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Too Much Information: Predictions of Employee Disease and the Fringe Benefit System

Lance Liebman†

Two themes of recent American labor policy are at odds with each other. One is the expansive concept of antidiscrimination, now in process of being applied to tell employers that certain predicted disadvantages of job applicants should be ignored when hiring decisions are made. The second is the equally expansive idea of social protection as an employer responsibility, now in process of assigning to employers a much larger responsibility for the economic needs of workers and their families. Testing—the effort by employers to discover information about applicants and employees—is at the intersection of these policies and at the center of the conflict. As advances in medical science and technology expand the universe of qualities and characteristics for which employees can be tested, this conflict becomes increasingly difficult to resolve. This paper considers one likely consequence of our rapid advances in medical science and technology: The increased ability to predict disease (and perhaps behavior itself) among job applicants. Does current antidiscrimination law bar employers from basing hiring decisions on predictions of future disease? Should it? On one hand, we as a society have a poorly articulated sense that consideration of such factors is inappropriate; on the other hand, state and federal legislation is heightening the economic relevance of those very factors.

† Professor of Law, Harvard Law School. I was assisted by the work of Harvard law students, some of whom wrote excellent papers of their own on aspects of these issues: Danny Eaton, Peter Fossett, Wendy Kornreich, Paul Louis Myers, Morris Panner, Eileen Penner, and Peter Waters.

1 See, for example, Archibald Cox, Foreword: Constitutional Adjudication and the Promotion of Human Rights, 80 Harv. L. Rev. 91 (1966): “Once loosed, the idea of Equality is not easily cabined.”

2 A related theme is that employers should be denied certain information about current and prospective workers—the appropriate protection for worker liberty includes freedom from employer concern with important aspects of the worker’s person and behavior.
I. EMPLOYERS AND WORKER SELECTION

Over the past quarter-century, government has intervened increasingly in employer hiring decisions. Much of this intervention has taken the form of official restrictions on the acquisition or use of information by employers when they are choosing new workers. The antidiscrimination crusade, begun with enactment of Title VII in 1964, has been an assault on illegitimate selection standards, especially those having an exclusionary impact on protected categories of applicants.

In this same quarter-century, employer investment in worker selection has increased mightily. Some of this increase is a response by employers to the new legal environment. Employers may collect more data in an effort to avoid or win discrimination lawsuits. They may do so in response to judicial retreat from doctrines of at-will employment: When law and social practice make dismissal more difficult, additional care may be taken in selection. They may be more careful in hiring because of expanded employer liability to third parties resulting from employee acts or omissions. And finally, they may be reacting to a phenomenon discussed below: The increase in employer responsibility for various aspects of an employee’s personal life. Other causes are not legal. For example, with intensive capital investment, it may be dangerous to let the wrong worker too close to an expensive and fragile machine.

Whatever the causes, the employee selection business is booming; sophisticated tests of personality and character are common; millions of lie detector tests and drug tests are given annually to prospective employees; and other forms of medical and biological tests are in wide use.

Genetics, the branch of natural science now undergoing the most dramatic ferment, has suddenly become relevant to the hiring system. Since Watson and Crick elucidated the structure of deox-
yribonucleic acid (DNA) in 1954, steady and sometimes revolution-
ary advances have occurred. In time, these gains in knowledge will
affect many aspects of human life: Sources of food, childbirth, dis-
ease, and the process of aging. Currently, genetic tests can predict
certain diseases in high risk groups: Huntington’s disease, cystic
fibrosis, Duchenne muscular dystrophy, and polycystic kidney dis-
ease. Soon, there are likely to be genetic tests to predict risk of a
number of other diseases: Familial Alzheimer’s disease, malignant
melanoma, breast cancer, and even manic depression. Some em-
ployers have already begun to use genetic tests on their
workforces.7

As an introduction to the legal questions likely to be posed by
genetic prediction, consider first an issue that is (unfortunately)
already with us: Job applications by persons who test positive for
the AIDS virus. It is estimated that 1.5 million Americans now
carry the AIDS virus, HIV, but have not become ill.8 In usual ways
of thinking, these individuals are afflicted with no disease.9 How-
ever, the positive response to the blood test identifies them as be-
longing to a group with a very substantial chance of becoming
AIDS victims. Some scientists say that all of them will develop
AIDS.10 With today’s capacity for treatment (no cure), the average
life expectancy of a person diagnosed as having AIDS (as opposed
to testing positive for the HIV virus) is 18 months. Between onset
of the disease and death, these victims will need medical care esti-
rated at $50,000 per person.11 Other costs to an em-

7 See Sandra N. Hurd, ed., Employment Testing: A National Reporter on Polygraph,
Company is currently offering genetic testing to one thousand employee volunteers in the
Washington, D.C.-Northern Virginia area. The pilot testing program . . . is an extension of
the company’s long-standing concern for the health of its employees.”

See also Alan L. Otten, Price of Progress, Wall St. J. 27 (Sept. 14, 1987), giving esti-
mated numbers of Americans afflicted by a disease that may have a genetic cause:
Alzheimer’s disease, 2-4 million; adult polycystic kidney disease, 300,000 to 400,000; Hunt-
ington’s disease, 25,000.

8 Glenn Kramon, Business and Health: Kaiser Fears AIDS Influx, N.Y. Times sec. D, 2
(Nov. 17, 1987).

* But see Thomas C. Schelling, Life, Liberty or the Pursuit of Happiness, forthcoming
in Isabel V. Sawhill, ed., Challenge to Leadership: Economic and Social Issues for the Next
Decade (1988). For further discussion, see note 69.

10 In one California study, 70 percent of those carrying the virus acquired the disease
within eight years. See AIDS: Employer Rights and Responsibilities, Special Report (CCH)
par. 6 (1985).

11 Remarks by Otis R. Bowen, M.D., reported in Rosemary DePaolis, AIDS in the
Workplace; Allstate Insurance Co. Conference, 88 Best’s Review 110, 112 (Feb. 1988). Secre-
tary Bowen said the state and federal governments will spend $600 million in 1988 to treat
AIDS patients through Medicaid. He predicts the number will be $2.5 billion in 1992. About
ployer—absenteeism, morale among fellow employees, fear of contagion—vary with the workplace context but can be heavy. What should an employer do when an otherwise qualified job applicant is AIDS-positive on a blood test?

The AIDS question is with us now, and it is a harbinger of other, similar questions that will become increasingly relevant as the “advance” (if so it be) of genetics—and of biology more generally—continues. Imagine that, before long, employers who now ask for blood will extract a small quantity of DNA from the white cells. At minor cost, they will learn certain percentage likelihoods about the job applicant’s medical future: Chance of heart attack, chance of schizophrenia, chance of Alzheimer’s disease. Suddenly, the job applicant is not a member of an undifferentiated population who are all subject to unpredictable health risks. Instead, this applicant has a statistically analyzable medical future that may well be relevant in evaluating the consequences of adding him or her to this firm’s workforce. Does current antidiscrimination law constrain the use of that new information? Should we enact new laws that would do so?

II. ANTIDISCRIMINATION, ESPECIALLY DISCRIMINATION ON THE BASIS OF HANDICAP

Massive federal and state regulation now restricts employer


13 The leading works on this subject include Mark A. Rothstein, Employee Selection Based on Susceptibility to Occupational Illness, 81 Mich. L. Rev. 1379 (1983); Thomas O. McGarity and Elinor P. Schroeder, Risk-Oriented Employment Screening, 59 Tex. L. Rev. 999 (1981); Edith P. Canter, Employment Discrimination Implications of Genetic Screening in the Workplace Under Title VII and the Rehabilitation Act, 10 Am. J. L. & Med. 323 (1984). The focus of these works and of much other literature is on screening of prospective workers to identify those who present greater than average risks of occupational disease. This article focuses on the employer’s cost if a worker becomes ill, regardless of whether the illness is related to the job. The issues of law and policy are not very different.

On the recent shift in the effort to achieve workplace health and safety from controlling the environment to monitoring (but possibly later selecting and/or controlling) the worker see Nicholas A. Ashford, Christine J. Spadafor and Charles C. Caldart, Human Monitoring: Scientific, Legal and Ethical Considerations, 8 Harv. Envtl. L. Rev. 263 (1984).
hiring decisions. Enactment and enforcement of Title VII of the Civil Rights Act of 1964 created employment discrimination law, and Title VII was the model for most subsequent antidiscrimination legislation. In that way, many of the ambiguities built into the language and interpretation of Title VII were transposed into the language and interpretation of later antidiscrimination statutes, ambiguities that remain with us today.

One major regulatory initiative is the ban on discrimination against handicapped workers, embodied in the federal Rehabilitation Act of 1973 as well as in various state laws banning discrimination in employment on the basis of handicap. But this social norm has so far not been much clarified by judicial decisions or scholarly analysis, and we are in uncharted water when we seek to apply our antidiscrimination laws to applicants whose medical futures can be predicted.

A. Title VII

Until 1964, employers had the legal authority to pick new employees according to whatever criteria they chose: Friendship, hair color, race, sex, or charm. Employers were presumably limited by the market. A competitive firm would be in trouble if it ignored a better or cheaper supply of labor. Many employers, however, have a degree of market power; and as long as there is no international competition, market forces will not restrain refusals to hire that are engaged in by all producers. Thus market-wide prohibitions

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15 All 50 states and the District of Columbia have enacted handicap-discrimination statutes. However, Alabama, Mississippi and Wyoming ban such discrimination only as to public employment, and Delaware does so by executive order rather than by statute. See Arthur Larson and Lex K. Larson, Employment Discrimination, sec. 108 (1988); Mark A. Rothstein, Drug Testing in the Workplace: The Challenge to Employment Relations and Employment Law, 63 Chi.-Kent L. Rev. 683, 719-20 (1987); and Arthur S. Leonard, 14 Hofstra L. Rev. 11, 21 n. 52 (1985).

For the argument that handicapped persons should receive protection under the Fourteenth Amendment, see Marcia P. Burgdorf and Robert Burgdorf, Jr., A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect Class" Under the Equal Protection Clause, 15 Santa Clara L. Rev. 855, 899 (1975). The Supreme Court addressed constitutional claims on behalf of handicapped persons in City of Cleburne v. Cleburne Living Center, 105 S. Ct. 3249 (1985).

against a particular group can exist until social norms evolve or law intervenes.

