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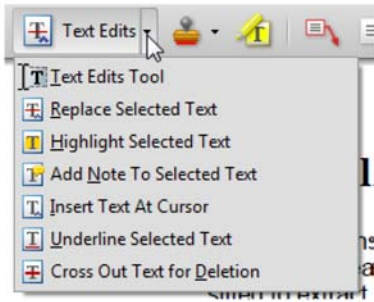
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## Political liberalism and the justice claims of the disabled: a reconciliation

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Unlike his theory of justice as fairness, John Rawls's political liberalism has generally been spared from critiques regarding what is due to the disabled. This paper demonstrates that, due to the account of the basic ideas of society and persons provided by Rawls, political liberalism requires that the interests of numerous individuals with disabilities should be put aside when the most fundamental issues of justice are settled. The aim is to accommodate within public reason the due concern for the disabled while upholding political liberalism. To achieve this aim, a revision of the basic ideas of persons and society is proposed. The idea of persons should be regarded as more fundamental than that of social cooperation, and persons should be defined in terms of minimal moral powers.

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**Keywords:** disabilities; political liberalism; John Rawls; public reason

### Introduction

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The justice claims of the disabled have been a source of powerful criticisms against John Rawls's theory of justice as fairness, which is most thoroughly articulated in *A Theory of Justice* (1971).<sup>1</sup> Famously, the transition from *A Theory of Justice* to the later *Political Liberalism* (1993) is marked by important changes in Rawls's thought. In *A Theory of Justice*, Rawls develops justice as fairness, which is regarded as a comprehensive doctrine (Rawls 1971). In *Political Liberalism*, the central question becomes whether, given the current pluralism of incompatible yet reasonable comprehensive doctrines, a just society can also be stable. According to Rawls, stability is made possible by the fact that the most diverse comprehensive doctrines 'overlap' on some basic political ideas. Therefore, there is room for the 'reason of the public' to emerge and settle the most fundamental issues of justice on a broadly consensual basis. In this context, justice as fairness becomes one of several liberal conceptions of justice that share the content of the overlapping consensus and, therefore, make up the public reason of our societies (Rawls 1993).

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Despite the great attention that has been paid to *Political Liberalism*, the implications that the shifts in Rawls's thought have for the claims of the disabled have been surprisingly neglected.<sup>2</sup> The first aim of this paper, therefore, is to fill this gap. Giving priority to the basic idea of social cooperation over that of persons, Rawls's political liberalism cannot accommodate the justice claims of many individuals with disabilities without significant revisions.

The implications of the failure of Rawls's political liberalism to accommodate the claims of the disabled reach far beyond Rawlsian interpretation. Political liberalism faces the challenges posed by the pluralism characterizing our societies, and its search for spaces of overlapping consensus highlights a precious source of legitimacy and stability. Thus, the inability of Rawls's political liberalism to include individuals with disability is a serious blow to a model that, in other respects, is worth our support. Accordingly, the second aim of this paper is to propose an amendment to Rawls's conception of overlapping consensus and public reason that, though upholding the project of political liberalism, is able to accommodate what is due to individuals with disabilities.

This paper is organized as follows. After outlining the main principles of Rawls's political liberalism, I show how the basic ideas of society and persons on which public reason relies require that the interests of many individuals with disabilities should be set aside when the most fundamental political decisions are made.<sup>3</sup> To complete my argument that Rawls's political liberalism cannot recognize the status of many individuals with disabilities, I argue that no extension of Rawls's theory can possibly solve the problem, and that the claims of the disabled must be regarded as a matter of political justice. Then, I turn to the revision of political liberalism. The starting point of my proposal is the recognition that a concern for the justice claims of the disabled is part of the common culture of our societies. Given that this recognition is inconsistent with Rawls's portrait of the basic ideas of society and persons, different basic ideas must be identified. A possible route is to follow Christie Hartley and widen the idea of social cooperation in such a way that virtually all individuals with disabilities are able to contribute to the extent that is needed to qualify as citizens. After pointing to the flaws in Hartley's model, I argue that Martha Nussbaum's claim that the conception of persons should be more fundamental than that of society is more convincing. Nonetheless, Nussbaum's conception of persons as centred on a determinate list of capabilities is object of reasonable disagreement. Therefore, political liberalism should be content with a definition of persons as possessing a *minimal capacity for moral powers*.

### Legitimacy and consensus in pluralistic societies

Western societies are characterized by a wide disagreement about moral, religious and philosophical doctrines. Rawls argues that the persistence of

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such disagreement under conditions of freedom shows that, to a good extent, pluralism is the product of the free exercise of human faculties – in Rawls’s words, much of the pluralism characterizing our societies is ‘reasonable pluralism’ (Rawls 1993, pp. 54–58).

*Political Liberalism* aims to demonstrate that, despite the pluralism of comprehensive doctrines, a fundamentally just society can be legitimate and stable. Central to Rawls’s argument is the notion of public reason, i.e. the ideal of legitimacy requiring that, when fundamental political issues are at stake, decisions should be made on the basis of justifications that every reasonable citizen can accept (Rawls 1993, pp. 212–254, Rawls 1997). Even though reasonable citizens hold different comprehensive doctrines, such doctrines converge on the most fundamental and abstract parts of a political conception of justice. Thus, reasons can be public if they are grounded in this domain of ‘overlapping consensus’ and not on more comprehensive beliefs.

