

*Beyond the Social Contract:  
Toward Global Justice*

MARTHA C. NUSSBAUM

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MARTHA NUSSBAUM is Ernst Freund Distinguished Service Professor of Law and Ethics at the University of Chicago. She was educated at New York University and received a Ph.D. from Harvard. She has taught at Oxford, Brown, and Harvard, and was a research advisor at the World Institute for Development Economics Research, Helsinki, a part of the United Nations University. She is a fellow of the American Philosophical Society and the American Academy of Arts and Sciences. She has received the NYU Distinguished Alumni Award, the Barnard College Medal of Distinction, and she is an academician in the Academy of Finland. Among her many publications are *The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy* (1986, updated edition 2000); *Love's Knowledge* (1990), which received the 1991 PEN Spielvogel-Diamondstein Award for the best collection of essays); *Cultivating Humanity: A Classical Defense of Reform in Liberal Education* (1997), which won the Ness Book Award of the Association of American Colleges and Universities and the Grawemeyer Award in Education; *Sex and Social Justice* (1998), which won the book award of the North American Society for Social Philosophy; and *Upheavals of Thought: The Intelligence of Emotions* (2001).

These three lectures are extracts from a manuscript in progress. I presented three lectures in both Canberra and Cambridge, England, but in both cases a much longer manuscript, available on a website, was the basis for discussion. The three manuscripts published here are an uneasy compromise between the longer website version and the shorter lecture version. Lecture I is fuller; Lectures II and III are presented more or less as delivered. (The reason for this is that the argumentative structure of my position is laid out in Lecture I, whereas Lectures II and III continue the general line of argument presented in Lecture I.) The website version may be consulted by those who would like to see the longer versions. But it is a first draft, and the whole project is under contract, in book form, to Harvard University Press; it is being revised currently, and many changes (which I hope are improvements) are being introduced.

The project begins from the assumption that theories of justice in the social-contract tradition are among the strongest theories of justice we currently have. These theories also have an untold influence on public policy, often in a simplified and degenerate form. Although such theories—both in the historical tradition and today—are very strong, and although John Rawls’s theory, in particular, is probably the strongest theory of justice we currently have, several aspects of the contract tradition seem problematic when we approach three of the most urgent problems of justice in our time: justice for people with disabilities (especially mental disabilities), justice across national boundaries, and justice for nonhuman animals.

Rawls himself recognizes that his theory runs up against some difficult problems in just these areas. In *Political Liberalism* he mentions four problems that are difficult for his conception of justice to handle: what is owed to people with disabilities (both temporary and permanent, both mental and physical), justice across national boundaries, “what is owed to animals and the rest of nature” (as we shall see, Rawls does not grant that these are issues of justice), and the problem of saving for future generations.<sup>1</sup> Of all these he concludes: “While we would like

<sup>1</sup> John Rawls, *Political Liberalism*, expanded paperback edition (New York: Columbia University Press, 1996), pp. 20–21 (hereafter *PL*).

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*, p. 21). He goes on to say that his conception can be extended to give plausible answers to the problem of future generations (I agree, and therefore I have not treated that problem here). Similarly, he claims, his conception may be extended to deal with the problem of international justice; and of course *The Law of Peoples* represents his attempt to make good on that claim. (As I shall argue in Lecture II, I believe that he did not in fact give a satisfactory answer to that set of problems.) As for the other two problems, however, he says that they 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" (*PL*, p. 21).

Although my project did not in fact begin from this remark of Rawls's, it is useful to think of it as answering the challenge that Rawls poses here to himself and to others, to work on these problems and to see to what extent a theory of his type can handle them. That is my project. I shall argue that Rawls's theory cannot in the end deliver satisfactory answers to any of these three problems and that a version of the capabilities approach, as I have developed it in *Women and Human Development*,<sup>2</sup> can deal with these issues better. My conclusion is not that we should reject Rawls's theory or any other contractarian theory but that we should keep working on alternative theories, which may possibly enhance our understanding of justice, particularly with these difficult problems in view.

Three aspects of Rawls's theory need to be kept in mind, since I shall find difficulties with all three and since they are to some extent independent of one another. First, there is Rawls's account of primary goods, with its commitment to measuring relative social positions with reference to wealth and income, rather than by some more heterogeneous and plural set of indices. That commitment is important to Rawls and forms a key element in his argument for the difference principle; but it

<sup>2</sup> Cambridge/New York and New Delhi: Cambridge University Press and Kali for Women, 2000.

is not essential to a Kantian/contractarian theory of his type. Thus the problems that I shall identify in this area of the theory do not pose serious problems for contractarianism, though they do (I shall argue) pose problems for Rawls.

The second problem area is Rawls's Kantian political conception of the person, which is key to many aspects of his theory in *Political Liberalism* especially; analysis of freedom and reciprocity are related to that, as is the account of the role of primary goods. Because this conception thinks of personhood as rationality (moral and prudential), it causes difficulty for the equal citizenship of people with mental disabilities, as well as for a good account of our relationship to nonhuman animals. It also poses problems, I argue, for an adequate understanding of "normal" people, as they go through growth, maturity, and decline. Again, this is a feature that is important to Rawls, but not so obviously to any contractarian theory. While all contractarian theories must rely on some account of rationality in the bargaining process, one might have adopted an account that saw rationality as more thoroughly embedded in need and animality. There would still be difficulties for the issues I have mentioned, but perhaps somewhat lesser difficulties than those that Rawls's theory encounters.

Finally, there is a commitment that lies at the heart of the entirety of the social contract tradition: it is to the idea that the parties to the social contract are roughly equal in power and ability. Rawls, of course, represents his parties as moral equals. But he also, and importantly, accepts David Hume's characterization of the "circumstances of justice," linking that account, not implausibly, to the requirements of independence and rough equality that are key to the contract tradition. He says that Hume's account of the circumstances of justice is his own analogue for the idea of the State of Nature in classic contract doctrines. Much though Rawls adds moral elements to his theory, rendering it richer and more adequate, he never gives up the contractarian starting point. Thus, although once parties are inside the contracting situation the demands of moral impartiality affect them, the contractarian premise still affects who is included at this initial stage and prevents Rawls from taking a route denying them all knowledge of their mental and physical disabilities. Nor does he give up the idea that in some sense the purpose of exiting from the State of Nature must be mutual advantage. Thus, he says that on account of the Veil of Ignorance the parties have no basis for

“bargaining in the usual sense.”<sup>3</sup> He never denies, however, and this remark suggests, that they do bargain in an unusual sense: each is “forced to choose for everyone” (*TJ*, p. 140), but their purpose is still mutual advantage, though within the constraints of fairness. I shall argue that these vestigial attachments to the contract tradition create severe problems for Rawls in handling people with disabilities both physical and mental and both temporary and permanent. He himself is well aware of these difficulties.

I shall argue that the capabilities approach does better on the three issues in question than does Rawls’s theory, because it adopts a richer account of the purposes of social cooperation, a less Kantian conception of the person, and a more variegated, capability-based way of thinking about relative social positions.

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 these lectures to his memory.

## I. CAPABILITIES AND DISABILITIES: JUSTICE FOR MENTALLY DISABLED CITIZENS

*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*

<sup>3</sup> John Rawls, *A Theory of Justice*, 1st ed. (Cambridge, Mass.: Harvard University Press, 1971), p. 129 (hereafter *TJ*).

*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, 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.<sup>4</sup>

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 syndrome, Jamie has been cared for, since his birth, by a wide range of doctors and therapists, not to mention the nonstop 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 were monitored by a blood gas machine. At the time his father describes him,<sup>5</sup> 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.

<sup>4</sup> See Eva Feder Kittay, *Love's Labor: Essays on Women, Equality, and Dependency* (New York: Routledge, 1999).

<sup>5</sup> In Michael Bérubé, *Life As We Know It: A Father, a Family, and an Exceptional Child* (New York: Pantheon, 1996).

Movement therapists work on the low muscle tone that is the main obstacle to both movement and speech in Down children. Equally important, a good local preschool 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 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.

Children and adults with mental disabilities 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,” “fully cooperating members of society over a complete life.”<sup>6</sup> 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 lecture I shall argue that the failure to deal adequately with the needs of people with mental disabilities is a serious flaw in modern theories that conceive of justice as the outcome of a social contract. This flaw goes deep, affecting such theories’ adequacy as accounts of human justice more generally.<sup>7</sup> 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 dis-

<sup>6</sup> John Locke is the source for the first phrase, Rawls for the second: see discussion below, section 2.

<sup>7</sup> 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.



abilities. The capabilities approach, I shall argue, does better. Because it starts from a conception of the person as a social animal, whose dignity does not derive from an idealized rationality, it can offer a more adequate conception of the full and equal citizenship of the mentally disabled and of those who care for them.

Disability raises two distinct problems of social justice, 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, Sessa 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 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.<sup>8</sup> As the life span increases, the relative independence that many of us enjoy looks more and more like a temporary condition, a phase of life that we move into gradually and that 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.<sup>9</sup>

<sup>8</sup> According to the U.S. 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).

<sup>9</sup> This is a major theme in recent feminist work: see especially 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); Harrington, *Care and Equality*. 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); and 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, Colo.: Westview Press, 1995).

2. 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 contract 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 of the Veil of Ignorance: people do not know their race, their family wealth, their class, their place in society, their sex.

In both versions of the contract, the idea of the approximate 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 he calls “the normal conditions under which human cooperation is possible and necessary” (*TJ*, p. 126). 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, he says, are required by the very idea of a contract for mutual advantage.<sup>10</sup> Rawls never ceases to endorse Hume's constraint, despite his

<sup>10</sup> *TJ*, pp. 126–30. 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.

Kantian focus on fair conditions. Linking Hume's idea to the contract tradition, he states that this rough equality is his own analogue for the idea of the State of Nature in classic contractarian theories (*TJ*, p. 12).

This assumption of equality has implications for the treatment of people with disabilities. For Gauthier, people of unusual disability are "not party to the moral relationships grounded by a contractarian theory."<sup>11</sup> Similarly, the citizens in Rawls's Well-Ordered Society are conceived as "fully cooperating members of society over a complete life."<sup>12</sup>

It would appear that this emphasis is built deeply into the logic of the contract situation: for the idea is that people will get together with others and contract for principles of justice only in certain circumstances in which they can expect mutual benefit and in which all stand to gain from the cooperation. To include in the initial situation people who are unusually expensive, or who can be expected to contribute less than others to the well-being of the group, would go contrary to the logic of the whole exercise. If people are making a bargain for mutual advantage, they will want to get together with those from cooperation with whom 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.<sup>13</sup>

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 from now on 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 nonmorality, but starts

<sup>11</sup> 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.

<sup>12</sup> In the subsequent discussion I shall refer to the following works of Rawls: *A Theory of Justice*; *Political Liberalism*; the Dewey Lectures, "Kantian Constructivism in Moral Theory," *Journal of Philosophy* 77 (1980): 515–71 (hereafter DL). References to citizens as "fully cooperating" occur frequently in DL and PL (for example, DL, p. 546, PL, p. 183).

<sup>13</sup> Gauthier, *Morals by Agreement*, p. 18, n. 30; see the epigraph above.

from a very attractive model of the moral point of view: people bargain for advantage, but only within constraints of fairness. 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” (p. 587). 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*, pp. 49–52). Unlike Gauthier, who attempts to derive reciprocity from prudential rationality, Rawls explicitly denies that he does any such thing (*PL*, p. 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.<sup>14</sup> These features of Rawls’s conception make it richer, I believe, than contractualist conceptions that do attempt to squeeze the moral out of the nonmoral, 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 keep in mind, however, the fact 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,” as I have said, and connects this account to the idea of the State of Nature and of a bargain for mutual advantage. Even though the bargain is going to be struck from a morally rich viewpoint, and even though the parties are unable to bargain *in the usual sense*, the exercise remains a deal, and it is supposed to give the parties

<sup>14</sup> 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.

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 mental 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 nonhuman 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 also, at the very same time, as 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 nonhuman 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 ra-

tional/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 who 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.<sup>15</sup> 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 is just 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.<sup>16</sup> 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

<sup>15</sup> See John Rawls, *Lectures on the History of Ethics*, ed. Barbara Herman (Cambridge, Mass.: Harvard University Press, 2000), esp. pp. 253–90.

<sup>16</sup> 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.

the moral and rational functions, just as much as the other animal functions. Fourth, it makes us think of the core of ourselves as atemporal. Thinking in this way, we may forget that the usual human life-cycle brings with it periods of extreme dependency, in which our functioning is very similar to that enjoyed by people with mental or physical disabilities 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 nonhuman 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 nonhuman animals, citing as his reason the fact that they are not capable of reciprocity (*TJ*, pp. 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*, p. 512). (I shall return to these remarks in Lecture III.) 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.<sup>17</sup> But the parties are imagined throughout as competent rational contracting adults, roughly similar in need, and capable of a “normal” level of social cooperation and productivity. Influenced on the one hand by his Humean/contractarian starting point, on the other by his Kantian conception of the person, he repeatedly characterizes the parties as

<sup>17</sup> For a good treatment of need in Kant’s ethical thought, see Allen Wood, *Kant’s Ethical Theory* (Cambridge: Cambridge University Press, 1999). Rawls, however, goes beyond Kant in the way he incorporates need. 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.



rough equals, all possessing a requisite “normal” degree of moral sensibility and prudential rationality. Thus, he repeatedly refers to citizens as “fully cooperating members of society over a complete life” (*PL*, pp. 20, 183, et saepe). And he stipulates 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*, p. 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. His account of the primary goods to be distributed by society is framed as an account of the needs of citizens who are characterized by moral and prudential rationality and by the capacity to be “fully cooperating.” Thus it has no place for the needs of many real people for care in times of asymmetrical dependency. Care, as Eva Kittay has well observed, does not figure on the list of primary goods.<sup>18</sup>

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

<sup>18</sup> 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, Colo.: Westview, 1997], pp. 219–66), there are five places in Rawls’s theory 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*, p. 32) fails to make a place for any freedom that might be enjoyed by someone who is not independent in that sense.

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, p. 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, p. 20)

Shortly after this passage, Rawls 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” (p. 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” (p. 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” (p. 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.<sup>19</sup> 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 my primary 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. 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 people who are 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

<sup>19</sup> 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.

social arrangements. People in wheelchairs can get around just fine, and do their work, so long as buildings have ramps, buses 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.<sup>20</sup> But it is actually quite important for Rawls, fundamental to his entire argument for the Difference Principle, to be able to speak of both social productivity and the well-being of individuals in simple economic terms.

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.<sup>21</sup>

<sup>20</sup> See Sen, "Equality of What?" in Sen, *Choice, Welfare, and Measurement* (Oxford: Basil Blackwell, 1982), pp. 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), pp. 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. chapters 1, 3, and 5.

<sup>21</sup> See *TJ*, pp. 440–46.

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 gays and lesbians in the United States are, or at least have been, in this position. So Rawls has already suggested an analysis of relative social positions that is complex and multivalued, 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 multivalued 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 people who are blind and deaf and wheelchair users is that their abilities are typically 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 buses, 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. Such expenditures, in general, greatly outweigh the return in economic productivity made possible by the full inclusion of people with disabilities, because they involve redesigning facilities for all, for the sake of the needs of a very small number of people. Thus, as Gauthier makes explicit, these arrangements are not mutually advantageous in the economic sense.

