no expenses at all. A Louis Harris national survey of people with disabilities found that among those employed, accommodations were provided in only 35% of the cases.<sup>179</sup>

Proponents of the vague standard asserted that: "a majority of accommodations provided by Federal Contractors involved little or no cost";<sup>180</sup> "[t]he cost of most accommodations is nominal";<sup>181</sup> "there really is not any great cost attached to making accommodations";<sup>182</sup> and that compliance with the Rehabilitation Act's reasonable accommodation requirement "has been 'no big deal'"<sup>183</sup> and "has not been onerous."<sup>184</sup> Indeed, following enactment of the ADA, the EEOC concluded that Title I will not have a "significant economic impact" on a substantial number of small business entities.<sup>185</sup>

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179. S. Rep. No. 101-116 at 89 (cited in note 7). Other studies with similar findings were bandied about by the status quo proponents. See, for example, *Employees Accommodations Study* at 20, 29 (cited in note 11) (finding that less than one-half of disabled workers require accommodations; 51.1% of accommodations are cost-free; 18.5% cost \$1-99; 11.9% cost \$100-499); U.S. Gov't Accounting Office, *Reports on Costs of Accommodations* (cited in note 11) (reporting that 51% of accommodations cost nothing; 30% cost less than \$500; 8% cost more than \$2,000); Daniel Finnegan, et al., *The Costs and Benefits Associated with the Americans with Disabilities Act* 38 (1989) (finding that the average cost of accommodations per disabled employee that requires accommodations is \$200), cited in EEOC, *Equal Employment Opportunity for Individuals with Disabilities*, 56 Fed. Reg. 8578, 8584; Frierson, *Employer's Guide to the Americans with Disabilities Act* at 103-04 (cited in note 11) (citing JAN, *In the Mainstream*, Min. Report #4 (July-Aug. 1988)) (finding that 31% of accommodations are cost-free; 19% cost less than \$50, 19% cost between \$50 and \$500; 19% cost between \$500 and \$1,000; 12% cost between \$1,000 and \$5,000).

180. H.R. Rep. No. 101-485, pt. 2 at 33 (cited in note 7).

181. *Equal to the Task, 1981 DuPont Survey of Employment of the Handicapped* 17-18 (DuPont, 1982), cited in 56 Fed. Reg. at 8583 (cited in note 179).

182. Equal Employment Opportunity for the Handicapped Act of 1979: Hearings on S. 446 before the Senate Committee on Labor and Human Resources, 96th Cong., 1st Sess. 103 (statement of Weldon Rougeau, Director, Office of Federal Contract Compliance Programs, U.S. Dep't of Labor).

183. S. Rep. No. 101-116 at 10 (cited in note 7). The Senate Report described as "typical" accommodations such as a \$26.95 timer with an indicator light which allowed a deaf medical technician to perform laboratory tests; a \$45 light probe which permitted a visually impaired receptionist to determine which telephone lines were ringing; and a \$49.95 telephone handset which allowed an insurance salesperson with cerebral palsy to write while talking. *Id.*; H.R. Rep. No. 101-485, pt. 2 at 33 (cited in note 7).

184. *Id.* During floor debate on the Ohn Amendment, one status quo proponent stated: Under section 503 we have Federal contractees. They are private sector people. Not one person has come after 16 years of experience with this kind of language and standard and said, "It has imposed on me a burden that I cannot meet."

Not one, not one example, after 16 years. Private sector contractors with the Federal Government have come forward and said this is unreasonable.

136 Cong. Rec. H2474 (daily ed. May 17, 1990) (statement of Rep. Hoyer).

185. 56 Fed. Reg. at 8579 (cited in note 179). In analyzing the costs of the ADA's reasonable accommodation requirement, the EEOC concluded that the average cost of accommodation under the ADA for every disabled employee (including those not needing



What was forgotten in all of this hyperbole was the significant broadening effect that the ADA likely will have on both the number and cost of proposed accommodations. The central goal of Title I was

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accommodations) would be \$261. *Id.* at 8584. The EEOC then used this figure to extrapolate that the total annual cost of Title I-mandated reasonable accommodations would be \$16,443,000. *Id.* To arrive at this number, the EEOC assumed that Title I would cover only 15 million employees who were not previously covered by the Rehabilitation Act or analogous state statutes. *Id.* This estimate assumed that 71% of the workforce, or 71 million employees, were protected by the Rehabilitation Act or analogous state statutes. See note 6. (EEOC's estimate that 86 million of the nation's 100 million employees are now covered by the ADA). The EEOC then assumed that those 15 million newly covered employees would produce 1,800,000 vacancies annually (12% annual vacancy rate), of which 3.5% or 63,000 would be filled by people with disabilities. 56 Fed. Reg. at 8584. Multiplying \$261 by 63,000, the EEOC arrived at its \$16.4 million estimate.

In the Author's opinion, this analysis grossly underestimated the annual cost of accommodation which Title I will require. First, the EEOC's estimate that only 15 million employees will be "newly covered" by Title I assumed that the 48 state statutes which had prohibited disability discrimination prior to the ADA's enactment required basically the same level of accommodation as Title I. That assumption was inaccurate. Twenty-one of those statutes did not require reasonable accommodation *at all* and four others narrowly circumscribed the level of accommodation required. See note 16. If those 25 statutes are excluded from the EEOC's analysis, probably about half of the nation's 120 million employees (the census data reveals a workforce of 120 million, rather than the 100 million figure relied on by the EEOC)—and 16 million disabled employees, McNeil, *Americans with Disabilities, 1991-92* at 64 (cited in note 7)—were left essentially uncovered by effective reasonable accommodation mandates prior to enactment of the ADA.

Second, the EEOC's estimate that only 3.5% of the American workforce is comprised of disabled employees was far off the mark. The actual number is 13.4%, *id.*, and that percentage should increase as Title I begins to fulfill its objectives. Thus, whereas the EEOC's analysis concluded that the ADA would result in new protection for only 63,000 new disabled employees per year, a more accurate prediction would be closer to 964,800 (60 million previously "uncovered" jobs  $\times$  12% annual vacancy rate  $\times$  13.4% of jobs filled by disabled applicants). Moreover, the EEOC's estimate overlooked the central goal of the Title I—bringing eight million previously unemployed citizens with disabilities into the workplace. See note 7 and accompanying text. Even if this goal is only partially fulfilled, it will radically increase both the number of accommodations required and the overall expense of making accommodations. See text accompanying notes 186-89.

Third, the EEOC's estimate failed to account for accommodations which the ADA will require previously uncovered employers to make for *current employees*. These accommodations fall into four categories: (1) accommodations to employees who were previously paying for their own accommodations because no law required their employer to do so (like the blind income-maintenance workers in *Nelson*, see text accompanying notes 107-18); (2) accommodations to disabled employees who, under the ADA, now demand their employers to equalize their access to restrooms, break rooms, and other workplace facilities, see note 31 and accompanying text; (3) accommodations to disabled employees seeking promotions, reassignments, or transfers whose new job responsibilities will require reasonable accommodations; and (4) accommodations to non-disabled employees who become disabled during their employment. (Every day approximately 11,000 workers are seriously injured on the job. Mary K. O'Melveny, *The Americans with Disabilities Act and Collective Bargaining Agreements: Reasonable Accommodations or Irreconcilable Conflicts?*, 82 Ky. L. J. 219, 220 n.11 (1994) (citing Charles Noble, *Keeping OSHA's Feet to the Fire*, Technology Rev. 43, 44 (Feb.-Mar. 1992))). In the final analysis, the Bush Administration's estimate that Title I will result in an additional \$1.7 to \$10.2 billion in annual accommodation costs, see note 14 and accompanying text, was much more realistic than the EEOC's estimate of \$16.4 million.

to put eight million currently unemployed citizens with disabilities to work.<sup>186</sup> It is plausible to assume that this population is more severely disabled than the currently employed disabled population, and that its unemployment is largely attributable to the failure to obtain adequate accommodations. Indeed, these were critical assumptions underlying the need for a federally mandated reasonable accommodation requirement. It is equally plausible, therefore, that the frequency and scope of accommodations which will be necessary to assist this population in obtaining employment will be significantly greater than the frequency and scope of accommodations required by citizens with disabilities who were employed prior to the ADA.<sup>187</sup> Moreover, in view of the disparity between the publicity surrounding employee entitlements under the Rehabilitation Act and state disability statutes, and the publicity regarding such entitlements under the ADA,<sup>188</sup> it can be safely predicted that even the sixteen million citizens with disabilities who were employed prior to Title I's effective date will demand accommodations more frequently—and with greater price tags—than they ever had prior to the ADA's enactment.<sup>189</sup> Hence, although accommodation costs prior to the ADA may have been “no big deal,” accommodation costs under the ADA—particularly for those disabled citizens pulled into the employment sector for the first time—may be a very big deal indeed.

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186. See note 7 and accompanying text.

187. A 1994 Lou Harris poll determined that 26% of the working-age disabled population require special equipment or technology to work effectively. Taylor, *Americans With Disabilities Make Gains* at 2 (cited in note 7). This percentage does not include those who will need modifications to their workplace or those who will require personal assistants such as readers, interpreters, page turners, travel assistants, etc.

188. The ADA requires each covered employer to post notices in conspicuous places regarding its obligations under Title I. 42 U.S.C. § 12115. Moreover, since 1992, nearly two million ADA-related publications have been disseminated to the public free of charge. EEOC News Release, 1994 WL 376729 at \*2 (cited in note 6). In addition, as of July 1994, EEOC field offices had made more than 1,700 ADA presentations to an aggregate audience of 129,000. *Id.*

189. The number of inquiries received by the JAN since Title I became effective supports this trend: In 1992, the JAN received 37,000 accommodation-related inquiries; in 1993, it received 61,000. *Strong Interest Seen In Accommodating Disabilities*, Daily Lab. Rep. (Feb. 24, 1994). In the first half of 1994, 36,264 such inquiries were received. Interview with D.J. Hedricks, JAN (Oct. 3, 1994). It is notable that all of this data was compiled *before* Title I applied to the 396,000 employers with 15 to 24 employees for whom coverage began on July 26, 1994. See note 15. We can therefore assume that these inquiry figures will continue to grow for quite some time.

There is also mounting evidence that the price tags of accommodations requested are growing. A comparison of the 1988 and 1994 JAN studies, see note 11, reveals that the percentage of workplace accommodations costing greater than \$1,000 grew from 12% in 1988 to 21% in 1994. The 1988 study did not include data on accommodations costing more than \$5,000; the 1994 study found that 4% of accommodations currently being made cost greater than \$5,000.

*B. If It Ain't Broke, Don't Fix It*

Simple inertia and the status quo were powerful forces weighing against the business lobbyists and members of Congress urging enactment of a precise undue hardship standard. Disability rights advocates argued that there was no need to tinker with the undue hardship standard as it had come to exist under the Rehabilitation Act:

[T]his term undue hardship and the flexible standard adopted by the ADA do not come out of thin air. They were not invented for the ADA. They are taken directly from the regulations under the 1973 Rehabilitation Act for sections 501, 503, and 504. After over a decade of experience with those laws, there have been none of the nightmares envisioned and espoused by the business community.

What is interesting, however, is that all of these fears were voiced during the development of the section 504 regulations. But these provisions did not result in bankruptcy or hardship.<sup>190</sup>

EEOC Commissioner Evan Kemp asserted that the concepts of reasonable accommodation and undue hardship "are old terms . . . and the courts . . . have done a fairly good job in defining [them]."<sup>191</sup> Indeed, this argument was employed successfully to defeat the Ohn Amendment, which would have established a fixed undue hardship standard:

We have heard it said on this floor that the definition of "undue hardship" is "vague and undefined and difficult to understand." I want to bring to the attention of the Members that first of all this is the same definition that has been in public law since 1973, and the country knows exactly what it means because it has been well defined; it has been tested in every court in the land, and in fact it is very clear what "undue hardship" means.<sup>192</sup>

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190. *Small Business Hearing* at 26 (cited in note 170) (testimony of Arlene B. Mayerson on behalf of Disability Rights Education and Defense Fund). Ms. Mayerson further stated that the undue hardship standard "does work. I think that if anyone looks at the case law for instance over the last 12 years . . . [it would] reassure the business people that the courts do not go hog wild with this standard by any means." *Id.* at 38.

191. *Joint Hearing* at 23 (cited in note 172).

192. 136 Cong. Rec. H2472 (daily ed. May 17, 1990) (statement of Rep. Bartlett). The House Judiciary Committee Report stated that the reason the committee rejected a similar amendment was that "the flexible approach used under Section 504 of the Rehabilitation Act, which has been in operation for 17 years, is appropriate for the ADA as well." H.R. Rep. 101-485, pt. 3 at 41 (cited in note 7).

Similarly, when Senator Jesse Helms challenged Senator Harkin regarding the costs to employers which would result from a vague undue hardship standard, Senator Harkin employed this rationale as a defensive weapon:

MR. HELMS. . . . I want to say this to the distinguished managers of the bill, with all due respect, nobody knows what this bill is going to cost. It may be we do not care what it is going to cost.

But I will tell you this much: I predict that 12 months after the implementation of this bill you are going to have a furor in this country which will make the catastrophic insurance issue look like a tea party. You wait until the flood tide of restrictions and demands rolls down upon the small business men and women of this country.

This bill is too broad. Nobody and I mean, nobody has any idea what it will cost. I was interested in the estimated or average annual cost of providing just some of the types of accommodations or auxiliary aids required under this act.

Can either managers of the bill tell me, for example, what the provisions of a full-time reader required to assist a blind executive, accountant, attorney, or other professional whose job requires extensive reading are? Does anybody have any idea about the cost of just that?

MR. HARKIN. Let me just answer the Senator that again it really depends upon whether or not this is undue hardship for the employer or the business in question. If it is IBM, perhaps that is not a big deal. But if it is a small pharmacy, as the Senator said earlier, that is a different story.

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, IA, 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. . . .

MR. HELMS. Well, nevertheless, section 102(b)(1)(e) provides that an employer's failure to make "reasonable accommodations"—and the Lord only knows what that means because that will be decided in court—the employer's failure to make these reasonable accommodations for the disabilities of a qualified applicant for employment constitutes illegal discrimination under section 102(b)(1)(e). And the committee report itself specifically mentions the provision of readers for blind people. That is the reason I brought it up.

The committee report also mentions personal assistance for wheelchair-bound people, so forth and so on. Now the provision of some accommodations may cost small business people many thousands of dollars and send them down the chute.

The act may even require the hiring of additional personnel to achieve an accommodation, as the Senator himself said.

So to wind up my question, does this bill contemplate any point at which the accommodation of a disabled employee poses an undue hardship? Does it do so if these costs exceed 5 percent of the employee's salary, paid for by the employer for the performance of the job in question, or 10 percent or 20 percent? Can the Senator enlighten me at what point it becomes an undue hardship on a small business man or woman[?]

MR. HARKIN. . . . Let me also say this about attendants. . . . Many severely physically disabled workers who are qualified for employment are not hired or are forced to quit their jobs because they may need some assistance during the work day. It makes no sense for a talented person who has skills to contribute, to sit idly at home receiving benefits because he needs assistance in the rest room twice a day, or needs someone to provide some assistance to him on out-of-town business trips. The question, as in any other accommodation, is whether it poses an undue hardship on the employer given the size of the employer's operation and the cost of the accommodation. *This accommodation has been provided by employers under section 504 for over a decade without difficulty.* Attendant care can usually be arranged easily and will not be an undue hardship on most employers.

MR. HELMS. You know, I bet you the person—and I say this with no disrespect to him or her—who wrote that has never run a small business in his or her life. That is a bunch of senseless verbiage.

This rationale even received the presidential seal of legitimacy when President Bush stated during the ADA signing ceremony that:

[t]he Rehabilitation Act standards are already familiar to large segments of the private sector that are either Federal contractors or recipients of Federal funds. Because the Rehabilitation Act was enacted 17 years ago, there is already an extensive body of law interpreting the requirements of that Act. Employers can turn to these interpretations for guidance on how to meet their obligations under the ADA.<sup>193</sup>

Were the disability rights advocates, EEOC Commissioner, Congress, and President of the United States all wrong? A more detailed analysis of their arguments suggests that they were.

