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Capabilities and Disabilities:**Justice for Mentally Disabled Citizens¹**

by

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The problem here is not care of the aged, who have paid for their benefits by earlier productive activity. Life-extending therapies do, however, have an ominous redistributive potential. The primary problem is care for the handicapped. Speaking euphemistically of enabling them to live productive lives, when the services required exceed any possible products, conceals an issue which, understandably, no one wants to face.

David Gauthier, *Morals by Agreement*

For Jamie came into the world asking us a question more basic than any I've yet dealt with, in this book or in my life: Assuming that we can even imagine a form of social organization in which citizens like James are nourished, supported, and encouraged to reach their full human potential, why might we seek to create it at all?

Michael Bérubé, *Life as We Know It*

I. Needs for Care, Problems of Justice

Sesha, daughter of philosopher Eva Kittay and her husband Jeffrey, is a young woman in her late twenties. Attractive and affectionate, she loves music and pretty dresses, and responds with joy to the affection and admiration of others. Sesha sways to music and hugs her parents. But she will never walk, talk or read. Because of congenital cerebral palsy and severe mental retardation, she will always be profoundly dependent on others. She needs to be dressed, washed, fed, dressed, wheeled out into Central Park. Beyond such minimal custodial care, if she is to flourish in her own way she needs companionship and love, a visible return of the capacities for affection and delight that are her strongest ways of connecting with others. Her parents, busy professionals, both care for Sesha for long hours themselves and pay a full-time caregiver. Still

other helpers are needed on the many occasions when Sesha is ill or has seizures, and cannot help by telling where she hurts.²

Jamie Bérubé loves B. B. King, Bob Marley, and the Beatles. He can imitate a waiter bringing all his favorite foods, and he has a sly sense of verbal humor. Born with Down's Syndrome, Jamie has been cared for, since his birth, by a wide range of doctors and therapists, not to mention the non-stop care of his parents, literary critics Michael Bérubé and Janet Lyon. In the early days of his life, Jamie had to be fed through a tube inserted into his nose, and his oxygen levels monitored by a blood gas machine. At the time his father describes him,³ Jamie is three. A speech therapist works to develop the muscles of his tongue; another teaches him American Sign Language. A massage therapist elongates the shortened muscles of his neck so that his head can sit straighter. Movement therapists work on the low muscle tone that is the main obstacle to both movement and speech in Down's children. Equally important, a good local pre-school in Urbana, Illinois, includes him in a regular classroom, stimulating his curiosity and giving him precious confidence in relationships with other children, who react well to his sweet personality. Above all, his brother, parents, and friends make a world in which he is not seen as "a child with Down's Syndrome," far less as "a mongoloid idiot." He is Jamie, a particular child. Jamie will probably be able to live on his own to some extent, and to hold a job. But his parents know that he will, more than many children, need them all his life.

Mentally disabled children and adults are citizens. Any decent society must address their needs for care, education, self-respect, activity, and friendship. Modern social contract theories, however, imagine the bargaining agents who design the basic structure of society as "free, equal, and independent" and "fully cooperating members of society over a complete life."⁴ They also imagine them as characterized by a rather idealized rationality. Such approaches do not even do well with severe cases of physical disability. What is especially clear, however, is that such theories must handle severe mental disabilities as an afterthought, after the basic institutions of society are already designed. Thus, in effect, the mentally disabled are not among those for whom and in reciprocity with whom society's basic institutions are structured.

In this essay I shall argue that the failure to deal adequately with the needs of the mentally disabled is a serious flaw in some forms of modern contractarianism, and a flaw that goes deep, affecting such theories' adequacy as accounts of human justice more generally.⁵ A satisfactory account of human justice requires recognizing the equal citizenship of the mentally disabled and appropriately supporting the labor of caring for them. It also requires recognizing the many varieties of disability, need, and dependency that "normal" human beings experience, and thus the very great continuity between "normal" lives and those of people with lifelong mental disabilities. The capabilities approach, starting from a conception of the person as a social animal, whose dignity does not derive from an idealized rationality, offers a more adequate conception of the full and equal citizenship of the mentally disabled, and of those who care for them. The term "global inequalities" most readily suggests inequalities between nations.

But a full study of global inequality needs to focus on this case – both because of its intrinsic importance and because it reveals theoretical shortcomings that are also relevant to the more familiar topic of international justice.⁶

There are actually two distinct problems of social justice here, both urgent. First, there is the issue of the fair treatment of disabled people who need a lot of care throughout their lives. In another era, Sesha and Jamie probably would have died in infancy; if they had lived they would have been institutionalized with minimal custodial care, never getting a chance to develop their capacities for love, joy, and, in Jamie's case, substantial cognitive achievement and, probably, active citizenship. A just society, by contrast, would not stigmatize these children and stunt their development; it would support their health, education, and full participation in social and even, where possible, political life.

A just society, we might think, would also look at the other side of the problem, the burdens on people who provide care for dependents. These people need many things: recognition that what they are doing is work; assistance, both human and financial; opportunities for rewarding work and for participation in social and political life. This issue is closely connected with issues of gender justice, since care for dependents is most often done by women. Moreover, much of the work of caring for a dependent is unpaid, and is not recognized by the market as work. And yet it has a large effect on the rest of such a worker's life. That the Bérubés and Kittays both share their child care responsibilities more equally than is typical among ambitious professionals is made possible only by the extremely flexible schedule of university teaching and writing. They also can afford a lot of help – most of it, as Kittay notes with unease, from women who are themselves, even though paid, not paid very highly and not generally respected by society as they should be for performing an expert and vital social service.

These problems cannot be ignored or postponed on the grounds that they affect only a small number of people. For -- and this is a further problem closely related to our two problems – disability and dependency come in many forms. It is not only the wide range of children and adults with lifelong impairments who need extensive and even hourly care from others. The mental, physical, and social disabilities that I have just described all have rough parallels in the conditions of the elderly, who are generally even more difficult to care for than disabled children and young adults, more angry, defensive, and embittered, less physically pleasant to be with. Washing the body of a child with Down's Syndrome seems vastly easier to contemplate than washing the incapacitated and incontinent body of a parent who hates being in such a condition, especially when both the washer and the washed remember the parent's prime. So the way we think about the needs of children and adults with disabilities is not a special department of life, easily cordoned off from the "average case." It also has implications for the way we think about our parents as they age – and about the needs we ourselves are likely to have if we live long enough.⁷ As the life span increases, the relative independence many of us enjoy looks more and more like a temporary condition, a phase of life that we move into gradually, and which we all too quickly begin to leave. Even in our prime, many of us

encounter shorter or longer periods of extreme dependency on others – after surgery or a severe injury, or during a period of depression or acute mental stress.

But if we recognize the continuity between the situation of the lifelong disabled and phases of so-called "normal" lives, we must also recognize that the problem of care for people in a condition of asymmetrical dependency is vast, affecting virtually every family in every society – every family, at any rate, that has either children or aging parents or lifelong disabled family members or members affected by phases of acute disability in the course of a "normal" life. Arranging for such care in a way that protects the dignity of the recipient and does not exploit the caregiver would also seem to be a central job of a just society.⁸

II. Rawlsian Contractarianism: "Fully Cooperating . . . Over a Complete Life"

What have modern contractarian theories of justice said about these problems? Virtually nothing. Nor can the omission be easily corrected; for, I shall argue, it is built into the structure of our strongest theories themselves. The basic idea of such theories is to use the idea of a bargain for mutual advantage among rough equals to illuminate the structure of political principles. If the initial situation is correctly designed, the resulting principles will be by definition just. All such theories need, then, to begin from an idea of rationality in the bargaining process: the agents in the hypothetical initial situation must be able to reason about their own advantage, and the whole exercise will be one of getting the arrangement that seems best to promote their mutual advantage. Some versions of the social bargain (Gauthier) begin from egoistic rationality alone; morality emerges from the constraints of having to bargain with others who are similarly situated. Rawls's version adds a representation of moral impartiality in the form of the Veil of Ignorance, which restricts the parties' information about their place in the future society. Thus, although Rawls's parties themselves are maximizers of individual self-interest, with no interest in the interests of others, the parties are explicitly not intended as models of whole people, but only as models of parts of whole people. The other part, the moral part, is supplied by the informational constraints.

In both of these versions, though, we can see that the idea of the rough equality of the parties plays a very important structural role in setting up the bargaining situation. Rawls explicitly endorses Hume's account of the "circumstances" of justice, which Rawls paraphrases as "the normal conditions under which human cooperation is possible and necessary."⁹ Like Hume, he argues that we have a place for justice only in conditions of moderate scarcity and a rough equality of the parties, such that none can dominate the others, either physically or intellectually. These conditions are required by the very idea of a contract for mutual advantage.¹⁰ He states that this rough equality is his own analogue for the idea of the State of Nature in classic contractarian theories (TJ 12). This equality has implications for the treatment of the disabled. For Gauthier, people of unusual need are "not party to the moral relationships grounded by a

contractarian theory."¹¹ Similarly, the citizens in Rawls's Well Ordered Society are "fully cooperating members of society over a complete life."¹²

It would appear that this emphasis is built deeply into the logic of the bargaining situation; for the idea is that people will get together with others and bargain about principles of justice only in certain circumstances, circumstances in which they can expect mutual benefit and in which all stand to gain from the cooperation. We can see that including in the initial game people who don't have anything to contribute to the well-being of the group would go contrary to the logic of the whole situation. If people are making a bargain for mutual advantage, they will want to get together with those from whose cooperation they expect to gain, not those who will demand unusual and expensive attention without contributing anything much to the social product, thus depressing the level of society's well-being. As Gauthier frankly acknowledges, this is an unpleasant feature of bargaining theories that people do not like to mention.¹³

Now of course we immediately want to say, the disabled are not like that. Both physically and mentally disabled people contribute to society in many ways, whenever society creates conditions in which they may do so. So contractarians are just wrong about the facts, and if they correct their false factual assumption they can fully include the disabled, and their unusual needs. As we shall see, however, a defense of contractarianism along these lines is doomed to failure.