(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 major life functions. (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."<sup>22</sup>

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 manner that is unfair to any individual. On the other hand, the account of how the contract initially gets going is still a classic contractarian account, with Hume's starting point taking the place of the State of Nature; 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 nonhuman 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*, p. 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" (p. 21). I am agreeing with Rawls's second suggestion—these are unsolved problems of *justice*—and it is my hope that the analysis here will

<sup>22</sup> Gauthier, *Morals by Agreement*, p. 18 and n. 30.

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 a Kantian like Rawls 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*.<sup>23</sup> 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.

As we have seen, Rawls takes over from the contractarian tradition its idea of a contract for mutual advantage and the related Humean idea<sup>24</sup> of the circumstances within which justice 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 metaphor

<sup>23</sup> E.g., *PL*, p. 208.

<sup>24</sup> 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.



of a contract for mutual advantage at all. Rawls moves away from contractarian doctrines at many points; but in the essential structure of the position he sticks with classical social contract doctrine, and he is correct in concluding that this commitment makes it impossible for him to handle the problem posed by people with disabilities as a problem of basic justice.

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 interests in pursuing their conceptions of the good.<sup>25</sup> 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 necessarily including the happiness of others. Any such commitment is a variable feature of particular conceptions of the good. In the Original Position, at any rate, ends are not seen as shared ends, whose fulfillment demands the inclusion and happiness of others. 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 are aware of pursuing as a good for themselves, it seems that Rawls is just right in thinking that that these interests cannot be

<sup>25</sup> 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.

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, as I have said, 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.<sup>26</sup> 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 clearly insists on handling at the legislative stage, after basic principles have already been designed? Surely such temporary disabilities are a paradigm of what insurance can cover.

There are 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 relative 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,

<sup>26</sup> Epstein, *Forbidden Grounds: The Case against Employment Discrimination Laws* (Cambridge, Mass.: Harvard University Press, 1992), p. 481.

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, and the argument for the Difference Principle will have to be completely reformulated. So, although Rawls 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.<sup>27</sup>

A second problem with 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

<sup>27</sup> This is my reading of the cryptic discussion of Sen at *PL*, pp. 183ff.

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; for the reasons given by Sen, income and wealth are not good proxies for these goods. More generally, care for children, the elderly, and people with mental and physical disabilities 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.<sup>28</sup>

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 nonpregnant 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

<sup>28</sup> 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 wheelchair 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 must be made to address these concerns.

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, multivalued 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 people with mental disabilities. 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 people with physical disabilities, 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.<sup>29</sup> For Sessa, not even this limited chance of a "return" for the expense of caring for her will ever be possible.

At this point, we need to dig in and question the very idea of society as a deal for mutual advantage. We should insist that this is not a complete account of social cooperation. This is not the right way to look at the question of social inclusion. Now obviously there are limits to any program of social benefit. At the margin, 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 Sessa, and seeks both to educate children with disabilities and to support their development with appropriate care, should not be seen in terms of

<sup>29</sup> See Bérubé, *Life As We Know It*, for a detailed account of these expenses.

mutual (economic) advantage. 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”<sup>30</sup>—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 stand. It includes 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 people with mental disabilities 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 adequate 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 mutual-advantage contractarian biases the whole idea of the benefits of social cooperation.

In the case of the physically disabled there was, we said, a pull in the other direction in Rawls’s theory, in the form of his Kantian doctrine of reciprocity, which suggests equal respect for all citizens. Where the mentally disabled are concerned, however, this very doctrine of reciprocity is the source of yet further difficulties. For the doctrine is articulated through a Kantian conception of the person, which makes possession of the mental and moral powers central both to citizenship and to reciprocity. Just as Kant and Rawls deny that reciprocity and relations of justice hold between humans and nonhuman 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 dis-

<sup>30</sup> John Stuart Mill, *The Subjection of Women*, chapter 4.

abled. But if we consider the lives of people with mental disabilities 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.

Probably none of this would count as reciprocity in Rawls's Kantian sense. Jamie may lack the capacity for forming a life plan and an overall conception of the good. Sesha clearly does not have the two moral powers. Moreover, because these 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*, p. 32).<sup>31</sup>

Thus people with mental disabilities 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 nonhuman 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 disabilities, and by nonhuman 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

<sup>31</sup> See Kittay, above n. 28.

only one part of morality: we will need a different account to cope with the facts of extreme dependency.<sup>32</sup>

Scanlon's own hypothetical contract situation does not employ 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 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 his 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,<sup>33</sup> 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 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 people with mental and physical disabilities, 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, letting the parties know that they have such relations of trusteeship may require

<sup>32</sup> Scanlon, *What We Owe to Each Other* (Cambridge, Mass.: 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.

<sup>33</sup> 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.



allowing them to know aspects of their conception of the good that Rawls has placed under the Veil of Ignorance, thus complicating the whole exercise in a way that Rawls would not want. In terms of their shared interest in mutual advantage, at any rate, it is not evident that the contracting parties, as described in the theory, ought to care about these nonproductive 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.<sup>34</sup>

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, and makes no claims to completeness, 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.<sup>35</sup> We are designing the basic structure of society, which Rawls defines as those institutions that influence all

<sup>34</sup> *Morals by Agreement*, p. 18, n. 30.

<sup>35</sup> See, for example, *TJ*, p. 135, where finality is a formal condition on political principles, and pp. 175–78, 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” (p. 176). Rawls’s opposition to intuitionism focuses on this issue: see, for example, *TJ*, pp. 35–36.

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 nonhuman 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.<sup>36</sup> 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.

<sup>36</sup> Kittay, *Love's Labor*, pp. 102–3.

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 both from 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 nonproductivity, 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 short-sighted, 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.<sup>37</sup> 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 people with mental disabilities 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.

### 3. THE CAPABILITIES APPROACH: A NONCONTRACTARIAN ACCOUNT OF CARE

We now turn to the capabilities approach, as I have articulated it in *Women and Human Development*. 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 minimal necessary conditions for a just society, in the form of a set of non-negotiable entitlements of all citizens. I argue that 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.

<sup>37</sup> See my discussion of this point in *Women and Human Development* (hereafter *WHD*), chapter 1, and in “The Future of Feminist Liberalism.”

*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.<sup>38</sup> 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.<sup>39</sup> 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 are 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 shares 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

<sup>38</sup> See *WHD*, chapter 2.

<sup>39</sup> See my *Upbeavals of Thought: The Intelligence of Emotions* (Cambridge: Cambridge University Press, 2001), chapters 6–8.

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 being whole in an existence 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 aspect 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 infuses 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. The specifically human kind is indeed characterized, usually, 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 fundamental and pervasive. And bodily need, including the need for care, 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 (such as those that are central for Rawls), but also relations of more or less extreme asymmetry; 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 on 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 involve 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 make the role of care in a conception of justice as fundamental as it ought to be. First, we 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 would argue that care is not a single thing, and therefore that it should not be introduced as a single separate extra capability in addition to the others.<sup>40</sup> 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 children and adults with mental disabilities 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 mere 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

<sup>40</sup> See the appendix for the current version of the capabilities list.

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 just 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 functioning may not always be possible, in order to stress that people with mental disabilities 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 who flourishes in its own way. Some abilities are developed, others are not; the life doesn't fully fit together without special support and good luck. Including people with mental disabilities 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. Not a single extra thing, then, but a way of thinking about all the items on the list.

#### 4. PUBLIC POLICY: EDUCATION AND INCLUSION

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

All modern societies have had gross inequities in their treatment of children with unusual mental disabilities. More, even, than people with many physical disabilities, children with mental impairments 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 syndrome who were denied admission to a zoo so as not to upset the chimpanzee.<sup>41</sup>

<sup>41</sup> Leslie Francis and Anita Silvers, eds., *Americans with Disabilities* (New York: Routledge, 2000), "Introduction," p. xix.



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 John Watson, diagnosed with mental retardation, 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*,<sup>42</sup> a federal district court issued a consent decree compelling Pennsylvania public schools to provide “free appropriate education” to mentally disabled 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.<sup>43</sup> 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 children with mental disabilities who challenged their exclusions from the District of Columbia 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. 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.<sup>44</sup> It 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

<sup>42</sup> 343 F. Supp. 279 (1972).

<sup>43</sup> 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.

<sup>44</sup> 348 F. Supp. 866 (D.D.C. 1972). Technically, because of the legally anomalous situation of the District of Columbia, the court 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.”

child than on the normal child.” Significantly, the court cited *Goldberg v. Kelly*,<sup>45</sup> 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

[f]rom 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.”<sup>46</sup>

Justice Brennan argues that 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 disabled<sup>47</sup> children enforceable rights to free suitable public education and making funds available to the states to help them meet their constitutional obligation.<sup>48</sup> 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. 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

<sup>45</sup> 397 U.S. 254 (1969).

<sup>46</sup> *Ibid.*, pp. 264–65.

<sup>47</sup> Today the terms “impairment” and “disability” are typically used to describe the pre-social condition of such children, so to speak; the term “handicap” is used to describe their socially disadvantaged situation.

<sup>48</sup> 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.

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 children with disabilities in the “least restrictive environment” appropriate to meet their needs. It thus urges “mainstreaming.” This practice can be defended both on grounds of the benefit 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 large difference here. If we are to include people with mental disabilities, 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.

#### APPENDIX: THE CENTRAL HUMAN CAPABILITIES

**1. Life.** Being able to live to the end of a human life of normal length; not dying prematurely, or before one’s life is so reduced as to be not worth living.

2. **Bodily Health.** Being able to have good health, including reproductive health; to be adequately nourished; to have adequate shelter.

3. **Bodily Integrity.** Being able to move freely from place to place; to be secure against violent assault, including sexual assault and domestic violence; having opportunities for sexual satisfaction and for choice in matters of reproduction.

4. **Senses, Imagination, and Thought.** Being able to use the senses, to imagine, think, and reason—and to do these things in a “truly human” way, a way informed and cultivated by an adequate education, including, but by no means limited to, literacy and basic mathematical and scientific training. Being able to use imagination and thought in connection with experiencing and producing works and events of one’s own choice: religious, literary, musical, and so forth. Being able to use one’s mind in ways protected by guarantees of freedom of expression with respect to both political and artistic speech and freedom of religious exercise. Being able to have pleasurable experiences and to avoid nonbeneficial pain.

5. **Emotions.** Being able to have attachments to things and people outside ourselves; to love those who love and care for us, to grieve at their absence; in general, to love, to grieve, to experience longing, gratitude, and justified anger. Not having one’s emotional development blighted by fear and anxiety. (Supporting this capability means supporting forms of human association that can be shown to be crucial in their development.)

6. **Practical Reason.** Being able to form a conception of the good and to engage in critical reflection about the planning of one’s life. (This entails protection for the liberty of conscience and religious observance.)

### 7. **Affiliation**

A. Being able to live with and toward others, to recognize and show concern for other human beings, to engage in various forms of social interaction; to be able to imagine the situation of another. (Protecting this capability means protecting institutions that constitute and nourish such forms of affiliation, and also protecting the freedom of assembly and political speech.)

**B.** Having the social bases of self-respect and nonhumiliation; being able to be treated as a dignified being whose worth is equal to that of others. This entails provisions of nondiscrimination on the basis of race, sex, sexual orientation, ethnicity, caste, religion, national origin.

**8. Other Species.** Being able to live with concern for and in relation to animals, plants, and the world of nature.

**9. Play.** Being able to laugh, to play, to enjoy recreational activities.

#### **10. Control over One's Environment**

**A. Political.** Being able to participate effectively in political choices that govern one's life; having the right of political participation, protections of free speech and association.

**B. Material.** Being able to hold property (both land and movable goods), and having property rights on an equal basis with others; having the right to seek employment on an equal basis with others; having the freedom from unwarranted search and seizure. In work, being able to work as a human being, exercising practical reason and entering into meaningful relationships of mutual recognition with other workers.

## II. BEYOND NATIONAL BOUNDARIES: CAPABILITIES AND GLOBAL JUSTICE

*But among the traits characteristic of the human being is an impelling desire for fellowship, that is for common life, not of just any kind, but a peaceful life, and organized according to the measure of his intelligence, with those who are of his kind.... Stated as a universal truth, therefore, the assertion that every animal is impelled by nature to seek only its own good cannot be conceded.*

HUGO GROTIUS, *On the Law of War and Peace*

*Global inequalities in income increased in the 20th century by orders of magnitude out of proportion to anything experienced before. The distance between the incomes of the richest and poorest country was about 3 to 1 in 1820, 35 to 1 in 1950, 44 to 1 in 1973 and 72 to 1 in 1992.*

*Human Development Report 2000,*

UNITED NATIONS DEVELOPMENT PROGRAMME

*What was at issue, then, . . . is a matter of ideas, and conceptions of the role of the government that derive from those ideas.*

JOSEPH STIGLITZ, *Globalization and Its Discontents*

## I. A WORLD OF INEQUALITIES

A child born in Sweden today has a life expectancy at birth of 79.7 years. A child born in Sierra Leone has a life expectancy at birth of 38.9 years.<sup>1</sup> In the United States, Gross Domestic Product (GDP) per capita is \$34,142; in Sierra Leone, GDP per capita is \$490. Adult literacy rates in the top twenty nations are around 99 percent. In Sierra Leone, the literacy rate is 36 percent. In twenty-six nations, the adult literacy rate is under 50 percent.

The world contains inequalities that are morally alarming, and the gap between richer and poorer nations is widening. The chance of being born in one nation rather than another pervasively determines the life chances of every child who is born. Any theory of justice that proposes political principles defining basic human entitlements ought to be able to confront these inequalities and the challenge they pose, in a world in which the power of the global market and of multinational corporations has considerably eroded the power and autonomy of nations.

The dominant theory of justice in the Western tradition of political philosophy is the social contract theory, which sees principles of justice as the outcome of a contract people make, for mutual advantage, to leave the state of nature and govern themselves by law. Such theories have recently been influential in thinking about global justice, thanks especially to the influential work of John Rawls. In this lecture I shall examine that tradition, focusing on Rawls, its greatest modern exponent; I shall find it wanting. Despite their great strengths in thinking about justice, contractarian theories have some structural defects that make them yield very imperfect results when we apply them to the world stage. I shall argue that much more promising results are given by a version of what Amartya Sen and I have called the capabilities ap-

<sup>1</sup> All data in this paragraph are from *Human Development Report 2002* (New York: Oxford University Press, 2001), pp. 141–44. Data are from 2000. Australia overall ranks number 5 in the weighted Human Development Index, behind Norway, Sweden, Canada, and Belgium. It is fifth in life expectancy, behind Japan at 81.0 years, Sweden with 79.7 years, Hong Kong with 79.5 years, and Iceland with 79.2 years, and tied with Switzerland. Sierra Leone ranks last overall among the 173 countries in the Human Development Index.

proach—an approach that, in my version (rather different here from Sen’s), suggests a set of basic human entitlements, similar to human rights, as a minimum of what justice requires for all.