How Congress came to believe that the courts had supplied a uniform and coherent interpretation of the undue hardship standard under the Rehabilitation Act is a complete mystery. The cases discussed above in Parts III.A.3 and III.A.4 were easily accessible for members of Congress and committee staffers to read and analyze. With legislator after legislator—and even the President of the United States—claiming that judicial interpretations were ample and consistent, it is surprising, if not inexplicable, that none of the congressional committee reports even addressed this claim, let alone confirmed its accuracy. Indeed, the *Nelson* and *Prewitt* cases were the only undue hardship cases even mentioned in the reports.<sup>194</sup>

Had the committees undertaken to factually support this rationale, they would have been forced to conclude that judicial decisions under the Rehabilitation Act regarding undue hardship were neither ample nor consistent. First, only 265 lawsuits had been filed under the Rehabilitation Act between 1973 and 1990—just over fifteen per year.<sup>195</sup> In contrast, in the first two years following Title I's

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Let me say this to the Senator—and I will conclude and I thank him for his patience—the bottom line is that every question I have brought up is going to be decided in a Federal court after thousands of employers are sued under this act if it becomes law.

134 Cong. Rec. S10, 773-74 (daily ed. Sept. 7, 1989) (emphasis added).

193. 26 Weekly Comp. Pres. Doc. 1165 (July 26, 1990).

194. H.R. Rep. No. 101-485, pt. 2 at 68 (cited in note 7) (citing *Nelson* and *Prewitt* as leading cases regarding undue hardship); H.R. Rep. No. 101-485, pt. 3 at 41-42 & nn.30-32 (same).

195. R. Lee Creasman, Jr. and Patricia Greene Butler, *Will the Americans with Disabilities Act Disable Employers?*, 42 Labor L. J. 52, 56 (1991) (citing *EEOC Official Tells Small-Business Group Agency Aims for Workable ADA Regulations*, 138 Daily Lab. Rep. A10 (1990)). These 265 lawsuits were predicated on the entire gamut of Rehabilitation Act coverage: education, transportation, public services, and employment. Since the ADA became effective, the EEOC alone has intervened in nearly that many lawsuits per year—25 in the first two years—and those cases have related solely to Title I-proscribed employment discrimination. Daniel J.

effective date for employers with twenty-five or more employees, approximately 30,000 charges of Title I discrimination were filed, one-quarter of which involved reasonable accommodation issues.<sup>196</sup> Those 265 Rehabilitation Act lawsuits over an almost two-decade period could not possibly have provided a large enough database to sufficiently clarify an issue which will be litigated exponentially more often under the ADA.

Second, the Supreme Court had never addressed the financial scope of an employer's obligation to reasonably accommodate employees under the Rehabilitation Act. Although *Davis*, *Alexander*, and *Arline* brushed across issues germane to undue hardship, none of those cases involved a claim that accommodating a person with a disability would have been too *costly*. Those cases addressed administrative burdens, not financial burdens.

Third, of all of the lower court decisions discussed in Part III.A.4, only a handful squarely addressed whether a proposed employment accommodation would have imposed an undue hardship on an employer, and of those, only *Nelson* and *Gardner* focused on the *financial* costs involved.<sup>197</sup> And even those two cases were inconsistent. Whereas the *Nelson* court looked to the enormous budget of the employing agency in determining that expensive accommodations would not have caused an undue hardship,<sup>198</sup> the court in *Gardner* looked exclusively to the enormous costs of the proposed accommodations, without addressing the budget or resources of the employing agency.<sup>199</sup> Neither of these approaches can withstand critical analy-

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Murphy, *Sorting Out ADA's Enforcement: Businesses Face Uncertainty Under Disability Law*, Investor's Bus. Daily A1-A2 (Aug. 18, 1994).

196. See note 24. Only employers with 25 or more employees, of which there are 264,000, could have been the subject of such charges prior to July 1994. See note 15. It is likely that significantly more charges per year will be filed against the 396,000 employers of 15-25 employees, which have been subject to Title I only since July 26, 1994.

197. Further, even though *Gardner* was ostensibly grounded on the financial cost of accommodations the court deemed necessary, the court failed to examine the actual financial cost involved.

198. *Nelson*, 567 F. Supp. at 380. See also *Kohl*, 672 F. Supp. at 1233-34 (looking to the total budget of a federal aid recipient).

199. See *Gardner*, 752 F.2d at 1283-84. "Like the accommodation in *Nelson*, the cost in *Gardner* [sic] of providing on-site medical facilities would not have imposed an undue hardship on defendant when viewing the cost in the context of the Corps' budget as a whole." Robert B. Fitzpatrick, *Reasonable Accommodation and Undue Hardship Under the ADA*, 39 Fed. Bar News & J. 69, 73 (1992). For additional criticism of the court's holding in *Gardner*, see Kathryn W. Tate, *The Federal Employer's Duties Under the Rehabilitation Act: Does Reasonable Accommodation or Affirmative Action Include Reassignment?*, 67 Tex. L. Rev. 781, 810-11 & nn.162-63 (1989) (arguing that the Corps did not prove undue hardship); Cooper, 139 U. Pa. L. Rev. at 1453-55 (cited in note 26) (arguing that accommodation would not have burdened the Corps as a whole).

sis. "When one looks at an accommodation for *one* employee in terms of an employer's entire budget," as in *Nelson*, "almost all accommodation[s] . . . are 'reasonable' and not an 'undue hardship.'"<sup>200</sup> Conversely, examining an accommodation's cost without considering the resources of the employer, as in *Gardner*, will invariably yield a finding of undue hardship.

Fourth, the Rehabilitation Act cases were hopelessly in conflict on other relevant issues. The *Bey* court found undue hardship because, if each employee in the workforce were entitled to the accommodation plaintiff sought, the *aggregate* cost to the employer in lost productivity would have been tremendous.<sup>201</sup> The court in *Nelson*, on the other hand, looked specifically at the financial cost required to accommodate each plaintiff *individually* in determining that an undue hardship did not exist.<sup>202</sup> The *Nelson* court reached this result even though the employer needed to hire additional part-time employees to assist the plaintiffs in performing their jobs. The court in *Treadwell*, however, ruled that this sort of "doubling up" would have constituted an undue hardship, at least in light of the "limited resources" of the Corps.<sup>203</sup> On the same issue, the court in *Arneson*,

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200. Lawrence P. Postol and David D. Kadue, *An Employer's Guide to the Americans with Disabilities Act: From Job Qualifications to Reasonable Accommodations*, 24 John Marshall L. Rev. 693, 714 (1991). See also Tucker, 1989 U. Ill. L. Rev. at 889 (cited in note 56) (noting that comparing the cost of an accommodation to the overall budget of the agency would eviscerate the undue hardship defense altogether). For this reason, the following statement in the regulatory appendix to 29 C.F.R. § 1630.15(d) seems misplaced: "For example, to demonstrate that the cost of an accommodation poses an undue hardship, an employer would have to show that the cost is undue as compared to the employer's budget." 29 C.F.R. app. 1630.15(d). No similar statement appears in the statute, the regulations themselves, the *EEOC Manual* (cited in note 30), or any of the Committee Reports. Another approach taken in cases outside of the employment setting compares an accommodation's cost to the amount of financial assistance received by the federal grantee, concluding that such aid is granted on the condition that it be used at least in part to benefit the disabled. See *Eastern Paralyzed Veterans Association of Pennsylvania, Inc. v. Sykes*, 697 F. Supp. 845, 852-54 (E.D. Pa. 1988); *Dopico v. Goldschmidt*, 687 F.2d 644, 650 (2d Cir. 1982); *Espino v. Besteiro*, 520 F. Supp. 905, 909 (S.D. Tex. 1981); *Camenisch*, 616 F.2d at 129, 133, vacated on other grounds, 415 U.S. 390 (1981). This approach was bolstered by the Supreme Court's dicta in *Consolidated Rail*, 465 U.S. at 632-33 n.13, that "Congress apparently determined that it would require contractors and grantees to bear the costs of providing employment for the handicapped as a *quid pro quo* for the receipt of federal funds." However, comparing an accommodation's costs to the total amount of federal funds received suffers from the same flaw as comparing the cost to the recipient's budget: "[v]irtually any expenditure would be justifiable in relation to what would almost always be a significantly larger 'comparative' expenditure." Tucker, 1989 U. Ill. L. Rev. at 889.

201. *Bey*, 540 F. Supp. at 927.

202. *Nelson*, 567 F. Supp. at 380.

203. *Treadwell*, 707 F.2d at 478. It is hard to imagine that the resources of the Corps were more limited than the resources of the Pennsylvania Department of Public Welfare, or that the "doubling up" of the seasonal park technician's duties would have been more financially

while acknowledging that the Rehabilitation Act does not require an agency to hire an additional full-time employee to assist a disabled employee, strongly suggested that the hiring of a part-time assistant would not cause an undue hardship.<sup>204</sup> Finally, other courts grounded a finding of undue hardship on health or safety concerns.<sup>205</sup> Yet nowhere in the HEW regulations on reasonable accommodation or undue hardship are the health or safety consequences of an accommodation listed as factors to be considered.<sup>206</sup>

The committees with jurisdiction over the ADA not only failed to analyze the case law they contended amply and coherently defined the contours of the undue hardship standard, they also failed to examine relevant scholarly literature. If they had consulted such literature, they would have learned that commentators had concluded that "[r]ather than provid[ing] a clear criterion for decision by designating some limit on the burden that may be imposed on employers, 'undue hardship' seems in practice to have served simply as a label for accommodations that courts have refused to require in particular cases"<sup>207</sup> and that "[i]mprecise terminology, such as 'reasonable accommodation' and 'undue financial burden' has resulted in inconsistent interpretations of section 504 [demonstrating] the need for more precise standards."<sup>208</sup> Indeed, both of these

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burdensome to the Corps than doubling up of the duties of the income-maintenance workers for the DPW.

204. *Arneson*, 879 F.2d at 397-98. *Arneson* is of dubious precedential value in ADA litigation because the court's analysis was explicitly predicated on § 501's affirmative action requirement, not § 504's reasonable accommodation requirement. *Id.* at 396. Because Title I of the ADA requires only reasonable accommodation, not affirmative action, courts interpreting the ADA should be wary of relying on *Arneson*. To a lesser extent, the same can be said of *Dexler*, *Gardner*, *Carter*, and *Baker*, each of which were grounded on § 501 (and at least in part on § 501's affirmative action requirement), rather than § 504.

205. See *Dexler*, 660 F. Supp. at 1423 (finding that the use of step stools presented safety concerns); *Gardner*, 752 F.2d at 1281 (finding that the plaintiff's medical condition would endanger himself and others); *Bey*, 540 F. Supp. at 926 (finding that the plaintiff would endanger his own health and safety by performing job duties); *Kohl*, 865 F.2d at 941 (finding that the plaintiff would pose a significant risk of communicating an infectious disease).

206. The ADA provides, separate and apart from the issue of undue hardship, that an employer need not employ a person with a disability, or provide an accommodation, where the plaintiff's health or safety, or the health and safety of others, would be jeopardized. 42 U.S.C. §§ 12111(3), 12113(b); 29 C.F.R. §§ 1630.2(r), 1630.15(b)(2) (1993). In a similar vein, the *Arline* court held that an employee could not be considered "otherwise qualified" if he posed a health or safety threat to himself or others. 480 U.S. at 287 n.16. But to the extent that courts construing the Rehabilitation Act's undue hardship standard factored health or safety issues into their analyses, their ultimate conclusions regarding undue hardship have limited precedential value in ADA undue hardship cases.

207. Comment, *Employment Discrimination Against the Handicapped and Section 504 of the Rehabilitation Act: An Essay on Legal Evasiveness*, 97 Harv. L. Rev. 997, 1011 (1984).

208. Gerse, 1982 U. Ill. L. Rev. at 718 (cited in note 57). In an article published at about the time the ADA was enacted, Professor Tucker noted that "the courts have applied different



commentators urged Congress to enact amendments to the Rehabilitation Act to increase the precision of the undue hardship standard.<sup>209</sup>

Fifth, Congress's conclusion that Rehabilitation Act precedents were adequate to guide employment decisions under the ADA ignored a crucial distinction between the scope of the Rehabilitation Act and the scope of the ADA: The Rehabilitation Act applies only to public-sector employers and private-sector employers that receive federal funding or hold federal contracts.<sup>210</sup> Indeed, the central impetus behind Congress's enactment of Title I of the ADA was to provide

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analyses, and reached confusing and conflicting results, when determining what constitutes 'undue hardship' to employers or program administrators." Tucker, 1989 U. Ill. L. Rev. at 888 (cited in note 56). She observed that "[w]hile everyone seems to agree that the term 'undue hardship' denotes excessive costs, there is no consensus as to how to determine whether the cost of accommodation is excessive." *Id.* More recently published scholarship has been even more direct: "Courts disagree radically on how far accommodation has to go before it becomes undue hardship"; "twelve years of case law construing and clarifying the terms 'reasonable accommodation' and 'undue hardship' have [not] resolved the terms ambiguities . . . ." Stuhlberg, 59 U. Cin. L. Rev. at 1336, 1339 (cited in note 26). See also Margaret E. Stine, Comment, *Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act of 1990*, 37 S.D. L. Rev. 97, 113 (1992) (stating that "[u]nfortunately, cases decided prior to the enactment of the ADA demonstrate no uniformity in the courts as to the interpretation of 'undue hardship'"); Brandfield, 59 Fordham L. Rev. at 119 (cited in note 26) (stating that "[l]ower courts . . . have not been able to determine with any uniformity when the Rehabilitation Act mandates accommodation"); Harger, 41 U. Kan. L. Rev. at 799 (cited in note 25) (stating that "case law interpreting the Rehabilitation Act provides little or no guidance to a small business trying to understand its obligation to accommodate reasonably and make decisions in accordance with the law's).

209. The first commentator proposed an amendment providing that "[t]he maximum statutory level for accommodation costs shall be equal to X percent of the employee's annual salary. . . ." Comment, 97 Harv. L. Rev. at 1013 (cited in note 207). Notice this proposal's similarity to the Olin and House Judiciary Committee amendments rejected by Congress during debate on the ADA. This proposal, and the Olin and House Judiciary Committee amendments, were inspired by a provision of the North Carolina Handicapped Persons Protection Act, N.C. Gen. Stat. §§ 168A-3(10)(a)(6), (7) (1987), providing that employers are not required to accommodate disabled employees at a cost any greater than 5% of the employee's annual salary.

The second commentator's proposed amendment provided that "[a] recipient is not required to make accommodations which are excessively expensive or disruptive" when viewed in light of: (1) the "total operating budget of the program or activity"; (2) the "total wage budget"; and (3) the "long-term benefits of the accommodation." Gerse, 1982 U. Ill. L. Rev. at 729. Professor Tucker proposed the following model for the Rehabilitation Act:

[W]hen deciding whether [a] proposed accommodation for a handicapped employee is reasonable or constitutes an undue hardship to the employer, agencies and courts should be required to compare the nature and cost of the accommodation requested against 1) the size, type, and budget of the employer's business; AND 2) the amount of federal financial assistance received by the employer; AND 3) the position and salary sought or held by the handicapped employee; AND 4) the handicapped employee's overall cost effectiveness to the employer. These factors should be given equal weight and no one factor should be determinative.

Tucker, 1989 U. Ill. L. Rev. at 892. Proposals to clarify the meaning of undue hardship under the ADA are discussed in notes 277 and 289.

210. 29 U.S.C. §§ 791, 793, 794. See text accompanying notes 59-61.

remedies to employees of private businesses who were left unprotected by the Rehabilitation Act.<sup>211</sup> Hence, to the extent the undue hardship standard had evolved under the Rehabilitation Act, it had evolved in the context of large public or quasi-public employers whose budgets were comprised in large part, or exclusively, of revenue collected from taxpayers, rather than in the context of wholly private employers.

This distinction has enormous significance considering that the ADA, unlike the Rehabilitation Act, applies to several hundred-thousand private employers never before covered by the Rehabilitation Act.<sup>212</sup> These employers must make reasonable accommodations not from money provided by the government, but rather from income and profit earned competitively through ingenuity and labor.<sup>213</sup> As the Supreme Court noted in *Consolidated Rail Corporation v. Darrone*, in the Rehabilitation Act, "Congress apparently determined that it would require contractors and grantees to bear the costs of providing employment for the handicapped as a *quid pro quo* for the receipt of federal funds."<sup>214</sup> A *quid pro quo* rationale obviously cannot be applied to private employers required to accommodate disabled employees from wholly private funds. Further, unlike a public employer, a private business's central purpose is to create and maximize profit.<sup>215</sup>

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211. See note 16.

212. S. Rep. No. 101-116 at 88 (cited in note 7).

213. Brandfield, 59 Fordham L. Rev. at 121 n.56 (cited in note 26) (arguing that "cost is a more important issue under the ADA because it deals with private businesses rather than the government's deep pockets, which were at issue under the Rehabilitation Act"); Sue A. Krenck, Note, *Beyond Reasonable Accommodation*, 72 Tex. L. Rev. 1969, 2001 (1994) (stating that "[b]ringing private employers into the accommodation picture, as the ADA does, alters the economic analysis substantially").

