

# **NUSSBAUM'S CAPABILITY THEORY, HUMAN DIGNITY AND PROFOUND DISABILITY<sup>1</sup>**

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## **ABSTRACT**

Martha Nussbaum has sought to establish the significance of disability for liberal theories of justice. She proposes that human dignity can serve as the basis of an entitlement to a set of capabilities that all human beings either possess or have the potential to develop. I consider whether the concept of human dignity will serve as the justification for basic human capabilities in accounting for the demands of justice for people with profound learning difficulties and disabilities. I examine the relationship between dignity and capabilities, suggesting that Nussbaum fails to distinguish between several conceptions of human dignity, whilst also identifying one of these conceptions as coming close to meeting several of her demands. However, it is difficult enough to show how dignity is related to just one of our basic entitlements, and even that requires more than the resources available in Nussbaum's approach.

Key words: capability theory; human dignity; Martha Nussbaum; profound impairment; profound learning difficulties.

## 1. INTRODUCTION

Martha Nussbaum has sought to establish the significance of disability for the content and structure of liberal theories of justice. Along with Sen<sup>2</sup> she has developed the 'capabilities approach', which amounts both to a significant theory in its own right and a formidable challenge to theories in the social contract tradition (Nussbaum 2000; 2006; 2008; 2009).<sup>3</sup> A distinguishing feature of Nussbaum's work, and the subject of this paper, is a proposal that human dignity can serve as the basis of an entitlement to an extensive set of capabilities that all human beings either possess or have the potential to develop. This is an inspiring vision: no one is left outside the ambit of a conception of justice which is responsive to the needs and dependencies of even the most vulnerable humans. Nussbaum provides a powerful example of what is required of a theory of justice if it is to extend to profoundly disabled people whose capacity for rationality and autonomy is severely constrained.

A comprehensive appraisal of Nussbaum's capability approach would require discussion of its procedural aspects, and in particular the adequacy of her departures from Rawlsian political contractarianism. Except incidentally, the procedural dimension is not considered here; nor is any attempt made to provide an assessment of the capability framework as a whole. The principal interest is how far the concept of human dignity will serve as the justification for basic human capabilities in giving an account of the demands of justice as these apply to people with profound and multiple learning difficulties and disabilities.

In section 2 I introduce Nussbaum's argument for a set of minimum core social entitlements to basic human capabilities, and in section 3 I consider as the basis of those entitlements the relationship between human dignity and human

capabilities. In section 4 I suggest that Nussbaum fails to distinguish between several conceptions of human dignity, and I identify one of these conceptions as coming close to meeting several of her demands. However, this will not provide a justification for all the absolute entitlements that Nussbaum claims in respect of the central human capabilities; it is difficult enough to show how dignity is related to just one of our basic human entitlements, and even that requires more than the resources available in Nussbaum's approach.

We should at the outset observe that Rawls finds that the idea of human dignity cannot serve as the foundation for the principles of justice: it is too indeterminate, and must await further specification 'once the conception of justice is on hand' (Rawls 1971: 585-6). Nussbaum appears to concur, for she considers her account of entitlements 'not as derived from the ideas of dignity and respect but rather as ways of fleshing out those ideas' (2006: 174). But elsewhere she writes of 'a dignity *based* capability approach' (2008: 361<sup>4</sup>), of how 'such an account [of dignity] might *ground* basic political entitlements (2008: 352), and of how 'the capabilities approach *begins* from a political conception of the human being, and of a life that is worthy of the dignity of the human being' (2006: 180). It is not clear, then, whether dignity does in fact have a foundational role in Nussbaum's work or whether political principles are first required to give determinate content to the idea. Either way human dignity plays a pivotal role in the argument and we will have to assess how the concept as articulated by Nussbaum fares in the face of the doubts expressed by Rawls, and by other writers more sceptical still.<sup>5</sup>

## 2. A SINGLE THRESHOLD

Whilst Nussbaum's approach is 'flexible and pluralistic' in respect of the range of capabilities deemed to make up a life worthy of human dignity, it is also 'single and demanding' in respect of a political goal characterised by a universal entitlement to a threshold level of those capabilities (2008: 364). The capabilities approach is a political doctrine, specifying some of the necessary conditions for a just society, these comprising a set of fundamental entitlements that apply to everyone (2006: 155). They are fundamental because they are 'implicit in the very notions of human dignity and a life that is worthy of human dignity' and any failure to secure them amounts to a 'grave violation of basic justice' (2006: 155). Human dignity includes a life that has available in it 'truly human functioning' (2006: 74), and Nussbaum identifies the central human capabilities as these apply to life, bodily health and other essential dimensions of a worthwhile human life (2006: 76-8).<sup>6</sup> The capabilities are to be pursued for every person, and there is a threshold for each capability, beneath which 'truly human functioning' is not possible:

[F]or each important entitlement, there is some appropriate level beneath which it seems right to say that the relevant entitlement has not been secured. The intuitive idea of a life with human dignity already suggests this: people are entitled not only to mere life but to a life compatible with human dignity, and this means that the relevant goods must be available at a sufficiently high level' (2009: 335).