I shall ultimately be arguing that something like my version of the capabilities approach provides us with a promising way of thinking about the goals of development in this increasingly interdependent and interconnected world. Before we reach the positive proposal, however, we must first confront the best attempts made by contractarians to confront the issue of global justice. I shall first describe the two different strategies used by contractarians to address the problems of justice between nations: the strategy of what I shall call the *two-stage bargain* and the strategy of what I shall call the *global bargain*. Taking John Rawls’s *The Law of Peoples* as a best case of the former strategy, I shall argue that this approach cannot provide an adequate account of global justice. The strategy of the *global bargain* looks more promising; but it cannot defend redistribution from richer to poorer nations without departing in major ways from the contractarian approach.

Although my arguments in this lecture are directed against contractarian approaches to global justice, I choose these approaches because they are stronger than some others we have—stronger, in particular, than models of global development based on contemporary economic Utilitarianism. The “human development approach” that I favor can make an alliance with contractarians, up to a point, against that crude approach. It is this subtle debate between two worthy opponents that concerns me here. And my main contention will be that we cannot solve the problem of global justice by envisaging international cooperation as a contract for mutual advantage among parties similarly placed in a state of nature. We can solve them only by thinking of what all human beings require to live a richly human life—a set of basic entitlements for all people—and by developing conception of the purpose of social cooperation that focuses on fellowship as well as self-interest. Contractarian ways of thinking, especially the idea that we ought to expect to profit from cooperation with others, have untold influence on public debate. My aim is to supply something both new and old, resurrecting the richer ideas of human fellowship that we find in Grotius and other exponents of the natural law tradition.

Before we begin, we need to have before us very clearly three salient features of social contract conceptions on which John Rawls, the most influential modern exponent of that tradition, continues to rely

throughout his work—despite the fact that his hybrid theory mixes Kantian moral elements with the idea of a social contract. First, Rawls explicitly endorses the idea that the social contract is made between parties who are roughly equal in power and resources, so that no one can dominate the others. Tracing this idea to Hume’s account of the “Circumstances of Justice,” as well as to classical social contract doctrine, he insists that this rough equality of the parties is an essential element in his theory and is his own analogue to the idea of the State of Nature in classical social contract doctrine. Second, and closely connected, the contract is imagined as one made for mutual advantage, where advantage is defined in familiar economic terms, and income and wealth play a central role in indexing relative social positions. Although the Veil of Ignorance introduces moral constraints on the ways in which the parties achieve their own interest, the parties are still imagined as exiting from the State of Nature in the first place because it is in their interest to do so. Thus, while the Veil sharply limits the role played by interest once they enter the Original Position, interest continues to play a large part in determining who is in and who is out at the initial stage: namely, they bargain with rough equals in power and resources, because a contract for mutual advantage makes sense only between rough equals, none of whom can dominate the others. Despite his Kantianism, Rawls remains a contractarian in these two crucial respects. Finally, contract theories take the nation-state as their basic unit, conceiving of their contracting parties as choosing principles for such a state. This focus is dictated by their starting point: they imagine people choosing to depart from the State of Nature only when they have found principles by which to live a cooperative life together. This starting point is a grave limitation, as we shall see.

## 2. *A Theory of Justice: THE TWO-STAGE BARGAIN INTRODUCED*

The precontractarian “natural law” tradition held that relations between states, like the rest of the world of human affairs, are regulated by “natural law,” that is, binding moral laws that supply normative constraints on states, whether or not these dictates are incorporated into any system of positive law. The social contract tradition, by contrast, understood the situation that exists between states as a State of Nature and imagined principles of justice being contracted as if between virtual



persons. The clearest example of this two-stage approach, and the most significant for Rawls, is Kant, who writes in *The Metaphysics of Morals* that a state is like a household situated alongside others. Under the Law of Nations, he continues, a state is “a moral Person living with and in opposition to another state in a condition of natural freedom, which itself is a condition of continual war.” States ought to “abandon the state of nature and enter, with all others, a juridical state of affairs, that is, a state of distributive legal justice” (p. 307). The social contract, then, is applied in the first instance to persons, enjoining that they leave the State of Nature and enter a state. It is then applied a second time over to states,<sup>2</sup> enjoining that they enter some kind of juridical state of affairs.<sup>3</sup>

In *A Theory of Justice*, Rawls continues this Kantian approach. He assumes that the principles of justice applying to each society have already been fixed: each has a “basic structure” whose form is determined by those principles (p. 377). The “basic structure” of a society is defined as “the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation” (p. 7). It is said to be equivalent to those structures that have effects that are “profound and present from the start,” affecting “men’s initial chances in life” (p. 7).

We now imagine a second-stage original position, whose parties are “representatives of different nations who must choose together the fundamental principles to adjudicate conflicting claims among states” (p. 378). They know that they represent nations “each living under the normal circumstances of human life,” but they know nothing about the particular circumstances of their own nation, its “power and strength in comparison with other nations.” They are allowed “only enough knowledge to make a rational choice to protect their interests but not so much that the more fortunate among them can take advantage of their special

<sup>2</sup> Kant says, rightly, that “Law of Nations” is a misnomer: it ought to be “Law of States” (in his Latin, *ius publicum civitatum*).

<sup>3</sup> See also “Idea for a Universal History,” where Kant speaks of the “barbarous freedom of established states” (p. 49); “Theory and Practice,” where he speaks of a “state of international right, based upon enforceable public laws to which each state must submit (by analogy with a state of civil or political right among individual men)” (p. 92); “Perpetual Peace,” where he speaks of the “lawless condition of pure warfare” between states and continues: “Just like individual men, they must renounce their savage and lawless freedom, adapt themselves to public coercive laws, . . .” (p. 105). (All translations from these works are from *Kant: Political Writings*, ed. Hans Reiss, trans. H. B. Nisbet [Cambridge: Cambridge University Press, 1970]. Pages are given for that edition, since it does not include the Akademie pagination.)

situation.” This second-stage contract is designed to “nullif[y] the contingencies and biases of historical fate” (p. 378).

Rawls says little about the principles that would be chosen in this situation, but he indicates that they would include most of the familiar principles of the current law of nations: treaties must be kept; each nation has a right of self-determination and nonintervention; nations have a right to self-defense and to defensive alliances; just war is limited to war in self-defense; conduct in war is governed by the traditional norms of the law of war; the aim of war must always be a just and lasting peace (pp. 378–79).

Let us now consider the analogy between states and “moral persons.” One of its problems is that many nations of the world do not have governments that represent the interests of the people taken as a whole. Even when a nation has a government that is not a mere tyranny, large segments of the population may be completely excluded from governance. Thus Rawls’s device of representation is indeterminate. In such cases, if representatives represent the state and its basic structure, as Rawls strongly implies, they are likely by this very fact *not* to represent the interests of most of the people.

A second problem concerns the fixity of the domestic basic structure. Rawls seems to accord legitimacy to the status quo, even when it is not fully accountable to people. One of the things people themselves might actually want out of international relations is help overthrowing an unjust regime, or winning full inclusion in one that excludes them. There is no place for this in Rawls’s early scheme.

But the gravest problem with the analogy is its assumption of the self-sufficiency of states. In designing principles at the first stage, the society is assumed to be “a closed system isolated from other societies” (p. 8). (Thus it is no surprise that the relations between states are envisaged as occupying a very thin terrain, that of the traditional law of war and peace.) This is so far from being true of the world in which we live that it seems most unhelpful. Rawls’s structure has no room even for a supranational political/economic structure such as that of the European Union (EU), far less for the complex interdependencies that characterize the world as a whole.

The assumption of the fixity and finality of states makes the second-stage bargain assume a very thin and restricted form, precluding any serious consideration of economic redistribution from richer to poorer nations. Indeed, Rawls waves that problem away from the start by his

contractarian assumption of a rough equality between the parties: no one is supposed to be able to dominate the others. Of course, in our world, these conditions are not fulfilled: one probably can dominate all the others. At any rate, the G8 do effectively dominate all the others. To assume a rough equality between parties is to assume something so grossly false of the world as to make the resulting theory unable to address the world's most urgent problems.

Notice, too, that starting from the assumption of the existence and finality of states, we do not get any interesting answer to the question why states might be thought to matter, why it might be important to make sure that national sovereignty does not get fatally eroded by the power of economic globalization. Let us now see whether *The Law of Peoples* solves these problems. I believe that it makes a little progress on some, but none on others; and it introduces new problems of its own.

### 3. *The Law of Peoples:*

#### THE TWO-STAGE BARGAIN REAFFIRMED AND MODIFIED

*The Law of Peoples* "is an extension of a liberal conception of justice for a domestic regime to a Society of Peoples" (*LP*, p. 9). As in *TJ*, Rawls takes the domestic principles and policies of liberal societies as fixed, including their economic policies, and simply inquires into their foreign policies. At the same time, however, Rawls devotes some attention to real-world problems, if only to reassure the reader that these problems can be solved through a structure that fixes the domestic basic structure first and then addresses, at a second stage, problems between nations. Thus he mentions immigration, only to reassure us that the need for immigration would "disappear" (*LP*, p. 9) if all nations had an internally decent political structure. Among the causes of immigration he mentions religious and ethnic persecution, political oppression, famine (which he holds to be preventable by domestic policies alone), and population pressure (which, again, he holds to be controllable by changes in domestic policy). In "the Society of liberal and decent Peoples" these causes would not exist. Absent from his list, however, is one of the greatest causes of immigration, economic inequality—along with malnutrition, ill health, and lack of education, which so often accompany poverty.

Similarly, discussing the "burdened peoples," who on account of their poverty will not be part of the Society of Peoples, he justifies not

discussing economic inequality between nations by insisting that extreme poverty can be eradicated by reasonable domestic policies: the main causes of wealth are, he says, the political culture of a people, their religious and ethical traditions, and their talents and “industriousness.” Such an analysis ignores the fact that the international economic system creates severe, disproportionate burdens for poorer nations, who cannot solve their problems by wise internal policies alone. Clearly in the domestic case Rawls would not consider it sufficient to point out that poor families can get by on thrift and virtue. Even to the extent that this may be true, it does not dispose of the question of justice.

Let us now investigate Rawls’s central argument. As in *TJ*, the device of the Original Position is applied in two stages: first domestically within each liberal society, and then between those societies. A major new feature of the book, however, is that Rawls also holds that a decent Society of Peoples includes as members in good standing certain nonliberal peoples, who have “decent hierarchical societies.” But of course these societies, being nonliberal, do not apply the Original Position domestically. They have other ways of establishing their political principles (*LP*, p. 70). So there are three applications of the Original Position device: domestically by liberal peoples, then internationally by liberal peoples, then, in a further step, internationally by the nonliberal peoples who decide to sign on to the Society of Peoples.

As in *TJ*, the traditional concerns of foreign policy are the focus of both second-stage bargains, and a stable peace is at the core of their aspiration. Thus, among the eight principles of the Law of Peoples, six deal with familiar topics of international law, such as independence and self-determination, nonaggression, the binding force of treaties, nonintervention, the right of self-defense, and restrictions on the conduct of war. But Rawls expands his account to include agreement on some essential human rights and a duty to assist other peoples living under unfavorable conditions.

Once again, Rawls treats the domestic principles of justice as fixed and not up for grabs in the second-stage bargain. For none of these states, then, will the second-stage bargain call into question anything about their assignment of liberties and opportunities, or, importantly, about their domestic economic arrangements.

On some vexing issues left over from *TJ*, however, the new work makes progress. Recall that the analogy between states and persons suggested that states somehow represent the interests of the people within

them; but this, we said, is not true of many nations in the world. Rawls now officially recognizes this fact and gives it structural importance. The second-stage Original Position includes only states that respect human rights and have either a liberal-democratic constitution or a “decent hierarchical” arrangement that includes a “common good conception of justice” and a “decent consultation hierarchy.” On the outside of the Society of Peoples are “outlaw states,” which do not respect human rights, and “burdened societies,” which are defined as not only poor but also politically badly organized. Rawls holds that one important task of the Society of Peoples is to restrain the outlaw states. In this way, the argument has at least some bearing on the opportunities of people who are oppressed by these societies. All members, moreover, have duties to assist the burdened societies, which primarily means, for Rawls, helping them to develop stable democratic institutions, which he takes to be the main ingredient of their eventual prosperity. As I have already said, this is a limited understanding of what we owe other nations, but at least it is something.

The most important development beyond the approach of *TJ* lies in Rawls’s recognition of the transnational force of human rights. Membership in the Society of Peoples requires respect for a list of such rights, which constrain national sovereignty. The list is understood to be only a subgroup of those rights that liberal societies typically protect internally, “a special class of urgent rights, such as freedom from slavery and serfdom, liberty (but not equal liberty) of conscience, and security of ethnic groups from mass murder and genocide” (p. 79). Although this is a clear progress beyond *TJ*, it is important to notice how thin the list of rights is: it explicitly omits more than half the rights enumerated in the Universal Declaration. Moreover, the fixity of the basic structure entails that no international agreement in the area of human rights going beyond this thin menu will have the power to alter domestic institutions.

So: Rawls makes only a little progress toward a richer conception of international society. Insofar as he does make progress, we can now observe, this progress is made possible not by the contractual approach itself, but by some very dramatic departures from it, in the direction of an approach more like the one I shall favor, which defines a minimal conception of social justice in terms of the realization of certain positive outcomes, what people are actually able to do and to be. The criteria used to judge who is part of the bargain and who is not are ethical outcomes-oriented criteria: respect for human rights. Moreover, it appears that

Rawls has jettisoned the traditional Humean criterion of rough equality, in the sense of similar economic circumstances. For clearly enough, nations that uphold human rights are not rough equals at all. Rawls seems to imagine the bargain as taking place between the United States and the nations of Europe and Australasia, which might at least be claimed to be rough equals. But where do we place nations such as India, Bangladesh, and South Africa, liberal rights-respecting democracies that are grossly unequal to Australia and the others in basic economic advantage? The GDP per capita of the United States is \$34,142; that of Bangladesh \$1,602; that of India \$2,358; that of South Africa \$9,401. So these nations are extremely far from being rough equals of the nations of the United States, Europe, and Australasia and also far from being rough equals of one another.

The upshot is as follows. Either Rawls will have to admit that the principles and circumstances that bring societies together to form the second-stage bargain are very different from the Humean “circumstances of justice,” with their focus on rough equality and mutual advantage, or he will stand firm on those conditions. If he departs from Hume, relaxing the condition of rough equality and the associated understanding of the motivation of the parties (they can all expect to gain from cooperation), then he can include all the nations I have mentioned, with their staggering inequalities. But in that case he will have to offer a new account of why they cooperate together, since the bargain can no longer be seen as one for mutual advantage. Peace, of course, is in the interests of all human beings, but, as with the “outlaw states,” peace can be promoted externally, so to speak, and need not be promoted by including the poor democracies in the bargain itself. So we must have a richer account of the purposes they pursue together. If, however, Rawls stands firm with Hume, then he ought to say that India, Bangladesh, and South Africa do not belong in the second-stage bargain, much though his other criteria tell in favor of their inclusion. They are just too poor for the richer nations to gain anything from treating them as rough equals.<sup>4</sup> Rawls has not thought this through; his unclarity at this point makes *LP* an unsatisfactory work.

