

# Rawls and capabilities: the current debate

CLAUDIO D'AMATO, VIRGINIA TECH (2014)

The capability approach to justice was conceived as an alternative to the Rawlsian scholarship that became dominant in moral and political philosophy at the end of the XX century. Among other issues, capability theorists have objected to Rawls's identification of the currency of distributive justice with primary goods and to the claim that the appropriate subject of distributive justice is the basic structure of society. As Ingrid Robeyns (2011) puts it, capability theorists argue that capability as a "metric of justice" does a better job than Rawlsian primary goods at capturing what human beings seek in a social distributive scheme. However, the relation between the two sides of the debate is not one of stark opposition, but rather one of productive exchange: all work within the liberal political tradition, and in the last few years there has been considerable mutual understanding, cooperation, and a certain softening of the two sides' original positions—pun intended.

This paper surveys the main arguments in the debate and evaluates recent (2003-2013) contributions to the literature that attempt to bridge the gap between justice as fairness and the capability approach. I begin with a statement of Rawls's argument on distributive justice, emphasizing the contribution of the difference principle. Then I present two strands of criticism from capability theorists that address the distributive lacunae of justice as fairness, and especially of the difference principle. I continue by showing how Rawlsians have rebutted these objections and why capability theorists have found those rebuttals wanting. Finally, I review some arguments for either active cooperation or mutual noninterference between the two theories. I find merit with both options: justice as fairness and the capability approach may be either integrated in a hybrid theory (alternatively subsuming the principles of justice under the capability framework or the other way around) or left to

answer different questions in substantially different realms of inquiry and applicability.

## *I. Justice as fairness*

Rawls argues that the object of distributive justice is the basic structure of society (1999a: 3); i.e., the political institutions that regulate the interactions of free and equal citizens in a democratic "cooperative venture for mutual advantage" (1999a: 4). The subjects of distributive justice are the citizens themselves, whose representatives, while in an original position of initial fairness, concur on a political conception of justice that all can endorse. Even if they privately endorse widely different comprehensive doctrines—religious, philosophical, traditional, historical, and moral—each doctrine, if it be reasonable, yet comprises the theoretical elements to support a public and political conception of justice (2001: 183). Thus, when deciding the principles of justice for a society, citizens must focus on this "overlapping consensus" and deemphasize their individual contingencies, stashing them away behind a "veil of ignorance," lest they render the terms of the contract biased or unequal (1999a: 11). In a way, people need not agree on anything except what they find themselves agreeing upon after a process of fair bargaining. Those who hold strong considered convictions about freedom, democracy, and equality will in fact also hold reasonable comprehensive doctrines that can support the political conception of justice (2001: §12-13).

The first principle chosen in the original position—in its final formulation in *Justice As Fairness: A Restatement* (2001)—mandates "a scheme of equal basic liberties [...] compatible with the same scheme of liberties for all" (42). The second principle states that socioeconomic inequalities must be equally accessible to all (Fair Equality of

Opportunity) and be to the greatest benefit of the least-advantaged members of society (Difference); both principles address distribution, but of different social goods (2001: 42-43). Equal Basic Liberties distributes rights on a Kantian egalitarian view of human persons as “possessing moral personality above a threshold level” that entitles them to a bare minimum of rights (Arneson 1999). Here the currency of distributive justice is strictly political, granting certain rights to persons who are sufficiently morally mature to choose them from the original position as literally indispensable. Instead, Fair Equality of Opportunity distributes access, limiting institutions from restricting privileged offices on the basis of unearned (dis)advantages like wealth, race, sex, and so forth. Finally, Difference distributes resources and social goods so that, given a fair distribution of inequalities arrived at via the previous principle, they work to the benefit of everyone in society, especially the least well-off. Many kinds of goods and resources may be the proper object of distribution according to Difference; they may include portions of earned income through taxation, incentive and motivation for the poorest members of society, social benefits like recognition or entertainment, and others still.

