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## THE DISABILITY–EMPLOYABILITY DIVIDE: BOTTLENECKS TO EQUAL OPPORTUNITY

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BOTTLENECKS: A NEW THEORY OF EQUAL OPPORTUNITY. By *Joseph Fishkin*. Oxford and New York: Oxford University Press. 2014. Pp. 1, 257. \$35.

### INTRODUCTION

Equal opportunity might appear to comprise a relatively simple question: Do similarly situated persons have an equal chance to attain a particular goal, or do obstacles irrelevant to their qualifications or to the desired goal preclude achievement? But equal opportunity is complicated.<sup>1</sup> There are descriptive and prescriptive dimensions to this question. Nuances exist when determining who is similarly situated, whether those individuals have the same opportunity, what goals we care about equalizing, and whether the ultimate aspiration is equality of opportunity or equality of outcome. Moreover, what means should we employ to remove obstacles, are these means likely to be successful, and do the cultural means justify the societal ends? And some readily apparent factors leading to inequalities of opportunity seem inexorable, including our individual genetic makeup, the environments in which we are raised, and our overall social circumstances. These considerations have prompted some scholars to argue that equality of opportunity is possible only if both law and government are committed to achieving it.<sup>2</sup>

To discuss equal opportunity in a coherent way often requires focusing on specific domains.<sup>3</sup> One field in which equal opportunity has special resonance is employment. Societal support exists both for the descriptive idea that racial discrimination poses an obstacle to equal opportunity and

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1. See, e.g., JAMES S. FISHKIN, *JUSTICE, EQUAL OPPORTUNITY, AND THE FAMILY* 132 (1983) (arguing that equal opportunity principles produce a fundamental conflict between liberty and equality once we account for the role of the family in preparing children to take advantage of opportunities); Michel Rosenfeld, *Substantive Equality and Equal Opportunity: A Jurisprudential Approach*, 74 CALIF. L. REV. 1687, 1689 (1986) (“A coherent and comprehensive concept of equal opportunity must rely on a theory of substantive equality.”).

2. See, e.g., Joseph William Singer, *Original Acquisition of Property: From Conquest & Possession to Democracy & Equal Opportunity*, 86 IND. L.J. 763, 777 (2011).

3. “Otherwise,” asks Fishkin, “where would we begin?” It would be impossible, and not necessarily desirable, to equalize all opportunities for all people all of the time. P. 4.

for the prescriptive idea that such an obstacle ought to be overcome. Accordingly, a law like Title VII of the Civil Rights Act of 1964 conveys something specific about what opportunities are important (work), what obstacles are inappropriate (discrimination), and what type of equality of opportunity is desired (race, color, sex, religion, and national origin). Such antidiscrimination laws generally enjoy strong support in the United States.<sup>4</sup>

Joseph Fishkin's new book, *Bottlenecks: A New Theory of Equal Opportunity*,<sup>5</sup> reinvigorates the concept of equal opportunity by simultaneously engaging with its complications and attempting to simplify its ambitions. Fishkin describes bottlenecks as narrow spaces in the opportunity structure through which people must pass if they hope to reach a range of opportunities on the other side (p. 13). A significant component of the American opportunity structure that *Bottlenecks* leaves largely unexplored, however, relates to people with disabilities.<sup>6</sup> This Review applies Fishkin's theory to explore how disability law creates and perpetuates bottlenecks that keep people with disabilities from achieving a greater degree of human flourishing. In particular, disability policy's opportunity structure features a conceptual disability–employability divide that ultimately prevents people with disabilities from reaching a wider array of opportunities. Fishkin's book, in concert with this Review, introduces new and inventive ways of reimagining and implementing structural solutions to these bottlenecks.

Part I provides an overview of Fishkin's arguments, including his theory of opportunity pluralism, which he advances as a theoretical framework for broadening the opportunity structure. Part II then applies Fishkin's theory to administrative disability policy to address and evaluate the disability–employability divide as a bottleneck. In particular, this Part explores how people with disabilities are frequently unable to pass through certain bottleneck policies to reach productive employment on the other side. Part III then proffers several policy solutions that could enable people with disabilities to move through or around the bottlenecks that keep them from accessing productive work opportunities.

## I. BOTTLENECKS: A NEW THEORY OF EQUAL OPPORTUNITY

*Bottlenecks* endeavors to demystify the concept of equal opportunity through the relatively simple metaphor of a bottleneck. Fishkin defines “bottlenecks” as narrow spaces through which people must pass to reach greater opportunities (p. 13). He characterizes bottlenecks as inevitable obstacles (p. 156) that ought to be addressed if they become pervasive or severe (pp. 21–22). To illustrate, *Bottlenecks* relates how some state legislatures have enacted laws in recent years to ban credit checks in hiring, bar employers

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4. See, e.g., BRUCE ACKERMAN & ANNE ALSTOTT, *THE STAKEHOLDER SOCIETY* 1 (1999) (discussing Americans' belief in equal opportunity).

5. Joseph Fishkin is an Assistant Professor of Law, University of Texas School of Law.

6. The book ably demonstrates how discrimination creates bottlenecks, pp. 20–21, 110–11, but there are only a few references to disability or reasonable accommodations. Pp. 22, 105–06, 168–69, 252.

from indicating “no unemployed need apply,” or prevent employers from inquiring into previous criminal convictions (pp. 21, 231–35). Fishkin argues that extending these innovative and seemingly unconventional protections is actually a part of our conventional antidiscrimination heritage. In other words, antidiscrimination law is, and should be, fundamentally about ameliorating severe bottlenecks in the structure of opportunity—and these recent statutes and doctrines are designed to do just that (pp. 20–22, 235).

Fishkin labels his proposal “opportunity pluralism,” which “requires us to look in a more structural way at how the opportunities in our society are created, distributed, and controlled” (pp. 1, 16–18). He wants to transcend a “big test society” (p. 15) in which there are strikingly similar preferences for jobs, social roles, or instrumental goods—and in which successes snowball, as “each outcome is another opportunity.”<sup>7</sup> To do so, we need a pluralistic model of opportunities in which no bottleneck is too severe and many different processes and paths enable one to pursue success (pp. 15–17, 76). If there is a highway of opportunities, Fishkin desires as many on-ramps as possible (p. 17). That way, if you fail to clear a big test hurdle at age sixteen, there remain other chances to pursue valuable opportunities.<sup>8</sup> Expanding the means for achievement may, over time, turn the conventional opportunity structure, which currently resembles a pyramid, into something that looks “more like a city, with many different structures and various roads and paths” to success.<sup>9</sup> But expanding the number of on-ramps or paths to opportunities requires, among other things, first minimizing or undoing the effects created by certain bottlenecks (pp. 18–20).

