

RESPECTING HUMAN DIGNITY: CONTRACT VERSUS CAPABILITIES

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Abstract: There appears to be a tension between two commitments in liberalism. The first is that citizens, as rational agents possessing dignity, are owed a justification for principles of justice. The second is that members of society who do not meet the requirements of rational agency are owed justice. These notions conflict because the first commitment is often expressed through the device of the social contract, which seems to confine the scope of justice to rational agents. So, contractarianism seems to ignore the justice claims of the severely cognitively impaired. To solve this problem, Martha Nussbaum proposes the capabilities approach. The justifiability condition, on this approach, is met by the idea of overlapping consensus. This essay argues that overlapping consensus cannot meet liberalism's justifiability condition, nor is it more inclusive of the cognitively impaired. Therefore, we have reason to retain the contract device and look for another way to ensure that liberalism respects the justice claims of all.

Keywords: capabilities, contractarianism, cognitive disability, dignity, liberalism, Martha Nussbaum, overlapping consensus, rational agency, John Rawls, reflective equilibrium, social contract theory.

One idea commonly associated with liberal justice is the idea of justifiability to all. This is the notion that just political principles are those that can be justified to all who are subject to those principles. Underlying this notion is an assumption about the nature of citizens: they are regarded as capable of being justified to. To be so capable, they must be able to understand and act for reasons. Indeed, this ability is not only required for individuals to comprehend justifications, it also stands as the normative ground for the requirement that they be *given* a justification. In liberal theory, one's ability to act for reasons—one's "rational agency"—is regarded as valuable. It is something that should be nurtured and cherished. It gives one a special worth or status, often called "dignity," which renders one inviolable. This inviolability places restrictions upon coercion. In the political realm, it places restrictions upon state coercion. The idea is, because one's rational agency is valuable and should be preserved, one harms someone if one forces her to act against her own reasons. By subjecting her, then, *only* to political authority that she has reason to accept, one refrains from such

harm and hence from violating her dignity. It follows that political principles are just only in the case where they can be justified to everyone subject to their authority.

The idea of justifiability to all is typically expressed through the device of the social contract. By establishing which political principles appropriately idealized agents would “contract for” under appropriately idealized circumstances, social contract theories tell us which principles actual citizens have reason to accept, and hence which principles are just.¹ The general idea, absent many important details, is that individuals have reason to accept political principles that they would choose if they were reasonable, rational, informed of all relevant facts, and shielded from all irrelevant facts.

The ideal of justification I have described is in tension with another ideal, which says that all members of society are owed justice regardless of whether they are or ever will be capable of rational agency. By associating justice with justifiability to all, and confining the “all” to rational agents, social contract theory seems to imply that only rational agents are subjects of justice.² Hence it seems to imply either that severely cognitively impaired adults with a limited rational capacity are not owed justice or that what they *are* owed as a matter of justice is a derivative issue.³ There seems to be a conflict, then, between social contract theory’s standard of justification and our judgment that severely cognitively impaired individuals are equal subjects of justice.

In light of these considerations, Martha Nussbaum has argued that we should abandon social contract theory in favor of the capabilities view (Nussbaum 2006, 24–25). One advantage of the capabilities view, according to Nussbaum, is that it does not use the social contract apparatus in order to fulfill the liberal standard of justification. Nussbaum’s approach to dissolving the tension I described above is to excise one of the aspects of liberalism that is responsible for the exclusion of the severely cognitively impaired—the social contract and its attendant view of the citizen—and to assign the work done by the social contract—establishing justifiability to all—to another theoretical mechanism, namely, the possibility of “overlapping consensus.”

¹ Some have argued that this method of justification fails. See Dworkin 1989. For a critique of Dworkin, see Stark 2000.

² The issue is in fact more complicated. As Barry (1989) and Nussbaum (2006) have argued, Rawls’s social contract theory excludes the cognitively impaired also by its reliance upon Hume’s account of the circumstances of justice, upon the idea of justice as mutual advantage and upon the assumption that all citizens are fully cooperating members of society. Nussbaum also argues that the contractarian’s view of the citizen as “free, equal and independent” is troublesome from the point of view of including the cognitively impaired. See also Hartley 2009, Hartley forthcoming, Stark 2007, and Stark 2009.

