

## REVIEW

### **Disability and the Social Contract**

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*Frontiers of Justice: Disability, Nationality, Species Membership*,  
Martha C. Nussbaum. Harvard, 2006. Pp xvii, 487.

#### INTRODUCTION

In *Frontiers of Justice: Disability, Nationality, Species Membership* (“*Frontiers of Justice*”), philosopher Martha Nussbaum demonstrates the power of her capabilities approach for political theory by proposing to bring three often-disregarded groups safely within the scope of justice. Like animals and economically underdeveloped nations, she contends, people with disabilities are excluded from traditional social contract theory.

In its simplest (perhaps oversimplified) form, social contract theory requires recipients to reciprocate for social benefits received, for why would people freely enter into cooperative arrangements with one another if the scheme was not similarly advantageous for all?<sup>1</sup> Specifically, why would productive people contract to cooperate with unproductive individuals whose inclusion in the cooperative scheme brings no additional resources to the common store? The implausibility of self-regarding productive people choosing nonproductive ones as cooperators propels the presumption that every party to the contract must have the ability to make real contributions to achieving mutual advantage for all the parties together (p 66). This is one of the many theoretical and practical commonplaces that Nussbaum challenges in her illuminating critique.

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<sup>1</sup> See generally David Boucher and Paul Kelly, eds, *The Social Contract from Hobbes to Rawls* (Routledge 1994) (collecting essays about social contract theory).

Historically, the disabled have been assumed to be less productive than other people.<sup>2</sup> Indeed, being unable to work is definitive of disability under the United States Social Security system.<sup>3</sup> Further, people with disabilities often require more resources than other people because they need assistance, or assistive devices, or adaptation of social practice to engage in some of the fundamental activities of life.<sup>4</sup> A standard illustration of the added expenses imposed by disability is the individual who must acquire a wheelchair to traverse distances ordinary citizens travel across easily on their legs.<sup>5</sup> With compromised productivity or larger than typical needs, the disabled have been portrayed by twentieth-century social contract theory as problematic for justice (for instance, in the influential account of distributive justice published in 1971 by John Rawls<sup>6</sup>) because as a group their contributions are thought inadequate to offset their needs.<sup>7</sup> As a result, they have not been sought after as cooperators. Neither their participation nor their perspectives, therefore, have seemed important to social contract theorists in developing definitive fundamental principles and procedures for justice.

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<sup>2</sup> See Deborah A. Stone, *The Disabled State* 22 (Temple 1984) (“The rationale behind the[] categories” of the socially excluded and needy “is that something inherent in the conditions they describe prevents people from working, no matter how strong the will to work in individual cases.”).

<sup>3</sup> The Social Security Disability Insurance program provides benefits to a person with a disability “only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot . . . engage in any other kind of substantial gainful work which exists in the national economy.” 42 USC § 423(d)(2)(A) (2000). The Supreme Court underscored the presumption of disability as determinative of an inability to work in *Cleveland v Policy Management Systems Corp.*, 526 US 795, 807 (1999), by holding that an American with Disabilities Act (ADA) plaintiff had to show how a reasonable accommodation in the workplace would overcome the crucial aspects of the employment-related dysfunction on which her Social Security Disability Insurance status was based.

<sup>4</sup> See generally David A. Weisbach, *A Welfarist Approach to Disabilities* (unpublished manuscript, Dec 2006) (proposing ways that the tax system can compensate for the greater costs generally associated with economically discernable disabilities). Three points tangential to this discussion bear noting. First, some disabled people do not require accommodations to interact socially. See Michael Ashley Stein, *Labor Markets, Rationality, and Workers with Disabilities*, 21 *Berkeley J Empl & Labor L* 314, 317–20 (2000). Second, most accommodations are necessary only because of the manner that social convention has chosen to organize the structured environment. See Anita Silvers, *Formal Justice*, in Anita Silvers, David Wasserman, and Mary B. Mahowald, *Disability, Difference, Discrimination: Perspectives on Justice in Bioethics and Public Policy* 13, 73–75 (Rowman & Littlefield 1998). Third, the majority of accommodation costs seem negligible. See Michael Ashley Stein, *The Law and Economics of Disability Accommodations*, 53 *Duke L J* 79, 102–09 (2003).

<sup>5</sup> See Amartya Sen, *Equality of What?*, in Sterling M. McMurrin, ed, 1 *Tanner Lectures on Human Values* 217–18 (Utah 1980) (discussing the reduced marginal utility of a “cripple”).

<sup>6</sup> See generally John Rawls, *A Theory of Justice* (Belknap 1971).

<sup>7</sup> But see Lawrence C. Becker, *Reciprocity*, in Lawrence C. Becker and Charlotte B. Becker, eds, 3 *The Encyclopedia of Ethics* 1464, 1465 (Routledge 2d ed 2001) (stating that a fitting and proportional response need not be identical in kind and quantity to the original benefit or harm).

Both in theory and in practice, countering exclusion of those with disabilities requires a powerful alternative to the supposition that cooperative endeavors, and indeed society itself, are motivated exclusively or fundamentally by participants' regard for their own advantage. Nussbaum begins her book with a far-reaching critique of social contract theory, focusing on Rawls's version. Mutually agreed-upon procedures, even those that are meticulously fair, are important but insufficient to secure justice, she says. To achieve just treatment of one another (across boundaries of disability, nationality, or species), we must be motivated by, and therefore strive to achieve, the good. While social contract theory is part of the seventeenth-century philosophical heritage that nourishes American political values, Nussbaum's appeal to the good has even deeper roots, drawing from Greek philosophy that the founding fathers also read.<sup>8</sup>

Part I of this Review sets forth Nussbaum's version of the capabilities approach, and her arguments why that framework is preferable as a theory of justice to Rawls's version of social contract theory. Next, Part II describes in greater detail Nussbaum's application of the capabilities approach to persons with disabilities and considers its implications. In Part III, we apply Nussbaum's capability theory to current disability law jurisprudence and assess the extent of the practical guidance her book offers to courts when deciding disability rights cases.

Even if philosophers take themselves to be developing ideal theories of justice, a fair test of the plausibility and power of their views lies in how well the conceptions they devise line up with, and account for, our intuitions about what counts as just treatment under the law. Therefore, while acknowledging that Nussbaum pursues Rawls's footsteps along the path of ideal theory, we believe that examining how her theory plays out in the context of real and problematic disability cases, and how her approach would affect jurisprudence, will illuminate some of its strengths and disclose some of its limitations.

## I. RAWLSIAN SOCIAL CONTRACT AND THE CAPABILITIES APPROACH

John Rawls holds a venerated place in American jurisprudence regarding state obligations to citizens.<sup>9</sup> According to his now-seminal

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<sup>8</sup> See Susan Dunn, ed, *Something that Will Surprise the World: The Essential Writings of the Founding Fathers* 257 (Basic 2006) (letter from John Adams to John Taylor referencing Socrates and Plato).

<sup>9</sup> See Samuel Freeman, *Justice and the Social Contract: Essays on Rawlsian Political Philosophy* 3 (Oxford 2007) ("John Rawls is widely recognized as the most significant and influential political philosopher of the twentieth century."). Rawls's influence on a broad spectrum of legal thinkers is evidenced by, among other things, the stature of the contributors to Symposium,

account of the social contract, rational parties choose mutually advantageous arrangements through a process of coming to agreement about the fundamental principles of justice.<sup>10</sup> To make the prospect of their reaching agreement plausible, the participating parties are presumed to be roughly equivalent to each other in strength, abilities, intelligence, sensibilities, and status; they are also presumed to resemble each other in desiring to exercise sovereignty over themselves and of being capable of doing so.<sup>11</sup> Further, none knows all her personal strengths and deficits, nor her actual social and economic positioning, so none can say whether, as an individual, she will be helped or hindered by a proposed principle. Absent information about one's own differences and therefore about which social arrangements will be most facilitative to one's own self, the most advantageous strategy for any one seems to be whatever will be most advantageous for each one alike, regardless of who one is and what one's social and economic position turns out to be.

From this "original position" situated behind a "veil of ignorance," all parties are similarly well positioned to convince the others to leave the state of nature by accepting their collectively agreed-on ideas regarding basic tenets of justice.<sup>12</sup> The homogeneity of the parties making these determinations induces each to take the others as seriously as she takes herself, so that the power of the ideas themselves, rather than the power of their proponents, can be said to shape the resulting principles that constrain the practices whereby cooperators will interact.<sup>13</sup> Thus Rawls's account of justice is procedural in nature, focusing on political and social processes that all the parties to the contract perceive as being fair, with the stability of the political arrangements contingent on relationships wherein equally endowed participants who adopt just forms of decisionmaking will reciprocate social contributions once beyond the veil.<sup>14</sup>

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*Rawls and the Law*, 72 *Fordham L Rev* 1381, 1382 (2004) (noting the presence of numerous "outstanding scholars").

