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Justice, Rights, and Capabilities

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Graduate Program in Philosophy

A thesis submitted in partial fulfillment of the requirements for the degree in Doctor of Philosophy

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JUSTICE, RIGHTS, AND CAPABILITIES

Integrated-Article

by

Jeffrey Spring

Graduate Program in Philosophy

A thesis submitted in partial fulfillment
of the requirements for the degree of
Doctorate of Philosophy

The School of Graduate and Postdoctoral Studies
Western University, Canada

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Abstract

My investigation of the capabilities approach as a burgeoning theory of global justice underlies the integrated-article format of this thesis, where each chapter treats a discrete but related problem. In Chapter One I survey the rapidly growing philosophical literature on global justice, focusing on contemporary rights-based approaches. I defend capabilities as central to global justice because justice demands that individuals be well positioned to enjoy the prospects of a decent life, measured by how well individuals are actually able to convert resources and opportunities into valuable functionings. In Chapter Two I explore what I take to be the most promising alternative philosophical approach to addressing pressing global challenges in terms of justice: the ethics of care. Just as capabilities help enrich and flesh out the depth and reach rights have, making capabilities a conceptually rich ally of rights, I argue rights signify a powerful ally to an increasingly global ethic of care. In Chapter Three I consider the as yet under examined connection between rights and well-being by exploring Sen's pioneering work on capabilities. Capabilities provide us with an appropriate measurement for justice to the extent that the rights and well-being of individuals leave them empowered to enjoy a life of dignity that has at least a minimum set of opportunities. In Chapter Four I consider Hugo Grotius's theory of rights as an important historical basis for developing a capability-based theory of global justice. In Chapter Five I argue that the status and treatment of nonhuman animals is not and cannot be a matter of justice within the structure of John Rawls's theory, making it inadequate to this extent. I defend capabilities theory as better able to account for why the treatment of nonhuman animals is a matter of justice.

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Justice, Rights, and Capabilities: An Introduction

In recent years political philosophers have dedicated considerable attention to issues of social and global justice, motivated by a sense of urgency concerning on-going injustices. Increased awareness concerning inequality, deprivation, and human rights violations has motivated political philosophers to determine what specific moral obligations wealthy individuals have toward poor individuals, what norms and institutions should govern the distribution of resources, how political institutions might be reformed and made more democratic, what are subjects of moral worth owed according to the demands of justice, and who qualifies for inclusion within the sphere of justice. Much of the global justice literature falls into one of two camps: that which assigns fundamental moral significance to national boundaries, and that which does not. The former focuses on the special obligations we have to our compatriots while the latter involves a commitment to cosmopolitanism, the view that each of us has responsibilities to distant others irrespective of national borders. The most prominent cosmopolitan approaches to global justice have either been consequentialist or rights-based. My thesis explores the capabilities approach as a theory of cosmopolitan justice. Specifically, I ask what a capabilities approach contributes to a theory of global justice, focusing on the prospects of partnering capabilities with rights-based approaches.

Like other cosmopolitan approaches the capabilities approach features an account of the informational basis that constitutes an individual's good. It is an ethical value theory with political implications. It offers a standard for aggregative appraisal, it can inform our choice and evaluation of institutions, and can serve as a guide to policy. Developed by Nobel-Laureate economist Amartya Sen and philosopher Martha Nussbaum, the capabilities approach advocates that one be free to function in certain ways and able to shape one's life

by choosing and doing a range of valuable things that constitute an empowered life.

Nussbaum's version offers an objective list of capabilities, the securing of which constitutes a dignified life. Examples include being able to be adequately nourished, exercise reason and the imagination through education, and being able to participate in political choices.

Accordingly, justice demands that these and other central capabilities be secured.

What follows is a fairly wide-ranging investigation of the relationship between justice, rights, and capabilities. Nussbaum has noted that while the language of rights plays a powerful moral role in political discourse, rights remain conceptually ambiguous. She insists that assessing the as yet underexplored relationship between rights and capabilities is an urgent task given their apparent connections and possibilities for mutual reinforcement. Sen maintains that the combination of the two gives us something that neither perspective can provide alone, arguing that the capabilities approach adds to a theory of justice an important focus on the freedom to choose particular levels of functionings. Although recent work in this area suggests a capabilities perspective on global justice entails a strong commitment to rights, working out what such a theory might tell us about the principles and procedures required of institutions remains ongoing. In recent years much attention has been paid to the contributions the capabilities approach makes as a measure of human development, including its crucial advantages over Gross National Product (GNP), utilitarian, and resource-based measurements used to measure quality of life. Unlike these other measurements, the capabilities approach directly focuses on the abilities and opportunities each person has to convert available resources into valuable functionings, leading to its adoption by the *United Nations Human Development Report*. The *Universal Declaration of Human Rights* (UDHR) is a focal point for the pursuit of global justice since rights secure our capabilities to function, safeguard the value we attach to our freedom and well-being, and

infuse into a theory of justice a conception of moral entitlements that have political significance above and beyond the enhanced personal advantage they help secure.

Rights are central to the language and issues of justice though rights and justice are sometimes characterized as conflicting ideals.¹ Rights-based approaches to justice attempt to connect our understanding of these concepts by making equality of rights a primary requirement of any just order. How rights are conceived to empower individuals directly informs the requirements we place on individuals, groups, and political institutions to achieve and reflect the demands of justice. This requires on-going evaluation of the comparative advantages, disadvantages, and differences a rights-based capabilities perspective on global justice might have. While rich in detail, it remains unclear how the capabilities approach might generate or accompany more thoroughgoing political principles to address pressing issues of global justice. My larger goal is to advance current debate by bridging the gap between justice and capabilities, contributing to the challenge of working out our responsibilities as global citizens by furnishing a more precise answer to the questions: *What does justice require?* and *To whom is justice owed?* My more modest goal is to get clear on where the capabilities approach currently sits within global justice theory. By critically engaging the growing literature my hope is to provide a useful map of the terrain, point out fruitful pathways for further pursuit, and note evident challenges in the development of a rights-based capabilities perspective on global justice.

My investigation of the capabilities approach as a theory of global justice underlies the integrated-article format of this thesis, where each chapter treats a discrete but related problem. My thesis roughly divides in two halves. The first half is a new, long critical survey

¹ See, for example, Tom Campbell, *Justice, Second Edition* (New York: St. Martin's Press, 2001), 1, Jonathan Gorman, *Rights and Reason: An Introduction to the Philosophy of Rights* (Montreal: McGill-Queen's University Press, 2003), 152, 154, James Griffin, *On Human Rights* (Oxford: Oxford University Press, 2008), 66.

of contemporary rights-based accounts of global justice in manuscript form. The second half is composed of four short argumentative essays that each deal with a distinct aspect of the relationship between justice, rights, and capabilities. Earlier versions of these four chapters have been presented at conferences and three of them appear here as published. In Chapter One I begin to assess the rapidly growing philosophical literature on global justice, focusing on contemporary rights-based approaches. I showcase a rights-based capabilities perspective as central to global justice because justice demands that individuals be well positioned to enjoy the prospects for a decent life. Justice requires universal respect for rights measurable by how well individuals are actually able to convert resources and opportunities into valuable functionings. In Chapter Two I explore what I take to be the most promising alternative philosophical approach to addressing pressing global challenges in terms of justice: the ethics of care. Just as capabilities help enrich and flesh out the depth and reach rights have, making capabilities a conceptually rich ally of rights, I argue that rights signify a powerful ally to an increasingly global ethic of care. In Chapter Three I consider the as yet underexplored connection between rights and well-being by exploring Sen's pioneering work on capabilities. Sen defines rights as primarily ethical demands that highlight and secure threshold conditions of freedom. The normative force of rights generates reasons for action for those in a position to advocate for and defend the freedoms that constitute the subject matter of rights. According to Sen, political philosophers must focus on the informational basis we use for evaluative judgments about the subject matter of rights, namely the basic capabilities that constitute the real bite of a theory of justice, if substantive individual freedoms are to be of central importance to social and global justice. Capabilities provide us with an appropriate measurement for justice to the extent that the rights and well-being of individuals leave them empowered to enjoy a life of dignity that has at least a

minimum set of opportunities. In Chapter Four I consider Hugo Grotius's theory of rights as an important historical basis for developing a capability-based theory of global justice. In Chapter Five I argue that the status and treatment of nonhuman animals is not and cannot be a matter of justice within the structure of John Rawls's theory, making it inadequate to this extent. I defend capabilities theory as better able to address the treatment of nonhuman animals in terms of justice. Grotius excludes nonhuman animals from being subjects of justice, but leaves room for their inclusion in the structure of his rights-based theory of international justice. Rawls, on the other hand, appears to recognize a powerful requirement to consider the interests of nonhuman animals, but requires their exclusion from the sphere of justice given the structure of his theory.

A decent political philosophy provides compelling and plausible moral guidelines that help inform resolutions to political problems. Worthwhile theories of global justice, in particular, develop approaches and perspectives for addressing grave political problems that exist on a global scale, such as staggering poverty, radical inequality, and other wide-spread violations of basic human rights. Perhaps justice on a global scale cannot be achieved without navigating large-scale political institutions like nation-states or the United Nations. Certainly there is a justice (or injustice) in the 'doing' of institutions – in creating and establishing them, operating them, refining them, reforming them, opposing or dismantling them, and defending them. Yet hesitation, distrust, and scepticism all strike me as healthy responses to such institutions as they currently exist. Perfect or transcendental justice promises to deliver 'the just' institutional arrangement and usually involves overarching principles theorized as unifying competing values that dissolve conflict. Yet idealized and static institutional arrangements conceived as the source from which 'the just' will

effortlessly flow are often impractical and illusory.² Demanding and compelling moral principles must be pursued and a plethora of institutions will no doubt play central instrumental roles in the pursuit of justice, but justice theory must avoid adopting overly restrictive institutional lenses that exclude from vision other reasonable and feasible approaches. In this regard, let us hope the focus of contemporary justice theory continues to move from providing the utopian solution to making a more immediate positive practical contribution. This is certainly what I hope to do. Academic philosophers working on global justice (myself included) surely know about, but very rarely confront, elementary truths central to our current global order: most, if not all, powerful states are extremely violent and fundamentally illegitimate institutions, many habitual and unnecessary forms of mass consumption lack moral justification, and perpetuation of the dominant consumerist lifestyle is inconsistent with our long-term planetary survival. To avoid self-deception about our prospects for global justice we must acknowledge the need for widespread reform of the global economic and political order and the need for radically altering globally dominant lifestyles and power dynamics. We must also confront, creatively and with persistence, the way individual and collective actions too often exacerbate rather than challenge or rectify global injustices because of powerful systematic processes and forces. This requires a concerted, on-going effort and constant vigilance.

² “Furthermore, it is not one thing: no single principle ... can possibly capture the richness of human thinking about justice.” David Miller, *Justice for Earthlings: Essays in Political Philosophy* (Cambridge: Cambridge University Press, 2012), 3. “If a theory of justice is to guide reasoned choice of policies, strategies or institutions, then the identification of fully just social arrangements is neither necessary nor sufficient.” Amartya Sen, *The Idea of Justice* (Cambridge, Mass: The Belknap Press of Harvard University Press, 2009), 15.

Chapter 1

Contemporary Rights-Based Theories of Global Justice: A Critical Survey

1.1 Introduction

In the following chapter I critically survey the rapidly growing philosophical work on global justice, focusing especially on contemporary rights-based approaches. By considering the breadth (what it includes) and scope (where it applies) of justice, including the place of human rights in global justice, I try to discern the general parameters and requirements of a substantive theory of global justice. Along the way I map out the philosophical terrain, highlighting tensions and contested issues. I then critically examine and compare the anti-cosmopolitan approaches of John Rawls and David Miller with rights-based cosmopolitan approaches such as Thomas Pogge's and the capabilities approach of Amartya Sen and Martha Nussbaum. I highlight a rights-based capabilities perspective as central to a theory of global justice.

Global justice is a relatively new and extremely lively area of political philosophy that has exploded in recent years. As an active topic for academic inquiry, theory of global justice emerged in the mid-1970s.³ The primary distinction between much work on justice and rights and the contemporary global justice literature concerns the latter's focus on questions of distributive justice *across* societies or states.⁴ As Gillian Brock writes:

Like many concepts in political philosophy, what global justice consists in is contested and the subject of much debate. However, we can identify at least one common element to theorists' use of the term, namely, an appreciation that the topic of justice is not exhausted by considering what justice within a

³ Thomas Pogge and Darrel Moellendorf, for example, date the contemporary global justice literature back to the mid-1970s in their edited collection *Global Justice: Seminal Essays* (St. Paul: Paragon House, 2008). David Miller indicates that "[t]he idea of global justice is comparatively new: it was rarely used before the last decades of the twentieth century." David Miller, *Justice for Earthlings: Essays in Political Philosophy*, 165.

⁴ See Thom Brooks, "Introduction" in Thom Brooks, ed. *The Global Justice Reader* (Malden: Blackwell, 2008) xii.

state consists in, but rather global justice includes a concern for matters of justice that extend beyond the borders of one's state (which was the focus for most philosophical theorizing about justice up until about the early 1990s).⁵

Increased awareness of war, human rights abuses, and global inequality has motivated political thinkers to determine what specific obligations citizens of wealthy countries have toward the citizens of poorer countries and what principles should govern both the distribution of the world's resources and the conduct of individuals and institutions globally. Much of this work falls into one of two camps: one that assigns fundamental moral significance to national boundaries, and another that does not. The former focuses on special obligations we have to our compatriots while the latter involves a commitment to cosmopolitanism, the view that each of us is a citizen of the world with equal moral worth and, as individuals, each of us thus has responsibilities to distant others. Interestingly, leading rights-based approaches to global justice fall into both of these camps.

Questions concerning political order, governance, and institutional design are central questions when it comes to the pressing challenges of global justice. For the last few centuries our world has been organized into a system of states which orders an international system of law and a global market. The extent to which our international system of states hinders or facilitates acceptable global norms and principles is central to global justice, although this is a complicated matter to assess and rarely addressed head on.⁶ However, much recent work ties questions of global justice or the prospect of resolving global

⁵ Gillian Brock, "Equality, sufficiency, and global justice," in Gerald Delanty, ed. *Routledge Handbook of Cosmopolitan Studies* (New York: Routledge, 2012), 341.

⁶ Thomas W. Pogge's *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (Cambridge: Polity, 2002) is, in certain respects, a noteworthy exception. More often liberal political theorists assume that obligations of justice apply *within* the international system of nation-states, taking the existing political order as a natural given, like the air we breathe. See Iris Marion Young, *Inclusion and Democracy* (Oxford: Oxford University Press, 2000), 238.

problems to arguments about obligations, claims about institutional boundaries and group membership, and views about collective responsibility.⁷

One current debate concerns whether a world government or world state is necessary for global justice. While the nationalist camp, which in many respects grows out of a Hobbesian perspective, sees the state as the highest unit of concern, the cosmopolitan camp, which in many respects grows out of a Kantian perspective, assigns ultimate concern to the individual person.⁸ Both perspectives, however, have assigned important roles to states but with noteworthy differences concerning states' moral significance and political efficacy. According to both the Hobbesian and Kantian perspective, whatever units are assigned fundamental moral significance (individuals, nations, states, etc.) the political institution we know as the state is often taken to be legitimate *and* a necessary requirement for achieving a just global order. As such, it is worth considering how these two broadly construed perspectives, including the nationalism versus cosmopolitanism debate, both frame and limit contemporary theories of global justice.

Cosmopolitans insist that individuals are the appropriate subjects for all claims about justice while nationalists argue for some kind of deference to national or state autonomy in the name of justice.⁹ Theorists from both perspectives often endorse or oppose a world state according to the way they characterize the necessity of the state for global justice. Indeed, these two positions are often remarkably similar, differing more in their focus than in

⁷ See, for example, Nicole Hassoun, *Globalization and Global Justice: Shrinking Distance, Expanding Obligations* (Cambridge: Cambridge University Press, 2012), Tracy Isaacs, *Moral Responsibility in Collective Contexts* (Oxford: Oxford University Press, 2011), David Miller, *National Responsibility and Global Justice* (Oxford: Oxford University Press, 2007), Richard Vernon, *Cosmopolitan Regard: Political Membership and Global Justice* (New York: Cambridge University Press, 2010).

⁸ Thom Brooks, for instance, characterizes the literature this way in his introduction to *The Global Justice Reader*. I am aware this generalization has many noteworthy exceptions such that the link is not sufficiently strong to constitute a decisive tendency. Thanks to Charles Jones for this important clarification.

⁹ Ian Shapiro and Lea Brilmayer, "Introduction," in their co-edited volume *Global Justice* (New York: New York University Press, 1999), 2-3.

any sharp disagreement about the objects of our obligations and special duties: “*both* most nationalists *and* most cosmopolitans *agree* that duties exist beyond our borders and that we have a special connection with those nearest and dearest to us. The difference then only lies with how highly we prize our obligations to compatriots and how strong are our commitments to non-citizens.”¹⁰

Statism, to be clear, is not simply the view that the state is a necessary requirement of justice domestically and globally.¹¹ Some non-statists provide an instrumental account of the link between the political authority and coercion of the state and justice, defending specific state activity on strategic not principled grounds. For example, human rights advocate Noam Chomsky states: “My short-term goals are to defend and even strengthen elements of state authority which, though illegitimate in fundamental ways, are critically necessary right now to impede the dedicated efforts to ‘roll back’ the progress that has been achieved in extending democracy and human rights.”¹² Some rights-based approaches to justice view the state as (temporarily?) necessary for realizing or at least defending rights, while others simply start with the moral and political demands of rights without exploring whether and to what extent the state might be a necessary requirement to meet these demands. Statists defend, as a matter of principle, the link between the political authority and coercion of the state and justice: “*Globalists* [or cosmopolitans] think the relevant relation holds among all human beings in virtue of the existence of practices that relate all humans to each other within a single global order. *Statists* think the relevant relation holds (only) among individuals who

¹⁰ Brooks, “Introduction,” xvii.

¹¹ According to Brian Barry, “[s]tatism is in essence a doctrine that endorses the status quo among states, almost regardless of what that is.” Brian Barry, “Statism and Nationalism: A Cosmopolitan Critique,” in Shapiro and Brilmayer, eds. *Global Justice*, 25.

¹² Noam Chomsky, Barry Pateman, ed. *Chomsky on Anarchism* (Edinburgh: AK Press, 2005), 192-193.

share membership in a state.”¹³ Statism involves a principled commitment to the state as the desirable and necessary political authority through which principles of distributive justice are mediated.¹⁴ So, at the level of moral principle cosmopolitans first consider the demands of global justice for individuals *per se* while statist approach the demands of global justice through an institutional lens:

Are we aiming at justice among individual human persons (as cosmopolitans maintain) or among states (perhaps aiming more at international justice)? Indeed, for many a central issue revolves around state membership. One of the key issues concerns whether membership in a state matters to the principles of distributive justice that we should endorse.¹⁵

Cosmopolitans and statist may share the same views on the moral legitimacy and justification of states yet diverge concerning the fundamentals of justice. The more cosmopolitans embrace states and the more statist embrace principles of global justice for individuals, the more similar these otherwise divergent positions become.¹⁶

The continuing centrality of states alone neither establishes their normative legitimacy nor demonstrates political philosophy’s success in defending such institutions. As a descriptive truth it is sufficient that states continue to effectively function for their authority to remain real, even if the “highly inegalitarian global distribution of wealth is protected and reinforced by the political division of the world into sovereign nation-states that differ greatly from one another in their political power and over whom no international authority is binding.”¹⁷ How the status quo ought to be navigated in pursuit of global justice presents an enormous challenge. The systems and institutions we might navigate in pursuit of justice

¹³ Mathias Risse, “Global Justice,” in David Estlund, ed. *The Oxford Companion of Political Philosophy* (Oxford: Oxford University Press, 2012), 264.

¹⁴ As Debra Satz indicates: “Statist argue that states are the appropriate units of moral concern, and they endorse a principle of the legal equality of all states.” Debra Satz, “Equality of What among Whom? Thoughts on Cosmopolitanism, Statism, and Nationalism,” in Shapiro and Brilmayer, eds. *Global Justice*, 69.

¹⁵ Brock, “Equality, sufficiency, and global justice,” 343.

¹⁶ “Indeed, the line between cosmopolitans and non-cosmopolitans seems, in some ways, to be getting harder to locate.” *Ibid.* 349 note 1.

¹⁷ Shapiro & Brilmayer, “Introduction,” 9.

may themselves be sources of, or complicit in, profound injustices. One approach involves trying to work out the demands of global justice irrespective of how realizable they currently are. Another approach aims to tinker with existing institutions, perhaps by challenging the profound injustices of the status quo.¹⁸ Some may see the necessary path to global justice as stemming directly from the international system of states, however unjust or morally illegitimate certain states or the global economic system as a whole. Perhaps national and international institutions, however illegitimate, represent the *only* viable means to achieving globally just outcomes, even if they only constitute part of the political landscape and even if they only play a peripheral political role in the lives of many. While working out the demands of global justice can remain decidedly abstract, most leading contemporary political philosophers turn their attention to the intricacies of the political order.¹⁹ This is why I introduce my survey by emphasizing the centrality of questions of institutional legitimacy. Indeed, how we ‘do’ justice hinges on the available and potential political avenues open to us.

Some of the most important and influential contemporary theories of justice reject cosmopolitanism in favour of statist approaches that refer to states or state affiliation in their primary principles. They regard something like a global order of states as the desirable, legitimate, and necessary institutional structure for realizing global justice. David Miller’s nationalism and John Rawls’s law of peoples are two prominent examples. By assuming that a set of overarching values is shared amongst a nation’s members and that this is part of what it means to constitute a legitimate nation, Miller subsumes individual responsibility within the bounds of state membership. Miller argues that nations, which are assigned fundamental moral significance, are communities whose existence depends on the shared

¹⁸ Ibid. 3, 9.

¹⁹ See, for example, the work of Gillian Brock, Thomas Pogge, David Miller, Martha Nussbaum, Amartya Sen, and numerous others.

beliefs and mutual commitments their members take to be constitutive of community membership, including a distinct public culture that features active views about territorial integrity, extended in history.²⁰ With respect to global justice, responsibilities are then characterized as responsibilities of citizens within nation-states. Miller juxtaposes his statist principle of responsibility with a capabilities-based cosmopolitanism that, he argues, risks disrespectfully interfering with the responsibilities and shared values of citizens in other cultures.²¹ Charles Jones argues that Miller's nationalism does not justify limiting duties of global justice to the responsibilities of citizens within nations. A cosmopolitan morality that construes our moral obligations to the needy in terms of individuals rather than as citizens is consistent with nationalist attachments.²² My concern is the way Miller seems to naturalize and neutralize the power dynamic of the state order. Though characterized as legitimate and stable, power dynamics within and between states are quite problematic, volatile, and contested. Miller appears to regard conventional political membership as a paramount value and assigns central priority to this value in his theory of justice. To the extent Miller's theory defends the value of shared beliefs in the nation or state per se it dispenses with the more onerous critical task of considering the rationality and truth of these beliefs as well as the predictable consequences for justice that follow.

Rawls's approach is not cosmopolitan because the primary commitment underlying his theory of international justice is not, in the first instance, to the equal moral worth of individuals or even citizens but to the equal moral worth of peoples.²³ This should not surprise us, argues Leif Wenar, because Rawls's theory is concerned more with the legitimacy

²⁰ David Miller, *On Nationality* (Oxford: Clarendon Press, 1995), 27.

²¹ David Miller, "National Responsibility and International Justice," in Deen K. Chatterjee, ed. *The Ethics of Assistance: Morality and the Distant Needy* (Cambridge: Cambridge University Press, 2004), 128-139.

²² Charles Jones, *Global Justice: Defending Cosmopolitanism* (Oxford: Oxford University Press, 1999), 150-172.

²³ See John Rawls, *The Law of Peoples* (Cambridge, Mass: Harvard University Press, 1999) or John Rawls, *From The Law of Peoples* in Thom Brooks, ed. *The Global Justice Reader*, 217-236.

of global coercion, the view that coercive political power may be legitimately exercised when peoples can accept the basic structure as appropriate.²⁴ Since a cosmopolitan basic structure could not, according to Rawls's theory, meet the fundamental requirements of legitimacy, concern for the interests of individuals remains indirect. Nussbaum insists we focus on Rawls's theory of justice because it is the strongest and most distinguished in the Western tradition of political philosophy, even though cosmopolitans have serious misgivings about his account of international justice.²⁵ As Samuel Scheffler indicates, cosmopolitanism "opposes any view which holds, as a matter of principle, that the norms of justice apply primarily within bounded groups comprising some subset of the global population."²⁶ In this respect, "[c]osmopolitanism is a moral outlook, not an institutional prescription."²⁷ A central task in the development of a capabilities theory of global justice like Nussbaum's is to work out a critical perspective on anti-cosmopolitan theories of justice like Rawls's and Miller's and to point in the direction of viable alternatives.

One of my concerns with the state-centric theories of Miller and Rawls is the way an idealized system of states, nations, and/or peoples is defended with reference to the existing global order. By opposing cosmopolitanism on the grounds that no robust public political culture yet exists to accommodate such commitments both theories endeavour to hold the current order against would be world-citizens as reasons why free and equal 'citizens' cannot relate fairly to one another as cosmopolitan individuals. Gillian Brock and Darrel Moellendorf have noted, "[c]osmopolitanism can embrace almost any theoretical perspective

²⁴ Leif Wenar, "Why Rawls is Not a Cosmopolitan Egalitarian," in Rex Martin and David A. Reidy, eds. *Rawls's Law of Peoples: A Realistic Utopia?* (Malden: Blackwell, 2006), 95, 100, 102-104.

²⁵ Martha C. Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Cambridge, Mass: The Belknap Press of Harvard University Press, 2006), 224-272, Martha Nussbaum, "Beyond the social contract: capabilities and global justice," in Gillian Brock and Harry Brighouse, eds. *The Political Philosophy of Cosmopolitanism* (Cambridge: Cambridge University Press, 2005), 201-207.

²⁶ Samuel Scheffler, *Boundaries and Allegiances: Problems of Justice and Responsibility in Liberal Thought* (Oxford: Oxford University Press, 2001), 112.

²⁷ Barry, "Statism and Nationalism: A Cosmopolitan Critique," 35.

and a wide range of normative theories may legitimately claim to be cosmopolitan, since there are a number of ways of understanding a person's good or what it is to be an ultimate unit of moral concern."²⁸ Capabilities theory features an account of what constitutes an individual's good in terms of her freedom to function in certain ways and ability to shape her own life by choosing and doing a range of valuable things that constitute a dignified and empowered life. One compelling way of justifying human rights is to supply an ethical argument about the valued capabilities of individuals. In this way having a right means having a fundamental entitlement to a certain level of capability to function. That is, having a right means being entitled to be empowered with the genuine opportunity to live a life of dignity by being able to do certain things and by being able to be a certain way, above a minimum threshold of justice. That the capabilities approach *entails* cosmopolitan commitments is clear enough, given its emphasis on the equal dignity and worth of individuals, irrespective of factors taken to be morally arbitrary including one's birth country. The *extent* of these cosmopolitan commitments is less clear.

Before critically engaging contemporary rights-based approaches and defending a rights-based capabilities perspective, I first consider the breadth (what it includes) and scope (where it applies) of justice by exploring the conceptual terrain of social and global justice. I then critically examine and compare the anti-cosmopolitan approaches of John Rawls and David Miller with rights-based cosmopolitan approaches such as Thomas Pogge's and the capabilities approach of Amartya Sen and Martha Nussbaum.

²⁸ Gillian Brock and Darrel Moellendorf, "Introduction," in Gillian Brock and Darrel Moellendorf, eds. *Current Debates in Global Justice* (Norwell, MA: Springer, 2005), 2.

1.2 From Social Justice to Global Justice

An excellent starting point for exploring the conceptual terrain of justice and discerning the general parameters and requirements of justice theory is Iris Marion Young's powerful and influential work. Her *Justice and the Politics of Difference* challenges the frequent reduction of social justice to distributive justice. She argues that mainstream theory of justice fails to address the problem of an inclusive participatory framework, especially for marginalized people. The distributive paradigm construes social justice too narrowly. Nonmaterial social goods such as rights, opportunity, power, and self-respect are awkwardly squeezed into a conception of social benefits and burdens to be distributed according to the demands of morality. Her criticism of the distributive paradigm effectively demonstrates mainstream approaches (Rawls, Miller, etc.) are too limited and underequipped to effectively address forms of institutionalized domination and oppression, including exploitation, marginalization, powerlessness, cultural imperialism, and violence. Social justice requires a broader theoretical response than distributive theories offer.

Young assumes that basic equality for everyone is a desirable moral value, that deep societal injustices can only be rectified by institutional changes, that there exist numerous oppressed groups, and that structures of domination wrongfully pervade society.²⁹ She defines social justice as “the elimination of institutionalized domination and oppression” and claims that any kind of social organization or practice involving domination and oppression is a matter of justice and thus subject to evaluation according to ideals of justice.³⁰ The distributive paradigm she assesses and aims to displace construes social justice much more

²⁹ Iris Marion Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 2011), 14. For a useful summary see Tom Campbell's chapter on 'Justice as Empowerment: Young and Affirmative Action' in his *Justice, Second Edition* (New York: St. Martin's Press, 2001).

³⁰ *Ibid.* 15.

narrowly, in terms of the proper distribution of social benefits and burdens demanded by morality:

The distributive paradigm defines social justice as the morally proper distribution of social benefits and burdens among society's members. Paramount among these are wealth, income, and other material resources. The distributive definition of justice often includes, however, nonmaterial social goods such as rights, opportunity, power, and self-respect. What marks the distributive paradigm is a tendency to conceive social justice and distribution as coextensive concepts.³¹

Young views distributive issues as important but incomplete components of a satisfactory conception of justice. The just distribution of material goods is a necessary but not sufficient condition for social justice. First, given its focus on the allocation of material goods or social positions the distributive paradigm ignores existing power dynamics and institutional arrangements that make up the social context and underlie widespread patterns of distribution. Second, the narrower conception of justice that focuses on distribution of wealth, income, or resources, represents nonmaterial social goods such as power, rights, opportunity, and self-respect, as static objects instead of fluid and varying features of the social context. Such nonmaterial social goods are intertwined with personal, civic, and professional relations as well as institutional processes. To get a sense of how this misrepresents nonmaterial social goods, consider a static and atomistic end-state pattern concerning, for example, the just social distribution of love and affection. By equating distributive justice with social justice and then characterizing nonmaterial social goods as akin to externally possessed things rather than practices we engage in, theorists overextend the concept of distribution.

Young's view bears on current debates between Rawlsians who argue that the best measure of justice concerns the goods which society produces and which people can use and

³¹ Ibid. 16.

capability theorists who argue we should focus on what people are actually able to do and be. Her view is relevant to this debate since she argues that a focus on possessions ignores what people are doing according to particular social contexts, customs, and institutionalized rules.³² For example, Young argues that rights are not best understood as things one possesses in some quantity. Rather, “they are institutionally defined rules specifying what people can do in relation to one another. Rights refer to doing more than having, to social relationships that enable or constrain action.”³³ Rights are, in part, a dynamic aspect of social practices. As with rights, opportunity is a concept concerning what individuals are able to do, rather than simply something one possesses. Surely ideals of justice compel us to see if rights and opportunities really enable individuals. It is inadequate to rank as just a situation where rights and opportunities are, in principle, equally distributed yet not effectively exercised and enjoyed given existing social power structures. In this manner nonmaterial goods like power, rights, opportunity, and self-respect have a wider scope than distribution, concerning as they do contextual relations and processes within which individuals act.

By widening the scope of distribution to fit nonmaterial goods, the social context, including power dynamics and institutional rules, becomes the neutral and necessary background. Issues of justice must then be conceptualized in terms of distributive patterns. Robert Nozick, for example, has argued that such static or end-state patterned approaches to justice are inappropriately ahistorical, ignoring the processes that generate the goods and produce distributive patterns.³⁴ The demands of justice are met, according to Nozick, when everyone has that to which they are entitled. Patterned theories of justice involving the

³² See for example, Amartya Sen, *The Idea of Justice* (Cambridge, Mass: The Belknap Press of Harvard University Press, 2009), Martha Nussbaum, *Sex and Social Justice* (Oxford: Oxford University Press, 1999), Elizabeth S. Anderson, “What is the Point of Equality?” *Ethics* Vol. 109, No. 2, 1999.

³³ Young, *Justice and the Politics of Difference*, 25.

³⁴ Ibid. 28. See Robert Nozick, *Anarchy, State, and Utopia* (Oxford: Blackwell, 1974).

redistribution of material goods like wealth, according to Nozick, disrupt and destroy liberty by violating individual self-ownership rights secured by the free market. While Young criticizes Nozick's entitlement theory for ignoring potentially coercive and involuntary structural consequences that may result from individual actions, she applauds his general criticism that patterned theories ignore social processes. Contra Nozick she claims the evaluation of distributive patterns, including the redistribution of material goods, is a priority of justice and an important starting point. However, by ignoring social processes the distributive paradigm concerns itself more with a particular pattern of distribution at a particular moment than with the underlying social context that generates distributive patterns over time.³⁵ As with rights and opportunities, power is a relation rather than a thing. To the extent power is characterized simply as something individually possessed, structural power dynamics disappear into the background. These dynamics greatly influence how well individuals can exercise their rights and act on their opportunities. Domination and oppression exist, but because they are structural or systemic phenomena, they are largely sidestepped by a distributive understanding of justice which misses, for example, the way in which the powerful enact and reproduce their power. Focus on distributive patterns and not social processes simply fails to adequately identify the existence and nature of domination and oppression.

Recall that the meaning and scope of justice is at issue here. It is one thing to explicitly adopt a narrower account of justice for practical purposes, acknowledging that such accounts are aspects of rather than exhaustive of social *and global* justice. Rawls and Miller, however, insist that social justice is distributive justice within nation-states. The real debate, therefore, concerns the conceptual grounds and methodological principles of justice theory.

³⁵ In other words, "regarding such social values as rights, opportunities, and self-respect as distributable obscures the institutional and social bases of these values." Ibid. 30.

The debate between cosmopolitans and nationalists is one of principle. Distributive justice within nation-states is obviously important, but with Young and others I challenge the narrowing of justice theory to the state-centric distributive paradigm. Contra Miller and Rawls, who both begin their theories of justice by assuming the political institutions through which justice is pursued, Young and others invert the meaning and scope of justice by asking: “what is the proper scope of obligations of justice to which political institutions ought to correspond?”³⁶ In a cosmopolitan light, existing institutions are neither idealized, neutralized, nor assigned fundamental moral significance and must instead answer to, rather than frame, the demands and obligations of justice.

For Miller the problem philosophers have with social justice is not their narrow interpretations of it in distributive terms, but rather their tendency to approach the idea of global justice as simply social justice writ large. Despite Young’s powerful criticisms he still largely defends the reduction of social justice to distributive justice. He is more adamant, however, in his defence of social justice as distinct and separate from global justice. Indeed, his persistent defence of a theory of justice, both social and global, in state-centric distributive terms is closely connected to how he defines social justice. Admittedly many thoroughgoing cosmopolitans also limit their focus to distributive principles. However, they often do so conventionally and on practical grounds. Miller defends a state-centric distributive paradigm contra Young as exhaustive of social and global justice. For Young and others the nation-state may or may not factor into social justice, depending on the context and issue. Obligations of justice extend to a global level for the straightforward reason that the scope of numerous social interactions also now extend globally. Societies and nation-states are not the same thing, though they can interact in familiar ways. Miller

³⁶ Young, *Inclusion and Democracy*, 238.

cannot be charged with equivocating social justice and justice within and according to nation-states because he explicitly defends these disparate concepts as constituting the same thing. This enables him to more comfortably limit social justice in distributive terms, since focus remains on the central role of the nation-state in the handling of distributive principles. Perhaps this explains Miller's denial of the existence of a robust global society, since in his terms a global society appears to require and be contingent upon a world-state. For Miller the site of politics concerns the passive effect nation-states have on their citizens, while for Young the site of politics concerns the active engagement and empowerment individuals have in relation to others socially. For Young 'doing' social justice may or may not be doing global justice since the scope and claims of justice have never equated to narrow distributive terms or to the nation-state. Rather, obligations of justice extend globally making the conceptual transition from social justice to global justice a matter of context and focus rather than a strict crossing of political or conceptual boundaries.³⁷ As a general approximation the more central the role political boundaries play in a theorist's account of justice, the more likely it is that theorist defends firm conceptual boundaries between social and global justice. Likewise, among the cosmopolitans, the more central the role of critically assessing the justness of both existing and theoretical institutions in a theorist's account of justice, the more likely it is that she characterizes obligations of justice as dependent on the particular context and issue. In Young's work justice is dynamic, not static, and concerned with the features of relationships amongst individuals in a context, be it local, regional, social, or global.

Rawls and Miller privilege relationships defined by the collective boundaries of peoples or nation-states. Accordingly, "the pursuit of justice involves a division of labour

³⁷ See in particular "Self-Determination and Global Democracy," in Young, *Inclusion and Democracy*.

between domestic and international spheres, with states having the primary responsibility for promoting social justice among their citizens, while the chief task of the international community is to create the conditions under which that responsibility can be discharged.”³⁸

This section is about social and global justice, including the nature and extent of any conceptual distinctions between institutional boundaries in competing political philosophies. Cosmopolitans increasingly endorse conceptions of *relational equality* that transcend and may be in tension with such boundaries:

As we see with real-world egalitarian social movements, the focus should rightly be on creating relations of equality which have as their focus not equalizing luck but rather eliminating sources of domination and oppression that preclude standing in the right kinds of relations with one another, namely those characterized by equal respect, recognition, and power.³⁹

Gillian Brock endorses this conception of relational equality because it reflects a cosmopolitan commitment to moral equality based on recognition of our equal moral worth and entitlement to equal respect. It focuses on the way unequal power can block the possibility of standing in relations of equality. It also aims to bridge sufficientarian and egalitarian concerns and expand justice beyond distributional issues.⁴⁰ This perspective has the virtue of taking the world as it is, with a multiplicity of social interactions that do not neatly map onto political borders. It is justice for human beings as such, and since social interactions increasingly extend globally, ‘doing’ social justice entails the challenge of globalizing theories of justice.⁴¹

Cosmopolitans do not insist in principle that we use social and global justice interchangeably as though they are the same thing or always signify a seamless connection.

³⁸ Miller, *National Responsibility and Global Justice*, 21.

³⁹ Brock, “Equality, sufficiency, and global justice,” 344. For similar defences of relational equality see, for example, the work of Elizabeth Anderson, Gillian Brock, Martha Nussbaum, and Iris Marion Young.

⁴⁰ Ibid. 344-348. Sufficientarian accounts aim to ensure people have the prospects for at least minimally decent lives.

⁴¹ Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, 92.

They are sufficiently distinct concepts that involve a different focus and express different demands and obligations of justice. However, because social and global justice may also feature the same bundle of central issues that overlap in important and complicated ways, cosmopolitans often highlight the joint pursuit of both for practical purposes. Principled disagreement exists between nationalists and cosmopolitans about whether social and global justice are in tension with one another, demanding trade-offs and either-or choices, or are instead compatible goals that must be pursued simultaneously. Simon Caney, for example, appears to regard the distributive principles for social and global justice as one and the same:

one central feature of cosmopolitanism is its suggestion that there is no fundamental morally significant difference between the domestic and global realms *such that the values that are appropriate in the former realm are inappropriate in the latter*. For cosmopolitans, the principles of justice that inform the domestic level should also inform the global realm.⁴²

Cosmopolitans grant, to varying degrees, that we can have special duties to our compatriots but in a manner that is not practically at odds with the demands of global justice. Miller, however, argues that the demands of social justice and global justice conflict in ways that more often force us to choose between the two.

