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The Good of Agency

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with Americans Disabilities

*Exploring Implications of
the Law for Individuals
and Institutions*

Edited by

**Leslie Pickering Francis
& Anita Silvers**

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The Good of Agency

LAWRENCE C. BECKER

APPRECIATION

The Americans with Disabilities Act has been an extraordinary success in many respects. Predecessor statutes from the early 1970s, such as the Rehabilitation Act of 1973, were important in upgrading vocational training and in making crucial opportunities for independent living available for people with severe disabilities, but the ADA has much wider application for education, employment, public accommodations and travel. Moreover, while the predecessor statutes helped sustain a useful level of activism among the disabled and their advocates, and that, combined with other liberalizing social forces, raised the consciousness of some people in government agencies, private business, education and medicine, those earlier statutes were also widely ignored. People who worked on committees to evaluate access issues in the seventies and eighties were often dismayed by the results. Reports were written; recommendations were made; a few recommended changes were made; the reports were filed, and eventually lost.¹

By comparison, the ADA has typically been taken seriously by people who control serious money. In responding to this statute, people in both the public and private sectors have opened up a remarkable range of education, work, housing, travel and entertainment opportunities—at least for paraplegics, amputees, the deaf, the blind and the mobility impaired. Admittedly, much of this was already well under way, often as an unexpected by-product of other changes, such as the dramatic increase in nonbusiness air travel brought about by that other ADA, the Airline Deregulation Act.² Moreover, the record has been disturbingly mixed with regard to mental illness, mental retardation, certain lethal and infectious diseases, and a whole array of rather low-profile issues. Nothing goes perfectly.

And of course the ADA is as much an *effect* of social changes (reaching back at least to the end of World War I) as it is a cause of such changes. In the United States, there has been a fairly steady expansion of opportunity for the disabled throughout the last half of the twentieth century. The ADA marks a sharp broadening of all of this, perhaps a change in velocity, and certainly a change in the legal cover given to the claims of the disabled. But it does not mark a change in general direction.

DISMAY

That said, we need to face an exasperating fact. Now that we have begun in earnest to funnel disability rights through legal channels, we have produced a huge body of legal briefs, judicial opinions, political speech, activist manifestos and philosophical argument—a body of work that, among other things, amounts to a baroque elaboration of standard legal and philosophical theories of rights and distributive justice. Disability rights often seem to follow (or fail to follow) from such theories in the form of “me too” claims, added as afterthoughts to our concerns about equal opportunity, discrimination and affirmative action for women and minorities. The result is confusion—or so it seems to me.

I shall argue here that disability rights are not “me too” matters. They are implicit in long-held, fundamental commitments about the value of human life and agency. The history of rehabilitation and vocational training makes it plain that we have not always needed legal sanctions to bring that to our attention. In my view, much of the current discussion that should be premised upon a simple, satisfying, philosophically sound consequence of liberal-democratic ideals has been corrupted by adversarial debate. Perhaps this is inevitable, given the way we organize efforts to achieve significant social change. Perhaps it is even good. Nevertheless.

AGENDA: GAINING SOME ALTITUDE

What follows is an attempt to make a fresh start. The idea is to offer a compact restatement of what I take to be the simplest, most politically plausible way to justify the sorts of social subsidies invoked by the ADA, as well as to generate defensible decisions about the details of their implementation. This restatement will take the form of a consistency argument, proceeding from premises that are no longer seriously debated in Western liberal democracies. It would be tiresome, in this context, to go all the way down to philosophical foundations on these things—to rehearse once again why we protect human life, liberty, property and the pursuit of happiness with an assortment of moral and legal rights understood as human rights. Most of the disagreements people in liberal democracies have with each other about such rights—the extent of them; the enforcement of them—will turn out not to matter in the argument I will outline.

The point of making this fresh start is simply to get some distance on the current debates. The ancient stoics used to recommend as a remedy for perplexity that people fasten their attention repeatedly on pithy, memorable maxims—or at worst, nutshell versions of knockdown arguments—designed to bring into sharp relief the ultimate values at stake. The purpose of this was to gain the altitude necessary to get an uncluttered, reassuring overview of one’s ultimate destination.³ Such an overview in the disability case reveals that the only plausible destination for dealing with it has almost nothing directly to do with justice, rights, caring, benevolence, dependence or independence, *except as those things are means to an end*. It has almost everything to do with the good of human agency.