<sup>10</sup> See Rawls, *A Theory of Justice* at 15 (cited in note 6) ("The intuitive idea is that since everyone's well-being depends upon a scheme of cooperation without which no one could have a satisfactory life, the division of advantages should be such as to draw forth the willing cooperation of everyone taking part in it, including those less well situated.")

<sup>11</sup> See *id.* at 12 ("Among the essential features of this situation is that no one knows his place in society, his class position or social status, nor does any one know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like.")

<sup>12</sup> *Id.* at 139.

<sup>13</sup> See *id.*

<sup>14</sup> See *id.* at 86 ("[P]ure procedural justice obtains where there is no independent criterion for the right result: instead there is a correct or fair procedure such that the outcome is likewise correct or fair, whatever it is, provided that the procedure has been properly followed.")

Rawls emphasized homogeneous reciprocity. Commentators concerned about justice for women and for racial minorities have insisted over the past quarter century that social contract theory incorporating this feature is flawed.<sup>15</sup> The thrust of their arguments is that the social contract model places such outliers, either individually or collectively as outgroup members, beyond the reach of equal justice (p 109).

A further application of this “outlier problem” charges social contract theory with standing between people with disabilities and justice.<sup>16</sup> The essence of this latter complaint is that social contract theory, understood as a process of bargaining for mutual advantage, cannot do justice to the disabled. Prompted by this concern, some scholars have proposed expansions or alterations of emphasis within the framework of social contract theory,<sup>17</sup> for example, by urging the greater salience of agency,<sup>18</sup> or by advancing an alternative account of cooperation that leads to a jurisprudence of trust.<sup>19</sup> Others have advanced alternative theories to the social contract as a means of mediating the place of persons with disabilities in society.<sup>20</sup> Prominent among

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<sup>15</sup> See, for example, Charles W. Mills, *The Racial Contract* 63–69 (Cornell 1997) (averring that social contract theory positions African Americans at a disadvantage where justice is concerned); Patricia J. Williams, *The Alchemy of Race and Rights* 224 (Harvard 1991) (“Contract law reduces life to fairy tale. . . . [A]ctivity is caged in retrospective hypotheses about states of mind at the magic moment of contracting.”); Carole Pateman, *The Sexual Contract* 6 (Stanford 1988) (arguing that the model reaches only a restrictive mutuality that shapes society by privileging men and denying recognition to women).

<sup>16</sup> See, for example, Ann Cudd, *Contractarianism*, in Edward N. Zalta, ed, *The Stanford Encyclopedia of Philosophy* (Spring 2003), online at <http://plato.stanford.edu/archives/spr2003/entries/contractarianism> (visited Sept 29, 2007) (stating that the premise that contracting parties must be able to contribute to the social product of interaction leaves many people, such as the severely disabled, “outside the realm of justice”).

<sup>17</sup> See, for example, Lawrence C. Becker, *Reciprocity, Justice, and Disability*, 116 *Ethics* 9, 39 (2005) (“[M]utual advantage theories, at least, have a good deal to say about justice for the disabled.”).

<sup>18</sup> See generally Anita Silvers, *Agency and Disability*, in Becker and Becker, eds, 1 *Encyclopedia of Ethics* 39 (cited in note 7) (stating that whether individuals with disabilities can command their moral duties of care turns on whether social practice permits them to be perceived as mutually engaged with others in morally important enterprises). See generally Lawrence C. Becker, *Social Contract*, in Becker and Becker, eds, 3 *Encyclopedia of Ethics* 1607 (cited in note 7).

<sup>19</sup> See, for example, Anita Silvers and Leslie Pickering Francis, *Justice through Trust: Disability and the “Outlier Problem” in Social Contract Theory*, 116 *Ethics* 40, 58–68 (2005) (discussing “contracting with trust,” which “acknowledges and even foregrounds the human conditions of vulnerability and dependence while preserving the idea that important moral and political relationships between people are illuminated by the contracting model”).

<sup>20</sup> See, for example, Henry S. Richardson, *Rawlsian Social-Contract Theory and the Severely Disabled*, 10 *J Ethics* 419, 420 (2006) (revising Rawlsian social contract theory to include individuals with severe disabilities); Ravi A. Malhotra, *Justice as Fairness in Accommodating Workers with Disabilities and Critical Theory: The Limitations of a Rawlsian Framework for Employing People with Disabilities in Canada*, in Diane Pothier and Richard Devlin, eds, *Critical Disability Theory: Essays in Philosophy, Politics, Policy, and Law* 70, 70 (UBC 2005) (doing the same for workers with disabilities).

these are various feminist proposals for ethics of care.<sup>21</sup> One of Nussbaum's achievements is to preserve the sensibility and promote the goals of care ethics as integral elements of a robust and comprehensive distributive political theory.

Nussbaum adds measurably to appraisals of social contract theory by spending about half of *Frontiers of Justice* in a deeply thoughtful critique of this theory, especially as developed by Rawls (p 94). In her view, Rawls "delivers answers that are basically right" for the issues he engages (p 6). However, Rawls's scheme "cannot solve" the challenge of including three categories of subjects within its ambit: people with disabilities, people resident in the poorest nations, and nonhuman animals (p 3). Nussbaum argues that Rawls's social contract theory is unable to encompass these three outlier categories.<sup>22</sup>

One of her objections to modeling justice on social contracting aims at the assumption that self-regarding, rather than other-regarding, motivation is the most plausible explanation and the most compelling justification for people's giving over some liberty. The relevant self-regarding considerations on this account are those that guide rationally calculating individuals in shaping mutually advantageous outcomes (p 104). Hence, political principles and practices cannot help but be shaped mainly to the interests of individuals capable of representing themselves through the rational calculation of their own interests. They therefore cannot escape privileging people whose calculated cooperation is believed to contribute to other people's advantage (p 66).

A core idea in social contract theory, according to Nussbaum, is respect of like people for each other. Accordingly, those who cannot represent themselves in the contracting process will not be respected as parties with full standing (p 66). Of course, the productive cooperative schemes that are underwritten by the theoretical contractual agreement among cooperators may make provisions for individuals with disabilities. After all, even the most vigorous producers may be hampered if they must worry about support for disabled family members or friends, so the welfare of the disabled may be of concern in constructing a successful cooperative scheme. But the subsidiary principles of generous treatment for the disabled will be formulated from

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<sup>21</sup> See, for example, Eva Feder Kittay, *Love's Labor: Essays on Women, Equality, and Dependency* 117 (Routledge 1998) (introducing a public ethic of care); Eva Feder Kittay, *When Caring is Just and Justice is Caring: Justice and Mental Retardation*, 13 *Pub Culture* 557, 573 (2001) (advocating care for individuals with mental retardation "as part of a broader idea of reciprocal Social Cooperation").

<sup>22</sup> Nussbaum addresses these inadequacies at pp 96–223 (disability), pp 224–324 (nationality), and pp 325–407 (species membership).

the perspective of the core cooperators, not from the perspectives of the disabled recipients who are the purported beneficiaries.

In contrast, Nussbaum proposes a basis for justice on which the needs of nondisabled and disabled people are equally important, and responding positively to their needs is of equal political as well as moral value. To address the shortcomings of social contract theory and its resultant trio of “unsolved problems on which justice as fairness may fail” (p 23), Nussbaum proffers a significantly expanded account of her earlier versions of the capabilities approach (p 6).<sup>23</sup> Her capability theory is a substantive alternative to the proceduralism of traditional social contract theory for understanding what obligations states owe disabled individuals, well-off states owe economically impoverished states, and humans owe some other animals (p 409). The capabilities approach, as set forth in *Frontiers of Justice*, specifies what goods are fundamental to all humans’ interests. Consequently, these resources are core human entitlements that a just society has an overriding obligation to provide to everyone, regardless of individuals’ different abilities to represent themselves in shaping mutually advantageous arrangements or to contribute materially to the implementation of those cooperative arrangements (p 78).

To give substance and direction to fulfilling entitlements to capabilities, Nussbaum enumerates a list of ten central capabilities that individuals require to flourish (pp 76–78).<sup>24</sup> These are essential, she avers, because being able to exercise all of them at a threshold level is a uniquely human mode of existence. Put another way, central capabilities

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<sup>23</sup> Nussbaum’s most comprehensive previous articulation focused on women’s capabilities. See generally Martha C. Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge 2000). For another treatment of disability, see generally Martha C. Nussbaum, *Capabilities and Disabilities: Justice for Mentally Disabled Citizens*, 30 *Phil Topics* 133 (2002). The capabilities approach was originated by Nobel Prize-winning economist Amartya Sen. Two representative examples of his work are Amartya Sen, *Development as Freedom* (Anchor 1999); Amartya Sen, *Development as Capability Expansion*, in Keith Griffin and John Knight, eds, *Human Development and the International Development Strategy for the 1990s* 41 (Macmillan 1990). An elaboration of the underlying differences between Nussbaum and Sen is provided in David A. Crocker, *Functioning and Capability: The Foundations of Sen’s and Nussbaum’s Development Ethic*, 20 *Polit Theory* 584 (1992); David Crocker, *Functioning and Capability: The Foundations of Sen’s and Nussbaum’s Development Ethic, Part II*, in Martha C. Nussbaum and Jonathan Glover, eds, *Women, Culture, and Development: A Study of Human Capabilities* 153 (Clarendon 1995).