While much contemporary work reiterates a narrower focus on transnational distributive justice, my account of the breadth (what it includes) and scope (where it applies) of global justice, echoes Young's account of social justice and requires a broader theoretical response than distributive theories offer. Transnational distributive justice is a necessary part of, but does not exhaust the subject matter of global justice. The predominance of distributive justice in contemporary philosophical work is more reflective of habitual disciplinary focus rather than a principled narrowing of the topic. However, global justice

⁴² Simon Caney, *Justice Beyond Borders: A Global Political Theory* (Oxford: Oxford University Press, 2005), 265. Miller assigns this view to Caney in David Miller, "A spoonful of sugar helps the medicine go down": Gillian Brock on global justice," *Journal of Global Ethics*, Vol. 5, No. 3, 2009, 253.

includes a number of noteworthy concerns and issues that do not clearly or neatly reduce to matters of distribution. These include analysis of the justness of political arrangements, justice movements that are global in scope such as justice for farmers or sweatshop workers, issues of domination, exploitation, and oppression involving nonmaterial social goods such as rights, opportunity, power, and self-respect, as well as questions of justice for indigenous peoples, the disabled, nonhuman animals, biological systems, and future generations. In terms of scope, global justice arguably transcends without presupposing one or more dominant political order or institution. Global justice applies transculturally to a global civil society increasingly unrestricted by traditional political boundaries, and transnationally across the borders of nation-states.

Even if human rights are now taken to be the proper cause of justice, whether the vision of a just future order animated by rights is one of *international* justice or one of *global* justice is hotly debated. Cosmopolitans continue to approach the demands and obligations of justice in such a way that does not and need not sharply divide between justice within states and transnational justice. When the nation-state is privileged as a matter of principle and conceptually, global justice is conceived as narrowly contingent upon relevant analogs in the global context. While defenders of this approach, such as Rawls and Miller, emphasize the need to be realistic they strangely betray such claims by requiring the global context to be analogous to that within nation-states. They then fault accounts of global justice for both *requiring and lacking* a world-state rather than taking the real world as it is and moving forward in a fluid manner with a plurality of possibilities in-line with the moral demands and obligations of a *global* justice. By judging in advance the required, familiar, and traditional political circumstances of justice a certain creative movement toward global justice, animated by a scientific spirit and an openness to new social and institutional arrangements conducive

to justice, is stifled. As Nussbaum argues, “[b]ecause all the major Western theories of social justice begin from the nation-state as their basic unit, it is likely that new theoretical structures will also be required to think well about this problem.”⁴³ Theories of global justice should be offered as a contribution to the global justice movement rather than as a complete self-contained system. Sen contrasts this more comparative and relational approach with what he calls transcendental institutionalism. If the individual is the most appropriate subject of a theory of justice, then what really happens to people must be a central concern within a theory of justice.⁴⁴ Sen contends that a Rawlsian theory of justice fails to combine the operation of principles of justice with the actual behaviour of people. Transcendental institutionalism concentrates on what it identifies as perfect justice rather than on relative comparisons of justice/injustice. In other words, it aims at identifying the nature of ‘the just’ rather than on ways of being ‘less unjust.’ It concentrates primarily on getting the institutions right, not on the actual societies that would emerge. This contrasts with more comparative and relational approaches that are concerned with the social realizations that result from actual institutions, actual behaviour, and other influences.⁴⁵

1.3 Rawls’s Account of Social and International Justice

Before surveying contemporary rights-based approaches to global justice it is important to start where most contemporary accounts of justice start, with the work of John Rawls. Rawls’s theory of domestic justice is the foundation of many early liberal theories of

⁴³ Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, 2.

⁴⁴ Although “Rawls repeatedly insists that the individual person is the only appropriate subject of a theory of justice,” for instance, in John Rawls, *A Theory of Justice* (Cambridge: Mass: The Belknap Press of Harvard University Press, 1971), 264-265, we will see shortly how his account of international justice arguably betrays this priority of justice. Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, 245.

⁴⁵ “If a theory of justice is to guide reasoned choice of policies, strategies or institutions, then the identification of fully just social arrangements is neither necessary nor sufficient.” Sen, *The Idea of Justice*, 15.

global justice and continues to be a central influence in contemporary global justice theory.⁴⁶ In terms of understanding and refining rights-based approaches to global justice, however, getting clear on Rawls is essential since his account of international justice stands as an alternative to, and in some sense challenge to, rights-based approaches.

Rawls's account of social or domestic justice found in *A Theory of Justice* fits squarely into the egalitarian camp while his account of international justice found in *The Law of Peoples* fits squarely into the sufficientarian camp. A sufficientarian account of justice aims to ensure people have the prospects for at least minimally decent lives. It is a minimal account of what justice requires, usually based on a view about what basic capabilities and rights individuals are entitled to, but sometimes, as in the case of Rawls, based on a view about an institutional arrangement or international political structure sufficient for justice. Rawls seems to regard his theory of domestic justice as delivering an account of a fully just social arrangement while his theory of international justice is an account of a sufficiently, but not fully just international arrangement. Both accounts stress the political conditions necessary for a society to function according to some minimal *institutional* requirement of justice, but according to Rawls justice demands, domestically, certain human rights and egalitarian commitments that, internationally, do not obtain. Rawls does not, strictly speaking, advance a rights-based approach to or theory of global justice. Indeed, as a matter of international justice Rawls simply insists for reasons of peace and stability that peoples are to honor human rights. His account is sufficientarian in the sense that it specifies the necessary political conditions for the international order to qualify as reasonably just. Also, he does not defend human rights as grounded on an account of our common humanity, conceiving

⁴⁶ See, for example, Brian Barry, *Theories of Justice* (Berkeley: University of California Press, 1989), Charles R. Beitz, *Political Theory and International Relations* (Princeton: Princeton University Press, 1999) and Thomas W. Pogge, *Realizing Rawls* (Ithaca: Cornell University Press, 1989).

individuals as fundamentally free and equal. Instead, he defends a narrow political account of persons first as members of groups which uphold a minimal set of human rights that accord with a decent system of social cooperation.⁴⁷ His *The Law of Peoples* is not strictly speaking a theory of global justice despite often being treated as one and featuring centrally in the global justice literature: “[i]nquiries into *global justice* differ from those into *international justice* precisely by not limiting inquiry to what states should do. They may also question the very moral acceptability of states and explore alternative arrangements.”⁴⁸ Instead, Rawls is focused on justice *between* peoples where a people is an idealized nation-state and concerned with the legitimacy of international coercion. He aims to offer guidelines for the foreign policy of liberal democracies and at establishing international peace and security.⁴⁹ *The Law of Peoples* completes Rawls’s domestic theory of liberal democratic justice and signifies a pole star for theory of global justice because it is a carefully set out position on international justice by perhaps the most important twentieth-century political philosopher in the English-speaking world. As Brighouse claims, “[s]ince it dominates, and provides the springboard for, most contemporary debates about justice, it is essential to have a good grasp of John Rawls’s theory of justice.”⁵⁰ Accordingly, in agreement with Nussbaum, “[t]hinking in detail about what is promising and what defective in Rawls’ theory of justice among nations is thus, I believe, a very good way to start thinking about global justice as we try to write theories that are adequate to this complex and changing world.”⁵¹

⁴⁷ Rawls, *The Law of Peoples*, 68.

⁴⁸ Risse, “Global Justice,” 261.

⁴⁹ “The Law of Peoples proceeds from the international political world as we see it, and concerns what the foreign policy of a reasonably just liberal people should be.” Rawls, *The Law of Peoples*, 83. See, for example, Leif Wenar “Why Rawls is Not a Cosmopolitan Egalitarian,” 95, Wilfried Hinsch and Markus Stepanians, “Human Rights as Moral Claim Rights,” 131 note 13, and Kok-Chor Tan, “The Problem of Decent Peoples,” 77, 86, all in Martin & Reidy, eds. *Rawls’s Law of Peoples: A Realistic Utopia?*

⁵⁰ Harry Brighouse, *Justice* (Cambridge: Polity, 2004), 30.

⁵¹ Martha Nussbaum, “Women and theories of global justice: our need for new paradigms,” in Chatterjee, ed. *The Ethics of Assistance: Morality and the Distant Needy*, 150.

Rawls's theory involves an ideal of reasonable reciprocity or fairness between moral equals. His aim is to theorize a conception of justice that features and advances familiar themes in the social contract tradition. Principles of domestic justice are the objects of an original agreement arrived at by free and equal rational persons behind a veil of ignorance. Principles of international justice are products of an international hypothetical agreement chosen by representatives of peoples, not individuals.⁵² The original position corresponds to the state of nature and is purely hypothetical. Justice as fairness conveys the idea that the principles of justice are agreed to in an initial situation that is fair. Rawls considers his view a contract theory that yields agreement and acceptance of certain moral principles that underlie liberal democratic political institutions. The purely hypothetical procedure sees these principles of justice as ones that would be chosen by rational persons or reasonable representatives of peoples. These rational persons or reasonable representatives are parties to the agreement and the principles are ones that would be acceptable by all parties as a matter of public knowledge. The two principles of justice that feature centrally in his domestic account are, first, that each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others. Second, social and economic inequalities are to be arranged so that they are (a) to the advantage of the least advantaged, and (b) attached to positions and offices open to all. The social primary goods are rights and liberties, powers and opportunities, income and wealth, and the social bases of self-respect. The natural goods include health and vigor, intelligence and imagination. Such principles, especially the second, result from setting aside morally arbitrary (because unearned and undeserved) features such as natural endowments and the contingencies of social circumstance (such as where, and to whom, one is born). Justice as fairness thus consists of

⁵² Rawls, *The Law of Peoples*, 9, 70, 82.

(1) the hypothetical choice situation and (2) the set of principles agreed to. Rawls is not employing the social contract device as a pre-state fiction meant to serve as retro-justification for one or other existing order. Rather, the original position is a purely hypothetical abstraction meant to account for how principles of justice for the basic structure of a well-ordered society or an international Society of Peoples might be chosen. The specific content of the agreement supplies the moral principles for this basic structure.

According to Rawls domestic justice concerns the equal distribution of social goods. We treat people as equals *not* by removing all inequalities, but by removing only those which are disadvantaging. By treating the contingencies of birth and circumstance as social assets to be employed to the advantage of everyone, inequalities remain acceptable provided they are to the benefit of the least advantaged. The principle of equal liberty is egalitarian because it distributes extensive liberties equally to everyone. The second part of the difference principle is egalitarian because it instructs opportunities to be considered for offices and positions to be distributed in an equal manner. The first part of the difference principle aims for the goal of equality, but is not by itself technically egalitarian.

Rawls thinks that the basic structure of society is the primary subject of justice. Justice, he says, is the first virtue of social institutions. By securing certain individual rights a just society takes the liberties of equal citizenship as settled. A well-ordered society is a more or less self-sufficient association of persons, regulated by a public conception of justice that advances the good of its members. Conceptions of justice specify basic rights and duties, and they determine the appropriate distributive shares, affecting and affected by problems of efficiency, coordination, and stability. Rawls restricts his pursuit of domestic justice to a society conceived as a closed system isolated from other societies. He thinks reasons for doing so are obvious and require no explanation, even though very few closed and isolated

societies now exist. This major methodological assumption receives no further explanation or defence. This abstraction from actually existing society(ies) to a society theorized as perfectly just is what Rawls calls ideal theory. As such Rawls's project is not focused in the first instance on arguing *for* a constitutional liberal democracy. Rather, Rawls is focused on supplying a sound theoretical account of the primacy of justice central to liberal democratic thought. Rawls assumes the only way to gain a deeper understanding is to animate our pursuit of justice with a worked out theory of an ideal (future) perfectly just domestic and international society. By keeping to a conception of justice for the basic structure, however, we do not fully work out and advance a more comprehensive social ideal.

Rawls says the basic liberties of citizens include: political liberty (right to vote and run for public office) as well as freedom of speech and assembly, liberty of conscience and thought, freedom of the person including the right to hold personal property, and freedom from arbitrary arrest and seizure. His serial or lexical ordering puts the first principle of justice prior to the second. Any or all distributive arrangements, including the distribution of social values of liberty and opportunity, income and wealth, and the bases of self-respect, must therefore be consistent with equal citizenship and equality of opportunity: "Injustice, then, is simply inequalities that are not to the benefit of all."⁵³ Rawls's two principles require that everyone benefit from economic and social inequalities. In combining fair equality of opportunity and the difference principle, the egalitarian idea is that the higher expectations of those better situated is just if and only if such an arrangement improves, as a matter of degree, the situation of the least advantaged. In this sense, everyone benefits when the difference principle is satisfied. Rawls suggests that treating the question of distributive shares – how fundamental rights and duties are assigned and how social and economic

⁵³ Rawls, *A Theory of Justice*, 62.

inequalities are regulated – is a matter of pure procedural justice. Whatever design the social system features, let it be designed to arrive, as a matter of procedure, at an outcome that is just. In this instance, the background circumstances of a just basic structure give rise to a just procedure. The role of the principle of fair equality of opportunity is to insure that the system of cooperation is one of pure procedural justice. So, while modern states are riddled with grave injustices, the claim is that the difference principle could realistically inform an institutional arrangement. The basic structure of society could be arranged to satisfy the demands of liberty and fair equality of opportunity.

A common objection is that those better situated deserve their greater advantages irrespective of the influence or effect they have on others. If someone works hard and plays by the rules, the objection goes, that person is entitled to any and all advantages that follow: “In this sense the more fortunate have a claim to their better situation; their claims are legitimate expectations established by social institutions, and the community is obligated to meet them.”⁵⁴ In response Rawls notes this *sense* of desert – what one deserves given one’s circumstances and efforts – presupposes a cooperative scheme, just one that (happens?) to be personally advantageous which may or may not also benefit others. Rawls argues that it is surely incorrect to maintain that someone deserves any of the greater advantages enjoyed or achieved because of fortunate natural endowments and social circumstances. On the contrary, we have an intuitive moral understanding that informs our considered judgments that no one *deserves* his or her life chances, including natural endowments (abilities) and social contingencies (starting place, resources, opportunities). People no more deserve their empowering superior IQ than they do the initial societal circumstances into which they happen to be born. Those inclined to argue that they deserve their advantages will or should

⁵⁴ Ibid. 103.

embrace, demand, and defend the difference principle in order to correctly maintain this sense of desert, otherwise they will lack any basis for defending their advantage as in any way deserved. Such intuitive considerations are offered to clarify the sense in which the difference principle is egalitarian, acceptable to both the more and the less advantaged. It appears to follow that a social system is unjust to the extent it is organized to advantage some by making others worse off, in terms of equality and primary social goods. Those with better circumstances should be unwilling to have their greater advantages unless this works out for the benefit of the least fortunate.

A Theory of Justice defends a liberal account of justice within domestic society. *The Law of Peoples* builds on and extends Rawls's theory to a system of international justice governing the Society of Peoples composed of reasonably just, liberal, or decent peoples (well-ordered peoples). While citizens are the basic actors in domestic society, peoples are the actors in the Society of Peoples.⁵⁵ The principles of international justice agreed to according to the model of the original agreement are established by the rational and reasonable representatives of liberal and decent peoples who conceive of themselves as free and equal *peoples* in the Society of Peoples:

It is, therefore, part of a people's being reasonable and rational that they are ready to offer to other peoples fair terms of political and social cooperation. These fair terms are those that a people sincerely believes other equal peoples might accept also; and should they do so, a people will honor the terms it has proposed even in those cases where that people might profit by violating them. Thus, the criterion of reciprocity applies to the Law of Peoples in the same way it does to the principles of justice for a constitutional regime.⁵⁶

Domestically, political liberalism insists that comprehensive doctrines of truth or right be replaced by an idea of what is politically reasonable between citizens. Internationally, "public reason is invoked by members of the Society of Peoples, and its principles are addressed to

⁵⁵ Rawls, *The Law of Peoples*, 23.

⁵⁶ *Ibid.* 35.

peoples as peoples.”⁵⁷ Decent hierarchical peoples would endorse the Law of Peoples, according to Rawls, since they respect others by not engaging in aggressive war, strive to protect the human rights and good of their own, and maintain security and independence while acknowledging the benefits of trade and the idea of assistance when in need.⁵⁸

Specifically, the eight principles agreed to in the original position by representatives of peoples as specifying fair terms of political cooperation are:

1. Peoples are free and independent, and their freedom and independence are to be respected by other peoples.
2. Peoples are to observe treaties and undertakings.
3. Peoples are equal and are parties to the agreements that bind them.
4. Peoples are to observe a duty of non-intervention.
5. Peoples have the right of self-defense but no right to instigate war for reasons other than self-defense.
6. Peoples are to honor human rights.
7. Peoples are to observe certain specified restrictions in the conduct of war.
8. Peoples have a duty to assist other peoples living under unfavorable conditions that prevent their having a just or decent political and social regime.

Rawls defines human rights as a special class of urgent rights, “such as freedom from slavery and serfdom, liberty (but not equal liberty) of conscience, and security of ethnic groups from mass murder and genocide.”⁵⁹ While the transnational force of human rights is here explicitly recognized, Rawls’s remarkably sparse list of rights omits numerous rights typically defended as basic or fundamental, including the majority of international human rights enumerated in the Universal Declaration of Human Rights (UDHR).⁶⁰ At issue here is both the content and role of human rights in Rawls’s account of international justice. Noticeably absent, for example, is the right to equal political participation, full liberty of conscience, the demand of full equality for women, and freedom of expression and association. As Allen Buchanan emphasizes:

⁵⁷ Ibid. 55.

⁵⁸ Ibid. 69.

⁵⁹ Ibid. 79.

⁶⁰ Nussbaum, “Beyond the social contract: capabilities and global justice,” 203.

So it appears that for Rawls a society in which there is a permanent racial, ethnic, religious, or gender underclass, hovering just above subsistence, systematically excluded from the more desirable economic positions, having grossly inferior property rights, lacking access to education and health care services available to the dominant classes, unable to afford legal counsel and bereft of sophisticated due process protections available to others, would *not* be a society in which those who were thus disadvantaged could complain that their human rights were violated.⁶¹

For many cosmopolitans the scope of Rawls's account of international justice is too limited. Criticisms emphasize the manner in which his conception of toleration is extended to qualify as just and in good standing the morally intolerable attributes of "decent peoples," his explicit exclusion of a global distributive principle, and his narrow understanding of the role of human rights.⁶² Critics often highlight apparent inconsistencies between his two accounts, and reject the anti-cosmopolitan, state-centric perspective underlying *The Law of Peoples*. Pogge, for instance, praises Rawls's domestic account for theorizing justice as something worth realizing for the sake of individual human persons, taken as the ultimate units of moral concern. He then faults Rawls's international account for implausibly and incoherently defending a just domestic regime as an end in itself.⁶³ Young rejects as essentialist and exclusionary such static accounts of the distinctness of peoples, arguing that,

[i]nstead, peoples should be understood as relationally constituted, and the political recognition of the distinctness of peoples would be able to accommodate the millions of people who think of their identities as hybrids of national membership, or who construct a cosmopolitan identity.⁶⁴

⁶¹ Allen Buchanan, "Taking the Human out of Human Rights," in Martin and Reidy, eds. *Rawls's Law of Peoples: A Realistic Utopia?*, 151.

⁶² See, for example, Tan's "The Problem of Decent Peoples" where he notes: "The problem of tolerating decent peoples is that it lets down dissenting individual members in these nonliberal societies." 85. See Thomas W. Pogge's, "An Egalitarian Law of Peoples," in Thom Brooks, ed. *The Global Justice Reader*, where he argues: "A plausible conception of global justice must be sensitive to international social and economic inequalities." 238. See Alistair M. Macleod's "Rawls's Narrow Doctrine of Human Rights," in Martin and Reidy, eds. *Rawls's Law of Peoples: A Realistic Utopia?*, where he defends the claim that: "no justification seems to be on offer for [Rawls's] implicit unwillingness to recognize that rights as fundamental as the right to full liberty of conscience and the right to equal participation in political decision-making processes ought to be regarded as *human* rights." 135.

⁶³ Pogge, "An Egalitarian Law of Peoples," 246.

⁶⁴ Young, *Inclusion and Democracy*, 237. Nussbaum echoes this criticism by faulting the fixity and finality of peoples (what she calls states) in Rawls for the weak analogy between peoples and moral persons, the manner in which the status quo seems to be accorded legitimacy, and for assuming self-sufficiency in what is actually a

In defence of Rawls, however, there is a straightforward consistency between his account of domestic and international justice about which he is explicit: there is no global justice. There is only internal social justice within closed, static, domestic societies understood as idealized nation-states. The end of each society is to become fully just and stable by realizing just institutions according to the internationally stabilizing influence of the Law of Peoples: “[o]nce that end is reached, the Law of Peoples prescribes no further target such as, for example, to raise the standard of living beyond what is necessary to sustain those institutions.”⁶⁵ Despite being the twentieth century’s leading liberal egalitarian his focus is simply not global, neither directly concerned with individual humans as such nor with addressing global material inequality.⁶⁶ Instead, *The Law of Peoples* completes Rawls’s theory of domestic justice by extending to the international realm his theory of political legitimacy first advanced in his *Political Liberalism*: “It states that the exercise of coercive political power over persons is legitimate only when this exercise of power is in accordance with a basic structure that those persons can accept, regarding those persons as either decent or reasonable, as appropriate.”⁶⁷ Rawls means to draw on the international public political culture from which representatives of peoples agree to principles for the international basic structure. Accordingly, Rawls’s standard of international legitimacy is much more permissive than his standard of justice:

This focus on people produces a thoroughly statist version of liberal internationalism. The thoroughgoingness of Rawls’s statism gives his theory a high degree of internal coherence, but this coherence comes at a price.

much more complex interdependent world. Nussbaum, “Beyond the social contract: capabilities and global justice,” 200.

⁶⁵ Rawls, *The Law of Peoples*, 119.

⁶⁶ Wenar, “Why Rawls is Not a Cosmopolitan Egalitarian,” 95.

⁶⁷ Ibid. 100. See John Rawls, *Political Liberalism, Expanded Edition* (New York: Columbia University Press, 2005), 137.

Because Rawls's global theory works exclusively in terms of peoples, it cannot show any direct concern for individuals.⁶⁸

Provided Rawls maintains state-centric assumptions about the international public political culture, it follows that a rights-based cosmopolitan account of global justice is not possible:

1. A global state with a stable monopoly of coercive power is either impossible or highly undesirable.
2. In the absence of a global state, territorial powers with armed forces that may permissibly protect territorial borders will be a permanent feature of the global order.
3. If territorial powers may permissibly use armed forces to protect territorial borders, then individuals' basic rights and liberties cannot be fully specified without reference to those individuals' territorial affiliation.
4. No complete set of pure cosmopolitan principles is possible.⁶⁹

As I claimed in my introduction, one of my concerns with such state-centric assumptions is the way an idealized system of states, nations, and/or peoples is defended with reference to the existing international (not global) order. By opposing cosmopolitanism on the grounds that no robust public political culture yet exists, Rawls's highly systematic theory holds the current order against would be world-citizens, and denies that free and equal 'citizens' can relate fairly to one another as cosmopolitan individuals. According to Rawls's systematic account of justice, cosmopolitan purity, whereby individuals remain the ultimate units of moral concern, is fine in principle yet, globally, impossible in practice. That is the way the world is, the world is *not* what we make of it.⁷⁰

For cosmopolitans Rawls's account is, at best, noble but misguided. Indeed, it strikes many as outdated. First, it is outdated for its peculiar us-and-them use of 'liberal'. Second, it is outdated for its narrow, undefended account of human rights, inconsistent with the efforts and status of the international human rights movement. Third, it is outdated for its state-

⁶⁸ Wenar, "Why Rawls is Not a Cosmopolitan Egalitarian," 104. "The fact that the concerns of peoples do not 'trickle down' to become concern for individuals gives Rawls's accounts of human rights and humanitarian intervention a bloodless, institutional character." Ibid.

⁶⁹ Ibid. 108.

⁷⁰ Ibid. 108-110.

centric perspective at odds with widespread cosmopolitan regard. Fourth, it is outdated for its explicit indifference to questions of transnational distribution in defence of the well-being of the globally worst-off individuals *as a matter of justice*. Rawls contrasts his view with cosmopolitanism: “The ultimate concern of a cosmopolitan view is the well-being of individuals and not the justice of societies. According to that view there is still a question concerning the need for further global distribution, even after each domestic society has achieved internally just institutions.”⁷¹ For many cosmopolitans justice demands a basic minimal kind of life for each and every individual, variously conceived in terms of well-being or welfare, decent or dignified existence, human rights, needs, capabilities, and so on. Justice in Rawls is the realization of just institutions. But of course, cosmopolitans are also concerned with the justice of societies. It is uncharitable to imply that, for cosmopolitans, the demands of justice *necessarily* remain unmet in a world populated with nothing but just societies. Rather, at issue here is the fundamental unit of moral concern. For cosmopolitans it is the individual. For statist like Rawls, it is the nation-state.⁷² Certainly cosmopolitans care about social justice and global stability, but justice remains unsatisfied by an international order, even the idealized one of Rawls’s, in which morally sufficient standards of a minimally decent life remain unmet. As Kok-Chor Tan writes, “[c]osmopolitanism is thus not a form of moral imperialism or paternalism that has as its fundamental intention the imposition of liberalism on all societies. Rather it is concerned fundamentally with protecting the rights of individuals, no matter where they are, to choose a life for

⁷¹ Ibid. 120.

⁷² “Peoples are thus states *twice idealized*. First, peoples are states with a moral capacity for complying with a reasonable law of peoples and treating other states justly. Second, peoples also are states that reflect a distinctive national community; that is, a people is also a nation-state. The Law of Peoples is thus a law for *nation-states capable of a sense of justice*.” Tan, “The Problem of Decent Peoples,” 79. “Rawls is a statist. His main goal is to offer principles of domestic justice. *The Law of Peoples* adds an approach to international justice by way of sketching the foreign policy of a society within which his domestic principles of justice apply.” Risse, “Global Justice,” 265.

themselves.”⁷³ For cosmopolitans Rawls’s idealized account of international justice is not populated by just societies because such societies are not populated by individuals regarded, as a matter of justice, as free and equal moral persons.

Rawls’s human rights minimalism has not found much approval because he overstates the way cosmopolitanism violates his conception of political liberalism and understates the centrality of human rights with respect to the demands of justice.⁷⁴ *The Law of Peoples* is admittedly at odds with his own conception of what social justice demands.

Rawls writes,

To repeat, I am not saying that a decent hierarchical society is as reasonable and just as a liberal society. For judged by the principles of a liberal democratic society, a decent hierarchical society clearly does not treat its members equally ... A decent hierarchical society honors a reasonable and just Law of Peoples even though it does not treat its own members reasonably or justly as free and equal citizens, since it lacks the liberal idea of citizenship.⁷⁵

As suggested by Tan, Rawls seems to falsely assume that a rights-based cosmopolitanism constitutes a form of Western imperialism, expounded in terms of controversial comprehensive religious doctrines or philosophical doctrines of human nature.⁷⁶ *A Theory of Justice* is itself among the discounted for featuring rights distinctive of liberal democratic citizenship.⁷⁷ This is surprising since, “[i]n some way or other, individuals need the social protection of these rights as a precondition for the development and exercise of their moral

⁷³ Tan, “The Problem of Decent Peoples,” 86.

⁷⁴ For example, James W. Nickel faults Rawls’s account for failing to acknowledge the many international roles human rights play. He also faults Rawls’s ultraminimal list of human rights for failing to address many severe injustices. See his *Making Sense of Human Rights, Second Edition* (Malden: Blackwell, 2007), 100-102. James Griffin criticizes Rawls’s short list for lacking any justifying reasons and his quite restricted conception of the role of human rights for being a poorly thought through strategy of avoiding a view about ethnocentricity now out of date. See his *On Human Rights* (Oxford: Oxford University Press, 2008), 24-25.

⁷⁵ Rawls, *The Law of Peoples*, 83.

⁷⁶ Ibid. 68, 81.

⁷⁷ Ibid. 79. “The Equal Liberty Principle, the Equal Opportunity Principle, and the Difference Principle are principles which – when taken together, and when given a reading that is consonant both with the early and with the later Rawls – can readily be cited in defense of most or all of the rights itemized in such documents as the *Universal Declaration of Human Rights*, the *Covenant on Civil and Political Rights*, and the *Covenant on Social, Economic and Cultural Rights*.” Macleod, “Rawls’s Narrow Doctrine of Human Rights,” 136.

powers, and this is supposed to hold true independently of how the conceptions of rationality, fairness, and the good involved are spelled out.”⁷⁸

In *The Law of Peoples* Rawls’s use of ‘liberal’ is awkward in at least four respects. First, ‘liberal’ is strangely offered as uniquely Western.⁷⁹ Second, full credit is given to the ‘liberal’ basis of human rights when rich parallel accounts are supplied or embraced by various different traditions.⁸⁰ Third, the implication of his use of ‘liberal’ is that reasonably just liberal peoples are actually to be found here in the real world.⁸¹ Fourth, it is assumed without argument that any broader account of basic human rights animated by values common to liberalism, such as the humanist, rationalist, and individualist sensibilities that often underlie human rights claims, automatically renders it a comprehensive doctrine.

Rawls seems to regard cosmopolitanism as overly individualistic and arrogantly disrespectful of cultural and national identities. Catherine Audard nicely captures the apparent way Rawls thinks of cosmopolitanism:

Cosmopolitanism is *universalistic* in the Kantian sense of unconditional respect for the human person as an end in itself. It claims that full human rights should apply to anyone anywhere in the world and neither historical contingencies nor natural circumstances should play any role in their application. It starts with the very ambitious claim that all persons are to have the equal liberal rights of citizens of a constitutional democracy. Cosmopolitanism takes seriously the priority of justice over state powers or

⁷⁸ Hinsch and Stepanians, “Human Rights as Moral Claim Rights,” 123.

⁷⁹ “It seems ... that by ‘liberal’ Rawls is still thinking above all of the Western democratic nations, and not, for example, of India or Bangladesh or South Africa, all of which have adopted liberal constitutions out of a history that is quite distinct ...” Nussbaum, “Women and theories of global justice: our need for new paradigms,” 152.

⁸⁰ See, for example, Joshua Cohen, “Minimalism About Human Rights: The Most We Can Hope For?” *The Journal of Political Philosophy*, Vol. 12, No. 2, 2004 and Amartya Sen, “Human Rights and Asian Values,” *The New Republic*, Vol. 217, No. 2-3, 1997.

⁸¹ Recall: “The Law of Peoples proceeds from the international political world as we see it, and concerns what the foreign policy of a reasonably just liberal people should be.” Rawls, *The Law of Peoples*, 83. One wonders what people most closely approximate Rawls’s vision of a just society. Numerous critics charge Rawls with unhelpfully conflating normative theory with practical guidance, confounding ideal theoretical justification for enforcement or implementation. See, for example, Nussbaum, “Beyond the social contract: capabilities and global justice,” 200. John Tasioulas, “From Utopia to Kazanistan: John Rawls and the Law of Peoples,” *Oxford Journal of Legal Studies*, Vol. 22, 2002 as discussed in Hinsch and Stepanians, “Human Rights as Moral Claim Rights,” 127. Macleod, “Rawls’s Narrow Doctrine of Human Rights,” 137.

prerogatives, economic welfare or religious traditions, and wants the full list of human rights, both political and economic, to be implemented.⁸²

To avoid the charge of parochialism – that human rights are merely the rights possessed by citizens of a liberal society – Rawls adopts an austere anti-cosmopolitan conception of human rights compatible with severe discrimination and oppression.⁸³ His account of human rights purposely lacks any reference to morally fundamental characteristics claimed to be shared by all human beings. Rawls contends that a political conception of justice addresses individuals as citizens, and claims only to be reasonable, while a comprehensive conception of justice (which by default appears to include cosmopolitanism) addresses individuals as whole moral persons, and claims to hold universally. Rawls writes, “[t]he list of human rights honored by both liberal and decent hierarchical regimes should be understood as universal rights in the following sense: they are intrinsic to the Law of Peoples and have a political (moral) effect whether or not they are supported locally.”⁸⁴ That is, what makes them universal is that they are accepted by reasonable and rational representatives of peoples as a minimal standard of decency and thus part of the minimal criteria of international political legitimacy in the Society of Peoples. As such, they do not rely upon any particular comprehensive conception of morality or the good.

In contrast, the universality of human rights according to rights-based cosmopolitan accounts is grounded upon certain common characteristics in human beings. Buchanan writes,

For example, James Nickel, Henry Shue, Amartya Sen, and Martha Nussbaum each ground human rights in common characteristics of human beings – more specifically, in a conception of basic human interests (or of central human capabilities in the cases of Sen and Nussbaum) understood as

⁸² Catherine Audard, “Cultural Imperialism and ‘Democratic Peace,’” in Martin and Reidy, eds. *Rawls’s Law of Peoples: A Realistic Utopia?*, 69.

⁸³ Buchanan, “Taking the Human out of Human Rights,” 151.

⁸⁴ Rawls, *The Law of Peoples*, 80.

those interests that must be realized (or those capabilities that an individual must have) if a human being is to have the opportunity to live a *decent* or *minimally* good life. It is also clear that all of these theories are intended to support longer lists of rights than Rawls's.⁸⁵

Such theorists, contra Rawls, do not defend human rights as part of a comprehensive conception of the best or most fully good life. Rather, they defend human rights on sufficientarian grounds, as minimal moral standards of a decent life, standards that justice demands. Once the human rights everyone is fundamentally entitled to as a matter of justice are met, the whole range of possible lives individuals might then embrace according to a plethora of comprehensive conceptions of the good remains open. As Buchanan notes, such rights-based cosmopolitan approaches to global justice remain agnostic about whether any more encompassing theory covers all moral subjects and are silent on most other subjects typically addressed by a comprehensive moral philosophy.⁸⁶ What matters is whether claims made to ground a list of human rights, according to human interests or capabilities, are well justified: “if they are, then it is unreasonable to deny them, and attempting to implement the human rights norms in question may not be parochial or intolerant in the sense of imposing an alien conception on those whose rejection of it is not unreasonable.”⁸⁷ It is close scrutiny of the content of rights-based cosmopolitan approaches and not the mere existence of such approaches that will determine whether such theories are parochial. Cosmopolitans can then focus on arguing that their claims about human interests or capabilities that justify their list of human rights cannot be reasonably rejected.⁸⁸ What, instead, may be parochial is, first, assuming basic human interests or capabilities are uniquely Western, rather than featuring more globally in ideas of human dignity and respect for persons. Second, it may be parochial

⁸⁵ Buchanan, “Taking the Human out of Human Rights,” 153.

⁸⁶ Ibid.

⁸⁷ Ibid. 155.

⁸⁸ Ibid.

to deny the universality of a broader list of human rights on the grounds that certain societies limit conceptions of individual good from recognizing basic human interests or capabilities as common to all human beings.⁸⁹ An ill-informed fear that a rights-based cosmopolitanism necessarily imposes one peoples' comprehensive view onto another forces Rawls to leave the basic rights of individuals demanded by justice unprotected, and sanctioning as part of a reasonably just order the comprehensive views of illiberal peoples.

Perhaps a more charitable interpretation will praise Rawls's account of international justice for comfortably assuming, without needing to philosophically defend, human rights as "firmly established elements of our moral common sense."⁹⁰ Human rights are employed by Rawls as a minimal standard of *decency*. They are not, however, regarded as a fundamental demand of justice that both accords and reflects individuals' free and equal moral standing. Rawls's account features an *instrumental* conception of human rights, where rights are advanced for the sake of peace and stability rather than for the sake of global justice itself. *The Law of Peoples* represents a worthwhile but flawed challenge to rights-based accounts of global justice.⁹¹

1.4 Global Justice and Human Rights

The claim that global justice must include respect for human rights *per se* is not particularly controversial. However, claims about *which* rights, the *place of* rights within a

⁸⁹ Nussbaum, "Women and theories of global justice: our need for new paradigms," 154. Buchanan, "Taking the Human out of Human Rights," 159.

⁹⁰ Hinsch and Stepanians, "Human Rights as Moral Claim Rights," 117-118.

⁹¹ "As Beitz points out, it is the narrow understanding of the role of human rights – namely, to regulate and to justify external interference and intervention – that explains the minimalism of the Rawlsian human rights list: '[A] less restricted understanding of the political role of human rights would suggest a different view of their justification and, most likely, a more expansive interpretation of their content.'" Quoting Beitz in Hinsch and Stepanians, "Human Rights as Moral Claim Rights," 127. As Catherine Audard concludes in her "Cultural Imperialism and 'Democratic Peace': 'I suggest that he should have insisted that it is only in clearly limiting the scope of the Law of Peoples to political ambitions, to securing peace and not to attaining a just world order, that both cosmopolitans' and cultural relativists' claims can be finally rejected. The normative weight of the whole enterprise has not been clearly defined. Is it peace or is it justice?'" 71.

theory or approach to global justice, and *reasons why* we have duties to respect rights are often more contentious. For my purposes rights-based theories of global justice are synonymous with rights-based approaches to the morality of a basic global minimum. Such theories stake out a number of specific claims concerning human rights. For example, they defend the basic minimum demanded by global justice *in terms of* human rights. They defend a *set or list* of human rights to be included in the basic global minimum. They also situate human rights within the demands of global justice. Some rights-based accounts contend that human rights exhaust the demands of global justice. Some others argue that human rights are the primary or most urgent but not the only demand of global justice. Still others argue that human rights feature equally, derivatively, or as lower priority than other pressing demands. In this manner rights-based theories of global justice address the *if* and *why* question concerning human rights, *which* human rights, and *where* human rights fit within the demands of global justice. A common theme among contemporary rights-based theories is that global justice demands that every person be well positioned to enjoy the prospects for a decent life. Explaining and realizing this demand is modelled upon universal respect for and promotion of human rights.⁹² Focus on whether people meet some threshold condition for a decent life, perhaps in the context of exploring our obligations to eliminate global poverty, is expressed in terms of sufficiency: “On sufficientarian accounts of global distributive justice obligations, what we owe others is informed by what is sufficient for a decent life. Different theorists elaborate on this theme by invoking a set of basic needs, capabilities, or basic human rights.”⁹³ Focus on sufficiency is juxtaposed with a focus on equality/egalitarianism

⁹² Brock, “Equality, sufficiency, and global justice,” 341.