Although some states had enacted fair employment practice laws before 1964, these laws applied only to race and religion.\textsuperscript{17} The enforcement agencies had their hands full combatting the most flagrant examples of Jim Crow, and never approached the challenging and thorny issues spawned by Title VII.

Title VII did many things. It began the process of bringing blacks into American society and the American economy, a process in grievous remission from the end of Reconstruction.\textsuperscript{18} It played a part in the remarkable alteration of the distribution of American work by gender.\textsuperscript{19} It opened a window on—pulled back the curtains from—the world of job selection, calling into moral question habits and practices that had existed for decades.\textsuperscript{20} And it began a society-wide inquiry into jobs themselves: What workers in fact do, and what entry skills are in fact necessary.\textsuperscript{21}

\begin{footnotes}
\item[19] Title VII’s protection of women was the result not of a popular movement and strong political support but of a legislative maneuver that backfired. Although Title VII was considered in committee and reached the floor of the House of Representatives as a proposal to ban discrimination by race, opponents, seeking to make the bill more radical and so more difficult to support, added an amendment banning sex discrimination. Those opponents received a well-deserved shock when Congress enacted the entire measure, including the provision they hoped would sink it. See E. W. Kenworthy, Jobs Issue Blocks Attempt in House to Vote on Rights, N.Y. Times 1 (Feb. 9, 1964). Thus, with no prior legislative preparation and very little prior political organization and demand, the United States granted to women a legal right to equal job opportunities. This event then had large consequences in the next quarter-century, when women’s labor force participation expanded rapidly resulting in massive social change.
\item[20] One story that I have studied is the decade-long controversy over selecting police officers in New York City. The old system was a civil service test, and applicants worked hard to get a passing score. See Patrick Fenton, The Way Police Exams Used to Be, N.Y. Times 23 (July 27, 1985). Most successful applicants were white males, and the test could not be validated as relevant to police work. Many good faith attempts failed to produce a substitute test that satisfied the judicial standards of relevance or a test that blacks passed in appropriate numbers. Finally even Mayor Koch, a strong opponent of quotas, agreed to let selection occur by taking the highest scoring whites and the highest scoring blacks in an appropriate ratio. The question remains: If the test is not relevant to police work, is it fair to deny white and black applicants whose score is one point below the cut-off for members of their respective races? The litigated case was Guardians Ass’n of New York City v. Civil Serv., 630 F.2d 79 (2d Cir. 1980).
\item[21] See the account of the litigation restructuring policies at what was then the largest private employer in the U.S. in Phyllis Wallace, ed., Equal Employment Opportunity and
Title VII, and the attention it received as its interpretation was debated and implementation occurred, legitimated the idea of antidiscrimination. However, as Owen Fiss saw early in the life of Title VII, a basic ambiguity is lodged in the concept of a ban on job discrimination according to race, sex, or age. Is the goal simply to end formal discrimination? If so, applicants hereafter will be considered without regard to their race, sex, and age; every other basis for choice, however, will remain legitimate, even those (connections, subjective supervisor choice, formal educational credentials) likely to perpetuate differentials in the access to jobs of particular groups in the population. Or is the goal a more active and far-reaching one: To spread opportunity to groups previously barred by legally sanctioned (in some instances legally mandated) discrimination? These are the alternative goals early addressed as "equality of access" versus "equality of outcome."

There are ways individual employers can bridge the gap between these two alternatives. They can reassess their criteria, altering exclusionary standards that in fact are not necessary for the job. They can search and recruit harder, and in new places. Both approaches promote not only equality of access, but also equality of outcome. But the problem remains, as is shown by continuing controversy over so-called reverse discrimination, seniority rights,
and quotas.\textsuperscript{26}

B. The Rehabilitation Act

Federal law first addressed the issue of discrimination according to handicap in the Rehabilitation Act of 1973.\textsuperscript{27} As enacted in 1973, Sections 503 and 504 of the Rehabilitation Act ("the Act") protected persons who could benefit from the rehabilitation programs authorized in the other parts of the statute. In 1974, the definition of handicapped person was changed to make the law a general charter of rights for handicapped workers (or at least for those employed by firms that receive federal contracts or by programs that receive federal financial assistance).\textsuperscript{28}

Section 503 of the Rehabilitation Act applies to firms that do at least $2,500 in business with the federal government. Those companies must take affirmative action to employ and promote handicapped individuals. The remedy is a proceeding brought by the Office of Federal Contract Compliance Programs in the Department of Labor. Section 504, on the other hand, applies to all programs and activities receiving federal financial assistance, with no minimum dollar amount. "Otherwise qualified" individuals with handicaps may not be excluded from participation in such programs.\textsuperscript{29} Violation can give rise to a private cause of action brought by the person illegally denied the benefits of the federally-assisted program.\textsuperscript{30}

\textsuperscript{26} The latest case is \textit{Johnson v. Transportation Agency}, 107 S. Ct. 1442 (1987). I recently canvassed this subject, Liebman, 58 U. Colo. L. Rev. 471. For a different perspective see the new foreword by Professor Nathan Glazer to his \textit{Affirmative Discrimination: Ethnic Inequality and Public Policy} (1987), accepting the "stability" of the current muddled state of the law.


There is virtually no relevant legislative history concerning Sections 503 and 504:

It appears that most members of Congress either were unaware that Section 504 was included in the act or saw the section as little more than a platitude, a statement of a desired goal with little potential for causing institutional change. Transforming Federal Policy at 54. The same could be said of section 503.


\textsuperscript{29} 29 U.S.C. sec. 794.

\textsuperscript{30} This was the holding of \textit{Consolidated Rail Corporation v. Darrone}, 465 U.S. 624 (1984), aff'g \textit{LeStrange v. Consolidated Rail Corporation}, 687 F.2d 767 (3d Cir. 1982).
1. **Purposes of the Act.** When Congress enacted Sections 503 and 504 of the Rehabilitation Act, it was not clear about what ideas of legal protection it was validating, or about the extent to which it was importing principles of antidiscrimination law from the very different contexts of discrimination by race, sex, and age.\(^3\) The attempt to legislate on behalf of job opportunities for handicapped persons may include at least the following goals:

   a) Preventing "handicap bigotry."\(^2\) The purest example of such bigotry is the employer who refuses a job to an epileptic whose disease is completely controllable with medication, or to a person in a wheel chair who can perform all aspects of a job. This idea is similar to the concept of equality of access in race and sex discrimination law. One way in which it is similar is that it requires outside inquiry—by a court, for example—into the true requirements of the job (as distinguished from conventional selection criteria that may exclude blacks or women or handicapped persons and that a judge concludes are not part of the essence of the job).\(^3\)

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\(^3\) Regarding the analogy to race discrimination laws, see Transforming Federal Policy at 141 (cited in note 27):

Since one staff member did have experience with another anti-discrimination law, Title IX, the language of Title IX (and thus of Title VI) was rather arbitrarily adapted into the forty-three words comprising section 504. The use of this language was felicitous, since it evoked powerful legal precedents and symbolic values of equality on behalf of disabled people. Thus access for disabled persons became linked to the legacy of the black civil rights movement, a legal and generally uncompromising commitment to guaranteeing access to publicly supported programs and activities.

Creating this association ... was the result of action taken by a small number of well-meaning individuals who were not altogether aware of what they were doing but who happened upon a formulation that symbolized values likely to produce change and minimize opposition.


\(^2\) A better phrase may be "discriminatory animus." See *Doe v. Region 13 Mental Hlth.-Mental Retard. Com’n*, 704 F.2d 1402, 1409 (5th Cir. 1983). The question of what constitutes a handicap for purposes of the Act is deferred until later in the paper. See text at notes 51-81.

\(^3\) The analogy to race and sex discrimination cases can be seen clearly in *Bentivegna v. U.S. Dept. of Labor*, 694 F.2d 619 (9th Cir. 1982), which rejected a government rule banning employment of diabetics who could not show a satisfactory blood sugar level. The court
Related to the goal of prohibiting "handicap bigotry" is that of prohibiting employers from implementing the prejudice of fellow-workers or customers. The economic market might well not discipline such prejudice because there may be few and isolated victims and because it may reflect attitudes widely shared among competitors. A statute implementing these goals would prohibit discrimination on the basis of a handicap if that mental or physical condition bears no relation to job performance, as an outside reviewer evaluates the true purpose of the job.

A law so intended would raise one important question: Why enact it only as to those irrelevant criteria that are categorized handicaps? Employers sometimes reject applicants because of their height, physical appearance, lack of charm, or low scores on tests of uncertain relevance to the job (LSAT, bar exam). Why not enact a law banning "discrimination" (job refusal) for reasons unrelated to the task (as judicially defined)? For example, should a law banning discrimination on the basis of handicap protect a person

borrowed the "business necessity" test created by judges in Title VII cases. It said that the Rehabilitation Act's purposes require judicial review of employer claims that good health is required for a particular job: "Potentially troublesome health problems will affect a large proportion of the handicapped population." Id. at 623. Thus, employer rules must be connected directly to "business necessity or safe performance of the job." Id.

The Supreme Court recently held that section 504 forbids discrimination on the basis of "the negative reactions" of others to an employee's handicap, even when that handicap is a disease that can be contagious. See School Bd. of Nassau County v. Arline, 107 S. Ct. 1123, 1129 (1987). For this issue in sex and race discrimination contexts, see Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 389 (5th Cir. 1971).

Or even a constitutional provision, see Ill. Const. art. I, sec. 19: "All persons with a physical or mental handicap...shall be free from discrimination...unrelated to ability in the hiring and promotion practices of any employer."


An analogy can be drawn to the position taken by Justice Marshall in his dissenting opinion in Board of Regents v. Roth, 408 U.S. 564, 589 (1972), that anyone refused a government job should get an explanation.