Let me now turn to a closer examination of John Rawls's Kantian social contract theory, which I believe to be the strongest such theory we have. Rawls's theory is unusually compelling, in my view, because it does not try to squeeze morality out of non-morality, but starts from a very attractive model of the moral point of view. The combination of the prudential rationality of the parties in the Original Position with the informational restrictions imposed by the Veil of Ignorance is intended to give us a schematic representation of a moral position that real people can occupy at any time, if they can sufficiently prescind from the pressing claims of their own interests. As Rawls says in the stirring final sentence of *A Theory of Justice*, "Purity of heart, if one could attain it, would be to see clearly and to act with grace and self-command from this point of view." In his later writings, moreover, Rawls has made explicit the fact that the citizens in the Well-Ordered Society – the society whose basic structure is shaped by the principles of justice – are characterized not simply by prudential rationality, but by the "two moral powers": the Rational (prudential rationality, connected by Rawls to the parties' pursuit of their own conception of the good) and the Reasonable, which includes the willingness to propose and abide by fair terms of cooperation that others might be expected to endorse (e.g. *PL*, 49-52). Unlike Gauthier, who attempts to derive reciprocity from prudential rationality, Rawls explicitly denies that he does any such thing (*PL*, 51): in the Original Position, the Reasonable is modeled by the informational constraints, which are kept clearly separate from the account of the rationality of the parties.¹⁴ These features of Rawls's conception make it richer, I believe, than contractualist conceptions that do attempt to squeeze the moral out of the non-moral, and surely more promising as

a starting point if we are looking for good answers to our questions about justice for the mentally disabled.

It is important to bear in mind, however, that Rawls situates himself squarely within the traditional theory of the social contract, as he understands it. He also accepts the Humean characterization of the "circumstances of justice," and connects this account to the idea of a bargain for mutual advantage. Even though the bargain is going to be struck from a morally rich viewpoint, it remains a bargain, and it is supposed to give the parties something that they would not get by living on their own. As we shall see, traditional considerations of economic advantage play a large role in Rawls's account of what that something is.

But because Rawls's theory is complex, before we can turn to its treatment of disability we must introduce one further element. Rawls is explicit in tracing his conception of the person to Kant, and he makes it clear that a, if not the, distinctive hallmark of his political conception is its use of a Kantian conception of the person in the construction of political principles. So before we turn to the specific treatment of issues of disability within the theory, we should scrutinize this foundational element. Is a Kantian starting point likely to build in elements that will make it more difficult, later, to deal well with questions of disability? It would appear that the answer to this question must be "yes."

Kant's conception of the person lies in a long tradition that goes straight back to the Greek and Roman Stoics, in which personhood is identified with reason (including, prominently, the capacity for moral judgment), and reason, so construed, is taken to be a feature of human beings that sets them sharply apart from non-human animals, and from their own animality. For the Stoics, there is a sharp split, not only between humans and other animals, but also between human life when moral rationality gets going and human life at other times.

Kant's theory takes the split even further. Stoics were compatibilists, who saw the realm of human freedom as also, at the very same time, a realm of nature that follows deterministic laws. Whether coherently or not, they believed that we do not need to exempt human freedom from natural laws in order to value it as we ought. Kant, of course, did not agree, and thus was led to think of the human being as a fundamentally split being who dwells in two realms: the realm of nature and the realm of rational/moral freedom. He thought of all non-human animals, and the animal side of human life, as belonging to the deterministic realm of nature. It is in virtue of our capacity for moral rationality, and that alone, that we rise above that realm and exist, as well, in a realm of ends. Therefore, for Kant, human dignity and our moral capacity, dignity's source, are radically separate from the natural world. Insofar as we exist merely in the realm of nature, we are not ends in ourselves and do not have a dignity; things in that realm simply have a price (as Kant puts it, *pretium usus*). Insofar as we enter the realm of ends, thus far, and thus far alone, we have dignity and transcend price. Morality certainly has the task of providing for human neediness, but the person, seen as the rational/moral aspects of the human being, is the goal of these

ministrations. Animality itself is not an end. In keeping with this view, Kant denies that we have any moral duties to animals; they have no independent value, only a "relative value" in relation to human ends. What is true of animals is bound to be true of all beings that are "nonrational," lacking the capacity for moral and prudential reasoning that is characteristic of human beings in Kant's view.

Rawls does not endorse the metaphysical elements of Kant's position, although he does elsewhere show a deep interest in them.¹⁵ He does not subscribe to a two-world view, and he understands his Kantianism as empirical. Nonetheless, by retaining a concept of the person based on Kant's, he reintroduces in the empirical realm the very split that Kant used his two-world view to express, a split between our rational and moral powers and the other aspects of the human animal. We should therefore begin our critical examination of Rawls's theory by setting out clearly some problematic aspects of the Kantian split, so that we can see to what extent Rawls's theory suffers from those problems.

First, then, the Kantian split between personhood and animality ignores the fact that our dignity just is the dignity of a certain sort of animal. It is the animal sort of dignity, and that very sort of dignity could not be possessed by a being who was not mortal and vulnerable, just as the beauty of a cherry tree in bloom could not be possessed by a diamond. If it makes sense to think of God or angels (Kant's other rational beings) as having dignity (magnificence and awe-inspiringness seem more appropriate attributes), it is emphatically not dignity of that type.¹⁶ Second, the split wrongly denies that animality can itself have a dignity; thus it leads us to slight aspects of our own lives that have worth, and to distort our relation to the other animals. Third, it makes us think of the core of ourselves as self-sufficient, not in need of the gifts of fortune; in so thinking we greatly distort the nature of our own morality and rationality, which are thoroughly material and animal themselves; we learn to ignore the fact that disease, old age, and accident can impede the moral and rational functions, just as much as the other animal functions. Fourth, it makes us think of the core of ourselves as a-temporal. Thinking in this way, we may forget that the usual human lifecycle brings with it periods of extreme dependency, in which our functioning is very similar to that enjoyed by the mentally or physically handicapped throughout their lives.

It is important to notice that the split goes wrong in both directions: it suggests, as I have said, that our rationality is independent of our vulnerable animality; and it also suggests that animality, and non-human animals, lack intelligence, are just brutish and "dumb." Both implications of the split should, of course, be called into question: in nature we find a rich continuum of types of intelligence, and of practical capacities of many types; we cannot understand ourselves well without situating ourselves within that continuum.

Let us now return to Rawls. Like Kant, Rawls explicitly denies that we have any duties of justice to non-human animals, citing as his reason the fact that they are not capable of reciprocity (*TJ*, 17, 504-5); he says that they are owed

"compassion and humanity," but "[t]hey are outside the scope of the theory of justice, and it does not seem possible to extend the contract doctrine so as to include them in a natural way" (*TJ*, 512). This alerts us to the fundamental role of the idea of reciprocity between rough equals in Rawls's contract doctrine, an idea that has deep roots in the whole idea of a contract for mutual advantage, but one that also gets a special impetus from Rawls's Kantian starting point, in which the capacity for reciprocity (understood as involving moral reasoning) is one of the two essential aspects of the concept of the person out of which political principles are going to be constructed.

Rawls's contracting parties are fully aware of their need for material goods. Here Rawls diverges from Kant, building need into the foundations of the theory.¹⁷ But he does so only to a degree: for the parties are imagined throughout as competent contracting adults, roughly similar in need, and capable of a "normal" level of social cooperation and productivity. Influenced on the one hand by the structure of bargaining theory, on the other by his Kantian starting point, he repeatedly characterizes the parties as rough equals, all possessing a requisite "normal" degree of moral sensibility and prudential rationality. Thus, Rawls repeatedly refers to citizens as "fully cooperating members of society over a complete life" (*PL*, 20, 183, *et saepe*). And he stipulated that the parties in the original position know that their endowments "such as strength and intelligence" lie "all within the normal range." Again, he insists: "I have assumed throughout and shall continue to assume, that while citizens do not have equal capacities, they do have, at least to the essential minimum degree, the moral, intellectual, and physical capacities that enable them to be fully cooperating members of society over a complete life" (*PL*, 183). The "fundamental question of political philosophy," in his theory, is "how to specify the fair terms of cooperation among persons so conceived" (*ibid.*).

In so conceiving of persons, Rawls explicitly omits from the situation of basic political choice the more extreme forms of need and dependency human beings may experience, both physical and mental, and both permanent and temporary. This makes a large difference to his theory of political distribution. For his account of the primary goods, introduced, as it is, as an account of the needs of citizens who are characterized by the two moral powers and by the capacity to be "fully cooperating," has no place for the need of many real people for the kind of care we give to people who are not independent.¹⁸

Now of course Rawls is perfectly aware that his theory focuses on some cases and leaves others to one side. He insists that, although the need for care for people who are not independent is "a pressing practical question," it may reasonably be postponed to the legislative stage, after basic political institutions are designed:

So let's add that all citizens are fully cooperating members of society over the course of a complete life. This means that everyone has sufficient intellectual powers to play a normal part in society, and no one suffers from unusual needs that are especially difficult to fulfill, for example,

unusual and costly medical requirements. Of course, care for those with such requirements is a pressing practical question. But at this initial stage, the fundamental problem of social justice arises between those who are full and active and morally conscientious participants in society, and directly or indirectly associated together throughout a complete life. Therefore, it is sensible to lay aside certain difficult complications. If we can work out a theory that covers the fundamental case, we can try to extend it to other cases later (*DL*, 546).

