

2000

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Recommended Citation

Becker, Lawrence C. "Afterword: Disability, Strategic Action, and Reciprocity," in Anita Silvers, David Wasserman, and Mary Mahowald (eds.), *Disability, Difference, and Discrimination*. Lanham, Md: Rowman & Littlefield Publishers, 2000. Pp. 293-303. Hollins Digital Commons. Web.

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**DISABILITY, DIFFERENCE,
DISCRIMINATION**

*Perspectives on Justice in Bioethics
and Public Policy*

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and Mary B. Mahowald

Afterword by Lawrence C. Becker

ROWMAN & LITTLEFIELD PUBLISHERS, INC.
Lanham x Boulder x New York x Oxford

2000

Afterword: Disability, Strategic Action, and Reciprocity

Lawrence C. Becker

The essays in this volume focus on philosophical problems that are extremely difficult. As we have seen, there are problems of definition that threaten to dissolve the distinction between the able and the disabled, problems of moral imagination in identifying and understanding each others' needs, problems about Kantian concerns for human dignity and utilitarian concerns for aggregate welfare, problems about fairness in the allocation of benefits and burdens, problems about the meaning of equality in this context, and problems about the appropriate moral response to the natural evils that befall us all to varying degrees. Equally able philosophers disagree about all of these matters, and it is of course appropriate for them to focus on the most challenging philosophical issues and the most persistent disagreements about them. How else will we make progress on these matters?

Yet there is something in this discussion that does not quite square with my own experience in living with a significant physical disability since my early teens. My experience has been that when my own "disability issues" are framed either in terms of love or in terms of justice, *in the long run* things do not go very well for anyone concerned. Moreover, I have reason to believe that my experience in this regard is not merely idiosyncratic. On the contrary, there is a general philosophical explanation for it in the theory of strategic action coupled with a consideration of norms of reciproc-

ity. (No doubt there is also a particular psychohistorical explanation for my experience as well—one that makes a more entertaining story.)

The philosophical explanation interests me because it situates the discouraging difficulties explored in this volume in a larger, less discouraging context. In short, I will argue that we can resolve many conflicts about disability and distributive justice by treating them as coordination problems. And I am hopeful that if we pursue disability issues in this larger context, we will be able both to see their most difficult aspects more clearly and to make some surprising progress in resolving them.

Hardin on the Limitations of Reason

In an important book,¹ Russell Hardin argues that careful attention to our limitations as rational agents is crucial for moral theory. In particular, he emphasizes three limitations that all human agents need to face squarely: the extent of our ignorance about the consequences of our actions, the intractable difficulties of our value theories, and the fact that we can accomplish very little without the active and sustained cooperation of other human agents. Hardin's aim is to use reflection on these limitations to construct a justification for utilitarian moral theory, but his point of departure is a perfectly general one of the first importance. Here I want to focus on the third of the limitations he mentions—the one that gives rise to the strategic dimension of human action.

It is now commonplace in discussions of disability for writers to point out that all human beings have extended periods of dependency during the normal life-cycle—in infancy and early childhood, in periods of illness or injury, in senescence—and in general have great vulnerability, not only in matters of their physical and psychological health as well as life itself but also in their attachments to all sorts of external goods, ranging from the most mundane matters of physical comfort to the most exalted rewards of intimate relationships. At our best, the argument goes, we are only temporarily “abled,” and we should reflect on this fact carefully before we decide how to treat the permanently disabled.

Hardin's point is a stronger one: No one is even temporarily able to

1. Russell Hardin, *Morality within the Limits of Reason* (Chicago: University of Chicago Press, 1988).

accomplish very much at all by her own actions, independent of the responses of others. No matter how others respond—whether they oppose her, ignore her, help her, or simply stand out of the way—she will need to adapt her conduct accordingly in order to succeed. That does not mean that she will always have to fight the opposition, curry favor, or accept help. (After all, sometimes a soft answer actually does turn away wrath; sometimes a low profile is a good thing; sometimes accepting help is more trouble than it is worth.) It does, however, mean that she will have to consider what to do in the light of the responses she is likely to get from various courses of action she might take. That is to say, if she wishes to act effectively, she will have to act strategically, and not simply as if the problem were simply to decide what is right in some abstract sense, and then to do it, regardless of what others might do. I simply add to this the observation that there is no direct correlation between the *extent* to which one must act strategically and the extent to which one is disabled—though there is sometimes a correlation between the extent of a disability and the range of strategic responses available to an agent.