³ See Nussbaum 2006 and Kittay 1999. For an argument that Rawlsian contractarianism does not have this implication, see Freeman 2006, Curaton 2008, and Wong 2009, which is included in this collection. See also Wong 2007 and Wong unpublished.

My argument is that Nussbaum's approach does not adequately fulfill the liberal principle of justification.⁴ This constitutes a weakness in her proposal for dissolving the tension described above. Hence we have reason to look for a different way to ensure the full inclusion of the severely cognitively impaired under the umbrella of liberal justice.

I begin by briefly summarizing Nussbaum's capabilities view. I then outline Rawls's account of political justification as background for understanding Nussbaum's account of political justification, which draws heavily upon Rawls.⁵ Then, after explaining Nussbaum's own account, I set out to assess what she loses by discarding the social contract mechanism. What she loses, I argue, is the ability of her theory fully to recognize human dignity.⁶ As long as the inherent worth of human beings who are capable of rationality is partly grounded in this capability—as Nussbaum thinks it is—the requirement of justifiability to all is binding.⁷ This requirement cannot be fulfilled by establishing the possibility of overlapping consensus, I argue; and so, we have a reason to retain the social contract apparatus.

Justifying the Capabilities Approach

Summary of the Capabilities View

Like John Rawls's account, from which she borrows, Nussbaum's view of political justification is subtle and complex, as is the theory of justice she seeks to justify. The fundamentals of that theory are these. At the theory's center is a list of ten human capabilities. These are regarded as entitlements and are to provide the basis for political principles, which, in turn, are to provide the basis for constitutional guarantees (Nussbaum 2000, 35; 2003b, 40; 2006, 70). The list includes such items as being able to live to the end of a human life of normal length, being able to move freely from place to place, being able to be free from sexual assault, being able to use imagination and thought in connection with experiencing and producing works and events of one's own choice, being able to have attachments to things and people outside of ourselves, being able to form a conception of the good and to engage in critical reflection about the planning of one's life, having the social bases of self-respect and

⁴ For discussion of whether or not Nussbaum's view is in fact a type of liberalism (or if it is, what type it is), see Barclay 2003, Cudd 2004, and Phillips 2001. See also Nussbaum 2003a.

⁵ For a critique of Nussbaum's approach to justification, see Okin 2003. For Nussbaum's response, see Nussbaum 2004.

⁶ Nussbaum defends her account of human dignity in Nussbaum 2008. See also Weithman 2008.

⁷ Some have argued that the inherent worth of human beings does not depend at all upon the capacity for rationality. See, for example, Kittay 2005.

nonhumiliation, being able to live in relation to the world of nature, and so forth (2000, 78–80; 2003b, 41–42; 2006, 76–80).⁸

The capabilities approach, Nussbaum says, represents a minimal theory of justice—governments are required at least to ensure a threshold level of capabilities for each citizen.⁹ The approach is silent on, for example, issues of distributive justice that arise once the threshold has been met (2000, 75). Though the view is outcome-oriented, rather than proceduralist, it is nonaggregative (2006, 82). What must be secured is a threshold level of capabilities for each citizen—total or average capability levels are not the goal. Moreover, trade-offs among the capabilities are not permitted (2000, 74; 2006, 85). One cannot reach the minimum threshold by having, for instance, an abundance of opportunity to live in relation to nature, while enjoying no freedom of movement. Underlying Nussbaum's prohibition on aggregation and trade-offs is a conception of the human being as an end (2000, 74). Human beings, on Nussbaum's account, have dignity. This status, however, is grounded not merely in our rational agency but in our animality as well (2006, 159–60).

Rawls's Approach to Political Justification

Let us look, now, at Rawls's account of political justification.¹⁰ His view has three components: the device of the social contract, the idea of an overlapping consensus, and the method of reflective equilibrium. Consider, first, the social contract. Rawls claims that whatever principles would be chosen by parties regarded solely as free and equal persons in circumstances that are fair, are just (1999a, 310). (Hence “justice as fairness” as the label for his view.) Rawls models this criterion by means of the “original position”—his version of the classical contractarian's state of nature. The parties in the original position deliberate behind a “veil of ignorance” that deprives them of certain knowledge, such as their class position and natural abilities, in order to ensure that the agreement reached, upon principles of justice, is not affected by social fortune or natural accident.

