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THE CAPABILITIES OF PEOPLE WITH COGNITIVE DISABILITIES

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Abstract: People with cognitive disabilities are equal citizens, and law ought to show respect for them as full equals. To do so, law must provide such people with equal entitlements to medical care, housing, and other economic needs. But law must also go further, providing people with disabilities truly equal access to education, even when that is costly and involves considerable change in current methods of instruction. The central theme of this essay is what is required in order to give such people political and civil rights on a basis of genuine equality.

Keywords: capabilities, civil rights, cognitive disability, constitutional law, economic entitlements, education, equality, human dignity, justice, mental disability, political entitlements, Rawls, social entitlements.

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1. *Frontiers of Justice* and the Challenge of Disability

The presence of people with cognitive disabilities in our societies poses a twofold challenge to philosophical theories of justice. First, it poses a direct challenge. Here are some of our fellow citizens, and fellow participants in human dignity. Their needs, real and important, have not been adequately addressed by previous theories of justice. So the direct challenge asks us to design theories that address these needs and offer good normative guidance for societies seeking to do justice to them. Second, it poses an indirect challenge, by offering a test we can apply to all candidate theories of justice. We ask of each of the theories how the principles they suggest would treat the entitlements of people with cognitive disabilities, and we find fault with theories that, however attractive in other respects, cannot handle that issue well. By the same token, the ability of a theory to handle it well is at least one point in favor of such a theory.

In *Frontiers of Justice* (2006), I focused primarily on the second question. Using the issue of disability as one test to apply to theories of justice that employ the idea of a social contract, I argued that such theories—even John Rawls's, the most subtle and adequate of them all—cannot fully pass the test. That is, its treatment of this one area is not fully adequate. If we can find a theory that does as well in other areas and better in this one, we ought to prefer that theory. I then argued that my version of the "capabilities approach" does well (at least) in other areas and better in this one, though it was beyond my purpose to argue that it does as well as Rawls's in the other areas, and certainly I have not yet argued that it does better. That question was left for a further inquiry.

The direct challenge was relevant to my argument, because one could hardly show that the capabilities approach did better than Rawls's theory on the proposed test without saying quite a lot about what it recommends, and how it argues for its recommendations. Large parts of the direct challenge, however, remained unaddressed. I focused on education of children, and said relatively little about other areas of human capability and functioning. The present essay aims to fill that gap by showing in much greater detail how my capabilities approach argues in this area and what specific policies it recommends, for both children and adults. (I continue, as in the book, to focus on cognitive disability, because that is the focus of the present collection of essays, but I am aware that there is a great deal that I shall ultimately need to say about emotional disturbances and mental illnesses of many types, as well as the easier case of physical disability.)

A central job of my essay will be to return to the difficult question of what equal respect for citizens as persons requires, and to what extent it requires equalizing the relevant capabilities. The capabilities approach, as I have articulated it, is a social-minimum approach, and I have always said that for this reason it is but a partial theory of social justice: it doesn't say what should be done about inequalities above its rather ample threshold. Nonetheless, even in pursuit of a decent social minimum we need to ask when a decent minimum of respect for persons requires full equality of the relevant capabilities and when it requires only something like adequacy. I began to face that task in the chapters of *Frontiers of Justice* devoted to global justice, but I did not connect that analysis back to the earlier analysis of disability. I must also, then, fill that gap.

Confronting the direct challenge will have some theoretically interesting results. For I shall argue that the area of the capabilities approach that is in general the most controversial and difficult in the American context—its strong emphasis on social and economic entitlements—is the easiest and simplest to apply to the case of cognitive disability; nobody should be surprised by my conclusions in that area. Education is somewhat more complicated and controversial, since equal respect recommends policies that are very expensive. Here, however, law has gotten in ahead of us, and the analysis I recommend is already not just statutory law, under the Individuals with Disabilities Education Act (IDEA), but is also supported by constitutional law, which used the idea of equal protection to compel a remedy like IDEA, and which has recently interpreted IDEA in an expansive and generous light. The surprising results will come in the area that usually looks so simple that we can basically take it for granted: the area of political and civil liberties. For I shall argue that showing equal respect for the dignity of citizens with cognitive disabilities requires giving them an equal right to vote, to serve on juries, and so forth—just as it entails that equal entitlement for everyone else. And I shall make a surprising and controversial use of notions of guardianship in this connection.

2. The General Approach of *Frontiers of Justice*

The general task of *Frontiers of Justice* was to continue a project I began in *Women and Human Development* (2000), confronting my version of the capabilities approach with the strongest alternatives offered by the philosophical tradition. In *Women and Human Development*, in keeping with my focus on development policy, I focused on the Utilitarian antagonist. In *Frontiers of Justice* I turned to a different and far more subtle opponent, the social contract tradition. Arguing that John Rawls's theory of justice casts that tradition in its best and most persuasive form, I chose to focus on Rawls's work.

I argued that Rawls's work does very well indeed in handling the most familiar issues of political justice: economic justice, justice between people of different religions, races, and classes, and even (though with some modifications suggested in *Women and Human Development*) justice for women and justice in the family. There were, however, four areas that Rawls himself identified as areas where his theory has grave difficulty: justice across generations; transnational justice; the just treatment of people with disabilities; and justice for nonhuman animals. (I use the term "justice" in this last case, but Rawls did not.) Rawls solved the first problem quite well by my lights, so I saw no reason to revisit it. He spent considerable time on the second, but I believe that *The Law of Peoples* (1999) is not a good solution, so I resolved to return to that set of issues. Regarding the third and fourth questions, Rawls expressed grave doubt: these look like questions on which justice as fairness "may fail."

