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## What We Have Reason to Value: Human Capabilities and Public Reason

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### 1 Introduction

Living together in a community, people inevitably make all sorts of demands on one another. We ask not only that people abide by laws, but that they conduct themselves in ways that comply with social morality. We strive to reach agreement peacefully about how we ought to behave with one another despite the fact that members may hold different beliefs about personal morality and religion, the good life, and how society should be ordered. Notwithstanding these differences, most of the time, we are able to resolve differences by appealing to reason.

*Public reason* is the name sometimes given to the reasoning we invoke in public life to come to agreement about matters requiring social action, such as the design of public institutions, laws and policies potentially affecting all, and social values and priorities. Unlike *private reason*, which

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is the individual reflection we engage in with people who share our values and way of life and identify with our moral or religious convictions, public reason extends beyond like-minded people; it rests on modest premises that can gain wide acceptance.

This chapter sets forth an interpretation of public reason that appeals to our central capabilities as human beings. I argue that appealing to central human capabilities and to the related idea of respect for threshold capabilities is the best way to understand public reason. My defense of this position advances stepwise. (1) First, I consider the central alternative to a capability account, which is to regard public reason as a matter of contracting based on voluntary choice and rational deliberation among equals. (2) Next, I describe central concerns with contract views and (3) show how a capability view can avoid them. (4) Lastly, I consider extending a capability account of public reason beyond national borders and address the objections that capability views of public reason apply only to Western constitutional democracies or that they embed exclusively Western values.

## 2 Public Reason as Contracting

Public reason is a way to ensure that the moral and political rules that govern common life are justifiable to all people to whom the rules apply. A well-known account, with roots in social contract theories of the seventeenth and eighteenth centuries, regards public reason as a process of contracting. According to this account, free and equal individuals pursuing their own interests agree to join together in a civil society and to be subject to its constraints. This kind of contractual account is found in the philosophies of Hobbes, Locke, and Rousseau, where it is used as a justification for the existence of a sovereign and the restrictions of the state. Kant endorses a version of social contract which is based on rational unanimity binding each legislator to “give his laws in such a way that they could have arisen from the united will of a whole people”<sup>1</sup> and stresses

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<sup>1</sup> Immanuel Kant, “On the Common Saying: That Might be Correct in Theory, But it is of No Use in Practice” (1793), *The Cambridge Edition of the Works of Immanuel Kant: Practical Philosophy*, trans. Mary J. Gregor (Cambridge, UK: Cambridge University Press, 1999), pp. 296 and 297.

that “[a]ny rights and duties stemming from an original contract do so ... because of the rightful relations embodied in the original contract,”<sup>2</sup> Taken together, the political philosophies of

Hobbes, Locke, Rousseau and Kant brought to the fore a crucial problem for social life among autonomous moral agents under modern conditions: using their reason as well [as] could reasonably be expected, people will arrive at conflicting judgments about morality. The solution of the social contract theorists was public reason as expressed by the political umpire.<sup>3</sup>

This manner of reconciling individual differences requires each person to exercise reason and consent to a framework for social life. No individual’s private morality dictates; instead, each retains autonomy and authorizes a moral framework for social life as normative for them.

Twentieth-century thinkers share and extend this conception, shifting from the justifying the state to justifying moral principles of justice. Gaus, for example, maintains that when we use our private reason, we disagree about what is right and good, but when we articulate public reason, we find areas of overlap between diverse moral viewpoints. The strategy gives expression to the idea, rooted in social contract theory, that a shared public morality must meet a condition of justifiable to each: “For each person, she only has one source of normative judgment—her overall set of evaluative standards”; therefore, “social morality must not make moral demands on a person that cannot be justified to her.”<sup>4</sup> The requirement of justifiability to all legitimates social morality in the same way that it legitimates the state. The basis for this condition is the belief the authority of social morality must be morally based, and that morality first and foremost arises at the level of individuals. Gaus writes, “While no one’s vision of the moral truth can dictate the social moral framework, the aim is for all to see the social moral framework as normative, given

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<sup>2</sup> Frederick Rauscher, “Kant’s Social and Political Philosophy,” in *Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, (2017). At: <https://plato.stanford.edu/archives/spr2017/entries/kant-social-political/>.

<sup>3</sup> Gerald Gaus, “On Being Inside Social Morality and Seeing it,” *Criminal Law and Philosophy* 9 (2015): 141–153, at p. 142, henceforth “*BP*”.

<sup>4</sup> *BP*, pp. 145, 146.

their individual understandings of moral truth.”<sup>5</sup> This coordination of moral sensibility makes possible a social life and public morality.