⁹³ *Ibid.* 342.

aimed at eliminating global inequalities irrespective of whether individuals surpass the basic minimum.⁹⁴

In the following section I tease out some of the common claims, tensions, and challenges in contemporary rights-based approaches by surveying several of the leading perspectives. Instead of unpacking in detail one or more of these theories I develop more of a composite account aimed at drawing out the salient features with regard to their content and central claims with respect to justice.⁹⁵ In the next section I outline and assess the capabilities approach as a particularly compelling *species of* rights-based approach to global justice. I am interested in the commonalities and mutually reinforcing aspects of the valuable members of the team of concepts central to rights-based sufficientarian accounts, specifically, capabilities and human rights. Focus on the finer conceptual distinctions or competing principled commitments between fundamental concepts, while of central importance to global justice theory, remains outside the scope of my present inquiry.⁹⁶

Theories of rights focus on the most important questions concerning their application, content, justification, meaning, and relation to other values. There is, to be sure, an embarrassment of riches when it comes to the existence of competing rights theories. A rights-based approach to justice regards all of the world's citizens as equal in their status as rights bearers. Conceptually or philosophically, human rights feature the twin commitments to universality and to a form of equality.⁹⁷ The universality of human rights means, at the

⁹⁴ Ibid.

⁹⁵ For the purposes of my critical survey, and to avoid redundancy and overly detailed exposition, this requires selective interpretation and analysis. The rights-based accounts I have considered include those of Brian Orend, Henry Shue, James Nickel, Charles Jones, James Griffin, David Miller, and Thomas Pogge.

⁹⁶ The team of concepts I have in mind includes agency, autonomy, dignity, equality, freedoms, interests, well-being or welfare, needs, capabilities, and rights.

⁹⁷ "To be sure, the analysis above assumes the universality of justice as the default and so assumes that any deviation from this ideal needs explanation. Perhaps justice is necessarily asymmetrical in the way Rawls describes, and thus the burden of proof is on the cosmopolitans to defend the symmetry they assume, and one

first level of approximation, that they apply to everyone everywhere simply in virtue of one's membership in the human species, simply in virtue of one's humanity. The form of equality human rights claims entail means that we all share a basic level of equal moral worth. These twin commitments underlying the concept of human rights demand philosophical justification. Indeed, a human rights claim, as Brian Orend suggests, is *a reason to treat persons in certain ways* rather than being a particular property of persons.⁹⁸ In other words, human rights do not describe our nature. Instead, they prescribe our behaviour. In Ronald Dworkin's view, such important moral reasons for treating persons in certain ways make rights trumps, powerful and weighty claims that take priority. Orend concludes:

A human right is a high-priority claim, or authoritative entitlement, justified by sufficient reasons, to a set of objects that are owed to each human person as a matter of minimally decent treatment. Such objects include vitally needed material goods, personal freedoms, and secure protections. In general, the objects of human rights are those fundamental benefits that every human being can reasonably claim from other people, and from social institutions, as a matter of justice.⁹⁹

The sense of *claim* of which a human right is a high-priority claim, is not the narrow one of actually uttering or stating a claim, but the broader one of being entitled to utter such a claim. A rights-holder does not have to verbalize his or her claim. Even if a rights-holder does not state her claim, she is entitled to make it in virtue of her humanity and to expect that it be fulfilled. While such claims and entitlements may be codified in a legal system, human rights are distinctively moral rights that exist within social moralities or within what Orend calls a critical, or justified, morality.¹⁰⁰ The point here is that it is primarily the moral reasons, as opposed to the legal facts, that instantiate human rights.

might suggest that there is no non-question-begging way of affirming the universality of justice." Tan, "The Problem of Decent Peoples," 91.

⁹⁸ Brian Orend, *Human Rights: Concept and Context* (Peterborough: Broadview Press, 2002), 18. The following conceptual account is largely based on Orend's in-depth yet clear and accessible philosophy of human rights.

⁹⁹ Ibid. 34.

¹⁰⁰ Ibid. 24.

A right is a justified claim *to* something, whereas the object of the right, what is sometimes called the right's substance, is that very something being claimed. Thus, what makes a right real is that the substance of the right, the something claimed that the rights-holder is entitled to possess and enjoy, is realized for the rights-holder, *not* whether the right is written into a legal code or endorsed by a majority of people. Sadly, plenty of rights exist in law and in declarations and plenty of rights are supported by a majority of people in various cultures that nonetheless remain unrealized.¹⁰¹

The question 'who holds human rights?' is a difficult one once we reflect upon the complicated challenge of working out which humans we mean. Do criminals count? Does a fetus count? Infants? Future generations? If we allow for certain distinctions and discriminations do we not run the risk of adopting the same exclusionary thinking we condemn rights-violators for? If only normal, well-functioning, adult human beings who do not violate the human rights of others qualify as genuine holders of human rights then the two bedrock beliefs of universality and moral equality thought to underlie human rights appear at risk: "If human rights are not really shared by all human beings, then do we lose the global reach and cosmopolitan concern – the 'one world' quality – that has long seemed part of the idea's real promise?"¹⁰² Some think that one's perspective on human rights has little, if any, necessary connection to whether one believes that other species, or things, also have rights. While I do not endeavour to settle the question of who has rights, my view is that any conceptual or philosophical defence of human rights bears a direct connection to who or what might qualify as a rights-holder. Those philosophers most inclined to exclude nonhuman animals from the category of rights-holders confirm rather than deny this view, which explains why they offer thoughtful and well-developed arguments for why they think

¹⁰¹ Ibid. 28-30.

¹⁰² Ibid. 39.

the category of rights-holder should be restricted to humans. My own view, which I defend at some length elsewhere, is that a kind of moral inconsistency follows from the behaviour of the human rights activist who is indifferent to the severe exploitation of animals, the eradication of species, or to factory farming practices. My argument, in brief, is that a viable theory of justice, domestic or global, must take account of nonhuman animals since they are potential rights-holders capable of experiencing gross injustices. Questions concerning the treatment of nonhuman animals are demanding enough to qualify as matters of justice, not just matters that require us to express our compassion and humanity. The tendency of rights-based approaches, and global justice theory in general, to focus primarily on *humans* strikes me as largely practical and habitual, motivated by a laudable desire to tackle gross human rights violations.

This section is about teasing out some of the common claims, tensions, and challenges in contemporary rights-based approaches to global justice by surveying a number of theories. Several of these theories claim that part of what makes one a rights-holder is having fundamental interests in, or vital needs for, living a minimally good life. One has fundamental interests in, or vital needs for, all of the things required to function in a way typical of the kind of creature one is (the species norm). An individual is said to be unjustly harmed if she is deprived of or lacking in these basic things, where no acceptable substitutes exist and they are an integral part of what makes a life minimally valuable.

Simply invoking the language of human rights is a globally recognized response to injustice. While there is little consensus on the best, correct or final justification of human rights, as a moral idea and set of moral norms human rights do not suffer from a lack of justification. Rather, human rights suffer from the opposite problem of having numerous competing accounts, which, some argue, is one of the concept's great strengths: "a sign – the

best possible sign in modern circumstances – that people *take rights seriously*.”¹⁰³ Prominent philosophical justifications that garner widespread support, and warrant more consideration than I can offer here, are all fundamentally linked by their regard for the individual human subject.¹⁰⁴ Human rights are often said to be grounded in the basic *human dignity* of each and every person.¹⁰⁵ Some accounts regard human rights as direct products of our *reason*, arguing that we are fundamentally entitled to well-being and freedom in order to engage in purposive action. Accordingly, reason itself forms the basis for a fuller doctrine of human rights because it demands as a matter of logical consistency that we possess and enjoy rights that secure our well-being and freedom.¹⁰⁶ A related view is that our individual lives ought to be under our own control, that life ought to be self-directed, self-authored, or self-legislated. On this view rights are derived from *autonomy* and choice as fundamental ingredients in any valuable life.¹⁰⁷ Another influential line of justification, grounded on *equality*, claims that our equal moral worth is best respected when we are accordingly treated as equals morally, socially, and politically.¹⁰⁸ Philosophers continue to develop compelling arguments and scientists continue to amass compelling empirical evidence that certain basic *needs*, especially around security and subsistence, exist universally among humans. Requirements to fulfill such basic needs directly link to the concept of rights.¹⁰⁹ Sometimes defined as the general goods required to live a life of dignity, *capabilities* concern what individuals can do and be. Working out what humans ought to be able to do and be to live a life of dignity, especially

¹⁰³ Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 2001), 311.

¹⁰⁴ The following very brief review of contemporary philosophical justifications for human rights is based on Anthony J. Langlois, “Normative and Theoretical Foundations of Human Rights,” in Michael Goodhart, ed. *Human Rights: Politics and Practice* (Oxford: Oxford University Press, 2009), 18-19.

¹⁰⁵ Michael J. Perry, *The Idea of Human Rights: Four Inquiries* (Oxford: Oxford University Press, 1998).

¹⁰⁶ Alan Gewirth, *The Community of Rights* (Chicago: University of Chicago Press, 1996).

¹⁰⁷ Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986).

¹⁰⁸ Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977).

¹⁰⁹ Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy 2nd ed.* (Princeton: Princeton University Press, 1996).

when deployed as a corrective against the state-centric distributive paradigm to account for matters of gender justice, provides a more pluralistic justification for human rights.¹¹⁰

Finally, the minimalist approach to rights aimed at international *consensus* avoids a specific grounding or foundation and instead justifies human rights by focusing on areas of agreement among diverse people, offering such agreement as the basis for legitimating rights.¹¹¹

Like so many values claims, justifications of human rights often rest on a conception of human nature in combination with some view about the demands and requirements of morality and justice. Importantly, pursuing the best chain of reasoning need not commit us to the problematic assumption that only one true justification, if any, exists. Perhaps several good reasons exist for providing compelling support for the existence and force of human rights. Even if reason is not always the most effective way of changing peoples' beliefs and behaviours, reason is the best instrument we have for grounding value claims and moral principles. Neither the existence of effectively codified rights nor the existence of actually practiced moral custom provides the kind of rigorous justification that reason demands. Justifications focused on the underlying basis of rights are required.

A proper understanding of human rights, claims Jay Drydyk, sees them as justifiable from within all cultures.¹¹² Drydyk juxtaposes this proper understanding with more limited conceptions of human rights. *Triumphalist* conceptions characterize human rights as the

¹¹⁰ Martha C. Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge: Cambridge University Press, 2000). "... any real society is a caregiving and care-receiving society, and must therefore discover ways of coping with these facts of human neediness and dependency that are compatible with the self-respect of the recipients and do not exploit the caregivers. This, as I have said, is a central issue for gender justice." Martha C. Nussbaum, "Capabilities as Fundamental Entitlements: Sen and Social Justice," *Feminist Economics*, Vol. 9, No. 2-3, 2003, 51.

¹¹¹ Rawls, *A Theory of Justice* and *The Law of Peoples*.

¹¹² Jay Drydyk, "Globalization and Human Rights," in Christine M. Koggel, ed. *Moral Issues in Global Perspective* (Peterborough, ON: Broadview, 2006), 73. The following brief account of current conceptions of human rights is based on Drydyk's survey, which he employs in defence of his view that: "it is not human rights that are Eurocentric, but only certain conceptions of human rights." *Ibid.*

evident achievement of Western cultures. *Rejectionist* conceptions agree that human rights are synonymous with Western cultures and then deny that human rights have value since they might be consistent with a corrupt and ill-fated social and political order. *Assimilationists* deny that human rights conceptions and beliefs are exclusively Western and instead emphasize the need to find grounds for accepting human rights in all cultures. *Revisionists* find justifications for human rights within non-Western cultures by revisiting and analysing historical traditions and foundational texts. Finally, *transformationalists* argue that concepts of human rights, however defective, are employed in all cultural traditions and that existing features of cross-cultural dialogue challenge, forbid, and continually reform such defective conceptions. As Drydyk argues, "... a consistent and complete knowledge of human rights can emerge cross-culturally, if the dialogue is not abused and if the relevant moral and political experience is let into the dialogue, from all quarters."¹¹³

Joshua Cohen picks up on this *transformationalist* conception of human rights as justifiable within all cultures. He stresses the distinction between *hope*, the best kind of rights-based approach to justice we can hope for, and *expectation*, the most we can expect assuming a narrow human rights minimalism.¹¹⁴ Here it is important to distinguish between the case for certain universal but minimal rights required of justice, versus the case for the specific content of these minimal requirements. In other words, distinguish between the *role* of human rights in global justice, what Cohen refers to as *justificatory minimalism*, and the *content* or objects of human rights, what Cohen calls *substantive minimalism*. According to *justificatory minimalism* a conception of human rights should be presented independently of its philosophical or religious justification, as we saw, for instance, in Rawls. Cohen contends that the "point is not simply to avoid a fight where none is necessary; the point is to embrace

¹¹³ Ibid. 74.

¹¹⁴ Cohen, "Minimalism About Human Rights: The Most We Can Hope For?," 191.

the value of toleration.”¹¹⁵ Accordingly, human rights serve a practical global role establishing a broad terrain of agreement about reasonable global norms. Global public reason provides the space for different ethical traditions to find common ground.¹¹⁶ We do not ‘find’ conceptions of human rights in different ethical traditions, rather, “there are ways of elaborating an ethical outlook that is nonliberal in its conception of the person and political society, but that is also consistent with a reasonable conception of standards to which political societies can reasonably be held. Similar elaborations can be (and have been) developed for other ethical traditions.”¹¹⁷ A *transformationalist* conception of human rights embraces the value of toleration, according to Cohen, by acknowledging, trusting, and reasonably hoping that different ethical traditions have their own resources to support rights-based global justice.¹¹⁸

A *transformationalist* understanding of human rights should not be premised upon a static account of cultures, peoples, nation-states, or ethical traditions. Abdullahi Ahmed An-Na’im says:

If international human rights standards are to be implemented in a manner consistent with their own rationale, the people (who are to implement these standards) must perceive the concept of human rights and its content as their own. To be committed to carrying out human rights standards, people must hold these standards as emanating from their worldview and values.¹¹⁹

Static accounts of cultures, peoples, nation-states, or ethical traditions are often unrealistic, suggesting sameness, agreement, and closure where there is difference, dispute, and openness.¹²⁰ The values that underpin human rights and the best justificatory reasons available for their defence must be embraced by those who are to adopt and implement

¹¹⁵ Ibid. 194.

¹¹⁶ Ibid. 201. Cohen illustrates this by showing how plausible interpretations of the fundamentals of Confucianism and Islam support a conception of human rights.

¹¹⁷ Ibid. 207.

¹¹⁸ Ibid. 213.

¹¹⁹ Quoting An-Na’im in Ibid.

¹²⁰ Nussbaum, *Women and Human Development: The Capabilities Approach*, 49.

them. By no means does this close off *substantive minimalism* from providing rigorous competing accounts of the preferred substance, objects, or contents of human rights. Cultural ideas do not simply clash. They travel and transform, are shared and explored. They remain no one's unique property or heritage as if fixed in time and place. In this respect there is no good reason why local, traditional, or historical ideas must reign when they are renewed, displaced, or transformed by better ones. General norms of toleration and respect need not push in the direction of accepting the less than sufficiently just practices of those cultures simplistically characterized as fixed and illiberal. Respect and toleration also push, importantly, to limit the intolerance of unjust cultural practices wherever they remain.¹²¹ The interaction of cultures requires rather than undermines the search for universal values, compelling us to ask which cultural values enrich and which hinder dignity. As soon as we begin to criticize externally imposed values in defence of diversity, the value of diversity itself directs us toward a transcultural framework of assessment, approximating and supporting a general search for common ground. By regarding diversity as a good to be protected the argument from diversity invites us to question values in relation to this good, suggesting some are worth preserving while others are not, implying at least a general universal standard from which to assess cultural values.¹²² Imposing 'liberal' or 'Western' values on others is an evil to be avoided since it undermines respect for people's capacity to determine their own moral course, treating them as inferior rather than free agents. It is also, in important respects, a chimera, an oversimplification of something otherwise fluid and dynamic as static, usually couched in state-centric 'us' and 'them' terms. The argument against paternalism, that cultural values should not be paternalistically imposed on others, appeals to an anti-authoritarian sentiment. This anti-paternalism is embraced by accounts of

¹²¹ Ibid.

¹²² Ibid. 50-51.

human rights that build in the protection of choice by respecting people's own capacities to choose a life.¹²³

Henry Shue's account of human rights, which is among the earliest and most influential in the global justice literature, is inspired by H. L. A. Hart's inference that we at least have the right to liberty:

1. Everyone has the right to something.
2. Some other things are necessary for enjoying the first thing as a right, whatever the first thing is.
3. Therefore, everyone also has rights to the other things that are necessary for enjoying the first as a right.¹²⁴

Based on this argument Shue stipulates that security, subsistence and liberty are the three necessary conditions, what he calls "the basic rights," for any subsequent exercise of special rights. Philosophical accounts like this offer a set of objects (such as Shue's list of basic rights) that are regarded as necessary for living a purposeful and meaningful life. Notably, these accounts are at odds with conventional Western liberalism which downplays or ignores severe economic needs, though they are familiar enough in societies that are often pejoratively labelled 'traditional.' Such justifications observe that all human beings have vital needs, fundamental interests, and a minimal value. Reason demands *some* list or set of human rights necessary to realize and respect our universal needs, interests, and value, and *some* account of the necessary conditions of, not just survival, but a minimally good, decent, dignified life.¹²⁵ Rights-based sufficientarian accounts concern the morality of the depths, social guarantees in defence of basic needs below which no one is allowed to sink. If there are any rights there must at least be a basic right to physical security since physical security is

¹²³ Ibid. 51-52.

¹²⁴ Henry Shue, "Chapters 1-2 of *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*," in Pogge and Moellendorf, eds. *Global Justice: Seminal Essays*, 100.

¹²⁵ Orend, *Human Rights: Concept and Context*, 94-95.

a precondition for enjoying other rights.¹²⁶ Shue also argues that a right to subsistence or minimal economic security, including clean air and water, adequate food and shelter, and minimal preventive public health care, is basic since it “is needed for a decent chance at a reasonably healthy and active life of more or less normal length, barring tragic interventions.”¹²⁷ As for the moral duties basic rights give rise to, Shue says:

That a right involves a rationally justified demand for social guarantees against standard threats means, in effect, that the relevant other people have a duty to create, if they do not exist, or, if they do, to preserve effective institutions for the enjoyment of what people have rights to enjoy.¹²⁸

What particular institutions are required and how they will look and function, however, cannot be deduced merely from such a theory, which speaks to the *sufficientarian* rather than the *comprehensive* nature of such approaches to justice. As a sufficient standard for justice rights-based approaches aimed at securing minimally good, decent, dignified lives leave quite open the specific institutional arrangements, cultural traditions, and comprehensive conceptions of the good that individuals might favour and adopt in a political community.¹²⁹ According to Shue rights are basic when their enjoyment is essential to the enjoyment of all other rights, and such basic rights are demanded as a matter of justice, as everyone’s minimum reasonable demand upon the rest of humanity.¹³⁰

Shue maintains that neither physical security nor subsistence neatly map onto the negative versus positive rights distinction. Historically, civil and political rights were

¹²⁶ “So anyone who is entitled to anything as a right must be entitled to physical security as a basic right so that threats to his or her physical security cannot be used to thwart the enjoyment of the other right. This argument has two critical premises. The first is that everyone is entitled to enjoy something as a right. The second, which further explains the first, is that everyone is entitled to the removal of the most serious and general conditions that would prevent or severely interfere with the exercise of whatever rights the person has.” Shue, “Chapters 1-2 of *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*,” 92.

¹²⁷ Ibid. 93.

¹²⁸ Ibid. 88.

¹²⁹ “The point here is only that the institutionalization of subsistence rights is in no way tied to some utopian future “advanced” society. On the contrary, the real question is whether modern nations can be as humane as, in *this* regard, many traditional villages are. If we manage, we may to a considerable extent merely have restored something of value that has for some time been lost in our theory and our practice.” Ibid. 98.

¹³⁰ Ibid. 89-90.

associated with negative rights, rights that are realized and respected by inaction or non-interference, while social and economic rights were associated with positive rights, rights that require some sort of proactive effort from individuals and institutions. Establishing a legal system replete with police, courts, legislation, and so on to respect civil and political rights requires much more positive action than simply refraining from interference. Likewise, sometimes social and economic rights remain unrealized because there is disempowerment and undue interference. The distinction between negative and positive rights raises the question: what duties can we reasonably require of people and institutions? Part of the challenge of answering this question involves determining what rights we think everyone is entitled to as a matter of minimally decent treatment. On its own, a basic right indicates very little about the requisite actions and institutions required to secure it. It is remarkable how misguided such dichotomous assumptions about negative versus positive rights and their correlative duties start to appear when we eschew certain state-centric perspectives. Protecting so-called negative rights requires positive measures while fulfilling so-called positive rights may require opportunities for self-support, perhaps by removing disempowering obstacles.¹³¹ In short, arguments defending negative rights as cheaper and easier while opposing positive rights as overly expensive and demanding are empirically dubious. Rather, for every basic right Shue argues the following three duties correlate: I. Duties to *avoid* depriving, II. Duties to *protect* from deprivation, and III. Duties to *aid* the deprived, which he fleshes out in further detail in his work. On this matter Shue again aligns

¹³¹ “For example, at the very least the protection of rights to physical security necessitates police forces; criminal courts; penitentiaries; schools for training police, lawyers, and guards; and taxes to support an enormous system for the prevention, detection, and punishment of violations of personal security.” Ibid. 106. “All that is sometimes necessary is to protect the persons whose subsistence is threatened from the individuals and institutions that will otherwise intentionally or unintentionally harm them. A demand for the fulfillment of rights to subsistence may involve not a demand to be provided with grants of commodities but merely a demand to be provided some opportunity for supporting oneself. The request is not to be supported but to be allowed to be self-supporting on the basis of one’s own hard work.” Ibid. 108.

his view *in opposition* to conventional Western liberalism, arguing that the *pro* negative rights but *anti* positive rights perspective has, until recently, been ubiquitous and largely unquestioned.¹³²

The influence of Henry Shue's rights-based account is significant, and often explicit. Importantly, echoing Shue, James Nickel insists that as minimum standards demanded by justice, human rights do not assume a particular existing institutional order or dictate an ideal future one. Rather, they place important moral demands on the social and political world without necessitating one or other comprehensive doctrine. Nickel argues,

Human rights do not require everything that might contribute to making a life good or excellent. Other concepts are available for talking about the requirements of excellence and for dealing with issues that human rights do not cover. The concept of human rights does not need to encompass every important dimension of social and political criticism.¹³³

Nickel provides four reasons in defence of a sufficientarian rights-based approach to global justice. First, by limiting the account of human rights to address very severe problems we ensure their fundamental status as high priority norms while affirming their universal appeal. Second, we leave ample room for cultural variability and democratic decision-making: “[g]lobalization is already producing excessive uniformity around the world. Human rights should not contribute to such uniformity except in a few important areas where only one

¹³² Ibid. 120. Of relevance to Shue's thinly veiled disgust with the pernicious tendency to unflinchingly reproduce the standard negative versus positive rights dichotomy is Jonathan Gorman's reminder that, “[p]hilosophy typically seeks, and seeks to question, the *presuppositions* of our understanding.” Jonathan Gorman, *Rights and Reason: An Introduction to Philosophy of Rights* (Montreal: McGill-Queen's University Press, 2003), 6.

¹³³ Nickel, *Making Sense of Human Rights, Second Edition*, 186. “Human rights aim at avoiding the terrible rather than achieving the best. Their modality is “must do” rather than “would be good to do.” Henry Shue suggests that human rights specify the “lower limits in tolerable human conduct” rather than “great aspirations and exalted ideals.” As minimal standards they leave most legal and policy matters open to democratic decision-making at the national and local levels. Minimal standards can accommodate a great deal of cultural and institutional variation. Human rights block common threats to a decent or minimally good life for human beings. There are many such threats, however, and we need several dozen specific rights to address them.” Ibid. 36.

way is the acceptable way.”¹³⁴ Third, as minimal standards they express tolerance for and consistency with independence and self-determination, at the individual and collective level. Finally, as minimal standards, human rights are feasible as practical demands on individual and official behaviour, legislation, and policy-making.

Charles Jones notes that, as perhaps the most popular form of cosmopolitanism, “[t]he cosmopolitan character of the rights approach should be obvious, for ‘the whole thrust of human rights theories is that the boundaries of nations are not the boundaries of moral concern.’”¹³⁵ Jones acknowledges a debt to Shue by aiming to assess the prospects for a rights-based theory of global justice by focusing on, and defending, the right to subsistence. He regards human rights as protections for the basic interests of individuals. A minimal set of shared interests are sufficiently important to justify corresponding duties to respect, secure, and promote such interests. Human rights connect basic interests to the duties of individuals and collectivities.¹³⁶ A right to subsistence is then a right to the means to a minimally adequate existence, since it is in everyone’s basic or vital human interests to have what is necessary, such as certain resources and opportunities, to lead a minimally decent life. Jones argues, “[r]ights as we are conceiving them here are grounds for imposing duties, but rights themselves are justified by appealing to the interests individuals have in the contents of those rights.”¹³⁷ It follows that, from a moral perspective, highly important human interests, such as interests in adequate shelter, nutrition, care, and the like that concern our primal necessities and vulnerabilities, push in the direction of supporting a basic right for their protection. Provided we establish reasonable priorities regarding our most important basic interests, we can then establish a more extensive working list of justified

¹³⁴ Ibid. 37.

¹³⁵ Jones, *Global Justice: Defending Cosmopolitanism*, 51.

¹³⁶ Ibid. 57.

¹³⁷ Ibid. 61.

human rights by identifying the substantive content the right is claimed for, the duties they give rise to, and the appropriate agents who bear such duties.¹³⁸

James Griffin's philosophy of human rights resonates with interest theories like Jones's where rights have the purpose of promoting the well-being of the rightholder. Griffin grounds human rights directly in what he defends as the substantive values of personhood, understood as what is needed for human *status* as opposed, for example, to what promotes human *good* or *flourishing*. As with previous philosophers he regards human rights as protections, and, as with previous accounts, he regards the things they protect as uniquely characteristic of a human life, especially important human interests, and that which is part of a minimally good, decent, dignified life.¹³⁹ Griffin situates his own account within the human rights tradition that sees rights as grounded in natural or objective facts about human beings. Basic needs, interests or capabilities that ground human rights are evaluatively rich features of the world, whose realization or lack thereof are goings-on in the world.¹⁴⁰ We protect our basic needs, important interests, or central capabilities as fundamental entitlements because of both the independent value of the content, objects, or substance of rights and the valuable outcome of a distinctly dignified life that their

¹³⁸ Ibid. 62, 65-67.

¹³⁹ "Human rights can then be seen as protections of our human standing or, as I shall put it, our personhood. And one can break down the notion of personhood into clearer components by breaking down the notion of agency. To be an agent, in the fullest sense of which we are capable, one must (first) choose one's own path through life – that is, not be dominated or controlled by someone or something else (call it 'autonomy'). And (second) one's choice must be real; one must have at least a certain minimum education and information. And having chosen, one must then be able to act; that is, one must have at least the minimum provision of resources and capabilities that it takes (call all of this 'minimum provision'). And none of this is any good if someone then blocks one; so (third) others must also not forcibly stop one from pursuing what one sees as a worthwhile life (call this 'liberty'). Because we attach such high value to our individual personhood, we see its domain of exercise as privileged and protected." Griffin, *On Human Rights*, 33. "I single out functioning human agents via notions such as their autonomy and liberty, and I choose those features precisely because they are especially important human interests. It is only because they are especially important interests that rights can be derived from them; rights are strong protections, and so require something especially valuable to attract protection. So my notions of 'human nature' and 'human agent' are already well within the normative circle, and there is no obvious fallacy involved in deriving rights from notions as evaluatively rich as they are." Ibid. 35.

¹⁴⁰ Ibid. 35-36.

enjoyment gives rise to.¹⁴¹ Griffin continues that when it comes to the specific content, objects, or substance of human rights we must also ground them in ‘practicalities’ so they can be an effective guide to behaviour. They must be safely kept from overreaching their urgent sufficientarian character. Human rights must also remain reasonably in check with human nature, society, and the political order. As moral standards human rights occupy but by no means exhaust the domain of justice: “There are forms of distributive justice, for all their importance, that do not bear on our personhood – so long, that is, as the human right to minimum provision is respected.”¹⁴² This marks the important distinction in the global justice literature between sufficientarian and egalitarian concerns.

Without theoretical supplementation rights-based approaches remain squarely sufficientarian, aimed at securing minimum provisions demanded by justice without, for example, also demanding global distributions of income, wealth, resources, opportunities, life-chances, and the like according to egalitarian commitments. This issue is not about whether equality is an acceptable and fundamental value but rather about how best to interpret and apply it according to the demands of justice.¹⁴³ David Miller weighs into this debate by defending a rights-based sufficientarian account while strongly criticizing global egalitarianism. Although the bare facts of global inequality – that what people are, what they have, and what they can do vary considerably – are not wrong *per se*, such vast global inequalities in people’s life chances seem so unfair, so unjustified, and so gross that they press us for an urgent response.¹⁴⁴ The continued existence of such inequality is a profound

¹⁴¹ Ibid. 36.

¹⁴² Ibid. 41.

¹⁴³ Thus, as Will Kymlicka suggests, “the idea of an egalitarian plateau for political argument is potentially better able to accommodate both the diversity and unity of contemporary political philosophy.” Will Kymlicka, *Contemporary Political Philosophy: An Introduction, Second Edition* (Oxford: Oxford University Press, 2002), 4-5.

¹⁴⁴ As Rawls says: “The natural distribution is neither just nor unjust; nor is it unjust that persons are born into society at some particular position. These are simply natural facts. What is just and unjust is the way that institutions deal with these facts.” *A Theory of Justice*, 102.

global injustice and principles of global justice are required to address such an unacceptable condition. The sheer existence of such global inequalities is a moral travesty, a lamentable wrongdoing of huge proportion. While such a response is understandable and perhaps even morally praiseworthy, Miller worries it overlooks important points of principle integral to the pursuit of global justice. According to Miller the case for making global equality a matter of justice rests on the ethical grounds that exist for challenging global inequalities. He argues that these grounds include infringements of people's basic rights or exploitative economic processes. For Miller, empowerment and responsibility, not equality of resources, are the central issues that should concern us.

According to Miller it is not egalitarian principles that underlie our judgment that the most egregious forms of inequality in life chances represent a gross injustice. The injustice of global inequality, he argues, is independent from the claim that justice demands equality. That is, nothing about this injustice shows that justice demands global egalitarianism. Rather, the wrongness, the injustice, the grossness of global inequality stems from a concern about absolute poverty or deprivation which is best addressed by defending universal human rights.¹⁴⁵ Miller's account of human rights as setting the global minimum arises from considering what responsibilities we have to aid the world's poor. He claims that we owe respect for basic human rights and that anyone, individual or group, able to protect such rights bears responsibility, at least in principle, for doing so. Like other defenders of human rights, Miller highlights the sense of moral urgency rights language exhibits and, as with other rights-based approaches, his account involves a comparatively short subset of familiar international human rights – *basic* human rights – as the most morally compelling.¹⁴⁶

¹⁴⁵ David Miller, "Against Global Egalitarianism," *The Journal of Ethics*, Vol. 9 (2005), 64.

¹⁴⁶ He indicates that, "[h]ere I follow, among others, Henry Shue for whom 'basic rights ... are everyone's minimum reasonable demands upon the rest of humanity.'" Miller, *National Responsibility and Global Justice*, 164

When rights establish minimum standards separating tolerable from intolerable institutional arrangements the focus is on enhancing justice and removing injustice. However, when the purpose of rights is characterized as defining conditions of political legitimacy, the focus changes from moving toward more just conditions to qualifying *institutions* as just or legitimate. I am not opposed in principle to the idea of a just institution functioning in an otherwise unjust society. I also agree that human rights are political aspirations, standards that inform and hold to account political institutions. However, when the institution in question concerns the political legitimacy of nation-states, the most powerful institutions ever known, institutions that are sometimes used interchangeably with the societies they regulate, institutions that claim a monopoly of force, I think it is not the place of rights to render such institutions officially just or legitimate. Considerations of justice ought to inform the criteria for and meaning of legitimate institutions, but rights should not be used as static placeholders fixing justice or legitimacy as officially achieved. I share Rawls's view that justice represents a particular subset of moral considerations. Justice is not the full range of morality. In particular, I regard justice as a key subset of a particularly urgent kind concerning the sphere of basic entitlements. Rights-based accounts of justice do not exhaust what justice requires. They are proposed as minimal demands or necessary conditions of social and global justice. States should be for rights but rights are not for states. As Jacques Maritain put it, in his version of the cosmopolitan insistence that obligations of justice precede rather than stem from political institutions:

The State is not the supreme incarnation of the Idea, as Hegel believed; the State is not a kind of collective superman; the State is but an agency entitled

footnote 2. Miller indicates that Shue's defence of basic rights is the best account known to him. David Miller, "Justice and Global Inequality," in Andrew Hurrell and Ngaire Woods, eds. *Inequality, Globalization, and World Politics* (Oxford: Oxford University Press, 1999), 319-320 endnote 10. Miller's purpose "is to identify a list of rights that can specify a global minimum that people everywhere are entitled to as a matter of justice, and that therefore may impose obligations, on rich nations especially." Miller, *National Responsibility and Global Justice*, 166.

to use power and coercion, and made up of experts or specialists in public order and welfare, an instrument in the service of man [sic]. Putting man at the service of that instrument is political perversion. The human person as an individual is for the body politic and the body politic is for the human person as a person. But man is by no means for the State. The State is for man.¹⁴⁷

Justice admits of varying degrees along numerous continuums. Just societies and global justice are goals and pursuits, replete with accomplishments worth celebrating. While statist employ rights to claim and celebrate the legitimacy of nation-states, I think the rest of us should focus on rights-based approaches aimed at enhancing justice and removing injustice. This means not presupposing nation-states as the only lens through which to view the politics of human rights. It also means taking care to avoid statism as a comprehensive doctrine.¹⁴⁸

For this reason Miller's otherwise compelling account of human rights as setting the global minimum is in tension with his liberal nationalism. Duties to respect human rights, and other duties of justice, run up against and press upon all social and political orders. The nation-state cannot be rendered neutral, natural, and intrinsically valuable, even if we work with it, within it, or through it in pursuit of justice. Otherwise commitments to freedom, justice, and human rights are peculiarly inverted and limited to being the results of, as opposed to measures of and challenges against, political institutions. This tension is worth pointing out here since the purpose of our rights-based account, what we want our theory of

¹⁴⁷ Jacques Maritain, *Man and the State* (Chicago: The University of Chicago Press, 1951), 13. To be clear, Miller means to use society and the state interchangeable so he is not guilty of equivocation: "Obviously what we need to get clear about here is what is meant by 'a society' and which of its features are supposed to be important from the point of view of justice. The answer I think is that by 'societies' we mean 'nation-states', using 'state' here in a somewhat broad, quasi-Hegelian sense to include not only formal political institutions but also the informal associations that make up civil society. Social justice is justice within nation-states so understood, and this is not accidental, as I have argued elsewhere." Miller, *Justice for Earthlings: Essays in Political Philosophy*, 170.

¹⁴⁸ I have in mind approaches to justice (social and global) that, unlike state-centric institutional accounts, align with the active doing and pursuing of justice on the ground or 'from below' whereby social justice includes, for example, "the social labour of groups and persons implicated in human rights struggles in historically specific socio-cultural contexts, yet proceeds 'upward' to formulate normative reconstructions of what is required ethically and politically of these struggles to advance the work of global justice." Fuyuki Kurasawa, *The Work of Global Justice: Human Rights as Practices* (Cambridge: Cambridge University Press, 2007), 10.

human rights to do, will inform the kind of justification we give in its defence. The justification that endorses a specific state-centric institutional arrangement differs from a justification that specifies what individuals are fundamentally entitled to as a matter of justice. As noted, the difference in focus is between securing fundamental human rights demanded by justice without presupposing more comprehensive political doctrines, or using rights to reinforce specific state-centric institutional arrangements. The fundamental entitlements justice demands transcend any *particular* political order or institutional arrangement. In this light, the state-centricity of Miller and Rawls appears to be the kind of comprehensive doctrine that should neither be assumed nor imposed.

Miller defends a nationalist conception of global justice. He assumes national boundaries signify morally appropriate lines according to which individuals assign loyalties, stake out identities, and determine obligations of justice. For Miller, while some of these obligations cross national and state boundaries, such boundaries constitute the lens through which obligations of global justice are determined:

If we are also to treat people as agents, however, we must respond to them not just as individuals, but as members of collectives whose practices and decisions may have profound effects on how individual lives go. So the boundaries that separate these collectives must count, as a matter of principle as well as a matter of fact. We cannot understand global justice without recognizing that belonging to a particular group or a particular society is not just an arbitrary feature like hair colour but something that can legitimately affect a person's life chances.¹⁴⁹

As an empirical claim this has considerable merit, at least in the broad sense that our being members of particular groups or societies can fundamentally influence our life chances. As a normative claim about the paramount moral importance of the nation-state, however, I think

¹⁴⁹ Miller, *National Responsibility and Global Justice*, 263.

this is false. Without careful nuance, qualification, and consideration, it is also reckless.¹⁵⁰

Nationalist sentiment and collective movement toward self-determination are not valuable in themselves. If nationalism has any value, its value is instrumental and derivative rather than intrinsic or constitutive of justice.

There is an uncomfortable disconnect between Miller's nationalist perspective and the record, behaviour, and constitution, of actual nation-states. I share Crispin Sartwell's view that however benevolent, legitimate, and ideal our purported justifications for the state, "the sheer fact of its overwhelming force is the distant whiff of burning flesh. No force in human history has caused more suffering and death ... only a fool could examine the history of the twentieth century and not see that once such a power is constituted, all bets are off."¹⁵¹ Thus, I regard Miller's nationalism, including his tendency to slide from idealized philosophical justifications to practical support for and strengthening of states, as playing with fire. If our conception of global justice is to be informed by empirical evidence, analysis of nation-states as threats to justice and causes of injustice must be pursued alongside the more sanitized claims typical of philosophers who characterize nation-states as mutual benefit schemes aimed at securing our rights and promoting justice.

¹⁵⁰ It is important to make clear here that what I take to be reckless (not just sloppy) are undefended transitions from rigorous defence of an ideal conception of nation to apparent endorsement of the status quo international order of existing states, repeatedly found in Miller's work. Veit Bader, for example, writes: "According to Miller, ideally democratic nations 'coincide with state-boundaries' and if not, he claims that we have 'strong ethical reasons to make that happen'. This move from a very much debatable 'ideal' to practical recommendations in the 'real world' is a foolish recipe producing disastrous nightmares." Veit Bader, "Reasonable Impartiality and Priority for Compatriots: A Criticism of Liberal Nationalism's Main Flaws," *Ethical Theory and Moral Practice*, Vol. 8, No. 1-2 (2005), 92 fn 18. The closest thing to an acknowledgment of this 'foolish recipe' in his work appears in a footnote where Miller writes: "Veit Bader underlines several respects in which existing nation-states diverge from the communitarian model that is used to justify special obligations to compatriots. These points are well-taken, so long as we recognize that such divergences are a matter of degree. We have obligations to our compatriots *to the extent* that our nation meets the conditions described in the text. A similar point might be made about families and other forms of attachment." David Miller, "Reasonable Partiality Towards Compatriots," *Ethical Theory and Moral Practice*, Vol. 8, No. 1-2 (2005), 67 footnote 9.

¹⁵¹ Crispin Sartwell, *Against the State: An Introduction to Anarchist Political Theory* (Albany, NY: SUNY Press, 2008), 69.