ARGUMENT: PUTTING AGENTS FIRST

Here is the maxim: if you are going to save the life, save the Agent in it first. The nutshell consistency argument for that maxim is this: (1) being an active, effective human agent is overwhelmingly more valuable than merely being a human who is alive, or conscious or capable of agency; (2) if we are ever committed to saving and sustaining *mere* human life, consciousness or capacity, even though doing so is expensive and inconvenient, then it is inconsistent with the values involved (not to mention cruel and wasteful) not to have a superordinate, prior commitment to saving and sustaining that human being as an active, effective agent; (3) we are often committed to saving and sustaining human lives in expensive and inconvenient circumstances; (4) we ought not to be inconsistent, cruel or wasteful; (5) therefore, in every case where we are committed to saving or sustaining the life, consciousness or agency potential of a given human being, we ought to commit ourselves first to saving or sustaining the active, effective agency of that human being, even when doing so is expensive and inconvenient.

All the rest is elaboration, and there need not be much of that.

The Superordinate Value of Active, Effective, Rational Agency (Agency, Agent, etc.)

Let us confine our attention to human beings, and think of the class of active, effective, rational human agents as including everyone who is (while awake) persistently, consciously goal-directed, who represents and deliberates about achieving such goals in a language, remembers prior activities, makes choices and takes action to accomplish goals, is typically effective in making at least local changes in the world as a result of those actions, and is (with the help of others and circumstance) sometimes successful in achieving those goals.

This notion of an Agent covers a very wide range of human beings, beginning with young children. The reference to rationality is meant to be minimal, referring only to the use of language to represent goals, to deliberate about means to those ends, and to make choices about achieving them. The range of goals is left undefined, so as to include at one extreme people who have grandiose ambitions for a wide variety of projects and at the other extreme people whose goals are mostly defensive—aimed at carving out a tranquil, unambitious existence. The category includes the moral philosopher's paradigm of independent, fully autonomous people, but also includes people who absorb their values and goals unreflectively from outside sources and who quite effectively subordinate their own agency to the control of others. Similarly, the notion of effectiveness here is much broader than the notion of success in accomplishing one's goals. It would be odd to call an agent effective if she *never* accomplished anything she set out to do, but equally odd to call her ineffective simply because she was often defeated by circumstance and sometimes defeated by lack of ability.

Contrast the notion of an Agent with that of its polar opposite among the living: someone in a persistent vegetative state. Next consider, for the sake of argumentative convenience, two intermediate points: one at which there is the ability to formulate projects but not to act on them, and the other at which there is mere sentience—consciousness without even the capacity to formulate and deliberate about projects. We now have before us four types of human existence: (a) active, effective rational Agents; (b) activity-disabled Agents—that is, rational Agents who have projects but wholly lack the ability to act on them; (c) agency-disabled human beings who are sentient but who lack the capacity for any form of rational agency; (d) human beings in a persistent vegetative state—alive as a biological organisms but irreversibly lacking all awareness of it, let alone self-awareness and conscious, goal-directed activity.

I take it there is no serious question about what the ordinal values are here, in the sense of what human beings generally prefer for themselves as well as for those they care about. It is $a > b < c < d$. The preference for Agency dominates all the others, and the relations among those others varies with the circumstances and personalities of the valuers. Moreover, I take it that the preference for Agency is a very strong one. The only evidence I have for this is in the conversational atmosphere—in what is regarded as uncontroversial, commonsense speech about the various possibilities. It would be gratifying to have empirical confirmation of this, but if any direct, systematic evidence exists, pro or con, I am not aware of it.