Similarly, in *Political Liberalism* he states:

Since we begin from the idea of society as a fair system of cooperation, we assume that persons as citizens have all the capacities that enable them to be cooperating members of society. This is done to achieve a clear and uncluttered view of what, for us, is the fundamental question of political justice: namely, what is the most appropriate conception of justice for specifying the terms of social cooperation between citizens regarded as free and equal, and as normal and fully cooperating members of society over a complete life?

By taking this as the fundamental question we do not mean to say, of course, that no one ever suffers from illness and accident; such misfortunes are to be expected in the ordinary course of life, and provision for these contingencies must be made. But given our aim, I put aside for the time being these temporary disabilities and also permanent disabilities or mental disorders so severe as to prevent people from being cooperating members of society in the usual sense (*PL*, 20).

Shortly after this passage, he again speaks of persons as "normal and fully cooperating," and then mentions, as a problem not dealt with in his conception of justice as so far developed, "the question of what is owed to those who fail to meet this condition, either temporarily (from illness and accident) or permanently, all of which covers a variety of cases" (21). Later, similarly, he draws a sharp distinction between variations in capacity that place people "above" or "below" a "line," drawn between those who have "more" and those who have "less than the minimum essential capacities required to be a normal cooperating member of society" (183). The sort of variation that puts people above this "line" is accommodated in the theory as described, especially by its ideas of fair equality of opportunity and free competition; the sort that puts some people below the "line" will be dealt with only later, at the legislative stage, "when the prevalence and kinds of these misfortunes are known and the costs of treating them can be ascertained and balanced along with total government expenditure" (184).

So: it is clear enough *that* Rawls believes that we can adequately design basic political principles without taking "abnormal" disabilities, either physical or mental and either temporary or permanent, into account, and, therefore, without taking them into account when asking what primary goods should be on the list of things that any citizen possessed of the two moral powers could be presumed to want.¹⁹ We must now pose two questions. First, *why* does Rawls think we need to defer these cases? And, what part in his decision is played by his contractarianism

and what part by his Kantian conception of the person? Second, is he correct to think that a Kantian contractarian theory like his must defer these cases?

Although the mentally disabled are our theme, we get a better understanding of our question if we begin with the apparently simpler case of physical disability: lifelong disability first, then temporary disability. Here it might seem that Rawls has just made a mistake when he thinks that his theory cannot handle such cases. An advocate for the disabled might reply: People who are blind, deaf, and in wheelchairs have the mental and moral powers described in your theory. Anyone might be such a person, so it seems arbitrary for the parties in the Original Position to deny themselves knowledge of their race, class, and sex, but to permit themselves knowledge that their physical abilities fall within the so-called "normal" range. Moreover, the case of the deaf, blind, and wheelchair-bound is much closer to the cases of race and sex than people usually think. For people with impairments of this sort can usually be highly productive members of society in the usual economic sense, performing a variety of jobs at a sufficiently high level, if only society adjusts its background conditions to include them. Their relative lack of productivity is not "natural"; it is the product of discriminatory social arrangements. People in wheelchairs can get around just fine, and do their work, so long as buildings have ramps, busses have wheelchair access, and so on. The blind can work more or less anywhere in these days of varied audio technology and tactile signage; the deaf, too, can take advantage of e-mail in place of the telephone, and the many other visual technologies, so long as workplaces structure themselves so as to include such persons. Just as it is sex discrimination not to provide women with pregnancy leave, even though it is a biological fact that only women get pregnant, so too it is discrimination against people with disabilities not to provide these supports for their productivity, even though it is a biological fact that only they will need them. So: let the parties in the Original Position not know what physical disability they may or may not have; then, and only then, will the resulting principles will be truly fair to people with disabilities.

Why is Rawls unable to accept this apparently reasonable suggestion? I see three reasons, all woven deeply into the logic of his contract doctrine. (1) First, by admitting people with disabilities into the calculation, he loses a simple and straightforward way of measuring who is the least well-off in society, a determination that he needs to make for purposes of thinking about material distribution and redistribution, and which he now makes with reference to income and wealth alone. If the state of one's body is now seen to be a highly variable primary good, then it will be possible for A to be less well off than B in the sense that matters for well-being, even though A and B have exactly the same income and wealth. This, indeed, is the point that Amartya Sen has repeatedly made in recommending a focus on capabilities as a substitute for a list of primary goods. I shall return to that solution later.²⁰ But it is actually quite important for Rawls to be able to speak of both social productivity and the well-being of individuals in simple economic terms. Indeed, it is probably implicit in the very logic of the contractarian approach that we do think of the gains of cooperation in this way, and, similarly, the situation of those who fail to gain. And of course the terms in

which social productivity is measured need to be the same terms in which the position of the least well-off is measured, or else the whole logic of accepting a general social gain so long as it does not worsen the position of the least well-off would be confused and confusing.

Now I believe that Rawls has already bought into this problem in another area of his theory, with his identification of self-respect, or rather, its social bases, as "the most important" of the primary goods.²¹ For it does seem possible for a society to contain a group of persons who are the least well off in terms of this primary good, and yet not so badly off in terms of wealth and income. One could argue, for example, that gay men in the United States are in this position. So Rawls has already suggested an analysis of relative social positions that is complex and multi-valued, although he himself refuses such an analysis. If he ever did face this issue squarely, he would have two further problems: first, how to balance one such good against another without giving way to "intuitionistic" tradeoffs, to which he is resolutely opposed; second, how to think about social productivity in new multi-valued terms, something that would cause a profound alteration in the whole logic of his contractarianism. I shall return to that point shortly.

The use of primary goods for purposes of social comparison, while important to Rawls, does not seem a necessary part of a contractarian doctrine of his sort: for one might have argued that the parties in the Original Position would favor an ample social minimum rather than the Difference Principle; in this case they would not need to appeal to primary goods for comparative purposes. (2) The second reason why Rawls cannot accept the apparently reasonable proposal, however, grows directly out of his conception of contractarianism. The parties in the Original Position know general facts about the world, and they know, therefore, that some disabilities, for example back trouble, are very common and that others, for example blindness and deafness, are much less common. The very idea of the "normal," employed in the definition of them and their position, is just this idea of statistical frequency. And of course in all societies these facts of statistical frequency determine the shape of public and private space and the general nature of daily life. It is not that so-called "normals" do not have their disabilities, such as mortality for one, and limits of height and arm span, and weak backs, and hearing that catches only some of the frequencies that exist. But we do not find our workplaces relying on equipment that produces sounds inaudible to human ears and audible only to dog ears; nor do we find in them staircases with steps so high that only the giants of Brobdingnag can climb them. Public space is arranged to cater to the disabilities of the "normal" case. What is different about the blind and deaf and wheel-chair bound is that their abilities are not catered for, because they are flawed in an unusual way. When they are allowed to compete on a playing field that is not thus stacked against them, things are indeed different: thus, wheelchair times in marathons are always much shorter than times for people using their legs. If someone objects that a wheelchair is a prosthesis, we can then observe that "normals" routinely use prostheses, such as cars and busses, and public space is also arranged to cater to these prostheses, and not those used by the atypically disabled. We pave roads, we create bus routes. Certainly we do not require that "normals"

demonstrate an ability to perform all work-related activities without mechanical assistance in order to regard them as "productive."

The real issue for the contractarian, however, is the relative rarity of the non-"normal" disabilities (defined as not "normal" just by reference to their relative rarity), and, therefore, the expensive and difficult arrangements that would have to be made to make work and public space fully accessible to people with disabilities, enabling them to be productive. It is clear that such expenditures, in general, greatly outweigh the return in economic productivity made possible by the full inclusion of the disabled, because they involve redesigning facilities for all, for the sake of the needs of a very small number of people. So even if we concede to the advocate for the disabled that disabled workers outside the "normal" range can be highly productive, it is unlikely that anyone could show that their productivity offsets the costs of fully including them.

(3) The contractarian will now add a third point. Although the blind, the deaf, and the wheelchair-bound can be highly productive workers if their circumstances are right, it is implausible to think that this is generally true of all persons with physical disabilities. Some disabilities greatly interfere with life functioning. (Indeed, that criterion is used in the Americans with Disabilities Act in order to define disability.) So even if the case for full inclusion of some disabled workers could be made, it would surely not cover all cases of physical disability.

Here we see the naked face of the contract doctrine. Moralize the starting point as we may, the bottom line is that the whole exercise is one of reaping benefits from cooperation, and the benefits are defined by all such theorists in a quite familiar economic way. Such a picture of cooperation is intimately linked to the idea that we must restrict the initial group of bargainers to those who have "normal" productive capacities. It is no trivial matter for the contractarian who is "in" and who is "out" at this initial stage; for, as David Gauthier says, our society now has medical technologies "that make possible an ever-increasing transfer of benefits to persons who decrease [the average level of well-being]." And so he insists, plausibly enough, that the atypically disabled must be excluded from the start: "Speaking euphemistically of enabling them to live productive lives, when the services required exceed any possible products, conceals an issue which, understandably, no one wants to face. . . . Such persons are not party to the moral relationships grounded by a contractarian theory."²²

Rawls's theory displays a deep tension at this point. On the one hand, one of its central purposes is to give questions of justice priority over questions of efficiency: once the bargain is under way, it is arranged in such a way that society may not pursue overall well-being in a way that is unfair to any individual. On the other hand, the account of how the bargain initially gets going is still a contractarian account, and the end in view, as the parties depart from Rawls's analogue of the state of nature, is still one of mutual advantage. Despite the presence of valuable moral elements in his initial situation, Rawls cannot get rid of the constraint imposed by the fact that it is a bargaining situation, without

giving up the formative link to the social contract tradition and developing a more straightforwardly Kantian theory.