Miller's preoccupation with countering the cosmopolitan claim that a person's nationality is morally arbitrary limits his analysis to what can be positive and meaningful about national identity. Lack of critical attention to the disease-like qualities of nationalism, to the ill-intentions behind and resultant scars of nationalist movements, and to the overwhelming human rights abuses of nation-states is a critical shortcoming for any practical conception of global justice. Miller's liberal nationalism dramatically underplays the gulf that exists between his account of global justice and the manifold injustices of the actually existing, state-based global order.

According to Miller, "[g]lobal justice must be understood as justice for a world of culturally distinct nation-states each of which can legitimately claim a considerable degree of political autonomy."¹⁵² This makes global justice *for* a world of states, even if nation-states are carefully conceived as an idealized political form at once theoretically attractive and functionally dissimilar from actually existing ones. Certainly global justice must be understood as informed by the complexities of the existing world, but this need not entail predetermined, principled commitments to contingent political institutions. Respecting individuals as agents and not simply as deprived and suffering victims involves seeing people within a context and as capable of making choices. Justice may demand that we effect change to that context through an approach focused on personal ethics, institutional arrangements, or both. On some level we risk being disrespectful as well as unimaginative by requiring in advance that culturally distinct nation-states necessarily constitute the future world order for each and every individual and group, however attractive our definition of

¹⁵² Miller, *National Responsibility and Global Justice*, 278.

nation-states may be.¹⁵³ Actually existing states are a central feature of our international order and may be, at least strategically, appropriate tools to effect change. If a world of culturally distinct nation-states is not the only or the best way to understand global justice, viewing global justice through national spectacles risks limiting or impeding the pursuit of global justice. One reason for being hesitant about viewing global justice through a nationalist lens stems from embracing a scientific spirit and remaining open-minded about what future just political forms might or should feature socially and globally. Another stems from wishing to maintain a healthy amount of scepticism towards states as we know them to be. Since we can be confident that states will remain central political institutions into the immediate future, Miller's nation-state-centric approach strikes me as an important strategic tool for navigating a world of states in pursuit of global justice. Whether it should limit our vision of a just global order is another matter.

Finally, there is a noteworthy ordering problem in Miller's work. This concerns his aim to identify the *underlying* principles of justice that spring directly from various modes of human relationships. Various modes of human relationships are treated as ideal types that are meant to illuminate real world relationships.¹⁵⁴ His conclusion that the nation-state is a fundamental unit of justice does not follow from his premises regarding interpersonal justice. The problem is that while he claims to start from a small number of basic modes of association from which to draw principles of justice, he advances his resultant theory of justice to stake out, defend, and reinforce his preferred political order of nation-states. Why not simply include among the very real and increasingly common modes of human

¹⁵³ As Daniel M. Weinstock suggests: "Here, philosophical imagination has been hamstrung by the hold that the nation-state paradigm still exerts upon philosophers." "Introduction" in Daniel Weinstock, ed. *Global Justice, Global Institutions* (Calgary: University of Calgary Press, 2005), xviii.

¹⁵⁴ Miller sets out his methodological pluralism about justice in "A Sketch of a Theory of Justice" in his *Principles of Social Justice* (Cambridge, Mass: Harvard University Press, 1999).

relationships something like ‘transnational association,’ ‘global citizenship,’ or ‘humanity as a whole’ from which principles of justice spring? Miller fails to consider that the demands of global justice stem directly from acting, living, and thinking globally. If, according to Miller, equality is the primary principle of justice governing relations among *domestic* citizens and something like *global* citizenship is acknowledged to be, or is becoming, a basic mode of association, Miller’s own method should undercut his opposition to global egalitarianism.¹⁵⁵

Miller argues that the best theories of justice reflect shared understandings of human association as much as or more than they reflect differences in principle between nationalism and cosmopolitanism, for instance. Despite his opposition to *strong* cosmopolitanism involving global egalitarianism, Miller defends a *weak* cosmopolitanism in the form of a rights-based global minimum as part of his theory of global justice. Weak cosmopolitanism involves commitments to equal moral concern for all individuals while strong cosmopolitanism involves commitments to substantial forms of equal treatment. My claim here is that Miller’s own methodological pluralism about justice, including his acceptance of some form of cosmopolitanism, may force him to abandon his preferred institutional lens. By contrasting Miller’s rights-based justice *through* state-centric principles with Pogge’s more thorough-going cosmopolitanism we see more clearly the significant difference between approaching global justice through an institutional lens and approaching global justice by focusing on the justice of institutions themselves.

¹⁵⁵ “When people share a common identity as members of a community, they see their lives and destinies as interwoven, and their sense of themselves as free-floating individuals is correspondingly weakened, their solidarity gives rise to a more or less powerful sense of mutual obligation, and this naturally expresses itself in a conception of justice as distribution according to need.” Quoting Miller in Leif Wenar, “Human Rights and Equality in the work of David Miller,” *Critical Review of International Social and Political Philosophy*, Vol. 11, No. 4, 2008, 406. As we see, for example, in Pogge’s cosmopolitan conception below, this pushes in the direction of global justice, where a world community of increasingly interconnected people increasingly share a common identity and are subject to the same global institutional order as fellow members of humanity.

Thomas Pogge's cosmopolitan conception of human rights is an example of a rights-based approach that assesses nation-states and the global economic order as threats to justice and causes of injustice, not just as avenues through which justice might be pursued. Pogge's rights-based theory of global justice focuses on the moral claims persons have on *any* institutional order imposed upon them and against those who are imposing this order. There is no inconsistency between his claim that the present global order is unjust, a massive crime against humanity, and his view that we are a few minor reforms and redesigns away from a global institutional order that would satisfy the minimal human rights standards of justice.¹⁵⁶ Pogge's sufficientarian account directly subjects the global institutional order to this standard. He does not presuppose a world of nation-states as the institutional structure through which justice happens. Both Pogge and Miller assume the state-based global order will continue to define the circumstances of justice into the immediate future. However, Pogge denies that the mere existence of states *necessarily* constitutes an injustice, while Miller defends in principle, as a requirement of justice, a state-based global order. Such differences in focus, between *whatever* institutional order satisfies the demands of justice versus justice through a *particular* institutional order, hinge on differences concerning the basic units of justice. Both Pogge and Miller, like Rawls, adopt a decidedly institutional focus. However, Pogge neither assumes nor defends state-centric principles of justice. Instead, he emphasizes individual human rights as minimum standards that inform and hold to account political institutions, separating tolerable from intolerable institutional arrangements. His theory is focused on enhancing justice and removing injustice, not transcendental justice.

¹⁵⁶ "My main claim is then that, by shaping and enforcing the social conditions that foreseeably and avoidably cause the monumental suffering of global poverty, we are *harming* the global poor – or, to put it more descriptively, we are active participants in the largest, though not the gravest, crime against humanity ever committed. Adolf Hitler and Joseph Stalin were vastly more evil than our political leaders, but in terms of killing and harming people they never came anywhere near causing 18 million deaths per year." Thomas Pogge, "Real World Justice," *The Journal of Ethics*, Vol. 9, No. 1-2, 2005, 33.

Accordingly, institutions must always be subject to the standards of justice rather than signifying *in principle* the baseline or institutional lens through which such standards are applied. This distinction is at the forefront of the debate between cosmopolitanism and statism. Cosmopolitanism eschews *fundamental* commitments to particular institutional arrangements. Where statists embrace the link between the political authority and coercion of the state and justice, cosmopolitans remain agnostic, insisting that the devil is in the details. Institutions are not idealized, neutralized, assigned fundamental moral significance, or defended as having intrinsic value in cosmopolitan accounts of justice. Instead, institutions answer to, rather than frame, the demands and obligations of justice.

According to Pogge social and political arrangements that foreseeably result in millions of avoidable deaths signify some of the largest human rights violations the world has ever seen.¹⁵⁷ The world's affluent have negative duties of justice to avoid imposing a rights-violating global institutional order that massively harms the global poor:

This minimal conception is proposed as merely a *necessary* condition of social justice. I do not hold that human rights exhaust what justice requires. I merely hold that justice requires *at least* that any institutional order we impose must fulfill the human rights of those on whom it is imposed insofar as this is reasonably possible. I work solely with this minimal requirement of social justice because it is widely acceptable and suffices to reach my conclusions. That some institutional order foreseeably reproduces an avoidable human rights deficit is thus on my view merely a *sufficient*, not a necessary, condition for this order being unjust and for its imposition being a violation of a negative duty of justice and hence a harming.¹⁵⁸

Human rights are conceived in terms of the globally recognized and shared basic universal needs of human persons which, in the first instance, social and political institutions must

¹⁵⁷ Thomas Pogge, "Severe Poverty as a Violation of Negative Duties," *Ethics & International Affairs*, Vol. 19, No. 1, 2005, 79. Examples might include protectionist policies that disadvantage poorer countries, global rules for incentivizing pharmaceutical research by rewarding medical research of and for the affluent with monopoly prices out of reach of the global poor, profiteering from international resource and borrowing privileges granted to tyrants and dictatorships, and the like.

¹⁵⁸ *Ibid.* 76.

officially protect and respect.¹⁵⁹ Pogge writes, “[h]uman rights are, then, moral claims on the organization of one’s society.”¹⁶⁰ This institutional understanding of human rights transcends debate between libertarians who think that human rights require only self-restraint and maximalists who think that human rights require efforts to fulfill everyone’s human rights everywhere. Individuals have a negative duty not to uphold or impose rights-violating institutions, including institutional arrangements that fail to secure access to basic necessities. These basic necessities require protection of civil and political *and* social and economic human rights set out, for example, in the UDHR.¹⁶¹ Pogge emphasizes the radical potential and transformative power of simply fulfilling negative duties when it comes to addressing severe global poverty.

Pogge’s powerful argument is cleverly couched in terms of negative duties. He argues that the affluent, because we are most responsible for perpetuating a system that fuels global poverty, are tasked with redesigning the international order and compensating the world’s poor for their deprivation.¹⁶² Critics might argue that no algorithmic calculation specifying a precise allocation of responsibility for complex collective harms can be given. However, given his emphasis on negative duties, this objection is beside the point. We fulfill our duties not to harm as well as duties to avert harm by not collaborating in and benefiting from institutional arrangements that produce foreseeable and avoidable deprivations. As such, “we have much more stringent duties to seek to reform these social institutions and to

¹⁵⁹ “The preeminent requirement on all coercive institutional schemes is that they afford each human being secure access to minimally adequate shares of basic freedoms and participation, of food, drink, clothing, shelter, education, and health care. Achieving the formulation, global acceptance, and realization of this requirement is the preeminent moral task of our age.” Ibid. 51.

¹⁶⁰ Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms*, 64.

¹⁶¹ Ibid. 66-67.

¹⁶² Miller, *National Responsibility and Global Justice*, 239. The massive deprivations and unprecedented inequalities Pogge has in mind concern, for example, the fully one-third of all human beings that currently die from poverty-related causes. Again, according to Pogge, such deprivations are a result of the global institutional order so, to be clear, this notion of deprivation concerns institutionally imposed rights-violations not simply comparative or relative deprivation.

do our fair share toward mitigating the harms they cause.”¹⁶³ Pogge’s forward looking intention is to constructively work out how citizens can work together to fulfill such responsibilities.¹⁶⁴ This conception of human rights is premised upon the assumption that world poverty is a product of human construction, foreseeably reproduced under the present global institutional order. Certainly justice requires more, but Pogge’s rights-based theory of justice is sufficientarian. Whatever else justice demands, minimally our human constructed institutional order must be designed to avoid basic universal human rights violations. In conceiving human rights, Pogge’s focus is on what human rights are rather than on the justification of one or other particular list.¹⁶⁵

Nothing about his account excludes positive duties, one or other particular set of rights, one or other particular conceptual or justificatory basis for rights, or other non-institutional conceptions from combining with his. Pogge maintains that a plausible and widely shared conception of human rights signifies our best hope for international agreement on a common moral standard for achieving a sufficiently just global order.¹⁶⁶ For this reason I now turn to a rights-based capabilities perspective which features this criteria of broad sharability because it embraces and builds upon the many strengths of the rights-based theories of global justice considered thus far.

¹⁶³ Pogge, “Real World Justice,” 36.

¹⁶⁴ Pogge, “Severe Poverty as a Violation of Negative Duties,” 81-82. He writes: “I am not writing *against* you, to make you feel guilty or to present you with an itemized bill for wrongful damages done. I am writing *for* you, to suggest that we can lead much better, happier lives in a much better country if we are willing to do without that bit of extra affluence now purchased for us with rivers of blood, sweat, and tears of the global poor.”

¹⁶⁵ “A conception of human rights addresses then two questions: what are human rights? And what human rights are there? I believe that these two questions are asymmetrically related in this sense: we cannot convincingly justify a particular list of human rights without first making clear what human rights are. Yet we *can* justify a particular understanding of human rights without presupposing more than a rough idea about what goods are widely recognized as worthy of inclusion. This, in any case, is what I will attempt to do.” Thomas Pogge, “Human Rights and Human Responsibilities,” in Pablo De Greiff and Ciaran Cronin, eds. *Global Justice and Transnational Politics: Essays on the Moral and Political Challenges of Globalization* (Cambridge: The MIT Press, 2002), 158.

¹⁶⁶ Pogge, “Human Rights and Human Responsibilities,” 179.

1.5 Capabilities Theory of Rights

A gulf persists between rights expressed in the language of moral philosophy and rights as the language of political struggle. Rights theory has traditionally focused on justifying and sustaining the foundation(s) upon which legitimate rights claims can be made.¹⁶⁷ Increasingly, critical accounts that see rights as historically relative tools of corporations and an exploitative global economy have coincided with anti-foundational approaches that dismiss all such philosophical accounts as futile in the power struggle for rights. A capabilities theory of rights must be able to play an important practical role in political struggle and bridge the gap between rights activism and rights theory.¹⁶⁸ The capabilities approach is a logical candidate for mounting such a defence since it is grounded in a theory of value embodied by the idea of universal rights. Universal values are not established by institutional authority or majority rule but by an on-going normative project committed to working out what powers, opportunities, and faculties seem so essential and characteristic of the species norm that we regard them as minimal thresholds of dignified existence that apply universally.

Amartya Sen states that “[i]n the most general form, the notion of human rights builds on our shared humanity. These rights are not derived from citizenship in any country, or membership in any nation. They are taken as entitlements of every human being.”¹⁶⁹ Sen sees a direct connection between rights and capabilities, regarding human rights as fundamental entitlements to a capability to function. For him, “[a] pronouncement of

¹⁶⁷ Tony Evans, *The Politics of Human Rights: A Global Perspective* (London: Pluto, 2001), 6-7, 34.

¹⁶⁸ Peter Uvin argues that Nussbaum’s work, along with Rawls’s and Sen’s, presently represents the most promising theoretical approach for establishing a universalist foundation in response to such cynicism towards the philosophy of rights: “It must be noted that in all these cases, the authors deliberately adopted a non-rights language because they accuse rights language of certain deficiencies. Their intellectual aims are very much in tune with those of rights scholars, however; that is, they all seek to specify universally valid conceptions of what human beings, qua humans, deserve.” Peter Uvin, *Human Rights and Development* (Bloomfield, CT: Kumarian Press, 2004), 27.

¹⁶⁹ Sen, “Human Rights and Asian Values,” 39.

human rights ... is an assertion of the importance of the freedoms that are identified and acclaimed in the formulation of the rights in question.”¹⁷⁰ Like Nussbaum, he advances a decidedly internalist account that avoids any metaphysical position. He states that, “[a]ny moral theory would have to begin with some primitive diagnosis of value ... I accept fully that one has to dig for foundations, but there is a substantial issue involved in deciding where to stop digging.”¹⁷¹

Sen advocates for capabilities as the best measurement of justice or most appropriate conceptual space for evaluating quality of life. His lack of commitment in defence of a finite set of foundational capabilities is deliberate, leaving such specification open-ended and, therefore, open to different contextual specifications within varying scenarios. Contrary to Nussbaum’s account that specifies a threshold level of ten central capabilities, Sen does not adopt one particular list.¹⁷² He expresses concern that any view of human nature could be “tremendously over-specified.”¹⁷³ In the past, Sen was content to develop a capability-based theory of justice in outline form, arguing that a complete theory is not needed to analyze gender inequality or any other form of injustice.¹⁷⁴ However, Sen helps defend the increased moral complexity involved in combining capabilities and rights when he states:

It is also possible for an ethical theory to include more than one type of variables in the category of basal significance. We may be concerned both with liberties and with levels of well-being. We may attach intrinsic importance both to well-being and to agency. We may value freedom as well as achievement. Indeed, pluralist proposals make up much of practical ethics,

¹⁷⁰ Sen, *The Idea of Justice*, 376.

¹⁷¹ Quoting Sen in David A. Crocker, “Functioning and Capability: The Foundations of Sen’s and Nussbaum’s Development Ethic, Part 1,” *Political Theory*, Vol. 20, No. 4, 1992, 589.

¹⁷² For a recent detailed list specifying these ten central capabilities, which include *Life, Bodily health, Bodily integrity, Senses, imagination, and thought, Emotions, Practical reason, Affiliation, Other species, Play, and Control over one’s environment (A) Political & (B) Material* see Martha C. Nussbaum, *Creating Capabilities: The Human Development Approach* (Cambridge, Mass: The Belknap Press of Harvard University Press, 2011), 33-34.

¹⁷³ Amartya Sen, “Capability and Well-Being,” in Martha C. Nussbaum and Amartya Sen, eds. *The Quality of Life* (Oxford: Oxford University Press, 1993), 47.

¹⁷⁴ Amartya Sen, “Gender Inequality and Theories of Justice,” in Martha C. Nussbaum and Jonathan Glover, eds. *Women, Culture, and Development: A Study of Human Capabilities* (Oxford: Clarendon Press, 1995), 267-268.

even though descriptive homogeneity evidently appeals to many moral philosophers (utilitarians among them).¹⁷⁵

Sen distinguishes his own position from the basic needs approach that focuses on commodities and the primacy of economic needs. He argues instead for the primacy of political rights such as freedom of speech, association, and political participation, noting: “[p]olitical rights are important not only for the fulfillment of needs, they are crucial also for the formulation of needs. And this idea relates, in the end, to the respect that we owe each other as fellow human beings.”¹⁷⁶

Sen’s suggestive sketch of a capability-based theory of rights signifies a crucial definitional contribution:

Rights, then, are defined as basic not because they are indispensable to the fulfillment of any other right but because they are a way of formulating the urgency of minimal levels of eminently valuable human (actual and possible) functionings. It is intrinsically good for humans to be and do in certain ways and to have the freedom to so function, to be above the ‘threshold’ that enables them to so function. To justify something as a fundamental right is to identify a human functioning as basic, that is, as intrinsically and supremely good. Rights are grounded in the good in the sense that they are justified with reference to valuable human functionings.¹⁷⁷

Basic rights secure central human capabilities to function and are intrinsically valuable with respect to human dignity. Capability-based rights understood as justified claims and fundamental entitlements help define what a rights holder must minimally have the opportunity to be. They establish a threshold above which the rights holder is empowered with genuine opportunities to function in ways deemed valuable.¹⁷⁸ The list of central human capabilities is conceived as a set of minimal requirements essential to a dignified existence.

¹⁷⁵ Amartya Sen, *Inequality Reexamined* (Cambridge: Harvard University Press, 1992), 132.

¹⁷⁶ Amartya Sen, “Freedoms and Needs,” *The New Republic*, Vol. 210, No. 2-3, 1994, 38.

¹⁷⁷ David A. Crocker, “Functioning and Capability: The Foundations of Sen’s and Nussbaum’s Development Ethic, Part 2,” in Nussbaum and Glover, eds. *Women, Culture, and Development: A Study of Human Capabilities*, 186-187.

¹⁷⁸ *Ibid.* 188.

The basic rights that secure these capabilities to function should be regarded as constraints on goal seeking action. Nussbaum insists,

This is important, since a list of human rights typically functions as a system of side constraints in international deliberation and in internal policy debates. That is, we typically say to and of governments, let them pursue the social good as they conceive it so long as they do not violate the items on this list. I think this is a very good way of thinking about the way a list of basic human rights should function in a pluralistic society; and I have already said that I regard my list of basic capabilities this way, as a list of urgent items that should be secured to people no matter what else we pursue. In this way, we both conceive of capabilities as a set of goals (a subset of total social goals) and say that they have an urgent claim to be promoted, whatever else we also promote.¹⁷⁹

The key to such a system is establishing the correct set of capabilities and rights that should be secured no matter what else we pursue.

Despite the ascendancy of the idea and use of human rights, significant skepticism remains concerning the depth and coherence of a rights-based approach to justice. Sen addresses three such critiques. First, the *legitimacy critique* casts doubts on the status of rights that are not sanctioned and enforced by political authority. Second, the *coherence critique* takes issue with the form the politics of human rights takes, specifically, by casting doubt on the duties entailed by certain conceptions of rights. The worry is that responsibilities for securing human rights are too loosely placed on those who, without any forthcoming and substantial change in political orientation and moral motivation, risk leaving such duties unfulfilled. Third, the *cultural critique* sees the moral authority of rights as resting on the accepted cultural practices and conventional social ethics of each society rather than on universal values.

¹⁷⁹ Martha C. Nussbaum, "Capabilities and Human Rights," in Pablo De Greiff and Ciaran Cronin, eds. *Global Justice and Transnational Politics: Essays on the Moral and Political Challenges of Globalization* (Cambridge: The MIT Press, 2002), 143.

Sen forcefully rejects the legitimacy critique exhibited by Marx, Bentham, and others who have insisted that rights are only products and instruments of institutions, not preexisting ethical entitlements. Such a position militates against the basic idea of universal rights – rights as a set of ethical claims – that must be kept conceptually distinct from legislated legal rights.¹⁸⁰ Instead, Sen insists that we continue to regard rights as a system of ethical reasoning and the basis of political demands. He argues that human rights are not principally legal demands, though they can inspire legislation. In response to the coherence critique that suggests it is incoherent to talk about rights without specifying who, in particular, is responsible for fulfilling rights, Sen counters that it is perfectly coherent to advance conceptions of what people should be able to do and be even if such normative claims are only generally addressed to anyone in a position to help. Without the language of rights to describe the freedom individuals should be able to achieve, it would appear difficult to distinguish between an unfulfilled right an individual nonetheless has and a right they do not have.¹⁸¹ The cultural critique challenges the universality of human rights and has featured, for example, in debates about ‘Asian values’. Sen counters the false notion that a distinct set of static values separate a large and heterogeneous population from the values that underlie universal human rights, arguing that,

What we have to investigate, instead, are the constituents, the components, of this compound idea. It is the powerful presence of some of these elements – in non-Western as well as Western societies – that I have been emphasizing. It is hard to make sense of the view that the basic ideas underlying freedom and rights in a tolerant society are “Western” notions, and somehow alien to Asia, though that view has been championed by Asian authoritarians and Western chauvinists.¹⁸²

¹⁸⁰ Sen, *Development as Freedom* (New York: Anchor Books, 1999), 229.

¹⁸¹ *Ibid.* 230-231.

¹⁸² Sen, “Human Rights and Asian Values,” 39.

Such claims against the universal values embodied by a basic conception of international human rights are unfounded, often rooted in narrow, arbitrary readings and motivated by political self-interest. Instead, Sen highlights the intrinsic importance and the constructive role of the genesis of universal values as part of the case for basic freedoms and their associated formulations in rights.¹⁸³ Doing human rights thus becomes a process of establishing, not simply appealing to supposedly established, universal values. Debate, argument, and disagreement about human rights is both a feature of the practice of human rights and part of the general discipline of human rights.

Rights-based approaches to justice can inspire and guide policy formation and public action. They aim to empower otherwise marginalized people(s) to enter mainstream debates on an equal social and political footing. They enable the articulation of, and aspiration towards, equal dignity and respect. They also strengthen the increasingly broad institutional influence and cosmopolitan appeal rights have.¹⁸⁴ Theories of global justice appeal to rights that secure and protect well-being and freedom. Certainly the UDHR features both sorts of rights, broadly based on a conception of shared human capacities that demand respect. It is my contention that a capabilities perspective can help refine and supplement such theories of global justice. I contend that rights are important because they secure capabilities to function, safeguard the value individuals attach to their freedom and well-being, and infuse into a theory of justice a conception of moral entitlements that have political significance above and beyond the enhanced personal advantage they help secure. Unfortunately, rights theorists have been reluctant to explore and develop this connection, perhaps because they regard capabilities as restricted to human development, as moving too far towards a

¹⁸³ Sen, *Development as Freedom*, 246.

¹⁸⁴ John M. Alexander, "Capabilities, human rights and moral pluralism," *The International Journal of Human Rights*, Vol. 8, No. 4, 2004, 451.

perfectionist account of justice,¹⁸⁵ or because capabilities theorists have not, until recently,¹⁸⁶ provided the kind of institutional analysis that other contemporary rights-based approaches to global justice supply.¹⁸⁷

As a theory of global justice involving a list of political goals, Nussbaum has presented the capabilities approach as an alternative language to people's basic entitlements. Some of the central questions she asks concerning the project of partnering capabilities and rights are:

Does the capabilities approach view supplement a theory of rights, or is it intended to be a particular way of capturing what a theory of rights captures? Is there any tension between a focus on capabilities and a focus on rights? (Are the two approaches competitors?) On the other hand, is there any reason why a capabilities theorist should welcome the language of rights – that is, is there anything in the view itself that leads naturally in the direction of recognizing rights? ... Does the capabilities view incline us to opt for any particular set of answers to the various questions about rights or any particular conception of rights?¹⁸⁸

From the start Nussbaum has insisted that the capabilities approach be combined with rights-based approaches. She understands human rights as involving “an especially urgent and morally justified claim that a person has, simply in virtue of being a human adult, and independently of membership in a particular nation, class, sex, or ethnic, religious, or sexual group.”¹⁸⁹ While the language of rights does indeed play a central role in contemporary political discourse, rights remain conceptually unclear, bogged down in theoretical debate about their basis, substance, and role. Capabilities, it should be noted, may only be thus far immune to the enormous disparity between official declarations and public practice because

¹⁸⁵ See, for example, Luis Cabrera, *Political Theory of Global Justice: A Cosmopolitan Case for the World State* (London: Routledge, 2008), 63 where Cabrera writes: “Capabilities theorists are criticized for moving too far toward perfectionism in human development.”

¹⁸⁶ See, for example, Séverine Deneulin, Mathias Nebel, and Nicholas Sagovsky, eds. *Transforming Unjust Structures: The Capability Approach* (Dordrecht: Springer, 2006).

¹⁸⁷ Thomas W. Pogge, “Real World Justice,” *The Journal of Ethics*, Vol. 9, No. 1-2, 2005, 30.

¹⁸⁸ Nussbaum, “Capabilities and Human Rights,” 121.

¹⁸⁹ *Ibid.* 135.

they have not yet featured in constitutions and public policy the way rights have.¹⁹⁰

Capabilities and rights are understood as fundamental entitlements and protections demanded by justice. Basic capabilities – what individuals should be free to do and be – flesh out the content, objects, or substance of rights. As a type of human rights approach the capabilities approach identifies basic capabilities underlying the formulation of rights.

It is important to retain the normative moral force of rights. Some suggest individuals only have rights when the content of those rights can be secured. This too easily accepts as natural the *political* reasons why rights are not secured, and implies people do not deserve the rights assigned to them universally. Nussbaum picks up on and sympathizes with this prepolitical ethical quality of rights and suggests that “thinking in terms of capability gives us a benchmark as we think about what it is to secure a right to someone.”¹⁹¹ This benchmark for assessing whether a right has indeed been upheld or realized “makes clear that this involves affirmative material and institutional support, not simply a failure to impede.”¹⁹² This suggests a comparative advantage of capability-based rights over traditional rights theories: “Often fundamental entitlements have been understood as prohibitions against interfering state action, and if the state keeps its hands off, those rights are taken to have been secured; the state has no further affirmative task.”¹⁹³ The right to political

¹⁹⁰ Nussbaum advocates for including the central human capabilities as fundamental constitutional principles. See, for example, Martha C. Nussbaum, “Constitutions and Capabilities,” in Deen K. Chatterjee, ed. *Democracy in a Global World: Human Rights and Political Participation in the 21st Century* (Lanham: Rowman & Littlefield, 2008).

¹⁹¹ Nussbaum, *Women and Human Development: The Capabilities Approach*, 98.

¹⁹² Nussbaum, “Capabilities as Fundamental Entitlements: Sen and Social Justice,” 38.

¹⁹³ Ibid. Capability-based rights transcend the traditional debate between negative and positive duties: “... a focus on capabilities, although closely allied with the human rights approach, adds an important clarification to the idea of human rights: for it informs us that our goal is not merely “negative liberty” or absence of interfering state action – one very common understanding of the notion of rights – but, instead, the full ability of people to be and to choose these very important things. Thus all capabilities have an economic aspect: even the freedom of speech requires education, adequate nutrition, and so forth.” Martha C. Nussbaum, “Beyond the Social Contract: Toward Global Justice,” *The Tanner Lectures on Human Values* Vol. 24, www.tannerlectures.utah.edu/lectures/volume24/nussbaum_2003, 474.

participation, for instance, might nominally exist while individuals continue to lack the opportunity to exercise it.

Rights can also be thought of as prior to and thus the justifying ground for securing the capability to function. For example, a right to not involuntarily starve is one instance where a right can be understood as providing the justifying ground for securing the capability to function. The political goal is to support the internal capabilities of a person with a suitable external environment that enables that person to exercise, or have the choice to exercise, the function.¹⁹⁴ In this sense rights language helps flesh out the capabilities approach where specific rights to things like freedom of expression, religion, and assembly speak to aspects of the general capability to exercise practical reason, one's mind and senses, as well as make self-defining personal choices:

Thus capabilities have a very close relationship to human rights, as understood in contemporary international discussions. In effect they cover the terrain covered by both the so-called "first-generation rights" (political and civil liberties) and the so-called second-generation rights (economic and social rights). And they play a similar role, providing both a basis for cross-cultural comparison and the philosophical underpinning for basic constitutional principles.¹⁹⁵

Combining both concepts improves both their rhetorical and theoretical force.¹⁹⁶

Capabilities supplement and bring precision to the language of rights by stating the motivating concerns and goals.¹⁹⁷ By this account fulfilling rights in a meaningful sense necessitates due consideration of the capabilities of each individual. The list of central human capabilities is established through an evaluative process of the species norm in order

¹⁹⁴ Nussbaum notes that "rights play an increasingly large role inside the account of what the most important capabilities are." Nussbaum, "Capabilities and Human Rights," 120.

¹⁹⁵ Nussbaum, "Capabilities as Fundamental Entitlements: Sen and Social Justice," 33.

¹⁹⁶ Nussbaum, "Capabilities and Human Rights," 120. "... a scheme of basic rights ... will be justified with reference to the role they play in protecting a way of life that citizens have agreed to be good for them as human beings." Quoting Nussbaum in Crocker, "Functioning and Capability: The Foundations of Sen's and Nussbaum's Development Ethic, Part 2," 187.

¹⁹⁷ Nussbaum, "Capabilities as Fundamental Entitlements: Sen and Social Justice," 37.

to secure a minimal threshold for all individuals. Since individuals are the fundamental bearers of rights, fulfilling rights to capability to function requires consideration of the opportunities that exist in the context of that life. While *having* rights is not contingent on what individuals are actually able to do and be, *realizing* such rights in practice entails consideration of the capacities and facilities they need to be able to act with reasonable hope of success. This point highlights one way in which capabilities and rights should be combined:

Human talents vary considerably, within a fixed framework that is characteristic of the species and that permits ample scope for creative work, including the creative work of appreciating the achievements of others. This should be a matter for delight rather than a condition to be abhorred. Those who assume otherwise must be adopting the tacit premise that people's rights or social reward are somehow contingent on their abilities. As for human rights, there is an element of plausibility in this assumption in the single respect already noted: in a decent society, opportunities should conform as far as possible to personal needs, and such needs may be specialized and related to particular talents and capacities ... Difficult questions of practice are sure to arise in any functioning social group, but I see no problem of principle.¹⁹⁸

Rights to freedom of movement, for instance, require that people be able to move freely from place to place as an aspect of the central human capability of bodily integrity. Realizing such rights for those in a wheelchair, for example, means connecting the rights they have with what needs to be done to ensure a genuine opportunity to exercise such rights.¹⁹⁹ In this light, upholding one's capability to function equates to upholding one's right, implying the existence of a certain integral and symbiotic relationship. If the basic duties demanded by a capabilities theory of rights better explain our responsibilities to realize rights, this can

¹⁹⁸ Noam Chomsky and James Peck, ed. *The Chomsky Reader* (New York: Pantheon, 1987), 198-199.

¹⁹⁹ "... capabilities would thus enable us to understand, as we might not otherwise, a rationale we might have for spending unequal amounts of money on the disadvantaged or creating special programs to assist their transition to full capability." Nussbaum, "Capabilities and Human Rights," 138.

influence how we assess the institutional structures and arrangements in which we participate.²⁰⁰

A capabilities theory of rights represents a strong conceptual combination that is consistent with a broadly shared and intuitive sense of justice and supplies us with philosophical justification and increasingly measurable criteria for its practical achievement. Perhaps the most obvious issue yet to be addressed is the question of specification concerning what rights, capabilities, and capability-based rights to include, develop, and advance. This demands critical assessment and hard thinking about fundamental human rights and the demands of justice in light of the content of Nussbaum's list. Sen's theory of rights as goals is concerned with establishing an account of what rights we have by considering the consequences of prioritizing and enforcing the wrong rights. Nussbaum, however, has continued to develop a list of central human capabilities that might, for instance, be situated alongside existing international human rights. This approach would have strategic value in aiding the international human rights project but does not strictly address the issue of which rights a sufficientarian approach to global justice demands. To some extent this is a practical job for policy-makers, but should be explored philosophically. Nussbaum's detailed and evolving list of central human capabilities primarily concerns some undetermined but finite set of basic rights. Although rights can be conceptually understood as rights to capability to function, we are in no position to suggest that all the official international human rights neatly fit with Nussbaum's central human capabilities. Matching her list with the rights of the UDHR, for example, is strictly strategic and political. The normative ethical pull of rights should come from the considered and substantive content of rights, rather than the authority of any declaration or institution.

²⁰⁰ Alexander, "Capabilities, human rights and moral pluralism," 464.

A major philosophical question concerns the ‘foundational’ issue of what rights are based on. Sen avoids pursuing at length the question of foundational basis. Instead, he starts by acknowledging that human rights demand a broad international acceptance and play a central role in contemporary discourse. Perhaps it is counterproductive or even insulting to insist that reasons for action on human rights should stand or fall on what philosophy delivers to us. I do not dispense with the foundational project or deny the importance of thinking hard about the basis of our values, yet agree that a problematic ‘foundational’ account can weaken and sour more practical and otherwise agreeable arguments about rights. Political philosophy must attend to the issue of what precisely is required of us concerning rights. Sen wants to establish strong moral responsibilities for anyone in a reasonable position to help fulfill rights.

The 2000 UN Human Development Report embodies a number of features of a capabilities theory of rights that is worth briefly noting. In many respects the first chapter of the Report reads as a latent version of the theory awaiting scrutiny. This is not very surprising given that the Report acknowledges Sen as having provided the conceptual framework and Sen is also its co-author. The Report notes that capabilities and rights “share a common vision and a common purpose – to secure freedom, well-being and dignity of all people everywhere.”²⁰¹ Rights are described as claims to social arrangements that safeguard against violence and neglect and secure the freedom for a dignified existence while capabilities expand opportunities for choosing valued functionings. Conceptually, and in action, each reinforces the other, signifying a new and innovative approach with growing political support. Specifically, rights add value to human development by highlighting the

²⁰¹ United Nations Development Programme, *Human Development Report 2000* (New York: Oxford University Press, 2000), 1.

importance of accountability for their fulfillment, protection, and respect.²⁰² Sen argues that each concept complements and enriches the other:

If human development focuses on the enhancement of the capabilities and freedoms that the members of a community enjoy, human rights represent the claims that individuals have on the conduct of individual and collective agents and on the design of social arrangements to facilitate or secure these capabilities and freedoms.²⁰³

Capabilities add to rights a more definite language with which to analyze human development, policy work, and existing social conditions.

A substantive theory of rights must be open to different contextual specifications in varying scenarios, but also venture a more specific account of basic goods. Rights and capabilities seem made for each other when combined in the aforementioned ways: “[i]f the capability approach can operate with some cross-culturally agreeable central human capabilities, it has then a better scope of functioning as a substantive theory of justice.”²⁰⁴

Unfortunately, the language of ‘capabilities’ has not yet been adopted in contemporary popular discourse. Capabilities are not as familiar as rights and do not enjoy the same pride of place in normative theory and political practice. Sen himself has noted that *capability* is not an especially attractive word or even perhaps the best word to describe a being’s ability to do valuable acts or reach valuable states of being.²⁰⁵

With capabilities theory already breaking ground in development economics and being used to combat the global injustices facing women, there is a need to work out its relationship with rights expediently in order to avoid redundancy and political inertia. Every effort should be made to render explicit how each concept synthesizes and diverges to counter potential political abuse and neglect, as well as to avoid lost opportunity. While any

²⁰² Ibid. 2.

²⁰³ Ibid. 19-20.

²⁰⁴ Alexander, “Capabilities, human rights and moral pluralism,” 458.

²⁰⁵ Sen, “Capability and Well-Being,” 30.

innovative theory aimed at improving quality of life is morally welcome, capabilities theory risks encountering the same limitations earlier rights-based approaches have faced. Hilary Charlesworth has pointed out that the capabilities approach does not clarify the status of groups, enable us to address indigenous peoples' claims to self-determination, or clarify how clashes between different capabilities are to be resolved.²⁰⁶ In a positive light, that capabilities can be understood to have counterparts in rights suggests that capabilities theory may help extend and develop rights guarantees, adding content and changing the focus from legal provision to political action.²⁰⁷ While providing a more concrete basis for evaluating quality of life, political progress, and public policy, the capabilities approach, according to Michael Freeman, "provides a relatively strong philosophical-anthropological basis for the justification of rights."²⁰⁸ Jan Garrett expresses a similar point this way:

We can now link the idea of capabilities with the idea of human rights. The idea of human rights may be interpreted as implying the following moral principle: the capabilities of human beings should not be permitted to fall below a certain floor, so far as nation-states and the international community are able to produce the minimum threshold for everyone.²⁰⁹

The capabilities approach helps flesh out the normative content, role, and value of rights, which enriches our understanding of rights. The approach leads us to consider the particular capabilities of each individual, requiring earnest respect for difference. As value-laden claims justifiable with reference to capabilities, rights can then help highlight and celebrate, without unfairly privileging, the unique abilities of individuals in a pluralistic society. Combining capabilities and rights in this globalizing era is a valuable theoretical and practical move that

²⁰⁶ See Hilary Charlesworth, "Martha Nussbaum's Feminist Internationalism," *Ethics*, Vol. 111, No. 1, 2000.

²⁰⁷ *Ibid.* 77, 69.

²⁰⁸ Michael Freeman, *Human Rights: An Interdisciplinary Approach* (Cambridge: Polity, 2002), 67.

²⁰⁹ Jan Garrett, "Martha Nussbaum on Capabilities and Human Rights," *Western Kentucky University*, www.wku.edu/~jan.garrett/ethics/nussbaum.htm, 6.

contributes greater conceptual clarity and understanding to the struggle for rights and global justice.