(If some vagrant philosophical reflex requires that more be said, this parenthesis will have to suffice. We regularly wish for the temporary oblivion of dreamless sleep (d), both for ourselves and for those whose welfare we care about, and we certainly wish for such oblivion during major surgery. We may wish for respite from our restless agency from time to time, and take refuge in an aimless form of tranquil self-awareness (b) or even in mere pleasant sensation (c), whether induced by meditation or medication. But I take it that such desires do not disturb the ordinal structure $a > b < c < d$, because they are part of a deliberate project of implementing and ultimately enhancing Agency, to which we expect

to return. Temporarily disabled agent activity may dominate temporarily disabled agency ($b > c$), especially if we expect the return from it to Agency to be easier or more certain. For the same reason both disabled activity and disabled agency usually dominate a persistent vegetative state ($b < c > d$) because, by definition, d virtually always precludes return to Agency. But when the return to Agency is blocked from all these states, the preference order changes. Or so it seems to me. This is so because, without the possibility of return, both (b) and (c) define forms of the “locked-in” syndrome characteristic of some horrific neurological injuries and the last stages of degenerative diseases such as amyotrophic lateral sclerosis (ALS). Faced with the certainty of becoming locked in, it is difficult to believe that one would not prefer death—or possibly, out of fear or hope, a persistent vegetative state. Since there is generally a very strong preference for active, effective, rational agency over either death or a persistent vegetative state, it follows that there is an even stronger preference for such Agency over being locked into either disabled activity or disabled agency.

(It is of course true that certain more or less self-sustaining forms of mental illness and chemical dependency persistently reduce Agency to one of the other states in a way that raises difficult questions about what the agents’ preferences “really” are. On the one hand, people in such straits are typically in great distress and struggle against their situation in periods when they are Agents. On the other hand, in some attenuated sense they repeatedly choose to reduce their Agency rather than to enhance it. Further, certain Eastern religious practices are incautiously proffered—at least by some Western enthusiasts—as projects that change the $a > b < c > d$ preference order in the sense that they value Agency only for its usefulness in securing ever more extensive forms of, say, tranquil sentience. I say the proffer is incautious because it is typically coupled with great concern about how such tranquility is to be achieved. We are expected to achieve it as the result of Agency rather than, for example, by the deliberate introduction of disease or neurological injury.)

A Commitment to Life Entails a Superordinate Commitment to Agency

I made the preceding section as long as it is mainly out of mild embarrassment at how quickly the rest of what I want to say follows from it. Given our strong preference for active, effective agency in ourselves and other human beings, this maxim follows directly:

If we are going to go to great lengths to create and save human lives, then it is inconsistent (not to mention cruel and stupid) to aim merely for the life alone, absent whatever potential for Agency there is in it, rather than aiming to save the Agency in it. No matter how much some of us insist that human beings who are in a persistent vegetative state must be protected and cared for, or even that human lives without any form of agency at all are in some sense as precious as those with it, deliberate attempts to put people into such states or to keep them there when they could become Agents, are out of the question, not to mention criminal.

So to subsidize childbearing but neglect child welfare and early education is inconsistent. And indeed we are not inconsistent in this way. To subsidize rescue and neglect the rehabilitation necessary to raise mere life into Agency is inconsistent, and we recognize this also. There are huge social subsidies for child welfare, education and rehabilitation. Moreover, these subsidies for agency are superordinate in the sense that they are required of us all in a way that reproduction and rescue are not. We do not force people to have children, but if they do, we bring them (and ourselves) under stringent requirements with respect to the welfare and education of those children. We do not force communities to have rescue squads, or hospitals to have emergency rooms and acute care units, or doctors to begin

treatment whenever an emergency presents itself. But if rescue attempts begin, we put the rescuers (and ourselves) under stringent requirements to strive to save the Agent, not merely the life. If we fail to save the Agent in the life, we may (or may not) require that mere life be preserved. But aiming for mere life rather than Agency, or failing to invest as much in saving the Agency as in saving the life and therefore failing to save the Agency, would be inconsistent. That much, as pilots say of some skies, is severe clear.⁴

Consequences for Disability Issues

The problems addressed by the ADA and its predecessor statutes concern the large area between a conventional baseline of full-fledged Agency and fully disabled agent-activity or less. At or below fully disabled activity there are of course significant ethical issues to consider—issues about palliation, custodial care, assisted suicide and various forms of euthanasia. But they are not pertinent to what may reasonably be called disability issues. Here we are concerned with the extent to which we ought to offer socially subsidized opportunities for people to achieve full-fledged Agency, as well as with defining the range of people to whom we should offer such opportunities and how we should fund those opportunities.