Underlying these analyses is a twofold consensus. First, on fundamental matters of how we ought to live our lives, reasonable people will disagree, where “reasonable” means the process of thinking and conversing in good faith about something. Second, public life should not be based on disputed features of any single individual’s private morality, but on a shared vision, which in a diverse society can only be a thin vision of the good, reflecting a narrow overlapping consensus. According to Larmore, social morality “must seek its principle in a minimal morality, which reasonable people can share despite their expectably divergent religious and ethical convictions.”<sup>6</sup> The corresponding aim of public morality must be nothing more than “restraining the struggle for advantage and the violence of emotion....”<sup>7</sup>

A striking feature of this account of public morality is the commitment to respect persons by seeking to justify social morality to each individual. Rawls calls this requirement the liberal principle of legitimacy.<sup>8</sup> For Rawls, as for Kant, people possess an inviolability that makes it wrong to regard them as mere means to a public good. According to Kant, the requirement of justifiability to all reflects the worth and dignity of persons: “a human being regarded as a person, that is, as the subject of morally practical reason, is exalted above all price ... as an end in himself he possesses a dignity by which he exacts respect for himself from all other beings in the world.”<sup>9</sup> Broadly speaking, justifiability to all expresses the idea that just political principles are those that can be justified to all those who are subject to them. The intuitive idea is that it violates the dignity and worth of an individual to force them to act against their own reasons.

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<sup>5</sup> *BI*, p. 143.

<sup>6</sup> Charles Larmore, “The Moral Basis of Political Liberalism,” *Journal of Philosophy* 96, no. 12 (1999): 99–625, at p. 600, henceforth “*MB*.”

<sup>7</sup> *MB*, p. 601.

<sup>8</sup> John Rawls, *Political Liberalism* (New York: Columbia University Press, 2005), henceforth “*PL*.”

<sup>9</sup> Immanuel Kant, *The Metaphysics of Morals* (1797), in *Immanuel Kant Practical Philosophy*, trans and ed. Mary Gregor (Cambridge, UK: Cambridge University Press, 1996), at pp. 434–435.

### 3 Disability Critiques of Contracting

Yet critics of the social contract tradition note that the conception of dignity it offers is narrow in scope, applying only to people who possess rational agency. Someone incapable of having reasons for acting falls outside the scope of contracting. To further consider what has come to be known as “the disability objection,” it is helpful to distinguish two strands within the social contract tradition: first a *contractarian* or Hobbesian strand and second, a *contractualist* or Kantian strand.<sup>10</sup> The contractarian stance leans toward narrow self-interest as a basis for bargaining and is associated with thinkers such as Hobbes. The contractualist stance leans opposite, away from narrow self-interest toward a broader requirement of justification before others as a requirement of deliberating and is associated with the tradition of Kant. It is relatively easier to make the case that people who lack the capacity for public reason, such as people with severe intellectual disabilities, fall outside the scope of hard bargaining and narrow self-interest associated with a contractarian interpretation, since there might be a perceived social burden associated with caring for people with lifelong dependencies. Yet even when self-interest is tempered by a requirement to justify oneself to others, as it is on the contractualist view, the social contract position remains vulnerable to the disability objection. For example, Rawls requires that contracting parties deliberate by drawing on “moral powers,” such as the capacity to form and revise a conception of the good and to have a sense of justice that enables them to act on and apply fair terms of cooperation.<sup>11</sup> Critics, such as Young, argue that an implication of Rawls’ view is that duties of justice cannot be owed directly to individuals with serious intellectual disabilities.<sup>12</sup> For Young, and others of her ilk,<sup>13</sup> members of society who do not meet the

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<sup>10</sup>Elizabeth Ashford, Tim Mulgan, “Contractualism,” in *Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta (2018), at: <https://plato.stanford.edu/archives/sum2018/entries/contractualism/>.

<sup>11</sup>*PL*, pp. 18–20.

<sup>12</sup>Iris Marion Young IM, “Rawls’s Political Liberalism,” *Journal of Political Philosophy* 3, no. 2 (1995): 181–190.

<sup>13</sup>Eva Feder Kittay, *Love’s Labor*, 2nd Edition (New York: Routledge, 2019), henceforth “LL”; Martha C. Nussbaum, “Capabilities and Disabilities,” *Philosophical Topics* 30, no. 2 (2002): 133–165, henceforth “CD.”

requirement of rational agency are nonetheless owed justice, even though the justifiability to all condition does not apply to them. Others note that this form of objection applies not just to people with lifelong disabilities, but also to all human beings during the usual course of the human life cycle, which brings with it periods of immaturity during infancy and early childhood and high rates of cognitive impairment and dependency during later life.<sup>14</sup> Other interpretations of the outlier problem hold that social contracting positions African Americans<sup>15</sup> and women<sup>16</sup> at distinct disadvantage, even if they are not excluded categorically.