Importantly, some bottlenecks are warranted (pp. 160–63, 169). In certain circumstances, we perhaps want a fairly unitary and rigid structure for specific opportunities. For example, we might decide that the route to becoming a pediatric anesthesiologist ought to be a very narrow one, given the specific set of skills required for and the stakes associated with that line of work. Hence, we might favor retaining the current bottleneck (which depends largely on the standardized United States Medical Licensing Examination) to ensure that only extremely qualified people can hold such jobs. The efficiency costs in designing alternative routes to such a specialized position may likewise counsel in favor of retaining the test and its consequent bottleneck.<sup>10</sup>

Fishkin advises us to ask two questions to determine whether we ought to retain a particular bottleneck. First, we must decide whether the policy creating the bottleneck is legitimate or arbitrary (p. 160). Here, we are concerned with the strength of the justification for imposing a bottleneck.

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7. P. 70 (quoting Clare Chambers, *Each Outcome Is Another Opportunity: Problems with the Moment of Equal Opportunity*, 8 POL. PHIL. & ECON. 374 (2009)).

8. See generally pp. 66–70.

9. Pp. 17–18; see also DAVID MILLER, *PRINCIPLES OF SOCIAL JUSTICE* 200 (1999) (opposing a “single-pyramid” conception of merit).

10. See p. 179 (observing that efficiency costs must be balanced against the value of opportunity pluralism).

Fishkin illustrates this idea with the credential of credit scores (p. 162). Conditioning a person's ability to get a loan on that person's credit score might seem a legitimate practice, given the lender's natural and logical interest in ensuring that the person has the capacity to pay back loans in a timely manner (p. 162). Conditioning a person's ability to get a job on that person's credit score seems arbitrary, however, given that credit scores are poor predictors of whether a person will be a good employee (p. 162). Even if using a credential or requirement is legitimate, we may decide that other values warrant limiting its use as a prerequisite. For example, even assuming that a four-year college degree was legitimate for every job as an indicator of a given individual's capabilities, we might oppose requiring such a degree for every job given the countervailing value of opportunity pluralism.<sup>11</sup>

The second question is whether the bottlenecking effect of a policy or requirement is severe. Even if a policy is arbitrary or unjustified, it still may not present much of a problem for making certain opportunities widely available (p. 163). Here, we are concerned with both the pervasiveness and strictness of any particular bottleneck (pp. 164–70). For pervasiveness, we want to know how many paths to opportunity are actually constrained by this requirement (p. 164). For strictness, we want to know whether the policy is “an absolute bar, a strong preference, or just a mild preference” (p. 164). Applying these concepts to the example of credit scores, we want to know how many employers actually require credit scores as a component of their application (pervasiveness) and whether this information is being applied strictly or just as part of an overall query into an applicant's reliability (strictness). Some bottlenecks may be pervasive but not especially strict, such as employers' valuing attractiveness (p. 164). Alternatively, some bottlenecks might be strict but not especially pervasive, such as employers' refusing to hire employees with children.

If a requirement is both arbitrary and severe, the case for ameliorating that bottleneck is “particularly compelling” (p. 167). In these instances, Fishkin contends that the bottleneck should be addressed by helping people get through—or around—it (pp. 19, 171–72). This way of examining opportunities provides a novel filter through which to reexamine antidiscrimination law. American antidiscrimination law tends to focus on wrongdoing by asking questions like the following: Why did the employer make a particular decision, that is, was there “disparate treatment” under the relevant statute? Is an employer-imposed requirement a business necessity, or is there a less discriminatory alternative?<sup>12</sup> Note that these questions

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11. See p. 163 (observing that, even if a “big test” were a legitimate predictor for every job, “that does not mean that adopting it across the board is ultimately the best policy, once we account for the value of opportunity pluralism”). This would be similar to the thrust of disparate impact jurisprudence under Title VII of the Civil Rights Act and *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), in which the Supreme Court decided that requiring a high-school diploma was a discriminatory practice that was not justified by reference to the underlying jobs. The exclusionary effects were simply not worth the value of the proxy. See p. 165 (discussing *Griggs*).

12. See, e.g., 42 U.S.C. § 2000e-2(k)(1)(A)(i)–(ii) (2012).

do not demand that the wrongdoing was severe or pervasive. According to Fishkin, these priorities are backwards; we ought to worry less about motive and more about whether certain bottlenecks severely constrain opportunities (p. 231).

Along the way, Fishkin explicates a taxonomy of bottlenecks. The most familiar are qualification bottlenecks in which opportunities are constrained by some requirement (p. 156). A qualification bottleneck could involve a requirement that the applicant possess a diploma or degree, succeed on a certain test, or be a member of a particular race or sex.<sup>13</sup> There are also developmental bottlenecks, in which opportunities are limited by the failure to develop important abilities or skills (pp. 156–58). These bottlenecks are often tied to status and implicate race, class, and/or disability. Education in general, and literacy in particular, is perhaps the most basic example: opportunities will be constrained for those who cannot read or write well (pp. 14, 156–58). Finally, there are instrumental-good bottlenecks, in which opportunities are controlled by a limited instrumental good that everyone wants (pp. 158–59). As an example, money may become a bottleneck where it is instrumentally necessary to reach outcomes that people value but where everyone cannot obtain the amount of money they need to reach those outcomes (pp. 158–60).

Part of Fishkin’s motivation in advocating for greater opportunity pluralism is his philosophical orientation that there is “no such thing as ‘natural’ talent or effort, unmediated by the opportunities the world has afforded us, which include our circumstances of birth.”<sup>14</sup> While it is tempting to view outcomes as part nature, part nurture, Fishkin says that all behavioral outcomes are 100% nature and 100% nurture (p. 95). Neither is a sufficient causal mechanism; neither does any work by itself.<sup>15</sup> Thus, for genes to do anything, they must be activated or “expressed,” which often depends on a person’s environment.<sup>16</sup> A particular environment similarly influences genetic activity, traits, capacities, merit, and the social and job-based roles that a person holds—and these in turn all reimpact a person’s environment.<sup>17</sup> So

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13. See p. 156 (“The question is what is *actually* required to pursue a path, not what is required officially or on paper.”).

14. P. 83. He devotes an entire chapter to explicating this viewpoint. Pp. 83–129.

15. Fishkin offers the following illustration: the conventional understanding of nature–nurture is that each contributes to the person separately, in the way that two people, say Billy and Suzy, might each partly fill a bucket with water. One might ask about Billy’s and Suzy’s contributions to the bucket of water, and the answer might be that Billy is 60% responsible while Sally provided 40% of the water. Fishkin contends that natural and environmental forces, rightly understood, are much more synergistic, and he offers a revised picture: Suzy brings the hose and Billy turns on the water. Now it makes little sense to ask how much of the filled bucket is due to Billy and Suzy, respectively. The bucket of water is due 100% to both of their unique and complementary contributions. Pp. 95–96.

16. P. 94. Similarly, environmental conditions may trigger hormone production, which in turn triggers gene expression. P. 94.

17. P. 114. Fishkin includes a graphic figure that very helpfully illustrates this iterative process.

when we question why or how someone becomes well qualified for a particular job, the answer is that there has been a multistaged, “iterative process of interaction between a person and her environment” (p. 104).