Now consider three general sorts of strategic situations that we face. Borrowing Hardin's terms we may identify them as situations of pure conflict, pure coordination, or mixtures of conflict and coordination.²

We have a pure conflict situation whenever a net gain by one person necessarily involves a net loss by another. Zero-sum (constant-sum) games are examples of this. And in general, whenever we compete for shares of a fixed sum of resources, my gain is necessarily your loss, *ceteris paribus*.

We have a pure coordination situation whenever it is possible (if we simply coordinate our conduct) for everyone to gain. Rules of the road are good examples. It typically does not matter what the rules are (e.g., whether we are to drive on the left or the right); it only matters that we coordinate on the same set of determinate rules. Social norms and conventions often solve pure coordination problems without the intervention of law—as with various arrangements for standing in the registration line in a hotel.

We have a mixture of conflict and coordination if we have a situation in which some options open to us pose problems of pure conflict while other options are pure coordination problems. Think of prisoner's dilemmas: Each target of the investigation is offered immunity in exchange for testi-

2. Hardin, *Morality within the Limits of Reason*, 35–53.

mony that leads to the conviction of his accomplice, but only if the accomplice does not accept a similar deal first. Here there are two possibilities that are pure conflict—namely, those in which one prisoner confesses while the other does not. The payoff structure that defines a prisoner's dilemma is one in which each prisoner's top preference is for getting immunity (the jackpot), even though that means the sucker's payoff for his silent accomplice; his second-best option is coordinating with his partner on joint silence; his third-best option is coordinating on joint confession; and his worst option is the one in which he gets the sucker's payoff because he stays silent while his partner confesses.

Note that if the two opportunities for pure conflict are removed, the prisoners have a pure coordination problem that is easily solved: they both prefer mutual silence to mutual confession. That is why, in the context of our criminal law, we often see elaborate efforts by police and prosecutors to keep all four options open and equally elaborate efforts by at least one of the "prisoners" to remove the pure conflict options. It is of the first importance to notice also, however, that in many other sorts of situations that have this same strategic structure—ranging from mundane business transactions to the control of nuclear weapons—we may *all* have a strong interest in defining social structures that eliminate the pure conflict options.

Now it is fairly obvious that pure coordination problems are, from the standpoint of moral theory, much less difficult than the other strategic problems we face. In pure coordination problems we can all be better off if and only if we coordinate our behavior. Further, if we coordinate, no one gets harmed, or even forced to take a second best option, and aggregate welfare is improved. Sadists, bullies, and the envious aside, then, we do not in general face motivational problems in these situations. Rather, the problems we face are merely those of communication and organization. (Hardin has an instructive example of this in the way Sweden went about changing from left-hand to right-hand driving.³)

Moreover, it is also clear that mixtures of conflict and coordination problems (such as prisoner's dilemmas) are often more manageable than those of pure conflict. In the former, we at least have the possibility of arranging a second-best outcome for everyone, and better yet, if we can somehow arrange effectively to block serious consideration or implemen-

3. Hardin, *Morality within the Limits of Reason*, 51–52.

tation of the pure conflict elements of such mixed situations (e.g., by making them unthinkable or undoable), we have effectively moved these problems into the realm of pure coordination. The Mutual Assured Destruction strategy of nuclear deterrence attempted to do this by making first strike unthinkable; verification treaties attempted to do this by making first strike undoable.