The obvious inference from the consistency argument is that we should subsidize Agency at a level of effort and expense at least comparable to our investment in saving and sustaining human life itself. Anything less is inconsistent with the values that underwrite our commitment to protecting human life. Moreover, it follows that these subsidies should be available to anyone to whom life-saving and life-sustenance subsidies are available. It matters not at all whether one's Agency has been limited by disease or by injury, by a psychologically damaging childhood or by poor nutrition, by genetic predisposition or by social or economic constraints.⁵ If we are going to save the life when it is threatened, we must if possible save the Agent in it first.

That leaves two issues: how to fund these opportunities, and the level of active Agency they should aim to make available. Take funding first. Nothing at all appears to follow directly from this high-altitude consistency argument about the details of funding. And this is as it should be. The method of funding is troublesome for many reasons (e.g., efficiency, fairness, unintended consequences, political theory), but not with respect to whether the funds ought to be socially guaranteed, given a prior social commitment to saving and sustaining human lives. Once the underlying social guarantee is secured, how we work out the details does not amount to a special disability issue. The ADA's mandates for funding arrangements are remarkable, but assuming we can guarantee equally effective outcomes in other ways, there is no special reason in terms of disability issues to insist, for example, that the "reasonable accommodations" must be paid for by each employer in turn, as a worker changes jobs, rather than through some form of portable social insurance that the disabled worker carries from job to job. For complicated reasons, we follow the employer-pays pattern for some things (including some very expensive things such as start-up costs for scientists' research laboratories in universities), and we follow the social insurance pattern for other things. Similarly, assuming equal trickle-down burdens that are not self-defeating, it does not matter whether access to government offices, transportation, public accommodations, shopping and entertainment are funded through broad-based taxes or through the budgets of individual agencies and businesses who pass on the cost to their whole customer base.

The level of Agency that should be guaranteed, however, is always a disability issue. And the target given by the argument here is clear enough: the target is to offer all individuals

the support necessary for them to achieve a conventional level of Agency. The argument assumes that efforts to reach this target would not be forced on the disabled except under the general conditions that justify paternalistic interventions. (We do, of course, make early education compulsory for everyone, with or without disabilities, for paternalistic as well as political reasons.) And it is important to be clear that the argument does not assume that reaching the target is tantamount to erasing all the socially controllable burdens of a disability or to providing the opportunity for disabled people to satisfy their every desire—or even their heart's desire—with respect to education, work, civic life, entertainment, travel and play. Time and circumstance limit options for us all. The peculiarities of our bodies and personalities do the same. We do not judge ourselves to be less than Agents just because our options are limited in a frustrating way—or limited relative to more fortunate people.

Hence, if all we can say of a given physical or mental disability is merely that it limits our options, or limits them in relation to what others have, that should not trigger a social subsidy for improvement unless mere quirks of time or circumstance, physique or personality also do it. (This is a consistency argument.) So when do such quirks trigger socially guaranteed support? The Rehabilitation Act and the ADA say that the trigger point is the limitation of a “major life activity,”⁶ but defining that has proved to be difficult.⁷ The sort of argument I am making here suggests that we back up a step and get an overview of the possibilities.

In order to do that, I suggest we speak first about activities that are “natural and necessary” for developing and sustaining Agency. They certainly deserve the label “major life activities,” and the warrant is clear for saying that limitations on them ultimately push us below the conventional baseline for full-fledged, active, effective, rational Agency.

The notion of a necessary activity is fairly straightforward. Some activities are necessary for sustaining life itself—namely, securing basic goods and carrying out basic life-sustaining projects with the available resources. These certainly count as major life activities if anything does. Some of these activities (breathing, for example) we expect healthy people to be able to accomplish effectively on their own, and count them as less than effective agents if they cannot do so (given the availability of air, in the case of breathing). Other necessary activities, such as securing food, clothing and shelter, we now organize through a complex division of labor. As a consequence, we do not typically count people as less than effective agents if they cannot directly produce their own food, make their own clothing or build their own houses. Rather, we think their Agency is compromised if they cannot secure such basic goods *either* on their own *or* through participating in the division-of-labor system, given the availability of work in it. Compromised Agency with respect to necessary activities—whether due to accident, injury or social circumstance—should trigger a helpful social response comparable to that we make for saving and sustaining life itself. It is a simple matter of consistency.