Consider two crucial features of Rawls’s approach to distributive justice. First, *the distributive scheme is institutionalized*, as the theory applies to the basic structure of society and not to special groups or laws or to contingent arrangements. By “institutionalized” and “basic structure” Rawls means law: the principles of justice must underwrite the design, functioning, and legislation of society’s fundamental institutions, including political offices, the legal system, the economy, and education. These are the legal essentials of a society. The choice of principles of justice in the original position is the first of a three-stage legislative process, which continues with agreement on the constitutional essentials inspired by the principles of justice and ends with the design of special laws (Stark 2007). The principles-constitution-laws arrangement is hierarchical. The constitutional es-

entials are agreed-upon and justified by the same process by which the parties in the original position choose the principles of justice. Indeed, this is the point of the ideas of reciprocity and publicity: just as the parties in the original position are able to agree on the principles of justice by remaining behind the veil of ignorance, the citizens of a society are able, using public reason, to justify to one another their support for the constitutional essentials (Wenar 2012), while special and contingent laws require less general agreement and less publicity. The principles of justice, thus, are neither purely moral mandates nor mere policy suggestions, but actually regulate the basic structure of society at the legal level. This is easy to see for the first principle, for basic equal liberties are often written into a constitution and legally guaranteed. The second principle, including both fair equality of opportunity and difference, is guaranteed legally both by nondiscrimination laws and by arrangements that positively grant opportunity and help maintain opportunity fair, such as education and some redistributions (Wenar 2012). Of course, many laws do not correspond directly to any principles of justice or constitutional essentials—such as age of consent or substance prohibition—and thus are not part of the basic structure, nor part of Rawls’s views on distributive justice.

The second important feature of the theory is that *the institutionalized distributive scheme applies equally to all persons* with no regard for their individual contingencies, life paths, past histories, preferences, etc. That is the point of the veil of ignorance and of the deontology after which it takes. When individual contingencies are considered, the bargaining terms in the original position are vulnerable to biases, and thus to discrimination against individuals for unfair reasons. The Kantian ideas of reciprocity and publicity reinforce this even application of the principle, as does Rawls’s repeated emphasis that the citizens represented in the original position are free and equal amongst themselves (for example: 1999a: 10-12; 2001: 18-24). Rawls is less clear about whether a person

must have satisfied the requirement of a degree of “moral personality above the threshold” in order to be guaranteed equal protection and entitlement under the principles of justice. One might say no, for while a modicum of moral quality and intellectual prowess are required to assume the original position and deliberate on the principles, no such skills are required in order to benefit from a certain right or opportunity. However, this problem is best understood as a discussion of what justice as fairness mandates for those who are severely mentally or physically disabled, as lacking the sufficient moral personality also usually entails a severe disability (or childhood, but that is a special case to be assessed separately).

With these features in mind, I turn to two families of criticism from capability theorists that rest on the features I just outlined: one contesting Rawls’s claim that a distributive scheme should apply (only) to the basic structure of society and another objecting to his metaphysical requirement of sufficient moral personhood in order to qualify as a legitimate participant in a distributive scheme.

## II. Capability

It will be well, first, to briefly summarize the capability approach and its scheme of distributive justice. The approach was first proposed by economist Amartya Sen in his 1979 Tanner Lectures, whose arguments were published in “Equality of what?” (1980). Evidence of capability-like thinking also appears in some of his earlier works, including, interestingly, an economics paper criticizing Rawls’s early statement of the difference principle (1976). The main goal of the capability approach was to provide “an alternative to normative views that rely exclusively on mental states in their evaluative exercises” (Robeyns 2011), focusing instead on subjective and contingent moral judgments and evaluations. The latter are more consistent with the approach to ethics of virtue theory, sidelining its perfectionist strive toward personal excellence and emphasizing its context-

sensitivity and respect for diverse relationships. In time, Sen came to deploy the capability approach as a tool for international studies to address the deep impoverishment of Third World economies, in an attempt to move away from wealth-based views of development that made heavy use of GDP and GNP figures. In “The concept of development” (1988), he criticizes the claim that a rich or industrialized society is a developed society. Instead, he proposes, a more telling measure of a society’s development is *the realistic availability of functionings* to its citizens, where ‘functionings’ are defined as “the doings and beings of a person”—that is, their capability.

