

MEANINGFUL LIVES AND MAJOR LIFE ACTIVITIES

*Ann Hubbard**

I. INTRODUCTION

The Americans with Disabilities Act of 1990 (“ADA”)¹ was hailed as a “Declaration of Independence” for the tens of millions of Americans who have physical or mental disabilities.² More than a decade later, however, there is considerable disagreement and widespread litigation about what counts as a disability and who has one. The ADA defines an individual with a disability as one who has a present, past, or perceived impairment that substantially limits one or more of her major life activities.³ Who meets this definition? In practice, the answer is “not who you might think.” To the surprise and dismay of the Act’s supporters, courts routinely refuse to hear the claims of people with physical impairments or diseases such as cancer, epilepsy or diabetes on the grounds that they are not disabled.⁴ In one striking case, a federal district judge ruled that no reasonable juror could find that a woman who was missing most of one arm had a disability.⁵

The courts in effect say that these individuals are not “disabled enough” under the prevailing interpretation of the ADA, which assesses disability by

* Associate Professor, University of North Carolina School of Law. I thank Lou Billionis for his invaluable insights and tireless support; Michael Corrado, Marion Crain, Adrienne Davis and Joe Kennedy for their thoughtful comments on an earlier draft of this article; Bridget Bishop, Ross Bradford, Hoang Lam and Jennifer Neuhauser for their exceptional research assistance; and the UNC Law School librarians for locating and obtaining materials. In addition, I am grateful to Anita Silvers, Eva Feder Kittay and the participants of the National Endowment of the Humanities summer seminar, “Justice, Equality and Disability,” for their ideas and encouragement.

1. 42 U.S.C. §§ 12101-12213 (2000).

2. 136 CONG. REC. S9690 (July 13, 1990) (statement of Sen. Simon); 136 CONG. REC. H10,860 (May 17, 1990) (statement of Rep. Conte); 136 CONG. REC. H2449 (May 17, 1990) (statement of Rep. AuCoin). See Statement by President George Bush upon signing S. 933, 26 WKLY. COMP. PRES. DOCS. 1165, July 30, 1990, reprinted in 1990 U.S.C.C.A.N. 601 (expressing hope that the ADA, like the Declaration of Independence, would be a beacon of freedom); see also 135 CONG. REC. S19,888 (Sept. 7, 1989) (statement of Sen. Kennedy) (referring to ADA as “an emancipation proclamation”).

3. 42 U.S.C. § 12102(2) (2000).

4. For discussions and critiques of these decisions, see, for example, Robert L. Burgdorf, Jr., “Substantially Limited” Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability, 42 VILL. L. REV. 409 (1997); Jane Byeffer Korn, *Cancer and the ADA: Rethinking Disability*, 74 CAL. L. REV. 399 (2001); David Olsky, *Let Them Eat Cake: Americans with Diabetes and the ADA After Sutton*, 53 STAN. L. REV. 1829 (2000); Bonnie Poitras Tucker, *The Supreme Court’s Definition of Disability Under the ADA: A Return to the Dark Ages*, 52 ALA. L. REV. 321 (2000).

5. *Gillen v. Fallon Ambulance Serv.*, 283 F.3d 11, 21 (1st Cir. 2002) (reversing grant of summary judgment to defendant).

the functional limitations produced by impairment. To say that they are not *disabled* enough is to say that they are not *different* enough. Or “*dysfunctional*” enough.⁶ This emphasis on difference is troubling to the plaintiff seeking equal opportunities or treatment as an equal, this focus on limitations anathema to the plaintiff who has come to court to vindicate her abilities. The shortcomings—indeed the perversity—of this restrictive account of who is—or is not—“disabled” for purposes of the ADA have been convincingly demonstrated by others.⁷ While I would welcome a fresh start with a new, more sensitive and sensible definition, my focus is on the here and now, on how to make the current definition better reflect the realities of living with physical and mental impairments—and with others’ negative reactions to them. Even within the existing interpretation of disability, we can expand the conception of who is disabled, and we can do so through the component of the definition that invites consideration of *sameness* or *equality*. This is the identification of “major life activities,” and this is where Congress’ aspirations and our own ideals find a common home. If the ADA stands for anything, it is the proposition that all Americans—with or without disabilities—want the same things for themselves and their families and have the same desires, needs, aspirations and ambitions. They therefore must all have the same opportunities to develop their skills and talents and to envision and obtain their personal conception of the good life, or, if you like, the American dream.⁸

At the most basic level, major life activities are activities that are important to our everyday lives or our long-term life plans. My argument, simply stated, is that we should favor a wide-ranging, thoroughgoing inquiry into what qualifies as a major life activity—what activities allow us to function and flourish in modern American society. The best answer to that question is one that yields a coherent standard that is validated by many overlapping sources of meaning: the text and history of the ADA and relevant implementing regulations; our own intuitions and shared understandings about what matters in our lives; the prevailing political, social, and cultural princi-

6. Anita Silvers, *Formal Justice*, in *DISABILITY, DIFFERENCE, DISCRIMINATION* 15 (Anita Silvers et al. eds., 1998). Anita Silvers exposes that what society deems “dysfunction” often is more accurately viewed as atypical, anomalous or diverse modes of functioning or the product of an inhospitable physical or social environment. *Id.* at 61-76. There is, moreover, “a notorious paucity of correlation between the kind and degree of an individual’s physiological impairment—the damage to nerve, muscle, vessel, organ, or other tissues—and that individual’s success, or lack of it, in accomplishing physical, daily living and higher-order functions.” *Id.* at 61. These are perhaps the principal, but certainly not the only, shortcomings of a “functional limitations” definition of disability.

7. See, e.g., Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99 (1999); Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKLEY J. EMP. & LAB. L. 91 (2000); Jane Byeff Korn, *Cancer and the ADA: Rethinking Disability*, 74 CAL. L. REV. 399 (2001); Bonnie Poitras Tucker, *The Supreme Court’s Definition of Disability Under the ADA: A Return to the Dark Ages*, 52 ALA. L. REV. 321 (2000).

8. The ADA promises “full participation” and true equality for Americans with disabilities in all those “opportunities for which our free society is justifiably famous.” 42 U.S.C. § 12101(a)(8), (9) (2000).

ples and beliefs that inspired and informed the ADA; and the wisdom accumulated across time and disciplines by scholars and other thinkers who have thought and written about what gives life meaning, promotes human happiness and flourishing, and allows individuals to achieve their full potential. This conception of major life activities would offer not merely consensus, but consilience, or a unity of knowledge drawing insights from diverse fields of inquiry.⁹

That far-reaching inquiry is a long-term project. What I present here is an outline of the directions that inquiry might take and a preview of the coherent insights it will produce. Part I sketches the current legal landscape, which marks the field and sets the boundaries for further inquiry, and then offers my proposed standard for determining whether a life activity is major—a standard that derives from my ventures into the kind of inquiry I am proposing here. The remainder of this Article will endeavor to show, in some small part, how I reached this conclusion and how continued inquiry and reflection can expand and enrich our conception of major life activities. Part II explores several philosophical accounts of the good human life. It demonstrates the fruitfulness of this discipline for insights into activities that are important to leading rich, purposeful and happy lives. Part III offers brief illustrations from other disciplines—sociology, anthropology, psychology and political theory—to forecast what an inquiry into those fields could contribute to an understanding of human needs, motivations, functioning and flourishing. More particularly, this discussion will demonstrate how each discipline identifies, in its own way, similar dimensions of life as especially important—and thus activities that each would naturally label as “major.” With the benefit of these new understandings from other disciplines, Part IV returns briefly to the ADA to remind us of the Act’s ambitions and also of its appreciation of the everyday aspects of life and the imperative of allowing individuals with disabilities to take part in those activities on the same terms and in the same settings as all other Americans.

9. I borrow the term loosely from EDWARD O. WILSON, *CONSILIENCE: THE UNITY OF KNOWLEDGE* (1998). Recent years have seen a growing appreciation of the relevance—and indeed indispensability—of this nature of interdisciplinary inquiry for an informed understanding of law. See Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761, 772, 779 (1987) (applauding the “the conscious application of other disciplines, such as political and moral philosophy and economics, to traditional legal problems” and encouraging “the study of the law not as a means of acquiring conventional professional competence but ‘from the outside,’ using the methods of scientific and humanistic inquiry to enlarge our knowledge of the legal system”). This inquiry is particularly helpful to understanding contingent meanings of disability. See, e.g., Carlos A. Ball, *Autonomy, Justice, and Disability*, 47 U.C.L.A. L. REV. 599 (2000) (exploring the philosophical foundations for the legal and moral rights of individuals with disabilities); Mary Crossley, *The Disability Kaleidoscope*, 74 NOTRE DAME L. REV. 621, 668 (1999) (advocating “a greater appreciation of nonlegal understandings of disability” to “assist courts in giving content to the ADA’s imprecise definition” of disability).

II. THE LEGAL FRAMEWORK

The ADA defines a disability as “a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual.”¹⁰ Of the three components of this definition—impairment, limitation and major life activity—only the third concerns us here. The statute does not define major life activities. We are not, however, entirely without legal guides. The ADA adopted the definition of disability from its predecessor, the Rehabilitation Act of 1973, and expressly references that Act and regulations implementing it.¹¹ The Rehabilitation Act does not define major life activities either, and Rehabilitation Act precedent at the time the ADA was passed was almost silent on the matter.¹² The applicable Rehabilitation Act regulations offer no standards or criteria for defining major life activities, but they do offer illustrative examples, listing “functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”¹³ Regulations implementing the ADA adopt the same language.¹⁴

Other aspects and provisions of the ADA can help identify the type of life activities Congress contemplated by showing the nature of the discrimination it sought to prohibit and the kind of life it sought to guarantee. Several aspects of the Act—including its emphasis on integration, inclusion, full participation and equal opportunity, and its unprecedented reach into virtually every corner of American life—attest to Congress’ aspirations for transforming virtually every aspect of the lives of millions of Americans. The ADA’s findings underscore this.¹⁵ In these findings, Congress identified the continued isolation and segregation of individuals with disabilities as a “serious and pervasive social problem.”¹⁶ This discrimination relegated individuals with disabilities to “lesser services, programs, activities, bene-

10. 42 U.S.C. § 12102(2)(A).

11. *See id.* § 12201(a) (providing that the ADA is to be construed to provide at least as much protection as the “Rehabilitation Act of 1973 (29 U.S.C. [§] 790 et seq.) or the regulations issued by Federal agencies pursuant to such title”).

12. For more than fifteen years, courts had routinely applied the Rehabilitation Act to protect people with a wide range of commonly recognized impairments. For a compilation of then-existing Rehabilitation Act decisions, see ROBERT L. BURGDORF, JR., *DISABILITY DISCRIMINATION IN EMPLOYMENT LAW* 137-40 (1996) (compiling Rehabilitation Act cases in which courts recognized as disabled persons with varied conditions including epilepsy, learning disabilities, limited arm and shoulder mobility, hepatitis B, impaired hearing corrected by hearing aids, chronic back pain with disc disease, vision in one eye, absence of a kidney and asthma); *see also* Crossley, *supra* note 9, at 622 (concluding that “[w]hen it came to identifying who would be protected from discrimination under the ADA, . . . Congress decided to leave well enough alone”).

13. 45 C.F.R. § 84.3(j)(2)(ii) (1997); 28 C.F.R. § 41.31(b)(2) (1997).

14. 29 C.F.R. § 1630.2 (Equal Employment Opportunity Commission); 28 C.F.R. § 35.104(B)(2) (Department of Justice).

15. The ADA’s findings have been a key to defining both disability and discrimination under the Act. *See* Sutton v. United Air Lines, Inc., 527 U.S. 471, 484 (1999) (citing the finding that 43 million Americans have a disability as “critical” to the definition of disability); *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 589 n.1 (1999) (citing congressional findings about isolation and discrimination in institutionalization).

16. 42 U.S.C. § 12101(a)(2) (2000).

fits, jobs, or other opportunities”¹⁷ and disadvantaged them “socially, vocationally, economically, and educationally.”¹⁸ In particular, Congress found that disability discrimination persisted “in such *critical* areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services.”¹⁹ This congressional recognition of the pervasive reach of disability discrimination and of the “critical” importance of these aspects of life suggests that activities within each of these areas should be candidates for “major” status. That said, the statute itself leaves considerable interpretive work to be done.

The Supreme Court has had limited opportunity to interpret “major life activity.”²⁰ The Court first addressed this issue in *Bragdon v. Abbott*,²¹ in which it held that reproduction is a major life activity.²² On the interpretation of ‘major,’ the Court concluded that “[t]he plain meaning of the word ‘major’ denotes comparative importance.”²³ Thus, “the touchstone for determining an activity’s inclusion under the statutory rubric is its significance.”²⁴ Under this standard, the five-justice majority “ha[d] little difficulty concluding” that reproduction is a major life activity.²⁵ Indeed, “[r]eproduction falls well within the phrase ‘major life activity,’” as “[r]eproduction and the sexual dynamics surrounding it are central to the life process itself.”²⁶

Significantly, the Court rejected the contention that the ADA covered only “those aspects of a person’s life which have a public, economic, or daily character”:²⁷ “Nothing in the definition suggests that activities without a public, economic, or daily dimension may somehow be regarded as so unimportant or insignificant as to fall outside the meaning of the word ‘major.’ The breadth of the term confounds the attempt to limit its construction in this manner.”²⁸

The Court concluded that the Rehabilitation Act regulations confirmed the status of reproduction as a major life activity in two respects.²⁹ First, the “inclusion of activities such as caring for one’s self and performing manual tasks belies the suggestion that a task must have a public or economic character in order to be a major life activity for purposes of the ADA.”³⁰ Second, using importance as its touchstone, the Court concluded that reproduction

17. *Id.* § 12101(a)(5).

18. *Id.* § 12101(a)(6).

19. *Id.* § 12101(a)(3) (emphasis added).

20. *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998).

21. 524 U.S. 624 (1998).

22. *Id.* at 639.

23. *Id.* at 638 (quoting *Abbott v. Bragdon*, 107 F.3d 934, 939 (1st Cir. 1997)).

24. *Id.* (quoting *Abbott*, 107 F.3d at 940).

25. *Id.*

26. *Id.*

27. *Id.* (citations omitted).

28. *Id.*

29. *Id.* at 638-39.

30. *Id.* at 639.

“could not be regarded as any less important” than two of the illustrative activities, working and learning.³¹ Notably, *Bragdon* also demonstrates that an activity need not be universal to be major.³² That some people choose not to reproduce does not deprive the activity of its significance.

The Court’s most recent decision on major life activities is *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*,³³ in which it addressed “the proper standard for assessing whether an individual is substantially limited in performing manual tasks.”³⁴ Reiterating that “[m]ajor means important,”³⁵ the Court held that the major life activity of performing manual tasks encompasses those tasks “that are of central importance to daily life.”³⁶ Significantly, the Court declared that “the variety of tasks central to most people’s daily lives” includes tasks related to household chores and personal hygiene.³⁷ From *Toyota* we learn that major life activities are not limited to momentous decisions or major milestones like having a child, but also extend to the mundane tasks of everyday life.³⁸

Before proceeding, let me explain how my (fairly hopeful) reading of *Toyota* differs from the popular account, which often includes a derisive reference to the “toothbrush test.” It hinges on the distinction between identifying a major life activity—which reflects our *sameness* or common undertakings – and evaluating an individual’s ability to perform it—which assesses her individual *differences*. After deciding that the major life activity of performing manual tasks includes tasks related to personal care and household chores, the Court proceeded to analyze whether the individual plaintiff’s carpal tunnel syndrome and bilateral tendinitis substantially limited her ability to perform those tasks.³⁹ The Court acknowledged that these impairments caused the plaintiff, Ella Williams, “to avoid sweeping, to quit

31. *Id.*

32. *Id.*

33. 534 U.S. 184 (2002).

34. *Id.* at 192. Neither party questioned, and the Court did not address, the prior question of whether performing manual tasks is a major life activity in the first place. Performing manual tasks is included in the EEOC regulations implementing the ADA, and the Court assumed without deciding that those regulations are valid. *See id.* at 198.

35. *Id.* at 197 (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1363 (1976)) (defining ‘major’ as “greater in dignity, rank, importance, or interest”).

36. *Id.* The Court thus rejected the Sixth Circuit’s approach, which considered only whether Williams was limited in performing manual tasks related to her job. *Id.* at 199.

37. *Id.* at 200, 202 (identifying bathing and brushing one’s teeth as among the tasks that have “central importance to people’s daily lives”). The Court concluded that the lower court erred in analyzing only work-related manual tasks, holding that “the central inquiry must be whether the claimant is unable to perform the variety of tasks central to most people’s daily lives, not whether the claimant is unable to perform the tasks associated with her specific job.” *Id.* at 200-01.

38. In other cases, the Court has accepted seeing and walking as major life activities. *See PGA Tour, Inc. v. Martin*, 532 U.S. 661, 668, 670 (2001) (accepting uncontested assertion that professional golfer Casey Martin was disabled because his impairment substantially limited his major life activity of walking); *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555, 563-67 (1999) (analyzing whether plaintiff was substantially limited in “seeing,” where parties did not contest that seeing is a major life activity); *see also Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 490 (1999) (noting that nearsighted plaintiffs had failed to raise “the obvious argument that they are regarded . . . as substantially limited in the major life activity of seeing”).