<sup>24</sup> Respectively: life (the faculty to live one’s full lifespan); bodily health (having good health, including reproductive ability); bodily integrity (freedom of movement and bodily sovereignty); senses, imagination, and thought (cognizing and expressing oneself in a “truly human” way); emotions (loving, grieving, and forming associations); practical reason (critical reflection and conscience); affiliation (self-respect, empathy, and consideration for others); other species (being able to co-exist with other species and the biosphere); play (the ability to enjoy recreation); and control over one’s political environment (via meaningful participation) and material surroundings (through property ownership and holding employment).

are the key determinants of the quality of individuals' lives because they are essential to people being able to execute "universal" functions and so live a "truly human" existence (pp 35, 71). Thus, to be considered just political arrangements under Nussbaum's capabilities scheme, states must provide sufficient resources to enable people to be raised up to the basic functional levels enabled by the ten central capabilities.<sup>25</sup>

Further, since each capability is a separate component in her theory, states ought not provide for one capability beyond the threshold (for instance, by creating a superlative healthcare system) at the expense of denying or limiting some or all people's (for example, denying women education or freedom of association (p 85)) reaching the threshold level for any other capability. States must provide resources to each individual to develop threshold levels of each of the ten central capabilities to enable each to flourish in a truly dignified human manner (p 85). In the case of persons with disabilities, some may need more resources than their nondisabled peers to achieve roughly equivalent capabilities as measured against species-typical threshold levels (pp 87–88). So differential distribution of resources, recognizing differences among people, may be needed to achieve the good equally for everybody. The capabilities approach endorses allotting greater resources to disabled persons if relatively greater distributions are able to bring those individuals up to average baseline levels of capabilities, that is, to the thresholds for species-typical flourishing (pp 116–18).

Nussbaum lacks faith in social contract theory's ability to generate just outcomes. Instead, she directly designates good outcomes, understood in terms of the achievement of threshold levels of capabilities (p 25). Nussbaum's capabilities scheme therefore distributes resources that individuals can convert into the functionings that are of central importance for their flourishing. Society's obligation to achieve these goods reaches to people unable to be parties in a contractual process or otherwise represent themselves effectively in developing principles of resource distribution (p 71). Nussbaum thus transforms the contemporary philosophical approach to distributive justice theory from a process-focused to an outcome-focused approach.<sup>26</sup>

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<sup>25</sup> The requirement is based on states' desire for legitimacy. As Francis M. Deng argues, when states do not adequately protect their citizens, they in turn lose their moral arguments that sustain sovereignty. See Francis M. Deng, et al, *Sovereignty as Responsibility: Conflict Management in Africa* 33 (Brookings 1996).

<sup>26</sup> By determining what fundamental entitlements states owe their citizens, Nussbaum's capabilities scheme diverges significantly from Sen's formulation. Sen describes capabilities as "what a person can, in fact, do or be," distinguishing the distribution of goods from the capability to use them. He acknowledges that some individuals, including disabled persons, have both fewer resources and less ability to convert resources to capabilities. The result is that some persons require more resources than others. Hence a uniform entitlement scheme has the potential to be both



Finally, as an outcome-focused account of justice directed at all sentient beings, including those who were excluded from primary decisionmaking under traditional social contract theory, her capabilities approach embraces all three of the “unsolved problems” disregarded by Rawlsian theory and seeks to correct each one’s problematic asymmetry of power and consequent problematic distribution of resources. Justice for disabled persons requires that each one be brought up to threshold levels of capabilities (p 75). Similarly, justice across national boundaries mandates that the ten capabilities be secured at threshold levels for “all the world’s people” (p 281). Justice for other sentient animals diverges somewhat because by definition they cannot live “truly human lives” and therefore the quality of their lives does not depend on their reaching human threshold capabilities. Nussbaum’s scheme would ensure that nonhuman animals live dignified lives as measured against their respective species-normal functional levels (p 326).

## II. THE CAPABILITIES APPROACH AND PEOPLE WITH DISABILITIES

Although *Frontiers of Justice* in turn addresses each of the three unsolved problems of social contract theory, Nussbaum accords the most expansive treatment of the capabilities approach to issues regarding the extent of state obligations towards disabled individuals. For that reason, and also because United States legislative and judicial history is replete with illustrations of the complexities of affording equitable and just treatment for the disabled, this Part sets forth an additional exegesis of *Frontiers of Justice* as it pertains to people with disabilities, and also assesses some ramifications of Nussbaum’s framework.

Nussbaum contends that social contract theory, understood as a process of bargaining for mutual advantage, cannot bring justice to persons with disabilities because the framework does not allow their participation in the group of those by whom and for whom political principles are chosen (pp 14–15). The exclusion, she maintains, results from the social contract model’s invoking standards of rationality, moral capacity, and ability to produce and thereby to engage in reciprocal cooperation as conditions for participating in designing the principles of justice. Since many persons with disabilities are perceived as being unable to meet these three conditions, they are not included as partici-

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under- and over-inclusive. Amartya Sen, *Inequality Reexamined* 31, 37, 113 (Harvard 1992). Sen has declined to form or support a capabilities list, believing that such a catalog would undercut democratic political discourse. He has, however, assisted in the design of the United Nations Development Programme’s Human Development Reports, which are notable for failing, thus far, to address the situation of disabled persons. See Martha C. Nussbaum, *Poverty and Human Functioning*, in David B. Grusky and Ravi Kanbur, eds, *Poverty and Inequality* 47, 47–48, 61 (Stanford 2006).

pants in the deliberation from the original position situated behind the veil of ignorance from which the fundamental principles of distributive justice, and (derivatively) state obligations, are determined (p 16).<sup>27</sup>

Nussbaum suggests that social contract theory reaches this conclusion by conflating the dynamics of being the subject of justice (those who choose just principles) and being the object of justice (those who benefit from just principles), and making the latter dependent on the former (pp 15–16). Especially problematic for social contract theory are people with reasoning impairments (pp 64–65). These individuals are precluded from being the subjects of justice, she contends, because they cannot participate successfully in the contracting process. As a result, social contract theory wrongly deprives people with developmental and cognitive disabilities of being objects of justice (pp 137–38).

In contrast, Nussbaum's scheme specifies ranges of functional abilities that are universally valuable because fundamental to pursuing basic human interests. It thereby provides an account of the good in terms of core human entitlements to resources that are necessary in view of their functional outcomes (p 78). Society serves as a trustee for individuals, regardless of whether they can represent their own interests (but especially important for those who cannot), by way of the list of distributive obligations to them that must be honored for everyone (pp 78–82).

For individuals with physical and mental impairments, Nussbaum's approach mandates that to achieve moral value through political action, states should provide each person with the means through which to exercise each of the ten central capabilities. Because the crucial value for Nussbaum is bringing every individual up to species-typical thresholds, she expressly rejects welfare metrics that assess individual wellbeing through broad-based economic categories, like per capita GNP (p 71). Such measures, which focus on the general utility of wealth maximization, cannot adequately respond to the circumstance of every particular individual.<sup>28</sup> In stark contrast, the capabilities

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<sup>27</sup> For contrary views of how social contract theory might be construed, see Lawrence C. Becker, *Social Contract* at 1607 (cited in note 18); Anita Silvers, *Agency and Disability* at 39 (cited in note 18).

<sup>28</sup> Comparing results published in the United Nations Development Programme's annual Human Development Report series illustrates this point. Without fail, one can find countries with substantially identical per capita GNP figures whose rates of female literacy vary wildly. Yet one would be hard pressed to argue that the women in countries with lower individual literacy live well in relation to those in higher individual literacy states, despite the equivalence in average (seemingly gender neutral) GNP determinants. One also cannot determine from the aggregate GNP figures how much wealth any particular woman in any given state requires to achieve literacy. These reports are available online at <http://hdr.undp.org/reports> (visited Sept 29, 2007).

approach requires that each and every person be treated as an end in herself, rather than as the instrument or agency of the ends of others.