For an example of a court struggling to prevent a handicap discrimination law from becoming a general law against arbitrary refusals to employ see Advocates for Handicapped v. Sears, Roebuck, 67 Ill. App. 3d 512, 516, 385 N.E.2d 39 (1978):

[W]e feel that [the plaintiff's] approach would extend the proscriptions of the Act well beyond the scope intended by the legislature. Since virtually every consideration upon which an employer is likely to evaluate a prospective or current employee may be classified as either a mental or physical condition, the Act would be transformed into a universal discrimination law. Even such conditions as sex, age and race could be denominated as physical conditions and thus could be swept within the purview of the [handicap laws]. As [the plaintiff] himself admits, these characteristics are generally considered to fall within a different category than mental or physical handicaps and the legislature has clearly dealt with them as being distinct.
who is obese? One aspect of obesity may be distaste among fellow employees. If obesity is a "disability," then fellow employee big-otry cannot lawfully motivate the employer’s decision under even the weakest reading of protection for the handicapped. On the other hand, whether it is a "disability" requires drawing a very fine line between the limitations that are clearly covered, such as re-

struction to a wheelchair, and characteristics that have traditionally influenced job choices but seem far-removed from the common-
sense purpose of handicap protections statutes, such as physical beauty. As TRB wrote in the New Republic, it is interesting that a Harvard Law Review student note wants to ban discrimination against the ugly but not discrimination according to minutely dif-

ferent scores on the Law School Aptitude Test:

Well, the one citadel of prejudice we may be sure is free from storming by the battalions of Harvard Law School is our society’s overwhelming bias in favor of smart peo-

ple. They may be short, fat, and ugly up there, with pro-

truding ears, unusual noses, jutting chins, and dyspeptic personalities. But they’re not dumb.

There are several possible reasons for deciding to add to the list of forbidden selection standards (a list already including race, sex, and age) only those arbitrary criteria that fall in the clumsily defined category we label “disabilities” or “handicaps.” First, ineffi-

cient discrimination against the handicapped may be thought to be a phenomenon that is widely shared and pernicious, whereas use of other arbitrary criteria may be more diverse and random

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38 State Div. of Human Rights v. Xerox, 65 N.Y.2d 213, 480 N.E.2d 695 (1985), dis-

cussed in text at notes 98-100.

39 TRB from Washington, The Tyranny of Beauty, New Republic 4 (Oct. 12, 1987), critici-
zizing Note, 100 Harv. L. Rev. 2035 (cited in note 36). See also Roberto Mangabeira Unger, Knowledge and Politics 169 and 172-73 (1975):

[T]he exercise of power by some men over others on the basis of the natural allo-
cation of talents must therefore come to be felt as a surrender by society to the arbitrariness of nature and as a submission by the dominated to the personal su-

periority of the dominant. The brute facts of natural advantage are made decisive to the distribution of power . . . .

The closer the assignment of jobs comes to the ideal of merit, the more deci-
sive the influence of natural talents in determining social place. The hierarchy of talents, distributed by nature without regard to men’s moral purposes, succeeds the accident of inherited wealth and opportunity. The lucky ones can then cash in on the favors of nature like prostitutes whose price depends on whether they are fat or slim. The exercise of power by the higher talents over the less gifted be-
comes simply another form of personal domination unless a moral standard can be found to justify and limit it.
and so may not have such a large and continuing impact on partic-
ular individuals or groups. Second, we may have a special solici-
tude as to conditions or lacks to which we can apply the label
"medical."\(^{40}\) Third, if unable to get work, the "handicapped" are a
group whom society must or will support, so taxpayers will save
money if they can be assured labor-market income.\(^{41}\) Fourth, the
physically or mentally handicapped person has declined (perhaps
before birth) from some hypothetical form of good health. Thus
perhaps this person "deserves" social treatment more like what he
or she would have had if healthy. The person at his or her maxi-
mum capacity may "deserve" nothing more than that. Fifth, the
"handicapped" (or the "disabled")\(^{42}\) may be a group of people who
have managed to make themselves an effective force in the politi-
cal process.\(^{43}\) Those affected by non-medical decisions have not (so
far) achieved a comparable voice. Finally, it may be an onerous
task for government to attempt to intervene as to all inefficient or
arbitrary job criteria, and intervention to protect the handicapped
may be, for all the reasons above, the first priority.\(^{44}\)

\(^{40}\) See Erving Goffman, Stigma (1963); Susan Sontag, Illness as Metaphor (1978); Stone,
The Disabled State (cited in note 27); and Liebman, 89 Harv. L. Rev. 833 (cited in note 31).

\(^{41}\) Society may be more hard-hearted towards those who are without work but not la-
beled disabled. See Liebman, 89 Harv. L. Rev. 833. If so, it may be rational to focus job
opportunities on those who would otherwise receive more generous social benefits.

\(^{42}\) On the issue of what label to use see David A. Larson, What Disabilities are Pro-
tected Under the Rehabilitation Act of 1973?, 37 Lab. L.J. 752, 752 n. 4 (1986). See also
Transforming Federal Policy at 179 n. 1 (cited in note 27): "Many people with disabling
conditions prefer to be called disabled rather than handicapped, claiming that 'handicaps'
are unnecessary social restrictions placed on them as a result of their disabilities. The term
disabled will be used here . . . ." In 1986 Congress changed the language in the Rehabilita-
tion Act from "handicapped individuals" to "individuals with handicaps." Rehabilitation
706 (1982).

\(^{43}\) On that political development, see Stone, The Disabled State (cited in note 27).

\(^{44}\) See Transforming Federal Policy at 69 et seq. (cited in note 27) for a discussion of
the mid-1970's dispute within HEW over whether the Rehabilitation Act regulations should
include "poor people, aged people, homosexuals, and drug and alcohol addicts within the
definition of handicapped individuals." See also Joseph A. Califano, Jr., Governing America
261 (1981): "It was the only part of the regulations in which President Carter expressed any
interest. At the cabinet meeting on March 21, 1977, Carter said he did not want drug ad-
dicts or alcoholics classified as handicapped." Statutory amendments in 1978 addressed this
issue but did not exactly solve it. The Act's coverage does not include "any individual who is
an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual
from performing the duties of the job in question or whose employment . . . would constitute
a direct threat to property or safety of others." 29 U.S.C. sec. 706(8)(B). This provision was
intended to make it more difficult for persons with alcohol and drug problems to obtain
protection under the Act. See the discussion in Rothstein, 63 Chi.-Kent L. Rev. at 713-18
(cited in note 15). Does the 1978 amendment mean that the Act forbids employers from
discrimination against cigarette smokers? See Mark A. Rothstein, Refusing to Employ
b) Ensuring equality of outcome. Legislation forbidding discrimination against the handicapped could attempt to give job opportunities to handicapped persons even if the refusals that would occur in the absence of the law are economically rational and job-related. That is, society might say: "We wish to make it possible for these individuals to work. Therefore we will pay a social cost to allow that to happen. The cost will be the output loss for the employer. It will also be—in a sense—the denial of the job to the non-handicapped individual who would have it otherwise."

This norm could be implemented in any of three ways. First, a policy intervention attacking discrimination on the basis of handicap could give an absolute preference (or an absolute forgiveness) by attempting to ensure employment irrespective of handicap. This interpretation is supported by statutory language. Arguing against it are its apparently unacceptable consequences (blind bus drivers), and the unlikelihood that the public supports so much alteration of workplace arrangements to provide job opportunities for handicapped persons. Thus, it is more likely that a legal ban on some economically rational discrimination against the handicapped would follow a different path. One possibility is a ban against certain group-based predictions rationally based on experience. It is now unlawful to refuse jobs to women because some women will become pregnant and leave the labor market. It is


* See 29 U.S.C. sec. 794: "No otherwise qualified individual with handicaps . . . shall, solely by reason of his handicap . . . be subjected to discrimination."

* Many persons are without work in the nation's economy, and no public commitment has been made to provide them with job opportunities. The most recent public consideration of this issue resulted only in the Full Employment and Balanced Growth (Humphrey-Hawkins) Act of 1978, 15 U.S.C. sec. 3101, which merely pronounces hortatory goals and calls for regular reports by the President. In 1978 President Carter's Better Job and Income Act (BJIA) would have tied AFDC benefits to a work requirement only if the government offered a job. The BJIA was not enacted.

* See generally Barbara D. Underwood, Law and the Crystal Ball: Predicting Behavior with Statistical Inference and Individualized Judgment, 88 Yale L.J. 1408, 1436 (1979):

The idea that each individual should have the opportunity to seek his own destiny occupies a high place in the hierarchy of American values. Although any decision to rely on predictive judgments poses some threat to the autonomy of individuals, that threat is greatest when the predictions are based on factors over which an individual applicant has no control.


Congress in enacting Title VII intended to prohibit an employer from singling out an employee by race or sex for the purpose of imposing a greater burden or denying an equal benefit because of a characteristic statistically identifiable with the group but empirically false in many individual cases.
unlawful to refuse to hire a black applicant because blacks as a group have performed badly in the past and are predicted to do so in the future. If some persons in wheelchairs or with drug-controlled epilepsy will be inefficient workers because of their condition but some with the condition will be successful workers, we could refuse to permit that percentage possibility to be taken into account in hiring decisions. But most (indeed, virtually all) hiring decisions are based on predictions. Why ban this particular prediction?

A third means of implementing this norm would be to say that hiring the handicapped is an appropriate expenditure of public resources. We would need to explain why employers should be legally bound to spend in this way, and we would need to determine the extent to which costly accommodation must be made.

2. What is a Handicap? The Rehabilitation Act does a poor job of choosing among these possible explanations for statutory restriction of employer hiring decisions. The Act merely poses questions: What is a handicap? To what extent must employers hire handicapped persons even if the employment of those persons will impose economic costs?

As Rehabilitation Act cases now arise, applicants and employers both face difficult litigation challenges. The employer must show that the applicant’s condition is not a handicap, despite evidence that the condition was the basis for the employer’s refusal to give the job to this applicant. On the other hand, the prospective employee must demonstrate that although she is very handicapped, she nonetheless is qualified.

Most judges and litigants who have addressed the issue of future impairments have not seen the doctrinal questions clearly. It is hard to define a handicap. Congress and the legislatures meant to include conditions that are in some form seen by the public as medical. They also meant to emphasize conditions that arise

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49 This version of the antidiscrimination principle would, however, permit an employer to use an applicant’s own employment record and experiences to predict that her handicap would diminish her job performance.

50 See Amer. Disabled for Accessible Pub. Transp. v. Dole, 676 F. Supp. 635 (E.D. Pa. 1988), striking down a Department of Transportation regulation limiting to three percent of its budget the amount of money a mass transit operator must spend to provide access for the disabled. This regulation was issued in May 1986.