Rawls is well aware of this point. In *Political Liberalism* he mentions four problems that are difficult for his conception of justice to handle: care for the disabled, justice across national boundaries, what we owe to non-human animals, and the problem of future generations. Of all these he concludes, "While we would like eventually to answer all these questions, I very much doubt whether that is possible within the scope of justice as fairness as a political conception" (*PL*, 21). He goes on to say that his conception can be extended to give plausible answers to the problem of future generations and, so he believes, to the problem of international justice; but the other two (care for the disabled and "what is owed to animals and the rest of nature") are "problems on which justice as fairness may fail." With regard to those cases where justice as fairness "may fail," he sees two possibilities. One is "that the idea of political justice does not cover everything, nor should we expect it to." The other possibility is that the problem is indeed one of justice "but justice as fairness is not correct in this case, however well it may do for other cases. How deep a fault this is must wait until the case itself can be examined" (21). I am agreeing with Rawls's second suggestion, and it is my hope that the analysis here will provide at least a part of the examination that will show how serious a problem this is for his theory.

Two questions become pressing at this point. First, why can't Rawls simply adopt a more moralized conception of the benefits of social cooperation, one that includes the goods of inclusion, respect for human dignity, and justice itself as among the benefits the parties are seeking out of their social cooperation? Second, why can't he use the idea of insurance against accident, given that every human being, as we have insisted, faces the possibility of extreme physical disability? The first line of reply looks very promising. In some form, it looks like just what we ought to say. We choose to respect and include the disabled because it is good in itself to do so, whether it is economically efficient or not. Benefit should not be understood in purely economic terms, for there is the great good of justice itself to be considered. This reply is clearly in tune with one deep strand in Rawls's thinking, and it is the sort of reply he makes often, when he is talking about the idea of overlapping consensus and why the agreement of citizens in a well-ordered society is no mere *modus vivendi*.²³ But it is very unclear indeed whether Rawls could introduce this consideration into the design of the Original Position itself, giving the parties, defined as rational maximizers, a wider set of moralized ends to consider. It was always wrong to say that Rawls's view of human nature is that people are self-interested maximizers; for, as I have insisted, the parties in the Original Position are only one part of people, the other (moral) part being supplied by the Veil of Ignorance. But the bargaining device in the Original Position does use the idea of self-interested maximization of advantage, and advantage would have to be understood, it seems, in terms of what parties so described could care about fostering.

Rawls takes over from the contractarian tradition its idea of a bargain for mutual advantage and the related Humean idea²⁴ of the circumstances within which

such a bargain makes sense. The inclusion of a broader list of moralized social goals would require a redesign of the rationality of the parties, since they would now have to care about other people's interests, not only their own. This change would not only greatly complicate and render indeterminate the whole question of what principles would be chosen, it would also depart so greatly from the bargaining idea that there would be no point to using the simulacrum of a bargain at all. Rawls moves away from contractarian doctrines at many points; but in the essential structure of the position he remains a bargaining theorist, and he is correct in concluding that this commitment makes it impossible for him to solve, at least as a problem of basic justice, the problem posed by the disabled.

Another way of putting the question uses Rawls's distinction between the right and the good. Rawls, like Kant, thinks of morality as supplying a system of constraints on people's pursuit of their own interests, which are understood in terms of their own interests in pursuing their conceptions of the good.²⁵ In the Original Position this distinction is modeled by the distinction between the self-interested rationality of the parties and the Veil of Ignorance. The parties pursue a good that is conceived in terms of personal advantage; but the Veil imposes on them constraints that make their deliberations moral. This two-part structure models the way, for Rawls, we pursue our own interests but agree to do so within the constraints of respect for the claims of others. It would appear that he is subtly influenced at this point by Kant's distinction between morality and happiness. People are seen to be in effect twofold in their rationality: pursuing their own happiness (the good), but accepting the demands of morality that limit these pursuits (the right). People do not, then, see their own good or happiness as including the happiness of others. In the Original Position, at any rate, ends are not seen as shared ends, whose fulfillment demands the inclusion and happiness of others. (This is related to the fact that Kant typically understands virtue as a matter of self-control, rather than as a matter of joyfully endorsing the other-regarding good.) But this means that the point of social cooperation, too, is understood in terms of people getting some happiness for themselves. While the constraints of morality are adequate to explain why respect for all those who are included will be a central feature of any principles that are chosen, they are not sufficient, I believe, to explain why parties so conceived would *initially* include people who are simply a drag, in terms of efficiency, on the whole system, compromising its ability to deliver mutual advantage. Because the good of these people is no part of what they pursue as a good for themselves, it seems that Rawls is just right in thinking that that these interests cannot be accommodated in the first stage of the theory, when we are choosing principles of justice – for the whole setup does not foster their inclusion. Given that they happen to be in society, their interests can be considered at the later, legislative, stage. But notice, now, that it is in effect out of charity that these interests will be considered, not out of basic justice. Thus there is a serious tension in the theory: for justice was supposed to take precedence over efficiency. It does so, once the bargain is constituted. But in getting the bargain off the ground something that looks very much like an issue of justice is left waiting in the wings. We avoid these difficulties, as we shall see, by pointing out (as seems true) that people actually do conceive of their good as including the good of vulnerable other

people. A reasonable political conception of the person can take advantage of this fact.

What about the insurance idea? Even Richard Epstein, who does not favor laws protecting the rights of the disabled, notes that they are in one way very plausible. For we all recognize that we ourselves may through accident suffer such a disability, and we therefore have motivations to choose a political regime that protects us from the worst consequences of that contingency.²⁶ In addressing this point we must at the same time confront a related question: why does Rawls exclude from the scope of justice as fairness not only lifelong disabilities, but also temporary ones, which, once again, he wishes to handle at the legislative stage, after basic principles have already been designed? Surely such temporary disabilities are a paradigm of what insurance can cover.

There would seem to be two answers to this question, closely related to our analysis above. The first answer is given by Rawls in replying to Amartya Sen. He argues that taking on the question of compensation for temporary disabilities that put people "below the line" complicates (as Sen explicitly says) the use of primary goods, in particular income and wealth, to rank social positions. Rawls appears to grant to Sen that once we consider such cases, it makes sense to measure well-being by capabilities, not just income and wealth; for two individuals may have similar amounts of income and wealth, but be very different in capability to function, as the result of a temporary disability. So even if an insurance scheme does seem a natural thing for the parties in the Original Position to want to design for themselves, given the general facts of human life, the theoretical costs of including this part of human life in the design of basic political principles are very great. We lose the clarity afforded by the use of income and wealth to index social positions, and we are required to shift to a much more cumbersome list of capabilities, which will inevitably generate a plurality of rankings of the well and not-so-well-off. Social choice appears to be forced into the area of intuitionistic balancing that Rawls wants so much to avoid. So, although he acknowledges the importance of the problem Sen has raised, he believes that he can postpone it to the legislative stage, and that, if he can, he must, in order to have a theory with the kind of clarity and finality that he is seeking.²⁷

The second issue raised by the insurance idea is one that Rawls does not mention explicitly; but it is implicit in his cautious and repeated statements that we are dealing, always, with people whose abilities fall within the "normal" range. The issue is that there really is a continuum between the cases of lifelong disability that Rawls has already postponed on contractarian grounds and the periods of disability imposed by illness, accident, and old age. As Gauthier says, we really are living in an age in which medicine makes it more and more possible to maintain people who are not "productive." And although Rawls uses the term "normal," and speaks of a "line," of course he is aware that the "line" is arbitrary, and that there is more similarity between the lifelong disabled person and a person who becomes paralyzed at age twenty and remains so, than there is between this latter person and a person who has a severe illness for a week and

then returns to "normal" functioning. Some people may live longer with a "temporary" disability than the "lifelong disabled" live at all. So it seems arbitrary to include the temporarily disabled and not to include the whole class of people with disabilities. Especially as more of us live longer into old age, with its myriad disabilities, the continuity between one group and the other becomes very great. But this means that thinking about social productivity even with regard to temporary disability requires complicated individualized calculations. As Epstein says, thinking about insurance well requires considering factors such as the probability that any person will become disabled, the alternative uses of the same resources, the level of support required, and, of course, the productivity of each type of disabled person under varying levels of support. Whether or not insurance of various types is efficient will depend on these empirical issues, which vary over time. This looks like a good reason to leave them to the legislative stage.

But the postponement is not innocent, clearly. We are being asked to imagine ourselves as if we have no needs for care in times of extreme dependency. This fiction does obliterate much that characterizes human life, and obliterates, as well, the continuity between the so-called normal and the lifelong disabled. It skews the choice of primary goods, concealing the fact that health care and other forms of care are, for real people, central goods making well-being possible, and the fact that, for the reasons given by Sen, income and wealth are not good proxies for these goods. More generally, care for children, the elderly, and the mentally and physically handicapped is a major part of the work that needs to be done in any society, and in most societies it is a source of great injustice. Any theory of justice needs to think about the problem from the beginning, in the design of the most basic level of institutions, and particularly in its theory of the primary goods.²⁸

Nor is it plausible to treat temporary disability as an isolated case where income and wealth are bad proxies for well-being. As Sen has also insisted, variations and asymmetries in physical need are simply not isolated or easily isolable cases. They are a pervasive fact of human life: pregnant or lactating women need more nutrients than non-pregnant persons, children need more protein than adults, and the very young and very old need more care than others in most areas of their lives. Even within the clearly recognized terrain of the "fully cooperating," then, the theory of primary goods seems flawed if it does not take such variations into account in measuring who is and is not the least well off, rather than, as the theory recommends, determining that status by income and wealth alone. The problem of variation in need is pervasive. So even in order to take account of the physical needs of those (fictional) citizens who never have the type of disability that puts them below the "line," even temporarily, Rawls will need a way of measuring well-being that does not rely on income and wealth alone, but looks at the abilities of citizens to engage in a wide range of human activities.