Fishkin keenly observes that opportunities matter not just because they are instrumental in attaining a certain outcome, such as well-paying employment, but also because they facilitate agency by providing access to intangible goods (pp. 9–10). Opportunities give us the materials out of which we build our lives (p. 10). They give us the chance to make choices and thus aid in the formation of self, including the development of human capital.<sup>18</sup> In the employment context, the opportunity to work matters not simply because it provides a means to earn an income but because it is embedded with a plethora of social meanings and social goods.<sup>19</sup> This reality has led scholars to write about the dignitary value in work and to argue that employment is about “pride, dignity, and belonging—the societal standing that comes from providing for one’s family and contributing to one’s community.”<sup>20</sup>

## II. DISABILITY-SPECIFIC BOTTLENECKS

There are a few bottlenecks that repeatedly keep people with disabilities from enjoying the full range of opportunities. The first is the most plainly literal of bottlenecks—accessibility. If a group of people cannot access a workplace or public accommodation, inaccessibility poses an obstacle to further opportunities (pp. 22, 252). Discrimination creates a second bottleneck. When a person needs a particular identity to pursue certain paths, this de facto requirement narrows a route in the opportunity structure (pp. 20–21, 110–11). Fishkin briefly mentions these two bottlenecks, which represent relatively straightforward applications of his theory.

This Part applies Fishkin’s theory to illuminate and explore one equally critical, but less intuitive, bottleneck: the law’s binary structure of disability and employability. This basic idea—although empirically incorrect and socially harmful—derives from the history of disability and modern administrative law, as well as from the very semantics of the word “disability.” In a classic tautology, if you are disabled, you must not be able to work; in contrast, if you are able to work, you must not really be disabled. This binary

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18. P. 10. Fishkin succinctly illustrates this point by sketching the story of two people with similar socioeconomic backgrounds. One attends an American university, which results in a range of potential careers and choices, and the other is strongly urged by his family to join the family business. Over a lifetime, both have, by all accounts, equally successful lives. But by Fishkin’s account, they do not enjoy equal opportunities. And the opportunity to choose from a broad range of choices matters in part because choosing is a dignitary good. Pp. 9–10.

19. See Jody Heymann, Michael Ashley Stein & Gonzalo Moreno, *Disability, Employment, and Inclusion Worldwide*, in *DISABILITY AND EQUITY AT WORK* 1–3 (Jody Heymann, Michael Ashley Stein & Gonzalo Moreno eds., 2014).

20. Jennifer Gordon & R.A. Lenhardt, *Rethinking Work and Citizenship*, 55 *UCLA L. REV.* 1161, 1168 (2008).

system serves to encourage people either to work or receive benefits. Furthermore, once a person works or receives benefits, it is difficult and complicated to cross from one path over to the other. This Part will thus consider how the legal manifestations of the disability–employability bottleneck constrain certain opportunities.

Treating disability and employability as binary conditions has been a long-standing administrative mechanism justifying the distribution of money or other goods to those unable to work.<sup>21</sup> Indeed, the artificial either/or construct reaches back to the Elizabethan Poor Laws,<sup>22</sup> which themselves grew out of fourteenth-century edicts intended to regulate vagrancy.<sup>23</sup> Such distributive schemes have long sought to sort the population into two groups: those who are able and expected to work and those who are not able to work and thus eligible for public assistance. Historically, people with disabilities have been viewed as falling squarely within the latter group.<sup>24</sup>

Contemporary administrative law incorporates this binary system and perpetuates it by forcing people into a dichotomous choice between working or receiving benefits. More often than not, the system shunts people with disabilities onto the benefits track. And transitioning from receiving benefits to working for a living, or vice versa, is fraught with peril under the current system. This is problematic from the viewpoint of opportunity pluralism because the resulting structure sharply limits the opportunity paths open to people with disabilities. This Part will now examine a few of the structural manifestations of this administrative bottleneck.

Welfare is one incarnation of this bottleneck. Welfare is a well-intentioned program that aspires to help people transition between benefits and work. And yet state-run, disability-oriented rehabilitation and vocational training programs fall short of this goal because they are insufficient for the task. This is partly due to their “work-first” emphasis, which often comes at the expense of greater emphasis on training or educational programs.<sup>25</sup> The

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21. Disability has long been an administrative category in the welfare state, a status that exempts a person from the labor market. See DEBORAH A. STONE, *THE DISABLED STATE* 4–10 (1984).

22. See generally Jacobus tenBroek & Floyd W. Matson, *The Disabled and the Law of Welfare*, 54 CALIF. L. REV. 809, 809–10, 821–22 (1966).

23. STONE, *supra* note 21, at 29; see *id.* at 29–40 (describing the evolution from fourteenth-century regulation of vagrants to the regulations of Poor Law administration). The English Poor Laws set up a system of economic distribution from the labor market to those unable to participate in that market. *Id.* at 51–55. Of the five categories of people considered paupers by Poor Law administrators, four—the sick, the insane, “defectives,” and the “aged and infirm”—“are part of today’s concept of disability.” *Id.* at 40. Disability thus originated as a status that was defined by whether a person was able to work. *Id.* at 54–55.

24. Of course, disability has not always been a single administrative category of the welfare state; in early descriptions of welfare programs in Europe, people with disabilities were subsumed under categories like “aged and infirm,” “lunatics and defectives,” and “invalids and the lying-in.” *Id.* at 26.

25. See generally Martha F. Davis, *Learning to Work: A Functional Approach to Welfare and Higher Education*, 58 BUFF. L. REV. 147 (2010) (arguing that welfare law is ineffective due to a lack of emphasis on education and training); Janice Y. Law, Comment, *Changing Welfare*



result is that welfare recipients who start out lacking the education or training necessary to compete successfully in the labor market remain so and will naturally face limited prospects for career progression.<sup>26</sup> Concurrently, while states have progressively scaled back funding for welfare benefits,<sup>27</sup> in recent years the federal government has increased spending for disability cash-transfer programs.<sup>28</sup> This dynamic is reflected in the current industry of professionals commissioned by states to help transfer people from state-supported welfare to federally funded disability benefits.<sup>29</sup> Welfare-to-work has become welfare-to-disability.

Social Security Disability Insurance (“SSDI”) and Supplemental Security Income (“SSI”) also perpetuate the disability–employability bottleneck. Both federal administrative programs are administered by the Social Security Administration (“SSA”) and provide income support for disabled individuals who are unable to work.<sup>30</sup> The criteria for the programs differ. SSDI is disability and work based—that is, a person must both have a disability and have worked enough to qualify.<sup>31</sup> In contrast, SSI is strictly need based and does not rely on a history of work.<sup>32</sup> Both programs disincentivize work, but in different ways. Under SSDI, employees are induced to quit their jobs immediately after the onset of a work-limiting disability since it is impossible under the law for them to obtain assistance from SSDI without first leaving the labor force.<sup>33</sup> No benefits may be paid for at least five months, although

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“As We Know It” *One More Time: Assuring Basic Skills and Postsecondary Education Access for TANF Recipients*, 48 SANTA CLARA L. REV. 243 (2008) (same).

26. Law, *supra* note 25, at 243–44.

27. David A. Super, *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544, 2613–14 (2005) (observing that state funding has decreased since the 1990s due to recessions but has never been revamped during periods of prosperity).