The extension of this argument beyond the class of necessary activities is not always a straightforward matter, but is unavoidable because it is patently obvious that dramatic limitations of Agency are possible in ways that have nothing to do with strictly basic or necessary goods. Legs are not strictly necessary for farming; one can work around the loss of them, especially with our technology. But it would be preposterous to insist that, because legs are not strictly necessary, losing them does not cripple one's Agency. The question is how to extend the argument while keeping it within plausible limits.

Perhaps we can best minimize the difficulties of this in the following way. First, we should stay focused on the aim of describing, in a commonsense way, what counts as less than active, effective, rational Agency itself. The simple inability to get what one wants in a

given case, even if one wants it desperately, does not rise to this level. Second, we should limit our attention to activities that are not only characteristic of *all* active, effective human Agents but are, when frustrated, especially potent in diminishing the human being's Agency quite generally, not just in a particular case or range of cases. Doing those two things will restrict discussion to matters that are clearly "major life activities," limitations on which we have reason to believe would threaten Agency itself.

No doubt any list we make along these lines will reflect some transient cultural preoccupations which, from the vantage point of succeeding generations, will seem anything but "natural." But this simply presents us with another version of the familiar epistemological problem of identifying and coping with persistent biases and doing the same with the all but invisible distortions introduced by the forms and filters overlaid on experience generally. That problem is unavoidable in every context.

In the present context this epistemological problem does not seem overwhelming. Think of activities that are strongly and persistently "called for" in the normal course of events by the impulses of a healthy human physiology and psychology operating in a reasonably hospitable environment. (We have plenty of history and anthropology to correct hasty, culture-bound generalizations about this.) Examples include unconstrained body movement, variety in one's activities, self-expression and communication, reciprocal social relationships, achievements through work, the satisfaction of sexual impulses, and play. Such impulses are persistent and strong throughout the lives of all humans who are Agents, though of course these impulses vary in form, frequency and amplitude with age, attention, nutrition and various socially constructed circumstances.

Moreover, it does not seem especially daunting to decide, in terms of the available anthropological, historical, medical and psychological evidence, which of these persistently impelled activities meet our second condition—namely, that their persistent and thorough frustration, *in a healthy human physiology and psychology*, tends to degrade the capacity for Agency itself. Voluntary abstention from sex, for example, does not necessarily do this, but living in an isolation cell from the age of two to twenty almost certainly does. If we can decide, then, which of these impulses are "natural" in the requisite sense, we will have a commonsense way of excluding any extension of the argument to the occasional or partial frustrations typical of human life generally or to the frustrations of impulses that are themselves already pathological.⁸

A persistent incapacity to engage in natural and necessary activities drops us below the conventional baseline of what counts as full-fledged, active, effective, rational agency. Whether that incapacity is the result of disease, injury, time, circumstance or the peculiarities of our physiology or psychology, the social protections surrounding Agency should thus be triggered, given that we are committed to saving and sustaining human lives generally.

A Rich Set of Opportunities Is Saved by the Scale, Complexity and Velocity of Modern Life

How many opportunities must we provide for each person who needs social support? How many specially equipped schools, job sites with automatic doors, television programs with closed captioning? It is hard to think that much in the way of variety is strictly natural or necessary for Agency, given the range of human lives (some of them very cramped and oppressive) we see around us—lives lived by people who are clearly active, effective, rational Agents. Suppose we make sure that the blind can make a living making brooms, and that paraplegics can make a living as telemarketers. Is that enough social support to meet the test of consistency? As a purely theoretical possibility, yes. But the yes is irrelevant as a practical matter for us. As a practical matter, the answer is no.

The theoretical yes must be given because the consistency argument does not require that the same range of opportunities be available for everyone. It is not an equality argument, and it is not about human capabilities of all sorts—for example, reproductive ones, athletic ones, artistic ones and so forth. It is thus not a version of Sen's equal-capabilities argument.⁹ But as a practical matter, given the way we have organized ourselves in complex, large-scale societies, any level of social support that meets the consistency test will provide a great deal of opportunity—and variety of opportunity—to any disabled person who can develop or be restored into active, effective, rational Agency.