<sup>4</sup> See Joseph Stiglitz, *Globalization and Its Discontents* (New York: W. W. Norton, 2002), who describes a notorious photograph in which a French representative of the International Monetary Fund (IMF) stands over a seated Indonesian leader, arms crossed, in a posture of high colonial condescension, delivering the wisdom of the rich nations and their agencies.

One more aspect of its inadequacy remains to be noted. As we have said, Rawls's Society of Peoples admits "decent hierarchical societies," justifying this move by appeal to a principle of toleration that makes a highly questionable use of the state-person analogy. Rawls argues as follows:

Surely tyrannical and dictatorial regimes cannot be accepted as members in good standing of a reasonable society of peoples. But equally not all regimes can reasonably be required to be liberal, otherwise the law of peoples itself would not express liberalism's own principle of toleration for other reasonable ways of ordering society nor further its attempt to find a shared basis of agreement among reasonable peoples. Just as a citizen in a liberal society must respect other persons' comprehensive religious, philosophical, and moral doctrines provided they are pursued in accordance with a reasonable political conception of justice, so a liberal society must respect other societies organized by comprehensive doctrines, provided their political and social institutions meet certain conditions that lead the society to adhere to a reasonable law of peoples. (*LP*, 42–43)

In other words: just as Americans are required to respect the comprehensive doctrines of believing Roman Catholics, and Buddhists, and Muslims, provided they respect the reasonable political conception of justice defended in *PL*, so too a liberal society is required to show respect both for other liberal societies and for decent hierarchical societies, provided that these societies adhere to the constraints and standards spelled out in the Law of Peoples. Toleration is said to require not only refraining from exercising military, economic, or diplomatic sanctions against a people, but also recognizing the nonliberal societies as equal members of the Society of Peoples.

Let us now examine this analogy. In fact, the case is both analogous and disanalogous. Inside a liberal society, there are many hierarchical conceptions of the good. These conceptions will be respected as reasonable, provided that their adherents accept, as a constituent part within their comprehensive doctrine, the principles of justice that shape the basic structure of their society.<sup>5</sup> In other words, the religious conceptions must include Rawls's principles of justice, even if originally they did not do so. Comprehensive doctrines that promulgate teachings

<sup>5</sup> For this language, see *PL*, pp. 144–45: "the political conception is a module, an essential constituent part, that in different ways fits into and can be supported by various reasonable comprehensive doctrines that endure in the society regulated by it."

conflicting with those will not find their speech suppressed, except in the exceptional conditions that Rawls specifies in his doctrine of free political speech. Nonetheless, they will not be respected, in the sense of being regarded as members of society's constitutional structure; nor will their proposals be allowed to come forward for straightforward majority vote, since contradictory ideas will be entrenched in the nation's constitution.

In the transnational case, things are very different. The religious or traditional doctrine is tolerated, in the sense of being recognized as belonging to the community of peoples, whenever certain far weaker conditions obtain. There must still be respect for a small list of human rights. But it is clear that a people may win respect in the community of peoples even if property rights, voting rights, and religious freedom are unequally assigned to different actors within the society—men and women, for instance.<sup>6</sup> The requirements of political democracy, equal liberty, and universal suffrage<sup>7</sup> are replaced by the weaker requirement of a “reasonable consultation hierarchy.” Even free speech need not be accorded to all persons, so long as certain “associations and corporate bodies” allow them to express dissent in some way, and take their views seriously.

In the domestic case, Rawls's principle of toleration is a person-centered principle: it involves respecting persons and their conceptions of the good. In the transnational case, although Rawls depicts himself as applying the same principle, the principle is fundamentally different: it respects groups rather than persons and shows deficient respect for persons, allowing their entitlements to be dictated by the dominant group in their vicinity, whether they like that group or not. Rawls still focuses on persons to the extent of insisting on a small list of urgent human rights. But he allows groups to have a power in the national case that they do not have in the domestic theory.

Furthermore, in the domestic case, any concessions that are made to the group are made against the background of exit options: persons are free to depart from one religion and to join another, or to have no reli-

<sup>6</sup> See *LP*, p. 65, n. 2: “this liberty of conscience may not be as extensive nor as equal for all members of society: for instance, one religion may legally predominate in the state government, while other religions, though tolerated, may be denied the right to hold certain positions.”

<sup>7</sup> See *LP*, p. 71: “. . . all persons in a decent hierarchical society are not regarded as free and equal citizens, nor as separate individuals deserving equal representation (according to the maxim: one citizen, one vote). . . .”



gion at all. Rawls knows well that the basic structure of a nation offers no, or few,<sup>8</sup> exit options; this is why he thinks it is so important that the institutions that form part of the basic structure should be just. The basic structure shapes people's life chances pervasively and from the start. And yet in the transnational case, Rawls has lost sight of this insight, allowing a local tradition to shape people's life chances pervasively, in ways that depart from principles of justice, even though there are no exit options for those who do not endorse that doctrine.

I conclude that Rawls's analogy is deeply flawed. So far as his argument goes, at least, there seems to be no moral obstacle to justifying a single far more expansive set of human rights, or human capabilities, as fundamental norms for all persons.

Rawls clearly thinks that if we conclude that another nation has defective norms we will intervene, whether militarily or through economic and political sanctions. But that need not be the case. For we may, and I believe must, separate the question of justification from the question of implementation. We may justify a set of benchmarks of justice for all the world's societies, in public debate, and yet hold that we are not entitled to use military force or even, perhaps, economic sanctions to impose these standards on a state, except in very exceptional circumstances, so long as that state meets some minimal conditions of legitimacy. The rationale for this deference to the nation is both prudential and moral. Its moral part, well expressed by Grotius, is the idea that national sovereignty is a key expression of human autonomy. When people join together to give laws to themselves, this is a human act that ought to be respected, even if the decision that is reached is one that is not fully justified from the moral point of view.

#### 4. THE GLOBAL BARGAIN: BEITZ AND POGGE

A far more appealing use of a contractarian approach is made by Charles Beitz and Thomas Pogge.<sup>9</sup> For both of them, the right way to use Rawlsian insights in crafting a theory of global justice is to think of the Original Position as applied directly to the world as a whole. The insight

<sup>8</sup> None in his formulation, since the society is assumed to be closed.

<sup>9</sup> Charles Beitz, *Political Theory and International Relations* (Princeton: Princeton University Press, 1979); Thomas Pogge, *Realizing Rawls* (Ithaca: Cornell University Press, 1989) (hereafter *RR*).

guiding this strategy is that national origin is rather like class background, parental wealth, race, and sex: namely, a contingent fact about a person that should not be permitted to deform a person's life.<sup>10</sup> Pogge and Beitz argue convincingly that the only way to be sufficiently respectful of the individual as subject of justice, within a Rawlsian framework, is to imagine that the whole global system is up for grabs, and that the parties are bargaining as individuals for a just global structure. Both argue, in different ways, that the resulting structure will be one that optimizes the position of the least well off. Pogge's view (which he calls "only illustrative speculation")<sup>11</sup> envisages an initial global agreement on a list of human rights, which, over time, becomes more robust, including a system of global economic constraints. The list of human rights is considerably thicker than that defended by Rawls: it includes the entirety of the Universal Declaration, plus an effective right to emigrate.<sup>12</sup> Natural resources are also subject to redistribution.

The Pogge-Beitz proposal is a big improvement over the two-stage bargain. The global Veil of Ignorance is an insightful way of capturing the idea that a just global order will not be based on existing hierarchies of power, but will be fair to all human beings. One significant difficulty with these proposals is their vague and speculative nature. We are not told in detail exactly how the global bargain will work, what information the parties will and will not have. The world we live in exhibits changing configurations of power at the level of the basic structure itself; even one hundred years ago it would have been difficult to predict what those structures would be. The new structures (multinational corporations, for example) govern people's life chances pervasively and from the start. If the parties do not know their own era and its economic structures, they can hardly choose well. A related area of unfortunate vagueness concerns the role of the nation-state. Pogge and Beitz set out to question the finality and closed character of domestic state structures. But they do not tell us how far they really want to go. Are we standing back so far from current events that the very concept of the state will have to be reinvented and considered against other options for arranging people's lives? But it is hard to arrange human lives in a complete vacuum. How can we say whether the state is or is not a good structure,

<sup>10</sup> *RR*, p. 247.

<sup>11</sup> *Ibid.*, p. 273.

<sup>12</sup> *Ibid.*, p. 272.

without first assessing its relation to other aspects of life, such as trade, the flow of information, the presence of international agencies and agreements? Finally, we need know more about what primary goods the parties are imagined as pursuing. Pogge depicts himself as following Rawls closely, and yet he also thinks that his parties will agree on a long list of Human Rights and will recognize a material basis for liberty. How far does he really intend to depart from Rawls's idea?

These are all questions that might be answered, although an adequate response will probably require departures from the Rawlsian framework. At this point, however, we arrive at the most serious difficulty with the Pogge-Beitz proposal: what is the bargain all about? The Rawlsian social contract takes place in Humean circumstances of justice, and it is a bargain for mutual advantage. Pogge has focused on the requirement of fairness that is built into Rawls's Veil of Ignorance and simply omitted Rawls's endorsement of Humean circumstances of justice as the starting point for the bargain. As Rawls insists, the requirement of equality among the parties is his analogue to the State of Nature in classical social contract doctrine, so if that is omitted we have a major departure from the contract tradition.

We have already seen that when the bargain is envisaged as taking place among nations, it cannot be cast in this form unless we omit not only nonliberal states but also pretty much everyone except the G8. If we imagine the bargain as taking place among individual persons, things are indeed different: for the individual persons of the world are at least morally equal, and in some ways they—all those who are not disabled, that is!—might be argued to be roughly equal in basic economic productivity and life chances, before the contingencies of life begin to affect them. But when is that? Surely not at any time after birth, for every child is born into a world that begins to affect its life chances directly and dramatically, through differential nutrition, differential cognitive stimulation, differential exposure to kindness or violence, and so on. As we have seen, life expectancy at birth in the poorest nations is half what it is in Australia; this aggregate figure derives from all kinds of differences at the level of individual lives.

Are individuals equal in life chances before birth? Surely not. Whatever account we give of the fetus, we must say that by the time a human being is born, differences in maternal nutrition, health care, bodily integrity, and emotional well-being, not to mention HIV status, have

already affected its life chances. For that matter, even getting the chance to be born is not a matter with respect to which there is rough equality: the staggering rise in sex-selective abortion in many developing countries means that females conceived in some parts of the world are grossly unequal in life chances both to boys in that same part of the world and to girls and boys in other parts of the world.

Unfortunately, then, the inequalities between nations that make the two-stage bargain exclude some nations in order to conform to the Humean circumstances of justice are translated into inequalities between persons in basic life-chances. There is no time when a human or even a potential human is alive that such inequalities do not obtain.

Pogge and Beitz abhor such inequalities in basic life chances. To cope with them, providing a philosophical rationale for an ambitious commitment to global redistribution, is the whole point of their project. But what I am trying to bring out is that this commitment is not so easily reconciled with the Rawlsian framework, even in the improved non-Rawlsian way in which they use it. It is all very well to say that the Original Position should be applied at the global level; as I have said, that idea does dramatize some important issues of fairness. But once we go into things in more detail, we find that the global bargain they propose actually requires a departure of major proportions from the Rawlsian framework. For it requires abandoning the Humean circumstances of justice as setting the stage for the bargain and including from the start all who are currently unequal in power. Above all, it requires admitting from the start that the point of the bargain is not, and cannot be, mutual advantage among "rough equals." It must be human fellowship, and human respect, in a more expansive sense.

##### 5. SOCIAL COOPERATION: THE PRIORITY OF ENTITLEMENTS

Because we live in a world in which it is simply not true that cooperating with others on fair terms will be advantageous to all, we must boldly insist that this account of social cooperation, even in its moralized Kantian form, is not the one we need to guide us. We have and use ideas of cooperation that are much richer than this. These richer ideas already inhabit the precontractarian natural law tradition, as my epigraph from Grotius makes clear. With Grotius, we ought to think of ourselves as people who want to live with others. A central part of our own good,

the good of each and every one of us, is to produce, and live in, a world that is morally decent, a world in which all human beings have what they need to live a life with human dignity.

The capabilities approach is an outcome-oriented approach. It says that a world in which people have all the capabilities on the list is a minimally just and decent world. Domestically, it interprets the purpose of social cooperation as that of establishing principles and institutions that guarantee that all human beings have the capabilities on the list or can effectively claim them if they do not. It thus has a close relationship to institutional and constitutional design, and the capabilities on my list are understood as informal recommendations to nations that are making or amending their constitutions.

In the international case, how should the approach proceed? Some theories, such as Rawls, begin with the design of a fair procedure. My capabilities approach begins with outcomes: with a list of entitlements that have to be secured to citizens, if the society in question is a minimally just one. Especially in the current world, where institutions and their relations are constantly in flux, I believe it is wise to begin with human entitlements as our goal. We think what people are entitled to receive; and, even before we can say in detail who may have the duties, we conclude that there are such duties and that we have a collective obligation to make sure people get what they are due.

We think about human dignity and what it requires. My approach suggests that we ought to do this in an Aristotelian/Marxian way, thinking about the prerequisites for living a life that is fully human rather than subhuman, a life worthy of the dignity of the human being. We include in this idea the idea of the human being as a being with, in Marx's phrase, "rich human need," which includes the need to live cooperatively with others. We insist that a fundamental part of the good of each and every human being will be to cooperate together for the fulfillment of human needs and the realization of fully human lives. We now argue that this fully human life requires many things from the world: adequate nutrition, education of the faculties, protection of bodily integrity, liberty for speech and religious self-expression—and so forth. If this is so, then we all have entitlements based on justice to a minimum of each of these central goods. So far, things are very definite: the idea of what human beings need for fully human living is a vivid intuitive idea, realized in many human rights documents.

But if human beings have such entitlements, then we are all under a

collective obligation to provide the people of the world with what they need. Thus the first answer to the question “Who has the duties?” is that we all do. Humanity is under a collective obligation to find ways of living and cooperating together so that all human beings have decent lives. Now, after getting clear on that, we begin to think about how to bring that about. The focus on capabilities reminds us that we will need to make special efforts to address the unequal needs of those who begin from a position of social disadvantage. Moreover, a focus on capabilities, although closely allied with the human rights approach, adds an important clarification to the idea of human rights: for it informs us that our goal is not merely “negative liberty” or absence of interfering state action—one very common understanding of the notion of rights—but, instead, the full ability of people to be and to choose these very important things. Thus all capabilities have an economic aspect: even the freedom of speech requires education, adequate nutrition, and so forth.

Although the approach remains focused on the person as goal, and is committed to securing the basic goods of life for each, it is respectful of cultural difference in several ways: in the role carved out for nations in implementing and more concretely specifying the list; in the prominence, on this list, of the major liberties of speech and conscience; and in the idea that capability, not functioning, is the appropriate political goal—once an opportunity is given to people, they may choose what to do with it.

## 6. GLOBALIZING THE CAPABILITIES APPROACH: THE ROLE OF INSTITUTIONS

So far, the capabilities approach has announced some ambitious goals for the world and some general principles regarding pluralism and national sovereignty. Obviously, however, a great deal more remains to be said about precisely how the approach can be used to generate political principles for today’s world. To some extent, this job is a practical job, a job for economists, political scientists, diplomats, and policy-makers. Philosophy is good at normative reasoning and at laying out general structures of thought. In a rapidly changing world, however, any very concrete prescriptions for implementation need to be made in partnership with other disciplines.