So far, then, the problems facing Rawls's theory derive largely from its basic contractarian-bargaining structure and from its commitment to measuring well-

being by appeal to primary goods, not from its Kantianism. Indeed, as I have suggested, the Kantian emphasis of the theory is in some tension with the contract doctrine in this area, since Kantian citizens, in the Well-Ordered Society, clearly do think of justice and respect as intrinsic goods, and their concept of the benefits of social cooperation is a rich multi-valued one. Kantian citizens could see *ex post* good reasons for having accorded the disabled full respect and inclusion; the problem is that *ex ante*, in the Original Position, the bargaining framework prevents this route from being chosen.

Now let us turn to our central theme, justice for the mentally disabled. All the problems that Rawls's theory had with the physically disabled it has with the mentally disabled; but it has other problems in addition. If the idea of the citizen as a productive augments of social well-being is strained by the inclusion of the physically disabled, it positively breaks down when we confront it with the lives of Jamie and Sessa. Neither is likely to be economically productive in a way that even begins to compensate society for the expense it incurs in educating and caring for them. Jamie will probably be able to hold some kind of job, and perhaps to play a role in political life; but one can be sure that he will not "repay" in the economic sense the vast medical and educational expenses he has incurred.²⁹ For Sessa, not even this limited chance of a "return" for the expense of caring for her will ever be possible.

Such cases strip contractarianism bare, so to speak, and reveal its dark side, so often concealed by the moralized elements present in the strongest such doctrines. For we are forced at this point to reply, this is not what social cooperation is all about. These are the wrong questions to ask. Now obviously there are limits to any program of social benefit. At the margins, there are indeed questions to be asked about how much the state should invest in special education, for example. But the point of a cooperation that includes Jamie, and to some extent Sessa, and seeks both to educate disabled children and to support their development with appropriate care, should not be seen in exclusively economic terms. The benefit to society of interacting with them and fully supporting them is more multifaceted and diffuse. It includes, in the first instance, what John Stuart Mill called "the advantage of having one of the most universal and pervading of all human relations regulated by justice instead of injustice"³⁰ – only here we are talking not about marriage and the family, as Mill was, but about the relations of care in which all human beings in some ways, at some times, and to some degree stand. It includes, that is, the advantage of respecting the dignity of the disabled and developing their human potential, whether or not this potential is socially "useful" in the narrower sense. It includes, as well, the advantage of understanding humanity and its diversity that comes from associating with mentally disabled people on terms of mutual respect and reciprocity. (Bérubé argues cogently that the other children who go to school with Jamie get at least as much out of his presence in a "normal" classroom as he derives from being there.) It includes new insight about the dignity of the aging and of ourselves as we age. And of course it includes the value of all the aforementioned interactions and relationships for the mentally disabled themselves, who without special social support would live, as they once did,

isolated and stigmatized lives. Even though the advocate for the physically disabled pressed for an understanding of these citizens as "productive," that did not seem a fully correct reply even for these cases. When we reach the case of the mentally disabled, we see with naked clarity the extent to which the very choice of a bargaining model biases the whole idea of the benefits of social cooperation.

But in the case of the physically disabled there were, as we said, countervailing elements in Rawls's theory, in the form of his Kantian doctrine of reciprocity. Where the mentally disabled are concerned, this very doctrine is the source of yet further difficulties. For as we have mentioned, citizens in the Well-Ordered Society are characterized through a Kantian conception of the person, which makes possession of the mental and moral powers central both to citizenship generally and to the key idea of reciprocity. Just as Kant and Rawls deny that there are reciprocity, and relations of justice, between humans and non-human animals, so too they are required to hold that there is no reciprocity, in the requisite sense, between "normal" human beings and the severely mentally disabled. But if we study the lives of the mentally disabled and those who live with them, it seems obvious enough that these lives involve complex forms of reciprocity. Jamie interacts in a loving, playful, and generous way both with his family and with other children. Sesha hugs those who care for her, dances with joy when they play music that she loves, and shows appreciation for the care she is given.

But probably none of this would count as reciprocity in Rawls's Kantian sense. Moreover, it is likely that neither Rawls nor Kant has devoted much thought to the question. Jamie may lack the capacity for forming a life plan and an overall conception of the good. When he was asked what he wanted to be when he grows up, his father reports that, while other children gave accounts of their careers, Jamie simply said, "Big." There was insight in that answer, and the other children learned from it, but it was not an answer of the sort that would demonstrate Jamie's membership in the Kantian moral community. Sesha clearly does not have the two moral powers. Moreover, because these three citizens lack or partly lack the two moral powers, they also fail to fit in with Rawls's conception of social cooperation, which is defined in terms of the Kantian conception of the person. Finally, they also fail to qualify for freedom in Rawls's sense, because freedom, in his theory, also has a Kantian flavor, and involves being a "self-authenticating source of valid claims" (*PL*, 32).³¹

Thus the mentally disabled pose a double challenge to Rawls's theory. The contract doctrine seems unable to accommodate their needs for special social attention, for the reasons of social productivity and cost that pertain to all disabled persons. But they are disqualified from citizenship in a deeper way as well, because they do not conform to the rather idealized picture of moral rationality that is used to define the citizen in the Well-Ordered Society. Like non-human animals, they are not regarded as capable of reciprocity of the requisite sort. Again, Rawls's own conclusion seems appropriate: either we should say that these are not issues of justice, or we should say that justice as

fairness does not offer a complete account of social justice, and we should figure out how serious a problem for the theory this is.

Thomas Scanlon confronts these problems facing a Kantian contract doctrine more explicitly than does Rawls. He offers two proposals that ought to be considered. Taking cognizance of the problem posed for such a theory by people with various handicaps, and by non-human animals, Scanlon concludes that we may recognize facts of extreme dependency in such a doctrine in one of two ways. Either we may persist in our pursuit of the contract doctrine, and say that the contracting parties are also trustees for those who are incapable of participating in that process; or we may say that the contract doctrine offers an account of only one part of morality and that we will need a different account to cope with the facts of extreme dependency.³²

Scanlon's own hypothetical contract situation does not imply the Humean idea of the "circumstances of justice," and it does not envisage the contract as one that must explain the good of social cooperation by pointing to an advantage to be derived by the parties from their agreement. He is not exploring the choice of basic political principles, and his bargaining situation is thus not an initial situation out of which such principles may be chosen. In many ways, then, his proposal is unlike the form of bargaining-model contractarianism that I have been criticizing, and I shall not consider it further here, since, in any case, it is a moral doctrine and not a political doctrine concerning the basic principles of justice for a society. Nonetheless, it seems reasonable to ask whether his proposed solution to the problem of the mentally disabled can be used by Rawls to extricate the bargaining theory from the difficulties it seems to have.

Applied to the Rawlsian project of selecting principles of justice that will form the basic structure of society,³³ then, Scanlon's disjunctive proposal is that we either take the parties in the Original Position to be trustees for the interests of all dependent members of society (as they currently are trustees for future generations) -- or else we should grant that the Original Position is not a complete device for designing political justice, and that other approaches are also required.

The first solution seems unsatisfactory. To make the "fully cooperating" trustees in a hypothetical original situation slights the dignity of physically and mentally disabled people, suggesting that they are worthy of respect in the design of basic political institutions only on account of some relationship in which they stand to so-called "fully cooperating" people. The bargain, after all, remains a bargain for mutual advantage, and it continues to assume a rough equality among its participants; the dependents enter the bargain not because they are judged worthy of regard as ends in themselves, but only because a contracting party cares about their interests. Furthermore, it is not clear that the contracting parties, as described in the theory, ought to care about these non-productive people. Gauthier puts the problem most starkly, when he says that the elderly have paid for their care by earlier periods of productive activity, but the "handicapped" have not.³⁴ In other words, for parties to the contract only

productivity justifies, ultimately, a claim to support, and the elderly get support, if they do, only because at one time they were not elderly. Animality and human neediness all on their own cannot justify a claim to support. Rawls's theory, though more subtle than Gauthier's, still suffers from something like this problem.

Moreover, the "trustee" solution retains, and even reinforces, the troublesome features in Rawls's notions of reciprocity and social cooperation. Rather than recognizing that reciprocity has many forms in this world, the "trustee" solution retains the Kantian split between the rational/reasonable person and everything else in nature; only humanity (understood in terms of the rational and moral powers) can be an end in itself, and other natural beings are worthy of concern only derivatively, in relation to human interests. In addition to being an unfortunate way to think about mentally disabled children and adults, this conception may well prejudice their thinking about the dignity of a wide range of capabilities in themselves. Are we not in effect saying that the full range of human and animal powers will get support only insofar as it is an object of interest and concern for Kantian rational beings? And doesn't this slight the dignity and worth that needy human animals surely possess even when they are not fully cooperating? Surely, if it is not necessary to require such split thinking, we should avoid it.