Rawls argues that the parties to the original position would choose two principles of justice for distributing “primary social goods”—goods that all citizens need, despite their differences, as free and equal persons (1993, 180).¹¹ Roughly, the first principle mandates a wide distribution of equal rights and liberties. The second mandates that differences in wealth be permitted only if they, first, arise under conditions of fair equality of opportunity and, second, maximally benefit the least well off (1971, 302–3).

⁸ The list has been modified over time.

⁹ For a critique of the sufficientarian aspect of Nussbaum's view, see Arneson 2006.

¹⁰ I draw heavily here upon Freeman 2003, Scanlon 2003, and Neiman unpublished manuscript. See also Weinstock 1994.

¹¹ The primary goods include basic rights, liberties, opportunities, income, wealth, and the social bases of self-respect (1993, 5–6).

Now consider the idea of an overlapping consensus. Once we have established which principles are just, we must determine whether or not the conception of justice containing those principles is stable. That is, can a society governed by that conception reproduce itself over time? One aspect of this problem concerns whether a conception of justice can be supported by all citizens given the “fact of reasonable pluralism”—given, that is, that citizens in democratic cultures tend to hold a variety of incompatible but reasonable “comprehensive doctrines”—views about the good, about the meaning of life, and so on. Rawls argues that justice as fairness can be supported by the reasonable comprehensive doctrines likely to gain adherents in a democratic society. Each reasonable view can support justice as fairness for its own sake, or on its own merits (1993, 148). This type of support constitutes an overlapping consensus. Justice as fairness, on this account, is a “free-standing” view; it is not justified by appeal to any particular comprehensive doctrine. It is, as such, a “political conception” of justice.¹²

Rawls distinguishes stability founded on an overlapping consensus from stability founded on a *modus vivendi*. The latter is a mere balance of power. The former, says Rawls, constitutes “stability for the right reasons” (1996, xxxix). A society characterized by an overlapping consensus of reasonable comprehensive doctrines meets the “liberal principle of legitimacy,” which says, “the exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason” (1993, 137).

Finally consider the method of reflective equilibrium (1971, 17–22, 46–53; 1999b, 288–90).¹³ Rawls introduces this as a method for characterizing the contractual situation. He observes that the principles yielded by that situation will differ according to how that situation is described (1971, 17–18). So, one needs a justification for one’s favored description. The method of reflective equilibrium fulfills this justificatory role. Briefly, it works as follows. Initially we describe the contractual situation by appeal to commonly shared presumptions about the conditions under which principles of justice should be chosen (1971, 18). (These presumptions include, for example, the idea that one should not be able to tailor principles to one’s own particular circumstances.)

Next we determine what principles of justice are generated by this description of the initial situation. Then we check to see whether those principles account for our considered judgments about justice. These are judgments made with full information about the relevant facts, where one has no personal stake in the answer and is not distraught or otherwise distracted (1971, 47). They are judgments which tend to be stable over

¹² For discussion of the plausibility of political liberalism, see Saenz unpublished.

¹³ For discussion of this feature of Rawls’s theory, see Daniels 1979.

time and about which we are confident. And, they vary as to their degree of generality (1993, 28; 1999b, 289).

We seek to establish whether the principles produced by the choice situation capture the firmest of these judgments and give us guidance where our judgments are less certain. If they do not, we must revise. In doing so, we “work from both ends”—we can either modify the account of the initial situation or modify our considered judgments, conforming them to the principles given by the initial situation. Reflective equilibrium is achieved when we reach a description of the contractual situation that yields principles that match our considered judgments, duly modified (1971, 20). One achieves *wide* reflective equilibrium when one has determined what principles to accept after evaluating other plausible views and their supporting grounds (1993, 28; 1999b, 289).

Rawls conjectures that the original position is the contractual situation we would end up with if we were to achieve reflective equilibrium. That is, the principles generated by the original position are, compared to principles that would be generated by some other choice situation, the ones that best match our considered judgments about justice.