39. *Toyota*, 534 U.S. at 202.

dancing, to occasionally seek help dressing, and to reduce how often she plays with her children, gardens, and drives long distances.”⁴⁰ It concluded, however, that these limitations were not *substantial* enough to establish a clear-cut disability.⁴¹ Because she testified that she could, among other things, “still brush her teeth,”⁴² the Court was not persuaded that she necessarily was substantially limited in the major life activity of performing manual tasks.⁴³

Thus, the Court ruled against Williams on the *substantial limitation* analysis, which relies on the *difference* principle: how different (deficient) is her functioning when compared to the reference (nondisabled) population? It is on this point that the Supreme Court has imposed highly restrictive standards, in *Toyota* and elsewhere.⁴⁴ The *major life activity* analysis, by contrast, focuses on our *sameness*, on our common activities and undertakings. On this score, the Supreme Court has either decided or assumed that all the activities presented to it—walking, seeing, reproduction, working and performing manual tasks—are major life activities.⁴⁵ This distinction is critical to sound legal analysis and to the approach I am urging. The significance or importance of an identified life activity is a matter of statutory construction, to be determined by reference to the general population—and, I propose, with an expansive and informed appreciation of what makes life important. The significance or substantiality of a specific functional limitation is a question of fact, to be determined with respect to an individual.⁴⁶

40. *Id.*

41. *Id.*

42. *Id.* (citing Williams’s deposition testimony that, “even after her condition worsened, she could still brush her teeth, wash her face, bathe, tend her flower garden, fix breakfast, do laundry, and pick up around the house”).

43. *Id.* (concluding that “these changes in her life did not amount to such severe restrictions in the activities that are of central importance to most people’s daily lives that they establish a manual task disability *as a matter of law*”) (emphasis added). Accordingly, the Court reversed summary judgment for Williams on the issue of whether she was disabled. *Id.* at 203.

44. In *Sutton v. United Air Lines*, for example, the Court held that the existence of a substantial limitation is to be assessed in light of mitigating or corrective measures. 527 U.S. at 482. It is this ruling that leads lower courts to find that people with serious or even life-threatening diseases are not disabled because medical treatment or corrective devices have mitigated the disease’s limitations on their present ability to function. *Sutton* also limits the class of people who are “regarded as” disabled. *See id.* at 484–86. Following *Sutton*, the plaintiff must show not simply that the defendant regarded her as diseased or impaired, but that it regarded her as presently substantially limited in some major life activity, taking mitigating measures into account—an often insurmountable hurdle. *See id.* at 491.

45. *PGA Tour v. Martin*, 532 U.S. 661 (2001) (walking); *Albertson’s v. Kirkingburg*, 527 U.S. 555 (1999) (seeing); *Bragdon v. Abbott*, 524 U.S. 624 (1998) (reproduction); *Toyota*, 534 U.S. 184 (performing manual tasks); *Sutton*, 527 U.S. 471 (working).

46. *See* Kiren Dosanjh Zucker, *The Meaning of Life: Defining “Major Life Activities” under the Americans with Disabilities Act*, 86 MARQ. L. REV. 957, 971 (2003) (advising that “keeping separate the issues of whether a task is a major life activity and whether the individual’s impairment substantially limits it” would help reduce confusion). *Toyota* reminds us that what a court grants with one hand (the “major life activities” hand), it can take back with the other (the “substantial limitations” hand). It is easy enough to decide—or often, simply assume—that an activity is major, only to conclude that the individual is not substantially limited in it. *See, e.g., Cooper v. Olin Corp.*, 246 F.3d 1083, 1089 (8th Cir. 2001) (assuming without deciding that socialization is a major life activity in which plaintiff was not substantially limited); *Steele v. Thiokol Corp.*, 241 F.3d 1248, 1255 (10th Cir. 2001) (same). Whatever the pitfalls of the substantial limitation analysis, it is important to preserve a major life activity analysis that

With that distinction in mind, the Supreme Court's early rulings on major life activities plainly permit and arguably welcome a conception of major life activities that encompasses the full array of activities that contribute to the good life.

To date, then, the legal contours of major life activities seem fairly open. Congress' aspirations for the ADA and its commitment to transforming the lives of people with disabilities in virtually every aspect of life—educational, vocational, civic, commercial, professional, cultural, residential, recreational and simply public—invite, if not compel, an expansive conception of major life activities that embraces what matters in life and what comes with the promise of full and equal membership in the community. Similarly, the Supreme Court's open-ended construction of "major" as "important," coupled with its recognition that the "breadth" of the term "confounds" any attempt to limit it to activities that are public, economic or daily, leave ample room for a capacious conception of what is "major."

Despite these broad contours, however, some federal judges—among them Supreme Court justices—appear to be forming a needlessly restrictive view of what is important in most people's lives. In *Bragdon v. Abbott*, the Court voted only five to four to recognize reproduction as a major life activity.⁴⁷ Twice the Court has suggested, in dicta, "a conceptual difficulty" in recognizing work as a major life activity.⁴⁸ And lower federal judges ad-

reflects our lives, congressional aspirations and what we know to be true about human nature and human life, rather than allowing impressions or conclusions about how deserving or "bad off" a plaintiff is to skew decisions about whether an identified activity is generally important. In other words, however high the Court sets the substantial limitations bar for performing manual tasks, it did not and should not cast doubt on the general importance of performing manual tasks.

47. *Compare* *Bragdon v. Abbott*, 524 U.S. 624, 638 (1998) (having "little difficulty" concluding that reproduction is a major life activity), *with id.* at 660 (Rehnquist, C.J., dissenting) (arguing that "major" activities are those that are "repetitively performed and essential in the day-to-day existence of a normally functioning individual," not those of "fundamental importance," such as "decisions as to who to marry, where to live, and how to earn one's living"), *and id.* at 664-65 (O'Connor, J., concurring in the judgment in part and dissenting in part) (opining that "the act of giving birth to a child, while a very important part of the lives of many women," is not "major" in the sense of the representative major life activities "of all persons" in the applicable regulations).

48. *Sutton*, 527 U.S. at 492 (noting that "there may be some conceptual difficulty" in defining major life activities to include work where plaintiff alleges exclusion from work, but assuming without deciding that work is a major life activity); *Toyota*, 534 U.S. at 200 (noting "conceptual difficulties inherent in the argument that working could be a major life activity," but declining to decide "this difficult question"). The history and status of working as a major life activity are beyond the scope of this Article but are explored in, among others, Richard A. Bales, *Once Is Enough: Evaluating When a Person Is Substantially Limited in Her Ability to Work*, 11 HOFSTRA LAB. L.J. 203, 235-42 (1993); Robert L. Burgdorf, Jr., "Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability, 42 VILL. L. REV. 409, 439-69 (1997); Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB. L. 91, 132-36 (2000); Steven S. Locke, *The Incredible Shrinking Protected Class: Redefining the Scope of Disability Under the Americans with Disabilities Act*, 68 U. COLO. L. REV. 107, 116 (1997); Bonnie P. Tucker, *The Americans with Disabilities Act Interpreting the Title I Regulations: The Hard Cases*, 2 CORNELL J.L. & PUB. POL'Y 1, 2-6 (1992); NAT'L COUNCIL ON DISABILITY, POLICY BRIEF SERIES: RIGHTING THE ADA NO. 13, THE SUPREME COURT'S ADA DECISIONS REGARDING SUBSTANTIAL LIMITATION OF MAJOR LIFE ACTIVITIES 10-12 (Apr. 29, 2003), available at <http://www.ncd.gov/newsroom/publications/limitation.html>.

Nevertheless, without minimizing the significance of the Court's dicta and rulings about the major life activity of working, there is reason to regard the Court's skepticism about work as a "special

dress major life activities have questioned the importance of such activities as interacting or getting along with others,⁴⁹ thinking or concentrating,⁵⁰ reading,⁵¹ driving,⁵² keeping house,⁵³ gardening or yard work,⁵⁴ social and leisure activities,⁵⁵ and playing with children.⁵⁶

Before we get too far down this path of dismissing or minimizing the value of common life activities, I urge the embrace of a fuller account of what life activities should count as “major”—an account that captures the richness, challenges and opportunities of the world in which we live and the depth of what we know about human nature. Even a cursory review of the literature in the social sciences and humanities reveals a remarkable consensus across time and disciplines about what is important to a good life. From this consensus, and within the existing legal contours of major life activities, it is possible to advance a comprehensive and workable standard for identifying which activities are major. I propose the following:

case” and not representative of its general approach to major life activities. *See Toyota*, 534 U.S. at 197-202 (refusing to hold the major life activity of performing manual tasks to the demanding standards it applies to working). Moreover, to date, the Court has been willing to assume, without deciding, that work is a major life activity.

49. *See Davis v. Univ. of N.C.*, 263 F.3d 95, 101 n.4 (4th Cir. 2001) (expressing doubt that interacting with others is a major life activity); *Soileau v. Guilford of Maine, Inc.*, 105 F.3d 12, 15 (1st Cir. 1997) (stating that the “ability to get along with others” is too vague to constitute a major life activity, although “a more narrowly defined concept going to essential attributes of human communication” might be considered a major life activity); *but see McAlindin v. County of San Diego*, 192 F.3d 1226, 1234 (9th Cir. 1999) (holding that “[b]ecause interacting with others is an essential, regular function, like walking and breathing, it easily falls within the definition of ‘major life activity’”), *cert. denied*, 530 U.S. 1243 (2000).

50. *See Doebele v. Sprint/United Mgmt. Co.*, 342 F.3d 1117, 1130 (10th Cir. 2003) (holding that concentration is not a major life activity under the ADA); *but see EEOC v. Sara Lee Corp.*, 237 F.3d 349, 352 (4th Cir. 2001) (recognizing thinking as a major life activity).

51. *Compare Hileman v. City of Dallas*, 115 F.3d 352, 355 n.4 (5th Cir. 1997) (expressing doubt that reading is a major life activity for purposes of the Rehabilitation Act), *with Bartlett v. N.Y. State Bd. of Bar Exam’rs*, 226 F.3d 69 (2d Cir. 2000) (recognizing reading as a major life activity).

52. *See Chenoweth v. Hillsborough County*, 250 F.3d 1328, 1329-30 (11th Cir. 2001) (concluding that driving is not a major life activity because it differs from the illustrative activities in the EEOC’s regulations, it requires a license and millions of Americans do not drive); *Sinkler v. Midwest Prop. Mgmt. Ltd. Partnership*, 209 F.3d 678, 684-85 (7th Cir. 2000) (commuting to work is not a major life activity). *But cf. Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 726 (5th Cir. 1995) (defining caring for oneself to include everything from driving and grooming to feeding oneself and cleaning one’s home).

53. *See Buskirk v. Appollo Metals*, 116 F. Supp. 2d 591, 597-98 (E.D. Pa. 2000) (performing household chores, engaging in various athletics and driving are not major life activities); *Marinelli v. City of Erie*, 216 F.3d 354, 363 (3d Cir. 2000) (cleaning house is major life activity only to the extent necessary to care for oneself, that is, “necessary for one to live in a healthy or sanitary environment”).

54. *See Weber v. Strippit, Inc.*, 186 F.3d 907, 914 (8th Cir. 1999) (holding that shoveling snow, gardening and mowing the lawn do not qualify as major life activities); *Colwell v. Suffolk County Police Dep’t*, 158 F.3d 635, 642-43 (2d Cir. 1998) (rejecting the following activities as major: doing yard work, gardening, shoveling snow, doing various home repairs, driving, working on the family cars, performing housework other than basic chores and shopping with his wife).

55. *See Kiphart v. Saturn Corp.*, 74 F. Supp. 2d 769, 775 (M.D. Tenn. 1999) (rejecting socializing and participating in recreational activities as major life activities), *rev’d on other grounds*, 251 F.3d 573 (6th Cir. 2001).

56. *See Toyota*, 534 U.S. at 191 (reporting the district court’s ruling, not before the Court, that gardening, housework and playing with one’s children are not major life activities).

Major life activities include at least those that promote human flourishing or thriving; advance human growth and development; secure personal autonomy; are important to well-being, happiness, comfort or dignity; integral to self-respect, identity or actualization; recognized by most people in our society as important; or necessary for full participation in and equal benefits from community, civic, social or political activities.

This formulation draws upon concepts about quality of life or human flourishing from philosophy, psychology, sociology and other disciplines.⁵⁷ It rests on time-tested, well-established principles about human nature, human need and human flourishing. It gives effect to the clear intent and ambitious vision of the legislators who passed the ADA and the administration officials who supported it. They understood and expressed the importance of giving *all* Americans the same chances and choices to participate in *all* aspects of modern American life, and they promised the dignity and opportunity that come with full acceptance into the mainstream of society.

This conception of major life activities—of what matters in life—also is in tune with the social and political thought that animated the disability rights movement and shaped the ADA. It reflects what we as Americans consistently recognize as important to us. We value (among other things) family life, friends and community ties; the freedom to make choices about where and how to live our lives; opportunities to pursue a good education and to develop our talents; the chance to identify and pursue one's life's work; the ability to provide for ourselves and our loved ones and—while we might take it for granted—the simple ability to go out in the world and go about our lives.⁵⁸ Moreover, by affording a sensitive and expansive account of what matters in *our* lives or is important in more or less *all* lives, this proposed standard acknowledges that the same things matter in the lives of people with disabilities (who, after all, are “us”). It thus avoids the real risk of envisioning only a limited sphere of activities or reduced expectations for

57. See, e.g., SUSAN WENDELL, *THE REJECTED BODY: FEMINIST PHILOSOPHICAL REFLECTIONS ON DISABILITY* 50 (1996) (defining disability as the inability “to participate in all *major aspects* of life in a society,” including “at least work, social life, political life, religious life, cultural life, personal relationships, and recreation”) (emphasis added); Anita Silvers, *The Unprotected: Constructing Disability in the Context of Antidiscrimination Law*, in *AMERICANS WITH DISABILITIES: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS* 126, 136 (Leslie Pickering Francis & Anita Silvers eds., 2000) (referring to “activities requisite to . . . being productive and fulfilled”).

58. According to public opinions surveys collected by the Roper Center at the University of Connecticut, roughly two out of three people surveyed in 1997 and 2002 reported that having paid employment is very important to them. In a 2002 survey, 46% of people said that their hobbies or recreational activities were very important to them, and 41% said they were somewhat important. See <http://www.ropercenter.uconn.edu> (citing 1997 Washington Post poll and 2002 Gallup Poll). But when asked what makes their life meaningful, most people mention close relationships with family, friends or romantic partners before anything else. David G. Myers, *Close Relationships and the Quality of Life*, in DANIEL KAHNEMAN ET AL., *WELL-BEING: THE FOUNDATIONS OF HEDONIC PSYCHOLOGY* 374, 375 (1999) (citing Ellen Berscheid, *Interpersonal Attraction*, in *THE HANDBOOK OF SOCIAL PSYCHOLOGY* (Gardner Lindzey & Elliot Aronson eds., 1985)); *id.* at 374 (when asked what would bring them happiness, most people answer “love”) (citing JONATHAN FREEDMAN, *HAPPY PEOPLE* (1978)).

people with disabilities, of calling on them to validate needs, desires and aspirations that non-disabled people assume as a matter of right. In that sense, this proposed standard for identifying major life activities accords with respect and regard for others and for equality of opportunity.

Finally, by turning to other disciplines for perspectives on what constitutes a life well lived, we tap into a rich, deep vein of knowledge. "Concern about the good life is probably as old as civilization,"⁵⁹ and there are countless sources of insight into what activities and undertakings are important to human life in general and modern American life in particular. As leading philosopher Martha Nussbaum teaches, the best guide for identifying the "central defining features" of the good human life is "the exchange of reasons and arguments by human beings within history, in which, for reasons that are historical and human but not the worse for that, we hold some things to be good"⁶⁰

My inquiry begins with philosophy.

III. PHILOSOPHICAL INSIGHTS INTO HUMAN FLOURISHING

For centuries, philosophers have examined the "central defining features" of the good human life.⁶¹ Aristotle celebrated reason and friendship above all else.⁶² Contemporary Aristotelian philosopher Martha Nussbaum expands and elaborates, explaining how reason and friendship suffuse and organize other central components of human flourishing, including mobility, meaningful work and opportunities for recreation, sexual satisfaction and play.⁶³ Many of her contemporaries sound similar notes. Charles Taylor urges that "what makes our lives meaningful or fulfilling" often is found in "the affirmation of ordinary life," the life of family and work.⁶⁴ Susan Wendell identifies the "major aspects of life" in our society to include "at least work, social life, political life, religious life, cultural life, personal relationships, and recreation."⁶⁵ Needs theorists affirm the importance of having meaningful opportunities to participate in a range of important life activities, including having friends and intimate relationships, parenting, main-

59. Karl F. Schuessler & G.A. Fisher, *Quality of Life Research and Sociology*, 11 ANN. REV. SOCIOLOGY 129, 130 (1985) [hereinafter Schuessler & Fisher, *Quality of Life Research*].

60. Martha C. Nussbaum, *Human Functioning and Social Justice: In Defense of Aristotelian Essentialism*, 20 POL. THEORY 202, 203, 213 (1992) [hereinafter Nussbaum, *Human Functioning*].

61. *Id.*

62. See Martha Nussbaum, *Non-Relative Virtues: An Aristotelian Approach*, in THE QUALITY OF LIFE 242, 266 (Martha C. Nussbaum & Amartya Sen eds., 1993) [hereinafter Nussbaum, *Non-Relative Virtues*].

63. See *infra* Part III.B.2.

64. CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF MODERN IDENTITY 4, 13, 211 (1989); *id.* at 15-16 (acknowledging the dignity that comes from being "a householder, father of a family, holding down a job, [and] providing for my dependants").