Following Rawls's own invitation, I resolved to probe these issues, searching for the roots of all three remaining difficulties in Rawls's strong allegiance to the social contract tradition, with its image of the parties to the contract as "free, equal, and independent," and as possessing a roughly equal amount of both physical and mental capacity. I argued in detail that although Rawls's principles are in themselves very attractive, he cannot, consistently with several deep commitments in his theory, do justice to the claims of people with cognitive and even physical disabilities; nor, I argued, could he solve the other two problems well. The reason in all three cases was the presence of a large asymmetry of power between the parties, which makes it no longer mutually advantageous for them to be included as fully equal parties to the social contract. I argued that Rawls would ultimately need to jettison the idea of rough equality in power and the related idea of mutual advantage as the aim of the social contract, were he to be able to do full justice to the claims of people with disabilities.

Most of the first of my two chapters on disability was spent analyzing the details of Rawls's argument, in order to show that his theory could not handle the case in any easy or straightforward way, for example, by adding to the account of the Veil of Ignorance the fact that the parties are ignorant of whether they have a disability or not. This would violate the deep commitment to similarity of power, with its associated idea of mutual advantage. In the case of mental disability this problem would be compounded by the need to suspend any determinate account of the rationality of the parties. Rawls was correct in thinking that he could not handle this problem without a major overhaul of his theory.

I then turned, in chapter 3, to my own capabilities approach, showing how it addressed the case of disability, and arguing that it did pretty well—better, for this case at least, than Rawls's theory. Focusing on the education of children with severe cognitive disabilities, I showed some examples of what the theory would yield in practice.

Frontiers of Justice, then, focused on what I've called the indirect challenge. The case of disability was seen as important in its own right, but my central argument was that, on account of its importance, it was a major problem for Rawls's theory that it could not address it. A theory that could do better had an advantage, and the capabilities approach looked like such a theory. My discussion of the direct challenge was confined to the question of education, with a brief discussion of guardianship. Even the education discussion was relatively brief. I left the direct challenge for others, and for myself in the future.

3. Equality and Adequacy

Sometimes people understand the capabilities approach to recommend something like equalizing all the capabilities for everyone.[1] No supporter of a capability-centered approach has ever said anything like this, to my knowledge. Amartya Sen does say that insofar as equality is our goal, the most pertinent space within which to think about and measure equality is that of capabilities (see Sen 1992). But he never says that our goal ought to be equality in all of them. Indeed, as Ronald Dworkin argues, such a social goal would be truly bizarre, and would have absurd entailments.

My own approach is different from Sen's in that it uses a specific list of the "Central Human Capabilities" as its benchmark for the definition of a social minimum.[2] Even here, however, the approach recommends, as a

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[1] See Ronald Dworkin's criticism of Amartya Sen in Dworkin 2000.

[2] See the exploration of that difference in my 2003.

necessary condition of social justice,[3] bringing all citizens above a rather ample threshold on each of the ten capabilities, not complete equalizing of all the capabilities. That, however, is not the end of the matter, as it turns out: the idea of equality crops up again in thinking about the threshold, for at least some of the capabilities. I broached this question in chapter 5 of *Frontiers of Justice*, but the present essay will press much further, so I must begin by recapitulating the position I took there.

The capabilities approach uses the idea of a threshold: for each important entitlement, there is some appropriate level beneath which it seems right to say that the relevant entitlement has not been secured. The intuitive idea of a life with human dignity already suggests this: people are entitled not only to mere life but to a life compatible with human dignity, and this means that the relevant goods must be available at a sufficiently high level. So far, the approach insists only on the idea of adequacy or sufficiency, and has stated that the question of what to do with inequalities above this minimum threshold is a further question that the approach has not yet answered. It is in that way as yet incomplete.

It seems crucial, however, to say more if we can: for we must indicate where, and to what extent, equality is part of the very idea of sufficiency. The list itself suggests that there are some instances in which we will not tolerate inequality of the relevant capabilities. Capability 7B, for example, speaks of "[h]aving the social bases of self-respect and non-humiliation; being able to be treated as a dignified being whose worth is equal to that of others." And it connects this idea to the idea of nondiscrimination. It seems crucial to go further at this point, spelling out the role of an idea of *equal* entitlement in the approach.[4] (Notice that in this area I also make my one concession to paternalism: for I say that people should not be permitted to be humiliated by government, even if they want to be. In that case, we should not shoot simply for the capability to be treated as a dignified being, we should shoot for the actual functioning.)[5]

The touchstone should always be, I believe, the idea of human dignity and the closely related idea of the social bases of self-respect and nonhumiliation. Equality of capability is an essential social goal where the absence of equality would be connected with a deficit in dignity and self-respect. We have seen that the idea of dignity is spelled out from the beginning in terms of equality: it is the *equal dignity* of human beings that demands recognition. Here the idea of equality is essential: we must add it to the bare idea of dignity in order to articulate the goal in an adequate way.

This idea, that equal dignity is what we must protect and promote, has implications for many of the capabilities on the list. For it appears—and a

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[3] Not a sufficient condition, since mine is only a partial account of social justice.

[4] I am exceedingly grateful to Charles Larmore for pushing me to confront this question, and for his suggestions about how it might be confronted.