Problems of pure conflict remain, however, and they present us with serious theoretical difficulties as well as grim practical choices. In such situations some people are going to be the losers, and absent motives of beneficence or justice on their part—motives strong enough to make them genuinely willing to yield—getting a stable result will be difficult. Moreover, from the standpoint of moral theory, we presumably do not want to recommend that people be genuinely willing to yield unless their yielding is justifiable. Yet how often is it the case, even in theory, that in matters of distributive justice we can identify precisely who *should* be the loser? Perhaps we can do this in clear cases of intentional wrongdoing by competent adults who are responsible for their characters. But in most cases Yossarian's problem⁴ remains as poignant for us as it was for him: he could see why the war had to be fought, and why, if it were fought, people had to die. What he could not see was how it followed from that that he, Yossarian, had to die.⁵

4. Joseph Heller, *Catch-22* (New York: Simon & Schuster, 1961), 102.

5. Yossarian famously takes everything personally. It is perfectly clear to him, for example, that German anti-aircraft gunners are trying to kill him, and he is not persuaded at all by the argument that they are not shooting at him personally but rather shooting at "everyone." (See Heller, *Catch-22*, 16–17.) But here is the passage relevant to what I call Yossarian's problem. Yossarian says (102):

"I don't want to be in the war anymore."

"Would you like to see our country lose?" Major Major asked.

"We won't lose. We've got more men, more money and more material. There are ten million men in uniform who could replace me. Some people are getting killed and a lot more are making money and having fun. Let somebody else get killed."

"But suppose everybody on our side felt that way."

"Then I'd certainly be a damned fool to feel any other way. Wouldn't I?"

This refrain is repeated at the end of the book when, after Yossarian has flown seventy bombing missions, he is considering desertion. (435–36.) It is hard to resist pointing out that Heller's book was published in the same year (1961) as the first edition of Marcus Singer's *Generalization in Ethics*.

Disability, Strategic Action, and Reciprocity

The general point should be obvious: we must all act strategically, but we are well advised to arrange to do so, as much as possible, in situations where we face only problems of pure coordination. I want to suggest that in the context of disability issues, though we must of course consider carefully what to do in cases of pure conflict, we should also examine very carefully the options we have for moving such issues into the realm of coordination problems.

In general, discussing disability issues in terms of equality is not helpful in this regard—whether it is equality of access, opportunity, life prospects, or capacities that we have in mind. Proposals to make people equal in some respect invite us to think in terms of conflict. We want to know whether we are going to have to “take” resources from some in order to “bring others up” to a predefined level, and if so how we can justify this sort of redistribution. We want to know whether we can draw a principled line that will justify such redistribution in the case of some disadvantages (e.g., those arising from bad luck in one’s choice of viruses) and not for others (such as those arising from bad luck in one’s choice of parents). And we will want to know whether the social costs of pursuing equality for the disabled can be contained or whether they are likely to be ratcheted up by a perpetually expanding definition of disability or an increasingly high standard of equality. All such thoughts distract us from considering the possibilities for dissolving such conflicts by transforming them into coordination problems.

Thinking about reciprocity, however, is helpful here. An effective norm of reciprocity resolves problems of pure conflict by seeing to it that people who are burdened by one aspect of a social relationship, policy, or transaction are benefited in return by another aspect of it. And when reciprocity is “full” or complete, meaning that the eventual return to the one who has been burdened is proportional to that person’s sacrifice, then there is no net loss to anyone. The strategic problem of arranging for full reciprocity is a problem of pure coordination, at least as long as envy, greed, and various forms of malice are kept out of the picture. These coordination problems are far from simple ones, but full reciprocity takes many forms other than a direct tit-for-tat exchange.⁶ In a setting characterized by gen-

6. Lawrence C. Becker, *Reciprocity* (Boston: Routledge, 1986), chap. 3.

eralized reciprocity, for example, both benefactor and recipient can be confident that “what goes around, comes around” and that any recipient will eventually be someone else’s benefactor just as surely as any benefactor will eventually be the recipient of someone else’s beneficence.

