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Rationing in the Time of COVID and the Perils of Anti-Subordination Rhetoric

Mark Kelman*

Abstract

With surges in COVID-19 cases threatening to overload some hospital facilities, we must face the possibility that therapeutic treatments will need to be rationed, at least in some places. I do not propose any particular ideal rationing scheme but caution strongly against adopting a position that Professor Bagenstos advocated this past spring, rejecting rationing on the basis of patient life expectancy simply because life expectancy based rationing might threaten the factual interests of those with disabilities and might conceivably be implemented by those making judgments that were not simply inaccurate but grounded in biased, unacceptably discriminatory intuitions that some decision makers would have about the life expectancy of those with disabilities. My view is that Professor Bagenstos does not make either considered normative or empirical arguments that attending to the factual interests of those with disabilities or protecting against the possibility of discriminatory implementation of a plan should trump all other considerations; instead, he is “performing” his rhetorical commitment to a subordinated community as though that commitment functioned in the same way as a formal, normatively and factually defended side constraint on action would function.

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As hospitals in different regions once more face a crush of COVID cases, the possibility of needing to ration ICU care (or ventilators, or, more plausibly, scarce but promising therapeutics) that was mooted this past spring in Yale Law Journal's online forum¹ is arising once again.² Of course, it would be ideal if all patients who could benefit from the treatment that would most likely be maximally efficacious for that patient could receive it, whether at the hospital nearest them or by being transported to a less stressed facility, but care rationing may either be essentially unavoidable (we cannot move all the patients who overstress a particular facility to a less overburdened one in a timely fashion) or be seen, by at least some observers, as ethically justified (because the resources that would be spent getting a patient maximally efficacious care might better be devoted to other life-saving projects or social projects thought more worthy than extending life, or increasing the low probability of survival in the way it would be extended or increased for the particular patient).³

Figuring out how best to ration scarce medical care is enormously difficult, and I have no faith that any scheme one might propose would be the best one. What I do have faith in is that the way that Professor Bagenstos approached the problem in his spring commentary rejecting schemes of the sort that

1. See generally Samuel R. Bagenstos, *Who Gets the Ventilator? Disability Discrimination in COVID-19 Medical-Rationing Protocols*, 130 YALE L.J.F. 1 (2020); Govind Persad, *Disability Law and the Case for Evidence-Based Triage in a Pandemic*, 130 YALE L.J.F. 26 (2020).

2. Health officials in Utah predicted in late October that they would need to ration care within a week if hospitalizations continued to spike, noting that their protocols suggested allocating care to those more likely to survive COVID if cared for. See Erin Alberty and Sean P. Means, *Utah's hospitals prepare to ration care as a record number of coronavirus patients flood their ICUs*, SALT LAKE TRIB. (Oct. 25, 2020), <https://perma.cc/NMQ9-YSTQ> ("With new coronavirus cases shattering records on a daily basis, Utah's hospitals are expected to begin rationing care in a week or two."). Age might be used as a proxy for survival likelihood, but there is no suggestion that if two patients were equally (un)likely to survive COVID, the hospital would allocate care to the person whose life expectancy was otherwise shorter. See *id.* (summarizing the four-step process that Utah health officials will follow if the state needs to ration ICU resources).

3. A very thoughtful defense of the idea that it is improper to spend limitless amounts on any particular life-saving venture is made in Barbara H. Fried, *What Does Matter? The Case for Killing the Trolley Problem (Or Letting It Die)*, 62 PHIL. Q. 505, 509–17 (2012).

Professor Persad proposed that account for the life expectancy of patients is a very bad way to approach it.⁴

Professors Bagenstos and Persad agree on many key points: one could legally (given each author's view of current law) and legitimately (given each author's preferred normative scheme) choose to allocate a scarce ventilator (or presumably whatever scarce resources we now feel are effective in treating the disease) to *X* rather than *Y* if *Y* would either not benefit at all from the resource (i.e., the treatment itself would be inefficacious⁵) or would die in the very short run regardless of whether he received the ventilator (i.e., *Y* is terminally ill).⁶ They also agree that it would be inappropriate to weigh the *quality* of each patient's remaining life years if we do think that life expectancy is relevant at all, believing that "able bodied" decision makers will systematically underestimate the quality

4. See Bagenstos, *supra* note 1, at 18–20 (explaining the problems inherent to Professor Persad's "quantity-of-life" rationing approach).

5. Each author seems to treat inefficacy in a more binary fashion than I would, but neither is explicit about his view on this issue: it might well be the case that *Y could* benefit from the treatment but that the probability that he would is much lower than the probability that *X* would. Since Bagenstos seems to treat rationing decisions based on current efficacy of treatment as presumptively legitimate, I take him to accept that *X* has a claim to treatment if an unprejudiced clinician would determine that it is (significantly?) more likely that the treatment will succeed for him than for *Y*.

Bagenstos does not address a related (and important) problem that I also largely leave aside although I hope readers will see the relevance of some of the discussion in this essay to this problem: What do we do if we can treat disabled patients as successfully as we treat non-disabled patients only if we devote more resources to their treatment so that, under certain circumstances, treating a single disabled patient might preclude the treatment of two, rather than one, non-disabled patients? For further discussion, see especially *infra* note 35. Persad does address this issue, arguing briefly that hospitals can justifiably devote resources to a patient who requires fewer resources in order to make more resources available to others. Persad, *supra* note 1, at 36–37.