As for the content of the overlapping consensus, Rawls claims that the vast majority of citizens living in liberal-democratic societies share a few basic political ideas: namely, the idea of society as a fair system of cooperation, the idea of citizens as free and equal, reasonable and rational persons, and the idea of a well-ordered society as effectively regulated by a public conception of justice.<sup>4</sup> These widely held ideas provide citizens with the basis for developing their conceptions of justice. According to Rawls, the fact that reasonable persons share the same basic political ideas limits the scope of reasonable disagreement over issues of political justice. Consequently, the vast majority of citizens have conceptions of justice that share three key liberal features:

First, a list of certain basic rights, liberties, and opportunities (such as those familiar from constitutional regimes); second, an assignment of special priority to those rights, liberties, and opportunities, especially with respect to the claims of the general good and perfectionist values; and third, measures ensuring for all citizens adequate all purpose means to make effective use of their freedom.(Rawls 1997, p. 774)<sup>5</sup>

To fulfil the duty imposed by public reason, it is sufficient that citizens be able to justify their stance on the most fundamental political issues by reference to their political values alone. This means showing that their stance is grounded in their liberal conception of justice and can be traced back to the shared political ideas of society and persons. According to Rawls, the fulfilment of this duty by politically active citizens builds legitimacy in pluralistic societies. Besides, the fact that reasonable citizens endorsing the most various comprehensive doctrines share the above-listed liberal commitments goes a long way in ensuring the stability of society.

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**Public reason and the required disregard for the interests of the disabled**

As mentioned above in the Introduction, Rawls's justice as fairness has been the object of numerous criticisms pointing at its inability to take into consideration the claims of individuals with disabilities.<sup>6</sup> However, Rawls's theory of justice is not the focus of this paper. In fact, my attention is concentrated on the changes in Rawls's thought leading to *Political Liberalism*. In other words, this paper focuses on the Rawlsian account of how a society characterized by reasonable pluralism can produce institutions that are just and stable. In this context, justice as fairness becomes one among the liberal conceptions of justice falling within the overlapping consensus. Although Rawls conjectures that justice as fairness might specify the centre of the class of conceptions falling within the overlapping consensus, he also states that public reason admits Jürgen Habermas's discourse ethics and political Aristotelian–Thomistic conceptions of the common good (Rawls 1993, pp. 167–168, Rawls 1997, pp. 774–775).

In short, justice as fairness and the twin ideas of public reason and overlapping consensus provide answers to important but distinct questions. Therefore, it is surprising that while the place of individuals with disabilities in justice as fairness has been the object of numerous analyses, the relationship between the claims of the severely disabled and the shifts in thought leading to *Political Liberalism* has thus far been neglected. To show that Rawls's political liberalism cannot accommodate the claims of numerous individuals with disabilities, I first analyse the ideas of society and persons that form the basis of overlapping consensus and public reason. Then, I argue that numerous individuals with disabilities fall outside the basic idea of persons as defined by Rawls. Finally, I demonstrate that this exclusion means that citizens and public officials are required to leave the basic interests of the disabled aside when the most fundamental issues of justice are settled.

On a Rawlsian account of public reason, any public deliberation concerning the liberties, opportunities and basic distributive entitlements of the disabled should consist of arguments whose normative elements, in the best judgement of their proponents, can be derived from the basic political ideas of society and persons. Thus, the question is: can the basic ideas of society and persons adequately support the interests of individuals with disabilities? The answer is decidedly 'No'.

Let me start from the basic idea of persons, given that its emphasis on the freedom and equality of each citizen seems to involve an inclusive conception of human dignity, which promises to serve as a good basis for supporting the interests of individuals with disabilities. According to Rawls, the individuals who should be regarded as persons are those fitting into the shared idea of society, which is, therefore, more fundamental.

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Since our account of justice as fairness begins with the idea that society is to be conceived as a fair system of cooperation over time between generations, we adopt a conception of the person to go with this idea. Beginning with the ancient world, the concept of the person has been understood, in both philosophy and law, as the concept of someone who can take part in, or who can play a role in, social life, and hence exercise and respect its various rights and duties. Thus, *we say that a person is someone who can be a citizen, that is, a normal and fully cooperating member of society over a complete life.* (Rawls 1993, p. 18, added emphasis)<sup>7</sup>

This excerpt shows that it is the ability to play a full role in a fair system of cooperation that provides the basis for the value that public reason attaches to persons. To understand the idea of a fair system of cooperation, it is necessary to present the notions of reciprocity and rational advantage, introduced by Rawls to explain fair cooperation (Rawls 1993, pp. 15–22). Reciprocity means that individuals should derive appropriate benefits from their contributions to social cooperation, where the appropriateness of benefits is judged with respect to a benchmark of equal distribution of goods. Now, what kind of benefit is appropriate? When considering the system from the standpoint of their conception of the good, citizens seek to advance their own rational advantage, i.e. the amount of the most effective means of achieving the broadest range of personal goals.

Given the way in which reciprocity and rational advantage are defined, a fair system of cooperation is concerned with the means that are necessary for individuals to achieve their goals. More specifically, those means should be distributed in such a way that each member of society is better off than under a regime of equal distribution of goods.<sup>8</sup> We can now see why Rawls needs to define persons as those who can be normal and fully cooperating members of society. An idea of persons that can go with Rawls's idea of a fair system of cooperation must define persons as those who can provide a net benefit to the collective production of goods (wealth being a prime example) that persons can use to pursue their goals. In fact, the inclusion of those who fall short of this requirement would hinder the production of an aggregation of net benefits that is large enough to make each member of society better off than under a regime of equality.

For the purposes of my argument, it is important that I clarify why Rawls needs to define persons as normal and fully cooperating members of society. Thus, it is important to answer an objection that could be raised against the explanation I proposed in the previous paragraph. A critic might argue that including those who fall below a threshold of full cooperation in a well-organized and otherwise productive system of cooperation would not make anyone worse off than under a regime of equality. In fact, the production of a large-enough aggregation of benefits would be under threat only if the individuals who are not fully cooperating members were much more numerous than can be expected in actual societies.



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5 This is a challenging objection, which helps to examine further the logic behind Rawls's definition of persons.<sup>9</sup> My answer is that, in defining the basic ideas of society and persons, our attention should not be limited to any specific stage of the evolution of Western economies. In other words, Rawls's exclusive idea of persons is needed for his conception of the basic ideas to apply beyond the specific stage that has characterized the recent past of Western economies.