Full Reciprocity and Coordination

Now suppose, as a first approximation to appropriate conduct in these matters, that we consider a social environment (like our own) that is characterized by a robust, complex norm of reciprocity for social interactions—a norm that defines at least a minimal level of justice in social arrangements. Let us leave aside, for the moment, the fact that some people (at least in some circumstances) are not motivated to reciprocate. And let us assume that the people who are motivated to reciprocate also recognize and are often satisfied by reciprocal arrangements that are very indirect, institutionalized, and delayed—as they are, for example, with various forms of insurance. Then let us consider the ways in which some people, against their wishes and choices, may both need an unusual amount of help from others and be unable to reciprocate for it—or at least to reciprocate fully for it.

Surely the appropriate strategic response to this is, as far possible, to make full reciprocity possible for such people. It makes little difference what the cause of their inability is—whether it is polio or poverty, for example. If we can arrange things so that they can and do reciprocate, it is hard to see what objection there could be to that from the standpoint of the initial benefactors, since they will be repaid. And it is equally hard to see what objection there could be from the standpoint of the reciprocally minded disabled themselves, since this strategic response to their disability offers a very powerful and socially benign ratchet mechanism—one which they will control—for their getting all the help for which reciprocal returns will eventually emerge, however indirectly. (As long as each increment proposed by the disabled will be fully reciprocated, it would be stupid for the able to confine rehabilitation or assistance to some arbitrary minimum. This is so not only because the increased benefits will cancel the increased burdens but because there is often a sort of “surplus value” created by increasing the level of functioning for a disabled person. Yet

since the benefits of reciprocation are lost when the recipient refuses the proffer of increased help, recipients retain control of this ratchet effect.)

A caution here: I am not proposing that we think along the lines of imposing a direct, tit-for-tat duty of reciprocation on the disabled—something like a loan for a college education, to be repaid directly to the lender by the very person initially benefited. Rather, I am simply proposing that in dealing with disability issues we should first look for new physical and social arrangements that eliminate anyone's serious, persistent inability to engage in fully reciprocal social interactions, however indirect those interactions might be. And I am suggesting that in this context we need not be concerned with refining the definition of disability—or even with singling out a special class of disabled people for special treatment. *Any* persistent inability to reciprocate poses the same sort of strategic problems—which we should, if possible, solve by restoring the ability to reciprocate. Among reciprocally minded people (surely the vast majority in our society), such coordination on reciprocity will pay for itself in the long run and immediately turn disability issues from problems of pure conflict to problems of pure coordination.

Indeed, for that reason I am suggesting that as a first approximation we may as well consider the inability to reciprocate, when it is more than merely transient, to be the very definition of the sort of disability that unambiguously calls for social assistance. Thus, for example, parents, children, or spouses who are persistently exhausted and socially isolated by the burdens of caring for profoundly disabled relatives are effectively disabled in this sense, and their situation warrants appropriate social assistance as much as does an inability imposed by paraplegia or Alzheimer's disease. But the nature and scale of the requisite assistance for all such disabilities, in this first approximation, is to be defined in terms of what can in fact be fully reciprocated, since that is the least problematic issue.

It is worthwhile to reflect on how many issues even this first approximation settles. Having level or ramped access to public buildings, for example, is useful for service technicians, furniture movers, delivery people, and parents pushing baby strollers as well as for wheelchair users, and the reciprocal social benefits begin to accrue immediately, not only from the increased participation of mobility-impaired people but from others' increased efficiency. The standard placement of signage introduced by accommodating the blind and visually impaired has similar immediate benefits for others. And, in general, problems of access to public transpor-

tation, accommodations, educational opportunities, medical care, rehabilitative services, and employment opportunities—for those who can and will fully reciprocate for them—can be fully addressed by a strategic concern for achieving full reciprocity.

Partial Reciprocity, Litigant’s Dilemmas, and Settlements

The next step is to consider disability cases that present us with a mixture of conflict and coordination problems—ones in which the conflict element cannot be removed because no new physical or social arrangements can be found in which full reciprocity can be restored, even among reciprocally minded people. Some people with profound cognitive disabilities appear to present us with this situation, as do some people with especially severe physical handicaps. In such cases it may be that significant social assistance can dramatically improve the situation for the disabled person but will inevitably impose a net cost on those who provide it.