6. See Bagenstos, *supra* note 1, at 4 (explaining that it may be permissible to ration "where an individual's underlying disability makes the individual unable to benefit from coronavirus treatment—either because that disability interferes with the treatment itself, or because the underlying disability will kill the individual in the very near term regardless of the treatment's success in addressing the virus"). Persad believes this sort of rationing scheme—which he dubs "minimal triage"—is insufficient, but he does not seem to oppose it. Persad, *supra* note 1, at 28.

of life that people with “disabilities” actually experience.⁷ And they agree that one cannot use disability status directly to make

7. Compare Bagenstos, *supra* note 1, at 4 (“[A] proper interpretation of the law requires assurances that such imminent-death determinations will be made based on the best available objective evidence, free from bias against people with disabilities or devaluation of their lives.”), with Persad, *supra* note 1, at 30 (“I likewise agree . . . that quality-of-life judgments are likely to incorporate unjust biases that preclude their use in pandemic triage.”). Bagenstos has written in the past that non-disabled actors will judge the quality of life of those with disabilities by reference to their aversion to becoming disabled. See Samuel R. Bagenstos and Margo Schlanger, *Hedonic Damages, Hedonic Adaptation, and Disability*, 60 VAND. L. REV. 745, 769 (2007) (explaining that people without disabilities “tend to believe that disability inevitably has a very negative effect on the enjoyment and quality of one’s life”). These *ex ante* preferences to avoid disability, though, unduly ignore hedonic adaptation—the tendency that people have to return to the same mildly positive hedonic state after either good events, which improve one’s overall hedonic state less than people expect, or bad ones, which have fewer negative hedonic consequences than people anticipate. *Id.* at 761–69 (summarizing the existing literature that establishes that people with disabilities experience a higher-than-expected level of happiness). Because those without disabilities improperly assess the quality of life enjoyed by those who are disabled (and because treating becoming disabled as “tragic” reinforces destructive views that disability is a problem that inheres in the disabled individual rather than the failure of the community generally to accommodate those with different abilities), jurors should be forbidden to award hedonic damages to those who have suffered disabling injuries. *Id.* at 797 (“Incorporating the views of people without disabilities in the law distracts attention from the social choices that attach disadvantage to disability, and it may itself inflict hedonic harm on people with disabilities.”).

I agree with both Professors Bagenstos and Persad that rationing COVID treatment resources by reference to QALY (quality adjusted life years) is problematic. I do so in part because the actual experiences of people with disabilities will likely not be properly heard and accounted for by those bureaucrats charged with measuring the quality of experience and in part because I am not convinced that anything that any single one of us (or a collective body made up of people with particular views of what made life of higher quality) would dub a “higher quality” life (unlike “years of life”) is what John Rawls would have called a “primary good,” a good that anyone would want regardless of her particular aims. (To be alive rather than not alive — that is, having *more* life—is something that permits anyone to meet whatever particular aims she has during the period she is alive. On the other hand, not everyone will think it is advantageous to have an additional year of what someone else calls a higher quality life than another year of what you yourself believe to be a higher quality experience.) See JOHN RAWLS, A THEORY OF JUSTICE 92 (1971) (explaining that primary goods are “things which it is supposed a rational man wants whatever else he wants”). Having said that, I should note that I think that Bagenstos misuses what is itself a quite

rationing decisions, even if one were doing so believing it was a proxy for shorter life expectancy (rather than manifesting even more clearly impermissible animus towards those with disabilities or dismissal of the value of their lives).⁸

problematic literature on hedonic adaption in his attack on assessing the experience of those with disabilities. I briefly explore some of the problems with the claim in the conventional literature on hedonic adaptation that becoming disabled does not adversely impact subjectively experienced welfare levels in Mark Kelman, *Hard Choices and Deficient Choosers*, 14 NW. J.L. & SOC. POL'Y 191, 213–20 (2019) and explore the problems at more length in Mark Kelman, *Injuries* ch. 3 (2020) (unpublished manuscript) (on file with author). The hedonic adaptation literature is also critiqued in Rick Swedloff & Peter H. Huang, *Tort Damages and the New Science of Happiness*, 85 IND. L.J. 553, 564–67 (2010).

8. See Bagenstos, *supra* note 1, at 3–4 (arguing that “disability-based distinctions” in rationing violate the law). Persad also argues that decision makers are required to make individualized judgments about life expectancy, rather than relying on (even true) generalizations about the traits of members of subordinated groups. See Persad, *supra* note 1, at 31–32 (proposing that decision makers should employ “medically relevant information” and exclude irrelevant factors like disability status); *id.* at 48

[E]vidence-based triage involves individualized determinations, not categorical denial of treatment to cystic fibrosis patients [a group of disabled patients that Bagenstos had discussed]. . . . [D]enying lifesaving treatment to the cystic fibrosis patients whose disability *makes them comparatively unlikely to benefit* could save more patients with cystic fibrosis *who are nevertheless likely to benefit*. This outcome is achievable under evidence-based triage, which considers individualized evidence about benefit

Early on in employment discrimination law, employers were quite appropriately forbidden to rely on true generalizations about the job-relevant traits of members of the plaintiff class when they could instead make more individualized assessments: thus, for instance, the fact that women as a group might possess less of the upper body strength relevant to a particular job did not permit them to refuse to hire women, rather than administer strength tests to each applicant. See, e.g., *Weeks v. S. Bell Tel. & Tel. Co.*, 408 F.2d 228, 235–36 (5th Cir. 1969) (rejecting the employer’s argument that the court should assume “on the basis of a ‘stereotyped characterization’ that few or no women can safely lift 30 pounds, while all men are treated as if they can”); *Mitchell v. Mid-Continent Spring Co.*, 583 F.2d 275, 280–81 (6th Cir. 1978)

Even a bona fide lifting requirement cannot be implemented by the blanket exclusion of all females. Rather, it may be implemented only by a valid test measuring strength directly. Regardless of the difficulty of measuring individual characteristics, Title VII prohibits the use of popular stereotypes or even statistical data to “attribute general group characteristics to each individual member of the group.” (citations omitted).