To say this is not at all to say that philosophy is not urgently practi-

cal. Ideas shape the way policy-makers do their work. That is why, from its very inception, the capabilities approach contested the idea of development as economic growth and insisted on the idea of “human development.” That is why it seems crucial, now, to call into question the idea of mutual advantage as the goal of social cooperation. The capabilities approach is not remote and impractical, but urgently practical, when it urges us to rethink our ideas of social cooperation. For we can see that many short-sighted policies in development and international financial policy flow from such ideas.<sup>13</sup>

We can certainly go somewhat further than this, in speaking about realizing the capabilities in our world. We must, indeed, confront the question of how to allocate the duties of promoting the capabilities, in a world that contains nations, economic agreements and agencies, other international agreements and agencies, corporations, and individual people. To say that “we all” have the duties is all very well, and true. But it would be good if we could go further, saying something about the proper allocation of duties between individuals and institutions and among institutions of various kinds.

Institutions are made by people, and it is ultimately people who should be seen as having moral duties to promote human capabilities. Nonetheless, there are three reasons why we should think of the duties as assigned, derivatively, to institutional structures. First of all, there are *collective action problems*. Think of a nation. If we say that the citizens have duties to maintain the system of property rights, the tax structure, the system of criminal justice, and so forth, we are in one sense saying something true and important. There are no living beings in the state other than its people; there is no magical superperson who will shoulder the work. Nonetheless, if each person tried to choose individually, massive confusion would ensue. It is far better to create a decent institutional structure and then to regard individuals as delegating their ethical responsibility to that structure. Much the same is true in the international sphere.

Second, there are issues of *fairness*. If I care a lot about the poor in my country, and give a lot of my personal money to support their needs, I am thus impoverishing myself and my family, relative to those who begin in the same place but who do nothing for the poor. Any system of voluntary philanthropy has this problem. As long as others are not made

<sup>13</sup> See George Soros, *New Republic* (August 2002).

to pay their fair share, whatever that is, the ones who do pay both have to do more (if the problem is to be solved) and have to incur a relative disadvantage that they would not incur if the system imposed a proportional burden on everyone.<sup>14</sup>

Finally, there is a more subtle issue about the personal life. In Utilitarianism, given that all moral responsibility is understood as personal responsibility to maximize total or average welfare, there is a large question about what becomes of the person and the sense that a person has a life. People are just engines of maximization. More or less all of their energy has to be devoted to calculating the right thing to do and then doing it. They will have to choose the careers that maximize total or average well-being, the friendships, the political commitments. The sense that there is anything that is really them or their own is difficult to maintain.<sup>15</sup> This worry is really a set of closely related worries: about personal integrity, about agency, about friendship and family, about the sources of the meaning of life, and about the nature of political agency.

We do not need to elaborate all of these concerns further here in order to see that there is a great deal in them—and from the perspective of the capabilities approach itself. The capabilities approach aims at giving people the necessary conditions of a life with human dignity. It would be a self-defeating theory indeed if the injunction to promote human capabilities devoured people's lives, removing personal projects and space to such an extent that nobody at all had the chance to lead a dignified life.

A good solution to this problem is to assign the responsibility for promoting others' well-being (capabilities) to institutions, giving individuals broad discretion about how to use their lives apart from that.<sup>16</sup> Institutions impose on all, in a fair way, the duty to support the capabilities of all, up to a minimum threshold. Beyond that, people are free to use their money, time, and other resources as their own conception of the good dictates. Ethical norms internal to each religious or ethical comprehensive doctrine will determine how far each person is ethically responsible for doing more than what is institutionally required. But

<sup>14</sup> See Liam Murphy, *Moral Demands in Non-Ideal Theory* (New York: Cambridge University Press, 2001).

<sup>15</sup> In one form, this family of objections is eloquently pressed by Bernard Williams, in "A Critique of Utilitarianism," in J. J. C. Smart and Bernard Williams, *Utilitarianism: For and Against* (Cambridge: Cambridge University Press, 1973), pp. 77–150.

<sup>16</sup> See Thomas Nagel, *Equality and Partiality* (New York: Oxford University Press, 1991).



the political task of supporting the capabilities threshold itself is delegated to institutions.

In the domestic case, we can easily say quite a lot about what institutions bear the burden of supporting the capabilities of the nation's citizens: the structure of institutions laid out in the nation's constitution, together with the set of entitlements prescribed in the constitution itself. This structure will include legislature, courts, administration and at least some administrative agencies, laws defining the institution of the family and allocating privileges to its members, the system of taxation and welfare, the overall structure of the economic system, the criminal justice system, and so forth.

When we move to the global plane, however, nothing is clear. If a world state were desirable, we could at least describe its structure. But it is far from desirable. Unlike domestic basic structures, a world state would be very unlikely to have a decent level of accountability to its citizens. It is too vast an undertaking, and differences of culture and language make communication too difficult. The world state is also dangerous: if it should become unjust, there would be no recourse to external aid. Moreover, even if those problems could be overcome, there is a deep moral problem with the idea of a world state, uniform in its institutions. National sovereignty, I have argued, has moral importance, as a way people have of asserting their right to give themselves laws.

If these arguments are good, the institutional structure at the global level ought to remain thin and decentralized. Part of it will consist, quite simply, of the domestic basic structures, to which we shall assign responsibilities for redistributing some of their wealth to other nations. Part of it will consist of multinational corporations, to whom we shall assign certain responsibilities for promoting human capabilities in the nations in which they do business. Part of it will consist of global economic policies, agencies, and agreements, including the World Bank, the International Monetary Fund, various trade agreements, and so forth. Part will consist of other international bodies (such as the United Nations, the International Labor Organization, the World Court, and the envisaged new world criminal court) and of international agreements in many areas (such as human rights, labor, and the environment). Part of it will consist of nongovernmental organizations, ranging from the large and multinational to the small and local.

The form this structure has assumed up until now is the result of history, rather than of deliberate normative reflection. There is thus an odd

fit between normative political philosophy and the details of a set of institutions as oddly assorted as this. It is also clear that the allocation of responsibility among different parts of the global structure must remain provisional, subject to change and rethinking. Notice, as well, that the allocation is an ethical allocation: there is no coercive structure over the whole to enforce on any given part a definite set of tasks. Nonetheless, we can articulate some principles for a world order of this kind, which can at least help us think about how capabilities can be promoted in a world of inequalities.

## 7. TEN PRINCIPLES FOR THE GLOBAL STRUCTURE

1. *Overdetermination of Responsibility: the Domestic Never Escapes It.* Most nations, well and honestly run, can promote many or even most of the human capabilities up to some reasonable threshold level. I have said that if justice requires the mitigation of global inequality, justice is not satisfied even if poor nations can promote the capabilities internally. Nonetheless, we can begin by insisting that they do all that is in their power. If the fulfillment of capabilities is overdetermined, so much the better.

2. *National Sovereignty Should Be Respected, within the Constraints of Promoting Human Capabilities.* In talking about justification and implementation I have already outlined the ideas behind this principle. In general, coercive intervention is justified in only a limited range of circumstances. But persuasion and persuasive use of funding are always a good thing. This brings me to my next principle:

3. *Prosperous Nations Have a Responsibility to Give a Substantial Portion of Their GDP to Poorer Nations.* The prosperous nations of the world have the responsibility of supporting the human capabilities of their own citizens, as Principle 1 asserts. But they also have additional responsibilities. They can reasonably be expected to give a great deal more than they currently give to assist poorer nations: the figure of 1% of GDP, while arbitrary, is a good sign of what might be morally adequate.

Less clear is the form that such aid ought to take: should it be given in the first instance to governments or also to NGOs? This must be left for contextual determination: the general principle would be not to undermine national sovereignty if the recipient nation is democratic, but

at the same time to give aid in an efficient way and also in a way that shows respect for the capabilities on the list.

4. *Multinational Corporations Have Responsibilities for Promoting Human Capabilities in the Regions in Which They Operate.* The understanding of what a corporation is for, until now, has been dominated by the profit motive. This understanding has not prevented corporations from devoting quite a lot of money to charity domestically, but there is no generally accepted standard of moral responsibility. The new global order must have a clear public understanding that part of doing business decently in a region is to devote a substantial amount of one's profits to promoting education and good environmental conditions. There are good efficiency arguments for this: corporations do better with a stable, well-educated workforce. Education also promotes political engagement, crucial for the health of a democracy; and corporations do well under conditions of political stability. Nonetheless, those arguments should be subsidiary to a general public understanding that such support is what decency requires. At the same time, corporations should undertake to promote good labor conditions, going beyond what local laws require.

5. *The Main Structures of the Global Economic System Must Be Designed to Be Fair to Poor and Developing Countries.* As I have said, the fact that many nations can feed all their people does not mean that it is fair for some countries to have additional burdens placed in their way. Exactly what this principle involves is a matter that economists debate and will long continue debating.<sup>17</sup> But there is pretty general agreement that the ways in which the IMF and various global trade agreements have been operating are insufficiently informed by careful ethical reflection about these issues.

6. *We Should Cultivate a Thin, Decentralized, and Yet Forceful Global Public Sphere.* A world state is not, I have argued, an appropriate aspiration. But there is no reason why a thin system of global governance, with at least some coercive powers, should not be compatible with the sovereignty and freedom of individual nations. This system should include a world criminal court of the sort currently proposed, to deal with grave human-rights violations; a set of world environmental regulations, with enforcement mechanisms, plus a tax on the industrial

<sup>17</sup> See, for example, Stiglitz, *Globalization and Its Discontents*, and the review of his book, summarizing pertinent criticisms, by Benjamin Friedman in the *New York Review of Books*, August 22, 2002.

nations of the North to support the development of pollution controls in the South; a set of global trade regulations that would try to harness the juggernaut of globalization to a set of moral goals for human development, as set forth in the capabilities list; a set of global labor standards, for both the formal and the informal sector, together with sanctions for companies that do not obey them; some limited forms of global taxation that would effect transfers of wealth from richer to poorer nations (such as the global resource tax suggested by Thomas Pogge); and, finally, a wide range of international accords and treaties that can be incorporated into the nations' systems of law through judicial and legislative action.<sup>18</sup>

7. *All Institutions and Individuals Should Focus on the Problems of the Disadvantaged in Each Nation and Region.* I have observed that national sovereignty, while morally important, risks insulating from criticism and change the situation of women and other disadvantaged groups within each nation. The situation of people (whoever they are, at any given time) whose quality of life is especially low, as measured by the capabilities list, should therefore be a persistent focus of attention for the world community as a whole. Although coercive sanctions will be appropriate in only some cases, our ability to justify a richer set of norms should lead to tireless efforts of persuasion, political mobilization, and selective funding.

8. *Care for the Ill, the Elderly, and the Disabled Should Be a Prominent Focus of the World Community.* A growing problem in today's world, as the population ages and as more and more people are living with HIV/AIDS, is the need to care for people in a condition of dependency. The state, the workplace, and the family must all change so that needs for care are met without crippling the well-being and the aspirations of women.

9. *The Family Should Be Treated as a Sphere That Is Precious But Not "Private."* The world community should protect the individual liberties of people, which includes their right to choose to marry and form a family and various further rights associated with that. But the protection of the human capabilities of family members is always paramount. The millions of girl children who die of neglect and lack of essential food and care are not dying because the state has persecuted them; they are dying because their parents do not want another female mouth to feed (and an-

<sup>18</sup> In several cases, for example, the norms of sex equality in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) have been held to be binding on nations that have ratified it, in a way that has affected the outcome of legal disputes and also generated new legislation.

other dowry to pay), and the state has not done enough to protect female lives.

10. *All Institutions and Individuals Have a Responsibility to Support Education, As Key to the Empowerment of Currently Disadvantaged People.* Education is a key to all the human capabilities.<sup>19</sup> It is also among the resources that is most unequally distributed around the world. Domestic governments can do much more in almost all cases to promote education in each nation; but corporations, nongovernmental organizations (funded by individual contributions, foreign aid from governments, etc.), and the global public sphere (in international documents and fora) can do a great deal more than they now do to promote universal primary and secondary education everywhere.

There is no natural place to stop this list of principles. One might have had a list of twenty principles, rather than ten. Nonetheless, the principles, together with the theoretical analysis that supports them, are at least a sign of what the capabilities approach can offer, as we move from goals and entitlements to the construction of a decent global society. If our world is to be a decent world in the future, we must acknowledge right now that we are citizens of one interdependent world, held together by mutual fellowship as well as the pursuit of mutual advantage, by compassion as well as self-interest, by a love of human dignity in all people, even when there is nothing we have to gain from cooperating with them. Or rather, even when what we have to gain is the biggest thing of all: participation in a just and morally decent world.

### III. BEYOND “COMPASSION AND HUMANITY”: JUSTICE FOR NONHUMAN ANIMALS

*Certainly it is wrong to be cruel to animals.... The capacity for feelings of pleasure and pain and for the forms of life of which animals are capable clearly impose duties of compassion and humanity in their case. I shall not attempt to explain these considered beliefs. They 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.*

JOHN RAWLS, *A Theory of Justice* (p. 512)

<sup>19</sup> See my “Women and Education: A Global Challenge,” forthcoming in *Signs*.

*In conclusion, we hold that circus animals...are housed in cramped cages, subjected to fear, hunger, pain, not to mention the undignified way of life they have to live, with no respite and the impugned notification has been issued in conformity with the . . . values of human life, philosophy of the Constitution. . . . Though not homosapiens, they are also beings entitled to dignified existence and humane treatment sans cruelty and torture. . . . Therefore, it is not only our fundamental duty to show compassion to our animal friends, but also to recognise and protect their rights. . . . If humans are entitled to fundamental rights, why not animals?*

*Nair v. Union of India,*

KERALA HIGH COURT, NO. 155/1999, JUNE 2000

### I. "BEINGS ENTITLED TO DIGNIFIED EXISTENCE"

In 55 B.C. the Roman leader Pompey staged a combat between humans and elephants. Surrounded in the arena, the animals perceived that they had no hope of escape. According to Pliny, they then "entreated the crowd, trying to win their compassion with indescribable gestures, bewailing their plight with a sort of lamentation." The audience, moved to pity and anger by their plight, rose to curse Pompey—feeling, writes Cicero, that the elephants had a relation of commonality (*societas*) with the human race.<sup>1</sup>

We humans share a world and its scarce resources with other intelligent creatures. These creatures are capable of dignified existence, as the Kerala High Court says. It is difficult to know precisely what we mean by that phrase, but it is rather clear what it does not mean: the conditions of the circus animals in the case, squeezed into cramped filthy cages, starved, terrorized, and beaten, given only the minimal care that would make them presentable in the ring the following day. The fact that humans act in ways that deny animals a dignified existence appears to be an issue of justice, and an urgent one, although we shall have to say more to those who would deny this claim. There is no obvious reason why notions of basic justice, entitlement, and law cannot be extended across the species barrier, as the Indian court boldly does.