65. WENDELL, *supra* note 57; see Gregory S. Kavka, *Disability and the Right to Work*, in AMERICANS WITH DISABILITIES: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS 174, 178 (Leslie Pickering Francis & Anita Silvers eds., 2000) (identifying the major spheres of life to include family, personal, social, recreational, economic and professional life).

taining a home, working and participating in the life of the community.⁶⁶ Eva Feder Kittay and other care theorists remind us of the extent to which our identity and our very existence depend upon our caring relationships with others.⁶⁷ Alisdair MacIntyre tells us that human flourishing depends on being integrated into a community and enjoying the respect of its members.⁶⁸

One theme that recurs throughout varied philosophical traditions and approaches—and resonates with the text and history of the ADA—is the importance of having meaningful opportunities to direct one’s own life, to determine and pursue one’s own personal and professional goals, to develop one’s own conception of the good, to choose one’s associations and affiliations and to form one’s own identity.⁶⁹ This is variously discussed in the philosophical literature in terms of agency,⁷⁰ autonomy,⁷¹ freedom,⁷² the capacity to form one’s own conception of the good,⁷³ having a full scope of action,⁷⁴ choosing from among a reasonable array of possible life plans,⁷⁵

66. See *infra* Part III.C.

67. Eva Feder Kittay, *When Caring Is Just and Justice Is Caring*, 13 PUB. CULTURE 557, 567-68 (2001). As Kittay explains, we become persons only through “the engagement of other persons—their care, as well as their recognition of the uniqueness and the connectedness of our human agency, and the distinctiveness of our particularly human relations to others . . .” *Id.* at 568; *id.* (“being a person has . . . everything to do with *relationships*—to our world and to those in it”) (emphasis in original). Accordingly, caring for others is an activity and “a virtue” that matters to all human beings and must be recognized and supported in any just society. *Id.* at 560.

68. ALISDAIR MACINTYRE, *DEPENDENT RATIONAL ANIMALS* 127 (1999) (recognizing that, along with the needs for food, drink, clothing, and shelter, we need “some recognized position within some network of communal relationships in which [we] are acknowledged as a participating member of a deliberative community,” a position that generates “both empowering respect from others and self-respect”).

69. Indeed, this strong philosophical consensus about the importance of having reasonably unconstrained life opportunities invites consideration of whether achieving or exercising this freedom is *itself* a major life activity—that is, the major life activity of making major life decisions, planning for and working toward the future, or meaningfully choosing one’s own life plan. Full development of the argument in favor of such a conception exceeds the scope of this Article, but strong foundations for it may be found in Carlos A. Ball, *Autonomy, Justice, and Disability*, 47 U.C.L.A. L. REV. 599, 635 (2000) (arguing that a good human life requires “freedom and opportunity to exercise personal autonomy,” defined as “the capability to make important life decisions and choices”). See *Bragdon v. Abbott*, 524 U.S. 624, 656 (1998) (Ginsburg, J., concurring) (recognizing that an HIV infection “inevitably pervades life’s choices: education, employment, family and financial undertakings”).

70. Lawrence C. Becker, *The Good of Agency*, in *AMERICANS WITH DISABILITIES: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS* 54, 55 (Leslie Pickering Francis & Anita Silvers eds., 2000) (observing that the issue in disability is not “justice, rights, caring, benevolence, dependence or independence,” but rather “the good of human agency”).

71. LEN DOYAL & IAN GOUGH, *A THEORY OF HUMAN NEED* 61-66 (1991).

72. E.g., Amartya Sen, *Capability and Well-Being*, in *THE QUALITY OF LIFE* 30, 35 (Martha C. Nussbaum & Amartya Sen eds., 1993) (discussing “well-being freedom” and “agency freedom”) [hereinafter Sen, *Capability and Well-Being*]; Amartya Sen, *Food and Freedom*, 17 *WORLD DEV.* 769, 770 (1989) (explaining that the good life “may be seen to be a life of freedom, and in that context freedom is not just a way of achieving a good life, it is constitutive of the good life itself”).

73. JOHN RAWLS, *POLITICAL LIBERALISM* 19, 30 (1993) [hereinafter RAWLS, *POLITICAL LIBERALISM*].

74. Robert Erikson, *Descriptions of Inequality: The Swedish Approach to Welfare Research*, in *THE QUALITY OF LIFE* 67, 73 (Martha C. Nussbaum & Amartya Sen eds., 1993).

75. ALISDAIR MACINTYRE, *DEPENDENT RATIONAL ANIMALS* 83 (1999) (distinguishing humans from other animals by our ability to imagine and select among realistic alternative futures and direct our activity toward our chosen good); Dan Brock, *Health Care and Medical Ethics*, in *THE QUALITY OF LIFE*

having the normal opportunity range⁷⁶ and other related concepts.⁷⁷ We see this concept in the ADA's declaration that the "[n]ation's proper goals" are to assure individuals with disabilities "equality of opportunity" and "full participation,"⁷⁸ or stated even more expansively, "the opportunity to compete on an equal basis and to pursue [all] *those opportunities for which our free society is justifiably famous.*"⁷⁹

It is not possible here to give a full accounting of all of these concepts and theories, or even to do justice to any one of them. My aim is simply to illustrate how philosophy naturally connects with and can enrich the discourse about what constitutes major life activities for purposes of the ADA—and thus stands as an example of how other disciplines can offer understandings and insights that help us achieve a sounder, more complete construction of the law. This brief philosophical exploration begins with Lawrence Becker's discussion of the centrality of agency. I begin with Becker because he actually has begun the intellectual exercise I advocate here, applying his philosophical concepts to inform the definition of major life activities. My principal focus, however, will be on capabilities and basic needs—two concepts that directly address the same central, underlying question: what is important to full human functioning and flourishing? Simply to state the question those approaches pursue is to state their relevance to the ADA. Activities important to full human functioning and flourishing should figure in any comprehensive construction of major life activities. I round out this examination with Rawls' influential theory of justice. Despite Rawls' steadfast refusal to articulate any comprehensive conception of the good life, even his "thin theory of the good"⁸⁰—including his concepts of moral powers, social cooperation and primary goods—confirms the importance of a range of human endeavors.

Although these approaches touch on numerous aspects of the good life—a varied array of important endeavors, indispensable human capacities and necessary conditions—I have, where appropriate, focused on their treatment of three spheres of activity: cognition (including activities like thinking, concentrating and reasoning); social interaction or affiliation (including activities related to forming and maintaining friendships and other personal ties and to being integrated into a community); and work (most

95, 124 (Martha C. Nussbaum & Amartya Sen eds., 1993) ("The *opportunity for choice* from among a reasonable array of life plans is an important and independent component of quality of life[.]"). (emphasis in original).

76. E.g., Norman Daniels, *Mental Disabilities, Equal Opportunity, and the ADA*, in *MENTAL DISORDER, WORK DISABILITY, AND THE LAW* 281, 286 (Richard J. Bonnie & John Monahan eds., 1997) (observing how disability may prevent people from enjoying their society's "normal opportunity range," described as "the [broad] array of plans for their lives that reasonable people in a given society might choose, given their talents and skills").

77. E.g., TAYLOR, *supra* note 64 (respecting a person's freedom to develop her personality as a "crucial feature [of] respecting the person's moral autonomy").

78. 42 U.S.C. § 12101(a)(8) (2000).

79. *Id.* § 12101(a)(9) (emphasis added).

80. John Rawls, *The Priority of Right and Ideals of the Good*, 17 *PHILOSOPHY & PUB. AFFAIRS* 252, 254 (1988).

frequently paid occupations and careers, but recognizing other significant undertakings). I focus on these activities for two reasons. First, they keep coming up: they figure prominently in virtually any philosophical account of a full and meaningful human life. Second, each sphere of activity—cognition,⁸¹ social interaction⁸² and work⁸³—has engendered a degree of skepticism or confusion among judges attempting to give content to the term “major life activities.”

A. *The Good of Agency*

Philosopher Lawrence Becker has sought to link his own notions of the human good directly to the legal conception of major life activities under the ADA. He offers an enticing taste—but only a taste—of what philosophical inquiries might teach us about life, its major activities, and hence the potential reach of the ADA’s definition of disability. Becker’s emphasis is on rational human agency. For him, the good for all human beings, including people with disabilities, is to be “active, effective rational [human] Agents.”⁸⁴ For Becker the ability to reason—to identify, articulate and

81. *Cognition*: Several courts have held that thinking, concentrating or remembering are not themselves major life activities, and thus may be considered only as limitations on other activities, such as working or learning. *See, e.g.*, *Pack v. Kmart Corp.*, 166 F.3d 1300, 1305 (10th Cir.), *cert. denied*, 528 U.S. 811 (1999); *Henderson v. Ardco*, 247 F.3d 645, 650 (6th Cir. 2001); *Lemire v. Silva*, 104 F. Supp. 2d 80, 87 (D. Mass. 2000). *Cf. Deas v. River West, L.P.*, 152 F.3d 471 (5th Cir. 1998) (deciding that maintaining “awareness” is not a major life activity and concluding that uncontrolled seizures therefore were not a disability), *cert. denied*, 527 U.S. 1044 (1999); Anita Silvers, *The Unprotected: Constructing Disability in the Context of Antidiscrimination Law*, in *AMERICANS WITH DISABILITIES: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS* 126, 131-32 (Leslie Pickering Francis & Anita Silvers eds., 2000) (suggesting the troubling possibility that learning could be deemed a major life activity for youngsters, but not for most adults).

82. *Social interaction*: For the most comprehensive presentation and analysis of this issue, see Wendy Hensel, *Interacting with Others: A Major Life Activity Under the Americans with Disabilities Act?*, 2002 WIS. L. REV. 1139 (revealing that some courts have rejected interacting with others as a major life activity; others disagree on a paradigm for analyzing it; and still others seemingly allow prejudices about the plaintiff’s impairment to infect their analysis of its effects). Professor Hensel concludes that “[i]nteracting with others, by any definition, is a required precursor to an individual’s ability to work, to love, to reproduce and to function on a day-to-day basis in modern society.” *Id.* at 1189.

83. *Work*: Although most federal courts routinely recognize working as a major life activity, e.g., *Peters v. City of Mauston*, 311 F.3d 835, 843 (7th Cir. 2002) (“To be sure, working constitutes a major life activity under the ADA and the Rehab Act.”), the Supreme Court twice has expressed misgivings. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 492 (1999) (noting that “there may be some conceptual difficulty in defining ‘major life activities’ to include work” where plaintiff alleges exclusion from work, but assuming without deciding that work is a major life activity); *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 200 (2002) (referring again to “conceptual difficulties inherent in the argument that working could be a major life activity,” but declining to decide “this difficult question”). Moreover, even courts that acknowledge that work is a major life activity may undervalue critical aspects of work, including the importance of practicing one’s chosen profession, of having a meaningful choice of occupations, of developing and exhibiting skills and expertise and of preserving one’s work identity status, as well as one’s social connections at work. A deeper, more informed understanding of the role that work plays in many people’s lives may help courts appreciate the significance of limitations on one’s work options.

84. Lawrence C. Becker, *The Good of Agency*, in *AMERICANS WITH DISABILITIES: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS* 54, 56 (Leslie Pickering Francis & Anita Silvers eds., 2000).

evaluate one's own goals, to devise and revise plans to achieve those goals, and to reflect on past successes and failures—is a defining feature of a functioning human being.⁸⁵ Accordingly, he proposes that major life activities include all activities that are either *necessary* or *natural* “for developing and sustaining Agency.”⁸⁶ *Necessary* activities are, quite simply, those that “are necessary for sustaining life itself—namely, securing basic goods and carrying out basic, life-sustaining projects with the available resources.”⁸⁷ To identify the *natural* activities that should qualify as major, Becker would ask two questions. First, “in a commonsense way, what counts as less than active, effective, rational Agency itself?”⁸⁸ Second, which activities “are not only characteristic of *all* active, effective human Agents but are, when frustrated, especially potent in diminishing the human being's Agency?”⁸⁹ These would include “activities that are strongly and persistently ‘called for’ in the normal course of events by the impulses of a healthy human physiology and psychology,” as confirmed by history, anthropology, medicine and psychology.⁹⁰ These “called for” activities would include, according to Becker, “reciprocal social relationships” and “achievements through work.”⁹¹ Indeed, Becker emphasizes that work is “certainly . . . natural to Agency and is often necessary to it.”⁹²

Becker's standard for identifying major life activities—which is broad enough to encompass thinking, socializing and working—is useful, but incomplete for purposes of the ADA. For one thing, Becker focuses on activities characteristic of *all* fully functioning humans, while the ADA has no such requirement of universality.⁹³ More fundamentally, Becker's ap-

85. Becker defines a rational agent to include anyone 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.

Id. Becker characterizes this rationality as “minimal,” presumably to underscore that it includes children and persons who are unreflective about their values and goals, as well as the “moral philosopher's paradigm of independent, fully autonomous people.” *Id.* Given that he identifies rational agency as the cardinal value of human life, “dominating all others,” he cannot be understood to minimize the centrality of reason to the good human life. *Id.*

86. *Id.* at 59.

87. *Id.* (noting that some of these activities include breathing and securing food, clothing and shelter).

88. *Id.*

89. *Id.* at 60 (emphasis in original).

90. *Id.*

91. *Id.* (also listing “unconstrained body movement, variety in one's activities, self-expression and communication, . . . the satisfaction of sexual impulses, and play”).

92. *Id.* at 61.

93. See *Bragdon v. Abbott*, 524 U.S. 624 (1998) (recognizing reproduction as a major life activity, even though it is not universal); *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002) (evaluating manual tasks that are central to most people's lives). Becker's somewhat higher threshold might reflect the greater consequences he wishes to attach to a finding of impairment with respect to such an activity: not merely protection against discrimination, but also a claim to social subsidies (rehabilitation, education, assistive equipment and the like) that will allow the disabled person “to achieve full-fledged Agency.” Becker, *supra* note 84, at 58-59. His argument is based in part on consistency: if a society is

proach—focused as it is on his concept of agency—does not capture other important dimensions of the good life highlighted by other philosophical inquiries and traditions. Particularly fruitful in this more comprehensive exploration of major life activities are the capabilities and basic needs approaches.

B. Capabilities

The capabilities approach advanced by Amartya Sen and Martha Nussbaum is perhaps the leading philosophical conception of what is important to a good human life. It posits that the nature and quality of a person's life should be assessed not by wealth and income but by "the alternative combinations of things a person is able to do or be—the various 'functionings' he or she can achieve."⁹⁴ A *functioning* is "what the person succeeds in *doing* with the commodities and characteristics at his or her command,"⁹⁵ or "what he or she manages to do or to be."⁹⁶ A person's *capabilities* are the various combinations of alternative functioning he or she can choose—in other words, the advantages or opportunities she has to achieve personal fulfillment, or a good quality life.⁹⁷ Life is "a combination of various 'doings and beings', with quality of life to be assessed in terms of the capability to achieve valuable functionings."⁹⁸ From these basic principles, Sen and Nussbaum each contemplates (Sen in general terms, Nussbaum with more specificity) that the good life is a self-directed one in which an individual is free to select and pursue objectives that she deems important; form attachments to and connections with others; enjoy basic necessities like food, shelter, health care and mobility; take part in and be part of the life of the community; and have access to the means of achieving respect in society.

1. Sen's Theory of Capabilities

Amartya Sen pioneered the capabilities approach in development economics.⁹⁹ He proposes that a person's quality of life be assessed in part by her "capability set," or the opportunities she has to choose among desirable "doings and beings."¹⁰⁰ Choice or agency is important. A person's quality of life reflects not only what she *actually* achieves or becomes, but also her *freedom* to "lead different types of life," to choose among desirable "doings

willing to devote resources to creating and saving lives (reproduction and rescue), it is "inconsistent (not to mention cruel and stupid) to aim merely for the life alone," absent its potential for agency. *Id.* at 57.

94. Sen, *Capability and Well-Being*, *supra* note 72, at 30.

95. AMARTYA SEN, *COMMODITIES AND CAPABILITIES* 10 (1985) (emphasis in original).

96. *Id.*

97. *Id.* at 27.

98. *Id.* at 31.

99. See Amartya Sen, *Equality of What?*, TANNER LECTURES ON HUMAN VALUES I (S. McMurrin ed., 1980), *reprinted in* AMARTYA SEN, *CHOICE, WELFARE, AND MEASUREMENT* (1982).

100. SEN, *COMMODITIES AND CAPABILITIES*, *supra* note 95, at 44-45.

and beings,” or “functionings.”¹⁰¹ What are these valuable functionings, or life activities? Sen suggests a rich account of human flourishing. Looking beyond mere basic or “elementary” functionings,¹⁰² he identifies “complex ones such as being happy, achieving self-respect, taking part in the life of the community, appearing in public without shame”¹⁰³ and “achieving self-respect or being socially integrated.”¹⁰⁴ Notably, the valuable functionings that constitute the good life include not only those that contribute to the individual’s standard of living, but also the rewards of doing for others, “the happiness generated by a purely other-regarding achievement,” including a person’s chosen social or political objectives.¹⁰⁵ The good life, therefore, includes goals and achievements both in personal well-being—reflecting personal welfare¹⁰⁶—and agency—reflecting the “pursuit of all the objectives that [a person] has reason to promote.”¹⁰⁷

Having spelled out this general approach, Sen declines Nussbaum’s challenge either to specify a list of objectively valuable human functionings or to “describ[e] a procedure of objective evaluation” for assessing how various functionings contribute to the good life.¹⁰⁸ Sen cautions that while some functionings—such as those involving health, nourishment and literacy—will be similarly valued across cultures, others—such as entertaining friends, “literary, cultural and intellectual pursuits” or “vacationing and travelling”—may have differing values, particularly in more affluent societies.¹⁰⁹ Even at a level of considerable generality, however, Sen’s approach anticipates that the good life will involve reason, as exercising agency re-

101. Sen, *Capability and Well-Being*, *supra* note 72, at 31, 33. Thus, “the good life’ is partly a life of genuine choice, and not one in which the person is forced into a particular life—however rich it might be in other respects.” *Id.* at 39 n.26 (“[F]reedom may have intrinsic importance for the person’s well-being achievement. Acting freely and being able to choose may be directly conducive to well-being, not just because more freedom may make better alternatives available.”).

102. These would include standard-of-living measures, such as “escaping morbidity and mortality, being adequately nourished, [and] having mobility.” *Id.* at 36-37.

103. *Id.* (citing ADAM SMITH, AN INQUIRY INTO THE NATURE OF CAUSES OF WEALTH OF THE NATIONS 469-71 (R.H. Campbell & A.S. Skinner eds., 1976)). *See also id.* at 37 (observing that the ability to be happy “will be widely recognized as . . . an important functioning”).