Thus I prefer Scanlon's second solution, which is similar to Rawls's own second proposal: namely, to grant that the contract doctrine does not provide a complete ethical theory. But this reply, which seems fine for Scanlon, because he is doing ethical theory, employs no hypothetical initial bargaining situation, makes no claims to completeness, and creates large problems for the bargaining-model contract doctrine in the area of political theory. Any approach to the design of basic political institutions must aim at a certain degree of completeness and finality, as Rawls's doctrine explicitly does.³⁵ We are designing the basic structure of society, which Rawls defines as those institutions that influence all citizens' life-chances pervasively and from the start. The principles we choose will affect the entire shape of the society, including its constitutional entitlements and the understanding of how those entitlements are grounded. It is very important for Rawls (as for Gauthier) that the principles emerge from a situation that is set up on the basis of the circumstances of justice, in the light of the proposed advantages of social cooperation. It seems that Rawls is right in judging that there is no plausible solution to the problem of the mentally disabled that we can extract from his initial bargaining situation. And yet it seems inadequate to defer this problem, in the context of basic political theory. For it is not open to us to say: we have done one part of that task, but of course other parts, equally basic, based on completely different principles, will come along later. If we leave for another day not only our relations to the non-human animals, but also all the many dependencies and needs that are entailed by disabilities of many sorts, both temporary and partial, this will leave huge areas of political justice up for grabs and will entail the recognition of much indeterminacy in the account of basic justice as so far worked out. Moreover, as I have already suggested, it is not just incompleteness that is the problem, it is misdirection. The list of primary goods selected by Rawls's parties omits items that appear

absolutely central for real dependent humans of "normal" capacity, as well as for the mentally and physically disabled. The account of social cooperation and its benefits is restricted in ways that seem unfortunate, both by the contract doctrine and by the Kantian account of persons.

Eva Kittay and Amartya Sen have proposed ways of reformulating Rawls's theory in order to address issues of disability. I have already suggested that Rawls has deep reasons for resisting proffered solutions of this type. Let us now look at their proposals, with this question in view. Kittay's central suggestion is that we ought to add the need for care during periods of extreme and asymmetrical dependency to the Rawlsian list of primary goods, thinking of care as among the basic needs of citizens.³⁶ This proposal seems reasonable enough, if we are thinking of the project as simply that of making a list of the most important social benefits that any real society must distribute. Surely Kittay is right that a viable account of political justice ought to make the appropriate distribution of care one of its central goals.

But, as should by now be evident, it is no simple matter simply to add this to Rawls's list. For the list is a list of needs of citizens as characterized by the two moral powers; this already leaves out the mentally disabled, and any who are like them for long stretches of their life. There are deep reasons for this, stemming from both Rawls's Kantian model of the person and from his adherence to a bargaining model of the social contract. The bargaining model, especially, appears to militate against even a limited recognition of needs for care during periods of non-productivity, at least when we are thinking about what parties in the Original Position would consider as they design society's basic principles. The idealizing fiction of the "fully cooperating . . . over a complete life" is no mere mistake that might be corrected by a longer list of primary goods. It is woven deeply into the very idea of a contract for mutual advantage.

Sen's more radical proposal is that the entire list of primary goods should be seen as a list of capabilities, rather than a list of things. His analysis starts from the fact that Rawls's list of primary goods is already quite heterogeneous in its structure. Some of its members are thing-like items such as income and wealth; but some are already more like human capabilities to function in various ways: the liberties, opportunities, and powers, and also the social basis of self-respect. This change would not only enable us to deal better with people's needs for various types of love and care as elements of the list, but would also answer the point that Sen has repeatedly made all along about the unreliability of income and wealth as indices of well-being. The well-being of citizens will now be measured not by the sheer amount of income and wealth they have, but by the degree to which they have the various capabilities on the list. One may be well off in terms of income and wealth, and yet unable to function well in the workplace, because of burdens of caregiving at home.

Sen's proposal offers a productive approach to the needs of disabled citizens, as we shall see. What is clear, however, is that, like Kittay's, it is no minor modification, but a change that goes to the very heart of the whole project of

using a list of primary goods to measure relative social positions in a determinate way. Rawls is wiser than Sen, not more stubborn and shortsighted, when he says that he cannot accept this suggestion, meritorious though it obviously is. Much the same should be said about my own earlier suggestion that Rawls could add other capability-like items to the list of basic goods: for example the social basis of health, and the social basis of imagination and emotional well-being.³⁷ For Rawls is already in difficulty enough through his addition of the social bases of self-respect, which greatly strains the contract doctrine in one way, although in another way it seems to fulfill some of its deeper moral aspirations. He will be in hopeless difficulty, in the terms he has set for himself, if he admits this highly heterogeneous list of "primary goods," all of which seem highly relevant to the determination of relevant social positions. A desired simplicity, both in indexing relative social positions and in describing the point of social cooperation, will be jeopardized.

In short, the case of the mentally disabled proves very revealing for the entire structure of Rawls's contract doctrine, and, more generally, for the project of basing principles of justice on reciprocity between rough equals who are imagined as joining together to reap a mutual benefit. Despite the moral elements that go very deep in Rawls's theory – and in a sense, also, because of them, or the particular Kantian shape they take – Rawls cannot altogether outstrip the particular limitations of the contract doctrine, which derive from its basic picture of why people live together and what they hope to gain therefrom. But to abandon that picture would appear to leave the theory of justice with what Rawls imagines to be the unmanageable indeterminacies of intuitionistic balancing among plural and heterogeneous goods, and with no clear way to measure relative social positions. The charge of intuitionism, however, seems to be for the most part erroneous although space will not allow a thorough discussion of that charge here. Let us now see, however, how the capabilities approach confronts the issue of disability.

III. The Capabilities Approach: A Non-Contractarian Account of Care

We now turn to the capabilities approach. My version of the capabilities approach is a political doctrine about basic entitlements, not a comprehensive moral doctrine. It does not even claim to be a complete political doctrine, since it simply specifies some necessary conditions for a decent society, in the form of a set of non-negotiable entitlements of all citizens. Failure to secure these to citizens is a particularly grave violation of basic justice, since these entitlements are held to be implicit in the very notion of human dignity, and a life that is worthy of the dignity of the human being.

A. The Bases of Social Cooperation

The capabilities approach departs from contractarianism in two especially striking ways. First, its account of the benefits and aims of social cooperation is moralized, and socialized, from the very start. Although the approach does not employ a hypothetical initial situation, it envisages human beings as cooperating

out of a wide range of motives, including the love of justice itself, and prominently including a moralized compassion for those who have less than they need to lead decent and dignified lives. (It would be good if one could show that a society held together in this way could be relatively stable, and I have elsewhere tried to show this.³⁸ But the significant issue for our purposes here is that there is no assumption, either overt or tacit, that justice is relevant only where the Humean circumstances of justice obtain. In other words, we do not assume that only a situation of rough equality, in which people are motivated to make a deal for mutual advantage, can get justice off the ground. We have seen that even Rawls's view, moralized though his initial situation is, is still dependent on the Humean analysis, and thus on the idea of rough equality among participants.

In my view, Hume's account of the conditions under which justice makes sense is too narrow. Human beings are held together by many ties: by ties of love and compassion as well as ties of advantage, by the love of justice as well as the need for justice.³⁹ Real people often attend to the needs of others in a way that is narrow, or arbitrarily uneven. But education can do a great deal to make these ties deeper, more pervasive, and more even-handed. Rawls agrees; but then it is unfortunate that he endorsed Hume's account of the circumstances of justice. I would argue that the changes we have seen in recent years toward the greater social inclusion of the disabled is evidence that people do aim at justice for its own sake, and this can make a political difference.

Thus the capabilities approach feels free to use a political conception of the person that views the person, with Aristotle, as a political and social animal, who seeks a good that is social through and through, and who shared complex ends with others, at many levels. The good of others is not just a constraint on this person's pursuit of her own good; it is a part of her good. She leaves the state of nature not because it is more advantageous in self-interested terms to make a deal with others, but because she can't imagine a life without shared ends and a shared life.

B. Dignity: Aristotelian, not Kantian

The second fundamental departure pertains to the notion of dignity, and thus to Rawls's Kantian contractarianism, which makes a notion of dignity basic. Unlike Kant, the capabilities approach does not contrast the humanity of human beings with their animality. It sees the two as thoroughly unified. Taking its cue from Aristotle's notion of the human being as a "political animal," and from Marx's idea that the human being is a creature "in need of a plurality of life-activities," it sees the rational as simply one determination of the animal, and, at that, not the only one that is pertinent to a notion of truly human functioning. Truly human functioning is animal through and through, and what makes for the specifically human dignity of this functioning is the combination of practical reasoning and sociability that infuse it. More generally, the capabilities approach sees the world as containing many different types of animal dignity, all of which deserve respect and even wonder.⁴⁰ The specifically human kind is indeed characterized by a kind

of rationality, but rationality is not idealized and set in opposition to animality; it is just garden-variety practical reasoning, which is one way animals have of functioning. Sociability, moreover, is equally architectonic and equally important. Need is a feature of our rationality and our sociability; it is one aspect of our dignity, then, rather than something to be contrasted with it.

Thus, in the design of the political conception of the person out of which basic political principles grow, we build in an acknowledgment that we are needy temporal animal beings who begin as babies and end, often, in other forms of dependency. We draw attention to these vulnerabilities, insisting that rationality and sociability are themselves temporal, with growth, maturity, and (if time permits) decline. The kind of sociability that is fully human includes symmetrical relations, but also relations of more or less extreme asymmetry, and we insist that the asymmetrical relations can still contain reciprocity and truly human functioning.

