

Disability, Priority, and Social Justice

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Is having a disability more like being a member of a racially stigmatized group or like lacking a talent? Both analogies might be apt. The Americans with Disabilities Act stresses the former analogy. The framing thought is that people with disabilities are objects of prejudice and prejudiced behaviors which wrongfully exclude them from participation in important social practices such as the labor market. Think for example of a blind person whose job applications are always automatically rejected because she is blind and without any consideration of her aptitude for this or that specific job. Such a person suffers wrongful discrimination and is denied equality of opportunity.

A further thought along the same line is that a longstanding pattern of discrimination can alter the shape of institutions and practices, so that even if individuals now are chosen for jobs strictly on the basis of their likely productivity, current productivity may reflect past discriminatory practices, so equality of opportunity properly understood can be violated even if no employers currently are acting from prejudice. An example would be a factory in which for many years only men have been hired for skilled jobs, and the workplace is designed for their convenience with bathrooms regularly spaced. Now women are hired and retained for skilled jobs along with men according to productivity, but women systematically produce less than men because at the skilled work site bathrooms for women are few and far between. In this example an investment in bathrooms would create a level playing field for men and women to compete on fair terms.

This case and others we might invent suggest the need to analyze the ideals of nondiscrimination and equality of opportunity. Another type of case would feature identical output productivity on the part of blacks and whites, but labor by whites would be preferred by an unprejudiced rationally profit-maximizing employer who sells his product to prejudiced consumers who are unwilling to buy products that have been built by the labor of blacks if the blacks are employed in skilled jobs. (We suppose that consumers can readily obtain information about what sort of workers are employed in what sort of jobs that produce the products they are reviewing for possible purchase.) In this setting a rational business decision by the employer would produce a workforce that is segregated by race, with whites only performing all skilled jobs. Yet in some clear sense blacks and whites in this example do not enjoy equal employment opportunities.

This essay distinguishes some possible ideals of equality of opportunity construed as a nondiscrimination norm. Stated baldly, my conclusion is that any and all versions of such norms are at best incomplete accounts of the substance of social justice, and at worst flawed by making a moral fetish of talent and by falsely supposing that a perfect meritocracy in which all with the same ambition and talent would have the same expectation of lifetime rewards would be a just society. What we owe to one another by way of social justice requirements goes beyond meritocratic nondiscrimination. In my judgment the provisions of the Americans with Disabilities Act (hereafter: ADA) cannot be fully justified by appeal even to the most plausible versions of the nondiscrimination ideal. That suggests not a criticism of the ADA but rather the imperative of exploring what beyond nondiscrimination we owe to one another. I sketch a prioritarian response to this question and describe how this approach handles difficult issues of disability and

justice. Once we are liberated from thinking of the problem of disability exclusively within the antidiscrimination framework, the way is open to consider other types of appropriate remedies for the condition of the disabled as viewed from the standpoint of social justice.

I. Nondiscrimination and Equality of Opportunity

Equality of opportunity is a powerfully resonant norm in contemporary societies with histories of racial exclusion and pervasive discrimination against women. This section surveys several candidate conceptions of equality of opportunity. To limit the discussion I focus on equality of opportunity as it might be interpreted to apply to the labor market and more broadly the economic market place.

1. *Contract at will.* Perhaps the simplest equal opportunity ideal is absence of government constraint (such as legal enforcement of Jim Crow segregation or apartheid) in the relationship between employers and employees. An employer may hire as she pleases and a potential employee is free to accept or reject any offer and once an employment relationship is established, either party may terminate the relationship at will. Each individual under this regime has equal opportunity to initiate any offer of employment or service and to accept or reject any offer that is tendered. During the specified duration of a contract, one is bound to carry out the agreed terms, but if the contract is breached, specific performance may not be demanded as reparation for breach, but only compensation for the money's worth of the breached terms to the party who is damaged.¹

Under contract at will, all employers might refuse on any ground whatsoever to hire women, blacks, or deaf and blind people for any skilled job. This policy could represent nothing more than a collective whim or deep-seated prejudice on the part of employers against women, blacks, the deaf, or the blind. Hence many people will find this interpretation of equal opportunity to be too weak.

2. *Careers open to talent.* On this construal, equal opportunity obtains when jobs are open to all applicants and applicants are judged solely on their qualifications for the post and the most qualified applicant is offered it. Each of the phrases in this formulation requires interpretation.

Jobs are open to all: A firm might find it cheaper to advertise only by word of mouth, if this minimal advertising will elicit sufficient applicants. Or a firm might choose to advertise more or less widely, balancing the cost of advertising against the likely expected improvement in the pool of applicants from further advertising. For similar reasons a firm might accept applications for a post only from firm members. An additional consideration might operate in this case: a ready internal ladder of advancement might be an inducement provided by a firm to attract more qualified individuals to entry-level positions and to help retain current firm members. In deciding what constitutes a reasonably open search for a particular firm seeking to fill a particular job, we might be most concerned when scant advertising disproportionately prevents members of groups who have been victims of past discrimination from applying.

Applicants are judged solely on their qualifications for the post: Several complexities enter once one recognizes that qualifications are not transparent either to the hiring firm or to the individual applicant. The firm chooses applicants on the basis of data it gathers that it deems to be predictive of job performance.

Since gathering information about candidates is not costless, a firm might find it profit maximizing to hire the first applicant found to satisfy some threshold set of qualifications rather than carefully to investigate who is most qualified. For similar reasons a firm might find that its profit-maximizing search procedure uses very rough but readily observable indicators to screen out from further consideration applicants who are marked as likely to possess traits that will impede job performance. Hence one gets statistical discrimination, which might involve excluding all black applicants (statistically more prone to absenteeism in this industry than applicants of other races), all women applicants (more likely than men to become pregnant and suspend their careers for childbearing and childrearing) and all blind applicants (more prone to on the job accidents that are costly for employers). Such statistical discrimination might be efficient from the standpoint of the firm (profit-maximizing) or inefficient. But from the perspective of the black who never misses work, the woman who has resolute career aspirations and abhors the thought of having children, and the blind person with a spotless safety record, statistical discrimination means “I never had a chance.” Such procedures may well prevent the most qualified from being hired, but of course any selection based on probabilistic indicators may do this.