Building on Sen’s work, first jointly (1993) and then individually (1995; 1997), Martha Nussbaum has developed a more fully structured, virtue-inspired theory of justice that employs capabilities as the main metric of interpersonal and social justice. To this end, she proposes a list of ten areas of human life where capability must be guaranteed for justice to exist. These areas range from bodily health and integrity to association and practical reason, comprising many factors that increase our quality of life and our ability to attain the goals that we have set for ourselves. Like Sen, Nussbaum also emphasizes self-determination of life prospects or functionings. Capability in the ten areas is multiply realizable and each can be instantiated in a variety of ways depending on culture, history, tradition, and socioeconomic status. They may be ranked differently, given different weighs, pursued by different entities at different times, receive more or less cultural publicity, etc. (Here we should note that Nussbaum pluralizes “capability” to “capabilities,” which in my view does not fully capture the extent of Sen’s original concept. Capability is the graduated measurement of the opportunity and realistic availability of life prospects, so there is only one capability, not many. There are, however, factors that positively contribute to increasing capability, so to avoid confusion I refer to what Nussbaum calls capabilities as *capability enablers*).

Despite the broad theoretical overlap, Sen and Nussbaum criticize Rawls in two subtly but importantly different ways. The main object of Sen's critique is that Rawlsian primary goods "seems to take little note of the diversity of human beings" (1980: 215). While it is undoubtedly true that all human beings *are* similar in some regards—we all need air, water, food, shelter, etc—those regards are extremely basic. In fact, Sen restricts the meaning of the word "primary" to "necessary for biological survival." Nearly all other goods are context-specific, socially or even personally determined, and very difficult if not impossible to theorize universally. This is for two reasons. For one, keeping with Rawlsian terminology, one person's comprehensive moral doctrine may require goods that another person's does not, and there is no non-arbitrary way to claim that these goods are more or less indispensable; that is, there exists a basic *incommensurability* of certain crucially important social goods: religious needs, honor, self-improvement, social department, and gender roles come to mind (Sen 1980).

The second reason is that certain persons require more resources than others, different resources than others, or more or different manners of social or spiritual accommodation in order to live a fully realized, capability-driven existence. Institutionalized equality of opportunity, whether formal or fair, and a redistributive difference principle geared to maintaining opportunity will do little good to persons who are severely physically or mentally impaired, whose political or spiritual needs drive them out of public life, or who are entrusted with caring for others—in short, the disabled, the outcast, and the burdened. Far from being exceptions to the rule to be dealt with only as special cases that special laws will take care of, these persons make up sizable portions of each society (Sen 1980).

I think that this is especially true of the burdened, which often include women, who have been traditionally entrusted with the care for the young, elderly, and disabled. Even if that particu-

lar barrier was to break down and the task of care was allocated more evenly across genders, *someone* would still have to care for those who cannot care for themselves, thus creating a class of persons who require more and different accommodations than the non-caregivers. And even in the unlikely case that most persons were caregivers in some capacity, each case would be substantially different and generalizations would remain difficult. Thus at the heart of Sen's critique of the primary goods approach is the empirical realization that human persons are in fact very different from one another, not merely mentally in their comprehensive moral doctrine, but also and especially practically in their actual lived lives.