104. *Id.* at 31.

105. *Id.* at 37. *See also id.* at 36 (“Doing good may make a person contented or fulfilled, and these are functioning achievements of importance.”); *id.* at 33 (A “full accounting of individual freedom must . . . go beyond the capabilities of personal living and pay attention to the person’s other objectives (e.g., social goals not directly related to one’s own life).”).

106. *Id.* at 36 (defining a person’s well-being achievement as “the ‘wellness’ of the person’s state of being (rather than, say, the goodness of her contribution to the country, or her success in achieving her overall goals)”).

107. *Id.* at 37.

108. *Id.* at 47 (quoting Martha C. Nussbaum, *Nature, Function, and Capability: Aristotle on Political Distribution*, in OXFORD STUDIES IN ANCIENT PHILOSOPHY 176 (1988, suppl. vol.)).

109. *See* SEN, COMMODITIES AND CAPABILITIES, *supra* note 95, at 30-31. Characterizing Sen as concerned primarily with hardship and want, Wulf Gaertner has suggested a more ambitious list of valuable functionings for industrialized nations; these might include the abilities “to receive further education, to be regularly employed, to take a holiday, to participate in social life,” to be happy in one’s job, to have clean air and water, and to enjoy enriched political and civil liberties. Wulf Gaertner, *Amartya Sen: Capability and Well-Being*, in THE QUALITY OF LIFE 62, 63, 65 (Martha C. Nussbaum & Amartya Sen eds., 1993).

quires the ability to make reasoned choices; social connections, including a social identity and attachments to others, whose well-being is a determinant of our own;¹¹⁰ and meaningful work associated with other-regarding goals and achievements.¹¹¹

2. Nussbaum's Aristotelian Capabilities

Martha Nussbaum is more specific than Sen in her discussion of capabilities, proposing a partial list of the "central defining features" of humanness that permit an "historically sensitive account of the most basic human needs and human functions."¹¹² Her list builds on Aristotle's concept of virtues, which holds that within each sphere of characteristic human functioning there is a corresponding virtue that represents *eudaimonia*, or "living well and doing well."¹¹³ For Nussbaum, the *good* life, or human flourishing, is one that provides opportunities to function well within each sphere. The ability to choose and to achieve the good (the virtue) in each sphere is itself a valuable functioning in her capability set.

Nussbaum starts with basic human functionings related to human bodily needs, including hunger and thirst, the need for shelter, and sexual desire.¹¹⁴ Within these spheres, capabilities of the good human life include "being able to live to the end of a complete human life, as far as is possible"; "being able to have good health; to be adequately nourished; to have adequate shelter; having opportunities for sexual satisfaction"; and "being able to avoid unnecessary and nonbeneficial pain and to have pleasurable experiences."¹¹⁵ Mobility is a basic human functioning,¹¹⁶ and being able to move

110. See also AMARTYA SEN, REASON BEFORE IDENTITY, THE ROMANES LECTURE FOR 1998 (1999), at 5 (concluding that "social identity cannot but be central to human life"); see also *id.* ("The idea that a sense of community and fellowship is important for us all is also difficult to ignore, and it relates closely to our conceptions of social identity.").

111. Elsewhere, speaking less as a social philosopher and more directly as a Nobel laureate in economics, Sen has recognized that suitable employment is central to many aspects of well-being, including personal freedom, self-esteem, social connection and family life. See Amartya Sen, *The Penalties of Unemployment*, TEMI DE DISCUSSIONE DEL SERVIZIO STUDI (Bank of Italy 1997), No. 307, at 1 (observing that the costs of unemployment include not only the "loss of family income and national output," but also the "deterioration of people's skill and motivation; loss of personal freedom; worsening of health and psychological equanimity; weakening of self-esteem and motivation for future work and job search; . . . [and] disruption of human relations and family life"); see also Martha Nussbaum & Amartya Sen, *Introduction*, in THE QUALITY OF LIFE I (Martha C. Nussbaum & Amartya Sen eds., 1993) (whether a person is thriving depends in part on whether his work "is rewarding or grindingly monotonous, whether [he] enjoy[s] any measure of dignity and control, [and] whether relations between employers and 'hands' are human or debased").

112. Nussbaum, *Human Functioning*, *supra* note 60, at 205.

113. Martha C. Nussbaum, *Aristotle on Human Nature and the Foundations of Ethics*, in WORLD, MIND AND ETHICS: ESSAYS ON THE ETHICAL PHILOSOPHY OF BERNARD WILLIAMS 86, 111 (J.E.J. Altham & Ross Harrison eds., 1995) [hereinafter Nussbaum, *Human Nature*]; Nussbaum, *Non-Relative Virtues*, *supra* note 62, at 247.

114. Nussbaum, *Human Functioning*, *supra* note 60, at 217-18.

115. *Id.* at 222.

116. *Id.* at 218 ("Human beings are . . . creatures whose form of life is in part constituted by the ability to move from place to place in a certain characteristic way, not only through the aid of tools that we have made but with our very own bodies. Human beings like moving about and dislike being de-

without constraint from place to place is a capability necessary to a “good human life.”¹¹⁷ The important but sometimes overlooked human functions of humor and play make Nussbaum’s list, and “being able to laugh, to play, to enjoy recreational activities” are capabilities of any fully good life.¹¹⁸

Nussbaum highlights two specific human capabilities, affiliation and practical reason, that Aristotle identified as “especially broadly and deeply shared.”¹¹⁹ Nussbaum agrees that these capabilities “both organize and suffuse all the others, making their pursuit truly human.”¹²⁰ Given her view that every truly human life is “planned and organized by practical reason and . . . done with and to others,”¹²¹ these foundational capabilities merit further examination.

a. *Affiliation*

Aristotle maintained that affiliation was a foundation of human nature. “[T]o have social or political concerns”¹²² was, for Aristotle, a defining quality of a human being. Aristotle thus urged a “communal conception of the good life,”¹²³ with a “full range of . . . other-related concerns, familial and friendly as well as civic and social.”¹²⁴ Among these relationships, he identifies friendship or *philia*, including caring family relationships and concern for distant beings, as “most necessary” to the good life and part of human nature.¹²⁵ Indeed, Aristotle concluded that “without friends nobody

prived of mobility.”).

117. *Id.* at 222.

118. *Id.* at 219, 222. See also Nussbaum, *Non-Relative Virtues*, *supra* note 62, at 246 (identifying spheres of human functioning to include relationships with others (“[a]ssociation and living together and the fellowship of words and actions”); self-regard (“[a]ttitudes and actions with respect to one’s own worth”); concern and regard for others (an “[a]ttitude to the good and ill fortune of others”); providing for others (“[m]anagement of one’s personal property” with respect to others); an intellectual life; and autonomy or the ability to make and direct one’s own life choices (the “planning of one’s [own] life and conduct”). Nussbaum also includes the recognition of our relatedness to other species and to nature as a basic human functioning, with the good life including the ability to “live with concern for and in relation to animals, plants, and the world of nature.” *Id.*

119. Nussbaum, *Non-Relative Virtues*, *supra* note 62, at 266.

120. MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* 82 (2000) [hereinafter NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT*]; Nussbaum, *Human Functioning*, *supra* note 60, at 222 (maintaining that affiliation and practical reason “play a special role as architectonic, holding the whole enterprise together and making it human”); Nussbaum, *Non-Relative Virtues*, *supra* note 62, at 265 (identifying affiliation and practical reason as “architectonic . . . in human life, suffusing and also organizing all the other functions”).

121. Nussbaum, *Human Functioning*, *supra* note 60, at 223.

122. Nussbaum, *Human Nature*, *supra* note 113, at 92 (citing ARISTOTLE, *POLITICS* 1253a1 ff.).

123. *Id.* at 86.

124. *Id.* at 127 n.29. Nussbaum concurs: “We define ourselves in terms of at least two sorts of affiliation: intimate family and/or personal relations and social or civic relations.” Nussbaum, *Human Functioning*, *supra* note 60, at 219.

125. Nussbaum, *Human Nature*, *supra* note 113, at 103. “We see that friendship stretches through the entirety of life and is present on every occasion, and that it is a good thing.” *Id.* at 127 n.30 (citing ARISTOTLE, *MAGNA MORALIA* 1208b5) (emphasis omitted). “It seems likely that it belongs by nature to the parent towards the child and the child towards the parent; . . . and that it belongs also to members of the same nation towards one another, especially among human beings. That is why we praise those who love and benefit other human beings.” *Id.* at 103-04 (quoting ARISTOTLE, *MAGNA MORALIA* 1115a16-

would choose to live, even if he had all the other goods.”¹²⁶ Nussbaum agrees that “any search for the *good life* must go on inside a context of relatedness.”¹²⁷ A good human life, she suggests, “is so thoroughly a life among others” that it derives its meaning and identity from those relationships.”¹²⁸ Any *fully good* human life must include the abilities “to have attachments to things and persons outside ourselves; to love those who love and care for us, to grieve at their absence, in general, to love, to grieve, to feel longing and gratitude” and “to live for and with others, to recognize and show concern for other human beings, to engage in various forms of familial and social interaction.”¹²⁹ Along with caring *about* others, Nussbaum recognizes caring *for* others as an indispensable activity in light of humans’ inevitable dependencies.¹³⁰

b. Practical Reason

The second foundational capability, practical reason, builds on what Nussbaum identifies as our “cognitive capability,” the abilities to perceive, to imagine and to think.¹³¹ Cognition allows a person to recognize and respond to others, interpret experience, find coherence in the world around her and direct her behavior.¹³² Practical reason, combining intellect and emotion, allows a person to define her own concept of her personal flourishing and to make life choices based on her vision of the good life for her. Nussbaum imagines no serious challenges to the universality and centrality of this function in any flourishing human life.¹³³ She certainly is correct that “[a]ll human beings, whatever their culture, participate (or try to) in the

23) (emphasis omitted).

126. *Id.* at 103 (quoting ARISTOTLE, POLITICS 1155a6-12) (emphasis omitted). See Nussbaum, *Human Functioning*, *supra* note 60, at 219 (“All human beings recognize and feel some sense of affiliation and concern for other human beings. Moreover, we value the form of life that is constituted by these recognitions and affiliations. We live for and with others and regard a life not lived in affiliation with others to be a life not worth living. . .”).

127. Nussbaum, *Human Nature*, *supra* note 113, at 108.

128. *Id.* at 107.

129. Nussbaum, *Human Functioning*, *supra* note 60, at 222.

130. A human being, states Nussbaum, is a creature “who is both capable and needy.” *Id.* at 216. Indeed, we share and are defined by our experience of helplessness during infancy, and “those experiences of extreme dependency, need and affection” are at the heart of our empathy and compassion. *Id.* at 218 (recognizing our experience of the helplessness of infancy as “a major source of our ability to recognize ourselves in the emotional experiences of those whose lives are very different in other respects from our own”). Nussbaum has called for greater recognition of the contribution of this care to a society’s quality of life. Martha C. Nussbaum, *Long-Term Care and Social Justice: A Challenge to Conventional Ideas of the Social Contract*, in ETHICAL CHOICES IN LONG-TERM CARE: WHAT DOES JUSTICE REQUIRE (World Health Org. 2002). I agree about the importance of care to human growth and flourishing. See Ann Hubbard, *The Major Life Activity of Caring*, J. GENDER RACE & JUST. (forthcoming 2004).

131. Nussbaum, *Human Functioning*, *supra* note 60, at 218.

132. See *id.* (noting the “central importance” of the shared human experiences of thinking, imagining, “making distinctions and ‘reaching out for understanding’”).

133. Nussbaum, *Non-Relative Virtues*, *supra* note 62, at 264 (1993) (“Aristotle’s famous claim that ‘all human beings by nature reach out for understanding’ seems to stand up to the most refined anthropological analysis.”) (citing ARISTOTLE, METAPHYSICS I.1).

planning and managing of their own lives, asking and answering questions about how one should live” and act.¹³⁴ In the fully good human life, then, practical reason creates the capability “to form a conception of the good and to engage in critical reflection about the planning of one’s own life.”¹³⁵

c. *Working*

The version of Nussbaum’s list of capabilities that most closely corresponds to Aristotle’s spheres of experience does not include work. This may reflect that “ancient Greece . . . understood work to be a baneful necessity, and a diminution of one’s worth.”¹³⁶ Nussbaum recognizes, however, that in modern societies “people’s sense of worth is frequently tied to a career and success in it,”¹³⁷ and that “a just society would minimally be one that offered to all its citizens, regardless of birth or race or sex or disability, decent life chances in areas including . . . health, education, *employment*, and political participation.”¹³⁸ More recent versions of Nussbaum’s list of central human capabilities reflect the importance of a range of opportunities for meaningful, dignifying employment. This means having the right to compete with others on an equal basis for positions in which one can “work as a human being, exercis[e] practical reason and enter into meaningful relationships of mutual recognition with other workers.”¹³⁹

C. *Basic Human Needs*

Closely related to the idea of capabilities is the concept of “basic human needs,” or necessary components of a good life. Two leading accounts of basic needs—those of David Braybrooke and of Len Doyal and Ian Gough—seek to identify the minimal conditions to support human well-being and functioning in important aspects of life. Neither account is lavish, and it therefore seems modest to assert that functions and activities necessary to satisfy basic human needs or to achieve a good life according to these accounts should also be considered major life activities under the ADA. Both conceptions of basic needs reflect the importance of pursuing

134. Nussbaum, *Human Functioning*, *supra* note 60, at 219 (commenting on humans’ shared desire “to enact their thought in their lives—to be able to choose and evaluate and to function accordingly”).

135. *Id.* at 222. This ability to plan and choose, informed by the shared experience of separateness or individuality, permits the capability of “[b]eing able to live one’s o[w]n life and nobody else’s . . . in one’s very own surroundings and context.” *Id.*

136. Martha C. Nussbaum, *Long-Term Care and Social Justice: A Challenge to Conventional Ideas of the Social Contract*, in *ETHICAL CHOICES IN LONG-TERM CARE: WHAT DOES JUSTICE REQUIRE* 7 n.14 (World Health Org. 2002).

137. *Id.* at 7.

138. *Id.* at 4-5 (emphasis added). Equal access to these life chances serve, in Nussbaum’s view, to provide what John Rawls termed “the *social bases of self-respect*.” *Id.* at 5 (emphasis in original).

139. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT*, *supra* note 120, at 79-80. Nussbaum specifies that truly human work “must involve being able to behave as a thinking being, not just a cog in a machine; and it must be capable of being done with and toward others in a way that involves mutual recognition of humanity.” *Id.* at 82.

one's own life plan with meaningful opportunities to participate in a range of important life activities, including having friends and intimate relationships, parenting, maintaining a home, working and participating in the life of the community.

1. Braybrooke's "Matters of Need"

David Braybrooke identifies universal human needs as essential components of every good human life, whatever a person's chosen path or preferences.¹⁴⁰ Braybrooke starts with two criteria for "need": first, does a person need this to survive, and second, does she need this to function normally or live well in her society?¹⁴¹ These criteria establish "the conditions for a *minimally full* human life."¹⁴² He proposes a possible third criterion, which asks what is necessary for "achieving a happy and completely fulfilled" human life.¹⁴³ All three criteria capture aspects of major life activities under the ADA.

To evaluate a proposed need, Braybrooke asks if it "indispensable to mind or body in performing the tasks assigned a given person under a combination of basic social roles, namely, the roles of parent, householder, worker, and citizen."¹⁴⁴ Focusing on adults in the prime of life, Braybrooke asks what they need to preserve their physical and mental capacities (including stamina, concentration and the like), to have a full-time occupation, care for children and a home and participate in civic life.¹⁴⁵ With these needs in mind, Braybrooke develops a two-part preliminary (and evolving) list of "matters of need." The first part deals principally with physical functioning; it includes subsistence needs like food, water, sleep, physical exercise and whatever else is necessary to keep the body healthy and intact.¹⁴⁶ The second part concerns social functioning. It includes companionship, education, social acceptance and recognition, sexual activity, freedom from harassment and fear and recreation.¹⁴⁷ Failure to fill any of these needs, Braybrooke asserts, would cause "significant damage, physical or psychological, which can be ascribed to all members of [his reference population], or to all human beings, with presumptive universality."¹⁴⁸

140. DAVID BRAYBROOKE, MEETING NEEDS 44-47 (Marshall Cohen ed., Princeton Univ. Press 1987). Braybrooke uses a presumption of universality, which may be rebutted by sufficient exceptions. *Id.* at 47.

141. *Id.* at 31.

142. *Id.* at 233 (emphasis added).

143. *Id.*

144. *Id.* at 48.

145. *Id.* at 53-54 (relating his list to adults who have not renounced or been precluded from any of these basic roles).

146. *Id.* at 36.

147. *Id.* "[F]ew things attach to human beings more firmly than their needs for companionship, social recognition, and recreation." *Id.* at 233.