To illustrate how Nussbaum's capabilities approach engages disability, consider her depiction of the lives of three intellectually disabled children. Philosopher Eva Feder Kittay's daughter Sesha has cerebral palsy and is severely intellectually disabled (p 134). Jamie, the son of public intellectual Michael Bérubé, has Down Syndrome (pp 133–36). Nussbaum's nephew, Arthur, has Asperger and Tourette syndromes (p 97). As Nussbaum describes them, each has a distinct personality and set of needs. Sesha loves pretty dresses, dancing to music in her wheelchair, and returning her parents' hugs (pp 96, 134);<sup>29</sup> Jamie is a fan of B.B. King, Bob Marley, and the Beatles, and has a clever wit (pp 97, 133);<sup>30</sup> Arthur deeply understands the theory of relativity and other scientific quandaries and is politically savvy (pp 96–98, 170).

Nussbaum believes that “[n]one of the three is likely to be economically productive in a way that even begins to compensate society for the expense that it incurs in educating them” (p 128). Sesha and Jamie are unlikely to achieve functions central to exercising some capabilities, in particular those that involve practical reasoning (pp 94–96). Arthur has “few social skills” and “seems unable to learn them” (p 97). Yet each is endowed with a minimum level of the central capabilities related to emotions and play (pp 96–98, 134). And each has talents that can be developed and encouraged. Sesha may not attain gainful employment. However, she expresses emotions and develops affiliations with others (pp 96–98, 134). Jamie and Arthur are likely to be employed and to be capable of exercising many or all of the functions associated with citizenship (pp 98–99, 128). Nussbaum's capabilities scheme would distribute resources to develop these individuals' potential, but only to the extent that they can reach species-typical threshold levels. This holds true even if the resources required by each are much greater than what people usually require. The expense is justified, on her view, because although Sesha, Jamie, and Arthur start off further away from the standard capabilities possessed by the majority of society, everyone deserves being brought as close as possible to the minimal level needed for a dignified life (pp 128–29).

Society's obligation to bring about this kind of good extends significant benefits to people whom classical social contract theory has rejected as incapable or otherwise improper to serve as parties in forging social contracts or otherwise to represent themselves. In many, if

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<sup>29</sup> See also Kittay, *Love's Labor* at 154–55, 166, 172, (cited in note 21) (describing Sesha's preferences).

<sup>30</sup> See also Michael Bérubé, *Life as We Know It: A Father, a Family, and an Exceptional Child* 147 (Vintage 1996) (describing Jamie's preferences).

not in most, circumstances, Nussbaum's scheme will enable people with disabilities to flourish in ways and to an extent that the social contract model appears unable to sustain. Nevertheless, capability theory may not be as generous to people with disabilities as its proponents might hope.<sup>31</sup>

Nussbaum's account of justice supports altering people by allocating resources sufficient to enable them to achieve threshold capability levels, or at least the greatest capability possible if they cannot rise to the threshold. Although initially appealing, this value carries the threat of extracting high costs from recipients who otherwise might seem to be its beneficiaries. In principle, people are free to have capabilities that meet species-typical levels without exercising them.<sup>32</sup> Indeed, Nussbaum is committed to preserving this liberty.<sup>33</sup> A related point is that capability theory is designed to escape paternalism.<sup>34</sup> Yet, by promoting species-typicality as the standard for capabilities, Nussbaum's proposed value scheme could invite oppression.

First, those who seem irremediably, and by their very nature, to fall short of having standard (that is, "normal") capabilities are ripe for being stigmatized by reason of their failure. For a capabilities approach may in practice find it either difficult or impossible to set threshold standards while remaining positive or at least neutral about whoever cannot be brought up to these standards.<sup>35</sup> In general, assimilation policies or strategies can be dangerous for individuals who cannot be assimilated.

Second, however generous society may be in allocating resources so that people deficient in capabilities can acquire them, recipients often must pay their share with hard work or pain for the acquisition.<sup>36</sup>

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<sup>31</sup> See generally Silvers and Francis, 116 *Ethics* 40 (cited in note 19); Michael Ashley Stein, *Disability Human Rights*, 95 *Cal L Rev* 75 (2007).

<sup>32</sup> See Silvers and Francis, 116 *Ethics* at 54 (cited in note 19).

<sup>33</sup> *Id.* at 54.

<sup>34</sup> Compare generally Cass R. Sunstein and Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 *U Chi L Rev* 1159 (2003) (arguing that, through exploiting bounded human rationality, it is possible to influence behavior while preserving individual choice).

<sup>35</sup> Thus, although Nussbaum's capabilities approach is set forth in terms of agency, social pressure to exercise capabilities and their associated functioning is a familiar phenomenon. Consider, for example, the debate over cochlear implants. Once the technological capability exists to enable deaf people to access aural communication, social pressure is brought to bear on deaf individuals to use this technology rather than rely on sign language interpreters precisely because the species typical mode of communicating makes them better able to participate without being burdensome to others.

<sup>36</sup> Compare Kenji Yoshino, *Covering*, 111 *Yale L J* 769, 772 (2002). Yoshino argues that sexual minorities assimilate in three different ways: converting (changing their underlying identity), passing (retaining their underlying identity but masking it to observers), and covering (retaining and disclosing their underlying identity, but making it easy to ignore). See *id.* See also Ilan H. Meyer, *Minority Stress and Mental Health in Gay Men*, 36 *J Health & Soc Beh* 38, 39-42

This is the experience of individuals who have been surgically altered to appear more normal. Some find the result to be worth undergoing alteration, but many do not.<sup>37</sup>

Where having capabilities is identified with the good, capability-deficient subjects' reluctance to be improved by being made more capable may meet with disparagement. Despite enjoying the political freedom to refuse interventions that increase or improve their (range of) functionings, capability-deficient individuals still may be blamed for not seizing every opportunity to advance toward that good. Although capability theory is committed in principle to maintaining a wide scope for liberty, in practice this approach may underwrite imposing the pursuit of capabilities on individuals who have reasons or desires not to do so. Thus, although elevating all citizens to a minimally adequate capability level is a very worthy ambition, making the achievement of such an outcome the goal of justice revives some of the very same risks to disabled people that capability theory's emphasis on human dignity is supposed to avert.<sup>38</sup> More generally, Nussbaum's capabilities scheme may not fully embrace the humanity and equality of those who cannot reach threshold levels of the ten central capabilities. This is because only those individuals who come close to attaining the basic essential capabilities can live a "fully human life" that is "worthy of human dignity" (p 181).<sup>39</sup>

Furthermore, although the capabilities approach seeks to protect social interaction, it does not sufficiently ensure participatory justice at a level that guarantees disabled persons' meaningful contact with the population at large.<sup>40</sup> Nussbaum's model *is* concerned about par-

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(1995) (describing sociological accounts of the effect that assimilation pressure has on gay men); James D. Woods, *The Corporate Closet: The Professional Lives of Gay Men in America* 74–75 (Free Press 1993) (same).

<sup>37</sup> See generally Erik Parens, ed, *Surgically Shaping Children: Technology, Ethics, and the Pursuit of Normality* (Johns Hopkins 2006); Alice Domurat Dreger, *Intersex in the Age of Ethics* (University Publishing Group 1999).

<sup>38</sup> For illustrations of how people with disabilities are subjected to social pressure to comply with medical judgments that are risky and may render them even less functional than before, see generally Anita Silvers, *Bedside Justice: Personalizing Judgment, Preserving Impartiality*, in Rosamond Rhodes, Margaret P. Battin, and Anita Silvers, eds, *Medicine and Social Justice: Essays on the Distribution of Health Care* 235 (Oxford 2002).

<sup>39</sup> In order to set a limit on who should receive state resources, the qualities of living a dignified human life are defined by a list of central capabilities. Consequently, individuals who fall below those markers are tragic cases and, according to Nussbaum, in that respect not fully human. Nussbaum makes this point in several places, for example on p 187 (evaluating the life of Sessa Kittay as someone for whom a "flourishing human life" that is "worthy of human dignity" is out of the question).

<sup>40</sup> Undergirding this notion is a prevailing normative assumption that in a just society everyone should have the ability, if they so choose, to interact with and take part in general culture because "individuals cannot flourish without their joining with other humans in some

icipatory justice as evidenced by the inclusion of respect and nonhumiliation as two key values (p 77). However, it does not require that these be applied to people with disabilities by drawing them into the mainstream of social interaction. Sequestering them in “special” or segregated circumstances might be defended as the most effective way of respecting their differences and protecting them from being humiliated on account of their deficits. But whether doing so is just, let alone sufficiently safe, is not clear. In principle, isolation from the mainstream may have inherent dangers that make disabled individuals prospectively more vulnerable to abuse, for their being distanced from other people may make the general population less inclined to think of them as human and for that reason be protective of them.