Nussbaum's critique of Rawls's justice as fairness follows a similar path, but it is both less radical and more rooted in normative ethics. The earliest clear statement of Nussbaum's views is in "Human Functioning and Social Justice" (1992), where she defends an Aristotelian essentialist "thick vague" theory of the Good that she explicitly juxtaposes to Rawls's "thin theory of the good." Rawls, says Nussbaum,

insists on confining the list of the "primary goods" that will be used by the members of the Original Position to a group of allegedly all-purpose means that have a role in any conception of the human good whatever. By contrast, my Aristotelian conception is concerned with *ends* and with the overall shape and content of the human form of life. (1992: 214-215)

The "overall shape and content" includes not only the minimal requirements to survive or participate in public life, but also what makes it "possible for citizens to function *well*" (1992: 214). Liberals like Rawls focus almost exclusively on the distribution of quantifiable resources, such as wealth and income, positing both that more of these are always better independently of a person's chosen conception of the Good and that inequalities in their distribution are permitted only if they benefit the least well-off. Nussbaum disagrees first because

“wealth and income are not good in their own right,” but only “insofar as they promote human functioning”; second, echoing Sen, because persons have “variable needs for resources”; and third because “impediments to functioning” go deeper than scarcity of wealth and opportunity and often encompass contingent social arrangements, mental and physical endowments, and conceptions of the Good (1992: 233).

### *III. Rawlsian rejoinders and capability comebacks*

In this section I review two rebuttals by Rawlsian scholars and the respective responses from the capability camp. Sen’s and Nussbaum’s work has been discussed in some detail by both of the most prominent end-century Rawlsian scholars, Samuel Freeman and Thomas Pogge. Before presenting their views I must recall that both authors, especially Pogge, usually walk the fine line between defending justice as fairness and amending it to meet important criticisms raised against it. So while their views are generally sympathetic to Rawls and present some of the most convincing interpretations and apologies of his work, they are also usually open to reworking the theory or proposing alternatives that are sufficiently Rawls-like. Freeman (2006) certainly takes this accommodat-ing approach in his review of Nussbaum, while Pogge (2002) rejects Sen’s argument more strongly. In both cases, I believe, there is room for theo-retical reconciliation.

Pogge deploys two arguments against the ob-jection that justice as fairness is merely concerned with a distribution of instrumental resources like wealth and income. First, he claims that even if the proper currency of distribution is opportunities and not wealth, the distribution of opportunities must be equitable “in the space of resources” (2002: 35), meaning that an equitable distribution of re-sources will go a long way toward granting equi-table distribution of opportunities. Second, he ar-gues that if this were a problem for the Rawlsian (or “resourcist” as he says), it would plague the

capability approach too, for the capabilities them-selves are merely instrumental means to an end: that of living a rewarding life according to the “vague thick” conception of the Good (2002: 35-36). For example, the capability theorist may ad-dress a severely disabled person in this way:

“I understand that you have a lesser capacity to convert resources into valuable functionings. For this reason, we will ensure that you get more re-sources than others as compensation for your disability. In doing so, our objective is that, by converting your larger bundle of resources, you will be able to reach roughly the same level of capability as the rest of us [...]” (2001: 31)

Whereas the resourcist may say:

“I understand that the present organization of our society is less appropriate to your mental and physical constitution than to those of most of your fellow citizens. In this sense, our shared in-stitutional order is not affording you genuinely equal treatment. To make up for the ways in which we are treating you worse than most oth-ers, we propose to treat you better than them in other respects. For example, to make up for the fact that traffic instructions are communicated through visible but inaudible signals, we will provide free guide dogs to the blind.” (2001: 31)

Capability theorists counter that this argument misunderstands Sen in important ways. Lori Keleher (2004) argues that Pogge’s characteriza-tion of the capability approach as merely requiring institutional distributions that take into account the capacity of people to convert resources into oppor-tunities is limited and has the wrong emphasis: “Pogge fails to realize that capabilities and functionings have intrinsic value [...] as he at-tempts to assign an equivalent, merely instrumen-tal value to capabilities” (4). Sen himself clearly argues that certain resources, like wealth, *do* re-main crucial as means, for no other reason that one cannot achieve capability without, say, food and shelter (1988: 162-164). In similar fashion, Ilse Oosterlaken (2013) agrees with Keleher and adds that Pogge himself “implicitly relies on some ca-

pability concept” in his resourcist defense (211). Consider the traffic example. The reliance of traffic signals on visual cues, such as lights, are unjust to blind citizens because they provide insufficient street safety for them. Pogge claims that situations like these exemplify the differences between capability theorists and resourcists. However, says Oosterlaken, in acknowledging that traffic signals are unjustly ableist Pogge is already relying on a capability concept. Traffic lights are designed without taking into account “the full range of diverse human needs and endowments”—but that can only be called “unjust” by making specific reference to capability:

