Justice and Cognitive Disabilities: Specifying the Problem

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Abstract. The question of how to treat people with cognitive disabilities (PCDs) poses an important problem for Rawlsian theories of justice because it is unclear whether PCDs are included within the scope of moral personhood. Rawls’s Standard Solution focuses on nondisabled adults as the fundamental case, while later addressing PCDs as marginal cases. I claim that the Standard Solution has two weaknesses. First, it relies on a dichotomy between nondisabled and disabled that is tenuous and difficult to defend. Second, it makes the theory circular in a vicious way.

I argue that Rawls’s theory can be revised so that it solves the problem of how to treat PCDs while avoiding the two weaknesses of the Standard Solution. There are three constraints on any successfully revised Rawlsian theory: 1) it must be resourcist rather than welfarist; 2) it must provide some principled basis for limiting our obligations to PCDs; and 3) it must address the whole range of PCDs, including the most severely disabled individuals.

Why Do Justice Theorists Need to Consider People with Cognitive Disabilities (PCDs)? There are significant natural inequalities among human beings, including differences in physical functioning as well as cognitive functioning. Western industrialized societies have developed assistive technologies to ensure that most people with disabilities can lead good lives, if they are provided with enough resources. Among contemporary political theorists, there has been much disagreement about whether natural inequalities such as disabilities should fall within the domain of justice. Some egalitarians hold that justice requires the distribution of goods so that all individuals receive comparable opportunities to live good lives. For egalitarians, those who happen to be born with lesser capacities are not to blame for their misfortune. In order to achieve justice, society must make efforts to compensate for the fact that some are born with lesser talents and capacities. The questions then arise: Do more fortunate members of society have the moral obligation to help rectify the inequalities that disadvantage the unlucky? If so, in what are these obligations grounded?

Testing justice theories so that they accommodate people with disabilities is of central importance because people with disabilities are not rare anomalies. Rather, they form a part of any society we can expect to live in. As such, these cases demand attention in a way that exceptional or unusual cases do not. By contrast, it may be argued that a theory of justice may justifiably omit consideration of socially produced injustices such as racism and sexism. Although such problems are significant sources of injustice in our society today, we can expect them to wither away after a prolonged period of governance under just principles. People living with disabilities, however, present a different case. Unlike conditions that are the continuing unjust effect of past injustice,
disability is almost certainly a permanent condition of human society. Some would go so far as to argue that the adequacy of a theory of distributive justice is now measured partly by its success in dealing with justice for everyone, including people with disabilities.  

I focus here on the work of American philosopher and political theorist John Rawls, who defended the social contract tradition against utilitarianism. The question of how to treat people with cognitive disabilities (PCDs) poses an important problem for Rawlsian theories of justice because it is unclear whether PCDs are included within the scope of moral personhood as he describes it. Rawls’s Standard Solution focuses on nondisabled adults as the fundamental case, while later addressing PCDs as marginal cases. The Standard Solution has two weaknesses. First, it classifies individuals based on a dichotomy between normal and abnormal that is inherently unstable and hence unreliable. Second, it makes the theory circular in a vicious way. I argue that Rawls’s theory can be revised so that it solves the problem of how to treat PCDs while avoiding the two weaknesses of the Standard Solution.

**Defining People with Cognitive Disabilities (PCDs)**

Let us examine how the Rawlsian theory deals with human beings who fall outside of the “normal range”: those who fail to develop and exercise what Rawls calls “the two moral powers” at any point over the course of a complete lifetime. I will refer to this group as “people with cognitive disabilities” (PCDs), in contrast to nondisabled people. I focus on conditions that are currently considered to be either genetically caused or of unknown etiology. It is important to note that physicians are unable to arrive at a precise diagnosis in roughly one-third of the more severely mentally deficient patients, defined as people with IQs less than fifty. Although our understanding of specific mental retardation syndromes has expanded with recent molecular genetic advances, for 30-50 percent of all individuals with mild to severe mental retardation, no etiology is identifiable, as shown in table 1. This suggests that PCDs will continue to exist in our society despite continuing improvements in medical knowledge and genetic testing. There is still no way to predict or prevent the birth of such individuals or to cure their conditions. In 2004 the frequency of mental retardation of all degrees ranged from 1.6 to 3 percent of the population. This represents roughly 4.7 to 8.8 million U.S. residents, if updated according to July 2005 population estimates.

<table>
<thead>
<tr>
<th>Cause (Percentage)</th>
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<tbody>
<tr>
<td>Chromosomal anomalies (4-28)</td>
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<tr>
<td>Recognizable patterns of malformation (3-7)</td>
</tr>
<tr>
<td>Known single-gene disorders (3-9)</td>
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<tr>
<td>Structural abnormalities of the brain (7-17)</td>
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<tr>
<td>Complications of prematurity (2-10)</td>
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<tr>
<td>Environmental/teratogenic causes (5-13)</td>
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<tr>
<td>Culturo-familial mental retardation* (3-12)</td>
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<tr>
<td>Provisionally unique syndromes (1-5)</td>
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<tr>
<td>Metabolic/endocrine disorders (1-5)</td>
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<tr>
<td>Unknown (30-50)</td>
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**Table 1. Causes of Mental Deficiency from Literature Surveys**
Some cognitive disabilities are caused by actions for which the affected individual can be held responsible, such as head injuries self-inflicted by adults while conscious, or brain damage caused by anorexia. There are also many conditions for which someone else or some social institution can be held responsible; e.g., mental retardation caused by lead poisoning in substandard housing, or fetal alcohol syndrome, which occurs in 1 to 2 per 1000 live births in the United States. It is possible to treat these cases separately from other PCDs whose conditions are either genetic or of unknown etiology. One could argue that the individuals causally responsible for the brain damage should be held solely liable for repairing the effects of their actions, and that social institutions need not be arranged so that they accommodate the needs of individuals harmed by other identifiable individuals. However, such an approach would also require theorists to deny benefits to those who have lost their jobs during corporate layoffs, following the line that if somebody else is responsible for causing the harm, social institutions have no place in alleviating the effects of unemployment. Because I reject the implications of such an approach, I prefer to include within the term PCDs all individuals whose mental functioning is deficient according to standardized measures such as IQ tests, regardless of the cause of their deficient functioning.