To see why this is so, begin by considering why the equal-capability approach may not be especially well suited for discussions of disability, even when it is filtered (as it is for Sen) through a sophisticated Aristotelian account of the capabilities required for human virtue and flourishing. In the first place, for the seriously disabled (those who have disabilities that are more than transient inconveniences), it is futile to press for the creation or restoration of equality with the nondisabled because it is futile to think that one can restore the capability that has been lost, or replace it with something equivalent. Artificial limbs and money are welcome gestures, but not an adequate substitute for the limbs lost. Moreover, focusing on the full range of human capabilities involved in full-fledged Aristotelian flourishing invites us to think that we must address disabilities as a matter of justice whenever they are serious losses of capacities, even though the losses have not noticeably compromised Agency, and even though the people thus disabled can themselves redirect their energies and activities into a form of life that (in other circumstances) we find not only acceptable but good.

For example, suppose there are some Aristotelian virtues that are inaccessible to people who do not have children—certain forms of unconditional love and self-sacrifice, for example. If so, childlessness is incompatible with an Aristotelian ideal. Yet when people choose not to have children, perhaps as a consequence of a religious vocation or the demands of another sort of career, Aristotelians as well as the rest of us are accustomed to regarding this loss of virtue as compatible with a socially acceptable good life, though perhaps not an ideal one. If that is so, then when childlessness is the result of sterility rather than chastity or contraception, and when acceptably good alternative forms of life are successfully adopted by those who are sterile, it is hard to see why we should insist on the existence of a social obligation to address it further (unless we are perfectionists in social policy as well as moral theory, or unless the incidence of sterility threatens social welfare).

That said, the focus here on the good of Agency is obviously very closely allied to the concerns of equal-capabilities theorists, because both accounts focus on what appears to be the central, indispensable element of specifically human flourishing. The Agency account is, however, more Stoic than Aristotelian in its insistence that full-fledged Agency is a sufficient locus of concern, and then only with respect to natural and necessary activities. Stoics notoriously deny that a variety of opportunities is necessary for a good life. So if the argument here is in the Stoic tradition, it is no surprise that it does not *directly*, as matter of theory, generate a social obligation to provide variety for the disabled. Yet it is not hard to see how, *in practice here and now*, the consistency argument will support extensive social obligations that yield such variety.

Consider work, which is certainly something natural to Agency and is often necessary to it. And take the worst case by confining the argument to paid employment and then supposing, with the Stoics, that it is not necessary to have any variety at all in the available jobs in order to develop or sustain Agency. Does this, as a practical matter, doom the disabled to one option each? It does not, given the way we have organized ourselves with

respect to the division of labor, the location of workplaces and the productivity demands on workers. Making sure that everyone who needs it gets assistance in developing and sustaining a conventional baseline level of Agency is a large-scale undertaking. This is required by the consistency argument to be comparable to the social investment we make in saving and sustaining lives. There is simply no way to do this effectively and efficiently without making schools, public places and work environments generally available to very large classes of people with disabilities. Very many people are mobility impaired; or are vision- or hearing-impaired; or are unable to do strenuous physical labor; or are unable to do strenuous intellectual labor.¹⁰ It is much easier and more efficient to arrange access across the board for a wide variety of common disabilities than to arrange exactly one adequate opportunity for each disabled person. Variety is saved by circumstance, if nothing else.

Vulnerability to Circumstance

It is clear that the consistency argument here is only as strong as the initial commitment to saving and sustaining life. Absent that initial commitment, the argument justifies nothing about social obligations to the disabled. Given a weak initial commitment, the argument justifies only a correspondingly weak obligation to the disabled. To anyone who is a foundationalist about ethics, this is an unsatisfactory situation. To anyone who is an advocate for disability rights, it may seem to make disability rights disturbingly conventional and vulnerable to the vagaries of time and place. What if social circumstances change? What about obligations to the disabled in cultures where there is little or no social investment in saving or sustaining life? Surely we need to put the rights of the disabled on firmer footing than this consistency argument provides.