[5] See the discussion in my 2000, 34–110.

long tradition of Western political philosophy agrees on this point—that all of the political, religious, and civil liberties can only be *adequately* secured if they are *equally* secured. To give some groups of people unequal voting rights, or unequal religious liberty, is to set them up in a position of subordination and indignity vis-à-vis others. It is to fail to recognize their equal human dignity. Large stretches of the U.S. tradition of constitutional law reflect such thinking.[6]

On the other side, there are other capabilities, closely connected with the idea of property or instrumental goods, where what seems appropriate is *enough*. For example, an *adequate* house or other shelter seems to be inherent in the idea of human dignity, and it seems right that constitutions all over the world are beginning to recognize the right to housing as a constitutional entitlement, following the creative lead of South African jurisprudence. It is not at all clear, however, that an *equal* house is required by the very idea of human dignity or even of equal human dignity; for indeed a mansion may not be better for a human being than a modest house. House size above a certain threshold does not seem intrinsically related to equal human dignity.

Insofar as envy and competition make people *feel* that an unequal house is a sign of unequal dignity, we might wonder whether these judgments are not based on an excessive valuation of material goods, which a just society might decide not to honor. The case is not clear. As Adam Smith observed, what is compatible with human dignity may itself vary from society to society. In England, the ability to appear in public without shame requires a shirt; in some other nations it does not. We might add that the ability to sit in the front of the bus is connected to human dignity not timelessly but through a set of social norms and practices. Thus the fact that house size is connected to dignity through social norms does not suffice to undermine the connection. It does, however, prompt a further inquiry. At least sometimes we may find that excessive valuation of competitive goods lies behind a social norm, and a just society could decide not to honor that valuation. This is surely one area where different nations with their different traditions will need to work out the problem for themselves through ample public deliberation.

In some areas that appear to fall on the "material" side, however, it does seem clear that grossly unequal shares fail to meet the adequacy condition. If education, for example, is arranged as it currently is in the United States, in such a way that students in a rich school district may have as much as seventy-five or a hundred times as much spent on them as is spent on students in a poor district, this does seem to be, in and of itself, a violation of equal dignity and equal political liberty.[7] At least where

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[6] See my 2007. On equality in the area of religious liberty, see my 2008, 115–74.

[7] Cf. Justice Marshall's dissenting opinion in *San Antonio School District v. Rodriguez*, 411 U.S. 1, 70-133 (1973) (Marshall, J., dissenting).

primary and secondary education are concerned, adequacy does appear to require something close to equality, or at least a very high minimum (perhaps allowing for divergences in aspects of education that are not firmly linked to basic opportunity and political participation). The same is true of basic essential health care. Whether higher education and nonessential health care are matters in which we may accept unequal shares as compatible with the threshold of adequacy, remains a question that societies will have to hammer out.

Harry Frankfurt influentially argues that equality all on its own is not a distinct political value; it becomes important when it affects some other capacity, such as the capacity for speech, or self-respect, or a life with dignity, or for relationships not predicated on hierarchy (see Frankfurt 1998). Apart from its connection to the content of these values, it remains a bare formal notion. How should the proponent of a capabilities approach respond to Frankfurt's challenge?

The matter is very difficult to think about, and all statements ought to be tentative. We should begin by insisting, again, that equality is important at the very base of the theory: for it is not just human dignity that must be respected, it is equal human dignity. Equality is not just a proxy for some other value, it is a constituent part of the basic value to be respected and promoted. This role for equality, however, does not entail that equality is a reasonable goal with regard to all the central capabilities.

Some capabilities must be secured to citizens on a basis of equality, or equal dignity has not been respected. Others, however, do not seem to have this intrinsic relationship to dignity; with these, the capabilities approach supplies a threshold of adequacy. Some nations and individuals may prefer a more egalitarian solution with these capabilities as well. But it seems likely that if we want a political conception that can achieve an overlapping consensus among people who differ in their comprehensive ethical and religious doctrines, especially when we are considering transnational transfers of wealth, this conception is more likely to prove broadly acceptable than one that insists on equality in all the central capabilities. Individuals whose comprehensive doctrine is more exigent can at least recognize the political conception as compatible with their own doctrine, though it does not deliver everything that they would favor.[8]

What this means is that we need to take the capabilities one by one and ask whether adequacy or equality is the relevant threshold goal in this area, and what, more concretely, that goal entails. And we must do this in a way that is sensitive to social norms—for we don't want to forget that social norms profoundly affect what is and isn't compatible with equal human dignity (our example of riding in the back of the bus shows this),

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[8] Note that income and wealth are not on the list at all, since they are not capabilities; thus the frequently discussed issue of equality in income and wealth is touched on only indirectly, through commitments concerning the central capabilities.

without being unduly deferential to fads and preferences (for if people feel bad because they don't have a mansion, that should not lead us to write mansions into the definition of the social minimum).

When we deal with the capabilities of people with cognitive disabilities, a preference-based approach is particularly likely to offer bad guidance, because we are well aware that many if not most social preferences in this area are deformed by ignorance, stigma, and fear. That likelihood should give us a preference for capability-equality, where we can't give any good reason against it. Here we should take a lesson from U.S. constitutional law. Under the Equal Protection Clause of the Fourteenth Amendment, whenever a classification is particularly likely to be infected by prejudice, there is a strong case for according that classification some type of *heightened scrutiny*; in other words, any differential treatment of that group must be justified by an unusually strong state interest, which is called "compelling." Although people with cognitive disabilities have been said not to be a "suspect class," warranting heightened scrutiny,[9] I have argued that heightened scrutiny is appropriate in their case (see Nussbaum forthcoming). Here, then, I apply something like that test: if people with cognitive disabilities have unequal capabilities in some area on my capabilities list, that can be justified only by a compelling state interest.