Mark Kelman presses this difficulty. Suppose the employer uses a test to screen applicants that weakly but fairly predicts good work performance. The test is a weak predictor in that some of those who fail the test would succeed on the job and some who pass the test would not succeed on the job. The test is fair with respect to a group whom we fear might be victims of hiring discrimination, say, those with disabilities. (For simplicity, suppose the disabled are all deaf.) The test is fair in the sense that it predicts whether deaf applicants would succeed at the job as accurately as it predicts whether nondeaf applicants would succeed on the job. Suppose the employer hires all who pass the test and some smaller percentage of those who fail. The deaf let us suppose have higher fail rates on the test, so fewer of them are hired. But Kelman notes that it turns out to be a robust result under these assumptions that of the group that does poorly on the test, fewer of those that would succeed will be hired than would be hired from the remainder group that does better on the test. If our view of equal opportunity as careers open to talents is that individuals who are equally able to succeed on the job have the same chance of being hired, then “for almost all values of pass and accuracy rates, a test that predicts equally well for [two groups] will become less fair as the relative pass rates on the test diverge and as validities decline.”² It does not follow that to implement equality of opportunity we should ban or discourage the use of such tests. That depends on what the feasible alternatives are. Perhaps the lesson is that the ideal of careers open to talents, in its most plausible construal, is not fully satisfiable in actual circumstances.

The notion of being judged on one’s qualifications can take what might be called perfectionist and nonperfectionist forms. Suppose carpenters are being hired to put up schlocky cheap houses favored by consumers. Being a consummate skilled carpenter may mean one is overqualified for this job; the firm suspects the master craftsman may resist doing the job the way the firm wants it done. From the firm’s standpoint, the ideally qualified are the moderately skilled, but one might hold that only tests of meritorious and skilled carpentering are relevant to one’s qualifications; there is an objective ideal of good carpentering and those who most approximate this ideal are most qualified, profits be damned. A similar case would arise if a mathematician were deemed overqualified

and denied employment as a clerk on the ground that she would likely get bored and quit after a brief tenure on the job. For these sorts of cases I shall stipulate that the appropriate sense of “most qualified” is the nonperfectionist sense, so that the most qualified applicant is the one reasonably best deemed to match the traits that in context are most conducive to the appropriately weighted fulfillment of the firm’s objectives. For private firms, this will be the set of traits most conducive to the firm’s profitability. If one takes the other tack, one is in effect opting for some version of a substantive meritocratic ideal. The idea is that those who are truly qualified can be identified as such by discerning their intrinsic traits, and independently of relations among those traits and contingent circumstances such as market demand. Taking this line, one incurs the obligation to explain what this intrinsic notion of qualification is and why it gives rise to moral entitlements. I doubt that this obligation cannot be fulfilled.

Another complication in the idea of being judged solely on one’s merits arises if one considers age discrimination. Consider a society that has a legally mandatory retirement age or that legally allows firms to set a mandatory retirement age or to take age into account in assessing applicants. Such practices might seem straightforwardly to violate the ideal of careers open to talents. They allow that the less qualified younger applicant is selected for the post over the more qualified older applicant.

Age and the mental and physical deterioration that eventually accompanies old age might be regarded as a disability to which all people are prone. But since everyone who does not die young becomes old, age discrimination can be compatible with equality of opportunity construed as careers open to talents over one’s lifetime even though it is not compatible with equality of opportunity at a particular time. The ideal of careers open to talents could be perfectly satisfied for all prime-age adults eighteen to sixty. School-age youth and those over age sixty are permitted to work only under constraints. If we abstract for the moment from the phenomena of childhood death and early adulthood death, then in a society that satisfies careers open to talents to this extent, everyone enjoys equal opportunity construed as careers open to talents over the life cycle. Since everyone is young once and becomes old eventually if premature death does not intervene, all individuals can enjoy the same equality of opportunity over the life cycle in a society that limits access to jobs for aged persons. (Moreover, those who die prior to old age and hence never face the permitted or enforced discrimination against the aged are not thereby advantaged compared to those who do live to old age.³ In this regard, discrimination against youth raises a more thorny issue.)

3. *Fair equality of opportunity.* Careers open to talents requires only that those who are equally qualified have the same prospects of success in competitions for jobs. Conceptions of fair equality of opportunity add the further requirement that individuals must have a fair opportunity to become qualified. The idea that justice requires that society make available schooling to all children via a public school system or some other means goes beyond the ideal of careers open to talents and embraces some ideal of fair equality of opportunity.

If we accept that some obligation falls on us to provide opportunities for all individuals to develop their native talent potential so as to become qualified according to their capacities, the question immediately arises, how far this obligation extends. John Rawls presses the idea of fair equality to its limit in his formulation, which holds that fair equality of opportunity among persons obtains when any persons who have the same

native talent and the same ambition will have the same prospects for success in competitions for positions that confer advantages.⁴ This is if you will the ideal of a classless society in the sense that no advantages accrue to individuals in virtue of their initial placement in the social order. Whether one is born into a rich or poor family, on the right side or the wrong side of the tracks, of parents who are well educated or the reverse—none of these social factors nor any others affect one's competitive prospects compared to those other individuals face. Nothing but one's native talent endowment and ambition determine one's competitive prospects. This means that if especially well off or socially influential parents follow their natural instincts to give their own children a competitive advantage by their educational and childrearing practices, social intervention occurs such as special educational programs for the underprivileged so that in the end the effect of social factors in boosting one individual's prospects above another's is entirely eliminated. Since we do not know how to carry out such interventions, fair equality of opportunity might better be regarded as an aspiration postulated by justice rather than as a strict justice requirement.

Two aspects of the fair equality norm call for comment.

First, the idea of having the same native talent as another is unclear. Consider a simple example. Suppose we could install just one of two educational programs in a two person society consisting of Smith and Jones. One provides more intensive education, the other a more relaxed schooling. Under the intensive regime, Jones ends up with higher earnings prospects, and under the relaxed regime, Jones ends up with higher earnings prospects. Which to choose? Fair equality does not say. Or taken strictly, with the construal that the capacity to respond to schooling is a talent, fair equality only requires that persons with identical disposition to develop exactly the same talent in response to any schooling and socialization regime qualify as having the same talent, and the proposal is silent about choices that would produce different results for individuals with different talents in this strict sense. Since in practice we only discover what talents people have by subjecting them to one or another schooling regime, fair equality, which had looked severely strict, now looks to be quite lax and undemanding. What we need to add to fair equality is some sensible continuity requirement, so that if two individuals' capacities to develop talent through schooling are "close," the developed talents they acquire should not be "too dissimilar."