10 Arguably, much of the appeal of the objection under discussion comes from the fact that we tend to focus on the generally growing economies characterizing Western societies since the end of the Second World War. However, things may well change. What if a period of sustained recession awaits our economies, leading to a progressive reduction of the value of production? How about the fact that we live in ageing societies, where individuals are expected to spend an increasingly large part of their lives in a state of increased need and diminished productivity? If we take these and similar considerations into account, it seems that those falling below a threshold of full cooperation do not have to be in an implausibly large number to threaten Rawls's conception of fair cooperation. Hence, Rawls is justified in proposing his exclusive idea of persons as grounded in his idea of fair cooperation.

15 Before proceeding any further, I need to substantiate a further claim that plays a major role in my critique of Rawls, namely, the claim that many individuals with disabilities are bound to fall outside the class of fully cooperating members of society. Indeed, this claim might seem unjustified: according to many disability advocates, much of what individuals with impairments can or cannot do is a product of the way in which the social environment is organized.<sup>10</sup> In a just social environment, physical and cognitive impairments would not make anyone fall below the threshold of full cooperation. Therefore, virtually no individual with physical or mental impairments needs to be placed outside the basic idea of persons as depicted by Rawls.

20 My answer to this hypothetical counter-argument is twofold. First, there are cases in which social reform might enable individuals with impairments to provide an appropriate benefit to social cooperation, but the cost of the necessary arrangements would outweigh the output. Let us consider the example of those severely impaired individuals who need multiple carers to work (Wolff 2009a, pp. 63–64). They cannot make a contribution to cooperation that, in a Rawlsian sense, counts as an appropriate exchange for the benefit received, because the benefit received will always outweigh the contribution. So, they cannot be regarded as fully cooperating members of society and, therefore, they have to be excluded from the basic idea of persons as presented by Rawls.

25 Second, there are cases in which the connection between impairment and disability is so direct that, whatever reform of the social environment

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were put in place (even regardless of its cost), the impaired could never be fully cooperating members of society. For example, an inclusive social environment could not compensate for the fact that those who are blind, affected by chronic pain or suffering from chronic fatigue cannot carry out as many activities as those who are not (Terzi 2004, pp. 149–153). If these impairments are serious enough, or if individuals are affected by several of them, the productivity of workers with impairments is bound to be lower than needed to be fully cooperating.

As stressed by Jonathan Wolff, these considerations make cognitive impairments especially resistant to any reform of the social environment aimed at enabling individuals with impairments to be fully cooperating members of society. Building on an argument proposed by Daniel Wikler, he invites consideration of what it would take to make our labour market (and its legislation) accessible to individuals who, because of cognitive impairments, cannot learn how to read: just the necessary revolution in contract law would come at an unimaginably high cost (Wolff 2009b, pp. 406–407).

Numerous individuals with disabilities fall outside the category of fully cooperating members of society. Given that Rawls's basic ideas of society and persons state that only those who are fully cooperating members of society should be regarded as persons, Rawls's basic ideas cannot be used to derive any conception of persons that can accommodate those individuals with disabilities who fall below the threshold of full cooperation. Indeed, the basic idea of persons as described by Rawls constitutes only a subset of any idea of membership that is inclusive towards individuals with disabilities. Thus, no principle of due respect for the disabled can be supported from within public reason, because no inclusive conception of membership can be derived from a basic idea of persons that constitutes only a subset of the very conception that should be derived.

On a Rawlsian account, no concern with the rights, opportunities and basic distributive shares of numerous individuals with disabilities should be regarded as a public reason. This conclusion would already be strikingly counterintuitive if its main implication was that citizens are allowed to make their most important political decisions without taking the claims of individuals who are not fully cooperating members of society into account: not only could decision-makers neglect the special needs of individuals with disabilities when institutions are built, but they would also be allowed to discriminate against such individuals and cast them out from the protection of pieces of ordinary or constitutional legislation.

Unfortunately, the implications of the exclusion of the interests of numerous individuals with disabilities from public reason are even more troubling than described in the previous paragraph: *if no case supporting the status of many individuals with disabilities can be built from within public reason, citizens and public officials are required to leave the interests of those individuals aside and make the most important political*

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5 *decisions on authentically public grounds.* In other words, public reason requires that decision-makers neglect the interests of many individuals with disabilities when liberties, basic opportunities and fundamental distributive entitlements are distributed. According to the supposedly liberal conception of legitimacy proposed by Rawls, citizens and public officials who are attentive to the interests of the disabled when the most fundamental issues of justice are settled fail to honour public reason.

### Why Rawls's political liberalism needs to be revised

10 The implications of my analysis of Rawls's political liberalism are intolerably counterintuitive. No society can be said to be shaped by a liberal public reason if the basic interests of the disabled are not taken into due considerations, let alone if marginalizing those interests is necessary for the institutions to be legitimate. Accordingly, in the next two sections I put forward a revision of Rawls's political liberalism that is able to accommodate the justice claims of individuals with disabilities. Revision, however, is not the only strategy that can be proposed to solve the difficulties of Rawls's theory. To be sure, Rawls acknowledges that disabilities, at least those disabilities so severe that individuals with them fall below the threshold of normal productivity over a complete lifetime, cause his theory serious problems (Rawls 1993, pp. 20–21, Rawls 2001, pp. 168–176). Rawls maintains that such problems should be addressed at a later stage of the development of his theory, and he outlines the possible results of that analysis. First, his model could be so radically incompatible with what is due to the disabled that its rejection would be justified. Second, the theory proposed by Rawls could be extended (perhaps by drawing on complementary ideas proposed by alternative theories) to cover the case of individuals with serious disabilities. Finally, it could be argued that 'we should not expect justice as fairness, or any account of justice, to cover all cases of right and wrong. Political justice needs always to be complemented with other virtues' (Rawls 1993, p. 21). What is due to individuals who are not fully cooperating members of society would be a case of right and wrong that does not fall within the purview of political justice.