What is a 'sufficiently high level'? Nussbaum is aware of the difficulties. She specifies a threshold level of capabilities in a 'general and approximate way, both because . . . the threshold level may shift in subtle ways over time, and because . . . the appropriate level of capabilities may, at the margin, be differently set by different

societies . . . ' (2006: 180; 2009: 335-7). But the question of sufficiency does not only arise at the margin, as we shall see when we return to this subject in section 4.

However we determine the level of sufficiency, Nussbaum is insistent that the same minimum threshold for the same set of political entitlements should apply to all citizens:

[I]f we say anything else, we fail to respect people with disabilities as fully equal citizens. To say that this person will have property rights and that one will not, that this one will be able to vote and that one will not, seems an intolerable violation of *equal* respect for human dignity' (2008: 363).

One reason for the insistence is that 'if we start fashioning different levels of political entitlement we lose a strong incentive . . . for making every effort we can to develop the capacities of people with disabilities to the point at which they are able to exercise these entitlements on their own' (2008: 363-4). There is a common tendency to underestimate the potential of people with learning difficulties, owing to ignorance, prejudice or a disinclination to meet the costs of care. The tendency to 'construct failure' applies in particular to people with mental impairments, as when the prejudice that children with Down syndrome were ineducable prevented an accurate appraisal of what they were capable of achieving (2006: 188-9). Nussbaum is, therefore, aware of the practical danger of proposing a discrete threshold for people with disabilities, and insists, instead, on a single set of nonnegotiable social entitlements, working 'tirelessly to bring all children with disabilities up to the threshold of capability that we set for other citizens' (2006: 190).

This strategy is not shown to be unjustified merely because we can identify persons who do not meet the threshold. There may be good reason to proceed 'as if everyone was capable of all the major capabilities' (2008: 362) just because, although some people may not meet the threshold now, they may yet be enabled to,

and nothing less than unqualified support, practical and political, will suffice to overcome the obstacles that now stand in their way.

At the same time it is one thing to proceed as if a person has a capacity when, though lacking it now she may attain it in the future, and another if a person is not now capable and it is likely or certain that she never will be. What is the position for profoundly disabled people who, after all our efforts, are unable to attain some of the central capabilities? Nussbaum stands firm: 'Here I insist that they still have these capabilities, for example the right to vote and the right to own property; but that these capabilities in some cases will have to be exercised in a relationship with a guardian' (2008: 364). Nussbaum writes illuminatingly about guardianship (2006: 195-199; 2009: 343-350) but the point here is to take note of the suggested extension as to how we conceive capabilities. In the context of determining entitlements we may regard a person as having a capability if, though she lacks it now she may attain it in the future; and we may take a similar view if, though she will always lack it when acting alone she may possess it when acting with others.

We will want to distinguish between these two last cases; for the questions Nussbaum is urging us to consider extend to people whose impairments will always prevent them from acquiring some of the central capabilities, no matter how much assistance they are given. We should therefore look at whether Nussbaum's concept of dignity can explain and justify the entitlements that she has argued for.

### **3. DIGNITY AND HUMAN CAPABILITY**

In *Human Dignity and Political Entitlements* (2008) an account of dignity is presented as being both 'squarely' part of the world of nature and as not requiring a

sharp division between rationality and other human capacities (2008: 352).

Nussbaum's conception of dignity is arrived at after consideration of a view common to the Stoics, who found the basis of human community to lie in the worth of practical reason and moral choice in each human being. Rationality and autonomy, however, are not the only capacities pertinent to the possession of dignity. Once we consider the features that characterise a wide variety of human lives, and not only those of unimpaired adults, we must allow for 'major human life activities' in numerous domains:

[F]ull and equal human dignity is possessed by any child of human parents who has any of an open-ended disjunction of basic capabilities for major human life-activities. At one end, we would not accord equal human dignity to a person in a persistent vegetative state, or an anencephalic child, since it would appear that there is no striving there, no reaching out for functioning. On the other end, we would include a range of children and adults with severe mental difficulties, some of whom are capable of love and care but not of reading and writing, some of whom are capable of reading and writing but severely challenged in the area of social interaction (2008: 363; see also 2006: 187-8).