The Standard Rawlsian Solution: Solving the Fundamental Case First

On the conventional interpretation of Rawls, which I call the Standard Rawlsian Solution, individuals with low levels of cognitive functioning are excluded from the scope of justice altogether. On this view, those of us who are moral persons choose principles of justice to set up a just society for ourselves. On the standard reading, Rawls distinguishes between two kinds of moral relations: relations among equals and relations among unequals. Relations among equals are to be guided by principles of justice. Rawls’s theory leaves unanswered the following vital question: what principles should guide our interactions with beings who are not our equals?

Rawls develops a conception of personhood and society for his discussion of the fundamental case of justice, which he regards as the clearest case. The fundamental case of social justice concerns relations among those who are “full and active and morally conscientious participants in society.” By this he means that everyone has sufficient intellectual powers to play a “normal” part in society. Rawls explicitly sets aside anyone who presents difficult complications, such as those who lack these intellectual powers, and those who happen to have unusual and costly medical requirements. While acknowledging that care for those with unusual requirements is a pressing practical question, Rawls makes it clear that his overall strategy is to first work out a political theory that covers the fundamental case, what he calls the “usual” case. We see that the idea of the person is idealized and simplified, and makes no attempt to capture the full scope of human diversity in the population to which the theory of justice will actually apply. Rather, as he explains in Political Liberalism, it is intended to help philosophers achieve “a clear and uncluttered view” of what he calls 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?”

After considering the fundamental case, Rawls argues, it will be easier to extend his theory to cover other cases later. His rationale for this strategy is that a theory that fails for the fundamental case is of no use at all. If the Rawlsian theory cannot be applied in the ideal case in which citizens have
roughly equal material needs and in which they are capable and willing to bear the burdens that justice imposes on them, then it is reasonable to think that it cannot be applied at all. If it does turn out to be applicable to the ideal society, then we have the task of working out the details for a society that is much more complicated to regulate, like our own. Having repeatedly postponed the discussion of “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,” Rawls never attempted to extend his theory to cover a society like ours. In this paper I argue that Rawls’s theory may have the resources to cover at least some of the “unusual” cases. While I do not offer a complete solution here, I lay the groundwork for such a solution and identify three constraints on any successful solution of this difficult problem. 

**Defining Moral Personhood**

Rawls understands society as a fair system of cooperation and conceptualizes persons as free and equal, as well as possessing the abilities necessary to be normal and fully cooperating members of society over the course of a complete life. Free and equal persons are those individuals who possess the two moral powers: the capacity for a sense of justice and the capacity for a conception of the good. Taken together, the two moral powers specify the necessary and sufficient conditions for being counted as a full and equal member of society in questions of political justice. The first moral power is the capacity for a sense of justice, namely, “the capacity to understand, to apply, and to act from the public conception of justice which characterizes the fair terms of cooperation. Given the nature of the political conception as specifying a public basis of justification, a sense of justice also expresses a willingness, if not the desire, to act in relation to others on terms that they also can publicly endorse.”

The capacity for a sense of justice involves reasonableness, understood as the ability to regard others as equal citizens and to engage with others on terms one could imagine others would accept. The second moral power, the capacity for a conception of the good, is “the capacity to form, to revise, and rationally to pursue a conception of one’s rational advantage or good.” In claiming that persons have the ability to form a *rational* conception of their good, Rawls means that persons are rational in the sense of being able to determine and take the most useful steps toward their ends.

This all seems straightforward enough until one stops to consider the complete lifetime of the average human being. Every human being is born utterly lacking the two moral powers as Rawls has defined them above. In the usual case, most humans acquire the two moral powers gradually during childhood and adolescence. Note that developing the moral powers is not a biological given; rather, it is made possible only when the distribution of social resources ensures the availability of good nutrition; adequate health care; a pollution-free environment; thousands of hours of care and nurturing from parents, siblings, extended family members, or other paid and unpaid caregivers; and several years of education, both formal and informal. There are some individuals who fail to develop the two moral powers because their environment lacks one or more of these conditions. In addition, many adults lose one or both of the moral powers temporarily or permanently due to injury, disease, accident, or aging. Most problematic of all, throughout their entire lifetimes certain unfortunate human beings possess neither the capacity for a sense of justice nor the ability to form, modify, and work toward realizing a rational conception of one’s good.
The question naturally arises whether it makes sense to think of all individuals lacking the moral powers as belonging to one large, undifferentiated group. Those who take such a view would exclude from moral personhood all infants, children, elderly persons whose faculties have degenerated, those who have temporary cognitive disabilities at any stage of life, and those who have permanent cognitive disabilities. None of the above individuals would count as moral persons for the purposes of Rawls’s theory. On the other hand, those claiming that there are relevant differences among members of this group would propose and defend some particular scheme for classifying beings who lack the two moral powers. According to criteria established by that classification, certain individuals would qualify as moral persons while others would not.