35 Let us consider whether the alternatives to rejection that are outlined by Rawls can be of any assistance in solving the problems that the claims of the disabled pose to Rawls's political liberalism. The proposal that Rawls's political liberalism could later be extended to cover the rights, opportunities and fundamental distributive entitlements of individuals with disabilities is shown to be untenable by the arguments that I put forward in the previous section. The problems of public reason vis-à-vis the status of the disabled spring from what forms the basis of the overlapping consensus, namely the political ideas of society and persons. If all the normative principles that should be employed as public reasons must be derivable from an idea of

social cooperation among fully cooperating human beings, there is simply no logical room left for the recognition of the status of many individuals with disabilities. In other words, no possible extension that is consistent with the basics of the Rawlsian model of public reason could ever solve a problem that is posed by a structural feature of the model itself.

The only alternative to rejection that is still available, then, is provided by the idea that the interests of those who are not fully cooperating members are not a matter of political justice. Since public reason consists of arguments grounded in one's liberal conception of justice, it follows that what is due to those falling below the threshold of full cooperation is not for public reason to settle. Instead, we should focus on alternative notions, like compassion or beneficence, to identify the right set of concepts to address their claims.

I argue that any proposal abandoning the language of political justice would not seem to do enough for those individuals with disabilities who fall outside the basic idea of persons as depicted by Rawls. In fact, the intuitions supporting the idea that concepts like rights and opportunities are indispensable are very strong.<sup>11</sup> Let us go back to the examples of individuals falling outside Rawls's idea of persons because their disabilities prevent them from being a net benefit to social cooperation. They are individuals who need multiple carers to work, or whose disabilities prevent them from providing a benefit to social cooperation that is large enough. To put the point more sharply, it is worth noticing that the disabilities in question are compatible with being in full possession of one's logical and moral powers. Now, should we accept that those individuals ought to be given no rights or opportunities? An affirmative answer would strike us as implausible, and for a good reason. In a liberal society, having one's rights, opportunities and basic distributive entitlements acknowledged is one and the same as being recognized as an equal. And what is missing from Rawls's political liberalism is precisely the idea that falling below a threshold of full cooperation should not be enough to prevent the disabled from being regarded as persons on an equal footing with anyone else.

In sum, Rawls's political liberalism is not amenable to any extension that, keeping the basic ideas of society and persons intact, is able to include a concern with the status of individuals with disabilities. In addition, the proposal that the interests of the disabled are not for public reason to protect is not satisfactory. Consequently, a substantial revision is the only way to reconcile political liberalism with our intuitions concerning what is due to the disabled.

### **Revising political liberalism I: beyond Hartley's contractualism**

The aim of this section and the next is to propose a substantial revision of Rawls's theory that accommodates the justice claims of the disabled while

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5 upholding the project of political liberalism. A question that needs to be  
answered at this point is: why should we uphold the project of political  
liberalism, rather than endorsing a different model that more neatly fits with  
our intuitions concerning what is due to the disabled? First, the general  
10 project of political liberalism is compelling. Rawls's political liberalism  
aims to identify a common ground of political ideas that can work as the  
basis on which the most important political decisions should be made. This  
project is of the greatest importance because, if successful, it creates legiti-  
macy by building institutions on the basis of concepts that are acceptable  
15 to each reasonable individual. Moreover, it promotes stability in societies  
that are characterized by deep pluralism.

Second, despite Rawls's failure to take the interests of the disabled into  
consideration, political liberalism is well suited to support the justice claims  
of individuals with disabilities. This is because the idea that the disabled  
are citizens who deserve our respect is part of the common culture of our  
20 societies. In other words, there is an overlapping consensus on the idea that  
rights, opportunities and distributive shares must be granted to individuals  
who are not fully cooperating members of society, including those who fall  
below full moral powers. It is widely believed that those with physical dis-  
abilities should have the same rights as their fellow citizens, live in a social  
25 environment that does not excessively limit their opportunities and receive  
benefits that help meet their special needs. Besides, although the state or  
third parties are given exceptional rights to interfere with the autonomy of  
individuals with severe cognitive disabilities, it is widely recognized that  
the mentally disabled are citizens whose basic interests must be protected  
30 by the law.<sup>12</sup> In the public space, any proposal that individuals who are not  
fully cooperating members of society should have their basic interests  
neglected would be widely received with outrage. Such proposal would be  
said to fit a fascist society, not a decent one. Among other legal documents,  
the United Nations Convention on the Rights of Persons with Disabilities  
35 (UN General Assembly, A/61/611) can be taken as the epitome of this  
widespread attitude. Adopted in 2006, the Convention requires that all  
individuals with disabilities should share in the enjoyment of equal  
fundamental rights.

Reasonable persons agree on less exclusive basic ideas than Rawls  
40 maintains. Thus, my project of revising political liberalism needs to target  
the basic ideas of society and persons upon which the overlapping consen-  
sus is based. To accomplish this task, I critically analyse two exemplary  
attempts to revise the ideas of society and persons as proposed by Rawls:  
Hartley's contractualism and Nussbaum's capabilities approach. Although  
45 we need to go beyond both Hartley and Nussbaum, the work of the latter  
points us in the right direction.

Hartley's attempt to revise the ideas of society and persons is, from a  
Rawlsian perspective, more conservative. This is because *the idea of*

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*society retains its priority*, and persons are still defined as those individuals fitting into the proposed conception of social cooperation. On this approach, *an extension of the idea of society is employed to secure the inclusion of individuals with disability*. According to Hartley, contractualism revolves around the notion of reciprocity, and reciprocity only requires that persons make some contribution to social cooperation in exchange for what they receive. Thus, Rawls is mistaken in claiming that only fully cooperating members of society should be regarded as persons. In fact, virtually all individuals with disabilities can join the exchange of contributions that is sufficient for reciprocity (Hartley 2009a, 2009b).