Nussbaum's Approach to Political Justification

Nussbaum's view of political justification makes use, in modified and supplemented forms, of the ideas of overlapping consensus and of reflective equilibrium. The list of capabilities, she says, matches the intuitive ideas of truly human functioning and of human dignity. It specifies what is necessary for truly human functioning and so what is required to respect the dignity inherent in human beings as such (2000, 76–83; 2006, 70). The harmony between the list and our intuitions about human dignity represents, Nussbaum claims, a state of reflective equilibrium.¹⁴ So, where Rawls introduces reflective equilibrium as a means for justifying his description of the contractual situation, Nussbaum relies on it as a method for justifying her list of capabilities. Furthermore, Nussbaum compares the capabilities approach to various types of subjective welfarism and to Rawlsian contractarianism, arguing that the capabilities approach better accounts for many of our firm considered judgments than do those views. This comparison is designed to reach toward *wide* reflective equilibrium (2000, 111–66; 2006, 9–153).¹⁵

¹⁴ It is evident that Nussbaum thinks that our intuitions about human dignity are very firm and so not likely to be given up in the effort to achieve reflective equilibrium. She claims, for instance, that the idea of truly human functioning is “intuitively powerful” (2000, 101).

¹⁵ Nussbaum does not use the phrase “wide reflective equilibrium.” However, her description of the method of reflective equilibrium suggests that she has wide notion in mind. She characterizes reflective equilibrium as follows: “[W]e lay out the arguments for a given theoretical position, holding it up against the ‘fixed points’ in our moral intuitions; we see how those intuitions both test and are tested by the conceptions we examine” (2000, 101).

Ancillary to justification through reflective equilibrium are considerations based upon informed desire. The content of the list of capabilities is determined not only by appeal to considered judgments but also by discussion with others—academics and lay persons from a variety of cultures. The list is, in part, a compilation of what people want, where their wants have been subjected to a certain kind of screening to prevent the influence of adaptive preferences.¹⁶ (For instance, Nussbaum draws upon discussions with women *in women's groups that affirm the values of equal dignity and nonhierarchy* (2000, 151).) So, the list of capabilities is justified primarily by the fact that it is in harmony with our considered judgments about justice but also by the fact that it reflects people's informed desires.

The list represents a *stable* conception of justice, Nussbaum claims, because it can be the object of an overlapping consensus. Indeed, where Rawls claims that justice as fairness can be the object of an overlapping consensus within one society, Nussbaum asserts that her list of capabilities can be the object of overlapping consensus across national boundaries. Like justice as fairness, the list of capabilities is not derived from any particular comprehensive doctrine—instead, as we saw, it comes from the intuitive idea of human dignity. This idea, says Nussbaum, has deep cross-cultural and transnational resonance (2000, 72). The fact that the list has been shaped through transnational discussion further shows that it can be accepted by people with widely differing comprehensive doctrines (2000, 76, 151). In keeping with Rawls, then, Nussbaum justifies her account of justice by arguing, first, that its normative imperatives match our considered judgments and, second, that it is stable in a way that meets the liberal principle of legitimacy.

Justification and the Value of Rational Agency

But what about the idea of justifiability to all? As we saw above, Rawls incorporates this idea through the social contract. He argues that *reflective equilibrium obtains when our considered judgments are balanced with principles that would be the outcome of a particular hypothetical choice situation*. It follows that “the most appropriate principles of justice” are, on Rawls's view, principles that can be justified to everyone. Having extracted the hypothetical choice situation from the overall framework of reflective equilibrium, it appears that Nussbaum has eliminated the idea that just principles must be justifiable to all who are governed by them and so has dispensed with a key feature of liberal justice.

At this point it may seem that I am begging the question against Nussbaum. Surely she can reject the idea of justifiability to all as a criterion of justice. Indeed, this is just what we might expect, since she rejects proceduralism (or at least *pure* proceduralism) in favor of a

¹⁶ For an account of adaptive preferences, see Nussbaum 2003b, 34.

substantive good view of justice. Surely, then, it does not count as an argument *against* her to note that she has failed to use a particular *procedure* to justify her list of capabilities.

But things are not so simple, for Nussbaum is not prepared to abandon proceduralism completely, as her appeal to informed desire indicates, nor is she prepared to abandon the idea of reasonable agreement as a feature of justification (2000, 152–57; 2006, 153). Her theory, she says, uses the idea of rational acceptability common to social contract theories but locates it at a “rather different, and later, point in the theory” (2006, 68). So, it seems that she is indeed concerned to include the notion of justifiability to all in her account of political justification.