Bagenstos hints, albeit rather vaguely, at an additional argument that I believe Persad would reject. He believes it might well be ethically (and legally?) required to reject any explicit rationing scheme (and move to a lottery system which is somehow viewed as something other than explicit or reason-based rationing?) because the observed shortages of medical resources (and the concomitant need for rationing) were generated through a political process in which people with disabilities have less political power than they would have in a system in which political power were appropriately distributed.⁹ Alternatively, Bagenstos might merely be claiming that one reason we should be especially wary of any rationing scheme which harms the interests of people with disabilities is that they were underrepresented in the political decision making process, both in selecting a rationing scheme and in establishing health care systems that determine the need for rationing.¹⁰

What makes this case a bit more difficult is that it is not clear that there are any reasonable individualized predictors of life expectancy that do not rely on, or at least account for, disability status. More generally, life *expectancy*, unlike lifting strength, can never be simply be currently observed: it is inevitably a prediction based on other observable facts. And to follow up on Persad's example, it is unlikely that we would conclude that a particular patient who has cystic fibrosis has an atypically short life expectancy without attending to and accounting for the fact that he has cystic fibrosis.

9. See Bagenstos, *supra* note 1, at 11 (explaining the questionable legitimacy of a rationing process that “place[s] the burden of resource scarcity on disabled individuals – the very individuals who are most likely to have been excluded from such decisions”); see also *id.* at 13

The perceived need to deny ventilators to coronavirus patients with pre-existing disabilities results not from scarcity as a natural fact, but from two societal decisions: first, the decision to fail to maintain an adequate stock of ventilators to serve all patients who would need them if a pandemic breaks out; second, the decision, once a pandemic breaks out, to use patients' pre-existing disabilities as a basis for denying them the use of those devices. A process in which people with disabilities were equally represented vis-à-vis the nondisabled, and in which the interests of both groups were given equal concern, would not lead to both of these decisions. An equal process might instead have chosen to obviate the second decision by maintaining a sufficient stock of ventilators to serve every patient in the event of a pandemic.

10. It is not as clear as would be ideal what Bagenstos means when he claims that people with disabilities (all? a particular subset?) lack appropriate political power in recent years. See Bagenstos, *supra* note 1, at 10 (“People

The (possible) claim that all political decisions are legally impermissible, full stop, if they adversely affect a group that had too little power in making the decision or, even more broadly, in making decisions that impacted the perceived need to make the particular decision is breathtaking, and not in the good sense. I take it as given that Blacks as a group are adversely impacted by many state legislative decisions setting criminal penalty levels, and that they neither have adequate influence over these particular decisions nor decisions, e.g., about how to allocate educational funds, that doubtless indirectly impact the perceived need for harsh criminal penalties by creating conditions in which, say, more people of color have reduced non-criminal economic opportunities.¹¹ It is one thing to say that the democratic provenance of a state action is relevant in assessing its legitimacy and quite another to adopt a lexical, non-compensatory scheme¹² in which the recognition that a

with disabilities have faced a long history of exclusion from democratic participation.”). I assume he might be echoing conventional concerns that they have less power than their numbers would suggest they should have because they find it atypically difficult to form coalitions with others or that others attend less to their interests than they would attend to the interests of non-disabled fellow citizens. *See id.* (characterizing the lack of political power as “exclusion [that] has resulted from an accumulation of decisions that made it impossible for many disabled people to have access to the political process”). I will take it as true for argument’s sake that the disabled community still lacks “appropriate” levels of political power, though I am not sure this is really true: GOP members of Congress who have tended to be generally restrictive in enacting both civil rights-protective measures and regulatory measures (like accommodation requirements) that mandate costly business practices nonetheless voted overwhelmingly for the Americans with Disabilities Act, though they have been much more prone than Democrats in the past two decades to seek to roll ADA protections back. *See, e.g.,* Brian Beutler, *Would Republicans Support the Americans with Disabilities Act Today?*, NEW REPUBLIC (July 27, 2015), <https://perma.cc/9BMM-CN8> (explaining that ADA was a “point of extraordinary consensus” at the time of enactment but that it “could fail in Congress[] if it were introduced as new legislation today”).

11. *See* David A. Lieb, *Divided America: Minorities Missing in Many Legislatures*, ASSOCIATED PRESS (June 16, 2016), <https://perma.cc/Y86E-PX2K> (describing minority underrepresentation in state legislatures and its “real-life consequences” across a variety of issues).

12. The easiest way to think about what a lexical decision-making scheme entails is to consider how we compare the size of two numbers: when judging whether one number is larger than another, we make the decision lexically. If number N has more thousands, the fact that another number N has more

political outcome might have been different had all subordinated groups been adequately empowered ends all further inquiry into the permissibility of the outcome. Adequate, fulsome representation has, quite justifiably, never been treated as something akin to a side-constraint on legitimate policy formation.

Throughout this piece, I emphasize the ways in which Bagenstos uses various undefended non-compensatory/lexical or side-constraint schemes. My claim is that he does not really argue that lexical views are appropriate in this case; instead, he “performs” some imprecisely-defined “support for the subordinated” as a quasi-lexical trump,¹³ and this

hundreds or tens or ones is of no moment. (4,123 is larger than 3,999 because $4 > 3$!). Domination along one dimension obviates the need to consider further factors.

Decision-making schemes are conventionally dubbed non-compensatory when it is the case that the presence of a good feature or several defined good features cannot be outweighed or compensated for by the presence of bad features (or that the presence of a bad feature or features cannot be compensated for by the presence of good features). For a discussion of non-compensatory cognitive processes, generally, skeptical of the descriptive claim made by some psychologists that people in fact make both *judgments* of fact and *decisions* about what option best serves their interests in a non-compensatory way, see MARK KELMAN, THE HEURISTICS DEBATE 8, 66, 104–12, 121–24, 172–74 (2011).

13. I leave aside several important issues as well as a more trivial one. *If* one decides that one can resolve any dispute by “siding with the subordinated,” one certainly need not believe that in each dyadic dispute the representative of the more subordinated community must prevail: *no one* as far as I know thinks that a Black defendant in a lawsuit should inevitably prevail by virtue of his subordination against a straight white male plaintiff without regard to further facts about the suit. That point seems trivial.