51 Each side confronts a Catch 22; is the situation thus a Catch 44? On the Catch 22 aspect, see Doe v. Region 13 Mental Hlth.-Mental Retard. Com’n., 704 F.2d 1402, 1408 n. 6 (5th Cir. 1983).

through no voluntary choice by the victim. And they meant conditions that reflect a "fall" or "decline" by the individual from that person's "normal" level. All that is problematic in the border-line cases, but it is problematic in ways familiar from the endlessly litigated context of qualification for Social Security Disability and Supplemental Security Income Disability benefits. Thus, the depressive neurotic is handicapped. So, closer to the line, is the person who is unusually sensitive to tobacco smoke. So is the person who had one leg amputated; the person with tennis elbow; and the bus driver with carbon monoxide phobia. But the statute does not protect the plaintiff who misses a great deal of work because he is "unable to cope with the stress of his job," or the person who asks statutory protection for his left-handedness.

A statement issued by the Department of Justice in 1986 casts some light on the question of whether the risk of future disease is a handicap under the Rehabilitation Act. The statement argues that an employer does not violate the Act if it refuses a job...
because an applicant tests positive for the AIDS virus. The Department gave two reasons. First, it said that the employer would be justified in refusing employment because prospective fellow employees had an incorrect fear of contagion. The Supreme Court rejected this position in School Board of Nassau County v. Arline, holding that the Act proscribes denial of employment benefits "because of the prejudicial attitudes or the ignorance of others." This is the bigotry interpretation of the Act. The Supreme Court took its stand for medicine and science, and against community suspicion and fear. The Court could do nothing else in light of the successful history of enforcing antidiscrimination laws in opposition to stereotypes in the context of race, religion, sex, and age discrimination.

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63 The Reagan Administration has not spoken with one voice on this matter. See, for example, Remarks by Otis R. Bowen, M.D., Secretary of Health and Human Services, Allstate Division Forum on AIDS, Washington, D.C., Jan. 20, 1988, reported in Jerry Estill, Bowen Warns of Discrimination Against Employees with AIDS, Boston Globe 10 (Jan. 21, 1988): "Health and Human Services Secretary Otis R. Bowen said: . . . 'Firing or otherwise discriminating against somebody with AIDS transgresses a great many legal as well as humanitarian considerations.' " Perhaps Secretary Bowen was not referring to discrimination in hiring or to discrimination against a person testing positive for the AIDS virus. But the newspaper reports of his speech suggested that he thought a broad antidiscrimination rule would be good social policy. Earlier, however, Secretary Bowen had spoken somewhat differently. See Joe Davidson, AIDS Bill Barring Discrimination Opposed by Bowen, Wall St. J. 72 (Sept. 22, 1987).


65 Id. at 1129.

66 The question is more complicated. Who will decide what is the relevant scientific truth, and will the risks of imperfect knowledge be put on employers, fellow workers, and consumers or on individuals who test positive? See Robert Pear, Key Jobs in Military Off Limits for AIDS-Infected, N.Y. Times 1 (Dec. 19, 1987): "Officials of the Defense Department said today that military personnel infected with the AIDS virus were being removed from sensitive, stressful jobs because of new evidence that the virus could impair mental function, even in people who show no overt symptoms of the disease." Undoubtedly judges will tread lightly when second-guessing the military, even though elementary school-teaching is also "sensitive" and "stressful," and even though the Rehabilitation Act makes no distinction. See Rostker v. Goldberg, 453 U.S. 57 (1981) (finding no Fifth Amendment violation in exemption of women from duty to register for the military draft).

67 Conservatives tried to overturn Arline in Congress. See H.R. 1396, 100th Cong., 1st Sess. in 133 Cong. Rec. H992 (March 4, 1987), introduced by Rep. Dannemeyer, which would "amend the Rehabilitation Act of 1973 to exclude individuals with contagious diseases from the definition of handicapped individuals;" and S. 673, 100th Cong., 1st Sess. in 133 Cong. Rec. S2820 (March 6, 1987), introduced by Sen. Dole (similar). These two bills were introduced several days after the Arline decision. Instead, Congress appears to have legislated in support of protection for ill persons who are not contagious. The Civil Rights Restoration Act of 1987 Pub. L. No. 100-259, 102 Stat. 28 (1988), was enacted (over President Reagan's veto) in 1988 to overturn Grove City College v. Bell, 465 U.S. 555 (1984). The Act added to the definition of "individuals with handicaps" in Sections 503 and 504 of the Rehabilitation Act this language:

[S]uch term does not include an individual who has a currently contagious disease
Second, the Justice Department memorandum said that the person who tests positive for the AIDS virus as yet has no disease, is not handicapped, and therefore is not protected by the Act.\textsuperscript{68} This argument turns upon a very limited understanding of the purposes of the Act. The statute offers protection to those medically afflicted. A person testing positive for the AIDS virus is so afflicted. The person who is AIDS-positive has a physical malformation that has a predictable percentage possibility of leading to illness (contraction of AIDS), inability to work, and death. Indeed, some observers have suggested that the physical malformation is itself the disease, of which AIDS is the final, fatal stage.\textsuperscript{69} If an epileptic whose disease is controllable with drugs cannot be refused a job on the basis of predicted illness,\textsuperscript{70} why should an employer be

or infection, and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of other individuals or who . . . is unable to perform the duties of the job.


One commentator sees this provision as likely to “eliminate the obligation of federally funded employers to reasonably accommodate [AIDS-]infected employees.” Nicholas Hentoff, A Legal Virus on Top of the AIDS Virus, N.Y. Times 31 (Apr. 16, 1988). It is more likely, however, to reaffirm Arline’s protection for persons testing positive for or already afflicted with AIDS who can still work in jobs where the current medical conclusion is that casual contact poses no threat to fellow employees or the public.


\textsuperscript{68} The memo said the person with AIDS or AIDS Related Complex is protected by the Act. Memorandum for Robertson at 22-29 (cited in note 62). See Shuttleworth v. Broward County, 639 F. Supp. 654 (S.D. Fla. 1986) (individual with AIDS is handicapped for purpose of Rehabilitation Act). But the memo then took it back, saying that since someone who is contagious but not sick can be refused a job (that person is not yet handicapped), therefore the person who is contagious and sick (has AIDS) can be refused on the grounds of contagion and is not the victim of discrimination on the basis of handicap. The ability to reason in this way may be a genetic trait that has lain dormant since the 13th century.

\textsuperscript{69} Professor Schelling has it right:

Schelling, Life, Liberty or the Pursuit of Happiness at 8-9 (cited in note 9). This also seems to be the position of the U.S. Surgeon General: “When a person is sick with AIDS, he/she is in the final stages of a series of health problems caused by a virus (germ) that can be passed from one person to another.” U.S. Dept. of Health and Human Services, Surgeon General’s Report on Acquired Immune Deficiency Syndrome 10 (1987).

\textsuperscript{70} See Mantolete v. Bolger, 767 F.2d 1416 (9th Cir. 1985), which found a violation of Section 501 of the Rehabilitation Act—covering federal employment—when the Postal Service refused a job to an applicant who had averaged one daytime grand mal seizure per year.
able to deny work because a person not yet afflicted is believed likely to contract a disease? The AIDS-positive is refused because the employer is worried (perhaps rationally) about the efficiency consequences that will result when and if the prediction turns into reality. If the Act forbids adverse consequences from having the disease, should it not ban consequences from being likely to have it in the future? Indeed, the statute says that a "handicapped individual" is a person who "has a physical or mental impairment" or "is regarded as having such an impairment." Although the words are in the present tense, and the employer can thus argue that they do not yet cover the AIDS-positive, they turn the focus to the workplace consequences for individuals, which inevitably are determined by both the physical condition of the applicant's body and the interpretation given to that condition by employers.

Although the Department of Justice's position is wrong and is not likely to prevail, it highlights the difficulty of defining the list of criteria, otherwise relevant to the profit-seeking employer, that the Rehabilitation Act places out of bounds. More generally, it highlights the difficulty of making a policy decision about which such criteria should be prohibited by antidiscrimination legislation. Even if the Act can be read as covering the risk of future illness, why should it be so read?

There is a strong argument for permitting employers to consider the possibility of future illness—for example, for permitting them to extract DNA, analyze it, and weigh medical costs among all other selection criteria. The argument is as follows: People present themselves for work. They offer a great range of desirable and

The court's test was whether the employer had shown a "reasonable probability of substantial harm" and whether it could accommodate the worker without "undue hardship." See also Chicago & N.W.R.R. v. Labor & Industry, 98 Wis.2d 592, 297 N.W.2d 819 (1980). 8 U.S.C. sec. 706(8)(B) (emphasis added). This language was added to the act as a "technical and clarifying' amendment" in 1974. See Transforming Federal Policy at 66 (cited in note 27). See also Ill. Fair Employment Practices Comm. Guidelines on Discrimination in Employment Under the Fair Employment Practices Act, art. 3, sec. 3.2 (1976): "any physical or mental impairment . . . which constitutes or is regarded as constituting a substantial limitation," cited in Caterpillar, 506 N.E.2d at 1031 (cited in note 58), and Micro Switch v. Human Rights Commissioner, 164 Ill. App.3d 589, 517 N.E.2d 587 (1987). Compare the language of the Rehabilitation Act with that of the handicap discrimination law of New South Wales, Australia, which applies to: "[A] person who, as the result of having a physical impairment to his body, and having regard to any community attributes relating to persons having the same physical impairment . . . is limited in opportunities." Anti-Discrimination Act, sec. 4(1), (5) & (6), part IVA (New South Wales 1977) in Australia Limited (CCH) par. 7-460. The New South Wales definition of "physical impairment" is also interesting: "[A] defect or disturbance of the normal structure and functioning of a person's body, whether arising from a condition subsisting at birth or from illness or injury." Id.
undesirable characteristics. One does well on standardized tests, another had all A’s in high school, a third is charming in an interview, a fourth is physically attractive, a fifth has contacts likely to produce business. Applicant six says this: “My wife works for the university hospital, which has an excellent medical plan that includes spouses. If you hire me, I won’t enroll in your medical plan and you will save $2,500 per year.” Should the employer be forbidden from giving weight to that consideration? Now consider the employee who proudly offers his or her “negative” on the AIDS test, or his or her DNA-report showing a greater-than-average likelihood of good health throughout an extended work life. Why would a society ban consideration of this information where it is rationally related to output? Putting the same point in a different way, why should those who offer good health be denied the advantages available to those who are smart or charming or tall or physically dexterous?