In recent years Nussbaum, Sen, and other capability theorists have focused on the parallels, connections, and possibilities that capabilities have with respect to rights theory and a theory of justice. The most significant methodological difference between Nussbaum and Sen's account is Nussbaum's specification of a list of central capabilities regarded as universal and essential to any life of dignity. Only with a definite set of capabilities, Nussbaum argues, can the approach construct a normative conception of justice with enough critical potential to concretely address gender issues, insisting that "[b]efore the approach can offer a valuable normative gender perspective, we must make commitments about substance."²¹⁰ Without a working set of criteria the capabilities approach remains suggestive only in a general sense, silent as to the specific levels of health service or educational provision, for example, a just society should provide. As she repeatedly emphasizes, sensitivity to cultural difference has been built into the construction of such a list. First, she ensures the list is open-ended and subject to revision. Second, she purposely specifies the list in a short, abstract, and general way so as to leave room for independent cultural and political specification and deliberation. Third, she regards her list as a free-standing, partial moral conception to be used for political purposes, without divisive metaphysical commitments. Fourth, it establishes capability not functioning as its goal. Recall that capability is a kind of freedom, what a person is able to choose no matter what they actually decide to do. Being able to play, for example, is an important freedom. Provided workaholics are able to enjoy play, even if they choose not to, this goal has been met. Fifth, it safeguards pluralism by assigning the major liberties of freedom of speech, association, and conscience as central features of the list. Finally,

²¹⁰ Nussbaum, "Capabilities as Fundamental Entitlements: Sen and Social Justice," 33.

Nussbaum is strongly committed to establishing sound and compelling reasons for justifying such a list, rather than coercively imposing and implementing it.²¹¹

Sen thus far refuses to endorse any specific list out of respect for democratic deliberation. Nussbaum counters this by arguing that debate over a set of social entitlements is central to rather than inhibiting of democracy. Starting with a set of capabilities allows for cultural specification and political debate around the basic criteria, advancing deliberation about a minimal threshold of dignity. Promoting freedom may not be desirable or coherent if that freedom is not specified and debated:

any political project that is going to promote the equal worth of certain basic liberties for the poor, and to improve their living conditions, needs to say forthrightly that some freedoms are central for political purposes, and some are distinctly not. Some freedoms involve basic social entitlements, and others do not. Among the ones that do not lie at the core, some are simply less important, but others may be positively bad.²¹²

So, for example, the freedom to drive a motorcycle without a helmet is simply less important than the freedom to enjoy adequate nutrition. The freedom to pollute the environment without limit may be positively bad. By arguing that we must make commitments about substance Nussbaum highlights the importance of specifying certain freedoms to function that are deemed valuable rather than defending freedom as a general, all-purpose good.²¹³ I agree that it is important to make commitments about substance. Nussbaum's evolving list of basic capabilities is a valuable resource and a compelling philosophical achievement. However, I think Nussbaum's challenge to Sen equivocates between the method by which agreements on substance are made and the importance of making such commitments. Both agree that some freedoms are more important than others and both value democratic deliberation. The difference between which aspects of the capabilities approach Nussbaum

²¹¹ Ibid. 42-43.

²¹² Ibid. 44.

²¹³ Ibid. 44-45.

and Sen develop is one of focus and theoretical preference. Such methodological pluralism is an asset, enriching capabilities theory so that it has greater application at different levels of debate.

Nussbaum shares the view that individuals are the fundamental bearers of rights and that a system of basic rights should be regarded as “a total system of liberties and opportunities” rather than as “isolated atoms” that “can be given or withheld independently of one another.”²¹⁴ Although this position does not rule out the possibility of collective rights including issues of minority rights and self-determination, any notion of institutional or group rights is derivative of the rights of individuals. To realize or fulfill a right necessitates due consideration of the capabilities of each individual so that securing a right is specified in terms of securing a capability to function. Capability-based rights are moral rights that should be protected by constitutional provisions and incorporated into public policy. While Nussbaum focuses predominantly on the unjust global situation of women and on central human capabilities more generally, her approach regards the separateness and uniqueness of each individual as a source of value without adopting speciesist assumptions that limit moral worth to humans. This involves asking what each individual should minimally have the opportunity to do and be, then regarding these as justified claims and entitlements that should be respected and secured.

1.6 Conclusion

My aim in critically surveying contemporary rights-based approaches has been to gain a better understanding of the philosophical terrain and to highlight a rights-based capabilities perspective as central to a theory of global justice. This exercise has the value of putting into

²¹⁴ Nussbaum, *Sex and Social Justice*, 102-103.

clearer focus some of the tensions, battle lines, and new directions in global justice theory. While engaging some debates and side-stepping others, I acknowledge and consider, rather than resolve, a number of the most pressing philosophical issues. For instance, two conceptual challenges regarding rights-based theories of global justice demand further attention. Namely, the connection between rights-based sufficientarian approaches and cosmopolitanism²¹⁵ and the competing basis of such sufficientarian accounts.²¹⁶ Another important question is to what extent might a rights-based account feature a consequentialist theory of right action? A consequentialist theory of right action judges the goodness of actions by the degree to which they secure desirable states of affairs. Sen argues that there are advantages to theorizing rights as fundamental goals. Respecting capability to function might form part of the state of affairs to be brought about by a consequence-sensitive theory of right action. This perspective regards any consequence-independent theory of right action as defective or inadequate in some fundamental way. For this reason Nussbaum defends capabilities theory as an outcome-oriented approach.

A world in which the basic capabilities of individuals are respected and secured is a minimally just one. Justice demands that individuals are entitled to the central goods of

²¹⁵ See especially Martha Nussbaum, "The Capabilities Approach and Ethical Cosmopolitanism: The Challenge of Political Liberalism," in Maria Rovisco and Magdalena Nowicka, eds. *The Ashgate Research Companion to Cosmopolitanism* (Farnham: Ashgate, 2011) and David Miller's "Cosmopolitanism," in his *National Responsibility and Global Justice*.

²¹⁶ Miller, Pogge, and Nussbaum, as we have seen, all regard their rights-based accounts as closely connected to basic human needs, owing a philosophical debt to Shue's work on rights. Brock considers the connections between needs, capabilities, and human rights in her *Global Justice: A Cosmopolitan Account* (Oxford: Oxford University Press, 2009), 63-83. I share Brock's emphasis on need as a valuable conceptual member of the team of concepts, including capabilities and human rights, central to global justice theory. On this matter Miller writes: "Brock is once again keen to emphasize that approaches to global justice that appear to diverge at the level of principle may converge in practice, but eclecticism is not a virtue if it means that important conceptual distinctions are being blurred." "A spoonful of sugar helps the medicine go down": Gillian Brock on global justice," 257. Dale Dorsey proposes a form of welfarist maximizing consequentialism instead of the moral notion of human rights in his "Global Justice and The Limits of Human Rights," *The Philosophical Quarterly*, Vol. 44, No. 221, 2005. Sen defends capabilities/freedoms as the foundational basis of rights and the most relevant threshold conditions against utility and interests in his *The Idea of Justice*, 366-379. Elsewhere he faults basic needs approaches for being too narrowly focused on commodities. See Miller, *National Responsibility and Global Justice*, 179 footnote 24.

capabilities and thus a goal of any rights-based capabilities perspective on global justice is the realization of capabilities as fundamental moral entitlements. An important line of inquiry for future consideration asks to what extent the normative demands of capabilities theory result in a hybrid theory or consequentialist theory of right action. Such a theory might include, for example, multiple variables of basal significance along with pluralist proposals for their achievement.

Considerable philosophical debate continues concerning the best way to measure justice. Rawls, Miller, and Pogge, for example, have all opposed the capabilities approach. Rawls opposes it because he prefers primary goods as a better measurement. Miller opposes it because he prefers the idea of a basic right over a basic capability as a better standard of international decency. Pogge opposes it because he contends that Rawlsian theoretical properties supply better public criteria of justice without the risk of stigmatizing those lacking valued capabilities. I direct readers to Elizabeth Anderson's recent defence of the capabilities approach to justice as a powerful response to such criticisms.²¹⁷ Nussbaum and Sen argue that Rawls's account of primary goods should be formulated in terms of capabilities rather than as a list of things.

Justice concerns the extent to which individuals are empowered to live dignified lives. The primary subject of justice is usually taken to be the institutional arrangements that generate the requisite opportunities for individuals to live dignified lives over time. Justice demands that institutional arrangements empower individuals to exercise their fundamental capabilities, combat oppression, and foster a community of equals. Equal respect for persons means treating people with dignity and not with condescending pity that addresses

²¹⁷ See Elizabeth Anderson, "Justifying the capabilities approach to justice," in Harry Brighouse and Ingrid Robeyns, eds. *Measuring Justice: Primary Goods and Capabilities* (Cambridge: Cambridge University Press, 2010). See also the contributions to Alexander Kaufman, ed. *Capabilities Equality: Basic Issues and Problems* (New York: Routledge, 2006).

them as burdensome inferiors. Most people lack significant power in the sense that they do not regularly participate in decisions that affect their lives, perhaps because they are not actively engaged in the social life of their communities, have only a marginal influence on political affairs and public policy, or do not enjoy workplaces that are organized democratically. I am keenly interested in this relationship between the demands of justice, the nature and influence of democracy, and the meaning of empowerment. The most fruitful and exciting work currently addressing this relationship is focused on the capabilities approach at the cross-sections of development studies, politics, and philosophy.²¹⁸

In the second half of my thesis I explore, in four short philosophical essays, related ways that a rights-based capabilities perspective on justice might be further developed. This includes, in Chapter Two, looking at how the value of rights and the value of care might integrate as effective conceptual allies in response to powerful feminist criticisms that characterize justice and care as oppositional. In Chapter Three I explore ways in which the ethical demands of rights might connect with value theory aimed at developing objective or hybrid accounts of well-being for political purposes. Chapter Four considers Hugo Grotius's ground breaking, rights-based theory of international justice and connects the rich historical heritage of the Grotian rights tradition to capabilities theory. Finally, in Chapter Five I consider theory of justice as it relates to the question of nonhuman animal rights, defending capabilities as well equipped to broaden theory of justice beyond the limiting social contract tradition and the distributive paradigm.

²¹⁸ See especially Anderson, "What is the Point of Equality?," Brock, *Global Justice: A Cosmopolitan Account*, Deen K. Chatterjee, ed. *Democracy in a Global World: Human Rights and Political Participation in the 21st Century* (Lanham: Rowman & Littlefield, 2008), David A. Crocker, *Ethics of Global Development: Agency, Capability, and Deliberative Democracy* (Cambridge: Cambridge University Press, 2008), and recent work by Jay Drydyk including: "When is Development More Democratic?," *Journal of Human Development*, Vol. 6, No. 2, 2005, "Durable Empowerment," *Journal of Global Ethics*, Vol. 4, No. 3 2008, "Participation, Empowerment, and Democracy: Three Fickle Friends," in Charles K. Wilber and Amitava Krishna Dutt, eds. *New Directions in Development Ethics: Essays in Honor of Denis Goulet* (Notre Dame, Ind: University of Notre Dame Press, 2010), and "A Capability Approach to Justice as a Virtue," *Ethical Theory and Moral Practice*, Vol. 15, No. 1, 2012.

A common theme throughout each chapter of my thesis is the opportunity for conceptual partnering, integration, and support aimed at strengthening theory of social and global justice. With important qualifications concerning matters of scope, principle, and strategy, I pursue avenues for aligning and combining various reasonable alternatives because, in short, we should be throwing everything we have got at the challenge of global justice. This involves the difficult task of pursuing theory of justice in a manner that constructively builds upon mutually reinforcing perspectives, and not simply characterizing the expansive global justice literature as competing, incomplete theories. We do not just want to work away, in isolation or in competition, at political philosophy. We want our political philosophies to work for justice, for understanding it, for pursuing it, and for achieving it.

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Chapter 2¹

On the Rescuing of Rights in Feminist Ethics

“Feminism is a revolutionary program, since it is committed to overthrowing the deepest and most entrenched hierarchy of all – the hierarchy of gender. It does not seek to substitute women for men in the hierarchy of domination but to overcome domination itself. The care that is valued by the ethics of care can – and to be justifiable must – include caring for distant others in an interdependent world, and caring that the rights of all are respected and their needs met. It must include caring that the environment in which embodied human beings reside is well cared for. The ethics of care will strive to achieve these transformations in society and the world non-violently and democratically but with persistence.”²

2.1 Introduction

Feminist ethicists have advanced one of the most important and sustained critiques of contemporary human rights. Narrowly defined liberal rights continue to reflect masculine interests and reinforce patriarchy, yet the potential of a more substantive moral conception and practice of rights that helps transform oppressive attitudes and institutions has inspired many feminists to rescue rather than abandon rights. Virginia Held’s work has focused on the relations between justice and care and her contribution to the development of an ethics of care signifies one noteworthy strategy of rescuing rights.

In the following chapter I focus on Held’s account of human right by specifically asking whether she effectively responds to the feminist critique. Care ethics is a promising and powerful corrective to traditional moral theory. With her work Held seeks to accommodate, while critically interrogating, an account of rights meant to fit within a

¹ An earlier version of this chapter was presented at the Annual Philosophy Graduate Student Association Conference, York University, April 2010. Thanks to Amanda Porter, Tracy Isaacs, Craig Roxborough, Mark Schranz, Jason Breen, Susan Dieleman, and Lorraine Code for their assistance, feedback, questions, and comments on earlier versions. I would also like to thank Jean Mueller and Hichem Naar, Editors of *Praxis*, and the two anonymous referees for their thorough and very valuable comments and suggestions. A version of this chapter was published as “On the Rescuing of Rights in Feminist Ethics: A Critical Assessment of Virginia Held’s Transformative Strategy,” *Praxis Journal of Philosophy*, Vol. 3, No.1, 2011, pp. 66-83. Special thanks to the editors for kindly permitting me to use this article here.

² Virginia Held, *The Ethics of Care: Personal, Political, and Global* (Oxford: Oxford University Press, 2006), 66.

globalized ethics of care. Out of sympathy with her transformative strategy I argue that her limited characterization of rights weakens the potential role of rights in contributing to her transformative vision. A rescue effort that reclaims rights as far-reaching moral practice embodying the values of care and justice, rather than one that limits rights to the procedural domain of state law, would better serve Held's transformative strategy.

2.2 The Feminist Critique of Rights

Rights are central to the language and issues of justice though sometimes rights and justice are characterized as conflicting ideals. Rights-based approaches to justice help connect our understanding of these concepts by making equality of rights a primary requirement of any just order. How rights are conceived to empower individuals directly informs the requirements we place on political institutions to achieve and reflect the demands of justice. Rights can be thought of as protections, entitlements, and/or claims, and can be negative or positive, legal or moral. There is a vast philosophical literature on rights that features many different and competing understandings of the concept of rights.³ While my present aim is critical, briefly stipulating my own understanding of rights will help define my terms and demarcate what I take to be a more substantive conception from the more narrowly defined liberal rights feminists primarily and rightly criticize.

³ For a very small representative sample see, for example, William A. Edmundson, *An Introduction to Rights* (Cambridge, UK: Cambridge University Press, 2004), Allan Gewirth, *The Community of Rights* (Chicago: The University of Chicago Press, 1996), Allan Gewirth, *Human Rights: Essays on Justification and Applications* (Chicago: The University of Chicago Press, 1982), Jonathan Gorman, *Rights and Reason: An Introduction to the Philosophy of Rights* (Montreal: McGill-Queen's University Press, 2003), James Griffin, *On Human Rights* (Oxford: Oxford University Press, 2008), Virginia Held, "Rights" in *A Companion to Feminist Philosophy*, eds. Alison M. Jaggar and Iris M. Young (Malden, MA: Blackwell, 1998), Brian Orend, *Human Rights: Concept and Context* (Peterborough, ON: Broadview, 2002), William J. Talbot, *Which Rights Should be Universal?* (Oxford: Oxford University Press, 2005).

A comprehensive theory of rights focuses on the most important questions concerning their application, content, justification, meaning, and relations to other values.⁴ As a first approximation, rather than a detailed systematic account, I offer a brief working conception of right in terms of what justifies rights, how rights are defined, and how we ground the specific content of rights. Rights are justified by an ethical argument about the valued capabilities of individuals and should entail, as well as emphasize, the interdependence of civil and political liberties and economic and social rights.⁵ As an underlying starting point, fundamental assumption, or primitive diagnosis of value I claim that since there is an inherent value and dignity to life, irrespective of one's nationality, race, sex, or species membership, each individual is fundamentally entitled to the opportunity to live a life worthy of that value and dignity. Having a right means having a fundamental entitlement to a certain level of capability to function. That is, having a right means being entitled to be empowered with the genuine opportunity to live a life of dignity by being able to do certain things and by being able to be a certain way, above a minimum threshold. As fundamental entitlements rights are prepolitical moral claims, not merely artefacts of laws and institutions. The contents of rights are grounded in our reasoned judgment of a species' moral value generally and, more specifically, in our best determination of what basic capabilities must feature in an individual life so that we can reasonably say her actual life is sufficiently dignified. In my view, securing a right is an affirmative task, not simply a matter of negative liberty where rights are regarded as secured if the state – or anyone in a position to help – refrains from interference on the matter. To properly respect rights is to value the realization

⁴ Gewirth, *Human Rights: Essays on Justification and Applications*, ix.

⁵ For the capabilities approach upon which my account is based see, for example, Martha C. Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Cambridge, Mass: The Belknap Press of Harvard University Press, 2006), Amartya Sen, *The Idea of Justice* (Cambridge, Mass: The Belknap Press of Harvard University Press, 2009).

of rights such that the responsibility to defend, secure, or uphold rights falls on whoever is in a reasonable position to do so. This focus on the central moral importance of rights, including their immediate practical significance for individuals, their cosmopolitan flavour, their explicit connection to responsibility and well-being, and their inclusion of non-human animals within the sphere of justice is what makes them a powerful and integral ally to an increasingly global ethic of care, not just a limited and subordinate formal resource. It also has the distinct advantage of emphasizing the expression of a plurality of values in the very practice of rights.

Rights have been highly criticized from many perspectives. Feminist critiques of rights have in particular been some of the most probing and extensive. There are a wide range of feminist criticisms of the meaning, nature, and use of rights, and the following section offers a brief summary of the major recurring themes that emerge from these otherwise varied and diverse criticisms. Held characterizes the feminist critique of rights as twofold. The feminist critique of rights emerges from scepticism about traditional rights-based moral theories and demonstrates the manner in which actual legal systems utilize rights to reinforce patriarchy and oppressive power structures. Mainstream liberal rights have come under the heaviest criticism for their emphasis on impartial justice, individual autonomy, and the separateness of persons. The feminist critique of rights regards the traditional liberal understanding of rights as overly individualistic, as obfuscating the real political issues, and as isolating people from one another. Fiona Robinson maintains:

Rights-based ethical theory is based on untenable assumptions about human rationality and the universality of human nature; it is an abstract impersonal, rule-oriented morality which obfuscates the social and political dimensions of global moral problems, and which can tell us remarkably little about who or what is responsible for ensuring that the claims of rights-holders are met.⁶

⁶ Fiona Robinson, "The Limits of a Rights-Based Approach to International Ethics," in Tony Evans, ed. *Human Rights Fifty Years On: A Reappraisal* (Manchester: Manchester University Press, 1998), 60.

Mainstream rights theories, it is argued, remain too general and impractical, restricted to a limited range of abstract moral problems, void of contextual details and often restricted to negative obligations of non-interference.⁷ Catherine MacKinnon argues that by encouraging a detached, procedural, and legalistic account, dominant rights discourse promotes an ideological commitment to the external rules of authority and with it a defence of patriarchy:

In the liberal state, the rule of law – neutral, abstract, elevated, pervasive – both institutionalizes the power of men over women and institutionalizes power in its male form ... [M]ale forms of power over women are affirmatively embodied as individual rights in law ... abstract rights authorize the male experience of the world.⁸

Peterson and Parisi argue: “The masculinist state institutionalizes and sustains gender hierarchy – which denies women equal ‘human’ rights – both directly and indirectly.”⁹ By equating the practice of rights with obedience to the rule of law we risk authorizing and reinforcing conventional morality and the traditional power structure. By equating moral rights with rational calculation, dutiful conformity to principle, and the illusion of autonomous moral action free of dependency and power imbalances we also risk adopting a self-interested atomistic and adversarial outlook detached from others as related possessors of moral value. In Nel Noddings’s words, if we “come to rely almost completely on external rules [we] become detached from the very heart of morality: the sensibility that calls forth caring.”¹⁰ Feminist critics have argued that thinking in terms of rights reinforces this divisive tendency to think of ourselves as separate from and in conflict with others.¹¹ As Carol

⁷ Samantha Brennan, “Reconciling Feminist Politics and Feminist Ethics on the Issue of Rights,” *Journal of Social Philosophy* Vol. 30, no. 2 (1999), 262-264.

⁸ Catherine A. MacKinnon, *Toward a Feminist Theory of the State* (Cambridge, Mass: Harvard University Press, 1989), 238-248.

⁹ V. Spike Peterson and Laura Parisi, “Are Women Human? It’s Not an Academic Question,” in Tony Evans, ed. *Human Rights Fifty Years On: A Reappraisal* (Manchester: Manchester University Press, 1998), 144.

¹⁰ Nel Noddings, *Caring: A Feminine Approach to Ethics and Moral Education* (Berkeley: University of California Press, 1984), 47.

¹¹ Brennan, “Reconciling Feminist Politics and Feminist Ethics on the Issue of Rights,” 267.

Gilligan has suggested, “a morality of rights and non-interference may appear frightening to women in its potential justification of indifference and unconcern.”¹² Coupled with the tendency of traditional rights theory to overlook or neglect large domains of women’s experience, including mothering and care giving, moral theories of rights may also appear to exist to benefit and reflect the interests of men: “Most feminist critiques of human rights focus on this androcentrism and argue that, ostensibly, human rights are in actuality men’s rights. As a consequence, exclusions, constraints and abuses more typical of women’s lives are neither recognized nor protected by human rights instruments.”¹³ In this sense human rights are argued to express male bias, privileging male power and experience while neglecting women’s oppression and downplaying women’s concerns. This privileging in turn reinforces a public/private dichotomy that relegates women’s moral concerns to the private realm while valuing what is male as important and public, rendering women’s moral concerns separate from and secondary to the broad requirements of justice and public morality.

2.3 The Ethics of Care and Human Rights

The ethics of care has developed, in part, out of dissatisfaction with traditional moral theory and is often juxtaposed with an ethics of justice. Whereas the justice approach is characterized as an impersonal and impartial morality based on abstract universal principles such as rights, the care approach acknowledges the existence of relationships of dependency, emphasizing the importance of care for helping and expressing concern for others. As Brian Orend notes, “[c]are for others means sympathizing with them and supporting them, helping

¹² Carol Gilligan, *In a Different Voice: Psychological Theory and Woman’s Development* (Cambridge, Mass: Harvard University Press, 1982), 22.

¹³ Peterson and Parisi, “Are Women Human? It’s Not an Academic Question,” 132.

them develop their skills, being committed to a personal connection with them based on trust and mutual respect, taking on responsibility to do what one can to ensure their well-being.”¹⁴ Since we are not all equal, independent, autonomous, adult, rational agents of traditional moral theory, such theory is unhelpful in addressing practical moral issues that arise within the context of relationships, especially relationships of dependency involving unequal vulnerability. Traditional moral theory contributes to the view that women are morally deficient according to the scale of moral development developed through empirical interview-based study by Lawrence Kohlberg.¹⁵ On Kohlberg’s scale the indifferent and impartial autonomous rational man is placed at the top: “The morality of responsibility which women describe stands apart from the morality of rights which underlies Kohlberg’s conception of the highest stages of moral judgment.”¹⁶ Gilligan famously criticized this traditional model for largely disparaging and excluding the concerns and experiences of women. She argued for an alternative model that characterizes women’s conceptions of self and morality in a different feminine voice than an ethic of justice modeled on male moral judgment:

The moral imperative that emerges repeatedly in the women’s interviews is an injunction to care, a responsibility to discern and alleviate the ‘real and recognizable trouble’ of this world. For the men Kohlberg studied, the moral imperative appeared rather as an injunction to respect the rights of others and thus to protect from interference the right to life and self-fulfillment. Women’s insistence on care is at first self-critical rather than self-protective, while men initially conceive obligation to others as negatively in terms of non-interference. Development for both sexes would seem to entail an integration of rights and responsibilities through the discovery of the complementarity of these disparate views.¹⁷

¹⁴ Orend, *Human Rights: Concept and Context*, 173.

¹⁵ See Lawrence Kohlberg, *Essays on Moral Development. Vol. 1: The Philosophy of Moral Development* (San Francisco: Harper & Row, 1981).

¹⁶ Carol Gilligan, “In a Different Voice: Women’s Conception of Self and Morality,” *Harvard Educational Review* Vol. 47, No. 4, 1977, 509.

¹⁷ *Ibid*, 511.

Gilligan's view has been criticized for suggesting that moral development rests on gender-specific differences, lending itself to an essentialist view of men and women. Gertrud Nunner-Winkler reinterprets Gilligan's position as establishing two different types of moral duties within one morality, contesting the view that there exists a distinct male and a distinct female ethical approach.¹⁸ Michele M. Moody-Adams argues that the great strength of Gilligan's work is in its defence of considerations of care as morally important, but questions a strictly bimodal approach to moral thinking that frames the justice versus care issue along gendered lines.¹⁹

My own interest is in the development of an integrated moral theory. In agreement with Joan C. Tronto I regard the ethics of care as an important intellectual concern for feminists, but feel that "debate around this concern should be centered not in discussion of gender difference but in discourse about the ethic's adequacy as a moral theory."²⁰

Specifically, the focus should be on what care ethics contributes to moral theory and practice and how it can be further developed, strengthened, and advanced. The ethics of care should be regarded as a vital component of, not simply as a necessary corrective to, moral discourse. Otherwise it will be treated as functional to the improvement of a specifically public morality and, to the extent that it remains associated with privatized women's morality, secondary and supplemental to impartialist views.²¹ Instead of siding with an impartialist view of the domain of morality that denies the existence of conflict between justice and care, I agree with the advocates of care that both rights and responsibilities are central descriptive and

¹⁸ See Gertrud Nunner-Winkler, "Two Moralities? A Critical Discussion of an Ethic of Care and Responsibility versus an Ethic of Rights and Justice," in Mary Jeanne Larrabee, ed. *An Ethic of Care: Feminist and Interdisciplinary Perspectives* (New York: Routledge, 1993).

¹⁹ See Michele M. Moody-Adams, "Gender and the Complexity of Moral Voices," in Claudia Card, ed. *Feminist Ethics* (Lawrence, KS: University Press of Kansas, 1991).

²⁰ Joan C. Tronto, "Beyond Gender Difference to a Theory of Care," in Mary Jeanne Larrabee, ed. *An Ethic of Care: Feminist and Interdisciplinary Perspectives* (New York: Routledge, 1993), 241.

²¹ *Ibid.* 247.

normative features of moral practice, public or private. Dominant liberal rights discourse prioritizes justice, stemming from what has sometimes been referred to as the stranger model of morality. Care ethicists such as Held regard such moral theories as poor models for relations between persons, pointing out the relational care central to our interdependent society is absent from such models and that they are demeaning when applied to domains of experience in which care is the primary value.²² Annette Baier has argued: “Liberal morality, if unsupplemented, may unfit people to be anything other than what its justifying theories suppose them to be, ones who have no interest in each others’ interests.”²³ Absent a sense and recognition of care, rights-based liberal morality appears to lend itself to a cold unfeeling vision of moral judgement and behaviour. The question for care ethicists, given their compelling insistence that care is as important for morality as justice, is how best to conceptualize this integrated view by looking critically at the promises and problems it presents.

Held maintains that most feminists recognize the important role rights continue to play in achieving feminist aims, from substantive equality rights for child care and maternity leave to the use of rights in combating racism and violence against women. Feminists have also emphasized the centrality of rights arguments in movements for social change, including the struggle for global justice. Rights may be unsuitable for dealing with particular moral issues arising in relationship contexts, where an ethic of care may be more appropriate. In other instances, however, a discourse of care separated from an emphasis on rights has been used to justify colonial domination. Uma Narayan has powerfully advanced this point, recalling “the colonialist project of denying rights to the colonized in the name of

²² Virginia Held, “Liberalism and the Ethics of Care,” in Claudia Card, ed. *On Feminist Ethics and Politics* (Lawrence, KS: University Press of Kansas, 1999), 294.

²³ Annette Baier, *Moral Prejudices: Essays on Ethics* (Cambridge, Mass: Harvard University Press, 1994), 29.

paternalistic concern for their welfare.”²⁴ Feminist reconstructions of rights see opportunities for reformulating existing schemes, reworking the concept of right, or limiting the reach of legal rights. Importantly, Held notes that,

Rights are not fixed but are contested, and political struggles are effectively organized around the indignation widely felt over clear denials of rights and persuasive reasons to recognize new rights. Among the strongest arguments women and minorities and colonized peoples have made are that they have not been accorded even the minimums of equal respect supposedly guaranteed by law. The basis for many of the most substantial advances made by disadvantaged groups has been composed of justice, equality, and rights; of course this discourse should not be abandoned.²⁵

For these reasons both care and justice must be regarded as essential to a substantive moral theory.

2.4 Held’s Account: A Critical Assessment

In their otherwise well-aimed criticisms, care ethicists sometimes equivocate between the dominant discourse and practice of rights and the philosophy of rights. Put another way, they sometimes equivocate between the concept of rights as defended in traditional liberal theories and rights per se. By granting their critical interpretations of either the dominant discourse or the mainstream liberal theories as the correct view of what rights are, the otherwise contested concept goes undisputed and is then dismissed prematurely or shown to be limited and in need of supplementation. However, we should be cautious about restricting or dismissing the concept of rights based on the way mainstream liberal theorists and states conceive and utilize rights. My own worry is that human rights scholarship has undergone an ideological perversion wherein the rights once employed to positively transform the social and political landscape are now used to insulate dominant institutions

²⁴ Held, “Rights,” 506. See Uma Narayan, “Colonialism and Its Others: Considerations on Rights and Care Discourses,” *Hypatia* Vol. 10, No. 2, 1995.

²⁵ Held, “Rights,” 507.

from criticism. Held's account strangely reinforces this worry, though she might object by insisting her very point is to develop an ethic of care, not rights, to facilitate her transformative strategy. By tending to focus on the insulating role rights can play, the feminist critique sometimes neglects the transformative potential a more substantive integrated moral theory might have. While rights can be and are used as weapon-like instruments to insulate existing systems of power, historically rights have not been the predictable and logical products of states. Rather, they have been bitterly fought for and hard-won in an on-going struggle to pry open and make more accountable, democratic, and humane dominant institutions like the global market and the global system of states.²⁶ It remains an open question whether anything resembling the current global market and global system of states is ultimately compatible with a sufficiently rights-respecting world. Care ethics, in my view, presents as strong a case for reclaiming the concept in this manner as it does for seeking to transform the moral and political landscape with the cultivation of care. I argue, however, that Held's own approach of rescuing rights is misguided, aimed at reconciling rights with care by demarcating limits on the role rights can play in moral practice. Despite stressing the contested nature of rights, Held's account is limited by her own reluctance to strive for a more inclusive rights theory embodying care. In this sense Held's account is not an effective response to the feminist critique of rights, nor is it postured as one, which, as I argue, is its biggest weakness. The feminist critique of rights powerfully exposes the unsavoury flaws of traditional theories and dominant discourses and practice. The motivation behind my own critical assessment of Held's account of rights

²⁶ See Noam Chomsky, "The United States and the Challenge of Relativity," in Tony Evans, ed. *Human Rights Fifty Years On: A Reappraisal* (Manchester: Manchester University Press, 1998). Lynn Hunt, *Inventing Human Rights: A History* (New York: W. W. Norton, 2007). Micheline R. Ishay, *The History of Human Rights from Ancient Times to the Globalization Era* (Berkeley, CA: University of California Press, 2004).

stems from my view that a burgeoning theory of care is well situated to respond to, not simply advance, that critique by reclaiming a conception of rights.

Held's transformative strategy involves developing a feminist morality that cultivates what might be called the art of moral practice. She seeks to provide guidance in resolving actual moral problems and considers the implications care has for restructuring cultural practices and social and political institutions. She envisions a more caring society as providing more accountable and democratically run services, decreased expenditures on legal remedies for illegal actions, reduced influence of the realm of law, increased participation in and creation of culture, and increased global concern and awareness.²⁷ She has clearly and consistently rejected a view that would regard the value of justice as most appropriate to the public sphere and the value of care as most appropriate to the private one.²⁸ Importantly, she has always maintained an integrative, albeit limited, approach aimed at rescuing rather than dismissing rights:

The criticism of rights from the perspective of care may perhaps best be seen as a criticism of the conceptually imperialistic role that law has played in moral thinking. It is not directed at overthrowing rights in the domain of law, but at limiting legal interpretations to the domain of law rather than supposing them to be suitable for all other moral problems as well. Once the framework of justice and rights is understood as a limited one rather than as the appropriate way to interpret all moral problems, other moral arguments can become salient and social and political organization can develop around other aims than those of justice, law, and rights.²⁹

The problem with Held's account here, however, is that she allows her criticism of the legalistic use of rights by states to inform her restriction and discouragement of a more substantive conception of rights. While acknowledging the problematic way rights can be

²⁷ Virginia Held ed., *Justice and Care: Essential Readings in Feminist Ethics* (Boulder, CO: Westview, 1997), 153-154, 165. Held, *The Ethics of Care: Personal, Political, and Global*, 75, 130.

²⁸ Virginia Held, "Feminist Transformations of Moral Theory," *Philosophy and Phenomenological Research* Vol. 50, 1990, 334-337. Held, "Rights," 509. Held, *The Ethics of Care: Personal, Political, and Global*, 68-69.

²⁹ Held, "Rights," 509.

used by states she is too willing to concede the moral territory of rights to the domain of law. Inadequate, abusive, or imperialistic state practice should compel us to employ our entire arsenal of intellectual self-defence, including rights advocacy, to combat such moral failings.

Held's most recent and detailed account of the ethics of care also features this underestimation of the progressive moral power of rights, focused as it is on discerning the value of care in apparent response to Tronto's advice that, "[o]nly when care is assessed in its relative importance to other values can it begin to serve as a critical standpoint from which to evaluate public life. Such an assessment will require a full-fledged moral and political theory of care."³⁰ We see Held working out the relative importance of other values when she states: "I am coming to the view that care and its related considerations are the wider framework – or network – within which room should be made for justice, utility, and the virtues. This perspective does not mean that all other values, points of view, or the institutions or practices they recommend can be reduced to aspects of care. Reduction does not seem like the right approach."³¹ Held insists that care is both a practice and a normative moral value. While her account lends itself to the development of a more integrative approach, her focus on the value of care too often characterizes the motive of care as dichotomous with and having normative priority over the motive of justice and this inhibits the role rights can play. Instead of developing an approach that integrates rights and care, rights are juxtaposed with a commitment to care and argued to entail different considerations. Rules, laws, and fairness underlie rights commitments while meeting needs, concern with well-being, or even the development of civil society is grounded on care.³² By equating rights with justice and juxtaposing the value of justice with the wider moral

³⁰ Tronto, "Beyond Gender Difference to a Theory of Care," 248.

³¹ Held, "Liberalism and the Ethics of Care," 302.

³² Held, *The Ethics of Care: Personal, Political, and Global*, 40-41.

framework of care into which justice should be fitted, Held appears to adopt the very notion of rights feminists primarily criticize, perhaps explaining her limited effort at rescuing them.

In her defence, Held sometimes moves beyond the either/or approach by repeatedly emphasizing the importance of both the values of care and justice. She is also explicit in reminding readers that her critique of rights concerns the mainstream liberal approach, at least leaving the door open for a more substantive conception of rights. She objects to the view that care should completely replace justice as the central concept of morality, insisting that rights, when viewed in the context of social practices, have a role to play in addressing discrimination and inequalities along with empowering women.³³

As a distinctively moral notion, human rights have obtained global status in at least the rhetoric of world affairs. The public discourse of rights serves as a reminder that people have justified and urgent claims to be treated in a dignified way irrespective of what society and the world have actually done about it. It highlights the great importance and role of the things rights represent, as commonly expressed in lists, laws, charters, and declarations. Rights language also emphasizes the importance of choice and the requisite preconditions that must exist to make such choices meaningful. Finally, the language of rights establishes a minimum threshold of basic entitlements and a sense of the terrain of agreement about that minimum. Certainly rights continue to be debated and are subject to abuse, but the language and concept of rights demands a broad consensus concerning the core idea that individuals have rights that demand our protection. While the language of rights plays a powerful moral role in contemporary political discourse, human rights remain conceptually ambiguous and continuing theoretical confusion and disagreement serves as a barrier to what might be called the human rights project. Held's rescuing of rights involves embracing the powerful role the

³³ Ibid. 62-63, 67.

language of rights has. In seeking to limit the dominance of that morality she nonetheless concedes the conceptual terrain to traditional mainstream liberal theory and practice.

Pragmatically, she appears convinced by the power of rights rhetoric but fails to assertively reclaim rights as a powerful moral practice that transcends legalistic power politics.

In her attempt to mesh care and justice, Held considers assigning moral minimums and constraints to rights, “a floor of moral requirements beneath which we should not sink as we avoid the injustices of assault and disrespect. In contrast, care deals with what is above and beyond the floor of duty,” informing our vision of the good life.³⁴ Held thinks this solution, however, is unclear, noting that there also exist necessary minimums of care such as responding to the basic needs of children, which arguably set constraints on justice. For this reason she answers the question of how justice and care and their related concerns fit together by arguing that “caring relations should inform the wider moral framework into which justice should be fitted. Care seems the most basic moral value. As a practice, we know that without care we cannot have anything else, since life requires it.”³⁵

Surprisingly absent from Held’s account is any explicit acknowledgment or exploration of a conception of rights that expresses both values simultaneously. As Brennan insightfully argues, “[s]ometimes what it is to care for a person is to take on concern for their rights. Concern for the rights of a loved one does not mean that one cares only for an abstract moral concept. One can be concerned about rights because of a direct love for the other person.”³⁶ A commitment to rights sometimes just is an expression of care. Rights-based practices often provide practical avenues to effectively channel our care for others. Although Held’s account hints at this, her ordering and division of justice and care as

³⁴ Ibid. 71.

³⁵ Ibid.

³⁶ Brennan, “Reconciling Feminist Politics and Feminist Ethics on the Issue of Rights,” 271.

concerning related but different considerations obscures this perspective and the concomitant conceptual and practical opportunities it entails. Consider the way Brian Orend's view mirrors Held's suggestion: "the ethics of rights is designed to secure the floor and foundations, whereas the ethics of care is better thought of as constructing the ceiling, for the structures of our shared social life."³⁷ In Held's haste to emphasize the limitations of a rights-based morality she adopts, like Orend, the assumption that rights embody one value, justice, distinct and separate from, and morally unequal to, care. Contra Orend, she simply reorders the values such that care underlies a rights-based approach rather than rights establishing the minimum upon which the aspirations of care are built. Instead of working within the realm of rights to articulate an alternative account of the content, practice, and motivation of rights, Held limits the role and meaning, not just the scope, of rights, leaving the development of rights in the hands of mainstream moral theory and practice.³⁸ Held's strategy resembles what Joy Kroeger-Mappes has called the necessary-base thesis in which care is the necessary base for an ethic of rights.³⁹ This strategy rests on the view that, when taken alone, rights represent an extremely inadequate moral guide for human behaviour. This leads Held to focus on the limitations, and thus duly limit, a narrowly defined conception of rights. Held often highlights the view that, "although there can be life without justice, there cannot be life without the care that has value," repeating that, "[w]ithout care, however, there would be no persons to respect and no families to improve. Without care, there would be no public system of right – even if it could be just."⁴⁰ She argues that rights entail a presumption of care but that such care has normative priority over

³⁷ Orend, *Human Rights: Concept and Context*, 175.