As for the individuals whose disabilities do not affect the two moral powers, they all can contribute to social cooperation and, therefore, should be regarded as persons.

For example, by voting and taking part in policy discussions, they can contribute to the political sphere. These individuals can also make cooperative contributions to the family, an institution that is part of the basic structure. These contributions include providing support and companionship to others, participating in family decision making, and helping children obtain the skills and values they will need as adult citizens. By treating other members of society with respect in civil society, they contribute to building the social bases of self-respect. (Hartley 2009a, p. 27)

Besides, apart from those with the most severe mental disabilities, even the cognitively disabled who lack the two moral powers can make cooperative contributions to society. Even when they cannot contribute to the economy, individuals with mental disabilities provide family members and caregivers with companionship, which in turn brings love and support. Further, individuals who lack the two moral powers can help others develop important values, such as patience, compassion and humility. Finally, Hartley employs an argument proposed by Anita Silvers and Leslie ~~Pickering~~ Francis (Silvers and ~~Pickering~~ Francis 2005): the inclusion of the most vulnerable strengthens a climate of trust, which is necessary for the stability of any cooperative activity.

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Hartley does not say whether her contractualism is consistent with political liberalism or not. Nonetheless, I have introduced Hartley's contractualism because it constitutes the most well-developed version of a way of revising Rawls's basic ideas that may be employed to amend political liberalism. Thus, the question is: does Hartley's contractualism provide a solid ground for the revision of political liberalism? To support a negative answer, I put forward a twofold argument: both the quality and the quantity of the contributions that, according to Hartley, suffice for membership are highly problematic.

First, Hartley's account of the quality of contributions that the disabled can make is in tension with political liberalism and its search for basic

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ideas that are shared by all reasonable comprehensive doctrines. Here we are investigating what cooperative contributions are sufficient for someone to be regarded as a person by a political liberalism resting on the idea of fair cooperation. Thus, those cooperative contributions must be regarded as valuable by all reasonable citizens, irrespective of their moral, religious, and philosophical views. In other words, contributions that are held in little or no regard by any reasonable comprehensive doctrine cannot define fair cooperation and, in turn, membership in society. The rationale underlying this constraint is simple: if the cooperative contributions defining who is a member of society encompassed activities whose desirability is an object of reasonable disagreement, the basic idea of society as a fair system of cooperation would not be the focus of an overlapping consensus any more. From within political liberalism, one cannot argue that the ability to perform an activity makes someone a person if there is reasonable disagreement as to whether that activity is desirable and, therefore, should count as a positive contribution to social cooperation.

Let us start from the ability to actively participate in the political sphere: this kind of contribution may be held in little or no regard by reasonable citizens and, therefore, cannot be used as a public reason supporting the inclusion of individuals with disabilities. Although universal suffrage and an inclusive right to political participation fall within the objects of overlapping consensus, the idea that the actual exercise of political rights is valuable appears to be the object of reasonable disagreement. Political liberalism is different from a comprehensive liberalism in that it makes no reference to controversial conceptions of the good life or perfectionist virtues. Thus, the overlapping consensus among reasonable doctrines includes those persons who, liberal in their commitment to securing the right to political participation to those who are willing to use it, hold the exercise of such value in little regard.

Analogously, regarding the ability to develop patience, compassion and humility in our fellow citizens as a valuable contribution to cooperation is in deep tension with political liberalism. Patience and humility are not regarded as virtues by all reasonable persons, and these character traits are not needed to respect the basic rights, opportunities and distributive entitlements of fellow citizens. Besides, great compassion is hardly necessary to support the commitment to the most fundamental interests of our fellow citizens that is required by political liberalism.

Lastly, the capacity to provide others with love and support is not a contribution that all reasonable persons, regardless of their comprehensive doctrines, place importance on. Whether we should build any close bond with others is a matter pertaining to each person's conception of the good and an object of disagreement among reasonable persons. There are persons pursuing a great degree of emotional self-sufficiency and self-reliance in their relationships with others. Consequently, they do not place much

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importance on the capacity of others to provide love and support. Importantly, this part of the conception of the good endorsed by the 'emotional self-reliant' is not inconsistent with reasonableness and a commitment to fair terms of cooperation at the political level.

Unlike the contributions that have just been analysed, the desirability of a climate of trust and the value of the social basis of respect are not objects of reasonable disagreement: arguably, all reasonable persons wish not to be targets of disrespect and all the activities we place importance on need a climate of trust to be stable. Nonetheless, helping to build the social bases of respect and a climate of trust constitutes a contribution of a special kind, such that the inclusion of the disabled in this enterprise does not add much to public goods that would be sufficiently secured by the cooperation of the non-disabled. This is a first problem with the quantity of contributions that should be considered against the background of a greater quantity-related difficulty, which comes down to the idea of reciprocity itself.

As well as Rawls, Hartley places reciprocity at the core of the idea of society. Also the way in which reciprocity is defined follows Rawls's lead: reciprocity is a relationship of mutuality in which every participant receives an appropriate benefit judged with respect to a benchmark of equality (Hartley 2009a, p. 19). As I argued against Rawls in the third section, cooperation based on reciprocity is still concerned with the production of an aggregate of net benefits that is large enough to provide every participant with greater advantages than would be received under an equal distribution of rights, opportunities, income and positions. Moreover, my analysis of the quality-related difficulties of Hartley's proposal has demonstrated that, as long as we wish to uphold political liberalism, we cannot accept a 'moralized' account of the benefits of social cooperation including, for example, political participation, emotional support and the development of humility in our fellow citizens.

Thus, social cooperation based on reciprocity is in tension with the inclusion of those human beings who are not fully cooperating members of society because their inclusion would interfere with the production of a large-enough aggregation of net benefits. As argued in the third section, many individuals with disabilities do not count as fully cooperating members. Consequently, Hartley fails in her attempt to devise a contractualist model that is inclusive towards the disabled.