Very few cases have addressed the issue of whether an employer can deny employment on the basis of the possibility of future sickness. Cases protecting job applicants against decisions not to hire them because of predictions of future illness or injury include Dairy Equipment Co. v. Department of Indus., Etc., where plaintiff was fired because, having only one kidney, his work as a truck assembler 10-12 feet above a concrete floor exposed him “to an undue risk of injury to his remaining kidney” and exposed the company to the risk of paying $20,000 to $30,000 for a kidney transplant or $8,000 for a dialysis machine; Kimmel v. Crowley

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72 This issue is not merely hypothetical. In the largest survey so far of business leaders’ views on AIDS (623 diverse companies responded), only one in four said their companies would hire an applicant if they knew he or she had “been exposed” to AIDS. About four in ten said the applicant would be rejected. Business Response to AIDS, National Survey sponsored by Fortune Magazine and Allstate Insurance (1988).

73 The Justice Department’s “legal opinion” on AIDS and the Rehabilitation Act posed the following hypothetical case: an individual who is immune from a disease (such as AIDS) but can spread the disease to others. The Justice Department document argued that such a person has no handicap (he or she can do any job) and thus has no legal protection against an employer’s decision not to hire due to fear of contagion. Memorandum for Robertson at 24-25 (cited in note 62). It is easy to argue that Justice is wrong: That the hypothetical applicant suffers from a “medical”-type condition that is the reason he or she is not hired. But if the Rehabilitation Act covers this individual, why is there no legal protection for others who may attract social scorn or enmity: The person who is unattractive, or speaks oddly, or is socially or physically clumsy, or is regarded as unfriendly. It is understandable that Congress decided to intervene in a decentralized employment system only on behalf of “medical” victims, but hard to be as confident as the Justice Department that the line between “medical” and “non-medical” can be clearly drawn.

74 95 Wis.2d 319, 290 N.W.2d 330 (1980).

75 290 N.W.2d at 332. The company violated the Fair Employment Act because it “per-
Maritime Corp., protecting a plaintiff whose history of knee injuries suggested future problems; Chicago, M., St. P. & P. R. Co. v. State Dept. of I., L. & H. R., protecting a plaintiff with asthma; and, perhaps most extraordinarily, Neeld v. American Hockey League, refusing to let the American Hockey League discriminate against a potential player with only one eye.

Courts have permitted employers to discriminate on the basis of a risk of future impairment when, for some reason the judges cannot quite specify, the applicant's or worker's condition ought not to be considered a handicap. For example, Burgess v. Joseph Schlitz Brewing Co. gave no relief to a plaintiff suffering from glaucoma because with glasses his vision was 20/20. Advocates for the Handicapped v. Sears, Roebuck & Co. refused protection under the Illinois Constitution and statute to a plaintiff denied a job as an uninsurable risk because he had had a kidney transplant. The court said it looks to "the ordinary and popularly understood meaning" of the word handicapped, and found that this condition was not within that definition.

3. Otherwise Qualified. The second half of the handicap discrimination puzzle is deciding the extent of the accommodation that should be provided to those determined to be covered by the statute. Again, the Rehabilitation Act is not a model of good drafting. Congress used words suggesting an absolute preference: "No otherwise qualified individual . . . shall, solely by reason of his handicap, be excluded." Congress probably meant "qualified,"
even if it said "otherwise qualified."

The Supreme Court faced this question in *Southeastern Community College v. Davis,* a case that arose under Section 504. The issue in *Davis* was admission into an educational institution (covered by the Rehabilitation Act because it received federal funds). But the Supreme Court's opinion treated Ms. Davis's claim as if she were seeking a job—quite appropriately, since without a nursing degree she could not become a nurse; and since the nursing school based its refusal of admission in part on its prediction that her handicap (deafness) would restrict her opportunities to use a nursing degree in the job market. *Davis* said that Southeastern Community College was under no obligation to ignore Ms. Davis's handicap in evaluating her candidacy. The question was whether, considering her handicap, she was qualified. This interpretation supports the inference that the goal of the Rehabilitation Act is that of preventing handicap bigotry—exclusion of discrimination on the basis of handicap where the handicap is irrelevant to ability to do the job. The Court salvaged some force for the statute by offering dicta suggesting that for some applicants with lesser handicaps, reasonable accommodation to their needs might be legally required. However, it did not require the college to supply what Ms. Davis needed, an individual translator.

Even though the Supreme Court suggested in *Davis* that the Rehabilitation Act means "qualified" when it says "otherwise qualified," the litigated cases show judges struggling to decide the degree of accommodation—of expense—that is appropriate. In every one of the cases discussed above, there is reason to think that the employee's condition imposes some cost or risk on the employer.

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in this state because of the race, creed, religion, color, natural origin, sex, or blindness or other physical disability of the person." Annot. Cal. Civ. Code sec. 51.5 (West Supp. 1988).


** Id. at 407. But see *Pushkin v. Regents of University of Colorado,* 658 F.2d 1372 (10th Cir. 1981), holding that plaintiff was illegally denied admittance to a psychiatric residency program because he suffered from multiple sclerosis. The court rejected, as a rationale for not admitting the plaintiff, the selecting doctors' "general knowledge of multiple sclerosis and their concern for psychologic reactions of the patient and in turn the doctor, as a result of his being in a wheelchair." Id. at 1386. One doctor said that Dr. Pushkin "is teachable, but to face the devastation, guilt, pity and rage that can be stirred up in his patients by his physical condition appears to be too much to ask of his patients or of him." Id. at 1387. There is a line that can be drawn between *Davis* and *Pushkin,* but it is exceedingly thin.

** Compare the dispute over whether an individual exposed to asbestos but not now sick can recover today for the percentage likelihood of future cancer. *Jackson v. Johns-Manville Sales Corp.,* 781 F.2d 394 (5th Cir. 1986). Here the employer is making a similar argument to the detriment of the job applicant who presents medical risks. If the employer
The reader of scores of handicap-discrimination cases rarely sus-
pects the employer of acting out of stupidity (the bigotry category, supra). Rather, the court finds the applicant to be “otherwise qual-
ified” if the cost the employer must bear to accommodate the
workplace to the applicant’s need or problem is determined to be
reasonable.87

There are substantial social costs to requiring employers to ac-
commodate the special limitations of handicapped employees. Ac-
commodation reduces output. It may inconvenience other employ-
ees or cause them to feel unfairly treated in comparison with the
protected handicapped employee. The transaction costs of this
protection—litigation costs, threats of litigation, and assertions of
dubious claims—may be very high. Yet the social benefit may also
be very substantial. Accommodation of the workplace allows us to
supply assistance to the handicapped in the best possible way, with
job opportunities rather than welfare payments.88 It also assures all
citizens that if they become victims, society will adapt the employ-
ment system to their needs. All of this gives us a theoretically ac-
ceptable explanation of the handicap laws, if only we could (and
were willing to) quantify what we mean by reasonable accommo-
dation.89 A student note in the Harvard Law Review proposed:

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87 There are interesting analogies to the Unemployment Insurance issue of “involuntary quit:” When is it reasonable for an employee to leave the job, so that she should not be denied Unemployment Insurance benefits? See, for example, Raytheon Co. v. Director of Division of Emp. Sec., 364 Mass. 593, 307 N.E.2d 330 (1974). Another analogy is to an employer’s obligation to make reasonable accommodation “to an employee’s or prospective employee’s religious observance or practice without undue hardship.” 42 U.S.C. sec. 2000e(j) (1982).


89 The Supreme Court posed the Rehabilitation Act problem in a similar way in Alexander v. Choate, 469 U.S. 287 (1985), rev’g Jennings v. Alexander, 715 F.2d 1036 (6th Cir. 1983), when it said that the Act does not bar government decisions that have a disparate impact on the handicapped but added:

Any interpretation of [the Rehabilitation Act] must therefore be responsive to two powerful but countervailing considerations—the need to give effect to the statutory objectives and the desire to keep [the Rehabilitation Act] within manageable bounds . . . . While we reject the boundless notion that all disparate-impact show-
ings constitute prima facie cases . . . we assume without deciding that [the Act] reaches at least some conduct that has an unjustifiable disparate impact upon the handicapped.
(a) No handicapped person . . . shall, solely by reason of his handicap, be denied employment . . . (1) if such a person can perform the functions of the job in question with the aid of any necessary accommodations, so long as the cost of those accommodations does not exceed the maximum statutory level, or (2) if the loss in productivity that would result from such person's handicap . . . does not exceed the maximum statutory level . . .

(b) The maximum statutory level for accommodation costs shall be equal to X percent of the employee's annual salary.

The law review proposal is too clumsy. The public attitude would distinguish among handicaps and order large accommodations to some and small ones to others. The idea is at odds with the absolute antidiscrimination stance of some advocates for the handicapped and not easy to square with statutory language derived from the analogy to race and sex discrimination and therefore not written in language of reasonable accommodation or comparison of relative costs. Nevertheless, the proposal acknowledges the current problem, and moves in the right direction.

C. Antidiscrimination Law and the Prediction of Future Disease

Davis and the hundreds of other handicap-discrimination

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Id. at 299.

The Court's clearest statement was in a footnote:

'The ultimate question is the extent to which a grantee is required to make reasonable modifications in its programs for the needs of the handicapped.

Id. at 299 n. 19.

Note, Employment Discrimination Against the Handicapped and Section 504 of the Rehabilitation Act: An Essay on Legal Evasiveness, 97 Harv. L. Rev. 997, 1013 (1984). See also Rebell, 74 Geo. L.J. at 1458-59 (cited in note 27). The case that comes closest to this cost-benefit calculation is Nelson v. Thornburgh, 567 F. Supp. 369 (E.D. Pa. 1983), aff'd in unpub. op. in 732 F.2d 146 (3d Cir. 1984), holding that Pennsylvania must pay the cost of permitting three blind persons to work as clerks in the Department of Welfare. The money was needed for salaries for sighted readers, the cost of translating manuals into braille, and purchase of computerized braille machines. The court compared the cost not to the salaries of the three employees (it was between 1/3 and 1/2 of their salaries), but to the $300 million welfare budget, finding the accommodation "not excessive."