214. *Consolidated Rail*, 465 U.S. at 632-33 n.13. "Federal employers and federal contractors, however, who are performing government functions rather than simply operating for-profit businesses should be held to a more onerous duty to accommodate handicapped persons. Indeed, Congress recognized this principle when it imposed an affirmative action obligation on federal agencies and contractors to hire handicapped people." Tucker, 1989 U. Ill. L. Rev. at 892 n.247 (cited in note 56).

215. See Tucker, 1989 U. Ill. L. Rev. at 892 (stating that federal employers and contractors are distinguishable from private employers to the extent the latter exist solely for profit-making purposes); Allan Cox, *The Cox Report on the American Corporation* 200-201, 210 (Delacorte, 1982) (stating that over 95% of business executives place the most importance on profits); Francis W. Steckmest, *Corporate Performance* 27 (McGraw-Hill, 1982) (stating that "profit is the major driving force of the private enterprise system"). As one member of Congress observed:

The private sector does not have deep pockets. The private sector has to make a profit to provide the jobs that we enjoy today and the standard of living that we enjoy today. The bill, if it is properly written, should tell the private sector, No. 1, who is disabled and how do you comply with the bill in making a public accommodation to those who are disabled.

136 Cong. Rec. H2316 (daily ed. May 15, 1990) (statement of Rep. DeLay). Congressman DeLay reiterated these concerns during debate on the Olin Amendment:

A \$6,638 accommodation may not cause undue hardship to a state agency with 38,000 employees and an annual budget of \$300,000,000,<sup>216</sup> but its impact on a private employer with fifteen employees that is barely breaking even will be radically different.<sup>217</sup> Consequently, even if the cases interpreting undue hardship under the Rehabilitation Act had been uniform and consistent, they could not possibly serve as the proper framework for evaluating claims by *private employers* that proposed accommodations would cause them an undue financial hardship.<sup>218</sup>

In summary, the argument that the standard codified in the ADA had been applied without problems or inconsistencies under the Rehabilitation Act was deeply flawed. In the seventeen years of Rehabilitation Act jurisprudence prior to the ADA's enactment, courts rarely had addressed the concept of *financial* undue hardship. The dearth of case law on this subject is hardly surprising in view of the

The gentleman from New York [Mr. Owens] talks about having a long case history, a dealing with section 5[0]4 of the Rehab Act since 1973. That is case history on government entities with deep pockets. We are going from deep pockets of government industry and applying this bill to private sectors that could not have the deep pockets of government, and that is the big difference. Employers must know how they are to comply with this law.

136 Cong. Rec. H2473 (daily ed. May 17, 1990).

216. See discussion of *Nelson*, text accompanying notes 107-18.

217. As one commentator observed, "[i]nsofar as . . . the facts pertaining to huge organizations receiving enormous grants are necessarily entirely different than facts pertaining to a small employer who is barely getting by, section 504 obviously cannot provide significant guidance to a small business in determining how to comply with the ADA." Stuhlbarg, 59 U. Cin. L. Rev. at 1334 (cited in note 26). See also Harger, 41 U. Kan. L. Rev. at 799 (cited in note 25) (stating that "[a]nalogizing the facts of cases involving huge businesses receiving enormous federal grants to the smallest of businesses is practically impossible"); Cooper, 139 U. Pa. L. Rev. at 1441 n.99 (cited in note 26) (stating that "the federal government, with its tremendous resources, is able to absorb far greater costs without undue hardship than a private employer is likely to be").

218. This distinction was not lost on business lobbyists, who vigorously pressed this argument at committee hearings:

We believe it is one thing to require institutions receiving substantial federal funds to use a part of those monies to ensure that the workplace is as hospitable as possible to the disabled; it is quite another to require precisely the same actions, and the same levels of expenditure, on behalf of all private employers as a matter of positive law. Similarly, we believe there is a substantial difference between the obligations of the federal government to its disabled citizens, who as citizens are entitled to demand that the government spend their tax dollars in socially beneficial ways, and the obligations of private sector employers trying desperately to compete in a global economy.

*Senate Hearings*, app. at 412 (cited in note 164) (letter from Zachary D. Fasman, on behalf of U.S. Chamber of Commerce, to Sen. Harkin 2 (May 26, 1989)). Another lobbyist interjected that "[t]here is no relationship between profit and undue hardship [in the bill]. What do you do with a business that is not making a profit? Do you have to go borrow the money in order to make these accommodations? Those things are not clearly spelled out." *Small Business Hearing* at 40 (cited in note 170) (testimony of David Pinkus, on behalf of National Small Business United).

fact that the public and quasi-public entities covered by the Rehabilitation Act could not truly suffer a financial undue hardship from a mandate that a portion of government funds received be set aside for reasonable accommodation. Moreover, the few cases that did address undue hardship under the Rehabilitation Act utilized different analyses and arrived at inconsistent results. Finally, even to the extent that some coherent meaning of undue hardship could be extracted from this mish-mash of jurisprudence, that meaning is of minimal value under the ADA, which extends coverage to private employers that will suffer undue hardship much more readily than the beneficiaries of government funds covered by the Rehabilitation Act.

### C. Leave it to the Courts

Accepting for a moment the argument that the courts *had already* clarified the meaning of undue hardship, it is hard to explain why status quo proponents also argued that judicial interpretation *would* clarify its meaning.<sup>219</sup> Apart from its inherent inconsistency with the previous rationale, this argument is deficient in several respects. First, and most significantly, the ADA threatens employers with liability for discrimination unless they accurately distinguish between accommodations which would cause them an undue hardship and those which would not.<sup>220</sup> Consequently, employers must be provided with a method which enables them to make this distinction.<sup>221</sup> To simply say that "the courts, over time, will provide such a method" is an insufficient response. It is unfair to impose liability on

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219. See 136 Cong. Rec. H2473 (daily ed. May 17, 1990) (statement of Rep. Owens that "[w]e leave it up to the courts. They have a long history of interpreting what undue hardship is"); *Senate Hearings* at 109-10 (statement of Sen. Harkin that the courts will decide what accommodations are reasonable); 136 Cong. Rec. H2317 (daily ed. May 15, 1990) (statement of Rep. DeLay criticizing the rationale that "we are going to rely on the courts to legislate and tell us what those parameters would be and those definition would be").

220. Indeed, the Civil Rights Act of 1991 authorized the award of compensatory and punitive damages for an employer's failure to make reasonable accommodations as required by Title I. 42 U.S.C. § 1981a(a)(2). See note 229 and accompanying text. However:

damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

Id. § 1981a(a)(3).

221. "What the small business community needs is a firm, clear, quantifiable, mechanical procedure which would convert data into answers, so that one can *know*, without needing to guess, whether a suggested accommodation would [create an undue hardship]." Stuhlbarg, 59 U. Cin. L. Rev. at 1338 (cited in note 26).

an employer for failure to comply with an obligation that Congress has consciously decided not to define clearly.<sup>222</sup> Congress' failure in this regard was nothing short of an abdication of its responsibility.<sup>223</sup>

Second, it is equally unfair to require employers to expend untold litigation costs to obtain the clarity in the judicial process that Congress could have achieved so easily in the legislative process.<sup>224</sup> It is one matter to subject an employer to the rigors and expense of litigation for engaging in conduct that it knew might subject it to litigation and which it could have prevented. It is quite another to subject an employer to litigation merely because Congress lacked the fortitude to clearly define the scope of the employer's responsibilities, and decided instead to "let the courts decide."<sup>225</sup>

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222. Representative DeLay made this argument just days prior to House passage of the ADA:

The proponents of the bill in hearings even admit that it is ambiguous and vague in its language, and that the courts will decide who are disabled and how do you comply. This is a very ominous position that our business people are being put in, especially the small business person who does not have the capability of hiring expensive lawyers to defend against frivolous suits or suits that are being brought to harass a particular place of business.

136 Cong. Rec. H2316 (daily ed. May 15, 1990).

223. As one Congressman eloquently stated:

One of the purposes of this and every piece of legislation is to provide a basis for reasonable expectation between parties in conflict. Even though great strides have been made in cleaning up this bill in that regard, it is still nebulous. What the meaning of "undue hardship" or "reasonable accommodation" is will vary depending on where you sit. This legislation should attempt to narrow the gap between those expectation levels. At this point, those expectations are left for courts all over this country to decide. No one will ever be certain that they have complied. Let's make them at least a little more certain. Congress is abrogating it [sic] constitutional duty by writing vague laws which must be clarified by the Federal courts. Our *responsibility* is to write laws which can be clearly understood when reading them—not have another branch of government do our job.

H.R. Rep. No. 101-485, pt. 3 at 94 (cited in note 31) (dissenting views of Rep. Douglas). See also Holtzman, Jennings, and Schenk, 44 Baylor L. Rev. at 304 (cited in note 25) (stating that "[t]he ADA is a classic example of a legislative body punting to the courts where tough determinations need to be made"); Harger, 41 U. Kan. L. Rev. at 791 (cited in note 25) (labeling such an approach "wholly insensitive to small businesses").

224. See 136 Cong. Rec. H2448 (daily ed. May 17, 1990) (statement of Rep. Arney) (stating that "[b]y leaving clarification up to the courts, we are inviting costly and unnecessary litigation"); *Joint Hearing* at 48 (cited in note 172) (statement of Mark R. Donovan, Manager of the Community Employment and Training Programs of Marriott Corporation, that "language in the Bill should be written . . . to minimize its use as a foundation for frivolous claims against employers"); Edward J. McGraw, Note, *Compliance Costs of the Americans with Disabilities Act*, 18 Del. J. Corp. L. 521, 540 (1993) (claiming that "[a]n onslaught of litigation must be expected from an Act which specifically contemplates interpretation on a case-by-case basis").

225. Congressman DeLay advanced this argument in support of the Olin Amendment:

Mr. Chairman, it frightens me when someone tell[s] me that the courts will decide on this issue. If[t] frightens me greatly. This is harmful to the employer by applying this higher expense. It is the wrong argument. The employers are willing to accept this higher expense for certainty of compliance rather than leave their fate up to the courts.

Third, and equally distressing, leaving the vague standard in place for judicial clarification leaves job applicants and employees in the awkward position of not knowing what accommodations they can rightfully demand from their potential or current employers. Employees with disabilities must either accept their employers' claims of undue hardship at face value or prepare for a lengthy and expensive court battle to obtain accommodations that in the end may not be worth the fight. This situation will assuredly result in tense, if not hostile, relations between employers and employees with disabilities, a state of affairs antithetical to Congress' goal of facilitating the full employment of people with disabilities.<sup>226</sup>

Finally, the assumption that the courts will adequately clarify what Congress did not ignore both history and reality. Our analysis of Rehabilitation Act jurisprudence teaches us that courts have been woefully unsuccessful in clarifying the meaning of undue hardship under that act. There is no reason to believe that they will be any more successful in defining the scope of undue hardship under the ADA. Courts have little inclination to draw the precise mathematical lines that the ADA will require them to draw in undue hardship cases.<sup>227</sup> They are even less likely to develop guidelines suitable for

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136 Cong. Rec. H2473 (daily ed. May 17, 1990).

226. See 136 Cong. Rec. S9694 (daily ed. July 13, 1990) (statement of Sen. Armstrong) (stating that the ADA would create "an adversarial relationship between people with disabilities and the proprietors of small businesses"); Krenck, Note, 72 Tex. L. Rev. at 1973 (cited in note 213) (saying that "[t]he ADA pits employers against people with disabilities, creating conflict between the two groups that *must* work together if the statute's goal of integration is to be met"). One commentator's response to Congress's "let the courts decide" rationale resonates with insight:

[V]ague standards are likely to lead to increased costs. With insufficient guidelines as to how much accommodation is enough, there is the possibility that overall cost, both to employers and to the judicial system, may eventually outweigh the considerable social benefits of the ADA. The problem of quantifying reasonable accommodation—delineating the standard beyond the law's vague generalizations—persists. As a result, employers, left without a road map for business planning, will have a hard time foreseeing their duty. They will be fearful of the legal ramifications of engaging in discriminatory practices, without even knowing when they have crossed that line. Employees will not know whether their rights have been violated and, therefore, whether to bring suit. Courts, in turn, will not have a clear standard by which to render judgments in discrimination cases. The potential is great for a lack of uniformity in decisions, which may lead to substantively unfair judgments. In the end, both employers and employees are ill-served.

Dolatly, 26 Colum. J. L. & Soc. Probs. at 547 (cited in note 25).

227. Recall that the ADA requires that even if an employer can successfully demonstrate that the *total* cost of an accommodation would impose an undue hardship on its business, it is nevertheless obligated to pay for the *portion* of the accommodation which would not impose an undue hardship. This obligation assumes that the undue hardship standard should be defined precisely enough to enable translation into dollars and cents. See notes 50-51 and accompanying text. Yet the judiciary is the most unlikely branch of government to supply the calculus necessary for such translation.

universal application, particularly because Congress specified that undue hardship is to be decided on a case-by-case basis.

In contrast, Congress is well-equipped to develop such bright-line guidelines.<sup>228</sup> Just one year following enactment of the ADA, Congress adopted precisely these sorts of guidelines in legislation defining the maximum liability for compensatory and punitive damages applicable to employers who violate Title I of the ADA and Title VII of the Civil Rights Act of 1964.<sup>229</sup> Hence, Congress has provided employers with advance knowledge of the scope of their financial obligations arising from *violation* of Title I without providing them any guidance regarding the level of financial expenditures required to *comply* with Title I.<sup>230</sup>

#### D. For Flexibility's Sake

The final defense employed by status quo proponents to repel requests for a more precise undue hardship standard was that, above all else, the undue hardship standard had to be flexible; a precise standard, they argued, could not achieve that objective. As one Congressman stated: "Flexibility, not a rigid formula rule, is what is needed to make this legislation effective and workable."<sup>231</sup> Another concurred that "the strength of the ADA, is that 'undue hardship' is a flexible standard, which is designed to take into account a range of different factors."<sup>232</sup> The House Judiciary Committee rejected a fixed standard because it believed "that setting a ceiling on reasonable accommodation is inappropriate and that the flexible approach used under section 504 of the Rehabilitation Act . . . is appropriate for the ADA as well."<sup>233</sup> Indeed, the Olin Amendment was opposed in part "because it would [have] erode[d] the flexible approach embodied in

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228. See, for example, 26 U.S.C. § 1(c) (Supp. 1993) (setting forth federal income tax table for unmarried individuals ranging from 15% to 39.6%, depending on taxable income).

229. The Civil Rights Act of 1991 established maximum liability for compensatory and punitive damages as follows:

Number of Employees		Maximum Liability
15-100 employees	=	\$ 50,000
101-200 employees	=	\$100,000
201-500 employees	=	\$200,000
501+ employees	=	\$300,000

42 U.S.C. § 1981a(b)(3) (Supp. 1993). See note 237 regarding pending legislation which would repeal these limits.

230. See note 316.

231. 136 Cong. Rec. H2474 (daily ed. May 17, 1990) (statement of Rep. Morrison).

232. *Id.* at E1915 (daily ed. June 13, 1990) (statement of Rep. Hoyer).

233. H.R. Rep. No. 101-485, pt. 3 at 41 (cited in note 7).

the Rehabilitation Act and adopted by the ADA.<sup>234</sup> Even some commentators have argued that "[a] strict definition of undue hardship that would provide a clear-cut answer in every situation is not possible, because of the range of possible accommodations and the variances in employer resources."<sup>235</sup>

This flexibility argument is flawed for two reasons. First, to the extent it attempts to account for an infinite number of permutations of disabilities and methods of reasonable accommodation, it is irrelevant to the undue hardship question. The undue hardship question focuses exclusively on the wherewithal of the employer to absorb financial costs. It matters not whether those costs are necessitated by a blind employee requiring a Braille computer or a deaf employee requiring an interpreter. The financial impact on the employer is the only relevant factor.

Second, to the extent that the flexibility rationale assumes that a mathematically precise standard cannot possibly be flexible enough to address all of the varying levels of employer resources from which reasonable accommodation will be made, it simply is not correct.<sup>236</sup> Again, just one year following enactment of the ADA, Congress in fact enacted legislation which contained such a mathematically precise formula to cover the very same range of employers. The Civil Rights Act of 1991 utilized a sliding scale to measure the level of damages which could be assessed against employers for violating Title I: the larger the employer, the greater the damages which could be assessed.<sup>237</sup> The same analytical concept can be applied to

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234. 136 Cong. Rec. H2474 (daily ed. May 17, 1990) (statement of Rep. Payne); id. at E1915 (statement of Rep. Hoyer that Olin Amendment was defeated in large part because of this inflexibility).