But it is a much harder question to know both how one resolves disputes in which each side is at least arguably subordinated and yet has clashing interests: for instance, does this rubric help us when we try to resolve a dispute over the propriety of disciplining a student with a behavior-affecting disability who claims that his harassment of his female classmates is a manifestation of his disability? Do we fix on the disabled student’s subordinated status or the female student’s? For a discussion of formal law and local practice protecting, to an uncertain extent, students with disabilities from being disciplined when they violate behavior codes, see MARK KELMAN & GILLIAN LESTER, JUMPING THE QUEUE 60–63, 102–11 (1997). It is also a harder question whether it is a good thing to make legal rights or quasi-entitlements turn on painting oneself or one’s group as subordinated: there are plainly problems worth considering with incentivizing a culture of victimization. *See*

non-compensatory scheme improperly displaces a fuller consideration of the virtues and flaws of distinct policy proposals.

Persad and Bagenstos most explicitly disagree on one key point, of course: Persad, but not Bagenstos, believes one could legitimately choose to give *X* rather than *Y* scarce life-saving resources if her life expectancy were longer, even if the use of life expectancy-based triage methods would disadvantage *Y* owing to her disability in the sense that her life expectancy is lower because of her disability and could disadvantage people with disabilities generally if their life expectancies are lower.¹⁴ Bagenstos never explicitly argues either that life expectancy is an irrelevant, impermissible criterion (though he does note that he does not think there would be universal agreement that it *is* relevant)¹⁵ or that policies with disparate impact on a protected group, as the use of the life expectancy criterion would likely have, are invalid *per se*, even if group membership is statistically associated with a relevant criterion.

But it is genuinely hard to tell what Bagenstos is claiming here. There is, of course, no version of disparate impact law that holds a practice invalid simply because members of a protected group receive fewer benefits or bear more costs than they would if the practice were not used: we always ask whether the practice is justified, whether it meets a legitimate end.¹⁶

MARK KELMAN, *WHAT IS IN A NAME?* 72–88 (2019) (discussing claims made by religiously observant parties to be exempt from secular laws designed to, among other goals, decrease discrimination and by politically progressive students to coach demands to change the ideological content of their courses in antidiscrimination language).

14. Compare Bagenstos, *supra* note 1, at 18–20 (criticizing Professor Persad’s use of “quantity-of-life” rationing criteria), with Persad, *supra* note 1, at 39 (explaining that “the law permits evidence-based medical judgments[,]” which includes “consideration of disabilities that limit lifespan,” “even when [those judgments] disadvantage patients with certain disabilities”).

15. See Bagenstos, *supra* note 1, at 17 (“Society does not, of course, universally endorse expected number of years of survival as a basis for discrimination in the provision of life-saving treatment.”).

16. Naturally, both burdens of production and proof might be allocated in different ways, and the allocation of these burdens might impact the likelihood that a party who wishes to use a practice with disparate impact would in fact be able to sustain the claim that the practice is indeed acceptable. See, e.g., 42 U.S.C. § 2000e-2(e) (permitting employment discrimination when it

Occupational qualifications might exclude members of a protected group at high rates if members of the group typically lacked such qualifications but would nonetheless be permissible if they are correlated with actual on-the-job performance.¹⁷ Similarly, plaintiffs' attorneys attacking, say, discrimination in the administration of the death penalty do not merely ask whether Black defendants are sentenced to death at higher rates than non-Black defendants but ask whether they are sentenced at higher rates when they do not differ along dimensions relevant to sentencing.¹⁸ If I am right that Bagenstos does accept that significant differences in the probability that treatment will be efficacious are legitimate bases for allocating treatment, then he too accepts that people

constitutes "a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise").

17. The canonical statements come from the first Title VII case expounding the disparate impact theory:

The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes [*sic*] cannot be shown to be related to job performance, the practice is prohibited. . . . Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance.

Griggs v. Duke Power Co., 401 U.S. 424, 431, 436 (1971). Bagenstos of course acknowledges this basic conceptual point in his essay, both in discussing job qualifications and qualifications for receiving medical care. See Bagenstos, *supra* note 1, at 8

To be sure, an individual's disability may make it impossible or impracticable for them to satisfy certain eligibility criteria, even if the criteria are defined with no reference to disability. For example, a state may legitimately demand that bus drivers operate their vehicles safely; with current technology, blindness is simply inconsistent with that requirement. Safe operation of motor vehicles is an interest that can be defined without any reference to disability. The recognition that some disabilities, given the current state of technology, are simply incompatible with that interest reflects a simple and uncontroversial empirical judgment.

18. For a description of such a study, used in litigation challenging the death penalty in Connecticut, see generally John J. Donohue III, *An Empirical Evaluation of the Connecticut Death Penalty System Since 1973: Are There Unlawful Racial, Gender, and Geographic Disparities?* 11 J. EMPIRICAL LEGAL STUD. 637 (2014).

with disabilities might legitimately be disadvantaged by COVID care rationing schemes. For instance, people with Down Syndrome are ten times more likely to die from COVID: while the data does not yet fully clarify the extent to which the higher incidence is a result of a greater risk of contracting COVID or greater risk of dying from it, the latter appears to be a significant factor.¹⁹

And it is not clear at all what traction Bagenstos thinks he gets from noting that there is no universal agreement that allocating scarce resources to those likely to live longest is the best rationing scheme.²⁰ There is no universal agreement that longer prison terms, which disproportionately impact a protected group, are ideal policy either, but we obviously do not characterize all controversial practices with adverse impact as impermissibly discriminatory, even if we might believe it appropriate in evaluating a policy that it did not enjoy universal support (a minus) and had disparate impact (a clear minus as well).