Kittay elaborates the disability objection by arguing that a contractarian view would make an outlier of her daughter, Sesha, who is profoundly mentally and multiply disabled; Kittay claims Sesha has an inviolability founded on dignity that social contract traditions miss. Raising Sesha imparted a lesson in humility, Kittay notes, by leading her to realize that “what ... I—thought was at the center of humanity, the capacity for thought, for reason, was not it, not it at all.”<sup>17</sup> Kittay identifies several features, unrelated to the capacity for thought, as morally salient: the human way in which Sesha appreciates music; shows sensitivity to others; stands in social relationships; evinces a “strong clear sense of herself”; “is capable of great joy and great love”; and seems to remember and anticipate people, places, and music she has not heard for years.<sup>18</sup> Kittay reasons that Sesha’s intellectual limitations might mean that she lacks the capacity to understand the distinct moments of her life as a meaningful whole, with a narrative-like unity, which would mean that Sesha’s life might not have a certain richness that her own life has. Yet, she rejects the idea that this shows that Sesha or other individuals with intellectual impairment should be compared to non-human animals in worth or dignity. Although Sesha cannot express cognitive capacities, and shows no measurable IQ, “What Sesha can do she does as a *human* would do them,

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<sup>14</sup> Nancy S. Jecker, *Ending Midlife Bias: New Values for Old Age* (New York: Oxford University Press, 2020), henceforth “*EMB*.”

<sup>15</sup> Charles Mills C., *The Racial Contract* (Ithaca, NY: Cornell University Press, 1997).

<sup>16</sup> Carol Pateman, *The Sexual Contract* (Stanford, CA: Stanford University Press, 1989).

<sup>17</sup> *LL*, p. 160.

<sup>18</sup> Eva Feder Kittay, “At the Margins of Moral Personhood,” *Ethics* 116, no. 1 (2005): 100–131, at pp. 127–129, henceforth “*MMP*.”

though frequently imperfectly, but it is *humanly* imperfect.”<sup>19</sup> Kittay’s conclusion is that Sessa’s life contains “an immeasurable amount of good.”<sup>20</sup> Nussbaum says of cases like Sessa’s that they show with “naked clarity the extent to which the very choice of a bargaining model biases the whole idea of the benefits of social cooperation.”<sup>21</sup>

In reply, it might be claimed that some versions of social contract theory escape the disability objection. Scanlonian contractualism purports to do just that. According to this view, what makes an act wrong is that it can be reasonably rejected; specifically, “an act is wrong if its performance under the circumstances would be disallowed by any set of principles for the general regulation of behavior that no one could reasonably reject.”<sup>22</sup> Scanlon goes on to say that human beings with significant disability deserve protection even when they themselves are incapable of having reasons to reject principles and unable to form even the more minimal “judgement sensitive attitudes,” which are attitudes that may arise spontaneously, without reflection, self-consciousness, or any judgment concerning oneself or what is done to one.<sup>23</sup> The justification Scanlon offers us for duties to beings with significant intellectual limitations is that “the mere fact that a being is ‘of human born’ provides [us] a strong reason for according it the same status as other human beings.”<sup>24</sup> He goes on to defend this claim against the charge of speciesism, arguing that “it is not prejudice to hold that our relation to these beings gives *us* reason to accept the requirement that our actions should be justifiable to them.”<sup>25</sup> He adds, “the beings in question here are ones who are born to us or to others to whom we are bound by the requirements of justifiability. This tie of birth gives us good reason to want to treat them ‘as human’ despite their limited capacities.”<sup>26</sup> The general idea seems to be that an individual like

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<sup>19</sup> *MMP*, pp. 127–128, emphasis added.

<sup>20</sup> *MMP*, p. 120.

<sup>21</sup> *CD*, p. 152.

<sup>22</sup> T.M. Scanlon, *What We Owe to Each Other* (Cambridge, MA: Belknap Press of Harvard University Press, 2000), p. 153, henceforth “*WWO*.”

<sup>23</sup> *WWO*, p. 23.

<sup>24</sup> *WWO*, p. 185.

<sup>25</sup> *WWO*, p. 185.

<sup>26</sup> *WWO*, p. 185.

Sesha can be wronged simply by virtue of how *others* are rationally disposed to relate to her. As Kumar notes, as a contractualist, Scanlon is committed to the “individual reasons restriction,” which roughly holds that what is morally relevant to justifying principles that regulate individual relations are only those considerations that have a bearing upon the recognition of persons capable of rational self-government.<sup>27</sup> Therefore, those with intellectual impairments like Sesha’s count morally only so far as they figure into the lives of rational self-governors.

Yet, a limitation of Scanlon’s account in these passages is that he includes people with disability derivatively, namely, because they stand in a certain relation to beings who have a reason to object to their ill-treatment. For example, we should not inflict gratuitous harm on Sesha because others could reasonably object. If our overall theory is contractualist, it makes sense to give a contractualist analysis of why treating Sesha cruelly would be wrong. Contractualism, as Scanlon presents it, is an account of reasoning about moral principles which assumes a specific normative ideal of a person, namely, someone with the capacity for reason and rational self-government.<sup>28</sup> However, in contrast to Scanlon, we want to say that Sesha’s value is not derivative. She herself deserves respect and she herself possesses an inherent worth and dignity. Her dignity holds irrespective of her relation to others. These reflections lead us to look elsewhere for an account of public reason.