**First Weakness in the Standard Rawlsian Solution: The Customary Classification**

Throughout his work, Rawls relies on a commonly accepted classification of the people who lack the two moral powers. I will call this the Customary Classification. Although I will end by arguing that this constitutes a weakness in the theory, I will first examine the reasons in favor of using the Customary Classification. The Customary Classification establishes a binary distinction among human beings, describing the usual case as normal as opposed to unusual cases that are presumably considered abnormal. At first blush one might assume that this distinction corresponds roughly to the division between nondisabled people and people with disabilities, but a closer examination reveals otherwise. In the literature, philosophers make arbitrary distinctions between different kinds of impairments. These distinctions do not correspond to the severity of the impairment or its effect on a person’s ability to participate in the daily activities of life. Some impairments are deemed to fall within the normal range, while others are simply considered unusual or abnormal. For example, people who use eyeglasses to improve their vision are generally described as normal while those who are partially sighted or legally blind count as abnormal. Those who use hearing aids to improve their hearing and spoken language to communicate are considered normal while those who have the same level of hearing impairment but rely on sign language to communicate count as abnormal. Likewise, people taking prescribed psychiatric drugs to treat their anxiety are described as abnormal, while those who relieve their anxiety by using caffeine, alcohol or nicotine count as normal.

Those who endorse the Customary Classification further argue that young children who are normal, although they do not yet possess the two moral powers, can be expected to develop those two moral powers in due course of time. Similarly, any normal elderly adult who has lost his or her two moral powers did possess the two moral powers during earlier periods of their life. When Rawls identifies moral persons as those who are “associated together throughout a complete life,” he is taking into account the normal life cycle of humans and presumably means to include in the category both children who will later possess the two moral powers and elderly adults who have earlier possessed the two moral powers at some point. It follows from the traditional view that Rawls’s assumption that all citizens have the two moral powers does not set aside the issue of distribution to normal children and the normal elderly. Quite clearly, those who count as normal children and the normal elderly also count as moral persons, because these descriptions refer to individuals who are part of a typical human life cycle that includes exercising the two moral powers during normal adulthood.

A related account that relies on the Customary Classification is the view defended by Christie Hartley. What I call the Dependency View holds that the Rawlsian theory can be interpreted as
already properly sensitive to three kinds of cases: 1) normal infants and children, 2) normal elderly persons whose mental abilities have deteriorated with age, and, adding a third category, 3) persons who temporarily face debilitating mental illness or cognitive disabilities. Hartley argues that these three cases can be considered unproblematic cases of human dependency. By briefly reviewing some aspects of Rawls’s theory, we can see how contractualists could easily address these cases. According to Rawls, those who count as moral persons for the purposes of the fundamental question of justice are those who have the two moral powers, a capacity for a sense of justice, and a capacity for a rational conception of the good. These persons are further described as being normal and fully cooperating members of society over the course of a complete life. Using the original position as a device for representation, the contractors are to choose the basic principles of justice for society. The contractors are considered as beings with the two moral powers and as members of a well-ordered society who know that those they represent will be governed by the principles. They are imagined behind the veil of ignorance, prevented from accessing information about their own particular abilities, social status, and conception of the good. The contractors do, nevertheless, know very general facts about human life:

[They] know that they are subject to the conditions of human life. Being in the circumstances of justice, they are situated in the world with other men who likewise face limitations of moderate scarcity and competing claims. Human freedom is to be regulated by principles chosen in the light of these natural restrictions. Thus justice as fairness is a theory of human justice and among its premises are the elementary facts about persons and their place in nature. The freedom of pure intelligences not subject to these constraints (God and the angels) are outside the range of the theory.

According to the Dependency View, natural variation in cognitive functioning is precisely one of these “elementary facts about persons,” one of the “conditions of human life.” If this is a theory of justice for humans, not for God or “pure,” disembodied intelligences, then it is highly relevant that our human intelligences are always determined by natural contingencies. Hence, while imagining the contractors in the original position, one can reason as follows. Inferring from the knowledge that they are representing human beings, the contractors would know the following three general facts about human beings: first, that part of the life cycle of all human beings includes dependency for having basic needs met in childhood; second, that those human beings who reach old age are very likely to become dependent again; and third, because of the vulnerability of human bodies, human beings are susceptible to physical injuries and mental stress that frequently render them temporarily unable to fully participate in society.

Given these three facts, it is plausible that contractors would require the basic principles of justice to meet the needs and interests of human beings who are in such states of dependency. The contractors presumably know that the conditions for developing the abilities for a sense of justice and a rational conception of the good are 1) the passage of time and 2) substantial amounts of resources provided by parents and society. It thus seems required to value normal children, who potentially have the two moral powers. This view also supports the claim that normal children should have the resources they need to properly develop these powers. The contractors are aware that since they are currently negotiating the social contract, they must formerly have been normal children. In choosing principles to govern their society, the contractors will therefore make sure that the needs of normal children will be met. The Dependency View argues further that it is irrational
for contractors to ignore the interests of those beings who have, over the course of a lifetime, exercised the capacities for a sense of justice and a rational conception of the good once these abilities no longer function properly, especially since the contractors know that they themselves may lose these capacities when they reach old age. Finally, if contractors recognize the general fact that periods of temporary disability are not uncommon in the course of the average human life, then they will ensure that the basic principles provide for the needs of those in limited times of disability. Thus contractualists who have access to general facts about human life should not have any difficulties in constructing a theory of justice in such a way as to include normal children, the normal elderly, and those with temporary disabilities, even if they have failed to do so to this point.