As I read her, she presents a two-pronged argument in response to proceduralist worries about her view. First, she argues that the capabilities approach converges in important ways with the contract approach, without relying on the contract (2006, 148, 153). So, perhaps the device of the contract is not as important as proceduralists think. Second, she argues that her view in fact captures the demand for justifiability to all through the idea of an overlapping consensus (2006, 153).

In what follows, I offer objections to both prongs of Nussbaum’s argument. First, I show that the contract view, unlike the capabilities approach, allows us to capture fully the value of practical reason. It follows that the contract view better captures Nussbaum’s own view of human dignity than does the capabilities approach. Second, I explain why displacing the justificatory work of the contract onto the notion of overlapping consensus cannot mitigate this problem.

Nussbaum emphasizes the similarities between her view and contractarianism in the context of discussing whether social contract theory can be modified to include the severely cognitively disabled (2006, 145–54). We need to answer this question because, if social contract theory can be so modified, then, given its strength, we may be wasting our time developing an alternative, such as the capabilities approach. What modifications of social contract theory would be necessary? Nussbaum argues that a suitably revised theory cannot, as Rawls’s theory does, invoke the ideas of rough equality of ability, mutual advantage, or mutual independence. Nor can it, as Rawls’s theory does, regard resources as the proper objects of distribution. Instead, it would have to include something like the list of capabilities. What would be *retained* is the hypothetical choice situation and the idea of individuals as ends in themselves—the former because we are looking for a form of contractarianism, and the latter because it grounds the justice claims of people with severe cognitive impairments.

It turns out, though, that the contract device forces us to adopt the problematic notion of the citizen as rational agent. This is because only rational agents can be parties to a contract, and, inasmuch as the parties are to represent citizens, it follows that only rational agents can be citizens. Those lacking the capacity for rationality are relegated

to the margins of the theory. So, we must, in the end, reject contractarianism.

This is not a serious loss, suggests Nussbaum, because the capabilities approach contains much of what a revised contract theory would include. In other words, if we retain the strengths of social contract theory, and replace its weaknesses—the parts of the theory that exclude the severely cognitively impaired—with inclusive notions, we will end up with something that looks a lot like the capabilities view (2006, 153). The main difference, Nussbaum claims, is that the capabilities view approaches the question of justice “from a different vantage point,” starting with a robust theory of the good and a more expansive account of the person (2006, 153).

Despite this postulated convergence between a suitably revised contractarianism and the capabilities view, it is still worth pressing, it seems to me, the question of whether we lose anything important when we eliminate the contract device so as to include the severely cognitively impaired. I claim that we do. The contract approach, unlike the capabilities approach, allows us to recognize fully the dignity of human beings who are capable of practical reasoning. In other words, by rejecting the contract apparatus in order to recognize the dignity of human beings who lack the capacity for practical reasoning, Nussbaum ends up with a view that fails to recognize fully the dignity of humans who possess the capacity for practical reasoning.

To see this, consider how Nussbaum’s view pays tribute to the value of rational agency. The list of capabilities, remember, is given by our intuitions about human dignity in both its animal and its rational manifestations. One of the items on the list is the capacity for practical reasoning. So, in a just society, each person is guaranteed the freedom and opportunity to exercise this capacity to the extent that he has it. Moreover, this capacity enjoys a special status among the capabilities in that it constrains the shape of principles and policies designed to ensure any of the other capabilities (2000, 82). It is clear, then, that the *substance* of the capabilities approach mandates respect for the capacity for practical reasoning. And, to a limited degree, the *form* of the approach also exhibits this respect insofar as provisions for advancing the other capabilities must be compatible with advancing the capability for practical reasoning.

The manner in which the capabilities approach itself is *justified*, however, does not exhibit proper respect for practical reason. The list is simply laid out, as we saw, by the theorist, on the basis of intuitions about human dignity, along with a certain sort of empirical investigation—checking the list against people’s actual informed desires. But if rational agency is indeed valuable—if it is a source of human dignity—it follows that political principles backed by coercion must be justifiable to those capable of rational agency. In other words, those individuals must be shown to have reason to abide by such principles; otherwise they are merely *subjected* to those principles. Their capacity for practical reason is,

in this case, neglected, and their dignity is violated. It is not enough that the content of principles of justice respect the capacity for practical reasoning. The principles themselves must be justified in a way that respects that capacity. And so we need an approach, such as the social contract approach, that can establish which principles rational agents, as such, have reason to accept.