My twofold criticism has led us to the core of the problem with Hartley's (and Rawls's) theory. In brief, the claim that the idea of society is more fundamental than the idea of persons is inconsistent with the actual content of the overlapping consensus, which includes a principle of due respect for the disabled as citizens. The project of broadening the idea of social cooperation does not solve the problem because the inclusion of numerous individuals with disabilities still threatens the point of social cooperation.



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5 Accordingly, I claim that the ordering of the ideas that form the basis  
of the overlapping consensus should be reversed: the idea of persons  
should be regarded as forming the ultimate basis of the common culture of  
our societies, while social cooperation is aimed at serving the interests of  
persons. This ordering, which is in line with the liberal common sense that  
10 society should serve individuals (and not vice versa), means that no  
individual can be excluded from membership because of their inability to  
contribute adequately to social cooperation. The claim that the idea of per-  
sons should be considered as the most fundamental is the starting point of  
Nussbaum's revision of the basic ideas as proposed by Rawls.

15 **Revising political liberalism II: beyond Nussbaum's capabilities  
approach**

Although springing from a criticism that is limited to Rawls's justice as  
fairness, Nussbaum's revision of the basic ideas of society and persons is  
presented as an object of overlapping consensus among reasonable compre-  
20 hensive doctrines. According to Nussbaum, a full account of human per-  
sonality and a thick idea of the good should be the starting points of any  
reasonable conception of justice. Thus, any such conception should con-  
ceive of the members of society as benevolent towards any other human  
being and loving justice in itself. Human beings are social animals, and the  
25 construction of social interactions is part of their conception of the good.  
Moreover, any account of justice should be based on a conception of  
human personality that acknowledges that animal needs define human na-  
ture as much as our rational powers.

A fully human life is defined by a list of capabilities that any just soci-  
30 ety should strive to secure for its members: developing our practical reason  
is as important as living to the end of a healthy life, having opportunities  
for sexual satisfaction and for choice in matters of reproduction, forming  
emotional attachments or being able to laugh and play. As long as individu-  
als have the ability to perform several of such defining features of human  
35 life, they qualify as persons and thus deserve full political status. Conse-  
quently, justice requires that individuals with serious physical and mental  
disabilities enjoy the protection of the law and have their needs met in the  
same way as 'normal' citizens. Moreover, the fulfilment of the needs of  
others is part of the very conception of the good that all reasonable persons  
40 pursue by cooperating in society. Thus, the conflict between the advantages  
that should be received in exchange for our contribution and the fact that  
some members cannot normally contribute is minimized (Nussbaum 2006,  
pp. 155–223).

45 I argue that Nussbaum's proposal does not fit within the project of  
political liberalism because it rests on a comprehensive account of human  
personality that is object of disagreement between reasonable doctrines.

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Even though Nussbaum maintains that her theory of justice can be the object of overlapping consensus among reasonable comprehensive doctrines, grounding justice on a thick conception of the good and of human personality is tantamount to rejecting political liberalism in favour of a comprehensive alternative. In a political liberalism, the aim pursued by the twin ideas of overlapping consensus and public reason is to include a wide variety of comprehensive doctrines in a democratic dialogue that can give legitimacy and stability to institutions. If the bases for any public reason were the conception of the good and that of human personality as depicted by Nussbaum, too many comprehensive doctrines would be left outside of this democratic dialogue.<sup>13</sup>

To begin with, many persons do not share the absolute benevolence towards others that Nussbaum places within any reasonable conception of the good. Moreover, the project to define a fully human life is bound to create sharp disagreement among those comprehensive doctrines that political liberalism aims to include in the overlapping consensus. This project needs to answer questions concerning the place of sexual satisfaction, reproductive freedom, strong emotional attachments and even recreational activities in human life. Any answer that is given to them will contradict important comprehensive doctrines. For example, in any society there are citizens holding traditionalist religious beliefs who would never agree that a fulfilled human life should be defined in terms of our capability to laugh and play, let alone sexual satisfaction and reproductive freedom. Given that these persons of faith can be strict in matters of recreation and sexual conduct without wishing to reform the basic rights of others, they should be allowed into the dialogue that builds legitimacy and stability in our pluralistic societies. On the contrary, Nussbaum's model requires that the world-views that do not agree on her list of capabilities should be excluded from the overlapping consensus. Consequently, the range of comprehensive doctrines that can engage in dialogue on the basis of public reason is severely restricted, defeating the purpose of political liberalism.

We need to go beyond Nussbaum to identify a basic idea of persons that is shared by the reasonable comprehensive doctrines flourishing in our societies. However, going beyond Nussbaum should not involve dismissing all the aspects of her idea of persons. In fact, as shown by the widespread concern for the basic interests of individuals with severe mental disabilities, there is overlapping consensus on the idea that *the full possession of rationality and reasonableness is not necessary to be regarded as a person*.

The similarities between my portrait of the basic idea of persons and Nussbaum's account of human personality, however, end here. My conception of the basic idea of persons cannot be nearly as articulated as Nussbaum's. Indeed, any attempt to identify the multiple features that define human personhood is bound to draw on intellectual resources provided by some controversial comprehensive doctrine. However, the basic idea of

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persons must be given more content, so that it can provide guidance when the most basic issues of justice are discussed.