28. See Damian Paletta & Dionne Searcey, *Two Lawyers Strike Gold in U.S. Disability System*, WALL ST. J., Dec. 22, 2011, at A1, available at <http://online.wsj.com/news/articles/SB10001424052970203518404577096632862007046>. Part of this expansion is due to the fact that “in 2004 the [Social Security Administration] and Congress relaxed rules governing representation, making it easier for nonlawyer advocates to get paid.” *Id.*

29. Chana Joffe-Walt, *Moving People From Welfare To Disability Rolls Is A Profitable, Full-Time Job*, NPR (Mar. 27, 2013, 3:00 PM), <http://www.npr.org/2013/03/27/175502085/moving-people-from-welfare-to-disability-rolls-is-a-profitable-full-time-job> (chronicling the phenomenon in which state governments hire consulting groups to move people off of state-supported welfare and onto federally funded disability).

30. *Substantial Gainful Activity*, SOC. SEC. ADMIN., [www.ssa.gov/oact/cola/sga.html](http://www.ssa.gov/oact/cola/sga.html) (last visited Oct. 15, 2014) (“To be eligible for disability benefits, a person must be unable to engage in substantial gainful activity (SGA).”).

31. *Disability Planner*, SOC. SEC. ADMIN., <http://www.ssa.gov/dibplan/dqualify.htm> (last visited Oct. 15, 2014).

32. *Understanding Supplemental Security Income SSI Eligibility Requirements*, SOC. SEC. ADMIN., <http://www.ssa.gov/ssi/text-eligibility-ussi.htm> (last visited Oct. 15, 2014).

33. Workers who participate in gainful employment during the application period are automatically denied benefits. David Autor, *The Unsustainable Rise of the Disability Rolls in the United States: Causes, Consequences, and Policy Options* 10 (Mass. Inst. of Tech. Dep’t of Econ., Working Paper No. 12-01, 2011), available at <http://ssrn.com/abstract=1987244>.

a successful application process often takes several years.<sup>34</sup> Once workers with impairments have stopped working and begun receiving benefits, it often becomes difficult—due to gaps in their work history, the investment of time and often legal fees in obtaining SSDI benefits, or inertia—for them to reenter the workforce.<sup>35</sup> Indeed, one study shows that individuals who are out of work for six months due to a work-related injury or illness have only a 50% chance of returning to work, and that number drops to 25% and 2% at the one- and two-year marks, respectively.<sup>36</sup> On the other side of the employment equation, employers are motivated to terminate an employee who experiences a work-limiting disability.<sup>37</sup> There is simply little incentive in the United States for employers to accommodate the employee as she rehabilitates or explores alternatives to her prior arrangement.

SSI discourages individuals from working principally because any piece-meal earnings are quickly offset by reductions in benefits. For almost every dollar earned, the government recoups 50 cents.<sup>38</sup> Once earnings surpass about \$1,100 per month, the worker is no longer eligible for SSI benefits.<sup>39</sup> And an eligible worker will be disqualified from receiving any benefits if she earns just one dollar more. Even more critically, this would end her eligibility for Medicaid.<sup>40</sup> The system therefore presents many people with a stark choice: remain poor and continue receiving a steady stream of income and access to health care<sup>41</sup> or earn a nominally greater amount of money and lose all governmental support and possibly endanger their lives.

The disability–employability bottleneck is substantiated by August 2014 statistics that reflect employment rates of 19.8% for people with disabilities and 68.8% for people without disabilities.<sup>42</sup> The current employment rate of

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34. *Id.* at 4, 9–10.

35. *See id.* at 10 (noting empirical research that demonstrates that claimants who experience delays in the SSDI application process are less likely to return to work—even if they are not ultimately awarded benefits). The process itself appears to inspire would-be claimants not to work.

36. Howard A. Bose, *Returning Injured Employees to Work*, PROF. SAFETY, June 2008, at 63, 64, available at [http://www.asse.org/professionalsafety/pastissues/053/06/BoseFeature\\_0608.pdf](http://www.asse.org/professionalsafety/pastissues/053/06/BoseFeature_0608.pdf).

37. Michael Ashley Stein, Anita Silvers, Bradley A. Areheart & Leslie Pickering Francis, *Accommodating Every Body*, 81 U. CHI. L. REV. 689, 705 (2014).

38. SOC. SEC. ADMIN., WORKING WHILE DISABLED—HOW WE CAN HELP 12–13 (2014), available at <http://www.ssa.gov/pubs/EN-05-10095.pdf>.

39. *Id.* at 8.

40. Mark C. Weber, *Disability and the Law of Welfare: A Post-Integrationist Examination*, 2000 U. ILL. L. REV. 889, 949.

41. Statistics from 2011 show that the average monthly payments to SSI and SSDI recipients were \$501 per month and \$1,068 per month, respectively. S. COMM. ON HEALTH, EDUC., LABOR & PENSIONS, 113TH CONG., UNFINISHED BUSINESS: MAKING EMPLOYMENT OF PEOPLE WITH DISABILITIES A NATIONAL PRIORITY 10 (2012) [hereinafter UNFINISHED BUSINESS]. “Both [amounts] are below the poverty level for a family of two.” *Id.*

42. *Labor Force Statistics*, BUREAU LAB. STAT., <http://www.bls.gov/webapps/legacy/cp-satab6.htm> (last visited Oct. 15, 2014).

people with disabilities is historically low,<sup>43</sup> and it can be partly attributed to SSA's failure to design programs that incentivize work.<sup>44</sup> Quite simply, it is often less stressful and more economically feasible for a disabled person to procure benefits from the federal government than to work.<sup>45</sup>

Moreover, just as with the welfare-to-disability phenomenon described above, there is institutional support in moving people from work to disability benefits. Indeed, an entire industry of lawyer and nonlawyer advocates now exists to help people with disabilities stop working and start receiving benefits.<sup>46</sup> The number of firms devoted to this kind of work has expanded in recent years, and such firms only get paid if they secure benefits.<sup>47</sup> Additionally, at the hearings where these decisions get made, there are no opposing lawyers to potentially resist the applicants' claims.<sup>48</sup> As a result, there are strong economic incentives to help people receive disability benefits, which, according to a recent U.S. Senate investigation, has led to many fraudulent claims.<sup>49</sup> As summed up by *60 Minutes*, "There's not much to lose, really. It doesn't cost you anything unless you win the appeal and the lawyers collect from the federal government."<sup>50</sup> This puts a tremendous amount of pressure on inundated administrative law judges to "sniff out misleading applications."<sup>51</sup>

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43. See Autor, *supra* note 33, at 8. This is hard to measure exactly as different federal agencies have, over time, used different definitions of "disability." UNFINISHED BUSINESS, *supra* note 41, at 6, 30; Stein et al., *supra* note 37, at 733. That said, the 1980 Census showed a 32% employment rate for working-age people with disabilities, as did 2012 statistics. UNFINISHED BUSINESS, *supra* note 41, at 6–7.