### III. THE CAPABILITIES APPROACH AND DISABILITY LAW JURISPRUDENCE

It is not surprising that one of the benefits of a theory of justice should be to guide us in resolving problematic or competing interpretations of justice-extending law by articulating and systematizing relevant moral and political intuitions. For example, scholarship around Rawls’s *Theory of Justice* has been widely applied to illuminate foundational legal notions.<sup>41</sup> Many more cases about disability have been litigated in United States courts than cases about animal rights or the obligations of wealthier nations to poorer ones. Accordingly, this Part addresses the practical use of Nussbaum’s capability theory for some issues related to disability that have arisen in American jurisprudence as a result of disabled people’s claims for justice. It assesses Nussbaum’s capabilities approach as an account of justice for the disabled by asking how some of their claims to be treated justly would fare in a judicial climate shaped by her theory’s guidance.<sup>42</sup>

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sorts of collective activities.” Anita Silvers, *People with Disabilities*, in Hugh LaFollette, ed, *The Oxford Handbook of Practical Ethics* 300, 318 (Oxford 2003).

<sup>41</sup> For two examples, see Amy L. Wax, *A Reciprocal Welfare Program*, 8 Va J Soc Policy & L 477, 516 (2001) (developing a “welfare system motivated by overarching principles of social reciprocity”); Anita L. Allen, *Social Contract Theory in American Case Law*, 51 Fla L Rev 1, 38 (1999) (“Whether one takes a sympathetic or an unsympathetic philosophical view of social contract theory, one must admit the possibility that the intellectual foundations of American law include social contract theory.”).

<sup>42</sup> Jerry Mashaw has suggested that when discussing disability-related policy choices, foundational issues should be eschewed in favor of pragmatic and prudential considerations. See Jerry L. Mashaw, *Against First Principles*, 31 San Diego L Rev 211, 221 (1994). We agree that policy discourse ought to include concrete proposals, but strongly disagree that “just” theorizing is inadequate. See generally Martha C. Nussbaum, *Why Practice Needs Ethical Theory: Particularism, Principle, and Bad Behavior*, in Steven J. Burton, ed, *The Path of the Law and its Influence: The Legacy of Oliver Wendell Holmes, Jr.* 50 (Cambridge 2000) (asserting that philosophical theorizing is a necessary ingredient in analyzing large systemic issues).

At the same time, although we focus on the parts of *Frontiers of Justice* relevant to disability (pp 96–223), all three issues of justice left unresolved by the commonplaces of social contract theory are of a piece, at least because the main issues about justice in all three domains are construed as primarily distributive. The core value informing just political arrangements and action on Nussbaum’s theory is realization of the good. This is understood as the widest possible distribution (at least among humankind) of all the capabilities, each to be attained at least to the threshold level required for a dignified life. As a corollary, Nussbaum’s capability theory requires the most effective distribution of resources to achieve this distribution of capabilities (p 275).

In the domain that includes disabled people, Nussbaum addresses the obligation to distribute resources to these individuals in ways and amounts that acknowledge them as ends in themselves, deserving of treatment that affirms their human dignity (pp 88, 164–68). In the domain of nonhuman animals, she addresses the obligation to distribute resources to provide sentient animals with a decent species-appropriate life (pp 351–65). In the domain of relations between nations, she addresses the obligations of wealthier nations to subscribe to resource distribution schemes that enable citizens of poorer nations to enjoy at least threshold levels of flourishing (pp 316–17). Consequently, we can project that some of the strengths and the weaknesses revealed by examining the theory’s usefulness in regard to disability law may carry over into or relate to current or future law in one or both of the other areas.

To illuminate the degree to which Nussbaum’s approach can advance American disability jurisprudence by purging it of at least some of the deleterious assumptions she finds in social contract theory, we turn to the landmark Supreme Court case of *Buck v Bell*.<sup>43</sup> In *Buck*, the Court upheld the right of the “State Colony for Epileptics and Feeble Minded” to sterilize “mental[ly] defective[ ]” individuals.<sup>44</sup> The policy was justified on the ground that it was in the best interest of both the Commonwealth of Virginia and the sterilized individuals—namely, that preventing “feeble minded” people from menacing society by procreating with other defective state-dependant individuals benefited all involved.<sup>45</sup> That *Buck* was driven by traditional social contract theory’s demand for reciprocity is evident in Justice Holmes’s reasoning:

We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it

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<sup>43</sup> 274 US 200 (1927).

<sup>44</sup> Id at 205 (famously concluding that “[t]hree generations of imbeciles are enough”).

<sup>45</sup> Id at 206.

could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.<sup>46</sup>

The first half of this statement exemplifies why we should have the representation concern about excluding persons with disabilities from deliberations about the principles of justice. The framework in which Justice Holmes forms his opinion permits him to assume that the people called upon to sacrifice their reproductive abilities for the good of the state do not mind the sacrifice much. Yet this is clearly an unwarranted imposition of his own views on them, disregarding what they might actually feel and notwithstanding the contrary evidence that one of them is represented in the litigation as bringing a complaint against being required to sacrifice.<sup>47</sup>

The second half is an instance of the reciprocity requirement problem. In *Buck*, having babies out of wedlock was attributed to “feeble-mindedness,” branded as deviant, and blamed for social burdens associated with people who are not gainfully employed.<sup>48</sup> Individuals stereotyped as burdening rather than contributing to society are expected to give up liberties accorded to everyone else.<sup>49</sup> That people with disabilities engage in socially burdensome conduct because they are defective,<sup>50</sup> and that biologically deviant people are ob-

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<sup>46</sup> Id at 207.

<sup>47</sup> In fact, prior to *Buck* being heard by the Supreme Court, courts and legislatures had in many cases pulled back from imposing sterilization precisely because of objections from the presumptive sacrificees or their guardians. See Robert L. Burgdorf and Marcia Pearce Burgdorf, *The Wicked Witch Is Almost Dead: Buck v. Bell and the Sterilization of Handicapped Persons*, 50 Temple L Q 995, 1000–01 (1977).

<sup>48</sup> Although this characterization does not make it into Justice Holmes’ opinion, the testimony from the trial bears this out. At multiple points, witnesses testified about the social inadequacy of Carrie Buck’s offspring, noting that her child was illegitimate. One Red Cross social worker who testified on behalf of the state was asked on cross examination if illegitimate children were a sign of feeble-mindedness. The reply: “No, but a feeble-minded girl is much more likely to go wrong.” Excerpts of the testimony are available online at <http://law.jrank.org/pages/13291/Buck-v-Bell.html> (visited Sept 29, 2007).

<sup>49</sup> See generally Anita Silvers and Leslie P. Francis, *A New Start on the Road Not Taken: Driving with Lane to Head off Disability-Based Denials of Rights*, 23 Wash U J L & Policy 33 (2007) (tracing the history and predicting the future of Supreme Court jurisprudence upholding as constitutional state exclusion of disabled persons on the ground of inconvenience).

<sup>50</sup> That assertion was at the heart of the Eugenics movement. See generally Edwin Black, *War against the Weak: Eugenics and America’s Campaign to Create a Master Race* (Four Walls Eight Windows 2003).



ligated to compensate by accepting constraints for the sake of social health, are familiar biases.<sup>51</sup>

*Buck* is notable for several reasons.<sup>52</sup> With hindsight even the prevailing party, the Commonwealth of Virginia, admits that this case was wrongly decided.<sup>53</sup> But the assumptions underlying *Buck*, and the force of Justice Holmes's view that disabled people have social debts that must be paid by forfeiting some capabilities, continued to pervade Supreme Court jurisprudence for many decades, with deleterious ramifications.<sup>54</sup> *Buck* can therefore serve as a benchmark against which to test the comparative adequacy of Nussbaum's scheme versus that of traditional social contract theory.

Plainly, Nussbaum's capabilities approach would have prompted an opposite conclusion in *Buck*, one that aligns with prevailing public opinion today.<sup>55</sup> Bodily integrity and reproductive ability are among her ten central capabilities.<sup>56</sup> More trenchantly, and in direct contrast to the rationale underlying *Buck*, capability theory ascribes human dignity to all humans. This is regardless of their ability to articulate their beliefs and feelings, to strategize to achieve their personal good, or to contribute to other people's or society's good (p 70). Had the

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<sup>51</sup> See generally Susan Wendell, *The Rejected Body: Feminist Philosophical Reflections on Disability* (Routledge 1996) (describing the influence of disability-exclusive images of bodily norms on the social construction of disability). For arguments that disability law ought to focus primarily on eliminating subordination, see generally Samuel R. Bagenstos, *Subordination, Stigma, and "Disability,"* 86 Va L Rev 397 (2000).