4. Social and Economic Entitlements

The United States is not consistently supportive of the capabilities of citizens on the side of what are standardly called "social and economic rights" (see Nussbaum 2007). Other nations do much better. As I argued in the previous section, however, entitlements such as entitlements to housing and to health care and others in that group require a high threshold of *adequacy*, rather than complete equality, for their fulfillment. Should people with cognitive disabilities have the same entitlements in these areas as so-called normal people? By and large, we already agree that the answer is yes. There are defects in health care schemes and in subsidized housing where there is subsidized housing. Our nation in particular does far too little to support the labor of care involved in securing the capabilities (health, mobility, bodily integrity) of both people with disabilities and elderly people, as Eva Kittay has so eloquently argued (see Kittay 1998). The argument that people with cognitive disabilities deserve the same level of care as people without cognitive disabilities (for example, physically infirm elderly people) is an easy one to make, and the argument that remains concerns the level of care that a decent society would provide. The debate

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[9] *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985). Here, however, the U.S. Supreme Court found in favor of people with cognitive disabilities, since it found that the law in question (a zoning ordinance that denied a permit for a home for people with mental retardation) didn't even pass the weaker rational basis test, being motivated by mere fear and animus.

about mental illness is actually a much more difficult debate in this area, because people still tend to blame mental illness on the ill person, and thus to be reluctant to grant him or her adequate medical support. (Much the same goes for alcoholism and drug addiction.) People with cognitive disabilities, like elderly people, aren't blamed for the care they need, so the debate about care in their case is not marred by false belief and inappropriate stigma. What needs to be done here is to convince all Americans to support a higher level of health care, nursing care, housing support, and so forth, for all, but the situation of people with cognitive disabilities does not appear to raise special problems.

5. Equality in Education

One might suppose that education for people with cognitive disabilities is also a threshold matter that raises issues about capability-equality, but not about capability-adequacy. In *Frontiers of Justice*, however, discussing equality and adequacy, I suggested that education was an area so central to matters of citizenship and self-respect that we should not tolerate a situation in which everyone comes up to some reasonable threshold but gross inequalities remain. The U.S. approach through constitutional law has never accepted this principle fully, but it has always been recognized that education is an area of fundamental importance in relation to citizenship, so gross inequalities are unconstitutional if the disadvantaged do not come up to a rather ample threshold. Dissenting opinions have suggested that the protection of equality ought to be stronger, given the role played by education in relation to the freedom of speech.[10]

When educational disadvantages are not simply due to de facto economic segregation but track an imposed segregation or exclusion of a group, however, the Constitution's Equal Protection Clause has been held to give the disadvantaged group an enforceable right to educational equality of a kind, meaning, at least, the removal of segregation and an equal openness of local school classrooms to members of the disadvantaged group. Thus *Brown v. Board of Education* used the Equal Protection Clause to argue that legally mandated segregation was unconstitutional.[11] *United States v. Virginia*, similarly, used the Equal Protection Clause to open the doors of the Virginia Military Institute to women, arguing that the separate women's program did not give students equal skills and job opportunities.[12] The analysis in *Brown* was borrowed in the case that ultimately opened the public schools to children with a wide range of disabilities.

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[10] Refer to *Plyler v. Doe*, 457 U.S. 202 (1982), *San Antonio*, and discussion in my 2007; also refer to Michelman 1969.

[11] 347 U.S. 483 (1954).

[12] 518 U.S. 515 (1996).

In 1972, in *Mills v. Board of Education*,[13] the U.S. District Court for the District of Columbia ruled in favor of a group of children with mental disabilities who challenged their exclusions from the District of Columbia public schools.[14] In an analysis that self-consciously set out to apply *Brown*, the court held that the denial of free suitable public education to the mentally disabled is an equal protection violation.[15] (Notice that the opinion understands *Brown* to be about the difference between exclusion and inclusion, not about a ban on special affirmative remedies: indeed, it understands the *Brown* framework to suggest, very strongly, the need for such affirmative remedies. Children with disabilities, the court holds, will need to be given special support in order to be fully integrated into the public schools.) Moreover, very important for our purposes, the court held that this equal protection violation could not be reasoned away by saying that the system had insufficient funds and these children were unusually expensive to include. "The inadequacies of the District of Columbia Public School System, whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the 'exceptional' or handicapped child than on the normal child," the opinion argues. Significantly, at this point the opinion cites the U.S. Supreme Court case of *Goldberg v. Kelly*[16] to make the point that the state's interest in the welfare of its citizens "clearly outweighs" its competing concern "to prevent any increase in its fiscal and administrative burdens." The court quotes the resonant reflections of Justice Brennan in *Goldberg* to make this point:

> From its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders. We have come to recognize that forces not within the control of the poor contribute to their poverty.... Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community.... Public assistance, then, is not mere charity, but a means to "promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity."[17]

Similarly, reasons the court, the District of Columbia's interest in the education of these excluded children "clearly must outweigh its interest in preserving its financial resources." Like *Goldberg*, the opinion emphasizes that the inclusion is not a matter of charity but one of entitlement and basic justice.

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[13] 348 F. Supp. 866 (D.D.C. 1972).

[14] A case decided in the same year, *Pennsylvania Association for Retarded Children v. Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971), reached a similar result.

[15] Technically, because of the legally anomalous situation of the District, the court held that it was a due process violation under the Fifth Amendment and that the equal protection clause in its application to education is "a component of due process binding on the District."