Although some profoundly disabled people have constrained powers of rationality they may yet have a considerable capacity for love, play, and other activities which, whilst not always requiring extensive cognitive powers, are yet characteristically human when exhibited in the context of affectionate relationships (2006: ch. 3). And perhaps we should agree that we should neither exalt any one capacity above all others - rationality for example - nor 'denigrate forms of need and striving that are part of our animality'. However, choosing not to denigrate animality is not the same as finding 'dignity not only in rationality but in human need itself and in the varied forms of striving that emerge from human need' (2008: 363). It is unclear why dignity resides in human need; where is the dignity inherent in the need to breathe, or to

defecate? And 'need' is not itself a capacity, yet it is capacities that Nussbaum considers as the principal sources of dignity. The emphasis, then, is better placed on 'striving' and 'reaching out' as it implicitly is in her distinction between 'basic' (untrained), 'internal' (trained) and combined capabilities (2008: 357). These capabilities are 'dynamic' in the sense that they have an autonomous tendency to develop, a tendency which is not itself the product of acculturation or societal intervention. But equally the tendency for our capacities to develop is not *realised* autonomously, but requires a set of political and social arrangements which are conducive to their growth and 'unfolding' (2008: 356-7).

Nussbaum is in agreement with the Stoics that there is a type of human worth that is 'truly inalienable, that exists and remains even when the world has done its worst' (2008: 357). However, on the Stoic view moral capacities are of equal and infinite worth only if they are immune to the vicissitudes of fortune. But then equality in the form of human dignity comes at the price of removing any conception of dignity from the empirical world. Nussbaum is not willing to move in this direction: '[h]uman beings have a worth that is indeed inalienable, because of their capacities for various forms of activity and striving. These capacities are, however, dependent on the world for their full development and for their conversion into actual functioning' (2008: 357).

A life in which opportunities for the development of the major capacities is denied is deemed not worthy of human dignity. What does this mean?

I mean that it is like imprisoning or raping a free thing whose flourishing (based on these capacities) consists in forms of intentional activity and choice. Such a life is a violation in much the way that rape and unjust imprisonment are violations: they give a thing conditions that make it impossible to unfold itself in a way suited to the dignity of those capacities (Nussbaum: 359)

There is some oddity in the reason given to explain the violation. It is not capacities *as such*, irrespective of their possessors, that are worthy of respect. There are forms of artificial intelligence which have a capacity for rational functioning whose speed and power is something we are impressed by. But this is not the sense of 'respect' that Nussbaum intends, for respect and dignity are a 'concept-family to be jointly elucidated', as expressing part of the Kantian idea of 'being an end and not merely a means' (2008: 353-4). If dignity does not inhere in a capacity, considered as such, it cannot attract the respect that Nussbaum is concerned with. Rather, it is the human being *as the bearer of human capacities* in which dignity resides and to whom respect is due, and not, considered separately, any capacity for rationality, autonomy or whatever. Furthermore, we need an account that explains how dignity is present *in advance* of any development of our capacities when the threat to dignity is represented as a threat to any such development. Granted, it is a violation to prevent a human being from developing in ways suited to her characteristic functioning, but if dignity (already) resides in our undeveloped capacities there will have to be a limit on how far it is undermined when the development of these capacities is impeded.

Perhaps the point is not that dignity inheres only in the (undeveloped) capacity itself but in a capacity which, as characteristically exhibited in human beings, has an autonomous tendency to develop. The violation is then a product of impeded development in conditions that make 'unfolding' difficult or impossible. This idea can be explored by thinking about imprisonment and rape.

Although unjust imprisonment may leave the worth of a good person untouched, it remains a serious harm because it 'deprives the person of the opportunities to exercise his or her good capacities. These capacities are preparations for activity,

and it is necessary for a flourishing life, a life worthy of these capacities, that there be opportunities to use them in activity' (2008: 358). It is here suggested that dignity is violated when the opportunity for exercising our basic capacities is denied. In the case of imprisonment, however, some prisoners find faith or a first opportunity for sustained reflection on their life. It cannot be assumed that imprisonment will always have the inhibiting or preventative effect Nussbaum asserts. This raises the question whether dignity is violated in conditions which are designed to impede functioning but which fail to have that effect.

Why is rape a violation of human dignity?