<sup>1</sup> The incident is discussed in Pliny, *Nat. Hist.* 8.7.20–21, and Cicero, *Ad Fam.* 7.1.3; see also Dio Cassius, *Hist.* 39, 38, 2–4. See the discussion in Richard Sorabji, *Animal Minds and Human Morals: The Origins of the Western Debate* (Ithaca, N.Y.: Cornell University Press, 1993), pp. 124–25.

Before we can perform this extension with any hope of success, however, we need to get clear about what theoretical approach is likely to prove most adequate. I shall argue that the capabilities approach as I have developed it—an approach to issues of basic justice and entitlement and to the making of fundamental political principles<sup>2</sup>—provides better theoretical guidance in this area than that supplied by contractarian and Utilitarian approaches to the question of animal entitlements, because it is capable of recognizing a wide range of types of animal dignity and of corresponding needs for flourishing.

## 2. KANTIAN CONTRACTARIANISM: INDIRECT DUTIES, DUTIES OF COMPASSION

Kant's own view about animals is very unpromising. He argues that all duties to animals are merely indirect duties to humanity, in that (as he believes) cruel or kind treatment of animals strengthens tendencies to behave in similar fashion to humans. Thus he rests the case for decent treatment of animals on a fragile empirical claim about psychology. He cannot conceive that beings who (in his view) lack self-consciousness and the capacity for moral reciprocity could possibly be an object of moral duty. More generally, he cannot see that such a being can have a dignity, an intrinsic worth.

One may, however, be a contractarian—and indeed, in some sense a Kantian—without espousing these narrow views. John Rawls insists that we have direct moral duties to animals, which he calls “duties of compassion and humanity.”<sup>3</sup> But for Rawls these are not issues of justice, and he is explicit that the contract doctrine cannot be extended to deal with these issues, because animals lack those properties of human beings “in virtue of which they are to be treated in accordance with the principles of justice” (*TJ*, p. 504). Only moral persons, defined with reference to the “two moral powers,” are subjects of justice.

To some extent, Rawls is led to this conclusion by his Kantian

<sup>2</sup> For this approach, see my *Women and Human Development* (Cambridge: Cambridge University Press, 2000), and “Capabilities as Fundamental Entitlements: Sen and Social Justice,” forthcoming in *Feminist Economics* (2003). The approach was pioneered by Amartya Sen within economics and is used by him in some rather different ways, without a definite commitment to a normative theory of justice.

<sup>3</sup> All references are to John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971) (hereafter *TJ*).

conception of the person, which places great emphasis on rationality and the capacity for moral choice. But it is likely that the very structure of his contractarianism would require such a conclusion, even in the absence of that heavy commitment to rationality. The whole idea of a bargain or contract involving both humans and nonhuman animals is fantastic, suggesting no clear scenario that would assist our thinking. Although Rawls's Original Position, like the State of Nature in earlier contractarian theories,<sup>4</sup> is not supposed to be an actual historical situation, it is supposed to be a coherent fiction that can help us think well. This means that it has to have realism, at least, concerning the powers and needs of the parties and their basic circumstances. There is no comparable fiction about our decision to make a deal with other animals that would be similarly coherent and helpful. Although we share a world of scarce resources with animals, and although there is in a sense a state of rivalry among species that is comparable to the rivalry in the state of nature, the asymmetry of power between humans and nonhuman animals is too great to imagine the bargain as a real bargain. Nor can we imagine that the bargain would actually be for mutual advantage: for if we want to protect ourselves from the incursions of wild animals we can just kill them, as we do. Hence the Rawlsian condition that no one party to the contract is strong enough to dominate or kill all the others is not met. Thus Rawls's omission of animals from the theory of justice is deeply woven into the very idea of grounding principles of justice on a bargain struck for mutual advantage (on fair terms) out of a situation of rough equality.

To put it another way: all contractualist views conflate two questions, which might have been kept distinct: "Who frames the principles?" and "For whom are the principles framed?" That is how rationality ends up being criterial of membership in the moral community: because the procedure imagines that people are choosing principles *for themselves*. But one might imagine things differently, including in the group for whom principles of justice are included many creatures who do not and could not participate in the framing.

We have not yet shown, however, that Rawls's conclusion is wrong. I have said that the cruel and oppressive treatment of animals raises issues of justice, but I have not really defended that claim against the

<sup>4</sup> Rawls himself makes the comparison at *TJ*, p. 12: his analogue to the state of nature is the equality of the parties in the Original Position.



Rawlsian alternative. What exactly does it mean to say that these are issues of justice, rather than issues of “compassion and humanity”? The emotion of compassion involves the thought that another creature is suffering significantly and is not (or not mostly) to blame for that suffering.<sup>5</sup> It does not involve the thought that someone is to blame for that suffering. One may have compassion for the victim of a crime, but one may also have compassion for someone who is dying from disease (in a situation where that vulnerability to disease is nobody’s fault). “Humanity” I take to be a similar idea. So compassion omits the essential element of blame for wrongdoing: that is the first problem. But suppose we add that element, saying that *duties* of compassion involve the thought that it is *wrong* to cause animals suffering. That is, a duty of compassion would not be just a duty to have compassion, but a duty, as a result of one’s compassion, to refrain from acts that cause the suffering that occasions the compassion. I believe that Rawls would make this addition, although he certainly does not tell us what he takes duties of compassion to be. What is at stake, further, in the decision to say that the mistreatment of animals is not just morally wrong, but morally wrong in a special way, raising questions of *justice*?

This is a hard question to answer, since justice is a much-disputed notion, and there are many types of justice: political, ethical, and so forth. But it seems that what we most typically mean when we call a bad act unjust is that the creature injured by that act has an entitlement not to be treated in that way, and an entitlement of a particularly urgent or basic type (since we do not believe that all instances of unkindness, thoughtlessness, and so forth are instances of injustice, even if we do believe that people have a right to be treated kindly, etc.). The sphere of justice is the sphere of basic entitlements. When I say that the mistreatment of animals is unjust, I mean to say not only that it is wrong *of us* to treat them in that way, but also that they have a right, a moral entitlement, not to be treated in that way. It is unfair *to them*. I believe that thinking of animals as active beings who have a good and who are entitled to pursue it naturally leads us to see important damages done to them as unjust. What is lacking in Rawls’s account, as in Kant’s (though more subtly), is the sense of the animal itself as an agent and a subject, a creature in interaction with whom we live. As we shall see,

<sup>5</sup> See the analysis in my *Upheavals of Thought: The Intelligence of Emotions* (Cambridge: Cambridge University Press, 2001), chapter 6; thus far the analysis is uncontroversial, recapitulating a long tradition of analysis.

the capabilities approach does treat animals as agents seeking a flourishing existence; this basic conception, I believe, is one of its greatest strengths.

### 3. UTILITARIANISM AND ANIMAL FLOURISHING

Utilitarianism has contributed more than any other ethical theory to the recognition of animal entitlements. Both Bentham and Mill in their time and Peter Singer in our own have courageously taken the lead in freeing ethical thought from the shackles of a narrow species-centered conception of worth and entitlement. No doubt this achievement was connected with the founders' general radicalism and their skepticism about conventional morality, their willingness to follow the ethical argument wherever it leads. These remain very great virtues in the Utilitarian position. Nor does Utilitarianism make the mistake of running together the question "Who receives justice?" with the question "Who frames the principles of justice?" Justice is sought for all sentient beings, many of whom cannot participate in the framing of principles.

Thus in a spirit of alliance those concerned with animal entitlements might address a few criticisms to the Utilitarian view. There are some difficulties with the Utilitarian view, in both of its forms. As Bernard Williams and Amartya Sen usefully analyze the Utilitarian position, it has three independent elements: *consequentialism* (the right choice is the one that produces the best overall consequences), *sum-ranking* (the utilities of different people are combined by adding them together to produce a single total), and *hedonism* or some other substantive theory of the good (such as preference-satisfaction).<sup>6</sup> *Consequentialism* by itself causes the fewest difficulties, since one may always adjust the account of well-being, or the good, in consequentialism so as to admit many important things that Utilitarians typically do not make salient: plural and heterogeneous goods, the protection of rights, even personal commitments or agent-centered goods. More or less any moral theory can be "consequentialized," put in a form where the matters valued by that theory appear in the account of consequences to be produced.<sup>7</sup> Although I do have

<sup>6</sup> See Sen and Williams, "Introduction," in *Utilitarianism and Beyond* (Cambridge: Cambridge University Press, 1982), pp. 3–4.

<sup>7</sup> See my "Comment" in Judith Jarvis Thomson's Tanner Lectures, *Goodness and Advice* (Princeton: Princeton University Press, 2000), discussing work along these lines by Amartya Sen and others.

some doubts about a comprehensive consequentialism as the best basis for political principles in a pluralistic liberal society, I shall not comment on them at present but shall turn to the more evidently problematic aspects of the Utilitarian view.<sup>8</sup>

Let us next consider the Utilitarian commitment to aggregation, or what is called “sum-ranking.” Views of justice that measure principles of justice by the outcome they produce need not simply add all the relevant goods together. They may weight them in other ways: for example, one may insist that each and every person has an inalienable entitlement to come up above a threshold on certain key goods. In addition, a view may, like Rawls’s view, focus particularly on the situation of the least well off, refusing to permit inequalities that do not raise that person’s position. These ways of considering well-being insist on treating people as ends: they refuse to allow some people’s extremely high well-being to be purchased, so to speak, through other people’s disadvantage. Even the welfare of society as a whole does not lead us to violate an individual, as Rawls says.

Utilitarianism notoriously refuses such insistence on the separateness and inviolability of persons. Because it is committed to sum-ranking of all relevant pleasures and pains (or preference-satisfactions and frustrations), it has no way of ruling out in advance results that are extremely harsh toward a given class or group. Slavery, the lifelong subordination of some to others, the extremely cruel treatment of some humans or of nonhuman animals—none of this is ruled out by the theory’s core conception of justice, which treats all satisfactions as fungible in a single system. Such results will be ruled out, if at all, by empirical considerations regarding total or average well-being. These questions are notoriously indeterminate (especially when the number of individuals who will be born is also unclear, a point I shall take up later). Even if they were not, it seems that the best reason to be against slavery, torture, and lifelong subordination is a reason of justice, not an empirical calculation of total or average well-being. Moreover, if we focus on preference-satisfaction, we must confront the problem of adaptive

<sup>8</sup> Briefly put, my worries are those of Rawls in *Political Liberalism*, expanded paperback edition (New York: Columbia University Press, 1996), who points out that it is illiberal for political principles to contain any comprehensive account of what is best. Instead, political principles should be committed to a partial set of ethical norms endorsed for political purposes, leaving it to citizens to fill out the rest of the ethical picture in accordance with their own comprehensive conceptions of value, religious or secular. Thus I would be happy with a partial political consequentialism, but not with comprehensive consequentialism, as a basis for political principles.

preferences. For while some ways of treating people badly always cause pain (torture, starvation), there are ways of subordinating people that creep into their very desires, making allies out of the oppressed. Animals too can learn submissive or fear-induced preferences. Martin Seligman's experiments, for example, show that dogs who have been conditioned into a mental state of learned helplessness have immense difficulty learning to initiate voluntary movement, if they can ever do so.<sup>9</sup>

There are also problems inherent in the views of the good most prevalent within Utilitarianism: hedonism (Bentham) and preference-satisfaction (Singer). Pleasure is a notoriously elusive notion. Is it a single feeling, varying only in intensity and duration, or are the different pleasures as qualitatively distinct as the activities with which they are associated? Mill, following Aristotle, believed the latter; but if we once grant that point, we are looking at a view that is very different from standard Utilitarianism, which is firmly wedded to the homogeneity of good.<sup>10</sup>

Such a commitment looks like an especially grave error when we consider basic political principles. For each basic entitlement is its own thing and is not bought off, so to speak, by even a very large amount of another entitlement. Suppose we say to a citizen: we will take away your free speech on Tuesdays between 3 and 4 P.M.; but in return, we will give you, every single day, a double amount of basic welfare and health care support. This is just the wrong picture of basic political entitlements. What is being said when we make a certain entitlement basic is that it is important always and for everyone, as a matter of basic justice. The only way to make that point sufficiently clearly is to preserve the qualitative separateness of each distinct element within our list of basic entitlements.

Once we ask the hedonist to admit plural goods, not commensurable on a single quantitative scale, it is natural to ask, further, whether pleasure and pain are the only things we ought to be looking at. Even if one thinks of pleasure as closely linked to activity, and not simply as a passive sensation, making it the sole end leaves out much of the value we attach to activities of various types. There seem to be valuable things in

<sup>9</sup> Martin Seligman, *Helplessness: On Development, Depression, and Death* (New York: W. H. Freeman, 1975).

<sup>10</sup> Here I agree with Thomson (who is thinking mostly about Moore): see *Goodness and Advice*.

an animal life other than pleasure, such as free movement and physical achievement, and also altruistic sacrifice for kin and group. The grief of an animal for a dead child or parent, or the suffering of a human friend, also seems to be valuable, a sign of attachments that are intrinsically good. There are also bad pleasures, including some of the pleasures of the circus audience: and it is unclear whether such pleasures should even count positively in the social calculus. Some pleasures of animals in harming other animals may also be bad in this way.

Does preference-Utilitarianism do better? We have already identified some problems, including the problem of misinformed or malicious preferences and that of adaptive (submissive) preferences. Singer's preference-Utilitarianism, moreover, defining preference in terms of conscious awareness, has no room for deprivations that never register in the animal's consciousness. But of course animals raised under bad conditions can't imagine the better way of life they have never known, and so the fact that they are not living a more flourishing life will not figure in their awareness. They may still feel pain, and this the Utilitarian can consider. What the view cannot consider is all the deprivation of valuable life-activity that they do not feel.

Finally, all Utilitarian views are highly vulnerable on the question of numbers. The meat industry brings countless animals into the world who would never have existed but for that. For Singer, these births of new animals are not by themselves a bad thing: indeed, we can expect new births to add to the total of social utility, from which we would then subtract the pain such animals suffer. It is unclear where this calculation would come out. Apart from this question of indeterminacy, it seems unclear that we should even say that these births of new animals are a good thing, if the animals are brought into the world only as tools of human rapacity.

So Utilitarianism has great merits, but also great problems.

#### 4. TYPES OF DIGNITY, TYPES OF FLOURISHING: EXTENDING THE CAPABILITIES APPROACH

The capabilities approach in its current form starts from the notion of human dignity and a life worthy of it. But I shall now argue that it can be extended to provide a more adequate basis for animal entitlements than the other two theories under consideration. The basic moral

intuition behind the approach concerns the dignity of a form of life that possesses both deep needs and abilities; its basic goal is to address the need for a rich plurality of life-activities. With Aristotle and Marx, the approach has insisted that there is waste and tragedy when a living creature has the innate or “basic” capability for some functions that are evaluated as important and good, but never gets the opportunity to perform those functions. Failures to educate women, failures to promote adequate health care, failures to extend the freedoms of speech and conscience to all citizens—all these are treated as causing a kind of premature death, the death of a form of flourishing that has been judged to be worthy of respect and wonder. The idea that a human being should have a chance to flourish in its own way, provided it does no harm to others, is thus very deep in the account the capabilities approach gives of the justification of basic political entitlements.