<sup>52</sup> See, for example, Stephen A. Siegel, *Justice Holmes, Buck v. Bell, and the History of Equal Protection*, 90 Minn L Rev 106, 107 (2005) (noting that nearly "[e]verything about Holmes's opinion in *Buck v. Bell* has been subjected to withering criticism"); Paul A. Lombardo, *Taking Eugenics Seriously: Three Generations of ??? Are Enough?*, 30 Fla St U L Rev 191, 217 (2003) (characterizing the decision as "a moralistic, backward judgment about eugenics").

<sup>53</sup> See William Branigin, *Va. Apologizes to the Victims of Sterilizations*, Wash Post B1 (May 3, 2002) (quoting Virginia Governor Mark R. Warner apologizing for the state's practices on the seventy-fifth anniversary of *Buck*).

<sup>54</sup> Fifteen years later, in *Skinner v Oklahoma*, 316 US 535, 541-42 (1942), the Court prohibited the State of Oklahoma from sterilizing a thrice-convicted chicken thief, but took pains to assure that the prohibition would not be read as constraining states from sterilizing noncriminal disabled persons based on "biologically inheritable traits." States seem to have taken this admonition to heart as they continued to sterilize people with various disabilities until as recently as 1979. See Silvers and Francis, 23 Wash U J L & Policy at 93 (cited in note 49).

<sup>55</sup> Parenthetically, although we doubt a contemporary Supreme Court addressing a factual scenario comparable to *Buck* would rule in a similar manner, the Court's disability jurisprudence does reflect a similar outlook, namely that disabled persons incommode society and that disability rights are not the same as those of other historically subordinated groups. See generally Silvers and Francis, 23 Wash U L J & Policy 33 (cited in note 49); Michael Ashley Stein, *Same Struggle, Same Difference: ADA Accommodations as Antidiscrimination*, 153 U Pa L Rev 579 (2004). For our previous discussion of retrograde Supreme Court methodology, see Anita Silvers and Michael Ashley Stein, *Disability, Equal Protection, and the Supreme Court: Standing at the Crossroads of Progressive and Retrogressive Logic in Constitutional Classification*, 35 U Mich J L Reform 81, 92 (2002).

<sup>56</sup> See note 24.

Court been guided by the values and perspectives foregrounded in *Frontiers of Justice*, the *Buck* decision would have been much better aligned with the way our understanding of justice for the disabled has subsequently evolved.

But what of situations that may not appear to us now as such clear-cut and implacable assaults on the capabilities that are basic to maintaining human dignity? To test how well the capabilities approach responds to more complex and strenuous issues of contemporary disability jurisprudence, we reference two problem cases. First, we consider an instance in which a court decisively curtailed resource distribution for accommodating disabled people, but subsequent democratic practice has declined to take the court's position as precedent and instead has embraced a more generous interpretation of justice. Second, we examine statutory implementation quandaries where courts are required to take into consideration defendants' claims that distributing resources to accommodate some disabled people will adversely affect other individuals. In regard to such cases, we contend, theories of distributive justice should have something heuristic to say.

Application of the Individuals with Disabilities Education Act<sup>57</sup> (IDEA) is an area of disability jurisprudence in which the Court has established a criterion regarding resource distribution to accommodate children with disabilities, but both subsequent legislative reforms and judicial practice have veered away from imposing that standard. In *Hendrick Hudson Central School District v Rowley*,<sup>58</sup> the parents of a deaf child sued the local school board to provide a qualified sign-language interpreter in all her classes.<sup>59</sup> An excellent lip-reader, Amy Rowley had been provided with a hearing aid that amplified sounds "during certain classroom activities" and also with in-class assistance.<sup>60</sup> Overall, Amy performed better than average and advanced from grade to grade without difficulty. However, to attain levels of learning commensurate with her intelligence she required in-class sign language interpretation, for she understood only about half of what was said in class and therefore lacked the same opportunity as the hearing children to fully develop her intellectual talents.<sup>61</sup> Writing for the Supreme Court, Justice Rehnquist ruled that Amy was not entitled to the

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<sup>57</sup> 20 USC § 1400 et seq (2000 & Supp 2004).

<sup>58</sup> 458 US 176 (1982).

<sup>59</sup> See id at 184.

<sup>60</sup> Id. A qualified sign-language interpreter was placed in Amy's kindergarten class for a two-week experimental period, but the interpreter had reported that Amy did not need his services at that time. Her individual educational program also provided that Amy should receive instruction from a tutor for the deaf for one hour each day and from a speech therapist for three hours each week. Id at 184-85.

<sup>61</sup> Id at 215 (White dissenting).

requested accommodation because the mandate of a “free appropriate public education” was satisfied.<sup>62</sup> So long as Amy performed at an average level, the school had satisfied its burden, for public education did not require the state to maximize the potential of every child with a disability commensurate with opportunities provided to children without disabilities.<sup>63</sup>

In this circumstance, Nussbaum’s capabilities approach appears to reach the same result as announced by the *Rowley* Court, and indeed might reinforce that decision. According to her scheme, the state’s obligation is to distribute resources enabling each person to attain the threshold human capability level, a functional stage Amy Rowley undoubtedly attained or exceeded using a hearing aid and in-class assistance. The Court would not allocate additional resources to give Amy (or other deaf children) the opportunity to exceed average achievement by more fully developing their talents, even though this is an opportunity their hearing classmates are given and often realize (and even if developing their above-average intellectual powers does no more than compensate for the sensory functionality they cannot fully attain). Nor apparently would Nussbaum do so, unless resources are so plentiful that there is a surplus after all people who can attain threshold levels of all the capabilities. Hence, Nussbaum’s scheme appears materially equivalent to Supreme Court jurisprudence, in that neither provides that disabled children be provided the same level of opportunity to acquire for themselves the information and skills taught in public schools as nondisabled children are given.

This is because Nussbaum’s capability theory locates justice in the outcomes of, rather than in the procedures for, resource distribution, and specifically in equality of basic outcomes rather than in equality of full access. On this approach, minimum outcomes that are the same for everyone become benchmarks for equality. Nussbaum’s strategy is to identify the basic necessities for dignified human flourishing as the benchmarks of equality. A strength of her scheme therefore is to obligate the state to facilitate disabled people in arriving at these benchmarks regardless of whether they need more resources than other people to do so. The state similarly is obligated to facilitate everybody else in meeting the benchmarks by offering the resources they need to do so. Thus, the state’s obligation is to ensure that everyone equally reaches the benchmarks, regardless of whether some peo-

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<sup>62</sup> *Id.* at 203 (majority).

<sup>63</sup> *Id.* at 189–90 (“Certainly the language of the statute contains no requirement like the one imposed by lower courts—that States maximize the potential of handicapped children commensurate with the opportunity provided to other children.”) (quotation marks omitted).

ple require more resources than others to do so, and of whether those who need more resources burden those who do not.

A weakness of the capabilities scheme, however, is the absence of obligation to level the playing field for disabled people so their opportunities to exceed basic outcome benchmarks equal those of nondisabled people.<sup>64</sup> Without equality of opportunity, disabled and nondisabled children of similar intellectual talents and dispositions are unlikely to be equal in their ultimate educational achievements.<sup>65</sup> While such disparate outcomes might be acceptable if solely due to differences of individual talent, a system where the state creates differential outcomes by privileging one kind of child with access to instruction over another equally deserving kind prompts concerns about fairness.

Given the predilection of schools for communicating information aurally in the classroom, and absent provision of qualified interpreters or captioners, a deaf child's opportunity to access classroom teaching will not be equal but instead greatly inferior to a similarly-talented hearing child's opportunities. Inferior access likely will lead to an inferior outcome, even if that outcome exceeds the basic level needed for dignity and flourishing.<sup>66</sup> Such an approach can doom disabled people, as a class, to inferior economic and social status. Advocates of the capabilities approach likely would agree that if excess or abundant resources exist, the level of capability development a state is obligated to support

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<sup>64</sup> Lawyers and philosophers may use different terminology in assessing equality; hence an explanatory note is warranted. Treating people the same (initially) is treating them equally (ultimately) only if they are similar to one another in the relevant ways. Treating people equally underwrites their being afforded equal opportunity. Affording equal opportunity to people who do not resemble each other in the relevant ways does not require, and is not always compatible with, equal treatment. A bone of contention in these schemes is the baselines that determine relevant characteristics as well as relative position in society, as is graphically the case in ongoing debates over affirmative action. See Silvers, *Formal Justice* at 127 (cited in note 4) (providing the example of placing two bowls of dog food, equally, atop a four-foot-high table for both a Great Dane and a Dachshund).