A second comment is that fair equality will not rule out what intuitively will strike us as discriminatory outcomes unless its ambition component is qualified. Suppose that fair equality of opportunity obtains perfectly in a society, and it turns out that no one with a disability obtains any desirable employment. This is so because those deemed to have disabilities are trained to have low ambition, so it never occurs that a disabled person with the same native talent for a desirable type of employment as a nondisabled person develops the same ambition to achieve it. Hence fair equality of opportunity in its Rawlsian formulation is satisfied even though disabled and nondisabled persons who have the same native talent for a type of desirable employment do not have the same prospects of obtaining it. To solve this problem we would need to clarify the idea of ambition by specifying that if two people have the same native talent but one ends up with lesser prospects for success in competitions for positions of advantage because her ambition has been reduced by prejudiced or discriminatory socialization then fair equality of opportunity is violated.

If equality of opportunity is inflated to appear the whole of justice, what one reaches is the view that provided equality of opportunity is sustained, any distribution of resources and life prospects thrown up by a competitive market economy in which individual property rights are firmly accepted is just. The ideal of justice becomes the market economy with careers open to talents. This amounts to justice as meritocracy.

Equality of opportunity in all of the guises considered so far places no constraints on the processes that determine how jobs are defined and individuated. If I am found unqualified for a post, I might truly observe that if the job were reconfigured, or if the work setting in which the job is set were reorganized in a certain way, then I would no longer be unqualified. The fact that I am unqualified is due to the fact that my traits do not match those required for the job, and one could get a match either by changing my traits to fit the job or changing the job description to fit my traits. Obviously some complaints of this sort that one might voice do not rise to the level of registering a prima facie claim of injustice. Lacking hand to eye coordination, I can imagine a large reconstruction of the surgeon's or baseball pitcher's trade such that I could qualify, but that is neither here nor there. But some complaints of this sort do seem to raise issues of social justice.

Catharine MacKinnon has posed an interesting challenge to narrow conceptions of equality of opportunity. Suppose that men and women compete on absolutely fair terms for jobs that are designed by men for men. For example, male owners over the years might structure the workplace so that employees need to display aggression and competitiveness, qualities men tend to have, rather than cooperativeness and solidarity, qualities women more often display. Fair selection processes then select men rather than women as best qualified for these male-oriented workplaces. In this hypothetical case men are more qualified than women according to the standards of qualification that are set by powerful men and reflect male proclivities. In this scenario the steady fulfillment of equal opportunity norms could coexist with continued exclusion of women from the most desirable jobs. MacKinnon suggests that actual labor markets might well function much as in the hypothetical example. As she puts it, the entire structure of contemporary economic life is "a giant affirmative action plan for white males."⁵ In a possible retelling of this story, job applicants marked with conventional disabilities are excluded from desirable employment in procedurally fair competitions for work roles that are substantively biased against the interests of the disabled.

Many people have regarded it as unexceptionable that individuals confined to wheelchairs experienced severe lack of access to social functions entry to which is gained via steps and stairs. But the lack of access the wheelchair-bound suffer in these circumstances is not the result only of their physical impairment but of that coupled with the design of buildings, a social construction that we could alter. In many cases of this sort natural misfortunes do not by themselves limit the opportunities and effective liberties of various categories of disabled persons. The combination of natural misfortune plus human doings and allowings produces the limitation of opportunity we observe. Roadways and streets are designed to be safe given a certain level of manual dexterity and quickness of vision and bodily response which most people can achieve easily provided they take due care. But for some people, driving cars and walking through urban streets as currently designed require more skill than they can muster.

However, we could have designed streets and walkways and cars differently so that they would be useable by (many of) the persons currently excluded. Bit by bit through a host of design and engineering decisions along with choices of laws and social norms we create a social environment that forms a scheme of cooperation from which some, labelled the disabled, are excluded. In a clear sense we create the categories of able and disabled individuals by patterns of individual and collective decisionmaking.

No version of equality of opportunity canvassed to this point, not even the most stringent and far-reaching, addresses the issue just posed, which has been called the problem of inclusion.⁶ Nor should it. The problem of inclusion is an aspect of the general problem of distributive justice, the theory of what we owe to each other and what properly belongs to whom. The moral principles of nondiscrimination and equality of opportunity, no matter how you stretch them, are not suited to address this range of problems. It is not plausible to make a norm against discrimination do all the work of distributive justice. To see this plainly, consider that a severely disabled person might be the victim of no violations of any norm against discrimination and for equality of opportunity yet face miserable life prospects. Suppose Arneson is legless, blind, and deaf. He does not suffer employment discrimination; in fact we might suppose he secures an unskilled job, the best job he is qualified to hold. He has little native talent, and the society is organized so that a suitably revised version of fair equality of opportunity is satisfied as it applies to his case. He faces the same prospects of success in competition for advantageous positions as anyone else with the same native talent and the same ambition he has. Moreover, his ambition levels are not stunted by prejudice or discriminatory socialization; he has always been encouraged to be all the best he can be. If one compares his lot with that of other persons whose native talent levels are roughly comparable to his, one sees their prospects are roughly comparable to his—there are no glaring discrepancies. His problem is not that he faces any sort of discrimination but rather than his talents are meager. In assessing his talents, a sensible talent measure will include among his talents the important negative talents that render him disabled. Though fairly treated, we stipulate, by norms that aspire to make the society a perfect meritocracy, he still ends up with a very low quality of life. In rating his quality of life we do not worry that he cannot afford baubles and trivial but fashionably chic goods. His quality of life is poor in terms of opportunities for genuine important human goods. The question arises whether social justice requires us to do something for Arneson or whether his plight is a “don’t care” from the standpoint of enlightened social justice. Equality of opportunity either does not address this question, or if viewed as addressing it, gives an implausible answer. The implausible answer it yields is that if one does not suffer discrimination, one is treated fairly according to distributive justice.

The Americans with Disabilities Act requires more of employers than that they do not discriminate against the handicapped. It requires that if one can do a job if one’s handicap is given a reasonable accommodation by the employer, and if one would be best qualified among the applicants if that reasonable accommodation was made, one must be hired for the job. In a similar way, if one is currently employed at a job, and acquires a disability, but one could continue to perform the job competently if the employer made a reasonable accommodation in response to one’s disability, the employer must do so. Examples of reasonable accommodation would be . . . The relevant point for our purposes is that a required reasonable accommodation for a disabled applicant might render it the

case that the disabled most qualified applicant is not the applicant hiring whom would be profit maximizing for the employer. The employer might make higher profits if she hired another applicant for whom no costly reasonable accommodation would have to be made.

It has been suggested, not altogether implausibly, that the “reasonable accommodation” rule is a form of compensation to the disabled that roughly offsets the impact of past discriminatory practice on their employment prospects. There would be a rough analogy here to rationales for affirmative action programs for blacks and other underrepresented minority groups and women.