The species norm is evaluative, as I have insisted; it does not simply read off norms from the way nature actually is. The difficult questions that this valuational exercise raises for the case of nonhuman animals will be discussed in the following section. But once we have judged that a central human power is one of the good ones, one of the ones whose flourishing defines the good of the creature, we have a very strong moral reason for promoting its flourishing and removing obstacles to it.

#### *A. Dignity and Wonder: The Intuitive Starting Point*

The same attitude to natural powers that guides the approach in the case of human beings guides it in the case of all forms of life. For there is a more general attitude behind the respect we have for human powers, and it is very different from the type of respect that animates Kantian ethics. For Kant, only humanity and rationality are worthy of respect and wonder; the rest of nature is just a set of tools. The capabilities approach judges instead, with the biologist Aristotle (who criticized his students’ disdain for the study of animals), that there is something wonderful and wonder-inspiring in all the complex forms of animal life.

Aristotle’s scientific spirit is not the whole of what the capabilities approach embodies: for we need, in addition, an ethical concern that the functions of life not be impeded, that the dignity of living organisms not be violated. And yet, if we feel wonder looking at a complex organism, that wonder at least suggests the idea that it is good for that being

to flourish as the kind of thing it is. And this idea is next door to the ethical judgment that it is wrong when the flourishing of a creature is blocked by the harmful agency of another. That more complex idea lies at the heart of the capabilities approach.

So I believe that the capabilities approach is well placed, intuitively, to go beyond both contractarian and Utilitarian views. It goes beyond the contractarian view in its starting point, a basic wonder at living beings, and a wish for their flourishing and for a world in which creatures of many types flourish. It goes beyond the intuitive starting point of Utilitarianism because it takes an interest not just in pleasure and pain but in complex forms of life. It wants to see each thing flourish as the sort of thing it is.

### *B. By Whom and for Whom? The Purposes of Social Cooperation*

For a contractarian, as we have seen, the question “Who makes the laws and principles?” is treated as having, necessarily, the same answer as the question “For whom are the laws and principles made?” That conflation is dictated by the theory’s account of the purposes of social cooperation. But there is obviously no reason at all why these two questions should be put together in this way. The capabilities approach, as so far developed for the human case, looks at the world and asks how to arrange that justice be done in it. Justice is among the intrinsic ends that it pursues. Its parties are imagined looking at all the brutality and misery, the goodness and kindness, of the world and trying to think how to make a world in which a core group of very important entitlements, inherent in the notion of human dignity, will be protected. Because they look at the whole of the human world, not just people roughly equal to themselves, they are able to be concerned directly and nonderivatively, as we saw, with the good of the mentally disabled. This feature makes it easy to extend the approach to include human/animal relations.

Let us now begin the extension. The purpose of social cooperation, by analogy and extension, ought to be to live decently together in a world in which many species try to flourish. (Cooperation itself will now assume multiple and complex forms.) The general aim of the capabilities approach in charting political principles to shape the human/animal relationship would be, following the intuitive ideas of the theory, that no animal should be cut off from the chance at a flourishing life and

that all animals should enjoy certain positive opportunities to flourish. With due respect for a world that contains many forms of life, we attend with ethical concern to each characteristic type of flourishing and strive that it not be cut off or fruitless

Such an approach seems superior to contractarianism because it contains direct obligations of justice to animals; it does not make these derivative from or posterior to the duties we have to fellow humans, and it is able to recognize that animals are subjects who have entitlements to flourishing and who thus are subjects of justice, not just objects of compassion. It is superior to Utilitarianism because it respects each individual creature, refusing to aggregate the good of different lives and types of lives. No creature is being used as a means to the ends of others or of society as a whole. The capabilities approach also refuses to aggregate across the diverse constituents of each life and type of life. Thus, unlike Utilitarianism, it can keep in focus the fact that each species has a different form of life and different ends; moreover, within a given species, each life has multiple and heterogeneous ends.

### *C. How Comprehensive?*

In the human case, the capabilities approach does not operate with a fully comprehensive conception of the good, because of the respect it has for the diverse ways in which people choose to live their lives in a pluralistic society. It aims at securing some core entitlements that are held to be implicit in the idea of a life with dignity, but it aims at capability, not functioning, and it focuses on a small list. In the case of human/animal relations the need for restraint is even more acute, since animals will not in fact be participating directly in the framing of political principles, and thus they cannot revise them over time should they prove inadequate.

And yet there is a countervailing consideration: human beings affect animals' opportunities for flourishing pervasively, and it is hard to think of a species that one could simply leave alone to flourish in its own way. The human species dominates the other species in a way that no human individual or nation has ever dominated other humans. Respect for other species' opportunities for flourishing suggests, then, that human law must include robust positive political commitments to the protection of animals, even though, had human beings not so pervasively interfered with animals' ways of life, the most respectful course might



have been simply to leave them alone, living the lives that they make for themselves.

#### *D. The Species and the Individual*

What should the focus of these commitments be? It seems that here, as in the human case, the focus should be the individual creature. The capabilities approach attaches no importance to increased numbers as such; its focus is on the well-being of existing creatures and the harm that is done to them when their powers are blighted.

As for the continuation of species, this would have little moral weight as a consideration of justice (though it might have aesthetic significance or some other sort of ethical significance), if species were just becoming extinct because of factors having nothing to do with human action that affects individual creatures. But species are becoming extinct because human beings are killing their members and damaging their natural environment. Thus damage to species occurs through damage to individuals, and this individual damage should be the focus of ethical concern within the capabilities approach.

#### *E. Do Levels of Complexity Matter?*

Almost all ethical views of animal entitlements hold that there are morally relevant distinctions among forms of life. Killing a mosquito is not the same sort of thing as killing a chimpanzee. But the question is, what sort of difference is relevant for basic justice? Singer, following Bentham, puts the issue in terms of sentience. Animals of many kinds can suffer bodily pain, and it is always bad to cause pain to a sentient being. If there are nonsentient or barely sentient animals—and it appears that crustaceans and molluscs, as well as sponges and the other creatures that Aristotle called “stationary animals” are such animals—there is either no harm or only a trivial harm done in killing such creatures. Among the sentient creatures, moreover, there are some who can suffer additional harms through their cognitive capacity: a few animals can foresee and mind their own death, and others will have conscious, sentient interests in continuing to live that are frustrated by death. The painless killing of an animal that does not foresee its own death or take a conscious interest in the continuation of its life is, for Singer and Bentham, not bad, for all badness, for them, consists in the frustration of

interests, understood as forms of conscious awareness.<sup>11</sup> Singer is not, then, saying that some animals are inherently more worthy of esteem than others: he is simply saying that, if we agree with him that all harms reside in sentience, the creature's form of life limits the conditions under which it can actually suffer harm.

Similarly, James Rachels, whose view does not focus on sentience alone, holds that the level of complexity of a creature affects what can be a harm for it.<sup>12</sup> What is relevant to the harm of pain is sentience; what is relevant to the harm of a specific type of pain is a specific type of sentience (e.g., the ability to imagine one's own death). What is relevant to the harm of diminishing freedom is a capacity for freedom or autonomy. It would make no sense to complain that a worm is being deprived of autonomy, or a rabbit of the right to vote.

What should the capabilities approach say about this issue? It seems to me that it should not follow Aristotle in saying that there is a natural ranking of forms of life, some being intrinsically more worthy of support and wonder than others. That consideration might have evaluative significance of some other kind, but it seems dubious that it should affect questions of basic justice.

Rachels's view offers good guidance here. Because the capabilities approach finds ethical significance in the flourishing of basic (innate) capabilities—those that are evaluated as both good and central (see section 5)—it will also find harm in the thwarting or blighting of those capabilities. More complex forms of life have more and more complex capabilities to be blighted, so they can suffer more and different types of harm. Level of life is relevant not because it gives different species differential worth per se, but because the type and degree of harm a creature can suffer varies with its form of life.

At the same time, I believe that the capabilities approach should admit the wisdom in Utilitarianism. Sentience is not the only thing that matters for basic justice; but it seems plausible to consider sentience a threshold condition for membership in the community of beings who have entitlements based on justice. Thus killing a sponge does not seem to be a matter of basic justice.

<sup>11</sup> Peter Singer, "Animals and the Value of Life," in *Matters of Life and Death: New Introductory Essays on Moral Philosophy*, ed. Tom Regan (New York: Random House, 1980), p. 356.

<sup>12</sup> James Rachels, *Created from Animals: The Moral Implications of Darwinism* (New York: Oxford University Press, 1990).

*F. Does the Species Matter?*

For the Utilitarians, and for Rachels, the species to which a creature belongs has no moral relevance. All that is morally relevant are the capacities of the individual creature: Rachels calls this view “moral individualism.” Utilitarian writers are fond of comparing apes to young children and to mentally disabled humans. The capabilities approach, by contrast, with its talk of characteristic functioning and forms of life, seems to attach some significance to species membership as such. What type of significance is this?

We should admit that there is much to be learned from reflection on the continuum of life. Capacities do criss-cross and overlap; a chimpanzee may have more capacity for empathy and perspectival thinking than a very young child or an older autistic child. And capacities that humans sometimes arrogantly claim for themselves alone are found very widely in nature. But it seems wrong to conclude from such facts that species membership is morally and politically irrelevant. A mentally disabled child is actually very different from a chimpanzee, though in certain respects some of her capacities may be comparable. Such a child’s life is tragic in a way that the life of a chimpanzee is not tragic: she is cut off from forms of flourishing that, but for the disability, she might have had, disabilities that it is the job of science to prevent or cure, wherever that is possible. There is something blighted and disharmonious in her life, whereas the life of a chimpanzee may be perfectly flourishing. Her social and political functioning is threatened by these disabilities, in a way that the normal functioning of a chimpanzee in the community of chimpanzees is not threatened by its cognitive endowment.

All this is relevant when we consider issues of basic justice. For a child born with Down syndrome, it is crucial that the political culture in which he lives make a big effort to extend to him the fullest benefits of citizenship he can attain, through health benefits, education, and the reeducation of the public culture. That is so because he can flourish only as a human being. He has no option of flourishing as a happy chimpanzee. For a chimpanzee, however, it seems to me that expensive efforts to teach language, while interesting and revealing, are not matters of basic justice. A chimpanzee flourishes in its own way, communicating with its own community in a perfectly adequate manner that has gone on for ages.

In short, the species norm (duly evaluated) tells us what the appropriate benchmark is for judging whether a given creature has decent opportunities for flourishing.

##### 5. EVALUATING ANIMAL CAPABILITIES: NO NATURE WORSHIP

In the human case, the capabilities view does not attempt to extract norms directly from some facts about human nature. We should know what we can about the innate capacities of human beings, and this information is valuable, in telling us what our opportunities are and what our dangers might be. But we must begin by evaluating the innate powers of human beings, asking which ones are the good ones, and the ones that are central to the notion of a decently flourishing human life, a life with dignity. Thus not only evaluation but also ethical evaluation is put into the approach from the start. Many things that are found in human life are not on the capabilities list.

There is a danger in any theory that alludes to the characteristic flourishing and form of life of a species: the danger of romanticizing nature or suggesting that things are in order as they are, if only we would stop interfering. This danger looms large when we turn from the human case, where it seems inevitable that we will need to do some moral evaluating, to the animal case, where evaluating is elusive and difficult. Inherent in at least some environmentalist writing is a picture of nature as harmonious and wise and of humans as wasteful overreachers who would live better were we to get in tune with this fine harmony. This image of nature was already very sensibly attacked by John Stuart Mill in his great essay "Nature," which pointed out that nature, far from being morally normative, is actually violent, heedless of moral norms, prodigal, full of conflict, harsh to humans and animals both. A similar view lies at the heart of much modern ecological thinking, which now stresses the inconstancy and imbalance of nature,<sup>13</sup> arguing, *inter alia*, that many of the natural ecosystems that we admire as such actually sustain themselves to the extent that they do only on account of various forms of human intervention.

<sup>13</sup> Botkin, "Adjusting Law to Nature's Discordant Harmonies," *Duke Environmental Law and Policy Forum* 7 (1996): 25–37.

Thus a no-evaluation view, which extracts norms directly from observation of animals' characteristic ways of life, is probably not going to be a helpful way of promoting the good of animals. Instead, we need a careful evaluation of both "nature" and possible changes. Respect for nature should not and cannot mean just leaving nature as it is and must involve careful normative arguments about what plausible goals might be.

In the case of humans, the primary area in which the political conception inhibits or fails to foster tendencies that are pervasive in human life is the area of harm to others. Animals, of course, pervasively cause harm, both to members of their own species and, far more often, to members of other species.

In both of these cases, the capabilities theorist will have a strong inclination to say that the harm-causing capabilities in question are not among those that should be protected by political and social principles. But if we leave these capabilities off the list, how can we claim to be promoting flourishing lives? Even though the capabilities approach is not Utilitarian, and does not hold that all good is in sentience, it will still be difficult to maintain that a creature who feels frustration at the inhibition of its predatory capacities is living a flourishing life. A human being can be expected to learn to flourish without homicide and, let us hope, even without most killing of animals. But a lion who is given no exercise for its predatory capacity appears to suffer greatly.

Here the capabilities view may, however, distinguish two aspects of the capability in question. The capability to kill small animals, defined as such, is not valuable, and political principles can omit it (and even inhibit it in some cases, to be discussed in section 6). But the capability to exercise one's predatory nature so as to avoid the pain of frustration may well have value, if the pain of frustration is considerable. Zoos have learned how to make this distinction. Noticing that they were giving predatory animals insufficient exercise for their predatory capacities, they had to face the question of the harm done to smaller animals by allowing these capabilities to be exercised. Should they give a tiger a tender gazelle to crunch on? The Bronx Zoo has found that it can give the tiger a large ball on a rope, whose resistance and weight symbolize the gazelle. The tiger seems satisfied. Wherever predatory animals are living under direct human support and control, these solutions seem the most ethically sound.

## 6. POSITIVE AND NEGATIVE, CAPABILITY AND FUNCTIONING

In the human case, there is a traditional distinction between positive and negative duties that it seems important to call into question. Traditional moralities hold that we have a strict duty not to commit aggression and fraud, but we have no correspondingly strict duty to stop hunger or disease or to give money to promote their cessation.<sup>14</sup>

The capabilities approach calls this distinction into question. All the human capabilities require affirmative support, usually including state action. This is just as true of protecting property and personal security as it is of health care, just as true of the political and civil liberties as it is of providing adequate shelter.

In the case of animals, unlike the human case, there might appear to be some room for a positive-negative distinction that makes some sense. It seems at least coherent to say that the human community has the obligation to refrain from certain egregious harms toward animals but that it is not obliged to support the welfare of all animals, in the sense of ensuring them adequate food, shelter, and health care. The animals themselves have the rest of the task of ensuring their own flourishing.

There is much plausibility in this contention. And certainly if our political principles simply ruled out the many egregious forms of harm to animals, they would have done quite a lot. But the contention, and the distinction it suggests, cannot be accepted in full. First of all, large numbers of animals live under humans' direct control: domestic animals, farm animals, and those members of wild species that are in zoos or other forms of captivity. Humans have direct responsibility for the nutrition and health care of these animals, as even our defective current systems of law acknowledge.<sup>15</sup> Animals in the "wild" appear to go their way unaffected by human beings. But of course that can hardly be so in many cases in today's world. Human beings pervasively affect the habitats of animals, determining opportunities for nutrition, free movement, and other aspects of flourishing.