So far the Dependency View has succeeded in extending the range of Rawls’s theory considerably, but it fails to account for PCDs who are considered abnormal because they never acquire the two moral powers at any point in their lifetimes. Like other interpretations of Rawls that rely on the Customary Classification, the Dependency View does not require the basic structure of society to provide for the needs of human beings who are perpetually dependent on others. The Customary Classification allows contractors to set aside the needs and interests of abnormal human beings, who lack the two moral powers in the past, present and future, and to choose the basic principles of justice in accordance with the needs and interests of the normal. This division may seem inconsequential in the Original Position, but it has significant consequences at the fourth stage of the Rawlsian theory, the Application Stage. Recall that this is the realm of nonideal theory in which the full system of rules applies to persons by virtue of their characteristics and circumstances. When the veil of ignorance is completely lifted, the contractors and legislators have complete access to all the particular facts about all the individuals, including their social positions, natural attributes, and peculiar interests.

When at that stage legislators discover that some of the normal individuals they have been representing turn out to be parents, siblings, caregivers, and friends of abnormal people, they will then have to generate a second tier for the Rawlsian theory, one that addresses the definition and diagnosis of abnormal members of society, the just treatment of abnormal members of society, what rights or duties the abnormal have, and how normal human beings are to interact with their abnormal neighbors. Martha Nussbaum has argued that the Rawlsian theory is weakened by postponing questions of this kind until the end because it is forced to create a two-part strategy for dealing with the full spectrum of human diversity.\textsuperscript{25} While she has claimed that this weakness is reason enough to abandon the Rawlsian theory, I am more optimistic about the prospects for reading the theory in a way that does not commit Rawls to defending the Customary Classification.

**Second Weakness in the Standard Rawlsian Solution: The Circularity Paradox**

Rawls’s theory has a second weakness, which I call the Circularity Paradox. Rawls uses the characterization of the contractors in the Original Position to single out the kind of beings to whom the principles chosen apply.\textsuperscript{26} This raises the question: what kind of beings are the contractors asked to represent when they are in the Original Position? To answer that question, Rawls defines the two moral powers and stipulates that whoever develops the two moral powers at any point during a complete lifetime counts as a moral person. The interests of moral persons are the interests that should be considered by the contractors in the Original Position.
However, note that whether any given individual reaches the stage of developing the two moral powers is itself crucially influenced by social institutions, the very ones shaped by the principles to be chosen in the Original Position. Because the various candidate distributions of social resources codetermine who develops the two moral powers, the theory as it stands is indeterminate with respect to its own scope. Rawls might respond that he does not intend to restrict the applicability of his theory to a subset of human beings; rather, he may see himself as constructing a theory on the basis of a counterfactual stipulation, namely that all human beings will in fact develop the two moral powers at some point in their lifetimes. Of course, the stipulation happens to be false; as we have just seen, Rawls leaves the task of adjusting his theory to actual circumstances for later.

Developing the two moral powers and starting to participate in social cooperation is something that human beings achieve in community with others who are already engaged in fully reciprocal relationships. As an analogy, think of the prerequisites for being allowed to vote. Imagine a society that specifies a minimum level of literacy as a prerequisite for being able to vote. If the social institutions in that society are structured so that slaves are denied access to education, then the basic structure will see to it that all slaves will be automatically excluded from participating in the political process because it is impossible, or at least extremely difficult, for them to acquire the minimum criteria for voting rights. It is possible for people to teach themselves to read, but it is very difficult. The problem is that if no slaves are ever admitted into the group of those who make laws for the society as a whole, it is unlikely that voters (non-slaves) will think of changing the laws to verify whether any of the slaves are actually capable of learning to read when allocated enough resources and access to education.

Rawls’s theory demonstrates a similar type of circularity. At the present moment, it is true that many PCDs do not currently exercise the two moral powers. However, we do not yet know what portion of PCDs might have the potential to develop the two moral powers if they were allocated sufficient resources, and if they were fully integrated into society. Developing the two moral powers is something that we achieve only in community. Since historically most PCDs have been kept apart from the rest of society, we have no means of predicting how much progress they would make if social institutions were transformed to include them. Consider the many astonishing developments and discoveries that have been made concerning individuals who live with Down syndrome, autism, and other cognitive disabilities. Some of these individuals are now participating in society to a degree never before anticipated, indeed previously declared impossible by medical professionals. There are many examples of individuals who have developed moral powers well beyond what was expected of them, thanks to their families’ support and advocacy for their inclusion in mainstream education, in the arts, and in politics. Only forty years ago, doctors predicted that infants born with Down syndrome would never learn to walk, talk, or dress themselves. Because their families refused to institutionalize them, instead choosing to raise them along with their non-disabled siblings, there are many adults with Down syndrome who have become flourishing members of society. Chris Burke became the first actor with Down syndrome to act in a TV series in the United States and has published his autobiography. Jason Kingsley completed high school and is now volunteering for a U.S. Senator and hoping to run for office. Sujeet Desai has a black belt in Tae Kwon Do, plays the clarinet, the piano, and the violin, and married Carrie Bergeron in 2006. The couple now lives together with support from their families and staff. In educational settings, it is well known that when one sets low expectations for a group of people, they tend to underperform. Similarly, Rawls’s theory, if interpreted incorrectly, may be
unintentionally excluding certain people who have the potential to develop the two moral powers. Another way of seeing the Circularity Paradox is to consider Rawls’s argument about the strains of commitment. In the Original Position, the parties are asked to protect their basic rights and to insure themselves against the worst eventualities. In Rawls’s words, “they cannot enter into agreements that may have consequences they cannot accept.” The consequence of this is that the viability of any agreement is vulnerable to the energy and anger of the people who will be foreseeable disadvantaged by it. The strains of commitment argument is intended to ensure that parties to the Original Position will be able to honor the agreement even if the worst possibilities prove to be the case. However, as I shall argue, one of the worst possible scenarios is for an individual to avoidably lack the two moral powers under a basic structure that fails to provide her with the social conditions necessary for developing the capacity to protest this state of affairs. Because such people lack the capacities to protest their plight, their concerns will not influence the deliberations of those in the Original Position. By placing too much weight on the strains of commitment argument, Rawls has structured the Original Position so that it builds in a disadvantage for PCDs from the very beginning.