44. See Autor, *supra* note 33, at 8 ("The simultaneous occurrence of these two trends—declining employment among working-age people with disabilities and rising SSDI receipt—underscores that the two key policy challenges of the SSDI program are two sides of the same coin.").

45. See *id.* at 10 ("It is difficult to overstate the role that the SSDI program currently plays in discouraging the ongoing employment of non-elderly adults.").

46. Paletta & Searcey, *supra* note 28.

47. *Id.*

48. *Id.*

49. See generally S. COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFAIRS, 114TH CONG., HOW SOME LEGAL, MEDICAL, AND JUDICIAL PROFESSIONALS ABUSED SOCIAL SECURITY DISABILITY PROGRAMS FOR THE COUNTRY'S MOST VULNERABLE: A CASE STUDY OF THE CONN LAW FIRM (2013), available at [http://www.coburn.senate.gov/public/index.cfm?a=Files.Serve&File\\_id=0d1ad28a-fd8a-4aca-93bd-c7bf9543af36](http://www.coburn.senate.gov/public/index.cfm?a=Files.Serve&File_id=0d1ad28a-fd8a-4aca-93bd-c7bf9543af36).

50. *60 Minutes: Disability, USA* (CBS television broadcast Oct. 10, 2013), available at <http://www.cbsnews.com/news/disability-usa/>.

51. *Id.* ("Marilyn Zahm and Randy Frye are two of the country's 1,500 disability judges. . . . They are each expected to read, hear, and decide up to 700 appeals a year to clear a backlog of nearly a million cases. They say disability lawyers have flooded the system with cases that shouldn't be there."); Joe Palazzolo, *Binder Brothers Thrive in Strained U.S. Disability System*, WALL ST. J. (Dec. 22, 2011), <http://blogs.wsj.com/law/2011/12/22/binder-brothers-thrive-in-strained-u-s-disability-system/>.

The structure of SSDI and SSI prevents the Americans with Disabilities Act (“ADA”) from having its full effect since the statute depends upon people with disabilities seeking and maintaining employment.<sup>52</sup> While the ADA has removed some barriers to work, not working has become more economically attractive due to administrative programs like SSDI and SSI.<sup>53</sup> The result is a deeply unsatisfying tension between the ADA and SSA’s programs, a tension that stems from these programs’ different implicit views about the relationship between disability and employability.<sup>54</sup> Long-term success in increasing the employment of people with disabilities will almost certainly require making the financial return on employment better than the return from SSA’s cash-benefit scheme.<sup>55</sup>

The disability–employability bottleneck is similar to a gender-related bottleneck that Fishkin identifies. He notes that many workplaces force people (especially women) to choose between two critical forms of flourishing: playing major roles in their families or having meaningful work lives (pp. 224–28). People get steered onto one of two tracks: “ideal worker” jobs or significant family caregiving.<sup>56</sup> And the tracks do not cross much: ideal worker jobs usually do not allow for much family caregiving, while significant family caregiving is most compatible with “marginal or part-time work” (pp. 225–27). Fishkin argues that, even if people are not completely barred from either role, the inability to do both—since they are such culturally valued forms of flourishing—constitutes a serious bottleneck.<sup>57</sup>

We can construct a similar argument with respect to disability-specific opportunities and benefit regimes. First, work is an important form of flourishing, and for reasons independent of remuneration.<sup>58</sup> Second, money is an

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52. RICHARD V. BURKHAUSER & MARY C. DALY, *THE DECLINING WORK AND WELFARE OF PEOPLE WITH DISABILITIES* 102 (2011) (“While the ADA changed the law regarding the treatment of people with disabilities, the safety net aimed at protecting their economic status—SSDI and SSI—remained the same, leaving it out of sync with the goals and expectations embodied in the ADA.”).

53. *Id.* at 3. It is worth noting that recipients are not getting rich from disability benefits and that, for many, such aid is precisely what is needed for them to have shelter and their basic needs fulfilled.

54. Stein et al., *supra* note 37, at 691–92 (“The definition of disability in the ADA . . . is in tension with the Social Security Administration’s competing definition of disability as a complete inability to work, a binary view of disability and employability that reaches back to the Elizabethan Poor Laws.”).

55. See BURKHAUSER & DALY, *supra* note 52, at 106 (making this observation).

56. P. 225. Fishkin credits Joan Williams with establishing the “ideal worker” norm: a worker who has no large nonwork time commitments and has access to domestic labor provided by someone else. P. 225 (citing JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* (2001)).

57. Pp. 4–5, 224. This example slots well into Fishkin’s general exposition of opportunities. There are many ways of flourishing, and people build lives out of combinations of them. See generally pp. 1–23. When the opportunity structure forces some people to make a choice between pursuing one of two important forms of flourishing—but not both—it creates a potentially severe bottleneck in the sense that it occludes significant combinations of flourishing. Pp. 4–5.

58. P. 220; see *supra* notes 18–20 and accompanying text.

important instrumental good that supports human flourishing, and in fact a steady flow of income is particularly important for certain forms of flourishing, such as home ownership, raising children, or purchasing groceries (pp. 158–59). An ideal system would support people with disabilities by enabling them to obtain both meaningful work and a steady income. But disability laws instead force people to make a choice: They can “work,” a route that is fraught with some difficulty, at least from the standpoint of the ADA’s statistical weakness in supporting employment.<sup>59</sup> Or they can switch to a “disabled” legal status, thereby ensuring a steady paycheck. The choice is especially complicated because of the ways in which the law incentivizes both employers and disabled employees to forgo work and pursue administrative benefits. This bottleneck is intuitively problematic from the perspective of anyone who sees benefits in work for people with disabilities.

This bottleneck is also problematic from the viewpoint of human agency. In Fishkin’s opportunity pluralism, agency matters; it is important that people have different paths open to them—not just on a one-time basis but throughout their lives (pp. 74–82). Yet the numbers highlighted above show that virtually no one who is out of work for two years returns to the workforce.<sup>60</sup> Such statistics starkly illustrate that, after a certain amount of time, America’s benefits scheme has the effect of putting up a “closed” sign along the path of work, even as new technologies or new work structures might enable disability-benefit recipients to return to work. (Here it is worth recalling that a successful SSDI application can sometimes take several years.<sup>61</sup>) These legal regimes lock in an unemployed status in ways that are fundamentally at odds with opportunity pluralism in part because they inhibit people’s agency.

The incentives to pursue disability administrative benefits also have the potential to create separate developmental bottlenecks. In other words, employment presents an opportunity to develop important abilities and skills that are critical for subsequent opportunities; each potential employment outcome may become an additional opportunity (p. 70). We might also view these administrative policies as creating future qualification bottlenecks in that failure to pursue employment now is likely to result in a person’s lacking the necessary credentials to pursue a better position in the future.

Finally, we come to the normative question of whether the disability–employability bottleneck should be addressed. As noted before, not all

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59. See, e.g., Samuel R. Bagenstos, *Has the Americans with Disabilities Act Reduced Employment for People with Disabilities?*, 25 BERKELEY J. EMP. & LAB. L. 527, 531 (2004) (book review) (“People with disabilities are employed at vastly lower rates than are the nondisabled, and a number of studies have shown that employment for people with disabilities declined throughout the 1990s.” (footnote omitted)); Thomas DeLeire, *The Unintended Consequences of the Americans with Disabilities Act*, 23 REGULATION, no. 1, 2000, at 21, 22–23 (documenting how the ADA’s accommodation mandate has increased the cost of employing disabled workers and thus has made such workers unattractive to businesses).