³⁸ Brennan, "Reconciling Feminist Politics and Feminist Ethics on the Issue of Rights," 272.

³⁹ See Joy Kroeger-Mappes, "The Ethic of Care vis-à-vis the Ethic of Rights: A Problem for Contemporary Moral Theory," *Hypatia* Vol. 9, No. 3, 1994.

⁴⁰ Held, "Liberalism and the Ethics of Care," 302. Held, *The Ethics of Care: Personal, Political, and Global*, 72.

rights. The evident tension, or inconsistency, that follows from her account is that a functioning conception of rights is necessarily care-laden, yet the notion of rights she employs to construct her ethics of care is limited to the legal realm of procedural justice because it is void of such value. Rights both do and do not embody the value of care.

Focus on the fundamental importance of care need not force care ethicists to prioritize care over rights by limiting the meaning and moral practice of rights. Care and justice are too important as allies in the struggle for a better world to allow the conceptual tensions and competing values they can occasion to unduly restrict our efforts. As Hilary Putnam says, “the function of ethics is not, in the first instance, to arrive at ‘universal principles.’ The primary aim of the ethicist ... should not be to produce a ‘system,’ but to contribute to the solution of practical problems.”⁴¹ Held aims to make such a contribution and the practical import of care ethics is part of what makes it so attractive, highlighting the importance of allying rights with care in a manner that builds upon Held’s increasingly global account. The constructive approach I recommend avoids the false dilemma between care and rights not by denying existing tensions or by assigning normative priority to one or the other, but by insisting on the potential of a more integrated approach. This requires further elaboration. Just as knowledge and enactment of rights, however defective or incomplete, emerges cross-culturally through the apparently universal idea of social protection against standard threats, so too a working knowledge of care, neglect, and abuse appears to exist in all cultures. Indeed, practices of direct personal care and support may be necessary conditions for cultural survival.⁴² While the expressions and requirements of care can be exemplified differently within and between cultures, “when it comes to identifying the most

⁴¹ Hilary Putnam, *Ethics without Ontology* (Cambridge, Mass: Harvard University Press, 2004), 4.

⁴² Jay Drydyk, “Globalization and Human Rights,” in Christine M. Koggel, ed. *Moral Issues in Global Perspective*, 2nd ed. (Peterborough, ON: Broadview, 2006), 73, 79, 84.

important types of protection, and probably even to ranking the worst cases of neglect and abuse, there is remarkable convergence. As a resource for moral understanding, this convergence is bedrock.”⁴³ A double convergence, in which care and rights converge within cultures to establish social protections and these social protections converge cross-culturally to inform an increasingly global perspective on what constitutes a caring rights-respecting order, would appear to underlie what Jay Drydyk calls a global public sphere of moral deliberation.⁴⁴ To the extent that this begins to accurately describe the dynamic relationship between care and rights globally, the moral practice of rights appears less adversarial and more integrated with care than Held suggests.

Just as rights without care are inadequate in the extreme, so too is care without rights. Admittedly, Held frequently stresses this and nowhere denies it and I am hard pressed to actually disagree with Held’s account. However, by too often associating rights with the value of justice, she maintains that without care there will be no human beings in a way that this is not true of a world absent rights.⁴⁵ This strikes me as a conceptually confused position, separating the practice of caring from an implicit respect for the right to life, concerned and committed to securing a life entitled to a dignified level of well-being. The problem is that the world is sorely lacking in respect for and realization of rights, yet I can scarcely imagine, nor do I care to, a world without rights. I am thus inclined to find fault with her account not for what it does wrong but for its focus, excluding from consideration the development of a richer conception of rights informed by care. Offered as constructive criticism, what is missing is an in-depth historical understanding and nuanced account of rights that recognizes the role rights play as an expression of care, along with their potential

⁴³ Ibid. 79-80.

⁴⁴ Ibid. 78.

⁴⁵ Held, *The Ethics of Care: Personal, Political, and Global*, 125, 132-134.

for realizing Held's transformative vision by helping reshape a cold, uncaring world. A relational account of rights, coupled with a focus on moral character, represents one such approach, noted but unexplored by Held.⁴⁶ Held might fairly object to this criticism by claiming that she has left the development of a relational account of rights, which she continues to support, up to others. Such a relational account rejects the traditional dichotomy between care and justice and a view of rights as merely individualistic and abstract principles, noting that moral rights are at play in our personal as well as impersonal relationships. Accounts of nonabsolute rights can directly attend to moral context.⁴⁷ Nedelsky insists that, "what rights in fact do and have always done is construct relationships – of power, of responsibility, of trust, of obligation."⁴⁸ Such accounts also emphasize the importance of care about self and others by caring about, recognizing, and respecting your own rights and the rights of others, be they close relations or distant strangers. Brennan argues that,

As feminists we will want to reject theories of rights that have built-in assumptions of complete independence and separation, but it is open to us to develop accounts of rights based upon a relational account of the self. Obviously further work is required in this area, developing such a relational account, but there is no good reason to throw out rights along with 'autonomous man.'⁴⁹

It is one thing to criticize Held for characterizing the role rights can play in too limited and unimaginative a light. It is quite another thing to begin to supply the more substantive account I demand of care ethics. How might a burgeoning theory of care respond to the feminist critique by rescuing rights? A relational account that acknowledges and builds upon our interconnectedness, our vulnerability, and the plethora of existing power imbalances and

⁴⁶ See, for example, Jennifer Nedelsky, "Reconceiving Rights as Relationship," in Christine M. Koggel, ed. *Moral Issues in Global Perspective, 2nd ed.* (Peterborough, ON: Broadview, 2006). Brennan, "Reconciling Feminist Politics and Feminist Ethics on the Issue of Rights."

⁴⁷ Brennan, "Reconciling Feminist Politics and Feminist Ethics on the Issue of Rights," 262-264, 271.

⁴⁸ Nedelsky, "Reconceiving Rights as Relationship," 100.

⁴⁹ Brennan, "Reconciling Feminist Politics and Feminist Ethics on the Issue of Rights," 266.

inequalities that exist in our increasingly global world rejects the central problematic assumptions of traditional rights theory. We probably should not, and for the most part do not, restrict our concern for the rights of others to hyper-rationalistic calculations about our own autonomy and individual advantage. Indeed, a relational, pluralistic, care oriented, capability-based conception of rights like the one I have very briefly sketched offers, among many other advantages, the prospect of more accurately reflecting what is decent about our everyday moral practices. It also highlights the transformative potential rights have to foster the kind of caring social relationships we correctly fault traditional rights theory for ignoring or discouraging:

[O]nce rights are conceptualized in terms of the relationships they structure, the problem of individualism is at least radically transformed. There will almost certainly still be people who want the kind of relationships of power and limited responsibility that the individualistic liberal rights tradition promotes and justifies. But at least the debate will take place in terms of why we think some patterns of human relationships are better than others and what sort of “rights” will foster them.⁵⁰

We need an account of rights that further cultivates the art of moral practice, that embodies the value of care without limiting or subordinating the potential role of rights, and that advances a practical integrative approach in line with Held’s transformative vision, if not her strategy. Instead of pursuing this project Held largely relegates rights to the domain of law, collapsing a morality of rights into the descriptive practice of statehood, seeking to limit the conceptually imperialistic role that law has played in moral thinking. Held rescues rights by seeking to contain and reform them rather than reclaim them with a richer and more relational account.⁵¹ Held’s particular vision is limited by her own reluctance to reclaim rights from their ‘autonomous man’ heritage. As noted earlier, sometimes the fault is not with the concept of rights but with the dominant discourse and practice. Held’s account of

⁵⁰ Nedelsky, “Reconceiving Rights as Relationship,” 101.

⁵¹ Held, *The Ethics of Care: Personal, Political, and Global*, 145.

rights concedes authority to this dominant discourse and practice and I remain at pains to see why we should grant this.

2.5 Conclusion

An advantage of adopting the kind of evaluative approach that capability theorists recommend is that it situates rights within a broader concern for human development and well-being, thereby challenging a limited view of rights as belonging solely to the domain of law and solely concerning the value of justice. Indeed, a capability-based conception of rights in which rights are fundamental entitlements to capability to function appears to be a promising theoretical approach that captures the central role and value of care that care ethicists like Held see as lacking from traditional rights theories while offering a substantive alternative to dominant liberal conceptions of rights feminists rightly criticize as too narrow. Held's account focuses too much on the differences between care and rights, stemming as it does from the feminist critique of rights, to effectively respond to that critique with the provision of a more substantive account of rights focused on the positive integration of the values of justice and care. Certainly rights can be used by the powerful to entrench and reinforce their dominance, but such abuse highlights the importance of pressing for and defending rights rather than limiting consideration of rights to an emphasis on their practical faults or failings. Rights should be fought for and a conception of rights reclaimed and shaped by a shared commitment to care and justice. Held's account concedes too much to authority and involves too little focus on the gulf that still exists between a substantive theory of rights and the existing political order. Held's ethics of care includes in its aim the cultivation of care for one's own and others' rights and I share her view that a rights-based morality includes a presumption of care. A rescue effort that reclaims rights as moral

practice embodying the values of care and justice would better serve Held's transformative strategy.

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Chapter 3¹

Rights and Well-Being in Amartya Sen's Value Theory

3.1 Introduction

Surprisingly little has been written on the apparent connection between rights and well-being. While philosophers such as Amartya Sen, James Griffin, and L. W. Sumner have written extensively on rights and on well-being, the nature of the relationship between rights and well-being remains largely implicit in their works. We will consider the connection by exploring how rights connect to well-being in Sen's value theory. Looking at well-being through the lens of rights can help us address specifically moral and political concerns fundamental to the nature of well-being. Sen's capability approach helps us focus not just on what individuals have, including the proximate resources over which they may or may not have command, but on what they are free to do to successfully realize a life they have reason to value. Capabilities provide us with an appropriate measurement for saying that a practice, policy, or society is just to the extent that the rights and well-being of individuals leave them empowered to enjoy a life of dignity that has at least a minimum set of opportunities in it.

3.2 Capability and Well-Being

An advantage of the capabilities approach with respect to development issues and matters of global justice is that it allows us to develop what Hilary Putnam calls the

¹ An earlier version of this chapter was presented at the "How to Live a Good Life" conference hosted by the Center on Values and Ethics at Carleton University in Ottawa, March 2010. I would like to thank Amanda Porter, Samantha Brennan, Gordon Davis, Jay Drydyk, two anonymous referees and Thomas Magnell, Editor-in-Chief of the *Journal of Value Inquiry* for their thorough and extremely valuable discussions, questions, comments, and suggestions. A version of this chapter was published as "Rights and Well-Being in Amartya Sen's Value Theory," *The Journal of Value Inquiry*, Vol. 45, No. 1, 2011, pp. 13-26. Special thanks to the editors for kindly permitting me to use this article here.

entanglement of fact and value. This serves as a corrective to a major shortcoming in modern economics, the ideological separation of economics from ethics. This shortcoming is exhibited, for example, by the view of economics since Adam Smith in which human beings are thought of as motivated purely or solely by self-interest.² The purpose of economic development and policy is to maximize, reflect, and reinforce this self-interest. Where the view of human nature as self-interested is identified with rational behaviour and rationality identified with the maximization of self-interest, questions of ethics have been viewed as non-rational and removed from the scientific analysis and application of economic theory. According to Lionel Robbins: “It does not seem logically possible to associate the two studies [ethics and economics] in any form but mere juxtaposition. Economics deals with ascertainable facts; ethics with valuation and obligations.”³ According to Milton Friedman, disagreements about economic policy can be eliminated by further economics, but when it comes to disagreements about value, “men can ultimately only fight.”⁴

Sen pioneered the capabilities approach in development economics and continues to elaborate it, sometimes in collaboration with Martha Nussbaum, who, since the 1980s has also significantly developed and expanded it. The capabilities approach helps to encourage economists to recognize that well-being is not value free but a moral and political conception with important implications and consequences. Capabilities theorists employ this perspective to measure well-being in terms of a person’s ability to perform certain acts or reach certain states deemed valuable: “The corresponding approach to social advantage – for aggregative

² To be clear, my point here is that since Smith there has been a decisive tendency in economics to characterize human motivation as purely self-interested. However, this would be an inaccurate characterization of Smith’s own view. Indeed, economic and political thinkers like Amartya Sen and Noam Chomsky have written about the inaccurate selective interpretation of and ideological perversion of Smith’s work. Thanks to Charles Jones for insisting on clarification of this point.

³ Quoted in Hilary Putnam, *The Collapse of the Fact/Value Dichotomy and Other Essays* (Cambridge, Mass.: Harvard University Press, 2002), 54.

⁴ Milton Friedman, “The Methodology of Positive Economics,” in his *Essays in Positive Economics* (Chicago: University of Chicago Press, 1953), 5.

appraisal as well as for the choice of institutions and policy – takes the set of individual capabilities as constituting an indispensable and central part of the relevant informational base of such evaluation.”⁵ Capabilities theorists use the language of people’s capabilities to refer to their freedom to function in certain ways and their ability and opportunity to be certain things that are deemed valuable. A person’s capability concerns ways of functioning that someone can choose and achieve, while the ways of functioning concern the actual choosing and doing of the valued things.

The reason for focusing on capability rather than on functioning is to respect the choices of people in determining their meaningful lives, highlighting the value of individual agency. The idea is that there are certain functions people should be empowered to achieve which, where a life developed and shaped by such opportunities constitutes a dignified life. It is not the case that a life lacks value *per se* if it does not feature one or other stipulated set of basic capabilities. Instead, aiming to empower a life by ensuring that it meets or exceeds some capability threshold is how we respect the dignity of life. What matters is having the capability to do a variety of things and then choosing for ourselves whether to exercise our capability to function. Fasting when we have access to plenty of food, for example, highlights the importance of focusing on capability rather than functioning as the political goal. Sen has focused on defending capabilities as the appropriate ethical space and the most fruitful approach for assessing and measuring quality of life globally, insisting that the set or list of capabilities we use depends on the type of social analysis, while Nussbaum has focused on fleshing out their substance by developing a list of central capabilities: “There is no escape from the problem of evaluation in selecting a class of functionings in the description and appraisal of capabilities. The focus has to be related to the underlying concerns and values,

⁵ Amartya Sen, “Capability and Well-Being,” in Martha C. Nussbaum and Amartya Sen, eds. *The Quality of Life* (Oxford: Oxford University Press, 1993), 30.

in terms of which some definable functionings may be important and others quite trivial and negligible. The need for selection and discrimination is neither an embarrassment, nor a unique difficulty, for the conceptualization of functioning and capability.”⁶ Sen stresses that we should be able to adequately assess extreme poverty with a relatively short list which might include the ability to be well nourished and well sheltered and the capability of escaping avoidable morbidity and premature mortality, whereas more general problems of economic development may demand a longer more diverse list. Importantly, Sen rejects the claim that freedom must be valued independently of the values and preferences of the person whose freedom is being assessed. Otherwise freedom could be evaluated independently of evaluating the choices between which the freedom is exercised, when, instead, the well-being and freedom of a person have to be assessed simultaneously in an integrated way, since well-being is not merely a matter of what the person achieves but also of what options the person has the opportunity to choose from. Judgment of a range of choice cannot be separated from evaluation of the elements of that range. It would be odd to conclude that two people have an equal amount of freedom when the three options open to one of them are gruesome, while the options of the other are superb.⁷

Sen distinguishes promotion of the well-being of persons from the pursuit of their overall agency goals, which might include goals other than advancement of their own well-being. He draws a distinction between the notions of achievement and the freedom to achieve, both of which apply to the perspective of well-being and agency. Taken together the two distinctions yield four different concepts of individual advantage: well-being achievement, agency achievement, well-being freedom, and agency freedom. Depending on the context, the well-being of a person may be seen as more relevant than the agency success

⁶ Ibid. 32.

⁷ Ibid. 34-35.

of the person. We may then, for instance, have better grounds for offering support to a person for overcoming hunger or illness than for helping the person build a monument to her hero, even if she attaches more importance to building a monument. Additionally, the well-being freedom of adult citizens may be more relevant than their well-being achievement, providing society with reason to secure opportunities for combating hunger without forcefully requiring citizens to act on such opportunities:

The well-being achievement of a person can be seen as an evaluation of the ‘wellness’ of the person’s state of being (rather than, say, the goodness of her contribution to the country, or her success in achieving her overall goals). The exercise then is that of assessing the constituent elements of the person’s well-being seen from the perspective of her own personal welfare. The different functionings of the person will make up these constituent elements.⁸

Ways of functioning are central to the nature of well-being, though the sources of well-being could be external to the valued capability to function of a person. Seeing the well-being of another person enhanced, for example, may be a source of our own well-being.

Evaluating the well-being of persons may include assessing their well-being achievement and their well-being freedom, which concerns their actual freedom to live well and be well; their freedom to enjoy various possible states of well-being associated with different ways of functioning. An integrated view that entails ways of functioning and the primary informational base of capabilities, which are defined derivatively as the space of ways of functioning, is required. Capability to function highlights the value and relevance of choice behind actual functioning, which then helps us assess ways of functioning in a refined way. Focusing on a person’s opportunity to do and be certain things deemed valuable rather than simply on what people do, independent of their reasons and options, allows us to distinguish between something like fasting and starving. We may want to eliminate

⁸ Ibid. 36.

involuntary hunger but not wish to forbid fasting, even where the same means for achievement exist.

3.3 Rights and Value in Sen's Capabilities Approach

Sen argues that capability to function is highly relevant to well-being because it enables us to assess a person's actual freedom to live and be well. Being able to freely choose is, for Sen, directly conducive to well-being. Rights are primarily ethical demands that generate reasons to promote or safeguard opportunities for meaningful free choice.⁹ The process aspect of freedom concerns the exercise of such freedom by freely choosing it. Inasmuch as simply doing something or functioning is different from choosing to do something and doing it by acting on our capability to function, well-being achievement need not be independent of capability to choose to do a particular function. In one straightforward sense, rights to a worked out set of capabilities can be thought of as rights to well-being where our well-being achievement involves successfully exercising such rights. Sen hints at this view noting: "The importance of rights and freedom can, of course, be combined with incorporating the significance of utility or well-being in ethical reasoning, but if such a 'combined' system is to be pursued, some consistency problems will have to be faced in devising a coherent and integrated social choice procedure."¹⁰ Although Sen is optimistic concerning the viability of such a combined system, he does not explicitly work out the manner and the value of the connection between rights and well-being.

Sen states that a "moral theory would have to begin with some primitive diagnosis of value ... I accept fully that one has to dig for foundations, but there is a substantial issue

⁹ Amartya Sen, "Elements of a Theory of Human Rights," *Philosophy and Public Affairs* Vol. 32, No. 4, 2004, 319.

¹⁰ *Ibid.* 325 note 17.

involved in deciding where to stop digging.”¹¹ Capabilities are defended as a space for evaluating quality of life and there is a deliberate incompleteness to the approach. On Sen’s view, we are not required to take one specific route or adopt one particular list, and he holds that any view of human nature could be dangerously over-specified. In apparent defence of the increased moral complexity involved, for example, in working out the connections between rights and well-being, he notes:

It is also possible for an ethical theory to include more than one type of variables in the category of basal significance. We may be concerned with both liberties and with levels of well-being. We may attach intrinsic importance both to well-being and to agency. We may value freedom as well as achievement. Indeed, pluralist proposals make up much of practical ethics, even though descriptive homogeneity evidently appeals to many moral philosophers (utilitarians among them).¹²

In discussing rights, Sen takes for granted a direct connection between rights and capabilities, regarding human rights as fundamental entitlements to a capability to function. Sen’s elements of a theory of rights and his conception of rights as goals do not offer us any specified or systematic account of the connection. People should be free to choose to act upon their capabilities and thus have a moral claim for such opportunities. For this reason Sen also regards rights as political goals to be secured for each individual.

An acceptable quality of life measured in capability to function involves creating the requisite environment in which rights to capability to function are realized. Thus, Sen asks whether the “realization of rights can itself be a fundamental goal, perhaps even the only fundamental goal?”¹³ He advances a system of rights as goals where realization of the specific content of rights is a major goal of moral philosophy. Although he does not say so,

¹¹ Quoted in David A. Crocker, “Functioning and Capability: The Foundations of Sen’s and Nussbaum’s Development Ethic, Part 1,” *Political Theory* Vol. 20, No. 4, 1992, 589.

¹² Amartya Sen, *Inequality Reexamined* (Cambridge, Mass.: Harvard University Press, 1992), 132.

¹³ Amartya Sen, “Rights as Goals,” in Stephan Guest and Alan Milne, eds. *Equality and Discrimination: Essays in Freedom and Justice* (Stuttgart: Franz Steiner, 1985), 11.

the content can include ethical attention to well-being by ensuring that a theory of rights helps us secure a person's ability to perform certain acts or reach certain states of being deemed valuable. Here the advantage of adopting a capabilities perspective is that it helps us further understand the potential of rights to protect and enhance well-being.¹⁴ In this context, goals entail states of affairs we have a reason to bring about.¹⁵ To understand rights as goals involves challenging any sharp theoretical distinction between respecting rights on the one hand and fulfilling them on the other. To respect rights is to value the realization of rights, where some rights can be instrumental in achieving goals such as a right to food-rationing credits while the intrinsic value of other rights, such as the right to not involuntarily starve, means desiring their fulfillment for their own sake.¹⁶

This focus on the central moral importance of rights, especially their connection to well-being, also has the distinct advantage of emphasizing the expression of a plurality of values in the very practice of rights. Care ethicists have tended to juxtapose rights with the value of care and fault rights for their limited connection to well-being. Rules, laws, and fairness are said to underlie rights commitments while meeting needs, concerns with well-being, or even the development of civil society is grounded on care.¹⁷ By limiting the concept of rights to instruments for maintaining existing legal procedure and juxtaposing the value of such formal justice with the wider moral framework of care, care ethicists risk adopting the very notion of rights that feminists criticize. Adopting such a limited conception of rights also risks limiting the role rights have in protecting and enhancing well-being. As Samantha Brennan argues: "Sometimes what it is to care for a person is to take on

¹⁴ Sen, "Elements of a Theory of Human Rights," 333 footnote 30.

¹⁵ Peter Jones, *Rights* (Basingstoke, England: Palgrave, 1994), 65.

¹⁶ Sen, "Rights as Goals," 18.

¹⁷ Virginia Held, *The Ethics of Care: Personal, Political, and Global* (Oxford: Oxford University Press, 2006), 40-41. See also Fiona Robinson, "The Limits of a Rights-Based Approach to International Ethics," in Tony Evans, ed. *Human Rights Fifty Years On: A Reappraisal* (Manchester, England: Manchester University Press, 1998), 70.

concern for their rights. Concern for the rights of a loved one does not mean that one cares only for an abstract moral concept. One can be concerned about rights because of a direct love for the other person.”¹⁸ A commitment to rights sometimes just is an expression of care. Although care ethicists hint at this possibility, focus on the hierarchical ordering of values and division of justice and care as concerning related but different considerations tends to deny this perspective and the conceptual opportunities it entails.

Sen argues that an acceptable theory of rights should include right fulfillment as goals and that certain advantages follow by understanding rights as fundamental goals. If rights are indeed examples and expressions of fundamental moral values and not just derivative of such values, the goal of realizing rights appears to be implicit in any rights-based theory. To construe the realization of rights as goals is to render explicit a view already present in the basic point of claiming rights as fundamental entitlements. Sen claims that the goal of realizing rights ought to be implicit in a conception of rights as fundamental entitlements. Sen changes the focus of a theory of rights from simply refraining from violating rights to the actual fostering of the realization of rights, and he makes his case by considering the problems with a conception of rights that lacks sensitivity toward the consequences of upholding some rights at the expense of realizing others. Again, the advantage of our adopting such an evaluative approach is that it situates rights within the broader concern for human well-being, challenging a limited view of rights as belonging solely to the domain of law and solely concerning the value of justice.

Since Sen’s focus on goals concerns the realization of rights, and rights can be construed as rights to achieve a state of capability to function, his theory connects rights with capabilities as a combined basis for measuring and valuing states of affairs. As Peter Jones

¹⁸ Samantha Brennan, “Reconciling Feminist Politics and Feminist Ethics on the Issue of Rights,” *Journal of Social Philosophy* Vol. 30, No. 2, 1999, 271.

notes: “Respect for rights would then form part of the state of affairs that ought to be brought about.”¹⁹ Sen’s starting foundation or primitive diagnosis of value is from the acknowledgment of rights as fundamental entitlements.²⁰ His early focus is on the normative demands of rights, implicitly connected with capabilities, rather than on justifying or specifying rights. He notes that the historical association of utilitarianism with goal-based theorizing makes anti-utilitarian rights as fundamental goals seem peculiar.²¹ Sen claims that any “consequence-independent way of seeing rights is fundamentally defective.”²² This criticism involves a nuanced position between any rigid account of rights as deontological or consequentialist. It also involves a direct focus on the contribution a rights-based approach can make to well-being without simply instrumentalizing rights. Though realizing rights is a goal to be achieved, Sen does not understand rights as existing only as goals, preferring to argue for the importance of consequence-sensitivity:

Consequentialism demands that actions (and also rules, motives, etc.) have to be judged exclusively by the goodness of the consequent state of affairs. This can be seen as implying that the rightness of action is ultimately just a matter of fulfillment of goals. The question as to whether rights should be seen as goals is clearly a different issue from that. Goals could be the exclusive basis of rightness of actions whether or not they include (*inter alia* or alone) the realization of rights, and equally goals can fail to provide such an exclusive basis for the rightness of actions whether or not rights figure as goals. The question of the *content* of goals has to be distinguished from the power that goals – whatever their content – exercise over judgments regarding the rightness of actions.²³

Respecting the intrinsic value of basic rights entails a desire to see them realized and the responsibility to secure their fulfillment. Such consequence-sensitivity is important when considering the value and status of various rights and what it means to realize a right.

¹⁹ Jones, *Rights*, 116.

²⁰ Amartya Sen, “Rights and Capabilities,” in his *Resources, Values and Development* (Cambridge, Mass: Harvard University Press, 1984), 310.

²¹ Sen, “Rights as Goals,” 13.

²² Sen, “Rights and Capabilities,” 311.

²³ Sen, “Rights as Goals,” 17.

However, it still leaves us with the challenging task of actually specifying the content of rights. It also provides minimal guidance for concretely addressing possible conflicts between rights. Referring to his research on famines, Sen notes that in instances where millions of people died, over-all food availability did not decline, yet “famines occurred precisely because of shifts in entitlements resulting from exercises of rights that are perfectly [legally] legitimate.”²⁴ His conception of capability-based rights is compatible with a critical position on rights construed as rules to be obeyed and if necessary enforced by the legal system of property rights and market exchange. By this account, sensitivity to the consequences of securing certain rights helps us determine what rights are fundamental and should be realized because of certain consequences and what rights result in unacceptable consequences when set in priority and fulfilled.

Sen rejects a system where rights are to be respected without any obligation to maximize their fulfillment or minimize their violation. He presents as paradigmatic of such a non-goal based system Robert Nozick’s conception of rights. Sen explains that in Nozick’s deontological constraint-based approach: “Rights do not determine a social ordering but instead set the constraints within which a social choice is to be made, by excluding certain alternatives, fixing others, and so on.”²⁵ If rights are constraints to be obeyed rather than goals to be secured, where respecting rights simply involves not directly violating them but not the goal of seeing them fulfilled for others, acting to realize rights can conflict with such a theory. For instance, Sen claims that when rights are so construed, we are under no obligation to snatch away a person’s phone in order to warn another person about an imminent threat to her survival. However, we are obligated to respect the rights of the person who owns the phone by not taking her phone. It follows that we are under no

²⁴ Sen, “Rights and Capabilities,” 311.

²⁵ Sen, “Rights as Goals,” 15. See Robert Nozick’s *Anarchy, State, and Utopia* (New York: Basic Books, 1974).

obligation to warn the threatened person, however easily it could be done, since respecting rights simply means not directly violating them.

Instead, Sen argues that it is “more plausible to argue that if rights are fundamental, then they are also valuable, and if they are valuable intrinsically and not just instrumentally, then they should figure among the goals.”²⁶ Valuing the fundamental rights of the individual whose survival is imminently threatened therefore includes the goal of seeing the rights realized out of a direct concern for the immediate well-being of the individual. Sen’s theory of rights-realizations as goals therefore challenges the dichotomy between negative and positive rights, recasting the debate between duties of non-interference and obligatory action with a value-laden notion of responsibility that takes the relative priority and status of individual well-being into account as part of the evaluative exercise of determining and prioritizing rights. Respecting the intrinsic value of fundamental rights involves prioritizing basic capability-based rights over certain less important property rights. In the context of Sen’s example, our responsibility is not to obey a designated system of rights *per se* by not interfering with a person’s right to be secure in the possession of her cell phone, but to actively realize the most important rights with sensitivity to the consequences by interfering to save a life.

As with his example of the famine, in criticizing Nozick, Sen takes issue with the prioritized set of legal rights people have. This emphasizes the primacy of ethics when it comes to rights and their relation to well-being. Sen’s suggestive sketch of a capability-based theory of rights signifies a crucial definitional contribution:

Rights, then, are defined as basic not because they are indispensable to the fulfillment of any other right but because they are a way of formulating the urgency of minimal levels of eminently valuable human (actual and possible) functionings. It is intrinsically good for humans to be and do in certain ways

²⁶ Sen, “Rights as Goals,” 15.

and to have the freedom to so function, to be above the ‘threshold’ that enables them to so function. To justify something as a fundamental right is to identify a human functioning as basic, as intrinsically and supremely good. Rights are grounded in the good in the sense that they are justified with reference to valuable human functionings.²⁷

Basic rights secure central human capabilities to function and are intrinsically valuable with respect to human dignity. Capability-based rights understood as fundamental entitlements thereby help define what a rights-holder must minimally have the opportunity to be, establishing a threshold above which the rights-holder is empowered with genuine opportunities to function in ways deemed valuable.²⁸ Sen emphasizes that respecting rights involves more than simply not directly violating them. He acknowledges that a threshold-based constraint system could be conceived in which the absolutist quality of non-interference is removed while consequence-sensitivity is added.²⁹ The key to such a system is establishing the correct set of capabilities and rights that should be secured no matter what else we pursue. While there are challenges to be faced in working out a consistent, coherent, and integrated theory, a number of fruitful connections that emphasize the moral importance and the evaluative space concerning the relationship between rights and well-being are worth further exploration.

3.4 A Valuable Life

Sen evaluates a person’s well-being or quality of life by assessing her capability to function. By valuing the dignity and freedom of a life guided by choosing a range of the valued functions, he characterizes a truly valuable life as a life that involves the secured basis

²⁷ David A. Crocker, “Functioning and Capability: The Foundations of Sen’s and Nussbaum’s Development Ethic, Part 2,” in Martha C. Nussbaum and Jonathan Glover, eds. *Women, Culture, and Development: A Study of Human Capabilities* (Oxford: Oxford University Press, 1995), 186-187.

²⁸ Ibid. 188.

²⁹ Sen, “Rights and Agency,” 6-7, note 8.

of well-being. Such an evaluative endeavour situates concern for well-being at the center of moral and political debate within the realm of economics and democratic policy formation. The informational base of the evaluative process concerns a person's abilities to perform certain acts or reach certain states deemed valuable.

The capability of a person to act freely depends on a variety of factors, including personal characteristics and social arrangements. For Sen, well-being concerns what options she has the opportunity to choose from: "An agent's well-being is based only on the quality of *her life*, and not on how well the world in general conforms to her desires and values."³⁰ We focus our conception of rights on ensuring that people remain free to make decisions and act on opportunities that may enhance or diminish their own well-being: "freedom may have intrinsic importance for the person's well-being achievement. Acting freely and being able to choose may be directly conducive to well-being, not just because more freedom may make better alternatives available."³¹ Thus, both well-being achievement and well-being freedom are assessed in terms of capability.³² Sen's emphasis on the characteristics of individual advantage when it comes to well-being is a strength of his approach. Another upshot is that Sen analyzes the evaluative space of capabilities to encourage us to directly and explicitly assess the nature, manner, and potential of rights to protect and enhance well-being. It remains up to us to incorporate, for example, a practice of rights that, among other things, helps us address the fairness of conventional and institutional processes with respect to their ability to secure capability to function. Inasmuch as rights effectively secure valued capabilities, a rights-based approach to well-being helps us secure opportunities for well-

³⁰ Peter Vallentyne, "Debate: Capabilities versus Opportunities for Well-Being," *Journal of Political Philosophy* Vol. 13, No. 3, 2005, 368.

³¹ Sen, "Capability and Well-Being," 39.

³² *Ibid.*

being. It is worth critically assessing this account in light of some concerns raised by Griffin and Sumner.

In his discussion of objective accounts of well-being, Griffin suggests that one attractive position “is that ‘well-being’ includes both basic needs and mere desires, but that needs have priority over mere desires.”³³ He assigns this eclectic position to Sen. He then suggests that the job of describing and clarifying an acceptable notion of well-being changes when we depart from broad prudential notions to narrower notions that help provide the basis for determining what is just. Thus, start with an account that fits inside morality and then move outward to see if the account is adequate in other domains of value. An objective account allows us to determine the minimal ingredients that ought to feature in a life so that we can say the well-being of that life is morally acceptable, the dignity of that life is sufficiently honoured and respected. Where such minimal ingredients are lacking that life is seen as less than fully human because one or more central basic capabilities, what all individuals should be able to do and be, is absent. Ensuring that a life has such objective ingredients, according to Sen, involves valuing more than just the basic needs of that individual. When a life has the objective ingredients, they make the life better. Such ingredients, which are needed for a dignified life, can be thought of as objective values in the sense that they are whatever capabilities we ought to insist a life have in order for it to be sufficiently valuable. The evaluative nature of this approach gives rise to two distinctions. One is a distinction primarily concerning moral value between conceiving life *per se* as valuable and then trying to determine what ingredients are essential for respecting its value. The other is a distinction primarily concerning prudential value between a life that can be sufficiently characterized as valuable because it contains those minimum ingredients and a

³³ James Griffin, *Well-Being: Its Meaning, Measurement, and Moral Importance* (Oxford: Oxford University Press, 1986), 41.

life that, additionally, fulfills many meaningful choices beyond basic needs and objective criteria.

Griffin argues that well-being is best explained in terms of the fulfillment of desires, including the desires we would have if we understood the true nature of the objects we might desire. According to Griffin, although it might appear on the surface that the values of autonomy, liberty, and equality expressed by rights are external to the prudential value of well-being, the preferences concerning the values expressed by rights should be included in a conception of well-being.³⁴ Griffin also insists that conceptions of rights and well-being can entail a plurality of values and therefore rejects as false the dichotomy between rights based on well-being and rights based on personhood. Although he does not explore the connection any further, Griffin also leaves room for rights to play a positive role concerning well-being. We need an account that includes both moral and prudential values to work out what it is that any life we consider sufficiently valuable ought to have. Trying to determine the specifics pertaining to the prudential value, however, may hinder focus on moral value. An account of what objectively constitutes a valuable life focused on determining the minimal ingredients necessary for a sufficiently dignified existence will have to leave determination of what constitutes a valuable life from a prudential point of view up to the individual. Sen takes this approach, since it accounts for the value we rightfully place on a life being an individual's own without taking a further position on what ought to be done with that life once it exists above a minimum threshold.

The criticism we can draw from Griffin's account is that Sen is not primarily focused on clarifying an acceptable notion of well-being, in part because he neglects a whole range of prudential value that constitutes a significant part of well-being. This is an important

³⁴ Ibid. 236.

criticism that, with qualifications, should be accepted. Sen does not provide a thoroughgoing conception of well-being and, despite the connection between rights and well-being, the two concepts concern different things. Part of the task of working out this relationship involves recognizing the limits of a rights-based approach. While rights-based approaches to justice, for example, will tend to focus on the means of obtaining and/or securing well-being rather than working out and directly focusing on well-being itself, some consideration and guiding conception of well-being must nonetheless inform the kind of life we think it just that rights enable. Sen's theory is best understood as a hybrid theory, including objective and subjective elements. As Brennan notes, "it may be that we are objectivists when we are concerned about the sort of lives there are, subjectivists when we think about the lives of actual people."³⁵ When our focus changes from trying to realize a minimally valuable life *per se* to trying to realize the most valuable kind of individual life, our guiding question changes from "What is the right theory of well-being for political purposes?" to "What moral obligations do we have to promote what is good?". Sen's approach does take subjective experiences of people into account by including the values, desires, and preferences of particular agents. Rights as goals entail desirable outcomes, including states of affairs we have a reason to bring about. Respect for rights and the well-being a theory of rights ought to help foster and protect form part of the desired states of affairs. For this reason, Griffin suggests "the most important appearance of rights will be on the political level: they will define how society ought to be arranged to protect certain central values."³⁶ Thus, a rights-based approach to well-being does leave a range of prudential value up to the lives of actual people by respecting their choices in determining their own

³⁵ Samantha Brennan, "Book review of Martha C. Nussbaum and Amartya Sen, eds. *The Quality of Life* in *Canadian Philosophical Reviews* Vol. 14, No. 5, 1994, 342.

³⁶ Griffin, *Well-Being: Its Meaning, Measurement, and Moral Importance*, 252.

meaningful lives. The extent to which an individual is free to live and be well signifies the extent to which her rights and well-being leave her empowered to enjoy a sufficiently valuable life.

Sumner has expressed pessimism at the prospect of constructing a descriptively adequate objective theory of welfare. It seems an account of well-being or welfare is going to have to feature a certain amount of subject-relativity, unless we exclude how a person's life is going for her from an assessment of her welfare. Yet a substantive theory must also account for that which is of value or has value whether or not it is an object of interest, or with Sumner's further specification, whether or not we have positive attitude toward or are favourably disposed toward it. Being able to enjoy a nutritional diet conducive to a healthy life is objectively valuable despite any disinterest in food we might have. Given Sen's approach, we are likely to be hesitant to agree with Sumner that we should work with a strict dichotomy rather than a continuum.³⁷ A subjective theory of welfare is going to be useful to us when comparing and assessing actual lives. For political reasons, however, we will want to include criteria that approximate objective values for comparative purposes and to avoid the problem of adaptive preferences. A wealthy, privileged free person with every opportunity before her can be discontented, while someone lacking opportunity in a violent world of abject poverty can sometimes adjust her attitude to achieve a relative sense of contentment. By including more objective criteria, we avoid ranking the chronic underdog who has learned to normalize and take pleasure in small mercies as having a greater level of well-being than the gloomy millionaire whose discontent leaves her stifled in the midst of unparalleled freedom and opportunity. With the subjective account, someone's life might be going well for her, though she lacks the opportunity to enjoy a minimally nutritional diet, is

³⁷ W. L. Sumner, "The Subjectivity of Welfare," *Ethics* Vol. 105, No. 4, 1995, 775.

afflicted with a debilitating but preventable illness, or perhaps has a terminal illness she does not yet know of. With an objective account, we can then say, comparatively, that her life is not going sufficiently well, since her well-being is about to be cut short and her freedoms and opportunities reduced, perhaps radically so. In this sense, we can say that a person's well-being is poor or is worsened, even if she is not upset about it or does not know it. Given that rights to capability to function so often concern basic needs central to forming the basis of our well-being, it will follow that many of our values, preferences, and desires will be in pursuit of such opportunities to freely pursue our meaningful choices.