Thus, while we may still maintain that one primary area of human responsibility to animals is that of refraining from a whole range of bad

<sup>14</sup> See my critique in "Duties of Justice, Duties of Material Aid: Cicero's Problematic Legacy," *Journal of Political Philosophy* 7 (1999): 1–31.

<sup>15</sup> The laws do not cover all animals: in particular, they do not cover animals who are going to be used for food or fur.

acts (to be discussed shortly), we cannot plausibly stop there. The only question should be how extensive our duties are and how to balance them against appropriate respect for the autonomy of a species.

In the human case, one way in which the approach respects autonomy is to focus on capability, and not functioning, as the legitimate political goal. But paternalistic treatment (aiming at functioning rather than capability) is warranted wherever the individual's capacity for choice and autonomy is compromised (thus, for children and the severely mentally disabled). This principle suggests that paternalism is usually appropriate when we are dealing with nonhuman animals. That conclusion, however, should be qualified by our previous endorsement of the idea that species autonomy, in pursuit of flourishing, is part of the good for nonhuman animals. How, then, should the two principles be combined, and can they be coherently combined?

I believe that they can be combined, if we adopt a type of paternalism that is highly sensitive to the different forms of flourishing that different species pursue. It is no use saying that we should just let tigers flourish in their own way, given that human activity ubiquitously affects the possibilities for tigers to flourish. This being the case, the only decent alternative to complete neglect of tiger flourishing is a policy that thinks carefully about the flourishing of tigers and what habitat that requires and then tries hard to create such habitats. In the case of domestic animals, an intelligent paternalism would encourage training, discipline, and even, where appropriate, strenuous training focused on special excellences of a breed (such as the border collie or the hunter-jumper). But the animals, like children, will retain certain entitlements that they hold, regardless of what their human guardian thinks about them. They are not merely objects for human beings' use and control.

## 7. TOWARD BASIC POLITICAL PRINCIPLES: THE CAPABILITIES LIST

It is now time to see whether we can actually use the human basis of the capabilities approach to map out some basic political principles that will guide law and public policy in dealing with animals. The list I have defended as useful in the human case is as follows:

### The Central Human Capabilities

1. **Life.** Being able to live to the end of a human life of normal length; not dying prematurely, or before one's life is so reduced as to be not worth living.

2. **Bodily Health.** Being able to have good health, including reproductive health; to be adequately nourished; to have adequate shelter.

3. **Bodily Integrity.** Being able to move freely from place to place; to be secure against violent assault, including sexual assault and domestic violence; having opportunities for sexual satisfaction and for choice in matters of reproduction.

4. **Senses, Imagination, and Thought.** Being able to use the senses, to imagine, think, and reason—and to do these things in a “truly human” way, a way informed and cultivated by an adequate education, including, but by no means limited to, literacy and basic mathematical and scientific training. Being able to use imagination and thought in connection with experiencing and producing works and events of one's own choice: religious, literary, musical, and so forth. Being able to use one's mind in ways protected by guarantees of freedom of expression with respect to both political and artistic speech and freedom of religious exercise. Being able to have pleasurable experiences and to avoid nonbeneficial pain.

5. **Emotions.** Being able to have attachments to things and people outside ourselves; to love those who love and care for us, to grieve at their absence; in general, to love, to grieve, to experience longing, gratitude, and justified anger. Not having one's emotional development blighted by fear and anxiety. (Supporting this capability means supporting forms of human association that can be shown to be crucial in their development.)

6. **Practical Reason.** Being able to form a conception of the good and to engage in critical reflection about the planning of one's life. (This entails protection for the liberty of conscience and religious observance.)

#### 7. Affiliation

A. Being able to live with and toward others, to recognize and show concern for other human beings, to engage in various forms of social in-



teraction; to be able to imagine the situation of another. (Protecting this capability means protecting institutions that constitute and nourish such forms of affiliation, and also protecting the freedom of assembly and political speech.)

**B.** Having the social bases of self-respect and nonhumiliation; being able to be treated as a dignified being whose worth is equal to that of others. This entails provisions of nondiscrimination on the basis of race, sex, sexual orientation, ethnicity, caste, religion, national origin.

**8. Other Species.** Being able to live with concern for and in relation to animals, plants, and the world of nature.

**9. Play.** Being able to laugh, to play, to enjoy recreational activities.

#### **10. Control over One's Environment**

**A. Political.** Being able to participate effectively in political choices that govern one's life; having the right of political participation, protections of free speech and association.

**B. Material.** Being able to hold property (both land and movable goods), and having property rights on an equal basis with others; having the right to seek employment on an equal basis with others; having the freedom from unwarranted search and seizure. In work, being able to work as a human being, exercising practical reason and entering into meaningful relationships of mutual recognition with other workers.

Although the entitlements of animals are species-specific, the main large categories of the existing list, suitably fleshed out, turn out to be a good basis for a sketch of some basic political principles.

**1. Life.** In the capabilities approach, all animals are entitled to continue their lives, whether or not they have such a conscious interest. All sentient animals have a secure entitlement against gratuitous killing for sport. Killing for luxury items such as fur falls in this category and should be banned. But intelligently respectful paternalism supports euthanasia for elderly animals in pain. In the middle are the very difficult cases, such as the question of predation to control populations and the question of killing for food. The reason these cases are so difficult is that animals will die anyway in "nature," and often more painfully. Painless predation might well be preferable to allowing the animal to be torn to bits "in the wild" or starved through overpopulation. As for food, the capabilities approach agrees with Utilitarianism in being most troubled

by the torture of living animals. If animals were really killed in a painless fashion, after a healthy and free-ranging life, what then? Killings of extremely young animals would still be problematic, but it seems unclear that the balance of considerations supports a complete ban on killings.

**2. Bodily Health.** One of the most central entitlements of animals is the entitlement to a healthy life. Where animals are directly under human control, it is relatively clear what policies this entails: laws banning cruel treatment and neglect; laws banning the confinement and ill-treatment of animals in the meat and fur industries; laws forbidding harsh or cruel treatment for working animals, including circus animals; laws regulating zoos and aquaria, mandating adequate nutrition and space. Many of these laws already exist, although they are not well enforced. The striking asymmetry in current practice is that animals being raised for food are not protected in the way other animals are protected. This asymmetry must be eliminated.

**3. Bodily Integrity.** This goes closely with the preceding. Under the capabilities approach, animals have direct entitlements against violations of their bodily integrity by violence, abuse, and other forms of harmful treatment—whether or not the treatment in question is painful. Thus the declawing of cats would probably be banned under this rubric, on the grounds that it prevents the cat from flourishing in its own characteristic way, even though it may be done in a pain-free manner and cause no subsequent pain. By contrast, forms of training that, though involving discipline, equip the animal to manifest excellences that are part of its characteristic capability profile would not be eliminated.

**4. Senses, Imagination, and Thought.** For humans, this capability creates a wide range of entitlements: to appropriate education, to free speech and artistic expression, to the freedom of religion. It also includes a more general entitlement to pleasurable experience and the avoidance of nonbeneficial pain. By now it ought to be rather obvious where the latter point takes us in thinking about animals: toward laws banning harsh, cruel, and abusive treatment and ensuring animals' access to sources of pleasure, such as free movement in an environment that stimulates and pleases the senses. The freedom-related part of this capability has no precise analogue, and yet we can come up with appropriate analogues in the case of each type of animal, by asking what choices and areas of freedom seem most important to each. Clearly this

reflection would lead us to reject close confinement and to regulate the places in which animals of all kinds are kept for spaciousness, light and shade, and the variety of opportunities they offer the animals for a range of characteristic activities. Again, the capabilities approach seems superior to Utilitarianism in its ability to recognize such entitlements: for few animals will have a conscious interest, as such, in variety and space.

**5. Emotions.** Animals have a wide range of emotions. All or almost all sentient animals have fear. Many animals can experience anger, resentment, gratitude, grief, envy, and joy. A small number—those who are capable of perspectival thinking—can experience compassion.<sup>16</sup> Like human beings, they are entitled to lives in which it is open to them to have attachments to others, to love and care for others, and not to have those attachments warped by enforced isolation or the deliberate infliction of fear. We understand well what this means where our cherished domestic animals are in question. Oddly, we do not extend the same consideration to animals we think of as “wild.” Until recently, zoos took no thought for the emotional needs of animals; and animals being used for research were often treated with gross carelessness in this regard, being left in isolation and confinement when they might easily have had decent emotional lives.<sup>17</sup>

**6. Practical Reason.** In each case we need to ask to what extent the creature has a capacity to frame goals and projects and to plan its life. To the extent that this capacity is present, it ought to be supported, and this support requires many of the same policies already suggested by capability 4: plenty of room to move around, opportunities for a variety of activities.

**7. Affiliation.** In the human case, this capability has two parts: an interpersonal part (being able to live with and toward others) and a more public part, focused on self-respect and nonhumiliation. It seems to me that the same two parts are pertinent for nonhuman animals. Animals are entitled to opportunities to form attachments (as in capability 5) and to engage in characteristic forms of bonding and interrelationship. They are also entitled to relations with humans, where humans enter the picture, that are rewarding and reciprocal, rather than tyrannical. At the same time, they are entitled to live in a world public culture that respects them and treats them as dignified beings. This entitlement

<sup>16</sup> On all this, see my *Upheavals of Thought: The Intelligence of Emotions*, chapter 2.

<sup>17</sup> See Stephen Wise, *Rattling the Cage: Toward Legal Rights for Animals* (Cambridge, Mass.: Perseus Books, 2000), chapter 1.

does not just mean protecting them from instances of humiliation that they will feel as painful. The capabilities approach here extends more broadly than Utilitarianism, holding that animals are entitled to world policies that grant them political rights and the legal status of dignified beings, whether they understand that status or not.

**8. Other Species.** If human beings are entitled to “being able to live with concern for and in relation to animals, plants, and the world of nature,” so too are other animals, in relation to species not their own, including the human species, and the rest of the natural world. This capability, seen from both the human and the animal side, calls for the gradual formation of an interdependent world in which all species will enjoy cooperative and mutually supportive relations with one another. Nature is not that way and never has been. So it calls, in a very general way, for the gradual supplanting of the natural by the just.

**9. Play.** This capability is obviously central to the lives of all sentient animals. It calls for many of the same policies we have already discussed: protection of adequate space, light, and sensory stimulation in living places and, above all, the presence of other species members.

**10. Control over One’s Environment.** In the human case, this capability has two prongs, the political and the material. The political is defined in terms of active citizenship and rights of political participation. For nonhuman animals, the important thing is being part of a political conception that is framed so as to respect them and committed to treating them justly. It is important, however, that animals have entitlements directly, so that a human guardian has standing to go to court, as with children, to vindicate those entitlements. On the material side, for nonhuman animals, the analogue to property rights is respect for the territorial integrity of their habitat, whether domestic or “in the wild.”

Are there animal capabilities not covered by this list, suitably specified? It seems to me not, although in the spirit of the capabilities approach we should insist that the list is open-ended, subject to supplementation or deletion.

In general, the capabilities approach suggests that each nation should include in its constitution or other founding statements of principle a commitment to animals as subjects of political justice and a commitment that animals will be treated with dignity. The constitution might also spell out some of the very general principles suggested by this capabilities list. The rest of the work of protecting animal entitle-

ments might be done by suitable legislation and by court cases demanding the enforcement of the law, where it is not enforced. At the same time, many of the issues covered by this approach cannot be dealt with by nations taken in isolation, but can only be addressed by international cooperation. So we also need international accords committing the world community to the protection of animal habitats and the eradication of cruel practices.

## 8. THE INELIMINABILITY OF CONFLICT

In the human case, we often face the question of conflict between one capability and another. But if the capabilities list and its threshold are suitably designed, we ought to say that the presence of conflict between one capability and another is a sign that society has gone wrong somewhere.<sup>18</sup> We should focus on long-term planning that will create a world in which all the capabilities can be secured to all citizens.

Our world contains persistent and often tragic conflicts between the well-being of human beings and the well-being of animals. Some bad treatment of animals can be eliminated without serious losses in human well-being: such is the case with the use of animals for fur and the brutal and confining treatment of animals used for food. The use of animals for food in general is a much more difficult case, since nobody really knows what the impact on the world environment would be of a total switch to vegetarian sources of protein or the extent to which such a diet could be made compatible with the health of all the world's children. A still more difficult problem is the use of animals in research.

A lot can be done to improve the lives of research animals without stopping useful research. As Steven Wise has shown, primates used in research often live in squalid, lonely conditions while they are used as medical subjects. This of course is totally unnecessary and morally unacceptable and could be ended without stopping the research. Some research that is done is unnecessary and can be terminated: for example, the testing of cosmetics on rabbits, which seems to have been bypassed without loss of quality by other cosmetic firms. But much important

<sup>18</sup> See my "The Costs of Tragedy: Some Moral Implications of Cost-Benefit Analysis," in *Cost-Benefit Analysis*, ed. Matthew D. Adler and Eric A. Posner (Chicago: University of Chicago Press, 2001), pp. 169–200.

research with major consequences for the life and health of human beings and other animals will inflict disease, pain, and death on at least some animals, even under the best conditions.

I do not favor stopping all such research. What I do favor is: (a) asking whether the research is really necessary for a major human capability; (b) focusing on the use of less complexly sentient animals where possible, on the grounds that they suffer fewer and lesser harms from such research; (c) improving the conditions of research animals, including palliative terminal care where they have contracted a terminal illness, and supportive interactions with both humans and other animals; (d) removing the psychological brutality that is inherent in so much treatment of animals for research; (e) choosing topics cautiously and seriously, so that no animal is harmed for a frivolous reason; and, finally, (f) a constant effort to develop experimental methods (for example, computer simulations) that do not have these bad consequences.

Above all, my approach requires constant public discussion of these issues, together with an acknowledgment that such uses of animals in research are tragic, violating basic entitlements. Such public acknowledgments are far from useless. They state what is morally true and thus acknowledge the dignity of animals and our own culpability toward them. They reaffirm dispositions to behave well toward animals where no such urgent exigencies intervene. Finally, they prompt us to seek a world in which the pertinent research could in fact be done in other ways.

## 9. TOWARD A TRULY GLOBAL JUSTICE

It has been obvious for a long time that the pursuit of global justice requires the inclusion of many people and groups who were not previously included as fully equal subjects of justice: the poor, members of religious, ethnic, and racial minorities, and more recently women, the disabled, and inhabitants of poor nations distant from one's own.

But a truly global justice requires not simply looking across the world for other fellow species members who are entitled to a decent life. It also requires looking around the world at the other sentient beings with whose lives our own are inextricably and complexly intertwined. Traditional contractarian approaches to the theory of justice did not and, in their very form, could not confront these questions as questions

of justice. Utilitarian approaches boldly did so, and they deserve high praise. But in the end, I have argued, Utilitarianism is too homogenizing—both across lives and with respect to the heterogeneous constituents of each life—to provide us with an adequate theory of animal justice. The capabilities approach, which begins from an ethically attuned wonder before each form of animal life, offers a model that does justice to the complexity of animal lives and their strivings for flourishing. Such a model seems an important part of a fully global theory of justice.