## 4 Public Reason as Human Capabilities

One way of spelling out an alternative vision is to focus on common humanity, a focus which derives from a more general idea I call, “species integrity.”<sup>29</sup> In contrast to the social contract tradition, which begins with

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<sup>27</sup> Rahul Kumar, “Who Can Be Wronged?” *Philosophy and Public Affairs* 31, no. 2 (2003): 99–118, at p. 108.

<sup>28</sup> Rahul Kumar, “Reasonable Reasons in Contractualist Moral Argument,” *Ethics* 114, no. 1 (2003): 6–37, at p. 9.

<sup>29</sup> *EMB*, pp. 29–51.



the choices of free and equal individuals, species integrity begins with the idea of a being who commands respect, not by virtue of our volition or choice, but by virtue of the kind of being they are. Darwall refers to this form of respect as “recognition,” distinguishing it from “appraisal.”<sup>30</sup> While appraisal respect is the product of an evaluation we make of another’s merit, recognition respect indicates “deference, in the most basic sense of yielding: self-absorption and egocentric concerns give way to consideration of the object, one’s motives or feelings submit to the object’s reality, one is disposed to act in obedience to the object’s demands.”<sup>31</sup>

If we begin with recognition respect, rather than consent, the first step is to ask what kind of being is Sessa that she commands this kind of respect? What Kittay tells us is that Sessa is human, and her imperfections are “humanly imperfect, not canine perfect.”<sup>32</sup> In other words, she is not to be compared with any other species because our response to her is partly owing to the fact that she is human, like us. Kittay’s description makes evident that Sessa can do and be many, though not all, of the central things that human beings generally can do and be. A more complete list might be the following, adapted from Nussbaum<sup>33</sup> and defended at greater length elsewhere<sup>34</sup>:

#### *Central Human Capabilities*

1. Life: having an unfolding story or narrative of one’s life;
2. Health: being able to have all or a cluster of the central capabilities at a threshold level;
3. Bodily Integrity: being able to use one’s body to realize one’s goals;
4. Senses, Imagination, and Thought: being able to imagine, think, and use the senses;
5. Emotions: being able to feel and express a range of human emotions;
6. Practical Reason: being able to reflect on and choose a plan of life;

<sup>30</sup> Stephen Darwall, “Two Kinds of Respect,” *Ethics* 88, no. 1 (1977): 36–49.

<sup>31</sup> Robin S. Dillon, “Respect,” in *Stanford Encyclopedia of Philosophy* ed. Edward N. Zalta (2018). At: <https://plato.stanford.edu/archives/spr2018/entries/respect/>.

<sup>32</sup> *MMP*, p. 128.

<sup>33</sup> Martha C. Nussbaum, *Creating Capabilities* (Cambridge, MA: Harvard University Press, 2011a).

<sup>34</sup> *EMB*.

7. Affiliation: being able to live for and in relation to others;
8. Nature: being able to live in relation to nature and other species;
9. Play: being able to laugh, play, and recreate; and
10. Environment: being able to regulate the immediate physical environment.

Appealing to central human capabilities is an appeal to salient features of shared humanity. Such an appeal extends well beyond the purely procedural focus found in Hobbes, Locke, Rousseau, and Kant (and in our own day, Rawls). With the capability view, the opening question is, ‘What kind of being is a human being?’ Only after there is an answer to the first question does the view ask, ‘What is minimally required to respect that being’s central capabilities at a minimal threshold?’ Finally, the capability view asks a third question, namely, ‘What reasonable steps can society take to support a minimal threshold with respect to each capability?’

If we assume that the proposed list of central human capabilities is at least a plausible way to answer the first question, then we turn to the second question. Here, our answer is that a capability threshold for Sesha (or another person with similar disabilities) focuses on supporting her capacities to be physically, emotionally, and mentally healthy; have bodily integrity; exercise senses and imagination; feel and express human emotions; affiliate with others; go outdoors; laugh, play, and recreate; and exercise some measure of control over her physical environment. All of these capabilities are part of the central things that Sesha can do and be as a human being. Since Sesha lacks some central capabilities, such as the capability to have a narrative or reflect on a plan of life, respecting her dignity will not require things that would be required if she had these capabilities.

The last step in a capability analysis is pinpointing reasonable steps society must take to bring about a capability threshold. This is a matter of balancing the responsibilities to respect Sesha in the ways described among various groups, including Sesha’s family; public/private institutions, such as schools, health, and social care systems; and various public services, such as public safety and security, education, and recreation. It also implies duties on the part of the long-term care facility where Sesha

lives and government funding at various levels to reasonably accommodate people with disabilities like Sesha's.