148. *Id.* at 236. In addition to identifying *what* people need (the "Matters of Need"), Braybrooke tackles the question of *how much* of it they need (the "Minimum Standards of Provision"). *Id.* at 44. This two-part inquiry corresponds to the ADA analysis of identifying major life activities (based on their

While this two-part list represents conditions for a minimally full, or adequate, life, Braybrooke admits that such a life could be meager and monotonous.¹⁴⁹ Achieving happiness and fulfillment anticipates the satisfaction of other needs, which would constitute a third part of the list. Braybrooke identifies “satisfying work” as a principal omission from the initial list. For people to develop fully, they may require “opportunities at work to enlarge their views, test their talents, and attain a sense of significant accomplishment”¹⁵⁰ or a feeling of usefulness.¹⁵¹ They may even have “the need for multiple accomplishments, answering at least to a variety of the talents that a given person may have, some of them distinctive to a degree,” or “at least chances to fail nobly in striving for such accomplishments.”¹⁵² Alongside accomplishments, the expanded list might recognize affection, with “a family circle, cherished and cherishing,” to provide “intimacy and mutual identification” beyond the need for companionship.¹⁵³ Other candidates for this expanded list promote autonomy, including “the need for establishing a sense of identity”¹⁵⁴ and for “having some of one’s preferences heeded.”¹⁵⁵

This expanded list, Braybrooke suggests, would have the virtues of reflecting “more sensitiv[ity] to other people’s fates,” avoiding “substantial impairments” to an individual’s life plans,¹⁵⁶ and providing a “reliable basis for fellow-feeling.”¹⁵⁷ In sum, Braybrooke’s “matter of needs” starts by identifying four principal activities central to most people’s lives: working, parenting, maintaining a home and participating as a citizen. From here, Braybrooke’s list of necessary things to *have* invites a corresponding list of important things to *do*, including making and maintaining friendships, pursuing an education, having and achieving personal goals and performing activities that foster social engagement and a sense of self-identity.

2. *Doyal’s and Gough’s Theory of Human Need*

Len Doyal and Ian Gough draw from Braybrooke and their own expertise in philosophy and political economics to articulate and defend their theory of universal basic human needs.¹⁵⁸ Starting from the premise that social circumstances can either produce human harm and suffering or encourage and sustain human flourishing, they seek a “coherent, rigorous the-

general importance), then determining whether the plaintiff is substantially limited in that activity (based on her individual circumstances). I address only the major life activities, not the individual limitations.

149. *Id.* at 231.

150. *Id.* at 249.

151. *Id.* at 250 (observing that work is more satisfying if it is useful, that is, if it serves one of the other basic needs).

152. *Id.* at 249.

153. *Id.* at 248.

154. *Id.* at 232; *see id.* at 249 (proposing the need “to come to terms with oneself; to discover one’s identity; to have full self-knowledge and full command of oneself”).

155. *Id.* at 232.

156. *Id.* at 236.

157. *Id.* at 237.

158. LEN DOYAL & IAN GOUGH, A THEORY OF HUMAN NEED xiii-45 (1991).

ory of human need” that can inform and guide social progress.¹⁵⁹ They define needs as the preconditions for human action and interaction and link basic needs to “the avoidance of serious harm.”¹⁶⁰ Serious harm is defined as the significant impairment of an individual’s social participation, including her pursuit and achievement of her higher-order goals.¹⁶¹ Successful social participation has two prerequisites: health and autonomy.¹⁶²

For Doyal and Gough, autonomy is at the heart of what makes us human. Minimal autonomy generally requires, among other things, a good and relevant education; the “intellectual capacity to formulate aims and beliefs” common to a chosen form of life; the ability to communicate with others about those goals; a concept of the good that incorporates other-regarding concerns; and the confidence to act and participate in one’s chosen form of life.¹⁶³ In addition, autonomy contemplates that an individual will have opportunities for “new and significant action” and the ability to participate in all the relevant social roles of her culture in a way that will garner the respect, or social acceptance, of her peers.¹⁶⁴ “Significant” activities include those deemed important for one of Braybrooke’s social roles—parent, householder, worker or citizen—as well as those the person herself “deems of significance for the rational improvement of her participation in her form of life.”¹⁶⁵ In other words, a person’s basic human needs are met only if she can select from the range of life chances available to citizens of her society:

The relevant life chances are those required to protect the status of individuals as *full members of the community*. Their purpose is to offer material opportunities to participate in the way of life of the society. . . . An individual is ‘in need’ . . . to the extent that he lacks the resources to participate as a *full member of society* in its way of life.¹⁶⁶

159. *Id.* at 3.

160. *Id.* at 50.

161. *Id.* (defining harm as “the impact of poor need satisfaction on the success of social *participation*”) (emphasis in original). In this regard, Doyal and Gough agree with Sen: when disadvantaged persons are denied “equal dignity in the pursuit” of their goals, they suffer “not because they *have* less than others but because they can *participate* less in their respective form of life. It is their impaired agency rather than their inequality as such that should be the focus of our moral concern.” *Id.* at 95-96 (citations omitted) (emphasis in original). *See id.* at 154-57 (comparing their concept of need satisfaction with Sen’s capabilities approach).

162. *Id.* at 59. Good health, in the biomedical sense, including normal life expectancy and avoidance of disease, allows a person “to lead an active and successful life in [her] own terms.” *Id.*

163. *Id.* at 63-66.

164. *Id.* at 61, 66.

165. *Id.* at 66. Relatively unconstrained choice is important to autonomy. “[T]o make significant choices—and to enjoy the pride and pleasure of knowing that we have successfully done so—we must have the opportunities.” *Id.*

166. *Id.* at 51-52 (quoting DAVID HARRIS, JUSTIFYING STATE WELFARE 91 (1987)) (emphasis added). This notion of full and equal membership corresponds to the vision and promise of the ADA. *See, e.g.*, 42 U.S.C. § 12101(a)(8) (2000) (declaring the nation’s goal of assuring individuals with disabilities “equality of opportunity” and “full participation” in society and acknowledging the capacities of individuals with disabilities to both participate in, and contribute to, society); Robert L. Burgdorf Jr.,

Doyal and Gough identify categories or groupings of “intermediate needs,” or the conditions that sustain health and autonomy.¹⁶⁷ Notable here are work and social relationships. Work or labor, according to Doyal and Gough, serves many functions, above and beyond providing the income to meet other needs. Participation in the workforce is crucial to our sense of self-worth and our mental health.¹⁶⁸ It serves to assign status and identity, structure our time, enlarge our social connections and allow us to “translate part of [our]selves into something [we] produce or maintain” and to “participat[e] in a collective purpose or effort.”¹⁶⁹ As for social relationships, the important relationships that help sustain our health and autonomy (and thereby our social participation) include primary support groups (ranging from families, classmates, friends and coworkers to members of the community) and “close and confiding relationships.”¹⁷⁰

For Doyal and Gough, then, the touchstone of the good or successful life is social participation through an array of activities that an individual finds meaningful. Social participation in turn requires health and autonomy, which are achieved and sustained by means of intermediate needs. This scheme points to the importance of many life activities, starting with the exercise of autonomy, by setting one’s own personal goals, directing one’s own life and choosing how one will participate as a full member of her society. Other important activities include those associated with principal societal roles (worker, parent, householder and citizen) and those that earn one a place in the community or create and maintain supportive or intimate personal relationships.

D. Rawls’ Political Liberalism

The capabilities and basic needs approaches are what John Rawls deems “comprehensive conceptions” of the good life, in that they “include conceptions of what is of value in human life, ideas of personal virtue and character, and the like.”¹⁷¹ He distinguishes his famous theory of justice as a “po-

“Equal Members of the Community”: The Public Accommodations Provisions of the Americans with Disabilities Act, 64 TEMP. L. REV. 551 (1991) (discussing the importance of the ADA’s public accommodations provisions to providing full and equal membership in society); cf. *Bell v. Maryland*, 378 U.S. 226, 286 (1964) (asserting, in the context of the Civil Rights Act of 1964, that all Americans have “the right to be treated as equal members of the community” in public accommodations) (Goldberg, J., concurring).

167. These needs fall under the following groupings: nutritional food and clean water, protective housing, a non-hazardous work environment, a non-hazardous physical environment, appropriate health care, security in childhood, significant primary relationships, physical security, economic security, appropriate education, and safe birth control and child-bearing. DOYAL & GOUGH, *supra* note 158, at 157-58.

168. *Id.* at 185-86 (citations omitted).

169. *Id.* (citing MARIE JAHODA, *EMPLOYMENT AND UNEMPLOYMENT: A SOCIO-PSYCHOLOGICAL ANALYSIS* 59 (1982)).

170. *Id.* at 79, 207, 208. These make up our “set of *significant primary relationships*—a network of individual reinforcers who provide an educative and emotionally secure environment.” *Id.* at 207 (emphasis in original).

171. John Rawls, *The Priority of Right and Ideas of the Good*, 17 PHIL. & PUB. AFFS. 251-52 (1988)

litical conception," which addresses society's "basic structure alone,"¹⁷² not the "whole of life."¹⁷³ His *political* conception of the good—justice as fairness—was limited, he insisted, to designing the basic structure of a pluralistic society in which each citizen had the space to choose and pursue her own comprehensive moral or philosophical conception of the good.¹⁷⁴ Because his theory requires a certain neutrality with respect to competing *comprehensive* conceptions of the good, Rawls declined to articulate or endorse one.¹⁷⁵ He does, however, offer at least a "thin theory of the good,"¹⁷⁶ one founded on certain necessary or desirable means, opportunities and abilities. First, each person in his just society is to have a fair share of "primary goods," understood as the "all-purpose means" required to achieve any rational conception of the good.¹⁷⁷ These primary goods include freedom of movement, a meaningful choice of occupations, access to positions of public responsibility, adequate financial means and "the social bases of self-respect."¹⁷⁸ Moreover, his normative description of a person in this society presupposes certain capacities, including the ability to reason and think, to interact and work with others and to select and pursue one's life's work.

(identifying comprehensive moral or philosophical conceptions to include "conceptions of what is of value in human life, ideas of personal virtue and character, and the like, that are to inform much of our nonpolitical conduct") [hereinafter Rawls, *Priority of Right*].

172. RAWLS, *POLITICAL LIBERALISM*, *supra* note 73, at 13 (explaining that his political conception offers a guide for choosing principles to govern the basic structure of society, not an all-embracing rule of behavior). Rawls conceives his theory of justice as an "organizing idea . . . of society as a fair system of social cooperation between free and equal persons viewed as fully cooperating members of society over a complete life." *Id.* at 9. Principles of justice would be chosen from behind a "veil of ignorance," from an "original position of equality," in which "no one knows . . . his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like." JOHN RAWLS, *A THEORY OF JUSTICE* 12 (1971) [hereinafter RAWLS, *THEORY OF JUSTICE*]. Parties in this original position would then use the maximin criterion to select principles of justice in which "[e]ach person has an equal claim to a fully adequate scheme of equal basic rights and liberties" and in which "[s]ocial and economic inequalities . . . are to be to the greatest benefit of the least advantaged members of society." RAWLS, *POLITICAL LIBERALISM*, *supra* note 73, at 5-6.

173. John Rawls, *Some Reasons for the Maximin Criterion*, 64 AM. ECON. REV. 141, 142 (1974) (cautioning that "the maximin criterion is not meant to apply to . . . how a doctor should treat his patients or a university its students"). Rawls modestly explains that, by eschewing a general moral conception, "justice as fairness deliberately stays on the surface, philosophically speaking." John Rawls, *Justice As Fairness: Political not Metaphysical*, 14 PHIL. & PUB. AFFS. 223, 230 (1985) [hereinafter Rawls, *Political not Metaphysical*].

174. Rawls, *Priority of Right*, *supra* note 171, at 251, 271.

175. *Id.* at 260.

176. *Id.* at 254; *id.* at 253 (acknowledging that any political conception "must draw upon various ideas of the good") (emphasis in original); *id.* at 252 (observing that a "political conception of justice must leave adequate room for forms of life citizens can affirm"). See generally 2 CHARLES TAYLOR, *PHILOSOPHICAL ARGUMENTS* 194-96 (1997) (discussing liberals' and communitarians' broad and narrow senses of the term "good").

177. RAWLS, *POLITICAL LIBERALISM*, *supra* note 73, at 187.

178. *Id.* at 181 (listing primary goods to include "freedom of movement and free choice of occupation against a background of diverse opportunities"; the "powers and prerogatives of offices and positions of responsibility in the political and economic institutions of the basic structure"; income and wealth; and the "social bases of self-respect").

1. Cognition

Rawls puts a premium on certain moral and cognitive powers. Persons qualify as free and equal citizens of Rawls' society by virtue of "their two moral powers (a capacity for a sense of justice and for a conception of the good) and the powers of reason (of judgment, thought, and inference connected with these powers)."¹⁷⁹ The ability to think and reason thus is not merely an important life activity, it is the defining quality of a citizen entitled to equal basic rights and liberties and eligible for a place in society's desirable positions and offices.

2. Social Interaction

Rawls' theory is designed to produce "a fair system of social cooperation between free and equal persons viewed as fully cooperating members of society over a complete life."¹⁸⁰ Thus, he identifies social participation and cooperation—engaging and working with others—as fundamental to a person's life in society. This social role highlights the importance of social respect. Rawls' list of primary social goods—those things that every person is presumed to want¹⁸¹—includes "the social bases of self-respect,"¹⁸² including the guarantee of "persons' public recognition as free and equal members [and] of their status of citizens."¹⁸³ This social cooperation and respect, however, refer principally to public interactions, not personal ties or commitments. What of the latter? Because Rawls assiduously avoids any comprehensive conception of what makes up the good life, he says little about these individual attachments. This social cooperation and respect, however, refer principally to public interactions, not personal ties or com-

179. *Id.* at 18 n.20, 19. Rawls emphasizes that his is a normative or moral conception of persons, not a psychological, sociological or historical account or human nature. Rawls, *Political not Metaphysical*, *supra* note 73, at 224 n.2, 232 n.15. He also acknowledges that his theory excludes persons whose serious cognitive impairments prevent them from becoming "normal and fully cooperating member[s] of society over a complete life." RAWLS, *POLITICAL LIBERALISM*, *supra* note 73, at 18; *id.* at 272 n.10 (putting off until a later stage the "problem of special health care and how to treat the mentally defective"). For a powerful critique of Rawls' failure to take account of inevitable human dependencies and the questions of social justice about providing care, see EVA FEDER KITTAY, *LOVE'S LABOR* 72-114 (1999). See also SEN, *COMMODITIES AND CAPABILITIES*, *supra* note 95, at 157 (suggesting that failure to consider people with disabilities "for fear of making a mistake, may guarantee that the *opposite* mistake will be made").

180. RAWLS, *POLITICAL LIBERALISM*, *supra* note 73, at 9; Rawls, *Priority of Right*, *supra* note 171, at 263 (identifying fair social cooperation as a virtue); *cf. id.* at 273 (encouraging political life "as the privileged locus of the good life").

181. RAWLS, *A THEORY OF JUSTICE*, *supra* note 172, at 62; RAWLS, *POLITICAL LIBERALISM*, *supra* note 73, at 180-81, 278 n.13.

182. RAWLS, *POLITICAL LIBERALISM*, *supra* note 73, at 181 (listing primary goods to include "basic rights and liberties," access to positions of responsibility in society's political and economic institutions, "freedom of movement and free choice of occupation against a background of diverse opportunities," and "income and wealth").

183. Rawls, *Priority of Right*, *supra* note 171, at 270 (emphasis added). Rawls allowed that, with proper precautions, the list could be expanded "to include other goods, for example, leisure time, and even certain mental states such as freedom from physical pain." RAWLS, *POLITICAL LIBERALISM*, *supra* note 73, at 180.

mitments. What of the latter? Because Rawls avoids any comprehensive conception of what makes up the good life, he says little about these individual attachments.¹⁸⁴ He does, however, recognize the family as part of society's basic structure and the site of the "socially necessary labor" of raising and caring for children and educating them for their roles as cooperating members of society.¹⁸⁵ Moreover, he advises that a person's chosen conception of the good should be understood to include a conception of what is valuable in human life, including attachments to others:

[A] conception of the good normally consists of a more or less determinate scheme of final ends, that is, ends we want to realize for their own sake, as well as attachments to other persons and loyalties to various groups and associations. These attachments and loyalties give rise to affections and devotions, and so the flourishing of the persons and associations who are the objects of these sentiments is also part of our conception of the good.¹⁸⁶

Accordingly, while Rawls declines to specify what components do or should figure in any good life, he recognizes that, for most of us, our devotion to and affection for others, including our families, is part of what gives our lives meaning.

3. *Meaningful Work*

Rawls considers the ability to pursue one's chosen occupation to be a primary good, something necessary to the fulfillment of any rational life plan. In a just society, Rawls advises, all free and equal members of society must have adequate access to a "free choice of occupation against a background of diverse opportunities."¹⁸⁷ Other primary goods include income and wealth and the social bases of self-respect—those aspects of society that give citizens "a lively sense of their own worth as persons" and the opportunity to "advance their aims and ends with self-confidence."¹⁸⁸ In American society, work is a principal source of both.

Yet another aspect of Rawls' thought underscores the importance of work. One of his two principles of justice requires that society's "positions

184 See Rawls, *Priority of Right*, *supra* note 171, at 263 (explaining that his political liberalism addresses only political virtues, to be "distinguished from the virtues that characterize ways of life belonging to comprehensive religious and philosophical doctrines, as well as from the virtues falling under various associational ideals (the ideals of churches and universities, occupations and vocations, clubs and teams) and those appropriate to roles in family life and to the relations between individuals").

185 John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 787-88 (1997).

186 Rawls, *Political, Not Metaphysical*, *supra* note 173, at 233-34. See also John Rawls, *Kantian Constructivism in Moral Theory: The Dewey Lectures 1980*, 77 J. PHIL. 515, 545 (1980) (noting that while his principles of justice apply to basic social institutions, "citizens in their personal affairs, or within the internal life of associations . . . may have attachments and loves that they believe they would not, or could not, stand apart from").

187 RAWLS, *POLITICAL LIBERALISM*, *supra* note 73, at 308.

188 *Id.* at 308-09.

and offices” that offer social and economic rewards “[be] open to all under conditions of fair equality of opportunity.”¹⁸⁹ Any plausible definition of those offices and positions would include a range of employment opportunities in the trades and professions. Philosopher Norman Daniels understands Rawls’ principle of equality of opportunity to support, and indeed require, society’s commitment to guaranteeing all citizens, including those with disabilities, equal access (within reason) to the full range of employment opportunities generally open to persons with comparable talent and skill.¹⁹⁰

This brief review of philosophical theories and approaches related to a good human life reveals shared beliefs about what is important in life, above and beyond what is necessary merely to live. The good life is lived with and for others; it is a life among family and friends; and it is lived in society among others. It is, accordingly, a life of engagement, integration and participation in civil, social, cultural or political matters. The good life is, to at least some degree, a life of one’s own choosing: it offers meaningful life chances and opportunities and the freedom to develop and pursue a life plan based on one’s own idea of the good. It offers opportunities to develop one’s talents, to pursue a sound education and to perform meaningful work in one’s chosen vocation. The good life provides the basis for dignity, self-respect and public recognition. And anything more than a minimally good life will include leisure activities and maybe humor and play.