'Rape violates the bodily, mental, and emotional life of a woman, affecting all her opportunities for development and functioning. Rape, we might say, does not remove or even damage dignity, but it violates it, being a type of treatment that inhibits the characteristic functioning of the dignified human being' (2008: 358-9).

Are these the terms in which we can provide the whole of the explanation of the violation of dignity? Would we not think of rape as a violation even if it did not affect *all* opportunities for development and functioning? Or suppose that A and B are both violated, yet A is the more resilient of the two. Can we say that the violation in both cases is the same *in the sense* of the inhibiting effect on development? If we want to say that the violation of A's dignity is no less, then the facts we appeal to cannot exclusively comprise the empirical effects on functioning.

The impact of conditions and treatment on human capacity will vary according to the characteristics of affected persons. Although subject to the same abuse or oppression, the impact on one robust person may be greater than it is for another who is less resilient. But no account of dignity can allow that its violation is wholly a function of the contingencies of human psychology and physiology.

This is borne out when we consider the significance of degrading treatment as one of the principal threats to dignity. Levi has reminded us that it is possible to endure extreme degradation even whilst human dignity is successfully fought for:

[P]recisely because the Lager was a great machine to reduce us to beasts, we must not become beasts; . . . So we must certainly wash our faces without soap in dirty water and dry ourselves on our jackets. We must polish our shoes, not because the regulation states it, but for dignity and propriety (Levi 1987: 47).

Some people retain dignity in spite of degrading treatment, through resistance and self-control. This calls to mind members of the disability rights movement who insist on their dignity as autonomous persons, for ‘to conceive of people as helpless is to denigrate them, to fail to respect their dignity as agents. Nobody is ever a victim, because human dignity is always enough’ (2008: 357.) Conditions may be designed to suppress functioning, and succeed in doing so, yet fail to violate human dignity because the intended subject simply *refuses* to allow them to do so. This suggests, again, that no account of human dignity can be couched exclusively in terms of how human functioning is affected, since the effect of treatment may be suppression of capacity, yet the attitude and demeanour of a person may suffice to keep dignity intact.

Here, then, the subject’s stance is decisive; her determination not to be reduced to the level of a beast suffices for dignity. On the other hand, there are cases in which our response is *not* decisive. In a civil rights context Nussbaum acknowledges that ‘the ability to appear in front of [a] bus is connected to human dignity not timelessly but through a set of social norms and practices’ (2009: 336). We need to take account of the impact of these norms on how persons perceive themselves, so that, for example, ‘if people feel bad because they don’t have a mansion, that should not

lead us to write mansions into the definition of the social minimum (2009: 338).<sup>7</sup>

Dignity, therefore, is not simply a function of the effects on perception and capacity, since the effects are themselves subject to prevailing social practice. In this context, Williams observes that we have no guarantee that degradation is absent merely because it is absent from the agent's point of view:

For it is precisely a mark of extreme exploitation or degradation that those who suffer it do *not* see themselves differently from the way they are seen by the exploiters; either they do not see themselves as anything at all, or they acquiesce passively in the role for which they have been cast (Williams 1973: 237).

When people live under a culture embodying social norms that demand servility and passivity those who are degraded by their status may remain unaware of their predicament under this description. Profoundly disabled people may adapt to oppressive social norms in a manner such that their identity conforms to their designated status as comprehensively dependent and incapable. We should therefore acknowledge the formation of 'adaptive preferences' (2006: 189), especially as these apply to people whose treatment encourages conformity to absolute dependency. Hence, 'even if people say that dependency is what they prefer, that fact should not stop us from offering alternatives' (2006: 189). But if that is what we ought to do it is because we understand that a person's sense of dignity and self worth are themselves susceptible to influences, psychological and social, that may succeed in detracting from the reliability of self report.

The world may do its worst yet dignity is retained; or its loss goes unnoticed as people adapt to oppression. Where does this leave Nussbaum's capabilities in an account of dignity? Perhaps the point is not that some treatment *will* invariably have some effect on capability but that this is its *aim*. Treatment may amount to a violation

of dignity because that is what it is calculated to achieve, and we regard it as such not because it always has an inhibiting effect on capability but because this is the effect that it tends to cause. The heroically robust may prove to be exceptions, but if most people suffer a significant diminution in human functioning then that will suffice to characterise the abuse as a violation of human dignity. And if we regard treatment or conditions as inimical to human dignity in virtue of a general tendency to curtail capacity we then retain an emphasis on human capabilities without requiring that what is decisive is how they are affected in each case.