Let us imagine that this is so in some cases and that the best option for the disabled person (and the worst for others) is to get an enforceable right to maximally effective social assistance, even though it imposes a net cost on others. Conversely, the best option for the others (and the worst for the disabled) is to get an enforceable right to refuse to provide any assistance at all to the disabled beyond what can be reciprocated. These are the pure conflict options. However, the second-best outcome for both parties is a settlement—just below the ignition point for conflict—in which some suboptimal but acceptable level of social assistance is provided to the disabled at a net cost acceptable to the providers, but is reciprocated as far as possible. The third-best option for both parties is a standoff in which neither assistance nor reciprocation occurs. These are coordination points. Schematically, we have these four options:

1. Claim rights to assistance; duties to provide it
2. Mutually suboptimal settlement
3. Standoff
4. No claim rights to assistance; no duties to provide it

And we are imagining that the preference order for these options is 1, 2, 3, 4 for the disabled, 4, 2, 3, 1 for everyone else.

This is, of course, the structure of the payoffs in a prisoner’s dilemma,

but the strategic situation is rather different from that described by the standard prisoner's dilemma story. In a prisoner's dilemma, when both parties go for their best options, they both confess and get what they agree is the third-best option. Here, in what we may call the "litigant's dilemma," when both parties go for their best options (let us say through a lawsuit) it is not clear what will happen. One party or the other may win outright, or both may get some sort of suboptimal settlement, or it may even be that a standoff results (e.g., if the case is mooted by the courts). In any case, the difficulty is that legal claims for options 1 and 4 must be adjudicated, and moral claims for them go through an even messier process before they become enforceable norms. These decision processes are typically quite unpredictable. Litigation (or moral suasion) is costly for both parties no matter what happens, and if both parties have plausible cases to the extent that it is simply not clear in advance which party has the stronger argument, the outcome is quite uncertain. Even if both parties press the conflict very hard—that is, press for their best options—there is often even no discernible change in the probabilities of the possible outcomes. This is the heart of the litigant's dilemma.

In such situations it is often in the strategic interests of both parties to settle. For one thing, a settlement is within their (joint) control. Opting for conflict is opting for loss of control, and that is not usually desirable. And if one is going to keep control by opting for coordination rather than conflict, then the choice is settlement vs. standoff, and it is hard to see why one would choose the standoff. (Accepting a standoff as a tactical move in a protracted conflict does not count as opting for coordination.) Moreover, coordination is the maximin option in these situations—the only way for each party to immunize herself against her least favored outcome. (By contrast, in a prisoner's dilemma it is conflict—confession—that is the maximin strategy for both.) And again, between the two coordination options, settlement is surely preferable to standoff. Finally, the sort of stability and mutual goodwill achieved by a genuine settlement is a genuine prize. Winners face new strategic problems with losers, and vice versa. In some cases, these new problems are as difficult as the old ones.

For all these reasons, in a reasonably just and beneficent social order of people who are, for the most part, willing to reciprocate, it seems reasonable to suggest that when we find ourselves in a litigant's dilemma with respect to disability issues, we should settle rather than opt for pure conflict—if we have the chance. And it seems to me that such a suggestion is

supported by reflection on the multitude of disturbing lawsuits, threatened lawsuits, and administrative and arbitration proceedings concerning students with cognitive disabilities in public schools.

Residues

That leaves cases of pure conflict—cases in which people either cannot or will not reciprocate (or accept either full or partial reciprocity) or in which they either cannot or will not settle for second best in order to avoid conflict. It is here that the classic problems of beneficence and distributive justice find their most severe tests.

I have little to add here, in a mere afterword, to the discussion of those difficult issues. My suggestion is simply that we should take the opportunity, afforded to us by the strategic value of norms of reciprocity, to minimize the range and intensity of such pure conflict in matters concerning human disabilities. It would be a great benefit to us all if we could arrange in this way to make the most difficult and discouraging problems of disability and distributive justice purely academic.