These characteristics appear in virtually any philosophical account of the good life, however one conceives the ultimate “good,” be it effective agency, personal fulfillment, human flourishing, Aristotelian virtues, the performance of valued social roles, unimpaired life chances, the ability to define and pursue one’s own conception of the good or some other criteria. My proposed standard for assessing major life activities reflects these criteria. It also has the virtue of reflecting related ideas of the good life that derive from other disciplines. A quick survey of a few of those disciplines will forecast how their understandings of human nature would complement those of philosophy.

IV. THE PROMISE OF OTHER DISCIPLINES

Participants in the ancient and ongoing inquiry into what makes for meaningful, fulfilling lives include philosophers, sociologists, anthropologists, historians, political scientists, psychologists, economists, researchers in various branches of medicine, and—more recently—disability theorists,

189. *Id.* at 5-6; *see id.* at 308 (defining primary goods to include the “powers and prerogatives of offices and positions of responsibility,” which “give scope to various self-governing and social capacities of the self”).

190. Norman Daniels, *Mental Disabilities, Equal Opportunity, and the ADA*, in *MENTAL DISORDER, WORK DISABILITY, AND THE LAW* 281, 285-87 (Richard J. Bonnie & John Monahan eds., 1997). For Daniels, equality of opportunity requires reasonable measures, including the commitment of social resources, to see that the range of job or career opportunities available to people with disabilities is as close as possible to the normal range. *Id.* at 286 (citing JOHN RAWLS, *A THEORY OF JUSTICE* (1971)).

feminist theorists, gerontologists, social epidemiologists and social capital theorists, among others.¹⁹¹ Selected insights from four of these fields—sociology, anthropology, psychology and political theory—will suffice to give a glimpse of the validity and promise of a wide-ranging multidisciplinary exploration into important human activities as a guide for defining major life activities under the ADA.

A. *Sociology*

Sociology, with its interest in social relations, including “relations of individuals and groups in and across different social contexts and periods,”¹⁹² offers valuable perspectives on the good life in modern society, particularly with respect to activities performed with and among others. I highlight four particular contributions relevant to the ADA and major life activities: quality of life studies and surveys; the recognition, in part through “stigma theory,” of the extent to which our self-identities and our social interactions are driven by a need for social acceptance; and the closely related fields of social epidemiology and social capital theory, which confirm how our social connections help us live longer, healthier and happier lives.

1. *Quality of Life Measures*

Systematic empirical “quality of life” research dates to the 1960s.¹⁹³ Quality of life is usually understood as a sense of well-being or satisfaction with life in general or specific domains of life in particular.¹⁹⁴ A good life has been described as one that is interesting, enjoyable, full, worthwhile and rewarding; that offers friendships and hope; that is liberating and relatively easy; and that “brings out the best” in the person.¹⁹⁵ Research consistently

191. Although I refer to distinct disciplines, some of the best work spans several fields or defies categorization. *See, e.g.*, THE QUALITY OF LIFE (Martha C. Nussbaum & Amartya Sen eds., 1993); SUBJECTIVE WELL-BEING: AN INTERDISCIPLINARY PERSPECTIVE (Fritz Strack et al. eds., 1991); RESEARCH ON THE QUALITY OF LIFE (Frank M. Andrews ed., 1986). Political theorists draw from philosophy and the behavioral sciences, social capital theory is next of kin to social epidemiology, and feminist theory is informed by psychology, philosophy, political science, law and other disciplines.

192. Len Barton, *Sociology, Disability Studies and Education: Some Observations*, in THE DISABILITY READER: SOCIAL SCIENCE PERSPECTIVES 53 (Tom Shakespeare ed., 1998).

193. Schuessler & Fisher, *Quality of Life Research*, *supra* note 59, at 130.

194. *Id.* at 131 (citation omitted).

195. *Id.* at 133. The converse is the life that is boring, miserable, useless, disappointing, empty, lonely, and discouraging; it is hard, restrictive and it “doesn’t give [the person] a chance” to improve herself or her lot. *Id.*

One sociologist uses concepts familiar in economics and philosophy, *see infra* Part III.3., to advocate a “basic needs” approach to assessing quality of life. Erik Allardt, *Having, Loving, Being: An Alternative to the Swedish Model of Welfare Research*, in THE QUALITY OF LIFE 88, 89 (Martha C. Nussbaum & Amartya Sen eds., 1993). Basic needs—defined as the conditions “without which human beings are unable to survive, avoid misery, relate to other people, and avoid alienation,” fall into three broad categories: “[h]aving, [l]oving, and [b]eing.” *Id.* “Having” refers to the material conditions necessary to survive and to avoid misery. *Id.* (identifying the basic needs of adequate food and water; economic resources; shelter and housing conditions; employment and working conditions; health and education). “Loving” refers to the “need to relate to other people and to form social identities.” *Id.* at 91 (iden-

shows that close personal relationships—including marriage, family and other primary relationships—are the most powerful determinant of a person's assessment of her quality of life.¹⁹⁶ Other indicators of a good quality of life include the satisfaction of basic needs (freedom from hunger or poverty), work satisfaction, health and education, and opportunities for personal growth, self-fulfillment and self-esteem.¹⁹⁷ Major life activities, then, might include those involved in making and maintaining close relationships and friendships; satisfying basic material needs; engaging in worthwhile, interesting work; and developing one's personal talents and capabilities.

2. *Stigma Theory*

Sociology also offers insights into how an individual's position in the "wider social conditions and relations of a given society" affects her esteem and social standing,¹⁹⁸ which in turn affects her well-being. This is brought to the fore by sociologist Erving Goffman's ground-breaking work on stigma and identity management.¹⁹⁹ According to Goffman, a necessary condition for social life is a set of shared expectations or norms concerning conduct, appearance, function, identity and being.²⁰⁰ Conforming to—or at least approximating—these norms is a key to social acceptance. Deviating from them (as with a discredited condition like a disability) often leads to isolation, impaired status and social condemnation. The human need for social acceptance is so strong that achieving it can become the organizing principle or "central feature" of a person's life, directing his choices about friendships, jobs and other important aspects of his life.²⁰¹ Typically, even extraordinary efforts to approximate "phantom normalcy" lead at best to "phantom acceptance."²⁰² The stigmatized individual learns that if he "presses his luck" and mistakes this tolerance or conditional acceptance for the real thing,²⁰³ he will be put back into his (inferior) place. Goffman's work underscores the importance of having full social acceptance, of being able to approach new locations and new situations without fear of the obstacles (physical and attitudinal) that one will encounter, and of enjoying "the

tifying relevant social ties to include "attachments and contacts in the local community; attachments to family and kin; active patterns of friendship; attachments and contacts with fellow members in association and organizations[;] and relationships with work-mates." *Id.* "Being" reflects personal growth and the ability to make decisions about one's life; it might include opportunities for a meaningful work life and leisure-time activities. *Id.*

196. Schuessler & Fisher, *Quality of Life Research*, *supra* note 59, at 136-40.

197. *Id.* at 131 (citations omitted).

198. Barton, *supra* note 192, at 57.

199. See ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* (1963).

200. *Id.* at 127-28.

201. *Id.* at 12; *id.* at 51 (discussing "stigma management"). Strategies of stigma management include sometimes elaborate measures of "information control," including breaking off friendships, denying one's biography, avoiding jobs or other situations that would result in disclosure, self-isolation or distancing and masquerading. *Id.* at 51-104.

202. *Id.* at 122.

203. *Id.* at 120, 122.

salutary feed-back of daily social intercourse with others,”²⁰⁴ unimpeded by elaborate strategies to win conditional social acceptance.

3. *Social Epidemiology*

Achieving true (not “phantom”) social acceptance opens the door for meaningful social connections, another focus of sociology. Social epidemiology, which traces its roots to nineteenth century French sociologist Emile Durkheim, examines populations to determine how social relationships affect individual health and well-being.²⁰⁵ Scores of epidemiological studies point to social connection as a powerful determinant not only of our health and happiness, but sometimes our very survival.²⁰⁶ Regardless of the social relationships studied (from intimate to extended) or the aspect of connection measured (such as social integration, social support, social participation, social ties or embeddedness),²⁰⁷ research consistently shows that we live longer, happier, healthier lives when we live in connection with family, friends and communities.²⁰⁸

204. *Id.* at 13.

205. See Lisa Berkman & Thomas Glass, *Social Integration, Social Networks, Social Support and Health*, in *SOCIAL EPIDEMIOLOGY* 137, 139-40 (Lisa Berkman & Ichiro Kawachi eds., 2000) [hereinafter Berkman & Glass, *Social Integration*] (crediting Durkheim with the first major work of social epidemiology); James S. House et al., *Social Relationships and Health*, 241 *SCI. 540*, 540 (1988) (same).

206. Leading social epidemiologists offer this summary of the leading research during the last twenty years:

Virtually all these studies find that people who are socially isolated or disconnected to others have between two and five times the risk of dying from all causes compared to those who maintain strong ties to friends, family, and community.

Berkman & Glass, *Social Integration*, *supra* note 205, at 160.

207. See, e.g., Sidney Cobb, *Social Support As a Moderator of Life Stress*, 38 *PSYCHOSOMATIC MED.* 300, 300-01 (1976) (speaking of social support as communication or conduct that makes a person feel that she is cared for and loved, that she is esteemed and valued, or that she belongs to a network of people who share mutual obligations); Berkman & Glass, *Social Integration*, *supra* note 205, at 145; *id.* at 155-58 (discussing assessment of social networks, social support and social ties and integration); Niall Bolger & John Eckenrode, *Social Relationships, Personality, and Anxiety During a Major Stressful Event*, 61 *J. PERSONALITY & SOC. PSYCHOL.* 440, 442 (1991) (measuring perceived social support through a Social Provisions Scale assessing attachment, social integration, reassurance of worth, reliable alliance, guidance and opportunity for nurturance) (citations omitted).

208. See generally Lisa Berkman, *Social Support, Social Networks, Social Cohesion and Health*, in *BEHAVIORAL SOCIAL WORK IN HEALTH CARE SETTINGS* 3, 11 (Gary Rosenberg & Andrew Weissman eds., 2000) (“Although these studies often measure social networks in different ways and conceptualize them somewhat differently, they show very consistent results. In almost all cases, those who are most ‘dis-connected’ are at increased risk from a number of causes of death.”); Maurice B. Mittelmark, *Social Ties and Health Promotion: Suggestions for Population-Based Research*, 14 *HEALTH EDUC. RES.* 447, 447 (1999) (citing pattern from eighty studies showing “a meaningful negative statistical relationship between social integration/social support and morbidity/mortality” and finding consistent trend from the studies “compelling given the remarkable heterogeneity in the ways that social integration and support have been conceptualized and measured, and the broad range of health status indicators that have been investigated”).

4. *Social Capital Theory*

Social capital theory, which overlaps with social epidemiology, examines the effects of civic and social ties on the health of communities as well as individuals. The term “social capital” was first defined in 1916 as “those tangible substances [that] *count for most in the daily lives of people*: namely good will, fellowship, sympathy, and social intercourse among the individuals and families who make up the social unit.”²⁰⁹ Our social capital reflects our sense of belonging to various intimate and extended communities.²¹⁰ Recent work by social capital theorists confirms that “[s]ocial connectedness matters to our lives in the most profound way.”²¹¹ Individuals are happier and healthier when they connect and identify with people outside their families or workplaces, often through membership in civic, social, religious, community or political organizations.²¹² The health effects are dramatic:

Dozens of painstaking studies . . . have established beyond reasonable doubt that social connectedness is one of the most powerful determinants of our well-being. The more integrated we are with our community, the less likely we are to experience colds, heart attacks, strokes, cancer, depression, and premature death of all sorts.²¹³

209. ROBERT D. PUTNAM, *BOWLING ALONE* 19 (2000) (quoting Lyda Judson Hanifan, *The Rural School Community Center*, 67 ANN. AM. ACAD. POL. & SOC. SCI. 130, 130 (1916) (emphasis added)). Subsequent definitions are substantively the same. *See, e.g.*, JAMES COLEMAN, *FOUNDATIONS OF SOCIAL THEORY* 302 (1990) (defining social capital as a variety of entities that consist of “some aspect of a social structure” that “facilitate[s] certain actions of individuals . . . within the structure”); Pierre Bourdieu, *The Forms of Capital*, in *THE HANDBOOK OF THEORY: RESEARCH FOR THE SOCIOLOGY OF EDUCATION* 241, 241 (John G. Richardson ed., 1986) (conceiving of social capital as the resources “that accrue to an individual or group by virtue of possessing a durable network of more or less institutionalized relationships of mutual acquaintance and recognition”); Glenn Loury, *The Economics of Discrimination: Getting to the Core of the Problem*, HARV. J. AFR. AM. PUB. POL’Y 91, 100 (1992) (identifying social capital as “naturally occurring relationships among persons which promote or assist the acquisition of skills and traits valued in the marketplace”).

210. PUTNAM, *BOWLING ALONE*, *supra* note 209, at 274:

Each of us derives some sense of belonging from among the various communities to which we might, in principle, belong. For most of us, our deepest sense of belonging is to our most intimate social networks, especially family and friends. Beyond that perimeter lie work, church, neighborhood, civic life, and the assortment of other ‘weak ties’ that constitute our personal stock of social capital.

You may accrue social capital from any engagement in the community, including “your Sunday school class, the regulars who play poker on your commuter train, your college roommates, the civic organizations to which you belong, the Internet chat group in which you participate, and the network of professional acquaintances recorded in your address book.” *Id.* at 21.

211. *Id.* at 326.

212. *See id.* at 332 (reporting that “[t]he single most common finding from a half century’s research . . . is that happiness is best predicted by the breadth and depth of one’s social connections”) (citing MICHAEL ARGYLE, *THE PSYCHOLOGY OF HAPPINESS* (1987)); Ed Diener, *Subjective Well-Being*, 95 PSYCHOL. BULL. 542-75 (1984); Ed Diener, *Assessing Subjective Well-Being*, 31 SOC. INDICATORS RES. 103 (1994); David G. Myers & Ed Diener, *Who Is Happy?*, 6 PSYCHOL. SCI. 10 (1995).

213. *Id.* at 326. These “dozens” of studies on which Putnam relies include the literature of social epidemiology. *See id.* at 326-31.

Social capital theory thus confirms that the social connections that bring us and bond us together—as friends, neighbors, coworkers, worshipers, teammates, or members of civic, religious or social organizations—are integral to a happy, healthy life. This suggests that participating in the life of the community and its organizations is a worthy candidate for a major life activity.

B. Anthropology

Anthropology is a relatively new discipline, and to date, law may have infused anthropology more than anthropology has contributed to law.²¹⁴ When we examine law in a cultural context, however, anthropology offers a helpful qualitative approach to defining characteristics of humanity.²¹⁵ As two legal anthropologists have observed, “[a]nthropology is especially helpful in discovering and describing the possibilities. . . . [It] can tell us what to consider.”²¹⁶ It might, for example, give us insights into the importance of kinship or social relations; the status or esteem attached to work or other public achievements; the cultural role of leisure and play; or the perceived significance of participating in the civic or political life of the community. The most relevant observations might result from ethnographic research in the United States.

The anthropological concept of “human universals,” properly conceived, might also inform our understanding of pursuits that are important, if not essential, to human flourishing. A relevant universal activity would be one that, with cultural variations, is widely engaged in and valued in all or virtually all societies and cultures.²¹⁷ These might include reproduction; forming and maintaining various kinship relations; mastering language to exchange information and express abstract concepts and inner states; using expressive facial gestures; having a concept of an intentional self; living in organized groups that extend beyond families; having individual and collective social identities based on roles and statuses; the socialization and education of children; using tools; engaging in production and cooperative labor; anticipating and planning for the future; and engaging in social rituals, hospitality, the decorative and musical arts, and play.²¹⁸ The universal importance, not simply the universal occurrence,²¹⁹ of such activities across cultures may help validate their importance in modern American life.

214. See John M. Conley & William M. O’Barr, *Legal Anthropology Comes Home: A Brief History of the Ethnographic Study of Law*, 27 LOY. L.A. L. REV. 41, 44 (1993).

215. *Id.* at 41, 44 n.19, 63.

216. *Id.* at 63.

217. See generally DONALD E. BROWN, HUMAN UNIVERSALS (1991).

218. See *id.* at 130-40.

219. Clearly not all that is universal is either important or valued. Murder and male domination of politics come to mind.

C. Psychology

Psychology is an obvious source of insights into the behaviors of a flourishing, functioning human being and the opportunities and experiences that promote that flourishing and functioning. Here I point to three approaches—drawn from motivational, developmental and hedonic psychology—that offer insights into activities and opportunities that are fundamental to human development, motivation, identity or well-being.