235. Cooper, 139 U. Pa. L. Rev. at 1454-56 (cited in note 26). See G. William Davenport, *The Americans with Disabilities Act: An Appraisal of the Major Employment-Related Compliance and Litigation Issues*, 43 Ala. L. Rev. 307, 328 (1992) (stating that "logic compels that [a bright-line test] be rejected as well because America's 43 million disabled citizens do not present a homogenous group by any stretch of the imagination. What will constitute undue hardships must always be determined by the facts of each particular case" (citations omitted)).

236. Unfortunately, the Olin Amendment legitimized the flexibility argument, inasmuch as a 10% per se cap on reasonable accommodation would truly not have been "flexible" enough to ensure that some disabled employees receive appropriate accommodations. The real problem with the Olin Amendment's approach, however, was not that it lacked flexibility, but rather that it improperly focused on the *employee's* financial resources, rather than on the employer's. This issue will be discussed further at notes 245-60 and accompanying text.

237. See note 229 and accompanying text. Why Congress adopted this approach to limit damages for violation of Title I of the ADA and Title VII of the Civil Rights Act of 1964 is unclear, inasmuch as there was no legislative debate regarding the need for a sliding scale and no committee reports were drafted on the Civil Rights Act of 1991. A committee report was drafted regarding similar legislation which died in the previous Congress, but that legislation did not include a sliding damages scale. See generally H.R. Rep. No. 101-644, pt. 2, 101st Cong., 2d Sess. (1990).



measure the scope of accommodation required by the ADA without causing any problems the flexibility proponents might have fathomed. A precise standard can be developed that fairly defines the scope of obligations of both a fifteen-employee business and a fifteen-thousand-employee business. Consequently, a vague undue hardship standard is not necessary to ensure that the ADA has sufficient flexibility to address all possibilities fairly.

Having critically analyzed the rationales advanced during the legislative process in favor of the ADA's vague "significant difficulty or expense" undue hardship standard, we can now comfortably conclude that such a vague standard is not compelled by history, logic, or sound public policy. Rather, history, logic, and sound public policy demand a quantitative undue hardship standard.<sup>238</sup> With full implementation of Title I now achieved, it is likely only a matter of time until all of the arguments raised above are brought to bear on Congress and the EEOC, together with requests for amendments and/or new regulations. Thus, it is appropriate to develop a quantitative proposal to bring to the bargaining table. Not only *can* such a standard be created, but one *must* if the ADA has any hope of fulfilling the noble objectives for which its drafters and supporters had strived.

#### V. BACK TO THE DRAWING BOARD: TOWARD A QUANTITATIVE UNDUE HARDSHIP MODEL

To begin the construction process, it will be helpful to determine the broad moral principles Congress seemed to embrace during its consideration of the ADA generally and the undue hardship provision specifically; for we should endeavor to incorporate those principles into our new quantitative model if at all possible. We will uncover two such principles, one which shall be referred to as the "fairness principle," and the other as the "equalizing principle."

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Interestingly, this scale may be repealed. As of this writing, legislation is pending in Congress under the title of the "Equal Remedies Act" which would dismantle the sliding scale and allow unlimited compensatory and punitive damages for violation of Title I of the ADA and Title VII of the Civil Rights Act of 1964. H.R. 96, 104th Cong., 1st Sess. (1995). See S. 17, 103d Cong., 1st Sess. (1993). See generally Equal Remedies Act of 1991, S. Rep. No. 102-286, 102d Cong., 2d Sess. (1992).

238. Other commentators agree. See Brandfield, 59 Fordham L. Rev. at 127 (cited in note 26); Dolatly, 26 Colum. J. L. & Soc. Probs. at 548 (cited in note 25); Stuhlberg, 59 U. Cin. L. Rev. at 1338 (cited in note 26); Comment, 97 Harv. L. Rev. at 1013 (cited in note 207).

*A. The Fairness Principle*

The fairness principle attempts to balance two competing interests. On the one hand is society's goal of leveling the employment playing field for citizens who cannot secure jobs without receiving accommodations. This goal can be achieved only if businesses are compelled by law to provide such accommodations. On the other hand is private enterprise's goal of generating and maximizing profit—its very reason for existing. We live in a capitalistic economy in which profit maximization is valued as a laudable goal. In such an economy, society cannot justifiably expect private businesses to abandon the goal of profit maximization to fulfill society's goal of employing people with disabilities. The fairness principle therefore labels as "undue hardship" the point at which a private business's ability to maximize profit is threatened by society's mandate that it accommodate employees with disabilities.<sup>239</sup> It is at that point, and only that point, that the societal goal embodied in Title I must yield.

The very words "undue" and "hardship," when used in tandem in the reasonable accommodation context, immediately convey what the fairness principle is all about. After all, it is a financial "hardship" for a private employer to be required to set aside funds otherwise distributable as profit to the business' owners for the sole purpose of accommodating employees with disabilities. When attached to "hardship," the word "undue" merely signifies the point at which that hardship is more than the society should demand of private employers.

The fairness principle is by definition flexible. What is fair to ask of one employer is not necessarily fair to ask of another employer, or even of the same employer at a different time.<sup>240</sup> For instance, whereas a giant multinational corporation might "fairly" be asked to spend thousands of dollars to accommodate an employee with a disability, requiring the same level of accommodation from a local restaurant would probably not be "fair."<sup>241</sup> The greater the resources

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239. See Tucker, 1989 U. Ill. L. Rev. at 891 (cited in note 56) (arguing that "the [undue hardship] test must give due recognition to the employer's primary objective of maximizing profits").

240. See 29 C.F.R. app. § 1630.15(d) (stating that "an accommodation that imposes an undue hardship for one employer at a particular time may not pose an undue hardship for another employer, or even for the same employer at another time").

241. As stated by the House Judiciary Committee, "[a]lthough an action may be a significant expense . . . in the abstract, or when considered with regard to a small employer, it may not be an undue hardship when considered in light of the size of the employer. . . ." H.R. Rep. No. 485, pt. 3 at 35 (cited in note 7). The *EEOC Manual* explicitly provides that "[i]n general, a larger employer would be expected to make accommodations requiring greater effort or expense

available to an employer, the greater the scope of accommodations which can be made without requiring the employer to sacrifice its profit-maximizing goal.

Turning to the legislative history, the first piece of evidence that Congress embraced this fairness principle is the compromise made by the Act's sponsors between the 1988 and 1989 legislative sessions. Recall that the initial bill contained not an undue hardship provision, but rather the "bankruptcy provision" which would have required businesses to make all requested accommodations unless doing so would have *threatened their existence*.<sup>242</sup> Business groups succeeded in replacing the "bankruptcy provision" with the undue hardship provision because the former asked of them more than society should demand of private employers. The undue hardship standard, on the other hand, better respected the balance between businesses' profit-maximizing goal and society's goal of putting individuals with disabilities to work.

Additional evidence of the fairness principle is present in the second and third factors of the statutory undue hardship provision, requiring analysis of the "overall financial resources" of the employer and "the effect [of proposed accommodations] on expenses and resources. . . ."<sup>243</sup> The only logical reason why the level of an employer's resources should be examined is to determine when an accommodation would too greatly deplete those resources to be acceptable in our capitalistic economy. Still further evidence of the fairness principle exists in the House Judiciary Committee's explanation of why an additional statutory factor was added to address local facilities:

The Committee is responding particularly to concerns about employers who operate in depressed or rural areas and are operating at the margin or at a loss. Specifically, concern was expressed that an employer may elect to close a

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than would be required of a smaller employer." *EEOC Manual* at § 3.9 (cited in note 30). Commentators have made the same observation. See, for example, Fitzpatrick, 39 Fed. B. News & J. at 73 (cited in note 199) (recognizing that "[t]he definition of undue hardship suggests that a large employer should absorb a higher cost of accommodation than should a small employer"); Lavelle, 66 Notre Dame L. Rev. at 1186-87 (cited in note 25) (noting that "the better off a covered entity is financially, the harder it will be to show an undue hardship, at least economically"); Matthew B. Schiff and David L. Miller, *Reasonable Accommodation Under the Americans with Disabilities Act*, 28 Gonzaga L. Rev. 219, 220 (1992/93) (symposium issue) (alleging that "[l]arger, profitable employers should be prepared to provide virtually any reasonable accommodation"); Davenport, 43 Ala. L. Rev. at 325 (cited in note 235) (arguing that "all other factors being equal, it should be recognized that smaller employers will be granted considerably greater leeway than larger firms in claiming undue hardship").

242. See notes 162-64 and accompanying text.

243. 42 U.S.C. § 12111(10)(B)(ii) & (iii).

store if it is losing money or only marginally profitable rather than undertake significant investments to make reasonable accommodations to employees with disabilities. The Committee does not intend for the requirements of the Act to result in the closure of neighborhood stores or in loss of jobs. The Committee intends for courts to consider in determining "undue hardship," whether the local store is threatened with closure by the parent company or is faced with job loss as a result of the requirements of this Act.<sup>244</sup>

In light of this legislative history, for Congress or the EEOC to consider seriously any proposed modification of the undue hardship standard, the fairness principle must lie at its core.

### *B. The Equalizing Principle*

The equalizing principle provides that all employees of a given company are entitled to exactly the same financial level of reasonable accommodation expenditures, irrespective of their position, salary, or the degree to which they contribute to the success of the company.<sup>245</sup> Under the equalizing principle, the janitor who mops the company floors at night is entitled to accommodations equally expensive as those which might be provided to the corporate executive who walks on those floors during the day.<sup>246</sup> Although this result may appear counterintuitive at first blush, it is unquestionably what Congress intended.

The committee reports cited study after study for the proposition that people with disabilities are, generally speaking, the least well employed, least well educated, and most economically disadvan-

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244. H.R. Rep. No. 101-485, pt. 3 at 40-41 (cited in note 7).

245. The equalizing principle requires that all employees *within* a business organization be entitled to the same financial level of accommodation. It does not require that all employees *in all business organizations* be entitled to the same level of accommodation. This is because the fairness principle is linked to the financial resources of *individual companies*: the greater the resources of an individual company, the more that company should be required to expend on reasonable accommodations. If the equalizing principle applied to the total American labor force, it would require some companies to pay less than what society could justifiably ask of them—to the detriment of employees with disabilities—and some companies to pay more than what society could justifiably ask of them—to the detriment of those companies. In tandem, the fairness principle and equalizing principle permit employees working for profitable companies to receive more expensive accommodations than employees working for less profitable companies. The tradeoff for this inter-organizational "inequality" is that each covered employer must push the reasonable accommodation envelope as far as society can ask. Requiring all covered employers to push this envelope will assure the maximum level of accommodation possible nationwide. In a nutshell, that is the central goal of Title I.

246. That being said, the equalizing principle tolerates a distinction between part-time and full-time employees. Indeed, there is something intrinsically *unequal* about entitling a 10-hour/week employee to the same level of accommodation as a 40-hour/week employee. Thus, to the extent the discussion above addresses the equalizing principle, it is discussing that principle solely in the context of full-time employees. Part-time employees are addressed at note 237.

tagged segment of the American population. For instance, the reports cited a Lou Harris poll finding that two-thirds of all Americans with disabilities between sixteen and sixty-four years of age are unemployed.<sup>247</sup> They also noted that, in 1984, half of all adults with disabilities had household incomes of \$15,000 or less—double the percentage of the non-disabled population in that income bracket.<sup>248</sup> It was in large part because of these disparities that Congress began considering the ADA in the first place, “to allow individuals with disabilities to be part of the economic mainstream of our society.”<sup>249</sup>

Congress’ statutory findings reiterated these concerns:

- (6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;
- ....
- (8) the Nation’s proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and
- (9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.<sup>250</sup>

Congress wanted the ADA to enable the disabled population to pull itself up by its own bootstraps and, over time, close the gaps in education, employment, and economic status which had persisted for too long. To achieve this goal, Congress realized that those most in need of financial assistance to procure accommodations would have to be provided with such assistance, unless doing so would run afoul of

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247. S. Rep. No. 116 at 9 (cited in note 7); H.R. Rep. No. 101-485, pt. 2 at 32 (cited in note 7). See also National Council on Disability, *Implications for Federal Policy* at 19 (cited in note 7). That number has now grown to 68%. See note 7. Census data, however, reveal that the percentage of disabled unemployed persons in the 21–64-year-old age bracket is only 48%. McNeil, *Americans With Disabilities: 1991-92, Current Population Reports* at 62 (cited in note 7).

248. S. Rep. No. 101-116 at 9. See H.R. Rep. No. 101-485, pt. 2 at 32. The Senate Report concluded from these statistics that “[i]ndividuals with disabilities experience staggering levels of unemployment and poverty.” S. Rep. No. 101-116 at 9. It also quoted President Bush as stating that “[t]he statistics consistently demonstrate that disabled people are the poorest, least educated and largest minority in America.” *Id.* See also H.R. Rep. No. 101-485, pt. 2 at 29 (concluding that “people with disabilities as a group occupy an inferior status socially, economically, vocationally, and educationally”).

249. S. Rep. No. 101-116 at 10; H.R. Rep. No. 101-485, pt. 2 at 34.

250. 42 U.S.C. § 12101(a)(6), (8), (9).

the fairness principle. Consequently, when Congress spelled out the factors relevant to determining undue hardship, it focused all of those factors on the resources of the employer. By placing the exclusive focus on the employer's resources, rather than the employee's position and salary, Congress attempted to equalize the right of all disabled employees to reasonable accommodations.

The Olin Amendment<sup>251</sup> put this equalizing principle to a critical test, and it was during the debate on that amendment that the principle was asserted most forcefully and eloquently. The amendment's ten-percent salary cap was antithetical to the equalizing principle because it would have provided greater reasonable accommodation benefits to the most financially secure employees. Under the Olin Amendment, as an employee's need for financial assistance to procure reasonable accommodations increased, his legal entitlement to such assistance would have decreased. In the extreme example, our \$10,000/year janitor would have been entitled to only \$1,000/year in accommodations whereas our \$100,000/year corporate executive would have been entitled to \$10,000/year in accommodations.<sup>252</sup>

Representative Patricia Schroeder argued forcefully that the Olin Amendment would have "discriminate[d] among the lowest paid workers in America."<sup>253</sup> She noted that the amendment was:

doubling up discrimination that the bill is trying to undo, so I urge Members to look at this very carefully, realize what this will mean, if we have this cap per employee based on their salary, and realize how that can be very discriminatory for low-income employees.

It is great for Donald Trump. It is lousy for the person who is cleaning up after Donald Trump.<sup>254</sup>

Another Congressman raised similar concerns:

Today, are we going to say that a company manager who earns \$40,000 is entitled to a greater accommodation than the mailclerk who receives a salary of \$15,000? The intent of this legislation is to provide equity where none

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251. For a more detailed discussion of this amendment, see notes 177-78 and accompanying text.

252. This amendment would also have had a crushing effect on the ability of blind and deaf individuals to secure jobs. Even for employees earning \$50,000, the ten percent Olin Amendment cap would have limited such employees to \$5,000 for readers or interpreters, an amount clearly inadequate to pay the salary of even part-time readers or interpreters. See Tucker and Goldstein, *Legal Rights of Persons With Disabilities* § 5:8 n.24 (cited in note 62) (discussing North Carolina statute limiting accommodations to 5% of employee's salary).

253. 136 Cong. Rec. H2473 (daily ed. May 17, 1990).

254. *Id.*

exists. The Olin amendment would allow further discrimination by making available to employees with the lowest paying jobs a lesser accommodation, without consideration of the individual's skills or qualifications. . . . I must also oppose this amendment because it unfairly switches the focus away from the resources of the employer and onto the annual salary of the employee.<sup>255</sup>

Still another Congressman argued that "those who are applying for lower paying jobs ought not to find themselves screened out of these opportunities, while those who are applying for higher paying jobs are successful because they fall within the 10 percent cap."<sup>256</sup>

It is important to remember that the Olin Amendment nearly passed,<sup>257</sup> in large part because there was a significant groundswell of support in the House for a more precise undue hardship standard.<sup>258</sup> The argument that likely kept the amendment from becoming law was that it violated the spirit of the equalizing principle.<sup>259</sup> Indeed, the *EEOC Manual* states that the amendment was rejected "because it would unjustifiably harm lower-paid workers who need accommodations. Instead, Congress clearly established that the focus for determining undue hardship should be the resources available to the employer."<sup>260</sup>

255. *Id.* at H2474 (statement of Rep. Payne).

256. *Id.* at H2474 (statement of Rep. Morrison). One Congressman tried to make the Olin Amendment more palatable to those of its detractors who were sensitive to its encroachment on the equalizing principle:

I would, for example, be interested in possibly supporting an amendment that the gentlewoman from Colorado [Mrs. Schroeder] might offer that would allow the lower paid workers to have, for example, a 20-percent cutoff so that we could have some progressivity in it, whatever the number might be chosen.