60. See *supra* text accompanying note 36.

61. See *supra* text accompanying note 34.

bottlenecks require action; sometimes they are perfectly warranted. The primary questions require investigating whether the bottleneck is legitimate or arbitrary and whether it is severe. If the bottleneck is both pervasive and strict—even if it is legitimate—we should look for ways to ameliorate the congestion it is causing within the opportunity structure (p. 168).

Here, the question of legitimacy is complicated. Some percentage of people with disabilities is in fact unable to work, even when provided reasonable accommodations. And it may be that, given the potential costs, some employers do not want to hire people with disabilities.<sup>62</sup> But there is no necessary tension between disability and employability. And any microinefficiencies felt by discrete employers may be offset in part by the macroefficiencies that come from leveraging more talent within the potential workforce (pp. 181–82).

The severity of the bottleneck is less equivocal. The effects of disability–employability funneling are pervasive because policies like welfare and SSDI are well-known alternatives to work. The impact is also severe in that people with disabilities are currently employed at some of the lowest levels in recent history, and this trend has coincided with rising SSDI levels.<sup>63</sup> Given both the appeal of opportunity pluralism and the value of work, we ought carefully to consider how to make work more attractive and sustainable for people with disabilities.

There is one related and additional bottleneck, and this bottleneck ties into the way that discrimination limits opportunities and affects the types of jobs available to people with disabilities. Even when people with disabilities find work, it is usually low-status or low-compensation work.<sup>64</sup> The bottleneck, in this context, might be described in the following way: There is an implicit bias that you must be able-bodied to work in all but the lower-status jobs.<sup>65</sup> Being perceived as disabled thus bars a person from most jobs, especially those that are likely to be seen as most fulfilling.

Furthermore, law and policy do little to remedy this state of affairs. In particular, state-level vocational training programs (which are often directed toward people with disabilities) usually focus on low-level training.<sup>66</sup> This feature effectively ensures that people with disabilities, if they enter the

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62. For example, some employers may self-insure for their health-insurance benefits, and someone with a present significant disability may have ongoing costs to manage the ancillary medical effects of the disability. Similarly, some accommodations undoubtedly have monetary costs. *But see* Stein et al., *supra* note 37, at 753 (arguing that most accommodations are inexpensive or even costless).

63. *See supra* note 44.

64. *See* Heymann et al., *supra* note 19, at 5 (observing that workers with disabilities are much more likely to be in part-time positions and earn lower wages than their comparable colleagues without disabilities).

65. *See generally* IMPLICIT RACIAL BIAS ACROSS THE LAW (Justin D. Levinson & Robert J. Smith eds., 2012).

66. *See supra* text accompanying notes 25–26 (describing how state benefit programs provide insufficient education and training).

workforce, will have low status and earn low pay.<sup>67</sup> Additionally, the combination of welfare, SSI, and SSDI stymies ambition by motivating people with disabilities either not to work or to work just enough to retain their governmental benefits.<sup>68</sup> Many disabled workers with minimal skills or low motivation to invest in their own human capital have thus found themselves pushed to the benefits rolls.

The principal thrust of disability policy remains providing money to those who are deemed “unable to perform any substantial gainful activity.”<sup>69</sup> It was in this context that, seventeen years ago, one labor-market scholar questioned whether people with disabilities are truly expected to work.<sup>70</sup> He cautioned that, until policymakers are willing to risk the politics of social engineering to reformulate a transfer-based disability policy into one that expects disabled people to work, “a new and growing population of young people with disabilities can look forward to a life of dependency.”<sup>71</sup>

The ultimate effect of these two bottlenecks is that people with disabilities usually do not work.<sup>72</sup> When they do, they cluster at the bottom levels of companies, earning low wages with little or no prospect for upward mobility.<sup>73</sup> If they later experience discrimination and seek recourse under the ADA, their complaint may be addressed without any attention to possible structural changes. After all, cases brought by lower-level employees are easier to settle and the employees themselves easier to replace.

### III. ADDRESSING THE DISABILITY–EMPLOYABILITY DIVIDE

This Part will now consider how best to address through policy reform the bottlenecks described above. Leaving aside the historical rationales for a binary view of disability and employability, such a framework obscures a complete and accurate contemporary account of disability’s relationship to working. Many people deemed “disabled” are in fact unable to work, but many others who are similarly catalogued are able to work. Most people are not simply one or the other—disabled or employable; indeed, the *raison*

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67. See *supra* text accompanying notes 25–26.

68. See *supra* notes 33–41 and accompanying text.

69. Richard V. Burkhauser, *Post-ADA: Are People with Disabilities Expected to Work?*, 549 ANNALS AM. ACAD. POL. & SOC. SCI. 71, 72 (1997); see also *Substantial Gainful Activity*, *supra* note 30.

70. See generally Burkhauser, *supra* note 69.

71. *Id.* at 72.

72. See *supra* notes 42–45 and accompanying text (discussing the current employment rate of people with disabilities, which is just above 19%). The bottlenecks identified in this Review are not the only causes of this effect, but it is hard to overestimate the role that SSDI plays in discouraging the employment of people with disabilities. Autor, *supra* note 33, at 10.

73. See Lauren Lindstrom & Laurie Gutmann Kahn, *Career Advancement for Young Adults with Disabilities*, in DISABILITY AND EQUITY AT WORK, *supra* note 19, at 213, 216–18 (observing that career advancement for people with disabilities is burdened both by patterns of discrimination and by lack of access to “specific skill training” or necessary education); *supra* note 64 and accompanying text.

d'être for Title I of the ADA is that the vast majority of people with disabilities are *both* disabled and able (with or without reasonable accommodation) to work.<sup>74</sup> The definition of “disability” used by SSA in administering SSI and SSDI benefits was written in 1956, “a time when our country’s expectations about people with disabilities and the general level of accessibility were very different than they are today.”<sup>75</sup> Today’s economy contrasts starkly with economies from centuries ago, when having a disability and working were less compatible. Most jobs today are not predicated on physically strenuous activities, and, for those that are, accommodations are often available to help people with physical disabilities remain active in the labor force.<sup>76</sup> Similarly, there are accommodations today that did not exist in earlier generations—such as telecommuting—which may allow people who have mental disabilities to keep working.<sup>77</sup> Yet tensions between disability and employability persist, and in fact they may help explain the one-sided results of the Supreme Court’s ADA jurisprudence.<sup>78</sup> Ameliorating bottlenecks will thus require making it more attractive to work—rather than not work—and perhaps combining work with limited receipt of benefits. It is also critical to enable people with disabilities to advance beyond entry-level positions.