[16] 397 U.S. 254 (1970).

[17] *Id.* at 264–65 (quoting the preamble of the United States Constitution).

As a result of *Mills*, in 1975, Congress passed the Education for All Handicapped Children Act (EAHCA), which turned the *Mills* decision into federal law, giving a wide range of mentally disabled children enforceable rights to free suitable public education, and making funds available to the states to help them meet their constitutional obligation. This law was slightly modified and elaborated in 1997 in the form of the Individuals with Disabilities Education Act (IDEA).

The guiding idea of the Act is that children with disabilities are individuals, equal in dignity to "normal" children, and that, in consequence, education should be based on a careful individualized consideration of a child's educational needs. The central vehicle of this idea is the Individualized Education Program (IEP), "a written statement for each child with a disability that is developed, reviewed, and revised." The Act requires that states affirmatively undertake to identify and locate all children with disabilities whose needs have not been addressed. It also requires that districts establish extensive procedural safeguards to give parents input in decisions regarding the evaluation and placement of their children, as well as access to records and rights to participation in due process hearings and judicial review. In general the Act obliges states to educate children with disabilities in the "least restrictive environment" appropriate to meet their needs. It thus urges "mainstreaming" of these children. But the underlying recognition of individuality is paramount: thus if a child will profit more from special education than from mainstreaming, the state is obliged to support a special placement, which sometimes will have to be in a tuition-charging private school.

Thus the remedy can often be very expensive for the state. My nephew Art, whose education I discussed in *Frontiers of Justice*, just graduated from high school and is currently thriving in a community college. For about eight years, the state he lives in supported his placement in a special school for people with Asperger's syndrome, and the educational result has been superb. Art not only is in college (and has already held a job), he also has a circle of friends whom he enjoys, and he is a happy kid. This is basically what I think the capability approach requires: affirmative measures to support the education of children with cognitive disabilities, so that they will have no education-related disadvantages as they prepare to enter society.[18] So, not just adequacy but equal concern and equal protection. Not every child with a cognitive disability will have educational attainments at Art's high level, but IDEA, if implemented well, will ensure that something like this equal concern has been shown, by the very fact of considering the child's educational needs individually and designing a program to develop his or her human potential.

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[18] I realize that Asperger's and other autism-spectrum disabilities are both cognitive and affective, but for that reason I am somewhat skeptical of the usual way of classifying these disabilities, as I discuss in my 2006.

IDEA has noble aspirations, and yet its implementation has been fraught with difficulty. For one thing, the funds were not appropriated for a long time, and even now the funding is not complete. Another major problem, however, is the IEP process, in which parents must negotiate with school committees who are not always well educated about the child's specific disability and who often try to save money, even at the cost of not supporting a special placement for a child who clearly needs one. Autism-spectrum disorders often pose particular problems, making mainstreaming difficult. A whole range of human capabilities, from citizenship to intellectual and emotional development, are at stake in the IEP process, making adequate representation crucial.[19] The Supreme Court considered this problem in 2007, interpreting the statute in a way that makes it clear that parents, as well as children, have rights under the Act. This interesting opinion further fleshes out what equal protection means in this context (*Winkelman v. Parma City School District*, 2007).

Many poor parents cannot afford to hire a lawyer. If they are denied the right to represent themselves, the already striking inequities of the Act, which clearly favors educated and articulate parents, become yet more striking. When discussions with the Parma, Ohio, school district led to an impasse, the Winkelmans, availing themselves of IDEA's administrative review procedures, filed a complaint, appealing to a state-level review officer; after losing that appeal, they appealed to the U.S. District Court for the Northern District of Ohio. The District Court found for the school district, so they appealed again, to the Sixth Circuit. The Sixth Circuit held that IDEA does not grant parents independent rights, and that, in consequence, the Winkelmans could not proceed unless they hired a lawyer. The Supreme Court reversed. In *Winkelman v. Parma City School District*, the Court held that IDEA gives rights to parents, as well as children, in respect of their children's education, thus permitting parents of children with disabilities to represent themselves in court when challenging a child's IEP (Individualized Education Program).[20] The statute, carefully read, is not ambiguous, and thus their victory breaks no new legal ground. It does, however, illustrate an ongoing dialogue and partnership between legislative and judicial action that has resulted in the protection of human capabilities for many of our most vulnerable young citizens.

I've said that equal protection and equal respect do not require equality of educational outcomes. In that sense, the approach in education has a good deal in common with the approach in the area of mobility, and thus it might seem to be an adequacy approach, not an equality approach. The whole point of the approach, however, is to ensure that no special disadvantages accrue to children with disabilities in virtue of their

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[19] See the analysis in my 2006, 155–223, where I also address the unusual difficulties of "mainstreaming" for autism-spectrum children.

[20] 550 U.S. 516 (2007).

disability. They are equally placed in the education process, and equally supported—which, in their case, requires a lot of affirmative measures and extra expense. After that, like all children, they will achieve at different rates and attain different levels. So the equality is in the concern, and the strenuous requirements it imposes.