For another example, the extra health insurance cost for a cigarette smoker has been estimated at $75 to $150 per year. Mark A. Rothstein, Medical Screening and Employment Law: A Note of Caution and Some Observations, 1988 U. Chi. Legal F. 1.

Note the parallels to workplace health and safety, where comparison of benefits and costs is inevitable but social institutions work hard to deny that such tradeoffs are made. See American Textile Mfrs. Inst., Inc., v. Donovan, 452 U.S. 490 (1981) (The Cotton Dust Case).
cases that have now received appellate consideration (many of them arising under state laws, because *Davis* is regarded by advocates as giving a less favorable interpretation to the antidiscrimination principle in the handicap discrimination context than has been supplied by some state courts)\textsuperscript{9} identify the issues as they are relevant to claims by applicants who do not want to be judged according to predictions of their future health:

a) The bigotry claim: I am being excluded for something irrelevant to the job as the job ought to be defined. The state laws banning use of lie detector tests and the federal Polygraph Protection Act of 1988\textsuperscript{9} are in part justified by the view that because lie detector tests are inaccurate, their conclusions should never be used. Of course many criteria that have a high inaccuracy quotient are not banned by any statute.

b) The individualism claim: Judge me as me, not as a member of a group about which you make predictions.\textsuperscript{4} But all selection is based on likelihoods, possibilities, and predictions.

c) The reasonable accommodation claim: Give me a chance. But which rational and efficient negative predictions should be discounted? Indeed, which candidates should lose the benefits of their positively-predicting characteristics and be passed over on behalf of someone who is predicted to be a less productive worker?

d) The indignity claim: Using this criterion involves socially undesirable intervention in my life. To the extent that the objection to lie detectors is not their inaccuracy but the indignity of an individual’s being strapped in with electrodes, the laws against the machines belong in this category.

Future illnesses should not be considered differently from other predictions about the prospective worker: His or her talent, commitment, durability, or potential for growth. Where use of predictions has a differential impact on minorities or women,\textsuperscript{8} they

\textsuperscript{9} There may also be relevance in the fact reported by Professors C. K. Rowland and Robert Carp, that federal district judges appointed by President Carter “found bias against the handicapped 61% of the time, Reagan appointees 25%.” Stephen Wermeil, Tilting Bench, Wall St. J. 1, 16 (Feb. 1, 1988).


\textsuperscript{8} See *Stutts v. Freeman*, 694 F.2d 666 (11th Cir. 1983). Joseph Stutts received a low score on a General Aptitude Test Battery and was refused a job as a heavy equipment operator for the Tennessee Valley Authority (TVA). Doctors said his low score was a result of dyslexia and he could in fact do the job. TVA tried and failed to get other test results and to relate them to its usual selection procedures. The court of appeals held that the agency violated the Rehabilitation Act, holding that employers must accommodate their criteria to the circumstances of handicapped individuals.

FRINGE BENEFIT SYSTEM

must meet a demanding standard of business necessity. Otherwise, the likelihood that a worker will become sick ought to be as legally relevant as the prediction that he will be good at selling real estate or will stay at this job after the employer has invested heavily in training. But the society's willingness to spend money making available job opportunities to a category denominated "handicapped" is also relevant, and since predicted future disease should be regarded legally as a handicap (because the issue only matters where the consequences of the prediction affect an important employment decision, and thus the prediction imposes a barrier because of the individual's current medical condition), employers must make a reasonable accommodation to such individuals. We must, however, bring ourselves to quantify or otherwise bound what we mean by reasonable accommodation.

The consequence, at today's level of knowledge and disease, would likely be protection for most job applicants subjected to genetic testing (since the discounted value of their future disease prospects would usually be within some reasonable accommodation tolerance) and no protection for the person testing positive for the AIDS virus (since that person's medical prognosis indicates a substantial chance that he or she will impose large costs very soon).97

III.FRINGE BENEFITS

The analysis above is incomplete. On one hand, antidiscrimination laws such as the Rehabilitation Act forbid employers from considering a wide range of criteria, including the likelihood of future disease. On the other hand, developments in the area of fringe benefits make it fiscally imperative that they consider those very criteria. A New York case, State Division of Human Rights v. Xerox,98 illustrates the trap into which employers have been forced. In Xerox, the New York Court of Appeals held that New


96 Many issues that arise in the handicap discrimination context do have differential impact. Presumably that is why Florida forbids employers from testing for the sickle cell trait but does not forbid testing for other diseases. See Fla. Stat. Annot. sec. 448.075 (West 1981). Indeed, genetics is likely to establish percentage relationships between many diseases and particular racial or national origin identifications.

97 Should the unprotected applicant be able to obtain a job by making an enforceable contract to accept a smaller wage or to take the job without health insurance (or, for example, without coverage for AIDS)? Government subsidization (pooling the risk at a larger social unit than the employer) is discussed below.

York's Human Rights Law was violated when Xerox dismissed a worker because of extreme obesity.\textsuperscript{99} The court accepted the company's factual declaration that a grossly obese employee would be more likely to be absent and more likely to become ill. But it said she could not be dismissed on that account and seemed to say she could not have been refused the job initially for that reason. Thus Xerox is the leading determination that a person cannot be refused employment on the grounds of a reasonably based prediction of likely health costs.\textsuperscript{100}

From the perspective of an employer's economic interests, a worker is nothing but a factor of production. If that worker will become ill, and if the employer will be responsible for the medical costs as well as the output costs of the worker's absence, then the predicted illness is nothing but a future dollar cost that the employer must consider and discount.\textsuperscript{101} The likelihood of illness is just one of many relevant predictions about the applicant's future ability to contribute to output.

But at least two types of concerns qualify that conclusion. First, we properly hesitate to give employers the most intimate knowledge about the medical futures of job applicants. Privacy is an independent social value, reflected in various federal and state laws and doctrines.\textsuperscript{102} Should employers have access to blood,

\textsuperscript{99} Compare the attempt by the Veterans Administration to distinguish between "primary" alcoholism (misconduct because no underlying psychiatric disorder) and "secondary" alcoholism (disorder). Only the latter justifies extension of the 10-year period (after military service) for government-paid educational benefits. Traynor \textit{v.} Turnage, 108 S. Ct. 1372 (1988). The statute, 38 U.S.C. sec. 1662(a)(1), makes some such line-drawing inevitable by granting the extension of benefits eligibility only to veterans whose "physical or mental disability . . . was not the result of . . . [their] own willful misconduct." But why does the Veterans Administration not deny extended benefits to cigarette smokers who contract lung cancer or emphysema? See Traynor, 108 S. Ct. at 1391 (Blackmun, concurring in part and dissenting in part).

\textsuperscript{100} See also \textit{Matter of State Div. of Human Rights}, 70 N.Y.2d 100, 510 N.E.2d 799 (1987), holding that New York City violated the state law when it refused a job as a police officer because of fear that the applicant's spinal condition (spondylolisthesis) would lead to future absences and benefit claims. Compare the new Massachusetts law, banning smokers from jobs as state police officers. 22 Annot. Laws Mass. sec. 9A (Lawyers Co-Operative 1988). The attempt to predict lower-back problems, especially by the railroad industry, is a major example of job selection to avoid later medical expenses. For the argument that this endeavor, as carried out, has had a "negative social value," see Paul H. Rockey, Jane Fantel and Gilbert Omenn, Discriminatory Aspects of Pre-employment Screening: Low-back X-ray Examinations in the Railroad Industry, 5 Am. J. L. & Med. 197 (1979).

\textsuperscript{101} Professor Stone calls this "a new medical status somewhere between health and disease—the status of being 'at risk' or 'hypersusceptible.'" Stone, 11 J. of Health Pol., Pol'y & L. at 683 (cited in note 6).

\textsuperscript{102} See, for example, H.R. 3071, 100th Cong., 1st Sess. in 133 Cong. Rec. H6855 (July 30, 1987), sponsored by Rep. Waxman; and S. 1575, 100th Cong., 1st Sess. in 133 Cong. Rec.
urine, and the raw material for psychological evaluations? Should they be free to circulate this information inside the company? Should they pass it on in response to requests from other employers or from insurance agencies? If they have the information, do they hold it under a fiduciary duty to the applicant or employee? Should an employer who learns from a blood test that an applicant is AIDS-positive tell that applicant? Not tell him or her? Tell the applicant's spouse or friends? These are difficult questions on which legal rules are just beginning to evolve. At minimum, they counsel caution about unlimited authorization to employers to make decisions based on predictions of an applicant's medical future.

Second, our not entirely coherent commitment to meritocracy—the opportunity for all, unconstrained by "irrelevant" and socially disapproved barriers—is offended when a job is refused because of medical prediction. We perceive a difference between a judgment about current capacity ("her score was lower on a test of ability to pull a fire hose and climb a ladder") and a prediction of the possibility of a future event. Or perhaps, since what we see as current capacity is itself a prediction ("she will be a good fire fighter as predicted by her score on the test"), we hold a view that certain possibilities, even if accurately predicted, should not influence current job opportunities. This is the important and difficult issue of categorization. It is (apparently) acceptable to group an applicant with all those who score between the 70th and

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The non-discrimination provision would be waived if a health professional determined there was a possibility of infecting others or if the person was unable to satisfy "bona fide essential criteria" for the job. Regarding the duty to disclose a genetic diagnosis, see Pratt v. U. of Minn. Affiliated Hospitals, 414 N.W.2d 399 (Minn. 1987).


103 See Luck v. Southern Pacific Transportation Co., No. 843230 (Cal. Super. Ct. Oct. 30, 1987) (described in Daily Labor Report (BNA), No. 212, A-2 (Nov. 4, 1987)), awarding plaintiff $485,000 when she was dismissed for refusing to participate in a random drug test. The jury found that the company violated her personal privacy and also its duty of good faith and fair dealing; the damages were for infliction of emotional harm.

104 For interesting discussion of these issues in the British context, see Diana Brahams, Aids and the Law, 137 New L.J. 749 (1987).