One structural answer to these disability bottlenecks is creating inventive “work-first” approaches to disability benefits. Several economists and public leaders have recently observed that U.S. disability policy would benefit from financial and institutional incentives that reward work.<sup>79</sup> One example, focused on employees, would involve designing a disabled-worker tax credit modeled on the Earned Income Tax Credit.<sup>80</sup> This kind of credit could

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74. See 42 U.S.C. § 12101(a)(1) (2012) (observing that “physical or mental disabilities in no way diminish a person’s right to fully participate in all aspects of society,” including through work); *id.* § 12112(b)(5) (requiring employers to reasonably accommodate people with disabilities).

75. UNFINISHED BUSINESS, *supra* note 41, at 3.

76. Autor, *supra* note 33, at 4–5.

77. Attitudes may also explain a lot on this score. As social attitudes about individuals with mental disabilities have gradually changed and as conditions in the Diagnostic and Statistical Manual of Mental Disorders have proliferated, there is less of a proclivity to institutionalize or demonize every mental condition.

78. Stein et al., *supra* note 37, at 716 (“[T]he inability of the Court to resolve the tension between work capability and disability status remains a critical problem.”); *id.* (“No ADA employment-discrimination suit brought before the Supreme Court (prior to the ADAAA) achieved victory, and every case involved persons with impairments who were both work capable and seeking to retain their employment.”).

79. UNFINISHED BUSINESS, *supra* note 41, at 23–30; BURKHAUSER & DALY, *supra* note 52, at 1–5, 105–06. See generally Burkhauser, *supra* note 69.

80. See Richard V. Burkhauser & David C. Wittenburg, *How Current Disability Transfer Policies Discourage Work: Analysis from the 1990 SIPP*, 7 J. VOCATIONAL REHABILITATION 9, 21–22 (1996) (proposing a disabled-worker tax credit); Weber, *supra* note 40, at 947 (advocating the same). Professor Burkhauser and Mary C. Daly cite the 1996 federal welfare reform, in which single mothers were given an earned income tax credit, as support for this approach. BURKHAUSER & DALY, *supra* note 52, at 4–5, 21–34.



help overcome SSI's tendency to discourage work by providing a tax credit for people with disabilities who work.<sup>81</sup>

Another work-first reform, this one focused on employers, would be to require companies fully to fund several years of disability benefits for their workers who take disability and to pay a disability tax based on the number of workers who transition from their employment onto long-term disability insurance.<sup>82</sup> Notably, SSDI is financed through a flat-rate payroll tax rather than experience rated (the way that state unemployment and workers' compensation programs are financed); this means that employers face no increased costs if workers transition to SSDI benefits.<sup>83</sup> If an employee with a work-limiting impairment exits the workforce, the federal government pays for all of the SSDI benefits, simultaneously freeing the employer from paying any costs associated with rehabilitation and accommodation.<sup>84</sup> Accordingly, employers are in no way incentivized to direct money toward rehabilitation or accommodation, and they may even actively shepherd disabled employees onto the SSDI rolls.<sup>85</sup> If U.S. employers were forced to bear the costs associated with their employees leaving work to pursue disability benefits—through experience rating or funding several years of benefits—these employers would naturally become more motivated to make investments in accommodation and rehabilitation that could help their employees keep working.<sup>86</sup>

But making work more attractive than benefits may require even greater changes to SSA's programs, which are largely predicated on a disability-employability divide. Under the current model, applicants must go through a long process of showing that they cannot work before they are allowed to use SSA's work-focused support mechanisms.<sup>87</sup> But by then it is too late. Intervening earlier with employment-support services, even as applications are pending, would help reintegrate workers into the labor force.<sup>88</sup> It would also help stem the inertia of disabled individuals who are not currently working—inertia that quickly results in their permanent exit from the workforce.<sup>89</sup>

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81. Weber, *supra* note 40, at 947–48.

82. A similar policy exists in the Netherlands and has been successful in motivating employers to accommodate disabled workers. See BURKHAUSER & DALY, *supra* note 52, at 68–84 (discussing lessons for the United States from Dutch disability policy reforms).

83. *Id.* at 60, 62.

84. *Id.* at 61, 109.

85. *Id.* at 61.

86. *Id.* at 109 (“[U]sing experience rating to determine a firm’s per-worker tax rate for SSDI would more directly link the costs to the firm of one of its workers moving onto the SSDI program, and thereby require an employer to balance the full economic costs and benefits of providing accommodation and rehabilitation versus assisting a worker onto the SSDI program following a health shock.”).

87. *Id.* at 105.

88. See *id.* at 105–07.

89. See *supra* text accompanying note 36.

A second structural answer would be to require, in certain contexts and by federal mandate, a specific level of employment of people with disabilities. The federal government for decades has had its own internal mandate for hiring people with disabilities.<sup>90</sup> Similarly, section 503 of the Rehabilitation Act of 1973 prohibits federal contractors and subcontractors from discriminating against people with disabilities and requires such employers to take affirmative action to recruit, hire, promote, and retain people with disabilities.<sup>91</sup> While section 503 has not been vigorously enforced,<sup>92</sup> there has been recent progress. In March 2014, new Department of Labor regulations went into effect that strengthened the affirmative action provisions of the regulations implementing section 503.<sup>93</sup> The new regulations are more proactive and set an explicit 7% goal for hiring individuals with disabilities.<sup>94</sup> While there may be limits to the efficacy of a quota system for the private sector (such as exists in Germany and Japan), this type of government-based affirmative action may be useful to increase the employment of people with disabilities.<sup>95</sup>

A third structural answer would be ameliorating disability bottlenecks to expand the availability of accommodations in the workplace. The ADA provides a right to workplace accommodations for people with disabilities as long as the accommodations are reasonable and do not pose an undue hardship to the employer.<sup>96</sup> But there have been long-standing challenges to securing such accommodations,<sup>97</sup> and those challenges may become even more pronounced in the wake of the 2008 amendments to the ADA.<sup>98</sup> The

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90. See, e.g., *Disability Employment*, OFF. PERSONNEL MGMT., <http://www.opm.gov/policy-data-oversight/disability-employment> (last visited Oct. 28, 2014); *Increasing Disability Employment in the Federal Government*, OFF. DISABILITY EMP. POL'Y, <http://www.dol.gov/odep/federal-hire/> (last visited Oct. 28, 2014).

91. See Rehabilitation Act of 1973, Pub. L. No. 93-112, § 503, 87 Stat. 355, 393 (codified as amended at 29 U.S.C. § 793 (2012)).

92. UNFINISHED BUSINESS, *supra* note 41, at 14 (“To the extent that disability has come up in OFCCP audits historically, it has never received the same level of data-driven scrutiny and attention that [sex and race] have received.”).

93. *New Regulations: Section 503 of the Rehabilitation Act*, OFFICE OF FED. CONTRACT COMPLIANCE PROGRAMS, [www.dol.gov/ofccp/regs/compliance/section503.htm](http://www.dol.gov/ofccp/regs/compliance/section503.htm) (last visited Oct. 15, 2014) (summarizing the new regulations implementing section 503).

