Comment on Martha Nussbaum's "Capabilities and Disabilities"

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Martha Nussbaum’s "Capabilities and Disabilities" is part of a profound challenge Nussbaum is mounting to the dominant liberal theory of justice of the past thirty years. That theory is due to John Rawls. It first appeared in full form when Rawls published his masterpiece, A Theory of Justice, in 1971. This work completely altered the landscape of political philosophy. It not only advanced a new theory vindicating welfare state liberalism as the political program required by the ideals of justice but also introduced a new set of concepts and methods for studying the main analytical and normative problems of political philosophy. Rawls developed these concepts and methods in furtherance of his aim of reviving the idea of a social contract that had prevailed in seventeenth and eighteenth century political thought and of taking this idea to a higher level of abstraction than the one at which it had been deployed in the earlier social contract tradition. The success of Rawls's work was such that it soon became the standard of contemporary liberal political theory.

As such, the work attracted and continues to attract many critics who have attacked it on the basis of political philosophies opposed to welfare state liberalism. These critics include Marxists, socialists, libertarians, communitarians, pragmatists, Burkean conservatives, and radical environmentalists, inter alios. Contemporary liberals, by contrast, have for the most part embraced Rawls’s theory and used it as a model for developing theories of their own in defense of liberal ideals and programs. The reason for this is that Rawls's theory offers what appears to be a firmer and deeper justification of the institutions essential to the liberal welfare state than the justification of those institutions that liberals commonly accepted before the publication of A Theory of Justice. The institutions in question are those characteristic of a liberal democracy in which the state guarantees all its citizens adequate provision of basic social goods, and before Rawls published his theory these institutions were commonly justified on utilitarian grounds, which is to say, by appeal to the Greatest Happiness Principle. Accordingly, the institutions were justified on the grounds that, compared to alternatives, they best promoted the happiness of the people they served. Though until Rawls's theory liberals commonly accepted this utilitarian justification, they were uneasy about doing so owing to the long-standing problem utilitarianism has of explaining why it is not committed to endorsing injustice when injustice is expedient.
Rawls expressly designed his theory to avoid this problem, and it was therefore quickly seen and taken up by liberal political theorists as an important advance on utilitarianism.

Nussbaum's challenge to Rawls's theory is thus unusual in being a challenge from a liberal political theorist. It is not, however, a challenge that is meant to reinstate the utilitarian justification of the institutions essential to the liberal welfare state. Just the opposite is true, since Nussbaum opposes utilitarianism even more strongly than she opposes Rawls's theory. Rather Nussbaum aims at replacing Rawls's theory as the theory on which these institutions are justified with a distinctively nonutilitarian theory, which is the capabilities approach to questions of political justice that she and Amartya Sen made influential. That approach appeals to capabilities that human beings share and whose development and exercise are necessary to an individual's having a good life. In this respect, it resembles approaches that appeal to human rights as entitlements that human beings have and that, when honored, secure for them a tolerably decent life. But it is nonetheless meant to be distinct from standard approaches that appeal to human rights, for modern appeals to human rights typically reflect either utilitarian views of justice that originated in the account of rights and justice that John Stuart Mill presented in the last chapter of *Utilitarianism* or the older appeals to natural rights, like those of Jefferson in the *Declaration of Independence*, that were an essential part of seventeenth and eighteenth century social contract theory.

What distinguishes Nussbaum's capabilities approach from these standard approaches that appeal to human rights is its conception of civil society as an organic collective all of whose members have equal moral worth or dignity in virtue of their human capabilities. This conception requires that the basic institutions of civil society operate in a way that is consistent with treating every member as having equal moral worth, and this requirement distinguishes Nussbaum's approach from utilitarianism. For utilitarianism can justify institutions that involve, for the sake of the society's general happiness, subordinating some people's basic interests to the interests of others, or in other words, treating some people as having less moral worth than others. The conception of civil society on Nussbaum's approach also represents civil society as a collective in which the civil bonds among the members are natural ties of fellow feeling and caring for others and for one's community with them, and this way of representing civil society distinguishes her approach from social contract theory. For civil society, on a social contract theory, is understood to be founded on a contract, and consequently the theory takes the civil bonds among the society's members to be artifacts of that contract. Human beings, that is, are understood in the theory to be joined together into a civil society by the pact they would have made with each other if they had come together in circumstances of equality to organize themselves into a cooperative
association for mutual advantage. Their civil ties, then, are understood as contractual and so artificial, rather than, as on Nussbaum's approach, affective and so natural.