The important thing though is to have certainty, certainty for the employers so that they can understand this law and plan on their own without the advice of counsel to look back through the case law, through 17 years, and without relying on their local Federal judge to figure it out for them.

*Id.* at H2473 (statement of Rep. Cooper). Neither Representative Schroeder nor other equalizing principle proponents took Representative Cooper up on his offer.

257. It failed by 27 votes. *Id.* at H2475.

258. See notes 173-78, 215, 222-25 and accompanying text.

259. Some other arguments made against the Olin Amendment were analyzed at notes 192 and 234 and accompanying text. Additional arguments against the Olin Amendment not addressed in the body of this Article included: (1) that ten percent of salary was too arbitrary; (2) the difficulty of applying the ten percent rule if a proposed accommodation benefited more than one employee or one employee for more than one year; and (3) that rather than creating a ceiling, the ten percent rule in reality would have created a floor to which every disabled employee would have claimed entitlement. During the debate on this amendment, there was much ado over whether the Bush Administration supported or opposed it. At various moments during the debate, legislators made claims that the administration supported the amendment, opposed the amendment, and had no position regarding the amendment. The debate is worth reading, and can be found at 136 Cong. Rec. H2470-75 (daily ed. May 17, 1990).

260. *EEOC Manual* at § 3.9 (cited in note 30). A thorough search of the ADA's legislative history will, however, unearth one stray reference which is antithetical to the equalizing

Had the Olin Amendment attempted to achieve its central goal of a more precise undue hardship standard without violating the spirit of the equalizing principle, it might well be law today. Unfortunately, no such proposal was made and, as they say, the rest is history. But it is not too late.

### C. Construction of A New Model

The above discussion establishes certain ground rules. First, any modified undue hardship standard must be faithful to both the fairness principle and the equalizing principle. Under the fairness

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principle. Two weeks prior to House consideration of the Olin Amendment, Representative Steve Bartlett, one of the House's principal sponsors of the ADA, stated for the record his analysis of how various questions posed by his colleagues would be answered. One of these questions related to undue hardship:

Q. What does the term "undue hardship" mean? Would hiring a reader at \$6.00 per hour to accommodate a \$5.00 per hour blind clerk be considered an undue hardship?

The hypothetical posed *would clearly be an undue hardship*, assuming that the question is a continuous "reading" requirement. On the other hand, hiring a \$6.00 per hour reader for one hour per year would not be an undue hardship.

136 Cong. Rec. H1921 (daily ed. May 1, 1990) (emphasis added). In the Author's view, Representative Bartlett's interpretation was implicitly rejected when the Olin Amendment was defeated. As is noted in the body above, the EEOC so concluded when it stated that the Olin Amendment "was rejected because it would [have] unjustifiably harm[ed] lower-paid workers who need accommodations." *EEOC Manual* at § 3.9. Furthermore, because all of the statutory undue hardship factors relate to resources available to the employer—not the salary of the employee—Representative Bartlett's analysis was not predicated on an application of the statute. Whether the assistant earns more than the disabled employee he is assisting is simply irrelevant to the undue hardship analysis. See *id.* (stating that "the resources available to the employer" is the entire focus). Indeed, despite being lobbied by business groups to expand the list of factors to include the "value of the position at issue, as measured by the compensation paid to the holder of the position," 56 Fed. Reg. 35,730 (1991), the EEOC concluded that "[s]imply comparing the cost of the accommodation to the salary of the individual with a disability in need of the accommodation will not suffice." 29 C.F.R. app. § 1630.15(d).

In light of the fact that Congress firmly embraced the equalizing principle, the following scholarly commentaries must also be rejected:

[T]he 'undue hardship' test should consider the handicapped employee's position and salary and should require some reasonable relationship to the cost of the accommodation sought. It would hardly seem reasonable, and thus would constitute an undue hardship, for an employer to pay \$16,000 per year for an interpreter to assist a deaf employee earning \$10,000 per year.

Tucker, 1989 U. Ill. L. Rev. at 892 (cited in note 56);

One might determine whether providing a part-time assistant is an undue hardship by examining such factors as the job duties of the assistant, the assistant's impact on the employee's job, the cost of the assistant, and what funding might be available to help offset the employer's cost. Presumably, if the impact of the assistance to the employee is substantial, and the overall cost to the employer is reasonable when compared with the position's value to the business, then such assistance would be required. Thus, an interpreter for a young man who flips hamburgers at McDonald's probably would not be reasonable, whereas a reader for a partner in a law firm probably would be.

John W. Parry, *Employment Under the ADA: A National Perspective*, 15 *Mental & Phys. Disab. L. Rep.* 525, 530 (1991).



principle, there must be a ceiling above which employers cannot justifiably be expected to allocate resources to accommodate employees with disabilities; however, the greater the resources of an employer, the greater the demands which can be made upon it to reasonably accommodate these employees. Under the equalizing principle, the exclusive focus of the undue hardship inquiry must be on the resources available to the employer, irrespective of the circumstances or salary peculiar to the employee seeking an accommodation; all disabled employees of a given company must be entitled to the same financial level of accommodation.

Second, assuming that reasonable accommodations are truly necessary to enable an employee to perform the essential functions of a job or equalize his access to the workplace, a covered employer must allocate at least some resources to accommodate that employee, inasmuch as the undue hardship standard will always require something more than a *de minimis* expenditure.<sup>261</sup> As a corollary to that rule, an employer cannot claim an undue hardship due to the cumulative effect of accommodating several employees with disabilities; each employee is to be treated separately, and each employee is, at a minimum, entitled to something more than a *de minimis* expenditure of funds.<sup>262</sup>

Finally, the new model should be mathematically precise so that every covered employer and every employee will know the extent of their obligations and entitlements in monetary terms. If an employer cannot cover an entire requested accommodation without suffering an undue hardship, then both the employer and the employee should be able to pinpoint the exact dollar amount of the accommodation for which the employee should be responsible.

With these ground rules in place, we must now determine the data which should be used to determine an employer's "resources." The financial statements of most business organizations are replete with contenders, including total sales, gross income, net income (profit), total assets, net worth, net working capital, and the size of the employer's labor force or payroll, among others. The two criteria best tailored to our needs are net income and net working capital.<sup>263</sup>

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261. See note 170 and accompanying text.

262. See notes 170 and 175 and accompanying text.

263. Total sales and gross income are rejected because a company may have high total sales or gross income only because of a high level of expenses; such a company may have limited resources from which to make accommodations. Similarly, a company with a high level of total assets may have an even higher level of liabilities, thereby limiting its ability to make accommodations. Although net worth is a good indicator of a company's long-term financial strength,

Net income is an excellent barometer of the current economic success of a given company; it will therefore be used as the figure central to the new model.<sup>264</sup> As we will soon see, however, there will be times when a company's profit is not indicative of its current ability to accommodate employees with disabilities. In those situations, a company's net working capital, the "difference between [its] short-term assets and [its] liabilities,"<sup>265</sup> should be a fairly good indication of the extent to which resources are available for reasonable accommodations, inasmuch as that figure "roughly measures the company's potential reservoir of cash."<sup>266</sup> The proposed model therefore employs net working capital as a secondary or fall-back figure.

We must next decide how to measure one employee's request for accommodation against a company's profit or net working capital. In making this decision, we must avoid the trap into which some of the courts addressing undue hardship under the Rehabilitation Act fell, namely comparing a relatively small figure for a single request for accommodation against the resources of an entire company; making such a comparison will inevitably favor a finding of "no undue hardship."<sup>267</sup>

The most sensible method of "individualizing" company-wide profit is to divide that figure by the average number of the company's

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it masks assets which are insufficiently liquid to be available for accommodations on a short-term basis. Finally, the size of an employer's labor force or payroll has little correlation with the liquid capital available to the employer from which to accommodate disabled employees. For instance, a labor-intensive organization may be struggling financially whereas a less labor-intensive organization may be thriving. To require the former to set aside a greater measure of its resources for reasonable accommodations merely because of its large labor force would impinge upon the fairness principle.

264. Other commentators have also suggested that profit should be the bellwether of undue hardship. See Brandfield, 59 Fordham L. Rev. at 131 (cited in note 26) (arguing that "[b]ecause maximizing profitability is the purpose and prerogative of American businesses, it serves as the proper benchmark to determine whether an accommodation imposes undue hardship"); Stine, 37 S.D. L. Rev. at 119 (cited in note 208) (stating that "[p]rofitability provides a quantifiable measure of the determinative factors in the statute"); *Small Business Hearing* at 36 (cited in note 170) (reporting the statement of Kenneth E. Lewis on behalf of National Federation of Independent Business that the undue hardship standard could be made more precise if undue hardship were equal to "a certain dollar amount of net profit . . .").

265. Richard A. Brealey and Stewart C. Meyers, *Principles of Corporate Finance* 97 (McGraw-Hill, 4th ed. 1991).

266. *Id.*

267. See note 200 and accompanying text. Another approach would break up each company into its divisions or operating units and establish different undue hardship figures for each division or unit. See Holtzman, Jennings, and Schenk, 44 Baylor L. Rev. at 306 (cited in note 25) (suggesting such an approach). The equalizing principle makes this approach unacceptable because it would result in greater accommodation expenditures for disabled employees working in a company's most profitable units, much the same as the Olin Amendment would have provided greater accommodation expenditures to higher-paid employees.

full-time employees, thereby producing a quotient we shall label the "per capita profit share" of each employee:

$$\text{PER CAPITA PROFIT SHARE} = \frac{\text{employer's annual net income}}{\text{average number of full-time employees}}$$

For example, a company that recorded \$1 million in net profit in a given year with an average of one hundred full-time employees would have had a per capita profit share of \$10,000 per employee. The per capita profit share equals the amount of profit which is theoretically available to accommodate each individual employee in the workforce at exactly the same level. The per capita profit share satisfies the fairness principle because the greater a company's profit, the greater its ability to provide reasonable accommodations without undue hardship. For instance, if our hypothetical 100-employee company recorded an annual profit of \$5 million, rather than \$1 million, the per capita profit share of each of its employees would increase to \$50,000. The per capita profit share also satisfies the equalizing principle by establishing one figure applicable to each employee within a given company regardless of that employee's position or salary.<sup>268</sup>

268. Another method of complying with the equalizing principle would use the median or average salary of all employees in the company as the basis for the undue hardship determination. Each disabled employee would be entitled to a certain percentage of the median or average wage of the entire workforce for reasonable accommodations. This method, however, would not be sufficiently faithful to the fairness principle because a company with a high median or average wage but minimal resources over and above its labor costs will be obligated to pay more in reasonable accommodation costs than a company with a lower median or average wage but with significant resources over and above its labor costs. Although a company's median or average wage may be a rough proxy for its ability to make reasonable accommodations, its profit measures that ability much more directly. Thus, using the per capita profit share construct to determine undue hardship satisfies both the fairness and equalizing principles better than using a company's median or average wage.

Michigan's current approach to undue hardship is based on a state average wage. The Michigan statute is similar to the proposed model in that it quantifies undue hardship to a specific dollar figure and makes larger employers responsible for greater accommodation costs than smaller employers; it is the only statute in the country which achieves both quantification and flexibility. It does so according to the following sliding scale:

Number of Employees	Maximum Equipment Costs	Maximum Assistant Costs
< 5	x	7x year 1; 5x thereafter
5-14	1.5x	10x year 1; 7x thereafter
> 14	2.5x	15x year 1; 10x thereafter

x = average weekly wage in the state of Michigan (which at the time the legislation was enacted was approximately \$470).

Now that we have established the construct that will be used to determine undue hardship, we must next determine how to compare an employee's request for accommodation to that construct. To help us along, let us revisit our example of a company whose per capita profit share is \$10,000 per employee. How much of that per capita profit is it "fair" to ask the employer to expend on an individual employee in the form of reasonable accommodations? In other words, at what point does the employer's goal of profit maximization become subordinate to the requirement that it help fulfill the societal goal embodied in the ADA?<sup>269</sup> By trial and error, we can derive a percentage that seems to answer these questions. Suppose that the employer is required to spend seventy-five percent of the per capita profit share on reasonable accommodations. That would result in the employer spending \$7,500 of the employee's per capita profit share on accommodations, thereby leaving the employer with \$2,500 in per capita profit. At this level of accommodation, the employer's goal of profit maximization seems subordinate to its provision of social benefits: \$7,500 in social benefits versus \$2,500 in profit. In contrast, if the undue hardship figure is set at twenty-five percent of the per capita profit share, the employer would spend only \$2,500 on accommodations and would retain \$7,500 of the per capita profit. Here society's mandate seems subordinate to the employer's goal of

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Mich. Comp. Laws Ann. § 37.1210 (West 1985 & Supp. 1994); Cynthia Lynne Pike, Note, *Assessing the Impact: The 1990 Amendments to the Michigan Handicappers' Civil Rights Act and the Americans with Disabilities Act*, 37 Wayne L. Rev. 1903, 1910-11 & n.39 (1991). Only the last gradation of the Michigan statute covers employers governed by the ADA (which applies only to employers with 15 or more employees). Thus, under Michigan law, all ADA-covered employers are required to expend a maximum of \$1,175 on equipment costs, \$7,050 on assistant costs in the first year of employment, and \$4,700 on assistant costs every year thereafter, to reasonably accommodate each disabled employee in need of an accommodation (using 1990 data).

Unfortunately, this approach is even less sensitive to the fairness principle than one based on a company's median or average wage because the state's average weekly wage is the same for all employers regardless of the actual resources available to any particular employer. Furthermore, making gradations in reasonable accommodation requirements according to the number of employees working for a given company ignores a crucial reality: some employers with more than 14 employees will have fewer resources to make accommodations than employers with less than four employees. Consequently, rather than using a statewide or national figure as the basis for making these gradations, the proposed methodology uses figures tied directly to the resources of each individual company: net income and net working capital.

The clarity of Michigan's reasonable accommodation requirement established yet another reason why the current vague standard should be rejected: In states like Michigan, Delaware, Louisiana, North Carolina, and Virginia, where employers and employees are supplied with quantitative statutory guidance, see note 16, they are likely to look to that guidance rather than attempting to comply with the vague federal requirement. In those states, federal law will actually be supplanted by state law, which is hardly what the ADA's drafters intended.

269. See text accompanying note 239.

profit maximization: \$7,500 in profit versus \$2,500 in social benefits. The percentage that strikes the most equitable balance between the employer's profit-maximizing goal and society's mandate to equalize access to the workforce is fifty percent. At that level of accommodation, our hypothetical employer would spend \$5,000 of per capita profit on reasonable accommodations, but would also be entitled to retain \$5,000 in profit. Once the employer is asked to spend more than fifty percent of the per capita profit share on accommodations, however, its profit-maximizing goal becomes subordinate to society's goal and, consequently, the fairness principle is compromised. Therefore, the proposed model sets the undue hardship figure at fifty percent of an employer's per capita profit share.<sup>270</sup>

What effect will a fifty percent per capita profit share undue hardship standard have on the average employer? A relatively minimal one. We start with the statistic that 13.4 percent of the current workforce is comprised of employees with disabilities.<sup>271</sup> Of that 13.4 percent, past studies have indicated that only about 35 percent require *any* accommodations.<sup>272</sup> Even assuming that the broadening effect of the ADA<sup>273</sup> will increase those percentages to 15 percent and 50 percent respectively, only 7.5 percent of the average company's employees will require accommodations. And even if each of these employees is entitled to the *maximum* expenditure required by the undue hardship standard proposed,<sup>274</sup> an employer would be required

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270. Why 50% and not 40% or 30%? Ultimately, the answer to this question lies in the political process, for as sure as the sun will rise tomorrow, business groups will argue that they should be entitled to a standard that allows them to retain significantly more profit than what is proposed here. However, inasmuch as the overriding goal of Title I is to place 8.2 million people with disabilities into the labor market for the first time, the undue hardship standard needs to be set as high as can be tolerated by businesses. The Author strongly believes that businesses can tolerate an undue hardship standard of 50% of the per capita profit share, which in the worst case scenario will require employers to expend only 3.75% of their annual net profit accommodating disabled employees. See notes 271-75 and accompanying text. Recalling that the business lobby pushed for an amendment limiting cumulative accommodations to 5% of an employer's annual net profit, see note 175 and accompanying text, it is reasonable to ask businesses to accept a methodology which will result in a smaller burden even in the worst case scenario.