6. Equality in Political Entitlements

Now to the difficult and controversial case. Where core political entitlements are concerned, we typically have no difficulty in concluding that adequacy of capability requires equality of capability. We do not hesitate a minute in thinking that the right to vote, the right to participate in the political process, and other basic civil rights such as those of free speech and association, must be delivered to citizens on a basis of equality if the nation in question is to claim even minimal justice. Suppose each woman or African American had a vote that counted as only half a vote, while white men each had a full vote: we immediately see that these policies would be profoundly wrong. Even if someone were to claim that women and African Americans still have "enough" voting rights, we would say, "Surely not. For to have enough voting rights just means to have equal voting rights." Similarly, the exclusion of women and African Americans from jury service, such a large feature of relatively recent political life, is now taken to be obviously and uncontroversially wrong. Why? It seems to express unequal respect for citizens, and politics must express equal respect as a very central and basic value.

It is instructive to observe how deeply this insistence on equality of entitlement enters into law even in the United States, in many respects a profoundly inegalitarian society. Take the freedom of religion. Our constitutional tradition has understood the entitlement to religious liberty to be an entitlement to *equal* liberty. (The words "equal rights of conscience" were used in many of the constitutional debates, and if they do not turn up in the final text that is because they were by that time taken for granted.)[21] What that means is quite interesting. It means that minorities often receive "accommodations," or special dispensations from laws of general applicability, because only an accommodation would render their religious free exercise fully equal to that of the majority. Laws are always made by majorities. Majority preferences determine what workdays will be chosen, what holidays will be observed, what intoxicants will be legal, and so on. Well then, if minorities come up against such laws, even when the laws themselves express no hostile intent, they may face special burdens to their religious practice. They may

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[21] See my 2008 on the role of ideas of equality at the founding (72–114) and their role in the interpretation of the Free Exercise Clause (115–74) and the Establishment Clause (224–305).

be fired for refusing Saturday work. They may be told that they must serve in the military, even though their religion forbids that. They may be forbidden to use a hallucinogen in their sacred ceremony, even when the majority is allowed to use alcohol in its sacred ceremonies. The concept of accommodation is the idea that in such instances the minority should not have to shoulder that special burden: they should be exempt from the law. In a 1789 letter to the Quakers, who refused military service, George Washington wrote: "I assure you very explicitly, that in my opinion the conscientious scruples of all men should be treated with great delicacy and tenderness: and it is my wish and desire, that the laws may always be as extensively accommodated to them, as a due regard for the protection and essential interests of the nation may justify and permit." Washington did not require the Quakers to perform military service, and he also did not require them to pay a fine or go to prison for breaking the law.

In a famous 1963 case, *Sherbert v. Verner*, the U.S. Supreme Court reasoned that accommodation was constitutionally required, in the absence of a "compelling state interest," and required for reasons of equality.[22] To say that Mrs. Sherbert should not receive unemployment compensation because she refused jobs that required Saturday work was tantamount, they said, to fining someone for Saturday worship. In other words, minorities may not be required to face any substantial disadvantage in their religious lives that majorities do not also have to bear—absent a compelling state interest. Thus the requirements of equal respect are extremely exigent: they brook no compromise except in the gravest of cases.

Let's now turn to the case of people with cognitive disabilities. In fact, there are three such cases.

In Case A, the person is both cognitively and physically capable of voting, serving on a jury, and making religious choices, but because of stigma and majority social arrangements, really enabling the person to do that—putting that person in a position of *combined capability*—will require special efforts and expense. There are many ways in which people with a range of physical disabilities—who are blind, deaf, or wheelchair users, for example—used to be excluded from these functions. These exclusions are gradually being corrected. In the case of cognitive disability, exclusions are more subtle and persistent. People with limited ability to read, people who easily become confused or fearful in a new setting, may be excluded from voting and jury service *de facto*, even though sensitive thought about how to include them could prove just as successful in these settings as it has in education.

In Case B, the person cannot exercise these functions on his or her own, even with special arrangements, but is able to communicate his or her preferences to a guardian, who can then exercise the function on his or her behalf. Here I am thinking about cases in which the person may not be able to speak or express thoughts in a way that is comprehensible to the

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[22] 374 U.S. 398 (1963).

world at large, or which could easily be adapted to the typical structure of the jury or the polling place, but the person is agreed to have views and to be able to communicate them to a small group of trusted individuals.[23]

In Case C, the person's disability is so profound that he or she is unable to perform the function in question, even to the extent of forming a view and communicating that view to a guardian. In honor of Eva Kittay, the founder of this field of philosophical research, we might take Sesha Kittay, so thoroughly and movingly described by Eva, as our example in this category.

I note that the other two people with cognitive disabilities who figured in *Frontiers of Justice*, Jamie Bérubé and my nephew Art, are in category A if they are in any category at all. (At least it seems to me that Jamie is in this category.) It seems likely that both can unproblematically go in and vote on their own, but if they need any special arrangements, they would be of the type A variety—thanks to the excellent education made available to them under the IDEA. (Art, as I've mentioned, is a freshman in a community college, Jamie is a flourishing and delightful young adult.)

To simplify, I shall just assume that things are on a par with respect to the whole range of political capabilities I've identified, although that might not be the case in life: some people might be able to make religious choices but not to vote, and so forth.

Case A is extremely easy. Equal respect for the person with a disability requires spending the money required to facilitate that person's full inclusion in the functions of citizenship, including voting, jury service, and so on. This is just like the case of religion that I discussed above: a minority may not be given a diminished entitlement because of majority arrangements or majority preferences. And it is exactly the way in which disability issues in education have already been treated in the court cases and, ultimately, under IDEA.