1. Maslow's Hierarchy of Needs

Motivational psychologist Abraham Maslow identified five levels of human needs and motivations. His familiar hierarchy of needs starts with the most basic—physiological needs like food, water, air and shelter—and progresses to safety needs, love and belonging needs, esteem needs and then to self-actualization, or the realization of one's full potential.²²⁰ Maslow deemed the first four levels of needs basic or “instinctoid,” meaning that they must be reasonably well satisfied in *any* healthy human being.²²¹ Among these basic needs are the “love and affection and belongingness needs,” which encompass intimate and family relationships, friendships, and the ties we have to neighbors, coworkers and others in our communities,²²² and “esteem needs,” which include the needs for reputation, recognition, importance, dignity and appreciation.²²³

These first four needs are “deficiency” needs, which propel us to satisfy them. Once these needs are reasonably satisfied, the healthy person is motivated primarily by “growth needs,” or the need for self-actualization. Maslow defines self-actualization as the:

ongoing actualization of potentials, capacities and talents, as fulfillment of mission (or call, fate, destiny, or vocation), as a fuller knowledge of, and acceptance of, the person's own intrinsic nature,

220. Maslow developed and refined his theory of motivation and personality throughout his career. See generally ABRAHAM MASLOW, HIERARCHY OF NEEDS (1954); ABRAHAM MASLOW, MOTIVATION AND PERSONALITY (1954) [hereinafter MASLOW, MOTIVATION AND PERSONALITY]; ABRAHAM MASLOW, TOWARD A PSYCHOLOGY OF BEING (1962) [hereinafter MASLOW, PSYCHOLOGY OF BEING]; ABRAHAM MASLOW, A THEORY OF HUMAN MOTIVATION (1968).

221. MASLOW, PSYCHOLOGY OF BEING, *supra* note 220, at 22. Put another way, the absence of one of these needed goods or states produces illness. *Id.* These needs are also referred to as “deficiency” needs. *Id.* at 21.

222. MASLOW, MOTIVATION AND PERSONALITY, *supra* note 220, at 89. Human beings, Maslow observed, are by nature social creatures, with a “deeply animal tendency to herd, to flock, to join, to belong.” *Id.* at 44.

223. *Id.* at 90. Indeed, healthy and stable self-respect or self-esteem is based on the “deserved respect from others” for our competence and achievement. *Id.* at 91. This self-esteem brings with it feelings of “self-confidence, worth, strength, capability, and adequacy, of being useful and necessary in the world.” *Id.* at 91.

as an unceasing trend toward utility, integration or synergy within the person.²²⁴

Self-actualization, then, is a state of maturation, health and self-fulfillment.²²⁵ Although few people attain complete self-actualization (an end state of “Being”), more have “peak” or self-actualized experiences of joy and fulfillment, and a healthy person is one who seeks it (in a state of “Becoming”).²²⁶

What might we learn from Maslow about major life activities? First, the most fundamental human needs include love and affection (which entail activities that form and sustain intimate relationships, friendships and family relationships) and esteem or recognition (achieved through activities that involve or invite public acceptance, social approval and the deserved respect of others). Second, even beyond these basic, universal needs, a flourishing person needs activities that allow her to develop her unique talents and capacities, to discover or define her self-identity, and to fulfill her individual goals.

2. *Adler’s Community, Work & Family*

Leading developmental psychologist Alfred Adler identified three major, encompassing tasks of life: life in society or the community, useful work or vocation, and romantic and family love.²²⁷ Life in the community provides companionship and “the spirit of fellow feeling,”²²⁸ as well as an indispensable sense of connection with and belonging to the community.²²⁹ Meaningful work provides a livelihood—itsself a fundamental need²³⁰—and far more. It allows us to “strive for perfection” through our “accomplishments, growth, development, [and] mastery over circumstances and tasks,”²³¹ and it provides us opportunities to fulfill our basic needs for cooperation, for contribution, and for community.²³² Romantic love, perhaps

224. *Id.* at 25.

225. MASLOW, *PSYCHOLOGY OF BEING*, *supra* note 220, at 71. Self-actualization is akin to what others might refer to as growth, individuation, autonomy, self-development, productiveness and self-realization. *Id.* at 24.

226. *Id.* at 72.

227. ALFRED ADLER, *SOCIAL INTEREST* 39 (Colin Brett ed., 1998) [hereinafter ADLER, *SOCIAL INTEREST*].

228. *Id.* at 40, 48.

229. *Id.* at 37 (observing that “individuals as complete beings cannot be dragged out of their connection with life—perhaps it would be better to say, with the community”).

230. *Id.* at 40.

231. See Eva Dreikers Ferguson, *Adler’s Motivational Theory: An Historical Perspective on Belonging and the Fundamental Human Striving*, 45 *INDIVIDUAL PSYCHOL.* 354, 357 (1989) [hereinafter Ferguson, *Adler’s Motivational Theory*]. My discussion reflects Ferguson’s helpful summary of Adler’s thinking and extensive writings.

232. ADLER, *SOCIAL INTEREST*, *supra* note 227, at 35, 206-07. Adler’s “social feeling” reflected “a tendency for people ‘to unite themselves with other human beings, to accomplish their tasks in cooperation with others’, and to be socially useful.” Ferguson, *Adler’s Motivational Theory*, *supra* note 231, at 356 (quoting ALFRED ADLER, *THE EDUCATION OF CHILDREN* 115 (1930)) (internal citations omitted).

more than any other human endeavor, is “vitaly bound up with the welfare and prosperity of the individual in the social environment.”²³³ Life-long loving relationships of mutual devotion enhance pleasure, contribute to the welfare of humanity, and create partnerships for raising and educating children.²³⁴ At the heart of these and all human undertakings is what Adler termed “social interest,” which describes “the fundamental motivation of human beings to belong: to bond with others, to feel worthwhile as a social being, and to be part of the human community.”²³⁵ Adler thus supports the importance of activities that bind the individual to the human community, through relationships at work, in the community (through friendships and associational ties), and in family and intimate relationships.

3. Hedonic Psychology

Hedonic psychology is an emerging field dedicated to questions directly relevant to major life activities: What makes us happy and flourishing? What makes our lives and life experiences meaningful, fulfilling, pleasant, and satisfying?²³⁶ Close personal relationships and social acceptance figure prominently in any account of a happy life.²³⁷ Work that is both rewarded and rewarding is central to mental health and important to overall well-being.²³⁸ The rewards of work—beyond the pay—include self-respect, autonomy, opportunities to use and develop skills, valued social positions, personal satisfaction from making meaningful contributions to others, and social support and cooperation.²³⁹ Participation in seemingly minor but per-

233. ADLER, SOCIAL INTEREST, *supra* note 227, at 51.

234. *Id.* at 51-53.

235. Ferguson, *Adler's Motivational Theory*, *supra* note 231, at 357.

236. Daniel Kahneman et al., *Preface*, in DANIEL KAHNEMAN ET AL., WELL-BEING: THE FOUNDATIONS OF HEDONIC PSYCHOLOGY ix (1999).

237. David G. Myers, *Close Relationships and the Quality of Life*, in DANIEL KAHNEMAN ET AL., ED DIENER & NORBERT SCHWARZ, WELL-BEING: THE FOUNDATIONS OF HEDONIC PSYCHOLOGY 374, 375 (1999) (examining the “pan-human quest for enduring, close relationships” and the extent to which we continually strive for social acceptance) [hereinafter Myers, *Close Relationships*]. When asked what they need to be happy, most people mention close relationships above anything else. *Id.* at 375 (citing Ellen Berscheid, *Interpersonal Attraction*, in THE HANDBOOK OF SOCIAL PSYCHOLOGY (Gardner Lindzey & Elliot Aronson eds., 1985)); *id.* at 374 (reporting survey in which 78% of college students chose an enduring love over winning the lottery, achieving professional acclaim or prestige, or enjoying the physical pleasures of food, drink, and sex) (citing Terry F. Pettijohn II & Terry F. Pettijohn, *Perceived Happiness of College Students Measured by Maslow's Hierarchy of Needs*, 97 PSYCHOL. REP. 759-62 (1996)); *id.* (when asked what missing element would bring them happiness, the most frequent answer is “love”) (citing JONATHAN FREEDMAN, HAPPY PEOPLE (1978)). See Michael Argyle, *Subjective Well-Being*, in IN PURSUIT OF THE QUALITY OF LIFE 18, 26 (Avner Offer ed., 1996) [hereinafter Argyle, *Subjective Well-Being*] (noting that many studies identify social relationships as the greatest single source of happiness).

238. See Peter Warr, *Well-Being and the Workplace*, in DANIEL KAHNEMAN ET AL., WELL-BEING: THE FOUNDATIONS OF HEDONIC PSYCHOLOGY 392, 393, 395 (1999); Argyle, *Subjective Well-Being*, *supra* note 237, at 28.

239. Warr, *supra* note 238, at 395-96. Psychology has shown a growing interest in work since Freud identified *lieben* and *arbeiten* (love and work) as the keys to a satisfying life. Organizational or occupational psychology examines, among other things, what motivates us to work, what work means to our identities, and both the salutary and detrimental effects of work and the workplace on our mental health. See generally CHRISTINE HODSON, PSYCHOLOGY AND WORK (2001). A growing “psychology of work”

sonally valued everyday activities may have a major impact on our health and well-being. Studies show that individuals are more satisfied with life when they can pursue their distinct personal goals in ways that they value and choose.²⁴⁰ Future work in hedonic psychology may underscore the importance of recreation and leisure activities,²⁴¹ along with other “pleasures of the mind.”²⁴²

D. Political Theory

Political theories present visions of and beliefs about human needs and potentials, the nature of social and civic life, and the political rules and arrangements of a society that facilitate a good life for its members, however the good is conceived. Two prominent theories, political liberalism and communitarianism, each represent implicit or explicit (and overlapping) beliefs about aspects of human nature and the good human life, with the former emphasizing individual freedoms and the latter moving the focus to the common good. Jacobus tenBroek’s vision of being a full and equal member of society with the unconstrained right to participate in society embraces both liberty and community. It also represents the political and social thought that informed and reflected the public and political understandings of disability that animate and shape the ADA.

1. Political Liberalism

Political liberalism, which dominates Western thinking, is a logical place to start. John Rawls’ theories are the logical work to consider, as he is liberalism’s most prominent proponent.²⁴³ As previously noted, Rawls con-

pays particular attention to the effects of work on individual well-being. *See, e.g.*, PETER B. WARR, WORK, UNEMPLOYMENT AND MENTAL HEALTH (1987). In the last decade psychologists from three approaches (cognitive, developmental and social) have developed the study of “good work,” which examines how personal expertise, identity and values lead to professional satisfaction, high-quality work and social responsibility. *See* HOWARD GARDNER ET AL., GOOD WORK: WHEN EXCELLENCE AND ETHICS MEET (2001); *see also* MIHALY CSIKSZENTMIHALYI, GOOD BUSINESS: LEADERSHIP, FLOW, AND THE MAKING OF MEANING (2003) (advising employers to bring out the best in employees by making it possible for them to work with engagement and joy).

240. Nancy Cantor & Catherine A. Sanderson, *Life Task Participation and Well-Being: The Importance of Taking Part in Daily Life*, in DANIEL KAHNEMAN ET AL., WELL-BEING: THE FOUNDATIONS OF HEDONIC PSYCHOLOGY 230, 233 (1999). These activities—which may include getting together with friends, volunteering in the community, or pursuing various hobbies and pastimes—can provide structure and meaning to daily life, as well as a sense of personal direction and purpose and opportunities for mutual support and caring. *Id.* at 231-35. Scholarly research confirms the role that leisure plays in health and well-being. *See, e.g.*, WORK, LEISURE AND WELL-BEING (John T. Haworth ed., 1998) (anthology of contributions from psychologists, sociologists and leisure specialists).

241. Argyle, *Subjective Well-Being*, *supra* note 237, at 30 (citing studies showing leisure satisfaction to be important to subjective well-being, with many people finding leisure activities at least as satisfying as their jobs).

242. Pleasures of the mind include those—such as reading, music, play, humor—that stimulate emotions like curiosity, virtuosity, surprise, and satisfaction from accomplishments. Michael Kubovy, *On the Pleasures of the Mind*, in DANIEL KAHNEMAN ET AL., WELL-BEING: THE FOUNDATIONS OF HEDONIC PSYCHOLOGY 134, 142-48 (1999).

243. His theories were introduced, *supra* notes 171-190.

ceives of each person as a “fully cooperating member of society” with “an equal claim to a fully adequate scheme of equal basic rights and liberties”²⁴⁴ and to a fair share of “primary goods,” including freedom of movement, a meaningful choice of occupations, access to positions of public responsibility, adequate financial means and “the social bases of self-respect.”²⁴⁵ Although Rawls maintained neutrality with respect to various “comprehensive conceptions” of the good, his articulation of liberalism suggests that endeavors important to any citizen would include the activities of reasoning, cooperating with others, working, aspiring to positions of public trust and achieving social respect or acceptance.

Given their architectonic role in Rawls’ scheme, two activities—reasoning and choosing—warrant specific mention. Recall that persons are free and equal members of society by virtue of certain moral and cognitive powers: “their two moral powers (a capacity for a sense of justice and for a conception of the good) and the powers of reason (of judgment, thought, and inference connected with these powers).”²⁴⁶ That the ability to think and reason are requirements of Rawls’ normative definition of personhood certainly supports their status as major life activities. Choosing and pursuing one’s own idea of the good is at the heart of Rawls’ theory: “[t]he capacity for a conception of the good is the capacity to form, to revise, and rationally to pursue a conception of one’s rational advantage or good.”²⁴⁷ Indeed, our “public identity as free persons” depends on this ability to form and change a determinate conception of the good.²⁴⁸ The basic premises of Rawls’ theory—including basic rights, liberties, and opportunities and the all-purpose means to achieve them are designed to provide citizens with meaningful choices. This would reinforce the claim that making important life choices (where to go to school, where to work, where to worship, and the like) is itself a major life activity.

2. *Communitarianism*

Communitarians see liberalism’s emphasis on individual rights and its claim to neutrality as wrong, both descriptively and normatively.²⁴⁹ Rather

244. RAWLS, POLITICAL LIBERALISM, *supra* note 73, at 3-5.

245. *Id.* at 181 (listing primary goods to include “freedom of movement and free choice of occupation against a background of diverse opportunities”; the “powers and prerogatives of offices and positions of responsibility in the political and economic institutions of the basic structure”; “income and wealth”; and the “social bases of self-respect”).

246. *Id.* at 19.

247. *Id.*

248. *Id.* at 30.

249. See Michael J. Sandel, *Introduction*, LIBERALISM AND ITS CRITICS 5 (Michael J. Sandel ed., 1984) (explaining that “communitarian critics of modern liberalism question the claim for the priority of the right over the good, and the picture of the freely-choosing individual it embodies,” and arguing “that we cannot justify political arrangements without reference to common purposes and ends, and that we cannot conceive our personhood without reference to our role as citizens, and as participants in a common life”). Rawls responds to these criticisms in *Priority of Right*, *supra* note 171, at 252-53. See also 2 CHARLES TAYLOR, PHILOSOPHICAL ARGUMENTS 181 (1997) (arguing for the need, when comparing

than a politics of right, they advance a “politics of the common good.”²⁵⁰ Michael Sandel, for example, criticizes the liberal conception of “the individual as an unencumbered self” for disregarding both our personal attachments and our common good:

[Liberalism] rules out the possibility of a public life in which, for good or ill, the identity as well as the interests of the participants could be at stake. And it rules out the possibility that common purposes and ends could inspire more or less expansive self-understandings and so define a community in the constitutive sense, a community describing the subject and not just the objects of shared aspirations.²⁵¹

Indeed, the various groups or communities to which we belong play an important role in shaping our individual identities²⁵² and “in setting the conditions under which [we] can flourish and order [our] lives together.”²⁵³ Accordingly, as we evaluate major life activities, communitarians would remind us of the importance of the various activities that bond us to others, embed us in our communities, and promote our shared social commitments.

3. *TenBroek’s Right to Live in the World*

Political scientist Jacobus tenBroek merits attention not only for his insights into life’s many possibilities, but also for his influence in shaping the

liberalism and communitarianism or civic humanism, to separate ontological from advocacy issues, that is, to distinguish descriptions of what is from claims of what should be).

It is true, of course, that there is no single or universal communitarian position or platform. See Carlos A. Ball, *Communitarianism and Gay Rights*, 85 CORNELL L. REV. 443, 443-51 (2000) (summarizing broad communitarian principles and beliefs and distinguishing “different strands in contemporary communitarian thinking”); Stephen A. Gardbaum, *Law, Politics, and the Claims of Community*, 90 MICH. L. REV. 685, 689 (1992) (describing three separate claims of community). I am sketching a version that highlights distinctions between liberalism and communitarianism.

250. MICHAEL SANDEL, *DEMOCRACY’S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 25 (1996) (promoting civic republicanism and affirm[ing] a “politics of the common good”). See ALASDAIR MACINTYRE, *AFTER VIRTUE* 172 (1984) (asserting that societies “are conceived as communities in which men in company pursue *the* human good” and not, as the liberals describe, merely “the arena in which each individual seeks his or her own private good”). Michael Perry presents another, although less developed, alternative to liberalism. From his “neo-Aristotelian” or “naturalist” perspective, moral knowledge for an individual is simply knowing “how to live so as to flourish, to achieve well-being.” MICHAEL J. PERRY, *MORALITY, POLITICS, AND LAW: A BICENTENNIAL ESSAY* 11 (1988). Although he embraces an “Anthropological Relativism,” he does recognize some common human needs and interests—including our social nature—that determine the bounds of acceptable communities. *Id.* at 11, 47-48.

251. MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 62 (1982) (describing the “Rawlsian self” as “an antecedently individuated subject, standing always at a certain distance from the interests it has”).

252. See TAYLOR, *supra* note 249, at 230-33 (discussing how we “become full human agents, capable of understanding ourselves, and hence of defining our identity,” through engagement with and recognition by others).

253. MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 137 (1991) (arguing that our various relationships are necessary conditions for the fulfillment of the liberal ideal of “full and free human development”).

academic, political and public discourse that informed the ADA.²⁵⁴ As early as the 1960s, tenBroek advocated a national policy of full “integrationism” for people with disabilities,²⁵⁵ using language that thirty years later would be used to express the goals and ideals of the ADA. He opened one law review article with these memorable lines:

Movement, we are told, is a law of animal life. As to man, in any event, nothing could be more essential to personality, social existence, economic opportunity—in short, to individual well-being and integration into the life of the community—than the physical capacity, the public approval, and the legal right to be abroad in the land.²⁵⁶

TenBroek thus embraced both liberty and community as fundamental human needs, essential for psychic, social and material well-being. These needs in turn compelled a national policy “entitling the disabled to full participation in the life of the community and encouraging and enabling them to do so.”²⁵⁷ This participation was to extend “not merely . . . to a single, narrow area of human endeavor, but . . . to the whole broad range of social, economic, and educational activity”²⁵⁸ The corollary to “the right to live in the world” is, tenBroek asserted, “the right to make [one’s] way into it,” and then to have “uninhibited and equal access to . . . ease, rest, sustenance, or recreation.”²⁵⁹ Thus, tenBroek suggests to us that community, social, recreational, economic and educational activities (among others) may be important to an individual’s well-being and personal and social identities—and for those reasons “major” under the ADA.

TenBroek made another contribution to public and political perceptions of people with disabilities. He used the language of the burgeoning civil rights movement to speak of people with disabilities,²⁶⁰ presenting them as citizens claiming equal rights and as individuals with the full range educational, social, economic and personal aspirations. TenBroek thereby emphasized the similarities or sameness—the common humanity—of people with

254. Political scientist Harlan Hahn also stands out for advancing disability rights as civil rights, challenging the medical model of disability, and encouraging broad-based research and development of disability policies. See, e.g., Harlan Hahn, *Toward a Politics of Disability: Definitions, Disciplines, and Policies*, 22 SOC. SCI. J. 87 (1985); Harlan Hahn, *The Politics of Physical Differences: Disability and Discrimination*, 44 J. SOC. ISSUES 39 (1988).

255. Jacobus tenBroek, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 CAL. L. REV. 841, 843 (1966) (defining “integrationism” as “a policy entitling the disabled to full participation in the life of the community and encouraging and enabling them to do so”).

256. *Id.* at 841.

257. *Id.* at 843.

258. *Id.* at 847.

259. *Id.* at 848.

260. For example, shortly after the adoption of the Civil Rights Act of 1964, tenBroek quoted a legislative report that deemed the right of equal access to public accommodations—a right denied people with disabilities—“so distinctive in nature that its denial constitutes a shocking refutation of a free society.” *Id.* at 849 (quoting H.R. REP. NO. 88-914(II), at 7 (1963)).

disabilities. At a time when many people with disabilities were both shut in and shut out, tenBroek promoted the principle that Americans with disabilities had the capability, the desire and the right to participate in and contribute to all that American society had to offer—in short, to all aspects of the good life. In so doing, tenBroek departed from the prevailing “medical model” of disability to articulate and advance the “civil rights” or “minority group” model that provides the basis for the ADA.²⁶¹

V. CONGRESSIONAL UNDERSTANDINGS OF MAJOR LIFE ACTIVITIES

TenBroek brings us full circle, back to the ADA and to a lingering question: Did Congress share in this broad vision of the good life that runs through varied disciplines? The answer undoubtedly is yes. When the ADA is examined against the backdrop of this accumulated knowledge, and in light of our common understandings, its voice on the matter of what is important in life reaches us with even greater clarity. Rightly heard, the ADA speaks for a broad consensus that expects an expansive conception of major life activities, one that encompasses the pleasures of fellowship with others; the everyday chores and tasks of life; developing and using our skills and talents in ways that produce a sense of accomplishment and achievement; and the ability to go about one’s life with public acceptance and approval, as well as activities related to life’s major undertakings, such as work, education and family.

Judged by its text alone, the ADA virtually explodes with ambition. Consider the stated purposes of the Act. In response to persistent disability discrimination “in such *critical* areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services,”²⁶² Congress declared its intent to address all “major areas of discrimination

261. The medical model views disability as a defect or deficiency that inheres in the individual, while the civil rights model sees disability as the product of a “disabling” social environment. The civil rights model calls for remedying inequality and disadvantage by restructuring the environment, rather than trying to “fix” the person, or as Anita Silvers puts it, to provide fair opportunity by leveling the playing field, rather than leveling the player. Anita Silvers, *Formal Justice*, in ANITA SILVERS ET AL., *DISABILITY, DIFFERENCE, DISCRIMINATION* 15, 70 (1998). For discussions of the evolution of medical, political, social and legal understandings of disability, see RICHARD SCOTCH, *FROM GOOD WILL TO CIVIL RIGHTS: TRANSFORMING FEDERAL DISABILITY POLICY* (1984); JOSEPH P. SHAPIRO, *NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT* (1993); Harlan Hahn, *Antidiscrimination Laws and Social Research on Disability: The Minority Group Perspective*, 14 *BEHAV. SCI. & L.* 41 (1996); Adam A. Milani, *Living in the World: A New Look at the Disabled in the Law of Torts*, 48 *CATH. U. L. REV.* 323, 328-38 (1999). For discussions of how the ADA reflects the civil rights or minority group model, see Samuel R. Bagenstos, *Subordination, Stigma, and Disability*, 86 *VA. L. REV.* 397 (2000); Mary Crossley, *The Disability Kaleidoscope*, 74 *NOTRE DAME L. REV.* 621 (1999); Sharona Hoffman, *Corrective Justice and Title I of the ADA*, 52 *AM. U. L. REV.* 1213 (2003).

262. 42 U.S.C. § 12101(a)(3) (2000) (emphasis added). As a result, people with disabilities “occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally,” and are unjustifiably deprived of the opportunity to “participate in, and contribute to, society” to the fullest extent of their abilities. *Id.* §§ 12101(a)(6), (7).

faced day-to-day by people with disabilities.”²⁶³ The “Nation’s proper goals,” Congress declared, are nothing less than assuring individuals with disabilities “*equality of opportunity, full participation, independent living, and economic self-sufficiency.*”²⁶⁴ Stated even more expansively, the ADA was the promise of “the opportunity to compete on an equal basis and to pursue *those opportunities for which our free society is justifiably famous.*”²⁶⁵ To achieve its stated purpose of providing a “comprehensive national mandate for the elimination of discrimination against individuals with disabilities,”²⁶⁶ the ADA casts a wide net, prohibiting discrimination in private employment, public goods and services, telecommunications, transportation, and an unprecedented number of private providers of goods and services to the public, far beyond those covered by the Civil Rights Act of 1964.²⁶⁷

Congressional statements about the meaning and aspirations of the ADA echo the themes of the philosophers and social scientists. We hear inspiring talk of “human possibility and capability,” the “fulfillment of human potential,” and the importance of community.²⁶⁸ These abstract ideals are then translated into examples of the many ways, large and small, that the

263. *Id.* § 12101(b)(4).

264. *Id.* § 12101(a)(8) (emphasis added).

265. *Id.* § 12101(a)(9) (emphasis added). These findings are not merely hortatory; rather, they “give[] content to the ADA’s terms, *specifically the term ‘disability.’*” *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 487 (1999) (emphasis added); *id.* at 484 (deeming one of the ADA’s findings “critical” to the Court’s interpretation of “disability”).

266. 42 U.S.C. § 12101(b)(1) (“Purpose”).

267. The purpose of the ADA’s public accommodations provision is to “continue to break down barriers to the integrated participation of people with disabilities *in all aspects of community life.*” H.R. NO. 101-485(III), at 49-50, 472-73 (emphasis added). To that end, it covers twelve broad categories of public accommodations: places of lodging, establishments serving food or drink, places of exhibition or entertainment, places of public gathering, sales or rental establishments, service establishments, stations used for specified public transportation, places of public display or collection, places of recreation, places of education, social service center establishments, and places of exercise or recreation. 42 U.S.C. § 12181(7) (2000).

For discussions of the political and legal significance of the unprecedented breadth of Title III, the ADA’s public accommodations provision, see Robert L. Burgdorf Jr., “*Equal Members of the Community*”: *The Public Accommodations Provisions of the Americans with Disabilities Act*, 64 TEMP. L. REV. 551, 557 (1991) (noting that, aside from housing, Title III covers “almost every type of operation which is open for business to, or in contact with, the general public”); Robert L. Burgdorf Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 470-73, 493-501 (1991) (discussing the expanded scope of public accommodations under the ADA and its implications for future civil rights statutes); Ruth Colker, *ADA Title III: A Fragile Compromise*, 21 BERKELEY J. EMP. & LAB. L. 377-85 (2001) (comparing scope of Title III of the ADA to the narrower public accommodations provision of the Civil Rights Act of 1964).

268. 136 CONG. REC. H4614, H4622 (July 12, 1990) (statement of Rep. Owens):

No piece of legislation this Congress will pass articulates more forcefully and eloquently the purposes which must be embodied in our public policies and in our commitments as individuals and as a nation in order for America to thrive in the 1990s. It embodies a philosophy and constitutes a declaration in support of human possibility and capability. Part of America’s maturation as a nation in this age must consist of a realization that divisions and inequities which inhibit the fulfillment of human potential hurt us as an economy and as a community of people who are dependent upon one another’s successes and support far more than we often realize.

ADA would change the day-to-day lives of individuals.²⁶⁹ Consider but a few representative statements from committee reports and floor speeches. A House committee offered this paean to the quality of life, with its celebration of the everyday:

Apart from the economic benefits to individuals with disabilities and to the nation that this legislation is expected to bring about, its *non-economic improvements in the quality of life of millions of Americans are no less important*. The deaf person who can . . . now spontaneously communicate with hearing friends in or out of their state; the woman who uses a wheelchair who can now accompany her children to the newly accessible museum . . . or visit her sick mother in another state using a newly accessible . . . bus, or enter the supermarket; the blind individual who can . . . conveniently get to her sixth floor office appointment; the woman with cerebral palsy now allowed to enter the movie theater—the value of such benefits to individuals who seek to *live a full life, free from arbitrary, confining, and humiliating treatment*, cannot be calculated. The commitment to promote greater dignity and an *improved quality of life* for people with disabilities evinced in the provisions of the Act provide further powerful justification for its enactment.²⁷⁰

Senator Dole, a chief proponent of the ADA, spoke of the dignity that comes with the all-important freedom to make everyday decisions that many people take for granted:

Living independently and with dignity means opportunity to *participate fully in every activity of daily life*, be it going to the movies, dining in a restaurant, cheering at a baseball game, communicating by phone or going to the doctor. The ADA offers such opportunity to persons with disabilities.²⁷¹

269. As Attorney General Richard Thornburgh recognized, “translat[ing] the words of the Americans with Disabilities Act . . . into lives of dignity, opportunity, and achievement” called for being sensitive to the “day-to-day living patterns” of Americans with disabilities, rather than treating “their rights or their lives in the abstract.” Dick Thornburgh, *The Americans with Disabilities Act: What It Means to All Americans*, 64 TEMP. L. REV. 375, 383, 385 (1991). See *Americans with Disabilities Act of 1989: Hearing on H.R. 2273 Before the House Comm. on the Judiciary*, 101st Cong. 203-04 (Oct. 12, 1998) (statement of Richard Thornburgh, Attorney General) (recognizing that ensuring that persons with disabilities enjoy “access to the mainstream of [American] life” meant, among other things, removing “insurmountable obstacles in accomplishing such vital tasks of daily life as grocery shopping or visiting a pharmacy or doctor’s office, or going to the dry cleaners”). Congress’ understandings of the everyday lives of people with disabilities reflected testimony, personal experiences and the influential reports of the National Council on Disability, which included, among other things, results of the first nationwide poll surveying people with disabilities about the quality of their lives. For a history of the disability rights advocacy that culminated in the passage of the ADA, see NATIONAL COUNCIL ON DISABILITY, EQUALITY OF OPPORTUNITY: THE MAKING OF THE AMERICANS WITH DISABILITIES ACT (1997).

270. H.R. REP. NO. 101-485 (II), at 47, reprinted in 1990 U.S.C.C.A.N. 329 (emphasis added).

271. 136 CONG. REC. S9695 (July 13, 1990) (statement of Sen. Dole) (emphasis added); H.R. REP.

To underscore the centrality of the everyday, Senator Harkin, the chief Senate sponsor of the ADA, told his colleagues of his exchange with a young woman who had cerebral palsy:

I was talking to her about the ADA, and what it would mean to her in terms of jobs, educational opportunity, being able to go out on her own; that she would not be discriminated against in the workplace.

She listened to all this, and in her own way she said, that is all very nice and that is very important. But, she said, all I want to do is just be able to go out and buy a pair of shoes like anybody else.

That really is what the ADA is about. It is letting people live like anyone else; opening the doors, breaking down the barriers, so that all Americans, regardless of their disability or abilities, are treated fairly and decently, as coequal in all aspects of American life.²⁷²

It was not, of course, just about the shoes; it was also about equality and about sameness. It was about the promise of having the same opportunities on the same terms and in the same settings as people without disabilities, of being welcomed as full and equal members of the community. It was about everything we have seen in the preceding sections of this Article. And so it was with transformative intent that members of Congress and the Bush Administration pronounced the ADA historic, akin to the Declaration of Independence and the tearing down of the Berlin Wall, and the most important civil rights legislation in a quarter century.²⁷³ One recurring theme was the ability to dream—to have dreams and to make those dreams come true.²⁷⁴ In

NO. 101-485 (II), at 93, *reprinted in* 1990 U.S.C.C.A.N. at 376; S. REP. NO. 101-116, at 52 (discussing accessible public transportation for purposes of going on a date, taking your children to the zoo, or taking out-of-town guests sightseeing).

272. 136 CONG. REC. S9689 (July 13, 1990) (statement of Sen. Harkin).

273. *See, e.g.*, 136 CONG. REC. S9690 (July 13, 1990) (statement of Sen. Simon) (calling the ADA a “declaration of independence”); 136 CONG. REC. H2428 (May 17, 1990) (statement of Rep. Conti) (same); 136 CONG. REC. H2449 (May 17, 1990) (statement of Rep. AuCoin) (same); Statement by President George Bush upon Signing S. 933, 26 WKLY. COMP. PRES. DOCS. 1165, July 30, 1990, *reprinted in* 1990 U.S.C.C.A.N. 601 (expressing hope that the ADA, like the Declaration of Independence, would be a beacon of freedom); *see also* 135 CONG. REC. S10789 (Sept. 7, 1989) (statement of Sen. Kennedy) (referring to the ADA as “an emancipation proclamation”); Ann Devroy, *In Emotion-Filled Ceremony, Bush Signs Rights Law for America’s Disabled*, WASH. POST, July 27, 1990, at A18 (“Let the shameful wall of exclusion finally come tumbling down.”) (quoting President Bush’s remarks at the ADA signing ceremony); Dick Thornburgh, *The Americans with Disabilities Act: What It Means to All Americans*, 64 TEMP. L. REV. 375, 375 (1991) (“The ADA is, if you will, a reawakening. Do not let this bright moment in modern American history escape you.”).

274. *See* S. REP. NO. 101-116, at 20 (1989) (citing testimony that the ADA would demonstrate that disabled people “[c]an have the same aspirations and dreams as other American citizens” and “know that their dreams can be fulfilled,” and that America is true to its ideal of equality, which is “the full measure of the American dream”); *id.* at 96 (additional views of Sen. Hatch) (“Persons with disabilities, no less than other Americans, are entitled to an equal opportunity to participate in the American dream. It is time for that dream to become a reality.”); H.R. REP. NO. 101-485 (II), at 49, *reprinted in* 1990 U.S.C.C.A.N.

short, when Congress promised “equality of opportunity, full participation,”²⁷⁵ and the ability “to pursue those opportunities for which our free society is justifiably famous,”²⁷⁶ it envisioned nothing short of a chance to pursue the American dream, and all that this dream embraces.

VI. CONCLUSION

It is striking, but no accident, that the legal material surrounding the ADA—its text and legislative history, as well as the principal interpretive postulates associated with the Act—corresponds so well with the discourse of philosophy and other disciplines. The ADA was drawn from life and reflects a deep culture of understanding about life. And so, my point is not merely that a philosopher’s approach to life’s major activities is one that the ADA can accommodate or that a philosopher’s definition of major life activities is one that the Act can bear, though both claims are undoubtedly true. It is that meanings drawn from other disciplines—illustrated here with philosophy—help us better appreciate the very similar meanings that are already there, embedded in the law.

331 (citing testimony that the loss of the use of your legs should not be the loss of the ability to achieve your dreams). *See also* 136 CONG. REC. S9684 (July 13, 1990) (statement of Sen. McCain) (“Mr. President, this bill is an important step in making the American dream available to all The freedom to pursue the American dream is at the heart of what makes our Nation great.”); 135 CONG. REC. S10710 (Sept. 7, 1989) (statement of Sen. Harkin) (“The American dream is the dream of opportunity for all. And when any American is denied the opportunity to contribute, we all lose. When we free the talents and the abilities of millions of Americans with disabilities, we all win.”); *id.* (“Initiative stifled, dreams dampened, opportunity denied—this is not the stuff of which America is made.”); 135 CONG. REC. S10797 (Sept. 7, 1989) (statement of Sen. Kerry) (stating that the time had come “to give disabled children a chance to dream of becoming doctors, lawyers, architects, or engineers, and to know that it is not just a dream”).

More recently, President George W. Bush has reprised this idealism. Remarks on the Anniversary of the Americans with Disabilities Act, President George W. Bush, July 26, 2002, WKLY. COMP. PRES. DOCS. 1261 (July 29, 2002) (recalling that “when my father signed the ADA into law in 1990, he said, ‘We must not and will not rest until every man and woman with a dream has the means to achieve it.’”); Proclamation 7579, Anniversary of the Americans with Disabilities Act, President George W. Bush, July 26, 2002, WKLY. COMP. PRES. DOCS. 1263 (July 29, 2002) (pledging his administration’s commitment “to removing the barriers that prevent people with disabilities from realizing their full potential and *achieving their dreams*”) (emphasis added).

275. 42 U.S.C. § 12101(a)(8) (2000).

276. *Id.* § 12101(a)(9).