II. Prioritarianism

The starting point for my reflections on distributive justice is the common thought that life is a jumble of chosen and unchosen lotteries. The latter are perhaps especially disquieting. Good and bad fortune falls on individuals randomly in ways that are entirely beyond their power to control, but which fundamentally determine their life prospects. By good luck, some start adult life prosperous, healthy, handsome, charming, and talented, while others face miserable prospects. Many principles of distributive justice hold that the lucky ought to compensate the unlucky in ways that tend to equalize the life prospects that attach to individuals through processes that are beyond their individual power to control. The advocates of principles in this broad class have been called “luck egalitarians.” The version of luck egalitarianism that I find most plausible is welfarist, responsibility-catering, and prioritarian. An *responsibility-catering* conception holds that the moral value of obtaining benefits and avoiding losses for individuals varies according to the degree of responsibility they bear for their current condition. The less one is responsible for one’s condition, if it is bad, the greater the moral value, other things being equal, of improving one’s condition or preventing further losses, and the more one is responsible for one’s condition, if it is good, the greater the moral disvalue, other things being equal, of allowing it to deteriorate or failing to improve it. One is more responsible for one’s condition, if it is bad, the more it is the case that over the course of one’s life one has behaved either culpably imprudently or virtuously imprudently or deliberately undertaken courses of action with known risks whether prudently or imprudently. This may sound convoluted, but the idea is simple. What we owe to one another depends in part on what each of us does for herself, given the available opportunities. If my condition is bad, but the background includes the fact that I deliberately undertook a gamble and lost, or culpably behaved without care for my well-being, or virtuously sacrificed my interests for what reasonably seemed a worthy cause in a manner that was morally optional, then in any of these cases the moral urgency of alleviating my plight lessens. (And a similar point holds if my condition is comparatively good.) A *welfarist* conception is one that holds that the appropriate distributive justice standard for measuring the initial opportunities that an individual faces is the well-being or welfare that those opportunities enable her to attain. A *prioritarian* distributive justice principle holds we should act and arrange institutions and practices so that that moral value, which is a function of well-being, is maximized. According to the prioritarian the moral value of achieving a small gain or avoiding a small loss in well-being for a person is greater, the larger the amount of well-being gained or conserved, and greater, the lower the person’s level of expected lifetime well-being prior to receipt of this benefit. The responsibility-catering version of prioritarianism adjusts the prioritarian calculation by

individual responsibility as described above. Finally, prioritarian justice as I understand it adjusts the rating of each individual's opportunities according to a view of individual responsibility that holds that one should not be held responsible for what lies beyond one's power to control and that within the region of the controllable, one should be held less responsible for making and implementing an unreasonable choice, the more difficult and painful it would be for one to make and implement that reasonable choice. So the distributive justice measure of an individual's opportunities is the welfare level (expected welfare level) that the person would reach if she conducted her life as prudently as it would be morally reasonable to expect her to behave, given her circumstances that fix the difficulty and cost for her of making and implementing prudent choices. For short, I shall call a conception of distributive justice that is welfarist, opportunity-oriented, prioritarian, and takes a flexible line on individual responsibility as just described a *prioritarian* conception.

Prioritarianism treats personal traits that are deemed disabilities (that befall an individual prior to the onset of adult status) just as it treats native personal abilities. Both are included in the comprehensive set of circumstances that determine one's initial life prospects. Distributive justice calls on us to reconfigure these circumstances by distribution of resources or in other ways so that the final initial distribution of resources satisfies the standard of fair opportunity provision. This means that if two individuals face identical circumstances except that one is armless and the other has two functioning arms, then a distribution of resources that fails to compensate the one for armlessness will likely not be fair, because with the same external resources, the person with arms will have a far higher initial reasonable opportunity for well-being (where this is the level of well-being that one would reach if one conducted one's life as prudently as could reasonably be expected, given one's circumstances). I say "will likely not be fair" advisedly. According to prioritarianism, what we owe each other by way of an initial set of opportunities depends on two factors—(1) how badly off or well off you would be in the absence of further receipt of benefits, and (2) the extent to which your well-being prospects would improve if further benefits were bestowed on you. Suppose that I am unlucky in my personal endowments. I am schizophrenic and also a borderline/narcissistic personality disorder. It may unfortunately be the case that I am an extremely poor transformer of resources into a good life. You could give me a lot of money and I would fritter it away. You could impose strict paternalistic rules designed for my benefit, or alter the social environment in other ways, but I would chafe at the paternalistic rules and find ways to subvert the good intentions of the socially altered environment. What society owes me by way of distributive justice provision is responsive both to the extent of my bad luck and the extent to which I can benefit from compensation. Moreover, the decision as to what should be done for me will be comparative. The issue is (1) how badly off I am, by comparison with the well-being expectation levels of others who might be helped or might be called on to assist me, and (2) how much I can benefit from measures that might be taken to aid me, by comparison with the extent to which others can benefit if the compensatory measures are instead directed toward the improvement of their quality of life. Justice involves calculation of costs and benefits and trade-off rules to determine the moral value of the policies we might choose.

Why accept prioritarianism? Consider again the morality of inclusion problem. One way or another individuals or society regulating the choices of individuals must make many decisions that will establish entry requirements for roles that involve being a productive contributor to cooperative schemes. The ensemble of these role requirements determine the terms of cooperation in these schemes to which any individual has access. The threshold requirements for being a useful contributor might be set higher or lower by establishing the scheme in one way or another. Within a broad range, setting the requirements lower is better for those who just barely pass the entry requirements at each lowered threshold but worse for those who could participate in a more restricted scheme and would be better off in it because it would be more productive per capita.

In the face of this problem, it is implausible to insist that cooperative terms must be set so that no one is excluded. Lowering the bar to productive contribution so that severely mentally retarded or severely mentally ill individuals can be full productive members might reduce the net benefits of cooperation almost to nothing. If this problem is regarded from a consequentialist standpoint, the argument for prioritarianism is that it lies between two unacceptable extremes. At one end, one might insist on the priority of inclusion no matter what. This would be tantamount to a maximin consequentialist approach: arrange institutions and practices and choose actions and policies so that the benefit level of the worst off individual is as high as it can be made. But here as elsewhere maximin is an implausibly stringent priority rule. It insists that any gain however tiny that can be obtained for the worst off should be chosen at the cost of any loss in benefits, however great, for no matter how many better off people stand to lose.