271. See note 185.

272. See text accompanying note 179.

273. See notes 186-89 and accompanying text.

274. This scenario is rather extreme considering that even the most recent data compiled by the JAN reveal that only 9% of accommodations currently being made cost between \$1,001 and \$2,000, only another 8% cost between \$2,001 and \$5,000, and only 4% cost more than \$5,000. See note 11. Nevertheless, because it is difficult to anticipate how much more these numbers will grow while the ADA broadens the frequency and scope of accommodations, see notes 186-89 and accompanying text, we will assume, for the sake of argument, that each employee requiring accommodations will require employer expenditures up to the point of undue hardship.

to spend only 3.75 percent of its annual net income on reasonable accommodations.<sup>275</sup>

In summary, we have thus far defined undue hardship by the following equation:

$$\text{UNDUE HARDSHIP} = 50\% \times \frac{\text{employer's annual net income}}{\text{average number of full-time employees}}$$

Our work is not over, however. Businesses sometimes operate at a loss. If the above equation were applied to such a business, any expenditure would be considered an undue hardship. This result would run afoul of our second ground rule—that each employee requiring accommodation is entitled to more than a de minimis expenditure.<sup>276</sup> We therefore must build into the new model a further mathematical construct which would ensure that companies make greater than de minimis expenditures during unprofitable periods. Furthermore, we must account for “bonanza” years in which a company’s profit is so excessively aberrant that the basic undue hardship equation would result in asking the company to do more than would be acceptable under the fairness principle; after all, businesses need to be left with sufficient resources to survive through bad years. To account for these extremes, we must set a floor and a ceiling, below

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275. The calculation used to derive this percentage is as follows:

$$50\% \times \frac{\text{net income}}{\# \text{ employees}} \times 7.5\% \times \# \text{ employees}$$

The number of employees cancels out, thereby leaving 3.75% of net income as the maximum aggregate level of accommodation. The Author acknowledges that this figure assumes that each company’s workforce will comply with the national average in terms of the percentage of disabled employees and the percentage of disabled employees requiring accommodations. For the smallest employers, these averages may be far from reality because averages tend to have less relevance when numbers are very small—such as for employers with less than 50 employees. For instance, if a 50-employee company hires only eight employees with disabilities, it will exceed the national average of 13.4%. If it instead hires only five such employees, it would fall well below the national average at 10%. Therefore, the maximum aggregate level of accommodation for some companies could fall well above or well below this 3.75% figure, depending upon how much their disabled employee population strays from these averages. Nevertheless, in view of these averages, it is unlikely that even a small employer will be required to spend as much as 10% of its annual net income on reasonable accommodations. Moreover, the sliding scale established in Table 1 protects against such an anomaly by setting comparatively low maximum levels of accommodation for employers with the smallest levels of net working capital (which are also likely to have the smallest number of employees).

276. See text accompanying note 261.

and above which the per capita profit share construct would no longer control the undue hardship analysis.<sup>277</sup>

The floor and ceiling must be flexible: a de minimis expenditure for a Fortune 500 company is surely larger than a de minimis expenditure for a small, family-owned operation. Likewise, in its bonanza years, a Fortune 500 company should be required to spend significantly more on reasonable accommodations than a small operation in its bonanza years. Just like the sliding damages scale Congress established for businesses of varying sizes under the Civil Rights Act of 1991,<sup>278</sup> a similar scale should be developed to determine the minimum and maximum obligations of employers of all sizes to reasonably accommodate employees with disabilities. Those parameters should be based on a measure of total resources more stable than profit, so that a given company's undue hardship floor and ceiling will be relatively constant from year to year. This is where net working capital comes into play. Table 1 below creates a sliding scale of minimum and maximum reasonable accommodation obligations based on a given company's net working capital.

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277. One of the proposals which has been advanced to clarify undue hardship suggests that a regulation be promulgated that:

[a]n employer will sustain undue hardship if as a result of providing a reasonable accommodation the employer suffers:

(a) an X percentage decrease in its net margin. To determine the percentage change in net margin, cost of accommodation should be added to the previous fiscal year's total cost of sales (expenses) and then divided by the previous fiscal year's revenues. If this figure is X percentage greater than the previous fiscal year's true expense/revenues margin, the accommodation has caused an undue hardship. . . .

Brandfield, 59 *Fordham L. Rev.* at 131 (cited in note 26). Aside from not specifying what X should be, this proposal fails to ensure that employers make accommodations that exceed de minimis costs at one extreme, and are protected against runaway costs at the other. It fails to take into account the rampant fluctuations that are standard in American industry. The standard proposed in this Article anticipates those fluctuations, as is demonstrated through Table 1.

278. See note 229.

Table 1

Company Net Working Capital ("NWC")	Min. Accommodation (floor) per year/per disabled employee		Max. Accommodation (ceiling) per year/per disabled employee	
	Expenditure	% of NWC	Expenditure	% of NWC
Less than \$20 thousand	\$100	N/A	\$1,000	5.0
\$20-100 thousand	\$200	1.0	\$2,000	2.0
\$100-500 thousand	\$400	0.4	\$4,000	0.8
\$500 thousand-\$2.5 million	\$800	0.16	\$8,000	0.32
\$2.5-12.5 million	\$1,600	0.064	\$16,000	0.128
\$12.5-62.5 million	\$2,400	0.0192	\$24,000	0.0384
\$62.5-312.5 million	\$3,600	0.00576	\$36,000	0.01152
\$312.5 million-1.56 billion	\$5,400	0.001728	\$54,000	0.003456
More than \$1.56 billion	\$8,100	0.0005192	\$81,000	N/A

How were these figures derived? Arbitrarily.<sup>279</sup> Table 1 is simply intended to serve as an example of how undue hardship floors and ceilings could be established for the entire range of employers. Surely the political process will produce different figures, possibly even derived using a different methodology. So be it. What is important is that employers and employees know the applicable figures in advance, and that the figures are set with respect for both the fairness principle and the goal of fully employing qualified individuals with disabilities.<sup>280</sup> Part VI.B will demonstrate how Table 1, in conjunction with the per capita profit share equation, achieves these goals.

279. Actually, there is some method to the Author's madness. The table above is loosely based on the sliding damages scale of the Civil Rights Act of 1991. See note 229. Like the first three gradations of that scale, under Table 1, the minimum and maximum potential exposure of a given company for a single accommodation request doubles from gradation to gradation for the first five gradations. At that point, like the final gradation of the Civil Rights Act of 1991's scale, each increase in from gradation to gradation in Table 1 is 50% of the previous gradation. The maximum at each level is set at ten times the minimum. The net working capital figures upon which the minimums and maximums are established increase from gradation to gradation by a factor of five.

The minimum and maximum percentages of net working capital a company must expend on individual accommodations regress by a factor of 0.4 through the first five gradations and by a factor of 0.3 for the final five gradations. As will be demonstrated subsequently in Table 2, this significant regression is necessary to ensure that larger employers (who will likely have large workforces) will have sufficient resources to accommodate *all* of their disabled employees needing accommodations. Thus, whereas a company with a net working capital of \$1.56 billion may have to expend only 0.0005192% of its net working capital on an *individual* accommodation (if 50% of its per capita profit share fell below \$8,100), it may have to make that level of accommodation to *thousands* of employees. In the aggregate, the overall percentage of its net working capital which may be devoted to reasonable accommodations could actually exceed 20%. See Table 2.

280. To those who would argue that the proposed model tips the balance too heavily in favor of employees with disabilities, the following responses come to mind. First, it was the business community that was most eager to codify a quantitative standard from which



A few clean-up issues must be addressed. First, what data should be used to establish an employer's annual profit, number of employees, and net working capital? The only answer that can be given at this point is "data that is reliable and accurate." That might mean tax returns, it might mean annual reports to shareholders, and it might mean something completely different.<sup>281</sup> Such minutiae is best left to economists, accountants, committee staffers, and bureaucrats.<sup>282</sup>

Second, what if a disabled employee's need for accommodations will exist beyond the first year of employment, as will be the case with blind employees needing readers and deaf employees needing interpreters? For employees who fall into this category, it is most appropriate to calculate the point of undue hardship annually, with

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obligations to employees could be measured and predicted. The proposed model gives the business community what it wanted in that regard. Second, the ADA exempts from coverage entirely those businesses that would be most threatened by the reasonable accommodation requirement, companies with less than 15 employees. Third, simply because a prospective employee claims to be disabled and greets his employer with a set of accommodation demands does not mean that the employer must immediately resort to the undue hardship calculation and cut a check for the specified amount. The prospective employee must still satisfy the definitions of "disabled" and "otherwise qualified"; reasonable accommodation is required only if necessary to enable the employee to perform the essential functions of the job or to equalize the employee's access to the workplace; and the employer is entitled to select the least expensive means of achieving these objectives. Only at that point does the employer need to resort to the undue hardship model proposed above. See notes 28-30 and 33 and accompanying text.

281. To those who might suggest that the proposed methodology would necessarily require private companies to open their books to the public, the Author disagrees. First, under the proposed model, an undue hardship calculation is required only upon a request for accommodation by a qualified applicant or employee. At that point, the only disclosure which need be made is the employer's financial obligation regarding accommodating that particular employee. That level of disclosure is a far cry from public disclosure of company books. Second, the current undue hardship standard implicitly requires the employer to open its books even wider if an employee challenges its refusal to accommodate. Because the statute and regulations place emphasis on the employer's resources, the EEOC and courts will likely require the employer to open its books to establish that a proposed accommodation would cause undue hardship. To the extent that the standard proposed would reduce litigation, it would also reduce the frequency of such disclosures.

282. The Author acknowledges that accounting conventions can vary widely among industries and that smaller, closely held companies' books are sometimes unreliable and/or inaccurate. To the extent deriving acceptable data is complicated, the goal of establishing a quantifiable point of undue hardship is frustrated. In view of this potential problem in the proposed model, some tradeoffs between complete fidelity to the fairness principle and securing data reliable enough to drive the undue hardship engine may be necessary. For instance, although using net working capital to derive Table 1 is most faithful to the fairness principle, using that criterion may prove too complicated because of variations in accounting methods between companies, particularly smaller companies. It may be that a criterion less faithful to the fairness principle—such as a company's operating budget, labor budget, total sales, etc.—will in actuality permit a more reliable undue hardship determination. Inasmuch as the goal of this Article is not to rigidly suggest that the proposed model is the perfect be-all and end-all, the Author leaves this analysis for others more qualified to make it.

new financial data changing the employee's entitlement to employer expenditures each year. In one year, a blind employee may be entitled to a \$5,000 contribution toward a reader, but in the next perhaps only \$2,000. If it were otherwise, and the initial point of undue hardship were "locked in" over the duration of the individual's employment, both the fairness principle and the equalizing principle would be compromised. The fairness principle would be compromised because employers who began accommodating employees with disabilities during successful times would be required to expend too much during lean times; conversely, an employee who was hired during lean times would never receive the full benefit of an employer's ability to accommodate during successful times. The equalizing principle would be compromised because different employees within the same company would be entitled to different levels of accommodation, depending solely on the fortuity of when they were hired. It is true that this annual recalculation will result in some employees with disabilities losing their jobs in lean years. However unfortunate this result, job losses during lean times is not a phenomenon unique to workers with disabilities—all employees face this possibility at one time or another.<sup>283</sup>

Third, should accommodations which will benefit an employee for more than one year—such as equipment or assistive devices—be treated differently than those which will not? In other words, should the cost of such accommodations be spread or amortized over multiple years in analyzing undue hardship? The answer here must be "no." If the employee were to derive a benefit from an accommodation's extended usefulness in enabling her to perform her job, it would have to be assumed that the employee would continue working for the employer for longer than the initial year in question. That assumption would often be invalid, and in such instances, would be detrimental to the employer.<sup>284</sup> Consequently, in keeping with the

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283. The current undue hardship regulations strongly imply that employers will be permitted to readjust reasonable accommodation expenditures as their fortunes ebb and tide: "an accommodation that poses an undue hardship . . . at a particular time may not pose an undue hardship . . . at another time." 29 C.F.R. app. § 1630.15(d). Thus, this aspect of the proposed model is no different than the current standard.

284. Recent data compiled by the Bureau of Labor Statistics reveal that the median employee tenure with the same employer is 4.5 years. Steven R. Maguire, *Employer and Occupational Tenure: 1991 Update*, 116 Monthly Lab. Rev. 45, 45 (1993). Among the hundreds of occupations surveyed, median tenure ranges from 0.8 years among kitchen food preparers, of which there are some 128,000 nationwide, id. at 50, to 20.3 years among fire prevention supervisors, of which there are 65,000 nationwide, id. at 49.

spirit of the fairness principle, long-lasting accommodations should be analyzed as a one-time cost to the employer.<sup>285</sup>

Fourth, what about accommodations that will benefit more than one disabled employee? The answer here is a bit more complex. If the accommodation at issue benefits a second disabled employee in only an incidental manner, but is not one to which the second employee would have been entitled to enable her to perform the essential functions of her job, or equalize her access to the workplace, the first employee should be "charged" with the entire accommodation and the second employee should not be "charged" at all. On the other hand, if two employees are entitled to the same accommodation, and one accommodation can be acquired which will enable both to perform their jobs, or equalize access to the workplace for both, each should be charged with only half (or, if more employees share the accommodation, one-third, one-fourth, etc.) of the total cost.<sup>286</sup> For example, if the purchase of a \$12,000 computer system is a reasonable accommodation of the disabilities of Employees A, B, and C, then each employee would be seeking a \$4,000 accommodation for purposes of the undue hardship analysis.

Fifth, if an employee is hired in October, should her entitlement to accommodation expenditures be prorated for that year? The answer must be "no." The employee should be entitled to a set level of accommodation for each year of employment, irrespective of whether that year coincides with the calendar year. If the answer to this question were "yes," then employees who need "up-front" accommodations

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285. Another answer to this question lies in the rental market. As more and more disabled employees in need of assistive equipment enter the workforce, more and more such equipment will become available for rent. Because the annual rental price of an assistive device will usually be less expensive than its total purchase price, employers who rent such devices will be less likely to confront the point of undue hardship. For rented equipment, the issue of the longevity disappears. As long as the employee remains with the company, the employer can continue renting the equipment. When the employee departs the company, whether it be one or ten years following initial employment, the rental device can be returned without the employer suffering a loss. Obviously the rental market will not always solve this problem; some disabilities are so unique that the market will never supply anything but custom-made equipment to accommodate them. In those instances, as is discussed above, the employer should be entitled to count the entire cost of the equipment against the employee's entitlement to accommodations in the year the equipment is provided.

286. See H.R. Rep. No. 101-485, pt. 2 at 69 (cited in note 7) (stating that "[a]ssistive devices for hearing and visually-impaired persons may be shared by more than one employee so long as each employee is not denied a meaningful equal employment opportunity caused by limited access to the needed accommodation").

like computers or other assistive equipment would be short-changed by the mere happenstance of being hired late in the calendar year.<sup>287</sup>

Finally, other subsidiary issues are likely to arise that have not been addressed here. The goal of this Article is to lay out a basic model, recognizing that it will have to be sifted through the political process, and that other concerns will exist that have not been considered. To the extent that such issues arise, fidelity to the fairness principle, equalizing principle, and to the overriding goal of putting people with disabilities to work should direct decisionmakers to the appropriate answers.

Having fully fleshed out a quantitative methodology for assessing undue hardship under Title I, it is time to analyze whether the methodology achieves the objectives of optimal precision and functionality.

## VI. TESTING THE MODEL FOR PRECISION AND FUNCTIONALITY

### A. *The "Precision Calculus"*

Professor Colon Diver's landmark article, *The Optimal Precision of Administrative Rules*,<sup>288</sup> provides a useful analytical framework for determining whether the model of undue hardship proposed above attains the level of precision necessary to achieve Title I's objectives. Diver measures precision with three variables: transparency, accessibility, and congruency. Transparency measures whether the words employed in the rule at issue have universally accepted meanings within the regulated community. The more ac-

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287. Another consideration which should be addressed is part-time employees. To what extent should employers be able to claim undue hardship in accommodating employees who work less than full time? Recall that the per capita profit share denominator is comprised of the average number of *full-time* employees. Part-time employees should be included in that figure in proportion to the percentage of a 40-hour week they work. For instance, two part-time employees who each work an average of 20 hours per week would account for one full-time employee in the denominator of the per capita profit share. In view of how part-time employees affect the per capita profit share, it seems most logical to answer the question posed above as follows: for part-time employees, both the per capita profit share and applicable floor and ceiling from Table 1 should be multiplied by the percentage of a full work week the employee will work on average. A 10-hour/week employee should be entitled to 25% of these figures, and a 20-hour/week employee should be entitled to 50%. Although at first blush this seems antithetical to the equalizing principle, that principle focuses solely on full-time employees. See note 246.