We can thus see the challenge to social contract theory that Nussbaum makes in "Capabilities and Disabilities" as ultimately a challenge to the theory's conception of civil society. Because social contract theory conceives of civil bonds as the artifacts of a contract made among equals for mutual advantage through cooperation, it must limit the relationships formed by these bonds to relationships among those who could be parties to such a contract, and this means it must limit the relationships to those who are capable of cooperating with each other in reciprocally beneficial ways. Consequently, the theory must exclude from these relationships anyone who, because of severe disability, cannot cooperate reciprocally with those whose abilities enable them to be parties to the social contract, and it must therefore conceive of the civil bonds between such a person and those in the latter group as artifacts of a different contract or arrangement, one that is distinct from the social contract that defines the ideal of justice among equals. Social contract theory would appear then, in view of this result, to fall short of upholding the ideal of equal justice for all and to do so because on its conception of civil society not everyone belongs to the relationships that the principles of justice it defends regulate.

To escape this criticism, to meet the challenge it represents, defenders of social contract theory must do one of two things. They must either explain how those who are so severely disabled that they cannot cooperate reciprocally with those who are not severely disabled nonetheless qualify as parties to the social contract. Or alternatively they must explain how the civil bonds that exist between the former and the latter, though different from the civil bonds that are the artifacts of the social contract, nonetheless form relationships regulated by the same principles of justice as regulate relationships that are founded on the social contract. Rawls, it would seem, believes that the second option is available in his theory, for he has suggested that justice for the severely disabled can be secured through laws that the just society's legislature would enact subsequent to the making of the social contract. But he never substantiated this suggestion, and Nussbaum seems to me right to be skeptical about it.

Perhaps, though, there is hope of meeting the challenge in the first option. At least the challenge can be mitigated somewhat by taking this option. For on Rawls's theory, one of the principles of justice is a principle that requires society's basic institutions to realize the ideal of fair equality of opportunity, and one can interpret this requirement as applying to the circumstances of severely disabled people who could, in a workplace that accommodated their disabilities, engage in productive work. To fail to provide such accommodations, unless their costs are so large as to be unreasonable, would be to deny such people equal opportunity to be socially productive members
of society. Hence, one could interpret Rawls's theory as including them among the parties to the social contract (i.e., to put the point in Rawls's terms, one could interpret his theory as holding that the parties to the Original Position were ignorant of whether they had such severe disabilities), for doing so would be how the theory made evident that the principle of fair equality of opportunity was to be interpreted as protecting people with severe disabilities from being denied equal opportunity to be socially productive on account of their disabilities.

What is more, Rawls's theory gives precedence to the ideals of liberty and equality of opportunity over those of a just distribution of wealth. As a result, one need not, when interpreting the theory as including people with severe disabilities among the parties to the social contract, restrict those who are included to people whose disabilities are not so severe that the costs of accommodating their disabilities would materially reduce the society's economic productivity. One can include them even though doing so would mean a net loss in the society's wealth. Contrary, then, to what Nussbaum argues, Rawls's theory can allow for limiting the economic productivity of society in the interest of securing fair equality of opportunity for those severely disabled people who could through public and workplace accommodations engage in socially productive work. For in a society whose basic institutions operate according to the principles of justice that the theory defends, claims to equal opportunity must be honored before claims to a larger income or an increase in one's wealth are met.

Still, these considerations do not answer Nussbaum's larger point against Rawls's theory, in particular, and social contract theory, in general. For some people are so severely disabled that no reasonable accommodations of their disability would enable them to engage in socially productive work, and consequently one cannot argue from the ideal of fair equality of opportunity to the appropriateness of including them among the parties to the social contract. Nussbaum's examples of people who have severe mental disabilities are plainly in point. Social contract theory, it would seem, must therefore exclude such people from the civil relationships that the principles of justice it defends regulate. And in consequence it must either admit that its account of justice is incomplete or deny that the principles of justice apply to people who, owing to severe disability, are incapable of reciprocal relations with others that involve sharing the burdens and benefits of cooperation. Neither is a particularly inviting alternative, however. And for this reason the challenge that Nussbaum makes to social contract theory is at the same time a powerful argument for her alternative approach to a liberal theory of political justice.