At the other extreme, one might adopt the neutral counting rule of aggregative utilitarianism. This tells us to arrange institutions and practices and choose actions and policies so that the sum of benefits over the long run is maximized. The straight maximization rule of utilitarianism tells us to accept severe losses for already badly off individuals if that loss will purchase a marginally higher sum of offsetting benefits for those who are already very well off. Many find this sort of implication unacceptable, and reject utilitarianism on this basis. One might say that any consequentialist position that cares about how benefits are distributed across persons as well as the total amount of benefits that are produced will reject utilitarianism. The positions that lie between straight summation of benefits all involve tilting in favor of the worse off but to an extent less stringent than strict lexical priority. In this range lie the family of positions included within prioritarianism. Since weighting rules that are very close to either the extreme of maximin or the extreme of straight maximize-the-sum-of-benefits will attract objections very close to the criticisms that adhere to the two extremes, I suppose that the versions of prioritarianism that are most defensible and that yield most acceptable implications in practical decision problems will lie toward the middle of the range between these extremes. But I have no precise weighting rule to propose.

3. What is a disability? The Americans with Disabilities Act of 1990 does not analyze the idea of a disability, which is simply identified with a “physical or mental impairment that substantially limits one or more of the major life activities ” of the one who has it. It is useful to distinguish a physical impairment, a chronic or permanent condition of an individual’s body that impeded normal physical and mental functioning,

from a disability, a physical impairment that leads to a significant diminution of opportunity to function in some valuable way. Nearsightedness is a physical impairment but it does not qualify as a disability on this definition when it is easily correctable and actually corrected by eyeglasses, laser surgery, or some other treatment. A physical impairment that affects only an individual's ability to do higher mathematics is not a disability in a hunter-gatherer culture in which no one, impaired or not, would have the opportunity to do higher mathematics. A disability so construed is an uncorrected mismatch between the individual and her environment. What is a disability in one environment is not a disability in another.

Why should disability trigger a requirement of "reasonable accommodation," which as we have seen goes beyond anything that could be fit under the protection of a nondiscrimination norm? Suppose a wealthy talented charming legless person is competing for employment with people who are nondisabled but generally lacking in desirable endowments, so by any reasonable standard the legless person is better off all things considered in the sense that he has higher well-being prospects. Granting that it would be wrong for the employer to pick another applicant who is less qualified over the legless person on the ground that he has a primitive revulsion against working next to someone with a physical handicap, we might wonder why the law should require the employer to hire the legless person if he is less qualified than the other applicants. Here "less qualified" is meant in the straightforward sense that the net value to the firm of hiring the disabled person is less than the net value added that would accrue to the firm from hiring one of the nondisabled. One must add the proviso that the difference in net value added does not arise via causal processes that are tainted by prejudice (as would be the case if the job involved building widgets and customers are unwilling to purchase widgets produced by skilled labor of disabled persons. With these stipulations in place it turns out that the law is intervening in the market to produce a better outcome for an already better off person at the expense of those who are worse off. Why do this? What warrants a policy that implies such a result?

One aspect of the matter seems not to touch any issue of principle. Any legal rule will be coarse-grained and will eschew fine-grained distinctions that are difficult to administer. It is better that differential legal treatment of persons should be based on readily observable features of persons that are difficult to fake. It is better that rules should be simple rather than complex, other things being equal. Hence any redistributive policy that aims to help the truly needy and deserving will be framed in terms of easy to administer proxies for the subtle matters we should care about. Hence just pointing out that a government policy or legal rule does not perfectly track what we should be caring about is not yet any sort of objection to it. Such an observation rises to the level of an objection only if one can propose an alternative policy that would yield better results overall in the long run from the standpoint of the values we should care about. So perhaps the class of people who are missing one or more legs is a class of people who on the whole and on the average are disadvantaged in well-being prospects all things considered, and that trying to define the class more narrowly would not be worthwhile in the terms of a cost benefit analysis done in terms of the relevant moral values.

From a prioritarian standpoint, we might raise two kinds of concerns about any given classification scheme in a redistributive policy. One concern is whether we might alter the classification scheme to take account, of course in a rough-grained way, of

people's differential responsibility for their unfortunate condition. Here are four persons lacking a leg: One lost a leg while attempting a murder, a second became legless in the course of exemplary battle-field conduct during a war, a third loses a leg while drunk and skiing, a fourth has a congenital condition. Is there a feasible administrable legal classification scheme that channels redistributive transfers toward the more deserving? Of so, prioritarianism will prefer this policy, other things being equal. Another concern is that according to prioritarianism the obligation to aid the disadvantaged is in principle an obligation only to aid those who are disadvantaged all things considered. So in principle we should be on the lookout for social policies that separate the people with a particular disability who are things considered disadvantaged in well-being prospects from those with the same disability who are not disadvantaged in this way. Return now to the example of the very well off disabled person competing for employment with the generally luckless nondisabled. One might limit the reasonable accommodation requirement to competitions for unskilled and semi-skilled employment, on the theory that persons lacking a leg who are competing for very lucrative and desirable types of employment are less likely to be truly disadvantaged than those who aspire to simple employment at low pay.

Another concern that might arise in this connection is responsibility.

It seems to me that in his lucid overview of disability and distributive justice David Wasserman too quickly dismisses the prospects for a welfarist approach to the issues. He observes that this approach is vulnerable to the problem of "social hijacking." The problem is supposed to be that if we say that what distributive justice requires depends on the welfare that individuals can expect under given arrangements, distributive justice will end up stipulating that virtually all available resources should go to those with the lowest welfare prospects, even if they can hardly be helped by further provision of aid. The hopelessly worst off would become a basin attracting all resources. The problem is exacerbated by noting that my welfare deficit could be produced not only by what we would regard as a genuine disability such as mental illness, retardation, or physical impairment, but also by extravagant tastes. If I have fancy tastes, and can only be made happy by champagne and truffles, a welfarist theory is alleged to hold that those who can be made happy with cheap beer and pretzels somehow receive compensation for my welfare disability.