Case A is, I said, easy, but its implications are still radical for the way voting and jury service are to be constructed and their requirements understood. The Help America Vote Act in 2002 made some progress: polling places must have equipment that allows voters with disabilities to vote privately and independently. Selection of voting equipment should be made with input from the local disability community, with the aim of including as many people with different types of disabilities as possible, but this goal is not always achieved in practice. People with physical disabilities still face such obstacles as unpaved parking lots, election officials who do not know how to operate the wheelchair-accessible equipment, denials of assistance for people who do not bring an assistant with them. More problematic still are the impediments for people with cognitive disabilities. Various jurisdictions impose time limits for marking a

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[23] I say "agreed" in order to bracket the controversy about "facilitated communication" in the case of autism.

ballot, despite the fact that the Americans with Disabilities Act entitles voters with disabilities to a reasonable accommodation in this case. The Voting Rights Act guarantees a right of assistance to voters who need help going through a ballot or through the voting process, but often election personnel refuse the voter assistance from persons of choice, saying that only election workers can assist the voter—and this assistance is often inadequate, given that election workers typically lack training and experience in working with people with disabilities. Signatures may also be refused if the voter uses an *X* or some other nontraditional signature. Voters' need for assistance understanding complex language and instructions is not always honored, or is met in a stigmatizing and disrespectful way.

All jurisdictions need to address these problems, above all by training election workers to offer respectful assistance to people with disabilities, including allowing them to use the assistance of persons of choice. Such changes are implicit in existing law. Making them reality is difficult in practice, but easy in theory.

Jury service in Case A is more difficult than voting, but still conceptually easy. If jury service is a fundamental symbol of one's equal citizenship, citizens with cognitive disabilities who can follow the trial and make a judgment should not be excluded. Including them, however, will require special aid and special explanations in many cases. Courts should be prepared to provide such assistance.

Case B is also, conceptually, relatively easy. If the person can form a view about whom to vote for but can't exercise that function in person by reason of a disability, then it seems obvious that a guardian ought to be entitled to exercise the function on that person's behalf. With voting this may seldom be necessary, since on-line voting and absentee ballots facilitate the inclusion of such people. (Even in such cases, some state laws require the person to be able to sign his or her name, and a person may be able to form a view about whom to vote for but be unable to sign a name.) Where those solutions are not possible the problems I have pointed out for Case A are even greater. The person may be denied consultation with a person of choice, or may be denied sufficient time, or may be refused on the ground of inability to write a signature. Indeed, Case A and Case B form a continuum: when a person with a disability needs assistance understanding the ballot, that case already requires a kind of guardian-like intervention, so the difference between A and B is one of degree, not kind. In both cases, that role is best played by a person of choice, whether a legally official guardian or not, though it is also good to have trained election officials who can assist those unable to bring a guardian and who can help ensure that the individuals are not being coerced or manipulated.

Now let's think about jury service in Case B. In case B, like Case A, the person ideally should be present in the room taking part personally in the process, but it is obvious that his or her ability to interact with other jurors will be more limited, and the role of the guardian will be correspondingly larger. Many people with a disability who currently do not serve on juries might be able to exercise this important civic function were a guardian entitled to be present with them, as an intermediary in their conversations with the other jurors. How exactly the consultative arrangement would be worked out would be a matter for much debate, and much would remain to be determined about how we would ascertain what the person understands about the proceedings and about the law; but that is a debate that should and must take place, whereas now it is not taking place.

Let us now, however, turn to the most difficult case, Case C. Here the person's cognitive disability is so profound that she cannot communicate her wishes about whom to vote for to a guardian; indeed, in many such cases he or she cannot form such view. Nor can she exercise religious choices, or serve on a jury even in the sense of delegating a guardian to represent her judgments. What does equal respect require in this case? I would argue that it requires that the person's guardian be empowered to exercise the function on that person's behalf and in her interests, just as guardians currently represent people with cognitive disabilities in areas such as property rights and contract.

What is the alternative? That, as at present, a large group of citizens are simply disqualified from the most essential functions of citizenship. They do not count. Their interests are not weighed in the balance. That, to me, means that they are not regarded as fully equal citizens with a dignity commensurate with that of others. The bottom line is, I think, that "one person, one vote" is the right idea, an idea with deep expressive and symbolic meaning, and it currently is not being observed where people with profound cognitive disabilities are concerned. If a concerned parent or other guardian votes in the interests of a person with a disability, she still has but a single vote, hers, and yet there are two people with that interest, not one. (It would be important to compare the case of the adult with senile dementia: Are these people disadvantaged in a similar way?)

Naturally it will be said that there is room for corruption in this process: the guardian may just vote his or her preferences and ascribe them to the person with a disability, thus doubling the guardian's own vote. It should be clear on reflection, however, that this is no more a problem for voting than it is in many other areas where we currently permit surrogate arrangements: property rights, health decisions. A decent guardian will be able to keep those interests apart. Sometimes a candidate's positions will favor certain interests of the guardian that are not shared with the person with a disability, and the guardian should be able to see this. (Once again, law would need to protect the person against the sort of coercion and manipulation that group home settings make possible.) By contrast, the candidate may have certain disability-friendly policies that affect the interests of the person with a disability but not those of the guardian. Again, a good guardian will see this. Many guardians won't be good, but what else is new? Every day, people vote because their parents are voting that way, or their spouse, or their pastor. Often, too, they vote one way because their parents or spouses are voting the opposite way. We do not assess people for independence of mind when we give them the franchise, nor should we. If a person announced that he or she would decide whom to vote for by tossing a coin, or by closing his or her eyes and sticking a pointer randomly into the voting card, we might think that person irresponsible, but there would be no basis for removing the franchise from that person. Indeed, with lesser and local offices, many people vote with no more information than that all the time, and this, though disturbing, is hardly illegal.