But perhaps none of this matters, for Nussbaum has the following argument to fall back on. The list of capabilities, she tells us, can be the object of an overlapping consensus. If that is so, then it can be the object of reasonable agreement. And if it can be the object of reasonable agreement, it is justified in a way that recognizes the value of rational agency (2000, 76; 2006, 163–64, 182). And so we can dispense with the contract apparatus at little or no cost. In fact we *should* dispense with it because of what we gain; we make liberalism inclusive of people with severe cognitive impairments.

I have two worries about this move. The first concerns the appropriate depth of an overlapping consensus. Is the appropriate focus of an overlapping consensus the principles endorsed by a conception of justice? Or, is the appropriate focus the principles and the ideas that underlie them? Or, is the appropriate focus the principles, their underlying ideas and the conception's method? If it turns out that legitimacy requires overlapping consensus on principles of justice *and their justification*, then establishing that the list of capabilities (or the principles derived from it) can be the object of overlapping consensus cannot serve as a justification for the list, because the justification for the list must itself be the object of overlapping consensus. My second worry is that Nussbaum's appeal to overlapping consensus as a method of justification reintroduces the problem that the removal of the contract device was designed to solve, namely, the exclusion of severely cognitively impaired individuals from the domain of citizenship.

Consider, first, the issue of the appropriate depth of an overlapping consensus.¹⁷ It is fairly clear from the text that Rawls takes the proper focus of overlapping consensus to be the whole of a conception of justice. He says, “[T]he consensus goes down to the fundamental ideas within which justice as fairness is worked out. It supposes agreement deep enough to reach such ideas as those of society as a fair system of cooperation and of citizens as reasonable and rational, and free and equal” (1993, 149). Rawls also says that forms of political liberalism (including justice as fairness) are constructivist conceptions. As such, they represent principles of justice as the outcome of a procedure of construction. In the case of justice as fairness, principles are represented as the outcome of the deliberation of the parties in the original position.

¹⁷ For discussion of this issue, see Hill 2000, 255, and Mandle 1999, 96–98.

The constructivist aspect of justice and fairness (and other political liberalism), says Rawls, is essential to the ability of justice as fairness (and other political liberalism) to be the object of overlapping consensus. This is because political constructivism can be neutral about the truth of constructivism as a general metaethical position. Political constructivism, so as to be consistent with comprehensive doctrines that countenance a mind-independent moral order, does not say that the procedure of construction *produces* the order of moral values. Rather it claims “that its procedure represents an order of political values proceeding from the values expressed by the principles of practical reason, in union with conceptions of society and person, to the values expressed by certain principles of justice” (1993, 95). In other words, political constructivism can *represent* principles of justice as constructed without *denying* that they are *more than* constructed—that is, without denying that they may also correspond to an independent order of moral values.

Now, it makes sense that Rawls’s would hold that a conception of justice, and not merely its principles, must be the object of overlapping consensus. After all, in a society characterized by reasonable pluralism, people disagree not only about the truth or falsity of moral principles but also about the metaphysical status of moral propositions and the proper way to justify those propositions. So, in order for reasonable people to agree on a political conception of justice, that conception must be amenable not merely to the moral substance of various comprehensive doctrines but to those doctrine’s metaethical and justificatory commitments as well.

If a conception of justice as a whole is the proper focus of overlapping consensus, it follows that overlapping consensus, as least as Rawls understands and utilizes that idea, cannot serve to fully justify principles of justice. Those principles must be justified by appeal to a constructivist procedure that itself is the object of overlapping consensus. So, at least so far as she understands overlapping consensus along Rawlsian lines, Nussbaum cannot rely on overlapping consensus as method for justifying her list of capabilities.

Overlapping consensus is constituted, as we have seen, by reasonable agreement. Exactly what is involved in the notion of reasonableness, in this context, is a matter of debate.¹⁸ Reasonableness is, however, in this context, bearing considerable weight: Rawls says, “[R]easonable persons will think it unreasonable to use political power, should they possess it, to repress comprehensive views that are not unreasonable, though different from their own” (1993, 60). So, “reasonable” applies to persons and to comprehensive doctrines.¹⁹ The exact relationship between reasonable persons and those who hold reasonable comprehensive doctrines is also a

¹⁸ For discussion of this issue see Boettcher 2004, Mandel 1999, and O’Neill 1997.