Three Constraints on Developing a Successful Rawlsian Solution

So far, I have specified the problem, described the Standard Rawlsian Solution, and shown that this solution is vulnerable in two areas. Any successful alternative Rawlsian solution to the problem of PCDs must eliminate the two weaknesses; it must give up the Customary Classification and eliminate the Circularity Paradox by providing a criterion of justice that does not result in preventing certain groups from developing the two moral powers and being admitted into the scope of the theory. Instead, the solution we seek must provide a viable method for individuals to enter the scope of the theory. Furthermore, this solution must provide the “best fit” or at least a reasonably good fit with Rawls’s ground assumptions and methodology. In so doing, it must fulfill three constraints. First, it must be resourcist rather than welfarist (or capabilities-based). Second, it must provide some principled basis for limiting our obligations to PCDs. Third, it must provide a plausible analysis of the so-called “Hard Cases” – people with disabilities so severe that they cannot be expected to develop the two moral powers at any point in their lifetime.

First Constraint: Resourcist, Not Welfarist

Welfarism is the doctrine that justice consists in some distribution of welfare or well-being. According to Rawls, justice is properly concerned with interpersonal comparisons of resources rather than interpersonal comparisons of welfare. Rather than asking what a given bundle of resources can do for a person, or what outcomes she can achieve with this bundle, the resourcist approach asks whether her resource holdings are fair relative to what others have. The constraint demands that any Rawlsian theory retain some version of the primary goods metric that Rawls uses as the basis of interpersonal comparisons for political purposes.

Recall the notion of primary goods defined above. Rawls’s theory of justice is concerned only with social primary goods, because natural primary goods are affected by social institutions but are not directly distributed by them. Is there any way to make sense of the idea of distributing natural primary goods? When asking how the distribution of social primary goods should be regulated, we
need to deal with the possible answer that this distribution should correlate, positively or negatively, with that of natural primary goods. The question then arises whether cognitive abilities should be classified as social or natural goods. Although great intelligence (like great wealth and opportunity) allows a person to achieve ends she could not rationally contemplate otherwise, Rawls assumes that there is some principled way of distinguishing social from natural goods. For the moment I shall set aside the fact that some theorists have raised significant objections to the social-natural distinction. Suffice it to say that it is central to Rawls’s view. Notice that in *Political Liberalism*, Rawls admits that we cannot view the talents and abilities of individuals as fixed natural gifts. Although there is some significant genetic component, he recognizes that “these abilities and talents cannot come to fruition apart from social conditions.” He writes further that “an ability is not, for example, a computer in the head with a definite measurable capacity unaffected by social circumstances. Among the elements affecting the realization of natural capacities are social attitudes of encouragement and support and the institutions concerned with their training and use.”

Consider an account that takes cognitive functioning as the basis of interpersonal comparisons. Specifying that social institutions should somehow regulate the distribution of cognitive functioning will count not as an extension but as a different, non-Rawlsian account. Equality of welfare is consistent with unequal distribution of resources, while equality of resources often leads to unequal levels of well-being. This criticism of resourcism is the core of Amartya Sen’s capability approach. Welfarism would require that we ensure that PCDs achieve the same levels of well-being as “normal” people. Such a solution would not be consistent with Rawls’s theory. Rawls makes several arguments against using a welfarist metric for making interpersonal comparisons in the fundamental case. In his paper “Social Unity and Primary Goods,” he provides a detailed case for using primary goods as the basis of interpersonal comparisons for the purposes of assessing the justice of the basic structure. Rawls argues that primary goods are the best alternative to welfare (understood as preference satisfaction), because a welfarist metric is wrongly insensitive to the moral content of the preferences involved (which he calls “offensive tastes”). He also objects that the welfarist metric rewards those who have expensive tastes that they could avoid. Rawls then goes on to develop a positive account of the primary goods by relating them to the interest in developing the two moral powers of free and equal persons: the capacities for a sense of justice and for a conception of the good.

Based on these considerations, any account that proposes to extend the Rawlsian project must therefore retain the primary goods metric that characterizes the resourcist view. For example, Eva Kittay writes that a hypothetical Rawlsian might propose extending Rawls’s theory by adding primary goods that recognize the importance of care. If dependency concerns are taken seriously, she argues, the list of primary goods should represent: 1) the understanding that we will be cared for if we become dependent; 2) the support we require if we have to take on the work of caring for a dependent; and 3) the assurance that if we become dependent, someone will take on the job of caring for those who are dependent on us. Kittay’s hypothetical Rawlsian construes the needs of caregivers and dependents in terms of allocating resources to meet these needs. Although this proposal goes beyond the letter of the Rawlsian theory, it is still very much in the spirit of resourcism.

It is important to note that this is not Kittay’s own approach, but merely a proposal that she discusses. I have chosen not to follow this proposal because the Rawlsian theory is deeply
incompatible with the feminist conception of the person as engaged in caring relationships. As a Kantian, Rawls is committed to the fundamental conception of the moral person as one who is engaged in reciprocal relationships, or at least one who aspires to participate in social cooperation at some level. In my reading, Rawls makes little room for relationships of one-way dependence that do not seek to become more reciprocal. Hence, I seek an alternate approach to revising the Rawlsian theory, one that retains a firm commitment to resourcism without adding care to the list of primary goods.