The case of Sesha and the disability challenge more broadly indicates that although common humanity is a constant, the presence or absence of particular capabilities varies from one individual to the next. In addition, particular capabilities vary for the same individual over time, from birth to death. For example, human practical reason is something acquired gradually as the human brain develops. Nor are we born with the ability to move from place to place or be sexually intimate; if we acquire these abilities, they might be diminished later in life. These variations between and within people do not change the underlying fact that each of us is equally and fully human. When we speak of *respecting human dignity*, it is the underlying humanity we speak to. When we speak of *showing respect for human dignity*, there will be different things required for different people and for the same person over time. Since people display unequal abilities to convert resources into functioning and opportunities, some individuals will require more resources than others to attain the same capability threshold.

In response, someone might think it matters *why* a person requires more resources to reach the same capability level, claiming that if the need for more is due to choices the individual made, it is the individual, not society, who should be held accountable.<sup>35</sup> Others might question why inequalities should matter only up to the threshold, rather than beyond it.<sup>36</sup> In reply, following Casal, I interpret the capability view as comprised of two separate theses: a positive thesis, claiming "the importance of people living above a certain threshold" and a negative thesis, denying "the relevance of certain additional distributive requirements" after threshold sufficiency.<sup>37</sup> It is possible to embrace both theses or to endorse just one. For example, Shields adopts a hybrid position, appealing to what he calls, "the shift thesis," which holds that it is worse to be unequal below than it is to be unequal above the threshold level.<sup>38</sup> My

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<sup>35</sup> Kasper Lippert-Rasmussen, *Luck Egalitarianism* (London: Bloomsbury Academic, 2015).

<sup>36</sup> Liam Shields, *Just Enough: Sufficiency as a Demand of Justice* (Edinburgh University Press, 2016).

<sup>37</sup> Paula Casal, "Why Sufficiency is Not Enough," *Ethics* 117, no. 2 (2007): 296–326, at p. 298.

<sup>38</sup> Liam Shields, *Just Enough: Sufficiency as a Demand of Justice* (Edinburgh: Edinburgh University Press, 2016), at p. 30.

emphasis throughout is the positive claim that we ought to reasonably support people at a capability threshold, leaving open questions about what additional principles, if any, justice entails.

If we accept a capability strategy for going about public reasoning, we are left with a more demanding account of what public reason requires. Public reason that appeals to central human capabilities requires supporting *each* central human capacity, not just the capacity for practical reason. Some charge that a capability view is overly demanding for this reason—it compels supporting people in a wide range of things they can do and be as human beings.<sup>39</sup> In reply, there are several features that temper the view's demandingness. First, as I interpret it, the capability view is life stage sensitive. For example, if a child is deprived of basic childhood opportunities, such as primary education, society should intercede, but it is not required to help a child reach their highest possible potential. Second, reasonable efforts do not demand exorbitant or useless efforts. For instance, Sesha will never be able to acquire certain kinds of functioning, such as literacy and numeracy, and it would be futile to attempt to provide these opportunities to her. Third, a pragmatic feature is built into the notion of what is "reasonable." For example, when the view is deployed in low resource settings, it might sanction moves in the right direction, while acknowledging that they fall short of the minimal threshold set by capability sufficiency.<sup>40</sup>

A final objection is that a capability account properly understood is not a way of engaging in public reason at all, but instead an outcome of public reason, that is, a preferred framework arrived out through a process of public reasoning. In response, like other accounts of public reason, capability views aim to tell us what is required in order to justify ourselves to others. Rather than using the social contract apparatus to meet this requirement, a capability view meets it by appealing to human dignity. While respecting human dignity demands respecting people's capacity for reason, it also requires respecting their other central capacities. Just as

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<sup>39</sup>Laura Capitaine, Guido Pennings, Sigrid Sterckx, "Why Jecker's Capabilities Approach to Rationing Is Incapable of Containing Health Care Costs," *American Journal of Bioethics* 13, no. 8 (2013): 22–23, at p. 22.

<sup>40</sup>Nancy S. Jecker, "Age-Related Inequalities in Health and Healthcare," *Developing World Bioethics* 18 (2017): 144–155.

we cannot force people to do things that they reasonably oppose, we cannot ride roughshod over their other central capacities. The capability view agrees with social contract views that human dignity resides in our capacity for rational agency, but it adds to this the claim that human dignity also resides in the many other capacities that make us human. This widening of the scope of public reason does not rest on a comprehensive doctrine, but instead on a view of humanness that departs from the view consent-based theories employ.

## 5 Public Reasons Beyond Borders

So far I have defended a capability approach to public reason by arguing that it carries advantages over contracting by including respect for all the central human capabilities, not just the capability for practical reason. In this way, it affords a fuller picture of common humanity and offers a vision of human dignity that encompasses the range of differences that humans display. However, a further test is how these different renderings of public reason fare at a global level. How can public reason extend beyond national borders and guide deliberations between nations? Does contracting or capability serve us better at an international level?