There is nothing about traffic lights as mere material artefacts in isolation that points in that direction. The problem cannot be identified without at least implicitly using some concept of a lack of capability or ‘access to functioning’ for the blind person, resulting from the interplay between specific personal characteristics and design features of the institutional arrangement in question. (Oosterlaken 2013: 212)

In other words, to call a resource distribution “unjust” one must take into account the interplay between the personal endowments of its recipients and the institutional arrangements that make the distribution possible in the first place. That is what capability theorists suggest, and, for Oosterlaken, that is what resourcists like Pogge implicitly do as well.

Freeman’s objection to capability is less radical. In his analysis (2006) of Nussbaum’s book *Frontiers of Justice* he claims that capability and justice as fairness are much closer than Nussbaum appreciates, and that the capability approach can be used to integrate the lacunae of justice as fairness as concerns persons with severe disabilities. Freeman first notes that according to Nussbaum justice as fairness conceives of social cooperation too narrowly by focusing merely on primary goods (2006: 412). He replies that while Rawls does not address the severely disabled directly, on Rawls’s own account we still owe them the proper duties

of justice: Rawls places due emphasis on the *natural duties* of persons, which include the positive duty to care for those who cannot care for themselves and the negative duty not to harm or hinder anyone (2006: 415-418). That is to say, justice as fairness never claims that persons who lack practical reason and the capacity for cooperative relationships based on moral equality—such as the severely disabled lack—are in any way “lesser” or “inferior” and not included in the scheme of distributive justice. They are merely not included in the scheme of distribution of primary goods *as partitioned from the original position*, but nothing in Rawls’s theory renders them second-class citizens or moral inferiors to able-bodied persons (2006: 419). These remarks answer my question from section I. about whether the possession of a minimally adequate moral capacity is required only for deliberation from the original position or also to benefit from the protection of the principles of justice. Freeman seems to think that, on Rawls’s account, the latter is the case: one is excluded from deliberations in the original position but still reaps the benefits of those deliberations.

One might rebut that the very exclusion from the original position creates two classes of citizens; or that this result gives us good reason to reject the idea of an original position *in primis* because its admittance requirement is the arbitrarily chosen factors of practical reason and cooperative capacity, which rule out on purely procedural grounds certain persons who are moral equals in other regards—so much in fact that they are fully accepted as beneficiaries of the protections guaranteed by the principles. On the other hand, even supposing that Freeman is right to charge Nussbaum with exaggerating the non-aptness of justice as fairness, Freeman’s characterization of the capability approach is also exaggerated. Nussbaum does not argue that persons such as the severely disabled ought to be allowed into the original position. In fact, she could easily grant Freeman’s argument that justice as fairness recognizes their natural rights and duties and insist that that is still

not good enough: natural rights and duties are no good if Rawls cannot countenance persons except in terms of their “baseline” equalities. In other words, Nussbaum could complain that when capability theorists point out justice as fairness’s strict adherence to the moral equality of persons and its inability to concern itself with actual, contingent, and deeply unequal arrangements, Rawlsians like Freeman dig their heels in so deep that they resort to a yet more basic form of moral equality. That is, when it is pointed out that fair equality of opportunity and the difference principle are not good enough for the severely disabled, Rawlsians retreat to equality of natural rights and duties, which is even broader and, consequently, even less capable of providing severely disabled persons with the proper arrangements of justice to which they are entitled on Nussbaum’s view. If this is correct, Freeman all but makes Nussbaum’s point.