<sup>65</sup> Although the capabilities approach might seem to be committed to maximizing valuable outcomes by developing people's capabilities to the fullest extent, this is not so. Nussbaum explicitly eschews such a purely consequentialist view (pp 338–42). For Nussbaum, outcomes must be assigned a more limited political role in order to make room for differences in people's conceptualizations of the ultimate good (p 341). Thus the idea that political obligation is informed by a partial conception of the good: a central content—threshold levels of the central capabilities—that everyone would or should endorse. Of course, construing political obligation in terms of maximizing capabilities faces practical difficulties as well. Such a requirement calls for greater resources than bringing capabilities just to the species-typical threshold. Further, differences in individuals' talents could increase disparities in advantage if everyone's capabilities are maximized to the greatest possible extent. While obligating the State to enable such disparate outcomes seems unfair, however, so does allowing the State to support some individuals but not others in pursuit of maximizing their capabilities.

<sup>66</sup> Of course, schools could equalize the situation for deaf children in other ways, for example, by offering all instruction to all children online in the form of text. In this case, hearing and deaf children would be treated identically in that the visual mode of instruction is equally accessible to them.

in all its citizens should be raised. But this will not resolve the underlying difficulty because the state still will give nondisabled students greater opportunity to maximize their potential, and therefore greater potential status and success, than disabled students, who still will be deficient in opportunity to achieve a better than average educational result.

The district court in *Rowley* specifically opted for equality of opportunity, taking the state to be required to offer this child “an opportunity to achieve . . . full potential commensurate with the opportunity provided to other children” despite her deafness.<sup>67</sup> But the Supreme Court found no such obligation for equality of opportunity in the Education for All Handicapped Children Act<sup>68</sup> (EAHCA), the predecessor of the IDEA. Practice subsequent to *Rowley*, however, has taken a progressive approach to the issue of fair opportunity for talent development. As part of IDEA-mandated individualized education plans for disabled children, lower courts will at times provide sufficient funds to enable these children to develop their talents as the education system enables nondisabled children to develop theirs.<sup>69</sup> Thus, in *Hall v Vance County Board of Education*<sup>70</sup> the Fourth Circuit acknowledged that while minimal outcomes (like passing from grade to grade) might be expected for “the most severely handicapped children,” the provision for individualized education plans meant that minimal results “would be insufficient” for most other children.<sup>71</sup> Writing eight years after *Rowley*, Mark Weber pointed out how other courts had achieved similar results by upholding the mainstreaming duty explicitly imposed in the EAHCA and its successors, as opposed

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<sup>67</sup> *Rowley v Board of Education of the Hendrick Hudson Central School District*, 483 F Supp 528, 534 (SDNY 1980).

<sup>68</sup> Pub L No 94-142, 89 Stat 773 (1975), codified as amended at 20 USC § 1400 et seq (2000 & Supp 2004).

<sup>69</sup> The underlying legal rationale for this shift is open to dispute. Some commentators argue that *Rowley* was undone by the 1997 amendment to the IDEA's preamble, see 20 USC § 1400(c)(5)(A), which references meeting developmental goals “to the maximum extent possible” and thus meeting “the challenging expectations . . . established for all children.” For an example of a court that agrees with this reading, see *J.L. v Mercer Island School District*, 2006 US Dist LEXIS 89492, \*11 (WD Wash) (holding that as amended, the IDEA stresses self-sufficiency), reconsidered 2007 US Dist LEXIS 10343 (WD Wash) (reconsidering as to document identification and attorney fees). But see *Lieutenant T.B. v Warwick School Committee*, 361 F3d 80, 83 (1st Cir 2004) (holding that the amended language does not overrule *Rowley*). A second rationale is that 20 USC § 1414(d)(3)(B)(iv) mandates that individual education plans consider the “full range of needs” and “opportunities.”

<sup>70</sup> 774 F2d 629 (4th Cir 1985) (holding that there were adequate grounds for determining that a school had failed to provide a dyslexic student with a free and appropriate public education under the EAHCA).

<sup>71</sup> See id at 636.

to the appropriate education standard of *Rowley*.<sup>72</sup> Noting that this practice is “a stronger egalitarian idea than that applied in the *Rowley* opinion,” Weber correctly proposed a corollary, namely, that “schools should affirmatively provide the services to enable handicapped children to prosper in settings from which they have been unlawfully barred.”<sup>73</sup>

That the weak egalitarianism of *Rowley* does not rise to current American moral and political intuitions about justice is further evidenced by the application of the Americans with Disabilities Act<sup>74</sup> (ADA) to public education. Title II of the statute, which prohibits discrimination in the provision of state and local government services, is understood to entitle deaf students to qualified sign language interpreters if needed to give them meaningful access to any school program or activity.<sup>75</sup> Indeed, from Amy Rowley’s day, when the issue was whether sign language interpretation must be provided, controversy now has shifted to the qualifications interpreters must meet to give deaf children meaningful access to the subject matter of their specific courses of study.<sup>76</sup> Indeed, state legislation addressing appropriate qualifications for sign language interpretation in the public schools is not unusual,<sup>77</sup> offering more evidence of the value United States public policy attributes to equality of opportunity,<sup>78</sup> here instantiated as equality of meaningful access to the content of instruction.<sup>79</sup>

*Rowley* founders on a classic dilemma in theorizing the state’s obligations under justice: should equality of opportunity, which permits differential outcomes responsive to differences of talent and effort, be prior or subsidiary to equality understood as similarity or identity of

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<sup>72</sup> See Mark C. Weber, *The Transformation of the Education of the Handicapped Act: A Study in the Interpretation of Radical Statutes*, 24 UC Davis L Rev 349, 390–92 (1990) (“The court supported its holding with the plain language of the Act.”).

<sup>73</sup> *Id.* at 393.

<sup>74</sup> Pub L No 101-336, 104 Stat 327 (1990), codified at 42 USC § 12101 et seq (2000).

<sup>75</sup> For a detailed account, see the legal memorandum posted by the National Association of the Deaf, online at <http://www.nad.org/publicschools> (visited Sept 29, 2007).

<sup>76</sup> See generally Malicia Hitch, *Educational Interpreters: Certified or Uncertified?*, 34 J L & Educ 161 (2005).

<sup>77</sup> See, for example, Utah Code Ann §§ 53A-26a-301, 53A-26a-201 (Matthew Bender 2006) (requiring certification by the Interpreters Certification Board in order to provide interpretive services); Minn Stat Ann § 122A.31 (West 2000 & Supp 2007) (imposing certification and training requirements on interpreters).

<sup>78</sup> Ironically, the Supreme Court recognized this point while under the stewardship of Chief Justice Rehnquist (who had written the majority opinion in *Rowley*) when it held in *Cleveland v Policy Management Systems Corp*, 526 US 795, 801 (1999), that “[t]he ADA seeks to eliminate unwarranted discrimination against disabled individuals in order both to guarantee those individuals equal opportunity and to provide the Nation with the benefit of their consequently increased productivity.”

<sup>79</sup> For a critique of the ADA on the ground that it does not reach equality of opportunity in many contexts, see generally Michael Ashley Stein and Penelope J.S. Stein, *Beyond Disability Civil Rights*, 58 Hastings L J 1203 (2007).

basic outcomes? In *Rowley* the Supreme Court opted for the latter, but subsequent public policy and practice appear to have gone the other way. Nussbaum's capability theory, as applied to the disabled in *Frontiers of Justice*, does not appear to account for, align with, or support the progressive jurisprudence and statutes that disregard or depart from *Rowley* by attending to equality of opportunity, and thereby to fair treatment, for children with disabilities. In regard to education, her theory does not seem to add anything to disabled children's flourishing beyond resources to achieve very basic outcomes and could result in lower distributions (as *Rowley* decrees) than existing practice.<sup>80</sup>

The Supreme Court's decision in *Olmstead v L.C.*<sup>81</sup> raises a pragmatic quandary for courts implementing the ADA's unambiguous statutory mandate of disability-based social inclusion.<sup>82</sup> In *Olmstead*, institutionalized individuals with "mental disabilities" claimed that the State of Georgia violated their rights under the ADA by failing to place them into community-based programs for which they were deemed eligible.<sup>83</sup> In what has been perhaps overly-optimistically lauded as a substantial victory on behalf of disabled persons,<sup>84</sup> the Court ruled that disabled persons were entitled to receive treatment in conditions that enable them to reside in "the most integrated setting."<sup>85</sup>

At the same time, however, the Court made clear that this right is not absolute. When determining appropriate conditions—that is, those that do not exceed the ADA's requirement to accommodate disability by causing a fundamental alteration in provided services—states may take into account the economic impact of moving individuals to community-based homes.<sup>86</sup> For example, states can consider whether deploying the

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<sup>80</sup> Nussbaum's sentiment undoubtedly is otherwise. She begins (p 155) and ends (pp 222–23) Chapter 3 with a commitment to enabling all children to reach their full human potential, which she takes to be motivated by "our attachment to justice and our love of others, our sense that our lives are entwined with theirs, and that we share ends with them" (p 222). Here, however, attachment to justice and love of others appear to be distinct rather than merged motivations. Tracing a commitment to developing potential fully in all children to this elucidation of love of others seems unexceptional, but it is much harder to find the source of such a commitment in her account of distributive justice.