**Second Constraint: A Principled Basis for Limiting our Obligations to PCDs**

In his early review of *A Theory of Justice*, Kenneth Arrow remarks that if justice as fairness is accorded to the disabled, the theory will demand far too much from our social resources. We shall end up having to devote immense amounts of resources to people who can gain very little from them, at great expense to others who are better endowed. This is the **Bottomless Pit Problem**. The maximin rule requires us to direct resources so that the worst position in society is made as well-off as possible. The maximin rule is implausible, Arrow argues, when we consider individuals with expensive health care needs as among the occupants of the least advantaged position. Can justice plausibly require huge sacrifices from everyone but the very worst off to realize what may be very small benefits for that group? Consider a view that requires devoting social resources to those who are least well endowed and who face the greatest difficulties in developing the two moral powers, until they do acquire the two moral powers. The problem will not be that PCDs can gain nothing from the resources they are entitled to, for the principle of maximin does not require us to devote resources where they yield no benefit at all. But a fair amount of resources can be consumed before saturation is reached, if ever, while others will receive barely enough to develop their own two moral powers and fend for themselves.

If the account fails to avoid the problem of the Bottomless Pit, two undesirable consequences follow. First, the account will be impossible to implement under current conditions. Second, it will support the belief that social institutions should be designed so that they minimize the numbers of PCDs who will make large demands on social resources, and maximize the numbers of gifted persons who will be entitled to very few resources. Rawls briefly mentions the prospect of adopting “more or less explicit” eugenic policies. Each person has an interest in having greater natural assets than other members of society. This enables her to pursue her preferred plan of life, whatever it may be. In the original position, then, the parties wish to ensure the best possible genetic endowment for their descendants. Each generation takes steps to preserve the general level of natural abilities and to prevent the diffusion of serious defects to the next generation. This is a matter of intergenerational justice, for these measures are to be guided by principles that the parties would be willing to consent to for the sake of their successors. Rawls conjectures that if there is an upper bound on human abilities, then the long-run effect of social policies will be to create a society with the greatest equal liberty, in which its members enjoy the greatest equal talents. Such a society will have to allocate fewer resources to accommodate the needs of the few remaining people with cognitive disabilities.

**Third Constraint: Dealing with the Hard Cases**

My discussion is informed largely by research regarding the most common conditions characterized
by mental retardation. I have discussed examples of people with Down syndrome, which has an incidence of 1 in 660 newborns, making it the most common pattern of human malformation. Critics may wonder, however, whether the Rawlsian solution will be able to accommodate the entire range of severe cognitive disabilities. Although there are many success stories, surely there are also many individuals who reach the higher limits of their potential before acquiring the two moral powers. In these cases, the potential for moral personhood, ordinarily realized in due course, is never actually realized during the lifetime of a given individual.

Nussbaum claims that people with severe mental impairments are described in Rawls's theory as “scattered individuals” who, lacking the moral capacities to some essential minimum degree, fail to qualify for equality. What I call the Hard Cases Objection consists of the fact that even though Rawls may be able to include individuals labeled “mildly” or “moderately” retarded, he cannot include the “severely retarded,” meaning those individuals who are so severely disabled as to be beyond hope of ever developing the two moral powers.

My response to the Hard Cases Objection is as follows. Terms such as “mildly,” “severely,” or “profoundly” retarded do not refer to natural kinds, but rather to socially constructed categories that are highly unstable, as Licia Carlson has shown in her work. These groups are identified by a description and not by a rigid designator, to use Saul Kripke’s term. Determining which individuals are labeled as “severely” retarded varies depending on historical period, race, and socioeconomic status. Bearing this in mind, we should not let these labels distort our thinking about the individuals in the category and their diverse abilities and capacities. Indeed, the moral capacities demonstrated by any given individual are crucially influenced by the current state of scientific, educational, and medical knowledge. For example, some individuals with hearing impairments were believed to be “retarded” and were denied educational opportunities because they did not communicate successfully with those who misdiagnosed them. For example, some individuals with hearing impairments were believed to be “nonverbal” and “severely retarded” and were denied educational opportunities because they did not communicate successfully with those who misdiagnosed them. As a child, the artist Judith Scott contracted scarlet fever and had lost her hearing before she learned to speak. Because she did not respond to verbal cues, she was diagnosed as profoundly retarded and placed in an institution where she had no education. After 35 years of institutionalization, she moved out to live with her (nondisabled) twin sister. Given access to art supplies and attentive caregivers, she started to express herself by creating colorful fiber sculptures that are now exhibited in museums and galleries around the world. Given the many similar cases of misdiagnoses so far, scientific knowledge about mental disabilities is still highly unreliable.

Furthermore, we must examine the assumptions and methodologies used by those who are attempting to determine the presence or absence of moral capacities. For example, consider the astonishing progress made by people diagnosed on the autism spectrum. Less than fifteen years ago, Nick Pentzell was initially diagnosed as “profoundly retarded” and was thought to be completely nonverbal. Because his family members continued to search for ways to communicate with him, he learned the technique of facilitated communication at the age of thirteen. He has since written college-level papers demonstrating that he definitely possesses the capacities that Rawls describes. Stories like Scott’s and Pentzell’s demonstrate that the label “profoundly retarded” has led to neglect and wrongful treatment of individuals who could learn and develop their capacities if they received the necessary care and attention. They also demonstrate that the severity of a person’s
disability can be socially constructed through the failure to develop technologies such as hearing aids, sign language, and facilitated communication.