The prioritarianism I have sketched, though welfarist to the core, is not plagued by these difficulties. Several points need to be clarified. First, Wasserman seems to be assuming that distributive justice must be demanding equality, whether of welfare, resources, or something else. Prioritarianism does not call for equality. Since prioritarianism assigns more moral value to gaining one unit of well-being for someone who is badly off in well-being than to gaining the same unit of well-being for someone whose prior well-being expectation is higher, this conception of justice will often favor more egalitarian distribution of resources, but equality per se is not valued. Hence the fact that Arneson has below-average welfare does not per se entail that resources should be shifted in my direction and toward all others who are below the average until equality is attained. Second, according to prioritarianism what one is owed by way of distributive justice compensation depends inter alia on how much one would benefit from the expenditure of resources by others on one's behalf. So justice will not demand huge

expenditures on Arneson if they will only achieve miniscule benefits for him. Third, at least at the foundational level, well-being or welfare is not to be identified with mere satisfaction of subjective preferences, which might be mere whims, or in other ways fail to track one's true interests and needs. What we owe one another according to prioritarianism is a fair distribution of opportunity for a genuinely good, choiceworthy, worthwhile life. To the extent that our subjective preferences do not follow our good, justice does not require that resources be expended to satisfy them. Fourth, we must be careful to distinguish various levels of abstraction in the theory of justice. We might think through what justice requires on the assumption that all relevant facts are known to those who make welfare-affecting decisions, including facts concerning how specified circumstances will affect each person's welfare, that all persons are disposed to comply with whatever requirements social justice demands, and that the government can implement any technically and physically feasible policy given the empirical circumstances. Thinking about justice at this level of abstraction can focus attention on difficult core issues. But the results of inquiry at this level of abstraction obviously do not directly dictate social policy, which can be sensibly formulated only given realistic constraints on people's dispositions, the availability of relevant facts to decision-makers and social planners, the moral costs of gathering information and imposing duties, and much else. At the level of social policy, we cannot reasonably propose that what individuals are owed according to distributive justice should be directly sensitive to their well-being expectations, because even on the assumption that we can make interpersonal well-being comparisons in principle, in practice planners will not be able to obtain this information. So social policy must be formulated in terms of various proxy measures for the in practice unobservable matters that we really care about. Subjective preference satisfaction or individual life plan fulfillment may play a role, though a limited one, as a proxy for genuine well-being in thinking about social justice at lower levels of abstraction than the level at which foundational principles are set. Fifth, distributive justice as I conceive it, though welfarist, is also opportunity-oriented. What we owe one another is a fair opportunity for a good life, not a good life come what may, regardless of the degree to which one makes sensible use in one's life of the goods that luck and social artifice place at one's disposal. So to return to the social hijacking worry, we should distinguish two cases of expensive tastes—the case in which the individual with the expensive tastes is reasonably held responsible for having them, and the case in which the individual is not reasonably held responsible for being in this state. Even leaving aside the point made earlier, that expensive tastes may be a bad indicator of what would enable the person to lead a genuinely choiceworthy life, distributive justice should distinguish the cases of responsible and nonresponsible expensive taste formation. Very roughly, if your voluntary choice or fault, interpreted by a fine-grained theory of responsibility, has brought about the situation in which you need exorbitant resources to obtain modest welfare, the onus is on you, and society is not obligated to provide further compensation. If your plight has come about in ways unmediated by your voluntary choice or fault, then distributive justice may specify that you are owed some compensation to restore your well-being expectation to a reasonable level. These implications strike me as roughly reasonable. (This discussion is a rough first cut, because an opportunity-oriented view can apparently be too rigid and unforgiving in its implications. When we are responsible

for providing individuals with second and third chances when they squander their initial fair share of opportunities is an interesting topic, which cannot be pursued here.)

Consider another objection against a welfarist approach to distributive justice. (The objection was first posed by G. A. Cohen.) Think of Tiny Tim, the crippled boy in Charles's Dickens's story A Christmas Carol. Though crippled, Tim is extremely cheerful, so it is plausible to suppose that overall he has high welfare. So a theory of distributive justice that scans society for individuals with low welfare expectation and directs resources and other forms of aid to them will miss Tim, or rather will regard him as fortunate (high in welfare), not unfortunate. But most of would think that a decent society will provide Tiny Tim a wheelchair or some other aid that will improve his mobility capability. If welfarist justice does not support that result, it stands condemned. In response: We should first of all be careful not to confound subjective feelings of happiness or subjective preference satisfaction with true welfare. It may well be the case that a sensible objective measure of well-being, presented with Tim's comprehensive circumstances, would judge that he has a low well-being expectation despite his jaunty cheerfulness. The conviction that Tim merits aid on a basis of distributive justice may well stem from convictions about true welfare. I would, however, not shrink from the possibility that someone like Tim might be very badly off along one dimension of welfare such as mobility, but very well endowed along other important dimensions, so that overall Tim is well off, one of the lucky ones, despite his physical impairment. That surely is possible, and not an embarrassment to a welfarist theory. But another confusion may enter into our reaction to the case. We need to distinguish different levels of abstraction in the theory of justice. It might for all that I have said turn out that at the level of social policy, distributive justice in its practical mode will call for compensation for observable physical impairment, but pay no heed to more elusive psychological traits such as cheerfulness, which are less easy to observe and perhaps more easily faked by persons wishing to manipulate the distributive justice agency unfairly. (The issue is not whether Tim's external demeanor appears cheerful, but whether his internal mood is happy or morose, and this may be hard to discern..) Moreover, if Tim is genuinely cheerful in a way that boosts his welfare score, this cheerfulness may reflect arduous virtuous effort on his part, rather than being part of his overall initial endowment of traits and circumstances. If feasible distributive justice agencies cannot reliably distinguish the case of Tim who is cheerful through his own efforts from the case of a Tim who is naturally cheerful, that is another reason not to let individual cheerfulness directly control what one owes to society and is owed from it according to distributive justice at the social policy level. In short, it seems to me that prioritarianism provides appropriate guidance in thinking of fair social policy responses to Tim's plight.

Prioritarianism might be thought to recommend an inherently inadequate response to the problem of inclusion and exclusion. The costs and benefits of altering the social environment so that various classes of disabled persons can become full participants in the scheme of social cooperation might be such that prioritarianism would recommend setting the social environment so that some are excluded. How can this be moral? Surely morality must require arranging institutions and practices so that all who can be made full participants are accorded that status.

I do not believe that the requirement of inclusion can plausibly be regarded as a trumping value in social policy. It is not entirely clear in this context what it is to be included as a full participant in social cooperation, but suppose that a particular society is arranged so that some people with severe and intractable cognitive disabilities and mental illness have no opportunities to secure employment, become heads of families, or vote and participate in other standard duties of citizens such as jury duty. Suppose we agree that whatever social inclusion involves, in this example these people fail to gain this valued status. This need not be wrong. The costs of inclusion might be too great for other members of society in the long run. To insist on inclusion being a trumping value whatever the cost in well-being for everybody else is tantamount to adopting a maximin principle that holds that society must be arranged so that the least well off in well-being is made as well off as possible. Here as elsewhere maximin gives too extreme a priority to the interests of the very worst off.