This is a move in the right direction. Yet, despite conditions that are degrading or exploitative, unawareness and adaptivity may prove to be the rule rather than the exception, as with oppressed groups in the past and some groups of profoundly disabled people today. Doubtless, we should say something about the constraining effect on dignity and human capability, irrespective of whether or not that is something people are aware of. But we need to say more, and not only about aims, for it may be no part of the aim but, rather, an unintended effect, that persons are subject to conditions that violate their dignity. Much of the abuse and violation of vulnerable impaired people is a product of ignorance rather than design. I will shortly discuss the additional materials required to supplement a capability account of dignity, but first it is necessary to mark some conceptual distinctions.

#### **4. A RIGHT TO BE TREATED WITH DIGNITY**

There are numerous conceptions of human dignity and one reason for the difficulties we have discussed is that Nussbaum does not clearly distinguish between them. And, however defined, human dignity is also made to carry a considerable

burden, supporting a set of entitlements that apply to all citizens. To fulfil any such role, as Nussbaum insists, the concept of dignity should be free of transcendental commitment and 'appropriate to the basis for political principles in a pluralistic democratic society' (2008: 361). This is a large ambition and it is not at all clear that Nussbaum succeeds in pulling it off. In any case, I will suggest that a number of her considerations lend themselves most naturally to one sense of human dignity in particular, a sense that also applies to all human beings, including the most vulnerable and dependent.

Of the many conceptions of human dignity I will discuss four (Rosen 2011; Vorhaus 2002).<sup>8</sup> Dignity is commonly invoked to express the idea that all human beings are of equal social status just in virtue of being human. This sense is appealed to in international law, as in the *East African Asians* case where it was argued that treatment was degrading for the purposes of Article 3 of the European Convention on Human Rights 'if it lowers [the victim] in rank, position or character, whether in his own eyes or in the eyes of other people' (*East African Asians v UK*, Comm Rep, [1973]: para. 189). This is the idea of dignity as rank or position, and of degradation as being reduced to a lower rank, or being 'lowered in dignity or estimation'.<sup>9</sup> Dignity in this sense has been deployed to significant political effect, formerly in resisting any suggestion that a social hierarchy is a true reflection of the natural order, and presently in legal judgements which condemn treatment and conditions that implicitly regard human beings as second class citizens, or as less than (fully) human. But this is not the sense of dignity that Nussbaum is most in need of, for it is a conception that has also often been applied to persons of high social status, implying the respect and deference owed by those of a more lowly station. When, on the other hand, dignity as status is used to imply equality, as

against hierarchy, it is typically used by the international Courts to emphasise the status of an agent as a human being and not as a non-human or some other animal, as an object to be toyed with and discarded.<sup>10</sup> The assertion of our humanity has a significant role in establishing a right not to be subject to treatment that would violate our dignity. But an appeal to our human status in order to explain what is absolutely wrong with these infringements requires more than a reference to our central capabilities. Capabilities explain what our human status rests on, and there are likely to be normative implications for what is unacceptable in the way we are treated. But an explanation of both the magnitude of the violation and the absolute prohibition it requires will also require reference to culturally sensitive matters of perception and symbolism, and these go beyond what Nussbaum's capability approach includes. I return to this below.

A second sense of human dignity is closer to Nussbaum's intent, and an inspiration for her own conception. This is dignity as absolute, unconditional and incomparable value, an attribute which according to Kant belongs exclusively to rational beings (or, strictly speaking, to the moral law within them). Nussbaum makes reference to Kant's view of dignity as requiring that we treat human beings as an end, never merely as a means to our own purposes (2008: 353). However, a Kantian view of dignity has several features that make it uncongenial to Nussbaum's purposes. First it is not clear what rights a Kantian conception of dignity entails, and since she is advancing a case for a set of universal political entitlements Nussbaum is required to specify what those entitlements are and how they are related to the human dignity she asserts. Second, the Kantian conception of dignity as inherent and supreme value is often regarded as including a transcendental aspect. Whatever the truth about this, Nussbaum is anxious to avoid 'contentious metaphysical notions