The question of when (if ever) it is appropriate to treat the violation of an interest—whether an individual’s “right” or a group’s interest in equality or greater degrees of social inclusion or the commitment to the use of a particular decision-making procedure—as obviating the need to analyze the fuller range of consequences that will result if the interest is violated is obviously a hugely charged political issue. One of many versions of the battle between deontologists and utilitarian consequentialists concerns the propriety of harming one individual to benefit others when the harm to that individual is (arguably) impermissible given some robust theory of inviolable side-constraining rights: we typically teach people about such controversies by asking them to consider whether it is permissible to convict a person one knows is innocent if the effects of the conviction (e.g., in deterring future crimes) are adequately propitious, or whether one can shoot an innocent

19. See Mary Van Beusekom, *Down Syndrome Tied to 10 Times the Risk of COVID-19 Death*, U. MINN. CTR. FOR INFECTIOUS DISEASE RSCH. & POL’Y (Oct. 22, 2020), <https://perma.cc/8YHQ-L2ZM> (assessing whether the “the abnormal immune responses, congenital heart disease, and lung abnormalities common in people who have the syndrome could be risk factors for severe COVID-19 illness”).

20. See *supra* note 15 and accompanying text.

person at the command of a madman who credibly threatens to kill five other innocents if one doesn't,²¹ or whether it is justifiable to push some mythical Fat Man to his death on a mythical Trolley track when that mythical Fat Man would block the out-of-control Trolley from running over and killing five people somehow stuck on the track.²² And, of course, among those who believe that there are certain things we should never do regardless of the beneficial consequences, there are disagreements about which side-constraints bind our actions.²³ Mainstream libertarians, of course, believe that redistributive taxation designed to fund transfer programs to aid the poor breaches what should be inviolable side-constraining ownership rights while others believe that such governmentally-compelled transfers are morally obligatory.²⁴ There are also frequent disputes about whether interests that we generally treat as side-constraints are truly absolute or are overridden in some circumstances. For example, does the ordinary "right" to be free from trespass dissipate when the trespass is "necessary" (and what kinds of necessity—health and safety only? property damage?—and level of necessity—how much property damage?—are adequate?).²⁵ When we say that an employment

21. See Tim Stelzig, *Deontology, Governmental Action, and the Distributive Exemption: How the Trolley Problem Shapes the Relationship Between Rights and Policy*, 146 U. PA. L. REV. 901, 904–05 (1998); Bernard Williams, *A Critique of Utilitarianism*, in UTILITARIANISM: FOR AND AGAINST 75, 97–99 (J. J. C. Smart & Bernard Williams eds., 1973) (offering these scenarios).

22. See Judith Jarvis Thomson, Comment, *The Trolley Problem*, 94 YALE L.J. 1395, 1409 (1984) (describing the "Fat Man" case).

23. See Stelzig, *supra* note 21, at 901–03 (concluding that torture of a child is morally impermissible regardless of any public good that may come of it).

24. See Daniel Markovits, Essay, *How Much Redistribution Should There Be*, 112 YALE L.J. 2291, 2325 (2003) (describing the philosophical disagreement between pro-redistribution egalitarianism and the libertarian thinking that redistributive taxation "enslaves the talented").

25. For an argument that current law is unduly restrictive in prohibiting trespass, which should be thought of as justified or adequately necessary in more circumstances than it is today, see generally Ben Depoorter, *Fair Trespass*, 111 COLUMBIA L. REV. 1090 (2011). For his brief discussion of the limited scope of formal necessity doctrine in existing law, see *id.* at 1100. For his claim that even existing law permits trespass to occur even in situations in which it does not invoke formal necessity doctrine, see *id.* at 1101–09.

practice with disparate impact is justified by “business necessity,” do we mean that it is justified only if the business would literally fold if it is prohibited from using the practice or do we mean that it is justified, if, for instance, the use of the practice simply increases plant-wide productivity by selecting more capable workers?²⁶

Once again, it is not clear whether Bagenstos is really claiming that a practice that disadvantages a socially subordinated group (in this case, those with disabilities) is

- Per se invalid, without consideration of further facts; or
- That a practice that disadvantages in a particular “discriminatory” way is invalid (and if so, how we should define the *form* of discrimination that is invariably impermissible); or
- That while it would be permissible to account for other interests even when one disadvantaged a subordinated group, in this particular case the interests that Persad highlights (maximizing the expected life years of the affected patient population)²⁷ is either intrinsically illegitimate or just not very weighty; or
- That the possibility that Persad’s rubric will be administered in a discriminatory fashion (doctors will underestimate the life expectancy of those with disabilities) renders it invalid (or should merely be weighed in judging its validity or in policing more vigorously how the scheme is implemented);²⁸ or

26. See, e.g., Susan S. Grover, *The Business Necessity Defense in Disparate Impact Discrimination Cases*, 30 GA. L. REV. 387, 387–88 (1996) (reviewing the issue of “whether the term ‘necessity’ in the business necessity defense literally requires that the discriminatory practice be essential to the continued viability of the business, or whether it requires something less”).

27. See *supra* note 14 and accompanying text.

28. When it comes to administering the scheme that he finds permissible—rationing care to those for whom it will be efficacious—he pretty clearly thinks we must simply be *careful* that it is administered properly, without conscious or unconscious reliance on the false idea that people with disabilities will be unable to benefit from care that he presumes will exist. See Bagenstos, *supra* note 1, at 4

A proper interpretation of the law may permit medical providers to use disability as a basis for a rationing decision where an individual’s underlying disability makes the individual unable to benefit from coronavirus treatment—either because that disability interferes with the treatment itself, or because the underlying disability will kill the individual in the very near term regardless of

- That there is a possibility that past discriminatory acts have suppressed life expectancy for people with disabilities and those with disabilities shouldn't be "double-penalized" by these discriminatory acts (and again, whether the possibility of "double penalties" would render the proposed rubric invalid or simply be a factor to be weighed in evaluating the proposal).²⁹

There are interesting discussions to be had about each and every one of these issues. For instance, my own sense is that if one were to argue that "discriminatory" acts are impermissible, per se, without regard to any putative legitimate gains one realizes if one takes them, the definition of discriminatory would have to be narrowed significantly to avoid unacceptable outcomes carefully. It is not my main point here, by any means, but I should confess that I am skeptical about the use of non-compensatory decision making across the board, as anything other than a heuristic³⁰ designed to protect against errors that may result from the use of a fuller consequentialist analysis.³¹ Still, I believe a reasonable case can be made that

the treatment's success in addressing the virus. But those circumstances will be narrow. And a proper interpretation of the law requires assurances that such imminent-death determinations will be made based on the best available objective evidence, free from bias against people with disabilities or devaluation of their lives.