So the claim that the guardian may do his or her job badly or incompletely, not fully representing independent interests of the person with a disability, is not a particular objection to my proposal, and we have never thought that it is, in other areas where guardianship is used. Instead, we design procedures to authorize guardianship that try to weed out the incompetent or the selfish. If we were to take this objection to heart, we might be led all the way to something like Mill's suggestion that educated people should have more votes than noneducated people. We know that we do not approve of that suggestion. Why don't we approve of it? Because it does not express equal respect for all citizens. So too here: the current system, under which citizens in class C are denied the franchise for life is disrespectful and wrong.

In terms of constitutional law, my proposal lacks strong grounding. The right to vote has been recognized as a fundamental right inherent in the Equal Protection Clause, and the case law seems to establish that only a "compelling state interest" can ever justify any abridgment of that right.[24] Resonant statements have been made about the importance of this right for equal citizenship. For example, in *Reynolds v. Sims*, a case concerning legislative apportionment, Chief Justice Warren wrote, "[T]he right of suffrage is a fundamental matter in a free and democratic society [and] is preservative of other basic civil and political rights. . . . [To] the extent that a citizen's right to vote is debased, he is that much less a citizen."[25]

In practice, however, the Court has been relatively deferential to states. The perpetual controversy over racially gerrymandered districts shows that there is no consensus about whether an equal right to vote entails giving minorities an equally meaningful or effective vote. More pertinent for our purposes, the Court's willingness to allow states to exclude

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[24] *Dunn v. Blumstein*, 405 U.S. 330 (1972) (ruling long-term residency requirements unconstitutional unless the State can show that they are necessary to protect a compelling governmental interest).

[25] 377 U.S. 533, 561, 567 (1964).

convicted felons from the franchise[26] indicates that they would also very likely defer to the states in this area, upholding the exclusion of people who have to vote via a surrogate in the sense of Case C.

My proposal is, then, an ethical proposal that has little chance of being recognized by the courts right now, although perhaps the legislative route offers some hope. What is important, however, is to see that it *ought* to prevail in the courts. There is no bona fide compelling state interest that justifies the exclusion of these people. Any reason that can be offered in this connection would also be a reason to exclude docile and deferential people, people who vote without knowing anything about the candidates, and so forth. We have opted for an understanding of the franchise that is nonelitist and inclusive, rejecting Mill's educational oligarchy. We have also accepted surrogate decision-making for people with severe cognitive disabilities across a wide range of areas of entitlement: property, bodily integrity, and so forth. There is no good reason to refuse a surrogate arrangement in this area, and very strong reasons to accept it.

Jury service is also a recognized hallmark of fully equal citizenship, exclusion from which is stigmatizing. Though a duty that may be burdensome, it is also a badge of civic equality. But jury service in Case C is different from the consultative arrangement that I've proposed for case B. It means, simply, that the guardian is the surrogate for the person she represents. There is no point in bringing that person along into the jury room. Moreover, since personal interests are supposed to be excluded from juror deliberations, there is no easy way to distinguish being a juror for oneself from being a juror representing a person with a disability. There will be differences, perhaps, in the voir-dire process. When jurors are questioned about their background, the surrogate will have to disclose her own background, because it is her own judgment she is using, and the possible biases in that judgment have to be elicited. But since she is representing a person with a disability, she needs to describe that relationship as well, in case any biases would emerge from that description. For example, suppose the case involved sexual violence against a person with a disability. If the representing guardian spoke only about her own experience of sexual violence, or lack of it, the lawyers for both sides would fail to be informed about a crucial factor that might bias the guardian's judgment. Once selected, however, the surrogate would use her own judgment. What would be the point of that? The all-important point that the person with a disability has her name in the pool, has an equal chance to perform that civic function.

So, let the guardian vote in that person's interest and serve on a jury when that person's name comes up. The very presence of the surrogate, known to be the surrogate for a person with a cognitive disability, serves to give due recognition to the person with a disability, and to people with

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[26] *Richardson v. Ramirez*, 418 U.S. 24 (1974).

disabilities more generally. Religious and associational liberties are easier, and right now we basically do permit guardians to make key choices in these areas on the person's behalf and in that person's interest.

I said in section 3 that any inequality in the political entitlements of people with disabilities should be examined under a very stringent standard of judicial review, and therefore could be justified only by something that would rise to the level of a "compelling state interest." What might such an interest be? Administrative expense and complexity has traditionally not counted as such an interest, except in the most extreme cases—for example, the refusal of an Amish employer with many employees to pay social security tax for any of them, something that would not just harm the system but would inflict a penalty on the employees. In this case, the difficulty of establishing who the certified guardian is would not be very great, once states had established reasonable systems of certification. Preventing corruption in the voting process will surely be cited, but, as I've already argued, that reason is not compelling, and if we should accept it we will be led down the dangerous road of seeking only qualified or independent voters, something we have long rejected.

In short: people with cognitive disabilities are equal citizens, and law ought to show respect for them as full equals. To do so, law must provide such people with equal entitlements to medical care, housing, and other economic needs. That is the easy part. But law must also go further, providing people with disabilities truly equal access to education, even when that is costly and involves considerable change in current methods of instruction. Even that, our society has begun to realize. Now we must take the most controversial step of all, giving people with cognitive disabilities political and civil rights on a basis of genuine equality. What that requires, and why it requires something that seems at first look so odd, has been the central theme of this essay. Let the debate begin.

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