We can now connect the two fundamental departures from contractarianism, by saying that this new conception of what is dignified and worthy in the human being supports the departure from Rawlsian circumstances of justice. Justice does not begin with the idea that we have something to gain from bargaining together. We have a claim to support based in justice in the dignity of our human need itself. Society is held together by a wide range of attachments, and concerns, only some of which concern productivity. Productivity is necessary, and even good, but it is not the main end of life.

C. Care and the Capabilities List

It is now quite easy to take up the suggestions that Kittay and Sen made to Rawls, and which he was unable to accept, given the logic of his contractarianism. First, we should understand the need for care in times of acute or asymmetrical dependency as among the primary needs of citizens, the fulfillment of which, up to a suitable level, will be one of the hallmarks of a decent society. How should this insight be incorporated into the capabilities list? I shall address this question in a general way first, before moving on to the special case of the mentally disabled. I would argue that care is not a single thing, and therefore that it should not be made a single separate capability in addition to the others. Thinking well about care means thinking about a wide range of capabilities on the side of both the cared-for and the caregiver. Good care for mentally disabled people, whether children or adults, will focus on support for capabilities of life, health, and bodily integrity. It will also provide stimulation for senses, imagination, and thought. It supports emotional attachments and removes "overwhelming fear and anxiety"; indeed, good care constitutes a valuable form of attachment. Good care also supports the capacity of the cared-for for practical reason and choice; it encourages affiliations of many other sorts, including social and political affiliations where appropriate. It protects the crucial good of self-respect. It supports the capacity to play and enjoy life. It supports control over one's material and political environment: rather than being regarded

as property themselves, the disabled need to be regarded as dignified citizens who have the claim to property, employment, and so forth. Disabled citizens often have diminished opportunities to enjoy nature; good care supports this capability as well. In short, given the intimate and foundational role that care plays in the lives of the cared-for, it should address the entire range of the capabilities. Good thought about how to do this must be sensitive to individual needs.

I have used the same list of capabilities for the mentally disabled that I advocate for the so-called normal citizen. It seems important to do so, although the same level of capability may not always be possible, in order to stress that the mentally disabled are full human beings and citizens. This move also reminds us continually of the element of tragedy that persists in many such lives. Sessa is crucially unlike a happy chimpanzee, because her capabilities are tragically out of step with those of most members of her species community. Moreover, in most mentally disabled lives there is a disharmony that does not exist in the life of an animal that flourishes in its own way. Some abilities are developed, others are not; the life doesn't fully fit together, not without special support and good luck. Including the mentally disabled on the same list reminds us of the strong reasons we have to address obstacles in the way of their full functioning.

On the side of the caregiver, we have, once again, a wide range of concerns covering all the central capabilities.

IV. Public Policy: Education and Inclusion

It is impossible for a discussion of this sort to do more than sketch some of the policy implications such an approach to the situation of the mentally disabled might have. Here I shall focus only on one issue, education, and on only one nation, the U.S.

All modern societies have had gross inequities in their treatment of unusually mentally disabled children. More, even, than people with many physical disabilities, mentally impaired children have been shunned and stigmatized. Many of them have been relegated to institutions that make no effort to develop their potential. And they are persistently treated as if they have no right to occupy public space. In the congressional hearings prior to the Americans with Disabilities Act (ADA), many examples of this shunning were cited. One case concerned children with Down's Syndrome who were denied admission to a zoo so as not to upset the chimpanzee.⁴¹

But the most egregious gap has been, perhaps, in the area of education. Stigmatized as either uneducable or not worth the expense, mentally disabled children have been denied access to suitable education. Early court cases upheld these exclusions. For example, in 1892 the Supreme Court of Massachusetts upheld the exclusion of mentally retarded boy John Watson from the Cambridge public schools, citing the disruptive effect of his appearance and

unusual behavior (which, they admitted, was not harmful or disobedient) on the experience of the other children.

In the early 1970s, advocates for the mentally disabled began a systematic challenge to the status quo, achieving two influential victories. In *Pennsylvania Association for Retarded Children v. Pennsylvania*⁴², a federal district court issued a consent decree compelling Pennsylvania public schools to provide "free appropriate education" to mentally handicapped children. The plaintiffs alleged that the right to education is a fundamental right, and that the school system therefore needed to show a "compelling state interest" in order lawfully to exclude retarded children.⁴³ In the same year, in *Mills v. Board of Education*, the U. S. District Court for the District of Columbia ruled in favor of a group of mentally disabled children who challenged their exclusions from the District of Columbia's public schools. This group was broader than the group of plaintiffs in the Pennsylvania case: it included children with a wide range of learning disabilities, not just mental retardation. In an analysis that cited *Brown v. Board of Education*, the landmark case that found racial segregation in public schools to be a violation of the equal protection clause, the Court held that the denial of free suitable public education to the mentally disabled is an equal protection violation.⁴⁴ They also held that this equal protection violation could not be reasoned away by saying that these children were unusually expensive to include. "The inadequacies of the District of Columbia Public School System, whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the 'exceptional' or handicapped child than on the normal child." Significantly, they cite *Goldberg v. Kelly*, a case that concerned welfare rights, in which the Supreme court held that the state's interest in the welfare of its citizens "clearly outweighs" its competing concern "to prevent any increase in its fiscal and administrative burdens."

Goldberg v. Kelly and *Mills*, are highly significant cases, for they articulate a conception of social cooperation and the purposes of political principles that supports the one articulated in the capabilities approach. In *Goldberg*, the Court held that:

From its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders. We have come to recognize that forces not within the control of the poor contribute to their poverty. . . . Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community. . . . Public assistance, then, is not mere charity, but a means to "promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity."

In other words, the purpose of cooperation is not to gain an advantage; it is to foster the dignity and well-being of each and every citizen.

With this fundamental insight securely articulated, the two cases touched off a national debate, focused on both equal access and funding. In 1975, Congress passed the Education for All Handicapped Children Act (EAHCA), which turned the *Mills* decision into federal law, giving a wide range of mentally disabled⁴⁵ children enforceable rights to free suitable public education, and making funds available to the states to help them meet their constitutional obligation.⁴⁶ This law was slightly modified and elaborated in 1997 in the form of the Individuals with Disabilities Education Act (IDEA).

IDEA begins from a simple yet profound idea — that of human individuality. I have said that this is one of the core liberal ideas that we should retain while we criticize the bargaining tradition, and now we will be able to see more clearly the work it can do in this area. Rather than regarding the various types of disabled persons as faceless classes of persons, the Act assumes that they are in fact individuals, with varying needs, and that therefore all prescription for groups of them would be inappropriate. The guiding idea of the Act is thus that of the Individualized Education Program (IEP), "a written statement for each child with a disability that is developed, reviewed, and revised. . . ."

In general the Act obliges states to educate disabled children in the "least restrictive environment" appropriate to meet their needs. It thus urges "mainstreaming." This practice can be defended on grounds of the benefit both to the mentally disabled child, who will be given more incentives to develop, and also on grounds of benefit to so-called "normal" children, who learn about humanity and its diversity by being in a classroom with a child who has unusual disabilities. But for purposes of the law, the underlying recognition of individuality is paramount; thus, when a child seems to profit more from special education than from mainstreaming, the state is required to support such a special placement.

IDEA is far from being a perfect law, in theory or in practice. But it is an achievement of which society may be proud. Such achievements are under threat, in an era dominated by economic models of advantage that are the cheap offshoots, in the public mind, of the idea of society as a bargain for mutual advantage.

Why would people ever create such a society that fully includes people with mental disabilities? Bérubé's question, which I have quoted as my epigraph to this lecture, is urgent, in a world in which, as he observes, we do not even support the full human development of all "normal" children. I have argued that theories of justice, and the conceptions of social cooperation they contain, make a difference here. If we are to include the mentally disabled it cannot be because we think we will gain thereby, in a narrow economic or self-interested sense of "gain." It can only be out of our attachment to justice and our love of others, our sense that our lives are intertwined with theirs and that we share ends with them. Images of who we are and why we get together do have power in shaping our projects. It is time, then, to see what a new account of social cooperation and its

goals can do to advance the search for justice, in one of the most difficult areas of human life.

Footnotes for “**Capabilities and Disabilities: Justice for Mentally Disabled Citizens**”

By Martha Nussbaum (University of Chicago)

¹ This is a work in progress: a version of a draft for one of my Tanner Lectures, delivered at Australian National University in November 2002, and scheduled for publication in the *Tanner Lectures in Human Values*, volume 24; and, ultimately, of a longer chapter of a book under contract to Harvard University Press, under the title *Beyond the Social Contract: Toward Global Justice*. The book argues that the capabilities approach handles well three problems of social justice that are difficult to handle in Rawls's contractarian theory: justice for the disabled, justice across national boundaries, and justice for non-human animals. Some of the material in the present essay (roughly, the second half) is published prior to the appearance of Tanner volume 24, by courtesy of The University of Utah Press and the Trustees of the Tanner Lectures on Human Values. The project is highly critical of John Rawls. It should therefore be emphasized that the reason for singling out Rawls's theory for critical examination is that it is the strongest theory we have, and, indeed, one of the most distinguished political theories in the Western tradition. With greatest respect, friendship, and sadness, I dedicate this essay to his memory.

² See Eva Feder Kittay, *Love's Labor: Essays on Women, Equality, and Dependency* (New York: Routledge, 1999).

³ In Michael Bérubé, *Life As We Know It: A Father, A Family, and an Exceptional Child* (New York: Pantheon, 1996).

⁴ Locke is the source for the first phrase, Rawls for the second: see discussion below, section II.

⁵ I shall focus on Rawls, although I briefly discuss Gauthier. As I mention elsewhere in the longer manuscript, these theories depart in some significant ways from the classical accounts of the social contract, and are at key points influenced by modern economics and its conception of bargaining.