**Moral Status and the Dilemma of Voice: Speaking for Speechless Others**

There is a growing, though not yet universal, consensus that race, sexual orientation, gender, and physical disability are no longer acceptable reasons to exclude any human being from the scope of a theory of justice. Age (or stage of biological development/degeneration), cognitive ability, and species are the new frontiers that are being contested. The groups currently underrepresented in academic and public debates about social justice can be divided into two categories. The first was formerly silenced by oppressive structures that made obstacles of race, gender, class, sexual orientation, and physical disability. These individuals have always had their own voices, although they may not have had a fair hearing in the public forum or in academic philosophy. Once these individuals raised their voices to claim recognition as moral equals to the dominant groups, however, they quickly developed advocacy movements in which people organized based on their common identities and publicized their concerns. In tandem with social activism, intellectuals established the emerging academic disciplines of critical race theory, feminist philosophy, gay and lesbian studies, and disability studies. These disciplines currently focus on developing the theoretical insights gained from the unique perspective of being epistemically marginalized. Both in social practice and in theory, the members of marginalized groups take leadership. Others who do not belong to these groups are welcome to lend a hand as allies, but they take a secondary role in supporting the leadership’s vision, and usually defer to those belonging to the marginalized group.

The second group, in contrast, consists of those who have had no voice to this point. In considering humans with degenerative conditions, humans in persistent vegetative states, and nonhuman animals, we face the paradox of theorizing about those who are not parties to the conversation. In the previously discussed case of those who are raising their voices theorists benefit from adding the epistemically privileged standpoints to the discussion, while in this second case of the voiceless theorists are necessarily saddled with significant epistemic limitations. The group of beings with severely limited cognitive functioning consists of those who either have no voice at all, or communicate in ways that we cannot now decipher. As Eva Kittay writes, “Those who speak do so in a language not recognized – and even demeaned – by those who speak in the language of the public sphere. Without a claim to cognitive parity, even those who speak are not recognized as authors or agents in their own right. Those who cannot speak must depend on others to speak for them. Those who can speak find that their voice is given no authority. Perhaps there is no more disabling disablement.”

People with whom we cannot currently communicate fall into two broad groups, as shown in Figure 1 below. Either they are people with whom we have communicated in the past, or people with whom we have not yet communicated at all. When considering those who were once cognitively able adults, we may rely on their previous assertions about what they valued in life, and attempt to extrapolate what kinds of lives they would like to live in the present and the future. However, even these extrapolations are unreliable because people’s desires and ideas change as they experience and adjust to different circumstances.
As for people with whom we have not yet communicated at all, however, we have absolutely no access to their first-person perspective. We are faced with an unpleasant choice concerning their point of view. The first possibility is that we can discount their interests, deciding *a priori* that since they cannot participate in the dialogue they are not worthy of moral consideration. In so doing, we run the risk of erring on the side of doing grievous moral wrong, possibly on the order of the historical injustices of sexism and racism. To minimize the risk of error, we may choose instead the second possibility; we may commit ourselves to some account of interest, however provisional or well-founded, and endeavor to speak on behalf of the voiceless. This alternative runs the risk of erring on the side of overextending moral status to a realm much broader than necessary. In this case, a theory might mistakenly give moral agents duties to all living creatures, or even to rocks, rivers, mountains, and icebergs. Such a theory could still distinguish among levels of moral status, but would surely draw criticism for being overly inclusive. While plausibility is not the first virtue of moral theories, it certainly is one of the desiderata of a theory that seeks to gain public acceptance. However, as John Rawls has argued, the best account of a person’s sense of justice is not the one that fits her judgments before she takes time to examine any conception of justice.\(^{53}\) Rather, because moral philosophy is Socratic, we may want to change or revise our current moral judgments once we have reflected on their regulative principles.
It may be more prudent to err on the side of being overinclusive, given the lessons of history. We are at the first stages of seeking intellectual and moral consensus about the permissibility of excluding certain human beings from moral consideration, just as our European predecessors first started to question the social practices of slavery. We must guard against bias whenever those who have a significant personal stake in the outcome of a debate are those who would benefit from a given practice. Rousseau’s criterion for an acceptable law is one that does not arbitrarily single out any one group by name, in order to prevent laws that unfairly benefit particular interests or target specific groups. Rawls’s principles of justice have the power to exclude individuals from the scope of personhood with all its attendant rights and advantages; these principles should not be constructed so that they permit some nondisabled persons to benefit materially by exploiting those considered non-persons because of their disability status.

Considering the possibilities of error as mapped in Figure 1, I conclude that we should endeavor to imagine the interests of people with severe cognitive disabilities and to speak on their behalf. I believe that they should be included in the scope of justice as a practical matter of avoiding the more serious moral wrong of excluding them. The boundary between moral persons and nonpersons is indistinct and difficult to judge; we should therefore include all human beings without trying to determine exactly where they are on the spectrum of cognitive functioning. The possibility of mistakenly denying someone’s personhood (as in the cases of Judith Scott and Nick Pentzell) is a moral harm that theorists would be arrogant to risk.

Given that I propose to consider the interests of those heretofore largely excluded from philosophical debates, I face another challenge: speaking on behalf of others is inherently problematic. There is a double danger in writing about those who have no voice. As in navigating between Scylla and Charybdis, one must find the golden mean between failing to represent the interests of the voiceless on the one hand, and overstating or misconstruing their interests, on the other hand. This phenomenon emerges clearly in “self-advocacy” groups for people with cognitive disabilities (PCDs). Most self-advocates are individuals who have received much support and encouragement from their families, educators, and communities, so much so that their views are heavily influenced by the views of their caregivers. However, in subtle and less subtle ways, self-advocates are finding their own voices, and we should not be surprised if their voices bear a resemblance to those of their family members. After all, a similar phenomenon can be observed in every competent adult, whose voice bears undertones evoking his or her friends, family, and religious leaders, whether by reflection or by reaction.