Anita Silvers and David Wasserman are exercised by further concerns that might be thought to impugn prioritarianism as a guide for determining the just response to disability. They note that approaches that single out individuals as advantaged or disadvantaged make the significant error of ignoring that whether one is able or unable depends not just on one's traits but on the match or mismatch between one's traits and the social surroundings. Being able to fight with edged weapons is a significant ability in medieval England, but not in a contemporary society, and having the latent ability to do computer programming is a significant personal asset nowadays, but not in ancient times. In this sense ability and disability are social constructions. Black skin is a disability in a racist society, but the appropriate remedy is not to identify the black-skinned individual as unable and compensate her for her unfortunate handicap, but rather to alter society to render it fair to individuals of all colors. Something like this train of thought leads Anita Silvers to welcome the 1990 Americans with Disabilities Act on the ground that it enacts "a conceptual shift in the meaning of 'disability.' Rather than defining 'disability' as a disadvantageous physical or mental deficit of persons, it codifies the understanding of 'disability' as a defective state of society which disadvantages those persons." Furthermore, conceptions of distributive justice that dictate scanning society for disadvantaged individuals who are then owed compensation are from Silvers's perspective defective because they inevitably insult the worth and dignity of those they aim to help. (In the same spirit Elizabeth Anderson has imagined a luck egalitarian dystopia in which the Distributive Justice Equality Agency sends compensation checks to those identified as disadvantaged along with explanatory letters such as: "To the disabled: Your defective native endowments or current disabilities, alas, make your life less worth living than the lives of normal people. To compensate for this misfortune, we, the able ones, will give you extra resources." Silvers proceeds to the conclusion that an antidiscrimination norm, what she calls formal justice, is the fundamental moral principle that will orient us toward just social policies that are properly responsive to issues of disability.

These are significant concerns intelligently expressed. But prioritarianism in my view is already an adequate response to them.

Prioritarianism does not take existing social conditions as fixed and immutable. The status quo is privileged only in that it exists. What is just, according to prioritarianism, depends on how we can achieve the best long run state of affairs that maximizes moral value from here—from our current starting point. Prioritarianism might in given circumstances require money payments as compensation to individuals, or it may be that the efficient way to make progress toward justice is to alter social arrangements in some small-scale or large-scale way. Distributive justice might require changes in the laws, transformation of the economy, the dissolution of sovereign nations in favor of a world government, or whatever. Prioritarianism does not make the mistake of assigning a normatively privileged status to the social status quo.

The problem of insult is significant. Since individuals do in fact tend to identify their worth with their personal endowments, which have fallen on them through processes of inheritance that are entirely beyond their power to control and for which they can claim no credit, social policies that involve public assignment of compensation on the basis of a public assessment of one's comprehensive circumstances and personal traits can be stigmatizing and insulting to the extent that they become counterproductive. However, this point can lead us astray. Being judged and graded and measured according to the quality of one's traits as perceived by others is a routine and everyday occurrence in social relations, whether in the job market, the marriage market, the dating scene, family life, spheres of voluntary association, spheres of friendship, professional associations, and so on. Would public sphere official judgments on these sensitive matters be more hurtful and debilitating than the private sphere judgments that we cope with every day? Perhaps so. To the extent this is so, prioritarian justice will seek to tailor social policies that mitigate the harm that is thereby done. For example, paternalistic policies might perhaps better be made in a coarse-grained way, that does not institute different rules for those judged to be good choosers and bad choosers, because the cost of stigma involved in being a bad chooser may outweigh the benefits of having separate policies catering to distinct types of people. But this depends on calculation. In some cases, all things considered, a social policy that imposes some stigma and insult may be best overall, because these costs are outweighed by offsetting benefits as measured by prioritarian justice standards. The problem of insult and stigma strikes me as a difficulty with which any adequate theory must cope, not an objection against welfarist or luck egalitarian conceptions of distributive justice.

These points may seem not to engage the thrust of Silvers's position. Consider the proposal that the morally correct response to disability is indicated by an antidiscrimination norm. The wrong to be corrected by justice is wrongful discrimination against those social arrangements stigmatize as disabled. Consider the example of access to buildings that might be provided through stairs or ramps. The former discriminates. Silvers suggests that we view the justice response to disability as an application of the antidiscrimination norm coupled with the temporary expedient of compensation for past wrongful discrimination during the interim when discriminatory social arrangements have been identified but not corrected.

I'm not sure I have fully grasped how Silvers wishes us to understand the antidiscrimination norm that she urges on us. Let's suppose it is a generalization of the formal equality of opportunity norm, that jobs in the private and public sector and economic services offered to the public should be open to all. This means that if one opens a restaurant, one must serve anyone who wants what one offers and can pay, and if one is hiring for some job, the position must be open to all who wish to apply and one should offer the job to the best qualified applicant, where qualifications are reasonably geared to the morally legitimate purposes of the enterprise that offers the job. It is easy to see that formal equality of opportunity might be violated by someone who is prejudiced against those with disabilities. One refuses to serve a would-be one-armed customer who wants what one has to offer and is willing to pay. One passes over Smith, the best qualified applicant, because Smith has epilepsy, even though it remains the case that Smith is best qualified.

It is not clear to me that formal equality of opportunity so construed would yield the result that Silvers takes it obviously to yield—namely, that as a matter of formal justice ramped access must be provided to buildings open to the public such as restaurants, post offices, and museums. I set up a restaurant in a way that I suppose will be profit-maximizing. I could offer a wider menu, but I decide it's not worthwhile to do so. I could stay open through later hours, but I deem that closing early would be more profitable. I could provide stairs or a ramp to the restaurant entrance, but stairs are cheaper and the extra business I would get by expanding access by providing a ramp would not pay for itself. So far as formal justice goes, all of these decisions seem to me to be on a par. Those who must work on the swing shift are denied access to my restaurant, which is not open past midnight, and those who for reasons of health can only eat vegetarian food are denied access to my restaurant, which serves only meat, and the same goes for those who are denied access by my decision not to install a ramp. Of course the costs and benefits to restaurant owner, other customers, and those whose access is determined by these decisions may be very different, and these differential costs and benefits may call for a social policy that requires ramped access but not late-night hours or a wide and nonesoteric menu. But I do not see that formal equality of opportunity can do the required differentiating.