### Contracting

An initial way to extend a Rawlsian contractual account of the just state to a global level is by introducing of a two-stage contract.<sup>41</sup> At the first stage, an agreement is struck among individuals with free and equal power who agree to abide by certain principles of justice in the domestic sphere. At the second stage, an agreement is struck among independent states with equal power that come together on the world stage and agree to abide by an international Law of Nations, which includes conventions such as keeping treatise, honoring nations' self-determination, and waging wars justly.

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<sup>41</sup>John Rawls, *Theory* (Cambridge, MA: Belknap Press of Harvard University Press, 1971).

Yet, this initial attempt faces obvious concerns related to the preconditions it sets. First, states are unequal in power, wealth, and development; second, their borders change over time; and third, they come to the bargaining table with preexisting dependencies. A subsequent attempt to adapt a Rawlsian view replaces the Law of Nations with a Law of Peoples, which applies exclusively to liberal democracies. Pursuing this approach, Rawls opines that

Just as a citizen in a liberal society is to respect other persons' comprehensive religious, philosophical, and moral doctrines, provided they are pursued in accordance with a reasonable political conception of justice, so a liberal society is to respect other societies organized by comprehensive doctrines, provided their political and social institutions meet certain conditions that lead the society to adhere to a reasonable law of peoples.<sup>42</sup>

The Law of Peoples is more robust and demanding than the Law of Nations, in the sense that it accords all people human rights and assigns all nations duties to assist people living under unfavorable conditions, regardless of national origin. As Nussbaum rightly notes, this more expansive conception is not based on contracting, but goes beyond it, making a direct appeal to those who are part of the bargain to respect human rights.<sup>43</sup> To find a basis in public reason for the appeal to human rights made in the Law of Peoples requires looking beyond contracting to a philosophical conception of human dignity, a concept often regarded as the philosophical basis of human rights.<sup>44</sup>

## Capabilities

A capability account is at home with the language of international human rights and can offer tools for making sense of such appeals. Simply put, to honor human rights at an international level is to make good on them

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<sup>42</sup> John Rawls, "The Law of Peoples," *Critical Inquiry* 20 (1993): 36–68, p. 37.

<sup>43</sup> Martha C. Nussbaum, "Beyond the Social Contract," *Oxford Development Studies* 32, no. 1 (2004): 3–18.

<sup>44</sup> Jeremy J. Waldron, "Is Dignity the Foundation of Human Rights," in *Philosophical Foundations of Human Rights* ed. Rowan Cruft, Matthew S. Liao, Massimo Renzo (New York: Oxford University Press, 2015).

through reasonable measures to ensure an adequate threshold of the central human capabilities they refer to. As Nussbaum notes, capabilities can work *either* with a conception of human rights as their philosophical underpinning, or they can function directly, as a standalone framework.<sup>45</sup> Those who regard the language of rights as beset with controversy, or as not especially informative beyond appeals to dignity, are sometimes led down the latter path, shedding the language of rights and using capabilities as a free-standing ethical analysis. Since 1993, for example, the United Nations (U.N.) Development Programme has assessed the quality of life in nations of the world using the concept of people's capabilities or their abilities to do and to be certain things deemed valuable.<sup>46</sup> Appealing to threshold capabilities, the U.N. directs economic development in low- and middle-income nations toward creating conditions that enable and create choice with respect to a variety of functions, while at the same time leaving open the question of which functions people choose to realize:

Someone who has access to adequate nutrition can always fast for religious reasons: but there is a great difference between fasting and starving. Someone who dislikes leisure and play and prefers a workaholic life can choose that life: but this is a huge difference between that chosen life and the 'double day' (working a full-day job and then doing all the child care and domestic labor) that stops millions of women the world over from choosing leisure activities that help to make their lives meaningful. One may also refuse to vote or participate in politics, as the Old Order Amish do—but it would be quite another thing, and an assault on their fundamental political equality, to deny them the *capability* of voting.<sup>47</sup>

In this way, a capability account articulates a set of enabling conditions which, together with the threshold level of adequacy, invites a conception of public reason and social morality that can be broadly embraced among nations.

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<sup>45</sup> Martha C. Nussbaum, "Capabilities and Human Rights," *Fordham Law Review* 66, no. 2 (1997): 273–300.

<sup>46</sup> United Nations, Development Programme, *Human Development Report 1993* (Geneva: United Nations 1996).

<sup>47</sup> Martha C. Nussbaum, "Political Liberalism and Global Justice," *Journal of Global Ethics* 11, no. 1 (2015): 68–79, at p. 71.

## Is a Capability View Individualistic or Western Biased?

However critics might worry that a capability approach is Western biased or presents a view of public reason that makes implicit assumptions that many societies would reject. One concern is that since a capability view rests on a particular list of central human capabilities, some societies might regard the chosen list as not reasonably reflective of their way of life. For example, a capability list might be perceived as Western biased if it were overly individualistic, focusing too much on the capabilities and functioning of individuals and not enough on the capabilities and functioning of groups. As a result, it may not sit well with collectivist leaning societies. Another worry is that a capability list might be biased in ways some societies would reject if it were perceived as overemphasizing rationality and underemphasizing affective qualities, such as caring and solidarity.