⁶ I argue as much in my longer project, which focuses on inequalities between nations.

⁷ According to the US Department of Labor, Women's Bureau (May 1998), an estimated 22.4 million households – nearly one in four – are providing home care for family members or friends over the age of fifty. For these and other data I am grateful to Mona Harrington, *Care and Equality* (New York: Knopf, 1999).

⁸ This is a major theme in recent feminist work: see especially Eva Kittay, *Love's Labor*; Nancy Folbre, “Care and the Global Economy,” background paper prepared for the *Human Development Report 1999*, United Nations Development Programme (New York: Oxford University Press, 1999), and, based largely on Folbre, chapter 3 of *Human Development Report 1999*; Joan Williams, *Unbending Gender: Why Family and Work Conflict and What to Do About It* (New York: Oxford University Press, 2000); Mona Harrington, *Care and Equality* (New York: Knopf, 1999). Earlier influential work in this area includes: Martha A. Fineman, *The Illusion of Equality* (Chicago: University of Chicago Press, 1991), and *The Neutered Mother, the Sexual Family and Other Twentieth Century Tragedies* (New York: Routledge, 1995); Sarah Ruddick, *Maternal Thinking* (New York: Beacon Press, 1989); Joan Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* (New York: Routledge, 1993); Virginia Held, *Feminist Morality:*

Transforming Culture, Society, and Politics (Chicago: University of Chicago Press, 1993); Robin West, *Caring for Justice* (New York: New York University Press, 1997). For an excellent collection of articles from diverse feminist perspectives, see *Justice and Care: Essential Readings in Feminist Ethics*, ed. Virginia Held (Boulder, CO: Westview Press, 1995).

⁹ *TJ*, 126. In the subsequent discussion I shall refer to the following works of Rawls: *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), hereafter *TJ*; *Political Liberalism*, expanded paperback edition (New York: Columbia University Press, 1996), hereafter *PL*; the Dewey Lectures, *Kantian Constructivism in Moral Theory*, *The Journal of Philosophy* 77 (1980), 515-71, hereafter *DL*.

¹⁰ *TJ*, 126-130. He explicitly assumes that the parties have "various shortcomings of knowledge, thought, and judgment," but, as we shall see, he stipulates that these are all within the "normal" range, so as to retain the idea of rough equality.

¹¹ David Gauthier, *Morals By Agreement* (New York: Oxford University Press, 1986), p. 18, speaking of all "persons who decrease th[e] average level" of well-being in a society.

¹² References to citizens as "fully cooperating" occur frequently in *DL* and *PL*, for example *DL*, 546, *PL*, 183.

¹³ Gauthier, *Morals by Agreement*, p. 18 n. 30, see epigraph.

¹⁴ One might wonder whether this works: for surely many, if not most, conceptions of the good involve relational goods and at least some altruistic goods. It is therefore not fully clear how adequately these can be modeled by the Rational as defined in the Original Position, where the parties are said to take no interest in one another's interests, and to act in such a way as to maximize their own personal good. However, since this is not my theme, I pass over this problem for the present.

¹⁵ See *Lectures on the History of Ethics*, ed. Barbara Herman (Cambridge, MA: Harvard University Press, 2000), esp. 253-290.

¹⁶ Another way of putting this, common in discussions of Kant, is to say that for Kant the most relevant genus under which we classify the human being is that of Rational Being; our fellow genus-members are the angels and any such further rational beings there may be. Within this genus, we are the animal species: the animal rational, then, rather than the rational animal. This problem is exacerbated, of course, by Kant's focus on some aspects of our humanity and not others as what particularly constitutes its worth and dignity.

¹⁷ I do not mean to deny that Kant gives need an important role in his theory. For just one good treatment of this aspect of Kant's thought, see Allen Wood, *Kant's Ethical Theory* (Cambridge: Cambridge University Press, 1999). What I mean is that whereas for Kant personality and animality are conceptually independent, and personality is not itself understood in terms of need, for Rawls these two elements are more thoroughly integrated, and the person is understood from the first as in need of material and other goods.

¹⁸ As Eva Kittay has argued in an excellent discussion (*Love's Labor*, pp. 88-99, and see also "Human Dependency and Rawlsian Equality," in *Feminists Rethink the Self*, ed. Diana T. Meyers (Boulder, CO: Westview, 1997), 219-66), there are five places in Rawls's theory where where he fails to confront facts of asymmetrical neediness that might naturally have been confronted. (1) His account of the "circumstances of justice" assumes a rough equality between persons, such that none could dominate all the others; thus we are not invited to consider relations of justice that might obtain between an adult and her infants, or her senile demented parents. (2) Rawls's idealization of citizens as "fully cooperating" etc. puts to one side the large facts about extreme neediness I have just mentioned. (3) His conception of social cooperation, again, is based on the

idea of reciprocity between equals, and has no explicit place for relations of extreme dependency. (4) His account of the primary goods, introduced, as it is, as an account of the needs of citizens who are characterized by the two moral powers and by the capacity to be "fully cooperating," has no place for the need of many real people for the kind of care we give to people who are not independent. And (5) his account of citizens' freedom as involving the concept of being a self-authenticating source of valid claims (e.g. *PL*, 32) fails to make a place for any freedom that might be enjoyed by someone who is not independent in that sense.

¹⁹ This is Rawls's current understanding of primary goods; earlier, in *TJ*, he understood them as all-purpose means in connection with any conception of the good one might have.

²⁰ See Sen, "Equality of What?" in Sen, *Choice, Welfare, and Measurement* (Oxford: Basil Blackwell, 1982), 353-69; other good accounts of the approach are in Sen, "Capability and Well-Being," in *The Quality of Life*, ed. M. Nussbaum and A. Sen (Oxford: Clarendon Press, 1993), 30-53; "Gender Inequality and Theories of Justice," in *Women, Culture and Development*, ed. M. Nussbaum and J. Glover (Oxford: Clarendon Press, 1995), and *Inequality Reexamined* (New York: Russell Sage, 1992), esp. chs. 1, 3, 5.

²¹ See *TJ*, 440-46.

²² Gauthier, *Morals by Agreement*, p. 18 and n. 30.

²³ E.g. *PL*, 208.

²⁴ Obviously enough, Hume is no contractarian, but Rawls seems right to think that there is similarity between Hume's account of the circumstances of justice and contractarian accounts of the relations of parties in the state of nature.

²⁵ Conceptions of the good obviously may contain altruistic elements, but the parties do not know what conception of the good they hold, and thus no commitment to altruism in the Original Position can be inferred from that fact.

²⁶ Epstein, *Forbidden Grounds*, p. 481.

²⁷ This is my reading of the cryptic discussion of Sen at *PL*, 183 ff.

²⁸ See Kittay, *Love's Labor*, p. 77: "Dependency must be faced from the beginning of any project in egalitarian theory that hopes to include all persons within its scope." The concrete stratagems adopted to address issues of disability (laws mandating wheel chair ramps, laws such as the Individuals with Disabilities Education Act) could well be left until this stage; but the fact that citizens experience such needs for care must be recognized from the start, and a commitment made to address these concerns.

²⁹ See Bérubé for a detailed account of these expenses.

³⁰ John Stuart Mill, *The Subjection of Women*, chapter 4.

³¹ See Kittay, above n. 18.

³² Scanlon, *What We Owe to Each Other* (Cambridge, MA: Harvard University Press, 1999). pp. 177-87. I am very grateful to Scanlon for correspondence that makes the complexity of his approach to these cases clear. Because this is a paper about the basic structure of a political conception, I shall hope to take up his views elsewhere.

³³ Once again, it is very important to stress the fact that this is Rawls's project, not Scanlon's, and that Scanlon does not recommend applying it in this way.

³⁴ *Morals by Agreement*, p. 18 n. 30.

³⁵ See for example *TJ*, 135, where finality is a formal condition on political principles, and 175-8, in the argument for the two principles where it is made clear that the agreement "is final and made in perpetuity" and that "there is no second chance" (176). Rawls's opposition to intuitionism focuses on this issue: see for example *TJ*, 35-6.

³⁶ Kittay, *Love's Labor*, 102-3.

³⁷ See my discussion of this point in *Women and Human Development: The Capabilities Approach* (Cambridge: Cambridge University Press, 2000), ch. 1, and "The Future of Feminist Liberalism."

³⁸ See my *Women and Human Development*, ch. 2.

³⁹ See my *Upheavals of Thought: The Intelligence of Emotions* (Cambridge: Cambridge University Press, 2001), chs. 6-8.

⁴⁰ In my larger project I develop the implications of this idea for the treatment of non-human animals. I focus on sentient animals, and tentatively conclude that sentience, while not the only issue of ethical relevance in our dealings with animals, is a necessary condition of moral standing.

⁴¹ Francis and Silvers, eds., *Americans with Disabilities*, Introduction p. xix.

⁴² 343 F. Supp. 279 (1972).

⁴³ The Court, however, lightened the plaintiffs' burden, holding that they had established a constitutional claim even under the less stringent rational basis test: in other words, they did not need to show that education is a fundamental right in order to make their equal protection claim. The plaintiffs' contention that the exclusions violate both due process and equal protection prevailed.

⁴⁴ Technically, because of the legally anomalous situation of the District, they held that it was a due process violation under the Fifth Amendment and that the equal protection clause in its application to education is "a component of due process binding on the District."

⁴⁵ Today the terms *impairment* and *disability* are typically used to describe the presocial condition of such children, so to speak; the term *handicap* is used to describe their socially disadvantaged situation.

⁴⁶ I wish to thank John Brademas, one of the authors of this legislation, for very helpful discussion about the background and history of the law.