. . that would make them incompatible with some of the many reasonable comprehensive doctrines that citizens hold' (2008: 361.) Nussbaum's capabilities are found in our animality, and depend on 'support from the world' to allow for their 'unfolding and development' (2008: 357). Finally, there may be no Kantian (or other) conception of human dignity that could both serve as the basis for a broad set of absolute entitlements, and elicit support from citizens of multifarious faiths and political commitments. The 'overlapping consensus' that Nussbaum considers 'fully available internationally across lines of tradition and religion' may prove out of reach (2006: 163).<sup>11</sup> We might ask, for example, whether a western multi-cultural society can be expected to reach broad agreement on the question whether moral autonomy is an ineliminable aspect of human dignity. The value of moral autonomy is seen by Kant as integral to human dignity. Yet millions of people subscribe to a faith which rejects moral autonomy as a way of life. This is recognised in the tradition of political liberalism,<sup>12</sup> leading Rawls, for example, to conclude that moral autonomy cannot serve as the foundation for a political conception of justice (2005: xliii<sup>13</sup>). If an overlapping consensus on the concept of human dignity is a necessary condition for serving as a ground for our entitlements, and there is a doubt about whether that consensus can be reached, then that is a reason, on Nussbaum's own terms, to call into question the potential for human dignity to serve the foundational role that she would assign to it.

A third sense of dignity is illustrated by Levi's resistance to the horrors of a concentration camp: this is dignity as measured and self possessed behaviour. However, we do not all have Levi's capacity for heroism. Profound disability represents a lifelong challenge for profoundly disabled people, their family and carers. Very few individuals could be expected to retain their self possession

throughout a lifetime characterised by persistent, multiple and complex needs. Nussbaum would be the first to agree, since she is claiming dignity for every human being, whether or not she behaves or is capable of behaving with dignity under pressure. She would certainly not have anyone lose entitlements in virtue of an inability to retain a dignified bearing in the face of the demands of disability.

However, dignity as bearing is more closely related to Nussbaum's concern than appearances might suggest. A dignified person is someone who shows dignity in character, resisting a natural impulse to lose self control or to give up in the face of degrading treatment. Just as being dignified is something that one shows, there is a corresponding idea that a person should be *treated* with dignity, and that to treat someone with dignity is to *respect* their dignity:

To respect someone's dignity by treating them with dignity requires that one *shows* them respect, either positively, by acting toward them in a way that gives expression to one's respect, or, at least, by refraining from behaviour that would show disrespect (Rosen 2011: 57-8).

Rosen is here drawing attention to the *right* to be treated with dignity, a right enshrined in international law. Article 3 of the European Convention on Human Rights absolutely prohibits treatment that destroys or impairs dignity: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.' And the Geneva Convention of 1949, Article 3 of Convention 111 absolutely prohibits 'outrages on personal dignity, in particular, humiliating and degrading treatment' (1) (c)). What is at issue here is not dignity in the sense of providing the foundation for some basic set of human rights but dignity in the sense of a requirement that people should be treated respectfully – that they should have a right to be treated 'with dignity'. If we think of dignity as revealed in the demeanour of Levi's resistance to oppression, then not everyone can be dignified. But even those who lack Levi's

moral courage should be treated with dignity and respect, or, in other words, not be treated disrespectfully by being humiliated or degraded (Rosen 2011: 60-2).

The right to be treated with dignity is closely related to one of Nussbaum's central human capabilities; that is, 'having the social bases of self-respect and non-humiliation' and 'being able to be treated as a dignified being whose worth is equal to that of others' (1996: 77).<sup>14</sup> This has the status of a minimum core entitlement, and is one of Nussbaum's requirements for a dignified life. However, whilst the right to be treated with dignity does indeed give some 'shape and content to the abstract idea of dignity' (1996: 75), what we are doing is filling out *one* sense of the concept, and articulating one right, rather than elaborating on the concept in general or providing grounds for a series of rights or entitlements.<sup>15</sup> This is already an extensive undertaking, and even the brief discussion that follows will illustrate the range of considerations we need to take account of.

We should begin by noticing that a failure to treat someone with dignity may or may not be intentional. It is intended when revealed in behaviour designed to cause humiliation, as when staff ridicule a formerly welcome resident of a care home, such that her preferred means of expressing her needs are now regarded as unwanted and contemptible.<sup>16</sup> However, not all failures to respect dignity are intended as such. There are well documented examples of how some of the most vulnerable people are neglected to the point that they do not receive what they need for even their most basic functioning. If people are not provided with sufficient food or water they are subject to treatment that is incompatible with their dignity. For it is degrading to be left to languish on a bed, dehydrated, in soiled bedclothes and forced to resort to drinking water from a bedside flower pot.<sup>17</sup>

Lack of respect may result not only from individuals' negligence but also from a system of rules and practices that make up the residential environment for profoundly dependent people. A regime constructed with the best of intentions, yet characterised by the imposition of routines found to be mundane and uncongenial, may prove to be incompatible with respect for the dignity of residents if living arrangements are found to have a deadening effect on personality and self expression.