<sup>81</sup> 527 US 581 (1999).

<sup>82</sup> See Stein, 95 Cal L Rev at 102–04 (cited in note 31) (discussing notions of "participatory justice").

<sup>83</sup> 527 US at 593.

<sup>84</sup> See, for example, Linda Greenhouse, *States Limited on Institutionalization*, NY Times A16 (June 23, 1999) (reporting the decision as "a substantial victory for a disabilities rights movement that has looked to the Americans With Disabilities Act of 1990 as a tool for breaking down institutional walls that separate people with serious mental and physical problems from the larger community").

<sup>85</sup> *Olmstead*, 527 US at 592, citing 28 CFR § 35.130(d) (1998).

<sup>86</sup> For a stringent critique of the Rehnquist Court's use of economic "rationality" as a ground for determining civil rights, see Aviam Soifer, *Disabling the ADA: Essences, Better Angles*,

resources necessary for community-based living for some individuals with cognitive disabilities will deprive other individuals with cognitive disabilities from adequate institutional-based care.<sup>87</sup> In the wake of the Court's decision, therefore, courts have been faced with the dilemma of what to do when allocating resources to accommodate some disabled people while adversely impacting similarly disabled people, or dissimilarly disabled people, or even people who are not disabled.<sup>88</sup>

Nussbaum's capability theory does not seem to provide guidance on how to resolve resource allocation issues that arise from competing rights claims. Recall that her scheme obligates states to provide sufficient resources to raise people to the basic functional levels of each of the ten central capabilities, including the capability of affiliation (pp 75, 80). Moreover, each capability is a discrete and integral component of her theory such that states may not deny or limit baseline-adequate distribution in any one capability, even if it provides resources above the required threshold in another (p 85). The mandate to distribute adequate means to achieve each of the ten central capabilities is, according to Nussbaum, absolute (p 75). Nussbaum's capability theory comes to a standstill when faced with the prospect of having to prioritize resource recipients; the only response it can muster is that each of the ten capabilities is equally valuable.

However, this kind of dilemma does not go away in real life just because obligations to everyone ought to be satisfied. A theory of justice—especially a theory that foregrounds distributive justice—should set or suggest principles of priority in case resources are insufficient to discharge all public obligations under justice. In the post-*Olmstead* world, courts are forced to consider the impact on a state's budget created by competing demands on available resources.<sup>89</sup> This is especially anguishing, for example, when the cost of providing some individuals with the capability of association by enabling them to be in integrated settings is increased by calculating the impact of the result-

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and *Unprincipled Neutrality Claims*, 44 Wm & Mary L Rev 1285, 1295 (2003) (arguing that the Court "arrogated for itself untethered authority to engage in second-guessing of Congress").

<sup>87</sup> *Olmstead*, 527 US at 597 ("In evaluating a State's fundamental-alteration defense, the District Court must consider . . . not only the cost of providing community-based care to the litigants, but also the range of services the State provides others with mental disabilities.").

<sup>88</sup> See, for example, *Frederick L. v Department of Public Welfare of Pennsylvania*, 364 F3d 487, 494–95 (3d Cir 2004) (considering budget constraints and other factors).

<sup>89</sup> Consider, for example, the competing claims facing the court in *Townsend v Quasim*, 328 F3d 511, 520 (9th Cir 2003):

Plaintiffs have asserted that it is cheaper on a per capita basis to provide long-term care services to individuals in a community-based setting rather than a nursing home. . . . At the same time, even if extension of community-based long term care services to the medically needy were to generate greater expenses for the state's Medicaid program, it is unclear whether these extra costs would, in fact, compel cutbacks in services to other Medicaid recipients.



ing inability to make economies of scale in regard to other members of the class who must be institutionalized.<sup>90</sup> These kinds of cases are an interesting test of Nussbaum's theory because she treats the obligations to bring citizens to threshold capabilities as obligations to individuals who are in isolation from one another. The hard economic fact, however, is that states sometimes need to provide capability-elevating services to the entire class of individuals with a particular disability in order to make economies of scale and therefore may contend that they must deny some members threshold levels of one capability (for example, affiliation<sup>91</sup>) in order to offer all members of the class threshold levels of a different capability (in this case, shelter<sup>92</sup>).

This is a real dilemma and it is hard to see how a theory that values different capabilities equally can avoid exacerbating the problem. Yet Nussbaum's substantive account of the good does not seem to generate a principle for ranking or choosing among the capabilities, or their possessors. Nussbaum could say that the aggregating principle that informs these cases is wrong, and that the state may never defer satisfying its obligation to raise one individual to threshold level by invoking the specter of resulting shortfalls in support for other individuals, whether or not the others share the same disability. In principle, especially in an ideal world, namely one without resource constraints, we could be more comfortable with her approach. But in practice, a solution must be reached, for there is no avoiding incurring an outcome of some sort (whether good or bad) whenever an *Olmstead*-generated dilemma occurs. Further, a solution that is just, or at least not unjust, should be reached. The capability approach to theorizing justice does not seem to offer resolution or guidance and may even deepen the dilemma.

#### CONCLUSION

In a review in *The Nation*, a publication identified with progressive liberal democratic views, John Gray praises *Frontiers of Justice* for

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<sup>90</sup> For example, in *Pennsylvania Protection & Advocacy, Inc v Dep't of Public Welfare of Pennsylvania*, 243 F Supp 2d 184, 191 (MD Pa 2003), the court decried a "simple comparison between the cost of community placement and the cost of institutional confinement" as inaccurate because it would overlook unavoidable costs, such as the cost of keeping institutions open for residents in need of more care than community-based services could provide.

<sup>91</sup> Nussbaum describes affiliation as "being able to live with and toward others" (p 77).

<sup>92</sup> Nussbaum states that being able to have adequate shelter is a component of the capability for bodily health (p 76). See also *Lankford v Sherman*, 451 F3d 496, 509 (8th Cir 2006) ("Rather than focusing on an individual entitlement to medical services, the reasonable-standards provision focuses on the aggregate practices of the states in establishing reasonable Medicaid services."); *Radaszewski v Maram*, 383 F3d 599, 614 (7th Cir 2004) ("A court must therefore take care to consider the cost of a plaintiff's care not in isolation, but in the context of the care it must provide to all individuals with disabilities comparable to those of the plaintiff.")

altering the terms of the social contract theory debate in a manner that enables justice theory to engage with political and legal realities.<sup>93</sup> If he is correct, then Nussbaum's capability theory will pass the test we advanced, namely, it will prove useful in sorting out real puzzles of political and legal interpretation that have arisen from attempts by Congress and the courts to do justice to disabled people. Our quick exploration of a few possible applications of Nussbaum's capabilities approach to real political and legal problems cannot do justice to the depth and importance of her work but does suggest areas and issues calling for more elucidation.

During the decades that separate us from the *Buck* Court, agreement about the injustice of that decision has developed in a process that aligns with and is usefully accounted for by Nussbaum's theory of justice. On the other hand, her capabilities approach to justice seems not to be helpful in regard to the agreement about the (in)justice of *Rowley* that has evolved in the shorter time since that decision. Nor does it seem sufficiently sharply decisive to cut through the knots tying up justice in *Olmstead*-generated dilemmas.

Yet we caution that these last two observations are only preliminary. More than two generations elapsed before clarity about justice enveloped *Buck*. We lack sufficient distance from the latter two cases to know how justice for disabled people in situations like those the cases address eventually will come to be understood.<sup>94</sup> Nor can our brief discussion properly explore the explanations, expansions, and emendations to which Nussbaum's capability theory may be subject and through which her scheme might illuminate questions about justice emerging from *Rowley*, *Olmstead*, and other disability cases. We should recall that Rawls's theory of justice earned its influential position by way of decades of examinations, interpretations and applications executed by other scholars, and revision and redaction by its author. Possessing analogous depth, power, and innovation, Nussbaum's theory of justice invites and will reward extrapolation like that accorded Rawls's work, from the scholarly community and from its own author as well.<sup>95</sup>

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<sup>93</sup> See John Gray, *In Theory*, *The Nation* 32 (June 5, 2006).

<sup>94</sup> As Nussbaum perspicaciously points out, theory and practice are interdependent (p 223). Prevailing theories of justice are one of the influences on people's lives, but how society eventually views these cases will affect whether or not her capabilities approach replaces classical social contract theory.

<sup>95</sup> For example, Rawlsian social contract theory has had a lot to say about the design of basic social institutions, while Nussbaum's version of the capabilities approach deserves further expansion in this direction. We thank Leslie Pickering Francis for the prompt that led to this observation.