29. See Bagenstos, *supra* note 1, at 18

[F]ew would defend rationing ventilators based on a patient's race or wealth—even if it would be a good proxy for number of years of expected survival following treatment. We recognize that race and wealth are morally arbitrary for these purposes, that minorities and poor people were disproportionately excluded from the decisions about how to invest in healthcare, and that requiring them to forgo life-saving treatment because of their groups' poor life expectancy inflicts a kind of double jeopardy. The disability discrimination laws place disability on a similar plane.

(internal citations omitted).

30. For these purposes, suffice it to say that "people are employing heuristics whenever they make a judgment or reach a decision without making use of some information that could be relevant." See HEURISTICS DEBATE, *supra* note 12, at 3.

31. Political theorists generally dubbed "rule utilitarians" (as opposed to act utilitarians) believe that it is often wise to forego case-by-case analysis of whether a practice is justified, all things considered, for many reasons (e.g., because people can only be expected to learn and obey simple rules that have

collective policies (like those at stake in the rationing case) that are sensible only if one discounts (or underweights) the interests of members of a subordinated group in constructing social welfare functions might well always be deemed impermissible as should individual actions that produce gains only because those taking the actions gain utility from the suffering of those in the disadvantaged group.³² But I don't think a case can be

no complex exceptions, because people will find facts in particular cases in an overly self-interested way, because act-utilitarian schemes that demand that one always does what has the best overall consequences might be too demanding for those who would prefer to display partiality towards some and would be relieved by a rule that permitted them to show partiality, for instance, to their family members without having to determine whether such partiality was beneficial, all things considered, in the particular case.) See Richard B. Miller, *Actual Rule Utilitarianism*, 106 J. PHIL. 5, 17 (2009) (explaining that the “essence of Rule Utilitarianism” is that one should not “evaluate actions in terms of the particular consequences of particular actions, . . . but rather evaluate[] actions according to the consequences of a system”); see also *id.* at 9–11 (explaining the theoretical underpinnings of rule utilitarianism). Thus, for instance, one might want to say that it is *never* justified to lie (or to lie in an official proceeding) or that one must *always* stop at a red light. In that sense, the truth-telling and stop-on-red rules undergird lexical or noncompensatory decision-making. One might believe these obligations hold even when one believes in the particular case that there are compensatory virtues to lying or proceeding because one might believe, among other reasons, that one's judgments about whether lying or proceeding is beneficent are too likely to be self-serving or under-informed. See *id.* at 10–11 (summarizing the harm of individual judgment to the public). For a classic discussion and defense of rule utilitarianism, see generally RICHARD B. BRANDT, *A THEORY OF THE GOOD AND THE RIGHT* (1979).

Actually, much of my hesitation about the use of QALYs—see *supra* note 5—is grounded in the rule utilitarian belief that even though there might well be particular cases in which I believe that it would be appropriate to differentiate the “quality” of two patient's life years in making rationing decisions (e.g., *X* but not *Y* is in a coma; *X* but not *Y* has advanced ALS or dementia), the use of a no-QALY “heuristic” protects against both serious errors of under-valuation of the interests of people with less typical physical and mental abilities and errors that result simply from assuming to an unwarranted degree that one's own picture of a better life is universally shared.

32. In the past, Bagenstos has rejected the idea that it is sensible in the context of antidiscrimination law to engage in what utilitarian theorists have called “preference laundering”—refusing to count the gains realized by satisfying certain bad tastes (like sadistic tastes or, in this case, animus-based tastes)—but he was, in that context, not really addressing the issue of whether discriminatory action was *per se* invalid but the issue of whether there were

made that Persad's plan appears sensible only because we have implicitly (and unacceptably) discounted the interests of members of the subordinated group or that any social policy that is less favorable to or inclusive of all disabled people is per se impermissible. And I don't believe that any "weaker" version of what it means to discriminate justifies treating "non-discrimination" obligations as absolute side-constraints. It is hard to tell whether Bagenstos agrees with this normative framework. It is hard to tell what factual and normative claims lead him to think that Persad's proposal to account for life expectancy is not just less than ideal, but illegitimate.

The reason, I think, that it is so hard to pin down what these claims are is that Bagenstos uses allegiance to the disability community and concern for that community's welfare as a *rhetorical* trump, not as a *formal* trump. (I use the term "formal trump" to mean an inviolable side-constraint, to mean that acting on that allegiance is the basis of a lexical decision-making rubric.) Listing all the ways in which people in the subordinated identity group *could* be hurt by a contested practice ends debate, without either detailed normative discussion of whether the fact of injury really renders the practice impermissible or a detailed factual discussion of how serious or prevalent the harms really are.³³ He is "performing"

sensible reasons to distinguish "antidiscrimination" and "accommodation" norms. See Samuel R. Bagenstos, *Rational Discrimination, Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 885–89 (2003) (evaluating the "antidiscrimination" versus "accommodation" distinction). He also expressed strong hesitations about trying to ascertain when people's actions reflect the fact that they discount the interests of others in historically subordinated groups. *Id.* at 852–54, 866–67 (expressing skepticism about determining when discrimination is based on the "intentional devaluing of another's interests"). It is a complex question, that I set aside here, whether decisions that are sensible only to those operating on (certain particular sorts of) stereotypes about members of subordinated groups should also perhaps be deemed per se unacceptable.