#### *IV. Reconciliation and cooperation*

This final section assesses reviews some positive attempts to bridge the gap between justice as fairness and the capability approach without dismissing or seriously amending either theory, and concludes by pointing out three directions for future research along “compatibilist” lines. To begin, I must point out that there are at least two ways to be a compatibilist, in this and other debates. First, one could insist that the points of contention on both sides are in fact quite similar and there is less divide than some have argued. Second, one could claim that while the points of contention are irreconcilable, they also need not contend for the same logical space at all: they could either coexist (for example if they address separate realms of inquiry) or cooperate (if they address the same realm but from different perspectives whose results are mutually intelligible or useful). My assessment of this debate surveys both of the latter options.

Ingrid Robeyns (2008) discusses a possibility for cooperation by showing, first, that some of their features are incommensurable, for “Rawls

and Sen were trying to answer different questions” (411); and, second, that despite this fact, or perhaps because of it, “it is possible to understand the capability approach and justice as fairness as complementary theories” (412). Some hope for complementarity is to be found in the two theories’ different real-world applicability. By Rawls’s own intention, justice as fairness is ideal theory, and Rawlsians have long attempted to bridge the gap to non-ideal theory (see, for example, Simmons 2010). The capability approach, instead, begins empirically and attempts to theorize and systematize from the ground up. Thus not only are Rawls and Sen reconcilable, but they need each other (Robeyns 2008: 417).

Similarly—and specifically concerning the question of persons with severe disabilities—Norman Daniels (2003) suggests that justice as fairness can be amended in ways that would be agreeable to capability theorists if we “include health status within the notion of opportunity” (259) and recognize that severe disabilities have strong negative effects on a person’s “normal functioning” and “opportunity range” (257). Daniels thus suggests that this simple amendment to justice as fairness brings Sen and Rawls much closer together, in fact bringing capability discourses within the same “space of justice” as justice as fairness.<sup>1</sup> Cynthia A. Stark (2007) suggests a similar way to include the needs of the severely disabled within contractarian theories like Rawls’, though without explicitly referring to capability in the Sen-Nussbaum sense. She argues that at the deliberative stage in the original position there is nothing wrong with the supposition that ideal theory applies only to “fully cooperating” persons; the problem only arises if we retain that supposition at the constitutional and legislative stages.

<sup>1</sup> Similarly, one may argue that the difference principle’s notion of “least-advantaged” is best captured not by a mere distribution of goods and resources, but by an account of capability, especially as concerns the severely disabled. That is to say, by “least-advantaged” justice as fairness could mean “those who are less *capable* of converting goods into opportunity.”

The reason why is that while Rawls insists that the needs of citizens (including the severely disabled) should be met by a “social minimum” of goods and services, the social minimum is not decided from the original position but is a constitutional essential instead. Thus, at the constitutional stage, we should drop the assumption of fully cooperating persons by simply imagining that we may be a person whose needs require a much higher social minimum, though within the limits imposed by the difference principle from the original position (2007: 137-9). A problem with Stark’s account, however, is its assumption that the needs of the severely disabled will be met by an increase in the allocation of primary goods afforded to them, which no doubt plays in the Rawlsians’ hand and is likely to be met with disagreement from the capability camp.

One could also follow the reverse approach as Daniels’, attempting instead to subsume Rawls’s principles of justice under the broader theoretical framework of capability by considering them as enablers in Nussbaum’s list—the most important enablers, in fact. The capability-based objections to Rawls do not claim that the principles of justice are useless or wrongheaded, but merely that they are insufficient to guarantee adequate capability *by themselves*.<sup>2</sup> But capability may still be increased by institutionally guaranteeing equal basic liberties, something like fair equality of opportunity, and a redistributive scheme along the lines suggested by the difference principle. After all, what

capability theorists individuate as the primary weakness of justice as fairness is also one of its most attractive strengths: its ability to affect institutions by imposing legal and procedural constraints. All capability enablers on Nussbaum’s list are more effective if they are made to bear on *some* institutions, but many of them, like “play” and “emotions,” can hardly be attached to or legally guaranteed by institutions, let alone by basic ones (however, see Freeman 2007: 235-242 for a discussion of whether the family ought to be considered part of the basic structure of society). Justice as fairness can provide the theoretical basis for the institutionalization of some principles and leave the rest to the space of capability.