Are we making too much of humiliation and degradation in accounting for a right to be treated with respect? It is true that if we deprive people of nourishment we are not showing respect for their dignity; but it is surely more to the point that they may die as a result. Equally, when lifting an impaired person, what may be thought to matter most is that she is carried without injury than that her sensibilities are left unruffled. Yet, just as there were holocaust survivors who insisted that the worst part of their suffering was the humiliation (Margalit 1996: 36), so there are people for whom kind consideration matters as much as the physical consequences of their treatment. If the act of lifting a person into a hoist is undertaken by care assistants largely unknown to the dependent person, then her preferences for how she is handled and spoken to may be ignored or misunderstood. She may consider her dignity compromised by an insensitivity that is yet consistent with treatment that is safe and competent.

At this point Nussbaum would insist that the features emphasised here are indeed included amongst the human capabilities she is concerned with; for we have the capability for self respect, and it is just this capability that is undermined if we are subject to degradation. However, we may register that dignity is maintained, or indignity suffered, irrespective of, or in spite of the impact on our capability to

develop or act on the world. As Honneth observes, degradation may be used to designate behaviour that 'represents an injustice [for people] not simply because it harms subjects or restricts their freedom to act, but because it injures them with regard to the positive understanding of themselves that they have acquired intersubjectively' (1995: 131-139). Human dignity is related not only to (constrained) action and development but also to self-assessment as revealed in perception and thought. We require a set of normative considerations which allows us to identify a life as consistent or incompatible with dignity for reasons that are in addition to - not in place of - the actual or intended effects on the development of human capability. Nussbaum does not eschew normativity, and is explicit about the evaluation required for selecting the fundamental features of a human life worthy of human dignity (2006: 181). But no account of dignity, in the sense under discussion, is exhaustively characterised by reference to the effects on human capabilities, even if they are 'normatively fundamental'; we must also take account of what treatment and conditions represent, and how they impinge on self-understanding.<sup>18</sup>

This is to draw attention to the significance of the symbolic or expressive aspects of human behaviour. It can be of great importance that we act in ways that express acknowledgement of the fact that someone is entitled to be treated with respect. One reason is that the symbolic and material aspects of dignity are related; for the point of degrading treatment is often not only to express contempt, but also to undermine someone's capacity for dignity. One of the features that characterise gross human abuses is symbolic degradation; Glover suggests that human beings are able to engage more easily in horrifying behaviour if at the same time they expressively deny the humanity of their victims. Symbolic denials of dignity, including the use of de-humanising language, may help psychologically to remove barriers to

acts of terror and gross neglect (Glover 1999: 35-8). Profoundly disabled people are a vulnerable group, and those responsible for their care often work under great pressure and wield considerable powers, not always exercised in the presence of third parties. If it is a priority to protect vulnerable people from degradation and humiliation, then we have a reason to promote rights that will serve to minimise ill treatment of this kind, and this, in turn, will require giving attention to both the material and expressive aspects of human behaviour.

I am suggesting that the concept of human dignity can supply the content for a basic human right not to be subject to degrading and humiliating treatment. It may now be pointed out that this concept is vulnerable to the same objection previously levelled against human dignity; namely that it is not a concept on which we can expect an overlapping consensus and that conceptions of degradation and humiliation are not timeless but subject to cultural variation. However, the idea that a violation of human dignity can take the form of humiliation or degradation has a good claim to be considered as (almost) universal, even though there is some variation in the *practices* by which people are subject to humiliating and degrading treatment. What variation there is, furthermore, is limited by the presence of common elements. To take just one example, recognised in legal judgments in numerous jurisdictions, the violation of human dignity is frequently characterised in terms that draw a distinction between human beings and other animals; around the world it is considered degrading and inimical to dignity to be forced by other people to behave or appear in ways that offend against such conventions as defecating in private, wearing clothes in a public place and eating according to a code of manners.

That said, the conditions of the most vulnerable and disabled human beings are not always publicised or well known. Are we sure we know what the prevailing

consensus is in respect of profoundly disabled people, and, if there is any such thing, whether it would provide reliable guidance on the minimum standards of treatment compatible with the dignity of these persons? The fact that Nussbaum is impelled to press a case for their entitlements, extending far beyond what societal norms have recently acknowledged suggests a limit on how far we should expect reliable guidance from any prevailing consensus. This is just one of several questions about treating humans with dignity that requires further discussion.

The conception of dignity discussed here, important though it is, is not equivalent to the idea of dignity as the central or foundational value grounding human rights in general. Humiliation and degradation are properly included in the content of a basic human right; but there are numerous other rights included in Nussbaum's list of central capabilities, whose justification requires resources in excess of anything that the present concept of human dignity is able to supply.