288. Diver, 93 Yale L. J. 65 (cited in note 27). Although the article addresses administrative rules, it is equally useful in analyzing statutes, particularly statutes which, like the ADA, spawn extensive regulatory schemes.

cepted the meaning of the words chosen, the more transparent the rule; the more ambiguous the meaning of the words chosen, the more opaque the rule. Accessibility measures the ease with which the rule can be applied to different circumstances. Accessible rules are easily applied, whereas inaccessible rules are not.<sup>289</sup> Congruency measures

289. Inaccessibility is the chief problem with two other proposals to increase the precision of the undue hardship standard. Under the first, undue hardship would be defined as "a sum total of 'extraordinary expenditures' for a given 'qualified individual requiring accommodation' exceeding X times customary expenditures for 'like employees,' where X, designated the 'hardship multiple,' is determined by the overall operating costs of the employer, according to Schedule A." Dolatly, 26 Colum. J. L. & Soc. Probs. at 548 (cited in note 25). The inaccessibility of this model is illustrated in the example the author provides to demonstrate its operation:

Employee A requires an accommodation. . . . In determining whether she is required to grant this accommodation, the employer must calculate the overall operating costs of the company. She then turns to Schedule A, which indicates a hardship multiple ("X") that corresponds to the operating costs, with higher operating costs resulting in a higher hardship multiple.

Having found X from the table, the employer calculates customary expenditures for like employees; that is, she determines what she must spend per employee to maintain her current staff of employees engaged in the same or similar jobs. The customary expenditure figure is multiplied by hardship multiple X. The product represents the maximum financial hardship that the employer must undergo before the accommodation in question is considered "undue".

Id. at 549 n.152. The second proposal is equally inaccessible:

Step 1: Add the cost of a requested accommodation, A, to the costs of all previous accommodations made within the year in response to specific accommodation requests by disabled employees. Is this sum greater than 10% of the employer's net worth? If so, then A would be an undue hardship per se. If not, then proceed to step 2.

Step 2: Make a chart on which the x axis is the range of salaries from highest to lowest paid, and on which the y axis ranges from .10 for the highest salary and .50 for the lowest. For each disabled employee who requires accommodation, determine where on the y axis the employee's salary falls. Multiply this result by the employee's annual salary. Call this product, the employee's "cap."

Step 3: Calculate any savings or earnings which one reasonably expects that A would generate, not counting benefits pertaining directly to disabled employees. Subtract this amount from A to obtain A<sub>1</sub>.

Step 4: Calculate the annualized depreciated value of A<sub>1</sub>, based upon the number of years during which the requested accommodation would reasonably be expected to continue benefiting disabled employees. Call this annualized depreciated value A<sub>2</sub>.

Step 5: Add together the caps of each disabled employee which one reasonably anticipates would benefit from the requested accommodation within the year. Call this figure C. Also add to A<sub>2</sub> the costs of other accommodations to these employees which have been implemented within the year. Call this result, A<sub>3</sub>.

Step 6: Compare C with A<sub>3</sub>. If A<sub>3</sub> is larger, then it would be an undue hardship per se. Otherwise, A<sub>3</sub> is not an undue hardship per se, in which case, proceed to step 7.

Step 7: To determine whether A<sub>3</sub> is a reasonable accommodation or an undue hardship, balance the four factors listed in the ADA, section 101(10)(B). The closer the value of A<sub>3</sub> to C, the more the weights assigned to the factors should favor finding A<sub>3</sub> to be an undue hardship. The closer the value of A<sub>3</sub> to zero, the more the weights assigned to the factors should favor finding A<sub>3</sub> unreasonable.

Stuhlbarg, 59 U. Cin. L. Rev. at 1346 (cited in note 26). This proposal also tramples on the equalizing principle, by making the employee's salary the central criterion upon which undue hardship determinations are made, and accepts the notion of cumulative undue hardship, despite the countervailing legislative history.

whether the rule as written will produce the desired effect. Congruent rules will; incongruent rules will not.<sup>290</sup>

Diver measures the costs and benefits of increased rule precision along four axes: (1) rate of compliance; (2) over- and under-inclusiveness; (3) costs of rulemaking; and (4) costs of rule application.<sup>291</sup> Regarding the rate of compliance, increased transparency will likely increase compliance and decrease evasion by: (1) reducing the costs to the regulated community of determining how the rule will apply to intended conduct; and (2) facilitating regulatory enforcement in policing prospective violators.<sup>292</sup> Unfortunately, increasing transparency may result in casting the regulatory net too wide or not wide enough—the problem of over- and under-inclusiveness. “The rule-maker may be unable to predict every consequence of applying the rule or to foresee all of the circumstances to which it may apply.”<sup>293</sup>

Nonetheless, a more opaque rule can be equally incongruent “because its vagueness invites misinterpretation.”<sup>294</sup> Greater initial precision can reduce future rulemaking costs by leaving fewer policy questions open for case-by-case determinations. However, greater transparency also can increase rulemaking costs “since objective regulatory line-drawing increases the risk of misspecification and sharpens the focus of value conflicts.”<sup>295</sup> A rule that is over- or under-inclusive will likely require revision resulting in increased regulatory costs. Finally, the costs of rule application to both the regulators and the regulated community increases as the rule’s opacity or inaccessibility increases. “Transparent and accessible rules can reduce the number of disputes that arise and simplify their resolution by causing the parties’ predictions of the outcome to converge.”<sup>296</sup>

Diver recognized that “[t]hese principles frequently work at cross-purposes,”<sup>297</sup> and therefore suggested that the importance of each will vary depending on the type of rule to be formulated. Certain types of rules should be highly transparent and highly accessible. These include: (1) rules regulating socially harmful conduct, because the rate of compliance with such rules is critically important;<sup>298</sup> (2) rules designed to govern a large volume of disputes, particularly if the

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290. Diver, 93 Yale L. J. at 67-70 (cited in note 27).

291. *Id.* at 73-74.

292. *Id.* at 73.

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.* at 74.

297. *Id.* at 71.

298. *Id.* at 74.

agency at issue has a crowded enforcement docket, where “bright-lines” can minimize rule application costs;<sup>299</sup> and (3) rules establishing liability, which require interpretation by both the regulated community and the rule’s enforcers.<sup>300</sup> Concerns over the breadth of the regulatory net, on the other hand, are most salient “when errors of misclassification are particularly costly,” such as regulation on speech, death penalty statutes, and pollution standards.<sup>301</sup>

With Diver’s “precision calculus”<sup>302</sup> in hand, we now possess the analytical tools to compare the precision of the current undue hardship standard with the model proposed in Part IV.C. To facilitate the comparison, both standards are summarized below:

*Current:* Financial undue hardship exists when an accommodation is significantly expensive in light of its nature and cost, financial resources of the employer, and the effect of the accommodation on such resources, and the number of people employed by the business.<sup>303</sup>

*Proposed:* Financial undue hardship exists when the accommodation’s net cost to the employer exceeds:

$$50\% \times \frac{\text{employer's annual net income}}{\text{average number of full-time employees}}$$

However, if the figure derived falls below the applicable minimum from Table 1, undue hardship exists if the minimum is exceeded; if the figure derived falls above the applicable maximum from Table 1, undue hardship exists if the maximum is exceeded.

There can be little disagreement that the proposed rule is more transparent than the current rule. Indeed, the proposed rule is analogous to Diver’s prototypical transparent rule: “No person may

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299. *Id.* at 75.

300. *Id.* at 78.

301. *Id.* at 74-75.

302. *Id.* at 80.

303. This paraphrase of 42 U.S.C. § 12111(10) and 29 C.F.R. § 1630.2(p)(2) omits reference to factors related solely to administrative undue hardship, which is beyond the scope of this Article, and factors related to the nexus between the “covered entity” and the “facility” in question, which would be analyzed identically under either the current or proposed standards, see note 35.

pilot a commercial airplane after his sixtieth birthday."<sup>304</sup> Both the commercial pilot rule and the proposed undue hardship standard draw critical distinctions based on mathematical figures; there can be no disagreement as to the meaning and significance of numbers. In contrast, the current undue hardship standard mirrors Diver's model of opacity: "No person may pilot a commercial airplane if he poses an unreasonable risk of an accident."<sup>305</sup> Both "unreasonable" and "significant" are "susceptible to widely varying interpretations."<sup>306</sup>

Although the question is somewhat closer, the proposed rule is also more accessible. The current rule may be "shorter and more memorable,"<sup>307</sup> but it relies on a set of ill-defined factors which in the end are much more difficult for the regulated community to apply than the explicit mathematical equation and table which embody the proposed standard. To apply the proposed rule, all the employer must do is plug its net income, number of employees, and net working capital into the equation and Table 1. That task will be decidedly simpler than attempting to squeeze tangible meaning from the word "significant."

A comparison of the actual congruence of the two standards is not possible due to the lack of data with which to analyze either. The current standard has been in effect only a short time; the proposed standard never has. Nevertheless, we can hypothesize about the way each standard will play out. To do so, we must first determine the objective that the undue hardship standard attempts to achieve. Fortunately, we have already done that in Part V.A. The central goal

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304. Diver, 93 Yale L. J. at 69 (cited in note 27).

305. *Id.* The current standard is also similar to the bank chartering rule Diver used to illustrate opacity. That rule:

enumerate[s] four "banking factors" ("income and expenses," "management," "stock distribution," and "capital"), five "market factors" ("economic condition and growth potential," "primary service area," "location," "population," and "financial institutions"), and several "other factors" to be considered in evaluating an application. Although the guidelines included a few objective tests for stock distribution and adequacy of capital, most of the relevant factors were expressed in highly conclusory terms with no indication of their relative weights.

*Id.* at 85. The same statement can be made regarding the five ADA undue hardship factors.

306. *Id.* at 69. One commentator has proposed an undue hardship standard which would provide that "an accommodation imposes an undue hardship if its cost would either (a) *substantially* impair the ability of the employer to produce goods or provide services, or (b) impose such a high cost that the employer would be forced to compensate by reducing the overall workforce." Cooper, 139 U. Pa. L. Rev. at 1454-55 (cited in note 26) (emphasis added). This proposal suffers from the same opacity problem as the current standard in that the word "substantial" is the twin sibling of the word "significant." Moreover, it will take quite a hefty accommodation expense to result in an employer being forced to reduce its workforce. Setting the undue hardship standard so high would trample on the fairness principle.

307. Diver, 93 Yale L. J. at 69 (cited in note 27).



of the undue hardship standard is to ensure that employers, while asked to do their fair share to accommodate employees with disabilities, are not asked to do too much. Under the current standard, however, the only guidance supplied to the decisionmaker in determining "how much is too much" is the word "significant." It is implausible that this vague guidance will enable decisionmakers to achieve results which are congruent with Congress' purpose in creating the undue hardship standard. In contrast, the express purpose of the proposed rule's reliance on the per capita profit share and Table 1 is to ensure that employers are not asked to do too much.<sup>308</sup> Hence, it is plausible to suggest that the proposed undue hardship standard would be more congruent than the current standard.

In summary, we have concluded that the quantitative model of undue hardship proposed in this Article is significantly more transparent than the current standard, at least somewhat more accessible, and is likely to be more congruent. We must next weigh the costs and benefits of this increased transparency, accessibility, and congruency. The first axis of analysis is the rate of compliance. Will the overall rate of compliance with Title I's reasonable accommodation mandate depend on how the undue hardship standard is interpreted? Most definitely. If employers believe they can label trivial expenses as undue hardships, then they will do so, and compliance with the reasonable accommodation mandate will be minimal. Conversely, if employers know that a certain level of accommodation will be required and enforced, compliance will be greatly increased. The importance of compliance with Title I, therefore, weighs heavily in favor of the highly transparent proposed standard.<sup>309</sup>

The next axis of costs and benefits is whether the greater transparency of the proposed rule increases "the variance between intended and actual outcomes."<sup>310</sup> We have already concluded, however tentatively, that the variance between intended and actual out-

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308. Moreover, the undue hardship determinations compiled in Table 2 demonstrate congruency between Congress' goal and the results achieved.

309. In contrast, an opaque standard is most useful in a regulatory scheme where compliance is "largely irrelevant." *Diver*, 93 *Yale L. J.* at 86 (cited in note 27). Recall that *Diver* illustrated an opaque standard with the bank chartering rule. Despite the bank chartering standard's opacity, *Diver* concluded that "a substantial increase in charter rule precision would probably not produce benefits justifying its cost." *Id.* at 88. He reached this conclusion in large part because "[e]ncouraging compliance . . . seems largely irrelevant here. Chartering standards are not aimed at modifying behavior. Their sole function is to guide the selection of applicants who are qualified to be admitted to the banking industry." *Id.* at 86.

310. *Id.* at 73.

comes is likely to be greater under the current standard than under the one proposed. This is principally because the vagueness of the current standard "invites misinterpretation."<sup>311</sup>

Comparing the costs of rulemaking of the current and proposed standards, we are left with something resembling a draw. On the one hand, the increased transparency of the proposed standard would reduce the costs associated with the current standard in future rule-making necessitated by case-specific determinations. On the other hand, the objective line-drawing utilized by the proposed standard "increases the risk of misspecification and sharpens the focus of value conflicts."<sup>312</sup>

The rule application costs at stake, however, weigh heavily in favor of the proposed standard because its superior transparency and accessibility: (1) permit less costly application and enforcement; and (2) will reduce the number of disputes which will require regulatory or judicial resolution.<sup>313</sup>

Finally, the undue hardship standard is of the type which Diver suggested requires a highly transparent and highly accessible formulation: (1) It ultimately regulates socially harmful conduct,

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311. *Id.* Even if the proposed standard were inferior to the current standard in this regard, it would not justify abandoning the more transparent model because over- and under-inclusiveness is not a major concern in determining undue hardship. The issue of undue hardship is quite dissimilar in this respect to the issue of bank chartering. As Diver noted in justifying the opacity of the bank chartering rule, the costs of an incongruent rule would be very high, threatening public confidence in the banking system by increasing the risk of failures. *Id.* at 86. The same cannot be said of a rule created to determine undue hardship, which, at worst, would require employers to spend too little or too much on reasonable accommodation measures. Consequently, to the extent over- or under-inclusiveness is a problem with the proposed model, it is not a problem significant enough to outweigh the benefits of its transparency, which ensures compliance and minimal application costs.

312. *Id.* at 73. One such value conflict is between employing the greatest number of employees with disabilities and employing the most severely disabled citizens who need the most expensive accommodations. The bright line of the proposed model values the former goal at the expense of the latter, in large part because Congress's central goal in Title I seemed to be to pull the greatest number of disabled citizens possible into the labor force. The current standard of undue hardship would leave decisionmakers with more give and take in employing individuals needing the most expensive accommodations.

313. The currently opaque undue hardship standard would be a more sensible approach only if the costs of rule application were expected to be minimal. In fact, Diver justified the opacity of the bank chartering standard on this ground noting that there are minimal costs in applying that rule because the Comptroller of Currency handles only about 120 applications per year. *Id.* at 87. On the other hand, Diver embraced the mechanical rules utilized by the Social Security Disability Insurance Program to determine disability benefits because of the tremendous transaction costs associated with such determinations. *Id.* at 89-90. The undue hardship determination, in this regard, is more analogous to the disability determinations made by the SSA than the chartering determinations made by the Comptroller: many thousands of such determinations will be made by employers, administrators, and judges every year. To limit these transaction costs as much as possible, a transparent rule like the social security disability grid is optimal. See *id.*

namely, discrimination against people with disabilities;<sup>314</sup> (2) it will be applied to a large volume of disputes by an agency with an overloaded enforcement docket, namely the EEOC;<sup>315</sup> and (3) it will be utilized to establish the liability of employers who illegitimately claim an undue hardship.<sup>316</sup> “[E]rrors of misclassification” regarding undue hardship determinations are not particularly costly, as they are with regulations on speech, death penalty statutes, and pollution standards.<sup>317</sup> At worst such errors would require employers to expend too little or too much on reasonable accommodations, a result that could be corrected without the significant harm associated with poorly drafted speech, death penalty, or pollution standards.

In conclusion, a rule which will be employed by hundreds of thousands of employers, millions of employees, the EEOC, and the courts to distinguish between legally mandated reasonable accommodations and accommodations which need not be made due to excessive cost, should be highly transparent and highly accessible, like the proposed standard of undue hardship. An opaque and inaccessible standard like “significant difficulty or expense” will ultimately frustrate the goal of putting millions of unemployed people with disabilities to work.

We now have established that the standard constructed in Part V.C is transparent and accessible, and therefore superior in those

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314. *Id.* at 74.

315. *Id.* at 75. As of September 1994, the EEOC had a backlog of 92,396 charges of discrimination awaiting investigation. Even if the EEOC ceased accepting new charges, it would take 17.9 months to eliminate this backlog. EEOC News Release, *EEOC's Pending Inventory Grows to Over 92,000 Charges*, 1994 WL 485550 (located in E.E.O.C. database), \*1 (Sept. 9, 1994).