94. *Id.*

95. See Michael Ashley Stein & Penelope J.S. Stein, *Beyond Disability Civil Rights*, 58 HASTINGS L.J. 1203, 1231–33 (2007) (noting problems and benefits of quota regimes for people with disabilities).

96. 42 U.S.C. § 12112(a) (2012) (prohibiting disability employment discrimination against a qualified individual); *id.* § 12112(b)(5)(A) (defining discrimination to include an employer’s failure to make reasonable accommodations unless it can prove undue hardship).

97. Stein et al., *supra* note 37, at 713–15.

98. See Stephen F. Befort, *An Empirical Analysis of Case Outcomes Under the ADA Amendments Act*, 70 WASH. & LEE L. REV. 2027, 2068 (2013) (“[P]laintiff-friendly outcomes engineered by the ADAAA with respect to disability status are being partially offset by more employer-friendly outcomes with respect to qualified status.”); Stein et al., *supra* note 37, at 715 (“Keeping the bar relatively high for securing an accommodation was part of the political compromise necessary to achieve the [amendment’s] passage.”).

most fundamental challenge has been the requirement that an individual prove her impairment is severe enough to qualify for an accommodation under the ADA while at the same time showing she is not so impaired that she is unqualified for the job in question.<sup>99</sup> Framed in slightly different terms, plaintiffs must show that they are “disabled enough” to seek a reasonable accommodation but not “too disabled” to be qualified for the job.<sup>100</sup> In a recent article, we argue that lowering the bar to receiving accommodations is at least part of the solution to enable disabled workers to start working and keep working.<sup>101</sup> We argue in particular for extending an ADA-like reasonable-accommodation mandate to all individuals who would be able to work if given such an accommodation.<sup>102</sup> In other words, accommodations should be detached from disability status, resulting in a right to reasonable accommodation that flows not from group affiliation but from the individual need for accommodation.<sup>103</sup> Expanding accommodations in this way could, over time, positively impact workplace norms and encourage all workers (and especially disabled workers) to make greater investments in their own productivity.<sup>104</sup>

To return to Fishkin’s opportunity nomenclature, the appeal of these proposals is that they help people with disabilities get both through and around disability bottlenecks. They do so by helping people with disabilities see work as an economically superior option to benefits and, more generally, by incentivizing people with disabilities to give up benefits in order to work. The employer-subsidization and accommodation proposals would help people with disabilities secure and sustain employment by inspiring and mandating, respectively, employers to structure their workplaces in ways that accommodate more disabled workers. These prescriptions help people move more fluidly between disability and employability statuses and break down the distinction by facilitating the employment of people who are both disabled and employable.

Our proposal to universalize accommodations is perfectly consonant with Fishkin’s focus on creating more opportunities for all human flourishing—and not merely relying on conventional, group-based claims to do so.<sup>105</sup> But some of our other proposals are in tension with Fishkin’s principles. For example, requiring a certain level of employment for people with disabilities ostensibly conflicts with Fishkin’s claim that we should focus on

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99. See generally Bradley A. Areheart, *When Disability Isn’t “Just Right”: The Entrenchment of the Medical Model of Disability and the Goldilocks Dilemma*, 83 *IND. L.J.* 181 (2008).

100. *Id.* at 209–25 (analyzing this tension).

101. See generally Stein et al., *supra* note 37.

102. *Id.* at 690–95.

103. *Id.* at 737–43.

104. *Id.* at 744–55.

105. P. 245 (“Instead of asking whether someone is really a member of a group in order to determine whether the law protects them, we need only ask whether a person’s opportunities are being constrained by the relevant bottleneck—discrimination of the prohibited kind.”); see also p. 252 (“The law of reasonable accommodation is a similarly powerful tool in the anti-bottleneck toolkit.”).

ameliorating the bottleneck itself instead of merely redistributing opportunities among groups (pp. 250–53). But as Fishkin also notes, if the bottleneck turns on group membership, the solution may also need to turn on group membership (as do a disabled-worker tax credit and requiring employers to subsidize disability benefits) (p. 251).

Fishkin’s focus on making opportunities more available to everyone is consistent with integrating more fully people with disabilities into our society. This emphasis underscores our proposal to reimagine and broaden the role of accommodations in the workplace.<sup>106</sup> Instead of channeling opportunities to one particular group (those legally sanctioned under the ADA as “disabled”), our proposal would accommodate a wider range of individuals (those who are not “disabled” but nonetheless need workplace accommodations). In this way, our proposal would reshape a “corner of the opportunity structure” (p. 22).

Fishkin’s observations about human development also advance the social model of disability, in which disability is seen not as fundamentally physiological but rather as socially constructed.<sup>107</sup> In particular, Fishkin’s work summarizes and powerfully illustrates how physiology and society are not separate causal inputs but rather iteratively constitute “disablement”—Professor Oliver’s term for disability’s social construction.<sup>108</sup> People are not born disabled, but the interaction between a person’s physiology and environment may result in a disabling reality. Moreover, a person’s environment may fundamentally shape that person’s physiology, which is evident in the way that eye surgery, hearing aids, or wheelchairs may “break the link between certain traits and particular incapacities” (pp. 105–06). The emergent understanding is that disability and ability are not essences; they are social conditions that are contingent upon and constituted by a person’s environment.<sup>109</sup>

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106. See generally Stein et al., *supra* note 37.

107. Michael Oliver is seen as the architect of this model and famously explained that disability was a social problem constituted by “all the things that impose restrictions on disabled people; ranging from individual prejudice to institutional discrimination, from inaccessible public buildings to unusable transport systems, from segregated education to excluding work arrangements.” MICHAEL OLIVER, *UNDERSTANDING DISABILITY* 33 (1st ed., St. Martin’s Press 1996). These observations were in contrast to the traditional view of disability as located squarely within the individual and as redressable only by medical institutions. *Id.* at 30–42. For more on the social model of disability and how disabled persons may be rightly seen as having no essential differences, see generally Bradley A. Areheart, *Disability Trouble*, 29 *YALE L. & POL’Y REV.* 347, 373–74 (2011) (arguing through various concrete examples that disability is socially constructed).

108. See MICHAEL OLIVER, *THE POLITICS OF DISABLEMENT* 11 (1990) (distinguishing between impairment and disablement).

109. See p. 105 (“[W]e need to think in terms of a social model of *ability*. No matter what the capacity . . . it necessarily arises out of some interaction between a person and her society or environment.”).

## CONCLUSION

It is worth revisiting what is at stake in the foregoing discussion for people with disabilities. In the context of bottlenecks, the wide swath of opportunity that lies on the other side is not simply the remuneration that work provides. There are also less tangible benefits, such as the dignitary interest of work, creation of self-esteem, breakdown of stigma, social inclusion, and being perceived as a financially productive and contributing member of society.<sup>110</sup> As Fishkin writes in his book, “Jobs are many things at once: a large part of many people’s identities, an engine of equality or inequality, a site of freedom or dependency” (p. 220). For people with disabilities, work can thus be critical to the evolution of their identity, it can be a site of equitable treatment and integration into society, and it can result in greater independence. These are all values that are at the heart of disability rights and the ADA itself.

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110. See *supra* text accompanying note 20.