In reply, on any interpretation of a capability view, some leeway is given to the specification of a list. Rather than strive for a “culturally neutral list,” the aim is instead to specify lists in accordance with the way of life and conditions of the society and to continuously adapt them as these conditions shift. On some accounts, such as Sen’s, capability lists are left entirely open for each society to choose; thus, Sen opposes “a cemented list of capability, which is absolutely complete (nothing could be added to it) and totally fixed (it could not respond to public reasoning and the formation of social values)”.<sup>48</sup> Yet, at the same time, Sen allows that some central human capabilities figure in every list.

On the specific account I defend, multiple lists are possible provided certain normative constraints are met.<sup>49</sup> First, a capability list must be *balanced* between individual and relational capabilities and between cognitive and noncognitive capabilities. For example, emotions, affiliation, and play are primarily relational and noncognitive, whereas practical reason and thought are primarily individualistic and cognitive. The balance requirement ensures an even-handed specification of dignity that

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<sup>48</sup> Amartya Sen, “Capabilities, Lists, and Public Reason,” *Feminist Economics* 10, no. 3 (2004): 77–80, at p. 78.

<sup>49</sup> *EMB*.



can gain traction among people with diverse moral orientations. Second, capability lists must be *provisional*. This allows not only for the possibility that new arguments or objections may come to light, but also that the conditions of human beings or the environments in which they live might change in ways that impact what human beings can do and be. For example, genetic modification or degradation of the environment, may transform some of the central things that people can do and be. Third, an adequate capability list must be *life stage sensitive*, since what individuals can do and be shifts over the life course. The ability to move from place to place or affiliate with others, for example, is different for an infant than it is for an adult; capability lists must reflect this, rather than attempting to be life stage neutral.

Critics might also raise the concern that a capability view is narrow in the same kind of way that contractarian and contractualist versions of social contract are, namely, relegating those who lack rational faculties to the margins of the theory. If capability lists rest, for example, on an overlapping consensus among people with diverse metaphysical and religious conceptions, as Nussbaum claims,<sup>50</sup> this presupposes that people have the requisite intellectual capability to have a metaphysical or religious worldview in the first place. How would Sessa or others with significant intellectual impairment partake in an overlapping consensus?

In reply, although justifiability to all is retained on some versions of the capability account, when it is retained it occurs at a later stage in the argument. The argument starts with human capabilities. It is the idea of what we can do and be as human beings and what it means to respect these capabilities at a threshold level that drives the argument and underlies the conception of human dignity. Elsewhere, I defend in greater detail the claim that every human being who possesses some (at least one) of the central capabilities has full and equal moral standing and is owed the respect that dignity demands.<sup>51</sup> If this is right, then over time, the fact that these ideas are stable (for the right reasons) among those who have rational capabilities adds force to their justification.

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<sup>50</sup> Martha C. Nussbaum, *Frontiers of Justice* (Cambridge, UK: Cambridge University Press, 2006), at p. 70.

<sup>51</sup> *EMB*.

A different kind of worry is that the capability view applies only to nations with governments that are liberal constitutional democracies. For example, Sen has argued that philosophical reasoning about justice is always democratic.<sup>52</sup> It is partly for this reason that Sen leaves the creation of capability lists to a later stage, as an evaluative exercise to be carried out by democratic decision-bodies. Reasoning along similar lines, Crocker argues that the capability approach needs to be connected to the theory and practice of deliberative democracy.<sup>53</sup>

In reply, while some interpretations do link justice and democracy, not all do. Siding with Nussbaum, the approach defended in this chapter is not merely a stimulus for public debate but also a substantive account of obligations of states to respect human dignity and to widen the scope of obligations to all citizens, including people with disabilities, such as Sessa, who are permanently incapable of the rational agency required for democratic deliberation. This is not up for a vote; rather, it sets parameters on how the state might act. The view I defend might be dubbed a “blended view,” since it is partly procedural and partly substantive. The procedural aspect refers to the ‘open-ended’ feature of capability lists, which can be specified in different ways in different contexts. The substantive aspect refers to the fixity of the requirement that threshold capabilities must be reasonably supported as a matter of justice.

It could be argued that to the extent that a capability view relies on procedural methods that are democratic, it reflects a Western democratic bias. However, this concern misses the mark. Although the institutional structure of the contemporary practice of democracy is largely a product of the West, participatory governance itself has “surfaced and resurfaced with some consistency in different parts of the world.”<sup>54</sup> People’s participation in public reason is not quintessentially Western; instead, as I have argued, it is among the central human capabilities that human beings everywhere share. As Sen notes, democracy “gives expression to a

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<sup>52</sup> Amartya Sen, *The Idea of Justice* (Cambridge, MA: Belknap Press of Harvard University Press, 2011), henceforth “*IJ*.”