¹⁹ It also applies to conceptions of justice and limits on the procedure of construction. See Mandel 1999. Rawls’s account of reasonable comprehensive doctrines is at 1993, 59.

matter of controversy (see Mandle 1999). This much is clear, however: reasonable persons tend to hold reasonable comprehensive doctrines. So, an overlapping consensus of reasonable comprehensive doctrines tends to be a consensus among reasonable persons.

A reasonable person, on Rawls's account, is one who is committed to the ideal of society as a fair system of cooperation among free and equal persons, who recognizes the "burdens of judgment," and who accepts the duty of civility (1993, 54). The details of this conception of a reasonable person are not important for my purposes. I merely wish to establish that severely cognitively impaired individuals are not reasonable persons in Rawls's sense; they lack the cognitive capabilities to be classed "reasonable." The idea of overlapping consensus, then, seems to rely, like the social contract, upon an ideal of the citizen as one who is capable of acting for reasons. But this ideal of the citizen is one of the features of social contract theory that, according to Nussbaum, leads that theory to neglect or demote the interests of the severely cognitively impaired. So, if the device of the contract and the mechanism of overlapping consensus essentially entail the same notion of the citizen, why does not the idea of overlapping consensus also exclude the interests of the severely cognitively impaired?

Perhaps the idea is this: because the "parties" to the overlapping consensus are not idealized as "disinterested," as are (typically) the parties to the social contract, many will take an interest in other people's interests. Hence they are in a position to ratify principles of justice that take account of the interests of, for example, cognitively impaired individuals. Where the contract device ensures that the group that chooses principles is identical with the group for whom the principles are chosen, the method of overlapping consensus, perhaps the reasoning goes, allows for the latter group to be more expansive (Nussbaum 2006, 137).²⁰

This line of reasoning is not open to Nussbaum, however, because it invokes a notion of trusteeship that Nussbaum rejects in discussing possible modifications of social contract theory. Some have suggested that this theory could be made more inclusive if the parties to the contract were regarded as trustees for dependent members of society (Hartley 2009). Nussbaum sees two problems with this approach. First, it cannot adequately model equality: the interests of dependents is taken into account only because the parties represent members of society who happen to care about the interests of dependents, not because the dependents are "citizens with rights" who are "equal ends in themselves" (2006, 138).

Second, the trusteeship solution reinforces the Kantian split between the rational agent and the rest of nature. "[O]nly people with Kantian powers in their full-fledged normal form can be fully included, and party to the social contract." It follows that the interests of cognitively impaired

²⁰ Thanks to Eva Kittay for pressing me on this point.

individuals are, on the trusteeship view, “worthy of concern only derivatively, in relation to those parties interests” (2006, 138). “Are we not in effect saying,” asks Nussbaum, “that the full range of human and animal powers will get support only insofar as it is an object of concern for Kantian rational beings? And doesn’t this slight the dignity and worth that needy human animals surely possess?” (2006, 138).

As we can see, Nussbaum maintains that in the case where rational beings are charged with representing the interests of nonrational humans, the interests of nonrational humans are necessarily demoted. Consequently, the dignity of nonrational humans is slighted. Now, if this result precludes trusteeship in the case of the parties to the social contract, then it should also preclude trusteeship in the case of the “parties” to the overlapping consensus. The reasonable persons who accept the list of capabilities (or the principles it implies) cannot, then, accept the list (or the principles) on behalf of nonrational humans. If this is so, it is not clear how Nussbaum’s reliance upon overlapping consensus renders her view more inclusive than social contract theory of the severely cognitively impaired.

Conclusion

It is critical that we adjust liberal political theory so that it can address the claims of those whose capacity for rational agency is compromised. This is necessary to acknowledge the worth of such individuals, which worth obviously has a source other than their rational agency. We are ill advised, I have argued, to make this adjustment by rejecting the device of the social contract and placing the burden of justifiability to all on the idea of overlapping consensus. Such a modification will cause us to neglect the dimension of human dignity that *does* reside in the capacity for rational agency. Moreover, the resulting theory proves, in the end, to be no more inclusive of the cognitively impaired than is social contract theory. We should, then, find another way to widen the scope of liberal justice.²¹

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²¹ I have offered a suggestion along these lines in Stark 2007. See also, Cohen 2007.

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