Of course we do, and I think the consistency argument calls our attention to the firmest footing imaginable on disability issues: the good of Agency. It is a footing right at the foundation of Stoic and Kantian ethical theory and versions of social-contract theory derived from them. It is similarly at the bottom of eudaimonistic versions of libertarianism and, perhaps, Aristotelian versions as well—at least as agency is central to the sort of human flourishing at stake in the “capabilities” arguments mentioned above. It is embedded, at least in a derivative way, in other plausible moral theories as well, such as in the concern for human autonomy one finds in Mill’s version of utilitarianism. So if we need arguments for the good of Agency that go all the way down to the ground, we can get plenty of them. Moreover, as a practical matter, it seems unlikely that Western liberal democracies are going to give up their social commitments to protecting human lives, so this consistency argument is as secure as those social systems. It is true that the argument cannot be exported to systems that lack the requisite social commitments, but paying attention to the good of Agency provides a powerful philosophical focus that can help create such social commitments.

That said, I know of no way to put reasonable social commitments to the disabled on the sort of *a priori* footing that might make them invulnerable to changes in social circumstances. Make the commitment to life as stringent as you like, and you still have to face the possibility of not being able to save everyone—of sometimes having to choose between people. In the cold moral arithmetic of desperate times, burdens of all sorts, including burdensome human beings, must sometimes be left behind. That is a hard doctrine, but it is difficult to see how to avoid it, short of adopting the implausible injunction that no one should ever be saved unless all can be saved—or, which comes to the same thing, insisting that we make the choices by lottery regardless of whether the result saves anyone. The argument here has the reassuring consequence that if we devote any time at all to saving and

sustaining lives, we must save the Agency first. Once that is done, it is hard to see why we disabled people should not take our chances along with everyone else.

NOTES

¹It is useful to compare the opening sections of the Rehabilitation Act of 1973, 29 U.S.C. § 701, with the Americans with Disabilities Act of 1990, 42 USC § 12101. In the Rehabilitation Act, under the heading "Purpose" we have this:

The purposes of this chapter are (1) to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society, through (A) comprehensive and coordinated state-of-the-art programs of vocational rehabilitation; (B) independent living centers and services; (C) research; (D) training; (E) demonstration projects; and (F) the guarantee of equal opportunity; and (2) to ensure that the Federal Government plays a leadership role in promoting the employment of individuals with disabilities, especially individuals with severe disabilities, and in assisting States and providers of services in fulfilling the aspirations of such individuals with disabilities for meaningful and gainful employment and independent living.

In the ADA, the "Purpose" is described this way:

It is the purpose of this Act (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities; (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this Act on behalf of individuals with disabilities; and (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

²Airline Deregulation Act, 92 Stat. 1705 (1978).

³Pierre Hadot, *Philosophy as a Way of Life: Spiritual Exercises from Socrates to Foucault*, 1987, translated by Michael Chase, edited by Arnold I. Davidson. Oxford: Blackwell Publishers, 1995, 84–86.

⁴My thanks for this image, as well as many others, to the splendid general aviation memoir by Mariana Gosnell, *Zero 3 Bravo*. New York: Knopf, 1993.

⁵Cf. Richard Arneson, "Disability, Discrimination and Priority," this volume.

⁶From the ADA, 42 U.S.C. § 12102:

The term disability means, with respect to an individual : (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.

⁷Duncan C. Kinder (dckinder@ovnet.com), *Americans with Disabilities Act Document Center*, Great Lakes Disability and Business Technical Assistance Center, the ADA-OHIO Steering Committee and Duncan C. Kinder, available at <http://janweb.icdi.wvu.edu/kinder/>.

⁸It may be that defeating (rather than transforming) an anorexic's desire for skeletal thinness will in fact defeat her capacity for Agency. This is a good reason for insisting on treatment rather than mere control of such impulses. But as long as anorexia is defined as pathological, the anorexic's efforts to achieve skeletal thinness will not count as a "natural" major life activity understood along the lines proposed here.

⁹See Amartya Sen, *Inequality Examined*. Cambridge, MA: Harvard University Press, 1992, esp. chaps. 1–5; and Martha Nussbaum and Amartya Sen, eds., *The Quality of Life*. Oxford, UK: Clarendon Press, 1993, esp. Part I. My thanks to Anita Silvers for prompting me to include these comparative remarks.

¹⁰From the ADA, 42 U.S.C. § 12101: "The Congress finds that . . . some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older. . . ."