Silvers suggests, not I take it as a criterion of unfairness but as a rough and ready indicator, that we make a counterfactual inquiry: What would the social world be like if people who are statistically abnormal and putatively disabled in some respect were the majority of the population? But this test does not seem to me useful in this connection. Here my worries echo what I take Wasserman's to be. If the majority of people worked on the swing shift, many more restaurants would stay open after midnight, and if most people were vegetarians, meat would likely be displaced by fruits and vegetables in many restaurants, and if hardly anyone could walk up stairs, stairs would probably disappear. In none of these cases does the counterfactual test signal unfairness. The effective opportunities that a market exchange economy offers vary in their shape with the ensemble of people's tastes and traits that determine supply and demand. This does not render the outcome of free market exchange a baseline that fixes what is just or that government should not attempt to alter to serve collective goals. In my view a market

economy would be just insofar as it could be harnessed effectively to other institutions and practices and distributive mechanisms so that the overall configuration best achieves the prioritarian goal. But what I do not yet see that the fact that a particular equilibrium of a market economy leaves some people better off and some worse off by itself indicates any unfairness or insidiously unjust social construction. The market economy responds to the ensemble of tastes and other factors that determine supply and demand, that's what it's for.

Moreover, once we notice that a particular state of society renders it the case that effective access to the goods that society offers is very unevenly distributed, what we should do about this or whether we should do anything at all surely depends on the costs and benefits of the various policy alternatives (the costs and benefits being measured by the right moral value scale). Notice that differential access is pervasive and that some remedies would be incredibly costly and not at all cost-effective. The level of complexity at which newspaper reporting and television and radio broadcasting are set excludes some people, the mentally retarded and those among the mentally ill who have difficulty concentrating their attention. An important, perhaps crucial good in our society is not provided to all on an equal basis, we might say. (What exactly we might mean by this is not yet clear to me.) We could remedy this situation to any degree we might wish by requiring that newspaper reporting and television and radio news programming be set at a level of simplicity that would enable the severely mentally retarded and the severely disoriented by dint of mental illness to have equal access in the sense that with equal effort, they could follow as well as anyone else and achieve roughly comparable levels of understanding. In my view this would not be a good policy to follow, because the costs would be enormous—the most relevant cost being the enormous reduction in the amount of accessible information that could be conveyed through these media to the person of mean intelligence and attention capability. Whether you accept a prioritarian standard for assessing costs and benefits or prefer some other norm, it seems to me that some cost benefit calculation is absolutely required in order to determine just social policies.

Let us return to the basic hunch that Silvers is developing. Her idea is that justice for the disabled is fundamentally a civil rights issue, on the model of justice for racial minorities and women and gays and other groups that have been singled out for vicious and hostile treatment by dominant groups. I have been construing the norm she is proposing as a formal antidiscrimination norm, a generalization of the ideal of careers open to talents (plus reparation for past injustice). But this construal invites the response that formal equality of opportunity is insufficient. After all, a world in which jobs are scrupulously allotted according to the qualifications of applicants might be a world in which people of color are so poor that they entirely lack opportunities to transform native talent into skills that will render them qualified.

Following John Rawls, one might then affirm a substantive equality of opportunity norm, which requires that society be transformed into a perfect meritocracy in which any two persons in society who have the same native talent and ambition will also have identical prospects for success in competitions for positions that confer above-average benefits. That something beyond formal equality of opportunity is the ideal that

drives her account is indicated by her approving citation of an antidiscrimination ideal that “permits public intervention in private affairs in order to promote people’s opportunities to be rewarded commensurate with their talents.” Pushed to the limit, this norm would become the Rawlsian version of substantive equality of opportunity, Fair Equality of Opportunity. Notice that substantive equality of opportunity along these lines cannot be a freestanding conception of social justice. It’s incomplete. Some further norm has to specify when jobs and other positions that confer advantages are properly set, and their qualifications properly determined, for if no such further norm is specified, substantive equality of opportunity oddly could be fully satisfied in a world in which the qualifications for attractive jobs and entrepreneurial opportunities are set by white males and are biased in favor of white males. I do not yet see the further norm that Silvers might have in mind, and insofar as the historical counterfactual test she suggests is meant to point toward it, the doubts I have already mentioned about that test become all the more pressing.

Leaving this last problem aside, I wonder: What is so great about a perfect meritocracy? After all, being born talented or untalented is just as much beyond one’s power to control, and in this sense morally arbitrary, as being born man or woman, of one putative race or another, into one or another ethnic group, of one or another sexual orientation, and so on for the distinctions that have tended to become bases of caste hierarchies. Silvers is moved by the concern that society grades as incompetent people identified as suffering from disability, who are not really incompetent. But in her discrimination-free society as I understand it, in which people are rewarded commensurate with their talents, the economy very dramatically labels the untalented/incompetent as entitled to lesser life prospects. Why is this fair? To my mind, when meritocratic principles command allegiance, this is so because they are contingently serving as efficient instruments for the achievement of more fundamental justice values. But here I do not claim to be making an argument, just acknowledging my prioritarian allegiance. Whatever its ultimate moral merits, this doctrine seems to me to score well by the test posed by the difficult issue of disability, which has been ably dissected by Mahowald, Silvers, and Wasserman.

¹ . One might also interpret contract at will asymmetrically, so that during the term of a labor contract the employer cannot fire the employee except as specified in the terms of the contract and can be compelled by law to rehire if he breaches the contract by terminating employment. But on the side of the employee, a voluntary quit that breaches the terms of the contract can only trigger legally compelled payment of monetary compensation for damages not legally compelled resubmission to employment according to the terms of the contract.

² . Mark Kelman, “Concepts of Discrimination in ‘General Ability’ Job Testing,” Harvard Law Review vol. 104, no. 6 (April, 1991): 1157-1247; at 1226.

³ . Notice that a teen-ager who is denied employment opportunities on the ground that it is a more urgent matter to ensure employment opportunities for adults and who dies at an early age does suffer disadvantage, perhaps unfair disadvantage, via this form of age discrimination. This teen-ager marked for early death does not benefit from the discrimination in favor of prime-age adults. One might consider the case of a teen-ager who has a known uncorrectable propensity to contract an ailment that might result in his early death and who suffers age discrimination. This case looks morally problematic in a way that uniform discrimination against the old, applying equally to all who live to old age, does not.

⁴ . John Rawls, A Theory of Justice (Cambridge: Harvard University Press, 1971)

⁵ . Catharine Mackinnon, Feminism Unmodified (Cambridge: Harvard University Press, 1987).

⁶ . By Allen Buchanan, in “Choosing Who Will Be Disabled: Genetic Intervention and the Morality of Inclusion,” Social Philosophy and Policy 13, no. 2 (Summer, 1996).