<sup>53</sup> David A. Crocker, *Ethics of Global Development* (Cambridge: Cambridge University Press, 2008).

<sup>54</sup> *IJ*, p. 323.

tendency in social living that has a much longer and more widespread history.”<sup>55</sup>

It could also be argued that public reason is objectionable in the opposite way, namely, it is antidemocratic. Habermas, for example, raises the concern that public reason fixes the content of public reason prior to any actual democratic debate.<sup>56</sup> Quong puts the challenge this way: “how can citizens engage in public reasoning about what the principles of justice ought to be if justice is also meant to be the basis for the grounds for their adherence to the practice of public reason?”<sup>57</sup> In reply, we might say that at a deeper level, what public reason requires is a prior commitment to civility, that is, a *duty of civility* that requires people who engage in public reason to

explain to one another how our important political positions are justifiable by reference to a reasonable political conception of justice, and to refrain from supporting positions when we believe they can only be justified by appeal to a religious doctrine, or some other comprehensive doctrine that we cannot reasonably expect everyone to endorse.<sup>58</sup>

While this duty is restrictive, it is not unduly restrictive, since the duty of civility applies only to individuals in their capacity as citizens, such as voting or expressing views publicly on essential matters of justice. In daily life within a family, friendship circle, or religious group, individuals are not generally constrained by it.

Another way of specifying the commitment assumed in public reason is suggested by Ebels-Duggan, who argues that when we invoke capabilities in public reason, we rely on a lenient interpretation of what it means to be reasonable, which holds that someone is *reasonable* provided they recognize the existence of reasonable disagreement and aim to

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<sup>55</sup> *IJ*, p. 323.

<sup>56</sup> Jürgen Habermas, “Reconciliation Through the Public Use of Reason,” *Journal of Philosophy* 92, no. 3 (1995): 109–131.

<sup>57</sup> Jonathan Quong, “On the Idea of Public Reason,” In *A Companion to Rawls* ed. Jon Mandle, David A. Reidy (New York: John Wiley & Sons, 2014): 265–280, at p. 274, henceforth “*IPR*.”

<sup>58</sup> *IPR*, p. 265.

cooperate.<sup>59</sup> They need not reach an overlapping consensus, yet they must share a spirit of cooperation and mutual respect. According to this version of a capability view, public reason extends to diverse societies around the world where we find a pledge to respect persons.<sup>60</sup> This approach diverges by a longshot from traditional social contracting, since it bears the mark of a broader exchange, one that engenders trust among committed participants.<sup>61</sup>

In defense of this line of reasoning, it could be argued that the social contract alternative requires similar kinds of assumptions. Hampton, for example, argues that a Hobbesian interpretation of social contract presents a dilemma: if the precontractual state is a potential war of all against all, then this state is generated either by passions, such as greed and fear, or by rationality. If it is generated by passions, then parties will still be motivated by these same passions after a contract is drawn up and will renege on the contract; if the precontractual state of war is generated by rationality, then contractors will have no more reason to comply with a contract than they did to cooperate before it was made.<sup>62</sup> Commentators, such as Cudd and Eftekhari, take such arguments as showing that contracting is unable to motivate morality without some preexisting “natural” inclination to morality.<sup>63</sup>

## 6 Conclusion

When we do ethics in the public square, we appeal to public reason. Given a plurality of reasonable views, public reason incorporates a requirement of equal respect for persons. A capabilities approach to

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<sup>59</sup> Kyla Ebels-Duggan, “The Beginning of Community,” *Philosophical Quarterly* 60(238) (2008): 50–71.

<sup>60</sup> *MB*, p. 624.

<sup>61</sup> Anita Silvers, Leslie P. Francis, “Justice Through Trust,” *Ethics* 116 (2005): 40–76.

<sup>62</sup> Jean Hampton, *Hobbes and the Social Contract Tradition* (Cambridge: Cambridge University Press, 1986).

<sup>63</sup> Ann Cudd, Seena Eftekhari, “Contractarianism,” in *Stanford Encyclopedia of Philosophy* ed. Edward N. Zalta, (2000), at: <https://plato.stanford.edu/archives/sum2018/entries/contractarianism/>.

public reason guides us to render decisions that respect human dignity through reasonable efforts to support floor-level human capabilities. While this means that political principles and policies must be justifiable to those capable of practical reason, it also entails reasonable efforts to support all capabilities at a threshold level. The question a society ought to ask is not only, "What do people think?" but also, "What can people do and be?" Appealing to capabilities carries advantages over appealing to contracting, because it includes all human beings as equals and can be used on the global stage in tandem with (or separate from) the language of international human rights. Rather than deriving individuals' worth and dignity from their capacity to reason, a capability view paints a fuller picture of shared humanity and recognizes the human dignity of those who need its protection most.