We will want to avoid adopting an overly subjective account that ranks the gloomy millionaire as worse off than the contented yet unhealthy underdog for political purposes. When it comes to institutional design, political practices, and social policy, we should aim to secure a set of basic central capabilities for every individual. This ensures that our focus is on raising the contented yet unhealthy underdog up to a minimum threshold rather than on helping the gloomy millionaire feel more personally satisfied despite functioning well above the threshold. This point draws on the important distinction between capabilities and functioning discussed by Alan Gewirth with respect to rights: "All persons have an equal right that their abilities of action and successful action be developed and protected. But what they then do with these abilities is up to them, as matters of their own personal responsibility, and they are to be rewarded (or punished) accordingly."³⁸ Capability to function is a political goal while functioning is an ethical ideal. Sen's focus is on helping individuals develop their capabilities for meaningful action in order for them to be free to live and be well. What they then do with the abilities and opportunities present in their life is, from a political point of view, up to them. We should care about the mental health of the

³⁸ Alan Gewirth, *The Community of Rights* (Chicago: The University of Chicago Press, 1996), 74.

gloomy millionaire, especially if the millionaire becomes too stifled to be capable of flourishing and drops below the threshold, but the example accounts for this. Since our focus is on raising individuals up to achieve a sufficient level of well-being, the capabilities perspective will inform policy formation and resource allocation to reflect this focus. The chronic underdog who perseveres while continuing to function below the minimum threshold by lacking basic opportunities everyone should have will thus rank as having much less objective well-being than the gloomy unsatisfied millionaire.

Sumner regards his highlighting of Sen's rejection of utility accounts of welfare on the ground of their subjectivity as a fatal objection. Having rejected subjectivity, Sen's approach to well-being, Sumner argues, has a glaring inconsistency, since it nonetheless features the subjective role of individual and social valuing. Sen responds by observing: "In doing a *scrutinized* valuation – central to the account I am concentrating on – the need for scrutiny is built in, but scrutiny does not get its due when pleasures or desires are simply taken as the basis of moral and political calculation. The difference lies in the need for critical assessment and scrutiny for *reasoned valuation*, which differs, in this respect, from just tallying pleasures or desires."³⁹ Sen argues that when it comes to the moral obligations we have toward the well-being of others, there must exist some test of open and informed scrutiny akin to what John Rawls has called public reasoning and its role in ethical objectivity.⁴⁰ Rights to choose and act upon valued ways of functioning constitutive of well-being are endorsed in this sense in the evaluative space of the capabilities approach.⁴¹

³⁹ Amartya Sen, "Reason, Freedom and Well-Being," *Utilitas* Vol. 18, No. 1, 2006, 92.

⁴⁰ *Ibid.* 93-94. See also Sen, "Elements of a Theory of Human Rights," 348-349.

⁴¹ Serena Olsaretti, "Endorsement and Freedom in Amartya Sen's Capability Approach," *Economics and Philosophy* Vol. 21, No. 1, 2005. See also David A. Clark, *Visions of Development: A Study of Human Values* (Cheltenham, England: Edward Elgar, 2002), 31-34.

Sumner's overly dichotomous perspective and insistence on a subjective account of welfare appears to close him off from considering more nuanced hybrid accounts.

3.5 Conclusion

Working out an account of the relationship between rights and well-being involves working out what constitutes a valuable life. The strength of a rights-based approach to well-being lies in its ability to help us address specifically moral and political concerns fundamental to the nature of well-being. The concerns center on establishing the appropriate evaluative space for determining rights. A rights-based approach to well-being is properly suited to the moral and political issues entailed in working out a practical theory that informs our collective efforts to promote the well-being of others. Such a theory features both subjective and objective components comprising both moral and prudential value. Although Sen points in the direction of establishing priorities for a set of fundamental rights, he offers little further guidance on this matter. However, his theory highlights the importance of infusing responsibility for the predictable consequences of our actions into a conception of rights. This rights-based approach to well-being requires us to act on our decent impulses to effectively prevent violations of rights, while supporting the realization of rights when we are in a plausible position to do so.⁴² The key challenge for us is to develop social policies and political institutions along with a culture that empowers people to support and enhance individual well-being through the practice of rights.

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Chapter 4¹

The Grotian Rights Tradition and The Capabilities Approach

4.1 Introduction

In this chapter I focus on the source and subject of rights in Hugo Grotius's *The Rights of War and Peace*. By "source" I mean the origin and authority of rights, where they come from. By "subject" of rights I mean to whom do rights apply or might they apply, who qualifies as a bearer or possessor of rights. Specifically, I ask what makes someone a bearer of rights according to Grotius and what according to Grotius is the source of the rights she or he has. I do this primarily through a critical textual analysis of his preliminary remarks where he establishes rights as the moral foundation of international justice. My aim is to work out and clarify what Grotius himself argues to be the source and subject of rights in his preliminary remarks and then assess this account in light of Martha Nussbaum's recent endorsement of the Grotian rights tradition. My focus on the Grotian rights tradition is motivated by an interest in refining and reinforcing the conceptual relationship between rights and capabilities that appears to be the underlying basis for the kind of substantive theory of global justice contemporary political philosophers are pursuing.

I start with some brief background on the person and his influence. I then draw out and interpret Grotius's rights theory in response to my guiding questions. Next, I examine

¹ Earlier versions of this chapter were presented at the *International Conference on Human Rights. Commemorating 60 years of the Declaration of Human Rights / Colloque international sur les droits humains. Commémoration des 60 ans de la Déclaration sur les droits de l'homme*, Dominican University College / Collège universitaire dominicain, Ottawa, December 2008 and the Canadian Philosophical Association (CPA) Congress, Carleton University, May 2009. Thanks to Mark Nyvlt at the Dominican University College for his support and for organizing the human rights conference. Thanks also to Amanda Porter, Dennis Klimchuk, Samantha Brennan, Michel Hebert, and William Sweet for their critical feedback on various drafts of this paper. Finally, thanks to Thomas Heyd for his insightful and constructive commentary at the CPA and to an anonymous reviewer for several comments on style and substance that challenged me to refine and clarify my position. A version of this chapter was published as "The Grotian Rights Tradition and The Capabilities Approach," *Science et Esprit*, Vol. 62, No. 2-3, 2010, pp. 275-291. Special thanks to the editors for kindly permitting me to use this article here.

three contentious aspects of Grotius's position that arise out of an interpretation by Martha Nussbaum from her recent book *Frontiers of Justice*. These contentious aspects concern the nature of Grotius's foundational claims, the place of moral value in his theory, and the question of who or what according to Grotius demands inclusion in the sphere of justice. Finally, I consider the kind of substantive capability-based theory of rights to which the Grotian rights tradition lends itself. Nussbaum herself has undertaken much of this initial work. My own evaluation and critical textual analysis is offered as a sympathetic contribution, intended to further the capabilities approach along as a burgeoning theory of global justice.

Grotius's theory of rights emphasizes reasoned on-going debate toward securing international justice. It appears to rest on judgments concerning the moral value of species, including approximations of species norms, as potential rights holders demanding inclusion in the sphere of justice. According to Grotius the natural goodness or fundamental moral value of animal nature makes someone (or something) a candidate for rights. That is, beings that qualify as possessors or potential possessors of rights are judged to exhibit in their nature and according to their species norms a fundamental value that involves moral demands, in the form of justified claims and/or entitlements. While the source of the rights she or he has originate from this fundamental value, the authority of rights stems from a combination of value judgments and reasoned assessment of these moral demands. According to Grotius there are rights and the project of securing international justice is a creative, evaluative, and reflective one based on right reason. It aims at a consistent non-arbitrary rights-based justice that reflects our social nature.

4.2 The Person and his Influence

Hugo Grotius is regarded as a significant precursor to our modern international order. Knud Haakonssen insists that Grotius should be credited for founding the modern school of natural law while Hersch Lauterpacht regards Grotius, in terms of authority and influence, as the founder of the modern system of international law.² Richard Tuck sees Grotius as the most important figure in the history of natural rights theories and, with Descartes, sees him viewed as having created the Enlightenment.³ R. J. Vincent sees Grotius as providing one of the earliest statements of rights as moral possessions.⁴ It is sufficient that his philosophy is integral to the development of modern rights theory and international law to warrant critical engagement with his ideas.

Hugo Grotius was an influential Dutch scholar who was imprisoned for life in Loevestein Castle for his political and religious liberalism. In 1612, in his late twenties, he famously escaped and fled to France where, in exile, he published his magnum opus in 1625. While the general focus of the book is on the definition, causes, and nature of war, from the outset Grotius takes issue with the sceptical view that no justice exists to regulate the conduct of states. His rights-based philosophical foundation is largely espoused in his prolegomena or preliminary remarks. In particular we find one of the first modern articulations of the concept of rights, which according to Grotius are grounded in animal nature including shared impulses and capacities. Grotius's aim, originating from the need to regulate the new sovereign states arising after the Reformation, is to wrest nations and

² Knud Haakonssen, "The Grotian Tradition in International Law," *Political Theory* Vol. 12, No. 2, 1985, 239. Hersch Lauterpacht, "The Law of Nations, the Law of Nature, and the Rights of Man," *Transactions of the Grotius Society* Vol. 29, 1943, 21, 25.

³ Richard Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge: Cambridge University Press, 1979), 58, 66.

⁴ R. J. Vincent, "Grotius, Human Rights, and Intervention," in Hedley Bull, Benedict Kingsbury, and Adam Roberts, eds. *Hugo Grotius and International Relations* (Oxford: Clarendon Press, 1990), 241.

international affairs under the moral guidance provided by the law of nature.⁵ Importantly, Grotius claims this law of nature is discoverable by reason and is equally valid even if God does not exist, insisting that the law of nature “would still have great weight, even if we were to grant, what we cannot grant without wickedness, that there is no God, or that he bestows no regard on human affairs.”⁶ With this separation of morality and jurisprudence from theology Grotius defends what he calls right reason, a moral faculty enabling us to determine right conduct and to assess the goodness or badness of things based on their nature, as the basis of a just society.

4.3 Grotius on the Subject and Source of Rights⁷

In his preliminary remarks Grotius takes issue with the under examined state of international law. He sets out to give a comprehensive treatment by first establishing the right method and foundation. Against the notion that law is but a means to an end, just to the extent it is useful for protecting powerful interests, Grotius advances and defends rights as a check and arbiter of power and violence. By juxtaposing rights with war Grotius makes it clear he regards rights-based international justice as integral to securing peace, warning that it is a grave error to deny rights.⁸ Grotius contrasts his strict standard of justification against the representative view of Carneades who rejects justice on the grounds that it either does

⁵ Lauterpacht, “The Law of Nations, the Law of Nature, and the Rights of Man,” 21.

⁶ Hugo Grotius, *Grotius on the Rights of War and Peace*, An abridged translation by W. Whewell. (Cambridge: Cambridge University Press, 1853), xxvi preliminary remarks paragraph 5.

⁷ As an aside it is important to note that significant disparities exist between different editions and translations, in terms of both meaning and completeness, which further exacerbate the task of deciphering and interpreting the not widely available work of Grotius. On this matter see Lauterpacht, “The Grotian Tradition in International Law,” *British Year Book of International Law* Vol. 23, 1946, 52 and Tuck, *Natural Rights Theories: Their Origin and Development*, 73 footnote 31. Throughout I have stuck to Whewell, noting other translations where inclusion of a Grotius quote found in a contemporary source serves the inquiry. Amongst the defenders and critics of Grotius there exists a broad consensus that *The Rights of War and Peace* is a difficult book to comprehend, full of obscurity, ambiguity, and inconsistency that results in conflicting readings of Grotius as a liberal defender of individual rights versus Grotius as an authoritarian defender of the state.

⁸ Grotius, *Grotius on the Rights of War and Peace*, An abridged translation by W. Whewell, xxiv preliminary remarks paragraph 5.

not exist, or exists in a calculating manner that is arbitrary, inconsistent, and self-interested. While Grotius conceives rights as the foundation of international law in response to such a view, and he explicitly indicates that his preface is focused on the origin of rights and law, his account of the subject and source of rights is at times obscure.

Curiously, he starts by recognizing humanity's unique animal nature stating that "man [sic] is an animal of an excellent kind, differing much more from all other tribes of animals than they differ from one another; which appears by the evidence of many actions peculiar to human species."⁹ We are animals and we have an animal nature. We are *a part of* rather than somehow *outside, separate from, or superior to* nature and its governing laws. Our particular animal nature, however, differs from other animals more than they differ from one another, suggesting we are uniquely situated with respect to rights, the concept Grotius has just set out to explain and justify. Additionally, the manner in which we identify both our differences from other animals and our unique nature is by referring to experience and the empirical evidence. We can see and identify what is peculiar to the human species by observing and assessing the species norm which, according to Grotius, includes an evident "desire for society; that is, a desire for a life spent in common with fellowmen [sic]; and not merely spent somehow, but spent tranquilly, and in a manner corresponding to the character of his intellect."¹⁰ Grotius is not denying that people sometimes behave in a self-interested manner, or that large numbers of people can betray a desire for tranquility and social stability. Instead he is simply claiming that, if the way most humans behave most of the time is observed, "the assertion, that, by nature, every animal is impelled only to seek its own advantage or good, if stated so generally as to include man [sic], cannot be conceded."¹¹

⁹ Ibid. xxiv preliminary remarks paragraph 6.

¹⁰ Ibid.

¹¹ Ibid.

Grotius argues that we also observe in other animals a tempering of individual self-interest through regard for offspring and other members of the species. He likens non-human animal concern for the survival and well-being of their kin as equally natural to human infants, “in which, previous to all teaching, we see a certain disposition to do good to others ... as for example, compassion breaks out spontaneously at that age.”¹² Non-human animals, like human infants, thus possess a certain natural goodness and are not simply and solely individually self-interested. In this regard Grotius sees the difference between non-human animals or human infants and rational adult humans as one of degree rather than kind:

But inasmuch as a man [sic] of full age has the knowledge which enables him to act similarly in similar cases; and along with that, a peculiar and admirable appetite for society; and has also language, an instrument of this desire, given to him alone of all animals; it is reasonable to assume that he has a faculty of knowing and acting according to general principles; and such tendencies as agree with this faculty do not belong to all animals, but are peculiar attributes of human nature.¹³

I read Grotius as holding that adult humans possess a faculty of knowing and acting according to general principles in addition to the natural goodness they, like human infants and non-human animals, possess. That is, all animals possess natural goodness. The manner in which animals differ in ‘kind’ from each other pertains to their different abilities and capacities according to an informed yet fallible assessment of their species norm. The difference in what we might call their moral value, however, is one of degree.¹⁴ The implication – of human and non-human animals equally possessing this intrinsic moral value – is not so much one of ranking species according to more or less value, but rather

¹² Ibid. xxv preliminary remarks paragraph 7.

¹³ Ibid.

¹⁴ Values are often used interchangeably with morals but should be understood in their most substantive form as including moral, aesthetic, epistemological or cognitive values, along with other types of value such as economic or religious value. As a first approximation moral value concerns action-guiding commitments and demands based on judgments about contingent or inherent worth, right and wrong, good and bad.

qualifying all animal species, based on their natural goodness and approximations of their species norm, as subjects of moral value and hence, as I will speculate, potential subjects of rights. On this matter Grotius's claims are rudimentary and his arguments thin. He is claiming that right reason, possessed alone by yet common to adult humans, enables us to determine right conduct and to assess the goodness or badness of things based on their nature. Grotius himself exercises his reasoned judgment in claiming the existence of a certain natural goodness or moral value in all animal species as exhibited by their behaviour. Our peculiar human attribute involves the capacity to use language to act in a consistent manner in accordance with general principles in the interest of social cohesion. This moral faculty uniquely qualifies humans among all the animals to establish an orderly society according to rational evaluation. What it does not do is uniquely qualify adult humans as possessors or subjects of value. Grotius is neither explicit nor thorough on this point, yet this reading is consistent with his position in the text.

By 'Right' it seems Grotius means a kind of moral possession held by animals that are subjects of moral value rather than the adjective 'right' which means being in accordance with the dictate of right reason.¹⁵ To assess this interpretation we must depart from the preface and examine Grotius's remarks in his section 'What are Rights' in chapter 1 of book 1:

In this sense Right is a moral Quality by which a person is competent to have or to do a certain thing justly. Right in this sense belongs to a person, though sometimes it follows a thing: as one piece of land may have a right of way, or other easement, over another piece of land. In this case the Right still belongs to a person, namely, to the person who possesses the first piece.¹⁶

¹⁵ Ibid. xxix preliminary remarks paragraph 41.

¹⁶ Ibid. 2 paragraph IV.

A being owed restitution is a being that has a right. Such rights include rights of non-interference, restoration and/or reparation when possessions have been interfered with, and the enforcement of promises and warranted punishments. A right is a kind of moral possession in the manner Grotius indicates, namely, it is an individual attribute. It belongs to the individual as a moral feature of what they should justly be able to do and be. In this sense a right is a kind of justified claim and/or entitlement that places demands on others. Grotius emphasizes this pre-legal moral quality of rights by insisting that, “Rights, even unsupported by force, are not destitute of all effect: for Justice, the observance of Rights, bring security to the conscience.”¹⁷ Rights extend beyond state boundaries and involve a kind of moral commitment necessary for preserving society.¹⁸ They also continue to exist during war and unlike civil laws cannot be silenced or extinguished. See, for example, Grotius’s preliminary remarks paragraph 25 where he denies the claim that all rights cease in war and paragraph 26 where laws, understood as civil and judicial are silenced in the conflict of arms while Natural Law, “those laws which are perpetual and accommodated to all time,” are not. This interpretation is further reinforced by Grotius’s uncharacteristically clear statement in which he recollects for the reader his purpose for justifying rights in the first place: “I, for the reasons which I have stated, [hold] it to be most certain that there is among nations a common law of Rights which is of force with regard to war, and in war, saw many and grave causes why I should write a work on that subject.”¹⁹ From what he has already said, Grotius gives us good reason to see rights as justified claims and/or entitlements based on our reasoned judgment of a species’ natural and inherent moral value, but more needs to be said.

¹⁷ Ibid. xxviii preliminary remarks paragraph 20.

¹⁸ Ibid. xxix preliminary remarks paragraph 22-23.

¹⁹ Ibid. xxix preliminary remarks paragraph 28.

There is an important difference between what it means for an individual to qualify as a subject of rights and the ability to rationally judge who or what qualifies. In arguing that animals are not solely concerned with their individual good Grotius suggests, “[t]he same is to be said of infants, in which, previous to all teaching, we see a certain disposition to do good to others.”²⁰ It is this perceived moral value intrinsic to non-human animals and human infants that is the source of rights according to Grotius. It is the peculiar attribute of human nature latent in the child and usually developed in the adult that uniquely qualifies us to exercise our moral faculty with reasoned judgment to determine the nature and extent of rights. This distinction between the natural goodness of species being the source of their rights and right reason being the basis for establishing such rights rests on a view about why individuals have rights and how we learn what those rights are. The natural goodness of the individual as it relates to their species norm is the source of rights and right reason is what adult humans exercise to establish these rights. Without this distinction only rational human adults could ever be fully qualified subjects of rights. However, since the capacity for rational judgment is not a requisite feature of a rights holder, non-rational human adults, children, and non-human animals are all, according to Grotius’s rights theory, potential subjects of rights. Humanity’s ability to evaluate such rights signifies its unique authority to identify the demands of justice as specified by the law of nature. In this manner the specific rights a subject of rights may be judged to have is contingent on a general approximation of its specific nature. It follows that different species are entitled and/or have moral claims to different rights, depending on their species norm. To illustrate the point consider the widespread recognition of animal rights by systems of justice that legally protect animal entitlements to basic health, habitat, and humane treatment, while, given their nature,

²⁰ Ibid. xxv preliminary remarks paragraph 7.

denying them rights to things we are typically entitled to, such as free speech or political participation.

4.4 Nussbaum's Interpretation and The Grotian Rights Tradition

On the final page of his preliminary remarks Grotius states that throughout his work he has endeavoured to make both the definitions and his reasons as clear as possible. He is not always successful in this regard, leaving room for debate as to his precise position. I have asked what makes someone (or something) a bearer of rights according to Grotius and what according to Grotius is the source of the rights she or he has. In fairness I must conclude that Grotius does not provide a clear, decisive or thorough answer to these questions in his prolegomena. However, critical interpretation of his preliminary remarks has provided some indication, however tentative and incomplete, of his underlying rights theory. This helps us understand how rights-based theories of justice, in the Grotian tradition, can both inform and direct contemporary work in this area. I now wish to consider three contentious aspects of that theory that arise in light of Nussbaum's recent interpretation. These concern debate about the nature of Grotius's foundational claims, the place of moral value in his theory, and the question of who according to Grotius should be included in the sphere of justice.

Martha Nussbaum sees the Grotian rights tradition as directly connected to the capabilities approach she espouses. She argues that subjects of justice should be free and able to function in certain ways deemed valuable and that there are certain functions that beings should be empowered to do such that a life developed and shaped by choosing and doing a range of these functions constitutes a dignified life:

The general idea of Grotius' natural law theory is that [the dignity or moral worth and sociability] of the human being, and their ethical value, suggest a

good deal about the treatment to which every human being is entitled. Thus political theory begins from an abstract idea of basic entitlements, grounded in the twin ideas of dignity (the human being as an end) and sociability. It is then argued that certain specific entitlements flow from those ideas, as necessary conditions of a life with human dignity.²¹

Nussbaum is interested in the general idea underlying Grotius's natural law approach to international justice. As a major source of her own thinking she regards it as similar in its basic structure to the view she defends, and an important template worth reviving for contemporary purposes.

In Nussbaum's capabilities approach the idea of a law of nature is replaced with an evaluative and interpretive commitment that is historically grounded and empirically supplemented, aimed at working out a set of basic capabilities necessary for a dignified life. In Grotius's rights theory much rests on his foundational claims about human and non-human animal nature. Nussbaum takes it as given that Grotius connects them to a metaphysical theory and advises we instead view them as freestanding ethical claims upon which a political conception of a subject of justice will be acceptable to people with different religious and metaphysical views. However, Grotius himself provides reasons for moving in this direction and for viewing Nussbaum's proposal as consistent with the spirit if not the letter of his rights theory. His ambiguities and inconsistencies allow us to question and doubt whether the underlying claims about animal nature must *necessarily* be metaphysical ones rather than freestanding ethical ones. In paragraph 13 of his preliminary remarks he appears to insist that the principles of natural law are metaphysical in nature, discoverable and understandable by weaker minds to the extent they are made manifest by God.²² Recall elsewhere, however, that he says they still apply even if there is no God, discoverable as they

²¹ Martha Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Cambridge, Mass: The Belknap Press of Harvard University, 2006), 36.

²² Grotius, xxvi preliminary remarks paragraph 13.

are by reason. These and other noted statements about reason and method lend themselves to view the foundational claims of his theory as freestanding rather than metaphysical, emphasizing as they do a fallible, empirical, and on-going process.

Grotius appears to regard basic species norms as deeply natural yet endeavours to argue the matter as subject to debate and verifiable observation. However much he may personally regard animal nature as fixed and woven into the fabric of reality, the project of establishing international justice will ultimately be the product of a cross-cultural enterprise between those that otherwise hold very different views in metaphysics and religion, open to change and evaluation over time: “for Natural Law, as we have said, is in a certain measure, to be proved by such consent; and as to the Law of Nations, there is no other way of proving it.”²³ According to Grotius laws of nature are ‘discoverable’ by reason, yet they also appear to be a product of reason and at times Grotius refers to the natural law as the natural human law and indicates that it proceeds from the internal principles of humanity.²⁴ This suggests we can in good conscience proceed with ethical claims about animal nature without having to take a strong position as to their metaphysical status.

Recall that Grotius insists human infants and non-human animals alike possess an evident natural goodness or moral value. I have suggested that Grotius’s equal assignment of moral value to pre or non-rational animals is akin to seeing in such beings some kind of inherent worth that presumably involves either an entitlement demanding our recognition and respect and/or a claim on us to honour and even protect that value:

What I want to bring out about Grotius’ theory is that it begins with the content of an outcome, in the sense of an account of basic entitlements of human being whose fulfillment is required by justice; if these entitlements are fulfilled, then a society (in this case, “international society”) is minimally just. The justification of the entitlement set is not procedural, but involves an

²³ Ibid. xxxvi preliminary remarks paragraph 46.

²⁴ Ibid. xxv preliminary remarks paragraphs 9 and 12.

intuitive idea of human dignity. Grotius argues explicitly that we must *not* attempt to derive our fundamental principles from an idea of mutual advantage alone; human sociability indicates that advantage is not the only reason for which human beings act justly. Grotius evidently believes that a society based upon sociability and respect rather than upon mutual advantage can remain stable over time.²⁵

The claim that there is in his theory an intuitive idea of human if not animal dignity seems to cohere with my interpretation.

Nussbaum has noted that ethical claims about the moral value of a being and its species norm combine to give us an idea of what specific entitlements justly demand our respect as necessary conditions of a life with dignity. For now it is enough that, with Nussbaum, my account sees in Grotius's theory an emphasis on a species' moral value as the source of its rights.

Nussbaum thinks that Grotius's distinction between humans and non-rational non-human animals is too strong but recognizes in the structure of his theory room for broad inclusion.²⁶ Though limited to humanity in Grotius's own thought, nothing in the theory he advances in his preliminary remarks limits the possession of rights to humans. Grotius appears to exclude non-human animals from his own practical consideration of justice because they lack the capacity to reason, including the faculties of speech and understanding. He was uniquely set on a rights-based approach to the subject of justice, regarding a right as a moral quality that enables a being to have or do something according to the law of nature.²⁷ As previously noted, I contend that Grotius's emphasis on rights as referring to persons is idiosyncratic and not a necessary feature of the theoretical structure he adopts for analyzing justice. His focus, of course, is on protecting individual human rights in international affairs. His aim, however, is not to establish a theoretical basis that *determines* and *presupposes* what is

²⁵ Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, 37.

²⁶ *Ibid.* 38.

²⁷ William A. Edmundson, *An Introduction to Rights* (Cambridge: Cambridge University Press, 2004), 18.

necessarily included in the sphere of justice. Rather, as I have attempted to show, his aim is to establish a theoretical basis for working our principles of justice based on approximations of animal nature and value, approximations that Nussbaum advises us to view as freestanding ethical claims that are fallible, empirically informed, and perpetually revisable.

Grotius was neither committed to nor concerned with non-human animal rights, and my point is only that his theoretical structure does not in principle appear to exclude them from being subjects of rights. Against the view that only those with the capacity to reason possess the dignity and intrinsic worth that gives rise to their status as moral agents, and only *these* moral agents are subjects of justice, the structure of Grotius's theory of rights leaves room for inclusion of non-human animals. Grotian subjects of rights equally possess moral value and thus demand moral equality, including equal respect and entitlement.²⁸ A Grotian subject of rights places demands of justice on others. An animal demands inclusion in the sphere of justice when it is entitled to be treated in a particularly urgent or basic way, ways necessary for it to approximate its species norm. To act unjustly towards any animal is thus to mistreat it in a particularly urgent or basic way. Such mistreatment is a matter of injustice because it is both wrong of us and unfair to them. Grotius's theory gives us good reasons to view non-human animals as potential subjects of rights. Those good reasons include Grotius's distinction between the method by which principles of justice are established and what qualifies an individual for inclusion in the sphere of justice.

It is not clear, however, that Grotius actually thought non-humans are and should be viewed as rights holders. Later in his book, for example, he provides grounds for objecting to my interpretation when he states: "If we ever assign justice to brute animals, it is improperly, when we see in them some shadow or vestige of reason. There being acts which

²⁸ Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, 38.

we have in common with brutes, as the rearing of offspring, and others which are peculiar to us, as the worship of God, has no bearing on the nature of *Jus*.” Here three responses are warranted. First, it must be remembered that in his preliminary remarks, the section dedicated to establishing the existence of and providing a justification for rights, there is no exclusion of non-human animals from the sphere of justice. Rather, there is an explicit emphasis on their equal intrinsic moral value amidst a sharp distinction between having the ability to exercise right reason and possessing natural goodness. Second, it is remarkable that Grotius’s rights theory should allow for the inclusion of non-human animals within the sphere of justice given his stated preoccupation with the rights that exist in conditions of lawlessness and warfare. Finally, it is certainly plausible that Grotius thought non-human animals should be excluded from the sphere of justice, even if his initial justification of rights allows for their inclusion. It is also plausible, however, that the above statement actually squares with my interpretation. Consider his meaning. Assigning justice to brute animals is different than including them in consideration of the demands of justice in the following straightforward way: we must take care not to assign the capacity for justice to those who lack right reason. Again, infant humans and numerous adults lack the capacity for right reason and there is no suggestion they either be assigned justice or excluded from the sphere of justice. Instead, Grotius’s warning appears to be motivated by his strong distinction between humans and other animals emphasizing rationality as a species norm in the former but not the latter. Recall earlier that, according to Grotius, a being owed restitution is a being that has a right. While justice is an expression of our nature in the sense noted above – that a species norm of humanity is the capacity to exercise right reason in establishing the fundamental principles of justice – rights are an expression of animal nature in a different manner, namely as an expression of a being that possesses fundamental moral value entitling

it to certain just treatment. That we do not have to be capable of justice to qualify for inclusion in the sphere of human justice, in this light, squares with Grotius's warning not to assign justice to brute animals. If Grotius did intend to restrict rights to humans, this is by no means obvious in his preliminary remarks where he has endeavoured to provide the philosophical justification of rights by grounding them in animal nature. Nor does he provide any compelling reasons to *necessarily* restrict rights to exclude those lacking rationality as an ability, capacity, or species norm. What surprises and delights me about Grotius's preliminary remarks is that, given what I defend as a fair critical interpretation of his theory of rights, the conclusions I draw concerning the distinction between subjects of morality and moral agents seems consistent with and arguably explicit in Grotius's preliminary remarks. I willingly concede that my conclusions are not definitive. As I have noted, it is hard to establish a conclusive position given both the lack of clarity and translation issues.

To dispel any fear that a contemporary view may have been inadvertently imputed into my interpretation of Grotius I refer the reader to the thought of the ancient Epicurean philosopher Porphyry who maintained that the dictate of right reason and not law should inform our moral consideration of non-human animals, non-human animals should be included in the sphere of justice, social contract approaches are ill-advised in their exclusion of non-human animals, and non-human animals exhibit in their species norm a kind of rational judgment. Even though Porphyry, unlike Grotius, assigned a kind of reason to non-human animal behaviour, he explicitly warned, like Grotius, that we must take care not to assign justice to animals in the sense of holding them capable of upholding laws or submitting them to legal proceedings.²⁹

²⁹ See, for example, some of the selected writings of Porphyry in A. A. Long and D. N. Sedley, eds. *The Hellenistic Philosophers. Volume 1. Translations of the principal sources with philosophical commentary* (Cambridge:

4.5 A Capabilities Theory of Rights and its Grotian Roots

Three concerns make me hesitant to embrace Nussbaum's take on Grotius. First, Grotius never makes such a claim explicit about dignity. Even if it is likely that he held such a view, which I think it is, he provides the reader with no obvious example to settle the matter. Second, the connection or relationship between inherent moral value, the fundamental moral value of species norms, and the concept of dignity remains as yet too unclear and undeveloped to readily and confidently accept such a reading. Third, not all people share the same intuitions about human and non-human animal value. We do well when we endeavour to provide reasons beyond intuitive appeal for accepting certain moral claims. Grotius does this by claiming the inherent goodness of human infants and non-human animals is evident in their apparently natural tendencies to behave in ways that are not self-interested. However, what inclines me to endorse Nussbaum's embrace of Grotius is that, with each of the pressing issues I have discussed and the concerns I have noted, the debate may be addressed in the manner Nussbaum proposes, namely, distinguish a resolution for contemporary purposes from one based on a definitive judgment of Grotius's own meaning. Given my interpretation I argue that we can confidently read Grotius as advancing a theory of rights that does indeed supplement and lend itself to Nussbaum's reading by distinguishing between Grotius's actual position, which remains contentious, and what we might call the Grotian rights tradition which speaks to the spirit if not the letter of Grotius's thought. Influential ideas found in works such as Grotius's *The Rights of War and Peace*, after all, should be taken as helpful guides connected to us by a continuing commitment to justice and peace, not as idols to be fought over or authorities to be strictly

Cambridge University Press, 1987) and M. A. Fox's writings about Porphyry in his *Deep Vegetarianism* (Philadelphia: Temple University Press, 1999).

obeyed. Nussbaum is right to claim and explicate a rich philosophical heritage connecting the Grotian rights tradition with the capabilities approach, but Grotius is not being claimed as the exclusive property of the capabilities theorist nor does the success of a capability-based theory of rights rest on Grotius's position. Rather, rich parallels in substance and method make the Grotian rights tradition, broadly construed, ripe for intellectual investigation and comparative research. Indeed, numerous theories of rights appear well-suited to comparative investigation, and such inquiry should focus on what, specifically, the theory consists of, to what extent it reflects, supports, and enriches the capabilities approach, and, most importantly, how it contributes to the working out and refining of a compelling and substantive capability-based theory of global justice.

Like other cosmopolitan approaches the capabilities approach features an account of the informational basis that constitutes an individual's good. It is an ethical theory with political implications, offering a standard for aggregative appraisal, informing our choice and evaluation of institutions, and serving as a guide to policy. Developed by Nobel-laureate economist Amartya Sen and philosopher Martha Nussbaum, the capabilities approach advocates a theory of well-being that answers the question: *What should an individual be able to do and be?* in terms of one's freedom to function in certain ways and ability to shape one's life by choosing and doing a range of valuable things that constitute an empowered life. Nussbaum's version offers an objective list of capabilities, the securing of which constitutes a dignified life. Examples include being able to be adequately nourished, exercise reason and the imagination through education, and being able to participate in political choices. Accordingly justice demands that these and other central capabilities be secured.

Nussbaum has noted that while the language of rights plays a powerful moral role in political discourse, rights remain conceptually ambiguous. She has insisted that assessing the

as yet underexplored relationship between rights and capabilities is an urgent task given both their apparent connections and possibilities for mutual reinforcement. Amartya Sen maintains that the combination of the two gives us something that neither perspective can provide alone, arguing that the capabilities approach adds to a theory of justice an important focus on the freedom to choose particular levels of functionings. Although their recent work, and the growing literature in this area, suggests a capability-based approach to global justice entails a strong commitment to rights, working out what such a burgeoning theory specifically tells us about the fairness or equity of the processes and procedures required of just institutions remains ongoing. In recent years much attention has been paid to the contributions the capabilities approach makes as a measure of human development, including its crucial advantages over GNP, utilitarian, and resource-based measurements used to measure quality of life. Unlike these other measurements, the capabilities approach directly focuses on the abilities and opportunities each person has to convert available resources into valuable functionings, leading to its adoption by the *United Nations Human Development Report*. The UN's *Universal Declaration of Human Rights* (UDHR) is a focal point for the pursuit of global justice since rights secure our capabilities to function, safeguard the value we attach to our freedom and well-being, and infuse into a theory of justice a conception of moral entitlements that have political significance above and beyond the enhanced personal advantage they help secure.

Rights are central to the language and issues of justice though rights and justice are sometimes characterized as conflicting ideals. Rights-based approaches to justice attempt to connect our understanding of these concepts by making equality of rights a primary requirement of any just order. How rights are conceived to empower individuals directly informs the requirements we place on political institutions to achieve and reflect the

demands of justice. This requires on-going evaluation of the comparative advantages, disadvantages, and differences an alternative or combined capabilities approach might have. Philosophers have been reluctant to explore the connection between capabilities and rights, either because they regard capabilities as restricted to human development, as moving too far towards an overly specified account of human perfection, or because capabilities theorists have thus far failed to provide the kind of institutional analysis that rights-based approaches tend to demand. While rich in detail, it as yet remains unclear how the capabilities approach can or might generate political principles to address pressing issues of global justice. The Grotian rights tradition helps exemplify the rich connection, as yet relatively untapped in the history of philosophy, between the concept of capabilities and the concept of rights. It also supplies an important historical heritage to a capabilities theory of rights that, along with its refined theory of well-being and its cosmopolitan commitments, may help capabilities theorists develop the kind of substantive theory that promotes the same global justice Grotius himself sought to facilitate with his own work.

Accordingly, a capabilities theory of rights – in which a capabilities perspective is conceived as *a species of* a rights-based approach to global justice given many of the same valuable entitlements central capabilities and basic rights emphasize – will highlight a rich moral set of goals for development.³⁰ This position construes rights as justified by an ethical argument about the valued capabilities of the individual and will entail, as well as emphasize the interdependence of, civil and political liberties and economic and social rights. As fundamental entitlements rights are prepolitical moral claims, not merely artefacts of laws and institutions, based on our reasoned judgment of a species' natural and inherent moral value grounded in a being's evident self-awareness and capacity to suffer: "Sentience is not

³⁰ Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, 284.

the only thing that matters for basic justice; but it seems plausible to consider sentience a threshold condition for membership in the community of beings who have entitlements based on justice.”³¹ A capabilities theory of rights recognizes that securing a right is an affirmative task, not simply a matter of negative liberty where rights are simply regarded as secured if the state – or anyone in a position to help – refrains from interference on the matter.³² Having a right means having a justified claim to a certain level of capability to function. Considering how to secure capabilities to function and thus secure the content of rights helps determine the manner in which individuals therefore have claims to a certain treatment, level of well-being, resources, and opportunities.

4.6 Conclusion

Grotius’s theory of rights emphasizes reasoned on-going debate toward securing international justice. It appears to rest on judgments concerning the moral value of species, including approximations of species norms, as potential rights holders demanding inclusion in the sphere of justice. As I have noted it is not possible to gain a much clearer, more decisive and thorough answer to my original guiding questions. As I have also suggested, we can confidently read Grotius as advancing a theory of rights that does indeed supplement and lend itself to Nussbaum’s reading by distinguishing between Grotius’s actual position, which remains contentious, and what we might call the Grotian rights tradition which speaks to the spirit if not the letter of Grotius’s thought. I interpret Grotius’s theory as not limiting an intuitive freestanding commitment to and assignment of dignity to humanity alone. Rather, in agreement with Nussbaum’s interpretation I see Grotius combining a claim about

³¹ Martha Nussbaum, “Beyond the Social Contract: Toward Global Justice,” *The Tanner Lectures on Human Values* Vol. 24, www.tannerlectures.utah.edu/lectures/volume24/nussbaum_2003, 29/09/2004, 494.

³² Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, 286-287.

the moral value of a being and its species norm, to give us an idea of what specific entitlements justly demand our respect as necessary conditions of a life with dignity. Like Nussbaum's account, mine sees in Grotius's theory an emphasis on a species' moral value as indicative of the fundamental entitlements owed individuals of that species. It is only by juxtaposing human dignity with the lesser non-human animal nature that a formidable wedge can be driven between the rights bearing subjects of justice that are members of the human species and non-human animals. Yet Grotius provides no decisive textual evidence in his preliminary remarks for us to confidently limit the assignment of dignity to humans alone, from which we might then be tempted to limit rights to only those animals with the capacity to identify and respect rights in the tradition of the Stoics, Kant, Rawls, and the like. Neither Nussbaum nor I attribute to Grotius the view that animals have rights. I have simply gone beyond Nussbaum in noting that the structure of Grotius's theory of rights, as laid out in his preliminary remarks, does not exclude, and appears to leave room for, non-human animals as potential rights holders. I do not interpret Grotius as dissuading us from the assumption of human exceptionalism, but rather see the structure of his theory as reinforcing, not denying, the distinction between rights holders and rights adjudicators. This distinction or difference explains both our special role with respect to rights, and the special rights to which we are entitled, given identifiable norms unique to the human species.

We should be concerned about the source and subject of rights in Grotius because it informs contemporary rights theory and because it advances both our understanding and pursuit of global justice. Grotius's view on the so called laws that govern our nature is a compelling one. His positive and fallible conception of human nature involves the observation of a shared impulse and capacity for civil society governed by moral reason. He

is optimistic that the method he adopts for determining rights will yield a broad consensus.³³ In contemporary terms what is thus unique to our nature is the shared desire to establish a just social and political order and the ability to exercise our intelligence towards working out the demands of justice: “Sociability and understanding combine in humans to make justice, as contrasted to mere sympathy, possible. Justice is therefore an expression of a human nature that Grotius believed to be sufficiently determinate to allow him to speak of *laws* governing that nature.”³⁴ The most valuable and relevant contribution to be taken from Grotius’s preliminary remarks is not only or primarily his progressive view of human nature but his remarkably modern theory of rights. The Grotian rights tradition, as interpreted above, helps reinforce and supplement the basis for developing a substantive capability-based theory of rights in which capabilities are not a rival, competitor, or alternative to rights, but rather a particularly fine species of a rights-based approach to global justice that resolves many of the sticky theoretical issues in what I, and many others, regard as the right

³³ “In order to give proofs on questions respecting this Natural Law, I have made use of the testimonies of philosophers, historians, poets, and finally orators. Not that I regard these as judges from whose decision there is no appeal: for they are warped by their party, their argument, their cause: but I quote them as witnesses whose conspiring testimony, proceeding from innumerable different times and places, must be referred to some universal cause; which, in the questions with which we are here concerned, can be no other than a right deduction proceeding from the principles of reason, or some common consent. The former cause of agreement points to the Law of Nature; the latter, to the Law of Nations: though the difference of these two is not to be collected from the testimonies themselves, (for writers everywhere confound the Law of Nature and the Law of Nations,) but from the quality of the matter. For what cannot be deduced from certain principles by solid reasoning, and yet is seen and observed everywhere, must have its origin from the will and consent of all.” Grotius, xxxiv preliminary remarks paragraph 40. See also a similar remark of Grotius’s, perhaps the same one differently translated, (as quoted in Edmundson, 18) from pages 21-23 of a 1646 edition of Grotius’s treatise: “[T]he principles of the law of nature, since they are always the same, can easily be brought into a systematic form; [unlike] the elements of positive law, [which,] since they undergo change and are different in different places, are outside the domain of systematic treatment. [...] I have made it my concern to refer the proofs of things touching the law of nature to certain fundamental conceptions which are beyond question, so that no one can deny them without doing violence to himself. For the principles of law [...] are in themselves manifest and clear, almost as evident as are those things that we perceive by the external senses. [...] I have, furthermore, availed myself of the testimony of philosophers, historians, poets, and finally also of orators [...] [for] when many at different times, and in many different places, affirm the same thing as certain, that ought to be referred to as a universal cause ...” With respect to Grotius’s method for establishing a consensus about rights, Lauterpacht explains that “[i]t is a law of nature largely based on and deduced from the nature of man [sic] as a being intrinsically moved by a desire for social life, endowed with an ample measure of goodness, altruism, and morality, and capable of acting on general principles and of learning from experience.” Lauterpacht, 1946, 24.

³⁴ Edmundson, *An Introduction to Rights*, 17.

way. As ever the significant task of working out and refining those rights remains on-going. Recent developments in the areas of rights and global justice, including the capabilities approach, are a testament to Grotius and the Grotian rights tradition.

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Chapter 5¹

Nonhuman Animals and Global Justice

Though not homosapiens, [animals] are also beings entitled to dignified existence and human treatment sans cruelty and torture ... Therefore, it is not only our fundamental duty to show compassion to our animal friends, but also to recognize and protect their rights ... If humans are entitled to fundamental rights, why not animals?

- *Nair V. Union of India*, Kerala High Court, no. 155/1999, June 2000²

5.1 Introduction

Members of the Kerala High court might ask of John Rawls's theory, 'if humans are entitled to fundamental rights, why not animals?' I ask of Rawls's theory the more modest question: why are animals excluded from the sphere of justice?³ Predictably, answers to both questions are connected, and I argue that Rawls does not adequately answer either question. I also critically engage Martha C. Nussbaum's recent criticisms of Rawls. Focus on his exclusion of animals from the sphere of justice highlights how Rawls's theory is a theory of justice and not a theory of rights. It also helps me isolate two underlying problems with Rawls's theory of justice, namely his conception of the moral agent and his social contract doctrine. This is not to suggest, of course, that Rawls's theory is not a major and original

¹ An earlier version of this chapter under the title *Accepting Nonhuman Animals into the Sphere of Justice* was presented at the Annual Philosophy Graduate Student Association Conference, York University, June 2009. Thanks to Amanda Porter, Samantha Brennan, Mark Schranz, and conference participants for your valuable comments and feedback.

² Quoted in M. C. Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Cambridge: The Belknap Press of Harvard University Press, 2006), 325.

³ I ask this because it strikes me as a serious shortcoming and because Rawls's theory is regarded as a signpost in moral and political philosophy. "His theory dominates the field, not in the sense of commanding agreement, for very few people agree with all of it, but in the sense that later theorists have defined themselves in opposition to Rawls. They explain what their theory is by contrasting with Rawls's theory. We will not be able to make sense of later work on justice if we do not understand Rawls." Will Kymlicka, *Contemporary Political Philosophy: An Introduction Second Edition* (Oxford: Oxford University Press, 2002), 55. "... the world we live in is post-Rawlsian ... *A Theory of Justice* is the watershed that divides the past from the present." Quoting Brian Barry in P. Pettit, 'Analytical philosophy' in Robert E. Goodin and Philip Pettit, eds. *A Companion to Contemporary Political Philosophy* (Oxford: Blackwell, 1993), 11.

philosophical contribution. Indeed it has enormous practical import and is arguably one of the most influential moral theories of the twentieth century. I accept Nussbaum's view that the best way to advance in our philosophical endeavours is to consider urgent matters of moral concern in light of the strongest theories we have, such as Rawls's. However, I argue that his social contract doctrine makes it impossible to include animals within the sphere of justice. That is, the status and treatment of nonhuman animals is something a theory of justice ought to be able to address, yet *is not and cannot be* a matter of justice within the structure of Rawls's theory.⁴ Typical of the strategy of Rawls's critics, I argue that his theory of justice is inadequate to the extent it fails to address, and equip us with means to address, a central issue of justice, namely, the status and treatment of nonhuman animals.

5.2 Nussbaum's Critique

While Rawls agrees with the claim that we have a duty to show compassion to our animal friends, he is very clear in his view that issues concerning the status and treatment of nonhuman animals are not a matter of justice. The idea behind his theory is that principles of justice are the object of an original agreement arrived at by free and equal rational persons behind a veil of ignorance. The original position corresponds to the state of nature and is purely hypothetical. He calls this justice as fairness because it conveys the idea that the principles of justice are agreed to in an initial situation that is fair. Rawls considers his view a contract theory that yields agreement and acceptance of certain moral principles that underlie liberal democratic political institutions. The purely hypothetical procedure produces principles of justice that would be chosen by rational persons. The agreed to principles

⁴ Justice for nonhuman animals is, for my purposes, a baseline assumption, foundational claim, or guiding value judgment. With Nussbaum I think that because animals are active beings that have a good they have a reasonable claim to pursue it, involving claims of justice.

would be a matter of public knowledge. By introducing the veil of ignorance into the original position, Rawls hopes to secure the voluntary cooperation of every member of society and nullify arbitrary differences in ability and social circumstance. The obvious question then is who are the parties to the contract? Rawls informs us that the parties to the original position are moral equals in that they have equality of rights and have the requisite capacity for reason:

It seems reasonable to suppose that the parties in the original position are equal. That is, all have the same rights in the procedure for choosing principles; each can make proposals, submit reasons for their acceptance, and so on. Obviously the purpose of these conditions is to represent equality between human beings as moral persons, as creatures having a conception of their good and capable of a sense of justice. The basis of equality is taken to be similarity in these two respects. Systems of ends are not ranked in value; and each man [sic] is presumed to have the requisite ability to understand and to act upon whatever principles are adopted. Together with the veil of ignorance, these conditions define the principles of justice as those which rational persons concerned to advance their interests would consent to as equals when none are known to be advantaged or disadvantaged by social and natural contingencies.⁵

Rawls summarizes, “[a]s the argument now runs, the principles of justice cover all persons with rational plans of life, whatever their content, and these principles represent the appropriate restrictions on freedom.”⁶ That is, principles of justice directly cover those beings who can participate in their formation. The principles of justice, determined by contracting parties to the original position behind the veil of ignorance, apply to those who are capable of understanding and acting upon them.

Rawls is forthcoming with the concession that his theory cannot adequately address the question of what is owed to nonhuman animals and the rest of nature because he denies that such issues are matters of justice:

⁵ John Rawls, *A Theory of Justice*. (Cambridge: The Belknap Press of Harvard University Press, 1971), 19.

⁶ *Ibid.* 254.

Certainly it is wrong to be cruel to animals and the destruction of a whole species can be a great evil. The capacity for feelings of pleasure and pain and for the forms of life of which animals are capable clearly imposes duties of compassion and humanity in their case. I shall not attempt to explain these considered beliefs. They are outside the scope of the theory of justice, and it does not seem possible to extend the contract doctrine so as to include them in a natural way.⁷

Over twenty years later, in his *Political Liberalism*, Rawls again expressed doubt that the social contract argument that underlies his theory of justice could address the problem of what is owed to nonhuman animals and the rest of nature.⁸ Nonhuman animals are excluded from justice in Rawls's theory, a fact that might deter some from turning to theory as an aid in addressing pressing issues of justice.⁹ Rawls's failure to address the issue of justice for nonhuman animals demonstrates that the social contract doctrine may not be an effective tool for building a substantive theory of global justice. In revealing the weaknesses of the contract approach, I argue that the plight of animals is an urgent matter of justice, and point in a direction that better enables us to address the issue. To be clear, I agree with Rawls that justice is not the full range of morality. The issue here is not whether nonhuman animals warrant moral concern, as Rawls admits. Certainly duties of compassion and humanity have normative force. Rather, my challenge is directed at Rawls's structural exclusion of non-human animals from the domain of justice. Rawls's strategy is often criticized because it seems to rely on implausible premises involving an imagined state of nature in which parties hypothetically consent to the contractual agreement. Of course a hypothetical agreement is no contract at all but, as Rawls indicates, he wants us to think of his social contract argument

⁷ Ibid. 512.

⁸ John Rawls, *Political Liberalism*. (New York: Columbia University Press, 1993), 21.

⁹ Will Kymlicka, for example, has argued that the contract device adds little to Rawls's theory and that its strength instead lies in its intuitive notions of justice. Kymlicka, *Contemporary Political Philosophy: An Introduction Second Edition*, 69-70.

as a device for working out certain moral premises concerning people's moral equality and reflecting, testing, and confirming our strongest intuitions and moral convictions.

With reference to three pressing issues of justice – disability, nationality, and species membership – Nussbaum argues that Rawls's theory is ill equipped to handle such issues and contends that this is because of the social contract doctrine at the heart of his theory. What is different about the question of justice for nonhuman animals, however, is that Rawls thought this question was outside the scope of a theory of justice. I regard justice as a key subset of morality concerning the sphere of basic entitlements. Denying animals a dignified existence is an urgent issue of justice and there is no obvious reason why our morals and institutions cannot be extended to include nonhuman animals.¹⁰ Why then are animals excluded from justice in Rawls's theory? A common defence for excluding animals from considerations of justice rests on distinguishing humans from other species, given our possession of reason. This perspective has a rich history in Western philosophy. Nussbaum rightly points out the significant influence of the Judeo-Christian view that humans have dominion over nature, but she also argues that it is the ancient ethical thought of Stoicism that has most influenced the tradition on the question of nonhuman animals.¹¹ The Stoics advocate “[t]he idea of universal respect for the dignity of humanity in each and every person,” but because they ground this dignity on a capacity for reason, animals were

¹⁰ Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, 326. Here I do not develop in greater detail a political theory of animal rights, beyond claiming nonhuman animals have fundamental entitlements and that the sphere of basic entitlements is a particularly urgent subset of morality concerning the domain of justice. The sheer presence and central place of nonhuman animals in virtually all aspects of life, especially cultural traditions, political economy, and other just/unjust behaviours, processes, and institutions, is part of what makes this urgent matter political. For a recent detailed exploration and defence of animal rights as decidedly political see Sue Donaldson and Will Kymlicka, *Zoopolis: A Political Theory of Animal Rights* (Oxford: Oxford University Press, 2011), especially 112-116 where presence, the exercise of agency in the public realm, companionship, protest and dissent, and institutional involvement all constitute forms of political participation. Thanks to Tracy Isaacs for encouraging me to address this important point.

¹¹ *Ibid.* 328.

excluded from direct moral consideration.¹² This explains why the Stoics were the least sympathetic of all the ancients to the view that animals have moral standing.

The view that the status and treatment of animals involves no direct harm since they lack the requisite capacities for moral agency is also evident in Kant and Rawls. Nussbaum thinks that Rawls is, to some extent, led to his conclusion by his Kantian emphasis on rationality and the capacity for moral choice. But that, she continues, the very structure of his social contract argument requires such exclusion, even in the absence of that heavy commitment to rationality. For Kant, direct moral duties have to be toward self-conscious beings and since animals lack self-consciousness they are simply means to our ends. For Kant, any care owed to animals is really just an indirect duty toward humanity.¹³ His distinction between ethical status and ethical consideration rests on a fragile psychological claim that mistreating animals gives rise to or further facilitates immoral behaviour. Nonhuman animals do not possess intrinsic worth so our treatment of them is at best instrumental to cultivating our own moral development.

Rawls calls our duties to animals duties of compassion and humanity but is explicit in his view that issues of justice do not apply since animals are incapable of understanding and acting upon such principles. For Rawls, the two moral powers that define a being as a moral agent are the capacity for a conception of the good and a capacity for a sense of justice. Dignity and intrinsic worth are thus defined by membership in the moral community and the moral agents who constitute this community possess “an inviolability founded on justice that even the welfare of society as a whole cannot override.”¹⁴ The difference between having moral duties regarding nonhuman animals and having direct duties of justice towards them

¹² Martha C. Nussbaum, *The Therapy of Desire* (Princeton: Princeton University Press, 1994), 12.

¹³ See, for example, Immanuel Kant, “Our Duties to Animals” in James E. White ed. *Contemporary Moral Problems Eighth Edition* (Belmont: Thomson Wadsworth, 2006).

¹⁴ Quoting Rawls in Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, 332.

concerns their moral status. According to Rawls, sentience gives rise to certain duties of compassion and humanity, but only intrinsic worth gives rise to duties of justice. Rawls's Kantian conception of the moral agent as a being who possesses self-conscious reason necessarily excludes animals from the sphere of justice.¹⁵

Even if we change this conception of the moral agent, which would involve abandoning Rawls's position, the contract doctrine remains structurally inadequate to deal with the moral status of nonhuman animals. This raises the question, why start with a theoretical basis that determines what will count as matters of justice when action-guiding principles can instead be constructed out of initial considerations of what should be included in and addressed by a theory of justice? As Hilary Putnam says, 'the function of ethics is not, in the first instance, to arrive at 'universal principles.' The primary aim of the ethicist ... should not be to produce a 'system' but to contribute to the solution of practical problems.'¹⁶

The idea of bargaining or contracting between humans and nonhumans is nonsensical and the asymmetry of power across the species barrier too great for the notion of bargaining to offer any assistance to our thinking. The Rawlsian condition of moral equality is simply not met. As Darwall writes: "Since we all stand, fundamentally, in the relation of mutual accountability and have an equal standing to claim justification from one another, unequal claims must be able to be justified within that framework. They must be supportable from a standpoint in which we regard one another, as Rawls put it, as 'self-originating source[s] of valid claims.'¹⁷ To be such a self-originating source, as we have

¹⁵ "Rawls's omission of animals from the theory of justice is motivated, then, both by his Kantian conception of the person and by the structure of the social contract position." Ibid. 335.

¹⁶ Hilary Putnam, *Ethics without Ontology* (Cambridge: Harvard University Press, 2004), 4.

¹⁷ Stephen Darwall, "Contractualism, Root and Branch: A Review Essay," *Philosophy and Public Affairs* Vol. 34, No. 2, 2006, 205-206.

seen, is to possess dignity or inherent worth, which from the Stoics to Kant and Rawls, is contingent on the possession of reason. Inclusion in the moral community *as* a moral agent has been traditionally secured by reason and reason alone. If we change the conception of the moral agent in an effort to *accommodate* animals, including them as parties to the principles of justice, we separate the question of who frames the contract from the question of who the contract is being framed for. Such reform assumes the interests of nonhuman animals can then be represented.

However, Rawls's contractualism conflates these two questions and this "is how rationality ends up being critical of membership in the moral community: because the procedure imagines that people are choosing principles *for themselves*."¹⁸ Animals cannot frame such contracts, yet the principles delivered from Rawls's social contract argument are ones that regulate the parties to this contract. Since inclusion of animals for particular moral consideration can then only be done derivatively, animals cannot be included within the sphere of justice. The interests of animals may or may not be considered and even if they are, such considerations are made on compassionate and humanitarian grounds rather than grounds of justice. Grounds of justice, for example, allow us to label certain wrongful behaviours toward and treatment of animals as unjust not simply immoral. Grounds of justice are more likely to involve legally sanctioned punishments, not just moral disapproval, for certain abusive harmful treatment. Finally, grounds of justice are more likely to inform policy reforms, systematic accountability, and conscientious scrutiny of things like factory farming practices and resource depletion.

¹⁸ Martha C. Nussbaum, "Beyond the Social Contract: Toward Global Justice," *The Tanner Lectures on Human Values*. www.tannerlectures.utah.edu/lectures/volume24/nussbaum_2003.pdf, 484.

5.3 On Nonhuman Animal Rights and Global Justice

Now that I have critically examined why animals are excluded from the sphere of justice in Rawls's theory, I will pursue the question of the Kerala High Court, 'if humans are entitled to fundamental rights, why not animals?' It is clear, at least as a first approximation, why animals are not entitled to fundamental rights according to Rawls.¹⁹ In brief, only those with the capacity to reason possess the dignity and intrinsic worth that makes them moral agents, and only moral agents are subjects of justice. As we have seen, nonhuman animals are not moral agents according to Rawls and are thus excluded from considerations of justice.²⁰ If subjects of justice are entitled to fundamental rights, then, for Rawls, nonhuman animals cannot be rights holders. For Rawls, sentience gives rise to moral duties toward animals but not duties of justice. If I am to convince the reader that this is indeed a crucial failing in his theory the case has to be made that animals *are* entitled to fundamental rights. My twofold strategy for defending this position is to make the case that the question of nonhuman animal rights is a matter of justice and that animal rights must be covered by any substantive theory of global justice.

A number of compelling arguments and strategic options exist within the contemporary debate on nonhuman animal rights. The role Rawls assigns to reason and the related significance he assigns to sentience would be rejected by Peter Singer. Singer argues that it is sentience, the capacity for suffering and enjoyment, not reason, which grounds our

¹⁹ For detailed work on Rawls pertaining to questions of rights and global justice see, for example, R. Martin, *Rawls and Rights* (Lawrence: University Press of Kansas), 1985) and T. W. Pogge, *Realizing Rawls* (Ithaca: Cornell University Press, 1989).

²⁰ They may still be moral subjects to whom we owe duties of compassion. However, this is not a form of fundamental right, which is a basic entitlement of a particularly urgent sort concerning just or unjust treatment. It is not only wrong of us to violate a fundamental right or moral entitlement by, for example, severely mistreating and exploiting animals, it is also unfair to such animals. By considerations of justice I have in mind, for example, the relentless expansion of human population and development that has seen our population double in the last 50 years while habitat for wild animals and wild animal populations have decreased considerably. "And the factory farm system keeps growing to meet (and fuel) the demand for meat. World meat production has tripled since 1980, to the point that humans today kill 56 billion animals per year for food (not including aquatic animals)." Donaldson and Kymlicka, *Zoopolis: A Political Theory of Animal Rights*, 2.

principle of equality and demands our ethical consideration of nonhuman animals: “The capacity for suffering and enjoying things is a prerequisite for having interests at all, a condition that must be satisfied before we can speak of interests in any meaningful way.”²¹

To exclude nonhuman animals because they possess a different degree or state of intelligence, or that they simply are not human, is arbitrary and what Singer calls ‘speciesism,’ a bias in favour of one’s own species. Singer contends that speciesism is “morally on par with sexism and racism.”²²

Alternatively, Rawls’s apparent exclusion of nonhuman animals from the status of moral agent could be challenged by Tom Regan’s animal rights argument. If humans have a right to life, Regan contends, then so do nonhuman animals since they too meet the condition of having positive interests that may be judged as intrinsically worthwhile.²³

Nonhuman animals can be said to possess inherent worth if they can be seen to contain some intrinsic quality, akin to our experience of existence that is independent of their utility in meeting human needs and wants. Regan calls this quality ‘subjects-of-a-life’ and attributes it to any being that has interests and is capable of having beliefs and desires, goals and aspirations. To the extent that any nonhuman animal can suffer, both Singer and Regan argue that the principle of equal consideration of interests demands that we consider equally their interest in continuing to live and not suffer. Their sentience and subjectivity put them morally on par with any human and this renders their status and treatment a direct matter of justice.

Additionally, I could analyze Rawls’s position in light of Michael Allen Fox’s insistence on a paradigmatic shift in the way we view our existence in the world, taking

²¹ Peter Singer, *Practical Ethics Second Edition* (Cambridge: Cambridge University Press, 1993), 57.

²² Lori Gruen, “Animals” in Peter Singer, ed. *A Companion to Ethics* (Malden: Blackwell, 1997), 350.

²³ Tom Regan, “The Moral Basis of Vegetarianism,” in K. S. Walters and L. Portmess, eds., *Ethical Vegetarianism: From Pythagoras to Peter Singer* (Albany: SUNY Press, 1999), 158.

“humans to be part of nature, not apart from nature.”²⁴ Specifically, he puts forth arguments based on good health, environmental impact, world hunger and injustice, and finally, an argument from sympathy and empathy. Fox considers a natural reverence for all life, situating nonhuman animals squarely within the sphere of justice.

Here it is worth briefly exploring one unlikely source, the decidedly modern perspective of the ancient Epicurean philosopher Porphyry. Porphyry’s remarkably relevant arguments appear to have anticipated Rawls’s basic position by thousands of years. For the Epicureans, reason is what enables us to consider the status and treatment of nonhuman animals from an ethical point of view, it is not, primarily, what distinguishes us as subjects of justice entitled to fundamental rights and restricts other sentient beings as simply worthy of compassion. According to Porphyry, the option of a social contract is not open to us and we cannot associate nonhuman animals’ lack of reason – their inability to participate in such a contract – as grounds for excluding them from the sphere of justice.²⁵ Central to Porphyry’s argument is the implicit view that no moral distinction should be drawn between humans and nonhuman animals and that the onus of proof is on those who deny justice to nonhuman animals.²⁶ With Rawls apparently in mind, Fox writes:

According to Porphyry, domesticated animals and humans exist in a relationship of ‘innate justice’ toward each other ... Porphyry hints that it does not matter whether any sort of social contract exists between humans and other animals, for there are innate bonds that create moral community that includes animals. Many contemporary philosophers have either assumed or overtly proclaimed, with no reference to Porphyry’s work and little awareness of animals’ remarkable capacities, that in the absence of a contractual social relationship between humans and animals, humans have no significant moral obligations to animals.²⁷

²⁴ Michael Allen Fox, *Deep Vegetarianism* (Philadelphia: Temple University Press, 1999), xvi.

²⁵ See the section on Epicurean ethics and the writings of Porphyry in A. A. Long and D. N. Sedley, eds., *The Hellenistic Philosophers. Volume 1. Translations of the principal sources with philosophical commentary* (Cambridge: Cambridge University Press, 1987), specifically 102, 131-132.

²⁶ Fox, *Deep Vegetarianism*, 8.

²⁷ *Ibid.* 10-11.

Porphyry anticipates Kant by arguing that harming animals can stifle our moral development.²⁸ He also anticipates, and rejects, Rawls's position that limits nonhuman animals from considerations of justice by limiting their inclusion in the moral community.

Duties of compassion, for Porphyry, are not enough. He claims that: "He, therefore, who admits that he is allied to all animals, will not injure any animal. But he who confines justice to man [sic] alone, is prepared, like one enclosed in a narrow space, to hurl from him the prohibition of injustice."²⁹ Here it is worth noting that, in addition to lack of entitlement to fundamental rights, one of the central differences between a duty of compassion toward nonhuman animals and a duty of justice is that the former lacks the same resources for articulating blame for the mistreatment of nonhuman animals. The kind of purposeful injury to animals that Porphyry has in mind, for example, is not adequately addressed by a duty of compassion.

Charges of animal cruelty, one might object, deny this since those who commit animal cruelty are guilty of a moral failing, namely failing to uphold a duty of compassion toward animals. This holds in instances where, morally speaking, the welfare of animals matters but in a manner that is subordinate to human interests. It is true, for example, that based on a duty of compassion we can blame the careless scientist for failing to exhibit sufficiently humane use of animals in his or her experiments. However, charges of animal cruelty tend to concern more than unethical treatment. Such charges concern unjust treatment or mistreatment of a particularly urgent sort that warrants serious and particular disapprobation.³⁰ When part of a formal justice system such charges can accompany

²⁸ Porphyry, "On Abstinence from Animal Food," in Walters and Portmess, *Ethical Vegetarianism: From Pythagoras to Peter Singer*, 44-45.

²⁹ Quoting Porphyry in Fox, *Deep Vegetarianism*, 12.

³⁰ I mean more serious disapprobation in the sense of warranting, for example, official response rather than simply negative judgment. 'Unjust' need not necessarily mean something more than 'immoral.' We might think of certain immoral parenting practices that strike us as worse than unjust parenting practices. Other cruelties

significant penalties such as fines or imprisonment and can become part of one's criminal record. Without the further duty of justice we could acknowledge the unfortunate status of animals and perhaps refrain from or inhibit acts that cause their suffering, but we could not say such actions are morally wrong in the particularly urgent way duties of justice indicate.³¹

Nussbaum argues,

It seems, however, that what we typically mean when we call a bad act unjust is that the creature injured by the act has an entitlement not to be treated in that way, and an entitlement of a particularly urgent or basic type (since we do not believe that all instances of unkindness, thoughtlessness, and so forth are instances of injustice, even if we do believe that people have a right to be treated kindly, and so forth).³²

Duties of justice provide us with the resources for assigning this significant kind of blame by highlighting particular acts as unjust, not just careless, inconsiderate, or harmful.

Nussbaum's theory appears to have the greatest potential to create a substantive theory of global justice that is capable of addressing the question of nonhuman animal rights.

She writes,

The sphere of justice is the sphere of basic entitlements. When I say that the mistreatment of animals is unjust, I mean to say not only that it is wrong *of us* to treat them in this way, but also that they have a right, a moral entitlement, not be treated in that way. It is unfair *to them*. I believe that thinking of animals as active beings who have a good and who are entitled to pursue it naturally leads us to see important damages done to them as unjust.³³

In place of social contract doctrine she argues that the capabilities approach provides a better theoretical basis for addressing questions of nonhuman animal rights, focused as it is on dignity and needs for flourishing. This approach allows us to regard and accept

performed by parents, loved ones, those in authority may be examples of forms of immorality that are in some senses worse than forms of injustice.

³¹ Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, 336. Again, my claim here is not that because we want to punish certain kinds of unjust behaviour it must be worse than, for example, immoral betrayal by family or friends for which judicial punishment seems inappropriate.

³² *Ibid.* 337.

³³ M. C. Nussbaum, "Beyond 'Compassion and Humanity': Justice for Nonhuman Animals" in C. R. Sunstein and M. C. Nussbaum, eds., *Animal Rights: Current Debates and New Directions* (Oxford: Oxford University Press, 2004), 302.

nonhuman animals as moral subjects who are subjects of justice because they have a natural good or intrinsic worth. A being's capability refers to a being's freedom to function in certain ways and ability to be certain things deemed valuable. The idea is that there are certain functions that beings should be empowered to do and that a life developed and shaped by choosing and doing a range of these functions is a dignified life. Such an approach can be extended to embody ethical concern for various species.³⁴ Nussbaum regards the capabilities approach as an ally rather than a competitor to the Rawlsian project. She argues that the capabilities approach can address certain aspects of his theory that are problematic, such as "justice for people with disabilities (especially mental disabilities), justice across national boundaries, and justice for nonhuman animals ..."³⁵ Simultaneously, the capabilities approach can embrace other aspects to provide action-guiding recommendations and enhance the inclusiveness of justice theory.³⁶

Nussbaum's examination of Rawls's work plays a central role in her growing conception of justice. She has clearly stated that her "list of the central capabilities is not a complete theory of justice."³⁷ Instead, her capabilities approach is best thought of as a theory of global justice that is in the process of elaboration and fine-tuning that, like Rawls's, is strengthened with the addition of each critical voice:

³⁴ Ibid. 304-310. For an account that is sympathetic with Nussbaum's capabilities approach to justice for animals, but moves beyond her species norm principle, see Donaldson and Kymlicka, *Zoopolis: A Political Theory of Animal Rights*, 95-100. They argue: "For both humans and animals, justice requires a conception of flourishing that is more sensitive to both interspecies community membership and intraspecies individual variation." 99.

³⁵ Nussbaum, "Beyond the Social Contract: Toward Global Justice," 415.

³⁶ Nussbaum's "conclusion is not that we should reject Rawls's theory or any other contractarian theory but that we should keep working on alternative theories, which may possibly enhance our understanding of justice, particularly with these difficult problems in view." Ibid. 416. As noted, her "project is highly critical of John Rawls. It should therefore be emphasized that the reason for singling out Rawls's theory for critical examination is that it is the strongest theory we have, and, indeed, one of the most distinguished political theories in the Western tradition." Ibid. 418.

³⁷ Martha C. Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge: Cambridge University Press, 2000), 75.

Many of the most urgent problems of justice and distribution that face human beings who live within nation-states are problems that are now, in their very nature, international problems, requiring worldwide communication and common effort for their effective solution . . . If we are so much as to survive as a species and a planet, we clearly need to think about well-being and justice internationally, and together.³⁸

I have argued that theory of justice should include consideration of nonhuman animal rights.

Given the rich and numerous relationships we have with animals in our everyday lives throughout the world it “seems plausible to think that these relationships ought to be regulated by justice, instead of the war for survival and power that now, for the most part, obtains.”³⁹ Additionally, such a theory must have global reach and it must lead debate, exemplifying the important practical role theory can and must play. Nussbaum insists,

In short: it makes sense to take the issue of social justice seriously, and to use a norm of justice to assess the various nations of the world and their practices. But if the issue of social justice is important, then the content of a conception of justice is important. Social justice has always been a profoundly normative concept, and its role is typically critical: we work out an account of what is just, and we then use it to find reality deficient in various ways.⁴⁰

One strength of Nussbaum’s approach to theorizing justice is that it builds in and takes seriously a range of moral capacities, including sympathy and the imagination from which a genuine sense of justice can be effectively developed.⁴¹ Nussbaum argues that “[t]he sphere of justice is the sphere of basic entitlements.” An act or situation is unjust to the extent it betrays the way a being should be treated, in a particularly urgent or basic way, because it is

³⁸ Quoting Nussbaum in D. A. Crocker, “Functioning and Capability: The Foundations of Sen’s and Nussbaum’s Development Ethic, Part 1,” *Political Theory*, Vol. 20, No. 4, 1992, 586.

³⁹ Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, 326. Jean Harvey, for example, has argued that consideration of certain rights involves moral demands involving a kind of justice that concerns relationships rather than simply distribution, where distributive justice “centres around the model of individuals accumulating benefits.” J. Harvey, “Justice Theory and Oppression,” in C. Wilson, ed., *Civilization and Oppression* (Calgary: University of Calgary Press, 1999), 180.

⁴⁰ Martha C. Nussbaum, “Capabilities as Fundamental Entitlements: Sen and Social Justice,” *Feminist Economics*, Vol. 9, No. 2-3, 2003, 47.

⁴¹ Kymlicka, *Contemporary Political Philosophy: An Introduction Second Edition*, 401.

both wrong of us and unfair to them.⁴² Nussbaum's theory is focused on basic entitlements, and aims to flesh out the minimal conditions necessary for a just society. For Nussbaum, a failure to secure basic entitlements is a violation of justice. Her emphasis on the dignity of individual lives in terms of the species norm makes her theory of justice perfectly suited to account for and address duties of justice to nonhuman animals.

5.4 Conclusion

I share Rawls's view that justice represents a particular subset of moral considerations. Justice is not the full range of morality. In particular, I regard justice as a key subset of a particularly urgent kind concerning the sphere of basic entitlements. Rights-based accounts of justice, including nonhuman animal rights, do not exhaust what justice requires. They are proposed as minimal, necessary conditions of social justice. Rawls acknowledged that his theory would have difficulty dealing with justice for animals. What is less clear is the extent to which he accepted that some important matters of justice run up against these theoretical limitations, or whether *A Theory of Justice* should be understood as *the* theory of justice, exhausting what or who counts. It is not reasonable to expect a theory, including Rawls's, to do everything. Nonetheless, I have argued that the exclusion of nonhuman animals from Rawls's theory of justice is a shortcoming. With Nussbaum, I treat Rawls's theory as powerful but limited, requiring theoretical innovation when it comes to certain frontiers of justice. It is a building block as we expand theories of justice to address the justness of political arrangements, justice movements that are global in scope, issues of domination, exploitation, and oppression, as well as questions of justice for indigenous

⁴² So, as noted earlier, even if we believe that a right to be treated kindly or thoughtfully etc. exists, where a right is synonymous with a moral entitlement, we are not therefore committed to necessarily regarding all instances of unkindness or thoughtlessness as instances of injustice. Nussbaum, "Beyond the Social Contract: Toward Global Justice," 485.

peoples, the disabled, the mentally challenged, nonhuman animals, biological systems, and future generations.

Rawls's theory involves an ideal of reasonable reciprocity or fairness between moral equals. This causes problems for the question of justice for nonhuman animals since we cannot expect them to reciprocate our conceptions of justice.⁴³ Nonhuman animals are excluded from the sphere of justice because they do not qualify as moral agents, lacking both a conception of the good and a capacity for a sense of justice.⁴⁴ If we take Rawls as exhausting what or who counts within the sphere of justice we gain a clearer view of the deficiencies of his theory. Whether we take Rawls as excluding nonhuman animals for lacking reason, or more particularly for lacking a capacity for reciprocity, justice is reserved for moral agents that are symmetrically situated and capable of giving justice to one another. Defenders of Rawls might argue that though our moral duties towards nonhuman animals are duties of compassion and humanity, and not duties of justice, they are no less compelling. In other words, it is neither clear nor obvious that Rawls's exclusion of justice for animals renders his theory deficient.⁴⁵ I conclude by reiterating five related ways I have answered this objection. First, Rawls's theory is deficient because of the inferior status it assigns to nonhuman animals, excluding them from the key subset of moral considerations that constitute the sphere of justice. Second, Rawls's account is conceptually, and in practice, at odds with justice for animals. Third, duties of compassion and humanity lack the

⁴³ Perhaps one reason this is unfortunate is that, comparatively, the human species may be more radically unjust than most (all?) other species. Should we try to emulate nonhuman animal behaviours that entail symbiotic relationships with other species and sustainable relationships with the natural environment?

⁴⁴ Here it is worth noting that, empirically, such claims remain far from settled. See, for example, Jonathan P. Balcombe, *Pleasurable Kingdom: Animals and the Nature of Feeling Good* (London: Macmillan, 2006), Frans De Waal, *Good Natured: The Origins of Right and Wrong in Humans and Other Animals* (Cambridge, Mass: Harvard University Press, 1996), Virginia Morell, *Animal Wise: The Thoughts and Emotions of our Fellow Creatures* (New York: Crown, 2013).

⁴⁵ Thanks to Michael Milde for encouraging me to clarify this matter. While a more detailed exploration of the idea that justice depends on reciprocity is worthwhile, it remains outside the scope of my present inquiry.

resources of duties of justice for addressing and challenging individual or systematic cruelty and mistreatment. Severely exploiting or eradicating a species can be a grave injustice, not just a failure of compassion. When normalized and systematic such injustice can even accompany widespread compassionate regard. Fourth, I have contested what I see as an ordering problem whereby theory of justice is delivered as the structure through which we do justice, an approach Amartya Sen calls transcendental justice.⁴⁶ Instead, we should start with the question of justice for animals, employing our theoretical resources in response to such challenging problems in an effort to render the world comparatively less unjust. Finally, Rawls's theory is deficient when it comes to the significant philosophical problem of justice in situations of asymmetrical power. By assuming rough equality of power among the parties Rawls's social contract does not produce good results, as he acknowledged, concerning, for example, the problem of rights-based justice for animals.⁴⁷

Nussbaum has rightly argued that, "a truly global justice requires not simply looking across the world for other fellow members who are entitled to a decent life. It also requires looking around the world at the other sentient beings with whose lives our own are inextricably and complexly intertwined."⁴⁸ Accepting Nussbaum's view that the best way to advance in our philosophical endeavours is to consider urgent matters of moral concern using the strongest theories we have, I have argued that Rawls's social contract doctrine is incapable of including animals within the sphere of justice. That is, the status and treatment of nonhuman animals is not and cannot be a matter of justice within the structure of Rawls's theory. Though some may try, attempts to expand the theory to cover issues relating to

⁴⁶ See Amartya Sen, *The Idea of Justice* (Cambridge, Mass: The Belknap Press of Harvard University Press, 2009).

⁴⁷ Martha Nussbaum, "The Capabilities Approach and Ethical Cosmopolitanism: The Challenge of Political Liberalism," in Maria Rovisco and Magdalena Nowicka, eds. *The Ashgate Research Companion to Cosmopolitanism* (Farnham: Ashgate, 2011), 408.

⁴⁸ Nussbaum, "Beyond the Social Contract: Toward Global Justice," 506.

nonhuman animals appear doomed to fail. Failure in this respect is serious for any substantive theory of global justice. Typical of the strategy of Rawls's critics, I argued his theory of justice is inadequate to the extent that it fails to address and equip us with the means to address a central issue of justice, namely, the status and treatment of nonhuman animals. Additionally, I explored what it means to say that the status and treatment of nonhuman animals is an issue of justice and why this should feature in a theory of global justice that is meant to contribute to the solution of urgent practical problems.

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