These prospects for cooperation are promising, and so are the prospects for simple coexistence in different logical spaces without any meaningful intersection. I end this paper by briefly describing three such *non-overlapping differences* between the two theories.

For one, while Rawls was concerned with distributive justice within liberal democratic societies and delayed treatment of international justice to *The Law of Peoples*, capability theory emerged from international political economy and development studies. Both theories are designed to address pluralism, but in unlike ways. Justice as fairness is a theory of public consensus in a democratic society where citizens are politically free and equal despite endorsing widely different private conceptions of the Good, and where citizens *know* that they are free and equal and *openly* endorse common liberal values like freedom and democracy. The capability approach, instead, claims that a certain thick (if vague) conception of the Good is *in fact* shared by virtually every human being on Earth. This empirical claim is central to Nussbaum’s defense of the enablers, which she thinks can be individuated as “non-relative virtues” through conversation and deliberation with people from all cultures and walks of life (1995: 70-71). So on one side Rawls posits procedural constraints for public deliberation given great normative dif-

<sup>2</sup> Much literature criticizes the principles on their own account, sometimes from the same normative moral premises that underwrite the capability approach. For example, Michael Sandel (1992) objects to the possibility and desirability of such “disembodied” selves as the original position requires, arguing instead for a particularist account of identity and a subjectivist moral theory along the lines of virtue. Charles Mills (1997) has contested the scope of application of the principles, claiming that the supposed “freedom and equality” of citizens in the original position ignores existing cultural arrangements where some groups are actually not free or equal, but subordinated to others. None of these objections belong to the capability side of the debate, and to some extent they criticize the entire liberal contractarian tradition, so I have not discussed them in this paper.



ference, and on another side Sen and especially Nussbaum posit a certain normative equality, though one that only concerns some life basics and does not go all the way down.

The previous non-overlapping difference points to another, that of cosmopolitan applicability. Justice as fairness is notoriously unreliable as a theory of *global* distributive justice: Rawls himself argues in *The Law of Peoples* that a “global original position” is indefensible and that international justice ought to be regulated by different principles of justice (1999b: §15). Conversely, the emphasis on context-sensitivity of the capability approach makes it more likely to be successful in apportioning global justice among the complex relations of diverse people and peoples. Of course, this by itself does not mean that capability is certainly the better theory at this level. The debate between justice and fairness and capability, and their underlying normative assumptions, replays at the global level in the debate among cosmopolitans, or between cosmopolitans and communitarians. Democratic egalitarians like David Held (2001) defend cosmopolitan principles that are virtually indistinguishable from Rawls’s, even without an explicitly stated commitment to Kantian liberalism; while moderate or weak cosmopolitans like Kwame Anthony Appiah (1997) and Charles Taylor (2008) recognize only very few principles for global interaction and leave the rest to smaller communities, regulated by something akin to capability. Similarly, communitarians like Craig Calhoun (2002) and Benjamin Barber (2013) insist that only societies that are sufficiently small can identify and properly fulfill the needs of their citizens, by being more sensitive to their metaphysical and normative commitments and more capable to distribute resources according to needs and requirements that might be blurred or flat-out denied at the cosmopolitan level.

Finally, there is a non-overlapping difference in the degree to which each theory addresses reparation, not only to severely disabled or otherwise burdened persons, but to historically disenfran-

chised groups as well. One reason why some persons find it much more difficult to convert goods into opportunities has less to do with the contrast of their individual contingencies with social institutions (as in the case of severe disability) than with non-institutional social arrangements. For example, the obstacles faced by certain racial minorities in the United States often result neither from institutional injustice nor from the characteristics of persons themselves, but from the cultural modes of recognition and treatment enforced by the racially dominant groups. Being less tied to institutions, the capability approach would seem more capable of dealing with these problems, which would count as a strike against justice as fairness. At the same time, justice as fairness never does claim this as one of its primary concerns: Rawls, after all, faces the question of reparation separately and as a case of special or contingent law.

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