105 Berkman v. City of New York, 812 F.2d 52 (2d Cir. 1987).
80th percentile on a test. Some of them will be excellent at the job, but refusing all of them (and choosing those ranked in the top decile), if the test is the best measure we can afford to use, offends no important value. But rejecting all blacks because race predicts unsatisfactory performance, or all women because many will impose the cost of pregnancy, are today forbidden categorizations. What are the arguments for including future health prospects among the forbidden criteria? Perhaps in our society the medical diagnosis and treatment of disease has to a degree replaced religion (a substitute way to think about, deter, and respond to mortality). It is bad enough that some will become sick. They should not be punished additionally by being grouped for purposes of job selection with others who are also more likely than the average person to be victims in the future. Whatever the reasons (and I admit I do not have a good sense of them), American society seems to accept the idea, and that acceptance will influence social arrangements.

Developments concerning so-called fringe benefits magnify the relevance to employers of worker health and jeopardize the social values embodied in handicap-discrimination legislation. Employer contributions toward employee medical expenses are little more than fifty years old in the United States. Since World War II, employer participation in medical insurance has grown dramatically; and health insurance of some sort has become virtually the defining feature of "primary labor market" jobs. In 1984 U.S. employers spent more than $154.5 billion for health costs of civilian workers and dependents. One important reason is that although the U.S. enacted federal and state programs duplicating most of

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106 A related issue, needing a separate article, is the relationship between the fringe benefit system and family responsibilities. As to some fringe benefits, the employer accepts obligations for need-based payments to persons other than the employee. Often, medical benefits are provided on behalf of a spouse and children. What about a live-in homosexual partner? A cousin's child, "taken in" for humanitarian reasons? Child care is only the most pressing current example of the attempt to assign to employers economic responsibility for social needs that affect only some workers and only at certain stages of their working careers. The proposed federal pregnancy leave statute would permit leaves to care for an elderly relative. Consider also possible employer responsibility for long-term care and hospice care. The issue can be seen as one of redistributing total wages toward those who bear certain responsibilities or expenses. But expanded employer economic responsibilities of these sorts create conflict with the view that employers have no proper concern with (and perhaps no authority to know about) the private lives and living arrangements of employees.

107 See Diane M. Disney, The Development and Scope of Employment-Related Health Protections, for the Ford Foundation, Project: Employer Benefits and the Future of the Social Protection System, Florence Heller Graduate School, Brandeis University 64 (April 1987). The Chamber of Commerce estimated that in 1984 fringe benefits were 36.6% of total payroll costs. U.S. Chamber of Commerce, Employee Benefits Table 6-2 (1985). Id.
the social welfare agenda of northern European countries, it failed to create a program of national health insurance for non-poor citizens of working age and their dependents. Instead, we provide substantial income tax advantages for employer provision of such insurance. It was therefore efficient for workers of adequate income to take part of their salary in tax-exempt employer payments to medical insurers.

Payment of medical expenses has become a major cost for employers. As former Secretary of Health and Human Services Joseph Califano wryly observed, Chrysler Corporation pays more for employee medical benefits than it pays for steel. Payments on behalf of current workers account for much of that cost. Another large expense is payment toward medical costs of retirees. Companies concerned about such expenses inevitably seek to impose controls. The company that bears financial responsibility for the most intimate details of an employee’s life (abortion, pregnancy, smoking, mental health care) will have financial incentives to “manage” that employee’s life. Thus two late twentieth century trends collide: The expansion of principles of antidiscrimination

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108 Presumably there are three reasons why millions of low-wage workers do not have medical insurance. First, if their income is low enough and their state offers Medicaid coverage for low-income workers, they and the employer benefit by placing this cost on state and federal taxpayers. Second, low-income workers need cash so badly that they cannot divert their small hourly salaries to protection against medical contingencies, and they, therefore, must run the risk that service will be provided on a charitable basis or in some way eventually subsidized by taxpayers or by those who do have insurance. Third, since fringe benefits are not credited against the minimum wage, employers paying wages at or near the legal minimum cannot shift payments from salary to medical benefits.


110 Joan Vogel, Until Death Do Us Part: Vesting of Retiree Insurance, 9 Indus. Rel. L. J. 183 (1987). This cost is a large “time bomb” potentially affecting the balance sheets of many large firms. The tax laws that require funding for future pension costs discourage current funding for the health care expense of retirees. Yet companies are about to be required to show those expenses as a current liability. For one fascinating case showing the significance of this issue in a bankruptcy proceeding see In re Century Brass Products, Inc., 795 F.2d 265 (2d Cir. 1986).

111 See H.R. 925, 100th Cong., 1st Sess. in 133 Cong. Rec. H528 (Feb. 3, 1987), introduced by Rep. Patricia Schroeder, which would require unpaid pregnancy leave (at latest report reduced in congressional negotiations from sixteen weeks to ten weeks but still the subject of violently conflicting costs estimates from supporters and business opponents). Albert R. Karr, Panel Clears Bill Giving Unpaid Leave from Work to New Parents, Seriously Ill, Wall St. J. 12 (Nov. 18, 1987). Some of the discussion has included the question of whether enactment of the law will lead companies to seek ways to avoid hiring female employees who are likely to become pregnant.
and employee privacy, and the assignment to employers of financial responsibility for those private lives.\textsuperscript{112}

The risk is that employers will attempt to resolve their conflict by choosing not to employ those whose private lives will result in greater financial liability.\textsuperscript{113} To the extent that the employer's decision not to hire is motivated primarily by the desire to avoid financial/fringe benefit liability, it could be argued that plaintiffs have an alternative to the Rehabilitation Act as a source of legal redress: The Employee Retirement Income Security Act of 1974 (ERISA). ERISA is an amendment to the Internal Revenue Code that offers certain tax incentives to companies that provide fringe benefit programs to their employees. ERISA conditions the tax benefits on operation of the programs in compliance with detailed regulations. It seeks to assure that employers fulfill their promises to employees regarding benefits by requiring, among other things, full information, current funding, and accurate accounting.

There is language in Section 510 of ERISA\textsuperscript{114} which suggests relevance to the potential employee who has been denied a job because of possible future expense to the employer in the form of higher health and life insurance costs or workers' compensation premiums. Section 510 says:

\textsuperscript{112} Job mobility and marital instability present problems when the employer assumes long-lasting obligations—e.g., for retiree health insurance. Commentators have observed the irony of less permanent marriages and more permanent relationships with employers. See, for example, Mary Ann Glendon, The New Family and the New Property 1 and 152-53 (1981).

Martin Rein, collaborating with Lisa Peattie, Lee Rainwater, and others, has explored patterns of assigning the social protection function among families, employers, and government. In each instance, the institution that accepts responsibility imposes duties and obligations. The institution also obtains information and (it can be asserted) infringes on privacy and liberty. The right question may be the extent to which our liberty is curtailed by family, by employer, by government or, almost inevitably, by some combination of all three. See Lee Rainwater, Martin Rein, and Joseph Schwartz, Income Packaging in the Welfare State (1986); Martin Rein and Lee Rainwater, From Welfare State to Welfare Society: Some Unresolved Issues in Assessment (1981); Martin Rein and Lee Rainwater, eds., Public/Private Interplay in Social Protection: A Comparative Study (1986); and Lisa Peattie and Martin Rein, Women's Claims: A Study in Political Economy (1983).

\textsuperscript{113} With respect to AIDS, employers worry that new treatments may mean that patients live longer but cannot work and also that new drugs may be very expensive.

\textsuperscript{114} On Section 510 as usually applied—to protect current workers from employer actions intended to prevent them from taking advantage of benefit programs—see Joan Vogel, Containing Medical and Disability Costs by Cutting Unhealthy Employees: Does Section 510 of ERISA Provide a Remedy?, 62 Notre Dame L. Rev. 1024, 1060-61 (1987). Of course the ERISA bar to firing an employee who becomes a heavy burden on fringe benefit costs may encourage employers to attempt to avoid hiring such workers. ERISA is unclear about when an employer can terminate a benefit program because it is becoming too expensive.
It shall be unlawful for any person to . . . discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of any employer benefit plan . . . or for the purpose of interfering with . . . any right to which such participant may become entitled.116

"Discriminate against" and "may become entitled" suggest that bringing suit under this section of ERISA would be the appropriate form of redress for applicants whom employers reject due to the future liability the applicants represent.116 This language, however, is misleading. ERISA does not say that American workers must get pension, medical, or other benefits. (European statutes, beginning with Bismarck's invention of the modern welfare state, usually do so provide). ERISA makes no redistribution to low-wage workers.117 Rather, it offers various forms of federal protection to better-off workers who have the bargaining power to obtain benefit promises.

A survey of the appellate cases that interpret Section 510 reveals only suits brought by current or, most often, discharged employees who lost their benefits or their jobs and now seek compensation. In one leading case, the provision was the basis for a large damages award against Marriott Corporation, when a jury found that the company dismissed a manager because it learned he had acquired multiple sclerosis and wished to avoid the health insurance consequences.118 However, it is unlikely that Section 510 will be applied to discrimination against job applicants. The Sixth Circuit found the purpose of Section 510, as revealed in its legislative history, to be "preventing unscrupulous employers from discharging or harassing their employees in order to keep them from obtaining vested pension rights."119 The court concluded that the "discrimination, to violate Section 510, must affect the individual's employment relationship in some substantial way."120 Although one might argue that refusing to hire someone affects that person's employment relationship (before it begins), the preceding state-

116 But other language in the section—"participant or beneficiary" and "employee benefit plan"—implies that the cause of action and subsequent relief are available only to the individual who has already crossed the hiring hurdle. Id.
117 But see the discrimination provisions in ERISA that protect lower-paid employees against pension plan discrimination in favor of higher-paid workers. 26 U.S.C. sec. 410(b)(1).
120 Id. at 245-46.
ment of the purpose of this section of the Act belies such an interpretation. Indeed the notion of an employment relationship itself implies that the employee and employer have already made an initial connection and that they will continue to have contact in an ongoing fashion.

In addition, the language in Section 510 about rights to which participants may become entitled, as applied by the courts, does not apply to the pre-employment discrimination context. Rather, the distinction that courts have addressed is that between probationary or junior employees who have not yet qualified for benefits and senior employees who have qualified for participation.\(^\text{121}\)

Thus ERISA—so committed to protecting promised and “accrued” benefits—is an unlikely vehicle for banning discrimination against applicants who are predicted to become heavy users of the benefit system.\(^\text{122}\) With the Rehabilitation Act and ERISA giving ambiguous guidance, several states have enacted legislation restricting employer discretion in hiring. Laws in Massachusetts and Wisconsin say that an employer may not require an AIDS test as a condition of employment.\(^\text{123}\) California and Florida statutes prohibit the use of such tests to determine an applicant’s “suitability for employment.”\(^\text{124}\) The broadest statute appears to be that of

\(^{121}\)See Kross v. Western Elec. Co., Inc., 701 F.2d 1238, 1243 (7th Cir. 1983); Garry v. TRW, Inc., 603 F. Supp. 157, 162 (N.D. Ohio 1985) (discussion of vested versus nonvested retirement benefits with respect to current employees only).