Here political liberalism is caught between two conflicting requirements, and finding a solution to this conflict is a difficult task. Nonetheless, I believe that Rawls's account of reasonableness and rationality can be used as a starting point for developing a satisfactory definition of my basic idea of persons (Rawls 1993, pp. 48–58). In brief, the ideas of reasonableness and rationality should be stretched as much as possible, reaching well beyond the limits set by Rawls. Thus, persons should be defined as those individuals who are in possession of the resulting versions of reasonableness and rationality, which may be called '*minimal moral powers*'.<sup>14</sup>

First, this process entails the search for a component of Rawls's idea of reasonableness that is shared by all of the individuals I aim to include in the idea of persons. Such a component cannot be the ability to appreciate the burdens of judgement and their consequences for public reasoning. Analogously, we should drop the idea that persons can engage in a conversation as to whether a policy proposal is acceptable to all. Indeed, many individuals with cognitive disabilities I aim to include in the basic idea of persons are not reasonable in either sense. However, a component of Rawls's idea of reasonableness can still be used to include the cognitively disabled within the idea of persons. Thus, 'minimally reasonable' persons can be defined as those individuals who perceive at least some blatant cases of wrongdoing as such. Besides, they show some appropriate reaction, such as rejection or repulsion, in the face of those cases. Let us take a case of unprovoked violence. If that occurred in front of their eyes, many individuals with severe cognitive disabilities would react in a way showing an understanding that something different should have happened.

Turning to the component of Rawls's idea of rationality that all persons possess, we should drop the notion that persons revise their ends in the light of the rest of their conception of the good. We should also drop the idea that persons choose the most effective means to their ends, and select the most probable alternative. Hence, 'minimally rational' persons are to be defined as those individuals who have ends or interests of their own. In addition, they desire that at least some of their ends or interests are fulfilled. In other words, they show a willingness to perform actions that satisfy some of their ends or, at least, they want to have those ends satisfied by means of actions that someone else can perform. As in the case of minimal reasonableness, minimal rationality is a requirement that a large number of individuals with severe cognitive disabilities can meet, for example with regard to such ends as nutrition, affection and relief from suffering. Thus, *the possession of minimal moral powers is fit for defining persons in a political liberalism that is inclusive towards the disabled*. This proposal avoids drawing on controversial ideas provided by any comprehensive

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doctrine, as it does not attempt to articulate a definition of what constitutes a human life.

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It is now time to address an important objection to my argument. In the fifth section, the idea that the disabled are persons was said to be part of the common culture of our societies, and I have just claimed that all reasonable doctrines agree upon a conception of persons as possessing minimal moral powers. Now, what is the evidence for all this? This is a difficult question, which can be asked of any attempt to define the basic ideas that all reasonable doctrines share, including Rawls's attempt. Arguably, no survey of what actual persons think could ever provide an answer. We are investigating what reasonable persons agree upon, and reasonableness is a normative element that is not satisfied by all actual persons. Instead, a good way to answer is to identify the methods used by Rawls to support his own conception of the content of the overlapping consensus. My aim is to show that Rawls's methods can actually be employed to support my revision of political liberalism.

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First, Rawls puts forward model examples of reasonable comprehensive doctrines. He examines what they have in common to answer questions about the depth of the overlapping consensus, the extent to which respecting public reason is a matter of compromise, and the like. Rawls's model case of overlapping consensus contains a doctrine deriving its commitment to toleration and equality among persons from religious beliefs; a Kantian comprehensive liberalism; a doctrine centred on John Stuart Mill's idea of autonomy; and classic utilitarianism (Rawls 1993, pp. 145–146, 159–160, 168–171).

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I argue that all model examples of reasonable doctrines would subscribe to my inclusive conception of persons. The religious doctrine would regard those with the minimal moral powers as persons because they may have a role to play in God's plan, because they bear the image of God, or on the basis of analogous considerations. Other doctrines would stress that those with the minimal moral powers are sentient beings (classic utilitarianism), or beings who add to the variety of walks of life individuals can draw from (Mill's liberalism). On the face of it, the Kantian comprehensive doctrine seems to pose a problem. One might argue that the followers of that doctrine would not recognize anyone who is not in full possession of the two moral powers as a person. In fact, the full possession of the two moral powers seems necessary to go through the complex mental procedures associated to the categorical imperative.

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I answer that at the centre of a Kantian worldview is an idea of autonomy as receptivity of the will to duty qua duty. Importantly, Kant stresses that what duty requires is generally simple. He goes as far as saying that, in many cases, children would see what is right more clearly than adults (Kant 1991, pp. 64–72). Given the stress placed on the simplicity of duty, it is fair to expect that the Kantian would put a premium on the receptivity

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5 of individuals to some core cases of wrongdoing. Thus, it is fair to expect that the Kantian would recognize as persons those individuals who, in virtue of their minimal moral powers, show repulsion towards (at least) some blatant cases of wrongdoing.

10 Let us now consider one further way of providing evidence that can be borrowed from Rawls. That concerns Rawls's argument that, in a liberal society with judicial review, 'public reason is the reason of its supreme court' (Rawls 1993, p. 231). Supreme courts deal exclusively with constitutional essentials and, therefore, are forced by their questions to provide arguments that are acceptable to a wide variety of perspectives, even beyond the parties appearing before them. Thus, Rawls suggests looking at supreme courts when we need to make our ideas about public reason more definite.

15 What Rawls describes as the exemplar of public reason actually relies on a basic idea of persons that is analogous to mine. For the sake of brevity, let us restrict our attention to the US Supreme Court. Now, the US Supreme Court has employed for decades an idea of persons that goes well beyond the full possession of moral powers. Indeed, there have been numerous cases in which the US Supreme Court has defended the rights of individuals with severe cognitive disabilities, implying that those individuals must be regarded as persons when constitutional essentials are discussed.

20 For example, consider the case of *Cleburne v. Cleburne Living Center* (473 U.S. 432, 1985), in which the Court applied the Equal Protection Clause of the 14th Amendment to individuals with 'mental retardation'. In *Olmstead v. L.C.* (527 U.S. 581, 1999), the Court ruled that, if certain conditions obtain, the institutional isolation of the cognitively disabled equates to discrimination, and generic cost considerations are not a valid defence for failing to provide community placement. In sum, as with the model case of overlapping consensus, following Rawls's method has led to the discovery of evidence supporting my basic idea of persons as possessing minimal moral powers.