316. Diver, 93 Yale L. J. at 78. As we have already discussed, Diver suggests that liability rules should be highly transparent. However, “drafters of sanctioning rules will be less willing to compromise congruence to attain transparency and accessibility.” *Id.* at 78. This is because “[t]he same act, committed by different actors under different circumstances, may warrant widely divergent sanctions. Any transparent rule, therefore, is likely to produce both underdeterrence (by generating too low a penalty in many cases) and overdeterrence (by generating too high a penalty in others).” *Id.* Title I of the ADA turns Diver’s analysis on its head. For as we discussed in note 229 and accompanying text, the penalty for violating Title I in terms of both compensatory and punitive damages is spelled out very transparently in the Civil Rights Act of 1991. Employers know their maximum exposure to such sanctions to the dollar, regardless of the circumstances which give rise to them. In contrast, the key provision of the ADA which will be used to determine liability for a failure to reasonably accommodate—undue hardship—is a model of opacity. The proposed standard would convert the liability rule from opaque to transparent, and the Equal Remedies Act, see note 237, would convert the sanctioning rule from transparent to opaque; the result would be a liability/sanctioning model consistent with Diver’s precision analysis.

317. *Id.* at 74-75.

respects to the current standard. Before we conclude, however, we must ask a very important question: will it work?

*B. The Real World*

To ensure that the methodology proposed will work in the real world, let us examine some readily available corporate data from ten randomly selected American corporations to analyze: (1) how difficult the proposed standard is to apply; and (2) whether the burden the proposed standard would place on these employers is fair and just. Because the only data readily available to the public involves corporations whose stock is traded on a public exchange, we are not able to study these questions regarding private businesses. Nonetheless, if we leave this section convinced that the proposed methodology will be adequate for public corporations, it is plausible that this type of methodology will be useful for determining undue hardship for private business entities as well.<sup>318</sup>

We will start small and work our way up. The first corporation we will examine is Cellular Products, Inc., which manufactures blood products. Its most recent financial report indicated a net loss of \$1,395,629 with 28 employees.<sup>319</sup> The same report showed net working capital of \$236,704,<sup>320</sup> thereby establishing reasonable accommodation range ("RAR") of \$400 to \$4,000, according to Table 1. Because Cellular Products has a negative net income, its point of undue hardship ("PUH") for any accommodation proposed in the current year equals the minimum level of accommodation in the applicable RAR, \$400. An enterprise of slightly larger size is Carbon Fiber Products, Inc., a company that manufactures carbon fiber golf club shafts. The company's net working capital, according to its most recent annual report, was \$971,900,<sup>321</sup> thereby establishing a RAR of \$800 to \$8,000 for the current year. Carbon Fiber's annual report also revealed a net income of \$77,126, which it earned with 38 employees.<sup>322</sup> These

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318. As was mentioned in note 282, smaller business entities may produce less reliable and less accurate data than larger ones. In contrast, because the public corporations analyzed above are all regulated by the Securities Exchange Commission, the data we will use to determine their undue hardship levels are quite reliable. As was discussed earlier, because of this disparity, adjustments may need to be made to ensure that something resembling the proposed methodology will work equally well for smaller, privately held companies.

319. Cellular Products, Inc., Auditor's Report, available in LEXIS, Company Library, USCO File (Dec. 31, 1994).

320. *Id.*

321. Carbon Fiber Products, Inc., Auditor's Report, available in LEXIS, Company Library, USCO File (July 31, 1993).

322. *Id.*

figures yield a per capita profit share ("PCPS") of \$2,030, and a PUH of \$1,015. Because this figure is within the applicable range, \$1,015 is Carbon Fiber's point of undue hardship.

Moving now to three slightly larger companies, Security Environmental Systems, Inc., is a waste management company employing 62 people.<sup>323</sup> Its most recent annual report revealed a net working capital of \$4,588,571,<sup>324</sup> thus creating a RAR of \$1,600 to \$16,000. The same report showed a net income of \$3,075,943<sup>325</sup> which computes to a PCPS of \$49,612. Because 50% of \$49,612 is larger than the maximum level of accommodation required by its RAR, Security Environmental Systems' PUH is \$16,000. Koll Management Services, Inc., a real estate management firm, reported \$6,516,000 in net working capital and \$2,987,000 in net income in its most recent annual report.<sup>326</sup> Its RAR is also \$1,600 to \$16,000. With 1,500 employees,<sup>327</sup> Koll's PCPS was \$1,992, thereby establishing a PUH of \$1,600, the applicable minimum. Sandy Corporation is a company that designs various training programs for its customers. Its most recent annual report indicated that Sandy's 129 employees produced \$1,322,229 in net income on a net working capital of just over \$9,038,694.<sup>328</sup> It too has a RAR of \$1600 to \$16,000. Its PCPS is calculated at \$10,250, thereby yielding a PUH of \$5,125.

Wendy's International, Inc., is a worldwide and familiar fast-food establishment. Its most recent annual report revealed \$35,438,000 in net working capital,<sup>329</sup> establishing an RAR of \$2,400 to \$24,000. With net income of \$79,267,000 and 43,000 employees,<sup>330</sup> Wendy's PCPS is \$1,844, thereby requiring Wendy's to accommodate at the minimum level established by its RAR, \$2,400. Callaway Golf Company manufactures and distributes golf equipment. In its most recent annual report, Callaway reported that its 1,071 employees

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323. Security Environmental Systems, Inc., Auditor's Report, available in LEXIS, Company Library, USCO File (June 30, 1993).

324. *Id.*

325. *Id.*

326. Koll Management Services, Inc., Auditor's Report, available in LEXIS, Company Library, USCO File (March 31, 1994).

327. *Id.*

328. Sandy Corporation, Auditor's Report, available in LEXIS, Company Library, USCO File (Aug. 31, 1993).

329. Wendy's International, Inc., Auditor's Report, available in LEXIS, Company Library, USCO File (Jan. 2, 1994).

330. *Id.* The report does not indicate whether Wendy's employed an average of 43,000 full-time employees or 43,000 full- and part-time employees. The Author assumes the former; if, however, the latter is accurate, the PCPS derived in the body above would be higher, perhaps significantly so.

helped the company earn \$42,862,000, and that it had \$83,683,000 in net working capital.<sup>331</sup> Callaway's net working capital puts it in the \$3,600 to \$36,000 RAR. Its PCPS was \$40,020, thereby establishing a PUH of \$20,010. The Washington Post Corporation distributes the world-renowned *Washington Post*. This 6,600-employee company recently reported net income of \$165,417,000, and \$367,041,000 in net working capital.<sup>332</sup> Its RAR is \$5,400 to \$54,000. Doing the appropriate math, we learn that the Washington Post's PUH for the current year is \$12,532.

Finally, let us look at two giant businesses, Kmart Corporation, the discount retail chain, and Microsoft Corporation, the nation's leading maker of computer software. Kmart's most recent annual report revealed over \$4,000,000,000 in net working capital,<sup>333</sup> whereas Microsoft's most recent report showed nearly \$2,300,000,000 in net working capital.<sup>334</sup> Both companies must accommodate within the highest RAR, \$8,100 to \$81,000. Kmart lost \$974,000,000 during this period,<sup>335</sup> with 358,000 employees;<sup>336</sup> Microsoft earned \$953,000,000 with 14,430 employees.<sup>337</sup> Performing the required calculations, Kmart's PUH is the minimum \$8,100 and Microsoft's is \$33,021, half of its \$66,042 PCPS.

Table 2 below summarizes the data we have just compiled in the first five columns. To help us further explore the implications of the proposed model, three additional columns of data are added. The sixth column contains figures representing each employer's potential aggregate reasonable accommodation obligation if: (1) 15% of its workforce is comprised of disabled employees; (2) 50% of those disabled employees are entitled to reasonable accommodations; and (3) 100% of those employees entitled to accommodations require the employer to expend funds on those accommodations up to the point of undue hardship.<sup>338</sup> The seventh and eighth columns contain figures

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331. Callaway Golf Co., Auditor's Report, available in LEXIS, Company Library, USCO File (Dec. 31, 1993).

332. Washington Post Co., Auditor's Report, available in LEXIS, Company Library, USCO File (Jan. 2, 1993).

333. Kmart Corp., Auditor's Report, available in LEXIS, Company Library, USCO File (Jan. 26, 1994).

334. Microsoft Corp., Auditor's Report, available in LEXIS, Company Library, USCO File (June, 30, 1993).

335. Kmart Corp., Auditor's Report (cited in note 333).

336. *Standard Corporate Descriptions* 2518 (Standard & Poors, Feb. 1994). Again, the Author cannot be sure that the 358,000 figure does not include part-time employees.

337. Microsoft Corp., Auditor's Report (cited in note 334).

338. See notes 271-75. To reiterate our earlier discussion, these assumptions in all likelihood greatly exaggerate the potential aggregate responsibility of each employer because: (1) only 13.4% of the current workforce is disabled; (2) past studies demonstrated that only 35%

representing the percentage of each company's net working capital and net income comprised by its potential aggregate reasonable accommodation obligation.

**Table 2**

Company Inc.	PUH	NWC (mill.)	Net Inc. (mill.)	Employees	Potential Aggregate <sup>339</sup>	% of NWC	% of Net
Cellular Products	\$ 800	\$ 0.2	(\$ 1.4)	28	\$ 1,600	0.68	NA
Carbon Fiber	\$ 1,015	\$ 1.0	\$ .08	38	\$ 3,045	0.31	3.9
Koll Mgmt.	\$ 1,600	\$ 6.5	\$ 3.0	1,500	\$ 180,000	2.8	6.1
Wendy's Int'l	\$ 2,400	\$ 35.4	\$ 79.3	43,000	\$ 7,740,000	21.8	9.8
Sandy Corp.	\$ 5,125	\$ 9.0	\$ 1.3	129	\$ 51,250	0.57	3.9
Kmart	\$ 8,100	\$4123.0	(\$974)	358,000	\$ 217,485,000	5.3	NA
Washington Post	\$12,532	\$ 367.0	\$165.4	6,600	\$ 6,203,340	1.7	3.8
Security Environ	\$16,000	\$ 4.6	\$ 3.1	62	\$ 80,000	1.7	2.6
Callaway Golf	\$20,010	\$ 83.7	\$ 42.9	1,071	\$ 1,600,800	1.9	3.7
Microsoft	\$33,021	\$2287.0	\$953.0	14,430	\$ 35,728,722	1.6	3.7

What we come away with from an analysis of Table 2 is a keen appreciation for the interrelationship between the three variables utilized to derive the precise point of undue hardship: net working capital, net income, and number of employees. The two companies on our list with the greatest net working capital—Kmart and Microsoft—do not, as might be expected, also have the highest PUHs. Rather, Microsoft's economic success, coupled with Kmart's economic decline, results in Microsoft being required to spend up to four times as much as Kmart to accommodate individual employees with disabilities. Moreover, the company with the third smallest net working capi-

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of those employees require *any* accommodations; and (3) recent data reveal that only 9% of accommodations currently being made cost between \$1,001 and \$2,000, only 8% cost between \$2,001 and \$5,000, and only 4% cost more than \$5,000. See notes 7, 11, 179, and 185. Moreover, these figures do not account for tax breaks and other assistance employers may receive to reduce their financial obligation to accommodate disabled employees. See note 48 and accompanying text. Consequently, as we move down list of businesses in Table 2, the percentage of employees in each employer's workforce who will actually need accommodations requiring employer expenditures as high as the PUH should dwindle to an almost imperceptible percentage. This is particularly so for Sandy, Kmart, the Washington Post, Security Environmental, Callaway, and Microsoft, who will likely have few, if any (in Microsoft's case) employees needing accommodations as expensive as their PUHs.

339. In creating these potential aggregate figures, the number of employees was multiplied by 7.5 percent (representing the average maximum percentage of the workforce that will require accommodations). The product was then rounded up to make an even number of employees needing accommodations. Because the product was rounded off, the maximum percentage of net income that some of these companies would need to set aside for reasonable accommodations deviated slightly from the 3.75 percent figure established in note 275.

tal—Security Environmental Systems—has the third greatest PUH, due to its relatively high net income and relatively small number of employees. The two companies with the smallest net working capital—Cellular Products and Carbon Fiber—also have, as expected, the lowest PUHs. It is noteworthy, though, that Wendy's, which generated over seventy times the income of Sandy Corporation and has nearly four times Sandy's net working capital, has less than half of Sandy's financial obligation to accommodate employees with disabilities, due to the comparatively large size of its workforce.

Turning to the aggregate figures, the four businesses with the greatest individual PUHs have very similar potential aggregate obligations: each has a potential aggregate exposure of 1.6 to 1.9 percent of its net working capital and 2.6 to 3.8 percent of its net income. Bearing in mind that even these small percentages greatly exaggerate these companies' potential aggregate exposure,<sup>340</sup> these numbers seem appropriately respectful of the fairness principle. Meanwhile, Cellular Products, Carbon Fiber, and Sandy all have potential aggregate responsibilities of less than one percent of their net working capital, a result that surely comports with the fairness principle. Similarly, Koll Management's potential aggregate obligation of 2.8 percent of its net working capital appears reasonable.

That leaves Wendy's and Kmart, the two corporations surveyed with the largest labor forces. Our assumption that 7.5 percent of the employees of each company will require accommodations yields projected totals of 3,125 of Wendy's employees and 26,850 of Kmart's employees who will need accommodations. Even though both companies' PUHs are set at the minimum on the applicable RAR, accommodating 3,125 employees to the full extent of Wendy's PUH will result in it expending 21.8 percent of its net working capital and 9.8 percent of its net income on accommodations. Due to Kmart's relatively massive net working capital of over \$4 billion, it can accommodate 26,850 employees at \$8,100 each with just 5.3 percent of its net working capital.

Although Wendy's and Kmart have significantly larger potential aggregate obligations than the other eight enterprises surveyed, their obligations are not so large as to impinge upon the fairness principle. After all, even after accommodating 3,125 employees with \$2,400 expenditures each, Wendy's would still retain 90.2 percent of its net income from the previous year—hardly a scenario which will threaten Wendy's ability to generate and maximize profit. Since

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340. See note 338.



Kmart operated at a loss during the year surveyed, the fairness principle requires that its remaining resources not be unduly diminished with reasonable accommodation expenditures. Even if Kmart were required to spend \$8,100 each on 26,850 employees, it would still retain 94.7 percent of its net working capital. Moreover, with the most recent data available showing that only five percent of accommodations cost more than \$5,000,<sup>341</sup> Kmart will, in all likelihood, retain significantly more than 95 percent of its net working capital, even after all 26,850 employees are fully accommodated. This result seems reasonably fair.

In summary, having put the proposed methodology to the test of real-world data, we can confidently conclude that it is superior to the vague standard with which the likes of Cellular Products, Callaway, and Kmart must currently grapple. The proposed methodology allows employers and employees alike to know where they stand, to the dollar. Employers can plan appropriately; employees can negotiate for their accommodations intelligently. Neither will have to resort to costly litigation to determine the parameters of a vague and unhelpful standard. At the same time, the proposed standard recognizes the importance of allowing employers to maximize profit, and permitting the lowest-paid employees to compete equally for accommodations with higher-paid employees. The proposed standard will truly facilitate the full employment of people with disabilities and their incorporation into the economic mainstream.

## VII. CONCLUSION

It is time to return to the point at which this Article began, with Acme Products' sales manager poised to make an offer to a talented, yet disabled, applicant. How would the proposed undue hardship standard alter the predicament faced by the sales manager, job applicant, and legal department? Suppose that Acme has \$275,000 in net working capital and that, in the previous year, it earned a net income of \$200,000 with fifty employees. Upon the sales manager's telephone call to the legal department it would be quickly established that Acme's obligation to accommodate this applicant extends to only \$2,000 of the \$5,000 in annual accommodation costs which she would require. The sales manager could then work

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341. See note 11.

together with the applicant to garner the remaining \$3,000 from tax benefits and grants from vocational rehabilitation agencies. To the extent these efforts fall short, the applicant could pay for the remainder of her reasonable accommodation needs from her own funds. Unnecessary acrimony and potential litigation would be avoided, and a well-qualified person with a disability would be put to work. This result is exactly what Title I was intended to achieve.

The fundamental shortcomings of the currently vague undue hardship standard will have to be addressed, if not by Congress or the EEOC, then by the courts. The issue, however, is too significant to be left to piecemeal, case-by-case judicial development. Rather, Congress or the EEOC should move swiftly and aggressively to create a highly transparent and highly accessible standard which recognizes the vital importance of allowing businesses to maximize profit while at the same time empowering citizens with disabilities to secure quality jobs. The fate of forty-nine million Americans with disabilities and 666,000 private employers hangs in the balance.