33. Bagenstos *suggests* (without straightforwardly asserting) that it is the case that we cannot use even a conceptually valid plan if it is likely to be used in a discriminatory manner. See Bagenstos, *supra* note 1, at 20

Persad's argument depends on the existence of "evidence-based" assessments of how a pre-existing disability affects life expectancy—and it depends on the evidence being good. But the biases I discussed . . . should lead to great skepticism about the quality of the "evidence" supporting express disability-based

a lexical decision rubric, grounded in what he rightly sees as the profound importance of addressing identity-based group subordination, but neither defending the uses of strict lexical schemes nor evaluating how the practice he is ostensibly interrogating would fare if we considered all of the possibly relevant facts.

A second COVID-related case might be useful in thinking about what I mean when I describe Bagenstos as “performing” a lexical decision-making scheme. It is a particularly salient example for me not only because I think the lexical decision-making scheme I decry led to the correct bottom-line decision in the particular case, but because I think I myself used the very sort of lexical scheme in evaluating the proposals that I am condemning here, even though I think I am usually sensitive to rejecting such schemes. Last spring, law schools had to make a decision as to whether to switch over to mandatory pass/fail grading. I think all of us I would describe as having broadly centrist or progressive sympathies made the decision via this sort of one-stop anti-subordination performativity, in part because this method has become so routinized in our political sub-communities. As soon as the argument was made (correctly) that *some* students of color and First Gen/Low Income students would have a harder time with online learning than more privileged students (given, e.g., distinctions in access to dependable Internet connections or more demands from family members more likely to be adversely impacted, both economically and in health terms, by the pandemic), none of us was willing to consider anything more. There was no empirical inquiry (how many students from subordinated communities would face these problems? what steps might the school take to overcome problems of unequal access to technology? how much

exclusions or deprioritizations in a rationing plan. A key goal of antidiscrimination laws is to counteract those sorts of biases.

But to reach that conclusion, we need a great deal more normative clarification than he offers to begin to figure out what level of discriminatory implementation *invalidates* a plan. And we also need far more data about the mistaken life expectancy predictions doctors have made or will make. It is not enough to say that doctors generically think “people with disabilities” will live less long than they actually will: many people with disabilities (e.g., certain cancers, cystic fibrosis) obviously *do* have a lower life expectancy because of their disability (and that lower life expectancy is not obviously related across the board to any past discriminatory mistreatment that they have received).

harder would school be for them? how much worse was the disadvantage during the pandemic relative to the advantages of privilege in ordinary times?) And there was no real effort to interrogate our own norms either: what are the virtues and flaws of grading generally? how will employers make decisions if students have not received grades and will some of the methods that they use entrench unjustified privilege in ways that should especially concern those who want to protect historically subordinated students? what are the virtues and flaws of reducing the number of grades students received before they went on the conventional job market? Of course, even from the perspective of those who reject non-compensatory decision-making, it was important to weigh the special burdens the pandemic imposed on already-disadvantaged students in reaching a decision on the proper course to follow, in the same way that we ought to attend to distributional concerns in evaluating policy choices across the board, but my point is that one almost surely needs to consider *more* to reach a satisfactory conclusion.

By using disability rights as a rhetorical trump here, Bagenstos dismisses Persad's argument that life expectancy matters without interrogating or explaining his own beliefs about that extremely difficult normative question.³⁴ It is

34. Bagenstos does briefly note that there are some reasons to believe that Persad's principle might not be compelling—e.g., the fact that one might prefer to save a thirty-year-old rather than an eighty-year-old might not be based on comparing their prospective life expectancies but on thinking that the eighty-year-old has already, retrospectively, lived a full life and the younger person should be given the chance to do the same. *See* Bagenstos, *supra* note 1, at near footnote 16

Even if we focus on those who *do* agree that age is an appropriate criterion, it is far from clear that they hold that position because they believe health systems should maximize the number of life-years saved. Many people defend the use of age based on grounds that are backward rather than forward looking—"the feeling that everyone is entitled to some 'normal' span of health . . ."

If that is why we should favor the thirty-year-old, though, there is less reason to differentiate the treatment of two sixty-five-year-old patients based on how long they might still have to live or to favor a twenty-five-year-old over a thirty-five-year-old, neither of whom has experienced a "normal life span" simply because the younger patient is projected to live longer.

striking that we never see him work through the difficult normative question or reveal how he resolved it, or whether the arguments he is relying on resemble arguments that readers might find appealing (or unpersuasive) in other contexts.³⁵ Nor

Once more, one of the reasons I think it is so difficult to recommend any particular rationing scheme with an even modest degree of assurance is that our ethical intuitions in this area are both complex and difficult to defend. For instance, my own intuition is that certain life expectancy distinctions should be of little consequence even though they may appear to be of substantial magnitude. In that sense, I would agree with Bagenstos that we should not simply seek (as Persad arguably does) to maximize the number of life years lived by the population. For example, I would not be predisposed to prioritize fifty-year-old Patient X with a life expectancy of thirty-five years over Patient Y (perhaps a Type-2 diabetic who smokes) with a life expectancy of twenty years but would be predisposed to prioritize seventy-year-old Patient Q with a life expectancy of fifteen years over seventy-year-old Patient R (with significant congestive heart failure that is not so likely to be imminently fatal that he would qualify for hospice care) whose life expectancy was between two and four years, even though this unquestionably harmed the interests of (disabled) CHF patients. But the collective dialogue that would allow us to accept or reject my intuitions would hardly be an easy or straightforward one and would not be advanced by ruling out the possibility of deprioritizing the CHF patient's claims unless he faced imminent death, as Bagenstos would.