**Conclusion**

In my reading of Rawls, PCDs do count as moral persons and are therefore owed the same burdens of justice as nondisabled adults. I hope to have persuaded the reader that Rawls’s Standard Solution (addressing PCDs as marginal cases) is unsatisfactory because of the two weaknesses I have described. I am optimistic about the prospects for an alternative solution that preserves the elegance and power of Rawls’s two principles of justice while reasonably addressing the problem of what we owe PCDs as a matter of justice. As long as this solution remains resourcist rather than welfarist, avoids the problem of the Bottomless Pit, and addresses the Hard Cases, it will be an improvement on the Rawlsian theories that we currently have.
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Notes


3. According to Brighouse, this is especially likely if the theory of justice is “patterned,” to use Nozick’s term, in the way that Rawls’s is.

4. Brighouse 539.


6. The two moral powers are defined below.


* Defined by a family history of one or more relatives with mental retardation, no other identified cause, and no evidence for a single-gene disorder. Typically, economic disadvantage complicates the phenotype.


16. For Rawls’s discussions of society as a fair system of cooperation, see A Theory of Justice 4; Justice as Fairness 4-8, 95-96; Political Liberalism 15-22. For Rawls’s discussions of citizens as free and equal, see A Theory of Justice, 10-19, 441-449; Justice as Fairness, 18-24; Political Liberalism, 18-21, 29-35. For the claim that citizens are normal and fully cooperating members of society, see Justice as Fairness, 7-8; Political Liberalism, 20-21; “Kantian Constructivism in Moral Theory,” The Journal of Philosophy 77 (1980): 546.

17. Political Liberalism 302.


20. See Political Liberalism 20, where “normal and fully cooperating members of society over a complete life” are contrasted with those who have “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” [emphasis added].

21. This is especially clear in his discussion of health care in Justice as Fairness, 173-75.

22. Thanks to Cynthia Stark for helping me clarify this issue.


26. A Theory of Justice Sec. 77, 505.

27. An interesting tale is told by longevity statistics. There are severe racial and socioeconomic disparities in the longevity of people with Down syndrome (DS). Whites with DS now live until the average age of 50, but the life expectancy for blacks is 25 and “others” 11, according to a recent study conducted at the Centers for Disease Control and Prevention. This means that white individuals with DS live twice as long as blacks and four times as long as Asians, Hispanics, and Native Americans with the very same condition. When comparing the life expectancy of whites and blacks in the same socioeconomic class the disparities are not nearly so great, indicating that the causal factors are class and social standing, not the genetic features of racial difference. These statistical variations support the view that a person’s longevity, far from being strictly determined by the genetic condition of Down syndrome, is linked to social and economic factors that can be influenced by policy changes.

28. See Chris Burke, A Special Kind of Hero (New York: Doubleday, 1991); Jason Kingsley and


30. Thanks to Jeremy Waldron for suggesting this point.


35. *Political Liberalism* 270.


39. An alternative response would be to contend that Arrow misunderstands the Rawlsian theory and its concept of the least advantaged in particular.

40. Rawls argues that the representatives in the original position would adopt the maximin rule as their principle for evaluating the choices before them. Borrowed from game theory, maximin stands for maximizing the minimum; i.e., making the choice that produces the highest payoff for the worst outcome.

42. *A Theory of Justice* 92-93.

43. Persons with Down syndrome are said to have an IQ ranging between twenty-five and fifty with an occasional individual above fifty. Early developmental enrichment programs for Down syndrome children have resulted in improved rate of progress during the first four to five years of life, and
medications have resulted in an increase in median age at death from twenty-five years in 1983 to forty-nine years in 1997. See Kenneth Lyons Jones, 7-8.

44. Nussbaum, Frontiers 65.


47. For example, a disproportionate number of black students are labeled “retarded” and placed in classrooms where they receive less attention from teachers, while a disproportionate number of white students are labeled “learning disabled” and given extra tutoring and support for their academic studies.


49. For example: National Organization of Women (NOW), National Association for the Advancement of Colored People (NAACP), AIDS Coalition to Unleash Power (ACT-UP), Coalition for Asian Pacific Americans (CAPA), and Not Dead Yet (people with disabilities opposed to the assisted suicide and euthanasia movement).

50. Feminist standpoint theory is derived from the Marxist position that the socially oppressed class can access knowledge unavailable to the socially privileged, particularly knowledge of social relations. As feminist standpoint theory has developed, it has focused more on the political nature of the standpoint (for example, a feminist standpoint rather than a women’s standpoint), and it has attempted to address the diversity of women by incorporating the standpoints of other marginalized groups. See, for example, Sandra Harding, Whose Science? Whose Knowledge? Thinking from Women’s Lives (Ithaca: Cornell University Press, 1991), and Patricia Hill Collins, Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment (New York: Routledge, 1990).

51. For examples see Jean-Dominique Bauby, The Diving Bell and the Butterfly: A Memoir of Life in Death (New York: Vintage, 1998); also Temple Grandin and Margaret N. Scariano, Emergence Labeled Autistic (Navato, California: Arena Press, 1996). The latter explores Temple Grandin’s life with autism, including accounts of her experiences as a child before people knew she could understand them even though she could not let them know through speech.

52. Eva Feder Kittay, “When Caring is Just and Justice is Caring: Justice and Mental Retardation,” in The Subject of Care: Feminist Perspectives on Dependency, eds. Eva Feder Kittay and Ellen K.


55. To give a concrete example, in many places PCDs are still employed in sheltered workshops where they perform work that is paid at rates below the minimum wage. Employers profit from their labor but are not obligated to compensate them like normal persons.


57. This was the problem addressed by a special panel of the Feminist Ethics and Social Theory Conference titled “A Difficult Conversation between Women with Disabilities and Caregivers for Those with Disabilities,” Clearwater, Florida, October 16, 2003.


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