## **5. DIGNITY, CAPABILITY, PROFOUND DISABILITY**

What should we conclude about the relation between the right to be treated with dignity and Nussbaum's capabilities? Any account of human dignity that is consistent with the spirit of Nussbaum's argument must appeal not only to the subject's perceptions but also the prevailing judgements and sensibilities which contribute to the process of public deliberation; not only to the effects on human functioning but also to the symbolic aspects of treatment and conditions that human beings are subject to. These are elaborations required of Nussbaum's theory, some of which go beyond but do not yet impugn a focus on human capability. But if all human beings have dignity, irrespective of their actual or potential functioning, and

for reasons that distinguish non human and human animals, including humans whose impairments are multiple and profound, then we need to explain further the significance of being human, of being treated as a human being and of belonging to and not suffering rejection from humanity. The account will both have a lot to say about the symbolism and conventions associated with showing respect for dignity, and explain how this applies to human beings whose understanding of precisely these aspects is significantly constrained by limited powers of cognition. Some such development is required, I suggest, in order to augment defence of Nussbaum's striking claim that it is the equal dignity of all human beings that demands recognition by a theory of justice from which not even the most profoundly disabled humans are excluded.

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## NOTES

<sup>1</sup> For their insightful and extensive comments I am grateful to Eva Kittay and Alice Baderin.

<sup>2</sup> Sen (1982, 1983) warrants extended discussion in this context and I discuss his work in Vorhaus 2013.

<sup>3</sup> Although Nussbaum does not altogether depart from contractarianism her capabilities approach is described as 'noncontractarian' (2007: 155-223). (Nussbaum is at pains to assert that her approach amounts only to a partial theory of justice (2009: 332)). The question whether a social contract device can accommodate claims of justice on the part of people with severe cognitive impairments is considered in Stark 2009, Richardson 2006 and Beaudry 2013.

<sup>4</sup> Here and subsequently italics added.

<sup>5</sup> Feinberg (1980: 151) and Griffin (2002: 131) are just two philosophers who regard the idea of dignity as obscure.

<sup>6</sup> The central human capabilities are elaborated in relation to: life; bodily health; bodily integrity; senses, imagination and thought; emotions; practical reason; affiliation; other species; play; and control over one's environment (Nussbaum 2007: 76-78).

<sup>7</sup> This argument is related to a debate about the extent to which any metric of distributive justice should be sensitive to variations in individuals' psychology and preferences. For a seminal contribution see Scanlon 1975.

<sup>8</sup> But not one of particular importance, which also lies outside the scope of this paper: Kittay argues that dignity 'is bound both to our capacity to care for one another and in our being cared for by another who is herself worthy of care (2005: 111); 'In our relationships of care, we witness, recognise – and so confer – that dignity in another (ibid.: 113). The relationship between dignity, perception and care requires extended consideration in its own right.

<sup>9</sup> See, for example, the Shorter Oxford Dictionary.

<sup>10</sup> See, for example, *Furman v State of Georgia* [1972] 408 US 238, 33 L Ed 2d 346.

<sup>11</sup> The subject of an overlapping consensus is a prominent feature of political liberalism (Rawls 1971, 1995; Nagel 1987).

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<sup>12</sup> Including by Nussbaum herself (2006) and Rawls (1971, 2005).

<sup>13</sup> Rawls remarks that if liberalism were to depend on comprehensive moral ideals of autonomy and individuality it would become 'another sectarian doctrine' (Rawls 1985: 246).

<sup>14</sup> A question arises here about the role of dignity in Nussbaum's theory, since the concept is both intended to feature as part of the justification for all the central human capabilities whilst also itself featuring as one of these capabilities ('to be treated as a dignified being').

<sup>15</sup> Nussbaum's entitlements and legal rights are not, of course, synonymous, but the differences are not significant in the context of this discussion.

<sup>16</sup> For discussion of belonging, rejection and humiliation, and their connection with human dignity, see Margalit 1996 and Vorhaus 2002.

<sup>17</sup> For details of abuse and neglect of vulnerable people to the point of depriving them of food and water, see evidence from the Mid Staffordshire NHS Foundation Trust Public Inquiry.

<sup>18</sup> Contrast with Kittay's alternative critique of Nussbaum: [P]ositing a norm of human functioning . . . where that norm is to serve as a basis for human dignity – will turn out to exclude certain people from the possibility of a truly human life, a life worthy of human dignity' (Kittay, 2005: 110).