35. Although my goal here is not to defend the idea that we *should* use life expectancy-based rationing schemes, it is important to recognize that there are many reasons one could offer that make attending to life expectancy morally acceptable. For instance, people behind a veil of ignorance, not knowing whether they would be long or short-lived, might well prefer a policy that maximized life expectancy. Or, from a collective welfarist perspective, the state of affairs in which a given population lives longer generates higher levels of aggregate welfare so long as being alive is a positive experience (in hedonic welfare terms) or preferred (if one looks at this from a preference-utilitarian viewpoint) and has access to a higher amount of "primary goods." It is consistent as well with a desire that I do not find especially compelling to treat one year of each and every individual's life as precisely equally valuable.

My tentative intuition is that Bagenstos is (very covertly?) adopting views similar to those advanced by John Taurek, who argued that a moral actor would have no more reason to save five drowning people than one if he could only take one of those acts. See John M. Taurek, *Should the Numbers Count?* 6 PHIL. & PUB. AFFS. 293, 293–94 (1977) (rejecting the view that one should act to save the greatest number of people that one can). Taurek's argument is one that most experimental subjects clearly reject. See Mark Kelman & Tamar Admati Kreps, *Playing with Trolleys: Intuitions About the Permissibility of Aggregation*, 11 J. EMPIRICAL LEGAL STUD. 197, 204–05, 217–18 (2014) ("[W]e note the consistency with which subjects reject Taurek's conclusion that the number of lives lost does not matter"). Taurek's primary claim is that we can never sum experiences across persons—*X*'s death is *never*

does he answer the hard question mentioned before: does the fact that allocating to those with the greatest life expectancy is not the *only* acceptable answer to the rationing problem mean that it is a discriminatory and unacceptable answer to the problem?

He also does not confront the challenging empirical questions that are inevitably raised if we take some of his worries seriously. If it is the case that we should worry about misestimation of the life expectancy of those with disabilities—and once again, it would be tremendously helpful to know if, and if so why, we should not merely consider that a problem that counts against the proposal or pushes us to work

compensated for by *Y*'s increased life and to think that it does require believing that “society” is a moral entity. See Taurek, *supra*, at 309–10 (questioning the concept of collective pain and the concomitant existence of a moral duty to save as many as possible). He further argues that it is inappropriate to attend to decisions that people would have made *ex ante* about preferred policies rather than show them equal regard in whatever position they find themselves *ex post*: thus, he says, if there are five folks on a rock to the left of the person with the lifesaving rowboat that can only make one lifesaving expedition, and just one on the right, one shows each of the six equal regard only by flipping a coin to decide whether to go one rock or the other, insuring that each has a 50/50 chance of being saved. See *id.* at 303 (“Why not give each person an equal chance to survive? Perhaps I could flip a coin.”). I take it in much the same way Bagenstos *might* be drawn to the idea that one only shows equal regard for low life expectancy people with disabilities and those with longer life expectancies by giving them an equal chance of receiving treatment, without regard to the impact on what should be treated as a morally fictional entity, “social welfare.” But I honestly cannot tell whether Bagenstos would embrace Taurek’s view or whether he would endorse any of the standard counterclaims to that claim (e.g., if we treat the person *A* alone on Rock 1 with the same regard as we treat person *B* on Rock 2, we should still go to Rock 2 unless we are treating people *C*, *D*, *E*, and *F* with no regard at all in the sense that they don’t influence our decision; all six could maximize their chance of survival assuming they don’t know which rock they will end up on if we adopt the “save more” rule). And my inability to sort through how Bagenstos resolves this issue reflects what I perceive as an unwillingness to face these thorny normative questions that is facilitated by adopting the anti-subordination rhetorical trope. Obviously, Taurek’s argument more directly bears on the question of whether we might justifiably ration care so that available care could be given to *more* patients, favoring using resource *R* to treat two patients efficaciously rather than one who required a higher quantity of *R*. And would, in Bagenstos’s view, this be permissible even if patients with disabilities more often required more treatment resources to be treated as efficaciously? Persad *is* clear that it is permissible in his view to attend to the quantity of resources that need to be utilized to save an individual when rationing scarce resources. Persad, *supra* note 1, at 36–37.

harder on program implementation rather than a problem that invalidates it³⁶—it would help to know how frequently life expectancy is misestimated and for which types of disabilities.³⁷ If merely asserting the possibility of unwarranted disadvantage to a subordinated community suffices to cut off further inquiry into any other goals or factual considerations that might militate in favor of taking account of remaining life years, then we will disregard the legitimate interests of people both within and outside the subordinated community.

Maybe it is appealing, or at least straightforward, to allow all hard questions to just fly away. We should not take the flight.

36. It is simply not clear in this context whether Bagenstos thinks we should be dealing with the sorts of balancing issues that compensatory consequentialists rightly forefront. If there is some measure of misestimation that is unfair to people with disabilities but ignoring life expectancy across the board badly misallocates scarce medical resources according to other compelling criteria, what do we do?

Generally speaking, it is very difficult to determine when it is appropriate to *police* discriminatory applications of a practice that we will nonetheless allow to continue and when we must abolish the practice because we recognize that there will be discriminatory applications. We might think it appropriate to abolish the death penalty altogether—even without regard to one's general moral attitudes about the death penalty—because it would be applied in a discriminatory fashion, but not think we would forbid firms from hiring or firing on anything but a lottery basis because they hire and fire in a discriminatory fashion. Instead, we should attempt to regulate hiring and firing so as to diminish discrimination, even if we despair that we will not completely eliminate it. Plainly, in making those sorts of distinctions, we consider both the possibility that discriminatory *instances* of a practice can be identified and rooted out and the viability of substituting a distinct practice for the one that might be administered in an unacceptable fashion. We also consider, of course, both the frequency of discriminatory applications and the consequences of unjust application to the affected parties. My own view is that Bagenstos could have made a reasonably persuasive case that the losses from moving to a system less likely to be administered in a discriminatory fashion might be relatively low and the consequences of discriminatory application especially high in this class of cases.

37. Presumably, if we believe that doctors underestimate the life expectancy for certain sub-groups of disabled people but not for others, we might want to fix the misestimation problem for those sub-groups rather than ditch the program altogether.