25 What still needs to be demonstrated is that, besides being supported by evidence, my basic idea of persons provides what Rawls depicts as the right answers to the most fundamental issues of justice. According to my revision of political liberalism, social cooperation is supposed to serve the basic interests of its members. Now, political liberalism thus understood is characterized by a focus on the interests of each person and a strong egalitarian commitment. Thus, if reasoning on the basis of my basic idea of persons, citizens and public officials would subscribe to a list of basic rights, liberties and opportunities; an assignment of priority to such rights, liberties and opportunities; and measures ensuring for all citizens all-purpose means to make effective use of their freedoms (Rawls 1997, pp. 773–775). Most importantly, my revision of political liberalism succeeds where Rawls's

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proposal fails, namely in dictating that rights, opportunities and distributive shares should be granted to those who are not fully cooperating members of society.

Before concluding, let us consider the case of the disabled who are still not included in political liberalism. To determine what is due to a class of individuals, public reason needs reasonable agreement as to whether they should be regarded as persons or not. Now, there is no agreement between reasonable persons as to whether personhood should be extended to those human beings whose mental impairments are so severe that consciousness is absent and any mental activity is reduced to a minimum. Consequently, what is due to them cannot fall within the purview of public reason. For example, consider anencephalic newborns or individuals in persistent vegetative state. When the basic rights, opportunities and distributive shares of citizens are discussed, the interests of anencephalic newborns or individuals in PVS should be set aside. What we owe to them should be addressed at a different stage, when ordinary legislation is formulated.

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I argue that this residual exclusion does not pose any serious problem to political liberalism. Contrast the cases under discussion with the exclusion of individuals with disabilities that is involved in Rawls's theory: the idea that the interests of anencephalic newborns or individuals in PVS should not be considered when the most fundamental issues of justice are settled does not provoke anything analogous to the shocked reaction produced by the implications of Rawls's model. The mental disabilities associated with anencephaly or PVS prevent human beings from developing virtually all the features that are prized in human life. Given that the individuals with such impairments lack virtually any feature that, according to the most various comprehensive doctrines, contributes to conferring dignity upon persons, it is acceptable that what is due to them is relegated to a level of ordinary legislation lying outside the purview of public reason.

### **Conclusion**

The general project of Rawls's political liberalism is compelling. However, the appeal of this project is greatly diminished by the fact that Rawls's public reason cannot accommodate the justice claims of many individuals with disabilities.

In this paper, I have demonstrated that political liberalism can be revised so as to be inclusive towards the disabled. A concern for the basic interests of virtually all individuals with disabilities is part of the common culture of our societies. This has led me to argue that, according to our shared reason, the idea of persons is more fundamental than the idea of society. More specifically, persons are to be defined as those individuals with the capacity to exercise their moral powers to a minimal degree.

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Besides being inclusive towards individuals with disabilities, my account of political liberalism is still able to deliver the Rawlsian promise of a stable and fundamentally just society under conditions of pluralism.

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### Notes

1. For the criticisms attracted by Rawls with regard to the disabled, see Barry (1995, pp. 28-61), Brighouse (2001, pp. 537-560), Cohen (1995, pp. 224-225), Hartley (2009a), Kittay (1999, pp. 75-113), Nussbaum (2006, pp. 107-140), and Silvers and Francis (2005).
2. Evidence of this neglect is provided by the fact that none of the works listed above in note 1 focuses on what is characteristic of *Political Liberalism*: the search for stability under conditions of pluralism, the idea of overlapping consensus and that of public reason are never objects of criticisms. Indeed, if those works analyse *Political Liberalism*, it is the treatment of justice as fairness that captures all the attention. Predictably, this neglect is shared by those who attempt to answer the critiques that are levelled at Rawls with reference to disability (Becker 2005, Stark 2007, Quong 2007, Richardson 2006, Wong 2007). A notable exception, however, is provided by Silvers and Francis (2009). After lamenting the lack of analyses of the implications of Rawls's shifts in thinking for the status of the disabled, Silvers and Francis argue that justice as fairness as presented in *Political Liberalism* still rests on metaphysical assumptions (that is, it falls outside the overlapping consensus).
3. The terminology here follows the usage according to which 'impairment' is a deviation from normal functioning and 'disability' is the lack of ability to do something in one's environment.
4. Rawls (1993, pp. 149-150) makes it clear that the overlapping consensus is so deep that it goes down to the basic political ideas of society and persons. For the most extensive analysis of such ideas, see Rawls (1993, pp. 15-22, 29-43).
5. The comprehensive doctrines that share the two basic political ideas and develop conceptions of justice characterized by the three features listed are called 'reasonable'.
6. See note 1.
7. The reference to justice as fairness should not be misleading: even though the basic ideas of society and persons are first introduced in the context of the analysis of justice as fairness, Rawls (1993, pp. 149-150) makes it clear that the overlapping consensus among reasonable doctrines is deep enough to reach these basic ideas.
8. In Rawls's own words, in a fair system of cooperation 'everyone benefits judged with respect to an appropriate benchmark of equality' (Rawls 1993, p. 17).
9. The author thanks an anonymous referee for raising this objection.

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10. The claim that disabilities are much more the product of the social environment than of any impairment is at the core of the so-called ‘social model of disability’ (Oliver 1996). For a more nuanced defence of the social roots of disability, see Silvers (1998). 5
11. To be sure, there are exceptions to this claim. As shown at the end of the sixth section, there are individuals whose mental disabilities are so severe that there is reasonable disagreement as to whether or not they should be considered as persons. In such extreme cases, concepts such as compassion or beneficence can legitimately be employed instead of political justice. 10
12. As inclusive as the common culture of our societies may be, there are mental disabilities that fall outside the shared concern with the basic interests of the disabled. These cases will be discussed in the sixth section. 15
13. The criticism here has important points of contact with some of the arguments employed by Cudd (2004) to demonstrate that Nussbaum’s theory is not liberal.
14. The author owes much of the analysis of the content of and evidence supporting his basic idea of persons to a conversation with Valeria Ottonelli. 20

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