\(^{122}\)The contrary argument would take this shape: ERISA requires no benefits. But if a company decides to give benefits, it should not be able to pick and choose among new workers according to whether they will use the benefits. Just as the Pregnancy Discrimination Act of 1978, 42 U.S.C. sec. 2000e(k), said a company cannot have a disability benefit that omits one disabling event—pregnancy—that occurs only in women, so ERISA (or some amended ERISA) should tell employers that they must devise a benefit program that they are willing to make available to all potential employees. The argument returns attention to the issue that runs throughout this paper: Should we have a principle of non-discrimination according to predicted future health? Is it wrong to have a benefit program for current workers but then endeavor to choose employees who will not seek to use the program? The Pregnancy Discrimination Act, after all, came after a general commitment against discrimination on the basis of sex. We have not yet decided to ban discrimination in favor of the now-and-future healthy.

On the political significance of the groupings that we permit insurance companies to make, see Stone, The Disabled State (cited in note 27). See also Mark Scherzer, Insurance, in Harlan L. Dalton and Scott Burris, eds., AIDS and the Law: A Guide for the Public 185 (1987), suggesting that if an AIDS test cannot be considered by a life insurer, those testing positive will have an incentive to buy a large amount of insurance and at least leave a substantial estate. Scherzer raises the possibility of offering health insurance to those who test positive at a higher premium.


New Jersey, which makes it unlawful to "refuse to hire or employ or to bar or to discharge ... or to discriminate against [an] individual" on the basis of any "atypical hereditary cellular or blood trait." As genetic explanations for human behavior multiply, New Jersey's law will require definition. Does it prevent a decision not to hire someone because of the individual's low intelligence?

Ironically, ERISA, along with other state and federal statutes that encourage or mandate employer provision of health benefits and thus increase the cost to employers of future illness, may actually create an incentive for employers to engage in discrimination against those they were designed to protect. One difficulty with banning certain types of discrimination is that employers look for second-best ways to maximize profits. Massachusetts has banned discrimination in worker selection on the basis of a positive test for exposure to the AIDS virus. At the close of its 1987 session the Massachusetts legislature rejected legislation, supported by Governor Dukakis, to ban discrimination on the basis of sexual preference. It is certainly not impossible that some employers, barred from refusing applicants who test positive, instead will seek to keep all gay men from their workforces.

IV. Conclusion

Government is accelerating the imminence of conflict between our commitment to worker liberty and our desire to make employers pay for worker health expenses. On one hand, it enacts laws expanding worker privacy and liberty, and telling employers to back off. On the other hand, it imposes new responsibilities on employers for larger aspects of worker life. There is an anomaly, and

Annot. sec. 381.606(5) (West 1986). The Florida statute is broader, banning all "serologic" tests. Laws in several southern states ban use by employers of a pre-employment screen for the sickle cell trait. See, for example, Fla. Stat. Annot. sec. 448.075 (West 1981).


See note 123 above.

This is discussed in Scherzer, Insurance (cited in note 122). Scherzer's conclusion is that fear of the cost of AIDS will result in refusal of jobs to the smallest size unit on which it is possible to get relevant facts and legally discriminate. If discrimination on the basis of the AIDS test is banned, says Scherzer, employers will refuse jobs to gay males. If that is banned, they may refuse jobs to males between 20 and 40. Scherzer found actual company policies to refuse jobs to persons who have gained or lost 10 pounds in a recent period and to persons who have worked as florists. Id. at 197. The National Institute of Insurance Commissioners, in 1986 guidelines, recommended that insurers be forbidden from asking if an applicant is homosexual but permitted to test for AIDS. Seven states have adopted these recommendations. James Kim, The Quandary of AIDS and Insurance, N.Y. Times sec. 4, 7 (Jan. 24, 1988).
perhaps even an irresponsibility, in government decisions that assert budgetary restraint while giving workers new benefits for which employers must pay.\textsuperscript{128} Congress shies from the budgetary significance of national health insurance.\textsuperscript{129} It also fears (with Medicare and Medicaid as its relevant history) that a government-managed insurance program will have difficulty restricting costs.\textsuperscript{130} It therefore considers mandating employer-paid insurance.\textsuperscript{131} The sponsors believe that incentives for employer cost control are a desirable feature. But employer consciousness of costs entails employer concern for the medically-relevant details of employee characteristics and employee life-styles.\textsuperscript{132} The clash of goals is

\textsuperscript{128} I do not address here the question whether it is possible for Congress or a legislature, by imposing mandatory costs on an employer for employee benefits, to redistribute total wealth from capital to labor. To some degree such redistribution may occur. What is clear is that many elected law-makers have not wanted to describe their purposes in that way and so may well choose methods that are inefficient or ineffective.

\textsuperscript{129} Recent efforts to slow the rise in health care costs have had limited success. Health expenses climbed from 9.1\% of GNP in 1980 to 11.3\% in 1987 and may exceed 13\% in 1992. Frank E. James, Medical Expenses Resist Controls and Keep Going One Way: Higher, Wall St. J. 41 (Sept. 29, 1987).

\textsuperscript{130} See Roger Ricklefs, Firms Turn to “Case Management” to Bring Down Health-Care Costs, Wall St. J. 21 (Dec. 30, 1987).

\textsuperscript{131} Senator Kennedy’s bill is S. 1265, 100th Cong., 1st Sess. in 133 Cong. Rec. S7055 (May 21, 1987). It would require employers to provide a specified package of health insurance to all employees who work 17\\frac{1}{2} hours per week and to their “dependents.” One estimate of the cost is $1,000 per employee per year. Cong. Q. Weekly Rep. 1081 (May 23, 1987). Senator Kennedy’s own cost estimate is 45 cents per hour as an “average cost... per employee.” Id. The point of this paper is that many job applicants are not “average.” See also the new Massachusetts law mandating employer-provided health insurance, Robin Toner, Health Insurance and Political Hoopla, N.Y. Times sec. A, 16 (Apr. 22, 1988). One difference between mandated protection for employees and a national program is coverage for non-workers. The Kennedy and Dukakis approaches would continue the separation between the health-benefits situation of workers and the situation of those supported by income-transfer programs. Social Security, our great example of an inclusive program holding broad public support as it lifts millions above the poverty line, is the example rarely followed in later programs. As one example of the need and the problem, consider the recent study by the Alan Guttmacher Institute reporting that more than 500,000 women have babies each year without maternity insurance. Twenty-six percent of women of reproductive age have no insurance coverage for maternity care. The average hospital bill for child-birth is $4,300. The average cost of an extremely premature birth is $27,000. Study: 555,000 Pregnant Women Lack Insurance, Boston Globe 2 (Dec. 16, 1987).

\textsuperscript{132} One report says that 1\% of employees account for 22\% of health-care costs and 5.6\% account for half of these costs. Ricklefs, Firms Turn to “Case Management,” Wall St. J. 21 (cited in note 130). As the significance of health-care costs rises, companies will inevitably consider selecting workers so as to avoid the 1\% or the 5.6\%. Massachusetts, concerned over the expense of benefits for police, fire, and corrections officers who became disabled, has enacted a new law banning the hiring of smokers by local police and fire departments. 41 Annot. Laws of Mass. sec. 101A (Lawyers Co-Operative Supp. 1988). (The problem is that these workers automatically receive higher pension benefits if they have heart and lung ailments.) A challenge under the federal Rehabilitation Act seems inevitable.
inevitable.

It is not impossible to mediate these concerns. Imagine first a discounted cashed-out calculation of health risk. AIDS-positive: X dollars. Smoker: Y dollars. Genetically predicted likelihood of schizophrenia: Z dollars. The employee could be told to pay that price to get the job (with its medical insurance); or an income transfer program could redistribute from those predicted healthy to pay the extra costs. Alternatively, government could create a secondary pool for persons posing substantial risk, so that employers would be able to transfer the excess risk of hiring them to a broader population.133 As a specific example, imagine a program assuming national responsibility for the medical costs resulting from AIDS.134 We can be sure that if costs are placed on employers, there will be real enforcement difficulties with the attempt through law to coerce those employers to be uninfluenced in their hiring decisions by the possibility the costs will arise.

The message of this paper is simple. Our systems for regulating the employment relationship and for providing social welfare protections have become very complicated. As we consider such major new steps as mandated employer-provided health insurance and confront such dramatic new challenges as AIDS and genetic

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133 Fifteen states have health insurance pools for high-risk consumers. Premiums are very high. James Kim, The Quandary of AIDS and Insurance, N.Y. Times, sec. 4 at 7 (Jan. 24, 1988). Appropriate analogies include workers compensation “second injury” funds, auto insurance assigned-risk pools, and Congressman Stark’s legislation, H.R. 3441, 100th Cong., 1st Sess. in 133 Cong. Rec. H8307 (Oct.7, 1987). See also the discussion of state health insurance pools for high-risk individuals, Robert Pear, States Act to Provide Health Care Benefits to Uninsured People, N.Y. Times sec. 1, 1, 44 (Nov. 22, 1987). See Letter by Charles Weller, Wall St. J. 31 (Nov. 19, 1987), asserting that the “medically uninsurable” group might be 1 percent of the U.S. population, and if their expenses are $16,000 per year, the cost of the Stark program would be $40 billion. The correct reply is that if so this is a current cost to U.S. society, and thus the only question is how to allocate the cost. The Stark proposal is very interesting. High-risk individuals would be assured coverage for no more than 150% of “the average individual standard risk policy sold in the state for comparable coverage.” If the pool operated at a loss, which is likely if many persons presenting high risks chose to enroll, costs would be assessed “equitably” to all employers in the state. Thus this is a program for distributing among most workers the unusual risk of medical benefits presented by some. And of course the sponsoring legislators can say they have not raised taxes because the assessment on employers is not called a tax.

predictions of future disease we should attend to the entire structure of our arrangements.